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October 18, 2013

VIA HAND DELIVERY

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

The dep'ns requested are authorized, and shall be the last to be taken by plaintiffs. Def'ts must answer R. 33 & the interrog. so as to give.
10-31-13

Re: *Jones v. Pfizer Inc., et al.*
Civil Action No. 1:10-cv-03864-AKH (S.D.N.Y.)

Dear Judge Hellerstein:

Pursuant to the Court's Individual Rule 2(E), the parties in the above-referenced action write to present the following issues to the Court for resolution: (1) the depositions of former defendants David L. Shedlarz, J. Patrick Kelly, and Joseph Feczko ("Former Defendants"); and (2) the Supplement to Responses and Objections to Plaintiffs' First Set of Interrogatories Directed to Defendant Pfizer, Inc. ("Pfizer" or the "Company") in *In re Pfizer Inc. Shareholder Derivative Litigation*. In addition to exchanging e-mails, the parties met and conferred in person on Friday, September 20, 2013 and by telephone on Monday, October 7, 2013.

I. PLAINTIFFS' POSITION

A. Depositions of Former Defendants

During the July 19, 2013 hearing, this Court gave Plaintiffs leave to issue additional deposition subpoenas. *See* 7/19/13 Tr. at 19:18-20 ("You can take anybody you want. If you want to take someone else, take someone else. I don't understand why you're objecting to the subpoenas."), 20:7-8 ("The motion to quash the subpoenas is denied. Take who you want."). On August 23, 2013, plaintiffs served subpoenas on Pfizer's former Executive Vice President and Vice Chairman of the Board David Shedlarz, former President of U.S. Pharmaceuticals J. Patrick Kelly and former Chief Medical Officer Joseph Feczko, requiring them to produce documents and attend their depositions. These depositions were noticed for October 17, 22 and 24. On August 26, 2013 and September 16, 2013, plaintiffs followed up with requests for deposition dates after previously

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asking for dates on June 17, 2013. *See* Exhibit A.[1] The Court ***did not grant defendants' motion to quash*** these depositions in the August 30, 2013 Order. Since that Order, defendants have neither agreed to produce the former defendants for their depositions nor sustained their burden to "demonstrate that the [Former Defendants] ha[ve] no personal knowledge of the relevant facts and no unique knowledge of those facts." *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316 (RMB) (MHD), 2006 U.S. Dist. LEXIS 87096, at *39 (S.D.N.Y. Nov. 30, 2006) (Dolinger, J.). Nor can defendants meet such a burden given the importance of these witnesses to plaintiffs' claims. Defendants themselves concede this point in failing to proffer to the Court a strong basis for why these key witnesses would not have highly relevant information relating to plaintiffs' claims. And the fact that defense counsel have a different interpretation of the testimony and documentary evidence relating to the Former Defendants merely demonstrates why Plaintiffs need ***their*** testimony regarding that evidence. Defendants already admitted in their Rule 26 initial disclosures that Messrs. Shedlarz, Kelly and Feczko all had "knowledge of ongoing government investigations referred to in the Complaint, assessment and disclosure of contingencies relating thereto and Pfizer's compliance programs." *See* Ex. B. Defendants' more recent decision to not call the Former Defendants to support their defenses at trial does not meet Rule 26(b)(2)(C)'s requirements for precluding their depositions. Depositions of these key executives are neither unreasonably cumulative nor duplicative, nor does the burden of attending the depositions outweigh the benefit considering what is at issue in this action – illegal conduct in promoting Pfizer's drugs off-label resulting in a criminal plea and $2.3 billion paid in fines and penalties that when revealed caused a market cap loss of over $12 billion. *See* Complaint, ¶¶19, 134.

The Former Defendants agreed to appear at trial in this action as if they were a party to the action. *See* Dkt. No. 151. They also agreed to preserve and maintain all documents, writings and recordings that they would have been obligated to preserve as of January 17, 2013 had they not been dismissed as parties. *Id.* Plaintiffs only stipulated to dismissing the Former Defendants in order to streamline the case, and have reserved their right to revive claims against the Former Defendants at any time before this action terminates. *Id.* As such, it would be highly unfair and inefficient to preclude plaintiffs from taking these key witnesses' depositions prior to trial in this action.

