IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS LIABILITY LITIGATION	:	**MDL NO. 2342** **12-MD-2342**
	:	**HON. CYNTHIA M. RUFE**
THIS DOCUMENT RELATES TO ALL ACTIONS	:	

SPECIAL DISCOVERY MASTER'S REPORT AND RECOMMENDATION NO. 9
(REGARDING ATTORNEY-CLIENT PRIVILEGE CLAIMS AS TO 34 DOCUMENTS)

March 25, 2014

I. INTRODUCTION

This Report and Recommendation arises from a controversy over Pfizer's assertion of attorney-client privilege with respect to communications that are in 34 documents. Pfizer produced these documents in discovery and seeks to invoke the "clawback" provisions of Fed. R. Civ. P. 26(b)(5)(B) and paragraph 16 of Pretrial Order No. 8, which was entered July 23, 2012. The production of these documents without redaction or withholding on grounds of the privilege claim was inadvertent. Under paragraph 16(d) of Pretrial Order No. 8, Pfizer ". . .retain[s] the burden of establishing its privilege. . . . claims." (Id.) The documents have been submitted for the Special Discovery Master to review them *in camera* and to Report and Recommend on whether the privilege claims should be sustained.

Pfizer has not claimed that the communications are attorney work-product.

In the case of some of the documents, Pfizer claims the attorney-client privilege only with respect to portions of them. In those cases, Pfizer inadvertently produced the entire documents; it now seeks to claw back those documents and substitute, in their place, redacted documents that delete or obliterate the communications as to which the privilege may apply.

Pfizer points out that paragraph 16(b) of Pretrial Order No. 8 required the PSC to return or destroy the documents at issue but that the PSC did not do so. If there is a basis for action against the PSC as a result, Pfizer has not urged that any be taken. Because the retention of the documents by the PSC does not affect the merits of whether the privilege was correctly asserted, this Report and Recommendation will not deal with the retention.

At first, Pfizer claimed the right to claw back more documents than are the subject of this Report and Recommendation. Pfizer appears to have acknowledged that at least one person who was thought to be a lawyer was actually a pharmacist. It withdrew assertions of privilege with respect to communications involving that person, unless another person involved in the communications was a lawyer.

The submissions by Pfizer and the PSC are not consistent about the number of documents in which communications are at issue. This is because some of the documents were produced in duplicate, apparently because they were in more than one file. Other arguably privileged communications appear as part of email chains, and those communications made their way into documents in which the emails chains overlap but are not duplicative. In all events, the two sides have submitted collections of the documents, and they are consistent, even if they are not consistently numbered. This Report and Recommendation refers to the documents primarily according to the numbers assigned to them in Pfizer's privilege log and in its submission.

II. GENERAL LEGAL STANDARDS

The parties appear to agree that the Pennsylvania law of privilege, as codified at 42 Pa.C.S.A. § 5928 and in cases such as those discussed here, applies to this controversy. In diversity cases, the privilege law of the host state applies. Fed. R. Evid. 501; United Coal Co. v.

Powell Constr. Co, 830 F.2d 958, 965 (3d Cir. 1988); Keating v. McCahill, 2012 U.S. Dist. Lexis 91179, at *6 (E.D. Pa., July 2, 2012).[1]

There are many definitions of what communications fall within the attorney-client privilege. This Report and Recommendation follows the definition used in In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979). There, the court stated:

> Perhaps the most commonly cited formulation of the attorney-client privilege is that offered by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D.Mass.1950):
>
> > The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Investigation, supra, 599 F.2d at 1233 (3d Cir. 1979). See also In re: Sunrise Sec. Litig., 130 F.R.D. 560, 570 (E.D. Pa. 1989)(O'Neill, J.)(quoting the same test); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994). *See also* Glenmede

[1] At least with respect to one point, however, the PSC suggests that Australian law apply, arguing that the attorney-client privilege may not apply under Australian law where the lawyer involved is an in-house counsel. The PSC has not submitted an expert opinion on this aspect of foreign law, but such an opinion would not change the outcome of this Report and Recommendation, since all but one of the communications involving Mr. Dunbar are recommended to be held as outside of the protection of the privilege. The one remaining communication would be privileged regardless of where and whether Mr. Dunbar was licensed as a lawyer, since he was communicating in order to give information to and procure legal services from outside counsel in New York. (See ¶ 1, below, discussing Document 199) See SEPTA v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 254 (E.D. Pa. 2008).

