

**FILED**

**NOT FOR PUBLICATION**

JUN 16 2010

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

JAMES M. KELLEY; et al.,

Plaintiffs - Appellants,

v.

RAMBUS, INC.; et al.,

Defendants - Appellees,

PAUL MICHAEL FARMWALD,

Defendant - Appellee,

and

JOHN DANFORTH; et al.,

Defendants.

No. 08-17720

D.C. No. 5:07-cv-01238-JF

MEMORANDUM \*

Appeal from the United States District Court  
for the Northern District of California  
Jeremy D. Fogel, District Judge, Presiding

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

Submitted January 2, 2010\*\*  
San Francisco, California

Before: HUG, BEEZER and HALL, Circuit Judges.

Plaintiffs-appellants James M. Kelley, Miki W. Larson and Douglas B. Kelley (collectively “Kelley”) appeal pro se the district court’s dismissal of their suit in favor of defendants-appellees Rambus, Inc. (“Rambus”) and several others (collectively “the Defendants”). Kelley sued the Defendants under Sections 10(b), 14(a), 18(a) and 20(a) of the Securities and Exchange Act of 1934 (the “Exchange Act”), 17 C.F.R. § 240.10b-5 (“Rule 10b-5”) and California common law, alleging that the Defendants had engaged in and concealed an extensive scheme of backdated options, understated compensation expenses and deceptive patent strategies.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The facts of this case are known to the parties. We do not repeat them.

## I

We review the dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. *Gibson v. Office of Atty. Gen.*, 561 F.3d 920, 925 (9th Cir. 2009). We may affirm “on any proper ground, even if the district court did not

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

reach the issue or relied on different grounds or reasoning.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

We review the denial of leave to amend a complaint for an abuse of discretion. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1072 (9th Cir. 2008). We also review the dismissal of a complaint pursuant to Rule 8 of the Federal Rules of Civil Procedure (“Rule 8”) for an abuse of discretion. *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996).

## II

The district court properly exercised its discretion by ordering that Kelley limit the original 227-page Consolidated Complaint to 50 pages so as to not impose a “wholly unnecessary strain on [the] defendants and on the court system.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1553–54 (9th Cir. 1994) (en banc) (deeming a 113-page complaint “unwieldy in the extreme”).

## III

Kelley raised numerous issues in the Consolidated Complaint that were not included in the Consolidated Amended Complaint or any complaint thereafter. Kelley “waive[d] all claims dismissed with leave to amend by failing to reallege those claims in his amended complaint.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998).

#### IV

The district court properly dismissed all of Kelley's claims under Sections 14(a), 18(a), 10(b) and 20(a) of the Exchange Act, 17 C.F.R. § 240.10b-5 ("Rule 10b-5") and California state law.

#### A

The district court properly concluded that Kelley failed to sufficiently allege the elements of a Section 14(a) claim. *See Desaigouard v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000). All of Kelley's assertions regarding alleged material misstatements or omissions fail to "set forth a belief that certain unspecified sources will reveal, after appropriate discovery, facts that will validate [the] claim." *See South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 783 (9th Cir. 2008). Kelley has also failed to show an "essential link" between Rambus' allegedly false proxy statements and corporate actions that occurred years before those proxy statements were released. *See In re Asyst Tech., Inc. Deriv. Litig.*, No. C-06-04669 EDL, 2008 WL 2169021, at \*9 (N.D. Cal. May 23, 2008) (rejecting a Section 14(a) claim premised on the failure to disclose options backdating).

#### B

The district court properly concluded that Kelley failed to sufficiently allege actual reliance on Rambus' financial and proxy statements. *See Howard v. Everex*

*Sys., Inc.*, 228 F.3d 1057, 1063 (9th Cir. 2000) (noting that “courts have required a purchaser’s actual reliance on the fraudulent statement under § 18(a), as opposed to the constructive reliance”). Kelley failed to allege that the actual purchase or sale of shares in reliance on the statements, and any allegation of reliance in the complaint is strongly contradicted by Kelley’s buying and shorting of Rambus’ stock both before and after the relevant statements were made.

### C

Kelley’s claims under Section 10(b) and Rule 10b-5 fail to sufficiently allege “particular facts giving rise to a strong inference of deliberate recklessness.”<sup>1</sup> *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 979 (9th Cir. 1999).

### D

Kelley’s state law claims for common law fraud and negligent misrepresentation fail to meet the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 576 n.3 (2007). Moreover, Kelley has failed to adequately allege reliance as to both claims.

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<sup>1</sup> Because Kelley’s claim for a Rule 10b-5 violation was insufficiently pleaded, Kelley’s Section 20(a) controlling person claim was also insufficiently pleaded due to the lack of underlying securities fraud.

**V**

The district court acted within its discretion in denying Kelley further leave to amend the Second Revised Consolidated Amended Complaint. *See Metzler*, 540 F.3d at 1072 (holding that a “district court’s discretion to deny leave to amend is particularly broad where [a plaintiff] has previously amended the complaint”).

**VI**

Kelley’s other arguments are without merit.

**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 (December 2009)

#### **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 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 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 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

#### **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:
  - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ▶ 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**

**BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
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Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
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\* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page.*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

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(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk