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 TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE RELIANCE EVIDENCE AND ARGUMENT

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I. INTRODUCTION

Over 100 pages of briefing concerning defendants' reliance defenses can be distilled down to one simple question: Will the Court hold defendants to their representations or will it allow a trial by ambush? There is no middle ground here. One side or the other will suffer the consequences of defendants' duplicity. Despite their affirmative motion for summary judgment and multiple opposition briefs, defendants have yet to acknowledge, let alone deny or explain, the complete reversal in their representations to the Court during discovery versus the evidence and arguments they seek to present at trial. During discovery, defendants repeatedly assured the Court that their reliance defenses relied ***only*** on Dennis Block and Larry Fox, and had ***nothing*** to do with "investigation counsel" (led by outside counsel Covington & Burling LLP ("Covington"), and inside counsel Carlton Wessel and Gary Giampetruzzi). The Court relied on these representations and rejected plaintiffs' requests for discovery beyond Block/Fox, ***but*** the Court told defendants their list of trial witnesses would be "binding" on them, and gave them "fair warning" that it would not allow any evidence from witnesses whose documents defendants withheld. Defendants now seek to do exactly what they promised the Court they would not do, and precisely what the Court warned them it would not allow: invoke investigation counsel to support their reliance defenses. If defendants pull this fast one on plaintiffs and the Court, it will mean an ambush in which defendants present reliance defenses at trial that plaintiffs were expressly precluded from testing in discovery.

Plaintiffs worked diligently throughout discovery to build a record that clearly shows defendants cannot possibly satisfy the Second Circuit's elements for the reliance defense that defendants asserted throughout discovery (*i.e.*, one limited to Block/Fox). This record consists of Block/Fox's testimony, defendants' testimony, and the documents produced in discovery. Block/Fox simply and undeniably lacked the information and experience necessary to assess the

government investigation that was the subject of ***all*** the statements, omissions, and reserve decisions at issue here. Block/Fox and each defendant deny that Block/Fox rendered any such advice, including specifically defendants' representation throughout the Class Period that Pfizer had "substantial defenses" to the government investigation. Rather than acknowledge that their self-defined reliance defense woefully fails to satisfy the elements set forth in *Markowski v. SEC*, 34 F.3d 99 (2d Cir. 1994), defendants simply ignore *Markowski* as completely as they ignore their prior representations to the Court and seek to broaden their reliance defenses so as to invoke the investigation counsel they successfully shielded from discovery. Now, only the Court can decide who will suffer the consequences of defendants' gamesmanship: defendants, by being held to their promise of "not invoking or relying on" investigation counsel, which would mean the loss of their reliance defenses; or plaintiffs, by being ambushed at trial with reliance defenses that they were not permitted to explore during discovery and that extend way beyond the reliance defense they have worked so hard to defeat.

II. STILL CORRECTING THE RECORD

Every time defendants file a brief on this issue, plaintiffs have to correct the record. This trend continues with defendants' opposition (Dkt. No. 400) to plaintiffs' motion to exclude reliance evidence and argument (Dkt. No. 346). Defendants' unequivocal representations to the Court led to very strict limitations on plaintiffs' discovery concerning defendants' reliance defenses. Plaintiffs had implored the Court to allow discovery from and concerning the investigation counsel (led by Covington (Ethan Posner), Giampetruzzi, and Wessel), who were the only counsel who could have provided defendants with substantive advice concerning the subject of the statements, disclosures, and reserve decisions at issue here: the government investigation into Pfizer's off-label promotion activities. Whatever investigation counsel told defendants behind closed doors must have differed

dramatically from the minimized risk defendants presented publicly because, despite defendants' professed competitive business advantage due to Pfizer's law abidingness, its "substantial defenses" to the government investigation, and its refusal to take a reserve, in reality (1) the evidence of Pfizer's guilt was overwhelming; and (2) it wound up agreeing to the largest criminal resolution in U.S. history.

Nevertheless, defendants shielded from discovery ***all*** of their private communications with investigation counsel, and they did so by assuring the Court that their reliance defenses would have ***nothing*** to do with investigation counsel:

> Defendants are not invoking or relying upon any advice provided by Covington regarding the Government Investigations.

Dkt. No. 172 at 35 n.30 (July 8, 2013).

Now, however, defendants wish to argue at trial the exact opposite of what they assured the Court and plaintiffs:

> [T]he company's Board, senior executives, and in-house lawyers all relied on Covington's judgment to inform them that the company had meritorious defenses. . . . [T]he undisputed fact is that Pfizer and its disclosure counsel relied on investigation counsel's judgment in crafting the company's securities disclosures.

Dkt. No. 246 at 46.

> "And it also is undisputed that ***based on government investigations counsel's views***, Pfizer's securities disclosure lawyers advised the company that the "substantial defenses" language in the securities filings was appropriate as applied to the DOJ investigation.

