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No. 15-623-cv

AG FUNDS, L.P., AG MM, L.P., AG SUPER FUND INTERNATIONAL, L.P.,
AG PRINCESS, L.P., NUTMEG PARTNERS, L.P., AG SUPER FUND, L.P.,
ARISTEIA HORIZONS, L.P., WINDERMERE IRELAND FUND PLC, COMPASS
ESMA, L.P., COMPASS TSMA, L.P., XEROPOLIS L.L.C., OZ ELS MASTER
FUND, LTD., OZ MASTER FUND, LTD., OZ EUREKA FUND, L.P., GORDEL
CAPITAL LIMITED, OZ EUROPE MASTER FUND, LTD., OZ GLOBAL
SPECIAL INVESTMENTS MASTER FUND, L.P., OZ SELECT MASTER FUND,
LTD., OZ GLOBAL EQUITY OPPORTUNITIES MASTER FUND, OZ
ENHANCED MASTER FUND, LTD., SAPELO LLC, WHITEBOX
CONCENTRATED CONVERTIBLE ARBITRAGE PARTNERS, L.P., WHITEBOX
CREDIT ARBITRAGE PARTNERS, L.P., WHITEBOX ASYMMETRIC PARTNERS,
L.P., WHITEBOX MULTISTRATEGY PARTNERS, L.P., PANDORA SELECT
PARTNERS, L.P., WHITEBOX INSTITUTIONAL PARTNERS, L.P., WHITEBOX
SPECIAL OPPORTUNITIES FUND SERIES B PARTNERS, L.P., WHITEBOX
SPECIAL OPPORTUNITIES FUND, SERIES O,

Plaintiffs-Appellants,

GOLDMAN SACHS PROFIT SHARING MASTER TRUST, MERRILL LYNCH
INVESTMENT SOLUTIONS OCH-ZIFF EUROPEAN MULTI-STRATEGY UCITS
FUND, OZEA, L.P.,

Plaintiffs,

v.

SANOFI, GENZYME CORPORATION, CHRISTOPHER VIEHBACHER, DAVID
MEEKER, JEROME CONTAMINE,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of New York.
Nos. 13 Civ. 8806 (PAE), 14 Civ. 2211 (PAE) — Paul A. Engelmayer,
District Judge.

Argued: October 7, 2015
Decided: March 4, 2016

Before: PARKER, LOHIER, and CARNEY, *Circuit Judges.*

In these related cases, Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York (Engelmayer, Paul A., J.) granting Defendants’ motion to dismiss the complaints for failure to state a claim upon which relief may be granted. *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510 (S.D.N.Y. 2015). Plaintiffs allege that Defendants made materially false or misleading statements or omissions regarding the clinical testing of Defendants’ drug, Lemtrada. Specifically, Plaintiffs allege that Defendants misled investors by failing to disclose that the FDA had expressed concern regarding the use of single-blind (as opposed to double-blind) clinical studies. We affirm the decision of the district court. We write here primarily to examine the impact of the Supreme Court’s intervening decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015). We conclude that even under the Supreme Court’s revised approach to allegations of materially misleading opinions, Plaintiffs have failed to meet the standards applicable under Fed. R. Civ. P. 12(b)(6).
Affirmed.

1 CHRISTOPHER L. NELSON (James M. Ficaró, Brett D.
2 Stecker, *on the brief*), The Weiser Law Firm, P.C.,
3 Berwyn, PA, Daniella Quitt, Harwood Feffer LLP,
4 New York, NY, *on the brief, for Plaintiffs-Appellants*
5 *Gen. Partner Glenn Tongue, Deerhaven Capital*
6 *Management.*

7 JOHN B. ORENSTEIN (Harry N. Niska, *on the brief*),
8 Ross Orenstein & Baudry LLC, Minneapolis, MN,
9 *for Plaintiffs-Appellants AG Funds, L.P. et al.*

10 JOHN NEUWIRTH (Joshua S. Amsel, Caroline
11 Hickey Zalka, Justin D. D'Aloia, *on the brief*), Weil,
12 Gotshal & Manges LLP, New York, NY, *for*
13 *Defendants-Appellees.*

14 _____
15 BARRINGTON D. PARKER, *Circuit Judge*

16 _____

17 In these related cases, Plaintiffs allege that the pharmaceutical
18 company Sanofi, along with its predecessor and three company
19 executives, made materially false or misleading statements
20 regarding its breakthrough drug, Lemtrada, designed to treat
21 multiple sclerosis ("MS"). Plaintiffs allege that while Lemtrada was
22 undergoing Phase III clinical trials prior to FDA approval, Sanofi
23 misled investors by failing to disclose that the FDA had repeatedly
24 expressed concern with Sanofi's use of single-blind studies and had
25 encouraged Sanofi to use double-blind studies in its clinical trials.
26 Plaintiffs allege that these omissions misled investors and artificially
27 inflated the value of Plaintiffs' contingent value rights ("CVRs"),
28 specialized financial instruments whose value is tied to the
29 achievement of certain "milestones."

