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

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

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Pursuant to Federal Rule of Civil Procedure 56, Defendant Frank D'Amelio respectfully submits this reply memorandum of law in further support of his motion for summary judgment.[1]

PRELIMINARY STATEMENT

Plaintiffs' Opposition[2] confirms that Mr. D'Amelio is entitled to summary judgment on all claims against him. Plaintiffs themselves abandon many such claims – *e.g.*, claims about Pfizer's internal controls and dividend – and those that remain are fatally defective:

- ***Plaintiffs fail to offer any genuine issue of material fact that Mr. D'Amelio caused their purported losses.*** Plaintiffs must disaggregate any supposed losses caused by Mr. D'Amelio's statements from any supposed losses caused by others' statements to determine whether Mr. D'Amelio caused any of Plaintiffs' losses. Plaintiffs do not identify any losses caused by Mr. D'Amelio's statements and, therefore, have failed to establish loss causation with respect to Mr. D'Amelio.

- ***Plaintiffs fail to offer any genuine issue of material fact that Mr. D'Amelio made any actionable misrepresentations.*** Mr. D'Amelio is not liable for statements by other defendants – *i.e.*, an oral statement by Mr. Read at Pfizer's Investor Day or statements by Pfizer (or other Defendants) in press releases – because Plaintiffs have not established that Mr. D'Amelio had ultimate authority over the content of those statements and whether and how to communicate them. Further, none of the statements for which Plaintiffs seek to hold Mr. D'Amelio liable – *i.e.*, Pfizer's statements about compliance, Pfizer's legal disclosures concerning the Government Investigations, Pfizer's judgment not to take a reserve, and statements about Pfizer's sales revenue from Lyrica – are actionable.

- ***Plaintiffs fail to offer any genuine issue of material fact that Mr. D'Amelio acted with scienter.*** Plaintiffs do not dispute that Mr. D'Amelio had no motive or opportunity to commit fraud because, although he could have sold more than $1.5 million worth of Pfizer stock grants that vested in late 2008, he did not sell a single share. Moreover, Mr. D'Amelio's reliance on in-house and outside counsel, independent accountants and auditors, and Pfizer's robust processes negates any inference of scienter. Plaintiffs try to paint such reliance as "a shell game" but, in fact, it is evidence of good faith that precludes any inference of scienter because Plaintiffs offer absolutely no evidence to the contrary.

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[1] Mr. D'Amelio adopts and incorporates by reference the arguments and authorities set forth in the Reply Memorandum of Law in Further Support of Pfizer Inc.'s Motion for Summary Judgment ("Pfizer Reply") and in the reply memoranda of law submitted by the other individual defendants to the extent applicable.

[2] Unless otherwise noted, capitalized terms have the same meanings as in the Memorandum of Law in Support of Defendant Frank D'Amelio's Motion for Summary Judgment ("D'Amelio Br."). "Opposition" or "Opp." refers to Plaintiffs' Memorandum of Law in Opposition to Pfizer Inc.'s and the Individual Defendants' Motions for Summary Judgment.

- ***Plaintiffs fail to offer any genuine issue of material fact that Mr. D'Amelio acted as a control person.*** Plaintiffs present no evidence that someone controlled by Mr. D'Amelio committed a Section 10(b) violation. In addition, for the same reasons that Plaintiffs have failed to establish scienter with respect to Mr. D'Amelio's statements, they have failed to establish culpable participation with respect to any other statements at issue. Indeed, all of the record evidence demonstrates that Mr. D'Amelio acted in good faith.

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

ARGUMENT

I. THIS COURT SHOULD GRANT SUMMARY JUDGMENT FOR MR. D'AMELIO AS TO THOSE CLAIMS THAT PLAINTIFFS CONCEDE THAT THEY DO NOT AND CANNOT ASSERT AGAINST HIM.

In their Opposition, Plaintiffs concede that they do not and cannot assert claims against Mr. D'Amelio as to statements (1) made before he joined Pfizer, (2) about Pfizer's compliance and internal controls, (3) about Pfizer's dividend, and (4) about Pfizer's sales revenue from Lyrica as reported by him on earnings calls. Specifically:

- ***Plaintiffs concede that they do not and cannot assert claims against Mr. D'Amelio for statements made before he became Pfizer's CFO.*** Mr. D'Amelio is not liable for any statements made before he joined Pfizer in September 2007. (D'Amelio Br. at 14-15.) Plaintiffs state that they "have only charged defendants with statements made during their time at Pfizer." (Opp. at 55 n.210 & Plaintiffs' chart of "Defendants' Class Period False and Misleading Statements" ("FMS").)

- ***Plaintiffs concede that they do not and cannot assert claims against Mr. D'Amelio for statements about Pfizer's compliance and internal controls.*** Mr. D'Amelio is not liable for statements during his tenure that the Company (1) had effective internal controls or (2) complied with laws, regulations, and its own policies on business conduct. (D'Amelio Br. at 8-9, 16-17, 23-25.) Plaintiffs concede that none of those statements (with the exception of Pfizer's 2007 Form 10-K discussed below) was false or misleading. (Opp. at 44-48 & FMS.)

