

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE BATTS

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:
UNITED STATES OF AMERICA :
:
-v.- :
:
JOHN KINNUCAN, :
:
Defendant. :
:
----- X

INDICTMENT

12 CRIM 163

USDC SDNY
DOCUMENT
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DOC #:
DATE FILED: **FEB 21 2012**

COUNT ONE

(Conspiracy to Commit Securities Fraud)

The Grand Jury charges:

Relevant Entities

1. At all times relevant to this Indictment, Broadband Research, LLC ("Broadband Research") was an investment research firm located in Portland, Oregon.

2. Broadband Research purported to provide investment research services to its clients (collectively, "BBR Clients"), in exchange for a quarterly retainer fee of thousands of dollars per client. BBR Clients were money managers, including hedge funds, located throughout the United States, including in New York, New York, whose principal purpose was to purchase and sell securities for profit. In exchange for the services offered by Broadband Research, BBR Clients made payments of tens of thousands of dollars to Broadband Research directly, as well as indirectly through soft-dollar payments, which are payments directed to the Consultant by BBR Clients through trading

activity.

3. At all times relevant to this Indictment, Hedge Fund A was an investment firm with its headquarters and principal place of business located in Texas. At all times relevant to this Indictment, Hedge Fund A was a BBR Client and paid Broadband Research a quarterly consulting fee of approximately \$10,000.

4. At all times relevant to this Indictment, Hedge Fund B was an investment firm located in Menlo Park, California. At all times relevant to this Indictment, Hedge Fund B was a BBR Client and paid Broadband Research a quarterly consulting fee of approximately \$20,000.

5. At all times relevant to this Indictment, F5 Networks, Inc. ("F5") was a technology company that specialized in providing a platform of technologies that improve computer network security, speed, and availability. F5 was headquartered in Seattle, Washington, and was listed on the Nasdaq Stock Market (ticker symbol: FFIV). Furthermore, at all times relevant to this Indictment, F5's policies prohibited the unauthorized disclosure of F5's confidential information by F5 employees.

6. At all times relevant to this Indictment, SanDisk Corporation ("SanDisk") was a manufacturer of flash memory headquartered in Milpitas, California, and was listed on the Nasdaq Stock Market (ticker symbol: SNDK). Furthermore, at all times relevant to this Indictment, SanDisk's policies prohibited

the unauthorized disclosure of SanDisk's confidential information by SanDisk employees.

7. At all times relevant to this Indictment, Flextronics International, Ltd. ("Flextronics") was a technology company that designed, engineered and manufactured electronics products for a wide array of business sectors, including technology companies. Flextronics was headquartered in Changi, Singapore, and San Jose, California, and was listed on the Nasdaq Stock Market (ticker symbol: FLEX). At all times relevant to this Indictment, Flextronics supplied certain electronic components to Apple, Inc., including camera and charger components that Apple used for its "iPhone" cellular telephones and "iPod" portable media players. Furthermore, at all times relevant to this Indictment, Flextronics' policies prohibited the unauthorized disclosure of Flextronics' confidential information by Flextronics employees.

8. At all times relevant to this Indictment, Apple, Inc. ("Apple") was a technology company that produced, among other things, consumer electronics. Apple, headquartered in Cupertino, California, was listed on the Nasdaq Stock Market (ticker symbol: AAPL).

9. At all times relevant to this Indictment, OmniVision Technologies, Inc. ("OmniVision"), was a technology company that supplied Flextronics and other companies with

sensors for the manufacture of camera modules for various Apple products, among other things. OmniVision, headquartered in Santa Clara, California, was listed on the Nasdaq Stock Market (ticker symbol: OVTI).

Relevant Individuals

10. At all times relevant to this Indictment, JOHN KINNUCAN, the defendant, was the President of Broadband Research.

11. On behalf of Broadband Research, JOHN KINNUCAN, the defendant, entered into consulting agreements with, and made representations to, certain BBR Clients, in which KINNUCAN agreed not to obtain or disseminate material non-public information with respect to any publicly-traded company, not to rely on employees at public companies as sources of information, and not to make any payments to third parties or public company employees in furtherance of Broadband Research's services.

