

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF UNDISPUTED FACTS 3

 A. McKinnell’s Relationship with Pfizer 3

 B. McKinnell’s Understanding of Pfizer’s Controls 3

 C. McKinnell’s Response to the July 2005 FDA Letter 4

 D. McKinnell’s Knowledge of the Government Investigations 4

 E. McKinnell’s Reliance on Robust Processes and Informed
 Counsel and Auditors 7

ARGUMENT 10

I. MCKINNELL IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’
 SECTION 10(b) CLAIM 10

 A. McKinnell Is Entitled To Summary Judgment With Respect To
 (1) Statements Made After He Left Pfizer And (2) Oral Statements Made
 By Others 10

 B. McKinnell Is Entitled To Summary Judgment Because There Is No
 Evidence That He Acted With Scienter 11

 1. There Is No Evidence That McKinnell Acted With Scienter 11

 2. McKinnell Relied In Good Faith On The Advice Of Pfizer’s
 Counsel And Auditors 16

 C. McKinnell Is Entitled To Summary Judgment Because Plaintiffs Cannot
 Establish Loss Causation Or Damages As To McKinnell 17

 D. McKinnell Is Entitled To Summary Judgment With Respect To Statements
 Regarding (1) Pfizer’s Policies And (2) The Efficacy, Safety And Sales
 Revenues Of Lyrica, Geodon And Zyvox 21

II. MCKINNELL IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’
 SECTION 20(a) CLAIM 24

CONCLUSION 25

APPENDIX Attachment

DECLARATION OF SCOTT D. MUSOFF (filed under separate cover)

Excerpts from Transcript of 11/11/13 Deposition of Henry A. McKinnell.....	Ex. A-M
Excerpts from Transcript of 09/19/14 Deposition of Henry A. McKinnell.....	Ex. B-M
August 3, 2005 Correspondence (PFE DERIV 00040339)	Ex. C-M
December 12, 2005 Compliance Update (PFE-JONES 00006634 through PFE-JONES 00006636).....	Ex. D-M
Excerpts from Pfizer's Form 14A, Definitive Proxy Statement filed with the Securities and Exchange Commission on March 16, 2006.....	Ex. E-M

TABLE OF AUTHORITIES

Cases

<i>Acito v. IMCERA Group, Inc.</i> , 47 F.3d 47 (2d Cir. 1995)	15
<i>ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.</i> , 493 F.3d 87 (2d Cir. 2007)	24
<i>Barbosa v. 1 World Trade Ctr. L.L.C.</i> , Nos. 06 Civ. 1649 (AKH), 21 MC 102 (AKH), 2014 WL 2979129 (S.D.N.Y. July 2, 2014)	10
<i>Bell v. Metro. Transp. Auth.</i> , No. 12 Civ. 1235 (AKH), 2013 WL 8112461 (S.D.N.Y. Nov. 1, 2013)	10
<i>Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC</i> , 853 F. Supp. 2d 181 (D. Mass. 2012), <i>aff'd</i> 752 F.3d 82 (1st Cir. 2014)	18, 21
<i>Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC</i> , 752 F.3d 82 (1st Cir. 2014)	18
<i>Dura Pharm., Inc. v. Broudo</i> , 544 U.S. 336 (2005)	2, 18
<i>ECA & Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.</i> , 553 F.3d 187 (2d Cir. 2009)	23
<i>Fait v. Regions Fin. Corp.</i> , 655 F.3d 105 (2d Cir. 2011)	12
<i>Gissin v. Endres</i> , 739 F. Supp. 2d 488 (S.D.N.Y. 2010)	23
<i>Glaser v. The9, Ltd.</i> , 772 F. Supp. 2d 573 (S.D.N.Y. 2011)	14
<i>Gordon Partners v. Blumenthal</i> , No. 02 Civ. 7377 (LAK) (AJP), 2007 WL 431864 (S.D.N.Y. Feb. 9, 2007), report and recommendation adopted by, 2007 WL 1438753 (S.D.N.Y. May 16, 2007), <i>aff'd</i> , 293 F. App'x 815 (2d Cir. 2008)	18
<i>Hubbard v. BankAtlantic Bancorp, Inc.</i> , 688 F.3d 713 (11th Cir. 2012)	18
<i>In re Bristol-Meyers Squibb Sec. Litig.</i> , 312 F. Supp. 2d 549 (S.D.N.Y. 2004)	14
<i>In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.</i> , 892 F. Supp. 2d 59 (D.D.C. 2012)	15, 17
<i>In re Omnicom Grp., Inc. Sec. Litig.</i> , 541 F. Supp. 2d 546 (S.D.N.Y. 2008), <i>aff'd</i> , 597 F.3d 501 (2d Cir. 2010)	2, 17, 20
<i>In re Pfizer Inc. Sec. Litig.</i> , No. 04 Civ. 9866 (LTS) (HBP), 2014 WL 2136053 (S.D.N.Y. May 21, 2014)	21

In re Pfizer Inc. Sec. Litig., No. 04 Civ. 9866 (LTS) (HBP),
2014 WL 3291230 (S.D.N.Y. July 8, 2014)2

In re REMEC Inc. Sec. Litig., 702 F. Supp. 2d 1202 (S.D. Cal. 2010).....17

In re Splash Tech. Holdings, Inc. Sec. Litig., 160 F. Supp. 2d 1059 (N.D. Cal. 2001)23

In re WebMD Health Corp. Sec. Litig., No. 11-cv-5382 (JFK),
2013 WL 64511 (S.D.N.Y. Jan. 2, 2013)23

In re Williams Sec. Litig., 558 F.3d 1130 (10th Cir. 2009)18

Janus Capital Group, Inc. v. First Derivative Traders,
564 U.S. ___, 131 S. Ct. 2296 (2011).....2, 10, 21

Kalnit v. Eichler, 264 F.3d 131 (2d Cir. 2001).....15

Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147 (2d Cir. 2007).....2, 21

Lentell v. Merrill Lynch & Co., 393 F.3d 161 (2d Cir. 2005).....18

Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167 (2d Cir. 2001).....16

Phillips v. Scientific-Atlanta, Inc., 489 F. App’x 339 (11th Cir. 2012).....18

Pivot Point Capital Master LP v. Deutsche Bank AG, No. 08 Civ. 2788 (AKH),
2010 WL 9452230 (S.D.N.Y. Dec. 9, 2010)11

Rothman v. Gregor, 220 F.3d 81 (2d Cir. 2000).....14

S. Cherry St., LLC v. Hennessee Grp. LLC, 573 F.3d 98 (2d Cir. 2009).....11, 14

Steed Fin. LDC v. Nomura Sec. Int’l, Inc., No. 00 Civ. 8058 (NRB),
2004 WL 2072536 (S.D.N.Y. Sept. 14, 2004),
aff’d, 148 F. App’x 66 (2d Cir. 2005).....2, 17

Steed Fin. LDC v. Nomura Sec. Int’l, Inc., 148 F. App’x 66 (2d Cir. 2005).....16

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).....11

WM High Yield Fund v. O’Hanlon, No. 04-3423, 2013 WL 3230776
(E.D. Pa. June 27, 2013)21

Statutes and Rules

15 U.S.C. § 78j..... *passim*

15 U.S.C. § 78u-523

Fed. R. Civ. P. 56.....1

Defendant Henry A. McKinnell (“McKinnell”) respectfully submits this memorandum of law in support of his motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.¹

PRELIMINARY STATEMENT

McKinnell joined Pfizer Inc. (“Pfizer” or the “Company”) in 1971 and served as its Chief Executive Officer from January 1, 2001 until July 31, 2006. To ensure an orderly transition of responsibilities following his departure as Chief Executive Officer, McKinnell continued to serve as the Chairman of Pfizer’s Board of Directors and as a Pfizer employee from August 1, 2006 until February 28, 2007. McKinnell therefore was at Pfizer for less than 14 months – and served as an officer for only the first 6 months – of the 36-month Class Period (January 19, 2006 through January 23, 2009). During the last 22 months of the Class Period, McKinnell was retired from Pfizer: he was not at Pfizer when Pfizer learned of the government’s investigation regarding marketing practices relating to Lyrica, Geodon and Zyvox; he did not participate in the discussions that led to the ultimate resolution of the government investigations that underlie this case; he had no role in Pfizer’s decision to settle the matters; and he did not have any involvement in any of the statements made by Pfizer.

