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. 1:10-cv-03864-AKH Hon. Alvin K. Hellerstein ECF Case

DEFENDANT IAN C. READ'S
REPLY IN SUPPORT OF SUMMARY JUDGMENT

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Defendant Ian C. Read ("Read") respectfully submits this reply memorandum of law in support of his motion for summary judgment with respect to all claims asserted against him in the First Amended Complaint. Mr. Read also joins in the arguments set forth in the reply briefs of Pfizer and each of the other individual defendants.

PRELIMINARY STATEMENT

With respect to their claims against Mr. Read, Plaintiffs' Opposition is more notable for the points it concedes than the points it challenges. After cutting through Plaintiffs' inflammatory and irrelevant hyperbole, what remains is an utterly insufficient rebuttal of the points set forth in Mr. Read's opening brief, which demonstrate that he is entitled to summary judgment.

Plaintiffs acknowledge, as they must, that Mr. Read did not: (i) sign or certify any of Pfizer's SEC filings during the Class Period; (ii) author or authorize any press releases; or (iii) make any statement whatsoever about Bextra or the Bextra investigation. Further, Plaintiffs point to no evidence that Mr. Read was involved in drafting or approving Pfizer's securities disclosures of legal proceedings during the Class Period, or that he had any role in setting, approving, or disclosing reserves under FAS 5. Nevertheless, Plaintiffs attempt to hold Mr. Read accountable based on the mere fact that Mr. Read was a senior executive on Pfizer's Executive Leadership Team ("ELT") for the second half of the Class Period. But, as Mr. Read argued in his opening brief, that theory is foreclosed by the U.S. Supreme Court's decision in *Janus*. Plaintiffs have no meaningful response.

Plaintiffs also concede that Mr. Read's oral statements at analyst conferences about the revenues of two Pfizer products, Geodon and Lyrica, were accurate, and that Mr. Read's accompanying statements about the safety and efficacy of those products were completely accurate as well. Plaintiffs' theory—that Mr. Read's statements were nevertheless actionably

"misleading" because of what he did *not* say—presumes that Mr. Read had a duty to accuse Pfizer of fraud. Plaintiffs are mistaken. Nothing in Mr. Read's oral statements triggered a duty to engage in a rite of confession with respect to any alleged off-label marketing, and Plaintiffs have offered no law to the contrary.

As to the element of scienter, while Plaintiffs spend more than 30 pages of their brief challenging Pfizer and the individual defendants' reliance on counsel with respect to the Bextra investigation, SEC filings, and FAS 5 reserves, they devote only a single footnote of their argument to Mr. Read's purported intent to defraud. Rather than addressing the fact that his statements were based on materials prepared by others and widely circulated for comment to ensure accuracy—a process that negates any suggestion of intent to hide or deceive—Plaintiffs simply argue that Mr. Read cannot "shirk" his duties by relying on others who helped prepare his statements. That invective cannot meet Plaintiffs' burden to come forward with actual *evidence* of scienter.

Mr. Read's opening brief further demonstrated that Plaintiffs have not (and cannot) raise a triable fact on loss causation, an essential element of their claims against Mr. Read. In response, Plaintiffs have switched their theory of the case. Plaintiffs now claim that their loss causation theory is based on the "materialization of risk," despite the fact that Plaintiffs' own causation expert focused only and entirely on a single alleged "corrective disclosure," and did not once mention a "materialization of risk" theory. But Plaintiffs' last-minute change in theory does not cure their failure to prove loss causation. Whether the January 26, 2009 announcement of Pfizer's settlement was a "corrective disclosure" or the "materialization of a risk," it did not even mention, let alone reveal any information about, Geodon or Lyrica—the only two products about which Mr. Read made statements during the Class Period. For that reason, regardless of

Plaintiffs' theory, no juror could find that a cent of Plaintiffs' alleged loss is traceable to any of Mr. Read's statements.

Finally, Plaintiffs make a half-hearted attempt to preserve control person claims against the individual defendants, including Mr. Read. But again, Plaintiffs' argument fails, as Mr. Read's status as a senior executive of Pfizer during the Class Period is insufficient to establish control person liability, and Plaintiffs point to nothing more. There is no evidence in this record that would allow a juror to find that Mr. Read exerted "actual control" over an alleged primary violator with respect to the challenged disclosures. That fact is fatal to Plaintiffs' control person claims.

