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6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

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11 SECURITIES AND EXCHANGE COMMISSION, Case No.

12 Plaintiff,

13 v.

14 MARTIN JULIEN MARKS,

15 Defendant.

COMPLAINT FOR PERMANENT
INJUNCTION AND OTHER EQUITABLE
AND STATUTORY RELIEF

16
17 Plaintiff Securities and Exchange Commission (the "Commission") alleges:

18 SUMMARY OF THE ACTION

19 1. Martin Julien Marks, the former President and Chief Operating Officer of Cutter & Buck
20 Inc. ("Cutter" or the "Company"), a Seattle-based manufacturer of high-end sportswear, engaged in a
21 scheme to fraudulently inflate the Company's earnings and revenue for the fiscal year ended April 30,
22 2000. At Marks's urging, Cutter shipped \$5.7 million of goods to three distributors in the closing days of
23 the fiscal year. In fact, the distributors were acting only as warehouses for Cutter -- Cutter retained full
24 responsibility for finding customers to purchase the goods and the distributors had no ability or
25 obligation to pay Cutter unless and until customers were found.

26 2. In press releases and in filings signed by Marks filed with the Commission that were
27 distributed to the public, Cutter announced revenue of \$54.6 million for the fourth quarter of Fiscal
28 2000 and \$152.5 million for the entire fiscal year. However, because these amounts included

1 approximately \$5.7 million in improperly recognized revenue on the distributor sales, they overstated
2 Cutter's true quarterly and annual revenue by 12% and 4%, respectively. Marks knew or was
3 reckless in not knowing that it was improper for Cutter to recognize revenue for the distributor
4 shipments.

5 3. By the end of April 2001, when Cutter failed to find enough customers to purchase the
6 products from the three distributors, the distributors returned \$3.8 million in unsold goods to Cutter. In
7 order to conceal the improper distributor deals from the Company's auditors and shareholders, Marks,
8 along with Cutter's former Chief Financial Officer, agreed to divide the returns among several of Cutter's
9 product lines in the Company's financial records.

10 4. As a result of his conduct, Marks violated or aided and abetted Cutter's violations of the
11 antifraud and other provisions of the federal securities laws. The Commission seeks a court order
12 enjoining Marks from future violations of these provisions, requiring him to disgorge his unjust
13 enrichment as a result of Cutter's artificially inflated revenue, and prohibiting him from serving as an
14 officer or director of any publicly traded company.

15 JURISDICTION AND VENUE

16 5. The Commission brings this action pursuant to Section 21(d) of the Securities Exchange
17 Act of 1934 ("Exchange Act") [U.S.C. § 78u(d)]. This Court has jurisdiction over this action pursuant to
18 Section 27 of the Exchange Act [15 U.S.C. §§ 78aa].

19 6. Marks made use of the means and instrumentalities of interstate commerce, of the mails,
20 or of the facilities of a national securities exchange, in connection with the acts, practices, and courses of
21 business and transactions alleged herein.

22 7. This district is an appropriate venue for this action under Section 27 of the Exchange Act
23 [15 U.S.C. § 78aa]. Certain of the transactions, acts, practices and courses of business constituting the
24 violations alleged herein occurred within the Western District of Washington.

25 8. Assignment to the Court in Seattle is appropriate pursuant to Local Civil Rule 5(e)(1)
26 because Marks resides in Bellevue (King County), Washington.

27 THE DEFENDANT

1 9. Martin Julien Marks, age 55, resides in Bellevue, Washington. Marks was a certified
2 public accountant licensed to practice in the State of Oregon until his license lapsed in 1985. Marks
3 joined Cutter in 1991 and served as Chief Financial Officer until approximately 1997. Marks served as
4 President and COO from approximately 1997 until his resignation from the Company in April 2002.

5 THE COMPANY

6 10. Cutter & Buck Inc. is a Washington corporation headquartered in Seattle, Washington.
7 The Company designs and distributes upscale sportswear. The Company's common stock is registered
8 with the Commission pursuant to Section 12(g) of the Exchange Act, and has been quoted on the Nasdaq
9 Stock Market since the Company's 1995 initial public offering. Cutter operates on a fiscal calendar that
10 ends on April 30.

11 ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

12 A. The Improper Distributor Transactions

13 11. As it neared the close of its 2000 fiscal year (ended April 30, 2000), Cutter faced a
14 potential shortfall in revenue as its product sales declined. This shortfall was exacerbated by the
15 Company's practice of "early shipping." Since at least 1995, Cutter had a practice of shipping products
16 in advance of the shipment date requested by the customer as a means of accelerating revenue
17 recognition. By 2000, under Marks's direction, the practice had grown substantially, with the Company
18 "early shipping" several million dollars in products each quarter. As a consequence of essentially
19 borrowing from the next quarter's sales, Cutter began each quarter with a sales deficit. This was
20 particularly problematic going into the fourth quarter of fiscal year 2000.

21 12. Marks searched for alternatives to compensate for the expected revenue shortfall caused
22 at least in part by this early shipping practice. Marks identified expanding an existing distributor-
23 warehouse program, in which Cutter's sales personnel would send customer orders to a third-party
24 distributor for fulfillment, as one method of compensating for the revenue shortfall.

25 13. At Marks's urging, Cutter's regional sales vice president negotiated deals with three
26 distributors under which Cutter would ship them a total of \$5.7 million in products. Under the terms of
27 the deals, Cutter had sole responsibility for locating customers to purchase the goods for the three
28 distributors, and the distributors had no obligation to pay for the goods unless and until Cutter located the

1 customers. In addition, the distributors were not creditworthy and did not have the ability to pay for the
2 products. In effect, these distributors acted as warehouses for goods that had been consigned to them by
3 Cutter.

4 14. In the last days of Cutter's fiscal year, Cutter shipped approximately \$5.7 million of
5 goods to these distributors and recognized revenue for the shipments. In filings with the Commission
6 and statements to the public, the Company reported revenue of \$54.6 million for the fourth quarter and
7 \$152.5 million for the fiscal year.

8 15. Under GAAP, it was improper for Cutter to recognize revenue on the distributor
9 shipments because Cutter had a continuing obligation to find customers for the products. Revenue
10 recognition was also improper because the Company had no reasonable assurance that the distributors
11 would pay for the products since such payment was contingent on Cutter's ability to find customers for
12 the goods. By improperly including the distributor deals in its reported revenue, Cutter overstated its
13 revenue by approximately 12% for the fourth quarter and approximately 4% for the fiscal year.

14 16. Marks signed the Company's Form 10-K for the fiscal year ended April 30, 2000. The
15 Form 10-K included financial statements that were materially misleading because they included revenue
16 from the improper distributor deals. Marks knew or was reckless in not knowing that the financial
17 statements filed with the Commission and disseminated to the public were materially misleading.

18 B. Concealment of Product Returns

19 17. Cutter's sales force failed to deliver enough customers to the three distributors to fill the
20 orders and by late 2000 most of the inventory held by the distributors remained unsold. In accordance
21 with the agreements they had made with the Company, the distributors had paid Cutter only for the
22 products successfully sold to third party customers.

23 18. By late 2000, Marks knew that the distributors still held substantial inventory and had not
24 paid Cutter for the unsold goods. The Company's then-CFO sought to have the warehoused inventory
25 returned to the Company. Marks asked the CFO to conceal the returns in a manner that would hide them
26 from the Company's board of directors and independent auditors.

27 19. The \$5.7 million in revenue from the original sales to the distributors had been
28 recognized in the accounts of Cutter's corporate sales division. However, in order to conceal the large

1 return from the Company's board of directors and independent auditors, as well as its shareholders,
2 Marks asked the CFO to divide the returns in the Company's accounting records among the accounts of
3 multiple sales divisions.

4 20. Marks signed Cutter's Form 10-K for the fiscal year ended April 30, 2001. The Form
5 10-K included financial statements that were materially misleading because the returns were reversed out
6 of fiscal 2001 revenue when the false 2000 financial results should have been restated instead. In
7 addition, the returns had been improperly divided among multiple sales divisions rather than accounted
8 for solely in the corporate sales division. Marks knew or was reckless in not knowing that the financial
9 statements filed with the Commission and disseminated to the public were materially misleading.

