MONACO LAW

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October 28, 2014

VIA ECF/HAND DELIVERY

The Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

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 the procedure to be followed in connection with the hearing ordered for October 30, 2014 to consider Ms. Holloway's assertion of her Fifth Amendment rights in connection with plaintiffs' request to compel Ms. Holloway's testimony. Defendants are not seeking to depose Ms. Holloway and are not part of plaintiffs' request. The Court ordered the parties submit by 4 pm October 24, 2014 the subjects on which they propose to question Ms. Holloway, and and that all supporting papers be submitted by October 28, 2014. Ms. Holloway respectfully requests that consistent with case law cited herein that she be permitted to present her supporting papers *in camera* and *ex parte.*

I. MEET AND CONFER EFFORTS

On the morning of Friday, October 24, 2014, counsel for Ms. Holloway discussed this dispute in separate telephone calls with counsel for plaintiffs, Jason Forge, and with counsel for defendants, Lauren Collogan. Ms. Collogan indicated on Friday October 24 that defendant Pfizer had no position on the issue and confirmed that today. Mr. Forge requested that he have the weekend to review applicable case law. He submitted his position to counsel for Ms. Holloway on the evening of Monday October 27.

A. PLAINTIFFS' POSITION

This case is unlike all of the cases that Ms. Holloway cites. Unlike those cases, the proponent of the privilege here, Ms. Holloway, has already pled guilty and submitted a sentencing memorandum regarding the very statements and acts for which she is asserting a Fifth-Amendment privilege. Specifically, Plaintiffs have already agreed to limit their questions to certain Bextra-related topics, and Ms. Holloway has already pled guilty and submitted a sentencing memorandum regarding her Bextra-

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is a legal question: how does Ms. Holloway still face potential criminal liability for any given statement/act?

For example, in her June 12, 2009 sentencing memorandum, Ms. Holloway explained that, "The implementation of a marketing plan to obtain Bextra protocols and standing orders was a company-wide initiative, not a Northeast Region initiative, and certainly not a Mary Holloway initiative." *See* Holloway Sentencing Memo, pp. 6-7 (to be attached to Plaintiffs' supporting materials and memorandum). There is no need for an *ex parte* submission or argument as to Ms. Holloway's theory as to why repeating this same statement would expose her to criminal liability in October 2014 because that is strictly a legal argument that does not entail the exposure of any new facts that could be used to incriminate her at trial. *See, e.g., In re Three Grand Jury Subpoenas, Dated Jan. 5, 1988,* 847 F.2d 1024, 1028-29 (2d Cir. 1988) ("Proper invocation of the Fifth Amendment privilege against self-incrimination requires a showing of all of the following three elements: compulsion, a testimonial communication and the incriminating nature of that communication. *See In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987,* 834 F.2d 1128, 1131 (2d Cir. 1987). Because production of the cassette for *in camera* examination could not have been used against Roe at trial, it could not have been incriminating."). Likewise, to the extent Ms. Holloway's arguments are based on any communications that she or her representatives have had with any government employee or agency, such communications are not protected from disclosure to Plaintiffs because such disclosure would not make the communications any more or less useable against Ms. Holloway at trial.

Of course, Plaintiffs recognize the Court's broad discretion to examine Ms. Holloway *in camera* if doing so would assist in the resolution of this issue, but Plaintiffs deserve to know Ms. Holloway's arguments as to her own statements and emails that Plaintiffs have already identified for her – and which the government possessed at the time of Ms. Holloway's conviction. Plaintiffs, therefore, suggest that we proceed by way of the adversarial process at least up through the start of the hearing on this matter.

B. MS. HOLLOWAY'S POSITION

The Court should review Holloway's contention that she is entitled to claim the privilege against self-incrimination in camera and ex parte because without confidential treatment, the procedure used to evaluate the claim would destroy it. In re John Lakis, Inc., 228 F. Supp. 918, 922 (S.D.N.Y. 1964) (ordering, when reviewing claim of privilege against self-incrimination, that "the supporting explanation may be submitted to the Court in a sealed envelope for the use of the Court only"); United States v. Duncan, 704 F. Supp. 820, 822 (N.D. Ill. 1989) (ordering in camera review of claim of privilege against self-incrimination); Continental Baking Co. v. Sacchetta, 1992 WL 350656 at *3 (N.D. Ill. Nov.24, 1992) (same); see Hoffman v. United States, 341 U.S. 479, 486 (1951) (reversing denial of Fifth Amendment privilege claim and stating "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."); United States v. Zolin, 491 U.S. 554, 574 (1989) (holding "that in camera review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception."). The Court should use this venerated procedure to protect the merits of Holloway's claim while the Court considers it.

Moreover, the claim Ms. Holloway presents is more complex than Plaintiffs' counsel understands not having had the benefit of attorney-client privileged communications that Ms. Holloway had with her attorneys and the experience of the actual criminal investigation. She respectfully requests the

right to present the grounds for her assertion of this right to the Court without bringing it before the litigants.

Filing under seal with notice to the parties does not adequately protect Ms. Holloway's rights since it is the very disclosure of the grounds for her Fifth Amendment rights that Ms. Holloway seeks to keep from those who wish to question her publicly about these events. Her right against self-incrimination is no less violated if she is forced to make disclosures to civil litigants in a civil hearing than it would be in the hands of a prosecutor in a criminal hearing.

Ms. Holloway proposes that she be permitted to submit the basis for her Fifth Amendment claim directly to chambers for sole use of the Court and be prepared on October 30 to address the Court *in camera* and *ex parte* to address any questions the Court may have regarding the grounds for her assertion. Given the short time frame between the submission of this letter and the deadline for memoranda of law, Ms. Holloway will submit her Memorandum of Law *ex parte* pending a ruling. She has informed opposing counsel of her intention to do so.

Respectfully,

CYNTHIA MONACO
KEIR N. DOUGALL
COUNSEL FOR MS. HOLLOWAY

/s/ Jason A. Forge

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cc: All counsel

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Southern District of New York

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Docket Text:
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