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

PFIZER'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Stripped of its rhetoric, Plaintiffs' Memorandum of Law in Opposition to Pfizer Inc.'s and the Individual Defendants' Motions for Summary Judgment ("Opp.") confirms that their claims cannot stand under recent, controlling Second Circuit law. Plaintiffs' entire theory of the case is now that although Pfizer disclosed the Department of Justice investigation and its risks to the company, Defendants misled investors by concealing "Pfizer's off-label promotion practices" and "the compelling evidence" the government had presented on the subject. Opp. 40. In other words, Plaintiffs claim Defendants committed securities fraud by not disclosing that Pfizer employees had, in fact, engaged in the unlawful conduct the government had alleged.

The most recent version of Plaintiffs' claim, formed with the benefit of extensive discovery, is explicitly and directly foreclosed by the Second Circuit's 2014 decision in *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG ("In re UBS AG Sec. Litig.")*, 752 F.3d 173 (2d Cir. 2014) (hereinafter "*UBS*"). In that case, the plaintiff class alleged that UBS and its executives planned, implemented, and otherwise were aware of widespread criminal tax offenses by the company, yet disclosed a Department of Justice investigation of the matter without acknowledging that the illegal conduct had occurred or the large dollar amounts involved. After UBS announced it had resolved the investigation with a deferred prosecution agreement and a $780 million fine, the plaintiffs sued, claiming securities fraud. In May 2014, well after this Court's decision on the motion to dismiss in this action, the Second Circuit affirmed Judge Sullivan's dismissal of the case, holding that UBS was not required to disclose it was guilty of unlawful conduct: "[b]y disclosing its involvement in multiple legal proceedings and government investigations and indicating that its involvement could expose UBS" to civil and criminal penalties and other consequences, "UBS complied with its disclosure obligations under

our case law." 752 F.3d at 184. Plaintiffs here advance the exact same theory that the Second Circuit has now rejected in *UBS*. Their claims therefore cannot survive.

As to their failure of proof on scienter—an independent basis for summary judgment—Plaintiffs misstate both the law regarding reliance on advice of counsel and the evidence in the record establishing lack of scienter. As to their failure of proof on loss causation—yet another independent basis for summary judgment—Plaintiffs effectively concede they cannot sustain their burden on the "corrective disclosure" theory on which their expert based his opinions. They now seek to pursue an entirely new "materialization of risk" theory. That eleventh-hour change is impermissible and, in any event, Plaintiffs have no record evidence to support it.

I. PLAINTIFFS HAVE NOT IDENTIFIED ANY GENUINE ISSUE OF MATERIAL FACT.

Plaintiffs have submitted a lengthy Rule 56.1 Statement, claiming that it contains "facts" requiring denial of summary judgment. As predicted, Plaintiffs' Statement contains myriad accusations of off-label marketing or other allegedly improper conduct, and conclusory assertions of "reckless" behavior. *See, e.g.*, Plaintiffs' Statement of Material Facts Requiring Denial of Defendants' Motions for Summary Judgment ("Plfs.' St.") ¶¶ 52-92. Although these allegations are either disputed or, in many cases, demonstrably untrue,[1] they are not "material" for purposes of this motion. Accordingly, Pfizer has not attempted to correct all the inaccuracies or unfair characterizations that Plaintiffs offer.

[1] By way of example, Plaintiffs cite a March 2006 slide deck from Pfizer's Corporate Internal Audit group ***seven*** times in their Opposition for the proposition that Pfizer knew the government's investigation would result in a "greater than $1.0 billion impact on profitability." Opp. 5, 15, 26, 31, 42, 45, 111 (citing Rosen Decl. Ex. 105); *see also* Plfs.' St. ¶¶ 106, 370 (same). As explained in Defendants' Response to Plaintiffs' "Statement of Material Facts Requiring Denial of Defendants' Motion for Summary Judgment" ("Defs.' Resp."), this document has ***nothing*** to do with the DOJ investigation or any of the products at issue in this case. Defs.' Resp. 2–3. Rather, it observes only that ***if*** off-label promotion of any of Pfizer's dozens of products were to occur, intentionally or unintentionally, on a large enough scale, it ***could*** have a large financial impact. Rosen Decl. Ex. 105 at PFE DERIV 01002341, 01002348. Plaintiffs' gross misrepresentation of this document does not create an issue of disputed fact, let alone a material one.

One overarching misstatement of the record bears mentioning, however, because it actually is relevant to the motion. Plaintiffs repeatedly assert that Pfizer's disclosure concerning the Department of Justice investigation was "merely" one sentence. *See* Opp. 30, 33, 34. That is demonstrably untrue. In fact, Pfizer's SEC filings contained numerous warnings, in numerous sections, that applied to the Department of Justice investigation, including all of the following:

> We and certain of our subsidiaries are involved in various . . . ***government investigations*** and other legal proceedings that arise from time to time in the ordinary course of our business. Litigation is inherently unpredictable, and ***excessive verdicts do occur***. Although we believe we have substantial defenses in these matters, ***we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results of operations in any particular period***.
> . . .
>
> Many claims involve highly complex issues relating to causation . . . actual damages and other matters. ***Often these issues are subject to substantial uncertainties and, therefore, the probability of loss and an estimation of damages are difficult to ascertain***.
> . . .
>
> Like other pharmaceutical companies, we are subject to extensive regulation by national, state and local government agencies in the U.S. and in the other countries in which we operate. ... Among the investigations and requests for information by government agencies are those discussed below. ***It is possible that criminal charges and fines and/or civil penalties could result from pending government investigations***, including but not limited to those discussed below.
> . . .
>
> Since 2003, we have received requests for information and documents concerning the marketing and safety of Bextra and Celebrex from the Department of Justice and a group of state attorneys general. ***We have been considering various ways to resolve these matters***.[2]

[2] Statement of Undisputed Facts in Support of Pfizer's Motion for Summary Judgment ("SUF") ¶¶ 65, 67, 71 (emphases added).

Indeed, this final paragraph was updated in 2008 to include: "The Department of Justice continues to actively investigate the marketing and safety of our COX-2 medicines, particularly Bextra, ***and more recently has begun to investigate the marketing of certain other drugs***. These investigations have included requests for information and documents. We have been considering various ways to resolve the COX-2 matter, ***which could result in the payment of a substantial fine and/or civil penalty***."[3] Pfizer's full disclosures show that it disclosed repeatedly and thoroughly the possible outcome of the investigation. For the reasons discussed below, these disclosures cannot, as a matter of law, support a securities fraud claim.

II. PLAINTIFFS' CLAIMS ARE FORECLOSED BY THE SECOND CIRCUIT'S 2014 DECISION IN *UBS*.

A. *UBS* Rejected the Precise Omissions Theory Plaintiffs Now Advance.

The theory of fraud that Plaintiffs advocate in their Opposition—that Pfizer's disclosures regarding the Department of Justice investigation were false and misleading because Pfizer did not disclose that unlawful marketing had occurred or that the government had presented evidence of such conduct—was flatly rejected by the Second Circuit earlier this year in *UBS*. *UBS* held that unadjudicated wrongdoing need not be disclosed in the course of a government investigation, which is consistent with the longstanding principle, reiterated multiple times by courts in this Circuit, that "'[d]isclosure is not a rite of confession,'" *UBS*, 752 F.3d at 184 (quoting *Lindsay v. Morgan Stanley*, 592 F.3d 347, 365 (2d Cir. 2010)), and "companies do not have a duty 'to disclose uncharged, unadjudicated wrongdoing'" even if the company has knowledge of that misconduct. *UBS*, 752 F.3d at 184 (quoting *Ciresi v. Citicorp*, 782 F. Supp. 819, 823 (S.D.N.Y. 1991), *aff'd without opinion,* 956 F.2d 1161 (2d Cir. 1992)).

[3] SUF ¶ 104 (emphases added).

