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 LEAD PLAINTIFF STICHING PHILIPS PENSIOENFONDS AND PLAINTIFF MARY K. JONES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

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Lead Plaintiff Stichting Philips Pensioenfonds and Plaintiff Mary K. Jones (collectively, "Plaintiffs") respectfully submits this memorandum of law in support of its motion to strike certain exhibits referenced in Defendants' Memorandum of Law in Support of Motion to Dismiss Consolidated Class Action Complaint (the "Motion to Dismiss") (Dkt. No. 55), filed January 19, 2011. Plaintiffs hereby move to strike Exhibits B1-B133 and C1-C2 attached to the Declaration of Hal S. Shaftel in Support of Defendants' Motion to Dismiss the Consolidated Class Action Complaint ("Shaftel Decl.") (Dkt. No. 56), also filed January 19, 2011.

I. BACKGROUND

On December 6, 2010, Plaintiffs filed the Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint") against defendants Pfizer, Inc., Henry A. McKinnel, Jeffrey B. Kindler, Frank D'Amelio, David L. Schedlarz, Alan G. Levin, Ian C. Read, Joseph Feczko, Karen Katen, J. Patrick Kelley and Allen Waxman (collectively, "Defendants") (Dkt. No. 51). On January 19, 2011, Defendants filed their Motion to Dismiss and the Shaftel Decl. The Shaftel Decl. attached 153 exhibits, many of which are not integral to, referenced in, or attached to the Complaint. Plaintiffs object to the submission of Exhibits B1-B133, which are excerpts of analyst reports, and Exhibit C1, which is a journal article published 18 months after the Class Period ended.

Pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), the defendants in a securities action may either: (1) answer the complaint and engage in discovery; or (2) move to dismiss the complaint under the Federal Rules of Civil Procedure, thus invoking the PSLRA's provision automatically staying discovery. *See* 15 U.S.C. §78u-4(b)(3)(B). Here, Defendants have moved to dismiss the Complaint, thereby obtaining the benefits of the PSLRA's stay of discovery. Defendants, however, have impermissibly introduced into the record analysts

reports and contentions of disputed fact that are not referenced in the Complaint and not properly considered on a motion to dismiss. In doing so, Defendants seek to avail themselves of the benefit of the automatic discovery stay, while asking this Court to determine substantive factual issues in their favor based on Defendants' selectively chosen documents. This is improper.

II. PLAINTIFFS' MOTION TO STRIKE SHOULD BE GRANTED

A. Applicable Standards

In deciding a motion to dismiss under Rule 12(b)(6), "the district court is normally required to look only to the allegations on the face of the complaint." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). *See also Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991); *Fonte v. Bd. of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988).

Under certain limited circumstances, a court may "permissibly consider documents other than the complaint" in deciding a motion to dismiss. *Roth*, 489 F.3d at 509. A court may, for example, consider "[d]ocuments that are attached to the complaint or incorporated in it by reference," and any document "'upon which [the complaint] ***solely*** relies and which is ***integral to the complaint***.'" *Id.* (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)) (emphasis in original). These are "narrow exceptions" and are "not intended to grant litigants license to ignore the distinction between motions to dismiss and motions for summary judgment." *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998). Moreover, at the motion to dismiss stage extraneous documents certainly may not be considered for the truth of their contents or to dispute Plaintiffs' claims. *See In re Omnicom Group, Inc. Sec. Litig.*, No. 02 Civ. 4483 (RCC), 2005 U.S. Dist. LEXIS 5272, at *38-*39 (S.D.N.Y. Mar. 30, 2005) (the court rejected defendants' request for

judicial notice of Securities and Exchange Commission ("SEC") filings to prove the truth of their purported contents). Yet that is exactly what Defendants do here.

Alternatively, should this Court permit Defendants to submit Exhibits B1-B133 and C1, then Defendants' motion should be reviewed as a motion for summary judgment and Plaintiffs should be permitted to take discovery prior to opposing the motion. Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). *See also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154 (2d Cir. 2002) ("The court could have excluded the extrinsic documents. Because it elected not to do so, however, the court was obligated to convert the motion to one for summary judgment and give the parties an opportunity to conduct appropriate discovery and submit the additional supporting material contemplated by Rule 56.").

