09-5006-cr(L)
10-0750(CON)

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

ALFRED CARONIA, PETER GLEASON,

Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District of New York

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

LORETTA E. LYNCH,
United States Attorney,
Eastern District of New York.

PETER A. NORLING,
MARTIN E. COFFEY,
Assistant United States Attorneys,
Of Counsel.

DOUGLAS N. LETTER,
SCOTT R. MCINTOSH,
Attorneys, Appellate Staff,
Civil Division,
United States Department of Justice.
Of Counsel.

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ARGUMENT

The United States submits this brief in response to the Court's supplemental briefing order. As we show below, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011), does not alter the appropriate level of judicial scrutiny in this case and does not affect the constitutionality of Caronia's conviction. Nor do the jury instructions provide any basis for reversing the conviction. The district court appropriately instructed the jury with respect to mens rea, an issue that is reviewed under a plain error standard; in any event, any error in the instruction is harmless.

POINT ONE

SORRELL DOES NOT AFFECT THE CONSTITUTIONALITY OF CARONIA'S CONVICTION

1. Caronia has been convicted of conspiring to introduce into interstate commerce a misbranded drug – specifically, a drug whose labeling fails to provide adequate directions for its intended uses. As explained in the government's principal brief, the government has broad latitude under the First Amendment to require sellers to disclose information about their products, such as directions for use, and to penalize those who market those products without providing such information. The fact that Xyrem was promoted for unapproved uses plays an evidentiary role in this regulatory scheme; it shows that the unapproved uses were intended by the manufacturer, and hence that the lack of directions for those uses in the drug's labeling renders the drug misbranded under

35 U.S.C. 352(f)(1). The constitutionality of using speech as evidence of intent was expressly sustained in Wisconsin v. Mitchell, 508 U.S. 476 (1993). Even if Caronia's conviction were predicated solely on off-label promotion, and even if off-label promotion were a prohibited act (neither of which is true), such a prohibition would be reviewed under the First Amendment standards of Central Hudson Gas & Elec. Co. v. Public Service Commission, 447 U.S. 557 (1980). And the FDCA readily satisfies those standards.

Nothing in Sorrell changes this constitutional framework for judicial review of Caronia's conviction. The state statute in Sorrell restricted the ability of drug companies to market brand-name prescription drugs to physicians by preventing the companies from making use of information about physician prescribing practices. The statute prohibited pharmacies and data mining companies from disseminating individual physician prescribing information for marketing purposes, and prohibited drug companies from using such information for marketing, absent consent by individual physicians. See 131 S. Ct. at 2659-61. The Supreme Court granted certiorari to resolve a conflict between this Court, which held that the Vermont law violated the First Amendment, and the First Circuit, which had rejected challenges to similar statutes in New Hampshire and Maine. Id. at 2662.

One of the central points of disagreement between the Circuits was the appropriate level of constitutional scrutiny. This Court regarded the Vermont statute as a restriction on commercial speech,

and therefore subjected it to intermediate scrutiny under Central Hudson. IMS Health Inc. v. Sorrell, 630 F.3d 263, 271-75 (2d Cir. 2010). In contrast, the First Circuit held that such laws were properly regarded as regulations of conduct rather than speech, and therefore were not subject to elevated judicial scrutiny under the First Amendment, but instead were subject to "rational basis [due process] review as a species of economic regulation." IMS Health Inc. v. Ayotte, 550 F.3d 42, 50-54 (1st Cir. 2008).

In the Supreme Court, the litigants renewed the dispute over the proper level of judicial scrutiny. Vermont endorsed the First Circuit's rational-basis review and argued that, if the statute were regarded as a restriction on speech, it was subject to no more than intermediate scrutiny under Central Hudson. See 131 S. Ct. at 2664-2666, 2667. The parties challenging the law argued that Central Hudson represented the lowest, rather than the highest, permissible level of judicial scrutiny, and that strict scrutiny was the more appropriate standard.

The Supreme Court addressed the standard of review in two stages. First, the Court held that the Vermont law was subject to "heightened judicial scrutiny," because it "is designed to impose a specific, content-based burden on protected expression." 131 S. Ct. at 2664. The Court rejected Vermont's argument that "heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation." Id. at 2664-65, 2666-67. The Court likewise rejected the state's argument that the law was not subject

to heightened scrutiny because it restricted access to information rather than speech. Id. at 2665-66.

Having concluded that "heightened judicial scrutiny" was in order, the Court then asked what kind of heightened scrutiny to employ. 131 S. Ct. at 2667-68. The Court identified two potential alternatives: strict scrutiny, which renders "content-based and * * * viewpoint-discriminatory" laws "'presumptively invalid,'" and intermediate scrutiny traditionally applied to restrictions on commercial speech. Id. at 2667.

The Court found it unnecessary to choose between those two levels of scrutiny, because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." 131 S. Ct. at 2667. The Court summarized the standards for intermediate scrutiny under prior commercial speech precedents, explaining that "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest," with "a 'fit between the legislature's ends and the means chosen to accomplish those ends.'" Id. at 2667-68 (citing Central Hudson and Board of Trustees v. Fox, 492 U.S. 469 (1989)). The Court proceeded to explain why the Vermont law did not satisfy those standards. Id. at 2668-72.

2. Prior to Sorrell, the Supreme Court's precedents set forth a well-settled framework for intermediate scrutiny of restrictions on commercial speech. Sorrell does not overrule those precedents.

To the contrary, it relies on them. As noted, Sorrell expressly employed the intermediate scrutiny standards of Central Hudson and its progeny to review and invalidate the Vermont law. 131 S. Ct. at 2667-72. For example, the Court held that the law failed to advance the goal of protecting physician privacy because, instead of confining disclosure of prescribing information to "only a few narrow and well-justified circumstances," the law allowed disclosure "to an almost limitless audience." Id. at 2668. In so holding, the Court cited prior commercial speech decisions that had used intermediate scrutiny to invalidate other laws whose exceptions defeated their stated goals. Id. Thus, it is clear that pre-Sorrell standards for judicial review of commercial speech restrictions remain intact because Sorrell itself relies on them.

Read in this context, the Supreme Court's references to "heightened judicial scrutiny" do not reflect a decision to abandon intermediate scrutiny in favor of a still more demanding level of judicial review. Instead, the term simply means a more rigorous form of judicial review than the rational-basis review employed by the First Circuit and urged by Vermont. The Court's opinion makes clear that "heightened scrutiny" encompasses not only strict scrutiny, but intermediate scrutiny as well.

For example, the Court singled out Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), as an example of a case "applying heightened scrutiny" to a content-based restriction on commercial speech. 131 S. Ct. at 2664. Discovery Network relied

on intermediate scrutiny under Central Hudson, expressly holding that "[i]t was * * * proper for the District Court and the Court of Appeals to judge the validity of the city's prohibition under the standards we set forth in Central Hudson and Fox." Discovery Network, 507 U.S. at 416. The Court's use of Discovery Network as an illustration of "heightened scrutiny" demonstrates that the phrase includes, rather than excludes, intermediate scrutiny. As the Court went on to explain, the need for "heightened" scrutiny in Sorrell did not require a further choice between intermediate scrutiny and something more demanding, because Vermont's law was invalid even under intermediate scrutiny standards.

To treat the Court's references to "heightened scrutiny" as a repudiation of intermediate scrutiny under Central Hudson would mean holding that Sorrell overruled thirty years of Supreme Court precedents in the commercial speech area. If the Court had actually meant to take such a drastic step, it surely would have said so, rather than leaving lower courts and litigants to extract that holding from the interstices of the opinion.

