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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :  
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 Plaintiff, :  
 :  
 :  
 -against- :  
 :  
 12 Civ. ( ) :  
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 GREGG ALWINE and :  
 DAVID BARNETT :  
 :  
 Defendants. :  
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COMPLAINT

Plaintiff Securities and Exchange Commission (the “Commission”), for its Complaint against defendants Gregg Alwine (“Alwine”) and David Barnett (“Barnett”, and collectively with Alwine, the “Defendants”), alleges:

SUMMARY

1. This case charges Alwine and Barnett with aiding and abetting an accounting fraud at TheStreet, Inc. (formerly known as TheStreet.com, Inc.) (“TheStreet,” or the “Company”) in 2008 by engaging in fraudulent transactions at a former Subsidiary (“Subsidiary A”) of the Company.

2. In August 2007, TheStreet, a financial media company, acquired from Alwine and Barnett Subsidiary A, which specialized in online promotions such as sweepstakes. Thereafter, Alwine and Barnett continued in their roles as co-presidents of Subsidiary A.

3. TheStreet had high expectations for Subsidiary A and, shortly after the acquisition, began publicly touting Subsidiary A's prospects for enhancing TheStreet's overall business and generating additional revenue. However, it soon became clear that Subsidiary A was struggling to generate the level of revenue that executives at TheStreet had anticipated. Rather than acknowledge this, Alwine and Barnett participated in a scheme to brazenly manipulate Subsidiary A's financial results.

4. Among other things, Alwine and Barnett structured at least three round-trip transactions between Subsidiary A and friendly counter-parties to create inflated or entirely fake revenue. In furtherance of this fraud, Alwine and Barnett altered documents, back-dated at least one contract, and obtained a false audit confirmation from a counter-party to support the notion that Subsidiary A had performed work that generated revenue when, in fact, it had not.

5. Because Subsidiary A's financial results were consolidated with TheStreet's for financial reporting purposes, improper revenue reflected on Subsidiary A's books was reported, and resulted in material misstatements, in TheStreet's Forms 10-Q for the second and third fiscal quarters of 2008, and its Form 10-K for the fiscal year ended December 31, 2008. On February 8, 2010, TheStreet restated its 2008 Form 10-K and disclosed a number of issues related to revenue recognition at Subsidiary A, including transactions that lacked economic substance, internal control deficiencies and improper accounting for certain contracts.

## **VIOLATIONS**

6. As a result of the misconduct alleged in this Complaint, Defendants Alwine and Barnett violated Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] and Rule 13b2-1 thereunder [17 C.F.R. §§ 240.13b2-1], and (ii) aided and abetted violations by TheStreet of Sections 10(b), 13(a) and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A)] and Rules 10b-5(b), 12b-20 and 13a-13 [17 C.F.R. §§ 240.10b-5, 240.12b-20 and 240.13a-13] thereunder. Defendant Barnett also violated Rule 13b2-2 under the Exchange Act [17 C.F.R. §§ 240.13b2-2].

## **JURISDICTION AND VENUE**

7. The Commission brings this action pursuant to the authority conferred by Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)], seeking permanent injunctions, officer and director bars, and civil penalties against the Defendants.

8. This Court has jurisdiction over this case pursuant to Sections 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 77u(e) and 78aa].

9. The Defendants, directly or indirectly, singly or in concert, made use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the transactions, acts, practices, and courses of business alleged herein.

10. Venue lies in this District pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa] because certain of Defendants' alleged transactions, acts, practices, and courses of business occurred in the Southern District of New York. Additionally, during the relevant period, shares of TheStreet were traded on the NASDAQ stock exchange, which is located in the Southern District of New York.

## THE DEFENDANTS

11. **Gregg T. Alwine**, age 40, resides in Boynton Beach, Florida. In 2008, he was co-president of TheStreet's wholly-owned subsidiary, Subsidiary A.

12. **David Barnett**, age 41, resides in Florham Park, New Jersey. In 2008, he was co-president of TheStreet's wholly-owned subsidiary, Subsidiary A.

## OTHER RELEVANT ENTITY

13. **TheStreet, Inc.**, formerly known as TheStreet.com, Inc., is incorporated in Delaware and maintains its principal place of business in New York, New York. TheStreet has been an SEC-reporting company since 1999, and its stock is quoted on the NASDAQ stock exchange. As a result of the misstatements alleged herein, TheStreet restated its Form 10-K for the fiscal year 2008 and its Form 10-Q for first quarter of 2009.

## FACTS

### I. Subsidiary A Failed To Generate Expected Revenue

14. TheStreet acquired Subsidiary A in August 2007 with the expectation that the acquisition would, according to its press release, "propel TheStreet.com forward in its strategy to become a premier one-stop shop for advertisers, advertising agencies and corporations in search of a broad spectrum of innovative, interactive advertising solutions, while further expanding the Company's current advertising offerings."

15. During conference calls with securities analysts regarding TheStreet's financial performance for the year ended December 31, 2007 and the first quarter of 2008, TheStreet touted Subsidiary A's long-term prospects, predicting that Subsidiary A could generate approximately \$3 million per quarter in revenue and serve as a "springboard" for TheStreet's advertising business.

16. As it turned out, Subsidiary A did not produce the revenue that TheStreet had hoped it would. Indeed, during the first quarter of 2008, Subsidiary A fell well short of its \$3 million revenue target, reporting only \$2.2 million. If properly accounted for, Subsidiary A's revenues in subsequent quarters were as far off target as they were in the first quarter of 2008 – its actual second quarter revenue was less than \$2.1 million, third quarter revenue was less than \$750,000, and fourth quarter revenue was less than \$1.1 million.

17. Alwine and Barnett had two choices – they could fully acknowledge Subsidiary A's disappointing financial performance, or they could artificially boost the subsidiary's reported results. In violation of the federal securities laws, they chose the latter course of action.

18. Due, in part, to Alwine's and Barnett's misconduct, TheStreet overstated its operating income or understated its operating loss for the second, third, and fourth quarters of 2008 by approximately 118%, 11%, and 10.5%, respectively.

## **II. U.S. Generally Accepted Accounting Principles**

19. The financial reporting of public companies in the United States must conform with Generally Accepted Accounting Principles in the United States ("U.S. GAAP"). U.S. GAAP, and in particular, *Staff Accounting Bulletin No. 104* ("SAB 104"), issued by the Commission's staff, and *AICPA Statement of Position 97-2, Software Revenue Recognition* ("SOP 97-2"), issued by the American Institute of Public Accountants, prohibited TheStreet from recognizing revenue based on its provision of services to customers unless each of the following four criteria was met: (a) there was persuasive evidence of an arrangement; (b) delivery had occurred; (c) the fee was fixed or determinable; and (d) collectability was probable.

20. As a result of the fictitious transactions that Alwine and Barnett created, TheStreet recognized revenue that did not exist in violation of SAB 104 and SOP 97-2.

### **III. Alwine and Barnett Artificially Boosted Subsidiary A's Revenue.**

#### **a. Inappropriate Revenue Based on Anticipated with Counter-party B**

21. In the second quarter of 2008, Alwine and TheStreet's Chief Financial Officer ("CFO") at the time ("Executive 3"), discussed ways to increase Subsidiary A's revenues and reduce the gap between expectations and reality. In one instance, Alwine and Executive 3 discussed a memorandum that Alwine would attempt to obtain from a key client, "Counter-party B," regarding significant promotional work that Subsidiary A might perform for Counter-party B in the future.

22. Approximately a month after their discussion, Alwine sent to Executive 3 a memorandum that was consistent with this discussion and appeared to be signed by a representative of Counter-party B. In the memorandum, Executive A, on behalf of Subsidiary A, set forth "opportunities to offer [Counter-party B] significant savings on upcoming promotions," proposed to "pre-build 20 promotions on our Promotion Platform during May and June of 2008 for a total cost of \$580,000," and requested that Counter-party B, "by signing below, reaffirm your intent to take advantage of this offer on any promotions that [Counter-party B] selects [Subsidiary A] to execute." Thus, Counter-party B was under an obligation to pay Subsidiary A only if, and to the extent that, Counter-party B engaged Subsidiary A to build a promotion – this, of course, was an event entirely contingent on Counter-party B's discretion as of the end of the second quarter of 2008 (and thereafter).

