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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO ADMIT DEPOSITION TESTIMONY OF MARY HOLLOWAY AND FOR ADVERSE-INFERENCE INSTRUCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

OTHER AUTHORITIES

Plaintiffs concede in their motion to admit Mary Holloway's Fifth Amendment invocations that "***Holloway had nothing to do with making Pfizer's statements, omissions and reserve decisions***."[1] Yet they seek to present to the jury prejudicial and confusing evidence—Ms. Holloway's ambiguous invocations of her Fifth Amendment privilege in response to questions, from both Plaintiffs and Defendants, that did not concern Pfizer's Class Period disclosures or reserving decisions. As explained in Defendants' Motion *In Limine* No. 9, both Second Circuit precedent and basic principles of evidence make it clear that Ms. Holloway's invocations are inadmissible.

I. PLAINTIFFS CANNOT SATISFY *LIBUTTI*'S REQUIREMENTS FOR ADMISSION AND AN ADVERSE-INFERENCE INSTRUCTION.

As Plaintiffs acknowledge, *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997), establishes the test for determining whether a non-party's invocation of the Fifth Amendment privilege is admissible against a party. Under *LiButti*, the key factors are the "nature of the relevant relationships," 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," the "compatibility of the interests of the party and non-party witness in the outcome of the litigation," and "[w]hether 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. As explained in more detail in Defendants' Motion *In Limine* No. 9, incorporated by reference herein, none of these factors supports the admission of Ms. Holloway's Fifth Amendment invocations.

In the first place, Plaintiffs have proffered no evidence—because there is none—that Ms. Holloway retains the sort of loyalty or "close[]" relationship with Defendants that would prevent

[1] Mem. of Law in Support of Pls.' Mot. To Admit Deposition Testimony of Mary Holloway and for Adverse-Inference Instruction at 7, ECF No. 352 (emphasis added) (hereinafter "Pls.' Br.").

her from "render[ing] testimony in order to damage the relationship." *Id.* at 123; *see also Banks v. Yokemick*, 144 F. Supp. 2d 272, 290 (S.D.N.Y. 2001) (denying an adverse-inference instruction when the court noted that the party and non-party "could maintain a strained or even hostile relationship, or no relationship at all"). As Plaintiffs concede, Pfizer terminated Ms. Holloway in 2006, seven years before she provided deposition testimony in this case. Plaintiffs cannot, and do not, seriously claim that Ms. Holloway retains any loyalty to Pfizer such that her purpose in invoking the Fifth Amendment in 2013 was to protect Pfizer's interests; indeed, Ms. Holloway also invoked the Fifth Amendment in response to ***Pfizer's*** questions, the answers to which would have elicited helpful testimony to the company.

Plaintiffs assert that "it appears" Pfizer is paying Ms. Holloway's legal fees in a ***different*** legal proceeding, a civil administrative action brought against her by the FDA, that was instituted long before Plaintiffs even filed this lawsuit. That is irrelevant to the issue here. When evaluating the overall "closeness" of the relationship in this context, courts consider whether the party is paying the non-party witness's legal fees ***in connection with the same proceeding in which the witness has invoked the Fifth Amendment***. *See Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, 1311 (11th Cir. 2014) (affirming the admission of a non-party's Fifth Amendment invocation in part because the party "paid [the non-party witness's] legal fees *associated with this action*" (emphasis added)). This obviously makes sense—if the party is paying the non-party's lawyer who is advising the non-party to assert the Fifth Amendment, there is a risk that the invocation is motivated by some loyalty to the (paying) party. In this case, Pfizer has not paid, and is not paying, for Ms. Holloway's counsel—she had independent counsel, of her own choice, appear with her at her deposition, and Pfizer has no relationship with

her counsel. Plaintiffs have no evidence that Ms. Holloway's Fifth Amendment invocations were motivated by anything other than her own self-interest.

As for the second and fourth factors, the key inquiry—which Plaintiffs distort by focusing on marketing activities rather than the securities disclosures actually at issue—is the degree of control which the party vested in the non-party, i.e., whether the non-party was a "key figure" with a "controlling role" in the "***subject matter of the litigation***." *LiButti*, 107 F.3d at 123-24 (emphasis added). Yet Plaintiffs concede, as they must, that "***Holloway had nothing to do with making Pfizer's statements, omissions, and reserve decisions***."[2] In other words, she had ***no*** control over the subject matter of this securities case. *See 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" who "had no control over the key facts and issues in the litigation").

