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 ECF Case

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 6 TO EXCLUDE ARGUMENT AND EVIDENCE REGARDING NONDISCLOSURES UNRELATED TO PLAINTIFFS' CLAIMED LOSSES

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Defendants respectfully submit this motion *in limine* to exclude argument and evidence regarding matters that were not disclosed by Pfizer in its January 26, 2009 announcement regarding its agreement in principle with the government to settle marketing investigations into Bextra and other unspecified drugs. Since Pfizer made no mention of these matters in its January 26 announcement, as a matter of both law and logic they have no connection to Plaintiffs' claimed losses, and Plaintiffs accordingly should not be permitted to argue or suggest to the jury that they should have been disclosed. In some instances, these matters have no relevance to any fact of consequence in this action, are unfairly prejudicial and, if raised at trial, would confuse the jury and complicate and unnecessarily lengthen the trial, and should therefore be excluded altogether. Fed. R. Evid. 401, 402, 403, 404(b).

BACKGROUND

Plaintiffs' claims in this case are based on a one-sentence disclosure made by Pfizer on January 26, 2009, in the course of announcing its results for the fourth quarter of 2008. In that single sentence, Pfizer stated:

> Fourth quarter results were impacted by a $2.3 billion pre-tax and after-tax charge resulting from an agreement in principle with the Office of Michael Sullivan, the United States Attorney for the District of Massachusetts, to resolve previously disclosed investigations regarding allegations of past off-label promotional practices concerning Bextra, as well as other open investigations.

First Am. Compl. ¶ 95. Plaintiffs assert that this statement revealed new information previously concealed by Pfizer and that, in reaction to that new information, Pfizer's stock price fell, causing Plaintiffs' claimed losses. First Am. Compl. ¶ 98.

Yet Pfizer had disclosed the Bextra investigation long before the start of the class period on January 6, 2006, and had also disclosed that the risk of criminal fines and

penalties could arise from investigations in addition to those specifically discussed in its legal proceedings disclosures.[1] Plaintiffs have accordingly sought to develop theories of securities fraud based on *other* purported nondisclosures by Pfizer during the class period that:

- the government had been investigating the marketing of Geodon, Lyrica and Zyvox;
- revenues for Geodon, Lyrica and Zyvox were purportedly derived from "off-label marketing";
- Pfizer had received a target letter from the Department of Justice ("DOJ");[2]
- during the third quarter of 2006, Pfizer's internal auditors had identified a "significant deficiency" in the company's internal controls over certain U.S. pharmaceuticals sales and marketing practices (which Pfizer rectified to the satisfaction of its outside auditors, KPMG); and
- Pfizer would risk debarment from government-funded health programs if it were charged criminally in the Bextra investigation.[3]

These matters have little if any relevance to Plaintiffs' claims, because none of them was "revealed" by the January 26, 2009 announcement—the supposed "corrective disclosure" that Plaintiffs assert caused Pfizer's stock price decline and their resulting losses. The

[1] *See* First Am. Compl. ¶¶ 72, 73, 76; Statement of Undisputed Facts in Support of Pfizer's Motion for Summary Judgment ¶ 90, ECF No. 248 ("It is possible that criminal charges and fines and/or civil penalties could result from pending government investigations, ***including but not limited to*** those discussed below." (emphasis added)) (hereinafter "Pfizer SUF").

[2] A "target letter" is a formal letter from the DOJ informing a company that it is the target of an investigation. On February 5, 2008, the DOJ sent a target letter to Covington & Burling, Pfizer's outside counsel for the Bextra investigation. Pfizer SUF ¶ 92. When Pfizer received the target letter, the government had already asked Pfizer to propose terms for resolution of the Bextra investigation, and the government had rejected Covington & Burling's recommended $50 to $70 million civil settlement as "not close to acceptable." Pfizer SUF ¶ 92.

