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**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

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U.S. DISTRICT COURT
DISTRICT OF MASS.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Civil Action No.

- against -

WILLIAM ANTHONY DAY,

Defendant.

06 - 10202 RWZ

COMPLAINT

MAGISTRATE JUDGE JLA

Plaintiff Securities and Exchange Commission ("Commission" or "SEC") alleges:

SUMMARY

1. Defendant William A. Day engaged in illegal insider trading in the securities of Oratec Interventions, Inc. ("OTEC") in February 2002. On Thursday, February 14, 2002, London, England-based Smith & Nephew, plc. ("S&N") and OTEC publicly announced that they had entered into a definitive agreement for S&N to acquire all outstanding shares of OTEC through a tender offer of \$12.50 per share. Approximately twenty-four hours before the acquisition was publicly announced, Day made an anonymous posting on an internet message board dedicated to OTEC, the contents of which revealed that he possessed material, nonpublic information regarding the tender offer, including the name of the acquiring company, the price per share, the tender offer structure, and the offer announcement date. In addition, Day bought 12,000 shares of OTEC common stock on February 12 and 13, and sold these shares for a profit of \$42,631.90 on February 14, following the public announcement of the tender offer. After buying 10,000 shares of OTEC stock for his personal account on the afternoon of February 12,

Day placed telephone calls to three friends, each of whom then bought OTEC stock for the first time.

2. The source of Day's inside information, either directly or indirectly, was an employee (the "Employee") of S&N's Endoscopy Division, located in Andover, Massachusetts. The Employee's work at S&N afforded the Employee access to material, nonpublic information regarding the tender offer before it was publicly announced. Day and his wife were friends with the Employee, with whom they frequently socialized. Day placed calls to the Employee's work and home phone numbers in the minutes before he placed his first orders to buy OTEC shares on February 12. In addition, Day was a friend of the Employee's now-deceased father, with whom Day frequently discussed investments.

3. Day knew that the Employee worked at S&N, and he knew or had reason to know that any information he received from the Employee, either directly or indirectly through the Employee's father, regarding an acquisition of OTEC by S&N was nonpublic and came from an employee of the offering company. By trading on this information, Day violated Section 14(e) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 14e-3 thereunder. Accordingly, the Commission seeks: (i) entry of a permanent injunction prohibiting Day from further violations of Section 14(e) and Rule 14e-3 thereunder; (ii) disgorgement of Day's profits from his insider trading, plus prejudgment interest; and (iii) imposition of a civil monetary penalty.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to Sections 21(d)(1), 21(e), 21A(a)(1), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d)(1), 78u(e), 78u-1(a), and 78aa]. Many of the acts complained of herein occurred within the District of Massachusetts.

5. Day, directly or indirectly, used the means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange in connection with the conduct alleged in this Complaint.

6. Venue is appropriate in this District pursuant to Section 27 of the Exchange Act because Day transacts business in this District.

DEFENDANT

7. **William Anthony Day**, age 56, has his primary residence in Windham, New Hampshire. He owns and operates Day Associates, Inc., a distributor of electronics and biomedical supplies, which is located in Dracut, Massachusetts. At all relevant times, he also owned several rental properties in Dracut. Day is an experienced investor who, at all relevant times, executed his own securities trades through his online brokerage account at CSFB Direct LLC. Day placed his OTEC trades for his personal account online using the computer at his home in Windham.

OTHER RELEVANT ENTITIES

8. **Oratec Interventions, Inc.**, prior to being acquired by S&N in 2002, was a California-based medical devices company. During the relevant time period, OTEC's securities were registered with the Commission pursuant to Section 12(g) of the Exchange Act and listed on the NASDAQ National Market System.

9. **Smith & Nephew, plc.**, is a London, England-based medical devices company. S&N's securities are registered with the Commission pursuant to Section 12(b) of the Exchange Act and listed on the London and New York Stock Exchanges. During the relevant time period, S&N's Endoscopy Division, a part of S&N's United States subsidiary, Smith & Nephew, Inc., was located in Andover, Massachusetts, approximately thirteen miles from Dracut.

STATEMENT OF FACTS

I. Smith & Nephew's Tender Offer for Oratec

10. Between December 2001 and February 12, 2002, substantial steps had been taken toward commencing a tender offer by S&N for the securities of OTEC.

11. On December 7, 2001, S&N delivered to OTEC a letter indicating its interest in acquiring OTEC through a tender offer for all outstanding shares at \$12.50 per share, subject to completion of satisfactory due diligence and negotiation of mutually-acceptable terms. S&N requested that OTEC enter into an exclusivity agreement with S&N so that S&N could complete its due diligence investigation of OTEC. Thereafter, S&N and OTEC took substantial steps to negotiate and finalize the proposed transaction.

12. S&N and OTEC entered into an exclusivity agreement on December 19, 2001, pursuant to which OTEC agreed not to solicit, initiate, or encourage third party proposals to acquire OTEC. The companies thereafter conducted extensive due diligence and negotiations.

13. On February 6, 2002, the S&N board of directors was informed by company management that most outstanding issues had been resolved, and that S&N and OTEC intended to execute a final agreement on February 13.

14. On February 13, S&N's and OTEC's Boards of Directors voted to approve the acquisition of OTEC by S&N through a tender offer of \$12.50 per share of OTEC common stock.