Notwithstanding McKinnell’s early, limited role in the government investigations underlying this action and his lack of any role in the statements made by Pfizer during the vast majority of the Class Period, Plaintiffs seek to hold McKinnell liable for all the damages they claim the Class suffered. While Plaintiffs’ claims are unsustainable with respect to all

¹ McKinnell adopts and incorporates by reference the points, arguments, and authorities set forth in (i) Pfizer’s Memorandum of Law in Support of Its Motion for Summary Judgment (“Pfizer Brief”), (ii) Pfizer’s Rule 56.1 Statement of Undisputed Facts in Support of Pfizer’s Motion for Summary Judgment, and, to the extent applicable, (iii) the Memoranda of Law filed by the other individual defendants in support of their Motions for Summary Judgment.

Defendants, including McKinnell, for the reasons set forth in Pfizer's Brief, this motion sets forth additional reasons why Plaintiffs' claims are untenable with respect to McKinnell:

- First, McKinnell cannot be held liable for statements he did not make. *See Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. ___, 131 S. Ct. 2296 (2011). He therefore cannot be held liable for (i) any statements made after Pfizer's 2006 Form 10-K or (ii) oral statements made by others. (*See* Section I.A, *infra*.)
- Second, the undisputed record – including McKinnell's appropriate and good faith reliance on the advice of Pfizer's counsel and auditors – demonstrates a complete lack of scienter with respect to the few statements McKinnell did make during the Class Period. *See Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, No. 00 Civ. 8058 (NRB), 2004 WL 2072536, at *9 (S.D.N.Y. Sept. 14, 2004) (Buchwald, J.) (granting summary judgment in favor of defendants where plaintiff could not demonstrate that defendants "acted with an intent to deceive, manipulate, or defraud") (internal quotation marks and citation omitted), *aff'd*, 148 F. App'x 66 (2d Cir. 2005). (*See* Section I.B, *infra*.)
- Third, Plaintiffs have failed to disaggregate the damages allegedly caused by McKinnell's early statements from the damages purportedly caused by statements made later in the Class Period, thereby violating principles of loss causation set forth in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). *See Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007) (affirming dismissal of a complaint that failed to disaggregate losses caused by the defendant's misstatements from those caused by a non-party's misstatements); *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008) ("[T]he law requires the disaggregation of [all] confounding factors[;] disaggregating only *some* of them cannot suffice to establish that the alleged misrepresentations actually caused Plaintiffs' loss."), *aff'd*, 597 F.3d 501 (2d Cir. 2010); *In re Pfizer Inc. Sec. Litig.*, No. 04 Civ. 9866 (LTS) (HBP), 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014) (Swain, J.) (granting summary judgment after excluding plaintiff's expert report on loss causation). (*See* Section I.C, *infra*.)
- Fourth, statements made by McKinnell regarding Pfizer's policies and the efficacy, safety and sales revenues of Lyrica, Geodon and Zyvox are not actionable. (*See* Section I.D, *infra*.)
- Fifth, McKinnell is entitled to summary judgment on Plaintiffs' Section 20(a) claim because Plaintiffs cannot show either a primary violation of Section 10(b) or culpable participation on the part of McKinnell. (*See* Section II, *infra*.)

For these reasons and for the reasons stated in Pfizer's Brief, summary judgment should be granted in McKinnell's favor and this action should be dismissed in its entirety with respect to McKinnell.

STATEMENT OF UNDISPUTED FACTS

McKinnell incorporates by reference the undisputed facts set forth in the Pfizer Brief and highlights the undisputed facts set forth below. True and correct copies of the record evidence (or relevant excerpts therefrom) are being submitted concurrently herewith.²

A. McKinnell's Relationship with Pfizer

McKinnell worked at Pfizer for the vast majority of his career. He joined the Company in 1971 and worked in a number of capacities for the next thirty years.³ In January 2001, he was appointed Chief Executive Officer and, in April 2001, he became the Chairman of Pfizer's Board of Directors.⁴ McKinnell voluntarily resigned from his position as Chief Executive Officer in July 2006.⁵ To ensure an orderly transition of responsibilities, he continued to serve on Pfizer's Board of Directors and as a Pfizer employee until the end of February 2007.⁶

B. McKinnell's Understanding of Pfizer's Controls

During McKinnell's tenure as Chief Executive Officer, Pfizer implemented and maintained various controls to ensure that the Company's sales force complied with legal standards and Pfizer's policies, including but not limited to: (1) product review committees comprised of regulatory, medical and marketing personnel that reviewed marketing materials; (2) ongoing training in laws, regulations and best practices; (3) ongoing review of and updates to Pfizer's policies and procedures; (4) compliance review of sales force practices; (5) internal audit

² All references to "Ex." are to the exhibits to the Declarations of Joseph G. Petrosinelli and Scott D. Musoff, dated October 30, 2014. Exhibits A-M through F-M are appended to the Musoff Declaration. All other referenced exhibits are appended to the Petrosinelli Declaration.

³ Ex. A-M, 11/11/13 McKinnell Tr. at 10:3-10.

⁴ *Id.* at 10:3-12, 10:23-12:16.

⁵ *Id.* at 11:8-13:12.

⁶ *Id.*

activities; and (6) a ten-fold increase in spending on compliance.⁷ Pfizer investigated reports of violations of Company policies and procedures and, where necessary, remediated issues and reported them to the government.⁸

C. McKinnell's Response to the July 2005 FDA Letter

On or about July 20, 2005, McKinnell received a letter from the United States Food and Drug Administration ("FDA") advising Pfizer that the FDA had rejected one of Pfizer's advertisements for Zyvox because it made comparative claims that the FDA determined to be unsupported.⁹ In accordance with his routine practice, McKinnell forwarded the letter to Pfizer's medical and regulatory groups.¹⁰ Although Pfizer disagreed with the FDA's view on the advertisement, it nonetheless revised the relevant promotional material to the FDA's satisfaction and ensured that any other Zyvox sales force materials that could be misinterpreted in a similar manner were discontinued or revised.¹¹ McKinnell believed the FDA's concerns, as reflected in the July 2005 letter, had been resolved.¹²

D. McKinnell's Knowledge of the Government Investigations

In or around February 2004, McKinnell learned that the DOJ was investigating a *qui tam* lawsuit involving Pfizer's marketing and sale of Bextra.¹³ An investigation by in-house and

⁷ *Id.* at 22:10-22, 26:25-27:23, 28:10-31:6, 41:13-44:12, 56:8-57:3, 84:23-88:13; 91:8-92:23, 222:25-223:22, 312:23-323:21.

⁸ *Id.* at 86:17-87:6, 222:25-223:22.

⁹ *Id.* at 108:13-114:1.

¹⁰ *Id.* at 109:22-111:13.

¹¹ Ex. C-M, PFE DERIV 00040339.

¹² Ex. A-M, 11/11/13 McKinnell Tr. at 109:22-111:13.

¹³ *Id.* at 224:10-227:4.

outside counsel was initiated to investigate the matters alleged in the lawsuit.¹⁴ McKinnell believed that experienced and qualified attorneys were involved in this “very thorough investigation,” including but not limited to: (1) Jeffrey Kindler, Pfizer’s former General Counsel; (2) Allan Waxman, who assumed the position of General Counsel from Kindler; (3) Douglas Lankler, Pfizer’s Chief Compliance Officer; and (4) other government investigations attorneys outside and within Pfizer.¹⁵

Throughout 2004 and 2005, McKinnell received periodic updates on the status of the investigation and Pfizer’s response. Among other things, McKinnell learned that Pfizer produced documents and gave presentations to the DOJ, that the DOJ had issued a formal subpoena for Bextra-related documents, that the DOJ was reviewing documents and that the DOJ had begun to subpoena members of the field sales force to testify before a grand jury.¹⁶ McKinnell also learned sometime in mid-2005 that Pfizer’s investigation had uncovered a small number of Pfizer sales representatives in a district in Brooklyn attempting to delete Bextra-related documents from their computers, in violation of a litigation hold.¹⁷ He understood that these employees had violated Company policies and possibly the law by using promotional material involving off-label indications that had not been approved by Pfizer.¹⁸ But he believed that the conduct was isolated in nature, was investigated and remediated (including through the

¹⁴ *Id.*

¹⁵ *Id.* at 226:21-228:18, 251:25-253:6, 258:7-259:12, 282:8-24; Ex. B-M, 09/19/14 McKinnell Tr. at 94:11-96:9.

¹⁶ Ex. A-M, 11/11/13 McKinnell Tr. at 266:22-268:20.

¹⁷ Ex. B-M, 09/19/14 McKinnell Tr. at 25:14-25.

¹⁸ Ex. A-M, 11/11/13 McKinnell Tr. at 247:10-248:21.

termination of the responsible employees) and had been “reported [to the government] as good companies do.”¹⁹

McKinnell also received updates on the status of Pfizer’s internal investigation. He understood that the internal investigation uncovered “possible violations of law [but] that we had good defenses, that we had done what good companies do, which is we investigated, we remediated and reported our findings to the Government.”²⁰ At no point did McKinnell learn of any pervasive off-label marketing practices or of practices being driven by Pfizer senior management.²¹ In fact, McKinnell’s belief in the isolated nature of any improper sales and marketing practices was continuously affirmed by Pfizer’s counsel in the DOJ investigation who advised that Pfizer had “substantial defenses” with respect to the issues raised in the Bextra *qui tam* complaint.²²

As of March 1, 2007 – the date of McKinnell’s last Pfizer statement – the DOJ investigation did not include sales and marketing practices with respect to Lyrica, Geodon or

¹⁹ *Id.* at 247:10-248:21; Ex. B-M, 09/19/14 McKinnell Tr. at 26:13-27:2.

²⁰ Ex. A-M, 11/11/13 McKinnell Tr. at 232:19-24, 255:18-256:17.

²¹ *Id.* at 255:18-256:17 (“We heard of allegations from the *qui tam* action which the Department of Justice joined. Any violation of law is of concern to me as the CEO. We then launched a very thorough investigation of our compliance with laws and regulations with respect to Bextra. . . . My concern was how widespread [the conduct] was . . . and the answer I got was it did not involve senior Pfizer executives, [but] it did involve a group of sales representatives and that we needed to remediate those problems by removing a number of those sales representatives and reporting the results of our investigation to Government.”); Ex. B-M, 09/19/14 McKinnell Tr. at 46:10-48:3 (“We certainly were aware of allegations [of off-label promotion of Bextra in early 2005]. We certainly were aware of a small group of employees who were violating company policy with respect to promotion and destruction of documents. Whether that implicated, quote, the company, I think was unclear.”).

²² Ex. D-M, PFE-JONES 00006634-36 (“In November [2005], we met with the government to discuss the substantial defenses that we believe the Company has with respect to issues raised in the [*qui tam*] complaint.”); Ex. A-M, 11/11/13 McKinnell Tr. at 282:8-283:17 (noting that the discussion of substantial defenses occurred in a “large group” and included “a large number of attorneys who knew the facts [and] had made a determination that this was a fair and accurate disclosure”); Ex. B-M, 09/19/14 McKinnell Tr. at 48:4-16 (“[T]he allegations and the defenses were thoroughly discussed within our legal, accounting organizations internally, and outside advisors, outside law firms, outside lawyers, individuals and the – and the audit firm. And the conclusion from that group was that, yes, we had substantial defenses.”), 90:14-91:16 (“[T]here were attorneys, our own attorneys, outside attorneys, who were making the judgment about substantial defenses.”).

Zyvox. Those drugs were the subject of DOJ subpoenas served in July 2007 (for Lyrica) and December 2007 (for Geodon and Zyvox)²³ – months after McKinnell left Pfizer and more than a year after he stepped down as Chief Executive Officer. Nor was Pfizer engaged in settlement discussions with the DOJ.²⁴ Those discussions began in early 2008 – long after McKinnell left Pfizer.

Rather, at the time McKinnell left Pfizer, the tenor of the investigation “was much more around review of documents, summary of the government’s interpretation of the facts, . . . [and] perhaps some discussions about theories of liability.”²⁵ For example, in a September 2006 meeting, the DOJ invited Pfizer to respond to the government’s interpretation of information it had collected and noted that it still had not determined “how the investigation should proceed.”²⁶

Thus, McKinnell was not at Pfizer when Pfizer learned of the government’s investigations regarding Lyrica, Geodon and Zyvox. He was not involved in Pfizer’s response to those investigations. He did not participate in the settlement discussions that occurred between Pfizer and the DOJ. He had no role in Pfizer’s decision to settle the government investigations. And he did not prepare, make or disseminate any Pfizer statements after March 1, 2007.

E. McKinnell’s Reliance on Robust Processes and Informed Counsel and Auditors

With respect to the few financial statements he did sign during the Class Period,²⁷ McKinnell believed them to be accurate and truthful given (i) his personal knowledge of the

²³ Ex. J-5, PFE-JONES 00033813; Ex. R-5, PFE-JONES 00044700.

²⁴ Ex. F-2, 12/10/13 Levin Tr. at 103:2-13; *see also* Ex. K-4, KPMG-PFIZ-DS 0003496 at 3513; Ex. Y-6, PFE DERIV 00066378-80.

²⁵ Ex. F-2, 12/10/13 Levin Tr. at 137:1-23; *see also* Ex. X-2, PFE JONES 00025621 at 00025626-55.

²⁶ Ex. X-2, PFE JONES 00025621 at 00025644-55.

²⁷ The three financial statements McKinnell signed during the Class Period are (i) the Company’s 2005 Form 10-K dated March 1, 2006 and (ii) its May 8, 2006 Form 10-Q, both of which McKinnell signed in his capacity as
(*cont’d*)

Bextra investigation, (ii) Pfizer's robust and comprehensive process for drafting and approving disclosures regarding government investigations, (iii) input from dozens of lawyers and accountants, and (iv) his reliance on the advice of Lawrence Fox and Dennis Block, Pfizer's in-house and outside disclosure counsel, with respect to the "adequacy of disclosure."²⁸ Throughout this process, McKinnell believed there was appropriate disclosure to all parties involved in the process, including Fox and Block, of all relevant facts concerning the DOJ investigation.²⁹ At the end of this process, the disclosures at issue were approved by Fox and Block, the Disclosure Committee and the individuals who attended the certification meeting.³⁰

Likewise, McKinnell believed his Sarbanes-Oxley certifications – signed on March 1, 2006 and May 8, 2006 – to be accurate and truthful.³¹ Before McKinnell signed the March 1, 2006 certification (i) he was informed that KPMG had concluded that Pfizer maintained effective internal control over financial reporting and (ii) the individuals responsible for Pfizer's internal controls signed their own certifications and sub-certifications assuring that there were no material issues with Pfizer's internal controls.³² Similarly, before McKinnell signed the May 8,

(cont'd from previous page)

Chief Executive Officer, and (iii) its 2006 Form 10-K dated March 1, 2007, which McKinnell signed in his capacity as a member of Pfizer's Board of Directors.

²⁸ Ex. A-M, 11/11/13 McKinnell Tr. at 258:7-18 (describing the involvement of KPMG, the board of directors, and lawyers in the "very thorough investigation"), 280:24-283:17 (explaining that based on the advice of counsel he believed and still believes that Pfizer had substantial defenses); Ex. B-M, 09/19/14 McKinnell Tr. at 47:8-49:9 ("[T]he allegations and the defenses were thoroughly discussed within our legal, accounting organizations internally, and outside advisors, outside law firms, outside lawyers, individuals, and the – and the audit firm. And the conclusion from that group was that, yes, we had substantial defenses."), 51:11-65:5 (noting that he relied on Block and Fox concerning the adequacy of disclosure), 88:19-91:16 (same).

²⁹ For a complete description of this process, see Undisputed Facts, Section A in Pfizer's Brief; *see also* Ex. A-M, 11/11/13 McKinnell Tr. at 282:8-24; Ex. B-M, 09/19/14 McKinnell Tr. at 28:16-30:18, 47:8-49:9, 51:11-65:5, 88:19-91:16.

³⁰ Pfizer Br., Undisputed Facts, Section A; *see also* Ex. B-4 at PFE-JONES 00036401-02, 00036468-69.

³¹ Ex. A-M, 11/11/13 McKinnell Tr. at 295:10-296:17.

³² Ex. B-1, Pfizer's March 1, 2006 Form 10-K, Exhibit 23; Ex. A-M, 11/11/13 McKinnell Tr. at 295:14-297:9; Ex. B-4 at PFE-JONES 00036401-02.

2006 certification, (i) KPMG did not identify any control issues as part of its quarterly review and (ii) McKinnell's direct reports informed him that the 10-Q was accurate and complete, that the disclosure controls were effective and that no other compliance issues needed to be disclosed.³³ McKinnell believed that KPMG was fully informed of all relevant developments concerning Pfizer's internal controls.³⁴ Accordingly, in signing the two certifications at issue, McKinnell relied on his own experience, input from internal audit and KPMG's advice.³⁵

McKinnell similarly believed that Pfizer's reserve decisions were correct (and thus Pfizer's disclosures were accurate) given (i) his personal knowledge of the Bextra investigation, (ii) Pfizer's robust and comprehensive process for evaluating the reserves decision,³⁶ (iii) input from Pfizer's Finance Group (led by Loretta Cangialosi, Pfizer's Controller) and numerous senior executives and (iv) his reliance on the work of KPMG.³⁷ Again, McKinnell believed that the individuals involved in this process, including the KPMG auditors, were fully informed of the relevant facts concerning the DOJ investigation and Pfizer's internal investigation.³⁸ At the end of this process, KPMG determined each quarter that Pfizer's reserving decisions were reasonable and compliant with Generally Accepted Accounting Principles.³⁹

³³ Ex. C-1, Pfizer's May 8, 2006 Form 10-Q at 20; Ex. A-M, 11/11/13 McKinnell Tr. at 295:14-296:17; Ex. B-4 at PFE-JONES 00036468-69.

³⁴ Ex. A-M, 11/11/13 McKinnell Tr. at 295:10-300:14.

³⁵ *Id.* at 295:10-300:14.

³⁶ For a complete description of this process, see Pfizer Brief, Undisputed Facts, Section B.

³⁷ Ex. A-M, 11/11/13 McKinnell Tr. at 232:16-236:12 (describing conversations with KPMG and Pfizer's internal accounting staff, including David Shedlarz and Alan Levin, concerning reserves), 236:13-239:10 ("We had no idea what the amounts were and we didn't think it was probable that we would be incurring these liabilities, and therefore should not reserve or disclose under FAS 5."), 245:6-18 (describing his reliance on KPMG, among others, for the reserving decision), 278:11-279:12 (describing discussions with David Shedlarz, Alan Levin and Loretta Cangialosi regarding the difficulty estimating Pfizer's exposure to the government investigations).

³⁸ *Id.* at 232:16-24, 246:18-247:18.

³⁹ Ex. S-1, 06/21/13 Cangialosi Tr. at 380:19-382:15.

ARGUMENT⁴⁰

SUMMARY JUDGMENT SHOULD BE GRANTED IN MCKINNELLS FAVOR

I. MCKINNELLS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' SECTION 10(b) CLAIM.

A. McKinnell Is Entitled To Summary Judgment With Respect To (1) Statements Made After He Left Pfizer And (2) Oral Statements Made By Others.

Under well-settled law, a defendant in a Section 10(b) action can only be liable for statements or omissions that he or she made. *See Janus*, 131 S. Ct. at 2302. "[T]he 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." *Id.*

It is undisputed that McKinnell's last possible statement was made on March 1, 2007 – Pfizer's 2006 Form 10-K issued the day after McKinnell left Pfizer. It is further undisputed that McKinnell did not have any involvement in making – let alone "ultimate authority" over – any statement after March 1, 2007. Accordingly, McKinnell is entitled to summary judgment with respect to alleged misstatements that were made after March 1, 2007. McKinnell is further entitled to summary judgment with respect to oral statements made by individuals other than McKinnell before McKinnell left Pfizer. McKinnell did not "make" these statements, and thus cannot be held responsible for them.

Attached hereto is an Appendix that lists (i) statements made after McKinnell left Pfizer and (ii) oral statements made by individuals other than McKinnell before McKinnell left Pfizer. Summary judgment should be granted in McKinnell's favor with respect to all these statements.

⁴⁰ This Court is fully familiar with the standard applicable to motions for summary judgment. *See, e.g., Barbosa v. I World Trade Ctr. L.L.C.*, Nos. 06 Civ. 1649 (AKH), 21 MC 102 (AKH), 2014 WL 2979129, at *1 (S.D.N.Y. July 2, 2014) (Hellerstein, J.); *Bell v. Metro. Transp. Auth.*, No. 12 Civ. 1235 (AKH), 2013 WL 8112461, at *1 (S.D.N.Y. Nov. 1, 2013) (Hellerstein, J.).

B. McKinnell Is Entitled To Summary Judgment Because There Is No Evidence That He Acted With Scienter.

“To establish liability under [Section] 10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter, a mental state embracing intent to deceive, manipulate, or defraud.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (internal quotation marks and citation omitted); *see also Pivot Point Capital Master LP v. Deutsche Bank AG*, No. 08 Civ. 2788 (AKH), 2010 WL 9452230, at *4 (S.D.N.Y. Dec. 9, 2010) (Hellerstein, J.). This standard requires evidence of a knowing intent to defraud or “conscious recklessness – i.e. a state of mind *approximating actual intent*.” *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (citation omitted). Recklessness is “*not merely a heightened form of negligence*,” but rather requires evidence of conduct that “is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that *the danger was either known to the defendant or so obvious that the defendant must have been aware of it*.” *Id.* (internal quotation marks and citations omitted).

1. There Is No Evidence That McKinnell Acted With Scienter.

McKinnell is entitled to summary judgment because the extensive record in this case is devoid of any evidence that McKinnell acted with scienter. To the contrary, the evidence shows that McKinnell did not act in either an intentional or a highly unreasonable manner in making the statements at issue.

First, with respect to statements regarding the government investigations and the marketing issues underlying them, the undisputed facts demonstrate that the DOJ’s investigation was still unfolding when McKinnell left Pfizer.⁴¹ It is undisputed that, at the time of

⁴¹ *See* Statement of Undisputed Facts, Section D, *supra*; Ex. F-2, 12/10/13 Levin Tr. at 103:2-13, 137:1-23; Ex. X-2, PFE JONES 00025621 at 00025644-55.

McKinnell's statements, Geodon, Lyrica and Zyvox were not even part of the DOJ's investigation.⁴² With respect to Bextra, McKinnell understood that a small group of sales representatives had engaged in improper conduct but he believed the conduct was confined to that small group and understood that Pfizer had done what a good corporate citizen should do: "we investigated, we remediated and reported our findings to the Government."⁴³ Indeed, it is undisputed that McKinnell believed that Pfizer's policies and controls were designed to avoid off-label marketing and to identify, remediate and, if necessary, report any violations to the government.⁴⁴

Second, with respect to Pfizer's reserving decisions, the record shows that McKinnell engaged in a deliberative process with KPMG and Pfizer's accounting experts, and that all individuals involved in this process agreed that a reserve was not required.⁴⁵ Moreover, there is no evidence that McKinnell subjectively disbelieved statements of opinion that he made, including statements regarding the adequacy of loss reserves.⁴⁶ *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 113 (2d Cir. 2011) ("[L]oan loss reserves reflect management's opinion or judgment about what, if any, portion of amounts due on the loans ultimately might not be collectible. . . . Such a determination is inherently subjective, and . . . estimates will vary

⁴² Ex. J-5, PFE-JONES 00033813; Ex. R-5, PFE-JONES 00044700. The only evidence in the record of McKinnell having knowledge of any marketing issue with Geodon, Lyrica or Zyvox is a single letter in which the FDA took issue with a single Zyvox advertisement. Ex. A-M, 11/11/13 McKinnell Tr. at 108:13-114:1. The record shows that McKinnell responsibly forwarded the letter to Pfizer's medical and regulatory groups for handling and believed the issue was handled appropriately within Pfizer and resolved. *Id.* at 109:22-111:13. Although Pfizer disagreed with the FDA's view on the advertisement, it nonetheless stopped the advertisement. Ex. C-M, PFE DERIV 00040339.

⁴³ Ex. A-M, 11/11/13 McKinnell Tr. at 232:19-24, 251:25-252:23.

⁴⁴ *Id.* at 22:10-23, 26:25-27:23, 28:10-31:6, 40:16-44:12, 56:8-57:3, 84:23-88:13, 91:8-92:23, 222:25-223:22, 312:23-323:21.

⁴⁵ *See* Statement of Undisputed Facts, Section E, *supra*.

⁴⁶ *See* Statement of Undisputed Facts, Section E, *supra*.

depending on a variety of predictable and unpredictable circumstances.”). The absence of such evidence compels summary judgment in McKinnell’s favor with respect to these statements. *See Fait*, 655 F.3d at 1133 (statements regarding the adequacy of loan loss reserves are false only where plaintiff can demonstrate “that defendant’s opinions were both false and not honestly believed when they were made”).

Third, with respect to the two Sarbanes-Oxley certifications that McKinnell signed in 2006, the record demonstrates that McKinnell believed them to be fair and accurate.⁴⁷ Moreover, the record demonstrates that KPMG certified that Pfizer maintained effective internal controls over financial reporting as of March 1, 2006 and did not identify any material control issues during the subsequent quarter.⁴⁸ It further demonstrates that McKinnell was assured during the relevant certification meetings that there were no material issues with Pfizer’s internal controls and no compliance issues that needed to be disclosed other than those in the disclosures.⁴⁹ Thus, Plaintiffs cannot show that McKinnell had any fraudulent state of mind when he signed the internal controls certifications.

Fourth, far from demonstrating scienter, discovery has shown that McKinnell exercised diligence in making statements during the Class Period. In particular, it is undisputed that McKinnell oversaw a robust process for vetting the statements he made, which included, among other things, review of the disclosure and sign-off from in-house and outside counsel, in-house and outside auditors, accountants and senior executives.⁵⁰ Discovery also has shown that

⁴⁷ Ex. A-M, 11/11/13 McKinnell Tr. at 295:14-297:9.

⁴⁸ Ex. B-1, Pfizer’s March 1, 2006 Form 10-K, Exhibit 23; Ex. C-1, Pfizer’s May 8, 2006 Form 10-Q at 20; Ex. A-M, 11/11/13 McKinnell Tr. at 295:14-297:9; Ex. B-4 at PFE-JONES 00036401-02, 00036468-69.

⁴⁹ Ex. A-M, 11/11/13 McKinnell Tr. at 295:14-297:9; Ex. B-4 at PFE-JONES 00036401-02, 00036468-69.

⁵⁰ *See* Statement of Undisputed Facts, Section E, *supra*.

McKinnell oversaw a “very thorough investigation” into allegations of improper promotion of Bextra involving highly qualified attorneys.⁵¹ McKinnell then diligently examined the statements, followed up on issues and believed the statements were truthful when made.⁵² Indeed, McKinnell and the counsel upon whom he relied (Block and Fox) continue to stand behind the truthfulness of the statements.⁵³ This underscores the reasonableness of McKinnell’s conduct and undercuts any claim that McKinnell acted in a way that “represents an extreme departure from the standard of ordinary care.” *S. Cherry St.*, 573 F.3d at 109.

Finally, there is no evidence that McKinnell had motive to engage in a fraud. Plaintiffs allege that McKinnell’s \$6.4 million stock sale in August 2006 is evidence of scienter.⁵⁴ But it is undisputed that this sale was part of a larger purchase of shares through a “cashless exercise” of stock options in which McKinnell “sold” a small number of shares in order to purchase a significantly larger number.⁵⁵ That McKinnell was acting to increase his Pfizer stock holdings belies Plaintiffs’ fraud claim. *See, e.g., Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 592-94 (S.D.N.Y. 2011) (finding that defendant’s increase in stock holdings is contrary to an inference of fraudulent intent) (collecting cases); *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 561 (S.D.N.Y. 2004) (same).⁵⁶ Plaintiffs further allege that McKinnell’s compensation is

⁵¹ Ex. A-M, 11/11/13 McKinnell Tr. at 226:21-228:18, 251:25-253:6, 258:7-259:12, 282:8-24; Ex. B-M, 09/19/14 McKinnell Tr. at 94:11-96:9.

⁵² Ex. A-M, 11/11/13 McKinnell Tr. at 171:6-173:3, 275:11-283:17, 295:14-296:17.

⁵³ Ex. A-M, 11/11/13 McKinnell Tr. at 280:24-282:24, 295:14-296:17; Pfizer Br., Section I.B.1.

⁵⁴ Dkt. 71, Am. Compl. ¶ 128.

⁵⁵ Ex. A-M, 11/11/13 McKinnell Tr. at 331:10-332:22.

⁵⁶ The amount of the sale is also insufficient to demonstrate motive in these circumstances. *See Rothman v. Gregor*, 220 F.3d 81, 95 (2d Cir. 2000) (upholding district court finding that sales of \$20 million of stock were insufficient to show motive where, among other things, the sale represented a small percentage of the stock owned by the defendant).

evidence of his scienter.⁵⁷ But the alleged salary and stock award cited by Plaintiffs – McKinnell’s salary for 2006 and stock awards made in 2006 – were tied to Pfizer’s and McKinnell’s performance in 2005, before the Class Period.⁵⁸ They thus cannot be relevant to McKinnell’s purported motive to engage in a fraud. Moreover, the mere prospect of financial reward, without proof of “a concrete and personal benefit to the individual defendants resulting from the fraud,” is insufficient to establish motive. *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001). Thus, the desire “for the corporation to appear profitable” or “to keep stock prices high to increase officer compensation” is insufficient to establish scienter. *Id.* at 139-40. Otherwise, “virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.” *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir. 1995).

In sum, Plaintiffs can present no evidence giving rise to a genuine issue of material fact regarding whether McKinnell acted with scienter with respect to any statement he made during the Class Period. McKinnell therefore is entitled to summary judgment on Plaintiffs’ Section 10(b) claim. *See In re Fed. Nat’l Mortg. Ass’n Sec., Derivative, & “ERISA” Litig.*, 892 F. Supp. 2d 59, 67-76 (D.D.C. 2012) (finding that plaintiffs “patchwork quilt” of evidence did not raise an issue of disputed fact with respect to scienter against a former chairman and CEO where there was “significant, undisputed evidence that is utterly inconsistent with the requisite scienter for securities fraud”).

⁵⁷ Dkt. 71, Am. Compl. ¶ 127.

⁵⁸ *See* Ex. F-M, 03/16/06 Pfizer Form 14A at 59-61 (noting that Pfizer’s Compensation Committee set McKinnell’s 2006 salary and his 2006 stock awards based on McKinnell’s performance in 2005).

2. McKinnell Relied In Good Faith On The Advice Of Pfizer's Counsel And Auditors.

As explained in detail in the Pfizer Brief, Plaintiffs cannot prove scienter for the additional reason that the undisputed record shows that McKinnell relied on the advice of Pfizer's in-house and outside disclosure counsel and auditors with respect to the statements at issue.⁵⁹ Such good faith reliance on the advice of an accountant or attorney negates scienter in securities fraud cases. *See Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (affirming summary judgment for defendant who "relied on the expertise of counsel from Cadwalader, Wickersham & Taft" because "[plaintiff] has failed to provide sufficient evidence that would enable a jury to conclude that [defendant] had the scienter required for such a claim"); *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001) (reliance on accounting firm and auditors would "constitute a complete defense" to claim of securities fraud).

Here, the record demonstrates unequivocally with respect to the statements made by McKinnell that (1) McKinnell sought advice from Pfizer's disclosure counsel and auditors; (2) Pfizer's disclosure counsel and auditors were fully informed; (3) McKinnell received advice from Pfizer's disclosure counsel and auditors that the disclosures at issue complied with the securities laws; and (4) McKinnell relied on the advice he received from Pfizer's disclosure counsel and auditors.⁶⁰ The un rebutted record also demonstrates that McKinnell relied upon the professional judgment of Pfizer's auditors in signing the SOX certifications at issue. The record shows that (1) McKinnell sought and received advice from Pfizer's auditors concerning the accuracy of his attestations; (2) Pfizer's auditors, fully informed, opined in February 2006 that

⁵⁹ *See* Pfizer Br., Section I.

⁶⁰ *See* Statement of Undisputed Facts, Section E, *supra*; Ex. A-M, 11/11/13 McKinnell Tr. at 232:16-239:10, 245:6-18, 258:7-18, 278:11-279:12, 280:24-283:17, 295:10-296:17; Ex. B-M, 09/19/14 McKinnell Tr. at 28:16-30:18, 47:8-49:9, 51:11-65:5; Ex. B-4 at PFE-JONES 00036401-02, 00036468-69.

Pfizer maintained “effective control over financial reporting”; (3) Pfizer’s auditors, fully informed, signed off on the May 8, 2006 Form 10-Q filing and did not raise any control issues; and (4) McKinnell relied on the expert advice from Pfizer’s auditors.⁶¹ The unrebutted record further demonstrates that McKinnell and Pfizer were transparent with their counsel and auditors and provided full access to information and sources at Pfizer.⁶²

Summary judgment therefore should be entered in McKinnell’s favor for these additional reasons. *See, e.g., Steed Fin. LDC*, 2004 WL 2072536, at *9 (granting summary judgment in favor of defendants where they relied in good faith on the advice of counsel); *In re Fed. Nat’l Mortg. Ass’n Sec. Litig.*, 892 F. Supp. 2d at 72 (granting summary judgment where the CEO “relie[d] in good faith on the professional judgment of the company’s internal and external accounting and auditing personnel”); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1238-47 (S.D. Cal. 2010) (no genuine material fact issue as to scienter where the CEO “relied in good faith on the[] competence and expertise” of company’s audit committee and external auditors).

C. McKinnell Is Entitled To Summary Judgment Because Plaintiffs Cannot Establish Loss Causation Or Damages As To McKinnell.

It is well settled that expert testimony is needed to establish loss causation in Section 10(b) cases, and that the plaintiff bears the burden of proof on this element. *See In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d at 554 (finding that there would be “no way for a juror to determine whether the alleged fraud caused Plaintiff’s loss” without adequate expert testimony). Where the plaintiff has failed to offer sufficient expert evidence on the elements of loss causation or damages, numerous courts have granted summary judgment for the defendant. *See, e.g., In re*

⁶¹ *See* Statement of Undisputed Facts, Section E, *supra*; Ex. A-M, 11/11/13 McKinnell Tr. at 295:14-296:17; Ex. B-4 at PFE-JONES 00036401-02, 00036468-69; Ex. B-1, Pfizer’s March 1, 2006 Form 10-K, Exhibit 23; Ex. C-1, Pfizer’s May 8, 2006 Form 10-Q at 20.

⁶² *See* Pfizer Brief, Undisputed Facts, Sections A and B.

Pfizer Inc. Sec. Litig., 2014 WL 3291230, at *3 (granting summary judgment after excluding plaintiff’s expert report on loss causation).⁶³

Because all or part of a price decline “may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events,” a loss causation expert is required to disaggregate the “tangle of factors affecting price.” *Dura*, 544 U.S. at 343. A loss causation or damages expert cannot simply “blame[] it all on the defendant[.]” *Bricklayers & Trowel Trades Int’l Pension Fund v. Credit Suisse First Bos.*, 853 F. Supp. 2d 181, 191 (D. Mass. 2012), *aff’d*, 752 F.3d 82 (1st Cir. 2014). Instead, inflation caused by statements of third parties – like those made after McKinnell left Pfizer – must be disaggregated because Plaintiffs have to establish that it was the “defendant’s fraud—rather than other salient factors—that proximately caused plaintiffs’ loss.” *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005).

Plaintiffs have not even attempted to disaggregate the damages allegedly caused by McKinnell’s statements from the damages purportedly caused by statements made later in the Class Period. Instead, Plaintiffs’ sole expert on these issues, Professor Steven P. Feinstein, posits that the purported artificial inflation remained “stable” or “unchanged” during the entirety

⁶³ See also *Gordon Partners v. Blumenthal*, No. 02 Civ. 7377 (LAK) (AJP), 2007 WL 431864, at *14 (S.D.N.Y. Feb. 9, 2007) (Peck, M.J.) (“Because the Gordon plaintiffs have not provided this Court with any evidence as to what their true damages are and therefore cannot show loss causation, defendants are entitled to summary judgment[.]”), report and recommendation adopted by, 2007 WL 1438753 (S.D.N.Y. May 16, 2007) (Kaplan, J.), *aff’d*, 293 F. App’x 815 (2d Cir. 2008); *Bricklayers & Trowel Trades Int’l Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82 (1st Cir. 2014) (affirming summary judgment in federal securities fraud class action following exclusion of plaintiffs’ loss causation expert); *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 725-26 (11th Cir. 2012) (affirming post-verdict judgment as a matter of law in federal securities fraud class action where expert’s event study failed to establish loss causation or damages); *In re Williams Sec. Litig.*, 558 F.3d 1130, 1143 (10th Cir. 2009) (affirming summary judgment in federal securities fraud class action after affirming exclusion of expert’s unreliable loss causation analysis); *Phillips v. Scientific-Atlanta, Inc.*, 489 F. App’x 339, 340-43 (11th Cir. 2012) (per curiam) (affirming summary judgment “based solely on Plaintiffs’ failure to present sufficient evidence of ‘loss causation’” where expert failed to disaggregate alleged fraud from other industry-wide factors).

of the three-year Class Period – i.e., from January 19, 2006 through January 26, 2009, the date of the alleged corrective disclosure.⁶⁴ Feinstein’s methodology is fatally flawed with respect to McKinnell because it fails to account for the undisputed fact that many of the statements at issue were made after McKinnell left Pfizer in February 2007 and upon information that was not known while McKinnell was there.