The *UBS* plaintiffs alleged that UBS had engaged in a wide-ranging tax fraud scheme involving 52,000 UBS clients and 50 UBS bankers and that UBS executives planned and were aware of the illegal conduct for many years. *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 RJS, 2012 WL 4471265, at *28–30 (S.D.N.Y. Sept. 28, 2012), *aff'd*, 752 F.3d 173. In its securities filings, UBS disclosed that the Department of Justice and SEC were investigating the matter, and that criminal fines or penalties could result, but it did not disclose that illegal conduct had occurred. Multiple UBS executives and managers were indicted in connection with the scheme; the company ultimately resolved the government investigation by entering into a deferred prosecution agreement and paying $780 million in fines and penalties. *Id.* at *5. Thereafter, UBS's stock price declined. The plaintiffs filed a 548-page, 1,477-paragraph complaint alleging, *inter alia*, that although UBS was aware of the tax fraud scheme for many years, it "failed to disclose the magnitude of the problem," including that the alleged scheme involved thousands of clients and a network of UBS advisors, and exposed the company to hundreds of millions of dollars in fines. *Id.* at *28 (internal quotation marks omitted).

Judge Sullivan, deciding a motion to dismiss and thus assuming as true all of plaintiffs' allegations—including the company's longstanding knowledge of the criminal behavior, to which it ultimately admitted—dismissed plaintiffs' claims. *Id.* at *37. Specifically, Judge Sullivan rejected plaintiffs' contention that once UBS "made partial disclosures about the DOJ and SEC investigations," it was then obligated to "disclos[e] the conduct underlying the investigation, and that UBS itself faced substantial criminal fines and penalties as a result of this conduct." *Id.* at *31 (internal quotation marks omitted). In May 2014, the Second Circuit affirmed the dismissal, holding that

> By disclosing its involvement in multiple legal proceedings and government investigations and indicating that its involvement

> could expose UBS "to substantial monetary damages and legal defense costs," as well as "injunctive relief, criminal and civil penalties[,] and the potential for regulatory restrictions," UBS complied with its disclosure obligations under our case law.

UBS, 752 F.3d at 184 (alteration in original). The Court specifically rejected plaintiffs' contention that the company was required to disclose "that UBS was, in fact, engaged in an ongoing tax evasion scheme." *Id.*

UBS forecloses Plaintiffs' theory of securities fraud here as a matter of law. As in *UBS*, Plaintiffs allege that Defendants were aware of widespread unlawful conduct (off-label promotion) that would result in a substantial financial penalty to the company, and that Defendants committed fraud by not disclosing that information to investors. Although Defendants dispute they knew any such things, even if the record reflected such knowledge, as a matter of law under *UBS*, there was no duty under the securities laws to include this information in SEC filings. As described above, Pfizer repeatedly disclosed the ongoing Department of Justice investigation and warned investors that the investigation could result in "criminal charges and fines and/or civil penalties," "excessive verdicts," and "settlements of claims that could have a material adverse effect on [Pfizer's] results of operations in any particular period."[4] Those are exactly the types of risks that UBS disclosed in its filings; like UBS, then, Pfizer "complied with its disclosure obligations under our case law."[5] 752 F.3d at 184.

In their Opposition, Plaintiffs all but ignore *UBS*, mentioning it once in passing, even though it is a controlling decision squarely addressing the precise theory of liability they advance here. Instead, they rely on two prior district court opinions, *Menkes v. Stolt-Nielsen S.A.*, No.

[4] SUF ¶¶ 64–65, 71, 104.

[5] Both the Second Circuit's decision in UBS and the ruling by Judge Sullivan that it affirmed post-dated this Court's August 2011 ruling on Defendants' motion to dismiss in this case.

3:03CV409(DJS), 2005 WL 3050970 (D. Conn. Nov. 10, 2005), and *In re Marsh & McLennan Cos. Securities Litigation*, 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006). Opp. 30. Both cases state in no uncertain terms that "securities laws do not impose a general duty to disclose corporate mismanagement or uncharged criminal conduct." *Marsh & McLennan*, 501 F. Supp. 2d at 469; *see also Menkes*, 2005 WL 3050970, at *6 ("Rule 10b–5 generally does not 'require management to accuse itself of antisocial or illegal policies . . . .'" (citation omitted)). Moreover, both merely stand for the uncontroversial proposition that when a company makes an affirmative disclosure about specific company conduct that it knows is false, the company is also required to disclose the true facts (including potentially facts involving criminal conduct). *Marsh & McLennan*, 501 F. Supp. 2d at 469; *Menkes*, 2005 WL 3050970, at *7.

These two cases—neither of which involved disclosure of a government investigation, as *UBS* did—do not support Plaintiffs' claims. Pfizer made no statements in its SEC filings regarding the existence (or lack thereof) of unlawful marketing, nor did it represent that the Department of Justice's investigation was unfounded. To the contrary, Pfizer disclosed the existence of the investigation and the fact that, although the company believed it had substantial defenses in the matter, the investigation could result in a number of highly unfavorable outcomes, including "criminal charges and fines and/or civil penalties." That is exactly the fact pattern in *UBS*, which is fatal to Plaintiffs' claims.

Plaintiffs' reliance on *In re Vivendi Universal, S.A., Securities Litigation*, 634 F. Supp. 2d 352, 365 (S.D.N.Y. 2009), is misplaced in light of *UBS*. *See* Opp. 101, 105. *Vivendi* did not involve a government investigation, but rather allegations that defendants "saddled" a public company with "massive amounts of debt," then hid the resulting risk to the company's liquidity from investors through false and misleading statements. 634 F. Supp. 2d at 354. Specifically,

plaintiffs alleged that defendants inflated the company's financial numbers and then lied to investors about the "rosy" state of its liquidity, even as the company was at risk for a downgrade by ratings agencies and possible bankruptcy. *Id.* at 355–56. The *Vivendi* defendants' failure to disclose any risk whatsoever and false portrayal of a destabilized company as "strong" stand in stark contrast to the allegations in *UBS* and this case, where defendants explicitly disclosed not only the government investigations at issue, but described the substantial risks, including criminal charges and penalties, associated with those investigations. The district court decision in *Vivendi* is not contrary to *UBS*, which in any event governs Plaintiffs' claims here.

B. *UBS* Held That Statements Concerning Business Ethics and Policies of Compliance with Laws Are Not Actionable.

In addition to foreclosing Plaintiffs' central theory of liability, *UBS* and other cases in this Circuit also bar Plaintiffs' claim that statements in Pfizer's policy manual, *Summary of Pfizer Policies on Business Conduct* ("the Blue Book"), are actionable under Rule 10b-5. Plaintiffs argue that isolated statements in this manual—which is a "general reference for all employees" containing descriptions of the "policies and legal requirements that govern how [Pfizer] conduct[s] business around the world"[6]—were false and misleading and can support a securities fraud claim. *See* Opp. 44–48, 59–60 & Attach. 1, Nos. 2, 4, 16, 18, 31, 34. The Blue Book is not a representation to investors—it is an employee policy manual, and it was referenced in certain Pfizer filings so that investors could see for themselves the company's policies.[7] But even if the Blue Book had contained statements directed to investors, its contents would not be actionable under Second Circuit law.

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[6] Oct. 30, 2014 Declaration of Joseph G. Petrosinelli In Support of Pfizer's Motion For Summary Judgment ("Oct. 30, 2014 Petrosinelli Decl.") Ex. F-7 at PFE DERIV 00013225.

[7] The opening salutation of the manual is "Dear Colleague," Oct. 30, 2014 Petrosinelli Decl. Ex. F-7 at PFE DERIV 00013227, which obviously is directed to Pfizer's employees, not its investors.

The Blue Book introduction informs readers that it summarizes "the standards of conduct ***expected of*** everyone at Pfizer."[8] It also warns readers that "[c]ompromising [Pfizer's policies] may jeopardize Pfizer's reputation and potential—and therefore your own."[9] The Blue Book contemplates that violations of company policies—including those prohibiting improper marketing—will occur; indeed, it instructs Pfizer employees who encounter such violations to report the offending conduct, and includes detailed lists of possible consequences for Pfizer and employees.[10] The manual is not a guarantee that no one at the company has ever acted or will ever act improperly, but rather a collection of corporate policies.

UBS held that these policy statements about business conduct cannot support a securities fraud claim. The Second Circuit held that "general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery,' meaning that they are 'too general to cause a reasonable investor to rely upon them.'" 752 F.3d at 183 (citation omitted). Indeed, several of the Pfizer policy statements in the Blue Book are substantively identical to statements that the Second Circuit rejected in *UBS*. *Compare, e.g.*, Oct. 30, 2014 Petrosinelli Decl. Ex. F-7 at PFE DERIV 00013244 ("It is and has always been ***the policy of Pfizer to obey applicable laws in the countries where we do business***.") *with UBS*, 2012 WL 4471265, at *34 ("UBS ***aims to comply with all applicable provisions*** and to work closely and maintain good relations with regulators in all jurisdictions where the firm conducts business."). In so holding, *UBS* reiterated

[8] Oct. 30, 2014 Petrosinelli Decl. Ex. F-7 at PFE DERIV 00013227 (emphasis added).

[9] Oct. 30, 2014 Petrosinelli Decl. Ex. F-7 at PFE DERIV 00013227.

[10] Oct. 30, 2014 Petrosinelli Decl. Ex. F-7 at PFE DERIV 00013233, PFE DERIV 00013235–00013236.

a rule the Second Circuit and other courts have long recognized.[11] Plaintiffs' argument that cherry-picked sentences from the Blue Book are statements of "existing fact," Opp. 46, is unavailing. The Blue Book is a 37-page document that, when read as a whole, is "explicitly aspirational," *UBS*, 752 F.3d at 183, and forward-looking, using words such as "expect," "strive," and "will."[12]

The cases cited by Plaintiffs are equally unpersuasive. *See* Opp. 45–47. Two of them actually ***reject*** claims that statements regarding adherence to a company's business and ethical guidelines are actionable under the securities laws.[13] For example, Plaintiffs cite *Kowal v. IBM Corp. (In re International Business Machines Corporate Securities Litigation)*, 163 F.3d 102 (2d Cir. 1998) (hereinafter "*IBM*"), which observed that "[s]tatements regarding ***projections of future performance*** may be actionable under Section 10(b) or Rule 10b–5 . . . if the speaker does not genuinely or reasonably believe them." *IBM*, 163 F. 3d at 107 (emphasis added). The Second Circuit then ***rejected*** the *IBM* plaintiffs' claims, regarding the future payment of dividends, because the statements were not guarantees. *Id.* The same is true of Pfizer's Blue

[11] *See, e.g.*, *Lasker v. New York State Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996) ("These statements consist of precisely the type of 'puffery' that this and other circuits have consistently held to be inactionable.").

[12] *See, e.g.*, Oct. 30, 2014 Petrosinelli Decl. Ex. F-7 at PFE DERIV 00013227 ("the standards of conduct *expected of* everyone at Pfizer"); PFE DERIV 00013237 ("Pfizer *will* compete lawfully and ethically in the marketplace."); PFE DERIV 00013240 ("We *strive for* continuous improvement in our performance, measuring results carefully, and ensuring that integrity and respect for people are never compromised.") (emphases added).

[13] *See City of Brockton Ret. Sys. v. Avon Products, Inc.*, No. 11 CIV. 4665 PGG, 2014 WL 4832321, at *16 (S.D.N.Y. Sept. 29, 2014) ("The aforementioned statements from the Ethics Codes and the Corporate Responsibility Reports ***offer no assurance that [defendant's] compliance efforts will be successful***, and do not suggest that [defendant's] compliance systems give the Company a competitive advantage over other companies. . . . Instead, these statements ***merely set forth standards in generalized terms that [defendant] hoped its employees would adhere to***. Such statements are not material.") (emphases added); *see also Boca Raton Firefighters & Police Pension Fund v. Bahash*, 506 F. App'x 32, 37 (2d Cir. 2012) (statement that code of practices and procedures "underscores [defendant's] dedication towards transparent and independent decision-making process" was "puffery").

Book: far from being a guarantee that employees would never violate Pfizer's policies, the manual explicitly contemplated that such violations would occur.[14] And there is not a shred of evidence in the record suggesting that any of the Defendants believed that Pfizer did not, in fact, have the policies and general goals of adherence to laws exactly as stated in the Blue Book. Accordingly, these statements are not actionable.[15]

III. PLAINTIFFS FAIL TO POINT TO ANY GENUINE ISSUE OF MATERIAL FACT CONCERNING SCIENTER.

A. Good Faith Reliance on Disclosure Counsel and KPMG Negates Scienter.

Plaintiffs' attempt to defeat Pfizer's good faith reliance on disclosure counsel and KPMG is premised upon a misapprehension of the defense. Pfizer does not claim that such reliance is a "complete defense," Opp. 72, or that it justifies summary judgment in all cases. Nor is reliance on disclosure counsel and KPMG Pfizer's "only objection to scienter." *Id.* 70. Rather, the undisputed fact *in this case* that Pfizer drafted, reviewed, and issued its securities filings—including all of the statements Plaintiffs now challenge—in good faith and in reliance on the advice of its disclosure counsel and independent auditors, is proof that precludes any finding that Pfizer acted with scienter. *See* Def. Pfizer Inc.'s Mem. of Law in Support of Its Motion for Summary Judgment ("Def. Pfizer's Mem.") 33.

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[14] *See, e.g.*, Oct. 30, 2014 Petrosinelli Decl. Ex. F-7 at PFE DERIV 00013233 ("You are also responsible for seeking advice when needed, raising concerns, and reporting violations of applicable laws and Company policy. If you know of, or suspect, a violation of the standards set out in this booklet, you must notify your manager or report the matter to the Corporate Compliance Officer.").

[15] Plaintiffs' other cited cases address different issues and are therefore inapplicable. *See, e.g.*, *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1193, 1998 (2d Cir. 1993) (involving allegedly false statements directed to investors to induce them to reject shareholder proposal); *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 PAC, 2014 WL 2815571, at *5 (S.D.N.Y. June 23, 2014) (statements at issue were "directly related to the subject of the fraud" alleged by Plaintiffs, which the court distinguished from *UBS*); *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 186 (S.D.N.Y. 2010) (involving statements to investors regarding its "discipline with respect to particular items and borrowers" that were "belied by detailed allegations directly contradicting" those statements).

Thus, Plaintiffs' effort to distinguish certain cases because they do not "stand[] for the proposition that . . . a reliance defense is a complete defense," *see* Opp. 73–76, is fruitless, because Pfizer did not cite the cases for any such proposition. Similarly, Plaintiffs' contention that *Markowski v. SEC*, 34 F.3d 99 (2d Cir. 1994), precludes summary judgment, *see* Opp. 72–73, is mistaken. In that case, the defendant sought to evade regulatory sanctions by claiming his reliance on counsel barred the charges; the Second Circuit properly rejected that position, stating that such reliance was "not a complete defense, but only one factor for consideration." *Markowski*, 34 F.3d at 105. Under the facts in *Markowski*, moreover, there was substantial evidence that the defendant ***had not actually consulted counsel*** prior to taking the key violative act at issue (and therefore had not been advised that his conduct complied with law). *Id.* at 103.

Pfizer does not contend that reliance on counsel requires ***in every case*** the granting of summary judgment on a plaintiff's claim of securities violations. Rather, consistent with *Markowski* and the other cases cited by Plaintiffs, given the undisputed record in this case, Pfizer's good faith reliance on Messrs. Block and Fox prevents Plaintiffs from proving a required element of their securities claims—namely scienter. *See also, e.g.*, *SEC v. Reserve Mgmt. Co. (In re Reserve Fund Sec. & Derivative Litig.)*, No. 09 Civ. 4346(PGG), 2012 WL 4774834, at *2 (S.D.N.Y. Sept. 12, 2012) ("'Good faith reliance on the advice of an accountant or an attorney has been recognized as a viable defense to scienter in securities fraud cases.'") (quoting *SEC v. Caserta*, 75 F. Supp. 2d 79, 94 (E.D.N.Y. 1999)); *SEC v. Cavanagh*, No. 98 Civ. 1818DLC, 2004 WL 1594818, at *27 (S.D.N.Y. July 16, 2004), *aff'd on other grounds*, 445 F.3d 105 (2d Cir. 2006) (reliance on advice of counsel available to "show that a defendant lacked the requisite specific intent"). The cases Pfizer cites are entirely consistent with *Markowski* in holding that

where plaintiffs are unable to establish scienter due to good faith reliance on counsel, summary judgment is appropriate.[16]

B. Defendants Relied in Good Faith on Advice from Professionals.

1. Disclosure Counsel Were Adequately Informed and Advised Pfizer That Its Disclosures Complied with Securities Laws.

Plaintiffs reiterate the argument they make in their Motion for Partial Summary Judgment that Messrs. Block and Fox were not adequately informed as to the status of and developments during the government investigations. Plaintiffs' position is baseless for the reasons set forth in Defendants' opposition to that motion, which Pfizer incorporates herein by reference.

Pfizer waived its attorney-client privilege with respect to its disclosure counsel—Messrs. Block and Fox—and, pursuant to the Court's order governing the scope of that waiver, produced ***all*** relevant documents and communications concerning their advice. Within this comprehensive record, there is copious evidence that Messrs. Block and Fox had access to all information material to providing advice on disclosures. For example, they testified that they were fully updated during their "extended conversations" with the government investigations lawyers; they "educat[ed]" themselves concerning "the status of the litigation" and its "likely outcomes" and "potential risks;" and they "drilled down until [they] were comfortable." *See* Def. Pfizer's Mem. 33–34; Defs.' Mem. of Law in Opp'n to Plfs.' Mot. for Partial Summ. J ("Defs.' Opp.") 14–16.

[16] *See Steed Fin. LDC. v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (plaintiff "has failed to provide sufficient evidence that would enable a jury to conclude that [defendant] had the scienter required" for securities fraud claim because record showed defendants "relied on the expertise of counsel"); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1238 (S.D. Cal. 2010) (plaintiffs "have not produced evidence sufficient to raise a question of fact of an intent to deceive" where defendants relied on accounting professionals in good faith); *In re Fed. Nat. Mortgage Ass'n Sec., Derivative, ERISA Litig. (In re Fannie Mae)*, 892 F. Supp. 2d 59, 67–68, 72 (D.D.C. 2012) (plaintiffs' claims "inadequate to establish the scienter required for securities fraud" where, *inter alia*, defendant "relie[d] in good faith on the professional judgment of the company's internal and external accounting and auditing personnel"); *see also Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) (affirming summary judgment based on defendants' good faith reliance on advice of counsel).

Plaintiffs asked each of Messrs. Fox and Block about the topics they now claim were withheld from them; neither believed that anything material was withheld.[17] Most importantly, at the conclusions of each of their depositions—during which Plaintiffs attempted to shake their confidence in the securities advice they had provided by showing them documents and information Plaintiffs claimed had been hidden from and were therefore "new" to them—Mr. Block and Mr. Fox each rejected that these items would have altered their previous opinions and reaffirmed that they continue to stand by the appropriateness of Pfizer's disclosures. Def. Pfizer's Mem. 34.

Plaintiffs attempt an end-run around this testimony, claiming that "Block and Fox were not shown during their depositions all of the evidence defendants withheld from them." Opp. 84. Plaintiffs chose what to show these lawyers during their depositions; Plaintiffs cannot defeat summary judgment by speculating that Messrs. Block and Fox may have recanted their disclosure advice had Plaintiffs shown them additional materials.[18] *See Jeffreys v. City of New*

[17] Dec. 8, 2014 Declaration of Joseph G. Petrosinelli In Support of Pfizer's Motion For Summary Judgment (Dec. 8, 2014) ("Dec. 8, 2014 Petrosinelli Decl.") Ex. W-7 (Fox (Sept. 26, 2013) Dep. 49:9–51:5 (questioning Fox about alleged document destruction), 51:6–55:9 (questioning Fox about internal investigation interviews regarding alleged off-label promotion), 57:2–61:11 (questioning Fox about call notes allegedly demonstrating off-label promotion)); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 58:14–60:6 (questioning Block about alleged document destruction); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 105:3–106:23 (questioning Block about internal investigation interviews regarding alleged off-label promotion), 227:22–228:24 (questioning Block about call notes allegedly demonstrating off-label promotion)).

[18] Plaintiffs rely upon the same cases in their Opposition that they cite in their Motion for Partial Summary Judgment to argue that Defendants did not rely on the advice of Messrs. Block and Fox. Opp. 86–87. As discussed in Defendants' Opposition to Plaintiffs' motion, the cases Plaintiffs cite are readily distinguishable—they involve situations in which either the client did not seek the advice at issue, or the lawyer did not give it, or both. All of these cases involve factual circumstances in which it was readily apparent that the defendant's claim to have consulted an attorney was a sham or where the defendant had actively concealed information from counsel. In contrast, Messrs. Block and Fox testified—and the contemporaneous documents confirm—without dispute that they were asked for advice on how to disclose the Bextra investigation, they obtained all material facts to inform them, they gave the advice, Defendants relied on it, and they stand by it today. SUF ¶¶ 2, 4, 7, 8–10, 12–14, 16, 21–25, 62–63, 70–71, 76, 80–81, 90–91, 94–95, 99–100, 104, 109.

York, 426 F.3d 549, 554 (2d Cir. 2005) ("[a]t the summary judgment stage, a nonmoving party must offer some hard evidence" in support of its version of events and "may not rely on conclusory allegations or unsubstantiated speculation" (internal quotation marks omitted)).[19]

Finally, Plaintiffs argue again that Messrs. Block and Fox—with a combined 75 years of experience as securities counsel—were "unqualified" to offer disclosure advice regarding the government investigations. Opp. 84. Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment demonstrates why that argument is wrong. Defs.' Opp. 35. For purposes of this motion, however, all that matters is that not a single person—including anyone at Pfizer, anyone at KPMG, or either of Mr. Fox or Mr. Block—testified that they believed disclosure counsel to be unqualified. To the contrary, every single witness who was asked testified to their belief that each of Mr. Block and Mr. Fox was highly competent and qualified to render disclosure advice.

2. KPMG Was Adequately Informed and Advised Pfizer that Its FAS 5 Judgments Complied with GAAP.

As to KPMG, Plaintiffs restate the argument made in their Motion for Partial Summary Judgment, suggesting that KPMG somehow deferred its accounting judgment to Pfizer's outside government investigations counsel. Opp. 88–90. Again, this argument is conclusively rebutted in Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment. Defs.' Opp. 46–49. In short, Plaintiffs—by virtue of their own subpoena to KPMG, which they issued at the outset of discovery in 2011, as well as Pfizer's productions—have ***all*** communications, and ***all*** documents referencing communications, between KPMG and Pfizer's investigations counsel.

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[19] *See also Abbey v. 3F Therapeutics, Inc.*, No. 06 CV 409 (KMW), 2011 WL 651416, at *6 (S.D.N.Y. Feb. 22, 2011) (party cannot defeat summary judgment "on mere denials or unsupported alternative explanations"), *aff'd sub nom. Abbey v. Skokos*, 509 F. App'x 92 (2d Cir. 2013).

These documents were never privileged in the first place; Plaintiffs have been shielded from nothing. Based on those documents and communications, KPMG opined each and every quarter of the Class Period that Pfizer's reserving and disclosure judgments complied with FAS 5.[20]

Plaintiffs suggest that KPMG was not sufficiently informed about the government investigation in order to render the advice it gave.[21] This is belied by the record, which reveals that every single quarter, KPMG met with Pfizer's Controller and its in-house government investigations counsel to "get a status update" on the investigation.[22] During those meetings, and as reflected in its work papers, KPMG was provided with fulsome updates about the government investigations and was invited to ask questions of Pfizer's counsel until it was satisfied that it had the information required to make a judgment as to FAS 5.[23] KPMG also separately communicated with Pfizer's outside counsel, Covington & Burling, and those communications are reflected in its work papers for all of the audit years of the Class Period.[24]

Plaintiffs suggest that Defendants did not "share[] all pertinent information with KPMG." Opp. 91. As with disclosure counsel, Plaintiffs focus on myopic details and, even then, misstate the record. For example, Plaintiffs claim that Pfizer "had the tools to calculate an estimated loss" based on the 2004 Neurontin settlement by Warner-Lambert. Opp. 91–92. Citing not a single piece of evidence—because none exists to support it—Plaintiffs state that Pfizer "[had] this view internally," but "did not inform KPMG." *Id.* This is false, and is contradicted by reams of

[20] SUF ¶¶ 32–35, 37–42, 46, 49; *see also* Def. Pfizer's Mem. 35–38.

