**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| MARY K. JONES, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>PFIZER INC., et al.,<br><br>Defendants. | Civil Action No. 1:10-cv-03864-AKH<br><br>Hon. Alvin K. Hellerstein |

**REPLY IN SUPPORT OF DEFENDANTS' MOTION**
**TO EXCLUDE PLAINTIFFS' EXPERT STEVEN FEINSTEIN**

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Plaintiffs' opposition to Defendants' motion to exclude the opinion testimony of Steven Feinstein largely ignores the critical flaws in his methodology that were pointed out in the motion. Plaintiffs insist that Feinstein is permitted to pay no heed to the record evidence of what happened during the Class Period—including that the government did not begin investigating three of the four medications at issue until nearly two years into the Class Period—and may simply declare that the alleged inflation in Pfizer's share price ***never*** changed. Neither the law, nor economics, nor common sense supports that approach. Moreover, Plaintiffs have now made clear that their principal theory justifying Feinstein's flawed method is that Pfizer was required to declare itself guilty of uncharged (and even uninvestigated) conduct from the outset of the Class Period. That foundational premise, however, is contrary to settled Second Circuit law.

Remarkably, Plaintiffs now claim that Feinstein opined that the alleged losses were caused by a "[m]ateralization of [r]isks [c]oncealed by the [f]raud." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Exclude Plaintiffs' Expert Dr. Steven Feinstein ("Opp.") 5. Actually, Feinstein never once mentioned a "materialization-of-risk" theory in either his report or his deposition, and instead relied solely on a different theory—that Pfizer's January 26, 2009 settlement announcement constituted a "corrective disclosure." Plaintiffs apparently have now abandoned a corrective-disclosure theory, undoubtedly because Defendants have pointed out its fundamental flaws (including, among other things, that it cannot be reconciled with many of the alleged misstatements and omissions and cannot support the use of a "constant inflation" ribbon for causation and damages). But they cannot now offer Feinstein as support for their new theory when he has never before mentioned it, let alone provided any analysis or disclosed any opinion applying it to this case.

For these and other reasons discussed below, Feinstein's opinions on both damages and loss causation should be excluded.

## I. FEINSTEIN'S DAMAGES OPINION SHOULD BE EXCLUDED.

Feinstein's methodology of ascertaining the amount of the stock drop attributable to the alleged fraud and then projecting that same amount of inflation backward on ***every single day*** throughout the Class Period must be rejected, for multiple reasons. Most fundamentally, Feinstein's underlying premise is at odds with governing law. Plaintiffs suggest that what actually happened during the Class Period, including the dozens of alleged misstatements and omissions by Defendants, does not matter for purposes of damages because throughout the Class Period, Pfizer never disclosed that the company had engaged in "unlawful off-label promotion." Opp. 3, 15. The Second Circuit, however, has made clear that companies "do not have a duty to disclose uncharged, unadjudicated wrongdoing." *City of Pontiac Policemen's & Firemen's Re. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014) (internal quotation omitted). Feinstein's theory of constant inflation is premised on his view that Pfizer should have declared itself "guilty" even before charges were brought or, as to three of the four medications, even before the investigations began.[1] Feinstein opines that the supposed reputational harm Pfizer suffered from the settlement would be constant because, in his opinion, "the reputation effect from learning that a company's management is intent on misdeeds[ ] is reasonably comparable to the reputation effects from learning that they had done the misdeeds."[2] Apart from being nonsensical, this assertion has no basis in the securities laws. Pfizer had no duty to announce that it was "intent

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[1] Declaration of Amanda M. MacDonald In Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein ("MacDonald Decl.") Ex. D (Oct. 14, 2014 Deposition of Steven A. Feinstein) (hereinafter "Feinstein Dep.") at 116:11–24, 119:11–24, 137:1–12, 199:16–201:1, 207:8–12.

[2] MacDonald Decl. Ex. A (June 10, 2014 Report of Steven P. Feinstein) (hereinafter "Feinstein Rep.") ¶ 259.

on misdeeds." Feinstein's contention that Pfizer was obligated to confess to an "illegal" business model[3] flies in the face of the clear law that "firms have no duty to accuse themselves of unproven, allegedly illegal policies." *In re Morgan Stanley Tech. Fund Sec. Litig*., 643 F. Supp. 2d 366, 377 (S.D.N.Y. 2009), *aff'd*, 592 F.3d 347 (2d Cir. 2010).

Moreover, Plaintiffs' assertion that Feinstein's approach is well accepted is simply not accurate. In *In re Sadia, S.A. Securities Litigation*, 269 F.R.D. 298 (S.D.N.Y. 2010), Judge Scheindlin pointed out the flaws in this "back-casting" approach. In that case, as here, the plaintiffs alleged that the defendant company suffered reputational harm from the revelation of wrongdoing that varied over the class period. There, as here, the plaintiffs' expert relied on the article by Jonathan Karpoff for the reputational-penalty theory. *Id*. at 320 n.178. There, as here, the expert attempted to justify a constant amount of inflation based on an assertion that "the value of the wrongdoing would have remained constant." *Id*. at 318. The court, however, recognized that nothing cited by the expert—including the Karpoff article—"supports [the] opinion that the wrongdoing value can be reliably backcast ***as a constant***." *Id*. at 320 (emphasis original). Ultimately, Judge Scheindlin was "not convinced that [the expert] has sufficiently supported his methodology that a wrongdoing value can be backcast as a constant throughout the Class Period where the value of the actual loss varies." *Id*.

The exact same conclusion is required in this case. Feinstein has offered no analysis to support the notion that under these circumstances, one can assume the same amount of inflation on each and every day of the Class Period, without regard to the allegedly false statements made or the facts that existed and were allegedly omitted from the disclosures. He devotes only a

[3] MacDonald Decl. Ex. D (Feinstein Dep.) at 116:14-15, 119:13-14.

single, conclusory paragraph of his report to that topic and cites no authority of any kind.[4] This lack of analysis, standing alone, is dispositive: "Without good explanations, courts cannot assess the reliability of any conclusion drawn by an expert, even if he possesses relevant experience." *LinkCo, Inc. v. Fujitsu Ltd.*, No. 00 CIV. 7242 (SAS), 2002 U.S. Dist. LEXIS 12975, at *14 (S.D.N.Y. July 15, 2002). Rule 26, of course, requires an expert's written report to include "a complete statement of all opinions the witness will express ***and the basis and reasons for them***." Fed.R.Civ.P. 26(a)(2) (emphasis added). *See also Kuzmech v. Werner Ladder Co.*, No. 3:10-CV-266 VLB, 2012 WL 6093898, at *7–*9 (D. Conn. Dec. 7, 2012) (rejecting under Rule 702 a "four paragraph" expert report that did not "provide a complete statement of the [expert's] basis and reasons" as required by Rule 26); *Borgognone v. Trump Plaza*, No. 98-CV-6139 (ILG), 2000 WL 341135, at *4–6 (E.D.N.Y. Mar. 9, 2000) (excluding expert testimony under Rule 702 because "nothing in [the expert's] report disclose[d] the methodological basis for [his] conclusions" or showed that his opinions were supported by "objective methods and scientific standards" from his field).

Feinstein's damages approach is also at odds with Plaintiffs' own theory of the case—which posits 44 false or misleading statements throughout the three-year Class Period[5]—and their own disclosure and accounting experts, whose opinions are predicated, in part, upon changing circumstances throughout the Class Period.[6] It also defies common sense: How could Pfizer have disclosed the outcome of government investigations that had not even been initiated? Obviously it could not.

[4] MacDonald Decl. Ex. A (Feinstein Rep.) ¶ 259.

[5] *See* Plaintiffs' Memorandum of Law in Opposition to Pfizer Inc.'s and the Individual Defendants' Motions for Summary Judgment ("Plfs.' Summ. J. Opp."), Appendix, "Defendants' Class Period False & Misleading Statements."

[6] *See* Memorandum in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein 8–9.

## II. FEINSTEIN'S LOSS-CAUSATION OPINION SHOULD BE EXCLUDED.

Feinstein's opinion on loss causation also must be excluded for multiple reasons. Most fundamentally, that opinion is completely inconsistent with the loss-causation theory Plaintiffs have belatedly embraced in their opposition to Defendants' summary judgment motions. Under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), an expert opinion cannot stand if it is out of step with Plaintiffs' theory of the case.

In this circuit, there are two distinct methods of establishing loss causation in securities-fraud cases: (1) a corrective disclosure that reveals the falsity of earlier statements and (2) the materialization of a concealed risk. *See Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 175 (2d Cir. 2005). Plaintiffs acknowledge that these are separate theories. *See* Plfs.' Summ. J. Opp. 102 n. 301. A corrective-disclosure theory requires that the defendant's subsequent statements reveal its earlier statements to be false or misleading. *See, e.g., In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 552 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 501 (2d Cir. 2010). A materialization-of-risk approach, on the other hand, may apply when the defendant "concealed or misstated [a] risk" which then materializes and causes investors' losses. *Lentell*, 396 F.3d at 175–76.

Feinstein based his opinion on the corrective-disclosure theory. He used that phrase 13 times in his expert report, and he never mentioned the words "materialization of risk."[7] He clearly stated his conclusion that a "corrective disclosure" took place on January 26, 2009, which "caused the inflation to dissipate, which in turn caused the stock price drop and investor losses."[8] In his deposition, Feinstein adhered to this approach: "Q: [January 26, 2009] is the date of the so-

[7] *See* MacDonald Decl. Ex. A (Feinstein Rep.) ¶¶ 17, 118, 257, 258, 261-63, 266.

[8] MacDonald Decl. Ex. A (Feinstein Rep.) ¶17.

called corrective disclosure; correct? A: That is right."[9] Again, Feinstein never even mentioned the words "materialization of risk."

Confronted with the fatal flaws in the corrective-disclosure approach, Plaintiffs now seek to do a last-minute switch to the materialization-of-risk theory. This maneuver is most evident in their Opposition to Defendants' summary judgment motions. *See* Plfs.' Summ. J. Opp. 102 & n.301, 110, 112. Plaintiffs attempt to hide this tactic by claiming that Feinstein's opinion actually is based on the materialization-of-risk approach. *See* Opp. 3 ("Feinstein opines . . . [that] $1.26 out of the total $1.90 per share residual decline on January 26, 2009 was caused by ***materialization of the concealed risks*** concerning the DOJ investigation") (emphasis added); *id*. at 5 ("Feinstein [h]as [r]eliably [o]pined that Pfizer's January 26, 2009 [s]tock [p]rice [d]rop [w]as [s]ubstantially [c]aused by ***[m]aterialization of [r]isks*** [c]oncealed by the [f]raud)") (emphasis added).

As described above, however, Feinstein's opinion was ***not*** based on a materialization-of-risk theory. In his report and his deposition, he referred to only one loss-causation approach: corrective disclosure. Now that Plaintiffs have abandoned that theory, Feinstein's opinion runs afoul of the bedrock principle that "a plaintiff's damages case must be consistent with its liability case." *Comcast*, 133 S. Ct. at 1433 (internal quotation omitted). Any expert opinion must "measure only those damages attributable to [the plaintiff's current] theory." *Id*. Nor can Feinstein attempt to change his theory to fit Plaintiffs' new theory of the case. *See Gallagher v. S. Source Packaging, LLC*, 568 F. Supp. 2d 624, 635 (E.D.N.C. 2008) (rejecting an expert whose "testimony changes to reflect whatever position [his client] is currently taking as to lost revenue, and is patently unreliable"); *see also Comer v. Am. Elec. Power*, 63 F. Supp. 2d 927, 935 (N.D.

[9] MacDonald Decl. Ex. D (Feinstein Dep.) at 30:1–3.

Ind. 1999) ("[O]ne marvels at the breath-taking ease with which [the expert] offers his 'expert' opinions, surpassed only by his apparent ability to change them based on nothing more than the mere suggestion of [his client's] counsel."). Because Feinstein's opinion no longer fits Plaintiff's loss-causation theory, it must be excluded.

Nor has Feinstein conducted any analysis that could support the materialization-of-risk approach. Materialization-of-risk cases present special problems for plaintiffs, especially where the company disclosed the risk but allegedly understated it. The Second Circuit set forth the requirements for proving such cases in *Lentell*: "where (as here) substantial indicia of the risk that materialized are unambiguously apparent on the face of the disclosures alleged to conceal the very same risk," plaintiffs bear the burden to come forward with "facts sufficient to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed an investment." *Lentell*, 396 F.3d at 177. Feinstein has offered nothing to satisfy this requirement, and therefore his opinion cannot support a materialization-of-risk theory.

Feinstein's opinion runs afoul of the Second Circuit's requirements for materialization-of-risk cases because he is attempting to impose on Defendants damages based on the entire stock drop he believes is attributable to the settlement announcement, despite the fact that the settlement did not exist at the time of the allegedly actionable statements. Thus, even under Feinstein's theory, Pfizer can be faulted, at most, for understating the risk that such a settlement would occur.

The court in a case cited by Plaintiffs, *In re BP p.l.c Sec. Litig.*, No. 10-MD-2185, 2014 WL 2112823 (S.D. Tex. May 20, 2014), cited a cogent explanation of this problem provided by BP's expert in that case:

> Imagine that a company announced that it was going to draw a marble from an urn of 100 marbles, of which 99 were black and

> one was red. If the company drew a red marble, it would have to pay $1 million. Prior to finding out the outcome, the company's market value would reflect the expected loss from this lottery of 1% of $1 million, or $10,000. If the company subsequently drew a red marble, the market value would have fallen $990,000 to reflect the new information—the certainty of a $1 million loss. If, however, contrary to the company's statement, there were two red marbles (increasing the probability of drawing a red marble), the share price would *still* have fallen when the company drew a red marble. In order to understand the value implication of the company's misstatement that there was only one red marble, the relevant issue is what the market would have been, prior to the drawing, had the company told the truth. In this case, the market value would have reflected an expected loss of $20,000, only $10,000 lower than the actual market value, not the $990,000 less that would be implied by looking at the reaction to the drawing of a red marble.

*In re BP*, 2014 WL 2112823, at *10 n.10. Here, Feinstein's opinion does the equivalent of charging the company in the hypothetical with the entire $990,000 drop. For the reasons cited by the *BP* court, that is improper.[10]

Plaintiffs' citation to *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352 (S.D.N.Y. 2009), is of no help. The *BP* court found *Vivendi* to be "uninstructive," 2014 WL 2112823, at *10 n.9, for reasons that are equally applicable here. *Vivendi* involved allegations that the defendants "saddled" a publicly-traded corporation with "massive amounts of debt," then hid the resulting risk to the company's liquidity from investors through false and misleading statements. *In re Vivendi*, 634 F. Supp. 2d at 354. The *Vivendi* defendants' failure to disclose

[10] In their opening brief, Defendants cited an earlier opinion in the *BP* case. Plaintiffs claim that the second opinion quoted in the text above supports their position. In fact, the second opinion only underscores the impropriety of Feinstein's opinion. As to one set of allegations in that case (pre-explosion), for which the plaintiffs advanced a materialization-of-risk theory, the court held that the plaintiffs had failed to offer a reliable basis for calculating class-wide damages, for the reasons discussed in the text. 2014 WL 2112823, at *12. As to the other set of allegations in that case (post-explosion), for which the plaintiffs invoked a corrective-disclosure theory, the court "share[d] Defendants' concerns regarding the apparent disconnect between some corrective events and the fraud which they are alleged to have corrected." Although the issue before the court was class certification rather than the merits and the court did not need to resolve these concerns, it noted that it was "difficult to imagine" that the plaintiffs could ultimately prevail on their theory. *Id.* at *13. This is precisely the problem that led Plaintiffs here to abandon their corrective-disclosure theory.

any liquidity risks stand in stark contrast to this case, where Pfizer not only disclosed the government investigations at issue, but described the substantial risks, including criminal charges and penalties, that could result from those investigations. In addition, as the *BP* court recognized, in *Vivendi* "the risk was virtually certain to materialize." 2014 WL 2112823, at *10 n.9. In contrast, here, it was impossible for the risk of a $2.3 billion settlement for investigations of the marketing of four medications to have materialized through most of the Class Period, because three of those investigations did not even exist until well into the Class Period.

Feinstein's loss-causation opinion also suffers from numerous other flaws. Plaintiffs seek to paper over these flaws by dwelling on his credentials. But "a court cannot permit experts to offer credentials rather than analysis." *LinkCo, Inc.*, 2002 U.S. Dist. LEXIS 12975, at *13 (internal quotation marks omitted). Whatever Plaintiffs claim his qualifications to be, Feinstein has in the past proved capable of offering "Fantasy Island" opinions. *Finkelstein v. Liberty Digital, Inc.*, No. CIV.A. 19598, 2005 WL 1074364, at *12 (Del. Ch. Apr. 25, 2005); *see id.* at *15 ("There is a well-known phrase, 'if wishes were horses, then beggars would ride.' If Feinstein's wishes were horses, the petitioners would have ridden and owned Secretariat, Seattle Slew, and (the trial judge's favorite) Affirmed, Triple Crown winners all.").

Nor is Feinstein's opinion immune from challenge merely because he performed an event study. It is not enough just to do an event study: the study must be reliable and its use must be appropriate. In numerous cases, courts have rejected expert opinions based on event studies that were nonetheless inconsistent with the facts or governing law. *See, e.g.*, *In re Omnicom Group*, 541 F. Supp. 2d at 554 ("Plaintiffs' economist . . . undertook an event study to isolate the effect of Plaintiffs' identified disclosures on Omnicom's stock price from that of other market forces. Assuming for the purposes of this motion that the event study is adequate in that regard, it nevertheless fails to demonstrate loss causation.") *See also In re Pfizer Inc. Sec. Litig.*, No. 04 CIV. 9866 LTS HBP, 2014 WL 2136053 (S.D.N.Y. May 21, 2014) (rejecting expert opinion based on event study); *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (same); *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Boston*, 853 F. Supp. 2d 181 (D. Mass. 2012) (same).

Here, among other flaws, Feinstein's event study incorporates his insupportable view that the market interpreted the announcement of the government investigation settlement to have damaged Pfizer's "reputation," despite the lack of ***any*** comment to that effect in the hundreds of analyst reports he reviewed (and, indeed, the complete lack of attention given to the settlement by the analysts). *See* Memorandum in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein 16–20. Plaintiffs do not even attempt to defend Feinstein's unscientific speculation that "something funny [was] apparently going on" in these hundreds of independent reports.[11] Plaintiffs instead assert that none of the analyst reports attributed the stock drop to any particular cause. *See* Opp. 8. But that is just false. A number of analysts attributed the price drop to the 50% cut in Pfizer's dividend. For example, a Deutsche Bank report dated January 26 reported that "Steep div. cut triggers sell-off."[12] Similarly, a Merrill Lynch report two days later, January 28, stated that "[t]he 50% dividend cut was disappointing, but it now appears to be reflected in the stock."[13] And a few days later yet (February 2), a Credit Suisse analyst wrote that "PFE stock is down 16% post deal as the case to sell was clear (high dividend yield investors

[11] MacDonald Decl. Ex. D (Feinstein Dep.) at 291:3–4.

