

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. SECURITIES AND EXCHANGE
COMMISSION,
100 F. Street, NE
Washington, D.C. 20549

Plaintiff,

v.

SMITH & NEPHEW plc
15 Adam Street
London, England WC2N 6LA

Defendant.

Case: 1:12-cv-00187
Assigned To : Kessler, Gladys
Assign. Date : 2/6/2012
Description: General Civil

COMPLAINT

Plaintiff, U.S. Securities and Exchange Commission (the "Commission"), alleges:

SUMMARY

1. This matter concerns violations of the Foreign Corrupt Practices Act ("FCPA") by Smith & Nephew plc ("S&N plc") through its subsidiaries to obtain sales for their medical device business.

2. S&N plc is a global medical company with operations around the world. From 1997 to June 2008, two of S&N plc's subsidiaries engaged in a scheme with a distributor who made illicit payments to public doctors employed by government hospitals or agencies in Greece.

3. S&N plc, through its subsidiaries, violated Section 30A of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78dd-1] by making illicit payments to foreign government officials in order to obtain or retain business. S&N plc

violated Section 13(b)(2)(B) of the Exchange Act by failing to have an adequate internal control system in place to detect and prevent the illicit payments. S&N plc violated Section 13(b)(2)(A) of the Exchange Act by improperly recording these payments in its accounting books and records.

JURISDICTION

4. This Court has jurisdiction over this action under Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) and 78aa]. S&N plc, directly or indirectly, made use of the means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange in connection with the transactions, acts, practices, and courses of business alleged in this Complaint.

5. Venue is appropriate in this Court under Section 27 of the Exchange Act [15 U.S.C. § 78aa] or 28 U.S.C. § 1391(d).

DEFENDANT

6. **Smith & Nephew plc** (“S&N plc”) is a medical device company with its headquarters in London, England that sells orthopedic, endoscopy and wound-care products. S&N plc conducts its orthopedic business principally through S&N Inc., which is based in Memphis, TN and operates a manufacturing facility there. S&N plc’s American Depositary Receipts (“ADRs”) trade on the New York Stock Exchange under the symbol (“SNN”), and the company files periodic reports with the Commission pursuant to Section 13 of the Exchange Act. In fiscal year 2010, its total sales were \$3.962 billion, and its operating profits were \$920 million.

RELATED ENTITIES

7. **Smith & Nephew Inc.** (“S&N Inc.”), a Delaware corporation that is headquartered in Memphis, TN, is a wholly-owned subsidiary of S&N plc. S&N Inc. sold its orthopedic products to a distributor in Greece. S&N Inc.’s financial statements were consolidated into the statements of S&N plc.

8. **Smith & Nephew Orthopaedics GmbH** (“S&N GmbH”), a German corporation, is a wholly-owned subsidiary of S&N plc that is headquartered and operates a manufacturing facility in Tuttlingen, Germany. S&N GmbH sold its orthopedic products to a distributor in Greece. S&N GmbH’s financial statements were consolidated into the statements of S&N plc.

9. **Greek Distributor**, based in Athens, Greece, was two individuals who operated as agents and distributors for S&N Inc. and S&N GmbH for sales in Greece. Greek Distributor operated Greek companies and three private companies based in the United Kingdom, Company A, B, and C.

10. **Vice President International Sales**, a U.S. citizen, was Vice President for International Sales for S&N Inc. and was based in Memphis, Tennessee. He left S&N Inc. in 2004.

11. **Greece Sales Manager**, a U.S. citizen, was the sales manager for S&N Inc.’s sales in Greece. He was based in Memphis, Tennessee and stopped working for S&N Inc. around September 2003.

FACTS

12. S&N Inc. and S&N GmbH sold orthopedic products in Greece since the 1970s through the Greek Distributor. Greece has a national health care system wherein

most Greek hospitals are publicly-owned and operated. Healthcare providers, including doctors, who work at publicly-owned hospitals are government employees, providing healthcare services in their official capacities. The public doctors in Greece are “foreign officials” as that term is defined in the FCPA, 15 U.S.C. § 78dd-2(h)(2)(A).

13. From the 1970s until the late-1990s, S&N Inc. and S&N GmbH had an agreement with the Greek Distributor to sell orthopedic products to the Greek Distributor entities at a discount from “list” price. The Greek Distributor would re-sell the products to Greek public hospitals at the full “list” price and the Greek Distributor entities would make a profit.