B. The Court Should Strike the 133 Analyst Report Excerpts

Plaintiffs do not cite or refer to any portion of the excerpts of the analyst reports attached as Exhibits B1-B133 in the Complaint. Neither the excerpts, the entire analyst reports, nor any other portion of the analyst reports are attached to the Complaint or otherwise incorporated by reference. As such, these excerpts can hardly be characterized as "integral" to the Complaint. Thus, they do not present any of the circumstances in which a court might properly consider such documents, absent converting the motion to a Rule 56 motion. *See Roth*, 489 F.3d at 509; *Global Network Commc'ns v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006). They should be stricken on that basis alone.

Moreover, the analyst reports (Exhibits B1-B133) are irrelevant and do not support Defendants' argument. Exhibits B1-B8 were published prior to the Class Period, and thus are

irrelevant to whether off-label marketing practices and the Department of Justice's ("DOJ") investigation of those practices was properly disclosed to the public during the Class Period. Further, Defendants cite to the analyst reports to support their argument that analysts "focused on the disclosed investigations into promotional practices as a significant factor affecting Pfizer's stock price." Motion to Dismiss at 12. Defendants' argument is disingenuous. The Bear Sterns analyst reports (Exhibits B1-B128) merely include identical boilerplate risk language buried on the last page of the issued reports: "[r]isks to our price target include . . . government investigations into pricing and promotional practices." *See* Shaftel Decl., Exhibits B1-B128. This boilerplate language included in each of the Bear Sterns reports does not indicate that Pfizer was engaging in off-label marketing or that the analyst "focused" on any "disclosed" investigation in particular. Indeed, the Bear Sterns analyst reports certainly do not reveal what defendants knew about Pfizer's off-label marketing practices at that time.

As for the five Cowen analyst reports (Exhibits B129-B133), the analyst simply cut and pasted the risk disclosures in Pfizer's public filings for the period the report was published. As alleged throughout the Complaint, Pfizer's disclosures (or lack of proper disclosure) of the off-labeling marketing were false and misleading and caused the price of Pfizer stock to be artificially inflated. Thus, the Cowen analyst reports which simply repeat Pfizer's disclosures could not have been adequate. In fact, as alleged in the Complaint, this was made clear when Pfizer's stock plummeted at the end of the Class Period due to a more detailed disclosure of the DOJ investigations.

Importantly, Defendants have not established that these analyst reports were widely available to the public. Certainly, Defendants cannot argue that the analyst reports warned investors of the off-label marketing investigation, if the reports were not available to the public.

Even if the analyst reports were widely available, however, a cursory reading of the complete analyst reports (rather than the selectively chosen snippets furnished by Defendants) demonstrates that analysts were actually focused on touting the success of Lyrica's launch and blockbuster Geodon sales in making consistently positive financial forecasts for Pfizer, and in doing so, did ***not*** reference any DOJ investigation into off-label promotion of these drugs or of Bextra and Zyvox, the other two drugs at issue in the Complaint. According to Bear Stearns analysts, Lyrica and Geodon were key products for Pfizer's highly profitable central nervous system segment and were primary drivers of revenues during the Class Period. *See, e.g.*, Shaftel Decl., Exhibits B9 at 1, B39 at 1 (Lyrica and Geodon are "standouts" in 1Q06), B108 at 1. Bear Stearns repeatedly encouraged investors to "remain focused" on Lyrica, one of Pfizer's "most important opportunities." *See, e.g.*, Shaftel Decl., Exhibits B9 at 1, B17 at 1, B39 at 1. Bear Stearns analysts increased their sales estimates for Lyrica as a percentage of Pfizer's five- year incremental pharmaceutical sales from 25% in May 2006 to 150% in January 2007. Shaftel Decl., Exhibits B50 at 1, B124 at 1. Similarly, Geodon sales were claimed to offset the substantial revenue losses resulting from the expiration of Pfizer's Zoloft patent and was a primary driver of the segment's growth. *See, e.g.*, Shaftel Decl., Exhibits B50 at 1, B83 at 1, B108 at 1, B126 at 1. These glowing forecasts in turn continuously drove Pfizer's stock price upward, from $24.00 at the start of the Class Period to a high of $28.41 in October 2006.

