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May 3, 2013

My ruling are set out in the margins 5/6/13 [signature]

By Hand

The Honorable Alvin K. Hellerstein
United States District Court for the Southern
District of New York
500 Pearl Street, Room 1050
New York, NY 10007

Re: Jones v. Pfizer, Inc., et al., 10-cv-3864-AKH (S.D.N.Y.)

Dear Judge Hellerstein:

Pursuant to Your Honor's Individual Rule of Practice 2.E., and Fed. R. Civ. P. 37(a)(1), non-party KPMG LLP ("KPMG") and Plaintiffs submit this joint letter outlining certain discovery disputes for the Court's resolution.

I. DISPUTES SUBMITTED FOR RESOLUTION

A. Plaintiffs' Request to Depose Four KPMG Partners

The first dispute concerns subpoenas *ad testificandum* that Plaintiffs issued to *four* KPMG partners.

KPMG seeks relief in the form of an order quashing three of the subpoenas on the grounds that they are redundant and unduly burdensome. In the alternative, KPMG seeks relief in the form of a protective order (i) requiring that Plaintiffs first depose the one KPMG partner listed on a trial witness list before determining whether any additional deposition of a KPMG partner is justified, and (ii) precluding Plaintiffs from taking depositions of KPMG partners that would be redundant or unduly burdensome.

Denied. Plaintiffs can choose the 2 partners. They may differ, but cannot repeat questions. If the answers will differ, witnesses, then Plaintiffs can depose a third, on a good faith basis. AKH

Plaintiffs disagree that the depositions are redundant or unduly burdensome.

B. Plaintiffs' Request for Additional KPMG Documents

The second dispute concerns Plaintiffs' requests for additional KPMG documents.

KPMG notes that in advance of the March 8, 2013 court conference, which was designed to reach closure on document production issues, counsel for Plaintiffs at Robbins, Geller, Rudman & Dowd LLP ("RGRD") represented in a letter to Your Honor:

> As such, the *final* issue remaining in the discovery dispute between plaintiffs and KPMG is whether KPMG will produce relevant documents from Mr. Hedley's custodial files.

(2/22/13 letter from R. A. Llorens to Honorable Alvin K. Hellerstein at 3 (emphasis added).) At the conference, RGRD again represented:

> MR. SMITH: … And, again, your Honor, just to make this clear. We're talking about one custodian. And this is a very narrow issue. *Our discovery spat with KPMG is just about this.* We get these documents --
> THE COURT: I've got the point.
> MR. SMITH: Okay.

(3/8/13 H'rg Tr. at 21 (emphasis added).) Thereafter, KPMG produced responsive documents from Mr. Hedley's custodial files. RGRD then turned around and raised more document requests. Without waiving any rights or objections, KPMG followed up with respect to each request, in certain instances producing additional documents, and in other instances explaining that no additional documents could be found and appear not to exist. In one instance, based on negotiations that long ago had resolved the scope of production, KPMG declined to entertain Plaintiffs' attempt to resurrect old document requests. In an apparent effort at escalation, RGRD now argues that eighteen months of meet-and-confer negotiations should be disregarded and KPMG should be ordered to produce *all* other annual and interim workpapers regarding Pfizer audits during the Class Period—which have nothing to do with the issues in this litigation. Regrettably, Plaintiffs also make uninformed and reckless accusations.

It is Plaintiffs' position that KPMG should be ordered to produce full sets of its Pfizer annual and interim workpapers for the January 2006 through January 2009 Class Period. In the alternative, KPMG should be ordered to produce the specific documents Plaintiffs have identified below.[1]

C. Plaintiffs' Request for a Fifth KPMG Deposition

The third dispute concerns KPMG's production of Tim Hedley ("Hedley") custodial files pursuant to this Court's March 8, 2013 Order.

[1] Further, the Court should order all documents to be produced directly to plaintiffs, denying defendants' counsel the opportunity to review prior to production.

It is Plaintiffs' position that KPMG should be ordered to make a witness available pursuant to Rule 30(b)(6) to explain whether any of Mr. Hedley's custodial documents relevant to the issue of off-label marketing of Pfizer drugs, dated between January 1, 2005 and present, have been deleted, destroyed or backed up to storage media.[2]

KPMG notes that, in response to the Court's March 8, 2013 Order, it promptly and diligently collected Mr. Hedley's responsive custodial files within the within the agreed-upon scope of discovery.[3] There was only a modest volume of documents for production, as counsel for KPMG at Sidley Austin LLP ("Sidley") had notified RGRD in advance. That fact does not suggest any nefarious conduct. Rather, it is consistent with Mr. Hedley's role in the engagement and the nature of documentation he maintained in the normal course during his work. As Sidley repeatedly had explained to RGRD prior to the March 8 conference, the interim and audit workpapers during the Class Period reflect the nature and extent of involvement of forensic professionals, including Mr. Hedley. KPMG long ago produced those responsive workpapers.