- ***Plaintiffs concede that they do not and cannot assert claims against Mr. D'Amelio for his statement about Pfizer's dividend.*** Mr. D'Amelio is not liable for his statement during Pfizer's Analyst Day on March 5, 2008, that the Company "expect[s] to continue" to pay its dividend "at least at current levels" absent "significant unforeseen events." (D'Amelio Br. at 11-13, 18-19, 31-33.)

Plaintiffs concede that Mr. D'Amelio's statement was not related to the alleged fraud and was not false or misleading. (Opp. at 27-28 & FMS.)

- ***Plaintiffs concede that they do not and cannot assert claims against Mr. D'Amelio for his statements about Lyrica on earnings calls.*** Mr. D'Amelio is not liable for his statements reporting Pfizer's sales revenue from Lyrica on earnings calls on October 18, 2007, January 23, 2008, April 17, 2008, and October 21, 2008. (D'Amelio Br. at 13-14, 20-21, 34-35.) Plaintiffs concede that they "do not seek to hold [him] accountable" for those statements. (Opp. at 63-69 & FMS.)

This Court should dismiss Plaintiffs' claims against Mr. D'Amelio as to these statements.

II. THIS COURT SHOULD GRANT SUMMARY JUDGMENT FOR MR. D'AMELIO BECAUSE PLAINTIFFS HAVE FAILED TO OFFER A GENUINE ISSUE OF MATERIAL FACT THAT HE CAUSED THEIR PURPORTED LOSSES.

As the Second Circuit held in *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005) – on which Plaintiffs rely heavily – a plaintiff must establish that it was the "defendant's fraud – rather than other salient factors – that proximately caused plaintiff's loss." *Id.* at 177.

Plaintiffs do not genuinely dispute that they have no evidence that the particular statements for which they seek to hold Mr. D'Amelio liable caused any of their alleged losses. Nor can they. Plaintiffs' damages and loss causation expert, Dr. Steven Feinstein, lumped together in his report the statements during the Class Period that in his view caused Plaintiffs' purported losses and then admitted during his deposition that he did not and could not determine whether any particular statement caused any losses to Plaintiffs. (D'Amelio Br. at 36-37.) Moreover, Dr. Feinstein's analysis appears to foreclose a claim that Mr. D'Amelio caused any alleged losses, as Dr. Feinstein asserts that the entire purported "inflation" in the stock price as a result of any claimed misstatement or omission occurred at the beginning of the Class Period in January 2006, twenty months before Mr. D'Amelio joined Pfizer. Since Plaintiffs have failed to establish loss causation with respect to Mr. D'Amelio's statements, their claims against him should be dismissed.

Plaintiffs argue that they "are not required to apportion damages on a defendant-by-defendant basis" because (1) "Defendants . . . cite to no legal authority requiring such a calculation" and (2) under 15 U.S.C. §78u-4(f), "defendants are jointly and severally liable should a jury find they acted intentionally in making their misleading statements" and, "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." (Feinstein *Daubert* Opp. at 29-30.)[3] Plaintiffs are wrong on both points.

First, Mr. D'Amelio does in fact cite legal authority directly on point in requiring plaintiffs to disaggregate any supposed losses caused by his statements from any supposed losses caused by others' statements. (D'Amelio Br. at 36-37.) Plaintiffs do not address, much less distinguish, any of it. Specifically:

In *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007), the plaintiffs brought a class action under Section 10(b) against Warnaco Group, Inc. ("Warnaco") and Deloitte & Touche LLP ("Deloitte"). *Id.* at 150. There, as here, the plaintiffs grounded loss causation in a "materialization of risk" theory. *Id.* at 157-58. Although the Second Circuit held that the plaintiffs had sufficiently alleged that Deloitte made misstatements in Warnaco's 1999 and 2000 Forms 10-K, *id.* at 156-57, it affirmed the dismissal of the claims against Deloitte because the plaintiffs had not established that those misstatements caused their alleged losses:

> Plaintiffs have not alleged facts to show that Deloitte's misstatements, among others (made by Warnaco) that were much more consequential and numerous, were the proximate cause of plaintiffs' loss; nor have they alleged facts that would allow a factfinder to ascribe some rough proportion of the whole loss to Deloitte's misstatements. Accordingly, plaintiffs have not alleged loss causation.

[3] Plaintiffs do not address Mr. D'Amelio's argument in their Opposition and instead refer the Court to their Memorandum of Law in Opposition to Defendants' Motion to Exclude Plaintiffs' Expert Dr. Steven Feinstein ("Feinstein *Daubert* Opposition"). (Opp. at 113 n.333.)

Id. at 158 (citation omitted). Under this binding Second Circuit precedent, Plaintiffs have not established loss causation with respect to Mr. D'Amelio.

Similarly, in *WM High Yield Fund v. O'Hanlon*, No. 04-3423, 2013 WL 3230667 (E.D. Pa. June 27, 2013), the plaintiffs brought suit under Section 10(b) against the officers, directors, and business entities of Diagnostic Ventures, Inc. ("DVI"); Deloitte as DVI's former independent auditor; and former Deloitte partner Harold Neas. *Id.* at *1, 3. There, as here, the plaintiffs grounded loss causation in a "materialization of risk" theory. *Id.* at *2. Deloitte and Mr. Neas moved for summary judgment, arguing (*inter alia*) "that Plaintiffs have not ascribed any proportion of the overall claimed damages to a misrepresentation or omission by either Deloitte or Neas." *Id.* at *1. The court granted the motion for summary judgment, concluding:

> 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. Such a broad brush accusation of securities fraud is not enough. Proof must be made as to each defendant.
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> . . .
>
> It must be shown that the decline in market price was due to the defendant's fraud. But this has not been done here. On this record, it cannot be shown what portion of the [securities]' price decline might be related or unrelated to the fraud allegedly committed by numerous Defendants other than Deloitte or Neas. Similarly, it cannot be shown what portion might be related or unrelated to the specific fraud allegedly committed by Deloitte or Neas.

Id. at *11-12. This Court should reach the same conclusion with respect to the claims against Mr. D'Amelio.

Second, 15 U.S.C. §78u-4(f) does not relieve Plaintiffs of their burden to establish loss causation as to each defendant. Indeed, the very first provision of 15 U.S.C. §78u-4(f) expressly defines and limits its "applicability": "Nothing 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." 15 U.S.C. §78u-4(f)(1). Accordingly, Plaintiffs may not use 15 U.S.C. §78u-4(f) to avoid the requirement of establishing loss causation as to each Defendant.

Laperriere v. Vesta Ins. Grp., Inc., 526 F.3d 715 (11th Cir. 2008), is directly on point. There, the Eleventh Circuit considered whether 15 U.S.C. §78u-4(f) altered the standard of liability under the Exchange Act. The court held: (1) "nothing in [15 U.S.C. §78u-4(f)] displaces in any way the standard of liability created by the Securities Exchange Act"; (2) "[i]f the clear and plain language were not enough, and it is, the legislative history of the PSLRA leads to the same conclusion"; and (3) "[a]ll of this means that the PSLRA, including the proportionate liability provisions, does not change the rules for determining who is liable for violating the securities laws." *Id.* at 726, 727 (citations and internal quotation marks omitted).

In short, since Plaintiffs do not and cannot dispute that they have failed to identify any losses caused by Mr. D'Amelio's statements – which remains their burden under the Exchange Act – their claims against him should be dismissed.[4]

III. THIS COURT SHOULD GRANT SUMMARY JUDGMENT FOR MR. D'AMELIO BECAUSE PLAINTIFFS HAVE FAILED TO OFFER A GENUINE ISSUE OF MATERIAL FACT THAT HE MADE ANY ACTIONABLE MISREPRESENTATIONS.

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

Plaintiffs assert that Mr. D'Amelio is liable for (1) an oral statement made by Mr. Read at Pfizer's Investor Day on March 5, 2008, and (2) statements made by Pfizer (or other Defendants) in press releases dated October 18, 2007, January 22, 2008, April 17, 2008, July 23, 2008, and October 21, 2008. (Opp. at 60-63, 67-69 & FMS.) According to Plaintiffs, Mr. D'Amelio had

[4] In addition, Plaintiffs have also failed to establish loss causation as to any of the statements at issue for the reasons set forth in Pfizer's brief and reply. (Pfizer Br. at 52-61; Pfizer Reply at 26-31.) Further, Mr. Feinstein's opinions are inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), as set forth in Defendants' opening and reply briefs in support of their Motion to Exclude Plaintiffs' Expert Steven Feinstein, which Mr. D'Amelio incorporates by reference. For these reasons as well, Plaintiffs cannot show that Mr. D'Amelio's statements caused any of their purported losses.

"ultimate authority" over each of those statements and, "[t]herefore, the statements satisfy the test set forth in *Janus*." (*Id.* at 54.)

In *Janus Capital Grp. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), the Supreme Court held: "For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 2302. Even "significant involve[ment]" in preparing a statement is insufficient for liability. *Id.* at 2305; *accord, e.g., In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012). Since Plaintiffs have not raised a genuine issue of material fact that Mr. D'Amelio had ultimate authority over these statements made by other Defendants, he is not liable for them.

1. Mr. D'Amelio Is Not Liable For The Statement Made By Mr. Read At Pfizer's Investor Day On March 5, 2008.

Plaintiffs seek to hold Mr. D'Amelio liable for Mr. Read's statements about Lyrica's sales growth at Pfizer's Investor Day because Mr. D'Amelio purportedly "approved, reaffirmed and adopted those false and misleading statements during the conference." (Opp. at 67 & FMS No. 33.) Plaintiffs are wrong.

As a matter of law, Mr. D'Amelio is not liable for Mr. Read's oral statement. Courts in this District have repeatedly refused to hold individual defendants liable for oral statements made by others. (D'Amelio Br. at 15.) To avoid this result, Plaintiffs claim that "[Mr.] D'Amelio echoed Read's oral statements" concerning "Lyrica and its growth." (Opp. at 68.) That is plainly false as a comparison of Mr. Read's and Mr. D'Amelio's statements makes clear:

Mr. Read's Statement	**Mr. D'Amelio's Statement**
Lyrica has demonstrated rapid and sustained uptake. 2007 U.S. sales were up 46% with international sales growing 78% to $781 million. On this	If you look at revenues, year-over-year, they were essentially flat. A lot going on in those revenue numbers. We had Norvasc was down $1.9 billion year-

slide, you can see how the product positively responded to the launch of the fibromyalgia indication in the third quarter of last year in the U.S. (Opp. FMS No. 33.)	over-year, Zoloft was down $1.6 billion, so $3.5 billion down on a year-over-year basis due to LOE impacts. ***We were able to offset that with a combination of new product revenues***, Chantix, ***Lyrica*** and Sutent, ***which were up $1.8 billion year-over-year***. (Opp. at 68-69 (emphasis in original).)

On its face, Mr. D'Amelio's statement does not describe "Lyrica and its growth." The ***only*** mention of Lyrica at all is the comment that the combination of Chantix, Lyrica and Sutent were up $1.8 billion year-over-year, which says nothing about Lyrica's specific growth. Tellingly, Plaintiffs do not assert that Mr. D'Amelio's own statement at Pfizer's Investor Day was false or misleading. That Mr. D'Amelio's true statement "approved," "reaffirmed," or "adopted" Mr. Read's allegedly false and misleading statement makes no sense as a matter of logic or law.

2. Mr. D'Amelio Is Not Liable For Statements Made By Pfizer (Or Other Defendants) In Press Releases.

Plaintiffs seek to hold Mr. D'Amelio liable for statements made by Pfizer (or other defendants) in press releases dated October 18, 2007, January 22, 2008, April 17, 2008, July 23, 2008, and October 21, 2008, concerning Pfizer's increasing sales revenue from Lyrica and/or Pfizer's financial results (*e.g.*, net income and diluted earnings per share). (Opp. at 60-63 & FMS Nos. 26, 30, 35, 38, 42.) Plaintiffs argue that "[t]he Individual Defendants [including Mr. D'Amelio] are also responsible for the press releases issued by Pfizer during their tenures with the Company" because "[t]he evidence established that the Individual Defendants reviewed Pfizer press releases as a matter of general practice and, thereby, had authority over the contents of these press releases." (*Id.* at 60-61.) Plaintiffs are wrong again.

As a matter of law, it is not enough that Mr. D'Amelio "reviewed" the earnings releases. *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252 (S.D.N.Y. 2013) – on which Plaintiffs rely exclusively – underscores the point. Plaintiffs rip from context the court's language in that case:

> The record contains evidence that the Individual Defendants had 'ultimate authority' over the alleged misstatements released by Pfizer as a corporation. In particular, Plaintiffs point to testimony from Andrew McCormick, Pfizer's vice president of media relations during the Class Period, stating that top management, including the Individual Defendants, reviewed all Pfizer press releases as to COX-2 drugs. . . . Thus, there is record evidence from which a jury could conclude that the Individual Defendants made statements issued by Pfizer, and Defendants are not entitled to judgment dismissing the claims against them that are based on such statements.

(Opp. at 61 (quoting *Pfizer*, 936 F. Supp. 2d at 269) (alteration in original).) What Plaintiffs omit – and ***replace with an ellipsis*** – is the fact that "McCormick's testimony is broadly corroborated by testimony from the Individual Defendants that they had authority over the issuance of any press releases." *Pfizer*, 936 F. Supp. 2d at 269. That is precisely the evidence that Plaintiffs do not have with respect to Mr. D'Amelio and, therefore, he is not liable for any statements in Pfizer's press releases.

B. Plaintiffs Have Failed To Establish That Any Of The Statements For Which They Seek To Hold Mr. D'Amelio Liable Are Actionable.

Plaintiffs' arguments are all variations on the theme that the statements for which they seek to hold Mr. D'Amelio liable were false and misleading because those statements did not disclose the impact of the alleged off-label marketing and related Government Investigations:

- ***Pfizer's Compliance:*** "Given the abundant evidence of off-label promotion about which defendants were aware – an awareness they knew the government shared – a reasonable jury could plainly find that defendants did not honestly or reasonably believe their statements about Pfizer's steadfast compliance with healthcare laws and that it represented 'one of our most important advantages.'" (Opp. at 48.)

- ***Pfizer's Legal Disclosures Concerning The Government Investigations:*** "Viewing defendants' statements in context, a reasonable jury could find that investors were materially misled as they failed to accurately inform investors as to

> the government investigations into the off-label promotion of Bextra, Lyrica, Geodon and Zyvox." (Opp. at 36 (internal quotation marks omitted).)

- ***Pfizer's Judgment Not To Take A Reserve:*** "Despite having recognized the likelihood that Pfizer would be forced to reach some sort of settlement of the Bextra Investigation and having the tools necessary to calculate the fine, defendants failed to take a reserve for this likely loss and thus caused Pfizer to file false and misleading earnings releases and quarterly and yearly SEC filings throughout the Class Period." (Opp. at 38.)

