

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____	X
MARY K. JONES, Individually and on Behalf	:
of All Others Similarly Situated,	:
	:
Plaintiff	:
	:
vs.	:
	:
PFIZER INC., et al.,	:
	:
Defendants.	:
_____	X

Civil Action No. 1:10-cv-03864-AKH

CLASS ACTION

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION *IN LIMINE*
NO. 14 TO EXCLUDE EVIDENCE AND
ARGUMENT OF DEFENDANTS'
FINANCES

I. INTRODUCTION

Defendants move to exclude evidence and argument concerning the Individual Defendants' compensation or wealth and Pfizer's financial resources or size, claiming that these topics are irrelevant and unfairly prejudicial to defendants.

Defendants are wrong. Evidence concerning the Individual Defendants' compensation is relevant to their motive and bias. Moreover, their compensation was tied to Pfizer's stock price, which plaintiffs allege was inflated as a result of the fraud alleged here. Indeed, the Individual Defendants have effectively conceded that evidence of compensation and stock sales are probative of scienter by acknowledging here that "compensation could provide a motive to commit fraud" and by arguing in their summary judgment motions that evidence of compensation and stock sales in this case are inconsistent with a motive to engage in the alleged fraud. In addition, evidence concerning Pfizer's finances is relevant because a jury should determine whether the alleged fraud was material under §10(b)/Rule 10b-5 and in order to do so, the jury must consider evidence regarding the Company's revenues and profits for context.

Defendants' concern regarding juror prejudice against large corporations and the wealthy is overblown. Any potential jury bias or confusion as to the relevance of evidence concerning the Individual Defendants' compensation and Pfizer's financial resources or size may be addressed through limiting instructions and/or restrictions confining plaintiffs' use of and reference to such evidence. Accordingly, plaintiffs should be permitted to introduce evidence relating to the Individual Defendants' compensation and Pfizer's financial resources or size.

II. EVIDENCE AND ARGUMENT CONCERNING DEFENDANTS' FINANCES IS RELEVANT

A. The Individual Defendants' Compensation Is Relevant to Their Motive to Engage in the Alleged Fraud and Their Bias

Defendants claim that compensation is not relevant to any issue in the case. Dkt. 380 at 2. However, the law in this circuit is clear that evidence of compensation is probative of defendants' motive to engage in wrongdoing. *United States v. Quattrone*, 441 F.3d 153, 187 (2d Cir. 2006) ("evidence of Quattrone's compensation for 1999 and 2000 was relevant to Quattrone's motive to protect his reputation and that of CSFB's Tech group"); *United States v. Kaiser*, 609 F.3d 556, 561 (2d Cir. 2010) ("USF executives, including Kaiser, only received bonuses when USF met these targets, providing a powerful motive for Kaiser to inflate USF's PA income").¹ Of particular relevance is the Second Circuit's affirmation in *Quattrone* of a district court's decision to admit evidence of compensation offered by the prosecution to help establish motive over defendant's claim of "class-based bias." 441 F.3d at 187. The *Quattrone* Court found that "the district court acted within the scope of its discretion in finding the evidence relevant and consistent with Rule 403." *Id.*

Defendants' arguments are principally based on cases discussing the standards for *pleading* a case of securities fraud, and the role that compensation has in supporting the required "strong inference of scienter" at that stage. *E.g. ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009); *Rombach v. Chang*, 355 F.3d 164, 177 (2d

¹ See also *United States v. Ferguson*, No. 06-cr-137, 2007 U.S. Dist. LEXIS 87842, at *5 (D. Conn. Nov. 30, 2007) ("The evidence concerning Milton's deferred compensation plan, however, is relevant to proving motive, because AIG's performance affected Milton's benefits under the plan. Evidence that links a defendant's financial compensation to his possible motives for participating in an alleged fraud is relevant to proving the fraud."); *United States v. Schnabel*, 939 F.2d 197, 202 (4th Cir. 1991) ("evidence of [defendant's] substantial monetary stake in the company's continued operations" was relevant to proving that he "acted with specific intent to deceive"); *United States v. Logan*, 250 F.3d 350, 369 (6th Cir. 2001) ("the income evidence was relevant to demonstrate that financial gain was the motive for the crimes charged").

