UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARY K. JONES, et al.,

Plaintiffs,

v. 10 CV 3864 (AKH)

PFIZER, INC., et al.,

Defendants.

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New York, N.Y.
March 26, 2012
4:00 p.m.

Before:

HON. ALVIN K. HELLERSTEIN

District Judge

APPEARANCES

ROBBINS GELLER RUDMAN & DOWD LLP
Attorneys for Plaintiffs
BY: WILLOW RADCLIFFE, ESQ.

CAHILL GORDON & REINDEL LLP
Attorneys for Defendants
BY: CHARLES A. GILMAN, ESQ.

Also Present: Amy D. Lamberti, Esq.
Bart Friedman, Esq.
Cahill Gordon & Reindel LLP

(In open court)

THE CLERK: Jones v. Pfizer. Counsel please state your appearances for the record.

MS. RADCLIFFE: Good afternoon, your Honor. Willow Radcliffe from Robbins Geller for the plaintiff.

MR. ROSEN: Good afternoon, your Honor. Henry Rosen from Robbins Geller for the plaintiff.

MR. GILMAN: Good afternoon, your Honor. Charles Gilman, Cahill Gordon & Reindel, for all defendants. With me from my offices, Amy Lamberti.

THE COURT: How do you do.

These are motions for certification, for class certification. Let me talk with Mr. Gilman first.

The problem with the class certification, in your opinion, Mr. Gilman, is the issue of typicality more than anything else, I think.

MR. GILMAN: We have, I believe, three concerns: One, neither of the two proposed plaintiffs are typical or adequate.

THE COURT: That's what I said, typicality. And the second?

MR. GILMAN: The second is, the proposed class is overbroad in terms of securities, membership, and duration. And, third, plaintiffs have not sustained their burden of demonstrating the application of the rebuttable presumption of fraud on the market, which requires proof of market efficiency.

I could address the typicality issue first if your Honor would wish me to.

THE COURT: Let's do that.

MR. GILMAN: The Stichting Philips pension fund plaintiff is a very large Dutch pension fund. It is an active aggressive in-and-out trader. It bought and sold on 77 occasions during the class period. It claims a loss approaching $20 million.

THE COURT: Is that netting?

MR. GILMAN: Yes. It claims to have a net loss of $20 million. And that certainly is sufficient. It has the wherewithal and the self-interest to prosecute an individual action. And it should be required to --

THE COURT: I asked that because presumably if the buys were the result of inflation, the sales also were the benefit of inflation.

MR. GILMAN: Exactly. And that's why we said, second point, the membership of the class is overbroad. In-and-out purchasers, those who both bought and sold during the class period, should be out. Your Honor questioned counsel --

THE COURT: Well, on the other hand, the netting shows that, if they are truly net, that is their loss. If you buy and you sell and the price is improperly inflated, you do suffer a loss because of that inflation.

MR. GILMAN: If you buy during the class period,

arguably you pay too much. If you sell during the class period, arguably you receive too much.

THE COURT: Right. So the netting adjusts it.

MR. GILMAN: Exactly. And that's why the Second Circuit, in *Flag Telecom*, suggests that in-and-out traders, those who both bought and sold during the period of alleged nondisclosure, be excluded from the class.

In addition, your Honor, we would urge you to exclude high-frequency traders. 82 percent of Pfizer common shares are held by institutions, and a large, substantial percentage of the volume daily is high frequency, millisecond intra-day trading. The fraud on the market theory doesn't apply to those traders. There is no presumption of reliance. And because they have no damages, having bought and sold during an alleged period of nondisclosure, they should be excluded.

At page 18 of the November 3, 2010 transcript, you asked Mr. Rosen pointblank, "Those who bought paid too much. Those who sold got too much. No loss causation?" He said: "Absolutely correct." That's page 18 of the November 3, 2010 transcript of proceedings. And that transcript appears at tab 12 of Ms. Radcliffe's affidavit. So that reads that in-and-out traders should be excluded.

But let me go back to the pension fund.

THE COURT: Are high-frequency traders also in-and-out traders?

MR. GILMAN: Yes. In-and-out traders may take a month or two or even a year in a three-year class to be in and out. High frequency are in and out within seconds. But they both should be excluded.

Stichting filed a materially false certification, which your Honor relied upon and commented upon --

THE COURT: Can I address this point separately, Mr. Gilman.

MR. GILMAN: Certainly.

THE COURT: So let me get Ms. Radcliffe's position on this.

MS. RADCLIFFE: Your Honor, we are not seeking a class of purely in-and-out traders. We put in the class definition that we are only seeking a class of purchasers who were damaged. If they bought all of their stock at inflated prices and then sold during the class period at inflated prices, they would not be damaged because they are in-and-out traders.

THE COURT: What is an in-and-out trader? Suppose you buy and eight months later you sell, within the class period obviously. Are you an in-and-out trader?

MR. GILMAN: Yes.

MS. RADCLIFFE: Yes, your Honor. Yes, you would be. And that's no separate carve-out needed for high-frequency traders.

THE COURT: So how can you be disagreeing, then?

MR. GILMAN: We are not. She's just conceded the point.

MS. RADCLIFFE: We're not. And we believe the class definition proposed satisfies that concern. It requires the purchasers to be damaged.

THE COURT: So if I buy a share of stock at the beginning of the damaged period, must I hold it through the rest of the class period in order to qualify?

MS. RADCLIFFE: Well, it depends, your Honor. If you sold part of those shares -- if you bought a hundred shares on day one and you sold 20 shares on day 15, you would still have damages with respect to the 80 remaining shares that you have.

THE COURT: So the answer is, you can be typical and you can remain qualified for class status to the extent that there is a balance of shares that you bought that you never sold.

MS. RADCLIFFE: Correct. And that the damages presented at the lead plaintiff stage and alleged here are approximately $20 million. Mr. Gilman is correct.

THE COURT: So, in other words, your $22 million, or $20 million, whatever it is, is the result of buys in excess of sells.

MS. RADCLIFFE: Yes. It's a first in, first out analysis.

THE COURT: But you can create a condition where you

sell in and out and, at the end of the day, you result with a net plus, but that doesn't necessarily mean you're not an in-and-out trader for everything.

MS. RADCLIFFE: Your Honor, and that's why this goes to the issue of damages. How much were you damaged? And that's going to be presented by experts, whether it's at trial or at a different stage in this litigation.

THE COURT: There's another point that troubles me. I already focused on it with Mr. Gilman. The in-and-out trader is not looking so much at the fundamental value of the share as the, how do they call it -- they're looking at the secular line of price movement over a period of time, and in classic in-and-out trading, if it's in a certain volume and a certain line of growth or decline, it becomes eligible in-and-out trading. And so that kind of trader is oblivious to the true value of a company and can't really be fooled by a misrepresentation in that perspective.

MS. RADCLIFFE: Well, your Honor, under basic --

THE COURT: What's that kind of trader called, Mr. Gilman?

MR. GILMAN: They're arbitrage.

THE COURT: No, not arbitrage. There's another word for it, but I can't remember now.

MR. GILMAN: They're technical traders, your Honor.

THE COURT: Yes. Yes.

MS. RADCLIFFE: But here, your Honor, under *Basic v. Levinson*, investors are entitled to rely on the price of the security. We alleged the price was inflated, inflated by the fraud, and that to the extent that the price is inflated, that's going to affect the projection of that stock. And those investors are also damaged.

THE COURT: How do you define the class? Including people who might have bought and sold within the class period?

MS. RADCLIFFE: We define the class as those purchasers of stock and options that were damaged. And damages are going to be determined at a different stage of this litigation. All of the investors relied on the price of Pfizer securities.

THE COURT: You don't have the exclusion for in-and-out.

MS. RADCLIFFE: Those in-and-out traders, purely in-and-out traders, would not be damaged.

THE COURT: How do you define an in-and-out trader? I think we're arguing in a circular fashion.

MS. RADCLIFFE: Exactly. If you wanted to make a precise definition to exclude those in-and-out traders beyond your damage thereby, it would be those -- and this is off the top of my head -- but it would be those who purchased during the class period and then sold the entirety of their shares before the corrective disclosure on January 26, 2009.

THE COURT: You don't agree with that, do you, Mr. Gilman? Specifically the aspect of the entirety.

MR. GILMAN: No, I don't.

THE COURT: Is there any case law that binds me on this issue, Mr. Gilman?

MR. GILMAN: I believe, your Honor, if you look at the Second Circuit's decision in *Flag Telecom*, which is reported at 574 F.3d 29, and the relevant pages, I believe, are 37 to 41, there, the Second Circuit counsels that in-and-out traders would be excluded from a class definition because they cannot demonstrate loss causation, as Ms. Radcliffe has conceded.

MS. RADCLIFFE: But, your Honor, if I may, that case doesn't specify how you then correlate that to a translation into a class definition.

THE COURT: Well, in-and-out trading is a difficult concept to deal with.

MS. RADCLIFFE: And that's why we believe our proposed class definition, which requires that the purchasers have been damaged --

THE COURT: Thereby.

MS. RADCLIFFE: -- satisfies it.

THE COURT: Thereby. Right.

MR. GILMAN: Your Honor, at page 18 of the November 3, 2010 transcript of proceedings --

THE COURT: I remember what you told me I said.

MR. GILMAN: Yes.

THE COURT: That doesn't mean I'm always right.

MR. GILMAN: You were right on that occasion. Spot on.

THE COURT: My feeling, Mr. Gilman, is that at this point in the case, I should accept the definition put forward by Ms. Radcliffe.

I think it's open to you on depositions to further explore this issue. There can be a type of trading that sometimes is technical and sometimes is fundamental. The same investor could look at one point to lighten his position by a change in the market and at another time buys because he thinks there is a strong fundamental value which will cause the stocks to appreciate further. At this stage, it's not appropriate for me to go that far into the merits of the case to decide this issue. So from the point of view of the proof of typicality, I'm looking not only for a classic similarity between the class representative and every member of the class; I'm really asking if there's sufficient similarity in the claim to suggest that counsel will pursue the claim with zealous vigor. And I think that is satisfied. But we can examine for a variety of certifications at every step along the way. For the moment I'm accepting typicality on that issue.

