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 PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF OMNIBUS OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* NOS. 4-12

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STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

Defendants' motions *in limine* convincingly establish how little evidence would be admissible if the Court would simply allow them to rewrite plaintiffs' complaint and reframe plaintiffs' theories of liability. That trial would consist of little more than presenting statements of defendants' choosing, putting defendants on the stand to say they relied on lawyers plaintiffs were not allowed to depose, and joint closing arguments commending Pfizer for "one of [its] most important advantages in global business": "the legacy of [its] 150-year history" of "[c]ompliance with all relevant statutes and rules."[1] Plaintiffs would prefer to prosecute their own allegations and theories of liability, which will not demand a prolonged trial, so long as the Court (1) holds defendants to their promise that they would not be "invoking or relying upon any advice provided by Covington regarding the Government Investigations" (Dkt. No. 172 at 35 n.30), and (2) precludes defendants from denying what they have already admitted.

Once placed in the proper context, it is readily apparent that defendants' motions *in limine* are baseless.

II. STATEMENT OF FACTS

A. What This Case Is Really About

Because defendants commit so many motions to a false narrative of this case, a recap is in order. On January 26, 2009, Pfizer[2] shocked investors with the announcement of a 90% drop in earnings caused by the largest criminal resolution in U.S. history:

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[1] Ex. 1 at PFE DERIV 00013228. All Exhibits referenced herein are attached to the Declaration of Jason A. Forge in Support of Plaintiffs' Memorandum of Law in Support of Omnibus Opposition to Defendants' Motion *in Limine* Nos. 4-12, filed concurrently herewith, unless otherwise noted.

[2] All references to "Pfizer" or the "Company" refer to Pfizer Inc. and/or its wholly owned subsidiaries.

> For fourth-quarter 2008, Pfizer posted reported net income of $266 million, a decline of 90% compared with the prior-year quarter, and reported diluted EPS of $0.04, a decrease of 90% compared with the prior-year quarter. Fourth-quarter 2008 results were impacted by a $2.3 billion pre-tax and after-tax charge resulting from an agreement in principle with the Office of Michael Sullivan, the United States Attorney for the District of Massachusetts, to resolve previously disclosed investigations regarding allegations of past off-label promotional practices concerning Bextra, as well as other open investigations.

Ex. 2 at 6.

This is primarily an omissions case, and the foregoing announcement was a shock to investors because it was a materialization of a risk that defendants' materially false and misleading statements and assurances had deceptively downplayed for years, including the following:

- "In a time when the news media is full of stories of business leaders and companies whose actions have engendered public suspicion and mistrust, Pfizer truly stands apart. Pfizer is proud of our record of compliance. Compliance with all relevant statutes and rules is both the legacy of our 150-year history and one of our most important advantages in global business."[3]

- "'As the Department of Justice has acknowledged, Pfizer voluntarily and fully self-disclosed the off-label promotion of Genotropin by a Pharmacia subsidiary before Pharmacia was acquired by Pfizer,' said Allen Waxman, senior vice president and general counsel. 'Pfizer's marketing and promotion practices are not involved in the settlement. The company has internal controls to guard against these types of practices.'"[4]

- "Although ***we believe we have substantial defenses*** [to the government investigation of Bextra and other matters (collectively the "government investigation")], 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."[5]

Pfizer also failed to reserve for any losses from the government investigation or to disclose a range of potential losses.

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[3] Ex. 1 at PFE DERIV 00013228.

[4] Ex. 3.

[5] Ex. 4 at 22.

Having chosen to speak on these topics, defendants were obligated to be both accurate and complete. They were neither. For example, throughout the class period, defendants concealed the fact that the heart of the government's Bextra investigation was off-label promotion. Yet, the off-label focus of the investigation is what gave the government its greatest leverage against Pfizer because it carried with it the consequence of automatic debarment if Pfizer was convicted of a felony, which is a risk with which "people who are acting as good fiduciaries don't play," according to Pfizer's own lawyer. Ex. 5 (O'Connor Depo.) at 112:6-7. And when defendants provided the government with a summary of the same investigation, which summary Pfizer's General Counsel considered accurate and complete, defendants acknowledged that the investigation concerned a "'complaint alleging the company promoted Bextra off-label.'" Ex. 6 (Lankler Depo.) at 41:10-12.[6]

Despite proclaiming a competitive advantage attributable to their compliance with all statutes and specifically assuring investors that they had voluntarily reported the pre-acquisition off-label-promotion activities of Pfizer's subsidiary, that they had internal controls to guard against off-label promotion, and that they believed they had "substantial defenses" to the government investigation, defendants concealed all of the following:

- "Plaintiffs have testimony from Pfizer and the individual defendants themselves that they were informed off-label promotion had occurred, and documents confirming that fact." Dkt. No. 355 at 6 (***defendants'*** Motion *in Limine* No. 5 (footnotes omitted)).

- From February 2002 through April 2005, Pfizer promoted Bextra for uses that were not within its approved labeling, including (a) for acute pain, (b) for pre-operative and post-operative surgical pain, and (c) as opioid sparing in the context of surgery. Ex. 7 at 51:10-17.

- Pfizer "promoted Bextra at dosages higher than the approved dosages for certain indications." Ex. 7 at 51:17-18.

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[6] Unless otherwise noted, internal citations are omitted and emphasis is added throughout.

- Pfizer "introduced a drug [Bextra] into interstate commerce [without] adequate directions for these off-label uses and dosages." Ex. 7 at 51:19-21.

- Pfizer "promoted Bextra with an intent to defraud or mislead." Ex. 7 at 51:22-23.

- "[C]ertain members of [Pfizer's] sales force promoted Bextra with false and misleading claims, including [that it] had no dose proportional increase in hypertension and edema." Ex. 7 at 52:1-4.

- "[C]ertain members of [Pfizer's] sales force [submitted] to their own supervisors false, fake requests indicating that doctors had requested off-label information when, in fact, they had not. And then there was follow-through in providing medical information letters to those doctors." Ex. 7 at 52:5-9.

- The gain from Pfizer's off-label promotion of Bextra was $664 million. Ex. 8 at 2.

B. Defendants' Awareness

If defendants are willing to stipulate to their awareness of all the foregoing facts throughout the class period including, the pervasiveness of Pfizer's management-driven off-label promotion, perhaps some time could be saved (of course, each individual defendant's knowledge would be limited to the relevant period of his tenure with Pfizer). While plaintiffs will not hold their collective breath for such a stipulation, the good news is that proving defendants' awareness of this information or their reckless indifference[7] to it will not take long because of the compelling and undisputed pre-class period evolution of the government investigation and the steady march toward the inevitable throughout the class period.

1. FDA's Surprising Limited Approval

Pfizer sought the approval of Bextra for, among other indications, acute pain, pre-operative pain and opioid-sparing in the context of surgery and in doses up to 40 mg.[8] In November 2001, the

[7] Scienter can be established by a showing of either defendants' conscious misbehavior or recklessness. *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000). Recklessness can be established by proof that defendants knew or should have known that they were misrepresenting material facts related to the corporation. *Id.*

[8] Ex. 9 at BEX001360555; Ex. 10 at BEX005818115.

U.S. Food and Drug Administration ("FDA") denied approval of Bextra for these uses. Ex. 9 at BEX001360555; Ex. 10 at BEX005818115. Instead, the FDA limited its approval to 10 mg for osteoarthritis ("OA") and rheumatoid arthritis ("RA") and 20 mg for primary dysmenorrhea ("PD"). Ex. 9 at BEX001360555; Ex. 10 at BEX005818115. Among the concerns the FDA raised for dosing Bextra higher than 10 mg daily was that "[a]t higher total daily doses, the findings of more hypertension and edema are frequently reproduced." Ex. 11 at BEX004849786. This was a stunning disappointment for Pfizer and one that jeopardized billions of dollars of expected revenues. Ex. 12 at Cawkwe-G 10000176217. Given the significance of this development, and the consequences, defendants were either aware of it or they were recklessly indifferent to it.

2. Felony Off-Label Promotion of Neurontin

In late 2003 or early 2004, Pfizer was negotiating a Corporate Integrity Agreement ("CIA") as part of a plea deal to resolve a criminal case against its Warner-Lambert subsidiary. Ex. 6 (Lankler Depo.) at 14:1-9. On May 13, 2004, Pfizer entered into a felony plea agreement to resolve the Neurontin off-label promotion case (the Warner-Lambert entity would actually plead guilty). Ex. 13. It agreed that under the United States Sentencing Guidelines, the gain from the off-label promotion was $150 million and the fine would be $240 million (Ex. 13 at 2-3); it also agreed to a $190 million civil settlement (Ex. 13 at 6) and to a side letter that bound Pfizer to a CIA with the Office of the Inspector General ("OIG"), which required defendants to supply the OIG with "data on the off-label use of products [and] the percentage of off-label sales" of any products identified by the OIG.[9] Ex. 14 at PFE DERIV 00006968; Ex. 15 at PFE DERIV 01039752. The government's sentencing memorandum in the Neurontin case walked through the methodology used to reach the gain figure upon which the parties had agreed. Ex. 16 at 46-50. In its reporting of the Neurontin

[9] *See* Ex. 14 at PFE DERIV 00006968.

resolution, Pfizer emphasized that the criminal conduct had been committed by a subsidiary ***prior*** to Pfizer's acquisition of it and that Pfizer had fully cooperated with the government's investigation. Ex. 17 at 6. This reinforced defendants' mantra of ***Pfizer's*** business advantage through law abidingness.

3. Bextra Off-Label Promotion

In February 2004, while Pfizer was still negotiating the Neurontin resolution, including the CIA, the DOJ informed it that a *qui tam* complaint had been filed alleging the off-label promotion of Bextra and that the government was investigating the allegations. Ex. 18 at KPMG-PFIZ-DS 053290; Ex. 19 at PFE-JONES 00103712-13. Pfizer disseminated a company-wide document hold for Bextra-related documents. Ex. 20. Defendants were aware that a felony off-label conviction would mean automatic debarment and would have absolutely devastating consequences for Pfizer. *See, e.g.*, Ex. 6 (Lankler Depo.) at 22:2-5; Ex. 21 (McKinnell 2014 Depo.) at 46:5-14. The DOJ identified the *qui tam* relator as John Kopchinski, and defendants had full access to the witnesses and documents (*e.g.*, emails and promotional materials) from the relator's Southeast Region. Ex. 22 at PFE DERIV 00066668; Ex. 23 at PFE-JONES 00006992-93. By July 15, 2004, Pfizer had identified the relevant areas of inquiry for its investigation as including witness interviews, call notes, sampling practices, and sales force surveys. Ex. 22 at PFE DERIV 00066668; Ex. 23 at PFE-JONES 00006992-93. As it turns out, each of these areas of inquiry revealed evidence of extensive off-label promotion. Given the recent Neurontin plea, the CIA, defendants' statements regarding Pfizer's business advantage through law abidingness, and the devastating consequences of Pfizer suffering a felony misbranding conviction, defendants were either aware of this information or they recklessly did not ask for it.

Pfizer widely promoted Bextra for the very uses and doses the FDA had rejected. Pfizer's message was that "'Bextra can be used pre- and post- operatively.'" Ex. 24 at Levy-L 10000300174. Pfizer's sales force understood the message to sell Bextra for acute pain. By August 2004, more than 50% of Bextra 20 mg samples "ha[d] been going to providers who don't typically treat primary dysmenorrhea," the only indication for which 20 mg doses were approved. Ex. 25 at BEX 0060062253.

On November 16-17, 2004, Pfizer's outside criminal investigation counsel, Covington & Burling LLP ("Covington"), made a presentation to the DOJ concerning evidence of the Company's illegal promotional activities, gathered during an internal investigation. Ex. 26 at BEX 000000059; Ex. 23 at PFE-JONES 00006993-94. Pfizer's investigation confirmed the systemic and pervasive off-label promotion of Bextra, as alleged in the *qui tam* complaint. For example, Pfizer's sales force surveys found that its District Managers "find specific reference to OA, RA and PD needlessly restrictive." Ex. 26 at BEX 000000099. Pfizer also acknowledged that its plans had been to co-position Bextra and Celebrex to capitalize on the broader pain market of 135 million pain sufferers versus only 3 million OA/RA patients with GI risk. Ex. 26 at BEX 000000114-15. Despite the FDA's specific rejection of Bextra for peri-operative use, Pfizer revealed training materials, including samples, that explicitly encouraged sales representatives to get Bextra added to hospital surgery protocols. Ex. 26 at BEX 000000187-95. Far from the patients suffering from Bextra's approved indications of arthritis or primary dysmenorrhea, Pfizer acknowledged that Bextra's target patient was the "Weekend Warrior," aged "34-49, male skew." Ex. 26 at BEX 000000124. In addition, physician surveys revealed that Pfizer's marketing strategy had successfully positioned Bextra for off-label use for general acute pain: "almost all physicians clearly understood the intended use of . . . Bextra (for acute pain)." Ex. 26 at BEX 000000126, 200. Pfizer confirmed that one of its

three primary rationales for marketing Celebrex and Bextra together was to capitalize on a "Halo Effect! Physicians Assume Data Apply to Both Products." Defendants were either aware of all this information or so recklessly indifferent that they did not care to ask for it.

