

Douglas S. Eakeley
LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500

MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
202.263.3000

Attorneys for the Exchange Act Defendants

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE SCHERING-PLOUGH
CORPORATION/ENHANCE
SECURITIES LITIGATION

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(Securities Class Action)

Oral Argument Requested

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**BRIEF OF EXCHANGE ACT DEFENDANTS IN SUPPORT OF THEIR
MOTION TO STRIKE ALLEGATIONS DERIVED FROM ANONYMOUS
SOURCES PURSUANT TO FED. R. CIV. P. 12(F)**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE.....	4
A. Allegations Concerning CaféPharma Postings	5
1. CaféPharma	5
2. Plaintiffs’ CaféPharma Allegations	11
B. Confidential Witnesses.....	15
ARGUMENT	16
I. The Court May Strike Allegations That Are Immaterial, Impertinent, or Scandalous.....	16
II. The Allegations Based on Anonymous Sources Should Be Stricken Under Rule 12(f).....	18
A. The Allegations are Immaterial and Impertinent.	19
1. Allegations Based on Anonymous Sources Must Be Disregarded, or At Least Discounted.....	19
2. The Allegations Concerning Anonymous Sources in the Complaint May Not Be Considered.....	21
3. The Information Purportedly Provided by the Anonymous Sources Would Be Inadmissible at Trial.....	23
B. The Allegations Based on Anonymous Sources Are Scandalous and Prejudicial.....	28
CONCLUSION	31

TABLE OF AUTHORITIES

CASES	PAGES
<i>Amentler v. 69 Main Street, LLC</i> , 2008 WL 4149125 (D.N.J. Sept. 2, 2008)	29
<i>Anderson v. United States</i> , 417 U.S. 211 (1974).....	25
<i>Bristol-Myers Squibb Co. v. Ivax Corp.</i> , 77 F. Supp. 2d 606 (D.N.J. 2000).....	17, 18, 27
<i>California Public Employees Retirement System v. Chubb Corp.</i> , 394 F.3d 126 (3d Cir. 2004)	passim
<i>Columbia Ins. Co. v. Seescandy.com</i> , 185 F.R.D. 573 (N.D. Cal. 1999).....	24
<i>Delaware Health Care, Inc. v. MCD Holding Co.</i> , 893 F. Supp. 1279 (D. Del. 1995).....	17
<i>Doe I v. Individuals</i> , 561 F. Supp. 2d 249 (D. Conn. 2008).....	24
<i>Doe v. 2TheMart.com., Inc.</i> , 140 F. Supp. 2d 1088 (W.D. Wash. 2001)	24
<i>Forge Industrial Staff, Inc. v. De La Fuente</i> , 2006 WL 2982139 (N.D. Ill. Oct. 16, 2006)	4
<i>Higginbotham v. Baxter Intern., Inc.</i> , 495 F.3d 753 (7th Cir. 2007)	20
<i>In re Intelligroup Securities Litigation</i> , 527 F. Supp. 2d 262 (D.N.J. 2007).....	20, 21, 26
<i>Kim v. Baik</i> , 2007 WL 674715 (D.N.J. Feb. 27, 2007)	16
<i>Knieval v. ESPN, Inc.</i> , 223 F. Supp. 2d 1173 (D. Mont. 2002).....	4

Law v. Luzerne Intermediate Unit 18,
 2006 WL 1455730 (M.D. Pa. May 25, 2006).....18

Lipsky v. Commonwealth United Corp.,
 551 F.2d 887 (2d Cir. 1976)17, 18

In re Merck, Inc. Sec. Lit.,
 432 F.3d 261 (3d Cir. 2005)30

Novak v. Tucows, Inc.,
 2007 WL 922306 (E.D.N.Y. March 26, 2007).....25

Oset v. Interstate Brokerage of the Southeast, Inc.,
 1999 WL 33236225 (E.D.N.C. Nov. 30, 1999).....18

Otero v. Vito,
 2005 WL 1429755 (M.D. Ga. June 15, 2005).....18

Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc.,
 998 F.2d 1192 (3d Cir. 1993)4

Pfizer, Inc. Sec. Lit.,
 538 F. Supp. 2d 621 (S.D.N.Y. 2008)21

St. Clair v. Johnny’s Oyster & Shrimp, Inc.,
 76 F.Supp. 2d 773 (S.D. Tex. 1999).....27

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
 -- U.S. --, 127 S. Ct. 2499 (2007)19

STATUTES

15 U.S.C. § 78u-4(b)(2)19

RULES

Fed. R. Civ. P. 12passim

Fed. R. Evid. 80125

Fed. R. Evid. 80225

Fed. R. Evid. 80726

Fed. R. Evid. 90123

OTHER AUTHORITIES

Charles A. Wright & Arthur R. Miller, FED. PRAC. & PROC. 3d § 138217

Defendants Schering-Plough Corporation (“Schering”), Merck/Schering-Plough Distribution Services LLC d/b/a Merck/Schering-Plough Pharmaceuticals, Fred Hassan, Carrie S. Cox, Robert J. Bertolini and Steven H. Koehler (collectively, the “Exchange Act Defendants”) respectfully submit this brief in support of their Rule 12(f) motion to strike the allegations derived from anonymous sources from the Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the “Complaint”).

PRELIMINARY STATEMENT

Grasping for anything to support their claim that Schering executives improperly “unblinded” themselves to the results of the ENHANCE clinical trial, plaintiffs rely on anonymous sources. The Complaint quotes from messages left by unidentified persons on an Internet message board called CaféPharma, and to the opinions and speculations of unnamed “confidential witnesses.” These allegations should be stricken from the Complaint because they are scandalous, immaterial and impertinent.