[3] The Secretary of Health and Human Services has authority to "exclude" or "debar" individuals and their employers from government-funded health care programs upon felony or misdemeanor convictions for certain offenses involving fraud or other misconduct. *See* 42 U.S.C. § 1320a-7; 21 U.S.C. § 335a. "Debarment" as used in this brief refers to both debarment and exclusion.

January 26 announcement contained no information about any of these matters. It did not identify the drugs that were the subject of the other investigations resolved alongside the Bextra investigation. It did not state that Pfizer had received a target letter from the Department of Justice. It did not state that, more than two years earlier, Pfizer had identified a temporary "significant deficiency" in its healthcare compliance controls. It did not disclose that Pfizer's earlier statements as to sales revenues for Geodon, Lyrica and Zyvox were false. Nor did it mention the possibility of debarment in connection with the Bextra investigation. The January 26 announcement says *nothing* about any of these subjects, and Plaintiffs accordingly cannot be permitted to argue that Pfizer acted improperly by not making disclosures about them during the class period. As to some, Plaintiffs should be precluded from offering any evidence at all.

ARGUMENT

I. PLAINTIFFS SHOULD BE PRECLUDED FROM ARGUING THAT PFIZER SHOULD HAVE DISCLOSED MATTERS THAT WERE NOT ADDRESSED BY ITS JANUARY 26, 2009 DISCLOSURES.

Loss causation is an essential element of Plaintiffs' securities fraud claim. To establish loss causation, Plaintiffs must prove that the alleged "misstatement or omission is the 'proximate cause' of an investment loss." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005). To prove this causal relationship, they must show "that the misstatement or omission concealed something from the market that, *when disclosed*, negatively affected the value of the security." *Id.* (emphasis added); *see also Prime Mover Capital Partners L.P. v. Elixir Gaming Techs., Inc.*, 548 F. App'x 16, 17 (2d Cir. 2013).

As noted above, the only disclosure that Plaintiffs claim caused their losses was Pfizer's January 26 announcement that it had recorded a $2.3 billion pre-tax charge in

connection with its "agreement in principle to resolve . . . previously disclosed investigations regarding allegations of past off-label promotional practices concerning Bextra, as well as other open investigations." First Am. Compl. ¶ 95. The purported omissions cited by Plaintiffs and discussed above were not "disclosed," "revealed" or "corrected" by the January 26 announcement. It necessarily follows that those nondisclosures cannot have been a proximate cause of the decline in Pfizer's stock price on January 26. Plaintiffs cannot prove that information about those subjects, "*when disclosed*," caused Plaintiffs' January 26 losses, *Lentell*, 396 F.3d at 173 (emphasis added), because no information about them *was disclosed* on January 26. Given that the January 26 announcement did not "reveal[] the truth with respect to the specific misrepresentations alleged," *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 41 (2d Cir. 2009), as a matter of law, Plaintiffs cannot prove liability with respect to these alleged misrepresentations. *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010) (loss causation cannot be shown where "none of [the statements in the allegedly corrective disclosure] even purported to reveal some then-undisclosed fact with regard to the specific misrepresentations alleged in the complaint."); *see also In re Merck & Co., Inc. Sec., Derivative, & "ERISA" Litig.*, Nos. 05-1151, 05-2367(SRC), 2011 WL 3444199, at *34 (D.N.J. Aug. 8, 2011). As in *Omnicom*, the purportedly "corrective" January 26 announcement could not have caused any losses here with regard to matters that the announcement never addressed. *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d at 511. Accordingly, Plaintiffs cannot be allowed to argue or imply to the jury that Pfizer's disclosures were wrong because they did not contain specific disclosures about those matters. Any such argument or suggestion should be precluded, and, with respect to

some of these matters which have no bearing on any issue of consequence to Plaintiffs' claims, Plaintiffs should not be allowed to offer any evidence. Fed. R. Evid. 401, 402.

