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 CLASS ACTION OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* NO. 1 TO EXCLUDE PLAINTIFFS' DESIGNATED EXPERT JEROME AVORN

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I. INTRODUCTION

Plaintiffs retained Jerome L. Avorn, M.D. to offer expert testimony regarding Bextra, Geodon, Zyvox and Lyrica and Pfizer Inc.'s ("Pfizer" or "the Company") promotion of those prescription drugs. Dr. Avorn will explain to the jury the difference between, and the impact of, promotion within the FDA's approved labels for these drugs and Pfizer's extensive system of off-label promotion. *See* June 10, 2014 "Avorn Report," ¶¶1-4.[1] Whatever defendants' perception of his opinions in this case hitherto, plaintiffs are setting the record straight now that ***Dr. Avorn is not opining on intent***. Thus, defendants' portrayal of Dr. Avorn's Report and testimony in this case as being about intent is inaccurate, and their citation to caselaw regarding intent is inapposite, and can be ignored. Memorandum in Support of Defendants' Motion *in Limine* No. 1 to Exclude Plaintiffs' Designated Expert Jerome Avorn (Dkt. No. 342) ("MIL No. 1") at 1-9. Contrary to defendants' assertions, no court has ever excluded Dr. Avorn as an expert. Rather, each of those courts confirmed Dr. Avorn's qualifications to testify as an expert on all subjects ***other than*** testimony about others' intent.

Defendants' mischaracterizations of Dr. Avorn's opinions as "narrating" evidence and as "personal" opinions should also be summarily dismissed. Dr. Avorn's opinions in this case, based on his analysis of the deposition testimony and documents evidencing defendants' off-label promotional tactics of Pfizer's prescription drugs, will assist a jury in understanding, *inter alia*, what is "on-label" versus "off-label," what makes a Pfizer-sponsored activity promotional, and how and why those promotional activities may constitute off-label promotion. His testimony will streamline the trial and simplify the case for the jury.

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[1] Attached as Ex. 1 to the Declaration of Ivy T. Ngo in Support of Plaintiffs' Opposition to Defendants' Motion *in Limine* No. 1 to Exclude Plaintiffs' Designated Expert Jerome Avorn ("Ngo Decl."), filed herewith.

Further, defendants' attempt to discredit Dr. Avorn's expertise despite his ***35 years*** of experience as a research physician studying prescription drugs, physician prescribing practices and pharmaceutical company promotion, including publishing 482 peer-reviewed articles on those subjects, fail. Specifically, Dr. Avorn has extensive experience researching how physicians' prescription drug choices are impacted by pharmaceutical companies' promotion. His research involved, *inter alia*, assessing pharmaceutical companies' promotional practices, their influence on continuing medical education of physicians and contact with physicians in training to influence their knowledge about prescription drug benefits and risks. He has published hundreds of peer-reviewed articles on these subjects. His opinions in this case regarding Pfizer's prescription drugs and the associated promotional activities are clearly within the realm of his expertise, and his qualifications have been accepted by other courts. *See, e.g.*, *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2000 U.S. Dist. LEXIS 9037, at *2 (E.D. Pa. June 20, 2000) ("Dr. Avorn is highly qualified in [his] areas of expertise."); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 550 (S.D.N.Y. 2004) (accepting "Dr. Avorn's expertise in pharmacoepidemiology"). Further, as required by Federal Rule of Evidence 702 and *Kumho*, Dr. Avorn derived his opinions in this matter by employing "the same level of intellectual rigor" that he does when conducting research or analyzing data as a research physician or teaching as a professor at Harvard Medical School. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). No more is required.

In light of Dr. Avorn's extensive experience and unchallenged qualifications, the soundness of his methodology and the relevance of his opinions, defendants' MIL No. 1 to exclude his opinions and testimony as inadmissible, irrelevant and prejudicial under Federal Rules of Evidence 401, 402, 403 and 702, should be denied.

