

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

August 23, 2022

UNITED STATES COURT OF APPEALS

Christopher M. Wolpert
Clerk of Court

FOR THE TENTH CIRCUIT

INDIANA PUBLIC RETIREMENT SYSTEM, individually and on behalf of all others similarly situated; PUBLIC SCHOOL TEACHERS' PENSION AND RETIREMENT FUND OF CHICAGO, individually and on behalf of all others similarly situated,

Plaintiffs - Appellants,

v.

No. 21-4058

PLURALSIGHT, INC.; AARON SKONNARD; JAMES BUDGE; GARY CRITTENDEN; SCOTT DORSEY; ARNE DUNCAN; RYAN HINKLE; LEAH JOHNSON; TIMOTHY MAUDLIN; FREDERICK ONION; BRAD RENCHER; BONITA STEWART; KARENANN TERRELL; MORGAN STANLEY & CO; JP MORGAN SECURITIES,

Defendants - Appellees.

ROBERT J. JACKSON, JR.; LUIS A. AGUILAR; LYNN E. TURNER; DANIEL J. TAYLOR; JOSHUA MITTS; M. TODD HENDERSON; NEJAT SEYHUN; ALAN JAGOLINZER; STANLEY VELIOTIS; PHILLIP QUINN; BRADFORD LYNCH,

Amicus Curiae.

**Appeal from the United States District Court
for the District of Utah
(D.C. No. 1:19-CV-00128-JNP-DBP)**

Carol V. Gilden, Cohen Milstein Sellers & Toll, Chicago, Illinois (Joel P. Laitman, Steven J. Toll, Benjamin F. Jackson, and Norhan Bassiouny, Cohen, Milstein Sellers & Toll, New York, New York; and Keith M. Woodwell, Clyde Snow & Sessions, Salt Lake City, Utah, with her on the briefs) for Plaintiffs – Appellants.

Gregory L. Watts, Wilson Sonsini Goodrich & Rosati, P.C., Seattle, Washington (John C. Roberts Jr., Wilson Sonsini Goodrich & Rosati, P.C., Seattle, Washington; Ignacio E. Salceda, Wilson Sonsini Goodrich & Rosati, P.C., Palo Alto, California; Jason W. Hardin and Sarah C. Vaughn of Fabian VanCott, Salt Lake City, Utah, with him on the brief) for Defendants – Appellees.

David W. Scofield, Peters | Scofield, Sandy, Utah, Jonathan A. Gardner, Carol C. Villegas, and Ross Kamhi, Labaton Sucharow LLP, New York, New York, and Jeremy A. Lieberman and Emma Gilmore, Pomerantz, LLP, New York, New York, filed an Amicus Curiae brief in support of Appellants.

Before **ROSSMAN**, **KELLY**, and **MURPHY**, Circuit Judges.

ROSSMAN, Circuit Judge.

Founded in 2004, Defendant Pluralsight is a software company offering a cloud-based technology skills platform. Pluralsight sells subscriptions to its various products and services, including a library of thousands of skills courses. Defendant Aaron Skonnard is Pluralsight’s Chief Executive Officer. Defendant James Budge is the Chief Financial Officer. Plaintiffs purchased Pluralsight stock between January 16, 2019, and July 31, 2019.

Beginning on January 16, 2019, Mr. Skonnard and Mr. Budge allegedly made materially false and misleading statements about the size and productivity of Pluralsight’s sales force, which Plaintiffs claim artificially inflated Pluralsight’s stock price, including during a secondary public offering (“SPO”) in March 2019. Pluralsight announced disappointing second-quarter earnings on July 31, 2019. Defendants attributed the low earnings to a shortage of sales representatives earlier in the year—but this explanation contradicted representations Pluralsight made in the first quarter of 2019 about the size of its sales force. The day after the announcement, Pluralsight’s stock dropped nearly 40%.

Lead Plaintiffs Indiana Public Retirement System (“INPRS”) and Public School Teachers’ Pension and Retirement Fund of Chicago (“CTPF”) brought claims on behalf of a putative class of Pluralsight stock holders under the Securities Exchange Act of 1934 (“Exchange Act”), and the Securities Act of 1933 (“Securities Act”) in federal district court in Utah. Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), contending Plaintiffs failed to adequately allege (1) any materially false or misleading statements or omissions and (2) that Defendants acted with the requisite scienter. The district court found one statement (of eighteen alleged) was materially false or misleading but dismissed Plaintiffs’ Exchange Act claims because the complaint failed to allege a strong inference of scienter. The district court dismissed Plaintiffs’ Securities Act claims because none of the statements in Pluralsight’s SPO documents were materially false or misleading. As

part of its analysis, the district court concluded Plaintiffs failed to plead a violation of SEC Regulation S–K as the basis for a claim under either Act.

This appeal asks us to decide whether the district court properly dismissed Plaintiffs’ complaint. Exercising jurisdiction under 28 U.S.C. § 1291, and applying de novo review, we reverse and remand. We conclude the district court erred in dismissing Plaintiffs’ Exchange Act claims. Although the district court correctly determined that Plaintiffs sufficiently alleged only one materially false or misleading statement, the district court’s scienter determination was erroneous, as we will explain. We also conclude the district court relied on erroneous reasoning to dismiss the alleged violation of Item 303 of SEC Regulation S–K, so we must remand for further consideration of Plaintiffs’ Exchange Act and Securities Act claims based on the alleged Item 303 violation, consistent with this opinion. We otherwise affirm the district court’s dismissal of Plaintiffs’ Securities Act claims.

I. Background

A. Factual allegations¹

1. **Pluralsight relied on “billings” growth to attract investors and Defendants assured investors they closely monitored the sales force data that drove billings.**

Pluralsight was not profitable, so it relied primarily on its quarterly “billings” growth to attract investors. It defined “billings” as “total revenue plus the change in deferred revenue in the period.” Aplt. App. vol. 1 at 58. Quarterly billings generally

¹ The background facts derive from the well-pleaded allegations in the complaint.

reflected amounts invoiced to customers that quarter, including subscription renewals, sales of additional products or services to existing customers, and sales to new customers. “While revenue in a given quarter provided investors with a snapshot in time, billings were a crucial indicator of the future revenue and cash flow that the Company would realize from deals that the sales representatives had executed in that quarter.” *Id.* at 59. In Pluralsight’s SEC filings, earnings calls, and presentations to investors, Defendants repeatedly stated that billings growth was Pluralsight’s “key business metric” and a “key factor affecting [the company’s] long-term performance.” *Id.*

Defendants also told investors and analysts that Pluralsight’s sales force—including both the number of its sales representatives and their productivity—was the primary driver of Pluralsight’s billings growth. For example, in an August 2018 earnings call with analysts and investors, Mr. Budge attributed Pluralsight’s billings growth to its “heavy” investment in “sales and marketing” and the “efficiencies” that resulted from having more “tenured sales reps.” *Id.* at 62. During a meeting at Pluralsight’s annual conference, Pluralsight Live, Mr. Budge told analysts and investors that Pluralsight’s billings growth depended on the sales representative headcount and the ability of those representatives to meet their sales quotas. Mr. Skonnard and Mr. Budge made similar comments attributing Pluralsight’s billings success to its sales force capacity in an earnings call with analysts and investors in October 2018.

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