- ***Pfizer's Sales Revenue From Lyrica:*** "A reasonable jury could find the defendants' explanation for Lyrica's sales were materially misleading given the fact that a substantial portion of Pfizer's reported revenue stemmed from illegal off-label promotion outside of Lyrica's approved label." (Opp. at 51.)

As the Second Circuit has made clear, none of the statements for which Plaintiffs assert claims against Mr. D'Amelio is actionable as a matter of law.

The Second Circuit's recent decision in *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*, 752 F.3d 173 (2d Cir. 2014), is both directly on point and dispositive. There, the plaintiffs alleged (*inter alia*) that the defendant's SEC filings "were materially incomplete inasmuch as they disclosed the DOJ investigation but concealed that the [allegedly illegal] cross-border activities under investigation were ongoing, and concealed the magnitude of [the defendant]'s exposure to liability and reputational damage." *Id.* at 182. The Second Circuit rejected the plaintiffs' argument "that, in addition to disclosing the existence of an investigation, defendants were required to disclose that [the company] was, in fact, engaged in an ongoing [allegedly illegal] tax evasion scheme." *Id.* at 184. Since the Second Circuit held that such allegations could not survive the defendants' motion to dismiss, *id.* at 182 n.37, *a fortiori*, they cannot survive Mr. D'Amelio's motion for summary judgment. In the Second Circuit's words:

> As we have explained, disclosure is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing. By disclosing its involvement in multiple legal proceedings and government investigations and indicating that its involvement could expose [the company] to substantial

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

Id. (alterations and internal quotation marks omitted).

For the same reasons, this Court should reject Plaintiffs' arguments as to Mr. D'Amelio. Mr. D'Amelio did not have a duty to disclose Pfizer's uncharged, unadjudicated off-label marketing as part of any statements for which Plaintiffs seek to hold him liable. It is undisputed and indisputable that Pfizer disclosed its involvement in multiple legal proceedings and government investigations related to Bextra and other drugs, including claims concerning "marketing and safety" by a group of attorneys general from 35 states and the District of Columbia and investigations by the Department of Justice into "the marketing and safety of our COX2 medicines, particularly Bextra," and "the marketing of certain other drugs."[5] It is also undisputed and indisputable that Pfizer disclosed that its involvement could expose the Company to substantial criminal and civil penalties: "The Department of Justice investigation could result in the payment of a substantial fine and/or civil penalty."[6] Therefore, the statements at issue all complied with disclosure obligations under Second Circuit law.[7]

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[5] *See* Declaration of Joseph G. Petrosinelli in Support of Pfizer's Motion for Summary Judgment ("Petrosinelli") Ex. I-1 (Pfizer's Q3 2008 Form 10-Q (Nov. 7, 2008) at 52); *see also* Petrosinelli Ex. H-1 (Pfizer's Q2 2008 Form 10-Q (Aug. 8, 2008) at 48.)

[6] *See* Petrosinelli Ex. I-1 (Pfizer's Q3 2008 Form 10-Q (Nov. 7, 2008) at 52); *see also* Petrosinelli Ex. H-1 (Pfizer's Q2 2008 Form 10-Q (Aug. 8, 2008) at 48.)

[7] In addition, Plaintiffs may not recover on statements about Pfizer's sales revenue from Lyrica because, as Plaintiffs do not and cannot dispute, the Company's disclosures on January 26, 2009, do not even mention Lyrica. (D'Amelio Br. at 21.) Plaintiffs argue that Defendants were "fully aware . . . that the $2.3 billion settlement resolved the DOJ's investigations into . . . the off-label marketing of Lyrica, Geodon and Zyvox." (Opp. at 112.) That is a *non sequitur*; it says nothing about the content of Pfizer's disclosures. Plaintiffs also argue that this "is a materialization-of-risk action" and "the risk of Pfizer being forced to pay a record fine for its rampant unlawful activity was clearly within the zone of risk concealed." (*Id.* at 112-13.) That, too, is no answer. Any risk related to the resolution of the government investigation into Pfizer's sales and marketing of Lyrica did not "materialize" until Lyrica was identified as part of the Government Investigations and settlement. That did not occur on January 26, 2009, but more than six months later in September 2009 (at which time there was no significant drop in Pfizer's stock price). (D'Amelio Br. at 21.)

Moreover, none of the statements for which Plaintiffs assert claims against Mr. D'Amelio are actionable for the following separate and independent reasons.