CaféPharma is designed for use by sales representatives at competing drug companies. Messages left there are anonymous and, according to CaféPharma itself, their authors can never be traced. With that license of complete anonymity, CaféPharma is a haven for racism, misogyny, wild speculation, and misinformation. Crude comments about the physical appearance of female

executives and sales representatives, as well as the sexual prowess of their male counterparts, flood the site. Minorities are denigrated and pilloried. Individuals pose as “insiders” at competing drug companies for the purpose of smearing their products, in the apparent hope of securing a competitive edge in the marketplace. Rumormongering abounds on the board; indeed, if the messages were to be believed, then Schering should have long ago disappeared through a corporate merger or acquisition.

CaféPharma is, literally, the cyberspace equivalent of scrawls left on a men’s room wall. And it is from this source that plaintiffs draw allegations of so-called “facts” to suggest the *scienter* and knowledge required to support their claims of securities fraud in this case.

A motion to strike is appropriately granted where, as here, a complaint relies upon scandalous matter that would never be admissible on an evidentiary motion or at trial. The CaféPharma messages can never be authenticated, since their authors can never be discovered; the Court will never know if the messages were left by sales representatives of Schering’s competitors, short-sellers of Schering stock, disgruntled employees, or other mischief-makers; no foundation of personal knowledge can ever be established; and the multiple hearsay problems can never be resolved. Indeed, it would cheapen the process of justice to rely on anonymous messages left on a message board rife with racism, bigotry, misogyny,

and wild (not to mention provably false) speculation and rumor to justify a claim for liability under the securities laws. Certainly, such messages cannot give rise to an inference of *scienter* under controlling precedent.

Plaintiffs attempt to bolster their reliance on CaféPharma with references to “confidential witnesses” who assert that Schering executives were aware of or visited the site. But these assertions are immaterial; an allegation that Schering was aware of the existence of an anonymous Internet message board, CaféPharma, hardly transforms it into a credible source. Equally impertinent are the unnamed sources upon whom, through smoke and mirrors, plaintiffs rely to insinuate that Schering executives improperly peeked at the blinded ENHANCE study data. In fact, an examination of the Complaint reveals that these “witnesses” do not claim they had access to the ENHANCE results and can only speculate as to whether and when others did. Their musings are therefore entirely irrelevant.

Accordingly, the Exchange Act Defendants’ motion to strike the allegations concerning anonymous sources from the Complaint should be granted.¹

¹ The Exchange Act Defendants respectfully request that the Court strike the following allegations from the Complaint: Paragraphs 10 (first and third bullets), 102-103, 115-121, 123-25, 130-35, 142, 155-56, 163, 211-13, and 214 (fifth bullet), as well as the clauses referring to CaféPharma or confidential witnesses in the preamble to the Complaint and in Paragraphs 145, 191, 222, and 233.

STATEMENT OF THE CASE

The Exchange Act Defendants set forth the following statement to provide the Court with background concerning CaféPharma and the Complaint's reliance on that site and on several confidential witnesses.² For a fuller explication of plaintiffs' claims and the background to this action, the Exchange Act Defendants respectfully refer the Court to the brief filed in support of the Exchange Act Defendants' motion to dismiss the Complaint.

Regrettably, the statement below quotes language from CaféPharma that is repulsive, offensive, and obscene. Ordinarily, the Exchange Act Defendants and their counsel would never include such language in a submission to the Court. However, because plaintiffs selectively quote from CaféPharma in their Complaint and rely so substantially on these selective pieces of CaféPharma posts to support their securities laws claims, the Exchange Act Defendants are compelled to

² The statement below references a number of postings from CaféPharma, which are attached as exhibits to the accompanying Declaration of Gavin J. Rooney in Support of the Exchange Act Defendants' Motion to Strike ("Rooney Declaration"). Because the Complaint relies heavily upon CaféPharma, the content of the site may properly be considered by the Court on a Rule 12 motion. See *Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993); see also, e.g., *Forge Industrial Staff, Inc. v. De La Fuente*, 2006 WL 2982139, at *3 n.2 (N.D. Ill. Oct. 16, 2006) (where complaint attached selected pages from a website, court could consider additional pages from the website on a motion to dismiss); *Knieval v. ESPN, Inc.*, 223 F. Supp. 2d 1173, 1176 (D. Mont. 2002) (where complaint attached certain pictures from a website, court could consider additional content from the website on a motion to dismiss).

provide the Court with a full picture of the kinds of messages left on that website to allow the Court to fairly assess this source.

A. Allegations Concerning CaféPharma Postings

1. CaféPharma

According to its home page, www.cafepharma.com, CaféPharma is “the website for pharmaceutical sales professionals.” *See* Ex. 1.³ The website includes scores of message boards, categorized by topics. *See, e.g.*, Ex. 2. Each message board includes specific lines of discussion – “threads” – which are comprised of one or more posted messages that respond to one another.

CaféPharma messages are anonymous. With limited exceptions, it is not necessary for a user to register a username to leave or review messages on the site, and the vast majority of the messages do not purport to identify their authors. Indeed, according to a statement posted by the site manager, CaféPharma does not even “collect IP addresses or other identifying information with anonymous posts.” Ex. 3; *see also* Ex. 4 (“As we have said before, per our policies, we do not collect any user information with anonymous posts (including IP addresses).”); Ex. 5 (“To protect user anonymity we do not record anonymous poster information such as IP addresses, email addresses, etc. linked to posts.”). This anonymity, moreover, is protected by the First Amendment, as discussed further below. Accordingly, the

³ Exhibits to the Rooney Declaration are cited herein as “Ex. ___.”

identity of the individuals who left the CaféPharma messages cited in the Complaint will never be known.