II. COMPLIANCE WITH FED. R. CIV. P. 37(A)(1) AND INDIVIDUAL RULES OF PRACTICE

On March 20, 2013, RGRD communicated via email to Sidley that they intended to serve subpoenas seeking the depositions of four individuals who are current partners of KPMG: Larry Bradley, John Chapman, Mr. Hedley and Eric Riso. This was the first time RGRD had conveyed to Sidley Plaintiffs' intent to seek the depositions of four individuals affiliated with KPMG. Promptly thereafter, on March 21, 2013, Sidley conveyed to RGRD via email that KPMG objected to the number of depositions sought. On March 22, 2013, Sidley and RGRD met-and-conferred by telephone regarding the contemplated depositions. During that call, Plaintiffs offered to refrain from seeking the deposition of one KPMG partner, Mr. Riso. In KPMG's view, depositions of the other three partners still was not justified under the circumstances. Sidley conveyed KPMG's inclination to seek a protective order if Plaintiffs persisted in attempting to take depositions of three KPMG partners.

Unable to resolve the issue, RGRD asked Sidley whether it would accept service of deposition subpoenas on behalf of the four KPMG partners. On March 28, 2013, Sidley confirmed, without waiving any rights or objections, that it was authorized to accept service of deposition subpoenas on behalf of the four individuals.

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[2] Plaintiffs reserve their right to seek further appropriate relief from the Court regarding these subjects pending the results of that Rule 30(b)(6) deposition.

[3] Based on the parties' agreed-upon scope of discovery, KPMG did not produce materials that pertained to (i) drugs other than Bextra, Geodon, Lyrica and Zyvox (*see* First Amended Complaint ¶¶ 1, 8-11, *Jones v. Pfizer Inc.*, No. 1:10-cv-3864 (S.D.N.Y. Apr. 15, 2011) (AKH), Dkt. No. 71 ("Amend. Compl.")), (ii) foreign investigations and FCPA matters, or (iii) investigations involving state attorneys general as opposed to the Department of Justice (*see id.* ¶¶ 19, 95).

On April 11, 2013, Sidley and RGRD again met and conferred via telephone to discuss the contemplated depositions. They were unable to resolve the dispute.

On April 16, 2013, RGRD sent to Sidley via UPS subpoenas *ad testificandum* directed to, respectively, Mr. Bradley, Mr. Chapman, Mr. Hedley and Mr. Riso. The subpoenas were delivered to Sidley on April 17, 2013.[4]

Separately, on April 12, 2013, RGRD sent Sidley a letter raising certain questions about KPMG's recent production of Mr. Hedley's custodial files. The letter also raised a variety of additional document requests. In the letter, RGRD proposed having a meet-and-confer telephone conference on April 15 to discuss the additional document requests. Sidley agreed. RGRD, however, then refused to proceed, insisting instead on posing written questions, which it refers to below as "dialog". Although counsel did speak by telephone on April 30, they have not been able to resolve the disputes.

III. PLAINTIFFS' REQUEST TO DEPOSE FOUR KPMG PARTNERS

A. KPMG's Position

At the March 8, 2013 conference, Your Honor conveyed the following helpful guidance with respect to the conduct of deposition discovery in this matter:

> I want to … reduce the number of people in the depositions to those that will prove to be relevant, I want to reduce the costs, the transaction costs of this case, which is going to be interesting for both sides. So that's my goal. I have been at this for a long time, I know how it goes. ***Many fewer depositions are really important than people take.***

(3/8/13 Hr'g Tr. at 10 (emphasis added).) Significantly, with respect to the possibility of a deposition of a KPMG witness, Your Honor noted: "***If there is to be a deposition***, he [Hedley] has the most extensive knowledge … ". (*Id.* at 24 (emphasis added).) Setting aside whether Mr. Hedley in fact has the most extensive knowledge, the articulation of this point suggests that Your Honor contemplated the possibility of one deposition of a KPMG witness, and certainly not three or four. RGRD made no suggestion at the conference of a contrary intent.

In light of Your Honor's recent guidance, KPMG respectfully seeks relief in the form of an order quashing three of the subpoenas *ad testificandum*. In the alternative, KPMG seeks relief

[4] On April 1, 2013, RGRD sent to Sidley via UPS subpoenas *ad testificandum* directed to, respectively, Mr. Bradley, Mr. Chapman, Mr. Hedley and Mr. Riso. The subpoenas were delivered to Sidley on April 2, 2013, yet service did not comply with Fed. R. Civ. P. 45(b)(1).

in the form of a protective order (i) requiring that Plaintiffs first depose Mr. Bradly, the only KPMG partner listed on a trial witness list, before determining whether any additional deposition of a KPMG partner is justified under the circumstances, and (ii) precluding Plaintiffs from taking depositions of KPMG partners that would be redundant or unduly burdensome.

Motions to quash are "entrusted to the sound discretion of the court." *Fitch, Inc. v. UBS Painewebber, Inc.*, 330 F.3d 104, 108 (2d Cir.2003) (quoting *United States v. Sanders*, 211 F.3d 711, 720 (2d Cir.2000)). A court "must quash or modify" any subpoena "that . . . subjects a person to undue burden." Fed. R. Civ. P. 45(c)(iv). Whether a subpoena imposes an undue burden depends upon such factors as relevance, the need of the party for the information sought, and the burden imposed. *See Koch v. Pechota*, 2012 WL 4876784, *3 (S.D.N.Y. Oct. 12, 2012) (quotation omitted); *Blackstone Partners, L.P.*, No. 04-cv-7757, 2005 WL 1560505, at *2 (S.D.N.Y. Jul. 1, 2005); *In re Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48-49 (S.D.N.Y. 1996) (citing Fed. R. Civ. P. 26(c) and 45(c)(3)). Thus, where information is sought from non-parties, "the Court must weigh the probative value of the information against the burden of production on said non-parties". *In re Biovail Corp. Sec. Litig.*, 247 F.R.D. 72, 74 (S.D.N.Y. 2007). And, "[t]he party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings." *Night Hawk Ltd. v. Briarpatch Ltd., L.P.*, 2003 WL 23018833, at *8 (S.D.N.Y. Dec. 23, 2003).

Plaintiffs' insistence on taking depositions of four—or even three—KPMG witnesses is excessive and unduly burdensome. To prepare just one witness to testify for deposition is a time consuming and expensive process, especially given that the events at issue took place as much as *seven* years ago. In addition to the witness himself, substantial involvement is required by not just outside counsel but also members of KPMG's Office of General Counsel, which is charged with directing and supporting such efforts in these types of legal proceedings. Thus, in addition to the significant business disruption, there is a significant monetary expense.

Notably, at the March 8, 2013 conference, Your Honor instructed Plaintiffs to "confine their depositions to the people identified" by Pfizer Inc. as potential trial witnesses in a disclosure to be served on March 15, 2013. (3/8/13 Hr'g Tr. at 4.) Among the four contemplated deposition witnesses here, only Mr. Bradley, the lead engagement partner on the Pfizer Inc. audits during the 2008-2009 fiscal years, has been identified as a potential trial witness. For that reason, Plaintiffs presumably would elect to take Mr. Bradley's deposition in the first instance, and KPMG does not seek relief at this time in the form of an order quashing the subpoena *ad testificandum* directed to him.

The testimony of other KPMG witnesses sought, however, is not justified under the circumstances, and certainly not for the purpose of "authenticating" documents as Plaintiffs

argue.[5] Specifically, the probative value of the additional testimony sought is outweighed by the burden imposed.

- Mr. Chapman, the lead engagement partner on the Pfizer Inc. audits during the 2006-2007 fiscal years, already provided deposition testimony in a prior related action, *In re Pfizer Inc. Shareholder Derivative Litigation*, 09-CV-7822 (S.D.N.Y., Rakoff, J.) ("Derivative Action"). The Derivative Action involved substantially similar issues with respect to off-label marketing. Likewise, plaintiffs' counsel there questioned Mr. Chapman about such issues, including legal reserves maintained during the class period. KPMG produced to Plaintiffs here a copy of that transcript, dated October 8, 2010, along with all the exhibits marked. There is little, if any, value in compelling Mr. Chapman to return two-and-a-half years later for another full day of testimony to rehash the same issues. And, Plaintiffs have not identified any issue on which they wish to examine Mr. Chapman that was not already addressed in the prior deposition, let alone one relevant to this action. *See Koch*, 2012 WL 4876784, *3 (quashing deposition subpoenas and limiting depositions where witnesses had been deposed in prior related litigation arising from the same facts at issue). Instead, they argue below (III.B.1) that the Derivative Action involved only Pfizer's internal controls concerning the off-label marketing of Bextra while here the allegations include not only Bextra but also Zyvox, Lyrica and Geodon. Plaintiffs are wrong. The complaint in the Derivative Action expressly is premised on the settlement announced in January 2009 between Pfizer Inc. and the Department of Justice for $2.3 billion concerning the off-label promotion and related internal controls regarding multiple drugs. *In re Pfizer Deriv. Litig.*, Consolidated, Amended and Verified Shareholder Derivative Complaint (09-CV-7822) (Nov. 18, 2009) ¶¶ 1, 138, 140. Specifically, the Derivative Action complaint expressly addressed not only Bextra (*e.g.*, ¶¶ 141(1)(a)-(c)) but also Geodon (*e.g.*, ¶¶ 141(2)(a)-(c)), Zyvox (*e.g.*, ¶¶ 141(3)(a)-(c)), and Lyrica (*e.g.*, ¶¶ 141(4)(a)-(c)).

