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 OF DEFENDANT JEFFREY B. KINDLER IN SUPPORT OF SUMMARY JUDGMENT

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Defendant Jeffrey B. Kindler 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

Most striking about the case against Jeffrey Kindler is what it lacks. This is not a case in which plaintiffs can point to a single fact suggesting that Mr. Kindler possessed an intent to defraud. Not a single fact witness has testified that Mr. Kindler intended to mislead anyone. Not a single email or other document has even arguably revealed any evidence of fraudulent intent. No one ever suggested to Mr. Kindler that there was a problem with the accuracy or completeness of the company's disclosures. This is also not a case in which Mr. Kindler had a financial motive to commit fraud. Nor did Mr. Kindler trade in the company's stock during the course of the alleged fraud. This is not a case in which Mr. Kindler had some unique knowledge that others within and outside the company did not also have. This is not a case in which the SEC ever questioned or investigated the company's disclosures. This is not a case in which financial analysts or the financial press have suggested some impropriety. There is no evidence that any market participant attributed a decline in the company's stock price to the alleged misstatements. Plaintiffs have simply failed to develop any evidence of the essential elements of their claims.

[1] Mr. Kindler also seeks summary judgment on the grounds asserted by the other defendants insofar as they are applicable to him, and incorporates by reference their memoranda of law in support of their respective motions for summary judgment.

Most relevant to Mr. Kindler, there is no evidence of the scienter element. No one among the numerous executives, lawyers and accountants within Pfizer or among its outside lawyers and auditors ever expressed any concern to Mr. Kindler that Pfizer's disclosures were misleading, or that an accrual was required prior to the fourth quarter of 2008. Despite claiming that one of the nation's largest enterprises perpetrated a fraud on investors for three years, plaintiffs can point to no evidence—no memorandum, no testimony, no email—that even begins to suggest that Mr. Kindler believed that Pfizer's disclosures were deficient, that he sought to defraud the company's shareholders or that he otherwise culpably participated in a fraud committed by someone else. The same is true for the varied collection of statements challenged by plaintiffs regarding Pfizer's internal controls over healthcare compliance, sales of various drug products and expectations as to future dividends. *See infra* at 14-15. The complete absence of evidence that Mr. Kindler ever sought to defraud investors or participated in any deception requires summary judgment in his favor.

Although this lack of proof of scienter is, by itself, fatal to plaintiffs' claims against Mr. Kindler, the affirmative evidence that has come to light affirmatively and indisputably demonstrates that Mr. Kindler is entitled to summary judgment. Mr. Kindler held two roles at Pfizer during the class period. Early in the class period, from January to August 2006, Mr. Kindler served as Pfizer's General Counsel and Chief Compliance Officer; for the balance of the class period (from August 2006 through January 2009), he was Pfizer's Chairman and Chief Executive Officer. In both roles, he relied on subordinates and other executives within Pfizer, including specialized disclosure attorneys and accountants, as well as the company's outside disclosure counsel and

independent auditors, to ensure that Pfizer made accurate and sufficient disclosures regarding the relevant government investigations and to determine whether Pfizer was required to reserve for any associated contingent liabilities. Mr. Kindler testified that throughout the class period he believed that Pfizer's disclosures were accurate and not misleading, and that Pfizer was not required to accrue a reserve in connection with the investigations until the fourth quarter of 2008 in view of the settlement discussions with the Department of Justice that led to its January 2009 agreement in principle. There is no evidence that suggests that that belief was not genuinely held.

Throughout the class period, Mr. Kindler, in both of his roles at the company, took pains to ensure that Pfizer's disclosures were accurate and not misleading, and that its reserve determinations were proper. That evidence includes undisputed proof that Mr. Kindler regularly looked to Pfizer's expert personnel and advisors, including Pfizer's outside disclosure counsel at Cadwalader, Wickersham & Taft and its outside auditors at KPMG, to validate Pfizer's decisions regarding its disclosures and accounting, in part through quarterly written certifications. The unrebutted evidence of Mr. Kindler's good faith reliance on these determinations by Pfizer's other executives, and in particular on the participation of both inside and outside lawyers and accountants in making the determinations, negates any inference of scienter on his part. *See infra* at 20-25.

Plaintiffs will undoubtedly contend that the assurances and advice that Mr. Kindler received were deficient—that different disclosures should have been made and that reserves should have been accrued earlier. As demonstrated by the memorandum of law filed by Pfizer in support of summary judgment, Pfizer's disclosures and accrual determinations were proper and not actionable as a matter of law. (*See* Pfizer Br. at 38-

52.) But even if plaintiffs could properly challenge those determinations, their fraud claim against Mr. Kindler would still fail, because the unrebutted evidence demonstrates that Mr. Kindler relied on those determinations in good faith, and good faith reliance on even legally incorrect advice is not evidence of an intent to defraud. The absence of any evidence that Mr. Kindler did not seek and follow the advice of his subordinates and outside advisors, including legal advice, precludes plaintiffs' claim that Mr. Kindler acted with scienter or otherwise culpably participated in any fraud.

STATEMENT OF UNDISPUTED FACTS

Mr. Kindler relies upon the following undisputed facts.

A. Mr. Kindler's Roles as General Counsel and CEO

At the start of the class period, in January 2006, Mr. Kindler was Pfizer's most senior lawyer and served as both General Counsel and Chief Compliance Officer and held the position of Vice Chairman.[2]

Prior to joining Pfizer as General Counsel in January 2002, Mr. Kindler had served as President of Partner Brands, General Counsel of McDonald's Corporation, head of litigation at General Electric Co. and a partner at Williams & Connolly. He is a graduate of Tufts University and Harvard Law School and served as law clerk to Judge David L. Bazelon of the U.S. Court of Appeals for the D.C. Circuit and to U. S. Supreme Court Associate Justice William J. Brennan, Jr.[3]

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[2] Declaration of Joseph G. Petrosinelli in Support of Pfizer's Motion for Summary Judgment (hereinafter "Petrosinelli Decl.") Ex. A-2 at 8:10-21.

[3] *See* Declaration of James P. Rouhandeh in Support of Defendant Jeffrey B. Kindler's Motion for Summary Judgment (hereinafter "Rouhandeh Decl.") Ex. A-K; *see also* Petrosinelli Decl. Ex. A-2 at 14:12-14; Petrosinelli Decl. Ex. B-2 at 11:2-8; Petrosinelli Decl. Ex. C-2 at 7:25-8:4, 9:21-10:1, 11:16-19.

As General Counsel and Chief Compliance Officer during the early part of the class period, from January to August 2006, Mr. Kindler oversaw the company's wide-ranging legal affairs, with the assistance of a large team of lawyers.[4] As relevant here, these included Douglas Lankler, an experienced ex-Assistant United States Attorney for the Southern District of New York, who led a group of lawyers with "the day-to-day responsibilities to conduct the government investigations and respond to them," and Lawrence Fox, an experienced securities lawyer, who advised on Pfizer's public disclosures in consultation with the company's outside disclosure counsel, Dennis Block of Cadwalader, Wickersham & Taft.[5] Mr. Lankler and his team provided updates to Mr. Kindler, Mr. Fox and other Pfizer executives (such as Pfizer's Controller, Loretta Cangialosi), as well as to Mr. Block and KPMG, on the status of the government investigations into the marketing of Bextra and other drugs.[6]

During his tenure as General Counsel, Mr. Kindler was a member of Pfizer's Disclosure Committee.[7] In that capacity, he participated in regular quarterly discussions with Mr. Lankler, Mr. Fox and others to review Pfizer's disclosures and evaluate whether and how to revise them in view of developments in the Bextra investigation.[8] Mr.

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[4] Petrosinelli Decl. Ex. A-2 at 9:19-10:9, 24:14-22; *see also* Petrosinelli Decl. Ex. B-2 at 83:13-20; Petrosinelli Decl. Ex. O-1 at 41:18-45:13.

[5] Petrosinelli Decl. Ex. B-2 at 90:2-91:4, 91:13-93:2, 116:25-117:19; Petrosinelli Decl. Ex. O-1 at 12:5-13:24, 41:18-45:13, 46:21-23; Petrosinelli Decl. Ex. Y-1 at 162:4-180:21, 231:3-21; Petrosinelli Decl. Ex. H-5; Rouhandeh Decl. Ex. B-K at PFE-JONES 00032605; Petrosinelli Decl. Ex. E-2 at 10:2-23.

[6] Petrosinelli Decl. Ex. Y-1 at 10:16-23, 18-6:10, 46:13-23, 162:4-164:15; Petrosinelli Decl. Ex. B-2 at 90:19-91:4, 92:20-93:2, 108:8-110:4, 117:21-118:6, 178:2-23; Petrosinelli Decl. Ex. C-2 at 30:13-31:9, 52:1-22; Petrosinelli Decl. Ex. O-1 at 41:18-43:3, 54:13-55:1, 83:19-84:22, 197:3-199:14; Petrosinelli Decl. Ex. E-2 at 66:11-17:19, 87:9-20, 260:16-261:9.

[7] *See* Petrosinelli Decl. Ex. V-6 at PFE-JONES 00036383-685.

[8] Petrosinelli Decl. Ex. C-2 at 70:10-24 ("At the disclosure meetings – at which were present Mr. Block, Mr. Fox, Mr. Lankler, Mr. Waxman, the outside and inside auditors – there would be a review of the (….continued)

Kindler's service on the Disclosure Committee ended upon his appointment as Chairman and CEO on August 1, 2006.[9] Accordingly, during the class period, Mr. Kindler participated in the Disclosure Committee meetings on February 22, 2006, April 18, 2006, May 1, 2006, July 18, 2006 and August 1, 2006.[10] The majority of the developments that plaintiffs argue should have prompted additional disclosures occurred in later periods. For example, the government presented its theory of liability as to Bextra in mid-August and September 2006, advised Pfizer of its "intended loss" theory in September 2007, issued subpoenas regarding the marketing of Lyrica, Geodon and Zyvox at various times in 2007, and sent its target letter and made its first settlement proposal in 2008.[11]

Beginning on August 1, 2006, with his appointment as Chairman and CEO, Mr. Kindler assumed a different set of duties at Pfizer, focused on the management and strategic direction of the enterprise.[12] He no longer participated in Disclosure Committee

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most significant events that had occurred in the investigation since the last time, and there would be – and this discussion would have preceded the disclosure meeting in my absence. But at the disclosure meeting there would be a discussion, and I would frequently – my habit would be to specifically ask is there something that occurred that you made a decision not to include; and if so, what was it and why was it your decision to do that. And we would discuss it."); *see also* Petrosinelli Decl. Ex. O-1 ("Then they would have what's called a disclosure committee meeting at which the head of everything within the organization attended, looked at the disclosure and gave their input as to the accuracy of the disclosures."); Petrosinelli Decl. Ex. Y-1 at 83:12-22, 87:24-88:14.

[9] Petrosinelli Decl. Ex. A-2 at 8:10-14; Petrosinelli Decl. Ex. B-2 at 170:14-22.

[10] *See* Petrosinelli Decl. Ex. V-6 (Disclosure Committee Meeting Minutes). Mr. Kindler assumed the role of Chairman and CEO of Pfizer on August 1, 2006. As reflected in the Disclosure Committee Meeting Minutes from October 17, 2006 (*see id.* at PFE-JONES 00036689-90), Mr. Kindler—after becoming Chairman and CEO—was succeeded on the Disclosure Committee by Allen Waxman.

[11] Petrosinelli Decl. Ex. X-2 at PFE-JONES 00025626-55; Petrosinelli Decl. Ex. B-6; Petrosinelli Decl. Ex. Y-6; Petrosinelli Decl. Ex. J-5 (Lyrica subpoena); Petrosinelli Decl. Ex. W-6 (Zyvox/Geodon subpoena); Petrosinelli Decl. Ex. E-2 at 191:5-7.

