

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

_____	)	
CITY OF MIAMI FIRE FIGHTERS'	)	
AND POLICE OFFICERS'	)	
RETIREMENT TRUST and	)	
INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS PENSION	)	
FUND OF EASTERN	)	
PENNSYLVANIA AND DELAWARE, <sup>1</sup>	)	
Plaintiffs,	)	
	)	C.A. No. 19-437-MSM-PAS
v.	)	
	)	
CVS HEALTH CORPORATION;	)	
LARRY J. MERLO; DAVID M.	)	
DENTON; JONATHAN C. ROBERTS;	)	
ROBERT O. KRAFT; AND EVA C.	)	
BORATTO,	)	
Defendants.	)	
_____	)	

MEMORANDUM AND ORDER

Mary S. McElroy, United States District Judge.

Before the Court is the Defendants' Motion to Dismiss (ECF No. 67) a shareholder securities fraud action, brought pursuant to the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C.A. § 78u-4. The Defendants, CVS Health Corporation ("CVS" or "CVS Health") and several executives of both CVS and its

<sup>1</sup> This action was originally entitled *Anarkat v. CVS Health Corporation*, but the parties agreed to substitute the then-named plaintiff by court-approved stipulation. (ECF No. 31). The case was filed in the Southern District of New York but transferred to Rhode Island on August 9, 2019. It was filed as a putative class action on behalf of all persons who acquired CVS Health stock between the dates of February 9, 2016 and February 20, 2019, inclusive (the "Class Period"), but at the time of this writing, there has not been class certification.

subsidiary, Omnicare, Inc. (“Omnicare”), contend that the Amended Complaint (ECF No. 38) fails to meet the enhanced pleading standard applicable to lawsuits claiming violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5.<sup>2</sup>

For the reasons stated below, the Court GRANTS the Defendants’ Motion to Dismiss. (ECF No. 67).

## I. STANDARD FOR PLEADING

In brief, and explained below, the Plaintiffs allege that CVS Health made statements during the Class Period that were both false and misleading, that the Plaintiffs relied on those statements and, as a result, suffered an economic loss. (ECF No. 38 at 131, ¶¶ 346-61).<sup>3</sup>

“To state a cause of action under § 10(b) and Rule 10b-5, a plaintiff must plead, with sufficient particularity, that the defendant made a false statement or omitted a material fact, with the requisite scienter, and that the plaintiff’s reliance on this statement or omission caused the plaintiff’s injury.” *Gross v. Summa Four, Inc.*, 93

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<sup>2</sup> The defendants are CVS Health, Larry J. Merlo, David M. Denton, Jonathan C. Roberts, Robert O. Kraft, and Eva C. Boratto (collectively, the “Defendants”).

<sup>3</sup> All statements of fact are taken from the Amended Complaint and as is appropriate at this stage of litigation are assumed to be true. Securities fraud litigation, however, demands that the Plaintiffs not only allege sufficient facts but that they plead them with particularity and support them with detailed information. *In re Cabletron Systems, Inc.*, 311 F.3d 11, 27 (1st Cir. 2002) (complaint must specify statements alleged to have been misleading, and the reason they are misleading; beliefs must be backed with sufficient facts to support them).

F.3d 987, 992 (1st Cir. 1996). A fact is “material only if its disclosure would alter the total mix of facts available to the investor and if there is a substantial likelihood that a reasonable shareholder would consider it important to the investment decision.” *Hill v. Gozani*, 638 F.3d 40, 57 (1st Cir. 2011) (quoting *Cooperman v. Individual, Inc.*, 171 F.3d 43, 49 (1st Cir.1999)). Actions brought under this rubric must meet an enhanced threshold of pleading, far greater than the conventional “plain statement” subject to Federal Rule of Civil Procedure 12(b)(6). *Hill*, 638 F.3d at 55. The heightened pleading demands that the Amended Complaint specify each statement alleged to be misleading and the reason. *Id.* In other words, statements made on information and belief must state the particular facts from which that belief was formed. *Id.* at 55-56.

To defend against a Motion to Dismiss, the Plaintiffs must allege sufficient and adequately detailed facts to show that the Defendants either “consciously intended to defraud” or “acted with a high degree of recklessness.” *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002). While the Plaintiffs may rely on inference, that inference must be a “strong” one rather than a merely “reasonable” one, and the facts supporting that inference must be stated with particularity. *In re Cabletron Systems, Inc.*, 311 F.3d 11, 28 (1st Cir. 2002). Liability may be shown by either affirmative statements that were false when made or by the omission of information that is so important that what was disclosed is rendered “so incomplete as to mislead.” *City of Roseville Employees’ Retirement Syst. v. Textron, Inc.*, 810 F. Supp. 2d 434, 443 (D.R.I. Aug. 24, 2011) (quoting *Hill*, 638 F.3d at 57). The inference of actionable

*scienter* must be “at least as compelling as any opposing inference of nonfraudulent intent.” *In re Ariad Pharmaceuticals, Inc.*, 842 F.3d 744, 751 (1st Cir. 2016). If the Court finds no actional misstatements, however, it need not reach the issue of whether the complaint fails to adequately allege *scienter*. *Hill*, 638 F.3d at 70 n.9; *see infra* n.21.

## II. BACKGROUND

CVS is a national company, founded in 1963 and headquartered in Rhode Island, traditionally selling retail from nearly 10,000 chain stores across the country. While it is a combination of convenience store and drug store, a large part of its retail business stems from its pharmacies. In recent years, CVS has focused on the pharmacy business, giving vaccinations and housing “minute clinics” that provide immediate medical care to walk-in customers. It has, according to the Amended Complaint, 156 specialty long-term care (“LTC”) pharmacies in forty-six states and a LTC repackaging facility. (ECF No. 38 at 2, ¶¶ 2-3). CVS has made acquisitions that both enhanced its medical focus and spawned lawsuits. In 2015, it acquired Omnicare, a national distributor of pharmaceuticals with a leadership role in the skilled nursing facility arena. That acquisition gave rise to this litigation. Then, in 2018, CVS acquired Aetna Inc. (“Aetna”). That acquisition generated other litigation. *E.g., Waterford Township Police & Fire Ret. Syst. v. CVS Health Corporation, et al.*, No. 1:19-cv-00434-MSM (D.R.I.) (ECF No. 1, filed Aug. 15, 2019).

The two acquisitions are related. The Plaintiffs here are shareholders who held CVS stock during the period after the Omnicare acquisition but before the Aetna

purchase. They contend that CVS actively put out false and misleading information in its financial reports and announcements during the Class Period, motivated by the desire to hide its struggling LTC business to ensure that the Aetna purchase would succeed and on terms preferable to CVS. (ECF No. 38 at 6, ¶¶ 15-16). They allege that although CVS acquired Omnicare with the idea of taking over what was at the time a healthy distribution network of pharmaceuticals in the LTC market, mismanagement ultimately spurred substantial client losses. In addition to false and misleading reports designed to hide the problem from investors, the Plaintiffs point to CVS's decision to "fold[]" the LTC business into its front-store retail operations in its financial reports to make it impossible for investors to see the drain. (ECF No. 38 at 6, ¶ 8).

### III. ANALYSIS

The allegations of fraudulent statements fall into three categories. First, the Plaintiffs allege straightforward false and misleading statements about CVS Health's performance and the success of its operations. Second, the Plaintiffs contend that the failure to disclose the customer losses, and the inadequacy of the disclosure that finally did occur, caused the statements made to be misleading. And third, the Plaintiffs complain that CVS misled investors by omitting unfavorable facts from the goodwill assessments attributed to its LTC business before taking a significant impairment.

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