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' MOTION TO ADMIT DEPOSITION TESTIMONY OF MARY HOLLOWAY AND FOR ADVERSE-INFERENCE INSTRUCTION

I. INTRODUCTION

On October 30, 2014, the Court heard plaintiffs' motion to compel testimony from former Pfizer Inc. ("Pfizer") Regional Manager Mary Holloway ("Holloway"), who had pled guilty to the criminal conduct underlying the statements and reserve decisions that comprise the heart of this case: Pfizer's misbranding (*i.e.*, off-label promotion) of the drug Bextra. The Court denied plaintiffs' motion based on what it found to be Holloway's ongoing Fifth Amendment privilege, but the Court observed that "[i]f she does refuse to testify and the point is relevant, the case of Brinks against the City of New York and others will support an adverse inference." Transcript of Proceedings dated October 30, 2014 at 13. Pfizer contended that because it no longer employs or controls Holloway, an inference against Pfizer would not be appropriate. *Id.* at 15. The Court invited both sides to brief the issue, and, as set forth below, the Court's initial remarks were correct and Pfizer's points regarding ongoing employment and control are unavailing. *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983), unequivocally held that "[t]he fact that the invokers of the privilege are no longer employees of the defendant does not necessarily bar admittance of their refusals to testify as vicarious admissions of their former employer." *Id.* at 710. Because the reliability of the adverse inferences from Holloway's invocation is well established and the instruction itself is so innocuous, there is no danger of unfair prejudice. Accordingly, plaintiffs respectfully request that the Court allow plaintiffs to present at trial Holloway's invocation of the privilege in response to specific questions regarding the off-label promotion of Bextra, along with the following jury instruction: A witness has a constitutional right to decline to answer a question on the ground that it may tend to incriminate her. However, you may, but need not, infer by such refusal that the answers would have been adverse to the witness's interest.

II. FACTS

Holloway was a Regional Manager at Pfizer from 1998 through December 31, 2006. In that position, Holloway supervised approximately 100 Pfizer sales representatives, district managers and others in Pfizer's Northeast region. Holloway was one of only 8-12 Pfizer Regional Managers for its Bextra sales force. On April 8, 2009, Holloway pled guilty to a one-count Information, which charged that "[f]rom in or about December 2001 through in or about April 2005, HOLLOWAY promoted and caused the promotion of the sale and use of Bextra for a variety of uses and at dosages other than the Approved Uses and Dosages." *See* Information, ¶22, and Plea Agreement, attached as Ex. 1 to the Declaration of Jason A. Forge in Support of Plaintiffs' Motion to Admit Deposition Testimony of Mary Holloway and for Adverse Inference Instruction ("Forge Decl."). Holloway was sentenced on June 18, 2009.

During her July 23, 2013 deposition, Holloway invoked the privilege against self-incrimination and refused to answer all questions concerning Pfizer's methods for promoting Bextra. The specific questions and invocations plaintiffs wish to play for the jury are highlighted in Ex. 2 to the Forge Decl. These questions primarily sought nothing more than Holloway's confirmation of (1) e-mails that she sent or received as Pfizer's Regional Manager and (2) admissions she made in the context of her criminal case. They include the following:

> Q. And obtaining Bextra protocols and standing orders was a company-wide initiative the entire time that Bextra was on the market from 2002 to 2005; correct?
>
> A. On the advice of counsel, I decline to answer that question based on my constitutional right not to be a witness against myself.
>
> Q. Beginning in 2003 regional managers such as yourself were required – sorry, to track protocols obtained in their territory and report back to Pfizer; correct?
>
> A. On the advice of counsel, I decline to answer that question based on my constitutional right not to be a witness against myself.

Q. And as a regional sales manager, you reported Bextra protocols obtained for orthopedic, podiatry, urology, OB/GYN, EBT, and dental indications; correct?

A. On the advice of counsel, I decline to answer that question based on my constitutional right not to be a witness against myself.

Forge Decl., Ex. 2 at 16:3-23.

Q. And during that [national sales] presentation you spoke about Bextra protocols in the perioperative setting, which included off-label uses; correct?

A. Same answer.

Q. Following that presentation you were praised by your superiors for the quality of the presentation, and one medical director wrote to another and said that you were awesome; correct?

A. Same answer.

Q. Obtaining protocols was part of the culture at Pfizer; correct?

A. Same answer.

Q. During your time at Pfizer, did you believe that obtaining protocols was consistent with the corporate strategy handed down from executive leadership?

A. Same answer.

Q. And in fact you believed you were following executive leadership instructions to obtain protocols for the use of Bextra in surgical settings?

A. Same answer.

Ex. 2 at 19:17-20:13.

Does this series of exhibits [Pfizer e-mails sent to dozens of employees] reflect that Pfizer instructed the sales force to market Bextra to orthopedic surgeons, hospitals, anesthesiologists to use Bextra in the preoperative setting?

A. Same answer.

Q. Do these documents [Pfizer e-mails sent to dozens of employees] reflect that executive leadership at Pfizer expected the sales force to detail Bextra for off-label uses in the surgical setting?

A. Same answer.

Ex. 2 at 43:14-24.

At the October 30, 2014 hearing on plaintiffs' motion to compel, Holloway confirmed her intention to continue to invoke her Fifth Amendment privilege and refuse to answer questions concerning Pfizer's off-label promotion of Bextra. Holloway has also indicated that she "is presently the subject of an administrative debarment proceeding before the Office of the Commissioner of the FDA which, upon debarment, would strip her of her right to work in the pharmaceutical industry based on her misdemeanor conviction."[1] It is plaintiffs' understanding that Pfizer is funding Holloway's defense in this debarment proceeding.

III. ARGUMENT

The Second Circuit's decision in *Brink's* made clear that it is completely appropriate to admit evidence of non-party former employees' refusals to testify. 717 F.2d at 710. Such testimony, however, is neither automatically precluded nor automatically admissible, but rather it must be examined "under the circumstances of [each] case." *Id.* The disputes in *Brink's* were over the City of New York's contract with Brink's, under which Brink's was responsible for collecting the coins from the City's parking meters. *Id.* at 702. After five Brink's employees were charged and convicted for stealing the City's parking meter revenues, the City cancelled Brink's contract. *Id.* Brink's then sued the City for money owed on the contract, and the City countersued for breach of contract and negligence in connection with the theft of the meter money. *Id.* Over Brink's objection, the district court allowed the City to question present ***and former*** Brink's employees about the meter-money pilferage, even though they were expected to (and did) invoke their privilege against self-incrimination in response to such questions. *Id.* at 707. In its closing argument, the City

[1] Memorandum of Law in Support of Claim of Privilege Against Self-Incrimination of Third Party Witness Mary Holloway and in Opposition to Plaintiffs' Motion to Compel Deposition Testimony at 8, submitted by Holloway to the Court *in camera*, *ex parte* and under seal (and subsequently ordered to be produced to plaintiffs).

argued that the witnesses' invocations supported its claim against Brink's, and the district court instructed "the jury that a 'witness ha[s] a constitutional right to decline to answer on the ground that it may tend to incriminate him. However, you may, but need not, infer by such refusal that the answers would have been adverse to the witness' interest.'" *Id.*

In affirming the admission of the invocation evidence and argument in *Brink's*, the Second Circuit embraced the distinction between evidence that is prejudicial "in the sense of being inflammatory," which weighs against admissibility, versus evidence that "is prejudicial in the sense of giving support to a party's position, i.e., it is 'damning,'" which favors admissibility. *Id.* at 710 (citation omitted). The court also highlighted the probative value of this evidence, even in light of the earlier admission of the employees' convictions: "The key issue here was the extent of the thefts because it is only from this evidence that the jury could draw an inference regarding Brink's knowledge or negligence." *Id.*

Brink's remains good law and courts have repeatedly applied it in admitting invocation evidence of non-parties and former or non-employees. For example, in *United States v. Dist. Council*, 832 F. Supp. 644 (S.D.N.Y. 1993), the court observed that *Brink's* "stands as square authority for drawing an adverse inference against the [defendant] in this civil case, assuming that the individuals in question bear a sufficiently close relationship to the [defendant] to have their refusals to testify qualify as vicarious admissions of the Council." *Id.* at 652. The court added that, "the fact that invokers of the privilege may not presently be employees or agents of the [defendant] does not necessarily bar the drawing of the inference." *Id.* Likewise, the court explained that "the fairness of taxing a party with a non-party's conduct depends upon the relationships between them, here the alleged conspiratorial relationship." *Id.*

In *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997), the Second Circuit reaffirmed its holding in *Brink's* and observed several "non-exclusive" factors that should guide trial courts when determining the "admissibility of a non-party's invocation of the Fifth Amendment privilege against self-incrimination in the course of civil litigation and the concomitant drawing of adverse inferences": "1. The Nature of the Relevant Relationships"; "2. The Degree of Control of the Party Over the Non-Party Witness . . . in regard to the key facts and general subject matter of the litigation"; "3. The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation"; and "4. The Role of the Non-Party Witness in the Litigation." *Id.* at 123-24.

