

Medical Tech Co. Looks To Dodge Investor Suit Over Backlog

By **Reenat Sinay**

Law360 (May 29, 2020, 6:11 PM EDT) -- ViewRay Inc. has urged an Ohio federal court to toss a proposed securities class action accusing the MRI radiation technology company of inflating its order backlog, chalking the matter up to the "growing pains" of an early-stage company.

The September 2019 suit claims ViewRay overestimated the expected sales revenue of its backlogged MRIdian product, an MRI-guided radiation therapy system that images and treats cancer patients simultaneously, which led its artificially inflated stock price to drop when disappointing financial results were later revealed.

But ViewRay on Thursday contended that its backlog practices are typical of companies that sell large pieces of equipment and that the company repeatedly warned shareholders that estimated earnings from backlogged orders were subject to change.

"Through this litigation, plaintiff tries to transform growing pains typical of any early, commercial-stage medical device company into securities fraud, claiming that a 'gap' between ViewRay's backlog and the revenue it recognized 18 months later demonstrates that ViewRay inflated the value of its backlog," the company said. "But this 'gap' is untethered to statements that ViewRay made."

The backlog tracks orders for which the company has sales agreements but which have yet to be fully completed. The sales process for MRIdian can take up to two years for some customers, who need to prepare their facilities for the "paradigm-shifting" technology and go through a monthslong installation and training process, according to the filing.

The company's backlog is a mere estimate of future revenue, and ViewRay has repeatedly disclosed to investors that the estimates can shift due to customer delays in, for example, construction, permitting, or installation, the company said.

A proposed shareholder class led by the Plymouth County Retirement Association alleges that between May 10, 2018, and Jan. 13, 2020, ViewRay knowingly inflated its backlog and overstated estimated revenue, only to revise that guidance in August 2019 and report disappointing earnings in January.

The revision prompted a stock drop of 54% on Aug. 9, followed by another 23% tumble in January after ViewRay disclosed disappointing fourth-quarter and fiscal-year 2019 results, according to the complaint.

On Thursday, ViewRay shot back, arguing that its shareholders are improperly attempting to allege "fraud-by-hindsight" and that none of the alleged misstatements regarding estimates are actionable.

The investors further fail to state a claim, ViewRay contended, because their allegations lack the specificity required by the Private Securities Litigation Reform Act.

"Following each set of alleged misstatements, plaintiff recites the same two conclusory allegations of falsity," the company said. "These allegations make it impossible to discern why each challenged statement was false or misleading when made, and fall far short of the PSLRA's exacting pleading

standards."

"Perhaps more noteworthy, however, is what the complaint does not allege," ViewRay added. "The complaint does not allege facts from confidential witnesses, documents, or otherwise that indicate any invalid orders were ever included in the backlog, or that defendants were aware of any alleged invalid backlog orders."

Representatives for the parties did not immediately respond to requests for comment Friday.

The shareholders are represented by Geoffrey M. Johnson, Max R. Schwartz, Thomas L. Laughlin IV, Donald A. Broggi, Rhiana L. Swartz and Randy Moonan of Scott + Scott Attorneys at Law LLP.

ViewRay and its executives are represented by Monica Loseman and Allison K. Kostecka of Gibson Dunn & Crutcher LLP and Michael D. Meuti of Benesch Friedlander Coplan & Aronoff.

The case is Plymouth County Retirement Association v. ViewRay Inc. et al., case number 1:19-cv-02115, in the U.S. District Court for the Northern District of Ohio.

--Editing by Daniel King.