Messrs. Shedlarz, Kelly and Feczko were all top executives of Pfizer and made statements at issue in this case. *See* the First Amended Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint"), ¶¶29, 32-33; Complaint, Ex. B at Nos. 3-5, 8-9, 14-15, 22, 24; Dkt. No. 84. At a minimum, plaintiffs are entitled to depose these former key executives as to the alleged false and misleading statements ***they made*** during conference calls –

[1] All exhibits referenced herein are attached hereto, unless otherwise noted.

statements that bind the existing defendant Pfizer and which plaintiffs must prove at trial were materially false and misleading in order to prove violations of the securities laws against Pfizer.

Depositions have confirmed that Messrs. Shedlarz, Kelly and Feczko have personal and unique knowledge of relevant facts to support plaintiffs' claims. First, Mr. Shedlarz, as the Vice Chairman of Pfizer, signed the management representation letters provided to KPMG LLP ("KPMG") for YE 2006, 1Q07 and 2Q07. *See* Exs. C, D and E, respectively. In doing so, Mr. Shedlarz represented to KPMG, on behalf of Pfizer, that the Company's financial statements were presented in conformity with Generally Accepted Accounting Practices ("GAAP"), including that loss contingencies and Pfizer's legal disclosures conformed with Statement of Financial Accounting Standards ("FAS") No. 5, and that Pfizer had sufficient internal controls over its financial reporting. *Id.* Indeed, Mr. Dennis Block, whom defendants are relying upon as part of their reliance on counsel defense, considered Mr. Shedlarz an expert at applying FAS No. 5. *See* Ex. F (excerpts of the September 16, 2013 Deposition Transcript of Dennis Block) at 40:16-41:5. At issue in this case, are plaintiffs' claims that, *inter alia*: (1) Pfizer did not comply with GAAP; (2) Pfizer failed to adequately disclose the risks it faced as a result of the systemic off-label marketing of its drugs; and (3) Pfizer's lack of internal controls over its financial reporting. Complaint, ¶¶78-80. Mr. Shedlarz was a direct part of the legal proceedings disclosures process, wherein he was directly involved in addressing KPMG's comments along with defendant Kindler. *See* Ex. G at PFE-JONES 00032741. He also received key corporate internal audit reports such as the May 22, 2006 report which rated Pfizer's promotional speaker programs "Unsatisfactory." *See* Ex. H (Ex. 284 to the Charles Mooney deposition). Third, as Vice Chairman, as well as a member of Pfizer's Executive Committee from 2005-2007 (responsible for reviewing and approving all major management, operating and financial decisions), Mr. Shedlarz was involved in discussions – that previously deposed witnesses have been unable to testify to – regarding speakers being paid in excess of limits, remediation of Pfizer's significant deficiency in connection with its internal controls over pharmaceuticals sales and marketing practices, and an unsatisfactory audit report relating to sales and marketing compliance. *See* Ex. I (excerpts of the August 14, 2013 Deposition Transcript of Hugh Donnelly) at 111:22-118:3, 128:14-129:16, 247:21-252:19, 293:6-296:12; Ex. J (excerpts of the June 21, 2013 Deposition Transcript of Loretta Cangialosi) at 180:12-181:3, 343:13-19; Ex. K (Ex. 302 to the Charles Mooney Deposition); Ex. L (Ex. 481 to the Hugh Donnelly Deposition).

Also at issue in this action are plaintiffs' allegations that Pfizer engaged in systemic off-label marketing of four of its drugs – Bextra, Lyrica, Geodon and Zyvox. Mr. Kelly is a key percipient witness as to defendants' knowledge of Pfizer's strategies to promote its drugs off-label to drive sales and profits. Mr. Kelly, as Vice President of Pfizer and President of U.S. Pharmaceuticals, spoke at plan of action meetings to members of the sales force who marketed and sold Bextra and Geodon as one of the top people in the chain of command on the marketing team. *See* Ex. M (excerpts of the July 19, 2013 Deposition Transcript of Dee L. Mahoney) at 27:20-29:10, 32:24-33:16, 112:17-113:15. During the time that Bextra was illegally promoted, Mr. Kelly, as a senior executive and member of the key leadership at Pfizer, participated in the Bextra launch as

