

that CCSI stock was manipulated by insiders, Dr. Woodside testified that CCSI was actively traded on an open and active market – the NASDAQ small cap market. Moreover, both Mr. Asensio and Dr. Woodside testified that the price of CCSI stock fluctuated according to material events such as its FDA approval. Therefore, there was ample evidence to support the jury’s conclusion that CCSI was traded on an open and active market.

C. The Jury’s Finding that Asensio Acted with “Scienter” was Supported by Sufficient Evidence.

In order to show that defendant acted with the requisite scienter, plaintiffs must prove by a preponderance of the evidence that defendant acted (1) knowingly with intent to deceive, manipulate, or defraud or (2) with reckless disregard for the truth. See Phillips v. LCI Int’l, Inc., 190 F.3d 609, 620-21 (1999). Recklessness is more than mere negligence. Id. at 621. Recklessness is “an act so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading a reasonable investor to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.” Id. (internal citations and quotation marks omitted).

Plaintiffs submitted sufficient evidence for a reasonable jury to conclude that Asensio either knew the statements were false or acted with reckless disregard for their truth. One means of showing scienter is evidence of a motive and opportunity to defraud.⁶ See id. at 621. In order to demonstrate motive, plaintiffs must show “concrete

⁶ Although the court in Phillips declined to resolve whether motive and opportunity, standing alone, is sufficient to plead scienter, the court’s opinion indicates

benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.” Id. (internal citations and quotations marks omitted). Here, plaintiffs introduced evidence showing that Asensio established short positions in CCSI stock before making the allegedly fraudulent statements. Thus, Asensio had the motive and opportunity to defraud because a decline in the CCSI stock price as a result of these statements would result in concrete financial benefit to Asensio.

In addition, plaintiffs introduced evidence showing that Asensio’s statements about CCSI’s Colormate bilirubinometer were based on self-interested medical sources. For example, Asensio testified that he based his conclusions about the effectiveness of CCSI’s products partially on the opinion of Dr. Judy Stone, a doctor-turned-short-seller who was a client of Asensio. Thus, the jury could have found that Asensio acted with a reckless disregard for the truth by basing these statements on a self-interested “medical” source. Therefore, by presenting evidence that Asensio both had a motive and opportunity to defraud and issued certain statements without appropriate medical support, plaintiffs presented sufficient evidence for a reasonable jury to conclude that Asensio either knew the statements were false or acted with a reckless disregard for their truth.

E. The Jury’s Finding that Asensio Made One or More Demonstrably False Statements was Supported by Sufficient Evidence.

To establish a violation under §10(b), “plaintiffs must point to a factual statement or omission – that is, one that is demonstrable as being true or false.” Longman, 197 F.3d at 675; see also Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1091-96 (1991)

that motive and opportunity is one type of evidence that may used to show scienter. See id. at 620-21.

(explaining that even opinion in the proper context can be demonstrably true or false and therefore factual). During the trial, plaintiffs presented testimony from Dr. Ian Holzman and Dr. Jeffrey Maisels stating that the following statements made by Asensio were demonstrably false:

- (1) The clinical testing of CCSI's bilirubinometer only compared its bilirubin measurement performance to a physician's visual assessment.
- (2) Repeated bilirubin testing is not normal and testing by bilirubinometers cannot replace the blood tests for infant jaundice.
- (3) CCSI's bilirubinometer can only produce estimates of total bilirubin levels, which are inadequate substitutes for indirect or direct bilirubin levels provided by blood tests.
- (4) CCSI had at least eight competitors in the bilirubinometer market and its products are no better than other existing equivalents.
- (5) The potential market for CCSI's products was extremely limited.
- (6) CCSI's Colormate III was a very simple easily duplicated device of limited utility an imprecise bilirubin testing.

The court instructed the jury on how to distinguish fact from opinion, and the jury apparently determined that at least one of Asensio's statements was demonstrably false. The court did not require the jury to identify which of these individual statements were the basis of the jury's verdict. However, a reasonable jury could have found that one or more of these statements was a false statement of fact. For example, a reasonable jury could have concluded that Asensio's statement that the clinical testing of CCSI's

bilirubinometer only compared its bilirubin measurement performance to a physician's visual assessment was false because plaintiffs presented evidence showing that the clinical testing compared the bilirubin measurement performance to blood tests. Accordingly, plaintiffs presented ample evidence upon which a reasonable jury could conclude that Asensio made at least one false statement of fact.

F. Materiality

A fact is "material if there is a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact." Longman, 197 F.3d at 683 (internal citations omitted). Defendant argues that the above statements were not material because they did not contain any new factual information. However, Dr. Woodside testified that these statements contained factual representations that were not previously available in the market. Moreover, Dr. Woodside testified that the statements in Asensio's report were material because they would be viewed as important by an average investor. This testimony is corroborated by the drastic drop in CCSI's stock price after the statements were made. Thus, plaintiffs presented evidence sufficient for a reasonable jury to conclude that the statements at issue were material.

G. "In Connection With" Requirement

Section 10(b) requires that the fraud occur "in connection with the purchase or sale of any security." Neither side objected to the following jury instruction explaining the "in connection with" requirement: