UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NORFOLK COUNTY RETIREMENT SYSTEM, individually and on behalf of all others similarly situated, Plaintiff, v. COMMUNITY HEALTH SYSTEMS, INC., WAYNE T. SMITH and W. LARRY CASH, Defendants.	Consolidated Civil Action No.: 11-cv-0433 Class Action Judge Aleta Trauger Magistrate Judge Joe B. Brown JURY TRIAL DEMANDED **ORAL ARGUMENT REQUESTED**
THIS DOCUMENT RELATES TO ALL ACTIONS	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS THE AMENDED COMPLAINT

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Plaintiff's brief rehearses a consistent (and familiar) refrain—that this Court should not "invade the jury's province" (Opp. 2) by resolving this case at the pleading stage. As we explained in our opening brief, however, the Amended Complaint fails—as a matter of law—for several independent reasons. That is true with respect both to Defendants' statements made before April 2011, and to those made afterwards (which Plaintiff largely ignores). Indeed, courts have repeatedly warned that shareholder class actions with "very little chance of success at trial" can impose enormous, unwarranted costs on defendants if improperly allowed to evade dismissal. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); *see also Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010). This is such a case.

I. PLAINTIFF FAILS TO STATE A CLAIM BASED ON STATEMENTS MADE PRIOR TO APRIL 11, 2011

A. The Statements Were Not Misleading

Plaintiff does not argue that CHSI's statements about its business strategy were false; instead it argues that they were misleading because of what they omitted. Opp. 15-18; *id.* at 19 n.28 ("Plaintiff advances an omissions theory."). But for all its accusations of "half-truths" and the like (*id.* at 16), Plaintiff's brief is devoid of any discussion of the legal standard for what makes a statement misleading by omission. A statement is misleading only if it "creates an impression that is false." *Bondali v. Yum! Brands, Inc.*, No. 15-5064, 2015 WL 4940374, at *8 (6th Cir. Aug. 20, 2015). And it does so if it omits facts that "conflict with what a reasonable investor would take *from the statement itself*." *Omnicare, Inc. v. Laborers Dist. Council Constr. Industry Pension Fund* ("*Omnicare IV*"), 135 S. Ct. 1318, 1329 (2015) (emphasis added).

Here, no investor would take from Defendants' *statements themselves* anything inaccurate about whether CHSI affiliates used Pro-MED or the Blue Book, or whether they faced compliance risks. And even if an investor would otherwise have drawn such an inference, CHSI

repeatedly *disclosed* that many of the hospitals used Pro-MED, that its success depended on a centralized ER strategy, and that its business model had compliance risks (MTD 15-17)—thus "neutraliz[ing]" any conceivable inaccurate implications of the statements. *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1305 (11th Cir. 2011).

Plaintiff's theory—that Defendants misled investors as to the "real" reasons for CHSI's success—is indistinguishable from the theory rejected in *In re Almost Family, Inc. Sec. Litig.*, No. 10-520, 2012 WL 443461 (W.D. Ky. Feb. 10, 2012). In that case, the plaintiffs argued that the defendant company's success "was substantially due to its scheme to manipulate Medicare's reimbursement system, rather than the explanations [it] offered." *Id.* at *6. The theory failed there, as it should here, because CHSI's success "could be attributed to several factors, and [Plaintiff has] offered no evidence suggesting that the factors discussed by [CHSI] were farcical." *Id* at *7. Indeed, Plaintiff affirmatively argues that CHSI was successful precisely because of the "centralized and standardized operating strategies" (Opp. 17) to which CHSI attributed its own success.[1] At bottom, then, Plaintiff's theory is that CHSI failed to disclose that aspects of that strategy were allegedly illegal (or "unsustainable," FAC ¶ 8). But as we have explained (MTD 11-12), companies are not obligated to opine on the legality of their conduct.

Plaintiff has no answer. Rather than describe how investors were misled *by CHSI's statements*, Plaintiff focuses on the materiality of the *additional* things that, they say, should also have been disclosed, such as CHSI's use of the Blue Book or its alleged observations strategy. *See* Opp. 18. But companies do not have "an affirmative duty to disclose any and all material

[1] Because CHSI attributed its success, in part, to its "centralized operating strategy[ies]" (FAC ¶ 281) and "Emergency Room Initiatives" (FAC ¶ 289), CHSI did not attribute its "financial performance . . . to the wrong source." Opp. 15 (quoting *Chamberlain v. Reddy Ice Holdings, Inc.*, 757 F. Supp. 2d 683, 708 (E.D. Mich. 2010)). Thus, this case is readily distinguishable from *Chamberlain*, *Sapssov v. Health Management Associates*, 22 F. Supp. 3d 1210 (M.D. Fla. 2014), and *In Re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 368 (E.D.N.Y. 2013), which involved defendants who "fail[ed] to disclose the true source of [their] revenue." *Sapssov*, 22 F. Supp. 3d at 1227.

information." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011); *In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) ("Materiality alone is not sufficient to place a company under a duty of disclosure."). Defendants did not *mislead* investors about whether CHSI used the Blue Book or sought to reduce observations. So even if those alleged facts were material, the mere fact that Defendants did not disclose them—along with countless other details of their business strategy—provides no basis to overcome the PSLRA's heightened pleading standard.[2]

B. The Statements Were Also Immaterial

The only statements that Plaintiff argues were actually false (as opposed to misleading by omission) are those, made in CHSI's Form 10-K, that "[w]e believe that our hospitals are in substantial compliance with current federal, state, and local regulations." Opp. 19. It is well established, however, that statements that are immaterial are nonactionable "even if they were misleading" or false. *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004). And, as the Sixth Circuit has explained, such "boilerplate" statements of legal compliance are typically immaterial. *In re Omnicare, Inc. Sec. Litig.* ("*Omnicare III*"), 769 F.3d 455, 478 (6th Cir. 2014). To be sure, *Omnicare III* went on to say that the compliance statements at issue in that case could be material—but only because the company "had a recent history of legal problems." *Id.* Here, Plaintiff alleges no such recent history of public legal problems "in the Complaint." *Id.*[3]

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[2] Moreover, "[a]n opinion statement . . . is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way." *Omnicare IV*, 135 S. Ct. at 1329. Defendants' statements that they believed CHSI was in "substantial compliance" (FAC ¶ 294), that it provided "quality" patient care (*id.* ¶ 9), and other opinion statements (including the post-April 2011 statements about the merits of the Tenet action (*id.* ¶ 438), discussed below) are therefore not misleading simply because Plaintiff alleges facts that it says cut the other way.

[3] Plaintiff provides no meaningful response to Defendants' argument that almost all of CHSI's allegedly misleading statements (discussed in § I.A., *supra*) were also immaterial as a matter of law. *See* MTD 14-15 (business-school jargon); *id.* at 19-20 (quality patient care). Because "a reasonable investor would not view [these statements] as significantly changing the general gist of available information," they are not actionable "even if they were misleading." *In re Ford*, 381 F.3d at 570.

C. Plaintiff Fails To Plead A Strong Inference Of Scienter

"To survive [a] motion to dismiss," Plaintiff must allege facts raising a strong inference that Defendants Smith and Cash made public statements "knowing they were false [or misleading], with the intent to defraud the public." *Omnicare III*, 769 F.3d at 481.[4] Other than invoking Judge Nixon's ruling (Opp. 23)—which is irrelevant to an analysis under the PSLRA (MTD 20 n.14)—Plaintiff's sole scienter argument is that Defendants knew about the Blue Book and CHSI's alleged admissions policies. Opp. 23-24. But knowledge of the Blue Book is *not* "knowledge that [CHSI's] statements . . . were false or misleading." *Omnicare III*, 769 F.3d at 471. Plaintiff therefore fails to plead facts giving rise to the strong inference that Smith and Cash *knew* that their statements *would mislead* investors about CHSI's admissions policies.

What is more, Plaintiff does not even *cite* the Sixth Circuit's "intent to defraud" requirement—much less show how Defendants made statements with such intent. At most, Plaintiff rehashes that Smith and Cash profited from certain stock transactions that were allegedly "opportunistic." Opp. 24. But as we explained, a stock sale is probative of motive only if the plaintiff pleads with particularity that the sale was "at unusual or suspicious levels." *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 553 (6th Cir. 1999). Plaintiff ignores that requirement entirely—and certainly makes no such particularized allegation in its Amended Complaint.

D. Plaintiff Fails To Plead Loss Causation

In order to plead loss causation, Plaintiff must identify some "release of information that reveals to the market [1] the pertinent truth that [2] was previously concealed or obscured by the

[4] The reasons for CHSI's success and the degree to which it complied with the law or was committed to quality care, like other "matters of opinion," all concern soft information, *Omnicare III*, 769 F.3d at 470, so the standard for scienter is higher than mere recklessness, *id.* at 472. Instead, "plaintiffs must plead facts showing that the defendants knowingly misrepresented or omitted facts to deceive, manipulate, or defraud the public." *Id.* Plaintiff's reliance on *Sapssov* (Opp. 24) is misplaced because that case applied the Eleventh Circuit's lower recklessness standard. *Sapssov*, 22 F. Supp. 3d. at 1228.

company's fraud," where such revelation is followed by a decline in the price of CHSI's stock. *FindWhat Investor Grp.*, 658 F.3d at 1311. The Tenet Complaint flunks both requirements. Each failure provides an independent ground for dismissal.

First, "[b]ecause a corrective disclosure obviously must disclose *new* information, the fact that the sources used [in preparing it] were already public is fatal to [Plaintiff's] claim of loss causation." *In re KBC Asset Management N.V.*, 572 F. App'x 356, 362 (6th Cir. 2014). Plaintiff tries to distinguish that line of authority on the grounds that (1) though the "raw data" relied upon by Tenet *was* available to the public, it was "meaningless without special knowledge . . . and statistical expertise" unavailable to the "lay investor," and; (2) no pre-Tenet "analyst report explained the Company's admission practices." Opp. 28-31 (citing *Pub. Employees' Ret. Sys. of Mississippi v. Amedisys, Inc.*, 769 F.3d 313 (5th Cir. 2014)). The first distinction is simply wrong: While Plaintiff protests that Tenet's analysis was an intellectual feat so complex that only Tenet's experts could perform it, Plaintiff does not deny that SEIU and the CtW Investment group were both able to perform similar analyses in 2010.[5] Nor does Plaintiff dispute that a civil complaint making similar allegations—the *Reuille qui tam* action—was made public months before Tenet filed its lawsuit. Opp. 30 n.50.[6] *Amedisys* is thus distinguishable, because in that case (unlike here) *no one* had previously performed the analysis at issue.[7]

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[5] Plaintiff's objection (at 30 n.50) that the 2010 CtW and SEIU analyses were nonpublic misses the point: The fact that they were able to analyze the publicly available CHSI data and come up with the same conclusions as the Tenet Complaint belies Plaintiff's claim that the indisputably public data were too difficult for investors to comprehend.

[6] Plaintiff complains that Defendants improperly cite the *Reuille qui tam* case (*see* MTD 26) because Plaintiff cited that action only in its *Initial Complaint*—and *removed* it from the Amended Complaint. Opp. 30. Of course, Plaintiff incorporated the Initial Complaint into the Amended Complaint by reference. FAC ¶¶ 488-91. And in any event, public filings, even in *other* litigation, are subject to judicial notice. *E.g.*, *Vaughn v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 12-01320, 2014 WL 234200, at *3 (M.D. Tenn. Jan. 22, 2014). Here, the publicly filed *Reuille* action shows that the information in the Tenet complaint was available to and readily understood by the market.

[7] See *In re Almost Family*, 2012 WL 443461, at *13 (stating that the same article at issue in *Amedisys* did not qualify as a corrective disclosure because it "presented no *new* information to the market" but was instead "based on a

Plaintiff's second distinction—that no research analyst had explained CHSI's practices—is irrelevant: The fact that analysts chose not to accuse CHSI of fraud does not mean that they were *unaware* of the public information regarding CHSI's admissions, or that they were unable to understand the significance of that information.

