NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: NIMBLE STORAGE, INC. SECURITIES LITIGATION,

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ARKANSAS TEACHER RETIREMENT SYSTEM, Lead Plaintiff; Individually and On Behalf of a Class of Similarly Situated Persons and Entities,

Plaintiff-Appellant,

v.

NIMBLE STORAGE, INC.; SURESH VASUDEVAN; ANUP V. SINGH; DANIEL LEARY; VARUN MEHTA,

Defendants-Appellees.

No. 17-17232

D.C. No. 4:15-cv-05803-YGR

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted February 13, 2019
San Francisco, California

Before: SCHROEDER, O'SCANNLAIN, and RAWLINSON, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plaintiff Arkansas Teacher Retirement System brought this securities class action against Nimble Storage, Inc. and four of its executives. Plaintiff alleges that defendants violated § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), when, between November 25, 2014, and November 19, 2015, they (1) misleadingly touted Nimble's enterprise-market success, and (2) released a misleading earnings projection. Plaintiff appeals the district court's order granting defendants' motion to dismiss. We affirm.

To state a claim under § 10(b), plaintiff must satisfy the "[e]xacting pleading requirements" of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see also* 15 U.S.C. 78u-4(b)(1). The PSLRA, which "significantly altered pleading requirements in private securities fraud litigation," requires that "a complaint 'plead with particularity both falsity and scienter.'" *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002) (quoting *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001)).

This appeal turns on whether plaintiff adequately pled falsity. To plead falsity under the PSLRA, plaintiff must "specify each statement alleged to have been misleading" and the "reasons why the statement is misleading[.]" 15 U.S.C.

§ 78u-4(b)(1); *see also Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990–91 (9th Cir. 2009).

Several of the allegedly false statements plaintiff identifies pertaining to Nimble's enterprise-market success are nonactionable, as they are "vague statements of optimism" and opinion. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010). Such statements include, for example: "we've successfully broadened our base beyond mid-size enterprises to large enterprises"; and "I think we are making really good progress [penetrating the large enterprise market]."

Plaintiff has not alleged that any of the facts contained within more specific statements were inaccurate. Defendants stated, for example, that Nimble had "added 41 new G5000 customers;" had obtained a "[r]ecord number of new G5000 (Global 5000) enterprises;" that "[b]ookings from Global 5000 Enterprises . . . more than doubled from a year ago;" and that its "product enhancements and sales investments are yielding strong bookings growth from Global 5000 enterprise . . . customers." Plaintiff contends that these statements were materially misleading because Nimble was using a reclassification scheme to list smaller commercial market customers as larger enterprise market customers. But, as the district court observed, plaintiff never alleged that any disclosed numbers of customers in each market were false. Nor did plaintiff allege that the bookings from Nimble's reclassified customers were not in fact growing. Thus, absent specific allegations that the statements were false, the complaint falls short of the PSLRA's exacting standard.

Plaintiff also claims that Nimble's third-quarter earnings projection for fiscal year 2016 was materially false and misleading. To support its position, plaintiff alleges that because Nimble generally used a highly accurate predictive technology, defendants must have known at the time they issued the third-quarter projection that Nimble was in no position to achieve it. But plaintiff has not alleged that Nimble's software did in fact predict a third-quarter miss, or that defendants received a report to that effect before issuing their prediction. That Nimble generally used this predictive software, and that Nimble ultimately missed its third-quarter projection, does not adequately plead that the projection was false when made.

Because plaintiff has not adequately pled falsity, neither plaintiff's § 10(b) claim nor plaintiff's derivative § 20(a) claim survives dismissal.

AFFIRMED.