12. At all times relevant to this Indictment, a co-conspirator not named as a defendant herein worked as a business development manager at F5 (the "F5 Insider"), and was prohibited from disclosing F5's confidential information without authorization.

13. At all times relevant to this Indictment, a co-conspirator not named as a defendant herein worked as a Senior Director of Business Development at Flextronics (the "Flextronics Insider"), and was prohibited from disclosing Flextronics'

confidential information without authorization.

14. At all times relevant to this Indictment, a co-conspirator not named as a defendant herein worked as a senior director at SanDisk (the "SanDisk Insider"), and was prohibited from disclosing SanDisk's confidential information without authorization.

The Scheme To Defraud

15. From at least in or about 2008, up to and including in or about 2010, JOHN KINNUCAN, the defendant, along with co-conspirators who were employed at publicly-traded companies (the "Public Company Sources"), and others known and unknown, participated in a scheme to defraud certain public companies of material, non-public information (the "Inside Information"), in breach of the Public Company Sources' duties of trust and confidence to the public companies that employed them.

16. In furtherance of the conspiracy, and in order to develop and maintain a network of Public Company Sources, JOHN KINNUCAN, the defendant, befriended public company employees and provided them with certain monetary and non-monetary consideration. The Public Company Sources that KINNUCAN cultivated to provide him with Inside Information included the F5 Insider, the Flextronics Insider, and the SanDisk Insider, as described in greater detail below.

17. For example, JOHN KINNUCAN, the defendant, offered to pay the Flextronics Insider and other employees at publicly-traded companies thousands of dollars in exchange for Inside Information about publicly-traded companies. KINNUCAN also invested thousands of dollars in a business venture founded by the SanDisk Insider. In addition to direct payments from KINNUCAN and Broadband Research, KINNUCAN also provided other forms of consideration to the Public Company Sources, including paying for their meals at high-end restaurants and shipping them expensive food, providing them confidential information about other technology companies and industry trends, and providing them stock trading advice and tips.

18. The Inside Information that the Public Company Sources provided to JOHN KINNUCAN, the defendant, was obtained by KINNUCAN in violation of: (i) fiduciary and other duties of trust and confidence the Public Company Sources owed to their employers; (ii) expectations of confidentiality held by the publicly-traded companies at which the Public Company Sources were employed; and (iii) written policies of the public companies regarding the use and safekeeping of confidential information.

19. As JOHN KINNUCAN, the defendant, well knew, the Inside Information he obtained from the Public Company Sources was obtained in breach of the duties each Public Company Source owed to his or her respective employer. Nonetheless, KINNUCAN

provided the Inside Information he obtained from the Public Company Sources to certain BBR Clients, and made trading recommendations to numerous BBR Clients based, in whole or in part, on that Inside Information. KINNUCAN understood that the Inside Information he provided to BBR Clients would be used by BBR Clients for the purpose of executing and causing others to execute securities transactions based, in whole or in part, on the Inside Information.

20. In furtherance of the conspiracy, and in order to attract and retain BBR Clients willing to pay consulting fees to Broadband Research, JOHN KINNUCAN, the defendant, made numerous misrepresentations to BBR Clients and prospective BBR Clients. For example, KINNUCAN advised certain BBR Clients that (i) none of the information KINNUCAN obtained was provided by an employee at a public company; (ii) KINNUCAN did not pay any of his sources for their information; and (iii) the research practices of Broadband Research and the information KINNUCAN obtained from his sources had been reviewed and approved by compliance attorneys at a law firm in San Francisco (the "Law Firm").

21. Specifically, in or about September 2010, JOHN KINNUCAN, the defendant, signed a letter in which he represented to the compliance department of Hedge Fund A that "[n]o industry contacts of [Broadband Research] work for a public company on which [Broadband Research] provides research"; that Broadband Research "does not pay any compensation to its industry

contacts"; and that Broadband Research "has procedures in place to ensure compliance with . . . U.S. securities laws" and these procedures were reviewed with outside legal counsel. In reality, as KINNUCAN also well knew, KINNUCAN obtained Inside Information from numerous Public Company Sources, several of whom received payments or other non-monetary compensation from KINNUCAN. In addition, and as KINNUCAN well knew, the Law Firm that KINNUCAN identified as conducting his compliance review never vetted any of Broadband Research's business practices and never conducted any compliance review for KINNUCAN or Broadband Research.

KINNUCAN Obtains Inside Information From the F5 Insider

22. At various times relevant to this Indictment, JOHN KINNUCAN, the defendant, sought from the F5 Insider non-public and confidential information about F5's quarterly financial earnings results, financial guidance, and other material business developments of F5. As a result of the friendship that KINNUCAN cultivated with the F5 Insider, on multiple occasions in 2009 and 2010, the F5 Insider provided KINNUCAN with, among other information, company-wide revenue results in advance of F5's quarterly earnings announcements.

23. For example, in or about late June 2010 and early July 2010, JOHN KINNUCAN, the defendant, repeatedly sought from the F5 Insider an update about F5's quarterly earnings results for the quarter ending on June 30, 2010. In a telephone call on July 2, 2010, at approximately 9:46 a.m., KINNUCAN informed the

F5 Insider that the earnings guidance F5 previously provided was \$220 million. The F5 Insider then told KINNUCAN that the F5 Insider "saw the number" and that the company's unadjusted revenue number was "\$232 million," confirming that F5 was going to beat Wall Street's consensus estimates for F5. In the same telephone call, the F5 Insider provided KINNUCAN with updates regarding F5's sales to certain significant customers, confirming that F5's sales were increasing.

24. Within minutes of the July 2, 2010 conversation with the F5 Insider, JOHN KINNUCAN, the defendant, called numerous BBR Clients to provide them the F5 Inside Information he had just received from the F5 Insider, informing BBR Clients that F5 would have a strong quarter and "can print and guide whatever they [F5] choose" -- meaning that F5 likely would announce earnings for the current quarter and guidance for the next quarter above analysts' expectations.

25. After receiving the F5 Inside Information from JOHN KINNUCAN, the defendant, multiple BBR Clients executed securities transactions in F5, in whole or in part, based on KINNUCAN's Inside Information. For example, in the morning hours of July 2, 2010, shortly after receiving F5 Inside Information from JOHN KINNUCAN, the defendant, a portfolio manager at Hedge Fund B covered a short position in F5 prior to the quarterly earnings announcement. As a result, Hedge Fund B avoided losses of more than \$630,000.

26. Similarly, on or about July 21, 2010, a portfolio manager at Hedge Fund A caused Hedge Fund A to purchase approximately 99,000 shares of F5 based, in whole or in part, on KINNUCAN's Inside Information regarding F5. Hedge Fund A earned over \$952,000 in profit as a result of trading in F5 after receiving KINNUCAN's Inside Information.

27. F5's earnings results surpassed analysts' expectations. On July 21, 2010, following the close of trading, F5 announced its financial results for the quarter ending on June 30, 2010. Specifically, F5 reported having earned revenues of \$230.5 million for the quarter. The following trading day, the price of F5 stock sharply increased.

28. In providing this and other F5 information to BBR Clients, JOHN KINNUCAN, the defendant, often misled BBR Clients about the source of the F5 information, falsely informing BBR Clients that the information was obtained from "resellers" and other "third party channels" -- not from an employee at F5 -- even though KINNUCAN knew full well that his F5 information came directly from the F5 Insider.

KINNUCAN Obtains Inside Information From The Flextronics Insider

29. In or about 2008, soon after JOHN KINNUCAN, the defendant, met the Flextronics Insider, KINNUCAN offered to pay the Flextronics Insider \$10,000 per quarter in return for non-public and confidential information about Flextronics and various of its customers and suppliers. The Flextronics Insider agreed

to the proposal and, thereafter, KINNUCAN frequently sought and obtained confidential information and Inside Information from the Flextronics Insider.