4. Unprecedented, and Unlawful, Document Deletion and Alteration

Between December 2004 and February 2005, Covington interviewed several Pfizer sales representatives, who confirmed that their District Manager had directed them to alter and delete electronic documents related to the off-label promotion of Bextra. Ex. 19. This document destruction was an unprecedented event at Pfizer (Ex. 27 (Kindler Depo.) at 40:6-15), each defendant was aware of it (either about when Covington learned of it or shortly after starting with Pfizer),[10] and Pfizer was concerned that the government would perceive this as evidence of consciousness of guilt (which it was). Ex. 6 (Lankler Depo.) at 74:24-75:3.

Given the significance of this event, upon learning of it, each defendant was obligated to make fundamental inquiries that would have revealed the following:

- The deleted and altered documents themselves clearly demonstrated off-label promotion, including surgical protocols calling for Bextra in 20 mg doses (off-label both in terms of usage and dosage). Exs. 29-30.
- Many emails demonstrating that one of Pfizer's eight Regional Managers for Bextra and multiple District Managers were actively pushing sales representatives to promote Bextra for off-label uses. Ex. 31. For example, by early 2003, Pfizer's sales force was told to market Bextra to "anyone that uses a scalpel for a living" (Ex. 32), and Pfizer's managers were running contests offering prizes for sales representatives. Ex. 33.
- Many call notes, demonstrating extensive off-label promotion. Ex. 34.
- A Northeast Region Product Action Guide that included as a Bextra "Core Message" that "there is no dose proportional response to hypertension and edema." Ex. 35.

[10] *See, e.g.*, Ex. 28 (Levin 2014 Depo.) at 19:19-20:3.

On September 26, 2005, Pfizer gathered all of the evidence related to its document-destruction investigation, including the documents themselves and the memoranda of the employees' interviews, which Pfizer described as "confessions," and turned over everything to the government. Ex. 19. At this point, Pfizer's commission of the off-label promotion violation was undeniable and a massive payment to resolve the government investigation was inevitable. Defendants were either aware of all of the foregoing information or they were recklessly indifferent to learning it. *See, e.g.*, Ex. 28 (Levin 2014 Depo.) at 18:21-22 ("I have no reason to doubt that I wouldn't [sic] receive any information I asked for.").

5. Government Presentations

Even if defendants had recklessly failed to investigate the extent of Pfizer's off-label promotion, or to ask for the information from others charged with doing so, the government did it for them. In August and September 2006, AUSA Sara Bloom made two lengthy presentations to Pfizer. Consistent with the information Pfizer had gathered over the previous two years, these presentations summarized evidence that Pfizer had produced to the government. Like Pfizer's own investigation plan, call notes were a major focus of the government's presentations, which included dozens of slides quoting call notes by Pfizer's sales representatives throughout the country. Ex. 36 at DOJ000002-30, 000093-104, 000187-90, 000329-33. Consistent with the *qui tam* complaint allegations and exhibits, as well as with the deleted and altered documents, these call notes reflected the repeated promotion of Bextra for usages and dosages that the FDA had explicitly rejected: for general acute and pre/post/peri-operative pain. Ex. 36 at DOJ000002-30. Indeed, AUSA Bloom presented statistics gathered from Pfizer's call notes that demonstrated that the Company's sales representatives referred to off-label indications during sales calls with physicians at least as often as they referred to on-label indications. Ex. 36 at DOJ000190.

AUSA Bloom also presented an analysis of call-note data that indicated that Pfizer's sales representatives had given out 20 mg Bextra samples in over 1.3 million sales calls to physicians who would not typically prescribe medication for patients suffering from PD (*e.g.*, surgeons, cardiovascular specialists and dentists), which demonstrated that Pfizer had promoted 20 mg Bextra for unapproved indications. Ex. 36 at DOJ000230.

Perhaps most seriously, AUSA Bloom quoted call notes from different Pfizer sales representatives in different states across the country that reflected the promotion of Bextra with the false claim that Bextra had no dose-related increases in hypertension and edema. Ex. 36 at DOJ000093-104. This false representation was a "Core Message" in the Northeast Region, where the document destruction had occurred. Ex. 35. Yet any such representation directly contradicted the FDA's express concerns and observations that Bextra users did experience dose-related increases in hypertension and edema. *See* Ex. 11 at BEX004849786. In fact, defendants' own criminal law expert admitted that he was unaware of ***any*** defenses, let alone "substantial defenses," for such conduct. Ex. 37 (Theodorou Depo.) at 64:23-65:11. Again, given what was at stake for Pfizer, the $430 million Neurontin resolution, the CIA, the assurances to investors about the business advantage from Pfizer's law abidingness, and its substantial defenses to the government investigation, as well as the ready availability of all the information the government presented, defendants were either aware of this information or they recklessly chose not to ask for it.

6. $664 Million in Gains from Bextra Off-Label Promotion

AUSA Bloom's presentation also included prescription writing statistics for Bextra. Ex. 36 at DOJ000200-04. Pfizer had access to even more data, as the CIA required it to be prepared to supply the OIG with "data on the off-label use of products [and] the percentage of off-label sales" of any products identified by the OIG. Ex. 14 at PFE DERIV 00006968. This is precisely the type of

data used to calculate the gain in the Neurontin case (Ex. 16 at 46-50), which was the exact same offense, and it is the same type of data used to calculate the $664 million gain that Pfizer agreed resulted from its off-label promotion of Bextra. Ex. 7 at 7:19-11:6 (government explains parties' agreed-upon calculations), 12:9-17 (Pfizer's counsel agrees with $664 million figure), 28:3-7 (Pfizer's representative agrees to figure, under oath).

7. Pfizer's Off-Label Promotion of Geodon, Lyrica and Zyvox

Pfizer's off-label promotion did not stop with Bextra, nor did the government investigation of the Company's promotional tactics. By November 2002, Pfizer's senior sales and marketing managers instructed the sales force to market Geodon for various unapproved uses (including, but not limited to, borderline personality disorder, depression, excessive compulsive disorder, post-traumatic stress disorder, dementia, bi-polar maintenance and pediatric/adolescent conduct disorders).[11] Pfizer also paid speakers hundreds of thousands of dollars to influence other physicians to write Geodon off-label, including for unapproved patient populations (children and the elderly), unapproved doses (exceeding 160mg per day), and for indications not approved by the FDA.[12] The inevitable subpoena from the DOJ arrived in December 2007.[13]

Similarly, Pfizer's sales force promoted Lyrica off-label by, among other things, claiming the drug was superior to Neurontin (an unsubstantiated claim) and for the use by surgeons despite its label being limited to neuropathic pain associated with shingles and diabetes, and later,

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[11] Ex. 38 (Westlock Depo.) at 27:10-30:12; Dkt. No. 303, ¶332.

[12] *E.g.*, Ex. 39; Ex. 40 at FLAG0037336 (notes of "pearls from [Dr. Risch's] talk" in January 2003 include "Children will benefit from G[eodon]," "if partial response to G[eodon], go as high as 240 to 300"); Ex. 41 at PFE-JONES 00006131 (email attaching slides of Dr. Deutschman who had "approximately 700 patients on Geodon and [wa]s able to show the diagnosis (psychosis, bipolar, anxiety, unipolar depression, etc.), dose of Geodon (up to 480 mg QD), and the age of the patients (which ranges from age 3-88)").

[13] Ex. 42.

Fibromyalgia.[14] Given Pfizer's track record, and the off-label promotion of the drug, the subpoena *duces tecum* received from the DOJ in July 2007 could not have come as a surprise.[15]

Defendants' off-label promotion of Zyvox during the class period was also extensive. In July 2005, the FDA sent a Warning Letter to defendant McKinnell demanding that Pfizer cease making claims that Zyvox was superior to vancomycin because the claim was unsubstantiated. Pfizer informed the FDA it was instructing its sales force to stop making any superiority claims, and that it was reviewing all Zyvox promotional materials in order to address other FDA concerns. Ex. 50 (Attachment A), ¶6. Nevertheless, Pfizer continued to use these improper promotional tactics, instructing its sales force on September 30, 2005, that when detailing doctors, "[a]lways go back to Zyvox proven efficacy [and that] Zyvox is better than vancomycin."[16]

8. Waxman Assures Investors Pfizer Has Controls to Guard Against Off-Label Promotion

On April 2, 2007, Pfizer announced another criminal plea by another subsidiary. Despite the foregoing backdrop, Pfizer seized this opportunity not only to distance itself from the pre-acquisition conduct of its subsidiary, but to boast of its full and voluntary self-disclosure of the subsidiary's off-label promotion, as well as internal controls to guard against the very off-label practices defendants knew Pfizer had committed:

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[14] *E.g.*, Ex. 43 at LYR000049343-44, 349-57, 359-64, 366, 369-71, 374-76, 379-82; Ex. 44 at PFE-JONES 00027779, 783; Ex. 45 at LYRC-001220787 ("comparative claims like 'Lyrica is safer or more powerful that Neurontin'" were "discovered in the field"); Ex. 46 at LYR000003710, 712 (Pfizer's sales representatives "emphasized the following points during details": "[i]mproved efficacy relative to other [neuropathic pain] treatments (including Neurontin)"); Ex. 47 at LYRC-000675327 ("What's Working in the Field" was "[c]ompare & win vs. Neurontin"); Ex. 48 (sales representative questions "why and how we can justify calling on general surgeons with Lyrica")

[15] Ex. 49.

[16] Ex. 50 (Attachment A), ¶¶9-10 (Pfizer admitted that despite the Warning Letter and Pfizer's promise to cease, "Pfizer's sales personnel thereafter continued to make claims to physicians that Zyvox was superior to vancomycin").

> "As the Department of Justice has acknowledged, Pfizer voluntarily and fully self-disclosed the off-label promotion of Genotropin by a Pharmacia subsidiary before Pharmacia was acquired by Pfizer," said Allen Waxman, senior vice president and general counsel. "Pfizer's marketing and promotion practices are not involved in the settlement. The company has internal controls to guard against these types of practices."[17]

Making these statements at the same time that defendants were assuring investors Pfizer had "substantial defenses" to the government investigation of Bextra sent a clear message to investors that the government investigation must not involve off-label promotion, and even if it did, there was no way Pfizer committed the offense. Investors in a company that "'voluntarily and fully self-disclosed . . . off-label promotion'" and had "'internal controls to guard against these types of practices'" (Ex. 3) with respect to its drugs would be completely blindsided if it turned out that the Company had not only engaged in such practices for years, but did so to such an extent that it wound up having to pay the largest fine in U.S. history. This is no hypothetical. This is how defendants defrauded Pfizer's investors.

9. Defendants' False and Misleading Statements Continue Throughout 2008

Pfizer's march toward the inevitable, though concealed, massive resolution of the Bextra case continued throughout 2008. Among the major milestones defendants concealed from investors (along with the prior omissions they continued to conceal) were Pfizer's formal designation as a grand jury target (Ex. 51) and Pfizer-authorized prepared-to-recommend offers to resolve the government investigation that were in the hundreds of millions of dollars (Ex. 6 (Lankler Depo.) at 128:22-129:8, 176:11-177:24). Throughout 2008, however, defendants never wavered in their assurances as to Pfizer's business advantage due to its law abidingness and its supposed substantial defenses to the government investigation.

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[17] Ex. 3.

III. ARGUMENT

The heart of the government investigation was Pfizer's off-label promotion of Bextra, and the heart of this case is that defendants' statements and reserve decisions concerning that investigation deceptively downplayed the risk it posed. As the Court put it for defendants over three years ago:

> But the argument would be that the senior management knew [and] countenance[d] this sales practice, this marketing practice; and so they knew the vulnerability. And presumably they knew the criteria in the statute, and the likelihood that a successive fine would be larger th[an] previous fines. So they knew that these disclosures were inadequate.

August 9, 2011 Hearing Transcript at 20:22-21:2.

Defendants now seek to exclude evidence of precisely what the Court stated this case is about. Defendants seek to exclude evidence of "this marketing practice" and "the vulnerability." Dkt. No. 353 (Memorandum in Support of Defendant's Motion *in Limine* No. 4 to Exclude Argument and Evidence Related to Former Employees' Deletion of Electronic Documents); Dkt. No. 355 (Memorandum in Support of Defendants' Motion *in Limine* No. 5 to Exclude Evidence Related to Marketing and Alleged Off-Label Promotion of Pfizer Products); Dkt. No. 359 (Memorandum of Law in Support of Defendants' Motion *in Limine* No. 7 to Exclude Evidence Regarding the August 2009 Criminal Information and Plea Documents). And defendants seek to exclude evidence of the "previous fines." Dkt. No. 361 (Memorandum of Law in Support of Defendants' Motion *in Limine* No. 8 to Exclude Evidence or Argument Related to the Promotion of, and Settlement Agreements Regarding, Neurontin and Genotropin"). Over three years ago, the Court pointed out the obvious to defendants: that plaintiffs' theory is that Pfizer's rampant off-label marketing practices, the vulnerability it (including the overwhelming evidence of it) posed, and the fines imposed for prior similar conduct meant defendants "knew that these disclosures were inadequate." Yet here we are with a whole new set of law firms, not only refusing to acknowledge

the obvious, but aggressively denying it. For the reasons the Court stated over three years ago, as well as those set forth below, the Court should deny defendants' Motion *in Limine* Nos. 4-8 and 10.