First, the statements at issue concerning Pfizer's compliance are inactionable puffery. For example, in *UBS*, the plaintiffs alleged (*inter alia*) that the defendant's SEC filings "were materially false inasmuch as they stated that [the company] held its employees to the highest ethical standards and complied with all applicable laws . . . when, in fact, [the company] was engaged in [an allegedly illegal] cross-border tax scheme." 752 F.3d at 182. The Second Circuit rejected the plaintiffs' argument "that [the company]'s involvement in the Tax Fraud rendered [the company]'s statements in the offering materials about compliance, reputation, and integrity materially misleading." *Id.* at 183. Instead, the Second Circuit held: "It is well-established 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.'" *Id.*

Plaintiffs try to avoid this result by arguing that the statements for which it seeks to hold Mr. D'Amelio (among others) liable were knowingly false and, therefore, material: "Pfizer and its executives knew, even before the Class Period, that the risks of non-compliance with marketing laws were 'Reputation,' 'Stock price,' 'Exclusion,' 'Fines,' and 'Civil Judgments.'" (Opp. at 44.) Even if Plaintiffs were right (and they are not), ***it does not matter***. As the Second Circuit concluded: "Plaintiffs' claim that these statements were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment." *Id.*[8]

[8] Remarkably, Plaintiffs' only mention of *UBS* in the litany of cases that they cite is a half-hearted attempt to distinguish it in passing on the ground that it involved statements that were "explicitly aspirational" while this case involves statements "of existing fact." (Opp. at 46.) The Second Circuit did not, however, base its decision on whether the statements were "explicitly aspirational." *UBS*, 752 F.3d at 183. Rather, the Second

Second, Pfizer's judgment concerning the Government Investigations (such as whether the Company had substantial defenses) and its judgment not to take a reserve are inactionable. For example, in *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011), the plaintiffs alleged that "[the company's] loan loss reserves from the first quarter of 2007 through the first three quarters of 2008" – as disclosed in its SEC filings – "were materially inadequate and did not reflect the high risk of loss." *Id.* at 113. The Second Circuit recognized that "determining the adequacy of loan loss reserves is not a matter of objective fact" but rather "inherently subjective" and that "estimates will vary depending on a variety of predictable and unpredictable circumstances." *Id.* As a result, "the plaintiff must allege that defendant's opinions were both false and not honestly believed when they were made." *Id.*

Plaintiffs have no evidence that Pfizer or its employees, including Mr. D'Amelio, failed to believe honestly either that the disclosure judgment by Pfizer and its counsel about legal disclosures concerning the Government Investigations was correct or that the accounting judgment by Pfizer and KPMG not to take a reserve was correct. Plaintiffs try to escape *Fait* by claiming that they "have demonstrated, unlike in *Fait*, that an objective standard exists to demonstrate the falsity of Pfizer's litigation reserves" (Opp. at 36-37); but they have done no such thing. (Pfizer Reply at 25-26.)

Third, the statements at issue concerning Pfizer's sales revenue from Lyrica are inactionable because Plaintiffs have put forth no evidence that any of Mr. D'Amelio's statements concerning Pfizer's sales revenue from Lyrica were inaccurate in any way. It is undisputed that Pfizer received the reported sales revenue from Lyrica. As a matter of law, even if those revenue figures included revenues from unlawful off-label marketing as Plaintiffs allege, that does not

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Circuit held that "general statements about reputation, integrity, and compliance" are inactionable puffery because "they are too general to cause a reasonable investor to rely upon them" – period – and then simply observed that its holding is "particularly true" for "explicitly aspirational" statements. *Id.*

make them actionable misrepresentations: "Absent an allegation that [defendant] reported income that it did not actually receive, the allegation that a corporation properly reported income that is alleged to have been, in part, improperly obtained is insufficient to impose Section 10(b) liability." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006). (*See also* Pfizer Reply at 21-23.) Plaintiffs do not even attempt to distinguish *Marsh*, instead citing it favorably on another point. (*See* Opp. at 30, 43.)

For these reasons as well, the statements for which Plaintiffs seek to hold Mr. D'Amelio liable are inactionable as a matter of law.[9]

IV. THIS COURT SHOULD GRANT SUMMARY JUDGMENT FOR MR. D'AMELIO BECAUSE PLAINTIFFS HAVE FAILED TO OFFER A GENUINE ISSUE OF MATERIAL FACT THAT HE ACTED WITH SCIENTER.

None of the arguments offered by Plaintiffs provide a genuine issue of material fact to support findings that Mr. D'Amelio acted with scienter with respect to (1) Pfizer's statements on compliance, (2) Pfizer's disclosures concerning the Government Investigations, (3) Pfizer's judgment about whether the Government Investigations required a reserve, or (4) statements about Pfizer's sales revenue from Lyrica.

As an initial matter, Plaintiffs do not and cannot dispute that Mr. D'Amelio had no motive or opportunity to commit fraud. (Opp. at 70 n.246.) Although he could have sold more than $1.5 million worth of Pfizer stock grants that vested in late 2008, he did not sell a single share. (D'Amelio Br. at 22.) That fact substantially undermines any inference of scienter. (*Id.* at 22 & n.92.) Moreover, since "[P]laintiff[s] ha[ve] failed to demonstrate that defendants had a motive to defraud . . . [they] must produce a ***stronger*** inference of recklessness." *Kalnit v.*

[9] Further, none of these statements are actionable for the many additional reasons set forth in Pfizer's opening and reply briefs and Mr. D'Amelio's opening brief. (*See* Pfizer Br. at 38-52; D'Amelio Br. at 14-21; Pfizer Reply at 23-26.)