[12] Petrosinelli Decl. Ex. A-2 at 10:10-19 ("When I became chairman, or when I became CEO, my general duties and responsibilities became . . . to enhance shareholder value for the company, meet, to the (….continued)

meetings but instead evaluated the company's proposed disclosures in the course of regular quarterly "Certification Meetings" held to provide the CEO and CFO with the assurances that would enable them to certify Pfizer's quarterly securities filings as required by the Sarbanes-Oxley Act.[13]

B. Mr. Kindler's Reliance on the Results of Pfizer's Processes for Reviewing Disclosures and Reserves

1. *Pfizer's Sarbanes-Oxley Certification Process*

Beginning prior to the class period, as General Counsel and Chief Compliance Officer, Mr. Kindler had established a process with the assistance of Pfizer's in-house and outside disclosure counsel that was designed to ensure that Pfizer's quarterly SEC filings were complete and accurate and to provide a basis for the CEO and CFO to make their required Sarbanes-Oxley certifications.[14] Mr. Kindler described it as a "very, very robust process for doing our very best to ensure that we would exercise great care and diligence in preparing the CEO and CFO to sign these certifications."[15]

(continued….)
extent consistent with that, the expectations of all our stakeholders, and to do so consistent with the law and with the values of our company."); Petrosinelli Decl. Ex. B-2 at 105:23-25.

[13] Petrosinelli Decl. Ex. B-2 at 170:14-22; Petrosinelli Decl. Ex. B-4; Petrosinelli Decl. Ex. V-6.

[14] Petrosinelli Decl. Ex. B-2 at 174:6-12 ("As general counsel . . . in collaboration with Larry Fox and Dennis Block, I helped put together a very, very robust process for doing our very best to ensure that we would exercise great care and diligence in preparing the CEO and the CFO to sign these certifications."); *see also id.* at 60:9-15, 116:25-117:19, 175:19-176:24 (describing the certification process); Petrosinelli Decl. Ex. O-1 at 41:18-45:13 (describing the certification process), 45:5-12 ("So you would have a full discussion to the CEO and CFO who had to certify either the 10-K or the 10-Qs regarding every issue that was discussed during the process . . . "); Petrosinelli Decl. Ex. Y-1 at 179:9-19 ("The purpose of the certification meeting was to review again with the 10-K or the 10-Q to make sure that the CEO and CFO are comfortable with both substance and process, to make sure that they had and they make use of the opportunity to ask questions of the people in the room and be comfortable before they sign the certifications, if they are obligated to sign, to the SEC with respect to each of our quarterly filings.").

[15] Petrosinelli Decl. Ex. B-2 at 174:6-12; *see also* Petrosinelli Decl. Ex. Y-1 at 170:22-172:8, 180:15-21; Petrosinelli Decl. Ex. O-1at 268:9-16; *see also* Petrosinelli Decl. Ex. H-5.

The process enlisted the participation of "all the relevant leaders in the company that had knowledge of the matters that were required to be addressed in [Pfizer's] public filings."[16] As explained by Mr. Kindler, "there was a process for collecting that information, reviewing it within the legal department, reviewing it with outside counsel, Mr. Block, reviewing it with the relevant heads of departments like tax, treasury, accounting et cetera, reviewing it with the outside auditors and the internal auditors."[17]

As to the quarterly legal proceedings disclosures, Mr. Fox and others testified that the process began with the preparation of a draft disclosure by Mr. Fox based on information he had received during regularly-scheduled calls and meetings with the company's attorneys, including Mr. Lankler.[18] His draft disclosure was then circulated for review by 15 to 20 lawyers, including Mr. Lankler and other in-house lawyers in the government investigations group.[19] A new draft incorporating comments from these lawyers was then reviewed by Pfizer's head of litigation and outside disclosure counsel,

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[16] Petrosinelli Decl. Ex. B-2 at 174:6-16; *see also* Petrosinelli Decl. Ex. O-1 at 44:23-45:13.

[17] Petrosinelli Decl. Ex. B-2 at 174:21-175:2.

[18] Rouhandeh Decl. Ex. C-K (Legal Proceedings Disclosure Process); Petrosinelli Decl. Ex. Y-1 at 162:4-10 ("I would prepare the first draft of the legal proceedings disclosures for an upcoming periodic SEC report . . . based on the information that I had been provided since our most recent disclosure by our in-house litigators, civil litigation attorneys, patent attorneys and government investigation attorneys."), 162:11-163:2; Petrosinelli Decl. Ex. O-1 at 41:18-25.

[19] Rouhandeh Decl. Ex. C-K; Petrosinelli Decl. Ex. Y-1 at 10:16-23, 46:13-23, 162:4-10 ("I would prepare the first draft, and I would send it to a group of eight or nine in house lawyers in certain areas that always included the [government investigations] lawyer…So there was a group of…15 to 20 lawyers who reviewed it in that first stage, and that always included the [government investigations] lawyer."), 165:23-166:4 ("I would get comments from that group of 15 to 20 lawyers…."). In addition to this quarterly process, during the course of the Bextra investigation, Mr. 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* Petrosinelli Decl. Ex. E-2 at 258:17-259:13; *see also* Petrosinelli Decl. Ex. Y-1 at 46:9-23 (testifying that Pfizer's statement that it believed that it had "substantial defenses" to the Government Investigations was "the result of regular updates provided to [Mr. Fox] and to Dennis Block" by the company's litigators and government investigation attorneys).

Mr. Block.[20] A third draft incorporating their comments was then sent to Mr. Kindler when he was General Counsel (pre-August 2006), copying everyone who had commented on earlier drafts.[21] Mr. Kindler's comments were incorporated into a fourth draft, which was sent to the Controller's group and included in the draft 10-Q or 10-K.[22] The draft 10-Q or 10-K was thereafter distributed to a larger group, which included the lawyers who had reviewed the prior legal proceedings draft as well as KPMG, Pfizer's outside auditor.[23]

Following that review, the draft 10-Q or 10-K was reviewed and discussed by the Disclosure Committee.[24] The Disclosure Committee meeting was the last step before the Certification Meeting, where senior management reviewed the 10-Q or 10-K, including

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[20] Rouhandeh Decl. Ex. C-K; Petrosinelli Decl. Ex. Y-1 at 166:5-19 ("Draft 2 was sent to the head of litigation and to our outside disclosure counsel, in those days, Dennis Block. . . . I would then receive comments from the head of litigation and from Dennis Block"); Petrosinelli Decl. Ex. O-1 at 42:8-14 ("[T]here would usually be a discussion between Larry and I. And Larry would typically have knowledgeable people about specific things join the conversation to give us . . . information regarding new matters that might be disclosable and the status of old matters that had been disclosed.").

[21] Rouhandeh Decl. Ex. C-K; Petrosinelli Decl. Ex. Y-1 at 173:24-174:10; Petrosinelli Decl. Ex. O-1 at 43:17-44:1.

[22] Petrosinelli Decl. Ex. Y-1 at 174:11-23.

[23] Rouhandeh Decl. Ex. C-K; Petrosinelli Decl. Ex. Y-1 at 174:11-175:2, 176:18-177:16. KPMG often suggested changes to Pfizer's proposed disclosures that the company implemented. *See* Petrosinelli Decl. Ex. O-5; Petrosinelli Decl. Ex. K-5; Petrosinelli Decl. Ex. I-5; Petrosinelli Decl. Ex. A-6.)

[24] Petrosinelli Decl. Ex. Y-1 at 177:23-178:5; Petrosinelli Decl. Ex. O-1 at 44:15-22. The Disclosure Committee was charged by its Charter with "review[ing] disclosure controls and other procedures that are designed to ensure that (1) information required to be disclosed by the Company in reports filed with the SEC and other information that the Company will disclose to the investment community is recorded, processed, summarized and reported accurately and on a timely basis and that all information that is necessary to make such disclosure complete and not misleading is included in such information . . . , [and] [p]rovid[ing] a report and certification to the Senior Officers prior to the filing with the SEC of each Company Annual Report on Form 10-K and Quarterly Report on Form 10-Q (collectively, the 'periodic reports') as to (i) the Committee's compliance with its policies and procedures and proper performance of the responsibilities that have been assigned to it and (ii) the Committee's conclusions resulting from its evaluation of the effectiveness of the Disclosure Controls." Rouhandeh Decl. Ex. D-K.

the legal proceedings disclosure, with the CEO and CFO to provide the assurances that enabled them to sign their Sarbanes-Oxley certifications.[25] As Mr. Kindler testified:

> The disclosure committee had in attendance the controller, the head of internal audit, the corporate secretary, members of the financial community from all the different businesses, the chief financial officer, people from media relations, treasury, investor relations and the general counsel.
>
> They would meet in advance of the certification meeting to review the documents, to discuss what matters needed to be disclosed, how they should be disclosed, how they should be described. There would be a further review of the documents over a period of time. Questions would be asked and answered. Further documents would be asked to be reviewed, again by inside counsel, outside counsel, internal auditors, outside auditors.
>
> And all this would culminate in what we called the certification meeting, which was a meeting at which the CEO and the CFO, first Dr. McKinnell and Mr. Shedlarz, then myself and Alan Levin and then subsequently myself and Mr. D'Amelio, would assemble a group of people. . . .
>
> We would get a report from the disclosure committee. We'd get a report from Mr. Fox. We would ask questions of the internal and external auditors. They would provide us with information about what was in and what was not included in the financial statements.
>
> They would present us with information regarding all the subcertifications that had been made. We would ask them questions about what matters they had considered disclosing and decided not to and would ask them why. We would ask them whether there were any disagreements among them.
>
> We would have a very robust discussion that usually went for half an hour, an hour. And then finally we'd go around the room again and ask if anybody saw any reasons why the statements that Mr. D'Amelio and I, or Mr. Levin and I in this case, were attesting to weren't accurate.[26]

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[25] Petrosinelli Decl. Ex. Y-1 at 177:23-178:25; Petrosinelli Decl. Ex. B-2 at 170:14-22, 175:3-11; Petrosinelli Decl. Ex. O-1 at 44:15-45:13.

[26] Petrosinelli Decl. Ex. B-2 at 175:5-176:24; *see also* Petrosinelli Decl. Ex. P-2 at 183:5-12 ("A certification meeting was where it was held by the CEO and he had all of . . . the financial and legal team around the table, and we went through the document and people discussed any issues they had with the document before it was filed and gave everyone an opportunity to speak up and raise concerns.").

Prior to signing the quarterly CEO certification, Mr. Kindler received "sub-certifications" from the heads of the various business units, the General Counsel and the Controller that certified the accuracy and completeness of the information contained in the company's proposed SEC filings.[27] After the Certification Meeting, Mr. Fox sent the entire legal proceedings disclosure to a group of 35 or 40 people, primarily in the legal department, for final review.[28]

2. *Review of SEC Filings*

Throughout the class period, and in both his roles at Pfizer, Mr. Kindler relied on the company's processes to ensure that Pfizer's SEC filings were accurate and fully compliant with the federal securities laws. Mr. Kindler testified in particular that he relied on the participation and advice supplied by Pfizer's in-house and outside disclosure attorneys, Mr. Fox and Mr. Block, and their assurances that Pfizer's disclosures were appropriate.[29] Mr. Kindler frequently told Mr. Fox and Mr. Block "that they should ask for any information they thought they needed," and questioned "whether they were . . .

[27] *See* Petrosinelli Decl. Ex. B-4; Rouhandeh Decl. Ex. E-K; Rouhandeh Decl. Ex. F-K; *see also* Petrosinelli Decl. Ex. B-2 at 174:13-175:2 ("all relevant leaders in the company that had knowledge of the matters that were required to be addressed in our public filings, which included the 10-K, the 10-Q, earnings releases and the like, were reviewed by those relevant people; that they provided certifications up the chain of command to the relevant leaders of the company . . . ."). As part of the sub-certification process, Mr. Lankler, head of government investigations, provided sub-certifications to the General Counsel attesting that the disclosures were accurate and complete. *See, e.g.*, Rouhandeh Decl. Ex. G-K (collection of Lankler certifications).

[28] Petrosinelli Decl. Ex. Y-1 at 179:22-180:14.

[29] Petrosinelli Decl. Ex. B-2 at 116:25-117:19; *see also id.* at 244:1-7; Petrosinelli Decl. Ex. C-2 at 44:2-11.

satisfied that they had exchanged sufficient information for them to endorse" the disclosures.[30] He explained:

> I and other people that were involved in the disclosures that were made in our public filings and the judgments that were made with regard to reserves and other accounting decisions did, in fact, rely in good faith on the advice of Mr. Block and Mr. Fox, who themselves participated in a very, very robust and extensive process that was designed to provide Mr. D'Amelio and myself with substantial assurance that our disclosures were accurate and that ultimately extremely experienced and professional securities attorneys carefully reviewed what we were disclosing and the judgments that we were making and gave us their expert opinion that we were complying both with the laws and regulations and with the representations made in accordance with our Sarbanes-Oxley certifications.[31]

Mr. Fox and Mr. Block reviewed every SEC filing challenged by plaintiffs and, as part of his review, Mr. Block formally certified in writing as to each filing that, "to the best of my knowledge," it "contain[ed] all information required to be included," did not "contain an untrue statement of a material fact" and did not "omit a material fact necessary to make the statements . . . not misleading."[32] Mr. Block has testified that Pfizer's disclosures during the class period were not only accurate and in conformance with the securities laws, but also that they were "strong," "robust" and "transparent."[33] Mr. Fox likewise testified that he too continues to believe, consistent with his advice at the time, that Pfizer's SEC filings were appropriate.[34]

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[30] Petrosinelli Decl. Ex. C-2 at 51:22-52:22; *see also* Petrosinelli Decl. Ex. R-2 at 137:11-21, 186:15-23.

[31] Petrosinelli Decl. Ex. B-2 at 116:25-117:19.

[32] Petrosinelli Decl. Ex. O-7 (collection of Block certifications); Petrosinelli Decl. Ex. O-1 at 139:22-140:16 ("I gave a certification saying, in essence, I'm not aware of anything that's untrue about the filings that I reviewed.").

[33] Petrosinelli Decl. Ex. O-1 at 179:9-12, 183:21-184:5, 269:12-18.

[34] Petrosinelli Decl. Ex. Y-1 at 109:20-25, 110:3-5, 180:23-181:16.

Based on Pfizer's extensive disclosure process and the advice and information supplied by all of the persons involved, including Mr. Fox and Mr. Block, Mr. Kindler believed that Pfizer's disclosures during the class period were accurate and complied with the securities laws.

> [T]he end result of [the process] was for Mr. Fox and Mr. Block to recommend the appropriate language to put in the filing, consistent with our obligations to make appropriate disclosures to our shareholders. And I have no reason to challenge that conclusion. I believe what was written here, and that was their advice on how to articulate it.[35]

3. *Disclosures Regarding the Government Investigations*

Mr. Kindler relied on Pfizer's certification process to ensure that Pfizer's disclosures regarding the government investigations were truthful and in compliance with securities laws. It was Mr. Kindler's understanding that, "if a matter arose during the course of the investigation, whatever it was—a new fact, a new allegation, some other activity—there would be a thorough review on the part of counsel regarding whether or not that new event, that new fact, that new interpretation should be included in the statement in our filings."[36] As Mr. Kindler further explained,

> Mr. Lankler and the outside investigators were under standing instructions to provide any such information to Mr. Block and Mr. Fox. They had regular meetings and telephone calls to review it. And ultimately and perhaps most importantly from my perspective, at the final disclosure meeting at which time I signed [the Sarbanes-Oxley certifications], I inquired of both Mr. Lankler and Mr. Block and Mr. Fox whether they

[35] Petrosinelli Decl. Ex. C-2 at 47:2-11, 67:12-25.

[36] Petrosinelli Decl. Ex. C-2 at 69:17-24; *see also* Petrosinelli Decl. Ex. Y-1 at 46:13-23, 88:4-11, 144:1-7 ("[A]s part of our very robust processes, that Dennis Block and I regularly consulted with and were informed by Doug Lankler and others in our GI group, and we would hear what they had to say. To the extent we had questions, we would ask them. We drilled down until we were comfortable."); Petrosinelli Decl. Ex. O-1 at 198:1-199:14, 269:12-18.

> were both satisfied that they had exchanged sufficient information for Mr. Block and Mr. Fox to endorse this language.[37]

Pfizer's disclosures were revised on numerous occasions, in consultation with counsel and external auditors, to reflect developments in the government investigations.[38]

4. *Assessment of Internal Controls*

Mr. Kindler relied on Pfizer's certification process as a basis for his certifications of Pfizer's internal controls over financial reporting. In this respect, he relied particularly on the assurances from Pfizer's internal auditors and external auditors at KPMG that the company maintained "effective internal control over financial reporting."[39] In response to questions from plaintiffs about a report made by Hugh Donnelly, the head of internal audit, at the Certification Meeting for the third quarter of 2006 regarding a "significant deficiency" finding as to Pfizer's internal controls over certain U.S. pharmaceuticals sales and marketing practices, Mr. Kindler explained his understanding that "the accounting community, internal and external, at Pfizer discussed that and apparently unanimously concluded it was a significant deficiency and not a material weakness."[40] Mr. Kindler explained that he was also satisfied with KPMG's determination after auditing the company's internal controls over healthcare reporting that the company's disclosures were accurate, and that he accepted and relied upon KPMG's conclusion:

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[37] Petrosinelli Decl. Ex. C-2 at 52:11-22; *see also* Petrosinelli Decl. Ex. F-2 at 96:7-97:6, 99:1-100:21; Petrosinelli Decl. Ex. Y-1 at 67:12-18, 144:1-7, 204:21-205:16; Petrosinelli Decl. Ex. O-1 at 41:18-45:13, 83:19-84:15.

[38] *See, e.g.*, Petrosinelli Decl. Ex. B-1 at 18; Petrosinelli Decl. Ex. D-1 at 73; Petrosinelli Decl. Ex. H-1 at 40; Rouhandeh Decl. Ex. H-K (reflecting Mr. Block's draft language); Petrosinelli Decl. Ex. O-6 (addition of language based on discussions with Ms. Cangialosi and Mr. Lankler); Petrosinelli Decl. Ex. O-5 (reflecting KPMG's suggestions to language).

[39] *See* Petrosinelli Decl. Ex. B-1 at 34; Petrosinelli Decl. Ex. D-1 at 36; Petrosinelli Decl. Ex. F-1 at 38.

[40] Petrosinelli Decl. Ex. B-2 at 177:18-180:14.

> I don't know what specific conversations occurred between the internal auditors and the external auditors. I do know, because I asked, whether the external auditors had obtained all the information that they required to evaluate that judgment and whether the internal auditors had provided all the information to the external auditors to allow them to make that judgment. And I was fully satisfied, based on their relationship and my requirement that they be transparent with one another, that they had shared all relevant information with one another in order to make that judgment.[41]

5. *Process for Setting Reserves*

Mr. Kindler similarly relied on Pfizer's certification process to ensure that Pfizer's determinations as to whether a reserve was required in connection with the Bextra investigation were correct.[42] In this respect, he relied in particular on the participation of the company's inside and outside accountants, its outside auditors at KPMG and its disclosure counsel, Mr. Block.[43] As Mr. Kindler explained, "[t]he official decision of the company whether or not FAS-5 is triggered [was] ultimately made by the controller of the company and the outside auditors."[44] Throughout the class period, Pfizer's Controller, Loretta Cangialosi, had principal responsibility for ensuring that the company's reserve determinations complied with FAS 5.[45]

Mr. Kindler explained his understanding that, in each quarter during the class period, Ms. Cangialosi and her internal accounting team, together with Mr. Lankler, met with KPMG and, periodically, Mr. Block, to evaluate whether a reserve was required in

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[41] Petrosinelli Decl. Ex. B-2 at 203:6-21.

[42] FAS 5 requires the accrual of a loss contingency only where the amount of any possible loss is both "probable" and "can be reasonably estimated." Petrosinelli Decl. Ex. W-3 at 4-6 (Statement of Financial Accounting Standards No. 5 at ¶ 8); *see, e.g.*, Petrosinelli Decl. Ex. B-2 at 116:25-117:19.

[43] Petrosinelli Decl. Ex. B-2 at 218:6-219:4.

[44] Petrosinelli Decl. Ex. B-2 at 224:8-13.

[45] Petrosinelli Decl. Ex. S-1 at 367:23-368:14.

connection with the government investigations.[46] Ms. Cangialosi's office received monthly updates on potentially material litigation matters, including the government investigations, and also periodically met with Mr. Lankler, outside investigation counsel and KPMG to discuss developments in the government investigations.[47] With regard to the Bextra investigation, for each quarter during the class period, Ms. Cangialosi determined that no reserve was required prior to the fourth quarter of 2008 and, as part of Pfizer's internal certification process, certified the accuracy of Pfizer's financial statements in writing each quarter.[48] Mr. Block similarly advised Pfizer that no accrual was required "because, among other things [the amount] was not reasonably calcula[ble]."[49]

KPMG determined each quarter that Pfizer's reserve decisions were reasonable and compliant with FAS 5 and GAAP.[50] KPMG affirmed these quarterly determinations in each of its annual audits for 2006 through 2008.[51] Covington & Burling, Pfizer's counsel in the Bextra investigation, also provided audit response letters to KPMG and

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[46] Petrosinelli Decl. Ex. B-2 at 222:25-223:14; *see also* Petrosinelli Decl. Ex. V-4; Rouhandeh Decl. Ex. I-K; Rouhandeh Decl. Ex. F-K; *see also* Petrosinelli Decl. Ex. B-4 at PFE-JONES 00036812-13 (Ms. Cangialosi "indicated that the committee concluded that the company's disclosure controls and procedures were adequate and effective as of the end of the period covered by the Form 10-Q, and she delivered a certificate from the Disclosure Committee to that effect to Messrs. Kindler and D'Amelio.").

[47] *See, e.g.*, Rouhandeh Decl. Ex. J-K; Petrosinelli Decl. Ex. F-5; Petrosinelli Decl. Ex. S-1 at 209:4-210:25, 275:11-15, 285:4-12, 374:21-375:21; Petrosinelli Decl. Ex. E-2 at 258:17-261:9; Petrosinelli Decl. Ex. T-1 at 46:16-47:14; Petrosinelli Decl. Ex. Q-1 at 154:16-155:15, 323:17-21; Petrosinelli Decl. Ex. P-2 at 107:12-25; *see also* Petrosinelli Decl. Ex. V-4.

[48] *See, e.g.*, Rouhandeh Decl. Ex. K-K (collected Cangialosi certifications).

[49] Petrosinelli Decl. Ex. C-2 at 112:2-22; *see also id.* at 113:11-15 ("Mr. Block advised us that the company should not take a reserve because, under the accounting rules as applied to our facts and circumstances in consultation with everyone else, the amount could not be reasonably calculated.").

[50] *See, e.g.*, Petrosinelli Decl. Ex. S-1 at 380:19-383:15.

[51] *See, e.g.*, Petrosinelli Decl. Ex. H-4; Petrosinelli Decl. Ex. I-4; Petrosinelli Decl. Ex.D-1; Petrosinelli Decl. Ex. F-1; Petrosinelli Decl. Ex. J-1; Petrosinelli Decl. Ex. W-4.

Pfizer that stated that Covington "has not concluded that the prospect of an unfavorable outcome in [the government investigations] is either 'probable' or 'remote.'"[52] Mr. Kindler relied in good faith on these expert accounting determinations by Pfizer's inside and outside accountants. As Mr. Kindler testified:

> FAS-5 is an accounting standard . . . and I am not an accountant. As I understand it, there's quite a body of learning on this that the accountants rely on. And I was looking to the outside and inside accountants to make that judgment [of whether the FAS-5 criteria had been met], together with Mr. Block.[53]

C. The March 2008 Statement Regarding Pfizer's Dividend

On March 5, 2008, during Pfizer's "Analyst Day" with investment analysts, Frank D'Amelio, Pfizer's Chief Financial Officer, predicted that the company would continue to pay its dividend "at least at current levels" absent "significant unforeseen events."[54] More than ten months later, on January 26, 2009, Pfizer announced its acquisition of Wyeth for $68 billion and advised that, in connection with financing the acquisition, it would be reducing its future dividend payment. (*See* Pfizer Br. at 22-24). There is no evidence that, at the time of Mr. D'Amelio's statement, Mr. Kindler or anyone else at Pfizer did not believe that Pfizer would continue its dividend at current levels, absent unforeseen future developments. Nor is there any evidence that Mr. Kindler or anyone else foresaw in March 2008 that Pfizer would enter into an agreement to acquire Wyeth in January 2009. There is also no evidence that the dividend cut had any connection to the agreement in principle to settle the government investigations announced on the same

[52] Petrosinelli Decl. Ex. S-4; Petrosinelli Decl. Ex. T-4; Petrosinelli Decl. Ex. Y-4; Petrosinelli Decl. Ex. N-4; Petrosinelli Decl. Ex. D-4.

[53] Petrosinelli Decl. Ex. B-2 at 218:7-14.

[54] Am. Compl. ¶¶ 81-83.

day. Mr. Kindler testified that the dividend cut had nothing to do with the settlement.[55] There is no contrary evidence.