Cir. 2004); *Kalnit v. Eichler*, 264 F.3d 131, 140-41 (2d Cir. 2001). Those cases are irrelevant to the question of the role that such evidence has in *proving* a fraud claim. Allegations related to a defendants' compensation may, in isolation, be insufficient to establish a strong inference at the pleading stage, however that motion to dismiss concept does not mean that such evidence cannot be considered by the jury at trial. To the contrary, the jury must be permitted to weigh the evidence of defendants' compensation together with all of the other evidence to determine whether defendants knowingly or recklessly disregarded the misleading nature of the information they were providing to investors because "motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference." *E.g., Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325-26 (2007).²

Here, the Individual Defendants have effectively conceded that evidence of compensation and stock sales could be probative of scienter by acknowledging that "compensation could provide a motive to commit fraud" and arguing in their summary judgment motions that evidence of

² Nor do the cases defendants cite which discuss the standard for proof at trial support their position because the low probative value of the excluded evidence in those cases was outweighed by the high potential for prejudice. *See, e.g., Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, No. 08 Civ. 7508 (SAS), 2013 U.S. Dist. LEXIS 38787, at *32 (S.D.N.Y. Mar. 20, 2013) ("generalized evidence of defendants' profits" was remotely relevant and thus not permitted, but "[e]vidence of how the fees and incentives for the [structure at issue] differed from fees for ratings of other structures [was] relevant because one of plaintiffs' arguments is that ***the fee structure was a motivating factor in the alleged fraud***") (emphasis added); *In re September 11 Litig.*, No. 21 MC 97 (AKH), 2007 U.S. Dist. LEXIS 76988, at *12-*13 (S.D.N.Y. Oct. 17, 2007) ("Plaintiffs are free to testify about the matters they viewed or learned from whatever source, including their reactions when they saw or heard about the items of extrinsic evidence" but the "extrinsic evidence themselves and the testimony of others are inadmissible"); *United States v. Reyes*, No. 3:06-cr-00556 CRB, Hr'g Tr. at 78:21-86:25, 91:7-8 (N.D. Cal. Feb. 16, 2010) (excluding compensation evidence that was "too tangential") (Declaration of Ivy Ngo in Support of Plaintiffs' Opposition to Defendants' Motion *in Limine* No. 14 to Exclude Evidence and Argument of Defendants' Finances ("Ngo Decl."), Ex. 1); *Sekuk Global Enters. v. Apollo Grp., Inc.*, No. 2:04-cv-02147, Minute Entry at 2 (D. Ariz. Nov. 5, 2007) (excluding evidence of wealth, salary and benefits because "the prejudice effect outweighs the probative value" of such evidence) (Ngo Decl., Ex. 2).

compensation and stock sales in this case are inconsistent with a motive to engage in the alleged fraud. *See* Dkt. 380 at 3 (“part of the Individual Defendants’ compensation was based on Pfizer’s financial performance”) and (“compensation awarded in 2006 . . . was tied to Pfizer’s and the individuals’ performance in 2005”); Dkt. 269 at 14; Dkt. 253 at 27 n.21; Dkt. 263 at 22; Dkt. 264 at 10 n.32; Dkt. 274 at 20. Moreover, it is undisputed that Pfizer’s executive compensation was directly tied to the performance of the Company and its stock price,³ thereby providing substantial financial incentive for each of the Individual Defendants to engage in the misconduct alleged here. Pfizer’s compensation plans provided defendants with a motive to overstate the Company’s performance and stock price and ignore conditions that would decrease its growth, including the prevention or cessation of off-label promotion of its drug products. Defendants acknowledge that revenue from sales of Lyrica, Geodon and Zyvox are relevant to Pfizer’s financial performance, but falsely claim that there is no evidence regarding how much of the Company’s revenue was tied to off-label prescriptions or promotion. Dkt. 380 at 3. Yet such a calculation was made as to Bextra as part of Pfizer’s \$2.3 billion settlement with the government. Plaintiffs will also present the testimony of Dr. Meredith Rosenthal which will prove the Company’s revenue from the off-label promotion of Bextra, Geodon, Lyrica and Zyvox. *See* Ngo Decl., Ex. 7 at 7:19-11:5 (calculating that the illegal off-label promotion of Bextra resulted in \$664 million in sales); *id.*, Ex. 8 at 40, Table 2

³ *E.g.*, Ngo Decl., Ex. 3 [2006 Proxy] at 50-51 (“a significant portion of compensation opportunity will be directly related to Company stock performance and other factors that directly and indirectly influence shareholder value”) and (“executive compensation is tied directly to the performance of the Company”); Ngo Decl., Ex. 4 at 42-43 (same); Ngo Decl., Ex. 5 at 36, 38 (“A significant portion of each Named Executive Officer’s total compensation opportunity is directly related to Pfizer’s stock price performance”) and (the executive “compensation package [is] designed to reward individual performance based on Pfizer’s short-term and long-term performance”); Ngo Decl., Ex. 6 at 42 (“Pfizer’s compensation philosophy . . . is designed to align executive officers’ compensation with Pfizer’s short-term and long-term performance. A significant portion of each Named Executive Officer’s total compensation opportunity is directly related to Pfizer’s stock price performance”).

