FILED
CHARLOTTE, NC

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US DISTRICT COURT
WESTERN DISTRICT OF NC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA v. **(1) MICHAEL KIPP** **(2) JOANNE VIARD**	)	DOCKET NO. 3:15cr244-MOC **BILL OF INDICTMENT** Violations: 15 U.S.C. § 78j(b) 15 U.S.C. § 78m 15 U.S.C. § 78ff 18 U.S.C. § 371 18 U.S.C. § 1343 18 U.S.C. § 1344 18 U.S.C. § 1349 18 U.S.C. § 1512(b)(3)

THE GRAND JURY CHARGES:

At the specified times and at all relevant times:

Relevant Entities and Individuals

1. Swisher Hygiene Inc. ("Swisher" or the "Company"), a co-conspirator unindicted herein, is a Delaware corporation with its headquarters and principal place of business in Charlotte, North Carolina. Swisher is a leading provider of hygiene and sanitation solutions throughout North America and internationally. Swisher is a publicly traded corporation, the Class A common stock of which has been listed since February 2, 2011 on the NASDAQ Stock Market LLC ("NASDAQ") under the ticker symbol "SWSH." Swisher's shareholders are located throughout the United States, including in the Western District of North Carolina.

2. DEFENDANT MICHAEL KIPP was Swisher's Chief Financial Officer (CFO) and a member of its executive management team. KIPP'S primary responsibilities included, among other things, directing, managing, and controlling the accounting and finance functions of the Company and preparing, filing, and signing the Company's financial statements with the United States Securities and Exchange Commission ("SEC").

3. DEFENDANT JOANNE VIARD was a certified public accountant and served as Swisher's Director of External Reporting. VIARD's responsibilities included, among other things, assisting with the accounting close process, providing technical accounting advice and guidance in conformity with Generally Accepted Accounting Principles ("GAAP") to other accounting personnel, and preparing and coordinating the filing of financial statements with the SEC.

4. John Pierrard, a co-conspirator unindicted herein, joined Swisher in 2011 as Director of Financial Planning and Analysis. Pierrard held various positions while at Swisher and was a senior level employee in the accounting department.

5. Employee D joined Swisher as Corporate Controller in July 2011. Employee D was a certified public accountant. In or about January 2012, KIPP directed Employee D to make fraudulent accounting entries in Swisher's books and records. Employee D refused. KIPP then fired Employee D.

6. Employee E, a co-conspirator unindicted herein, joined Swisher in or about May 2011 as a Division Level CFO. Employee E was a certified public accountant.

7. Wells Fargo Bank, N.A. ("Wells Fargo") is a financial institution the deposits of which are insured by the FDIC. In or about March 2011, Swisher entered into a $100 million senior secured credit facility (hereinafter "Credit Facility") with Wells Fargo. In or about September 2011, Swisher sought additional money from Wells Fargo to conduct a large acquisition (hereinafter "Acquisition A"). Swisher was required to provide a variety of financial information to Wells Fargo in connection with securing money for both the Credit Facility and Acquisition A, as well as maintaining access to the Credit Facility.

Requirements of Swisher as a Public Company

8. As a public company, Swisher is required to comply with the rules and regulations of the SEC. The SEC's rules and regulations are designed to protect members of the investing public by, among other things, ensuring that a company's financial information is accurately recorded and disclosed to the investing public.

9. As a public company, Swisher is required to file with the SEC quarterly reports (on Form 10-Q) and annual reports (on Form 10-K) that included financial statements that accurately presented Swisher's financial condition and the results of its business operations.

10. Under the SEC's rules and regulations, Swisher and its officers were also required to (a) make and keep books, records and accounts that, in reasonable detail, fairly and accurately reflect the Company's business transactions; and (b) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that the Company's transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP.

11. As a public company, Swisher is also required to have an outside auditor conduct annual audits and quarterly reviews of the Company's financial statements. Swisher's outside auditor at all relevant times was BDO Seidman, LLP ("BDO").

Swisher's Financial Reporting

12. Swisher, like other publicly traded companies, reported the financial results of its operations in financial statements that included, among other things, a Balance Sheet and an Income Statement. The Balance Sheet represents a company's net worth, whereas the Income Statement represents the company's profits or losses. A company's Balance Sheet is a statement

of the assets, liabilities, and capital of a business at a particular point in time. A company's Income Statement reports, among other things, revenue recognized, expenses incurred, and net income or loss during a stated period of time, usually a fiscal quarter or a fiscal year. Within an Income Statement, expenses are subtracted from revenues to calculate net income or loss.

13. One type of expense reflected in Swisher's Income Statement was what is commonly known as a reserve. The accounting rules provided in relevant sum and substance that reserves and contingencies shall be accrued if the relevant contingency is probable and the amount of the loss could be reasonably estimated. Such accruals and disclosures of accruals should be based on an "evaluation of the facts [about the contingency] in each particular case."

14. Swisher had reserves for multiple contingencies, including workers compensation reserves and allowance for doubtful accounts (commonly known as "bad debt").

15. When companies spend money or incur costs, those expenditures can be accounted for in a number of ways. Some types of expenditures, including those most commonly incurred in normal operations, are accounted for as current or operating expenses. Other types of expenditures, including those that most commonly result in the acquisition of, or improvement to, the company's assets, are accounted for as capital expenditures. Examples of capital expenditures include purchase of equipment or vehicles.

