UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PFIZER INC., et al., Defendants.	Civil Action No. 1:10-cv-03864-AKH Hon. Alvin K. Hellerstein ECF Case

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 9 TO EXCLUDE FIFTH AMENDMENT INVOCATIONS OF NON-PARTY MARY HOLLOWAY AND DOCUMENT RELATING TO HER CRIMINAL CONVICTION

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The parties recently exchanged proposed witness and exhibit lists. Plaintiffs suggest that they intend to offer at trial deposition testimony from a former midlevel Pfizer sales employee, Mary Holloway, who left the company in late 2006. In 2009, months after the Class Period ended, Ms. Holloway pleaded guilty to a misdemeanor offense regarding her marketing of the Pfizer product Bextra. As the Court will recall, Ms. Holloway invoked the Fifth Amendment in response to all questions Plaintiffs and Pfizer asked her at her deposition; by Order dated October 31, 2014 the Court ruled that Ms. Holloway was permitted to do so and denied Plaintiffs' motion to compel substantive answers. Now Plaintiffs apparently seek to introduce Ms. Holloway's Fifth Amendment invocations at trial, for the sole purpose of requesting that the jury draw adverse inferences against Defendants based on those invocations. Plaintiffs also have included on their exhibit list Ms. Holloway's sentencing memorandum, which postdates the Class Period.[1]

All of this proposed testimony and evidence is inadmissible. Under the Second Circuit's decision in *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997), the Fifth Amendment invocations of Ms. Holloway, a non-party who left Pfizer in 2006 and who Defendants do not control, cannot be used to seek adverse inferences against any Defendant. The invocations therefore are inadmissible under Fed. R. Evid. 401, 402, and 403. Ms. Holloway's sentencing memorandum is inadmissible hearsay under Fed. R. Evid. 801 and 802, and in any event is irrelevant and unfairly prejudicial. The Court should exclude all of this evidence.

I. MS. HOLLOWAY'S INVOCATIONS OF THE FIFTH AMENDMENT SHOULD BE EXCLUDED.

Ms. Holloway was a regional sales manager (there were many dozens at Pfizer) in one region of one Pfizer sales division that was responsible for marketing Bextra. She was

[1] Pls.' Ex. 403.

terminated at the end of 2006 as part of a corporate downsizing. She had absolutely no responsibility for, or involvement in, Pfizer's securities disclosures. In 2009, months after the Class Period ended, Ms. Holloway pleaded guilty to one misdemeanor count of misbranding Bextra under 21 U.S.C. §§ 331(a), 333(a)(1), and 352(f). Section 333(a)(1) is a strict liability misdemeanor; thus, even in connection with her plea, Ms. Holloway denied that she intentionally or knowingly violated any laws regarding the promotion of Bextra.

At her deposition on July 23, 2013, Ms. Holloway, on the advice of her counsel, asserted her Fifth Amendment rights and refused to answer any questions, from either Plaintiffs or Defendants, regarding her work at Pfizer. She provided no substantive testimony of any kind, yet Plaintiffs propose to introduce her deposition testimony at trial.

Fifth Amendment invocations from a non-party witness, by themselves, obviously are irrelevant under Rule 401 and not helpful to the jury. There is only one circumstance in which they can be admitted at trial, and that is where the jury can properly draw an adverse inference *against a party* based on the non-party's invocations. Under Second Circuit law, the party offering the invocations bears a heavy burden to support such an adverse inference, and Plaintiffs cannot satisfy that burden with respect to Ms. Holloway's testimony.

In *LiButti*, the Second Circuit held that "the circumstances of a given case" determine whether a non-party witness's Fifth Amendment invocations warrant an adverse inference instruction against a party. 107 F.3d at 121. To provide guidance to trial courts, *LiButti* described four non-exclusive factors to consider in making this determination: (1) "the nature of the relevant relationships," which "will invariably be the most significant circumstance"; (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 compatability 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.

All four of the *LiButti* factors demonstrate why Ms. Holloway's invocations are inadmissible here. As to the relationship between Ms. Holloway and Defendants, the first and most important factor, Ms. Holloway is a former Pfizer employee, not a current employee, and was terminated from Pfizer ***seven years*** before she testified in this matter. We are not aware of a single case in which the Fifth Amendment invocations of a former employee who is so far removed from a defendant-company's employment have been admitted against the company. And as to the individual defendants, there is no evidence they even knew Ms. Holloway when she worked for Pfizer, let alone had any relevant interactions with her.[2] Under this factor, the key issue is whether the "bond" between the party and the non-party witness is so "close[]" that it is unlikely the witness would "render testimony in order to damage the relationship." *Id.* at 123. There is no evidence that Ms. Holloway retains any particular loyalty to Pfizer and, to the contrary, her sentencing memorandum—discussed in Part II, *infra*—made assertions that Plaintiffs argue are directly adverse to Pfizer's interests.

The facts in *LiButti* demonstrate the type of close relationship that is required before a non-party's Fifth Amendment invocations can support an adverse inference against a party. The relationship in *Libutti* was between a father (the non-party) and his own daughter (the party), and the record showed that the two jointly managed the very assets at issue in that case. *See id.* at 124. In cases where, as here, the relationship between the party and the non-party witness at the time of the invocations is not close, courts in this jurisdiction regularly decline to give an adverse

[2] *See, e.g.,* Dec. 10, 2014 Declaration of Amanda M. MacDonald In Support of Defendants' Motions *In Limine* Ex. JJ-4 (McKinnell (Sept. 19, 2014) Dep. 37:4-11); Dec. 10, 2014 MacDonald Decl. Ex. MM-4 (Kindler (Oct. 10, 2014) Dep. 102:5-9); Dec. 10, 2014 MacDonald Decl. Ex. RR-2 (Waxman (Oct. 16, 2014) Dep. 40:19-23).

inference instruction based on the non-party's Fifth Amendment invocations. *See Banks v. Yokemick*, 144 F. Supp. 2d 272, 290 (S.D.N.Y. 2001) (where plaintiff relied on mere fact that defendant and non-party witnesses were fellow police officers teamed on patrol, the court noted that such officers "could maintain a strained or even hostile relationship, or no relationship at all"); *Akinyemi v. Napolitano*, 347 F. App'x 604, 607 (2d Cir. 2009) (no adverse inference charge appropriate when non-party witness "was a very low level employee").

The second *LiButti* factor is the "degree of control which the party has vested in the non-party witness . . . in regard to the key facts and general subject matter of the litigation." 107 F.3d at 123. In *LiButti*, for example, there was ample evidence of the non-party father's "financial control" over a number of transactions concerning the asset at issue, *id.* at 115-17, which he appeared to manage for or with his daughter. Here, however, Ms. Holloway is a peripheral figure—and even that may be too generous—in this litigation. Plaintiffs allege securities fraud committed by Pfizer and certain of its senior officers. The actions of Ms. Holloway, who this Court has recognized as an employee belonging to a "lower intermediate" level within the company, Oct. 30 Hr'g Tr. 4:20, have nothing to do with the issues at the heart of this case. Ms. Holloway did not provide input into Pfizer's securities filings or legal reserves and therefore had *no* involvement in the key facts and general subject matter of this litigation. *Akinyemi*, 347 F. App'x at 607 ("[T]he witness had no control over the key facts and issues in the litigation."). Ms. Holloway's irrelevance to this litigation is even more apparent since she was not a Pfizer employee for two-thirds of the Class Period, and the conduct about which Plaintiffs attempted to question her concluded prior to the Class Period.

Third, *LiButti* asks whether the party and non-party witness's interests are aligned such that "the assertion of the privilege advances the interests of both the non-party witness and the

affected party" and the nonparty is "pragmatically a noncaptioned party in interest." 107 F.3d at 123. Nothing of the sort is true here. To the contrary, Ms. Holloway's interests in asserting the privilege at her deposition were contrary to Defendants' interests in obtaining what Defendants believe would have been helpful testimony from her. As this Court has recognized, one of Ms. Holloway's most pressing reasons for asserting her Fifth Amendment right is that, as part of her plea agreement, she "agreed not to make statements inconsistent with the admissions in the agreement." ECF No. 280, at 2. Thus, as she argued to the Court, "her testimony . . . could potentially expose her to criminal prosecution . . . in the event that it is inconsistent, or claimed to be inconsistent, with her plea agreement or earlier statements." *Id.* The Court ordered that she could not be compelled to testify "[i]n light of the terms of her plea agreement, as well as the fact that her deposition testimony might elicit new or inconsistent information exposing her to additional prosecution." *Id.* Ms. Holloway's silence thus was motivated by dual concerns: the fear of making an inconsistent statement and thus nullifying her plea agreement, and the possibility that she could be asked for self-incriminating information.

