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. 8 TO EXCLUDE EVIDENCE OR ARGUMENT RELATED TO THE PROMOTION OF, AND SETTLEMENT AGREEMENTS REGARDING, NEURONTIN AND GENOTROPIN

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Pursuant to Federal Rules of Evidence 401, 402, 403, and 404, Defendants Pfizer Inc. ("Pfizer"), Frank D'Amelio, Jeffrey B. Kindler, Alan Levin, Henry A. McKinnell, Ian C. Read, and Allen Waxman (collectively, "Defendants") respectfully submit this motion *in limine* to exclude all evidence or argument relating to Warner-Lambert Company's promotion of, or the settlements regarding, the drug Neurontin and Pharmacia Corporation's promotion of, or the settlements regarding, the drug Genotropin.

INTRODUCTION

This case is about the adequacy of Pfizer's public disclosures concerning four drugs: Bextra, Geodon, Zyvox, and Lyrica.[1] Plaintiffs allege that the Defendants made false and misleading statements about government investigations relating to those drugs. Defendants deny that claim. Nevertheless, from the outset of this action through discovery, Plaintiffs have sought to put Pfizer's sales and marketing practices on trial. Although every purported misrepresentation relates to the sufficiency and accuracy of Pfizer's disclosures regarding the four drugs at issue,[2] the Complaint is replete with irrelevant references to two other drugs—Neurontin and Genotropin—that two other pharmaceutical companies—Warner-Lambert and Pharmacia—marketed before Pfizer acquired them.[3] While Plaintiffs' purpose in focusing on that conduct is obvious—to lead the jury to conclude that Pfizer has a history of and propensity

[1] *See* First Am. Compl. ¶ 1.

[2] *See*, *e.g.*, First Am. Compl. ¶ 68 (alleging misstatements regarding liability for SEC disclosures related to Geodon, Lyrica, Zyvox and Bextra); ¶ 79(b) (alleging misstatements regarding reserves for Geodon, Lyrica, Zyvox, and Bextra litigation).

[3] Plaintiffs' Introduction to their Complaint begins, "This is not the first time that Pfizer has faced criminal sanction for the unlawful marketing of its drugs." Compl. ¶ 2; *e.g.*, *id*. ("In 2004, Pfizer paid $430 million to settle criminal charges for its illegal off-label promotion of Neurontin."); *id*. ¶ 39 ("The DOJ release set forth the off-label marketing tactics Warner-Lambert employed to illegally promote the unapproved uses of Neurontin"); *id*. ¶ 40 ("Warner-Lambert also pled guilty to two felonies [and] Warner-Lambert also paid $83.6 million and $68.4 million, respectively, to settle civil violations").

to commit marketing violations—evidence of that conduct is both irrelevant and prejudicial. It should therefore be excluded.

First, evidence of another company's marketing practices cannot possibly be relevant to the adequacy of Pfizer's public disclosures. Rules 401 and 402 therefore bar its admission. Second, even if the underlying conduct had been Pfizer's, as opposed to that of two other companies, the marketing evidence would be precluded under Rule 404(b)(1) as improper "propensity" evidence. But it is indisputable that this conduct was not committed by Pfizer, which did not even own Warner-Lambert or Pharmacia when the conduct took place. Any attempt to offer this evidence would be a transparent effort to insinuate that Pfizer was a recidivist off-label promoter. The prior conduct of two independently owned pharmaceutical companies should therefore be excluded under Rule 404(b)(1).

Finally, admitting this unrelated evidence would unfairly prejudice Defendants, confuse the jury, and cause undue delay. Thus, it should also be excluded under Rule 403.

ARGUMENT

I. THE UNRELATED OFF-LABEL PROMOTIONAL ACTIVITIES AT WARNER-LAMBERT AND PHARMACIA ARE NOT RELEVANT TO PLAINTIFFS' CLAIMS.

Plaintiffs' repeated references to Warner-Lambert's and Pharmacia's promotion of Neurontin and Genotropin are irrelevant to their allegations that Pfizer's public statements contained material misrepresentations concerning Bextra, Geodon, Zyvox, and Lyrica. Pfizer's SEC disclosures—not its sales and marketing practices—are at issue in this case. Evidence about whether some other, then-unaffiliated corporate entities engaged in improper promotion of two other drugs is therefore irrelevant under Rule 401.