well as the annual operating plan process and thus had to approve promotional guidelines and strategies for the sales force to implement. *See, e.g.*, Ex. N (excerpts of the September 20, 2013 Deposition Transcript of Richard Burch) at 21:13-22:6; 93:25-94:12; 193:24-194:23; Ex. O at Levy-L 10000217517. Pfizer, via its shell Company Pharmacia, has pled "guilty to a felony violation of the Food, Drug and Cosmetic Act for misbranding Bextra with the intent to defraud or mislead. . . . ***Pfizer promoted the sale of Bextra for several uses and dosages that the FDA specifically declined to approve due to safety concerns.***" *See* Complaint, ¶100. Likewise, part of the $2.3 billion in fines and penalties included the off-label promotion of Lyrica. Mr. Kelly was presented business reviews, operating plans and/or brand plans regarding Lyrica. *See* Ex. P (excerpts of the May 17, 2013 Deposition Transcript of Kathleen Dowd) at 106:20-107:17. Despite the fact that Lyrica was not approved by the U.S. Food and Drug Administration for neuropathic pain generally, Mr. Kelly represented during the January 19, 2006 Earnings Conference Call that with respect to Lyrica, "there are an extraordinary number of patients with neuropathic pain" who were not satisfied with their pain relief and this was "responsible for a lot of the rapid uptake in Lyrica." Complaint, Ex. B at No. 3. Only Mr. Kelly can testify as to the basis of his statement to investors – a statement plaintiffs allege was materially misleading because it did not disclose that Pfizer's earnings were marred by its off-label promotional practices.

Finally, as the Chief Medical Officer of Pfizer and a member of the Executive Leadership Team from 2006 until his retirement in 2009, Dr. Feczko was responsible for the clinical teams marketing of Geodon, Zyvox and Lyrica. *See* Ex. Q (excerpts from the August 6, 2010 Deposition Transcript of Dr. Joseph Feczko in the derivative action) at 27:20-29:11. Thus, when an analyst asked about Geodon's sales as "accelerated from sequential quarters" during the April 19, 2006 Earnings Conference Call, Dr. Feczko was the executive who responded to explain exactly how the CATIE data "was very positive" for Geodon and how Pfizer's clinical studies showed "much better efficacy at the higher doses." *See* Complaint, Ex. B at No. 14. Only Dr. Feczko can testify as to the basis of his public statements that plaintiffs allege were materially misleading because they did not disclose that sales of Geodon had increased due to Pfizer's off-label promotion of the drug. In addition, Dr. Feczko approved off-label studies which the sales force used to promote Bextra for unapproved indications such as dental pain as well as press releases to investors regarding the off-label studies. *See, e.g.*, Ex. O at Levy-L 10000217517; Ex. R at Sirota-E 10000002145.[2] And after Pfizer paid the $2.3 billion in fines and penalties for the off-label marketing of Bextra, Zyvox, Geodon and Lyrica, Dr. Feczko publicly disclosed that "These were viewed as individual in stances until it dawned on everybody that this was more pervasive." *See* Ex. S.

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[2] Defense counsel's focus on the standard for what is a scientific study misses the mark as the issue is whether the sales force used such studies to promote Bextra off-label, which they did.

Plaintiffs therefore have good cause to take the depositions of the Former Defendants and this Court should reiterate the August 30, 2013 ruling denying defendants' motion to quash and requiring these key witnesses to testify at depositions and to produce documents in this action.

B. Interrogatories from the Derivative Litigation

From the outset of this case, the Court has encouraged the parties to be pragmatic. Consistent with that approach, rather than authorizing full-blown discovery, the Court ordered defendants to produce to plaintiffs everything that they produced to the plaintiffs in a prior derivative case. Among those items were responses to interrogatories and a supplement to those responses. The supplement detailed over a dozen meetings between Pfizer's representatives and the government that concerned the government investigations that are the subject of the disclosures and reserves decisions at issue here. The information set forth in the supplement is highly relevant here, but neither the original responses nor the supplement were signed as required under Fed. R. Civ. P. 33(b). Consistent with the pragmatism this Court has urged, plaintiffs made a simple request of defendants: "will you please provide us with the verification(s) for the Rogs response and supplemental response (Exhibits 504 and 286, respectively)? If they were never verified, please let us know if defendants are willing to provide verifications within the next week."

