

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,  
450 Fifth Street, N.W.  
Washington, DC 20549

Plaintiff,

v.

BRIAN SPEARS,

Defendant.

Civil Action No.

COMPLAINT

Case: 1:08-cv-00820

Assigned To : Kollar-Kotelly, Colleen

Assign. Date : 5/13/2008

Description: General Civil

Plaintiff Securities and Exchange Commission ("SEC" or "Commission") alleges for its  
Complaint against Defendant Brian Spears:

**NATURE OF THE ACTION**

1. Defendant Brian Spears and others at U.S. Foodservice, Inc. ("USF") engaged in a large-scale fraud that, for fiscal years 2001 and 2002, materially overstated USF's income by approximately \$700 million in Commission filings and other public announcements. When the fraud was disclosed to the public, Ahold's stock price plummeted from approximately \$10.69 per share to \$4.16 per share. Spears' acts and failures to act, as described below, occurred from 2001 until early 2003, when Spears was a Vice President of Purchasing at USF.

2. USF is a foodservice and distribution company that, at the relevant times, was a subsidiary of Royal Ahold (Koninklijke Ahold N.V.) ("Ahold"). A significant portion of the operating income for USF was derived from promotional allowances ("PAs") paid by USF's vendors. USF executives recorded materially overstated PA entries in the books and records of

USF. These entries did not reflect the company's actual operating performance; instead, they were determined solely by what USF required to make its budgeted earnings. Spears knowingly provided substantial assistance to others providing Ahold's independent auditors with false and misleading information to conceal the fraud.

### **JURISDICTION AND VENUE**

3. The Commission brings this action pursuant to Sections 21(d) and 21(e) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d) and 78u(3)].

4. This Court has jurisdiction over this action pursuant to Sections 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(e) and 78aa]. Defendant directly or indirectly has made use of the means or instrumentalities of interstate commerce, or of the mails, or the facilities of a national securities exchange in connection with the transactions, acts, practices and courses of business alleged herein. Certain transactions, acts, practices and courses of business that are the subject of this action occurred within this District, and venue is proper pursuant to Section 27 of the Exchange Act.

### **DEFENDANT**

5. Brian Spears, 42 years old, was a Vice President in U.S. Foodservice's purchasing department from 2001 until his termination in 2003.

### **RELATED ENTITIES**

6. Ahold is a publicly-held company organized in the Netherlands with securities that were registered with the Commission pursuant to Section 12(b) of the Exchange Act. At the relevant time, Ahold's common stock traded in the United States on the New York Stock Exchange under the symbol AHO as evidenced by American Depositary Receipts.

7. USF, a foodservice and distribution company with headquarters in Columbia, Maryland, was a wholly-owned subsidiary of Ahold during the relevant time.

#### **STATEMENT OF FACTS**

8. USF purchases food and food-related products from vendors and resells those products to customers throughout the United States.

9. At the relevant time, USF and many of its vendors entered into agreements whereby USF bought products from the vendors and, in return, the vendors paid negotiated rebates or "PAs." These PA agreements were negotiated by members of USF's purchasing department, including Spears. The agreements contained terms including the rates at which USF would earn PAs and the conditions under which they would be earned.

10. For at least fiscal years 2001 and 2002, USF's purchase price for the products it sold to its customers was recorded in USF's books, records, and financial statements as part of the "cost of sales." USF recorded revenue generated from sales to customers other than Ahold-affiliated companies as "net sales." USF recorded PA income from vendors as a reduction of the cost of sales. Because PAs reduced USF's costs, they had the direct effect of increasing USF's and Ahold's earnings.

11. During at least fiscal years 2001 and 2002, USF made no significant profit directly from its end-sales to customers. Instead, the majority of USF's operating income was derived from PAs. Thus, PAs were critical to USF's financial results – without them, USF's and Ahold's operating income would have been materially reduced.

12. USF personnel often referred to PA earnings as "PA income." The PA income accrued and recorded at USF, but not yet collected, was accumulated in a PA receivable account.

