

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION,**  
100 F St., N.E.  
Washington, D.C. 20549

**Plaintiff,**

v.

**JOHN W. DWYER,**  
2 South 375 Canterbury Court  
Glen Ellyn, Illinois 60137,

**Defendant.**

Civil Action No. \_\_\_\_\_

**Case: 1:09-cv-02386  
Assigned To : Kollar-Kotelly, Colleen  
Assign. Date : 12/17/2009  
Description: General Civil**

**COMPLAINT**

Plaintiff Securities and Exchange Commission ("Commission"), for its complaint against defendant John W. Dwyer ("Dwyer" or "defendant"), alleges:

**NATURE OF THE ACTION**

1. Dwyer, the Chief Financial Officer of Bally Total Fitness Holding Corporation ("Bally") during the relevant time, violated the anti-fraud provisions, and aided and abetted Bally's violations of the reporting, record-keeping, and internal controls provisions, of the Federal securities laws. As described below, Dwyer is responsible for Bally's materially false and misleading statements about its financial condition in filings with the Commission and in other public statements from at least fiscal year 2001 through fiscal year 2003. These materially false and misleading statements portrayed Bally's financial condition (its net worth) and its performance (its net income) as being materially better than they actually were during the relevant period, and also failed to disclose the reasons for certain recorded adjustments and accounting changes.

2. Bally's misrepresentations about its financial condition and performance, for which Dwyer was responsible, were the result of Bally's employment of accounting methods that were not in conformity with generally accepted accounting principles ("GAAP") and were fraudulent. On November 30, 2005, Bally filed its 2004 Form 10-K, which restated its previously reported financial statements for the years ended December 31, 2002, and 2003, and restated selected financial data for the years ended December 31, 2001, and December 31, 2000. The restatement acknowledged more than two dozen different accounting improprieties that materially affected Bally's financial statements during the relevant period.

3. Those accounting improprieties, some of which are charged herein as fraudulent, had a material effect on the accuracy of Bally's financial statements. For example, Bally originally reported in its 2001 Form 10-K that its year-end 2001 shareholders' equity, or net worth, was positive \$513 million. In truth, Bally's year-end 2001 net worth was negative \$1.3 billion. Simply put, Bally overstated its year-end 2001 net worth by \$1.8 billion.

4. Bally's accounting fraud and improprieties continued through 2003. As a result, Bally understated its originally reported 2002 loss before income tax by \$94.2 million. Bally also understated its originally reported 2003 loss before income tax by \$90.8 million. In addition to being included in the annual Forms 10-K, these materially false and misleading financial statements were also included annual earnings releases filed as exhibits to Forms 8-K and in registration statements (and amendments thereto) filed by Bally in 2001, 2002, and 2003.

5. As a result of the conduct described below, Dwyer violated Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b) and 13(b)(5) of the Exchange Act of 1934 ("Exchange Act") and Rules 10b-5 and 13b2-1 thereunder, and aided and abetted Bally's violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11 and 13a-13 thereunder.

## JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to Sections 20(b) and 22(a) of the Securities Act [15 U.S.C. §§77t(b) & v(a)] and Sections 21(e) and 27 of the Exchange Act [15 U.S.C. §§78u(e) and 78aa].

7. Defendant directly or indirectly made use of the means or instrumentalities of interstate commerce, or of the mails, or the facilities of a national securities exchange in connection with the transactions, acts, practices and courses of business alleged herein.

8. Venue is proper in this District pursuant to section 22(a) of the Securities Act [15 U.S.C. §77v(a)] and sections 21(d)(1) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d)(1), 78aa] because, among other reasons, some of the conduct constituting the violations occurred within this District.

## DEFENDANT

9. John W. Dwyer, age 57, was Bally's CFO from May 1994 to April 2004, when he was forced to resign. Prior to his employment at Bally, Dwyer was an audit partner in the Chicago office of Ernst & Young LLP. At all relevant times, Dwyer was a certified public accountant.