Therefore, based solely on Ms. Holloway's blanket invocation of the Fifth Amendment, the jury cannot know what reason motivated her decision not to answer any particular question. An adverse inference can be appropriate only if the witness's silence can imply one thing: the answer would admit some fact relevant to the witness's possible criminal conduct, and would support an adverse inference against a party. *See Brink's Inc. v. City of New York*, 717 F.2d 700, 707-10 (2d Cir. 1983). Here, however, Ms. Holloway's silence could imply a number of things. Critically, her withheld answers actually could have been *helpful* to Defendants—for instance, testimony that Pfizer trained her and her subordinates to promote only on-label—but contradictory (or, at least in her mind, potentially contradictory) to her prior statements in

connection with her plea, which required her to refrain from speaking. Therefore, it is impossible to know what inference to draw from her refusal to answer any particular question, and any adverse inference under these circumstances could never be "trustworthy" or helpful to the fact-finder. *LiButti*, 107 F.3d at 124. An adverse inference instruction against Defendants is totally inappropriate when, in fact, Ms. Holloway has withheld responses that may be favorable to Defendants.

In addition, there can be no dispute that Ms. Holloway is not a *de facto* "party in interest" to this lawsuit. Ms. Holloway had nothing to do with Pfizer's securities disclosures process, and the outcome of this case will have no effect on her.

The final *LiButti* factor is whether "the non-party witness was a key figure in the litigation and played a *controlling* role in respect to any of its underlying aspects." *Id.* at 123-24 (emphasis added). Plainly, as noted above, Ms. Holloway played no role, much less a controlling role, in Pfizer's securities disclosures or its loss contingency reserves.

In addition, an adverse inference instruction would be highly prejudicial to Defendants. As *LiButti* recognized, there are "many . . . management problems which a trial court invariably has to wrestle with in order to guard against unfair prejudice when [a non-party witness] takes the proverbial Fifth" in a jury trial. *Id.* at 124. In *LiButti*, those problems did not exist because there was only a bench trial. *See id.* In a jury trial, however, "the danger of prejudice" is a serious concern, particularly where the Fifth Amendment invocation "may not be as one-sided as it at first appears," and where the assertion of the privilege, "on the advice of counsel, is an ambiguous response." *Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 210-11 (5th Cir. 1983). "An attorney might advise her or his client not to answer questions simply as a safety measure," yet "[t]he revelation that [the invoker] has claimed the privilege marks him as a criminal who has

probably eluded justice. The jury is not likely to realize that the innocent may invoke." *Id.* at 211 (internal quotation marks omitted). That is precisely the issue here; Ms. Holloway has invoked the Fifth Amendment on the advice of counsel as a safety measure, shielding from scrutiny answers that may well be favorable to Defendants. In these circumstances, granting an adverse inference against Defendants is exactly contrary to Second Circuit law.

II. DOCUMENTS REFLECTING OR RELATING TO MS. HOLLOWAY'S CONVICTION ARE INADMISSIBLE HEARSAY AND IRRELEVANT.

Separately, Plaintiffs have included on their exhibit list Ms. Holloway's 2009 sentencing memorandum. This document is inadmissible hearsay, irrelevant, and would needlessly confuse and unfairly prejudice the jury.

