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' REPLY MEMORANDUM IN RESPONSE TO PLAINTIFFS' ANSWERING BRIEF AND IN FURTHER SUPPORT OF MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

Defendants[1] submit this brief in response to Plaintiffs' answering brief ("Pl. Br.") and in further support of their motion to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b).

Contrary to Plaintiffs' argument, the fact that Pfizer, in 2009, ultimately agreed to resolve long-running governmental investigations – which had been publicly, timely and repeatedly disclosed – of unknown Pfizer employees' alleged "off-label marketing violations" (Pl. Br. at 6), is not a viable basis to sustain this securities action. No charges or allegations from the investigations in any way related to knowledge or conduct on the part of the Defendants. Plaintiffs identify no specific – let alone material – fact known to the Defendants that was required to be and was not timely disclosed to investors. Peeling away the rhetoric, in the absence of specific facts, Plaintiffs' Complaint fails to satisfy their need to plead with particularity, as required under the heightened pleading standards that control this case, the core elements of their securities claims.

Although the law does not require Defendants to disclose the pendency of governmental investigations when the outcome is unknown, Plaintiffs ignore the fact that Defendants did so and made entirely accurate and regular disclosures throughout the Class Period about the investigations, including the potential risks. Despite their allegations, Plaintiffs also fail to identify any inaccuracy in disclosures regarding the Company's sales or revenue. Of the drugs at issue, Bextra, Geodon, Lyrica, and Zyvox, by far the largest – Bextra – was not even sold during the Class Period. The sales of the other three drugs were fully and accurately reported, and in any event were not material to Pfizer's earnings and revenues.

Plaintiffs fail to plead any basis for inferring scienter on the part of the Defendants. The very governmental investigations referenced by Plaintiffs – which were publicly disclosed promptly upon notice to Pfizer – never implicated the Individual Defendants in any way.

Plaintiffs also fail to and cannot plead the materiality of any claimed actionable statements. With respect to reported sales and revenues, Bextra, was not sold during the Class Period. The fact that the sales of the other drugs at issue continued to increase after the Class Period and the alleged unlawful conduct ceased only confirms that any alleged improprieties were not the cause of sales and revenue growth for the drugs as alleged. With respect to the ultimate settlement payment of $2.3 billion to resolve the governmental investigations, Plaintiffs do not identify any basis for alleging that the Defendants did not timely disclose the amount of the settlement.

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[1] Capitalized terms defined in Defendants' moving brief are given the same meaning below.

Plaintiffs do not adequately plead that any alleged misstatement or omission was the causal factor for any investor loss. Given the uncontroverted disclosures about the investigations, Plaintiffs were aware throughout the Class Period of the pendency and risks from the ongoing investigations into Pfizer sales practices. Moreover, Pfizer simultaneously announced in 2009 – as Plaintiffs acknowledge in their pleading – both the resolution of the governmental investigations and its $68 billion merger with Wyeth, but Plaintiffs are unable to plead that the merger was not the cause of the temporary stock price decline for which they claim loss.

Plaintiffs' claims are also time-barred under the applicable 2-year statute of limitations, since Pfizer made disclosures, and Plaintiffs were aware, of the existence of the governmental investigations dating back at least to early 2004.

Plaintiffs' brief in no way rebuts the multiple and fundamental defects in Plaintiffs' pleading, each one of which, standing alone, mandates dismissal of this action against all Defendants with prejudice.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE ANY FALSE OR MISLEADING STATEMENTS

A. The Government Investigations Were Properly Disclosed: The disclosure rules under the Securities and Exchange Act of 1934 do not require the disclosure of the mere existence of a governmental investigation.[2] Even so, Pfizer went beyond its legal obligations. Plaintiffs bury deep in their brief (Pl. Br. at 18) the critical fact that, beginning in March 2004, the very month that it initially received notice, Pfizer made at least sixteen disclosures in its public filings with the SEC reporting on the government's investigations into the Company's sales and marketing practices. See Declaration of Hal S. Shaftel dated January 19, 2011 ("Shaftel Decl."), Exs. A1-A16. These disclosures began before the purported Class Period commenced. The disclosures during the Class Period stated, among other things, the possibility that a resolution of the investigations "could result in the payment of a substantial fine and/or civil penalty;" that the Company was "considering various ways to resolve" the potential claims; and that, in addition to the principal focus on Bextra,

[2] See Acito v. IMCERA Grp., Inc., 47 F.3d 47, 53 (2d Cir. 1995) (finding no duty to disclose the existence of a government inspection where the possibility of adverse consequences was still unknown); In re Open Jt. Stock Co. Vimpel-Commc'ns Sec. Litig., No. 04-9742, 2006 WL 647981, at *6 (S.D.N.Y. Mar. 14, 2006) (dismissing securities fraud claims where plaintiffs did not allege that defendants knew of liability); In re Yukos Oil Co. Sec. Litig., No. 04-5243, 2006 WL 3026024, at *16 (S.D.N.Y. Oct. 25, 2006) (holding that there was no duty to disclose when the outcome of a government investigation was still "speculative"); Ballan v. Wilfred Am. Educ. Corp., 720 F. Supp. 241, 248 (E.D.N.Y. 1989) (finding no duty to disclose the existence of a government investigation whose eventual outcome was unknown).

the government expanded its inquiries into the "marketing of certain other drugs." Pfizer also promptly disclosed an "agreement in principle" to resolve the investigations nearly nine months before the agreement was consummated.

Although Plaintiffs argue, in essence, that Pfizer's disclosures should have predicted the ultimate outcome of the investigations or simply assumed liability and the size of the fine and penalty, both law and logic are to the contrary. Nowhere do Plaintiffs address the precedent cited by Defendants rejecting the view that corporate defendants must "anticipat[e] future events [in order to make] certain disclosures earlier." Novak v. Kasaks, 216 F.3d 300, 309 (2d Cir. 2000) ("[c]orporate officials need not be clairvoyant; they are only responsible for revealing those material facts reasonably available to them"); In re Marsh & McLennan Cos. Sec. Litig., 501 F. Supp. 2d 452, 471 (S.D.N.Y. 2006) (finding no requirement that disclosures predict future adverse events). Plaintiffs also provide no counter to the principle that the securities laws do not require a company to characterize its actions with "'pejorative'" or "adverse inferences" (Stein v. Aldrich, No. 78 Civ. 2364, 1980 WL 1489, at *5 (S.D.N.Y. July 18, 1980) (citations omitted)), or "to accuse itself of wrongdoing." In re Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004), aff'd sub nom. Albert Fadem Trust v. Citigroup Inc., 165 Fed. Appx. 928 (2d Cir. 2006) (Summary Order).

To the extent that disclosure of governmental investigations could in a given situation be required, courts have dismissed claims where the company's disclosures were less informative than the disclosures at issue here. See Ieradi v. Mylan Labs., Inc., 230 F.3d 594, 597 (3d Cir. 2000) (where, unlike here, the disclosures optimistically advised investors that "the Company believes the ultimate resolution of this matter will not have a material adverse effect on the Company's financial position"); In re Yukos Oil, 2006 WL 3026024, at *16 (defendants sufficiently disclosed the pertinent risks by stating that "transactions may be challenged by tax authorities" without explaining any basis). Here, Pfizer disclosures were frequent (at least sixteen times before and during the Class Period), candid (informed of the possibility of a "substantial" penalty), and comprehensive (noting, among other things, the expansion of subject drugs from Bextra to other medicines). See Shaftel Decl., Exs. A1-A16.

In challenging Pfizer's disclosures as inadequate, Plaintiffs rely heavily on a misplaced comparison to an AstraZeneca public disclosure (Pl. Br. at 19) concerning a government investigation into its marketing of the drug Seroquel. However, the AstraZeneca disclosure is not the subject of any claim or cited decision, does not define any legal standard, and involves its own distinct circumstances. Furthermore, it is telling that Pfizer's disclosures are even more robust than the single example urged by Plaintiffs. In fact, Pfizer's disclosures went further than AstraZeneca during the Class Period and disclosed the potential for "the payment of a **substantial** fine." Shaftel Decl., Ex. A16 (emphasis added). Furthermore, Plaintiffs contend – without citing any basis – that AstraZeneca disclosed the investigation "at the earliest possible filing" (Pl. Br. at 19). But that is at least equally the case here, where Pfizer publically disclosed the government investigation of its marketing practices within the very month it received notice.

Plaintiffs also contend that Defendants caused "deliberate confusion" in an October 8, 2008 press release by announcing the settlement of personal injury claims related to the drugs Bextra and Celebrex, because, according to Plaintiffs, the press release stated that the settlement "puts the substantial majority of the **civil** litigation the company is facing with regard to [Celebrex and Bextra] behind us," thus, apparently in Plaintiffs' view, suggesting the government investigations were also resolved. Pl. Br. at 18 (emphasis added). However, Plaintiffs ignore the fact that Pfizer's disclosures in this period specifically and clearly advised that the settlement "do[es] not apply . . . to the pending investigation by the Department of Justice of the marketing of the Company's COX-2 medicines, particularly Bextra."[3] Notably, the press release cited by Plaintiffs (Compl. ¶ 67) nowhere contains the alleged language that the settlement "put[] the substantial majority of the civil litigation . . . behind us." In any event, as Pfizer's public disclosures confirmed, any reference to "civil litigation" related to the personal injury claims, and not the government investigations, which were separately identified in the Company's disclosures.

B. Pfizer Accurately Reported Sales And Revenues: Plaintiffs do not allege that Pfizer reported in its public filings with the SEC any sales or revenue that were not made or

[3] See Shaftel Decl., Ex. A17.

received. Instead, Plaintiffs resort to challenging the quality of Defendants' sales and earnings by arguing that the financial disclosures thereof are misleading, because they "failed to disclose that sales . . . were driven by off-label and misleading marketing." Pl. Br. at 13. But Plaintiffs cannot identify a single recorded sale that was the result of any off-label promotion, or even if they could, why that would be material to Pfizer or its financial condition. Indeed, Bextra, by far the largest selling of the drugs subject to the government investigations, was not marketed or sold during the Class Period. Nor, contrary to Plaintiffs' assertion, could the reported sales of the other drugs have been "driven by off-label" sales practices, since the sales of each of these drugs increased dramatically after the Class Period and at a time even the Plaintiffs agree was after the end of the alleged misconduct that was the subject of the investigations. See Opening Brief at 7 n.5.

In a misguided attempt to link Pfizer sales during the Class Period to unlawful promotion, Plaintiffs contend that Pfizer "admitted to over $664 million in ill-gotten gains from off-label marketing." Pl. Br. at 14. However, Plaintiffs' argument is facially erroneous. Plaintiffs merely cite to a letter agreement between Pfizer's counsel and the Department of Justice, in which, far from admitting any actual revenue tied to off-label sales, Pfizer agreed to a negotiated settlement amount to resolve legal claims See Compl., Ex. A at 9 (the letter describes itself as "an agreement between the parties relating to the disposition of this matter"). Plaintiffs plead no basis to conclude that the negotiated settlement corresponds to actual revenue received from off-label sales. Moreover, even if this number represented actual sales, which it does not, Pfizer earned approximately $50 billion a year in revenue or over $200 billion during the Class Period (see Opening Brief at 6), making this amount of revenue ($664 million) immaterial to Pfizer's overall revenues for the period. Finally, Plaintiffs cannot identify any basis for pleading that the negotiated settlement figure reflected any fact known to the Defendants before the point when Pfizer reached its settlement with the government – and promptly reported such settlement to the market.[4]

[4] Plaintiffs also offer no counter to Defendants' explanation that Pfizer's disclosure concerning the CATIE clinical trial was entirely accurate, even aside from the failure to attach scienter or materiality to it. See Opening Br. at 10 n.6 (contrary to Plaintiffs facially false allegation, the disclosure never stated the trail showed the medicine to be "more effective" than other drugs studied, but correctly stated the drug was the only one studied that had "comparable efficacy" and reduced certain side effects).

Plaintiffs' position is directly contrary to In re Citigroup, which held that the claim, like here, that defendants' "failure to disclose that its revenues were derived from 'unsustainable and illegitimate sources' violated [§] 10(b) [is] . . . unavailing." 330 F. Supp. 2d at 377. Nor do Plaintiffs find support in their citation to In re Van der Moolen Holding N.V. Securities Litigation, 405 F. Supp. 2d 388 (S.D.N.Y. 2005), where, unlike here, the court found certain financial disclosures misleading because defendants did not "inform[] investors about the . . . [effect of the] investigation on profitability." Id. at 394. Here, of course, Plaintiffs have failed to plead facts demonstrating that the allegedly improper marketing had any negative impact on Pfizer's sales, profitability or revenues; in fact, Plaintiffs concede that revenues increased both during and subsequent to the Class Period. Pl. Br. at 14. Plaintiffs' citation to In re Amgen Securities Litigation, 544 F. Supp. 2d 1009 (C.D. Cal. 2008), is similarly misplaced, since, unlike here, the very Amgen press release disclosing the investigation contained the qualifying statement that "Amgen only promotes . . . consistent with the FDA label." Id. at 1021. There is no analogous language in Pfizer disclosures that commented on the merits of the investigations.