Defendants' Motion *in Limine* Nos. 9, 11 and 12 should also be denied. In defendants' Motion *in Limine* No. 9 (Dkt. No. 364) defendants seek to exclude the Fifth-Amendment invocations of Pfizer's former Regional Manager Mary Holloway. But defendants' motion is based on their misunderstanding of the neutral adverse-inference instruction and plain disregard for the very case the Court cited for the parties on this issue. Defendants' Motion *in Limine* No. 12 (Dkt. No. 375) seeks to sidestep the Court's process for identifying claims and defenses the parties are pursuing or withdrawing. This maneuver is particularly inappropriate because the parties are presently working through the Court's process. Last, defendants Motion *in Limine* No. 11 (Dkt. No. 371) simply repackages as a motion *in limine* their erroneous claim on summary judgment that certain of their statements are not actionable as a matter of law.

A. Evidence Primer

Defendants' motions *in limine* are written as if any given piece of evidence is admissible as to no more than one issue (as defined by defendants) and no evidence may be admitted unless it irrefutably proves that one issue. As the Court knows, this is an impractically myopic perspective.

Federal Rule of Evidence 401 provides a very simple test for relevance:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Under Fed. R. Evid. 402, relevant evidence is admissible unless another rule, statute, or the Constitution provides otherwise. This is not rocket science. But defendants repeatedly misunderstand these fundamental rules, as well as Fed. R. Evid. 403 and 404(b).

1. Federal Rule of Evidence 403 Reaches Only *Unfairly* Prejudicial Evidence

Federal Rule of Evidence 403 provides the following:

> The court may exclude relevant evidence if its probative value is ***substantially outweighed*** by a danger of one or more of the following: ***unfair*** prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The main flaw with defendants' application of Fed. R. Evid. 403 is that they fail to recognize that:

> Rule 403 permits exclusion of relevant evidence on grounds of prejudice ***only where*** the prejudice would be ***unfair***. Unfairness does not result from the tendency of the evidence to prove an adversary's case. "Unfair prejudice," according to the Advisory Committee Note to Rule 403, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

United States v. Gutierrez, 181 F. Supp. 2d 350, 354 (S.D.N.Y. 2002) (footnote omitted); *see also United States v. Munoz*, 36 F.3d 1229, 1233 (1st Cir. 1994) ("The damage done to the defense is not a basis for exclusion; the question under Rule 403 is 'one of "unfair" prejudice – not of prejudice alone'")). "'[S]ince the trial judge is granted such a powerful tool by Rule 403, he must take special care to use it sparingly.'" *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983) (quoting 1 J. Weinstein and M. Berger, Weinstein's Evidence ¶403[01], at 403-7 (1982)).

The defendant in *Gutierrez* was charged with conspiracy to commit securities fraud and securities fraud (insider trading). 181 F. Supp. 2d at 351. He was a director and audit committee member of a publicly traded company ("Nalco") who purchased shares in Nalco shortly after Nalco received an acquisition proposal. *Id*. at 352. The defendant's uncharged relatives also purchased Nalco shares and they profited by over $3.4 million versus the defendant's profits of about $100,000. *Id.* The defendant moved to exclude evidence of his uncharged relatives' Nalco stock purchases. *Id.* at 353. The court rejected the defendant's motion, explaining that "[w]hile there is a risk of unfair prejudice based on jealousy or antipathy to the Ballesteroses' wealth, that risk does not substantially

outweigh the probative value of the evidence [due to the volume and timing of the trades]." *Id.* at 354; *see also United States v. Contorinis*, 692 F.3d 136, 144-45 (2d Cir. 2012) (affirming admission of trades of stranger to defendant-tippee because they had "arguable probative value in support of the credibility of [the cooperating tipper's] testimony that he shared common information with appellant").

Here, evidence that makes it more likely that defendants knew or recklessly disregarded the inevitability of a massive fine from the government's off-label promotion investigation is evidence that has a tendency to prove plaintiffs' case. That does not render such evidence ***unfairly*** prejudicial. In fact, unlike cases such as *Gutierrez* and *Contorinis*, the evidence defendants seek to exclude is not just probative. It is imperative. The only way to prove that defendants deceptively downplayed the risk posed by the government's investigation into Pfizer's off-label promotion is to present the circumstances of, and those surrounding, Pfizer's off-label promotion. That way, the jury can determine whether defendants "knew that the[ir] disclosures were inadequate" (or were recklessly indifferent to their inadequacy). Moreover, some of the evidence defendants seek to exclude is the very information whose omission rendered defendants' statements misleading. *See, e.g.*, *United States v. Levy*, No. S5 11 Cr. 62 (PAC), 2013 U.S. Dist. LEXIS 31968, at *6 (S.D.N.Y. Mar. 5, 2013) ("direct evidence" of charged crime "should not be excluded under a Rule 403 balancing").

2. Federal Rule of Evidence 404(b) Does Not Apply to Evidence Necessary to Complete Story at Trial

Rule 404(b) provides the following:

> (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

> (2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident . . . .

Fed. R. Evid. 404(b).

> "It is well established that evidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial."

United States v. Mostafa, 16 F. Supp. 3d 236, 250-51 (S.D.N.Y. 2014).

As was the case in *Levy,* direct evidence of an offense is not excludable under Rule 403 or 404(b), no matter how inflammatory it may be. The case of *United States v. Robinson*, 702 F.3d 22 (2d Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 1481 (2013), presents the perfect example. There, the defendant was found guilty of two counts of sex trafficking of a minor in violation of 18 U.S.C. §1591. *Id.* at 26. At Robinson's trial, his underage victim ("Jane Doe") testified that Robinson was her boyfriend, not her pimp, and that he had merely lived off her earnings as a prostitute, rather than facilitated her prostitution. *Id.* at 27. Over Robinson's objections, the District Court admitted evidence of (1) "several recorded telephone calls in which Robinson discussed his former, current, or prospective control of other prostitutes"; and (2) "recorded telephone calls [from prison] in which he threatened, among other things, to beat Jane Doe and to kill her if she were to leave him." *Id.* at 36-38. Even though Robinson was charged with prostituting only Jane Doe, the Second Circuit held that because Robinson argued at trial that Jane Doe was his girlfriend, "[e]vidence that Robinson was in the prostitution business and controlled prostitutes other than Jane Doe was therefore 'necessary to complete the story of the crime on trial.'" *Id.* at 37. Likewise, even though Robinson was not charged with sex trafficking by force and had already been arrested when he threatened Jane Doe if she were to leave him, the Second Circuit affirmed the admission of the

evidence of the threats "because it addressed the nature of the relationship between Robinson and Jane Doe" and, therefore, "related to material factual disputes at trial." *Id.* at 38; *see also United States v. Brand*, 467 F.3d 179, 197 (2d Cir. 2006) (noting "direct connection" between child pornography and pedophilia, affirming conviction where trial court allowed evidence of defendant's child pornography collection to prove his sexual interest in children).

Moreover, even where Fed. R. Evid. 404(b) applies, the Second Circuit "'follow[s] an inclusionary rule, allowing the admission of such evidence for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403 of the Federal Rules of Evidence.'" *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000). When applying that test, which is unnecessary here, it is important to keep in mind that the extent to which evidence is likely to inflame a jury is a relative concept. For example, in *Robinson*, "the evidence regarding the other prostitutes . . . was no more inflammatory than the child sex trafficking charges involving Jane Doe." 702 F.3d at 37-38 (citing *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) (holding that prior act evidence was not unduly prejudicial because, in part, it "did not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged")).

B. Evidence of Pfizer's Employees' Deletion and Alteration of Documents Demonstrating Off-Label Promotion Is Plainly Admissible (Response to Motion *in Limine* No. 4)

Defendants' fourth motion *in limine* seeks to exclude evidence of Pfizer's employees' deletion and alteration of documents demonstrating prevalent off-label promotion of Bextra. Dkt. No. 353. The omission of this information, or at least of the vulnerability it represented, is an actual basis for liability here. In other words, defendants seek to exclude from the jury the very evidence that plaintiffs claim they misleadingly excluded from investors. Defendants' request is the

equivalent of an accused child pornographer seeking to exclude from evidence the actual child pornography he is accused of creating. No case has ever entertained such nonsense. In *Brand*, the Second Circuit affirmed the admission of child pornography when it was not even the offense charged, but rather bore a direct connection to the charged pedophilia by proving the defendant's sexual interest in children. 467 F.3d at 197.

In terms of direct connections, beyond being a basis for liability, the document-destruction evidence is an integral part of the story here. This was an ***unprecedented*** event at Pfizer, coming within months of a *qui tam* complaint, the opening of a government investigation that posed the risk of crushing debarment, a $430 million payout for a different off-label offense (which, of course defendants also seek to exclude), and the commencement of a CIA. Under these circumstances, the document deletion and alteration had all the indicia of consciousness of guilt, which several witnesses have acknowledged to be a natural inference. *See, e.g.*, Ex. 52 (Block Depo.) at 232:13-19; Ex. 5 (O'Connor Depo.) at 37:13-38:22. And, in fact, Pfizer's investigation of the incident revealed overwhelming evidence of rampant off-label promotion – including the deleted documents themselves, which were entirely consistent with the *qui tam* allegations and call notes throughout the country. Yet defendants continued to beat the same drum of Pfizer's competitive advantage due to its law abidingness, as well as its substantial defenses to the government investigation.

It is beyond unreasonable for defendants to suggest, let alone argue, that this powerful evidence of the very conduct defendants denied occurred at Pfizer, and that confirmed the merits of the government investigation to which defendants assured Pfizer had substantial defenses, is not inextricably intertwined with plaintiffs' allegations concerning the adequacy of defendants' disclosures/assurances. It is equally indisputable that such evidence is critically important to defendants' knowledge or recklessness as to the deceptiveness of their disclosures/assurances.

Obviously, the more extensive Pfizer's off-label promotion was, and the more prominent the indications were that Pfizer was promoting off-label, the more likely it is that defendants were aware of it or recklessly chose not to be. *See, e.g.*, *Brink's, Inc. v. New York*, 717 F.2d 700, 710 (2d Cir. 1983) ("The key issue here was the ***extent*** of the thefts because it is only from this evidence that the jury could draw an inference regarding Brink's knowledge or negligence."). Similarly, the more extensive and flagrant the off-label promotion, the more likely the government would prosecute, particularly in light of the Neurontin conviction and CIA. If the evidence of other prostitutes and threats in *Robinson*, and the child pornography in *Brand*, bore a direct connection to the charges there, defendants here can raise no honest dispute as to the direct connection of the evidence concerning the document deletion and alteration.

Last, the only thing inflammatory about this issue is defendants' melodramatic description of it. Dkt. No. 353 at 5 (accusing plaintiffs of trying "to smear Defendants with the details surrounding Mr. Farina's actions and criminal conviction"). Pfizer issued a Bextra document hold after the government informed it of the off-label promotion investigation. One of its managers directed his subordinate sales representatives to violate the document hold by deleting and altering documents that demonstrated Pfizer's off-label promotion of Bextra. Pfizer learned of the deletion and alteration, investigated, extracted confessions from its employees, and turned over everything to the government. How does such evidence possibly carry "'undue tendency to suggest decision [***against defendants***] on an improper basis, commonly, though not necessarily, an emotional one[?]'" *Gutierrez*, 181 F. Supp. 2d at 354. It clearly does not. After all, in their own summary judgment motions, ***defendants*** affirmatively used this evidence to support their good-corporate-citizen narrative. *See, e.g.*, Dkt. No. 246 at 12-13 (Pfizer "turned over all investigation materials that would assist the government in prosecuting these individuals"); Dkt. No. 269 at 5-6 (McKinnell believed

the incident "had been 'reported [to the government] as good companies do.'") (alteration added by McKinnell). Compared to the multi-billion-dollar fraud defendants are accused of perpetrating, catching and turning over to law enforcement the employees who deleted and altered documents is child's play. *See, e.g.*, *Roldan-Zapata*, 916 F.2d at 804 (holding that prior act evidence was not unduly prejudicial because, in part, it "did not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged").

C. Evidence of Pfizer's Illegal Off-label Promotion of Pfizer Products Is Admissible Under Federal Rules of Evidence 401, 402, 403 and 404 (Response to Motion *in Limine* No. 5)

As set forth above, defendants' disingenuous attempt to recast plaintiffs' case as a simple dispute over the advice allegedly provided by their lawyers should be rejected by this Court. Defendants' widespread off-label promotion of their products is the very evidence that demonstrates falsity, materiality and *scienter*.

Defendants' remaining arguments with respect to the relevance of off-label promotions are simply a rehash of arguments made in both their motions to dismiss and their seven motions for summary judgment. Nevertheless, defendants raise these arguments yet again, restyling them as motions *in limine* now, forcing plaintiffs to play whack-a-mole.

