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.	10-cv-03864 (AKH) ECF Case

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

CAHILL GORDON & REINDEL LLP
Bart Friedman
Charles A. Gilman
David G. Januszewski
S. Penny Windle
80 Pine Street
New York, New York 10005
(212) 701-3000

- and -

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

Attorneys for Defendants

May 24, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Page

Statutory and Codified Law

Rules and Regulations

Defendants, Pfizer Inc. ("Pfizer") and individuals who are current or former Pfizer executives (the "Individual Defendants"), submit this Memorandum in support of their motion to dismiss Plaintiffs' First Amended Consolidated Class Action Complaint (the "Complaint") pursuant to Fed. R. Civ. P. 8, 9(b) and 12(b)(6), and the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

PRELIMINARY STATEMENT

Plaintiffs' prolix and confusing Complaint – their third – fails to remedy the shortcomings identified in this Court's April 5, 2011 Order (the "April Order"). *See* Docket No. 70. Plaintiffs' prior complaint violated Rule 8's requirement that a pleader provide "a short and plain statement of the claim" and that "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2); *id.* at (d)(1). Plaintiffs' latest pleading is an affront to the April Order. Their 75-page, 160-paragraph prior complaint has been replaced by the 75-page, 159-paragraph Complaint. The Court directed that Plaintiffs should "refer[] to only a limited number of exhibits essential to understanding the complaint's material allegations." (April Order at 2.) Yet the Complaint retains the very same language previously quoted from dozens of exhibits, while merely deleting all but three exhibits as attachments. The Complaint suffers from the same defects as the prior pleading and continues to violate Rule 8.

The Complaint also fails to satisfy the settled requirements of Rule 9(b) and the PSLRA for pleading securities fraud. Notwithstanding the expansiveness of the Complaint, the theory of Plaintiffs' securities fraud case remains elusive. Plaintiffs do not allege that the Company's financial statements during the Class Period reported any sales that were not made or any revenues that were not received. Instead, Plaintiffs claim that Pfizer's announcement, at the end of the alleged Class Period in January 2009, that it settled governmental investigations

concerning alleged improper "off-label marketing" and other sales practices (the "2009 Settlement") somehow renders the Company's prior disclosures during the Class Period materially false or misleading. It does not.

If the Complaint means to allege that Pfizer inadequately disclosed the potential risk of government investigations into its marketing practices, there is no actionable omission. Beginning before and continuing throughout the Class Period, Pfizer made public disclosure of the ongoing investigations, including that they "could result in the payment of a substantial fine and/or civil penalty." (Complaint ¶ 73; *see also* Form 10-K, filed March 10, 2004 (Lamberti Dec. Ex. A)).[1] Indeed, Judge Rakoff has already found that Pfizer made timely and proper disclosures concerning the investigations into its sales practices. *See In re Pfizer Inc. Shareholder Derivative Litigation*, 722 F. Supp. 2d 453, 464 (S.D.N.Y. 2010). Judge Rakoff found no actionable omissions and concluded that Pfizer "disclosed that the Government was investigating Pfizer's promotional practices for certain drugs" in 2007 and 2008. *Id*. at 464. No aspect of the 2009 Settlement undercuts the accuracy of Pfizer's prior statements when made.

[1] In its April Order, the Court made clear its intention not to exercise its discretion under Fed. R. Civ. P. 12(d) to "entertain matters outside of the pleadings, such as affidavits and exhibits" because to do so would require conversion of the Rule 12(b)(6) motion into a motion for summary judgment. (April Order at 2) The Court may consider the documents submitted herewith as Exhibits to the Declaration of Amy D. Lamberti (the "Lamberti Dec."), without converting the motion to a motion for summary judgment, as the documents are limited to the very SEC filings upon which Plaintiffs' securities fraud claims are based and which provide context for Plaintiffs' allegations. *See ATSI Communications* v. *Shaar Fund, Ltd*., 493 F.3d 87, 98 (2d Cir. 2007) (on a Rule 12(b)(6) motion, the court may consider "legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit"); *see also Tellabs*, *Inc*. v. *Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007); *Cortec Industries, Inc*. v. *Sum Holding LP*, 949 F.2d 42, 47 (2d Cir. 1991); *Industrial Risk Insurers* v. *Port Authority of New York and New Jersey*, 387 F.Supp. 2d 299, 303 (S.D.N.Y. 2005) (Hellerstein, J.) ("Even where a document is not incorporated by reference, a court may nevertheless consider it [on a 12(b)(6) motion] where the complaint relies heavily upon its terms and effects, which renders the document integral to the complaint.") (citation and internal quotation marks omitted), *aff'd in relevant part*, 493 F.3d 283 (2d Cir. 2007).
.

If the Complaint instead means to allege a failure to monitor compliance with corporate policies and prior government settlements, it again fails. Even if Plaintiffs could adequately allege mismanagement, which they cannot, it has long been settled law that the judicially implied private right of action under Section 10(b) and Rule 10b-5 does not address "internal corporate mismanagement." *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479-80 (1977). "Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." *Superintendent of Insurance* v. *Bankers Life and Casualty Co*., 404 U.S. 6, 12 (1971); *see also Field* v. *Trump*, 850 F.2d 938, 948 (2d Cir. 1988) ("allegations of garden-variety mismanagement" do not support a claim under federal securities laws); *In re Citigroup, Inc. Securities Litigation*, 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004) ("[t]he securities laws were not designed to provide an umbrella cause of action for the review of management practices"), *aff'd sub nom.*, *Albert Fadem Trust* v. *Citigroup, Inc.*, 165 F. App'x 928 (2d Cir. 2006). An allegation of a failure to adhere to publicly disclosed compliance policies — which is at bottom what Plaintiffs allege here — "amounts to nothing more than a charge that [defendant's] business was mismanaged" and does not provide a basis for a claim under Section 10(b) and Rule 10b-5. *See In re Citigroup, Inc. Securities Litigation*, 330 F. Supp. at 375-77. "Plaintiff's view of the proper application of stated management policies is a far cry from the sort of fraudulent or manipulative conduct contemplated by section 10(b) and related provisions of federal law." *Id.* at 376-77.

THE ALLEGED FACTS

Lead Plaintiff Stichting Philips Pensioenfonds and Mary K. Jones ("Plaintiffs") bring this action against ten current and former Pfizer executives[2] on behalf of an alleged class of investors

[2] The Individual Defendants held a range of different positions at different times: Defendant Kindler served as Pfizer's General Counsel from January 2002 to July 2006, its Chief Executive Officer ("CEO") from July 2006 to December 2010 and Chairman of the Board from February 2007 to December 2010. Defendant McKinnell served as CEO from 2001 until July 2006 and Chairman of the Board from 2001

who purchased or acquired Pfizer securities between January 19, 2006 and January 23, 2009 (the "Class Period"). (*Id*. at ¶¶ 1, 21, 22).

Launched in 2002, Bextra was an important drug used for the treatment of arthritis and menstrual discomfort, with sales of over $1.2 billion per year. (*Id*. at ¶¶ 47, 49). 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." (*Id*. at ¶ 13). *Qui tam* complaints are filed in camera and under seal by relators pursuant to the False Claims Act. *See* 31 U.S.C. § 3729, *et seq*. Pfizer promptly disclosed the existence of the investigation in its Form 10-K filed with the SEC in March 2004. (Lamberti Dec. Ex. A).

In April 2005, *prior* to the commencement of the Class Period, Pfizer voluntarily discontinued sales of Bextra due to certain side effects. (Complaint ¶ 50). Bextra was not sold by Pfizer during the Class Period. (*Id.*). Pfizer continued to make disclosures of the pendency of ongoing investigations into Bextra, both by the DOJ and later by other authorities, in its quarterly and annual reports throughout the Class Period. *See id*. at ¶¶ 69-74, 76. As additional investigations regarding marketing practices related to other drugs commenced, Pfizer disclosed them. (*Id*. at ¶ 73). In November 2008, Pfizer disclosed that "[t]he Department of Justice investigation could result in the payment of a substantial fine and/or civil penalty." (*Id.* at ¶ 76).

---

until February 2007. Defendant D'Amelio has served as the Company's Chief Financial Officer ("CFO") since September 2007. Defendant Shedlarz served as Executive Vice President and CFO from January 1999 until July 2005 and Vice Chairman from March 2005 until December 2007. Defendant Levin served as CFO from March 2005 until September 2007. Defendant Read served as Senior Vice President and Group President of the Worldwide Biopharmaceutical Operations from 2006 until December 5, 2010, when he was named CEO. 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. (Complaint ¶¶ 24, 27-35).

On January 26, 2009, Pfizer announced that it reached an agreement in principle to resolve the previously disclosed governmental investigations into allegations of past unlawful promotion of Bextra and certain other drugs. (*Id.* at ¶ 95). Pharmacia & Upjohn Company ("Pharmacia"), a subsidiary of Pfizer, agreed to plead guilty to one count of off-label promotion relating solely to Bextra and to pay a $1.3 billion criminal fine, including a $105 million forfeiture, and a $1 billion civil penalty. (*Id.* at ¶ 100). Pfizer did not admit to any specific practices or sales involving improper off-label promotion of Bextra.

The $1.3 billion criminal settlement and the bulk of the $1 billion of civil penalties related only to Bextra. (*Id.* at ¶¶ 100, 106). The balance of the civil penalties largely involved three other drugs: (i) Geodon, launched in 2001 for the treatment of schizophrenia; (ii) Lyrica, launched in 2005 to treat neuropathic pain and approved for the treatment of fibromyalgia in 2007; and (iii) Zyvox, an antibiotic launched in 2001. (*Id.* at ¶¶ 51, 53, 56, 100, Ex. B at No. 32).

During the Class Period, Pfizer's overall annual sales approximated $48 billion each year. *See* Form 10-K, filed February 27, 2009. (Lamberti Dec. Ex. L). During the same period, the total sales for Geodon, Lyrica and Zyvox collectively accounted for roughly 9% of Pfizer's global pharmaceutical sales and only 7.6% of total revenues. (*Id.*).

Plaintiffs allege that, on January 26, 2009, Pfizer's stock price declined on announcement of the 2009 Settlement. (Complaint ¶ 19). But Pfizer's announcement of the resolution of the government investigations did not admit or establish anything contrary to its prior public statements which disclosed the existence of the government investigations, including that they "could result in the payment of a substantial fine and/or civil penalty." (*Id.* at ¶ 73). What was news that day was Pfizer's announcement of its agreement to acquire a major pharmaceutical

company, Wyeth, for $68 billion. (*Id*. at ¶ 19). Pfizer's stock price dropped on the announcement. (*Id*. at ¶¶ 19, 133-34).

ARGUMENT

I. THE COMPLAINT CONTINUES TO VIOLATE RULE 8

In its April Order, the Court found that Plaintiffs failed to satisfy the basic pleading requirements of Rule 8 and directed Plaintiffs to file an amended pleading. *See* Docket No. 70. Plaintiffs' Complaint is, in effect, the same complaint found deficient by this Court, minus the exhibits previously attached, and does not comply with the April Order. Neither Defendants nor the Court should bear the burden of piecing together or guessing at Plaintiffs' claims.

This Court has long held that allegations in securities fraud cases must "spell out with reasonable clarity" their allegations. *Spiegler* v. *Wills*, 60 F.R.D. 681, 682 (S.D.N.Y. 1973). Here, the Complaint violates Rule 8 and thus must be dismissed:

> Confronted with a 103 page Amended Complaint, with 322 paragraphs, this Court is faced with a rhetorical exercise in length and forensic embroidery. The Amended Complaint is hopelessly redundant, argumentative, and has much irrelevancy and inflammatory material. It is excessively long-winded, and its wordiness is unjustified. It is hopelessly in violation of the rules of pleading.

Morgen's Waterfall Holdings, LCC, v. *Donaldson, Lufkin & Jenrette Securities Corp.*, 198 F.R.D. 608, 610 (S.D.N.Y. 2001). [3]

[3] The deficiencies in Plaintiffs' Complaint are very similar to pleadings prepared by the same counsel and dismissed by this Court and others. *See In re Alcatel Securities Litigation*, 382 F. Supp. 2d 513, 534 (S.D.N.Y. 2005) (dismissing 102-page, 250-paragraph securities fraud complaint because, although long, it stated very little with particularity, "placing the burden on the Court to sort out the alleged misrepresentations and then match them with the corresponding adverse facts"); *see also Patel* v. *Parnes*, 253 F.R.D. 531, 551-52 (C.D. Cal. 2008) (dismissing 73-page, 145-paragraph securities fraud complaint as a "classic example of prohibited puzzle-pleading"); *McCasland* v. *FormFactor Inc*., No. C07-5545, 2008 WL 2951275, at *7 (N.D. Cal. July 25, 2008) (dismissing 107-page securities fraud complaint because it "employs an impenetrable 'puzzle-pleading' structure"); *Brodsky* v. *Yahoo! Inc.*, 592 F. Supp. 2d 1192, 1198 (N.D. Cal. 2008) (dismissing 209-page securities fraud complaint designed to place "the burden . . . on the reader to sort out the statements and match them with the corresponding adverse facts to solve the 'puzzle' of interpreting Plaintiffs' claims") (citation and internal quotation marks omitted).

