

Dewey & LeBoeuf Litigation Team Wins Significant Victory Against SEC Charges

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On April 27, 2009, Dewey & LeBoeuf achieved a significant victory on behalf of client Jay Carter when the District of New Jersey dismissed all fraud and aiding and abetting charges brought against him by the Securities and Exchange Commission. More fundamentally, D&L's Securities Litigation Team convinced the court to establish important precedents restricting the SEC's power to prosecute innocent corporate officers, who neither participated in nor knew of financial misstatements.

Mr. Carter, the former president of Lucent's AT&T Customer Business Unit, was accused by the SEC of securities fraud, despite the facts that Mr. Carter did not participate in the accounting at issue, that Lucent's management and outside auditors had approved it, and that the SEC had never required Lucent to restate it. Although D&L argued strongly from the outset that the SEC had rushed to charge Mr. Carter without adequate legal or factual bases, federal courts are commonly reluctant to dismiss SEC fraud charges before trial, given the widespread assumption that the government does not expend resources bringing fraud claims it cannot win.

Yet after over four years of discovery, encompassing over a million pages of documents and over 40 depositions, Judge William Walls, of the District of New Jersey, granted summary judgment to Carter on all fraud and aiding and abetting charges. *SEC v. Lucent Techs.*, 2009 U.S. Dist. LEXIS 35629, 2009 WL 1111234 (D.N.J. Apr. 27, 2009). The court held that the "most persuasive evidence" that Carter could not have knowingly participated in fraud was that "Lucent's management, its outside auditor, and outside counsel approved the accounting." The court's opinion should comfort corporate directors and officers that participation in day-to-day accounting decisions, approved by company accountants, does not subject one to fraud charges.

Moreover, the court issued two holdings that should serve as important precedent restricting the reach of the securities laws to corporate defendants in SEC enforcement actions. First, although other courts in other circuits had held differently, the District of New Jersey Court adopted the "bright-line" test, which provides that for an individual to be primarily liable under Section 10(b) and Rule 10b-5 of the Exchange Act, the SEC must show that he or she made the misstatement at issue, and that it was attributed to him or her at the time of dissemination. Mr. Carter, as a sales executive, did not make any misstatements

About Dewey & LeBoeuf

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in Lucent's financial statements, and thus the court dismissed primary fraud charges against him.

Secondly, the District of New Jersey Court held that the SEC, when it brings aiding and abetting charges, must show that the defendant "knowingly," not "recklessly," aided and abetted the allegedly fraudulent scheme. The court joined other courts in helping to establish increasingly well-settled precedent. Importantly, the court also held that defendants must "knowingly" aid and abet minor non-fraud violations under Section 13 of the Exchange Act that do not themselves require knowing misconduct. Since Mr. Carter did not act "knowingly," the court dismissed all aiding and abetting charges against him. Both of the court's holdings serve to check the SEC's power to prosecute innocent corporate officers who neither participated in, nor knew of, corporate financial wrongdoing.

The only charge that remains against Mr. Carter is one under Rule 13b2-1 of the Exchange Act, which requires the lower standard of proof that one acted "unreasonably." Although the SEC retains the power to pursue such a minor charge, it is now prohibited from seeking a bar against Mr. Carter serving as a director or officer of a public company. D&L considers the court's opinion to be a significant victory for Mr. Carter that eviscerated the heart of the SEC's case.

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