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., HENRY A. MCKINNELL, JEFFREY B. KINDLER, FRANK D'AMELIO, DAVID L. SHEDLARZ, ALAN G. LEVIN, IAN C. READ, JOSEPH FECZKO, KAREN KATEN, J. PATRICK KELLY, and ALLEN WAXMAN,

Defendants.

ECF Case 10:cv-03864 (AKH)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT

CADWALADER, WICKERSHAM & TAFT LLP
Dennis J. Block
Hal. S. Shaftel
One World Financial Center
New York, New York 10281
Telephone: (212) 504-6000

Attorneys for Defendants Pfizer Inc.,
Henry A. McKinnell, Jeffrey B. Kindler,
Frank D'Amelio, David L. Shedlarz,
Alan G. Levin, Ian C. Read, and Joseph Feczko

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUES AND OTHER AUTHORITIES

PRELIMINARY STATEMENT

Defendants Pfizer Inc. ("Pfizer") and the Individual Defendants,[1] who are current or former Pfizer executives, submit this brief in support of their motion to dismiss Plaintiffs' Consolidated Class Action Complaint ("Complaint" or "Compl.") pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b) (the "PSLRA").

In this putative securities class action, Plaintiffs claim to have purchased Pfizer stock, during a Class Period defined as January 19, 2006 through January 23, 2009, based on Defendants' allegedly "false and misleading statements about Pfizer's sales performance and sales practices" with respect to certain specific medicines in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("1934 Act"). Compl. ¶ 1. In essence, Plaintiffs are alleging that Pfizer overstated its revenues and earnings from four drugs by including in its financials the alleged improper sales from the "off-label promotion" of these drugs. But among the medicines identified by Plaintiffs, Bextra, Geodon, Lyrica, and Zyvox, by far the largest in annual revenues – Bextra – was not sold after April 2005, and thus its reported sales and revenues could have no bearing on stock purchases during the later Class Period. Even as to the other medicines, as well as Bextra for that matter, Plaintiffs do not allege that the Company's financial statements during the Class Period reported any sales that were not made or revenues that were not received. Instead, Plaintiffs seek to challenge the amount of revenues and earnings disclosed by Pfizer by claiming that Pfizer announced a settlement in January 2009 of certain governmental investigations concerning alleged "unlawful off-label promotion" and other sales practices for these medicines, and that the settlement somehow makes the reported revenues and earnings for the Company during the Class Period materially false and misleading.

No aspect of the 2009 settlement of the governmental investigations undercuts the accuracy of any of the financial or other alleged statements made by Pfizer during the Class Period or otherwise. As Plaintiffs concede, Pfizer made regular disclosures of the ongoing

[1] The Individual Defendants include Dr. Henry A. McKinnell, Jeffrey B. Kindler, Frank D'Amelio, David L. Shedlarz, Alan G. Levin, Ian C. Read, and Joseph Feczko. While named as defendants, Allen Waxman, Karen Katen, and J. Patrick Kelly have not been served with the Complaint and currently are not parties.

investigations leading to the settlement. The disclosures, which began even before the start of the Class Period, provided regular updates throughout the Class Period, and included statements that the Company was "considering various ways to resolve" the matter and that the investigations "could result in the payment of a substantial fine and/or civil penalty." The eventual settlement primarily related to alleged marketing and sales activities concerning Bextra – which was not marketed or sold during the Class Period. With regard to both Bextra and the other, ancillary medicines covered by the settlement, the settlement provides no basis – nor do Plaintiffs otherwise plead any – for claiming that any magnitude of sales or revenues, let alone a material amount, were inaccurately reported, attributable to allegedly improper marketing and sales practices, or that the Individual Defendants were aware of these alleged activities. Plaintiffs cannot even allege that the revenues from sales of these medicines declined after any allegedly improper marketing activities ceased. To the contrary, revenues for these three medicines continued to increase dramatically, even after Plaintiffs concede that the Class Period ended and Pfizer sales personnel ceased the allegedly improper promotion of these products.

As demonstrated below, Plaintiffs' Complaint – involving conclusory allegations falling far short of the heightened pleading standard under Fed. R. Civ. P. 9(b) and the PSLRA – should be dismissed for at least seven independent reasons:

> First, Plaintiffs fail to adequately plead that Defendants made any material misleading statements or omissions, particularly since Pfizer's disclosures accurately reported sales and revenue figures and disclosed the governmental investigations. There is no duty to disclose anything more under Section 10(b) of the 1934 Act. Furthermore, no facts are pled that any amount of sales were even attributable to alleged improper practices or that any Defendant was aware of sales involving improper practices. It is "insufficient" for Plaintiffs to rely on "[a]llegations that are conclusory" to meet their pleading requirements. ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007). See Point I infra.
>
> Second, Plaintiffs have failed to adequately plead that the alleged misstatements or omissions were material and served to "defraud the market." Ganino v. Citizens Utils. Co., 228 F.3d 154, 167 (2d. Cir. 2000). As a matter of law, there is no materiality because Plaintiffs' own pleading cites to Pfizer's proper disclosures of the existence and nature of the government investigations at issue, dating at least as far back as March 2004, which went beyond any disclosure obligations in providing notice of the investigations. Nor, particularly when Bextra is excluded because it was not sold during the Class Period, could the sales and revenues of the other ancillary drugs, let alone the fines in respect of

these medicines under the 2009 settlement, be considered material in relation to the amount of Pfizer's overall sales and revenues. See Point II infra.

Third, Plaintiffs fail to adequately plead scienter on the part of any, let alone all, of the Defendants. Plaintiffs cannot raise an inference of scienter based on motives common to all corporations, including incentive-based compensation and the alleged failure to adequately reserve for losses, or based on bare allegations that certain Individual Defendants sold some of their stock at times unrelated to the alleged non-disclosures. Plaintiffs also do not allege facts giving rise to a strong inference that the Defendants knew or were severely reckless in disregarding alleged improper sales practices. See Tamar v. Mind C.T.I., Ltd., No. 09 Civ. 7132 (RMB), 2010 WL 2802216, at *8 (S.D.N.Y. July 2, 2010). Further, Plaintiffs' attempt to infer scienter by reference to Pfizer's 2009 settlement with governmental authorities is insufficient under Rule 9(b) because none of the Individual Defendants is in any way alleged to have acted improperly in connection with the allegations that led to the settlement. See Point III infra.

Fourth, Plaintiffs have failed to adequately plead transaction causation (i.e., reliance by Plaintiffs on any alleged misstatement), an essential element of a Section 10(b) claim. Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 96 (2d Cir. 2001). Plaintiffs cannot invoke the fraud on the market presumption of reliance because, as Plaintiffs' pleading acknowledges, the relevant disclosures were known to the market, Bextra was not even on the market during the period at issue, and thus any alleged misstatements could not be the basis for Plaintiff's purchase of Pfizer stock. See Point IV infra.

Fifth, Plaintiffs fail to adequately allege loss causation (i.e., a plausible connection between the alleged misstatement and loss) because Plaintiffs never take account of a multitude of relevant factors, including what medicines and in what magnitude were sold during the Class Period, the absence of indicia of any magnitude of sales attributable to any unlawful practices during the relevant period, or the announcement of Pfizer's merger with Wyeth – the largest-ever pharmaceutical industry transaction – at the same time it announced the resolution of the governmental investigations. See Point V infra.

Sixth, Plaintiffs' Section 20(a) claim for control person liability fails because Section 20(a) provides that a person who controls another person who violates Section 10(b) may be held liable. See 15 U.S.C. § 78(t)(a). However, Plaintiffs have not adequately alleged a violation of Section 10(b), thus their Section 20(a) claim also fails. See Point VI infra.

Seventh, Plaintiffs are barred by the statute of limitations by failing to bring this action within two years of the date that a "reasonably diligent" plaintiff would have discovered the potential claims. See Merck & Co., Inc. v. Reynolds, 130 S.Ct. 1784, 1798 (2010). Pfizer disclosed the pendency of the governmental investigations referenced by Plaintiffs beginning in 2004, and made repeated disclosures after that time. See Point VII infra.

For each of these separate reasons, this action should be dismissed against all Defendants with prejudice.[2]

STATEMENT OF ALLEGED FACTS

A. The Parties

This purported class action is brought by Lead Plaintiff Stichting Philips Pensioenfonds and Plaintiff Mary K. Jones ("Plaintiffs"), on behalf of an alleged class of investors who purchased or acquired Pfizer securities between January 19, 2006 and January 23, 2009 (the purported "Class Period"). Compl. ¶¶ 1, 18, 19. Pfizer is the world's largest research-based pharmaceutical company. Id. at ¶ 20. Plaintiffs also named individually as defendants ten current and former Pfizer executives, with varying responsibilities.[3]

B. Chronology of Relevant Disclosures

Plaintiffs allege that the Individual Defendants were aware – but "deliberately concealed from investors" (Compl. ¶ 12) during the Class Period – that Pfizer was engaged in "unlawful off-label marketing of Pfizer's pharmaceuticals, specifically Bextra, Geodon, Lyrica and Zyvox." Compl. ¶ 1. Off-label promotion refers to the marketing and promotion of drugs for uses not

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[2] Although Defendants do not concede the allegations made in the Complaint, they accept them solely for purposes of this motion because, even if assumed to be true, the allegations do not state a viable claim. In addition to the Complaint, the below is based on the following exhibits to the accompanying Declaration of Hal S. Shaftel ("Shaftel Decl."): (1) Documents publicly filed with the SEC, including exhibits to the Complaint. See Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991) ("court may take judicial notice of the contents of relevant public disclosure documents"); Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) (court may consider documents that are referenced in and integral to the complaint in ruling on motion to dismiss); (2) Published analyst reports. See In re MBIA, Inc. Sec. Litig., 700 F. Supp. 2d 566, 575 n. 7 (S.D.N.Y. 2010) (citing In re Zyprexa Prods. Liab. Litig., 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008)) (on motion to dismiss, judicial notice may be taken of analyst reports to determine "what the market knew:); Steinberg v. Ericsson LM Tele. Co., No. 07-9615 (RPP), 2008 WL 5170640 at *10 (S.D.N.Y. Dec. 10, 2008) (on dismissal motion, a "Court may take judicial notice of analyst reports."); and (3) Publicly available press statements. See In re IAC/InterActiveCorp Sec. Litig., 695 F. Supp. 2d 109, 123 (S.D.N.Y. 2010) ("The Court may consider the full contents of [a] press release because . . . the Court may take judicial notice of it as a matter of public record").

[3] The Individual Defendants held a range of positions at different times: Defendant Kindler served as Pfizer's General Counsel from January 2002 to July 2006, and its Chief Executive Officer from July 2006 to December 2010 and Chairman of the Board from December 2006 to December 2010. Defendant McKinnell served as Chief Executive Officer from 2001 until July 2006 and Chairman of the Board from 2001 until December 2006. Defendant D'Amelio has served as the Company's Chief Financial Officer since September 2007. Defendant Shedlarz served as Executive Vice President and Chief Financial Officer from January 1999 until July 2005 and Vice Chairman from March 2005 until December 2007. Defendant Levin served as Chief Financial Officer from March 2005 until September 2007. Defendant Read served as Senior Vice President and Group President of the Worldwide Biopharmaceutical Operations of the Company from 2006 until December 5, 2010, when he was named Chief Executive Officer. Defendant Kelly served as Vice President of U.S. Pharmaceuticals from 2002 until August 2006. Defendant Feczko served as Chief Medical Officer until May 2009. Defendant Katen served as Vice Chairman and President of Pfizer Human Health from March 2005 until March 2007. Defendant Waxman served as General Counsel from 2006 until 2008. Id. at ¶¶ 21, 24-32.

approved by the U.S. Food and Drug Administration ("FDA"). Compl. ¶ 3. While it is unlawful for pharmaceutical company personnel to promote products for uses not approved by the FDA, it is legal and common for physicians, at their discretion, to prescribe drugs for off-label use.

1. Bextra Is Subject to Government Investigations, Which Are Disclosed Prior to Discontinuation of Sales. Bextra was launched in 2002, and was an important drug used for the treatment of arthritis and menstrual discomfort, with sales of over $1.2 billion per year. Compl. ¶¶ 42, 44. Pfizer learned of allegations of off-label promotional activities with respect to Bextra in February 2004, when the Department of Justice ("DOJ") disclosed the existence of a qui tam complaint and advised Pfizer of its "Bextra off-label marketing investigation." Compl. ¶ 12. Qui tam complaints are filed under seal by relators, who are often former company employees, pursuant to the False Claims Act. See 31 U.S.C. § 3729, et seq. Within a month of learning of these allegations, on March 12, 2004, Pfizer publicly disclosed that the DOJ had initiated an investigation into the marketing and sale of Bextra. See Shaftel Decl., Ex. A1.

In April 2005, prior to the commencement of the Class Period, Pfizer voluntarily discontinued sales of Bextra for reasons involving severe skin reactions in a small amount of patients using the drug. Compl. ¶ 45. The discontinuance had nothing to do with marketing or sales practices. Even after Bextra was removed from the market, Pfizer continued to make regular disclosures of the pendency of ongoing investigations, both by the DOJ and later by state authorities, in its quarterly and annual reports. See Compl. ¶¶ 62-67, 69. In addition to the governmental investigations concerning Bextra, Pfizer also disclosed that the government was investigating the Company's sales and marketing practices for other drugs. Compl. ¶ 66.

2. Pfizer Settles the Bextra Investigations. On January 26 2009, Pfizer announced that it reached an agreement with the DOJ and other governmental authorities to resolve the previously disclosed investigations into allegations of past unlawful promotion of Bextra and certain other medicines. Compl. ¶ 101. The settlement ("2009 Settlement") was finally entered into on August 31, 2009. Compl. ¶ 121. As part of the 2009 Settlement, a

subsidiary of Pfizer agreed to plead guilty to one count of off-label promotion relating solely to Bextra and pay a criminal fine of $1.3 billion, as well as $1 billion civil penalty. Compl. ¶ 106, Ex. A. Pfizer did not admit to any off-label practices with respect to Bextra nor to the government's description of the alleged misconduct. The government's Information did not mention any of the Individual Defendants, let alone involve any allegations that any of them were involved in, or aware of, any alleged improper sales practices. See id.[4]

3. 2009 Settlement Also Covers Certain Ancillary Drugs. Of the total $2.3 billion of penalties and fines paid as part of the 2009 settlement, roughly 80% was allocated under the settlement for alleged Bextra-related conduct. The balance of the settlement payment involved civil payments for other drugs, including (i) Geodon, a drug approved for the treatment of schizophrenia, launched in 2001 (Compl. ¶ 46); (ii) Lyrica, a drug approved for the treatment of fibromyalgia, launched in 2005 (Compl. ¶ 50); and (iii) Zyvox, an antibiotic drug, launched in 2001(Compl. ¶ 48). Compl. ¶ 106, Ex. A. The investigations into Lyrica and Zyvox primarily involved alleged conduct in making claims of product superiority (without sufficient clinical support), and not improper off-label promotion. Compl. ¶¶ 48, 50.

Note that during the Class Period, Pfizer's overall sales ranged from $48 billion in 2006 to $50 billion in 2009. See Shaftel Decl. Exs. A2 and A4. The total sales, however, for Geodon, Lyrica and Zyvox collectively accounted for only a very small portion of Pfizer's revenue during the Class Period. For the first year of the Class Period, all sales of these medicines (whether for on-label use or off-label use, and whether in the U.S., as solely at issue in the 2009 Settlement, or outside the U.S.) accounted only for approximately 5% of Pfizer's global revenues. See Shaftel Decl. Ex. A3. Even more significantly, there was no reduction of sales of these products

[4] Perhaps seeking to unjustifiably tarnish Defendants, Plaintiffs refer to prior instances when Pfizer resolved sales and marketing investigations by the government in 2002, 2004 and 2007. See Compl. ¶ 114 (discussing 2002 Corporate Integrity Agreement which resolved allegations of Medicaid "best price" violations by predecessor entity); ¶¶ 2, 5 (discussing 2004 Corporate Integrity Agreement which resolved allegations of off-label promotion of Neurontin by predecessor entity); ¶ 59 (referring to the 2007 deferred prosecution agreement which covered alleged conduct at another predecessor entity). None of these resolutions could have any bearing on Plaintiffs' claims because each (a) involved the conduct of a predecessor company, where the settlement occurred after Pfizer acquired the entity; and (b) the conduct at issue occurred before the Class Period. If anything, these pre-Class Period settlements put investors on further notice of industry-wide risks associated with promotional practices.

after the end of the Class Period and the alleged conduct ceased; indeed, sales were higher.[5] In addition, with regard to these medicines, there was no admission of wrongdoing whatsoever under the 2009 Settlement, no criminal fine was imposed, and no determination was made as to any amount or percentage of sales attributable to alleged off-label marketing. See Compl., Ex. A.

4. Pfizer Acquires Wyeth. Also on January 26, 2009, the day the 2009 Settlement was announced, Pfizer announced its agreement to acquire a major pharmaceutical company, Wyeth. Compl. ¶ 16. At a value of $68 billion in Pfizer stock, Pfizer's acquisition of Wyeth was the largest merger in pharmaceutical history. Compl. ¶ 138. The transaction value was almost 30 times larger than the 2009 Settlement's penalty and fines. That day, Pfizer common stock price declined to $15.65 from $17.45. Compl. ¶ 17. Once the market more fully evaluated the transaction, Pfizer's stock price rebounded in October 2009, and then increased further. See Yahoo! Finance, Pfizer, Inc. Common Stock (10/15/2009), available at http://finance.yahoo.com/q/hp?s=PFE&a=09&b=15 &c=2009&d=09&e=15&f=2009&g=d.

C. The Claims Asserted in the Complaint

Plaintiffs contend that Pfizer's stock price was artificially inflated during the Class Period due to Defendants' alleged misrepresentations and omissions in Pfizer's publicly disclosed reports to the SEC on Forms 10-K and 10-Q and in press releases, and that the January 26, 2009 announcement of the 2009 Settlement – the same day the Wyeth transaction was announced – caused the stock price to fall. Compl. ¶ 154. In particular, Plaintiffs allege that Defendants omitted during the Class Period to disclose "that Pfizer was only able to achieve its reported growth in drug sales it reported by utilizing illicit off-label promotion." Compl. ¶ 15. According to Plaintiffs, (1) Pfizer's disclosures allegedly misrepresented the existence of "illegal off-label

[5] Plaintiffs contend that "unlawful promotion" of Geodon continued until the end of 2007 (See Compl. at ¶ 46), but revenues from Geodon sales thereafter rose 17.3% between January 2008 and December 2009. See Shaftel Decl. Ex. A2. Similarly, while Plaintiffs contend that the alleged illegal promotion of Zyvox ended in February of 2008 (See Compl. at ¶ 48), Zyvox revenues continued to increase throughout 2008 and 2009, rising 20.9% between January 2008 through December 2009. Shaftel Decl. Ex. A2. Likewise, revenues for Lyrica sales rose 10.4% in the year following the date after which Plaintiffs contend that the alleged illegal promotion ended See Compl. at ¶ 50; Shaftel Decl. Ex. A2.

promotional practices" (Compl. ¶ 14), and (2) Defendants "were well aware" of the alleged conduct. Compl. ¶ 12.

Based on alleged off-label promotion and other misconduct by certain Pfizer employees in its sales force, and without linking such alleged conduct to any of the Individual Defendants, Plaintiffs contend that: (1) Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5; and (2) Pfizer, and Defendants Kindler, McKinnell, D'Amelio, Levin, Shedlarz, Read, Feczko, Waxman are liable under Section 20(a) of the Exchange Act as control persons.

ARGUMENT

To state a claim under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder, a plaintiff must allege: (i) a misstatement or omission (ii) of material fact by a defendant, (iii) with scienter, (iv) in connection with the purchase or sale of a security, (v) reasonable reliance by the plaintiff on the representation or omission, and (vi) that the misstatement or omission proximately caused economic loss. See Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005); Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147, 153 (2d Cir. 2007) (affirming dismissal of complaint). Failure to properly plead any one of these elements necessitates dismissal of the claim. Good Hill Partners L.P. v. WM Asset Holdings Corp. CI 2007-WM2, 583 F. Supp. 2d 517, 520-21 (S.D.N.Y. 2008) (dismissing securities fraud claim).

Furthermore, complaints alleging securities fraud are subject to the heightened pleading requirements imposed by Fed. R. Civ. P. 9(b) and the PSLRA. See ECA, Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 196 (2d Cir. 2009). Rule 9(b) requires "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting the fraud or mistake." Fed. R. Civ. P. 9(b). "Allegations that are conclusory or unsupported by factual assertions are insufficient" and will warrant dismissal. ATSI Commc'ns, 493 F.3d at 99. The PSLRA requires Plaintiffs to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1)(B). The PSLRA

also requires Plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Id. § 78u-4(b)(2)(A); see Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007) ("an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."). As addressed below, Plaintiffs do not – and cannot – adequately plead any of the claims asserted in the Complaint.

I. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE ANY MISLEADING STATEMENTS OR OMISSIONS

Plaintiffs do not assert that the Company's disclosures reported any sales that were not actually made or any revenues not received. Indeed, with respect to Bextra, there could be no issue of misleading disclosures of sales and revenues during the Class Period, since the sale of the product was voluntarily discontinued well before the commencement of the Class Period. Further, Plaintiffs concede – as they must – that the Company made regular disclosures about the pendency of the governmental investigations leading to the 2009 Settlement. But in an effort to challenge the quality of these disclosures, Plaintiffs allege – without support – that the Individual Defendants were aware of, but failed to disclose, that improper sales practices in fact were occurring; that some material (but unspecified) quantum of sales and revenues was attributable to alleged improper activities; and that the ultimate resolution with the government could have been foreseen years in advance. Under the heightened pleading requirements of Fed. R. Civ. P. 9(b) and the PSLRA, none of these utterly conclusory assumptions provide a basis to sustain Plaintiffs' pleading.

A. Sales and Revenues Were Accurately Reported

No allegation is made that any reported sales or revenue figures for the medicines covered by the 2009 Settlement were inaccurate. Rather, Plaintiffs rely upon conclusory statements that "[sales] performance, unbeknownst to investors was fueled by Pfizer's illegal off-label marketing." Compl. ¶ 90. However, Bextra was withdrawn from the market in April 2005, before the Class Period began, and thus its reported sales and revenues are not even relevant to this case. In any event, nothing in the 2009 Settlement, nor elsewhere pleaded, provides any

basis for claiming that any magnitude – let alone a material one – of Bextra sales or revenues was even related to improper marketing practices. Likewise, Plaintiffs do not plead how the sales figures of Geodon, Lyrica and Zyvox were inaccurate in any way.

Plaintiffs at most allege that Defendants misrepresented the true nature of its revenue growth reported from the sales of Geodon, Lyrica and Zyvox. Compl. ¶¶ 13-14. For example, Plaintiffs contend that the following statements were misleading:

> "Geodon's strong performance is due to the improved perception among clinician's of its efficacy, increased benefits for optimal dosing and its favorable metabolic profile"; Id., and "Geodon exhibits strong full-year growth." Compl. ¶¶ 13-14.
>
> "Lyrica's growth continues to be fueled by strong efficacy as well as high patient and physician satisfaction in the marketplace." Id.
>
> "our most important medicines perform[ed] well around the world, including Lyrica, Zyvox and Geodon." Id. ¶ 99.

See also Compl. ¶¶ 71-74, 90-100. Importantly, the Complaint does not allege that any of sales or revenue figures are incorrect. Nor is there anything false about the challenged statements, particularly since the 2009 Settlement does not even implicate sales practices outside the U.S. Pfizer's statements about its drugs' performances indisputably were accurate.

Plaintiffs do not plead any particulars about a single sale that was made as a result of alleged off-label promotion of Pfizer medicines. See In re Citigroup, Incs. Secs. Litig., 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004) (dismissing allegation that Citigroup violated Section 10(b) because it "fail[ed] to disclose that its revenues were derived from . . . illegitimate sources"), aff'd sub nom., Albert Fadem Trust v. Citigroup, Inc., 165 Fed. Appx. 928 (2d Cir. 2006). In fact, the Complaint contains only one reference to off-label revenues during the Class Period: a claim with no citation or basis that "more than $10.6 billion [in revenues] . . . was a direct result of off-label marketing." Compl. ¶ 93.[6] But even if Plaintiffs' unsupported figure of $10.6 billion

[6] In an attempt to bolster their claims, Plaintiffs further allege in conclusory fashion that Defendants "misrepresented the results" of the clinical CATIE trials for Geodon when discussing reasons behind revenue growth. Id. at ¶¶ 95-96. Specifically, Plaintiffs cite to the statement that the CATIE trial demonstrated that Geodon was the only one of the five drugs studied that both had "comparable efficacy" ***and*** reduced weight gain and certain metabolic side effects. Id. Plaintiffs only challenge the statement by alleging that "the CATIE trial actually revealed Geodon was not more effective than the other anti-psychotic drugs to which it was compared" and that "[t]he drug did ***not*** prove itself more effective at higher doses." Id. at ¶ 96 (emphasis in Complaint). However, the very statement they challenge nowhere claims that the drug was "more effective," but only states that Geodon had

is to be accepted, Plaintiffs never differentiate between revenue from lawful off-label prescriptions – at the lawful discretion of physicians – and revenue from any alleged improper off-label promotion by Pfizer personnel. Thus, Plaintiffs fail to plead any basis that supports their contention that the sales figures disclosed for Geodon, Lyrica and Zyvox were false or misleading.

Tellingly, after the alleged off-label promotion ceased even according to Plaintiffs, the aggregate sales of these drugs continued to increase significantly, and therefore, it could not have been a driver for the sales of these drugs. See supra, at note 5.

B. The Government Investigations Concerning Pfizer Sales and Marketing Practices Were Adequately Disclosed

While there is no legal requirement or duty to disclose governmental investigations, Plaintiffs concede that Pfizer disclosed the commencement and pendency of the government investigations underlying the 2009 Settlement. For instance, Pfizer's SEC filings advised investors that:

> "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. In 2005, we received a similar request from the staff of the Securities and Exchange Commission." Compl. ¶ 62.

> "Since 2005, we have received requests for information and documents from the Department of Justice concerning certain physician payments budgeted to our prescription pharmaceutical products." Compl. ¶ 63; see also Compl. ¶¶ 61-70.

In fact, beginning with Pfizer's 2003 Financial Report, the Company publicly disclosed the government investigations into Pfizer's sales and marketing practices involving Bextra and other drugs on at least sixteen occasions.[7] These public filings accurately disclosed the following: (i) requests for information from the government regarding the marketing of several medicines and physician payments; (ii) the Company was "considering various ways to resolve" the potential claims; (iii) the possibility that a resolution of the investigations "could result in the

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"comparable efficacy to established agents despite sub-optimal dosing while reducing weight, reducing cholesterol, reducing lipids and reducing measures of glucose." Id. at ¶ 95.

[7] See Shaftel Decl. Exs. A1 through A18 (Pfizer public disclosures pre-dating the Class Period and continuing through its duration, including exhibits to the Complaint).

payment of a substantial fine and/or civil penalty"; and (iv) the announcement of an agreement in principle to resolve the investigations. Indeed, Plaintiffs' own Complaint cites to various disclosures, e.g., Compl. ¶¶ 64-66, which provided investors notice of the existence and risks of the investigations. See Steed Fin. LDC v. Nomura Secs. Int'l, Inc., No. 04-5485, 2005 WL 2243899, at *2 (2d Cir. Sept. 14, 2005) (finding that the disclosure of government investigations was sufficient to put investors on notice of the underlying alleged conduct). Further, market analysts during the Class Period focused on the disclosed investigations into promotional practices as a significant factor affecting Pfizer's stock price, and also regularly noted the pendency of the investigations.[8]

Plaintiffs resort to claiming that the quality of these statements "misrepresented the nature and severity" of these investigations. Compl. ¶ 14. Although Plaintiffs contend – from the perspective of 20/20 hindsight – that Defendants initially did not disclose the full extent of the Company's ultimate liability to the government (see, e.g., Compl. ¶¶ 13, 14, 61, 63, 34, 69, 70, 75, 86, and 89), a company is not required to predict the outcome of governmental investigations. Indeed, since a company is not even required to make disclosures of investigations, especially if it believes they do not involve meritorious allegations, Pfizer, if anything, exceeded its disclosure obligations. See In re Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243 (WHP), 2006 WL 3026024, at *16 (S.D.N.Y. Oct. 25, 2006) (holding on a motion to dismiss that there is no duty to disclose the "speculative possibility" that the company might be found to violate the law); In re Par Pharm., Inc. Sec. Litig., 733 F. Supp. 668, 678 (S.D.N.Y. 1990) (stating on a motion to dismiss that "[d]efendants cannot be held liable for failing to 'disclose' what would have been mere speculation."). Indeed, the lead prosecutor on the Bextra case, Assistant United States Attorney Sara Bloom, recently described their investigation of Pfizer as involving "more nuanced behavior" that was initially seen as "too close" of a call to prosecute, but has since evolved into a "legitimate area[] of investigation." See Shaftel Decl., Ex. C1.

[8] See Shaftel Decl. Exs. B1 through B133 (market analyst reports predating the Class Period and continuing through its duration).