[12] MacDonald Decl. Ex. M (Deutsche Bank, "Pfizer—Merger Model Update, 4Q Review" (Jan. 26, 2009), at 1).

[13] MacDonald Decl. Ex. V (Merrill Lynch, "Transaction boosts long-term outlook; lowering PO" (Jan. 28, 2009), at 1).

were exiting the stock) . . . .").[14] Other analysts lowered their price targets for Pfizer stock based on the unexpected reduction in 2009 earnings guidance; indeed, two lowered their price target by $2, very close to the amount by which Pfizer's stock actually dropped on January 26.[15]

Plaintiffs also offer no persuasive justification for Feinstein's misuse of the Karpoff paper. That the article appeared in a peer-reviewed economic journal, Opp. 22, hardly establishes that it can support a damages award in a securities-fraud case (a purpose for which it was never intended). It cannot. As other prominent economists have recognized, "determining whether ***any*** portion of [a] stock price drop is attributable to such changed perceptions [of company reputation] is a hazardous enterprise at best. Estimating ***how much*** of the drop might represent [this type of] collateral damage is wholly speculative." Bradford Cornell & James C. Rutten, *Collateral Damage and Securities Litigation*, 2009 Utah L. Rev. 717, 728 (2009) (emphasis added). Moreover, even if the Karpoff article were theoretically capable of supporting some expert's opinion, it simply does not fit the facts of this case. Karpoff analyzes reputational losses experienced by companies that were "targeted by SEC enforcement actions" for financial misrepresentations. Jonathan M. Karpoff, et al., *The Cost to Firms of Cooking the Books*, 43 J. Financial & Quantitative Analysis 581, 581 (2008). Pfizer's situation includes none of the criteria articulated in the Karpoff study: the January 26, 2009 announcement was of a pharmaceutical marketing settlement; Pfizer was not subject to an SEC enforcement action;

[14] MacDonald Decl. Ex. W (Credit Suisse, "A Closer Look Reinforces Merits, Upgrade PFE to Outperform" (Feb. 2, 2009), at 1).

[15] *See* MacDonald Decl. Ex. N (BMO Capital Markets, "The Wyeth Purchase: Activity Yes, But Progress?" (Jan. 28, 2009), at 1 (applying 8x multiplier to downwardly revised EPS estimates)); MacDonald Decl. Ex. V (Bank of America/Merrill Lynch, "Transaction boosts long-term outlook; lowering PO" (Jan. 28, 2009), at 1 (applying 8x multiplier to downwardly revised EPS estimates)); *see also* Declaration of Amanda M. MacDonald in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein (Dec. 8, 2014) ("MacDonald Dec. 8, 2014 Decl.") Ex. Y (Bernstein Research, "Pfizer: 4Q08 Beats—Overshadowed, of Course, by Low 2009 Guidance and News of Wyeth Acquisition" (Jan. 27, 2009), at 4 (applying 9x multiplier to downwardly revised EPS estimates)).

Pfizer had no restatement; and Pfizer experienced no withdrawal of opinion on its financial statements by its auditor. Moreover, during the past decade, many other pharmaceutical companies—including Merck, Amgen, Abbott, Eli Lilly, and GlaxoSmithKline—also settled Department of Justice investigations related to their marketing practices. The Karpoff model fails to accurately predict the magnitude of the stock movement in ***any*** of these cases. In fact, in many instances, the share prices of these companies ***rose*** on the date of their announcements.[16] That the Karpoff paper would not accurately predict the share price reaction to these settlements should come as no surprise, as his study does not purport to encompass pharmaceutical marketing settlements. In short, Feinstein's misapplication of Karpoff's article requires exclusion of his loss causation opinion. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398, 411–25 (S.D.N.Y. 2005) (excluding expert who relied on studies that were only tangentially relevant).

