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 TO EXCLUDE RELIANCE EVIDENCE AND ARGUMENT

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Plaintiffs' Motion To Exclude Reliance Evidence and Argument recycles the same meritless arguments advanced in support of their motion for partial summary judgment. For the same reasons Defendants presented in opposition to that earlier motion, this motion should be denied as well.

I. DEFENDANTS' EVIDENCE OF RELIANCE ON COUNSEL'S ADVICE IS ADMISSIBLE TO DEMONSTRATE THEIR GOOD FAITH AND SCIENTER.

As set forth in Defendants' opposition to Plaintiffs' motion for partial summary judgment, as well as in Defendants' briefs in support of their motions for summary judgment, Defendants are entitled to introduce evidence of their reliance on the advice of counsel and auditors in order to demonstrate their good faith and lack of scienter. *See, e.g.*, ECF No. 322, at 21-23; ECF No. 331, at 11-14. Plaintiffs' multiple briefs on this issue wholly ignore this fact. For example, in Plaintiffs' reply brief in further support of their motion for partial summary judgment, Plaintiffs misleadingly cite to *United States v. Gorski*, No. 12-10338-FDS, --- F. Supp. 2d ----, 2014 WL 3818111 (D. Mass. Aug. 1, 2014), for the proposition that in order to assert the "affirmative defense" of reliance on the advice of counsel, a defendant must establish a number of formal elements, including that he "'made a full and accurate report to his attorney of all material facts which the defendant knew.'" ECF No. 391, at 25. But, significantly, Plaintiffs fail to note that the court in *Gorski* went on to state that evidence that a defendant relied on the advice of counsel would be admissible for the purpose of negating intent "even if the defendant could not establish all of the elements of the formal affirmative defense." *Gorski*, 2014 WL 3818111, at *10; *see also id.* (evidence of counsel's advice "would surely be admissible on the issue of defendant's state of mind" even though it might "not qualify for an advice-of-counsel defense in the formal sense").

II. DEFENDANTS DID NOT WAIVE THE RIGHT TO SHOW GOOD FAITH RELIANCE ON SECURITIES DISCLOSURE COUNSEL.

Plaintiffs argue that Defendants waived their right to rely on disclosure advice from Messrs. Block and Fox because Pfizer did not waive its attorney-client privilege as to its government investigations counsel and the advice they provided the company on the underlying Department of Justice investigation. As noted in Defendants' opposition to Plaintiffs' motion for partial summary judgment, the Court already has ruled that Plaintiffs are incorrect. The Court's January 18, 2013 Order established the scope of the limited waiver Pfizer made—which covered all "legal advice regarding Pfizer's legal proceedings disclosures concerning the government investigations"[1]—in order to show its reliance on Messrs. Block and Fox. Plaintiffs specifically negotiated and agreed that there would be no waiver of the privilege with respect to government investigations counsel, and instead accepted thousands of previously-privileged documents from the files of Messrs. Block and Fox.[2]

After Plaintiffs saw that the documents demonstrated the clear advice of Messrs. Block and Fox that the disclosures were adequate and Defendants' good faith reliance on that advice, Plaintiffs changed their tune and claimed they were entitled to a broader waiver of privilege. The Court rejected Plaintiffs' position. At a July 19, 2013 hearing, for example, Plaintiffs insisted that they were entitled to discovery of the privileged communications of government investigations counsel, regardless of whether those communications occurred when Defendants

[1] December 8, 2014 Declaration of Joseph G. Petrosinelli Ex. Y-8 (Jan. 18, 2013 Rule 502(d) Order), ECF No. 279.

