

2nd Circ. Won't Revive Tremor IPO Investors' Suit

By **Carmen Germaine**

Law360, New York (February 8, 2016, 4:14 PM ET) -- The Second Circuit on Monday declined to give investors another shot at allegations Tremor Video Inc. misled them ahead of its \$75 million initial public offering, saying proposed amendments didn't show the online video advertising company knew about looming losses.

A three-judge panel affirmed U.S. District Judge Paul A. Crotty's decisions dismissing the shareholder suit and denying investors' request to file an amended complaint, finding that the investors had failed to show Tremor knew it was going to post losses after its IPO and that the proposed amended complaint didn't add any facts to show Tremor was aware of the issue at the time.

"We cannot attribute to defendants, based on hindsight alone, knowledge that events that may well have appeared unremarkable at the time, were omens of future material problems," the order said.

Lead plaintiff Alejandro Medina filed the suit in November 2013, alleging Tremor intentionally misled investors ahead of its June 2013 IPO. The complaint noted that a press release detailing the company's third-quarter results for that year, released shortly after the IPO had taken place, showed poor results and reduced Tremors' revenue forecast going forward.

Medina, later joined by Adam Furman, alleged that Tremor should have known murky waters lay ahead because two of its customers — television networks NBCUniversal and ABC — had not yet purchased their regularly scheduled upfront advertisements before the IPO, meaning Tremor was two weeks behind its purchasing schedule from the previous year.

But Judge Crotty in March dismissed the suit, saying the fact NBCUniversal and ABC were behind schedule was not enough to signal troubled times ahead for Tremor. Judge Crotty also noted that other networks, including the CW and Fox, were actually ahead of their regularly scheduled purchases, meaning assertions that the company should have seen uncertainty and alerted potential investors at that point are baseless. Judge Crotty then denied leave to amend in June.

The investors argued before the Second Circuit in January that Judge Crotty should have given them leave to amend, saying their proposed second amended complaint contained plenty of detail alleging that Tremor executives were mum about possible snags in the ad buys from the two networks.

In Monday's decision, the appellate court first rejected claims that Judge Crotty had abused his discretion in denying leave to amend, saying it assumed the lower court judge "did as he said" and

considered the amended complaint. In any event, the Second Circuit said, the objection was "immaterial" because it would review the new complaint itself.

The Second Circuit then agreed with Judge Crotty that amending the complaint would be futile, saying the proposed amendments still fail to allege that Tremor actually knew about any uncertainty when it filed a registration statement for the IPO.

The allegations about the delayed ad buys were insufficient, the Second Circuit said, noting in a footnote that the historical data on the delay was "very slim."

The investors had alleged "only suppositions" of what Tremor "would have" or could have known about other potentially damaging trends or uncertainties, the appellate court said, but those were insufficient and lacked specific facts.

Even if it was possible to say, with hindsight, that "seeds of what was to come" were available to Tremor at the time, that couldn't prove that the company or its executives actually knew they faced future problems, the Second Circuit said.

Representatives for the investors did not respond Monday to requests for comment.

An attorney for Tremor, Koji F. Fukumura of Cooley LLP, told Law360 on Monday that they were pleased with the decision.

"We're gratified the Second Circuit affirmed Judge Crotty's well-reasoned decision and thankful that this litigation is now behind our client," Fukumura said. "It is critically important for innovative companies to be able to access the capital markets and not face unfounded lawsuits."

Justices Guido Calabresi, Gerard E. Lynch and Raymond J. Lohier Jr. sat on the panel for the Second Circuit.

The investors are represented by Susan K. Alexander and Andrew S. Love of Robbins Geller Rudman & Dowd LLP and Corey D. Holzer and Marshall P. Dees of Holzer & Holzer LLC.

Tremor is represented by Koji F. Fukumura and Ryan E. Blair of Cooley LLP and Adam Hakki of Shearman & Sterling LLP.

The case is *Medina v. Tremor Video*, case number 15-2178, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Pete Brush and Benjamin Horney. Editing by Catherine Sum.