1 At least as far back as 2002, the FDA expressed concern about
2 the use of single-blind studies for Lemtrada, telling ILEX (the then-
3 owner of Lemtrada that was acquired by Genzyme in 2004) in a
4 teleconference that the use of single-blind studies in Lemtrada’s
5 early clinical trials would “not provide substantial support for a
6 BLA.”¹ Joint App’x at 43. In 2004, the FDA again informed ILEX in
7 another teleconference that “[b]ecause of study design issues (open-
8 label, small sample size) the [clinical trial] is unlikely to provide
9 substantial support for an sBLA.”² *Id.* After Genzyme acquired
10 ILEX, the FDA reiterated in a telephone call that the early clinical
11 trial “will not be a pivotal study to support a license application.” *Id.*

12 In 2006, the FDA expressed more optimism for the drug’s
13 approval based on the single-blind studies, saying that “a rater
14 blinded (but patient not blinded) study may be adequate if the effect
15 is large,” though the FDA again noted that it would “prefer double-
16 blinded, controlled studies, especially for the pivotal trials.” *Id.* at
17 78. In 2007, the FDA sent a letter “strongly recommend[ing]” that
18 Genzyme “use a double-dummy placebo control in your pivotal
19 trials,” adding that “[t]he acceptability of your rater-blinded study
20 will be a matter of review. If your study results reveal an extremely
21 large effect, then FDA may potentially accept this rater-blinded
22 design for the pivotal trials.” *Id.* Notwithstanding this feedback, the
23 FDA permitted Genzyme to enroll patients in Phase III clinical trials
24 that were only single-blind studies. (Phase III is the final phase of
25 trials prior to submission of the drug for FDA approval for public
26 usage.)

¹ Biologics License Application. According to the FDA, a BLA “is a request for permission to introduce, or deliver for introduction, a biologic product into interstate commerce.” FDA, *Biologics License Applications (BLA) Process (CBER)*,

<http://www.fda.gov/BiologicsBloodVaccines/DevelopmentApprovalProcess/BiologicsLicenseApplications/BLAProcess/default.htm> (last visited Mar. 1, 2016).

² Supplemental Biologics License Application.

1 The FDA’s concerns regarding the use of single-blind studies
2 continued and were expressed to Genzyme during the Phase III
3 trials. According to the FDA’s minutes of a meeting with Genzyme,
4 the FDA expressed in March 2010 that it “was concerned by the
5 potential bias introduced by the absence of blinding of patients,” and
6 that “the bias introduced by unblinding physicians and patients
7 remains a significant problem which will cause serious difficulties in
8 interpreting the results of the trial.” *Id.* at 43. And in 2011, the FDA
9 reiterated in a meeting with Genzyme that “the lack of double-
10 blinding has consistently concerned us. The lack of blinding remains
11 a major concern.” *Id.* at 43–44. The FDA added that “despite these
12 previous concerns that have been communicated to you, there was
13 little discussion of the unblinded design of the trials in the meeting
14 material.” *Id.* at 44.

15 **B. Sanofi Acquires Genzyme**

16 Defendant Sanofi is a global pharmaceutical company
17 engaged in the research, development, manufacturing, and
18 marketing of healthcare products. In 2010, Sanofi began an effort to
19 acquire Genzyme. At the time, Lemtrada’s market worth was
20 estimated at \$14 billion worldwide. Genzyme initially rejected
21 Sanofi’s offers, arguing that Sanofi undervalued Lemtrada’s business
22 potential. Partially as a result of this contention, Genzyme and
23 Sanofi began to negotiate a deal whereby Genzyme’s stockholders
24 would be partially compensated by a financial instrument tied to the
25 value of Lemtrada. The two parties eventually agreed that each
26 shareholder would receive a cash payment of \$74 per share, plus one
27 CVR per share. The parties agreed to the terms of the acquisition
28 and executed a Merger Agreement on February 16, 2011.

29 Each CVR entitled the holder to cash payouts upon
30 achievement of certain “milestones” connected to the success of
31 Lemtrada. The first milestone, called the “Approval Milestone,”
32 entitled CVR holders to \$1 per CVR if the FDA approved Lemtrada
33 for treatment of MS by March 31, 2014. The four other milestones,

1 called the “Product Sales Milestones,” entitled CVR holders to
2 similar cash payments if Lemtrada achieved certain levels of global
3 net sales. In addition, the second Product Sales Milestone, if met,
4 compensated CVR holders an additional \$1 per CVR if Lemtrada
5 had failed to meet the Approval Milestone. The CVRs also
6 contained a \$1 per share payout for production milestones related to
7 other drugs.

8 Sanofi initiated a tender offer on April 1, 2011, consisting of
9 the \$74 per share and one CVR per share. The tender offer was
10 followed by a short-form merger on April 8, 2011. The offer and
11 merger were conducted pursuant to a Form F-4 Registration
12 Statement and a 424B3 Prospecture (together, the “Offering
13 Materials”). The Offering Materials incorporated, by reference, a
14 number of Genzyme’s prior SEC filings containing statements
15 regarding Lemtrada, its clinical results, and its potential approval by
16 the FDA. Specifically:

17 **1) 14D-9 (filed March 7, 2011)**

- 18 • Estimated a 90% probability that Lemtrada would
19 achieve the Approval Milestone. *Id.* at 45.
- 20 • “The Approval Milestone is designed to trigger a
21 payment to CVR holders in the event that the
22 Company receives FDA approval of
23 alemtuzumab³ for treatment of MS by March 31,
24 2014. Company management currently
25 anticipates product approval in the United States
26 in the second half of 2012.” *Id.*

27 **2) Form 10-K (filed March 1, 2011)**

- 28 • “We are currently developing alemtuzumab for
29 the treatment of Relapsing-Remitting MS, or

³ “Alemtuzumab” is the scientific name for Lemtrada.