C. Pfizer's Statements Regarding Its Corporate Policies And Its Internal Controls: Plaintiffs claim that Defendants, through Pfizer's disclosures concerning its written policies and controls, "falsely represented that Pfizer was in compliance with the law." Pl. Br. at 11. As a matter of law, Pfizer's statements regarding its corporate policies and internal controls are not actionable because they "are too general to cause a reasonable investor to rely upon them." ECA & Local 134 IBEW Jt. Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009); see also In re Barclay's Bank PLC Sec. Litig., No. 09 Civ. 1989, 2011 WL 31548, at *10 (S.D.N.Y. Jan. 5, 2011) ("'Generalizations regarding integrity, fiscal discipline, and risk management,' however, are not actionable misstatements") (citation omitted). Moreover, Plaintiffs fail to explain how any of its disclosures regarding Company policies and controls were false in any way. See In re Citigroup, 330 F. Supp. 2d at 379 (dismissing Section 10(b) claim because Plaintiff "never specifie[d] which of [the] descriptions constitute[d] a false or misleading statement or how"). Here, there is no allegation that the polices and controls did not exist. Even if Plaintiffs

could identify specific violations of policies – which they do not – the disclosures regarding the polices in place nowhere state that no infractions within a company of over 100,000 employees would not or could not occur. In addition, Plaintiffs' suggestion that the certification to Pfizer's 10-K, required by the Sarbanes-Oxley Act, is a personal guarantee by certain Defendants of 100% compliance by all employees with Pfizer policies is specious (Pl. Br. at 12); the certification is that the 10-K accurately sets forth the financial condition and results of Pfizer's operations and is only based on the signatory's "knowledge" at the time, and nothing is pleaded to show any misstatements or contrary knowledge.[5]

II. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE SCIENTER

Plaintiffs argue that scienter can be inferred because Defendants allegedly "spoke knowingly" when issuing Pfizer's disclosures, which Plaintiffs claim somehow were inaccurate. Pl. Br. at 5-6, 11 n.12. But Plaintiffs do not allege any specific basis to support their claim that Defendants knew that Pfizer's disclosures – which repeatedly and accurately identified the ongoing investigations – were false or misleading (which they were not). Under the PSLRA, the law requires that plaintiffs "allege facts that particularize how and why each defendant actually knew, or was reckless in not knowing that the alleged statements and omissions were fraudulent at the time they were made." Tamar v. Mind C.T.I., Ltd., 723 F. Supp. 2d 546, 557 (S.D.N.Y. 2010) (dismissing securities fraud class action). However, Plaintiffs have not alleged "the existence of any specific documents or other information contradicting [defendants] public statements that were available" to them. See In re Sotheby's Holdings, Inc., No. 00 Civ. 1041, 2000 WL 1234601, at *7 (S.D.N.Y. Aug. 31, 2000) (scienter not adequately alleged where no allegations that financial officer defendants had information that their SEC filings were inaccurate). Nor, as precedent makes

[5] Even if SOX certifications were relevant to Plaintiffs' claims (and they are not), no case cited by Plaintiffs holds that SOX certifications are actionable absent allegations not applicable here that defendants had specific knowledge that the certifications were false. See In re America Serv. Grp., Inc., No. 06-0323, 2009 WL 1348163, at **41-42 (M.D. Tenn. Mar. 31 2009) (court finds the certifications actionable where, unlike here, plaintiff had pleaded specific allegations, including direct witness testimony, that certain defendants were directly involved in an illegal importing scheme); In re Lattice Semiconductor Corp. Sec. Litig., No. CV04-1255-AA, 2006 WL 538756, at **17-18 (D. Or. Jan. 3, 2006) (SOX clarifications by themselves not held to be actionable). In fact, the Ninth Circuit declined to follow Lattice, holding that "[b]oilerplate language in a corporation's 10-K form, or required certifications under Sarbanes-Oxley section 302(a), however, add nothing to the scienter calculus" because it would be an "invitation to undermine the PSLRA's distinct requirements for pleading falsity and scienter." Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1003-04 (9th Cir. 2009).

plain, can Defendants' claimed scienter be inferred by virtue of the their managerial positions. Pl. Br. at 5-6; see, e.g., In re Winstar Commnc'ns, No. 01-CV-3014, 2006 WL 473885, at *7 (S.D.N.Y. Feb. 27, 2006) ("scienter cannot be inferred solely from [defendants'] . . . executive managerial position"); In re Health Mgmt., Inc. Sec. Litig., 970 F. Supp. 192, 205 (E.D.N.Y. 1997) (same).

Unlike here, Plaintiffs cite to cases in which the pleading adequately alleged specific facts evidencing defendants' knowledge of the falsity of their public disclosures. No specific basis is or can be alleged here. In re Oxford Health Plans, Inc. Sec. Litig., 51 F. Supp. 2d 290, 294 (S.D.N.Y. 1999) (defendants reaffirmed the accuracy of its audit despite contrary knowledge of "Oxford's extreme accounting irregularities, particularly Oxford's complete lack of internal controls and utterly ineffective computer system"); In re Dynex Cap., Inc. Sec. Litig., No. Civ. 1897, 2009 WL 3380621, at *13 (S.D.N.Y. Oct. 19, 2009) (defendants knew that the underwriting statements issued by the company were inaccurate based on information learned from personally monitoring of the performance of the subject loans); Novak 216 F.3d at 308 (plaintiffs "specifically alleged defendants' knowledge" of actual violations of company policy which rendered its SEC filings false); In re Marsh & McLennan, 501 F. Supp. 2d at 486 (while finding general allegations of scienter insufficient to support claims against certain defendants, scienter was inferred as to others where, unlike here, a government investigation was coupled with "the rapid discovery of widespread misconduct" contrary to continuing disclosures); In re Moody's Corp. Sec. Litig., 599 F. Supp. 2d 493, 515-16 (S.D.N.Y 2009) (plaintiffs' alleged specific statements evidencing that defendants, while making disclosures to the contrary, knew that Moody's independence, ratings and methodology had been compromised).[6]

In the absence of any basis for pleading that Defendants had specific knowledge that Pfizer's disclosures were incorrect, Plaintiffs argue the compliance procedures, including those set

[6] The same distinctions exist between this case – where no showing is made that the defendants were aware of false disclosures – and the cases cited by Plaintiffs from outside this Circuit. In re Health Mgmt., 970 F. Supp. at 204 (defendant had actual knowledge of inventory scheme from specific letters received from auditors alerting him of accounts receivables problems); Eastwood Enters., LLC v. Farha, No. 8:07-cv-1940-T-33EAJ, 2009 WL 3157668, at *4 (M.D. Fla. Sept. 28, 2009) (alleging defendants "direct involvement in, control over and knowledge of" the fraudulent accounting scheme and stock sales of over $90 million); In re Lernout & Hauspie Sec. Litig., 230 F. Supp. 2d 152, 165 (D. Mass. 2002) (defendant approved financial statements despite knowing that the information was contradicted by specifically identified communications concerning "skimpy or nonexistent" internal audit controls).

forth in the 2004 Corporate Integrity Agreement ("CIA"), somehow "provided Pfizer executives with clear knowledge of the risks to Pfizer of future off-label promotional campaigns." Pl. Br. at 5. This argument is a red-herring, since the investigations and the conduct leading to Pfizer's agreement to settle a prior governmental action which resulted in the imposition of the 2004 CIA occurred before the Class Period, indeed at a predecessor company at a time prior to that company's acquisition by Pfizer, and thus did not involved Pfizer personnel or negatively reflect on Company practices during the Class Period. Nor does the existence of compliance procedures, including the requirements of the 2004 CIA, mean that Defendants had any knowledge that Pfizer's disclosures regarding the ongoing investigations during the Class Period were inaccurate. Indeed, the government has never claimed any breaches of the 2004 CIA, including Pfizer's resolution in 2009 of the investigations referenced by Plaintiffs. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1129 (2d Cir. 1994) (Section 10(b) claim dismissed on allegations that "defendants should have been more alert and skeptical but nothing alleged indicates that management was promoting a fraud"). Even if it were relevant to the content of any disclosures at issue, which it is not, there is no indicia that the Company failed to take corrective actions pursuant to the 2004 CIA upon receipt of any allegations of individual misconduct.[7]