ARGUMENT

I. THERE IS NO EVIDENCE THAT MR. KINDLER POSSESSED THE REQUISITE SCIENTER

Mr. Kindler is entitled to summary judgment because there is no evidence whatsoever that he sought to defraud investors. The grave accusation of fraud inherent in plaintiffs' securities claim has no basis in any evidentiary fact. Scienter being an essential element of their claim, *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 455 (S.D.N.Y. 2000), this failure of evidence as to Mr. Kindler is fatal and mandates summary judgment. "A failure of proof on any one of th[e] . . . essential elements of plaintiffs' claims 'necessarily renders all other facts immaterial' and requires summary judgment in favor of defendants." *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 509 (2d Cir. 2010). Mere negligence is insufficient, *Ernst & Ernst v . Hochfelder*, 425 U.S. 185, 198-99 (1976), as is poor business judgment. *Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000). There must be evidence that the defendant consciously mischaracterized facts or recklessly disregarded them. *In re Symbol Techs. Class Action Litig.*, 950 F. Supp. 1237, 1245 (E.D.N.Y. 1997) (citations omitted).

In the early months of the class period, from January to August 2006, Mr. Kindler served as Pfizer's most senior lawyer, overseeing its wide-ranging legal affairs. For the balance of the class period, he was Pfizer's CEO, charged with the overall direction of

[55] Petrosinelli Decl. Ex. B-2 at 292:20-293:7 ("Q. Mr. Kindler, if Pfizer had not acquired Wyeth, would Pfizer have cut its dividend in January 2009? A. No. . . . . Q. Did you have any plans to cut your dividend absent the Wyeth acquisition? A. No.").

the business. Mr. Kindler has testified that he intended for Pfizer's disclosures to be accurate and for its reserve determinations to be correct.[56] The mountain of documentary evidence in this action contains nothing inconsistent with that testimony. There is no email, no record of any communication, no testimony, no circumstantial evidence that indicates that Mr. Kindler sought to deceive investors about the government's investigations into Bextra and other drugs,[57] about Pfizer's internal controls over healthcare compliance,[58] about its sales of various drug products or about its plans for its dividend.[59]

Plaintiffs may argue that Mr. Kindler had knowledge of matters that were not disclosed. As a matter of law, those arguments fail to demonstrate any defect in Pfizer's disclosures. (*See* Pfizer Br. at 28-38.) But even assuming otherwise, there is nothing to suggest that Mr. Kindler manipulated Pfizer's processes for making disclosures or reserve determinations, much less that he sought to mislead the markets and defraud investors. To the contrary, the undisputed facts uniformly demonstrate that Mr. Kindler believed that Pfizer's disclosures were accurate and that its reserve determinations were appropriately made. Nor is there any evidentiary basis for plaintiffs' claim that Mr. Kindler sought to deceive investors in connection with Mr. D'Amelio's March 2008 prediction that Pfizer would not reduce its dividend absent "significant unforeseen

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[56] Petrosinelli Decl. Ex. B-2 at 310:15-311:4 ("Q. When you signed the certifications, did you believe that the financial statements were fairly stated in all material respects? A. Yes. Q. Did you believe that the company's legal proceeding disclosures complied with the securities laws? A. Yes. Q. Would you have signed those certifications and those filings had you not believed those things? A. I would not have.").

[57] *See* Am. Compl. ¶¶ 16, 66-74, 76, 79(c), 79(d).

[58] *See* Am. Compl. ¶¶ 15, 65, 67, 77.

[59] *See* Am. Compl. ¶¶ 84-85, 87-88, 90-92, 94, Ex. B.

events."[60] There is no evidence that Mr. Kindler believed otherwise. To the contrary, the record unambiguously shows that it was the then-unforeseen $68 billion acquisition of Wyeth in January 2009 that prompted Pfizer to reduce its dividend, not the settlement of the government investigations. *See supra* at 17-18.

Not only do plaintiffs lack any evidence of deceptive intent, they also cannot proffer any possible reason why Mr. Kindler, an experienced and successful lawyer and CEO of a large public company, would engage in the fraud they allege. Plaintiffs do not allege that he sold stock during the class period. As this Court has repeatedly recognized, the absence of stock sales by a defendant tends to disprove scienter on his part. *See*, *e.g.*, *In re SLM Corp. Sec. Litig.*, 740 F. Supp. 2d 542, 558-59 (S.D.N.Y. 2010) ("[T]he absence of sales by [the defendant] undermines the claim of scienter against him."); *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d at 462-63 (absence of "pecuniary gain by company insiders" is "inconsistent with an intent to defraud shareholders") (citation omitted).

It is not enough for plaintiffs, with hindsight perspective, to critique Pfizer's disclosures and loosely tar its senior executives with a charge of "fraud." To survive summary judgment as to Mr. Kindler, plaintiffs must come forward with proof that would substantiate that serious allegation, and there is none.

II. MR. KINDLER'S GOOD FAITH RELIANCE ON PFIZER'S PROCESSES FOR ENSURING ACCURATE DISCLOSURE NEGATES ANY INFERENCE OF SCIENTER

Apart from plaintiffs' failure to adduce any evidence of scienter, Mr. Kindler is entitled to summary judgment as to all alleged misstatements and omissions because the

[60] Am. Compl. ¶¶ 81-83.

undisputed evidence demonstrates that he relied in good faith on Pfizer's procedures, personnel and experts to ensure that the company's disclosures were accurate and complied with the securities laws.

Courts have repeatedly recognized that unrebutted evidence that a corporate executive relied in good faith on the professional judgment of internal or external lawyers, accountants and auditors will negate a claim of scienter and entitles the defendant to summary judgment as a matter of law. *See, e.g., Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (affirming summary judgment based on reliance on counsel); *SEC v. Shanahan*, 646 F.3d 536, 544-45 (8th Cir. 2011) (reliance on counsel) (judgment as a matter of law); *Howard v. SEC*, 376 F.3d 1136, 1147-49 (D.C. Cir. 2004) (reliance on counsel) (reversing SEC administrative order); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.,* 892 F. Supp. 2d 59, 72 (D.D.C. 2012) (hereinafter "*In re Fannie Mae Securities Litigation*") (summary judgment based on reliance on internal and external accountants and auditors); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1251 (S.D. Cal. 2010) (summary judgment based on reliance on internal and external accountants and auditors); *SEC v. Steadman*, 967 F.2d 636, 642-43 (D.C. Cir. 1992) (reliance on counsel); *see also N. Port Firefighters' Pension–Local Option Plan v. Temple-Inland, Inc.*, 936 F. Supp. 2d 722, 754-55 (N.D. Tex. 2013) (motion to dismiss based on reliance on internal and external accountants and auditors); *cf. SEC v. Spectrum, Ltd.*, 489 F.2d 535, 541-42 (2d Cir. 1973) ("The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously

disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters.").

Like the defendants in these cases, Mr. Kindler is entitled to summary judgment as a matter of law given the unrebutted record of his good faith reliance on Pfizer's internal and outside counsel, accountants and auditors and its established processes for making decisions regarding disclosures and reserves. During the class period, in both of his roles, first as General Counsel and then as CEO, Mr. Kindler relied on persons inside and outside Pfizer with more detailed knowledge or specialized legal or accounting expertise to ensure that Pfizer's disclosures were accurate and that its accounting was proper.

The unrebutted evidence demonstrates that Mr. Kindler looked to Mr. Block and Mr. Fox, together with Mr. Lankler and others in Pfizer's internal legal department and the company's outside investigations counsel, to ensure that Pfizer's disclosures regarding the government investigations into Bextra and other drugs were accurate and complied with the securities laws. *See supra* at 13-14. Pfizer's processes for making its disclosures as to legal proceedings involved literally dozens of lawyers, inside and outside the company, to ensure that appropriate disclosures were made. Mr. Kindler's indisputable good faith efforts to ensure that Pfizer's disclosure determinations were made with the benefit of their knowledge and expertise and conformed to their advice negates any inference of an intention to defraud.

Courts have not hesitated to grant summary judgment where the record demonstrates a defendant's good faith. In *Shanahan*, for example, the Eighth Circuit affirmed summary judgment in favor of an outside director who had relied on the

company's internal and external accounting and legal advisors to ensure that the company's proxy disclosures were proper. 646 F.3d at 539. "Depending on others to ensure the accuracy of disclosures," the court explained, "even if inexcusably negligent—is not severely reckless conduct that is the functional equivalent of intentional securities fraud." *Id.* at 544. Here, Mr. Kindler's conduct in relying on Pfizer's processes for ensuring adequate disclosure could not possibly be described as even negligent, much less support a claim of fraud. As the D.C. Circuit explained in *Howard*, in reversing an SEC order, evidence that a defendant believed that a transaction had been approved by outside counsel is a "green" flag and "powerful evidence" of good faith that is inconsistent with scienter. 376 F.3d at 1147-49; *see also Steadman*, 967 F.2d at 642-43 (mutual fund firm had no scienter in failing to disclose potential fines for failing to complete blue sky registrations where attorney had provided opinion letter stating that registration was not required).

The record similarly shows that Mr. Kindler appropriately looked to Pfizer's internal and outside auditors to evaluate Pfizer's internal controls. *See supra* at 14-15. Here again, his good faith reliance on the company's inside and outside auditors negates any inference of an intent to defraud. As here, in *In re REMEC Inc. Sec. Litig.*, the plaintiffs claimed that the CEO of a public company had made false statements regarding the state of the company's internal controls. 702 F. Supp. 2d at 1251. The court granted summary judgment in favor of the CEO based on evidence that he relied in good faith on the company's accounting department, CFO, audit committee and outside auditors. *See id.* The same result should obtain here.

Finally, the undisputed evidence demonstrates that Mr. Kindler relied on Pfizer's accountants, led by Ms. Cangialosi, Pfizer's Controller, in consultation with Mr. Lankler, as well as KPMG and Mr. Block, to determine whether Pfizer was required to accrue a reserve in connection with the Bextra investigation. *See supra* at 15-17. Courts have repeatedly held that a CEO who, like Mr. Kindler, relies in good faith on determinations by accountants and auditors is entitled to summary judgment as a matter of law. In *In re Fannie Mae Securities Litigation*, the court granted summary judgment in favor of a CEO on securities fraud claims premised on alleged accounting violations. 892 F. Supp. 2d at 72. There, as here, the CEO had "relie[d] in good faith on the professional judgment of the company's internal and external accounting and auditing personnel." *Id.* Unlike here, the evidence in *Fannie Mae* included a memo from the company's controller that suggested that the company's accounting violated GAAP. *Id.* at 71-72. Nonetheless, the court properly granted summary judgment in favor of the CEO because the plaintiffs failed to "put forth any evidence that [the CEO] was notified or should have known that [the company's] accounting policies violated GAAP." *Id.* at 70-72; *see also In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d at 1241, 1251 (granting summary judgment on claims of alleged failure to recognize goodwill impairment where evidence showed that CEO had "relied in good faith on [the] competence and expertise" of accountants); *cf. N. Port Firefighters' Pension*, 936 F. Supp. 2d at 754-55 (granting motion to dismiss where CEO had relied upon "accounting opinions and judgments that were approved by [the company's] top two internal accountants . . . [and] outside auditors"). As in these cases, Mr. Kindler is entitled to summary judgment on plaintiffs' claims in view of the

unrebutted evidence that he relied in good faith on the company's accountants, outside auditors and legal advisors.

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

Mr. Kindler is similarly entitled to summary judgment on the Section 20(a) control person claim. A Section 20(a) claim requires: (1) a primary violation of Section 10(b) by the controlled person; (2) the defendant's control of the primary violator; and (3) that the defendant was in some meaningful sense a culpable participant in the fraud perpetrated by the controlled person. *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014). If the plaintiff can establish a prima facie case under Section 20(a), then "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.'" *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1473 (2d Cir. 1996) (citation omitted). Good faith can be established by showing that the control person "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[s].'" *Id.* (citation omitted).

Mr. Kindler is entitled to summary judgment on plaintiffs' Section 20(a) claim because plaintiffs cannot establish a primary violation of Section 10(b). *See* Pfizer Br. at 28-52. Even if they could, however, there is no evidence that Mr. Kindler was a "culpable participant" in any fraud. *See supra* at 18-20. The unrebutted evidence demonstrates that throughout the class period, Mr. Kindler acted in good faith and exercised due care in his supervision of Pfizer's procedures to ensure that it complied

with the securities laws. *See supra* at 20-25. Mr. Kindler is entitled to summary judgment on plaintiffs' Section 20(a) claim.

CONCLUSION

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

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Respectfully submitted,

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