Mr. Read is thus entitled to summary judgment on all of Plaintiffs' claims.

ARGUMENT

Point I.

Plaintiffs Have Not Raised a Triable Issue With Respect to Mr. Read's Liability for Allegedly Misleading Statements in SEC Filings and Press Releases That He Did Not Make

As set out in his opening brief, Mr. Read did not "make" any statement in Pfizer's SEC filings or press releases. Read Br. at 7. Mr. Read did not author or sign any of those statements, and none was attributed to him. *Id*. For these reasons, Mr. Read cannot be held liable as a primary violator of Rule 10b-5. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011).[1]

Although Plaintiffs do not dispute these points, they have "clarifi[ed]" that they intend to pursue direct fraud claims against Mr. Read for written statements in Pfizer's SEC filings and

[1] Although not relevant for purposes of the *Janus* analysis, Mr. Read also was not on Pfizer's Disclosure Committee.

press releases that Mr. Read did not author or sign and were not attributed to him.[2] Opp. at 52. This theory is based on nothing more than the fact that, as head of Pfizer's commercial business unit in the U.S., Mr. Read was a senior executive on Pfizer's ELT during the second half of the Class Period, when these statements and filings were made. *Id*. at 55-56. Plaintiffs' eleventh-hour attempt to hold Mr. Read personally and directly responsible for these statements by the Company is foreclosed by *Janus*. 131 S. Ct. at 2302.

First, Plaintiffs fail to acknowledge any of the relevant post-*Janus* decisions in this District holding that an individual may be liable for having "made" false statements contained in SEC filings *only* if he or she actually *signed* the statement. *See, e.g.*, *In re Smith Barney Transfer Agent Litig*., 884 F. Supp. 2d 152, 165 (S.D.N.Y. 2012) ("[O]nly those officers whose signatures appear on misleading statements may be liable as the 'makers' of those statements."); *see also Livingston v. Cablevision Systems Corp.*, 966 F. Supp. 2d 208, 221 (S.D.N.Y. 2013) (same). Under this line of authority, the inquiry begins and ends with the undisputed fact that Mr. Read did not sign any of the relevant SEC filings or press releases.

Second, Plaintiffs concede that even under the competing authority they cite, an individual who did not sign any of the statements at issue may only be held liable as a "maker" of a statement if it is attributed to the individual, or if the individual had "ultimate authority" over the statement. Opp. at 54 (citing *In re Fannie Mae 2008 Sec. Litig*., 891 F. Supp. 2d 458, 473 (S.D.N.Y. 2012)). But Plaintiffs fail to create a triable issue of fact even under their preferred standard.

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[2] Plaintiffs concede that summary judgment should be granted for Mr. Read on statements they do not allege he made, specifically statements 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 17, 18, 21, 24, 27, 28, 32, 34, 36, 39, and 43 in Plaintiffs' chart of "Defendants' Class Period False and Misleading Statements" ("FMS") attached to their Opposition.

Acknowledging that not a single statement was attributed to Mr. Read, Plaintiffs argue that Mr. Read had "ultimate authority" over those statements. Opp. at 55-56. But the lone piece of "evidence" they cite is the simple fact that Mr. Read was a member of Pfizer's ELT during the second half of the Class Period, which, according to Plaintiffs, gave him an opportunity to review and comment on drafts of SEC filings. *Id*. at 56. Plaintiffs cite no evidence that Mr. Read, in fact, reviewed any of the challenged disclosures in the SEC filings or press releases, or that he had an obligation to do so. Regardless, under *Janus*, neither Mr. Read's status on the ELT, nor the fact that the ELT had the opportunity to review and comment on SEC filings, is enough to hold Mr. Read responsible as a "maker" of the Company's statements. Even where a senior corporate executive has "significant involve[ment] in preparing a statement," that alone "does not give rise to liability." *Janus*, 131 S. Ct. at 2305; *accord In re UBS AG Sec. Litig.*, No. 07-CV-11225, 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012). "Ultimate authority," according to the Court in *Janus*, means having control over a statement's "content and whether and when to communicate it." *Janus*, 131 S. Ct. at 2302. "Without control, a person . . . can merely suggest what to say, not 'make' a statement in his own right. One who prepares or publishes a statement on behalf of another is not its maker." *Id*.