There is no dispute that the improper promotion of Neurontin and Genotropin occurred at separate corporations before they became Pfizer subsidiaries. Although the settlements with the

government relating to Neurontin and Genotropin occurred after Pfizer acquired the companies, the government itself acknowledged that the Neurontin improper promotion occurred at Warner-Lambert,[4] and the Genotropin improper promotion occurred at Pharmacia.[5] And Plaintiffs' own references to the Neurontin settlement in certain parts of the Complaint reflect that Warner-Lambert, not Pfizer, engaged in improper promotion,[6] that this conduct occurred "at Warner-Lambert before Pfizer acquired that company,"[7] and that Warner-Lambert paid the civil and criminal fines to settle the government actions.[8] Certain of Plaintiffs' references to Genotropin similarly concede that the settlement involved Pharmacia's "improper activities prior to acquisition by Pfizer."[9] Accordingly, any improper promotion of Neurontin and Genotropin—committed by third parties not under the ownership or control of Pfizer at the time—is not probative on any fact related to Plaintiffs' allegations against the Defendants. It is therefore inadmissible under Rules 401 and 402 ("Irrelevant evidence is not admissible.").

Nor are Pfizer's settlements of its subsidiaries' pre-acquisition conduct relevant in this disclosure case. Pfizer participated in those settlements because the Neurontin and Genotropin

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[4] *See* Dec. 10, 2014 Declaration of Amanda M. MacDonald In Support of Defendants' Motions *In Limine* Ex. FF-3 (May 13, 2004 Press Release, *Warner-Lambert To Pay $430 Million To Resolve Criminal & Civil Health Care Liability Relating To Off-Label Promotion*) ("Pfizer Inc, the owner of Warner-Lambert since June of 2000, has also agreed to institute a compliance program. The charged conduct occurred prior to the acquisition.").

[5] *See* Dec. 10, 2014 MacDonald Decl. Ex. NN-1 (Apr. 2, 2007 Press Release, *Pfizer Subsidiary Agrees to Plead Guilty for Offering Kickback and Pay $19.68 Million Criminal Fine*) (acknowledging that the government investigation involved "Pharmacia's unlawful promotion [of drugs].").

[6] *See* First Am. Compl. ¶ 38 ("Warner-Lambert's strategic marketing plans . . . show that Neurontin was aggressively marketed to treat a wide array of ailments for which the drug was not approved."; "Warner-Lambert promoted Neurontin even when scientific studies had shown it was not effective."); ¶ 39 ("The DOJ release set forth the off-label marketing tactics Warner-Lambert employed to illegally promote the unapproved uses of Neurontin").

[7] First Am. Compl. ¶ 42.

[8] First Am. Compl. ¶ 40 ("Warner-Lambert also pled guilty to two felonies [and] Warner-Lambert also paid $83.6 million and $68.4 million, respectively, to settle civil violations").

[9] First Am. Compl. ¶ 66.

investigations were not resolved until after Pfizer acquired Warner-Lambert and Pharmacia. In fact, after Pfizer acquired Pharmacia, Pfizer itself prompted the Genotropin investigation by reporting Pharmacia's marketing practices to the government.[10] Evidence of Pfizer's settlements involving the unrelated Neurontin and Genotropin misconduct is thus irrelevant and inadmissible.[11]

II. THE NEURONTIN AND GENOTROPIN EVIDENCE SHOULD BE EXCLUDED UNDER RULE 404(B)(1).

Plaintiffs repeatedly point to the unrelated improper promotion of Neurontin and Genotropin by two other, then-unaffiliated pharmaceutical companies in order to insinuate that Pfizer had a propensity to engage in improper promotion. But Rule 404(b)(1) expressly prohibits the admission of evidence of prior crimes, wrongs or bad acts by the same person or entity—let alone by unrelated persons or entities—for this purpose.[12] Where a party seeks to admit evidence of this nature, it must satisfy three criteria: first, the evidence must be offered for a proper purpose; second, it must be relevant; and third, the court must conclude that it is more probative than prejudicial. *Huddleston v. United States*, 485 U.S. 681, 691 (1988); *United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012).[13] Plaintiffs cannot satisfy any of these requirements.

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[10] *See* Dec. 10, 2014 MacDonald Decl. Ex. NN-1 (Apr. 2, 2007 Press Release*, Pfizer Subsidiary Agrees to Plead Guilty for Offering Kickback and Pay $19.68 Million Criminal Fine*) ("Pfizer, which acquired Pharmacia in April 2003, acted responsibly when it self-disclosed to various federal government agencies, in May 2003, Pharmacia's unlawful promotion.").

[11] There may be some evidence related to the Neurontin and Genotropin resolutions that would be relevant—for example, in connection with those resolutions the government specifically commented on Pfizer's controls, and subjected Pfizer's compliance system to third-party monitoring. Such information supports Defendants' position that Pfizer's compliance programs were robust. In contrast, the underlying marketing conduct at Warner-Lambert and Pharmacia that led to these resolutions, and the terms of the resolutions, have no probative value here, and should be excluded.

[12] "Evidence of a crime, wrong or other act is not admissible 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).

[13] Rule 404 is implicated whenever a party seeks to introduce evidence that "*might* adversely reflect on the actor's character," and the proposed evidence must satisfy the restrictions under Rule 404(b) to be

First, as discussed above, past conduct by other pharmaceutical companies before Pfizer acquired them cannot be probative of Pfizer's conduct, and consequently is irrelevant to Plaintiffs' claims. Second, even if this did not end the inquiry, the evidence would nevertheless be inadmissible because its purpose is to show that Pfizer has a propensity for improper promotion, the very thing that Rule 404(b)(1) prohibits. Rule 404(b)(1) "cannot support the admission of such propensity evidence" to suggest that the party acted in accordance with its past behavior. *Scott*, 677 F.3d at 79-80 (evidence of the defendant's prior encounters with the police, introduced to show his propensity for criminal behavior, was impermissible); *see also United States v. McCallum*, 584 F.3d 471, 477 (2d Cir. 2009) (noting that the defendant's prior convictions, although ostensibly offered to prove the defendant's knowledge and intent, were actually "propensity evidence in sheep's clothing"); *Hynes v. Coughlin*, 79 F.3d 285, 292 (2d Cir. 1996) (rejecting defendants' "lip service to the proper principle" when the defendants' invocation of plaintiff's prior bad acts was clearly intended to persuade the jury that plaintiff acted in conformance with that character).

Finally, Plaintiffs also fail to satisfy the third criteria for admission of evidence under Rule 404(b)(1)—that the probative value of the proposed evidence outweighs the danger that defendants will be unfairly prejudiced. *See* Fed. R. Evid. 403. Here, evidence of Warner-Lambert's and Pharmacia's prior marketing practices has little, if any, probative value. But it is inconceivable that any value of the evidence would not be outweighed by the risk of unfair prejudice, jury confusion, and undue delay. *McCallum*, 584 F.3d at 477 ("[T]he availability of other, less prejudicial, evidence on the same point ordinarily reduces the probative value of a given item of extrinsic evidence. . . . If the incremental value is slight, and the possibility of

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admitted. *Scott*, 677 F.3d at 79 (emphasis in original). Therefore, regardless of Plaintiffs' stated purpose for admitting this evidence, it nonetheless must satisfy the requirements for admissibility under Rule 404.

prejudice through misuse by the jury great, the court should exclude the evidence under Rule 403." (internal quotation marks omitted)). The prejudice to the Defendants is obvious: the purpose of the evidence is to suggest that Pfizer and the other Defendants had a propensity to engage in, or condone, the unlawful promotion of drugs. That is improper. *Old Chief v. United States*, 519 U.S. 172, 181-82 (1997) (propensity evidence was an "improper basis" for conviction and inadmissible).

There is also the real danger of jury confusion, which Plaintiffs seem more than willing to promote. Although, as noted above, Plaintiffs at times acknowledge in the Complaint that the conduct occurred before Pfizer acquired Warner-Lambert and Pharmacia,[14] at other times they nonetheless attribute those two companies' conduct to Pfizer. *See, e.g.*, First Am. Compl. ¶ 2 ("Pfizer paid $430 million to settle criminal charges for *its* illegal off-label promotion of Neurontin." (emphasis added)); *id.* at ¶ 5 ("As part of the 2004 Neurontin settlement, Pfizer not only paid over $430 million to settle criminal and civil violations relating to *its* unlawful promotion of Neurontin . . . ." (emphasis added)). And in the opening line of their "Overview of Material Facts" in their opposition to Defendants' summary judgment motions, they say that "[i]n May 2004, Pfizer announced that it had paid $430 million to settle criminal and civil charges for illegal off-label promotion of Neurontin." Memorandum of Law in Opposition to Pfizer Inc.'s and the Individual Defendants' Motions for Summary Judgment at 4, ECF No. 304. This no doubt is intended to suggest to the Court—as Plaintiffs will to a jury if this issue is not excluded—that the underlying conduct was Pfizer's and that the Company is a recidivist with a propensity for off-label promotion. The risk that the jury would become confused and, like Plaintiffs, attribute the Neurontin off-label conduct to Pfizer is significant. The Court should

[14] *See supra* page 3 & nn. 7-9.

therefore exclude this evidence.

