REQUIEM FOR THE OFF-LABEL REGIME? THE RISE AND COMING FALL OF THE GOVERNMENT'S "OFF-LABEL PROMOTION" PROSECUTION THEORIES

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In 2006, the Food and Drug Administration ("FDA") celebrated the one-hundred year anniversary of the legislation that gave rise to its existence.[2] Today, a focal point of this centenarian regulatory regime is criminal and civil enforcement of the Federal Food, Drug, and Cosmetic Act ("FDCA"). Just last year, FDCA-related prosecutions of pharmaceutical and device manufacturers resulted in 21 convictions and the imposition of $1.3 billion in criminal penalties, as well as several billions more in civil fines and monetary settlements.[3] The basis for many recent, high-profile FDCA prosecutions is the Government's theory that the Act prohibits pharmaceutical manufacturers from speaking to healthcare professionals or otherwise "promoting" their drugs for unapproved, or "off-label," uses.

The Department of Justice's ("DOJ") penchant for levying off-label charges against pharmaceutical manufacturers coincides with drugmakers' willingness to settle. Despite substantial questions surrounding the Government's increasingly aggressive prosecution theories, pharmaceutical companies have by and large settled off-label promotion charges, often for staggering amounts. In 2009, for instance, Eli Lilly paid $1.415 billion and Pfizer paid $2.3 billion in separate global settlements relating to their alleged marketing of drugs for off-label uses.[4] The next year the Government obtained five more notable settlements from pharmaceutical manufacturers accused of engaging in off-label promotion. Although Allergan's $600 million settlement was the largest,[5] Abbott Laboratories, AstraZeneca, Elan, Johnson & Johnson, and Novartis resolved their individual cases through settlements totaling more than $1.27 billion.[6] And, in 2011, the Government concluded investigations into the alleged off-label promotion of Vioxx® by Merck and of Avandia® by GlaxoSmithKline, with global civil and criminal settlements totaling $950 million and $3 billion, respectively.[7] The Government that same year obtained an additional $308 million through individual off-label promotion settlements with Forest, Johnson & Johnson, Novo Nordisk, and UCB S.A.[8]

The increasing number of investigations and ever-increasing financial settlements, however, are hollow measures of the legitimacy of the Government's prosecution theories in many off-label promotion cases. To everyone, perhaps other than those in the Government, the primary reason companies settle is clear: to avoid exclusion from federal healthcare programs.[9]

The Government's business-crippling exclusion power, which may be wielded even before conviction,[10] makes it virtually impossible to test the Government's theories in court.

In our view, these settlements are not signs of the strength of the off-label regime but rather harbingers of its impending downfall. Each settlement emboldens the Government to push the envelope with its prosecution theories. As its theories become increasingly unmoored from any statutory text, legal precedent, or common sense, the FDA's off-label regulatory regime approaches a tipping point at which settlement is no longer a certainty. Multiple recent challenges to the off-label regime in courts across the country indicate a growing belief that the Government's interpretations of the FDCA cannot stand. And as more off-label prosecutions proceed to trial, the Government risks having to square its stances with First Amendment principles – a reconciliation that likely will prove fatal to the Government's core theories of criminality, especially when the Government seeks to punish truthful and non-misleading speech.

THE TAUPE REVOLUTION

Not everyone has grudgingly acquiesced to the Government's aggressive interpretations in off-label cases of the FDCA and the FDA's regulatory regime. Individual company executives and employees charged criminally for alleged off-label promotion, for instance, have stood and fought the Government's ability to bring such charges. Although the Chief Counsel to the Inspector General for the U.S. Department of Health and Human Services ("HHS") may want to use the agency's exclusion power to send pharmaceutical executives "back to selling vinyl siding,"[11] he will likely find few individuals willing to accept the Government's invitation to trade medically beneficial pharmaceutical products for taupe paneling. Indeed, individuals facing such extreme potential penalties have a strong incentive to start their own color revolution by forcing the Government to submit its off-label prosecution theories to potentially debilitating judicial scrutiny.

Two recent prosecutions demonstrate the ability and willingness of individuals to challenge the Government's off-label prosecution theories. In *United States v. Harkonen*,[12] the Government in 2008 indicted W. Scott Harkonen, the former Chief Executive Officer of InterMune, Inc., on wire fraud and felony misbranding charges for allegedly disseminating false and misleading communications regarding Actimmune®. Specifically, the Government contended that Harkonen promoted Actimmune® for an off-label use.[13] Unlike InterMune, which entered into a settlement agreement with the Government for $36 million,[14] Harkonen opted to fight the prosecution. He filed a motion to dismiss the indictment, arguing, in part, that discussing off-label uses was a form of speech protected by the First Amendment. Although the

district court denied this pretrial motion,[15] the jury acquitted Harkonen of misbranding.[16] Harkonen has appealed his wire fraud conviction to the Ninth Circuit, arguing that the First Amendment prohibits the Government from "prosecut[ing] [him] for expressing a scientific opinion about clinical study results with which the government disagreed."[17]

United States v. Caronia presents another instance of an individual challenging the Government's theories in an off-label prosecution.[18] In *Caronia*, the Government in 2007 charged Orphan Medical, Inc., a wholly owned subsidiary of Jazz Pharmaceuticals, and Alfred Caronia, an Orphan sales representative, with misbranding and conspiracy to misbrand in connection with alleged marketing of Xyrem for off-label uses.[19] Orphan pled guilty to felony misbranding and agreed to pay a $20 million settlement.[20] Conversely, Caronia filed a motion to dismiss the indictment on various grounds, including that the prosecution violated the First Amendment.[21] Caronia reasoned that because the FDA allows doctors to prescribe prescription drugs for off-label uses, the First Amendment permits pharmaceutical companies and their employees to engage in truthful and non-misleading speech regarding those uses.[22] The federal district court denied the motion, finding that the speech at issue was commercial and thus subject to an intermediate level of scrutiny, and that the Government's interest in preserving the integrity of the FDA's approval process justified the speech restrictions.[23] On appeal to the Second Circuit following his conviction, Caronia has framed the First Amendment question as whether the FDCA misbranding provisions are "more restrictive than necessary to serve the government's interest in protecting its citizens."[24] In other words, Caronia contends that his conviction cannot stand even presuming off-label promotion receives only the qualified protection of commercial speech.

After oral argument in the Second Circuit in *Caronia*, the United States Supreme Court issued its decision upholding the speech rights of pharmaceutical manufacturers in *Sorrell v. IMS Health Inc.*,[25] which is discussed further below. At the Second Circuit's request, the parties submitted supplemental briefs addressing *Sorrell*'s impact on the constitutionality of Caronia's conviction for off-label promotion. In an *amicus* brief supporting Caronia, the Medical Information Working Group, a collection of leading biopharmaceutical manufacturers, argued that "the FDA regulations at issue . . . are no less speaker- and content-based than was the law at issue in *Sorrell*."[26] As a result, the regulations must survive heightened judicial scrutiny, which they cannot do. A decision is expected anytime.

THE INSURGENCY GOES CORPORATE

Individuals are not alone in challenging the Government's unprincipled off-label promotion theories. For instance, Allergan in 2009 sued the United States, HHS, and FDA asserting that FDA's regulations restricting off-label promotion violate both the First

Amendment and the FDCA. That case stemmed from the Government's investigation into whether Allergan had marketed Botox® for off-label uses. In seeking a preliminary injunction to prevent the Government from enforcing the challenged regulations to prohibit truthful speech, Allergan argued that "[t]he Government cannot be allowed to continue the status quo, in which significant off-label use of FDA-approved drugs by doctors is permitted and even encouraged, but the manufacturer that supplies the FDA-approved drugs to those doctors commits a crime by speaking about the off-label use."[27] Allergan, which was seeking FDA approval of Botox® for the commonly prescribed off-label treatment of upper-limb spasticity, added that "[i]t would be nothing short of perverse to impose criminal liability on a manufacturer for speaking truthfully about an off-label use that is widely recognized."[28] The iniquity of the Government's prosecution of Allergan is even more apparent now. The Government prosecuted Allergan for speaking to healthcare professionals about uses of Botox® that FDA ultimately concluded were safe and effective, and thus approved for distribution.[29]

Before the district court could resolve the motion, Allergan reached a settlement with the Government. On September 1, 2010, Allergan agreed to plead guilty to one misdemeanor count of misbranding, pay $600 million in civil and criminal penalties, and dismiss its First Amendment challenge.[30] Many have speculated that Allergan's lawsuit influenced the settlement. Allergan's payout was "within [Standard & Poor's] expectations" and resulted in an uptick in its stock price.[31] Moreover, the FDA Commissioner touted the dismissal of Allergan's First Amendment and statutory challenge as "'a good outcome' that protects the agency's authority."[32]

Similarly, in *United States v. Stryker Biotech, LLC*,[33] the Government in 2009 indicted Stryker Biotech, its former president, and three sales managers on numerous felony charges, including the allegation that the defendants pushed certain surgeons to use its bone void filler product for unapproved uses.[34] Despite facing a conviction that could have resulted in automatic exclusion from the federal healthcare system and the imposition of $250 million in penalties,[35] Stryker refused to settle. The company instead filed a pretrial motion to dismiss the indictment on First Amendment grounds, arguing that "even assuming that the Government could permissibly regulate some forms of commercial speech (*e.g.*, television commercials marketing off-label uses of a medical device), the FDA's regulations go much further, criminalizing on the basis of content even core *non*-commercial speech that addresses matters of legitimate scientific and medical debate."[36] Two days into the criminal trial the charges were settled. According to reports, "[t]he courtroom was stunned into silence when [Stryker's] attorney[s] revealed that [the] surgeons who were painted by the federal government as victims of . . . [the] alleged off-label marketing plot would stick up for Stryker during its criminal trial."[37] The Government promptly dismissed its thirteen-count indictment against Stryker. In its place, the Government

substituted one count of misdemeanor misbranding to which Stryker pleaded guilty and agreed to pay a $15 million fine.[38]

THE FIRST AMENDMENT BATTLEFIELD

As these cases indicate, challenges to the Government's construction of the FDCA and related FDA regulations increasingly rely on the First Amendment. Opponents of the off-label provisions argue that the regulations impermissibly burden speech based on both the identity of the speaker and the content of the speech. They contend that the off-label provisions restrict only the speech of pharmaceutical manufacturers. Any other speaker, from doctors to insurance companies to public health organizations to government officials, may advocate the off-label use of a particular drug without fear of prosecution. This discrimination among speakers, according to challengers, renders the off-label regulations susceptible to First Amendment scrutiny.

The Government counters that off-label speech is either wholly outside the protection of the First Amendment or enjoys a lesser level of protection. First, the Government reasons that it merely uses manufacturers' speech as evidence of an off-label "intended use," in line with decisions holding that such evidentiary use of speech does not trigger any First Amendment scrutiny at all.[39] In the alternative, the Government contends that off-label promotion is a form of commercial speech subject to, at most, intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[40] and that FDA's speech restrictions pass muster based on the Government's interest in preserving the integrity of FDA's new drug approval process and protecting public health.

Demarcating the contours of this First Amendment fight are the decisions of the United States District Court for the District of Columbia and the Supreme Court. The D.C. District Court was the first court to grapple directly with the thorny First Amendment issues presented by the off-label thicket. In *Washington Legal Foundation v. Friedman* (*WLF I*),[41] a nonprofit public interest group asserted the First Amendment as grounds for enjoining FDA guidelines that prohibited pharmaceutical manufacturers from disseminating off-label drug information through academic texts or continuing medical education seminars.[42] Judge Lamberth deemed the guidelines a burden on commercial speech and invalid due to the existence of "less-burdensome alternatives," such as requiring pharmaceutical manufactures to make full disclosures regarding the non-FDA-approved status of off-label indications.[43]

Shortly after Judge Lamberth issued his decision in *WLF I*, Congress enacted the Food and Drug Administration Modernization Act ("FDAMA").[44] This Act and its implementing regulations, which superseded the FDA guidelines at issue in *WLF I*, provided that manufacturers may disseminate articles and reference texts containing suggested off-label uses

of drugs so long as several conditions were met, including the requirement that, absent certain exceptions, manufacturers must seek FDA's approval of the off-label indications.[45] FDAMA resulted in *WLF III*,[46] which largely tracked *WLF I*. Judge Lamberth once again invalidated the regulations, explaining that "[t]he supplemental application requirement . . . amounts to a kind of constitutional blackmail — comply with the statute or sacrifice your First Amendment rights."[47] The Government could have ensured that manufacturers submit to the FDA approval process through a variety of non-speech restrictions, such as banning off-label prescriptions altogether or imposing financial penalties on drugmakers who fail to submit supplemental drug applications.[48] Burdening manufacturers' speech more than necessary, however, it could not do.