Plaintiff also flunks the *second* requirement for pleading loss causation. As the Eleventh Circuit held in *Sapssov v. Health Management Associates, Inc.*, the Tenet Complaint cannot serve as a corrective disclosure because it merely *alleges* fraud, and therefore did not reveal the "truth" of anything about CHSI. 608 F. App'x 855, 863 (11th Cir. 2015) ("a civil suit is not proof of liability"). Plaintiff tries to evade that clear holding by dismissing *Sapssov* as against the "overwhelming line of authorities." Opp. 27. Far from being an outlier, however, *Sapssov* follows a line of cases dating back to *Teachers' Retirement System of Louisiana v. Hunter*, 477 F.3d 162 (4th Cir. 2007). There, plaintiffs alleged that a prior securities complaint constituted a corrective disclosure. The Fourth Circuit rejected that argument, explaining that the prior complaint "merely attribute[d] an improper *purpose* to the previously disclosed facts." *Id.* at 187 (emphasis added). As we have explained, since *Hunter* other courts routinely have dismissed cases where the alleged corrective disclosure contains merely unsubstantiated allegations of misconduct. MTD 22-26.[8] Indeed, following *Hunter*, the Eleventh Circuit likewise held in *Meyer v. Green*, 710 F.3d 1189, 1201 (11th Cir. 2013), that the "announcement of an

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statistical analysis of financial statements and records already available to the public"); *In re Herbalife, Ltd. Sec. Litig.*, No. 14-2850, 2015 WL 1245191, at *3 (C.D. Cal. Mar. 16, 2015) (distinguishing *Amedisys* on the ground that it "involved findings of wrongdoing" in addition to the *Wall Street Journal* article).

[8] *See also Janbay v. Canadian Solar, Inc.*, No. 10-4430, 2012 WL 1080306, at *5 (S.D.N.Y. Mar. 30, 2012) ("The announcement of an SEC subpoena or an internal investigation is itself insufficient to plead loss causation."); *In re Maxim Integrated Prods., Inc. Sec. Litig.*, 639 F. Supp. 2d 1038, 1046-47 (N.D. Cal. 2009) (analyst reports predicting a "risk for potential earnings restatement" as well as disclosures of "an SEC investigation, subpoenas from the United States Attorney's office, and the formation of its own Special Committee to investigate" merely alleged fraud).

investigation reveals just that—an investigation—and nothing more." Even *Amedisys*, the principal case on which Plaintiff relies (at 29), recognizes that allegations of fraud generally "do not, standing alone, amount to a corrective disclosure." *Amedisys*¸ 769 F.3d at 323.[9]

Recognizing that the Tenet Complaint (1) revealed no new facts, and (2) constituted mere allegations of fraud, Plaintiff falls back on the argument that, under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005), loss causation is "not ripe for the Court to decide" until trial. Opp. 27. But *Dura* clearly requires a plaintiff *at the pleading stage* to do more than merely "include the magic words 'direct and proximate' in connection with its alleged loss"—which is all Plaintiff does in the Amended Complaint. *In re Compuware Sec. Litig.*, 386 F. Supp. 2d 913, 918 (E.D. Mich. 2005). Thus, as we have explained (MTD 22), courts routinely dismiss complaints for failure to adequately allege a loss tied to a corrective disclosure.

Plaintiff suggests that it *must* have adequately pleaded loss causation, because CHSI's stock fell when Tenet's lawsuit was filed. Opp. 27, 29. That argument is entirely circular and, if accepted, would eliminate *Dura*'s requirement to adequately plead loss causation.[10] Indeed, Plaintiff's allegation—that the Tenet Complaint caused the decline in CHSI's stock price *because* the decline occurred after it was filed—is precisely the type of "boilerplate" allegation that does "nothing more than note that a stock price dropped after [an] announcement," which

[9] Plaintiff protests (at 27) that *Sapssov* is distinguishable because, unlike the *qui tam* action in that case, the Tenet Complaint "was nationally disseminated, asserted a companywide fraud and resulted in the dramatic and immediate stock decline." Not so. In *Sapssov*, a prominent securities analyst nationally disseminated the allegations in the *qui tam* suit shortly before the company's stock dropped 7%. 608 F. App'x at 863. In any event, Plaintiff's distinction is irrelevant: Nothing in *Sapssov* turned on whether the allegations of fraud were "nationally disseminated."

[10] Plaintiff's loss causation theory is also belied by the movements in CHSI's stock price (of which the Court may take judicial notice). On December 9, 2011, the day before CHSI announced its proposed acquisition of Tenet, CHSI's stock closed at $31.64. The stock price rose steadily from there in anticipation of the merger, until it fell suddenly on April 11, 2011, upon the filing of the Tenet suit. The next day, on April 12, 2011, CHSI resumed trading at $31.48—the same price it had been before the acquisition announcement. This demonstrates, of course, that the market was reacting *to the failure of the merger*. Plaintiff's argument that the April 2011, Tenet suit is corrective as to the alleged fraud is therefore wholly conclusory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaint must plead more than facts "merely consistent with a defendant's liability").

courts routinely hold to be insufficient under *Dura*. *D.E. & J. Ltd. Partnership v. Conaway*, 133 F. App'x 994, 1000 (6th Cir. 2005). Allowing the Amended Complaint to survive on the bald allegation that Plaintiff paid an inflated price for a security would "bring about harm of the very sort" the PSLRA seeks to avoid, namely, the "abusive" practice of filing lawsuits "with only [a] faint hope that the discovery process might lead eventually to some plausible cause of action." *Dura*, 544 U.S. at 347 (internal quotation marks omitted).

II. PLAINTIFF ALSO FAILS TO STATE A CLAIM BASED ON STATEMENTS MADE AFTER APRIL 11

Plaintiff also asserts that, after the April 11, 2011, Tenet Complaint, CHSI further misled the market by "misrepresent[ing]" both "the true impact discontinuing the Blue Book would have on CHS financial performance" and the merits of the Tenet Complaint. FAC ¶ 489. Plaintiff does not dispute, however, that this claim is distinct from any claim asserted in the Initial Complaint. Plaintiff fails to state a claim, and in any event its new claim is time barred.

A. Plaintiff Pleads Insufficient Facts To Support Any Claim Of Fraud Based On Any Statement Made After April 11, 2011

1. Plaintiff fails adequately to plead that any of the statements identified in the Amended Complaint is actionable. As Defendants explained, many of those statements were (1) non-actionable puffery, MTD 27 (discussing FAC ¶¶ 422, 425, 428, 438); (2) opinions that are not alleged to be subjectively false, MTD 28 (FAC ¶¶ 423, 436, 438, 454); or (3) statements about Pro-MED that are not alleged to be false at all, MTD 29 n.22 (FAC ¶¶ 262, 435, 438). Plaintiff does not respond to, and therefore waives any objection to, these arguments. *Gomery v. Continental Cas. Co.*, No. 13-947, 2014 WL 4209648, at *4 (W.D. Mich. Aug. 25, 2014) (failure to dispute independently sufficient ground for dismissal is a "fatal omission").

The only post-April 2011 statements that Plaintiff does address are Defendants' forward-looking statements, which fall squarely within the PSLRA's safe harbor. See MTD 28-29. With

regard to those forward-looking statements, Plaintiff asserts only that Defendants *knew* that the statements were false at the time they were made. Opp. 22. But as we explained (MTD 28-29), "if the statement qualifies as 'forward-looking' and is accompanied by sufficient cautionary language, a defendant's statement is protected *regardless of the actual state of mind*." *Miller v. Champion Enters. Inc.*, 346 F.3d 660, 672 (6th Cir. 2003) (emphasis added). Plaintiff's brief does not dispute that the statements at issue contained such cautionary language.

2. Plaintiff also fails to plead particularized facts supporting a strong inference of scienter. Plaintiff misses the point when it argues (at 24) that Defendants request that the Court "ignore[]" "knowledge predating April 2011." Our point is that Plaintiff's anecdotal evidence that the *2004* Blue Book differed from InterQual says nothing about whether Defendants knew that statements that they made regarding the Tenet Complaint and the effect of the Blue Book were inaccurate in *2011*—after the Blue Book had been revised many times. Courts routinely dismiss claims based on such conclusory allegations where plaintiffs fail to explain how occurrences "year[s] earlier bear[] on scienter during the relevant time period." *Sharenow v. Impac Mortg. Holdings, Inc.*, 385 F. App'x 714, 716 (9th Cir. 2010); *cf. In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 352 (S.D.N.Y. 2011) (rejecting "pleading strategy [that] effectively requires the Court to reconstruct the chronology of Class Period allegations in order to decipher what Defendants knew or should have known on the date of a particular statement").

