

## Ninth Circuit: Market Growth and Sales Performance Statements Determined to Be Non-Actionable Puffery (Securities Law Alert)

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On July 7, 2022, the Ninth Circuit affirmed a district court’s dismissal of a securities fraud class action against a medical product manufacturer and certain of its executives alleging that senior executives misrepresented the company’s sales growth in China. [Macomb Cnty. Emps. Ret. Sys. v. Align Tech.](#), 39 F.4th 1092 (9th Cir. 2022) (McKeown, J.). The court agreed with the district court that six of the challenged statements were puffery.

### Background

For a number of years, the company had double-digit revenue growth rates in China. For example, in every quarter in 2017 and 2018, the company’s year-over-year revenue growth rate in China was between 70% and 100%. However, at the beginning of 2019, the company’s revenue growth rate in China decreased, and in Q2 the rate fell to between 20% and 30%. These decreases were followed by a stock drop of approximately 27%. Subsequently, the plaintiff pension plan filed a class action under Section 10(b) and Rule 10b-5, alleging that company executives had misrepresented the company’s growth in China throughout Q2 of 2019, “claiming strong numbers despite knowing (or recklessly disregarding) that the growth rate in China had slowed significantly.”

The district court dismissed the action with prejudice, holding that the challenged statements, which described the market for the company’s products in China and the company’s performance there, were either non-actionable puffery or were not false or misleading. Plaintiff appealed.

### Vague, Generically Positive Statements Were Puffery

On appeal, the court held that the district court correctly found that six of the challenged statements were non-actionable puffery. Under Ninth Circuit precedent, puffery involves “expressing an opinion that is not capable of objective verification.” *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard*, 845 F.3d 1268 (9th Cir. 2017). Such statements are not actionable because professional investors, and most amateur investors, “know how to devalue the optimism of corporate executives.” *Police Ret. Sys. of St. Louis v. Intuitive Surgical*, 759 F.3d 1051 (9th Cir. 2014). The Ninth Circuit explained that six of the challenged statements used vague, generically positive terms, such as describing China as “a great growth market,” “a huge market opportunity,” and “a market that’s growing significantly for us,” as well as describing the company’s performance in China as “tremendous” and “great.” The court determined that such characterizations

were not “objectively verifiable” and did not present the kind of “precise information” on which investors rely.

**The District Court Did Not Err As the Statements Were Not Made Against a Clearly Pessimistic Backdrop**

Plaintiff argued that the district court erred by failing to “consider the context” in which these six statements were made. The Ninth Circuit disagreed. Citing *Intuitive Surgical*, the court explained that this was not a case where “general statements of optimism” were “made against a clearly pessimistic backdrop,” which “may form a basis for a securities fraud claim[.]” Rather, on the facts at issue, the court emphasized that when the executives “made the six challenged statements, the company’s sales were *still growing* in China, albeit at a diminished rate, so these feel-good descriptions . . . did not ‘affirmatively create an impression of a state of affairs that differed in a material way from the one that actually existed.’” Quoting *In re Quality Sys. Sec. Litig.*, 865 F.3d 1130 (9th Cir. 2017) (emphasis in original).

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