

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

JOHN PIERRARD,

Defendant.

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: **Civil Action No.**
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COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff, Securities and Exchange Commission (“Commission”), files its complaint and alleges that:

OVERVIEW

1. This matter involves a financial fraud conducted by the accounting department of Swisher Hygiene, Inc. (“Swisher”) that began shortly after the Charlotte, North Carolina-based hygiene and sanitation company became a public reporting company in late 2010. During 2011, Swisher was engaged in ongoing acquisitions of related sanitation and waste management companies, and lacked effective internal controls over financial reporting.
2. Exploiting Swisher’s lack of effective internal controls, Swisher’s accounting group reevaluated and manipulated various acquisition-related reserves

and expenses in order to increase earnings to predetermined targets tied to what Swisher management understood to be the expectations of the Company's lenders as the basis for future acquisition financing.

3. John Pierrard ("Pierrard"), the company's Director of Financial Planning and Analysis, assisted in carrying out this scheme.

4. The scheme came to light in early 2012, before Swisher filed its Form 10-K for 2011. Specifically, a former employee provided Swisher's general counsel and outside auditor, BDO USA, LLP ("BDO"), with a draft letter outlining the employee's concerns that the accounting department was preparing financial statements manipulated to meet previously communicated targets.

5. Upon learning of the former employee's allegations, Swisher's Audit Committee commenced an internal investigation, which led to the terminations of several individuals, including Pierrard.

6. In February 2013, after the conclusion of the internal investigation, Swisher filed amended quarterly reports for the first three quarters of 2011, including restated financial statements, to reflect adjustments to previously reported financial information. The restatement reflects the reversal of entries made in furtherance of the earnings management scheme.

7. As restated, Swisher's aggregate reported losses for the first three quarters of 2011 increased by a total of approximately \$4.8 million.

8. During the closing process for fourth quarter of 2011, Pierrard, at the direction of Swisher's CFO, manipulated Swisher's allowance for doubtful account to increase earnings, knowing or consciously disregarding that the associated entries were not in accordance with GAAP.

VIOLATIONS

9. By the conduct described herein, Pierrard has engaged and, unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute violations of Section 17(a)(1) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)(1)] and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(b)(5)] and Rules 10b-5(a) and 13b2-1 thereunder [17 C.F.R. §§ 240.10b-5(a) & 240.13b2-1].

10. By the conduct described herein, Pierrard has engaged and, unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute aiding and abetting violations of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)] and Sections 10(b), 13(b)(2)(A), and

13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(b)(2)(A), and 78m(b)(2)(B)] and Rule 10b-5(a) thereunder [17 C.F.R. § 240.10b-5(a)].

JURISDICTION AND VENUE

11. The Commission brings this action pursuant to Sections 20 and 22 of the Securities Act [15 U.S.C. §§ 77t and 77v] and Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d) and 78u(e)] to enjoin Defendant from engaging in the transactions, acts, practices, and courses of business alleged in this complaint, and transactions, acts, practices, and courses of business of similar purport and object, for civil penalties and for other equitable relief.

12. This Court has jurisdiction over this action pursuant to Section 22 of the Securities Act [15 U.S.C. § 77v] and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].

13. Defendant, directly and indirectly, made use of the mails, the means and instruments of transportation and communication in interstate commerce and the means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in this complaint and made use of mail and means of instrumentality of interstate commerce to effect transactions, or to induce or to attempt to induce the purchase or sale of securities alleged in this complaint.

14. Certain of the transactions, acts, practices, and courses of business constituting violations of the Securities Act and the Exchange Act occurred in the Western District of North Carolina.

THE DEFENDANT

15. John Pierrard is a resident of Delray Beach, Florida. Pierrard became an employee of Swisher in early 2011. During the relevant period, Pierrard was Swisher's Director of Financial Planning and Analysis, and he reported to Swisher's CFO. Swisher terminated Pierrard in May 2012.

16. Pierrard has pled guilty to one count of conspiracy to commit securities fraud in connection with his employment at Swisher. United States v. Pierrard, Case No. 3:15-CR-238 (W.D.N.C.)

OTHER RELEVANT ENTITY

17. In 2001 and 2012, Swisher Hygiene, Inc. was a Delaware corporation headquartered in Charlotte, North Carolina. Prior to the sale of its operating assets, Swisher was a commercial hygiene company delivering essential hygiene and sanitizing solutions to customers in a wide range of end-markets. Swisher's common stock was registered pursuant to Section 12(b) of the Exchange Act. Swisher became a public company at the end of 2010, and its stock commenced trading on The NASDAQ Stock Market LLC ("NASDAQ") on February 2, 2011.

In November 2015, Swisher consummated the sale of the stock of its wholly owned U.S. subsidiary, Swisher International, Inc., and other assets relating to Swisher's U.S. operations, which comprised all of Swisher's remaining operating interests, to Ecolab, Inc., a publically traded company. In January 2016, NASDAQ suspended trading in Swisher's stock, and initiated formal delisting proceedings.

THE FRAUDULENT SCHEME

18. Swisher's financial statement closing process during the second, third, and fourth quarters of 2011 was conducted with the intent to realize targeted Adjusted EBITDA figures, and the closing process ended immediately after achieving those results rather than continuing through a complete analysis of all significant accounts.

19. EBITDA generally stands for earnings before interest, taxes, depreciation and amortization. In its September 30, 2011 Form 10-Q, Swisher defined Adjusted EBITDA as "net loss excluding the impact of income taxes, depreciation and amortization expense, interest expense and income, foreign currency gain, net gain/loss on debt related fair value measurements, stock based compensation and third party costs directly related to merger s and acquisitions."

20. Swisher's closing process followed a consistent pattern, namely: (1) the communication by the CFO of an Adjusted EBITDA target to accounting

personnel; (2) an initial closing process that produced numbers less than the target; (3) meetings and communications through which the CFO demanded adjustments to help Swisher meet the original target; (4) the recording of inappropriate accounting entries to achieve the target; and (5) the immediate cessation of the closing process once the target was achieved.

21. After reaching the Adjusted EBITDA target, the CFO typically would advise his team that additional entries would not be recorded.

22. Pierrad, as a member of the accounting department, was aware of and participated in this improper closing process.

23. Moreover, Pierrad actively assisted in manipulating at least one account to reach EBITDA targets.

24. During the fourth quarter of 2011, accounting personnel discovered that Swisher had significantly understated its reserve for doubtful accounts because the company had failed to include write-offs associated with one of the companies it had acquired in 2011. The CFO instructed Pierrad to come up with a solution that would increase the reserve without impacting Swisher's earnings.

25. In response, Pierrad obtained a spreadsheet of Swisher's acquisitions during the year, and arbitrarily increased the previously recorded reserves for each company by approximately 5%, thereby increasing the reserve for doubtful

accounts by approximately \$550,000. There was no legitimate justification to increase the reserves in this manner.

26. This improper adjustment allowed Swisher to increase its reserve for doubtful accounts without impacting earnings.

27. Pierrard prepared this adjustment and caused it to be entered into Swisher's accounting books and records even though he had concerns with its effect on earnings and despite the fact that he believed he was underqualified to perform the analysis.

28. By preparing this adjustment and causing it to be entered into the accounting books and records, Pierrard caused Swisher's accounting books and records to not be in conformity with GAAP.

29. Pierrard knowingly circumvented Swisher's internal accounting controls to manipulate the allowance for doubtful accounts.

DISCOVERY OF THE FRAUDULENT SCHEME

30. Swisher's earnings management scheme unraveled in early 2012.

31. During the closing process for the fourth quarter of 2011, the CFO terminated a member of the accounting department. That former employee subsequently met with Swisher's General Counsel and BDO and provided them with a draft letter to the audit committee. The letter raised several accounting

issues, including the allegation that Swisher was using purchase accounting to manage reported results to previously determined Adjusted EBITDA targets.

32. The former employee's letter also alleged that Swisher's standard practice was to put reserves on the opening balance sheet for a number of potential losses and for contingent consideration. According to the letter, the reserves were typically recorded at their highest possible amount so that they could be considered part of the purchase price of the acquired entity and thus offset against goodwill. Swisher would later reduce the inflated reserves and reflect the reduction as an increase to income.

33. The letter further alleged that rather than expensing the costs that arose in connection with the ongoing operation of the acquired businesses, Swisher would frequently place those costs on the opening balance sheet as part of goodwill.

34. After learning of the former employee's allegations, in March 2012 Swisher's audit committee hired the law firm of Holland & Knight to conduct an internal investigation. Holland & Knight and the forensic accounting firm Cherry Beckert & Holland reviewed the accounting entries related to each of the 63 acquisitions made by Swisher in 2011.

35. On May 17, 2012, Swisher announced that it was firing several individuals, including Pierrard.

36. On March 28, 2012, Swisher announced that its quarterly reports for 2011 should no longer be relied upon and might require restatement.

37. Although the fraudulent earnings management scheme continued into the fourth quarter of 2011, the scheme was discovered and came to a halt before the filing of the 2011 Form 10-K. Thus, although the fraudulent accounting entries were recorded in Swisher's books and records for the fourth quarter, none of the fraudulent accounting for that quarter is reflected in filings with the Commission.

38. As a result of Swisher's earnings management and departure from GAAP, the internal investigators identified approximately 20 accounts that were materially misstated in 2011. Consequently, on February 19, 20 and 21, 2013, Swisher filed amended quarterly reports on Form 10-Q/A for the quarterly periods ended March 31, 2011, June 30, 2011 and September 30, 2011, respectively.

COUNT I—FRAUD

Violations of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)]

39. Paragraphs 1 through 38 are hereby re-alleged and are incorporated herein by reference.

40. During 2011, Defendant, in the offer and sale of the securities described herein, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, employed

devices, schemes and artifices to defraud purchasers of such securities, all as more particularly described above.

41. Defendant knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud.

42. While engaging in the course of conduct described above, Defendant acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severely reckless disregard for the truth.

43. By reason of the foregoing, Defendant, directly and indirectly, has violated and, unless enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

COUNT II—FRAUD

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

44. Paragraphs 1 through 38 are hereby re-alleged and are incorporated herein by reference.

45. During 2011, Defendant, in connection with the purchase and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly employed devices, schemes, and artifices to defraud.

46. Defendant knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts, and engaged in fraudulent acts, practices and courses of business. In engaging in such conduct, Defendant acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severely reckless disregard for the truth.

47. By reason of the foregoing, Defendant, directly and indirectly, has violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5(a) thereunder [17 C.F.R. § 240.10b-5(a)].

COUNT III—FRAUD

Violations of 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]

48. Paragraphs 1 through 38 are hereby re-alleged and are incorporated herein by reference.

49. During 2011, Defendant, directly and indirectly, knowingly circumvented Swisher's system of internal accounting controls.

50. During 2011, Defendant, directly and indirectly, falsified and caused to be falsified Swisher's books and records.

51. By reason of the foregoing, Defendant, directly and indirectly, has violated and, unless enjoined, will continue to violate 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].

COUNT IV – AIDING AND ABETTING FRAUD

**Aiding and Abetting Violations of 17(a)(1) of the Securities Act
[15 U.S.C. § 77q(a)(1)]**

52. Paragraphs 1 through 38 are hereby re-alleged and are incorporated herein by reference.

53. During 2011, Defendant aided and abetted Swisher's violation of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)] by knowingly or recklessly providing substantial assistance to an issuer that in connection with the offer and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly employed devices, schemes, and artifices to defraud purchasers of such securities, all as more particularly described above.

54. By reason of the foregoing, Defendant, directly and indirectly, has aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

COUNT V – AIDING AND ABETTING FRAUD

**Aiding and Abetting Violations of 10(b) of the Exchange Act
[15 U.S.C. § 78j(b)] and Rule 10b-5(a) thereunder [17 C.F.R. § 240.10b-5(a)]**

55. Paragraphs 1 through 38 are hereby re-alleged and are incorporated herein by reference.

56. During 2011, Defendant aided and abetted Swisher's violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] by knowingly or recklessly providing substantial assistance to an issuer that in connection with the purchase and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly employed devices, schemes, and artifices to defraud.

57. By reason of the foregoing, Defendant, directly and indirectly, has aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5(a) thereunder [17 C.F.R. § 240.10b-5(a)].

**COUNT VI – AIDING AND ABETTING THE FAILURE TO MAINTAIN
ACCURATE BOOKS AND RECORDS**

**Aiding and Abetting Violations of 13(b)(2)(A) of the Exchange Act
[15 U.S.C. § 78m(b)(2)(A)]**

58. Paragraphs 1 through 38 are hereby re-alleged and are incorporated herein by reference.

59. During 2011, Defendant aided and abetted Swisher's violation of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)] by knowingly or recklessly providing substantial assistance to an issuer that failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

By reason of the foregoing, Defendant, directly and indirectly, has aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

**COUNT VII – AIDING AND ABETTING THE FAILURE TO DEVISE AND
MAINTAIN A SYSTEM OF INTERNAL CONTROLS**

**Aiding and Abetting Violations of 13(b)(2)(B) of the Exchange Act
[15 U.S.C. § 78m(b)(2)(B)]**

60. Paragraphs 1 through 38 are hereby re-alleged and are incorporated herein by reference.

61. During 2011, Defendant aided and abetted Swisher's violation of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)] by knowingly or recklessly providing substantial assistance to an issuer that failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

a. transactions are executed in accordance with management's general or specific authorization;

b. transaction are 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 assets;

c. access to assets is permitted only in accordance with management's general or specific authorization; and

d. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

62. By reason of the foregoing, Defendant, directly and indirectly, has aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Commission respectfully prays for:

I.

Findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, finding that Defendant named herein committed the violations alleged herein.

II.

A permanent injunction enjoining Defendant, his officers, agents, servants, employees, and attorneys from violating, directly or indirectly, Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)] and Sections 10(b) and 13(b)(5) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78m(b)(5)] and Rules 10b-5(a) and 13b2-1 thereunder [17 C.F.R. §§ 240.10b-5(a) & 240.13b2-1].

III.

A permanent injunction enjoining Defendant, his officers, agents, servants, employees, and attorneys for aiding and abetting any violations of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)] and Sections 10(b), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(b)(2)(A), and 78m(b)(2)(B)] and Rule 10b-5(a) thereunder [17 C.F.R. § 240.10b-5(a)].

IV.

An order 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)] imposing civil penalties against Defendant.

V.

An order pursuant to Section 20(e) of the Securities Act and Section 21(d)(2) of the Exchange Act barring Pierrard from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

VI.

Such other and further relief as this Court may deem just, equitable, and appropriate in connection with the enforcement of the federal securities laws and for the protection of investors.

Plaintiff requests a jury trial.

Dated: May 24, 2016

Respectfully submitted,

/s/ M. Graham Loomis

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