1 RRMS, the most common form of MS. . . . We
2 have completed enrollment in two phase 3 clinical
3 trials of alemtuzumab vs. Rebif® (a standard of
4 care therapy) for the treatment of RRMS, from
5 which we expect to obtain results in 2011. Five-
6 year follow up data from our phase 2 study
7 continues to show durable treatment benefit. In
8 2010, the FDA granted alemtuzumab ‘fast track’
9 status for the treatment of RRMS. We anticipate
10 product approval in the United States in the
11 second half of 2012.” *Id.* at 46.

12 **3) Form 8-K (filed January 11, 2011)**

13 • “Within Genzyme’s late-stage product pipeline,
14 three product approvals are expected by the end
15 of 2013 [including] alemtuzumab for multiple
16 sclerosis” *Id.*

17 **4) Form 8-K (filed February 16, 2011)**

18 • “Based on promising phase 2 data, alemtuzumab
19 has the potential to become a new standard of
20 care for multiple sclerosis treatment, a market
21 that is expected to reach \$13 billion by 2012. Two
22 phase 3 trials are fully enrolled; results of the trial
23 in treatment-naïve patients are expected mid-
24 year, and results of the trial in treatment-
25 experienced patients are expected during the
26 second half of this year. Genzyme anticipates
27 U.S. approval of the treatment in the second half
28 of 2012.” *Id.* at 47.

29 **C. Sanofi’s Statements Following the Acquisition**

30 Following its acquisition of Genzyme, Sanofi continued to
31 speak optimistically about Lemtrada. In its November 14, 2011 Form

1 6-K filing, Sanofi announced its “Successful Phase III Results for
2 Alemtuzumab (LEMTRADA™) in Multiple Sclerosis.” *Id.* The CEO
3 of Genzyme added that “[w]e are very pleased with the results of the
4 [Phase III clinical trials] which are unprecedented Based on
5 these positive results, we are on track to submit LEMTRADA™ for
6 review to US and EU regulatory authorities in the first quarter of
7 2012.” *Id.* at 47–48. Sanofi later averred, in its March 5, 2012 Form
8 20-F:

9 The two Phase III studies demonstrating the safety and
10 efficacy of alemtuzumab were completed in 2011. The
11 first study . . . demonstrated strong and robust
12 treatment effect on the relapse rate co-primary endpoint
13 vs Rebif. . . . The second study . . . demonstrated that
14 relapse rate and SAD⁴ were significantly reduced in MS
15 patients receiving alemtuzumab as compared with
16 Rebif. In both cases, safety results were consistent with
17 previous alemtuzumab use in MS and adverse events
18 continued to be manageable. The dossier is scheduled
19 to be submitted to FDA review in the second quarter of
20 2012.

21 *Id.* at 48, 936.

22 Sanofi continued to make similar statements endorsing the
23 effectiveness of Lemtrada, saying that patients taking Lemtrada
24 “were more than twice as likely to experience a sustained reduction
25 in disability over two years,” *id.* at 49, and “two pivotal Phase III
26 studies demonstrating the safety and efficacy of alemtuzumab were
27 completed in 2011,” *id.* at 50. In a conference call with analysts on
28 April 27, 2012, Sanofi’s CEO noted that with regard to Lemtrada,
29 “the data are nothing short of stunning.” *Id.* at 87. In another
30 conference call with analysts on October 25, 2012, Sanofi’s CFO
31 stated that “this will continue and probably somewhat amplify in the

⁴ “Sustained accumulation of disability.” Joint App’x at 981.

1 coming quarters as we prepare for the launch of Lyxumia, thereafter
2 for the launch of Lemtrada,” and Sanofi’s CEO added, “look at
3 Lemtrada I would say I’m actually very satisfied with where
4 the progress is going.” *Id.* at 90.

5 On January 28, 2013, Sanofi announced that the FDA had
6 accepted its sBLA filing seeking approval of Lemtrada. Shortly
7 thereafter, on February 7, 2013, Sanofi’s CEO told analysts:

8 So I think it augurs well because this also says that we
9 have a team, that should be in good position to launch
10 Lemtrada. It is obviously a huge opportunity that we
11 have to be able to put 2 significant new medicines into
12 an important area like MS. This is a market of some \$14
13 billion worldwide.

14 *Id.* at 1099. On October 30, 2013, Sanofi’s CEO told analysts: “But
15 quite honestly, I’m feeling pretty, pretty relaxed because if I look at
16 our Phase III pipeline, there’s an awful lot of really good stuff in
17 there We’ve got Aubagio and Lemtrada rolling out.”⁵ *Id.* at 98.

18 **D. The FDA Rejects Lemtrada’s Initial Application**

19 On October 16, 2013, the FDA announced it would conduct a
20 hearing on November 13, 2013 regarding Lemtrada’s application.
21 On November 8, 2013, the FDA Advisory Committee on Peripheral
22 and Central Nervous System Drugs released the materials for the
23 November 13 hearing (the “Briefing Materials”).⁶ The three

⁵ We do not attempt here to recite each and every allegedly false or misleading statement identified by Plaintiffs in their respective complaints, but the statements above provide an adequate sampling.

