UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, -vs- 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. 11 TO PRECLUDE EVIDENCE OR TESTIMONY IN CONNECTION WITH CERTAIN STATEMENTS THAT ARE NOT ACTIONABLE AS A MATTER OF LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

OTHER AUTHORITIES

Defendants Pfizer Inc. ("Pfizer"), Jeffrey B. Kindler, Henry A. McKinnell, Frank D'Amelio, Alan G. Levin, Ian C. Read and Allen Waxman (collectively, "Defendants") respectfully submit this memorandum of law in support of their motion for an order precluding Plaintiffs from advancing as a basis for any Defendant's liability evidence or testimony in connection with certain allegedly false or misleading statements that are inactionable as a matter of law.

ARGUMENT

As this Court has held, "'[t]he purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence.'" *Great Earth Int'l Franchising Corp. v. Milks Development*, 311 F. Supp. 2d 419, 424 (S.D.N.Y. 2004) (Hellerstein, J.) (citation omitted). "In ruling on a motion in limine, a court may exclude evidence which is 'clearly inadmissible on all potential grounds.'" *Id.* "While 'dismissing claims is not the prototypical purpose of a motion in limine,' such motions have sometimes been addressed on the merits." *Id.* And "[s]ince evidence offered in support of non-viable legal claims is not relevant, and carries a substantial risk of misleading the jury, a motion in limine is an appropriate vehicle for obtaining an order of exclusion." *Applera v. MJ Research Inc.*, No. 3:98CV1201 (JBA), 2004 WL 323039, at *1 (D. Conn. Jan. 28, 2004) (citation omitted).

As set forth in detail in Pfizer's Memorandum of Law In Support of Its Motion For Summary Judgment ("Pfizer Summary Judgment Brief" or "Pfizer SJ Br."), numerous of the disclosures and statements that Plaintiffs challenge cannot, as a matter of law, support a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10b-5 promulgated thereunder. *See* Pfizer SJ Br. at 38-52. Among other things:

- Pfizer had no duty to disclose that its employees purportedly engaged in the off-label promotion of its products. *See In re Citigroup Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004), *aff'd sub nom. Albert Fadem Trust v. Citigroup Inc.*, 165 F. App'x 928 (2d Cir. 2006). *See* Pfizer SJ Br. at 38-41.

- Pfizer's statements that its policy was to comply with all laws and that it was committed to ethical business practices constituted inactionable "puffery." *See City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014). (*See* Pfizer SJ Br. at 41-43.)

- Pfizer's statement that it "believed" it had "substantial defenses" to the government's investigation concerning Bextra is not actionable because, among other things, it is (i) a forward-looking statement that is immunized from liability under the Private Securities Litigation Reform Act's safe harbor provision, 15 U.S.C. § 78u-5(c)(1)(A), and (ii) a statement of opinion and Plaintiffs cannot, as they must, demonstrate that Defendants did not honestly believe the statement at the time it was made, *see Kaess v. Deutsche Bank AG*, 572 F. App'x 58, 59 (2d Cir. 2014). *See* Pfizer SJ Br. at 43-46.

- Pfizer's description of the government's investigation concerning Bextra as involving "marketing" as opposed to "off-label marketing" cannot form the basis of a securities fraud claim. *See Dalberth v. Xerox Corp.*, 766 F.3d 172, 186-87 (2d Cir. 2014) ("we have never required a corporation to frame its public information with specific adjectives," and "[w]hile Plaintiffs may have desired more detailed or nuanced language, that is not what the law requires"). *See* Pfizer SJ Br. at 46-48.

- Pfizer's statements regarding the safety, efficacy and sales revenue for Geodon, Lyrica and Zyvox were accurate and, therefore, not actionable under the securities laws. *See, e.g.*, *In re Marsh & Mclennan Cos., Sec. Litig.*, 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006). *See* Pfizer SJ Br. at 48-49.

- Pfizer's statements that it maintained effective internal controls over financial reporting were accurate and, therefore, not actionable under the securities laws. *See* Pfizer SJ Br. at 49-50.

- Pfizer's determination that the requirements for a reserve under Financial Accounting Standard 5 were not met until fourth quarter 2008 was an accounting judgment and cannot support a securities fraud claim. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011). *See* Pfizer SJ Br. at 50-52.

Because these statements are inactionable as a matter of law, Plaintiffs should be precluded from advancing as a basis for any Defendant's liability evidence or testimony relating to the statements. *See, e.g.*, *Summit Properties Int'l, LLC v. Ladies Professional Golf Assoc.*, No. 07 Civ. 10407(LBS), 2010 WL 4983179, at *5-8 (S.D.N.Y. Dec. 6, 2010). In *Summit*

Properties, the defendant filed motions in limine seeking to exclude evidence or arguments relating to the plaintiff's unjust enrichment claim and damages theories, arguing that they failed "as a matter of law." *Id*. at *2. As an initial matter, the court noted that "[m]otions in limine are appropriate for evidentiary or 'purely legal . . . non-record dependent legal issues, like those that could easily be raised in the Rule 12 context.'" *Id.* (citation omitted). The court went on to hold that the plaintiff's unjust enrichment claim and damages theories "fail[ed] as a matter of law," and therefore "precluded [plaintiff] from offering evidence or theories" at trial in connection with such claim and damages theories. *Id.* at *5-8.

Here, as discussed above and in the Pfizer Summary Judgment Brief, numerous of the disclosures and statements that Plaintiffs challenge cannot, as a matter of law, support a securities fraud claim. Accordingly, as was the case in *Summit Properties*, Plaintiffs should be precluded from advancing as a basis for liability evidence or testimony concerning these non-actionable statements. *See Summit Properties*, 2010 WL 4983179, at *5-8; *see also Applera*, 2004 WL 323039, at *1 (granting motion in limine to exclude evidence and arguments relating to Sherman Act claim that failed as a matter of law).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court issue an Order precluding Plaintiffs from advancing as a basis for any Defendant's liability evidence or testimony concerning the non-actionable alleged misstatements identified above.

Dated: Washington, DC
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 tenth of December, 2014, the foregoing Memorandum in Support of Defendants' Motion to Preclude Evidence Or Testimony In Connection With Certain Statements That Are Not Actionable As A Matter Of Law 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

From: NYSD_ECF_Pool@nysd.uscourts.gov
Sent: Wednesday, December 10, 2014 9:22 PM
To: CourtMail@nysd.uscourts.gov
Subject: Activity in Case 1:10-cv-03864-AKH Jones et al v. Pfizer, Inc. et al Memorandum of Law in Support of Motion

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

Southern District of New York

Notice of Electronic Filing

The following transaction was entered by Collogan, Lauren on 12/10/2014 at 9:21 PM EST and filed on 12/10/2014

Case Name: Jones et al v. Pfizer, Inc. et al
Case Number: 1:10-cv-03864-AKH
Filer: Frank D'Amelio
Jeffrey B. Kindler
Alan G. Levin
Henry A. McKinnell
Pfizer, Inc.
Ian C. Read
Allen Waxman
Document Number: 371

Docket Text:
MEMORANDUM OF LAW in Support re: [370] MOTION in Limine *No. 11 To Preclude Evidence or Testimony In Connection with Certain Statements that Are Not Actionable As a Matter of Law*. . Document filed by Frank D'Amelio, Jeffrey B. Kindler, Alan G. Levin, Henry A. McKinnell, Pfizer, Inc., Ian C. Read, Allen Waxman. (Collogan, Lauren)

1:10-cv-03864-AKH Notice has been electronically mailed to:

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

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1008691343 [Date=12/10/2014] [FileNumber=13989820
-0] [46df3d6195d07f4dfd7d4de7c0ba1098e99e22593277f96eea36586dd20dfb6c7
e71a2253105cab380e53cf0b4988b136633e0e2fc9e2434628333682b87465f]]