UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 4 TO EXCLUDE ARGUMENT AND EVIDENCE RELATED TO FORMER EMPLOYEES' DELETION OF ELECTRONIC DOCUMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

In 2004, when the government informed Pfizer Inc. ("Pfizer" or "the Company") it was investigating the Company's marketing of Bextra, Pfizer's legal division immediately issued a document hold notice and directed all employees who had involvement with Bextra to preserve all Bextra-related documents. Several months later, a lower-level sales manager in one of Pfizer's sales districts, Thomas Farina, asked three sales representatives who reported to him to delete certain electronic documents relating to Bextra from their computers, and they did so. When Pfizer discovered the conduct, it reported it to the government, fired the four employees, and cooperated with the government's investigation of them. Documents they had attempted to delete were recovered; no relevant evidence was missing.

Plaintiffs now propose to introduce at trial documents and witness testimony concerning these employees' document deletion efforts, as well as the subsequent 2009 conviction of Mr. Farina for obstruction of justice. This evidence is irrelevant to Plaintiffs' securities claims. It is intended to distract the jury and encourage it to punish Defendants for conduct—in this case, by former Pfizer employees, whom Pfizer terminated, well *before* the beginning of the Class Period—unrelated to Plaintiffs' claims. Pursuant to Federal Rules of Evidence 401, 402, 403, and 404, Defendants respectfully submit this motion *in limine* to preclude Plaintiffs from introducing this evidence.

BACKGROUND

In 2004, the Department of Justice ("DOJ") began an investigation into Pfizer's marketing of Bextra. Upon learning of DOJ's inquiry, Pfizer hired outside counsel—the law firm Covington & Burling ("Covington")—to conduct an internal investigation. Pfizer also issued a widespread litigation hold that directed employees to preserve all documents and other materials related to Bextra. During the course of its investigation, Covington discovered that in mid-2004, in violation of Pfizer's policies and the document hold, a field-based sales manager,

Mr. Farina, in one district (Brooklyn) of one region (Northeast) of one of Pfizer's sales divisions (Powers) had asked three sales representatives reporting to him to delete a handful of Bextra-related documents from their computers, which they did. (Covington later recovered deleted documents during its forensic examination of these employees' computers and disks; those documents were produced to DOJ and have been produced to Plaintiffs here.) Pfizer immediately investigated the matter and in 2005 terminated the four employees involved. Pfizer also voluntarily disclosed the issue and the results of its investigation to DOJ.

Based on Pfizer's disclosure of its investigation findings, DOJ investigated Mr. Farina for obstruction of justice. In January 2008, at the government's request, Pfizer cooperated with Mr. Farina's prosecution and produced to the government redacted Covington interview memoranda and attorney notes related to the issue. Mr. Farina was indicted in March 2008, charged with one count of destruction, alteration or falsification of records and three counts of aiding and abetting (he was not charged with any off-label promotion of Bextra). Pfizer was not a party to the case, though it continued to cooperate with the government's prosecution, including permitting one of its outside lawyers at Covington to testify for the government at Mr. Farina's trial in March 2009, which resulted in his conviction. The case against Mr. Farina played no role in the DOJ investigation of Pfizer regarding the marketing of Bextra, which was resolved prior to Mr. Farina's conviction.

Among the millions of documents Pfizer produced to Plaintiffs were materials relating to the investigation and prosecution of Mr. Farina. Plaintiffs also obtained copies of redacted Covington interview memoranda that Pfizer produced to the government during its investigation of Mr. Farina. Plaintiffs used these materials to question numerous fact witnesses about Mr. Farina's document deletion and the government's prosecution of him. Plaintiffs now seek to

introduce a number of these documents at trial as well as to present testimony from witnesses who have no connection to Pfizer's investor disclosures or Plaintiffs' securities claims but who were involved in Mr. Farina's unsuccessful attempt to delete documents.