None of the other authorities cited by Plaintiffs supports their position against Mr. Read.[3] For example, Plaintiffs rely on *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252 (S.D.N.Y. 2013),

[3] All but one of the cases cited by Plaintiffs involved motions to dismiss, before a factual record could show the limited involvement of individual defendants. *See 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); *Carpenters Pension Trust Fund v. Barclays, PLC*, No. 12-CV-5329 (SAS), 2014 WL 5334053 (S.D.N.Y. Oct. 20, 2014). In *SEC v. Daifotis*, the court permitted a claim to go to trial where the individual defendant had undeniably authored a written statement that was then repeated to the investor public by another employee. 874 F. Supp. 2d 870, 880-81 (N.D. Cal. 2012). That fact pattern has no application to Mr. Read, who is not charged with authoring any relevant SEC filing or press release.

but that case actually supports granting summary judgment in favor of Mr. Read. In *Pfizer*, the court denied summary judgment to individual defendants on securities fraud claims where there was "testimony from the Individual Defendants that they had authority over the issuance of any press releases." *Id*. at 269. At the same time, however, the court granted summary judgment in favor of other individual defendants, several of whom were senior executives and members of the ELT, based on the fact that "Plaintiffs have identified no evidence to indicate that the other Individual Defendants had authority over the content of Pfizer's SEC filings." *Id*. at 269 n.10. That is exactly the position in which Mr. Read finds himself here: Mr. Read had nothing whatsoever to do with the disclosures at issue in this case, let alone "ultimate authority" over them,[4] and Plaintiffs can point to no evidence to the contrary.[5]

In this regard, Plaintiffs grossly mischaracterize a short summary of a September 2006 ELT meeting (Exhibit 202, incorrectly cited in their Opposition as Exhibit 560) for the proposition that "in his role on the ELT [Mr. Read] was responsible for taking the lead on assessing 'statements to the investor community.'" Opp. at 116. Plaintiffs fail to include the full quotation from the document, which states that, along with others, Mr. Read was to: "Assess our ***Tier 2 statements*** to the investment community." Ex. 202 at KPMG-PFIZ-DS 037997 (emphasis added). "Tier 2" is a technical term of art that refers to Medicare and other insurance providers'

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[4] In fact, Plaintiffs affirmatively state that the "CEO and CFO at different times during the Class Period"—*i.e.*, not Mr. Read—had "ultimate authority over any Pfizer press releases." Opp. at 61.

[5] In addition to press releases regarding earnings, Plaintiffs charge Mr. Read with primary responsibility for a press release regarding the Genotropin settlement, in which Mr. Waxman was quoted. Opp. at FMS at 18. Aside from the fact that the press release is neither false nor misleading, Plaintiffs do not offer a single fact suggesting that Mr. Read had "ultimate authority" over Mr. Waxman's statement or the press release. Opp. at 62 (noting that the statement was attributed to Mr. Waxman and citing to the Pfizer Disclosure Committee, which did not include Mr. Read).

division of pharmaceutical products into multiple tiers for reimbursement, and typically refers to "preferred brand-name drugs," *i.e.*, the preferred non-generic products. *See* Your Guide to Medicare Prescription Drug Coverage, Department of Health and Human Services, at 27, *available at* http://www.medicare.gov/pubs/pdf/11109.pdf. In the context of the full quotation, it is clear that Mr. Read's responsibility with respect to assessing "statements to the investment community" was limited to a specific, narrow point relating to medical insurance coverage, and had nothing to do with statements regarding Bextra, the Bextra investigation, reserves, or any other fact at issue in this litigation.

Because Plaintiffs have failed to create a triable issue on whether Mr. Read may be held responsible as a primary violator of the securities laws for having "made" allegedly false or misleading statements contained in the Company's SEC filings, Mr. Read is entitled to summary judgment on those claims.

