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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 MARY K. JONES,

4 Plaintiff,

5 v.

10 CV 3864

6 PFIZER, INC., ET AL,

7 Defendant.

8 -----x

New York, N.Y.
November 29, 2011
3:04 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13 APPEARANCES

15 ROBBINS, GELLER RUDMAN & DOWD, LLP

15 HENRY ROSEN

16 WILLOW RADCLIFFE

16 Attorneys for Plaintiff

18 CAHILL GORDON & REINDEL LLP

18 AMY D. LAMBERTI

19 DAVID G. JANUSZEWSKI

19 Attorneys for Defendant

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1 (In open court; defendant present)

2 THE COURT: Thank you very much for coming on short
3 notice. So basically -- you can sit down for a minute. I'll
4 summarize where I think we are, and then we'll see who speaks.

5 Basically, the issue is that the plaintiffs want the
6 entire investigative file produced to the SEC. And the
7 defendants are arguing that much of it is extraneous to the
8 issues of this litigation.

9 Have I captured it right, Mr. Januszewski?

10 MR. JANUSZEWSKI: Your Honor, it's not a file produced
11 to the SEC. There is two categories that are really at issue
12 here. One is the entirety of the documents produced in another
13 litigation, which is the derivative action that was pending and
14 settled in front of Judge Rakoff. That was a derivative action
15 brought by a plaintiff against Pfizer. In that case, Pfizer
16 produced, according to Judge Rakoff's decision approving the
17 settlement, I believe it was some 12 million pages of
18 documents. The plaintiffs in this case want all of that. Plus
19 all depositions, all interrogatories. Basically everything
20 from that case.

21 The second set of documents, is the case, this case,
22 arises out of alleged disclosures or nondisclosures concerning
23 a criminal investigation of Pfizer that was settled in January
24 of 2009. That investigation four, five years preceding that
25 settlement out of the District of Boston.

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1 The second category they request in this case --

2 THE COURT: Who was the Judge?

3 MR. JANUSZEWSKI: It was in Boston. Judge Woodcock.

4 MS. RADCLIFFE: Woodlock.

5 THE COURT: Sorry.

6 MS. RADCLIFFE: I believe it is Judge Woodlock, your
7 Honor. It is referenced in the letter.

8 MR. JANUSZEWSKI: And there was a plea agreement in
9 that case in January of '09 which led to a 2.3 billion dollar
10 settlement by Pfizer.

11 The plaintiffs in this case, the second category we're
12 talking about, are asking for basically every document produced
13 by Pfizer to the government, to the U.S. Attorney's Office,
14 Department of Justice, in the course of that investigation.

15 THE COURT: That would be a grand jury subpoena?

16 MR. JANUSZEWSKI: Correct.

17 There may have been informal requests, I'm not sure if
18 it was all grand jury, but there was a criminal investigation,
19 correct.

20 THE COURT: And there is a CID that also could have
21 been used, instead of a grand jury subpoena. And you're not
22 distinguishing between them.

23 MR. JANUSZEWSKI: No.

24 But what we believe this case is about, based on --
25 your Honor denied a motion to dismiss in this case in August.

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1 And I risk being presumptuous, but as I interpreted your ruling
2 from the bench, we thought you were focusing this case on
3 issues of disclosure or nondisclosure concerning the government
4 investigations, disclosures of them. There was some disclosure
5 but your Honor in the ruling took the view that they may have
6 been inadequate in terms of the status or seriousness of the
7 investigation. And the issue of a reserve. Because there was
8 no reserve posted during the class period preceding the
9 settlement.

10 THE COURT: The early disclosures, as I remember from
11 reading the complaint, was that nothing material would come out
12 of these investigations.

13 MR. JANUSZEWSKI: Well --

14 THE COURT: Later on, you said it would be material.

15 MR. JANUSZEWSKI: Correct. Or could have material,
16 correct.

17 THE COURT: So is the nondisclosure the period where
18 the company was saying that it's not likely to be material?

19 MR. JANUSZEWSKI: I think they challenged both. I
20 think they -- they challenged both disclosures --

21 THE COURT: All right.

22 MR. JANUSZEWSKI: -- essentially saying that -- I
23 don't want to characterize their case, but as I understand it
24 they say you should have disclosed -- you know, there was a two
25 billion dollar liability earlier than it did, which was when

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1 the settlement was reached.

2 THE COURT: Let me get back to the derivative action
3 Mr. Januszewski.

4 MR. JANUSZEWSKI: Yes.

5 THE COURT: What was the allegation of mismanagement
6 against the directors?

7 MR. JANUSZEWSKI: The allegations arose from these and
8 other issues. But, primarily, it stemmed out of this
9 settlement. So it was actually against the director saying
10 that they had failed to prevent this, essentially.

11 THE COURT: So in the past when I have tried to parse
12 previous discovery programs as to what is relevant, inevitably
13 it caused a great deal of friction and tension and motions,
14 what was included, what was excluded, requiring an excessive
15 amount of judicial management. Which is okay, that's what I'm
16 paid for. But it results in a spade of unnecessary motion
17 practice which is a financial burden to your clients.

