LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005-5901
(202) 434-5000
FAX (202) 434-5029
www.wc.com

August 29, 2013

The Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Room 1050
New York, NY 10007-1312

VIA HAND DELIVERY

Re: *Jones v. Pfizer Inc., et al.*, Civil Action No. 1:10-cv-03864-AKH (S.D.N.Y.)

Dear Judge Hellerstein:

The parties in the above-referenced action write to present one issue to the Court for resolution: Plaintiffs' request for additional depositions.

I. DEFENDANTS' POSITION

The Court has repeatedly admonished Plaintiffs to be judicious in the number of depositions they take. *See, e.g.*, 8/9/2011 Tr. 26 (instructing the parties to "economize on excessive numbers of depositions"); 11/29/2011 Tr. 23 (as to depositions, "I want a reasonably limited schedule"). Early in the case, the Court indicated that Plaintiffs would be limited to a dozen or fewer depositions. *See* 3/26/2012 Tr. 37-38 ("I don't want a large number of depositions. . . . I don't care whether it's ten or 12 or eight. . . . [T]here has to be a purpose beyond a deposition."). In March 2013, Plaintiffs sought leave to take 46 depositions. The Court rejected that request, instead granting leave for Plaintiffs to take up to 18 depositions. *See* 3/8/2013 Order.

Plaintiffs have now have now taken, or are scheduled to take, ***26 depositions*** before the close of fact discovery on November 29, 2013. These 26 depositions include ***eight depositions*** beyond those allotted to Plaintiffs by the Court, which Defendants agreed to solely in an effort to resolve Plaintiffs' requests for more depositions and avoid burdening the Court. Nevertheless, Plaintiffs refuse to be reasonable. Now, just three months before the close of fact discovery, and in disregard of the Court's March 8, 2013 Order, Plaintiffs have begun serving subpoenas and notices for an ***additional 19***

Pl. may depose Abelardo, Beach, Clark, Dowd, Levy, Loebel, Parini and Westrock, having sufficient showing of need and relevance, but not Brockie, nor Posner, Gibney, Wray, Wessel, Giampetruzzi, Schulman, nor Horowitz.
So ordered, 8/30/13

depositions. If allowed, this would bring the total number of depositions in this case to ***45*** – only one shy of Plaintiffs' original request, and nearly triple what the Court allowed in response to that request. Their demands should be rejected, and their unauthorized subpoenas should be quashed.

A. <u>This Court's Prior Order</u>

At the March 8, 2013 hearing, when Plaintiffs sought leave to depose 46 witnesses, the Court ruled that Plaintiffs were permitted take the following depositions: (i) Pfizer's trial witnesses; (ii) eight to ten of Plaintiffs' requested seventeen "drug witnesses" regarding sales and marketing of the four drugs at issue in the case; and (iii) two Pfizer employees who oversaw the company's Internal Audits. *See* 3/8/2013 Tr. 9-10; *see also* 3/8/2013 Order at 1. Pfizer identified six trial witnesses. Thus, under the Court's Order, Plaintiffs are entitled to 18 depositions (eight more than the presumptive ten allowed under Rule 30(a) of the Federal Rules of Civil Procedure).

The Court ruled that these were all of the depositions that Plaintiffs could take without seeking leave of court and without showing the existence of previously unknown information:

> If Plaintiff seeks any depositions beyond those allowed under this order, ***Plaintiff must show***, by a "2E" letter, ***why the proposed deponent would provide relevant information that had not previously been uncovered through discovery***.

3/8/2013 Order at 2 (emphases added).

Plaintiffs already have taken 13 of the depositions the Court granted, and are scheduled to take all but one of their remaining allowance before the November 29 close of fact discovery. Beyond these 18 depositions authorized by the Court, Pfizer did not oppose Plaintiffs' efforts to depose three additional KPMG witnesses. Also outside of the 18 allowed, Plaintiffs also have requested, and Pfizer has agreed, to add the six individual defendants to the list of deponents.[1] ***Thus, Plaintiffs have taken, or will have taken, 26 depositions before the close of fact discovery in November.***

Plaintiffs take the position below that, during the last hearing on July 19, the Court vacated its March 8 Order regarding the number of permitted depositions, even though the Court did not even mention that Order. Plaintiffs pluck two statements out of context from the hearing transcript, during which the Court was addressing certain ***document*** subpoenas that the Plaintiffs sought to enforce.

[1] Plaintiffs' assertion below that Defendants "refused to schedule or even discuss" additional depositions is inaccurate. We have agreed to several of Plaintiffs' requests, including consenting to depositions of the six remaining named defendants. We also offered that, to the extent Plaintiffs could identify a small number of witnesses for whom they could articulate a need to depose based on some development since the March 8 Order, we would entertain such a request. Plaintiffs refused our invitation – in fact, they have since ***increased*** their list of proposed deponents by two.

There were no depositions, and no deposition subpoenas, at issue in the July hearing. *See* 7/8/2013 Joint Letter. This issue was not before the Court, let alone decided. Plaintiffs' attempt to interpret the Court's statements concerning another subject as somehow vacating its prior written ruling regarding depositions is incorrect.

B. Plaintiffs' Unauthorized Subpoenas For An Additional 19 Witnesses

Without seeking leave, as required by the Court's Order, Plaintiffs have begun to issue subpoenas for an additional 19 depositions. This is exactly what the Court prohibited back in March. In truth, what has happened here is that Plaintiffs have deposed most of the witnesses the Court permitted, and this testimony has not supported Plaintiffs' claims. So Plaintiffs now want to start from scratch, with an entirely new slate of witnesses, hoping for a better result.

Plaintiffs' request should be denied because they cannot meet the standard imposed by the Court for additional depositions, namely that "the proposed deponent would provide relevant information that had not previously been uncovered through discovery." 3/8/2013 Order at 2. Plaintiffs seek to depose, at the eleventh hour:

- Eight More "Drug Witnesses": At the March hearing, Plaintiffs identified 17 "drug witnesses" who they sought to depose, and the Court responded that they needed to cut that number in half. 3/8/2013 Tr. 9-10. Plaintiffs then chose the nine witnesses they wanted to depose in this category, and they have conducted all of these depositions. Plaintiffs now seek a full scale do-over. Plaintiffs' demand for another eight "drug witness" depositions, on top of the nine already completed, takes them right back to their original request for 17 drug witnesses, a request that the Court considered and rejected in March. Moreover, Plaintiffs do not identify any new information that has been uncovered since the Court's ruling that would necessitate any of these depositions – all of these eight individuals have been known to Plaintiffs for years, through the document productions Pfizer has made. Plaintiffs' lengthy chart does not identify a single new fact revealed during the depositions taken to date that would justify these additional depositions. Plaintiffs' request should be rejected, and the subpoenas they have already issued to some of these witnesses – in direct violation of the Court's Order – should be quashed.

- "Accounting" Witness: This case involves a single accounting issue: whether Pfizer "failed to timely record a minimum of a $2.3 billion loss reserve" for potential liabilities relating to off-label promotion allegations. Compl. ¶ 17. Plaintiffs have already deposed the individual at Pfizer who made ***all*** reserving decisions: Loretta Cangialosi, Pfizer's controller, whom Pfizer designated as a trial witness. She testified that she was responsible for Pfizer's reserving decisions, and she testified at length about the bases for her decisions. Plaintiffs also have deposed three KPMG witnesses, all of whom testified regarding KPMG's agreement with Pfizer's FAS 5 reserve analysis. A final KPMG witness will be deposed on September 5. Yet

Plaintiffs now claim that they must also depose Paul Brockie, a Divisional Controller at Pfizer.[2] Mr. Brockie does not and did not make reserving decisions for Pfizer. And there is nothing about his role at the company that "had not been previously uncovered through discovery." 3/8/2013 Order at 2. Plaintiffs focus below on a single email that Mr. Brockie authored, summarizing topics that were discussed at a meeting involving, among others, Dennis Block and Doug Lankler, both of whom Plaintiffs will depose in the next several weeks. They are free to ask Mr. Block and Mr. Lankler about this meeting; there is no reason to depose Mr. Brockie just because he wrote an email. Given that Plaintiffs already have deposed the Controller, who made the reserving decisions at issue, and the accountants at KPMG, who reviewed and approved all such decisions, there is no need to depose a more junior person on the same issue.

- Pfizer's In House and Outside Counsel: In the coming weeks, Plaintiffs will be deposing the Pfizer in-house and outside counsel who provided advice on the securities disclosures at issue, as well as all inside and outside lawyers who Pfizer designated as trial witnesses. That is exactly what the Court's March 2013 Order permitted – Plaintiffs had asked for permission to depose several additional counsel, and the Court rejected Plaintiffs' request. Plaintiffs seek simply to ignore the Court's ruling, and now demand depositions of ***seven additional*** inside and outside Pfizer lawyers, again without identifying any new material information that was unavailable at the time of the March 2013 Order. That is because there is no new information; all of these lawyers, and their roles, have been well known to Plaintiffs for years. Plaintiffs claim now that they need these depositions to challenge Pfizer's "credibility" as it relates to Pfizer's agreement with the government that Pharmacia & Upjohn, Inc. would be the Pfizer subsidiary to enter a guilty plea as part of the resolution of the government investigation.[3] But the government's decision to accept a plea from Pharmacia & Upjohn, as opposed to Pfizer, bears no relevance to any issue in this case. The U.S. Attorney's office and Pfizer reached that

[2] Plaintiffs listed Mr. Brockie as a potential deponent in their March 2013 submission to the Court, arguing that because he was listed on Pfizer's Rule 26 initial disclosures, they were entitled to depose him. The Court expressly rejected this request, holding instead that Pfizer must provide its list of trial witnesses to Plaintiffs, and Plaintiffs would be entitled to depose "the witnesses on that list only." 3/8/2013 Order at 1.

[3] To attempt to justify these numerous additional depositions, Plaintiffs make the inexcusable accusation that these lawyers—who include no less than four former federal prosecutors, a current high-ranking Department of Justice official, Pfizer's current General Counsel, and some of the leading white-collar practitioners in the Bar—of engaging in criminal "obstruction of justice" in connection with the agreement between Pfizer and the U.S. Attorney's Office as to the entity that took the plea. Plaintiffs' allegation is both irresponsible and wrong. The letter Plaintiffs cite—which was submitted more than a year after both the public announcement of the settlement and the stock price decline that is at issue in the case—merely clarified the corporate structure of the particular subsidiary at issue and related subsidiaries. That clarification did nothing to alter the plea or the disposition of the case; indeed, the government indicated in the letter that it continued to believe the plea was appropriate, and the court did nothing in response to the letter. Neither the prosecutors handling the case nor the court found anything inappropriate about the matter, let alone an "obstruction of justice."

agreement ***eight months after*** the alleged "corrective" disclosure that ended the class period; indeed, at the time of the "corrective" disclosure in January 2009, in which Pfizer announced its agreement in principle with the Department of Justice to settle the Government Investigations, the particular entity that would enter the plea was unknown to either Pfizer or the government. The later agreement on the entity has nothing to do with any of the alleged misstatements or omissions in Plaintiffs' complaint.

- Former Defendants: In February, Plaintiffs voluntarily dismissed from the case three of the individuals who they now seek to depose. And with good reason, as these individuals had nothing to do with the securities disclosures at issue. Plaintiffs claim that they already made a good cause showing to depose these individuals, but that is not so. Plaintiffs' last request to depose these three witnesses was included in their March request for 46 depositions. The Court made a precise and complete ruling as to which depositions Plaintiffs could take in response to that request; the former defendants were not among the authorized depositions. Plaintiffs offer no explanation as to why their depositions are necessary. Moreover, Plaintiffs cannot point to any new information about these individuals that was not known to Plaintiffs as of March 2013, which is the standard Plaintiffs must meet.

The Court has already ruled on the scope and number of depositions that Plaintiffs may take, and in fact was generous in permitting Plaintiffs to take more than double the number prescribed in Rule 30(a). Now, with less than three months left in fact discovery (and 11 depositions still to be taken), Plaintiffs seek to cast the Court's prior ruling aside and add 19 more depositions to the already-full calendar, ratcheting the total up to 45. In violation of the Court's Order, Plaintiffs have already begun serving subpoenas for these unauthorized depositions. The Court's Order should be enforced: Plaintiffs' subpoenas should be quashed; and Plaintiffs' demand for 19 additional depositions should be denied.

II. PLAINTIFFS' POSITION

Since the July 19, 2013 hearing, Defendants have flatly refused to schedule or even discuss the limited number of additional depositions Plaintiffs wish to notice. Plaintiffs seek to only depose, aside from Defendants and former defendants[4], 16 additional witnesses as follows: eight additional drug-related witnesses, one additional reserve-related witnesses and seven additional litigation disclosures-

[4] Plaintiffs already presented good cause bases for the depositions of the former defendants in their March 8, 2013 submission to the Court. Defendants as the moving party on the motion to quash, however, have not submitted any evidence to satisfy their burden to "demonstrate that the [former defendants] ha[ve] no personal knowledge of the relevant facts and no unique knowledge of those facts." *Louis Vuitton Malletier v. Dooney & Burke, Inc.*, No. 04 Civ. 5316 (RMB) (MHD), 2006 U.S. Dist. LEXIS 87096, at *39 (S.D.N.Y. Nov. 30, 2006) (Dolinger, J.). Plaintiffs further note that the Former Defendants have agreed to appear at any trial held in this case as if they were a party to the case.

related witnesses. Given the Court's clear ruling on this issue during the July 19, 2013 hearing, Plaintiffs are embarrassed to burden the Court with this dispute. During the July 19, 2013 hearing, this Court already gave Plaintiffs leave to issue additional deposition subpoenas. *See* 7/19/13 Tr. at 19:18-20 ("You can take anybody you want. If you want to take someone else, take someone else. I don't understand why you're objecting to the subpoenas."), 20:7-8 ("The motion to quash the subpoenas is denied. Take who you want."). Defendants claim that the issuance of these subpoenas violates this Court's March 8, 2013 Order, but the Court at that hearing noted that Plaintiffs can show cause to take more depositions after taking the initial group of depositions. *See* 3/8/13 Tr. at 10:2-3. Set forth below is Plaintiffs' explanation for why good cause exists to take each of the additional depositions.

A. Additional Depositions Related to Off-Label Marketing

The relevant timeframe during which Bextra, Geodon, Zyvox and Lyrica ("Four Drugs") was promoted covers over eight years through four different sales divisions – Powers, Roerig, CNS (later named Neuroscience) and Anti-Infective – and involved thousands of Pfizer employees. The Geodon sales force alone was comprised of at least 1,118 people, including seven regional managers, seven assistant regional managers, three sales directors, three assistant sales directors, 99 district managers and 999 sales representatives. In addition, each division was led by different vice presidents, senior vice presidents and presidents. Beyond the sales organization, each of the Four Drugs also had a dedicated marketing team and review committee.

From the thousands of Pfizer employees who were involved in the promotion and sales of the Four Drugs, Plaintiffs had selected nine for the initial set of depositions who they felt would have the most knowledge based on their review of the documents and understanding of the facts at that point in time. The testimony from those depositions has highlighted the relevance and importance of issues regarding which Maria Connie Abelardo, Richard Burch, Robert Clark, Christopher Dowd, Lisa Levy, Antony Loebel, Mike Parini and Mark Westlock have unique knowledge and which the initial deponents did not have. *See* Ex. A, attached hereto. Plaintiffs thus have good cause to request their depositions.