ARGUMENT

I. Documents and Testimony Concerning the Farina Incident Are Irrelevant to Plaintiffs' Securities Claims.

As discussed in Defendants' Motion *in Limine* No. 5, documents and testimony concerning the marketing and alleged off-label promotion of Pfizer products, such as the documents Mr. Farina and his colleagues deleted (or attempted to delete), are irrelevant to Plaintiffs' claims that Defendants violated the Securities Exchange Act of 1934 ("the 1934 Act"). *See* Defs.' Mot. *in Limine* No. 5 at 3–7; *see also* First Am. Compl. ¶ 155. Simply put, Pfizer had no obligation to disclose in its securities filings that certain of its employees had engaged in off-label promotion or other improper conduct, rendering these materials irrelevant to the jury's consideration of Pfizer's liability under the 1934 Act. *See* Defs.' Mot. *in Limine* No. 5 at 3–4.[1] Moreover, it is undisputed that Pfizer's government investigation counsel, Covington, was aware of incidents of off-label promotion and, notwithstanding that conduct, advised the company that it had substantial defenses to any charges the government might bring related to the marketing of Bextra. *Id.* at 4–5; *see also* Pfizer Inc.'s Mem. in Supp. of Mot. for Summ. J. at 45–46 ("Defs.'

[1] *See also Lindsay v. Morgan Stanley (In re Morgan Stanley Info. Fund Sec. Litig.*), 592 F.3d 347, 365 (2d Cir. 2010) ("[D]isclosure is not a rite of confession."); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG* (*In re UBS AG Sec. Litig.)*,752 F.3d 173, 184 (2d Cir. 2014) (companies have no legal duty to disclose "uncharged, unadjudicated wrongdoing[s]" or mismanagement); *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) (companies subject to government investigations "have no duty to accuse themselves of unproven, allegedly illegal policies"); *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004) ("[T]he federal securities laws do not require a company to accuse itself of wrongdoing."), *aff'd sub nom. Albert Fadem Trust v. Citigroup, Inc.*, 165 F. App'x 928 (2d Cir. 2006); Defs.' Mem. at 38–39 (describing cases).

Mem."). Accordingly, evidence of off-label promotion cannot establish that Pfizer's statement that it believed it had "substantial defenses" to the government's investigation was false. *Id.*

For these same reasons, any evidence concerning the investigation, termination, and conviction of Mr. Farina and the termination of his three direct reports for deleting documents, in clear violation of Pfizer policies, is irrelevant to Plaintiff's claims. Pfizer had no obligation to disclose the conduct of these four former employees—all of which took place prior to the Class Period and was separate from the DOJ's Bextra investigation—in its securities filings, rendering the incident irrelevant to Plaintiffs' securities claims. As to the "substantial defenses" language in Pfizer's disclosures, there is no dispute that Covington—which uncovered the Farina incident during its investigation—advised Pfizer of its numerous defenses to DOJ's allegations notwithstanding Mr. Farina's actions and prosecution. Indeed, Plaintiffs deposed the two lawyers, Dennis Block and Lawrence Fox, who advised Defendants that the disclosures, including the "substantial defenses" language, complied with the securities laws, and both were aware of the incident.[2] Neither advised changes to the "substantial defenses" language as a result. The fact that four lower-level employees disregarded Pfizer's express instructions,

[2] December 10, 2014 Declaration of Amanda A. MacDonald ("Dec. 10, 2014 MacDonald Decl.") Ex. XX-1 (Block (Sept. 16, 2013) Dep. 58:14–60:6 (describing conversation with Covington regarding attempted destruction of documents by Pfizer employee related to promotion of Bextra), 230:25–231:5 ("As far as I understand it, there was document destruction, and that document destruction was reported by Pfizer voluntarily to the US Attorney, and the Pfizer lawyers themselves acted as witnesses and helped to prosecute those individuals.")); Dec. 10, 2014 MacDonald Decl. Ex. EE-2 (Fox (Sept. 26, 2013) Dep. 49:13–15 ("I was aware of one employee, whom I believe Pfizer self reported, and that that employee did destroy documents.")); *see also* Dec. 10, 2014 MacDonald Decl. Ex. GG-2 (Kindler (Dec. 6, 2013) Dep. 270:16–19 ("There were other individuals who engaged in destruction of documents that . . . we identified and turned over to the government.")); Dec. 10, 2014 MacDonald Decl. Ex. QQ-2 (Waxman (Nov. 14, 2013) Dep. 138:12–18 (recalling that certain sales persons at Pfizer improperly attempted to destroy documents)); Dec. 10, 2014 MacDonald Decl. Ex. RR-2 (Waxman (Oct. 16, 2014) Dep. 33:9–35:22 (describing awareness of improper document destruction by Pfizer employees)); Dec. 10, 2013 MacDonald Decl. Ex. JJ-2 (McKinnell (Nov. 11, 2013) Dep. 251:25–253:12 (describing Pfizer internal investigation that uncovered problems with off-label promotion in Brooklyn district and broader northeast region)).

