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.	:	10-cv-03864-AKH **ECF Case** **Electronically Filed**

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT HENRY A. MCKINNELL'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT[1]

Former Pfizer CEO Henry A. McKinnell – who stepped down as CEO six months into the three-year Class Period – established in his Opening Memorandum ("McKinnell Br.") that he is entitled to summary judgment as to all of Plaintiffs' claims. Far from providing a basis to allow this case to go forward against McKinnell, Plaintiffs (i) have abandoned numerous aspects of their claims against McKinnell requiring summary judgment in McKinnell's favor with respect to the vast majority of statements at issue, (ii) concede that they have not attempted to disaggregate losses purportedly caused by the statements McKinnell made at the very start of the Class Period from the losses purportedly caused by the statements made in the following thirty months, and (iii) proffer no evidence even suggesting McKinnell acted with scienter and indeed highlight throughout their opposition papers McKinnell's good faith efforts to stay faithful to Pfizer's policies of conducting business ethically and lawfully. The undisputed record thus demonstrates that McKinnell is entitled to summary judgment as to Plaintiffs' Section 10(b) and 20(a) claims.

ARGUMENT

I. MCKINNELL IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' SECTION 10(b) CLAIM.

A. Plaintiffs Concede That McKinnell Is Entitled To Summary Judgment With Respect To The Vast Majority Of Statements At Issue In This Case.

Although Plaintiffs purport to oppose McKinnell's motion for summary judgment in its entirety, they have abandoned numerous aspects of their claims against McKinnell:

[1] Capitalized terms shall have the meaning set forth in McKinnell's Opening Memorandum (Dkt. 269). McKinnell adopts and incorporates by reference the points, arguments and authorities set forth in (i) Pfizer's Reply Memorandum of Law in Support of Its Motion for Summary Judgment ("Pfizer Reply Br.") and (ii) the Reply Memoranda filed by the other individual defendants in support of their Motions for Summary Judgment.

- They acknowledge – as they must – that McKinnell "cannot be liable for statements made by the other defendants after [his] departure from the Company." (Dkt. 304, Plaintiffs' Memorandum of Law in Opposition to Motions for Summary Judgment ("Opp'n") at 55 n.210.)

- They no longer seek to hold McKinnell liable for oral statements made by others. (*See id.* at 63-69.)

- They no longer seek to hold McKinnell liable for statements he made during analyst meetings and earnings conference calls regarding the efficacy, safety and sales revenues of Lyrica, Geodon and Zyvox. (*Compare id.* (Table of Class Period False & Misleading Statements ("FMS")) *with* Dkt. 71, Am. Compl. Ex. B.)

- They have abandoned their claims regarding Pfizer's internal controls over financial reporting. (*Id.*)

Indeed, Plaintiffs contend that McKinnell made just eight statements (FMS Nos. 1-8) – all before July 31, 2006. They do not seek to hold him liable for any of the 36 statements made after July 31, 2006 (*i.e.*, FMS Nos. 9-44). McKinnell is entitled to summary judgment with respect to all such statements and all statements abandoned by Plaintiffs. *See In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252, 270-71 (S.D.N.Y. 2013) (granting partial summary judgment in favor of defendants with respect to statements not made by defendants).[2]

[2] As demonstrated in Pfizer's Opening and Reply Briefs, none of the eight remaining statements can support liability under Section 10(b) or Rule 10b-5. (*See* Pfizer Br. at § II; Pfizer Reply Br. at §§ II & IV.) First, Plaintiffs challenge statements regarding Pfizer's business ethics and policies of compliance with laws. (*See* FMS Nos. 2, 4.) However, "[i]t 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." *City of Pontiac Policemen's & Fireman's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014). (*See* Pfizer Reply Br. at § II.B.) Second, Plaintiffs challenge statements accurately disclosing sales revenues for products. (*See* FMS Nos. 1, 5, 7, 8.) However, "[a]ccurate statements about past performance are self evidently not actionable under the securities laws." *Nadoff v. Duane Reade, Inc.*, 107 F. App'x 250, 252 (2d Cir. 2004). (*See* Pfizer Reply Br. at § IV.A.) Finally, Plaintiffs challenge Pfizer's warning of the possibility of judgments and settlements that could have a "material adverse effect" on the company and its loss contingency reserve decisions. (FMS Nos. 2, 3, 6, 7.) But these statements, too, cannot support a securities fraud claim because they constitute warnings of future risk and reflect subjective judgments honestly believed when they were made. (*See* Pfizer Reply Br. at §§ IV.B & IV.C.)

B. Plaintiffs Have Not Raised A Genuine Issue Of Material Fact Regarding Loss Causation.

Plaintiffs' concession that McKinnell cannot be held liable for the vast majority of the purportedly false and misleading statements at issue in this case – including all statements made after July 31, 2006 – also compels summary judgment in McKinnell's favor with respect to the eight statements he made prior to July 31, 2006 because Plaintiffs do not even attempt to disaggregate the loss allegedly caused by these early statements from the loss purportedly caused by statements made later in the Class Period. They therefore have offered no evidence that it was the eight statements made by McKinnell prior to July 31, 2006 – "rather than other salient factors – that proximately caused plaintiff[s'] loss." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005).

Plaintiffs acknowledge that they have not done so but they do not meaningfully grapple with the impact of this failure on their claims against McKinnell.[3] Indeed, although they submitted a 120-page summary judgment opposition, Plaintiffs address McKinnell's loss causation argument in a single sentence, asserting: "Last, most of the Individual Defendants merely summarize arguments currently before the Court on defendants' motion to exclude Feinstein, which, for the sake of brevity, need not be relitigated here." (Opp'n at 113.)[4] In their opposition to Defendants' motion to exclude Plaintiffs' expert Dr. Steven Feinstein, however, they mischaracterized the argument as one focused solely on damages and asserted that a

[3] Plaintiffs do claim that they disaggregated the loss caused by non-fraud-related factors from the loss purportedly caused by fraud-related factors (for the reasons set forth in Defendants' *Daubert* papers, Plaintiffs' expert did not reliably do so). But this is not the same thing as disaggregating the loss purportedly caused by one defendant's statements from the loss purportedly caused by statements for which the defendant cannot be held liable.

[4] Having submitted hundreds of pages of briefing to the Court in opposition to Defendants' motions for summary judgment, Plaintiffs' invocation of "brevity" as an excuse to avoid responding to dispositive loss causation arguments rings suspiciously hollow.

provision of the PSLRA dealing with "proportionate liability" somehow relieves them of the obligation to establish loss causation as to each defendant. (Dkt. 293 at 29-30.) The cited provision of the PSLRA, however, does no such thing. To the contrary, it 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." 15 U.S.C. § 78u-4(f)(1); *see also LaPerriere v. Vesta Ins. Grp.*, 526 F.3d 715, 727 (11th Cir. 2008) ("[T]he PSLRA, including the proportionate liability provisions, does not change the rules for determining who is liable for violating the securities laws."). In the end, Plaintiffs provide no response to McKinnell's loss causation argument, compelling summary judgment in his favor on loss causation grounds. *See Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007) (affirming dismissal of a complaint that failed to disaggregate losses caused by the defendant's misstatements from those caused by a non-party's misstatements); *In re Pfizer Inc. Sec. Litig.*, No. 04 Civ. 9866 (LTS) (HBP), 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014) (Swain, J.) (granting summary judgment for the defendant where the plaintiff failed to disaggregate the harm purportedly caused by the defendant's statements from that caused by statements made by a third party).

C. Plaintiffs Have Not Raised A Genuine Issue Of Material Fact With Respect To Scienter.

Plaintiffs also do not – because they cannot – identify any genuine issue of material fact on the issue of scienter. Instead, they attempt to obscure the record in an effort to draw the Court's attention from the fact that McKinnell, at all relevant times, acted in good faith.[5]

[5] Plaintiffs argue that "by only asserting their good faith, defendants waive any claim that Plaintiffs' allegations of actual knowledge or recklessness are insufficient." (Opp'n at 70.) But McKinnell demonstrated that "the extensive record in this case is devoid of any evidence that McKinnell acted with scienter" and that "the evidence shows that McKinnell did not act in either an intentional or highly unreasonable manner in making the statements at issue." (McKinnell Br. at 11; *see also id.* at § II.B.1.)

First, Plaintiffs filed a *single* opposition to the separate summary judgment briefs filed by the seven defendants and a *single* separate statement of material facts. (Dkts. 303, 304.)[6] Throughout these documents, Plaintiffs use the term "Defendants" indiscriminately, including to describe events that occurred long after McKinnell left Pfizer. (*See, e.g.*, Opp'n at 20, 22-24, 32; Dkt. 303 at ¶¶ 317-353.) Indeed, Plaintiffs assert – without any evidentiary support and despite their own admissions regarding McKinnell's February 2007 departure from Pfizer – that "McKinnell was aware of Pfizer's presentations to the Government and he had access to the presentation slides and backup materials prior to, *and throughout, the Class Period*." (Dkt. 303 at ¶ 301 (emphasis added).) Moreover, in their Response to McKinnell's Local Rule 56.1 Statement, they specifically refer to events occurring *after* McKinnell's departure from Pfizer in their (ultimately unsuccessful) efforts to demonstrate that fact issues exist. (*See, e.g.*, Dkt. 297 at 49-54 (referring to a June 19, 2007 letter from the DOJ, the February 5, 2008 target letter, an April 4, 2008 letter from the DOJ and meetings that occurred in September 2007 and July 2008).) Plaintiffs' efforts to blur the facts through imprecise references to "defendants" and time frames are not sufficient to demonstrate a genuine issue of material fact with respect to McKinnell's scienter. *See In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 892 F. Supp. 2d 59, 67-76 (D.D.C. 2012) ("In essence, plaintiffs have stitched together a patchwork quilt of evidence that they allege presents a disputed issue of material fact as to [the CEO]'s scienter. I disagree. Plaintiffs' cited evidence simply does not rise to an inference of scienter.")

[6] Many of Plaintiffs' proffered "facts" – whether presented affirmatively or in response to McKinnell's statement of undisputed facts (Dkt. 297, 303) – are not supported by the underlying evidence. McKinnell, moreover, disputes Plaintiffs' characterization of many of these facts. However, such disputes are not relevant to deciding McKinnell's Motion as they do not serve to refute the uncontested nature of the facts which compel summary judgment in McKinnell's favor. *See* Defendants' Response to Plaintiffs' "Statement of Material Facts Requiring Denial of Defendants' Motion for Summary Judgment."

Second, Plaintiffs seek to exclude evidence of McKinnell's reliance on Pfizer's robust processes – including his good faith reliance on advice provided by Pfizer's disclosure counsel and auditors – by misconstruing McKinnell's reliance argument as an affirmative defense. (*See* Opp'n at 72-97.) McKinnell, however, demonstrated that summary judgment is warranted because his good faith reliance on the advice of accountants and attorneys, among many other things, negates scienter. *See Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (affirming summary judgment for defendant who "relied on the expertise of counsel" because "[plaintiff] has failed to provide sufficient evidence that would enable a jury to conclude that [defendant] had the scienter required for such a claim"). Plaintiffs – who bear the burden of proof on the issue of scienter – proffer no evidence suggesting that McKinnell did not rely in good faith on Pfizer's disclosure counsel and its auditors. Such good faith reliance "is inconsistent with the intent to defraud." *Stavroff v. Meyo*, No. 95-4118, 1997 WL 720475, at *6-7 (6th Cir. Nov. 12, 1997); *see also 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.").