Nor do the federal securities laws require a company to characterize government claims or ongoing investigations with "'pejorative nouns and adjectives" or to "verbalize all adverse inferences expressly." Stein v. Aldrich, No. 78 Civ. 2364, 1980 WL 1489, at *5 (S.D.N.Y. July 18, 1980) (citations omitted) (granting motion to dismiss); see also Warner Commc'ns, Inc. v. Murdoch, 581 F. Supp. 1482, 1490 (D. Del. 1984). Here, Plaintiffs would have had Pfizer do exactly that – characterize what were unproven and even, for a considerable period, unknown allegations by the government. Pfizer was under no obligation to do so. Thus, Plaintiffs fail to plead, with any particularity, what information Defendants should have disclosed but did not. Contentions that Defendants should have disclosed unproven, indeed unalleged assertions of misconduct are incorrect as a matter of law.

In the face of the uncontroverted disclosures made by Pfizer, Plaintiffs claim, without any foundation, that the Individual Defendants must have known of the existence and extent of alleged unlawful conduct and that years later there would be a settlement of a government investigation on the terms ultimately negotiated. Compl. ¶ 14. Additionally, Pfizer should have, according to Plaintiffs, recorded a loss reserve for a settlement before the settlement was negotiated, or even before any negotiations took place. Id. However, Plaintiffs do not – and cannot – make any allegations that the Defendants during the course of five years of investigations believed that misconduct took place and were aware that a settlement would be negotiated, or the magnitude of any such settlement, yet unlawfully concealed it.[9] Pfizer disclosed what it knew at the time – that the DOJ's investigation into Bextra "could result in the payment of a substantial fine and/or civil penalty." See Shaftel Decl. Ex. A16. Indeed, Plaintiffs fail to make any allegation as to the timing of Defendants' knowledge of the government's demands, the Company's willingness to settle, and what amount ultimately would be agreed to if a settlement were agreed to with the government.

[9] Relatedly, Plaintiffs complain – in conclusory fashion – that Defendants should have taken a loss reserve earlier under GAAP. However, an alleged violation of GAAP without "evidence of corresponding fraudulent intent," is not sufficient to state a securities fraud claim. Novak v. Kasaks, 216 F.3d 300, 309 (2d Cir. 2000); Woodward v. Raymond James Fin., Inc., No. 09-CV-5347 (RPP), 2010 WL 3239411, at *12 (S.D.N.Y. Aug. 16, 2010) (granting motion to dismiss securities fraud class action); In re Fannie Mae 2008 Secs. Litig., Nos. 08 Civ. 7831, 09 MD 2013 (PAC), 2010 WL 3825713, at *17 (S.D.N.Y. Sept. 30, 2010) (dismissing allegations based on GAAP violations). Indeed, GAAP "tolerate[s] a range of reasonable treatments, leaving the choice among alternatives to management." Thor Power Tool Co. v. Commissioner of Internal Revenue, 439 U.S. 522, 544 (1979).

As a related matter, Plaintiffs contend that Defendants concealed that Pfizer personnel violated its own corporate policies and that the Company did not possess adequate internal controls to prevent, detect and stop alleged off-label marketing. Plaintiffs challenge generalized public statements such as:

> "all employees are obligated to understand the basic rules Pfizer follows to ensure compliance with FDA law and regulations regarding labeling, promotion, off-label use, pharmaceutical samples, and adverse event reporting." Compl. ¶ 54.
>
> "At Pfizer, we are committed to fair competition. This means, among other things, abiding by all laws that apply to our marketing activities." Compl. ¶ 55.

See also Compl. ¶¶ 52-57. However, no allegation is made that these corporate policies did not exist or that the general descriptions were false or misleading. Moreover, every one of Pfizer's SEC filings certified that the statements made were only "[b]ased on [the signatory's] knowledge". Compl. ¶ 58. Even accepting, for purposes of this motion, the existence of violations of policies, none of these statements represented that no violations by individual employees had, would or could occur. Nor do Plaintiffs allege any facts indicating that any Individual Defendant was aware of conduct "violating" these policies. Id. at ¶ 56. See In re Citigroup Inc. Secs. Litig., 330 F. Supp. 2d at 378 (dismissing Section 10(b) claim and holding that it is insufficient to quote descriptions from company policies without specifying how each policy was violated).

II. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE MATERIALITY

To adequately plead a Section 10(b) and Rule 10b-5 claim, a plaintiff "must establish that the defendant, in connection with the purchase of sale of securities, made a materially false statement [of] a material fact . . ." Lawrence v. Cohn, 325 F.3d 141, 147 (2d. Cir. 2003). "The materiality of a misstatement depends on whether there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [act]." ECA, Local 134 IBEW Joint Pension Trust of Chi., 553 F.3d at 197 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988)). An omission is material if there is a substantial likelihood that the "disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly

altered the 'total mix' of the information made available." TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976). Here, Plaintiffs fail to plead materiality for at least two reasons.

First, "[a] misrepresentation is immaterial if the information is already known to the market because the misrepresentation cannot then defraud the market." Ganino, 228 F.3d at 167; See also Hall v. Children's Place Retail Stores, Inc., 580 F. Supp. 2d 212, 226 (S.D.N.Y. 2008) ("Under the 'truth-on-the-market' doctrine, information already known on the market is [] immaterial."); In re MBIA Inc. Sec. Litig., No. 08-CIV-264 (KMK), 2010 WL 1253925, at *12 (S.D.N.Y. Mar. 31, 2010). Plaintiffs in effect concede that the challenged statements were immaterial. The Complaint contains multiple citations to public disclosures of the government investigations, dating back at least as far as March 2004. Thereafter, Pfizer's public filings also disclosed the existence and nature of the government investigations and the possibility of a large fine or penalty (see Point I(B) supra), and they thereby put investors on notice of the potential issues relating to promotional practices. In Ieradi v. Mylan Labs., Inc., 230 F. 3d 594, 599 (3d Cir. 2000), the court found that, like here, the company's public disclosure of a government investigation was "more than sufficient to put potential investors . . . on notice." Because Pfizer continually made these disclosures to the market, Plaintiffs cannot claim that this information was material.

Second, Plaintiffs claim that statements regarding the revenues derived from sales of Bextra and the other identified drugs were materially misleading during the Class Period. But Bextra was voluntarily withdrawn from the market before the Class Period began, and thus, by definition, Plaintiffs cannot claim that any statements about its sales or revenues fraudulently induced them to purchase Pfizer stock during the Class Period. Plaintiffs attempt to disguise this deficiency by citing to the sales figures for three other drugs – Geodon, Lyrica and Zyvox. However, while these drugs were included in the ultimate resolution with the government, they constituted a very insignificant portion of the settlement and of Pfizer's overall business. In fact, in the 2009 Settlement, the government allocated almost 80% of the combined criminal and civil payments to Bextra. See Compl. Ex. A. In any event, Plaintiffs fail to make any particularized

allegations of what percentage, if any, of the sales of each of these three drugs were due to alleged illegal marketing activity. Even if, for the sake of argument, one makes the facially unsupportable assumption that 100% of the sales of Geodon, Lyrica and Zyvox were due to improper marketing, an absurd conclusion, the total sales of these drugs were not a significant portion of the Company's total revenue. If Plaintiffs cannot identify the alleged extent to which any sales figures were based on alleged off-label promotion, they cannot plead that the challenged statements were material.[10] Finally, Plaintiffs ignore that the aggregate amount of the revenues received by Pfizer from the sale of these ancillary drugs actually increased subsequent to the alleged cessation of the conduct alleged. See supra, at note 5.

III. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE SCIENTER

Plaintiffs have failed to allege adequately that any of the Defendants acted with scienter, i.e. that they acted with the "intent to deceive, manipulate or defraud." Tellabs, Inc., 551 U.S. at 319. The PSLRA and Fed. R. Civ. P. 9(b) require that intent be established either "by alleging facts (1) showing that the defendants had both motive and opportunity to commit fraud, or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." ATSI Commc'ns, Inc., 493 F.3d at 99.