Against the backdrop of *Brink's* and the cases applying it, the admissibility of Holloway's invocations is quite clear.[2] Although most of the defendants have acknowledged their awareness of Pfizer's off-label promotion of Bextra, they have tried to portray this as aberrational, as opposed to systemic. Just like in *Brink's*, therefore, "[t]he key issue here [i]s the extent of the [off-label promotion] because it is only from this evidence that the jury could draw an inference regarding [defendants'] knowledge or [recklessness]." 717 F.2d at 710. Because Holloway was a Pfizer Regional Manager throughout the entire time that Pfizer promoted Bextra off-label, all of her off-label promotional acts were plainly within the scope of her employment and intended to benefit Pfizer, which makes them directly attributable to Pfizer. *See, e.g.*, *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 543 (3d Cir. 2012) ("'A corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior . . . where the agent is acting within the scope of employment.'") (alteration in original) (quoting *United States v. MacDonald & Watson Waste Oil*

[2] Holloway's signed plea agreement and plea allocution are of course, admissible as statements against interest under Fed. R. Evid. 804(b)(3)(A). *See, e.g.*, *United States v. Chen Xiang*, No. S(1) 02 CR 271 (RCC), 2003 U.S. Dist. LEXIS 12343, at *2 (S.D.N.Y. May 20, 2003) ("guilty pleas allocutions 'fully qualif[y] as declarations against penal interest' under Rule 804") (quoting *United States v. Winley*, 638 F.2d 560, 562 n.2 (2d Cir. 1981)).

Co., 933 F.2d 35, 42 (1st Cir. 1991)); *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009) (per curiam) ("[W]e refuse to adopt the suggestion that the prosecution, in order to establish vicarious liability, should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees.") (citing *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989)). Accordingly, the relationship between Holloway and Pfizer could not be any closer: when it comes to the off-label promotion of Bextra, they are one.

This close relationship is also ongoing inasmuch as they share a mutual interest in downplaying the extent of their criminality so as to minimize the risk that the government will exclude one or both of them from federal health benefits programs, which explains why it appears that Pfizer is funding Holloway's defense in the government debarment proceedings. Similarly, in regard to "the key facts and general subject matter" of Pfizer's promotion of Bextra, Pfizer had complete control over Holloway, including uniform (off-label) promotional tactics and mandated reporting requirements. Those off-label practices were focus of the government investigation that is the subject of the statements, omissions and reserve decisions at issue in this case. So although Holloway had nothing to do with making Pfizer's statements, omissions and reserve decisions, her actions – and the questions she refused to answer – have everything to do with the veracity and completeness of those statements, omissions and reserve decisions.

This is powerful evidence, yet it poses virtually no risk of ***unfair*** prejudice. Judge Weinfeld's analysis is apt today as it was over 30 years ago:

> Striking the balance, I find, on the one hand, no real danger of unfair prejudice. For a witness to assert his Fifth Amendment privilege in the course of a civil trial is "hardly the equivalent" of passing a bloody shirt among the jury or introducing a dying accusation of poisoning. On the other hand, such evidence of [wrongdoing] has significant probative value and is essential to [plaintiffs'] claims.

> With respect to the assertion of the privilege by any witness, Mr. Justice Brandeis' observation is pertinent: "Silence is often evidence of the most persuasive character."

Brink's, Inc. v. City of New York, 539 F. Supp. 1139, 1141 (S.D.N.Y. 1982) (footnote omitted) (quoting *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923)), *aff'd*, 717 F.2d 700 (2d Cir. 1983). As the adverse-inference instruction makes clear, admitting this evidence merely allows the jury to decide whether or not to draw any inference from Holloway's invocation. Both sides will have plenty of opportunity to argue for one inference or another.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court admit the portions of Holloway's deposition attached as Ex. 2 to the Forge Decl.

DATED: December 10, 2014

Respectfully submitted,

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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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