II. THE COMPLAINT ALSO FAILS TO SATISFY THE HEIGHTENED PLEADING REQUIREMENTS OF RULE 9(B) AND THE PSLRA

Plaintiffs allege that Defendants violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Section 10(b) provides it is unlawful to:

> use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> 15 U.S.C. § 78j(b).

Rule 10b-5 provides that it is unlawful:

> (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
>
> 17 CFR § 240.10b-5.

To state a securities fraud claim under Section 10(b), a "plaintiff must establish that the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff." *ECA, Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co*., 553 F.3d 187, 197 (2d Cir. 2009) (citation and internal quotation marks omitted). "[A] simple declaration that defendant's conduct violated the ultimate legal standard at issue . . . does not suffice." *Gregory* v. *Daly*, 243 F.3d 687, 692 (2d Cir. 2001). "The tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Section 10(b) claims must meet the heightened pleading requirements of both Fed. R. Civ. P. 9(b) and the PSLRA. *See ATSI*, 493 F.3d at 99. Rule 9(b) requires Plaintiffs to "state with particularity the circumstances constituting the fraud." Fed. R. Civ. P. 9(b). In addition, "'Rule 9(b) requires a plaintiff to give every defendant notice as to the specific wrongs with which that defendant has been charged.'" *Morgen's Waterfall Holdings,* 198 F.R.D. at 610 (quoting *Minpeco, S.A.* v. *Conticommodity Services, Inc.,* 552 F. Supp. 332, 338 (S.D.N.Y. 1982)). 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).

A. PLAINTIFFS FAIL TO ALLEGE ANY MATERIALLY MISLEADING STATEMENTS OR OMISSIONS

1. The Government Investigations Were Disclosed

Plaintiffs admit that Pfizer's SEC filings informed investors of the commencement and evolution of the government investigations. (Complaint ¶¶ 68-77). Pfizer publicly disclosed the government investigations into its sales and marketing practices involving Bextra and other drugs on at least sixteen occasions during the Class Period. *See id.* at ¶¶ 69-73; 68 n.6.[4] These disclosures provided investors notice of the existence and risks of the investigations:

- "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." (*Id*. at ¶ 69).

[4] In addition to the disclosures Plaintiffs include in the Complaint, Pfizer made twelve additional disclosures in SEC filings and publicly available documents. *See* Form 10-K, filed March 10, 2004; 2003 Financial Report; Form 8-K, filed on January 19, 2005; Form 10-K, filed on February 28, 2005; 2004 Financial Report; Form 10-Q filed on August 8, 2005; Form 10-Q, filed on November 9, 2005; 2005 Financial Report; 2006 Financial Report; 2007 Financial Report; Form 10-K, filed on February 27, 2009; 2008 Financial Report (Lamberti Dec. Exs. A through J & Exs. L & M).

- "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." (*Id*. at ¶ 70).

- "[W]e have been considering various ways to resolve the COX-2 matter, which could result in the payment of a substantial fine . . ." (*Id.* at ¶ 73).

- "[W]e reached agreements to resolve substantially all of the cases and claims of state attorneys general involving Celebrex and Bextra." (*Id.* at ¶ 76).

Far from "deliberately downplay[ing]" the risks associated with the investigations (*id*. at ¶ 16), Pfizer disclosed the investigations as they evolved. *See id.* at ¶¶ 69-73; 68 n.6. For a stock trading in an efficient market (*see id*. at ¶ 141(c)), this is sufficient. *See Steed Finance LDC* v. *Nomura Securities International, Inc.*, 148 F. App'x 66 (2d Cir. 2005) (finding disclosure of government investigations was sufficient to put investors on notice of the underlying alleged conduct).

Plaintiffs claim that the quality of these statements "misrepresented the nature and severity" of the investigations. (Complaint ¶ 17).[5] Although Plaintiffs contend, with the benefit of 20/20 hindsight, that Defendants initially did not disclose the full extent of the Company's ultimate liability (*id*. at ¶¶ 15, 16, 17, 68, 70, 76, 77, and 83), a company is not required to predict the outcome of governmental investigations.[6] Nor do the federal securities laws require a company to "phrase disclosures in pejorative terms." *In re Merrill Lynch Auction Rate*

[5] Plaintiffs contend that Pfizer's disclosures "concealed that it had been illegally promoting products" by failing to use the specific term "off-label." (*Id*. at ¶ 16). The securities laws call for disclosure, not word-smithing. Pfizer's disclosures stated that the government was "conducting investigations relating to the marketing and safety of [certain medicines]" (*Id*. at ¶¶ 71-72), and the 2009 Settlement covered allegations beyond off-label practices. (*Id*. at ¶ 100). Disclosure is not deficient because Plaintiffs might have written it differently.

[6] *See In re Yukos Oil Co. Securities Litigation*, 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 Citigroup, Inc. Securities Litigation*, 330 F. Supp. 2d at 377 (holding that there is no duty to make disclosures predicting the risks associated with liability); *see also Acito* v. *IMCERA Group, Inc.*, 47 F. 3d 47 (2d Cir. 1995) (holding that there is no duty to disclose possible future inspection by regulatory agency).

Securities Litigation, 704 F. Supp. 2d 378, 392-93 (S.D.N.Y. 2010); *see In re Pfizer, Inc. Shareholder Derivative Litigation*, 722 F. Supp. 2d at 465 ("[S]elf-flagellation . . . is not required unless its absence renders any particular statement false or misleading.").

2. Sales and Revenues Were Reported

Plaintiffs allege that "[sales] performance[], unbeknownst to investors was fueled by Pfizer's illegal off-label marketing." (Complaint ¶ 84). Plaintiffs further allege that Defendants misled the market about the drugs' efficacy, safety and marketing. (*Id.* at ¶ 85). Yet Plaintiffs fail to plead any particulars regarding a single sale made as a result of alleged improper off-label marketing.

Bextra – the major focus and primary monetary component of the 2009 Settlement – was withdrawn from the market in April 2005, before the Class Period began. (*Id.* at ¶¶ 50, 100). Thus, reported sales and revenues of Bextra are not relevant here. Plaintiffs allege that Pfizer "has admitted . . . as part of its criminal plea, that the pecuniary or gross gain from [off-label marketing of Bextra] was $664 million." (*Id.* at ¶ 50). But Plaintiffs plead no basis to conclude that the negotiated settlement corresponds to actual revenue received from actual improper off-label sales. Moreover, Plaintiffs plead no facts to demonstrate the settlement was material in light of Pfizer's revenue during the Class Period.

The Complaint attaches, as Exhibit B, a chart of 42 alleged false and misleading statements from Pfizer press releases, earnings conference calls, analyst meetings, SEC filings, and investor-sponsored healthcare conferences. The excerpted statements principally discuss sales and revenue figures and trends for Geodon, Lyrica and Zyvox. *See id.* at Ex. B; *see also id.* at ¶¶ 84-94. But Plaintiffs fail to specify how each statement was inaccurate in any way. *See* 15 U.S.C. § 78u-4(b)(1)(B); *see also In re Alcatel*, 382 F. Supp. 2d at 534-35. Plaintiffs do not identify with particularity how the reported sales figures for Geodon, Lyrica and Zyvox were

derived from alleged off-label promotion. *See In re Citigroup, Inc. Securities Litigation*, 330 F. Supp. 2d at 377 (dismissing allegation that Citigroup violated Section 10(b) because it "fail[ed] to disclose that its revenues were derived from . . . illegitimate sources"). Instead, Plaintiffs conclusorily state that Pfizer "earned tens, if not hundreds, of millions from the off-label promotion of" Geodon and Lyrica. (Complaint ¶¶ 52, 57). Accordingly, Plaintiffs fail to meet the PSLRA's threshold requirements.

Plaintiffs allege that Pfizer received $9.7 billion in revenue during the Class Period for Geodon, Lyrica and Zyvox, and that Pfizer "included substantial revenues directly derived from unlawful off-label marketing." (Complaint ¶ 86).[7] But Plaintiffs do not allege with any particularity how much of Pfizer's revenue for the three drugs, if any, was attributable to improper off-label sales. To the contrary, sales of these drugs significantly increased following the periods when Plaintiffs concede that any alleged improper promotion ceased. *See id.* at ¶¶ 51, 53, & 56; *see* Form 10-K, filed February 26, 2010 (Lamberti Dec. Ex. N).[8] Nor do Plaintiffs 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. Furthermore, Plaintiffs do not distinguish between off-label sales that occurred in the United States, and sales that were transacted abroad, in countries that do not similarly regulate sales and

[7] Plaintiffs allege that Defendants "misrepresented the results" of a clinical trial for Geodon. *See* Complaint ¶¶ 88-89. Citing to the statement that the trial demonstrated that Geodon was the only of the five drugs studied that both had "comparable efficacy" ***and*** reduced weight gain and certain side effects, Plaintiffs allege that "the [] 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 ¶ 89 (emphasis in original). Yet, the challenged statement only states that Geodon had "comparable" efficacy. *Id.* at ¶ 88. Allegations cannot stand when rebutted by the document cited.

[8] Plaintiffs contend that "unlawful promotion" of Geodon continued until the end of 2007, but revenues from Geodon sales rose 17.3% between January 2008 and December 2009. Plaintiffs contend that the alleged illegal promotion of Zyvox ended in February of 2008, but Zyvox revenues rose 20.9% between January 2008 and December 2009. 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* Complaint ¶¶ 51, 53, 56; *see also* Form 10-K, dated February 26, 2010 (Lamberti Dec. Ex. N).

promotional activity. *See, e.g.*, Complaint Ex. B, No. 33. Simply put, Plaintiffs fail to plead any basis whatsoever that supports their contention that the sales figures disclosed for Geodon, Lyrica and Zyvox were false or misleading in a material way.

In a similarly conclusory fashion, Plaintiffs allege that Pfizer's sales revenues for Geodon, Lyrica and Zyvox increased significantly between 2005 (when revenues were $589 million, $291 million and $618 million, respectively) and 2008 (by which time each had "over $1 billion in annual sales") as a result of "pervasive off-label unlawful marketing practices." (*Id.* at ¶ 93). Plaintiffs ignore more plausible explanations for sales increases, including the approval of Lyrica for treatment of fibromyalgia. *See* Ex. B, Nos. 32-40; *see also Tellabs*, 551 U.S. at 308. As noted, Plaintiffs' conclusory allegations are further undermined by the increase in revenues after the alleged improper promotion ceased. *See* Form 10-K, filed February 26, 2010 (Lamberti Dec. Ex. N); *see also* footnote 8, *supra*.

3. Defendants Did Not Violate GAAP

Plaintiffs allege that Defendants should have recorded a loss reserve for a settlement before the settlement was negotiated, or even before any negotiations took place. *See* Complaint ¶¶ 17, 79(d). But 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). 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) (citation and internal quotation marks omitted); *In re Fannie Mae 2008 Securities Litigation*, 742 F. Supp. 2d 382, 408 (S.D.N.Y. 2010); *Woodward* v. *Raymond James Financial, Inc.*, 732 F. Supp. 2d 425, 435 (S.D.N.Y. 2010).

Moreover, the Complaint itself undermines Plaintiffs' allegations of understated reserves. (Complaint ¶ 79(d)). Plaintiffs quote the relevant accounting guidance, which required that

Pfizer "accrue[] for and/or disclose[] in [its] financial statements" a loss contingency related to the government investigations. (*Id.* at ¶ 79(b)). As the Complaint concedes, Pfizer was not required to establish a reserve unless the amount was "probable. . . and the loss c[ould] be reasonably estimated." (*Id.*). Hindsight allegations about understated reserves do not state a claim for securities fraud. *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978); s*ee also In re Security Capital Assurance, Ltd. Securities Litigation*, 729 F. Supp. 2d 569, 597 (S.D.N.Y. 2010) ("Plaintiffs' repeated assertions that SCA failed to maintain adequate loss reserves . . . are criticisms of Defendants' business judgment and management of SCA, not fraudulent misrepresentations.").