First, Feinstein fails to account for the fact that there was changing information and McKinnell’s statements were made in a factual context totally different from that in existence when the statements later in the Class Period were made. Feinstein opines that a constant inflation rate across the Class Period was nevertheless appropriate because, although events occurred, the alleged statements “maintained the level of inflation” and had there been full disclosure at any point in time “the stock price would have fallen.”⁶⁵ But in doing so, he sidesteps critical issues, including: (1) the progression of the DOJ’s Bextra investigation over time, which culminated in settlement discussions and the exchange of settlement offers after McKinnell left Pfizer; and (2) the initiation of the DOJ’s investigation into Lyrica, Geodon and Zyvox following McKinnell’s departure. Feinstein’s analysis fails to explain how McKinnell’s statements – given the different fact setting – could have caused the same loss as statements made later in the Class Period. In fact, Feinstein recognizes that the DOJ’s fine – which is the basis of Plaintiffs’ damages calculation – “would have been lower had there been full disclosure earlier.”⁶⁶ He thus implicitly recognizes that the statements made at the start of the Class Period

⁶⁴ Ex. C-4, Feinstein Rep. ¶¶ 258-59.

⁶⁵ Ex. W-1, 10/14/14 Feinstein Tr. at 125:17-127:7.

⁶⁶ Ex. C-4, Feinstein Rep. ¶ 259. Feinstein argues that this effect would have been offset by “lost revenue and earnings stemming from restricted marketing practices,” thereby keeping stock price inflation stable over the course of the Class Period. *Id.* ¶ 259. But Feinstein offers no quantitative analysis or methodology to support his offsetting theory. *Id.* ¶ 259; Ex. W-1, 10/14/14 Feinstein Tr. at 157:4-159:22. Nor does he account for the fact that even with restricted marketing practices, Pfizer still would have generated revenue and earnings from
(cont’d)

– i.e., those attributed to McKinnell – were of a different make and had a different effect than those made at the end of the Class Period. Yet, he still opines that the artificial inflation remained unchanged throughout the entirety of the Class Period.

Second, Feinstein’s constant inflation analysis is inconsistent with the testimony of Paul Regan, Plaintiffs’ expert concerning Pfizer’s accounting for contingent losses. Regan acknowledges that the information concerning the Bextra investigation “matured” over time.⁶⁷ As a result, Regan posits that the reserve Pfizer should have taken changed as well throughout the Class Period.⁶⁸ Feinstein’s failure to similarly account for changing circumstances during the Class Period is fatal to his analysis.

Third, Feinstein fails adequately to address the fact that McKinnell’s statements – made at the start of the three-year Class Period – are substantively different than those made later in the Class Period. It makes no sense that substantively different disclosures made over a three-year period would each have the same effect on the alleged inflation.⁶⁹

For all these reasons, Feinstein’s methodology violates the disaggregation requirement. *See In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d at 554 (“[T]he law requires the disaggregation of [*all*] confounding factors[;] disaggregating only *some* of them cannot suffice to establish that the alleged misrepresentations actually caused Plaintiffs’ loss.”), *aff’d*, 597 F.3d

(*cont’d from previous page*)

off-label sales as the FDA permits doctors to prescribe drugs for off-label or non-FDA approved use. These shortcomings make his methodology not only unreliable, but insufficient as a matter of law to support loss causation.

⁶⁷ Ex. O-2, 08/12/14 Regan Tr. at 193:11.

⁶⁸ *Id.* at 192:18-193:19.

⁶⁹ Ex. W-1, 10/14/14 Feinstein Tr. at 125:17-127:7.

501 (2d Cir. 2010) (emphasis added).⁷⁰ It also runs headlong into *Janus*, which makes clear that a securities fraud defendant is liable only for statements that he actually “makes,” and not for statements by a “legally independent entity.” 131 S. Ct. at 2304-05. McKinnell therefore is entitled to summary judgment for this additional reason.

D. McKinnell Is Entitled To Summary Judgment With Respect To Statements Regarding (1) Pfizer’s Policies And (2) The Efficacy, Safety And Sales Revenues Of Lyrica, Geodon And Zyvox.

Summary judgment is warranted on separate and independent grounds for two other categories of statements attributed to McKinnell in the Amended Complaint. First, Plaintiffs allege that McKinnell is liable for statements concerning Pfizer’s policies of conducting business ethically and lawfully.⁷¹ As explained in the Pfizer Brief, such statements are not actionable because they are indisputably true and constitute inactionable puffery, as verified by case law and Plaintiffs’ own securities disclosure expert.⁷²

Second, Plaintiffs allege that statements in analyst conference calls and other such settings that addressed the efficacy, safety and sales revenue of Lyrica, Geodon and Zyvox were false and misleading.⁷³ Plaintiffs attribute six of these statements to McKinnell:

⁷⁰ See also *Lattanzio*, 476 F.3d at 158 (affirming dismissal of a complaint that failed to disaggregate losses caused by the defendant’s misstatements from those caused by a non-party’s misstatements); *Bricklayers*, 853 F. Supp. 2d at 190 (finding that an inflation calculation that has not been fully disaggregated “misleadingly suggests to the jury that a sophisticated statistical analysis proves the impact of [the] alleged fraud on a stock’s price when, in fact, the movement could very well have been caused by other information on the same date”); *In re Pfizer Inc. Sec. Litig.*, No. 04 Civ. 9866 (LTS) (HBP), 2014 WL 2136053, at *1-2 (S.D.N.Y. May 21, 2014) (disqualifying an expert, in part, because he failed to disaggregate the stock inflation attributable to a non-party’s statements from those attributable to defendants); *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 favor of auditor and an audit partner alleged to have made false statements with other defendants, in part, because plaintiffs assumed 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 numerous [other] defendants”).

⁷¹ Dkt. 71, Am. Compl. ¶¶ 58-64.

⁷² See Pfizer Br., Section II.B.

⁷³ Dkt. 71, Am. Compl. ¶¶ 84-94 & Ex. B.

- *I'm pleased that our fourth quarter and full year results exceeded our earlier expectations of \$1.92 to \$1.94. There were two drivers of this better than expected performance. Human Health revenues were stronger than previously forecast, reflecting the early market success of Lyrica, better than anticipated performance in key markets such as Japan and Germany, better than planned performance in key markets such as Japan and Germany, better than planned performance in some key products such as Zyrtec and Norvasc, and an unanticipated two-week delay in the introduction of an azithromycin generic in the United States. (01/19/06 Pfizer 4Q 2005 Earnings Conference Call)⁷⁴*
- In the past few months, we've seen a string of affirming events, from the victories in Lipitor to *the vast uptake of Lyrica. . . . We do expect by 2007 the patent expirations to be more than offset by the introduction and continuing growth of new products, so we do expect to return to growth still, as we said a year ago in 2007.* (02/10/06 Pfizer Analyst Meeting)
- *I certainly hope we didn't say anything today on Celebrex or Geodon or any other product we talked about which was outside label. If that had happened, we would have had lawyers beating on us on the script here.* But Pat, why don't you talk a little bit about where that data comes from, where it is [and the latest]? (02/10/06 Pfizer Analyst Meeting)
- During the first quarter, *we saw good results from our in-line medicines* and increasing contributions from new products. *Among our key in-lines, our worldwide revenues for Celebrex grew 19% and Geodon 32%. Lyrica continued to deliver exceptional results, and we now expect Lyrica to achieve \$900 million or more in sales this year.* (04/19/06 Pfizer 1Q 2006 Earnings Conference Call)
- Analyst: And the second question is on Lyrica, in terms of the uptick we're seeing for that product. Can you just kind of walk-through within the different indications where you are seeing kind of the greatest traction thus far?

McKinnell: *One of the most successful launches ever.* (04/19/06 Pfizer 1Q 2006 Earnings Conference Call)
- As we noted in our media release today, *Pfizer delivered strong second-quarter results, driven largely by the performance* of Lipitor, *Geodon, Celebrex and Lyrica.* Our performance exceeded your consensus estimates and our expectations. Our outlook for the year improved, and consequently we are raising our estimate of 2006 adjusted diluted earnings per share. (07/20/06 Pfizer 2Q 2006 Earnings Conference Call)

⁷⁴ Bold, italicized language is alleged by Plaintiffs to be false and misleading.

