

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 19 2022

FOR THE NINTH CIRCUIT

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

GANESH KASILINGAM, Individually and
on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

STITCH FIX, INC.; KATRINA LAKE;
PAUL YEE,

Defendants-Appellees.

No. 21-16837

D.C. Nos. 3:18-cv-06208-JD

3:18-cv-06565-JD

3:18-cv-06965-JD

3:18-cv-07427-JD

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding

Submitted October 17, 2022**
San Francisco, California

Before: McKEOWN, CALLAHAN, and VANDYKE, Circuit Judges.

Plaintiff-Appellant Ganesh Kasilingam appeals from the district court's dismissal of his complaint under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Defendant-Appellee Katrina Lake founded Defendant-Appellee Stitch Fix, Inc. in 2011. In November 2017, Stitch Fix went public. That same year, Stitch Fix diversified its broad marketing portfolio to include television advertising. Although the move proved successful, in the fourth quarter of Fiscal Year (FY) 2018, Stitch Fix “temporarily ceased [its] national TV campaign for [ten] weeks” as part of an ongoing plan to test the efficacy of its different marketing channels. Despite this temporary pause in television advertising, Stitch Fix increased its marketing expenditures during the fourth quarter of FY 2018 and added 54,000 new customers. But the day after Stitch Fix published its fourth quarter results, its stock price dropped more than 35%.

In October 2018, a securities-fraud complaint was filed against Stitch Fix and several of its officers, including Lake. Related actions followed. In August 2019, the district court consolidated the various lawsuits and appointed Kasilingam lead plaintiff. Kasilingam filed a consolidated complaint, which Stitch Fix moved to dismiss for failure to state a claim. In September 2020, the district court dismissed the consolidated complaint with leave to amend. Two months later, Kasilingam filed an amended complaint, seeking “remedies under §§ 10(b) and 20(a) of the Securities Exchange Act ... and SEC Rule 10b-5.” *See* 15 U.S.C. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b-5. Kasilingam challenged three of Stitch Fix’s statements, claiming the statements were false and misleading because the company represented it was using,

and “would continue” to use, “national television advertising” to “deliver near-term payback” at a time when Stitch Fix had temporarily ceased national television advertising.

Stitch Fix moved to dismiss Kasilingam’s amended complaint. In September 2021, the district court dismissed the amended complaint with prejudice. The court found, in relevant part, that the challenged statements “are too general about [Stitch Fix’s] ongoing [marketing] efforts and future plans to be misleading with respect to the test that shut down national television advertisements for [ten] weeks.” And Kasilingam “does not point to anything even hinting that investors had reason to believe that national television advertisements were essential to Stitch Fix’s continued success.” The district court also found that Kasilingam had misread other statements that were “clearly about advertising more generally,” as being “limited to television advertising.” Kasilingam timely appealed.

“We review de novo an order granting a motion to dismiss for failure to state a claim under [Rule] 12(b)(6).” *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021). In considering a Rule 12(b)(6) motion, we normally ask whether the complaint contains “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) (cleaned up). But the standard pleading requirements are supplemented in this case by rules specific to securities fraud cases. Specifically, the circumstances

constituting the alleged fraud must be stated with particularity under Federal Rule of Civil Procedure 9(b). *See Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 604 (9th Cir. 2014). In addition, the Private Securities Litigation Reform Act of 1995 requires a complaint to “specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading.” 15 U.S.C. § 78u-4(b)(1).

“To plead a claim under [§] 10(b) and Rule 10b-5, [Kasilingam] must allege: (1) a material misrepresentation or omission; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.” *Or. Pub. Emps. Ret. Fund.*, 774 F.3d at 603 (citation omitted). We need only address the first of these elements.

Kasilingam argues that the challenged statements “led investors to believe that Stitch Fix was maintaining its successful national-television advertising campaign.” But none of the challenged statements reference “national” television advertising. Moreover, although television advertising is mentioned in two of the statements, it’s mentioned simply as one of several marketing channels. And although television advertising had proven successful in the past, the challenged statements give no indication that the company was certain to continue television advertising in the future. Rather, the statements only generally describe Stitch Fix’s marketing efforts. In short, none of the challenged statements “affirmatively create an impression of a

state of affairs that differs in a material way from the one that actually exists.” *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002).

Kasilingam’s argument that the challenged statements “are false and misleading because the television-dark test was not designed to achieve near-term payback,” fails for the same reason. Stitch Fix’s statement about “investments designed to achieve near-term payback” cannot be construed as the company promising to pursue “near-term payback” using national television advertising. Indeed, as with the other challenged statements, television advertising was simply mentioned as one marketing channel among others. Moreover, the statement refers to Stitch Fix’s activities during the third quarter of FY 2018, not the fourth quarter. And the fact remains that Stitch Fix’s marketing efforts generally achieved some level of “near-term payback” in the fourth quarter of FY 2018, with the company adding more than 50,000 new customers.

Kasilingam’s remaining arguments fail for the same reason. Accordingly, Kasilingam fails to adequately allege a material misrepresentation or omission.

AFFIRMED.