UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated,	:	10-cv-3864 (AKH)
Plaintiff,	:	**ECF Case**
v.	:	**Electronically Filed**
PFIZER INC., et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ALAN G. LEVIN'S MOTION FOR SUMMARY JUDGMENT

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Jay B. Kasner
Gary J. Hacker
Alexander C. Drylewski
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Fax: (212) 735-2000

Attorneys for Defendant Alan G. Levin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Defendant Alan G. Levin respectfully submits this memorandum of law in support of his motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[1]

PRELIMINARY STATEMENT

Mr. Levin is named as a defendant in this securities fraud action based upon his status as the Chief Financial Officer ("CFO") of Pfizer – a position from which he resigned in early September 2007, nearly a year and a half before the end of the Class Period – and based upon alleged misstatements or omissions the vast majority of which were not, as a matter of law, made by him. Summary judgment in Mr. Levin's favor is warranted for the following separate and independent reasons:

First, it is axiomatic that a defendant may be held liable under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") for only those statements directly attributed to the defendant and over which the defendant exercised "ultimate authority." *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (*infra* § I). Here, it is undisputed that Mr. Levin is not the maker of any of the challenged statements occurring after he exited his role as CFO, nor is he the maker of any oral statements made by others during his tenure. (*See* App'x 1.) Accordingly, Mr. Levin is entitled to summary judgment as to those alleged misstatements.

Second, even as to the statements issued by Pfizer during Mr. Levin's tenure as CFO that assuming *arguendo* for purposes of this motion he may be deemed to have made, there is no genuine issue of material fact that any of those statements were materially false or misleading. (*See* Pfizer Brief § II.) Just as significantly, Plaintiffs cannot point to any evidence – much less

[1] Mr. Levin adopts and incorporates by reference the arguments and authorities set forth in the Memorandum of Law in Support of Pfizer Inc.'s ("Pfizer" or the "Company") Motion for Summary Judgment (the "Pfizer Brief"), as well as in the memoranda of law submitted by the other individual defendants, to the extent applicable. Citations to "56.1 ¶ __" are to the Local Rule 56.1 Statement of Undisputed Facts in Support of Alan G. Levin's Motion for Summary Judgment, submitted herewith.

evidence giving rise to a genuine issue of material fact – that Mr. Levin made any of those statements with scienter, an essential element of Plaintiffs' securities fraud claim. (*Infra* § II.) While Plaintiffs apparently fault Mr. Levin for Pfizer's disclosures regarding the government's investigation of Bextra, the undisputed facts make clear that Mr. Levin – who is not a lawyer – was consistently assured by Pfizer's experienced in-house and outside securities counsel that the disclosures in question were both accurate and fully compliant with the securities laws. *See Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (affirming summary judgment based on lack of scienter where defendant "relied on the expertise of counsel"). The undisputed record also demonstrates that Mr. Levin acted reasonably and in good faith in relying on that legal advice, particularly as the Bextra investigation was still in its nascent stages during his tenure as CFO. In fact, by the time Mr. Levin resigned as Pfizer CFO, the government had not yet made any demand on the Company, the two sides had not engaged in any settlement discussions regarding Bextra and the government had not yet initiated any investigation into two other drugs encompassed by Pfizer's eventual $2.3 billion settlement. Significantly, right up until the time of his departure as CFO, Mr. Levin was informed repeatedly that the Company's lawyers believed there were strong defenses to the government's theories of wrongdoing.

Similarly, while Plaintiffs allege with hindsight that Pfizer failed to take the appropriate reserves in connection with the government investigation, again, the undisputed facts demonstrate that during Mr. Levin's tenure as CFO, the investigation had not progressed to the point where a reserving determination properly could be made. (*Infra* § II.D.) This conclusion is bolstered by the advice of the Company's outside auditor, KPMG, who independently assessed Pfizer's reserving decisions each quarter that Mr. Levin served as CFO and determined that no

reserve was required under Generally Accepted Accounting Principles ("GAAP") and Statement of Financial Accounting Standards No. 5 ("FAS 5"). Under controlling Second Circuit law, Plaintiffs must show that the challenged reserving decisions "were both false and not honestly believed when they were made," *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 113 (2d Cir. 2011) – a conclusion that is not supported by one shred of evidence.

Third, Plaintiffs cannot prove the essential elements of loss causation and damages as to Mr. Levin. (*Infra* § III.) Plaintiffs employ an untenable "constant inflation" theory of damages whereby the purported inflation in Pfizer's stock (and thus the damages available) was exactly the same throughout the entire class period. However, this theory – which has been criticized by courts and commentators, *see, e.g.*, Ferrell & Saha, *Forward-Casting 10b-5 Damages: A Comparison to Other Methods*, 37 J. Corp. L. 365, 371-73 (2011-12) – utterly fails to account for Mr. Levin's departure halfway through the class period at a time when Plaintiffs' own reserving expert admits the Company did not have enough information to accurately predict the entire $2.3 billion settlement later reached. Moreover, that settlement related, in part, to government investigations that only began after Mr. Levin left the Company. As a result, Plaintiffs improperly fail to disaggregate the alleged harm caused by Mr. Levin's purported misstatements from the "tangle of [other] factors affecting" Pfizer's stock price – including alleged misstatements made after Mr. Levin's departure for which Mr. Levin cannot be held liable, in direct derogation of the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343 (2005). In substantially similar circumstances, Judge Swain recently granted summary judgment for Pfizer where the plaintiff's loss causation and damages expert neglected to disaggregate the inflation caused by alleged misstatements previously dismissed by the court. *See In re Pfizer Inc. Sec. Litig.*, Nos. 4-CV-9866-LTS-HBP, 5-MD-1688-LTS, 2014 WL

3291230, at *3 (S.D.N.Y. July 8, 2014); *In re Pfizer Inc. Sec. Litig.*, No. 04 Civ. 9866 (LTS) (HBP), 2014 WL 2136053, at *1-2 (S.D.N.Y. May 21, 2014). The same reasoning applies with equal force here, where Plaintiffs' "constant inflation" analysis improperly attempts to hold Mr. Levin liable for every alleged misstatement or omission made by every defendant throughout the Class Period, including those made after he left the Company.

Finally, Mr. Levin is entitled to summary judgment on Plaintiffs' control person claim under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a). (*Infra* § V.) A Section 20(a) claim requires: "(a) a primary violation [of Section 10(b)] by a controlled person, (b) actual control by the defendant, and (c) the controlling person's culpable participation in the primary violation." *Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 498 (S.D.N.Y. 2011), *aff'd sub nom. Alki Partners, L.P. v. Windhorst*, 472 F. App'x 7 (2d Cir. 2012). Here, Plaintiffs cannot raise a genuine issue of fact that a person or entity controlled by Mr. Levin committed a primary violation of Section 10(b) or that Mr. Levin was a culpable participant in any alleged fraudulent conduct.

For all of these reasons, as well as those set forth below and in the other defendants' briefs, Mr. Levin's motion for summary judgment should be granted in its entirety.

STATEMENT OF FACTS[2]

Mr. Levin incorporates by reference the Statement of Facts in the Pfizer Brief and emphasizes the following additional undisputed facts.

A. Mr. Levin and His Role at Pfizer

Mr. Levin is a certified public accountant with a Bachelor's Degree from Princeton

[2] The facts set forth herein are drawn from the record in this action, including pleadings, documentary evidence, expert reports, deposition testimony and declarations. The documents referenced herein are attached as exhibits to the Declaration of Alexander C. Drylewski, dated October 30, 2014 ("Drylewski Decl.") and the Declaration of Joseph Petrosinelli, dated October 30, 2014, submitted in support of Pfizer's Motion for Summary Judgment ("Petrosinelli Decl.").

University and a Master's Degree from New York University's Stern School of Business. (56.1 ¶ 2.) He is not an attorney. (*Id.* ¶ 3.)

Mr. Levin began working at Pfizer in April 1987. (*Id.* ¶ 4.) He held a number of positions at the Company including Treasurer, Vice President of Finance and Senior Vice President of Finance for Pfizer's research and development division. (*Id.* ¶ 5.) In March 2005, Mr. Levin assumed the role of CFO. (*Id.* ¶ 6.) Mr. Levin served as Pfizer's CFO until September 10, 2007, when he resigned from the position. (*Id.* ¶ 7.) Mr. Levin remained employed by the Company in a non-executive position until November 2, 2007. (*Id.* ¶ 8.)

B. The First Amended Complaint

Lead plaintiff Stichting Philips Pensioenfonds and plaintiff Mary K. Jones (together, "Plaintiffs") purport to represent a class of purchasers of Pfizer common stock between January 19, 2006 and January 23, 2009. (FAC ¶¶ 1, 21-22.) Plaintiffs' First Amended Complaint[3] names as defendants Pfizer and certain current and former officers of Pfizer, including Mr. Levin. (FAC ¶¶ 23-35.) The First Amended Complaint generally alleges that defendants "deliberately concealed" from investors information regarding "the materially adverse risks to Pfizer from its illegal off-label marketing" (*id.* ¶ 13), and asserts causes of action for violations of (i) Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, and (ii) Section 20(a) of the Exchange Act (*id.* ¶¶ 149-59).[4] While the First Amended Complaint alleges at least 34 days on

[3] ECF No. 71.

[4] The First Amended Complaint generally alleges four broad categories of alleged "misstatements": (1) "statements that Pfizer lawfully promoted its drugs," including statements regarding "Pfizer's business conduct," its "internal controls" and its "legal proceedings and contingencies" (FAC ¶¶ 58-77); (2) statements regarding Pfizer's financial results (*id.* ¶¶ 78-79); (3) statements regarding "Pfizer's dividend payments" (*id.* ¶¶ 81-83); and (4) "statements regarding revenue growth and Pfizer's drugs' efficacy" (*id.* ¶¶ 84-98). As set forth below, the significant number of these statements were communicated after Mr. Levin's tenure as Pfizer CFO had ended or by other individuals. (*Infra* § I; App'x 1.) In all events, it is unclear precisely which alleged "misstatements" are actually being pursued by Plaintiffs. For example, during discovery, Plaintiffs appeared to focus solely on statements relating to Pfizer's legal proceedings disclosures, reserves and internal controls. Indeed, during his two depositions, Mr. Levin was not asked a single question about any other categories of alleged "misstatements."

which defendants purportedly made misrepresentation or omissions, only 19 of those days occurred during Mr. Levin's tenure as CFO of Pfizer. (56.1 ¶¶ 92-93.)

C. The Bextra Investigation

In February 2004, the United States Department of Justice informed Pfizer that it had begun investigating the Company's sales and marketing practices concerning the prescription medication Bextra. (56.1 ¶ 9.) Thereafter, in December 2004, the government issued a subpoena for Bextra-related documents. (56.1 ¶ 11.) In August and September 2006, after two years of investigation, the government met with Pfizer's lawyers and presented for the first time its view of the documents it had received concerning the promotion of Bextra. (56.1 ¶ 12.) At the conclusion of the meetings, the government made clear that its investigation was still continuing and invited Pfizer to respond to its views of the evidence. (56.1 ¶ 13.)[5]

The undisputed record makes clear, however, that at no time during Mr. Levin's tenure as CFO did the government make a settlement demand on Pfizer, nor did the parties engage in any settlement discussions. (56.1 ¶¶ 15-16; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 103:2-13, 112:15-19.) To the contrary, it was not until a meeting occurring on September 14, 2007 – *i.e.*, after Mr. Levin had exited the role of CFO – that the government suggested for the first time that Pfizer make a financial proposal for a resolution of the matter. (56.1 ¶ 20.) At that meeting, the government also suggested for the first time that it could pursue a damages theory via criminal charges under which it could recover the "intended loss" (as opposed to any actual loss) caused by the alleged conduct. (*Id.* ¶ 21; Pfizer Br. 15.)

And it was not until April 4, 2008 that the government made its first settlement demand – seven months after Mr. Levin exited his position as CFO and five months after Mr. Levin left

[5] Additional meetings between Pfizer representatives and the government took place on January 30, 2007, January 31, 2007 and March 23, 2007. (56.1 ¶ 14.)

Pfizer's employ altogether. (56.1 ¶ 23; Petrosinelli Decl. Ex. Y-6.) That proposal required, among other things, Pfizer to pay nearly $5 billion in fines and penalties. (56.1 ¶ 24.) Several years of meetings and negotiations between Pfizer and the government ensued – all of which occurred after Mr. Levin left the Company – and on January 25, 2009, Pfizer's Board of Directors approved a settlement with the government. (*Id.* ¶ 25.) Pursuant to that settlement, a non-operating subsidiary of Pfizer would plead guilty to one count of felony misbranding of Bextra (the government agreed not to prosecute Pfizer) and Pfizer would pay $2.3 billion in fines, penalties and civil settlements – less than half of the government's initial settlement demand in April 2008. (*Id.* ¶¶ 26-28.) The settlement was publicly disclosed on January 26, 2009. (FAC ¶ 95.)

D. The Geodon, Lyrica and Zyvox Investigations

The $2.3 billion settlement encompassed not only the Bextra investigation, but also the government's investigations into Pfizer's promotion and marketing of three other prescription medications – Geodon, Lyrica and Zyvox. (56.1 ¶ 30.) The government had issued document subpoenas concerning Lyrica in July 2007 (two months before Mr. Levin exited the role of CFO) and Geodon and Zyvox in December 2007 (after Mr. Levin's departure from Pfizer). (*Id.* ¶¶ 31-32.)

E. Pfizer's Legal Proceedings Disclosures During Mr. Levin's Tenure as CFO

In Pfizer's 2005 Form 10-K, filed on March 1, 2006, the Company disclosed that it had "received requests for information and documents concerning the marketing and safety of Bextra . . . from the Department of Justice and a group of state attorneys general." (56.1 ¶ 33; Petrosinelli Decl. Ex. B-1, 2005 Financial Report at 67.) Pfizer further disclosed: "We and certain of our subsidiaries are involved in various . . . government investigations" and "[a]lthough we believe we have substantial defenses in these matters, we could in the future

incur judgments or enter into settlements of claims that could have a material adverse effect on our results of operations in any particular period." (56.1 ¶ 34.)

Thereafter, in Pfizer's 2006 10-K, filed on March 1, 2007, the Company disclosed: "Since 2003, we have received requests for information and documents concerning the marketing and safety of Bextra . . . from the Department of Justice and a group of state attorneys general. We have been considering various ways to resolve these matters." (56.1 ¶ 37; Petrosinelli Decl. Ex. D-1, 2006 Financial Report at 73.) In addition, Pfizer further disclosed that "[i]t is possible that criminal charges and fines and/or civil penalties could result from pending government investigations." (*Id.*) Finally, Pfizer once again disclosed: "We and certain of our subsidiaries are involved in various . . . government investigations" and "[a]lthough we believe we have substantial defenses in these matters, we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results of operations in any particular period." (*Id.* at 17.)[6]

F. Mr. Levin's Role as CFO

During the Class Period, in his role as CFO, Mr. Levin would "undertake specific procedures on a monthly and quarterly basis relative to review of [Pfizer's] financial results and disclosures," including:

- "[a]ttend[ing] Monthly Executive Litigation review meetings to discuss changes in the legal environment, particularly as they relate to financial contingencies and disclosures, as well as potential reserves";

[6] Materially identical disclosures were made in Pfizer's (1) 10-Q for the Quarter Ended April 2, 2006, filed on May 8, 2006 (Petrosinelli Decl. Ex. C-1 at 58); (2) 10-Q for the Quarter Ended July 2, 2006, filed on August 11, 2006 (Drylewski Decl. Ex. C-L at 65-66); (3) 10-Q for the Quarter Ended October 1, 2006, filed on November 3, 2006 (Drylewski Decl. Ex. D-L at 70); (4) 10-Q for the Quarter Ended April 1, 2007, filed on May 4, 2007 (Petrosinelli Decl. Ex. E-1 at 50); and (5) 10-Q for the Quarter Ended July 1, 2007, filed on August 6, 2007 (Drylewski Decl. Ex. E-L at 59-60).

- "[m]eet[ing] quarterly with KPMG to discuss the results of their limited reviews of [Pfizer's] quarterly financial results including a discussion of any matters they wish to highlight that carry enterprise or financial risk";
- "[p]articipat[ing] in Disclosure Committee meetings which review near-final drafts of quarterly earnings press releases as well as 10Q/10K filings";
- "review[ing] successive drafts of both earnings press releases and SEC draft filings on a quarterly basis"; and
- "[d]iscuss[ing] . . . sub-certifications received from Pfizer executives and key finance personnel in support of CEO/CFO certification process."

(56.1 ¶ 40; Drylewski Decl. Ex. F-L.)

For every 10-Q and 10-K that Pfizer filed with the SEC during Mr. Levin's tenure as CFO of Pfizer, he signed a certification pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act, Pub.L. 107–204, 116 Stat. 745 (2002), indicated his "belief that the filing presents fairly [the Company's] financial position and results in compliance with securities laws." (56.1 ¶ 42; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 34:2-25.) Mr. Levin testified at his deposition that there were "fulsome procedures" in place during his tenure as CFO "that [he followed] in order to allow [him] to make that certification." (56.1 ¶ 43; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 36:12-15.)

For example, during his tenure as CFO of Pfizer, Mr. Levin was a member of the Company's Disclosure Committee, which "was a group primarily of finance and legal professionals who got together in advance of filing a 10-Q or a 10-K in order to discuss the various disclosures that were included in that quarter's financial filing and to determine whether any adjustments needed to be made in those disclosures." (56.1 ¶ 44; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 57:14-58:7.) The Disclosure Committee "assist[ed] the senior officers in fulfilling their responsibility for oversight of the disclosures made by the company" and was "a part of a framework for allowing executive officers to get to a Sarbanes-Oxley certification." (56.1 ¶ 45;

Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 67:6-11; 69:18-21.) The Disclosure Committee would have "fulsome discussions" regarding the legal proceedings disclosures in the Company's 10-Q and 10-K filings. (56.1 ¶ 46; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 59:2-10, 66:23-67:2.)

Additionally, prior to signing a particular certification during his tenure as CFO of Pfizer, Mr. Levin would attend a certification meeting where a report of the "activities of the disclosure committee was read out," including a "summary of activities from the last disclosure committee associated with that filing." (56.1 ¶ 47.) In advance of the certification meeting, Mr. Levin would meet with "key individuals who were directly involved in the preparation" of the filings. (56.1 ¶ 48.) Many of those key individuals, including the Company's outside disclosure counsel, provided Mr. Levin with sub-certifications attesting to the accuracy of the disclosures at issue, which Mr. Levin relied upon in executing his own certification. (*Id.* ¶ 49.) At no point during Mr. Levin's tenure as CFO "did anyone in any disclosure committee meeting or certification meeting ever suggest that they believed that the [Company's] disclosures concerning the legal proceedings were not in compliance with the law." (*Id.* ¶ 50; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 300:5-10.)

G. Mr. Levin's Reliance on the Advice of Internal and External Disclosure Counsel in Connection with the Company's Disclosures

The undisputed record evidence makes clear that during Mr. Levin's tenure as CFO, he relied on the advice of the Company's lawyers to ensure that the public disclosures Plaintiffs now challenge were accurate and fully compliant with the federal securities laws. (56.1 ¶ 55; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 99:12-20 ("I was dependent on both internal and external counsel, external counsel being Cadwalader, on our securities disclosures"), 120:1-6, 159:7-160:1, 299:17-23; *see also* Petrosinelli Decl. Ex. G-2 (Levin 9/23 Tr.) at 30:19-24, 40:14-18 ("I'm not an attorney. I'm not trained legally in these matters. And so I'm highly reliant on the

professional advice I have from legal professionals in the execution of my responsibility."), 113:20-114:10.) These attorneys had significant involvement in the process of drafting, reviewing and approving Pfizer's securities disclosures, including the legal proceedings sections of those disclosures (56.1 ¶ 56; Pfizer Br. 5-9), and included:

- Dennis Block: Outside disclosure counsel; partner at Cadwalader, Wickersham & Taft LLP; recognized expert in the area of securities law with approximately 45 years of legal experience (Petrosinelli Decl. Ex. O-1 (Block Tr.) at 12:11-13,19:23-25, 20:18-21:2, 41:6-46:7); and

- Lawrence Fox: Pfizer internal disclosure counsel with more than 40 years of legal experience, including 35 years advising companies on disclosure requirements (Petrosinelli Decl. Ex. Y-1 (Fox Tr.) at 30:25-35:2, 231:3-21).

The robust process engaged in by these and other professionals – and relied upon by Mr. Levin during the Class Period – included the following steps:

Step 1	Mr. Fox would prepare a first draft of the legal proceedings disclosures based on information he had been provided by in-house litigators, civil litigation attorneys and government investigation attorneys during regularly-scheduled and interim calls/meetings. As Mr. Fox testified: "[W]e schedule every quarter a conference call among our [government investigation] attorneys, the head of the group and very often others in his group, our outside disclosure counsel, Dennis Block at the time, and me. That happened every quarter. And in addition, not infrequently, there were similar conference calls that were not scheduled, but took place as appropriate as developments occurred in connection with any particular matter. And beyond that, there might well be one-on-one calls and sending Dennis or me or both of us various documents." (Petrosinelli Decl. Ex. Y-1 (Fox Tr.) at 161:24-163:2; *see also* Petrosinelli Decl. Ex. O-1 (Block Tr.) at 41:15-45:13.) Moreover, during the course of the Bextra investigation, Mr. Lankler [then head of Pfizer's Government Investigations] had conversation with Messrs. Fox and Block "[s]o that we could make sure that they were aware of the government investigations that were pending, what developments had occurred, and they could assess whatever disclosures they thought might need to be made . . . in our securities filings." (Petrosinelli Decl. Ex. E-2 (Lankler Tr.) at 258:17-259:13.)[7]
Step 2	A draft of the legal proceedings disclosure is sent to a group of 15-20 lawyers, including Pfizer's government investigation lawyers. (Petrosinelli Decl. Ex. Y-1

[7] (*See also* Petrosinelli Decl. Ex. Y-1 (Fox Tr.) at 46:9-15 (testifying that Pfizer's statement that it believed it had "substantial defenses" to the government investigations was "the result of regular updates provided to [Fox]" by Pfizer's litigators and government investigation attorneys).)

	(Fox Tr.) at 164:17-165:5.)
Step 3	The group of 15-20 lawyers provide comments and a second draft is created. (*Id.* at 165:22-166:4.)
Step 4	The new draft is sent to Pfizer's head of litigation and outside disclosure counsel, Mr. Block. (*Id.* at 166:5-17.)
Step 5	Comments from the head of litigation and Mr. Block are incorporated into a new third draft. (*Id.* at 166:18-25, 173:13-23.)
Step 6	The third draft is sent to Pfizer's General Counsel, copying everyone who has thus far provided comments. (*Id.* at 173:24-174:4.)
Step 7	The General Counsel provides comments and a fourth draft is created. The fourth draft is provided to the controller's group, who would include it in the draft 10-Q or 10-K. (*Id.* at 174:5-15.)
Step 8	The controller's group would then circulate the entire filing, including the legal proceedings disclosure, to a long list of people, including the various lawyers who had previously reviewed the legal proceedings disclosure and KPMG, the Company's outside auditor. (*Id.* at 174:16-175:2.)
Step 9	A meeting of the disclosure committee (of which Mr. Levin was a member) for the purpose of reviewing the particular public filing would then take place. (*Id.* at 177:23-178:5; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 57:14-17; Drylewski Decl. Ex. F-L.)
Step 10	In addition, a Certification Meeting would be held, which would include Pfizer's CEO, CFO (*i.e.*, Mr. Levin), Controller, General Counsel, KPMG, in-house and outside disclosure counsel and others. The purpose of the Certification Meeting is to review again both the substance and process in connection with the public filing in an effort to ensure that the CEO and CFO are comfortable in signing the requisite certifications. (Petrosinelli Decl. Ex. Y-1 (Fox Tr.) at 178:15-179:19; *see also* Petrosinelli Decl. Ex. O-1 (Block Tr.) at 45:5-12 ("So you would have a full discussion to the CEO and CFO who had to certify either the 10-K or the 10-Qs regarding every issue that was discussed during the process that I just described. And everybody then would either sign off or say, no, I think we should make additional disclosure here or maybe this isn't something that needs to be disclosed.").)
Step 11	As a final step, Mr. Fox would send the entire legal proceedings disclosure to a group of 35 or 40 people, most of whom are in the legal department, giving them a final chance to provide any comments. (Petrosinelli Decl. Ex. Y-1 (Fox Tr.) at 179:22-180:14.)

Step 12	Mr. Block would provide Pfizer's General Counsel with a certification that the filing met the requirements of the securities laws. (*Id.* at 169:16-23.)

At no point during Mr. Levin's tenure at CFO did any of the Company's in-house or outside attorneys upon whom he relied (or anyone else) advise him that the Company's public disclosures were inaccurate or not compliant with the federal securities laws.

H. Pfizer's Litigation Reserves and Internal Controls

During his tenure as CFO, Mr. Levin also relied in good faith upon the advice of Pfizer's external and internal accountants in connection with litigation reserves under FAS 5. (56.1 ¶ 66; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 179:23-180:17, 300:16-302:2.)[8] The Company's Controller, Loretta Cangialosi, "had principal responsibility for ensuring that the company's reserves were in compliance with GAAP" and utilized "FAS 5" to do so. (56.1 ¶¶ 67-68.) Mr. Levin would participate in "monthly executive litigation review meetings to discuss changes in the legal environment, particularly as they relate to financial contingencies and . . . potential reserves." (*Id.* ¶ 69.) Those executive litigation review meetings were also attended by Ms. Cangialosi, "several members of her staff, and members of the legal division who were handling various litigation matters," as well as KPMG. (*Id.* ¶ 70.) The purpose of the monthly litigation update meetings was "to get a status and an update on where these various matters were so that we could better understand whether or not something had happened that we would need to take a reserve, or whether or not something had happened that we need to consider revising disclosures." (*Id.* ¶ 71.)

Additionally, during Mr. Levin's tenure as CFO, Pfizer's reserving decisions were independently reviewed by KPMG, which determined each quarter that those decisions were

[8] FAS 5 – which was in place at the time of Mr. Levin's tenure as CFO – provided that the accrual of a loss contingency reserve is required only where the amount of any possible loss is "probable" and "[t]he amount of the loss can be reasonably estimated." Statement of Financial Accounting Standards No. 5 ¶ 8.

both reasonable and compliant with FAS 5 and GAAP. (56.1 ¶¶ 77-79; Petrosinelli Decl. Ex. S-1 (Cangialosi Tr.) at 380:19-382:15 (KPMG reviewed government's investigation "every single reporting period from January 2006 through the end of 2008").)[9] Mr. Levin's unrebutted testimony makes clear that KPMG "scrutinized [Pfizer's] disclosures with regard to legal proceedings and contingencies" and "[t]hey had a responsibility as [Pfizer's] auditors to satisfy themselves with respect to conclusions that management was coming to on reserve disclosures." (56.1 ¶ 80; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 170:5-12.)[10] At no point during Mr. Levin's tenure as CFO did anyone from KPMG (or anyone else) indicate to Mr. Levin that the Company's reserving decisions or disclosures were in any way incorrect or inappropriate. (56.1 ¶ 83; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 302:3-15.)

To the contrary, in connection with its 2006 audit, KPMG concluded that "Pfizer has not recognized a contingent liability related to the government's investigation of Bextra promotion as the facts and circumstances surrounding this matter have not yet developed to the point whereby an estimated range of loss can be determined under [FAS 5]. Disclosure in the 10-K is appropriate." (56.1 ¶ 81.) The same was true of KPMG's 2007 audit (the results of which were announced in February 2008, after Mr. Levin had left the Company).[11]

---

[9] (*See also* Petrosinelli Decl. Ex. T-1 (Chapman Tr.) at 82:6-10 ("Q: Did KPMG believe that the company's position was appropriate with respect to accruing a reserve for the government investigation? A: As of the end of this fiscal year, absolutely."), 118:24-119:8 ("Q: With regard to the Bextra investigation, was the estimable pillar established as of the sign-off date of this document, which appears to be November 3, 2007? A: No.").)

[10] (*See also* Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 301:20-302:2 ("Q. [D]id you personally take comfort in the fact that KPMG was performing audits of these areas? A. Yes, I did. It was an independent set of eyes that had a fiduciary responsibility to evaluate the same kinds of things that we were evaluating within the management group.").)

[11] KPMG concluded that "Pfizer has not recognized a contingent liability related to the government's investigation of Bextra promotion because amounts of potential exposure are not estimable in accordance with SFAS No. 5. The facts and circumstances surrounding this matter have not yet developed to the point whereby an estimated range of loss can be determined under SFAS No. 5. This was further emphasized by the Bextra white paper [from Covington & Burling], which Pfizer submitted to the Department of Justice detailing its defenses to various allegations." (56.1

Moreover, Mr. Levin testified that during the Class Period, KPMG conducted audits of the Company's internal controls and affirmatively concluded that the Company's disclosure decisions regarding its internal controls were correct. (Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 300:16-302:2 ("Q. During the period when you were the chief financial officer of the company, did KPMG conduct audits of the company's internal controls over financial reporting? A. Yes, they did. They were required to come to an independent conclusion with respect to management's evaluation of the integrity of internal controls.").) Specifically, while Pfizer had identified an issue during the third quarter of 2006 with respect to monitoring controls over U.S. healthcare compliance,[12] Pfizer and KPMG agreed that the issue should be characterized, at most, as a "significant deficiency" (which does not require public disclosure under Public Company Accounting Oversight Board ("PCAOB") Auditing Standard No. 5) rather than a "material weakness" (which does require such disclosure). (56.1 ¶¶ 86-88 Petrosinelli Decl. Ex. P-2 (Riso Tr.) at 139:12-140:25; Petrosinelli Decl. Ex. T-1 (Chapman Tr.) at 98:22-100:8.) Mr. Levin testified:

> [N]o one ever thought that we were anywhere close to a material weakness in terms of our financial reporting. As I said, I think that we felt internally within the company there was some debate as to whether we would characterize these as deficiencies or whether they rose to the level of a significant deficiency.
>
> We had a view from KPMG that they viewed it as a significant deficiency. And, again, there is a robust dialog between us and KPMG. There is an area where they have a lot more experience than I do in interpreting PCAOB pronouncements and how those had to work.

(56.1 ¶ 89; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 253:13-256:3 ("Ultimately we decided it was a significant deficiency, in good measure because KPMG had gone through their evaluation

---

¶ 82; Petrosinelli Decl. Ex. U-4 ("[W]e believe that Management's conclusion that no accrual pursuant to FAS 5 as of December 31, 2007 [for the Bextra investigation] is appropriate.").)

