UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

-against-

PFIZER INC., HENRY A. MCKINNELL, JEFFREY B. KINDLER, FRANK D'AMELIO, DAVID L. SHEDLARZ, ALAN G. LEVIN, IAN C. READ, JOSEPH FECZKO, KAREN KATEN, J. PATRICK KELLY, and ALLEN WAXMAN,

Defendant.

ECF Case 10:cv-03864 (AKH)

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

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Defendants Pfizer Inc. ("Pfizer"), Henry A. McKinnell, Jeffrey B. Kindler, Frank D'Amelio, David L. Shedlarz, Alan G. Levin, Ian C. Read, Joseph Feczko, Karen Katen, J. Patrick Kelly, and Allen Waxman (the "Individual Defendants;" collectively "Defendants") respectfully submit this memorandum in opposition to Plaintiffs' motion to strike certain documents presented to the Court in connection with Defendants' pending motion to dismiss Plaintiffs' Consolidated Class Action Complaint (the "Complaint").[1]

INTRODUCTION

In the face of the meritorious grounds for Defendants' pending motion to dismiss Plaintiffs' Complaint, Plaintiffs present a procedurally infirm motion that seeks to exclude from the Court's consideration documents that are integral to Plaintiffs' pleading, and that are of the type routinely reviewed by courts on a motion to dismiss. Although no aspects of Defendants' motion to dismiss are entirely dependent on the documents at issue, these documents further refute, on their face, the legal sufficiency of Plaintiffs' case – and thus are beneficial to the Court's proper and efficient adjudication of the viability of the pleading.

This case turns on Plaintiffs' contention that Pfizer's disclosures – made regularly beginning before and continuing throughout the Class Period – of government investigations into the Company's sales and marketing practices, were allegedly inadequate. A fatal flaw in Plaintiffs' claims lies in the fact that Pfizer's disclosures, on their face, put investors on notice of the pendency and nature of the investigations, even going so far as to state the possibility of a settlement and substantial fine even before any resolution was reached.. See Def. Br. at 11. Plaintiffs, in this "fraud on the market" case, now ask this Court to ignore the fact that securities analyst reports – whose authenticity is not disputed and who provide the "truth on the market" response to Plaintiffs' complaint – routinely expressed awareness from Pfizer's disclosures of the

[1] Specifically, Plaintiffs direct their motion to Exhibits B1-B133 and C1 attached to the Declaration of Hal S. Shaftel, dated January 19, 2011 (the "Shaftel Declaration" or "Shaftel Decl."), filed by Defendants in connection with their Memorandum in Support of Defendants' motion to dismiss the Consolidated Class Action Complaint, also dated January 19, 2011 ("Def. Br.").

existence, nature and risks of the investigations. In addition, Plaintiffs attempt to strike Defendants' reference to a news article containing statements by the lead government official involved in the investigations, even though Plaintiffs themselves reference in their own pleading extensive quotations from government press statements and court filings. See Memorandum in Support of Plaintiffs' Motion to Strike ("Pls. Br.") at 1.

As demonstrated below, Plaintiffs' motion to strike fails on two independent grounds: (1) the motion is not proper as a procedural matter, as reflected by Plaintiffs' inability to cite any rule supporting the motion; and (2) substantively, the documents that Defendants cite squarely satisfy the standards for judicial notice and consideration. Plaintiffs ignore the authority that clearly allows reference to these documents on a motion to dismiss.

ARGUMENT

I. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY IMPROPER

Plaintiffs fail to identify any Federal Rule of Civil Procedure upon which they purport to rely in bringing their motion. There is no mystery about Plaintiffs' omission: their motion to strike is procedurally without basis. The only authorization for a motion to strike is Rule 12(f), which is clearly inapplicable here.

First, Rule 12(f), which alone governs motions to strike, allows a court to "strike from a **pleading** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f) (emphasis added). However, "'[e]xhibits attached to a dispositive motion are not "pleadings" within the meaning of Fed. R. Civ. P. 7(a) and are therefore not subject to a motion to strike.'" In re Bear Stearns Cos. Sec., Deriv., & ERISA Litig., No. 08 MDL 1963, 2011 WL 223540, at *143 (S.D.N.Y. Jan. 19, 2011) (citation omitted); Katz v. Mogus, No. 07 Civ. 8314, 2009 WL 5173789, at *2 (S.D.N.Y. Dec. 30, 2009) (finding no "procedural mechanism to strike statements contained in motion papers"); Granger v. Gill Abstract Corp., 566 F. Supp. 2d 323, 334-35 (S.D.N.Y. 2008) ("all of Plaintiff's motions to strike are improper because [Rule 12(f)] allows a court to strike pleadings only").

Second, even if applicable, Rule 12(f) contains a strict time limit of 21 days after service of the subject pleading. Here, Plaintiffs waited in bringing their motion until 49 days after the declarations/exhibits were served, and until the same day as the filing of their opposition to the underlying motion to dismiss. Plaintiffs never sought relief from the Court for their untimely motion.

