ROBERT S. MUELLER, III (CSBN 59775)
United States Attorney

ORIGINAL
FILED
APR 15 PM 12:59
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CR 01 - 0157

WHA

UNITED STATES OF AMERICA, Plaintiff, v. MALCOLM B. WITTENBERG, Defendant.	No. VIOLATIONS: 15 U.S.C. §§ 78j and 78ff and 17 C.F.R. § 240.10b-5 – Insider Trading SAN FRANCISCO VENUE

INDICTMENT

The Grand Jury charges:

Background

At all times relevant to this Indictment:

1. The defendant MALCOLM B. WITTENBERG was an attorney and was employed as a director at the law firm of Crosby, Heafey, Roach & May ("Crosby, Heafey"). WITTENBERG was the head of Crosby, Heafey's Patent Department, and worked in the firm's San Francisco office.

2. Forte Software, Inc. ("Forte") was a software company headquartered in Oakland, California. Forte was a client of Crosby, Heafey.

3. Sun Microsystems, Inc. ("Sun") was a Palo Alto, California-based maker of network computing products.

4. Forte and Sun were publicly traded on the National Association of Securities Dealers Automated Quotation System market ("NASDAQ"), a national securities market.

Relevant Securities Law Principles

5. The national securities markets are operated based on the assumption that all investors have equal access to information about the companies in which they invest. As a result, the federal securities laws prohibit corporate "insiders" from trading in company-related securities using material nonpublic information about the company.

6. In addition to company directors, officers, and employees, non-employees such as outside attorneys who become fiduciaries of a company are considered to be "temporary insiders" of the company. An attorney who becomes a temporary insider of a company owes a fiduciary duty to the company not to trade in company securities while in possession of material nonpublic information regarding the company.

WITTENBERG's Insider Trading

7. On or about August 14, 1999, Forte and Sun entered into a confidential agreement regarding a planned stock-for-stock merger between the two companies.

8. On or about August 16, 1999, defendant WITTENBERG had a telephone conversation with an attorney employed by Forte. The attorney advised WITTENBERG of the impending merger and requested that he provide information regarding Forte's patents to assist in the merger process. The attorney asked WITTENBERG to cooperate with attorneys for Sun by providing any requested information regarding intellectual property matters. The attorney further advised WITTENBERG that information regarding the merger was confidential.

9. On August 16, 1999, after being informed by his client, Forte, that it was about to be acquired by Sun, WITTENBERG purchased 1000 shares of Forte stock at a price of $13.50 per share.

10. On August 19, 1999, an attorney employed by Sun contacted WITTENBERG by telephone and arranged to review Forte patent files at WITTENBERG's office. The attorney and WITTENBERG discussed the company's due diligence effort and the merger as the reason for reviewing the files. Later that day, the Sun attorney visited Crosby, Heafey's San Francisco office to review Forte's patent files. While reviewing the files, the Sun attorney spoke to WITTENBERG regarding one of the Forte patents.

11. On Friday, August 20, 1999, WITTENBERG purchased an additional 1000 shares of Forte stock, at a price of $14.75 per share.

12. On Monday, August 23, 1999, Sun publicly announced that it would acquire Forte through a stock-for-stock exchange. That day, Forte stock closed at $21 1/8 per share. The merger was consummated in October 1999. As a result of the merger, shareholders of Forte became shareholders of Sun. WITTENBERG's 2000 shares were exchanged for 600 shares of Sun.

13. On or about October 21, 1999, WITTENBERG sold all 600 Sun shares, earning gross proceeds of $54,687.44.

COUNT ONE:

14. Paragraphs One through Thirteen are realleged and incorporated in Count One.

15. On or about August 16, 1999, in the Northern District of California, the defendant

MALCOLM B. WITTENBERG

did willfully, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the facilities of a national securities exchange, use and employ manipulative devices and contrivances in connection with the purchase and sale of securities, namely, the stock of Forte Software, Inc., in contravention of the rules and regulations prescribed by the Securities and Exchange Commission, namely, 17 C.F.R. § 240.10b-5, by (a) employing a device, scheme, and artifice to defraud, (b) omitting to state material facts necessary to make statements made, in light of the circumstances under which they were made, not misleading, and (c) engaging in acts, practices, and courses of dealing which would and did operate as a fraud and deceit.

16. Specifically, on or about August 16, 1999, on the basis of material nonpublic information regarding an impending merger between Forte, a Crosby, Heafey client, and Sun Microsystems, WITTENBERG purchased 1000 shares of Forte stock, in breach of his fiduciary duty not to trade in Forte stock while in possession of material nonpublic information regarding Forte.

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

COUNT TWO:

17. Paragraphs One through Thirteen are realleged and incorporated in Count Two.

18. On or about August 20, 1999, in the Northern District of California, the defendant

MALCOLM B. WITTENBERG

did willfully, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the facilities of a national securities exchange, use and employ manipulative devices and contrivances in connection with the purchase and sale of securities, namely, the stock of Forte, in contravention of the rules and regulations prescribed by the Securities and Exchange Commission, namely, 17 C.F.R. § 240.10b-5, by (a) employing a device, scheme, and artifice to defraud, (b) omitting to state material facts necessary to make statements made, in light of the circumstances under which they were made, not misleading, and (c) engaging in acts, practices, and courses of dealing which would and did operate as a fraud and deceit.

19. Specifically, on or about August 20, 1999, on the basis of material nonpublic information regarding an impending merger between Forte, a Crosby, Heafey client, and Sun Microsystems, WITTENBERG purchased 1000 shares of Forte stock, in breach of his fiduciary duty not to trade in Forte stock while in possession of material nonpublic information regarding Forte.

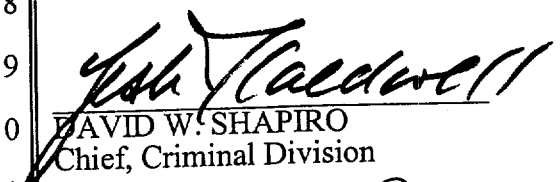
All in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

DATED:

A TRUE BILL.

FOREPERSON

ROBERT S. MUELLER, III
United States Attorney



DAVID W. SHAPIRO
Chief, Criminal Division

(Approved as to form: _____)
AUSA John Hemann