On appeal, the D.C. Circuit Court of Appeals recognized the "difficult constitutional question of considerable practical importance" that *WLF III* presented.[49] The D.C. Circuit dismissed the case, however, after the Government contended that FDAMA and the associated regulations merely created a "safe harbor" rather than an independent basis for the restriction of off-label speech. Washington Legal Foundation's agreement with the Government's construction of the law nullified any controversy as to the constitutionality of the statute and regulations.[50] In vacating the district court's decisions and injunction, the appellate court noted that it was "certainly . . . not criticiz[ing] the reasoning or conclusions of the district court,"[51] and that "[a] manufacturer, of course, may still argue that the FDA's use of a manufacturer's promotion of off-label uses as evidence in a particular enforcement action violates the First Amendment."[52] Nonetheless, the D.C. Circuit's vacation of Judge Lamberth's prior orders and avoidance of an admittedly important question rendered the constitutional status of off-label speech "100% unresolved."[53]

Two additional decisions impacting off-label challenges are Supreme Court opinions. Although the Court has not addressed directly the constitutional status of off-label promotion, the First Amendment analysis of the pharmaceutical industry speech restrictions at issue in *Thompson v. Western States Medical Center* and *Sorrell v. IMS Health Inc.* raise serious doubts as to the constitutionality of off-label speech regulations. In *Western States*,[54] the Court considered the constitutionality of restricting the promotion of compounded drugs, which are non-commercially available medicines produced by pharmacists. FDAMA exempted compounded drugs from FDA's approval process provided that pharmacists do not advertise such drugs. A group of pharmacies specializing in drug compounding challenged the provisions as a violation of the First Amendment.[55]

The focus of the Court's opinion was on the substantial interest / reasonable fit inquiry in the *Central Hudson* analysis. The *Western States* Court determined that while proscribing the promotion of compounded drugs advanced the Government's interest in preventing large scale compounding that would undermine the new drug application process,[56] the Government could

have achieved the same result with several non-speech regulations.[57] Bans on the use of machinery associated with large-scale manufacturing, prohibitions on wholesale pricing, or limitations on the amount of compounded drugs that a pharmacist could make or sell would all have achieved the same result without trenching on the First Amendment.[58] Further, the Government's speech restrictions not only curtailed the ability of pharmacists to communicate but also impeded the free flow of truthful information to the general public regarding the beneficial attributes of compounded drugs.[59]

The Supreme Court reaffirmed these principles in *Sorrell*.[60] There, the Supreme Court considered the constitutionality of a Vermont statute prohibiting pharmaceutical manufacturers from using a doctor's prescription history for marketing purposes without the doctor's consent.[61] The purported rationale for proscribing this use of prescriber data was to protect public health and curb healthcare costs by limiting the ability of drugmakers to influence physician's prescription decisions.[62] Nonetheless, insurance companies, academic organizations, and the state itself freely could use the same data for promotional purposes.[63]

The *Sorrell* Court held the statute unconstitutional as a violation of the First Amendment. In doing so, the Court affirmed the long-standing First Amendment precept that the Government cannot censor speech based on its content or speaker out of a paternalistic fear that persuasive communications will cause recipients of the information to make bad decisions.[64] Such a principle becomes even more apt "when the audience . . . consists of 'sophisticated and experienced' consumers," such as medical professionals.[65] Although not all content-based restrictions are impermissible, Vermont failed to show any neutral justification for its statute, such as the prevention of false or misleading speech. Rather, its "interest in burdening . . . speech . . . turn[ed] on nothing more than a difference of opinion."[66] As a result, the Vermont statute could not survive *Central Hudson*. Restricting the promotional efforts of some speakers, but not others, did not directly advance the state's claimed interests in protecting the public and lowering healthcare costs.[67]

BEGINNING OF THE END?

In arguably the most vigorous challenge yet, on October 14, 2011, Par Pharmaceutical, Inc. ("Par"), filed a lawsuit against the United States, HHS, and FDA in the United States District Court for the District of Columbia attacking yet another aggressive off-label prosecution theory.[68] The suit asserts that FDA's off-label regulatory regime violates both the First Amendment and the FDCA as applied to restrict Par's truthful and non-misleading speech concerning the *approved*, *on-label* use of its prescription drug, Megace® *ES*, to physicians who are more likely to prescribe the drug predominately for certain off-label uses.

The FDA approved Megace® *ES* in 2005 for the treatment of anorexia (loss of appetite), cachexia (severe malnutrition), or unexplained significant weight loss in patients diagnosed with AIDS, collectively referred to as "AIDS-related wasting." While physicians routinely prescribe Megace® *ES* for on-label use, they even more frequently prescribe the drug off-label to treat wasting in other patient populations, including geriatric and cancer patients who do not have AIDS. Par's complaint asserts that the company wishes to continue marketing Megace® *ES* to healthcare professionals in the long-term care and oncology settings, based on the company's studied determination that those professionals may encounter AIDS patients, though physicians in those settings are more likely to prescribe the drug predominately off-label. Par asserts that FDA's byzantine regulatory regime criminalizes Par's proposed speech because that speech could establish Par's "objective" intent to encourage doctors to prescribe Megace® *ES* off-label. In support of its First Amendment claims, Par argues that "[t]he government has little or no interest in punishing a manufacturer's speech about the FDA-approved use of a prescription drug."[69] Because the Medicare and Medicaid healthcare programs reimburse for off-label uses of Megace® *ES*, moreover, Par contends that "[a]ny interest of the government in preventing off-label use is also illegitimate when the government itself endorses and subsidizes off-label uses as an integral and beneficial part of quality medical care."[70] In short, "[t]he First Amendment prohibits the government from irrationally criminalizing speech about a lawful and medically beneficial activity that the government subsidizes."[71]

The Government has moved to dismiss Par's claims principally on the ground that FDA's regulations supposedly do not criminalize Par's proposed on-label speech.[72] In support of its position, the Government submitted the declaration of FDA official Rachel Sherman, M.D., who attested that "FDA does not consider a manufacturer's truthful and non-misleading speech to healthcare professionals concerning the approved use of an FDA-approved drug as establishing, *by itself*, a manufacturer's objective intent that the drug be used for an unapproved use."[73] According to Dr. Sherman's declaration, moreover, "[n]or does FDA regard a manufacturer's knowledge that an FDA-approved drug was being prescribed by healthcare professionals for an unapproved use as establishing, *by itself*, a manufacturer's objective intent that the drug be used for an unapproved use."[74] Accordingly, the Government argues that "engaging in truthful and non-misleading speech about the approved use of Megace ES will not place Par in danger of being charged with distributing a drug that was misbranded for lacking adequate directions for an unapproved use . . . because FDA would not regard that speech as establishing, *by itself*, Par's objective intent that Megace ES be used for an unapproved use . . . ."[75]

Notably, as Par has pointed out, Dr. Sherman's declaration does not cite any FDA regulation or other agency pronouncement supporting or memorializing her view, and none exists. Further, other statements in Dr. Sherman's declaration suggest that her apparent

assurance of non-prosecution may be a Potemkin village. She states that while a manufacturer's on-label speech is not a crime "by itself," such speech may prompt the Government to "inquire into a manufacturer's marketing practice," and that on-label speech combined with "additional evidence" of an off-label objective intent may give rise to a criminal prosecution.[76]

Because Dr. Sherman's declaration gives no indication as to what "additional evidence" will, in her view, transform lawful, on-label speech into a criminal offense, Par has filed a motion seeking to take her deposition on this topic, among others raised by the Government's dispositive motion.[77] In Par's discovery motion, Par points out that Dr. Sherman's representations as to FDA's position not only raise more questions than they answer, but also are at odds with what other government officials have repeatedly told Par in connection with an ongoing federal investigation into Par's past marketing practices for Megace® *ES*. The government's apparent change of heart, according to Par, warrants discovery regarding the contours, genuineness, and permanence of Dr. Sherman's representations, including whether her statements would bind other law enforcement agencies and officials in the federal government. In opposing Par's discovery motion, the Government further concedes that "[t]he United States and FDA are both defendants in this action, and the views memorialized in Dr. Sherman's sworn declaration and the Government's briefs regarding the meaning of the FDCA and its implementing regulations are the views of FDA as well as those of the Department of Justice."[78]