attempted to delete documents, and one was (with Pfizer's cooperation) convicted of obstruction of justice simply has no possible relevance to this case. When words like "document destruction" and "obstruction of justice" are littered throughout a plaintiff's presentation, they tend to get a jury's attention, even if not relevant; that is the only genuine reason why Plaintiffs would seek to introduce the Farina evidence, and it should be prevented.

II. Rule 404(b) Prohibits Plaintiffs' Use of Evidence of the Farina Incident To Attack Defendants.

Federal Rule of Evidence 404(b) prohibits the introduction of "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Plaintiffs may not ask the jury to "generaliz[e] a defendant's earlier bad act into bad character and [to take] that as raising the odds that he did the later bad act now charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997).[3] This proscription is especially important when, as in this case, the prior bad act "involve[s] conduct 'more sensational'" than the acts alleged. *United States v. Nachamie*, 101 F. Supp. 2d 134, 145 (S.D.N.Y. 2000) (quoting *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir.1990)) (excluding evidence of prior arson conviction in case involving alleged Medicare fraud).

Plaintiffs' effort to smear Defendants with the details surrounding Mr. Farina's actions and criminal conviction falls squarely within Rule 404(b)'s prohibition. Plaintiffs have suggested that the Farina incident is evidence that Pfizer schemed to promote Bextra off-label

[3] *See also United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012) (admission of "prejudicial extrinsic act evidence" improper where "offered to prove propensity"); Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4.40, at 884 (4th ed. 2013) ("To sum it up, prior acts are broadly excludable in civil cases, and proof of prior acts should be excluded when they are relevant only because they support a propensity inference.").

and urged its employees to commit such promotion, because Mr. Farina would not have attempted to delete documents unless they evidenced off-label conduct. *See* Letter from J. Forge & A. MacDonald to Hon. A. Hellerstein (May 15, 2014) at 2–3 (Dkt. No. 195)). Setting aside that evidence of off-label promotion is irrelevant to Plaintiffs' securities claims, *see supra* pp. 5–7, there is nothing in the record—which includes the depositions Plaintiffs took on this specific topic—suggesting in any way that anyone else at Pfizer was involved in, encouraged, or supported Mr. Farina and his colleagues in their efforts to delete documents.[4] In fact, all the evidence is to the contrary. Plaintiffs hope that simply by highlighting the Farina incident, they can persuade the jury that Defendants should be found liable for securities violations. Such tactics are impermissible.

Although there are exceptions to Rule 404(b), such as knowledge or intent, if Plaintiffs "cannot identify a similarity or some connection between the prior and current acts, then evidence of the prior act is not relevant to show knowledge and intent." *United States v. Garcia*, 291 F.3d 127, 137 (2d Cir. 2002); *see also United States v. McCallum*, 584 F.3d 471, 475 (2d Cir. 2009) ("Where such evidence is offered for the purpose of establishing the defendant's knowledge or intent, we require that the government identify a similarity or connection between the two acts that makes the prior act relevant to establishing knowledge of the current act."