Point II.

Plaintiffs Have Not Raised a Triable Issue With Respect to the Alleged Falsity of the Statements Mr. Read Made Concerning Geodon and Lyrica

Significantly, Plaintiffs have abandoned their claims with respect to several of Mr. Read's statements identified in the First Amended Complaint.[6] Plaintiffs target only oral

[6] The only remaining statements that Mr. Read actually made that Plaintiffs continue to allege were false and misleading are set forth below in their entirety:

- "Lyrica's launch has gone extremely well, and with excellent feedback from both patients and physicians, we have an exciting new marketing initiative aimed at improving the appropriate diagnosis of patients, and we are optimistic about the potential new indication for fibromyalgia. Another drug, Geodon, is a quiet but impressive success story. It is now the fastest-growing atypical agent in the US, and I will give you an update on what is driving this. * * * Let's now look at Geodon, a growing success story. Geodon's 2006 sales of over $600 million and a growth of 31% is a clear sign that the atypical antipsychotic market is changing. * * * Better understanding of Geodon's dosing, as well as its superior metabolic

statements Mr. Read made at three analyst conferences, which statements concerned just two Pfizer products, Geodon and Lyrica. Read Br. at 7, Opp. at FMS at 13, 29, and 34. As stated in Mr. Read's opening brief and conceded by Plaintiffs, Mr. Read did not personally make a single written or oral statement regarding Bextra or the Bextra investigation. Read Br. at 7. Plaintiffs also concede that—as Mr. Read stated in his opening brief—each of Mr. Read's statements about the revenue generated by Geodon and Lyrica was accurate, and each of the statements about the medical benefits of these products was accurate. Read Br. at 7-8, Opp. at 49-50. This is the thin reed on which Plaintiffs' attempt to keep Mr. Read, Pfizer's current CEO, in this case rests.

But as Pfizer explains in its Reply in Support of Summary Judgment, Plaintiffs' proffered support does not save these claims. Pfizer Reply at 21-23. *In re Van der Moolen Holding N.V. Sec. Litig.* held that where a company made "numerous" allegedly false statements regarding specific "sources and significance of the revenue" generated by a business unit comprising nearly two-thirds of the company's income, the "failure to disclose the true sources of such revenue could give rise to liability…." 405 F. Supp. 2d 388, 393, 401 (S.D.N.Y. 2005).

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profile, has made Geodon the fastest-growing atypical medicine in the US market." January 22, 2007 Analyst Meeting, Opp. at FMS at 13.

- "Lyrica has demonstrated rapid and sustained uptake. 2007 U.S. sales were up 46% with international sales growing 78% to $781 million. On this 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." March 5, 2008 Analyst Meeting, Opp. at FMS at 29.
- "Lyrica is demonstrating strong performance in the United States and around the world, primarily driven by the rapid uptake of fibromyalgia indication in the US and by global growth in neuropathic pain conditions. There continues to be the leading branded agent for diabetic peripheral neuropathy and post-hepatic neuralgia. We're differentiating it based on its rapid onset of action, persistence of efficacy and lack of titration, as well as clinical development for new indications such as post-stroke pain, cancer pain, restless leg syndrome and postoperative pain." September 22, 2008 UBS Global Life Sciences Conference, Opp. at FMS at 34.

Plaintiffs alleged that when the business unit's trading practices came under investigation, the company falsely attributed the resulting decline in income to "a challenging trading environment." *Id*. at 394. Here, Mr. Read's limited statements about the positive growth of only two of Pfizer's products did not put the cause of Pfizer's "financial success" at issue and are not actionable even under *Van der Moolen*. *Id*. at 401. To the contrary, as set out in Pfizer's Reply in Support of Summary Judgment, many other cases have found that these types of statements are not actionable. Pfizer Reply at 21-23.

Point III.

