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June 19, 2013

The Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: Jones v. Pfizer Inc., et al.,
Civil Action No. 1:10-cv-03864-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), plaintiffs and non-party KPMG LLP ("KPMG") submit this joint letter concerning an on-going discovery dispute for the Court's resolution.

I. Dispute Submitted for Resolution

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

A. Despite the Court's March 8, 2013 Order that KPMG produce Mr. Hedley's files, KPMG continues to play hide-the-ball with the documents its forensic partner Mr. Hedley authored, received or possessed during the period January 19, 2006 to January 23, 2009 (the "Class Period"). Given the robust description of Mr. Hedley's role as forensic partner, which this Court also found significant, Mr. Hedley must have done more work related to the government investigations at issue here than suggested by his document production. Despite repeated requests by plaintiffs' counsel, KPMG has never represented that it is not in the possession, custody or control of documents authored and/or generated by Mr. Hedley during the three year Class Period. This is all KPMG needs to do to avoid wasting the Court's time with yet another letter writing campaign concerning Mr. Hedley's documents. Instead, KPMG provides vague and cryptic reasons as to why there is not a single document authored by Mr. Hedley during the Class Period, which suggests that the documents are in its possession, but plaintiffs simply have not jumped through the proper hoops to get them. It is plaintiffs position that the Court should provide any relief necessary to finally get to the bottom of this issue, including allowing plaintiffs to take a Fed. R. Civ. P. 30(b)(6) deposition.

VIA HAND DELIVERY
Pl's demand for additional
"30(b)(6)" dep's has not been justified.
Pl. must depose currently identified
witnesses to establish a foundation for
Pl's application. Pl is free
also to argue at trial on the basis
of absence of documents. 6-25-13

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B. It is KPMG's position that Plaintiffs' insistence on yet another deposition of non-party KPMG is overkill. KPMG has conducted a reasonable diligent search and produced Mr. Hedley's custodial files responsive to the agreed-upon scope of discovery. The Court already has ordered that Mr. Hedley be deposed. Plaintiffs are free to ask Mr. Hedley about the documents he created and retained in the normal course and the documents he preserved in response to preservation notices once the instant subpoena was served. Further, although KPMG is not a party to this case, the Court also has ordered that—in addition to Mr. Hedley—three other KPMG witnesses be deposed, each of whom plaintiffs also can question about Mr. Hedley's role in assisting the KPMG engagement teams that conducted integrated audits of Pfizer's financial statements and internal controls. And, despite plaintiffs' complaint that the incremental production of Mr. Hedley's custodial documents was smaller than expected, KPMG otherwise produced the *entirety* of its workpapers along with the custodial files of six other partners and managers, which productions include many dozens of workpapers and other documents relating to the work of Mr. Hedley and the KPMG forensic professionals. (*See* Appendix hereto.) Enough is enough.

II. Plaintiffs' Position

Again, plaintiffs and KPMG are before this Court to resolve the issues surrounding the production of Mr. Hedley's documents. At the March 8, 2013 hearing, the Court ordered KPMG to produce Mr. Hedley's documents. March 8, 2013 Hearing Transcript ("03/08/13 Transcript") at 22. In fact, the Court, like plaintiffs, assumed this process would be simple, explaining:

That's what accountants do. They are very careful and organized in what they have received from the client, because they have to justify what they say to the client, and defend themselves in a later situation. So I'm sure Hedley has it. And I'm sure it would be a very small burden to produce it.

Id. Unfortunately, the process of determining the whereabouts of Mr. Hedley's documents has not been as simple and straightforward as the Court and plaintiffs envisioned. Instead, it has been tedious and tortuous.

Subsequent to the Court's March 8 Order, KPMG produced merely 36 pages of Mr. Hedley's documents. KPMG did not produce a single document or email authored by Mr. Hedley. As we have explained to KPMG and this Court, given Mr. Hedley's role as the forensic audit partner, it is beyond belief that plaintiffs have received all the documents Mr. Hedley authored, received or otherwise possessed during the Class Period. As previously described by plaintiffs, KPMG's workpapers describe Mr. Hedley's role and responsibilities as the following:

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

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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.

During the March 8 hearing, KPMG's counsel even described Mr. Hedley's role as follows:

[D]uring 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 professionals in to assist us in shadowing the work, and helping consider potential illegal acts and any impact on the financial statements.

03/08/13 Transcript at 23.

Further illustrating the fact that Mr. Hedley must have received and created more relevant documents than were produced, KPMG's counsel also stated that Mr. Hedley "collect[ed] information" and "ma[de] assessments and judgments." *Id.* at 24. Where is the information Mr. Hedley collected throughout the Class Period? Where are the assessments and judgments he made?

When the discrepancy in the production was pointed out to the Court in the May 3, 2013 joint letter, the Court denied without prejudice plaintiffs' request to take a Rule 30(b)(6) deposition concerning the potential deletion or destruction of relevant Mr. Hedley documents. However, the Court also stated that plaintiffs can renew the request after KPMG produced its workpapers. Plaintiffs have reviewed those workpapers and recovered no other documents for Mr. Hedley. As such, and pursuant to the Court's May 8, 2013 Order, plaintiffs renew their request for the Rule 30(b)(6) deposition.

The issues surrounding the whereabouts of Mr. Hedley's documents are serious and extremely important to plaintiffs' ability to properly litigate this case. Over three months ago, during the March 8 hearing, the Court warned KPMG that "[i]f you go beyond that to make them fight, then you lose my sympathy." *Id.* at 26. Well, making plaintiffs fight for Mr. Hedley's documents is exactly what KPMG has done. As such, the time has finally come for KPMG to reveal exactly where Mr. Hedley's documents are located. If KPMG has moved the documents from what it considers Mr. Hedley's custodian files, and that is the reason KPMG claims Mr.

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Hedley does not have them, then KPMG needs to stop playing fast and loose and retrieve the documents from wherever they may be located.

Plaintiffs have also attempted to determine if the documents have been destroyed or deleted. KPMG's counsel, however, has avoided answering very direct questions concerning the potential document deletion or destruction, including simply asking Mr. Hedley if he destroyed documents relevant to this litigation. Given the nature of Mr. Hedley's role at KPMG, both deletion of documents in the ordinary course and intentional destruction of documents are troublesome. As previously described by Mr. Hedley's own counsel, it was Mr. Hedley's job to conduct internal investigations of potentially illegal acts, including the illegal acts at the center of this case. Because anything Mr. Hedley worked on revolved around and was relevant to Pfizer's potentially illegal acts, all of his work product should have been saved. Also, Public Company Accounting Oversight Board ("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." Thus, there is no excuse as to why any of Mr. Hedley's files would have even been deleted.

There is no dispute that Mr. Hedley authored, received or possessed more relevant documents during the Class Period than KPMG has produced. As far as plaintiffs can tell, the next logical step to determine the whereabouts of those documents is to take a Rule 30(b)(6) deposition covering the following topics:

- KPMG's document retention and litigation hold policies from 2006 to the present;
- KPMG's electronic databases, including any shared drives and storage of deleted materials;
- Shared files or central locations where relevant and responsive forensic documents could potentially be stored;
- The parameters used to collect Mr. Hedley's documents; and
- The potential deletion or destruction of Mr. Hedley's documents.

If the Court has any other solutions to solve this problem sooner rather than later, plaintiffs are open to exploring any avenues that finally get to the bottom of the games KPMG seems to be playing.

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III. KPMG's Position

Plaintiffs already have been granted leave to take the deposition of Mr. Hedley himself, along with the depositions of three other partners of KPMG who were involved in performing the integrated audits of Pfizer's financial statements and internal controls during the Class Period. Mr. Hedley will explain his role as a forensic partner assisting KPMG's audit engagement team and the nature of his involvement with respect to off-label promotion of Bextra, Geodon, Lyrica and Zyvox that was investigated by the Department of Justice. He also will explain his own practices as a partner with respect to creating, sending, and receiving documents and his compliance with applicable document retention guidelines during that time. Plaintiffs demand for more is unwarranted.

As a brief background, pursuant to meet-and-confer negotiations in the spring 2012, KPMG and plaintiffs agreed upon a specific scope of documents, both electronically-stored and hard-copy, to be produced from the files of six custodians who served as partners and managers on Pfizer audits during the Class Period. Subsequently, in early 2013 plaintiffs then demanded that KPMG search for the same agreed-upon scope of documents from the files of another custodian, Mr. Hedley, who served as the forensic partner assisting the audit engagement teams during the Class Period. KPMG objected because the demand contravened prior meet-and-confer agreements. Nevertheless, on March 8, 2013, the Court ordered KPMG to produce documents from Mr. Hedley's custodial files.

Accordingly, promptly after the March 8, 2013 Order, KPMG forensic technicians and outside counsel from Sidley met with Mr. Hedley to collect responsive custodial documents. The forensic technicians used the same agreed-upon search terms and procedures as those previously applied in collecting electronically-stored information 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 plaintiffs that there was only a modest volume of responsive documents from Mr. Hedley's custodial files.

Plaintiffs now complain that there must be additional "responsive" documents from Mr. Hedley's custodial files. Their argument in support of the requested Rule 30(b)(6) deposition is riddled with factual inaccuracies and unfounded assertions.