Whatever the outcome of the parties' discovery dispute, the case is noteworthy for the Government's willingness to retract an earlier, more aggressive off-label prosecution theory in response to a constitutional and statutory challenge brought by a manufacturer. The case also merits attention based on FDA's attempt to regulate via a declaration filed in litigation, as opposed to using more ordinary notice and comment or other agency processes. In all events, Par's claims present the district court with an ideal opportunity to address the First Amendment and statutory issues that to date have evaded review, and to bring some discipline to the Government's increasingly aggressive theories of prosecution based on truthful and non-misleading manufacturer speech.

CONCLUSION

The Government's aggressive prosecution of pharmaceutical manufacturers for so-called "off-label promotion" under the FDCA has yielded impressive results, including plea agreements and criminal and civil settlements in the hundreds of millions and even billions of dollars. But as the Government's success has emboldened prosecutors to reach for ever more creative theories of off-label promotion prosecutions, companies and individuals have increasingly fought back in court, despite significant obstacles to doing so. Whether any of the cases currently pending — *Caronia*, *Harkonen*, and *Par* — will conclusively resolve the important constitutional and

statutory challenges to the Government's prosecution theories remains to be seen. But what the cases indicate is that the time when the Government could espouse theories without any risk that they would be tested in court, no matter how outrageous, is over.

ENDNOTES

1. Mr. Nassikas is a Partner at Arnold & Porter LLP, and global chair of the firm's White Collar Criminal Defense practice. Laura Lester is a Counsel at Arnold & Porter LLP, and a member of the firm's White Collar Criminal Defense and FDA and Healthcare practice groups. R. Stanton Jones is an Associate at Arnold & Porter LLP, and a member of the firm's Appellate and Supreme Court practice group. Alex Berrang is an Associate at Arnold & Porter LLP, and a member of the firm's Litigation practice group. Arnold & Porter LLP, including Mr. Nassikas, Ms. Lester, Mr. Jones, and Mr. Berrang, represents Par Pharmaceutical, Inc. in the litigation discussed in this article.

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3. Press Release, U.S. Dep't of Justice, Healthcare Fraud Prevention and Enforcement Efforts Results in Record-Breaking Recoveries Totaling Nearly $4.1 Billion (Feb. 14, 2012), http://www.justice.gov/opa/pr/2012/February/12-ag-213.html.

4. Press Release, U.S. Dep't of Justice, Pharmaceutical Company Eli Lilly to Pay Record $1.415 Billion for Off-Label Drug Marketing (Jan. 15, 2009), http://www.justice.gov/usao/pae/News/Pr/2009/jan/lillyrelease.pdf; Press Release, U.S. Dep't of Justice, Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009), http://www.justice.gov/opa/pr/2009/September/09-civ-900.html.

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9. See 42 U.S.C. § 1320a-7 (2012); 42 C.F.R. §§ 1001.101, 1003.107 (2012).

10. See 42 U.S.C. § 1320a-7(b)(7) (2012); 42 C.F.R. §§ 1001.901(a), 1001.951(a) (2012).

11. Walter Armstrong, Crackdown on the C-Suite, Pharmaceutical Executive, June 2010, at 64, 68. See also Anna Edney, Drugmaker CEOs May Be Targets for U.S. FDA in Off-Label Cases,

Lawyer Says, Bloomberg, Oct. 14, 2010, http://www.bloomberg.com/news/2010-10-14/drugmaker-executives-may-become-targets-of-fda-for-off-label-promotions.html ("'It's clear we're not getting the job done with large monetary settlements,' [FDA Deputy Chief for Litigation Eric] Blumberg said. 'Unless the government shows more resolve to criminally charge individuals at all levels in the company, we cannot expect to make progress in deterring off-label promotion.'").

12. No. C 08-00164 MHP, 2009 WL 1578712 (N.D. Cal. June 4, 2009).

13. Id. at *1.

14. Press Release, U.S. Dep't of Justice, Biopharmaceutical Firm InterMune to Pay U.S. Over $36 Million for Illegal Promotion and Marketing of Drug Actimmune (Oct. 26, 2006), http://www.justice.gov/opa/pr/2006/ October/06_civ_728.html.

