UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff vs. PFIZER INC., et al., Defendants.	Civil Action No. 1:10-cv-03864-AKH CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MISCELLANEOUS MOTIONS *IN LIMINE*

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I. INTRODUCTION

In filing these motions, plaintiffs seek *in limine* rulings from the Court relating to certain trial procedures and the manner in which evidence will be presented at trial. Plaintiffs ask that the Court enter the following orders:

A. Plaintiffs Should Be Granted the Same Number of Peremptory Challenges as Defendants Combined;

B. Plaintiffs Should Be Permitted to Examine Witnesses Identified with Defendants Through the Use of Leading Questions;

C. Defendants Should Be Precluded from Introducing Live Testimony from Persons Unavailable to Plaintiffs and Introducing Deposition Testimony of Persons in Defendants' Control;

D. Percipient Witnesses Should Be Excluded from the Courtroom;

E. Counsel Should Be Precluded from Communicating with a Witness Until the Witness's Testimony Is Concluded;

F. Counsel Should Be Permitted Six-Minute Summations at the End of Each Week;

G. The Court Should Distribute a Preliminary Jury Questionnaire; and

H. The Court Should Permit Certain Preliminary Jury Instructions.

II. MOTIONS *IN LIMINE*

A. Plaintiffs Should Be Granted the Same Number of Peremptory Challenges as Defendants Combined

Plaintiffs respectfully move this Court for an order equalizing the number of peremptory challenges between the plaintiff class and all defendants. The relevant statute governing the allocation of peremptory challenges states:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

28 U.S.C. §1870. In multi-party civil litigation, courts have considerable discretion in allocating additional peremptory challenges. *See, e.g.*, *Jocks v. Tavernier*, 97 F. Supp. 2d 303, 318 (E.D.N.Y. 2000) (noting courts have broad discretion to treat several defendants as one for purposes of making peremptory challenges), *vacated on other grounds*, 316 F.3d 128 (2d Cir. 2003); *see also Cincinnati Ins. Co. v. Boyle*, No. 01-2425, 2002 U.S. App. LEXIS 8778, at *2 (3d Cir. May 3, 2002) ("When a number of defendants face a single plaintiff, the court may require the defendants to share their strikes.").

It would be inequitable for the Court to grant defendants as a group more peremptory challenges than plaintiffs. Simply counting parties should never be the test.[1] As the Court is fully aware, *voir dire* and peremptory challenges are critical components in the trial process. Since jurors often have personal biases affecting their impartiality, the peremptory challenge is an essential tool in effectuating an impartial jury. If plaintiffs are denied the same number of challenges as the defendants, they will be at a material disadvantage in selecting a fair and balanced jury.

In fact, in a situation similar to the one here, an appellate court held that it was an abuse of discretion in failing to equalize the number of peremptory challenges exercised by each side. *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir. 1984). The *Goldstein* case involved a single plaintiff and two defendants that were represented by the same counsel. On appeal, in response to plaintiff's argument that the magistrate judge should have equalized the number of peremptory challenges, the *Goldstein* court agreed, stating:

> We believe he should have done so given the fact that the two defendants . . . clearly had identical interests at the trial. . . . [I]t is hard to see any reason here for not equalizing peremptories as between plaintiff and defendants.

[1] If the number of parties was dispositive of the number of peremptory challenges, plaintiffs would be entitled to far more challenges than defendants. There are seven defendants; there is one Lead Plaintiff, one named plaintiff and thousands of other class members.

Id. at 37. Furthermore, the court stated that the "magistrate abused his discretion in refusing either to treat both defendants as a single party or to allow plaintiff to exercise double the number of peremptory challenges." *Id*.

For these reasons, plaintiffs respectfully request the Court to allocate peremptory challenges so an equal number of peremptory challenges are provided to defendants and plaintiffs.

B. Plaintiffs Should Be Permitted, Pursuant to Federal Rule of Evidence 611(c), to Examine Witnesses Identified with Defendants Through the Use of Leading Questions

Plaintiffs intend to call during their case-in-chief several witnesses who are either current or former officers or employees of defendant Pfizer Inc. ("Pfizer" or the "Company"), including defendants Henry McKinnell, Ian Read, Jeffrey Kindler, Frank D'Amelio, Allen Waxman and Alan Levin.[2] Plaintiffs should be permitted to examine these witnesses using leading questions "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party," interrogation may be by leading questions. Fed. R. Evid. 611(c). Courts have broad discretion in allowing leading questions where the witness is a party, hostile or identified with an adverse party. *See McCaffrey v. City of New York*, No. 11 Civ. 1636 (RJS), 2013 U.S. Dist. LEXIS 18815, at *22-*23 (S.D.N.Y. Feb. 7, 2013).

Many of the witnesses plaintiffs may call served in a variety of positions at Pfizer, reported directly to the individual defendants and participated in events that led to this action and the U.S. Department of Justice's ("DOJ") criminal investigation of the Company. Because these witnesses are "identified with" Pfizer and the individual defendants, Rule 611(c) permits plaintiffs to use

[2] The following witnesses on Plaintiffs' Witness List are current or former Pfizer officers or employees identified with the defendants: Maria Abelardo, Paul Brockie, Loretta Cangialosi, Gail Cawkwell, Kim Dadlani, Hugh Donnelly, Michael Gavigan, James Gibney, J. Patrick Kelly, Lisa Levy, Antony Loebel, Charles Mooney, Lawrence Fox and Douglas Lankler. In addition, Dennis Block and Brien O'Connor were Pfizer's agents and plaintiffs should also be permitted to ask leading questions during their examinations at trial.

leading questions to examine them. The rule has also been applied to witnesses who are former employees of a defendant. *See Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1477-78 (11th Cir. 1984); *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991).

Finally, defendants and each of the remaining Pfizer employee witnesses (who were deposed) were represented by Pfizer's counsel, at Pfizer's (or its insurer's) expense, during their depositions and each spent time with defendants' counsel in preparation for their depositions. This further demonstrates an identification with defendants. *See United States v. McLaughlin*, No. 95-CR-113, 1998 U.S. Dist. LEXIS 18588, at *3 (E.D. Pa. Nov. 19, 1998) ("'"witness identified with an adverse party"'" is, in part, based upon a "'demonstrated connection to an opposing party'").[3]

C. Defendants Should Be Precluded from Introducing Live Testimony from Persons Unavailable to Plaintiffs and Introducing Deposition Testimony of Persons in Defendants' Control

Plaintiffs move to require defendants to make available for live examination in plaintiffs' case-in-chief any witnesses defendants intend to call in their case-in-chief. Under Rule 611, the Court has control over "the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth" and "(2) avoid wasting time." Fed. R. Evid. 611(a); *Maran Coal Corp. v. Societe Generale de Surveillance S.A.*, No. 92 CIV. 8728 (DLC), 1996 U.S. Dist. LEXIS 172, at *4 (S.D.N.Y. Jan. 10, 1996) ("Courts have used their discretion under [Rule 611] 'to preclude parties who refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence.'").

In *Buchwald v. Renco Grp.*, No. 13-cv-7948 (AJN), 2014 U.S. Dist. LEXIS 118239, at *4-*9 (S.D.N.Y. Aug. 25, 2014), the Court rejected defendants' attempts to force plaintiffs to rely on

[3] All citations are omitted and emphasis is added, unless otherwise noted.

deposition testimony of witnesses whom defendants intended to call live later in the trial. The Court characterized defendants' position as "gamesmanship" and held:

> To prevent unfairness and avoid wasting time, numerous courts have held that a party may not limit a witness that the party intends to call at trial from testifying only during its own case in chief. Instead, the party must either permit its opponent to directly examine the witness, so that both parties may elicit the witness's live testimony during their cases in chief, or rely itself on the witness's deposition testimony, so that neither party may elicit the witness's live testimony during its case in chief.

Id. at *4-*5.

Under Rule 611, the Court has the authority to preclude the live appearance of any witness defendants refuse to make available during plaintiffs' case-in-chief. *See also In re Disaster at Detroit Metro. Airport*, 130 F.R.D. 647, 650 n.4 (E.D. Mich. 1989) ("the court may utilize Rule 611 and preclude [defendants] from introducing witnesses who are not available to testify during the plaintiff's case in chief because this 'is the fairest method of making sure the complete truth is told to the jury in this case and the least likely method of wasting time'").

There is no reason that plaintiffs should be denied the opportunity of examining a witness in person during their case-in-chief if defendants intend to present that same witness live. If this were to occur, valuable Court time would be wasted by the repeated introduction of deposition testimony followed by live testimony of the same witness. Plaintiffs ask the Court to preclude defendants from calling for live testimony any witnesses whom defendants refused to make available for plaintiffs' case-in-chief.

Plaintiffs further request that the Court preclude defendants from offering into evidence deposition testimony of witnesses under defendants' control. Generally, a party may introduce deposition testimony of a witness who is unavailable as contemplated by Fed. R. Evid. 804(b)(1). Defendants should not be permitted to rely on Rule 804(b)(1) to introduce deposition testimony of

witnesses that are under their control, including current Pfizer employees, since such witnesses are not unavailable within the meaning of the Rule. *See* Fed. R. Evid. 804(a)(5).

D. Percipient Witnesses Should Be Excluded from the Courtroom

Plaintiffs request that the Court exclude percipient witnesses from the courtroom to prevent them from hearing the testimony of other witnesses. Rule 615 provides that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." Fed. R. Evid. 615. Preventing a witness from hearing ongoing testimony of other witnesses reduces the risk of fabrication, collusion and inaccuracy. 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* §615.02 (2d ed. 2008). Moreover, sequestration under Rule 615 properly extends to opening and closing statements in order to fulfill the Rule's purpose of promoting truthful and accurate testimony that is not shaped by the remarks or testimony of others. 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* §339, at 561-62 (2d ed. 1994). According to the Supreme Court:

> It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections.

Perry v. Leeke, 488 U.S. 272, 281-82 (1989).

Plaintiffs will be severely prejudiced if the Court allows adverse witnesses to observe each other's testimony and/or consult with defense counsel regarding others' testimony before testifying themselves. Without the above order, plaintiffs will be particularly handicapped and prejudiced because they will present their case almost exclusively through adverse witnesses. Indeed, many of the witnesses are current or former Pfizer employees or third parties who served as defendants' agents (*e.g.*, Pfizer's outside auditors and attorneys). Moreover, an order excluding witnesses from

the courtroom for the purpose of insulating them from others' testimony would be meaningless if they nonetheless learned of the testimony from others, including other witnesses or a party's counsel.

There are several exceptions to Rule 615, as the "rule does not authorize excluding: (a) a party who is a natural person, or (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney, or (c) a person whose presence a party shows to be essential to presenting the party's claim of defense; or (d) a person authorized by statute to be present." Fed. R. Evid. 615. Plaintiffs, of course, do not move to exclude defendants, including Pfizer's representative, from trial. While plaintiffs do not dispute Pfizer's right to designate one natural person as its representative to sit in the courtroom, the Company should not be permitted to skirt Rule 615 by designating more than one representative. *See United States v. Hickman*, 151 F.3d 446, 453-54 (5th Cir. 1998) (abuse of discretion to permit government to designate two representatives as excepted from Rule 615 without finding that two agents were "essential"); *United States v. Phibbs*, 999 F.2d 1053, 1072-73 (6th Cir. 1993) (Rule 615 entitles government to designate only one representative as excepted from the rule; additional government representatives excepted only if shown to be "essential"); *Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co.*, 519 F. Supp. 668, 679 (D. Del. 1981) ("the exception is clearly framed in the singular and the Court concludes . . . that it does not permit counsel to designate more than one person to be present as a corporation's representative"). Finally, plaintiffs do not seek to exclude expert witnesses from hearing the trial, as experts are generally the types of witnesses that fall within the third exception to the exclusion rule.

For the reasons stated above, plaintiffs request that the Court exclude all percipient witnesses, except defendants and/or their representative and expert witnesses, from the trial and that the Court

enter an order preventing percipient witnesses from discussing the trial with other witnesses or attorneys involved with the case.

E. Counsel Should Be Precluded from Communicating with a Witness Until the Witness's Testimony Is Concluded

Plaintiffs request that once a witness has been sworn, counsel should be prohibited from communicating with the witness regarding his or her testimony until it is completed. Such an order is essential to minimize the risk of witnesses being coached and to insure the unobstructed discovery of truth during witness examination:

> Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness . . . to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess.

Perry, 488 U.S. at 282 (holding no Constitutional violation on order barring defendant from consulting with his counsel during recess in defendants' testimony). There is absolutely no reason why percipient witnesses should be consulting with counsel once they have been sworn. As *Perry* teaches, parties are first and foremost witnesses when they testify. *Id.* ("[R]ules that serve the truth-seeking function of the trial – are generally applicable to [the party] as well."). Counsel can fully prepare a witness before trial begins, but not after a witness has taken the stand and been sworn to tell the truth.