MR. GILMAN: Your Honor, there is one aspect of the class definition that Ms. Radcliffe went through rather

quickly. She defined the class as those who purchased common shares and options.

THE COURT: I knew you'd stop me on that.

MR. GILMAN: There's no reference to options in the complaint. Neither of the plaintiffs ever purchased any options.

THE COURT: I think that's a totally different consideration.

MR. GILMAN: Of course it is.

THE COURT: And if you're going to represent the class of stockholders, I won't allow you to represent the class of options holders as well, unless you show me something different.

MS. RADCLIFFE: Your Honor, if I can address it. First of all, the complaint --

THE COURT: No, we're not going to do that now. There are more serious issues, and Mr. Gilman will have to get into that.

MR. GILMAN: Your Honor, on the same plaintiff, Stichting, they filed a false certification on which this Court relied in appointing them as lead plaintiff. That certification falsely stated they had 23 transactions aggregating almost one quarter million common shares of Pfizer. That wasn't true. They didn't buy any of it. That was that totality, which put them over the top in their alleged net

loss, which presumptively caused them to be appointed lead plaintiff. Secondly, they refused, even today --

THE COURT: What's the correct number?

MR. GILMAN: The correct number is 241,627 shares less than they certified to this Court. They have filed an amended certification.

THE COURT: So give me the correct number. What did they certify?

MR. GILMAN: I don't have the aggregate number in front of me. The difference between the false initial certification and the second one is 241,627 shares.

THE COURT: Give me the numbers.

MS. RADCLIFFE: It's a little over 2.1 million shares, your Honor.

THE COURT: That have been served by --

MS. RADCLIFFE: That is in the amended certification, yes.

THE COURT: And as you looked into it, you took off 241,000, which leaves you with approximately 1.7 million?

MS. RADCLIFFE: No, no, no. The 2.1 is the revised figure, your Honor. I'm sorry. We have -- and I'll verify that -- but basically, using a Pfizer analysis which was used for the latest plaintiffs --

THE COURT: So you're saddled with about 2 1/2 million dollars. You took off a quarter million and you gave out about

2.1 million.

MR. GILMAN: That's close enough. It's not dollars, it's shares.

THE COURT: It's shares, I understand.

MS. RADCLIFFE: The dollars are, roughly 19.6 million are claimed under FICO analysis.

THE COURT: So let's say you came in with 2 million shares, Mr. Gilman. What's the next highest number?

MR. GILMAN: I think the Oklahoma Firefighters and Union Asset Management claim to have a larger loss than that.

THE COURT: By not very much.

MR. GILMAN: Not very much.

THE COURT: And they're not complaining, are they?

MR. GILMAN: I don't know. I don't remember them.

THE COURT: I haven't heard any. I haven't received any complaints. I don't think that's a ground in counting these shares when you have trading. I'm not going to hold that against them.

MR. GILMAN: OK. Well, your Honor, if I could tie it together. After -- as we took the deposition --

THE COURT: The one point that really bothered me on this, Mr. Gilman, was the allegation, which I'd like to explore, that there was a very cozy relationship between Ms. Radcliffe's law firm and the Stichting pension fund.

MR. GILMAN: The monitoring agreement.

THE COURT: Which in effect gave carte blanche to the law firm to the lawsuit. Their job is to monitor situations where there is apparently fraud causing the pension fund to buy shares that, if it knew about things, it wouldn't have bought, and then the law firm has an agreement that where they uncover that kind of thing they get the deal.

MR. GILMAN: And they do all of that work for free. And Judge Chin found that to be troubling.

THE COURT: Judge Rakoff.

MR. GILMAN: Well, Judge Chin in the General Electric case said, "This gives me some pause." Judge Rakoff found it to be disqualifying, in terms of a lead plaintiff role and a lead counsel role for Robbins Geller and another one of their pension fund clients.

The problem is this. It ties together. We just went over the 241,000 shares that were in the certification and then disappeared. The monitoring agreement requires Stichting to give ten years' financial information to Robbins Geller. They're in possession of all of the trading information of this pension fund. And nevertheless, a false, and materially false, certification was filed.

Nevertheless, a 30(b)(6) deponent showed up, and he said, I have no idea why Stichting bought anything that it bought, I have no idea why it sold anything it sold.

THE COURT: So let me ask you this. If the pension

fund relies on an investment advisor to cause it to buy or sell various securities, does the pension fund lose its ability to sue?

MR. GILMAN: Of course not.

THE COURT: Then what's the difference? And as to their not producing that investment advisor for deposition, you could have subpoenaed them very easily.

MR. GILMAN: No. They're in the Netherlands and I was told by Mr. Rosen they will not appear absent the Hague Convention. I have no time to do that. And it's not my burden. It is their burden.

THE COURT: Mr. Gilman, how much burden is it to write a letter to me and get Ms. Radcliffe to put her position on it and comply with my Rule 2(e), get me the rule, which I do within 24 hours?

MR. GILMAN: We thought that was the purpose of today, your Honor. It's plaintiff's burden to be forthright.

THE COURT: No, I don't think so.

MR. GILMAN: It's plaintiff's burden to produce a 30(b)(6) witness.