A. Plaintiffs Do Not Plead Any Defendant Had A Motive or Opportunity to Commit Fraud

To demonstrate "motive and opportunity to commit fraud," a plaintiff "must allege that defendants could realize 'concrete benefits' through the deception.'" Suez Equity, 250 F.3d at 99-100 (citations omitted); Lesavoy v. Lane, 304 F. Supp. 2d 520, 530 (S.D.N.Y. 2004), aff'd in part, vacated in part, remanded by sub. nom., Lesavoy v. Gattullo-Wilson, 170 Fed. Appx. 721 (2006). As discussed below, Plaintiffs fail to plead particularized facts – as required – demonstrating that Defendants had a motive or opportunity to commit securities fraud.

[10] Furthermore, the $2.3 billion paid as part of the 2009 Settlement is not material in the overall context of the sales and revenues of the medicines at issue. During the period in which Plaintiffs alleged that improper activities occurred (see Compl. ¶¶ 46, 48, 50, 83, fn. 15), Pfizer received more than $400 billion in revenues. In the context of the overall sales, the settlement amount is only a fraction of 1% of Pfizer's revenue for the period, and it is thus immaterial as a matter of law. See ECA, Local 134 IBEW Joint Pension Trust of Chi., 553 F.3d at 197 (finding that the accounting treatment of 0.3% of defendant's assets was immaterial as a matter of law); In re Duke Energy Corp. Sec. Litig., 282 F. Supp. 2d 158, 161 (S.D.N.Y. 2003) (finding on a motion to dismiss that an inflation of company's revenue by 0.3% was immaterial as a matter of law), aff'd, 113 Fed. Appx. 427 (3d Cir. 2004).

1. Plaintiffs' Allegations Regarding Incentive-Based Executive Compensation Are Insufficient to Plead Motive. Plaintiffs allege that the mere fact that the Individual Defendants' compensation was based on the Company's financial performance motivated them to commit fraud. Compl. ¶¶ 126-129. However, on motions to dismiss, the Second Circuit has expressly rejected the sufficiency of such allegations, stating that "incentive compensation tied to general corporate profitability is not a basis for a finding of scienter." Acito v. IMCERA Grp., Inc., 47 F.3d 47, 54 (2d Cir. 1995); Kalnit v. Eichler, 264 F.3d 131, 139 (2d Cir. 2001) (affirming dismissal and holding that "[m]otives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from this fraud."); Novak, 216 F.3d at 307 (finding on a motion to dismiss that scienter cannot be established "based on motives possessed by virtually all corporate insiders, including . . . the desire to maintain a high stock price in order to increase executive compensation").

2. Plaintiffs' Allegations of Failure to Adequately Reserve Are Insufficient to Plead Motive. Plaintiffs also seek to establish scienter by alleging that Individual Defendants knew that Pfizer faced a financial risk from the government investigations, but "failed to reserve for the fines and penalties that would be assessed for the [illegal off-label promotion] or disclose to investors that the Company's financial condition was marred by Pfizer's unlawful off-label marketing." Compl. ¶ 47; see id. at ¶¶ 41, 45, 51. Although Plaintiffs imply that Defendants' scienter is established by this alleged effort to make Pfizer appear more profitable, mere allegations of common motives among corporate officers, "such as the desire for the corporation to appear profitable," are not adequate for purposes of pleading scienter. See Woodward, 2010 WL 3239411, at *9 (rejecting scienter on a motion to dismiss based on alleged incentive to under-fund loss reserves). In addition, Plaintiffs do not and cannot even plead any specific amount of profit that was allegedly earned as a result of unlawful off-label promotion. Instead, Plaintiffs only allege aggregate sales figures which include sales

from not only on-label prescriptions, but also off-label prescriptions which physicians in their discretion are legally entitled to write. See id.

3. The Stock Sale Allegations Are Insufficient to Plead Scienter. Plaintiffs' assertion that Defendants Feczko, Katen, Levin, McKinnell, Read and Shedlarz ("Selling Defendants") sold some Pfizer stock between 2006 and 2007 also fails to meet the pleading requirements necessary to raise a strong inference that they acted with fraudulent intent. Compl. ¶ 130, Ex. N. The "mere fact that insider stock sales occurred does not suffice to establish scienter." In re Keyspan Corp. Sec. Litig., 383 F. Supp. 2d 358, 381-86 (E.D.N.Y. 2003) (granting motion to dismiss Section 10(b) claim); see also Acito, 47 F.3d at 53 (same). Rather, to demonstrate motive to commit fraud, Plaintiffs must plead that the Defendants trading during the relevant period was unusual. See id., at 54. The relevant factors include: (1) the amount of profit from the sales; (2) percentage of defendants' holding sold; (3) number of insiders selling stock; (4) timing of the sales with respect to alleged misstatements; and (5) adherence to prior stock sale patterns. In re Keyspan, 383 F. Supp. 2d at 381-82. Plaintiffs omit any detail regarding the stock sales and cite only to the Selling Defendants' $22 million combined proceeds. Compl. ¶ 130. Gross proceeds are not, however, relevant to the scienter analysis. See Malin v. XL Capital Ltd., 499 F. Supp. 2d 117, 152 (D.Conn. 2007) aff'd, 312 Fed. Appx. 400 (2d Cir. 2009) (dismissing complaint and holding that insider transactions are used in the scienter analysis to determine the "likely intent of the insiders. The gross proceeds, standing alone, tell us very little.").

The timing of the Selling Defendants' sales, which occurred between February 2006 and November 2007, also does not support an inference of scienter if "the timing of the insider sales [does] not closely coincide with alleged false statements." Fishbaum v. Liz Claiborne, Inc., No. 98-9396, 1999 WL 568023, at *4 (2d Cir. July 27, 1999) (affirming district court's decision to dismiss a securities fraud claim); Malin, 499 F. Supp. 2d at 156. Here, Plaintiffs allege that the "truth" regarding the alleged misstatements and omissions was "revealed" on January 26, 2009 when Pfizer disclosed the 2009 Settlement. Compl. ¶ 101. Because the Selling Defendants sold

Pfizer stock well over a year before this announcement, with the last alleged sale during the Class Period occurring on November 7, 2007 (Compl. Ex. N), the timing of the sales does not suggest an effort to profit from stock sales by "dump[ing] the stock just before the investing public discovered a fraud." Frazier v. VitalWorks, Inc., 341 F. Supp. 2d 142, 162 (D. Conn. 2004) (granting motion to dismiss); In re BISYS Secs. Litig., 397 F. Supp. 2d 430, 444-45 (S.D.N.Y. 2005) (dismissing complaint where sales were not at a time when defendants would have cashed in before the fraud was revealed). Further, Plaintiffs makes no allegations as to the percentage of the insiders' stock sold or why Defendants sold stock. Thus, on their face, the mere allegation that some of the Defendants sold Pfizer stock does not support an inference that Defendants acted with scienter.[11]

B. Plaintiffs Have Not Alleged Strong Circumstantial Evidence of Conscious Misbehavior or Recklessness

To show "conscious misbehavior or recklessness," a plaintiff must allege particular facts of "deliberate illegal behavior" or conduct that was "'highly unreasonable' and 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Novak, 216 F.3d at 308.