(Bextra off-label promotion resulted in \$1.5 billion in revenue), 51, Table 4 (Geodon off-label promotion resulted in \$715 million in revenue), 60, Table 6 (Lyrica off-label promotion resulted in \$760 million in revenue), 72, Table 7 (Zyvox off-label promotion resulted in \$647 million in revenue). Defendants further erroneously imply that the Company's 2005 performance is irrelevant because it was before the Class Period – purposefully ignoring the fact that the false and misleading statements alleged in this case begin with Pfizer's 2005 financial results, which were announced on January 19, 2006. *See* Dkt. 304, Attachment 1, FMS Nos. 1-3.

Under Pfizer's executive compensation plan, defendants received incentive compensation according to their success at achieving financial objectives for the Company, including its reported revenue, earnings per share and cash flow. *See* Ngo Decl., Ex. 4 at 45; *id.*, Ex. 5 at 40; *id.*, Ex. 6 at 48. Throughout the Class Period, defendants received substantial monetary rewards for maintaining the Company's revenue growth by any means possible, including the off-label promotion of Bextra, Geodon, Lyrica and Zyvox which was concealed from investors.⁴ Whether a jury finds this evidence consistent or inconsistent with a motive to engage in the alleged fraud, such evidence is clearly probative of the issue. *United States v. Peters*, 53 F. App'x 5, 10 (2d Cir. 2013) (summary order) (“some evidence of the defendant's wealth was relevant to the question of motive”).⁵ The jury

⁴ Defendants received over \$92 million in compensation during the Class Period. In particular, the value of Kindler's total compensation from 2006 through 2008 was \$33 million, D'Amelio's compensation from 2007 through 2008 was \$14.6 million, Levin's compensation from 2006 through 2007 was \$9.8 million, Read's compensation from 2006 through 2008 was \$15.7 million and McKinnell's 2006 compensation (despite only performing his CEO duties from 1/06 to 7/06) was \$19.4 million. *See* Ngo Decl., Exs. 4 at 54, 56; 5 at 54-55; 6 at 62-63.

⁵ None of the cases referenced by defendants support their argument that *evidence* of wealth is generally inadmissible in trial; nor do they raise any concern that a limiting instruction or restriction would not address. Dkt. 380 at 1; *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970) (disapproving of remarks “suggesting that the defendant should respond in damages because he is rich and the plaintiff is poor”); *United States v. Stahl*, 616 F.2d 30, 32-33 (2d Cir. 1980) (reversing conviction in light of the “the prosecutor's trial strategy . . . that obviously included a persistent

should therefore not be precluded from considering the details of these executive compensation plans, and the rewards that defendants achieved under them, in its assessment of the proof of scienter at trial. *Tellabs*, 551 U.S. at 325-26.

Furthermore, plaintiffs are entitled to cross-examine defendants regarding their motive – particularly as it relates to their compensation and wealth. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“the exposure of a witness’ motivation in testifying is a proper and important function” of cross-examination). The Supreme Court has made clear that “[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *United States v. Abel*, 469 U.S. 45, 52 (1984); *see also United States v. Friedman*, 854 F.2d 535, 567 (2d Cir. 1988) (“the credibility of the compensated witness . . . is for a properly instructed jury to determine”) (citation omitted). Accordingly, defendants’ motion *in limine* to preclude evidence relating to the Individual Defendants’ compensation and wealth should be denied.