[2] Plaintiffs' statement that Defendants made a "strategic decision to foreclose discovery regarding investigation counsel" ignores the privilege waiver they negotiated, signed, and then asked the Court to endorse. Mem. of Law in Support of Mot. To Exclude Reliance Evidence and Argument at 5, ECF No. 346 (hereinafter "Pls.' Br."); Jan. 17, 2013 Joint Letter & Dec. 8, 2014 Petrosinelli Decl. Ex. Y-8 (ECF No. 150) (Jan. 18, 2013 Rule 502(d) Order). It is their own strategic decision they seek to revisit, and it is too late.

sought or obtained disclosure advice from Messrs. Block and Fox. The Court rejected the argument and drew a clear distinction between securities disclosure advice—as to which Pfizer has waived privilege and for which it has produced all responsive documents and allowed all relevant questions of its disclosure attorneys—and litigation advice. As the Court explained, Plaintiffs were entitled to "[w]hatever Block used or considered," but not to "test what's down the chain" or to "test everything . . . that the [disclosure] lawyer may never have seen."[3]

Defendants are relying only on documents and information that were fully produced in discovery in this matter. To the extent Messrs. Block, Fox, or the individual Defendants received information from government investigations counsel that they relied on in forming the disclosures, that information has been produced or testified to (without objection). There is no sword and shield issue here. The produced documents establish that Messrs. Fox, Block were told that Pfizer had substantial defenses. This trial is about Pfizer's disclosures, not whether Pfizer's government investigations counsel were right or wrong when they told Messrs. Fox, Block that Pfizer had substantial defenses to the government investigation. Plaintiffs' attempt to turn this issue into a trial within a trial by accusing Covington, Ropes, and the many other government investigations attorneys of either lying or being part of some conspiracy to commit securities fraud should be rejected.

The Court's decisions were correct and consistent with the established principle that a waiver extends only to "the same subject matter." Fed. R. Evid. 502(a)(2); *see also Pritchard v. Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008); *In re von Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987). Because advice on securities disclosures addresses a different subject from advice on the conduct of the government investigation, reliance on counsel for one does not affect a waiver of

[3] July 19, 2013 Hr'g Tr. 11:3-5.

privilege as to the other. *See, e.g.*, *SEC v. Reserve Mgmt. Co.*, Nos. 09 MD 2011, 09 Civ. 4346, 2012 WL 4774834, at *3 (S.D.N.Y. Sept. 12, 2012) (waiver was properly limited to counsel who had provided advice at issue and could not reach company's bankruptcy counsel when "Defendants' advice of counsel defense does not rely on any advice provided by" bankruptcy counsel).

Plaintiffs have received all discovery to which they were entitled pursuant to the agreed-upon waiver of privilege. They have received all communications to and from Messrs. Block and Fox concerning the disclosure of the Department of Justice investigation, including communications between and among them and the company's government investigations counsel. Plaintiffs had the opportunity to ask Messrs. Block and Fox about what they learned from government investigations counsel, and Plaintiffs availed themselves of that opportunity. Plaintiffs also deposed Douglas Lankler, Pfizer's in-house government investigations counsel, as well as Brien O'Connor, one of Pfizer's lead outside counsel for the Bextra investigation. The record is replete with documents and testimony concerning Mr. Fox's and Mr. Block's frequent interactions with these lawyers.[4] Thus, Plaintiffs have no basis for asserting that Defendants have waived any defense, and the Court should (yet again) reject this argument.

Separately, Plaintiffs have no basis whatsoever for requesting that the Court "exclude any evidence or argument concerning the defendants' purported reliance on others or on Pfizer's disclosure process, including the exclusion of testimony of Ethan Posner, Carlton Wessel and Gary Giampetruzzi." Pls.' Br. at 7-9. *See also* section III *infra*. As they did in their motion for

[4] *See* Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:21-12:18, 66:25-68:14, 82:10-18, 144:1-12, 204:8-205:16); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 94:2-13, 186:10-187:4); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 46:8-48:11, 58:14-59:13, 137:25-138:21); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 66:11-67:10, 74:17-75:12, 195:9-199:14, 202:18-205:3). Where Pfizer did interpose a privilege objection, it was to questions concerning investigation counsel's litigation advice to Pfizer or disclosure counsel's other work for Pfizer.

partial summary judgment, Plaintiffs complain that Defendants' motions for summary judgment refer to government investigations counsel 99 times, but those references all occur in the context of explaining the course of the Department of Justice investigation and government investigations counsel's role in updating Messrs. Fox and Block as to the key facts of the investigation—all facts that have been the subject of discovery.

