

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| _____ | X | |
| MARY K. JONES, Individually and on Behalf | : | Civil Action No. 1:10-cv-03864-AKH |
| of All Others Similarly Situated, | : | |
| | : | <u>CLASS ACTION</u> |
| Plaintiff | : | |
| vs. | : | MEMORANDUM OF LAW IN SUPPORT |
| | : | OF PLAINTIFFS' MOTION TO EXCLUDE |
| PFIZER INC., et al., | : | RELIANCE EVIDENCE AND ARGUMENT |
| | : | |
| Defendants. | : | |
| _____ | X | |

I. INTRODUCTION

The Court should exclude any evidence or argument concerning defendants' various "reliance" defenses because all of these defenses rely on the investigation counsel whom defendants shielded from discovery. Plaintiffs have twice demonstrated three different bases for this relief: (1) defendants cannot establish the elements of their reliance defenses; (2) defendants waived these defenses by shielding investigation counsel from discovery; and (3) the individuals and the process on whom and which defendants purport to have relied are mere conduits for investigation counsel. Dkt. Nos. 288, 304 at 72-97 (incorporated by this reference). As fully explained in plaintiffs' prior filings, defendants' gamesmanship created this situation, as epitomized by the stark contradiction between what defendants represented to the Court when they successfully shielded investigation counsel from discovery versus what they represented to the Court in support of their motions for summary judgment:

Shield

"Defendants are not invoking or relying upon any advice provided by Covington regarding the Government Investigations."

Dkt. No. 172 at 35 n.30.

Sword

"[T]he company's Board, senior executives, and in-house lawyers all relied on Covington's judgment to inform them that the company had meritorious defenses. . . . [T]he undisputed fact is that Pfizer and its disclosure counsel relied on investigation counsel's judgment in crafting the company's securities disclosures."

Dkt. No. 246 at 46. Plaintiffs respectfully request that the Court preclude any evidence or argument concerning defendants' purported reliance on others or on Pfizer Inc.'s ("Pfizer") disclosure process.

II. ARGUMENT

A. Defendants' Disclosure Counsel Were Not Involved in the Government Investigation and Rendered No Advice Concerning It

Defendants expressly limited their reliance-on-counsel defense to Dennis Block and Larry Fox, both of whom have expressly stated they were not involved in the government investigation and never rendered any sort of assessments of the government investigation or Pfizer's defenses to it:

Q. In other words – I guess different way of asking it: Did you actually participate in any sort of internal investigation –

A [Dennis Block]. Oh, no.

Q. – related to the government investigations?

A. No, no. I had no knowledge of the actual – firsthand knowledge of the actual facts. I never looked at documents and things like that during this time frame.

Dkt. No. 290, Ex. 22 at 56:2-11; Dkt. No. 289, ¶11. Larry Fox echoed this sentiment as to all internal investigations: "I'm a securities lawyer and do not get involved in the investigations themselves." Dkt. No. 290, Ex. 23 at 11:19-20; Dkt. No. 289, ¶12.

[Q.] The first part talking about "we have substantial defenses in these matters," did you personally and professionally make the assessment that there were substantial defenses regarding the government investigations?

A [Dennis Block]. No.

Q. You relied on others for that –

A. Yes.

Q. – conclusion?

Dkt. No. 290, Ex. 22 at 104:15-23.

Q. But with respect to the disclosure that "We believe we have substantial defenses in these matters," is that the type of information that you, Larry Fox, independently researched and determined to be accurate?

[Objection]

THE WITNESS [Larry Fox]: No.

Dkt. No. 290, Ex. 23 at 86:13-19.

[Q.] Did you render any legal advice regarding the accuracy of the statement “We believe we have substantial defenses in these matters”?

A [Larry Fox]. I would not have said that I am – that this is my view. Nobody in the company would have ever thought to even ask me whether I have personal knowledge of the strength of our defenses in any litigation.

Id. at 90:12-20; *see also* Dkt. No. 289, ¶¶14-15.

Dennis Block and Larry Fox’s testimony is consistent with all of the evidence in this case, including defendants’ testimony:

Q. I’m asking you point-blank: On what counsel do you – are you claiming to have relied on [for] your defense in this case?

[Objection]

A [Alan Levin]. Covington & Burling.

Q. Any others?

A. My recollection was that it was primarily Covington & Burling. I don’t recall if there were any others.

Dkt. No. 290, Ex. 28 at 99:19-100:4.

Q. In the course of that process or in any other context, did Mr. Block ever advise you regarding the strengths or weaknesses of Pfizer’s defenses to the government’s investigation of Bextra?

[Objection]

A [Jeffrey Kindler]. He may or may not have expressed an opinion about that, but I did not look to him for advice on that.

Q. Did you look to Larry Fox for advice on that?

A. No.

Q. You looked to other lawyers for advice on that; correct?

A. On the strength – could you repeat the predicate?

Q. Sure, the strengths or weaknesses of the government’s investigation regard[ing] Bextra.

[Objection]

A. I did not look to either Mr. Block or Mr. Fox for advice on that subject.

Q. But you did look to other lawyers for advice on that subject; correct?

A. Yes.

Dkt. No. 290, Ex. 19 at 31:10-32:8.

