UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PFIZER INC. SECURITIES LITIGATION
THIS DOCUMENT RELATES TO: The Consolidated Securities Class Action

No. 04 Civ. 9866 (LTS) (HBP)
ECF CASE

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 8 TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL R. FISCHEL

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Defendants Pfizer Inc. ("Pfizer"), Hank McKinnell, Karen Katen, John LaMattina, Joseph Feczko, and Gail Cawkwell (collectively, "Defendants") respectfully submit this memorandum of law in support of their motion to exclude the testimony of Daniel R. Fischel, pursuant to *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), Federal Rules of Evidence 702, 401, 402, and 403, and Federal Rules of Civil Procedure 26 and 37.

PRELIMINARY STATEMENT

The opinions proffered by Plaintiffs' loss causation and damages expert, Daniel Fischel, ignore the Court's summary judgment opinion and fall woefully short of the standard for expert testimony under *Daubert* and Rule 702. They should be excluded for three principal reasons.

First, the methodology Fischel uses to calculate alleged artificial inflation in Pfizer's stock price is unrecognized, unscientific, and entirely unreliable. At summary judgment, the Court rejected two of the stock price declines Fischel initially used to estimate alleged inflation as legally invalid and held that those dates must be stricken from any inflation estimate. Rather than simply accepting the Court's ruling and striking the dates, Fischel issued a Supplemental Report that applied an entirely new methodology to recalculate inflation—one that contradicts his own prior opinion, has no support in the economic literature, and has never before been applied by any expert (as Fischel himself admits). Fischel's contrived methodology is economically indefensible and serves no purpose other than to give Plaintiffs an inflation estimate higher than they would have obtained if Fischel had simply removed the rejected dates as the Court ordered. Worse, for many of the days in the Class Period, Fischel's made-up methodology produces an inflation estimate *even higher than what he originally calculated*. It defies all economic logic that the Court's decision to *reject* portions of Fischel's inflation analysis, and dismiss Plaintiffs' claims to the extent they were based on that rejected analysis,

could *increase* daily inflation above Fischel's original estimate. Fischel's improper attempt to evade the Court's ruling and unjustifiably boost Plaintiffs' damages should be rejected.

Second, Fischel's opinion will provide no assistance to the jury. Fischel acknowledges that his entire inflation analysis is built on the unverified assumption that Defendants are liable for all of the alleged misstatements identified in the Complaint, and therefore for all of the inflation those alleged misstatements purportedly caused. At summary judgment, the Court eviscerated that assumption, holding that these Defendants are not responsible and cannot be held liable for multiple statements Pharmacia made before Pfizer acquired that company. Fischel's revised opinion disregards that clear ruling and does not even attempt to estimate what portion of the inflation he previously calculated could actually be attributable to Defendants (rather than Pharmacia)—even though that is the only inflation question the jury will be asked to decide. Asked how jurors should deal with that unanswered question in their deliberations, Fischel responded that they would have to figure it out.

Third, confronted with the obvious defects in his analysis at deposition, Fischel has more recently submitted yet another report that attempts to justify his problematic opinion. In it, he asserts that other unidentified experts might have proffered an even more plaintiff-friendly approach for estimating inflation—one that he himself disavowed because it would have overestimated inflation. Fischel's point seems to be that because he used an approach less damaging to Defendants than other experts might have chosen, his opinion should be accepted. At the risk of appearing ungrateful for Fischel's professed solicitude, Defendants do not believe that his flawed methodology should be accepted only because other, admittedly invalid approaches would have been worse. Nor should Fischel be permitted to present the jurors with a hypothetical inflation estimate that he himself rejects as overinflated in hopes of luring them into

accepting his own opinion as the lesser of two evils.

BACKGROUND

Fischel's Inflation Analysis

To understand why Fischel's opinion is so fundamentally flawed, it is necessary to first understand the mechanics of his inflation analysis. In his original report, Fischel calculated the inflation allegedly present in Pfizer's stock price by identifying dates on which he claims fraud-related inflation came out of the stock price—that is, dates on which the stock price declined because, according to Fischel, previously concealed information about cardiovascular risk was made known to the market. (*See* Omnibus Declaration of Andrew J. Ehrlich, Esq., dated Sept. 30, 2013 ("Ehrlich Decl."), Ex. 72 ¶¶ 19–20, 28, 30.) In loss causation parlance, these events are called "corrective disclosures." The amounts the stock price decreased as a result of these alleged corrective disclosures are called the "residual stock price declines." Fischel's first step in calculating alleged inflation in Pfizer's stock price was to aggregate those declines. For any given day in the Class Period, the more corrective disclosures that came later, the higher the alleged inflation calculated for that day. Fischel made no attempt to determine *how* artificial inflation came into Pfizer's stock price as of the start of the Class Period. (Ehrlich Decl., Ex. 73, at 82:13–84:2.) He just assumed that Defendants' statements were responsible for causing that inflation because that is what Plaintiffs told him. (*Id.* at 78:9–79:19, 82:2–11.)

In his analysis, Fischel also took into account inflation *coming into* Pfizer's stock price during the Class Period. Absent these "inflation-in" days, inflation coming out of the stock price on corrective disclosure days would be present in the price on all prior days in the Class Period. However, Fischel acknowledged that if some of that inflation first entered the price on a date *during* the Class Period, that inflation logically could not have been present in the stock price *before* that date. Fischel explained that in order to avoid overestimating inflation for any

particular day he had to *subtract* any residual stock price increases that introduced inflation into the stock price for the first time *after* that day. (Ehrlich Decl., Ex. 74, at 42:16–43:2.) Accordingly, he identified "inflation-in" dates during the Class Period on which he (and Plaintiffs) believe Pfizer's stock price was inflated by Defendants' alleged fraud. (Ehrlich Decl., Ex. 72 ¶¶ 17, 22, 29.) And he conducted an economic analysis of the events on those days to estimate what portion of the stock price increase represented artificial inflation—the "residual stock price *increase*." (*Id.* ¶ 30 & n.14.) Because the effect of residual stock price increases during the Class Period is to *reduce* the amount of total inflation allegedly present in the stock price *earlier* in the Class Period, the inclusion of these inflation-in days lowers class damages overall. (*See* Ehrlich Decl., Ex. 74, at 44:11–45:8.)

