UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PFIZER INC., et al., Defendants.	Civil Action No. 1:10-cv-03864-AKH Hon. Alvin K. Hellerstein ECF Case

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTIONS *IN LIMINE* NOS. 4-12

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Plaintiffs filed a consolidated opposition brief to Defendants' Motions *In Limine* Nos. 4-12. Those nine motions raise distinct issues, but given the amount of paper that already has been filed, Defendants confine their reply to several specific points that apply across several of the motions.

I. EVIDENCE CONCERNING MARKETING CONDUCT OR MISCONDUCT BY FORMER EMPLOYEES IS IRRELEVANT TO *SCIENTER* OR ANY MATTER AT ISSUE. (MOTIONS *IN LIMINE* NOS. 4, 5, 10)

Plaintiffs argue that the evidence subject to these three motions is relevant to scienter—in other words, Plaintiffs claim that evidence of off-label marketing shows that Defendants intentionally misled investors in disclosing the Department of Justice investigation. Pls.' Mem. of Law in Support of Omnibus Opp. to Defs.' Mot. *In Limine* Nos. 4-12, at 4, ECF No. 409 ("Pls.' Opp."). In the first place, Second Circuit law squarely forecloses Plaintiffs from arguing that any off-label marketing itself should have been disclosed, as companies have no legal duty to disclose "uncharged, unadjudicated wrongdoings or mismanagement." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG* (*In re UBS AG Sec. Litig.)*, 752 F.3d 173, 184 (2d Cir. 2014); *see also* Defs.' Mem. in Supp. of Mot. *In Limine* No. 5, at 3, ECF No 355. To the extent that Plaintiffs suggest this evidence is relevant to what Plaintiffs characterize as an assurance to investors that the company had "substantial defenses" to the Bextra investigation, Plaintiffs' theory of admissibility rests on a mischaracterization of what any reasonable investor would have understood, in context, to be a *warning* regarding litigation risks:

> ***Litigation is inherently unpredictable, and excessive verdicts do occur***. Although we believe we have substantial defenses in these matters, ***we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results***.

This non-actionable warning could never be the basis of liability under the securities laws and, therefore, cannot support Plaintiffs' arguments for admitting this evidence.

Moreover, even leaving these fatal legal infirmities to one side, another basic flaw in Plaintiffs' position is that they seek to introduce evidence and make arguments that ***the Department of Justice itself never cited*** in the course of the underlying investigation. At bottom, Plaintiffs want to show how they would have litigated the government's case, and then argue that Pfizer could not have had "substantial defenses" to certain aspects of that hypothetical prosecution.

The problem with Plaintiffs' argument is that Pfizer's Class Period securities disclosures, and Defendants' knowledge about the basis for those disclosures, related to the ***actual*** Department of Justice investigation that occurred between 2004 and January 2009, not Plaintiffs' 2015 re-imagination of that investigation. The only relevant *scienter*-related question, therefore, is what Defendants knew or believed during the Class Period concerning the ***actual*** government investigation.[1]

Plaintiffs seek to introduce numerous documents that the Department of Justice itself never identified as supporting its allegations of improper promotion, and to argue legal theories that the government never raised.[2] Those matters cannot possibly be relevant to whether Defendants acted with scienter in describing the Department of Justice's investigation, because the Department of Justice itself did not identify them as relevant to its theories of liability or damages. The fact that Plaintiffs, years later, having combed through millions of pages of

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[1] As set forth in Part IV *infra*, Plaintiffs have conceded that "each individual defendant's knowledge would be limited to the relevant period of his tenure with Pfizer," Pls.' Opp. at 4, and the admissibility of the evidence at issue therefore must be considered on a Defendant-by-Defendant basis.

[2] To give a concrete example, Plaintiffs' proposed exhibit list includes numerous operating plans and marketing presentations related to the medications Geodon, Zyvox, and Lyrica, notwithstanding the fact that the Department of Justice never argued to Pfizer that those specific documents supported any claims against the company. Indeed, Plaintiffs' desired trial-within-a-trial about how the government could have prosecuted claims concerning Geodon, Lyrica, and Zyvox is all the more irrelevant, given that Pfizer resolved those matters in a civil settlement in which the company made no admission of liability.

documents, have identified materials that they believe the Department of Justice ***should have*** used to support a theory of improper promotion cannot speak to Defendants' state of mind during the Class Period. As the case upon which Plaintiffs rely makes clear, "allegations that defendants should have anticipated future events and made certain disclosures earlier than they actually did do not suffice to make out a claim of securities fraud." *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000).

Perhaps the most glaring example of Plaintiffs' attempt to recast what actually happened in the Department of Justice's investigation is the evidence that four employees attempted to alter or delete documents in violation of an unambiguous Pfizer document hold, *see* Defs.' Mot. *In Limine* No. 4, ECF Nos. 351 & 353. In their 2015 re-imagination of the government's investigation, Plaintiffs describe that evidence as showing "consciousness of guilt" and "confirm[ing] the merits of the government investigation," Pls.' Opp. at 20, as if the government believed the acts of these employees would be held against Pfizer. But in the ***actual*** investigation, the ***exact opposite*** was true. Pfizer promptly reported the attempted alteration or deletion of documents to the Department of Justice upon learning of it.[3] And the Department of Justice never raised those employees' improper acts as a basis to bring any charges against Pfizer. For instance, the August and September 2006 government presentations, on which Plaintiffs place great emphasis, *see* Pls.' Opp. at 9-10 & Ex. 36, ***do not even mention*** the alteration or deletion of documents, despite including a timeline of what the government perceived to be key events up to that point in time, *see* Ex. 36, at DOJ000192-000198. The Court should not allow Plaintiffs to manufacture entirely different theories of liability than the ones which the government pursued, and then argue that, based on their *ex post facto* theories,

[3] Decl. of Amanda M. MacDonald In Supp. of Reply Mem. In Supp. of Defs.' Mots. *In Limine* Nos. 4-12, dated Jan. 2, 2015 ("Jan. 2, 2015 MacDonald Decl.") Ex. FF-5 (PFE DERIV 00066719).

Defendants' Class Period disclosures about the government investigations were somehow false or misleading. Plaintiffs' vague gesture at the concept of scienter is simply an excuse to inject this irrelevant, confusing, and unfairly prejudicial evidence and argument into this case.

What ***is*** relevant to Defendants' state of mind is the actual government investigation; what happened during the investigation; Pfizer's responses to the government's allegations; and the reasonableness of Defendants' efforts to accurately disclose the investigation in Pfizer's SEC filings. On this subject, the record is undisputed. Pfizer's government investigations counsel handling the matter, including its outside counsel at Covington & Burling, conducted an internal investigation of the government's allegations and then, even according to ***Plaintiffs***, "vigorously defended" the company in an investigation that spanned nearly five years. Pls.' Reply Mem. in Supp. of Mot. *In Limine* Precluding Defs. From Disputing Off-Label Promotion of Bextra and Zyvox at 3, ECF No. 426; *see also* Mem. of Law in Supp. of Pfizer's Mot. for Summ. J. at 11-22, ECF No. 246. Government investigations counsel kept the company's disclosure counsel and its outside auditor KPMG fully informed about the status of the investigation, *see* Defs.' Mem. of Law in Opp. to Pls.' Mot. for Partial Summ. J. at 14-18, 36-41, ECF No. 319 (hereinafter "Def. Opp. to PMSJ"), and shared with them the key submissions to the government—including a 75-page memorandum explaining at length the numerous factual and legal defenses Pfizer had to the government's allegations.[4] Disclosure counsel in turn evaluated all of Pfizer's legal proceedings disclosures and advised Defendants that all of those disclosures were appropriate. Def. Opp. to PMSJ at 8–13. This record demonstrates that Defendants reasonably believed Pfizer had defenses to the government investigation—and that Defendants and the disclosure counsel upon whom they relied in crafting Pfizer's securities disclosures held this belief *notwithstanding their*

[4] Decl. of Joseph G. Petrosinelli in Supp. of Pfizer Inc.'s Mot. for Summ. J., dated Oct. 31, 2014, Ex. C-4 (KPMG-PFIZ-DS 033924-4002).

awareness that the company's internal investigation had identified instances of employee misconduct. Def. Opp. to PMSJ at 16-17. Plaintiffs' 2015 attempt to present a case different than the one the government was developing—a hypothetical case that Defendants obviously were not and could not have been addressing during the Class Period—says nothing about Defendants' state of mind during the Class Period and therefore is irrelevant. The Court should grant Defendants' Motions *In Limine* Nos. 4, 5, and 10.