First, plaintiffs know full well that the production of Mr. Hedley's custodial files was limited by a specific scope of responsiveness relating to the off-label promotion of four drugs—not all documents relating to Mr. Hedley's involvement assisting the audit engagement teams. By agreement, KPMG produced documents pertaining to off-label promotion *excluding* (i) drugs other than Bextra, Geodon, Lyrica and Zyvox (*see* First Amended Complaint ¶¶ 1, 8-11, *Jones v. Pfizer*

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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, and (iii) investigations involving state attorneys general as opposed to the Department of Justice (*see id.* ¶¶ 19, 95). (*See, e.g.*, May 3, 2013 Joint letter to Hon. A. K. Hellerstein from K. A. Burke and T. Smith, at 3 fn.3 (Dkt. 167.) Thus, plaintiffs’ suggestion above that Mr. Hedley had almost no documents is wrong. Rather, his custodial files contain few documents relating to the matters in dispute in this action, and Mr. Hedley will explain why in his deposition.¹

Second, KPMG long ago produced the official quarterly and year-end audit workpapers pertaining specifically to the agreed-upon scope of discovery, *i.e.*, the off-label marketing of Bextra, Geodon, Lyrica and Zyvox that was investigated by the Department of Justice. Moreover, in response to the Court’s Endorsed Letter, entered May 8, 2013, KPMG subsequently produced the *entirety* of its quarterly and year-end audit work papers for fiscal years ending in the Class Period. These produced workpapers contain the definitive output of the work of Mr. Hedley and his forensic colleagues who assisted KPMG’s audit engagement team. In particular, the production includes many dozens of workpapers pertaining to potential off-label marketing and related compliance matters, along with a multitude of other documents relating to Mr. Hedley and the work of KPMG forensic professionals. (*See* Appendix hereto.) Plaintiffs insist on ignoring the significance of these produced documents.

Third, plaintiffs assertion that Mr. Hedley was prohibited by PCAOB standards from deleting or discarding *any* documents during the normal course of his work is wrong. Their assertion highlights a complete lack of understanding for PCAOB standards regarding “audit documentation”. *See* AS No 3. It also appears designed merely to create intrigue. Again, Mr. Hedley will explain at his deposition how he complied with applicable document retention practices during the Class Period and why, in the first place, he did not author, send or receive the

¹ Plaintiffs continue to mischaracterize Mr. Hedley’s role, in an apparent attempt to place him at the center of this litigation. Their assertion that Mr. Hedley’s job supposedly was “to conduct internal investigations of potentially illegal acts, including the illegal acts at the center of this case” is wrong. Likewise, their assertion that he communicated with Pfizer’s outside counsel “to assure that proper steps were being taken to eradicate the off-label marketing” is wrong. Neither Mr. Hedley nor anyone else at KPMG conducted an investigation on behalf of Pfizer, nor undertook to assure that Pfizer took steps to eradicate off-label marketing. Rather, Mr. Hedley, along with other forensic professionals at KPMG, assisted the audit engagement team by “shadowing”, or monitoring, certain investigations conducted by Pfizer itself, and its outside counsel, regarding possible illegal acts. The primary purpose of such shadow work is to determine whether the scope of the audit client’s investigation is adequate to allow the auditors to rely on the findings in forming an audit opinion.

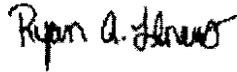
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cache of documents pertaining to off-label promotion of Bextra, Geodon, Lyrica and Zyvox that plaintiffs insist he must have.

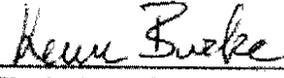
Rather than engaging in diversion, plaintiffs should move forward with the depositions of the four KPMG partners, including of Mr. Hedley himself, so that this action can proceed.

Respectfully,



RYAN A. LLORENS

Non-party KPMG LLP Acknowledges and Endorses
Sections I.B and III *supra*.

By: 
Kevin A. Burke
Sidley Austin LLP

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

RAL:mmh
Enclosures



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Appendix

1. Sample of KPMG production documents reflecting the work of KPMG forensics professionals assisting the audit engagement team: KPMG-PFIZ-DS 0000126, KPMG-PFIZ-DS 0000127-129, KPMG-PFIZ-DS 0000466-467, KPMG-PFIZ-DS 0001779-782, KPMG-PFIZ-DS 0002747-751, KPMG-PFIZ-DS 0003028-030, KPMG-PFIZ-DS 0003031-033, KPMG-PFIZ-DS 0003041-047, KPMG-PFIZ-DS 0005507-509, KPMG-PFIZ-DS 0005644-656, KPMG-PFIZ-DS 0005657-660, KPMG-PFIZ-DS 0005748-765, KPMG-PFIZ-DS 0005889-899, KPMG-PFIZ-DS 0006029, KPMG-PFIZ-DS 0006230-235, KPMG-PFIZ-DS 0006273-278, KPMG-PFIZ-DS 0007240-247, KPMG-PFIZ-DS 0007248-256, KPMG-PFIZ-DS 0009179-184, KPMG-PFIZ-DS 0015436-446, KPMG-PFIZ-DS 0015880-895, KPMG-PFIZ-DS 0015896-917, KPMG-PFIZ-DS 0015918-933, KPMG-PFIZ-DS 0015934-955, KPMG-PFIZ-DS 033805-814, KPMG-PFIZ-DS 033815-824, KPMG-PFIZ-DS 033825-844, KPMG-PFIZ-DS 034003-008, KPMG-PFIZ-DS 034009-025, KPMG-PFIZ-DS 034026-031, KPMG-PFIZ-DS 034041-049, KPMG-PFIZ-DS 034050.

