UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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PRELIMINARY STATEMENT[1]

Plaintiffs have now conceded that Mr. Levin cannot be held liable for any alleged misstatements he did not make, including (i) each and every statement made after he resigned as CFO of Pfizer in September 2007, nearly a year and a half before the end of the Class Period, and (ii) oral statements made by other defendants during his tenure (other than one statement made by the Company's general counsel). This alone entitles Mr. Levin to summary judgment as to such statements. (*Infra* § I.)[2]

Even more significantly, Plaintiffs' concession is fatal to their attempt to establish loss causation attributable to Mr. Levin. (*Infra* § II.) In contravention of controlling authority (which the Opposition fails to address), Plaintiffs do not point to any evidence regarding what portion of the alleged decline in Pfizer's stock price was caused by Mr. Levin's alleged misstatements, as opposed to alleged misstatements made after he left and for which he cannot be held liable. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343 (2005); *see also Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005). As the case law makes clear, including Judge Swain's recent decision in *In re Pfizer Inc. Sec. Litig.*, No. 04-cv-9866 (LTS)(HBP), 2014 WL 3291230, at *2-3 (S.D.N.Y. July 8, 2014), *appeal pending*, No. 14-2853, this failure dooms Plaintiffs' case against

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[1] Unless otherwise indicated, all capitalized terms shall have the same meanings ascribed to them in Mr. Levin's opening memorandum of law in support of his motion for summary judgment ("Levin Br."). Mr. Levin adopts and incorporates by reference the arguments and authorities set forth in the Reply Memorandum of Law in Further Support of Pfizer Inc.'s ("Pfizer" or the "Company") Motion for Summary Judgment ("Pfizer Reply Br."), as well as the reply memoranda of law submitted by the other individual defendants, to the extent applicable. In addition, for the reasons set forth in Defendants' Response to Plaintiffs' "Statement of Material Facts Requiring Denial of Defendants' Motion for Summary Judgment," which is incorporated by reference, Mr. Levin does not separately address Plaintiffs' "Statement of Material Facts Requiring Denial of Defendants' Motion for Summary Judgment" or Plaintiffs' Local Rule 56.1 Response to Defendant Alan G. Levin's Statement of Undisputed Material Facts.

[2] Plaintiffs append a chart of challenged statements to their Opposition, which makes clear that they have abandoned their claims against Mr. Levin with respect to at least twenty-two statements. (Opp., Chart Nos. 4, 14, 18, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44.) They apparently continue to pursue claims against Mr. Levin with respect to the remaining identified statements. (Opp., Chart Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24 and 25.)

Mr. Levin. In *In re Pfizer*, Judge Swain granted summary judgment for the defendant where – just as here – the plaintiff failed to disaggregate the alleged harm caused by the defendants' statements from the harm caused by non-actionable statements made by a third party. (*Infra* pp. 6-7.) The same result is warranted in this case, where Plaintiffs do not even attempt to disaggregate the harm allegedly caused by statements for which Mr. Levin may be held liable. Plaintiffs have no answer to *In re Pfizer*, which they deride as "cursory" without any meaningful attempt to address its substance.

The only substantive argument Plaintiffs muster concerns the apportionment provision of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(f), but that provision relates to the allocation of damages in securities fraud cases, not liability based on causation. (*Infra* pp. 7-8.) Indeed, the provision explicitly states that it may not be construed to expand a defendant's liability under Section 10(b) – precisely the result Plaintiffs urge here. *See Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 727 (11th Cir. 2008) (reviewing legislative history and interpreting PSLRA loss apportionment provision as applying "solely" to allocation of damages, not to liability). Accordingly, the apportionment provision cannot rectify Plaintiffs' failure to demonstrate loss causation as to Mr. Levin, and accordingly, summary judgment is warranted in his favor on the same grounds articulated by Judge Swain in *In re Pfizer*.

Even if Plaintiffs' Section 10(b) claim could somehow survive summary judgment on loss causation (and it cannot), Plaintiffs have failed to raise a genuine issue of material fact that Mr. Levin acted with scienter regarding any of the alleged misstatements that Plaintiffs continue to pursue against him. (*Infra* § III.)[3] Indeed, the undisputed facts make clear that Mr. Levin believed in good faith that the disclosures which form the basis of Plaintiffs' claims against him

[3] For the reasons set forth in Pfizer's submissions, summary judgment is also warranted because none of the challenged statements are actionable under well-established law. (*Infra* § IV; Pfizer Br. § II.)

were accurate and legally compliant and that he took steps to ground that belief, including seeking the advice of Pfizer's experienced in-house and external disclosure counsel. (*Infra* § III.B.) Unable to offer any evidence to rebut this conclusion, Plaintiffs spend the bulk of their Opposition attacking a strawman argument that Mr. Levin has never raised – *i.e.*, that his reliance on the advice of counsel constitutes a "complete defense" to securities fraud. Mr. Levin has not advocated such a position. Rather, he has moved for summary judgment based on his lack of scienter, of which his reliance on Pfizer's disclosure counsel was but one facet. The Second Circuit and other courts have repeatedly recognized such grounds for granting summary judgment in securities fraud cases such as this (*infra* pp. 11-12), and Plaintiffs' efforts to obscure the record through irrelevant arguments should be disregarded.

