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 OPINION TESTIMONY BY FACT WITNESSES

TABLE OF AUTHORITIES

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Defendants Pfizer Inc. ("Pfizer" or the "Company"), Henry A. McKinnell, Jeffrey B. Kindler, Frank D'Amelio, Alan G. Levin, Ian C. Read and Alan Waxman (collectively, the "Defendants") respectfully submit this memorandum of law in opposition to Plaintiffs' motion "to preclude fact witnesses from offering expert opinion testimony."[1]

After telling this Court that Defendants' reliance on counsel and outside auditors is one "factor for the jury to consider when weighing defendants' good-faith defense" to securities fraud,[2] Plaintiffs now take the untenable position that the jury should not hear any testimony from those advisors regarding what advice they gave to Defendants or the basis for that advice. In support of their motion, Plaintiffs identify ten statements made in depositions by Lawrence Fox and Dennis Block (Pfizer's internal and external disclosure counsel) as well as Larry Bradley (KPMG partner), which Plaintiffs contend constitute impermissible "legal or accounting opinions." Mot. 2. For several independent reasons, Plaintiffs arguments are meritless.

As an initial matter, the identified statements do not constitute "opinion testimony." Rather, they constitute factual testimony based on the witnesses' first-hand knowledge regarding the conclusions they personally reached during the Class Period and their state of mind when reaching those conclusions. *See SEC v. Treadway*, 438 F. Supp. 2d 218, 225 (S.D.N.Y. 2006) (testimony was "not lay opinion, but factual testimony regarding the events at issue, based on [witness's] own personal knowledge and understanding of the market timing policy gained through his position, duties, and responsibilities as CEO"); *see also United States v. McMillan*,

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[1] *See* Mem. of Law in Supp. of Pls.' Mot. *in Limine* to Preclude Opinion Testimony By Fact Witnesses ("Mot.") (ECF No. 382).

[2] Pls.' Mem. of Law in Opp. to Pfizer Inc.'s and the Individual Defs.' Mots. For Summ. J. ("Pls.' Summ. J. Opp.") (ECF No. 304) 2–3.

600 F.3d 434, 456–57 (5th Cir. 2010) (auditor witness's factual testimony about his investigation and findings was not impermissible opinion testimony).

For example, Plaintiffs take issue with Mr. Block's testimony that he personally concluded that Pfizer "had a very robust and transparent set of disclosure documents" during the Class Period.[3] Plaintiffs similarly seek to preclude Mr. Fox's testimony that based on his understanding of the facts at the time, he personally "concluded that the disclosures that were already in our SEC reports fully complied with the securities laws."[4] This testimony provides necessary factual information regarding the advice upon which Defendants relied from the very individuals who gave that advice. Such testimony is highly relevant to numerous factual issues that jurors may be called upon to determine, including what advice Defendants received from disclosure counsel and KPMG and the basis for that advice. Moreover, the witnesses' testimony that they continued to believe that their advice was correct despite knowledge of Plaintiffs' allegations is directly relevant to whether they were aware of the necessary facts at the time their advice was rendered.[5] Plaintiffs do not—and cannot—offer any basis to preclude this relevant fact testimony.

Even assuming *arguendo* that the identified statements somehow constitute "opinion" testimony (and they do not), Plaintiffs fail to explain how such testimony is not admissible under Federal Rule of Evidence 701, which allows a lay witness to testify in the form of an opinion where the testimony is "(a) rationally based on the witness's perception; (b) helpful to clearly

[3] Dec. 10, 2014 Decl. of Willow E. Radcliffe (hereinafter "Radcliffe Decl.") Ex. 3 (Block (Sept. 16, 2013) Dep. 183:9–184:5).

[4] Radcliffe Decl. Ex. 2 (Fox (Sept. 26, 2013) Dep. 141:7–142:8.

[5] Mem. of Law in Supp. of Pls.' Mot. for Partial Summ. J. on Defs.' Reliance on Advice of Counsel and Good Faith Defenses (ECF No. 288) 7–8, 15–23; Pls.' Summ. J. Opp. at 84–85, 91–96.

understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701; *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911–12 (2d Cir. 1997). "The rational-basis requirement of Rule 701 is the familiar requirement of first-hand knowledge of observation." *Lightfoot*, 110 F.3d at 911 (citation omitted). Moreover, "[t]he fact that the lay opinion testimony bears on the ultimate issue in the case does not render it inadmissible." *B&G Plastics, Inc. v. E. Creative Indus., Inc.*, No. 98 Civ. 0884 (RMB)(JCF), 2004 WL 307276, at *8 (S.D.N.Y. Feb. 18, 2004) (citing *United States v. Rea*, 958 F.2d 1206, 1214–15 (2d Cir. 1992)).

Here, the identified testimony is "rationally based" upon the witnesses' own first-hand knowledge and understanding of the facts of the case. *See B&G Plastics*, 2004 WL 307276, at *8 ("Lay opinion testimony is admissible when the inference is a conclusion drawn from a series of personal observations over time.") (citing 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 701.03 (2d ed. 2003)). While the witnesses possess generalized knowledge regarding disclosure and accounting issues, again, their testimony is based upon their own first-hand perceptions and not principally drawn from any special expertise. *See United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007) ("A witness's specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony 'expert' as long as it was based on his 'investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise . . . .'") (quoting *Bank of China, N.Y. Branch v. NBM LLC*, 359 F.3d 171, 181 (2d Cir. 2004)); *see also Koch v. Greenberg*, 14 F. Supp. 3d 247, 268 (S.D.N.Y. 2014) (allowing lay opinion testimony that "was a reflection of [witness's] work at Sotheby's and familiarity with the wine auction business"); *United States v. Rubin*, 828 F. Supp. 2d 698, 704 (S.D.N.Y. 2011) ("[S]ome degree of specific,

industry-related knowledge will not disqualify lay opinion testimony."). Moreover, as demonstrated above, Plaintiffs cannot seriously dispute that such testimony would be helpful to a clear understanding of the central facts of the case. *See Rigas*, 490 F.3d at 224–25.[6]

Courts have routinely allowed opinion testimony under Rule 701 in substantially similar circumstances. *See id.* at 224 (accountant witness allowed to testify as to opinion of company's accounting decisions "based upon his observations during his twenty months as an Adelphia employee"); *Helena Assocs., LLC v. EFCO Corp.*, No. 06 Civ. 0861 (PKL), 2008 WL 2117621, at *5–6 (S.D.N.Y. May 15, 2008) (project manager could offer opinion testimony where he "observed first-hand the project and its delays"); *Treadway*, 438 F. Supp. 2d at 226–27 (denying motion *in limine* to exclude testimony as "improper expert opinion" where witnesses had "sufficient personal knowledge from their positions as portfolio managers"); *Palmieri v. Celebrity Cruise Lines, Inc.*, No. 98 Civ. 2037 (LAP) (HBP), 2000 WL 310341, at *5 (S.D.N.Y. Mar. 27, 2000) ("[A]s a treating physician, Dr. Giovinazzo was free to testify [as] to opinions he formed in the course of treating [plaintiff], without regard to the disclosure requirements of Rule 26(a)(2).").[7] For example, in *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985)—a securities fraud case—the court held that a lawyer could testify under Rule 701 as to whether he would have considered certain offering memoranda to contain adequate disclosure if he had been aware

[6] Contrary to Plaintiffs' contention, the testimony in question does not "merely tell the jury what result to reach." Mot. 3. Rather, it provides necessary factual information for the jury to evaluate whether the Defendants acted with scienter in light of the advice they received. Def. Pfizer Inc.'s Mem. of Law in Supp. of Its Mot. for Summ. J. (ECF No. 246) Part I.

[7] *See also United States v. Young*, 745 F.2d 733, 760 (2d Cir. 1984) (narcotics agents permitted to testify as to nature of activity around "heroin mill" under Rule 701); *Soden v. Freightliner Corp.*, 714 F.2d 498, 510–12 (5th Cir. 1983) (service manager with "very considerable practical experience and specialized knowledge" of truck maintenance permitted to offer opinion regarding defect and its dangerousness); *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403–4 (3d Cir. 1980) (accountant familiar with books could give lay opinion as to how lost profits should be calculated); *United States v. Grote*, 632 F.2d 387, 389–90 (5th Cir. 1980) (IRS agent could give opinion as to whether tax returns filed were acceptable).

of certain facts about the offering. *Id.* at 780–81. The witness had reviewed one of the offering documents at the time it was being prepared. The court stated:

> Since [the witness] personally observed the preparation of the offering memoranda and scrutinized them for adequacy of disclosure, and possessed the qualifications to draw legal conclusions from them, his testimony as to how he would have viewed the undisclosed facts was not an impermissible answer to a hypothetical question by a non-expert, but remained a lay inference from his prior personal experience and observation.

Id. at 781. This reasoning applies with equal force here.

Plaintiffs' cited cases—which appear in a lengthy string-cite with no explanation as to their relevance—are inapposite. Mot. 3. For example, in *United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005), the court ruled that opinion testimony of an undercover agent regarding the overall culpability of the defendant was inadmissible where it was "not limited to [the witness's] personal perceptions but drew on the total information developed by all the officials who participated in the investigation leading to [the defendant's] arrest." *Id.* at 212.[8] In *United States v. Collins*, 581 F. App'x 59 (2d Cir. 2014), the court held that the district court's exclusion of opinion testimony was not "prejudicial error" where the testimony was "conclusory," "would not be helpful to the jury" and "was within the competence of a jury unassisted by opinion testimony," and where other fact witnesses proved sufficient to advance the same defense. *Id.* at 60. None of those circumstances is present here.

[8] Likewise, in *Mirowski Family Ventures, LLC v. Boston Scientific Corp.*, No. 11-cv-736-WTL-DKL, 2013 WL 432500 (S.D. Ind. Feb. 4, 2013), the court excluded certain testimony where it was not "based on [the witness's] own experiences." *Id.* at *2.

CONCLUSION

Accordingly, for the reasons stated above, Plaintiffs' motion should be denied in its entirety.

Date: Washington, D.C.
December 22, 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 22nd day of December, 2014, the foregoing Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion *in Limine* to Preclude Opinion Testimony By Fact Witnesses 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, lisa.hirakawa@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

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

Sidney Bashago sidney.bashago@dpw.com, ecf.ct.papers@davispolk.com, jennifer.kan@davispolk.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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