Ms. Holloway's sentencing memorandum consists entirely of statements made by Ms. Holloway in another proceeding. The only purpose for offering them would be to establish the truth of the matters asserted in the documents (for example, that Ms. Holloway engaged in certain conduct for certain reasons). As judges of this Court have repeatedly held, court filings from another case are inadmissible hearsay under Rules 801 and 802. *See Gaffney v. Dep't of Info. Tech.*, 579 F. Supp. 2d 455, 459 (S.D.N.Y. 2008) (excluding affidavits and decisions of a court in a prior lawsuit as hearsay); *Gutierrez v. City of New York*, No. 08 Civ. 6537(LBS), 2012 WL 2357063, at *2 (S.D.N.Y. June 20, 2012); *Richmond v. General Nutrition Centers Inc.*, No. 08 Civ. 3577(PAE)(HBP), 2012 WL 762307, at *9 (S.D.N.Y. Mar. 9, 2012) ("To the extent that defendants seek only to preclude the introduction of pleadings and court filings in other lawsuits, their motion to preclude is granted. . . . [S]uch pleadings are inadmissible hearsay."). There are no exceptions to the hearsay rule that would permit admission of Ms. Holloway's sentencing memorandum. Defendants were not permitted to question Ms. Holloway about any of the statements in the memorandum—at her deposition, she asserted the Fifth Amendment equally to

both Plaintiffs' and Defendants' questions—so these are exactly the type of statements that the hearsay rule was designed to prohibit.

Even if the document were not hearsay, Ms. Holloway's conviction occurred months after the end of the Class Period, and therefore it is irrelevant to this case. *See Arlio v. Lively*, 474 F.3d 46, 52 (2d Cir. 2007) ("Evidence that is not relevant is not admissible."). A post-Class Period conviction of a former employee, and statements she made in connection with the conviction, cannot possibly have informed or be relevant to Pfizer's securities disclosures between January 2006 and January 2009.[3] Plaintiffs have offered no evidence—and there is none—that Ms. Holloway made any of the statements contained in her sentencing memorandum to anyone at Pfizer before January 2009, the end of the Class Period.

Finally, the memorandum is inadmissible under Rule 403 because it is highly and unfairly prejudicial to Defendants, with minimal probative value and no indicia of trustworthiness. The fact that a former Pfizer employee pleaded guilty to a misdemeanor misbranding offense is obviously prejudicial and totally unnecessary to admit into evidence, because the jury already will hear that a Pfizer subsidiary pleaded guilty to a felony misbranding offense. Moreover, it appears that Plaintiffs seek to use these documents to suggest that Ms. Holloway was directed by Pfizer senior management to engage in unlawful promotion of Bextra, largely because Ms. Holloway's counsel stated in the memorandum, "Ms. Holloway believed at all times that her actions . . . were lawful and indeed consistent with how Pfizer wanted her to

[3] Plaintiffs cannot claim that a company has an obligation to disclose a criminal investigation of a former employee. Their own disclosures expert, Edward Buthusiem, admitted that "[h]aving an employee indicted is vastly different than having the company indicted," and does not have to be disclosed under the securities laws. Dec. 10, 2014 MacDonald Decl. Ex. AA-2 (Buthusiem (Aug. 1, 2014) Dep. 114:24-115:2). His former employer, GlaxoSmithKline, did not disclose the fact that one of the company's senior lawyers was under investigation—while still an employee—and later was indicted for allegedly failing to respond adequately to an FDA inquiry concerning part of the marketing conduct at issue in the company's Department of Justice investigation. *See id.* at 113:25-115:12.

promote and sell the product"[4] and characterized certain activities that violated Pfizer policies as "a company-wide initiative."[5] Yet the first statement, that "[she] believed at all times that her actions . . . were lawful," contradicts the inference Plaintiffs seek to draw. In addition, as noted above, because she pleaded to a strict liability misdemeanor Ms. Holloway maintained that position notwithstanding her plea. And of course, in connection with a criminal plea in which the defendant is arguing for as lenient a sentence as possible, the defendant's counsel will advocate a version of the underlying facts that is most favorable for the defendant.

No one represented Defendants' interests in Ms. Holloway's prosecution or her sentencing proceedings, and because Defendants did not have the opportunity to question Ms. Holloway about these statements, there is no way to know what they mean or whether they are supported by the facts. Indeed, in connection with the recent motions practice concerning her Fifth Amendment invocations, Ms. Holloway indicated that if she gave testimony in this case she might have to contradict, in some unknown way, statements she made in connection with her plea. Oct. 30 Hr'g Tr. 9:7-10:1. These statements thus lack any indicia of trustworthiness or probative value, and any weight they have would be substantially outweighed by unfair prejudice to Defendants. Rule 403 therefore provides an independent basis for their exclusion.

[4] Pls.' Ex. 174, at 1.

[5] *Id.* at 7.

CONCLUSION

For the reasons stated above, the Court should exclude Ms. Holloway's Fifth Amendment invocations and her sentencing memorandum.

Date: Washington, D.C.
December 10, 2014

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By: /s/ Joseph G. Petrosinelli

Joseph G. Petrosinelli (admitted *pro hac vice*)
Steven M. Farina (admitted *pro hac vice*)
George A. Borden
Amanda M. MacDonald (admitted *pro hac vice*)
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
sfarina@wc.com
jpetrosinelli@wc.com
gborden@wc.com
amacdonald@wc.com

Counsel for Defendant Pfizer Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Scott D. Musoff

Scott D. Musoff
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
scott.musoff@skadden.com

Jennifer L. Spaziano (*pro hac vice* pending)
Michael S. Bailey (*pro hac vice* pending)
1440 New York Avenue NW
Washington, DC 20005

Telephone: (202) 371-7000
Facsimile: (202) 393-5760
Email: Jen.Spaziano@skadden.com
Email: Michael.Bailey@skadden.com

Counsel for Henry A. McKinnell

DAVIS POLK & WARDWELL LLP

By: /s/ James P. Rouhandeh
James P. Rouhandeh
Charles S. Duggan
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
james.rouhandeh@davispolk.com
charles.duggan@davispolk.com

Counsel for Defendant Jeffrey B. Kindler

GOODWIN PROCTER LLP

By: /s/ Richard M. Strassberg
Richard M. Strassberg
Daniel Roeser
The New York Times Building
620 Eighth Avenue
New York, NY 10018
Tel.: 212.813.8800
Fax: 212.355.3333
rstrassberg@goodwinprocter.com
droeser@goodwinprocter.com

Counsel for Defendant Frank D'Amelio

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jay B. Kasner

Jay B. Kasner
Gary J. Hacker
Alexander C. Drylewski
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
jay.kasner@skadden.com
gary.hacker@skadden.com
alexander.drylewski@skadden.com

Counsel for Defendant Alan G. Levin

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: /s/ Michael B. Carlinsky

Michael B. Carlinsky
Sheila Birnbaum
Brant Duncan Kuehn (*pro hac vice* pending)
51 Madison Avenue
New York, New York 10010
(212) 849-7000

Lori Alvino McGill
777 6th Street, NW
Washington, DC 20001
(202) 538-8000

Counsel for Defendant Ian C. Read

O'MELVENY & MYERS LLP

By: /s/ Ross B. Galin

Ross B. Galin
Stuart Sarnoff
Howard E. Heiss
7 Times Square
New York, New York 10036

Telephone: (212) 326-2000
Facsimile: (212) 326-2061
rgalin@omm.com
ssarnoff@omm.com
hheiss@omm.com

Counsel for Defendant Allen Waxman

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of December, 2014, the foregoing Memorandum of Law in Support of Defendants' Motion *In Limine* No. 9 To Exclude Fifth Amendment Invocations of Mary Holloway and Document Relating to Her Criminal Conviction was filed with the Court through the CM/ECF system and thereby served to all parties of record.

/s/ Lauren K. Collogan

Lauren K. Collogan
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
lcollogan@wc.com

Regan Karstrand

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Jeffrey B. Kindler
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1:10-cv-03864-AKH Notice has been electronically mailed to:

Alexander C Drylewski alexander.drylewski@skadden.com

Amanda M. MacDonald amacdonald@wc.com

Brant Duncan Kuehn brantkuehn@quinnemanuel.com

Charles S. Duggan charles.duggan@dpw.com, ecf.ct.papers@davispolk.com

Cynthia Margaret Monaco cmonaco@cynthiamonacolaw.com, cmmonaco@gmail.com

Daniel Prugh Roeser droeser@goodwinprocter.com

Danielle Suzanne Myers dmyers@rgrdlaw.com

Darren J. Robbins e_file_sd@rgrdlaw.com

David Avi Rosenfeld drosenfeld@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com