## RELEVANT ENTITIES

10. Bally Total Fitness Holding Corporation, a Delaware corporation, purported to be the largest, and only nationwide, commercial operator of fitness centers. At all relevant times, Bally's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange ("NYSE"). The NYSE delisted Bally's common stock on June 8, 2007. After filing for reorganization under Chapter 11 of the Bankruptcy Code, on September 17, 2007, Bally emerged as a privately held reorganized entity. On February 28, 2008, the Commission filed a settled injunctive action against Bally in the

United States District Court for the District of Columbia, charging Bally with violating Section 17(a) of the Securities Act, Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, and Rules 10b-5, 12b-20, 13a-1, 13a-11 and 13a-13 thereunder. The District Court issued permanent injunctions on May 8, 2008.

11. Ernst & Young LLP (“E&Y”) is a national public accounting firm and, during the relevant period, was Bally’s independent auditor. E&Y issued unqualified audit opinions for each of the relevant years.

## **STATEMENT OF FACTS**

### **Bally’s Fraudulent Accounting**

#### **Background**

12. Bally became a publicly traded company at the beginning of 1996, as a result of being spun off from its parent corporation, Bally Entertainment Corporation. At the time of the spin-off, Bally had a reported accumulated deficit of \$52.8 million as of year-end 1995.

13. Bally’s principal source of revenue was selling gym membership contracts, which provided customers access to gyms in exchange for the payment of a one-time initiation fee and monthly dues. Failure to pay either would result in cancellation of the membership. The one-time fee was typically several thousand dollars, while the monthly dues typically were less than \$10 per month. Most of Bally’s customers financed their initiation fees. Since the initiation fees were Bally’s biggest source of revenue, Bally required a stream of new customers to succeed.

14. As Bally’s CFO for fiscal years 1997 through 2003, Dwyer was responsible for ensuring that Bally’s financial statements and accounting were in conformity with GAAP. Instead of doing so, however, Dwyer established, directed, and/or approved of numerous fraudulent and other accounting improprieties described below. These fraudulent accounting

practices and improprieties principally served (a) to overstate Bally's gross revenue, and thus overstate Bally's net income (or understate Bally's net loss); (b) to understate Bally's expenses, and thus overstate Bally's net income (or understate Bally's net loss); or (c) to understate Bally's accumulated deficit as of December 31, 2001, and thus overstate Bally's net worth.

15. In addition, Dwyer was also responsible for Bally's disclosures relating to various accounting adjustments and accounting changes. Dwyer knew or was reckless in not knowing that various of Bally's disclosures in 2002 and 2003, relating to certain recorded adjustments and accounting changes, were false and misleading.

**Bally Fraudulently Overstated its  
Gross Revenue from "Reactivation Fees"**

16. As early as 1997, Bally recognized revenue from what it called "reactivations," which were payments from Bally members who had completed their initial contract period, but whose memberships were canceled for failure to pay the monthly dues necessary to maintain their membership. Bally did not attempt to recover those dues because there was no legal obligation to pay those dues. Accordingly, for those canceled members who had completed their initial contract period, Bally waited at least six months after receiving their last payment and then began soliciting those canceled members to reactivate. Those who accepted the reactivation offers did so, on average, approximately 36 months after having stopped paying monthly dues. The reactivation offers did not contain claims for or seek payment of "past due" amounts. Instead, they asked for either a nominal reactivation fee or no reactivation fee at all, and the payment of monthly dues for a period of future service, generally 12 months.

17. Bally's method of accounting for reactivations was to project (as of the balance sheet date) the reactivation payments it anticipated receiving during the coming year and

immediately recognize most of these projected payments by improperly allocating them to past periods.

18. Bally's method of accounting for reactivations was not in conformity with GAAP because Bally recognized revenue before it was earned and was realized or realizable. Bally recognized revenue before it was earned because, among other things, it barred canceled members from the gyms, and therefore, had not provided services to those of its canceled members who might reactivate in the future. Additionally, Bally recognized revenue before it was realized or realizable because it was recognizing revenue for reactivations that had not yet occurred, which it anticipated from canceled members whom it could not identify individually and who had no legal obligation to reactivate or pay Bally. In short, Bally violated GAAP by recognizing revenue related to the anticipated future payments before the reactivation transactions occurred.

19. Dwyer knew, or was reckless in not knowing, that Bally's accounting for reactivation fees was not in conformity with GAAP. Dwyer failed to prepare any analysis to support the reactivation accounting methodology and was unaware of any accounting guidance that would support the methodology. Dwyer knew that Bally had no valid claim against the reactivation receivable booked as of the balance sheet date; and knew that the reactivation offers themselves made no claim that payments made pursuant to the offers were intended to cover "past dues" or "past delinquency" obligations.

20. In June 2003, as Bally was in the midst of refinancing its debt and was registering a debt offering with the Commission, E&Y called a meeting with Dwyer and other senior financial officers of Bally. The meeting was held on June 16, 2003 at Bally's offices. In the course of that meeting, the E&Y audit team – which included a senior regional partner and two national office partners – told Dwyer that E&Y would not provide a comfort letter or consent

that Bally needed to complete the debt offering unless Bally stopped accruing reactivation revenue. Dwyer resisted the auditor's demand to stop accruing reactivations, stating that the auditor had approved Bally's accounting for years.

21. The auditors suggested that Bally write off the reactivation accrual in that quarter or over the next several quarters. Neither alternative was in conformity with GAAP: the \$20.3 million reactivation accrual could not be written off in one quarter because a material error requires a restatement under Accounting Principles Board Opinion No. 20, *Accounting Changes*; and the \$20.3 million was material to Bally's income statement. Similarly, GAAP does not allow spreading the write-off of an error over several quarters.

22. In response, Dwyer asked the audit team if accounting for reactivations on a cash basis was preferable. After advising Bally management that the auditors would need to consult with their national office, the audit team convened in a separate room. After a period of time, E&Y advised Dwyer that the auditor would issue a preferability letter authorizing Bally to change its accounting methodology for reactivations to a cash basis, thus allowing Bally to avoid improperly a restatement. Subsequently, the auditor issued the preferability letter.

23. On August 14, 2003, Bally filed with the Commission its Q2 2003 Form 10-Q, which stated that the Company had changed its "method of accounting related to the recognition of recoveries of unpaid dues under inactive membership contracts for accrual-based estimations to a cash basis of recognition." As a result, Bally improperly recorded a cumulative effect charge for the second quarter of 2003 of \$20.3 million.

24. Dwyer knew or was reckless in not knowing that Bally was accounting for reactivation fees in a manner that was not in conformity with GAAP and caused Bally's financial statements to be materially misstated. Dwyer also knew or was reckless in not

knowing that the change in accounting for reactivation revenue was improperly recorded as a change in accounting principle.

**Bally Fraudulently Overstated its  
Gross Revenue from "Initiation Fees"**

25. Dwyer was responsible for Bally fraudulently and prematurely recognizing revenue from initiation fees. As described above, part of the price of a Bally health club membership was a one-time initiation fee. This initiation fee was either paid in full when a member joined or was financed over a period of time, typically 36 months. Regardless of whether the initiation fees were paid in full at the beginning of the membership, or financed over time, GAAP prohibited Bally from recognizing all the revenue from initiation fees immediately.

26. Instead, GAAP required that Bally recognize initiation fee revenue over the entire membership life. This means that for members who maintained their memberships beyond the financing period, or initial period of membership, Bally was required to defer initiation fee revenue and recognize it over the estimated membership life, not over the term of the initial period of membership.

27. In 1997, Bally adopted the "deferral method" of accounting for initiation fee revenue, pursuant to which Bally recognized initiation fee revenue over the estimated average membership life. The average membership life included an estimate for both the average initial contract period and the average renewal period. Bally disclosed that the weighted average expected membership life was 22 months for financed memberships and 36 months for cash memberships.

28. Despite these disclosures, Bally's estimates of the weighted average expected membership life were flawed. A cursory inspection of the computations would have revealed

these flaws. For example, one of the errors involved omitting renewal periods for many members and instead assuming that those members never renewed. Another error was failing to estimate a terminal value for renewing members. In effect, Bally assumed that all members in their renewal periods would immediately cease being members. The errors in Bally's estimates had the effect of understating the average membership life. As a result, Bally's member life estimates improperly accelerated revenue recognition and distorted the economic reality of Bally's business.

29. Dwyer was responsible for overseeing Bally's calculations of the average member life over which Bally deferred its initiation fee revenue. Dwyer knew that initiation fee revenue was the largest component of Bally's revenue and that Bally's accounting for initiation fee revenue was a critical accounting policy that directly impacted Bally's financial statements. The results produced by Bally's demonstrably flawed member life computation were inconsistent with economic reality and thus unreasonable. Dwyer knew or was reckless in not knowing that Bally's calculations were flawed and caused it to understate the estimated average member life and thus improperly accelerate recognition of initiation fee revenue.