Plaintiffs' motion also ignores the serious incompatibility between Defendants' interests and Ms. Holloway's interests, which bears on both the first and third *LiButti* factors. As explained in more detail in Defendants' Motion *In Limine* No. 9, Ms. Holloway's Fifth Amendment invocations did not prevent substantive answers solely to Plaintiffs' questions; Defendants also were denied the opportunity to obtain substantive answers to their questions,[3] which they believe would have been helpful to them. As the Court has noted, one of Ms. Holloway's reasons for invoking the privilege is that, if she makes any statement that could be interpreted as inconsistent with her plea agreement, the government could revoke the agreement. ECF No. 280, at 2. Any answer helpful to Defendants but potentially inconsistent with her plea

[2] Pls.' Br. at 7.

[3] *See* December 10, 2014, Declaration of Jason A. Forge in Support of Plaintiffs' Motion to Admit Deposition Testimony of Mary Holloway and for Adverse Inference Instruction Ex. 2 (Holloway (July 23, 2013), Dep., ECF No. 362-2, 47:10-22).

would have compelled her to remain silent as a "safety measure," *Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 211 (5th Cir. 1983), and therefore her silence cannot support any inference one way or the other.

Notably, this ambiguity is absent in the cases Plaintiffs have cited, such as *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983). In *Brink's*, the City of New York sought to ask convicted former employees of Brink's Inc. only two questions: "whether . . . they ever stole money from parking meters while working for Brink's" or "whether they know of any other Brink's' employees who did." *See Brink's Inc. v. City of New York*, 539 F. Supp. 1139, 1140 (S.D.N.Y. 1982), *aff'd*, 717 F.2d 700. Because the witnesses had been convicted of that very conduct, there was no doubt concerning what their withheld answers would have been, nor their reasons for invoking their Fifth Amendment privilege. Here, in contrast, Plaintiffs questioned Ms. Holloway on topics going far beyond her own guilty plea and have stated that they primarily seek to use her silence to show that there was a *corporate* directive to promote off-label—a fact which her guilty plea cannot and does not establish. Thus, this case presents an entirely different question—whether to admit Fifth Amendment invocations where neither the court nor the jury could predict the non-party witness's likely answers with any reasonable certainty, much less know those answers to be unfavorable to Defendants.

Plaintiffs' strategy is as obvious as it is improper. Presented with a witness who stated she would not provide any answers regarding "any subject matter having to do with Pfizer,"[4] Plaintiffs' counsel posed multiple misleading questions without fear of being contradicted by the witness. For example, Plaintiffs have designated a series of questions in which they presented several emails to Ms. Holloway and asked her whether the emails "reflect that executive

[4] Dec. 10, 2014, Forge Decl. (Holloway (July 23, 2013) Dep. 21:5-10).

leadership at Pfizer expected the sales force to detail Bextra for off-label uses[.]"[5] The emails themselves, however, all reflect communications among or between Ms. Holloway and her *subordinates*, not executive leadership.[6] "Courts have discretion"—and should choose—"not to admit evidence of the invocation" when there is "'lawyer abuse'—where an examining attorney, once determining that the privilege will be invoked, poses damaging questions, safe from contradiction by the witness." *In re WorldCom, Inc.*, 377 B.R. 77, 109 (Bankr. S.D.N.Y. 2007) (declining adverse inference based on the Fifth Amendment invocations of, among others, the party's former senior vice president).

At bottom, any adverse inference the jury might draw could never be reliable or "trustworthy under all of the circumstances." *LiButti*, 107 F.2d at 124. For these reasons, the Court should deny Plaintiffs' motion and grant Defendants' Motion *In Limine* No. 9.

II. MS. HOLLOWAY'S INVOCATIONS HAVE NO PROBATIVE VALUE AND ARE HIGHLY PREJUDICIAL TO DEFENDANTS.

Rule 403 provides an independent basis to deny Plaintiffs' motion and grant Defendants' motion to exclude Ms. Holloway's invocations.

Plaintiffs assert that the inference they seek to draw from Ms. Holloway's silence is relevant to the issue of Defendants' knowledge or recklessness in approving Pfizer's securities disclosures and loss contingency reserves.[7] Yet the probative value of Ms. Holloway's testimony as to these issues is virtually nonexistent, for several reasons. Most obviously, she had no part in the process of determining or evaluating Pfizer's disclosures and reserves, as Plaintiffs have conceded. Moreover, as multiple individual Defendants testified, they either did not know

[5] Dec. 10 Forge Decl. Ex. 2 (Holloway (July 23, 2013) Dep. 43:4-44:5).

[6] December 22, 2014 Declaration of Amanda M. Macdonald in Support of Defendants' Responses to Plaintiff's Motions *In Limine*, Exhibits YY-4, ZZ-4 (email from T. Farina to various recipients, dated January 16, 2004; email from T. Farina to various recipients, dated February 24, 2004).

