DAVID W. SHAPIRO (NYSB 2054054)
United States Attorney

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DAVID A. THATCHER, Defendant.	No. VIOLATION: Conspiracy to Commit Securities Fraud – 18 U.S.C. § 371 SAN FRANCISCO VENUE

I N F O R M A T I O N

The United States Attorney charges:

COUNT ONE: 18 U.S.C. § 371 (Conspiracy to Commit Securities Fraud)

1. Between at least September 2000 and February 2001, both dates being approximate and inclusive, in the Northern District of California, and elsewhere, the defendant

DAVID A. THATCHER

and others knowingly and willfully conspired to commit offenses against the United States, namely, (a) fraud in connection with the offer and sale, and the purchase and sale, of Critical Path securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17, Code of Federal Regulations, Section 240.10b-5; (b) false and misleading statements of material fact in reports and documents required to be filed under the Securities Exchange Act of 1934 and the rules and regulations thereunder, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a); and (c) violation of Critical Path's internal accounting procedures and system of accounting controls, in violation of Title 15, United States Code, Sections 78m(b)(2)(B)(ii)(I) and 78ff(a).

I. BACKGROUND

A. The Company

2. At all times relevant to this Information, Critical Path, Inc. was a high-tech software and services company, incorporated in California and headquartered in San Francisco, California. Critical Path was founded in 1997 with a business plan that called for it to "handle the world's email" on an outsourced basis. Critical Path went public in 1999, and its common stock was publicly traded under the symbol "CPTH" on the nationwide automated quotation system ("NASDAQ") operated by the National Association of Securities Dealers.

3. In 1999 and 2000, Critical Path embarked on a succession of cash-and-stock acquisitions of other high-tech companies. Buoyed by these acquisitions, Critical Path enjoyed skyrocketing revenues during the first two quarters of 2000. While the Company reported revenues of approximately $16.1 million for all of 1999, its revenues for the first quarter of 2000 alone jumped to approximately $24.6 million, and its second-quarter revenues jumped again to approximately $33.5 million.

4. These accelerating revenues fueled even higher expectations for further revenue growth at Critical Path. On July 20, 2000, a stock analyst publicly forecasted that Critical Path would report approximately $39 million in revenues for the third quarter of 2000. Critical Path's internal revenue goals were even more aggressive, with third-quarter revenues projected at approximately $44 million. Critical Path's CEO publicly stated that the Company would "handily" exceed analysts' estimates.

5. As the third quarter drew to a close, however, Critical Path was far short of its public and internal financial goals. By September 26, 2000, Critical Path had internally recorded revenue of approximately $28.38 million, with additional revenue of approximately $4.45 million forecasted for the remainder of the quarter, leaving the Company millions of dollars short of publicly-stated goals and millions more short of its internal goals.

B. The Defendant

6. Defendant DAVID A. THATCHER was president of Critical Path from January 2000 to February 2001. Previously, from December 1998 to January 2000, he was the executive vice president, chief financial officer and secretary of Critical Path. In addition, during part of the fourth quarter of 2000, he was both president and acting CFO of Critical Path. THATCHER was a certified public accountant and a former auditor with the accounting firms Price Waterhouse and Touche & Ross.

II. MANNER AND MEANS OF THE CONSPIRACY

7. It was part of the conspiracy that defendant THATCHER and others allowed and caused Critical Path improperly to record and accelerate revenue from transactions with Peregrine Systems, Inc. ("Peregrine"), International Computers Limited ("ICL") and StarMedia Network, Inc. ("StarMedia") during the third quarter of 2000, and with Bestseats, Inc. ("Bestseats"), Storerunner Network, Inc. ("Storerunner") and Educational Networks of America ("ENA") during the fourth quarter of 2000.

A. Peregrine

8. In or about early September 2000, defendant THATCHER and others discussed a product swap for approximately $500,000 between Critical Path and Peregrine. Although the companies would be exchanging software, the transaction would be structured as two separate software purchases, thereby allowing Critical Path improperly to recognize revenue on Peregrine's purchase, without obtaining the evidence needed to establish the fair value of this barter exchange.

9. In the weeks following this initial proposal, the Peregrine product swap under discussion grew in size as defendant THATCHER and others at Critical Path realized that Critical Path needed additional revenue to meet its financial goals for the third quarter of 2000. By September 29, 2000, Peregrine agreed to buy more than approximately $3 million of software and services from Critical Path, in return for Critical Path's agreement to buy more than approximately $3 million of software and services from Peregrine.

10. To disguise the true nature of the Peregrine product swap, the transaction documents were prepared as standard software-licensing agreements; the agreements did not refer to the barter nature of the transaction; each company paid the other in the gross amount attributed to its purchase; and the companies paid each other on different days.

11. Critical Path recognized third-quarter revenue for the gross amount attributed to the software license that Peregrine received from Critical Path. Meanwhile, Critical Path delayed recognition of the expense attributable to its purchase from Peregrine by capitalizing this purchase as a nondepreciating asset.

12. Defendant THATCHER and others at Critical Path caused and allowed Critical Path improperly to recognize revenue for the Peregrine product swap. THATCHER and others at Critical Path caused and allowed Critical Path to structure the Peregrine product swap in a manner intended to mislead Critical Path's auditors about facts material to Critical Path's recognition of revenue from this product swap.

B. <u>ICL</u>

13. In the third quarter of 2000, Critical Path acquired PeerLogic, Inc. ("PeerLogic"). ICL claimed that it was owed approximately $8.7 million by PeerLogic. Critical Path assumed PeerLogic's obligation to ICL when Critical Path acquired PeerLogic. ICL expressed its willingness to accept approximately $6 million to satisfy its claim, if Critical Path paid this lesser amount before the end of the third quarter.

14. Critical Path did pay approximately $6 million to ICL. However, the transaction was structured so that Critical Path paid approximately $8.7 million to ICL to

settle the PeerLogic claim, and ICL paid back approximately $2.7 million to Critical Path as a software-licensing fee. Critical Path then recognized revenue for ICL's payment of approximately $2.7 million.

15. To avoid the appearance that the settlement agreement and the software-licensing agreement were related, the agreements were prepared as separate documents, which did not refer to each other. Further, Critical Path and ICL exchanged checks in the full amount of the gross payments, rather than having Critical Path pay the net amount owed to ICL.

16. Defendant THATCHER and others at Critical Path caused and allowed Critical Path improperly to recognize revenue for the ICL transaction. THATCHER and others at Critical Path caused and allowed Critical Path to structure the transaction in a manner intended to mislead Critical Path's auditors about facts material to Critical Path's recognition of revenue from the ICL transaction.

C. StarMedia

17. As the third quarter of 2000 drew to a close, Critical Path was engaged in negotiations with an existing customer, StarMedia, for an extension of its software-licensing agreement. To obtain the StarMedia extension during the third quarter, defendant THATCHER and others at Critical Path agreed to extend the time StarMedia would have to pay for the extended licensing agreement from 30 to 100 days. Believing that this payment extension would require Critical Path to delay its recognition of the StarMedia revenue, THATCHER executed, on or about September 30, 2000, a side letter containing this payment extension. The side letter was separated from the software-licensing agreement, and only the software-licensing agreement was forwarded to Critical Path's internal accounting and finance department, which was responsible for recording sales revenue.

18. Defendant THATCHER believed that the change in payment terms from 30 to 100 days was material and would prevent Critical Path from recognizing third-quarter revenue from the StarMedia transaction. THATCHER realized that withholding the

StarMedia side letter was improper. THATCHER and others at Critical Path caused and allowed Critical Path improperly to recognize third-quarter revenue from the StarMedia transaction.

D. Critical Path's Predictions of Fourth-Quarter Revenues and Profitability

19. Improperly based on the Peregrine, ICL and StarMedia transactions, and others, Critical Path exceeded its third-quarter revenue goals and expectations. On October 19, 2000, Critical Path announced third-quarter revenues of approximately $45 million and quarterly losses, excluding special charges, of approximately $0.14 per share. These results were materially misstated in part as a result of Critical Path's improper recognition of revenue for the Peregrine, ICL and StarMedia transactions.

20. In announcing the Company's financial results on October 19, 2000, Critical Path's CEO predicted that Critical Path would earn revenues of $54 to $56 million during the fourth quarter, and that Critical Path would become profitable for the first time ever during that quarter.