1. Conclusory Allegations that the Defendants "Knew or Recklessly Disregarded" Are Insufficient to Plead Scienter. Plaintiffs try to establish scienter through conclusory allegations that Defendants "kn[ew] or recklessly disregarded" Pfizer's promotion of drugs for off-label uses and the chance that the Company would incur a fine for such practices. See Compl. ¶¶ 70, 77, 84, 120. In particular, Plaintiffs allege that Defendants "were employing a myriad of illegal marketing techniques," "falsely assured investors that the adequacy of their controls prevents any [off-label promotion]," "misrepresented the nature and extent of the DOJ's

[11] From the public record, Defendants Kindler, D'Amelio, and Waxman did not sell Pfizer stock during the Class Period. The lack of sales by several Defendants "undermines plaintiffs' claim that defendants delayed notifying the public so that they could sell their stock at a huge profit." Acito, 47 F.3d at 54. Further, where the CEO, here Defendant Kindler, "who held a significant amount of shares and who would have been an essential participant in any fraudulent scheme, did not sell stock, undermines any suggestion of knowledge on the part of the defendants due to any other claimed inside sells." Druskin v. Answerthink, Inc., 299 F. Supp. 2d 1307, 1336, n. 40 (S.D. Fla. 2004) (granting motion to dismiss securities fraud class action).

investigation into Pfizer's off-label marketing of Bextra, Geodon, Lyrica and Zyvox" and "concealed the material adverse risk to Pfizer's financial statements . . . as a result of their pervasive illegal marketing techniques." Compl. ¶ 70. Plaintiffs "fail to allege facts that particularize how and why each defendant actually knew, or was reckless in not knowing" of the alleged unlawful marketing practices, inadequate controls or the possibility that Pfizer would be fined for such conduct. See Tamar, 2010 WL 2802216, at *8 (granting motion to dismiss securities fraud class action).[12]

Plaintiffs fail to point to a single event or communication indicating that any Individual Defendant knew of any – let alone widespread – unlawful conduct or violations of company policy. See Compl. ¶¶ at 12, 34, 40-51, 70, 77, 89, 93 and 153. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1129 (2d Cir. 1994) (affirming dismissal of complaint and stating that conclusory allegations that defendants knew or were reckless in not knowing is insufficient to demonstrate scienter). Indeed, the government investigations extending over five years resulted in a settlement in which none of the Individual Defendants was subject to any accusations of involvement in, or knowledge of, any improper activities. See Compl. Ex. A. Instead, Plaintiffs merely reiterate the entirely speculative assumption that Defendants "knew . . . but concealed from investors that substantial fines and penalties as a result of Pfizer's off-label marketing campaigns of Bextra, Lyrica, Geodon and Zyvox . . . would have a significant and foreseen impact on Pfizer's cash-flow." Compl. ¶ 89. Such allegations are insufficient to meet the scienter pleading standard. Moreover, as described above, this possibility was disclosed in Pfizer's public filings during the Class Period. Compl. ¶ 66.

2. Plaintiffs' Allegations Regarding the Corporate Integrity Agreements and Blue Book Are Insufficient to Plead Scienter. Plaintiffs allege that Defendants' "repeated disregard for applicable and governing regulations" embodied in two prior resolutions of sales and marketing investigations between Pfizer and the Government – namely, the 2002 and 2004

[12] See also In re PXRE Grp., Ltd. Sec. Litig., 600 F. Supp. 2d 510, 536 (S.D.N.Y. 2009) (granting motion to dismiss and holding that "facts must be alleged which particularize how and why each defendant actually knew" the statements were false), aff'd sub nom., Condra v. PXRE Grp. Ltd., 357 Fed. Appx. 393 (2d Cir. 2009); Goplen v. 51job, Inc., 453 F. Supp. 2d 759, 768 (S.D.N.Y. 2006) (dismissing Section 10(b) claim and stating that "allegations that defendants knew or should have known that [disclosures] were false lack the particularity required").

Corporate Integrity Agreements ("CIAs") – establishes scienter. Compl. ¶ 113. However, Plaintiffs' recitation of excerpts from the CIAs (Compl. ¶¶ 118-120) does nothing to show that Defendants intentionally ignored the alleged improper off-label promotion. Plaintiffs leap into the unsubstantiated conclusion that the Individual Defendants were "deliberately reckless in ignoring the Company-wide off-label promotion of Bextra, Geodon, Lyrica and Zyvox." See Compl. ¶¶ 113-121. The 2002 CIA was completely unrelated to off-label promotion, and, in any event, was based on conduct which occurred at a predecessor company before it was acquired by Pfizer. See Shaftel Decl. Ex. C2, October 28, 2002 Department of Justice Press Release. So, too, the 2004 CIA, which also involved "legacy" conduct which occurred at Warner-Lambert prior to its acquisition by Pfizer and did not implicate Pfizer. See Compl. Ex. D.

Plaintiffs also rely on allegations from the complaints of certain qui tam relators, all former employees raising concerns only after leaving the Company, who allegedly provided "accounts of widespread off-label marketing at Pfizer's highest levels" (Compl. ¶¶ 123-125) to establish Defendants "treat[ed] the Blue Book as a [s]ham" – the "Blue Book" referring to the compilation of basic corporate policies. Compl. ¶ 123. The Complaint merely excerpts allegations of off-label promotion from the relators who claim generally to have advised the "corporate compliance department" about off-label concerns. Id. at 123-124. However, nothing about these allegations from former employees – which remain unproven – in any way implicates any Individual Defendant. Compl. ¶¶ 123-125. Nor is there a single communication or event alleged by Plaintiffs that indicates that any Individual Defendant had knowledge of these unproven allegations by former employees or that they had any merit. See also Shields, 25 F.3d at 1129 (affirming dismissal of Section 10(b) claim where allegations were that "defendants should have been more alert and skeptical but nothing alleged indicates that management was promoting a fraud"). Notably, Plaintiffs do not – and cannot – allege that Pfizer did not investigate and take appropriate action on learning of the qui tam complaints.

3. Plaintiffs' Allegations Relating to the 2009 Criminal Plea Are Insufficient to Plead Scienter. Similarly, Plaintiffs' allegation that off-label marketing of

Bextra must have been "deliberate" and "premeditated by senior management" in light of the "scope and content" of the 2009 criminal plea entered by a subsidiary of Pfizer, Pharmacia, does not support a strong inference of scienter by the Defendants as a matter of law. Compl. ¶ 122. The plea agreement pertained solely to Bextra sales and marketing practices. As explained above, because Bextra was removed from the market in 2005 (Compl. ¶ 45), it could not have had any impact on financial statements issued during the Class Period. Accordingly, these allegations fail to establish scienter as a matter of law. Further, entering into a settlement agreement with the government is insufficient to establish scienter of the Defendants where "there is nothing in [the] settlement agreement that would support the conclusion that [the individual defendants] had actual knowledge of the violations." Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736, 748-49 (9th Cir. 2008) (affirming dismissal of § 10(b) claim and refusing to impute scienter based on a settlement where nothing indicated that defendants were aware of the conduct underlying the settlement). Here, the Complaint is thus deficient – merely relying on excerpts from the plea, but failing to link any Individual Defendant specifically to the allegations involved in the 2009 Settlement. See Tamar, 2010 WL 2802216, at *8.[13]

IV. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE TRANSACTION CAUSATION

To survive a motion to dismiss a claim under Section 10(b), a plaintiff must allege reliance, or "that the violations in question caused the plaintiff to engage in the transaction in question." Grace v. Rosenstock, 228 F.3d 40, 46 (2d Cir. 2000) (affirming dismissal for failure to plead causation); Suez Equity, 250 F.3d at 95 (transaction causation means that "but for the fraudulent statement or omission, the plaintiff would not have entered into the transaction"). Plaintiffs rely on "fraud on the market" to invoke the presumption of reliance (Compl. ¶¶ 140-141), which requires three elements to apply: that a defendant has (1) publicly made (2) a material misrepresentation (3) about a stock traded on an efficient market. Berks County

[13] As an additional ground for dismissal, Plaintiffs fail to plead facts supporting a strong inference of scienter with respect to each individual defendant. See, e.g., Compl. ¶¶ 70, 77, 120, 126, 134. While the Second Circuit has not resolved this issue, courts have rejected such "group pleading" because it is insufficient to satisfy a plaintiff's burden to plead scienter. See In re Citigroup, Inc. Secs. Litig., 330 F. Supp. 2d at 380 (granting motion to dismiss securities fraud class action and holding that a plaintiff "must allege that an officer or director personally knew of or participated in the fraud"); Southland Sec. Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 365 (5th Cir. 2004) (rejecting the group pleading doctrine because it "conflicts with the scienter requirement of the PSLRA").

