

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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U.S. DISTRICT COURT
W. DIST. OF N.C.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff,

Civil Action No.

3:01cv521-MU

v.

COMPLAINT

PATRICK L. SWISHER and
SWISHER INTERNATIONAL, INC.
Defendants.

SUMMARY

1. This is an accounting fraud case. Defendant Patrick Swisher, Chairman of the Board of Swisher International, Inc. (SII), caused SII to overstate its earnings for the quarter ended July 31, 1996 by prematurely recording a \$450,000 sale of a company-owned Houston franchise to a corporation Swisher set up and controlled. At Swisher's direction, SII improperly recognized the revenue in its Form 10-Q for the period ended July 31, 1996, despite the fact that the transaction had not been completed. In that filing, SII also improperly described two-thirds of the revenue as "other income" instead of revenue from a nonrecurring item. These false and misleading entries enabled SII to avoid reporting that it had experienced its first lost in at least eight quarters and thus to support artificially the share price of SII common stock.

2. Swisher personally profited from the false entries by selling 200,000 shares into a market conditioned by the false information.

3. By knowingly or recklessly engaging in this conduct, defendants directly or indirectly violated, are violating, and unless restrained will violate the antifraud, registration, and filing provisions of the federal securities laws, as set forth in Claims One through Five below.

JURISDICTION AND VENUE

4. This Court has jurisdiction of this action pursuant to Section 22(a) of the Securities Act [15 U.S.C. §77v(a)], and Section 27 of the Exchange Act [15 U.S.C. §78aa].

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

DEFENDANTS

6. Swisher International Inc., a Nevada corporation headquartered in Charlotte, NC, is in the business of franchising commercial and residential hygiene services. Following its initial public offering in 1993, SII registered with the Commission pursuant to Section 12(g) of the Exchange Act. It's common stock traded on the NASDAQ From April 1993 to May 1998 under the symbol SWSH and currently trades on the OTC bulletin board. On April 28, 2000, SII filed a Form 15 terminating its registration with the Commission pursuant to Exchange Act Rule 12(g)(4), and is no longer required to file periodic reports with the Commission. SII uses an October 31 fiscal year end.

7. Patrick Lee Swisher, 46, has been Chief Executive Officer, President and a director of SII since its inception. Swisher is also the majority owner of Lone Star Hygiene, LLC, a Texas corporation that bought and manages the SII Houston hygiene franchise. Swisher resides in Huntersville, NC.

CONDUCT RELEVANT TO ALL CLAIMS

8. In the summer of 1996, the price of SII common stock reached a high for the year, reflecting in part at least eight continuous profitable quarters. Swisher

commenced efforts to promote SII stock by retaining consultants and investment bankers, including Argent Securities, Inc. (Argent) to publish research reports on the company.

SII Prematurely and Improperly Books
the Houston Franchise Sale

9. In 1994, SII had re-acquired the hygiene franchise for the Houston, Texas territory from the prior franchisee. Thereafter, SII successfully operated this franchise as a company-owned business and made no serious attempts to market it to the public as an available franchise.

10. In early September 1996, just days before the company filed its Form 10-Q for the quarter ended July 31, 1996, SII's accounting staff provided defendant Swisher with preliminary financial statements for the third quarter to be included in the Form 10-Q. This draft showed that SII had a significant loss for the quarter. Thereafter, Swisher directed the accounting staff to recognize the company's purported sale of the profitable Houston franchise to an entity called Lone Star in the third quarter. Swisher gave this direction, even though the transaction had not been completed.

11. Swisher told the accounting staff that the franchise sale price was \$450,000. SII booked a \$284,017 gain for the Houston franchise sale.

12. The Houston franchise sale was material as it enabled SII to report quarterly net income of \$163,886 instead of a loss of \$120,131.

13. Counter to generally accepted accounting principles, SII's accounting staff improperly classified two-thirds of the \$284,017 gain from the Houston franchise sale as operating income in the financial statements included in SII's third quarter Form 10-Q filed with the Commission. Based on the inflated operating revenue figure, Swisher issued a September 18, 1996 press release touting that the company's "total revenues increased by 34%."

14. On September 9, 1996, a Texas lawyer incorporated Lone Star Hygiene, Inc., a Texas corporation. Swisher owned fifty-one percent (51%) of Lone Star, and another Swisher employee selected by Swisher owned the remaining forty-nine percent (49%).

15. SII's third quarter Form 10-Q also failed to disclose that Swisher was the majority owner of Lone Star. Such disclosures, known as related-party transaction disclosures, are required by Regulation S-X § 210.10, Interim Financial Statements [17 CFR ¶ 210.10], and Statement of Financial Accounting Standards No. 57, Related Party Disclosures.

16. Although it was SII's policy to have the board of directors approve all material related-party transactions, the sale was never presented to the full four-person board.

17. At a September 27, 1996 board meeting, Swisher mentioned that the Houston franchise was sold to Lone Star, but he did not disclose that he owned fifty-one percent (51%) of Lone Star.

18. Swisher and others agreed that the sale would be one hundred percent (100%) financed by SII.

The Armand Pledge

19. Sometime thereafter, in response to concerns about the risk to SII of entering into a one hundred percent (100%) financed sale, Swisher prepared, signed, and delivered a Pledge of 25,000 shares of restricted SII stock purportedly owned by Armand Investment Corporation (the "Armand Pledge"). Swisher signed the Armand Pledge in his capacity as Director of Armand.

20. At all times relevant to the action, Swisher was the sole director of Armand Investment Corporation, a Bahamian company organized by a lawyer Swisher had retained.

21. Armand was an empty shell that had no assets and held no Swisher stock until October 3, 1996.

22. On or about October 3, 1996, Swisher transferred 480,000 shares of his personal restricted SII stock, approximately one-fourth of the company's outstanding shares, to Armand in exchange for a private annuity.

23. Although Swisher prepared the Armand Pledge sometime in the fall of 1996, he dated it July 29, 1996, despite the fact that on July 29 Armand did not hold any SII stock or any other assets. Swisher subsequently pledged 25,000 shares of his personal stock in 1997.

Swisher Did Not Disclose his Interest in Lone Star to the Auditors

24. Swisher had directed the sales department to omit his name from the Houston franchise sale documents. As a result, his name does not appear on them. Instead, Lone Star's minority owner is the only Lone Star representative mentioned on the documents.

25. On or about November 23, 1996, SII's independent auditors arrived and commenced work on the 1996-year end audit.

26. When they inquired about the company's franchise sales, the SII staff showed them the Houston franchise sale documents, which nowhere mentioned Swisher's majority ownership of Lone Star. The auditors never saw the Armand Pledge. As a result, the auditors were unaware that Swisher owned Lone Star. Instead they believed that the minority owner was the sole owner.

27. On or about February 14, 1997, Swisher reviewed and signed a representation letter requested by the auditors. In this letter, Swisher told the auditors that all "Related-party transactions and related amounts receivable or payable including sales, purchases, loans, transfers, leasing arrangements and guarantees, all of which have

been recorded in accordance with the economic substance of the transactions” had been properly recorded and disclosed in the company’s financial statements.

28. Consequently, SII’s financial statements did not reflect that Swisher was the majority owner of Lone Star.

The Stock Sale

29. In late September 1996, days after the Form 10-Q was filed, Argent issued a buy recommendation for SII stock. Prompted by SII’s inflated earnings as disclosed in the Form 10-Q, and Argent’s buy recommendation, SII’s share price held steady in September and October, and did not decline as it would have if SII had disclosed its first loss in at least eight quarters.

30. On October 30, 1996, SII filed a registration statement on Form S-3 to register 221,000 of the 480,000 shares that Swisher had transferred to Armand. Swisher and SII failed to disclose in that statement that Swisher beneficially owned Armand.

Profits from the Stock Sale

31. On or about November 27, after the company filed its Form S-3 to register the shares, Swisher opened a brokerage account in the name of Armand and deposited 221,000 of the 480,000 shares.

32. On or about December 2, 1996, Armand sold 200,000 shares at \$5.475 per share resulting in \$1,095,000 in proceeds.

33. Armand sold the shares into a market conditioned by the Form 10-Q.

34. \$162,000 of the sale proceeds represents improper gain.

35. On or about June 27, 1997, SII filed a definitive proxy statement with the Commission wherein Swisher “disclaim[ed] beneficial ownership of [Armand’s] shares” when he knew or should have known that he was the beneficial owner of the shares.

Other Accounting Inaccuracies

36. In addition, SII had a number of inaccurate records and a poor system of internal controls.

37. SII had a common practice of granting interest-free periods to new franchisees on franchise sales that the company financed. Between November 1, 1995 and October 31, 1997, approximately 30% of SII's franchise sales included interest-free periods.

38. However, SII failed to discount notes receivable on the company's financial statements to reflect such interest-free periods as required by generally accepted accounting principals. A director and paid consultant to SII, who advised its accounting staff, admitted that he overlooked the need to discount the notes.

39. On or about July 30, 1997, SII sold the company-owned Charlotte franchise to a corporation owned by a senior SII officer for \$415,000.

40. SII recorded a \$381,461 gain for the Charlotte sale. This was a material transaction as it allowed the company to avoid reporting an approximately \$133,000 quarterly loss.

41. The Charlotte franchise sale was a related-party transaction, which fact was not disclosed in SII's Form 10-Q for the period ended July 31, 1997, as it should have been under Regulation S-X § 210.10, Interim Financial Statements [17 CFR ¶ 210.10] and Statement of Financial Accounting Standards No. 57, Related Party Disclosures.

CLAIM ONE
FALSE AND MISLEADING FILINGS
Violations 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]

42. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibits any person, in connection with the purchase or sale of securities, by the use of means or instrumentalities of interstate commerce or of the mails, directly or indirectly, from: (a) employing devices, schemes or artifices to defraud; (b) making untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engaging in acts, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers of securities.

43. Swisher and SII intentionally or recklessly recognized prematurely the Houston franchise sale in the quarter ended July 31, 1996 and improperly classified a portion of the revenue as other income. Armand profited from this conduct through the subsequent stock sales.

44. By reason of the foregoing, defendants SII and Swisher, directly or indirectly, have violated, are violating, and unless restrained will violate 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].

CLAIM TWO AS TO DEFENDANT SWISHER ONLY
BOOKS, RECORDS, AND ACCOUNTS; MISREPRESENTATIONS TO AUDITORS
Violations of Section 13(b)(5) of the Exchange Act
[15 U.S.C. §§78m(b)(2)(A), 78m(b)(2)(B), and 78m(b)(5)]
and Rule 13b2-1 and 13b2-2 thereunder
[17 C.F.R. ¶¶ 240.13b2-1, 240.13b2-2]

45. Section 13(b) of the Exchange Act requires, in part, that an issuer make and keep accurate books and records and maintain a system of internal accounting controls

sufficient to provide reasonable assurances that its financial statements were prepared in accordance with generally accepted accounting principles.

46. Section 13(b)(5) prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal controls or knowingly falsifying any book, record or account. Rule 13b2-1 prohibits any person from falsifying any book or record subject to Section 13(b)(2)(A). Rule 13b2-2 prohibits an officer or director from making material false statements or omissions to an accountant in connection with an audit of an issuer's financial statements or the preparation of any document or report required to be filed with the Commission.

47. Defendant Swisher directed SII's accounting staff to reflect in SII's books and records that the Houston franchise sale to Lone Star occurred in the third quarter of 1996, when the transaction had not been completed. Also, Swisher certified in a management representation letter to the company's auditors that he had disclosed all related-party transactions, when Swisher knew that his ownership of Lone Star had never been recorded in SII's financial statements.

48. By reason of the foregoing, Swisher has violated, is violating, and unless restrained will violate Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] and Rules 13b2-1 and 13b2-2 thereunder [17 C.F.R. §§ 240.13b2-1 and 240.13b2-2].

CLAIM THREE AS TO DEFENDANT SWISHER ONLY
REPORTING CHANGES IN HOLDINGS
Defendant Violated Section 16(a) [15 U.S.C. §78p]
Of the Exchange Act and
Rules 16a-2, 16a-3 thereunder
[17 C.F.R. §§ 240.16a-2 and 16a-3]

49. Section 16(a) of the Exchange Act also provides that within ten days of the close of each month, every director or officer of an issuer registered with the Commission pursuant to Section 12 of the Exchange Act, shall file with the Commission

(and with a national securities exchange, if the security is registered there) a statement reporting changes in beneficially-owned company stock. Rules 16a-2 and 16a-3, provide, in part, that statements of changes in beneficial ownership of equity securities required by Section 16(a) of the Exchange Act shall be prepared and filed on Form 4, Statement of Changes in Beneficial Ownership of Securities. Further, statements shall be filed on Form 5, Annual Statement of Beneficial Ownership of Securities, within forty-five days of the issuer's year-end, by every person who at any time during the issuer's fiscal year was subject to Section 16 of the Act with respect to that issuer, and that such statement shall disclose, among other things, all holdings and transactions that should have been, but were not, reported on Form 4 or 5 during the most recent fiscal year.

50. Swisher was the beneficial owner of the 200,000 shares Armand sold on December 2, 1996. As Armand's sole director, Swisher opened the Armand brokerage account and, having sole authority to trade on Armand's behalf instructed the broker to sell the shares.

51. Because Swisher was both Chief Executive Officer and a director of SII at the time of the stock sale, Swisher was required to file a Form 4 or Form 5. Swisher has never filed a statement of the change in beneficial ownership resulting from Armand's December 1996 sale.

52. By reason of the foregoing, Swisher has violated, is violating, and unless restrained will violate Section 16(a) of the Exchange [15 U.S.C. §78p(a)] and Rules 16a-2 and 16a-3 thereunder. [17 C.F.R. ¶¶ 240.16a-2 and 16a-3].

CLAIM FOUR
OMISSIONS IN THE OFFERING OF SECURITIES
Violations of Section 17(a)(2) and 17(a)(3) of the
Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)]

53. Section 17(a)(2) and (3) of the Securities Act, prohibit any person, in the offer or sale of securities, directly or indirectly, from obtaining money or property by

means of untrue statements of material facts or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaging in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers of securities.

54. Swisher and SII each failed to disclose in the October 30, 1996 Form S-3, and the June 25, 1997 proxy statement, that Swisher was the beneficial owner of Armand's shares. In fact, in the June 1997 proxy statement Swisher explicitly disclaimed beneficial ownership of Armand's SII shares.

55. By reason of the foregoing, defendants Swisher and SII directly or indirectly, have violated, are violating, and unless restrained will violate Section 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and (3)].

CLAIM FIVE AS TO DEFENDANT SII ONLY
BOOKS, RECORDS, AND ACCOUNTS
Violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B)
Of the Exchange Act [15 U.S.C. §§
78m(a), 78m(b)(2)(A), and 78m(b)(2)(B)]

56. Section 13(a) of the Exchange Act requires that issuers with securities registered pursuant to Section 12 of the Exchange Act file such information and documents as the Commission shall prescribe by its rules and regulations. Rules 13a-1 and 13a-13 require issuers to file with the Commission accurate annual and quarterly reports, including accurate disclosures of their revenues, income, and net earnings.

57. Rule 12b-20 requires that quarterly and annual reports contain such further information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

58. Sections 13(b)(2)(A) and (B), of the Exchange Act require an issuer to make and keep accurate books and records and maintain a system of internal accounting

controls sufficient to provide reasonable assurances that its financial statements were prepared in accordance with generally accepted accounting principles.

59. SII failed to disclose the related party nature of the Houston franchise sale to Lone Star in its Form 10-Q for the period ended July 31, 1996 filed on or about September 16, 1996, and its 1996 Form 10-K filed on or about February 18, 1997.

60. Swisher International also failed to write-down properly certain notes receivable to reflect interest-free periods in the same 1996 Form 10-K.

61. SII failed to disclose the related-party nature of the Charlotte sale in its Form 10-Q for the period ended July 31, 1997.

62. By reason of the foregoing, defendant SII has violated, is violating, and unless restrained will violate Section 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)].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court issue Orders:

I.

Permanently enjoining defendants Swisher and SII, and each of them, and their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice by personal service or otherwise, from violating, directly or indirectly, 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], and Section 17(a)(2) and (3) of the Securities Act [15 U.S.C. §§77q(a)(2) and (3)].

II.

Permanently enjoining defendant Swisher and his agents, servants, employees, attorneys, and those persons in active concert or participation with it who receive actual notice by personal service or otherwise, from violating, directly or indirectly,

Sections 13(b)(5) and 16(a) of the Exchange Act [15 U.S.C. §§ 78m(b)(5) and 78p(a)], and Rules 13b2-1, 13b2-2, 16a-2 and 16a-3, thereunder [17 C.F.R. §§ 240.13b2-1, 240.13b2-2, 240.16a-2 and 240.16a-3].

III.

Permanently enjoining defendant SII and its officers, agents, servants, employees, attorneys, and those persons in active concert or participation with it who receive actual notice by personal service or otherwise, from violating, directly or indirectly, Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78m(a), 78m(b)(2)(A), 78m(b)(2)(B)], and Rules 12b-20, 13a-1, and 13a-13, thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13].

IV.

Enter an order requiring Swisher to disgorge all illegal gains, together with prejudgment interest.

V.

Enter an order requiring Swisher to pay appropriate civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. §77t(d)] and Section 21(d) of the Exchange Act [15 U.S.C. §78u(d)].

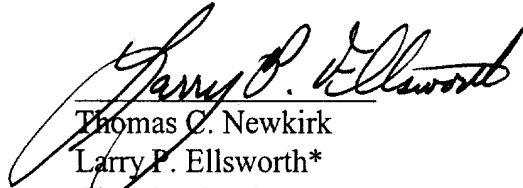
VI.

Enter an order prohibiting Defendant Swisher from acting as an officer or director of any issuer required to file reports pursuant to Sections 12(b), 12(g) or 15(d) of the Exchange Act, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. §78u(d)(2)], as a result of his violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

VII.

Granting such other relief as this Court may deem just and proper.

Respectfully submitted,



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