16. Operating expenses and capital expenditures generally receive different accounting treatment. Operating expenses are generally subtracted from revenue in the period in which the expense is incurred or paid to calculate net income. Capital expenditures, by contrast, are not subtracted from revenue immediately; instead a portion of the expenditure is subtracted from revenue each period over the life of the asset. Accordingly, capital expenditures reduce net income gradually over time, while ordinary expenses reduce reported net income immediately.

17. Swisher, like other publicly traded companies, was required to record on its books the total amount of money owed to the Company by customers who purchased its products or services. The amount was recorded as an asset known as an "account receivable." When a customer account was charged off as bad debt, or an account not likely to be paid by the customer, the Company was required to reduce accounts receivable in an amount equal to the charge-off amount.

18. Swisher was required to estimate each quarter the amount of accounts receivable that it expected to be uncollectible, and to record this amount on its books as a reserve. The name of this particular reserve was "allowance for doubtful accounts," also sometimes referred to as bad debt. Swisher's total net receivables therefore equaled its accounts receivable minus its allowance for doubtful accounts.

19. Generally speaking, an earn-out allows an acquiring company to propose a transaction by which the acquiring company would purchase a company by paying some money up front and then paying an earn-out over time, which would provide the owner of the company being purchased with more money if certain future financial goals were met.

20. As part of its financial reporting, Swisher was also required, in connection with its many acquisitions, to record the fair value of acquired assets and liabilities. Examples include, among others, earn-outs, reserves, and accounts receivable.

21. As part of its financial reporting, Swisher also reported "Adjusted EBITDA" (Earnings Before Interest, Tax, Depreciation, and Amortization), as an additional metric by which to measure the Company's performance. In its public filings, Swisher defined Adjusted EBITDA as net loss excluding the impact of income taxes, depreciation and amortization expense, interest expense and income, foreign currency gain, net gain/loss on debt related fair value measurements, stock based compensation, and third party costs directly related to mergers and acquisitions. According to its public filings, Swisher presented Adjusted EBITDA "because we consider it an important supplemental measure of our operating performance and believe it is frequently used by securities analysts, investors and other interested parties in the evaluation of our results."

22. Swisher was required to provide Wells Fargo financial statements that fairly presented its financial condition in order to maintain the $100 million credit facility and to obtain financing for Acquisition A. Swisher also provided Adjusted EBITDA forecasts to Wells Fargo and other financial institutions. Thus, Adjusted EBITDA was an important measure utilized by Swisher to obtain from banks the money necessary to fund Swisher's business operations.

Accounting Fraud Scheme

23. From in or about 2011 through in or about early 2012, KIPP, VIARD, Pierrard, and their co-conspirators devised and carried out a scheme to defraud the investing public by materially misrepresenting Swisher's financial position, as reported in its Forms 10-Q and 10-K.

24. The purpose of the scheme was to ensure that Swisher consistently reported that its Adjusted EBITDA had met or exceeded executive management's forecasts and to conceal the existence of the fraud from, among others, BDO, Wells Fargo and the investing public.

25. Generally speaking, the accounting fraud scheme involved: (a) the creation of fraudulent accounting entries in multiple accounts of Swisher's corporate books and records, including those related to, among others, acquisition expenses, "bad debt" or allowance for doubtful accounts receivable, workers compensation reserves, and marketing expenses; and (b) the provision of false and/or misleading information to, among others, BDO, Wells Fargo, and the investing public.

26. When Adjusted EBITDA was falling short of the target, KIPP, VIARD, Pierrard and their co-conspirators used various methods to fraudulently manipulate the books and records in order to hit certain Adjusted EBITDA targets, including, for example:

a. Taking expenses that were supposed to be booked to the Company's profit and loss statement and moving them to the balance sheet, fraudulently reducing expenses and thereby increasing income.

b. When acquiring companies, inflating certain liabilities that were established for contingent earn-outs, and then fraudulently reducing those liabilities, resulting in increased income.

c. Engaging in what is commonly referred to as "cookie jar" accounting by inflating reserves during the process of acquiring other businesses and then fraudulently reducing those reserves and increasing income.

27. Regardless of the methodology, the accounting fraud scheme generally progressed as follows:

a. As part of the closing process, KIPP sent accounting department personnel emails that provided the Adjusted EBITDA target and a "hit list" of accounting entries that could be fraudulently adjusted to enable Swisher to hit the Adjusted EBITDA forecast.

b. On the "hit list" and in other documents, certain co-conspirators referred to entries that had a positive effect on Adjusted EBITDA as "good guys" and to entries that had a negative effect on Adjusted EBITDA as "bad guys."

c. Often, when a "bad guy" had to be made, KIPP searched for or directed others to search for a corresponding entry that would negate the "bad guy's" effect on Adjusted EBITDA.

d. Generally, once the desired Adjusted EBITDA target was achieved, KIPP communicated the results to accounting department personnel and others in Swisher's executive management and the closing process concluded. At year-end, however, KIPP and his co-conspirators took steps to build a "cushion" into the Adjusted EBITDA for use in the scheme later.

28. KIPP, VIARD, Pierrard and their co-conspirators took numerous specific steps in furtherance of the accounting fraud scheme.

A. <u>Certain Fraudulent Acts in Closing Swisher's Books in the Second Quarter of 2011</u>

29. As part of the close of the books for the second quarter, which ended June 30, 2011, various co-conspirators engaged in the following overt acts:

a. Prior to the close of the second quarter, on May 14, 2011, KIPP informed Swisher's CEO and others that the expected Adjusted EBITDA for the second quarter would be between \$3 and \$4 million.

b. On July 23, 2011, as part of the second quarter closing process, KIPP informed VIARD, Pierrard, and others that the Adjusted EBITDA for the second quarter, which had ended June 30, 2011, was "currently" at "\$2.370 million" but that "based on what I see right now we can close at slightly above \$3.0 million."

c. On July 23, 2011, VIARD emailed KIPP, stating "Have we taken into consideration the $176k intercompany balance? This is a bad guy and would put us back below the $3M. Can we find the offset yet?"

d. On July 24, 2011, VIARD emailed an outside accountant, stating "I am getting a lot of pressure to record a liability for an underwater contract for Lee county [sic] at Choice. The issue I have is that the President and CFO of Choice keep telling me that Lee county contract operates more efficiently than the majority of their contracts. Therefore, there is no like comparable contract that I could easily compared [sic] margins and prove that it was underwater." While the outside accountant offered advice suggesting the contract was not unfavorable, VIARD nevertheless recorded the purported liability, resulting in an approximate $180k earnings increase in the second quarter as well as further fraudulent increases in earnings in the third and fourth quarters.

e. On July 26, 2011, KIPP emailed Pierrard, stating, "I need about $250k in income to get to $3MM."

f. On July 26, 2011, Pierrard responded that there were uncapitalized labor expenses in two accounts and that "those together may get you close."

g. On July 26, 2011, KIPP then responded, stating "Let's work up the number. If we are short. We will get it in bad debt. Good work. Can we get it today?"

h. On July 26, 2011, after booking that and other fraudulent entries, KIPP informed Swisher management that "June is closed" and that "Adjusted EBITDA is $3 million."

30. Through the above described conduct, KIPP, VIARD, Pierrard, and others fraudulently manipulated Swisher's books and records so that Swisher could hit the Adjusted EBITDA forecast of $3 million for the second quarter, thus rendering Swisher's 10-Q and the financial statements contained therein fraudulent and/or misleading.

31. On or about August 15, 2011, Swisher then submitted its second quarter 10-Q, containing these fraudulent and misleading financial statements, to the SEC. As part of that submission, KIPP falsely certified that the 10-Q did "not contain any untrue statement of material fact or omit to state a material fact;" that "the financial statements…fairly present in all material respects the financial condition" of Swisher; and that he had disclosed "[a]ny fraud, whether or not material, that involves management or other employees…" to Swisher's auditors and audit committee.

32. On or about August 15, 2011, KIPP falsely certified to BDO that, among other things, Swisher's second quarter 10-Q was fairly presented, that he had no knowledge of any fraud or suspected fraud involving management or employees who had significant roles in internal control, or any fraud or suspected fraud involving others where the fraud could have had a material effect on the interim financial statements.

33. Pursuant to Swisher's credit agreement with Wells Fargo on or about August 15, 2011, KIPP also submitted the Company's second quarter financial statement along with an

executed Compliance Certificate to Wells Fargo, in which KIPP falsely certified that "Such financial statements ...fairly present the financial condition of the Borrower and its Subsidiaries on a consolidated basis..."

B. Certain Fraudulent Acts in Closing Swisher's Books in the Third Quarter of 2011

34. As part of the close of the books for the third quarter, which ended September 30, 2011, various co-conspirators engaged in the following overt acts:

a. Approximately five days after the third quarter ended, on October 5, 2011, KIPP informed Wells Fargo that Swisher's Adjusted EBITDA forecast for the third quarter was $5.2 million.

b. Approximately fourteen days after quarter end, at close of business on Friday, October 14, 2011, KIPP informed Swisher management that Swisher was currently "at an Adjusted EBITDA of $2.4 million against our forecast of $3.5 million [for the month of September]. I believe the Wells expectation is $2.8...[for the month of September]."

c. The next morning, on Saturday, October 15, 2011, KIPP emailed VIARD stating "I need to get about $300k in expense reductions." VIARD responded less than an hour later by offering a "few other ideas" as to potential expense reductions, including reduction of the "Enviro earnout." VIARD further advised KIPP that "as long as the changes are not material, I wouldn't need to disclose." KIPP and VIARD then caused the Enviro earnout to be fraudulently reduced by $500,000, resulting in a corresponding increase in Adjusted EBITDA of $500,000.

d. Also on October 15, 2011, KIPP emailed Employee E, a division CFO, stating "Please call me as soon as possible. I need to talk to you about your Q3 numbers. I need you to go back and squeeze them for an additional $220k of EBITDA. I suspect you should have room in some of your reserves."

e. On October 15, 2011, Employee E responded, stating "so we didn't want to touch it yet...but if we are at the 'rainy day' then maybe we take in now. Beside those 2 items...we scrubbed the hell out of our #'s this month hoping to get closer to budget. Overall I think I can take the $225 out of reserves...but I [sic] will leave me naked on reserves after this."

f. On October 15, 2011, KIPP then responded, stating "Do your best to get $200k. We need to stretch a bit to get to the numbers in Q3. I think we all will be a bit bare. At the end of the day if we get to the number I will let some come back your way. Can I get a confirmation that you can do 200k today? Tell me where to book it by account up here and we will do it in consolidation."

g. On October 15, 2011, Employee E responded with the figures and the account, stating "... the cupboard is pretty bare now."

h. On October 15, 2011, KIPP forwarded the foregoing email exchange to VIARD, stating "Please book these entries in consolidation..."

i. On October 15, 2011, KIPP emailed a member of the Swisher accounting department, stating "... I need no less than $50k out of Chemical COGS...I am almost at the number, but need some help here.... no pressure with the only thing between hitting the bank forecast and falling short is Chemical COGS."

j. On October 15, 2011, KIPP emailed VIARD, stating "Here is the sum of my handy work for the day. I think if we can make all these stick, we will make it to the forecast of $3.5 million. Let's discuss them to make sure we are in synch."

k. On October 15, 2011, KIPP emailed Employee D, stating "We may find one or two things in the MOR's [monthly operating reviews] but with this list we are at forecast. Let's bring this together. My inclination would be to use things we find in the MOR to refill the cookie jar."

l. On October 15, 2011, KIPP emailed VIARD, Pierrard, Employee D, and others in the accounting department, stating "It looks like we have gotten to our forecast number of $3.5 million for September. Congrats on the good work."

35. Through the above described conduct, KIPP, VIARD, Pierrard, and others fraudulently manipulated Swisher's books and records so that Swisher could hit the Adjusted EBITDA forecast of $5.2 million for the third quarter, which had previously been provided to Wells Fargo, thus rendering Swisher's 10-Q and the financial statements contained therein fraudulent and/or misleading.

36. On November 14, 2011, Swisher then submitted its third quarter 10-Q, containing these fraudulent and misleading financial statements, to the SEC. As part of that submission, KIPP falsely certified that the 10-Q did "not contain any untrue statement of material fact or omit to state a material fact;" that "the financial statements...fairly present in all material respects the financial condition" of Swisher; and that he had disclosed "[a]ny fraud, whether or not material, that involves management or other employees..." to Swisher's auditors and audit committee.

37. On November 14, 2011, KIPP falsely certified to BDO that, among other things, Swisher's third quarter 10-Q was fairly presented, that he had no knowledge of any fraud or suspected fraud involving management or employees who had significant roles in internal control, or any fraud or suspected fraud involving others where the fraud could have had a material effect on the interim financial statements.

38. Pursuant to Swisher's credit agreement with Wells Fargo, on or about November 11, 2011, KIPP then submitted the Company's third quarter financial statement along with an executed Compliance Certificate, in which KIPP falsely certified that "Such financial statements ... fairly present the financial condition of the Borrower and its Subsidiaries on a consolidated basis..."

C. Certain Fraudulent Acts in Closing Swisher's Books in the Fourth Quarter of 2011

39. As part of the close of the books for the fourth quarter, which ended December 31, 2011, various co-conspirators engaged in the following overt acts:

a. On the last day of the fourth quarter, December 31, 2011, Swisher transmitted to Wells Fargo an Adjusted EBITDA forecast for the fourth quarter, which revised the Adjusted EBITDA range downward approximately $7.6 million to $5.4 to $6.5 million. KIPP subsequently met with Wells Fargo to discuss Swisher's revised forecast.

b. On January 3, 2012, KIPP emailed VIARD, Pierrard, Employee D, and others in the accounting department an excel spreadsheet, with a "starting point for December," *i.e.*, where Adjusted EBITDA was at the time, an Adjusted EBITDA "forecast" of $5.4 for them all to be "working towards," and a "hit list…of all the open items."

c. On January 20, 2012, Employee D informed KIPP that an entry needed to be made that would result in a negative effect on the Adjusted EBITDA target. KIPP responded, stating "If that's what you think, you need to find another $90K to offset it."

d. Approximately twenty-one days after the fourth quarter closed, KIPP wrote to VIARD, Pierrard and others, "We are still short of the target", noting that EBITDA was just over $4 million and with other adjustments Swisher was just over $5 million. KIPP further stated "I thought we were there yesterday. We will get to $5.4 million. What are the options to find the remaining $131K?"

e. On January 21, 2012, VIARD responded to Pierrard, stating "Is the Hawaii Enviro earnout still booked as a liability? Do we need it?"

f. On January 21, 2012, Pierrard replied to VIARD and copied KIPP, stating "Yes it's still there. [KIPP] does not want to use it."

g. On January 21, 2012, KIPP emailed Pierrard, Employee D, and other accounting department employees, stating "Where do we stand at this point other than short of our mark? Have we booked the $100k Shamrock rebate reversal?"

h. Employee D refused to book the $100k Shamrock entry, leaving the Adjusted EBITDA figure just below the target of $5.4 million.

i. Nonetheless, on January 22, 2012, KIPP emailed Swisher's CEO, stating "It looks like we have found enough to clear $5.4 of adjusted EBITDA with a little wiggle room. On Friday, as you know we were short of it."

j. KIPP continued pressuring Employee D to make the $100k Shamrock entry in order to hit the $5.4 Adjusted EBITDA target. For instance, on January 23, 2012, KIPP emailed Employee D, stating "the Shamrock deal has been done for some time. Signed copies will be back this week." Employee D responded, stating "…per my previous emails, [I] do not feel the Shamrock deal is appropriate." KIPP responded, stating "Book the Shamrock entry, it's appropriate. It's my call. With a signed agreement, it's a no-brainer."

k. Employee D continued to push back, stating "I'll run it by BDO so we're on the same page." KIPP responded, stating "You'll run it by me since I'm the chief accounting officer. I'm out of patience with this."

l. On January 25, 2012, Employee D, in further efforts to resist making the $100k Shamrock entry, emailed KIPP, stating "My professional opinion is that reversing this expense would not be appropriate. I have received no credible evidence to the contrary."

m. Shortly thereafter, KIPP summoned Employee D to his office and fired him.

n. The Shamrock $100k entry was subsequently made, enabling KIPP to hit the $5.4 Adjusted EBITDA target.

o. On January 28, 2012, after reaching the target of $5.4 million, KIPP emailed members of the accounting department concerning the Adjusted EBITDA target, stating "Great job guys. It is a bit higher than I thought we would get to. Let's freeze it here."