II. DR. AVORN'S OPINIONS ARE RELEVANT AND WILL ASSIST THE JURY

Contrary to defendants' insinuations, Dr. Avorn is ***not*** offering any opinions as to intent. Dr. Avorn confirmed that he will not offer an opinion on Pfizer or Pfizer management's intent at his deposition, testifying that he "had no way of knowing what was in their mind" and "was not in [their] closed-door meetings." Ngo Decl., Ex. 2 at 313:6-13, 308:24-309:5. Rather, as stated in his Report, Dr. Avorn will opine based on his considerable experience and expertise "that Pfizer did in fact engage in a pervasive and consistent campaign" of inappropriate off-label marketing activities related to Bextra, Geodon, Zyvox and Lyrica. Avorn Report, ¶¶1-4. Dr. Avorn's opinions are relevant and probative of plaintiffs' claims.

For example, at issue are whether defendants' statements that Pfizer "observes all requirements of the [FDA]" and that the growth of Lyrica was "fueled by strong efficacy" were materially false and misleading. *See* Dkt. No. 304, Attachment 1, FMS Nos. 2, 4, 16, 18, 26, 31, 34, 38; Avorn Report, ¶¶13-15. His testimony will assist the jury in understanding that, in fact, Pfizer had and was promoting its prescription drugs for purposes unapproved by the U.S. Food and Drug Administration ("FDA") and of no proven scientific benefit to patients. *See, e.g.*, Avorn Report, ¶¶13-15, 17-18, 22 ("Pfizer's actions in marketing Bextra, Geodon, Zyvox, and Lyrica . . . were striking in the manner in which the Company sought to increase its revenues by directing its sales representatives to promote its drugs for uses and in doses for which they were not approved – and generally, for which they had no solid evidence of an acceptable benefit-risk relationship."). In addition, Dr. Avorn's opinions give credence to plaintiffs' allegations that defendants misled investors as to the materially adverse risks Pfizer faced as a result of improper off-label promotion. *See, e.g.*, Avorn Report, ¶¶14, 39 (Pfizer was operating in an "'increasingly difficult and hostile

environment' . . . as a result of the ongoing Department of Justice investigation."). [2] Accordingly, Dr. Avorn's opinions will assist the jury in understanding the evidence and determining the facts at issue. Fed. R. Evid. 401, 402 and 702.

Furthermore, Dr. Avorn's expertise generally in "marketing and communication strategies in relation to prescription drug use" and particularly in distinguishing between proper, balanced "'academic detailing'" versus improper "commercially-influenced sales messages" will aid the jury in, *inter alia*, (1) understanding and evaluating the evidence related to Pfizer's promotion of Bextra, Geodon, Zyvox and Lyrica and the impact of such promotion on physician prescribing behavior and the Company's sales and (2) determining whether an activity is promotional and whether that promotional activity is improper. *See* Ngo Decl., Ex. 2 at 56:8-10; Avorn Report, ¶¶7-8, 10; *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF 2011 U.S. Dist. LEXIS 145593, at *29-*31 (S.D. Ill. Dec. 16, 2011) ("Having an expert [testify about] the marketing of this [pharmaceutical] industry will undoubtedly assist the trier of fact."). Additionally, Dr. Avorn's expertise in "medication safety and side effect outcomes, pharmaceutical cost-effectiveness, and drug policy, particularly as it relates to FDA decisions concerning the approval of medications for specific indications and off-label prescribing" will assist the jury, *inter alia*, in understanding the difference between on and off-label promotion and the duty of care a pharmaceutical company has in selling its drug products in light of complex regulatory requirements. *See* Avorn Report, ¶¶9-10; *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 191 (S.D.N.Y. 2009) ("A lay jury cannot be expected to understand the complex regulatory framework that informs the standard of care in the pharmaceutical industry. [An expert]'s

[2] Unless otherwise noted, internal citations are omitted.

assessment of the reasonableness of [a pharmaceutical company]'s conduct in light of her experience and her understanding of FDA regulations will be helpful to the jury.").