Plaintiffs also try to escape their pleading burden by relying heavily on unproven accusations – which, even if given credit, in no way implicate the Defendants personally – made by Company employees, including qui tam complaints filed under seal by former employees. Plaintiffs use these allegations to leap to the assertion that Defendants somehow "knew about and encouraged the pervasive off-label promotion of Bextra, Zyvox, Geodon and Lyrica." Pl. Br. at 6. However, as Plaintiffs admit, the qui tams were only disclosed to Pfizer after the Class Period (Pl. Br. at 25) and therefore cannot be a basis for imputing knowledge during the relevant timeframe. Furthermore, because the qui tam complaints do not implicate the Defendants personally, or suggest they had any

[7] Plaintiffs' citation to Judge Rakoff's opinion in a shareholder derivative action (Pl. Br. at 5, 11) is inapposite because that decision granted in part and denied in part a motion to dismiss, and thus did not make any factual findings as to knowledge or wrongdoing.

knowledge of the alleged wrongdoing, they cannot be the basis for claiming or inferring any knowledge on the part of Defendants.

Plaintiffs admit "the absence of a motive allegation," further undermining an inference of scienter. Pl. Br. at 7 n.9. Indeed, their own insider trading allegations affirmatively rebut any inference of scienter because: (1) three Defendants, including then CEO Kindler, did not sell any stock during the Class Period (see San Leandro Emer. Med. Grp. Profit Sharing Plan v. Philip Morris Cos, 75 F.3d 801, 814 (2d Cir. 1996) (other defendants failure to sell stock "sufficiently undermines plaintiffs' claim regarding motive")) and (2) the timing of the stock sales, over a year before the Class Period ended, refutes any inference that they "dumped the stock" to profit before the January 2009 disclosure of the government settlement. See Frazier v. VitalWorks, Inc., 341 F. Supp. 2d 142, 162 (D. Conn. 2004) (granting motion to dismiss). In addition, Plaintiffs argue that Defendants' incentive compensation is a basis for inferring scienter. However, as set forth in our Opening Brief at 17, such arguments are not sufficient as a matter of law to support an inference of scienter. Similarly, Plaintiffs disregard Defendants' argument that profit motives common among all corporate officers, such as Defendants determination that there was no need to reserve for speculative losses, has also been rejected as a basis for establishing scienter. Id.

Plaintiffs claim that scienter can also be inferred because Defendants violated GAAP by failing to accrue a specific amount of reserves in 2005 for possible loss related to the government's investigation. Pl. Br. at 22 n.26. However, particularly since GAAP "tolerate[s] a range of reasonable treatments, leaving the choice among alternatives to management," nothing in Plaintiffs' pleading supports a finding that any divergence from GAAP occurred. Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 544 (1979). In any event, a failure to comply with GAAP cannot raise an inference of scienter without alleging specifics to show "corresponding fraudulent intent." Chill v. GE Co., 101 F.3d 263, 270 (2d Cir. 1996) (dismissing allegation that scienter can be inferred based on alleged failure to comply with GAAP). Here, Plaintiffs' pleading does not contain any allegations supporting the fraudulent intent of any Defendant.[8]

[8] Further, Plaintiffs rely on inapposite cases (Pl. Br. at 22, n.26) where the court "coupled" alleged GAAP failures with additional scienter allegations not present here. See id.; In re Scottish Re Grp. Sec. Litig., 524 F. Supp. 2d 370, 393-94 (S.D.N.Y. 2007).

III. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE MATERIALITY

A. Material Information About The Governmental Investigations Was Properly Disclosed: As Plaintiffs concede, Pfizer made disclosures of the existence of the government investigations on numerous occasions before and during the Class Period, including the risk of a substantial fine or penalty (see, e.g., Compl. ¶¶ 59-69) – even though the pendency of a government inquiry, by itself, does not require disclosure. See Acito, 47 F.3d at 53. There, of course, can be no failure to disclose material information where "the information [from the onset was] known to the market because the misrepresentation cannot then defraud the market." Ganino v. Citizens Utils. Co., 228 F.3d 154, 167 (2d Cir. 2000).[9] The fact that the market was aware of the "material information" is confirmed by the existence of hundreds of references to these investigations and their potential ramifications in various analyst reports dating back even before the start of the Class Period. See Shaftel Decl., Exs. B1–B133.[10] Furthermore, "[m]ateriality is determined in light of the circumstances existing at the time the alleged misstatement occurred." Ganino, 228 F.3d at 165. Here, Plaintiffs have not alleged – because they cannot – that the Defendants knew the outcome of the investigations before this information was publicly disclosed. Because materiality is determined by the circumstances at the time of the alleged misstatement, and because Plaintiffs have failed to plead any material facts available at the time that were allegedly omitted or misstated, Plaintiffs have not demonstrated materiality.