⁶ Plaintiffs in the consolidated class action allege that a separate “Background Package” was released on November 13, detailing the FDA’s past comments to Genzyme and Sanofi regarding the use of single-blind trials. A review of the documents themselves reflects that these comments were, in fact, included in the original Briefing Materials, released on November 8, as alleged by the plaintiffs in the *AG Funds* action. Where a document is referenced in a complaint, “the documents control and this Court need not accept as true the allegations in the amended complaint.” *Rapoport v. Asia Elecs. Holding Co.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000). In any event, the timing of the disclosure is immaterial for purposes of this appeal.

1 physicians reviewing Lemtrada’s application in advance of the
2 hearing all expressed concerns regarding Lemtrada, and two of them
3 referenced the failure to use double-blind studies:

4 In particular, Dr. Marler has grave concerns that the
5 failure to blind patients and treating physicians in the
6 open-label design of the trials introduced bias that
7 confounds interpretation of their ostensible results.
8 Because of these issues, Dr. Marler finds that the
9 applicant has not submitted evidence from adequate
10 and well-controlled studies to support the effectiveness
11 of alemtuzumab for treating multiple sclerosis. . . .

12 . . . Dr. Yan also feels that troublesome design
13 issues and the presence of bias in trials prevents reliance
14 on their results, and that a valid, accurate, and
15 interpretable effect on the two main clinical outcomes of
16 interest, relapse rate and sustained accumulation of
17 disability, has not been established. Dr. Yan finds, like
18 Dr. Marler, that the applicant has not provided evidence
19 from adequate and well-controlled studies in this
20 application and that such studies still need to be
21 conducted to establish the effectiveness of alemtuzumab
22 for the treatment of patients with multiple sclerosis.

23 *Id.* at 53–54.⁷ The Briefing Materials also detailed the FDA’s
24 communications with Genzyme and Sanofi regarding the use of
25 single-blind clinical trials.

26 Upon release of the Briefing Materials on November 8, the
27 value of the CVRs dropped from \$2.00 per share to \$0.77 share, or
28 more than 62%.

⁷ The third physician was primarily concerned with the safety of the drug, and did not discuss the reliability of the clinical trials. As Plaintiffs’ claims relating to the safety of Lemtrada have been abandoned on appeal, we need not consider the impact of his statements here.

1 On December 30, 2013, Sanofi announced that it had received
2 formal rejection of Lemtrada from the FDA and acknowledged that
3 it did “not anticipate that the CVR milestone of U.S. approval of
4 Lemtrada by March 31, 2014 will be met.” *Id.* at 54. The value of the
5 CVRs dropped further on the news, falling to \$0.32 per share.

6 Sanofi’s CEO said in a January 23, 2014 interview that the
7 rejection “wasn’t a total surprise,” but added, “[t]hat having been
8 said, this is a drug that’s been approved by 30 countries in the world.
9 We’re seeing patients who have gone five years without a relapse.
10 So we believe that the drug actually is working and it’s important for
11 patients.” *Id.* at 1235.

12 In April of 2014, Sanofi announced that it was engaged in
13 discussions with the FDA regarding Lemtrada’s application, and on
14 May 30, 2014, Sanofi announced that the FDA had accepted
15 Lemtrada for resubmission.⁸ On November 14, 2014, the FDA
16 approved Lemtrada for treatment of MS, well after the deadline for
17 the Approval Milestone had passed.

18 **E. Procedural History**

19 Two class action complaints were filed against Defendants in
20 December 2013. The complaints were consolidated in February 2014,
21 and a Consolidated Amended Complaint was filed on April 28, 2014
22 (the “CAC”). The putative class comprised all persons, other than
23 Defendants, who purchased CVRs between March 6, 2012 and
24 November 7, 2013. The CAC alleged violations of § 10(b) (and SEC
25 Rule 10b-5 promulgated thereunder) against all defendants, and
26 § 20(a) of the Exchange Act against the individual defendants.

27 On March 28, 2014, 32 corporations filed a separate complaint
28 (the AG Funds Complaint, or “AGC”) alleging claims arising out of
29 the same set of facts. These plaintiffs had either opted out of the
30 class action or had acquired CVRs outside the class period. In

⁸ At oral argument, counsel for all parties agreed that the record did not reflect what amendments were made to the submission, but that Sanofi did not conduct new Phase III trials for Lemtrada.

1 addition to violations under §§ 10(b) and 20(a) of the Exchange Act,
2 the AGC alleges violations under § 18 of the Exchange Act, §§ 11 and
3 12(a)(2) of the Securities Act, and state blue sky laws. For purposes
4 of this appeal, the operative differences between the complaints are:

- 5 (1) The CAC only alleges violations of the Exchange Act,
6 requiring a showing of scienter, and
- 7 (2) The AGC's Securities Act claims encompass statements
8 made by Genzyme and Sanofi in the Offering Materials.

9 Both complaints allege, among other things, that by failing to
10 disclose the feedback from the FDA regarding the use of single-blind
11 studies, Defendants misled investors as to the likelihood of meeting
12 the Approval Milestone, upon which the CVRs' value partially
13 depended, thereby artificially inflating the value of the CVRs.⁹ The
14 district court accepted these cases as related.¹⁰

15 On June 27, 2014, Defendants moved to dismiss both
16 complaints for failing to state a claim, arguing that the complaints
17 did not allege any materially false or misleading statements, there
18 were no sufficient allegations of scienter, and their statements were
19 protected as forward-looking statements. On January 28, 2015, the
20 district court granted Defendants' motion.