- Mr. Hedley served as a forensic partner on the Pfizer audits during the 2006-2008 fiscal years. As described briefly at the March 8, 2013 conference, Mr. Hedley "shadowed" certain investigatory work performed by Pfizer for purposes of assisting the audit engagement team in assessing financial statement impacts. He reported to the lead audit engagement partners and assisted in the engagement teams' work. (3/8/13 Hr'g Tr. at 23-24.) Notwithstanding Plaintiffs' apparent misconception, neither Mr. Hedley nor anyone else at KPMG conducted a "forensic audit". (*See* section III.B.2 (referring to "his role as a forensic

[5] *See infra* section III.B.1 ("Mr. Chapman is in a unique position to authenticate and provide business record testimony for a majority of KPMG's documents throughout the Class Period") and III.B.3 ("Mr. Riso could authenticate and provide a business record foundation for a number of important KPMG documents").

auditor").) And, significantly, Mr. Hedley was not responsible for discussing with Pfizer Inc. the disclosures in its financial statements. The workpapers, and responsive documents retrieved from his custodial files, do not suggest otherwise. Moreover, he did not have authority on behalf of KPMG to release the audit opinions regarding Pfizer Inc.'s financial statements during the Class Period, which opinions are the culmination, and definitive output, of KPMG's audit work. Authority to release such audit opinions rests with the lead engagement partners.

- Finally, Mr. Riso served as a junior partner on the Pfizer audits during several fiscal years in the Class Period. Mr. Riso assisted and reported to Mr. Chapman during the 2006-2007 fiscal years and to Mr. Bradley during the 2008 fiscal year. Tellingly, Plaintiffs offered once to refrain from pursuing Mr. Riso's deposition, acknowledging that his testimony would be redundant and in any event not worth the burden imposed. Their argument below (section III.B.3) that he is merely "qualified" to testify on certain subjects falls far short of the showing that ought to be required here.

At a minimum, Plaintiffs should be required to proceed first with the deposition of Mr. Bradley, the only identified potential trial witness, before a determination is made regarding whether additional KPMG witness testimony may be justified.

B. Plaintiffs' Position

During the Class Period, KPMG audited Pfizer's 2005, 2006, 2007 and 2008 financial statements. Over 100 KPMG U.S. audit professionals worked on the Pfizer domestic engagement during the Class Period.[6] KPMG's work on the audits involved issues concerning Pfizer's off-label marketing of Bextra, Zyvox, Lyrica and Geodon, the government investigations surrounding the off-label promotion of those drugs, Pfizer's internal controls designed to prevent and delete the off-label promotion of those drugs, and Pfizer's public disclosure (and lack thereof) of the legal proceedings involving the off-label promotions. KPMG, through its forensic audit professionals, also conducted more detailed shadow work concerning Pfizer's illegal off-label marketing. Indeed, the allegations in the Complaint include all of these issues. Thus, due to their extensive audit work and the over-lap of their work and Plaintiffs' allegations, each of the KPMG witnesses Plaintiffs subpoenaed for depositions and document productions possess relevant material information.

Defendants' reliance on the advice of KPMG as a defense further highlights the need to depose these KPMG witnesses. The defense dictates that the defendants must have made a

[6] Although some of the 2005 audit work was done prior to the Class Period, the audit is relevant because the 2005 10-K was issued during the Class Period and contains Pfizer management's and KPMG's false and misleading statements concerning Pfizer's legal proceedings and internal controls.

complete disclosure of material information to KPMG concerning the widespread and persistent unlawful off-label promotions during the Class Period. *See United States v. McCormick*, 67 F.2d 867, 870 (2d. Cir. 1933); *United States v. Mitter*, 658 F.2d 235, 237 (4th Cir. 1981). In other words, if Pfizer withheld from KPMG information concerning its off-label marketing practices, including the related government investigations and remediation efforts, then the defense is thwarted. Given that defendants will be relying on their advice, deposing the KPMG engagement partners and forensic partner is critical to gain an understanding of the information KPMG relied on in providing advice.

KPMG's suggestion that this Court instructed Plaintiffs to limit their depositions to the people identified by defendants as potential trial witnesses is inaccurate and completely misconstrues the Court's order. The Court's instruction concerning deposing defendants' trial witnesses was a compromise from Plaintiffs' original request to depose each of the witnesses named in defendants' initial disclosures. During the same hearing, in addition to defendants' trial witness depositions, the Court permitted depositions concerning off-label marketing and internal audit. (3/8/13 Hr'g Tr. at 9 and 18) Other than Mr. Bradley, who is a trial witness and his deposition will proceed, KPMG depositions were not a topic during the March 8, 2013 hearing. As argued below, however, Plaintiffs have significant cause to also take the depositions of Messrs. Chapman, Hedley and Riso.

The fact of the matter is that this is Plaintiffs' case to prove, and they have the right to determine who they view as being important witnesses. Each of these witnesses are relevant and have material information, neither of which KPMG disputes. Plaintiffs' deposition list should not be dictated by whom non-party KPMG wants Plaintiffs to depose. KPMG's argument that four KPMG depositions is excessive, redundant and duplicative does not consider the magnitude of this litigation, KPMG's involvement in all the financial statement issues surrounding Pfizer's off-label marketing, the fact that the lead engagement partner changed during the Class Period or defendants' reliance on KPMG's advice defense.

1. Mr. Chapman

Mr. Chapman was the engagement partner during the 2005, 2006 and 2007 audits, each of which were conducted during the Class Period. As the lead engagement partner, Mr. Chapman was responsible for the audit and signing the audit opinion. Among other things, he regularly met with Pfizer's senior management, attended and presented at the Audit Committee meetings and attended the disclosure committee meetings. Mr. Chapman has knowledge of and provided feedback to Pfizer regarding the issues concerning Pfizer's internal controls over Health Care Compliance, the government investigations of Pfizer's off-label marketing and the disclosure of the government investigations, including Pfizer's failure to timely reserve in accordance with FAS 5.

Mr. Chapman was an integral part of preparing and reviewing the financial statements that Plaintiffs allege are false and misleading and is in a unique position to provide testimony concerning those financials. Moreover, in auditing Pfizer throughout the Class Period, Mr. Chapman and KPMG played significant roles in analyzing Pfizer's Health Care Compliance violations, including the off-label marketing violations. And as the Court is aware, Pfizer's off-label marketing of Bextra, Lyrica, Zyvox and Geodon are central allegations in the Complaint.

The fact that Mr. Bradley, the audit partner for only the 2008 financials, is named as one of defendants' trial witnesses only illustrates the importance of the audit partners in this litigation. Defendants' failure to also name Mr. Chapman as a trial witnesses is befuddling and makes little sense, as Mr. Bradley cannot testify to KPMG's conduct throughout the entire Class Period. Nonetheless, Plaintiffs' ability to prove the allegations in the Complaint should not be hamstrung by defendants' speculative tactics. Certainly, if defendants have determined that Mr. Bradley is important enough to name as a trial witness, then Plaintiffs should be permitted to depose the audit partner who preceded him and covered the majority of the Class Period audits.

As mentioned above, defendants' reliance on the advice of KPMG as a defense also supports Plaintiffs' need to depose both Mr. Chapman and Mr. Bradley. Plaintiffs are entitled to examine Mr. Chapman on critical documents concerning the issues in this case that defendants did not share with Mr. Chapman or KPMG prior to him signing the 2005, 2006 and 2007 audit opinions and while conducting interim reviews. Indeed, Mr. Bradley cannot testify to the documents and information Mr. Chapman received and relied on when signing the 2005, 2006 and 2007 audits. Mr. Chapman is the only witness that can provide that testimony.

KPMG's argument that Mr. Chapman was deposed in the derivative litigation misses the mark. Plaintiffs have explained to KPMG a number of times that the derivative Plaintiffs alleged a much more narrow set of facts than the Plaintiffs here. The derivative litigation simply involved Pfizer's internal controls concerning the off-label marketing of Bextra. Here, Plaintiffs allegations include the illegal acts of off-label marketing Bextra, Zyvox, Lyrica and Geodon, the internal controls purportedly designed to prevent and detect those illegal acts, FAS 5 reserves and failure to properly disclose legal proceedings. And KPMG is a material witness to each of those allegations. Thus, there are many more issues and facts to cover with Mr. Chapman.

Moreover, Plaintiffs are entitled to have their attorneys litigate their case without having to rely on the work of attorneys in a supposedly similar case. Mr. Chapman is in a unique position to authenticate and provide business record testimony for a majority of KPMG's documents throughout the Class Period. Because Mr. Bradley was involved in only one audit, he cannot do the same. Thus, the depositions of both Mr. Bradley and Mr. Chapman are necessary here.

2. Mr. Hedley

Plaintiffs have previously explained to this Court the key role Mr. Hedley played in assuring Pfizer kept KPMG apprized of all material facts concerning Pfizer's off-label promotions, internal controls over Health Care Compliance, and remediation of any breaches in internal controls over Health Care Compliance. See March 6, 2013 Letter to the Court. During the Class Period, Mr. Hedley was KPMG's forensic audit partner on the Pfizer engagement and served as the chief liaison between Pfizer's legal and compliance teams during off-label marketing investigations. Prior to the filing of each 10-Q and 10-K during the Class Period, Pfizer executives updated Mr. Hedley on the status of Pfizer's off-label marketing allegations and investigations. Mr. Hedley also regularly reviewed the workplans followed by Pfizer and its legal team when investigating off-label marketing allegations. He regularly communicated with Pfizer's outside counsel to assure that proper steps were being taken to eradicate the off-label marketing. Mr. Hedley was involved in all meetings with Pfizer management prior to each Audit Committee meeting, quarterly press release and SEC filing. Mr. Hedley shared the results of his work with the KPMG lead audit partner on the Pfizer engagement prior to each Audit Committee meeting.

KPMG has not and cannot argue Mr. Hedley's relevance to this litigation. In fact, during the March 8, 2013 hearing, KPMG's counsel's general description of Mr. Hedley's role established Mr. Hedley to be a critical witness:

> Pfizer, during the course of the class period, was conducting a number of ***internal investigations and was facing issues that potentially constituted potential legal acts.*** That could ***impact the financial statements***. So as an independent auditor, we bring professional in to assist us in shadowing the work, and ***helping consider potential illegal acts*** and any impact on the financial statements.