Defendants have not selectively introduced privileged materials from outside the record, nor have they relied on one lawyer's disclosure advice while shielding from discovery another lawyer's disclosure advice. When Defendants have cited to documents or testimony referencing government investigations counsel, all of that evidence has been subject to discovery either because it (1) was ***never privileged*** in the first place; or (2) was subject to Pfizer's limited privilege waiver as to disclosure counsel's legal advice regarding Pfizer's disclosures of the Department of Justice investigation. There can be no basis to bar Defendants from using this evidence to demonstrate that Defendants believed, and acted on the belief, that Pfizer had substantial defenses to the government's allegations.

III. DEFENDANTS ARE PERMITTED TO SHOW THAT THEY RELIED ON MESSRS. BLOCK AND FOX IN GOOD FAITH.

A. Defendants Relied on Messrs. Block and Fox, Not the Company's Government Investigations Counsel, To Advise on Disclosures.

As was true with their motion for partial summary judgment, the heart of Plaintiffs' motion is a fundamental mischaracterization of the role of Messrs. Block and Fox. As with all of Pfizer's other legal proceedings before, during, and after the Class Period, Pfizer and its executives relied on Messrs. Block and Fox to draft, review, discuss, edit, and approve the

disclosure of the Bextra investigation.[5] And they did so. In order to advise Defendants as to whether and how to disclose the Bextra investigation, Messrs. Block and Fox did what every responsible disclosure lawyer must do: they communicated extensively with the litigators representing Pfizer in the underlying investigation to get an understanding of the matter. Those oral and written communications—***all*** of which were the subject of discovery—contained not simply factual information, but also the litigators' judgments regarding the investigation, including potential claims, evaluations of the strength of the case and the company's defenses, and the possible outcomes.[6]

Plaintiffs attempt to conflate legal advice regarding ***securities disclosures***, which would be provided by ***securities disclosure counsel***, with legal advice provided by litigators regarding the underlying litigation. Defendants have never relied, either in practice or in their defense of this case, on government investigations counsel to render securities disclosure advice.

Defendants relied on the company's government investigations counsel (Covington & Burling and Ropes & Gray) to advise them on how to respond to the Department of Justice's requests and positions in the Bextra investigation, whether and what defenses Pfizer might have if the government decided to litigate the matter, and other litigation-related issues. In contrast, Defendants relied on Messrs. Block and Fox for advice on an entirely different legal issue: what do the securities laws require as to whether and how to disclose the Bextra investigation in the company's SEC filings? For example, Pfizer relied on Covington & Burling and Ropes & Gray to advise, as a substantive ***litigation*** matter, what defenses Pfizer might have to the Bextra

[5] Pfizer's Statement of Undisputed Facts ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-109, Oct. 30, 2014, ECF No. 248 (hereinafter "SUF"); Defendants'Counterstatement of Material Facts, ¶¶ 77-86, 89-90, 92, Dec. 8, 2014, ECF No. 320 (hereinafter "CS").

[6] SUF ¶¶ 7-10; CS ¶¶ 77-79, 97-103, 107-110.

investigation,[7] but Defendants sought and relied upon the advice of Messrs. Block and Fox regarding what the ***securities disclosures*** should say about the investigation.[8]

Plaintiffs offer deposition excerpts in which witnesses stated the obvious fact that they did not rely on Messrs. Block and Fox for ***litigation*** advice, as if those excerpts establish that Defendants did not look to Messrs. Block and Fox for ***securities disclosure*** advice. Plaintiffs cite, for instance, Mr. Kindler's testimony that he "did not look to" Messrs. Block or Fox to advise him regarding the strengths or weaknesses of Pfizer's defenses to the government's investigation.[9] What Plaintiffs do not cite is the consistent distinction between litigation advice and securities disclosure advice, drawn by these very same witnesses: "[Mr. Fox and Mr. Block] evaluated the implications of our investigations for purposes of securities law disclosure. They did not do the former, which is to say conduct the investigations themselves."[10]

Plaintiffs place heavy emphasis on one isolated excerpt from Mr. Levin's deposition, where Plaintiffs asked him to identify the counsel on which he relied for "your defense," and he responded "Covington & Burling." *See* Pls.' Br. at 3. What Plaintiffs fail to point out is that in the same deposition, when Mr. Levin was asked a question that properly focused on ***securities disclosure*** advice, he testified:

> Q. So with regard to Pfizer's securities disclosures which are at issue in this case, which counsel are you relying upon in connection with the reliance of counsel defense that [Plaintiffs' counsel] was asking you about?

[7] CS ¶¶ 76, 80-84, 86, 91.

[8] CS ¶¶ 77-86, 89-90, 92.

[9] Pls.' Br. at 3-4.

[10] CS ¶ 91; *see also* CS ¶¶ 80-81, 85, 86.

> A. So securities disclosures would be our disclosure counsel, and that would be Larry Fox internally and Dennis Block . . . on the external side.[11]

Mr. Levin reiterated, when questioned by Plaintiffs' counsel again on this issue, that Mr. Block was the "securities lawyer whom we relied on with respect to disclosure,"[12] and that he "was relying on both Dennis as well as Larry Fox to have the appropriate conversations with inside and outside investigation counsel so that they could in turn draft disclosures."[13] Plaintiffs cannot use one snippet of Mr. Levin's testimony to preclude evidence supporting Defendants' reliance defense. Defendants do not argue, and have never argued, that they are relying on disclosure advice given by Covington & Burling.

In Plaintiffs' view, Messrs. Block and Fox needed to be criminal lawyers and, moreover, should have replicated the work of the company's litigators, in order to advise Defendants on the company's disclosure obligations concerning the Bextra investigation. They state that "the individuals on whom defendants purport to have relied (Dennis Block, Larry Fox, KPMG witnesses, and Loretta Cangialosi) lacked the information and qualifications necessary to render assessments of the government investigation and defenses thereto." Pls.' Br. at 6.[14] Plaintiffs' position would effectively demand that a securities disclosure lawyer for a major corporation have expertise in and personally participate in hundreds of legal matters—from antitrust, to intellectual property, to products liability, to environmental regulation, to government

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[11] CS ¶ 82.

[12] CS ¶ 83.

[13] CS ¶ 83. This is consistent with Mr. Levin's answer in his earlier deposition in this matter, in which he identified Mr. Fox and Mr. Block as the counsel upon whom the company relied for disclosures advice. *See* CS ¶ 83 & n.138.

[14] Plaintiffs cite *Faulkner v. Arista Records LLC*, No. 07 CIV. 2318 (LAP), 2014 U.S. Dist. LEXIS 129711, at *39 (S.D.N.Y. Sept. 15, 2014), for this argument. But *Faulkner* addressed *Daubert* motions; the issue of reliance on counsel, or the ability of an attorney to offer advice on a legal matter, has nothing to do with the standard for admitting expert testimony.

investigations, and across multiple countries. Any person familiar with the legal department of a major company would know that this task would be impossible for any securities disclosure counsel. Even Plaintiffs' own proffered disclosures expert, Edward Buthusiem, disagrees with Plaintiffs. Mr. Buthusiem, who served as securities disclosures counsel at another large pharmaceutical company, GSK, noted that he is "not a criminal lawyer," and that his company's outside disclosure counsel (like Messrs. Block and Fox) was a securities lawyer—not a specialist in criminal law, antitrust, intellectual property, products liability, or environmental matters.[15] As Mr. Buthusiem went on to explain, he relied on "meetings with all the subject matter experts" to keep him informed, and did not review documents such as court filings or trial exhibits in most instances.[16]

B. Messrs. Block and Fox Were Informed About All Aspects of the Bextra Investigation Material to Their Advice.

Plaintiffs argue that the law requires the impossible—that securities disclosure counsel, for a corporation that discloses dozens of legal matters every quarter, must learn every conceivable fact and review all potentially relevant evidence about all of those matters in order to render disclosure advice. The law is to the contrary: What matters is not whether disclosure counsel receives every scrap of paper generated over the course of a years-long government investigation, but whether they learn the material facts and so can provide informed advice. *See Jock v. Ransom*, No. 7-05-cv-1108, 2007 WL 1879717, at *7 (N.D.N.Y. June 28, 2007) (advice of counsel requires "a full and accurate report to his attorney of all ***material*** facts which the defendant knew" (emphasis added) (internal quotation marks omitted)); *see also United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195 (2d Cir. 1989) (quoting approvingly a jury

[15] CS ¶ 95.

[16] CS ¶ 95.

instruction stating the defendant must have "fully and honestly laid all ***material*** facts of which he has knowledge before the lawyer" (emphasis added)).[17]

The undisputed record shows that Messrs. Block and Fox learned all facts material to their evaluation of Pfizer's disclosure obligations concerning the Department of Justice investigation, including the basis for Pfizer's belief that it had substantial defenses but that the investigation could nonetheless result in substantial criminal or civil fines and penalties. The two had "extended conversations" every quarter—and sometimes more frequently—with the company's government investigations lawyers.[18] They had ample opportunity to, and did, ask questions, were never denied access to any information they requested, and "drilled down until [they] were comfortable"[19] that they were in a position to provide "informed disclosure judgments."[20] Pfizer's senior management directed everyone that "if Larry Fox wants information, you provide it to him"; that Mr. Fox was "encourage[d]" to ask "whatever questions he wanted to ask, whenever he wanted to ask them"; and that government investigations counsel was required "to keep Mr. Block and Mr. Fox ***fully informed of the state of these investigations*** and what they were finding in order that Mr. Block and Mr. Fox could advise us on our securities

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[17] In all events, as set forth in Defendants' reply briefs in further support of their motions for summary judgment, *see, e.g.*, ECF No. 322, at 41-43; ECF No. 331, at 12-14, even if the assertion that Messrs. Fox and Block were not fully informed were true—and it is not—the record evidence establishes that Defendants believe in good faith that Messrs. Fox and Bock were fully informed. *See Gorski*, 2014 WL 3818111, at *10 (evidence of counsel's advice "would surely be admissible on the issue of defendant's state of mind" even though it might "not qualify for an advice-of-counsel defense in the formal sense" because defendant "failed to provide a complete set of facts to the lawyer"); *SEC v. Prince*, 942 F. Supp. 2d 108, 142 (D.D.C. 2013) (finding defendant relied in good faith on legal advice, which was sufficient to negate scienter, where, among other things, company's employees "believed they had disclosed the relevant facts to [counsel], and that [counsel was] aware of those facts").

[18] SUF ¶ 8; CS ¶¶ 97, 99-103, 107-110.

[19] SUF ¶¶ 7-8.

[20] CS ¶ 85.

disclosures."[21] These communications with government investigations counsel were how Messrs. Block and Fox kept themselves informed of Pfizer's "major meetings" with the government, the "key findings of the internal investigation," the government's "assessment of the case,"[22] and significant events such as the expansion of the investigation to cover additional products.[23] As part of these conversations, Messrs. Block and Fox also learned of the company's defense efforts and verified from their conversations that Pfizer and its government investigations counsel did in fact believe the company had strong defenses.[24]

Plaintiffs rely on inapposite authority, such as *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.,* in which a magistrate judge of this Court concluded that a privilege waiver had occurred because of the selective disclosure of, and reliance upon, privileged communications as part of an advice-of-counsel defense. *See* Nos. 93 Civ. 5298 et al., 1998 WL 567862, at *1 (S.D.N.Y. Sept. 3, 1998). This case stands only for the inapposite principle that a party cannot disclose privileged communications to support its position and then shield those same communications from scrutiny. There is no sword-and-shield issue here. This is not a case, as Plaintiffs suggest, where Defendants have selectively introduced privileged materials from outside the record, or where Defendants have relied on one lawyer's disclosure advice while shielding from discovery another lawyer's disclosure advice. As discussed above, when Defendants have cited documents or testimony referring to government investigations counsel, all of that evidence has been subject to discovery either because it (1) was never privileged in the

[21] CS ¶ 99 (emphasis added).

[22] SUF ¶ 9.

[23] SUF ¶ 90.

[24] CS ¶ 90.

first place; or (2) was subject to Pfizer's limited privilege waiver as to disclosure counsel's legal advice regarding Pfizer's disclosures of the Department of Justice investigation.

IV. THERE IS NO BASIS TO EXCLUDE THE TESTIMONY OF MESSRS. GIAMPETRUZZI, WESSEL, AND POSNER.

Prior to deposition discovery, Defendants submitted an initial trial witness list, identifying the witnesses who—based solely on the allegations in Plaintiffs' complaint—they believed in good faith they would call at trial. That was nearly ***two years*** ago. Since then, Plaintiffs moved repeatedly and received permission to depose dozens of additional witnesses. This has dramatically expanded Plaintiffs' case well beyond the allegations in their complaint to include issues that Defendants reasonably believed (prior to discovery) would not be joined at trial. Defendants accurately predicted many of the witnesses they intend to call at trial, but Plaintiffs' efforts to expand this case beyond Pfizer's securities disclosures has rendered that entire initial exercise moot. Plaintiffs now assert that the inclusion of Pfizer's outside government investigations counsel Ethan Posner and in-house lawyers Carlton Wessel and Gary Giampetruzzi on Defendants' witness list is "a brazen defiance of the Court's prior orders" and a "brazen contradiction of defendants' prior representations to the Court." Pls' Br. at 7. Those accusations are baseless. Plaintiffs cannot seriously contend that Defendants should be barred from adding to a witness list created nearly two years ago, before depositions commenced, when Plaintiffs have since injected dozens of witnesses into this case and continue to do so up through the final weeks before trial.[25]

This is especially true because Plaintiffs have known of the existence of Messrs. Giampetruzzi, Wessel, and Posner, and their roles in the matters at issue, from the beginning of

[25] Just ten days ago, Plaintiffs added additional names to their trial witness list, including an individual who they had not previously identified in discovery as a witness with relevant knowledge.

the case, and heard their names come up repeatedly during depositions. For example, in their initial and supplemental disclosures, Defendants identified Mr. Giampetruzzi and Mr. Wessel as individuals likely to have discoverable information. Plaintiffs did too. Years later, in March 2013, at the outset of deposition discovery, Plaintiffs sought to take 46 depositions, including of Mr. Giampetruzzi and Mr. Wessel.[26] Defendants objected to the large number of depositions Plaintiffs sought, but they made no argument that Plaintiffs could not take the depositions of Mr. Giampetruzzi or Mr. Wessel.

The Court denied Plaintiffs' request for 46 depositions, but it did permit them to take up to 10 depositions of "witnesses with knowledge of Bextra, Geodon, Zyvox, and Lyrica," as well as two additional depositions of "individuals at Pfizer who conducted internal audits." The Court also allowed Plaintiffs to depose the witnesses on the list that the Defendants were required to file shortly after the Court's order was issued. Order, March 8, 2013, ECF No. 157. The Court also directed Defendants to identify the fact witnesses they planned to call at trial as of that time, to enable Plaintiffs to take their depositions as well. *Id*. Defendants identified six witnesses, bringing the number of possible depositions by Plaintiffs to 18, but made clear that this list was "based on what we presently know about Plaintiffs' case." March 22, 2013 Letter from S. Farina to H. Rosen. Defendants also "reserve[d] the right to supplement this list in the event that any issues arise over the course of discovery that require us to identify additional trial witnesses." *Id*.

At that stage—before any depositions had been taken, any experts designated, or any summary judgment motions submitted—Defendants had no way of knowing the direction that Plaintiffs' case would eventually take. Based on their understanding of Plaintiffs' case at that

[26] March 5, 2013 Joint Letter & Ex. A.

time, Defendants had no intention of calling Mr. Giampetruzzi, Mr. Wessel or Mr. Posner as trial. They therefore did not list them in this preliminary witness list.

Later, Plaintiffs made multiple attempts to revisit the scope of discovery. In July 2013, Plaintiffs attempted to expand the breadth of Pfizer's waiver of its attorney-client privilege to include advice from its government-investigations counsel. *See* ECF No. 172. The Court rejected that attempt.