30. In 1997 communications with Commission Staff regarding the implementation of the deferral method, Dwyer represented that Bally would periodically update those calculations to ensure that Bally was using an appropriate deferral period. Contrary to that commitment, in the subsequent six years, Dwyer and Bally failed to update the 1997 calculations.

31. Bally's auditor formally requested Bally update its member life computations in 1998, 2001 and 2002, but Dwyer and Bally never did so. In response to the auditor's 2001 request, Dwyer asserted that the 1997 calculations were "still an appropriate approximation of the current historical average membership" because the original calculation constituted a "35-year historical average." In fact, Dwyer knew or was reckless in not knowing that the 1997

calculations did not constitute a 35-year average, but reflected a flawed average from a much shorter pool of membership data.

32. Knowing that Bally had not updated its member life estimate since 1997, as part of its 2003 year-end audit efforts, the audit team pressed Bally for support for its member life estimate. Bally never provided the support for the member life estimate.

33. By late January 2004, Dwyer had become concerned about his lack of communications with the engagement partner, particularly since two important meetings were fast approaching: a regularly scheduled Audit Committee meeting was set for January 28<sup>th</sup> and an earnings call was scheduled for February 12<sup>th</sup>.

34. A meeting was scheduled between the audit team and Bally financial managers for Sunday, January 25, 2004. The audit team had prepared a five-item agenda for the meeting; four of the items related to audit adjustments totaling approximately \$260 million.

35. At the January 2004 meeting, E&Y notified Bally that it would have to take a charge relating to new accounting guidance -- EITF 00-21, *Revenue Arrangements With Multiple Deliverables* -- that Bally had failed to implement during the third quarter of 2003. E&Y also identified three substantial audit adjustments that Bally would have to book. E&Y made clear that the new accounting guidance required Bally to adopt a modified cash basis of accounting to some of its contracts. As Bally and E&Y discussed the proposed change, Dwyer proposed adopting a modified cash basis of accounting for all of the company's membership contracts, regardless of whether such contracts contained multiple deliverables. Dwyer knew that the change to a modified cash basis of accounting for the rest of Bally's membership contracts would allow Bally to avoid or at least reduce the significance of some of the charges E&Y had identified.

36. Bally's proposed change in accounting would enable Bally to improperly avoid a restatement. Dwyer knew that the accuracy of the member life estimate would be less important under the new accounting method and the deferred acquisition costs estimate would no longer exist.

37. Bally's Controller prepared a draft preferability request which Dwyer received and reviewed before it was sent to the engagement and the concurring partner on February 11, 2004. The draft raised additional warning signals about whether Bally's member life estimation methodology was reasonable and whether Bally's accounting policy for initiation fee revenue was in conformity with GAAP. For instance, the draft request states, "We have concluded that our revenue recognition policy for financed membership fees . . . does not appropriately reflect the economic earnings process of membership revenue since it accelerates the earnings process ahead of membership collections." The draft also states that "[T]he earnings pattern under the straight-line approach is always out of sync with cash receipts. After the average 22-month period of recognition is complete, the earnings process for those members paying over 36-months (i.e. those who do not default) is 14 months ahead of cash collection. The straight-line method is always ahead of cash collections, with approximately 30% of the total net realizable value of a pool of new member revenue remaining to be collected in membership months 23 through 36."

38. Dwyer knew or was reckless in not knowing that these factual representations in the draft preferability request were warning signals that Bally's accounting for its initiation fee revenue was not in conformity with GAAP.

39. E&Y subsequently issued a preferability letter allowing Bally to change from accrual accounting to a modified cash basis of accounting. As a result of the change in accounting, Bally recorded a cumulative effect change of \$441 million in its 2003 financial

statements. Dwyer knew or was reckless in not knowing that the size of the cumulative effect adjustment resulting from the change in accounting -- \$441 million -- raised additional doubts as to whether Bally's prior method of accounting for initiation fee revenue was in conformity with GAAP.

40. In 2004, Bally acknowledged that the manner in which it applied both the deferral method and the modified cash method of accounting for initiation fee revenue were improper and not in conformity with GAAP.