Defendants responded that the initial responses were signed by counsel (unsworn, despite Fed. R. Civ. P. 33(b)(3)) and that "[t]he supplemental responses were not signed." Still trying to be practical, plaintiffs asked if defendants would provide "a verification from Pfizer, or consent for us to serve the same interrogatory anew, which Pfizer will answer with a verified response? We just need the responses in an admissible form and right now that's more complicated than it need be. A stipulation that they're admissible by us as party-opponent admissions?" Defendants again refused to cooperate and simply invited plaintiffs "to ask the witnesses that you are deposing in this case." The foregoing e-mails are attached hereto as Ex. T.

Well, plaintiffs have now completed the depositions of three lawyers, including the two on whom defendants claim to have relied and the one (Brien O'Connor) who, in the derivative case, was designated the Rule 30(b)(6) witness for the meetings with the government. All of these witnesses disclaimed any knowledge as to who furnished the information set forth in the supplement; two of them disclaimed any knowledge as to the accuracy of the supplemental responses in their entirety; and the third (Brien O'Connor) disclaimed any personal knowledge as to the majority of the time period covered by the supplemental responses. Defendants' argument that, "***plaintiffs asked [O'Connor] virtually nothing about what occurred at any of these meetings***" is simply untrue. Plaintiffs' questions concerning these meetings spanned 11 pages of Mr. O'Connor's deposition. Moreover, the responses span a period that begins July 15, 2004 and ends on August 24, 2009. Yet, the first meeting Mr. O'Connor attended was not until October 15, 2008, which means that he has no personal knowledge of what occurred during the meetings that spanned 51 of the 61 months (over 80%) covered by the responses, so questions about meetings throughout

the majority of this period would have wasted everyone's time. In sum, no deponent has been able to verify the dates and substance of the most important meetings detailed in the supplemental responses. For example, the supplemental responses describe a critical meeting with the government as having taken place on August 17, 2006, yet no attendees are listed and no deponent has been able to confirm whether that meeting really took place in the year 2006 versus 2007. On Monday, October 7, 2013, at 9:00 a.m. PDT, counsel for plaintiffs (Jason A. Forge) and counsel for defendants (Steven Farina and Amanda MacDonald) participated in a 15-minute conference call. Although defendants expressed a willingness to agree that the attorney signature on the original interrogatory responses applied to the supplement, defendants continue to refuse to stipulate to the admissibility of the supplemental responses or to provide valid verifications for them.

Plaintiffs realize that the Court does not generally view interrogatories as productive. Here, though, we have the benefit of the work on responding to interrogatories already being done, ***and*** the benefit of hindsight as to the substantive value of the responses. This is one of those rare situations when interrogatories were useful – very useful. Defendants are just refusing to cooperate with the largely ministerial procedures for rendering admissible those useful responses. In order to avoid any further waste of time and money, plaintiffs respectfully request that the Court enter an order: (1) directing defendants to provide, within five business days, a version of the supplemental responses "in writing under oath" and signed by "[t]he person who makes the answers," as required by Rule 33(b)(3) and (5); or (2) permitting plaintiffs to serve anew the same interrogatories as in the derivative actions and directing defendants to comply with Rule 33(b) in response (because defendants have already completed, albeit in a different case, the work of gathering and summarizing the responsive information, this alternative form of relief will not be burdensome).

II. DEFENDANTS' POSITION

A. Depositions of Former Defendants

Plaintiffs continue to attempt to re-litigate requests that have already been briefed, argued, and denied by the Court. **The Court has denied Plaintiffs' request to depose the Former Defendants twice, once in March 2013 and again in August 2013**. Plaintiffs have been permitted to take an extraordinary number of depositions in this case—33, more than 3 times the presumptive limit imposed by the Federal Rules of Civil Procedure—ten of which remain to be conducted in the closing weeks of fact discovery. There is no basis for the Court to reconsider its prior rulings on this issue; Plaintiffs' **third** request for the same relief should be rejected.[3]

[3] Incredibly, Plaintiffs take the position **yet again** that during a hearing in July, the Court inadvertently vacated its March 8 Order regarding the number of permitted depositions and the required showing for Plaintiffs to expand that number. As they already tried back in August, Plaintiffs pluck two statements out of context from the hearing transcript, during which the Court was addressing certain **document** subpoenas that the Plaintiffs sought to enforce.

In March 2013, Plaintiffs sought permission to depose 46 fact witnesses, including Former Defendants J. Patrick Kelly, David L. Shedlarz, and Joseph Feczko, M.D. Plaintiffs claimed (incorrectly) that, despite having voluntarily dismissed them as defendants from the suit, these three witnesses had unique and relevant information. By Order dated March 8, 2013, the Court denied Plaintiffs' request, ruling that Plaintiffs could depose only those witnesses Pfizer designated as trial witnesses (none of the Former Defendants were so designated), plus 8 to 10 "drug witnesses" (none of the Former Defendants fall into this category). The Court further ruled that, in order to take **any** additional depositions, Plaintiffs would have to show "why the proposed deponent would provide relevant information that had not previously been uncovered through discovery." March 8, 2013 Order at 2.

The Court ruled that these were all of the depositions that Plaintiffs could take without seeking leave of court and without showing the existence of previously unknown information:

> If Plaintiff seeks any depositions beyond those allowed under this order, **Plaintiff must show**, by a "2E" letter, **why the proposed deponent would provide relevant information that had not previously been uncovered through discovery**.

March 8, 2013 Order at 2 (emphases added).

In August 2013, Plaintiffs attempted to make the showing required by the March 8 Order and requested permission to depose 19 additional witnesses, **including these same three Former Defendants**. As to these three, Plaintiffs simply adopted the purported "good cause" showing that they had already submitted to the Court in March. *See* August 29, 2013 Joint Letter, at n.4. The Court issued a written ruling listing the eight additional witnesses for whom depositions would be permitted because Plaintiffs had made a showing of need and relevance. *See* August 30, 2013 Order. The Former Defendants were not on the list. The Court did not grant (and thus denied) Plaintiffs permission to depose the three Former Defendants.

Now, having failed twice already, Plaintiffs attempt to spin the Court's August 30 Order by claiming that the Court "did not grant defendants' motion to quash these depositions." Plaintiffs have it backwards. Under the Court's March 8 Order, it was **Plaintiffs'** burden to establish some new information or compelling need to depose additional witnesses beyond those authorized by the Court. The August 30 Order found that Plaintiffs had met their burden as to eight additional witnesses, but not as to any of the other witnesses Plaintiffs sought to depose. The fact that the

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There were no depositions, and no deposition subpoenas, at issue in the July hearing. *See* 7/8/2013 Joint Letter. The Court already rejected Plaintiffs' effort to interpret the Court's statements as somehow vacating its prior written ruling regarding depositions. It should do so yet again.

Court did not specifically mention the Former Defendants in the text of its ruling does not mean—as Plaintiffs seem to suggest—that the Court somehow missed Plaintiffs' request as to them.

Plaintiffs cite excerpts from a few depositions that have been taken, presumably in an effort to create an appearance that some new information about the Former Defendants has been uncovered in discovery. But Plaintiffs carefully do not actually claim there is new information, because that is untrue. For example:

- As to Mr. Kelly, Plaintiffs cite deposition testimony to assert that he spoke to members of the sales force who marketed and sold Bextra and Geodon, and participated in the Bextra and Lyrica operating plans processes. This is undisputed, and has been known to Plaintiffs from the beginning of this case. Plaintiffs' own Consolidated Class Action Complaint—filed in December 2010—alleges that, "[d]uring his marketing career at Pfizer, Kelly built and managed teams that developed and implemented educational and promotional programs in support of Pfizer medicines." Consol. Class Action Compl. ¶ 29. Plaintiffs further cite to **their own Amended Complaint and its attachments**, including a January 2006 Earnings Conference Call, as evidence that Mr. Kelly should be deposed regarding his statement to investors. By definition, such documents cannot be considered "new information" post-dating this Court's March 2013 Order that would justify Plaintiffs' (third) request to depose Mr. Kelly.

- As to Mr. Shedlarz, Plaintiffs' inability to show any "new" information is exposed by the fact that they disingenuously claim that he was a "direct part of the legal proceedings disclosures process, wherein he was directly involved in addressing KPMG's comments along with defendant Kindler." The document Plaintiffs cite references only the **potential** for Mr. Shedlarz to be involved in that process, and even then, he is one of five names listed. **But Plaintiffs cannot point to a single legal proceedings disclosure at issue in this case that Mr. Shedlarz had any involvement in whatsoever**. Plaintiffs have deposed Pfizer's in-house and outside securities counsel, as well as four KPMG partners, and they have marked dozens of exhibits relating to Pfizer's disclosures. Not one of the deponents, and not one of the exhibits, referenced Mr. Shedlarz as having anything to do with the legal proceedings disclosures at issue. Plaintiffs are grasping at straws. Beyond that, Plaintiffs again cite a few documents that were produced to them long before the Court's March and August orders governing the depositions, and random snippets of depositions in which Mr. Shedlarz was mentioned. There is no "new" information; Plaintiffs want yet another bite at the apple.