[4] *See* Dec. 10, 2014 MacDonald Decl. Ex. JJ-4 (McKinnell (Sept. 19, 2014) Dep. 25:14–25 (document destruction involved "one district manager" and "a small number of sales representatives")); Dec. 10, 2014 MacDonald Decl. Ex. JJ-2 (McKinnell (Nov. 11, 2013) Dep. 251:25–252:9 (investigation into off-label promotion uncovered problems in region containing Brooklyn district)); Dec. 10, 2014 MacDonald Ex. HH-2 (Jan. 22, 2014 Lankler Dep. 79:13–80:7) (document destruction involved "three to four" employees from same district); Dec. 10, 2014 MacDonald Decl. Ex. II-2 (Levin Dep. (Sept. 23, 2014) 64:23–65:15) (internal investigation found that off-label promotion was "isolated to a few instances primarily in the Brooklyn district"); Dec. 10, 2014 MacDonald Decl. Ex. ZZ-3 (PFE-DERIV 00003273) (Apr. 27, 2005 Audit Committee Compliance Update) (noting that "three sales representatives and one District Manager based in Brooklyn, New York, appeared to have attempted to destroy electronic documents related to Celebrex and Bextra in violation of a pre-existing and articulated instruction to preserve documents pursuant to a legal document hold").

(internal quotation marks omitted)); *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 191 (3d Cir. 2000) ("[A] proponent's incantation of the proper uses of [Rule 404(b) evidence] . . . . does not magically transform inadmissible evidence into admissible evidence."). Here, Plaintiffs cannot show that documents and testimony regarding the conduct of Mr. Farina and his colleagues—all of which took place before the Class Period and involved individuals who played no role in Pfizer's securities disclosures—are in any way connected to the investor statements Defendants made that Plaintiffs claim violate the 1934 Act. Nor can Plaintiffs credibly suggest that these materials reliably demonstrate Pfizer's corporate knowledge or intent as to the securities violations at issue in this case. *See United States v. Lauersen*, No. S298CR1134(WHP), 2000 WL 1677931, at *4 (S.D.N.Y. Nov. 8, 2000) ("While the Government obtusely proffers that this evidence 'informs the jury's assessment of defendant's knowledge and intent,' the logical real effect of this evidence is to call into question [Defendant's] competency as a physician and, therefore, invites the jury to prejudge [Defendant] and to decide the case on an improper basis.").

III. Evidence of the Farina Incident Should Be Precluded Under Rule 403.

Even if Plaintiffs were able to establish a proper purpose for the introduction of evidence related to the Farina incident, such evidence should be excluded under Rule 403 because whatever probative value it has is minimal, and substantially outweighed by unfair prejudice. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, . . . an emotional one." Fed. R. Evid. 403 advisory committee's note; *see also United States v. Watts*, 934 F. Supp. 2d 451, 481 (E.D.N.Y. 2013) (It is "well within [a] court's discretion to draw the line to exclude testimony that . . . could well cause the jury to be influenced by sympathies having no bearing on the merits of the case."); *United States v. Miller*, 641 F. Supp. 2d 161, 166 (E.D.N.Y. 2009) ("The term 'unfair prejudice' . . . 'speaks to

the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'" (quoting *Old Chief*, 519 U.S. at 180)). Here, Plaintiffs seek to present to the jury evidence that former Pfizer employees, one of whom ultimately was convicted of criminal obstruction of justice, attempted to delete documents related to the promotion of Bextra, the subject of the DOJ investigation described in the disclosures at issue in this case. While the Farina incident is in no way relevant to the question of whether Defendants' disclosures to investors were appropriate, there is real danger that the jury would react negatively to Mr. Farina's criminal conduct and seek to punish Defendants as a result, *see Old Chief*, 519 U.S. at 181;[5] the evidence therefore should be prohibited. *See In re September 11 Litig.*, No. 21 MC97(AKH), 2007 WL 3036439, at *5 (S.D.N.Y. Oct. 17, 2007) (Hellerstein, J.) (granting motion *in limine* and excluding evidence "because of its high likelihood of prejudicing, confusing and misleading the jury pursuant to Federal Rule of Evidence 403").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion *in limine* to exclude reference at trial to evidence of attempted deletion of electronic documents by Mr. Farina and his colleagues.

Date: December 10, 2014
Washington, D.C.

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

[5] *See Old Chief*, 519 U.S. at 181 (even if propensity evidence is relevant, "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance").

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of December, 2014, the foregoing Memorandum in Support of Defendants' Motion *in Limine* No. 4 to Exclude Argument and Evidence Related to Former Employees' Deletion of Electronic Documents was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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