Plaintiffs Have Not Raised a Triable Issue Regarding Mr. Read's Alleged Intent to Deceive Investors

As Mr. Read set out in his opening brief, there is no evidence that Mr. Read ever acted with "a mental state embracing intent to deceive, manipulate or defraud." Read Br. at 9 (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007)). Simply stated, as Mr. Read made clear, there is no record evidence to demonstrate that he had any intent to deceive investors when he made statements about Geodon and Lyrica revenue at analyst conferences. Read. Br. at 9-11. To the contrary, the evidence shows that his comments were based on a package of written materials prepared as part of a collaborative process involving dozens of senior professionals—a fact wholly inconsistent with an intent to defraud. *Id*. Although Plaintiffs dedicate more than 30 pages to addressing scienter, each and every page relates to disclosures involving the Bextra investigation, including setting reserves. Opp. at 69-101. Plaintiffs relegate their argument on Mr. Read's scienter to a single footnote, arguing that, as a senior executive, Mr. Read could not "shirk his responsibility to ensure the accuracy of his statements." Opp. at 87 n.254. This is a rhetorical flourish with no substance behind it. It is Plaintiffs' burden to proffer actual evidence, not innuendo, that Mr. Read acted with an intent to

deceive—and they have none. *See In re Northern Telecom Ltd. Sec. Litig*., 116 F. Supp. 2d 446, 462 (S.D.N.Y. 2000) (holding that to avoid summary judgment with respect to scienter, plaintiffs must produce evidence that "taken as a whole, could support a finding by a reasonable juror that defendants acted with intent to deceive, manipulate or defraud investors"). Moreover, in addition to Plaintiffs' failure to point to a shred of actual evidence, Mr. Read's reliance on materials that were prepared and vetted by numerous others, including counsel, is inconsistent with—and negates—any inference of scienter.[7] *See Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) ("[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter.").

Point IV.

Plaintiffs Have Not Raised a Triable Issue Regarding Loss Causation With Respect to Mr. Read

Mr. Read's motion for summary judgment explains why Plaintiffs' sole theory of loss causation must fail as to Mr. Read's particular statements: put simply, there is no relevant "corrective disclosure" that proximately caused any investor's loss. *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010) (holding that a corrective disclosure must reveal a previously undisclosed fact "with regard to the specific misrepresentations alleged in the complaint."). Plaintiffs, tellingly, have no meaningful response on that point.

Instead, Plaintiffs' Opposition asserts a "materialization of risk" theory of loss causation that is not even *mentioned* in their damages expert's report or deposition testimony. Opp. at 102, 112. Because Plaintiffs have not offered any evidence in support of a materialization of risk theory, their claims cannot survive summary judgment. *See Ray v. Citigroup Global Markets,*

[7] Plaintiffs fail to even address the fact that Mr. Read's increase of Pfizer stock holdings during the Class Period is wholly inconsistent with scienter, as pointed out in his opening brief. Read Br. at 10 n.32.

Inc., No. 03-CV-3157, 2005 U.S. Dist. LEXIS 24419, at *****11-*****13 (N.D. Ill. Oct. 18, 2005) (granting summary judgment because plaintiff offered no expert testimony or other evidence to show loss causation, where the stock price collapsed before alleged fraud was disclosed); *Ikon Office Solutions Sec. Litig*., No. 98-CV-4286, 2001 U.S. Dist. LEXIS 1172, at *****22-*****23 (E.D. Pa. Feb. 6, 2001) (granting summary judgment in favor of the defendants because plaintiffs' expert's event study did not show price movements were due to alleged fraud).

In any event, Plaintiffs' abrupt shift does not aid them, because they cannot show that any of Mr. Read's statements regarding Geodon or Lyrica caused any investor's loss. The only "risk" that Plaintiffs allege was concealed and then "materialized" is the risk that the Company would be forced to pay a substantial fine or penalty related to the marketing of Bextra and "other drugs." Opp. at 113. To the extent that risk "materialized," it did so in the form of the settlement with the government, which was disclosed by the Company in January 2009 (the alleged "corrective disclosure"). The risk of such a substantial settlement involving Bextra and "other drugs" had already been disclosed in Pfizer SEC filings, which informed the market that:

> It is possible that **criminal charges and fines and/or civil penalties could result from pending government investigations**…
>
> The Department of Justice continues to actively investigate the marketing and safety of our COX-2 medicines, particularly Bextra, **and more recently has begun to investigate the marketing of certain other drugs**. These investigations have included requests for information and documents. We have been considering various ways to resolve the COX-2 matter, **which could result in the payment of a substantial fine and/or civil penalty**.[8]

Thus, to the extent Plaintiffs focus on the inclusion of the other medications as part of the investigation and eventual settlement, the risk associated with those other products was disclosed

[8] Pfizer SUF ¶ 104 (emphasis added).

as soon as they became part of the investigation (*see* Pfizer SUF ¶ 104 (DOJ "more recently has begun to investigate the marketing of certain other drugs")).