Moreover, even if Sorrell had raised the level of judicial scrutiny for restrictions on commercial speech, it would not affect this case. As noted above, Caronia was not convicted for conspiring to promote off-label uses of Xyrem, but instead for conspiring to distribute Xyrem without adequate directions for use. The Supreme Court and this Court have long employed a more relaxed standard of judicial review when the government requires disclosure

of commercial information. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650-51 (1985); New York State Restaurant Ass'n v. New York City Board of Health, 556 F.3d 114, 132-34 (2d Cir. 2009) ("rules 'mandating that commercial actors disclose commercial information' are subject to the rational basis test"). Sorrell does not address, much less alter, the constitutional standards governing disclosure statutes. Nor does Sorrell disturb the Court's holding in Wisconsin v. Mitchell that the First Amendment is not offended by laws, like the one here, that use a defendant's speech as evidence of intent.

3. As this discussion shows, whether the FDCA provisions at issue here are characterized as "content-based" and/or "speaker-based" is ultimately of little constitutional moment. Where a law regulates commercial speech, as distinct from non-commercial speech, on the basis of its content, neither Sorrell nor any other case requires courts to employ more than intermediate scrutiny.

In any event, the FDCA's prohibition against distributing drugs without adequate directions for use is not "content-based" in any way that would trigger strict scrutiny. In a literal sense, of course, the FDCA's misbranding provisions necessarily look to the contents of the drug's labeling, to determine, for example, whether the labeling is false or misleading (21 U.S.C. 352(a)) or fails to provide adequate directions for use (id. §352(f)(1)). But "the principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of

[agreement or] disagreement with the message it conveys." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994)). When 21 U.S.C. 352(f)(1) requires a drug manufacturer to provide adequate directions for the intended uses of its drugs, it does so not because of official hostility to the manufacturer's message, but simply to ensure that physicians and patients receive the information they need to use the drug safely and effectively. "[T]he rationale of the general prohibition [against content-based speech regulations] is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," and in "situations in which that risk is inconsequential, * * * strict scrutiny is unwarranted." Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 188 (2007).

Nor is the law properly characterized as "speaker-based." With minor exceptions, the provisions in 21 U.S.C. 331 and 352 regarding misbranded drugs are not limited by their terms to particular speakers (or categories of speakers), and 21 U.S.C. 333 imposes criminal penalties on "any person" who violates those provisions. In practice, of course, only manufacturers and other participants in the distribution chain are capable of violating the prohibitions against misbranding and distributing misbranded drugs. But to the extent that the Act's misbranding provisions are effectively confined to manufacturers and others involved in drug distribution, that practical incidence reflects the realities of drug marketing, not a preference for one speaker over another. By

their very nature, regulations of commercial speech ordinarily and unavoidably apply to persons engaged in particular commercial activity rather than to the world at large. Even in the context of non-commercial speech, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 658 (1994) (emphasis added); see also id. at 657 ("the view that all regulations distinguishing between speakers warrant strict scrutiny * * * is mistaken"). That is not so here.

4. Finally, it is important to note the basic differences between the statute in Sorrell and the federal misbranding provisions at issue in this case. The Vermont law restricted the dissemination of information. In contrast, 35 U.S.C. 352(f)(1) requires it. The Vermont law was designed to "tilt the playing field" by favoring promotion of generic drugs over promotion of brand name drugs. The FDCA's misbranding provisions, in contrast, are not designed to favor one side of a public debate over the other side, but instead to provide the public with reliable information about the medicines they are using, in much the same fashion that securities laws provide the public with reliable information about the investments that they are making.

Moreover, the Vermont law applied to, and was designed to limit, the promotion of brand-name drugs for their approved uses. In contrast, this case involves the promotion of drugs for unapproved uses.

In order to approve a new drug, FDA must determine on the basic of rigorous clinical trials that the drug is safe and effective for each of its intended uses. In contrast, when a drug is promoted for an unapproved use, there has been no comparable showing that the drug is either safe or effective for that use, and it may well be neither. As a result, the Supreme Court's emphasis in Sorrell on the value of drug marketing information to physicians and patients (see, e.g., 131 S. Ct. at 2670, 2671) has far less salience in cases involving unapproved uses. Unlike Sorrell, this is not a case in which the government is animated by "'fear that people would make bad decisions if given truthful information.'" 131 S. Ct. at 2670. The promotion of unapproved uses involves representations of safety and efficacy that are scientifically unproven and potentially false, and physicians and patients who rely on those representations may do so to the detriment of the patients' health and even their lives. Sorrell casts no doubt on provisions that protect the public from those harms.

POINT TWO

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY

1. There were no errors in the jury instructions. To begin, the district court correctly instructed the jury on the elements of conspiracy, including mens rea. The court stated, "In order to satisfy its burden of proof, the Government must establish... [t]hat the defendant knowingly and willfully was or became a member of the conspiracy." (GA (Gov't Appendix) 479-80). This in turn,

the court explained, meant that the jury had to find that "the defendant participate[d] in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or worker[.]" (GA 482). The court went on to explain the terms "knowingly," "intentionally," and "willfully." (GA 482). Notably, the court defined "intentionally" as "act[ing] deliberately and with the purpose to do something the law forbids" and "willfully" as "to act with knowledge that one's conduct is unlawful and with the intent to do something [the] law forbids, that is to say with the bad purpose to disobey or disregard the law." (GA 482).

Having thus instructed the jury as to the mens rea required for a finding of participation in a conspiracy generally, the court then addressed the object of the conspiracy. The court required the government to prove that the "element[] of misbranding through the introduction of a misbranded drug into interstate commerce" by proving that "the defendant conspired to introduce or conspired to cause to be introduced a drug into interstate commerce or conspired to deliver a drug for introduction into interstate commerce or conspired to cause a drug to be delivered for introduction into interstate commerce." (GA 493).

In short, with respect to mens rea, the district court instructed the jury that, in order to convict, the jury had to conclude that Caronia had, knowingly and with intent to disobey the law, entered into an agreement the purpose of which was to

introduce a misbranded drug into interstate commerce. Thus, to answer the question posed in the Court's July 14 order, the instructions did not omit a mens rea requirement.

Moreover, these instructions made clear that the mens rea required to convict was that the defendant have joined a conspiracy the purpose of which was the introduction into interstate commerce of misbranded drugs rather than simply promoting the drug; similarly, leaving aside the mens rea requirement, there could be no misunderstanding by the jury that proof of mere promotion would be sufficient to convict. While the court did instruct the jury that "[t]he manufacturer, its agents, representatives and employees, are not permitted to promote uses for a drug that have not been cleared by the United States Food and Drug and Administration" (GA 492), this was said in the context of charging with respect to the elements of the crime of misbranding. In charging these elements, the court also defined a misbranded drug as any drug the labeling of which does not bear adequate directions for use and the offense of misbranding as the introduction into interstate commerce of a drug that is misbranded or the doing of an act with respect to a drug when such drug was held for sale after shipment in interstate commerce, resulting in the drug's being misbranded. (GA 489-91). Thus, the court correctly explained the elements of the offense of misbranding as the introduction of a misbranded drug into interstate commerce rather than promotion itself.

2. Even assuming that there was error in the instructions, in the absence of an objection, the instructions are reviewed for plain error. See Fed. R. Crim. P. 30(d); Johnson v. United States, 520 U.S. 461, 466-67 (1997). At the charging conferences, defense counsel did not object to the instructions on mens rea or to any of the instructions explaining misbranding; nor were any objections interposed after these instructions were given. (See T 424-58, 773-97, 935-39). At a second charging conference, defense counsel reiterated that she had no complaint about the district court's charge concerning the conspiracy count. (T 773-74). Indeed, while he has attacked the verdict sheet, Caronia has not challenged the instructions with respect to mens rea on appeal.

Caronia cannot meet the plain error standard, even assuming that there was error in the instructions, because the error did not "affect substantial rights," in that it did not "affect[] the outcome of the district court proceedings," see United States v. Olano, 507 U.S. 725, 734 (1993); for the same reasons, even if Caronia had preserved his objection, any error was harmless. The government presented a compelling case through recorded conversations with a cooperating defendant. In particular, in one such recording, on October 26, 2005, Caronia promoted Xyrem for "off-label" uses such as fibromyalgia, EDS, muscle disorders, chronic pain and fatigue. (A 12-28; Gov't. Br. 13-19). In a videotaped meeting on November 2, 2005, Caronia introduced co-defendant Dr. Peter Gleason to the cooperating defendant. Gleason

was a paid consultant for Orphan and Jazz and promoted Xyrem nationwide to medical professionals as part of the companies' marketing program. Following a similar pattern of his presentations to other physicians, on November 2, in the presence of Caronia, Gleason promoted Xyrem as a medication for the treatment of fibromyalgia, EDS, sleepiness, weight loss and chronic fatigue. (A 37-52; Gov't. Br. 19-21). Through these tapes and the accompanying evidence, the government presented a strong case and proved a conspiracy by officials with the pharmaceutical company to introduce into interstate commerce a drug that did not bear adequate directions for use, that Caronia participated in that conspiracy as charged, and that his conduct as depicted in the recordings on October 26th and November 2 was the evidence of the actions that he took in furtherance of that conspiracy.

POINT THREE

THE AMICUS ARGUMENTS ARE UNTIMELY, IRRELEVANT, AND WITHOUT MERIT

1. The Medical Information Working Group has tendered an amicus brief that is directed largely at issues other than the ones on which the Court has ordered supplemental briefing. In particular, the amicus argues at length that the FDCA's misbranding provisions impermissibly chill manufacturers from providing truthful information about off-label uses of approved drugs. The amicus also argues, inter alia, that the FDCA "criminalizes speech qua speech" and that the justifications for the misbranding provisions do not apply in the circumstances of this case.

These First Amendment arguments are entirely outside the scope of the Court's briefing order, which directs the parties to address the relevance of Sorrell and the validity of the jury instructions. The time for the amicus to present arguments on other issues was more than a year ago, when amicus briefs were due. If the amicus believed that the FDCA impermissibly chills speech by drug manufacturers, it could have presented the Court with its views at that time; having failed to do so, it should not be heard now.

Moreover, even if the amicus's arguments about chilling had been presented in a timely fashion, they are irrelevant to the case before the Court. As the record below demonstrates, the FDCA's misbranding provisions manifestly did not chill Caronia from communicating with physicians regarding unapproved uses of Xyrem, and Caronia has not suggested otherwise. Thus, even if it were constitutionally problematic (which it is not) for the regulatory scheme to deter drug manufacturers from communicating with physicians regarding off-label uses of their products, that would provide no basis for overturning the conviction here.[1]

2. For these reasons, this appeal provides no occasion for the Court to address the merits of the amicus's chilling arguments.

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[1] "[T]he overbreadth doctrine does not apply to commercial speech." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982); Allstate Ins. Co. v. Serio, 261 F.3d 143, 153 n.16 (2d Cir. 2001). Thus, Caronia could not challenge the application of the law to himself on the ground that it impermissibly chills speech by other persons, nor has he sought to do so.

Nevertheless, we offer the following comments on those arguments.

As the amicus suggests, there are instances in which approved drugs are used safely and effectively for unapproved indications. But in other cases, unapproved uses are ineffective and unsafe – sometimes catastrophically so. To take but a single well-known example, the drug DES was approved to treat estrogen deficiency in premature ovarian failure, but was prescribed by physicians to millions of women off-label to prevent miscarriage. The drug was later shown not only to be ineffective in preventing miscarriage and premature birth but also to have caused severe long-term harms, including breast cancer in DES users.