Eichler, 264 F.3d 131, 143 (2d Cir. 2001) (emphasis added). Plaintiffs cannot do so because, fundamentally, Mr. D'Amelio's reliance on in-house and outside counsel, independent accountants and auditors, and Pfizer's robust processes rebuts any inference of scienter. Plaintiffs denigrate that reliance as "finger-pointing" (Opp. at 79); in fact, it is evidence of good faith that precludes any inference that Mr. D'Amelio acted intentionally or recklessly.[10]

To avoid this straightforward conclusion, Plaintiffs offer a series of technical arguments: whether Defendants' "reliance defenses" are a complete defense, whether Defendants have established all of the elements of those defenses, whether Defendants have waived any of those defenses, and whether any of those defenses are improper. (Opp. at 72-97.) Those arguments – which take up 25 pages of Plaintiffs' scienter section – are wrong on the facts and the law (*see* Pfizer Reply at 11-12); but this Court need not even consider them. Mr. D'Amelio's reliance on counsel, KPMG, and Pfizer's robust processes "need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter." *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004). (*See also* Pfizer Reply at 12.) That reliance is, to coin a phrase from the D.C. Circuit, a powerful "green" flag that negates Mr. D'Amelio's scienter. *Id.*

[10] Plaintiffs argue in passing that "[D]efendants waive any claim that plaintiffs' allegations of actual knowledge or recklessness are insufficient" because "Defendants do not challenge their scienter" but "only assert their scienter is excused." (Opp. at 70.) Plaintiffs are apparently confused. Mr. D'Amelio directly challenged Plaintiffs' allegations of actual knowledge or recklessness in his opening brief: "Plaintiffs also put forth no evidence that Mr. D'Amelio acted intentionally or recklessly. Rather, the undisputed evidence shows that Mr. D'Amelio acted only after the Company's elaborate review and disclosure process had vetted and approved the statements at issue. Those statements were vetted in advance through (*inter alia*): Disclosure Committee meetings, Certification Meetings, Audit Committee meetings, and Quarterly Review meetings with KPMG. After vetting, those statements were approved by (*inter alia*): outside disclosure counsel Dennis Block of Cadwalader, Wickersham & Taft; inside disclosure counsel Larry Fox; independent accountant and auditor KPMG; and/or Pfizer subject matter experts. Mr. D'Amelio was entitled to – and did – rely on these processes and experts in good faith, and Plaintiffs have developed literally no evidence to the contrary. These unrebutted facts negate any inference of scienter." (D'Amelio Br. at 2.)

The uncontroverted evidence in this case is full of "green" flags, all of which make clear that Plaintiffs have failed to establish that Mr. D'Amelio acted with scienter. Specifically:

- ***Plaintiffs have no evidence that Mr. D'Amelio acted with scienter with respect to Pfizer's statements on compliance.*** The Opposition merely confirms that Mr. D'Amelio relied on Pfizer's rigorous processes and KPMG's independent review when he signed Pfizer's SEC filings (including his SOX certifications); no one raised any concern about Pfizer's disclosures of compliance during Mr. D'Amelio's tenure as CFO; and nothing in the record suggests that Mr. D'Amelio believed that Pfizer's statements were false or misleading in any way. (*See* D'Amelio Br. at 23-25.)

- ***Plaintiffs have no evidence that Mr. D'Amelio acted with scienter with respect to Pfizer's disclosures concerning the Government Investigations.*** The Opposition simply confirms that Mr. D'Amelio relied in good faith on the advice of in-house and outside disclosure counsel and Pfizer's elaborate processes with respect to the Company's disclosures concerning the Government Investigations and related risk of liability; the record contains nothing to suggest that Mr. D'Amelio believed that Pfizer's statements were false or misleading; and no one (including disclosure counsel) disagreed with the Company's disclosures of the Government Investigations and related risk of liability, much less voiced any disagreement to Mr. D'Amelio. (*See id.* at 25-28.)

- ***Plaintiffs have no evidence that Mr. D'Amelio acted with scienter with respect to Pfizer's judgment as to whether the Government Investigations required a reserve.*** The Opposition merely confirms that Mr. D'Amelio relied in good faith on the advice of KPMG and Pfizer's robust processes in accepting the Company's judgment that FAS 5 did not require a reserve for the Government Investigations; there is no indication in the record that any participant in Pfizer's FAS 5 determination (including KPMG) ever told Mr. D'Amelio that a reserve should have been taken earlier than January 2009; and the record establishes the careful attention to, and unanimous agreement about, whether and when Pfizer was required to take a reserve. (*See id.* at 28-31.)[11]

- ***Plaintiffs have no evidence that Mr. D'Amelio acted with scienter with respect to statements about Pfizer's sales revenue from Lyrica.*** The Opposition confirms that Mr. D'Amelio relied in good faith on the advice of KPMG and Pfizer's extensive process (which also included disclosure counsel and others in

[11] As ostensible support for their claims that Mr. D'Amelio acted with scienter, Plaintiffs observe in passing: "Less than two weeks later, on October 20, 2007, and shortly after taking the reins as Pfizer's CFO, D'Amelio sent Pfizer's controller a handwritten letter confirming the Bextra case 'has the potential to be a very big charge (as you know).'" (Opp. at 100.) Yet Mr. D'Amelio's handwritten note only reaffirms that he was acting in good faith, demonstrating that (1) he began paying careful attention to the question of whether Pfizer would be required to take a reserve as soon as he joined the Company and (2) he believed that FAS 5 did not require a reserve at that time.