40. Through the above described conduct, KIPP, VIARD, Pierrard, and others fraudulently manipulated Swisher's books and records so that Swisher could hit the Adjusted EBITDA forecast of $5.4 million for the fourth quarter, which had previously been provided to Wells Fargo, thus rendering Swisher's financial statements fraudulent and/or misleading.

41. On February 13, 2012, Swisher transmitted to Wells Fargo its 2011 results reflecting that it had supposedly hit the low end of its revised forecast, $5.4 million of Adjusted EBITDA, for the fourth quarter.

42. While Swisher attempted to prepare a fraudulent and misleading 10-K, the accounting fraud conspiracy was uncovered before the fraudulent 10-K could be filed with the SEC.

The Accounting Fraud Scheme Is Uncovered

43. After firing Employee D, KIPP misrepresented to the Audit Committee Chairman, to BDO, and to others that Employee D was fired principally because he was failing at his job. KIPP failed to inform the Audit Committee Chairman and BDO that he fired Employee D in the midst of the year-end close of the books process only after Employee D refused to make the fraudulent entry in Swisher's books and records.

44. KIPP's misrepresentations concerning the reasons for Employee D's termination caused BDO to delay speaking to Employee D for several weeks. On the evening of February 22, 2012 Employee D was finally interviewed by representatives from BDO and Swisher's

general counsel. During the interview, Employee D reported the existence of the fraudulent scheme. This was the first time BDO learned the true nature of Employee D's allegations.

45. The following day, February 23, 2012, Employee D's concerns that Swisher was preparing "materially false or misleading financial statements" were conveyed to Swisher's Audit Committee, which then commissioned an investigation concerning Employee D's accounting fraud allegations (hereinafter "Audit Committee Investigation").

Obstruction of Justice: Misleading Conduct

46. Upon learning of Employee D's allegations of fraud, KIPP almost immediately began preparing a "rebuttal" memorandum to provide to the Audit Committee Chairman. KIPP's initial draft contained a number of lies, including statements that "We do not close to a 'number'"; "In fact prior to terminating [Employee D], I had called ... our BDO partner, and he told me he...was going to speak with me that very next day about his concerns with [Employee D]..."

47. Although KIPP and his co-conspirators removed many of the lies from the draft rebuttal memorandum prior to providing it to the Audit Committee Chairman, KIPP left in the rebuttal memorandum the lie with regard to the false or misleading justification for the $100,000 entry that Employee D refused to book.

48. KIPP, VIARD, and others then began preparing a "White Paper" to present in response to the Audit Committee Investigation in an effort to justify the fraudulent accounting entries that had been made during the course of the conspiracy. For example, in the White Paper, KIPP, VIARD, and others:

a. Falsely asserted that it was determined during merger negotiations that an employee of the acquiree would not continue to be employed by Swisher, the acquirer, thereby purporting to justify the fraudulent decision to alter the accounting (during the second quarter close) for the employee's salary in a way that resulted in an increase to Swisher's Adjusted EBITDA. In truth and fact, following the acquisition, the employee continued to be employed by the combined entity, receiving his salary per the ongoing employment agreement.

b. Falsely asserted that a $1.3 million adjustment to a purportedly unfavorable contract was supposedly justified because "the county mandated" certain concessions before it would consent to transfer the contract from the company being acquired to Swisher, the acquirer. In truth and fact, the concessions did not render the contract unfavorable, as they were unrelated to and independent of the transfer of the contract.

c. Falsely asserted that Shamrock agreed to forgive or reverse previously paid rebates in the amount of approximately $100,000. In truth and fact, Shamrock did not agree to forgive or reverse any rebates. Instead, prior to the time that Swisher needed and took the $100,000 to hit its earning target, Swisher had properly booked the accounting entries to match rebate expenses with 2011 sales.

d. Failed to disclose that the true purpose of various accounting entries was to enable Swisher to hit Adjusted EBITDA targets.

49. VIARD and others then presented this White Paper to the Audit Committee on or about March 20, 2012, making false representations and/or material omissions in an effort to cover up the accounting fraud conspiracy and mislead the Audit Committee Investigation.

50. The following day, KIPP recommended that VIARD receive a raise and a promotion, and VIARD subsequently received the raise and promotion.

51. On or about March 28, 2012, Swisher publicly announced that the Audit Committee was conducting an investigation "regarding a former employee's concerns with certain of the Company's accounting policies." The Company also announced that, among other things, its financial statements for the first three quarters of 2011 in the Company's quarterly reports should no longer be relied upon and that these financial statements may need to be restated. Finally, Swisher announced that it would be delayed in filing its Form 10-K for the 2011 year.

52. On or about April 4, 2012, a civil complaint alleging federal securities laws violations arising from the Company's restatement announcement was filed in United States District Court for the Western District of North Carolina against Swisher, its CEO, and KIPP. By at least April 12, 2012, KIPP had received notice that he was a defendant in that matter.

53. During the Audit Committee Investigation, KIPP, Pierrard, and VIARD provided investigators false and/or misleading information in an effort to cover up the accounting fraud scheme and mislead the Audit Committee Investigation.

54. Additionally, prior to his interview with the Audit Committee Investigators, Pierrard approached KIPP to discuss what he (Pierrard) should tell the investigators during the interview. During that discussion, Pierrard and KIPP agreed to provide false and/or misleading information to the Audit Committee Investigators in an attempt to conceal the accounting fraud conspiracy and mislead the Audit Committee Investigators. Pierrard then lied to the Audit Committee Investigators during his interview telling them that no one gave him advice on what to say.

55. On April 24, 2012, Pierrard was interviewed by the Audit Committee Investigators. Pierrard made several false and/or misleading statements during that interview. For example,

a. Pierrard stated that the biggest problem with Employee D was that he was ineffective and overwhelmed and that many things under Employee D's responsibility were not done correctly. That was false and/or misleading because Pierrard did not believe this to be true and instead thought that Employee D was smart and capable.

b. When asked whether in calculating the accounts receivable reserve for the fourth quarter KIPP wanted to avoid a loss, Pierrard stated that was not the case. That was false and/or misleading because, instead of increasing the reserve to the correct level in the manner that had previously been established, which would have resulted in a significant reduction to Adjusted EBITDA and a resulting number well below the $5.4 million target, KIPP directed Pierrard to find a different way to increase the reserve that would not result in a reduction to Adjusted EBITDA, so that the $5.4 million target would be hit.

c. Pierrard stated that no one ever directed him to cook the books and that the purpose of Swisher's close process was to arrive at an accurate figure and to conduct analysis of that figure in order to provide actionable information to senior management. That was false and/or misleading because, as set forth above, Pierrard, KIPP, VIARD, and others fraudulently manipulated the books and records in order to hit certain Adjusted EBITDA targets.

56. Pierrard made these statements in an effort to conceal the accounting fraud conspiracy and mislead the Audit Committee Investigators.

57. On May 3, 2012, KIPP was interviewed by the Audit Committee Investigators. KIPP made several false and/or misleading statements during his interview. For example,

a. KIPP was asked whether the $5.4 million figure for the fourth quarter close had any significance and he stated no. That was false and/or misleading because, as set forth above, KIPP provided Wells Fargo and others with an Adjusted EBITDA target of $5.4 million for the fourth quarter and thereafter engaged in fraudulent conduct to hit that target.

b. KIPP failed to disclose the true circumstances surrounding Employee D's firing, namely that KIPP fired Employee D after Employee D refused to book fraudulent accounting entries that were necessary for KIPP to hit the Q4 earnings target he had already informed management they had achieved.

c. When KIPP was asked about the accounts receivable account and a potential $700,000 liability he had discussed with Employee D in the fourth quarter, KIPP stated that the problem with accounts receivable was an error in the system that was not resolved, that it was misunderstood by everyone who looked at it, and that the error was ultimately identified after the fourth quarter closing. That was false and/or misleading because, among other things,

i. The issue was first brought to KIPP prior to the fourth quarter close;

ii. KIPP failed to disclose that after Employee D advised him of the need to book the $700,000 liability to correct the accounts receivable reserve account, KIPP stated "there is no way we are going to book that" and then instructed Employee D to reevaluate the reserve calculation so that it would not cause a negative impact on earnings; and/or

iii. KIPP failed to disclose that after Employee D refused to complete the task, KIPP then directed Pierrard to find a different way to increase the reserve that would not result in a reduction to Adjusted EBITDA, so that the $5.4 million target would be hit, and Pierrard complied.

d. KIPP was asked whether he was at all involved in preparing the White Paper that was drafted by management and provided to the Audit Committee and KIPP stated no and further stated that the first time he saw the White Paper was one day before the interview. That was false and/or misleading because KIPP was involved in the creation of the White Paper, including exchanging multiple drafts of the White Paper with VIARD and others as early as March 10, 2012 and receiving a copy of the final White Paper presented to the Audit Committee on March 20, 2012.

58. KIPP made these statements in an effort to conceal the accounting fraud scheme and mislead the Audit Committee Investigators.

59. On April 13, 2012 and May 1, 2012, VIARD was interviewed by the Audit Committee Investigators. During those interviews, VIARD made false and/or misleading statements to the Audit Committee Investigators. For example,

a. When asked about an entry concerning an unfavorable contract, VIARD stated that an outside accountant told her it clearly sounded like it was an unfavorable contract. This was false and/or misleading because what the outside accountant had told her, in essence, was that it sounded like it was *not* an unfavorable contract.

b. VIARD was asked about an email from KIPP where he stated that "I need to get about 300K in expense reductions. This could be one." VIARD gave an evolving answer in which she initially denied that KIPP was trying to increase EBITDA, then denied knowing what KIPP meant, then denied that KIPP was trying to hit a number, and then denied knowing the significance of the $300,000. This was false and/or misleading because VIARD's email responses at the time of the entry show that she not only knew KIPP was looking to increase EBITDA to hit a target, but also show that she proposed additional ways to reduce expenses in order to get to that target.

60. VIARD made these statements in an effort to conceal the accounting fraud scheme and mislead the Audit Committee Investigators.

61. On or about May 9, 2012, VIARD and others again made a presentation to the Audit Committee Investigators and BDO in which they made false and/or misleading statements and/or fraudulent omissions in an effort to cover up the accounting fraud scheme and mislead investigators. For example, VIARD and others continued to offer post-hoc justifications for their fraudulent accounting entries and again failed to disclose that the true purpose of various accounting entries was to enable Swisher to hit Adjusted EBITDA targets.

62. On or about May 15, 2012, Swisher fired KIPP, VIARD, and Pierrard for their roles in the accounting fraud scheme.

63. In February 2013, approximately 11 months following the announcement of the Audit Committee investigation, Swisher filed restated financial reports for the first three quarters of 2011 ("Restatement") and filed its Form 10-K for the 2011 year. The Restatement reflected, among other things, that Swisher had substantially overstated its Adjusted EBITDA and significantly understated its net loss during the relevant time period.

COUNT ONE
18 U.S.C. § 371
(Conspiracy)

64. The Grand Jury realleges and reincorporates by reference herein all of the allegations in paragraphs 1 through 63 of this Bill of Indictment and further alleges that:

65. From at least in or about 2011 through in or about 2012, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendants,

(1) MICHAEL KIPP
(2) JOANNE VIARD

Swisher, Pierrard and others known and unknown to the Grand Jury did knowingly and intentionally combine, conspire, confederate and agree:

a. To commit securities fraud in violation of Title 15 U.S.C. §§ 78j(b) and 78ff, and Title 17 C.F.R. § 240.10b-5;

b. To make and cause to be made false and misleading statements to Swisher's auditors and accountants, in violation of Title 15 U.S.C. § 78ff, and Title 17 C.F.R. § 240.13b2-2;

c. To falsify books, records and accounts of Swisher, in violation of Title 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5) and 78ff, and Title 17 C.F.R. § 240.13b2-1.

Objects of the Conspiracy

66. It was a part and an object of the conspiracy that the defendants and others known and unknown to the Grand Jury willfully, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, would and did use and employ manipulative and deceptive devices and contrivances in connection with the sale of Swisher securities 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 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 and did operate as a fraud and deceit upon investors and others, in connection with the sale of securities, in violation of Title 15 U.S.C. §§ 78j(b) and 78ff, and Title 17 C.F.R. § 240.10b-5.

67. It was a part and an object of the conspiracy that the defendants and others known and unknown to the Grand Jury would and did willfully, directly and indirectly, make and cause to be made materially false and misleading statements to an accountant and omit to state and cause another person to omit to state to an accountant any material fact necessary in order to make the statement made, in light of the circumstances under which such statements were made, not misleading, in connection with the preparation and filing of a document and report required to be filed with the SEC pursuant to Subpart A of the Securities and Exchange Act of 1934, in violation of Title 15 U.S.C. § 78ff, and Title 17 C.F.R. § 240.13b2-2.

68. It was a part and an object of the conspiracy that the defendants and others known and unknown to the Grand Jury, would and did willfully and knowingly falsify the books, records, and accounts of Swisher, an issuer of securities registered pursuant to Title 15 U.S.C. § 78*l*, in violation of of Title 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5) and 78ff, and Title 17 C.F.R. § 240.13b2-1.

Manner and Means

69. KIPP, VIARD, Pierrard and others known and unknown to the Grand Jury carried out the conspiracy in the manner and means as set forth in paragraphs 1 through 63 above.

Overt Acts

70. In furtherance of the conspiracy, and to accomplish the objects thereof, KIPP, VIARD and their co-conspirators committed one or more of the overt acts set forth in paragraphs 1 through 63 above, among others, in the Western District of North Carolina and elsewhere.

All in violation of 18 U.S.C. § 371.

COUNT TWO
18 U.S.C. § 1343
(Wire Fraud Scheme)

71. The Grand Jury realleges and reincorporates by reference herein all of the allegations in paragraphs 1 through 63 of this Bill of Indictment and further alleges that:

72. From at least in or about 2011 through in or about 2012, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendants,

(1) MICHAEL KIPP
(2) JOANNE VIARD

together with persons known and unknown to the Grand Jury, having devised the above-described schemes and artifices 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 purposes of executing said scheme and artifice, in violation of Title 18, United States Code, Section 1343.

All in violation of Title 18 U.S.C. Section 1343.

COUNT THREE
15 U.S.C. §§ 78j(b), 78ff
(Securities Fraud)

73. The Grand Jury realleges and reincorporates by reference herein all of the allegations in paragraphs 1 through 63 of this Bill of Indictment and further alleges that:

74. From at least in or about 2011 through in or about 2012, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendants,

(1) MICHAEL KIPP
(2) JOANNE VIARD

together with persons known and unknown to the Grand Jury, willfully, directly and indirectly, by use of the means and instrumentalities of interstate commerce and the mails, used and employed manipulative and deceptive devices and contrivances 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 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 and did operate as a fraud and deceit upon Swisher investors and others, in connection with the sale of securities, to wit, common stock.

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

COUNT FOUR
18 U.S.C. § 1344
(Bank Fraud)

75. The Grand Jury realleges and reincorporates by reference herein all of the allegations in paragraphs 1 through 63 of this Bill of Indictment and further alleges that:

76. From at least in or about 2011 through in or about 2012, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(1) MICHAEL KIPP

together with persons known and unknown to the Grand Jury, devised and executed, and aided and abetted each other in devising and executing, a scheme to defraud and to obtain moneys owned by, or in the custody or control of Wells Fargo Bank, N.A., the deposits of which were insured by the Federal Deposit Insurance Corporation, by means of material false and fraudulent pretenses, representations and promises.

All in violation of Title 18, United States Code, Section 1344 and Title 18, United States Code, Section 2.

COUNT FIVE
18 U.S.C. § 1512(b)(3)
(Obstruction of Justice: Misleading Conduct)

77. The Grand Jury realleges and reincorporates by reference herein all of the allegations in paragraphs 1 through 63 of this Bill of Indictment and further alleges that:

78. From in or about January 2012 through in or about May 2012, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(1) MICHAEL KIPP

knowingly and corruptly engaged in misleading conduct toward another person with the intent to hinder, delay, and prevent the communication of information to federal law enforcement officers, to wit, the FBI Office in Charlotte, North Carolina, the United States Attorney's Office for the Western District of North Carolina, and the United States District Court in the Western District of North Carolina, which was presiding over the then pending Securities Fraud Class Action Lawsuit against Swisher, its CEO, and KIPP, relating to the possible commission of a federal offense.

All in violation of Title 18, United States Code, Section 1512(b)(3) and Title 18, United States Code, Section 2.

COUNT SIX
18 U.S.C. § 1512(b)(3)
(Obstruction of Justice: Misleading Conduct)

79. The Grand Jury realleges and reincorporates by reference herein all of the allegations in paragraphs 1 through 63 of this Bill of Indictment and further alleges that:

80. From in or about January 2012 through in or about May 2012, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(2) JOANNE VIARD

knowingly and corruptly engaged in misleading conduct toward another person with the intent to hinder, delay, and prevent the communication of information to federal law enforcement officers, to wit, the FBI Office in Charlotte, North Carolina, the United States Attorney's Office for the Western District of North Carolina, and the United States District Court in the Western District of North Carolina, which was presiding over the then pending Securities Fraud Class Action Lawsuit against Swisher, its CEO, and KIPP, relating to the possible commission of a federal offense.

All in violation of Title 18, United States Code, Section 1512(b)(3), and Title 18, United States Code, Section 2.

NOTICE OF FORFEITURE AND FINDING OF PROBABLE CAUSE

81. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 63 of the Bill of Indictment, and further alleges that:

82. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2(a), of the provisions of 18 U.S.C. § 982, 21 U.S.C. § 853, and 28 U.S.C. § 2461(c). Under Section 2461(c), criminal forfeiture is applicable to any offenses for which forfeiture is authorized by any other statute, including but not limited to 18 U.S.C. § 981, and all specified unlawful activities listed or referenced in 18 U.S.C. § 1956(c)(7), which are incorporated as to proceeds by 18 U.S.C. § 981(a)(I)(c). The defendant has or had possessory or legal interests in the following property that is subject to forfeiture in accordance with Section 982 and/or Section 2461(c):

a. All property involved in the violations alleged in this Bill of Indictment, or traceable to such property;

b. All property which is proceeds of such violations, or traceable to such property; and,

c. In the event that any property described in (A) or (B) cannot be located or recovered or has been substantially diminished in value or has been commingled with other property which cannot be divided without difficulty, all other property of the defendants, to the extent of the value of the property described in (A) and (B).

A TRUE BILL

[redacted]

JILL WESTMORELAND ROSE
UNITED STATES ATTORNEY

Mark T. Odulio

MARK T. ODULIO
ASSISTANT UNITED STATES ATTORNEY

Maria K. Vento

MARIA K. VENTO
ASSISTANT UNITED STATES ATTORNEY

Revised AO 45 (WDNC-03/07)

NEW CRIMINAL CASE COVER SHEET **U. S. DISTRICT COURT**
*(To be used for **all** new Bills of Indictments and Bills of Information)*

CASE SEALED: ( ) Yes (X) No **DOCKET NUMBER:** ____________________
*(If case is to be sealed, a Motion to Seal and proposed Order **must** be attached.)*

CASE NAME : **MICHAEL J. KIPP et al**

COUNTY OF OFFENSE : **MECKLENBURG COUNTY**
RELATED CASE INFORMATION :

Magistrate Judge Case Number : ____________________
Search Warrant Case Number : ____________________
Miscellaneous Case Number : ____________________
Rule 20b : ____________________

SERVICE OF PROCESS - *WARRANT*

U.S.C. CITATIONS (*Mark offense carrying greatest weight*): ☐ Petty ☐ Misdemeanor X Felony

18 U.S.C. §371

JUVENILE : ☐ Yes X No

ASSISTANT U. S. ATTORNEY : MARK T. ODULIO/MARIA K. VENTO

VICTIM / WITNESS COORDINATORS : shirley.rutledge@usdoj.gov /ulricia.kennedy@usdoj.gov

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INTERPRETER NEEDED : ____________________
LIST LANGUAGE AND/OR DIALECT: ____________________

REMARKS AND SPECIAL INSTRUCTIONS:

Relate to:
U.S. v. Swisher Hygiene, Inc., 3:15cr237
U.S. v. Pierrard, 3:15cr238