[21] Opp. 91–97.

[22] Def. Pfizer's Mem. 9.

[23] Def. Pfizer's Mem. 9–10; SUF ¶¶ 35, 37–39, 41–42, 45–46.

[24] SUF ¶ 42.

evidence showing that no one—either at Pfizer or KPMG—believed the potential loss from the government investigations was reasonably estimable before the fourth quarter of 2008.[25]

As with disclosure counsel, Plaintiffs had multiple days to depose Messrs. Chapman and Bradley, the two KPMG engagement partners during the Class Period. During these depositions, Plaintiffs challenged the auditors' conclusions and questioned them on the very topics they now use to argue KPMG was uninformed. At the end of their examinations, both Messrs. Chapman and Bradley testified that they continue to believe, even after being confronted with Plaintiffs' theories, that their advice to Pfizer was correct and that their view as to the timing of Pfizer's FAS 5 reserve for the government investigation had not changed. *See* Def. Pfizer's Mem. 37.

Finally, as with disclosure counsel, confronted with an undisputed record showing the good faith bases for KPMG's (and Pfizer's) FAS 5 judgments, Plaintiffs resort to the extraordinary position that the chorus of professionals involved each committed their own professional malpractice. First, Plaintiffs complain that KPMG was "unqualified and unprepared" to render the advice it gave Pfizer. Opp. 90. Next, Plaintiffs claim that "Pfizer's outside Disclosure Counsel [Dennis] Block also provided KPMG with misinformation." *Id.* 93. Then Pfizer's outside litigation counsel, Covington & Burling, "failed to disclose information" in its audit response letters that was required under the ABA guidelines. *Id.* 96. Finally, and perhaps most extreme, Plaintiffs suggest that Pfizer paid "huge sums . . . to KPMG to obtain clean audit opinions." *Id.* 97. Setting aside the absurdity of this parade of allegations, they are irrelevant for purposes of Pfizer's summary judgment motion because Plaintiffs point to no

[25] Def. Pfizer's Mem. 9–10, 16–17, 21, 35, 51; SUF ¶¶ 35–36, 40–41, 80–83, 105. Plaintiffs also ignore that KPMG was aware of the "Neurontin settlement methodology" throughout the Class Period, and no one ever suggested that this earlier settlement could form the basis for an estimation of the entirely separate Bextra investigation. Dec. 8, 2014 Petrosinelli Decl. Ex. T-7 (Chapman (Sept. 5, 2013) Dep. 129:16–130:4 (discussing Neurontin settlement)); Dec. 8, 2014 Petrosinelli Decl. Ex. G-8 (Riso (Aug. 1, 2013) Dep. 160:17–161:1).

evidence—and there is ***none***—that even suggests that anyone believed that KPMG was unqualified or uninformed in performing its auditing duties. To the contrary, KPMG asserted repeatedly it had the information it needed to render its advice.[26]

C. There Is No Evidence of Scienter.

In 120 pages of briefing, 472 paragraphs of "material facts," and 565 exhibits, Plaintiffs do not cite a single piece of evidence that suggests that anyone—any of the Defendants, anyone at Pfizer, anyone at KPMG, or either of Pfizer's disclosure lawyers—believed that Pfizer's Class Period disclosures or reserving judgments were wrong. Plaintiffs ultimately challenge three of Pfizer's disclosure judgments. As to each, Plaintiffs have all of the emails and markups showing the process through which each was drafted, and they can point to nothing suggesting that anyone believed the disclosures were wrong. They are:

- Criticism #1: Pfizer should have described the investigation as one related to "off-label marketing" instead of "marketing and safety." The record demonstrates that Messrs. Block and Fox advised Pfizer that "marketing and safety" was an appropriate disclosure, and it was in fact the language used by the government to describe its own investigation.[27] Plaintiffs have no response to this, other than to quibble that "marketing" is a "generic term." Opp. 34 n.161. They point to no authority suggesting this term was inappropriate, and indeed the Second Circuit recently and repeatedly has rejected this type of after-the-fact word-smithing as the basis for a securities fraud claim. *E.g., Kleinman v. Elan Corp., plc*, 706 F.3d 145, 154–55 (2d Cir. 2013) (affirming this Court's[28] dismissal of a securities class action and rejecting argument that press release was misleading); *see also Dalberth v. Xerox Corp.*, 766 F.3d 172, 186–87 (2d Cir. 2014). Moreover, there is no evidence to suggest that anyone, including the Defendants, KPMG, and disclosure counsel, believed this disclosure to be false or misleading.

[26] SUF ¶¶ 27–29. Plaintiffs regurgitate an argument from their Motion for Partial Summary Judgment that KPMG has somehow provided improper "conduit" testimony. Opp. 90–91. Just as with Mr. Fox and Mr. Block, KPMG's partners are fact witnesses, not experts. They were the accountants who evaluated and determined that Pfizer's FAS 5 judgments were appropriate. The conduit cases Plaintiffs cite have no relevance to this motion. *See* Defs.' Opp. 49.

[27] SUF ¶¶ 61-62; Defendants' Counterstatement of Facts ¶ 92 ("CS").

[28] *Kleinman v. Elan Corp., plc*, No. 10-cv-5630, Rec. Docs. 32 & 33 (Hellerstein, J.) (granting motion to dismiss).

- Criticism #2: Pfizer should not have included the "although we believe we have substantial defenses" warning in the introduction to its legal proceedings footnote. The record demonstrates that Messrs. Block and Fox advised as to this disclosure, concluding that it was appropriate.[29] Plaintiffs cite various developments in the government investigation to express their own opinion that Pfizer did not have substantial defenses to the government's allegations. Opp. 32–36. But there is no evidence to suggest that anyone at Pfizer (or KPMG, or disclosure counsel) shared Plaintiffs' view.

- Criticism #3: Pfizer should have disclosed that its internal investigations had revealed instances of off-label promotion. As discussed at length above, there is no duty under Second Circuit law to disclose such conduct. Critically, Plaintiffs still cannot identify a single piece of evidence that anyone at Pfizer (or KPMG, or disclosure counsel) believed this information was required to be disclosed. Every single witness who was asked testified to the contrary, and disclosure counsel and KPMG believed, based on communications that have been produced in discovery, that Pfizer's disclosures were appropriate.[30] Plaintiffs simply disagree with Pfizer's judgment; this is not the basis for a securities fraud claim.

In sum, Plaintiffs cannot point to any evidence of scienter generally, nor can they point to anything specific as to the particular disclosures they now challenge.

The same is true with regard to Pfizer's FAS 5 accounting judgments. Plaintiffs do not cite any evidence—because none exists—to show that anyone believed a FAS 5 reserve was required before Pfizer booked one in the fourth quarter of 2008. Rather, Plaintiffs argue that Pfizer "***could have***" or "***should have***" estimated the loss based on the entirely separate Neurontin settlement by Warner-Lambert in 2004, using formulae and "recipes" developed by their experts.[31] Opp. 99, 98 (emphases added). Here again, Plaintiffs simply disagree with the

[29] CS ¶¶ 89–90. When Mr. Fox was asked specifically about this warning language, he explained, "My role and Dennis' role was to speak about the matter with our [government investigations] counsel, . . . to have the opportunity to ask questions, which indeed we did, and ***then to either say this or not to say this***, depending on what we heard." CS ¶ 89 (emphasis added).

[30] SUF ¶¶ 2, 4, 11, 21–29.

[31] There is no evidence that the Neurontin "formula" cited by Plaintiffs is an objective means of determining a settlement, as discussed below, because of the multiple subjective inputs involved in applying it. *Infra* at 29. As Plaintiffs' own accounting expert testified, a "recipe" for calculating a reserve "doesn't work" when the parties disagree—as did Pfizer and the DOJ, in this instance—about the

judgment rendered by Pfizer and KPMG. "Could have" and "should have" cannot be the bases for a securities fraud case.