[12] As Mr. Levin testified, in 2006, Pfizer "began to focus on better ensuring that the monitoring controls in place on health care interactions were robust." (Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 212:19-22.)

independent of ours and had concluded that it was a significant deficiency.").)[13] Indeed, the "significant deficiency" identified by the Company was remedied by July 2007, during Mr. Levin's tenure as CFO. (Petrosinelli Decl. Ex. T-1 (Chapman Tr.) at 100:9-17.)

I. Mr. Levin Received Regular Litigation Updates on the Bextra Investigation

To ensure that Mr. Levin was kept reasonably informed as to the status of any potentially material legal matters or government investigations, he personally received internal Litigation Monthly Financial Controls Reports ("Litigation Reports") during his tenure as CFO. (56.1 ¶ 51; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 82:21-83:12.) These Litigation Reports provided updates on the status of the government investigations at issue in this case. (56.1 ¶ 52; Drylewski Decl. Ex. H-L.) Significantly, during Mr. Levin's tenure as CFO, none of the Litigation Reports he received contained any information that would have led Mr. Levin to believe that the Company's disclosures or reserving decisions were false or misleading or that the advice he was receiving from counsel during that time was incorrect. (56.1 ¶ 53.) To the contrary, the Litigation Reports reflected that the government's Bextra investigation was still in the very early stages during his tenure and that the Company believed it had strong defenses to any potential charges. (*Id.* ¶ 53.) For example, the Litigation Report dated September 2007 – *i.e.*, the final month of Mr. Levin's tenure as CFO – stated:

> We have had numerous meetings with federal prosecutors on the Bextra matter. During these meetings the government presented its version of the factual issues surrounding the alleged off-label promotion of Bextra and the Company's interactions with physicians . . . . Likewise, we have pushed back forcefully on the government[']s theories. We have also had a physician present to them on our position that there are no safety issues relating to the use of Bextra for acute pain.

(*Id.* ¶ 54 (emphasis added).)

[13] *See also id.* at 263:11-18 ("John Chapman [KPMG Partner] was also present at the [certification] meeting, and he indicated that KPMG expected to issue an unqualified review report. If KPMG had any concerns that we were inappropriately characterizing the deficiency, he would have brought that to our attention as part of his report during that certification meeting.").)

ARGUMENT[14]

MR. LEVIN IS ENTITLED TO SUMMARY JUDGMENT

I. MR. LEVIN CANNOT BE HELD LIABLE FOR ANY ALLEGED MISSTATEMENTS OR OMISSIONS HE DID NOT MAKE

In order to recover on a securities fraud claim under Section 10(b), a plaintiff must demonstrate that the defendant "'made an untrue statement of a material fact' or 'omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading.'" *Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120, 128 (2d Cir. 2011) (citation omitted). As the Supreme Court has made clear, a defendant can be held liable only for those statements personally made or over which he or she exercised "ultimate authority . . . including its content and whether and how to communicate it." *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011); *City of Roseville Emps.' Ret. Sys. v. Energy Solutions Inc.*, 814 F. Supp. 2d 395, 416 (S.D.N.Y. 2011); *SEC v. Kelly*, 817 F. Supp. 2d 340, 342 (S.D.N.Y. 2011).

Here, it is undisputed that Mr. Levin resigned as CFO on September 10, 2007 – nearly a year and a half before the end of the Class Period. (56.1 ¶ 7; FAC ¶ 1 n.1.)[15] Thus, while Plaintiffs allege at least 34 different misrepresentation days in the First Amended Complaint, Mr. Levin served as CFO on only 19 of those days. (56.1 ¶¶ 92-93.) Accordingly, as a matter of logic and well-settled law, Mr. Levin cannot be held liable for any of the alleged misstatements or omissions made by other defendants following his departure as CFO. *See In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 643 (S.D.N.Y. 2007) (Lynch, J.) (former CFO not liable under

[14] The standard for granting summary judgment under Federal Rule of Civil Procedure 56 is well settled. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Dalberth v. Xerox Corp.*, 766 F.3d 172, 182 (2d Cir. 2014); *Bell v. Metro. Transp. Auth.*, No. 12 Civ. 1235 (AKH), 2013 WL 8112461, at *1 (S.D.N.Y. Nov. 1, 2013) (Hellerstein, J.).

[15] Plaintiffs do not allege that Mr. Levin signed any of Pfizer's SEC filings following his September 2007 departure as CFO. (*See* FAC ¶ 30.)

Section 10(b) for alleged misstatements filed after he left the company because "'a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).'") (quoting *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998)).

Additionally, many of the alleged misstatements that occurred during Mr. Levin's tenure were oral statements communicated by individuals other than him.[16] Accordingly, Mr. Levin cannot be held liable for those oral statements as a matter of well-settled law. *See Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547, 572 n.13 (S.D.N.Y. 2012) (referencing "the well-established rule that the group-pleading doctrine does not apply to oral statements") (citing cases); *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 190-92 (S.D.N.Y. 2003) (declining to attribute to company's CFO oral statements made by CEO). A list of statements that post-date Mr. Levin's tenure as CFO or were communicated by other individuals – and thus as to which summary judgment is required – is attached hereto as Appendix 1.[17]

II. MR. LEVIN DID NOT ACT WITH SCIENTER

A. Standard

"To establish liability under [Section] 10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007)

[16] While Plaintiffs attach as Exhibit B to their First Amended Complaint a list of 42 allegedly misleading statements regarding Geodon, Lyrica and Zyvox, only 25 of those statements were made during Mr. Levin's tenure as CFO of Pfizer. (56.1 ¶¶ 94-95; FAC Ex. B.) Of those 25 statements, 18 were communicated orally by individuals other than Mr. Levin and thus cannot be attributed to him. (56.1 ¶ 96.) The remaining 7 statements were published by Pfizer. (FAC Ex. B.)

[17] Mr. Levin respectfully preserves the argument that he was not the "maker" of any of the Company's public disclosures during his tenure as CFO of Pfizer and thus cannot be held liable for them under *Janus*. *Cf. In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012) ("a theory of liability premised on treating corporate insiders as a group cannot survive a plain reading of the *Janus* decision"), *aff'd sub nom. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014).

(citation omitted); *see also Dalberth v. Xerox Corp.*, 766 F.3d 172, 182-83 (2d Cir. 2014); *Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 68 (2d Cir. 2005). To satisfy this requirement, a plaintiff must demonstrate "'conscious recklessness – *i.e.*, a state of mind approximating actual intent, and not merely a heightened form of negligence.'" *South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (citation omitted). Conduct satisfies such a heightened degree of recklessness only if it is "'at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (2d Cir. 1996) (alteration in original) (citation omitted).[18]

Additionally, as courts in this and other Circuits have recognized, a defendant's good faith reliance on the advice of attorneys and accountants precludes a finding of scienter. *See Steed Finance*, 148 F. App'x at 69 (affirming summary judgment based on lack of scienter where defendant "relied on the expertise of counsel" from Cadwalader); *Steed Fin. LDC v. Nomura Sec. Int'l Inc.*, No. 00 Civ. 8058(NRB), 2004 WL 2072536, at *9 (S.D.N.Y. Sept. 14, 2004) (granting summary judgment where defendants received advice from counsel that their actions were legal and, thus, "cannot be said to have acted with an intent 'to deceive, manipulate, or defraud . . . such that a finding of scienter would be appropriate"), *aff'd*, 148 F. App'x 66 (2d Cir. 2005); *see also SEC v. Shanahan*, 646 F.3d 536, 544 (8th Cir. 2011) (granting defendant's motion for judgment as a matter of law where defendant relied on advice of company's inside and outside counsel and independent auditors); *In re Fannie Mae Sec. Litig.*, 892 F. Supp. 2d 59, 72 (D.D.C.

[18] As the Supreme Court has recognized, resolving a defendant's "state of mind" may be appropriate on a motion for summary judgment and a plaintiff may "not defeat the properly supported summary judgment motion of a defendant . . . without offering 'any significant probative evidence tending to support the complaint.'" *Anderson*, 477 U.S. at 256.

2012) (granting summary judgment and dismissing Section 10(b) claims where CEO "relie[d] in good faith on the professional judgment of the company's internal and external accounting and auditing personnel"); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1251-57 (S.D. Cal. 2010) (granting summary judgment and dismissing Section 10(b) claims where CEO and CFO relied on advice of company's outside auditor).

B. Mr. Levin Did Not Act With An Intent to Defraud Regarding the Company's Disclosures

The undisputed facts demonstrate that Mr. Levin acted reasonably and in good faith with respect to the challenged Pfizer disclosures during his tenure as CFO. As set forth above, Mr. Levin was involved in an extensive process for preparing, reviewing and finalizing the Company public filings. (*See Supra* 8-13.) In addition, Mr. Levin was provided with sub-certifications from various key individuals, including Pfizer's outside disclosure counsel, that the Company's disclosures were accurate and compliant with the federal securities laws. (*Supra* 10.) He testified that these rigorous procedures allowed him to make his own certifications, and importantly, at no point did anyone ever inform him that they believed the Company's disclosures were in any way improper. (*Id.*; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 36:12-15, 300:5-10; Petrosinelli Decl. Ex. B-4; *see also* Petrosinelli Decl. Ex. G-2 (Levin 9/23 Tr.) at 38:12-22 ("I have no reason to believe that that process failed at any point during my tenure as CFO").) At bottom, Plaintiffs cannot point to any issues of material fact demonstrating that Mr. Levin acted with scienter in connection with the challenged disclosures. *See, e.g.*, *In re Fannie Mae*, 892 F. Supp. at 67 (granting summary judgment for defendant where evidence was "utterly inconsistent with the requisite scienter for securities fraud," where "no witness testified that anyone had advised [defendant] that [company's] financial statements were not GAAP compliant or that [defendant] knew that the statements were materially inaccurate" and where defendant

"identified substantial evidence indicating that he believed [company's] accounting was GAAP compliant").

The conclusion that Mr. Levin did not act with scienter is further supported by the preliminary nature of the government's Bextra investigation during his time as CFO. (56.1 ¶ 16; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 103:2-13 ("During my tenure as CFO, the investigation was in a much earlier phase and so settlement discussions would not have come up."); 112:15-19 ("There was a good piece of time during my tenure as CFO where all the government was doing was reviewing documents and had not gotten into a regular dialog with us.").) For example, the Litigation Reports that Mr. Levin regularly received during his tenure indicate that the government's investigation was still in its nascent stages and that the Company believed it had strong defenses to the government's theories of liability. (56.1 ¶¶ 51-54.) Indeed, the September 2007 Litigation Report provided that while the Company's government investigations attorneys "had numerous meetings with federal prosecutors on the Bextra matter," they had "pushed back forcefully on the government[']s theories." (*Supra* 16.)