13. During at least fiscal years 2001 and 2002, USF's quarterly and year-end financial results were purportedly based, in part, on PA income recorded on the basis of an estimated PA rate. USF's quarterly financial results were, in turn, consolidated into Ahold's quarterly and year-end financial results, which were contained in earnings press releases, SEC filings, and other public statements.

14. During at least fiscal years 2001 and 2002, USF management's compensation was based on, among other things, USF's ability to meet or exceed budgeted earnings goals that were set by Ahold management. Specifically, Spears and other USF executives were eligible to receive bonuses if USF met its budgeted earnings. For the fiscal year 2001, Spears was paid a performance-based bonus of \$45,000.

15. USF's management engaged in a scheme to artificially inflate USF's and Ahold's earnings by hundreds of millions of dollars to meet budgeted earnings targets, and thereby obtain substantial monetary bonuses. USF management perpetuated this scheme to "book to budget" by, among other things, recording in USF's and Ahold's books and records PA income that had not been earned.

16. To make it falsely appear that recorded PA income had been earned, Spears and his superiors at USF induced vendors to confirm falsely inflated PA income and receivable balances to USF's outside auditors.

17. When some recipients challenged the accuracy of the confirmation letters, Spears was told by his superiors to tell, and did tell, the particular vendors to sign the confirmation letters and was told to tell, and did tell, the particular vendor, in substance, that the PA income and related PA receivable balances in the letters were not real and/or that USF would not make any effort to collect such amounts. In some cases, Spears knew that USF management sent side

letters to particular vendors acknowledging that the amounts contained in the confirmation letters were incorrect.

18. In particular, in preparation for the audit of USF's 2001 fiscal year, Spears was told by his superiors at USF to call and did call three or four vendors, some of whom received multiple audit confirmation letters for USF's auditors. Spears was told by his superiors at USF to instruct and did instruct those vendors to sign the letters and contact USF if they had any questions. Spears was told by his superiors at USF to inform and did inform the vendors that the accounts receivables in the confirmation letters would not be billed or owed by the vendor to USF.

19. The vendors to whom Spears spoke signed false audit confirmation letters and sent those letters to USF's external auditors.

20. In one instance in connection with the audit of USF's 2001 fiscal year, Spears talked with a vendor who told Spears that he had concerns about the numbers in the confirmation letter. Spears nevertheless encouraged the vendor to sign the letter, and Spears then called the vendor with Spears' supervisor to convince the vendor to sign. Those efforts resulted in that vendor signing and sending a false audit confirmation letter to USF's external auditors.

21. In preparation for the audit of USF's 2002 fiscal year, Spears was told by his superiors at USF to call and did call ten or eleven vendors, and again some of those vendors received multiple audit confirmation letters for USF's auditors. As in the prior year, Spears was told by his superiors at USF to instruct and did instruct those vendors to sign the letters and contact USF if they had any questions. Spears similarly was told by his superiors at USF to inform and did inform the vendors that the accounts receivables in the confirmation letters would not be billed or owed by the vendor to USF.

22. In one instance in connection with the audit of USF's 2002 fiscal year, Spears talked with a vendor who specifically questioned the amount purportedly due at year end as an accounts receivable. Spears expressed concerns about the same amount, as he knew that the amount being confirmed was incorrect. After consultation, Spears was told by his superiors at USF to call and did call the vendor and told the vendor that one of his superiors at USF had promised to send the vendor a 'side letter' stating that the amounts in the audit confirmation letter did not reflect the vendor's true obligations to USF. The vendor then signed the false audit confirmation letter and sent it to USF's external auditors.

23. In another instance in connection with the audit of USF's 2002 fiscal year, Spears spoke to a vendor who told Spears that his company did not owe the amount purportedly due at year end as an accounts receivable as set forth in the audit confirmation letter for USF's auditors that the vendor had received. Spears agreed with the vendor that the amount was too high, yet he continued to encourage the vendor to sign it and send it to the auditors. The vendor then signed the false audit confirmation letter and sent it to USF's external auditors.

### **FIRST CLAIM FOR RELIEF**

#### **Fraud**

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

24. Paragraphs 1 through 23 are re-alleged and incorporated by reference.

25. By reason of the foregoing, Defendant Spears directly or indirectly, acting intentionally, knowingly or recklessly, by use of the means or instrumentalities of interstate commerce or of the mails, in connection with the purchase of securities: (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material fact or omitted to state a material fact necessary to make the statements made, in the light of the circumstances under

which they were made, not misleading; or (c) engaged in acts, practices or courses of business which operated as a fraud or deceit upon other persons.

26. By reason of the foregoing, Defendant Spears violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.

### **SECOND CLAIM FOR RELIEF**

#### **Reporting**

Aiding and Abetting Violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 [17 C.F.R. § 240.12b-20 and § 240.13a-1] Thereunder

27. Paragraphs 1 through 26 are re-alleged and incorporated by reference.

28. The Exchange Act and rules promulgated thereunder require every issuer of a registered security to file reports with the Commission that accurately reflect the issuer's financial performance and provide other true and accurate information to the public.

29. By reason of the foregoing, Defendant Spears aided and abetted Ahold's violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

### **THIRD CLAIM FOR RELIEF**

#### **Record Keeping**

Violations of Sections 13(b)(2)(A), (b)(2)(B) and (b)(5) of the Exchange Act [15 U.S.C. §§ 78m(b)(2)(A), (b)(2)(B), and (b)(5)] and Rule 13b2-1 [17 C.F.R. § 240.13b2-1] Thereunder

30. Paragraphs 1 through 29 are re-alleged and incorporated by reference.

31. The Exchange Act and rules promulgated thereunder require each issuer of registered securities to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the business of the issuer and to devise and maintain a system of internal controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit preparation of financial statements and to

maintain the accountability of accounts. The Exchange Act and rules promulgated thereunder further prohibit any person from directly, or indirectly, falsifying any such required book, record or account and prohibit any person from knowingly circumventing or failing to implement such a system of internal accounting controls.

32. By reason of the foregoing, Defendant Spears aided and abetted Ahold's violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

33. By reason of the foregoing, Defendant Spears violated Section 13(b)(5) of the Exchange Act and Exchange Act Rule 13b2-1.

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

##### **Misrepresentations to Auditors**

Violations of Exchange Act Rule 13b2-2 [17 C.F.R. § 240.13b2-2]

34. Paragraphs 1 through 33 are re-alleged and incorporated by reference.

35. The Exchange Act further prohibits the making of, or causing to be made, materially false or misleading statements or omissions to an accountant in connection with any required audit, review or examination of the financial statements of any issuer or the preparation or filing of any document or report required to be filed with the Commission.

36. By reason of the foregoing, Defendant Spears aided and abetted violations by Ahold's directors and officers of Exchange Act Rule 13b2-2.

**PRAYER FOR RELIEF**

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

- a) permanently enjoining Defendant from violating Exchange Act Sections 10(b) and 13(b)(5) and Exchange Act Rules 10b-5 and 13b2-1;
- b) permanently enjoining Defendant from aiding and abetting any violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Exchange Act Rules 12b-20, 13a-1 and 13b2-2;
- c) ordering Defendant to provide a complete accounting for and to disgorge any and all compensation or economic benefit to which he was not entitled as a result of the conduct described herein, plus prejudgment interest thereon;
- d) ordering Defendant to pay a civil monetary penalty pursuant to Section 21(d)(3) of the Exchange Act in respect of his violations;
- e) prohibiting Defendant from acting as an officer or director of a public company for a period of five years from the date of entry of Final Judgment pursuant to Section 21(d)(2) of the Exchange Act; and
- f) granting such other relief as this Court may deem just and appropriate.

Dated: May 13 2008

Respectfully submitted,



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