B. Pfizer’s Finances Are Relevant to the Jury’s Determination of the Materiality of the Alleged Fraud

Next, defendants argue that evidence concerning Pfizer’s finances is just as irrelevant as evidence concerning the Individual Defendants’ compensation. Dkt. 380 at 4. As in any §10(b)/Rule 10b-5 action, however, plaintiffs must demonstrate materiality to the jury at trial in order for defendants to be held liable. *See, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). A statement “‘is material if there is a substantial likelihood that a reasonable shareholder

appeal to class prejudice” through references to defendant’s wealth); *Tyco Int’l Ltd. v. Walsh*, No. 02 Civ. 4633 (DLC), 2010 U.S. Dist. LEXIS 79019, at *1 (S.D.N.Y. July 30, 2010) (“defendant’s net worth is only relevant if there is a finding that punitive damages should be awarded”). Moreover, plaintiffs are not seeking to introduce evidence as to defendants’ wealth generally, but rather, their compensation as it relates to Pfizer during the Class Period.

would consider it important in deciding” whether or not to buy or sell that security. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (citation omitted). In this case, in order for a jury to determine the materiality of a reserve related to the government investigation into Pfizer’s promotional practices, the jury must consider the amount of the reserve in the context of the Company’s revenues and profits. As such, defendants’ attempt to preclude evidence concerning Pfizer’s finances is tantamount to an improper attempt to prevent plaintiffs from presenting part of their proof of materiality.

III. THE PROBATIVE VALUE OF EVIDENCE AND ARGUMENT CONCERNING THE INDIVIDUAL DEFENDANTS’ COMPENSATION AND PFIZER’S FINANCIAL RESOURCES OR SIZE OUTWEIGHS ANY POSSIBLE PREJUDICE

Defendants exaggerate the possible peril of class or juror prejudice should evidence and references concerning defendants’ finances not be precluded. Dkt. 380 at 1, 4-5. As the Second Circuit instructed in *Quattrone*, “[w]hile evidence of compensation, wealth, or lack thereof can unduly prejudice jury deliberations, that evidence may be admitted where other safeguards are employed such as limiting instructions or restrictions confining the government’s references to that wealth.” 441 F.3d at 187. Thus any potential jury bias or confusion as to the relevance of evidence concerning the Individual Defendants’ compensation and Pfizer’s financial resources or size as raised by defendants in their brief and in the caselaw they cite, may easily be addressed through limiting instructions or restrictions confining plaintiffs’ use of and reference to such evidence.⁶ And unlike the plaintiff in *Loussier v. Universal Music Grp., Inc.*, No. 02 Civ. 2447 (KMW), 2005 U.S. Dist. LEXIS 37545 (S.D.N.Y. July 14, 2005), plaintiffs here have shown “how evidence of the

⁶ The cases defendants cite thus do not compel a different result. Dkt. 380 at 4; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 492 (1993); *Garcia v. Sam Tanksley Trucking, Inc.*, 708 F.2d 519, 532 (10th Cir. 1983); *Cleveland v. Peter Kiewit Sons’ Co.*, 624 F.2d 749, 752 (6th Cir. 1980); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978).

individual Defendants' wealth, financial condition, and unrelated revenues is relevant to . . . the liability." *Id.* at *6-*7. Accordingly, plaintiffs should be permitted to introduce evidence and/or make arguments to the jury relating to the Individual Defendants' compensation and Pfizer's financial resources or size.

IV. CONCLUSION

For the aforementioned reasons, defendants' motion to exclude evidence and argument concerning the Individual Defendants' compensation and Pfizer's finances and financial resources should be denied.

DATED: December 22, 2014

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD
HENRY ROSEN
TRIG R. SMITH
JASON A. FORGE
RYAN A. LLORENS
IVY T. NGO

s/ IVY T. NGO

IVY T. NGO

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
miked@rgrdlaw.com
henryr@rgrdlaw.com
trigs@rgrdlaw.com
jforge@rgrdlaw.com
ryanl@rgrdlaw.com
ingo@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
WILLOW E. RADCLIFFE
DANIEL J. PFEFFERBAUM
MATTHEW S. MELAMED
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)
willowr@rgrdlaw.com
dpfefferbaum@rgrdlaw.com
mmelamed@rgrdlaw.com

Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

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

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

s/ IVY T. NGO

IVY T. NGO

ROBBINS GELLER RUDMAN
& DOWD LLP

655 West Broadway, Suite 1900

San Diego, CA 92101-8498

Telephone: 619/231-1058

619/231-7423 (fax)