[9] Plaintiffs' reliance on Litwin, which held that "potential future impact" on a company possibly could be material, is inapposite. Litwin v. Blackstone Grp., L.P., No. 09-4426-cv, 2011 WL 447050, at *9 (2d Cir. Feb. 10, 2011). In that case, the defendants failed to disclose risks to their business posed by certain investments in subprime mortgages and other failing businesses. The defendants argued that they had no duty to disclose because the information was already publicly available from third party sources. Here, unlike the Litwin defendants, Pfizer itself made repeated disclosures about the pendency, nature and risk of the investigations over the course of several years, thereby itself putting investors on notice of the potential risks of the investigations. See Opening Brief at 11.

[10] Plaintiffs' response is that truth-on-the-market defenses often involve fact-specific determination not amenable to a motion to dismiss. Pl. Br. at 20. See, e.g., Lapin v. Goldman Sachs Grp., Inc., 506 F. Supp. 2d 221, 238 (S.D.N.Y. 2006); In re Columbia Sec. Litig., 155 F.R.D. 466, 482-83 (S.D.N.Y. 1994). But here, it is not necessary to look further than the very disclosures that Plaintiffs acknowledge and reference in their own pleading to find that investors were provided the information allegedly not made public.

B. Material Information About The Company's Financial Condition Was Properly Disclosed: For various reasons, Plaintiffs cannot plead that any material information known to Defendants about the Company's financial condition was not timely disclosed.

> Plaintiffs cannot claim that any statements relating to sales or revenues of Bextra fraudulently induced them to purchase Pfizer stock, because Bextra was voluntarily withdrawn from the market before the Class Period began.
>
> Plaintiffs' claim that the sales figures for the three other drugs – Geodon, Lyrica and Zyvox – were misleading and artificially inflated due to alleged illegal marketing also fails because, there was no reduction of sales of these products after the end of the Class Period and the alleged conduct ceased; indeed, sales were higher. See Opening Brief at 7 n.5. Further, while allegations regarding these drugs were included in the ultimate resolution with the government, they constituted a very insignificant portion of the amount paid in settlement and of Pfizer's overall sales. Additionally, Plaintiffs do not 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.
>
> Plaintiffs' contention that the $2.3 billion settlement is material is also insufficient. 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.[11] See, e.g., ECA & Local 134 IBEW Jt. Pension Trust, 553 F.3d at 197, 204 (on a motion to dismiss, finding that the accounting treatment of 0.3% of defendant's assets was immaterial); In re Duke Energy Corp. Sec. Litig., 282 F. Supp. 2d 158, 161 (S.D.N.Y. 2003) (on a motion to dismiss, finding that an inflation of company's revenue by 0.3% was immaterial), aff'd, 113 Fed. Appx. 427 (2d Cir. 2004) (Summary Order).

Citing Greenfield v. Professional Care, Inc., 677 F. Supp. 110, 113 (E.D.N.Y. 1987), Plaintiffs argue that "Defendants' failure to disclose . . . [revenue] derived from illegal practices is plainly material as it goes to the financial condition of the Company." Pl. Br. at 14. But Plaintiffs fail to identify a single sale, let alone a material quantity of sales, attributable to any illegal activity that impacted earnings. In any event, Defendants in this case indisputably disclosed the pendency of the governmental investigations concerning the underlying conduct and there is no indicia of falsity in their disclosures – in fact, there is no falsity. Greenfield, unlike here, involved

[11] Plaintiffs rely on a factually distinct case from outside this Circuit, to claim that "information relating to the risks to Pfizer's ability to continue to pay dividends" is material. Pl. Br. at 1; Holdsworth v. Strong, 545 F.2d 687, 698 (10th Cir. 1976). Even if any disclosures here were relevant to dividends, Plaintiffs' citation is misguided because Holdsworth, unlike here, involved a closely held corporation where the majority shareholder specifically misrepresented the company's ability to pay dividends in order to fraudulently induce a minority shareholder to sell his shares. In addition, the Second Circuit has held that statements about future plans for dividends were immaterial. See In re IBM Corp. Sec. Litig., 163 F.3d 102, 107 (2d Cir. 1998).

undisclosed matters "plainly material . . to the financial condition of the Company" where individual defendants were indicted (in stark contrast to the case here) for personal involvement in wrongdoing. 677 F. Supp. at 112 (defendants "were indicted by a New York grand jury for falsifying business records, grand larceny, and conspiracy").