THE COURT: Had you asked me, I would have required it. But you didn't ask me. And at this point in time, it's a point that I don't really think is material on this.

MR. GILMAN: Well, your Honor, Judge Rakoff, in this instance, held an evidentiary hearing, at which the pension

fund testified in open court about the monitoring relationship. We would like that.

THE COURT: Not necessarily as an evidentiary hearing. If you want to take it as a deposition, do it.

MR. GILMAN: But they refuse to produce.

THE COURT: So you get him. They'll come here.

MR. GILMAN: May we defer ruling on class certification --

THE COURT: No.

MR. GILMAN: -- so I may have this discovery?

THE COURT: No, but if you get some beautiful point you can always move to decertify.

MR. GILMAN: All right.

THE COURT: The rule of decertification is a provisional rule. It could let the judge reexamine it along the way.

I hope you won't ask me too many times.

MR. GILMAN: No, certainly.

Would your Honor wish to hear of the adequacy and typicality of Mary Jones, the only other --

THE COURT: Not yet. But I would like to have Ms. Radcliffe's explanation for the monitoring agreement.

MS. RADCLIFFE: Yes. I would actually like to clarify several points. It appears that we're having several issues combined together.

THE COURT: That happens here, Ms. Radcliffe.

MS. RADCLIFFE: It does. First of all, at the lead plaintiff stage, we still believe we have the largest losses of $19.6 million versus the other defendants. But putting that aside --

THE COURT: I'm not really concerned about that. If the representative of Oklahoma were to come in here, maybe I would have been concerned. But I'm not concerned.

MR. GILMAN: I think they're we are.

A VOICE: Your Honor, we are here. We represent the Oklahoma buyers.

THE COURT: Did you make a motion?

A VOICE: We did not make a motion.

THE COURT: I'm not interested.

MS. RADCLIFFE: Your Honor, putting that aside, defendants were aware of the monitoring agreement during the deposition of the Rule 30(b)(6). They had an opportunity to ask about the monitoring agreement. They apparently didn't elicit any answers.

THE COURT: I'm not interested in the strategy. I'm interested in what you have to say about the merits of the arrangement.

MS. RADCLIFFE: Certainly. The monitoring agreement allows Stichting to either decide to not bring a claim, to bring it with another law firm, to decide that they will bring

the claim with that. They are a lead plaintiff with one case. They are a 13.8 billion euro fund. They have a board of trustees. They have internal counsel. In *Ironworkers*, Judge Rakoff's matter, of which it was a lead plaintiff's case, it was not class certification --

THE COURT: But your client is the lead plaintiff.

MS. RADCLIFFE: Correct. -- he specifically said he wasn't addressing Rule 23.

THE COURT: I read Rakoff's decision.

MS. RADCLIFFE: He also recently, as recently as last month, issued another opinion regarding a monitoring agreement. And actually, this is a case where the client, whom he appointed as lead counsel, had a monitoring agreement with our firm. He again expressed his concerns over monitoring agreements. But he then explained that one of his concerns was the bringing of strike suits, and that because the amended complaint was detailed, he didn't have that concern in this case.

THE COURT: He had a number of concerns, including the concern that Congress expressed in the PLRA for law firm-driven class litigation.

MS. RADCLIFFE: Yes, your Honor, he did. And in the *Ironworkers* case, there is a declaration submitted by esteemed expert Geoffrey Hazard.

THE COURT: I read Professor Hazard's position as

expressed in Judge Rakoff's decision. I don't really enjoy these declarations of people who teach ethics and lend themselves out to be advocates for a cause. In the cases where I've seen them, I've found them less than useful.

MS. RADCLIFFE: I understand that.

THE COURT: And I hope that you won't, either of you, do that in the case. If I need an expert of a professional ethics nature to guide me, I know where to reach them. When they become advocates for cause, they lose out on their ethics.

MS. RADCLIFFE: And the question here is whether the --

THE COURT: All right. I think I've had enough on this issue.

Under *Niesig v. Team I*, 76 N.Y.2d 363, decided in 1990, Judge Kaye made the observation that the court should be interested in observance of ethical concerns and professional ethical standards when it affects the integrity of the litigation. I don't see these arrangements as affecting the integrity of this lawsuit. The rubric comes up in the issue of whether counsel is sufficiently motivated and sufficiently free to advocate their cause zealously. I think Ms. Radcliffe is, notwithstanding the monitoring concerns.

I do share my colleague's concerns about these ethical considerations and the issue whether it's the lawyer merely fomenting the lawsuit or the client. But I don't think I need

to resolve it in this case. In fact, I do not wish to resolve it in this case. There is sufficient popularity in these kinds of concerns as I observe it to lend themselves to some study by the bar association, but I have no ability to organize one here. And there are a number of complexities that we encountered. But as far as the integrity of the lawsuit, I don't really have concern because of this issue. So that objection is overruled as well.

I think that takes up the whole case of Stichting, does it not, Mr. Gilman?

MR. GILMAN: There is one point, your Honor. And that is that because Stichting outplaced all of its trading to a Dutch investment advisor --

THE COURT: Not trading but --

MR. GILMAN: Investment decisions.

THE COURT: Yes, investment decisions.