Dkt. No. 355 at 4.[1] The lawyers whom defendants assured the Court they would ***not*** be "invoking or relying upon" for their defenses are the very same lawyers (1) they now wish to argue they and their "disclosure counsel" "relied on"; and (2) whose views the disclosures at issue were "based on."

[1] Unless otherwise noted, emphasis is added and citations are omitted.

Back in March 2013, plaintiffs expressly moved to compel the depositions of a number of witnesses, including the two government investigations counsel listed on defendants' 26(a) disclosures: Giampetruzzi and Wessel. *See* Joint Letter, dated March 5, 2013, Ex. A at 10, 20. Plaintiffs contended that these were individuals defendants "'will likely call at trial.'" Joint Letter, dated March 5, 2013, at 14. Defendants adamantly disagreed:

> But the initial disclosures are ***not*** the trial witness list. . . . Several of the individuals are the critical witnesses in the case, and thus, they should be deposed. But the list also includes individuals who will almost certainly have no role at trial.

Id. at 14-15.

One week later, the Court held a hearing on the dispute. During that hearing, defendants represented that:

- "We have no intention of calling those 19 people [on our 26(a) list]." RT 3/8/13 at 3:22-23.
- "We would could [sic] identify the people we're going to the [sic] call at trial, and I'm happy to do so and share that with Mr. Rosen." *Id.* at 3:25-4:2.
- In response to the Court's inquiry as to how many witnesses defendants were going to call at trial, defendants represented that, "I would have to go through the list, but I would say it's 10 or less." *Id.* at 4:4-5.

The Court then issued the following ruling:

> My ruling is that by next Friday, Mr. Farina should give you a list, ***which will be binding on him***. And plaintiffs will confine their depositions to the people identified. People identified. Not entities, but people who are identified.
>
> And with regard to the binding nature of the disclosures, if defendants want to enlarge the list, they'll have to show some cause for doing that.

Id. at 4:16-23.

Per the Court's order, defendants identified the following trial witnesses: (1) Larry Fox, (2) Loretta Cangialosi, (3) Doug Lankler, (4) Dennis Block, (5) Brien O'Connor, and (6) Larry Bradley. *See* Ex. 2 to Declaration of Jason A. Forge in Further Support of Plaintiffs' Motion *in*

Limine to Exclude Reliance Evidence and Argument ("Reply Decl."), filed herewith (March 15, 2013 email from defendants' counsel to plaintiffs' counsel). Defendants never attempted to show good cause to enlarge this list, as the Court required. Soon thereafter, Cangialosi (Pfizer's Controller) testified that she had relied on Giampetruzzi and Wessel (among other investigation counsel) in connection with Pfizer's reserves decisions. Dkt. No. 172 at 10. Plaintiffs then moved, *inter alia*, (1) to compel defendants to produce documents related to the government investigation that defendants had withheld as privileged; and (2) "to allow discovery directed towards the outside law firms representing Pfizer in the Government Investigations," expressly including Covington. *Id.* at 3. Defendants had withheld as privileged, and continued to withhold throughout discovery (and to date), hundreds of documents related to the government investigation authored or received by investigation counsel, including specifically Giampetruzzi, Wessel, and Posner.

Defendants opposed plaintiffs' request based on their unequivocal promise not to so much as ***invoke***, let alone rely, on investigation counsel. *See, e.g.*, Dkt. No. 172 at 35 n.30 (July 8, 2013) ("Defendants are not invoking or relying upon any advice provided by Covington regarding the Government Investigations."). At the hearing on this dispute, the Court accepted defendants' representation and denied plaintiffs' requests for discovery, but the Court made it crystal clear to defendants that it would hold them to their representation. RT 7/19/13 at 13:21-14:17.

Regarding deposition subpoenas, the Court had remarked that "You can take anybody you want. If you want to take someone else, take someone else. I don't understand why [defendants are] objecting to the subpoenas." RT 7/19/13 at 19:18-20. Plaintiffs then served deposition subpoenas for several witnesses, including Giampetruzzi, Wessel, and Posner. Plaintiffs explained that they were seeking information from these witnesses that they hoped "will establish the details and consequences of the Underlying Offense, which will expose the deceptiveness and impropriety of

Pfizer's disclosures and lack of reserves." Dkt. No. 181 at 7. Defendants immediately moved to block these depositions. *Id.* And once again, defendants assured the Court that there was no need for discovery concerning these witnesses because Block, Fox, Lankler, and O'Connor were "***all*** inside and outside lawyers who Pfizer designated as trial witnesses" and their depositions had already been scheduled. *Id.* at 4.[2] Once again, the Court took defendants at their word, and their representations and assurances convinced the Court to deny plaintiffs' request to depose "Posner . . . , Wessel, [and] Giampetruzzi." Dkt. No. 181at 1.

III. ARGUMENT

A. Defendants' Bait and Switch

Defendants urge the Court to abide by its prior decisions limiting plaintiffs' discovery concerning defendants' reliance defenses (Dkt. No. 400 at 2-3), but they completely ignore their representations to the Court, which served as the foundation for the Court's ruling: "Defendants are not invoking or relying upon any advice provided by Covington regarding the Government Investigations." Dkt. No. 172 at 35 n.30. Because the Court ruled based on defendants' representation that they "are not invoking or relying on" investigation counsel, defendants are foreclosed from reversing their representation, after having enjoyed the benefit of a complete discovery shield. Yet, this is exactly what they are now trying to do:

> [T]he company's Board, senior executives, and in-house lawyers all relied on Covington's judgment to inform them that the company had meritorious defenses. . . . [T]he undisputed fact is that Pfizer and its disclosure counsel relied on investigation counsel's judgment in crafting the company's securities disclosures.

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[2] Defendants' actual representation was that "[i]n the coming weeks, Plaintiffs will be deposing" all of defendants' designated attorney witnesses – those scheduled depositions were of Block, Fox, O'Connor, and Lankler. Dkt. No. 181 at 4. Although Lankler and O'Connor are investigation counsel, defendants foreclosed on privilege grounds plaintiffs' questions about their communications with defendants concerning the government investigation. *See, e.g.*, Reply Decl., Ex 3 at 98:20-99:10 (Lankler Depo.); Reply Decl., Ex. 4 at 18:9-16, 41:4-11 (O'Connor Depo.).

Dkt. No. 246 at 46.

> And it also is undisputed that ***based on government investigations counsel's views***, Pfizer's securities disclosure lawyers advised the company that the "substantial defenses" language in the securities filings was appropriate as applied to the DOJ investigation.

Dkt. No. 355 at 4.

Although defendants quote a portion of the July 19, 2013 hearing transcript (Dkt. No. 400 at 3), they omit the Court's unambiguous warning to defendants regarding the consequences of their self-defined limits of their reliance defenses:

> THE COURT: And if you call any witness and any of these [withheld] documents are handled by that witness, that witness will be precluded.
>
> * * *
>
> THE COURT: If it has to do with relevance, if it's relevant to the case – I don't care about documents dealing with the weather and things of that nature, but if it has to do with these drugs or this case, you'd better disclose. Fair notice, Mr. Farina.
>
> [Defendants' counsel]: Understood.
>
> THE COURT: If you hold back, you're going to be precluded.
>
> [Defendants' counsel]: Understood.
>
> THE COURT: You take that risk.

RT 7/19/13 at 13:21-14:17.

Of course, the Court's warning would be meaningless if defendants could simply refer to (invoke) investigation counsel with or without calling them because either way, defendants' gamesmanship would leave plaintiffs completely unprepared to challenge this new reliance defense. That is why the Court's warning is entirely consistent with what is a universally recognized prohibition on such ambush tactics – even where they were not preceded by a motion to compel, let alone a motion to compel that a defendant opposed:

> In any event, a motion to compel is not a prerequisite to invoking the *Bilzerian* rule. Rather, *Bilzerian* provides that a party "who intends to rely at trial" on a good faith defense "must make a full disclosure during discovery; failure to do so constitutes a waiver" of that defense. *Vicinanzo*, 739 F. Supp. at 894. Indeed, courts in this circuit have followed *Bilzerian* and blocked good faith defenses, without requiring the party seeking preclusion to move to compel.

Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5936 (KMW), 2011 U.S. Dist. LEXIS 42881, at *8-*9 (S.D.N.Y. Apr. 20, 2011) (quoting *Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 891, 894 (S.D.N.Y. 1990), and citing *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991)); *see also E.G.L. Gem Lab Ltd. v. Gem Quality Inst., Inc.*, 90 F. Supp. 2d 277, 296 n.133 (S.D.N.Y. 2000) ("Having blocked his adversary from conducting discovery on this issue, he will not now be heard to advance reliance on counsel."), *aff'd*, 4 F. App'x 81 (2d Cir. 2001). Plaintiffs cite *Arista Records*, *Bilzerian*, and *E.G.L. Gem Lab* several times in their opening brief (Dkt. No. 346 at 6, 8) because they are directly on point here. Yet, defendants do not even acknowledge these cases, let alone attempt to distinguish them.

Instead, defendants cite just one case, and that one case confirms that their failure to make a complete disclosure to Block/Fox dooms their reliance defenses. Dkt. No. 400 at 4 (citing *SEC v. Reserve Mgmt. Co.*, Nos. 09 MD 2011 (PGG), 09 Civ. 4346 (PGG), 2012 U.S. Dist. LEXIS 147723 (S.D.N.Y. Sept. 12, 2012)).

First, *Reserve Mgmt.*, again a case that ***defendants*** cite, confirms that a reliance-on-counsel defense is an affirmative defense:

> "In order to establish ***the affirmative defense of advice of counsel***, ***a defendant must show*** (1) that he made a complete disclosure to counsel; (2) sought advice from counsel as to the legality of his actions; (3) received advice that his conduct was legal; and (4) relied on such advice in good faith." *S.E.C. v. O'Meally*, No. 06 Civ. 6483(LTS)(RLE), 2010 U.S. Dist. LEXIS 107696, 2010 WL 3911444, at *4 (S.D.N.Y. Sept. 29, 2010) (citing *Markowski v. SEC*, 34 F.3d 99, 104-05 (2d Cir. 1994)).

Reserve Mgmt., 2012 U.S. Dist. LEXIS 147723, at *18-*19. Second, although defendants ignore *Arista Records*, the court in *Reserve Mgmt.* embraces it. 2012 U.S. Dist. LEXIS 147723, at *19 (""[A] party who intends to rely at trial on the advice of counsel must make a full disclosure during discovery; failure to do so constitutes a waiver of the advice-of-counsel defense."") (citing *Arista Records*, 2011 U.S. Dist. LEXIS 42881, at *8). And third, the reason the *Reserve Mgmt.* court allowed the defendants to proceed with their affirmative defense was because the facts there were the inverse of those presented here. There, the Securities and Exchange Commission ("SEC") sought to preclude defendants' reliance defense because the defendants had withheld discovery concerning their bankruptcy counsel. *Id.* at *19-*20. But the two topics that were the subject of the reliance defense "'d[id] not relate'" to the subject of the defendants' communications with bankruptcy counsel, and "the Commission has cited no public statements by Defendants that directly implicate principles of, or the application of, bankruptcy law." *Id.* at *21.

The contrast with this case could not be clearer. The exact same government investigation that is the subject of the disclosures to which defendants' reliance defense applies is also the subject of the work and advice of the investigation counsel defendants shielded from discovery. And, the public statement by defendants assuring investors of their "substantial defenses" to the government investigation directly implicates principles of, and the application of, criminal law, which is what defendants shielded from discovery. Because the circumstances this case presents are the opposite of those presented in *Reserve Mgmt.*, its reasoning would compel the opposite outcome here: defendants should be precluded from advancing their reliance defense.

B. Defendants' False Premise of Mutual Exclusivity

As they did in their opposition to plaintiffs' motion for partial summary judgment defendants urge the Court to accept their false premise of mutual exclusivity between investigation counsel's

advice and Block/Fox's advice regarding disclosures concerning the government investigation. Dkt. No. 400 at 7 (asserting the "consistent distinction between litigation advice and securities disclosure advice"). This is how defendants presented their reliance defense to the Court in order to shield investigation counsel from discovery: "Defendants are not invoking or relying upon any advice provided by Covington regarding the Government Investigations." Dkt. No. 172 at 35 n.30 (July 8, 2013). But the reality proved to be vastly different from defendants' representation. In fact, despite accusing plaintiffs of "attempt[ing] to conflate" investigation counsel's advice with Block/Fox's advice regarding disclosures concerning the government investigation (Dkt. No. 400 at 6), elsewhere, defendants admit that the two are completely intertwined: "[T]he company's Board, senior executives, and in-house lawyers all relied on Covington's judgment to inform them that the company had meritorious defenses. . . . [T]he undisputed fact is that Pfizer and its disclosure counsel relied on investigation counsel's judgment in crafting the company's securities disclosures." Dkt. No. 246 at 46. "And it also is undisputed that ***based on government investigations counsel's views***, Pfizer's securities disclosure lawyers advised the company that the 'substantial defenses' language in the securities filings was appropriate as applied to the DOJ investigation." Dkt. No. 355 at 4.

Plaintiffs are not questioning whether a company should be able to choose to hire lawyers with different areas of expertise, depending on their needs (Dkt. No. 400 at 8-9). Of course they should. But if such a company then ***chooses*** to intertwine the work of these different groups of lawyers so that, for example, one group of "disclosure counsel relie[s] on [another group of] investigation counsel's judgment in crafting the company's securities disclosures" (Dkt. No. 246 at 46), and if such company later ***chooses*** to pursue a reliance-on-counsel defense concerning its security disclosures, it may do so only if it produces in discovery all privileged communications and

work product from all lawyers concerning the subject of the security disclosures. Otherwise, all defendants could eat their cake and have it too by (1) using "buffer counsel" to receive a partial and skewed perspective from the fully informed counsel who have separate contrary communications with defendants; (2) limiting discovery to only the buffer counsel; and (3) invoking all counsel at trial – thereby rendering their "'claim of reliance on counsel . . . immune from a showing that, in fact, the defendant had received overwhelming advice to the contrary.'" *SEC v. Wyly*, No. 10 Civ. 5760 (SAS), 2011 U.S. Dist. LEXIS 87660, at *5-*6 (S.D.N.Y. July 27, 2011) (quoting *SEC v. Forma*, 117 F.R.D. 516, 523 n.5 (S.D.N.Y. 1987)); *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 Civ. 5298 (LMM) (RLE), 1998 U.S. Dist. LEXIS 13611, at *9 (S.D.N.Y. Sept. 3, 1998), *aff'd sub nom.*, *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, No. 93 Civ. 6876 (LMM), 2000 U.S. Dist. LEXIS 14316 (S.D.N.Y. Sept. 29, 2000). This is what defendants are doing here by feeding Block/Fox and KPMG investigation counsel's advocacy pieces, such as the Covington "white paper," but then excluding Block/Fox and KPMG (and thus plaintiffs) from defendants' private communications with investigation counsel that rendered their disclosures and reserve decisions so misleading and led to the largest criminal resolution in U.S. history. The patent inequity of such a scenario is why the law prohibits it and why the Court should preclude defendants' reliance defenses and any direct or indirect invocations of investigation counsel's "judgment."

C. Defendants' Reliance Defenses Fail

Defendants are engaging in all this gamesmanship because plaintiffs' hard work and determination have demonstrated that defendants cannot establish the elements of the reliance defense they maintained throughout discovery. Dkt. Nos. 288, 391.

1. Defendants Unquestionably Failed to Share All Pertinent Information with Block/Fox

Defendants' false mutual-exclusivity premise extends into their next argument, which contends that "Plaintiffs argue that the law requires the impossible – that securities disclosure counsel, for a corporation that discloses dozens of legal matters every quarter, must learn every conceivable fact and review all potentially relevant evidence about all of those matters in order to render disclosure advice." Dkt. No. 400 at 9 (also citing testimony of Edward Buthusiem). Again, the point is not that executives and disclosure counsel are precluded from relying on advice from investigation counsel. Rather, the point is that in such situations where, as here, defendants and disclosure counsel (and accountants) adopt the judgment of investigation counsel, any reliance defense ***necessarily*** extends to investigation counsel. In other words, plaintiffs agree that it was impossible for Block/Fox, who did not participate in the Pfizer side of the government investigation and knew next to nothing about criminal law, to learn and analyze "all potentially relevant evidence" about the government investigation so they could render disclosure advice concerning the government investigation. This is what plaintiffs exposed through discovery, which is what prompted defendants' midnight-hour reversal, and it explains why Block/Fox simply relied on and adopted the judgment of investigation counsel (*e.g.*, substantial defenses), rather than their own, as defendants admit. Dkt. No. 246 at 46; Dkt. No. 355 at 4.

As to Pfizer's government investigation disclosures, Block/Fox's role was largely ministerial:

> Q. In other words – I guess different way of asking it: Did you actually participate in any sort of internal investigation –
>
> A. Oh, no.
>
> Q. – related to the government investigations?

> A. No, no. I had no knowledge of the actual – firsthand knowledge of the actual facts. I never looked at documents and things like that during this time frame.

Reply Decl., Ex. 5 at 56:2-11 (Block Depo.); SUF (Dkt. No. 289), ¶11. Fox echoed this sentiment as to all internal investigations: "I'm a securities lawyer and do not get involved in the investigations themselves." Reply Decl., Ex. 6 at 11:19-20 (Fox Depo.); SUF, ¶12. Both Block and Fox also disclaimed any role in advising Pfizer as to the accuracy of its "substantial defenses" assurance. Reply Decl., Ex. 5 at 104:15-23 (Block Depo.); Reply Decl., Ex. 6 at 86:13-19, 90:12-20 (Fox Depo.); *see also* SUF, ¶¶14-15. They realized their limited role and experience, so they simply adopted, without questioning, investigation counsel's judgment:

> Q. Did you have any basis to assess the reliability of the responses you would have received if you had asked, what is our exposure [in the government investigation]?
>
> A. Second guessing the advice from GI attorneys on our potential exposure?
>
> Q. Yes.
>
> A. No.

Reply Decl., Ex. 6 at 82:19-25 (Fox Depo.).

> Q. Did you understand during the class period that you and Dennis Block were the most knowledgeable lawyers involved in this process concerning the government investigations?
>
> [Objection]
>
> THE WITNESS: We – we were the lawyers – we were the securities lawyers who were advising the company on disclosure obligations. We certainly were not the most knowledgeable about the underlying litigation. That's why we have litigators.
>
> BY MR. FORGE:
>
> Q. So was the advice you were rendering only as reliable as the information you were receiving from the experts and outside counsel?
>
> [Objection]
>
> THE WITNESS: We assumed, and I think with good reason given the nature of the people that we were dealing with, the reliability of the information that we were

> being given. But, yes, we were relying on our GI counsel to advise us about the status of the litigation, judgments, some possible outcomes and the like.

Id. at 84:4-85:4 (Fox Depo.).