Moreover, Mr. Levin's unrebutted testimony makes clear that at the time of his departure as CFO, the government and Pfizer had only discussed potential theories of liability; the government had not made any demand and Pfizer – which believed that it had substantial defenses to any liability – had not made any settlement offers. (*Supra* 6-7.) In fact, the government did not make its first settlement proposal until April 2008 – seven months after Mr. Levin had exited his position as CFO – and that proposal required Pfizer to pay nearly $5 billion, more than twice the amount to which the Company ultimately agreed. (*Id.*) As Mr. Levin testified:

> Q. While you were CFO at Pfizer, did anyone ever present to you a damage analysis related to the Bextra investigation?

A. No, they did not.

Q. Did anyone ever discuss with you whether or not it was possible to conduct a damage analysis on the Bextra investigation?

A. No, they did not. But I would also say that doing so would – that – the logical course of these investigations would be you wouldn't get to something like that until after you had had some discussion about the facts and some common understanding of the facts and after you had had some understanding of theories of liability.

(Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 152:17-153:6.) Accordingly, the unrebutted evidence makes clear that prior to Mr. Levin's departure as CFO in September 2007, the government investigations were still in their very early stages, buttressing the conclusion that Mr. Levin did not act with scienter.

C. Mr. Levin's Good Faith Reliance On The Advice Of Disclosure Counsel

If there were any remaining question as to whether Mr. Levin acted with scienter, it is definitively dispelled by the undisputed evidence that during his tenure as CFO, Mr. Levin relied in good faith on the advice of disclosure counsel in connection with Pfizer's disclosures, including Dennis Block and Lawrence Fox. (*Supra* 10-13; 56.1 ¶¶ 55-61.) As Mr. Levin testified:

> Dennis [Block] and Larry [Fox] are our disclosure counsel, internal and external. They would have in turn been having conversations with other lawyers in the organization with respect to the various matters that are subject to legal contingencies and are discussed here.
>
> And they would have formed a view with respect to the sufficiency of the disclosure and the quality of the disclosure around those different matters. And I in turn am very reliant on them when we talk about . . . we have substantial defenses in these matters.
>
> Again, I'm not a lawyer, so I am reliant on the professional views of people who have engaged with people in our legal organization who believe that we have those defenses.

(Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 159:7-160:1 (emphasis added); *see also id.* 99:12-20 ("I

was dependent on both internal and external counsel, external counsel being Cadwalader, on our securities disclosures"); Petrosinelli Decl. Ex. G-2 (Levin 9/23 Tr.) at 40:14-18 ("I'm not an attorney. I'm not trained legally in these matters. And so I'm highly reliant on the professional advice I have from legal professionals in the execution of my responsibility.").)

Plaintiffs cannot point to a single piece of evidence rebutting this testimony or indicating that anyone ever told Mr. Levin that the disclosures Plaintiffs challenge were inadequate. *See In re Fannie Mae*, 892 F. Supp. at 67 (no scienter where "no witness testified that anyone informed [defendant] that [company] had material weaknesses in its internal controls, and [defendant] received assurances . . . from internal and external auditing professionals[] to the contrary"). Given Mr. Levin's good faith reliance on the advice of counsel as rendered through the rigorous processes described above (*supra* 10-13), Plaintiffs cannot raise a genuine issue of material fact that he acted with scienter in connection with the challenged disclosures. *See Steed Finance*, 148 F. App'x at 69; *see also Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) (affirming district court's grant of summary judgment based on defendants' good faith reliance on the advice of counsel where the "record disclose[d] nothing beyond the 'incorrectness' of counsel's opinion to support an inference that the Trustees' reliance [on the advice of counsel] was not in good faith").[19]

Indeed, Mr. Levin also testified that during his tenure as CFO, Pfizer's lawyers handing the investigations repeatedly informed him that the Company had substantial defenses to the government's theories of wrongdoing. (56.1 ¶ 62; *see also* Petrosinelli Decl. Ex. F-2 (Levin Tr.)

---

[19] *See also SEC v. Steadman*, 967 F.2d 636, 642-43 (D.C. Cir. 1992) (holding that the record did not support a determination that defendant "acted with the requisite scienter" where defendant received a legal opinion that company's actions were legal and there was no evidence that defendant "actually knew the opinion was wrong or was reckless in relying on it"); *SEC v. Prince*, 942 F. Supp. 2d 108, 140 (D.D.C. 2013) (finding defendant relied in good faith on legal advice, which was sufficient to negate scienter, were there was no evidence in record that defendant did not believe the "advice was accurate or legal" (citation omitted)).

at 120:7-15 ("I was in a position to take the advice of our internal and external counsel with regard to how this investigation was unfolding. And what I was told was that we had substantial defenses with respect to the investigation itself and that those defenses remained intact even as the dialog with the government continued to unfold."); Petrosinelli Decl. Ex. G-2 (Levin 9/23 Tr.) at 40:4-10 ("As I've said previously in my testimony, that conclusion is a conclusion drawn by investigation counsel, inside and outside the company. They in turn have conversations with disclosure counsel, who in turn have conversations with me. And in reliance on that, I believe that we had substantial defenses.").) While Mr. Levin acknowledged that he was aware of "some documents that would lead one to conclude that there may have been off-label promotion for Bextra," he testified that he "was guided by [Pfizer's] attorneys" that the Company continued to have "strong defenses" to any government charges, including that:

> [T]here didn't seem to be any pattern of intentional direction of off-label promotion of Bextra by people in senior management positions in the company; that this seemed to be isolated incidents by a limited number of representatives; that the company had put in place very robust processes to monitor the promotional practices of its representatives; that those practices continued to evolve as new standards came into place; and that we had put practices in place under other corporate integrity agreements that gave us some reasonable assurance that there was not a systematic pattern of effort by the company.

(Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 120:18-121:7; *see also* Petrosinelli Decl. Ex. G-2 (Levin 9/23 Tr.) at 45:10-14 ("[W]hile there were isolated instances, there was no indication that there was a systemic practice at Pfizer or that senior executives of the company were directing any systemic activity in those – in that regard.").) There is no evidence that Mr. Levin did not rely on such advice in good faith.

Additionally, while Plaintiffs apparently attempt to fault Mr. Levin for the statement: "Although we believe we have substantial defenses in these matters, we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our

results of operations in any particular period," as set forth in the Pfizer Brief (Pfizer Br. 45), this is plainly a statement of opinion and therefore Plaintiffs must prove it to be "both objectively false and disbelieved by the defendant at the time it was expressed." *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110-12 (2d Cir. 2011) (holding that statement "based upon a belief or opinion" is only actionable to the extent it is "both objectively false and disbelieved by the defendant at the time it was expressed" and affirming dismissal of Securities Act claims because plaintiffs did not "plausibly allege that defendants did not believe [opinion statements] at the time they made them"); *see also Kaess v. Deutsche Bank AG*, 572 F. App'x 58, 59 (2d Cir. 2014), *rehearing denied*, No. 13-2364 (Oct. 16, 2014); *City of Omaha, Nebraska Civilian Emps.' Ret. Sys. v. CBS Corp.*, 679 F.3d 64, 67-68 (2d Cir. 2012). There is simply no evidence in the record – let alone evidence sufficient to avoid summary judgment – to indicate that Mr. Levin did not honestly believe that Pfizer had "substantial defenses" to the government investigation during his tenure as CFO. (*See* Petrosinelli Decl. F-2 (Levin Tr.) at 299:9-23.) Thus, for this additional reason, Mr. Levin is entitled to summary judgment in connection with Plaintiffs' claims regarding this challenged disclosure.

D. Mr. Levin Did Not Act With Intent to Defraud In Connection with Pfizer's Reserving Decisions And Internal Controls

The undisputed evidence also makes clear that Mr. Levin did not act with scienter regarding the Company's setting of litigation reserves. As numerous courts in this Circuit have held, reserves "reflect management's opinion or judgment" about future events and are "inherently subjective." *Fait*, 655 F.3d at 113; *Oklahoma Firefighters Pension & Ret. Sys. v. Student Loan Corp.*, 951 F. Supp. 2d 479, 497 (S.D.N.Y. 2013) (dismissing securities fraud claim because "plaintiffs allege no basis for concluding that [defendant's] loan loss reserves reflected anything other than management's opinion – based on a variety of subjective

determinations – as to the likelihood and magnitude of future losses"). Thus, in order to be actionable, statements regarding reserves must be both objectively and subjectively false. *See Fait*, 655 F.3d at 113; *see also Kaess*, 572 F. App'x at 59 (in order to be actionable, "statements of opinion" must be "'both objectively false and disbelieved by the defendant[s] at the time [these statements] w[ere] expressed'" (alteration in original) (citation omitted)).

Once again, there is simply no evidence anywhere in the record that Mr. Levin did not honestly believe the Company's statements regarding reserves at the time they were made. (*See* Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 299:3-8 ("Q. When you were CFO at the company and you signed your Sarbanes-Oxley certifications, did you personally believe that the company's financial statements were fairly stated in all material respects? A. Yes, I did.").) To the contrary, the record reflects that during his tenure as CFO, Mr. Levin followed the Company's robust procedures regarding reserving decisions, including attending "monthly executive litigation review meetings" and engaging in regular discussions with the Company's Controller's office, in-house and outside counsel and outside auditor KPMG. (*Supra* 13-14.)

The record is also undisputed that during Mr. Levin's tenure as CFO, KPMG reviewed each of the Company's challenged reserving decisions and concluded that they were appropriate and fully compliant with GAAP and FAS 5. (*Id.*) Indeed, Mr. Levin's unrebutted testimony makes clear that KPMG "had a responsibility as [Pfizer's] auditors to satisfy themselves with respect to conclusions that management was coming to on reserving and disclosures" and "there's always a fulsome discussion with KPMG on these matters." (*Id.*; Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 170:5-14.) And, as Pfizer's lead audit partner John Chapman testified, KPMG did in fact satisfy itself that the Company's reserving decisions were appropriate. (*See* Petrosinelli Decl. Ex. T-1 (Chapman Tr.) at 81:13-83:1.) There is nothing in the record to

suggest that anyone ever thought to the contrary. Accordingly, Mr. Levin is entitled to summary judgment in connection with Plaintiffs' claims regarding reserving decisions. *See In re REMEC Inc.*, 702 F. Supp. 2d at 1254 (granting summary judgment for CFO based on lack of scienter where, among other things, company's outside auditors concurred in and approved of company's goodwill impairment testing); *see also Stavroff v. Meyo*, No. 95-4118, 1997 WL 720475, at *6 (6th Cir. Nov. 12, 1997) (defendant's "reliance on the guidance of outside auditors is inconsistent with the intent to defraud." (citation omitted)).