F. Counsel Should Be Permitted Six-Minute Summations at the End of Each Week

In lengthy and complicated trials, some courts have allowed interim summations by counsel to assist jury comprehension. A short summation will help the jury put witness testimony into context or understand how the evidence fits into the overall theme of the case. Counsel should be permitted to summarize briefly – in a few minutes – only the substance of the witnesses' testimony. Plaintiffs request that each side have the opportunity to give a short, six-minute summation to the

jury at the end of each week. *See United States v. Yakobowicz*, 427 F.3d 144, 152 (2d Cir. 2005) (recognizing that interim summation in civil cases is often appropriate and does not pose undue risk of prejudice).

The *Manual for Complex Litigation* (Fourth) §12.34 (2004) states that some judges have found that in "a lengthy trial, it can be helpful" to the trier-of-fact for counsel to "summarize the evidence that has been presented or can outline forthcoming evidence," and "the purpose is to aid the trier of fact in understanding and remembering the evidence and not to argue the case." Former Director of the Federal Judicial Center, Judge William Schwarzer, has expounded on this idea: "The traditional opening statement serves as a road map for the jury. But, like travellers on a long trip, jurors may find that they must consult their maps more than once to find their way. Some lawyers have used 'interim summations' to meet this need." *Reforming Jury Trials*, 1990 U. Chi. Legal F. 119, 144 (1990). Simply stated, interim summations – short statements – will refocus the jury's attention on the evidence as it develops, and this method, in connection with jurors' questions, reduces confusion and keeps the jury engaged.

G. The Court Should Distribute a Preliminary Jury Questionnaire

The Court should distribute a juror questionnaire prior to *voir dire* to streamline the process and better inform counsel about the characteristics of the potential jurors. Indeed, courts have noted the value of juror questionnaires. *See United States v. Cacace*, No. CR-08-240-14 (BMC), 2013 U.S. Dist. LEXIS 127553, at *14-*15 (E.D.N.Y. Sept. 6, 2013) ("courts routinely employ questionnairs to facilitate *voir dire*"); *In re Report of the Advisory Group*, 1993 WL 30497, at *56 (D. Me. Feb. 1, 1993) (in asbestos class-action litigation "juror questionnaires have been very helpful, especially in these cases where many potential jurors have opinions concerning asbestos and smoking about which they must be questioned"); *United States v. Honken*, 378 F. Supp. 2d 880, 924 (N.D. Iowa 2004) (permitting "extensive juror questionnaire to assist the parties in conducting an

effective voir dire"). Plaintiffs have discussed exchanging proposed questionnaires with defendants. Absent an agreement by the parties on a proposed questionnaire, plaintiffs will provide their proposed draft questionnaire to the Court at the pretrial conference on January 6, 2015.

H. The Court Should Permit Certain Preliminary Jury Instructions

The Court, under Rule 51, "may instruct the jury at any time before the jury is discharged." Fed. R. Civ. P. 51(b)(3). Plaintiffs request that the Court instruct the jury regarding trial procedures, the concepts of direct and circumstantial evidence and burden of proof before evidence is presented, and that the jury be re-read these instructions along with the other instructions at the close of evidence.

Because the concepts of direct and circumstantial evidence and the burden of proof in a civil case are typically not well understood by jurors, instructions before the presentation of evidence would assist jurors in more fairly evaluating the evidence as it is presented to them. *See* John C. Lowe, *Reinventing an Outdated Wheel: Innovations in Complex Litigation*, 2 Va. J.L. & Tech. 6, §VI.23. (1997) ("Particularly in a complex case, the judge should give ***comprehensive*** instructions in lay terms to the jury ***before*** opening statements.") (emphasis in original).

III. CONCLUSION

By way of the foregoing, plaintiffs request that the Court enter orders granting their motions *in limine*.

DATED: December 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 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 December 10, 2014.

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Document Number: 338

Docket Text:
MEMORANDUM OF LAW in Support re: [337] MOTION in Limine *Plaintiffs' Miscellaneous Motions in Limine*. . Document filed by Mary K. Jones(Individually), Stichting Philips Pensioenfonds. (Dowd, Michael)

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