18 So the question I put to you, a very practical
19 question, what harm is done if you just take that whole dump
20 and put it on -- Mr. Rosen and Ms. Radcliffe's desks?

21 MR. JANUSZEWSKI: The harm, your Honor, is first of
22 all they have also served -- if I can just finish the status
23 here. We were just talking about their first document
24 requests. They have served second and third requests which are
25 targeted towards what the issues are, arguably, in this case.

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1 Such as disclosure reserves and those things. So, we're going
2 to have to do a general search of all documents --

3 THE COURT: Maybe only once.

4 MR. JANUSZEWSKI: Sorry?

5 THE COURT: Maybe only once.

6 MR. JANUSZEWSKI: Correct, your Honor, but --

7 THE COURT: On the theory that you gave everything you
8 had to the government and to the derivative stockholders'
9 action. One possible outcome of this is that if you gave all
10 of those papers to the plaintiffs, you are finished.

11 MR. JANUSZEWSKI: That won't happen, your Honor,
12 because the issue of disclosure, nondisclosure reserves, was
13 not in issue because Judge Rakoff dismissed that claim.

14 THE COURT: So you might have some more. You might
15 have some more. But you would limit it.

16 MR. JANUSZEWSKI: The way we would view it, is the
17 issues that are relevant are not going to be in that universe,
18 because that's not what those cases are about. So what they
19 want is the entirety of these 30 million pages of documents,
20 whatever it is.

21 THE COURT: I understand what they want. I
22 understand.

23 MR. JANUSZEWSKI: The burden --

24 THE COURT: That there is a volume that lends itself
25 to an argument of excessiveness. But I would like to push you

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1 a little bit, Mr. Januszewski and explore the point before I
2 settle on what I need to do.

3 MR. JANUSZEWSKI: Uh-huh.

4 THE COURT: I take it -- and I've not studied your
5 lawsuit, I have not even really seen it. But I take it that
6 the gravamen of the lawsuit against the directors is that they
7 did not see to it that there were controls, and lack of
8 controls' reserves with regard to the substantive mistakes,
9 alleged mistakes, that gave rise to the government
10 investigations. So that I would think that there is a large
11 degree of overlap between what was produced in the derivative
12 action and what might be producible in this action.

13 MR. JANUSZEWSKI: There is certainly some overlap.
14 And that's one of the things I wanted to say in response to
15 their letter. Is we're not saying nothing in those cases is
16 relevant and nothing should be produced. We are saying the
17 entire universe of Pfizer documents should be subject to the
18 same process of who are the right custodians, who are the
19 relevant witnesses for this case. Because what you have is
20 a --

21 THE COURT: Won't that really add unnecessarily to the
22 expense of this lawsuit?

23 MR. JANUSZEWSKI: I don't think so, your Honor.

24 THE COURT: What is the great issue of privacy that
25 you resolve. Certainly, it is not an issue of burden. You,

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1 I'm sure, knowing Cahill Gordon, don't you have repositories
2 where all of that information is collected, stamped with
3 production numbers and the like. And you could write, in 10
4 minutes, a letter to the plaintiff's lawyers and say: Here is
5 everything, folks, production numbers 1 through 10 million, and
6 production numbers whatever they are, and you're finished.

7 MR. JANUSZEWSKI: Well, I --

8 THE COURT: And then it's up to them to parse it, and
9 see what you have to do.

10 MR. JANUSZEWSKI: The practical answer to that, your
11 Honor, is that -- I'm sorry to report -- that Cahill was not
12 counsel in those cases.

13 THE COURT: Oh, what a mistake.

14 MR. JANUSZEWSKI: So what -- they've learned. But, so
15 certainly the documents are out there somewhere. And I'm not
16 saying --

17 THE COURT: Who were the counsel.

18 MR. JANUSZEWSKI: Cadwalader and Davis Polk.

19 THE COURT: Well, those firms do the same thing you
20 do.

21 MR. JANUSZEWSKI: Of course.

22 But my point is, we are the only counsel in this case.
23 And the practical answer to your burden question is we don't
24 have them, we don't know what's in them, we're going to have to
25 review them and figure out what they are to defendants. That's

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1 the practical answer to the burden question. And we don't
2 think that, again, your Honor, the issue here is who at the top
3 of this, we believe, top of this pyramid of the corporation,
4 was responsible for SEC filings, press releases, reports to
5 analysts, conference calls. The things that are at issue in
6 this case are the people at the top of the pyramid, CFO, the
7 CFO of the board, those people, the people who have been sued.

8 What you are going to get here is millions of pages of
9 documents relating to some guy selling a pharmaceutical product
10 in Boston, or some other location around the country that has
11 nothing to do with what the defendants knew about the
12 government investigation. We've said --

13 THE COURT: But the burden of distinguishing what was
14 known and what was not known, what is relevant and what's
15 arguably not relevant, is an enormous burden. Much more so --
16 look, you are going to have access to Cadwalader, you are going
17 to have access to Davis Polk, I'm sure. In the same way that
18 they were able to figure out what was important to be able to
19 defend their clients, it will be accessible to you as well. So
20 you're not going to have to read everything. You are going to
21 have a couple of work product memos that they'll share with you
22 without losing the privilege, saying a lot of things that would
23 be useful to you.

24 I note your colleague is writing all of this down.

MR. JANUSZEWSKI: We do have a reporter today, I'm

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1 happy to see.

2 THE COURT: But I think you are magnifying the
3 problem, and I think the problem would be much worse if you
4 have to figure out, from that big mass of paper, what had to be
5 produced and what didn't.

6 And I'm not saying this will end your production, as I
7 thought that might be the case, it may not, but it's likely
8 to -- substantially to discharge your obligation.

9 MR. JANUSZEWSKI: I hope you are right about that
10 point, your Honor. I fear this is chapter 1 of a longer book.
11 Because, as I said, we have second and third requests already.

12 THE COURT: Can I deal with this separately? I
13 mean -- is the second and third one in here?

14 Mr. Rosen is shaking his head no.

15 MR. JANUSZEWSKI: No, there is no issue. They just
16 served them last week. They are the requests that would
17 normally be served in the case.

18 THE COURT: Here is what I think first, and I'll hear
19 from Mr. Rosen and Ms. Radcliffe, one of the two, and they'll
20 tell me what the situation is.

21 I would like to order Mr. Januszewski to produce
22 everything. And then, I will not allow you to ask substantive
23 requests until you have gone through that mess and decide what
24 hasn't been produced. I'm willing to change that. I may be
25 wrong. There are maybe other issues here in terms of setting

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1 reserves that have not been produced, but I doubt it. I think
2 everything has been produced. But when was the derivative
3 action settled?
4 MR. JANUSZEWSKI: February.
5 MR. ROSEN: February, I believe. Approximately
6 earlier this year.
7 MR. JANUSZEWSKI: That's right.
8 THE COURT: In 2011.
9 MR. JANUSZEWSKI: Correct.
10 THE COURT: And when was the criminal case settled?
11 MR. JANUSZEWSKI: January '09.
12 MR. ROSEN: Well, it was actually September.
13 MR. JANUSZEWSKI: Announced January of '09, finalized
14 September of '09.
15 THE COURT: So it was really as of the earlier date,
16 January '09. I doubt that anything more was happening in that
17 case.
18 MR. JANUSZEWSKI: The class period ends January '09.
19 THE COURT: With them.
20 MR. JANUSZEWSKI: Yeah.
21 THE COURT: I think it's highly likely that everything
22 in those productions will answer your needs, will answer the
23 plaintiff's needs, and we can go into depositions.
24 Ms. Radcliffe.
25 THE COURT: You will be the only spokesperson, right?
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1 MS. RADCLIFFE: Right, for the plaintiffs today, yes,
2 your Honor, unless you have a specific question to other
3 counsel.

4 THE COURT: That's a good comment.

5 MS. RADCLIFFE: Okay.

6 With respect to the derivative action documents. The
7 defendants have provided us the deposition transcripts and
8 exhibits of the certain defendants in this case. We received
9 approximately two boxes of documents that relate to the
10 derivative action that are the deposition transcripts. And in
11 that production, what is telling is what was redacted and
12 probably added to the delay in producing the derivative action
13 documents, for example, the board minutes which are attached as
14 exhibits to some of the depositions of the defendants.

15 The part about the legal liability contingencies,
16 which are the reserves, that entire section is redacted in the
17 board minutes. So while I was --

18 THE COURT: We're not dealing with the propriety of
19 those redactions.

20 MS. RADCLIFFE: Well, those -- because that was not
21 alleged in the derivative action, they redacted as
22 nonresponsive. So while I respect your proposal to go through
23 the derivative action documents -- and this was our initial
24 thought, to go through these documents and then ask defendants
25 for the documents that are missing with respect to key issues

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1 in our case.

2 THE COURT: Do you know what they are?

3 MS. RADCLIFFE: I already know that there are
4 documents that the derivative action does not entail, and I
5 don't think that defendants have necessarily a dispute with
6 regard to certain areas of documents that were not produced in
7 the derivative action that are relevant to our claims.

8 THE COURT: If you can identify those now, that's
9 okay.

10 MS. RADCLIFFE: I will.

11 THE COURT: I would respect your ability to enlarge on
12 that, but I think there will be a presumption in favor of Mr.
13 Januszewski's clients.

14 MS. RADCLIFFE: I understand, your Honor.

15 I think that primarily what is missing from the
16 derivative action documents are the documents regarding the
17 accounting reserves and, significantly, the documents relating
18 to loss causation. Loss causation is not an element in the
19 derivative action.

20 The question goes to the January 23rd, 2009 stock drop
21 and the disclosures on that date. None of the documents sought
22 in the derivative action were keyed to those issues. They also
23 were not key to Pfizer's dividends, which is also alleged in
24 the complaint.

25 THE COURT: What about dividends?

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1 MS. RADCLIFFE: Well, there are specific statements in
2 the complaint regarding Pfizer's continuance of its dividends
3 at current levels. Six months later, Pfizer announces that
4 they will no longer be paying the dividend at the current
5 level. That is part of the January 23rd, 2009 disclosure.

6 In terms of -- those are the primary two areas which I
7 believe that the derivative action documents are missing.
8 There are --

9 THE COURT: So let's suppose I'm sympathetic to your
10 requested supplemental production. What about loss causation?

11 MS. RADCLIFFE: With respect to loss causations, we're
12 going to need to know the basis of the corrective events
13 disclosed on January 23.

14 THE COURT: Say that again? Say that again? You need
15 to know the basis of what?

16 MS. RADCLIFFE: Of the -- the disclosures, basically,
17 on January 26th, 2009.

18 THE COURT: No, you don't. You are going to compare
19 the -- set up, in effect, a fraction, the numerators of which
20 are the disclosures beforehand as one numerator. The other
21 numerator, the stock price at that time. Denominators will be
22 the corrective disclosure and the corrective or adjusted stock
23 price. And you'll get experts to tell you that the
24 differential is as a result of the disclosures.

25 That's how you're gonna prove loss causation, right?

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1 MS. RADCLIFFE: Your Honor, in theory. Yes. But on
2 January 26, 2009, which is the last day of class period,
3 defendants announced multiple disclosures. Defendants alleged,
4 for example, that the Wyeth merger, which is the largest
5 pharmaceutical merger in history, was also announced on the
6 same day as the 2.3 billion dollar civil and criminal class was
7 the true cause of the stock drop.

8 THE COURT: That's what they're gonna be arguing.

9 MS. RADCLIFFE: They are.

10 THE COURT: They're going to have experts who will say
11 that, and you are going to have experts to say something else.
12 And you'll argue that they masked their disclosures, and masked
13 the alleged fraud.

14 So what else is new?

15 MS. RADCLIFFE: We need the documents that underlie
16 the reason and the bases for those disclosures on that day.

17 THE COURT: I don't think so. I don't think so.
18 Unless you are contesting the accuracy, which you're not, your
19 complaint is specific. And I'm going to hold you to that. I
20 don't think you need to know that. What you need to know is
21 what caused what. And that's gonna be an expert.

22 MS. RADCLIFFE: Well, your Honor, for example, we need
23 to know why they announced on January 26, 2009, the Wyeth
24 merger and the --

25 THE COURT: Maybe it was the worst motive in the

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1 world, but it has nothing to do with loss causation.

2 MS. RADCLIFFE: Well, it does to the extent, for
3 example, they also announced on January 26, 2009 that they are
4 going to reduce projected earnings. Was that reduction a
5 result of having to stop their off-label practices, or was it
6 due to other factors. Only internal documents are going to --

7 THE COURT: Mr. Januszewski, what is it going to be,
8 your argument.

9 MR. JANUSZEWSKI: I --

10 THE COURT: You are going to tell me you don't know
11 right now, right?

12 MR. JANUSZEWSKI: I'm sorry, I didn't hear the
13 question.

14 THE COURT: You're going to tell me you don't know
15 right now.

16 MR. JANUSZEWSKI: I don't know. But I always thought
17 loss causation was -- followed from disclosures and are
18 external to the company. Why did the stock price react.

19 THE COURT: The trouble is that Ms. Radcliffe is
20 telling me that this company has said that X percentage of its
21 loss resulted from benign factors, benign to this lawsuit. So
22 that's gonna figure in the loss causation.

23 MR. JANUSZEWSKI: Certainly. Our position will be the
24 stock decline resulted from the announcement of the merger, as
25 always happens when you announce a merger. And we're going to

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1 say that. But that's -- the market decides that, we don't
2 decide why the stock went down.

3 THE COURT: I think Mr. Januszewski is correct, Ms. --

4 MR. JANUSZEWSKI: And your Honor, they have also --

5 THE COURT: I'm not going to be sympathetic to the
6 arguments that you would have to produce all of these documents
7 to prove loss causation.

8 MS. RADCLIFFE: Well, your Honor, I would respectfully
9 request that we be allowed to brief the issue and that, you
10 know, we can present, for example --

11 THE COURT: What's the briefing going to tell me, that
12 I have discretion?

13 MS. RADCLIFFE: It's going to tell you the various
14 ways loss causation can prove. It's is not one way.

15 THE COURT: Of course it's not one way, but if you
16 have causes that are suspect causes, those that you allege
17 specifically in the complaint, and you have losses that are
18 benign causes, those that you have not alleged in the
19 complaint, and it doesn't make any difference that those benign
20 causes are nefarious or honest. It has no difference. Because
21 you are not bringing them up as nefarious. You have alleged
22 only specific ones. That's the law.

23 MS. RADCLIFFE: Well, actually, we have alleged that
24 the disclosure was nefarious. It was timed in order the mute
25 the disclosure of the civil and criminal.

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1 THE COURT: So let be so, you don't have to prove
2 that. You just have to prove what the effects were.

3 MS. RADCLIFFE: We do, but we have a confounding issue
4 in that the merger was leaked on the Friday before and the
5 impact of the leakage.

6 THE COURT: You can brief anything you want, make any
7 motions you want. I don't have any rules that require you,
8 like in kindergarten to ask permission. Permission is not
9 requested to make motions. But in the way I look at it, loss
10 causation will not be a basis to get discovery.

11 So where I am so far is that Mr. Januszewski has to
12 turn over everything in his files, that you want to supplement
13 that production in the files of his company. Let me be more
14 specific. Mr. Januszewski has to turn over to you everything
15 he produced in the derivative action, and everything he
16 produced to the government in the criminal investigation.

17 Anything he has turned over is also, therefore, a
18 waiver of privilege and, therefore, none of those documents are
19 privileged. To be turned over to you.

20 You have a problem with that which has been redacted,
21 and you can work with Mr. Januszewski to eliminate the
22 redactions. If there is a dispute, we'll have another pleasant
23 hearing like this.

24 And I don't think anything else.

25 MS. RADCLIFFE: The only other issue, your Honor, was
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1 related to the contingency reserves.

2 THE COURT: The what?

3 MS. RADCLIFFE: The accounting aspect of the case
4 regarding the reserves defendants took with respect to Pfizer's
5 off-label marketing activity.

6 THE COURT: Tell me why that is relevant.

7 MS. RADCLIFFE: Plaintiffs specifically allege that
8 the defendants failed to make the necessary reserves under the
9 accounting principles, or disclose those in their SEC filings
10 with respect to the risks Pfizer faced as a result of off-label
11 marketing.

12 THE COURT: That begs the question, they were saying
13 at the time it is not material so, therefore, there is no
14 reserves. If you argue and prove that it was indeed material
15 and they should have known it, which is all over the derivative
16 lawsuit, I'm sure, then you have a basis to say there should
17 have been reserves. I don't think you need to know anything
18 more.

19 MS. RADCLIFFE: Your Honor, well, we will review the
20 derivative action documents and perhaps those documents are
21 encompassed in there and --

22 THE COURT: If not, you know how to write letters --

23 MS. RADCLIFFE: Yes, your Honor.

24 THE COURT: -- right?

25 All right, have I resolved your dispute at this time?

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1 Is there anything more that you are disputing that I have not
2 resolved.

3 MR. JANUSZEWSKI: I --

4 THE COURT: Ms. Radcliffe?

5 MS. RADCLIFFE: Just a timeline for production, your
6 Honor.

7 THE COURT: Since they are all -- documents are all
8 attacked, Mr. Januszewski will produce it very quickly. And he
9 will be aware that the sharing of work product with the
10 Cadwalader and Davis Polk firms will not be a waiver of work
11 product privilege. There is a sufficient community of interest
12 among the three firms and their clients.

13 MS. RADCLIFFE: Yes, your Honor.

14 And for the record, Cadwalader was counsel in the
15 litigation up to approximately November 5.

16 THE COURT: When Dennis Block left the firm.

17 MS. RADCLIFFE: And they filed a motion to withdraw.

18 THE COURT: Yes.

19 MS. RADCLIFFE: And that just --

20 THE COURT: And then they went to Mr. Januszewski.

21 And that was a really intelligent decision.

22 MR. JANUSZEWSKI: I would like to order the
23 transcript, please.

24 MS. RADCLIFFE: The only next issue would be we had
25 bifurcated in this case depositions after discovery.

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1 I believe --

2 THE COURT: Say that again. My mind was slipping. I
3 thought I was finished, but I guess I'm not.

4 MS. RADCLIFFE: In our status conference held on, I
5 believe it was September 23 --

6 THE COURT: I remember every word.

7 MS. RADCLIFFE: I'm sure you do.

8 -- we had bifurcated document review and depositions.
9 And I believe we had until the end of January to review
10 documents prior to depositions.

11 THE COURT: That would seem to have been a sensible
12 idea, yes.

13 MS. RADCLIFFE: Yes. I agree, your Honor.

14 The only issue is the timeline for the review.

15 THE COURT: What would you like? You can whisper it.

16 MS. RADCLIFFE: I think 4 months after production
17 would be sufficient.

18 THE COURT: Mr. Januszewski, how about a two-week
19 production, three-week, four-week, what do you say?

20 MR. JANUSZEWSKI: How about we shoot for the end of
21 the year?

22 THE COURT: Seeing as we're almost in December, that
23 sounds good.

24 All right. Am I going to ruin your Christmas?

25 MR. JANUSZEWSKI: No, sir. You may ruin hers, but,
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1 no.

2 THE COURT: Well, no, I don't want that to happen,
3 actually. It's hard to -- it's hard to have vacation as a
4 lawyer. A respite vacation with family is, in my book, among
5 the highest priorities that we have to deal with, so --

6 MR. JANUSZEWSKI: I agree.

7 THE COURT: If you need another couple of weeks, it
8 would be okay.

9 MR. JANUSZEWSKI: How about January 15, if that is a
10 weekday.

11 THE COURT: Why don't we ask Ms. Lamberti.

12 MR. JANUSZEWSKI: Is that okay with you?

13 MS. LAMBERTI: Yes.

14 MR. JANUSZEWSKI: Ms. Lamberti approves, your Honor.

15 THE COURT: All right. So January 13 is the Friday,
16 so production by then. But could you do this. You are going
17 to work them one at a time. I would like you to have an
18 interim production.