Taking judicial notice of Exhibits B1-B133 also is not appropriate, and indeed, Defendants have not even requested that the Court take such notice.[1] Defendants' failure to do so is enough to

[1] In the opening paragraph of the Shaftel Decl., defendants state the Court "may" take judicial notice of the exhibits. Defendants, however, do not make any argument requesting judicial notice.

prevent this Court from taking judicial notice of these extraneous materials. *Atlas v. Accredited Home Lenders Holding Co.*, 556 F. Supp. 2d 1142, 1161 n.7 (S.D. Cal. 2008) ("[D]ocuments, which are neither referenced in Plaintiffs' complaint nor the subject of a proper request for judicial notice, may not be considered on a motion to dismiss."). Even if this Court were to take judicial notice of these documents, however, to the extent Defendants rely on these analyst reports as factual support that they fulfilled their disclosure obligations under the federal securities laws, this Court may not take judicial notice "'for the truth of the matters asserted.'" *See Roth*, 489 F.3d at 509 (quoting *Kramer*, 937 F.2d at 774).

In any event, Defendants' submission of the analyst report excerpts are not integral to the Complaint, and this Court should strike them.

C. The Court Should Strike Exhibit C1

Defendants improperly rely on Exhibit C1 to contest Plaintiffs' allegation that they had a duty to disclose the DOJ's investigation of Pfizer's off-label marketing of Bextra. *See* Motion to Dismiss at 12. Exhibit C1 is an article in the Rx Compliance Report, Volume IX, Issue 9:3 (July 21, 2010). It is not clear that Rx Compliance Report is a journal available to the public. Moreover, the volume Defendants rely on was published well after the end of the Class Period, and thus is irrelevant to whether disclosures during the Class Period were adequate. For both of these reasons, among others, this Court should strike Defendants' use of Exhibit C1.

The article (Exhibit C1) is not attached to the Complaint or incorporated by reference. Defendants improperly use Exhibit C1 in an attempt to show that during the Class Period it was not clear whether Pfizer was breaking any off-label marketing laws. *See* Motion to Dismiss at 12. To support their argument, Defendants rely on statements from Assistant United States Attorney Sara

Bloom ("Bloom").[2] Neither the article nor the statement from Bloom support Defendants' position. Notably, Defendants fail to quote a statement from Bloom that suggests Defendants should have known their marketing of Bextra was improper, "it turns out the FDA was very clear about what it meant by arthritis pain versus acute pain." Shaftel Decl., Exhibit C1 at 3. Besides, regardless of Bloom's current opinion of the Bextra investigation, the facts, as alleged in the Complaint, are that Defendants were aware of the DOJ's investigation throughout the Class Period and chose not to properly disclose it to the market. Even if Defendants' argument was cogent, this Court cannot consider Exhibit C1 for the purpose of proving or evidencing that argument.

The article (Exhibit C1) is neither referenced in the Complaint nor a matter of public record subject to judicial notice, and therefore it is plainly inappropriate for this Court to give the article any consideration.[3] The law is clear on this issue. *See United States SEC v. Power*, 525 F. Supp. 2d 415, 418 n.2 (S.D.N.Y. 2007) (on motion to dismiss the court refused to consider news reports attached to attorney declaration because they were not attached to or referenced in plaintiffs' complaint); *In re IAC/InterActiveCorp. Sec. Litig.*, 478 F. Supp. 2d 574, 590 n.8 (S.D.N.Y. 2007) (the court did not consider extraneous contracts submitted by defendants in support of their motion to dismiss because the complaint did not rely on the contracts).

While courts have taken judicial notice of articles in determining a motion to dismiss, they have done so for limited purposes, not for the truth of the matter asserted as Defendants are

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[2] Defendants describe Bloom as "the lead prosecutor on the Bextra case," however, the article does not provide that description of her. Motion to Dismiss at 12. Instead, the article simply states that Bloom "has played a leading role in several major drug marketing investigations." Shaftel Decl., Exhibit C1 at 3.

[3] Defendants also do not properly request judicial notice of Exhibit C1.

improperly asking this Court to do here. *See In re Merrill Lynch & Co. Research Reports Sec. Litig.* 289 F. Supp. 2d 416, 425 & n.14 (S.D.N.Y. 2003) (the court considered newspaper articles for the limited purpose of showing that investment community was on inquiry notice of defendants' alleged fraud at least two years before filing complaint); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 402, 408-09 (S.D.N.Y. 2005) (court limited its consideration of newspaper articles not referenced in the complaint to the fact of the article's publication and not for the truth of the matter asserted). While this standard is uniformly acknowledged, Defendants disregard it and urge this Court to improperly draw inferences from Exhibit C1 that they were not required to disclose the off-label marketing investigations. Defendants reliance on the documents in this manner is inappropriate.

III. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court grant the motion to strike in its entirety.

DATED: March 9, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2011, 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 March 9, 2011.

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