UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. PFIZER INC., et al., Defendants.	Civil Action No. 1:10-cv-03864-AKH Hon. Alvin K. Hellerstein

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FRANK D'AMELIO'S MOTION FOR SUMMARY JUDGMENT

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND OTHER AUTHORITIES

Pursuant to Federal Rule of Civil Procedure 56, Defendant Frank D'Amelio respectfully submits this memorandum of law in support of his motion for summary judgment.

Mr. D'Amelio respectfully requests that this Court grant his motion for summary judgment on all of Plaintiffs' claims against him.[1]

PRELIMINARY STATEMENT

In September 2007 – more than halfway through the Class Period – Mr. D'Amelio became Pfizer's Chief Financial Officer. By virtue of his position, Mr. D'Amelio thereafter signed Pfizer's Forms 10-K and 10-Q (including Sarbanes-Oxley ("SOX") certifications) and spoke on behalf of the Company during analyst presentations and earnings calls. Plaintiffs sued Mr. D'Amelio (as well as Pfizer and several other current and former officers) under Sections 10(b) (and Rule 10b-5 promulgated thereunder) and 20(a) of the Securities Exchange Act of 1934. To survive Defendants' motion to dismiss, Plaintiffs argued that they were entitled to the inference that such statements contained intentional, material misrepresentations that caused Plaintiffs' purported losses. Discovery has now disproven those inferences. Plaintiffs have no evidence that Mr. D'Amelio's statements were intentionally (or unintentionally) false. Rather, the undisputed evidence shows that Mr. D'Amelio did not make any statements on Pfizer's behalf without the prior approval of an army of in-house and outside counsel, internal and independent accountants, and subject matter experts – all of whom vetted the statements as part of the Company's comprehensive, rigorous disclosure processes. Nor have Plaintiffs put forth any evidence that Mr. D'Amelio's statements caused their purported losses. In fact, Plaintiffs' own damages and loss causation expert now admits that he did not and cannot make

[1] Mr. D'Amelio 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 ("Pfizer's brief" or "Pfizer Br.") and in the memoranda of law submitted by the other individual defendants to the extent applicable.

such a determination. On this record, there is no basis to allow these meritless claims against Mr. D'Amelio to continue. This Court should grant Mr. D'Amelio's motion for summary judgment for the following reasons:

- ***Plaintiffs have failed to establish that Mr. D'Amelio made any actionable misrepresentations.*** Mr. D'Amelio may be held liable only for those statements over which he had "ultimate authority." *Janus Capital Grp. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). Plaintiffs cannot dispute that, as a threshold matter, Mr. D'Amelio is not liable for any statements that were made (1) before he joined Pfizer, (2) by other individuals on earnings calls, and/or (3) by Pfizer or other individuals in press releases. Moreover, Plaintiffs' claims on the remaining statements are legally insufficient.

- ***Plaintiffs have failed to establish that Mr. D'Amelio acted with scienter.*** Plaintiffs have offered no motive for Mr. D'Amelio to commit fraud. Although Mr. D'Amelio could have sold more than $1.5 million worth of Pfizer stock grants that vested in late 2008 –precisely when Plaintiffs claim that Defendants knew that (1) settlement negotiations concerning the Government Investigations were well underway, (2) the Company's disclosures concerning the Government Investigations and the reserve taken for them were false, and (3) Pfizer's stock price was inflated – Plaintiffs do not and cannot allege that he sold a single share. Nor have Plaintiffs demonstrated an opportunity to commit fraud. The record is undisputed that Mr. D'Amelio's statements were not made in isolation but as part of Pfizer's elaborate disclosure process. Plaintiffs also put forth no evidence that Mr. D'Amelio acted intentionally or recklessly. Rather, the undisputed evidence shows that Mr. D'Amelio acted only after the Company's elaborate review and disclosure process had vetted and approved the statements at issue. Those statements were vetted in advance through (*inter alia*): Disclosure Committee meetings, Certification Meetings, Audit Committee meetings, and Quarterly Review meetings with KPMG. After vetting, those statements were approved by (*inter alia*): outside disclosure counsel Dennis Block of Cadwalader, Wickersham & Taft; inside disclosure counsel Larry Fox; independent accountant and auditor KPMG; and/or Pfizer subject matter experts. Mr. D'Amelio was entitled to – and did – rely on these processes and experts in good faith, and Plaintiffs have developed literally no evidence to the contrary. These unrebutted facts negate any inference of scienter.

- ***Plaintiffs have failed to establish that Mr. D'Amelio caused Plaintiffs' losses.*** Plaintiffs have not even attempted to demonstrate that any of their purported losses were caused by Mr. D'Amelio's particular statements at issue. Rather, their own damages and loss causation expert has admitted that he did not disaggregate any losses caused by Mr. D'Amelio's statements from any losses caused by other statements at issue. That is fatal to Plaintiffs' claims.

- ***Plaintiffs have failed to establish that Mr. D'Amelio acted as a control person.*** Mr. D'Amelio is not subject to control person liability because Plaintiffs have failed to put forth any evidence that someone controlled by him committed a primary violation. In addition, Plaintiffs have failed to establish Mr. D'Amelio's culpable participation with respect to Pfizer's statements at issue for the same reasons that they have failed to establish Mr. D'Amelio's scienter with respect to his own statements. Indeed, all of the record evidence demonstrates that Mr. D'Amelio acted in good faith.

Summary judgment is especially important in a case such as this. Plaintiffs accuse Mr. D'Amelio of fraud. That is a serious charge to make against any individual – and particularly the CFO of a public company. "[F]raud claims require more deterrence than other claims" because "lawsuits based on fraud are more likely to harm a defendant's reputation than a typical lawsuit. Accusations of fraud, even if proven to be untrue, can do serious damage to the goodwill of a business firm or professional person." *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 291, 325 (S.D.N.Y. 2003) (internal quotation marks omitted). The Amended Complaint filed by Plaintiffs alleged no facts to suggest that Mr. D'Amelio himself committed fraud, and discovery has not produced a shred of evidence to support Plaintiffs' accusations. On this record, it is essential that the Court act as a gatekeeper to prevent Plaintiffs' baseless claims against Mr. D'Amelio from going forward. This Court should grant Mr. D'Amelio's motion for summary judgment on all of Plaintiffs' claims against him.

STATEMENT OF FACTS

Mr. D'Amelio became Pfizer's CFO in September 2007, bringing with him almost three decades of operating and financial experience from three large public companies.[2] As CFO, Mr. D'Amelio signed Pfizer's Forms 10-K and 10-Q, including SOX certifications with respect

[2] *See* Rule 56.1 Statement of Undisputed Facts in Support of Defendant Frank D'Amelio's Motion for Summary Judgment ("D'Amelio Rule 56.1 Statement") at ¶ 1. Mr. D'Amelio previously worked in various executive and managerial capacities at AT&T Bell Labs, Lucent Technologies, and Alcatel-Lucent. *See id.* at ¶1 n.2.

to those filings, and made statements on the Company's behalf during analyst presentations and earnings calls. Plaintiffs claim that Mr. D'Amelio's statements were intentionally false because:

- Pfizer's Forms 10-Q and 10-K (including Mr. D'Amelio's SOX certifications) for Q3 2007 through Q3 2008 stated that the company complied with laws, regulations, and its own policies on business conduct and that it had adequate internal controls to guard against off-label marketing practices.[3]

- Pfizer's Forms 10-Q and 10-K for Q3 2007 through Q3 2008 did not adequately specify the nature of, or Company's potential liability from, government investigations into off-label marketing related to Bextra, Lyrica, Geodon, and Zyvox (the "Government Investigations").[4]

- Pfizer's Forms 10-Q and 10-K for Q3 2007 through Q3 2008 did not establish a reserve for Pfizer's liability from the Government Investigations.[5]

- Mr. D'Amelio stated at Pfizer's Analyst Day on March 5, 2008, that the Company would continue to pay its dividend "at least at current levels" absent "significant unforeseen events."[6]

- Mr. D'Amelio's statements on earnings calls on October 18, 2007, January 23, 2008, April 17, 2008, and October 21, 2008, did not disclose that a portion of the sales revenue from Lyrica was purportedly the result of off-label marketing.[7]

Yet Plaintiffs cannot point to any record evidence that these statements were false when made or that Mr. D'Amelio ever intended to make any false statements. Rather, the unrebutted, undisputed record establishes that Mr. D'Amelio relied on Pfizer's robust disclosure processes and intended to – and did – make statements that had been approved in advance by Pfizer's in-house and outside counsel, its independent accountant and auditor, and/or its internal subject matter experts and that were believed to be true and correct at the time that they were made.

---

3 (Amended Complaint ("Compl.") ¶¶ 58-67.)

4 (Compl. ¶¶ 68-76, 79-80.)

5 (Compl. ¶¶ 78-80.)

6 (Compl. ¶¶ 81-83.)

7 (Compl. ¶¶ 84-94 & Ex. B.)

I. PFIZER'S PROCESS FOR DISCLOSURES IN SEC FILINGS.

According to Plaintiff's own securities disclosure expert, Edward Buthusiem, Pfizer's disclosure process was "very long and lengthy and involved";[8] and that process made certain that ***Mr. D'Amelio never acted alone***. Statements in Pfizer's SEC filings (including Mr. D'Amelio's SOX certifications) were vetted by dozens of in-house and outside counsel, internal and independent auditors, and senior executives.[9] Pfizer's disclosure process was led by two securities disclosure lawyers with more than 75 years of experience between them: Mr. Fox and Mr. Block.[10] "[T]o ensure that [every litigation update] was accurate and complete," Mr. Fox developed eight steps that Pfizer followed each quarter:[11]

- ***Step 1:*** Mr. Fox e-mailed 15-20 senior legal division members specializing in each area of Pfizer's legal department (including government investigations) to request disclosures of any significant developments in previously reported matters and of any material legal proceedings that had not been reported previously.[12]

- ***Step 2:*** Mr. Fox reviewed the responses from those senior legal division members and sought clarification and additional information as necessary. He prepared a first draft of the legal proceedings disclosures, which were then approved by each of the appropriate senior legal division members.[13]

- ***Step 3:*** Approximately three weeks before the SEC filing date, Mr. Fox e-mailed Mr. Block and Pfizer's head of litigation a second draft of the legal proceedings disclosures.[14] He reviewed their comments, discussed the comments with them, and "ma[d]e various judgments, including with respect to the materiality of various developments."[15] After they would all "get comfortable" with the

---

[8] D'Amelio Rule 56.1 Statement at ¶ 4. In fact, it was the same process that Mr. Buthusiem had used himself while at GlaxoSmithKline. *See id.* at ¶ 4 n.5.

[9] D'Amelio Rule 56.1 Statement at ¶ 5.

[10] D'Amelio Rule 56.1 Statement at ¶ 6.

[11] D'Amelio Rule 56.1 Statement at ¶ 7.

[12] D'Amelio Rule 56.1 Statement at ¶ 7a.

[13] D'Amelio Rule 56.1 Statement at ¶ 7b. In addition to this quarterly process, during the course of the Bextra investigation, Pfizer's then-Chief Compliance Officer, Douglas Lankler, provided regular updates to Mr. Fox and Mr. Block to ensure that the disclosures in the securities filings were up-to-date and accurate. *See id.* at ¶ 7b n.10.

[14] D'Amelio Rule 56.1 Statement at ¶ 7c.

[15] D'Amelio Rule 56.1 Statement at ¶ 7c.

disclosures,[16] Mr. Fox prepared a third draft of the legal proceedings disclosures, which were reviewed and revised by Pfizer's head of litigation and Mr. Block.[17]

- ***Step 4:*** Approximately two to three weeks before the SEC filing date, Mr. Fox e-mailed the General Counsel a complete draft of the legal proceedings disclosures that had been approved by Mr. Block and Pfizer's head of litigation.[18] This resulted in a fourth draft, incorporating the General Counsel's comments.[19]

- ***Step 5:*** Approximately two weeks before the SEC filing date, Mr. Fox e-mailed to KPMG for comment the legal proceedings disclosures that had been approved by Mr. Block, Pfizer's General Counsel, and Pfizer's head of litigation.[20] KPMG often suggested changes to Pfizer's proposed disclosures that the Company implemented.[21] At the same time, Mr. Fox e-mailed the disclosures to the Controller's office.[22]

- ***Step 6:*** The Controller's office distributed the approved legal proceedings disclosures to a "very long list of people"[23] one to two weeks before the SEC filing.[24] The disclosures were then reviewed and discussed at the Disclosure Committee meeting.[25] The Disclosure Committee's quarterly review concluded with a Certification Meeting.[26]

- ***Step 7:*** As a "last step," Mr. Fox sent the final version of the legal proceedings disclosures to Mr. Block and 35 to 40 others, most of whom were in Legal, providing them a last opportunity to comment before the disclosures were filed.[27] Mr. Fox updated the legal proceedings disclosures to include any "late-breaking" significant developments and reviewed the revisions with Mr. Block and Pfizer's General Counsel, head of litigation, and relevant attorneys for approval.[28]

---

16 D'Amelio Rule 56.1 Statement at ¶ 7c.

17 D'Amelio Rule 56.1 Statement at ¶ 7c.

18 D'Amelio Rule 56.1 Statement at ¶ 7d.

19 D'Amelio Rule 56.1 Statement at ¶ 7d.

20 D'Amelio Rule 56.1 Statement at ¶ 7e.

21 D'Amelio Rule 56.1 Statement at ¶ 7e.

22 D'Amelio Rule 56.1 Statement at ¶ 7e.

23 D'Amelio Rule 56.1 Statement at ¶ 7f.

24 D'Amelio Rule 56.1 Statement at ¶ 7f.

25 D'Amelio Rule 56.1 Statement at ¶ 7f.

26 D'Amelio Rule 56.1 Statement at ¶ 7f.

27 D'Amelio Rule 56.1 Statement at ¶ 7g.

28 D'Amelio Rule 56.1 Statement at ¶ 7g.

- ***Step 8:*** At the end of the process, Mr. Fox filled out, signed, and dated a checklist that all of the steps had been completed.[29]

Mr. D'Amelio became a member of the Disclosure Committee upon joining Pfizer as CFO and participated in every Disclosure Committee and Certification Meeting thereafter concerning the securities filings at issue in the Amended Complaint. *See* Appendix A (Disclosure Committee and Certification Meetings Concerning Securities Filings in Which Mr. D'Amelio Participated During the Class Period).[30] During the Disclosure Committee meetings, which included the head of each business and finance unit, Pfizer's General Counsel and disclosure counsel reviewed active legal proceedings and noted any updates to previously disclosed matters and any matters disclosed for the first time.[31] Mr. D'Amelio's role was "the same as anybody else": "to bring forward any issues or concerns around the disclosures, and to . . . listen to the debate around the table."[32] The Disclosure Committee's review concluded with a Certification Meeting where the business and finance heads – as well as both outside disclosure counsel and Pfizer's General Counsel – provided sub-certifications to the CEO and CFO, who assembled and questioned (*inter alia*) in-house and outside disclosure counsel, KPMG, and Pfizer's General Counsel, Controller's office, and Internal Audit.[33] At the close of each Certification Meeting, Pfizer's CEO would ask the entire group if there was any reason that the statements to which he and the CFO were attesting were in any way inaccurate.[34] After

[29] D'Amelio Rule 56.1 Statement at ¶ 7h.

[30] D'Amelio Rule 56.1 Statement at ¶¶ 8-12.

[31] D'Amelio Rule 56.1 Statement at ¶¶ 10-11.

[32] D'Amelio Rule 56.1 Statement at ¶ 13.

[33] D'Amelio Rule 56.1 Statement at ¶¶ 14-17.

[34] D'Amelio Rule 56.1 Statement at ¶ 18.

receiving final assurances, the CEO and CFO (including Mr. D'Amelio after he joined Pfizer) signed their SOX certifications.[35]

In addition to the Disclosure Committee's quarterly review, Mr. D'Amelio participated in Audit Committee meetings. Those meetings – which were attended by in-house counsel and KPMG – included updates from Pfizer's then-Chief Compliance Officer, Mr. Lankler, on the Company's compliance, the status of continuing government investigations, and the progress with discussions to resolve such investigations.[36] KPMG described Mr. Lankler's updates as "very open" and confirmed that he "was responsive to the committee's questions."[37]

Further, Mr. D'Amelio participated in Quarterly Review meetings with the Controller's office and KPMG. During those meetings, KPMG – which independently monitored Pfizer's internal controls[38] – advised Mr. D'Amelio directly on "Legal, Compliance, etc." by "[a]ddress[ing] risks related to regulatory requirements and compliance, as well as internal detection, investigation and reporting of fraud and misconduct . . . and other compliance matters."[39] Mr. D'Amelio and KPMG also discussed "sales and marketing compliance,"[40] including "healthcare compliance" in particular.[41] As of July 2007 – months before Mr. D'Amelio joined Pfizer – KPMG concluded that concerns regarding Pfizer's compliance controls had been fully addressed.[42] With respect to the 2007 and 2008 audits, KPMG stated that

---

35 D'Amelio Rule 56.1 Statement at ¶ 19.

36 D'Amelio Rule 56.1 Statement at ¶¶ 28-30.

37 D'Amelio Rule 56.1 Statement at ¶ 29.

38 D'Amelio Rule 56.1 Statement at ¶ 31.

39 D'Amelio Rule 56.1 Statement at ¶ 31.

40 D'Amelio Rule 56.1 Statement at ¶ 31.

41 D'Amelio Rule 56.1 Statement at ¶ 31.

42 D'Amelio Rule 56.1 Statement at ¶ 32.

it had reviewed Pfizer's controls and agreed with the Company's determination that those "internal controls over financial reporting" were effective.[43]

The record shows that Mr. D'Amelio relied in good faith on this rigorous disclosure process, including the advice of in-house and outside disclosure counsel and KPMG, with respect to each SEC filing (and SOX certification) that he signed. Plaintiffs have absolutely no evidence to the contrary. To this day, Mr. Fox, Mr. Block, and KPMG stand behind Pfizer's disclosures and the advice that they provided. (*See* Pfizer Br. at 7-8, 37.)

II. PFIZER'S PROCESS FOR FINANCIAL STATEMENTS IN SEC FILINGS.

Pfizer's financial statements in its SEC filings (including Mr. D'Amelio's SOX certifications) – and specifically the judgment that the requirements for establishing a FAS 5 reserve for the Government Investigations had not been met – were vetted through a process that was as comprehensive and rigorous as the disclosure process.

Pfizer's Controller's office and KPMG scheduled Quarterly Review meetings that included the Company's in-house government investigations counsel in order for KPMG "to obtain an update on legal matters, the status of legal matters and give us an opportunity to ask questions and obtain information for purposes of our quarterly review and at year-end for the year-end audit."[44] During those meetings, Pfizer's in-house government investigations counsel discussed (*inter alia*): (1) the government's claims in the Bextra investigation; (2) Pfizer's potential defenses to limit liability in the Bextra investigation; and (3) the status of settlement negotiations (if any).[45] In addition, Pfizer's in-house government investigations counsel updated KPMG (as well as Mr. Block and Mr. Fox) whenever there was a material development in the

[43] D'Amelio Rule 56.1 Statement at ¶ 33.

[44] D'Amelio Rule 56.1 Statement at ¶ 36.

[45] D'Amelio Rule 56.1 Statement at ¶ 37.

Bextra investigation in order to assess any impact on the Company's FAS 5 obligations.[46] (Pfizer Br. at 7, 9-10.) KPMG was always "satisfied" with the information provided by Pfizer.[47]

In the context of "every quarterly filing," KPMG reviewed the status of the Government Investigations to determine whether or not the requirement for recording a reserve had been met.[48] KPMG brought "a level of skepticism" to their independent review because they were "not bound or reporting to the client in any way, shape or form."[49] KPMG determined that Pfizer was not required under FAS 5 to take a reserve with respect to the Government Investigations until January 2009 when the Company reached an agreement in principle with the government.[50]

Mr. D'Amelio participated in a series of meetings where KPMG offered its advice on Pfizer's financial statements, including the Company's FAS 5 obligations. He attended the Audit Committee meetings along with KPMG.[51] He participated in Quarterly Review meetings where KPMG advised that FAS 5 did not require Pfizer to reserve for the Government Investigations.[52] He held "Meetings with the CFO" with KPMG before each earnings release where KPMG reiterated that advice.[53]

Mr. D'Amelio relied on KPMG's advice. As he testified: "KPMG has a responsibility to determine what they believe needs to be recorded as a reserve because they've got to sign an

---

46 D'Amelio Rule 56.1 Statement at ¶ 38.

47 D'Amelio Rule 56.1 Statement at ¶ 39.

48 D'Amelio Rule 56.1 Statement at ¶ 40.

49 D'Amelio Rule 56.1 Statement at ¶ 41.

50 D'Amelio Rule 56.1 Statement at ¶¶ 42-45.

51 D'Amelio Rule 56.1 Statement at ¶ 47.

52 D'Amelio Rule 56.1 Statement at ¶ 48.

53 D'Amelio Rule 56.1 Statement at ¶ 49.

opinion letter for the company."[54] He continued: "KPMG was all over this. You can tell from the meetings they had with me, this came up, they were in all the audit committee meetings where this was being reviewed. They had plenty of opportunity to hear status on this, to interact with folks."[55]

Here again, the record shows that Mr. D'Amelio relied in good faith on this robust process, including the advice of KPMG, with respect to each SEC filing (and SOX certification) that he signed. Plaintiffs offer literally no evidence to the contrary. Indeed, to this day, KPMG stands by its advice that Pfizer took a reserve for the Government Investigations at the proper time.[56]

III. PFIZER'S PROCESS FOR MR. D'AMELIO'S MARCH 5, 2008, STATEMENT ABOUT THE COMPANY'S DIVIDEND.

On March 5, 2008, Mr. D'Amelio stated during Pfizer's Analyst Day that the Company "expect[s] to continue" to pay its dividend "at least at current levels" absent "significant unforeseen events."[57] His statement was based on the draft Q&A prepared by Investor Relations for Mr. D'Amelio's "Financial Overview" presentation,[58] which made clear that Pfizer's dividend would remain strong: "We have a long, proven track record of providing a strong, steady dividend, and we see no reason why that can't continue."[59] Those presentation materials had been distributed to a wide range of subject matter experts at Pfizer, including Mr. Fox and

---

[54] D'Amelio Rule 56.1 Statement at ¶ 50. Pfizer's former CFOs similarly relied on KPMG's determinations regarding FAS 5. D'Amelio Rule 56.1 Statement at ¶ 50 n.84.

[55] D'Amelio Rule 56.1 Statement at ¶ 51.

[56] D'Amelio Rule 56.1 Statement at ¶ 53.

[57] D'Amelio Rule 56.1 Statement at ¶ 54 ("So the way I'll say this is significant unforeseen risks and opportunities aside, so significant unforeseen events aside, we expect to continue to generate sufficient cash flow from operations to fund the dividend at least at current levels – at least at current levels.").

[58] D'Amelio Rule 56.1 Statement at ¶ 56.

[59] D'Amelio Rule 56.1 Statement at ¶ 56.

others in Legal, Internal Audit, and the Controller's office.[60] Investor Relations specifically asked those experts whether they saw "any errors or significant issues with any of the presentation and/or notes that must be corrected."[61] The experts did not.

Four months later, nothing had changed. In July 2008, Investor Relations and Pfizer's subject matter experts prepared materials for Mr. D'Amelio and others at Pfizer in advance of the Q2 2008 earnings call.[62] Those materials contained the same views on the dividend: "As we've previously stated, unforeseen significant risks and opportunities aside, we expect to continue to generate sufficient cash from operations to fund the dividend at least at the current levels."[63] No such risk or opportunity existed at that time.

In late 2008 and January 2009, Pfizer's discussions with Wyeth Pharmaceuticals about the possibility of an acquisition ripened.[64] When Pfizer announced its acquisition of Wyeth for $68 billion on January 26, 2009, it also announced a dividend cut.[65] As Mr. D'Amelio testified, the Wyeth acquisition was the sort of "significant unforeseen event" that required Pfizer to cut its dividend.[66] Pfizer would not have done so but for the Wyeth acquisition, and certainly not as a result of the settlement of the Government Investigations.[67]

---

60 D'Amelio Rule 56.1 Statement at ¶ 57.

61 D'Amelio Rule 56.1 Statement at ¶ 57.

62 D'Amelio Rule 56.1 Statement at ¶ 58.

63 D'Amelio Rule 56.1 Statement at ¶ 59.

64 D'Amelio Rule 56.1 Statement at ¶ 60.

65 D'Amelio Rule 56.1 Statement at ¶ 61.

66 D'Amelio Rule 56.1 Statement at ¶ 62.

67 D'Amelio Rule 56.1 Statement at ¶¶ 63-64.

Plaintiffs have not a shred of evidence that, when Mr. D'Amelio stated in March 2008 that Pfizer "expect[ed] to continue" to pay its dividend "at least at current levels" absent "significant unforeseen events," that statement was intentionally (or unintentionally) false.[68]

IV. PFIZER'S PROCESS FOR MR. D'AMELIO'S STATEMENTS ABOUT THE COMPANY'S REVENUE FROM LYRICA.

In earnings calls on October 18, 2007, January 23, 2008, April 17, 2008, and October 21, 2008, Mr. D'Amelio reported Pfizer's sales revenue from Lyrica. Mr. D'Amelio's statements were based on proposed remarks or "scripts" and other materials that had been prepared by Investor Relations and vetted in advance through a rigorous process of review including inside and outside professionals. The earnings materials included "Key Messages" memoranda, draft scripts for the CEO and CFO, charts or presentations to assist in preparing for the call, and draft Q&A to help respond to likely questions.[69] In the week before each earnings call, Investor Relations circulated the materials to a wide range of subject matter experts within Pfizer, including Mr. Fox and Mr. Block (and/or others in Legal), the Controller's office, and Finance.[70] Investor Relations requested feedback on anything that was "materially incorrect and must be changed."[71] After vetting, the final materials were then circulated to over twenty people within Pfizer who provided "help throughout [the] entire process" of creating them.[72]

---

[68] D'Amelio Rule 56.1 Statement at ¶ 64 ("Q. Did you believe that as of January 26th, 2009 investors expected Pfizer to cut its dividend in half? A. No, I did not. In fact prior to announcing the acquisition I don't believe investors expected us to cut the dividend at all. Q. Why is that? A. Because we said publicly our intent, significant unforeseen events aside, was to at least maintain the dividend at current levels. Q. Was that in fact Pfizer's intent? A. That was absolutely our intent.").

[69] D'Amelio Rule 56.1 Statement at ¶ 67.

[70] D'Amelio Rule 56.1 Statement at ¶ 68.

[71] D'Amelio Rule 56.1 Statement at ¶ 68.

[72] D'Amelio Rule 56.1 Statement at ¶ 69.

Mr. D'Amelio relied on this comprehensive process to vet the statements that he made on each earnings call.[73] His statements tracked the earnings materials – often verbatim.[74] *See* Appendix B (Comparison Between Prepared Earnings Materials and Mr. D'Amelio's Statements at Issue on Earnings Calls). In addition, his statements tracked information that had already been disclosed by Pfizer in press releases to the investor community.[75] *See* Appendix C (Comparison Between Pfizer's Press Releases and Mr. D'Amelio's Statements at Issue on Earnings Calls). Plaintiffs have failed to put forth any evidence that contradicts either Mr. D'Amelio's statements or his good faith reliance on Pfizer's processes in making those statements.

ARGUMENT

I. THIS COURT SHOULD GRANT SUMMARY JUDGMENT BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH THAT MR. D'AMELIO MADE ANY ACTIONABLE MISREPRESENTATIONS.

A. Mr. D'Amelio Is Not Liable For Statements Made By Other Defendants.

Plaintiffs allege a litany of misrepresentations by Pfizer and six individual defendants over a three-year Class Period spanning January 19, 2006, to January 23, 2009. As a threshold matter, Mr. D'Amelio is not liable for any statements that were made (1) before he joined Pfizer, (2) by other individuals on earnings calls, and/or (3) by Pfizer or other individuals in press releases. *See* Appendix D (Alleged Statements That Are Not Actionable Because They Are Not Attributable to Mr. D'Amelio).

1. Mr. D'Amelio Is Not Liable For Any Statements That Were Made Before He Became Pfizer's CFO.

"Individual defendants plainly cannot be held liable for alleged losses resulting from statements made . . . before . . . they had assumed the [roles] in which they are alleged to have

[73] D'Amelio Rule 56.1 Statement at ¶ 70.

[74] D'Amelio Rule 56.1 Statement at ¶ 71.

[75] D'Amelio Rule 56.1 Statement at ¶ 72.

committed fraud." *In re UBS AG Sec. Litig.*, No. 07-cv-11225 (RJS), 2012 WL 4471265, at *22 n.20 (S.D.N.Y. Sept. 28, 2012) (internal quotation marks omitted) (dismissing securities claims against individual defendant executives "to the extent that they rely on any part of the alleged frauds that occurred before they assumed their roles"). Therefore, Mr. D'Amelio is not liable for any statements before he joined Pfizer in September 2007. *See* Appendix D (statements 1-30).

2. Mr. D'Amelio Is Not Liable For Any Statements That Were Made By Other Individuals On Earnings Calls.

"[A] defendant must actually make a false or misleading statement in order to be held liable under Section 10(b)." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998) (internal quotation marks omitted). Applying this case law, courts have refused to hold individual defendants liable for statements made by others on earnings calls. *See, e.g., In re JPMorgan Chase & Co. Sec. Litig.*, No. 12-cv-03852 (GBD), 2014 WL 1297446, at *10 (S.D.N.Y. Mar. 31, 2014); *City of Pontiac Gen. Emp. Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 375 (S.D.N.Y. 2013). Accordingly, Mr. D'Amelio is not liable for statements by others on Pfizer's earnings calls. *See* Appendix D (statements 32, 34-37, 39-40, 42).

3. Mr. D'Amelio Is Not Liable For Any Statements That Were Made By Pfizer Or Other Individuals In Press Releases.

"For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus*, 131 S. Ct. at 2302. Plaintiffs do not allege that Mr. D'Amelio drafted or otherwise exercised "ultimate authority" over Pfizer's press releases,[76] nor do they have any evidence to

[76] (*See* Compl. ¶ 28.)

support such an allegation. Consequently, Mr. D'Amelio is not liable for any statements in those press releases. *See* Appendix D (statements 31, 33, 36, 38, 41).[77]

B. Plaintiffs Have Failed To Establish That Mr. D'Amelio Is Liable For Any Of The Remaining Statements.

1. Plaintiffs Have Failed To Establish That Mr. D'Amelio Is Liable For Any Statements Concerning Compliance And Internal Controls.

Plaintiffs attack statements in Pfizer's Forms 10-Q and 10-K (including Mr. D'Amelio's SOX certifications) for Q3 2007 through Q3 2008 that the Company complied with laws, regulations, and its own policies on business conduct and that it had adequate internal controls against off-label marketing practices.[78] But these statements are not actionable. ***First***, Pfizer's statements about compliance were not false; it is indisputably true that the Company had compliance policies and communicated them to its employees. (Pfizer Br. at 41.) In addition, as this Court has recognized, Pfizer's statements about compliance constitute inactionable puffery. *See* 7/7/2014 Hearing Tr. at 20:12. (*See also* Pfizer Br. at 41-43.) ***Second***, Plaintiffs have presented no evidence – because there is none – that KPMG or Pfizer's Internal Audit ever found a material weakness in the Company's internal controls that was required to be reported under the securities laws. (Pfizer Br. at 11-12, 49-50.) Nor do they have any evidence that the Company or its employees, including Mr. D'Amelio, failed to believe honestly that this

---

[77] In any event, the statements at issue in press releases issued by Pfizer during Mr. D'Amelio's tenure as CFO are not actionable. Plaintiffs point to (1) statements concerning Lyrica's safety, efficacy, and sales revenue and (2) statements that Lyrica, Geodon, and Zyvox were "performing well." (*See* Compl. Ex. B.) Statements concerning Lyrica's safety, efficacy, and sales revenue are not actionable for all of the reasons below and in Pfizer's brief. (*See* Pfizer Br. at 48-49; *infra* at 20-21.) Statements that Lyrica, Geodon, and Zyvox were "performing well" are not actionable because they were true; they were opinions that Plaintiffs have failed to show were not honestly held, *see, e.g.*, *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110-12 (2d Cir. 2011), and they were puffery, *see, e.g.*, *In re Nevsun Res. Ltd.*, No. 12-cv-1845 (PGG), 2013 WL 6017402, at *9 (S.D.N.Y. Sept. 27, 2013). Moreover, Plaintiffs have no evidence that Mr. D'Amelio acted with scienter with respect to any of these statements. (*See infra* at 20-21.)

[78] (*See* Compl. ¶¶ 58-67.)

accounting judgment by Pfizer and KPMG was correct. (Pfizer Br. at 50-52.) As a result, these allegedly false statements cannot support any claim against Mr. D'Amelio.

2. Plaintiffs Have Failed To Establish That Mr. D'Amelio Is Liable For Any Legal Disclosures Concerning The Government Investigations.

Plaintiffs next claim that Pfizer's Forms 10-Q and 10-K for Q3 2007 through Q3 2008 failed adequately to specify the nature of the Government Investigations or quantify the Company's potential liability from those Investigations.[79] But Plaintiffs cannot dispute that the disclosure of the Government Investigations occurred as part of Pfizer's elaborate disclosure process; and those disclosures, on their face, were legally sufficient. As a result, the statements at issue are not actionable. ***First***, Plaintiffs offer no evidence that Pfizer's disclosures of the government's investigation into the marketing of Bextra and (later) other medications and the substantial legal risks that the investigation presented – disclosures vetted and approved by many in-house and outside professionals – were somehow inappropriate. (Pfizer Br. at 38-41.) ***Second***, Plaintiffs have no evidence that the Company or its employees, including Mr. D'Amelio, failed to believe honestly that this disclosure judgment by Pfizer and its counsel was correct. (*Id.* at 29-35; *infra* at 25-28.) Accordingly, these claims fail as to Mr. D'Amelio.

3. Plaintiffs Have Failed To Establish That Mr. D'Amelio Is Liable For Pfizer's Judgment Not To Take A Reserve.

Plaintiffs then allege that Pfizer's Forms 10-Q and 10-K for Q3 2007 through Q3 2008 misstated the Company's financial statements by failing to take a reserve for Pfizer's liability from the Government Investigations.[80] That accounting judgment is also not actionable. ***First***, Plaintiffs offer no evidence that Pfizer and KPMG were incorrect in their judgment as to when FAS 5 required the Company to take a reserve. (Pfizer Br. at 35-37.) ***Second***, Plaintiffs have no

[79] (*See* Compl. ¶¶ 68-76, 79-80.)

[80] (*See* Compl. ¶¶ 78-80.)

evidence that the Company or its employees, including Mr. D'Amelio, failed to believe honestly that this accounting judgment by Pfizer and KPMG was correct. (*Id.* at 37; *infra* at 28-31.) Consequently, these claims against Mr. D'Amelio must be dismissed.

4. Plaintiffs Have Failed To Establish That Mr. D'Amelio Is Liable For His Statement About Pfizer's Dividend.

Plaintiffs further assert that Mr. D'Amelio's statement on March 5, 2008, that Pfizer "expect[s] to continue" to pay its dividend "at least at current levels" absent "significant unforeseen events" was false because, they claim, Mr. D'Amelio knew at that time that the penalties resulting from the Government Investigations would have an impact on Pfizer's cash flow of more than $2 billion.[81] That statement is not actionable as a matter of law or fact.

First, Mr. D'Amelio's statement is a classic "forward-looking" statement entitled to the protection of the safe harbor provided by the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the "bespeaks caution" doctrine.[82] The PSLRA itself explicitly defines forward-looking statements to include "a projection of . . . dividends," such as Mr. D'Amelio's statement here. *See* 15 U.S.C. § 78u-5(i)(1)(A). Moreover, Mr. D'Amelio's statement was accompanied by meaningful cautionary language.[83] On substantially similar facts, the Second Circuit has affirmed summary judgment for the defendant. *See In re IBM Corp Securities Litigation*, 163 F.3d 102, 105 (2d Cir. 1998) (granting summary judgment where the plaintiffs challenged (*inter*

---

81 (*See* Compl. ¶¶ 81-83.)

82 A forward-looking statement is protected from liability where it is accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." *See* 15 U.S.C. § 78u-5(c)(1)(A)(i); *accord Rombach v. Chang*, 355 F.3d 164, 172-73 (2d Cir. 2004).

83 D'Amelio Rule 56.1 Statement at ¶ 55 ("Our discussions at this meeting will include forward-looking statements. Actual results could differ materially from those projected in the forward-looking statements. The factors that could cause actual results to differ are discussed in Pfizer's 2007 Annual Report on Form 10- K and in our reports on Form 10-Q and Form 8-K.").

alia) the statement of IBM's CFO on an earnings call that "I have no plan, no desire, and I see no need to cut the dividend").[84]

Second, Plaintiffs have offered no evidence that Mr. D'Amelio's statement was intentionally (or unintentionally) false. Plaintiffs have no evidence that Pfizer's dividend cut had anything to do with the settlement of the Government Investigations rather than the $68 billion acquisition of Wyeth in January 2009. (*See infra* at 32-33.) Moreover, Plaintiffs have no evidence that potential liability related to the Government Investigations would have prevented Pfizer from continuing to pay its dividend "at least at current levels" when the statement was made in March 2008. (*See infra* at 33.) Further, Plaintiffs have no evidence that Mr. D'Amelio failed to believe honestly that his statement was correct. (*See infra* at 33-34.) On each of these points, all of the record evidence is just the opposite

Third, Plaintiffs' own damages and loss causation expert, Steven P. Feinstein, has admitted that Mr. D'Amelio's statement did not cause any of Plaintiffs' purported damages. After determining that Pfizer's price decline due to the dividend cut was "modest at most,"[85] Plaintiffs' expert expressly excluded the dividend cut as one of the factors that caused Plaintiffs' damages,[86] fatally undermining Plaintiffs' claim that Mr. D'Amelio's statement is actionable.

For all of these reasons, Plaintiffs' assertion cannot support a claim against Mr. D'Amelio.

---

[84] *See also Gissin v. Endres*, 739 F. Supp. 2d 488, 504-11 (S.D.N.Y. 2010) (holding that statements concerning expectations of future cash flows were forward-looking and not actionable given meaningful cautionary language).

[85] D'Amelio Rule 56.1 Statement at ¶ 66.

[86] D'Amelio Rule 56.1 Statement at ¶ 66.

5. Plaintiffs Have Failed To Establish That Mr. D'Amelio Is Liable For His Statements About Pfizer's Sales Revenue From Lyrica.

Plaintiffs finally contend that Mr. D'Amelio's statements on earnings calls misleadingly failed to disclose that a portion of Pfizer's sales revenue from Lyrica was the result of off-label marketing.[87] Those statements are also not actionable.

First, Plaintiffs do not – and cannot – offer any evidence that Pfizer failed to receive the reported revenue from Lyrica or that the revenue figures were otherwise inaccurate. (Pfizer Br. at 48-49; *infra* at 34.)

Second, Mr. D'Amelio's statements merely repeated information that Pfizer had already publicly disclosed in quarterly earnings releases. *See* Appendix C. Plaintiffs cannot recover for such statements – made after the market already had the information – as a matter of law: "It is clear that a characterization of previously disclosed facts can cause a loss, just not one attributable to the alleged fraud." *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 501, 512-13 (2d Cir. 2010).[88]

Third, Plaintiffs have no evidence that any alleged off-label marketing of Lyrica was material. "In order to be material, a pharmaceutical company's failure to disclose information about a drug must be of sufficient magnitude that the commercial viability of the drug would be called into question if the truth were disclosed." *In re GlaxoSmithKline*, No. 05-cv-3751 (LAP), 2006 WL 2871968, at *10 (S.D.N.Y. Oct. 6, 2006) (granting a dismissal where the alleged "off-label use" represented "a small fraction of total sales" and "[t]he potential loss of a nominal

---

87 (*See* Compl. ¶¶ 84-94 & Ex. B.)

88 *Accord Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 665-66, 668 & n.16 (5th Cir. 2004) (finding that a CEO's reiteration of revenue projections is inactionable because "confirmatory information has already been digested by the market and will not cause a change in stock price. Because the presumption of reliance is based upon actual movement of the stock price, confirmatory information cannot be the basis for a fraud-on-the-market claim").

amount of off-label sales certainly did not threaten the commercial viability of the drug"). It is indisputable that any alleged off-label marketing did not threaten Lyrica's "commercial viability." Its sales revenue has increased after the government settlement, growing from $2.8 billion in 2009 to $4.6 billion in 2013.[89] Thus, any alleged misrepresentation was not material.

Fourth, Plaintiffs may not recover on Mr. D'Amelio's statements about Pfizer's sales revenue from Lyrica. Plaintiffs must identify a "corrective disclosure" concerning Lyrica that "purported to reveal some then-undisclosed fact with regard to the specific misrepresentations alleged in the complaint." *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010). The absence of such a corrective disclosure is "fatal under Second Circuit precedent." *In re Omnicom*, 541 F. Supp. 2d at 551. Pfizer's alleged "corrective disclosures" on January 26, 2009, do not even mention Lyrica, much less correct any prior alleged misrepresentations about the drug. In fact, Lyrica was not identified as part of the Government Investigations and settlement until more than six months later in September 2009 (at which time there was no significant drop in Pfizer's stock price). (Pfizer Br. at 28.) Therefore, Plaintiffs may not recover.

In sum, nothing about Mr. D'Amelio's statements regarding Lyrica can support claims against him.

II. THIS COURT SHOULD GRANT SUMMARY JUDGMENT BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH THAT MR. D'AMELIO ACTED WITH SCIENTER.

To prove their claims against Mr. D'Amelio, Plaintiffs must offer evidence that he acted with scienter – *i.e.*, 'an intent to deceive, manipulate or defraud.'" *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168 (2d Cir. 2000) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)). (*See also* Pfizer Br. at 28-29.) Plaintiffs have no such evidence.

[89] D'Amelio Rule 56.1 Statement at ¶ 75.

Plaintiffs have offered no evidence that Mr. D'Amelio had a motive to commit fraud. In late 2008, Mr. D'Amelio acquired 82,591 shares of Pfizer common stock worth more than $1.5 million in total through the vesting of restricted stock units.[90] Yet even though Mr. D'Amelio could have sold all of that stock at that time – *i.e.*, precisely when Plaintiffs claim that Defendants knew that (1) settlement negotiations concerning the Government Investigations were well underway, (2) the Company's disclosures concerning the Government Investigations and the reserve taken for them were false, and (3) Pfizer's stock price was inflated – Plaintiffs do not and cannot allege that Mr. D'Amelio traded a single share of Pfizer stock during the Class Period.[91] Because he did not. The absence of trading by an individual defendant during the alleged fraud can rebut any inference that he acted with scienter: "[T]he individual defendants had nothing to gain from making the alleged misrepresentations. . . . The absence of stock sales by insiders, or any other evidence of pecuniary gain by company insiders at shareholders' expense, is inconsistent with an intent to defraud shareholders." *In re Northern Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 462-63 (S.D.N.Y. 2000).[92] The fact that Mr. D'Amelio did not sell any of his $1.5 million in Pfizer stock that vested during the Class Period substantially undermines any inference of scienter.

---

90 D'Amelio Rule 56.1 Statement at ¶ 3.

91 (Compl. ¶¶ 127-28.)

92 *Accord Turner v. MagicJack VocalTec, Ltd.*, No. 13-cv-0448, 2014 WL 406917, at *11 (S.D.N.Y. Feb. 3, 2014) ("That three of four individual Defendants, all high-ranking executives at the Company, did not sell stock during the Class Period . . . rebuts an inference of scienter."); *In re SLM Corp. Sec. Litig.*, 740 F. Supp. 2d 542, 558-59 (S.D.N.Y. 2010) ("[T]he absence of sales by [an individual defendant] undermines the claim of scienter against him."); *see also Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1253 (11th Cir. 2008) ("[T]he amended complaint says nothing about suspicious stock transactions by any of the individual defendants, an omission that weighs against inferring scienter."); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1424-25 (9th Cir. 1994) ("[I]f, as Plaintiffs allege, the Officers knew [the company] was heading for financial disaster, they probably would have bailed out of their substantial holdings. Each of the Officer Defendants, by contrast, held onto most of their [company] stock and incurred the same large losses as did the Plaintiffs themselves."); *In re Downey Sec. Litig.*, No. 08-cv-3261-JFW (RZx), 2009 WL 736802, at *14 (C.D. Cal. Mar. 18, 2009) ("A strong inference of scienter is negated when there is an absence of stock sales."); *Thornton v. Micrografx, Inc.*, 878 F. Supp. 931, 938 (N.D. Tex. 1995) (finding that it is a "nonsensical premise" that defendants would "conceal facts and misrepresent information . . . [without] enjoying the fruits of their fraud by selling their stock").

Plaintiffs have also failed to advance evidence that Mr. D'Amelio had an opportunity to commit fraud. The record is undisputed that all of Mr. D'Amelio's statements at issue were vetted and approved by dozens of in-house and outside professionals and that he followed the advice and approvals that they provided to him. Those statements were never made in isolation, but always as part of Pfizer's elaborate disclosure process.

Finally, Plaintiffs have put forth no evidence of conscious misbehavior or recklessness by Mr. D'Amelio. Plaintiffs have no evidence that Mr. D'Amelio believed that any of his statements were inaccurate in any way. In contrast, there is a mountain of undisputed evidence in the record that demonstrates that Mr. D'Amelio's statements were all made in reliance on the advice of Pfizer's counsel and accountants and/or vetted through rigorous processes. Scienter cannot be established where, as here, the defendant relied on the professional judgments of lawyers and accountants. *See Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005); *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001); *Cruden v. Bank of N.Y.*, 957 F.2d 961, 972 (2d Cir. 1992). (*See also* Pfizer Br. at 31.)[93] And the existence of comprehensive disclosure processes, as the record demonstrates here, undercuts any inference of scienter. *See Fannie Mae*, 892 F. Supp. 2d at 69. Accordingly, each of Mr. D'Amelio's statements at issue fails to support a claim and must be dismissed.

A. Plaintiffs Have No Evidence That Mr. D'Amelio Acted With Scienter In Certifying Pfizer's Statements on Compliance and Internal Controls.

All of the evidence developed in this case demonstrates that Mr. D'Amelio relied on Pfizer's rigorous processes and KPMG's independent review when he signed Pfizer's SEC filings (including his SOX certifications):

[93] *Accord S.E.C. v. Shanahan*, 646 F.3d 536, 544-45 (8th Cir. 2011); *In re Fed'l Nat'l Mort. Ass'n Sec., Deriv. & "ERISA" Litig.*, 892 F. Supp. 2d 59, 72 (D.D.C. 2012) ("*Fannie Mae*"); *Newton v. Uniwest Fin. Corp.*, 802 F. Supp. 361, 368 (D. Nev. 1990), *aff'd*, 967 F.2d 340 (9th Cir. 1992).

- ***First***, Mr. D'Amelio relied on the Disclosure Committee to "monitor the integrity and effectiveness of the Company's Disclosure Controls."[94]

- ***Second***, Mr. D'Amelio relied on Certification Meetings to serve as a check on Pfizer's disclosures concerning compliance and internal controls. For example, Loretta Cangialosi, the "chair of the Disclosure Committee,. . . certif[ied] the committee's findings that the disclosure controls and procedures are adequate."[95] Hugh Donnelly, the head of Internal Audit, "certified as to internal control over financial reporting" and the absence of any material weakness in those controls.[96]

- ***Third***, Mr. D'Amelio relied on Audit Committee meetings where Pfizer's Chief Compliance Officer gave updates on the Company's compliance matters, the Bextra investigation, and measures taken to address any compliance risks.[97]

- ***Fourth***, Mr. D'Amelio relied on Quarterly Review meetings where KPMG advised him directly on "risks related to regulatory requirements and compliance, as well as internal detection, investigation and reporting of fraud and misconduct,"[98] and on "sales and marketing compliance,"[99] including "healthcare compliance" in particular.[100]

On this record, there is no basis for Plaintiffs to contend that Mr. D'Amelio acted with scienter in certifying Pfizer's statements that it complied with laws, regulations, and/or its own policies on business conduct and that it had adequate internal controls to guard against off-label marketing practices. Indeed, Mr. D'Amelio's reliance on counsel, KPMG, and Pfizer's robust processes rebuts any inference of scienter. *See, e.g.*, *Steed Fin.*, 148 F. App'x at 69; *Pecarsky*, 249 F.3d at 174; *Fannie Mae*, 892 F. Supp. 2d at 69, 72. (*See also* Pfizer Br. at 31.)

Plaintiffs have no evidence to the contrary. Nothing in the record suggests that Mr. D'Amelio believed that Pfizer's statements were false or misleading in any way. No one raised any concern about Pfizer's disclosures of compliance or internal controls during

---

94 D'Amelio Rule 56.1 Statement at ¶ 27.

95 D'Amelio Rule 56.1 Statement at ¶ 15.

96 D'Amelio Rule 56.1 Statement at ¶ 15.

97 D'Amelio Rule 56.1 Statement at ¶ 30.

98 D'Amelio Rule 56.1 Statement at ¶ 31.

99 D'Amelio Rule 56.1 Statement at ¶ 31.

100 D'Amelio Rule 56.1 Statement at ¶ 31.

Mr. D'Amelio's tenure as CFO. As of July 2007 – months before Mr. D'Amelio joined Pfizer – KPMG concluded that its concerns regarding Pfizer's compliance controls had been fully addressed.[101] KPMG then found in both its 2007 and 2008 audits that Pfizer's "internal controls over financial reporting" were effective.[102] To this day, KPMG stands behind Pfizer's disclosures and the advice that it provided.[103] There is no basis for Plaintiffs' allegations of scienter.

B. Plaintiffs Have No Evidence That Mr. D'Amelio Acted With Scienter In Certifying Pfizer's Disclosures Concerning The Government Investigations.

Once again, all of the evidence in this case shows that Mr. D'Amelio relied on the advice of in-house and outside disclosure counsel and the Company's elaborate processes in certifying Pfizer's disclosures concerning the Government Investigations and related risk of liability.

First, the Government Investigations and resulting risk of liability were thoroughly disclosed to the in-house and outside disclosure counsel (and accountants). Before every quarterly filing, each senior legal division representative provided updates about the Government Investigations, which were compiled by Mr. Fox and shared with Mr. Block as part of the disclosure process. (Pfizer Br. at 6-8.) In addition, Pfizer's Chief Compliance Officer reviewed recent developments regarding the Government Investigations with Mr. Fox and Mr. Block at Disclosure Committee and Certification Meetings; updated Mr. Fox and Mr. Block on developments between meetings as necessary; and discussed with Mr. Fox and Mr. Block potential outcomes, including the risk of debarment, the range of fines in other cases, and views on the $5 billion demand that Pfizer eventually received. (*Id.* at 6-8, 19-20.)

---

[101] D'Amelio Rule 56.1 Statement at ¶ 32.

[102] D'Amelio Rule 56.1 Statement at ¶ 33.

[103] D'Amelio Rule 56.1 Statement at ¶ 53.

In any event, Plaintiffs have put forth no evidence that Mr. D'Amelio thought that the information shared with Mr. Fox and Mr. Block was anything but complete. Mr. D'Amelio was at meetings where Mr. Fox and Mr. Block received comprehensive updates[104] and saw e-mails reflecting the free flow of information between the Chief Compliance Officer and disclosure counsel. For example, an April 7, 2008, e-mail from the Chief Compliance Officer, copying Mr. D'Amelio, states:

> The Boston office has made a monetary request in the Bextra matter. As predicted, it is absurdly high and not even close to anything we would ever consider (nor, for that matter, is it anywhere close to the highest award DOJ has ever obtained in any matter). . . . We have advised Dennis [Block]. We wanted you to be aware as we will be working through our processes to ensure this does not impact reserve or disclosure obligations (the strong collective sense is that it won't.)"[105]

Plaintiffs have no evidence that, when Pfizer's disclosures were made, Mr. D'Amelio believed anything but that the Government Investigations and related risk of liability were thoroughly disclosed to Mr. Fox and Mr. Block (and KPMG).

Second, Mr. D'Amelio sought and received advice from Mr. Fox and Mr. Block on the draft legal disclosures each quarter. Mr. D'Amelio asked questions of them at Disclosure Committee and Certification Meetings before signing the SEC filings (including his SOX certifications) and relied on their answers.[106] As he testified:

> Q: [C]an you explain the process that you went through to become familiar with what the status was of that investigation? . . .
>
> A: Sure. So really it was a combination of things. One was my attendance in audit committee meetings where typically Doug Lankler would get up and give an update on litigation matters including this investigation . . . [W]hen we went through every earnings release process. We have a series of meetings. One is a disclosure committee, one is a certification committee, before I would sign-off on

[104] D'Amelio Rule 56.1 Statement at ¶ 22.

[105] D'Amelio Rule 56.1 Statement at ¶ 23.

[106] D'Amelio Rule 56.1 Statement at ¶¶ 25-26.

> a Q or a K. And those processes included a review of the legal disclosures that were part of those external financial documents.[107]

Third, Mr. D'Amelio relied in good faith on the advice of Mr. Fox and Mr. Block to ensure that Pfizer's legal disclosures were appropriate. Contemporaneous documents demonstrate Mr. D'Amelio's reliance. For example, before Mr. D'Amelio signed each SOX certification, Mr. Block formally certified that the disclosures "d[id] not contain an untrue statement of material fact as of the end of the period covered by such report" and "d[id] not omit a material fact necessary to make the statements . . . not misleading as of the end of the period covered by such report."[108] Moreover, Mr. D'Amelio's testimony confirms that he relied on the advice of Mr. Fox and Mr. Block:

> [There are] certain elements of these disclosures where I rely on certain people who have expertise in areas that I don't. I don't have expertise in legal disclosure. I'm not trained in legal disclosure. So on areas like this I do rely on people who have expertise in this area. Quite frankly, at the time the people that were doing this, people like Dennis and Larry, they have decades, decades worth of experience in this area. Dennis is a securities lawyer expert. So yes, I do rely on other people. I need to sign this, I need to get comfortable. Part of how I get comfortable is I get to know these people. But I'm not in any way saying I'm not responsible for signing the Q or the K, I am. But there are certain areas of this where I do rely on experts to get me comfortable.[109]

In sum, Mr. D'Amelio relied in good faith on the advice of Mr. Fox and Mr. Block and Pfizer's rigorous processes in certifying the Company's disclosures concerning the Government Investigations and related risk of liability. This unrebutted record of Mr. D'Amelio's reliance negates any inference of scienter. *See, e.g.*, *Steed Fin.*, 148 F. App'x at 69; *Fannie Mae*, 892 F. Supp. 2d at 69, 72. (*See also* Pfizer Br. at 31.)

---

[107] D'Amelio Rule 56.1 Statement at ¶ 24.

[108] D'Amelio Rule 56.1 Statement at ¶ 15.

[109] D'Amelio Rule 56.1 Statement at ¶ 26.

Again, Plaintiffs have no evidence to the contrary. The record contains nothing to suggest that Mr. D'Amelio believed that Pfizer's statements were false or misleading. No one – including Mr. Fox and Mr. Block – disagreed with Pfizer's disclosures of the Government Investigations and related risk of liability, much less voiced any disagreement to Mr. D'Amelio. To this day, Mr. Fox and Mr. Block stand behind Pfizer's disclosures and the advice that they provided. (*See id.* at 7-8.) There is no evidence of scienter.

C. Plaintiffs Have No Evidence That Mr. D'Amelio Acted With Scienter In His Judgment Of Whether The Government Investigations Required A Reserve.

All of the evidence in this case shows that Mr. D'Amelio relied on the advice of KPMG and Pfizer's robust processes in accepting the Company's judgment about whether FAS 5 required a reserve for the Government Investigations.

First, the Government Investigations and related risk of liability were thoroughly disclosed to KPMG, which consistently sought and received updates in order to assess Pfizer's obligations under FAS 5. Specifically, KPMG met with the Company's in-house government investigations counsel both as part of its comprehensive quarterly evaluation of Pfizer's reserve and when developments in the Government Investigations required updates during quarters.[110] In addition, KPMG attended Audit Committee meetings where Pfizer's Chief Compliance Officer – who KPMG described as "very open" and "responsive to the committee member's questions"[111] – provided updates on the Government Investigations[112] and Pfizer's General Counsel provided updates on settlement discussions in related litigation.[113]

---

[110] D'Amelio Rule 56.1 Statement at ¶¶ 35-38.

[111] D'Amelio Rule 56.1 Statement at ¶¶ 29, 47.

[112] D'Amelio Rule 56.1 Statement at ¶¶ 28-30, 47.

[113] D'Amelio Rule 56.1 Statement at ¶ 47.

KPMG was "always satisfied with the information that [it] received during the course of those meetings."[114] Mr. Chapman, one of KPMG's signing partners for Pfizer during the Class Period, testified: "I would not leave a meeting unless I was satisfied. We'd still be in a meeting if I wasn't satisfied. The questions will not go away. You get answers to your questions."[115] Mr. Bradley, another of KPMG's signing partners for Pfizer during the Class Period, testified that KPMG would ask questions during each quarterly review or year-end audit concerning updates on legal matters and was never dissatisfied with the "quantity or quality of information" provided by the Company.[116] (*See also* Pfizer Br. at 9-11.)

In any event, Plaintiffs have once again failed to put forth any evidence that Mr. D'Amelio thought that the information shared with KPMG was anything but complete. Mr. D'Amelio attended meetings where KPMG received comprehensive updates on the Government Investigations. He believed that "[t]here's no question that KPMG was very aware of what was going on with the Government investigations and [Bextra] was on their list…this was clearly one of their items that was on their review list consistently."[117] Plaintiffs have no evidence that, at the time that Pfizer's financial statements were disclosed, Mr. D'Amelio believed anything but that the Government Investigations and related risk of liability were thoroughly disclosed to KPMG.