15. Harkonen, 2009 WL 1578712, at *3-8.

16. Andrew Pollack, Former Drug Executive Convicted of Wire Fraud, N.Y. Times, Sept. 30, 2009, at B10.

17. Brief of Dr. W. Scott Harkonen at 45, United States v. Harkonen, No. 11-10209, 11-10242 (9th Cir. Oct. 28, 2011).

18. 576 F. Supp. 2d 385 (E.D.N.Y. 2008).

19. Id. at 388-90. The government also charged Dr. Peter Gleason with misdemeanor misbranding of Xyrem pursuant to a superseding indictment filed after Dr. Gleason moved to dismiss the original felony indictment. Dr. Gleason, who Orphan allegedly paid to market Xyrem, pled guilty to the misdemeanor charge before the district court resolved his motion. Id. at 390.

20. Press Release, U.S. Dep't of Justice, Jazz Pharmaceuticals, Inc. Agrees to Pay $20 Million to Resolve Criminal and Civil Allegations in "Off-Label" Marketing Investigation (July 13, 2007), http://www.justice.gov/usao/nye/pr/ 2007/2007jul13a.html.

21. Caronia, 576 F. Supp. at 393.

22. Id.

23. Id. at 394-99.

24. Brief and Appendix for Defendant-Appellant Alfred Caronia at 38, United States v. Caronia, No. 09-5006-cr (2d Cir. Apr. 16, 2010).

25. 131 S. Ct. 2653 (2011).

26. Amicus Curiae Brief of the Medical Information Working Group in Support of Defendant-Appellant Alfred Caronia and Reversal of the Decision Below at 1-2, United States v. Caronia, No. 09-5006-cr (2d Cir. Aug. 22, 2011).

27. Memorandum of Law in Support of Motion for Preliminary Injunction at 5, Allergan, Inc. v. United States, No. 1:09-cv-01879-JDB (D.D.C. Oct. 1, 2009).

28. Id. at 44.

29. Jon Kamp & Brent Kendall, Botox Allegations Settled with U.S. for $600 Million, Wall St. J., Sept. 2, 2010, http://online.wsj.com/article/SB10001424052748703882304575465371767239834.html (noting that FDA approved Botox® for upper-limb spasticity in 2010); Natasha Singer, Botox Shots Approved for Migraine, N.Y. Times, Oct. 16, 2010, at B1 ("The Food and Drug Administration . . . approved Botox . . . as a treatment to prevent chronic migraines, a little more than a month after the company agreed to pay $600 million to settle allegations that it had illegally marketed the drug for unapproved uses like headaches for years.").

30. Natasha Singer, Maker of Botox Settles Inquiry, N.Y. Times, Sept. 2, 2010, at A1.

31. Kamp & Kendall, supra note 29 (internal quotations omitted).

32. Id.

33. No. 09-10330-GAO, 2010 WL 2900684 (D. Mass. July 21, 2010).

34. Id. at *1-2.

35. Bibeka Shrestha, How They Won It: Ropes & Gray Rescues Stryker Biotech, Law360, Feb. 8, 2012, http://www. law360.com/articles/306978/how-they-won-it-ropes-gray-rescues-stryker-biotech.

36. Memorandum in Support of Defendant's Motion to Dismiss Counts Seven Through Fourteen of the Indictment at 7-8, United States v. Stryker Biotech, LLC, No. 09-CR-10330-GAO (D. Mass. July 7, 2010).

37. Shrestha, supra note 35.

38. Plea Agreement at 1, 3, United States v. Stryker Biotech, LLC, No. 09-CR-10330-GAO (D. Mass. Jan. 17, 2012). The Government also dismissed the charges levied against the four Stryker employees. Government's Assented-To Motion to Dismiss All Counts as to Defendant Mark Phillip at 1, United States v. Stryker Biotech, LLC, No. 09-CR-10330-GAO (D. Mass. Feb. 2, 2012); Government's Assented-To Motion to Dismiss All Counts as to Defendants William Heppner and Jeffrey Whitaker at 1, United States v. Stryker Biotech, LLC, No. 09-CR-10330-GAO (D. Mass. Jan. 18, 2012); Government's Assented-To Motion to Dismiss All Counts as to Defendant David Ard at 1, United States v. Stryker Biotech, LLC, No. 09-CR-10330-GAO (D. Mass. Jan. 17, 2012).

39. See, e.g., Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); Whitaker v. Thompson, 353 F.3d 947, 953 (D.C. Cir. 2004) (determining that the "use of speech to infer intent, which in turn renders an otherwise permissible act unlawful, is constitutionally valid," so "it is constitutionally permissible for the FDA to use [a manufacturer's] speech . . . to infer intent for purposes of determining that [the manufacturer's] proposed sale . . . would constitute the forbidden sale of an unapproved drug.").

40. 447 U.S. 557 (1980).

41. 13 F. Supp. 2d 51 (D.D.C. 1998).

42. Id. at 54.

43. Id. at 69-73.

44. Washington Legal Found. v. Henney, 56 F. Supp. 2d 81, 82 (D.D.C. 1999) (WLF III).

45. Id. at 83.

46. In the interim, Judge Lamberth issued Washington Legal Foundation v. Friedman, 36 F. Supp. 2d 16 (D.D.C. 1999) (WLF II). There, the district court rejected the Government's contention that WLF I did not apply to the FDAMA. Judge Lamberth explained that his "decision and injunction must be read to apply to the underlying policies of the FDA, and not merely to the express provisions of the Guidance Documents . . . ." Id. at 18. WLF III followed from the Government's subsequent request for the district court to reconsider its decision.

47. WLF III, 56 F. Supp. 2d at 87.

48. Id.

49. Washington Legal Found. v. Henney, 202 F.3d 331, 335 (D.C. Cir. 2000).

50. Id. at 335-36.

51. Id. at 337 n.7.

52. Id. at 336 n.6.

53. Washington Legal Found. v. Henney, 128 F. Supp. 2d 11, 15 (D.D.C. 2000).

54. 535 U.S. 357 (2002).

55. Id. at 360.

56. Id. at 369.

57. Id. at 372.

58. Id.

59. Id. at 376-77. Six years after Western States, the Seventh Circuit forwent an opportunity to directly address the constitutionality of off-label promotion restrictions. In United States v. Caputo, 517 F.3d 935 (7th Cir. 2008), two individuals challenged, as violative of the First Amendment, their convictions on various charges stemming from the sale of certain medical device sterilizers for uses not approved by the FDA. Id. at 938. The Caputo Court noted the existence of competing First Amendment concerns, but declined to resolve the "difficult question" presented. Id. at 939.

60. 131 S. Ct. 2653 (2011).

61. Id. at 2659.

62. Id. at 2670.

63. Id. at 2663.

64. Id. at 2670-71 ("Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech.") (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002)).

65. Id. at 2671 (quoting Edenfield v. Fane, 507 U.S. 761, 775 (1993)).

66. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2672 (2011).

67. Id. at 2670-72.

68. Complaint for Declaratory and Injunctive Relief, Par Pharm., Inc. v. United States, No. 1:11-cv-01820 (D.D.C. Oct. 14, 2011).

69. Plaintiff's Motion for Preliminary Injunction at 26, Par Pharm., Inc. v. United States, No. 1:11-cv-01820 (D.D.C. Oct. 14, 2011).

70. Id.

71. Id.

72. Defendant's Memorandum in Support of Motion to Dismiss or for Summary Judgment and in Opposition to Motion for Preliminary Injunction, Par Pharm., Inc. v. United States, No. 1:11-cv-01820 (D.D.C. Dec. 23, 2011).

73. Declaration of Rachel E. Sherman, M.D. at ¶ 14, Par Pharm., Inc. v. United States, No. 1:11-cv-01820-RWR (D.D.C. Dec. 23, 2011) (emphasis added).

74. Id. (emphasis added).

75. Defendant's Memorandum, supra note 72, at 16 (emphasis added).

76. Declaration of Rachel E. Sherman, M.D., supra note 73, at ¶ 15.

77. Plaintiff's Motion for Limited Discovery, Par Pharm., Inc. v. United States, No. 1:11-cv-01820-RWR-JMF (D.D.C. Jan. 30, 2012).

78. Defendant's Opposition to Plaintiff's Motion for Discovery at 12, Par Pharm., Inc. v. United States, No. 1:11-cv-01820-RWR (D.D.C. Mar. 2, 2012).