Since Dr. Avorn is not opining about intent, none of the cases defendants reference involving his opinions being limited (but ***not*** excluded) are applicable.[3] As allowed under Rule 702, Dr. Avorn is "testify[ing] about facts from which the jury can infer intent," if so inclined. *Wells v. Allergan, Inc.*, No. CIV-12-973-C, 2013 U.S. Dist. LEXIS 185246, at *10 (W.D. Okla. Feb. 7, 2013) (citing *DePaepe v. GMC*, 141 F.3d 715, 720 (7th Cir. 1998)). The *Allergan* court explained that, as long as the record demonstrates a company's knowledge, an expert's testimony about that knowledge "is not speculation," but rather, "an analysis of the facts," which is permissible at trial. 2013 U.S. Dist. LEXIS 185246, at *10 (permitting at trial expert testimony regarding a pharmaceutical company's knowledge as supported by the record).[4]

Defendants also falsely accuse Dr. Avorn of "narrating" or "simply reading" to the jury the documents that reflect off-label promotion. Dkt. No. 342 at 1, 5-6. In fact, Dr. Avorn only discusses documents as context and support for his expert opinions, and the inferences that he drew from the

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[3] Dr. Avorn was permitted to testify regarding the subject matters within his expertise in all the cases defendants referenced. *See Diet Drugs*, 2000 U.S. Dist. LEXIS 9037, at *35 (allowing Dr. Avorn to "testify concerning risks and benefits of the diet drugs in issue"); *Skibniewski v. Am. Home Prods. Corp.*, No. 99-0842-CV-W-FJG, 2004 U.S. Dist. LEXIS 31014, at *19-*21 (W.D. Mo. Apr. 1, 2004) (same); *Rezulin*, 309 F. Supp. 2d at 550, 566 (limiting Dr. Avorn's opinions to those within his "expertise in pharmacoepidemiology"); *O'Neill v. Novartis Consumer Health, Inc.*, 147 Cal. App. 4th 1388, 1402 (2007) (at trial, "Dr. Avorn testified about the purpose and protocol of the Yale Study, and explained the content of the final report. He then testified about the FDA's response to the Yale Study"). Thus, their request for the exclusion of Dr. Avorn based on their mischaracterization of his opinions here is unfounded.

[4] Therefore, the cases defendants cite in support of their position regarding expert testimony on intent, state of mind and motive are factually inapposite. *See Bd. of Trs. of the Aftra Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686 (SAS), 2011 U.S. Dist. LEXIS 144382, at *28-*29 (S.D.N.Y. Dec. 15, 2011); *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005); *Taylor v. Evans*, No. 94 Civ. 8425 (CSH), 1997 U.S. Dist. LEXIS 3907 (S.D.N.Y. Apr. 1, 1997); *Andrews v. Metro N. C. R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989).

documents were informed by his 35 years of research experience and related specialized knowledge, which Rule 702 permits. *See Fosamax*, 645 F. Supp. 2d at 192 (allowing expert "commentary on any documents and exhibits in evidence [as] limited to explaining the regulatory context in which they were created, defining any complex or specialized terminology, or drawing inferences that would not be apparent without the benefit of experience or specialized knowledge"); *Allergan*, 2013 U.S. Dist. LEXIS 185246, at *10-*11 ("To the extent the facts relied upon by [an expert] in forming her opinions are relevant and not cumulative, [she] may include them in her testimony."). Moreover, the trial court "has broad discretion over the mode and order of examining witnesses and presenting evidence and may allow testimony in narrative form at trial if the Court finds that it would [be] helpful to the jury." *Yasmin*, 2011 U.S. Dist. LEXIS 145593, at *26-*27; *see also* Fed. R. Evid. 611; *United States v. Am. Express Co.*, No. 10-CV-4496 (NGG) (RER), 2014 U.S. Dist. LEXIS 87360, at *66 (E.D.N.Y. June 24, 2014) ("An expert witnesses [sic] may provide summary testimony 'to prove the content of voluminous writings' when appropriate under Federal Rule of Evidence 1006."). Dr. Avorn's summary testimony and related opinions regarding the evidence of off-label promotion will serve to streamline the trial and be extremely helpful to a jury given the over ***20,000 pages*** of documents and deposition testimony that form the basis of his opinions.