Q. So the basis for your understanding as to substantial defenses would have been based on information that you received from Sidley, Covington & Burling, and Doug Lankler's internal team?

[Objection]

A [Allan Waxman]. So the actual analysis and assessment of the investigation and the defenses would have come from some or all of those people and groups.

Dkt. No. 290, Ex. 21 at 16:2-14.

Q. So Block and Fox would have relied on the inside and outside criminal defense government investigation team?

[Objection]

A [Allen Waxman]. I believe they would have. You certainly can talk to them. But it's my understanding, that's right.

Id. at 20:15-21.

Dennis Block and Larry Fox's lack of involvement and absence of advice is also consistent with their complete lack of criminal law experience and defendants' failure to provide them with the most important information and evidence concerning the government investigation. Dkt. No. 288 at 14-22.

B. Defendants' Reliance Defenses Are Precluded Because They Are Based on the Investigation Counsel, Whom Defendants Shielded from Discovery

As defendants themselves acknowledge, "the undisputed fact is that Pfizer and its disclosure counsel relied on investigation counsel's judgment in crafting the company's securities disclosures."

Dkt. No. 246 at 46. The same can be, and has been, said for KPMG, Loretta Cangialosi, and for the disclosure process itself:

- “*Covington & Burling, Pfizer’s counsel in the Bextra investigation*, also provided audit response letters to KPMG” Dkt. No. 274 at 16.¹
- “*Mr. Lankler and his team provided updates* to Mr. Kindler, Mr. Fox and other Pfizer executives (such as Pfizer’s Controller, Loretta Cangialosi), as well as to Mr. Block and KPMG, on the status of the government investigations into the marketing of Bextra and other drugs.” Dkt. No. 274 at 5.
- “[Cangialosi’s] office also met and conferred with Pfizer’s *in-house and outside investigations counsel*, as well as KPMG, in response to developments in the investigations.” Dkt. No. 246 at 9.
- “The process for disclosures about government investigations included: (i) review and comment by the in-house lawyers responsible for supervising the company’s government investigations; (ii) *quarterly consultation between the lawyers handling the investigations* and inside and outside disclosure counsel, as well as additional consultations whenever developments warranted” Dkt. No. 246 at 5.
- “Pfizer had a comprehensive process for evaluating whether an accounting reserve was required, including quarterly reserve reviews with the Controller’s group, KPMG, and the *in-house attorneys responsible for the Bextra investigation*.” Dkt. No. 258 at 13-14.
- “[T]he company’s Finance Group, led by Ms. Cangialosi, and KPMG, regularly conferred with Pfizer’s inside and outside investigations counsel to evaluate the FAS 5 reserve judgment.” Dkt. No. 258 at 31-32.

There is simply no way to separate the “judgment” of, “updates” from, and “consultations,” “conferrals” and “reviews” with (read: advice of) investigation counsel from the individuals or the disclosure process on whom defendants wish to argue they relied for their statements and reserve decisions concerning the government investigation. In other words, defendants cannot rely on these individuals or this process without inherently relying on investigation counsel. As a result, defendants’ strategic decision to foreclose discovery regarding investigation counsel *automatically* foreclosed any evidence or argument concerning their reliance on these individuals and the

¹ Emphasis is added throughout unless otherwise noted.

disclosure process. “The [privileged] communications will enable the plaintiffs to verify or challenge [defendants’] assertion that its liability, if any, was caused by faulty advice of counsel. ***To deny the plaintiffs this opportunity would result in a one-sided account and prejudice the plaintiffs’ ability to litigate their claim.***” *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, No. 93 Civ. 6876 (KMW), 1995 U.S. Dist. LEXIS 14808, at *16 (S.D.N.Y. Oct. 11, 1995). “If the rule were otherwise, a ‘claim of reliance on counsel would be immune from a showing that, in fact, the defendant had received overwhelming advice to the contrary.’” *SEC v. Wyly*, No. 10 Civ. 5760 (SAS), 2011 U.S. Dist. LEXIS 87660, at *5-*6 (S.D.N.Y. July 27, 2011) (quoting *SEC v. Forma*, 117 F.R.D. 516, 523 n.5 (S.D.N.Y. 1987)); *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 Civ. 5298 (LMM) (RLE), 1998 U.S. Dist. LEXIS 13611, at *9 (S.D.N.Y. Sept. 3, 1998) (rejecting defendant’s attempt to limit reliance and waiver to “transactional” counsel because the defendant’s pleading was “replete with detailed references to conversations between [defendant] and its litigation counsel”), *aff’d*, 2000 U.S. Dist. LEXIS 14316 (S.D.N.Y. Sept. 29, 2000); *E.G.L. Gem Lab Ltd. v. Gem Quality Inst., Inc.*, 90 F. Supp. 2d 277, 296 n.133 (S.D.N.Y. 2000) (“Having blocked his adversary from conducting discovery on this issue, he will not now be heard to advance reliance on counsel.”), *aff’d*, 4 F. App’x 81 (2d Cir. 2001).

Because the individuals on whom defendants purport to have relied (Dennis Block, Larry Fox, KPMG witnesses, and Loretta Cangialosi) lacked the information and qualifications necessary to render assessments of the government investigation and defenses thereto, the Court should not allow testimony regarding assessments of the government investigation, including defenses thereto, from any witnesses. *See, e.g., Faulkner v. Arista Records LLC*, No. 07 CIV. 2318 (LAP), 2014 U.S. Dist. LEXIS 129711, at *39 (S.D.N.Y. Sept. 15, 2014) (precluding expert testimony because “his failure initially to review of many categories of records, and his disregard of such relevant records

after his belated review indicate that his methodology was aimed at achieving one result”); *id.* at *51 (precluding expert testimony because expert “did not supervise [substantive work of others on which expert’s opinion based] because, as discussed supra, he did not have knowledge of the field . . . [a]ccordingly, [expert] is not qualified to testify as an expert on [subject on which he relied on others who were qualified]”).

Consistent with their 99 references to investigation counsel in their summary judgment briefs, defendants recently included 3 investigation counsel on their trial witness list: Ethan Posner, Carlton Wessel and Gary Giampetruzzi. Declaration of Jason A. Forge in Support of Plaintiffs’ Motion to Exclude Reliance Evidence and Argument, Ex. 1. This is a brazen defiance of the Court’s prior orders and an equally brazen contradiction of defendants’ prior representations to the Court. Indeed, the parties spent a significant part of the summer of 2013 litigating plaintiffs’ motions to compel documents from and depositions of *each one of these three witnesses*. Dkt. Nos. 172, 181. In opposing plaintiffs’ requests, defendants expressly represented to the Court that, “[i]n the coming weeks, Plaintiffs will be deposing the Pfizer in-house and outside counsel who provided advice on the securities disclosures at issue, as well as *all inside and outside lawyers who Pfizer designated as trial witnesses*.” Dkt. No. 181 at 4. Defendants’ designated trial witnesses did not include Ethan Posner, Carlton Wessel and Gary Giampetruzzi, from whom plaintiffs were seeking discovery, including seeking to depose them. The Court accepted defendants’ representations and shielded these specific investigation counsel from discovery. Dkt. Nos. 172, 181. The Court also unequivocally warned defendants about the consequences if it turned out that they were engaging gamesmanship:

THE COURT: And if you call any witness and any of these documents are handled by that witness, that witness will be precluded.

* * *

THE COURT: If it has to do with relevance, if it's relevant to the case – I don't care about documents dealing with the weather and things of that nature, but if it has to do with these drugs or this case, you'd better disclose. Fair notice, Mr. Farina.

MR. FARINA: Understood.

THE COURT: If you hold back, you're going to be precluded.

Transcript of Proceedings dated July 19, 2013 at 13:20-14:17.

It is also far too late for defendants to salvage their reliance defenses by producing the mountains of evidence and legion of witnesses they shielded from discovery. Doing so now would require a complete re-do of the entire discovery process because most witnesses would have to be re-deposed and at least as many new witnesses would have to be deposed for the first time. Instead of such an unreasonable waste of time and resources, courts uniformly hold that rather than re-doing discovery due to a defendant's failure to make a full disclosure *during discovery*, the proper response is to preclude the defense: "*Bilzerian* provides that a party 'who intends to rely at trial' on a good faith defense 'must make a full disclosure *during discovery*; failure to do so constitutes a waiver' of that defense." *Arista Records LLC v. Lime Grp. LLC*, No. 06 CV 5936 (KMW), 2011 U.S. Dist. LEXIS 42881, at *9 (S.D.N.Y. Apr. 20, 2011) (citation omitted). Defendants have only themselves to blame for their gamesmanship, so defendants are the only ones who should suffer the consequences.

III. CONCLUSION

For the foregoing reasons, including those described more fully in the Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment on Defendants' Reliance on Advice of Counsel and Good Faith Defenses (Dkt. No. 288) and Plaintiffs' Memorandum of Law in Opposition to Pfizer Inc.'s and the Individual Defendants' Motions for Summary Judgment (Dkt. No. 304), the Court should exclude any evidence or argument concerning defendants' purported

reliance on others or on Pfizer's disclosure process, including the exclusion of testimony of Ethan Posner, Carlton Wessel and Gary Giampetruzzi, whom defendants specifically shielded from discovery.

DATED: December 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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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Southern District of New York

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Filer: Mary K. Jones
Stichting Philips Pensioenfonds

Document Number: [346](#)

Docket Text:

MEMORANDUM OF LAW in Support re: [343] MOTION in Limine to Exclude Reliance Evidence and Argument. . Document filed by Mary K. Jones(Individually), Stichting Philips Pensioenfonds. (Forge, Jason)

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