

The Hound of the Baskervilles - Questions, Questions and More Questions for Wal-Mart

We continue our week of exploration of all things Sherlock Holmes in honor of his 125th anniversary last week by taking a look at my favorite Holmes novel “*The Hound of the Baskervilles*”. It is the third of four crime novels by Sir Arthur Conan Doyle featuring the detective Sherlock Holmes. The book was originally serialized in *The Strand Magazine* from August 1901 to April 1902. In 2003 the book was listed on the BBC's *The Big Read* poll of the UK's best-loved novel. I have read the novel and seen almost all of the available movie and television adaptations. I love the Basil Rathbone version, in eerie black and white, but the Hammer version starring Peter Cushing is actually more faithful to the original text. The story is set largely on Dartmoor in Devon in England's West Country and tells the story of an attempted murder inspired by the legend of a fearsome, diabolical hound. And for every stone that Holmes overturns to try and solve the mystery another question arises.

I thought about this novel in the context of the recent news comings and goings of Wal-Mart and its ongoing Foreign Corrupt Practices Act (FCPA) imbroglio. As reported by the FCPA Blog, in an article entitled “*Wal-Mart's latest FCPA disclosure (November 2012)*”, the company disclosed in its Form 8-K filed with the Securities and Exchange Commission (SEC) on November 15, 2012 that its internal investigation of its foreign subsidiaries had expanded into “Brazil, China and India.” It was not clear from its 8-K filing whether this was the internal investigation initiated after the New York Times (NYT) April 22 story about allegations of corruption and bribery coming out of its Mexico subsidiary or if this was a part of the investigation began in spring 2011 as a relatively routine audit of how well its foreign subsidiaries were complying with its anti-corruption policies.

In a very interesting development, as reported by the FCPA Professor Mike Koehler in a blog, entitled “*New Wal-Mart Details Emerge*”, where he cited back to a NYT article that “Wal-Mart's internal review began in Spring 2011 when Jeffrey Gearhart (Wal-Mart's general counsel) learned of an FCPA enforcement action against Tyson Foods. According to the NYT article, “the audit began in Mexico, China and Brazil, the countries Wal-Mart executives considered the most likely source of problems” and Wal-Mart hired KPMG and Greenberg Traurig LLP to conduct the audit. The NYT article notes that “in July 2011” the firms “had identified significant weaknesses in all three subsidiaries.”

The NYT article went on to state that an un-named Wal-Mart official said that “It was clear that they were not executing” or following Wal-Mart's internal protocols for performance of due diligence on third parties and FCPA compliance training. Further, the problems unearthed in this internal investigation were serious enough to merit an increase in scope “to expand the audit to all 26 of its foreign subsidiaries.” Then in the fall of 2011, Wal-Mart discovered that the NYT was investigating the company over allegations of bribery and corruption in its Mexico subsidiary and “Wal-Mart's response in 2005 to serious and specific accusations of widespread bribery by Wal-Mart de Mexico, the company's largest foreign subsidiary.” This new allegation

led Wal-Mart to hire another law firm, Jones Day, “to investigate whether top executives had quashed the company’s investigation into the lawyer’s claims.” The company began to look into other specific accusations of wrongdoing, both in Mexico and its other subsidiaries. This “effectively created two lines of inquiry — the first being the global compliance review begun by Greenberg Traurig and KPMG. The second was the internal inquiry into specific accusations of bribery and corruption.”

Last Friday, an article in the Chicago Tribune, entitled “*Wal-Mart India unit suspends CFO, others pending probe*”, reported that the company had “suspended its chief financial officer and other employees as it investigates alleged violations of U.S. anti-bribery laws”. In addition to the Chief Financial Officer (CFO), who doubled up as the firm's acting legal counsel, those suspended included a senior manager, manager, assistant manager and retainer. “The five, whose job was to procure licenses required for stores and other real estate approvals, taxation and logistics, were told not to attend office until the FCPA-related investigations were over, said one of the persons asking not to be named.”

This investigation was being led by Greenberg Traurig. In the Tribune article, the FCPA Professor was quoted as saying, “Suspensions are common in situations like this. Companies that are under FCPA scrutiny want to demonstrate to enforcement agencies that upon learning of improper conduct, they took effective remedial measures,” said Koehler. “Part of doing that is to isolate current employees from their positions, so that any improper conduct does not continue.” Further, the Professor stated that “If any alleged improper conduct occurred, then the suspensions by Wal-Mart “will serve it well in the eyes of enforcement agencies” such as the Department of Justice and the Securities and Exchange Commission, in deciding how to resolve the broader case.”

An interesting perspective was presented by Sonia Jaspal in her blog RiskBoard, in a post entitled “*Bharti Walmart India – Internal FCPA Investigation*”. Jaspal posed some interesting and difficult questions relating to the difficulty of doing business in India without paying bribes. She stated, “The Retail Association of India lists 51 different approvals from 32 different agencies. Seeing the corruption index of India and the way government departments’ function, I would be very surprised if an organization manages to obtain all the relevant licenses without any grease payments. *Hence, the question is how will the organizations manage to function without paying bribes?*” She went on to ask “What happens in such a case to the license? Will the license be revoked, cancelled, or returned? If not, what is stopping the organizations from first taking the licenses by paying bribes and then doing a clean-up exercise to show their commitment to ethics?”

These are all serious and difficult questions for Wal-Mart, its Indian subsidiary and many others to answer. But as Holmes, through his dogged pursuit, was able to finally overcome the mystery of the Hound of the Baskervilles, perhaps someday these questions posed herein may become close to being resolved.

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