19 MR. JANUSZEWSKI: We'll do it on a rolling basis.

20 THE COURT: Well, I'm not sure that's so good, because
21 it makes it very difficult to process the documents on the
22 receiving side. But let's do the derivative case first, all
23 those 12 million pages that Judge Rakoff cited as one of the
24 reasons he was approving the settlement, this being not an SEC
25 settlement.

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1 So why don't we have that production made, let's say,
2 by December 16th.

3 Ms. Lamberti, would that be doable?

4 MR. JANUSZEWSKI: We think we can do that, your Honor.

5 THE COURT: Okay. Let's do a target date, okay. And
6 then the second production would be January 13, all right. And
7 then, I don't think you need 4 months.

8 MR. JANUSZEWSKI: Your Honor, at a prior conference,
9 by the way, as I'm sure you remember, you had said that parties
10 would be limited to 10 depositions.

11 THE COURT: We have not reached that point. I'm going
12 to reach that point.

13 You know what I would like to do, I would like to
14 approve the deposition schedule. So I want to set up a meeting
15 amongst us when you have processed, and you know your
16 deposition schedule, and you have discussed it with Ms.
17 Lamberti and Mr. Januszewski.

18 MS. RADCLIFFE: That's fine, your Honor.

19 THE COURT: And you'll identify who you want to take
20 there, and who they will take of you. And I want a reasonably
21 limited schedule.

22 MS. RADCLIFFE: Yes, your Honor.

23 THE COURT: I will not preclude you, later on, from
24 adding names. And one of the points that I do want discussed
25 at an earliest point, is an estimate by Mr. Januszewski what

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1 defenses you really going to be putting forward, because I want
2 the discovery to focus, not only on the proofs, but on the
3 defenses, as well. And that way we'll limit everything, so --

4 MS. RADCLIFFE: Yes, your Honor. I'll just interject.
5 From the review of the derivative action transcripts, of the
6 derivative action documents, counsel for the defendants
7 represented it took 30 reviewers 3 months working weekends to
8 review just the derivative action documents for production.

9 THE COURT: Who represented --

10 MS. RADCLIFFE: I believe Mr. Schacter from
11 Cadwalader.

12 THE COURT: Well, he was seeing them for the first
13 time. I don't think you need that. And I don't think I
14 honored that. He was reviewing each document to see if there
15 was some kind of a problem there that would come back to haunt
16 him. And the process of review in anticipation of producing
17 documents is much more intensive and much less focused in the
18 review by an attorney receiving the documents. I would venture
19 to say that of the 12 million pages that are involved, you can
20 quickly get rid of 85 percent of them as unimportant, and focus
21 is an inquiry of much less than that.

22 How were they produced, do you know, Mr. Januszewski?
23 Were they produced according to chronology, were they produced
24 according to file, are they marked, earmarked? That is going
25 to be very important.

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1 MR. JANUSZEWSKI: I think they're electronic, your
2 Honor. But there were numerous -- there were 64 separate
3 productions, apparently. So it is not a matter of just
4 pressing one button or one CD. But I can't be any more
5 specific than that.

6 THE COURT: I'm going to ask you -- and I'll tell you
7 the alternative in a moment -- to interview the parties
8 responsible for the production, to find out how they were
9 organized, and to relate the information to Ms. Radcliffe. And
10 I think you know what I will say if you find any difficulty in
11 doing that, and I don't think you want that consequence.

12 MR. JANUSZEWSKI: Fair enough, your Honor.

13 THE COURT: All right. So that's going to help a lot.

14 I think what you can do is write her a letter, if you
15 want, because it's good to have that record anyhow, identifying
16 by production number which are categorized and which were not.

17 All right. Are they in searchable form, do you know?

18 MR. JANUSZEWSKI: I believe they are.

19 THE COURT: Okay, because I would want that.

20 Now, I'm thinking by the end of February, I think you
21 will have done most of your job.

22 Ms. Radcliffe?

23 MS. RADCLIFFE: So, your Honor, once we receive the
24 electronic production, we're going to need to load that on our
25 systems and our computers. I don't know how long that is going

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1 to take.

2 THE COURT: It doesn't take long, it is all done
3 electronically.

4 MS. RADCLIFFE: Right now we have defendants producing
5 documents, that would be the 20 million pages in the government
6 litigation, on January 13 is their deadline.

7 THE COURT: So you need 32 million pieces of paper.

8 MS. RADCLIFFE: 32 million pieces of paper, 20 million
9 of which I would have six weeks to review.

10 THE COURT: Off the record.

11 (Off the record)

12 THE COURT: Back on the record. So let's keep that
13 date. I want you, the week before, to exchange with each other
14 what is going to come up. And I want a joint letter from the
15 both of you, say that Thursday the previous week, that
16 will give me an idea of what you are going to talk about, what
17 you have agreed to, what you dispute. And that will be the
18 basis of the next case management plan.

19 I don't remember what is the date that you had in the
20 former case management plan for meeting again. But we ought to
21 cancel that. It's probably in the future anyhow. When you
22 come back with me, know what that date is, because we may want
23 to change that date.

24 MS. RADCLIFFE: Yes, your Honor.

25 THE COURT: All right. Does this make sense to both
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1 of you?

2 MR. JANUSZEWSKI: Yes, your Honor.

3 MS. RADCLIFFE: Yes, your Honor.

4 THE COURT: All right, I've bludgeoned you both.

5 Okay.

6 MR. JANUSZEWSKI: Your Honor, there is just one other
7 issue that is out there that I --

8 THE COURT: Have I certified the class?

9 MR. ROSEN: No.

10 MS. RADCLIFFE: No.

11 THE COURT: Shouldn't I?

12 MS. RADCLIFFE: Well, yes, your Honor.

13 THE COURT: Shouldn't you be wanting to make that

14 motion?

15 MS. RADCLIFFE: Yes, we would, your Honor.

16 THE COURT: Right?

17 MS. RADCLIFFE: Yes.

18 THE COURT: Are you going to object to class action

19 status, Mr. Januszewski?

20 MR. JANUSZEWSKI: I would like to see the motion

21 first, your Honor.

22 THE COURT: The likelihood is yes, right?

23 MR. JANUSZEWSKI: I appreciate that it -- the tendency

24 is to certify classes in this context, but I think I need to

25 see the motion.

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1 THE COURT: When can you make the motion.

2 Off the record again.

3 (Off the record)

4 THE COURT: You don't need to wait on their discovery
5 to make the motion certified. There is no reason to delay it.
6 It should be as early in the case as possible. So we are
7 now November 29th. Can you make it in two weeks?

8 MS. RADCLIFFE: I think we can -- if we have could
9 have until that third week of December, your Honor.

10 THE COURT: Okay. Third week of December, December 23
11 okay. All right. The motion to certify the class will be
12 made -- you don't need that much time to make this motion.

13 MS. RADCLIFFE: Your Honor, we want to make sure
14 whatever motion we file is sufficient enough for Mr.
15 Januszewski and Ms. Lamberti to review and to, you know, to
16 make their decision with respect to whether or not their client
17 is going to object to class cert, so --

18 THE COURT: Assume it will.

19 MS. RADCLIFFE: And then they're going to want --

20 THE COURT: It is now November 29th, so -- all right.
21 You have until December 16. Don't ask me for enlargement.

22 Mr. Januszewski, how about January 10 to oppose?

23 MR. JANUSZEWSKI: We're going be busy producing
24 documents at the time, your Honor.

25 THE COURT: How many people you have on the case?

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1 MR. JANUSZEWSKI: Three associates.

2 THE COURT: All right. Ms. Lamberti is senior?

3 MR. JANUSZEWSKI: Yes.

4 THE COURT: You can get it done.

5 January 10 we'll oppose.

6 January 17 for reply.

7 MS. RADCLIFFE: Your Honor, I'm only going to raise
8 the issue because it is going to come up between the parties.

9 That is, defendants are likely going to want to depose
10 the class cert reps before they file their opposition brief.
11 And with the holidays and to coordinate counsel, it is going to
12 be very difficult --

13 MR. JANUSZEWSKI: Yes, it will, your Honor.

14 THE COURT: Yeah, even though what they say is largely
15 irrelevant?

16 MR. JANUSZEWSKI: I don't know about that, your Honor,
17 but I think we're entitled to depose.

18 THE COURT: You're entitled.

19 MS. RADCLIFFE: And just to interject, one of our
20 clients --

21 THE COURT: Do you want to do that discovery before we
22 finish -- before you make the motion. Why don't you take the
23 depositions of the class. And whatever interrogatories you
24 have -- you don't need interrogatories, you need to do the
25 class. How many representatives are there?

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1 MS. RADCLIFFE: There is a named plaintiff and a lead
2 plaintiff currently, your Honor.

3 THE COURT: Two?

4 MS. RADCLIFFE: Two.

5 THE COURT: All right, so --

6 MR. JANUSZEWSKI: If we get the documents that we --

7 THE COURT: So why don't you turn over the documents
8 they have in their files by next week, Ms. Radcliffe.

9 And Mr. Januszewski, why don't you take their
10 depositions by December 16th.

11 MR. JANUSZEWSKI: We can do that, your Honor.

12 MS. RADCLIFFE: Your Honor, one of our clients is in
13 Holland, I'm not --

14 THE COURT: Bring him here.

15 MS. RADCLIFFE: We will make every effort to bring
16 them here.

17 THE COURT: They would love to have Christmas in New
18 York. What better shopping, what better window displays are
19 there.

20 MS. RADCLIFFE: And it would go to what documents in
21 their files. Because defendants have served very broad
22 document requests that don't relate to Pfizer securities, that
23 don't relate to --

24 THE COURT: Whatever they have in their files is not
25 privileged, and as to privilege, you are going to claim it on a

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1 separate log anyhow.

