

D7j Wj onC
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----X
2

3 STICHTING PHILIPS
3 PENSIOENFONDS, et al.,

4 Plaintiff,

5 v.

10 CV 3864 (AKH)

6
6
7 PFIZER, INC.,

8 Defendant.

8
9 -----X

New York, N. Y.
July 19, 2013
11: 20 a. m.

10
10
11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13
13 District Judge

14
14
15 APPEARANCES

15
16 ROBBINS GELLER RUDMAN & DOWD LLP
16 Attorneys for Plaintiffs
17 BY: HENRY ROSEN
17 JASON A. FORGE
18 RYAN A. LLORENS
18

19
20 WILLIAMS & CONNOLLY LLP
20 Attorneys for Defendant
21 BY: STEVEN M. FARINA
21 AMANDA M. MacDONALD
22
22
23
24
25

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

D7j Wj onC

(Case called)

1 THE COURT: You have a bit of a discovery dispute that
2 takes about 45 pages to describe. Who wants to tell me about
3 it?
4

5 MR. ROSEN: I'd be happy to go first. Whatever your
6 pleasure is.

7 THE COURT: Who is the proponent of the discovery?

8 MR. ROSEN: We are, your Honor.

9 THE COURT: Go ahead, Mr. Rosen.

10 MR. ROSEN: Your Honor, the reason that we're here
11 today --

12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: The reason you're here today is that you can't agree. Let's go right to the dispute.
MR. ROSEN: The dispute, your Honor, is the defendants are taking what we view as an untenable position, that the government investigations which are explicitly referenced in the waived subjects are somehow beyond the scope of the waiver, and they're taking this position because they are making a factually impossible argument, that members of the disclosure process and defendants who are responsible for drafting the disclosures at issue in this case having to do with the government investigations and the FAS 5 reserves can wear one hat while drafting those disclosures and a separate hat while they're receiving advice from the counsel who is processing those investigations regarding the status of those

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

3

D7j Wj onC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

investigations. They have seen fit to produce documents regarding the drafting of those disclosures, yet they want to withhold documents regarding advice they have received regarding the government investigations.

THE COURT: Won't they have to use that at trial to defend their position?

MR. ROSEN: They will, your Honor.

THE COURT: So why isn't it satisfactory to you if I just preclude them from relying on the subject matter of any document that they hold back?

MR. ROSEN: Your Honor, we are allowed to test what information.

THE COURT: Did you hear what I said?

MR. ROSEN: If your Honor had concluded that you precluded them from raising the defense, that would be sufficient.

THE COURT: No. I wouldn't do that. But they can't use as evidence anything they didn't give to you or the reasonable penumbra around it.

MR. ROSEN: But that's not sufficient, your Honor, because we're, under the law, entitled to test what information, good and bad advice, they received about those investigations.

THE COURT: You're exalting discovery over trial, Mr. Rosen. Imagine if you get into a trial, you make your

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

4

D7j Wj onC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

points, and they come up with something and they can't use it because they're precluded.

MR. ROSEN: We can't use it either, your Honor, because we don't have it.

THE COURT: You don't need it. You have your main case. You're showing that they did all these things that they weren't supposed to do because they've misrepresented and they have to come up and prove that they made disclosure.

MR. ROSEN: I'll give you a perfect example, your Honor.

In the course of the government investigation in August and September of 2007, defendants and their lawyers met with the government and negotiated regarding the government investigations. We've received no documents from any source regarding the substance of those conversations. Yet we do know following those discussions there was a need for the defendants

17 and their lawyers to meet to discuss whether disclosures were
18 necessary following those meetings. If we do not get discovery
19 of what happened during those conversations, how can we present
20 it at trial, as your Honor suggests? We need those.

21 THE COURT: The representations were not made. It
22 falls to the defendants to explain why they weren't made. You
23 know they weren't made, right?

24 MR. ROSEN: No. We know they were made, and we know
25 that during those meetings, defendants tasked lawyers from

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

5

D7j Wj onC

1 outside firms with the job of taking notes during those
2 meetings.

3 THE COURT: Mr. Rosen, you're not responding to my
4 question. You're proving that there was failure to disclose,
5 right?

6 MR. ROSEN: Correct.

7 THE COURT: So the defense will come up with an
8 explanation why they failed to disclose and I'm telling you
9 that you can preclude them from giving an explanation for why
10 they failed to disclose. All you have is a failure to disclose
11 without an explanation. If it's material, if it's relied on,
12 you win the case.

13 MR. ROSEN: The explanation they want to provide at
14 trial is that they received advice from one outside lawyer that
15 their disclosures were adequate. The position is that it would
16 be prejudicial for plaintiffs not to have access to all advice
17 that they received and whether they communicated that advice to
18 counsel who is responsible for giving them the advice that
19 they're relying on, that their disclosures were adequate.

20 THE COURT: Mr. Farina, is this a case where you're
21 relying on the lawyer's advice?

22 MR. FARINA: Your Honor, we are relying upon the
23 advice regarding certain specific subjects which we received
24 from our outside disclosure counsel. We have waived the
25 privilege. It's reflected in a binding agreement by the

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

6

D7j Wj onC
1 parties.

2 THE COURT: So isn't Mr. Rosen entitled to understand
3 if there are other advices that you rejected; in other words,
4 that you chose the advice that you want that's convenient?

5 MR. FARINA: Your Honor, every single document related
6 to the disclosures and the reserves, whether privileged or not,
7 has been preserved. Pursuant to the agreement, we produced
8 over 7,000 pages of documents.

9 THE COURT: You didn't answer my question.

10 MR. FARINA: He's entitled to everything within the
11 scope of the waiver, which are the disclosures and the
12 reserves, and he has every single document.

13 THE COURT: You're still not answering my question.

14 MR. FARINA: I'm sorry, your Honor.

15 THE COURT: He's worried or he's thinking that there
16 could be advice from a number of different counsel and that you
17 chose the advice that's convenient to you.

18 MR. FARINA: That is a fair point. We received no
19 other advice regarding disclosures. If we received advice from
20 any lawyer regarding disclosures, we've produced that.

21 THE COURT: Why can't he test that?

22
23
24
25

Let me ask you this, Mr. Rosen. Every document that he's held back has been identified in a log, true?

MR. ROSEN: Yes, it has, your Honor. We brought the logs with us. When the parties negotiated the Rule 502(d)

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

7

D7j Wj onC

order, the defendants specifically agreed to search these logs for documents that would be subject to the waiver.

THE COURT: What do you want me to do, Mr. Rosen?

MR. ROSEN: We've requested an order in the letter. I'm sorry the letter is so long. On pages 12 and 13, we've set forth five categories of documents from the logs that we want them to produce. I brought with me today specific examples.

THE COURT: You believe you're not obligated to produce?

MR. FARINA: Your Honor, there's a binding written agreement that we entered into six months ago that Mr. Rosen signed. It's reflected in an order you signed.

THE COURT: You believe you're not obligated to produce.

MR. FARINA: We have produced everything that we're obligated to produce under the order.

THE COURT: I don't know why people have such trouble answering my questions.

MR. FARINA: We are not obligated to produce anything else.

THE COURT: Why isn't that just simply what you tell me?

MR. FARINA: I'm trying to explain why we're not obligated.

THE COURT: Did I ask you why?
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

8

D7j Wj onC

MR. FARINA: No, your Honor.

THE COURT: Let's test it. Give me an illustration, Mr. Rosen.

MR. ROSEN: Sure. If you look at Exhibit C to the submission, your Honor, we have disclosed just examples, not a full list of everything from the logs.

THE COURT: Okay.

MR. ROSEN: Look at the first page of Exhibit C.

THE COURT: I have that. No. 25891.

MR. ROSEN: 25873.

THE COURT: I have it.

MR. ROSEN: There are two entries on this page I want to refer you to, your Honor. Please look at entry 57 and entry 59.

THE COURT: Okay.

MR. ROSEN: Entry 57 is from Loretta Cangialosi to Frank D'Emilio, both members of Pfizer's disclosure committee.

THE COURT: What's the disclosure committee?

MR. ROSEN: The disclosure committee is the committee responsible for the process of drafting the litigation disclosures that are subject of the waiver and that are at issue in this case. It's comprised of 11 members and from the period 2005 to 2009, in addition to those 11 members, there was between seven and 13 additional people who were involved in the disclosure process.

SOUTHERN DISTRICT REPORTERS, P. C.
Page 4

♀

D7j Wj onC

1 THE COURT: Okay.
2 MR. ROSEN: Ms. Cangialosi.
3 THE COURT: I've got it.
4 MR. ROSEN: And Mr. D'Emilio.
5 THE COURT: So why wasn't this privileged?
6 MR. ROSEN: If you look at the entry, it says, "e-mail
7 between attorneys containing legal advice re Bextra
8 investigation." All advice that Ms. Cangialosi received
9 regarding the disclosures and the government investigation is
10 at issue in the case because whether that advice is good or
11 bad, it has to be revealed so we can test whether that
12 information was passed on to the counsel they're relying upon
13 that their litigation disclosures were adequate.
14 THE COURT: Whose counsel?
15 MR. ROSEN: The counsel they're relying on is Dennis
16 Block, formerly from Cadwalader.
17 THE COURT: He's the outside counsel.
18 MR. ROSEN: He's the outside counsel they're relying
19 on.
20 THE COURT: Why can't you just rely on what Block
21 used, what he consulted to give his advice on?
22 MR. ROSEN: Because a lot of the information in this
23 case was passed orally. He attended a lot of these meetings.
24 THE COURT: Take Block's deposition.
25 MR. ROSEN: His deposition is scheduled for early next
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

D7j Wj onC

1 month, your Honor.
2 THE COURT: So if he says that he doesn't know
3 anything about this e-mail, why should Mr. Farina have the
4 obligation to disclose it?
5 MR. ROSEN: First of all, your Honor, under the law,
6 if you're going to rely on counsel, you're entitled to all
7 advice that you received.
8 THE COURT: That's not true.
9 MR. ROSEN: And we get to test whether they passed
10 that on to him to see whether he relied in good faith.
11 THE COURT: That's not true. You're entitled to
12 everything that the client was told. You're entitled to
13 everything that Pfizer was told by the lawyer and you can test
14 what the lawyer knew and what he said because it's a good faith
15 defense. But you can't test everything that may be down the
16 channel of communication that the lawyer may never have seen.
17 MR. ROSEN: But, your Honor, what we're asking for is
18 what Pfizer and the defendants were told by the counsel who is
19 representing them in the government investigation.
20 THE COURT: You're entitled to that and you're going
21 to take Block's deposition.
22 MR. ROSEN: But this is not what they've given us.
23 They've given us the advice they've received from Block
24 regarding what disclosures have to be made based on his
25 interpretation of the other advice they have received. They
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

D7j Wj onC

1 have to give us what advice they received from their lawyers
2 regarding the government investigation.

3 THE COURT: I don't agree. You don't test what's down
4 the chain. Whatever Block used or considered, you're entitled
5 to have.

6 MR. ROSEN: Your Honor, what we're asking for is up
7 the chain, not down the chain. The stuff that they received
8 regarding the severity of the government investigation,
9 regarding the likelihood of a fine, regarding the likelihood
10 that they would be --

11 THE COURT: You're telling me Block's an outside
12 lawyer, Block gave advice. I'm telling you that you're
13 entitled to see what Block considered in giving that advice.
14 You're not entitled to fish around in whatever the legal
15 department or the disclosure department may have been thinking
16 or commenting on one to the other.

17 MR. ROSEN: But, your Honor, the process they're
18 relying on is the disclosure process that's run by the
19 disclosure committee. That's what they've stated in their
20 answer. That's in the term sheet. That was in the 502(d)
21 order.

22 THE COURT: So that's not Block; that's something
23 else?

24 MR. ROSEN: That's a whole process that happens
25 internally. It includes Block.

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

12

D7j Wj onC

1 MR. FARINA: Your Honor there's one in-house lawyer,
2 Larry Fox. Every communication regarding disclosures and
3 reserves that involved Mr. Block has been produced every
4 communication. Every communication with Mr. Block involving
5 the disclosures and reserves has been produced, and that
6 includes information that was provided to Mr. Fox about the
7 investigation so that he could give disclosure advice. They
8 have thousands of pages of documents on the investigations
9 insofar as that relates to disclosure advice which is an issue
10 in the case. That's the subject of the waiver.

11 THE COURT: I sustain the objection.

12 MR. FARINA: Thank you.

13 THE COURT: Do you want to test something about No.
14 59?

15 MR. ROSEN: Yes. No. 59 is also --

16 THE COURT: Same thing.

17 MR. ROSEN: Same thing. If you turn over to page
18 three of the same exhibit, your Honor --

19 THE COURT: Page 25896.

20 MR. ROSEN: '896. This is an entry that is labeled --

21 THE COURT: Which one are you looking at, entry what?

22 MR. ROSEN: 330.

23 THE COURT: Okay.

24 MR. ROSEN: This one is listed as a memorandum without
25 a "to" and a "from," but the description is very telling:

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

13

D7j Wj onC

1 "Memorandum from in-house counsel containing legal advice and
2 attaching legal memorandum prepared by outside counsel re
3 Bextra investigation." We're entitled to know the advice that
4 they received about the government investigations in order to
5 test whether they relied on Mr. Block in good faith when he
6 told them they didn't have to disclose the government
7 investigations.