23. Based on this memorandum, Executive 3 caused TheStreet to recognize \$580,000, the full amount referenced in the memorandum, as revenue in the second quarter of 2008.

24. While Executive 3 knew or recklessly disregarded several other factors that precluded revenue recognition, Alwine misled Executive 3 with respect to this memorandum. In

particular, the actual arrangement, as documented in the memorandum, that Alwine proposed to Counter-party B contained no reference to a “total cost of \$580,000” because Alwine understood that the client had not agreed to any monetary commitment. Rather, by signing the memorandum, the client simply acknowledged that it could avail itself of a discount if it decided to buy a promotion from Subsidiary A.

25. To hide this fact, upon receiving the signed memorandum from Counter-party B, Alwine cut and paste between the document signed by Counter-party B and a version that made reference to the \$580,000 value to create a new, fake version of the memorandum for the Company’s files that made it appear that Counter-party B had signed the memorandum with the value. It was this fake memorandum that Alwine sent to Executive 3.

26. Based on the fabricated document that Alwine submitted, TheStreet’s finance department recognized \$580,000 in revenue in its Form 10-Q for the second quarter of 2008 that should not have been recognized. This misstatement, in turn, caused the Company to overstate operating income during that quarter by 74%.

**b. Inflated Round-trip Transaction with Counter-party C**

27. During the second quarter of 2008, Alwine and Barnett also caused Subsidiary A to engage in two inflated round-trip transactions with friendly counter-parties. Both resulted in TheStreet improperly recognizing significant revenue for the second and third quarters of 2008, which, in turn, materially overstated TheStreet’s operating income for the second quarter and materially understated its third quarter operating loss.

28. In one transaction, Subsidiary A and a start-up entity in which Alwine and Barnett owned a small interest (“Counter-party C”) entered into an inflated round-trip transaction. Specifically, in or about July 2008, Subsidiary A and Counter-party C executed two agreements.

The first purportedly obligated TheStreet to purchase a \$500,000 fixed asset from Counter-party C. Under the terms of the second agreement, Counter-party C purportedly agreed to purchase \$375,000 in promotional services from Subsidiary A. Barnett knowingly signed and back-dated this inflated promotional services contract to make it appear that he signed it in the second quarter of 2008 when, in fact, he signed it in the third quarter.

29. Subsidiary A and Counter-party C exchanged payments in early-October, although neither party completed virtually any work on either contract as of that point in time. In fact, TheStreet never received a completed fixed asset from Counter-party C, and Subsidiary A performed virtually no promotional work for Counter-party C during the second or third quarters of 2008. Alwine knew that no work had been performed because he and Barnett discussed this fact during the third quarter of 2008, and Alwine had only preliminary meetings with respect to the promotional services with Counter-party C in the fourth quarter of 2008. Thus, Alwine knew the status of work that had been, and had not been, performed. In fact, Subsidiary A never completed a promotion for Counter-party C.

30. Nevertheless, in or about July 2008, Alwine and/or Barnett provided the agreement for promotional services to the finance department with the intention that revenue be recognized based on promotional work that, as they knew or recklessly disregarded, Subsidiary A did not perform. Based on the documents and information obtained from Alwine and/or Barnett, TheStreet's finance department recognized revenue of \$275,000 and \$100,000 in the second and third quarters of 2008, respectively, based on the foregoing transactions with Counter-party C in violation of SAB 104, SOP 97-2, and other relevant accounting rules.



**c. Inflated Round-trip Transaction with Counter-party D**

31. In the second quarter of 2008, Barnett also caused Subsidiary A to enter into a bogus agreement with a small web design company (“Counter-party D”). Barnett and Alwine owned a majority interest in Counter-party D, which maintained its offices at the same location as Subsidiary A.

32. Barnett presented Counter-party D with two, related offers: Subsidiary A would pay Counter-party D \$138,000 for marketing services, and Subsidiary A would complete a \$102,000 promotions project for Counter-party D. Counter-party D accepted these offers.

33. Despite the terms of the agreement for Subsidiary A to complete a promotions project, Subsidiary A performed only minimal work, and Subsidiary A and Counter-party D did not exchange any payments in connection with this agreement.