There is a fair and sensible rationale why a motion to strike is not properly directed to exhibits on a motion to dismiss:

> It is sufficient for the party opposing the motion to register its objection to the movant's affidavits by way of the material submitted in opposition to the motion. The court will then implicitly, if not explicitly, rule upon these objections in its consideration of the motion.

Smith v. Southeastern Stages, Inc., 479 F. Supp. 593, 594-95 (N.D. Ga. 1977) (rejecting motion to strike affidavit). To permit a party that has already filed a brief opposing a motion to dismiss to move separately to strike the defendants' exhibits gives that party the opportunity to avoid the court's rules with respect to timing and briefing and potentially obtain an unjustified surreply. The proper procedure is to raise an objection as part of the opposition to the dismissal motion, not to impermissibly expand the briefing.[2]

II. TO THE EXTENT CONSIDERED, PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THE EXHIBITS ARE PROPER

Under Second Circuit law, in ruling on a motion to dismiss, a court may consider "[d]ocuments that are attached to the complaint or incorporated in it by reference," and documents "which [are] integral to the complaint." Roth v. Jennings, 489 F.3d 499, 509 (2d Cir.

[2] On a further procedural note, Plaintiffs incorrectly argue that Defendants did not specifically request the court to take judicial notice of the challenged documents. Pls. Br. at 5-6. In fact, Defendants did so request. See Def. Br. at 4 n.2. In any event, no formal request is needed: "[a] court may take judicial notice, whether requested or not." Fed. R. Evid. 201(c); see also Garber v. Legg Mason, Inc., 347 Fed. Appx. 665, 669 (2d Cir. 2009) (Summary Order) (holding that "[t]he fact that defendants did not formally file a request for judicial notice is not relevant [because] 'a court may take judicial notice, whether requested or not'") (citation omitted).

2007); Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991). In addition, a court may consider "matters of which judicial notice may be taken" pursuant to Federal Rule of Evidence 201. Brass v. American Film Techs, Inc., 987 F.2d 142, 150 (2d Cir. 1993). Federal Rule 201(b) provides that "[a] judicially noticed fact must be one not subject to reasonable dispute that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b).

As shown below, Plaintiffs' motion to strike should be denied because the challenged documents can be considered on Defendants' motion to dismiss pursuant to the governing legal principles of this Circuit.[3]

A. This Court Should Take Judicial Notice Of The Analyst Reports

Plaintiffs challenge Exhibits B1-B133, which are examples of securities analyst reports prepared, respectively, by the firms Bear Stearns and Co. and Cowen and Company. These reports, which were published both before and during the proposed Class Period, contain analyses and projections of Pfizer's future stock price, financial condition and business prospects. Each makes references to the government's investigations into Pfizer's sales and marketing practices, stating, for example, that "the Department of Justice investigation [into the marketing of Bextra] could result in the payment of a substantial fine and/or penalty" (Shaftel Decl., Ex. B133), and that "risks to our price target include . . . government investigations into pricing and promotional practices" (Shaftel Decl., Ex. B10). Defendants provided these reports for the purpose of further reinforcing the argument that Plaintiffs' claims should be dismissed

[3] Contrary to Plaintiffs' argument (Pls. Br. at 3), no basis exists to convert the motion to dismiss to a motion for summary judgment: "a trial court should not transform a 12(b)(6) motion into a summary judgment where, as here, the motion has been filed in lieu of an answer, and the parties have neither completed discovery nor formally requested that the motion be converted." Giant Grp., Ltd. v. Sands, 142 F. Supp. 2d 503, 506 (S.D.N.Y. 2001). Plaintiffs rely solely on one inapposite decision, where the appellate court found that because the trial court had improperly considered certain exhibits on a motion to dismiss, the matter should be remanded for treatment as a summary judgment motion. See Chambers v. Time Warner, Inc., 282 F.3d 147, 154-55 (2d Cir. 2002). However, there is no issue here of the Court improperly considering exhibits – rather, the issue is whether or not to consider certain exhibits.

because investors were aware both before and during the Class Period of the pendency, nature and risks of the investigations. See Def. Br. at 12. This bears on Plaintiff's own pleading burdens with respect to the issues concerning the very disclosures on which they rely – causation (truth on the market), materiality, and the running of the statute of limitations, among others.