II. PLAINTIFFS CANNOT INTRODUCE EVIDENCE OF OTHER COMPANIES' CONDUCT UNDER RULE 404(b). (MOTION *IN LIMINE* NO. 8)

Even further afield, Plaintiffs seek to introduce evidence of the resolution of government investigations that concerned marketing conduct at ***other*** pharmaceutical companies prior to their acquisition by Pfizer. Faced with Rule 404(b)'s prohibition on introducing evidence of prior bad acts to show propensity, Plaintiffs offer a nonsensical argument, attempting to distinguish the clear line of precedent forbidding such evidence—such as *Huddleston v. United States*, 485 U.S. 681, 691 (1988), *Old Chief v. United States*, 519 U.S. 172, 181-82 (1997), *United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012), and *United States v. McCallum*, 584 F.3d 471, 477 (2d Cir. 2009)—because the present case concerns Plaintiffs' attempt to introduce "the misconduct of an individual ***other than*** the individual against whom the evidence and resulting context would be used." Pls.' Opp. at 28. Plaintiffs fail to appreciate that this fact makes it ***more*** inappropriate, not less, to introduce this evidence. At best, this evidence of separate companies' conduct is irrelevant to the present case and, at worst, it is highly prejudicial and would enable Plaintiffs to insinuate, as they have repeatedly done and continue to do, that this conduct is attributable to Pfizer.[5] *See McCallum*, 584 F.3d at 477 (rejecting evidence of prior convictions, though

[5] First Am. Compl. ¶¶ 2, 5 (characterizing the Neurontin case as Pfizer paying "$430 million to settle" charges regarding "*its* illegal off-label promotion of Neurontin"). Notably, in the marked-up Complaint filed with the Court as part of the parties' proposed joint pretrial order, in which Plaintiffs were required

ostensibly offered for other purposes, as "propensity evidence in sheep's clothing"). Thus, the Court should grant Defendants' Motion *In Limine* No. 8.

III. PLAINTIFFS CANNOT INTRODUCE THE GOVERNMENT'S INFORMATION OR OTHER PLEA-RELATED DOCUMENTS AND FILINGS, WHICH ARE NOT PARTY ADMISSIONS. (MOTION *IN LIMINE* NO. 7)

Plaintiffs concede that documents such as the government's charging Information, sentencing memorandum, and letter to the sentencing court concerning the Bextra plea could be admissible only to the extent the statements contained therein constitute "an adversary's [i.e., Pfizer's] relevant admissions." Pls.' Opp. at 25. Plaintiffs promise that they will "redact from the Information the allegations that Pfizer disputed, but leave in the allegations that Pfizer admitted." *Id.* Effectively, however, Plaintiffs' concession that they seek to admit only party admissions is a concession that they cannot admit any of these documents. As Defendants have explained, Pharmacia—the entity that actually entered the plea—did not admit to any of the conduct charged in the Information, but rather admitted only that there was a sufficient factual basis for its plea.[6] And there is nothing in the ***government's*** sentencing memorandum, letters to the sentencing court, or statements at the sentencing hearing that would constitute admissions by Pfizer. In addition, Plaintiffs' assertion that these documents could be admitted against all the "defendants" as "admissions," *see* Pls.' Opp. at 24-27, contradicts both their own concession that "***each individual defendant's knowledge would be limited to the relevant period of his tenure with Pfizer***," Pls.' Opp. at 4 (emphasis added); *see also* Pls.' Mem. of Law in Opp. to Pfizer Inc.'s and the Individual Defs.' Mots. for Summ. J. at 55 n.210, ECF No. 304, and the basic legal

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to indicate allegations they intended to withdraw, Plaintiffs retained these false averments. *See* ECF No. 430, Ex. C.1 ¶¶ 2, 5.

[6] Jan. 2, 2015 MacDonald Decl. Ex. EE-5 (Kindler (Dec. 6, 2013) Dep. 269:9–15, 276:17–25, 278:2–279:3); *see also* Defs' Counterstatement of Undisputed Material Facts and Reply to Pls.' Statement of Undisputed Facts ¶¶ 40, 67, ECF No. 320.

principle that, even if these documents did constitute admissions of the company (which they do not), such admissions generally would not bind the corporation's officers. *See* Defs.' Mem. of Law in Opp. to Pls.' Mot. *in Limine* Precluding Defs. From Disputing Off-Label Promotion of Bextra and Zyvox at 2–4, ECF No. 399. For these reasons, and those more fully articulated in Defendants' Motion *In Limine* No. 7, the Court should exclude this irrelevant hearsay evidence.

IV. THE ADMISSIBILITY OF THE EVIDENCE AT ISSUE MUST BE CONSIDERED ON A DEFENDANT-BY-DEFENDANT BASIS.

As noted above, Plaintiffs' blunderbuss approach fails to distinguish among Defendants, *see, e.g.*, *United States v. Payden*, 622 F. Supp. 915, 918-19 (S.D.N.Y. 1985) ("The court must determine whether the evidence is admissible and, if so, against whom. Each of the statements must be examined independently with respect to the individual defendants. . . . Simply because the statements are admissible as to Grant, the statements are not automatically admissible against Payden and Coleman . . . . The court must determine the admissibility against Payden and Coleman as if they were being tried separately."), despite their concession that "***each individual defendant's knowledge would be limited to the relevant period of his tenure with Pfizer***," Pls.' Opp. at 4 (emphasis added). In addition to the Information and plea documents discussed in Part III, for instance, Plaintiffs also argue that physician surveys and call notes are admissible as "admissions" against all of the Defendants. Pls.' Opp. at 39-41. Pfizer denies these are admissions of the company, but as explained above, even if they were, they generally are not binding on a corporation's officers. This is particularly the case here given that certain of the Individual Defendants were not even employed by Pfizer at the time those documents (such as the plea documents or call notes) were created. Similarly, Plaintiffs' argument that they have not abandoned any of their omission claims, *see* Pls.' Opp. at 46, cannot be reconciled with their acknowledgment that each Individual Defendant's knowledge is "limited to the relevant period

of his tenure with Pfizer," *id.* at 4, and that they do not seek to hold the Individual Defendants liable for statements made when they were not employed by Pfizer.

Each of the above are simply examples of Plaintiffs' utter failure to distinguish among Defendants in connection with evidentiary issues, and are meant to highlight the fact that even under Plaintiffs' view of evidentiary issues, certain evidence and testimony is not admissible against certain of the Defendants under any ground. To that end, each Defendant reserves his or its right to object at trial to the introduction of evidence or testimony based on that Defendant's individual circumstances.

CONCLUSION

For the reasons stated above, the Court should grant Defendants' Motions *In Limine* Nos. 4-12 and exclude the irrelevant, prejudicial evidence and argument at issue.

Date: January 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of January, 2015, the foregoing Reply Memorandum in Support of Defendants' Motions *In Limine* Nos. 4-12 was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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REPLY MEMORANDUM OF LAW in Support re: [351] MOTION in Limine *No. 4 To Exclude Argument and Evidence Related to Former Employees' Deletion of Electronic Documents.*, [358] MOTION in Limine *No. 7 To Exclude Evidence Regarding the August 2009 Criminal Information and Plea Documents.*, [373] MOTION in Limine *No. 12 To Preclude Plaintiffs From Arguing At Trial that the Abandoned Statements and Omissions Support Any Finding of Liability Against Any of the Defendants.*, [367] MOTION in Limine *No. 10 To Exclude Physician Surveys and Sales Representative "Call Notes".*, [363] MOTION in Limine *No. 9 To Exclude Fifth Amendment Invocations of Non-Party Mary Holloway and Documents Relating To Her Criminal Conviction.*, [356] MOTION in Limine *No. 6 To Exclude Argument and Evidence Regarding Nondisclosures Unrelated to Plaintiffs' Claimed Losses.*, [360] MOTION in Limine *No. 8 To Exclude Evidence or Argument Related to the Promotion of, and Settlement Agreement Regarding, Neurontin and Genotropin.*, [370] MOTION in Limine *No. 11 To Preclude*

***Evidence or Testimony In Connection with Certain Statements that Are Not Actionable As a Matter of Law*., [354] MOTION in Limine *No. 5 To Exclude Evidence Related to Marketing and Alleged Off-Label Promotion of Pfizer Products*. . Document filed by Frank D'Amelio, Jeffrey B. Kindler, Alan G. Levin, Henry A. McKinnell, Pfizer, Inc., Ian C. Read, Allen Waxman. (Collogan, Lauren)**

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