

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 IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 14  
TO EXCLUDE EVIDENCE AND ARGUMENT OF DEFENDANTS' FINANCES**

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Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants respectfully request that the Court preclude Plaintiffs from introducing evidence, or making any argument, relating to (1) the compensation or finances of the individual Defendants and (2) the size or financial resources of Pfizer. None of these topics is relevant to the issues to be tried and their introduction at trial could only result in unfair prejudice to the Defendants.

**I. EVIDENCE AND ARGUMENT CONCERNING THE INDIVIDUAL DEFENDANTS' FINANCES AND COMPENSATION SHOULD BE EXCLUDED**

**A. The Individual Defendants' Wealth and Other Financial Circumstances Are Irrelevant and Would Be Unfairly Prejudicial**

Evidence is relevant only if it has a tendency to make a fact more or less probable, and that fact is of consequence in determining the action. *See* Fed. R. Evid. 401. But any evidence of the individual Defendants' personal finances would not provide a proper basis for a jury to decide any relevant issue in this case. Evidence of wealth is generally inadmissible in trials not involving punitive damages, which are not available here. *See, e.g., Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970); *Tyco Int'l Ltd. v. Walsh*, No. 02 Civ. 4633, 2010 WL 3000179, at \*1 (S.D.N.Y. July 30, 2010).

Moreover, any evidence or argument relating to the individual Defendants' finances would open the door to class prejudice and thus would be unfairly prejudicial. Appeals to class prejudice "are improper and have no place in a courtroom." *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980). Courts uniformly condemn appeals to juror prejudices through references to a defendant's wealth. *See id.* at 32-33; *Koufakis*, 425 F.3d at 902.

In conformity with these many clear precedents, the Court should exclude evidence and argument on the individual Defendants' finances because they are irrelevant and could only result in unfair prejudice. *See* Fed. R. Evid. 401, 403.

**B. The Individual Defendants' Compensation at Pfizer Is Irrelevant and Would Be Unfairly Prejudicial**

Evidence and argument concerning the individual Defendants' compensation at Pfizer should be excluded for the same reasons discussed above: the compensation is not relevant to any issue in the case and could unfairly prejudice the Defendants.

Plaintiffs may seek to introduce evidence of the individual Defendants' compensation at Pfizer to support their allegation of motive. *See* Cons. Am. Compl. ¶¶ 124-27 (alleging that "Pfizer's executive compensation plan provided substantial financial incentive for each of the Individual Defendants to engage in the misconduct at issue here"; setting forth chart purporting to show that "defendants received over \$50 million in compensation"). The law is clear, however, that "[m]otives that are common to most corporate officers, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute 'motive' for purposes of" establishing scienter in a securities-fraud case. *See ECA, Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009). *See also Rombach v. Chang*, 355 F.3d 164, 177 (2d Cir. 2004); *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001).

Even if compensation could provide a motive to commit fraud, the evidence of individual Defendants' compensation would not be admissible here. The uncontradicted facts demonstrate that the connection between the Individual Defendants' compensation and the alleged wrongdoing is so attenuated that it cannot be relevant to motive:

- The Individual Defendants' compensation was based, in part, on factors unrelated to Pfizer's financial performance, including the Individual Defendants' levels of responsibility, individual job performance and an assessment of the compensation mix paid by Pfizer's competitors.

- Although part of the Individual Defendants' compensation was based on Pfizer's financial performance, the only drugs sold during the Class Period that are at issue are Geodon, Lyrica, and Zyvox. Between 2006 and 2008, these drugs accounted for on average approximately 7% of Pfizer's revenue.<sup>1</sup> There is no evidence regarding how much of this revenue, if any, was tied to off-label prescriptions (which were and are legal), let alone off-label marketing.

- The compensation awarded in 2006 – for example, the salary and stock awards attributed to McKinnell, Kindler and Levin – was tied to Pfizer's and the individuals' performance in 2005, before the Class Period.<sup>2</sup>

Based on these facts, evidence of compensation is inadmissible here.<sup>3</sup> *See, e.g., Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.*, 08 Civ. 7508, 2013 U.S. Dist. LEXIS 38787, at \*31-33 (S.D.N.Y. Mar. 20, 2013) (Scheidlin, J.) (excluding evidence of a company's

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<sup>1</sup> December 10, 2014 Declaration of Amanda M. MacDonald in Support of Defendants' Motions *In Limine* AA-1 (Pfizer Inc. 2008 10-K filed on February 27, 2009); Dec. 10, 2014 MacDonald Decl. GG-3 (Appendix A to 2008 Financial Report at 19-21).