Trust Company v. The Honorable Herbert J. Hutton, 56 F.3d 476, 486 n.15 (3d Cir. 1995) (same).

The cases cited involve assertions of the privilege by corporations, and this test is as applicable to corporations as it is to individuals. See also Corbis Walker, LLP v. Hill, Barth & King LLC, 930 A.2d 573, 579 (Pa. Super. 2007). While the test is the same for corporations and individuals, it is sometimes more complicated to apply when corporations are asserting the privilege with respect to internal communications. In re: Avandia Mktg., 2009 U.S. Dist. LEXIS 113562 (E.D. Pa. Dec. 7, 2009). If a communication is primarily about legal considerations, it is privileged regardless of whether the considerations apply to regulatory requirements, business decisions or more traditional questions of legal principles. Id.

It has been held in this district: "When the record is ambiguous as to the elements necessary to establish a claim of attorney-client privilege, the burden is on the party asserting it … [to] show, by record evidence such as affidavits, sufficient facts as to bring the communications at issue within the narrow confines of the privilege." *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)). Under this approach, where the affidavits do not establish the factual basis for the privilege, then the assertion of the privilege will not be availing. It may be possible, however, for the text of the communication itself to establish the factual basis for the privilege, in which case the lack of proof based on the affidavits alone will not preclude application of the privilege. If the text of the message itself is not ambiguous, then there is no need to seek further evidence on whether the elements of the privilege are applicable.

Many of Pfizer's assertions of privilege are based on the participation of Alan Dunbar in the communications. Mr. Dunbar became licensed as an attorney in New York after the

communications at issue were made. He was an Australian attorney when he was involved in the communications in question. Nearly all of the communications in which Mr. Dunbar was involved related to questions or issues of Australian regulation of disclosures about pharmaceuticals.

Mr. Dunbar's status as an attorney in a foreign country during the communications in question does not bar application of the attorney-client privilege. Keating v. McCahill, 2012 U.S. Dist. Lexis 91179, at *7 (E.D. Pa., July 2, 2012)(Pratter, J.), citing Rest. 3d Law Governing Lawyers § 72 (comment e); Corbis Walker, LLP v. Hill, Barth & King LLC, 930 A.2d 573, 579 (Pa. Super. 2007).

Mr. Dunbar was Director of Worldwide Regulatory Strategy. The dates of his Australian bar admission and of his tenure as Director of Worldwide Regulatory Strategy are not made clear in the submissions, but it is assumed for the purposes of this Report and Recommendation that he was a lawyer who held the position of Director of Worldwide Regulatory Strategy during the period when all of the relevant communications involving him were made.

There is no evidence that the Director of Worldwide Regulatory Strategy needs to be a lawyer or that the decisions made by the Director depend primarily on legal knowledge, insight or training. In fact, the PSC's submission states that a pharmacist served at one time as Director of Worldwide Regulatory. (PSC letter of July 12, 2013, page 4) With one exception, discussed below (¶ 5, discussing Documents 204-08), the communications to, from and about Mr. Dunbar reveal nothing pointing to reliance on his legal knowledge, insight or skills as the basis for his statements or for the inquiries made of him.

In addition to the documents themselves, Pfizer has supplied the Declaration of Joseph Valentine as part of its effort to establish that the privilege applies to the communications at issue.

Mr. Valentine has represented Pfizer over several decades. (Valentine Dec., ¶ 9) In connection with the litigation arising from ingestion of Zoloft, Mr. Valentine has to review documents and "in appropriate instances, to inquire of company legal staff and personnel regarding the meaning and purpose of the documents and the identities of persons known to have been involved in the communication(s) involved in the documents." (Id., ¶ 7) Such an inquiry, presumably, is designed to resolve ambiguities and overcome lack of clarity where the communication set forth in one of the documents at issue is not clearly covered by attorney-client privilege. Except in a small number of cases (see document 1, below), it is not clear whether the documents and communications at issue gave rise to the inquiry described by Mr. Valentine. If a document is ambiguous or if there is lack of clarity as to the purposes and circumstances of a communication set forth in the document, there is not in Mr. Valentine's declaration, for the most part, anything that states that the ambiguity or lack of clarity was explored and resolved as a result of an inquiry of one or more of the people involved in the communication.

Mr. Valentine's Declaration does establish that the privilege was asserted upon the exercise of care and judgment. It was done in good faith. Pfizer seems to have taken an approach consistent with what the Court found to be proper in In re: Avandia Mktg., 2009 U.S. Dist. LEXIS 113562, at *17-18, 23 (E.D. Pa. Dec. 7, 2009). This was not a case where a producing party marked documents and communications as privileged indiscriminately, leaving the parties and the court to sort it out later. As of the date of Mr. Valentine's Declaration, Pfizer

had produced more than 2.7 million pages of documents without applying any claim of attorney-client privilege or work product immunity to them. Only 1,535 documents are listed on its privilege log. This is just less than two percent of Pfizer's production of documents through October 21, 2013. (Valentine Dec., ¶ 6) Pfizer redacted documents as to which it asserted the attorney-client privilege, producing the portions of the documents as to which the privilege was not claimed. (Id., ¶¶ 8, 9)

The fact that the assertions of attorney-client privilege were made thoughtfully and in good faith does not mean that they were made correctly in all instances. (This is demonstrated by Pfizer's withdrawal of the claim with respect to documents involving G. Legere, who turned out to be a pharmacist, and not, as the review team seems originally to have thought, a lawyer.) Nor does it mean that Pfizer has submitted evidence or documentation that proves that the assertions were correct in these 34 instances. The examination of the communications at issue is done without regard to whether the assertions of privilege in the 1,501 documents not presented were correct.

On the present motion, the main issue is whether the "primary purpose" of the communication was to obtain, facilitate or communicate about legal advice or services. This requirement that legal considerations be the "primary purpose" of the communication is found in the United Shoe test quoted above and in SEPTA v. CaremarkPCS Health, Inc., 253 F.R.D. 257 (E.D. Pa. 2008). In the SEPTA case, however, it was acknowledged that a decision that involves consideration of business concerns may be privileged if the decision was "infused with legal concerns and was reached only after securing legal advice." Id., at 257 (citation omitted)

In the SEPTA case, however, the court was able to review lengthy memoranda and other documents that showed how a business decision might have been "infused" with legal concerns.

The documents that contained mixed business and legal considerations appear to have included lengthy discussions of both kinds of considerations in Faloney v. Wachovia Bank, N.A., 254 F.R.D. 204, 209-10 (E.D. Pa. 2008), and in In re: Ford Motor Co, 110 F.2d 954, 966 (3d Cir. 1997). In this case, however, the communications at issue are in almost all instances quite terse. They do not outline how the person writing the email notes relied on legal considerations, or even gave any weight at all to legal considerations, as opposed to business, pharmacological or epidemiological considerations.

The statements, advice and directions at issue are not shown to have been made with any deliberation that involved consideration of legal principles or learning. If the "primary purpose" test is at odds with the "infusion" test of SEPTA in some cases, it is not at odds with it here, because the communications at issue here do not, in most cases, even implicate the "infusion" test. The communications are too brief and the record is too spare to say that there were two kinds of considerations and that one was infused with the other. Even if more than one kind of consideration is expressed,[2] there remains an ambiguity about whether the legal considerations were primary or merely weighty. Any ambiguity is resolved in favor of the party challenging the assertion of privilege under *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)).

III. INDIVIDUAL DOCUMENTS

Below, this Report and Recommendation discusses each document in which the privilege is at issue. The discussions are necessarily a sketch, because a court must take special caution

[2] The PSC appears to argue that discussions of regulatory issues are not privileged. The cases show, however, that discussions of regulatory issues that rely primarily on legal considerations may be privileged. In this sense, discussions of regulatory issues are no different from discussions of other issues. If the legal considerations in the discussion are the primary considerations, then the discussion is privileged.

not to discuss the specific content of the documents in detail, lest "the very purposes of [*in camera*] review would be special caution not subverted, creating a risk that 'the privilege will be destroyed.' " In re: Ford Motor Co., 110 F.2d 954, 966 n. 11 (3d Cir. 1997); see also Faloney v. Wachovia Bank, N.A., 254 F.R.D. 204 (E.D. Pa. 2008).

1. **Document 199 (PF 100210039400).** This is one of many communications between Alan Dunbar and someone at Pfizer who is not a lawyer. It is not clear from the communication itself that it involves legal advice or opinion. The Declaration of Mr. Valentine, however, establishes that the communications in this document were made for the purpose of providing information to Mr. Valentine himself—acting as outside counsel—so that Mr. Valentine could provide legal advice or services. (Valentine Dec., ¶ 11a) Mr. Valentine's declaration provides sufficient evidentiary basis for upholding the assertion of the privilege with respect to the communications in this document. On this basis, I recommend that the assertion of privilege with respect to this document be upheld. *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)).