A. The Government's Investigations into Geodon, Lyrica and Zyvox

Prior to January 26, 2009, Pfizer had disclosed that the government was investigating marketing practices as to Bextra and also that the risk of "criminal charges and fines and/or civil penalties" from governmental investigations was not limited to the investigations specifically discussed in the company's legal proceedings disclosures. Pfizer SUF ¶ 90. Pfizer was under no obligation to identify that these other drugs were being investigated, *see*, *e.g.*, *Dalberth v. Xerox Corp.*, 766 F.3d 172, 186 (2d Cir. 2014) ("While Plaintiffs may have desired more detailed or nuanced language, that is not what the law requires."), and Defendants were so advised by Pfizer's disclosure counsel. Pfizer SUF ¶¶ 90-91.

In addition, and apart from whether Pfizer had any obligation to disclose the government's investigations into those particular drugs by name, Plaintiffs cannot establish that their January 26, 2009 losses were caused by any failure to do so, because the January 26 announcement did not name Geodon, Lyrica or Zyvox. In its announcement, Pfizer merely observed that "other open investigations" were being resolved together with the Bextra investigation. The stock drop on January 26 could not have reflected market reaction to Pfizer's agreement in principle to resolve investigations into Geodon, Lyrica and Zyvox, because the corrective disclosure on its face does not name those drugs. Plaintiffs cannot prove that the investigation into those drugs, "*when disclosed*," caused Plaintiffs' losses, because those drugs were *not* identified on January 26, when Plaintiffs' claimed losses were incurred. Nor can Plaintiffs argue that the settlement Pfizer announced on January 26 revealed the "risk" posed by the allegedly

undisclosed investigations into these drugs, because it is undisputed that the settlement charge disclosed by Pfizer on January 26 was overwhelmingly attributable to Bextra—Pfizer had disclosed throughout the class period that it risked criminal fines and penalties from the government's investigation into Bextra.

Since there was no disclosure of any investigations into Geodon, Lyrica and Zyvox on January 26, Plaintiffs cannot prove loss causation from any *nondisclosure* that the government was investigating marketing practices as to these drugs prior to January 26. Plaintiffs accordingly cannot be allowed to argue for liability based on the alleged nondisclosure of these investigations. Further, since the investigations into these other drugs have no bearing on Plaintiffs' claims, Plaintiffs should similarly be precluded from offering any evidence at trial about the investigations or Pfizer's disclosure determinations with regard to them. Fed. R. Evid. 401, 402.

B. Statements Regarding Sales Revenues for Geodon, Lyrica and Zyvox

Although there is no real question that Pfizer accurately reported its revenues from sales of Geodon, Lyrica and Zyvox, Plaintiffs may seek to argue that Pfizer should have disclosed that those revenues were purportedly "derived from unlawful off-label marketing." First Am. Compl. ¶ 86. As Defendants have shown, there is no legal obligation to disclose unadjudicated wrongdoing. Pfizer's Reply in Supp. of Summ. J. at 4-5, 21-22, ECF No. 326 (citing *In re Marsh & Mclennan Cos., Sec. Litig.*, 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006) ("Absent an allegation that [defendant] reported income that it did not actually receive, the allegation that a corporation properly reported income that is alleged to have been, in part, improperly obtained is insufficient to impose Section 10(b) liability.")) (hereinafter "Pfizer Reply").

But regardless of whether Pfizer's statements about its revenues for Geodon, Lyrica and Zyvox could potentially be actionable, Plaintiffs' losses were not caused by any failure to make disclosures about purported off-label promotion of those products as a matter of law, because the January 26 announcement contained no information about the promotion of Geodon, Lyrica or Zyvox. As noted above, as of January 26, the market could not have learned of any alleged misrepresentations concerning Geodon, Lyrica, and Zyvox, or that any portion of the settlement was attributable to these drugs. Indeed, following the January 26 announcement, analysts uniformly ignored Pfizer's disclosure about the government settlement and focused instead on the $68 billion merger and the unexpected dividend cut that Pfizer announced. During a conference call with stock analysts on January 26, these industry experts—whose job it is to analyze financial statements—did not ask a single question about Pfizer's revenues, off-label marketing or the settlement. Pfizer SUF ¶ 125. Plaintiffs cannot prove that previously undisclosed information regarding the marketing of these drugs, "*when disclosed*," caused Plaintiffs' losses, because no such information was disclosed on January 26, when Plaintiffs' claimed losses were incurred.

It follows that evidence about such matters is irrelevant to Plaintiffs' claims. Accordingly, all argument and evidence regarding Pfizer's sales revenues for Geodon, Lyrica and Zyvox, including the absence in Pfizer's disclosures of statements attributing sales revenue for these drugs to alleged marketing improprieties, should be excluded.

C. Pfizer's Nondisclosure of the Target Letter from the DOJ

As Defendants have shown, Pfizer had no obligation to further disclose that it had received a letter from the Department of Justice in February 2008 that advised the company that it was the target of an investigation. Pfizer had already disclosed that the

government was investigating its marketing of Bextra and other drugs and that the government's investigations presented a number of substantial legal risks, including: "civil and criminal sanctions," "criminal charges and fines and/or civil penalties," "the payment of a substantial fine and/or civil penalty," an "excessive verdict[]" because "[l]itigation is inherently unpredictable" and "judgments or . . . settlements of claims that could have a material adverse effect on our results of operations in any particular period."[4] These disclosures satisfied any obligation Pfizer had to inform its investors about the government's investigations into possible violations of law during the class period, and no more was required. *See* Defendant Pfizer, Inc.'s Memorandum of Law In Support of Its Motion for Summary Judgment at 38-41, ECF No. 246.

Apart from the fact that no such disclosure was required, the nondisclosure of the target letter cannot have caused Plaintiffs' January 26 losses. The January 26 announcement that Plaintiffs contend caused their losses said nothing about the target letter, only that Pfizer had resolved previously disclosed government investigations into Bextra and other open matters. Indeed, in view of Pfizer's prior disclosures as to the risk of a potentially costly fine and penalties, there was nothing "corrective" about the January 26 disclosure, and certainly no new "revelation" that Pfizer had previously received a target letter from the DOJ. The nondisclosure of the target letter was not the

[4] *See* Pfizer SUF ¶ 64 (apprising investors that proceedings with the Department of Justice could result in "civil and criminal sanctions" (citing Pfizer, 2005 Annual Report (Form 10-K) at 12 (Feb. 28, 2006))); Pfizer SUF ¶ 71 (informing investors that "criminal charges and fines and/or civil penalties could result from pending government investigations" (citing Pfizer, 2006 Annual Report (Form 10-K) at 73 (Feb. 27, 2007))); Pfizer SUF ¶ 104 (disclosing that resolution of the government investigation "could result in the payment of a substantial fine and/or civil penalty" (citing Pfizer, 2008 Q2 Form 10-Q, at 40 (Aug. 8, 2008))); Pfizer SUF ¶ 64 (noting that despite its belief in its substantial defenses, "[l]itigation is inherently unpredictable . . . we could in the future incur judgments or enter into settlements of claims" (citing Pfizer, 2005 Annual Report (Form 10-K) at 18 (Feb. 28, 2006))).

cause of Plaintiffs' alleged losses. Plaintiffs accordingly cannot be permitted to argue for liability or imply that Pfizer's disclosures were inadequate because they did not mention Pfizer's receipt of the letter.

D. Pfizer's Purported Nondisclosure of Its Internal Healthcare Compliance Controls

As Defendants have shown, Pfizer had no obligation to disclose that its internal auditors had identified a "significant deficiency" in the company's internal controls over certain pharmaceuticals sales and marketing practices. Pfizer Reply at 49-50. First, Pfizer properly remediated the deficiency to the satisfaction of Pfizer's external auditors at KPMG. Pfizer SUF ¶¶ 136-139. Second, a "significant deficiency" need not be disclosed, as Plaintiffs' own expert has conceded, Pfizer SUF ¶ 139 & n.227, and no one involved in Pfizer's accounting determinations—Pfizer's Controller, Pfizer's Internal Audit team or KPMG—believed this temporary deficiency rose to the level of a "material weakness," which must be disclosed. Pfizer SUF ¶ 138 & n.226.

Plaintiffs cannot establish that the nondisclosure of the temporary "significant deficiency" caused any part of their claimed losses. Pfizer's January 26 announcement said nothing about the 2006 significant deficiency finding. Nor can Plaintiffs contend that the disclosure of the settlement of the Bextra investigation "corrected" any misleading nondisclosures of Pfizer's significant deficiency finding from 2006, because Pfizer stopped marketing Bextra in April 2005, Pfizer SUF ¶ 50, and therefore the deficiency identified in the third quarter of 2006 could not have concerned Bextra. No information was disclosed to the market about Pfizer's temporary "significant deficiency" finding from 2006, and thus the prior nondisclosure of that information cannot have caused Plaintiffs' January 26 loss.

Given that it has no bearing on Plaintiffs' claim as a matter of law, Plaintiffs should be precluded from offering evidence about that finding or arguing that Pfizer should have disclosed it to the investors during the Class Period.

E. Pfizer's Purported Nondisclosure of Its Risk of Debarment

Plaintiffs should be precluded from arguing for liability based on Pfizer's nondisclosure that it risked debarment, a potentiality that never eventuated and that Pfizer had no obligation to disclose. As noted above, Pfizer had disclosed that it faced a risk of criminal fines and penalties as a result of pending government investigations, including the investigation into Bextra. *See supra* at 8-9 & n.4. As Plaintiffs' own expert has conceded, Pfizer did not also need to disclose that debarment could result from a finding of guilt in a criminal matter.[5] Further, a corporation does not violate Rule 10b-5 by failing to warn about remote risks—particularly if they never actually come to pass, as was the case here. *See*, *e.g.*, *In re FBR Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 357 (S.D.N.Y. 2008) (companies under investigation "are not obligated to speculate as to the myriad of consequences, ranging from minor setbacks to complete ruin, that might . . . befall[] the company if the [illegal conduct were] disclosed"). Pfizer was not debarred as

[5] Plaintiffs' disclosure expert, Mr. Buthusiem, admitted during his deposition that during his tenure as disclosure counsel at GlaxoSmithKline, he "believed [that] . . . through our description of the areas in which the government was investigating, that saying debarment as a remedy would have been redundant." *See* Oct. 30, 2014 Declaration of Joseph G. Petrosinelli, Ex. R-1 (Buthusiem (Aug. 1, 2014) Dep. 243:7-11). The possibility of debarment following a finding of guilt in a criminal matter exists as a matter of law, not internal company information. *See* 42 U.S.C. § 1320a-7; 21 U.S.C. § 335a; *DiCola v. Food & Drug Admin.*, 77 F.3d 504, 505 (D.C. Cir. 1996) ("Congress required the Secretary of Health and Human Services to debar anyone convicted of a felony related to the federal regulation of drug products from thereafter 'providing services in any capacity to a person that has an approved or pending drug product application.'" (quoting 21 U.S.C. § 335a)).

a result of the government's investigations, so the company's purported failure to disclose the risk of debarment cannot support Plaintiffs' securities claims.

But in any event, Plaintiffs cannot establish that any failure to disclose the risk of debarment caused their claimed losses. Pfizer was not debarred. Pfizer's January 26 announcement said nothing about the risk of debarment. Nothing that may have been concealed about that risk "*when disclosed*" caused any losses to Plaintiffs, because there was no disclosure about debarment on January 26. Accordingly, the nondisclosure of the risk of debarment could not have caused Plaintiffs' losses, as a matter of law.