Second, Mr. D'Amelio sought and received advice from KPMG each quarter on whether FAS 5 required a reserve for the Government Investigations. In addition to participating in Certification Meetings and Audit Committee meetings with KPMG, Mr. D'Amelio met directly

---

[114] D'Amelio Rule 56.1 Statement at ¶ 39.

[115] D'Amelio Rule 56.1 Statement at ¶ 39.

[116] D'Amelio Rule 56.1 Statement at ¶ 39.

[117] D'Amelio Rule 56.1 Statement at ¶ 51.

with KPMG during Quarterly Review meetings and "Meetings with CFO" where KPMG advised that FAS 5 required no such reserve (until Q4 2008).[118] That advice tracked KPMG's audit results and opinions. For example, KPMG concluded in its 2007 audit results:

> 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.[119]

Consistent with that advice, KPMG provided unqualified opinions throughout the Class Period that Pfizer's financial statements were accurate, specifically determining each quarter that the Government Investigations did not trigger FAS 5's reserve requirement – until January 2009 when the Company and government reached an agreement in principle. (Pfizer Br. at 35-38.)

Third, Mr. D'Amelio relied in good faith on the advice of KPMG with respect to Pfizer's obligation under FAS 5 to reserve for the Government Investigations. Contemporaneous documents and Mr. D'Amelio's testimony reflect his reliance. For example:

- An October 20, 2007, note from Mr. D'Amelio states that the government investigation into Bextra was on his "radar screen" following a meeting with KPMG during which Pfizer's FAS 5 obligations were discussed as a "watch item."[120]

- A February 5, 2008, e-mail from Mr. D'Amelio to the Controller's office provided "the summary KPMG reviewed with me regarding the Q4/08 book close and earnings release" with a note from Mr. D'Amelio on the FAS 5 considerations for the government investigation into Bextra: "[N]o addt'l accruals required. White paper helped a lot[;] Got John C[hapman] comfortable w/ no add'tl reserves required."[121]

---

[118] D'Amelio Rule 56.1 Statement at ¶ 49.

[119] D'Amelio Rule 56.1 Statement at ¶ 43.

[120] D'Amelio Rule 56.1 Statement at ¶ 52.

[121] D'Amelio Rule 56.1 Statement at ¶ 52.

- Mr. D'Amelio's testimony confirms that he relied on Pfizer's subject matter experts and KPMG – *i.e.*, his "accounting team" and the Controller's office (who were "CPAs with extensive experience in accounting") and "KPMG who goes off and does their own independent assessment of whether or not it's required because they've got to put an opinion in this document" – all of whom "concluded that there was no basis for an accrual."[122]

In sum, Mr. D'Amelio relied in good faith on the advice of KPMG and Pfizer's processes in accepting the Company's judgment that FAS 5 did not require a reserve for the Government Investigations, and this unrebutted record of Mr. D'Amelio's reliance negates any inference of scienter. *See Pecarsky*, 249 F.3d at 174; *Fannie Mae*, 892 F. Supp. 2d at 69, 72. (*See also* Pfizer Br. at 31.)

Once again, Plaintiffs have no evidence to the contrary. There is no indication in the record that any participant in Pfizer's FAS 5 determination – including KPMG – ever told Mr. D'Amelio that a reserve should have been taken earlier than January 2009. (Pfizer Br. at 39, 35-37.) Indeed, the record establishes the careful attention to, and unanimous agreement about, whether and when Pfizer was required to take a reserve. (*Id.*) To this day, KPMG stands by Pfizer's financial statements and the advice that it gave. (*Id.* at 37.) Evidence of scienter is utterly non-existent.

D. Plaintiffs Have No Evidence That Mr. D'Amelio Acted With Scienter In His Statement About Pfizer's Dividend.

Plaintiffs have developed no evidence that Mr. D'Amelio knew that Pfizer would cut its dividend at all, much less as a result of the Government Investigations, when he said on March 5, 2008, that Pfizer "expect[s] to continue" to pay its dividend "at least at current levels" absent "significant unforeseen events."

[122] D'Amelio Rule 56.1 Statement at ¶ 52.

First, Plaintiffs have no evidence that Pfizer cut its dividend because of fines and penalties from the Government Investigations. The record clearly establishes that the dividend cut was strictly a result of Pfizer's acquisition of Wyeth. (*See also* Pfizer Br. at 23-24.)[123] As Mr. D'Amelio testified:

> [T]he Government settlement was a one-time event. The dividend is a perpetual event. So I mentioned if we didn't cut the dividend it would have been 10-1/2 billion a year every year if we didn't increase it. After five years that's a 52-1/2 billion dollar number versus a $2.3 billion one-time event. So that's clearly one reason. That's a big reason . . . [T]he other thing is the acquisition was $68 billion… Don't get me wrong, I don't like writing checks but [the settlement] was a one-time event. Relative to the other items, it was relatively small."[124]

Indeed, contemporaneous documents confirm that it was only in the context of the Wyeth acquisition discussions in late 2008 – months after Mr. D'Amelio's March 2008 statement – that Pfizer considered the possibility of cutting the dividend. For example:

- An e-mail to Mr. D'Amelio's assistant on September 9, 2008, states: "Frank gave me a note today that he would normally hand to you for follow up: He wants an analysis that shows a 50% dividend cut for project Horizon [*i.e.*, the Wyeth acquisition] . . . This if [sic] for follow by on 9/17/2008."[125]

- A PowerPoint presentation sent to Mr. D'Amelio on December 16, 2008, stated: "The dividend cut will result in some shareholder movement, but is not expected to be a drag on P's stock price given the strategic merits of the transaction" and because "[i]nvestors [are] not expecting dividend to remain this high in perpetuity.[126]

Plaintiffs have not put forth a scrap of evidence that the dividend cut was tied to anything but the Wyeth acquisition.

---

123 *See also* D'Amelio Rule 56.1 Statement at ¶¶ 63-65.

124 D'Amelio Rule 56.1 Statement at ¶ 63; *see also id.* at ¶ 64 ("Q. If Pfizer hadn't made the Wyeth acquisition would it have cut its dividend in January of 2009? A. We would not. Q. On January 26th, 2009 there was also an announcement of the settlement between the company and the Government regarding Bextra, correct? A. Yes. Q. Did that settlement play any role at all in Pfizer's decision to cut the dividend? A. It did not.").

125 D'Amelio Rule 56.1 Statement at ¶ 65.

126 D'Amelio Rule 56.1 Statement at ¶ 65.

Second, Plaintiffs have no evidence that Mr. D'Amelio could have foreseen that Pfizer would cut its dividend more than ten months before the Company did so. All of the evidence shows that, when Mr. D'Amelio discussed Pfizer's dividend in March 2008, he believed that it would remain at least at the current level. The materials on which Mr. D'Amelio relied, which were prepared for him by Pfizer's subject matter experts, made clear that Pfizer's dividend was expected to remain strong: "We have a long, proven track record of providing strong, steady dividend, and we see no reason why that can't continue."[127] That remained true four months later, as materials for Pfizer's July 2008 earnings call repeated: "As we've previously stated, unforeseen significant risks and opportunities aside, we expect to continue to generate sufficient cash from operations to fund the dividend at least at the current levels."[128] These documents confirm that Mr. D'Amelio did not and could not foresee Pfizer's dividend cut ten months early.

Third, Mr. D'Amelio relied on Pfizer's processes to vet his statement about the Company's dividend. Mr. D'Amelio's statement was based on presentation materials that had been prepared by Investor Relations and distributed to a wide range of Pfizer's subject matter experts, including Mr. Fox and Legal, Internal Audit, and the Controller's office.[129] Mr. D'Amelio's reliance on this process negates any inference of scienter. *See Fannie Mae*, 892 F. Supp. 2d at 69. Here again, Plaintiffs have no evidence to the contrary. There is nothing in the record to suggest any basis from which to infer that Mr. D'Amelio had any other intent – not a single word of dissent at the time that he spoke in March 2008 or any indication that anyone brought to his attention a different view. The absence of support for Plaintiffs' claims is complete. On this record, there is no basis to find scienter.

---

[127] D'Amelio Rule 56.1 Statement at ¶ 56.

[128] D'Amelio Rule 56.1 Statement at ¶ 59.

[129] D'Amelio Rule 56.1 Statement at ¶ 57.

E. Plaintiffs Have No Evidence That Mr. D'Amelio Acted With Scienter In His Statements About Pfizer's Sales Revenue from Lyrica.

Plaintiffs have no evidence that Mr. D'Amelio's statements reporting the sales revenue from Lyrica on Pfizer's earnings calls were somehow incorrect, much less that Mr. D'Amelio believed them to be incorrect.

First, Plaintiffs have put forth no evidence that any of Mr. D'Amelio's statements concerning Pfizer's sales revenue from Lyrica were inaccurate in any way. It is undisputed that Pfizer received the reported sales revenue from Lyrica. (Pfizer Br. at 48.) As a matter of law, even if those revenue figures included "revenues directly derived from unlawful off-label marketing" as Plaintiffs allege,[130] that does not make them misrepresentations: "Absent an allegation that [defendant] reported income that it did not actually receive, the allegation that a corporation properly reported income that is alleged to have been, in part, improperly obtained is insufficient to impose Section 10(b) liability." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006). (*See also* Pfizer Br. at 48-49.)

Second, Plaintiffs have no evidence that Mr. D'Amelio believed that the statements were inaccurate when he made them. The evidence shows that Mr. D'Amelio's statements on earnings calls had been fully vetted in advance through a robust internal process that included Mr. Fox and Mr. Block (and others in Legal), the Controller's office, and Finance.[131] Mr. D'Amelio relied on this extensive process. As he testified:

> [B]efore we get to this point in an earnings cycle, we've had several meetings with I'll call it just a bunch of people who are involved in the earnings release process. They include people from my team, so controller's organization, investor relations, Treasury, tax, folks from the legal team. Larry Fox is very involved in this entire process. KPMG is involved in this process. Outside counsel is involved in this process. . . . All those folks, those different

[130] (Compl. ¶ 86.)

[131] D'Amelio Rule 56.1 Statement at ¶¶ 68-69.

> organizations that I just referred to have all been through this document in detail.[132]

Indeed, Mr. D'Amelio's statements on earnings calls tracked the statements vetted through Pfizer's internal process. Specifically, Mr. D'Amelio's statements concerning the Company's sales revenue from Lyrica followed – often verbatim – the information in earnings materials. *See* Appendix B. Further, the revenue figures reported by Mr. D'Amelio were the same figures that Pfizer had already reported to investors in press releases the previous day. *See* Appendix C. As is true with his other statements, Mr. D'Amelio's reliance on Pfizer's processes negates any inference of scienter. *See Fannie Mae*, 892 F. Supp. 2d at 69. Yet again, Plaintiffs have no evidence to the contrary. The record contains no suggestion that anyone involved with Pfizer's earnings calls thought that Mr. D'Amelio's statements about the Company's sales revenue from Lyrica were incorrect in any way, much less shared those thoughts with Mr. D'Amelio. Rather, the record establishes only the complete lack of support for Plaintiffs' allegations of scienter.

III. THIS COURT SHOULD GRANT SUMMARY JUDGMENT BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH THAT MR. D'AMELIO CAUSED THEIR PURPORTED LOSSES.

For Mr. D'Amelio to be liable under Section 10(b), Plaintiffs must establish that the "defendant's fraud – rather than other salient factors – that proximately caused plaintiff's loss." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005). Plaintiffs have utterly failed to meet their burden.

First, Plaintiffs have no evidence of loss causation with respect to any of the statements at issue for the reasons set forth in Pfizer's brief:

- Plaintiffs have put forth no evidence of their purported losses in the first place. Plaintiffs' damages and loss causation expert, Dr. Feinstein, opines that Pfizer's stock price included the same amount of inflation on each and every day of the

[132] D'Amelio Rule 56.1 Statement at ¶ 70.

