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October 15, 2014

VIA ECF

The Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
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Re: *Jones v. Pfizer Inc., et al.*,
Civil Action No. 1:10-cv-03864-AKH (S.D.N.Y.)

Dear Judge Hellerstein:

This letter addresses a dispute between plaintiffs and third-party witness, Mary Holloway, as to whether Ms. Holloway has a reasonable basis on which to assert her Fifth Amendment right against self-incrimination in response to efforts by plaintiffs' counsel to question Ms. Holloway and by defendants' counsel to cross-examine her concerning the subject matter of the government's wide-ranging investigation into her activities while employed at Pfizer Inc. ("Pfizer"). Defendants are not seeking to depose Ms. Holloway and are not part of plaintiffs' request.

On June 29, 2009, a Judgment of Conviction was entered sentencing Ms. Holloway to a 24-month term of probation, a fine of $75,000 and a special assessment of $25 following her guilty plea, pursuant to an agreement with the United States Attorney's Office for the District of Massachusetts, to a one-count misdemeanor violation of the Food, Drug and Cosmetic Act, 21 U.S.C. §§331(a), 333(a)(1) and 352(f), a crime which required no finding of intent or willfulness and is sometimes referred to as a "strict-liability offense." Ms. Holloway did not file a notice of appeal, and by force of law, her conviction became final on or about July 13, 2009. Although Ms. Holloway and the government disputed the nature and scope of the conduct underlying her misdemeanor plea, the government contended that it was centered on "her role in introducing a misbranded drug Bextra into interstate commerce." *See United States v. Holloway*, No. 09-CR-10089 (JGD), United States' Opposition to Defendant's Motion for Early Termination of Probation at 1 (D. Mass. July 9, 2010).

On July 23, 2013, Ms. Holloway appeared for her deposition in this matter.

Prior to this deposition, counsel for Ms. Holloway met with and conferred with counsel for plaintiffs and defendants. Counsel revealed that Ms. Holloway's Pre-Sentence Report was among the documents produced in discovery and that plaintiffs sought, among other things, to question Ms. Holloway about the promotional activities at Pfizer and the knowledge of her superiors and

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subordinates about those activities. Defendants' counsel indicated that on cross-examination they would seek to elicit information about any of her activities at Pfizer or allegations by the government against her that they deemed favorable to Pfizer's case. Ms. Holloway asserted her Fifth Amendment privilege against self-incrimination in response to substantive questions concerning her work at Pfizer.

In October 2014, plaintiffs' counsel informed Ms. Holloway that since more than five years had elapsed since her misdemeanor conviction had been entered, they knew of no basis for her to continue to invoke the Fifth Amendment and now sought to compel her deposition testimony.

I. MEET AND CONFER EFFORTS

On October 1, 2014, at approximately 9:00 a.m. PDT, plaintiffs' counsel, Michael Dowd, Jason Forge and Henry Rosen, spoke with Cynthia Monaco, counsel for Ms. Holloway, about the issues presented in this letter. Plaintiffs' counsel indicated that they believed the five-year statute of limitations on the offense of conviction had now expired, and that Ms. Holloway had no reasonable fear of criminal prosecution or penalty. Ms. Monaco took the position that Ms. Holloway is making a non-frivolous assertion of her Fifth Amendment privilege in response to any questions relating to the full range of criminal conduct for which she had previously been under investigation by the United States Attorney's Office for the District of Massachusetts and would seek to make an *ex parte* showing to the Court of the grounds for her invocation if so requested. Following this conference, Ms. Monaco spoke with defendants' counsel who indicated, as they had previously indicated prior to her deposition, that on any cross-examination of Ms. Holloway, they would seek to elicit any appropriate testimony they deemed favorable to Pfizer's theory of defense.

II. PLAINTIFFS' POSITION

On May 30, 2014, the Court issued an order granting plaintiffs ten, two-hour depositions based on certain documents (*e.g.*, witness interview memoranda, attorney notes, etc.) that had been produced to the government, but that had not been produced to plaintiffs in discovery. Ms. Holloway was the Regional Manager for all of the witnesses who were the subjects of those interviews, was expressly mentioned in several of those interview memoranda, and was the sender of many related emails. As such, plaintiffs wish to use one of their remaining two-hour depositions to depose Ms. Holloway, but her counsel has indicated that she will continue to assert her Fifth Amendment privilege as to all the questions related to her criminal conduct or her employment at Pfizer.

Ms. Holloway was convicted and sentenced over five years ago for criminal acts that she committed over five years ago, and her employment with Pfizer ended over five years ago. Although Ms. Holloway was still within the five-year window of her sentencing at the time of her

deposition in this case, that window has now closed. Given the passage of time, Ms. Holloway has no reasonable fear of criminal prosecution or criminal penalty for any of her acts while employed by Pfizer, nor for any of her statements leading up to her sentencing. Accordingly, plaintiffs respectfully request that the Court compel Ms. Holloway to answer all questions related to her employment at Pfizer. This is just a two-hour deposition, and plaintiffs' questions will be focused on the promotion of Bextra – a drug that Pfizer pulled from the market over nine years ago.

There is no need for the Court to review specific questions and responses from Ms. Holloway's deposition because she flatly refused to answer all questions related to her employment at Pfizer:

> Q. You answered Mr. Rosen's questions for the most part anything relating to your work with Pfizer with the following: On the advice of counsel, I decline to answer that question based on my constitutional right not to be a witness against myself; correct?
>
> A. Correct.
>
> Q. If I asked you questions about your work at Pfizer in connection with the promotion of Bextra, would you answer the questions with the same phraseology, just like you did when Mr. Rosen asked you questions this afternoon?
>
> A. Yes.

See Holloway Depo. at 47:10-22.

This dispute presents two simple questions with similarly simple answers: (1) does Fifth Amendment protection extend to non-criminal proceedings or penalties; and (2) does Fifth Amendment protection extend to criminal acts long past for which the statute of limitations has run? The unequivocal answer to both of these questions is no.

It is apparent that Fifth Amendment protection is limited to actual criminal proceedings and penalties. "'The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself – in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply.' *Hale v. Henkel*, 201 U.S. 43, 67 [(1906)]." *Ullmann v. United States*, 350 U.S. 422, 430-31 (1956). In *Ullmann*, the Supreme Court held that Fifth Amendment protections do ***not*** extend to non-criminal proceedings or penalties "such as loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium." *Id.*; *see also Napolitano v. Ward*, 457 F.2d 279, 284 (7th Cir. 1972) (use of immunized testimony for basis

to remove judge from bench did ***not*** violate Fifth Amendment because the removal proceeding was not criminal in nature).

The foregoing cases relate to immunized testimony, but they are equally apt here because Ms. Holloway enjoys the functional equivalent of immunity. It is undisputed that over five years have elapsed since her conduct ended, as well as since her employment at Pfizer ended, her criminal conviction became final, and since Pfizer stopped selling Bextra. Therefore, the statute of limitations for any criminal prosecution related to her conduct (and the questions she has refused to answer in this case) and any possible criminal penalties for that conduct has elapsed, rendering the Fifth Amendment inapplicable:

> It is true as a general proposition that "if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer." *Brown v. Walker*, 161 U.S. 591, 598 (1896). *See The Pillsbury Company v. Conboy*, 459 U.S. 248, 266 n.1 (1983) (Marshall, J., concurring); *Hale v. Henkel*, 201 U.S. 43, 67 (1906) ("If the testimony relate to criminal acts long past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply"); *In Re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974); *United States v. Stewart*, 445 F.2d 897, 900-01 (8th Cir. 1971); *United States v. Goodman*, 289 F.2d 256, 259 (4th Cir. 1961) ("Of course, if by reason of the statute of limitations there remains ***no possibility*** that a prosecution of the witness could result from or be assisted by his answers to questions, he is not justified in refusing to answer") (emphasis in original), *vacated on other grounds*, 368 U.S. 14 (1961); *United States v. Miranti*, 253 F.2d 135, 138 (2d Cir. 1958); *United States v. Rosen*, 174 F.2d 187, 191-92 (2d Cir. 1949), *cert. denied*, 338 U.S. 851 (1949).

United States v. Clark, No. 86-0288T, 1988 U.S. Dist. LEXIS 16868, at *14-*15 (W.D.N.Y. July 19, 1988).