MR. GILMAN: -- it doesn't know why it bought and what it bought, when it bought.

THE COURT: I just notice that, in an efficient market, if there is ever such a thing, that it can rely on an investment advisor, and if an investment advisor is fooled based on materially misleading statements in a prospectus or registration statement or other SEC filing, it has a right to sue.

MR. GILMAN: But we have no evidence on this motion,

and it is plaintiff's burden to present some evidence on this motion of that. The investment advisor has not put in a declaration, has refused to appear for deposition, and has not imported to the client that which it knew so the client, under Rule 30(b)(6), could come in and testify. The only piece of paper they tendered, this schedule, is not a contemporaneous business record. It was generated solely for purposes of this litigation. It is hearsay under 803(6)(D). It is not a regularly kept record of any kind and is not authenticated by the sole proponent they produced, who doesn't know anything. And it is their burden.

THE COURT: Ms. Radcliffe.

MS. RADCLIFFE: Yes, your Honor. First, with respect to the investment manager, when the lead plaintiff's deposition was first noticed by defendants, there was an objection served on defendants, and it specifically indicated that the lead plaintiff would not be testifying as to information --

THE COURT: Tell me about the merits. Don't tell me about the strategy, please.

MS. RADCLIFFE: Thank you, your Honor. With respect to the database -- and this is a database of which Stichting derived a trade in Pfizer securities -- there is sufficient --

THE COURT: What do you mean by "a database"?

MS. RADCLIFFE: It's a database kept by the custodian bank, State Street, of which Stichting has access to. It uses

that database in the ordinary course of business.

THE COURT: The custodian keeps it?

MS. RADCLIFFE: It's a custodial bank.

THE COURT: What's the business of the custodial bank? The custodial bank holds the assets of the pension plan.

MS. RADCLIFFE: And it records in the database the transaction in the securities, in this case Pfizer securities. So as Mr. Camp, the Rule 30(b)(6) designee, testified, any time they want to look up when they purchased and what they purchased, they go to the database.

THE COURT: That doesn't tell me very much, Ms. Radcliffe. That doesn't tell me why stock is bought.

MS. RADCLIFFE: Well, your Honor --

THE COURT: I don't need an after-the-fact papering over of the record. The issue is whether or not there was a material representation on anyone who had buying power for the plaintiff.

MS. RADCLIFFE: The question of class cert, your Honor, is not whether or not plaintiff needs to prove there was a material misrepresentation or omission to the plaintiff. That's not the issue at --

THE COURT: What is the issue?

MS. RADCLIFFE: It is whether or not the market for Pfizer stock was insufficient and whether or not there was a fraud on the market alleged. And that's what is alleged.

THE COURT: Have you ever read Professor Kahneman on the efficient market?

MS. RADCLIFFE: No, your Honor, I have not.

THE COURT: So he asks a question. If the market is efficient, why is one seller selling, conceding he'll make a profit, and another party, the buyer, buying at the very same price, thinking he'll make a profit? How could that definition of the willing buyer and willing seller be consistent with an efficient market?

MS. RADCLIFFE: Well, your Honor, I am not an expert --

THE COURT: Why should one sell, another one buy, same price?

MS. RADCLIFFE: But there's still --

THE COURT: I've thought a lot about the efficiency of markets and the disruptions in markets, and I'm not a big fan of it. The point that you have to prove is that there was a mix of information that fooled whoever it was that had buying power, or your client. If you prove that, you prove misrepresentation. There is this notion of the efficient market and the effect of misrepresentations on the mix of information that creates a price. But I'm going to be looking for testimony. At the present time, I rule that there is sufficient evidence of typicality. But you've got to produce those fellows and the investment advisor. Understand?

MS. RADCLIFFE: We'll do our best to help facilitate it, your Honor.

THE COURT: In New York.

MS. RADCLIFFE: We'll do our best to help facilitate it.

THE COURT: I'll tell you what. If it doesn't work, if you don't have the same persuasive power on them as you do with me, I'm going to be much more tempted to grant Mr. Gilman's objection.

MS. RADCLIFFE: Yes, your Honor.

THE COURT: You don't play games in my court, Ms. Radcliffe. I'm not interested in tit for tat. I'm interested in getting to the merits of the case, efficiently and quickly. I'd rather have an efficient courtroom than an efficient market.

MS. RADCLIFFE: Yes, your Honor.

All right. So the motion, the objections as to class certification with regard to Stichting are overruled. But, as I observed before, certification is a provisional rule and can be overturned at any time. And I think it's also appealable. If Mr. Gilman wants to test out his theories in the court of appeals, he can. It will not slow down this case, because that issue may go up, but the issue of merits and substance will be with me.

MR. GILMAN: Would your Honor like me to address Mary

Jones?

THE COURT: Yes, sir.

MR. GILMAN: Mary Jones alleged --

THE COURT: You're scoring points, Mr. Gilman. Don't be discouraged.

MR. GILMAN: Mary Jones alleges that she is 86 years old, she purchased 500 shares --

THE COURT: I'm finding 86 to be a younger age than I thought.

MR. GILMAN: Your Honor, I aspire to it.

She purchased 500 shares in one transaction on September 18, 2007. The class period, your Honor, is proposed to be January 19, 2006 through January 23, 2009. She purchases September 18, 2007. She has no interest whatsoever in the adequacy, in the accuracy of disclosures made after her date of purchase. That's 16 months of the class that she has no interest in representing, because anything that happened after she bought wasn't why she bought.

Second, your Honor, she isn't the purchaser. She didn't even buy those shares. Those shares were purchased by a trust, for which she is trustee, the beneficiary of which is her son. Your Honor, she is a fiduciary.

THE COURT: She is not the owner of the shares. She is the trustee.

MR. GILMAN: Exactly.

THE COURT: Is she the trustee?

MR. GILMAN: She is the trustee and grantor of the trust.

THE COURT: So she is the owner of the shares. As fiduciary.

MR. GILMAN: No. The trust, the trust is the owner of the shares.

THE COURT: Depends on the state, doesn't it, Mr. Gilman?

MR. GILMAN: This is Arkansas, your Honor.

THE COURT: I'm not a specialist in Arkansas law.

MR. GILMAN: Ms. Radcliffe is suggesting under Rule 17 --

THE COURT: What is Arkansas law on that point?

MR. GILMAN: We are informed that under Arkansas law, the grantor can sue or the trust can sue. That's not my point. And my point isn't a Rule 17 real party in interest, which is the only response I'm hearing. My point is, she is an 86-year-old fiduciary, and she should not be taking on conflicting fiduciary duties to an absentee class.

THE COURT: She may be praying she lives to 120. I don't know.

MR. GILMAN: That's not the point.

THE COURT: Why should I think that she's going to die before the case is over?

MR. GILMAN: A fiduciary can't have two masters, your Honor. It puts her in a position of conflict. That is why she's not adequate. I'm not saying she is not a wonderful person.

THE COURT: With whom is she conflicted?

MR. GILMAN: The beneficiaries of the trust on the one hand and the class members on the other.

THE COURT: Why is she conflicting with the beneficiary?

MR. GILMAN: Because she may have to extend trust funds in the prosecution of this action, for the benefit of other people.

THE COURT: Like every plaintiff.

MR. GILMAN: Every plaintiff isn't a fiduciary trustee, your Honor.

THE COURT: No. It's the same thing. The same thing. A plaintiff, whether a fiduciary or beneficiary, will make a calculation, or should be making a calculation, at every moment of the lawsuit: Will the expenses of the case exceed the recovery, or be so much as not to justify further expenditures? That's the same calculation that a lead plaintiff should make for the class, the same calculation that a grantor should make for a beneficiary. I don't see the conflict.

MR. GILMAN: Your Honor, I think that any

individual --

THE COURT: You've got to do this for defendants, Mr. Gilman. At every point in time, you've got to ask yourself, if I can get out of this lawsuit for X dollars, does it justify my paying Y dollars in defense. If you're, as a fiduciary for your client, not making that calculation --

MR. GILMAN: I only have one client, your Honor. She'll be taking on two. She has the beneficiary of the trust --

THE COURT: But they're aligned. They're aliped.

MR. GILMAN: Not if you're talking about the expenditure of trust funds.

THE COURT: They're aligned. And she's got a contingency arrangement, doesn't she? Which makes it a little easier for her.

I don't think that's a ground. Let's focus, Ms. Radcliffe, on the fact that she bought about a fifth of the way into the class.

MS. RADCLIFFE: Certainly, your Honor. Defendants cite absolutely no cases --

THE COURT: Actually about a quarter of the way into the class.

MS. RADCLIFFE: Sorry. Defendants provide the Court with no citations as to why this would create a conflict.

THE COURT: Well, it's logical. Mr. Gilman's argument

is logical. She was interested in the class period up to September 18, 2007 so she can get a recovery. She wouldn't want to spend a dollar to go and prove falsity in the period following that.

MS. RADCLIFFE: But the issue on typicality is whether or not the allegations and the claims derive from the same general course of conduct. It is the same general course of conduct --

THE COURT: So it is a type of misrepresentation that was repeated throughout the class period that's typicality.

MS. RADCLIFFE: That's right, your Honor.

THE COURT: That sounds like a good argument to me, Mr. Gilman.

MR. GILMAN: But we have 16 different representations that evolved over time as the government investigation evolved overtime.

THE COURT: It's a pattern. It's a pattern. If she proves that they lied up through September 18, 2007, she is pretty far along.

So I overrule your objection as to Ms. Jones. I rule that certification has been shown. I certify the class for the period January 19, 2006 to January 23, 2009, adopting the definition proposed by Ms. Radcliffe.

Do I have an order?

MS. RADCLIFFE: We submitted a proposed order to you,

your Honor, and I have a copy for you, your Honor.

THE COURT: I have it right in front of me. It suddenly appeared.

Have you looked at the order form, Mr. Gilman?

MR. GILMAN: Is this the amended one or the one that was filed with the motion?

MS. RADCLIFFE: I'm not sure which one your Honor has before you.

THE COURT: Why don't I take yours after Ms. Gilman looks at it.

MS. RADCLIFFE: I think he just wants to clarify which one and I can give you a copy of what I gave him.

MR. GILMAN: Your Honor, this includes options. Perhaps we can confer and submit something, different forms, what your Honor has instructed.

MS. RADCLIFFE: And, your Honor, I could address the options issue briefly.

THE COURT: I've ruled in the past that an options holder has a different interest than a securities holder. There's a strike price involved. There's a greater degree of trading involved. There's a greater degree of leveraging involved. There are different considerations. And I don't want to get involved in an options case unless one is brought. And nobody has brought it.

MS. RADCLIFFE: Yes, your Honor. We'll correct the

proposed order to remove that.

THE COURT: OK. So it's now Monday. How about Wednesday? Give it to me by Wednesday?

MR. GILMAN: Certainly.

MS. RADCLIFFE: Yes, your Honor.

THE COURT: Great. So it will be a consent to inform, reserving all objections made.

MR. GILMAN: Thank you, your Honor.

THE COURT: OK. So we're finished with the motions, right?

MS. RADCLIFFE: Yes, your Honor.

THE COURT: Now, you've made a motion to seal some records?

MS. RADCLIFFE: I think both parties have made motions to seal some orders, your Honor.

THE COURT: I'll take yours first.

MS. RADCLIFFE: OK.

THE COURT: Why do you need sealing?

MS. RADCLIFFE: There's some confidential business information with respect to certain of the 15 documents that shows competitive information.

THE COURT: What's competitive?

MS. RADCLIFFE: And it's proprietary business information.

THE COURT: So why did you give it to me in the first

instance? Why is it necessary?

MS. RADCLIFFE: Because the defendants challenged whether or not Stichting made trades of the securities and on what dates, and the records reflect those.

THE COURT: Then I'm not going to seal them. Plaintiff's motion to seal is denied.

MS. RADCLIFFE: That's one of the documents. Another of the documents is the monitoring agreement which is at issue here. There's a provision in the monitoring agreement that we believe is proprietary. It regards monitoring certain claims.

THE COURT: It affects your law firm?

MS. RADCLIFFE: Yes, your Honor.

THE COURT: Motion denied.

MS. RADCLIFFE: And with respect to the Jones deposition and exhibits, those relate to her health and the medications that she takes, and we believe that those are protected information --

THE COURT: Off the record.

(Discussion held off the record)

THE COURT: Back on the record.

The status of health of Ms. Jones was brought into issue, and it's a legitimate point that Mr. Gilman advances. So the motion has to be denied. There has to be transparency in every aspect of this case.

MS. RADCLIFFE: OK, your Honor. The only other

documents that we have sought to be sealed relate to actually defendants' documents.

THE COURT: You want sealing or does Mr. Gilman want sealing?

MS. RADCLIFFE: Defendants have marked them as confidential, so I have no objection to them being public, but I believe Mr. Gilman has some objections to them being public.

THE COURT: Mr. Gilman?

He doesn't need your help, Ms. Radcliffe. He does very well himself.

MR. GILMAN: I have copies if you wish, but on February 27, 2012, we wrote your Honor about Exhibits 17, 18, and 19 to Ms. Radcliffe's declaration. You endorsed my letter, and what you said was, "The exhibits shall be kept under seal. Plaintiff's counsel shall show at the argument in what ways the exhibits are relevant and if they were included in good faith with the motion." Your signature.

THE COURT: Can you wait a minute.

MR. GILMAN: I have a copy I could bring up if you wish.

THE COURT: We should have it.

Ms. Radcliffe, in the future, could you tab your exhibits for me?

MS. RADCLIFFE: Yes, your Honor.

MR. GILMAN: I have copies of the exhibits if it will

assist the Court.

THE COURT: Ms. Radcliffe, what's the relevance of Exhibit 17?

MS. RADCLIFFE: Yes, your Honor. Each of the exhibits --

THE COURT: 17.

MS. RADCLIFFE: Exhibit 17. It is a document that shows that Pfizer identified significant deficiencies in internal controls. It was submitted to the Court because defendants challenged whether there was a pervasive course of conduct throughout the class period.

THE COURT: So this is relevant to Ms. Jones's --

MS. RADCLIFFE: Yes, to Ms. Jones as well as to the lead plaintiffs with respect --

THE COURT: Let me look at it.

(Pause)

THE COURT: What's an unrated memo? What's an unrated memo, Mr. Gilman?

MR. GILMAN: I'm sorry, your Honor?

THE COURT: Unrated memo. The term is on page 3.

MR. GILMAN: Page 36 Exhibit 17?

THE COURT: In audit results.

MR. GILMAN: Your Honor, it has to be a technical patent term. It's an unrated memo as agreed with the United States Patent Office and legal management for first-time

audits.

What this is, your Honor, is a draft of a Sarbanes-Oxley memo.

THE COURT: I don't provide any benefit by providing the sealing here. It's going to come up again and again. It has to do with the integrity of the books and records.

MR. GILMAN: What it has to do with, your Honor, is that they have robust procedures. But it's not relevant to the motion on class certification. If this comes in on summary judgment, so be it. But in terms of class certification, what they have done is taken three pieces of paper out of 23 million documents that we produced, and they have filed them in court. One of them is settlement correspondence. One of them is a settlement demand.

