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 REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE DEFENDANTS' CUMULATIVE TESTIMONY

I. INTRODUCTION

Plaintiffs have moved to exclude certain opinions of defendants' purported disclosure experts – John C. Coates IV ("Coates"), Jack T. Tanselle ("Tanselle"), Nicholas C. Theodorou, Esq. ("Theodorou") and William Holder ("Holder") – on the basis that those rebuttal opinions are repetitive with respect to plaintiffs' expert's, D. Paul Regan ("Regan"), opinions concerning Pfizer's FAS 5 disclosure and accrual judgments. *See* Dkt. No. 374.

Plaintiffs have also moved to exclude certain opinions of Sunil Panchal ("Panchal"), Sean Nicholson ("Nicholson") and David Feigel ("Feigel") on the basis that those rebuttal opinions regarding physician prescribing behavior are nearly identical. Further, plaintiffs seek to preclude the needlessly cumulative critique by these experts of plaintiffs' expert's, Meredith Rosenthal ("Rosenthal"), opinion concerning the economic impact of the Company's unlawful promotional activities based, in part, on her identification of physician specialties and Rosenthal's use of ICD9 codes. Finally, plaintiffs object to Panchal and Feigal both opining that Pfizer's use of advisory boards and consultants were not promotional in nature, in criticism of plaintiffs' expert, Jerry Avorn ("Avorn").

In opposing plaintiffs' Motion, defendants re-write and mischaracterize the experts' opinions and distort the issues before the Court.[1] Defendants claim that while Messrs. Coates, Tanselle, and Theodorou offer completely similar opinions, based on their background and experience, their opinions are somehow unique. Similarly, defendants claim that Professor Nicholson and Drs. Feigal and Panchal's different backgrounds and areas of experience render their critiques of Professor Rosenthal and Dr. Avorn different. In doing so, they ignore the needless overlapping testimony of

[1] In fact, defendants just make up opinions for Mr. Regan. *See* Dkt. No. 396 at 5 ("Mr. Regan also opines, without any background to do so, that Pfizer's securities disclosures were inadequate . . . ."). Plaintiffs are still looking for that opinion in the first two pages of Mr. Regan's report.

these experts and fail to explain how the cumulative testimony of these experts will add any meaningful help to the jury that would overcome the prejudice to plaintiffs resulting from such testimony. Rather, they try to deflect from such impermissible testimony by claiming that off-label promotion of Pfizer's drugs is irrelevant. While defendants may not like the fact that Pfizer's systemic off-label promotion of its drugs is highly relevant to plaintiffs' claims that defendants violated the securities laws, their claim that off-label promotion is irrelevant is unfounded. *See* Dkt. No. 409 at 6-14, and Responses to Motions *in Limine* Nos. 1, 2, 3, 5 and 10 (Dkt. Nos. 403, 405, 407, 409). Further, defendants are not allowed to defend any of the claims at issue "through the sheer weight of successive expert testimony." *United States v. Walker*, 910 F. Supp. 861, 863 (N.D.N.Y. 1995).

II. COATES, TANSELLE, THEODOROU AND HOLDER OFFER IDENTICAL OPINIONS IN RESPONSE TO MR. REGAN'S FAS 5 AND INTERNAL CONTROL OPINIONS

Defendants are utterly silent regarding plaintiffs' identification of virtually identical opinions intended to be offered by defendants' experts. Defendants concede that Mr. Coates intends to opine that Mr. Regan has not "'identified any material misstatement in or omission from the Investigation of Marketing Disclosures.'" *See* Dkt. No. 374 at 3.[2] Defendants conceded that Mr. Tanselle intends to opine that Mr. Regan is wrong about his internal control opinions. *See id.* at 4. Defendants concede that Mr. Theodorou will opine that it was inappropriate for Mr. Regan to utilize the actual gain or Neurontin methodology in estimating what Pfizer should have reserved for the DOJ

[2] Unless otherwise noted, citations are omitted.

investigation at the outset of the Class Period. *Id.* at 4. It is undisputed that Mr. Holder intends to offer the exact opinions at trial.[3]

Notably, defendants acknowledge that Mr. Holder is the appropriate expert to respond to Mr. Regan's opinions. *See* Dkt. No. 396 at 4. However, in the effort to defeat plaintiffs' Motion, defendants re-write the scope of Mr. Regan's opinions to include: (a) what would have increased the probability of government action against Pfizer; and (b) it would have been simple to determine the criminal multiplier the parties would use when they ultimately settled the investigation. *See id.* Mr. Regan did not offer these opinions. Further, defendants had the opportunity at deposition to clarify if he was offering such opinions, but they did not.[4]

With regard to Mr. Regan's purported "probability of government action" opinion, a rational reading of his report demonstrates that Mr. Regan explained that certain facts in the record were consistent with Pfizer's September 2005 conclusion that a loss associated with the DOJ investigation was probable under FAS 5. In support of that opinion, Mr. Regan described how Pfizer employees had been caught red-handed attempting to destroy relevant Bextra documents. He further described FBI interviews of several of those employees, during which they admitted that Pfizer had been engaged in the rampant off-label promotion of Bextra at the direction of senior management. *See* Dkt. No. 377, Ex. 2 ("Regan Report") at 18. It is only common sense that destruction of documents and admissions of criminal behavior would make it more probable that Pfizer would suffer a loss at the hands of the DOJ pursuant to FAS 5. Mr. Theodorou is not an accountant and he certainly brings

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[3] In fact, defendants admit that the only reason why they should be allowed to offer cumulative and wasteful opinions is because when their experts will provide identical testimony, they do so based on differing backgrounds and expertise. *See* Dkt. No. 396 at 5

[4] It is odd that defendants now accuse Mr. Regan of offering these as opinions and, yet, defendants failed to address them in their motion *in limine* to preclude his testimony. *See* Dkt. No. 378.

no expertise to the table as to what facts make a loss "probable" or qualify for recording as a reserve under FAS 5. Accordingly, Mr. Holder's identical opinions are sufficient.

Next, defendants claim that Mr. Regan opined that it would have been a simple process for Pfizer to determine a criminal multiplier under the U.S. sentencing guidelines. *See* Dkt. No. 396 at 4 n.15. That is not one of Mr. Regan's opinions. Mr. Regan observed in support of his FAS 5 opinion that "it would have been reasonable to expect the multiplier to [be] at least equal, if not exceed, the Neurontin multiplier." Regan Report at 28. Mr. Regan based his conclusion on the similarities of the unlawful conduct in the Bextra and Neurontin cases and the "repeated use of [the Neurontin] method" in other cases where the multiplier was between 1.0 and 2.0x. *Id.* at 24, 27-28. In fact, Mr. Regan, for the sake of conservatism, used the Neurontin multiplier – *i.e.*, 1.6x – in his estimate of a reserve. *Id.* at Ex. 2. Mr. Regan opined that Pfizer had all necessary information and data at the beginning of the Class Period to record a reasonable reserve for the Bextra investigation pursuant to FAS 5. Further, given how serious Pfizer's criminal conduct in the promotion of Bextra was, it clearly would have been reasonable to expect the multiplier to at least equal what Pfizer experienced in the Neurontin settlement in 2004. *Id.* at 19-23. Again, Mr. Theodorou is not an accountant. Mr. Holder is. Mr. Holder offers the exact same opinion as does Mr. Theodorou. Mr. Holder's opinion is sufficient.

III. DR. NICHOLSON, DR. FEIGEL AND DR. PANCHAL OFFER IDENTICAL OPINIONS IN OPPOSITION TO THE OPINIONS OF PLAINTIFFS' EXPERTS DR. ROSENTHAL AND DR. AVORN

Defendants' failure to address the actual testimony that Professor Nicholson and Drs. Panchal and Feigal seek to offer at trial highlights why the opinions they seek to offer are needlessly cumulative under Federal Rule of Evidence 403. The fact that these three experts seek to offer identical testimony regarding the reasons why a physician might prescribe a drug off-label other than

being influenced by Pfizer's off-label promotion is not addressed by defendants. *See* Dkt. No. 374 at 5-6. Defendants' generic claim that their experts have different backgrounds does not excuse their affront to Federal Rule of Evidence 403. They fail to explain, for example, how two physicians offering identical testimony will provide any meaningful assistance to a jury beyond that of a single expert. Nor do they explain why testimony from any physician on this point is necessary (or even relevant) when it is offered to rebut the opinion of plaintiffs' public health economist, Professor Meredith Rosenthal. It is a waste of time for defendants to parade three experts before a jury (two physicians and an economist) to provide this needlessly cumulative testimony at trial to rebut Professor Rosenthal's expert opinion that economic regression analysis can be used to calculate Pfizer's revenue and profits from the off-label promotion of its drugs. Dkt. No. 377, Ex. 1, Executive Summary at 1. There is no need to take a "wait and see" approach as defendants suggest – these experts have already proffered expert reports and deposition testimony that demonstrate that these experts will offer virtually identical testimony.