41. At least since 2001, Dwyer knew or was reckless in not knowing that Bally's accounting for initiation fee revenue was not in conformity with GAAP and caused Bally's financial statements to be materially misstated.

#### **Bally Fraudulently Deferred Member Acquisition Costs**

42. At the same time it adopted a deferral policy for recognition of initiation fee revenue, Bally began to defer member acquisition costs and amortize such costs over the same period that it recognized initiation fee revenue. Member acquisition costs were supposed to be the costs that would not have been incurred but for entering into particular member agreements. Under GAAP, costs that were direct and incremental to the acquisition of a contract were permitted to be capitalized and amortized as an expense over the same period that the deferred revenue from the contract was recognized. All other costs were required to be charged to expense as incurred.

43. Bally, however, arbitrarily determined what amount of costs to defer without any reasonable empirical basis. Among other things, Bally deferred as "membership acquisition costs" 33% of its Management Information Systems "(MIS)" department costs and 100% of various bank and credit card charges through 2002 (when it began to defer 39% of such charges).

44. Dwyer was responsible for establishing Bally's arbitrary cost deferral determinations. Dwyer failed to prepare any analyses to support the allocation of such costs, and knew or was reckless in not knowing that many items deferred as membership acquisition costs did not qualify for deferral. For example, "base salaries" for "sales trainees" were improperly deferred and MIS costs that were deferred included such non-contract-acquisition items as depreciation, repairs and maintenance, equipment rental, supplies, professional fees and utilities.

45. Dwyer knew or was reckless in not knowing that Bally's practice of deferring member acquisition costs that were not direct and incremental to the acquisition of membership contracts was not in conformity with GAAP and therefore misstated Bally's financial statements.

**Bally Fraudulently Overstated its  
Gross Revenue from "Prepaid Dues"**

46. Bally also fraudulently recognized revenue from "prepaid dues." Prepaid dues revenue was generated, for example, when a Bally health club member elected to renew his or her membership for an additional period of time after completing the initial membership contract term. A renewing member could elect to prepay his or her renewal dues. These prepayments were referred to as prepaid dues.

47. GAAP required Bally to recognize prepaid dues revenue as monthly health club services were provided. When dues were prepaid, the prepaid portion was to be deferred and recognized as it was earned. From 1997 through 2003, however, Bally improperly accelerated revenue from prepaid dues by recognizing as revenue each year's prepaid dues at the time of prepayment, instead of recognizing it over the period for which that member had prepaid.

48. Beginning in at least 2000, Dwyer knew that Bally was improperly accelerating revenue from prepaid dues, but he failed to assess the scope of the problem, take corrective action or disclose it to Bally's auditors.

49. Eventually, Bally publicly acknowledged "errors" regarding prepaid dues for prior periods. In its 2003 Form 10-K, Bally restated its prepaid dues revenue for prior periods going back to 1997 because, as the Company reported, its previous methodology resulted in "errors in calculating prepaid dues and accelerated dues recognition for certain prepaying members."

50. Dwyer knew, or was reckless in not knowing, that Bally was accounting for prepaid dues revenue in a manner that was not in conformity with GAAP and caused Bally's financial statements to be materially misstated.

#### **Bally's False and Misleading Disclosures**

51. In both 2002 and 2003, Bally made false and misleading disclosures in its SEC filings about the reasons for certain recorded adjustments and certain accounting changes. Dwyer was responsible for each of these filings and knew or was reckless in not knowing that Bally made these false and misleading disclosures.

#### **Bally's False and Misleading Disclosure Relating to a \$55 Million Special Charge in Fiscal Year 2002**

52. From 1997 through 2002, Bally consistently used a 41% reserve rate in establishing its allowance for doubtful accounts ("ADA"), despite changes in the economy and in market conditions. The result of using the unvarying 41% rate was that Bally's ADA was at the low end of the range that E&Y had deemed to be reasonable. During the third quarter of 2002, E&Y determined that Bally's collections had deteriorated substantially and advised Dwyer that Bally needed to increase its ADA in order to cover the shortfall resulting from the deteriorating collections. Dwyer insisted that no change be made to the ADA until the fourth quarter to allow Bally time to obtain waivers of debt covenants provisions from its lenders.

53. Dwyer also did not want to disclose that the reason for taking a charge was due to deteriorating collections. In a letter to Bally's lenders, Dwyer knew or was reckless in not

knowing of the falsity of his representation that “the one time charge does not reflect any deterioration in the Company’s expected cash flows.”

54. During the fourth quarter of 2002, Dwyer agreed to increase Bally’s ADA by \$55 million, and Bally ultimately presented it as a “special charge” in its year-end financial statements.

55. In its 2002 Form 10-K, Bally made false and misleading disclosures regarding the reasons for the charge: the only reason for the charge cited in the Form 10-K was that Bally’s estimation was based on an accelerated monetization scenario which would result in collecting less than book value. No mention was made of the deterioration of the collectability of Bally’s accounts receivable portfolio, which had been identified by the auditor as requiring Bally to take a charge.

56. Dwyer knew, or was reckless in not knowing, that Bally’s disclosure relating to the \$55 million charge was materially false and misleading. The \$55 million special charge virtually eliminated Bally’s 2002 earnings.

**Bally’s False and Misleading Disclosures  
Relating to its Failure To Implement EITF 00-21**

57. During the third quarter of 2003, Bally was required to implement EITF 00-21, *Revenue Arrangements with Multiple Deliverables* (“EITF 00-21”), which provides guidance relating to the recognition of revenue for contracts containing multiple deliverables such as gym memberships bundled with personal training services and nutritional supplements. Bally failed to implement EITF 00-21 as required.

58. Bally’s failure to implement EITF 00-21 in the third quarter of 2003 was a material accounting error.

59. In connection with its 2003 earnings press release issued on March 11, 2004, Bally prepared a set of unaudited financial statements, and, in the notes to the financial statements, Bally misrepresented that it had implemented EITF 00-21 "as required." Bally made a similar misrepresentation in its 2003 Form 10-K. Dwyer knew about the error prior to the filing of the 2003 Form 10-K.

60. Dwyer knew, or was reckless in not knowing, that Bally's disclosures relating to its implementation of EITF 00-21 were false and misleading.

**Bally's False and Misleading Disclosure  
Relating to a \$48 Million Recorded Adjustment in Fiscal Year 2003**

61. During 2003, Bally's collectability of its accounts receivable portfolio continued to deteriorate and its auditor insisted that Bally book an additional \$48 million adjustment. In connection with changes in accounting principles during fiscal year 2003, Bally recorded a cumulative effect adjustment. Bally used the cumulative effect adjustment to hide the \$48 million audit adjustment by booking it against the deferred revenues rather than as a reduction to revenues. Bally did not disclose that its accounts receivable portfolio was continuing to deteriorate or the resulting material deterioration in its 2003 financial statements.

62. Dwyer knew or was reckless in not knowing that Bally's receivable portfolio had continued to deteriorate resulting in the \$48 million charge and that Bally had failed to disclose this deterioration.

**Internal Control Failures And Falsification of Records**

63. At least for the periods 2001 through 2003, Bally had a system of internal controls that was not sufficient to detect violations of GAAP. Dwyer, as Bally's CFO, had direct responsibility for overseeing Bally's internal controls. Based on the foregoing conduct, Dwyer knowingly circumvented those internal controls.

64. Dwyer, as Bally's CFO, also had direct responsibility for overseeing Bally's books and records. Based on the foregoing conduct, Dwyer knowingly falsified, and caused to be falsified, Bally's required books and records.

**FIRST CLAIM FOR RELIEF**

**Fraud**

**Violations of Section 17(a) of the Securities Act [15 U.S.C. §77q(a)],  
Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)], and  
Exchange Act Rule 10b-5 [17 C.F.R. §240.10b-5]**

65. Paragraphs 1 through 64 are re-alleged and incorporated by reference.

66. By reason of the foregoing, defendant directly or indirectly, knowingly or recklessly, by use of the means or instrumentalities of interstate commerce or of the mails, in connection with the offer, sale, or purchase of securities: (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material fact or omitted to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; (c) obtained money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (d) engaged in transactions, acts, practices, or courses of business which operated as a fraud or deceit upon other persons.

67. By reason of the foregoing, Dwyer violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5.

## **SECOND CLAIM FOR RELIEF**

**Aiding and Abetting Bally's Reporting  
Violations of Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)]  
and Exchange Act Rules 12b-20, 13a-1, 13a-11 and 13a-13  
[17 C.F.R. §§240.12b-20, 240.13a-1, 240.13a-11 & 240.13a-13]**

Paragraphs 1 through 67 are re-alleged and incorporated by reference.

68. The Exchange Act and rules promulgated thereunder require every issuer of a registered security to file reports with the Commission that accurately reflect the issuer's financial performance and provide other true and accurate information to the public. In addition to the materially inaccurate Forms 10-K identified above, during the relevant period, Bally also filed materially inaccurate Forms 10-Q and 8-K. By reason of the foregoing, Bally violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11 and 13a-13 thereunder.

69. Dwyer knew that Bally's filings contained materially inaccurate information, but he approved and/or signed the filings. By reason of the foregoing, Dwyer aided and abetted Bally's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11 and 13a-13 thereunder.

## **THIRD CLAIM FOR RELIEF**

**Aiding and Abetting Bally's Record Keeping and Internal Controls  
Violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act  
[15 U.S.C. §§78m(b)(2)(A) and 78m(b)(2)(B)]**

Paragraphs 1 through 69 are re-alleged and incorporated by reference.

70. The Exchange Act and rules promulgated thereunder require each issuer of registered securities: (a) to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the business of the issuer; and (b) to devise and maintain a system of internal controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit preparation of financial statements in conformity

with GAAP or any other criteria. By reason of the foregoing, Bally violated Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

71. By reason of the foregoing, Dwyer aided and abetted Bally violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

#### **FOURTH CLAIM FOR RELIEF**

##### **Knowingly Circumventing or Failing To Implement Internal Controls or Knowingly Falsifying Required Books or Records Violations of Section 13(b)(5) of the Exchange Act [15 U.S.C. §78m(b)(5)]**

Paragraphs 1 through 71 are re-alleged and incorporated by reference.

72. The Exchange Act prohibits a person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record or account required to be kept pursuant to Section 13(b)(2).

73. By reason of the foregoing, Dwyer violated Section 13(b)(5) of the Securities Act.

#### **FIFTH CLAIM FOR RELIEF**

##### **Falsification of Accounting Records Violations of Rule 13b2-1 under the Exchange Act [17 C.F.R. §240.13b2-1]**

Paragraphs 1 through 73 are re-alleged and incorporated by reference.

74. Rule 13b2-1 promulgated under the Exchange Act prohibits a person from, directly or indirectly, falsifying or causing to be falsified, any book, record or account described in Section 13(b)(2)(A) of the Exchange Act.

75. By reason of the foregoing, Dwyer violated Rule 13b2-1 under the Exchange Act.

### **PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that this Court enter a final judgment:

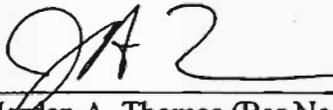
- (a) permanently enjoining Dwyer from violating Section 17(a) of the Securities Act, Sections 10(b) and 13(b)(5) of the Exchange Act, and Rule 10b-5 thereunder, and from aiding and abetting violations of Section 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, and Exchange Act Rules 12b-20, 13a-1, 13a-11, 13a-13 and 13b2-1 thereunder;
- (b) bars Defendant, pursuant to Section 21(d)(2) of the Exchange Act and /or Section 20(3) of the Securities Act, from serving as an officer or director of any issuer that has a class of securities registered under Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act;
- (c) ordering Dwyer to disgorge ill-gotten gains in the amount of \$125,000;
- (d) ordering Dwyer to pay a \$125,000 penalty pursuant to Section 20(d) of the Securities Act and/or Section 21(d) of the Exchange Act; and

(e) granting such other relief as this Court may deem just and appropriate.

Dated: December 15, 2009

Washington, D.C.

By:



Jordan A. Thomas (Bar No. 452886)  
Robert E. Leidenheimer, Jr. (Bar No. 420959)  
U.S. Securities & Exchange Commission  
100 F. Street, N.E.  
Washington, D.C. 20549  
Tel.: 202-551-4475 (Thomas)  
Fax: 202-772-9245 (Thomas)  
Email: [ThomasJA@sec.gov](mailto:ThomasJA@sec.gov)

Of Counsel:

Fredric D. Firestone  
Kenneth R. Lench  
David Kagan-Kans  
Melissa E. Lamb  
Richard E. Johnston