There is not a single piece of paper or testimony indicating that anyone at Pfizer or KPMG believed, as Plaintiffs now assert, that a loss from the Bextra investigation was reasonably estimable before the fourth quarter of 2008.[32] All of the evidence is to the contrary.[33] Indeed, the evidence Plaintiffs do cite illustrates that no one believed the loss was estimable. For example, Plaintiffs cite an October 2007 note written by Pfizer's CFO, Frank D'Amelio, after a meeting with KPMG. Opp. 100. In the note, Mr. D'Amelio observes that the investigation "has the potential to be a very big charge." *Id*. (quoting Rosen Decl. Ex. 133). Of course, that is precisely what Pfizer told investors in its securities disclosures.[34] The note does not suggest, nor does any other piece of evidence suggest, that Mr. D'Amelio or KPMG or anyone else believed the potential loss was reasonably estimable.[35]

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extent to which off-label promotion caused physicians to write prescriptions. Dec. 8, 2014 Petrosinelli Decl. Ex. F-8 (Regan Dep. 108:23–109:8).

[32] Plaintiffs say Pfizer did not book a reserve for the "express purpose of downplaying the potential financial risks." Opp. 99. But they cite nothing, and there is nothing, to corroborate this purported statement of intent. Indeed, it is flatly contradicted by Pfizer's express disclosure in its securities filings that the potential resolution of the investigation could include "the payment of a substantial fine and/or civil penalty." SUF ¶ 104.

[33] SUF ¶¶ 35–41, 43–46, 49, 68, 80–83, 101, 103, 105.

[34] SUF ¶¶ 64, 65, 71, 104.

[35] Plaintiffs half-heartedly suggest that a "series of settlement offers" were "large" and "certainly of unusual significance." Opp. 101. Plaintiffs' musings notwithstanding, both Pfizer's Controller and its CFO, as well as KPMG, testified that in their judgment, Pfizer's outside counsel's "prepared to recommend" numbers could not serve as the basis for a reasonable estimate or range of the probable loss for a variety of reasons. Oct. 30, 2014 Petrosinelli Decl. Ex. S-1 (Cangialosi (June 21, 2013) Dep. 315:19–318:11, 383:25–385:11, 387:4–19); Oct. 30, 2014 Petrosinelli Decl. Ex. U-1 (D'Amelio (Dec. 4, 2013) Dep. 239:4–240:4). KPMG agreed. SUF ¶ 101; Oct. 30, 2014 Petrosinelli Decl. Ex. P-1 (Bradley (Aug. 8, 2013) Dep. 87:1–89:12); Oct. 30, 2014 Petrosinelli Decl. Ex. Q-1 (Bradley (Aug. 9, 2013) Dep. 329:4–336:12).

IV. PLAINTIFFS MISSTATE SECOND CIRCUIT LAW CONCERNING THE TYPES OF AFFIRMATIVE STATEMENTS THAT CAN BE ACTIONABLE UNDER THE SECURITIES LAWS.

A. Statements Accurately Disclosing Sales Revenues for Products Cannot Support a Securities Fraud Claim.

Plaintiffs contend that even if Defendants accurately stated sales revenues for Geodon, Zyvox, and Lyrica, those statements can support a securities claim because Defendants also had a duty to disclose alleged off-label promotion of those products, as that promotion was a "driving source of Pfizer's success for its blockbuster drugs." Opp. 49. As an initial matter, Plaintiffs' claims as to Defendants' statements about Geodon, Zyvox, and Lyrica, including sales figures, are barred because neither the products nor the subjects of the statements were even mentioned in the alleged "corrective disclosure" (*i.e.*, Pfizer's January 26, 2009 press release announcing its government settlement) on which Plaintiffs' damages expert bases his analysis. *See* Def. Pfizer's Mem. 54–55.[36] Consequently, the press release could not have revealed as misleading any of Defendants' statements about Geodon, Zyvox, and Lyrica—indeed, Plaintiffs have not alleged that Pfizer's financial statements with respect to these products were inaccurate. Accordingly, Plaintiffs cannot, as a matter of law, establish loss causation with respect to these statements. *See, e.g.*, *New Orleans Emps.' Ret. Sys. v. Omnicom Grp., Inc. Sec. Litig. (In re Omnicom Grp., Inc. Sec. Litig.)*, 597 F.3d 501, 511 (2d Cir. 2010) (affirming summary judgment where "none of [the statements in the allegedly corrective disclosure] even purported to reveal some then-undisclosed fact with regard to the specific misrepresentations alleged in the complaint").

Even apart from this defect in their claim, the law precludes a finding of securities fraud in these circumstances. As discussed at length by Judge Kram in *Marsh & McLennan*—a case

[36] *See also* Dec. 8, 2014 Petrosinelli Decl. Ex. W-8 (Feinstein Dep. 48:5–11 (corrective disclosure does not identify products other than Bextra); 61:5–12 (same)).

Plaintiffs ignore entirely in arguing this point but cite favorably elsewhere, *see* Opp. 30—"[a]bsent an allegation that [defendant] reported income that it did not actually receive, the allegation that a corporation properly reported income that is alleged to have been, in part, improperly obtained is insufficient to impose Section 10(b) liability." 501 F. Supp. 2d at 470; *see also In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004) (dismissing claims that defendant failed to disclose "that its revenues were derived from 'unsustainable and illegitimate sources'" because "federal securities laws do not require a company to accuse itself of wrongdoing"), *aff'd sub nom. Albert Fadem Trust v. Citigroup, Inc.*, 165 F. App'x 928 (2d Cir. 2006); *cf. Nadoff v. Duane Reade, Inc.*, 107 F. App'x 250, 252 (2d Cir. 2004) ("Accurate statements about past performance are self evidently not actionable under the securities laws . . . ."). As there is no allegation that Pfizer reported income it did not receive, Plaintiffs' claim on this issue fails.

Plaintiffs cite *In re Van der Moolen Holding, N.V. Securities Litigation*, a pre-*Marsh & McLennan* case which held that where a company made "numerous" allegedly false statements concerning the specific "sources and significance of the revenue" generated by a business unit comprising nearly two-thirds of the company's income, "the . . . failure to disclose the true sources of such revenue could give rise to liability." 405 F. Supp. 2d 388, 393, 401 (S.D.N.Y. 2005). When the business unit's trading practices came under investigation, forcing the unit to end its illegal conduct, plaintiffs alleged that the company not only failed to disclose the government investigation to investors, but it falsely attributed the resulting decline in income to "a challenging trading environment." *Id.* at 394. These statements stand in sharp contrast to those at issue in this case, where Defendants' isolated statements about the positive growth of a small number of Pfizer's products did not put the "financial success" of the entire company at

issue. *Id.* at 401. *Marsh & McLennan* and many other cases[37] have held that such statements are not actionable.

B. The "Although We Believe We Have Substantial Defenses" Warning Is Not Actionable.

Plaintiffs adopt a "kitchen sink" approach to salvaging their claim on this explicitly forward-looking statement of belief. They first claim that Pfizer's statement of its present belief in its defenses renders the safe harbor provision of the PSLRA inapplicable. Opp. 39. But the fact that a statement is expressed in present tense, or conveys a presently-held belief, does not remove it from the protections of the PSLRA's safe harbor if the *subject* of the discussion is a future event. *See, e.g.*, *Marsh Grp. v. Prime Retail, Inc.*, 46 F. App'x 140, 146 (4th Cir. 2002) (per curiam) ("All projections can be characterized as presently held beliefs. The statements are forward-looking because they relate to 'future . . . performance.'" (citation omitted)). Here, there is no question that Pfizer's statement was about events "in the future." Plaintiffs then claim, without any factual or legal support, that Pfizer's statement was "tied to defendants' purported explanation of whether a contingent liability was probable" and that the warning about possible judgments or settlements with a "material adverse effect" on the company's operations was "overshadowed" by the "substantial defenses" belief. Opp. 40. These contentions represent nothing more than counsel argument, not evidence; they cannot defeat summary judgment.

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[37] *See Galati v. Commerce Bancorp, Inc.*, No. Civ. 04-3252(RBK), 2005 WL 3797764, at *5, *7 (D.N.J. Nov. 7, 2005) (bank's comments about "dramatic deposit growth" and "strong top-line revenue growth" were "too vague and subjective" to be regarded as material, and accurate statement of earnings did not give rise to duty to disclose allegedly illegal activities), *aff'd*, 220 F. App'x 97 (3d Cir. 2007); *Murphy v. Sofamor Danek Grp., Inc. (In re Sofamor Danek Grp., Inc.)*, 123 F.3d 394, 400 (6th Cir. 1997) (company's attribution of "record revenues and earnings . . . to such things as increased sales volume without properly explaining how the sales were being achieved" did not create duty to disclose allegedly illegal conduct resulting in sales growth); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 538 (3d Cir. 1999) (accurate reports of past earnings combined with statements of "consistent earnings growth" and "confidence in the company's earnings momentum" insufficient to state claim), *overruled in part on other grounds by Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 276 (3d Cir. 2009).

Plaintiffs' suggestion that this statement is unbalanced or a "half-truth," when it explicitly warns of the possibility of judgments and settlements that could have a "material adverse effect" on the company *in spite of* Pfizer's belief in its defenses, is nonsensical. Next, Plaintiffs contend that even if the safe-harbor or bespeaks caution doctrines apply to this statement, the cautionary language it contains is not meaningful because the disclosure "did not make clear that such contingencies had, in fact, already occurred" and instead "assured investors that they were in compliance with 'laws that apply to marketing activities' and concealed Pfizer's off-label promotion practices." Opp. 40. In other words, Plaintiffs argue that Pfizer's warning of the risk of consequences of certain conduct was tantamount to a pledge that no such conduct had occurred. Courts have roundly refused to apply such a tortured reading to general risk disclosures. *In re FBR Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 362 (S.D.N.Y. 2008) ("cautionary statements are 'not actionable to the extent plaintiffs contend defendants should have disclosed risk factors 'are' affecting financial results rather than 'may' affect financial results' because such cautionary language is not misleading"); *see also Zeid v. Kimberley*, 930 F. Supp. 431, 437 (N.D. Cal. 1996) (argument that defendant "should not have stated that certain adverse factors *may* [a]ffect the financial statements, but rather it should have said they *are* [a]ffecting . . . business" is "absurd").

Plaintiffs' contorted interpretation of this clear warning language simply cannot be reconciled with the actual text of the disclosure, let alone the fact that Pfizer specifically warned investors that the Bextra investigation "could result in the payment of a substantial fine and/or civil penalty." No reasonable investor could have understood Pfizer's statement—read in context—to be inconsistent with what actually happened, i.e., a substantial settlement that had "a

material adverse effect on our results of operations" in a particular period (here, the fourth quarter of 2008). In short, Pfizer's warning of future risk cannot support a securities fraud claim.

C. Pfizer's Judgment Concerning FAS 5 Loss Contingency Reserves Is a Matter of Opinion Under *Fait.*

The Second Circuit expressly held in *Fait* that loss contingency reserves "reflect management's opinion or judgment" and are therefore "inherently subjective"—meaning they are not actionable under securities laws unless they are both objectively and subjectively false. *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 113 (2d Cir. 2011). Plaintiffs contend that *Fait*'s unequivocal holding does not apply in this case because in *Fait* "there was no methodology" to calculate reserves, whereas Plaintiffs claim such a method existed here. Opp. 36–37. The ruling in *Fait* was not based on the absence of a method for determining reserves, but rather on the subjective nature of reserving decisions themselves. *See Fait*, 655 F.3d at 113 ("estimates [of reserves] will vary depending on a variety of predictable and unpredictable circumstances"). As Judge Kaplan, whose opinion the Second Circuit affirmed in *Fait*, observed:

> Whether [defendants] had adequate reserves for [a company's] predicted loan losses is not a matter of objective fact. The reserves instead were statements of opinion by defendants as to the portion of the stated value of [defendants'] loans that would prove to be uncollectable.

Fait v. Regions Fin. Corp., 712 F. Supp. 2d 117, 124–25 (S.D.N.Y. 2010), *aff'd*, 655 F.3d 105. Like the loan loss reserves in *Fait*, reserves for potential litigation losses depend entirely on a company's subjective assessment of the underlying matter (in this case, the merits of a potential litigation). Pfizer had no way of knowing—and there is not a shred of evidence in the record suggesting that anyone believed that it did know—the outcome of the negotiations with the government or how such negotiations would translate into a settlement until the parties reached

an agreement in principle. The only thing the company could (and did) rely on was its subjective view about the merits (or lack thereof) of the matter.

Plaintiffs' argument that Pfizer could have used an "actual loss standard"[38] to estimate a potential maximum criminal fine for the Bextra investigation before it reached a settlement, Opp. 37, is unavailing. Any attempt to estimate a fine using this method depends entirely on subjective inputs to the formula Plaintiffs propose. For example, in 2007, Pfizer argued to the government that there was ***no*** "actual loss," and even if there had been, it "was not directly and proximately caused" by Pfizer.[39] Accordingly, in Pfizer's view, the applicable fine using an "actual loss" method was zero—clearly a different opinion than that of the government. Thus, even if Pfizer and the government would ultimately agree to use an "actual loss" method, that would not change the overall subjective nature of the reserve analysis. Because there is no evidence that anyone at Pfizer subjectively disbelieved its reserving decisions, Plaintiffs' argument fails. *See* Dec. 8, 2014 Petrosinelli Decl. Ex. F-8 (Regan Dep. 108:23–109:8) ("recipe" for calculating reserve "doesn't work" when parties disagree about extent to which off-label promotion caused physicians to write prescriptions).

V. PLAINTIFFS' NEW THEORY OF LOSS CAUSATION CANNOT SAVE THEIR CLAIMS.

Plaintiffs attempt to hide a drastic switch in their loss causation theory. Although their expert economic witness has relied solely on a corrective-disclosure theory, Plaintiffs apparently now abandon this theory, undoubtedly because Defendants have pointed out its fundamental flaws (including, among other things, that it cannot be reconciled with many of the alleged

[38] Oct. 30, 2014 Petrosinelli Decl. Ex. B-6 at PFE-JONES 00059186. If Plaintiffs' interpretation were correct, it would effectively collapse *Fait*'s two-prong (objective and subjective) standard into one prong.

[39] *Id.* at PFE-JONES 00059193.

misstatements and omissions and cannot support the use of a "constant inflation" ribbon for causation and damages). Instead, they casually announce that "in reality, [this case] is a materialization-of-risk action." Opp. 112. But Plaintiffs have no expert opinion supporting a materialization-of-risk theory and, in any event, that theory is also legally flawed.

The Second Circuit has established two distinct means of establishing loss causation in fraud-on-the-market cases: a corrective disclosure that reveals the falsity of earlier statements, and the materialization of a concealed risk. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005). A corrective-disclosure theory requires that the defendant's subsequent statements reveal its earlier statements to be false or misleading.[40] A materialization-of-risk approach, on the other hand, may apply when the defendant "concealed or misstated [a] risk" which then materializes and causes investors' losses. *See Lentell*, 396 F.3d at 175–76. Plaintiffs recognize that these are separate theories, as they must. *See In re Initial Pub. Offering Sec. Litig.*, 399 F. Supp. 2d 298, 303 (S.D.N.Y. 2005) (Second Circuit has established "several different standards"), *aff'd*, Nos, 05-3430, -4739, -4760, 2006 WL 1423785 (2d Cir. May 19, 2006). Plaintiffs also do not deny that expert testimony is required to establish loss causation in a securities-fraud case. *See In re Pfizer Inc. Sec. Litig.*, Nos. 4-CV-9866-LTS-HBP, 5-MD-1688-LTS, 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014).

Plaintiffs' loss-causation expert, Steven Feinstein, based his opinion on the corrective-disclosure theory. He invoked that phrase 13 times in his expert report, and never mentioned the words "materialization of risk."[41] His conclusion was clear: a "corrective disclosure" took place on January 26, 2009, which "caused the inflation to dissipate, which in turn caused the stock

[40] *See* Def. Pfizer's Mem. 53–54 (citing cases); *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 551–53 (S.D.N.Y. 2008) *aff'd*, 597 F.3d 501 (2d Cir. 2010).