Most importantly, because this is primarily an omissions case, there is no question that Block/Fox did ***not*** advise defendants it was appropriate for them to omit information that was plainly pertinent to the government investigation and thus pertinent to their disclosures concerning the government investigation, including their "substantial defenses" assurance. The information that defendants withheld from Block included the following: (1) defendants' awareness that Pfizer had actually committed the offense the government was investigating (Dkt. No. 288 at 15-17); (2) the exhibits corroborating the *qui tam* complaint that triggered the government investigation (*id.* at 17); (3) the documents that Pfizer's District Manager illegally directed to be deleted and altered, which proved Pfizer's off-label promotion (*id.* at 17-18); (4) sales force surveys (*id.* at 18-19); (5) call notes (*id.* at 19-21); (6) employee interviews (*id.* at 21-23); and (7) off-label sales/gain data (Reply Decl., Ex. 5 at 73:21-74:16 (Block Depo.); Reply Decl., Ex. 6 at 76:2-4 (Fox Depo.)). Defendants withheld from Fox categories (2)-(7). *Id.* Rather than face these omissions head on, defendants try to rewrite the rules.

Defendants argue that they can satisfy the fundamental requirement that they "made complete disclosure to counsel"[3] merely by "direct[ing] everyone" to give Block/Fox whatever they want. Dkt. No. 400 at 10. This argument conflicts with every single case to consider a reliance-on-counsel defense, beginning with the Second Circuit's seminal *Markowski* decision, which defendants ***never*** acknowledge. This is such a universal requirement, it is confirmed even in the cases defendants themselves cite. *See, e.g.*, *Reserve Mgmt.*, 2012 U.S. Dist. LEXIS 147723, at *18 ("'In

[3] *Markowski*, 34 F.3d at 105.

order to establish the affirmative defense of advice of counsel, a defendant must show (1) that he made a complete disclosure to counsel . . . .'") (cited by defendants, Dkt. No. 400 at 4); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989) ("a defendant who would rely on an advice-of-counsel defense is required to have disclosed all pertinent information in his possession to his attorney") (cited by defendants, Dkt. No. 400 at 9-10); and *Jock v. Ransom*, No. 7:05-cv-1108, 2007 U.S. Dist. LEXIS 47027, at *25 (N.D.N.Y. June 28, 2007) ("'[t]he advice-of-counsel defense ***requires a defendant to establish*** the following elements: . . . (4) and [he] made a full and accurate report to his attorney of all material facts which the defendant knew"), *aff'd*, No. 07-3162-cv, 2009 U.S. Dist. LEXIS 6048 (2d Cir. Mar. 20, 2009)) (cited by defendants, Dkt. No. 400 at 9).[4]

Defendants' attempt to rewrite the law is particularly inappropriate here because Block and Fox did not have the requisite experience to even know what information to request, let alone to be able to assess it:

> [A.] I know as much about misbranding as probably yourself. It's not my area of interest or expertise.

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[4] Earlier in their brief, defendants incredibly accuse plaintiffs of "misleadingly cit[ing]" to *United States v. Gorski*, Crim. No. 12-10338-FDS, 2014 U.S. Dist. LEXIS 105384 (D. Mass. Aug. 1, 2014) in plaintiffs' reply brief in further support of their motion for summary judgment. Dkt. No. 400 at 1. This is an incredible accusation for three main reasons. First, plaintiffs merely quoted the *Gorski* court's citation to Seventh and First Circuit precedent that require a defendant bear the burden of establishing complete disclosure of all material facts. Dkt. No. 391 at 25 (quoting *Gorski*, 2014 U.S. Dist. LEXIS 105384, at *24). Second, *Gorski* was a decision concerning a motion to disqualify counsel, where a reliance-on-counsel defense arose only ***hypothetically***. *Gorski*, 2014 U.S. Dist. LEXIS 105384, at *22 ("[the government] contends that attorneys from Mintz Levin ***could be called*** as witnesses ***if*** defendant asserts an advice-of-counsel defense"). Thus, the quote defendants pull from the case is rampant dictum, ***which cited no supporting authority***. Dkt. No. 400 at 1 (quoting *Gorski*, 2014 U.S. Dist. LEXIS 105384, at *26). And third, *Gorski* is a case ***defendants*** had cited and this section of plaintiffs' brief concluded, "[m]ore importantly, as can be seen, all of the cases defendants cite are from outside the circuit and cannot possibly overrule the Second Circuit's requirements that a defendant asserting a reliance-on-counsel defense "show that he made complete disclosure to counsel." *Markowski*, 34 F.3d at 105; Dkt. 391 at 25-26.

[Plaintiffs' counsel]:

Q. I know a thing or two about it.

A. I don't know as much as you. It's not my area of expertise.

Reply Decl., Ex. 5 at 197:21-198-2 (Block Depo.).

Q. Given your lack of experience in criminal cases, lack of experience concerning health care fraud, lack of experience concerning internal investigations, and your lack of involvement in the investigations related to the government investigations, did you have – personally have any way of verifying whether you were receiving all relevant information regarding the government investigations?

[Objection]

THE WITNESS: I am – as I've indicated many times, I am a securities lawyer. I am not a litigator. It is not my job, it is not the job of any securities lawyer in any company in the country to look at the evidence – the underlying evidence, make analyses, interview witnesses, look at interviews of witnesses in connection with making a securities law judgment. If we did that, we could not do our own jobs. I am fully confident in the experience and the expertise of our in-house GI attorneys, Doug in particular, a former prosecutor. And I relied on them for that. And as I've indicated many times, we had scheduled and unscheduled calls with them, "we" meaning Dennis Block and I, to fully inform us of what we needed to know to make our securities law judgment. I'm not a litigator.

* * *

[Q.] I'm asking you, did you have any way of verifying that the information they gave you was all of the information that was relevant to the government investigations?

A. The answer to that question is no, but I did have confidence in the experience and expertise and integrity of our GI attorneys who provided the information to Dennis and me.

Reply Decl., Ex. 6 at 211:5-212:11, 213:21-214:3 (Fox Depo.).

2. Defendants Cannot Establish Any of the Remaining Elements of the Reliance Defenses Either

In addition to their failure to satisfy the complete-disclosure element, defendants also cannot satisfy the three other elements of their defense because the testimony from Block, Fox, and the defendants themselves confirmed that defendants did ***not*** seek, receive or rely on advice from

Block/Fox for defendants' "substantial defenses" assurance, nor for any other assessment of the government investigation:[5]

> [Q.] The first part talking about "we have substantial defenses in these matters," did you personally and professionally make the assessment that there were substantial defenses regarding the government investigations?
>
> A. No.
>
> Q. You relied on others for that –
>
> A. Yes.
>
> Q. – conclusion?

Reply Decl., Ex. 5 at 104:15-23 (Block Depo.).

> Q. But with respect to the disclosure that "We believe we have substantial defenses in these matters," is that the type of information that you, Larry Fox, independently researched and determined to be accurate?
>
> [Objection]
>
> THE WITNESS: No.

See Reply Decl., Ex. 6 at 86:13-19 (Fox Depo.).

> [Q.] Did you render any legal advice regarding the accuracy of the statement "We believe we have substantial defenses in these matters"?
>
> A. I would not have said that I am – that this is my view. Nobody in the company would have ever thought to even ask me whether I have personal knowledge of the strength of our defenses in any litigation.

Id. at 90:12-20 (Fox Depo.); *see also* SUF, ¶¶14-15.

The individual defendants acknowledged the same ***lack*** of reliance on Block/Fox for any substantive advice concerning the government investigation that is the subject of all the statements, omissions, and reserve decisions at issue in this case:

---

[5] *Markowski*, 34 F.3d at 104-05 (in addition to complete disclosure, defendant asserting reliance defense must establish that he (2) sought advice from counsel as to the legality of his actions; (3) received advice that his conduct was legal; and (4) relied on such advice in good faith.

> Q. I'm asking you point-blank: On what counsel do you – are you claiming to have relied [for] your defense in this case?
>
> [Objection]
>
> A. Covington & Burling.
>
> Q. Any others?
>
> A. My recollection was that it was primarily Covington & Burling. I don't recall if there were any others.

See Reply Decl., Ex. 7 at 99:19-100:4 (9/23/14 Levin Depo.). Defendants attempt to downplay the significance of Levin's admission as "one isolated excerpt from Mr. Levin's deposition" (Dkt. No. 400 at 7), but as can be seen, plaintiffs' counsel posed a completely open-ended question to Levin. Then, plaintiffs' counsel followed up with yet another wide-open question that gave Levin free rein to provide whatever honest answer he wanted. In both instances, Levin clearly identified Covington as the ***only*** counsel on whom he is claiming to rely for his defense. In contrast, Levin's own counsel had to lead him by literally reading prior testimony to him before posing the question defendants quote in their opposition. Reply Decl., Ex. 7 at 110:14-111:9 (Levin Depo.). And, far from sticking to that forced answer, on re-cross, Levin relented and admitted that, regarding the government investigation, "it was consultation with ***investigation counsel*** that drove the views that were factored into the disclosures." *Id.* at 115:25-116:2.

Defendant Kindler also confirmed these obvious points:

> Q. In the course of that process or in any other context, did Mr. Block ever advise you regarding the strengths or weaknesses of Pfizer's defenses to the government's investigation of Bextra?
>
> [Objection]
>
> A. He may or may not have expressed an opinion about that, but I did not look to him for advice on that.
>
> Q. Did you look to Larry Fox for advice on that?

A. No.

Q. You looked to other lawyers for advice on that; correct?

A. On the strength – could you repeat the predicate?

Q. Sure, the strengths or weaknesses of the government's investigation regard[ing] Bextra.

[Objection]

A. I did not look to either Mr. Block or Mr. Fox for advice on that subject.

Q. But you did look to other lawyers for advice on that subject; correct?

A. Yes.

See Reply Decl., Ex. 8 at 31:10-32:8 (10/10/14 Kindler Depo.). It would be terribly unfair if all of the time and money expended to disprove defendants' reliance defense resulted in ***plaintiffs*** suffering an ambush at trial with a new reliance defense that invokes or relies on investigation counsel.

D. Defendants' Final Straw

Defendants' final argument may be their most disingenuous. As set forth above, defendants fought tooth and nail to prevent plaintiffs from deposing Giampetruzzi, Wessel, and Posner. Defendants' sense of power and self-importance is on full display when they blithely assert that, "Defendants have never represented that the March 2013 preliminary witness list was final." Dkt. No. 400 at 15. It was ***the Court*** that ordered defendants to identify their trial witnesses in March 2013, and there was nothing "preliminary" about the Court's mandate:

> THE COURT: My ruling is that by next Friday, Mr. Farina should give you a list, ***which will be binding on him***. And plaintiffs will confine their depositions to the people identified. People identified. Not entities, but people who are identified.
>
> And with regard to the binding nature of the disclosures, if defendants want to enlarge the list, they'll have to show some cause for doing that.

RT 3/8/13 at 4:16-23.

Four months later, when defendants opposed plaintiffs' efforts to obtain documents that inside and outside counsel, including Giampetruzzi, Posner, and Wessel had received and authored concerning the government investigation, the Court expressly warned defendants that there was no turning back from their decision to withhold hundreds of documents:

> THE COURT: And if you call any witness and any of these [withheld] documents are handled by that witness, that witness will be precluded.
>
> * * *
>
> THE COURT: If it has to do with relevance, if it's relevant to the case – I don't care about documents dealing with the weather and things of that nature, but if it has to do with these drugs or this case, you'd better disclose. Fair notice, Mr. Farina.
>
> [Defendants' counsel]: Understood.
>
> THE COURT: If you hold back, you're going to be precluded.
>
> [Defendants' counsel]: Understood.
>
> THE COURT: You take that risk.

RT 7/19/13 at 13:21-14:17.

One month later, when plaintiffs issued deposition subpoenas for Giampetruzzi, Posner, and Wessel, defendants ran to the Court to prevent the depositions. Dkt. No. 181. Defendants now represent, tellingly without citation, that "Plaintiffs did not argue any other basis [beyond witness credibility] for taking the depositions of these witnesses, and never sought to depose them on any other issues." Dkt. No. 400 at 14. That is just an outright falsehood, as proved by the very joint letter brief the parties submitted on the issue of these depositions. In their portion of this letter brief, plaintiffs expressly stated that the ***first*** reason they were seeking these depositions was because they hoped to obtain information from these witnesses that "will establish the details and consequences of the Underlying Offense, which will expose the deceptiveness and impropriety of ***Pfizer's disclosures and lack of reserves***." Dkt. No. 181 at 7. The witness-credibility issue was only a ***secondary*** reason

for plaintiffs' request: "These revelations will ***also*** enable Plaintifffs to identify and discredit any witness who participated in, or was complicit in, the Obstruction of Justice." *Id.*

Defendants never produced the hundreds of documents relating to the government investigation that Giampetruzzi, Wessel, and Posner handled. They never withdrew their opposition to plaintiffs' request to depose Giampetruzzi, Wessel, and Posner. They never stopped asserting the privilege as to defendants' communications with Giampetruzzi, Wessel, and Posner.[6] And throughout discovery, they never added Giampetruzzi, Wessel, and Posner to their trial witness list. Only after plaintiffs' motion for partial summary judgment (Dkt. No. 288) exposed the fatal flaws in defendants' reliance defenses did defendants identify Giampetruzzi, Wessel, and Posner as trial witnesses – with no attempt to establish good cause for such inexcusably late notice and no regard for the complete lack of discovery concerning these three. There is none.

Defendants made their strategic decisions with the benefit of multiple warnings from the Court. Plaintiffs played by defendants' rules and have shown that they deserve to win on defendants' reliance defenses. Dkt. Nos. 288, 391. It would be a grave injustice if the Court allowed defendants to change completely the rules of engagement and ambush plaintiffs at trial with reliance defenses that do precisely what defendants promised they would not do by "invoking or relying" on investigation counsel. Thus, the only fair outcome would be to preclude defendants from both calling investigation counsel as witnesses ***and*** from "invoking" the judgment or advice of investigation counsel in any way. Otherwise, either tactic would be an ambush of plaintiffs with a defense plaintiffs were prevented from preparing to overcome.

---

[6] Indeed, during the final deposition in this matter, taken just two months ago, defendants were still asserting the privilege and refusing to answer questions about their communications with investigation counsel: "Wait a minute. You can't ask him about his discussions with Covington. That is privileged, and we haven't waived it." Reply Decl., Ex. 9 at 52:21-53:7 (10/16/14 Waxman Depo.).

IV. CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that the Court preclude defendants from offering any testimony, document or argument that invokes or relies upon the judgment or advice of any counsel, including any statements or actions of KPMG that were based on input from counsel.

DATED: December 30, 2014

Respectfully submitted,

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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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Docket Text:
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