8 MR. FARINA: The government investigations were
9 disclosed and they have every single document that went back
10 and forth with Mr. Block concerning the government
11 investigation and disclosures and reserves. Your Honor, I went
12 back to the privilege log, as I said I would.
13 THE COURT: The objection is sustained.
14 MR. FARINA: Thank you.
15 THE COURT: Was there another point, Mr. Rosen?
16 MR. ROSEN: Your Honor, if you look at Exhibit --
17 THE COURT: You should know, Mr. Farina, every
18 document that you hold back you are precluded from using at
19 trial.
20 MR. FARINA: Absolutely, your Honor.
21 THE COURT: And if you call any witness and any of
22 these documents are handled by that witness, that witness will
23 be precluded.
24 MR. FARINA: Your Honor, we have produced many, many
25 documents that were touched by many, many witnesses and we
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

14

D7j Wj onC

1 would only in examining those witnesses use documents that have
2 been produced that are within the scope of the waiver.
3 THE COURT: No. You can't be selective. If you're
4 using a witness in and any of these documents passed by that
5 witness, that document is precluded.
6 MR. FARINA: Your Honor, not if the document has
7 nothing to do with the subject matter of the waiver.
8 THE COURT: If it has to do with relevance, if it's
9 relevant to the case -- I don't care about documents dealing
10 with the weather and things of that nature, but if it has to do
11 with these drugs or this case, you'd better disclose. Fair
12 notice, Mr. Farina.
13 MR. FARINA: Understood.
14 THE COURT: If you hold back, you're going to be
15 precluded.
16 MR. FARINA: Understood.
17 THE COURT: You take that risk.
18 MR. FARINA: Your Honor, to be clear, we have waived
19 on two subjects. They have gotten every document relating to
20 those two subjects.
21 THE COURT: You've already told me that. I've heard
22 it. I tend to remember what you tell me. You don't need to
23 tell me twice.
24 MR. ROSEN: Your Honor, the deposition of
25 Ms. Cangialosi has already been completed in this case.
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

15

D7j Wj onC

1 Ms. Cangialosi said she relied on advice from other lawyers at
2 the firm and other lawyers from outside the firm when she was
3 drafting her litigation disclosures and making the FAS 5
4 reserves. When asked questions about whether settlement offers
5 were made and whether she was informed about that, she was
6 instructed not to answer those questions.
7 THE COURT: Why are they relevant?
8 MR. ROSEN: Because whether or not a settlement offer
9 is being made goes directly to the heart of whether reserve has
10 to be taken. Because if a settlement offer is made, then the
11 amount of the fine is both probable --
12 THE COURT: Were reserves taken?
Page 7

13 MR. ROSEN: No. No disclosure was made. That's the
 14 heart of the case. Counsel wants to sit here and say that
 15 everything related to the waived subjects has been produced.
 16 Not true, your Honor, because he's dividing where the
 17 government investigation is related directly to the draft.
 18 THE COURT: Did you ask Ms. Cangialosi whether she was
 19 aware of any settlement offers that have been made?
 20 MR. ROSEN: Yes, and she was instructed not to answer
 21 those questions.
 22 THE COURT: Why?
 23 MR. FARINA: That's not factually accurate.
 24 THE COURT: Why, Mr. Farina?
 25 MR. FARINA: That's not accurate. They have all the
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

♀ 16

D7j Wj onC

1 information about the offers and the demands that were
 2 exchanged. That was produced in the government investigation.
 3 What she was asked was whether an offer was made with authority
 4 because there was a particular type of offer. I told counsel
 5 that she actually didn't know the answer to that and that I
 6 would allow her to answer if he agreed it wouldn't waive the
 7 privilege.
 8 Your Honor, there are many, many documents that they
 9 have that go exactly to these issues that he's saying he needs.
 10 He has all the information.
 11 THE COURT: That's not a criterion. It seems to me
 12 that the issue of reserves has to do with materiality and it
 13 has to do with a certain point where it becomes capable of
 14 being quantified. The risk capable of being quantified, if I
 15 remember correctly, is when reserves have to be set. So if
 16 Ms. Cangialosi was privy to the making of any kind of offers,
 17 that tends to set a value.
 18 MR. FARINA: They have those documents. They were
 19 used at her deposition. The current range of loss remains at
 20 zero to several hundred million.
 21 THE COURT: Why don't you allow her to answer the
 22 question?
 23 MR. FARINA: It was a different question, your Honor.
 24 THE COURT: What was the question?
 25 MR. FARINA: He didn't ask the question he said he
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

♀ 17

D7j Wj onC

1 asked.
 2 THE COURT: What was the question?
 3 MR. ROSEN: The question that she was asked, your
 4 Honor, was whether the settlement offer --
 5 THE COURT: Read it literally.
 6 MR. FARINA: Do you have the transcript?
 7 THE COURT: I think Ms. MacDonald has it.
 8 MR. ROSEN: I have it. Sorry, your Honor.
 9 THE COURT: Read the question.
 10 MR. ROSEN: "Did anybody from Pfizer authorize
 11 Mr. Posner to communicate the \$250 million number to the
 12 Federal government in March of 2008?" I'm not going to read
 13 the long objection by Mr. Farina interfering with the answer.
 14 THE COURT: Is there an answer?
 15 MR. ROSEN: There was an instruction not to answer.
 16 MR. FARINA: Your Honor, I think this is very
 17 revealing. They were able to inquire and they knew about the

18 actual offer. They knew about the offer. I didn't raise any
19 objection to them discussing the offer. They were asking about
20 internal communications about who authorized outside counsel to
21 make that offer. They have all the information about the offer
22 being communicated. They have the amount.
23 THE COURT: It's relevant to the issue of reserves
24 because it has to do with the knowledge of the party. That
25 question should be answered.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

18

D7j Wj onC

1 MR. ROSEN: Your Honor, we would also ask that
2 documents relating to whether settlement offers were made and
3 authorized in internal memos that have been withheld from
4 production that went to Ms. Cangialosi and other members of the
5 disclosure process --

6 THE COURT: The answer to the question should be
7 enough. If she said she doesn't know, then you can inquire.

8 MR. FARINA: I told counsel she didn't know the answer
9 to the question. I thought that would be noted.

10 THE COURT: Say it again.

11 MR. FARINA: I told counsel she didn't know the answer
12 to the question. We took a break and came back.

13 THE COURT: She did know or did not know?

14 MR. FARINA: She did not know the answer to the
15 question. We came back from a break and I said, Guys, she
16 doesn't know the answer to the question.

17 THE COURT: The ruling is that the answer should be
18 given, and, if she doesn't know, counsel should be given the
19 documents to allow him to refresh recollection.

20 MR. FARINA: Your Honor, there will be other witnesses
21 in the case who can answer the question, and we'll apply your
22 Honor's ruling and have them answer the question.

23 THE COURT: Did you hear my ruling, Mr. Farina?

24 MR. FARINA: Yes, your Honor.

25 THE COURT: That's my ruling. Comply with my ruling.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

19

D7j Wj onC

1 Next.

2 MR. ROSEN: In addition, your Honor, we've also asked
3 for the right for discovery directed towards the outside law
4 firms that represented Pfizer during the investigation in order
5 to test what advice was given to them so that we can test
6 whether they relied on Mr. Block in good faith. We need the
7 discovery directed towards the outside firms.

8 THE COURT: I'm not going to allow you to go on a
9 fishing expedition. Objection sustained.

10 MR. FORGE: Your Honor.

11 THE COURT: Only one attorney argues.

12 MR. ROSEN: In addition, your Honor, the defendants
13 have refused to respond to deposition subpoenas that were
14 directed towards current Pfizer employees. As you can see from
15 the letter, they're claiming we're trying to do an end run
16 around the discovery agreements that are in existence in this
17 case.

18 THE COURT: You can take anybody you want. If you
19 want to take someone else, take someone else. I don't
20 understand why you're objecting to the subpoenas.

21 MR. FARINA: They deposed the witnesses, your Honor.
22 We have produced waves of documents.

23
24
25

THE COURT: How many times are you going to tell me that?

MR. FARINA: Your Honor, we negotiated with the SOUTHERN DISTRICT REPORTERS, P. C. (212) 805-0300

♀

20

D7j Wj onC

1 plaintiffs whose documents we would search. They had two
2 opportunities to weigh in. They provided names. When they
3 subpoenaed witnesses for testimony, we put up the witnesses and
4 the witnesses were deposed. But they were trying to use the
5 deposition subpoenas to reopen document discovery, which we
6 believe is improper.

7 THE COURT: The motion to quash the subpoenas is
8 denied. Take who you want.

9 MR. ROSEN: Thank you, your Honor.

10 In addition, your Honor, during the course of the
11 depositions that we've noticed --

12 THE COURT: There's a risk on fees, Mr. Rosen. If you
13 just take a lot of depositions for the sake of taking
14 depositions, you may not get recovery of fees for those. And
15 I'm going to be interested to know when it's all over whether
16 there was a reasonable discovery program or not.

17 MR. ROSEN: Your Honor, I believe I'm very confident
18 we're going to show you that the program has been reasonable.

19 THE COURT: Okay.

20 MR. ROSEN: In addition, your Honor, during the
21 depositions, defendants have introduced documents during the
22 depositions mostly relating to compliance training, compliance
23 certifications that the witnesses have signed. We've requested
24 that they produce documents relating to these issues that
25 they're going to use in the deposition in advance, and they say
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

21

D7j Wj onC

1 they're under no obligation to do that.

2 THE COURT: I don't understand how they can do that.
3 Aren't those documents relevant?

4 MR. ROSEN: That's our position, your Honor. If
5 they're using them, we believe they're relevant.

6 THE COURT: Did you ask for them?

7 MR. ROSEN: We asked for them.

8 THE COURT: Mr. Farina, how come they haven't been
9 produced?

10 MR. FARINA: Your Honor, these documents relate to
11 very specific individuals. They weren't relevant until those
12 individuals became deponents, and they weren't even asked for
13 until those individuals became deponents. We're using the
14 documents for impeachment. We have no obligation to produce
15 documents that we intend to use for impeachment. They've taken
16 their examination. We didn't even know we were going to use
17 those documents necessarily. I have offered, I said if you're
18 willing to provide all the documents you're going to use with
19 the witnesses in advance, we can work out some sort of an
20 arrangement, and they're not willing to do that.

21 I don't think this issue is going to come up very
22 much. It came up with a couple of very specific witnesses. It
23 involved documents that deal with those specific witnesses. I
24 don't frankly see this coming up again.

25 THE COURT: There's no rule that requires counsel to
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

D7j Wj onC

1 telegraph in advance what documents he's going to use in the
2 deposition, but I don't think it's very good to not give out a
3 document that's responsive and relevant.

4 MR. FARINA: It wasn't responsive to what they asked
5 for. If they had asked for it previously, it would have been
6 produced.

7 MR. ROSEN: Your Honor, let's review the bidding. We
8 did not get to serve document requests in this case. They were
9 ordered to produce everything from the government
10 investigation.

11 THE COURT: Were these part of the government
12 investigation?

13 MR. ROSEN: No.

14 THE COURT: All right.

15 MR. ROSEN: These are part of their compliance
16 certifications that the witnesses signed.

17 THE COURT: Why is that relevant in the first
18 instance? What's the importance of the fact that personnel are
19 compliant with various licensing procedures?

20 MR. ROSEN: It's not licensing. It's certifying
21 whether they are compliant with the FDA requirements regarding
22 the marketing of the drugs. As you know, the offer of the
23 marketing is the central underlying conduct here.

24 THE COURT: Seems to me that stuff is relevant.

25 MR. FARINA: Your Honor, I'm happy to produce all the
SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

♀

D7j Wj onC

1 certifications for all the individual witnesses. The point
2 though is that I shouldn't have to in a deposition produce in
3 advance every document I may use for cross-examination.

4 THE COURT: If you've already produced that, that's
5 true. But if you haven't produced it, you can't hide the ball
6 and then come up with it. I'm not making any ruling here, but,
7 in the future, I don't really like that practice. If you've
8 already produced it, yes, you're right. But if you haven't
9 produced it, then you owe an obligation to produce something
10 that's relevant, and it was wrong not to give Mr. Rosen an
11 advance look. Don't do it again.

12 MR. FARINA: Understood, your Honor.

13 MR. ROSEN: In addition, your Honor, I'm loathe to
14 raise it, but the parties have been having trouble resolving
15 disputes regarding follow-up for documents that result from
16 depositions.

17 THE COURT: It probably is because you're asking for
18 too much. You're both very aggressive advocates, so it's hard
19 to deal with this. If you're following up on something that
20 should have been produced earlier, the answer is Mr. Farina
21 should have been producing that earlier, and if sometimes you
22 overlook things, it's reasonable to follow up with the
23 depositions, but not everything that's mentioned by a witness
24 in a deposition is subject to discovery and inspection. This
25 is not a state procedure of using a witness to identify

SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

♀

D7j Wj onC

1 documents.

2 MR. ROSEN: And that's right, your Honor, but the
3 request that we've made in the letter on page 21 relates to the

4 internal audit department's work papers regarding health care
5 compliance. We believe that those should have been searched as
6 part of the parties' negotiation of search terms and
7 custodians.

8 THE COURT: Why weren't they?

9 MR. FARINA: Because we had an agreement and we took
10 his suggestions in the course of that agreement and he didn't
11 ask for it. He didn't ask for it.

12 THE COURT: If it's in the audit department and it's
13 relevant, it should be produced.

14 MR. FARINA: Your Honor, this is an enormous request.
15 It is incredibly expansive. It has nothing to do with the
16 case.

17 MR. ROSEN: That is completely not true. First of
18 all, your Honor --

19 THE COURT: Stop, stop, stop. The fact that it's an
20 internal audit department does not immunize the document for
21 inspection and production. If it's responsive, produce it,
22 whether it's in the audit department or anywhere else.

23 MR. FARINA: Absolutely, that's true. And they have a
24 significant amount of documents from the Pfizer internal audit
25 department. They also have those documents from the KPMG

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

25

D7j Wj onC

1 production. If they were to make a targeted request for
2 specific items --

3 THE COURT: What you're saying is that you produced
4 everything they asked for?

5 MR. FARINA: I produced everything that was relevant
6 and then they came back with a new request that we produce an
7 enormous volume of materials that aren't relevant. We said if
8 you have a specific request, if there are particular documents
9 you're looking for, I'm happy to talk to you. They want every
10 piece of paper from the internal audit department. It's not
11 right.

12 THE COURT: Mr. Rosen.

13 MR. ROSEN: Page 21 of the letter, your Honor, this is
14 a very targeted request. He has not entertained a single
15 request for a follow-up document. These are documents from
16 this corporate internal audit department which comprise the
17 health care compliance audit work papers.

18 THE COURT: Where am I reading?

19 MR. ROSEN: The paragraph under E. Mr. Farina takes
20 the position that we negotiated search terms, we negotiated
21 custodians, we renegotiated them a little bit and we produced a
22 few documents. Now, following a deposition, we've made a
23 request for a single category of documents.

24 THE COURT: What are those?

25 MR. ROSEN: The health care compliance audit work
SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

♀

26

D7j Wj onC
1 papers.

2 MR. FARINA: For a four-year period.

3 MR. ROSEN: Those should have been in the universe of
4 documents searched when we negotiated internal control
5 documents in the first place.

6 THE COURT: That's true, Mr. Farina.

7 MR. FARINA: They have them. They have documents from
8 that universe.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: They may not have all the documents.
MR. FARINA: Not all the documents are relevant.
MR. ROSEN: Mr. Mooney testified.
THE COURT: Can you stop arguing when I'm speaking?
MR. ROSEN: Sure. Sure, your Honor.
THE COURT: Here is the ruling. The audit work papers have to be searched and inspected to assure that all documents within the original production requests that are under the obligation to produce are produced.
MR. FARINA: We will do that, your Honor.
MR. ROSEN: I have one final question, your Honor.
THE COURT: Go ahead.
MR. ROSEN: Regarding depositions going forward of more senior members of the compliance committee and the disclosure committee and of the defendants themselves, if they have received advice from their outside counsel regarding the government investigations, my question is why are we not

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

27

D7j Wj onC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

entitled to those documents.
THE COURT: Why are you entitled?
MR. ROSEN: We believe we're entitled to those documents to test whether their reliance on Mr. Block who gave advice about the disclosures of the government investigations was reasonable and whether it was done in good faith.
THE COURT: Dennis Block is a first-rate lawyer in the securities field, and if Dennis Block says something is so and something should be done or should not be done, there's a right to rely on that. Now, if the advice is unreasonable, you can show it, but I'm not going to let you go around to every conceivable counsel that advised them to test whether Block said something that may or may not have been consistent with some other lawyer. The ruling is you can't do it.
MR. FARINA: Your Honor, we have one other housekeeping issue.
THE COURT: Have a seat until Mr. Rosen is finished.
MR. FARINA: I'm sorry.
MR. ROSEN: Your Honor, our position is that the law allows us to.
THE COURT: I've heard your position. I've made my ruling.
MR. FARINA: Your Honor, there's a deposition going on right as we speak. It's of a third party. It's a former employee. She was terminated by Pfizer. The deposition has

