

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

NORFOLK COUNTY RETIREMENT)	
SYSTEM, et al.,)	
)	
Plaintiffs,)	
)	No. 3:11-cv-00433
v.)	CHIEF JUDGE CRENSHAW
)	
COMMUNITY HEALTH SYSTEMS,)	
INC., et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

This purported securities class action comes before the Court on a renewed motion to dismiss. (Doc. No. 257.) Previously, former Judge Sharp dismissed the Amended Complaint in its entirety. (Doc. No. 249.) The United States Court of Appeals for the Sixth Circuit unanimously reversed. (Doc. No. 253.) The mandate has issued (Doc. No. 254), and the case was reassigned to the undersigned after Judge Sharp resigned.

Only a short recitation of the factual allegations, as found by the Sixth Circuit, is necessary because Defendants' arguments are clearly barred by the mandate rule. Community Health Systems runs for-profit hospitals, with about thirty percent of its income coming from Medicare reimbursements. (Doc. No. 253 at 4.) One way it allegedly made substantial profits was by prescribing inpatient treatment for people with symptoms that would normally only require outpatient treatment. (*Id.* at 5.) Community did this by using the Blue Book, a system that it created that directed the appropriate treatment for certain conditions. (*Id.*) Community used the Blue Book instead of two other systems created by independent sources that most other hospitals used. (*Id.*) In some cases, using the Blue Book instead of one of the independent systems increased

Community's revenue tenfold. (Id.) Community's audits warned the company that it may be subject to a fraud suit by using the Blue Book. (Id. at 6.)

In 2011, Community initiated a hostile takeover of Tenet Healthcare Corporation. (Id. at 7.) In April 2011, Tenet sued Community for misleading its shareholders by failing to inform them that the real source of Community's profit was the Blue Book, which Tenet essentially alleged was used to defraud Medicare. (Id.) Tenet alleged that Community misled its own shareholders by failing to disclose its fraudulent business practices and potential liabilities. (Id.) Community publically denied Tenet's allegations, but conceded to a Wells Fargo analyst that some of its hospitals were using the Blue Book. (Id. at 7-8.) Community assured the analyst that its use of the Blue Book was being phased out and that it did not expect the phase out to cause any loss of profits. (Id. at 7-8.) In the meantime, Community's Chief Financial Officer Larry Cash and Chief Executive Officer Wayne Smith sold their shares of Community stock. (Id. at 9.)

On October 26, 2011, Community disclosed earnings reports that showed that its hospitals had admitted seven percent fewer inpatients during that quarter than the during same quarter in the prior year. (Id. at 8.) This caused lower earnings. (Id.) On a conference call that day, Cash admitted that that the losses were related to the phasing out of the Blue Book. (Id.) As Community's stock declined, Plaintiffs lost a total of \$891 million. (Id. at 9.)

The Complaint alleges that Community, Smith, and Cash inflated Community's share price through false and misleading statements. (Id.) On appeal, the Sixth Circuit recited that to state a claim of securities fraud under § 10(b) of the Securities Act, a plaintiff must allege "that the defendants made material misrepresentations or omissions in connection with the sale of a security, that they did so with bad intent (i.e., scienter), that the plaintiffs relied on the misrepresentations or omissions, and that they eventually suffered an economic loss as a result." (Id. at 12 (citing Ohio

Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp., 830 F.3d 376, 383-84 (6th Cir. 2016))).

The Sixth Circuit held that, here, the first two elements were undisputed and the only element at issue was causation. (Id.)

When discussing causation, the Sixth Circuit found that there were two separate disclosures that contained material misrepresentations: (1) the Tenet complaint in 2011 and Larry Cash's related admission that Community used the Blue Book for inpatient admissions; and (2) Defendants' October 2011 admissions that earnings were down and that Community's phase-out of the Blue Book played a role in that decrease. (Id. at 13.) The Sixth Circuit held: "Taken together, these disclosures—and the speed at which Community's share price fell after them—make it at least plausible that the disclosures had something to do with the Funds' losses." (Id. at 13-14 (citing Robbins v. Kroger Props., Inc., 116 F.3d 1441, 1447 (11th Cir. 1997))).

Defendants now move to dismiss the portion of the Complaint dealing with the October 2011 admissions because they are not new disclosures and did not cause profit loss. (Doc. No. 258 at 9.) This issue was squarely dealt with by the Sixth Circuit. The "mandate rule 'compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.'" United States v. O'Dell, 320 F.3d 674, 679 (6th Cir. 2003) (quoting United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir. 2001)). "Its fundamental principle is straightforward: [a] district court may not contravene an appellate court's mandate." Rochow v. Life Ins. Co. of N.A., 780 F.3d 364, 378 (6th Cir. 2015) (citing United States v. Campbell, 168 F.3d 263, 265 (6th Cir. 1999)). The "trial court must proceed in accordance with the mandate and the law of the case as established on appeal." Allard Enters., Inc. v. Advanced Programming Res., Inc., 249 F.3d 564, 570 (6th Cir. 2001) (quoting United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994)). The Sixth Circuit here resolved the Motion to Dismiss, finding

that the Complaint plausibly stated a claim. The Sixth Circuit expressly considered the October 2011 admissions as part of its decision and did not exclude them from Plaintiffs' claim on remand.

Defendants' only argument that the mandate rule does not apply is that the Sixth Circuit did not address whether "the Amended Complaint fails to plead actionable misstatements, a strong inference of scienter, or loss of causation with respect to the [October 2011 statements]." (Doc. No. 258 at 15.) Defendants misread the Sixth Circuit's Opinion. The Court of Appeals read the April and October 2011 statements together as alleging one cause of action. It held that Defendants conceded whether Plaintiffs adequately pleaded actionable misstatements or a strong inference of scienter. (Doc. No. 253 at 12.) It then held that Plaintiffs sufficiently pleaded causation for the April and October 2011 statements. (Id. at 13-14.) Accordingly, the Sixth Circuit expressly resolved the issues that Defendants now ask the Court to revisit. To do so would violate the Mandate rule.

Defendants' Motion to Dismiss (Doc. No. 257) is **DENIED**.

IT IS SO ORDERED.



WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE