

Corporate & Financial Weekly Digest

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Court Denies Motion for Summary Judgment to Dismiss Aiding and Abetting Claims

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The Securities and Exchange Commission recently brought an enforcement action against six former officers and directors of Fischer Imaging Corporation (Fischer), a designer, manufacturer and seller of medical imaging systems used for the diagnosis and screening of diseases. The SEC alleged that the officers and directors engaged in a fraudulent scheme to inflate reports of Fischer's profits by improperly recording income from sales transactions that were not complete. Contrary to Generally Accepted Accounting Principles, Fischer recognized income when equipment was shipped to Fischer-controlled warehouses, where the equipment was stored and insured by Fischer for significant periods of time before purchasers were ready to accept delivery ("ship in place sales").

At issue were the SEC's allegations that Robert Hoffman, who served as, among other things, Fischer's National Sales Manager during the relevant period, aided and abetted the fraudulent scheme in violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. Hoffman argued that the aiding and abetting claim failed for lack of evidence that Hoffman provided substantial assistance to any primary violator, a necessary element of the claim, because there was no evidence that he concealed information or altered documents. The court held that such evidence was not necessary and instead examined whether the SEC's evidence was sufficient to support an inference that Hoffman knew his conduct was making a substantial contribution to the scheme to misrepresent Fischer's financial results in public documents.

The court held that there was sufficient evidence that Hoffman knew he was making a substantial contribution to the scheme to create a genuine issue of material fact precluding the entry of summary judgment. In so holding, the court pointed out that: (i) Hoffman had substantial sales experience before joining Fischer and knew that documenting contingent terms in side agreements and offering terms that supported Fischer's use of "ship in place sales" were contrary to common business practices; (ii) Hoffman's exercise of stock options before the accounting fraud was revealed, and his immediate sale of that stock at a profit, supported an inference that Hoffman understood that the market price was buoyed by inflated revenue reports; and (iii) the amount of Hoffman's commissions was related to Fischer's reported quarterly revenues, which

could support the conclusion that Hoffman understood that Fischer was using improper accounting practices to inflate revenues which would yield a benefit to him.

SEC v. Rivelli, 2010 WL 2775623 (D. Colo. July 14, 2010).

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