30. Thereafter, the Flextronics Insider periodically provided JOHN KINNUCAN, the defendant, with, among other things, Flextronics' monthly sales and forecasts for certain Apple products, and provided KINNUCAN with non-public and confidential information about new product developments at Apple. As the Flextronics Insider well knew, disclosure of these confidential details regarding Apple violated both the non-disclosure agreement Flextronics had signed with Apple and his duties of confidentiality to Flextronics.

31. In addition, as part of his employment at Flextronics, the Flextronics Insider obtained and provided to JOHN KINNUCAN, the defendant, confidential information and Inside Information about OmniVision's unit sales, shipment numbers, and sales forecasts for OmniVision's camera sensors to Apple. The Flextronics Insider knowingly provided such information to KINNUCAN in breach of his duties of confidentiality and loyalty.

32. In total, from in or about 2008 through in or about 2010, JOHN KINNUCAN, the defendant, paid the Flextronics Insider approximately \$27,500 for confidential information and Inside Information from the Flextronics Insider.

KINNUCAN Obtains Inside Information From The SanDisk Insider

33. At various times relevant to this Indictment, JOHN KINNUCAN, the defendant, sought and obtained from the SanDisk Insider non-public and confidential information, including, among other things, information about SanDisk's revenues and sales.

34. For example, on or about July 21, 2010, the SanDisk Insider informed JOHN KINNUCAN, the defendant, over the telephone that SanDisk's anticipated earnings for the year would be approximately \$4.95 billion. At the time, this information was not public and the SanDisk Insider was required to maintain it in strict confidence.

35. Moreover, on or about September 10, 2010, the SanDisk Insider told JOHN KINNUCAN, the defendant, about certain confidential negotiations over a legal dispute between SanDisk and Apple that were expected to be finalized within 6 weeks, and expected to be positive for SanDisk's business. The SanDisk Insider explained that once finalized, SanDisk would have to file a Form 8-K with the U.S. Securities and Exchange Commission to disclose material corporate events to shareholders and the public. KINNUCAN thanked the SanDisk Insider and stated that he would be "very thoughtful and circumspect" with the information. Shortly after his September 10, 2010 conversation with the SanDisk Insider, KINNUCAN contacted several BBR Clients and advised them against short selling SanDisk stock for the next six weeks.

The Conspiracy

36. From at least in or about 2008 through in or about 2010, in the Southern District of New York and elsewhere, JOHN KINNUCAN, the defendant, certain Public Company Sources, and others known and unknown, willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.

Object of the Conspiracy

37. It was a part and an object of the conspiracy that JOHN KINNUCAN, the defendant, certain Public Company Sources, and others known and unknown, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by: (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material fact and 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; and

(c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon any person, all in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.

Means and Methods of the Conspiracy

38. Among the means and methods by which JOHN KINNUCAN, the defendant, and his co-conspirators would and did carry out the conspiracy were the following:

a. KINNUCAN sought and obtained confidential information, including Inside Information, from Public Company Sources that had been disclosed and/or misappropriated in violation of the Public Company Sources' fiduciary and other duties of trust and confidence.

b. In order to develop and maintain a network of Public Company Sources, KINNUCAN befriended public company employees and offered to provide certain Public Company Sources with consulting fees and/or other non-monetary consideration.

c. Having obtained Inside Information from Public Company Sources, KINNUCAN then provided that Inside Information to BBR Clients, via telephone and interstate wire, understanding that the BBR Clients would use such Inside Information for purposes of executing securities transactions.

d. In order to attract and retain BBR Clients, and in an effort to hide the true identity of his Public Company

Sources, KINNUCAN lied to BBR Clients and prospective BBR Clients about the sources of his Inside Information, including by stating that none of his sources was employed at a public company.