The content of the messages on CaféPharma reflects the intensity of the competition between pharmaceutical sales representatives from different companies, including within the market for cholesterol drugs such as Vytorin, Zetia, Zocor, Lipitor and Crestor. The message boards are replete with attacks by sales representatives on the products of competitors. *See, e.g.*, Ex. 44 at 12 (“Zocor has better OUTCOMES th[a]n your shitty product fuck wits!!!!”); Ex. 45 at 5 (“IDEAL proved that Lipitor 80 was no better than generic simva. Why spend money on any brand name?”); Ex. 6 at 2 (“[Crestor] is very, very dangerous, and it should be prescribed with caution, due to cases of Rabdomyosis [sic], and general muscle breakdown, the bastards at [AstraZeneca] are dead wrong about Crestors [sic] safety, it is all about \$\$\$\$\$\$\$\$\$ for shareholders.”). Authors frequently hurl expletives at one another — “scum bag loser,” “shit stain” “asshole,” “prick,” “douchebag whore,” “jitbag,” “dipshit,” and “dumbshit” are some of the common monikers. *See* Ex. 43 at 3-5; Ex. 44 at 4, 7, and 13; and Ex. 45 at 6. Representatives even attack each other’s sexual prowess and masculinity. *See, e.g.*, Ex. 45 at 4 (“The fact is, you don’t know any more about the results of ENHANCE than you do about fornicating.”); Ex. 44 at 4 (“What has your panties in such a bunch? . . . Good luck to your wife.”).

Given this atmosphere, it is understood by CaféPharma users that anonymous messages are frequently left by competitors masquerading as company insiders to intentionally misdirect rivals with false information. *See, e.g.*, Ex. 6 at 3 (“Probably was posted by some soon to be out of a job, low life fucking Pfizer rep.”); *id.* (“Are all outgoing pfizer reps now posing as docs on [CaféPharma]?”); Ex. 44 at 3 (“I bet the [original poster] is just a jealous rep from AZ [AstraZeneca.]”); Ex. 45 at 3 (“Sounds like a Lipitor rep with his head up his ass hoping against all odds that [this] is the case.”).

Indeed, rumors and false information are ubiquitous on CaféPharma. Not only does the website feature a discussion board explicitly dedicated to “Industry Rumors,” *see* Ex. 2, but rumors fill the pages of many of the boards throughout the site. Much of this information is false. For example, readers of the site might have expected that Merck would buy Reliant Pharmaceuticals, Inc., Ex. 7; that Merck would buy Medimmune, Inc., Ex. 8; that Pfizer would buy Eli Lilly and Company, Ex. 9; that Symphony Pharmaceuticals would buy Verispan, Ex. 10; and that Johnson & Johnson would buy Esprit Pharma, Inc., Exs. 11-12. As a matter of public record, however, no such transactions have ever occurred.

Schering is a particular target of such falsehoods. For example, various posters have asserted that Schering was to be bought by Merck, Exs. 13-15; that Pfizer, Inc. would buy Schering, Ex. 16; and that Wyeth and Schering

would merge, Ex. 17. One user claimed knowledge that Schering's CEO, Fred Hassan, was going to be replaced in 2007. Ex. 18. Yet another stated that Schering had decided not to participate in marketing Vytorin. Ex. 19. Each of these assertions, again, is false, and, in fact, controverted by plaintiffs' own allegations. *See, e.g.*, Complaint ¶¶ 23-25, 26.

Not only are many of the messages on CaféPharma untrue; they are also offensive and degrading. One Schering female executive, for example, is derided on the site as a "token female executive, nothing more." Ex. 20 at 1. Users refer to "her big fat ass," and ask whether "she ha[s] huge, floppy titties?" *Id.* at 2-3. The female staff at physicians' offices are denigrated as "office cows" who "waddle up to the trough and put on the feed bag." Ex. 21. Female sales representatives are similarly demeaned. Posters discuss who among their colleagues are the "hottest female reps," and wax on about "milf[s]" and "hotties." Exs. 22-24. There is no limit to the crudeness of such messages. Ex. 22 at 8 (referring to a particular female representative as a "slice of apple pie," and claiming that the poster will "suck the farts right out of her bung hole.").

In fact, such lewd and obscene content is ubiquitous throughout CaféPharma. *See, e.g.*, Ex. 43 at 6-7 ("Your dear sweet mom does however look me in the eyes as she gobbles up my trouser snake every evening when she goes out to play 'bingo.' Oh and she swallows like a good little girl."); Ex. 24 at 2

("[D]on't you hate it when your fucking a hot bitch in the ass, reach around to play with her clit and THERE'S A COCK! Has happened to me a couple times and just freaks me out. And for the curious, yes I did finish, had to. One was so nice I decided to jerk him/her off because of the effort he/she put in."). Some threads on certain CaféPharma message boards (in particular, the "Darkened Playground" and "CaféPharma Playground") even cater to those with prurient interests. *See, e.g.*, Ex. 25 (thread entitled "pussy smell"); Ex. 26 (thread entitled "Anal Sex with women").

Such offensive discussions find their match in the blatantly racist rants on CaféPharma. One user, for example, asserts that African-Americans "love[] handouts and freebies" and the "white man [has] been carrying them since slavery has been outlawed." Ex. 27 at 2. Others concur: African-Americans are "like cancer cells" — "[t]hey reproduce, yet make no contribution to the organism they live in, so the organism dies." *Id.* at 3. Yet another poster has called for the "lynching" of a prominent African-American. Ex. 28 at 2 ("Kobe [Bryant] is a fucking [nigger] who should be lynched. Let that fucking eggplant come visit us down here in Mississippi. We will string him up in no time."). Latinos are attacked as well. One agitator sounds the call to "grab your guns and . . . go spic huntin'." Ex. 29 at 9. Another tells the "dirty immigrants," "minority trash," and "dirt bags" to "go back to [El Salvador]." Ex. 30 at 2.