[7] Pls.' Br. at 6.

or could not recall ever having met Ms. Holloway.[8] Finally, to the extent Ms. Holloway's ambiguous silence can speak to anything, Plaintiffs have indicated they will present testimony from multiple witnesses who were more highly placed in Pfizer's organization—including Ms. Holloway's superior, Bruce Fleischmann. Unlike Ms. Holloway, these witnesses either have given or are expected to provide substantive answers to the very same questions Plaintiffs posed to Ms. Holloway, rendering her testimony devoid of any real probative value. *See Old Chief v. United States*, 519 U.S. 172, 184-85 (1997) (probative value "signifies the marginal probative value of the evidence relative to the other evidence in the case" (internal quotation marks omitted)); 2 Joseph M. McLaughlin et al., *Weinstein's Federal Evidence* § 403.02[2][a], at 403-14 (2d ed. 2014).

On the other side of the balance, the danger of unfair prejudice from Ms. Holloway's invocations is extremely high. As noted above, the inherent ambiguity of her answers means that the jury may draw an adverse inference based on questions Defendants actually wanted Ms. Holloway to answer, and where her answers would have been helpful to Defendants. This risk of unfair prejudice is even higher in a jury trial, *see LiButti*, 107 F.2d at 124; *Farace*, 699 F.2d at 210-11 ("the danger of prejudice" is a serious concern, particularly when the assertion of the privilege "on the advice of counsel, is an ambiguous response" and "may not be as one-sided as it at first appears"), particularly where Plaintiffs' requested jury instruction fails to explain to the jury the reasons Ms. Holloway's counsel has articulated for her Fifth Amendment invocations. The only instruction that would be appropriate here would be one explaining why Ms. Holloway has chosen to invoke the Fifth Amendment privilege—that is, her desire to avoid any statement

[8] 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, at 3 & n.2, ECF No. 364.

inconsistent with her plea agreement—and instructing the jury that it may draw an inference against *either* Plaintiffs or Defendants based on Ms. Holloway's Fifth Amendment invocations. That such an instruction is the only one that fairly fits these circumstances is reason enough not to admit the testimony—the jury, which would no way of discerning whether Ms. Holloway's utterly ambiguous silence shielded answers that were helpful or harmful to Defendants, would be left to speculate as to what her answer would have been to any particular question. Thus, no jury instruction could adequately prevent the unfair prejudice that would result from admitting Ms. Holloway's invocations.

Furthermore, Plaintiffs do not even attempt to argue that Ms. Holloway's Fifth Amendment invocations are admissible against the Individual Defendants, who do not have any relationship with Ms. Holloway. Therefore, even if the invocations were admissible for another purpose—and they are not—they should not be admitted because the prejudice to the Individual Defendants, which cannot reasonably be addressed through limiting instructions, would far outweigh any probative value of the evidence.

CONCLUSION

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

Date: December 22, 2014
Washington, D.C.

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 22nd day of December, 2014, the foregoing Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Admit Deposition Testimony of Mary Holloway and for Adverse-Inference Instruction 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

From: NYSD_ECF_Pool@nysd.uscourts.gov
Sent: Monday, December 22, 2014 8:38 PM
To: CourtMail@nysd.uscourts.gov
Subject: Activity in Case 1:10-cv-03864-AKH Jones et al v. Pfizer, Inc. et al Memorandum of Law in Opposition to Motion

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

Southern District of New York

Notice of Electronic Filing

The following transaction was entered by Collogan, Lauren on 12/22/2014 at 8:37 PM EST and filed on 12/22/2014

Case Name: Jones et al v. Pfizer, Inc. et al
Case Number: 1:10-cv-03864-AKH
Filer: Frank D'Amelio
Jeffrey B. Kindler
Alan G. Levin
Henry A. McKinnell
Pfizer, Inc.
Ian C. Read
Allen Waxman
Document Number: 397

Docket Text:
MEMORANDUM OF LAW in Opposition re: [350] MOTION in Limine *to Admit Deposition Testimony of Mary Holloway and for Adverse-Inference Instruction*. . Document filed by Frank D'Amelio, Jeffrey B. Kindler, Alan G. Levin, Henry A. McKinnell, Pfizer, Inc., Ian C. Read, Allen Waxman. (Collogan, Lauren)

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, lisa.hirakawa@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

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

Sidney Bashago sidney.bashago@dpw.com, ecf.ct.papers@davispolk.com, jennifer.kan@davispolk.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

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1008691343 [Date=12/22/2014] [FileNumber=14043027
-0] [461e914af74d60f3bc36320163ceb531ca66527fa95238d87e221f1150e7f46a4
c024677ad9518e4dae3a22166cd356e5e19152569d3c173b8983d1b43dbbc12]]