<sup>2</sup> Dec. 10, 2014 MacDonald Decl. BB-1 (Pfizer's Form 14A, dated March 16, 2006 at 59-61).

<sup>3</sup> Indeed, in Plaintiffs' opposition to the Defendants' motions for summary judgment, Plaintiffs did not reference wealth and compensation evidence once in arguing that the record provides a basis for a jury to find in favor of Plaintiffs on the element of scienter. This omission is all the more glaring given that the individual Defendants argued in their summary judgment motions that evidence of compensation and stock sales in this case are inconsistent with a motive to engage in the alleged fraud. *See* Mem. of Law in Support of Def. Henry A. McKinnell's Mot. for Summary Judgment (Dkt. 269) at 14; Mem. of Law in Support of Def. Alan G. Levin's Mot. for Summary Judgment (Dkt. 253) at 27 n.21; Mem. of Law in Support of Def. Frank D'Amelio's Mot. for Summary Judgment (Dkt. 263) at 22; Mem. of Law in Support of Def. Ian C. Read's Mot. for Summary Judgment (Dkt. 264) at 10 n.32; Mem. of Law of Def. Jeffrey B. Kindler in Support of Summary Judgment (Dkt. 274) at 20. This confirms the minimal probative value of the wealth and compensation evidence to Plaintiffs' claims.

*See* Dec. 10, 2014 MacDonald Decl. AA-3 (*United States v. Reyes*, No. 3:06-cr-00556, Hr'g Tr. at 78:21-86:25; 91:7-8 (N.D. Ca. Feb. 16, 2010) (excluding compensation evidence that was "too tangential" to motive, in part, because it would "excite the jurors' antipathy"); Dec. 10, 2014 MacDonald Decl. ZZ-2 (*In re Apollo Group Inc. Secs. Litig.*, No. 2:04-cv-02147, Minute Order) (D. Ariz. Nov. 5, 2007) (excluding evidence of wealth, salary and benefits because "the prejudice outweighs the probative value" of admitting such evidence)

profits and executive compensation not tied to the fraud at issue because “[t]he probative value of such evidence to the question of motive is outweighed by the potential for prejudice); *see also*, *e.g.*, *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”).<sup>4</sup>

## II. EVIDENCE AND ARGUMENT CONCERNING PFIZER’S FINANCIAL RESOURCES SHOULD BE EXCLUDED

Evidence or argument concerning Pfizer’s financial resources would be equally irrelevant and unfairly prejudicial as such evidence or argument as to the individual Defendants. “Courts long have recognized that jurors may view large corporations with great disfavor.” *TXO Prod. Co. v. Alliance Res. Corp.*, 509 U.S. 443, 490 (1993) (O’Connor, J., dissenting). Accordingly, courts routinely hold that “[a]ny probative value that evidence of the corporate Defendants’ wealth, financial condition, and unrelated revenues may have during the liability phase of the trial is substantially outweighed by the danger of unfair prejudice that might result from jurors basing their conclusions on the relative wealth of the parties.” *Loussier v. Universal Music Group, Inc.*, 2005 U.S. Dist. LEXIS 37545, at \*7 (S.D.N.Y. July 14, 2005). Similarly, argument that invites jury sympathy by referring to a defendant corporation’s size or wealth is improper. *See, e.g.*, *Garcia v. Sam Tanksley Trucking, Inc.*, 708 F.2d 519, 522 (10th Cir. 1983); *City of Cleveland v. Peter Kiewit Sons’ Co.*, 624 F.2d 749, 757 (6th Cir. 1980); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978).

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<sup>4</sup> Plaintiffs may also seek to introduce evidence of certain individual Defendants’ stock sales during the Class Period. *See* Consol. Am. Compl. ¶ 128. For the reasons set forth in the individual Defendants’ summary judgment motions, those allegations, too, are legally insufficient to demonstrate scienter.

For these reasons, the Court should exclude any evidence or argument that Pfizer is a large or wealthy corporation, that it has substantial financial resources, that it earns large revenues or profits, or any other evidence or argument that relates to Pfizer's finances and would tend to mislead the jury as to the issues in the case.

**CONCLUSION**

For the foregoing reasons, the Court should exclude evidence or argument at trial relating to Defendants' finances, financial resources or compensation.

Dated: December 10, 2014  
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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this tenth of December, 2014, the foregoing Memorandum in Support of Defendants' Motion *in Limine* No. 14 to Exclude Evidence and Argument of Defendants' Finances was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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