2 MS. RADCLIFFE: It's not a privilege issue, it's scope
3 issue.

4 THE COURT: Anything having to do with the allegations
5 in their complaint, or the complaint, or the derivative action,
6 or the government investigation action. They bought the stock.
7 Whatever is in their file, turn over. It's gonna eventually be
8 turned over anyhow, let's not play these games.

9 I learned from Judge Pollack, these requests to
10 produce and these interrogatories just take up money and time
11 and they are of no value. Turn over your files to each other.
12 You'll eventually get it, stop fighting over stupid things.
13 Give whatever your clients have. It is not privileged. As to
14 privilege, identify them on the log. That should be done, what
15 did I say, by December 9, I said I think.

16 MR. JANUSZEWSKI: Yes.

17 MR. ROSEN: Yes.

18 THE COURT: And depositions by end of December.

19 MR. JANUSZEWSKI: Yes, your Honor.

20 THE COURT: January 13 to make the motion.

21 January 25 to oppose.

22 February 1 to reply.

23 All right, anything else I missed?

24 MR. JANUSZEWSKI: I wanted to flag an issue so we're
25 not criticized for not alerting you to it if it arises?

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1 THE COURT: I'll never criticize, Mr. Januszewski.

2 MR. JANUSZEWSKI: The plaintiffs have served, I
3 believe, 31 nonparty subpoenas.

4 THE COURT: What for?

5 MR. JANUSZEWSKI: I only raise this because Goldman
6 Sachs, Morgan Stanley had served, and they called me saying
7 what is this case about?

8 THE COURT: What do you need Morgan Stanley for,
9 Ms. --

10 MS. RADCLIFFE: Most of the subpoenas relate to
11 analysts, and what the analyst reports in the market were
12 saying about Pfizer. That's it.

13 THE COURT: You have a collection of those, don't you,
14 Mr. Januszewski? Your company has probably collected all of
15 the analysts.

16 MR. JANUSZEWSKI: We probably have a collection of
17 analyst reports.

18 THE COURT: Why don't you turn that over.

19 MR. JANUSZEWSKI: We can do that.

20 MS. RADCLIFFE: And it also goes to notes of the
21 analysts, your Honor, at meetings and other things that Pfizer
22 represented.

23 THE COURT: That has nothing to do with the class.

24 MS. RADCLIFFE: The other third parties, there is.
25 KPMG who is the external auditor, and there is also PM --

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1 THE COURT: You are probably going to -- the subject
2 of audits will come in afterwards, so.

3 MS. RADCLIFFE: KPMG has already voluntarily produced
4 the documents in the derivative action, and we have an
5 agreement with them regarding production.

6 PWC was their compliance monitor.

7 THE COURT: Whose compliance monitor?

8 MS. RADCLIFFE: Pfizer's. And their corporate
9 integrity agreement that it had entered into in 2004 with
10 respect to preventing off-label marketing.

11 And PWC has agreed to produce the compliance-related
12 documents.

13 THE COURT: All right. So you have it.

14 MS. RADCLIFFE: Yes.

15 THE COURT: Okay, good.

16 Alerting me to anything else, Mr. Januszewski?

17 MS. RADCLIFFE: The only other area is Pfizer's and
18 Wyeth's financial advisors with respect to the deal. And,
19 there, the document requests go to the valuation of Pfizer
20 stock.

21 THE COURT: Not relevant. You are going to be doing
22 it yourself.

23 MS. RADCLIFFE: Well --

24 THE COURT: It's gonna be hearsay, objectionable, you
25 don't need it. It won't lead to evidence and it won't be

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1 evidence.

2 MS. RADCLIFFE: Your Honor, to the extent that Morgan
3 Stanley or Goldman Sachs, when they were discussing the Wyeth
4 merger considered the 2.3 billion dollar charge for the
5 off-label marketing in valuing Pfizer stock, that is an
6 admission by Pfizer, through its agents, as to what was the
7 effect of that valuation on Pfizer stock.

8 That is what Pfizer agreed to in connection with the
9 Wyeth merger. And that is what we're requesting. It is not a
10 voluminous request. It is how did Pfizer's agents come to an
11 agreement with respect to the valuation of Pfizer stock.

12 THE COURT: I don't believe they're agents. I believe
13 they are independent contractors engaged to do work in
14 connection with a merger.

15 MS. RADCLIFFE: Well, with respect to Wyeth's
16 financial advisors, there were fairness opinions written by the
17 financial advisors to Wyeth shareholders as to the fairness --

18 THE COURT: What is your position, Mr. Januszewski.

19 MR. JANUSZEWSKI: I don't think it is relevant at all,
20 your Honor. We know what fairness --

21 THE COURT: You object to it at this time?

22 MR. JANUSZEWSKI: Yes.

23 THE COURT: I sustain the objection at this time. You
24 can raise it again, Ms. Radcliffe after you get their
25 production.

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1 MS. RADCLIFFE: Thank you, your Honor.
2 THE COURT: All right.
3 MR. JANUSZEWSKI: Thank you, your Honor.
4 THE COURT: Enjoy your holidays.
5 (Adjourned)
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