Class Period. That opinion – which is inconsistent with the facts, the law, Plaintiffs' other expert opinions, and the Amended Complaint – is unfounded and unreliable. Without a reliable (or admissible) opinion on damages, Plaintiffs cannot establish any purported losses. (*See* Pfizer Br. at 58-61.)

- The supposed "corrective disclosure" identified by Plaintiffs – *i.e.*, the statement in Pfizer's Q4 2008 earnings release that "[f]ourth quarter 2008 results were impacted by a $2.3 billion pre-tax and after-tax charge resulting from an agreement in principle . . . to resolve previously disclosed investigations regarding allegations of past off-label promotional practices concerning Bextra, as well as other open investigations"[133] – did not disclose that any of the Company's prior statements were false or misleading. Accordingly, Plaintiffs' purported losses resulting from the decline in Pfizer's stock price following that earnings release were not caused by any of the statements at issue. (*See* Pfizer Br. at 53-55.)

- Plaintiffs cannot disaggregate the effect (if any) of the announcement of the agreement in principle from the admitted effects of the announcements of the $68 billion acquisition of Wyeth, the dividend cut, and lower-than-expected 2009 earnings guidance on the same day. Since Plaintiffs have failed to show that any of their purported losses were caused by the announcement of the agreement in principle, as opposed to the announcements of these other three major events, they cannot establish loss causation. (*See* Pfizer Br. at 55-58.)

Second, Plaintiffs have no evidence of loss causation with respect to any of Mr. D'Amelio's specific statements at issue. Plaintiffs cannot carry their burden simply by offering an expert to "blame[ ] it all on the defendants." *See Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Boston*, 853 F. Supp. 2d 181, 191 (D. Mass. 2012), *aff'd*, 752 F.3d 82 (1st Cir. 2014); *accord Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 157-58 (2d Cir. 2007) (affirming dismissal where the plaintiff failed to disaggregate the losses caused by the defendant's statements from those caused by another's statements). Yet that is precisely what Plaintiffs try to do. They have failed to disaggregate any supposed losses caused by Mr. D'Amelio's statements from any supposed losses caused by the statements of others and, as a result, there is "simply no way for a juror to determine whether [Mr. D'Amelio's] alleged fraud caused any portion of Plaintiffs' loss." *Omnicom*, 541 F. Supp. 2d at 554.

[133] D'Amelio Rule 56.1 Statement at ¶ 73.

Indeed, Plaintiffs do not and cannot identify any losses caused by Mr. D'Amelio's statements. Dr. Feinstein lumped together in his report the statements during the Class Period that, in his view, caused Plaintiffs' purported losses.[134] Dr. Feinstein then admitted during his deposition that he did not and could not determine whether any particular statement caused any losses to Plaintiffs.[135] In fact, Dr. Feinstein conceded that the losses attributable to individual statements – *e.g.*, Mr. D'Amelio's specific statements – were not part of, and were irrelevant to, his analysis.[136] Since Plaintiffs do not even attempt to show that his statements caused any purported losses, Mr. D'Amelio cannot be liable. *See WM High Yield Fund v. O'Hanlon*, No. 04-3423, 2013 WL 3230667, at *11-12 (E.D. Pa. June 27, 2013) (granting summary judgment in part because the plaintiffs assumed that damages were "due to the collective fraud of all named defendants" and failed to show what portion of the alleged damages "were related or unrelated to the fraud allegedly committed by the numerous [other] Defendants").[137]

IV. THIS COURT SHOULD GRANT SUMMARY JUDGMENT BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH THAT MR. D'AMELIO ACTED AS A CONTROL PERSON.

Control person liability under Section 20(a) requires (1) a primary violation; (2) Mr. D'Amelio's control of the primary violator; and (3) Mr. D'Amelio's culpable

[134] D'Amelio Rule 56.1 Statement at ¶ 76. Mr. Feinstein has admitted that he did not perform any analysis of "when and how the inflation first got into the stock price," let alone an analysis of which statements at issue caused the supposed inflation. *See id.* at ¶ 77.

[135] D'Amelio Rule 56.1 Statement at ¶ 78 ("Q. So there's not a single statement that's identified in the complaint that caused the inflation to increase during the class period. . . . [W]e looked at 41 that are in [Exhibit B]. There are more in the Complaint. There's not a single statement that was made by Pfizer or a Pfizer employee during the class period that . . . added inflation to the stock. A. Correct.").

[136] D'Amelio Rule 56.1 Statement at ¶ 79 ("[I]f it's determined by the trier of fact that a particular statement was not responsible for the deception, then I would accept that that statement was not responsible for the $1.26 deception. Other statements were.").

[137] In addition, Mr. Feinstein's opinions are inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), as set forth in Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein, which Mr. D'Amelio incorporates by reference. For that reason as well, Plaintiffs cannot show that Mr. D'Amelio's statements caused any of their purported losses. *See, e.g., In re Pfizer Inc. Sec. Litig.*, No. 04-cv-9866 (LTS) (HBP), 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014) (granting summary judgment after excluding the plaintiff's expert report on loss causation).

participation in the primary violation. *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014). If the plaintiff establishes each of these elements, "the burden shifts to the defendant to show that he acted in good faith, and that he did not directly or indirectly induce the act or acts constituting the violation." *S.E.C. v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472-73 (2d Cir. 1996) (citations and internal quotation marks omitted). Plaintiffs have failed to satisfy their burden of establishing control person liability and, in any event, the unrebutted evidence demonstrates that Mr. D'Amelio acted in good faith.

First, Plaintiffs have no evidence that someone controlled by Mr. D'Amelio committed a Section 10(b) violation for all of the reasons set forth above and in Pfizer's brief.[138]

Second, Plaintiffs have no evidence of Mr. D'Amelio's culpable participation in the alleged fraud. "This culpable participation requirement of [Section] 20(a) is similar to the scienter requirement of Section 10(b)" – *i.e.*, a plaintiff must have "facts giving rise to a strong inference that the controlling person knew or should have known that the primary violator, over whom that person had control, was engaging in fraudulent conduct." *Levy v. Maggiore*, No. 13-cv-2219 (MKB), 2014 WL 4803936, at *21 (E.D.N.Y. Sept. 29, 2014) (internal quotation marks omitted).[139] Plaintiffs offer no evidence of Mr. D'Amelio's scienter with respect to his own statements and, similarly, offer no evidence of Mr. D'Amelio's culpable participation with respect to any other statements. *See supra* at 21-34.

---

[138] Should the Court determine that a genuine issue of material fact exists as to whether another defendant committed a primary violation of Section 10(b), Mr. D'Amelio 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).

[139] *Accord In re ShengdaTech, Inc. Sec. Litig.*, No. 11-cv-1918 (LGS), 2014 WL 3928606, at *10 & n.1 (S.D.N.Y. Aug. 12, 2014) ("The Court agrees with those courts holding that a plaintiff must sufficiently plead culpable participation as a separate scienter element of control person liability under § 20(a) . . ."); *In re Corning, Inc. Sec. Litig.*, 349 F. Supp. 2d 698, 722 (S.D.N.Y. 2004) (granting summary judgment for the defendant where the plaintiff failed to establish the defendant's "culpable participation" in the securities violation).

Third, all of the record evidence demonstrates that Mr. D'Amelio acted in good faith. "To meet the burden of establishing good faith, the controlling person must prove that he exercised due care in his supervision of the violator's activities in that he maintained and enforced a reasonable and proper system of supervision and internal control." *First Jersey*, 101 F.3d at 1472-73 (internal quotation marks omitted). It is indisputable that Mr. D'Amelio participated with in-house and outside counsel, independent accountants and auditors, and other Pfizer executives and subject matter experts in a series of rigorous, comprehensive processes that "maintained and enforced a reasonable and proper system of supervision and internal control" over all of the statements at issue. *See supra* at 5-13.

Therefore, Mr. D'Amelio is not liable as a control person under Section 20(a).

CONCLUSION

For the foregoing reasons, this Court should grant Mr. D'Amelio's motion for summary judgment on all of Plaintiffs' claims against him.

Dated: October 30, 2014

Respectfully submitted,

/s/ Richard M. Strassberg
Richard M. Strassberg
Daniel Roeser
Goodwin Procter LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018
Tel.: 212.813.8800
Fax: 212.355.3333
rstrassberg@goodwinprocter.com
droeser@goodwinprocter.com

Counsel for Defendant Frank D'Amelio

CERTIFICATE OF SERVICE

I, Richard M. Strassberg, hereby certify that on October 30, 2014, a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies shall be served by first class mail postage prepaid on all counsel of record who are not served through the CM/ECF system.

/s/ Richard M. Strassberg
Richard M. Strassberg

Appendix A

Disclosure Committee and Certification Meetings Concerning Securities Filings in Which Mr. D'Amelio Participated During the Class Period

Securities Filing	Disclosure Committee Meetings	Certification Meeting
Pfizer Inc., Quarterly Report (Form 10-Q) (11/5/2007)	10/30/2007 Petrosinelli Ex. V-6, PFE-JONES 00036782 (Minutes)	11/1/2007 Petrosinelli Ex. B-4, PFE-JONES 00036812 (Minutes)
Pfizer Inc., Annual Report (Form 10-K) (2/29/2008)	2/26/2008 Petrosinelli Ex. V-6, PFE-JONES 00036853 (Minutes)	2/27/2008 Petrosinelli Ex. B-4, PFE-JONES 00036882 (Minutes)
Pfizer Inc., Quarterly Report (Form 10-Q) (5/2/2008)	4/28/2008 Petrosinelli Ex. V-6, PFE-JONES 00035688 (Minutes)	4/30/2008 Petrosinelli Ex. B-4, PFE-JONES 00036947 (Minutes)
Pfizer Inc., Quarterly Report (Form 10-Q) (8/8/2008)	8/5/2008 Petrosinelli Ex. V-6, PFE-JONES 00037016 (Minutes)	8/6/2008 Petrosinelli Ex. B-4, PFE-JONES 00037021 (Minutes)
Pfizer Inc., Quarterly Report (Form 10-Q) (11/7/2008)	11/3/2008 Petrosinelli Ex. V-6, PFE-JONES 00037044 (Minutes)	11/5/2008 Petrosinelli Ex. B-4, PFE-JONES 00037056 (Minutes)

Appendix B

Comparison Between Prepared Earnings Materials and Mr. D'Amelio's Statements at Issue on Earnings Calls

Earnings Call	Prepared Earnings Materials	Mr. D'Amelio's Statement at Issue
Q3 2007 Earnings Call (10/18/2007)	"Lyrica **grew 37% to $465 million in the quarter,** compared to the same period last year, and it has delivered $1.3 billion in revenues through the end of the third quarter." Strassberg Ex. W-D, PFE DERIV 01028837 at -838 (10/17/2007 e-mail from Loretta Ucelli to Frank D'Amelio and others (attaching PFE DERIV 01028840 at -841, "11am Version of Jeff's Call Script")) (emphasis added).	"I would also like to emphasize the strong growth being delivered by our key new products. . . . Revenues of Lyrica, our medicine for the management of neuropathic pain and most recently fibromyalgia, **increased 37% to $465 million**." (Compl. Ex. B at ¶ 29 (emphasis in original).)
Q4 2007 Earnings Call (1/23/2008)	"**Lyrica, our medicine for the management of neuropathic pain and more recently fibromyalgia, delivered revenues of $564 million, an increase of 60 percent compared with the year-ago quarter**." Strassberg Ex. Z-D, PFE DERIV 01030599 (1/21/2008 e-mail from Jeff Kindler (attaching PFE DERIV 01030601 at -606, "Qtr 4 FDA Script 012008 7pm")) (emphasis added).	**"Lyrica, our medicine for the management of neuropathic pain and, more recently, fibromyalgia, delivered revenues of 564 million, an increase of 60% compared with the year-ago quarter."** (Compl. Ex. B at ¶ 32 (emphasis in original).)
	"**Our new products, especially Lyrica . . . continued to deliver strong growth and partially offset decreasing revenues from products that have lost exclusivity**." Strassberg Ex. Z-D, PFE DERIV 01030599 (1/21/2008 e-mail from Jeff Kindler (attaching PFE DERIV 01030601 at -608, "Qtr 4 FDA Script 012008 7pm")) (emphasis added).	**"Our new products, especially Lyrica . . . continued to deliver strong growth, and partially offset decreasing revenues from products that have lost exclusivity."** (Compl. Ex. B at ¶ 32 (emphasis in original).)
Q1 2008 Earnings Call (4/17/2008)	"**Lyrica Q1 global sales were up 47% to $582M**." Strassberg Ex. HH-D, PFE DERIV 01003429 at -447 ("Anticipated Investor Q&A – 1Q08 Conference Call") (emphasis added).	"Lyrica, the only FDA approved treatment for fibromyalgia, continued to deliver strong performance, **with revenues of $582 million, an increase of 47% year over year**." (Compl. Ex. B at ¶ 35 (emphasis in original).)
Q3 2008 Earnings Call (10/21/2008)	**"We continue to see steady growth from several key products—including Lyrica . . . "** Strassberg Ex. S-D, PFE DERIV 01143501 (10/21/2008 e-mail from Suzanne Harnett regarding "Third Quarter Earnings – Final Materials" (attaching PFE DERIV 01143504 at -512, "FINAL FDA SCRIPT")) (emphasis added).	**"We continue to see steady growth from several key products including Lyrica**." (Compl. Ex. B at ¶ 42 (emphasis in original).)