14. Starting in 1997, a scheme was developed to create an offshore fund to make payments to public doctors to purchase S&N Inc. and S&N GmbH products in Greece. The Greek Distributor set up two shell companies in the United Kingdom, Company A and Company B. The Greek Distributor negotiated a series of deals in which the Greek Distributor purchased orthopedic products from S&N Inc. and S&N GmbH at full “list” price, but S&N Inc. and S&N GmbH then paid a percentage of those purchases to the Greek Distributor’s offshore companies. Specifically, S&N Inc. entered into an agreement in 1998 with Company A, and S&N GmbH entered into an agreement in 1998 with Company B. In 2003, S&N Inc. shifted its agreement to Company B as well.

15. On paper, it appeared as if S&N Inc. and S&N GmbH were paying Company A and Company B for marketing services, but no true services were actually performed. Company A and Company B were essentially receiving the portion of the sales to the Greek Distributor entities that represented the difference between the list price and the discount price normally paid by distributors, usually between 25 and 40

percent of sales. This had the effect of creating off-shore funds for the Greek Distributor entities that were not subject to Greek taxes and that would be used to pay bribes to public doctors to purchase S&N Inc. and S&N GmbH products.

16. Throughout the period, S&N Inc. executives and S&N GmbH employees understood that the Greek Distributor was paying bribes to public doctors in Greece by using the funds paid to Company A and Company B. In October 1999, one of the Greek Distributor's employees sent an email to the Greek Sales Manager in Memphis asking for S&N Inc. to pay a Company A invoice, noting that "We have many outstanding payments to surgeons and I would appreciate your help if this payment can be made to [Company A] by the end of next week at the very latest."

17. In late fall 1999, S&N Inc's Chief Financial Officer raised questions with S&N lawyers following questions from internal auditors concerning the payments to the Greek Distributor's UK Companies. On November 9, 1999, Greece Sales Manager and an S&N Inc. attorney met to discuss issues with S&N GmbH's agreement with the Greek Distributor. The notes of the S&N Inc. attorney who attended the meeting stated: "Pay surgeon to use prod – Not legal or ethic; but universal. S&N will not do." On November 17, 1999, the same S&N Inc. attorney then briefed a more-senior S&N Inc. attorney on the issue, noting that the Greek Distributor was receiving "promotion support" from S&N GmbH, that Memphis was doing the same thing, and that no services were received in exchange. The notes of the meeting by the more-senior attorney also reflected that: "Distributor in Greece pays docs to use our products."

18. In January 2001, S&N Inc. renewed its contract with Company A.

19. In February 2002, the Greek Distributor traveled to Memphis to meet with Vice President International Sales and others concerning certain proposed reductions in the percentage paid to Company A. In March 2002, the Greek Distributor sent an email to Greece Sales Manager and Vice President International Sales in the United States that explicitly said he was paying doctors for purchasing S&N Inc. products (emphasis in original):

The [Company A] commission cannot be reduced for the time being, since it is already not sufficient to cover my company's cash incentive requirements at the current market level, with major competitors paying 30-40% more than [the Greek Distributor].

As I explained to you in Memphis (as well as during your last visit to Athens) **I absolutely need this fund to promote my sales with surgeons, at a time when competition offers substantially higher rates.**

[Company A]'s only reason for being is the need for cash incentives, a real pain in the neck but unavoidable fact of Greek life.

...

In case it is not clear to you, please understand that I am paying cash incentives right after each surgery . . .

S&N Inc. did not reduce the commissions.

20. Company A was also used by another medical device company to pay bribes to public doctors in Greece.

21. S&N Inc. and S&N GmbH recorded the payments to Company A and Company B as legitimate marketing expenses in their books and records when a portion of those payments were used to pay bribes.

22. During 2004, Vice President International Sales left the company.

23. In 2004, S&N Inc. and S&N GmbH reconsidered their arrangement with the Greek Distributor after foreign tax authorities questioned S&N GmbH's deduction of certain expenses. As a result, starting in 2005, S&N Inc. sold its products to Company C,

another offshore company controlled by the Greek Distributor, at a standard discount off of list price. Company C then sold the products to the Greek Distributor, which sold them in Greece. Similar to Company A and Company B, Company C also acted as an offshore fund to make bribe payments to public doctors in Greece. Starting in 2005, S&N GmbH discontinued dealings with the Greek Distributor.

24. In May 2005, the Greek Distributor met with an S&N Inc. representative, who informed the Greek Distributor that it could not make payments to doctors, and that Greek Distributor would have to produce to S&N a marketing plan. However, no further steps were taken to ensure that the Greek Distributor was not making payments to public doctors in Greece.

25. In June 2007, S&N plc acquired a new subsidiary, a private Swiss company that sold orthopedic products in Greece. S&N plc intended to use the new subsidiary to sell its products in Greece rather than use the Greek Distributor. The Greek Distributor tried to maintain the relationship and, in trying to convince an S&N Inc. executive of his value, the Greek Distributor said that he paid surgeons less than the payments to surgeons made by the newly acquired subsidiary. S&N plc did later learn that the newly acquired subsidiary had engaged in unacceptable sales practices prior to its acquisition.

26. The deal between S&N Inc. and Company C expired in 2007. However, S&N Inc. continued to sell products to the Greek Distributor to fulfill long-term contracts with Greek hospitals. S&N Inc. ended its sales of orthopedic products to the Greek Distributor entities in June 2008.

A. Anti-Bribery Violations

27. S&N plc's subsidiaries S&N Inc. and S&N GmbH knowingly allowed the Greek Distributor to pay Greek public doctors for the purpose of obtaining or retaining business.

28. S&N Inc. employees who were U.S. nationals approved the arrangements with the Greek Distributor that included payments to doctors. The mails and instrumentalities of interstate commerce were used in furtherance of this bribery scheme.

B. Failure to Maintain Its Books and Records

29. S&N plc's subsidiaries S&N Inc. and S&N GmbH characterized their payments to Company A and Company B as being for "commissions" and marketing services even though those payments were used by the Greek Distributor to pay bribes to Greek doctors. S&N plc's books and records did not reflect the true nature of those payments. For example, they did not reflect that a portion of the payments to the Greek Distributor constituted reimbursements for bribes. S&N Inc. also mischaracterized the nature of the sales to Company C.

C. Failure to Maintain Adequate Internal Controls

30. S&N plc failed to implement adequate internal controls to detect or prevent bribery. The conduct involved employees and managers of several levels at two subsidiaries.

31. S&N plc failed to implement, either directly or through its subsidiaries, adequate internal controls to prevent the bribery or to ensure that transactions were recorded properly, as follows. S&N plc failed to act on numerous red flags of bribery. Among other things, even though S&N plc was aware that S&N Inc. and S&N GmbH

were conducting business in Greece and was aware of the heightened risks of the Greek market, S&N plc did not require proof of services rendered by Company A and Company B. S&N plc failed to question the reasons for paying the Greek Distributor for Greek sales to accounts in the names of entities located outside of Greece. S&N plc failed to conduct due diligence on Company A and Company B. S&N plc also failed to conduct any audits of the transactions.

CLAIMS FOR RELIEF

FIRST CLAIM

[Violations of Section 30A of the Exchange Act]

32. Paragraphs 1 through 31 are realleged and incorporated by reference.

33. As described above, S&N plc, through its agents, and subsidiaries, S&N Inc. and S&N GmbH, corruptly offered, promised to pay, or authorized payments to one or more persons, while knowing that all or a portion of those payments would be offered, given, or promised, directly or indirectly, to foreign officials for the purpose of influencing their acts or decisions in their official capacity, inducing them to do or omit to do actions in violation of their official duties, securing an improper advantage, or inducing such foreign officials to use their influence with foreign governments or instrumentalities thereof to assist in obtaining or retaining business.

34. By reason of the foregoing, S&N plc violated, and unless enjoined will continue to violate, Section 30A of the Exchange Act. [15 U.S.C. § 78dd-1]

SECOND CLAIM

[Violations of Section 13(b)(2)(A) of the Exchange Act]

35. Paragraphs 1 through 34 are realleged and incorporated by reference.

36. As described above, S&N plc failed to keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected its transactions and dispositions of its assets.

37. By reason of the foregoing, S&N plc violated, and unless enjoined will continue to violate, Section 13(b)(2)(A) of the Exchange Act. [15 U.S.C. § 78m(b)(2)(A)]

THIRD CLAIM

[Violations of Section 13(b)(2)(B) of the Exchange Act]

38. Paragraphs 1 through 37 are realleged and incorporated by reference.

39. As described above, S&N plc failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

(i) transactions were executed in accordance with management's general or specific authorization; and (ii) transactions were recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for its assets.

40. By reason of the foregoing, S&N plc violated, and unless enjoined will continue to violate, Section 13(b)(2)(B) of the Exchange Act. [15 U.S.C. § 78m(b)(2)(B)]

PRAYER FOR RELIEF

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

A. Permanently restraining and enjoining S&N plc from violating Sections 30A, 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78dd-1, 78m(b)(2)(A), and 78m(b)(2)(B)];

B. Ordering S&N plc to disgorge ill-gotten gains wrongfully obtained as a result of its illegal conduct and prejudgment interest; and

C. Granting such further relief as the Court may deem just and appropriate.

Dated: Feb 6, 2012

Respectfully submitted,



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