"[A] misstatement or omission is the 'proximate cause' of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged by a disappointed investor." *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005) (citations omitted). As the Court of Appeals explained, in order to establish loss causation under a materialization of risk theory, a plaintiff must show "that the *subject* of the fraudulent statement or omission was *the cause of the actual loss suffered*, i.e., that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." *Id.* (emphasis in original) (internal quotation marks omitted). The only risk that Mr. Read allegedly concealed was "the risk of Pfizer being forced to pay" a fine for its alleged "unlawful activity" with respect to Bextra and other unnamed drugs. Opp. at 113. But Pfizer disclosed this risk to the market, long before it allegedly "materialized." Because Plaintiffs have failed to create a genuine issue of material fact as to whether any of Mr. Read's statements caused a loss, summary judgment is appropriate.

Finally, Plaintiffs' failure to disaggregate losses caused to shareholders is fatal under binding Second Circuit precedent. *See, e.g.*, *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 157-58 (2d Cir. 2007) (affirming dismissal of claims against accountants where plaintiffs failed to allege facts showing that accountants' statements rather than those of company defendant caused plaintiffs' losses or facts allowing factfinder to make rough apportionment of losses among defendants). Here, Plaintiffs have failed to disaggregate alleged losses caused by statements made before Mr. Read joined the ELT in late 2006, which they concede is the earliest date for which he could bear any responsibility. In addition, Plaintiffs fail to disaggregate the

losses allegedly caused by statements related to Geodon and Lyrica from losses caused by statements related to Bextra, none of which can be attributed to Mr. Read. For these reasons, Mr. Read should be granted summary judgment on all of Plaintiffs' claims against him.[9] *In re Pfizer Inc. Sec. Litig.*, No. 04-CV-9866, 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014) (granting summary judgment for the defendant where plaintiff failed to disaggregate the loss allegedly caused by the defendant's statements from that caused by statements made by third party); *WM High Yield Fund v. O'Hanlon*, No. 04-3423, 2013 WL 3230667, at *12 (E.D. Pa. June 27, 2013) (granting summary judgment where plaintiffs failed to show what portion of their loss was caused by the moving defendants' alleged misrepresentations rather than the misrepresentations of other defendants).

Point V.

Plaintiffs Have Not Raised a Triable Issue as to Mr. Read's Alleged Control Over Pfizer or Other Individual Defendants With Respect to the Challenged Disclosures

To establish control person liability under Section 20(a), a plaintiff must prove more than simply corporate status—a plaintiff must establish actual control over the challenged transaction. Read Br. at 16. And there is no evidence that Mr. Read ever controlled Pfizer or another individual defendant with respect to the challenged statements in SEC filings and press releases. As Plaintiffs concede, their Section 20(a) control person claims against Mr. Read are based on

[9] Plaintiffs' argument in their opposition to Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein, that the PSLRA allows a plaintiff to avoid disaggregating loss causation because it allows for apportionment of damages among all defendants, is off point. Dkt. No. 293 at 29-30 (citing 15 U.S.C. § 78u-4(f)). Loss causation is an essential element and the PSLRA does not relieve Plaintiffs of the requirement to prove it with respect to each individual defendant, including Mr. Read. *Laperriere v. Vesta Ins. Grp., Inc.*, 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."). Mr. Read adopts and incorporates by reference the arguments by the other individual defendants as to why 15 U.S.C. § 78u-4(f) does not relieve Plaintiffs of their obligation to disaggregate losses.

nothing more than his status as a member of senior management, specifically, the ELT and as President of Worldwide Pharmaceutical Operations ("WPO"). Opp. at 116. But the law is clear that such status alone is insufficient as a matter of law to support control person liability. *See In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 221 (S.D.N.Y. 1999) (holding that the status as an officer or other member of management is generally not enough to constitute control); *Wallace v. Buttar*, 239 F. Supp. 2d 388, 396 (S.D.N.Y. 2003), *rev'd on other grounds*, 378 F.3d 182 (2d Cir. 2004) ("The power to direct the management and policies of a person must be a real, de facto power and not just de jure[,] 'officer or director status alone does not constitute control.'") (citations omitted).

