UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, -vs- PFIZER INC, et al., Defendants.	Civil Action No. 10-cv-03864 Honorable Alvin K. Hellerstein **ECF Case** **Electronically Filed**

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ALLEN WAXMAN'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs' opposition to Mr. Waxman's motion for summary judgment—despite its length and 565 exhibits—fails to identify any genuine factual dispute necessitating trial. Mr. Waxman should therefore be granted summary judgment.[1]

First, with the exception of Mr. Waxman's statement in the April 2, 2007 press release regarding the resolution of the Genotropin investigation, there is no factual dispute that Mr. Waxman was *not* the maker of any allegedly false or misleading statements because none were attributed to him and he did not have ultimate authority over any of them.

Second, plaintiffs' argument that Mr. Waxman should be held liable for the April 2, 2007 Genotropin press release because he attempted to conceal an undisclosed risk that later materialized is unsupported by the facts in the record and is contradicted by controlling Second Circuit law.

Third, the case against Mr. Waxman should be dismissed because plaintiffs cannot point to any evidence of scienter, but instead resort to recasting Mr. Waxman's scienter argument as limited to reliance on counsel, and improperly attempt to rely on speculation rather than actual evidence of wrongful intent.

Fourth, plaintiffs have failed to satisfy their burden to disaggregate losses allegedly caused by Mr. Waxman's statements from those of the other defendants or those made before and after his time as general counsel, and their "risk materialization" theory of loss causation is untenable.

[1] Plaintiffs' opposition concedes both that Mr. Waxman cannot be liable for any misstatement or omission before he became general counsel or after he left the company, *see* Plaintiffs' Statement of Disputed Facts at Attachment 1, and that Mr. Waxman was not responsible for Pfizer's FAS 5 judgments, abandoning their unsustainable claim that he could have Rule 10b-5 liability in connection with the company's FAS 5 process. *See Palmieri v. Lynch*, 392 F.3d 73, 87 (2d Cir. 2004) (arguments waived when not addressed in opposition to summary judgment).

Finally, in addition to failing to prove that any of the underlying statements are actionable, plaintiffs have failed to offer any evidence that Mr. Waxman controlled the makers of those statements or that he culpably participated in them.[2]

II. ARGUMENT

A. Mr. Waxman was not the maker of any material misstatements or omissions in any SEC disclosures or earnings press releases.

None of the allegedly false or misleading statements in Pfizer's SEC disclosures or earnings releases were attributed to Mr. Waxman, and he did not have ultimate authority over them. Thus, Mr. Waxman cannot be liable as a "maker" of the challenged statements. *Janus Capital Grp. v. First Derivative Traders*, 131 S. Ct. 2295, 2302-05 (2011); *see also* Waxman Brief at 17-20.

Plaintiffs concede that under *Janus*, an individual who did not sign any of the company statements at issue can be found liable as a maker only if the statements were "attributed to him" or he had "ultimate authority" over them. *See* Plaintiffs' Opposition at 54 (citing *Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 473 (S.D.N.Y. 2012)).[3] Conceding that none of those statements were attributed to Mr. Waxman, *see* Plaintiffs' Opposition at 55,[4] plaintiffs argue that he had "ultimate authority" over the statements based on his membership on various Pfizer

[2] As stated in Mr. Waxman's Memorandum in Support of his Motion for Summary Judgment ("Waxman Brief"), at fn. 1, Mr. Waxman joins the summary judgment motions of his co-defendants, and incorporates by reference their reply memoranda. Because, as demonstrated in Mr. Waxman's Brief and herein, plaintiffs' opposition fails to identify any genuine dispute of material fact, Mr. Waxman will not separately address plaintiffs' Local Rule 56.1 Response to his Statement of Undisputed Facts.

[3] Because the issues of ultimate authority and statement attribution do not depend on a distinction between insider and third-party status, it is unnecessary to address plaintiffs' attempt to restrict *Janus*'s application to the third party/mutual fund context. *See* Plaintiffs' Opposition at 53. In fact, the remainder of plaintiffs' *Janus* analysis—which as shown above is wrong for other reasons—as much as concedes its applicability to the intra-corporate setting. *See id*. at 54 *et seq*.

