



Swisher's controller, orchestrated an earnings management scheme during the second, third, and fourth quarters of that year.

3. In 2011, Swisher was actively acquiring sanitation and waste management companies.

4. At this time, Swisher lacked effective internal control over financial reporting. In particular, Swisher had difficulty integrating the financial reporting systems of recently acquired companies into its own systems, had an insufficient number of qualified accounting personnel, and placed undue emphasis on meeting internal financial results.

5. As Swisher's CFO, Kipp directed the accounting entries made by Swisher and incorporated into Swisher's financial statements.

6. Exploiting Swisher's lack of effective internal controls, Kipp presided over an accounting group that aggressively reevaluated and manipulated various acquisition-related reserves and expenses in order to increase earnings to predetermined targets tied to the expectations of the Company's lenders as the basis for future acquisition financing.

7. Kipp carried out the fraudulent scheme with the assistance of Joanne Viard ("Viard"), Swisher's Director of External SEC Reporting, who was responsible for Swisher's acquisition accounting.

8. During the closing process for the second, third, and fourth quarters of 2011, Swisher's earnings management scheme followed a certain pattern, namely (1) the communication of a target for Adjusted Earnings Before Interest, Taxes, Interest, Depreciation and Amortization ("EBITDA") by Kipp to accounting personnel; (2) an initial closing process that produced results less than the target; (3) meetings and communications through which Kipp demanded adjustments to help Swisher meet the original target; and (4) the recording of adjusting accounting entries that were not in compliance with generally accepted accounting principles ("GAAP") to achieve the target.

9. After reaching the Adjusted EBITDA target, Kipp typically told his team that additional entries would not be allowed.

10. Kipp and Viard directed and/or recorded entries that were incorporated into financial statements that Swisher included in quarterly reports filed with the Commission.

11. As the result of the earnings management scheme, Swisher issued quarterly reports on Form 10-Q and quarterly earnings announcements that were included on Form 8-K in 2011 that were materially misstated.

12. As CFO, Kipp signed the Sarbanes-Oxley quarterly certifications and management representation for Swisher's Forms 10-Q filed for the second and third quarters of 2011.
13. Both Kipp and Viard knew or recklessly disregarded that the accounting entries they manipulated for purposes of achieving earnings targets were not in accordance with GAAP.
14. Swisher received a financial benefit by using its stock (the price of which was artificially inflated by the publicly reported inflated earnings) and/or convertible notes to pay for a series of acquisitions during 2011.
15. The scheme came to light in early 2012, before Swisher filed its Form 10-K for 2011.
16. In January 2012, Kipp summarily terminated Swisher's controller for refusing to make an accounting entry that the controller thought was improper.
17. Shortly thereafter, the terminated controller provided Swisher's general counsel and outside auditor, BDO USA, LLP ("BDO"), with a draft letter outlining the controller's concerns that senior management was preparing financial statements that met previously communicated targets.

18. Upon learning of the former controller's allegations, Swisher's Audit Committee commenced an internal investigation, which led to the terminations of Kipp and Viard.

19. In February 2013, after the conclusion of the internal investigation, Swisher filed amended quarterly reports for the first three quarters of 2011, including restated financial statements, to reflect adjustments to previously reported financial information. The restatement reflects correction of entries made in furtherance of the earnings management scheme, as well as errors largely associated with the company's lack of effective internal controls (also acknowledged as part of the restatement).

### **VIOLATIONS**

20. By the conduct described herein, Defendant Kipp has engaged and, unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)] and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) & 78m(b)(5)] and Rules 10b-5, 13b2-1, 13b2-2 and 13a-14 thereunder [17 C.F.R. §§ 240.10b-5, 240.13b2-1, 240.13b2-2 & 240.13a-14].

21. By the conduct described herein, Defendant Kipp has aided and abetted and, unless restrained and enjoined by this Court, will continue to aid and abet violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B) and 21F(h) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A), 78m(b)(2)(B) & 78u-6(h)] and Rules 10b-5, 12b-20, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-11 & 240.13a-13].

22. In addition, Defendant Kipp is also liable as a “control person” under Section 20(a) of the Exchange Act [15 U.S.C. § 78t(a)] for Swisher’s violations of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B) and 21F(h) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A), 78m(b)(2)(B) & 78u-6(h)] and Rules 10b-5, 12b-20, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-11 & 240.13a-13].

23. By the conduct described herein, Defendant Viard has engaged in and, unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rules 10b-5(a), 10b-5(c) and 13b2-1 thereunder [17 C.F.R. §§ 240.10b-5(a), 240.10b-5(c) & 240.13b2-1].

24. By the conduct described herein, Defendant Viard has also aided and abetted and, unless restrained and enjoined by this Court, will continue to aid and abet violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A) & 78m(b)(2)(B)] and Rules 10b-5, 12b-20, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5(a), 240.12b-20, 240.13a-11 & 240.13a-13].

### **JURISDICTION AND VENUE**

25. The Commission brings this action pursuant to Sections 20 and 22 of the Securities Act [15 U.S.C. §§ 77t & 77v] and Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d) & 78u(e)] to enjoin Defendants from engaging in the transactions, acts, practices, and courses of business alleged in this complaint, and transactions, acts, practices, and courses of business of similar purport and object, for civil penalties and for other equitable relief.

26. This Court has jurisdiction over this action pursuant to Section 22 of the Securities Act [15 U.S.C. § 77v] and Sections 21(d), 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) & 78aa].

27. Defendants, directly and indirectly, made use of the mails, the means and instruments of transportation and communication in interstate commerce and the

means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in this complaint and made use of mail and means of instrumentality of interstate commerce to effect transactions, or to induce or to attempt to induce the purchase or sale of securities alleged in this complaint.

28. Certain of the transactions, acts, practices, and courses of business constituting violations of the Securities Act and the Exchange Act occurred in the Western District of North Carolina.

#### **THE DEFENDANTS**

29. **Michael J. Kipp** is a resident of Charlotte, North Carolina. Kipp joined Swisher in July 2010 and was Swisher's Senior Vice President and CFO from May 2011 until he was terminated in May 2012.