Overt Acts

39. In furtherance of the conspiracy, and to effect the illegal object thereof, JOHN KINNUCAN, the defendant, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. On or about May 20, 2010, KINNUCAN had a telephone conversation with the Flextronics Insider, during which the Flextronics Insider provided KINNUCAN with Inside Information concerning OmniVision's sales figures for the prior fiscal year and the next fiscal year.

b. On or about July 2, 2010, KINNUCAN had a telephone conversation with the F5 Insider, during which the F5 Insider provided KINNUCAN with Inside Information concerning F5's quarterly earnings results.

c. On or about July 2, 2010, KINNUCAN called multiple BBR Clients, several of whom were located in New York, New York, and provided them with F5 Inside Information.

d. On or about July 15, 2010, KINNUCAN called a portfolio manager at Hedge Fund A, who was located in New York, New York, during which KINNUCAN referenced the F5 Inside Information that he had provided on an earlier occasion.

e. On or about July 21, 2010, a portfolio manager located in New York, New York caused Hedge Fund A to purchase approximately 99,000 shares of F5.

f. On or about September 10, 2010, KINNUCAN had a telephone conversation with the SanDisk Insider, during which the SanDisk Insider provided KINNUCAN with SanDisk Inside Information concerning confidential negotiations between SanDisk and Apple.

(Title 18, United States Code, Section 371.)

COUNT TWO

(Conspiracy to Commit Wire Fraud)

The Grand Jury further charges:

40. The allegations contained in paragraphs 1 through 35, 38, and 39 are repeated and realleged as though fully set forth herein.

41. From in or about 2008 through in or about 2010, in the Southern District of New York and elsewhere, JOHN KINNUCAN, the defendant, and others known and unknown, willfully and knowingly combined, conspired, confederated, and agreed together and with each other to commit an offense against the United States of America, to wit, wire fraud, in violation of Title 18, United States Code, Section 1343.

42. It was a part and an object of the conspiracy that JOHN KINNUCAN, the defendant, willfully and knowingly, having

devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, pictures and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343.

Means and Methods of the Conspiracy

43. Among the means and methods by which JOHN KINNUCAN, the defendant, and his co-conspirators would and did carry out the conspiracy were the same means and methods set forth above in paragraph 38 of Count One of this Indictment.

Overt Acts

44. In furtherance of the conspiracy and to effect the illegal object thereof, JOHN KINNUCAN, the defendant, and others known and unknown, committed the same overt acts set forth above in paragraph 39 of Count One of this Indictment, among others, in the Southern District of New York and elsewhere.

(Title 18, United States Code, Section 1349.)

COUNTS THREE AND FOUR

(Securities Fraud)

The Grand Jury further charges:

45. On or about the dates set forth below, in the Southern District of New York and elsewhere, JOHN KINNUCAN, the defendant, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and 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; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon persons, to wit, KINNUCAN caused Hedge Fund A and Hedge Fund B to execute the securities transactions listed below based, in whole or in part, on material, non-public information:

<u>COUNT</u>	<u>BBR CLIENT</u>	<u>DATE</u>	<u>SECURITY</u>	<u>TRANSACTION</u>
THREE	Hedge Fund B	July 2, 2010	FFIV	purchase of 43,100 shares of common stock
FOUR	Hedge Fund A	July 21, 2010	FFIV	purchase of 99,000 shares of common stock

(Title 15, United States Code, Sections 78j(b) & 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2.)

FORFEITURE ALLEGATION

46. As a result of committing one or more of the foregoing securities and wire fraud offenses alleged in Counts One through Four of this Indictment, JOHN KINNUCAN, the defendant, shall forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(c) and Title 28, United States Code, Section 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the securities and wire fraud offenses, including but not limited to a sum of money in United States currency which was derived from proceeds traceable to the commission of the wire fraud and securities fraud offenses.

Substitute Assets Provision

47. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited

with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendant up to the value of the forfeitable property described above.

(Title 18, United States Code, Section 981; Title 28, United States Code, Section 2461; Title 18, United States Code, Sections 371, 1349 and 2; Title 15, United States Code, Sections 78j(b) and 78ff; and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.)

Forej


PREET BHARARA (MPB)
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

JOHN KINNUCAN,

Defendant.


INDICTMENT

(18 U.S.C. §§ 2, 371, 1349; Title 15,
United States Code, Sections 78j(b) &
78ff; Title 17, Code of Federal
Regulations, Section 240.10b-5)

PREET BHARARA
United States Attorney.

A TRUE BILL

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2-21-12
 Filed Indictment. Case assigned to J. Batts.
Maas
U.S.M.J