21 **F. The Opinion Below**

22 The district court (Engelmayer, J.) held in a thorough and
23 thoughtful opinion that Plaintiffs had failed to allege false or
24 materially misleading statements. *In re Sanofi Sec. Litig.*, 87 F. Supp.
25 3d 510 (S.D.N.Y. 2015). With regard to the allegedly false or
26 misleading statements of opinion, the court held, invoking the
27 standard in *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011),
28 that Plaintiffs had failed to allege any facts suggesting that

⁹ The CVRs are publicly traded on the NASDAQ exchange.

¹⁰ Though each complaint sets out slightly different allegations, we address the complaints together and refer to Plaintiffs collectively.

1 Defendants “did not genuinely believe what they were saying at the
2 time they said it,” and that there similarly had been no showing of
3 objective falsity. 87 F. Supp. 3d at 531–33. The court came to the
4 same conclusion for each group of allegedly false or misleading
5 statements of opinion. *See id.* at 537–47.

6 The court additionally held that, insofar as it was required,
7 Plaintiffs had failed to adequately allege scienter, saying that “[a]t all
8 relevant times, and without the benefit of hindsight, Sanofi did not
9 have reason to know that its public statements omitted or
10 misrepresented material facts.” *Id.* at 545. The court also held that,
11 in any event, Defendants’ forward-looking statements were
12 protected by the Private Securities Litigation Reform Act Safe
13 Harbor provision, as they were accompanied by cautionary language
14 and not made with actual knowledge of falsity. *See, e.g., id.* at
15 535–36.¹¹

16 After dismissing Plaintiffs’ federal claims, the court declined
17 to exercise its discretionary jurisdiction over Plaintiffs’ remaining
18 claims under state blue sky laws. *Id.* at 548. Finally, the court denied
19 Plaintiffs’ motion for leave to amend the complaint, noting that the
20 deficiencies in the complaints were substantive and would not likely
21 be cured upon amendment. *Id.* at 548–49. Judgment was entered
22 against Plaintiffs on January 30, 2015. This appeal followed.

23 DISCUSSION

24 We review a district court’s dismissal of a complaint under
25 Fed. R. Civ. P. 12(b)(6) de novo, “accepting all factual allegations in

¹¹ The court also discussed materiality with regard to Defendants’ statements about the Lemtrada clinical trials, holding that the omissions were not material because there was no credible allegation that disclosure of the FDA’s interim, nondispositive feedback would have “significantly altered the total mix of information made available” to investors. *Sanofi*, 87 F. Supp. 3d at 540–41 (internal quotation marks omitted) (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011)). Because we affirm on the grounds that Plaintiffs failed to allege materially misleading omissions, we need not confront Plaintiffs’ concern that the district court endorsed a bright-line test absolving issuers from any duty to disclose interim FDA feedback.

1 the complaint as true and drawing all reasonable inferences in the
2 plaintiff's favor." *Fait*, 655 F.3d at 109. The Court must examine the
3 complaint for "facial plausibility," considering whether the "factual
4 content" "allows the court to draw the reasonable inference that the
5 defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556
6 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556
7 (2007)). The Court may also "consider any written instrument
8 attached to the complaint, statements or documents incorporated
9 into the complaint by reference, legally required public disclosure
10 documents filed with the SEC, and documents possessed by or
11 known to the plaintiff upon which it relied in bringing the suit."
12 *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

13 Plaintiffs' claims under § 10(b) of the Exchange Act (and Rule
14 10b-5 promulgated thereunder) require a showing of scienter.
15 *Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013).¹² By contrast,
16 Plaintiffs' claims under §§ 11 and 12(a)(2) of the Securities Act do not
17 require a showing of scienter, reliance, or loss causation, and require
18 Plaintiffs to show only that Defendants issued or signed a
19 registration statement containing "an untrue statement of a material
20 fact or omitted to state a material fact required to be stated therein or
21 necessary to make the statements therein not misleading." 15 U.S.C.
22 § 77k(a); *see also Fait*, 655 F.3d at 109. Claims under § 18 of the
23 Exchange Act likewise need not allege scienter. *Ross v. A. H. Robins*
24 *Co.*, 607 F.2d 545, 556 (2d Cir. 1979).

25 We see no reason to disturb the conclusions of the district
26 court. However, after the district court's opinion, the Supreme
27 Court decided *Omnicare*, which refined the standard for analyzing
28 whether a statement of opinion is materially misleading. Plaintiffs
29 have urged us to reconsider the district court's ruling in light of
30 *Omnicare*. We do so here, but conclude that even under *Omnicare's*

¹² Because § 20(a) of the Exchange Act imposes derivative liability on parties controlling persons who commit Exchange Act violations, scienter is also required for Plaintiffs' § 20(a) claim to succeed. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996).

1 standard, Plaintiffs have failed to allege that Defendants made
2 materially misleading statements of opinion.

3 **A. *Omnicare***

4 In *Omnicare*, the Supreme Court held that where an investor
5 has alleged that an issuer omitted stating material information and
6 thereby rendered a statement of opinion misleading,

7 [t]he investor must identify particular (and material)
8 facts going to the basis for the issuer’s opinion— facts
9 about the inquiry the issuer did or did not conduct or
10 the knowledge it did or did not have— whose omission
11 makes the opinion statement at issue misleading to a
12 reasonable person reading the statement fairly and in
13 context.