Ms. Holloway's assertion of the privilege is no longer valid (if it ever was). Moreover, if the Court compels her testimony, by definition, such "compelled testimony" could not be used against her in a criminal proceeding and Ms. Holloway's compelled testimony will be effectively immunized. Ms. Holloway's suggestion that the Court postpone ruling on this issue until trial disregards the importance of depositions so as to avoid trial by ambush, and for dispositive motions and settlement discussions. Accordingly, plaintiffs respectfully request that the Court order Ms. Holloway to appear for a deposition and to answer all questions put to her that relate to her employment at Pfizer.

III. MS. HOLLOWAY'S POSITION

1. The Plaintiff's Motion to Compel Should Be Denied

"The right of an accused person to refuse to testify, . . . was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable perogatives of the citizen." Slochower v. B'd of Higher Ed., 350 U.S. 551, *57 (1956). The right to be free of compelled self-incrimination is to be construed broadly and is not dependent on whether the testifying individual is actually guilty of those other transactions or professes her innocence to them. Indeed, "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." Id.; see also Grunewald v. United States, 353 U.S. 391, 415-424 (1957); Ullmann v. United States, 350 U.S. 422 (1956); United States v. Tomaiolo, 249 F.2d 683, 690 (1957) ("claiming the privilege does not imply any guilt.").

As plaintiffs correctly note, Ms. Holloway was sentenced to a misdemeanor conviction over five years ago following a lengthy and bruising four-year criminal investigation by the United States Attorney's Office for the District of Massachusetts into a wide-range of alleged violations of law by Pfizer, Inc. and its employees in connection with marketing of pharmaceuticals. Although Ms. Holloway shares the hope expressed by plaintiffs that she is free of future prosecution, the facts of that investigation and the terms of her plea agreement do not support plaintiffs' assertions.

In any case, plaintiffs are incorrect that her conviction alone and the five-year passage of time extinguished her Fifth Amendment right not to bear witness against herself in connection with these transactions. "The Fifth Amendment privilege is not lost after a witness has pleaded guilty if the witness is still subject to a realistic risk of incrimination on other charges, or if the desired testimony about the transaction in question would give rise to a risk of incrimination in connection with other transactions." United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983) (citing cases)").

Based solely on the five year passage of time, plaintiffs cannot assert that there survive no theories of prosecution "in connection with other transactions" with which Ms. Holloway faces a "risk of incrimination" if she is forced to testify. In fact, a review of her plea agreement indicates that it does not include any express promise by the government – sometimes referred to in this and neighboring districts as "coverage language" -- to forebear from prosecuting any additional criminal conduct arising out of that four-year investigation. Absent an immunity order issued by this Court pursuant to 18 U.S.C. § 6003, Ms. Holloway faces the risk of a reopening of that investigation if she is forced to testify publicly in this case and plaintiff's motion should be denied without a hearing or further briefing.

2. Because Ms. Holloway is a Tangential Witness and the Parties Have Detailed Discovery Describing Her Misdemeanor Offense Conduct, the Court Should Defer Considering this Motion to Compel Testimony Until She is Called to Testify at Trial

Ms. Holloway was a regional manager for one region of one sales division of Pfizer, Inc. and had no responsibility for or familiarity with any statements made to shareholders or the Securities and Exchange Commission in quarterly and annual filings by Pfizer, Inc. It is *those* filings and the alleged failure of Pfizer, Inc.'s executives to make certain disclosures concerning the government's investigation into company-wide practices and to estimate the likely size of a fine required to settle the wide-ranging investigation that are at issue in this case. No party has contended that Ms. Holloway had any role in making those determinations or that she was consulted by Pfizer executives in their deliberations on how to prepare those securities filings.

Accordingly, her role in marketing certain drugs is, at best, of marginal relevance to the issue of what Pfizer executives responsible for those filings knew about the size of the likely settlement with the government. Given this Court's practice of promoting trial efficiency by limiting the number of witnesses at trial to those with significant and relevant testimony to the issue before the jury, and given the likelihood that a case of this complexity will be settled by the parties before such a trial is undertaken, the Court should defer any ruling on this extraordinary motion until Ms. Holloway is actually called to testify at trial.

Postponing such a ruling would conserve judicial resources since consideration of this motion would require briefing, a hearing on the merits of the motion and the reasonableness of her continued fear of prosecution, and an *ex parte* demonstration by Ms. Holloway to the court of the grounds on which she reasonably fears prosecution. Moreover, postponing a ruling until trial would not prejudice the actual parties in this litigation since the plaintiffs have indicated they have access to her Pre-Sentence Report and seek principally to ask Ms. Holloway to adopt statements made by her counsel in connection with her sentencing. The details of that sentencing are public-record. In contrast, defendants counsel do not seek her testimony but may well ask Ms. Holloway about events that were at the heart of her dispute with the government and which were not the basis for her misdemeanor guilty plea. They are similarly not prejudiced by a delay in considering this motion since as counsel for Pfizer they have already had access to the full range of conversations with the government about all the individuals the government considered culpable during its investigation and the basis for the settlement and fine agreed upon between Pfizer and the government. In short, both parties have had ample discovery on the questions they would put to Ms. Holloway on the stand at trial -- assuming the highly unlikely event she is called to testify.

Only Ms. Holloway would be prejudiced by an unnecessary consideration of this motion to compel testimony since she was the subject of an investigation into her conduct that spanned approximately four years and raised many allegations by the government of her offense conduct. See Plea Agreement of Mary Holloway dated March 30, 2009 (referencing a proffer agreement dated January 4, 2006). While plaintiffs counsel are correct in noting that five years have passed since Ms. Holloway was sentenced, they are not aware of the nature of the allegations made by the government against Ms. Holloway or the protracted negotiations made over the heads of line prosecutors that resulted in the misdemeanor plea. Notably, that plea agreement binds only the United States Attorney for the District of Massachusetts and only bars further prosecution for the crime of allowing a misbranded drug, to wit Bextra into interstate commerce. No other criminal conduct or district is excluded from future prosecution.

In addition, the financial burden of paying counsel to litigate this claim would prove a hardship to Ms. Holloway who has not been employed full time since her dismissal from Pfizer. Deferring that burden until such time as it became clear her testimony was actually needed at trial would protect her from this hardship since such an event is highly unlikely.

In conclusion, because the litigants already have the substantive statements they wish to introduce at trial, and because the public record contains her plea agreement, the transcript of her sentencing, a detailed sentencing memorandum prepared by her counsel and a filing by prosecutors in opposition to her request for early termination of her period of probation, Ms. Holloway requests that the court defer consideration of this motion to compel her testimony until such time as she is called to testify at trial.

3. If the Court Considers This Motion Pre-Trial, It Should Permit Ms. Holloway Adequate Time to Brief the Issue and to Submit the Reasons for Her Invocation of the Fifth Amendment Ex Parte

In the event, the Court wishes to hear the grounds for Ms. Holloway's invocation of the Fifth Amendment pre-trial, Ms. Holloway requests a hearing on such a motion, adequate time for her current counsel to confer with the three prior attorneys who represented her in the District of Massachusetts and the opportunity to submit an *ex parte* memorandum of facts setting forth the nature of her basis to fear prosecution and a memorandum of law under seal. In the alternative, Ms. Holloway proposes to personally submit to an *in camera* and *ex parte* presentation to the Court directly as would a witness in a criminal proceeding who invoked the Fifth Amendment if called to testify.

It would be inappropriate for the litigants to force Ms. Holloway to reveal in open court or to them the nature of the allegations made by federal prosecutors since those theories are not related to the litigation at issue in this case and would provide a road map for the litigants to probe those

areas in her testimony and theoretically for prosecutors to access her statements for their own investigatory purposes. Any such showing should be presented directly to the Court which could then reasonably conclude that Ms. Holloway had a continued basis to assert her Fifth Amendment rights without briefing by the litigants.

It is noteworthy that any dispute placed on the record would serve as a roadmap for prosecutors and would force Ms. Holloway to publicly air the government's theories about her offense conduct to her detriment. Finally, Ms. Holloway would of course answer any questions posed to her if the court conferred a grant of immunity on her. However, in the absence of an application by the Department of Justice, undersigned counsel is unaware of any authority for the Court providing such an order although one would be welcome in this case.

Respectfully,

s/JASON A. FORGE

JASON A. FORGE
ROBBINS GELLER RUDMAN & DOWD LLP

s/ CYNTHIA MONACO

CYNTHIA MONACO
COUNSEL FOR MS. HOLLOWAY

IN:llf

cc: All Counsel

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 15, 2014.

s/ JASON A. FORGE
JASON A. FORGE

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