[4] Mr. Waxman's opening brief established that none of the SEC disclosures were attributed to Mr. Waxman. *See* Waxman Brief at 17-18. In their opposition, plaintiffs have now identified six earnings press releases (in addition to the April 2, 2007 Genotropin release) for which they allege Mr. Waxman was responsible. *See* Attachment 1 to Plaintiffs' Statement of Disputed Facts (Nos. 11, 15, 20, 23, 26 and 30). Yet, while all but one of those press releases quotes various Pfizer executives, not one mentions, refers to or quotes Mr. Waxman.

committees and his participation in disclosure meetings.[5] But merely participating on a committee and attending meetings does not alone establish "ultimate authority." And here plaintiffs point to nothing more.

As the Court in *Janus* explained, "ultimate authority" over a statement means having control over "its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker."[6] Mr. Waxman's membership on the Executive Leadership Committee ("ELT") upon his appointment as general counsel in August 2006, his membership on the Disclosure Committee, his review and comment on the earnings release drafts as a member of those committees, and his participation as general counsel in quarterly reviews, *see* Plaintiffs' Opposition at 62-63, do not change that fact.[7] Those

[5] Plaintiffs also mischaracterize Mr. Waxman's *Janus* argument. Mr. Waxman did not, as plaintiffs suggest, argue that an actionable statement can have only one maker, *see* Plaintiffs' Opposition at 58 ("[p]ut simply, *Janus* does not hold that there can be only one "maker" of a statement"), or that unless Mr. Waxman signed an SEC filing, was quoted in a press release, or personally uttered an oral statement, he could not be primarily liable for that statement. *See id*. at 53. Rather, Mr. Waxman explained that because he was not the "maker" of Pfizer's SEC disclosures—i.e., they were not attributed to him and he did not have ultimate authority over them—he was not liable for them under Rule 10b-5. *See* Waxman Brief at 17-20.

[6] *Janus*, 131 S. Ct. at 2302.

[7] A few courts have considered factors such as being on a company's leadership or disclosure committee, and being one of numerous corporate officers to sign sub-certifications, to allow plaintiffs to survive motions on the pleadings. *See* Plaintiffs' Opposition at 54-59 (citing, *inter alia*, *In re Fannie Mae,* 891 F. Supp 2d 458 (S.D.N.Y. 2012), *City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp*., 875 F. Supp 2d 359 (S.D.N.Y 2012), and *In re Satyam Computer Servs. Sec. Litig.*, 915 F. Supp. 2d 450 (S.D.N.Y. 2013)). But each of those cases involved motions to dismiss, where absent a developed factual record, the court could not determine that plaintiffs had failed to state a claim upon which relief could be granted. Most of the cases cited by plaintiffs had "barely sufficient allegation[s] that the [defendants] had ultimate authority . . . over the content of the fraudulent statements." *SEC v. Benger*, 931 F. Supp. 2d 908, 911 (N.D. Ill 2013) (noting, in denying the motion to dismiss, that "[t]he ultimate proof may not end up supporting the allegations, but proof is for another time. For now, the allegations suffice under *Janus*.") In fact, the group pleading doctrine was often invoked so that plaintiffs could rely on bare factual allegations and the presumption that group-published information like annual reports are the collective work of individuals with direct involvement in the company's day-to-day affairs. *See, e.g., City of Pontiac*, 875 F. Supp. 2d at 374-75; *In re Satyam*, 915 F. Supp. 2d at 477. The only case plaintiffs cite aside from *In re Pfizer Sec. Litig.* (discussed below) that was at the summary judgment stage is *SEC v. Daifotis*, 874 F. Supp. 2d 870, 881 (N.D.Cal 2012). But there, the written statements at issue were directly attributed to the defendant, and the oral statements at issue were ones he personally made on conference calls. On the basis of that very different factual record, the court allowed the case to go to a jury. Here, after extensive discovery, there is no evidence that Mr. Waxman had ultimate authority over the public disclosures attributed to and made by others.

activities, typical for a general counsel at a public company, do not constitute evidence of "ultimate authority" or control over the statements. Indeed, since *Janus*, not a single court has found a general counsel liable for providing information or drafting assistance for SEC filings ultimately signed by and attributed to the company's CEO and CFO. Waxman Brief at 20-21.

Furthermore, despite exhaustive discovery, not one of Pfizer's witnesses or documents suggests or identifies Mr. Waxman as having control or ultimate authority over the company's SEC disclosures or earnings releases. *See* Waxman Brief at 18-20.[8] In fact, the evidence shows just the opposite. With respect to the SEC disclosures, Pfizer's CEOs and CFOs have acknowledged that they, not Mr. Waxman, had ultimate authority over them. *See id.* at 19 and n. 86.[9]

Plaintiffs' attempt to tag Mr. Waxman with ultimate authority for the earnings releases based on *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252, 269 (S.D.N.Y. 2013) is off-target. First, plaintiffs themselves assert in this case that Pfizer's CEO and CFO had ultimate authority over those press releases. *See* Plaintiffs' Opposition at 61. Moreover, the record in the prior Pfizer case involved a different leadership team at Pfizer and contained clear evidence that the individual defendants not only reviewed each of the relevant press releases, but also expressly acknowledged in their depositions that they had "authority over the issuance of any press releases." *In re Pfizer Sec. Litig*, 936 F. Supp. 2d at 269. As a result, Judge Swain found sufficient evidence from which a jury could conclude that those defendants "made" the statements in the press releases issued by Pfizer. *See id.* at 269.

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[8] Mr. Waxman's role in helping to prepare the SEC disclosures does not alter this conclusion. "Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes the credit—or blame—for what ultimately is said." *Janus*, 131 S. Ct. at 2302.

[9] As defined by the *Oxford English Dictionary*, "ultimate" means "coming at the end of a process, course of action," and such ultimate authority in this case was exercised by the Pfizer CEOs and CFOs who signed the SEC disclosures at the end of the vetting process. *See* Waxman Brief at 18-19.

The record in this case is materially different because there is no evidence from which to conclude that Mr. Waxman "made" the statements in Pfizer's earnings releases. None of those earnings releases quote, refer to, or attribute anything to Mr. Waxman, and, in contrast to *In re Pfizer Sec. Litig.*, there is no evidence that Mr. Waxman had ultimate control over the content of the earnings releases.

B. Mr. Waxman did not make any material misstatements or omissions in the Genotropin press release.

Because the evidence is undisputed that Mr. Waxman did not "make" any of the SEC disclosures or earnings press release statements, plaintiffs' primary liability case against Mr. Waxman is reduced to the April 2, 2007 press release announcing the resolution of the DOJ's Genotropin investigation, a drug inherited by Pfizer through a prior acquisition. The press release quoted Mr. Waxman as saying that "Pfizer's marketing and promotion practices are not involved in the settlement. The company has internal controls to guard against these types of practices."[10]

Plaintiffs argue that when "viewed in context," Mr. Waxman's Genotropin statement misleadingly suggested that off-label promotion was not occurring and could not occur at Pfizer, and Pfizer would never have to pay a criminal fine similar to Pharmacia's. *See* Plaintiff's Opposition at 42-43. Yet it is plain that the press release provided no such assurances. Plaintiffs' tortured reading of the press release is driven by their "risk materialization" theory, because, according to their own theory, unless Mr. Waxman's statement attempted to conceal from investors a risk that Pfizer's alleged off-label promotion of Bextra, Lyrica, Geodon, and Zyvox would result in paying penalties or fines "of a substantial magnitude," it is not actionable.

[10] Compl. ¶ 67; Apr. 2, 2007 Pfizer Press Release (Galin Decl. Ex. Q-W).

See id. at 109-110. Plaintiffs' reading, however, is not supported by either Mr. Waxman's words or the "context" in which they were offered.

First, Mr. Waxman's statement was true. Plaintiffs do not contest that the conduct underlying the Genotropin settlement occurred at Pharmacia, not Pfizer.[11] And notwithstanding plaintiffs' protestations, the second part of the statement—that Pfizer had "internal controls to guard against these types of practices"—is indisputable. Pfizer had internal controls in place that were designed to guard against the off-label promotion and anti-kickback violations that were implicated in the Genotropin investigation. The record is replete with such unrefuted evidence.[12] Indeed, plaintiffs themselves concede that Pfizer had internal controls to guard against such activities, such as a corporate integrity agreement in effect during this time period that was designed to monitor and prevent off-label promotion.[13] *See* Plaintiffs' Opposition at 44. Moreover, plaintiffs' proffered disclosure expert, Edward Buthusiem, effectively conceded that even if employees were engaging in off-label activities, the statement would still be true because the existence of internal controls does not mean that employees will not violate them. *See* Waxman Brief at 28 ("No…It's not a guarantee").

Because they cannot deny that the statement on its face was true, and that it did not imply what they suggested it did, plaintiffs are forced to argue that, "in context," it nevertheless was misleading because it hid an undisclosed risk that ultimately materialized. *See id.* at 42-43, 109-

[11] *See* April 2, 2007 DOJ Press Release (Galin Decl. Ex. O-W) (praising Pfizer for acting responsibly when it timely self-disclosed the newly acquired Pharmacia's unlawful promotion of Genotropin).

[12] *See, e.g.*, Summary of Pfizer Policies on Business Conduct ["Blue Book"] (PFE DERIV 00013223-68) (Petrosinelli Decl. Ex. F-7); Pfizer, The Field Guide ["Orange Guide"] (LYR00044363-560) (Petrosinelli Decl. Ex. M-7); *see also* Fleischmann (Apr. 26, 2013) Dep. 254:4-256:21 (identifying the Blue Book and Orange Guide as "documents that dealt with Pfizer's compliance policies" and noting "each member of the Pfizer field force was expected to review [the Blue Book] and sign an affidavit attesting that they had reviewed and would comply with the policies and procedures laid out here on an annual basis").

[13] As pointed out in Mr. Waxman's opening brief, the Independent Review Organization charged with evaluating those controls under the corporate integrity agreement determined, at the time of Mr. Waxman's statement in the press release, that the controls were extensive and continuously improving. *See* Waxman Brief at 12 and n.61.

110. But even if Mr. Waxman could be charged with a duty to disclose such information in the press release about the Genotropin resolution—and he cannot (*see infra* at 7-9)—the "context" to which plaintiffs refer actually refutes plaintiffs' claim: the undeniable fact is that there was not an undisclosed risk at the time Mr. Waxman made his statement.

Under plaintiffs' theory, the undisclosed risk Mr. Waxman allegedly concealed was "the near certainty that Pfizer would have to pay over $1 billion in penalties due to its off-label-promotion" of Bextra, Geodon, Lyrica, and Zyvox. *See id.* at 42. But at the time Mr. Waxman made his statement, Pfizer had yet to receive subpoenas regarding Geodon, Lyrica, or Zyvox.[14] Thus there is no evidence that either Mr. Waxman or Pfizer was aware that any government investigations had begun with respect to those three products, let alone that there was a "near certainty" that these investigations would be resolved for over a billion dollars.

Moreover, with respect to the Bextra investigation, at the time of the April 2007 Genotropin press statement, the investigation was still almost two years from resolution, settlement discussions had not yet begun,[15] and Pfizer had already disclosed the then known risks associated with that investigation.[16] Those disclosures included express warnings that the ongoing government investigation could result in criminal charges and fines or civil penalties,[17]

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[14] *See* Petrosinelli Decl. Ex. J-5 (PFE-JONES 00033812 at 00033813) (July 12, 2007 subpoena duces tecum re: Lyrica); Petrosinelli Decl. Ex. W-6 (PFE-JONES 00041167 at 00041168) (December 12, 2007 subpoena duces tecum re: Detrol, Geodon, Zoloft and Zyvox).

[15] *See* Petrosinelli Decl. Ex. X-2 (Pfizer's Dec. 3, 2013 Supplement and Verification to Pfizer's Suppl. Int. Resp. at 5, 51-52); Petrosinelli Decl. Ex. E-4 (KPMG-PFIZ-DS 030177 at 030178) (Jan. 23, 2009 email from L. Cangialosi to L. Bradley) (discussing settlement agreement in principle); Petrosinelli Decl. Ex. E-2 (Lankler (Jan. 22, 2014) Dep. 192:17-193:25).