10 21. In addition, Marks signed management representation letters to Cutter's independent
11 auditors in calendar year 2000 and 2001. These letters falsely stated, among other things, that all
12 material transactions in fiscal years 2000 and 2001 were properly recorded in Cutter's financial records,
13 and that no goods had been shipped on consignment. Marks knew or was reckless in not knowing that
14 these statements to the Company's auditors were false and misleading.

15 22. In or around late July 2002, following a change in management (including the April 2002
16 resignation of Marks), Cutter's new management learned about the improper distributor transactions.
17 The Company began an internal investigation in early August 2002. On August 12, 2002, the Company
18 announced that it would restate its financial statements for fiscal years 2000 and 2001. The
19 announcement caused Cutter's stock price to drop from \$4.02 to \$3.44, or 14%, the following day.

20 23. In October 2002, in its Form 10-K for the fiscal year ended April 30, 2002, the Company
21 restated its audited financial statements for fiscal years 2000 and 2001. The Company reported that the
22 restatement resulted from the improper recognition of revenue for shipments to distributors in April
23 2000, the improper accounting for the shipment returns in 2001, as well as from the Company's practice
24 of shipping products in advance of the customer's requested shipment date.

25 FIRST CLAIM FOR RELIEF

26 Violations of Section 10(b) of the Exchange Act and Rule 10b-5

27 24. The Commission realleges and incorporates by reference Paragraphs 1 through 23 above.

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2 25. During the relevant period, Marks, directly or indirectly, in connection with the purchase
3 or sale of securities, by the use of means or instrumentalities of interstate commerce, or of the mails, with
4 scienter:

5 (a) employed devices, schemes, or artifices to defraud,

6 (b) made untrue statements of material facts or omitted to state material facts
7 necessary in order to make the statements made, in the light of the circumstances under which
8 they were made, not misleading, or

9 (c) engaged in acts, practices, or courses of business which operated or would operate
10 as a fraud or deceit upon other persons, including purchasers and sellers of securities.

11 26. Marks has violated and, unless restrained and enjoined, will continue to violate Section
12 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 under the Exchange Act [17 C.F.R.
13 §240.10b-5].

14 SECOND CLAIM FOR RELIEF

15 Aided and Abetted Violations of Section 13(a)
16 of the Exchange Act and Rules 12b-20 and 13a-1

17 27. The Commission realleges and incorporates by reference Paragraphs 1 through 23 above.

18 28. Cutter filed with the Commission annual reports on Form 10-K for the fiscal years ended
19 April 30, 2000, and April 30, 2001, that contained untrue statements of material fact and omitted to state
20 material information required to be stated therein or necessary in order to make the required statements
21 made, in the light of the circumstances under which they were made, not misleading, in violation of
22 Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 under the Exchange
23 Act [17 C.F.R. §§ 240.12b-20 and 240.13a-1].

24 29. Marks knowingly provided substantial assistance to Cutter's violations of Section 13(a)
25 of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1 under the Exchange Act [17
26 C.F.R. §§ 240.12b-20 and 240.13a-1].

27 30. Marks aided and abetted, and unless restrained and enjoined, will continue to aid and
28 abet, violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-1
under the Exchange Act [17 C.F.R. §§ 240.12b-20 and 240.13a-1].

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2 THIRD CLAIM FOR RELIEF

3 Aided and Abetted Violations of Section 13(b)(2)(A) of the Exchange Act

4 31. The Commission realleges and incorporates by reference Paragraphs 1 through 23 above.

5 32. Cutter, by engaging in the conduct described above, failed to make and keep books,
6 records, and accounts, which, in reasonable detail, accurately and fairly reflected the transactions and
7 dispositions of the assets of the Company, in violation of Section 13(b)(2)(A) of the Exchange Act [15
8 U.S.C. § 78m(b)(2)(A)].

9 33. Marks knowingly provided substantial assistance to Cutter's violations of Section
10 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

11 34. Marks aided and abetted, and unless restrained and enjoined, will continue to aid and
12 abet, violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

13 FOURTH CLAIM FOR RELIEF

14 Aided and Abetted Violations of Section 13(b)(2)(B) of the Exchange Act

15 35. The Commission realleges and incorporates by reference Paragraphs 1 through 23 above.

16 36. Cutter, by engaging in the conduct described above, failed to devise and maintain a
17 system of internal accounting controls sufficient to provide reasonable reassurances that:

18 (a) transactions are executed in accordance with management's general or specific
19 authorization,

20 (b) transactions are recorded as necessary (i) to permit preparation of financial
21 statements in conformity with generally accepted accounting principles or any other criteria
22 applicable to such statements, and (ii) to maintain accountability for assets,

23 (c) access to assets is permitted only in accordance with management's general or
24 specific authorization; and

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

27 37. Marks knowingly provided substantial assistance to Cutter's violations of Section
28 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

1 38. Marks aided and abetted, and unless restrained and enjoined, will continue to aid and
2 abet, violations of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

3 SIXTH CLAIM FOR RELIEF

4 Violations of Section 13(b)(5) of the Exchange Act

5 39. The Commission realleges and incorporates by reference Paragraphs 1 through 23 above.

6 40. By engaging in the conduct described above, Marks knowingly circumvented or
7 knowingly failed to implement Cutter's system of internal accounting controls or knowingly falsified
8 Cutter's books, records and accounts in violation of Section 13(b)(5) of the Exchange Act [15 U.S.C. §
9 78m(b)(5)].

10 41. Marks has violated and, unless restrained and enjoined, will continue to violate Section
11 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)].

12 SEVENTH CLAIM FOR RELIEF

13 Violations of Rule 13b2-1 of the Exchange Act

14 42. The Commission realleges and incorporates by reference Paragraphs 1 through 23 above.

15 43. By engaging in the conduct described above, Marks falsified or caused to be falsified
16 Cutter's books, records and accounts in violation of Rule 13b2-1 under the Exchange Act [17 C.F.R. §
17 240.13b2-1].

18 44. Marks has violated and, unless restrained and enjoined, will continue to violate, Rule
19 13b2-1 under the Exchange Act [17 C.F.R. § 240.13b2-1].

20 EIGHTH CLAIM FOR RELIEF

21 Violations of Rule 13b2-2 of the Exchange Act

22 45. The Commission realleges and incorporates by reference Paragraphs 1 through 23 above.

23 46. By engaging in the conduct described above, and in connection with an examination of
24 the financial statements of Cutter and the preparation and filing of statements and reports with the
25 Commission, Marks, directly or indirectly, made or caused to be made materially false or misleading
26 statements to accountants and omitted to state, or caused another person to omit to state to accountants,
27 material facts necessary in order to make statements made to the accountants, in light of the
28 circumstances under which such statements were made, not misleading.

1 47. Marks has violated and, unless restrained and enjoined, will continue to violate, Rule
2 13b2-2 under the Exchange Act [17 C.F.R. §240.13b2-2].

3 P R A Y E R F O R R E L I E F

4 WHEREFORE, the Commission respectfully requests that this Court:

5 Enjoin Marks from violating, directly or indirectly, Sections 10(b) and 13(b)(5) of the Exchange
6 Act and Rules 10b-5, 13b2-1 and 13b2-2 under the Exchange Act, and from aiding and abetting
7 violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1
8 under the Exchange Act;

9 Order Marks to pay \$45,777 in disgorgement and prejudgment interest;

10 Bar Marks from serving as an officer or director of any entity having a class of securities
11 registered with the Commission pursuant to Section 12 of the Exchange Act [15 U.S.C. §78l] or that is
12 required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)];

13 Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules
14 of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be
15 entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of
16 this Court; and

17 Grant such other and further relief as this Court may determine to be just and necessary.

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19 Dated: December ____, 2004

Respectfully submitted,

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23 _____
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25 Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
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