FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MACOMB COUNTY EMPLOYEES' RETIREMENT SYSTEM, Lead Plaintiff, *Plaintiff-Appellant*, and CITY OF ROSEVILLE EMPLOYEES' RETIREMENT SYSTEM, individually and on behalf of all others similarly situated, *Plaintiff*, v. ALIGN TECHNOLOGY, INC.; JOSEPH M. HOGAN; JOHN F. MORICI; JULIE TAY, *Defendants-Appellees.*	No. 21-15823 D.C. No. 3:20-cv-02897-MMC OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted March 10, 2022
San Francisco, California

Filed July 7, 2022

Before: J. Clifford Wallace, Sidney R. Thomas, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Securities Fraud

The panel affirmed the district court's dismissal of a securities fraud class action under §§ 10(b), 20(a), and 20A of the Securities Exchange Act of 1934 and Rule 10b-5.

Plaintiff alleged that corporate executives at Align Technology, Inc., a medical device manufacturer best known for selling "Invisalign" braces, misrepresented their company's prospects in China.

The panel rejected as unsupported defendants' argument that their statements could not be considered false at the time they were made because plaintiff did not allege sufficient facts to make plausible the inference that the rate of Align's growth in China had begun to decline significantly when the challenged statements were made. The panel concluded that former employees' reports, viewed alongside circumstantial evidence of the short period of time between the twelve challenged statements and the downturn of Align's prospects in China, sufficiently supported the inference that Align's growth in China had slowed materially when the statements were made.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court correctly found that six of the challenged statements were non-actionable "puffery," which involves vague statements of optimism expressing an opinion that is not capable of objective verification. The district court also correctly found that the remaining six statements did not create a false impression of Align's growth in China and so were not actionable. Having determined that all of the challenged statements were non-actionable, the panel declined to reach issues of scienter and control-person or insider-trading liability. The panel rejected the argument that because Align touted positive facts about China, the company had a duty to disclose negative facts in order to make the statements not misleading.

COUNSEL

Javier Bleichmar (argued), Bleichmar Fonti & Auld LLP, New York, New York, for Plaintiffs-Appellants.

Shay Dvoretzky (argued) and Peter A. Bruland, Skadden Arps Slate Meagher & Flom LLP, Washington, D.C.; Peter B. Morrison, Virginia F. Milstead, and Mayra Aguilera, Skadden Arps Slate Meagher & Flom LLP, Los Angeles, California; for Defendants-Appellees.

OPINION

McKEOWN, Circuit Judge:

Securities actions often ask courts to distinguish between corporate braggadocio and genuinely false or misleading statements. This is one of those cases. In reviewing the dismissal of this class action, we consider whether corporate executives misrepresented their company's prospects in China to such an extent that their statements were actionable under our securities laws. After a careful review of the record, we conclude that the district court did not err in determining that all twelve challenged statements were non-actionable.

BACKGROUND

For the better part of twenty years, Align Technology, Inc. ("Align")—a medical device manufacturer that is best known for selling clear, plastic "Invisalign" braces—enjoyed skyrocketing growth. At the beginning of 2002, the company had served roughly 44,000 customers, but by 2019 that number had grown to 7 million. During much of that period, the growth was driven primarily by international sales, especially in China: Between 2013 and 2017, shipments of Invisalign cases to China increased by an average of 88 percent each year, and then by another 91 percent in 2018. Indeed, every quarter in 2017 and 2018, Align's year-over-year revenue growth rate in China hovered between 70 percent and 100 percent.

But then the trouble began. At the start of 2019, Align's Chinese growth rate dipped slightly, apparently due to increased competitive pressure and diminished consumer demand, and in the second quarter of that year the rate fell to between 20 and 30 percent. As news of this fall reverberated

across the market, Align's stock dropped by roughly 27 percent, from $275.16 per share on July 24, 2019, to $200.90 per share on July 25, 2019, erasing approximately $5.4 billion in shareholder value.

A year later, Macomb County Employees' Retirement System ("Macomb"), a Michigan-based pension plan, filed suit against Align (and several of its senior executives) on behalf of itself and all others that acquired Align common stock between April 25, 2019, and July 24, 2019 (the "Class Period"), and were damaged thereby. Macomb alleged that several Align senior executives had "misrepresent[ed]" Align's growth in China throughout the second quarter of 2019, claiming strong numbers despite knowing (or recklessly disregarding) that the growth rate in China had slowed significantly. According to Macomb, Align executives made twelve statements during the Class Period that are actionable under Sections 10(b), 20(a), and 20A, as well as Rule 10b-5, of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* ("Exchange Act" or "Act").

The district court dismissed the action with leave to amend, holding that the majority of the challenged statements constituted non-actionable puffery and the rest were not false or misleading. Instead of amending the complaint, Macomb requested a final judgment, so the district court dismissed the action with prejudice. Macomb appealed.

ANALYSIS

We review de novo a district court's dismissal for failure to state a claim, "tak[ing] all allegations of material fact as true and constru[ing] them in the light most favorable to the nonmoving party." *In re Quality Sys., Inc. Sec. Litig.* (*Quality Systems*), 865 F.3d 1130, 1140 (9th Cir. 2017).

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