UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff vs. PFIZER INC., et al., Defendants.	Civil Action No. 1:10-cv-03864-AKH CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM PRESENTING EVIDENCE OR MAKING STATEMENTS CONCERNING THE ABSENCE OF AN SEC INVESTIGATION OR ENFORCEMENT ACTION OR RESTATEMENT OF PFIZER'S CLASS PERIOD FINANCIAL STATEMENTS

Plaintiffs hereby move *in limine* for an order precluding defendants from introducing evidence, advancing argument or otherwise referring at trial to the absence of an U.S. Securities and Exchange Commission ("SEC") investigation/enforcement action into Pfizer Inc.'s ("Pfizer" or the "Company") conduct or to Pfizer's decision to not restate the Company's class period financial statements.

I. INTRODUCTION

Any evidence or statement concerning the absence of an SEC investigation/enforcement action or restatement of Pfizer's class period financials is irrelevant and inadmissible under Federal Rules of Evidence 401 and 402. Moreover, such evidence should be excluded under Fed. R. Evid. 403 as it is likely to confuse the issues, mislead the jury and its probative value is substantially outweighed by the unfair prejudice to plaintiffs. *See* Fed. R. Evid. 401-403.

The SEC's decision to not investigate or bring an action against a company is "based upon various reasons, some of which, such as workload considerations, are clearly irrelevant to the merits of any subsequent action." *Procedures Relating to the Commencement of Enforcement Proceedings & Termination of Staff Investigations*, Exchange Act Release No. 9796, 1972 SEC LEXIS 238, at *7-*8 (Sept. 27, 1972) ("*SEC Procedures*"). Likewise, the fact that Pfizer has not restated its class period financials is also irrelevant here because it does not bear on the Company's liability under §10(b)/Rule 10b-5.

Despite the clear irrelevance of SEC inaction to this case, a jury could erroneously interpret evidence or statements concerning SEC inaction as implying that defendants have done nothing wrong or that plaintiffs' case lacks merit. Similarly, a jury could mistakenly interpret evidence or statements concerning the absence of a restatement as indicating that the Company's class period financials were complete, accurate and not misleading. Because offering evidence or statements at

trial concerning the absence of an SEC investigation/enforcement action or restatement of Pfizer's class period financials would introduce substantial risk that the jury will become confused and decide the case on an improper basis, such evidence is exceedingly prejudicial and should be precluded.

II. STANDARDS FOR MOTIONS *IN LIMINE*

Trial courts are authorized to issue *in limine* rulings pursuant to their "inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (citing Fed. R. Evid. 103(c)); *see also Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (approving the practice of trial courts ruling on motions *in limine*). "'The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence.'" *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419, 424 (S.D.N.Y. 2004) (Hellerstein, J.) (citation omitted). Rulings on whether to exclude certain evidence at trial are within the discretion of the trial court. *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 207 (2d Cir. 1984) ("The trial judge is vested with wide discretion in determining whether an adequate foundation has been laid for admission of the evidence and whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury.").

III. ARGUMENT

A. Evidence or Statements Concerning the Absence of an SEC Investigation/Enforcement Action Should Be Precluded at Trial

Defendants should be precluded from introducing evidence, advancing argument or otherwise referring to the absence of an SEC investigation/enforcement action at trial because companies are forbidden by statute from using SEC inaction as a defense to securities fraud, and any such evidence or reference is irrelevant and highly prejudicial.

The Securities Exchange Act of 1934 ("Exchange Act") provides that the SEC's declination or failure to act may not be used as a defense by a company in private litigation to imply that the SEC has approved of the company's financial statements:

> No action or failure to act by the Commission . . . in the administration of [the Exchange Act] shall be construed to mean that the [Commission] has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein, nor shall such action or failure to act with regard to any statement or report filed with or examined by [the Commission] pursuant to [the Exchange Act] or rules and regulations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading.

15 U.S.C. §78z. This section of the Exchange Act means "that failure of the Commission to act shall not be construed to mean any approval." *Millimet v. George F. Fuller Co.*, No. 65 Civ. 1678, 1965 U.S. Dist. LEXIS 9836, at *20 (S.D.N.Y. Aug. 19, 1965).[1]

As the SEC itself explains in its regulatory guidelines, any attempted use of SEC inaction to draw a non-culpable inference "would be clearly inappropriate and improper since" the decision not to act "may be based upon various reasons, some of which, such as workload considerations, are clearly irrelevant to the merits of any subsequent action." *SEC Procedures*, 1972 SEC LEXIS 238, at *7-*8.[2]

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[1] Not only does failure to act not equate to approval, but it does not estop the Commission from raising violations later. *Capital Funds, Inc. v. SEC*, 348 F.2d 582, 588 (8th Cir. 1965); *see also Reserve Life Ins. Co. v. Provident Life Ins. Co.*, 499 F.2d 715, 722 n.9 (8th Cir. 1974) ("inaction does not estop the Commission from assuming a contrary position later"); *Graham v. SEC*, 222 F.3d 994, 1008 (D.C. Cir. 2000) ("the SEC's failure to prosecute at an earlier stage does not estop the agency from proceeding once it finally accumulated sufficient evidence to do so").

[2] *See also Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (a federal agency "alone is empowered . . . to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically"); *Koppel v. 4987 Corp.*, 167 F.3d 125, 136 (2d Cir. 1999) (the "SEC has made clear . . . that it 'needs private actions as a supplement to its efforts . . . due to its limited staff resources'") (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (private actions are a necessary supplement to SEC enforcement of the securities laws);

Courts addressing motions *in limine* on this issue have consistently barred evidence and statements at trial relating to the absence of an SEC investigation/enforcement action. *E.g.*, *Sawant v. Ramsey,* No. 3:07-cv-980 (VLB), 2012 U.S. Dist. LEXIS 64384, at *3-*7 (D. Conn. May 8, 2012) (precluding defendants from offering SEC "No action" letters as "exceedingly prejudicial" and having "minimal if any probative value"); *White v. Heartland High-Yield Mun. Bond Fund*, No. 00-C-1388, 2005 U.S. Dist. LEXIS 47792, at *8-*9 (E.D. Wis. Nov. 28, 2005) (precluding defendant from introducing evidence or otherwise referring at trial to the fact that the SEC did not bring an enforcement action against defendant); *In re Safety-Kleen*, No. 3:00-1145-17, 2005 U.S. Dist. LEXIS 46268, at *15-*16 (D.S.C. Feb. 4, 2005) (holding that "the absence of S.E.C. proceedings against certain defendants is not relevant, and is therefore inadmissible").

Accordingly, the absence of an SEC investigation/enforcement action against defendants in this case does not demonstrate any finding or conclusion by the SEC and cannot be used by defendants to imply that the SEC "approved" of any of Pfizer's financial statements. A juror who is not trained in the law or experienced in these matters easily could mistake the SEC's inaction as implying that the Company's financial statements were not false or misleading, that defendants did nothing wrong and/or that plaintiffs' case has no merit. Therefore, the Court should preclude defendants from presenting any evidence or making any statement concerning the absence of an SEC investigation/enforcement action. *See* Fed. R. Evid. 403.

B. Evidence or Statements Concerning the Absence of a Restatement of Pfizer's Class Period Financials Should Be Precluded at Trial

Defendants should also be precluded from offering evidence, advancing argument or otherwise referring to the absence of a restatement of Pfizer's class period financials at trial because

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Berner v. Lazzaro, 730 F.2d 1319, 1322 (9th Cir. 1984) (SEC can prosecute "only the most flagrant abuses"), *aff'd sub nom. Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985).

this fact is completely irrelevant to the determination of liability, and any evidence or reference concerning it is highly prejudicial.

The fact that Pfizer did not restate its class period financials is irrelevant because it does not prove any defense Pfizer may have to any of the §10(b)/Rule 10b-5 elements that plaintiffs must show at trial to establish liability. *See SEC v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342, 366 n.13 (D.N.J. 2009) ("the failure of the SEC to require restatement proves nothing"); *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230, 1245 (N.D. Cal. 2008) ("the lack of a restatement did not mean that [the company] only engaged in legitimate conduct"); *In re Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1222 n.4 (N.D. Okla. 2003) ("the fact that [the company's] financial results were not restated does not mean that the financial results disseminated during the Class Period were accurate").[3]

Accordingly, the absence of a restatement of Pfizer's class period financial statements is not relevant and thus inadmissible to show that the financial statements were complete and accurate. *See* Fed. R. Evid. 401-402. Furthermore, a juror could easily misinterpret the lack of a restatement as indicating that Pfizer's class period financial statements were complete and accurate or that defendants' conduct was legitimate, and thereby decide the case on an improper basis. Therefore, any evidence or statement concerning the absence of a restatement would unfairly prejudice plaintiffs and should be precluded. *See* Fed. R. Evid. 403.

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[3] *See also Feiner v. SS&C Techs., Inc.*, 11 F. Supp. 2d 204, 209 (D. Conn. 1998) ("the fact that [the company] has not elected to restate or reverse its earnings or revenue figures . . . does not indicate, much less prove, the accuracy of those figures"); *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002) ("[T]he fact that the financial statements for the year in question were not restated does not end [plaintiff's] case when he has otherwise met the pleading requirements of the PSLRA. To hold otherwise would shift to accountants the responsibility that belongs to the courts. It would also allow officers and directors of corporations to exercise an unwarranted degree of control over whether they are sued, because they must agree to a restatement of the financial statements.").

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court exclude any evidence or statement relating to the absence of an SEC investigation/enforcement action or restatement of Pfizer's audited class period financial statements as irrelevant, confusing, misleading and unfairly prejudicial. *See* Fed. R. Evid. 401-403.

DATED: December 10, 2014

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 10, 2014.

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Docket Text:
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