[16] Petrosinelli Decl. Ex. A-1 (Pfizer 2003 Annual Report (Form 10-K), 2003 Financial Report at 50 (Mar. 10, 2004)) ("The Company recently was notified that the U.S. Department of Justice is conducting investigations relating to the marketing and sale of Genotropin and Bextra, as well as certain managed care payments"); *see also* Petrosinelli Decl. Ex. B-1 (Pfizer, 2005 Annual Report (Form 10-K), 2005 Financial Report at 67 (Feb. 28, 2006)) ("In 2003 and 2004, we 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.").

[17] Petrosinelli Decl. Ex. B-1 (Pfizer, 2005 Annual Report (Form 10-K) at 12 (Feb. 28, 2006)) ("We are subject to possible administrative and legal proceedings and actions by these various regulatory bodies . . . . Such actions may

and that, as a result, Pfizer could incur judgments or enter into settlements that could have a materially adverse impact on its operations in any period.[18]

The known risks were, therefore, anything but undisclosed. The law in this Circuit is clear that a defendant "may not be faulted for failure to repeat material information which has been publicly proclaimed in various ways on other occasions." *Spielman v. Gen. Host Corp.*, 402 F. Supp. 190, 195–98 (N.D.N.Y. 1975) (finding alleged omission in prospectus was disclosed in two direct mailings to stockholders); *see also Beleson v. Schwartz*, 419 F. App'x 38, 40–41 (2d Cir. Apr. 5, 2011) (rejecting arguments alleging that CEO's report of positive business developments in a *Reuters* article was materially misleading due to his failure to disclose the company's lack of viability and contingency bankruptcy plans, since the market had been informed of the dire nature of the company's financial condition through the Form 10-K issued three months before the article and via other publicly available information); *Dalberth v. Xerox Corp.*, 766 F.3d 172, 187 (2d Cir. 2014) ("The touchstone of the inquiry is . . . whether defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor regarding the nature of the securities offered.").

But even more fundamentally, Second Circuit law is clear also that Mr. Waxman had no duty to disclose the risk plaintiffs contend he concealed. Thus, even if he had known of the risk

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include . . . civil and criminal sanctions."); Petrosinelli Decl. Ex.D-1 (Pfizer, 2006 Annual Report (Form 10-K) at 73 (Feb. 27, 2007)) ("It is possible that criminal charges and fines and/or civil penalties could result from pending government investigations.").

[18] Petrosinelli Decl. Ex. B-1 (Pfizer, 2005 Annual Report (Form 10-K) at 18 (Feb. 28, 2006)) ("We and certain of our subsidiaries are involved in various patent, product liability, consumer, commercial, securities, environmental and tax litigations and claims; 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"); *see also* Petrosinelli Decl. Ex. B-1 (Pfizer, 2005 Annual Report (Form 10-K), 2005 Financial Report at 32 (Feb. 28, 2006)); Petrosinelli Decl. Ex.D-1 (Pfizer, 2006 Annual Report (Form 10-K) at 73 (Feb. 27, 2007)).

of "the near certainty that Pfizer would have to pay over $1 billion in penalties due to its off-label-promotional activities," the law does not require a corporate representative to confess to corporate wrongdoing. In *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014), the Second Circuit recently held that even when a company claims that its employees are held to the highest ethical standards and comply with all applicable laws, it still "do[es] not have a duty 'to disclose uncharged, unadjudicated wrongdoing' . . . [rather] [b]y disclosing its involvement in multiple legal proceedings and government investigations . . . UBS complied with its disclosure obligations under our case law." *Id.* at 184; *see also* Pfizer Brief at 38-43; *see generally* Pfizer Reply.

In short, Mr. Waxman's statements in the Genotropin press release were true, were not misleading, did not (and could not) attempt to conceal plaintiffs' "unmaterialized" risk of a substantial resolution of the investigations, and are not actionable as a matter of law.

C. There is no evidence in the record that Mr. Waxman acted with scienter.[19]

Contrary to plaintiffs' mischaracterization, *see* Plaintiffs' Opposition at 69-72, Mr. Waxman has not waived any aspect of his scienter defense. Nor, as plaintiffs know full well, is Mr. Waxman's defense of good faith reliance on Mr. Fox, Mr. Block, and KPMG his only challenge to scienter. *See* Waxman Brief at 24-26.