14 135 S. Ct. at 1332. This holding altered the standard announced by
15 this Court in *Fait*, where we held that “when a plaintiff asserts a
16 claim . . . based upon a belief or opinion alleged to have been
17 communicated by a defendant, liability lies only to the extent the
18 statement was both objectively false and disbelieved by the
19 defendant at the time it was expressed.” 655 F.3d at 110 (citing *Va.*
20 *Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095–96 (1991)). *Omnicare*
21 affirmed that liability for making a false statement of opinion may lie
22 if either “the speaker did not hold the belief she professed” or “the
23 supporting fact she supplied were untrue.” 135 S. Ct. at 1327. But
24 *Omnicare* went on to hold that opinions, though sincerely held and
25 otherwise true as a matter of fact, may nonetheless be actionable if
26 the speaker omits information whose omission makes the statement
27 misleading to a reasonable investor. *Id.* at 1332.

28 The Supreme Court emphasized that meeting the standard
29 under *Omnicare* “is no small task for an investor,” *id.*, and also
30 provided guidance for applying its ruling. The Court noted that a
31 reasonable investor, upon hearing a statement of opinion from an
32 issuer, “expects not just that the issuer believes the opinion (however

1 irrationally), but that it fairly aligns with the information in the
2 issuer’s possession at a time.” *Id.* at 1329. The Court provided an
3 example: if an issuer tells investors that “We believe our conduct is
4 lawful,” an investor in such a situation “likely expects such an
5 assertion to rest on some meaningful inquiry—rather than, say, on
6 mere intuition.” *Id.* at 1328. The core inquiry is whether the omitted
7 facts would “conflict with what a reasonable investor would take
8 from the statement itself.” *Id.* at 1329.

9 The Court, however, cautioned against an overly expansive
10 reading of this standard, noting that “[r]easonable investors
11 understand that opinions sometimes rest on a weighing of
12 competing facts,” and adding that “[a] reasonable investor does not
13 expect that *every* fact known to an issuer supports its opinion
14 statement.” *Id.* The Court went on to say that a statement of opinion
15 “is not necessarily misleading when an issuer knows, but fails to
16 disclose, some fact cutting the other way.” *Id.*

17 The Court also recognized the unique context in which
18 securities claims arise. Acknowledging the formality and legal
19 weight of documents filed with the SEC, the Court noted that
20 “[i]nvestors do not, and are right not to, expect opinions contained in
21 those statements to reflect baseless, off-the-cuff judgments”; “[a]t the
22 same time, an investor reads each statement within such a document
23 . . . in light of all its surrounding text, including hedges, disclaimers,
24 and apparently conflicting information.” *Id.* at 1330. The Court
25 further stated that “the investor takes into account the customs and
26 practices of the relevant industry,” and instructed that “an omission
27 that renders misleading a statement of opinion when viewed in a
28 vacuum may not do so once that statement is considered, as is
29 appropriate, in a broader frame.” *Id.*

30 **B. Allegedly Materially Misleading Statements of**
31 **Opinion**

32 As the district court recognized, some of the statements at
33 issue are not ones of opinion, and thus *Omnicare* does not impact the

1 court's analysis with regard to those statements.¹³ The district court
2 analyzed three groups of statements of opinion:

3 (1) Six statements in the Offering Materials related to
4 Sanofi's expectation that the FDA would approve
5 Lemtrada prior to March 31, 2014, the cutoff date for the
6 Approval Milestone;

7 (2) A subset of statements made after the tender offer
8 regarding the launch of Lemtrada, such as that
9 Defendants were "very satisfied with where the
10 progress is going," they "expect[ed] a decision on
11 Lemtrada by the end of the year," and they were
12 "feeling pretty, pretty relaxed"; and

13 (3) A subset of statements regarding Lemtrada's clinical
14 trial results, such as that Lemtrada demonstrated
15 "strong and robust treatment effect," the test results
16 "underscore[d] the tremendous promise that Lemtrada
17 holds," and "[w]e are very pleased with the results of
18 the [Phase III] study."

19 We analyze each group of statements in turn.

20 **1. Expected Timing of FDA Approval**

21 The first set of statements is found exclusively in the Offering
22 Materials. Plaintiffs argue that by failing to disclose the FDA's
23 repeated statements of concern about the use of single-blind studies,
24 statements from Defendants estimating a 90% likelihood of
25 achieving the Approval Milestone and projecting FDA approval in
26 late 2012 were materially misleading.

27 Two points from *Omnicare* are important here. First, the
28 omitted facts must "conflict with what a reasonable investor would
29 take from the statement itself." 135 S. Ct. at 1329. There is no

¹³ Plaintiffs do not argue that the district court incorrectly categorized any statements as opinions.

1 plausible allegation that the FDA’s interim feedback conflicted with
2 any reasonable interpretation of Defendants’ statements about FDA
3 approval. Though the FDA had expressed concern about
4 Defendants’ testing methodology, it had also stated that any
5 deficiency could be overcome if the results showed an “extremely
6 large effect.” The record reflects, and the parties do not dispute, that
7 Lemtrada’s treatment effect was, in fact, large. There can be no
8 conflict inferred from a statement of optimism consistent with the
9 FDA’s instructions as to the treatment results necessary for approval.