21. On November 2, 2000, at a conference attended by stock analysts, Critical Path reaffirmed these predictions of fourth-quarter revenue growth and profitability. On that same day, Critical Path issued a press release stating in part: "The fourth quarter of 2000 is a pivotal one for Critical Path, one in which we join an elite group of profitable new economy companies." The press release predicted fourth-quarter revenues of $54 to $56 million, and fourth-quarter earnings of $0.01 per share.

22. On or about November 14, 2000, Critical Path filed its third-quarter report on Form 10-Q with the United States Securities and Exchange Commission. With the knowledge and approval of defendant THATCHER and others at Critical Path, the Company's misstated third-quarter results were incorporated into this filing.

23. As the fourth quarter of 2000 drew to a close, however, Critical Path was far short of its financial goals. Defendant THATCHER and others concluded there was no legitimate means by which Critical Path could achieve its financial goals.

24. Although Critical Path's fourth quarter ended on December 31, 2000, defendant THATCHER and others at Critical Path told Critical Path salespeople that transactions closed as late as January 5, 2001 could be included in Critical Path's fourth-quarter revenues. With the knowledge and approval of THATCHER and others at Critical Path, transactions with Bestseats, Storerunner and ENA were closed in January 2001 and improperly included in Critical Path's revenues for the fourth quarter of 2000.

E. Bestseats

25. On or about January 5, 2001, Bestseats executed an agreement to license approximately $2 million in Critical Path software. With the knowledge and approval of defendant THATCHER and others at Critical Path, the agreement was backdated to December 29, 2000.

26. On or about January 16, 2001, as Critical Path's auditors were attempting to ascertain Bestseats' ability to pay for the software that Bestseats was purporting to license from Critical Path, the Bestseats CEO sent Critical Path an email summarizing Bestseats' capitalization. The email showed that Bestseats had recently received private-placement funding in the amount of $250,000. Defendant THATCHER believed that Bestseats could not pay Critical Path $2 million and believed that the Bestseats email revealed Bestseats' inability to pay. THATCHER altered the email to say that Bestseats had received funding in the amount of $12,500,000. THATCHER altered the email in a way that did not reveal that it had been altered, and so that it appeared the $12,500,000 figure was provided by the Bestseats CEO. THATCHER forwarded the altered email believing that it would be provided to Critical Path's auditors, and believing that the altered email would deceive the auditors about Bestseats' ability to pay Critical Path.

27. Defendant THATCHER and others at Critical Path caused and allowed Critical Path improperly to recognize revenue for the Bestseats transaction. THATCHER and others at Critical Path made statements to Critical Path's internal accounting, finance and legal personnel, which statements were, in the circumstances in which they were

made, false and misleading, and omitted information that was material to Critical Path's recognition of revenue from the Bestseats transaction.

F. Storerunner

28. On or about January 5, 2001, a Critical Path salesperson signed a software-licensing agreement between Storerunner and Critical Path in the amount of approximately $2 million. The agreement was backdated to December 29, 2000 with the knowledge and approval of defendant THATCHER and others at Critical Path.

29. Defendant THATCHER believed that Storerunner did not have the ability to pay for the transaction and was aware that the transaction was not completed during the fourth quarter of 2000. THATCHER and others at Critical Path caused and allowed Critical Path improperly to recognize revenue from the Storerunner transaction.

G. ENA

30. On or about January 5, 2001, ENA executed a software-licensing agreement with Critical Path in an amount exceeding approximately $2 million. With the knowledge and approval of defendant THATCHER and others at Critical Path, this agreement was backdated to December 29, 2000.

31. Critical Path issued two side letters to ENA. The side letters extended ENA's payment schedule and allowed ENA to cancel the software-licensing agreement "at the sole discretion of ENA." These side letters were not provided to Critical Path's accounting and finance department, which was responsible for recording sales revenue. Critical Path recognized approximately $2 million in revenue for the ENA agreement during the fourth quarter of 2000.

32. Defendant THATCHER was aware that ENA had been given a side letter. THATCHER was aware that the ENA agreement had not been executed until after the close of the fourth quarter of 2000. THATCHER and others at Critical Path caused and allowed Critical Path improperly to recognize fourth-quarter revenue for the ENA agreement.

H. Critical Path's Reported Financial Results for the Fourth Quarter of 2000

33. On January 18, 2001, Critical Path announced financial results for the fourth quarter of 2000. Critical Path reported quarterly revenues of approximately $52 million and a net loss for the quarter, excluding special charges, of approximately $0.16 per share. These results were materially misstated in part as a result of Critical Path's improper recognition of revenue for the Bestseats, Storerunner and ENA transactions. Despite Critical Path's improper revenue recognition for these transactions, the Company fell short of its stated financial goals of $54 to $56 million in quarterly revenues and $0.01 in quarterly net profits per share.

III. CRITICAL PATH'S REVISION AND RESTATEMENT OF ITS FINANCIAL RESULTS

34. On January 18, 2001, before Critical Path announced financial results for the fourth quarter of 2000, the Company's stock traded as high as approximately $25.95 per share.

35. On February 2, 2001, Critical Path formed a Special Committee of the Board of Directors to conduct an investigation into the Company's revenue-recognition practices. Later that same day, NASDAQ suspended trading in Critical Path common stock.

36. NASDAQ trading in Critical Path stock resumed on February 15, 2001. On that day, Critical Path's stock traded down to less than approximately $4 per share. This trading price reflected more than an approximately 80% drop from Critical Path's January 18 market value. Approximately one year earlier, on March 9, 2000, Critical Path's stock had traded as high as approximately $116.75 per share.

37. On April 5, 2001, Critical Path restated its financial results for the third quarter of 2000 and revised its results for the fourth quarter and fiscal year of 2000. The

restatement and revision included the following adjustments to quarterly and annual revenues and net losses, excluding special charges, in millions of dollars:

Critical Path's FY 2000 Restated and Revised Financial Results

	Revenues			Net Losses		
Period	Originally Released	As Restated or Revised	% Original Overstated	Originally Released	As Restated or Revised	% Original Understated
Q3	$45	$35.3	27.47%	($8.7)	($18.6)	53.22%
Q4	$52	$42.3	22.93%	($11.5)	($23.3)	50.64%
FY	$155	$135.7	14.22%	($57.2)	($78.9)	27.50%

OVERT ACTS

38. In furtherance of the conspiracy and to effect the objects thereof, in the Northern District of California, and elsewhere, defendant THATCHER and others committed the acts described in paragraphs 11 through 32 of this Information, which are realleged as if fully set forth here.

39. Defendant THATCHER and others also committed the following overt acts in furtherance of the conspiracy, in the Northern District of California, and elsewhere:

(a). On or about September 20, 2000, defendant THATCHER sent an email to StarMedia, proposing that StarMedia and Critical Path enter into an agreement with stated payment terms of 30 days and an "understanding" that Critical Path would not collect for 100 days. Explaining the need for stated payment terms of 30 days, THATCHER said in email, "If cash terms are specifically extended, then revenue recognition is correspondingly extended."

(b). On or about September 30, 2000, defendant THATCHER executed a side letter to the StarMedia agreement. The side letter stated in part, "Notwithstanding the provisions of Section 4.3 of the Software License Agreement, the payment by Licensee to Critical Path of the Licensee Fees will be due on the one-hundredth (100th) day following the Effective Date."

(c). On or about December 20, 2000, defendant THATCHER sent an email to a Critical Path salesperson, stating in part, "As long as we get contracts by 1/5/01 I believe we will be ok."

(d). On or about January 16, 2001, defendant THATCHER altered an email describing Bestseats' capitalization. The email stated that Bestseats had received private-placement funding in the amount of $250,000. THATCHER altered the email to state that Bestseats had received funding in the amount of $12,500,000.

(e). In or about February 2001, defendant THATCHER attempted to delete emails revealing the existence of the criminal conspiracy from his computer.

All in violation of Title 18, United States Code, Section 371.

DATED: ____________

DAVID W. SHAPIRO
United States Attorney

____
J. DOUGLAS WILSON
Chief, Criminal Division

(Approved as to form: ______________________)
AUSA Anderson