Defendants' argument that Dr. Avorn is offering personal opinions rather than expert opinions based on his specialized knowledge and/or experience is utterly unfounded. Dkt. No. 342 at 4-5, 8-9. Dr. Avorn offers no personal opinions among the opinions he lays out in his Report, so none of defendants' referenced caselaw is factually germane.[5] Unsurprisingly, defendants' only examples of purportedly personal opinions come from testimony which they elicited from Dr.

[5] *See LinkCo, Inc. v. Fujitsu Ltd.*, No. 00 Civ. 7242 (SAS), 2002 U.S. Dist. LEXIS 12975 (S.D.N.Y. July 16, 2002); *Rezulin*, 309 F. Supp. 2d at 547.

Avorn. Those are not opinions he is offering in this case. For example, defendants highlight a snippet of testimony in which defense counsel asked about Dr. Avorn's interpretation of certain documents he relied upon in his Report. Dkt. No. 342 at 8-9. However, during the line of questioning related to those particular documents, defense counsel never asked Dr. Avorn for the basis of his opinion. Ngo Decl., Ex. 2 at 89:7-100:12.[6] Thus, Dr. Avorn never had the opportunity to answer whether and how his specialized knowledge and experience researching pharmaceutical companies' promotional practices bore on his interpretation of those documents. Defendants also misinterpreted a part of Dr. Avorn's testimony as conceding that the inferences he drew from documents he relied upon did not "require [any] specialized knowledge or expertise, just common sense." Dkt. No. 342 at 4. What Dr. Avorn actually testified to was that while corporate intent is an inference which does not require an expert, "marketing and communication strategies in relation to prescription drug use" and "how pharmaceutical companies develop and deploy promotional and marketing activities" are subject matters which do require an expert. Ngo Decl., Ex. 2 at 56:8-10, 58:5-8. Because the caselaw is clear that opinions regarding pharmaceutical companies' promotional practices and the regulatory framework by which such practices are guided are not matters within the average juror's comprehension, Dr. Avorn's opinions on these matters are admissible under Rule 702. *See Yasmin*, 2011 U.S. Dist. LEXIS 145593, at *29-*31; *Fosamax*, 645 F. Supp. 2d at 191.

[6] In response to defense counsel's question about what a Pfizer employee meant in a particular document, Dr. Avorn again confirmed that he is not opining on intent: "I cannot know what she meant." Ngo Decl., Ex. 2 at 90:12-14.