Similarly, the unrebutted record evidence also demonstrates that Mr. Levin relied in good faith upon KPMG in connection with statements that any "material weaknesses" in the Company's internal controls had been disclosed.[20] Mr. Levin testified that during his time as CFO, KPMG conducted audits of the Company's internal controls and affirmatively concluded that the Company's determinations in this regard were correct. (*Supra* 15; 56.1 ¶¶ 87-89.) Plaintiffs do not challenge this undisputed fact or that KPMG's review was legally compliant. (*See* Petrosinelli Decl. Ex. O-2 (Regan Tr.) at 247:2-5 ("Q. You're not suggesting that KPMG in the course of its audit work failed to comply with PCAOB standards are you? A. No."); 246:18-20; 255:18-20.) Accordingly, summary judgment as to Mr. Levin is appropriate in connection with Plaintiffs' claims regarding internal controls. *In re Fannie Mae*, 892 F. Supp. at 67; *In re REMEC Inc.*, 702 F. Supp. 2d at 1254.[21]

---

[20] As Plaintiffs' expert recognizes, the Company had no duty under GAAP to disclose "significant deficiencies" in internal controls, only "material weaknesses," as those terms are defined by the PCAOB. (Petrosinelli Decl. Ex. O-2 (Regan Tr.) at 264:21-265:3; PCAOB Auditing Standard No. 2 ¶¶ 9-10.)

[21] While Plaintiffs pled in the First Amended Complaint that Mr. Levin "received $5 million" on account of his sale of some Pfizer stock during the Class Period (FAC ¶ 128), Plaintiffs did not pursue this issue during fact discovery or in Mr. Levin's deposition. This is with good reason, as the sales of Mr. Levin's Pfizer holdings over a year and a half before the alleged corrective disclosure are no evidence of scienter on his part. *See, e.g.*, *City of Brockton Ret. Sys. v. Shaw Grp., Inc.*, 540 F. Supp. 2d 464, 475 (S.D.N.Y. 2008) (10-week gap between stock sale and corrective disclosure undermined finding of scienter). Even more significantly, Mr. Levin continued to beneficially own a substantial amount of Pfizer stock following his departure and continues to do so to this day. (*See* 56.1 ¶¶ 97-99); *In*

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO LOSS CAUSATION OR DAMAGES ATTRIBUTABLE TO MR. LEVIN

A. Standard

Mr. Levin should be granted summary judgment in his favor for the separate and independent reason that Plaintiffs cannot present evidence demonstrating loss causation or damages attributable to him. Under Section 10(b), it is Plaintiffs' burden to prove loss causation. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008); 15 U.S.C. § 78u-4(b)(4). Thus, Plaintiffs must show not only that they suffered an economic loss in connection with the purchase of Pfizer stock, but also that their loss was proximately caused by Mr. Levin's alleged fraud. *See In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 509-10 (2d Cir. 2010). As the Supreme Court has held, in order to do so, Plaintiffs must disaggregate the effect of Mr. Levin's alleged fraud from "the tangle of [other] factors affecting price," which may include "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343 (2005); *see also Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005) (a plaintiff must demonstrate that it was the "defendant's fraud – rather than other salient factors – that proximately caused plaintiff's loss" (emphasis added)); *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Boston*, 853 F. Supp. 2d 181, 191 (D. Mass. 2012) (a loss causation or damages expert cannot simply "blame[] it all on the defendant[]"), *aff'd*, 752 F.3d 82 (1st Cir. 2014). Similarly, Plaintiffs must proffer expert testimony to quantify damages – an essential element under Section 10(b). *See, e.g.*, *In re Warner Commcn's Sec. Litig.*, 618 F.

---

re Travelzoo Inc. Sec. Litig., Nos. 11 Civ. 5531 GBD, 11 Civ. 6845 GBD, 2013 WL 1287342, at *10 (S.D.N.Y. Mar. 29, 2013) (stock sales did not give rise to inference of scienter where individual retained large amount of holdings through corrective disclosure).

Supp. 735, 744 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *see also Freeland v. Iridium World Commcn's, Ltd.*, 545 F. Supp. 2d 59, 81 (D.D.C. 2008); *Carpe v. Aquila, Inc.*, No. 02-0388-CV-W-FJG, 2005 WL 1138833, at *8 (W.D. Mo. Mar. 23, 2005).

Numerous courts have granted summary judgment in securities fraud actions where, as here, the plaintiff failed to offer sufficient expert evidence on the elements of loss causation or damages. *See, e.g.*, *In re Pfizer Inc. Sec. Litig.*, Nos. 4-CV-9866-LTS-HBP, 5-MD-1688-LTS, 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014) (granting summary judgment where plaintiff's expert report on loss causation and damages was excluded); *Gordon Partners v. Blumenthal*, No. 02 Civ. 7377(LAK)(AJP), 2007 WL 431864, at *14 (S.D.N.Y. Feb. 9, 2007) (Peck, M.J.) ("Because the Gordon Plaintiffs have not provided this Court with any evidence as to what their true damages are and therefore cannot show loss causation, defendants are entitled to summary judgment"), *aff'd*, 293 F. App'x 815 (2d Cir. 2008).[22]

B. Plaintiffs' Constant Inflation Theory of Damages is Unsound and Unworkable as Applied to Mr. Levin

Plaintiffs' theory of loss causation and damages, as expressed in the report of their expert, Steven P. Feinstein, hinges on the untenable notion that the purported artificial inflation in Pfizer's stock – and thus the damages available to class members – was perfectly constant throughout the entire Class Period and equal to "the amount of artificial inflation that dissipated due to the corrective disclosures" on January 26, 2009. (Petrosinelli Decl. Ex. C-4 ¶¶ 258-259;

[22] *See also Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 97 (1st Cir. 2014) (affirming summary judgment in federal securities fraud class action following exclusion of plaintiffs' loss causation expert); *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 725-26 (11th Cir. 2012) (affirming post-verdict judgment as a matter of law in federal securities fraud class action where expert's event study failed to establish loss causation or damages); *In re Williams Sec. Litig.*, 558 F.3d 1130, 1143 (10th Cir. 2009) (affirming summary judgment in federal securities fraud class action after affirming exclusion of expert's unreliable loss causation analysis under Daubert); *Phillips v. Scientific-Atlanta, Inc.*, 489 F. App'x 339, 340-41 (11th Cir. 2012) (affirming summary judgment "based solely on Plaintiffs' failure to present sufficient evidence of 'loss causation'" where expert failed to disaggregate alleged fraud from other industry-wide factors).

Petrosinelli Decl. Ex. W-1 (Feinstein Tr.) at 28:4-29:13.) As demonstrated in Defendants' motion *in limine* to exclude the testimony of Feinstein, Plaintiffs' "constant inflation" theory is both illogical and unreliable as a matter of law.[23] Plaintiffs' theory is even more egregious when applied to Mr. Levin's circumstances and warrants summary judgment in his favor.

First, nowhere does Feinstein disaggregate the inflation introduced into Pfizer's stock price on a misstatement-by-misstatement basis, despite the fact that Plaintiffs allege at least 34 separate misrepresentation days in the First Amended Complaint which purportedly had the effect of inflating the Company's stock. Rather, Feinstein analyzes the "corrective disclosure" day – *i.e.*, January 26, 2009 – on which he believes that all of the alleged inflation came out of the Company's stock due to the revelation of the defendants' fraud. (*See* Petrosinelli Decl. Ex. C-4 ¶ 258 ("No artificial inflation remained in the stock price as of 26 January 2009, the date of the final corrective disclosure."); Petrosinelli Decl. Ex. W-1 (Feinstein Tr.) at 26:18-24.). But Feinstein admits that he did no analysis of how this alleged inflation was incorporated into the Company's stock price in the first place and simply assumes that all of the inflation is attributable to all of the Defendants – including Mr. Levin. (*Id.* at 27:17-28:3 ("I didn't study when and how the inflation first got into the stock price. . . . [I]t would be just conjecture to speculate as to how and when it got in . . . .").

Plaintiffs' broad-brush "constant inflation" approach completely ignores the undisputed fact that Mr. Levin exited his position as CFO of the Company in early September 2007 and thus cannot be held liable for any of the alleged misstatements or omissions occurring from September 2007 to January 2009, nor can he be held liable for any oral statements made by others during his tenure. (*See supra* § I.) If, as Plaintiffs allege in the First Amended Complaint,

---

[23] Mr. Levin adopts and incorporates by reference Defendants' motion *in limine*, filed concurrently herewith.

the alleged misstatements for which Mr. Levin cannot be held liable were responsible for some of the inflation that allegedly came out of Pfizer's stock price in January 2009, then they must also be responsible for a portion of the inflation that came into the stock price on the dates they were allegedly made. Plaintiffs have done nothing to estimate what portion of the inflation coming out of Pfizer's stock is attributable to those statements that Mr. Levin did not make and for which he cannot be held responsible as a matter of law. As a result, Plaintiffs' damages analysis blindly treats Mr. Levin as if he had made all of the misstatements alleged in the Complaint. Without this disaggregation, there is "simply no way for a juror to determine whether [Mr. Levin's] alleged fraud caused any portion of Plaintiffs' loss." *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 501 (2d Cir. 2010); *see also* Ferrell & Saha, *Forward-Casting 10b-5 Damages: A Comparison to Other Methods*, 37 J. Corp. L. 365, 371-73 (2011) ("Not only is there little reason to suppose that inflation necessarily maintains a constant dollar value over the class period, in fact, there are strong affirmative reasons to believe that this is false in scenarios involving multiple misstatements.").[24]