Rather, Mr. Waxman demonstrated in his opening brief that—in addition to being entitled to a reliance on counsel defense—plaintiffs also could not meet their burden of proving scienter[20] because they could not point to any evidence—no testimony, internal memorandum or email—of Mr. Waxman's bad faith or recklessness. *See* Waxman Brief at 22–23. To the

[19] If the Court concludes that Mr. Waxman did not make any of the statements in Pfizer's SEC disclosures or earnings releases and that his April 2, 2007 Genotropin press release was neither false nor misleading, the Court need not reach the issue of scienter.

[20] Plaintiffs bear the burden of proving scienter. *See Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1796 (2010).

contrary, Mr. Waxman established that the evidence actually demonstrated his good faith. *See id*. at 23–24.

Specifically, Mr. Waxman demonstrated that he believed the challenged statements in the SEC filings were accurate. He demonstrated that he and others participated in a rigorous review process, asked the right questions, and acted conscientiously to help ensure that the disclosures were truthful. *See* Waxman Brief at 3-4, 23-26. He demonstrated how the involvement of the attorneys in charge of the government investigations gave him added comfort that the legal proceedings disclosures section were vetted appropriately. *See id*. at 6-7. Mr. Waxman demonstrated that throughout the process he did his best to assure that the disclosures were accurate. He demonstrated that his good faith belief was further reinforced by Pfizer's disclosure experts' conclusion that the company's disclosures were accurate and complete, a powerful green flag. [21]

Mr. Waxman also demonstrated that he believed his April 2, 2007 press release statement about the Genotropin settlement was true when made, and that his belief was reinforced by the review of the statement by others, including Mr. Lankler, who was in charge of Pfizer's compliance program. *See id*. at 29-30. Moreover, as pointed out above, plaintiffs' only potentially actionable theory on the Genotropin press statement turns on Mr. Waxman's alleged concealment of the "near certain" billion dollar resolutions of investigations that either had not

[21] Whether or not reliance on counsel is a full or partial defense is not critical, *see* Pfizer Reply at III.A, and plaintiffs either misapprehend or misrepresent the law in an attempt to shift the burden on the issue of scienter. Mr. Waxman did not invoke reliance on counsel as an affirmative defense in order to "assert [his] scienter is excused." *See* Plaintiffs' Opposition at 70. Instead, Mr. Waxman pointed to his reliance on professional disclosure advice as further evidence of his good faith—a "green" flag that "constitute[s] powerful evidence" of a defendant's lack of scienter. *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 Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (affirming summary judgment where plaintiff failed to produce sufficient scienter evidence to overcome defendant's showing that he relied on counsel); Waxman Brief at 24-26.

yet occurred at the time of the press statement (Lyrica, Geodon and Zyvox) or were still far from being resolved and which had actually been disclosed (Bextra). As shown above at page 7-8, Mr. Waxman can hardly be charged with acting with bad faith or recklessness.

Despite its heft, plaintiffs' opposition fails to point to any evidence whatsoever to contradict Mr. Waxman's showing on any of these points. Nor do plaintiffs even suggest that Mr. Waxman had a motive to mislead investors, or what that motive might have been. Of course, Mr. Waxman had no such motive, a fact confirmed by the extensive record in this case. Given the weight of this uncontroverted evidence, no reasonable jury could find that Mr. Waxman acted with scienter.

Because plaintiffs have failed to carry their burden of producing actual evidence—as opposed to conclusory allegations or speculation—of scienter, summary judgment is mandated on this basis alone. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247–48 (1986); *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 850–51 (2d Cir. 1981).

D. Plaintiffs cannot establish loss causation with respect to Mr. Waxman.

Plaintiffs have failed to disaggregate the losses purportedly caused by any of Mr. Waxman's allegedly actionable statements from those allegedly caused by the other defendants at other times during the class period. This alone compels summary judgment in favor of Mr. Waxman. *See In re Pfizer Inc. Sec. Litig.*, No. 4-CV-9866-LTS-HBP, 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014) (granting summary judgment for defendant where plaintiffs failed to disaggregate the harm purportedly caused by defendant's statements from that allegedly caused by others); *see also* Memorandum in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein at 11-13; Reply in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein at 8; Waxman Brief at 30.