As explained in the Pfizer Brief, these statements are not actionable because they were accurate.⁷⁵ Moreover, because Lyrica, Geodon and Zyxin were not mentioned in the alleged corrective disclosure, statements relating to these drugs could not have caused any of the alleged damages.⁷⁶ Further, the statements are not actionable because they are either (1) forward-looking statements projecting revenue, management’s plans or objectives, or future economic performance – i.e., “[W]e now expect Lyrica to achieve \$900 million or more in sales this year”⁷⁷; or (2) general statements of “puffery” that are so lacking in specificity that no reasonable investor would rely on them – i.e., “[Lyrica is] [o]ne of the most successful launches ever.” Summary judgment is warranted on these statements because the securities laws prohibit liability for making them. *See, e.g., In re WebMD Health Corp. Sec. Litig.*, No. 11-cv-5382 (JFK), 2013 WL 64511, at *5 (S.D.N.Y. Jan. 2, 2013) (“At its core, a forward-looking statement is one that contains a projection of income or earnings, or one of ‘future economic performance.’”) (quoting 15 U.S.C. § 78u-5(i)(1)(A), (C)); *ECA & Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (generalizations regarding business practices are “precisely the type of ‘puffery’ that this and other circuits have consistently held to be inactionable”) (internal quotation marks and citation omitted).⁷⁸

⁷⁵ *See* Pfizer Br., Section II.E.

⁷⁶ *See* Pfizer Br., Section III.A.1.

⁷⁷ The forward-looking statements attributed to McKinnell were accompanied by meaningful, cautionary language as required by the Private Securities Litigation Reform Act. *See* 15 U.S.C. § 78u-5(c)(1)(A); Ex. B-1, Pfizer’s March 1, 2006 Form 10-K at 16-18. Moreover, there is no evidence that McKinnell made the statements with actual knowledge that they were false or misleading. *See* 15 U.S.C. § 78u-5(c)(1)(B).

⁷⁸ *See also Gissin v. Endres*, 739 F. Supp. 2d 488, 504-11 (S.D.N.Y. 2010) (finding statements concerning expectations of future cash flows to be forward-looking and not actionable given meaningful cautionary language); *In re Splash Tech. Holdings, Inc. Sec. Litig.*, 160 F. Supp. 2d 1059, 1076-77 (N.D. Cal. 2001) (concluding that statements such as “strong” demand, “better than expected” results, and a company’s “solid” position are inactionable puffery).

II. MCKINNELLS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' SECTION 20(a) CLAIM.

The un rebutted record also compels summary judgment in McKinnell's favor on Plaintiffs' Section 20(a) claim. To state a claim of control person liability under § 20(a), "a plaintiff must show (1) a primary violation by the controlled person, (2) control of the primary violator by the defendant and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007). Here, for the reasons discussed above and in the Pfizer Brief, Plaintiffs cannot raise a genuine issue of material fact that a primary violation of Section 10(b) occurred by someone controlled by McKinnell.⁷⁹ Nor can they point to an issue of material fact that McKinnell was a culpable participant in the alleged fraudulent conduct. To the contrary, the record demonstrates that McKinnell exercised diligence and acted in good faith in making the alleged statements at issue.⁸⁰ Accordingly, McKinnell is entitled to summary judgment on Plaintiffs' Section 20(a) claim.

⁷⁹ 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), McKinnell 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).

⁸⁰ See Section I.B, *supra*.

CONCLUSION

For the foregoing reasons, McKinnell respectfully requests that this Court grant his motion for summary judgment.

Dated: New York, New York
October 30, 2014

Respectfully submitted,

/s/ Scott D. Musoff

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
scott.musoff@skadden.com

Jennifer L. Spaziano (*pro hac vice* pending)
Michael S. Bailey (*pro hac vice* pending)
1440 New York Avenue NW
Washington, DC 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760
Email: jen.spaziano@skadden.com
Email: michael.bailey@skadden.com

Counsel for Henry A. McKinnell

APPENDIX

Disclosure Date	Alleged Disclosure Event	Amended Complaint Reference	Description
01/19/06	Pfizer 4Q05 Earnings Conference Call	Ex. B Item 3	Oral statements not made by McKinnell
02/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 4	Oral statement not made by McKinnell
02/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 5	Oral statement not made by McKinnell
02/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 6	Oral statement not made by McKinnell
02/10/06	Pfizer Analyst Meeting – statement by Jeffrey Kindler	¶ 88; Ex. B Item 7	Oral statement not made by McKinnell
02/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 8	Oral statement not made by McKinnell
02/10/06	Pfizer Analyst Meeting – statement by J. Patrick Kelly	¶ 88; Ex. B Item 9	Oral statement not made by McKinnell
02/10/06	Pfizer Analyst Meeting	¶ 88; Ex. B Item 10	Oral statements not made by McKinnell
04/19/06	Pfizer 1Q06 Earnings Conference Call – statements by Karen Katen	¶ 84; Ex. B Item 13	Oral statements not made by McKinnell
04/19/06	Pfizer 1Q06 Earnings Conference Call	¶ 84; Ex. B Item 14	Oral statements not made by McKinnell
05/02/06	Deutsche Bank Securities Inc. Health Conference	¶ 84; Ex. B Item 15	Oral statement not made by McKinnell
07/20/06	Pfizer 2Q06 Earnings Conference Call	¶ 78; Ex. B Item 19	Oral statement not made by McKinnell
10/19/06	Pfizer 3Q06 Earnings Conference Call	Ex. B Item 22	Oral statement not made by McKinnell
01/22/07	Pfizer Analyst Meeting	Ex. B Item 23	Oral statements not made by McKinnell

Disclosure Date	Alleged Disclosure Event	Amended Complaint Reference	Description
01/22/07	Pfizer Analyst Meeting	Ex. B Item 24	Oral statements not made by McKinnell
04/20/07	Pfizer Press Release	¶ 78; Ex. B Item 25	Made after McKinnell's departure
10/18/07	Pfizer Press Release Pfizer 3Q07 Earnings Conference Call	¶¶ 78, 84; Ex. B Items 26-29	Made after McKinnell's departure
11/05/07	Pfizer 3Q07 Form 10-Q	¶¶ 68, 71, 78	Made after McKinnell's departure
01/23/08	Pfizer Press Release Pfizer 4Q07 Earnings Conference Call	¶ 78; Ex. B Items 30-32	Made after McKinnell's departure
02/29/08	Pfizer 2007 Form 10-K	¶¶ 58, 60, 62, 63, 68, 72, 78	Made after McKinnell's departure
03/05/08	Pfizer Analyst Meeting	¶ 81; Ex. B Item 33	Made after McKinnell's departure
03/14/08	Pfizer 2008 Form 14A Proxy Statement	¶¶ 58, 60, 62, 63	Made after McKinnell's departure
04/17/08	Pfizer Press Release Pfizer 1Q08 Earnings Conference Call	¶ 78; Ex. B Items 34-35	Made after McKinnell's departure
05/02/08	Pfizer 1Q08 Form 10-Q	¶¶ 68, 78	Made after McKinnell's departure
05/05/08	Deutsche Bank Securities Inc. Health Conference	Ex. B Item 36	Made after McKinnell's departure
07/23/08	Pfizer Press Release Pfizer 2Q08 Earnings Conference Call	¶ 78; Ex. B Items 37-38	Made after McKinnell's departure
08/08/08	Pfizer 2Q08 Form 10-Q	¶¶ 68, 73, 78	Made after McKinnell's departure
09/22/08	UBS Global Life Sciences Conference	¶ 91; Ex. B Item 39	Made after McKinnell's departure

Disclosure Date	Alleged Disclosure Event	Amended Complaint Reference	Description
10/17/08	Pfizer Press Release	¶ 74	Made after McKinnell's departure
10/21/08	Pfizer Press Release Pfizer 3Q08 Earnings Conference Call	¶¶ 78, 82, 84, 92; Ex B Items 40-42	Made after McKinnell's departure
11/07/08	Pfizer 3Q08 Form 10-Q	¶¶ 68, 76, 78	Made after McKinnell's departure