Judge Swain's recent decisions in *In re Pfizer* are instructive. There, like here, the plaintiff brought claims against Pfizer based on allegations of securities fraud under Section 10(b) of the Exchange Act. *In re Pfizer Inc.*, 2014 WL 3291230, at *3. The court granted in part Pfizer's motion for summary judgment on the ground that Pfizer could not be held liable for some of the alleged misstatements made by non-party Pharmacia prior to its acquisition by Pfizer. *In re Pfizer Inc. Sec. Litig.*, No. 04 Civ. 9866 (LTS) (HBP), 2014 WL 2136053, at *1 (S.D.N.Y. May 21, 2014). In light of this ruling, the court excluded plaintiff's expert on loss causation and

[24] *See also In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 320-21 (S.D.N.Y. 2010) ("I am not convinced that Vellrath has sufficiently supported his methodology that a wrongdoing value can be backcast as a constant throughout the Class Period where the value of the actual loss varies," and this shortcoming "undermine[s] plaintiffs' claim that they can present a reliable methodology for purposes of calculating damages.").

damages, Daniel Fischel, on the ground that Fischel "did not make any adjustments or otherwise disaggregate his computations to identify any stock price inflation attributable to the dismissed claims that were based on statements by [Pharmacia], although he has asserted in his prior report and in deposition testimony that his stock inflation opinions are premised on the assumption that Defendants are responsible for all of the alleged misrepresentations and omissions alleged in the complaint." *Id.* Having excluded the plaintiff's expert report on damages, Judge Swain held that the plaintiff could not prove an essential element of its claim as a matter of law. Accordingly, the court granted summary judgment in favor of Pfizer. *In re Pfizer Inc.*, 2014 WL 3291230, at *3. Judge Swain's reasoning applies with equal force here, where Plaintiffs' damages theory fails to acknowledge that Mr. Levin cannot be held liable for a significant portion of the misrepresentations alleged in the First Amended Complaint.[25]

This conclusion is bolstered by the ever-changing status of the government investigations. For example, Plaintiffs allege that the Company (and Mr. Levin) failed to disclose the ultimate consequences of the Bextra investigation or accrue a contingent loss for the eventual $2.3 billion settlement that was not reached until nearly a year and a half after Mr. Levin left the Company. But the Bextra investigation was not a static event – rather, it continued to unfold and progress over the course of the Class Period as new information became available to the defendants. (Pfizer Br. 11-22.) Significantly, during Mr. Levin's tenure as CFO, the government had not made any demand on the Company and no settlement talks had yet taken place. (*Supra* 6-7.) Moreover, while Plaintiffs allege that the Company made misstatements regarding the government investigation of three additional drugs encompassed by the $2.3 billion settlement –

[25] To hold otherwise would run afoul of the Supreme Court's admonition that a plaintiff may not recover for stock price declines based upon "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Dura*, 544 U.S. at 342-43 (emphasis added).

Lyrica, Geodon and Zyvox – Pfizer only first received the government subpoena regarding Lyrica in July 2007 and the government's investigations concerning the remaining two drugs encompassed by the $2.3 billion settlement had not even begun by the time of Mr. Levin's departure from the Company. (*Id.*) Feinstein's analysis does not take into account any of these undisputed facts. (*See* Petrosinelli Decl. Ex. W-1 (Feinstein Tr.) at 56:16-22 ("So I didn't do that analysis. I never tried to ascertain from what was reported here when the misconduct started.").)

In this regard, Plaintiffs' damages theory is also directly contradicted by Plaintiffs' other expert, Paul Regan, who takes the view that the Company should have accrued only a $1.2 to 1.4 billion reserve in connection with the government investigation during Mr. Levin's tenure. (Drylewski Decl. Ex. G-L at 35.) Regan claims that the Company should have then increased that amount in January 2008 – after Mr. Levin had left the Company – in order to "encompass[] the broad and deepening scope of Government's and Pfizer's investigations of Bextra and other drugs, including the receipt of additional subpoenas" for Lyrica, Geodon and Zyvox. (*Id.* at 38.) But Feinstein's "constant inflation" calculation is based directly on the size of the $2.3 billion settlement ultimately reached. (Petrosinelli Decl. Ex. C-4 ¶ 233.)[26] Putting aside the propriety of that calculation, Feinstein's own analysis – when viewed in conjunction with Regan's expert report – leads to the conclusion that the purported inflation in Pfizer's stock prior to January 2008 necessarily must have been lower than at the time of the corrective disclosure.

Moreover, the assumption of constant inflation is particularly inappropriate in circumstances where, as here, "the class period extends over several years." Ferrell & Saha, 37 J. Corp. L. at 373. This is because any alleged misstatements occurring at the beginning of the Class Period – *i.e.*, three years before the January 2006 corrective disclosure – would have

[26] Feinstein simply divided the $2.3 billion charge "by Pfizer's 6.74 billion shares outstanding." (*Id.*)

become stale and been replaced by new information during that time period which was incorporated into the Company's stock price. *Id.* As a result, alleged misstatements occurring earlier in the Class Period during Mr. Levin's tenure would have been supplanted by any alleged misstatements occurring later in the Class Period, after he had left the Company. *Id.* ("[A]ny price effect of the first quarter [] earnings report, including the fact that earnings were overstated, would very likely have been entirely supplanted by the price impacts of future quarterly earnings reports, in particular the most recent quarterly earnings report.").

Despite the undisputed fact that the information available to the defendants continued to develop throughout the Class Period – and thus changed the very nature and alleged magnitude of the purported misstatements over that time – Feinstein applies a simplistic constant inflation number across the entire period without any regard to Mr. Levin's unique circumstances. This assumption not only leaves the jury without any guidance whatsoever in determining what (if any) inflation could be attributable to Mr. Levin, but it also creates a serious risk that the jury will simply attribute all of the inflation to him. *See Comcast Corp v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (reversing affirmance of class certification where damages theory failed to "measure only those damages attributable to" defendants' liability); *Bricklayers*, 853 F. Supp. 2d at 190.[27]

IV. THE ALLEGED MISSTATEMENTS AND OMISSIONS CANNOT SUPPORT A SECURITIES FRAUD CLAIM

For the reasons set forth in the Pfizer Brief, none of the challenged disclosures or statements can support liability under Section 10(b) or Rule 10b-5. (Pfizer Br. § II.) Mr. Levin

[27] *See also Wilamowsky v. Take-Two Interactive Software, Inc.*, 818 F. Supp. 2d 744, 756 (S.D.N.Y. 2011) ("As for the misrepresentations that did vary – namely Take-Two's reported net income and compensation costs – Plaintiff fails to disaggregate their impact on his loss from prior misstatements and legitimate news affecting Take–Two stock prices"); *In re BP p.l.c. Sec. Litig.*, No: 4:10-MD-2185, 2013 WL 6388408, *16-*17 (S.D. Tex. Dec. 6, 2013) (denying class certification where plaintiff "does not disaggregate 'inflation' according to the type of misrepresentation corrected or risk disclosed" and "[t]he amount of inflation remains constant over the Class Period" such that "the repetition of certain statements . . . is not shown to have had any cumulative inflationary effect, and that the amount of damages to be awarded will be similarly unresponsive to the jury's specific findings of liability").

is entitled to summary judgment for this additional reason as well.

V. MR. LEVIN IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM UNDER SECTION 20(A)

Plaintiffs' claim against Mr. Levin for control person liability under Section 20(a) also fails. A Section 20(a) claim requires: "(a) a primary violation [of Section 10(b)] by a controlled person, (b) actual control by the defendant, and (c) the controlling person's culpable participation in the primary violation." *Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 498 (S.D.N.Y. 2011), *aff'd sub nom. Alki Partners, L.P. v. Windhorst*, 472 F. App'x 7 (2d Cir. 2012); *see also Special Situations Funds III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, No. 13 Civ. 1094(ER), 2014 WL 3605540, at *24-25 (S.D.N.Y. July 21, 2014).

First, Plaintiffs cannot raise an issue of material fact that a primary violation of Section 10(b) occurred by someone controlled by Mr. Levin. *See In re Omnicom Grp.*, 541 F. Supp. 2d at 554.[28] Just as significantly, there are no issues of material fact that Mr. Levin was a "culpable participant" in any alleged fraud. "'[C]ulpable participation' requires 'particularized facts of the *controlling person's* conscious misbehavior or recklessness.'" *Special Situations Funds*, 2014 WL 3605540, at *25. Here, there are no facts demonstrating "conscious misbehavior or recklessness" on the part of Mr. Levin. (*Supra* § II.)[29]

CONCLUSION

For the foregoing reasons, defendant Alan G. Levin respectfully requests that the Court grant summary judgment in his favor.

---

[28] Should the Court determine that an issue of material fact exists as to whether Pfizer or "its employees" committed a primary violation of Section 10(b) (FAC ¶ 159), Mr. Levin reserves the right to argue that he did not exercise control over that defendant sufficient to give rise to control person liability under Section 20(a). Of course, Mr. Levin cannot be held liable as a control person for any alleged wrongdoing occurring after he left his position as CFO.

[29] To the extent that Mr. Levin must show that he acted in good faith, *see SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996), the unrebutted record evidence conclusively demonstrates just that. (*See supra* § II.)

Dated: New York, New York
October 30, 2014

Respectfully submitted,

_/s/ Jay B. Kasner_____

Jay B. Kasner
Gary J. Hacker
Alexander C. Drylewski
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Fax: (212) 735-2000
jay.kasner@skadden.com
gary.hacker@skadden.com
alexander.drylewski@skadden.com

Attorneys for Defendant Alan G. Levin

APPENDIX 1

Challenged Statements That Post-Date Mr. Levin's Tenure As CFO Or Were Communicated By Other Individuals

Disclosure Date	Alleged Disclosure Event	Complaint Reference	Mr. Levin Not Liable
1/19/06	Pfizer 4Q05 Earnings Conference Call	Ex. B Item 2	Oral statement not made by Mr. Levin.
1/19/06	Pfizer 4Q05 Earnings Conference Call	Ex. B Item 3	Oral statements not made by Mr. Levin.
2/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 4	Oral statement not made by Mr. Levin.
2/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 5	Oral statement not made by Mr. Levin.
2/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 6	Oral statements not made by Mr. Levin.
2/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 7	Oral statements not made by Mr. Levin.
2/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 8	Oral statement not made by Mr. Levin.
2/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 9	Oral statements not made by Mr. Levin.
2/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 10	Oral statements not made by Mr. Levin.
4/19/06	Pfizer 1Q06 Earnings Conference Call	¶¶ 84, 92; Ex. B Item 12	Oral statement not made by Mr. Levin.

Disclosure Date	Alleged Disclosure Event	Complaint Reference	Mr. Levin Not Liable
4/19/06	Pfizer 1Q06 Earnings Conference Call	¶ 84; Ex. B Item 13	Oral statements not made by Mr. Levin.
4/19/06	Pfizer 1Q06 Earnings Conference Call	¶¶ 84; Ex. B Item 14	Oral statements not made by Mr. Levin.
5/2/06	Deutsche Bank Securities Health Conference	¶ 84; Ex. B Item 15	Oral statement not made by Mr. Levin.
7/20/06	Pfizer 2Q06 Earnings Conference Call	Ex. B Item 18	Oral statement not made by Mr. Levin.
7/20/06	Pfizer 2Q06 Earnings Conference Call	Ex. B Item 19	Oral statement not made by Mr. Levin.
10/19/06	Pfizer 3Q06 Earnings Conference Call	Ex. B Item 22	Oral statement not made by Mr. Levin.
1/22/07	Pfizer Analyst Meeting	Ex. B Item 23	Oral statement not made by Mr. Levin.
1/22/07	Pfizer Analyst Meeting	Ex. B Item 24	Oral statement not made by Mr. Levin.
10/18/07	Pfizer Press Release	¶ 84; Ex. B Item 26	Made after Mr. Levin's departure as CFO.
10/18/07	Pfizer 3Q07 Earnings Conference Call	Ex. B Item 27	Oral statement not made by Mr. Levin after his departure as CFO.
10/18/2007	Pfizer 3Q07 Earnings Conference Call	Ex. B Item 28	Oral statement not made by Mr. Levin after his departure as CFO.

Disclosure Date	Alleged Disclosure Event	Complaint Reference	Mr. Levin Not Liable
10/18/2007	Pfizer 3Q07 Earnings Conference Call	Ex. B Item 29	Oral statement not made by Mr. Levin after his departure as CFO.
11/5/07	Pfizer 3Q07 10-Q	¶¶ 68, 71, 78	Made after Mr. Levin's departure.
1/23/08	Pfizer Press Release	¶ 78; Ex. B Item 30	Made after Mr. Levin's departure.
1/23/08	Pfizer 4Q07 Earnings Conference Call	Ex. B. Item 31	Made after Mr. Levin's departure.
1/23/08	Pfizer 4Q07 Earnings Conference Call	Ex. B Item 32	Made after Mr. Levin's departure.
2/29/08	Pfizer 2007 10-K	¶¶ 58, 60, 62, 63, 68, 72, 78	Made after Mr. Levin's departure.
3/5/08	Pfizer Analyst Meeting	¶ 81; Ex. B Item 33	Made after Mr. Levin's departure.
3/14/08	Pfizer 2008 Proxy Statement	¶¶ 58, 60, 62, 63	Made after Mr. Levin's departure.
4/17/08	Pfizer Press Release	¶ 78; Ex. B Item 34	Made after Mr. Levin's departure.
4/17/08	Pfizer 1Q08 Earnings Conference Call	Ex. B. Item 35	Made after Mr. Levin's departure.
4/17/08	Deutsche Bank Securities Inc. Healthcare Conference	Ex. B Item 36	Made after Mr. Levin's departure.
5/2/08	Pfizer 1Q08 10-Q	¶¶ 68, 78	Made after Mr. Levin's departure.
5/5/08	Deutsche Bank Securities Health Conference	Ex. B Item 36	Made after Mr. Levin's departure.
7/23/08	Pfizer Press Release	¶ 78; Ex. B Item 37	Made after Mr. Levin's departure.
7/23/08	Pfizer 2Q08 Earnings Conference Call	Ex. B Item 38	Made after Mr. Levin's departure.

Disclosure Date	Alleged Disclosure Event	Complaint Reference	Mr. Levin Not Liable
8/8/08	Pfizer 2Q08 10-Q	¶¶ 68, 73, 78	Made after Mr. Levin's departure.
9/22/08	UBS Global Life Sciences press conference	¶ 91; Ex. B Item 39	Made after Mr. Levin's departure.
10/17/08	Pfizer Press Release	¶ 74	Made after Mr. Levin's departure.
10/21/08	Pfizer Press Release	¶¶ 78, 82, 84, 92; Ex. B Item 40	Made after Mr. Levin's departure.
10/21/08	Pfizer 3Q08 Earnings Conference Call	Ex. B Item 41	Made after Mr. Levin's departure.
10/21/08	Pfizer 3Q08 Earnings Conference Call	Ex. B Item 42	Made after Mr. Levin's departure.
11/7/08	Pfizer 3Q08 10-Q	¶¶ 68, 76, 78	Made after Mr. Levin's departure.

Regan Karstrand

From: NYSD_ECF_Pool@nysd.uscourts.gov
Sent: Thursday, October 30, 2014 11:39 AM
To: CourtMail@nysd.uscourts.gov
Subject: Activity in Case 1:10-cv-03864-AKH Jones et al v. Pfizer, Inc. et al Memorandum of Law in Support of Motion

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

U.S. District Court

Southern District of New York

Notice of Electronic Filing

The following transaction was entered by Kasner, Jay on 10/30/2014 at 11:39 AM EDT and filed on 10/30/2014
Case Name: Jones et al v. Pfizer, Inc. et al
Case Number: 1:10-cv-03864-AKH
Filer: Alan G. Levin
Document Number: 253

Docket Text:
MEMORANDUM OF LAW in Support re: [252] MOTION for Summary Judgment . . Document filed by Alan G. Levin. (Kasner, Jay)

1:10-cv-03864-AKH Notice has been electronically mailed to:

Alexander C Drylewski alexander.drylewski@skadden.com

Amanda M. MacDonald amacdonald@wc.com

Brant Duncan Kuehn brantkuehn@quinnemanuel.com

Charles S. Duggan charles.duggan@dpw.com, ecf.ct.papers@davispolk.com

Cynthia Margaret Monaco cmonaco@cynthiamonacolaw.com, cmmonaco@gmail.com

Daniel Prugh Roeser droeser@goodwinprocter.com

Danielle Suzanne Myers dmyers@rgrdlaw.com

Darren J. Robbins e_file_sd@rgrdlaw.com

David Avi Rosenfeld drosenfeld@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com

Donald Alan Migliori dmigliori@motleyrice.com

Eugene Mikolajczyk genem@rgrdlaw.com

Gary John Hacker ghacker@skadden.com

George Anthony Borden gborden@wc.com

Hamilton Philip Lindley hlindley@deanslyons.com, mgoens@deanslyons.com

Henry Rosen henryr@rgrdlaw.com, dianah@rgrdlaw.com

Howard E. Heiss hheiss@omm.com, #nymanagingattorney@omm.com

Ivy T. Ngo ingo@rgrdlaw.com, e_file_sd@rgrdlaw.com

James M. Hughes jhughes@motleyrice.com, erichards@motleyrice.com, kweil@motleyrice.com, kweil@pacernotice.com

James P. Rouhandeh james.rouhandeh@dpw.com, ecf.ct.papers@davispolk.com

James R. Harper coljamesrharper@me.com

Jason A. Forge jforge@rgrdlaw.com, e_file_SD@rgrdlaw.com, tholindrake@rgrdlaw.com

Jay B. Kasner jkasner@skadden.com

Jennifer Lynn Spaziano jen.spaziano@skadden.com

Joe Kendall administrator@kendalllawgroup.com, hlindley@kendalllawgroup.com, jkendall@kendalllawgroup.com

John K. Villa jvilla@wc.com

Joseph F. Rice jrice@motleyrice.com

Joseph G. Petrosinelli jpetrosinelli@wc.com

Juliana Newcomb Murray juliana.murray@davispolk.com, ecf.ct.papers@davispolk.com

Keir Nicholas Dougall kdougall@dougallpc.com

Kevin Anthony Burke kaburke@sidley.com, efilingnotice@sidley.com, nyefiling@sidley.com

Leigh R. Lasky lasky@laskyrifkind.com

Matthew Melamed mmelamed@rgrdlaw.com

Michael Barry Carlinsky michaelcarlinsky@quinnemanuel.com, brantkuehn@quinnemanuel.com, jomairecrawford@quinnemanuel.com

Michael Joseph Dowd miked@rgrdlaw.com, e_file_sd@rgrdlaw.com, e_file_sf@rgrdlaw.com, tome@rgrdlaw.com

Michael Scott Bailey michael.bailey@skadden.com

Mitchell M.Z. Twersky mtwersky@aftlaw.com

Paul T. Hourihan phourihan@wc.com

Richard Mark Strassberg rstrassberg@goodwinprocter.com, nymanagingclerk@goodwinprocter.com

Ross Bradley Galin rgalin@omm.com, neverhart@omm.com

Ryan A. Llorens ryanl@rgrdlaw.com, kirstenb@rgrdlaw.com, nbear@rgrdlaw.com

Samuel Howard Rudman srudman@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com, mblasy@rgrdlaw.com

Scott D. Musoff smusoff@skadden.com, david.carney@skadden.com

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

Sidney Bashago sidney.bashago@dpw.com

Steven M.. Farina sfarina@wc.com

Stuart Michael Sarnoff ssarnoff@omm.com

Trig Randall Smith trigs@rgrdlaw.com, e_file_sd@rgrdlaw.com, nhorstman@rgrdlaw.com

William E. Schurmann wschurmann@wc.com

William H. Narwold bnarwold@motleyrice.com, ajanelle@motleyrice.com, vlepine@motleyrice.com

Willow E. Radcliffe willowr@rgrdlaw.com, ptiffith@rgrdlaw.com

1:10-cv-03864-AKH Notice has been delivered by other means to:

Catherine J. Kowalewski
Robbins Geller Rudman & Dowd LLP (San Diego)
655 West Broadway
Suite 1900
San Diego, CA 92101

Daniel E. Hill
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

David C. Walton
Robbins Geller Rudman & Dowd LLP (SANDIEGO)
655 West Broadway
Suite 1900
San Diego, CA 92101

Jamie J. McKey
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

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

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1008691343 [Date=10/30/2014] [FileNumber=13803802
-0] [1b793828e88a67bed9f1a50951e711500870cf0d6c6366746cc78268210b3458f
ff1960d8b2ac83540703501a16b7fe64eff884219a0feebf8750225ae7190ea]]