Finally, Feinstein's opinion on loss causation does not disaggregate the losses allegedly caused by the separate Defendants. As Judge Swain ruled in *In re Pfizer Inc. Securities Litigation*, 2014 WL 2136053, at *1, an expert's opinion is inadmissible where it simply "assum[es] that Defendants are responsible for all of the alleged misrepresentations and omissions alleged in the complaint." *Id. See also Lentell*, 396 F.3d at 177 (plaintiff must demonstrate that it was the "defendant's fraud—rather than other salient factors—that proximately caused plaintiff's loss"). It is no answer that the individuals may be held "jointly and severally liable." Defendants, of course, cannot be held liable for statements that cannot be legally attributed to them, such as statements made after the individuals left the company.

[16] *See* MacDonald Decl. Ex. S (Revised Exhibit 11 to Report of Ken Lehn) ("Analysis of Preliminary Settlement Disclosures Pharmaceutical Marketing Settlements Over $100 Million") (noting that for Abbott Laboratories, Eli Lilly, and others, the residual return actually increased following DOJ settlements related to marketing practices).

Plaintiffs concede as much in their opposition to Defendants' motions for summary judgment, yet Feinstein's approach completely ignores this fact and threatens to impose liability on Defendants with no legal basis. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343 (2005).

Nor does the apportionment provision of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(f), relieve Plaintiffs of their burden to establish Defendants' ***liability*** in the first place (of which loss causation is an essential element). That provision relates to the allocation of ***damages*** in securities fraud cases, not ***liability*** based on causation. Indeed, the provision explicitly states that it may ***not*** be construed to expand a defendant's liability under Section 10(b)—precisely the result Plaintiffs urge here. 15 U.S.C. § 78u-4(f)(1) ("Nothing in this subsection shall be construed to create, affect, or in any manner modify, the standard for liability associated with any action arising under the securities laws."); *see also Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 727 (11th Cir. 2008) (reviewing legislative history and interpreting PSLRA loss apportionment provision as applying "solely" to allocation of damages, not to liability).

Because Feinstein does not disaggregate losses caused by separate defendants and simply "assum[es] that Defendants are responsible for all of the alleged misrepresentations and omissions alleged in the complaint," his opinion is inadmissible. *In re Pfizer*, 2014 WL 2136053, at *1.

## CONCLUSION

Plaintiffs cannot "call an expert economist to present opinions unless those opinions are the product of the expert's rigorous application of economic methods." *Texas v. Penguin Group (USA) Inc. (In re Elec. Books Antitrust Litig.)*, No. 12 CIV. 3394 (DLC), 2014 U.S. Dist. LEXIS 42549, at *62 (S.D.N.Y. Mar. 28, 2014). Feinstein's opinions fail that test.

For the reasons stated above and in Defendants' opening memorandum in support of the motion, the Court should exclude Feinstein's opinions and testimony.

Date: December 8, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 8th day of December, 2014, the foregoing Reply In Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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**U.S. District Court**

**Southern District of New York**

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| **Case Name:** | Jones et al v. Pfizer, Inc. et al |
| **Case Number:** | 1:10-cv-03864-AKH |
| **Filer:** | Frank D'Amelio<br>Jeffrey B. Kindler<br>Alan G. Levin<br>Henry A. McKinnell<br>Pfizer, Inc.<br>Ian C. Read<br>Allen Waxman |
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**Docket Text:**
**REPLY MEMORANDUM OF LAW in Support re: [249] MOTION in Limine *to Exclude Plaintiffs' Expert Steven Feinstein*. . Document filed by Frank D'Amelio, Jeffrey B. Kindler, Alan G. Levin, Henry A. McKinnell, Pfizer, Inc., Ian C. Read, Allen Waxman. (Collogan, Lauren)**

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