30. **Joanne K. Viard** is a resident of Freeport, Florida. During most of the relevant period, Viard was Swisher's Director of External SEC Reporting. In that capacity, Viard's job responsibilities included purchase accounting and related fair valuations.

#### **OTHER RELEVANT ENTITY**

31. In 2011 and 2012, Swisher Hygiene, Inc. was a Delaware corporation headquartered in Charlotte, North Carolina. Prior to the sale of its operating assets,

Swisher was a commercial hygiene company delivering essential hygiene and sanitizing solutions to customers in a wide range of end-markets. At that time, Swisher's common stock is registered pursuant to Section 12(b) of the Exchange Act. Swisher became a public company at the end of 2010, and its stock commenced trading on The NASDAQ Stock Market LLC ("NASDAQ") on February 2, 2011. In November 2015, Swisher consummated the sale of the stock of its wholly owned U.S. subsidiary, Swisher International, Inc., and other assets relating to Swisher's U.S. operations, which comprised all of Swisher's remaining operating interests, to Ecolab, Inc., a publically traded company. In January 2016, NASDAQ suspended trading in Swisher's stock, and initiated formal delisting proceedings.

### **THE FRAUDULENT SCHEME**

#### **A. Background and Mechanics of Swisher's Acquisition Strategy**

32. Swisher became a public reporting company in late 2010. From inception, Swisher's business strategy was to grow through acquisitions. In 2011, Swisher acquired 63 franchises and independent businesses.

33. Swisher's newly acquired companies continued to maintain their own accounting systems for a three- to six-month period after the transactions closed.

The acquired companies typically sent trial balances to lower-level accounting personnel at Swisher for monthly consolidation.

34. Viard was involved in the monthly “mapping” of trial balances for certain acquisitions to Swisher’s accounting systems. The acquired companies’ financial reporting systems were maintained in approximately 75 separate databases, and different portions of each company’s accounting records were consolidated with Swisher’s in an ad-hoc and inconsistent manner.

**B. Swisher Engaged in an Earnings Management Scheme During the Second, Third, and Fourth Quarters of 2011**

35. Swisher reported Adjusted EBITDA in its public filings with the Commission and to its Board of Directors.

36. According to its Form 10-Q for the quarter ended September 30, 2011, 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.”

37. Adjusted EBITDA amounts are derived by adjusting the GAAP financial results for certain items. Misstatements in Swisher’s Adjusted EBITDA for the second and third quarters of 2011 resulted in misstatements in Swisher’s GAAP financial statements.

38. Swisher developed internal Adjusted EBITDA targets that were based on what management understood to be the expectations of the Company's lenders as the basis for future acquisition financing.

39. Swisher's financial statement closing process during the second, third, and fourth quarters of 2011 was conducted with the intent to realize targeted Adjusted EBITDA figures, and the closing process ended immediately after achieving those results rather than continuing through a complete analysis of all significant accounts.

40. Kipp e-mailed Swisher's senior management reporting the consolidated Adjusted EBITDA after the initial close and announced that continued efforts were underway to identify the shortage in the preliminary results relative to expected results.

41. Thereafter, Kipp communicated with his corporate accounting team regarding suggested areas and amounts for adjustments. The corporate level accounting personnel were asked to get "into the weeds" and contribute ideas as to how to improve earnings results.

42. A "hit list" of potential positive adjusting entries would be compiled and the positive adjusting entries or "good guys" were recorded.

43. Accounting personnel were encouraged to find offsets for negative entries or “bad guys.”
44. When Swisher achieved its Adjusted EBITDA target, the financial statement closing process concluded, and Kipp e-mailed his accounting team, announcing the result and advised that additional entries would not be recorded.
45. Kipp sent another e-mail to senior management announcing that the Adjusted EBITDA figures had been achieved.
46. For example, for the second quarter of 2011, Swisher needed \$3 million of Adjusted EBITDA to meet its predetermined target.
47. After the initial closing process for the quarter concluded on July 23, 2011, the Adjusted EBITDA for the second quarter was \$2.3 million. Kipp instructed relevant accounting staff to make adjustments to achieve the \$3 million targeted amount.
48. By July 29, 2011, Swisher’s Adjusted EBITDA for the second quarter was \$3 million.
49. As the adjustments were accumulated to meet the target, Viard would update Swisher’s Financial Statement Workbook.

50. Similarly, Swisher's forecasted Adjusted EBITDA for the third quarter was \$5.2 million. On October 14, 2011 following the initial closing process for the quarter, Swisher computed its Adjusted EBITDA at \$4.1 million.

51. Kipp again instructed Swisher staff to make adjusting accounting entries to increase the Adjusted EBITDA. Swisher ultimately reported an Adjusted EBITDA of \$5.26 million for the third quarter of 2011.

52. The accounting adjustments directed by Kipp typically involved aggressive re-evaluation and manipulation of various acquisition-related reserves and expenses. Five instances of improper accounting identified are described below in detail.

**C. Improper Accounting Associated with Swisher's Acquisition of Choice Environmental**

53. Three of the five accounting adjustments involved in the earnings management scheme related to Swisher's acquisition of Choice Environmental ("Choice"), a Florida-based waste management and sanitation company.

54. When accounting for its acquisition of Choice on Swisher's financial statements, Swisher was required to recognize and measure all of the identifiable assets and liabilities of Choice at "fair value" as of the acquisition or closing date.

55. Fair value is defined as “the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.” (ASC 805-10-20)

56. If the acquiring company does not have all of the information that it needs to value the acquired company’s assets by the time it files financial statements that cover the acquisition date, the fair values are considered provisional and can be adjusted throughout the “measurement period,” which is up to one year after acquisition. (ASC 805-10-25-13 through 19)

57. Measurement period adjustments are reflected retroactively back to the acquisition date. A measurement period adjustment can only be recorded if the purchaser obtains new information about facts and circumstances that existed as of the acquisition date that, if known at the time, would have affected the measurement of the amounts recognized as of that date. (ASC 805-10-25-13)

58. Measurement period adjustments to reflect newly learned facts are recorded on the balance sheet as an increase or decrease to goodwill.

