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 PLAINTIFFS' REPLY MEMORANDUM IN RESPONSE TO DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AND IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO STRIKE

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Lead Plaintiff Stiching Philips Pensioenfonds and plaintiff Mary K. Jones respectfully submit the following reply memorandum in response to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Strike (Dkt. No. 68) ("Defs.' Opp.") and in further support of plaintiffs' motion to strike (Dkt. No. 62). Plaintiffs' motion to strike is procedurally proper and should be granted because: (i) defendants err in seeking to rely on irrelevant excerpts of analyst reports as documentary evidence to support their truth-on-the-market defense at the pleading stage; and (ii) statements 18 months after the Class Period by an Assistant U.S. Attorney General are neither integral to the Complaint[1] nor provide the context that defendants urge the Court to accept. Exhibits B1-B133 and C1[2] are neither cited to nor referred to in the Complaint and do not fall within any of the narrow exceptions to the Second Circuit's authority that in deciding a motion to dismiss under Fed. R. Civ. P. 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* Lead Plaintiff Stiching Philips Pensioenfonds and Plaintiff Mary K. Jones' Memorandum of Points and Authorities in Support of Motion to Strike (Dkt. No. 63) ("Mot. Strike"), §II.A.

I. Plaintiffs' Motion to Strike Is Timely and Procedurally Proper

Defendants contend that plaintiffs' motion to strike is procedurally "without basis" because Fed. R. Civ. P. 12(f) "alone" governs motions to strike and that Rule only permits a court to strike "pleadings." Defs.' Opp. at 2. This argument, while creative, is in error and misplaced. Plaintiffs' motion to strike was not based upon Rule 12(f), nor is that Rule cited anywhere in plaintiffs' motion.

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[1] "Complaint" refers to the Consolidated Class Action Complaint for Violations of the Federal Securities Laws (Dkt. No. 51). Paragraph references herein ("¶__" or "¶¶__") are to the Complaint.

[2] These exhibits are attached to the Declaration of Hal S. Shaftel in Support of Defendants' Motion to Dismiss the Consolidated Class Action Complaint (Dkt. No. 56) ("Shaftel Decl.").

Thus, *Bear Stearns* and the other cases cited by defendants are inapposite, since in those cases the court denied motions to strike extraneous materials because they were improperly filed pursuant to Rule 12(f). *In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, No. 08 MDL 1963, 2011 WL 223540, at *143 (S.D.N.Y. Jan. 19, 2011); *Katz v. Mogus*, No. 07 Civ. 8314 (PKC) (KNF), 2009 WL 5173789, at *2 (S.D.N.Y. Dec. 30, 2009) ("Rule 12(f) does not provide a 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).

That does not mean that plaintiffs' motion to strike is procedurally improper or that the Court lacks grounds to strike the inappropriate materials defendants have submitted. Plaintiffs properly filed their motion under Fed. R. Civ. 7(b) and S.D.N.Y. Local Civ. R. 7.1(a), and stated the grounds for their motion with particularity: Fed. R. Civ. P. 12(b)(6) and (d) and applicable Second Circuit case law governing consideration of matters outside the pleadings on a motion to dismiss. Mot. Strike at 2-3.

Furthermore, the Court is authorized to grant the relief that plaintiffs have properly requested because the Court has the "inherent authority to strike any filed paper which it determines to be abusive or otherwise improper under the circumstances." *Sierra v. United States*, No. 97 Civ. 9329 (RWS), 1998 U.S. Dist. LEXIS 14135, at *27 (S.D.N.Y. Sept. 10, 1998); *see also Chambers v. NASCO*, 501 U.S. 32, 43, 44-45 (1991) (a federal court's inherent powers are "'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases'").[3]

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[3] Citations are omitted and emphasis is added throughout unless otherwise indicated.