Finally, the introduction of any evidence regarding the improper promotion of Neurontin and Genotropin would inevitably divert attention from the relevant matters in this litigation, causing undue delay. If Plaintiffs were permitted to introduce evidence of Warner-Lambert's and Pharmacia's past conduct—which would be an unnecessary distraction—Defendants would be compelled, at minimum, to explain their lack of responsibility for that conduct, their role in bringing the conduct to the government's attention, and their cooperation in the government's investigation, all in an attempt to rehabilitate their character before the jury. *See United States v. Certified Envtl. Servs., Inc.,* 753 F.3d 72, 85-86 (2d Cir. 2014) (recognizing that an attack on a witness's credibility justifies the introduction of rehabilitative character evidence). Whatever the purported relevance of the unrelated Neurontin and Genotropin conduct, it cannot justify this substantial waste of judicial resources. Accordingly, this evidence should be excluded under Rules 404(b)(1) and 403.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant the foregoing motion.

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

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By: /s/ Joseph G. Petrosinelli

Joseph G. Petrosinelli (admitted *pro hac vice*)
Steven M. Farina (admitted *pro hac vice*)
George A. Borden
Amanda M. MacDonald (admitted *pro hac vice*)
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
sfarina@wc.com
jpetrosinelli@wc.com
gborden@wc.com
amacdonald@wc.com

Counsel for Defendant Pfizer Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Scott D. Musoff

Scott D. Musoff
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
scott.musoff@skadden.com

Jennifer L. Spaziano (*pro hac vice* pending)
Michael S. Bailey (*pro hac vice* pending)
1440 New York Avenue NW
Washington, DC 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760
Email: Jen.Spaziano@skadden.com
Email: Michael.Bailey@skadden.com

Counsel for Henry A. McKinnell

DAVIS POLK & WARDWELL LLP

By: /s/ James P. Rouhandeh

James P. Rouhandeh
Charles S. Duggan
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
james.rouhandeh@davispolk.com
charles.duggan@davispolk.com

Counsel for Defendant Jeffrey B. Kindler

GOODWIN PROCTER LLP

By: /s/ Richard M. Strassberg

Richard M. Strassberg
Daniel Roeser
The New York Times Building
620 Eighth Avenue
New York, NY 10018
Tel.: 212.813.8800
Fax: 212.355.3333
rstrassberg@goodwinprocter.com
droeser@goodwinprocter.com

Counsel for Defendant Frank D'Amelio

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jay B. Kasner

Jay B. Kasner
Gary J. Hacker
Alexander C. Drylewski
Four Times Square

New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
jay.kasner@skadden.com
gary.hacker@skadden.com
alexander.drylewski@skadden.com

Counsel for Defendant Alan G. Levin

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: /s/ Michael B. Carlinsky
Michael B. Carlinsky
Sheila Birnbaum
Brant Duncan Kuehn (*pro hac vice* pending)
51 Madison Avenue
New York, New York 10010
(212) 849-7000

Lori Alvino McGill
777 6th Street, NW
Washington, DC 20001
(202) 538-8000

Counsel for Defendant Ian C. Read

O'MELVENY & MYERS LLP

By: /s/ Ross B. Galin
Ross B. Galin
Stuart Sarnoff
Howard E. Heiss
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
rgalin@omm.com
ssarnoff@omm.com
hheiss@omm.com

Counsel for Defendant Allen Waxman

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. 8 To Exclude Evidence or Argument Related to the Promotion of, and Settlement Agreements Regarding, Neurontin and Genotropin was filed with the Court through the CM/ECF system and thereby served to all parties of record.

/s/ Lauren K. Collogan
Lauren K. Collogan
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
lcollogan@wc.com

Regan Karstrand

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Alexander C Drylewski alexander.drylewski@skadden.com

Amanda M. MacDonald amacdonald@wc.com

Brant Duncan Kuehn brantkuehn@quinnemanuel.com

Charles S. Duggan charles.duggan@dpw.com, ecf.ct.papers@davispolk.com

Cynthia Margaret Monaco cmonaco@cynthiamonacolaw.com, cmmonaco@gmail.com

Daniel Prugh Roeser droeser@goodwinprocter.com

Danielle Suzanne Myers dmyers@rgrdlaw.com

Darren J. Robbins e_file_sd@rgrdlaw.com

David Avi Rosenfeld drosenfeld@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com

Donald Alan Migliori dmigliori@motleyrice.com

Eugene Mikolajczyk genem@rgrdlaw.com

Gary John Hacker ghacker@skadden.com

George Anthony Borden gborden@wc.com

Hamilton Philip Lindley hlindley@deanslyons.com, mgoens@deanslyons.com

Henry Rosen henryr@rgrdlaw.com, dianah@rgrdlaw.com

Howard E. Heiss hheiss@omm.com, #nymanagingattorney@omm.com

Ivy T. Ngo ingo@rgrdlaw.com, e_file_sd@rgrdlaw.com

James M. Hughes jhughes@motleyrice.com, erichards@motleyrice.com, kweil@motleyrice.com, kweil@pacernotice.com, mgruetzmacher@motleyrice.com

James P. Rouhandeh james.rouhandeh@dpw.com, ecf.ct.papers@davispolk.com

James R. Harper coljamesrharper@me.com

Jason A. Forge jforge@rgrdlaw.com, e_file_SD@rgrdlaw.com, tholindrake@rgrdlaw.com

Jay B. Kasner jkasner@skadden.com

Jennifer Lynn Spaziano jen.spaziano@skadden.com

Joe Kendall administrator@kendalllawgroup.com, hlindley@kendalllawgroup.com, jkendall@kendalllawgroup.com

John K. Villa jvilla@wc.com

Joseph F. Rice jrice@motleyrice.com

Joseph G. Petrosinelli jpetrosinelli@wc.com

Juliana Newcomb Murray juliana.murray@davispolk.com, ecf.ct.papers@davispolk.com

Keir Nicholas Dougall kdougall@dougallpc.com

Kevin Anthony Burke kaburke@sidley.com, efilingnotice@sidley.com, nyefiling@sidley.com

Lauren Kristina Collogan lcollogan@wc.com

Leigh R. Lasky lasky@laskyrifkind.com

Lori McGill lorialvinomcgill@quinnemanuel.com

Matthew Melamed mmelamed@rgrdlaw.com

Michael Barry Carlinsky michaelcarlinsky@quinnemanuel.com, brantkuehn@quinnemanuel.com, jomairecrawford@quinnemanuel.com

Michael Joseph Dowd miked@rgrdlaw.com, e_file_sd@rgrdlaw.com, e_file_sf@rgrdlaw.com, tome@rgrdlaw.com

Michael Scott Bailey michael.bailey@skadden.com

Mitchell M.Z. Twersky mtwersky@aftlaw.com

Paul T. Hourihan phourihan@wc.com

Richard Mark Strassberg rstrassberg@goodwinprocter.com, nymanagingclerk@goodwinprocter.com

Ross Bradley Galin rgalin@omm.com, lisachen@omm.com, mochoa@omm.com, neverhart@omm.com

Ryan A. Llorens ryanl@rgrdlaw.com, kirstenb@rgrdlaw.com, nbear@rgrdlaw.com

Samuel Howard Rudman srudman@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com, mblasy@rgrdlaw.com

Scott D. Musoff smusoff@skadden.com, david.carney@skadden.com

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

Sidney Bashago sidney.bashago@dpw.com

Steven M.. Farina sfarina@wc.com

Stuart Michael Sarnoff ssarnoff@omm.com

Trig Randall Smith trigs@rgrdlaw.com, e_file_sd@rgrdlaw.com, nhorstman@rgrdlaw.com

William E. Schurmann wschurmann@wc.com

William H. Narwold bnarwold@motleyrice.com, ajanelle@motleyrice.com, vlepine@motleyrice.com

Willow E. Radcliffe willowr@rgrdlaw.com, ptiffith@rgrdlaw.com

1:10-cv-03864-AKH Notice has been delivered by other means to:

Catherine J. Kowalewski
Robbins Geller Rudman & Dowd LLP (San Diego)
655 West Broadway
Suite 1900
San Diego, CA 92101

Daniel E. Hill
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

David C. Walton
Robbins Geller Rudman & Dowd LLP (SANDIEGO)
655 West Broadway
Suite 1900
San Diego, CA 92101

Jamie J. McKey
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

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