Employees' Ret. Fund v. First Am. Corp., No. 08 Civ. 5654 (LAK), 2010 WL 3430517, at *3 (S.D.N.Y. Aug. 31, 2010). Plaintiffs must show that the statement is material (a prima facie showing will not suffice). Id. The presumption is rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." In re Sadia S.A. Secs. Litig., 269 F.R.D. 298, 308 (S.D.N.Y. 2010).

Bextra was removed from the market in 2005, and therefore any alleged off-label promotion of Bextra could not affect the Pfizer stock price during the Class Period. Further, Plaintiffs have not alleged any actionable misstatements or omissions. As explained above, Pfizer's disclosures provided notice of the governmental investigations into sales and marketing practices. Indeed, such disclosures included the fact that Pfizer could be subject to substantial fines and penalties as a result of these investigations by the government. Thus, investors and the market were aware of the risk of future imposition of liability, and that the reported sales theoretically could include possible sales involving improper promotion. See Point I(B) supra; Ganino, 228 F.3d at 167 (alleged misrepresentations are not material if the information is already known to the market). Accordingly, Plaintiffs cannot invoke a presumption of reliance.

V. PLAINTIFFS DO NO ADEQUATELY ALLEGE LOSS CAUSATION

To state a claim under Section 10(b) and Rule 10b-5, a complaint must properly plead – which Plaintiffs have failed to do – an injury that was proximately caused by the alleged misconduct. See generally 15 U.S.C. § 78u-4(b)(4); Dura, 544 U.S. at 346-47. Dismissal is appropriate where a plaintiff has failed to plead a direct casual connection between the alleged fraud and the losses claimed. See id.; Lentell v. Merrill Lynch & Co., Inc., 396 F.3d 161, 172-173 (2d Cir. 2005) (granting a motion to dismiss). In addition, loss causation also must be pled with particularity as required by Rule 9(b), which Plaintiffs have failed to do. See In re Adelphia Commc'ns Corp. Secs. and Deriv. Litig., No. 03 MDL 1529 (LMM), 2010 WL 3528872, at *4 (S.D.N.Y. Aug. 30, 2010) (granting motion to dismiss).

Here, the theory that Pfizer's stock was artificially inflated by the alleged misrepresentations and then declined when the 2009 Settlement was announced fails to satisfy the pleading requirements for loss causation. First, the pleading is inadequate because it ignores various relevant factors, including the fact that Bextra was not sold during the relevant period and that the other medicines covered by the 2009 Settlement were only ancillary to the investigations and ultimate resolution. Compared to Bextra, these other medicines which were part only of the civil (not criminal) resolution of the investigations, involved a small percentage of that settlement. And during the Class Period, the magnitude of their total sales, whether off-label or not, and whether as a result of off-label marketing or not, was not material to the Company's overall performance. Furthermore, where, as here, a pleading neglects to address "if an intervening cause supersedes the effects of an initial misrepresentation, then a Section 10(b) claim fails." In re QLT Inc. Secs. Litig., 312 F. Supp. 2d 526, 536 (S.D.N.Y. 2004) (dismissing a Section 10(b) claim because loss causation was not adequately pled where plaintiff failed to account for another unrelated company-specific event as a intervening cause that superseded any direct effect of the alleged cause of the stock decline). Although Plaintiffs admit the Wyeth transaction was announced simultaneously with the 2009 Settlement, they do not account for why the $68 billion transaction (30 times the size of the 2009 Settlement) – and the biggest merger in pharmaceutical history – was not the cause for the stock price decline. Thus, Plaintiffs have failed to adequately plead loss causation.

VI. PLAINTIFFS FAIL TO STATE A CLAIM FOR CONTROL PERSON LIABILITY AGAINST THE DEFENDANTS

Plaintiffs' Section 20(a) claim for control person liability against certain Defendants fails because Plaintiffs have not adequately pled a primary violation of Section 10(b). Under Section 20(a), a person who controls another person who violates Section 10(b) may be held liable to the same extent as the controlled person. See 15 U.S.C. § 78(t)(a). Control person liability is derivative of the underlying securities violation. ATSI Commc'ns., 493 F.3d at 108. Accordingly, because Plaintiffs fail to state a claim under Section 10(b), their Section 20(a) claim should be dismissed as well.

VII. PLAINTIFFS' CLAIMS ARE TIME-BARRED

Even assuming, for the sake of argument, that the allegations in the Complaint are sufficient to plead securities fraud – which they are not – Plaintiffs are too late. The statute of limitations for the commencement of a securities fraud action is two years and begins to run "after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1). "[D]iscovery" is interpreted to mean either the plaintiff's actual discovery, or when "a reasonably diligent plaintiff would have discovered the facts constituting the violations." Merck & Co., Inc., 130 S.Ct. at 1798 (internal citations omitted). In light of Pfizer's disclosures, a reasonably diligent plaintiff would have discovered the facts underlying the allegations well before May 11, 2008, two years prior to the filing of the Complaint.

Plaintiffs' claim is barred by the statute of limitations because the Company made repeated disclosures concerning the ongoing government investigations into its sales and marketing practices. Plaintiffs' own pleading references numerous pre-2008 Pfizer public disclosures concerning investigations into Pfizer's sales and marketing practices, as well as a publicly available warning letter from the FDA concerning allegedly problematic Zyvox promotional practices. Compl. ¶¶ 9, 62-67, 69. By their express contents, Pfizer's disclosures would have caused a reasonably diligent plaintiff to learn of the governmental concerns, and that by extension, some degree of sales were allegedly related to the promotional practices in question and that the Company might face liability exposure. See Ieradi, 230 F. 3d at 599 (finding on a motion to dismiss that public disclosure of a government investigation was sufficient to make plaintiffs aware of their cause of action); De la Fuente v. DCI Telecomms., Inc., 206 F.R.D. 369, 382 (S.D.N.Y. 2002) (disclosure of a government investigation "should have alerted plaintiffs to the probability that there were [] misleading statements or significant omissions."). Therefore, Plaintiffs claims are time-barred.

CONCLUSION

For all of the reasons set forth above, Defendants' motion to dismiss the Consolidated Class Action Complaint with prejudice should be granted.

Dated: January 19, 2011

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT LLP
By: /s/ Dennis J. Block
Dennis J. Block (dennis.block@cwt.com)
Hal S. Shaftel (hal.shaftel@cwt.com)
One World Financial Center
New York, New York 10281
(212) 504-6000

Attorneys for Defendants Pfizer Inc., Henry A. McKinnell, Jeffrey B. Kindler, Frank D'Amelio, David L. Shedlarz, Alan G. Levin, Ian C. Read, and Joseph Feczko