15. The tender offer was publicly announced for the first time on the morning of February 14, 2002 at 2:07 a.m. ET, prior to the opening of the London stock markets.

II. Day's Pre-Announcement Message Board Posting Demonstrates That He Possessed Material, Nonpublic Information Regarding the Tender Offer

16. At 2:01 a.m. ET on Wednesday, February 13, 2002 – approximately twenty-four hours before the tender offer was publicly announced – Day made the following posting on the Yahoo! Finance message board dedicated to OTEC:

Be my valentine
by: auntbetty1234

Happy Valentine's Day to my Nephew Smitmie [sic]. He'll be 12 ½ on thursday [sic]. When I take him shopping, he just wants to buy-out everything in the store. He's so cute and much smarter than most.

Love,
Aunt Betty

17. In order to conceal his identity, Day created and used the alias, "auntbetty1234", instead of his normal Yahoo! user name, "billyboy1949us".

18. The obvious references in the posting to Smith & Nephew ("Nephew Smitmie"), the existence and exact price of the cash tender offer ("buy-out everything"; "12 ½"), and the correct date of the acquisition ("Thursday"; "Valentine's Day") show that Day possessed material, nonpublic information regarding the tender offer at the time he made the posting.

III. Day's Trading of Oratec Stock

19. During the afternoon of February 12, 2002, hours before he made the posting, Day placed on-line orders to purchase 10,000 shares of OTEC common stock for his personal account at CSFB Direct LLC. This was the first time Day purchased OTEC stock.

20. The following day, Day purchased another 2,000 shares of OTEC common stock for the profit sharing plan of Day Associates, Inc. through an account that he controlled at First Union Securities, Inc.

21. At the time of his purchases, S&N's tender offer for OTEC had not been publicly disclosed.

22. Day sold the positions in OTEC on February 14, following the public announcement of the tender offer, for a combined profit of \$42,631.90.

IV. Day knew or had reason to know that the material nonpublic information in his possession came from an employee of a party to the tender offer

23. Day and his wife are longtime friends of the Employee, who at all relevant times was an employee of S&N's Endoscopy Division. At all relevant times, Day knew that the Employee worked at S&N.

24. By virtue of the Employee's position as an S&N employee, the Employee had access to nonpublic information regarding the acquisition.

25. Day placed several calls to the Employee before he bought OTEC. On Saturday, February 9, he placed a ninety second call to the Employee's home number at 2:37 p.m. and a twenty-four second call to the Employee's home number at 2:39 p.m.

26. On Tuesday, February 12, Day placed brief calls to the Employee's work and home phone numbers minutes before placing his online orders to purchase OTEC:

2:16 p.m. – Day places 30 second call to the Employee's work number at S&N.

2:19-2:24 p.m. – Day buys 5,000 shares of OTEC.

2:28 p.m. – Day places 42 second call to the Employee's home number.

2:32 p.m. – Day buys 5,000 shares of OTEC.

27. Day also was a friend of the Employee's father. Day and the Employee's father saw each other frequently during their daily routines and often discussed investments.

28. The Employee had a close relationship with the Employee's father and spoke to him almost every day, including on February 12 and February 13.

29. At the time he purchased OTEC, Day possessed material, non-public information regarding S&N's tender offer for OTEC that he learned either directly from the Employee or indirectly through the Employee's father.

30. Because Day knew that the Employee worked at S&N, he knew or had reason to know that any information regarding an acquisition of OTEC by S&N that he received from the Employee, either directly or indirectly through the Employee's father, came from an employee of the offering company.

31. Because Day knew at the time of his trading that the tender offer had not been publicly announced, he knew or had reason to know the information was nonpublic.

CLAIM FOR RELIEF

**[Insider Trading in Violation of Section 14(e) of the
Exchange Act and Rule 14e-3 Promulgated Thereunder]**

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

33. By February 12, 2002, substantial steps had been taken to commence a tender offer for the securities of OTEC by S&N, including, among others: (1) S&N and OTEC entered into an exclusivity agreement on December 19, 2001, pursuant to which OTEC agreed not to solicit, initiate, or encourage third party proposals to acquire OTEC; (2) the companies thereafter conducted extensive due diligence and negotiations; (3) on February 6, 2002, the S&N board of directors was informed by company management that most outstanding issues had been resolved, and that S&N and OTEC intended to execute a final agreement on February 13.

34. At the time Day purchased OTEC stock on February 12 and February 13, 2002, he was in possession of material information regarding the tender offer for OTEC securities by S&N, which he knew or had reason to know was nonpublic, and which he knew or had reason

to know was acquired directly or indirectly from an officer, director, partner, or employee or other person acting on behalf of the offering company.

35. By reason of the foregoing, Day violated Section 14(e) of the Exchange Act and Rule 14e-3 thereunder.

PRAYER FOR RELIEF

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

- A. Permanently enjoining Day from engaging, directly or indirectly, in violations of Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3 thereunder [17 C.F.R. § 240.14e-3];
- B. Ordering Day to disgorge ill-gotten gains received from illegal trades made or directed by Day, plus prejudgment interest thereon;
- C. Ordering Day to pay an appropriate civil monetary penalty pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]; and
- D. Awarding such other and further relief as this Court may deem just and appropriate.

Date: January 31, 2006

Of Counsel:
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Respectfully submitted,



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