Racial stereotyping and slurs simply abound. *See, e.g.*, Ex. 31 at 16 (“Do they eat a lot of fried chicken and drink 40s at Kwanzaa? I bet KFC advertises for that shit.”); Ex. 32 at 5; (“I always thought NAACP stood for [Niggers] Are Actually Colored Pol[oc]ks!”); Ex. 33 at 6 (“I can think of two [niggers] and one beaner in our region. They are by far the dumbest reps we have, but kind of funny.”); *Id.* at 8 (“Puerto Ricans smell like body odor alllllll the time.”); Ex. 34 at 2 (“I hope this teaches future Republican Presidents a lesson. Never, ever, put a spic, nig-ger, or a woman in a cabinet position.”).

Public officials are similarly skewered on CaféPharma. Members of Congress who provide oversight into activities in the pharmaceutical industry are common targets. Senator Charles Grassley is called a “low pedigreed lowlife,” an “asshole,” and a “dumb ass Republican hick.” Ex. 35; Ex. 36 at 6; Ex. 37. Representatives Dingell and Stupak are ridiculed as “Dingleberry and Fudgeback,” who are “easily fooled.” Ex. 38 at 2; Ex. 39 at 2.

Judges, too, are not spared disparagement. According to CaféPharma, “[a]ny judge can be bought off.” Ex. 40. Federal judges are mocked as “lawyer[s] with an IQ of 5.” Ex. 41.

2. Plaintiffs' CaféPharma Allegations

Remarkably, plaintiffs turn to CaféPharma to create a purported inference of *scienter* and knowledge to support their claims of securities fraud in this matter. According to the Complaint:

Beginning in March 2007, dozens of posts about ENHANCE began appearing on the Schering board at CaféPharma. Certain of the anonymous posts claimed to know the results of ENHANCE, and included specific, non-public details that only Schering insiders would have known at the time, and which were later revealed to be correct. This supports the strong inference that the Exchange Act Defendants knew the results. . . . The CaféPharma posts further support the strong inference that by no later than March 2007, the Exchange Act Defendants were aware of or recklessly disregarded the ENHANCE results.

Complaint ¶ 118. In particular, plaintiffs rely on eight posts on CaféPharma between March and November 2007 as core allegations of their Complaint. *See id.* ¶¶ 120-121, 123-134, 131-134.⁴

Contrary to plaintiffs' allegations, however, most of these messages contain little in the way of actual information about ENHANCE. Instead, they simply assert that the study was negative. *See, e.g., id.*, ¶ 124 (the study “crashed and burned!”); *id.* ¶ 121 (“[T]he study is a bust. Adding Zetia to already maxed-out statin is useless.”); *id.* ¶ 131 (“[A]dding Zetia to high dose GENERIC statin

⁴ Copies of the complete threads containing the CaféPharma posts cited by plaintiffs are attached as Exhibits 42 to 47 to the Rooney Declaration.

provides no real benefit.”); *id.* ¶ 132 (“ENHANCE is . . . negative.”); *id.* ¶ 134 (“[I]t is a negative study.”). And nearly all of faceless writers of these posts acknowledge that they are only purporting to relay information they supposedly heard second- or third-hand from other, unidentified sources. *See, e.g., id.* ¶ 121 (citing a “buddy at SPRI”); *id.* ¶ 124 (reporting what the writer “heard” without identifying source); *id.* ¶ 132 (citing “sources close”); *id.* ¶ 133 (citing “one of my docs” who “is a very good friend of the study [Principal Investigator]”); *id.* ¶ 134 (citing “word of mouth from investigators”).

These anonymous statements appear in the same threads that contain demonstrably false information. Some posters within the same threads, for example, contended that ENHANCE involved a placebo-only control group – which it did not. *See, e.g., Ex. 42 at 2* (“One of my docs told me that he had heard from someone at SPRI that there was no difference between the Zetia and placebo groups in terms of carotid thickness.”); *id.* (“It was not Zetia and placebo, it was Zocor/Zetia against placebo.”). Another poster asserted that the ENHANCE study involved “10/80 of Zocor vs 10/80 of Vytorin,” *id.* at 3— which misstates the dosages involved in the study. Yet another explained that Schering “pulled” ENHANCE from the agenda of a conference due to safety issues, *i.e.*, that “there was rhabdo with Zetia/Zocor combo.” *Id.* at 1. Again, this is untrue; ENHANCE was never “pulled” due to rhabdomyolysis or any other adverse event.

Unsurprisingly, therefore, many posters on the CaféPharma website itself dismissed the posts as false or speculative:

- “You are all morons. This is a double blind study and the group out of Europe analyzing the data is the same group that analyzed METEOR. With that said, no one knows jack either way.” Ex. 44 at 7.
- “Look – NO ONE from SP has the results – NO ONE. Do not believe them as they are liars. . . . There may be bad news, may be good news, but none of these losers that post here are in the ‘KNOW.’” *Id.* at 13.
- “Don’t believe the crap on this board. The data set is still locked and the person who has ‘connections’ has no idea of which they speak. If the data was actually leaked (violation of SEC and other laws), it would have appeared in the media by now. I am not saying that the results are negative or positive, only that this person has no more idea of them than a one legged ice cream salesman.” Ex. 45 at 3.
- “Let me get this straight. It would be a FEDERAL CRIME to leak study information and yet some moron is in the ‘know.’ I call complete and utter BS! If it was true, why would you not short the stock and make a mint?” Ex. 44 at 3.
- “You crave the thrill of trying to make others believe you know something they don’t. Well you don’t! We all know you’re a scum bag loser!!” Ex. 45 at 6.
- “Post your proof fool. You may be correct, but until you can prove it with evidence, you are nothing more than a cafepharma blow hard.” *Id.* at 2.