Third, Plaintiffs argue that McKinnell's awareness of allegations of off-label promotion and unfavorable audit findings supports the conclusion that McKinnell "knew or recklessly disregarded that his statements concerning Pfizer's compliance with the law were false and misleading when made." (*See* Dkt. 303 at ¶¶ 298-310.) But, even if McKinnell's statements concerning Pfizer's policies of conducting business ethically and lawfully were actionable – and they are not (*see* note 2, *supra*) – the facts proffered by Plaintiffs do not support the conclusion that McKinnell acted with scienter with respect to these statements. To the contrary, they demonstrate McKinnell's diligence in addressing issues in conformity with Pfizer's policies.

With respect to McKinnell's awareness of allegations of off-label promotion, the facts proffered by Plaintiffs show that Pfizer retained outside counsel to investigate the issues and that outside counsel met with and made disclosures to the government. (Dkt. 303 at ¶¶ 298, 300-302.) Such evidence is entirely consistent with McKinnell's testimony that he understood Pfizer had done what a good corporate citizen should do: "we investigated, we remediated and reported our findings to the Government." (Dkt. 273, Musoff Ex. A-M, 11/11/13 McKinnell Tr. at 232:19-24, 251:25-252:23.)[7]

With respect to the internal audit findings, Plaintiffs proffer April 2005 internal audit findings regarding travel and entertainment practices. (*See* Opp'n at 1, 14; Dkt. 303 at ¶ 307.) According to Plaintiffs and the document they cite, McKinnell was "understandably angry and embarrassed by these findings . . . as indeed we ALL should be." (Dkt. 303 at ¶ 307; *see also* Opp'n at 1, 14.) The document, moreover, states: "This kind of behavior is contrary to everything we stand for as a company and *this is a situation that must be addressed immediately*." (Dkt. 305, Rosen Ex. 102 at 6 (emphasis added).) Far from demonstrating that McKinnell acted with an intent to defraud, McKinnell's reaction to these findings is entirely consistent with his public statements concerning Pfizer's policies of conducting business ethically and lawfully.

Fourth, Plaintiffs argue that McKinnell's knowledge of the Neurontin settlement somehow demonstrates that he "knew or recklessly disregarded that his statements concerning

[7] In their Response to McKinnell's Local Rule 56.1 Statement, Plaintiffs complain that "Defendant McKinnell largely relies on his own inadmissible testimony as evidence for his undisputed facts." (Dkt. 297 at 1 n.1.) However, Federal Rule of Civil Procedure 56 expressly identifies depositions as record evidence on which a party moving for summary judgment may rely. Fed. R. Civ. P. 56(c)(1)(A). McKinnell's testimony, which was based on McKinnell's own personal knowledge, is proper, relevant evidence that can be presented in a form – *i.e.*, live testimony – that would be admissible at trial. Fed. R. Civ. P. 56(c)(2). *See* Defendants' Response to Plaintiffs' Objections to Exhibits Submitted in Support of Defendants' Motions for Summary Judgment.

Pfizer's legal proceedings and FAS 5 disclosures were false and misleading." (Dkt. 303 at ¶¶ 311-316.) In particular, Plaintiffs argue that Pfizer's Legal Division reported in September 2005 that "it is our estimation based on the facts and circumstances to date that we are likely to be forced to reach some form of settlement of [the Bextra investigation]." (*Id.* at ¶ 312.) Plaintiffs further argue that McKinnell should have been able to estimate at that time the amount to be paid in settlement of the Bextra investigation because he was "personally involved in the resolution of the Neurontin litigation." (Opp'n at 38; *see also* Dkt. 303 at ¶¶ 313-315.)[8]

However, even assuming McKinnell received the September 2005 document – and Plaintiffs proffer no evidence that he did – that document also states that "[t]here was a consensus that a loss, if any, *is not estimable at this time*." (Dkt. 247, Petrosinelli Ex. P-5 (emphasis added).) In support of their assertion that the Neurontin "fine was calculated using a well-established formula for estimating actual gain from off-label promotion," Plaintiffs cite to documents relating to the 2009 settlement of the Bextra matter. (*See* Dkt. 303 at ¶ 314 (citing Rosen Exs. 513 and 179).) These documents – which post-date by years McKinnell's time at Pfizer – show that the Bextra fine was calculated by reference to the United States Sentencing Guidelines. Plaintiffs provide no explanation as to why McKinnell – a non-lawyer – should have known how to calculate a potential fine under the Guidelines. Moreover, one of these documents – the Sentencing Memorandum – expressly states that "not all of the off-label sales of Bextra were caused by" illegal marketing "as some physicians would have exercised their independent decision-making in prescribing Bextra even without being influenced by" such marketing. (Dkt. 305, Rosen Ex. 513 at 26.) Thus, contrary to Plaintiffs' assertion, the fact that "McKinnell knew

[8] Plaintiffs do not – and cannot – dispute the fact that the conduct giving rise to the Neurontin settlement occurred at another company by non-Pfizer employees. In fact, it is undisputed that Pfizer identified these issues, investigated the matters, remediated the issues and self-reported to the government.

that Pfizer had data showing the uses for which its drugs were sold" (Dkt. 303 at ¶ 315) does not support the conclusion that McKinnell had any basis for "estimating actual gain from off-label promotion" (*id.* at ¶ 314).[9] Plaintiffs therefore proffer no facts to support their assertion that McKinnell acted with scienter when in early 2006 he did not disclose the terms of a settlement that was not reached until January 2009.

Yet, at bottom, the entirety of Plaintiffs' scienter argument with respect to McKinnell hinges on this absurd assertion: that three years before Pfizer reached agreement with the government, McKinnell knew – but deliberately disregarded – that it was inevitable that Pfizer was going to have to enter into a $2.3 billion settlement with the government. They make this argument despite voluminous record evidence demonstrating the course of the government investigation and they make this argument notwithstanding that their own expert has opined that Pfizer's reserve should have increased over time, including after McKinnell stepped down as CEO. Such argument, which is all that it is, is insufficient to overcome the undisputed record evidence regarding McKinnell's good faith in making public statements on Pfizer's behalf. For all these reasons, Plaintiffs have presented no evidence creating a genuine issue of material fact as to McKinnell's state of mind, compelling summary judgment in favor of McKinnell.

[9] Elsewhere in their briefing, Plaintiffs cited to a May 13, 2004 letter from the Department of Justice describing the Neurontin settlement as support for this proposition with respect to a different individual Defendant. (*See* Dkt. 303 at ¶ 179 (citing Rosen Ex. 229).) Even if Plaintiffs meant to cite this May 13, 2004 letter instead of the 2009 Bextra documents they did cite, Plaintiffs' argument would fare no better: Plaintiffs proffer no evidence that McKinnell received the letter; the letter shows that the Neurontin fine also was calculated by reference to the United States Sentencing Guidelines; and the letter states that the amount of gain associated with Warner-Lambert's off-label marketing of Neurontin could not "be determined with precision and that the gain figure . . . is an estimate." (Dkt. 305, Rosen Ex. 229 at 2.)

II. MCKINNELL IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' SECTION 20(a) CLAIM.

Finally, Plaintiffs have not raised a genuine issue of material fact that a primary violation of Section 10(b) occurred by someone controlled by McKinnell. Nor have they pointed to an issue of material fact that McKinnell was a culpable participant in the alleged fraudulent conduct. To the contrary, for all the reasons discussed above, the undisputed record demonstrates that McKinnell exercised diligence and acted in good faith in making the alleged statements at issue. Accordingly, McKinnell is entitled to summary judgment on Plaintiffs' Section 20(a) claim.

CONCLUSION

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

Dated: New York, New York
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Respectfully submitted,

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Original filename:n/a
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[STAMP dcecfStamp_ID=1008691343 [Date=12/8/2014] [FileNumber=13976150-0] [5bbf2024e2a59f5813d21d1dbd17db5be00455fd405038d7e82012f41d9eab485e1084d39305650d2ac709677a6e3b8d3141c913e249a4d20f1cba3c18ce66e0]]