B. Additional Deposition Related to Reserves

This Court also stated that with regard to material weaknesses and significant deficiencies, Plaintiffs could get additional witnesses if the witnesses they deposed did not have knowledge on particular issues. *See* 3/8/13 Tr. at 18:13-16. Ms. Loretta Cangialosi, who Defendants claim "made ***all*** reserving decisions," did not recall the circumstances leading up to the October 8, 2007 email from Mr. Paul Brockie to Messrs. Doug Lankler and Carl Wessel regarding the "reserving issue" related to "the Bextra DOJ matter." *See* 6/21/13 Cangialosi Depo. Tr. at 274:18-278:6 (attached hereto as Ex. B). Nor did she recall whether she attended the October 9, 2007 meeting involving Messrs. Brockie, Lankler, Wessel, Dennis Block and Kim Dadlani during which "[i]t was decided that the 'probable' criteria of

FAS5 ha[d] been met." *Id.* at 281:5-13. No other deponent thus far has been able to testify as to the adequacy of Pfizer's reserves relating to the Government Investigation. As admitted by Defendants' initial disclosures, Mr. Brockie is uniquely qualified to testify regarding Pfizer's reserves. In addition, the documents produced to date show that Mr. Brockie discussed the pending compliance matters with KPMG relating to the FAS 5 accrual and disclosure requirements. Plaintiffs therefore have good cause to take the deposition of Mr. Brockie as well.

C. Additional Depositions Related to Disclosures and Credibility

Two of the most critical issues in this case are (1) the details and consequences of Pfizer's illegal off-label promotion of Bextra (the "Underlying Offense") and (2) the credibility of Defendants and their witnesses. Plaintiffs seek several depositions focused on the intersection of these two issues: a second crime that Pfizer committed to escape the consequences of the Underlying Offense. This second crime involved a number of false statements that Pfizer's agents made for the purpose of deceiving the Honorable Douglas P. Woodlock into accepting a Rule 11(c)(1)(C) plea from an entity that did not even exist during the years that Pfizer committed the Underlying Offense. Pfizer used a number of in-house and outside counsel to execute this patent violation of 18 U.S.C. §1512(c)(2) (the "Obstruction of Justice"), the goal of which was to enable Pfizer to escape the mandatory exclusion from federal benefits programs that would have resulted from an honest plea to the Underlying Offense. Pfizer's disclosures during the Class Period (January 19, 2006 to January 23, 2009) not only concealed this death-penalty risk, but they further misled investors with statements such as, "we have substantial defenses in these matters." No one reading Pfizer's disclosures could have possibly understood its criminal conduct was so pervasive and its situation was so dire, that it would have to pay the largest fine in U.S. history and commit yet another crime just to survive.

The information Plaintiffs seek will reveal who knew what and when about Pfizer's commission of both the Underlying Offense and the Obstruction of Justice to escape its consequences. Through these revelations, Plaintiffs will establish the details and consequences of the Underlying Offense, which will expose the deceptiveness and impropriety of Pfizer's disclosures and lack of reserves. These revelations will also enable Plaintiffs to identify and discredit any witness who participated in, or was complicit in, the Obstruction of Justice. Four of the six trial witnesses Defendants have identified are lawyers, all of whom appear to have a direct connection to the Obstruction of Justice – either by actually committing it or by concealing the motive for it through Pfizer's misleading disclosures. These same witnesses also have a direct connection to Pfizer's reliance-on-counsel defense, so their credibility is a critical issue for trial. Most of the Defendants themselves also appear to share similar connections to the Obstruction of Justice.

Regarding any potential privilege concerns, it is clear that the crime-fraud exception applies here: "a party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof." *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995). Section 1512(c)(2) makes it a crime to deceive a court into accepting a guilty plea from a defendant

who did not, in fact, commit the charged offense. *See* 18 U.S.C. §1512(c)(2) (prohibiting corruptly influencing an official proceeding); *United States v. Kloess*, 251 F.3d 941, 943 (11th Cir. 2001) (reversing dismissal of indictment charging lawyer with §1512 violation for entering a guilty plea *in absentia* under a false name for his client, who had provided the false name to avoid a probation violation after police caught him possessing a pistol). There is far more than probable cause to believe that is what Pfizer and its agents did here.