2. **Document 201 (PF100210045848-50).** The document at issue is a chain of emails written in September 2005. There are nine emails in the chain. At least eighteen people are in the chain. The last of the emails is the only one as to which the privilege is asserted. It is from Alan Dunbar to seven other people. Mr. Dunbar gives a brief discussion of a journal article. There is nothing in this discussion that tells us that Mr. Dunbar is drawing on legal sources, knowledge or expertise for the points he makes in his discussion. The email is ambiguous, at best, on the point of whether its contents provide legal advice or services. There is no affidavit or other evidence that resolves the ambiguity. Therefore, Pfizer has not met its burden of establishing that the attorney-client privilege applies. *Sunrise Securities*, supra, 130

F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)). It is recommended that the assertion of the privilege with respect to certain emails in this chain be rejected.

3. **Document 202 (PF100210046219-20).** This document is an email chain written in October 2005. There are five emails in the chain. Pfizer claims privilege with respect to the last three of them. In the first of these three, written at 4:52 pm on October 18, 2005, a Pfizer employee asked Mr. Dunbar and three other people to review a draft email. In the next email, written three minutes later, Mr. Dunbar provided a response. The next day—October 18, 2005--another Pfizer employee made a comment. As in the case of Document 201, discussed above, it is not clear that the advice sought from and the advice given by Mr. Dunbar was legal in nature. The email itself is ambiguous on this point. In the absence of evidence to clarify the point, Pfizer has not met its burden of establishing that the attorney-client privilege applies. *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)). As for the email of October 19, it is not even clear that the comment is responsive to Mr. Dunbar's comment or if it is responsive to an earlier email in the chain. It is recommended that the assertion of privilege with respect to emails in this document be rejected.

4. Document 203 (PF100210046221-22) is an email chain that duplicates part of the email chain in Document 202 (discussed above). One of the emails is the subject of a privilege assertion, and I recommend that the assertion of privilege be rejected for the reasons stated in paragraph 3, immediately, above.

5. **Documents 204 (PF100210046476-82), 205 (PF100210046485-91), 206 (PF100210046508-14), 207 ((PF100210046531-36) and 208 (PF100210046541-47).** Each of

these five documents is a variation of the same email string, the most complete of which is in Document 208. The discussion of the privilege assertion starts, therefore, with the emails in Document 208 as to which the attorney-client privilege is asserted. Mr. Dunbar became part of the discussion in the second email in the early morning of October 18, 2005. He was one of ten people discussing the point at issue. The number of participants rose to twelve in the next days.

Mr. Dunbar made his first comments on November 23, 2005 in the fifth email of the chain, and he made them to only two people. His remarks relate to an attachment, and the attachment is not provided. There is nothing about the communication itself that supports the notion that his comment constitutes legal advice or services or that it is based on legal knowledge or insight.

The sixth email is a response to Mr. Dunbar, and it broadens the conversation again to ten people. There is nothing about the communication itself that supports the notion that the response seeks legal advice or services. The same is true with respect to the next five emails, running through November 23, 2005 at 10:58 a.m.

The twelfth and thirteenth emails, sent on November 23, 2005 at 11:53 a.m. and November 24, 2005 at 4:02 a.m. are more arguably based in legal considerations. Mr. Dunbar discusses the relevance of certain information, and another Pfizer employee responds with an informal reference to Mr. Dunbar's status as a lawyer. Nevertheless, it is not possible to know from the discussion itself whether the point Mr. Dunbar makes relates to legal relevance, epidemiological relevance or some other kind of relevance. The communications themselves are ambiguous on the points that would resolve whether the privilege is applicable, and there is no additional information that resolves the ambiguity. Pfizer, therefore, has not met its burden of

establishing that the attorney-client privilege applies. *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)).

The fourteenth through the seventeenth emails include comments by Mr. Dunbar with apparent responses. The attachments to which he refers are not provided. The communications remain ambiguous on the question of whether the points being discussed by and with Mr. Dunbar are legal points, epidemiological points, pharmacological points, or points about the style in which a presentation should be made, or other non-legal points. Pfizer has not met its burden of establishing that the attorney-client privilege applies. *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)).

Documents 204, 205, 206 and 207 do not present any issues different from those discussed in connection with Document 208. I recommend that the assertion of privilege with respect to any communications in these documents be rejected.

6. **Document 212 (PF100210049447).** This document consists of one email from a Pfizer employee to Mr. Dunbar. It shows that the email was sent by way of "cc" to seven other people. Mr. Valentine's declaration (at ¶ 11f) describes this document as an email in which the writer refers to a previous discussion in which legal advice was given. It is clear enough that the email does refer to a previous discussion in which advice or direction was given, and it does summarize that advice or direction. Nevertheless, given Mr. Dunbar's dual role, it is unclear whether the advice proceeded from legal considerations or from other considerations. There remains ambiguity on whether the privilege applies, and Pfizer has not met its burden of establishing that the attorney-client privilege applies. *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)).

7. **Document 213 (PF10016000205) and Document 214 (10016000213)** On June 4, 2008, a medical director of a Pfizer entity wrote and email to attorney Chan Lee and one other person, copying in four others) about a regulatory issue. This email is Document 213. In the email that is Document 214, the recipient, who was not an attorney, passed the request along to yet another person, seeking advice about the regulatory issue. It appears that the medical director was seeking both legal advice and non-legal advice, as is apparent from the fact that the request for advice was made both to a lawyer and to non-lawyers. This is not a situation where various people were copied in so that they could all gain the benefit of advice from a lawyer. Rather, a discussion of a regulatory issue was held among a group of people that included a lawyer. It does not appear that the lawyer was copied in just to create a record that would help to cloak the discussion within the privilege; but it also appears that the discussion was held in a way that makes it impossible, at this point, to separate the legal issues in the discussion from the non-legal issues. Therefore, the assertion of the privilege should be rejected, and I so recommend.

8. **Document 217 (PF100200006330) and Document 218 (PF100200006351-63).** Document 218 is a draft of a report. Drafts of documents prepared by counsel are privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version. SEPTA, supra, 254 F.R.D. at 258. It follows that a counsel's comments in a draft are privileged. This draft contains edits, proposed edits and comments. It is not clear from the presentation provided by Pfizer whether these edits, proposed edits and comments were made by Mr. Dunbar or by someone else. Assuming that they were made by Mr. Dunbar, it is not clear that his remarks constituted legal advice or commentary, or whether they are given in his non-legal role as director of regulatory affairs. Document 217 includes an email from Mr. Dunbar transmitting his edits and comments. Given

the lack of clarity about which remarks are Mr. Dunbar's and the ambiguity about whether the remarks made by Mr. Dunbar constitute legal advice or services (as opposed to non-legal advice or services, Pfizer has not met its burden of establishing that the attorney-client privilege applies. *Sunrise Securities*, supra, 130 F.R.D. at 570 (quoting *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 687-88 (E.D. Pa. 1986)). I recommend that the assertion of privilege with respect to these documents be rejected.

9. **Documents 219 (PF100200006349-63) and 220 (not provided by the parties to the Special Discovery Master with numerical markings).** These documents are a draft of a report with emails commenting on Mr. Dunbar's directions relating to the report. Whether Mr. Dunbar's wishes and directions are based on legal considerations or on business, epidemiological or safety considerations cannot be discerned from the discussion of them. (See paragraph 8, above) Therefore, Pfizer has not met its burden of establishing that the attorney-client privilege applies. Mr. Valentine's Declaration describes Mr. Dunbar's directions as "legal advice or comments by Attorney Dunbar." (Valentine Dec. ¶ 11k) But this description is conclusory; there is nothing in Mr. Valentine's Declaration that explains why what Mr. Dunbar said was described as legal advice rather than as a business-oriented directive. I recommend that the assertion of privilege with respect to these documents be rejected.

10. **Document 197 (PF100210028714)** appears to be a notice scheduling a teleconference. The Valentine Declaration (at ¶ 11*l*) states that it calls for the attendance of a lawyer who is in Pfizer's Legal Department, a lawyer who is outside counsel, and three other people to attend the conference. The Declaration states that the notice called for the lawyers to attend "in order to provide legal advice and comment." The Declaration's conclusion on that point is not derived from the text of the notice, and Mr. Valentine does not state that he or

anyone working with him was able to verify through investigation that this was the purpose of the lawyers' participation. Nevertheless, in-house and outside counsel identified on the notice do not appear to have any non-legal roles with the company, and there is no reason to think that they were invited to the meeting for any purpose other than to provide legal advice. Therefore, there is no ambiguity in the record about whether the notice was a way of initiating a request for legal advice or services. The notice did serve that purpose, and I recommend that the assertion of privilege with respect to this notice be upheld.

11. **Documents 198 (PF100180022014-17) and 215 (PF100180028683)** are identical drafts of a document. Pfizer claims a privilege for a few lines in this draft. In these lines, it is noted that Mr. Dunbar and someone named Gail are being asked for input. Mr. Dunbar, as noted, is an attorney; Gail is not. There is no reason to uphold the assertion of privilege insofar as the notations state that input is being sought from Gail—the non-attorney. The question of whether Mr. Dunbar's input is sought because it is legal advice is not clear. The same question may be posed of an attorney and a layperson, seeking the answers on the basis of the different perspective of each person. In that case, the attorney's advice would be privileged, and the posing of the question to the attorney would also be privileged. But here, Mr. Dunbar acts in the role of a director of regulatory strategy, which is not necessarily a legal post; the request for input from him may or may not have been a request for input based on legal considerations. The request, therefore, is ambiguous, with no extrinsic evidence to resolve the ambiguity. I therefore recommend that the privilege assertion with respect to any notations in this document be rejected.

12. **Document 221 (PF 100200006501-57)** is a 57-page draft. On the twenty-ninth page is a two-sentence comment. The first sentence is clearly a communication aimed at

initiating a request for legal advice. The second is just as clearly not a communication aimed at procuring legal advice. It is recommended that the assertion of privilege with respect to the first sentence be upheld and that the assertion of privilege with respect to the second sentence be rejected.

13. **Documents 194 (PF100210027703-28), 195 and 226 (identical to Document 194 or a truncated version of it with different numerical markings)** is a tabulation of safety reports prepared on Pfizer products over a period of eight years and two months. The tabulation lists the product reported on, the subject of each report, which organization requested the report and the purpose of the report. Six of about 500 entries are said to be privileged. In each of those six entries, it is noted either that a legal department asked for the report, that the report was made as a legal inquiry, or both. The entries are privileged, and I recommend that the assertion of the privilege with respect to them be upheld).

14. **Documents 196, 209, 211 and 227** are similar to Document 194, with similar entries as to which the privilege is asserted. On the basis of the same considerations as are set out in the discussion of Document 194, I recommend that the assertion of privilege be upheld.

15. **Documents 216, 223 and 224 (PF100190002110-16, PF100190070584-90 and PF100190070617-23)** each include one sentence stating that a request for legal advice from one of Pfizer's legal departments is to be made. This is clearly a privileged communication, and I recommend that the assertion of privilege with respect to this portion of these two documents be upheld.

16. **Document 222 (PF1002000018791-98)** is a chain of several emails. The chain includes three statements in which the writer states his or her intent to "run it by Legal" or otherwise seek the advice of lawyers for Pfizer. The second and third statements describe the

intention to seek the advice of lawyers and non-lawyers. To the extent that the statements discuss the intention to seek further input from non-lawyers, the statements are not privileged. (See paragraph 11, above) I recommend, therefore, that the privilege assertions be upheld in part and rejected in part. To the extent that the assertions relate to communications or intended communications with non-lawyers, the assertions should be rejected. In all other respects, the privilege assertion should be upheld.

17. **Document 225 (PF100190083448-51) and Document 228** are identical. Each is a chain of eight emails. In one of them, there is a reference to "an email from legal" along with the advice given in the "email from legal." Those remarks are privileged, and I recommend that the assertion of privilege with respect to them be upheld.

IV. SUMMARY

It is recommended for the reasons stated above that Pfizer's assertion of privilege with respect to communications in the following documents be rejected: Documents 198, 201-208, 212-215, 217-220.

It is recommended for the reasons stated above that Pfizer's assertion of privilege with respect to communications in the following documents be upheld: Documents 194-197, 199, 109, 211, 216, 222-228.

It is recommended Pfizer's privilege claim with respect to the first sentence of its redaction to Document 221 be upheld and that its privilege claim with respect to the second sentence of its redaction in Document 221 be rejected.

3/25/14

Andrew A. Chirls, Special Discovery Master
Fineman Krekstein & Harris, PC
1735 Market Street, Suite 600
Philadelphia, PA 19103
215-893-8715