Given that Plaintiffs' losses were not caused by the nondisclosure of debarment risk, Plaintiffs should be precluded from arguing or suggesting at trial that Pfizer should have disclosed its risk of debarment.

II. EVIDENCE AS TO CERTAIN MATTERS THAT WERE NOT DISCLOSED ON JANUARY 26, 2009 SHOULD BE EXCLUDED ON GROUNDS OF JURY CONFUSION, UNDUE DELAY AND UNFAIR PREJUDICE

Evidence as to some of the matters disclosed above—the government's investigations into Geodon, Lyrica and Zyvox; the alleged contribution of off-label marketing to the sales revenues for Geodon, Lyrica and Zyvox; and the 2006 "significant deficiency" finding—should be excluded because any possible probative value of evidence regarding the issues discussed above would be substantially outweighed by the dangers of jury confusion, undue delay and unfair prejudice. Fed. R. Evid. 403, 404(b). *See also* Motion *in Limine* No. 5 To Exclude Evidence Related to Alleged Off-Label Promotion of Drugs. In addition, evidence regarding the 2006 "significant deficiency" finding will potentially lead the jury to the mistaken belief that such finding pertains to the marketing of Bextra, whereas Pfizer stopped marketing Bextra in 2005.

Evidence as to these matters will present a substantial risk of confusing the jury as to the potential grounds on which it could determine that Pfizer's disclosures were inadequate or harmed Plaintiffs. It would be natural for the jury to expect that the evidence presented at trial relates to Pfizer's disclosure obligations, but as explained above, these matters supply no basis for liability on Plaintiffs' claims. To permit Plaintiffs to argue these collateral matters alongside their core allegations about Pfizer's Bextra exposure presents a substantial risk of jury confusion that outweighs whatever minimal probative value these matters may have.

Permitting argument or evidence as to these matters would unduly complicate and delay the trial. If Plaintiffs are permitted to introduce evidence about the investigations into Geodon, Lyrica and Zyvox, Pfizer's marketing of those products and the "significant deficiency" finding, Defendants will be compelled to offer counter-evidence to demonstrate that Pfizer's marketing activities as to the other drugs were appropriate, or that any potential marketing misconduct was limited and unauthorized, and to offer additional fact and expert testimony, including as to accounting standards, to explain the "significant deficiency" finding. Expanding the scope of trial to include such matters would "turn[] the trial into a 'multi-ringed sideshow of mini-trials on collateral issues . . . that may have only tangential bearing, if at all, to the issues and claims disputed in this case.'" *Park W. Radiology v. CareCore Nat'l LLC*, 675 F. Supp. 2d 314, 325 (S.D.N.Y. 2009); *see also United States v. Borrero*, No. 13 Cr. 58(KBF), 2013 WL 6020773, at *2 (S.D.N.Y. Nov. 1, 2013) (excluding evidence and argument because "on the facts of this case, the limited amount of probative value that the [evidence] add[s] is substantially outweighed by the risk of undue confusion and an unnecessary sideshow").

Finally, evidence as to these matters would pose a significant risk of unfairly prejudicing the jury against Defendants. For the jury to hear evidence of investigations into the marketing of other products in addition to Bextra and of Pfizer's own determination—as to other products—of a "significant deficiency" in its internal controls would create an unfair risk that the jury will prejudge Pfizer's evidence regarding Bextra and tempt it to "punish" Defendants for alleged marketing misconduct unrelated to Plaintiffs' disclosure claims. Fed. R. Evid. 404(b).

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court exclude from trial argument and evidence regarding matters that were not disclosed by Pfizer in its January 26, 2009 announcement.

Date: December 10, 2014

Respectfully submitted,

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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. 6 To Exclude Argument and Evidence Regarding Nondisclosures Unrelated to Plaintiffs' Claimed Losses was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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