1. Pfizer Had a Duty to Disclose Its Off-Label Promotion Practices

Defendants argue that they were under no duty to disclose their criminal conduct, relying on cases such as *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347 (2d Cir. 2010). Here, however, defendants chose to speak about the government investigation and the Company's purported strict adherence to the law in the sale of its products. Having chosen to speak, defendants had a "duty to be both accurate and complete." *Caiola v. Citibank, N.A.*, 295 F.3d 312, 331 (2d Cir. 2002). Defendants' duty applies "to the disclosure of criminal conduct to the same extent it applies

to the disclosure of any other material information." *In re Marsh & McLennan Cos. Sec. Litig.*, 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006); *see also* Dkt. No. 304 at 30-38.

In short, defendants' Motion *in Limine* No. 5 is simply an invitation to the Court to revisit the identical argument made in their summary judgment motion. *See* Defendant Pfizer Inc.'s Memorandum of Law in Support of Its Motion for Summary Judgment (Dkt. No. 246), §II.A., at 38-41. Their Motion *in Limine* No. 5 should also be denied. Dkt. No. 304 at 30-38.

2. Evidence of Defendants' Off-Label Promotion Is Relevant to Pfizer's False Claim of Having "Substantial Defenses" to the Government Investigation

Evidence of defendants' widespread off-label promotion is relevant, for example, to demonstrating the falsity of Pfizer's statement that it had substantial defenses to the government investigation. *See supra* at 3-4. The evidence of off-label promotion will also be part of plaintiffs' proof that defendants acted with ***scienter***. *See supra* at 21.

Nevertheless, plaintiffs are compelled to address the fallacy of certain statements made by defendants in support of their position. Defendants claim that "it is undisputed" that Covington, one of its investigations counsel, advised Pfizer that it had numerous legal and factual defenses. For the record, that purported fact is very much in dispute. What is undisputed is that defendants refused to waive the attorney-client privilege and thereby prevented plaintiffs from discovering what Covington was actually telling defendants about their chances. It is also undisputed that whatever Covington told defendants resulted in Pfizer paying the largest fine in U.S. history. Similarly, defendants assert that it is undisputed that Pfizer's securities lawyers advised defendants that the "substantial defenses" language in their SEC filings was appropriate. In fact, defendants concede that the securities lawyers did not provide the "substantial defenses" advice. *See* Dkt. No. 355 at 4. The

stark reality is that defendants' straw men for their defense, Block and Fox, were utterly incapable of giving such advice. *See* Dkt. No. 288 at 14-15.

3. Defendants' Off-Label Promotion of Geodon, Lyrica and Zyvox Is Relevant

Once again, defendants argue that the January 26, 2009 announcements did not mention Geodon, Lyrica and Zyvox by name. Now, defendants claim that this argument somehow precludes related evidence at trial. In short, defendants have re-filed their loss-causation-based motions for summary judgment, this time disguised as a motion *in limine*. *See, e.g.*, Dkt. No. 246 at 54-55; Dkt. No. 264 at 11-15. Defendants' Motion *in Limine* No. 5 on these grounds should be rejected for the same reasons as their motions for summary judgment. Dkt. No. 304 at 101-13.

4. Evidence of Defendants' Off-Label Promotions Is Admissible, Is Not Unfairly Prejudicial and Does Not Violate Federal Rule of Evidence 404(b)

Defendants' remaining arguments with respect to off-label promotion should also be rejected by this Court. *See supra* at 18-22. The documents and other evidence of off-label promotion are relevant. *Id*. Defendants' arguments based on Fed. R. Evid. 403 simply miss the mark. *See supra* at 16-18. Finally, the widespread off-label promotion of Pfizer products is part and parcel of this case. As such, it is intrinsic, as opposed to extrinsic evidence. Nevertheless, even if it were extrinsic evidence, its admission at trial would be completely justified under Fed. R. Evid. 404(b). *Supra* at 18-22.

D. Pfizer's Admissions Are Admissible (Response to Motion *in Limine* No. 7)

Defendants continue to waste the Court's time with their motion to exclude evidence of Pfizer's admissions, which includes an expressly unlimited laundry list of documents they seek to exclude: "These documents include, but are not limited to the government's charging information,

the government's sentencing memorandum, the plea hearing transcript, the letter to the court regarding the plea by Pharmacia, Pharmacia's sentencing memorandum, the plea agreement, the side letter, and the Corporate Integrity Agreement." Dkt. No. 359 at 1 n.1. Nevertheless, the only cases defendants cite are those that exclude statements from complaints, a party's own deposition, investigation reports, and from an unrelated arbitration decision. *Id.* at 2-3 (citing *D'Cunha v. Genovese/Eckerd Corp.*, 415 F. App'x 275, 278 (2d Cir. 2011) (excluding complaint, answer, and plaintiff's own deposition (offered by him)); *Park W. Radiology v. CareCore Nat'l LLC*, 675 F. Supp. 2d 314, 329 (S.D.N.Y. 2009) (granting ***both*** sides' motions to exclude unrelated complaint); *In re Blech Sec. Litig.*, No. 94 Civ. 7696(RWS), 2003 U.S. Dist. LEXIS 4650, at *26-*29 (S.D.N.Y. Mar. 26, 2003) (***admitting*** plea allocution and excluding statements from complaint); *United States v. Cruz*, 894 F.2d 41, 44 (2d Cir. 1990) (excluding investigation report); *SEC v. Badian*, 822 F. Supp. 2d 352, 356 (S.D.N.Y. 2011) (excluding criminal complaint to which defendant never pled concerning charges for which no one was ever convicted); *Cary Oil Co. v. MG Ref. & Mktg., Inc.*, 257 F. Supp. 2d 768, 773-74 (S.D.N.Y. 2003) (excluding "Unrelated Arbitration Decision").

As can be seen, defendants fail to cite a single case excluding evidence of an adversary's relevant admissions. That is because none exist, as Fed. R. Evid. 801(d)(2) expressly provides that statements of an ***opposing*** party (including its adoptive admissions), its representative, or its agent or employee are ***not*** hearsay. This is about as basic as hearsay rules get, and though defendants do not deny it, they fail to acknowledge their motion's incompatibility with this bedrock rule. The bottom line here is that plaintiffs will offer for the truth of the matter asserted only those statements that defendants' agents made or adopted. For example, plaintiffs would redact from the Information the allegations that Pfizer disputed, but leave in the allegations that Pfizer admitted. When offered by plaintiffs, Pfizer's agents' admissions at the plea hearing and in documents such as the plea

agreement are not hearsay. They are also unquestionably relevant. Indeed, this is some of the most probative evidence in the case. Throughout all of defendants' posturing about Pfizer's coveted business advantage due to its law abidingness and its supposedly substantial defenses to the government investigation, they knew Pfizer was on a collision course for a massive loss because:

- From February 2002 through April 2005, Pfizer promoted Bextra for uses that were not within its approved labeling, including (a) for acute pain, (b) for pre-operative and post-operative surgical pain, and (c) as opioid sparing in the context of surgery. Ex. 7 at 51:10-17.

- Pfizer "promoted Bextra at dosages higher than the approved dosages for certain indications." Ex. 7 at 51:17-18.

- Pfizer "introduced a drug [Bextra] into interstate commerce that lacked adequate directions for these off-label uses and dosages." Ex. 7 at 51:19-21.

- Pfizer "promoted Bextra with an intent to defraud or mislead." Ex. 7 at 51:22-23.

- "[C]ertain members of [Pfizer's] sales force promoted Bextra with false and misleading claims, including [that it] had no dose proportional increase in hypertension and edema." Ex. 7 at 52:1-4.

- "[C]ertain members of [Pfizer's] sales force [submitted] to their own supervisors false, fake requests indicating that doctors had requested off-label information when, in fact, they had not. And then there was follow-through in providing medical information letters to those doctors." Ex. 7 at 52:5-9.

- The gain from Pfizer's off-label promotion of Bextra was $664 million. Ex. 8 at 2.

In addition to Pfizer's admission in the plea agreement as to the $664 million gain, Pfizer's attorney's in-court affirmation followed the government's explanation of how it had been determined. Ex. 7 at 7:19-11:6. At other points in the plea hearing, Pfizer's attorney pointed out where Pfizer disagreed with the government's position, but at no point did he offer any disagreement whatsoever with the $664 million gain figure or the government's explanation as to how it was calculated. Therefore, the Court should admit the government's explanation for the context of Pfizer's lawyer's comments and as an adopted admission. "[A]n admission by silence is admissible if 'there are circumstances which render it more reasonably probable that a man would answer the

charge made against him than that he would not.'" *United States v. Aponte*, 31 F.3d 86, 87 (2d. Cir. 1994); Fed R. Evid. 801(d)(2)(B).

Because all of these admissions are in documents, it is silly for defendants to contend that this evidence will "needlessly lengthen the trial." Dkt. No. 359 at 3. This evidence will take less than two hours to present to the jury, yet it will cover tremendous ground. Accordingly, the Court should deny defendants' Motion *in Limine* No. 7.

E. Pfizer's Resolutions of the Neurontin and Genotropin Cases Are Plainly Necessary to Complete the Story at Trial (Response to Motion *in Limine* No. 8)

As the Court already observed, defendants "presumably . . . knew . . . that a successive fine would be larger th[an] previous fines." August 9, 2011 Hearing Transcript at 20:24-21:1. The "previous fines" to which the Court referred were the fines imposed in the Neurontin and Genotropin cases that defendants seek to exclude in their Motion *in Limine* No. 8. Dkt. No. 361. As set forth above, the total resolution in the Neurontin off-label promotion case was $430 million. A critical component of that resolution was the CIA that governed Pfizer's conduct throughout the class period and included, *inter alia*, Pfizer's obligation to provide the government with an annual summary of matters such as the government investigation of Bextra. The contrast between defendants' summary for the government (which acknowledged that the investigation was about "off-label promotion") and their disclosures for investors (which concealed that information) is compelling evidence of both the misleading nature of defendants' disclosures and their scienter. Moreover, Pfizer took the position with the government that the fine in the Bextra matter should be determined using the same gain methodology used in the Neurontin case, which Pfizer characterized as "analogous" to Bextra. Ex. 53 at PFE-JONES 00059190. This is important evidence regarding Pfizer's failure to book a loss for the government investigation because defendants asserted that a loss was not reasonably

estimable, despite their awareness of (or reckless indifference to) this readily available methodology for calculating damages.

It is even clearer that the Genotropin resolution is an integral part of the case. One of the most flagrantly misleading statements in this case is the one Waxman made in connection with the announcement of the Genotropin resolution:

> "As the Department of Justice has acknowledged, Pfizer voluntarily and fully self-disclosed the off-label promotion of Genotropin by a Pharmacia subsidiary before Pharmacia was acquired by Pfizer," said Allen Waxman, senior vice president and general counsel. "Pfizer's marketing and promotion practices are not involved in the settlement. The company has internal controls to guard against these types of practices."

Ex. 3. Making these statements at the same time that defendants were assuring investors Pfizer had "substantial defenses" to the government investigation of Bextra sent a clear message to investors that the government investigation must not involve off-label promotion, and even if it did, there was no way Pfizer committed the offense. After all, defendants were so upstanding that they "'voluntarily and fully self-disclosed . . . off-label promotion'" when they detected it, and they had "'internal controls to guard against these types of practices.'" Ex. 3. This statement provides a critical context for defendants' assurances.

Plaintiffs will not belabor the obvious here. Under the standards set forth in cases such as *Robinson* and *Brand*, and as defendants' motion confirms, no credible argument can be made that these resolutions are not an indispensable part of the story at trial in this case. Defendants do not cite a single case where a court even considered excluding relevant contextual evidence because it related to the misconduct of an individual ***other than*** the individual against whom the evidence and resulting context would be used. Dkt. No. 361 at 4-7 (citing *Huddleston v. United States*, 485 U.S. 681, 691 (1988) (other act was ***defendants'*** involvement in the sale of other stolen merchandise); *United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012) (other "acts" consisted of police officers'

testimony as to a combined 15-20 prior sightings of ***defendant*** and about half as many brief conversations with ***defendant***); *United States v. McCallum*, 584 F.3d 471, 477 (2d Cir. 2009) (***defendant's*** prior felony drug convictions); *Hynes v. Coughlin*, 79 F.3d 285, 292 (2d Cir. 1996) (other acts were ***plaintiff-prisoner's own*** disciplinary history); *Old Chief v. United States*, 519 U.S. 172, 181-82 (1997) (other act was nature of prior felony (assault causing serious bodily injury) where government rejected felon-in-possession ***defendant's*** offer to stipulate to felon status). Defendants have nothing.

Nor is there any risk whatsoever of unfair prejudice here. It is undisputed, and Pfizer's announcements clearly pointed out, that the criminal conduct at issue in these cases was committed ***prior*** to Pfizer's acquisition of the offending companies. How does such evidence possibly carry an "'undue tendency to suggest decision [***against defendants***] on an improper basis, commonly, though not necessarily, an emotional one[?]'" *Gutierrez*, 181 F. Supp. 2d at 354. Defendants do not articulate so much as a theory as to how plaintiffs could possibly use as "propensity" evidence the commission of crimes by entities before defendants had anything to do with them. There is no risk the jury's impression of defendants will suffer due to the crimes of entities with whom defendants had no affiliation. Rather, the jury will judge defendants by the evidence of the multi-billion-dollar fraud scheme they are accused of orchestrating. *See Robinson*, 702 F.3d at 37-38 ("the evidence regarding the other prostitutes . . . was no more inflammatory than the child sex trafficking charges involving Jane Doe"). Moreover, Pfizer used both cases to promote its supposed good corporate citizenship: "Pfizer voluntarily and fully self-disclosed the off-label promotion"; these "investigations [all concern allegations of] Warner-Lambert's promotion of Neurontin prior to Pfizer's acquisition of Warner-Lambert in [June] 2000. Pfizer has cooperated fully with these inquiries . . . ." Ex. 17 at 6.

Defendants plainly think they can give life to any meritless motion by simply adding to it a phrase such as "undue delay" (Dkt. No. 361 at 7), or one or more of its close cousins, including "delay the trial" (Dkt. No. 345 at 12), "require a time-consuming rebuttal" (Dkt. No. 342 at 11), and "needlessly lengthen the trial" (Dkt. No. 359 at 3). Defendants' baseless motions are wasting far more of the parties' and the Court's time than plaintiffs will need to present at trial ***all of the relevant evidence*** defendants illegitimately seek to exclude.

F. An Adverse Inference Instruction Is Entirely Appropriate for Holloway's Testimony (Response to Motion *in Limine* No. 9)

Defendants' Motion *in Limine* No. 9 (Dkt. No. 364) is simply the flip side of plaintiffs' motion to admit Mary Holloway's Fifth-Amendment invocations and for an adverse inference instruction. Dkt. No. 352. While plaintiffs may file a reply to defendants' opposition, defendants' own motion merits only two brief points in response. First, defendants' motion is based on a fundamental misunderstanding of the "adverse inference instruction," which is actually a misnomer because the instruction itself is neutral: A witness has a constitutional right to decline to answer a question on the ground that it may tend to incriminate her. However, you may, but need not, infer by such refusal that the answers would have been adverse to the witness's interest. *Brink's*, 717 F.2d at 707. At the October 30, 2014 hearing, this Court referred both sides to the Second Circuit's decision in *Brink's*, yet defendants argue against an instruction *Brink's* did not embrace and plaintiffs do not seek: "An adverse inference instruction ***against*** Defendants is totally inappropriate when, in fact, Ms. Holloway has withheld responses that may be favorable to Defendants." Dkt. No. 364 at 6. In light of the neutral instruction that plaintiffs are actually seeking, defendants' argument amounts to an admission that, as is true for most evidence, there is room for both sides to argue for an inference that favors them. Clearly, then, there would be no risk of unfair prejudice to defendants and

plaintiffs stand by their motion to admit Holloway's invocations, along with the neutral adverse-inference instruction that plaintiffs submitted.

The only other point that bears making in response to defendants' motion is another correction based on *Brink's*. Defendants contend that "[w]e are not aware of a single case in which the Fifth Amendment invocations of a former employee who is so far removed from a defendant-company's employment have been admitted against the company." Dkt. No. 364 at 3. Apparently defendants' awareness does not extend so far as to read the case that this Court mentioned and that they cite in their own brief, because in *Brink's*, the Second Circuit undoubtedly affirmed the District Court's decision to allow the City to question present ***and former*** Brink's employees about meter-money pilferage, even though they were expected to (and did) invoke their privilege against self-incrimination in response to such questions. *Brink's*, 717 F.2d at 707. Pfizer gave Holloway a $300,000 severance package, and it is believed to be footing the bill for her defense in the FDA's ongoing administrative proceeding against her. There is no indication that *Brink's* was so generous with its former employees, or that it was still providing them with benefits at the time of their invocations. Defendants' attempt to cast this situation as an outlier fails.

G. Survey and Call Note Evidence Should Not be Excluded Under Federal Rule of Evidence 403 (Response to Motion *in Limine* No. 10)

1. Physician Surveys Regarding Pfizer Sales Representatives' Contacts with Physicians and Sales Representatives' Call Notes Are Admissible

Pfizer sales representatives called on physicians throughout the relevant time period. The purpose of these contacts was to promote Pfizer's pharmaceutical products. During these promotional meetings, Pfizer sales representatives would "detail" Pfizer products. At trial, the evidence will show that Pfizer sales representatives engaged in massive off-label promotion of Pfizer

products in violation of the law. The evidence will also show that defendants knew of these widespread practices.

As set forth above, evidence of widespread, egregious off-label promotion demonstrates the falsity and materiality of defendants' false statements. Put simply, defendants' statements regarding the government investigation, the reasons for their products' success and the competitive advantage created by their unblemished history of, and ongoing commitment to, compliance with applicable laws are all disproved because Pfizer was actually engaged in widespread, unabated off-label promotion. Evidence of off-label promotion will also demonstrate defendants' ***scienter***.

Faced with this reality, defendants seek to exclude two types of evidence of the Company's widespread promotional practices: surveys produced by Pfizer documenting interviews with doctors regarding their interactions with Pfizer sales representatives and call notes maintained by Pfizer sales representatives on the Company's computer systems of this same type of interaction with doctors and other healthcare providers. Both the physician surveys and call notes are admissible at trial and defendants' hearsay objections should be overruled.

a. Physician Surveys

The physician surveys, which are colloquially referred to as verbatims, are admissible for four reasons: the surveys are admissible as non-hearsay to demonstrate that defendants were on notice of the widespread off-label promotion of Pfizer products; the surveys are alternatively admissible as state of mind evidence under Fed. R. Evid. 803(3); the surveys also qualify for admission under Fed. R. Evid. 807, the residual exception to the hearsay rule; and certain surveys are admissions by a party opponent under Fed. R. Evid. 801(d)(2).

Defendants' motion simply assumes that these physician surveys must be offered for the truth of the matter asserted. However, defendants' assumption causes them to leap over the obvious: the

surveys are admissible to demonstrate that defendants knew or should have known that Pfizer sales representatives throughout the country were promoting products off-label. If the physician surveys are offered simply to show that defendants received notice of these physician reports of off-label promotion, as opposed to being offered to prove that sales representatives were actually making these statements, the surveys are non-hearsay. Fed. R. Evid. 801(c)(2); *United States v. Dupree*, 706 F.3d 131, 137 (2d Cir. 2013) ("We have repeatedly held that a statement is not hearsay where, as here, it is offered, not for its truth, but to show that a listener was put on notice.").

The physician surveys put defendants on notice of their sales force's off-label activities. In fact, the evidence will show that both Pfizer's outside counsel and the government included physician survey data with respect to off-label marketing in presentations in the Bextra case between 2004 and 2006. The use of these surveys by Pfizer and the government demonstrates their importance in showing that defendants knew or should have known of the off-label activities. Certainly, defendants should have evaluated this evidence in analyzing the strengths of the government's case.

Moreover, Pfizer was required by the terms of its Neurontin CIA to obtain, review and monitor these surveys or verbatim reports.[18] As set forth in the CIA, Pfizer was required to analyze

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[18] The Neurontin CIA states:

> Each Reporting Period, Pfizer shall obtain commercially available non-Pfizer records reflecting the purported content and subject matter of detailing interactions between sales representatives and HCPs [healthcare providers] for the Covered Products (*e.g.*, ***Verbatims or similar records***). For each Covered Product, Pfizer shall randomly select one week within each of the first three quarters of the Reporting Period. For each Covered Product, Pfizer shall obtain records reflecting the purported content and subject matter of detailing sessions that occurred during the identified week in all regions across the United States. Pfizer shall review the records obtained and shall identify any instances in which the records appear to indicate that Covered Persons may have discussed and/or disseminated information about off-label uses of the Covered Products.

these results to "identify any instances in which the records appear to indicate that Covered Persons [sales representatives] may have discussed and/or disseminated information about off-label uses of the Covered [Pfizer] Products." Ex. 54 at 23. In short, one of the key uses of the verbatim surveys was to alert defendants to off-label marketing. This information was readily available to defendants. The surveys should be admitted, at a minimum, as non-hearsay.

However, the analysis of the admissibility of these surveys does not end here. Plaintiffs should also be permitted to offer these verbatim surveys as substantive evidence. In fact, defendants' hearsay objections with respect to the verbatim interviews of physicians are undermined by the very case law that they rely on in their moving papers. Defendants argue that these surveys are vulnerable to "the very risks of 'faulty perception,' 'faulty memory,' and 'faulty narration' that the hearsay rule is intended to combat." Dkt. No. 368 at 4. Defendants point the Court to *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999), in purported support of their position.

In *Schering*, the Second Circuit reversed the trial court's decision to exclude verbatim reports at a preliminary injunction hearing on hearsay grounds. The Court of Appeals held that to the extent the reports were offered to show the doctors' impressions of the sales representatives' main messages during the visit, they were admissible. The Second Circuit described the doctors' impressions as "classic states of mind and, as such, [they] fall under Rule 803(3)." *Id.* at 228. The impressions left with physicians by Pfizer sales representatives is important evidence. Once again, Pfizer routinely obtained verbatim surveys, both pursuant to the CIA and to monitor how the Company's messaging was being received by physicians. If defendants had reviewed these verbatim surveys, they would have certainly learned of a massive potential problem.

Ex. 54 at 22-23.

However, the Court of Appeals in *Schering* did not simply stop with its finding that the physician surveys were admissible under Fed. R. Evid. 803(3). The Court of Appeals also opined that verbatim reports may also be admissible under the residual exception to the hearsay rule, Fed. R. Evid. 807, contrary to the trial court's ruling. On remand, the trial court was ordered to assess the admissibility of these surveys under Fed. R. Evid. 807. Ultimately, the trial court found that all five of the surveys at issue were admissible under the residual exception. *Schering Corp. v. Pfizer Inc.*, No. 98 Civ. 7000 (LMM), 2000 U.S. Dist. LEXIS 7071 (S.D.N.Y. May 24, 2000). The trial court's decision to admit all five surveys on remand came over Pfizer's objection in that case. Pfizer argued then, as it does now, that the verbatim survey evidence should not be admitted because the surveys could not answer the question whether the prohibited message was delivered by Pfizer's sales representatives. The District Court rejected Pfizer's argument and found that the surveys were trustworthy and necessary.[19]

As in *Schering*, the verbatim surveys at issue here are also admissible under the residual exception. First, unlike the *Schering* case in which some of the physician surveys were commissioned by Pfizer's adversary in that litigation, all of the verbatims here were commissioned by Pfizer. Second, Pfizer officers testified in this case to the Company's internal use of the verbatims. For example, J. Patrick Kelly, Pfizer's former Vice President of U.S. Pharmaceuticals, testified that a verbatim was a "report of what a doctor stated that they had heard in a given sales presentation from a given representative." Ex. 55 (Kelly Depo.) at 32:9-19. Mr. Kelly also testified

[19] Contrary to Pfizer's argument that this evidence will create a mini-trial sideshow, Judge McKenna, on remand, found that the survey evidence would actually reduce the length of the hearing. The Court noted that the verbatim surveys would be more probative than the testimony of physicians that a party could bring to court and held: "'[g]reat practical inconvenience or the need for extended trial time or the expense of more conventional methods of proof will support use of survey evidence.'" *Schering*, 2000 U.S. Dist. LEXIS 7071, at *12 (quoting 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, §901.11[3][a] (2d ed. 2000)).

that in the marketing and marketing research departments, "there certainly were occasions where those [verbatims] were used . . . in order to . . . help prepare what might be possible strategies for promoting and selling the products." Ex. 55 (Kelly Depo.) at 33:1-9. Similarly, Dee Mahoney, a former Pfizer Senior Vice President of Sales and member of the Company's Compliance Committee, specifically identified verbatims as one of the methods used by Pfizer sales managers to monitor Pfizer's sales representatives' promotional practices stating:

> Q. And if you wanted to determine how a drug was being promoted by your sales force, what are the means by which you could go about to determine that?
>
> A. You could attend field rides. You could do some type of monitoring. You could speak to, you know, people on the sales force, people in management.
>
> Q. When you say "monitoring" does anything come to mind in terms of how you would monitor the sales force?
>
> A. You could look at call notes.
>
> Q. Any other sources of information?
>
> A. ***We sometimes relied on verbatim message recall***.

Ex. 56 (Mahoney Depo.) at 124:20-125:9. And Mahoney also confirmed that verbatims were used to monitor compliance, testifying with respect to claims made regarding Zyvox:

> Q. And how did you monitor the compliance?
>
> A. One of the key things we did was verbatim research, asking physicians if they recalled hearing comparative claims versus vancomycin.

Ex. 56 (Mahoney Depo.) at 214:9-13.

As this testimony shows, the physician surveys were created for Pfizer and were relied on internally to strategize product promotion and to monitor whether the sales force was detailing physicians off-label. Standing alone, Pfizer's reliance on the surveys demonstrates their reliability. In fact, simply reviewing some examples of the physician surveys at issue confirms both Pfizer's internal use of these verbatims and their reliability.