Critically, Plaintiffs also ignore that the applicable law requires control over the "transaction in question," not merely generalized control over the alleged primary violator. *In re Smith Barney*, 884 F. Supp. 2d at 166 (quoting *H & H Acquisition Corp. v. Fin. Intranet Holdings*, 669 F. Supp. 2d 351, 361 (S.D.N.Y. 2009)). Plaintiffs have pointed to no evidence that any such general corporate control extended to the complained-of disclosures, as they must. *Id.* ("But these allegations are unavailing because they focus exclusively on [the CEO]'s 'control person status' rather than [his] exercise of 'actual control over the matters at issue."). Rather, Plaintiffs point only to the fact that "[a]s President of WPO, defendant Read, was responsible for operations and sales and marketing of Pfizer's pharmaceutical products." Opp. at 116.[10] This

[10] None of the cases Plaintiffs cite in their opposition is contrary to this authority. In *In re Ambac Fin. Grp. Inc. Sec. Litig.*, the court found that Ambac's CEO and CFO were controlling persons where they "participated in writing or reviewing Ambac's allegedly misleading corporate reports, press releases and SEC filings." 693 F. Supp. 2d 241, 274 (S.D.N.Y. 2010). Thus there was no dispute that they had control over the disputed transaction, and Section 20(a) liability was not based on corporate status alone. Here, Mr. Read had no role in writing or reviewing the relevant sections of the SEC legal proceedings disclosures, FAS 5 reserves, or press releases. In *Sgalambo v. McKenzie*, 739 F. Supp. 2d 453, 487 (S.D.N.Y. 2010), cited by Plaintiffs, the court summarily refused to dismiss control person claims over

fact, even considered in conjunction with Mr. Read's status on the ELT, is insufficient to give rise to Section 20(a) liability, in particular where Mr. Read did not sit on the Disclosure Committee or author or direct any of the disclosures other than the oral statements he personally made at analyst conferences.

Finally, contrary to Plaintiffs' argument, culpable participation is a required element of any control person claim under binding Second Circuit precedent. Plaintiffs' failure to point to any evidence of culpable participation by Mr. Read is thus fatal to their control person claims. *See 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 quotation marks omitted). For the same reasons Plaintiffs are unable to establish that Mr. Read acted with scienter, they are unable to show culpable participation.

CONCLUSION

For the foregoing reasons and those set out in Mr. Read's opening memorandum of law, this Court should grant Mr. Read's motion for summary judgment in its entirety.

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individuals who were senior officers and directors at the company defendant. But the officer defendants in *Sgalambo* were active participants in making the complained-of disclosures, unlike Mr. Read in this case, who had no role in any challenged disclosures, except oral statements that he personally made. Further, *Sgalambo* relied exclusively on *SEC v. First Jersey Sec., Inc*., in which the Second Circuit found control person liability against an officer who had engaged in "purposeful planning" of the deceptive conduct and "orchestrated every facet" of the alleged corporate fraud. *SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1471-72 (2d Cir. 1996).

DATED: New York, New York
December 8, 2014

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of December, 2014, the foregoing Defendant Ian C. Read's Reply in Support of Summary Judgment was filed with the Court through the CM/ECF system and thereby served on all counsel of record.

/s/ Brant D. Kuehn

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To: CourtMail@nysd.uscourts.gov
Subject: Activity in Case 1:10-cv-03864-AKH Jones et al v. Pfizer, Inc. et al Reply Memorandum of Law in Support of Motion

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Case Number: 1:10-cv-03864-AKH
Filer: Ian C. Read
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