Plaintiffs allege that Defendants violated Item 303 of Regulation S-K (Complaint ¶ 79(e)), which states in pertinent part that a company's disclosures must: "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact" on a company's financial condition or results of operations. 17 C.F.R. § 229.303(a)(3)(ii). However, even if Plaintiffs could show that a violation of Regulation S-K occurred, it "would be insufficient to establish Defendants' liability under Section 10(b) and Rule 10b-5." *In re Marsh & McLennan Cos., Inc. Securities Litigation*, 501 F. Supp. 2d 452, 473 (S.D.N.Y. 2006); *see also In re Flag Telecom Holdings, Ltd. Securities Litigation*, 308 F. Supp. 2d 249, 263 (S.D.N.Y. 2004) ("[E]ven if a plaintiff properly alleges a violation of Item 303 of Regulation S-K, such a violation cannot alone create a § 10(b) violation."), *vacated in part on other grounds*, 574 F.3d 29 (2d Cir. 2009). Indeed, it is undisputed that Pfizer repeatedly disclosed, fully consistent with Item 303, the pendency of the government investigations, including the fact that the investigations could have an unfavorable impact. *See, e.g.*, Complaint ¶ 73. The very "trend[] or uncertaint[y]" that Plaintiffs allege

should have been disclosed, was, in fact, disclosed at least sixteen times. *See id.* at ¶¶ 69-73; 68, n.6; *see also* footnote 4, *supra*.

4. Defendants' Statements Regarding Future Dividends Are Not Actionable

Plaintiffs allege that statements made during a March 5, 2008, analyst meeting regarding the payments of future dividends were false and misleading because fines and penalties paid to resolve the government investigations would, Plaintiffs claim, ultimately impact Pfizer's ability to maintain dividend payments at then-current levels. (*Id.* at ¶ 83). Pfizer had disclosed that it had "been considering various ways to resolve" the investigations (*id.* at ¶ 72), but there simply was no settlement in March 2008. Moreover, Plaintiffs themselves highlight an important qualification with respect to intentions to maintain the dividend – "*significant unforeseen events aside*[,] . . . Something that's significant that I'll call it has a big impact on our operating cash flow, so that aside, our intention is to continue to fund the dividend at least at current levels, and that's going forward." (*Id.* at ¶ 81). Nothing is pled to show that Defendants' "intention" on March 5, 2008 about future payment of dividends was anything but honestly held.

Furthermore, Plaintiffs ignore the effect on the dividend of the largest pharmaceutical merger in history — Pfizer's $68 billion acquisition of Wyeth, financed with more than $22.5 billion in new debt. *See* Form 8-K, filed January 26, 2009 (Lamberti Dec. Ex. K); Complaint ¶ 138-139. As Pfizer announced: "In connection with the proposed transaction between Pfizer and Wyeth, the Board of Directors has determined that . . . it will reduce Pfizer's quarterly dividend." *See* Form 8-K, filed January 26, 2009 (Lamberti Dec. Ex. K).[9] Plaintiffs' suggestion

[9] Management's expectation regarding the payment of future dividends is a classic "forward-looking" statement entitled to the protection of the safe harbor provided by the PSLRA. *See* 15 U.S.C. § 78u-5(i)(1)(A) (forward-looking statements include "a projection of . . . dividends, . . . or other financial items"); *see, e.g.*, *Rombach* v. *Chang*, 355 F.3d 164, 173 (2d Cir. 2004); *In re International Business Machines Corp. Securities Litigation*, 163 F.3d 102, 108 (2d Cir. 1998); *In re Australia and New Zealand*

that it was the government settlement, not the 30-times larger Wyeth acquisition, that impacted the dividend is unsupported and implausible.

5. Plaintiffs' Allegations Regarding Corporate Mismanagement Do Not State a Securities Fraud Claim

Plaintiffs contend that Defendants concealed that Pfizer personnel violated corporate policies and that Pfizer did not possess adequate internal controls to prevent, detect and stop alleged off-label marketing. (Complaint ¶¶ 60-67). Plaintiffs challenge statements such as:

- "Pfizer is committed to full healthcare law compliance globally . . . ." (*Id.* at ¶ 60).
- "[A]ll 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." (*Id*. at ¶ 61).

See also id. at ¶¶ 58-64. However, Plaintiffs do not, and can not, allege that these corporate policies did not exist or that the general descriptions of them were in any way materially false or misleading. Pfizer did not represent that no violations by individual employees had, would or could occur. A failure to adhere to publicly disclosed compliance policies "amounts to nothing more than a charge that [defendant's] business was mismanaged." *In re Citigroup Inc. Securities Litigation*, 330 F. Supp. 2d at 376 (dismissing § 10(b) claim because "[t]he securities laws were not designed to provide an umbrella cause of action for the review of management practices"); *see also* p. 3, *supra*.

Finally, to the extent that these Plaintiffs complain about corporate mismanagement in connection with matters relating to the government investigations, those claims have already been brought, and settled, in the derivative action before Judge Rakoff. *In re Pfizer Inc.*

Banking Grp. Ltd. Securities Litigation, No. 08 Civ. 11278, 2009 WL 4823923, at *13 (S.D.N.Y. Dec. 14, 2009).

Shareholder Derivative Litigation, No. 09 Civ. 7822, 2011 WL 1630110, at * 7 (S.D.N.Y. Apr. 29, 2011).

B. PLAINTIFFS FAIL TO ALLEGE SCIENTER

The PSLRA requires that a securities fraud complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Kalnit* v. *Eichler*, 264 F.3d 131, 138 (2d Cir. 2001) (quoting 15 U.S.C. § 78u-4(b)(2)(A)). To withstand a motion to dismiss, "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." *Tellabs*, 551 U.S. at 314. While courts "normally draw reasonable inferences in the non-movant's favor on a motion to dismiss, the PSLRA establishes a more stringent rule for inferences involving scienter because the PSLRA requires particular allegations giving rise to a strong inference of scienter." *ECA*, 553 F.3d at 196.

In order to allege scienter, *i.e.*, that defendants acted with the "intent to deceive, manipulate or defraud," *Tellabs,* 551 U.S. at 319; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976), Plaintiffs must allege "facts (1) showing that the defendants had both motive and opportunity to commit the fraud, or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *ATSI,* 493 F.3d at 99.

1. Plaintiffs Do Not Plead "Motive and Opportunity to Commit Fraud"

a. Plaintiffs' Allegations Regarding Incentive-Based Executive Compensation Are Insufficient to Plead Motive

Plaintiffs allege that the compensation of the Individual Defendants was based on the Company's financial performance. *See* Complaint ¶¶ 124-27. However, incentive compensation tied to general corporate profitability is not a basis for a finding of scienter. *Acito*, 47 F.3d at 54; *see also Kalnit*, 264 F.3d at 139 ("Motives 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 the fraud."); *Novak*, 216 F.3d at 307 (scienter cannot be "based on motives possessed by virtually all corporate insiders, including . . . the desire to maintain a high stock price in order to increase executive compensation").

b. The Stock Sale Allegations Fail to Plead Scienter

Plaintiffs' assertion that Defendants Feczko, Katen, Levin, McKinnell, Read and Shedlarz sold some Pfizer stock between 2006 and 2007 (Complaint Ex. C) fails to meet the pleading requirements necessary to raise a "strong inference of intent to deceive the investing public." *Acito*, 47 F.3d at 54. The "mere fact that insider stock sales occurred does not suffice to establish scienter." *In re Keyspan Corp. Securities Litigation*, 383 F. Supp. 2d 358, 381 (E.D.N.Y. 2003) (citation and internal quotation marks omitted). To demonstrate motive, Plaintiffs must plead that the Defendants' trading during the relevant period was unusual. *Acito*, 47 F.3d at 54. The relevant factors include: (1) "the amount of profit from the sales;" (2) percentage of defendants' holdings 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, 384-85; *see also In re BISYS Securities Litigation*, 397 F. Supp. 2d 430, 444 (S.D.N.Y. 2005). Plaintiffs do not allege any details, referring only to combined sales proceeds. *See* Complaint ¶ 128. But gross proceeds are not relevant to a defendant-by-defendant scienter analysis and "standing alone, tell[] us very little." *Malin* v. *XL Capital Ltd.*, 499 F. Supp. 2d 117, 152 (D. Conn. 2007), *aff'd*, 312 F. App'x 400 (2d Cir. 2009).

The timing of the selling Defendants' alleged sales – which occurred between February 2006 and November 2007 (Complaint Ex. C) – does not support an inference of scienter because it "[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); *see Malin*, 499 F. Supp. 2d at 156.

Plaintiffs allege that the "truth" regarding the alleged misstatements and omissions was "revealed" on January 26, 2009, when Pfizer disclosed the 2009 Settlement. (Complaint ¶ 95). But the selling Defendants sold Pfizer stock well over a year before this announcement. *See* Complaint Ex. C. This is not "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); *see also In re BISYS Securities Litigation*, 397 F. Supp. 2d at 444-45. The mere allegation that some of the Defendants sold Pfizer stock more than a year removed from the events at issue simply does not support an inference that they, or anyone else, acted with scienter.

The lack of any stock sales by Defendants Kindler, D'Amelio and Waxman during the Class Period "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; *see San Leandro Emergency Medical Group Profit Sharing Plan* v. *Philip Morris Cos.*, 75 F.3d 801, 814 (2d Cir. 1996). Indeed, "any suggestion of knowledge on the part of the defendants due to any other claimed inside sells" is undermined where the CEO, "who held a significant amount of shares and who would have been an essential participant in any fraudulent scheme, did not sell stock." *Druskin* v. *Answerthink, Inc.*, 299 F. Supp. 2d 1307, 1336, n.40 (S.D. Fla. 2004).

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

To show "conscious misbehavior or recklessness," Plaintiffs must allege "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 (citations and internal quotation marks omitted). "Where motive is not apparent, . . . the strength of the circumstantial allegations must be correspondingly greater." *Kalnit*, 264 F.3d at 142.

a. Conclusory Allegations that the Defendants "Knew or Recklessly Disregarded" Illegal Off-Label Marketing Fail to Plead Scienter

Plaintiffs allege that Defendants "kn[ew] or recklessly disregarded" Pfizer's promotion of drugs for off-label uses and the risk that Pfizer would incur a fine for such practices. *See, e.g.*, Complaint ¶¶ 77, 115. The Individual Defendants held widely varying positions at Pfizer. *See* footnote 2, *supra*. Yet Plaintiffs "fail to allege facts that particularize how and why each defendant actually knew, or was reckless in not knowing" of continuing improper off-label marketing that could result in a fine. *See Tamar* v. *Mind C.T.I., Ltd.*, 723 F. Supp. 2d 546, 597 (S.D.N.Y. 2010).[10] Plaintiffs' unparticularized allegations therefore fail to meet the pleading requirements.

In addition, where "plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information." *Novak*, 216 F.3d at 309. Plaintiffs fail to point to a single event or communication indicating that any Individual Defendant knew of any widespread, ongoing unlawful conduct regarding off-label marketing. *See Plumbers & Steamfitters Local 773 Pension Fund* v. *Canadian Imperial Bank of Commerce*, 694 F. Supp. 2d 287, 299 (S.D.N.Y. 2010) (dismissing claims based on "perfunctor[]y" allegations "that Defendants received information contradicting their public statements because they held management roles and monitored . . . reports"). Plaintiffs' allegations that Pfizer

[10] *See also In re PXRE Grp., Ltd. Securities Litigation*, 600 F. Supp. 2d 510, 536 (S.D.N.Y. 2009) ("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 F. App'x 393 (2d Cir. 2009). 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 in conformity with the PSLRA. *See In re AstraZeneca Securities Litigation*, 559 F. Supp. 2d 453, 472 (S.D.N.Y. 2008) ("The group pleading doctrine cannot apply to create a presumption of scienter as to individual defendants."), *aff'd sub nom. State Universities Retirement System of Illinois* v. *Astrazeneca PLC*, 334 F. App'x 404 (2d Cir. 2009); *In re Citigroup, Inc. Securities Litigation*, 330 F. Supp. 2d at 381 (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") (citation and internal quotation marks omitted).

received an FDA warning letter regarding Zyvox are unavailing. (Complaint ¶ 55). The FDA warning letter involved claims of superiority, not off-label marketing. (*Id.*). At best, Plaintiffs' allegation that "Pfizer did not provide adequate guidance to it sales force" (*id.*) suggests corporate mismanagement and fails to show scienter as to any Individual Defendants. *See In re Security Capital Assurance Ltd. Securities Litigation*, 729 F. Supp. 2d at 597.

Despite five years of government investigations, none of the Individual Defendants were accused of involvement in, or knowledge of, any improper activities. The 2009 Settlement did not mention any of the Individual Defendants, let alone allege that any of them were involved in, or aware of, any alleged improper sales practices. *See* Complaint ¶¶ 116-17.[11] Plaintiffs' speculative allegation 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" (*id.* at ¶ 83) fails to meet the scienter pleading standard. The majority of the fine's impact arose from Bextra. (*Id.* at ¶ 100). Pfizer disclosed this possibility in public filings during the Class Period. (*Id*. at ¶ 73). Plaintiffs fail to plead with particularity any adverse fact known to any of the Individual Defendants related to off-label promotion of Lyrica, Geodon and Zyvox. Plaintiffs thus fail to allege scienter.