Plaintiffs' attempt to raise an issue of fact as to Mr. Levin's scienter regarding the Company's litigation reserves is equally unavailing. (*Infra* § III.C.) The record demonstrates that Mr. Levin subjectively believed the Company's reserving decisions were correct and appropriate during his tenure. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 112-13 (2d Cir. 2011). This conclusion is further evidenced by KPMG's independent review and approval of each reserving decision at issue. While Plaintiffs assert that KPMG was not "fully informed" of the facts regarding the government investigation, they largely rely on documents and events that occurred after Mr. Levin left his position as CFO. Moreover, for the reasons set forth in Pfizer's reply brief, the record evidence makes clear that KPMG was fully informed of all material facts. In any event, the undisputed evidence shows that Mr. Levin believed in good faith that KPMG was so informed.

Finally, Mr. Levin is entitled to summary judgment on Plaintiffs' control person claim. (*Infra* § V.) It is undisputed that Mr. Levin cannot be a control person for any statements made

after he exited his position as CFO of Pfizer in September 2007. For the reasons set forth in Pfizer's brief, summary judgment is warranted in its favor and, therefore, there are no viable claims against any "controlled" person. *See Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 498 (S.D.N.Y. 2011), *aff'd*, 472 F. App'x 7 (2d Cir. 2012). Plaintiffs also cannot point to any evidence that Mr. Levin "culpably participated" in any alleged wrongdoing. *Id.* Rather, the undisputed record demonstrates that Mr. Levin acted in good faith during his tenure.

ARGUMENT

I. PLAINTIFFS HAVE CONCEDED THAT MR. LEVIN CANNOT BE HELD LIABLE FOR MANY OF THE STATEMENTS AT ISSUE

Under controlling Supreme Court authority, Mr. Levin cannot be held liable for any alleged misstatements or omissions of which he was not the "maker." (Levin Br. § I); *Janus Capital Grp., Inc. v. First Der. Traders*, 131 S. Ct. 2296, 2302 (2011). Plaintiffs apparently agree, as they have now conceded that Mr. Levin is not responsible for any alleged misstatements occurring after he left his position as CFO of Pfizer in September 2007 – nearly a year and a half before the end of the Class Period. (Opp. n. 210 ("Levin and McKinnell argue that they cannot be liable for statements made by the other defendants after their departure from the Company. Plaintiffs do not disagree and have only charged defendants with statements made during their time at Pfizer.".) Consistent with this, Plaintiffs also do not seek to hold Mr. Levin liable for the oral statements made by other defendants during his tenure (other than one statement made by Allen Waxman in a press release). (*Id.* n.243, 64-69; Chart No. 19.) Therefore, at minimum, summary judgment should be granted in Mr. Levin's favor as to all of these statements. (Levin Br. at 17-18.)[4]

[4] Specifically, summary judgment on this basis must be granted in Mr. Levin's favor as to statement Nos. 4, 14, 18, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 identified in the chart appended to Plaintiffs' Opposition.

II. PLAINTIFFS HAVE NOT RAISED A MATERIAL ISSUE OF FACT REGARDING LOSS CAUSATION AS TO MR. LEVIN

Plaintiffs' concession that Mr. Levin cannot be held liable for any alleged misstatements following his departure is fatal to their attempt to raise a genuine issue of fact concerning loss causation attributable to him. (*See* Levin Br. § III.) It is undisputed that Plaintiffs have not offered any evidence as to what (if any) portion of the alleged drop in Pfizer's stock price was directly caused by Mr. Levin's alleged misstatements, as opposed to other causes such as statements made by other defendants after Mr. Levin left. *See Dura Pharm*, 544 U.S. at 343; *see also Lentell*, 396 F.3d at 177 (plaintiff must demonstrate that it was the "defendant's fraud – rather than other salient factors – that proximately caused plaintiff's loss").[5]

Plaintiffs have not even attempted to disaggregate the purported harm caused by Mr. Levin's alleged misstatements, which were made long before the alleged corrective disclosure at a time when (1) the Bextra investigation was still in its preliminary stages, with no settlement demands or negotiations having taken place, (2) the Company had only just received a subpoena regarding Lyrica, and (3) the government investigation regarding Geodon and Zyvox had not even begun. (*See* Levin Br. at 32-33.) Plaintiffs' "constant inflation" theory of damages fails to account for these facts and improperly seeks to hold Mr. Levin responsible for all of the loss allegedly caused by the announcement of the $2.3 billion settlement – even though that settlement encompassed investigations occurring after Mr. Levin's departure. (*Id.*); *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 156-158 (2d Cir. 2007) (affirming dismissal of claims where plaintiffs failed to allege facts showing that certain defendants' statements, rather than those of company defendant, caused plaintiffs' losses); *WM High Yield Fund v. O'Hanlon*,

[5] Tellingly, Plaintiffs' "response" to Mr. Levin's loss causation argument consists essentially of one sentence buried at the end of their 120-page Opposition cross-referencing their opposition to Defendants' *Daubert* motion. (*See* Opp. at 113.)

No. 04-3423, 2013 WL 3230667, at *11 (E.D. Pa. June 27, 2013) (granting summary judgment where "Plaintiffs' position assumes that the overall decline in the value of the [securities] was due to the collective fraud of all named defendants, which in some unexplained manner subsumes each defendant's individual, contributory wrongdoing"). Plaintiffs justify their use of constant inflation "because defendants' misleading statements and omission are alleged to have concealed risks associated with the DOJ's investigation into Pfizer's rampant and illegal off-label promotion of pharmaceutical products throughout the Class Period." (ECF No. 293 at 16 (emphasis added).) It is undisputed, however, that the "DOJ's investigation" into two of those "pharmaceutical products" had not even begun during Mr. Levin's tenure. (Levin 56.1 [ECF No. 259] ¶¶ 30-32; Pls' 56.1 Response [ECF No. 298] ¶¶ 30-32.)

Judge Swain's recent decision in *In re Pfizer* is on all fours. There, Judge Swain granted summary judgment in defendant Pfizer's favor where the plaintiff offered an inflation analysis that failed to disaggregate the inflation attributable to certain non-actionable statements made by a third party. *See In re Pfizer Inc. Sec. Litig.*, 2014 WL 3291230, at *2-3; *see also In re Pfizer Inc. Sec. Litig.*, No. 04-cv-9866 (LTS)(HBP), 2014 WL 2136053, at *1 (S.D.N.Y. May 21, 2014). Similarly, here, Plaintiffs have conceded that Mr. Levin cannot be liable for numerous statements allegedly "made" by others after he left his position as CFO. (*Supra* § I.) Because Plaintiffs' theory fails to disaggregate the effect of Mr. Levin's statements from those by other parties, Judge Swain's reasoning compels summary judgment in Mr. Levin's favor.

Plaintiffs have no answer to Judge Swain's decision, which they resort to deriding as "cursory" yet fail to distinguish on the merits. (ECF No. 293 at 19-20.) Their assertions that *In re Pfizer* involved multiple "curative disclosure dates" (*id.* at 20) and that the plaintiff's expert "attempt[ed] to submit a third supplemental report" (Opp. at 110 & n.323) are completely

irrelevant, and certainly do not provide any basis to disregard its holding.[6] Finally, Plaintiffs' claim that "defendants are placing the cart before the horse" because "[t]his Court has not dismissed a single one of plaintiffs' alleged misstatements" (ECF No. 293 at 21) rings particularly hollow, given that Plaintiffs have expressly abandoned claims against Mr. Levin regarding over twenty of the alleged misstatements.[7]

Left with nothing else, Plaintiffs make the untenable argument that they are "not required to apportion damages on a defendant-by-defendant basis" because "should a jury find that defendants acted recklessly, it will be able to apportion liability to each individual defendant based on which false statements they made" under the provisions of the PSLRA. (ECF No. 293 at 29-30 (citing 15 U.S.C. § 78u-4(f).) This is a red herring. The PSLRA provision upon which Plaintiffs rely concerns the apportionment of damages to multiple defendants in securities fraud actions only once liability has been established. It does not, as Plaintiffs urge, relieve them of their burden to establish Mr. Levin's liability in the first place (of which loss causation is an essential element). *See* 15 U.S.C. § 78u-4(b)(4); *see also Laperriere*, 526 F.3d at 727 (reviewing legislative history and interpreting PSLRA loss apportionment provisions as applying "solely" to allocation of damages, not to determination of liability). To the contrary, the provision explicitly states that "[n]othing in this subsection shall be construed to create, affect, or in any manner modify, the standard for liability associated with any action arising under the securities laws."

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[6] Plaintiffs' argument that the expert in *In re Pfizer* had provided "no explanation" for his damages theory (ECF No. 293 at 20) is equally true here, where Feinstein does not even attempt to explain his failure to disaggregate the loss caused by Mr. Levin's alleged statements from that caused by other statements for which he is not responsible.

[7] Equally unavailing is Plaintiffs' attempt to distinguish *In re BP P.L.C. Securities Litigation*, 2013 U.S. Dist. LEXIS 173303 (S.D. Tex. Dec. 6, 2013), on the ground that "a single damages analysis was not appropriate" there given the "two distinct" periods of fraud. (ECF No. 293 at n.10.) Indeed, Plaintiffs' own reserving expert has asserted that the Company should have reserved one amount during the period of Mr. Levin's tenure and a significantly larger amount during the period after he left as the circumstances concerning the government's investigations unfolded. (*See* Levin Br. at 33.)

15 U.S.C. § 78u-4(f)(1). The legislative history of this provision is in accord. *See* H.R. Rep. No. 104-369, at 38 (1995) (Conf. Rep.) ("[T]he standard of liability in any such action should be determined by the pre-existing, unamended statutory provision that create[s] the cause of action, without regard to this provision, which applies solely to the allocation of damages.").

Plaintiffs attempt to use this provision for exactly what it proscribes – *i.e.*, to circumvent their burden of proof regarding an essential element of their claim against Mr. Levin. Such a result is contrary to the plain language and legislative history of the provision and thus should be rejected. *Laperriere*, 526 at 727 ("[T]he PSLRA, including the proportionate liability provisions, does not change the rules for determining who is liable for violating the securities laws.").

III. PLAINTIFFS HAVE FAILED TO RAISE AN ISSUE OF MATERIAL FACT THAT MR. LEVIN ACTED WITH SCIENTER

A. Mr. Levin Did Not Act With an Intent to Defraud Regarding the Company's Legal Disclosures

Plaintiffs have not pointed to any record evidence – let alone evidence raising a genuine issue of material fact – that Mr. Levin acted with the requisite "intent to deceive." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007); (Levin Br. § II). Plaintiffs instead attempt to muddy the record by resorting to arguments untethered to any position actually taken by Mr. Levin in support of his motion for summary judgment.

For example, Plaintiffs argue that "by only asserting their good faith, defendants waive any claim that plaintiffs' allegations of actual knowledge or recklessness are insufficient." (Opp. at 70.) This is simply not true. Mr. Levin has specifically moved for summary judgment on the ground that he "did not act with an intent to defraud." (Levin Br. at 20, 25.) And, quite tellingly, Plaintiffs fail to even address (let alone contest) any of the extensive and good faith actions taken by Mr. Levin himself in reviewing and finalizing Pfizer's public filings that they challenge, or the fact that no one ever informed Mr. Levin that they believed the Company's disclosures were

in any way improper or incorrect. (*See id.* at 8-10, 20-21.)[8] This unrebutted record evidence is "utterly inconsistent with the requisite scienter for securities fraud" and, on this basis alone, Mr. Levin is entitled to summary judgment. *In re Fannie Mae Sec. Litig.*, 892 F. Supp. 2d 59, 67 (D.D.C. 2012).

Plaintiffs likewise fail to address the fact that Mr. Levin's lack of scienter is supported by the preliminary nature of the government's Bextra investigation during his tenure as Pfizer CFO. (*See* Levin Br. at 21-22.) While Plaintiffs attempt to manufacture a factual issue by pointing to certain preliminary events relating to the Bextra investigation that occurred before or early in the Class Period (Opp. at 7-8), it is undisputed that at no time during Mr. Levin's tenure as CFO of Pfizer did (i) the government make a settlement demand on Pfizer relating to the Bextra investigation; (ii) the Company make a settlement offer to the government relating to the Bextra investigation; (iii) Mr. Levin have discussions with Pfizer's attorneys concerning a settlement with the government; or (iv) Mr. Levin view or receive a damages analysis relating to the investigation. (*See* Levin 56.1 ¶¶ 15-18.)[9]

It is also undisputed that just as he was exiting his role as CFO, Mr. Levin was informed that the Company was "push[ing] back forcefully on the government's theories" of liability. (*Id.*

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[8] *See Johnston v. Town of Orangetown*, No. 10 Civ. 8763(GAY), 2013 WL 1189483, at *7 n. 3 (S.D.N.Y. Mar. 22, 2013) ("Defendants moved for summary judgment on said claims. . . . Plaintiff failed to respond to defendants' arguments and, thus, apparently concedes defendants' points and waives said claims."), *aff'd*, 562 F. App'x 39 (2d Cir. 2014); *Plahutnik v. Daikin Am., Inc.*, 912 F. Supp. 2d 96, 104 (S.D.N.Y. 2012) ("[A]rguments not made in opposition to a motion for summary judgment are deemed abandoned.").

[9] While Plaintiffs purport to "dispute" these facts in their Response to Mr. Levin's Rule 56.1 Statement (Resp. to Levin 56.1 Statement ¶¶ 15-18), they fail to point to any evidence or testimony that actually refutes or contradicts them. *See Bell v. MTA*, No. 12 Civ. 1235(AKH), 2013 WL 8112461, at *1 (S.D.N.Y. Nov. 1, 2013) (Hellerstein, J.) ("[T]he non-moving party may not rely on conclusory allegations or unsubstantiated speculation to defeat [a] summary judgment motion.") (citation omitted). As Mr. Levin testified: "During my tenure as CFO, the investigation was in a much earlier phase and so settlement discussions would not have come up." (Petrosinelli Decl. Ex. F-2 (Levin Tr.) at 103:5-8.) Plaintiffs do not – and cannot – cite any evidence to the contrary.

¶¶ 51-54 (emphasis added).)[10] This is in accord with other documents that Plaintiffs themselves have offered in an unsuccessful attempt to raise an issue of fact. For example, Plaintiffs claim that "[o]n December 1, 2005, Levin was informed of details of the Government's investigation into the off-label promotion of both Bextra and other products." (Pls' Statement of Material Facts [ECF 303] ¶ 242.) But the document they cite explicitly states that Pfizer's attorneys had "met with the government to discuss the substantial defenses that we believe the Company has with respect to" the Bextra matter. (Ex. 224 (emphasis added).)

Unable to point to specific evidence of Mr. Levin's scienter, Plaintiffs resort to lumping all defendants together in order to conceal the fatal flaws in their case. Plaintiffs repeatedly use the term "defendants," even when referring to periods after Mr. Levin exited his role as Pfizer CFO. (*See, e.g.*, Opp. at 20, 23-24.) Plaintiffs even go so far as to repeatedly cite evidence that did not even exist during Mr. Levin's tenure in their Response to Mr. Levin's Rule 56.1 Statement. (*See, e.g.*, Response to Alan Levin's Statement of Undisputed Material Facts ¶¶ 40, 53, 66, 72, 78 (referring to "target letter" received in 2008, as well as documents and events from October 2007 and November 2007).)[11] This obvious failure to distinguish among the defendants – and to acknowledge in this context the legal consequences of Mr. Levin's departure half-way

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[10] Unable to explain away this clear indication of Mr. Levin's good faith, Plaintiffs attempt to exclude the September 2007 Litigation Report containing this statement as hearsay. (ECF No. 295-1 at 4.) This is nonsense. Not only is Plaintiffs' objection to admissibility improper at this stage (*see* Response to Plaintiffs' Objections to Exhibits Submitted in Support of Defendants' Motions for Summary Judgment), but it is also without merit. The Litigation Report clearly is a business record that falls within a well-established exception to the hearsay rule. *See* Fed. R. Evid. 803(6). The document also is not offered for the truth of the matter asserted but rather to show Mr. Levin's state of mind with respect to the Company's "substantial defenses" disclosure. *See* Fed. R. Evid. 801(c); *Cameron v. Cmty. Aid For Retarded Children, Inc.*, 335 F.3d 60, 65 n.2 (2d Cir. 2003) ("Because these statements are not used to prove the truth of the matter asserted, but to establish [defendant's] state of mind, they are not hearsay").

[11] As another example, Plaintiffs continually point to a letter from Covington & Burling to the government dated October 1, 2007, which purportedly "acknowledged a methodology for calculating the fine [for Bextra] from 'analogous' cases such as Neurontin . . . ." (Opp. at 92.) Putting aside Plaintiffs' blatant mischaracterization of this document (it says no such thing), the letter post-dates Mr. Levin's tenure as CFO and provides no evidence of Mr. Levin's scienter with respect to the disclosures for which Plaintiffs seek to hold him liable.

through the Class Period – dooms Plaintiff's Opposition to Mr. Levin's motion.[12]

B. Mr. Levin's Lack of Scienter Is Further Bolstered by His Good Faith Reliance on the Advice Of Pfizer's Disclosure Counsel

Mr. Levin's lack of scienter is bolstered by his good faith reliance on the advice of the Company's disclosure counsel, who, among other things, vetted and approved each of the disclosures at issue. (*See* Levin Br. at 10-13, 22-25); *see also Steed Fin. LDC v. Nomura Sec. Int'l Inc.*, No. 00 Civ. 8058(NRB), 2004 WL 2072536, at *9 (S.D.N.Y. Sept. 14, 2004) (granting summary judgment where defendants received advice from counsel that their actions were legal and, thus, "cannot be said to have acted with an intent 'to deceive, manipulate, or defraud . . . such that a finding of scienter would be appropriate"), *aff'd*, 148 F. App'x 66 (2d Cir. 2005). Rather than substantively address this point, Plaintiffs' Opposition attacks a "strawman" argument that Mr. Levin has never made – *i.e.*, that his "reliance-on-others defense" is a "complete defense" to securities fraud. (Opp. at 72-75.) That is not a basis of Mr. Levin's motion for summary judgment. To the contrary, Mr. Levin has demonstrated that there is no evidence that he made any challenged statement with scienter, of which his reliance on Pfizer's disclosure counsel was one aspect. (*See* Levin Br. § II); *see also Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (affirming summary judgment based on lack of scienter where defendant "relied on the expertise of counsel" from Cadwalader); *In re Fannie Mae Sec. Litig.*, 892 F. Supp. at 72; *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1251-57

[12] As set forth in Mr. Levin's opening brief, Mr. Levin's lack of scienter is further supported by the fact that he continued to beneficially own a substantial amount of Pfizer stock following his departure and continues to do so to this day. (*See* Levin Br. at 27 n.21; *see also* Levin Decl. ¶¶ 3-5.) Significantly, Plaintiffs do not dispute this, and instead proffer baseless evidentiary objections premised on the language used by Mr. Levin in his Declaration. (*See* Resp. to Levin 56.1 Statement ¶¶ 97-99.)

(S.D. Cal. 2010).[13]

As the case law makes clear – including at least one case cited by Plaintiffs themselves (Opp. at 77) – reliance on the advice of counsel need not be a formal defense to securities fraud, and can instead be offered as evidence negating the defendant's scienter, as Mr. Levin does here. *See Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) ("[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter."); *see also United States v. Gorski*, No. 12-10338-FDS, 2014 WL 3818111, at *10 (D. Mass. Aug. 1, 2014) (evidence that a defendant relied on the advice of counsel may be admissible for the purpose of negating intent "even if the defendant could not establish all of the elements of the formal affirmative defense").[14] Thus, while Plaintiffs rely heavily on *Markowski v. SEC*, 34 F.3d 99 (2d Cir. 1994), for the proposition that reliance on counsel is not a "complete defense" (Opp. at 75-79), this argument simply misses the point.[15]

Similarly, while Plaintiffs reprise the arguments made in their summary judgment motion that Pfizer's disclosure counsel was not fully informed, they fail to show how this assertion (even if true, which it is not, *see* Pfizer Reply Br. § III.B) in any way impacts the analysis of Mr. Levin's good faith. *See Gorski*, 2014 WL 3818111, at *10 (evidence of counsel's advice "would surely be admissible on the issue of defendant's state of mind" even though it might "not qualify for an advice-of-counsel defense in the formal sense" because defendant "failed to provide a

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[13] Plaintiffs' superficial attempt to dismiss *Steed* as an "unpublished decision" (Opp. at 74) is unavailing. *See Brault v. Social Sec. Admin., Comm'r*, 683 F.3d 443, 450 n.5 (2d Cir. 2012) ("We are, of course, permitted to consider summary orders for their persuasive value, and often draw guidance from them in later cases."). While Plaintiffs also attempt to distinguish the district court decision in *Steed* on the ground that the court "did not grant summary judgment as to scienter based strictly on the defendants' reliance-on-counsel defense" (Opp. at 74), Mr. Levin does not ask the Court to do so here.

[14] Of course, that Mr. Levin has not sought summary judgment on the basis of a reliance on advice of counsel defense does not address his right to assert such a defense at trial.

[15] *Markowski* is also inapposite for the reasons set forth in Pfizer's Reply Brief. (Pfizer Reply Br. at 12.)

complete set of facts to the lawyer"); *SEC v. Prince*, 942 F. Supp. 2d 108, 142 (D.D.C. 2013) (finding defendant relied in good faith on legal advice, which was sufficient to negate scienter, where, among other things, company's employees "believed they had disclosed the relevant facts to [counsel], and that [counsel was] aware of those facts") (emphasis added).[16]

Here, the undisputed facts demonstrate that Mr. Levin participated in, and reasonably relied upon, the robust and exhaustive procedures in place at Pfizer, which were designed to ensure that disclosure counsel were in possession of the relevant facts necessary to render the legal advice at issue. (*See* Levin Br. at 10-13.) Mr. Levin repeatedly testified that he had no reason to believe that those procedures were in any way inadequate or not working properly during his time at Pfizer, or that disclosure counsel was not fully informed in rendering its advice. (*See, e.g.*, Petrosinelli Decl. Ex. G-2 (Levin 9/23 Tr.) at 24:12-27:11.) Plaintiffs do not even attempt to rebut this testimony or offer any evidence that his reliance on those procedures was misplaced. To the contrary, Plaintiffs' own purported "expert" conceded that such procedures were appropriate. (*See* Pfizer Statement of Undisputed Facts [ECF No. 248] ¶ 17.)[17]

Finally, Plaintiffs' repeated emphasis that certain Pfizer employees had in fact engaged in off-label promotion and attempted document deletion (*see, e.g.*, Opp. at 8) improperly conflates those issues with whether Mr. Levin knew that the challenged securities disclosures during his tenure were materially false or misleading. Indeed, this argument is refuted by Mr. Levin's own

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[16] *Cf. United States v. Defries*, 129 F.3d 1293, 1308-09 (D.C. Cir. 1997); (3/8/2013 Tr. at 13 (Court: "But the test of good faith is not what [Dennis] Block had in his mind, or even in his files, it's what he communicated to his client. Ms. Radcliffe: That's correct, your Honor.").)

[17] Plaintiffs' reliance on *In re Bank of America Corp. Securities Derivative & ERISA Litigation*, No. 09 MD 2058(PKC), 2011 WL 3211472 (S.D.N.Y. July 29, 2011) (Opp. at 95-96) is entirely misplaced. There, the court denied the defendant's motion to dismiss a securities fraud claim on the ground that the complaint adequately alleged scienter where "[the defendant] impeded counsel from making a fully informed analysis." *Id.* at *8. By contrast, this action is at the summary judgment stage and there is no record evidence that Mr. Levin took any actions that "impeded counsel from making a fully informed analysis."

testimony, in which he explained that he was told that the Company's government investigations counsel had advised that the Company had "substantial defenses" to the government's investigation even though certain of Pfizer's employees had engaged in instances of off-label promotion. (*See* Levin Br. at 24.) Plaintiffs have not offered a shred of evidence to dispute this testimony or Mr. Levin's good faith belief in what he was told.

C. Mr. Levin Did Not Act With Intent To Defraud In Connection With Pfizer's Reserving Decisions

The undisputed evidence also demonstrates that Mr. Levin did not act with scienter in connection with Pfizer's setting of reserves. (*See* Levin Br. at 25-27.) As an initial matter, the law in this Circuit is clear that reserving decisions are matters of opinion that must be both "objectively" and "subjectively" false. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 112-13 (2d Cir. 2011). Plaintiffs fail to offer any evidence that Mr. Levin subjectively believed that the reserving determinations made by the Company during his tenure were incorrect. This failure entitles Mr. Levin to summary judgment as a matter of law.[18]

It is also undisputed that during Mr. Levin's tenure, KPMG independently assessed and approved the Company's reserving decisions, further negating any showing of scienter. (*See* Levin Br. at 26.) Plaintiffs' argument that Mr. Levin cannot rely upon KPMG in this regard is entirely misplaced. As with his good faith reliance on the advice of disclosure counsel, Mr. Levin offers evidence of KPMG's independent assessment of the reserving issues not as a "complete defense" to Plaintiffs' claims, but as undisputed additional evidence of his good faith subjective belief that those reserving decisions were correct. *See In re REMEC Inc. Sec. Litig.*,

[18] Plaintiffs nevertheless argue that the subjective prong of *Fait* somehow does not apply here because "there was an objective methodology to estimate the range of loss" – namely, the "methodology applied in the 'analogous' Neurontin case." (Opp. at 36-37.) This argument is without merit for the reasons set forth in the Pfizer Reply Brief. (Pfizer Reply Br. at 16-17, 19.) Indeed, Plaintiffs' interpretation would eviscerate the subjective prong of the Second Circuit's test set forth in *Fait*.

702 F. Supp. 2d at 1251-57 (granting summary judgment for CFO based on lack of scienter where, among other things, company's outside auditors concurred in and approved of company's goodwill impairment testing). Plaintiffs have no answer to this point.

Instead, Plaintiffs argue that KPMG was not provided with "full disclosure" and, therefore, the good faith reliance on the advice of auditor defense is unavailable to Mr. Levin. (Opp. at 91.) But, again, such an argument is misplaced because Mr. Levin does not attempt invoke a "complete defense" of reliance on KPMG on this motion. Rather, Mr. Levin offers such evidence to negate a showing of scienter. In any event, most of the "information" that Plaintiffs contend KPMG did not receive post-dates Mr. Levin's tenure as CFO. (*See* Opp. at 92-94.) As one example, Plaintiffs contend that KPMG was never informed that Pfizer had determined in October 2007 that "a loss from the DOJ Bextra Investigation was 'probable.'" (*Id.* at 92.) Setting aside the veracity of Plaintiffs' claim, that was one month after Mr. Levin had exited the role of CFO. (*See also id.* at 94 (citing February 2008 target letter and April 2008 Covington letter).)

Even Plaintiffs' cited documents from Mr. Levin's tenure fail to support their position. For example, Plaintiffs misleadingly cite a document (Petrosinelli Decl. Ex. P-5) for the notion that the defendants – including Mr. Levin – were aware that the Company would be "forced to settle the Bextra investigation with the DOJ" as early as September 2005. (*See, e.g.*, Opp. at 12 & n.52; n.95; n.171; n.178; n.260.) Plaintiffs provide no evidence that this document was ever received by Mr. Levin, and in any event, fail to inform the Court that the document also stated that "we have substantial defenses to the merits of the potential claims" and

> [t]here was a consensus that a loss, if any, is not estimable at this time due, among other things, to the following factors: (1) the government is still outlining its theories and has not made any demand; nor has it spelled out the statutory remedies or the types of damages/penalties that it may seek; (2) we have not

> discussed with the government the substantive merits of any case that it might have and the ultimate settlement of the merits of the case will have a direct impact on the calculation of any loss; (3) calculation of loss in a case of this nature is particularly complex and requires further definition, starting with the issues raised in (1) and (2) above.

(Petrosinelli Decl. Ex. P-5.) This same document was re-circulated within Pfizer in October 2007 – just after Mr. Levin left his position as CFO – by investigation attorney Carl Wessel with a note that "[i]t is consistent with our current thinking on these matters." (*Id.*) Accordingly, this evidence not only fails to undermine Mr. Levin's motion for summary judgment, but it actually supports Mr. Levin's good faith belief that the Company's Bextra-related disclosures and reserves were proper during his tenure.[19]

D. Plaintiffs Have Abandoned Their Claims Regarding Pfizer's Internal Controls Over Financial Reporting

Plaintiffs have abandoned any claims that Mr. Levin made misstatements regarding the Company's internal controls over financial reporting, which do not appear in the chart of "Defendants' [Alleged] Class Period False & Misleading Statements" attached to the Opposition. (*Compare* FAC ¶ 65 *with* Opp., Chart Nos. 3, 6, 9, 12, 17, 24.) This is with good reason, as the undisputed evidence demonstrates that there was never a "material weakness" relating to healthcare compliance monitoring controls in the U.S. pharmaceuticals division. (*See* Levin Br. at 15, 27.) Moreover, as Plaintiffs are forced to acknowledge, the significant deficiency identified by Pfizer was remedied by second quarter of 2007 – while Mr. Levin was CFO. (Opp. at 94; Levin Br. at 16.)[20]

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[19] In their Response to Mr. Levin's Rule 56.1 Statement, Plaintiffs take issue with the quoted language in paragraph 81 of Mr. Levin's Rule 56.1 Statement. The quoted language can be found in Petrosinelli Decl. Ex. I-4 at 2.

[20] While Plaintiffs apparently now attempt to hold Mr. Levin liable for a quotation expressly attributed to defendant Allen Waxman that "[t]he company has internal controls to guard against" off-label promotion practices (*see* Opp., Chart No. 19), they offer no evidence that Mr. Levin was the "maker" of that statement for purposes of imposing

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

As demonstrated in Pfizer's submissions, none of the challenged disclosures or statements can support liability under Section 10(b) or Rule 10b-5. (Pfizer Br. § II.)[21] For this independent reason, Mr. Levin should be granted summary judgment as to these statements.

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

Finally, Plaintiffs have failed to raise a genuine issue of material fact regarding Mr. Levin's control person liability under Section 20(a). (*See* Levin Br. § V.) Because Mr. Levin exited his role as CFO in September 2007, Plaintiffs do not dispute that he cannot be a control person for periods after he left the Company. For the portion of the Class Period during which Mr. Levin acted as CFO, as set forth in Pfizer's motion for summary judgment, Pfizer is entitled to summary judgment and, therefore, there is no claim against a "controlled person." (*See* ECF No. 246.) Moreover, for that period, Plaintiffs do not raise a material issue of fact that Mr. Levin "culpably participated" in any alleged wrongdoing. *See Alki Partners*, 769 F. Supp. 2d at 498. To the contrary, the unrebutted record demonstrates that Mr. Levin acted at all times during his tenure in good faith with respect to the challenged disclosures and reserving decisions. (*Supra* § III.A-C.)

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liability. (Levin Br. at 18 & n.16.) In any event, Plaintiffs cannot point to any evidence that Mr. Levin believed Mr. Waxman's oral statement to be false when it was made.

[21] As one example, Plaintiffs apparently seek to hold Mr. Levin liable for Pfizer's press releases announcing the Company's accurate financial results. (*See, e.g.*, Nos. 5, 7, 10, 11, 12, 15, 16, 20, 22, 23, 25.) Such statements, however, cannot create liability under Section 10(b) where, as here, Pfizer was accurately reporting its historical results. (Pfizer Br. at 48-49); *see also FBR Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 356 (S.D.N.Y. 2008) ("Accurate statements of past earnings figures are not themselves actionable under Section 10(b).").

CONCLUSION

Defendant Alan G. Levin respectfully requests that the Court grant summary judgment in his favor.

Dated: New York, New York
December 8, 2014

Respectfully submitted,

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