Even if the failure to disaggregate did not alone defeat plaintiffs' damages claim against Mr. Waxman, plaintiffs' "risk materialization" theory is untenable as it relates to the April 2, 2007 Genotropin statement. *See supra* at Sec. II.B. Thus, it cannot give rise to loss causation concerning the one public statement Mr. Waxman actually made.[22]

E. Mr. Waxman is not liable as a control person.

Plaintiffs cannot establish control person liability against Mr. Waxman under Section 20(a). First, not only have plaintiffs failed to prove an underlying actionable statement or omission, there is also no evidence that Mr. Waxman actually had the power to direct the actions of the alleged primary violator and had "actual control over the transaction in question." *In re Alstom SA*, 406 F. Supp. 2d 433, 486-87 (S.D.N.Y. 2005) (internal citations omitted); Waxman Brief at 34-36. Once again, plaintiffs try to rely exclusively on Mr. Waxman's position as general counsel, his membership on committees, and his participation in certain disclosure and compliance meetings. But a person's status as an officer or membership on a management committee is not enough to constitute control under Section 20(a), *see In re Alstom SA* at 488–89, just as it is insufficient to establish ultimate authority under Rule 10b-5, *see Janus*, 131 S. Ct. at 2302.[23]

Moreover, contrary to plaintiffs' statement of the law, *see* Plaintiffs' Opposition at 117-18, culpable participation is in fact required for Section 20(a) liability in the Second Circuit. *See*

[22] Plaintiffs appear to have abandoned their "corrective disclosure" theory and at the eleventh hour tried to substitute a "risk materialization" theory, although they provide no expert support for it. For this reason alone, it should be rejected. *See* Pfizer Reply at 2, 29-31; Pfizer Reply in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein at 2-3, 7-8.

[23] Plaintiffs do not dispute that all of the alleged misstatements underlying their Section 20(a) claim against Mr. Waxman were made by Pfizer's CEOs and CFOs. It is unreasonable then to presume that Mr. Waxman, as general counsel, had the ability to "control" the company's highest-ranking officers and actual decision-makers. *See Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 494 (7th Cir. 1986) (attorney's "ability to persuade and give counsel is not the same thing as control."); *see also Alstom SA*, 406 F. Supp. 2d at 487 ("exercise of influence" and "the mere ability to persuade," without the power to direct actions of the controlled person, are insufficient to establish control). Of course, plaintiffs have not cited any evidence demonstrating that Mr. Waxman had actual control over Pfizer's CEOs or CFOs with respect to their own public statements.

Carpenters Pension Trust Fund v. Barclays PLC, 750 F.3d 227, 236 (2d Cir. 2014) ("To state a claim of control person liability under § 20(a), a plaintiff must show . . . that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud.") (internal quotations omitted). Accordingly, just as plaintiffs cannot establish the requisite evidence of scienter for Rule 10b-5 purposes, their Section 20(a) claim must also fail for lack of evidence of culpable participation. *See Special Situations Fund Qp, L.P. v. Deloitte Touche Tohmatsu CPA Ltd.*, No. 13 Civ. 1094(ER), 2014 WL 3605540, at *26 (S.D.N.Y. July 21, 2014) (culpable participation requires the same showing as scienter—particularized facts of the controlling person's conscious misbehavior or recklessness"); Waxman Brief at 34-35.[24] As shown in Mr. Waxman's moving brief and above, he at all times acted in good faith in connection with his role in Pfizer's disclosure process. This alone negates plaintiffs' section 20(a) claim.

III. CONCLUSION

For the foregoing reasons, and those set forth in the motions of Mr. Waxman's co-defendants, Mr. Waxman respectfully requests that the Court grant him summary judgment.

[24] Although the *Carpenters Pension Trust* district court decision cited by plaintiffs noted that the Second Circuit has not yet decided whether scienter had to be pled as an essential element of a control person claim—that is, whether scienter and culpable participation were synonymous standards—it also noted that while it disagreed, the majority of courts within the Second Circuit had found that scienter and culpable participation were the same. *Carpenters Pension Trust*, 12-cv-5329 (SAS) 2014 U.S. Dist. LEXIS 148772, at *22-23 (S.D.N.Y. Oct. 20, 2014).

Dated: December 8, 2014
New York, New York

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