On August 29, 2013, Plaintiffs asserted that they should be entitled to take the depositions of 19 additional witnesses, including seven so-called "Obstruction of Justice Witnesses." August 29, 2013 Joint Letter at 9, ECF No. 181. Plaintiffs argued that these seven witnesses—including leading members of the criminal defense bar at Covington & Burling and King & Spalding, a former outside counsel to Pfizer who is now the Inspector General of the Department of Justice, and the then-General Counsel of Pfizer—had participated in a "second crime" of obstruction of justice by making false statements to the court that accepted Pharmacia & Upjohn's guilty plea. *Id.* at 7-9 & Ex. D. These supposed "Obstruction of Justice Witnesses" included Mr. Giampetruzzi, Mr. Wessel, and Mr. Posner. In response, Defendants pointed out the irresponsible nature of Plaintiffs' baseless accusations, as well as that any issues relating to the Pharmacia & Upjohn guilty plea—which occurred eight months after the end of the Class Period—are irrelevant to this case. *Id.* at 4-5.

The Court rejected Plaintiffs' argument on August 30, 2013—one day after it was submitted—and ordered that Plaintiffs "may . . . not" depose Messrs. Giampetruzzi, Wessel, and Posner, nor any of the other so-called "Obstruction of Justice Witnesses," on these irrelevant issues. ECF No. 181 (endorsement). Plaintiffs did not argue any other basis for taking the depositions of these witnesses, and never sought to depose them on any other issues.

Discovery continued, eventually including Plaintiffs taking 51 depositions and designating ten expert witnesses. Many of the deposition witnesses discussed Messrs. Giampetruzzi, Wessel, and Posner, and their role in communicating with the Department of Justice about the Bextra investigation and informing Pfizer's securities disclosures counsel and KPMG about the status of that investigation. It simply cannot be a surprise to Plaintiffs that these individuals have information about the issues Plaintiffs themselves have injected into the case. Based on the current status of Plaintiffs' case, Defendants have listed 39 trial witnesses in their submission required by Rule 26(a)(3) (Plaintiffs have listed 54 witnesses). Plaintiffs do not—and could not—contend that Defendants are limited to calling at trial only the six witnesses identified prior to discovery in March 2013. The listing of these witnesses does not contradict any statement Defendants have made to the Court. Defendants have never represented that the March 2013 preliminary witness list was final.

Nor have Defendants ever blocked Plaintiffs from taking the depositions of Messrs. Giampetruzzi, Wessel, or Posner, other than by correctly pointing out that the "Obstruction of Justice" theory for doing so was groundless and irrelevant. If Plaintiffs wished to depose these witnesses on non-privileged topics, such as communications with the government and the nature of the arguments made by both sides, as well as on topics covered by Pfizer's waiver of the privilege—such as what information about the investigations these lawyers conveyed to Pfizer's securities disclosure counsel or KPMG—nothing would have prevented them from doing so.

These non-privileged topics are the reasons these witnesses are now on Defendants' witness list. Through the course of fact discovery, expert discovery, and the filing of summary judgment motions and oppositions, it has now become clear that Plaintiffs contend that Pfizer's disclosure counsel were not sufficiently informed about the government investigations, *see* ECF

No. 288, at 15-23; that Plaintiffs assign importance to presentations made by the government at certain meetings in August and September 2006, *see* ECF No. 304, at 16-17; and that Plaintiffs put the focus of their case on the first clause of Pfizer's warning that "Although we believe we have substantial defenses . . . we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results of operations in any particular period," *see* ECF No. 304, at 39-42. Mr. Giampetruzzi, Mr. Wessel, and Mr. Posner can offer relevant testimony that, among other things, (1) they fully advised Pfizer's disclosure lawyers of the progress of the government investigations; (2) Pfizer's lawyers made significant counterarguments to the government's presentations in August and September 2006; and (3) Pfizer's lawyers told the government and disclosure counsel that they viewed Pfizer's defenses as substantial.

Plaintiffs have identified no basis to exclude this relevant testimony.

CONCLUSION

For all of the above reasons, this Court should deny plaintiffs' motion to exclude reliance evidence and argument.

Date: December 22, 2014

Respectfully submitted,

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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 To Exclude Reliance Evidence and Argument was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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Case Number: 1:10-cv-03864-AKH
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Henry A. McKinnell
Pfizer, Inc.
Ian C. Read
Allen Waxman
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