Finally Fischel explained that, for any given day in the Class Period, he calculated the amount of alleged inflation in Pfizer's stock price to be: (a) the sum of the residual stock price declines on subsequent corrective disclosure days, minus (b) the sum of the residual stock price increases on subsequent inflation-in days. (*See* Ehrlich Decl., Ex. 72 ¶ 30.)

Dr. Gompers, Defendants' economic expert, provides a simplified example to help explain how Fischel's inflation calculation works:

> [I]f fraud-related inflation of $0.05 came out of the stock price on March 1, and fraud-related inflation of $0.10 came out of the stock price on April 1, then he would conclude there must have been fraud-related inflation of $0.15 on dates in the class period prior to March 1. . . [I]f fraud-related inflation of $0.03 came into the stock price on February 1, then Fischel's methodology would conclude that the fraud-related inflation before that date . . . was $0.12, rather than $0.15."

(Ehrlich Decl., Ex. 75 ¶¶ 11, 12.)

The Court's Summary Judgment Opinion

The Court's summary judgment decision dealt a serious blow to Fischel's inflation analysis, in two respects. *First,* the Court rejected Fischel's choice of corrective

disclosure dates. It ruled that no reasonable jury could find that the reason Pfizer's stock price declined on November 4, 2004 or October 20, 2005 was because previously concealed information about cardiovascular risk was revealed to the market. *In re Pfizer Inc. Sec. Litig.*, Nos. 04 Civ. 9866(LTS)(HBP), 05 MD 1688(LTS), 2013 WL 1285173, at *10 (S.D.N.Y. Mar. 28, 2013). And it held that therefore the stock price drops that occurred on those days—$0.60 and $0.07, respectively (Ehrlich Decl., Ex. 72 ¶ 30 n.15, Table 1)—were irrelevant to Plaintiffs' alleged losses. *In re Pfizer*, 2013 WL 1285173, at *10. *Second*, the Court's opinion undermined a critical assumption underlying Fischel's entire inflation analysis: that Defendants are responsible for all of the alleged misstatements that purportedly put inflation into Pfizer's stock price. Contrary to that assumption, the Court ruled that Defendants are *not* responsible and cannot be held liable for certain statements Pharmacia made before Pfizer acquired it. *Id.* at *13.

Following summary judgment, Fischel had ample opportunity to fix his inflation analysis to comport with the Court's rulings. Instead, six weeks after receiving the Court's summary judgment opinion, Fischel served a one-page "Supplemental Report" that fails to properly address either of these issues. (*See* Ehrlich Decl., Ex. 76.)

Fischel's Recalculation of Alleged Artificial Inflation

Prior to the Court's summary judgment opinion, Fischel testified under oath that, if any of his corrective disclosure dates were rejected, he would simply remove those dates from his inflation calculation.

> Q. If the jury were to agree [with] all of Plaintiffs' allegations except to conclude that November 4th, 2004 was not a corrective disclosure, how would that affect inflation in your analysis?
>
> A. . . . If the statistically significant price decline on November 4th for whatever reason is determined not to be an appropriate part of the calculations, then the sum of the residuals on all days before November 4th would obviously be different and the artificial inflation numbers would change accordingly under those assumptions.

> Q. So translated into this specific example, that means that the artificial inflation on dates preceding November 4th would be $0.60 lower at least post the Pharmacia acquisition, is that correct?
>
> MR. JARVIS: Objection, form.
>
> THE WITNESS: Correct.

(Ehrlich Decl., Ex. 74, at 38:19–39:12.)

The hypothetical posed to Fischel was prescient. The summary judgment opinion rejected the very corrective disclosure in that hypothetical, November 4, 2004, and also struck the October 20, 2005 disclosure. Under Fischel's originally espoused methodology, the Court's rejection of those dates simply required him to remove them from his estimate of the inflation leaving the stock—by a total of $0.67—which would, at the same time, automatically lower his estimate of inflation going into the stock on day one of the Class Period by the same amount.

Fischel, however, did not do what he testified he would do. Instead, when actually faced with the prospect of removing two inflation dates and the impact that would have on Plaintiffs' potential damages, he issued a Supplemental Report adopting an inconsistent, previously unmentioned methodology. Under this new methodology, Fischel removed the November 4, 2004 and October 20, 2005 dates. But he did not stop there. Instead, he made an *additional*, offsetting adjustment to other dates that were not addressed by the Court's summary judgment ruling. Specifically, for each of the days on which inflation allegedly *came into* Pfizer's stock price, Fischel *reduced* those days' alleged effect on artificial inflation by a standard, across-the-board percentage of 9.7 percent. (Ehrlich Decl., Ex. 76 ¶ 2.) Fischel's explanation for the 9.7 percent adjustment in his Supplemental Report was as follows:

> Because eliminating the stock price declines related to Celebrex and Bextra on these dates reduces the total residual stock price decline I estimated related to these drugs by 9.7 percent, I proportionally reduce the residual stock price increases I measured that are related to these drugs by 9.7 percent.

(*Id.* (citations omitted).) Fischel did not explain how he could have previously concluded, based on an events-driven economic analysis, that the residual stock price increases he measured for these days were attributable to Defendants' alleged fraud—but then, without revisiting or revising his former analysis in any way, now conclude that only 90.3 percent of those residual price movements is fraud-related.

When asked why he could not just remove the two rejected dates without making a 9.7 percent adjustment to price increases, Fischel asserted, if "a court decides that less inflation is coming out of the stock, that also means that less inflation is going into the stock." (Ehrlich Decl., Ex. 73, at 35:9–40:16.) He said that he decided to satisfy that equilibrium principle by lowering the amount of inflation going into the stock on his inflation-in days by a standard percentage. (*Id.* at 53:12–55:11 ("I eventually concluded that the methodology that I chose was the most reasonable one to apply given the necessary logical relationship between negative fraud-related disclosures and positive fraud-related disclosures.").) What Fischel failed to see (or refused to acknowledge) was that simply removing the November 4, 2004 and October 20, 2005 dates—as he originally said he would do—was by itself sufficient to achieve equilibrium, since the removal of the $0.67 stock price declines on those days automatically lowers the amount of inflation present in the stock price as of the first day of the Class Period by exactly that amount.

Fischel also did not acknowledge—in his report or at deposition—that the effect of his 9.7 percent adjustment was to *raise* the estimated stock price inflation for virtually every day in the Class Period *above* what it would have been if he had simply removed the rejected dates as he testified he would.[1] (*See* Ehrlich Decl., Ex. 76, Ex. 38.) He also did not

[1] The reason the 9.7 percent adjustment to inflation-in days increases estimated inflation for most of the Class Period is because it means that less of the inflation Fischel calculated came into the stock price *late* in the Class Period, and more of it was present on all prior Class Period days. The adjustment also drives upward aggregate damages since it increases inflation over an extended period during which class members purchased stock.

acknowledge that, as a result of his 9.7 percent adjustment, Fischel's estimate of inflation for several months during the Class Period is even *higher* than the inflation he estimated in his original report, before the Court rejected two of his corrective disclosures and dismissed part of Plaintiffs' damages claim. (*Compare id.* at 26–28 *with* Ehrlich Decl., Ex. 72, Ex. 38, at 27–29.)

As for the Court's decision regarding pre-acquisition Pharmacia statements, Fischel's Supplemental Report did not address it at all. At deposition, Fischel explained that he might have only "skimmed" portions of the Court's ruling. (Ehrlich Decl., Ex. 73, at 15:2–14.) He confirmed that he did not "modify [his] analysis in any way" to account for the Pharmacia ruling, including by trying to determine what portion of inflation coming out of Pfizer stock on the corrective disclosure days was attributable to the statements made by Pharmacia and therefore should be removed from his estimate of the inflation allegedly caused by Defendants. (*Id.* at 76:14–77:15, 81:5–82:11.) Asked how the jury should account for the fact that a non-defendant, like Pharmacia, could be responsible for some of the inflation allegedly in Pfizer stock, he stated that the "jury would have to take that into account if they so concluded" and "modify [his] methodology accordingly." (*Id.* at 83:18–84:21.)

Dr. Gompers' Supplemental Report and Fischel's Reply

Defense expert Dr. Paul Gompers issued a rebuttal to Fischel's Supplemental Report, explaining the flaws in Fischel's newly invented methodology. Fischel then submitted a further Reply Report on July 25, 2013, which laid out a hypothetical estimate of artificial inflation that "ignored all price increases." (Ehrlich Decl., Ex. 77 ¶ 2 n.1.) According to Fischel, this alternate approach is a "typical" way to calculate inflation. (*Id.* ¶ 2 & n.1.) He explained he "made the decision to apply the methodology" he did to "avoid a possible overestimate of inflation," which would have produced "far greater inflation and far greater damages." (*Id.*) For example, for all but two weeks of the five-year Class Period, the Alternate Methodology more

than *doubles* Fischel's inflation estimate, and rises as high as $6.22 per share for a duration of one-and-a-half *years* compared to $2.62 in Fischel's Supplemental Report. (*Id.* at Ex. A.)

ARGUMENT

The methodology Fischel applied to recalculate inflation in response to the Court's summary judgment opinion has never been applied by any economics expert (including Fischel); has never been published or subjected to peer review; finds no support in the economic literature; and contradicts Fischel's own prior analysis and sworn testimony in this very case. Rather than vindicating any economic principle, the only purpose Fischel's new unscientific methodology serves is to give back to Plaintiffs some of the inflation they lost when the Court threw out portions of his prior calculation. In fact, for several months of the Class Period, Fischel's new method illogically produces inflation that is *even higher* than what he estimated before the Court's ruling. Because Fischel has failed to offer a reliable inflation opinion that actually comports with the Court's ruling, his testimony should be excluded in its entirety.

Fischel's opinion will also be of no assistance to the jury. Experts may make certain assumptions in formulating their opinions. But they may not assume facts that have been rejected by the court. Here, Fischel has done exactly that. He assumes Defendants are responsible and can be held liable for every alleged misstatement in the Complaint, even though the Court's ruling with respect to pre-merger Pharmacia statements undercut that assumption. Thus, if permitted to testify, he would offer an inflation estimate that misleadingly suggests Defendants must be on the hook for every dollar of inflation those statements purportedly caused, and leaves to the jury the task of disaggregating inflation attributable to Pharmacia instead of Defendants. That is a task that no jury, no matter how economically astute, could meaningfully perform without expert assistance. Fischel's failure to provide that assistance is a separate and independent ground for excluding his unreliable opinion.

I. Fischel's New Inflation Calculation Should Be Excluded

The Court's elimination of the November 4, 2004 and October 20, 2005 corrective disclosures required Fischel to eliminate the residual price declines on those days from his inflation calculation; that elimination, in turn, would have reduced damages by lowering the amount of inflation in the stock price throughout the Class Period. Rather than accept that result, Fischel has attempted to circumvent this reduction by conjuring a new methodology that makes an unfounded, offsetting adjustment to *other* dates in his analysis. That adjustment fails *Daubert* scrutiny. It is unprecedented, unscientific, and utterly lacking in economic reason.

A. There is No Precedent or Support for Fischel's Contrived Methodology

Fischel's new methodology is concededly unprecedented in the field of economics. *See Daubert*, 509 U.S. at 592 (expert opinions must have a "reliable basis in the knowledge and experience of his discipline"). He is not aware of any instance where another expert has employed the same kind of offsetting adjustment. (Ehrlich Decl., Ex. 73, at 50:23–51:9.) He knows of no reference to it in the relevant literature. (*Id.* at 42:20–43:5.) And he himself has never before used it or subjected it to peer review. (*See id.* at 40:17–42:18, 50:11–21); *Washburn* v. *Merck & Co.*, No. 99–9121, 2000 WL 528649, at *2 (2d Cir. May 1, 2000) (affirming exclusion of expert whose "opinion did not emanate from his own research in the field, but rather was developed for purposes of litigation"). Instead, Fischel admits he came up with the idea of his offsetting adjustment by "thinking about" it, discussing it with his coworkers and with Plaintiffs' counsel, and deciding based on his personal "judgment" that it "was the most reasonable [methodology] to apply." (Ehrlich Decl., Ex. 73, at 14:9–25, 49:6–50:10, 53:12–55:11.) But a reliable opinion "connotes more than subjective belief." *Daubert*, 509 U.S. at 590; *Montefiore Med. Ctr.* v. *Am. Prot. Ins. Co.*, No. 00Civ.3235LTSMHD, 2003 WL 21108232, at *2 (S.D.N.Y. May 14, 2003) (Swain, J.). It requires "[a]dherence to . . . standards of intellectual

rigor." *Colon ex rel. Molina* v. *BIC USA, Inc.*, 199 F. Supp. 2d 53, 76 (S.D.N.Y. 2001); *accord Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999). Fischel has not met those standards.

