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No. 21-3863

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

PLYMOUTH COUNTY RETIREMENT ASSOCIATION, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellant, v. VIEWRAY, INC.; SCOTT DRAKE; AJAY BANSAL; JAMES F. DEMPSEY; CHRIS A. RAANES; SHAHRIAR MATIN, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: NORRIS, SUHRHEINRICH, and CLAY, Circuit Judges.

SUHRHEINRICH, Circuit Judge. Plymouth County Retirement Association appeals the dismissal of its complaint in this securities-fraud action against ViewRay, Inc., and some of its officers. Because Plymouth failed to meet its hefty pleading burden under the Private Securities Litigation Reform Act and Federal Rule of Civil Procedure 9(b), we affirm.

I.

ViewRay's Business. ViewRay designs, manufactures, and markets the Linac MRIdian, a machine that images and treats cancer simultaneously using MRI-guided radiation. The MRIdian can distinguish between types of soft tissue and thus deliver radiation more accurately, reducing collateral damage to healthy tissue. Nearly all of ViewRay's revenue comes from sales of the MRIdian.

Each MRIdian system costs about $6 million, a cost that's substantially more than radiation-therapy systems lacking the MRI feature, but about the same as those with it. That sticker price comes with other costs too. Typically, a customer needs between nine and fifteen months after ordering an MRIdian to construct and prepare the room in which it'll be installed—called a "vault" in industry jargon. R. 55 at 1264–65 ¶ 36. Installation of the machine in the vault usually takes another 60 to 90 days. All told, the time from contract-signing to installation is usually between 12 and 18 months. However, due to the complicated nature of this sale, ViewRay is often left to "mov[e] at [its] customers' pace"—which could extend the process even further. *Id.* at 1293 ¶ 115.

ViewRay went public in July 2015. Since then, the company has largely operated at a loss and has raised capital to fund its operations. ViewRay held two public offerings of stock during the alleged class period, raising about $173 million in August 2018 and about $150 million in December 2019.

ViewRay's Marketing and Backlog. ViewRay sells the MRIdian in the United States and abroad. In the United States, ViewRay sells through a direct sales force. Abroad, ViewRay primarily uses third-party distributors supported by ViewRay employees. To estimate future revenue from MRIdian orders, ViewRay uses a "backlog" to track "all orders for which ViewRay has not recognized revenue and that ViewRay considers 'valid.'" *Id.* at 1254 ¶ 3.

Plymouth's theories of fraud center on this backlog. Simply stated, Plymouth claims that ViewRay misled investors by failing to follow the publicly disclosed criteria for determining which orders to include in the backlog, which thereby inflated the backlog with orders that didn't belong; because ViewRay did not disclose to investors that it failed to follow the backlog criteria, those omissions were misleading given ViewRay's other disclosures about the backlog.

Parties and Procedural History. The original complaint was filed by a different plaintiff on behalf of a putative class of purchasers of ViewRay's common stock between March and August 2019. As a member of the proposed class, Plymouth moved for (and was granted) appointment as lead plaintiff; it then filed its first amended complaint on behalf of a differently defined class (those who purchased ViewRay stock between May 10, 2018, and January 13, 2020). In addition to suing ViewRay, Plymouth named several ViewRay officers (current and former) as individual defendants; their identities are irrelevant for our purposes.

ViewRay moved to dismiss the first amended complaint for failure to state a claim; after that motion was fully briefed, Plymouth moved for leave to amend the complaint again, which the district court granted in a text-only order, and the second amended complaint (the "operative complaint") was docketed.

ViewRay moved to dismiss the operative complaint for failure to state a claim, arguing that Plymouth failed to meet the heightened pleading standards for securities fraud under the Private Securities Litigation Reform Act ("PSLRA"), Federal Rule of Civil Procedure 9(b), or both. The district court agreed, granting the motion in a thorough and well-reasoned opinion and order. *See generally Plymouth Cnty. Ret. Ass'n v. ViewRay, Inc.*, 556 F. Supp. 3d 772, 791, 801–02 (N.D. Ohio 2021). Plymouth now appeals.

II.

We review de novo an order granting a Rule 12(b)(6) motion to dismiss. *Dougherty v. Esperion Therapeutics, Inc.*, 905 F.3d 971, 978 (6th Cir. 2018). We construe the complaint in the plaintiff's favor and accept its well-pleaded factual allegations as true. *City of Taylor Gen. Emps. Ret. Sys. v. Astec Indus., Inc.*, 29 F.4th 802, 809 (6th Cir. 2022). Although our review is normally limited to the complaint, we may also consider any document attached to the defendant's motion

to dismiss if it "is referred to in the complaint and is central to the plaintiff's claim." *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (citation omitted); *see also In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 466–67 (6th Cir. 2014).

To avoid dismissal, any complaint generally must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Securities-fraud complaints like Plymouth's, however, must clear a higher bar. The PSLRA stands as an "elephant-sized boulder" to such suits and its "requirements are not easily satisfied." *Omnicare*, 769 F.3d at 461. Along with Federal Rule of Civil Procedure 9(b), the PSLRA requires certain elements of these claims (including both elements considered here) to be pleaded with particularity. *Astec Indus.*, 29 F.4th at 810, 812. At bottom, the plaintiff must "allege the 'who, what, where, when, and why' of the fraudulent statements." *Id.* at 810 (citation omitted).

III.

Count One of the operative complaint alleges that ViewRay violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Section 10(b) makes it unlawful for anyone to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device." 15 U.S.C. § 78j(b).[1]

Section 10(b) claims have six elements, but ViewRay challenges Plymouth's allegations as to only three of them—arguing Plymouth failed to adequately allege that (1) ViewRay made "a material misrepresentation or omission" (what we call the "falsity" element) in connection with the sale of a security, (2) ViewRay made that statement or omission with the requisite scienter,

[1] SEC Rule 10b-5 implements Section 10(b), and its "coverage" is "coextensive with" Section 10(b). *SEC v. Zanford*, 535 U.S. 813, 816 n.1 (2002).

and (3) the alleged fraud caused Plymouth's loss. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38 (2011) (citation omitted). Falsity and scienter must be pleaded with particularity, *Astec Indus.*, 29 F.4th at 810, 812, while loss causation need be pleaded only plausibly, *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 384 (6th Cir. 2016).

The district court reached only the falsity and scienter elements, finding that Plymouth failed to adequately allege either. *See Plymouth*, 556 F. Supp. 3d at 786–801. Although ViewRay renews its arguments as to all three elements, we focus on falsity, since (as explained below) Plymouth's appeal revolves almost entirely around that element. Because we conclude as such, we need not separately analyze scienter. *See Astec Indus.*, 29 F.4th at 812 (explaining that scienter must be alleged for each false or misleading statement). That said, the district court's scienter analysis was sound and provides an alternative basis for affirming the decision below.

A.

Plymouth claims that ViewRay falsely inflated the backlog with orders that did not meet its publicly disclosed backlog criteria. The district court concluded that Plymouth failed to plead enough; it reasoned that "ViewRay . . . sufficiently identified discretion and judgment as factors" in determining which orders to include in the backlog. *Plymouth*, 556 F. Supp. 3d at 787; *see also id.* (observing that ViewRay "cautioned [investors] that determining when or how much of the backlog would turn into revenue presented a difficult exercise"). Based largely on this finding of subjectiveness, the court held that Plymouth insufficiently alleged (1) that any backlogged order identified by Plymouth violated the backlog criteria, *id.* at 787–88 (discussing "sham orders," stale orders, and allegedly invalid distributor orders), (2) that ViewRay's statements regarding the

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