> Legal, the Controller's office, and Finance) to vet the statements in the earnings releases fully; there is no evidence that Mr. D'Amelio believed that the statements were inaccurate when made; and the record contains no suggestion that anyone involved with Pfizer's earnings releases thought that the statements about the Company's sales revenue from Lyrica were incorrect in any way, much less shared those thoughts with Mr. D'Amelio. (*See id.* at 34-35.)[12]

In the face of so many "green" flags showing Mr. D'Amelio's good faith reliance on in-house and outside counsel, independent accountants and auditors, and Pfizer's robust processes, Plaintiffs offer no countervailing "red flags" that raise any genuine issue of material fact relating to Mr. D'Amelio's scienter. As a result, Plaintiffs cannot establish that Mr. D'Amelio acted recklessly, much less intentionally, with respect to any of the statements for which they seek to hold him liable. Therefore, this Court should dismiss all of Plaintiffs' claims against him.

V. THIS COURT SHOULD GRANT SUMMARY JUDGMENT FOR MR. D'AMELIO BECAUSE PLAINTIFFS HAVE FAILED TO OFFER A GENUINE ISSUE OF MATERIAL FACT THAT HE ACTED AS A CONTROL PERSON.

Plaintiffs have failed to establish that Mr. D'Amelio acted as a control person because (1) they have not demonstrated a primary violation, (2) they have not demonstrated Mr. D'Amelio's culpable participation in the primary violation, and (3) in any event, all of the evidence shows that Mr. D'Amelio acted in good faith.

First, Plaintiffs concede that, if they have not established a primary violation, they have not established control person liability. (Opp. at 113-14.) Plaintiffs have no evidence that someone controlled by Mr. D'Amelio committed a Section 10(b) violation for all of the reasons

[12] Plaintiffs nowhere argue in their Opposition that Defendants (including Mr. D'Amelio) acted with scienter with respect to statements concerning Pfizer's sales revenue from Lyrica. (*See* Opp. at 69-101.) The closest that Plaintiffs come to making such an argument with respect to Mr. D'Amelio is the statement in their response to Mr. D'Amelio's Rule 56.1 statement that, "[a]fter becoming Pfizer's CFO in September 2007, D'Amelio was a member of Pfizer's ELT [*i.e.*, Executive Leadership Team] and regularly attended ELT meetings." Plaintiffs' Local Rule 56.1 Response to Defendant Frank D'Amelio's Statement of Undisputed Material Facts ¶ 67. Of course, that does nothing to raise a genuine issue of material fact in light of the undisputed facts that (1) Mr. D'Amelio relied in good faith on the advice of KPMG and Pfizer's extensive process, (2) Mr. D'Amelio believed that the statements were accurate when made; and (3) no one involved with Pfizer's earnings releases thought that the statements about the Company's sales revenue from Lyrica were incorrect in any way.

set forth above, in Mr. D'Amelio's opening brief, and in Pfizer's and the other individual defendants' opening and reply briefs. Thus, Plaintiffs cannot establish control person liability.

Second, Plaintiffs have no evidence of Mr. D'Amelio's culpable participation in the alleged fraud. Plaintiffs begin by arguing that culpable participation is not an element of a control person liability claim under Section 20(a). (Opp. at 117-18.) Yet Second Circuit cases have repeatedly identified culpable participation as an element. *See, e.g., Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014). Plaintiffs then concede that, if culpable participation is an element of control person liability, its requirements are the same as the requirements for scienter. (Opp. at 118-19.) Plaintiffs proceed to rehash arguments concerning Defendants' alleged false and misleading statements and scienter. (*Id.*) For the same reasons that Plaintiffs have failed to establish scienter with respect to the statements for which they seek to hold Mr. D'Amelio liable, they have failed to establish culpable participation with respect to any other statements at issue. (*See* Pfizer Reply at 18-20; D'Amelio Br. at 38.)

Third, all of the record evidence demonstrates that Mr. D'Amelio acted in good faith. Plaintiffs assert in a single sentence that they have identified evidence from which a jury could find that "Defendants" did not act in good faith. (Opp. at 119.) But Plaintiffs do not genuinely dispute that Mr. D'Amelio participated with in-house and outside counsel, independent accountants and auditors, and other Pfizer executives and subject matter experts in a series of rigorous, comprehensive processes that maintained and enforced a reasonable and proper system of supervision and internal control over all of the statements at issue. (D'Amelio Br. at 39.) That is the definition of good faith.

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

CONCLUSION

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

Dated: December 8, 2014

Respectfully submitted,

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