Plaintiffs' allegation that "defendants deliberately concealed" the risk that Pfizer faced debarment from federal healthcare programs (*id.* at ¶ 13) is similarly unavailing because Pfizer

[11] Plaintiffs refer to prior instances when Pfizer resolved sales and marketing investigations. *See* Complaint ¶ 110 (discussing 2002 Corporate Integrity Agreement resolving allegations relating to Medicaid Rebate payments and kickbacks); *id*. at ¶¶ 2, 5 (discussing 2004 Corporate Integrity Agreement resolving allegations of off-label promotion of Neurontin by predecessor entity); *id*. at ¶ 66 (referring to the 2007 settlement 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, and (b) resolution of the conduct at issue was disclosed before the Class Period.

was not, and has never been, debarred from participation in a federal healthcare program. Hypothetical risk of debarment was a matter of public record. *See* 21 U.S.C. § 335a.

b. Plaintiffs' Allegations Regarding the Corporate Integrity Agreements and Blue Book Fail to Plead Scienter

Plaintiffs allege that Defendants' "repeated disregard for the law" embodied in two prior resolutions of sales and marketing investigations – the 2002 and 2004 Corporate Integrity Agreements (the "CIAs") – establishes scienter. (Complaint ¶ 109). But the CIAs involved conduct at predecessor companies. *See id*. at ¶¶ 38, 39, 42; *see also* footnote 11, *supra*. Plaintiffs' recitation of excerpts from the CIAs (*id*. at ¶¶ 42-4, 113-14) fails to show that Defendants intentionally or recklessly ignored alleged ongoing improper off-label promotion during the Class Period. Plaintiffs conclusorily claim that the CIAs required senior management to "monitor and report off-label marketing," both internally and to the government. (*Id*. at ¶¶ 43-4, 118-20). Plaintiffs leap to the unsubstantiated conclusion that, because of the Individual Defendants' alleged monitoring and reporting obligations, they must have been "informed of or were reckless in knowingly ignoring the Company-wide off-label promotion of Bextra, Geodon, Lyrica and Zyvox." (*Id*. at ¶ 115). Yet Plaintiffs have not pled with particularity any situation in which persons with responsibilities under the CIAs were aware of such wrongdoing and, with such knowledge, permitted unlawful conduct to continue. *See Denny*, 576 F.2d at 469 (finding insufficient a "mere conclusory allegation to the effect that defendant's conduct was fraudulent").

Plaintiffs nowhere identify any specific compliance reports (Complaint ¶¶ 43-44) that actually informed the Defendants of any alleged wrongdoing. *See Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 196 (2d Cir. 2008) (holding that plaintiffs did not adequately plead a failure to review or check information based on a duty to

monitor because plaintiffs "have not specifically identified any reports or statements that would have come to light in a reasonable investigation and that would have demonstrated the falsity of the allegedly misleading statements"); *see also In re PXRE Group Ltd. Securities Litigation*, 600 F. Supp. 2d at 536 ("Plaintiff fails to allege that Defendants had access to information that *specifically* informed them of the alleged flaws in the preparation of PXRE's loss estimate reports . . . .").

Plaintiffs' conclusory allegations regarding the Blue Book similarly fail to meet the heightened pleading standards. Plaintiffs rely on complaints of a handful of *qui tam* relators, who provided "accounts of widespread off-label marketing at Pfizer's highest levels" and claim generally to have advised the "corporate compliance department" about off-label concerns. (Complaint ¶¶ 121-22). Yet the *qui tam* complaints were not unsealed until recently. *See In re Pfizer Inc. Shareholder Derivative Litigation*, 722 F. Supp. 2d at 456. Thus knowledge of the relators' allegations – even if deemed credible – cannot be imputed to Defendants during the Class Period. And nothing about these allegations – which remain unproven – in any way implicates any of the Individual Defendants. *See* Complaint ¶¶ 121-23; *Shields* v. *Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994) (affirming dismissal of Section 10(b) claim where allegations were that "defendants should have been more alert and more skeptical, but nothing alleged indicates that management was promoting a fraud").

c. Plaintiffs' Allegations Relating to the 2009 Criminal Plea Fail to Plead Scienter

Plaintiffs allege 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 Pfizer subsidiary Pharmacia. (Complaint Heading before ¶ 116). Plaintiffs fail to allege any link between any of the Individual Defendants and the allegations involved in the

2009 Settlement. *Tamar*, 723 F. Supp. 2d at 557. And the plea pertained solely to Bextra sales and marketing practices. (Complaint ¶ 100). Entering into a settlement agreement with the government is insufficient to establish scienter 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).

C. PLAINTIFFS FAIL TO ALLEGE MATERIALITY

To state a Section 10(b) and Rule 10b-5 claim, a plaintiff "must establish that the defendant, in connection with the purchase or 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]." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988). "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 In re MBIA Inc. Securities Litigation*, 700 F. Supp. 2d 566, 578-79 (S.D.N.Y. 2010); *Hall* v. *Children's Place Retail Stores, Inc.*, 580 F. Supp. 2d 212, 226 (S.D.N.Y. 2008). 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 Industries* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).

Judge Rakoff found that Pfizer "adequately" disclosed the existence of the government investigations. *See In re Pfizer Inc. Shareholder Derivative Litigation*, 722 F. Supp. 2d at 464. The Complaint contains multiple citations to public disclosures of the government investigations,

dating back at least as far as March 2006. (Complaint ¶¶ 69-76). Such disclosure is "more than sufficient to put potential investors . . . on notice." *Ieradi* v. *Mylan Laboratories, Inc.*, 230 F. 3d 594, 599 (3d Cir. 2000).

Bextra, by far the largest selling of the subject drugs (Complaint ¶ 49), and the subject of the majority of the fine paid in the 2009 Settlement (*id.* at ¶ 100), was voluntarily withdrawn from the market before the Class Period began (*id.* at ¶ 50). Allegations about its revenues cannot possibly be material, because 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 Geodon, Lyrica and Zyvox. *See id.* at ¶¶ 51, 53, 56. While these three drugs were included in the ultimate resolution with the government, they constituted a minor portion of the settlement. (*Id.* at ¶¶ 100, 106). 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. *Cf. id.* at ¶ 50. Indeed, Plaintiffs fail to allege any context for what percentage of Pfizer's total revenues sales of these drugs comprised, either annually or by quarter. *See ECA*, 553 F. 3d at 204 (focusing on "the quantitative factor" and concluding that "[a]lthough $2 billion in prepay transactions may sound staggering, the number must be placed in context"). If Plaintiffs cannot identify the extent to which any sales figures were based on alleged off-label promotion of these drugs, they cannot plead that the challenged statements were material.[12]

[12] The $2.3 billion settlement is not material in the overall context of the sales and revenues of the drugs at issue. During the Class Period, Pfizer received more than $145 billion in revenues. *See* Form 10-K, dated February 27, 2009 (Lamberti Dec. Ex. L). The $2.3 billion settlement is only 1.6% of Pfizer's reported revenue. *See Masters* v. *GlaxoSmithKline*, 271 F. App'x 46, 50-51 (2d Cir. 2008) (holding that an amount of "less than 3% of GSK's revenues from Paxil" was "financially immaterial"); *see also ECA*, 553 F.3d at 197; *In re Duke Energy Corp. Securities Litigation*, 282 F. Supp. 2d 158, 161 (S.D.N.Y. 2003).

