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February 24, 2015

Via Federal Express

The Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *Jones v. Pfizer Inc., et al.*
Civil Action No. 1:10-cv-03864-AKH

Dear Judge Hellerstein:

We write in advance of the upcoming hearing on the proposed Settlement. For the reasons set out below, the Parties agree that a second opt-out procedure is not required. Accordingly, the Parties respectfully request that Notice be provided in the form proposed, without a second opt-out procedure.

I. Brief Description of the Case.

The procedural history of this case is described in more detail in Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement, ECF No. 467. In short, this is a securities fraud class action brought against Pfizer Inc. and certain of its officers alleging false and misleading statements to investors between January 19, 2006 and January 23, 2009. This Court certified the case as a class action on March 29, 2012. Beginning on December 5, 2014, Notice of Pendency was mailed to more than 2.8 million potential Class Members. Class Members were provided the opportunity to request exclusion from the Class up through January 20, 2015. Accordingly, as recently as last month, Class Members had the opportunity to opt out of the Class.

On January 18, 2015, approximately one week before trial, the Parties reached an agreement-in-principle to resolve the litigation. On February 17, 2015, Plaintiffs presented the Parties' Stipulation of Settlement to the Court for preliminary approval. Paragraph 7.3 of the Stipulation grants Pfizer the right to terminate the settlement if a specified percentage of Class Members opts out of the Class:

If Persons who would otherwise be Members of the Class have timely requested exclusion from the Class in accordance with the Notice of Pendency of Class Action dated November 17, 2014 or in the event the Court affords a new opportunity for Class Members to request exclusion from the Class pursuant to Fed. R. Civ. P. 23(e)(4), Pfizer shall have the option to terminate the settlement in the event that Class Members representing more than certain percentages of Pfizer common stock subject to this settlement exclude themselves from the Class, as set forth in a separate agreement (the "Supplemental Agreement") executed between the Lead Plaintiff and Pfizer, by and through their counsel.

II. Because Class Members Already Have Had an Opportunity to Request Exclusion from the Class (Just One Month Ago), a Second Opt-Out Is Not Required.

Federal Rule of Civil Procedure 23 and its commentary make clear that there is no obligation to provide Class Members with a second bite at the apple when they already have had an opportunity to exclude themselves from the Class. *See* Fed. R. Civ. P. 23, advisory committee's note (2003) (whether a second opt-out opportunity is warranted "is confided to the court's discretion."). "Both before and after the 2003 amendments, courts have consistently rejected arguments that due process requires a second opportunity to opt out when the final terms of a proposed settlement become known—*even in those cases where the initial opt-out period expires before a settlement agreement is reached.*" *Denny v. Jenkens & Gilchrist*, 230 F.R.D. 317, 345 (S.D.N.Y. 2005) (emphasis added), *aff'd in part sub nom. Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006).[1]

Indeed, courts in the Second Circuit and other jurisdictions regularly approve settlements that do not provide for a second opt-out period for class members, including in instances where the time periods between the opt-out window and the settlement were far longer than the one-month period in this case. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 102, 114-15 (2d Cir. 2005) (affirming settlement approval where the class notice and opt-out period occurred in June 2002, prior to the parties' April 2003 agreement in principle); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 CIV.1262 RWS, 2002 WL 31663577, at *2, *12 (S.D.N.Y. Nov. 26, 2002) (Sweet, J.), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) (approving of a 2002 settlement notwithstanding objection that the opt-out period

[1] Pursuant to Rule 23, Class Members who are dissatisfied with the settlement have the opportunity to object and be heard at the final fairness hearing. *See, e.g.*, *In re Lloyd's Am. Trust Fund Litig.*, No. 96 CIV.1262 RWS, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002) (Sweet, J.), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) ("Due process requires only that Class Members have notice of the proposed settlement and an opportunity to be heard at the fairness hearing. If the proposed settlement is fair, adequate and reasonable, due process does not afford Class Members a second opportunity to opt out."); 7B Charles Alan Wright et al., Federal Practice & Procedure § 1797.5 (3d ed. 2014) (second opt-out not required because "the parties' interests are protected by the Rule 23(e) requirements of court approval . . . with notice and a fairness hearing at which the dissenters can voice their objections").

occurred in 1998); *Hicks v. Stanley*, No. 01 CIV. 10071 (RJH), 2005 WL 2757792, at *2-*4 (S.D.N.Y. Oct. 24, 2005) (Holwell, J.) (approving of a settlement that allowed previous opt-outs to opt back in, but did not provide another opportunity for Class Members to opt out); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345-46 (E.D.N.Y. 2010) (Weinstein, J.) (second opt-out "not necessary" when class members who "wished to control . . . their own claims . . . could have opted out . . . after notice of pendency was given" a year before the settlement); *Officers for Justice v. Civil Service Comm'n of S.F.*, 688 F.2d 615, 635 (9th Cir. 1982) (characterizing a second, post-settlement opt-out opportunity as "unusual" and noting "we have found no authority of any kind suggesting that due process requires that members of a … class be given a second chance to opt out"); 7B Charles Alan Wright et al., Federal Practice & Procedure § 1797.5 (3d ed. 2014) (when "plaintiff was given notice and an opportunity to opt out at an earlier stage, due process does not require that a second opportunity be given after the settlement terms are disclosed.").

Sound reasons underlie this practice. Multiple courts agree that "to hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law." *In re Lloyd's*, 2002 WL 31663577, at *12 (internal quotation marks omitted); *see also Officers for Justice*, 688 F.2d at 634 (requiring a second opt-out period "would discourage settlements because class action defendants would not be inclined to settle" (internal quotation marks omitted)). The same is true here. The Parties negotiated a settlement that assumes the integrity of the Class will be preserved. This is reflected in the Supplemental Agreement executed by the Parties, which permits Pfizer the option of terminating the settlement in the event that a material percentage of the Class requests exclusion. Thus, maintaining the integrity of the Class as it is currently constituted is essential to preserving the Settlement. *Cf. Lloyds*, 2002 WL 31663577, at *12 ("the integrity of the Class as constituted was an essential element to the Settlement"); *Klein*, 705 F. Supp. 2d at 664-65 ("the proposed settlement allows defendants to back out if any class member is permitted to opt out").

We look forward to addressing any questions that the Court may have about the proposed settlement on Thursday, February 26.

Respectfully,

MICHAEL DOWD
ROBBINS GELLER RUDMAN
& DOWD LLP

Respectfully,

STEVEN FARINA
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Regan Karstrand

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Southern District of New York

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Docket Text:
JOINT LETTER addressed to Judge Alvin K. Hellerstein from Michael Dowd and Steven Farina dated February 24, 2015 re: Proposed Settlement. Document filed by Frank D'Amelio, Mary K. Jones(on behalf of all others similarly situated), Jeffrey B. Kindler, Alan G. Levin, Henry A. McKinnell, Pfizer, Inc., Ian C. Read, Allen Waxman.(Collogan, Lauren)

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