10 Moreover, the Supreme Court emphasized the need to
11 examine the context of an allegedly misleading opinion, *id.* at 1330,
12 and context is instructive here. Plaintiffs are sophisticated investors,
13 no doubt aware that projections provided by issuers are synthesized
14 from a wide variety of information, and that some of the underlying
15 facts may be in tension with the ultimate projection set forth by the
16 issuer. These investors are similarly aware, as the district court
17 recognized, that “[c]ontinuous dialogue between the FDA and the
18 proponent of a new drug is the essence of the product license
19 application process.” *Sanofi*, 87 F. Supp. 3d at 542 (internal quotation
20 marks omitted) (quoting *In re Medimmune, Inc. Sec. Litig.*, 873 F.
21 Supp. 953, 966 (D. Md. 1995)). These sophisticated investors, well
22 accustomed to the “customs and practices of the relevant industry,”
23 would fully expect that Defendants and the FDA were engaged in a
24 dialogue, as they were here, about the sufficiency of various aspects
25 of the clinical trials and that inherent in the nature of a dialogue are
26 differing views.

27 That such a dialogue was ongoing did not prevent Defendants
28 from expressing optimism, even exceptional optimism, about the
29 likelihood of drug approval. Furthermore, the Offering Materials
30 themselves made numerous caveats to the reliability of the
31 projections, and a reasonable investor, especially one dealing in a
32 complex financial instrument like the CVRs here, would have
33 considered the statements “in light of all [the] surrounding text,
34 including hedges, disclaimers, and apparently conflicting

1 information.” *Omnicare*, 135 S. Ct. at 1330. While a layperson,
2 unaccustomed to the subtleties and intricacies of the pharmaceutical
3 industry and registration statements, may have misinterpreted
4 Defendants’ statements as evincing assurance of success, Plaintiffs
5 here can claim no such ignorance.

6 Thus, fatal to Plaintiffs’ case is the absence of any serious
7 conflict between the FDA’s interim, albeit repeated, concerns about
8 methodology and Defendants’ optimism about FDA approval. As
9 the Supreme Court noted, “a statement of opinion is not misleading
10 just because external facts show the opinion to be incorrect.” *Id.* at
11 1328.

12 Second, the Supreme Court noted that “[a]n opinion
13 statement, however, is not necessarily misleading when an issuer
14 knows, but fails to disclose, some fact cutting the other way.” *Id.* at
15 1329. Plaintiffs’ case essentially boils down to an allegation that the
16 statements were misleading for failure to include a fact that would
17 have potentially undermined Defendants’ optimistic projections.
18 But *Omnicare* imposes no such disclosure requirements on issuers.
19 Defendants were only tasked with making statements that “fairly
20 align[ed] with the information in the issuer’s possession at the time.”
21 *Id.* Defendants need not have disclosed the FDA feedback merely
22 because it tended to cut against their projections—Plaintiffs were not
23 entitled to so much information as might have been desired to make
24 their own determination about the likelihood of FDA approval by a
25 particular date. Certainly, Plaintiffs would have been interested in
26 knowing about the FDA feedback, and perhaps would have acted
27 otherwise had the feedback been disclosed, but *Omnicare* does not
28 impose liability merely because an issuer failed to disclose
29 information that ran counter to an opinion expressed in the
30 registration statement.

31 Counsel for Plaintiffs urged at oral argument that the test is
32 whether Defendants failed to disclose a risk above and beyond the
33 normal risks associated with drug approval. No plain reading of

1 *Omnicare* supports this interpretation. Such a test eschews the more
2 taxing question of whether an issuer’s statement is misleading, and
3 instead seeks to impose a bright-line disclosure rule, regardless of
4 the nature of the statements actually made by the issuer. But even if
5 *Omnicare* did impose such a standard, Plaintiffs’ case would still
6 falter. As counsel acknowledged at oral argument, nowhere in the
7 complaints do Plaintiffs allege that the risks arising out of the FDA
8 feedback were out of the ordinary, or presented a special challenge
9 not of the kind normally confronted by pharmaceutical companies
10 seeking FDA approval for their drugs.

11 Plaintiffs’ argument here is further belied by the fact that the
12 FDA has long made public its preference for double-blind trials,
13 telling pharmaceutical companies that “[t]he double-blind trial is the
14 optimal approach.” Guidance on Statistical Principles for Clinical
15 Trials, 63 Fed. Reg. 49583, 49587 (Dep’t of Health & Human Servs.
16 Sept. 16, 1998).¹⁴ Defendants admitted they were relying on single-
17 blind trials, and even alluded at times to the desirability of double-
18 blind trials.¹⁵ Sophisticated investors, aware of the FDA’s strong
19 preference for double-blind trials, cannot claim surprise when it is
20 revealed that the FDA meant what it said. Especially where a
21 complex financial instrument whose value is tied to FDA approval is
22 involved, investors may be expected to keep themselves apprised of
23 the FDA’s public positions on testing methodology.

24 Thus, even with the benefit of *Omnicare*’s expanded standard
25 for liability, Plaintiffs have not stated a claim with regard to the
26 statements regarding the likelihood of FDA approval.

¹⁴ See also *Sanofi*, 87 F. Supp. 3d at 539–40 (citing 21 C.F.R. §§ 314.126(b)(2)(iv), 314.126(b)(5), 352.72(e), 514.117(b)(7), 860.7(f)).

¹⁵ See Joint App’x at 685 (“The infusion-related syndrome associated with alemtuzumab precluded double-blinding.”); *id.* at 801 (“[M]asking of patients and treating clinicians to treatment assignment was not feasible. Several steps were undertaken to lessen the risk of bias.”); *id.* at 807 (“Because both study drugs had adverse effects that precluded double-blinding, . . . clinical data integrity was secured by stringent rater-masking and independent adjudication of relapses.”).