Exercising this inherent authority, courts have routinely entertained and granted motions to strike matters outside the pleadings submitted by defendants on a motion to dismiss. *See, e.g., Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (at the motion to dismiss stage it is error to consider extraneous documents not integral to the complaint to make a finding of fact that controverts the allegations in a complaint); *Nyame v. Bronx Leb. Hosp. Ctr.*, No. 08 Civ. 9656 (DAB), 2010 U.S. Dist. LEXIS 33949, at *12-*13 (S.D.N.Y. Mar. 31, 2010) (exhibits attached to defendants' motion stricken from the record as inappropriate).[4] Here, the Court should exercise its inherent powers and strike Exhibits B1-B133 and C1 because they were submitted improperly in support of a motion to dismiss pursuant to Rule 12(b)(6), as discussed in plaintiffs' memorandum of points and authorities in support of their motion to strike and more fully below.

Defendants also argue that motions to strike are improper on a motion to dismiss because they "potentially" constitute an improper sur-reply and instead, any objections should be raised in the opposition to the motion to dismiss. This argument is meritless. Plaintiffs' motion to strike does not advance any arguments on the merits, and defendants do not assert otherwise. Defendants' reliance on a single case decided by a Georgia district court over 30 years ago, *Smith v. Southeastern*

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[4] *See also City of Livonia Emps.' she* (granting in part plaintiffs' motion to strike certain news articles submitted by defendants); *In re Bausch & Lomb, Inc. Sec. Litig.*, No. 01-CV-6190 (CJS), 2003 U.S. Dist. LEXIS 24062, at *56 (W.D.N.Y. Mar. 28, 2003) ("the motion to strike the conference call transcript is granted"); *In re OPUS360 Corp. Sec. Litig.*, No. 01 Civ. 2938 (JGK) (JCF), 2002 U.S. Dist. LEXIS 18558, at *5 n.3 (S.D.N.Y. Oct. 2, 2002) ("The plaintiffs' motion to strike is granted, and these exhibits will not be considered in resolving the defendants' motions."); *In re Scholastic Sec. Litig.*, No. 97 Civ. 2447 (JFK), 1998 U.S. Dist. LEXIS 13910, at *1 (S.D.N.Y. Sept. 1, 1998) ("the Court grants Plaintiffs' motion to strike in its entirety"); *J/H Real Estate Inc. v. Abramson*, 901 F. Supp. 952, 955 (E.D. Pa. 1995) (rejecting 32 documents, including press releases, analyst reports, teleconference transcripts and news articles, because they "were not referred to or relied upon by the plaintiff in the complaint and [were] not public records").

Stages, Inc., 479 F. Supp. 593, 594-95 (N.D. Ga. 1977), is misplaced. *Smith* held that a motion to strike filed pursuant to Rule 12(f) is improper. *Id.* Because plaintiffs did not file their motion pursuant to Rule 12(f), *Smith* is inapplicable here.

Moreover, while *Smith* suggested that objections to the affidavit submitted in that case could have been made in the opposition to the motion to dismiss instead of in a motion to strike, that approach is contrary to the practice in this District of entertaining motions to strike separately, as is clear from the case law cited above, and in any event, is not appropriate in this action. *Smith* dealt with the propriety of a single affidavit, not the sheaf of inappropriate materials – consisting of well over 130 documents – submitted by defendants here. Requiring plaintiffs in their memorandum in opposition to the motion to dismiss to address the impropriety of defendants' submission of over 130 documents would be prejudicial to plaintiffs, whose briefing on the merits would be unfairly curtailed as a result of defendants' improper submissions.

Citing Fed. R. Civ. P. 12(f), defendants also argue that plaintiffs' motion to strike was untimely. Rule 12(f) is not the basis of plaintiffs' motion, thus the 21-day time limit in that Rule is inapplicable. Defendants have not asserted any prejudice as a result of plaintiffs filing the motion to strike concurrently with their opposition to the motion to dismiss. And courts in this District, including this Court, routinely permit and consider motions to strike extraneous materials filed concurrently with oppositions to motions to dismiss. Examples of such cases include: *In re Elan Corp. Sec. Litig.*, No. 1:08-cv-08761-AKH (S.D.N.Y) (Dkt. No. 52 (12/11/09 motion to dismiss), Dkt. No. 55 (2/16/10 opposition to motion to dismiss), Dkt. No. 59 (2/16/10 motion to strike)); *In re Société Générale Sec. Litig.*, No. 1:08-cv-02495-RMB (S.D.N.Y.) (Dkt. No. 63 (12/18/08 motion to dismiss), Dkt. No. 72 (2/16/09 motion to strike), Dkt. No. 76 (2/16/09 opposition to motion to dismiss)); *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron,*