The entity that Pfizer used for this sham plea was Pharmacia & Upjohn Company, Inc. Pfizer formed this entity on March 27, 2007 (for another sham plea). Nevertheless, at the plea hearing for the Underlying Offense, attorney Brien O'Connor, one of defendants' trial witnesses, represented to Judge Woodlock "that from February 2002 through April 2005 Pharmacia [& Upjohn Company, Inc.] promoted Bextra for uses that were not within Bextra's approved label." *See* Ex. C at 50:22-52:11. That was a false statement. Likewise, O'Connor represented that "certain members of the Pharmacia [& Upjohn Company, Inc.] sales force promoted Bextra with false and misleading claims." *Id.* That was also a false statement. In addition to these and other false statements at the plea hearing, Mr. O'Connor and other Pfizer agents made false statements in documents submitted to Judge Woodlock, including a plea agreement and a sentencing memorandum. Although success is not an element of a §1512 violation, the Obstruction of Justice did work – Judge Woodlock accepted the plea of, and sentenced, an entity that did not commit the Underlying Offense. And the entity that actually committed the Underlying Offense, Pfizer (a fact the proposed deponents should confirm), escaped the consequences of a conviction.

Defendants assert that it is an "inexcusable accusation" that Pfizer and its agents committed the Obstruction of Justice. *See* n.3. Rhetoric aside, however, Defendants do not, and cannot, deny that Pfizer used its agents to make a series of false statements to Judge Woodlock in order to influence him to accept a Rule 11(c)(1)(C) guilty plea from an entity that did not commit the crime, rather than the entity that did: Pfizer. In light of their lack of denial, Defendants' refusal to stipulate to these facts is entirely unreasonable. Defendants' additional argument that because some of the potential participants in, or percipient witnesses, to the Obstruction of Justice are former prosecutors or a present DOJ official is relevant only because it confirms that these individuals would have known the impropriety of this plea. In addition, the letter to Judge Woodlock was sent after the case was closed, so Judge Woodlock's inaction in no way alters the analysis of the Obstruction of Justice.

Defendants take the position that Plaintiffs may depose only those attorneys Defendants wish to call as witnesses and that Plaintiffs can simply seek whatever information they want from Defendants' handpicked witnesses. But Defendants are not entitled to dictate how Plaintiffs prove their case, and they are certainly not entitled to force Plaintiffs to rely on the testimony of the same witnesses whom Plaintiffs intend to discredit because of their participation in the Obstruction of Justice. Regarding this latter purpose for the proposed depositions, impeachment, Defendants refused to consider stipulating that some or all of the Defendants and their trial witnesses had conspired to, and did, deceive the District Court of Massachusetts. Plaintiffs are entitled to discovery that will enable them to prove what Defendants refuse to admit.

To that end, Plaintiffs have good cause to depose the following witnesses: Ethan Posner, James Gibney, Chris Wray, Carl Wessel, Gary Giampetruzzi, Amy Schulman and Michael Horowitz (collectively referred to as "Obstruction of Justice Witnesses"). *See* Ex. D for explanations of the good cause basis for each of the Obstruction of Justice Witnesses. Because the credibility of several of these witnesses may be suspect, and some may invoke their Fifth Amendment privilege, Plaintiffs may have to schedule more depositions than they would prefer in order to gather the evidence and information they need. Of course, it is always possible that earlier depositions will render later ones unnecessary, but Plaintiffs need to schedule all of them now with the understanding (and hope) that they may be able to cancel some. In addition, Plaintiffs will commit to making these highly focused depositions, which should be completed within four hours. Accordingly, Plaintiffs respectfully request that Court permit Plaintiffs to depose the Obstruction of Justice Witnesses.

Very respectfully yours,

HENRY ROSEN
ROBBINS GELLER RUDMAN
& DOWD LLP

Very respectfully yours,

STEVE FARINA
WILLIAMS & CONNOLLY LLP

Judge wrote:

"Plaintiff may depose Abelardo, Burch, Clark, Dowd, Levy, Loebel, Parini and Westlock, having sufficiently shown need and relevance, but not Brockie, nor Posner, Gibney, Wray, Wessel, Biampetruzz, Schulman, nor Horowitz.

So Ordered,

8-30-13

Alvin K. Hellerstein"