

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT**

SECURITIES AND EXCHANGE	:	Civil Action No. 3:04-CV-1331 JCH
COMMISSION,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
COMPETITIVE TECHNOLOGIES, INC.,	:	
CHAUNCEY D. STEELE, JOHN R. GLUSHKO,	:	
THOMAS C. KOCHERHANS, RICHARD KWAK,	:	
SHELDON A. STRAUSS, STEPHEN J. WILSON	:	
and FRANK R. McPIKE,	:	
Defendants.	:	JULY 24, 2006

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT RICHARD KWAK'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Faced with a motion for summary judgment, the SEC response shows that despite its prelitigation investigation and later discovery in this action, it does not have evidence to prove a securities fraud claim against Defendant Kwak as a matter of law. Nonetheless, having now destroyed Kwak's career and reputation built as a broker over the past 39 years, it relies on pleas that this court infer and speculate to keep the claims alive. Dismissal on Summary Judgment remains the proper way to dispose of this case without further delay.

The SEC's entire claim against Kwak is based on the claim that he delayed entering what the SEC admits were legitimate, investment driven, open market purchases of CTT stock, for his clients, to maximize their positive impact on the price of the stock. Beyond the fact that this alleged conduct does not violate the securities laws, the SEC has admitted that Kwak did not have discretion to purchase CTT stock for his clients, and it has not offered an iota of evidence to prove which, if any, of his client's orders he could have entered earlier or that the alleged delay

affected the price of the stock in any different manner than it would have affected the price had he entered the order earlier.

II. THE SEC HAS NOT PRESENTED THE PREPONDERANCE OF EVIDENCE NECESSARY TO SUPPORT A VERDICT THAT KWAK VIOLATED THE SECURITIES LAWS

To avoid summary judgment, the SEC bore the burden to set forth evidence that is both sufficient for a jury to return a verdict for the SEC, and that is “significantly probative,” See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In this case, the SEC can only prevail on its claims if it presents evidence from which a jury could reasonably find that it is more likely than not that Kwak violated the securities laws. U.S. v. Russo, 74 F.3d 1383, 1394 (2nd Cir. 1996). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587. 1-6 S.Ct. 1348 (1986)(citations omitted). Additionally, while it is not the court's function to decide which of various possible inferences should be drawn from the SEC's evidence, it is the court's function to determine whether evidence is competent to justify certain inferences. See United States v. Valenti, 135 F.2d 362, 364 (2nd Cir. 1943).

The SEC's purported “mountain of evidence” only obscures that the SEC has utterly failed to meet its burden. Not only is the SEC's theory of liability unsupportable as a matter of law, and not only is this so-called “evidence” inadmissible for the reasons set forth in defendant's Motion to Strike, filed herewith¹, but even a cursory review discloses that the SEC's

¹ This defendant has filed a motion to strike which, subject to permission of this court, adopts those claims set forth in the CTT defendants' motion to strike filed this same date, and also asserts others challenges to the admissibility of portions of the evidence submitted to oppose summary judgment. Defendant also requests that the Court take notice of the fact that the investigative testimony upon which the SEC heavily relies, will not be admissible at trial. See Goldsmith v. Comm'r of Internal Revenue, 86 T.C. No. 66, 86 T.C. 1134 (1986) (transcripts of depositions conducted during SEC investigation are inadmissible hearsay).

evidence does not support, and often contradicts, the inferences that it claims a jury could draw from the evidence.

A. The SEC Has Not Presented Evidence From Which A Jury Could Conclude That It Is More Likely Than Not That Kwak Engaged In “Matched Trades” Within The Meaning of Section 9(a)(1)(B) of the Exchange Act

There is no dispute on facts or the applicable law: the SEC cannot prevail on its claim that Kwak engaged in 18 “matched trades” in violation of Section 9(a)(1)(B) of the Exchange Act because it has admitted the facts that show that the trades were not substantially similar in size and/or time of entry, and has failed to present any evidence that the parties’ orders were for substantially the same price. See Summary of Alleged Matched Trades, attached hereto as Exhibit 1; SEC Exhibits A & N.