Inc., No. 1:08-cv-04063-JGK (S.D.N.Y.) (Dkt. No. 23 (11/25/08 motion to dismiss), Dkt. No. 34 (1/23/09 motion to strike), Dkt. No. 36 (1/23/09 opposition to motion to dismiss)); *In re Open Joint Stock Co. "Vimpel-Commc'ns" Sec. Litig.*, No. 1:04-cv-09742-NRB (S.D.N.Y.) (Dkt. No. 13 (8/26/05 motion to dismiss), Dkt. No. 16 (10/17/05 motion to strike), Dkt. No. 18 (10/17/05 opposition to motion to dismiss)). The Court should reject defendants' argument that plaintiffs' motion to strike is procedurally improper and grant the requested relief for the reasons set forth below.

II. Defendants' 133 Analyst Report Excerpts and Post-Class Period Compliance Report Should Be Stricken

The parties agree that limited exceptions to the general rule that "'the district court is normally required to look only to the allegations on the face of the complaint'" are (i) "'[d]ocuments that are attached to the complaint or incorporated . . . by reference,'" and (ii) any document "'"upon which [the complaint] solely relies and which is integral to the complaint."'" Mot. Strike at 2; Defs.' Opp. at 3-4 (both quoting *Roth*, 489 F.3d at 509). Neither of those exceptions apply here.

First, the 133 analyst report excerpts are neither attached to, referenced in or integral to the Complaint nor relevant to defendants' truth-on-the-market defense. The exhibits simply do not disclose the information plaintiffs allege was concealed from investors. Thus, the Court should strike Exhibits B1-B133, not take judicial notice as defendants request. *See* Mot. Strike, §II.B.

Second, defendants attempt to introduce a compliance report (Exhibit C1) as evidence to contradict plaintiffs' allegations by claiming that the statements of an assistant U.S. Attorney 18 months after the Class Period are "integral" to the Complaint's allegations is erroneous. The evidence defendants seek to introduce to discredit plaintiffs' allegations does not exist in the compliance report defendants proffer – the report actually corroborates plaintiffs' allegations that Pfizer, Inc. ("Pfizer" or the "Company") was blatantly off-label marketing Bextra when it was

solemnly promising to cease such illegal conduct. ¶7; *see also* Mot. Strike, §II.C. In short, Exhibits B1-B133 and C1 should be stricken as not proper for consideration at the pleading stage.

A. Defendants' Irrelevant Analyst Report Excerpts (Exhibits B1-B133) Should Be Stricken

Defendants concede by their silence that none of the exceptions to the Second Circuit's mandate that "normally" a district court is "required to look only at the allegations on the face of the complaint" apply to Exhibits B1-B133. *Roth*, 489 F.3d at 509. Instead, defendants seek judicial notice of these documents. Judicial notice of defendants' proffered 133 analyst report excerpts (Exhibits B1-B133) is not appropriate for the simple reason that they are not relevant to the pending motion to dismiss. *Torain v. Clear Channel Broad., Inc.*, 651 F. Supp. 2d 125, 142 n.11 (S.D.N.Y. 2009) (declining to take judicial notice of irrelevant newspaper articles); *In re Tommy Hilfiger Sec. Litig.*, No. 04-civ-7678, 2007 U.S. Dist. LEXIS 55088, at *14 (S.D.N.Y. July 20, 2007) (noting that court may make judicial notice of "'relevant public disclosure documents'" and striking news articles regarding the market's reaction as irrelevant). The exhibits are not integral to plaintiffs' claims and do not reflect the relevant "truth" – that Pfizer was engaging in systemic illegal off-label marketing before and during the Class Period of its drugs Bextra, Zyvox, Lyrica and Geodon when it had pledged to cease such marketing in a 2004 Corporate Integrity Agreement, and promised investors that it was in compliance with U.S. Food and Drug Administration ("FDA") rules and laws prohibiting such marketing.

