

Corporate & Financial Weekly Digest

Posted at 12:09 PM on January 14, 2011 by [William M. Regan](#)

District Court Denies Media Executives Summary Judgment in SEC Action

Co-authored by [Jessica M. Garrett](#)

The Securities and Exchange Commission brought an enforcement action against three former executives of a major media company, alleging that the executives improperly reported \$1 billion in online advertising revenue. The SEC alleges that, in 10 separate transactions, the media company declined discounts or lower prices for goods, services, or the settlement of disputes, and instead paid inflated prices that were offset, dollar for dollar, by sums ostensibly paid for online advertising (collectively referred to as the “‘round trip’ transactions”). This advertising “revenue” artificially inflated the media company’s revenues for the years 2000 through 2003.

The SEC asserted claims for securities fraud, aiding and abetting liability, record keeping violations, and misrepresentations to auditors, and each of the three executives moved for summary judgment. The court denied the motions filed by Mark Wovsaniker, head of Accounting Policy, and Steven Rindner, Senior Vice President of Business Affairs, in their entirety. The motion filed by John Michael Kelly, who held positions as CFO, COO and CEO during the relevant time period, was denied as to the securities fraud and aiding and abetting claims, but granted as to the remaining counts.

In sustaining the securities fraud and aiding and abetting claims, the court determined that there were genuine issues of fact as to whether each executive acted with scienter, i.e., whether each knew the company was wrongly recognizing revenue as a result of the “round trip” transactions.

For example, Mr. Rindner argued that he did not have an accounting background, did not understand complex accounting rules and therefore did not know that the company was recognizing revenue improperly. However, the court found that the SEC had adduced sufficient evidence to suggest that Mr. Rindner knew that “round trip” transactions were improper (e.g., that Mr. Rindner instructed employees to refrain from “cross-referencing” the individual components of a “round-trip” transaction). As to Mr. Wovsaniker, the head of Accounting Policy, the court found that the SEC had raised genuine issues of fact as to whether he knew that the company’s financial statements were inaccurate, including evidence suggesting that Mr. Wovsaniker approved the recognition of \$23.8 million in advertising revenue from a party that had offered to settle a legal claim for \$20 million in cash. Similarly, the court found genuine issues of fact as to whether Mr. Kelly, a CPA and CFO, knew that the media company declined discounts in exchange for advertising commitments in equal amounts.

Finally, the court granted summary judgment dismissing the SEC's request for disgorgement because the SEC "proffered no evidence that [the] court could use to reasonably approximate the percentage of Rindner's and Kelly's compensation that was causally connected to the alleged violations." (*Securities and Exchange Commission v. Kelly, et al.*, 1:08-cv-04612 (S.D.N.Y. Jan. 7, 2011))

Katten Muchin Rosenman LLP

Charlotte Chicago Irving London Los Angeles New York Washington, DC