

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MARY K. JONES, Individually and on Behalf	:	Civil Action No. 1:10-cv-03864-AKH
of All Others Similarly Situated,	:	
	:	<u>CLASS ACTION</u>
Plaintiff	:	
vs.	:	REPLY IN SUPPORT OF PLAINTIFFS’
	:	MOTION <i>IN LIMINE</i> TO PRECLUDE
PFIZER INC., et al.,	:	DEFENDANTS FROM PRESENTING
	:	EVIDENCE OR MAKING STATEMENTS
Defendants.	:	CONCERNING THE ABSENCE OF AN SEC
_____	X	INVESTIGATION OR ENFORCEMENT
		ACTION OR RESTATEMENT OF PFIZER’S
		CLASS PERIOD FINANCIAL
		STATEMENTS

Defendants oppose plaintiffs' Motion<sup>1</sup> to preclude at trial, evidence and/or argument relating to the absence of a restatement of Pfizer's Class Period financial statements or an SEC investigation/enforcement action into Pfizer's conduct, with nothing more than flawed conclusions, irrelevant case law and assumptions unsupported by the record. First, the evidence defendants intend to offer at trial regarding the lack of a restatement – mainly related to KPMG's conclusions regarding Pfizer's reserves being appropriate and a restatement not being necessary – should be excluded as part of defendants' flawed "reliance" defenses because defendants withheld from KPMG key information regarding the government investigations.<sup>2</sup> Moreover, the only cases defendants reference in support of their position are irrelevant in the context of *proving* securities fraud claims at trial because they discuss how the absence of a restatement could defeat the required "strong inference of scienter" when *pleading* such claims at the motion to dismiss 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 Cir. 2004); *Kalnit v. Eichler*, 264 F.3d 131, 140-41 (2d Cir. 2001).

Second, defendants offer no evidence (because there is none in the record) that the SEC reviewed, much less approved, Pfizer's disclosure of the government investigations or accounting for the resulting \$2.3 billion settlement. SEC inaction thus has no bearing on the accuracy or completeness of those disclosures. Accordingly, defendants' opposition does not raise any law or evidence which substantively defeats plaintiffs' argument that evidence concerning the absence of a

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<sup>1</sup> "Motion" refers to Plaintiffs' Motion *in Limine* to Preclude Defendants from Presenting Evidence or Making Statements Concerning the Absence of an SEC Investigation or Enforcement Action or Restatement of Pfizer's Class Period Financial Statements (Dkt. No. 339).

<sup>2</sup> See Plaintiffs' Motion for Partial Summary Judgment, Opposition to Defendants' Motions for Summary Judgment and Motion to Exclude Reliance Evidence and Argument. Dkt. Nos. 288, 304, 343 and 391.

restatement or an SEC investigation/enforcement action is irrelevant in proving at trial defendants' liability under §10(b)/Rule 10b-5.

Since the lack of a restatement and SEC investigation/enforcement action *proves nothing* regarding the accuracy or completeness of defendants' disclosure of the government investigations or accounting for the resulting \$2.3 billion settlement, defendants' dismissal of plaintiffs' arguments concerning the prejudicial value of evidence on these points is disingenuous. A jury could misinterpret such evidence and find defendants not liable for securities fraud even though Pfizer's financials and disclosures could still be materially misleading to investors absent a restatement or SEC action. In addition, a jury could erroneously surmise that the lack of a restatement or SEC action resulted from a thorough evaluation by KPMG and the SEC of all the relevant information when such was not the case. Therefore, the prejudicial value of evidence concerning the absence of a restatement or SEC investigation/enforcement action greatly outweighs any of its probative value and favors its preclusion at trial.

## **I. ARGUMENT**

### **A. Defendants Rely on Flawed Conclusions and Irrelevant Case Law to Support Their Claim that Evidence Concerning the Absence of a Restatement Is Admissible at Trial**

Even though the lack of a restatement is irrelevant to the jury's determination of whether Pfizer's disclosures were materially misleading to investors under the federal securities laws, as explained in plaintiffs' Memorandum,<sup>3</sup> defendants misleadingly attempt to make it relevant by connecting it to their flawed reliance on KPMG defense. Dkt. No. 394 at 2-4. However, as

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<sup>3</sup> "Memorandum" refers to the Memorandum of Law in Support of Plaintiffs' Motion *in Limine* to Preclude Defendants from Presenting Evidence or Making Statements Concerning the Absence of an SEC Investigation or Enforcement Action or Restatement of Pfizer's Class Period Financial Statements (Dkt. No. 340).

explained in prior memoranda filed with this Court (*see* Dkt. Nos. 288, 304, 343 and 391), any conclusion KPMG made regarding Pfizer having appropriate disclosures or not needing to restate its Class Period financials was based on cherry-picked information from the investigation counsel whom defendants shielded from discovery and consequently should be excluded.

Furthermore, defendants' protests are principally based on cases evaluating the role that the absence of a restatement has in undermining the required "strong inference of scienter" at the *pleading* stage of a securities fraud case. *E.g.*, *JP Morgan Chase Co.*, 553 F.3d at 198; *Rombach*, 355 F.3d at 177; *Kalnit*, 264 F.3d at 140-41. Those cases are immaterial to the question of the role that such evidence has in disproving a fraud claim *at trial*. Courts considering the issue of proof have not found the lack of a restatement to be probative. *See, e.g.*, *SEC v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342, 366 n.13 (D.N.J. 2009) ("the failure of the SEC to require restatement proves nothing"); *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230, 1245 (N.D. Cal. 2008) ("the lack of a restatement did not mean that [the company] only engaged in legitimate conduct"); *In re Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1222 n.4 (N.D. Okla. 2003) ("the fact that [the company's] financial results were not restated does [n]ot mean that the financial results disseminated during the Class Period were accurate").

Next, defendants' claim as to lack of prejudice entirely misses the point. Precisely because a jury could rely on evidence of KPMG's decision to not require Pfizer to restate to conclude that the Company's Class Period financials were not false and misleading is why such evidence is unfairly prejudicial. Under defendants' logic, only if there was a restatement could there possibly be securities fraud. But juries have found defendants liable for securities fraud in cases in which there were no restatements. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-cv-5571, Jury Verdict Form (S.D.N.Y. Feb. 4, 2010); *In Re Real Estate Associates Limited Partnerships*, No.

CV98-7035 DDP (AJWx), Order and Final Judgment (C.D. Cal. April 29, 2003). Moreover, defendants completely ignore the unfair prejudice that is inherent in their reliance on KPMG's conclusions when KPMG was not fully informed of all the relevant facts based on defendants' selective proffering of the facts to KPMG. Accordingly, any evidence concerning the absence of a restatement should be precluded as irrelevant and prejudicial.

**B. Defendants Have No Support for Their Claim that Evidence Concerning SEC Inaction Is Admissible at Trial**

Defendants have proffered no evidence demonstrating that the SEC received all the relevant information related to Pfizer's disclosure of the government investigations and accounting for the resulting \$2.3 billion settlement as part of any potential investigation or enforcement action against the Company, much less approved those disclosures. Thus, the cases referenced by defendants are factually inapposite because the SEC not only considered, but gave "clearance" to, the disclosures in those cases.<sup>4</sup> The cases cited by plaintiffs, on the other hand, are directly on point because those courts were all ruling on motions *in limine* which related to the admissibility of evidence demonstrating SEC inaction. *See* Memorandum at 4. As in those cases, this Court should find evidence and argument regarding the lack of an SEC investigation/enforcement action irrelevant, prejudicial and inadmissible. *Id.*

**II. CONCLUSION**

For the foregoing reasons, including those described more fully in plaintiffs' Memorandum, the Court should preclude any evidence or argument concerning the absence of a restatement of

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<sup>4</sup> *See, e.g., Gen. Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 163 (2d Cir. 1968); *Spielman v. Gen. Host Corp.*, 402 F. Supp. 190, 197 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 39 (2d Cir. 1976); *Sherman v. Posner*, 266 F. Supp. 871, 874 (S.D.N.Y. 1966); *Kauder v. United Board & Carton Corp.*, 199 F. Supp. 420, 423 (S.D.N.Y. 1961).

Pfizer's Class Period financial statements or an SEC investigation/enforcement action into Pfizer's conduct.

DATED: December 30, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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#### Docket Text:

**REPLY MEMORANDUM OF LAW in Support re: [339] MOTION in Limine to Preclude Defendants from Presenting Evidence or Making Statements Concerning the Absence of an SEC Investigation or Enforcement Action or Restatement of Pfizer's Class Period Financial Statements. . Document filed by Mary K. Jones(Individually), Stichting Philips Pensioenfond. (Ngo, Ivy)**

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