In re Avon Prods., Inc. Sec. Litig., No. 05 Civ. 6803 (LAK) (MHD), 2009 WL 848017 (S.D.N.Y. 2009), relied on by defendants, illustrates the point. In that case, Judge Kaplan took judicial notice of analyst reports that reported on a lawsuit that alleged Avon shipped unordered products to its sales representatives to boost Avon's sales. *Id.* at *23-*24. Analysts at UBS, among others, gave a detailed report of the accusations including that "Avon had been accused of 'shipping

reps unordered products and failing to credit returns, raising the possibility of sales manipulation' and of 'using phony rep names/social security numbers to meet [Avon's] key performance targets.'" *Id*. at *24.[5]

Here, the analyst report excerpts defendants seek to introduce do not inform the Court of what the market knew beyond Pfizer's inadequate risk "disclosures" that plaintiffs specifically allege to be materially false and misleading. ¶¶61-70. The analyst reports' generalized references to "governmental investigations" mimic defendants' purported "disclosures" and neither are sufficient on their face to inform investors of the material information deliberately concealed by defendants. *See* Mot. Strike, §II.B. Indeed, the presumably best example defendants can find is an excerpt from a January 20, 2006 Bear Sterns analyst report listing as one of seven risks "'to our price target include . . . government investigations into pricing and promotional practices.'" Defs.' Opp. at 4 (quoting Shaftel Decl., Ex. B10). Notably, the report is missing the relevant detail and specifics found in *Avon* and begs the questions – what government investigations into "promotional practices?" and "what risks?" *See* Mot. Strike, §II.B (the reports do not indicate Pfizer was engaging in off-label marketing or that the analyst was "focused" on any "disclosed investigation in particular"). The misleading answer defendants gave investors can be found publicly in defendants' disclosures, the most recent of which prior to the January 20, 2006 analyst report would have been Pfizer's 3Q05 Form 10-Q filed on November 9, 2005.

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[5] Defendants' reliance on *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 273 F. Supp. 2d 351 (S.D.N.Y. 2003), is similarly misplaced. In that case, the reports were specific and "detailed ***particular*** statements by Merrill Lynch analysts indicating a massive scheme to defraud." *Fogarazzo v. Lehman Bros., Inc.*, 341 F. Supp. 2d 274, 300 (S.D.N.Y. 2004) (emphasis in original).

Pfizer's 3Q05 Form 10-Q provides no real answers and with respect to matters relating to "The Department of Justice" stated the following: (i) "The U.S. Department of Justice has informed us that is investigating Pharmacia's former contractual relationship with a health care intermediary" and (ii) "We have received requests for information and documents from the U.S. Department of Justice relating to certain physician payments budgeted to our prescription pharmaceutical products." Shaftel Decl., Ex. A9 at 45. Pfizer's 3Q05 Form 10-Q also simultaneously told investors that "[w]e do not believe [government investigations] will have a material adverse effect on our financial position." *Id.* at 43.

Defendants' prior "disclosures" on this matter fair no better. For example, Pfizer's 2004 annual report filed on March 11, 2005 merely reports:

> [W]e received requests for information and documents from the U.S. Department of Justice and a group of state attorneys general concerning the marketing of Bextra and Celebrex. The Department of Justice and the attorney general group have also recently sought information and documents relating to the safety of both products.

Shaftel Decl., Ex. A7 at 59. In a few weeks time, Bextra was pulled from the market due to safety concerns. ¶7.

