

**FILED**

DEC 17 2020

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ECKERT; EDWIN K. BELL,  
Lead Plaintiffs,

Plaintiffs-Appellants,

v.

PAYPAL HOLDINGS, INC.; DANIEL H.  
SCHULMAN; JOHN D. RAINEY, Jr.;  
TIO NETWORKS ULC; TIO  
NETWORKS USA, INC.; JOHN KUNZE,

Defendants-Appellees.

No. 19-16869

D.C. No. 3:17-cv-06956-EMC

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Edward M. Chen, District Judge, Presiding

Argued and Submitted November 19, 2020  
San Francisco, California

Before: THOMAS, Chief Judge, and SCHROEDER and BERZON, Circuit  
Judges.

Michael Eckert and Edwin Bell appeal the district court's Rule 12(b)(6)  
dismissal of their class action complaint against PayPal alleging manipulative and

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

deceptive practices in violation of sections 10(b) and 20(a) of the Securities Exchange Act and SEC Rule 10b-5. 15 U.S.C. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b-5. PayPal announced in November 2017 that it had discovered security vulnerabilities in connection with the recently acquired TIO Networks Corporation and had consequently suspended TIO's operations. The next month, PayPal announced that it had identified a potential compromise of 1.6 million TIO customers' personally identifiable information, and PayPal's share price dropped 5.75%. Plaintiffs, who bought stock in the period between the two announcements, claim that they suffered losses as a result of PayPal's failure to disclose the breach and its potential magnitude in its first announcement.

Since 1995, the Private Securities Litigation Reform Act (PSLRA) has required plaintiffs to plead, with particularity, "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). Plaintiffs bringing section 10(b) and Rule 10b-5 claims must therefore, among other requirements, plead facts giving rise to a "cogent and compelling" inference that the defendants made a material misrepresentation or omission (i.e., falsity) with intent or "deliberate recklessness" (i.e., scienter). *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1052–53 (9th Cir. 2014) (deliberate recklessness must "present[] a danger of misleading buyers or sellers that is either

known to the defendant or is so obvious that the actor must have been aware of it”). The district court dismissed Plaintiffs’ second amended complaint for failure to adequately allege scienter.

Plaintiffs contend that they satisfied the PSLRA’s heightened pleading standard by alleging that the defendant in question knew, in November 2017, that PayPal had discovered an actual security breach, not just “security vulnerabilities.” Yet the defendant publicly disclosed at that time that the issue was serious enough to merit suspending TIO’s operations entirely. Under such circumstances, we cannot conclude that Plaintiffs have shown a cogent and compelling inference that the defendant’s November announcement was intentionally misleading or so obviously misleading that he must have been aware of its potential to mislead. *See NVIDIA*, 768 F.3d at 1053. This point is underscored by the absence of any allegation in the complaint that any defendant sold stock during the relevant time period or otherwise had a motive to mislead investors in November but not in December. *See Webb v. Solarcity Corp.*, 884 F.3d 844, 856–57 (9th Cir. 2018). The district court therefore properly dismissed Plaintiffs’ second amended complaint for failure to state a claim.

**AFFIRMED.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 10. Bill of Costs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>*

**9th Cir. Case Number(s)**

**Case Name**

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

**Signature**

**Date**

(use "s/[typed name]" to sign electronically-filed documents)

<b>COST TAXABLE</b>	<b>REQUESTED</b> <i>(each column must be completed)</i>			
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Excerpts of Record*	<input style="width: 100%; height: 25px;" type="text"/>	<input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>
Principal Brief(s) ( <i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i> )	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Reply Brief / Cross-Appeal Reply Brief	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
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**\*Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

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TOTAL: 4 x 500 x \$.10 = \$200.

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