34. Nonetheless, in or about June 2008, Barnett provided the agreement for promotional services to the finance department with the intention that revenue be recognized based on promotional work that, as he knew or recklessly disregarded, Subsidiary A did not perform. Based on the documents and information obtained from Barnett, TheStreet recognized the full amount referenced in the promotions agreement as revenue, reporting approximately \$75,000 and \$27,000 in the second and third quarters of 2008, respectively. These amounts should not have been recognized under relevant U.S. GAAP standards.

**d. Fake Round-trip Transaction with Counter-party F**

35. In the fourth quarter of 2008, Alwine and Barnett created another round-trip transaction with a cash-strapped, friendly counter-party (“Counter-party F”). This time, Alwine and Barnett disguised a loan to Counter-party F as a payment by Subsidiary A for services provided by Counter-party F. They also disguised Counter-party F’s \$200,000 repayment of the

loan as a revenue-generating contract for Subsidiary A. Barnett knowingly signed these completely fake contracts so that he could help boost Subsidiary A' revenue for the fourth quarter of 2008 and, in turn, reduce TheStreet's reported operating loss.

36. When accounting personnel at TheStreet raised questions about the documents surrounding these purported transactions, including whether the service Counter-party F provided was a new service, what Subsidiary A was effectively getting from Counter-party F, why Counter-party F's services were needed, and what additional fees would be incurred by Subsidiary A. In response, Alwine and Barnett misrepresented facts surrounding the purported agreements and intentionally altered the contracts. For example, Alwine and Barnett fabricated a payment schedule that Counter-party F was to follow and attached it to one of the contracts, and inserted the supposed duration of agreement into the other contract. After creating these fabrications, Alwine and Barnett simply used Counter-party F's signature from previous versions of the contracts.

37. At one point, when Counter-party F considered backing out of the transactions, Barnett asked that it not do so, explaining that even if Counter-party F did not need the money, it could return it and both parties could still recognize revenue purportedly arising from the transaction.

38. At the end of the quarter and in connection with TheStreet's year-end audit, Barnett knowingly induced Counter-party F to provide a false audit confirmation to the Company's auditors stating that Subsidiary A had performed work for Counter-party F. More specifically, on or about January 21, 2009, Barnett asked Counter-party F to confirm that Subsidiary A had fulfilled its obligations under one of the agreements because "we have our auditors in." In response to his email request, Counter-party F emailed a response confirming

that Subsidiary A had completed the related work. In fact, no work had been performed when Barnett sought and Counter-party F provided the audit confirmation.

39. Despite the fact that Subsidiary A performed no work for Counter-party F, in or about November 2008, Alwine and/or Barnett provided the purported agreements with Counter-party F to the finance department with the intention that revenue be recognized based on promotional work that, as they knew or recklessly disregarded, Subsidiary A did not perform. Based on the documents and information obtained from Alwine and/or Barnett, TheStreet's finance department recognized revenue of over \$200,000 of revenue in connection with these entirely fake transactions.

#### **FIRST CLAIM FOR RELIEF**

##### **Aiding and Abetting Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder (Defendants Alwine and Barnett)**

40. The Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 38.

41. By reason of the activities alleged herein, TheStreet violated Section 10(b) of the Exchange Act [15 U.S.C. §§78j(b)] and Rule 10b-5(b) [17 C.F.R. §240.10b-5] promulgated thereunder by making untrue statements of material fact, and omitting to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading. Claims against TheStreet for these direct violations of Section 10(b) and Rule 10b-5(b) are not asserted by or through this Complaint.

42. Alwine and Barnett were generally aware that their roles in connection with such violations were part of an overall activity that was improper, and provided substantial assistance to TheStreet in committing such violations.

43. By reason of the foregoing, Alwine and Barnett, directly or indirectly, singly or in concert, have aided and abetted violations, and unless enjoined will again aid and abet violations, of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5(b) [17 C.F.R. §240.10b-5(b)].

## **SECOND CLAIM FOR RELIEF**

### **Violations of Section 13(b)(5) of the Exchange Act and Rule 13b2-1 Thereunder (Defendants Alwine and Barnett)**

44. The Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 38.

45. Defendants Alwine and Barnett violated Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] by, directly or indirectly, knowingly circumventing or knowingly failing to implement a system of internal accounting controls at TheStreet or knowingly falsifying a book, record, or account described in Exchange Act Section 13(b)(2) [15 U.S.C. § 78m(b)(2)]. In addition, Alwine and Barnett violated Exchange Act Rule 13b2-1 [17 C.F.R. § 240.13b2-1] by, directly or indirectly, falsifying or causing to be falsified, the books, records or accounts of TheStreet subject to Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

46. By reason of the foregoing, Alwine and Barnett violated, and unless enjoined will again violate, these provisions.

## **THIRD CLAIM FOR RELIEF**

### **Violations of, and Aiding and Abetting TheStreet's Violations of, Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 Thereunder (Violations by Defendant TheStreet; Aiding and Abetting by Defendants Alwine and Barnett of Section 13(a) and Rules 12b-20 and 13a13 thereunder)**

47. The Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 38.

48. TheStreet failed to make required reports and to include in the Company's financial reports accurate information or in addition to the information expressly required to be stated in such reports, such further material information as was necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading.

49. By reason of the foregoing, TheStreet, singly or in concert, directly or indirectly violated, and unless enjoined will again violate, Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1 and 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a.1 and 240.13a.13].

50. Alwine and Barnett were generally aware that their roles in connection with such violations were part of an overall activity that was improper, and provided substantial assistance to TheStreet in committing such violations.

51. By reason of the foregoing, Alwine and Barnett, singly or in concert, aided and abetted TheStreet's violations, and unless enjoined will again aid and abet violations, of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-13 [17 C.F.R. §§ 240.12b-20 and 240.13a.13].

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

##### **Violations and Aiding and Abetting TheStreet's Violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act**

(Violations by Defendant TheStreet; Aiding and Abetting by Defendants Alwine and Barnett of Section 13(b)(2)(A) Violation)

52. The Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 38.

53. TheStreet failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected the transactions and dispositions of its assets; and failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

- a. transactions were executed in accordance with management's general or specific authorization;
- b. transactions were recorded as necessary to permit preparation of financial statements in conformity with Generally Accepted Accounting Principles or any other criteria applicable to such statements, and to maintain accountability for assets;
- c. access to assets was permitted only in accordance with management's general or specific authorization; and
- d. the recorded accountability for assets was compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any differences.

54. By reason of the foregoing, TheStreet, singly or in concert, directly or indirectly violated, and unless enjoined will continue to violate, 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)].

55. Alwine and Barnett were generally aware that their roles in connection with such violations were part of an overall activity that was improper, and provided substantial assistance to TheStreet in committing such violations.

56. By reason of the foregoing, Alwine and Barnett, singly or in concert, aided and abetted TheStreet's violations of, and unless restrained will continue to aid and abet 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)].

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

##### **Violations of Rule 13b2-2 of the Exchange Act (Defendant Barnett)**

57. The Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 38.

58. In connection with an audit confirmation, Barnett, directly or indirectly, singly or in concert, made or caused to be made materially false or misleading statements, or omitted to state or caused another person to omit to state material facts necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading to an accountant, in connection with a review of TheStreet's Form 10-Q.

59. By reason of the foregoing, Barnett singly or in concert, directly or indirectly, violated Exchange Act Rule 13b2-2 [17 C.F.R. § 240.13b2-2].

#### **PRAYER FOR RELIEF**

**WHEREFORE**, the Commission respectfully requests that the Court enter a final judgment against the Defendants granting the following relief:

##### **I.**

Finding that the Defendants violated the securities laws and rules promulgated thereunder as alleged herein.

## **II.**

Permanently enjoining the Defendant from future violations of the federal securities laws as alleged in this complaint.

## **III.**

Directing the Defendants to pay civil money penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

## **IV.**

Prohibiting Defendants under Section 21(d)(6) of the Exchange Act [15 U.S.C. § 78u(d)(6)] from acting as an officer or a director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].



V.

Ordering the Defendants to reimburse TheStreet for incentive-based and equity-based compensation he received during the relevant statutory time periods pursuant to and established by Section 304 of the Sarbanes-Oxley Act [15 U.S.C. § 7243].

VI.

Granting such other and further relief as this Court seems just and proper, including such equitable relief as may be appropriate or necessary for the benefit of investors.

Dated: December 17, 2012  
New York, New York



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