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

28

D7j Wj onC

1
2
3
4
5
6
7
8
9
10
11
12
13

been cross-noticed by both parties. We had offered to split the time, four hours for the plaintiffs, three hours for ourselves. I was told that as of 9:00 this morning we have not been given any commitment by the plaintiffs that we'll get any set amount of time. We've proposed four and three. They get more than we do.
THE COURT: Take the time you need.
MR. FARINA: Your Honor, we don't control the witness and we think the witness is going to leave after seven hours.
THE COURT: Then if the witness leaves, none of it is useable.
MR. ROSEN: May I be heard.
THE COURT: The marshal will knock on her door and

14 tell her to come back.
15 MR. ROSEN: May I be heard, your Honor.
16 THE COURT: Sure.
17 MR. ROSEN: We have been negotiating well about
18 sharing time, and up to this deposition, we haven't had any
19 problems.
20 THE COURT: What do you want me to do, Mr. Rosen?
21 MR. ROSEN: They did not cross-notice.
22 MR. FARINA: We did cross-notice.
23 THE COURT: What do you want me to do? I don't care.
24 They have a right to cross-examine. What do you want me to do?
25 MR. FARINA: Your Honor, I would like --
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

29

D7j Wj onC

1 THE COURT: Mr. Farina, is your name Mr. Rosen?
2 MR. FARINA: No.
3 THE COURT: Sit down.
4 What do you want me to do, Mr. Rosen?
5 MR. ROSEN: If we cannot finish with Ms. Mahoney, who
6 is a very important witness, we may seek leave to have
7 additional time with her if the time-sharing today prevents us
8 from completing.
9 THE COURT: Take the time you want, but if Mr. Farina
10 doesn't have the time he wants, none of her testimony is
11 useable. Got it?
12 MR. ROSEN: Okay.
13 MR. FARINA: Thank you, your Honor.
14 THE COURT: Ms. Mahoney is under subpoena, isn't she?
15 MR. ROSEN: Yes, she is, your Honor.
16 THE COURT: It's her obligation to come. Where does
17 she live?
18 MR. ROSEN: It's either New Jersey or New York, your
19 Honor.
20 MR. FARINA: She's sitting right now for deposition.
21 THE COURT: Yes, but you may have to take her
22 deposition where it's convenient to her.
23 MR. FARINA: I'm willing to divide the time and live
24 within the seven hours.
25 THE COURT: I think I've heard enough.
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

30

D7j Wj onC

1 MR. FARINA: Your Honor, one last housekeeping matter.
2 THE COURT: Sometimes it takes longer to do the direct
3 than the cross.
4 MR. FARINA: That's fair, and we offered them more
5 time.
6 THE COURT: I'm in no position to say that four and
7 three is a good or not good allocation. I can't tell.
8 MR. FARINA: We're fine with your Honor's ruling. We
9 have no objections.
10 Your Honor, the materials that were appended to the
11 joint letter, none of those are covered by the parties'
12 protective order. There's a joint motion.
13 THE COURT: Take it all back. I don't need it.
14 MR. FARINA: Thank you.
15 THE COURT: Finished?
16 MR. FARINA: That's all, your Honor.
17 MR. ROSEN: Thank you.
18 (Discussion off the record)

19
20
21
22
23
24
25

THE COURT: All discovery must be completed by November 29, 2013. That's long enough to accommodate both of you. And I mean it.

MR. ROSEN: Yes.

THE COURT: No adjournments. After that, any unfinished discovery is waived. All discovery must be finished by November 29. It's a fixed date.

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀

31

D7j Wj onC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. FARINA: Your Honor, this is in reference to fact discovery, correct?

THE COURT: Yes. I'm going to meet with you December 13 at 10:30, and we'll discuss where we're going in the case. The classic path for all these cases is to ask that mediation guru in New Jersey to mediate.

(Proceedings adjourned)

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

♀