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. 7 TO EXCLUDE EVIDENCE REGARDING THE AUGUST 2009 CRIMINAL INFORMATION AND PLEA DOCUMENTS

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Plaintiffs should not be permitted to offer evidence at trial that relates to the August 31, 2009 criminal information and plea documents pursuant to which Pfizer's subsidiary Pharmacia & Upjohn Company, Inc. ("Pharmacia") agreed to plead guilty to one count of violating the Food, Drug, and Cosmetic Act. Certain of these materials—the government's charging information and various other plea-related documents—are hearsay not covered by any exception to the hearsay rule. More fundamentally, none of the evidence regarding the information and plea existed as of January 26, 2009, when Pfizer announced its agreement in principle with the government to resolve the Bextra investigation, which is the event that Plaintiffs assert caused their losses. Accordingly, all such evidence should be excluded as irrelevant. It should also be excluded on the grounds that it would confuse the jury, needlessly lengthen the trial and unfairly prejudice Defendants.[1]

ARGUMENT

I. CERTAIN PLEA DOCUMENTS SHOULD BE EXCLUDED AS INADMISSIBLE HEARSAY.

Plaintiffs have listed as proposed trial exhibits various hearsay documents related to the final plea agreement which formally resolved the government's Bextra investigation in August 2009, more than seven months *after* the close of the Class Period in this case. These hearsay materials include the government's charging information, its sentencing memorandum, the plea hearing transcript, and a letter to the court regarding the plea by Pharmacia. Plainly, all of the statements in these documents are hearsay if offered in evidence to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). The authors or speakers reflected in these documents will

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[1] These documents include, but are not limited to the government's charging information, the government's sentencing memorandum, the plea hearing transcript, the letter to the court regarding the plea by Pharmacia, Pharmacia's sentencing memorandum, the plea agreement, the side letter, and the Corporate Integrity Agreement. *See* Pls.' Exs. 272-75, 278, 279, 355, 398, 610, 902, 903.

not be testifying at trial, and Plaintiffs seek to use them for the sole purpose of proving that Pfizer engaged in acts of off-label marketing, *i.e.*, for the truth of the matter asserted.

It is well-settled that allegations and accusatory instruments in other lawsuits are inadmissible hearsay that cannot be admitted in evidence. *See, e.g.*, *D'Cunha v. Genovese/Eckerd Corp.*, 415 F. App'x 275, 278 (2d Cir. 2011) (holding that the district court "properly excluded the complaint, the answer, and [plaintiff's] deposition, as these documents were inadmissible hearsay"); *Park W. Radiology v. CareCore Nat'l LLC*, 675 F. Supp. 2d 314, 330 (S.D.N.Y. 2009) (excluding evidence concerning other lawsuits brought against the defendant as inadmissible hearsay); *In re Blech Sec. Litig.*, No. 94 Civ. 7696(RWS), 2003 WL 1610775, at *11 (S.D.N.Y. Mar. 26, 2003) (excluding statements contained in the amended complaint as inadmissible hearsay and stating, "[t]his document is not evidence of anything other than the existence of an accusation"). This Court should do the same.[2]

The information and sentencing memorandum are not only hearsay themselves but also contain statements attributed to persons other than Defendants in this case. *See* Fed. R. Evid. 805. The information, which sets forth the government's allegations, is replete with inadmissible statements from unsourced emails. The sentencing memorandum, which sets forth the government's view of what it would have proven at trial—which Pharmacia disputed—contains unattributed, and again, inadmissible, statements by persons other than Defendants. Such double-hearsay is not admissible. *See United States v. Cruz*, 894 F.2d 41, 44 (2d Cir. 1990)

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[2] Nor are these materials admissions of a party-opponent. Pharmacia did not agree with all of the allegations in the government's information and merely conceded that there was a sufficient factual basis for its plea. Dec. 10, 2014 Declaration of Amanda M. MacDonald in Support of Defendants' Motions *In Limine* Ex. GG-2 (Kindler (Dec. 6, 2013) Dep. 269:9-15, 276:17-25, 278:2-279:3).

(excluding investigation reports as inadmissible hearsay and noting "[e]ach hearsay statement within multiple hearsay statements must have a hearsay exception in order to be admissible").

II. EVIDENCE REGARDING THE CRIMINAL INFORMATION AND ASSOCIATED PLEA DOCUMENTS SHOULD BE EXCLUDED UNDER RULES 401 AND 403.

Apart from the hearsay issues noted above, all evidence regarding the August 2009 plea by Pharmacia should be excluded on the grounds that it is irrelevant to Plaintiffs' claims, is unfairly prejudicial and will confuse the jury and needlessly lengthen the trial. Fed. R. Evid. 401, 402. Plaintiffs allege that their losses were sustained as a result of Pfizer's January 26, 2009 announcement of its agreement in principle to resolve the Bextra investigation. First Am. Compl. ¶ 19. As of that date, it had not reached a final agreement on the terms of the resolution; the details of those terms including the charging information had yet to be determined. These matters were negotiated over the next several months, and the final criminal information, associated plea documents, and civil settlement agreements were not finalized and filed until August 31, 2009—more than seven months later. As a matter of law and logic, evidence regarding decisions and agreements that occurred after January 26, 2009, has no "tendency to make a fact more or less probable," Fed. R. Evid. 401, and accordingly is inadmissible as irrelevant, *see* Fed. R. Evid. 402. Accordingly, all evidence regarding Pharmacia's plea should be excluded—including the particular facts alleged by the government, the violation of law that was ultimately charged and the admissions made as part of the plea.

Evidence regarding the plea should also be excluded because it would unfairly prejudice the jury against Pfizer. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note. The plea documents, especially the information,

present the government's (disputed) contentions regarding the underlying facts and accuse company employees of various improper conduct in connection with off-label promotion. If permitted to consider those documents, the jury might punish Defendants for "bad acts" unrelated to Plaintiffs' securities fraud claims. Evidence of the plea would also improperly induce the jury to infer that Defendants had a propensity to ignore their legal obligations; such use of evidence of a crime or wrong that is prohibited under Rule 404(b). *See*, *e.g.*, *SEC v. Badian*, 822 F. Supp. 2d 352, 366 (S.D.N.Y. 2011) (excluding evidence of criminal complaint that could "lead the jury to make improper propensity inferences and confuse the allegations in the criminal Complaint with the allegations in the instant case"); *Cary Oil Co. v. MG Refining & Mktg., Inc.*, 257 F. Supp. 2d 768, 773-74 (S.D.N.Y. 2003) (excluding an Arbitration Decision because it "could encourage the jury to make a decision on how much blame to assign to Defendants based on the arbitration panel's findings, not on the jury's own deliberations."). The risk of unfair prejudice, particularly when weighed against its lack of probative value, weighs heavily in favor of exclusion of such evidence.

Apart from being irrelevant and prejudicial, evidence regarding the August 2009 plea would confuse the jury and unduly lengthen the trial. This lawsuit does not turn on whether or not there was a violation of the Food, Drug, and Cosmetic Act. Plaintiffs must prove that Pfizer's disclosures prior to its announcement on January 26, 2009 were false or misleading, that Defendants sought to defraud investors, and that the alleged fraud, when disclosed, caused Plaintiffs' losses. To permit evidence regarding the plea would run the risk of confusing the jury into conflating liability under the FDCA with Plaintiffs' claim of securities fraud. Furthermore, in explaining the plea and associated documents to the jury, Defendants would have to address with the jury what these documents are and are not (for example, that a criminal information is

simply an allegation, rather than evidence), the nature of federal plea agreements and Sentencing Guideline calculations and other matters relating to the Bextra investigation and plea—unnecessary additional explanation that would lengthen the trial and provide no real probative value in this securities case.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their motion *in limine* to exclude evidence regarding the August 31, 2009 criminal information and associated plea documents.

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 of Law in Support of Defendants' Motion *In Limine* No. 7 To Exclude Evidence Regarding the August 2009 Criminal Information and Plea Documents was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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