[41] *See* Oct. 30, 2014 Petrosinelli Decl. Ex. A-4 (Feinstein Report ¶¶ 17, 118, 257, 258, 261–63, 266).

price drop and investor losses." *Id.* ¶ 17. In his deposition, Feinstein reiterated this opinion: "Q: [January 26, 2009] is the date of the so-called corrective disclosure; correct? A: That is right."[42] Again, Feinstein never even mentioned the words "materialization of risk," much less stated any opinion that this case is "in reality . . . a materialization-of-risk action," as Plaintiffs now declare for the first time.

Based on Plaintiffs' repeated invocation of the corrective-disclosure theory, Pfizer addressed the loss-causation section of its summary judgment brief solely to that theory. In that brief, Pfizer demonstrated that Plaintiffs' claim that there was a corrective disclosure on January 26, 2009, is fatally flawed. *See* Def. Pfizer's Mem. 53–55. The so-called "corrective disclosure" simply announced the occurrence of the very thing that Pfizer repeatedly warned might happen. Pfizer explained these insurmountable problems both in its motion for summary judgment and its motion to exclude Feinstein's opinion. Plaintiffs chide Defendants for incorrectly "assum[ing]" that they were relying on a corrective-disclosure approach. Opp. 112. Defendants assumed nothing: they relied on Plaintiffs' and their expert's clear and unequivocal statements invoking the corrective-disclosure method of showing loss causation.

Plaintiffs' last-ditch effort to switch theories is unavailing. Whether the Court permits the switch or not, Plaintiffs' case is doomed. Plaintiffs now concede that this case does not fit the corrective-disclosure paradigm. *See* Opp. 112. Therefore, if the Court declines to allow Plaintiffs to switch to a new loss-causation theory, their case fails as a matter of law. Moreover,

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[42] Oct. 30, 2014 Petrosinelli Decl. Ex. W-1 (Feinstein (Oct. 14, 2014) Dep. 30:1–3); *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. W-1 (Feinstein (Oct. 14, 2014) Dep. 26:16–24, 27:1–7, 29:5–25, 31:2–6, 50:17–51:21, 60:12–16 ("Q. All right. Professor Feinstein, I'm asking you about this document, because . . . this is the day that you're identifying as the corrective disclosure; correct? A. That's right."), 199:8–23 (opining that Pfizer's previous disclosures do not "mirror the final corrective disclosure—the actual corrective disclosure, because it doesn't say that they were guilty")); Dec. 8, 2014 Petrosinelli Decl. Ex. W-8 (Feinstein (Oct. 14, 2014) Dep. 34:11–3, 35:7–10, 48:5–11, 63:17–18, 74:11–17, 106:22–7, 162:25–163:12, 200:14–201:1, 202:13–18).

even if the corrective-disclosure theory is not deemed abandoned, it fails for the reasons pointed out in Pfizer's summary judgment motion and motion to exclude Feinstein's opinion.

On the other hand, if the Court honors Plaintiffs' last-minute switch to a materialization-of-risk theory, their case fails because they have no expert opinion supporting that theory. As set forth above, Feinstein exclusively relied on the corrective-disclosure theory and has never even mentioned the materialization-of-risk theory. Without an expert, Plaintiffs' case cannot survive. *See In re Pfizer*, 2014 WL 3291230, at *3.

And even if the Court were to overlook the dispositive lack of an expert, Plaintiffs' materialization-of-risk argument is simply untenable. "The concept of materialization of the risk . . . is . . . not an excuse for lack of evidence of loss causation." *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1265 (N.D. Okla. 2007), *aff'd*, 558 F.3d 1130 (10th Cir. 2009). The materialization-of-risk theory requires that the defendant has wrongfully concealed a risk. *See Lentell*, 396 F.3d at 177. Plaintiffs' Opposition refers to two supposedly hidden risks: (1) "the risk of off-label marketing," Opp. 110, and (2) the risk of a substantial settlement, Opp. 109. But Pfizer did not wrongfully conceal either of these "risks."

First, as to the risk of off-label marketing, as set forth in Part II.A above, Pfizer had no duty to make the statements Plaintiffs allege it should have made. The Second Circuit has ruled clearly that a company need not accuse itself of unadjudicated wrongdoing. And if there was no duty to disclose, there can be no loss causation based on a failure of disclosure. *See, e.g.*, *In re Warnaco Grp., Inc. Sec. Litig. (II)*, 388 F. Supp. 2d 307, 317 (S.D.N.Y. 2005) (no loss causation where defendant had no duty to disclose information), *aff'd sub nom. Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007). *See also* Bradford Cornell & James C. Rutten, *Collateral Damage and Securities Litigation*, 2009 Utah L. Rev. 717, 744–45 (2009) (where

plaintiff seeks recovery for "collateral damage" due to reputation effect of disclosure, "loss causation is lacking" because of no duty to disclose wrongdoing).

Second, Pfizer did not conceal the risk of a substantial settlement. Pfizer repeatedly disclosed the risk that it might resolve the government investigation in a manner that resulted in substantial fines and penalties. It said, for example: "***we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results of operations in any particular period***," and that resolution of the investigation "***could result in the payment of a substantial fine and/or civil penalty***."[43] That is precisely the risk that materialized on January 26, 2009.

Nor could Plaintiffs succeed with a theory that Pfizer understated the risk. As the Second Circuit has made clear, "where (as here) substantial indicia of the risk that materialized are unambiguously apparent on the face of the disclosures alleged to conceal the very same risk," Plaintiffs bear the burden to come forward with "(i) facts sufficient to support an inference that it was defendant's fraud—rather than other salient factors—that proximately caused plaintiff's loss; or (ii) facts sufficient to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed an investment." *Lentell*, 396 F.3d at 177. Plaintiffs fail this test here, for multiple reasons. For one, as fully discussed in Pfizer's motion to exclude Feinstein's opinion, they have not disaggregated the effects of the other major events announced on January 26, 2009. In addition, they have made no effort to apportion the loss between the disclosed and allegedly concealed portions of the risk.

Plaintiffs' argument suffers from numerous other legal flaws. They attempt by sleight of hand to shift their burden of proof to Defendants, by arguing that "defendants have not satisfied

[43] SUF ¶ 104 (emphases added).

their burden on loss causation" because they supposedly have not offered evidence showing that "the alleged fraud did not cause economic losses." Opp. 106. Plaintiffs have it backwards. Loss causation is a required element of their case, on which they bear the burden of proof. *See Lentell*, 396 F.3d at 172. Pfizer bears no burden to disprove loss causation. Its only burden on this motion is to "show[] that the materials cited [by Plaintiffs] do not establish the . . . presence of a genuine dispute, or that [Plaintiffs] cannot produce admissible evidence to support the fact" they allege. Fed. R. Civ. P. 56(c)(1)(B). Pfizer has carried that burden as to loss causation.

Pfizer also is entitled to summary judgment on damages, another essential element of Plaintiffs' claim. Plaintiffs rely on Feinstein's constant-inflation-ribbon theory to support their damages case, but that theory cannot apply here, for the reasons set forth in Pfizer's motion to exclude Feinstein's opinion. Plaintiffs offer no justification for claiming the exact same amount of alleged inflation on each day of the class period despite the indisputably changing facts of the government investigation. Plaintiffs' desperate assertion that they can proceed without a viable expert opinion because "losing $2.3 billion is damaging," Opp. 111 n.326, is simply wrong. Plaintiffs confuse a securities-fraud case brought by investors with a derivative case brought to remedy harm to the company. Pfizer paid $2.3 billion, not investors. That alleged harm to the company has been addressed in a separate derivative action. Plaintiffs here must advance an expert opinion to prove *investors*' damages on a reliable, class-wide basis. They have failed to do so.

CONCLUSION

For all of the above reasons, this Court should grant Pfizer's Motion for Summary Judgment.

Date: December 8, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of December, 2014, the foregoing Pfizer's Reply Memorandum In Support of Its Motion for Summary Judgment was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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