The lack of support for Fischel's methodology is laid bare by the paucity of his Supplemental Report. That four-paragraph report contains a single sentence describing Fischel's adjustment and, contrary to the requirements of Federal Rule of Civil Procedure 26, provides no bases or reasons for the adjustment. (Ehrlich Decl., Ex. 76 ¶ 2.) Fischel's "fail[ure] to meet Rule 26's threshold underscores the conclusion that his testimony is insufficient under Rule 702." *Kuzmech* v. *Werner Ladder Co.*, No. 3:10–cv–266 (VLB), 2012 WL 6093898, at *7–*9 (D. Conn. Dec. 7, 2012) (rejecting under Rule 702 a "four paragraph" expert report that did not "provide a complete statement of the [expert's] basis and reasons" as required by Rule 26(a)(2)(B)(i)); *Borgognone* v. *Trump Plaza*, No. 98-CV-6139 (ILG), 2000 WL 341135, at *4–6 (E.D.N.Y. Mar. 9, 2000) (excluding expert testimony under Rule 702 because "nothing in [the expert's] report disclose[d] the methodological basis for [his] conclusions" or showed that his opinions were supported by "objective methods and scientific standards" from his field).

Fischel claims that the reason he has no support for his adjustment is because he does not "recall this situation ever coming up before in [his] experience." (Ehrlich Decl., Ex. 73, at 41:11–23.) He explains that by "this situation" he means a case where inflation is calculated using both negative and positive residual price movements, and where at least one of those dates could be rejected for reasons similar to those in the summary judgment decision. (*Id.* at 41:24–42:10.) Fischel's professed unfamiliarity in this area is belied by his own admission that, in the course of his work, he "typically" considers "both positive and negative" price movements when estimating inflation (*Id.* at 40:17–41:3), and by the fact that courts often exclude corrective disclosure dates on similar grounds to those in the Court's opinion here, as Fischel undoubtedly

is aware. *E.g.*, *In re Merck & Co. Sec. Derivative & "ERISA" Litig.*, MDL No. 1658 (SRC), 2011 WL 3444199, at *33 (D.N.J. Aug. 8, 2011) (rejecting a corrective disclosure made after an earlier disclosure had already "deflated all false valuation of [the defendant's] stock").

Indeed, Fischel himself has testified at trial in at least one other case where his inflation analysis considered both positive and negative residual price changes: *Jaffe* v. *Household Int'l, Inc.*, No. 02-cv-5893, Trial Tr. (N. D. Ill. Apr. 2009). (Ehrlich Decl., Ex. 73, at 40:17–41:10.) And in that trial (as in this one) the jury could easily have rejected one or more of Fischel's purported corrective disclosures. Notwithstanding that distinct possibility, Fischel never explained to the *Household* jurors that if they rejected one or more dates, they would have to not only eliminate those dates from inflation, but also make an adjustment to other, unrelated residual price increases. *See* Ehrlich Decl., Ex. 78, at 119–209, 2837–2979, 4272–4292.

Perhaps most significantly, Fischel was confronted with exactly the situation that he now claims he could not have anticipated *when he was asked about it at deposition in this very case*. He testified, under oath, that if one of his corrective disclosure dates were rejected "*for whatever reason*," he would simply remove that date from his analysis and reduce his inflation estimate accordingly. (*See* Ehrlich Decl., Ex. 74, at 38:19–39:25.) Fischel made no mention of his newly invented offsetting adjustment. Rather, he conjured this adjustment only after the Court's ruling on summary judgment threatened to significantly reduce Plaintiffs' damages claim. (*See* Ehrlich Decl., Ex. 73, at 31:10–17, 32:8–35:2, 35:9–36:4.)

B. Fischel's Methodology is Unscientific and Yields Inconsistent Results

Even if the situation presented by this case were as novel as Fischel mistakenly claims, that would not give him license to apply an unscientific and arbitrary methodology in response. But that is exactly what he has done. A valid scientific methodology should yield the same result for the same set of facts—in this case alleged corrective disclosures—upon repeated

application. *See Lava Trading, Inc.* v. *Hartford Fire Ins. Co.*, No. 03 Civ. 7037(PKC), 2005 WL 4684238, at *17 (S.D.N.Y. Apr. 11, 2005) ("Someone else using the same data and methods must be able to replicate the result.") (quoting *Zenith Elecs. Corp.* v. *WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005)). The result the methodology produces should not depend on whether the expert using it made a mistake the first time he tried to apply it. Fischel's new methodology violates that basic scientific principle.

Here, when Fischel originally estimated alleged inflation, he included two corrective disclosures that the Court later rejected as legally invalid: November 4, 2004 and October 20, 2005. Fischel (erroneously) claims that, because the Court's elimination of those dates reduced his estimate of total inflation *coming out* of Pfizer's stock price by 9.7 percent, he had to make a separate 9.7 percent adjustment to every day on which inflation *comes into* the stock price.[2] (Ehrlich Decl., Ex. 73, at 35:9–40:16.) He achieved that equilibrium by shaving 9.7 percent off each of the five inflation-in days he identified in the Class Period. The effect of that haircut was to *increase* inflation for virtually every day in the Class Period above what it would have been had Fischel removed the rejected dates from his calculation and left it at that.

Imagine, however, if Fischel had never included the legally invalid dates in his original analysis, and simply started where he has now ended up: with the five post-summary-judgment corrective disclosure dates. Under that scenario, Fischel's 9.7 percent haircut, and its aggrandizing effect on daily inflation, would not have been necessary. After all, Fischel applied the 9.7 percent adjustment only to compensate for the fact that the Court rejected his two invalid dates. If those invalid dates had never existed in Fischel's analysis, neither would Fischel's adjustment and, as a result, estimated inflation would be lower. It is only because Fischel

[2] As explained below, Fischel's adjustment is not required to satisfy and, in fact, contravenes his equilibrium principle. *See* discussion *infra* Section I.C.1.

mistakenly included those legally invalid dates in his first analysis that he is able to deliver Plaintiffs a *higher* inflation number than they would have if Fischel had gotten it right the first time around, and in some cases higher than even his original report.

The perversity of that result—that Plaintiffs do better because Fischel erred—is magnified when one realizes that the more mistakes Fischel makes, the better Plaintiffs do. Consider what would have occurred if Fischel had included additional, legally invalid dates in his initial analysis. Under that scenario, the Court's reduction of alleged inflation would have been even greater, Fischel's proportional adjustment to the residual stock price increases would have been higher, and the resulting boost to daily inflation estimates even more significant. (*See* Ehrlich Decl., Ex. 75 ¶¶ 33–37.)[3] "[N]o valid scientific analysis can have its final results turn on how many unsupported events an earlier version of the analysis contained." (*Id.* ¶ 37.) Fischel himself acknowledged that a properly conducted event study "does not depend on any particular choice of dates," but rather is a "general methodology that can be used for any combination of dates." (Ehrlich Decl., Ex. 74, at 31:22–33:3.)

The fact that Fischel's new methodology can be—and, in this case, has been—manipulated by inserting and then removing extra, erroneous dates, confirms that it cannot possibly survive *Daubert* scrutiny. *See Romano* v. *Metro-N. Commuter R.R.*, No. 06 Civ. 4986(PAC), 2007 WL 5309190, at *1 (S.D.N.Y. Nov. 26, 2007) (rejecting "result-driven and convenient" expert opinions and testimony that were based on an "unverifiable methodology").

[3] As an illustration, imagine that Fischel had initially included an additional purported corrective disclosure, such as July 20, 2005. Had Fischel included that date, and had the Court rejected it on the grounds similar to the summary judgment rulings, Fischel would be left with the very same five corrective disclosure dates and five residual price increases that he currently has. Yet because, in this hypothetical, the Court would have rejected three dates instead of two, the percentage reduction to "inflation out" would be even higher, and so would Fischel's percentage adjustment to the price-increase dates: up from 9.7 percent to 19.1 percent. (*See* Ehrlich Decl., Ex. 72, Ex. 36, at 111). Put simply, Fischel's method allows an expert to reduce inflation-in—thereby raising implied damages—*ad infinitum* by simply misidentifying more invalid corrective disclosures up front.

C. Fischel's Methodology Lacks Economic Validity

In addition to being unprecedented and unscientific, Fischel's new methodology flouts the economic principles he purports to follow and is divorced from the facts of this case.

1. Fischel's Methodology Violates His Own Equilibrium Principle

Fischel premises his proportional adjustment on the principle that "when inflation comes out of a stock, it also has to come into the stock at some particular point in time." (Ehrlich Decl., Ex. 73, at 42:20–43:16.) In other words, *inflation in* must equal *inflation out*. According to Fischel, because the Court's rejection of the November 4, 2004 and October 20, 2005 dates reduced the amount of inflation coming *out* of Pfizer's stock price, he had to make further adjustments to reduce the amount of inflation coming into the stock price.

What Fischel disregards is that by operation of his own model, lowering the inflation coming out of the stock price necessarily lowers the inflation coming in by reducing the inflation present in the stock price at the start of the Class Period. Thus, Fischel's removal of the $0.60 and $0.07 of the "inflation out" he estimated on November 4, 2004 and October 20, 2005 automatically reduced the "inflation in" on all prior days by the same $0.67 amount—achieving precisely the equilibrium Fischel claims is so important.[4] Fischel's *further* 9.7 percent reduction to all five residual price increases is an unjustified and superfluous step.

Even if some further adjustment were necessary to achieve balance (and it is not), the adjustment Fischel has chosen to make is illogical. Fischel says that because less inflation came out of the stock price on November 4, 2004 and October 20, 2005, then less inflation must have come into the stock price. Assuming that general principle makes sense (at least

[4] On days prior to Pfizer's acquisition of Pharmacia on April 16, 2003, Fischel allocates the total artificial inflation between Pfizer's stock and Pharmacia's stock by roughly a 50-50 split. (*See* Ehrlich Decl., Ex. 72 ¶ 31.) Thus, eliminating the two rejected corrective disclosure dates results in approximately 34 cents less inflation in *Pfizer's stock* at the start of the Class Period. However, there is still a full 67 cents less "inflation in" overall because the remaining 33-cent reduction is allocated to *Pharmacia's stock* before the merger.

superficially)— it must mean that inflation coming out of the stock price on November 4, 2004 previously *entered* the stock price on an *earlier* date. Fischel, however, reduces the amount of inflation coming into the price on three inflation-in dates *after* November 4, 2004—December 21, 2004, December 22, 2004, and February 18, 2005. It is by irrationally adjusting the amount of inflation on these *later* dates—instead of acknowledging that the inflation at the start of the Class Period is automatically lowered simply by removing the November 4, 2004 and October 20, 2005 dates—that Fischel is able to retain for Plaintiffs a significant portion of the inflation that otherwise would be eliminated by the Court's summary judgment rulings and, in fact, achieve an even higher inflation estimate than his original analysis for several months in the Class Period.

2. Fischel's Methodology Ignores His Prior Data-Driven Analysis

Fischel's 9.7 percent adjustment also flies in the face of his own prior, data-specific analysis. In his original report, Fischel applied commonly used event study tools to estimate what portion of the stock price increase on his inflation-in days was attributable to Defendants' alleged fraud. For August 26, 2004 and September 30, 2004, for example, Fischel determined that 57 percent of the price movements on those dates occurred because of Defendants' purported misstatements about Celebrex and Bextra as opposed to non-fraud factors; he determined the full amount of the remaining dates was relevant to inflation. (Ehrlich Decl., Ex. 72 ¶ 30 & n.14; Ex. 76 ¶ 3.) While Fischel's original analysis was far from error-free, he at least advanced some real-world economic basis in an attempt to support his conclusions, including contemporaneous analyst commentary and historical sales data. (Ehrlich Decl., Ex. 72 ¶¶ 22, 30 n.15, Ex. 37.) Now, without any regard to that prior analysis, Fischel has given all of those dates an abrupt (and unnecessary) 9.7 percent haircut. But the reasons Fischel previously gave for calculating his original price increases in his inflation analysis are no different today

than when he first identified them. Nonetheless, and without any reasoned economic analysis, he now attributes only 90.3 percent of the inflation he originally estimated to Defendants' alleged misstatements. (*See* Ehrlich Decl., Ex. 76 ¶ 2.)

Fischel's decision to categorically reduce all five inflation-in dates by a standard 9.7 percent is arbitrary not only because it ignores his prior analysis of the events on those days, but also because he admits he did not find any "clear one-for-one relationship between any particular positive disclosure and any particular negative disclosure." (Ehrlich Decl., Ex. 73, at 53:12–55:11.) He posits a general, nonspecific "relationship" between the November 10, 2004 and October 20, 2005 dates and all five inflation-in dates, but offers no specific economic explanation that ties those dates together such that a change to one date would necessitate adjustment to the others. (*Id.* at 36:8–39:4, 51:24–55:11.) As Dr. Gompers explains, "to uniformly reduce all five residual stock price increases by 9.7 percent—regardless of their lack of linkage to the excluded disclosures—has no economic support." (Ehrlich Decl., Ex. 75 ¶ 18.)

It is a fundamental *Daubert* principle that an expert's opinion must be tied to the existing data by more than just "the *ipse dixit* of the expert." *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997). Here, Fischel has provided no factual or scientific support for the "relationship" he now posits between the corrective disclosure dates rejected by the Court and the inflation-in dates his Supplemental Report modifies. His unsupported insistence that such a relationship exists cannot support his arbitrary recalculation of purported inflation. *See Daubert*, 509 U.S. at 591–92 (the expert must provide "creditable grounds" showing his opinion has a "valid scientific connection" to the facts in issue); *Nook* v. *Long Island R.R. Co.*, 190 F. Supp. 2d 639, 642–43 (S.D.N.Y. 2002) (Swain, J.) (rejecting an expert opinion that lacked an adequate "factual foundation" from "objective data regarding the actual conditions").

3. Fischel's Methodology is Vague, Subjective, and Unhelpful to the Jury

Asked at deposition why he did not simply remove the two rejected corrective disclosures as he previously testified he would, Fischel claimed that his additional offsetting adjustment was necessary because the Court attributed the stock price declines on the rejected dates to "cardiac issues related to Celebrex and Bextra." (Ehrlich Decl., Ex. 73, at 35:9–36:4.) Fischel claims that he did not anticipate that possibility when he gave his original testimony. (*Id.* at 57:22–58:20.) He concedes that if the Court had attributed the price movements on November 4, 2004 and October 20, 2005 "to some factor other than cardiac issues," his offsetting adjustment would have been unnecessary. (*Id.* at 35:9–36:4.) But he insists that because of the reason the Court gave for eliminating the dates, the adjustment was required.

Fischel has provided no cogent explanation for why *the reason* a corrective disclosure date is rejected should affect how inflation is recalculated. Nor does he coherently explain the cardiac/non-cardiac distinction he claims to be applying.[5] Thus, even if there were any rationale for applying an offsetting adjustment in some cases but not others, it would be impossible for anyone to distinguish between those two types of cases. Fischel explained that if a jury rejects additional corrective disclosure dates, they would have to determine whether to apply the adjustment by first deciding "why the dates [they reject are] not viewed as corrective disclosures," and then using their "discretion based on what it is they conclude." (Ehrlich Decl., Ex. 73, at 58:22–60:3, 65:3–24.) He declined to provide any further insight into "what [he] would suggest doing [at trial] because [he] d[oes]n't know what's going to come up." (*Id.* at

[5] Fischel also appears to misread the Court's opinion, which does not attribute the stock price declines on November 4, 2004 and October 20, 2005 to "cardiac issues related to Celebrex and Bextra." Rather, the Court rejected the October 20, 2005 date because the earnings announcement on that day reported only "business information," not new information about cardiovascular *risks*. *In re Pfizer*, 2013 WL 1285173, at *10. And it dismissed the November 4, 2004 date as legally invalid because the Canada Post article to which Fischel attributed the stock price decline on that day did not reveal true information about cardiovascular risks. *Id.*

65:3–24.) By transforming the jury's task from a relatively simple exercise of removing erroneous dates to a complex, amorphous, and unguided process, Fischel's new methodology "would only complicate, not assist, the jury's decision." *United States* v. *31–33 York Street*, 930 F.2d 139, 141 (2d Cir. 1991).[6] This too warrants its exclusion under *Daubert*.

II. Fischel's Testimony Should Be Excluded Because It Ignores the Court's Pharmacia Ruling

Fischel's inflation analysis purports to determine how much Pfizer's stock price was inflated by *Defendants'* misstatements. He does so not by identifying or analyzing all of the statements that purportedly introduced artificial inflation into the stock price, but instead by identifying days on which he believes inflation *came out* of the stock because the truth allegedly concealed by Defendants' statements was revealed. Put differently, he "backs into" his inflation estimate. Through this backwards looking process, Fischel concludes that Pfizer's stock price was already inflated by $1.17 on the first day of the Class Period. (Ehrlich Decl., Ex. 73, at 83:13–17.) Fischel did nothing to investigate how this inflation got into the stock price in the first place. Instead, he simply assumes that all of that inflation is "attributable to the defendants" "because of the allegations in the complaint." (*Id.* at 82:2–11, 83:13–84:2.)

The Court undercut that assumption in its summary judgment opinion, ruling that Defendants cannot be held liable for some of the statements allegedly responsible for adding inflation to Pfizer's stock price—namely, certain statements that *Pharmacia* made before Pfizer acquired that company. *In re Pfizer*, 2013 WL 1285173, at *13. If those Pharmacia statements were responsible for some of the inflation that allegedly *came into* the stock price, then they must also be responsible for some of the inflation that allegedly *came out* of the stock price. By

[6] In addition to making the subjective threshold inquiry described above, the jury would also have to calculate the percentage of total inflation removed by its verdict, apply that percentage to reduce the residual price increases whether they occur before or after the rejected dates, and then revise Fischel's inflation estimate for all preceding days within the five-year Class Period. (*See* Ehrlich Decl., Ex. 73, at 63:8–65:24.)

Fischel's own admission, if some or all of the purported misstatements alleged in the Complaint are not attributable to Defendants, then "for those statements where there was no liability, there *wouldn't be any role for analyzing inflation* or damages." (Ehrlich Decl., Ex. 73, at 79:5–19 (emphasis added).) Notwithstanding that admission, Fischel has done nothing to estimate what portion of the inflation coming out of Pfizer's stock is attributable to those Pharmacia statements. Instead, he continues to "assume[]" that *all* inflation is attributable to Defendants "because of the allegations in the Complaint." (*Id.* at 82:2–11.) Because Fischel's inflation analysis depends on an invalid assumption, and because it will provide the jury no meaningful assistance in determining the facts relevant to this case, it should be excluded.

A. Fischel's Analysis is Predicated on an Invalid Assumption

An expert cannot blindly accept and "bolster[]" a plaintiff's allegations by incorporating them as "assumptions" to his opinion. *See Lava Trading, Inc.* v. *Hartford Fire Ins. Co.*, No. 03 Civ. 7037(PKC), 2005 WL 4684238, at *2 (S.D.N.Y. Apr. 11, 2005). Rather, he is obligated to "vouchsafe the reliability of the data on which he relies and explain how the cumulation of that data was consistent with standards of the expert's profession." *SMS Sys. Maint. Servs., Inc.* v. *Digital Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999). Fischel shirked that responsibility here. He failed to form any independent opinion about who or what caused the inflation in Pfizer's stock price—including the $1.17 of inflation purportedly present at the outset of the Class Period. Instead, he unquestioningly assumed that Defendants were responsible for all of the inflation, based on Plaintiffs' Complaint. (Ehrlich Decl., Ex. 73, at 83:13–84:2.)

Fischel then compounded that misstep by clinging to this unverified assumption, even *after* the Court ruled that Defendants could not be held responsible for several Pharmacia statements, which, according to Plaintiffs, are part of what inflated Pfizer's stock price. (Dkt. No. 361 ¶ 569.) Fischel admits he made no effort to decide whether the Court's Pharmacia

ruling was even "relevant" to his analysis or assumptions, and he took no steps at all to "modify [his] analysis in any way" in response to it. (Ehrlich Decl., Ex. 73, at 76:14–77:15.) Instead, he continued to blindly adhere to his assumption that Defendants are responsible for all of the inflation in Pfizer stock, because that is what Plaintiffs claim. (*Id.* at 82:2–11.)

Where, as here, an expert's opinion "rests on inadequate factual foundations, problematic assumptions, or a misleadingly partial selection of relevant facts, it must be excluded under Rule 702." *Davis* v. *Carroll*, No. 09 Civ. 1088 (JPO), 2013 WL 1285272, at *25 (S.D.N.Y. Mar. 29, 2013). An assumption that has been undercut by a court ruling is undeniably problematic. Courts have likewise refused to allow a purported expert to testify where an "unfounded assumption underlying [the expert's damages] calculations render[ed] them unhelpful and unnecessarily confusing to the jury." *Dupont Flooring Sys., Inc.* v. *Discovery Zone, Inc.*, No. 98 Civ. 5101(SHS), 2005 WL 22865, at *1 (S.D.N.Y Jan. 5, 2005). These are precisely the problems with Fischel's inflation analysis. If permitted to testify, Fischel would offer the jury an inflation estimate reflecting an unfounded assumption that all of the inflation-causing misstatements are attributable to Defendants, and thereby creating a misleading impression that Defendants are responsible for all of the inflation he calculated. His failure to even consider what portion of his estimated inflation could be attributable to Pharmacia renders his opinion not only unreliable, but also utterly unhelpful and confusing to the jury.

B. Fischel Fails to Disaggregate Confounding Pharmacia Statements

Under Supreme Court precedent, a loss causation expert is required to disaggregate the "tangle of factors affecting price," because all or part of a price decline "may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 343 (2005). Inflation caused by statements of third

parties, like Pharmacia, must also be disaggregated because Plaintiffs have to establish that it was "*defendant's* fraud—rather than other salient factors—that proximately caused plaintiff's loss." *Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005) (emphasis added).[7] A loss causation expert may not simply "blame[] it all on the defendants." *Bricklayers & Trowel Trades Int'l Pension Fund* v. *Credit Suisse First Bos.*, 853 F. Supp. 2d 181, 191 (D. Mass. 2012). Here, instead of disaggregating inflation allegedly caused by Defendants from that caused by Pharmacia, as he must, Fischel improperly leaves it to the jury to implement the Court's ruling:

> Q. Let's take a case where defendants are responsible for some of the statements and *not responsible for some of the statements* that are allegedly misleading. How would your analysis address that issue?
>
> A. . . . The jury would have to decide what to do. . . .
>
> Q. If the court were to conclude that [inflation is] in part the responsibility of someone other than a defendant named in the complaint, your analysis doesn't purport to disaggregate on that account; is that right?
>
> MR. MUSTOKOFF: Objection to form.
>
> THE WITNESS: . . . [T]hat would just mean that the defendants are not liable for or not responsible for some or all of the inflation that I've calculated, and that a jury would have to take that into account . . . .

(Ehrlich Decl., Ex. 73, at 79:21–80:14, 84:3–21 (emphasis added).)

By punting the disaggregation question to the jury, Fischel ignores the requirement that the *expert* must perform his own disaggregation, because in the absence of such expert guidance, there is "simply no way for a juror to determine whether the alleged fraud caused any portion of Plaintiffs' loss." *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008).

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[7] *See also* Ehrlich Decl., Ex. 79, at 29 ("It is often the case that different sets of codefendants—such as officers versus outside auditors—are alleged to be responsible for different misrepresentations that are, nonetheless, revealed together in corrective disclosures. This is another species of confounding information.").

Failure to disaggregate not only leaves the jury at sea in terms of deciding the inflation that could be attributable to Defendants (as opposed to Pharmacia), it also creates a serious risk that the jury will simply attribute all of the inflation to Defendants. As one court explained, presenting the jury with an inflation calculation that has not been fully disaggregated "misleadingly suggests to the jury that a sophisticated statistical analysis proves the impact of defendants' alleged fraud on a stock's price when, in fact, the movement could very well have been caused by other information." *Bricklayers*, 853 F. Supp. 2d at 190. Having given his inflation analysis and quantification the imprimatur of expert opinion, Fischel cannot fairly tell the jury that it must overhaul his calculations in order to implement the existing summary judgment ruling. Under such circumstances, "[i]t would be just as scientific to submit to the jurors evidence of defendants' alleged fraud and [defendant's] stock fluctuations and let them speculate whether the former caused the latter." *Id.*; *see also Omnicom*, 541 F. Supp. 2d at 554 (excluding testimony of expert who disaggregated only some confounding factors).

III. Fischel's Reply Report Should Be Excluded

Confronted with the flaws in his Supplemental Report, Fischel submitted an additional "Reply Report," ostensibly intended to address Dr. Gompers' observation that there is "no precedent" for Fischel's 9.7 percent offsetting adjustment and "no economic literature to support it." (Ehrlich Decl., Ex. 77 ¶ 2.) But instead of identifying any such support, Fischel asserts that, if he had wanted to, he could have ignored the inflation-in days altogether—as experts in his field "typically" do—and thereby would have produced "far greater inflation estimates and far greater damages." (*Id.* ¶ 2 & n.1.) Fischel's Reply Report should be stricken and testimony regarding it precluded under Fed. R. Evid. 401, 403, and 702, and Fed. R. Civ. P. 26 and 37.

First, the Reply is not responsive to Dr. Gompers' Supplemental Report and far exceeds the scope of permissible rebuttal. *See* Fed. R. Civ. P. 26(a)(2)(D)(ii) (rebuttal is allowed "solely to contradict or rebut evidence on the same subject matter identified by another party").[8] Instead it is a non-sequitur that provides a gratuitous explanation of an alternate method that Fischel claims he could have applied in this case, but did not, out of concern that it would "overestimate" inflation. (Ehrlich Decl., Ex. 77 ¶ 2.) The obvious purpose of the Reply is to insinuate that because Fischel's overall methodology was somehow generous to Defendants, they have no cause to complain about his 9.7 percent adjustment.

Second, the reasoning set forth in the Reply is specious. Contrary to Fischel's assertion, experts in his field regularly consider residual price increases when quantifying inflation. *See, e.g.*, (Ehrlich Decl., Ex. 80 ¶¶ 15, 17); *Carpenters Health & Welfare Fund* v. *Coca-Cola Co.*, No. 1:00-CV-2838-WBH, 2008 WL 4737173, at *1–3 (N.D. Ga. Mar. 14, 2008) (expert used both "inflationary and deflationary events" that, respectively, caused "share price inflation or share price correction"); *In re Cal. Micro Devices Sec. Litig.*, 965 F. Supp. 1327, 1333 (N.D. Cal. 1997) (expert "identified inflationary events and corrective disclosures"); *c.f. Fogarazzo* v. *Lehman Bros., Inc.*, 232 F.R.D. 176, 189 (S.D.N.Y. 2005) ("[A] valid loss causation methodology in this case must be able to analyze the inflationary effects of the alleged misrepresentations or omissions and the alleged corrective events.").[9]

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[8] *See also R&O Const. Co.* v. *Rox Pro Int'l Grp., Ltd.*, No. 2:09-cv-01749-LRH–LRL, 2011 WL 2923703, at *3–4 (D. Nev. July 18, 2011) (striking "rebuttal" report that set forth "an alternate theory" of causation, since "simply because one method fails, the other does not become 'rebuttal'"); *Ebbert* v. *Nassau Cnty.*, No. CV 05-5445(FB)(AKT), 2008 WL 4443238, at *13 (E.D.N.Y. Sept. 26, 2008) (rebuttal reports may not "present[] new arguments, unless presenting those arguments is substantially justified and causes no prejudice"); Fed. R. Civ. P. 37(c)(1) (noncompliance with Rule 26(a) warrants preclusion of expert evidence unless that "failure was substantially justified or harmless").

[9] Additionally, the concepts of market overreaction and bounce back, which underpin three of Fischel's price-increase dates, are well known in the literature. (Ehrlich Decl., Ex. 81, at 38:21–40:8; Ex. 82.)

Moreover, even if including such increases were atypical (and it is not), that would not change the fact that *in this case* Fischel determined that these increases must be included to produce accurate daily inflation estimates. (Ehrlich Decl., Ex. 77 ¶ 2; Ex. 73, at 36:8–39:4, 65:3–66:7 (omitting price-increase dates "would produce excessive inflation and potentially excessive damages"); Ex. 74, at 43:23–45:8.) The possibility that other experts might have improperly ignored the residual price increases that Fischel identified as relevant on the facts of this case provides no justification for modifying his measurement of those increases through an unscientific and arbitrary adjustment.

Finally, to the extent the Reply is meant to suggest that, once the Court rejected two of his corrective disclosures, Fischel's only choice was to apply his unprincipled adjustment or jettison inflation-in days altogether, he once again ignores his prior, sworn testimony that the proper response to the rejection of a corrective disclosure is to simply remove those disclosures and reduce the inflation estimate accordingly. (*See* Ehrlich Decl., Ex. 74, at 38:19–39:25.)

In sum, Fischel's Reply does him no good in defending his improper methodology for recalculating inflation. Nor would Fischel have any business testifying to its contents in front of the jury, particularly since it misleadingly casts as "typical" an approach that Fischel *admits* significantly overstates inflation. Fischel cannot be permitted to lure the jurors into accepting his own flawed estimate of inflation by insisting that other, less solicitous experts might have presented an even higher (and more problematic) estimate.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant their foregoing motion to exclude the expert testimony of Daniel R. Fischel at trial.

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