2. Sample of KPMG production documents relating to the assessment of "possible illegal acts", including: KPMG-PFIZ-DS 0000123-125, KPMG-PFIZ-DS 0000130, KPMG-PFIZ-DS 0000131-135, KPMG-PFIZ-DS 0000136-157, KPMG-PFIZ-DS 0002741-746, KPMG-PFIZ-DS 0003034-040, KPMG-PFIZ-DS 0005721-747, KPMG-PFIZ-DS 0006103-104, KPMG-PFIZ-DS 0006105-110, KPMG-PFIZ-DS 0006113-114, KPMG-PFIZ-DS 0006116-121, KPMG-PFIZ-DS 0012225-226, KPMG-PFIZ-DS 0012227-232, KPMG-PFIZ-DS 0012233-234, KPMG-PFIZ-DS 0013504-509, KPMG-PFIZ-DS 0013552-557, KPMG-PFIZ-DS 0014942-947, KPMG-PFIZ-DS 0015622-628, KPMG-PFIZ-DS 0016114-115, KPMG-PFIZ-DS 033805-814, KPMG-PFIZ-DS 033815-824, KPMG-PFIZ-DS 033825-844, KPMG-PFIZ-DS 033845-895, KPMG-PFIZ-DS 033897-002, KPMG-PFIZ-DS 034003-008, KPMG-PFIZ-DS 034009-025, KPMG-PFIZ-DS 034026-031, KPMG-PFIZ-DS 034032-040, KPMG-PFIZ-DS 034041-049, KPMG-PFIZ-DS 034050.

3. Sample of KPMG production emails that include Timothy Hedley as a recipient or sender: KPMG-PFIZ-DS 006265-267, KPMG-PFIZ-DS 006268-270, KPMG-PFIZ-DS 006434-436, KPMG-PFIZ-DS 007759, KPMG-PFIZ-DS 007760, KPMG-PFIZ-DS 007838, KPMG-PFIZ-DS 007839, KPMG-PFIZ-DS 007840, KPMG-PFIZ-DS 007841-842, KPMG-PFIZ-DS 007844-845, KPMG-PFIZ-DS 007846, KPMG-PFIZ-DS 007854-858, KPMG-PFIZ-DS 009697-699, KPMG-PFIZ-DS 014369-370, KPMG-PFIZ-DS 014972, KPMG-PFIZ-DS 015124-125, KPMG-PFIZ-DS 015143-145, KPMG-PFIZ-DS 015146-148, KPMG-PFIZ-DS 015149-151, KPMG-PFIZ-DS 020088-089, KPMG-PFIZ-DS 020097-098, KPMG-PFIZ-DS 020115-117, KPMG-PFIZ-DS 020125-126, KPMG-PFIZ-DS 020153-154, KPMG-PFIZ-DS 020157-159, KPMG-PFIZ-DS 020162-164, KPMG-PFIZ-DS 020165-166, KPMG-PFIZ-DS 020333-337, KPMG-PFIZ-DS 020480, KPMG-PFIZ-DS 020596-597, KPMG-PFIZ-DS 021049-050, KPMG-PFIZ-DS 021056-058, KPMG-PFIZ-DS 021059, KPMG-PFIZ-DS 021060-061, KPMG-PFIZ-DS 031261-262,

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KPMG-PFIZ-DS 031512-533, KPMG-PFIZ-DS 031623-641, KPMG-PFIZ-DS 032244-262,
KPMG-PFIZ-DS 032291, KPMG-PFIZ-DS 032914, KPMG-PFIZ-DS 033538,-539 KPMG-PFIZ-
DS 033547-548, KPMG-PFIZ-DS 033565-566, KPMG-PFIZ-DS 034026-031.

Judge wrote:

“Plaintiff’s demand for additional “30(b)(6)” depositions has not been justified. Plaintiff must depose currently identified witnesses to establish a foundation for plaintiff’s application. Plaintiff is free also to argue at trial on the basis of absence of documents.

6-25-13

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