59. If facts and circumstances come to light during the measurement period that did not exist as of the acquisition date, the acquiring company must account for those changes in its post-combination financial statements in conformity with any other applicable GAAP, typically impacting the income statement.

***1. Background on Swisher's Acquisition of Choice Environmental***

60. One of Swisher's most significant acquisitions during 2011 was Choice, a Florida-based waste management and sanitation company. The transaction closed on March 1, 2011.

61. Both Kipp (then in his capacity as Swisher's Controller) and Viard were responsible for setting up accruals and expenses in connection with the related acquisition accounting.

62. After the transaction closed, senior management closely tracked Choice's financial results; with projected annual revenues of approximately \$76 million and projected annual EBITDA of approximately \$17 million (as of October 2011), Choice's performance significantly impacted Swisher's financial results.

63. During the second, third, and fourth quarters, Choice's financial results consistently failed to meet Swisher's initial expectations.

64. In an October 2011 e-mail to Choice's CFO and others, Swisher's CEO bluntly expressed his disappointment with Choice's financial results: "We need to have a discussion... The 4<sup>th</sup> quarter number you are 'selling' needs to be reconciled to the budget current 'Choice' management provided on the date of acquisition plus the pro forma that current 'Choice' management provided with

synergies for [two specific transactions]. We paid for the EBITDA number that management provided and we expect to see it.”

65. As an operating division of Swisher, Choice’s disappointing financial results during the second, third, and fourth quarters of 2011 were the primary driver of the earnings management scheme.

**2. *Improper Adjustment of a Choice Employee’s Salary Expense (Kipp and Viard: Second and Third Quarters of 2011)***

66. During 2011, Swisher terminated certain employees of the acquired companies after the acquisition dates and reclassified the previously recorded salary expenses for those employees to the opening balance of goodwill, thereby increasing Swisher’s earnings.

67. Although contingent payments to employees may be included as part of a business combination exchange, classification of post-merger salary expenses as acquisition costs requires a determination that the subsequent salary expenses, as “contingent consideration,” were specifically contemplated as part of the business combination, and existed at the date of acquisition, rather than a subsequent, separate transaction. (ASC 805-10-55-24 to 25)

68. In July 2011, after learning that Swisher had not met its Adjusted EBITDA target for the second quarter, Viard, at Kipp’s direction, reclassified the salary expense of Choice’s Chief Operating Officer for that quarter as a severance

payment. This adjusting entry increased goodwill, reduced Swisher's second quarter expenses, and enabled the company to meet its second quarter Adjusted EBITDA target.

69. At the same time, Viard also reclassified the accrued salary expense for this employee for the third quarter to goodwill, thus reducing expenses for that quarter.

70. Choice's Chief Operating Officer never agreed to a severance arrangement and never executed a written severance agreement at the time of the merger.

71. Because there was no severance agreement in place prior to the acquisition, this accounting adjustment violated GAAP and was improperly undertaken in furtherance of the earnings management scheme.

72. Kipp and Viard knew that the reclassification of this employee's salary from an expense to goodwill was made to meet earnings targets.

73. Kipp and Viard also knew that they lacked sufficient documentary support for this adjustment.

74. As part of Swisher's restatement, these adjusting entries (which had increased Swisher's Adjusted EBITDA by approximately \$112,000 and \$462,000 in the second and third quarters, respectively) were reversed and reclassified as salary expense.

**3. *Improper Treatment of a Purportedly Unfavorable Contract as an Acquisition Expense (Kipp and Viard; Second and Third Quarters)***

75. In accounting parlance, an “unfavorable contract” is one that has terms that are unfavorable relative to market terms. (ASC 805-20-55-31)

76. When a contract is acquired as part of an acquisition, the acquiring company typically performs an analysis to determine if the contract is “out of market” or “unfavorable,” often using valuation specialists to make that determination.

77. In making this determination, the issue is not whether a contract is profitable, but whether it is less profitable than similar contracts negotiated at prevailing “market” terms.

78. For an unfavorable contract, the acquiring entity must recognize a liability at fair value as of the acquisition date, establish a reserve for that liability, and amortize that liability against the reserve over the life of the contract.

79. Swisher, in violation of GAAP, improperly reclassified a waste services contract covering a portion of Lee County, Florida (the “Lee County contract”) as an “unfavorable contract,” thereby increasing earnings by \$182,000 and \$90,000 in the second and third quarters respectively.

80. Swisher assumed the contract through the acquisition of Choice. Prior to the acquisition, Choice was having difficulties servicing the contract as required by Lee County.

81. As a result of these difficulties, Choice was required to make changes to the manner in which it serviced the contract, which resulted in additional operating expenses to service the contract.

82. The monthly cost estimates for these additional operating expenses were \$39,400.

83. After receiving an e-mail from Swisher's CEO identifying the additional costs associated with operating the Lee County contract, Kipp tasked Viard with making a related purchase accounting adjustment, and identified the issue as an "open item" to help achieve Adjusted EBITDA targets.

84. Viard raised the issue with a representative from a third-party valuation consulting firm that Swisher used in connection with its acquisition accounting. In a July 24, 2011 e-mail to the valuation specialist, Viard stated: "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 the 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 is underwater.”

85. The valuation specialist expressed skepticism about classifying the Lee County contract as unfavorable. Specifically, he responded to Viard’s e-mail as follows: “The clause was in the contract that was agreed to. It may be performing poorer than expected, but seems to be within the allowable operating margins given the allowable structure of the final deal given the contract.”

86. Nevertheless, Viard chose to classify the Lee County contract as unfavorable. This allowed Swisher to treat the expenses from the Lee County contract as a cost of acquisition, thus removing those expenses from the income statement and increasing earnings.

87. Kipp and Viard were fully aware that the accounting treatment of this contract, which was ultimately reversed and reclassified as part of the restatement, was chosen in order to increase Swisher’s Adjusted EBITDA so that it could meet an internal target.

88. Viard, aware of the earnings management scheme, failed to perform the necessary analysis or obtained the requisite documentation to support the adjusting accounting entry.

**4. *Manipulation of Choice's Insurance Reserves***  
**(Kipp; Third Quarter of 2011)**

89. Swisher also manipulated insurance reserves in order to reach Adjusted EBITDA targets in the third quarter of 2011.

90. In particular, Kipp directed a reduction of Choice's reserve for workers' compensation expense in order to meet earnings targets.

91. Specifically, during the third quarter closing process, Kipp engaged in the following e-mail exchange with Choice's CFO:

Kipp: 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 that you should have room in some of your reserves. You should have \$300K of Workers comp accruals we set up on the operating balance sheet that should still be there.

Choice CFO: Mike – in the last 2 days I had Ken analyze our general insurance reserve – and I know we have about \$70K there. ...I need to look at the Workers Comp – Ken was looking into that, but we just had the audit and haven't got the results ...so we didn't want to touch it yet...but if we are at the "rainy day" then maybe we take it now. Besides 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 will leave me naked on reserves after this.

Kipp: Do your best to get to \$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.

Choice CFO: Mike – here is what I have for you:

\$50,000 of General Insurance Reserve ....

\$175,000 of Workers Comp. Insurance ....

As I stated earlier, the cupboard is pretty bare now.

Kipp: I appreciate the help. I will try to help you refill the cupboard as we go forward.

92. Kipp later sent an e-mail to another member of the accounting staff indicating that Swisher would “refill the cookie jar” using items to be found in a monthly operating review.

93. By reducing the workers compensation insurance reserve by \$175,000, Kipp enabled Swisher to increase its earnings for the quarter by a corresponding amount.

94. Kipp directed the adjustments to the worker's compensation insurance reserve solely for the purpose of achieving earnings targets, without any regard to appropriate accounting treatment.

95. The associated \$175,000 increase to earnings from the adjustment to the worker's compensation insurance reserves did not comply with GAAP and was reversed as part of the restatement based on a lack of supporting documentation for the valuation of the reserve at the time of acquisition.

**D. Manipulation of “Earnout” Reserve in Connection with Swisher’s Acquisition of En-Viro Solutions, Inc. (Kipp and Viard; Third Quarter of 2011)**

96. Swisher also made adjustments to its accounting for an “earnout” reserve associated with the January 2011 acquisition of En-Viro Solutions, Inc. (“En-viro”), a waste management company based in Seattle, Washington, in order to achieve targeted results in the third quarter of 2011.

97. An earnout is a contractual obligation whereby the purchaser of a business agrees to pay the seller additional future consideration based on the acquired business achieving certain future financial goals. The term “earnout” refers to a pricing structure in mergers and acquisitions where the sellers must “earn” part of

the purchase price based on the performance of the business following the acquisition.

98. The appropriate accounting treatment for an earnout, also referred to as “contingent consideration,” is to reflect the anticipated future payments at fair value on the balance sheet at the time of acquisition. An earnout must be both probable and subject to reasonable estimation at the time it is initially recorded. (ASC 805-20-25-15A, 805-30-25-5 & 805-30-35-1).

99. Subsequent to the acquisition, changes in the fair value of an associated earnout are accounted for in one of two ways.

100. If the change in fair value is a result of additional information that existed at the acquisition date, the resulting change is corrected retrospectively to the provisional balance sheet amounts recorded to goodwill and the associated earnout accrual.

101. If the change in fair value is a result of events that occurred after the acquisition date, the resulting change is recorded in the income statement as either an increase or decrease in earnings.

102. In connection with the En-viro acquisition, in January 2011, Viard recorded a \$1 million earnout reserve that corresponded to anticipated future quarterly payments representing 10% of the company’s “Gross Margin generated on service

revenue,” (“gross margin revenue”) i.e., the dollar amount by which gross revenues exceeded associated service costs.

103. At that time, En-viro’s annual gross margin revenue was approximately \$1 million based on its existing customer base.

104. Based on past performance, the earnout could only have reasonably been expected to generate approximately \$100,000 per year, or \$300,000 over a three-year period.

105. The historical financial information included in Viard’s associated “Purchase Accounting Workbook” did not support an earnout greater than \$300,000.

106. In February 2011, a Swisher employee involved in the acquisition sent Viard an e-mail reflecting the anticipated timing of the earnout payments. This analysis reflected an increase in the quarterly earnout amount over the three year period and total payments equaling \$1,000,000.

107. Viard copied and pasted the e-mail into the associated workbook. Viard did not fair value the earnout and performed no due diligence on this entry.

108. Kipp and Viard aggressively reevaluated the reserve in connection with the earnings management scheme during the closing process for the third quarter of 2011.

109. Specifically, on October 15, 2011, during the third quarter closing process, Kipp and Viard had the following e-mail exchange:

Kipp: How much of the BDO accrual is for the 2011 audit?  
Didn't we leave something in for that? To your point, technically we probably should not be accruing any of that since the service hasn't been performed. Any thoughts? I need to get about \$300K in expense reductions. This could be one.

Viard: The Enviro earnout may have some potential, but may be (sic) would be stretching it. It is a 3-year total \$1M pay out and they have not been making the full payments, but again they have 3 years to hit the revenue targets. The payments have been around \$20-30K a quarter... We haven't wanted to reverse anything just yet, given that they have 3 years, but it likely (sic) that they will not get the full \$1M. What have we done about the Mt. Hood profit sharing accrual? . . . .  
This is \$180K.

Kipp: How would the earn-out be booked? Wouldn't that be an adjustment to goodwill rather than the P&L?

Viard: No – it is contingent consideration. Fair value at the time of acquisition and subsequent changes go through the P&L. As long

as the changes are not material I wouldn't need to disclose. I am not positive where on the income statement to put it.