(3/8/13 Hr'g Tr. at 23). After hearing even KPMG's watered-down description of Mr. Hedley's job function, the Court determined that "[h]e is the most important person to depose" Id. at 24

KPMG's inadequate production of Mr. Hedley's documents is troubling and only underscores the importance of his deposition. Mr. Hedley's work and description of his job responsibilities are referenced throughout KPMG's workpapers . Having an understanding of his involvement in the off-label marketing issues throughout the Class Period, certainly Plaintiffs expected a much larger document production from Mr. Hedley's custodial files. KPMG's recent production of Mr. Hedley's files yielded merely 36 pages of discovery. In those pages, KPMG failed to produce a single email authored by Mr. Hedley. Of the two new emails produced, Mr. Hedley was either a recipient or carbon copied. Given his critical role as the forensic audit partner throughout the Class Period, it is difficult to believe that Mr. Hedley did not author and send a single email between January 2006 through January 2009 that is relevant to this litigation.

Despite the minuscule Hedley production, Plaintiffs need to depose Mr. Hedley to obtain a better understanding of the documents Mr. Hedley did indeed draft and receive during the Class Period, including emails and notes. Confirmation from Mr. Hedley that the documents KPMG produced from his files represent all of his documents relevant to this litigation will provide evidence that Pfizer did not share all material facts with KPMG concerning the widespread and persistent unlawful off-label promotion during the Class Period. Indeed, if Mr. Hedley did not draft a single document or email nor take any notes concerning Pfizer's persistent Class Period off-label marketing troubles, then his role as a forensic auditor was truly a sham, and Plaintiffs are entitled to get a better understanding of the work Mr. Hedley performed. Certainly, evidence that Mr. Hedley did as little as his document production suggests, cuts against an essential element of defendants' reliance on the advice of KPMG defense.

3. Mr. Riso

Mr. Riso was the day-to-day hands-on engagement partner before, during and after the Class Period. He regularly met with Pfizer senior management, the Corporate Compliance Group, attended Audit Committee meetings and is knowledgeable regarding the internal controls issues relating to sales & marketing regulatory compliance. Indeed, Mr. Riso was the KPMG audit partner responsible for the Domestic Client Service Team on the Pfizer engagement and supervised/coordinated the audit work of at least eight other partners and senior managers. He received Internal Audit's quarterly memo regarding the evaluation of internal controls over U.S. Healthcare Compliance risks. He is qualified to testify regarding Pfizer's lack of adequate internal controls because documents produced to date show that he helped identify control weaknesses in Pfizer's sales and marketing controls as significant deficiencies as a result of widespread and persistent problems with regulatory compliance. For instance, Mr. Riso was a recipient of numerous Pfizer Internal Audit reports describing the lack of internal Pfizer's controls over laws governing off-label promotion. Riso had first-hand knowledge how Pfizer's continuous off-label marketing problems presented a tremendous risk to the Company.

KPMG has not denied that Mr. Riso has relevant information. Instead, KPMG focuses its argument on Plaintiffs' offer to compromise. In an effort to resolve this dispute and lessen KPMG's burden, Plaintiffs offered to forgo taking Mr. Riso's deposition if KPMG was willing to let the depositions of Messrs. Chapman and Hedley go forward. Plaintiffs offer, however, should not be confused with a concession that Mr. Riso's deposition is not warranted. Mr. Riso likely spent more time on the Pfizer engagement and interacted more often with Pfizer employees than any other member of the engagement team during the Class Period. He either received or sent a majority of internal KPMG correspondences concerning the audits and received or sent a number of correspondences with Pfizer employees concerning the audits. Mr. Riso could authenticate and provide a business record foundation for a number of important KPMG documents. Certainly, he is relevant to this litigation and his deposition would be justified.

IV. PLAINTIFFS' REQUEST FOR ADDITIONAL KPMG DOCUMENTS

A. KPMG's Position

After eighteen tedious months of meet-and-confer negotiations regarding the scope of KPMG's production, and the production by KPMG of tens of thousands of pages of documents in accordance with agreed upon parameters, RGRD represented to Sidley, and to Your Honor, that the production of Mr. Hedley's custodial files was the *final* issue remaining in the discovery dispute between plaintiffs and KPMG. (2/22/13 letter from R. A. Llorens to Honorable Alvin K. Hellerstein at 3; 3/813 H'rg Tr. at 21. As soon as KPMG produced responsive documents from Mr. Hedley's custodial files, however, RGRD turned around and raised still more document requests in their April 12 letter. Plaintiffs offered no explanation for the about-face or why they waited *eighteen months* to raise these issues.

Nevertheless, without waiving any rights or objections, KPMG in good faith followed up with respect to each request. In certain instances KPMG produced additional documents, and in other instances Sidley explained that no additional documents could be found and appeared not to exist. In one instance, based on negotiations that long ago had resolved the scope of production, KPMG declined to entertain Plaintiffs' request for information from an "Illegal Act Database", especially given that KPMG already had produced responsive excerpts from that database as found in the ESI for the selected custodians. Although Plaintiffs' additional requests appear to be resolved, one in particular merits elaboration.

Plaintiffs requested that KPMG produce "Compliance Issue Summaries"—without subject matter limitation—for 1Q06, 4Q06 and all quarters of 2007 and 2008. On April 24, after RGRD refused to discuss the issue by telephone, Sidley responded by identifying a variety of documents already produced that relate to summaries of compliance issues and indicating that KPMG would produce two additional documents, which previously were withheld as privileged and identified on its privilege log, that are entitled "Compliance Issues Summary". Sidley explained that it had not been able to locate any other workpaper so entitled, let alone a responsive one. Thus, while KPMG has no objection to producing a "Compliance Issue Summary" relevant to the issues in this action, it has not found any others that have not already been produced and no others appear to exist. Nevertheless, as Sidley informed RGRD on April 30, in an expression of good faith, KPMG has undertaken to look once more for additional responsive documents to this request, although it does not anticipate locating any.[7]

Not wanting to accept that additional responsive documents do not exist, RGRD threatens that eighteen months of meet-and-confer negotiations should be disregarded and KPMG should be ordered to produce *all* other annual and interim workpapers regarding Pfizer audits during the

[7] Plaintiffs insisted on filing this letter by the morning of May 3 rather than waiting for the outcome of KPMG's additional search.

Class Period—which have nothing to do with the issues in this litigation. Such a course would be a gross miscarriage of the non-party discovery process. Because Plaintiffs only half-heartedly suggest it, and because Sidley is confident the production issue will be resolved, further discussion of the threat is not warranted at this time.

B. Plaintiffs' Position

The genesis of the dispute concerning missing relevant KPMG documents is KPMG's repeated assurances to Plaintiffs that KPMG had produced all non-privileged annual audit and quarterly review workpapers relevant to the issues of off-label marketing, FAS 5 disclosures and internal control issues. But review of KPMG's document production to date, including the paltry 36-pages of Hedley documents produced pursuant to the Court's March 8, 2013 Order, reveals that KPMG's representations have been inaccurate.

Plaintiffs have asked KPMG to produce numerous missing "Compliance Issues Summary" workpapers. Twice now Plaintiffs have pointed out that these documents are missing for the following interim periods during the Class Period: 1Q06, 2Q06, 3Q06, 4Q06, 1Q07, 2Q07, 3Q07, 4Q07, 1Q08, 2Q08, 3Q08 and 4Q08. These documents are critical to this case as they document, *inter alia*, Hedley's meetings with Pfizer's Corporate Compliance Group to obtain an understanding of allegations and investigations into such allegations of off-label promotion of the Company's drugs. Yet, KPMG has failed to produce any of these memos for the Class Period. During our most recent meet and confer, Sidley stated that it would determine if the "Compliance Issues Summary" workpapers were created for every quarter throughout the Class Period. If they were, Plaintiffs request that KPMG produce the summaries that have not already been produced.

Accordingly, Plaintiffs respectfully submit that the Court should simply order KPMG to produce complete sets of its audit and review workpapers created during the Class Period. They are in .pdf format and KPMG merely needs to click the print button. Certainly, Plaintiffs will uncover numerous additional deficiencies in KPMG's production before the document discovery deadlines passes in this action. Plaintiffs, however, would rather litigate this case on its merits versus wasting the Court's time with recurring motions to compel. Obviously, KPMG has instructed its counsel to be uncooperative in discovery and not to produce obviously relevant documents unless ordered to do otherwise by Your Honor. KPMG's blocking tactics have now grown stale. Indeed, the appropriate remedy under the circumstances is to order KPMG to produce complete sets of its integrated Class Period workpapers.

In the alternative, Plaintiffs respectfully request the Court to order KPMG to produce the documents specifically identified above.

V. PLAINTIFFS' REQUEST FOR A FIFTH KPMG DEPOSITION

A. Plaintiffs' Position

A few days ago, KPMG produced 36 pages of Hedley's documents pursuant to this Court's March 8, 2013 Order. Remarkably, not a single page of those documents was authored by Hedley. That KPMG suggests that it has complied with this Court's order is absurd given that Hedley was intimately involved in Pfizer's inside and outside counsels' investigations into wide-spread off-label marketing, as well as a multi-year Department of Justice investigation into the same conduct. Indeed, KPMG has conceded that Hedley was integral in providing the auditing support necessary for KPMG to reach its audit and interim review conclusions throughout the Class Period. But KPMG wishes Plaintiffs and this Court to believe that Hedley never authored a relevant email during the Class Period.

Making matters even more suspicious, Plaintiffs have twice requested that KPMG's counsel participate in a dialog concerning Hedley's skimpy document production and KPMG has refused both invitations. Plaintiffs also left a voice message with KPMG's counsel on April 18, 2013, to propose conducting a reasonable discussion on the issue, but counsel has again ignored Plaintiffs' request. On April 30, 2013, KPMG and Plaintiffs finally had a substantive discussion concerning Hedley's production. Indeed, KPMG's counsel was willing to answer questions concerning a number of issues surrounding the Hedley production, including the parameters of the search, the search terms used, etc. However, KPMG's counsel refused to engage in discussions concerning the potential detention or destruction of Mr. Hedley's Class Period documents. Moreover, KPMG's counsel refused Plaintiffs' request to simply enquire into the matter so we could put this issue to rest.

