

Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION— EDKy: Omnicare Fraud Case Tossed, (Mar. 28, 2013)

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By Mark S. Nelson, J.D.

Fraud claims against a pharmaceutical services and long-term care company must be dismissed, according to the federal court in Covington, Kentucky. The case arose from claims that Omnicare, Inc.'s executives misrepresented its billing practices in violation of Exchange Act Section 10(b) and Rule 10b-5. The complaint was based on allegations contained in an earlier, dismissed *qui tam* action in Illinois by former Omnicare vice president of internal audit, John Stone. The court also dismissed related Exchange Act Section 20 controlling person claims (*In Re Omnicare, Inc. Securities Litigation*, March 27, 2013, Bunning, D.).

Alleged misstatements. The court found that Omnicare's statements regarding its claimed "material compliance" with regulations and the risks of noncompliance were nonactionable. The complaint had alleged that internal audits showed that Omnicare had disregarded Medicaid billing rules and had billed for pharmacies' filling of pediatric prescriptions with leftover medicine instead of discarding the unused excess drugs.

Omnicare rebutted these claims by asserting that the outcome of the *qui tam* action showed it had done nothing wrong, that the plaintiffs failed to show actual knowledge that Omnicare's statements were false, and that it had no duty to disclose internal audit results.

The court agreed. Specifically, the court noted that most of Omnicare's statements consisted of "soft" information that need not be disclosed. The court further said that the complaint failed to allege actual knowledge by the defendants that their statements were false. Moreover, citing the *City of Pontiac* opinion, the court said that these statements could not be imputed to Omnicare. The court also rejected the plaintiffs' claim that Omnicare had to disclose alleged violations based on its statements about being compliant.

Additionally, the plaintiffs failed to show that statements by Joel Gemunder, Omnicare's then-president, CEO, and director, were made with actual knowledge they were false. Specifically, the complaint alleged that Mr. Gemunder falsely remarked to a conference that Omnicare seeks to "comply with all laws and regulations" and that Omnicare had begun to address past alleged regulatory violations.

The court found that Mr. Gemunder's remarks were not rooted in Omnicare's internal audits that were at issue in the *qui tam* action because those audits were performed later. The court also noted the lack of particularized allegations in the complaint showing Mr. Gemunder's actual knowledge that his statements were false. The plaintiffs also conceded that Mr. Gemunder's remarks had mentioned that Omnicare was cooperating with the U.S. attorney in Massachusetts. According to the court, Mr. Gemunder's remarks amounted to nonactionable corporate puffery.

Financials and SOX certifications. The court found that the plaintiffs' allegations that Omnicare's executives misrepresented the company's financials were nonactionable. Here, the court noted that the plaintiffs conceded at oral argument that they had no objection to the accuracy of Omnicare's financials. The court also said that under Sixth Circuit precedent, as with the plaintiffs' other claims, the type of information involved was "soft" information that need not be disclosed and is not actionable without a showing that the defendants had actual knowledge of the falsity of their statements. The plaintiffs' related Sarbanes-Oxley Act certification claims similarly failed.

The case is No. 11-cv-173-DLB-CJS.

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Companies: KBC Asset Management N.V.; Jacksonville Police & Fire Pension Fund; Omnicare, Inc.

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