Kipp: Can you do a quick calculation of what the reserve adjustment would be if the remaining payments were \$25K/Qtr. How much of the Earn-out can be bring down to earnings?

Viard: It is anywhere from \$200K to 700K. . . . The only risk we have is if they finally start to make their numbers.

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Viard: Do you want to run it through SG&A?

Kipp: Where should it go? I would like it in EBITDA.

110. Following the e-mail exchange above, Viard reached out to two Swisher employees involved in the acquisition for their thoughts on what the remaining payout would be. In response, Kipp said:

For this analysis, I would assume they earn no more than 50% of the contractual bonus in any period. I have reviewed the assumptions with [Swisher's CEO] and [Swisher's EVP]. They are good with it. Please finalize and send a journal entry to [Swisher's controller].

111. During the closing process for the third quarter of 2011, Viard ultimately reduced improperly the Enviro earnout reserve by \$500,000, with a corresponding increase to earnings for that quarter.

112. Viard made this accounting adjustment without documenting any analysis as to whether the entire \$500,000 reduction was attributable to newly acquired information.

113. Viard's failure to assess whether any portion of the adjustment was the result of facts or circumstances that existed at the time of acquisition was, at a minimum, severely reckless.

114. Had Viard, in connection with determining how to book the reduction in the earnout reserve, considered whether the initial valuation was appropriate, she would have determined that at least a portion of the excess reserve was attributable to information that existed at the time of the acquisition, and thus should have been booked through goodwill, not earnings.

115. In a presentation to the Swisher's Board of Directors in connection with the acquisition on En-Viro, those most familiar with the transaction only valued the earnout at approximately \$700,000, rather than the \$1 million that Viard had recorded. This indicates that at least \$300,000 of the reduction to the \$1 million

earnout was attributable to information known when the earnout was initially recorded, rather than information acquired after the merger closed.

116. Viard proposed another adjustment to the earnout in the Fourth Quarter of 2011, and acknowledged at that time that the adjustment would “leave just enough room to cover the remaining Enviro earnout.” She further noted that there would not “be any room to adjust in the future” and that there was a potential that they would have to pay more in the future.

117. Kipp’s conduct in connection with this transaction reflects his fraudulent intent. When Viard attempted to obtain more information to support the accounting adjustment, Kipp stopped her further inquiry.

118. Kipp provided Viard the assumptions to use in her analysis, but there is no evidence that those assumptions were supported by anything other than the desire to obtain the right number for EBITDA purposes.

119. Kipp also controlled the stream of information supporting the accounting adjustment, and Kipp never obtained the requisite documentation to support the adjustment.

120. Given that this accounting adjustment arose from Kipp’s request for additional expense reductions in connection with the earnings management scheme, both Kipp and Viard acted knowingly or recklessly.

121. The subsequent \$500,000 adjustment was reversed as part of the restatement, based on the fact that the initial valuation of the earnout lacked any supporting documentation.

122. The independent auditing firm retained by Swisher's audit committee during the internal investigation fair valued the earnout at \$350,000. As part of Swisher's year-end audit for 2011, BDO fair valued the earnout at \$300,000.

**E. Manipulation of the Allowance for Doubtful Accounts (Kipp; Fourth Quarter)**

123. In connection with the closing process for the second quarter of 2011, Kipp determined to apply a new methodology for calculating Swisher's allowance for doubtful accounts.

124. Specifically, using historical monthly write-offs (apparently across all divisions and recent acquisitions) for the preceding 5 months (with certain one-time adjustments) as a percentage of credit sales for the same period, Swisher multiplied the resulting percentage by associated accounts receivable.

125. Applying this methodology in the second quarter of 2011, Kipp was able to conclude that the allowance for doubtful accounts that had been booked was too high and that a write-down to the reserve was appropriate.

126. Kipp used two different methodologies to calculate the reserve in the second quarter of 2011, with only the second methodology disclosed to BDO.

127. Initially, the staff accountant responsible for preparing the accounts receivable analysis applied a 0.5% rate to calculate the reserve. That analysis resulted in the reserve being overstated by approximately \$361,000.

128. Based on that analysis, Swisher reduced the reserve by \$250,000 (the remaining excess reserve, \$125,000, appears to have been re-classified to reserve against a note that Swisher was having difficulty collecting).

129. Less than two weeks later, the staff accountant prepared a second analysis of accounts receivable. For that analysis, she used the 0.3% rate, which generated an additional \$330,000 of excess reserve.

130. Ultimately, Swisher booked both adjustments and reduced the reserve by \$580,000.

131. Contemporaneous e-mails indicate that Kipp viewed the overstated reserve as an earnings management cushion/tool, and ultimately determined to book the second adjustment to the reserve only after sufficient other adjustments had been made to hit the earnings targets for that quarter.

132. For example, in connection with the closing process for the second quarter of 2011, e-mails indicate that Kipp delayed making a final determination as to the size of the second adjustment to Swisher's allowance for doubtful accounts until he first confirmed that accounting personnel had made other requested adjustments.

133. On July 26, 2011, Kipp bluntly e-mailed a member of the accounting department: “I need about 250K in income to get to 3MM.” After the employee responded with some corresponding adjustments short of the requested amount, Kipp responded: “Let’s work up the number. If we are short. [sic] We will get it in bad debt.”

134. Earlier that day, a lower level accountant at Swisher told Kipp in an e-mail that she had “accidentally posted” a \$330,000 adjustment to the reserve, and indicated that the final entry would be posted that day, the final day by which Kipp indicated had that the earnings targets were to be met.

135. Using the same methodology and employing the 0.3% rate, the reserve was further reduced in in the third quarter of 2011 by approximately \$150,000.

136. During the fourth quarter of 2011, accounting personnel discovered that Swisher was significantly under-reserved in this area because the company had failed to include write-offs associated with Choice’s operations after that company was acquired in March 2011.

137. The terminated controller initially discovered the discrepancy and provided the information to Kipp, who insisted that Swisher would not book the adjustment and insisted that the controller find a way to fix it.