Appendix C

Comparison Between Pfizer's Press Releases and Mr. D'Amelio's Statements at Issue on Earnings Calls

Earnings Call	Pfizer's Press Release	Mr. D'Amelio's Statement at Issue
Q3 2007 Earnings Call (10/18/2007)	"**Lyrica revenues grew 37% to $465 million in the third quarter of 2007** compared to the same period last year. Lyrica's growth continues to be fueled by strong efficacy as well as high patient and physician satisfaction in the marketplace." Strassberg Ex. H-D (Press Release, Pfizer Reports Third-Quarter 2007 Results; Reconfirms 2007 and 2008 Revenue and Adjusted Diluted EPS Guidance (Oct. 17, 2007) (emphasis added).)	"I would also like to emphasize the strong growth being delivered by our key new products. . . . Revenues of **Lyrica, our medicine for the management of neuropathic pain and most recently fibromyalgia**, increased **37% to $465 million**." (Compl. Ex. B at ¶ 29 (emphasis in original).)
Q4 2007 Earnings Call (1/23/2008)	"In the fourth-quarter 2007, Lyrica **revenues were $564 million, an increase of 60%** compared with the prior-year quarter." Strassberg Ex. I-D (Press Release, Pfizer Reports Fourth-Quarter and Full-Year 2007 Results and 2008 Financial Guidance (Jan. 22, 2008) (emphasis added).)	"Lyrica, our medicine for the management of neuropathic pain and, more recently, fibromyalgia, delivered **revenues of 564 million, an increase of 60%** compared with the year-ago quarter." (Compl. Ex. B at ¶ 32 (emphasis in original).)
	"**Our new products – Lyrica . . . are performing well**." Strassberg Ex. I-D (Press Release, Pfizer Reports Fourth-Quarter and Full-Year 2007 Results and 2008 Financial Guidance (Jan. 22, 2008) (emphasis added).)	**"Our new products, especially Lyrica . . . continued to deliver strong growth, and partially offset decreasing revenues from products that have lost exclusivity."** (Compl. Ex. B at ¶ 32 (emphasis in original).)
Q1 2008 Earnings Call (4/17/2008)	"In the first-quarter 2008, Lyrica **revenues were $582 million, an increase of 47% compared with the prior-year quarter** driven by strong efficacy and high patient and physician satisfaction in the marketplace, particularly in managing fibromyalgia." Strassberg Ex. K-D (Press Release, Pfizer Reports First-Quarter 2008 Results; Reaffirms Full-Year 2008 Financial Guidance (Apr. 16, 2008) (emphasis added).)	"Lyrica, the only FDA approved treatment for fibromyalgia, continued to deliver strong performance, with **revenues of $582 million, an increase of 47% year over year**." (Compl. Ex. B at ¶ 35 (emphasis in original).)
Q3 2008 Earnings Call (10/21/2008)	"**Lyrica revenues in third-quarter 2008 were $675 million, an increase of 45% compared with the prior-year quarter.** . . . In the U.S., Lyrica revenues rose to $379 million, an increase of 40% compared with the prior-year quarter, while international revenues grew to $296 million, an increase of 51% primarily from operational growth." Strassberg Ex. L-D (Press Release, Pfizer Reports Third Quarter 2008 Results (Oct. 20, 2008) (emphasis added).)	**"We continue to see steady growth from several key products including Lyrica**." (Compl. Ex. B at ¶ 42 (emphasis in original).)

Appendix D

Alleged Statements That Are Not Actionable Because They Are Not Attributable to Mr. D'Amelio

	Disclosure Date	Alleged Disclosure Event	Complaint Reference	Mr. D'Amelio Not Liable
1	1/19/2006	Pfizer Press Release	¶¶ 78, 84; Ex. B Item 1	Made before Mr. D'Amelio's arrival.
2	1/19/2006	Pfizer Q4 2005 Earnings Call	Ex. B Item 2	Made before Mr. D'Amelio's arrival.
3	1/19/2006	Pfizer Q4 2005 Earnings Call	¶ 90; Ex. B Item 3	Made before Mr. D'Amelio's arrival.
4	2/10/2006	Pfizer Analyst Meeting	¶ 88; Ex. B Item 4	Made before Mr. D'Amelio's arrival.
5	2/10/2006	Pfizer Analyst Meeting	¶ 88; Ex. B Item 5	Made before Mr. D'Amelio's arrival.
6	2/10/2006	Pfizer Analyst Meeting	¶ 88; Ex. B Item 6	Made before Mr. D'Amelio's arrival.
7	2/10/2006	Pfizer Analyst Meeting	¶ 88; Ex. B Item 7	Made before Mr. D'Amelio's arrival.
8	2/10/2006	Pfizer Analyst Meeting	¶ 88; Ex. B Item 8	Made before Mr. D'Amelio's arrival.
9	2/10/2006	Pfizer Analyst Meeting	¶ 88; Ex. B Item 9	Made before Mr. D'Amelio's arrival.
10	2/10/2006	Pfizer Analyst Meeting	¶ 88; Ex. B Item 10	Made before Mr. D'Amelio's arrival.
11	3/1/2006	Pfizer Form 10-K for 2005	¶¶ 58, 60, 61, 62, 63, 65, 68, 69, 77, 78	Made before Mr. D'Amelio's arrival.
12	4/19/2006	Pfizer Press Release	¶¶ 78, 84, 88; Ex. B Item 11	Made before Mr. D'Amelio's arrival.
13	4/19/2006	Pfizer Q1 2006 Earnings Call	¶¶ 84, 92; Ex. B Item 12	Made before Mr. D'Amelio's arrival.
14	4/19/2006	Pfizer Q1 2006 Earnings Call	¶ 84; Ex. B Item 13	Made before Mr. D'Amelio's arrival.

	Disclosure Date	Alleged Disclosure Event	Complaint Reference	Mr. D'Amelio Not Liable
15	4/19/2006	Pfizer Q1 2006 Earnings Call	¶¶ 84; Ex. B Item 14	Made before Mr. D'Amelio's arrival.
16	5/2/2006	Deutsche Bank Securities Healthcare Conference	¶ 84; Ex. B Item 15	Made before Mr. D'Amelio's arrival.
17	5/08/2006	Pfizer Form 10-Q for Q1 2006	¶¶ 65, 68, 78; Ex. B Item 16	Made before Mr. D'Amelio's arrival.
18	7/20/2006	Pfizer Press Release	¶ 78; Ex. B Item 17	Made before Mr. D'Amelio's arrival.
19	7/20/2006	Pfizer Q2 2006 Earnings Call	Ex. B Item 18	Made before Mr. D'Amelio's arrival.
20	7/20/2006	Pfizer Q2 2006 Earnings Call	¶ 90; Ex. B Item 19	Made before Mr. D'Amelio's arrival.
21	8/11/2006	Pfizer Form 10-Q for Q2 2006	¶¶ 65, 68, 78; Ex. B Item 20	Made before Mr. D'Amelio's arrival.
22	10/19/2006	Pfizer Press Release	¶ 78; Ex. B Item 21	Made before Mr. D'Amelio's arrival.
23	10/19/2006	Pfizer Q3 2006 Earnings Call	Ex. B Item 22	Made before Mr. D'Amelio's arrival.
24	11/3/2006	Pfizer Form 10-Q for Q3 2006	¶¶ 65, 68, 78	Made before Mr. D'Amelio's arrival.
25	1/22/2007	Pfizer Analyst Meeting	Ex. B Item 23	Made before Mr. D'Amelio's arrival.
26	1/22/2007	Pfizer Analyst Meeting	Ex. B Item 24	Made before Mr. D'Amelio's arrival.
27	3/1/2007	Pfizer Form 10-K for 2006	¶¶ 58, 60, 61, 62, 63, 65, 68, 70, 77, 78	Made before Mr. D'Amelio's arrival.
28	4/20/2007	Pfizer Press Release	¶ 78; Ex. B Item 25	Made before Mr. D'Amelio's arrival.
29	5/4/2007	Pfizer Form 10-Q for Q1 2007	¶¶ 65, 68, 78	Made before Mr. D'Amelio's arrival.
30	8/6/2007	Pfizer Form 10-Q for Q2 2007	¶¶ 65, 68, 78	Made before Mr. D'Amelio's arrival.

	Disclosure Date	Alleged Disclosure Event	Complaint Reference	Mr. D'Amelio Not Liable
31	10/18/2007	Pfizer Press Release	¶ 78; Ex. B Item 26	Pfizer statement not made by Mr. D'Amelio.
32	10/18/2007	Pfizer Q3 2007 Earnings Call	Ex. B Item 28	Oral statement not made by Mr. D'Amelio.
33	1/23/2008	Pfizer Press Release	¶ 78; Ex. B Item 30	Pfizer statement not made by Mr. D'Amelio.
34	1/23/2008	Pfizer Q4 2007 Earnings Call	Ex. B Item 31	Oral statement not made by Mr. D'Amelio.
35	3/5/2008	Pfizer Analyst Meeting	¶ 81; Ex. B Item 33	Oral statement not made by Mr. D'Amelio.
36	4/17/2008	Pfizer Press Release	¶ 78; Ex. B. Item 34	Pfizer statement not made by Mr. D'Amelio.
37	5/5/2008	Deutsche Bank Securities Healthcare Conference	Ex. B Item 36	Oral statement not made by Mr. D'Amelio.
38	7/23/2008	Pfizer Q2 2008 Earnings Call	Ex B Item 37	Pfizer statement not made by Mr. D'Amelio.
39	7/23/2008	Pfizer Q2 2008 Earnings Call	Ex. B Item 38	Oral statement not made by Mr. D'Amelio.
40	9/22/2008	UBS Global Life Sciences Conference	¶ 91; Ex. B Item 39	Oral statement not made by Mr. D'Amelio.
41	10/21/2008	Pfizer Press Release	¶¶ 78, 92; Ex. B Item 40	Pfizer statement not made by Mr. D'Amelio.
42	10/21/2008	Pfizer Q3 2008 Earnings Call	Ex B Item 41	Oral statement not made by Mr. D'Amelio.