IV. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE CAUSATION

Dismissal of Plaintiffs' Section 10(b) claim is also warranted because the Complaint does not properly plead that the alleged violations caused Plaintiffs to engage in any transactions. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346-47 (2005). Plaintiffs seek to defend their allegations of transaction causation by invoking the "fraud on the market" presumption. See Pl. Br. at 22; Grace v. Rosenstock, 228 F.3d 40, 46 (2d Cir. 2000). However, as a result of the Company's disclosures, investors were aware of the government investigations, and thus made investment decisions with knowledge of the ongoing investigation risks. See In re UBS Auction Rate Sec. Litig., No. 08-Civ. 2967, 2010 WL 2541166, at *22 n.14 (S.D.N.Y. June 10, 2010) (the "disclosures and information available to Plaintiffs prior to their respective purchases rebut any presumption of reliance"). This is evidenced by references in numerous analyst reports discussing the pendency and potential risks of the government investigations before and during the Class Period. See Shaftel Decl., Exs B1-B133.

Recognizing the absence of specific facts in their pleading, Plaintiffs ignore the recent holdings from this District that causation is subject to the standards of Fed. R. Civ. P. 9. See In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig., No. 03 MDL 1529, 2010 WL 3528872, at *4 (S.D.N.Y. Aug. 30, 2010) (dismissing Section 10(b) claim and holding "under Fed. R. Civ. P. 9(b), the allegations of loss causation must be alleged with particularity"); Cohen v. Stevanovich, 722 F. Supp. 2d 416, 432 n.9 (S.D.N.Y. 2010) (same). Furthermore, In re QLT Inc. Securities Litigation, 312 F. Supp. 2d 526, 536 (S.D.N.Y. 2004), holds that Plaintiffs' pleading must account for superseding events that, on their face, effect the stock price decline. See Opening Br. at 24. Although Plaintiffs concede that the $68 billion Wyeth transaction "was seen as negative news by

some investors" (Pl. Br. at 24), their pleading ignores, in disregard of the requirements set forth in QLT, its impact on the Company's temporary stock price decline.

V. PLAINTIFFS' CLAIMS ARE TIME BARRED

Plaintiffs' claims are time-barred by a two-year statute of limitations that begins to run when "a reasonably diligent plaintiff would have discovered 'the facts constituting the violation[s].'" Merck & Co. v. Reynolds, 130 S. Ct. 1784, 1798 (2010) (citations omitted). As noted above, Pfizer, before and during the Class Period, dating back as far as 2004, made repeated, substantive disclosures concerning the governmental investigations that underlie Plaintiffs' claim. That these disclosures sufficiently informed the market as far back as January 2005 is further evidenced by the fact that analyst reports repeatedly recognized the risk posed by the investigations. As exemplars, Defendants cited to nearly 130 published analyst reports, between January 2005 (before the Class Period) and January 2007, stating that government investigations into the Pfizer's pricing and promotional practices constituted a "risk[] to our price target." See Shaftel Decl., Exs. B1-B128. The point, which Plaintiffs ignore, is not that these reports were the source of notice to investors, which they were, but more important, they show that the market understood from Pfizer's own disclosures in its SEC filings from long before the limitations period began, the existence of the investigation and its risks to the Company. This refutes Plaintiffs' argument that they could not have "discovered facts evidencing scienter" until 2009, when the qui tam complaints were unsealed and Pfizer's settlement with the government was announced (Pl. Br. at 25) – none of which implicates any knowledge or conduct of the Individual Defendants in any way.[12]

CONCLUSION

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

[12] Plaintiffs' Section 20(a) claim must also be dismissed because this claim is "necessarily predicated on a primary violation of securities law which has not been pled." In re MRU Holdings Sec. Litig., No. 09 Civ. 3807, 2011 WL 650792, at *30 (S.D.N.Y. Feb. 17, 2011) (quoting Rombach v. Chang, 355 F.3d 164, 177-78 (2d Cir. 2004)).

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Respectfully submitted,

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