THE COURT: I don't think they are really relevant to the motion.

MR. GILMAN: Thank you, your Honor.

THE COURT: You can -- I will have Ms. Radcliffe substitute -- or withdraw these exhibits. I don't need them. They don't play any part in my consideration. So Exhibits 17 to 19 will be withdrawn from the court file.

MS. RADCLIFFE: Yes. I will just put blank sheets in there and resubmit.

THE COURT: You can write "withdrawn pursuant to court order."

MS. RADCLIFFE: OK.

THE COURT: Anything else, Ms. Radcliffe?

MS. RADCLIFFE: No, your Honor.

THE COURT: Mr. Gilman?

MR. GILMAN: We have a conference with the Court at 10:30 a.m. April 2. And in aid of that conference, your Honor, back in November of 2011, instructed the parties to confer and if possible to submit a joint letter to the Court on scheduling and discovery. We have been promised a draft from plaintiffs, who would get to see it. One would think that they would propose a schedule.

THE COURT: When is the meeting with me?

MR. GILMAN: April 2, 10:30. And by this Thursday, which is three days from today, we are supposed to submit the letter to you. I don't have it, and your Honor directed it back in November.

THE COURT: When are you going to have the letter exactly?

MS. RADCLIFFE: Yes, your Honor. We are working on the letter and we will attempt to provide it to Mr. Gilman -- we told him earlier today we would attempt to provide it to him today.

THE COURT: We are not going to deal with working intent. We want a commitment date.

MS. RADCLIFFE: We confirmed with Mr. Gilman --

THE COURT: "We will commit," "we will commit."

MS. RADCLIFFE: I will commit to provide it to him by tomorrow.

THE COURT: Noon?

MR. GILMAN: Fine.

THE COURT: Noon.

MS. RADCLIFFE: Your Honor, with all due respect, I will be on a plane.

MR. GILMAN: 4 o'clock.

THE COURT: New York time, 4 o'clock.

MS. RADCLIFFE: I guess I will work on the letter. What time? 4 p.m. New York?

THE COURT: New York time. You can e-mail it to him.

MS. RADCLIFFE: Yes, your Honor.

THE COURT: And when do you respond?

MR. GILMAN: We are supposed to submit it to you on Thursday.

THE COURT: OK. Let me give you -- if you need to take two more days after you submit, do it.

MR. GILMAN: Thank you.

THE COURT: I don't want a large number of depositions.

MR. GILMAN: Your Honor has already ordered on that and restricted plaintiffs to ten deposition.

THE COURT: Well, I'm going beyond that. I don't care

whether it's ten or 12 or eight. I just want you to know, Ms. Radcliffe, that there has to be a purpose beyond a deposition, and I don't need a plan that tries to anticipate what will happen ten months from now.

MS. RADCLIFFE: Yes, your Honor.

THE COURT: You have written discovery. You really can't formulate how many depositions you're going to have until you see that written discovery. You may not need that. Has there been written discovery yet?

MR. GILMAN: Your Honor, we produced 23 million documents to the plaintiffs in this case.

THE COURT: When I'm talking to Ms. Radcliffe, would you let me get an answer from her.

MR. GILMAN: I'm sorry.

MS. RADCLIFFE: Your Honor, at our last conference regarding discovery, you had ordered defendants to produce discovery which was in a prior litigation in two phases. The deadline was to be January 13. The defendants, we believe they've been working diligently on production, but we continue to get production responses to those requests. I would submit that at this point it is likely premature to assess the number of depositions.

THE COURT: So I'll tell you what you do. Except the one deposition I'd like to have is the people in the Hague. So that should be scheduled next month or so. Other than that,

please exchange your documentary discovery and get that done as soon as possible, and confine your discussions to that.

And I follow the late Judge Pollack's rule on this. I find and I have found that interrogatories and requests to produce are a large waste of time. They spawn endless controversies. You all have a file that's relevant. Produce it. It will be produced sooner or later. The transaction costs don't have any merit. I'd like to keep the fees down in this case. Produce your files. If there's attorney-client material, of course you're going to withhold that, but it's got to be discussed under law. I take a narrow point of view in the attorney-client privilege. It has to do with advice, not the presence of the lawyer. If the advice of a lawyer is requested and advice is given in response, that's privileged. It can be waived depending on the number of people getting it and who gets it. But that's where privilege is defined, not the presence of a lawyer.

All right. Define it that way. Schedule written discovery. And then we'll have another meeting after written discovery is finished. Both of you can get a better size of the case.

MS. RADCLIFFE: Your Honor, so that I may understand your Honor's direction, you'd like the letter submitted to be confined --

THE COURT: I want you to work it out in discovery.

Give me a joint letter setting out the boundaries of the written discovery and the production of documents and if there's any dispute and the like. But the meetings, there's no need for it. I've seen you now. I know you from before. We won't meet until there's some point to it.

MS. RADCLIFFE: And, your Honor, can we take a little more time to submit that letter?

THE COURT: Yes. Work it out. I think we have a different arrangement at this point in time.

MS. RADCLIFFE: Thank you, your Honor.

THE COURT: Cooperate. OK. Thanks very much.

MR. GILMAN: Thank you, your Honor.

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