1 **2. Timing of Launch of Lemtrada**

2 Plaintiffs' next challenge is to statements made by Defendants
3 relating to the anticipated launch date of Lemtrada. As the district
4 court recognized, these statements fail to support a claim for many
5 of the same reasons as the statements pertaining to FDA approval in
6 the Offering Materials.

7 First, it can hardly be said that the FDA's critique of Sanofi's
8 testing methodology conflicted with Defendants' statements that
9 they were feeling "relaxed" or "satisfied." Such a generalized
10 statement of subjective optimism arguably does not even "convey
11 facts about how the speaker has formed the opinion." *Omnicare*, 135
12 S. Ct. at 1328. But whatever the implication of such a statement, no
13 reasonable investor would have inferred that mere statements of
14 confidence suggested that the FDA had not engaged in industry-
15 standard dialogue with Defendants about potential deficiencies in
16 either the testing methodology or the drug itself.

17 Second, Defendants' statement that they "expect[ed] a
18 decision on Lemtrada by the end of the year" did not conflict with
19 the information available to them at the time. On the contrary,
20 Defendants were correct about the proposed timing—Defendants
21 announced on December 30, 2013 that the FDA had rejected
22 Lemtrada. Defendants' statement is about timing, not about the
23 likelihood of approval. Further, as set forth above, Defendants'
24 optimism about the approval of Lemtrada was not in conflict with
25 the FDA's comments, which had indicated that Lemtrada could be
26 approved if it demonstrated an "extremely large effect."

27 For these reasons, Plaintiffs' allegations with regard to
28 statements made about the prospective launch of Lemtrada fail to
29 support a claim.

30 **3. Lemtrada's Trial Results**

31 The final set of opinion statements identified by Plaintiffs as
32 misleading are Defendants' statements that Lemtrada demonstrated

1 a “strong and robust treatment effect,” and that “the data are
2 nothing short of stunning.”

3 Plaintiffs fail, in the first instance, to show a relationship
4 between the FDA’s critical feedback and Defendants’ statements
5 touting the results of the Lemtrada trials. Sanofi is a global
6 pharmaceutical company operating in a \$14 billion market—by early
7 2014, Lemtrada had already been approved for distribution in the
8 European Union, Canada, Australia, Mexico, and Brazil, totaling at
9 least 30 countries, based on Lemtrada’s exceptional clinical results.
10 Plaintiffs’ argument that Sanofi had no reason to comment on
11 Lemtrada’s Phase III success except to build investor anticipation
12 about FDA approval has no merit—Sanofi had an interest in
13 building global interest in Lemtrada. Statements lauding the
14 effectiveness of Lemtrada, when taken in the context of a global
15 rollout plan, do not suggest any special approval (or likelihood of
16 approval) from the regulators of a single country.

17 In addition to the lack of any rational connection between
18 Defendants’ statements about the general effectiveness of Lemtrada
19 and the FDA’s methodological feedback, Plaintiffs fail to
20 demonstrate any conflict between the two. The Supreme Court’s
21 example of an issuer stating a belief that its conduct is lawful is
22 particularly instructive. Such a statement does not imply that the
23 issuer’s conduct is, in fact, lawful, but only that the issuer has
24 conducted a meaningful inquiry and has a reasonable basis upon
25 which to make such an assertion. Here, too, Defendants’ statements
26 about the effectiveness of Lemtrada cannot be misleading merely
27 because the FDA disagreed with the conclusion—so long as
28 Defendants conducted a “meaningful” inquiry and in fact held that
29 view, the statements did not mislead in a manner that is actionable.

30 At bottom, Plaintiffs’ allegations regarding Defendants’ stated
31 opinion about the Lemtrada trial results are little more than a
32 dispute about the proper interpretation of data, a dispute this Court
33 rejected as a basis for liability in *Kleinman*. 706 F.3d at 154.

1 Defendants' statements were not misleading simply because the
2 FDA disagreed with Defendants' interpretation of the data; an issuer
3 is not liable merely because it "knows, but fails to disclose, some fact
4 cutting the other way." *Omnicare*, 135 S. Ct. at 1329.

5 Nowhere in the complaints do Plaintiffs even allege that
6 Defendants' interpretation of the data was irrational or
7 unreasonable, and such an allegation would have little merit
8 anyway, as the FDA eventually accepted Lemtrada without further
9 clinical trials. Again, as *Omnicare* counsels, investors account for the
10 "customs and practices of the relevant industry," and statements
11 must be considered "as is appropriate, in a broader frame." *Id.* at
12 1330. Reasonable investors understand that dialogue with the FDA
13 is an integral part of the drug approval process, and no sophisticated
14 investor familiar with standard FDA practice would expect that
15 every view of the data taken by Defendants was shared by the FDA.
16 In the absence of plausible allegations showing a conflict between
17 Defendants' statements and the FDA feedback, Plaintiffs' claims here
18 fail as well.

19 CONCLUSION

20 Issuers must be forthright with their investors, but securities
21 law does not impose on them an obligation to disclose every piece of
22 information in their possession. As *Omnicare* instructs, issuers need
23 not disclose a piece of information merely because it cuts against
24 their projections. Given the sophistication of the investors here, the
25 FDA's public preference for double-blind studies, and the absence of
26 a conflict between Defendants' statements and the FDA's comments,
27 we conclude that no reasonable investor would have been misled by
28 Defendants' optimistic statements regarding the approval and
29 launch of Lemtrada. The judgment of the District Court is affirmed.