III. DR. AVORN'S OPINIONS ARE SUFFICIENTLY RELIABLE UNDER RULE 702 AND *KUMHO*

A. Dr. Avorn Is Qualified to Give His Opinions in This Case

Dr. Avorn's opinions are tethered to his expertise. In contending otherwise, defendants blatantly ignore his qualifications detailed in his Report, his attached curriculum vitae, and his deposition testimony regarding his knowledge and experience with pharmaceutical companies' promotional practices through his own research and resulting peer-reviewed publications. Avorn Report, ¶¶7-10. "'Courts within the Second Circuit "have liberally construed expert qualification requirements" when determining if a witness can be considered an expert.'" *Arista Records LLC v. Lime Grp. LLC*, No. 06 CV 5936 (KMW), 2011 U.S. Dist. LEXIS 47416, at *9 (S.D.N.Y. May 2, 2011) (collecting cases). "'In considering a witness's practical experience and educational background as criteria for qualification, the only matter the court should be concerned with is whether the expert's knowledge of the subject is such that his opinion will likely assist the trier of fact in arriving at the truth.'" *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, No. 04 Civ. 7369 (LTS)(HBP), 2006 U.S. Dist. LEXIS 51869, at *15 (S.D.N.Y. July 28, 2006). An expert may be qualified by experience through his own research in the matters at issue. *See, e.g.*, *In re Actos® (Pioglitazone) Prods. Liab. Litig.*, MDL No. 6:11-md-2299, 2014 U.S. Dist. LEXIS 5289, at *26-*28 (W.D. La. Jan. 14, 2014) (finding physician expert "qualified by education, knowledge, and experience (including her own research)" to opine on matters associated with a pharmaceutical company's "marketing program and promotion pursued by the Defendants"); *Beastie Boys v. Monster Energy Co.*, 983 F. Supp. 2d 354, 364 (S.D.N.Y. 2014) (expert's "analysis of [defendant company's] marketing efforts . . . is based principally upon his experience and research in the world of marketing, which qualify him to opine on such matters").

In his Report, Dr. Avorn describes how his research career began in 1979 as he sought to improve physicians' prescription drug choices by understanding the impact of pharmaceutical company promotions on those choices, and how he has continued that work through today as an unpaid clinical consultant to a non-profit organization. Avorn Report, ¶7. For the past 35 years, Dr. Avorn's research has continued to focus on how physicians make drug prescribing choices, which has necessarily involved assessing "pharmaceutical companies' marketing practices, their influence on continuing medical education courses, and contact with physicians in training to influence their knowledge about medication benefits and risks." *Id.*, ¶8. Indeed, a review of just the titles of the 482 publications in his curriculum vitae reveals that he has extensively studied pharmaceutical companies' promotional practices and undoubtedly gained specialized knowledge and experience in the subject matter.[7] He has even authored a book relating to the benefits, risks and costs of prescription drugs, now in its eleventh printing. Avorn Report, ¶9. And during his deposition, Dr. Avorn explained his expertise in "marketing and communication strategies in relation to prescription drug use" and in FDA regulations with respect to the promotion of pharmaceutical products, as well as his "expertise in the pharmaceutical industry in terms of how pharmaceutical companies develop and deploy promotional and marketing activities." Ngo Decl., Ex. 2 at 26:2-11, 56:8-10, 58:5-8.

[7] *See, e.g.*, Avorn Report, Ex. B, Publication entries 5 ("Demarketing strategies in prescription drug use."); 73 ("Health promotion and disability prevention in the second fifty: Report of a Committee of the Institute of Medicine."); 257 ("Internet marketing of herbal products."); 259 ("Advertising and prescription drugs: promotion, education, and the public's health."); 267 ("The role of pharmacoepidemiology and pharmacoeconomics in promoting access and stimulating innovation."); 309 ("Torcetrapib and atorvastatin – should marketing drive the research agenda?"); 441 ("The food and drug administration has the legal basis to restrict promotion of flawed comparative effectiveness research."); 445 ("Conflict of interest reporting by authors involved in promotion of off-label drug use: an analysis of journal disclosures."); 464 ("FDA regulation of off-label drug promotion under attack.").

To the extent defendants object to Dr. Avorn's qualifications[8] or the quantity or quality of the evidence upon which he made conclusions,[9] such objections may be "properly explored on cross-examination and [go] to his testimony's weight and credibility – not its admissibility." *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995); *IBM v. BGC Partners, Inc.*, No. 10 Civ. 128 (PAC), 2013 U.S. Dist. LEXIS 59779, at *49 (S.D.N.Y. Apr. 25, 2013).