In fact, the CaféPharma posts were considered by some readers to be misinformation propagated by Schering and Merck competitors in an effort to derail sales of Vytorin and Zetia.

- “[T]he ENHANCE . . . study data is still blinded so NOBODY knows the results of ENHANCE . . . *You guys at AZ [AstraZeneca] are chumps . . . IDIOTS!*” Ex. 43 at 1 (emphasis added).
- “The data is still blinded asshole. So unless your name is Crouse, you are a rumor mill loser. You may be correct; however, you do not know any more than I do. *Now, shit stain, go back to selling your Crestor.*” *Id.* at 4 (emphasis added).
- “This cannot be true. Everyone that promotes statins knows that if you add zetia to any statin, the LDL lowering effects are tremendously better. Look at the consistency in the dozens of studies already completed. *I bet the OP [original poster] is just a jealous rep from AZ [AstraZeneca].*” Ex. 44 at 3 (emphasis added).
- “Someone on this board is FOS... *sounds like a Lipitor rep with his head up his ass hoping against all odds that [this] is the case.*” Ex. 45 at 3 (emphasis added).

Thus, the very audience to which the CaféPharma posts were directed discounted the reliability of the messages on which plaintiffs here seek to ground their pleading of securities fraud.

B. Confidential Witnesses

Plaintiffs rely not only on the claims of anonymous CaféPharma users, but also on the assertions of six “confidential witnesses” whom they have refused to identify.

Three of the confidential witnesses — Confidential Witness (or “CW”) 4, CW 5 and CW 6 — seek to bolster the Complaint’s reliance on the anonymous CaféPharma posts. But the allegations derived from these witnesses suggest only that it is possible that Schering executives were aware of CaféPharma and, at times, visited the site. No witness claims that the executives themselves posted information about ENHANCE, nor claims to have personal knowledge that the Schering senior executives named in the Complaint ever visited the site, much less relied on it as a source for information and news. *See, e.g.*, Complaint ¶ 117 (alleging that CW 4, a former District Sales manager, “believes” that “senior management . . . visited CaféPharma” because he once heard the national sales director refer to a posting on the site concerning a corporate acquisition).

The remaining confidential witnesses described in the Complaint have no greater relevance. CW 1 and CW 3 are offered to suggest management’s knowledge of unspecified issues with the ENHANCE study — but, significantly, neither witness claims to have been informed of the study results nor to have any knowledge different from that disclosed contemporaneously to the public. CW 1’s

reference to “problems with ENHANCE,” his expectation that “meaningful results from ENHANCE” were unlikely, and that “they were not going to get any good news from ENHANCE” are fully consistent with the quality problems with the data that delayed the study results’ release and which were announced to the public. *Id.* ¶¶ 103, 211. CW 3’s statements that employees “always seemed a bit worried” about the study and “did not like the kind of results they were seeing” likewise merely reflect data-quality issues. *Id.* ¶ 212.

CW 2 and CW 3 are also offered for their opinion critiquing the proposed change in the study’s endpoint considered by the November 2007 expert panel. *See id.* ¶¶ 142, 155-56. But neither CW 2 nor CW 3 is alleged to have played any role in that consideration, or to have an opinion more probative than that of any other bystander. Indeed, the confidential witnesses are most striking for what they do not say: that the individual defendants in this lawsuit had actual knowledge of the results of the ENHANCE study, when they had that knowledge, or how they acquired it.

ARGUMENT

I. The Court May Strike Allegations That Are Immaterial, Impertinent, or Scandalous.

Fed. R. Civ. P. 12(f) permits a court to strike from a pleading “any redundant, immaterial, impertinent or scandalous matter.” “A court possesses considerable discretion in disposing of a motion to strike under Rule 12(f).” *Kim*

v. Baik, 2007 WL 674715, at *5 (D.N.J. Feb. 27, 2007) (Kugler, J.). Motions to strike may be granted in exceptional circumstances where “the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues.” *Bristol-Myers Squibb Co. v. Ivax Corp.*, 77 F. Supp. 2d 606, 619 (D.N.J. 2000) (Walls, J.).

In construing the scope of Rule 12(f), courts consider matter “immaterial” if it “has no essential or important relationship to the claim for relief or the defenses being pleaded.” *Delaware Health Care, Inc. v. MCD Holding Co.*, 893 F. Supp. 1279, 1291 (D. Del. 1995) (quoting 5A Charles A. Wright & Arthur R. Miller, FED. PRAC. & PROC. 2d § 1382). “Impertinent matter” has similarly been defined to “consist[] of statements that do not pertain, and are not necessary, to the issues in question.” *Id.* Scandalous matter, as the term suggests, “is that which improperly casts a derogatory light on someone.” 5C Charles A. Wright & Arthur R. Miller, FED. PRAC. & PROC. 3d § 1382.

Critically, a precondition to both materiality and pertinence is the admissibility of the evidence described at trial. If proof supporting the matter could not be received at trial, then the matter is immaterial and impertinent. *Id.* Accordingly, courts may strike allegations from a complaint under Rule 12(f) where “it can be shown that no evidence in support of the allegations would be admissible.” *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir.

1976); *see also* *Law v. Luzerne Intermediate Unit 18*, 2006 WL 1455730, at *3 (M.D. Pa. May 25, 2006). In *Lipsky*, the Second Circuit held that, because evidence concerning a previous consent judgment in a regulatory matter would be inadmissible at a trial, references to the regulatory matter could “have no possible bearing” on plaintiff’s case and should be stricken as immaterial. 551 F.2d at 892-894; *see also, e.g., Otero v. Vito*, 2005 WL 1429755, at *1 (M.D. Ga. June 15, 2005) (striking as “impertinent” allegations deriving from privileged communications). In short, “nothing should remain in a pleading, over objection, which is incompetent to be introduced in evidence.” *Oset v. Interstate Brokerage of the Southeast, Inc.*, 1999 WL 33236225, at *3 (E.D.N.C. Nov. 30, 1999) (quoting *Cox v. E.I. DuPont de Nemours & Co.*, 38 F.R.D. 8, 9 (D.S.C. 1965)).

II. The Allegations Based on Anonymous Sources Should Be Stricken Under Rule 12(f).

Under these standards, the Complaint’s allegations based on anonymous sources are immaterial, impertinent and scandalous, and should be stricken from the Complaint because they have “no possible relation to the controversy.” *Bristol-Myers Squibb*, 77 F. Supp. 2d at 619. Accordingly, the Court should only assess the Exchange Act Defendants’ parallel motion to dismiss after these improper allegations are removed from the Complaint.

A. The Allegations are Immaterial and Impertinent.

Plaintiffs cite to CaféPharma messages and confidential witnesses for the apparent purpose of satisfying the threshold requirement of the Private Securities Litigation Reform Act (“PSLRA”) that a complaint “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). But under controlling law, these anonymous sources cannot provide the basis for an inference of *scienter* or anything else.

1. Allegations Based on Anonymous Sources Must Be Disregarded, or At Least Discounted.

Precedent from the Supreme Court and the Third Circuit requires that allegations based on information from “confidential sources” must be discounted, if not disregarded altogether. In *California Public Employees Retirement System v. Chubb Corp.*, 394 F.3d 126, 148 (3d Cir. 2004), the Third Circuit held that, when relying on an unidentified witness source in a securities-fraud complaint, a plaintiff must describe the source “with sufficient particularity to support the probability that a person in the position would possess the information alleged.” Thus, where a complaint fails to allege whether and when the sources were employed by defendant, the dates when the sources acquired the information at issue, or how they had access to that information, the allegations based on the source are of no value and must be disregarded on a motion to dismiss. *Id.*

The Supreme Court's more recent decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, -- U.S. --, 127 S. Ct. 2499 (2007), suggests that even the stringent standard enunciated in *Chubb* is too generous. In *Tellabs*, the Court explained that “[a] complaint will survive [a motion to dismiss] only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged,” and that in applying this standard, “the court must take into account plausible opposing inferences.” 127 S.Ct. at 2502-03, 2510.

Tellabs, therefore, “requires judges to weigh the strength of plaintiffs’ favored inference in comparison to other possible inferences.” *Higginbotham v. Baxter Intern., Inc.*, 495 F.3d 753, 757 (7th Cir. 2007). But, as the Seventh Circuit has concluded, “anonymity frustrates [this] process”: “It is hard to see how information from anonymous sources could be deemed ‘compelling’ or how [a court] could take account of plausible opposing inferences.” *Id.* (“[A]nonymity conceals information that is essential to the sort of comparative evaluation required by *Tellabs*.”). Thus, under the reasoning of *Tellabs*, allegations attributed to confidential witnesses must, at least, be “discounted.” *Id.*

Under these standards, a securities plaintiff’s reliance on anonymous Internet posts is improper. In *In re Intelligroup Securities Litigation*, 527 F. Supp. 2d 262 (D.N.J. 2007), for example, Chief Judge Brown rejected a plaintiff’s

reliance on anonymous postings on a Yahoo! message board to support an inference of *scienter*. Applying *Chubb*, the court held that, because the complaint was “silent as to the identity, employ, and any other facts about [the anonymous poster],” the court could not “draw any inferences adverse to Defendants ... based on [the] postings.” 527 F. Supp. 2d at 369. *See also Pfizer, Inc. Sec. Lit.*, 538 F. Supp. 2d 621, 630-31 (S.D.N.Y. 2008) (allegation “based entirely on an anonymous blog post” and without a showing that the poster was “likely to have known the relevant facts” was insufficient to support claim that defendants’ statements were misleading).

2. The Allegations Concerning Anonymous Sources in the Complaint May Not Be Considered.

Applying the legal standards for pleading information from confidential witnesses leaves no doubt that the allegations here must be disregarded. Plaintiffs fail to plead sufficient information about either the CaféPharma messages or the confidential witnesses they cite.

Plaintiffs do not — and cannot — identify who posted the CaféPharma materials on which they rely. They do not — and cannot — allege whether the posters were employees of Schering, or if so, when they were employed by the company. Nor do plaintiffs allege how the posters came into possession of the information about ENHANCE that they purport to be sharing. The messages thus suffer from the same defects as the sources in *Chubb* and

Intelligroup, and are immaterial and impertinent for the purpose of pleading facts that would permit an inference of *scienter*.

The confidential-witness allegations are no better pled. For example, although plaintiffs allege that CW 1 attended Brand Team meetings, they do not allege specifically when those meetings occurred or what information CW 1 learned at those meetings that prompted his conclusion that there were “real problems” with ENHANCE — or even what those “problems” happened to be. Complaint ¶ 103. The Court, of course, is not permitted to fill the gap or otherwise engage in its own speculation about the basis for CW 1’s assertion. *Chubb*, 394 F.3d at 148. Moreover, the only plausible inference arising from plaintiffs’ allegations is that there were Brand Team meetings in which an ongoing, publicly-disclosed study, was mentioned.

Similarly, while plaintiffs allege that CW 2 worked at Schering, they do not allege that CW 2 was involved in considering whether to change the ENHANCE endpoint. That deprives the Court and the Exchange Act Defendants of any basis to assess the significance — if any — of CW 2’s disapproval of that decision, much less to see how that relates to any allegation of knowledge of the results of the ENHANCE clinical trial. With respect to CW 3, plaintiffs offer neither specific details regarding the basis for CW 3’s personal knowledge of the change in the ENHANCE endpoint, nor detailed descriptions of the alleged events

that supposedly led to CW 3's opinions concerning that change. Indeed, plaintiffs allege that CW 3 was employed at Schering only through "early 2007," *see* Complaint ¶ 156 —meaning that CW 3 had left Schering's employ months before the endpoint change was considered in November 2007. Accordingly, CW 2's and CW 3's opinions are no more significant than that of any other bystander.

In sum, plaintiffs have failed to satisfy the threshold requirement for pleading information based on anonymous sources with respect to the CaféPharma messages and the confidential witnesses.

3. The Information Purportedly Provided by the Anonymous Sources Would Be Inadmissible at Trial.

a. CaféPharma Messages

Not only are the CaféPharma posts irrelevant at the pleading stage; they would also be immaterial and impertinent at trial.

As an initial matter, the authors of the messages will never be known because CaféPharma does not collect and keep identifying information about anonymous posters. Plaintiffs therefore cannot authenticate the messages and exclude the probability that they were left by sales representatives at competing drug companies seeking a competitive edge. Because CaféPharma has made clear that it does not even "collect IP addresses or other identifying information with anonymous posts," Ex. 3, there is no conceivable way in which plaintiffs could ever demonstrate that the postings are what plaintiffs claim them to be — messages

left by knowledgeable Schering “insiders” or by persons who spoke to such “insiders.” *See* Fed. R. Evid. 901 (“a condition precedent to admissibility” is the submission of “evidence sufficient to support a finding that the matter in question is what its proponent claims”).

Nor would discovery be likely to uncover the identities of the authors, even if CaféPharma had the information. Under First Amendment’s right to speak anonymously, courts will generally not enforce subpoenas seeking to discover the identities of anonymous authors of Internet messages and posts. *See Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008) (“Courts . . . recognize that anonymity is a particularity important component of Internet speech.”); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (discussing “the legitimate and valuable right to participate in online forums anonymously or pseudonymously”). Accordingly, subpoenas to identify anonymous Internet users are typically enforced only where the anonymous poster himself is being sued and the party serving the subpoena establishes a prima facie case of his liability. *See, e.g., Seescandy.com*, 185 F.R.D. at 578-79. Where, as here, the anonymous poster is not a defendant but only a non-party witness, the threshold for requiring disclosure of his identity of course “must be even higher,” and, indeed, disclosure “only is appropriate in the exceptional case.” *See Doe v. 2TheMart.com., Inc.*, 140 F. Supp. 2d 1088, 1095, 1097 (W.D. Wash. 2001) (quashing subpoena to identify

non-parties that had posted messages critical of corporate defendant in shareholder-derivative action).

Even beyond the impossibility of authentication, plaintiffs cannot escape the fact that the CaféPharma posts are hearsay within the meaning of Fed. R. Evid. 801. Plaintiffs offer the CaféPharma posts to prove the truth of the matter asserted by (or necessarily implicit in) the posts — that, as early as March 2007, Schering executives were aware that the ENHANCE trial failed to demonstrate that the combination of Zetia and simvastatin provided superior outcomes on carotid intermedial thickening than simvastatin alone. *See, e.g.*, Complaint ¶¶ 10, 116, 118, 119. But these out-of-court statements could not be challenged by the Exchange Act Defendants at trial; and, indeed, these messages were likely left by sales representatives at competing drug companies seeking to trash Schering’s products. *See Anderson v. United States*, 417 U.S. 211, 220 (1974) (“The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.”). Accordingly, the CaféPharma posts are exactly the type of “evidence” that is prohibited under the Federal Rules of Evidence. *See Fed. R. Evid. 801, 802; Novak v. Tucows, Inc.*, 2007 WL 922306, at *5 (E.D.N.Y. March 26, 2007) (“Where postings from internet websites are not statements made

by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay under Fed. R. Evid. 801.”).

Equally problematical, the authors of the CaféPharma posts acknowledge that the information about ENHANCE that they purport to be sharing is not even based on their personal knowledge (whoever they are). One poster reports what he “heard” without identifying any source. Complaint ¶ 124. Another refers to what he “heard” from “sources close.” *Id.* ¶ 132. Others purport to be passing along “word of mouth from investigators,” or information received from a “buddy at SPRI” and “one of my docs.” *Id.* ¶¶ 120, 121, 133, 134. Accordingly, the CaféPharma posts are not only hearsay, but at least second- or third-hand hearsay. The CaféPharma posts thus resemble the rejected Internet postings in *Intelligroup*, which were based on information that was “at best, second hand,” and therefore “present[ed] nothing more than the poster’s beliefs based on potentially exponential layers of hearsay.” 527 F. Supp. 2d at 369.

Nor do the CaféPharma posts contain “circumstantial guarantees of trustworthiness” that could otherwise permit their admissibility. *See* Fed. R. Evid. 807. As a general matter, because anyone can post inaccurate and false information on the Internet with impunity, courts have concluded that “evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in Fed. R. Civ. P. 807.”

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F.Supp. 2d 773, 774 (S.D. Tex. 1999). Such concerns apply with particular force to CaféPharma—a website rife with misogyny, profanity, and racism that no one could mistake as a forum for honest debate and sharing of ideas and data. To the contrary, anonymity on the site fosters the propagation of rumors and misinformation. Even the threads on which plaintiffs themselves rely contain information of ENHANCE that is indisputably inaccurate. Thus, far from containing “guarantees of trustworthiness,” CaféPharma lacks any of indicia of reliability whatsoever.

b. Confidential Witnesses

The information purportedly provided by the confidential sources is likewise inadmissible. To begin with, the Complaint offers information from CW 4, CW 5, and CW 6 solely to substantiate the Complaint’s reliance on the CaféPharma posts. But because the CaféPharma messages themselves are immaterial and should be stricken, information from CW 4, CW 5, and CW 6 could “have no possible relation to the controversy.” *Bristol-Myers Squibb Co.*, 77 F. Supp. 2d at 619.

Any testimony by CW 1, CW 2, and CW 3 would be equally impertinent. None of these witnesses claims to have known the actual results of ENHANCE before the results were disclosed to the public. CW 1, for example, refers to “real problems” with the ENHANCE. *See* Compl. ¶ 103. But those

“problems” were the known and publicly disclosed quality-control issues, not a failure of the study to prove the superiority of Vytorin. CW 3 can only speculate as to why two individuals in charge of ENHANCE “always seemed a bit worried.” *Id.* ¶ 212. Indeed, the cause of this alleged worry appears to have been the quality of the data being gathered, not what the data meant for Vytorin. *See id.* (“[T]hey did not like the kind of results they were seeing and . . . they had to take another look at something.”).

CW 2 and CW 3 both offer personal opinions that it would have been inappropriate to change the endpoint of the study. But their personal opinions are no more relevant than those of any bystander, and are no more probative than those of the anonymous CaféPharma posters who demonstrate no actual first-hand knowledge. Indeed, and as noted above, CW 3 was not even employed by Schering at the time. Thus, like the anonymous CaféPharma posts, the confidential witnesses can offer nothing of actual evidentiary value that could be presented at trial.

B. The Allegations Based on Anonymous Sources Are Scandalous and Prejudicial.

The allegations based on the anonymous sources are not only immaterial and impertinent; they will also scandalize and prejudice defendants. By creating the impression that Schering executives were aware of the results of ENHANCE and fraudulently failed to disclose them to its own shareholders —

without any legally competent foundation — the allegations place defendants in a derogatory light. Media organizations and market analysts following this high-profile litigation may be misled, harming Schering's reputation to the detriment of its shareholders.

In addition, while, as discussed above, these allegations have no proper place at trial, there is no doubt that plaintiffs hope ultimately to put before the jury, over defendants' objections, the CaféPharma posts and the speculations and opinions of the confidential witnesses. Accordingly, the parties will be led during discovery into digressions away from the central facts of the case and into investigations of the anonymous sources.

Plaintiffs no doubt will engage in the fruitless exercise of seeking to discover the identities of the CaféPharma posters by issuing subpoenas to CaféPharma and to Internet service providers. Even if such efforts are rejected by the Court, they will result in the wasted time and expense that Rule 12(f) seeks to avoid. *See Amentler v. 69 Main Street, LLC*, 2008 WL 4149125, at *1 (D.N.J. Sept. 2, 2008) (Bongiovanni, J.) (“[T]he purpose of a motion to strike is to simplify the pleadings and save time and expense by excising from a pleading ‘any redundant, immaterial, impertinent, or scandalous matter’ which will not have any possible bearing on the outcome of the litigation.”). The Exchange Act Defendants, for their part, will be forced to serve discovery requests seeking

information about the confidential witnesses and, ultimately, to depose these witnesses (assuming plaintiffs actually identify them) — even though they have no admissible testimony to offer.

Indeed, inclusion of the CaféPharma posts in this litigation threatens to change the complexion of the case entirely. Plaintiffs' theory is dependent upon the notion that the securities market was unaware of the study results. However, if the study results were posted on an Internet website, and if the market for Schering stock was an efficient one (as plaintiffs allege, *see* Compl. ¶¶ 390-91), then the stock price presumably reflected those study results and investors can hardly claim that they were deceived. *See In re Merck, Inc. Sec. Lit.*, 432 F.3d 261, 269 & n. 5 (3d Cir. 2005) (under the efficient market hypothesis, “information important to reasonable investors (in effect, the market) is immediately incorporated into stock prices.”). Echoing the very points made in this brief, the Complaint tries to escape this result by pleading that the CaféPharma posts were “anonymous,” which “called into question their validity” for investors. Compl. ¶ 119. But plaintiffs cannot have their cake and eat it too. If the CaféPharma posts put Schering executives on notice of the ENHANCE results, then those posts did the same for the securities market. Accordingly, the CaféPharma posts will — if not stricken from the Complaint — become a focal point for discovery and trial here.

Given the size and complexity of this lawsuit, neither the Court nor the parties can afford to be distracted by the anonymous scrawls of CaféPharma rumormongers and the irrelevant suppositions of confidential sources.

CONCLUSION

Plaintiffs' allegations concerning anonymous posts on the CaféPharma website have even less pleading and evidentiary value than would allegations based on hearsay gossip in supermarket tabloids. In fact, the obvious inaccuracies in much of what is posted on CaféPharma, and the vulgar and repulsive nature of the content on the site, undermines any conception of CaféPharma as a reliable source.

Plaintiffs' reliance on confidential personal sources is equally flawed. Even assuming that a plaintiff can ever rely upon a confidential source in a securities fraud pleading, plaintiffs' reliance on the irrelevant speculation and opinions of the confidential witnesses here fails to suggest the existence of admissible evidence to support plaintiffs' claims.

At the same time, plaintiffs' citation to the CaféPharma posts and confidential witnesses threatens to prejudice the Exchange Act Defendants' interests in this litigation and their reputation with the public. Accordingly, the Exchange Act Defendants respectfully request that the Court strike the anonymously-sourced allegations from the Complaint.

Respectfully submitted,

MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
202.263.3000

LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500
973.597.2400 (Fax)
deakeley@lowenstein.com
Attorneys for Exchange Act Defendants

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By: /s/ Douglas S. Eakeley