As the DES example reflects, the fact that an unapproved use is widely accepted in the medical community is no assurance that the drug is, in fact, either safe or effective for that use. Cf. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 630 (1973) ("The 'substantial evidence' requirement [for FDA approval of new drugs] reflects the conclusion of Congress, based upon hearings, that clinical impressions of practicing physicians and poorly controlled experiments do not constitute an adequate basis for establishing efficacy"). That is why the FDCA's drug approval process, including the rigorous clinical trials at the heart of that process, are critical to ensuring drug safety and efficacy.

The amicus suggests that the FDCA's misbranding provisions deprive physicians of reliable information about unapproved uses by deterring manufacturers from disseminating such information. But

absent clinical trials, manufacturers themselves have no way to be sure whether their drugs are, in fact, safe and effective for unapproved uses, even if such uses are common in the medical community. To the extent that the FDCA's misbranding provisions lead manufacturers to seek FDA review and approval of drugs for off-label uses, they generate new and qualitatively more reliable information about safety and efficacy – information that would never become available to physicians if manufacturers promoted approved drugs for unapproved uses without undergoing the drug approval process. The amicus ignores the affirmative role of the longstanding statutory provisions in generating such information.

Other sources of information, such as medical journal articles, may also help physicians to evaluate the safety and efficacy of drugs for unapproved uses. But to the extent that manufacturers have objective, accurate, and unbiased information about unapproved uses of approved drugs, the misbranding provisions do not prohibit manufacturers from disseminating such information. Manufacturers can provide such information to physicians without running afoul of the FDCA, and do so on a regular basis. For example, they may disseminate reprints of journal articles relating to unapproved uses and may provide non-promotional support for continuing medical education (CME) programs at which unapproved uses are discussed by independent parties.

The gravamen of the amicus's argument is that manufacturers are deterred from availing themselves of these opportunities

because they are uncertain whether doing so will lead FDA to view the unapproved uses as intended ones. FDA has responded to that concern by providing manufacturers with guidance regarding dissemination of journal reprints and support for CME programs relating to unapproved uses.[2] The reprint guidance, for example, provides recommendations for manufacturers relating to the selection of the texts and their manner and context of distribution, which are cumulatively designed to encourage unbiased and non-promotional dissemination of truthful and non-misleading information. If a manufacturer follows the recommendations, FDA will not consider the distribution of such information as establishing a new intended use.

The amicus argues that the guidance is too narrow, excluding forms of communication that should (in the amicus's view) be permitted. But even if that were true (and we strongly disagree that it is), manufacturers are under no obligation to "comply" with the guidance documents. The guidances simply create clearly defined safe harbors, which manufacturers may use or not as they see fit. To the extent that manufacturers may have residual uncertainty about whether particular activities outside those safe

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[2] See Guidance for Industry on Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices (available at http://www.fda.gov/oc/op/goodreprint.html); Guidance for Industry: Industry-Supported Scientific and Educational Activities, 62 Fed. Reg. 64093 (Dec. 3, 1997).

harbors will be taken as evidence of intended use, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989). Any statutory scheme in which liability turns on intent will require judgments about what speech and conduct demonstrate intent, but that hardly renders such schemes constitutionally suspect. See Nat'l Ass'n of Manufacturers v. Taylor, 582 F.3d 1, 26 (D.C. Cir. 2009) ("an intent standard is not per se vague, even in a statute regulating speech")

The amicus also objects that FDA guidances are not "binding" on the agency and are not embodied in formal rules. But FDA and DOJ have never brought an enforcement action against a manufacturer on the basis of conduct that conforms to the guidances. The risk of liability for a manufacturer who engages in such conduct is nil.

