

**FILED**

APR 11 2002

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

LARRY W. PROPPES, CLERK  
CHARLESTON, SC

JOE H. MILLER, IV, and )  
ROBERT W. PEARCE, JR., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
ASENSIO & COMPANY, INC., )  
 )  
Defendant. )

Civil Action No. 2:99-1861-18

**DEFENDANT'S RENEWED MOTION  
FOR JUDGMENT AS A MATTER OF LAW**

The Defendant, Asensio & Company, Inc., pursuant to Rule 50, Federal Rules of Civil Procedure, renews its motions for judgment as a matter of law heretofore made, and respectfully requests that this Honorable Court enter judgment in favor of Defendant on the following grounds:

1. The testimony of Plaintiffs' economist, both as to the fact and the amount of Plaintiffs' alleged damages, was erroneously admitted and should have been stricken. Without this testimony, the record contains no competent evidence as to the fact or amount of any alleged damages, and Defendant is entitled to judgment as a matter of law.
2. The testimony of Plaintiffs' economist, both as to the fact and amount of Plaintiffs' alleged damages, even if properly admitted, was so lacking in reliability and probative value that there was no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiffs either that damages had occurred or the amount thereof, and Defendant is entitled to judgment as a matter of law.

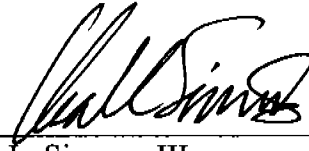
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3. There was no legally sufficient evidentiary basis for a reasonable jury to find that any alleged fraud proximately caused any damage to either Plaintiff. Plaintiffs failed to establish loss causation or transaction causation and Defendant is entitled to judgment as a matter of law.
4. There was no legally sufficient evidentiary basis for a reasonable jury to find that there was an open and active market for shares of common stock in CCSI. There was no competent evidence that there was a large number of traders, a high level of activity, or a sufficient frequency of trades, and, in fact, the evidence brought before the Court on this issue tended to show that during the period in question the market for shares of CCSI was subject to manipulation by a relatively small number of shareholders owning very large positions in the stock. In the absence of sufficient evidence on this issue, Plaintiffs were not entitled to a presumption of reliance under the “fraud-on-the-market theory,” and Defendant is entitled to judgment as a matter of law.
5. There was no legally sufficient evidentiary basis for a reasonable jury to find that Defendant acted with *scienter*. Evidence tending to show that some of the statements made by Defendant were allegedly inaccurate is not legally sufficient to enable a reasonable jury to find that Defendant acted knowingly with intent to deceive, manipulate or defraud, or that the allegedly inaccurate statements presented a danger of misleading a reasonable investor which was known to Defendant or so obvious that Defendant must have been aware of it. Evidence tending to show that Defendant allegedly had a motive to depress the market value of the stock is not sufficient; Plaintiffs failed to show any additional misconduct from which *scienter* could have been inferred. The record does not contain the substantial factual basis necessary to create a strong inference that Defendant acted with *scienter*.

6. There was no legally sufficient evidentiary basis for a reasonable jury to find that Defendant made any misstatements of fact, as opposed to misstatements of opinion. At appropriate stages during the trial, Defendant requested that the Court require Plaintiffs to identify each of the alleged misstatements or omissions which they contended entitled them to relief, so that the Court could critically examine each to determine whether they constituted statements of fact or opinion. This the Court declined to do, and Plaintiffs were permitted to argue numerous alleged statements to the jury, many of which, if not all, constituted matters of opinion. Defendant requests that the Court now examine the statements put forth by Plaintiffs and enter judgment for Defendant as a matter of law with respect to those determined to constitute matters of opinion rather than fact.
7. If and to the extent the Court determines that any of the statements in issue constituted matters of fact, there was no legally sufficient evidentiary basis for a reasonable jury to find that any of the alleged misstatements or omissions were material. Under the "fraud-on-the-market theory," all publically available information is immediately reflected in the price of the stock. In order for information to be material, it must significantly alter the total mix of information already possessed by the market. In other words, only new factual information can be material in a case premised upon the "fraud-on-the-market theory." Here, Plaintiffs offered no evidence of any new factual information published or omitted by Defendant. Taken in the light most favorable to Plaintiffs, there was evidence tending to show only that Defendant mis-characterized or misstated information already publically available regarding CCSI and its products. Such alleged misstatements or omissions, even if proved, cannot be material as a matter of law under the "fraud-on-the-market theory," and Defendant is entitled to judgment as a matter of law.

8. There was no legally sufficient evidentiary basis for a reasonable jury to find that Defendant's alleged conduct was "in connection with" the sales of securities by Plaintiffs. There was no evidence that Defendant, through any agent or employee, had any contact, connection, or communication with either Plaintiff at any time or that either Plaintiff directly relied on anything said or done by Defendant.. To the knowledge of Defendant, this is the first and only time that a short seller or an independent stock analyst publishing research reports for public consumption has ever been made subject to a claim under Section 10(b) or Rule 10(b)(5). In the absence of evidence that Defendant's alleged fraud occurred "in connection with" Plaintiffs' sales, Defendant is entitled to judgment as a matter of law.
9. There was no legally sufficient evidentiary basis for a reasonable jury to find that Defendant had not established the "truth on the market" defense. Taken in the light most favorable to Plaintiffs, the evidence established that CCSI timely and comprehensively responded to each of Defendant's reports. If what the company had to say was false, then Defendant spoke the truth and was guilty of no fraud. On the other hand, a conclusion that Defendant's statements were false and fraudulent, necessitates a corresponding conclusion that CCSI's responses were truthful. Thus, as a matter of law, the information disseminated by CCSI must be regarded as having credibly entered the market and to have immediately dissipated the effects of any alleged fraud. If this is not so, Defendant's published reports concerning the lack of credibility of statements made by the company is fully vindicated. In other words, if CCSI's statements did not credibly dissipate the alleged fraud, then no fraud in fact occurred.

Respectfully submitted,



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