B. Dr. Avorn Employed the Same Intellectual Rigor as a Research Physician Working in the Medical Industry

Defendants incorrectly claim that Dr. Avorn's opinions do not have an analytical or scientific method, and thus do not meet the standard for reliability under Rule 702 and *Kumho.* Dkt. No. 342 at 9-11. The caselaw defendants reference in support of their logic is inapposite because they set forth the considerations relevant for expert scientific testimony under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591-93 (1993) rather than for non-scientific expert testimony in *Kumho*.[10] *See In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 197 n.16 (S.D.N.Y. 2011)

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[8] Defendants note that Dr. Avorn has not directly treated patients since 2000. Dkt. 342 n.3. Since 2000 though, Dr. Avorn has been supervising interns, residents and medical students as they treat patients at Harvard's main teaching hospital, and before 2000, he had been treating patients himself for 30 years. Ngo Decl., Ex. 2 at 17:1-10. Moreover, there is no "jurisprudence suggesting that a medical expert must be practicing full-time in order to present reliable opinion evidence at trial." *Actos*®, 2014 U.S. Dist. LEXIS 5289, at *27.

[9] Defendants' complaint that Dr. Avorn does not have personal knowledge of the underlying facts at issue in this case is irrelevant. Dkt. No. 342 at 7. This is why he is an expert. Dr. Avorn has based his opinions on facts and "data in the case that the expert has been made aware of" through his examination of the transcripts and documents listed in his Report. Fed. R. Evid. 703. Likewise, defendants' claim that Dr. Avorn's opinions are based upon documents and testimony that plaintiffs provided him, which included draft documents and did not include all possible documents or facts, is irrelevant. Dkt. No. 342 at 5, 10. Dr. Avorn's opinions only need be "based on sufficient facts or data," which they are. Fed. R. Evid. 702. Indeed, they are based on his consideration of more than 700 documents and 24 deposition transcripts. Avorn Report, Ex. A (Documents Considered).

[10] *See Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (describing factors to consider under *Daubert* and analyzing medical expert under *Daubert*); *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 04-md-1628 (RMB) (MHD), 2009 U.S. Dist. LEXIS 97289, at *55-*56 (S.D.N.Y. Sept. 30, 2009) (analyzing expert economist under *Daubert*).

(Hellerstein, J.). The central issue that Dr. Avorn is opining on in this case – whether Pfizer's promotional activities constituted inappropriate off-label promotion of the Company's prescription drugs, in violation of FDA regulations – is not susceptible to evaluation by a scientific formula or mathematical equation. Rather, the issue involves determining, *inter alia*, what makes an activity promotional and how and why certain promotional activities are inappropriate. Accordingly, to satisfy the reliability requirement under Rule 702, Dr. Avorn needed to have analyzed the documents and transcripts provided to him with "the same level of intellectual rigor that characterizes the practice" of a research physician examining and analyzing data in the medical industry. *Kumho* 526 U.S. at 152. Dr. Avorn did precisely that to reach his opinions in this case.

Not only does Dr. Avorn have considerable experience and expertise in conducting research in the medical industry (*see supra*, 8-9), he founded and has led the Division of Pharmacoepidemiology and Pharmacoeconomics at one of Harvard's main teaching hospitals for the past 16 years, which provides "post-graduate and post-doctoral training in pharmacoepidemiology" to students and physician-trainees and hosts "international scholars from around the world on a visiting basis who seek to learn about advanced methods in pharmacoepidemiology and pharmacoeconomics." Avorn Report, ¶5.[11] To suggest that Dr. Avorn did not apply "the same level of intellectual rigor" to analyzing and scrutinizing the evidence in this case as he does to analyzing data and/or scientific literature in conducting his research and teaching is unwarranted and unfounded. Dkt. No. 342 at 10.

[11] In contrast, defendants' own expert, Dr. Sunil Panchal, purportedly offers rebuttal testimony to Dr. Avorn's Report regarding pharmaceutical companies' promotional activities based on his "experience" as an anesthesiologist and professor in anesthesiology, oncology or critical care medicine, anecdotal evidence and nothing else. *See* Ngo Decl., Ex. 3 at 31:11-32:24 ("Advisory Boards are not a promotional environment"); Ngo Decl., Ex. 4 (Expert Report of Dr. Sunil Panchal, Ex. A).

Defendants' concerns about how many and what documents Dr. Avorn reviewed to reach his opinions and how much he knew about how documents were created or distributed within Pfizer go to the weight, not the admissibility of his opinion. *See Bee v. Novartis Pharm. Corp.*, 18 F. Supp. 3d 268, 304-05 (E.D.N.Y. 2014) (finding that "questions concerning the accuracy or credibility" of evidence relied upon by an expert and whether he considered certain facts or factors in reaching his opinion "may serve as valuable ammunition for countering [his] opinion, once given on the stand" but "are insufficient . . . for purposes of establishing that [his] opinion . . . should be deemed inadmissible altogether"). As courts in this Circuit have noted, "lapses in memory are traditionally challenged through cross-examination and do not render [expert] opinion testimony unreliable." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 716 F. Supp. 2d 220, 227 n.45 (S.D.N.Y. 2010). Moreover, his Report clearly sets forth his opinions as to his interpretation of the evidence in this case.

C. The Probative Value of Dr. Avorn's Opinions Outweigh any Possible Prejudice

Defendants state that "no one disagrees that certain employees violated Pfizer's prohibitions against off-label marketing," yet defendants intend to call both expert witnesses as well as current and former employees in an attempt to minimize the extent of the Company's off-label promotion of Bextra, Geodon, Lyrica and Zyvox. Dkt. No. 342 at 11. Defendants conveniently ignore that whether their off-label promotional practices were systemic is at issue in this trial. Since Pfizer's promotional practices and the regulatory framework by which such practices are guided will not be obvious to the average juror, the jury will actually be ***more*** confused if Dr. Avorn is ***not*** permitted to testify and help them better understand the case. *See Yasmin*, 2011 U.S. Dist. LEXIS 145593, at

*29-*31; *Fosamax*, 645 F. Supp. 2d at 191.[12] Furthermore, while plaintiffs share defendants' concerns regarding a long and complicated trial, defendants have not offered to stipulate to the facts relating to the off-label promotion in this case. Consequently, plaintiffs must prove at trial, *inter alia*, off-label promotion of the prescription drugs at issue as well as the risks the Company faced as a result. The probative value of Dr. Avorn's opinions thus outweigh any possible prejudice to defendants because his testimony regarding whether Pfizer's promotional practices were improper, what impact those practices had on prescriptions and what safety risks patients faced as a result are highly relevant to plaintiffs' allegations and will aid the jury in understanding the evidence and determining facts in issue. *See supra*, §II.

IV. CONCLUSION

For the foregoing reasons, this Court should deny defendants' MIL No. 1 in its entirety.

DATED: December 22, 2014

Respectfully submitted,

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[12] None of the cases defendants cite require the exclusion of Dr. Avorn's opinions. *See Daubert*, 509 U.S. at 595-96 (while "Rule 403 permits the exclusion of relevant evidence . . . [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"); *United States v. Hatfield*, 685 F. Supp. 2d 320, 324 (E.D.N.Y. 2010) (excluding evidence that did ***not*** relate "to the actual crimes charged"); *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (excluding ***unrelated*** "earlier bad act").

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 22, 2014.

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Case Number: 1:10-cv-03864-AKH
Filer: Mary K. Jones
Stichting Philips Pensioenfonds
Document Number: 403

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MEMORANDUM OF LAW in Opposition re: [341] MOTION in Limine *No. 1 to Exclude Plaintiffs' Expert Designated Expert Jerome Avorn*. . Document filed by Mary K. Jones(Individually), Stichting Philips Pensioenfonds. (Ngo, Ivy)

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