Although cited by Defendants in their motion to dismiss papers, Plaintiffs never address the precedent in which courts routinely take account of securities analyst reports on a motion to dismiss securities claims. See Def. Br. at 4 n.2. "'Judicial notice can be taken of . . . published analyst reports in determining what the market knew'" (the very issue before this Court). In re Avon Prods., Inc. Sec. Litig, No. 05-6803, 2009 WL 848017, at *24 n.10 (S.D.N.Y. Feb. 23, 2009) (quoting In re Zyprexa Prods. Liab. Litig., 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008)); see also In re MBIA, Inc., Sec. Litig., 700 F. Supp. 2d 566, 575 n.7 (S.D.N.Y. 2010) (where the court took judicial notice of analyst reports "for the fact of their publication and not for the truth of the matters asserted"); Steinberg v. Ericsson LM Tel. Co., No. 07-9615, 2008 WL 5170640, at *10 n.5 (S.D.N.Y. Dec. 10, 2008) (on a motion to dismiss, a "[c]ourt may take judicial notice of analysts' reports"); In re Merrill Lynch & Co. Research Reps. Sec. Litig., 273 F. Supp. 2d 351, 357 (S.D.N.Y. 2003) (on a motion to dismiss, taking judicial notice of publicly available analysts' reports), aff'd sub nom. Lentell v. Merrill Lynch & Co., 396 F.3d 161 (2d Cir. 2005). In opposing the motion to dismiss, Plaintiffs themselves cite to authority holding that "[a]mong the public documents a court may consider in a motion to dismiss securities fraud claims are analyst reports when they are submitted to establish whether and when certain information was provided to the market, not the truth of the matters asserted in the reports." Plaintiffs' Opposition Brief at 13-14; Mendell v. Amgen, Inc. (In re Amgen Inc. Sec. Litig.), 544 F. Supp. 2d 1009, 1023-24 (C.D. Cal. 2008).

In Avon Products, the court took judicial notice of analyst reports that were offered for the purpose of showing that the facts underlying plaintiffs allegations "were a matter . . . of public record . . . [and] of presumptive knowledge in the pertinent financial market." 2009 WL 848017, at *25. This is exactly the point for which Defendants cite the challenged reports – to

demonstrate the presumptive knowledge of the market as to the pendency, nature and risk of the government investigations.

Plaintiffs miss the point by arguing that the Court should not consider the truth of these reports. Pls. Br. at 3-5. The issue is not the truth of the analyst reports – whatever that may mean in this context – but rather, that the reports further demonstrate that the market was on notice and was aware of the government investigations on which Plaintiffs' predicate their claims. On a motion to dismiss, "'[j]udicial notice can be taken of . . . published analyst reports in determining what the market knew.'" In re Avon Prods., 2009 WL 848017, at *24 n.10 (citation omitted).

Plaintiffs also miss the point by arguing that certain of the analyst reports were published prior to the Class Period and are, so they claim, irrelevant to establishing whether the investigations were properly disclosed during that timeframe. Pls. Br. at 3-4. However, these reports serve to further evidence that material information was disclosed and known to the market even before the Class Period began. Because this information taken into account by the analyst reports was available to any purchaser of Pfizer stock before and during the Class Period, a purchaser thus could not be defrauded by the alleged non-disclosures. In any event, the reports also show that, by this point, sufficient information was known and recognized to commence the statute of limitations.

B. This Court Should Take Judicial Notice Of The RX Compliance Report Article

Plaintiffs challenge Exhibit C1, an article from Rx Compliance Report, a biweekly publication reporting on the government's investigations into pharmaceutical industry sales and marketing practices. Although Defendants could have simply cited the article, a full copy was provided to the Court as a courtesy. The article contains quotations from one of the lead government prosecutors, Sara Bloom, an Assistant United States Attorney for the District of Massachusetts, who stated that the government's investigation of Pfizer involved "more nuanced behavior" that was initially seen as "too close" of a call to prosecute. See Shaftel Decl., Ex. C1

at 3. "A court may . . . take judicial notice of news articles discussing the conduct raised in the complaint." In re Smith Barney Transfer Agent Litig., No. 05 Civ. 7583, 2011 WL 350289, at *3 (S.D.N.Y. Jan. 25, 2011); see also In re Salomon Analyst Winstar Litig., No. 02 Civ. 6171, 2006 WL 510526, at *4 & nn.6-7 (S.D.N.Y. Feb. 28, 2006) (on a motion to dismiss, taking judicial notice of a news article not referenced in the complaint because it discussed conduct at issue in the complaint).

In objecting to the citation to the article, Plaintiffs ignore the fact that their own pleading relies extensively on purported statements by government officials and government filings. See, e.g., Compl. ¶¶ 2, 6, 38, 68, 106 and 109. For instance, Plaintiffs quote to five paragraphs of a Department of Justice press release issued following the settlement of the government investigation on September 9, 2009. Id. ¶ 106. Plaintiffs also extensively quote press comments by Michael Loucks, who served in the same U.S. Attorney's office as Bloom, to support their allegations. See id. ¶¶ 2, 6, 109. By so heavily relying on statements by government officials, Plaintiffs have made such material "integral" to their pleading and have interjected it into the case. See Cortec Indus., 949 F.2d at 47 (A court may consider documents "which [are] integral to the complaint"). Here, by Plaintiffs placing great weight on outside of court quotations by government officials regarding the investigations, consideration of this article is proper to put the allegations in context.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' motion to strike be denied.

Dated: March 25, 2011
New York, New York

Respectfully submitted,

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