At the time of the March 2005 purported disclosure and during the Class Period, Pfizer was well aware of the *qui tam* relators' allegations of corporate-wide off-label promotions of Bextra – among other avenues of knowledge, by 2004 the government had told Pfizer and so had the *qui tam* relators. *See, e.g.*, ¶¶12, 123. Defendants claim that notice of the government investigation triggered prompt disclosure. Defendants' Reply Memorandum in Response to Plaintiffs' Answering Brief and in Further Support of Motion to Dismiss Consolidated Class Action (Dkt. No. 67) at 2 (purported sufficient disclosures "began ***before*** the . . . Class Period commenced," "the very month that [Pfizer] initially received notice") (emphasis in original). Yet, defendants later assert that the "*qui tam*s were only disclosed to Pfizer ***after*** the Class Period" when challenging scienter. *Id.* at 9

(emphasis in original). This inconsistency highlights precisely why defendants' "disclosures" were inadequate and the 133 analyst report excerpts, at best mimicking said "disclosures," are irrelevant to the instant motion. Pfizer's generic disclosures of government investigations while at the same time claiming compliance with the law was insufficient to inform investors of the material adverse risk to the Company.

B. The Court Should Deny Defendants' Request for Judicial Notice and Strike Exhibit C1 from the Record

Defendants' proffered Exhibit C1 (Rx Compliance Report), a report published 18 months after the Class Period, is neither referenced in the Complaint nor integral to its allegations. As such, it should be stricken. *Roth*, 489 F.3d at 509.

Defendants attempt to claim that statements made by an assistant U.S. attorney are "integral" to their pleading as a result of plaintiffs' incorporation of the statements of prosecuting U.S. Attorney Michael Loucks. This argument is without merit and underscores defendants' inappropriate efforts to try this case at the pleading stage prior to discovery. *See* Defs.' Opp. at 7 ("by Plaintiffs placing great weight on outside of court quotations by government officials regarding investigations, consideration of this article is proper to put the allegations in context"). For a document to be integral to the complaint, the complaint must "'rel[y] heavily upon its terms and effect.'" *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 68 (2d. Cir. 2008)[6]; *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (a "necessary prerequisite to the court's

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[6] Even though the documents in *Sahu* were referred to in the complaint, the documents were not essential and as such, the court could not consider them without converting the motion to one of summary judgment. *Id*. at 68 & n.2.

consideration of [a] document on a dismissal motion" is that plaintiff must rely "on the terms and effect of a document" in drafting a complaint).[7]

There is no question that the statements of then-acting U.S. Attorney for the District of Massachusetts Michael Loucks are quoted in the Complaint. *E.g.*, ¶¶6, 109. The inclusion of his statements in the Complaint, however, does not give defendants a license to introduce misplaced factual disputes regarding the knowledge of the U.S. Attorney's Office. For example, the Complaint quotes an article appearing in *Bloomberg* on November 9, 2009 explaining that Michael Loucks, when he was finalizing the Neurontin settlement and negotiating the 2004 Corporate Integrity Agreement, ***did not know "until years later"*** that "***when*** lawyers for ***Pfizer Inc.*** [*e.g.*, defendant Jeffrey B. Kindler], the world's largest drug company, ***looked across the table and promised it wouldn't break the law*** [against off-label marketing] again" that "***Pfizer managers were breaking that pledge not to practice so-called off-label marketing even before the ink was dry on their plea***." ¶6; *see also* ¶109.

In Exhibit C1, assistant U.S. Attorney Ms. Bloom indicates that the "first time" prosecutors looked at allegations relating to Bextra it was "'too close'" but that "'***several billion dollars later'" "'the FDA was very clear about what it meant by arthritis pain versus acute pain***.'" Shaftel Decl., Ex. C1 at 3.[8] Bextra's annual sales exceeded $1.4 billion by 2004 and it was taken off the market in

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[7] Defendants' citations to *In re Smith Barney Transfer Agent Litig.*, No. 05 Civ. 7583 (WHP), 2011 WL 350289, at *3 (S.D.N.Y. Jan. 25, 2011), and *In re Salomon Analyst Winstar Litig.*, No. 02 Civ. 6171 (GEL), 2006 WL 510526, at *4 & nn.6-7 (S.D.N.Y. Feb. 28, 2006), are inapposite as neither case took judicial notice of unknown facts.

[8] There is nothing in the record or in Exhibit C1 to indicate when the U.S. Attorney's office first looked at the marketing of Bextra or what information they had at that time. Bextra was first launched in April 2002 and in November 2001 the FDA specifically rejected the use of Bextra for acute pain generally, and yet Pfizer blatantly ignored the FDA's mandate, and marketed the drug for

April 2005. ¶¶7, 44. Accordingly, ***the "'several billion dollars later'"*** referenced by Ms. Bloom likely occurred ***prior to the Class Period***. This inference is bolstered by then-acting U.S. Attorney Loucks' statements that he did not know (what the defendants knew), that in 2004 Pfizer was engaged in the "'blatant and continued'" disregard for the law. ¶106.[9] The inference is further cemented by the plea agreement related to Bextra, where Pfizer's shell subsidiary who had not ever sold a single drug, Pharmacia & Upjohn, pled guilty for Pfizer's crimes and in doing so, "expressly and unequivocally admits that it knowingly, intentionally and willfully committed the crime charged." ¶121.

III. Alternatively, the Court Should Convert Defendants' Motion to Dismiss to a Motion for Summary Judgment and Permit Discovery

As plaintiffs pointed out in their opening motion, if these exhibits are not excluded, defendants' motion to dismiss should be deemed a motion for summary judgment and plaintiffs should be permitted discovery prior to opposing the motion. Mot. Strike at 3 (citing Fed. R. Civ. P. 12(d)). Defendants baldly ignore Fed. R. Civ. P. 12(d), which explicitly provides:

> 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.

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such uses. ¶¶42-44. Defendants concede that Pfizer was aware of a governmental investigation by February 2004, almost two years prior to the start of the Class Period; *qui tam* relators also informed Pfizer of the off-label marketing of Bextra as far back as 2003. ¶¶12, 123.

[9] *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Cir. 1991), relied on by defendants, provides the example of a case where a plaintiff alleged a prospectus contained misrepresentations and the court found the prospectus "integral to the complaint." *Id*. at 47. There is simply no comparison between the post-Class Period report defendants erroneously seek to inject here as some sort of evidence of their innocence and a prospectus which formed the basis of a complaint's allegations as discussed in *Cortec*.

Instead, they take issue with the Second Circuit's decision in *Chambers*, 282 F.3d at 154-55. Defs.' Opp. at 4 n.3. Yet, the case is directly on point as defendants acknowledge that the "issue [here] is whether or not to consider certain exhibits" (*id.*) and the issue in *Chambers* was the consideration of extrinsic documents that could have been "excluded" but were not, "obligat[ing]" the trial court to convert the motion to summary judgment and permit discovery. 282 F.3d at 154; *see also* Defs.' Opp. at 4 n.3.[10] Thus, should the Court not exclude Exhibits B1-B133 and C1, discovery in this case should be permitted and plaintiffs should be afforded "a reasonable opportunity to present all the material" pertinent to the motion. Fed. R. Civ. P. 12(d).

IV. Conclusion

For the reasons set forth above and in plaintiffs' motion to strike, plaintiffs respectfully request the Court to strike defendants' Exhibits B1-B133 and C1 or, alternatively, permit discovery in this action and allow plaintiffs to properly oppose defendants' pending motion.

DATED: April 1, 2011

Respectfully submitted,

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& DOWD LLP
DARREN J. ROBBINS
HENRY ROSEN

s/ HENRY ROSEN
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[10] Defendants selectively quote from *Giant Grp., Ltd. v. Sands*, 142 F. Supp. 2d 503 (S.D.N.Y. 2001). Defs.' Opp. at 4 n.3. The quotation is attributed to Judge Lynch's opinion in *2 Broadway LLC v. Credit Suisse First Boston Mortg. Capital LLC*, No. 00 Civ. 5773 (GEL), 2001 U.S. Dist. LEXIS 4875 (S.D.N.Y. Apr. 20, 2001), where he declined to consider an affidavit ***submitted by a plaintiff*** in opposition to defendants' motion to dismiss precisely because the court would have had to convert the motion to one of summary judgment. *Id.* at *16 n.3. Further, unlike here, the documents the court considered in *Giant Grp.* were specifically found by the court to have been relied on by the plaintiff in drafting the complaint. 142 F. Supp. 2d at 511.

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 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 April 1, 2011.

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