E-mail: ivyn@rgrdlaw.com

Mailing Information for a Case 1:10-cv-03864-AKH

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Michael Scott Bailey**
michael.bailey@skadden.com
- **Sidney Bashago**
sidney.bashago@dpw.com,jennifer.kan@davispolk.com,ecf.ct.papers@davispolk.com
- **Sheila L. Birnbaum**
sheilabirnbaum@quinnemanuel.com
- **George Anthony Borden**
gborden@wc.com
- **Kevin Anthony Burke**
kaburke@sidley.com,nyefiling@sidley.com,efilingnotice@sidley.com
- **Michael Barry Carlinsky**
michaelcarlinsky@quinnemanuel.com,brantkuehn@quinnemanuel.com,jomairecrawford@quinnemanuel.com
- **Lauren Kristina Collogan**
lcollogan@wc.com
- **Keir Nicholas Dougall**
kdougall@dougallpc.com
- **Michael Joseph Dowd**
miked@rgrdlaw.com,e_file_sd@rgrdlaw.com,tome@rgrdlaw.com,e_file_sf@rgrdlaw.com
- **Alexander C Drylewski**
alexander.drylewski@skadden.com
- **Charles S. Duggan**
charles.duggan@dpw.com,ecf.ct.papers@davispolk.com
- **Steven M. Farina**
sfarina@wc.com
- **Jason A. Forge**
jforge@rgrdlaw.com,tholindrake@rgrdlaw.com,e_file_SD@rgrdlaw.com
- **Ross Bradley Galin**
rgalin@omm.com,mochoa@omm.com,neverhart@omm.com,lisachen@omm.com
- **Gary John Hacker**
ghacker@skadden.com
- **James R. Harper**
coljamesrharper@me.com
- **Howard E. Heiss**
hheiss@omm.com,#nymanagingattorney@omm.com
- **Paul T. Hourihan**
phourihan@wc.com
- **James M. Hughes**
jhughes@motleyrice.com,kweil@pacernotice.com,mgruetzmacher@motleyrice.com,erichards@motleyrice.com,kweil@motleyrice.com
- **Jay B. Kasner**
jkasner@skadden.com
- **Joe Kendall**
administrator@kendalllawgroup.com,jkendall@kendalllawgroup.com,hindley@kendalllawgroup.com

- **Brant Duncan Kuehn**
brantkuehn@quinnemanuel.com
- **Leigh R. Lasky**
lasky@laskyrifkind.com
- **Hamilton Philip Lindley**
hlindley@deanslyons.com,mgoens@deanslyons.com
- **Ryan A. Llorens**
ryanl@rgrdlaw.com,nbear@rgrdlaw.com,kirstenb@rgrdlaw.com
- **Amanda M. MacDonald**
amacdonald@wc.com
- **Lori McGill**
lorialvinomcgill@quinnemanuel.com
- **Matthew Melamed**
mmelamed@rgrdlaw.com
- **Donald Alan Migliori**
dmigliori@motleyrice.com
- **Eugene Mikolajczyk**
genem@rgrdlaw.com
- **Seema Mittal**
smittal@wc.com
- **Cynthia Margaret Monaco**
cmonaco@cynthiamonacolaw.com,cmmonaco@gmail.com
- **Juliana Newcomb Murray**
juliana.murray@davispolk.com,lisa.hirakawa@davispolk.com,ecf.ct.papers@davispolk.com
- **Scott D. Musoff**
smusoff@skadden.com
- **Danielle Suzanne Myers**
dmyers@rgrdlaw.com
- **William H. Narwold**
bnarwold@motleyrice.com,vlepine@motleyrice.com,ajanelle@motleyrice.com
- **Ivy T. Ngo**
ingo@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Joseph G. Petrosinelli**
jpetrosinelli@wc.com
- **Willow E. Radcliffe**
willowr@rgrdlaw.com,ptiffith@rgrdlaw.com
- **Joseph F. Rice**
jrice@motleyrice.com
- **Darren J. Robbins**
e_file_sd@rgrdlaw.com
- **Daniel Prugh Roeser**
droeser@goodwinprocter.com
- **Henry Rosen**
henryr@rgrdlaw.com,dianah@rgrdlaw.com
- **David Avi Rosenfeld**
drosenfeld@rgrdlaw.com,e_file_ny@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **James P. Rouhandeh**
james.rouhandeh@dpw.com,ecf.ct.papers@davispolk.com

Regan Karstrand

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1:10-cv-03864-AKH Notice has been electronically mailed to:

Alexander C Drylewski alexander.drylewski@skadden.com

Amanda M. MacDonald amacdonald@wc.com

Brant Duncan Kuehn brantkuehn@quinnemanuel.com

Charles S. Duggan charles.duggan@dpw.com, ecf.ct.papers@davispolk.com

Cynthia Margaret Monaco cmonaco@cynthiamonacolaw.com, cmmonaco@gmail.com

Daniel Prugh Roeser droeser@goodwinprocter.com

Danielle Suzanne Myers dmyers@rgrdlaw.com

Darren J. Robbins e_file_sd@rgrdlaw.com

David Avi Rosenfeld drosenfeld@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com

Donald Alan Migliori dmigliori@motleyrice.com

Eugene Mikolajczyk genem@rgrdlaw.com

Gary John Hacker ghacker@skadden.com

George Anthony Borden gborden@wc.com

Hamilton Philip Lindley hlindley@deanslyons.com, mgoens@deanslyons.com

Henry Rosen henryr@rgrdlaw.com, dianah@rgrdlaw.com

Howard E. Heiss hheiss@omm.com, #nymanagingattorney@omm.com

Ivy T. Ngo ingo@rgrdlaw.com, e_file_sd@rgrdlaw.com

James M. Hughes jhughes@motleyrice.com, erichards@motleyrice.com, kweil@motleyrice.com, kweil@pacernotice.com, mgruetzmacher@motleyrice.com

James P. Rouhandeh james.rouhandeh@dpw.com, ecf.ct.papers@davispolk.com

James R. Harper coljamesrharper@me.com

Jason A. Forge jforge@rgrdlaw.com, e_file_SD@rgrdlaw.com, tholindrake@rgrdlaw.com

Jay B. Kasner jkasner@skadden.com

Jennifer Lynn Spaziano jen.spaziano@skadden.com

Joe Kendall administrator@kendalllawgroup.com, hlindley@kendalllawgroup.com, jkendall@kendalllawgroup.com

John K. Villa jvilla@wc.com

Joseph F. Rice jrice@motleyrice.com

Joseph G. Petrosinelli jpetrosinelli@wc.com

Juliana Newcomb Murray juliana.murray@davispolk.com, ecf.ct.papers@davispolk.com, lisa.hirakawa@davispolk.com

Keir Nicholas Dougall kdougall@dougallpc.com

Kevin Anthony Burke kaburke@sidley.com, efilenotice@sidley.com, nyefiling@sidley.com

Lauren Kristina Collogan lcollogan@wc.com

Leigh R. Lasky lasky@laskyrifkind.com

Lori McGill lorialvinomcgill@quinnemanuel.com

Matthew Melamed mmelamed@rgrdlaw.com

Michael Barry Carlinsky michaelcarlinsky@quinnemanuel.com, brantkuehn@quinnemanuel.com, jomairecrawford@quinnemanuel.com

Michael Joseph Dowd miked@rgrdlaw.com, e_file_sd@rgrdlaw.com, e_file_sf@rgrdlaw.com, tome@rgrdlaw.com

Michael Scott Bailey michael.bailey@skadden.com

Mitchell M.Z. Twersky mtwersky@aftlaw.com

Paul T. Hourihan phourihan@wc.com

Richard Mark Strassberg rstrassberg@goodwinprocter.com, nymanagingclerk@goodwinprocter.com

Ross Bradley Galin rgalin@omm.com, lisachen@omm.com, mochoa@omm.com, neverhart@omm.com

Ryan A. Llorens ryanl@rgrdlaw.com, kirstenb@rgrdlaw.com, nbear@rgrdlaw.com

Samuel Howard Rudman srudman@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com, mblasy@rgrdlaw.com

Scott D. Musoff smusoff@skadden.com

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

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

Steven M. Farina sfarina@wc.com

Stuart Michael Sarnoff ssarnoff@omm.com

Trig Randall Smith trigs@rgrdlaw.com, e_file_sd@rgrdlaw.com, nhorstman@rgrdlaw.com

William E. Schurmann wschurmann@wc.com

William H. Narwold bnarwold@motleyrice.com, ajanelle@motleyrice.com, vlepine@motleyrice.com

Willow E. Radcliffe willowr@rgrdlaw.com, ptiffith@rgrdlaw.com

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Catherine J. Kowalewski
Robbins Geller Rudman & Dowd LLP (San Diego)
655 West Broadway
Suite 1900
San Diego, CA 92101

Daniel E. Hill
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

David C. Walton
Robbins Geller Rudman & Dowd LLP (SANDIEGO)
655 West Broadway
Suite 1900
San Diego, CA 92101

Jamie J. McKey
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

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