Likewise, defendants' proffer of three experts to rebut Professor Rosenthal's selection, as an economist, of challenged specialties is needlessly cumulative. In opposition, defendants selectively ignore that they proffer Professor Nicholson on this point and provide no explanation for Dr. Feigal's failure to offer any expert opinion on this issue until his deposition despite knowing of Professor Rosenthal's selections prior to the submission of his expert report. Dkt. No. 374 at 6. Defendants' experts all offer the virtually same testimony in rebuttal – that Rosenthal's challenged specialties "'in fact write on-label prescriptions.'" *Id*. at 6.[5] The only exception seems to be that Dr.

[5] Defendants' thinly veiled attempt to deflect from their needlessly cumulative testimony by claiming that Professor Rosenthal's opinion is flawed because she consulted with Dr. Stan Finkelstein is belied by the fact that defendants' experts knew of her selection of physician specialties well in advance of their reports. Having proffered one physician expert to critique these specialties, defendants cannot blame plaintiffs for their addition of a second physician expert until

Panchal's opinions are now subsumed in Dr. Feigal's testimony. Dkt. No. 396 at 6; *see also Mengele v. Patriot II Shipping Corp*., No. 99 Civ 8745 (LTS) (KNF), 2002 U.S. Dist. LEXIS 2550, at *5 (S.D.N.Y. Feb. 19, 2002) (physician expert's testimony inadmissible as needlessly cumulative to another physician expert). Defendants fail to explain how the backgrounds of defendants' experts would add any meaningful value to their identical opinions on this point that would overcome the prohibitions on needlessly cumulative evidence set forth in Federal Rule of Evidence 403. Defendants' efforts to buttress their opinions by offering multiple experts on the same topic should not be countenanced. *Williams v. Cnty. of Orange*, No. 03 Civ. 5182 (LMS) 2005 U.S. Dist. LEXIS 46051, at *18-*19 (S.D.N.Y. Dec. 13, 2005) (cumulative expert testimony excluded where it only served to buttress the testimony of another expert).

Further, defendants concede that both Dr. Feigal and Professor Nicholson critique Professor Rosenthal's use of ICD9 codes. Dkt. No. 396 at 7. Their efforts to distinguish their overlapping critiques proves plaintiffs' point – the cumulative testimony is unnecessary. Both Dr. Feigal and Professor Nicholson purport to have experience with ICD9 codes. Declaration of Trig R. Smith in Further Support of Plaintiffs' Motion *in Limine* to Exclude Defendants' Cumulative Expert Testimony, Ex. 7, filed herewith, at 124:6-9 (Nicholson Depo.); Dkt. No 402, Ex. RR-4 at 138:18-139:4 (Feigal Depo.). They both critique her methodology, albeit Dr. Feigal, for the first time in deposition. Dkt. No. 374 at 6. Defendants were well aware of her use of ICD9 codes at the time of her report, there is no need to add the duplicitous testimony of Dr. Feigal. *See, e.g*., Dkt. No. 377, Ex. 1 at 23; Ex. 5, ¶¶32, 92-94.

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his deposition nearly three months later. Regardless, defendants' motion to exclude her testimony fails for the reasons set forth in Plaintiffs' Opposition to Defendants' Motion *in Limine* No. 2 to Exclude the Testimony of Professors Rosenthal and Baum (Dkt. No. 405).

Defendants also offer no opposition to the cumulative testimony of Drs. Panchal and Feigal to rebut plaintiffs' expert, Dr. Jerry Avorn with respect to the promotional nature of Pfizer's advisory boards and consulting meetings. Dkt. No. 374 at 6-7. The identical opinions of these experts on this topic is precluded under Fed. R. Evid. 403.

Defendants should be precluded from offering needless and prejudicial cumulative testimony under Fed. R. Evid. 403. Accordingly, defendants should be ordered to promptly identify for plaintiffs which of their experts will testify as to why: (i) physicians prescribe drugs off-label(*i.e.*, Nicholson, Panchal, or Feigal); (ii) Professor Rosenthal's classification of physician specialties is flawed (*i.e.*, Nicholson, Panchal, or Feigal); (iii) Professor Rosenthal's use of ICD9 codes is flawed (*i.e.*, Nicholson or Feigal); and (iv) advisory boards and consultant meetings are not promotional activities (*i.e.*, Panchal or Feigal)

IV. CONCLUSION

For the reasons set forth in plaintiffs' motion *in limine* to exclude defendants' cumulative expert testimony and set forth above, plaintiffs' motion should be granted and defendants should be precluded from offering needlessly cumulative evidence.

DATED: December 30, 2014

Respectfully submitted,

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I hereby certify that on December 30, 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 30, 2014.

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