3. Plaintiff fails to plead loss causation for the "statements about (i) the *Tenet Action* and (ii) the effects of abandoning the Blue Book." Opp. 31. Plaintiff acknowledges, as it must, that Defendants had disclosed declines in admissions before the alleged October Disclosure. *Id.* at 31-32. It nevertheless argues that Defendants continued to deceive the market by giving "deflecting" and "lulling" explanations of why this decline happened in order to "reassure[]

analysts." *Id.* at 32. As we explained (MTD 31), however, Plaintiff's Amended Complaint (and now its brief) elides that, on July 28, 2011, CHSI expressly ascribed a decline in same-store admissions to "[a] reduction in one-day stays for emergency room"—including the "removal of inpatient criteria to direct chest pain in admissions" and "a natural reaction to the publicity" of the Tenet lawsuit. Orseck Decl. Ex. 2 at 4 (7/29/2011 Tr.). That is *exactly* what Plaintiff claims to have been revealed for the first time in the October 2011 report. Because CHSI had already disclosed that the Tenet lawsuit and the transition to InterQual had caused admissions declines in July, the October 2011 earnings release was not "corrective" of any alleged post-April fraud.

B. Plaintiff's New Claim Is Time Barred

Plaintiff concedes its new claim is untimely, asserting only that it "relates back" to its earlier complaint. But Plaintiff seeks not only to expand the size of the putative class, but also to plead an entirely new fraud. Because nothing in the earlier complaint gave Defendants "the essential information necessary to determine both the subject matter and size of the prospective litigation," Rule 15 does not permit relation back. *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1132-33 (11th Cir. 2004); *see also United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 516 (6th Cir. 2007).

Although Plaintiff faults the Court for its delays (*e.g.*, Opp. 3-4, 33 n.51), Plaintiff has only itself to blame for its previous failure to mention, let along bring a claim based on, the third quarter 2011 earnings release. Plaintiff filed its previous complaint in July 2012—ten months *after* the October disclosure. Plaintiff does not dispute that it *could* have included this claim in the last complaint, nor does it offer any explanation why its failure to do so should be excused.

Plaintiff's own authority demonstrates that the Amended Complaint falls short of the fair notice demanded by Rule 15. Although Plaintiff cites (at 33) *Selburg v. Virtuoso Sourcing Group, LLC*, No. 11-1458, 2012 WL 4514152 (S.D. Ind. Sept. 29, 2012), the court in that case

allowed relation back only because "Plaintiff's original allegations and the amended class allegations concern the *exact same conduct*." *Id.* at *5 (emphasis added). Here, by contrast, "the newly proposed class members bought stock at different values and after different disclosures and statements were made by Defendants and analysts." *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 935 (9th Cir. 1996); *see also* Opp. 31 (conceding that October disclosure related to fraud not alleged in Initial Complaint).[11] Such a fundamental change to the "nature and scope" of the complaint does not relate back to the filing of the original complaint. *Bledsoe*, 501 F.3d at 516.

In any event, this Court should exclude from any putative class any plaintiff who did not "purchase[] or otherwise acquire[] the publicly traded securities of CHS from July 27, 2006 through April 8, 2011"—the class alleged in the previous complaint (Dkt. 68 ¶ 2). Plaintiff cites a number of cases from outside this Circuit that extend Rule 15(c)(3)—which by its language applies only to amendments that add *defendants*—to efforts to add new plaintiffs. *See, e.g.*, *Blanchard v. Edgemark Fin. Corp.*, 2000 WL 33223385, at *7 (N.D. Ill. May 22, 2000). But as we explained (MTD 35), in the Sixth Circuit an amendment that adds a new *plaintiff* "creates a new cause of action and there is no relation back to the original filing." *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313, 318 (6th Cir. 2010). That is the end of the matter.[12]

CONCLUSION

For the reasons stated above and in Defendants' opening brief, this Court should dismiss the Amended Complaint with prejudice.

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[11] Plaintiff argues that *Syntex* does not "concern[]" relation back. Opp. 35 n.54. Not so. *See* 95 F.3d at 935 ("We also disagree with Plaintiffs' alternate argument that the claims relate back."). Nor is its holding "unique" (Opp. 35 n.54). *See, e.g.*, *Young v. Lepone*, 305 F.3d 1, 16 (1st Cir. 2002) (citing *Syntex*).

[12] Plaintiff asks the Court (at 35) to wait until the class-certification stage to decide on the length of the class period. But the statute of limitations provides an independent ground to exclude the additional plaintiffs separate and apart from the Rule 23 factors that would be considered for class certification.

Dated: December 16, 2015

Respectfully submitted.

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