For example, Pfizer launched Lyrica in 2005. Shortly thereafter, Pfizer commissioned Hawk Partners to "gather early feedback from physicians following Lyrica's recent launch." Ex. 57 at LYR000047314. Between October 19, 2005 and May 31, 2006, Hawk Partners produced three reports for Pfizer. Exs. 46, 57-58. In its reports, Hawk Partners noted that Pfizer had commissioned it to conduct qualitative research with physicians to "understand their early impressions of Lyrica." Ex. 46 at LYR000003684. The Hawk Partners surveys demonstrated that Pfizer sales representatives were detailing off-label. Most of the surveyed physicians had been detailed between two and six times. Among other things, the doctors reported that their drug reps emphasized Lyrica's indications, but also made claims that Lyrica was superior to Neurontin – which was impermissible. The final report from Hawk Partners also demonstrated that certain Pfizer sales representatives "spent barely a minute or two talking about epilepsy," focusing instead on its use for general neuropathic pain, an unapproved indication. Ex. 58 at LYR000003740. Again, Pfizer had been told by its own agent that physicians were reporting impressions consistent with off-label promotion by its sales representatives.

Pfizer also commissioned physician surveys with respect to Bextra. *See*, *e.g.*, Ex. 59. One such survey, prepared by NOP World at Pfizer's request in 2004, was circulated to Pfizer sales executives to be passed along to Pfizer regional sales managers. Pfizer adopted the report, as Amy Jenner, the Company's Vice President of its Searle sales division, noted that "[t]he results suggest that the field is doing an excellent job in delivering the clinical message." Ex. 59 at BEX001063992. According to the report, 892 physicians who had been recently detailed by Pfizer sales representatives were surveyed between June 18, 2004 and July 10, 2004. Ex. 59 at BEX001063997.

The objectives of the Bextra physician survey were, among others, to "[d]etermine message recall on a national level," "[o]btain information on detail specifics" and "[a]ssess sales rep

performance." Ex. 59 at BEX001064001. The survey demonstrated that physicians were being detailed for off-label indications for Bextra. The main messages recalled by doctors included:

- "fast and powerful and can be used first line for moderate pain"

* * *

- "newest data showing acute pain relief without increased cardiac risk"
- "Strong pain relief for broad spectrum of pain without drowsiness or other side effects"
- "Excellent for post-operative pain"
- "excellent 24 hour pain relief."

Ex. 59 at BEX001064020.

This survey, like many others, demonstrated that physicians were being detailed off-label by sales representatives. The reliability of the surveys, a key criteria for admission under Fed. R. Evid. 807, is corroborated by other evidence. Pfizer ultimately admitted, as part of its plea agreement, that it had achieved a $664 million gain from its off-label promotion of Bextra. Ex. 7 at 7:19-11:6, 12:9-17, 28:3-7. Pfizer's admission regarding the off-label promotion of Bextra corroborates the physician survey evidence and further demonstrates its trustworthiness and reliability.

Pfizer also commissioned physician surveys from Verispan and ImpactRx regarding Lyrica detailing from September 2005 at Lyrica's launch to October 2008. These verbatims include Exs. 43-44. Ultimately all Lyrica verbatims were produced by Pfizer to the Boston U.S. Attorney's Office during the course of the government investigation. Ex. 60 (December 13, 2008 letter from Pfizer's counsel to the AUSA Sara Bloom from the U.S. Attorney's Office in Boston). This production by Pfizer is a strong indicia of reliability.

The physician surveys were commissioned by Pfizer, used by Pfizer for both marketing strategy and compliance, and corroborated by other evidence. The surveys should be admitted for all purposes under Fed. R. Evid. 807.

Finally, Pfizer commissioned many of these surveys. Prepared by Pfizer's agents for Pfizer, they should also be admitted as party admissions under Fed. R. Evid. 801(d)(2). *Schering*, 189 F.3d at 238.

b. Call Notes

Defendants suggest, but fail to actually argue, that call notes prepared by Pfizer sales representatives regarding their contacts with doctors and other healthcare providers are hearsay. Defendants are mistaken. Pfizer's call notes are admissible both as business records under Fed. R. Evid. 803(6) and as admissions by a party opponent under Fed. R. Evid. 801(d)(2). The testimony with respect to the creation and use of Pfizer call notes was unambiguous. Former Pfizer sales representative Alex Alvarez provided the foundation for Pfizer's call notes:

> Q. Mr. Alvarez, while you worked on Mr. Farina's supervision, did you use call notes?
>
> A. Yes.
>
> Q. What were call notes?
>
> A. Call notes were a requirement for us to detail what we discussed for either another representative within Pfizer that's going to follow up with that physician, has an understanding where that call was left off, or if myself were to follow up, I can go back and see where I left off on that conversation.
>
> Q. How would you create those calls notes, what would you do mechanically?
>
> A. So when you documented that you made a call on a physician, you would go into their system, I don't remember what it was called, I believe it was Sherlock, you go in, you enter in the information of the products you discussed and on the bottom there was a place for you to enter notes and it was encouraged that you document your conversations.
>
> Q. When you say their system, you mean Pfizer's system?

A. Correct.

Ex. 61 (Alvarez Depo.) at 38:11-39:13.

Other Pfizer witnesses confirmed Mr. Alvarez's testimony with respect to the creation, maintenance and use of call notes. *See*, *e.g.*, Ex. 62 (Friedman Depo.) at 73:3-13 (call notes "were used as a post-call recollection of the conversation a representative had with the specific doctor, health care provider"; the sales rep entered the information with respect to the contact); Ex. 63 (Christopher Dowd Depo.) at 131:18-132:10 ("I would have reviewed call notes in various jobs at Pfizer, yes. Because they're captured – or they were at the time captured in the computer. The rep would call on the physician, and they would add some notes."); Ex. 38 (Westlock Depo.) at 90:10-19, 95:16-97:1 (describing call notes as "a valuable system that would help keep the continuity of the call together . . . [t]hose notes all were shared in the system[, s]o you could see what the previous representative, if they wrote good call notes, you could see what was done in the previous call").

In short, Pfizer's call note system generated prototypical business records: call notes were made at or near the time of the contact by someone with knowledge; kept in the course of Pfizer's regularly conducted activity; and preparing the call notes was a regular practice at Pfizer. Fed. R. Evid. 803(6). As such, they are admissible.

Courts have consistently recognized that call notes qualify as business records. *Zeneca, Inc. v. Eli Lilly & Co.*, No. 99 CIV. 1452 (JGK), 1999 U.S. Dist. LEXIS 10852, at *5-*8 (S.D.N.Y. July 19, 1999) (holding call notes written by Eli Lilly sales representatives about their meetings and detailing of doctors concerning a drug "satisfy the business records exception to the hearsay rule"); *United States v. Tischler*, No. S2 11 CR 424 (NRB), 2013 U.S. Dist. LEXIS 122933, at *21-*25 (S.D.N.Y. Aug. 23, 2013) (holding Department of Labor case notes documenting telephone calls with employers are admissible as business records under Fed. R. Evid. 803(6)), *aff'd*, *United States*

v. Tischler, 572 F. App'x 63, 66 (2d Cir. 2014); *Muller-Paisner v. TIAA*, 528 F. App'x 37, 41 n.1 (2d Cir. 2013) (holding call summaries prepared by defendant's employees after contact with customers are admissible as business records pursuant to Fed. R. Evid. 803(6)).

However, another ground exists for the admissibility of the call notes. The call notes were prepared by Pfizer employees within the scope of their employment. Therefore, the call notes are not hearsay in the first instance. The call notes are admissions by a party-opponent. Fed. R. Evid. 801(d)(2). And the courts agree that call notes are admissions. *Zeneca*, 1999 U.S. Dist. LEXIS 10852, at *7-*8; *Muller-Paisner*, 528 F. App'x at 41 n.1.

Defendants cite *Romano v. Howarth*, 998 F.2d 101 (2d Cir. 1993), in support of their hearsay arguments. *Romano* does not help their cause. In *Romano*, the plaintiff, a state prisoner, alleged that correctional officers beat him. At trial, the District Court allowed the admission of "progress notes" prepared by a nurse, which reflected that an unidentified corrections officer had informed the nurse that plaintiff said that he hurt his hand by punching a wall – not as a result of a beating by correctional officers. The Second Circuit reversed on other grounds, but added that the notes should not be admitted at the new trial. The Court of Appeals observed that the source of the information was presumably one of the defendants – who clearly had a "motive to fudge the truth of what really happened in Romano's cell." *Id*. at 108. *Romano* is irrelevant to verbatim surveys commissioned by Pfizer of doctors' meetings with sales representatives or call notes prepared by Pfizer employees. Neither the doctors nor the sales representatives had a motive to falsely claim that off-label promotion had taken place. If anything, Pfizer sales representatives would have a motive to deny their off-label detailing.

The verbatim physician surveys and call notes are admissible. Defendants' hearsay objections should be overruled.

H. Defendants' Motion *in Limine* No. 11 Challenging Whether Their Statements Are Actionable Is Not Well Taken

Defendants also ask the Court to revisit its finding, in upholding the operative complaint in this action, that defendants' statements are actionable. Defendants claim, for the same reasons as in their motion to dismiss papers filed over three years ago and in their summary judgment papers filed less than eight weeks ago, that statements at issue in this litigation are not actionable as a matter of law. Defendants are wrong for the same reasons plaintiffs identified in their opposition to the motion to dismiss and in opposition to summary judgment. Dkt. Nos. 81, 304.

Defendants' attempts to seek a do-over of the decision by this Court, at the pleading stage, under the guise of a motion *in limine*, are without merit. *Pavone v. Puglisi*, No. 1:08 C 2389 (MEA), 2013 U.S. Dist. LEXIS 9140 (S.D.N.Y. Jan. 23, 2013) (rejecting defendants' summary judgment arguments in a motion *in limine* where defendants offered no compelling reason to depart from prior rulings). This Court's opinion in *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419 (S.D.N.Y. 2004), does not give them a license to seek a ruling on summary judgment for the second time. Dkt. No. 371 at 1. Their "motion . . . double[s] as a motion for summary judgment." *Great Earth*, 311 F. Supp. 2d at 432. Defendants claim they seek "an order precluding Plaintiffs from advancing as a basis for any Defendant's liability evidence or testimony in connection with [] statements that are inactionable as a matter of law," but what they really ask is for the Court to weigh evidence to make such a determination. Dkt. No. 371 at 1-2 (citing Dkt. No. 246 at 38-52). As such, "the motion is procedurally improper, in that it calls upon the Court to weigh the sufficiency of the evidence in support of the parties' claims and defenses." *Bowers v. NCAA*, 563 F. Supp. 2d 508, 531 (D.N.J. 2008); *see also Young v. Kadien*, No. 09-cv-6639-FDG, 2013 U.S. Dist. LEXIS 117836, at *4 (W.D.N.Y. Aug. 20, 2013) (motion *in limine* "'is not a proper vehicle for a party to ask the Court to weigh the sufficiency of the evidence to support a particular claim or defense'"); *C & E Servs.,*

Inc. v. Ashland Inc., 539 F. Supp. 2d 316, 323 (D.D.C. 2008) ("a motion *in limine* should not be used to resolve factual disputes or weigh evidence").

Putting aside the impropriety of their motion *in limine*, the Court has already ruled as a matter of law at the pleading stage that plaintiffs' statements are actionable over defendants' strenuous objections. Dkt. No. 84. There has been no intervening change of law. Whether a statement is materially false and misleading requires factual context, which is absent from defendants' instant motion. *Matrixx Initiatives, Inc. v. Siracusano*, __ U.S. __, 131 S. Ct. 1309, 1312 (2011) ("assessing . . . materiality is a fact-specific inquiry, requiring consideration of . . . source, content, and context"). There are no bright-line materiality tests. *Id*. at 1318-21. Nor are there any categorical rules automatically excluding information as immaterial. *Id*. at 1319. The factual context in this case is described in §II above and includes evidence that Pfizer was under a CIA to prevent off-label marketing, the strength of the DOJ investigation into the off-label promotion of Bextra that was disclosed to Pfizer, and internal Pfizer documents acknowledging that it was "likely [Pfizer would] be forced to reach some form of settlement.'" *See, e.g.*, Dkt. No. 304 at 4, 29, 32-35, 41. For these reasons, and the reasons (as well as evidence) set forth in opposition to defendants' motion for summary judgment, defendants' Motion *in Limine* No. 11 should be denied.

Plaintiffs will briefly revisit the arguments set forth in plaintiffs' opposition to defendants' motion for summary judgment to explain why defendants' motion fails. It is within the province of the jury to decide whether defendants' statements are materially false and misleading. Under the facts at issue here, for example, a reasonable jury could find materiality can be decided as a matter of law only when an alleged omission is "'so obviously [un]important to an investor, that reasonable minds cannot differ on the question of materiality.'" *TSC Indus. v. Northway, Inc.*, 426 U.S. 438,

450 (1976). The statements at issue, considered in context, are actionable for the following reasons, among others:

- When a corporation chooses to speak, it has a "duty to be both accurate and complete." *Caiola*, 295 F.3d at 331; *Slayton v. Am. Express Co*., 604 F.3d 758 (2d Cir. 2010) (defendants may not tell half-truths). "[A] corporation has a duty to disclose uncharged criminal conduct to prevent conveying, through its own public statements, a false impression to an investor." *Menkes v. Stolt-Nielsen S.A*., No. 3:03CV409 (DJS), 2005 U.S. Dist. LEXIS 28208, at *23 (D. Conn. Nov. 10, 2005); *see also United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1200-01 (2d Cir. 1993) (duty to disclose conduct which involved felonies, enormous potential fines, breach of prior settlements and government exclusion). Dkt. No. 304 at 30-52.

- When Pfizer told investors in its SEC filings that the extent of Pfizer's Legal Proceeding and Contingencies Disclosures with respect to Bextra was that "'we received requests for information and documents concerning the marketing and safety of Bextra and Celebrex from the Department of Justice and a group of states attorneys general,'" this statement was materially misleading in light of the facts known at the time to defendants. These facts included: (i) a grand jury investigation; (ii) attempted destruction of evidence of off-label promotion of the drug; and (iii) massive evidence of off-label promotion of Bextra uncovered by the government based on Pfizer's own documents. Further, Pfizer's Bextra disclosures stood in stark contrast to Pfizer's disclosures of other government investigations relating to "'improper payments,'" "'under criminal investigation[s]'" and promotion of products for "'indications other than those approved by the FDA.'" Dkt. No. 304 at 33-36.

- Pfizer's SEC filings were materially false because the Company failed to reserve for its contingent liabilities in its class period SEC filings in accordance with GAAP despite the fact that Pfizer knew: (i) by September 2005 that it would be forced to settle with the DOJ for huge sums of money or risk debarment; and (ii) the existence of an objective methodology to estimate the range of loss. *See In re MF Global Holdings Sec. Litig*., 982 F. Supp. 2d 277, 312 (S.D.N.Y. 2013); *see also City of Westland Police & Fire Ret. Sys. v. Metlife, Inc.*, 928 F. Supp. 2d 705, 713, 717 (S.D.N.Y. 2013) (no reasonable basis for reserves where defendants knew reserves did not account for the company's obligations). Dkt. No. 304 at 36-38.

- Pfizer's present-tense statements that "we believe we have substantial defenses" to the Bextra government investigation in SEC filings are actionable. *In re Nortel Networks Corp. Sec. Litig*., 238 F. Supp. 2d 613, 629 (S.D.N.Y. 2003) (safe-harbor does not apply to present tense statements mixed with future tense statements). Having spoken, Pfizer omitted material facts regarding the weaknesses in its case based on, *inter alia*, the compelling evidence that the government presented to Pfizer in August and September 2006. *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 160-61 (S.D.N.Y. 2008) (company's assertion that it would

"vigorously pursue" its patent rights was not accurate or complete). Moreover, even if defendants' statement is considered a "belief," defendants had no reasonable basis based on evidence such as the Company's acknowledgement that: (i) it was "likely to be forced to reach some form of settlement";[20] and (ii) it was "'almost certain/highly likely'" that it would face severe penalties for off-label promotion. Dkt. No. 304 at 39-41; *see In re IBM Corporate Sec. Litig.*, 163 F.3d 102, 107-09 (2d Cir. 1998); *Slayton*, 604 F.3d at 774-75.

- Defendants' statements to investors regarding compliance with requirements and rules, including that: (i) "'Pfizer observes all requirements of the FDA'"; (ii) "'[c]ompliance with all relevant statutes and rules is both the legacy of our 150-year history and one of our most important advantages in global business'"; and (iii) Pfizer had the internal controls "'to guard against'" off-label promotion, are actionable. *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 (PAC), 2014 U.S. Dist. LEXIS 85683, at *7, *13 (S.D.N.Y. June 23, 2014) (statements such as "'[w]e are dedicated" to complying fully with the letter and spirit of the laws'" were actionable non-puffery); *United Paperworkers*, 985 F.2d at 1198 ("glowing description of the Company's [compliance] spirit, performance, and sense of responsibility" material in light of the actual record on compliance); *Lapin v. Goldman Sachs Grp., Inc.*, 506 F. Supp. 2d 221, 240 (S.D.N.Y. 2006) (statements regarding dedication to the compliance with the letter and spirit of the laws actionable). Dkt. No. 304 at 42-48.

- When defendants told investors about the success of Pfizer's drugs, for example that the growth of Lyrica was "'fueled by strong efficacy'; 'driven by strong efficacy'; or 'driven by high patient and physician satisfaction,"' those statements are actionable because they were "'obligated to disclose information concerning the source of [the] success.'" *In re Van Der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 400-01 (S.D.N.Y. 2005); *In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 368-69 (E.D.N.Y. 2013) (same). Here, systemic off-label promotion. The literal truth of a statement is not the measure of whether a statement violates the securities laws. *See, e.g.*, *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86 (2d Cir. 2010). Dkt. No. 304 at 49-56.

Defendants' statements are actionable as a matter of law as the Court ruled on August 10, 2011 in upholding the complaint. Dkt. No. 84. Their efforts to argue differently now merely parrots their summary judgment motion, which is based on the evidentiary record, as is plaintiffs' opposition. *See* Dkt. Nos. 246 and 304. Their motion is not only procedurally improper, it fails on the merits. *Pavone*, 2013 U.S. Dist. LEXIS 9140, at *5-*8 (finding it more efficient to resolve

[20] Dkt. No. 279, Ex. P-5 at PFE-JONES 00043524.

defendants' motion for summary judgment disguised as a motion *in limine* at trial and denying said motion).

I. Plaintiffs Have Not "Abandoned" Any of Defendants' Material Omissions (Response to Motion *in Limine* No. 12)

Defendants' Motion *in Limine* No. 12 is their feeble attempt to argue about what statements and omissions are still alive in this case. Despite the fact that plaintiffs provided defendants with a chart that illustrates exactly which statements plaintiffs will assert are false and misleading at trial, defendants now argue that plaintiffs have abandoned false statements and omissions that have not been withdrawn.

Defendants reach this incredible conclusion by misconstruing the record. To begin with, the Court has never dismissed any of plaintiffs' alleged false and misleading statements. Nonetheless, for the sake of clarity, plaintiffs attached to their opposition to defendants' motions for summary judgment a chart listing the statements they intend to prove are false and misleading at trial. Dkt. No. 304, Attachment 1. Therefore, there should be no confusion as to what statements are at issue. Defendants' argument concerning abandoned omissions is just as absurd. Plaintiffs have pled and consistently sought discovery surrounding omissions that make certain statements false and misleading, as a revelation of these omissions would have revealed, or at least partially revealed, the risk that materialized at the end of the class period. Plaintiffs have never suggested that they are abandoning any of these omissions.

Moreover, the Court's Individual Rules provide a process for the parties to identify all withdrawn claims and defenses before trial. Certainly the process provided by the Court is much better than the process defendants have chosen to take, which is wasting everyone's time by asking the Court to dismiss claims plaintiffs have not abandoned because they are harmful to their case. Indeed, the parties have already exchanged marked copies of their respective pleadings, as the

Court's rules require. Defendants' Motion *in Limine* No. 12 should be denied, as plaintiffs will continue to follow the process provided in the Court's Individual Rules to identify statements plaintiffs will not pursue at trial.

1. Plaintiffs Opposed Defendants' Motions for Summary Judgment in Their Entirety

The only case law remotely on point to what defendants argue here are cases that hold a plaintiff abandons ***claims*** when they fail to address a defendant's argument to dismiss the claims. *See, e.g.*, *Dineen v. Stramka*, 228 F. Supp. 2d 447, 454 (S.D.N.Y. 2002) ("We note . . . that plaintiff does not address these ***claims*** in its opposition papers, enabling the Court to conclude that it has abandoned them."); *Taylor v. City of New York*, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003) ("Federal courts may deem a ***claim*** abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address the arguments in any way.") The problem defendants have, however, is that plaintiffs' opposition papers address every point raised in defendants' motions for summary judgment. Dkt. No. 304. Moreover, cases that address abandoning ***claims*** do not support an argument for abandoning alleged false statements or omissions as defendants argue here. Defendants have not cited any cases that support their contention that false statements and omissions can be abandoned.

As defendants know, this Court has individual rules to clarify before trial the claims and defenses the parties intend to withdraw. Individual Rule 3.A.v. Given defendants' alleged concern about conserving time and resources (Dkt. No. 375 at 5), it is surprising they would put plaintiffs and the Court through the time-consuming exercise of responding to and ruling on this motion when the Court already has a process for withdrawing claims. Through their correspondence with plaintiffs' counsel, defendants know that the parties have already commenced this Court's Individual Rule 3.A.v. process.

2. The False and Misleading Statements Have Already Been Identified

Defendants' Motion *in Limine* No. 12 is simply another attempt by defendants to exclude from trial whatever evidence plaintiffs need to prove their claims. As defendants acknowledge, without being ordered to do so, plaintiffs have provided the Court and defendants with a chart listing the false and misleading statements they intend to pursue at trial. Plaintiffs did this despite the Court never dismissing any of their false and misleading statements or ever finding a lack of clarity in plaintiffs' falsity allegations. Nonetheless, defendants are trying to muddy the waters for the sole purpose of preventing plaintiffs from proving their case.

3. No Omissions Relevant to Proving any Element of Plaintiffs' Case, Including Falsity, Have Not Been Abandoned

Defendants do not point to a single case that holds omissions relevant to a plaintiffs' claims are abandoned when they are not connected to specific statements in plaintiffs' opposition to defendants' motions for summary judgment. The only cases in the universe of defendants' argument are those in which a plaintiff has failed to respond to a specific argument to dismiss a certain claim. *See Taylor*, 269 F. Supp. 2d at 75. That is not the case here. *See* Dkt. No. 304.

As defendants point out, plaintiffs devoted a considerable amount of time over the course of discovery to obtain evidence and testimony related to the omissions defendants now claim have been abandoned. Moreover, plaintiffs' opposition to defendants' motions' for summary judgment, statement of material facts and responses to defendants' Rule 56.1 statements make it clear that the omissions and any evidence related to those omissions have not been abandoned. Dkt. Nos. 303-304, 310-316. By way of example, plaintiffs use evidence related to the omissions defendants assert have been abandoned to dispute a number of Pfizer's factual assertions. *See* Dkt. No. 313, ¶¶1-8, 11, 13-14, 18, 22-25, 31, 43, 62, 92-93, 98. Plaintiffs also use evidence related to the omissions

defendants seek to exclude in opposing defendants' motions for summary judgment. *See, e.g.*, Dkt. No. 304 at 1, 2, 6-9, 21, 44, 48, 94, 100. In fact, plaintiffs devote an entire section of their motion for partial summary judgment to the document-destruction issue, an omission defendants remarkably now claim plaintiffs have abandoned. Dkt. No. 288 at 17-18, 29 (listing the "illegally deleted and altered documents" among the "most important evidence" defendants failed to disclose to investors).

Defendants' Motion *in Limine* No. 12 actually highlights the materiality and, thus, importance of the omissions defendants seek to exclude. First, defendants admit that plaintiffs have spent time during discovery pursuing evidence related to the omissions. Dkt. No. 375 at 2. Second, defendants go through the trouble of concocting an unfounded argument to support their unfounded claim that the omissions have been abandoned. Finally, defendants do not argue that the omissions are irrelevant to this case. Instead, defendants assume that the omissions have been abandoned (unsupported by case law and despite plaintiffs spending time in discovery pursuing this evidence), and then leap to the conclusion that they are not relevant ***because*** they have been abandoned and cannot be pursued at trial. Indeed, defendants' circular arguments regarding omissions being abandoned and, thus, irrelevant, despite plaintiffs pursuit of these omissions during discovery and at summary judgment, serve to demonstrate the materiality of the omissions.

Plaintiffs have provided their false statement chart and have/will comply with this Court's Individual Rules. No omissions have been abandoned. As such, and for the foregoing reasons, defendants' Motion *in Limine* No. 12 must be denied.

J. Plaintiffs' Loss Causation Arguments Should Be Denied (Response to Motion *in Limine* No. 6)

Defendants' Motion *in Limine* No. 6 to exclude argument and evidence regarding nondisclosures unrelated to plaintiffs' claimed losses is based on an inaccurate factual basis and is an inappropriate use of a motion *in limine*. Defendants' Motion *in Limine* No. 6 is not an evidentiary

motion, but instead is a motion for summary judgment on loss causation. Defendants once again attempt to confuse plaintiffs' loss causation theories and exclude evidence that does not fit into the new loss causation theory they have now created for plaintiffs.

Defendants' Motion *in Limine* No. 6 is premised on their improper assumption that plaintiffs have pled a corrective disclosure case, suggesting that the only actionable statements are those that are a mirror image of what was disclosed by Pfizer on January 26, 2009. Defendants are wrong, as the January 26, 2009 announcement of the record $2.3 billion settlement has always been pled and argued as a materialization of the risk that Pfizer was involved in rampant off-label marketing that would lead to a substantial loss. Dkt. No. 71, ¶¶132, 135. As such, this case is not limited to false and misleading statements concerning the Bextra investigation, as defendants would prefer. Instead, statements and omissions concerning the promotion and growth of Geodon, Zyvox and Lyrica, are actionable here. Moreover, disclosure of other facts related to Pfizer's off-label marketing practices and the government investigation, such as the target letter, the potential for debarment, the damning presentation of evidence the government made to Pfizer and its lawyers, and the dilapidated state of Pfizer's healthcare compliance controls, would have revealed the real risk that materialized on January 26, 2009. Thus, those are all omissions that are relevant to this case.

All of the facts defendants want precluded on the grounds that they are not relevant to loss causation prove that the loss was foreseeable, which is an element of loss causation that plaintiffs must prove. Furthermore, the omissions and evidence related to the omissions support all of the other elements of securities fraud that plaintiffs must prove. Defendants' Motion *in Limine* No. 6 ignores the fact that plaintiffs must prove those other elements.

1. Defendants Are Simply Rearguing Summary Judgment

Defendants' motion *in limine* is another blatant attempt to take another bite at the loss causation apple. Defendants have argued in their motion to dismiss and at various hearings that plaintiffs cannot prove loss causation, and each time the Court has rejected their arguments. Despite the Court's comments that "I don't know how a judge can decide, as a matter of law . . . that the settlement didn't have any impact on price" (July 7, 2014 Hearing Transcript at 31:22-24), that is exactly what defendants want the Court to decide in their motion for summary judgment. Defendants argue on summary judgment and in their recent motion to exclude plaintiffs' loss causation expert Steven Feinstein that plaintiffs cannot prove loss causation. Not to be out done by their prior attempts to be heard on loss causation, defendants now file a third loss causation motion, and attempt to disguise it as an evidentiary motion by styling it a motion *in limine*. Defendants' antics are improper. *See Louzon v. Ford Motor Co.*, 718 F.3d 556, 562 (6th Cir. 2013) ("'While this might be a proper argument for summary judgment or for judgment as a matter of law, it is not a proper basis for a motion to exclude evidence prior to trial.'").

A clear indication that defendants' motion *in limine* is essentially another motion for summary judgment on loss causation is the first sentence of their argument: "Loss causation is an essential element of Plaintiffs' securities fraud claim." Dkt. No. 357 at 3. Defendants later argue that "as a matter of law, Plaintiffs cannot prove liability with respect to these alleged misrepresentations." *Id.* at 4. In fact, defendants' motion is replete with loss causation arguments, *e.g.*, "Pfizer had disclosed that the government was investigating marketing practices as to Bextra," "there is no legal obligation to disclose unadjudicated wrongdoing," "the nondisclosure of the target letter cannot have caused Plaintiffs' January 26 losses," and "Pfizer did not also need to disclose that debarment could result from a finding of guilt in a criminal matter." *Id.* at 5-6, 8, 10. Indeed,

defendants' motion *in limine* is improper because "[r]esolution of this issue – whether [plaintiffs can prove liability with respect to certain omissions] – requires a summary-judgment analysis." *Louzon*, 718 F.3d at 562.

Moreover, the majority of the cases defendants cite and rely on to support the arguments in their evidentiary motion are loss causation cases that have already been used by defendants in previously filed motions and addressed by plaintiffs, including, among others, *Dalberth v. Xerox Corp.*, 766 F.3d 172 (2d Cir. 2014), *In re FBR Inc. Sec. Litig.*, 544 F. Supp. 2d 346 (S.D.N.Y. 2008), *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29 (2d Cir. 2009), *Marsh & McLennan*, 501 F. Supp. 2d 452, *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501 (2d Cir. 2010), and *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005). Defendants' Motion *in Limine* No. 6 should be denied on its face, as it simply rehashes loss causation arguments that have been addressed multiple times. *See Louzon*, 718 F.3d at 563 ("Where, as here, the motion *in limine* is no more than a rephrased summary-judgment motion, the motion should not be considered.").

2. Plaintiffs Have Consistently Alleged a Realization of the Risk Theory

Defendants entire argument is premised on their attempt to rewrite the theory of the case and claim that plaintiffs have alleged that the January 26, 2009 settlement announcement was a corrective disclosure. Dkt. No. 357 at 1; *see also* Dkt. No. 325 at 1. Relying on their faulty premise that plaintiffs have exclusively alleged the settlement announcement was a corrective disclosure, defendants argue that any statement, omission or material fact that does not exactly mirror the one-sentence disclosure made by Pfizer on January 26, 2009 is not actionable or relevant to this case. Defendants are wrong.

Plaintiffs have always alleged that this is a materialization of the risk case. Dkt. No. 71, ¶¶132, 135. Defendants' suggestion to the Court that plaintiffs have made a "drastic switch in their

loss causation theory" is completely unsupported and reckless. Dkt. No. 326 at 26. If defendants had bothered to read the complaint, they would know that plaintiffs' loss causation allegations have been consistent. Dkt. No. 71, ¶132 ("When the ***materialization of the risks*** that had been fraudulently concealed by defendants occurred and the true facts became known to the market and investors, Pfizer's stock price fell precipitously as the prior artificial inflation came out of the price, causing loss and damages to plaintiffs and members of the Class."), ¶135 ("The decline in Pfizer's stock price at the end of the Class Period was a direct result of the ***materialization of the risks*** concealed by defendants' prior false statements and omissions and the nature and extent of the truth revealed to investors and the market."). Defendants' Motion *in Limine* No. 6 must be denied, as it is based on a false premise and their arguments are nonsensical in the context of plaintiffs' materialization of the risk allegations. *See, e.g.*, Dkt. No. 357 at 8 (when discussing why the target letter was not relevant, defendants argued that "in view of Pfizer's prior disclosures as to the risk of a potentially costly fine and penalties, there was nothing '***corrective***' about the January 26 disclosure").

In reality, the evidence defendants seek to preclude is clearly relevant to loss causation and other elements plaintiffs must prove. To prove their materialization of the risk allegations, plaintiffs must show that the risk that materialized was foreseeable. *See In re Vivendi Universal, S.A., Sec. Litig.*, 634 F. Supp. 2d 352, 363 (S.D.N.Y. 2009). As such, evidence of the investigation into other drugs, the extent of the off-label marketing of those drugs, the significant deficiencies in Pfizer's healthcare compliance controls and the damning facts in the government investigation, including a target letter and the risk of debarment, all made it foreseeable that Pfizer would eventually pay a large fine related to the government investigation. Plaintiffs must be permitted to use this evidence to prove foreseeability.

There are other examples of why the evidence defendants seek to exclude is directly related to loss causation and damages. As previously argued in plaintiffs' opposition to defendants' motions for summary judgment (Dkt. No. 304), Pfizer healthcare compliance documents support plaintiffs' argument that reputational harm from the disclosure of the record $2.3 billion settlement contributed to the January 26, 2009 stock price decline. Dkt. No. 304 at 111. Clearly, evidence related to Pfizer's healthcare compliance controls is relevant to this litigation, despite defendants' attempt to exclude it.

The target letter combined with the risk of debarment warned of the magnitude of the settlement. Defendants' assertion that a target letter is simply "a formal letter from the DOJ informing [Pfizer] it [was] the target of an investigation" is another example of defendants misconstruing the factual record. Dkt. No. 357 at 2 n.2. In reality, Pfizer's receipt of a target letter means that the prosecutor or the grand jury had substantial evidence linking Pfizer to the commission of a crime and, in the judgment of the prosecutor, Pfizer was a putative defendant. United States Attorneys' Manual ("USAM") 9-11.151.

The risk of debarment was also much more relevant than defendants would have the Court believe. As Pfizer's government investigations lawyer Brien O'Connor has testified, the risk of debarment is the reason Pfizer ultimately settled and would never take the case to trial. Ex. 5 (O'Connor Depo.) at 123:21-125:15. As such, the target letter, which made it clear Pfizer was going to be indicted, and the risk of debarment, which prevented Pfizer from going to trial, made it certain that Pfizer was going to settle the government investigation. Moreover, among other facts, the amount of off-label promotion that occurred, including that of Geodon, Lyrica and Zyvox, made the size of the eventual fine also foreseeable.

3. Defendants Completely Ignore Any Other Elements Plaintiffs Must Prove

To prove a Rule 10b-5 securities fraud violation, plaintiffs will have to present evidence proving "(1) defendants made an untrue statement of material fact, or omitted to state a material fact which made what was said, under the circumstances, misleading; (2) defendants acted with scienter; (3) plaintiffs justifiably relied on the misstatement or omission; and (4) plaintiffs suffered an economic loss as a result of the misstatement or omission." *Liberty Media Corp., LMC v. Vivendi Universal, S.A.*, 923 F. Supp. 2d 511, 516 (S.D.N.Y. 2013). Nonetheless, defendants seek to preclude facts evidencing the degree of off-label promotion that was occurring at Pfizer and the seriousness of the government investigation because, in their view, it does not support plaintiffs' loss causation theory, even if these facts may prove other elements of a Rule 10b-5 violation. Defendants' motion must be denied for the mere fact that they limit their argument to loss causation and have failed to argue that the evidence they seek to preclude is irrelevant to all of the elements they expect plaintiffs to prove at trial.

For example, defendants' argument to exclude evidence of Pfizer's healthcare compliance controls completely ignores defendant Waxman's false and misleading statement concerning Pfizer's controls and off-label promotion practices. On April 2, 2007, in a news release discussing the settlement of the off-label promotion of Genotropin, Waxman assured investors that "'Pfizer's marketing and promotion practices are not involved in the settlement. The company has internal controls to guard against these types of practices.'" Ex. 3. Indeed, evidence of Pfizer's off-label promotion and deficiencies in Pfizer's healthcare compliance controls are relevant to proving Waxman's statement was false and misleading, which is why defendants use a loss causation argument in their attempt to preclude the use of this evidence. Further, defendants were obliged to

maintain controls concerning the promotion of Pfizer's drugs under the CIA and to monitor off-label promotion. The failure to do so is evidence of scienter. *Novak*, 216 F.3d at 308.

The off-label promotion of Geodon, Lyrica and Zyvox and the significant deficiency in Pfizer's healthcare compliance controls are directly related to other statements plaintiffs have alleged to be false and misleading. Attached to plaintiffs' opposition to defendants' motion for summary judgment is a false and misleading statement chart. *See* Dkt. No. 304, Attachment 1. The chart lists class period statements concerning Pfizer's marketing activities and drug sales growth that plaintiffs have always alleged were misleading because they omitted that Pfizer was off-label promoting Geodon, Lyrica and Zyvox at the time the statements were made. *See, e.g.*, *id.* at Nos. 1-2, 4, 8, 14, 16, 18, 26-27, 31, 33-34, 38, 41-42. Of course, the evidence concerning the investigation into and off-label promotion of Geodon, Lyrica and Zyvox, which defendants ask the Court to exclude, is directly relevant to these statements that plaintiffs allege to be false and misleading. None of these statements have been dismissed from this case and plaintiffs must be afforded the right to prove these allegations.

For the reasons discussed above, the Court should deny defendants' Motion *in Limine* No. 6 and permit plaintiffs to rely on the evidence they have established to prove their case at trial.

IV. CONCLUSION

By reason of the foregoing, defendants' Motion *in Limine* Nos. 4-12 should be denied.

DATED: December 22, 2014

Respectfully submitted,

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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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Subject: Activity in Case 1:10-cv-03864-AKH Jones et al v. Pfizer, Inc. et al Memorandum of Law in Opposition to Motion

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Southern District of New York

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Case Name: Jones et al v. Pfizer, Inc. et al
Case Number: 1:10-cv-03864-AKH
Filer: Mary K. Jones
Stichting Philips Pensioenfonds
Document Number: 409

Docket Text:
MEMORANDUM OF LAW in Opposition re: [351] MOTION in Limine *No. 4 To Exclude Argument and Evidence Related to Former Employees' Deletion of Electronic Documents*., [358] MOTION in Limine *No. 7 To Exclude Evidence Regarding the August 2009 Criminal Information and Plea Documents*., [373] MOTION in Limine *No. 12 To Preclude Plaintiffs From Arguing At Trial that the Abandoned Statements and Omissions Support Any Finding of Liability Against Any of the Defendants*., [367] MOTION in Limine *No. 10 To Exclude Physician Surveys and Sales Representative "Call Notes"*., [363] MOTION in Limine *No. 9 To Exclude Fifth Amendment Invocations of Non-Party Mary Holloway and Documents Relating To Her Criminal Conviction*., [356] MOTION in Limine *No. 6 To Exclude Argument and Evidence Regarding Nondisclosures Unrelated to Plaintiffs' Claimed Losses*., [360] MOTION in Limine *No. 8 To Exclude Evidence or Argument Related to the Promotion of, and Settlement Agreement Regarding, Neurontin and Genotropin*., [370] MOTION in Limine *No. 11 To Preclude Evidence or Testimony In Connection with Certain Statements that Are Not Actionable As a Matter of Law*., [354] MOTION in Limine *No. 5 To Exclude Evidence Related to Marketing and Alleged Off-Label Promotion of Pfizer Products*. . Document filed by Mary K. Jones(Individually), Stichting Philips Pensioenfonds. (Forge, Jason)

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