138. After the controller declined to make any adjustments (which would have resulted in a reduction to earnings), Kipp instructed another employee to come up with some solution that would not impact earnings.

139. In response, that employee obtained a spreadsheet of Swisher's acquisitions during the year, and arbitrarily increased the previously recorded reserves for each company by approximately 5%, thereby increasing the reserve for doubtful accounts by approximately \$550,000 without impacting earnings, i.e. with corresponding debits to the goodwill associated with the acquisitions.

140. The employee provided his "solution" to Kipp, who authorized him to book the associated reserve entry.

**F. The Earnings Management Scheme Unraveled in the Fourth Quarter of 2011**

141. Swisher's earnings management scheme unraveled in early 2012 when, as part of the year-end financial statement closing process, Kipp terminated the controller after the controller refused to record an accounting entry for which the controller thought there was no plausible justification other than to hit a target.

142. After articulating why he believed the entry was inappropriate, the controller sent an e-mail, dated January 23, 2012, to Kipp saying "I'll run it by BDO so that we are all on the same page."

143. The next morning Kipp sent the controller the following response: “You’ll run it by me since I am the chief accounting officer. I am out of patience with this.”

144. Kipp terminated the controller the next day.

145. The controller’s performance reviews showed that the controller was meeting or exceeding all relevant performance standards.

146. The terminated controller subsequently met with Swisher’s General Counsel and BDO and provided them with a draft letter to the audit committee.

147. The letter raised several accounting issues, including the allegation that Swisher was using purchase accounting to manage reported results to previously determined Adjusted EBITDA targets.

148. The controller’s letter also alleged that Swisher’s standard practice was to put reserves on the opening balance sheet for a number of potential losses and for contingent consideration. The reserves were typically recorded at their highest possible amount so that they could be considered part of the purchase price of the acquired entity and thus offset against goodwill. Swisher would later reduce the inflated reserves and reflect the reduction as an increase to income.

149. Similarly, rather than expensing the costs that arose in connection with the ongoing operation of the acquired businesses, Swisher would frequently place those costs on the opening balance sheet as part of goodwill.

150. After learning of the former controller's allegations, in March 2012 Swisher's audit committee hired the law firm of Holland & Knight to conduct an internal investigation. Holland & Knight and the forensic accounting firm Cherry Bekaert & Holland reviewed the accounting entries related to each of the 63 acquisitions made by Swisher in 2011.

151. On March 28, 2012, Swisher announced that the quarterly reports for 2011 should no longer be relied upon and might require restatement.

152. On May 17, 2012, Swisher announced that it was firing Kipp and Viard.

153. In management representation letters sent to BDO in connection with the firm's reviews conducted in the second and third quarters of 2011, while orchestrating the earnings management scheme, Kipp falsely represented that he had "no knowledge of [f]raud or suspected fraud involving management or involving employees who have significant roles in internal controls," and that he had "not identified any significant deficiencies, including material weaknesses, in the design or operation of internal controls that could adversely affect the

Company's ability to record, process, summarize, and report interim financial data."

**G. Swisher Restated its Financial Results for the First Three Quarters of 2011**

154. As a result of Swisher's earnings management and departure from GAAP, the internal investigators identified approximately 20 accounts that were materially misstated in 2011.

155. Consequently, on February 19, 20 and 21, 2013, Swisher filed amended quarterly reports on Form 10-Q/A for the quarterly periods ended March 31, 2011, June 30, 2011 and September 30, 2011, respectively. The following table details the restatement effect on Swisher's originally reported net loss before income taxes (in 000s):

Period Ended	As Originally Reported	As Restated	% under/(over)stated
Quarter ended March 31	\$ (7,925)	\$ (12,394)	36%
Quarter ended June 30	\$ (10,640)	\$ (12,048)	11.6%
Quarter ended September 30	\$ (3,710)	\$ (2,605)	(42%)

156. The restatement reflects entries made in furtherance of the earnings management scheme, as well as errors largely associated with the company's lack of effective internal controls (also acknowledged as part of the restatement).

157. The five instances of acquisition-related earnings management adjustments described above (all of which were reversed as part of the restatement) had

increased Swisher's previously reported earnings by approximately \$500,000 (4.1%) and \$1,500,000 (57%) in the second and third quarters of 2011, respectively.

158. These five accounting adjustments had a material impact on Swisher's financial statements, in part because they were made to further an earnings management scheme.

159. Swisher also restated Adjusted EBITDA as follows (in 000s):

Period Ended	As Originally Reported	As Restated	% under/(over)stated
Quarter ended March 31	\$ (962)	\$ (3,609)	73%
Quarter ended June 30	\$ 3,009	\$ 1,170	157%
Quarter ended September 30	\$ 5,255	\$ 1,950	169%

#### **H. Materially Deficient Internal Controls**

160. Swisher acknowledged in its Form 10-K for the fiscal year ended December 31, 2011, filed on February 26, 2013, and in its restated Forms 10-Q for 2011 that as of those reporting periods, Swisher's internal control over financial reporting and disclosure controls and procedures were not effective, as a result of material weakness of the company's internal control over financial reporting.

161. Among the deficiencies identified were the placement of an undue emphasis on internal anticipated financial results in communications during the financial statement close process and allowing for overrides of entity-level controls during

the financial reporting close process resulting in a number of journal entries having either insufficient or no support.

162. Swisher failed to devise and maintain an adequate system of internal accounting controls permitting the preparation of financial statements in conformity with GAAP, particularly with respect to the financial close process.

163. As CFO, Kipp knowingly failed to implement a system of internal accounting controls and knowingly falsified accounts.

164. Kipp knowingly circumvented the controls, and knowingly falsified accounting records in order to produce financial statements in alignment with targeted numbers and such management override of controls was a material weakness at Swisher.

165. Viard, directly or indirectly, falsified Swisher's accounting records or caused such records to be falsified in furtherance of the earnings management scheme.

166. In Swisher's most recent 10-K, both Swisher and BDO acknowledged that Swisher did not maintain, in all material respects, effective internal control over financial reporting as of December 31, 2014.