Donald Alan Migliori dmigliori@motleyrice.com

Eugene Mikolajczyk genem@rgrdlaw.com

Gary John Hacker ghacker@skadden.com

George Anthony Borden gborden@wc.com

Hamilton Philip Lindley hlindley@deanslyons.com, mgoens@deanslyons.com

Henry Rosen henryr@rgrdlaw.com, dianah@rgrdlaw.com

Howard E. Heiss hheiss@omm.com, #nymanagingattorney@omm.com

Ivy T. Ngo ingo@rgrdlaw.com, e_file_sd@rgrdlaw.com

James M. Hughes jhughes@motleyrice.com, erichards@motleyrice.com, kweil@motleyrice.com, kweil@pacernotice.com, mgruetzmacher@motleyrice.com

James P. Rouhandeh james.rouhandeh@dpw.com, ecf.ct.papers@davispolk.com

James R. Harper coljamesrharper@me.com

Jason A. Forge jforge@rgrdlaw.com, e_file_SD@rgrdlaw.com, tholindrake@rgrdlaw.com

Jay B. Kasner jkasner@skadden.com

Jennifer Lynn Spaziano jen.spaziano@skadden.com

Joe Kendall administrator@kendalllawgroup.com, hlindley@kendalllawgroup.com, jkendall@kendalllawgroup.com

John K. Villa jvilla@wc.com

Joseph F. Rice jrice@motleyrice.com

Joseph G. Petrosinelli jpetrosinelli@wc.com

Juliana Newcomb Murray juliana.murray@davispolk.com, ecf.ct.papers@davispolk.com

Keir Nicholas Dougall kdougall@dougallpc.com

Kevin Anthony Burke kaburke@sidley.com, efilingnotice@sidley.com, nyefiling@sidley.com

Lauren Kristina Collogan lcollogan@wc.com

Leigh R. Lasky lasky@laskyrifkind.com

Lori McGill lorialvinomcgill@quinnemanuel.com

Matthew Melamed mmelamed@rgrdlaw.com

Michael Barry Carlinsky michaelcarlinsky@quinnemanuel.com, brantkuehn@quinnemanuel.com, jomairecrawford@quinnemanuel.com

Michael Joseph Dowd miked@rgrdlaw.com, e_file_sd@rgrdlaw.com, e_file_sf@rgrdlaw.com, tome@rgrdlaw.com

Michael Scott Bailey michael.bailey@skadden.com

Mitchell M.Z. Twersky mtwersky@aftlaw.com

Paul T. Hourihan phourihan@wc.com

Richard Mark Strassberg rstrassberg@goodwinprocter.com, nymanagingclerk@goodwinprocter.com

Ross Bradley Galin rgalin@omm.com, lisachen@omm.com, mochoa@omm.com, neverhart@omm.com

Ryan A. Llorens ryanl@rgrdlaw.com, kirstenb@rgrdlaw.com, nbear@rgrdlaw.com

Samuel Howard Rudman srudman@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com, mblasy@rgrdlaw.com

Scott D. Musoff smusoff@skadden.com, david.carney@skadden.com

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

Sidney Bashago sidney.bashago@dpw.com

Steven M.. Farina sfarina@wc.com

Stuart Michael Sarnoff ssarnoff@omm.com

Trig Randall Smith trigs@rgrdlaw.com, e_file_sd@rgrdlaw.com, nhorstman@rgrdlaw.com

William E. Schurmann wschurmann@wc.com

William H. Narwold bnarwold@motleyrice.com, ajanelle@motleyrice.com, vlepine@motleyrice.com

Willow E. Radcliffe willowr@rgrdlaw.com, ptiffith@rgrdlaw.com

1:10-cv-03864-AKH Notice has been delivered by other means to:

Catherine J. Kowalewski
Robbins Geller Rudman & Dowd LLP (San Diego)
655 West Broadway
Suite 1900
San Diego, CA 92101

Daniel E. Hill
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

David C. Walton
Robbins Geller Rudman & Dowd LLP (SANDIEGO)
655 West Broadway
Suite 1900
San Diego, CA 92101

Jamie J. McKey
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

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