The amicus suggests that the government's requested jury instructions reflect confusion on the government's own part about the relationship between manufacturer speech and intended use. That argument rests on cherry-picking two sentences out of 38 pages of proposed instructions and reading those sentences out of context. As explained above, when read in context, the first of the two sentences does not mean that promotion of unapproved uses is a crime in and of itself and the second, which is drawn from 21 C.F.R. 201.128, merely says that knowledge of how the product is being used "may" be taken as evidence that the use is intended. Neither the instruction nor the regulation suggests that knowledge

establishes intent as a matter of law. See Sigma-Tau Pharms., Inc. v. Schwetz, 288 F.3d 141, 146-48 (4th Cir. 2002) (rejecting argument that § 201.128 obligates FDA to treat common and foreseeable uses of drug as intended uses).

Finally, amicus argues that manufacturer speech promoting unapproved uses is "both a necessary and a sufficient condition" for misbranding liability under § 352(f)(1) and the FDCA therefore criminalizes "speech qua speech." That is incorrect. While it is easier to demonstrate intended use on the basis of the manufacturer's own words, speech is not necessary; intended use may be shown on the basis of "any...relevant source." Action on Smoking and Health v. Harris, 655 F.2d 236, 239 (D.C. Cir. 1980).[3] And even when a manufacturer's speech suffices to establish an intended use, that is not enough to establish liability under §§ 331(a) and 352(f)(1). The government must also prove, inter alia that the drug's labeling lacks adequate directions for the intended use and that the drug has been introduced into interstate commerce. Thus, manufacturer speech is neither necessary nor sufficient to establish criminal liability.

CONCLUSION

For these reasons, Caronia's conviction should be affirmed.

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[3] For example, if a drug were approved only for a geriatric indication (such as Alzheimer's), but was also used for an unapproved pediatric indication, evidence that the drug manufacturer was distributing samples of the drug to pediatricians would be evidence that the pediatric use was an intended one.

Dated: Brooklyn, New York
August 29, 2011

LORETTA E. LYNCH,
United States Attorney,
Eastern District of New York

By: _____
Martin Coffey
Assistant U.S. Attorney

PETER A. NORLING,
MARTIN E. COFFEY,
Assistant United States Attorneys,
OUGLAS N. LETTER,
SCOTT R. MCINTOSH,
Attorneys, Appellate Staff,
Civil Division,
United States Department of Justice,
(Of Counsel).

DECLARATION REGARDING FILING AND SERVICE

I, _____, hereby declare that, on August 29, 2011, the Supplemental Brief for the United States was filed with the United States Court of Appeals for the Second Circuit by hand delivery, a Portable Document Format version was submitted to criminalcases@ca2.uscourts.gov, and two copies of the Supplemental Brief for the United States were served by regular mail and the Portable Document Format version was submitted as an email attachment to:

Jennifer L. McCann, Esq.
600 Old Country Road, Suite 530
Garden City, New York 11530
Tel: 516-794-4700
E-Mail: jmccan01@gmail.com

Eric E. Murphy, Esq.
JONES DAY
325 John McConnell Boulevard
Columbus, OH 43215
Tel: 614-281-3925
E-mail: eemurphy@jonesday.com

Michael A. Carvin, Esq.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: 202-879-7613
E-mail: macarvin@joneday.com

Joan McPhee, Esq.
Ropes & Gray LLP
800 Boylston Street
Boston, MA 02199
Tel: 617-951-7000
E-mail: Joan.McPhee@ropesgray.com

Douglas Hallward-Driemeier, Esq.
Alan Bennett
Ropes & Gray LLP
700 12th Street, NW

Washington, DC 20005
Tel: 202-508-4600
E-mail: Douglas.Hallward-Driemeier@ropesgray.com
E-mail: Alan.Bennett@ropesgray.com

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: New York, New York
August 29, 2011

Record Press

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Caronia

Docket Number: 09-5006-cr(L)

I, Louis Bracco, hereby certify that the Supplemental Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/29/2011) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: August 29, 2011