167. Swisher's financial statement closing process during the second, third, and fourth quarters of 2011 was conducted with the intent to realize targeted Adjusted EBITDA figures, and the closing process ended immediately after achieving those

results rather than continuing through a complete analysis of all significant accounts.

**COUNT I**

**FRAUD**

**Violations of Section 17(a)(1) of the Securities Act  
[15 U.S.C. § 77q(a)(1)]**

**(Kipp and Viard)**

168. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

169. During 2011, Defendants, in the offer and sale of the securities described herein, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, employed devices, schemes and artifices to defraud purchasers of such securities, all as more particularly described above.

170. Defendants knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud.

171. While engaging in the course of conduct described above, Defendants acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severely reckless disregard for the truth.

172. By reason of the foregoing, Defendants, directly and indirectly, have violated and, unless enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

**COUNT II**

**FRAUD**

**Violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act  
[15 U.S.C. §§ 77q(a)(2) & 77q(a)(3)]**

**(Kipp and Viard)**

173. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

174. During 2011, Defendants, in the offer and sale of the securities described herein, by use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly:

- a. obtained money and property by means of untrue statements of material fact and omissions 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
- b. engaged in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities,

all as more particularly described above.

175. By reason of the foregoing, Defendants, directly and indirectly, have violated and, unless enjoined, will continue to violate Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) & 77q(a)(3)].

### **COUNT III**

#### **FRAUD**

#### **Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]**

#### **(Kipp)**

176. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

177. During 2011, Defendant Kipp, in connection with the purchase and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly:

- a. employed devices, schemes, and artifices to defraud;
- b. made untrue statements of material facts and omitted 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. engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities,

all as more particularly described above.

178. Defendant Kipp knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts, and engaged in fraudulent acts, practices and courses of business. In engaging in such conduct, Defendant Kipp acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severely reckless disregard for the truth.

179. By reason of the foregoing, Defendant Kipp, directly and indirectly, has violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)].

#### **COUNT IV**

#### **FRAUD**

#### **Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rules 10b-5(a) and 10b-5(c) thereunder [17 C.F.R. §§ 240.10b-5(a) & 240.10b-5(c)]**

#### **(VIARD)**

180. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

181. During 2011, Defendant Viard, in connection with the purchase and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly:

- a. employed devices, schemes, and artifices to defraud; and
- b. engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities, all as more particularly described above.

182. Defendant Viard knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts, and engaged in fraudulent acts, practices and courses of business. In engaging in such conduct, Defendant Viard acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severely reckless disregard for the truth.

183. By reason of the foregoing, Defendant Viard, directly and indirectly, has violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rules 10b-5(a) and 10b-5(c) thereunder [17 C.F.R. §§ 240.10b-5(a) & 240.10b-5(c)].

**COUNT V**

**Internal Controls, Books and Records, Lying to Auditors and SOX  
Certifications**

**Violations of Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] and  
Rules 13a-14, 13b2-1 and 13b2-2 thereunder  
[17 C.F.R. § 240.13a-14, 240.13b2-1 & 240.13b2-2]**

**(Kipp)**

184. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

185. During 2011, Defendant signed Kipp signed Swisher's Form-Q certifications for the second and third quarters of 2011 that were provided to the company's outside auditors, despite knowing that: (a) there were material misstatements and omissions in the relevant financial statements; (b) internal controls were not properly designed; and (c) Defendant Kipp had not disclosed to the Swisher's audit committee and BDO all significant internal control deficiencies and any fraud involving members of management.

186. During 2011, Defendant Kipp, directly and indirectly, knowingly circumvented Swisher's system of internal accounting controls and Defendant Kipp knowingly failed to implement a system of internal accounting controls.

187. During 2011, Defendant Kipp, directly and indirectly, knowingly falsified and caused to be falsified Swisher's books and records.

188. By reason of the foregoing, Defendant Kipp, directly and indirectly, has violated and, unless enjoined, will continue to violate Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] and Rules 13a-14, 13b2-1 and 13b2-2 thereunder [17 §§ C.F.R. 240.13a-14, 240.13b2-1 & 240.13b2-2].

## **COUNT VI**

### **Books and Records**

#### **Violations of Rule 13b2-1 of the Exchange Act [17 C.F.R. § 240.13b2-1]**

**(Viard)**

189. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

190. During 2011, Defendant Viard, directly and indirectly, falsified and caused to be falsified Swisher's books and records.

By reason of the foregoing, Defendant Viard, directly and indirectly, has violated and, unless enjoined, will continue to violate Rule 13b2-1 of the Exchange Act [17 § C.F.R. 240.13b2-1].

**COUNT VII**

**AIDING AND ABETTING FRAUD**

**Aiding and Abetting Violations of Section 17(a) of the Securities Act  
[15 U.S.C. § 77q(a)]**

**(Kipp and Viard)**

191. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

192. During 2011, Defendants aided and abetted Swisher's violation of Section 17(a)(1) of the Exchange Act [15 U.S.C. § 77q(a)(1)] by knowingly or recklessly providing substantial assistance to an issuer that, in the offer and sale of the securities described herein, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly:

- a. employed devices, schemes and artifices to defraud purchasers of such securities;
- b. obtained money and property by means of untrue statements of material fact and omissions 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. engaged in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities,

all as more particularly described above.

193. By reason of the foregoing, Defendants, directly and indirectly, have aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

### **COUNT VIII**

#### **AIDING AND ABETTING FRAUD**

##### **Aiding and Abetting Violations of 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]**

##### **(Kipp and Viard)**

194. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

195. During 2011, Defendants aided and abetted Swisher's violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] by knowingly or recklessly providing substantial assistance to an issuer that in connection with the purchase and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly:

a. employed devices, schemes, and artifices to defraud;

b. made untrue statements of material facts and omitted 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. engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities, all as more particularly described above.

196. By reason of the foregoing, Defendants, directly and indirectly, have aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

### **COUNT IX**

#### **AIDING AND ABETTING THE FILING OF FALSE AND MISLEADING REPORTS WITH THE COMMISSION**

**Aiding and Abetting Violations of 13(a) of the Exchange Act  
[15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-11 and 13a-13  
[17 C.F.R. §§ 240.12b-20, 240.13a-11 & 240.13a-13]**

**(Kipp and Viard)**

197. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

198. During 2011, Defendants aided and abetted Swisher's violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20 & 240.13a-13] by knowingly or recklessly providing substantial assistance to an issuer in filing materially false and misleading quarterly reports on Forms 10-Q with the Commission.

199. During 2011, Defendants aided and abetted Swisher's violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20 and 13a-11 thereunder [17 C.F.R. §§ 240.12b-20 & 240.13a-11] by knowingly or recklessly providing substantial assistance to an issuer in filing materially false and misleading quarterly earnings announcements that were included on Form 8-K reports filed with the Commission.

200. By reason of the foregoing, Defendants, directly and indirectly, have aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-11 & 240.13a-13].

**COUNT X**

**AIDING AND ABETTING THE FAILURE TO MAINTAIN ACCURATE  
BOOKS AND RECORDS**

**Aiding and Abetting Violations of 13(b)(2)(A) of the Exchange Act  
[15 U.S.C. § 78m(b)(2)(A)]**

**(Kipp and Viard)**

201. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

202. During 2011, Defendants aided and abetted Swisher's violation of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)] by knowingly or recklessly providing substantial assistance to an issuer that failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

203. By reason of the foregoing, Defendants, directly and indirectly, has aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

**COUNT XI**

**AIDING AND ABETTING THE FAILURE DEVISE AND MAINTAIN A  
SYSTEM OF INTERNAL CONTROLS**

**Aiding and Abetting Violations of 13(b)(2)(B) of the Exchange Act  
[15 U.S.C. § 78m(b)(2)(B)]**

**(Kipp and Viard)**

204. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

205. During 2011, Defendants aided and abetted Swisher's violation of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)] by knowingly or recklessly providing substantial assistance to an issuer that failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

- a. transactions are executed in accordance with management's general or specific authorization;
- b. transaction are recorded as necessary (i) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (ii) to maintain accountability for assets;

c. access to assets is permitted only in accordance with management's general or specific authorization; and

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

206. By reason of the foregoing, Defendants, directly and indirectly, have aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

## **COUNT XII**

### **AIDING AND ABETTING WHISTLEBLOWER VIOLATIONS**

#### **Aiding and Abetting Violations of 21F of the Exchange Act [15 U.S.C. § 78u-6(h)]**

#### **(Kipp)**

207. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

208. During 2011, Defendant Kipp aided and abetted Swisher's violation of Section 21F(h) of the Exchange Act [15 U.S.C. § 78u-6(h)] by knowingly or recklessly providing substantial assistance to an employer that retaliated against a whistleblower.

209. By reason of the foregoing, Defendant Kipp, directly and indirectly, has aided and abetted and, unless enjoined, will continue to aid and abet violations of Section 21F(h) of the Exchange Act [15 U.S.C. § 78u-6(h)].

### **COUNT XIII**

#### **CONTROL PERSON LIABILITY**

**Control Person Liability under Section 20(a) of the Exchange Act for Violations of Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A), and 78m(b)(2)(B)] and Rules 10b-5, 12b-20, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-11 & 240.13a-13]**

**(Kipp)**

210. Paragraphs 1 through 167 are hereby re-alleged and are incorporated herein by reference.

211. As a person who, directly or indirectly, controlled Swisher during the relevant period, Defendant Kipp is liable jointly and severally and to the same extent as Swisher for the violations of the securities laws by Swisher.

As a control person of Swisher, Defendant Kipp, by engaging in an earnings management scheme, directly or indirectly and knowingly or recklessly, induced the act or acts that constituted violations by Swisher of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B) and 21F(h) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A), 78m(b)(2)(B) & 78u-6(h)] and Rules 10b-5, 12b-20, 13a-11

and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-11 & 240.13a-13].

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Commission respectfully prays for:

#### **I.**

Findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, finding that Defendants named herein committed the violations alleged herein.

#### **II.**

A permanent injunction enjoining Defendant Kipp, his officers, agents, servants, employees, and attorneys from violating, directly or indirectly, Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Sections 10(b) and 13(b)(5) of the Exchange Act [15 U.S.C. §§ 78j(b) & 78m(b)(5)] and Rules 10b-5, 13b2-1, 13b2-2 and 13a-14 thereunder [17 C.F.R. §§ 240.10b-5, 240.13b2-1, 240.13b2-2, & 240.13a-14], and aiding abetting any violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B) and 21F(h) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A), 78m(b)(2)(B) & 78u-6(h)] and Rules 10b-5, 12b-20, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-11 & 240.13a-13].

### **III.**

A permanent injunction enjoining Defendant Viard, her officers, agents, servants, employees, and attorneys from violating, directly or indirectly, Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rules 10b-5(a), 10b-5(c) and 13b2-1 thereunder [17 C.F.R. §§ 240.10b-5(a), 240.10b-5(c) & 240.13b2-1] and aiding and abetting any violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2)(A) & 78m(b)(2)(B)] and Rules 10b-5, 12b-20, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5(a), 240.12b-20, 240.13a-11 & 240.13a-13].

### **IV.**

An order pursuant to Section 20(d) of the Securities Act [15 U.S.C. §77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. §78u(d)(3)] imposing civil penalties against Defendants.

### **V.**

An order pursuant to Section 20(e) of the Securities Act and Section 21(d)(2) of the Exchange Act barring Kipp and Viard from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12

of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

VI.

Such other and further relief as this Court may deem just, equitable, and appropriate in connection with the enforcement of the federal securities laws and for the protection of investors.

Plaintiff requests a jury trial.

Dated: May 24, 2016

Respectfully submitted,

/s/ M. Graham Loomis

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