- As to Dr. Feczko, Plaintiffs again offer no new information—and the information they attempt to offer is demonstrably false. Plaintiffs have simply cited to Dr. Feczko's deposition testimony in the derivative action (produced to Plaintiffs in October 2011); an exhibit to their own Amended Complaint (filed in April 2011); and documents that were

produced to them long ago (December 2011 and January 2012). Plaintiffs assert that Dr. Feczko was "responsible for the clinical teams marketing of Geodon, Zyvox, and Lyrica," **but the transcript that Plaintiffs cite says the opposite**. Dr. Feczko testified that he was "responsible for [ ] the clinical teams" and "clinical group that *was for marketed products*" (as opposed to, for example, a clinical team for investigational research). *See* Pls.' Ex. Q at 28:7–16. Dr. Feczko did not testify that he had any responsibility for sales or marketing, in fact—in a portion that Plaintiffs chose not to include—Dr. Feczko testified to the contrary: "**My group and my responsibility was in clinical trials, safety reporting, regulatory interactions, the scientific side of the operation. I didn't have interactions with sales. Had very little interaction with marketing teams.**" Ex. U, Feczko Dep. at 309:16–21.

And Plaintiffs' misrepresentations of the record do not end there. Plaintiffs also attach a December 2002 email to suggest that Dr. Feczko approved off-label studies for the sales force to use in promoting Bextra for unapproved indications such as dental pain. Putting aside the fact that Plaintiffs make no connection between an email predating the class period by more than three years and their allegations in this case, **Plaintiffs misrepresent the substance of the email itself**. The publication referenced in the email is a WLF reprint, which has nothing to do with promotional activity. Plaintiffs are well-aware of this distinction, as it has already been explained to them:

> Q. And what -- what did the Washing -- what does the Washington Legal Foundation standards have to do with giving that type of information to the sales force?
>
> A. So the way I understand WLF or Washington Legal Found -- **it's just a -- a legal standard that allows a company to distribute published scientific articles** to physician customers. However, **there's no promotion that can be made from the article.** Ex. V, May 10, 2013 Gavigan Dep., at 30:15–24.

In sum, Plaintiffs do not offer a single piece of newly discovered evidence that justifies overturning two Court Orders—nor can they, as there are no new facts or changed circumstances to consider.

Finally, it has been almost two months since the Court's August 30 Order, during which time the parties have been conducting one or more depositions per week and have been in constant contact. On August 23, Plaintiffs issued subpoenas for the Former Defendants, and on September 6, Defendants issued timely objections, noting the fact that the Court's prior orders rendered those subpoenas unauthorized and invalid. Now, just over six weeks before the end of fact discovery, Plaintiffs are proposing to raise the issue yet again.

The Court has been more than generous in allowing Plaintiffs to take depositions—many of which, in truth, have been totally irrelevant to the issues in this securities case. Plaintiffs have already taken 23 depositions, and are scheduled to take 10 more, for a total of 33, more than three times the presumptive limit of Rule 30(a). It is undisputed that Mr. Kelly, Mr. Shedlarz, and Dr. Feczko did not draft or sign any of the disclosures at issue in this case—which is why they were dropped as named defendants in the first place—and there is absolutely no new information that has been uncovered in discovery about any of them. The Court should adhere to its two prior rulings on these witnesses, and deny (for the third time) Plaintiffs' request to depose them.

B. Interrogatories from the Derivative Litigation

In September 2010, during the *In re Pfizer Inc. Shareholder Derivative Litigation* before Judge Rakoff (the *Klein* case), Pfizer's counsel in that case provided the *Klein* plaintiffs with supplemental interrogatory responses listing certain meetings between Pfizer and the government. The original interrogatory responses were signed by counsel, and these responses were a supplement. The *Klein* case settled in May 2011, and to our knowledge the *Klein* plaintiffs never complained about any lack of signature or verification of the supplemental responses, because everyone understood the limited purpose they served: as stated on their face, the supplemental responses were provided in *Klein* "as an accommodation to provide additional information to Plaintiffs," and expressly were not "a verbatim, exhaustive account" of Pfizer meetings with the government. *See* Ex. W, Excerpted Responses at 1, 2. For literally two years, Plaintiffs in this case have had a copy of these supplemental responses. They have marked them in depositions since May 2013. Yet they have never raised any issue about them until now, on the eve of the close of discovery. They now demand that someone at Pfizer provide a back-dated verification of the *Klein* responses that were prepared by counsel in the context of an entirely different—and long settled—litigation.

Plaintiffs cite no legal authority that would support compelling a party to provide years-after-the-fact verification of discovery responses from a prior case. That is because there is none. Verification would not be, as Plaintiffs suggest, a "largely ministerial procedure." The supplemental responses are 58 pages long, and even if Pfizer could identify one or more individuals who could provide a verification now, such an effort would require a complete re-do of the work that produced these supplemental responses years ago. To avoid this time-wasting dispute, however, during the meet and confer process, we offered to stipulate (to the extent it even matters) that Pfizer would deem these supplemental responses as having been signed by Pfizer's counsel in *Klein*, just like the original responses had been. Plaintiffs refused, insisting that Pfizer provide a stipulation as to the "admissibility" of the responses. As we explained, the question of whether responses to interrogatories (which include a number of objections) in one case are admissible at trial in a different, subsequent case is an entirely different matter, which would be addressed only if and when Plaintiffs sought to admit the *Klein* responses.

Finally, as a practical matter, Plaintiffs have been provided full discovery of Pfizer's meetings with the government that are the subject of the supplemental responses. Pfizer has produced hundreds of pages of documents exchanged with the government (including lengthy slide decks presented at many of the meetings at issue). Plaintiffs also have had the opportunity to ask about the meetings and the substance of the supplemental responses in the deposition of Brien O'Connor, of Ropes & Gray. Yet when Plaintiffs deposed Mr. O'Connor, who was Pfizer's lead counsel in the negotiations with the government that ultimately resulted in the settlement of the matters, and who attended 42 of the meetings listed in the supplemental responses, **Plaintiffs asked him virtually nothing about what occurred at any of these meetings**. Plaintiffs' questioning of Mr. O'Connor spanned more than 175 pages of testimony, and even by their own calculation, **Plaintiffs spent more than 90% of the deposition ignoring non-privileged factual information** about the meetings which led to the resolution of the government investigations. In their letter above, Plaintiffs insist that "no deponent has been able to verify the dates and substance of the most important meetings," but they entirely ignore (yet again) the fact that Mr. O'Connor was present during the key meetings when a resolution was negotiated with the government. In fact, the supplemental responses reflect that Mr. O'Connor was present at 42 meetings between October 15, 2008 and August 24, 2009. Of those 42 meetings, Plaintiffs mentioned only 7 during the deposition. This is completely at odds with Plaintiffs' purported dire need to have the *Klein* supplemental responses about those meetings verified.

For these same reasons, Plaintiffs' alternative request to re-serve the *Klein* interrogatories in this case is untimely and unjustified. Plaintiffs agreed (indeed, they moved the Court) to accept the discovery that was provided in *Klein* as the document production in this case. Now, two years after receiving that discovery, and a month before t he fact discovery cutoff, they claim that some interrogatory responses in *Klein* are insufficient. Local Rule 33.3(b) discourages such interrogatories, providing that they should "only be served . . . if they are a more practical method of obtaining the information sought than a request for production or a deposition." Plaintiffs cannot meet that standard, having had a full and fair opportunity to review and inquire about meetings between Pfizer and the government through much more useful discovery devices—*i.e.*, document production and depositions. Their request to serve interrogatories on this same subject should be denied.

Respectfully,

HENRY ROSEN
ROBBINS GELLER RUDMAN & DOWD

STEVEN M. FARINA
WILLIAMS & CONNOLLY

Judge wrote:

"The depositions requested are authorized, and shall be the last to be taken by plaintiffs. Defendants must swear to the interrogatory answers. R. 33 so requires.

10-31-13
Alvin K. Hellerstein"