

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

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'
MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM PRESENTING
EVIDENCE OR MAKING STATEMENTS CONCERNING THE ABSENCE OF AN SEC
INVESTIGATION OR ENFORCEMENT ACTION OR RESTATEMENT OF PFIZER'S
CLASS PERIOD FINANCIAL STATEMENTS**

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Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants respectfully submit this opposition to Plaintiffs' motion to preclude Defendants from presenting evidence or making statements concerning the absence of a restatement of Pfizer's Class Period financial statements or an SEC investigation or enforcement action involving Pfizer. *First*, evidence concerning Pfizer's decision not to restate its Class Period financials is admissible at trial. As part of its audits, Pfizer's independent accountant, KPMG, determined that the Company's Class Period financial statements were fairly stated and that no restatement of any prior period financials was warranted or appropriate. Such evidence—which is highly probative of the propriety of Pfizer's financials, including its reserve determinations—is directly relevant to Plaintiffs' allegations that Defendants made intentionally or recklessly false or misleading statements in Pfizer's public statements (specifically, its financial statements). Jurors would be confused and misled if such evidence was kept from them. *Second*, evidence concerning the SEC's decision not to investigate Pfizer is also admissible at trial. That decision may be accorded some weight on the facts of this case under Second Circuit and Southern District precedent and Plaintiffs' claims of prejudice are based on an assumption that is wrong as a matter of law. For these reasons and those below, this Court should deny Plaintiffs' motion.

ARGUMENT

I. EVIDENCE THAT KPMG REPEATEDLY DETERMINED THAT NO RESTATEMENT OF PFIZER'S CLASS PERIOD FINANCIAL STATEMENTS WAS NECESSARY IS ADMISSIBLE AT TRIAL.

Plaintiffs assert that this Court should preclude Defendants from presenting any evidence or argument at trial that KPMG considered whether a restatement of the Company's Class Period financials was necessary and determined that it was not because (1) "the absence of a restatement of Pfizer's class period financial statements is not relevant and thus inadmissible to show that the financial statements were complete and accurate" and (2) "a juror could easily misinterpret the

lack of a restatement as indicating that Pfizer's class period financial statements were complete and accurate or that defendants' conduct was legitimate, and thereby decide the case on an improper basis." Pls.' Br. at 5. Plaintiffs are wrong on both counts. Evidence of KPMG's repeated determinations that the timing of Pfizer's accrual of a reserve was appropriate—and, consequently, that no restatement of Pfizer's Class Period financials was necessary—is directly relevant to Plaintiffs' claims; and jurors would be confused and misled if such evidence was kept from them.

First, evidence of KPMG's repeated determinations that Pfizer's Class Period financials were correct and that no restatement was necessary is highly probative of the fact that those financials were not intentionally or recklessly false or misleading. Following Pfizer's agreement in principle to settle the government investigations into Bextra, Geodon, Lyrica, and Zyvox (the "Government Investigations"), KPMG specifically undertook to determine the proper period in which to accrue a reserve—including whether Pfizer needed to restate any prior period financials in order to account for the reserve:

- On February 9, 2009, KPMG summarized the results of this task to "[e]valuate the timing and the propriety of the charge being recorded in the fourth quarter of 2008."¹ In that workpaper, KPMG concluded: "Pfizer appears to have appropriately assessed the accrual and disclosure requirements and recorded a charge that is consistent with SFAS No. 5."²
- Similarly, on February 25, 2009, KPMG again assessed the timing and propriety of the reserve in its audit of Pfizer's FY 2008 financials, concluding that "[w]e are also satisfied with the nature and the timing of the \$2.3 billion charge and the related tax application."³ KPMG's audit involved a comprehensive analysis of both Pfizer's FY 2007 and FY 2008 financials and reaffirmed that the reserve for the Government

¹ Oct. 30, 2014 Declaration of Joseph G. Petrosinelli Ex. Z-4 (KPMG-PFIZ-DS 0004834 at -835) (Feb. 9, 2009 KPMG workpaper), ECF No. 279.

² Oct. 30, 2014 Petrosinelli Decl. Ex. Z-4 (KPMG-PFIZ-DS 0004834 at -837).

³ KPMG-PFIZ-DS 019590 at 019609 (2008 Audit Results and SAS 114 Report).

Investigations was properly accrued in the fourth quarter of 2008 (rather than in any prior period) and that no restatement was required.

KPMG's determinations are directly relevant to Plaintiffs' claims that Pfizer's Class Period financials were intentionally or recklessly false or misleading.

KPMG's assessment of Pfizer's reserve decision was not a one-time event. It was (and is) KPMG's professional obligation to review and assess regularly whether *any* items in Pfizer's financials require restatement because such items could affect the accuracy of KPMG's audit opinions. As explained by Larry Bradley, the lead KPMG signing partner on the audit for FY 2008, "[i]f items had come to our attention to indicate that prior filings were materially misstated, we would have had an obligation to . . . file an amended filing to make a correction."⁴ Significantly, KPMG never disagreed with Pfizer's decision to reserve for the Government Investigations only in Q4 2008 after reaching an agreement in principle and never required a restatement for the reserve (or otherwise):

- Mr. Bradley testified that "management had made a proper determination to record the accrual in its 2008 financial statements" and that "we [*i.e.*, KPMG] did not determine that any period, any prior period financial statements or filings were materially misstated."⁵
- Eric Riso, the second KPMG partner on the audits for FY 2006, FY 2007, and FY 2008, testified that the settlement of the Government Investigations did not cause KPMG to conclude that any of Pfizer's prior financial statements had been materially misstated and that KPMG "believed it [*i.e.*, the reserve] belonged in 2008 . . . [i]n the fourth quarter."⁶
- To this day, the KPMG audit partners stand by the decision not to take a reserve until Pfizer reached an agreement in principle with the

⁴ December 22, 2014 Declaration of Amanda M. MacDonald in Support of Defendants' Responses to Plaintiff's Motions in Limine Ex. OO-4 (Bradley (Aug. 8, 2013) Dep. 94:1-21).

⁵ Dec. 22, 2014 MacDonald Decl. Ex. OO-4 (Bradley (Aug. 8, 2013) Dep. 92:20-93:2, 93:11-19); *see also id.* at 54:5-55:24, 68:2-69:1.

⁶ Dec. 22, 2014 MacDonald Decl. Ex. UU-4 (Riso (Aug. 1, 2013) Dep. 260:6-261:14); *see also id.* at 262:24-263:3.

government. Specifically, John Chapman, the lead KPMG signing partner on the audits for FY 2006 and FY 2007, testified that there was nothing that he had “seen or heard...that [would] call[] into question the opinion that KPMG issued on [its] financial statements” during the Class Period.⁷ Similarly, Mr. Bradley “continue[d] to stand behind the conclusions that KPMG reached in connection with its audit.”⁸

All of this evidence goes to the heart of Plaintiffs’ allegations: whether Defendants made a false or misleading statement in Pfizer’s public statements—specifically, its financial statements—and acted with scienter in doing so. Therefore, the evidence is directly relevant and highly probative. *See, e.g., In re UBS AG Sec. Litig.*, No. 07 Civ. 11225(RJS), 2012 WL 4471265, at *18 (S.D.N.Y. Sept. 28, 2012) (“[T]he fact that UBS’s outside independent auditor, Ernst & Young, did not require a restatement of UBS’s financials significantly undercuts Plaintiffs’ allegations of recklessness as to compliance with [the international financial reporting standards].”), *aff’d sub nom. City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014); *In re JP Morgan Chase Sec. Litig.*, No. 02 Civ. 1282(SHS), 2007 WL 950132, at *13 (S.D.N.Y. Mar. 29, 2007) (Plaintiffs did not allege that “JPM Chase has had to restate its financial statements due to its failure to comply with [an accounting rule]. These omissions suggest that reasonable accountants could differ as to whether [the rule] applied to the Mahonia transactions—an inference that defeats plaintiffs’ claim of recklessness.”), *aff’d sub nom. ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187 (2d Cir. 2009).⁹

⁷ Dec. 22, 2014 MacDonald Decl. Ex. PP-4 (Chapman (Sept. 5, 2013) Dep. 192:11-195:19).

⁸ MacDonald Decl. Ex. SS-4 (Bradley (Aug. 9, 2013) Dep. 333:18-336:12).

⁹ *Accord Lighthouse Fin. Grp. v. Royal Bank of Scotland Grp., PLC*, No. 11 Civ. 398(GBD), 2013 WL 4405538, at *8 (S.D.N.Y. Aug. 5, 2013) (“Plaintiffs’ allegation of scienter regarding RBS’s subprime exposure is further undercut by the fact that RBS never restated its holdings.”); *Kuriakose v. Fed. Home Loan Mortgage Corp.*, 897 F. Supp. 2d 168, 181 (S.D.N.Y. 2012) (“Further negating any inference that Freddie Mac materially misstated its financials is the fact that the company never issued a restatement for its Class Period financials.”), *aff’d sub nom. Cent. States, Se. & Sw. Areas*

Second, evidence of KPMG’s failure to require any restatement of Pfizer’s Class Period financials is not unfairly prejudicial. There is no risk that jurors would “misinterpret” the contemporaneous documents and sworn testimony of Defendants and KPMG, all of which support the inference that Defendants did not intentionally or recklessly make a false or misleading statement in Pfizer’s Class Period financials. Rather, there is a risk that jurors would “misinterpret” the absence of such evidence to mean that Defendants and KPMG did not believe then and/or do not believe now that Pfizer’s Class Period financials were correct—when just the opposite is true. Not surprisingly, Plaintiffs do not and cannot offer any explanation why all of the above evidence would provide “an improper basis” on which to decide the case other than the unspoken fact that such evidence would support a verdict in favor of Defendants. Of course, that is no reason. *See, e.g., Costantino v. Herzog*, 203 F.3d 164, 174-75 (2d Cir. 2000) (“Because virtually all evidence is prejudicial to one party or another, to justify exclusion under Rule 403 the prejudice must be *unfair*. The unfairness contemplated involves some adverse effect beyond tending to prove a fact or issue that justifies admission.” (citations omitted; emphasis in original)).

II. EVIDENCE THAT THE SEC DECIDED NOT TO INVESTIGATE PFIZER IS ADMISSIBLE AT TRIAL.

Plaintiffs’ motion also seeks to preclude Defendants from introducing evidence concerning the SEC’s decision not to commence an investigation or enforcement action involving Pfizer following the Company’s announcement of the accrual of a reserve in Q4 2008

Pension Fund v. Fed. Home Loan Mortgage Corp., 543 F. App’x 72 (2d Cir. 2013); *Hutchinson v. Perez*, No. 12 Civ. 1073(HB), 2012 WL 5451258, at *7 (S.D.N.Y. Nov. 8, 2012) (“Plaintiff does not allege any restatement of Kodak’s financial statements,” which undermined any inference of scienter). Unlike all of these cases, the cases cited by Plaintiffs, *see* Pls.’ Br. at 5 & n.3, are wholly inapposite. Not one addresses whether the absence of a restatement is relevant. Instead, all stand for the proposition that the absence of a restatement, without more, does not demonstrate that the financial statements were correct.

for the Government Investigations. Pls.' Br. at 2-4. Plaintiffs are wrong. All of Pfizer's SEC filings during the Class Period disclosed the existence of the Government Investigations. In addition, Pfizer's Forms 10-K for FY 2008 through FY 2010 disclosed that Pfizer recorded a \$2.3 billion charge in Q4 2008 related to the agreement in principle to resolve the Government Investigations.¹⁰ Pfizer received one comment letter from the SEC on those Forms 10-K—issued by the SEC staff on March 25, 2010, with respect to the Company's Form 10-K for FY 2009—and that letter did not ask any questions related to Pfizer's accounting for, or disclosure of, the Government Investigations.¹¹ That is not surprising. The SEC has considered disclosure issues identical to those in this case and accepted the judgment of companies that did not take a loss contingency reserve for government investigations into sales and marketing practices before reaching an agreement in principle for the very reasons that Pfizer chose not to do so. In this context, the fact that the SEC reviewed Pfizer's disclosures and decided not to raise any such questions may be accorded some weight. *See, e.g., General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 163 (2d Cir. 1968).¹² Nor would such evidence confuse or mislead jurors, as Plaintiffs have suggested. Since the SEC's decision not to take any action against Pfizer may be

¹⁰ Oct. 30, 2014 Declaration of Joseph G. Petrosinelli, Ex. JJ-1 (Pfizer Inc., 2008 Financial Report (Feb. 27, 2009), at 2), ECF No. 279; Dec. 22, 2014 MacDonald Decl. Ex. AA-5 (Pfizer Inc., 2009 Financial Report (Feb. 26, 2010), at 59); MacDonald Decl. Ex. BB-5 (Pfizer Inc., 2010 Financial Report (Feb. 28, 2011), at 66).

¹¹ Dec. 22, 2014 MacDonald Decl. Ex. CC-5 (Pfizer Inc., SEC Comment Letter Re: Form 10-K for Fiscal Year Ended December 31, 2009 (Mar. 25, 2010), *available at* <http://www.sec.gov/Archives/edgar/data/78003/000000000010016531/filename1.pdf>).

¹² *Accord Spielman v. General Host Corp.*, 402 F. Supp. 190, 197 (S.D.N.Y. 1975); *Abramson v. Nytronecs, Inc.*, 312 F. Supp. 519, 526 (S.D.N.Y. 1970); *Sherman v. Posner*, 266 F. Supp. 871, 874 (S.D.N.Y. 1966); *Kauder v. United Board & Carton Corp.*, 199 F. Supp. 420, 423-24 (S.D.N.Y. 1961).

accorded some weight, it would not be a “mistake” (in Plaintiffs’ words) for jurors to consider such evidence.¹³

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs’ motion to preclude Defendants from presenting evidence or making statements concerning the absence of a restatement of Pfizer’s Class Period financial statements or an SEC investigation or enforcement action involving Pfizer.

Date: December 22, 2014

Respectfully submitted,

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¹³ Plaintiffs assert that “[c]ourts addressing motions *in limine* on this issue have consistently barred evidence and statements at trial relating to the absence of an SEC investigation/enforcement action,” Pls.’ Br. at 4, but they cite just three scattered cases. None is persuasive. Those courts did not cite any case law to support their rulings and failed to address the decisions from the Second Circuit and this District cited above.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of December, 2014, the foregoing Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion *In Limine* To Preclude Defendants from Presenting Evidence or Making Statements Concerning the Absence of an SEC Investigation or Enforcement Action or Restatement of Pfizer's Class Period Financial Statements was filed with the Court through the CM/ECF system and thereby served on all parties of record.

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