Finally, Plaintiffs' allegations regarding Pfizer's statements describing the company's general business practices are immaterial. *See, e.g.*, Complaint ¶¶ 59-60. "Such generalizations are 'precisely the type of "puffery" that this and other circuits have consistently held to be inactionable.'" *ECA*, 553 F. 3d at 206 (quoting *Lasker* v. *New York State Electric & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996)).

D. PLAINTIFFS FAIL TO ALLEGE LOSS CAUSATION

Plaintiffs also must plead an injury that was proximately caused by the alleged misconduct. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 346-47 (2005). Section 10(b) is not meant "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Id.* at 345. "Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Lentell* v. *Merrill Lynch & Co., Inc.*, 396 F.3d 161, 172 (2d Cir. 2005) (citation and internal quotation marks omitted). Plaintiffs' theory – that Pfizer's stock price was artificially inflated by alleged misrepresentations and then declined when the 2009 Settlement was announced – fails to adequately allege loss causation. *See* Complaint ¶¶ 133-34.

First, loss causation "is typically pled by alleging that the defendant made a corrective disclosure . . . that served to reveal to the market the falsity of prior recommendations followed by a drop in the relevant stock's price." *Alaska Laborer Employers Retirement Fund* v. *Scholastic Corp.*, No. 07 Civ. 7402, 2010 WL 3910211, at *5 (S.D.N.Y. Sept. 30, 2010) (citing *Lentell,* 396 F.3d at 173-175 n.4). But the January 26, 2009, announcement was not a corrective disclosure that informed the market that Pfizer's prior statements were untrue. Rather, Pfizer consistently disclosed the pendency and evolving nature of the government investigations, including the possibility that a resolution of the investigations "could result in the payment of a

substantial fine and/or civil penalty." (Complaint ¶¶ 69-73). Thus, the risk of the government settlement and fine was not "within the zone of risk concealed by [] misrepresentations and omissions." *Lentell,* 396 F.3d at 173.

Second, Plaintiffs have not "show[n] that [their] loss was caused by the alleged misstatements as opposed to intervening events." *Lentell*, 396 F.3d at 174 (citation and internal quotation marks omitted). Plaintiffs must distinguish the alleged fraud from the "tangle of [other] factors affecting price." *Dura*, 544 U.S. at 343. Where, as here "an intervening cause supercedes the effects of an initial misrepresentation, then a Section 10(b) claim fails." *In re QLT Inc. Securities Litigation*, 312 F. Supp. 2d 526, 536 (S.D.N.Y. 2004). Plaintiffs admit Pfizer announced the Wyeth transaction simultaneously with the 2009 Settlement. (Complaint ¶ 136). Yet, Plaintiffs do not plausibly account for why the $68 billion transaction (30 times the size of the 2009 Settlement and involving $22 billion in debt) did not cause, or contribute to, the January 26 stock price movement.[13]

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR CONTROL PERSON LIABILITY

Plaintiffs assert a controlling person liability claim against all defendants under Section 20(a). *See* 15 U.S.C. § 78t(a). "In order to establish a *prima facie* case of liability under § 20(a), a plaintiff must show . . . a primary violation by a controlled person." *Boguslavsky* v. *Kaplan,* 159 F.3d 715, 720 (2d Cir. 1998); *see also In re Omnicom Group, Inc. Securities Litigation*, 597

[13] In addition to failing to allege loss causation, the Complaint also fails to allege the additional requisite element of transaction causation. Plaintiffs must allege "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). Plaintiffs rely on the "fraud on the market" theory to invoke a presumption of reliance. (Complaint ¶¶ 141-42). 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." *Basic Inc.*, 485 U.S. at 248 (citation and internal quotation marks omitted). As explained above, Pfizer disclosed the governmental investigations. "[D]isclosures and information available to Plaintiffs prior to their respective purchases rebut any presumption of reliance." *In re UBS Auction Rate Securities Litigation*, No. 08-Civ. 2967, 2010 WL 2541166, at *22 n.14 (S.D.N.Y. June 10, 2010).

F.3d 501, 514 n.6 (2d Cir. 2010); *ATSI,* 493 F.3d at 108. Because Plaintiffs fail to state a claim under Section 10(b) and Rule 10b-5, the Section 20(a) claim fails as a matter of law.

IV. PLAINTIFFS' CLAIMS ARE TIME-BARRED

The statute of limitations for 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.* v. *Reynolds*, 130 S. Ct. 1784, 1798 (2010). The numerous pre-2008 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 (*see* Complaint ¶¶ 10, 69-74, 76), would have caused a reasonably diligent plaintiff to learn that the Company might face liability exposure. *See Ieradi*, 230 F. 3d at 599 (finding public disclosure of a government investigation was "sufficient" to make plaintiffs aware of their cause of action); *De la Fuente* v. *DCI Telecommuncations, Inc.*, 206 F.R.D. 369, 382 (S.D.N.Y. 2002) (finding that disclosure of a government investigation "should have alerted plaintiffs to the probability that there were either misleading statements or significant omissions"). Plaintiffs' claims are time-barred.

CONCLUSION

Plaintiffs' Complaint should be dismissed with prejudice.

Dated: May 24, 2011

Respectfully submitted,

CAHILL GORDON & REINDEL LLP

By: /s/ David G. Januszewski
Bart Friedman
(bfriedman@cahill.com)
Charles A. Gilman
(cgilman@cahill.com)
David G. Januszewski
(djanuszewski@cahill.com)
S. Penny Windle
(pwindle@cahill.com)
80 Pine Street
New York, New York 10005
(212) 701-3000

- and -

CADWALADER, WICKERSHAM & TAFT LLP
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