Given Hedley's responsibilities as the lead forensic partner on the Pfizer engagement throughout the Class Period, the sufficiency of KPMG's recent production of Hedley documents and KPMG's failure to engage on this issue is highly suspect. If Mr. Hedley's documents were deleted within the normal course of business, Plaintiffs have the right to know that so back-up tapes can be searched. And if Mr. Hedley's documents were destroyed to avoid production, obviously, Plaintiffs need to know that, too.[8] Either way, KPMG's simple refusal to answer any questions on the topic is troubling and unproductive.

Accordingly, Plaintiffs respectfully request an order allowing Plaintiffs the opportunity to conduct a Rule 30(b)(6) deposition of KPMG in order to determine whether KPMG conducted a good faith search for Hedley documents and/or whether Hedley's documents were deleted or destroyed at any time between January 1, 2005 and present.

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[8] Plaintiffs note that PCAOB Auditing Standard No. 3, ¶14, requires the auditor to "retain audit documentation for seven years from the date the auditor grants permission to use the auditor's report in connection with the issuance of the Company's financial statements. . ."

B. KPMG's Position

Promptly after the March 8, 2013 Order, KPMG forensic technicians and Sidley met with Mr. Hedley to collect responsive custodial documents. The forensic technicians used the same agreed-upon search terms as those previously applied in collecting ESI from the custodial files of the original six KPMG custodians. The forensic technicians processed the data and transferred it to an outside discovery vendor for hosting and review. Sidley then reviewed the data and identified that which was responsive. Based on these efforts, Sidley conveyed to RGRD that there was only a modest volume of responsive documents from Mr. Hedley's custodial files.

In their April 12 letter, RGRD stated: "During our call next week, we would like to discuss with you the sources of ESI KPMG searched for responsive documents and whether any of Mr. Hedley's custodial files have been deleted or destroyed pursuant to KPMG's document retention policies since January 1, 2005." Thereafter, on April 14, RGRD notified Sidley that it refused to discuss the issues but instead insisted that Sidley answer, among others, the following interrogatory-type questions:

- What sources of ESI did KPMG search for Hedley documents (e.g., his pc?, laptop?, KPMG servers?, back-up media?, stored hard-drives?)?
- If you searched back-up media or drives, what time period(s) do those back-up files represent (e.g., is it for the year 2006, or the years 2006 to 2007)?
- Were any of Mr. Hedley's emails or documents destroyed between January 1, 2005 and now (whether pursuant to a document retention policy or not)?
- If the answer … is yes, for each instance describe when and why.

The refusal to discuss by RGRD was not productive. Nevertheless, on April 24, Sidley responded in email by explaining that the ESI collection with respect to Mr. Hedley's custodial files was executed pursuant to the same parameters as the collections for the original six custodians. KPMG forensic technicians collected data from Mr. Hedley's hard drive, email system, and any shared drives where he stored information. And, Mr. Hedley did not have responsive hard copy files.

RGRD finally agreed to discuss the issue in an April 30 telephone conference. Sidley explained that the modest volume of Mr. Hedley's responsive custodial files is consistent with the role he played in the engagement and the nature of documentation he maintained in the normal course during his work. Also, the interim and audit workpapers reflect the nature and extent of Mr. Hedley's involvement, and KPMG long ago produced those responsive workpapers. Plaintiffs effort to investigate whether Mr. Hedley deleted email or discarded documents "pursuant to KPMG's document retention policies since January 1, 2005", *i.e.*, as one

SIDLEY AUSTIN LLP
SIDLEY

would expect in the normal course prior to receipt of any subpoena, is a side show. The Court should not indulge it.

Respectfully,

Kevin A. Burke

Plaintiffs Acknowledge and Endorse
Sections III.B, IV.B and V.A *supra*.

By: _____
Trig R. Smith
Robbins Geller Rudman & Dowd LLP

cc: Steve Farina, Esq. (via email)
Amanda MacDonald (via email)
Ryan A. Llorens (via email)

Judge wrote:

"My rulings are set out in the margins.

5/6/13

Alvin K. Hellerstein"

* * * * * * * * * * * *

On page 1 margin:

"Denied. Plaintiff can choose the sequence of witnesses, but cannot repeat questions without a good faith basis to believe that answers will differ. AKH"

On page 2 margin:

"The entire workpaper file for all audits for years ended during the class period should be produced. If inconveniences are not caused, the productions may be vetted by Pfizer's counsel. AKH"

On top page 3 margin:

"Denied, without prejudice to renewal, after production is made. AKH"

On bottom page 3 margin:

"KPMG, within 2 days, shall provide addresses, dates and times when plaintiff can serve the four individuals."