Nor can the SEC prove that when Kwak entered the alleged matching orders, he did so for the sole purpose of creating a false or misleading appearance of active trading in CTT stock or a false or misleading appearance with respect to the market for CTT stock because there is also no dispute that Kwak fulfilled his clients’ orders that he purchase the stock on their behalf for the legitimate purpose of investing in the stock. P.S. & D.S., 9, 18;² United States v. Mulheren, 938 F.2d 364, 368-369 (2nd Cir. 1991); In Re College Bound Consolidated Litigation, 1995 WL 450486 at *4-5 (S.D.N.Y. July 31, 1995).

The SEC’s selective “summary” of the records of telephone calls to and from Kwak does not alter that the SEC cannot prove any of the elements of a violation of Section 9(a)(1)(B), even assuming *arguendo* that it was admissible (see Footnote 1, supra), and that a reasonable jury

² Unless otherwise specified, “D.S.” refers to Kwak’s Rule 56(a)(1) Statement and “P.S.” refers to the SEC’s Rule 56(a)(2) Statement, and specifically to section II of the SEC’s statement in which it responds to the facts contained in Kwak’s Rule 56(a)(2) Statement. The SEC has also admitted that Kwak did not have discretion to purchase CTT stock for his clients and did not exercise such discretion. P.S. & D.S., ¶¶ 9, 18-19. The SEC does not even claim to have evidence that Kwak solicited any of the client orders that resulted in the alleged “matched” trades. Compare Def. Exhibits A, ¶ 33 with Exhibit B, ¶ 10 and Exhibit B(2).

could infer, without any supporting evidence, that the parties exchanged information regarding their trades during these conversations and that a reasonable jury could infer, contrary to the undisputed facts, that Kwak had complete control over the size and timing of his client's orders, as the SEC asks this Court to infer. The SEC's chronology (Exhibit N) reveals the following:

August 5, 1998 (1) Steele did not contact Kwak either before or after he placed his 9:25 a.m. order to sell 200 shares to solicit a "matching" purchase; and (2) Kwak called Steele ½ hour after Steele placed his order, and thereafter entered an order to purchase 1,000 shares on his client's behalf.

November 4, 1998: (1) Steele did not contact Kwak either before or after he placed his 9:18 am order to sell 100 shares to solicit a "matching" purchase; and (2) Kwak called Steele more than 1 hour after Steele had placed the order, and then waited more than 40 minutes after the telephone call to place an order for his client for 300 shares.

November 5, 1998: (1) Steele did not contact Kwak either before or after he placed his 9:18 am order to sell 200 shares to solicit a "matching" purchase; and (2) Kwak called Steele almost 4 hours later, and then waited more than 2 hours after the telephone call to place his client's order, which was for 2,000 shares.

May 5, 1999: (1) Steele did not contact Kwak either before or after he placed his 9:28 am order to sell 300 shares to solicit a "matching" purchase, and (2) Kwak called Steele approximately 1 hour and 15 minutes after Steele had placed the order, and then waited for more than 1 hour after the conversation to enter his client's order to purchase 500 shares.³

August 4, 1999: (1) Steele waited for more than ½ hour after he placed the order to sell 275 shares, to call Kwak; and (2) Kwak waited another 20 minutes after the telephone call with Steele before he placed his client's orders to purchase 1,000 shares.

November 3, 1999: (1) again, Steele did not contact Kwak either before or after he placed his 9:24 am order to sell 200 shares to solicit a "matching" purchase; and (2) Kwak called Steele 55 minutes after Steele had placed the order, and then waited another 20 minutes before he entered his client's order to purchase 200 shares.

March 22, 2000: (1) Kwak and Steele spoke to each other in the early part of the day on a number of occasions, the last occasion being at 12:39 pm; (2) one hour after the parties last spoke, Steele entered an order to sell 200 shares; and (3) twenty minutes after Steele entered this order, Kwak entered his client's order to purchase 1,500 shares.

June 23, 2000: (1) again, Steele did not contact Kwak either before or after he entered his client's order to sell 200 shares at 8:51 a.m. in order to solicit a "matching" purchase order; and

³ Even the SEC's incomplete chronology of telephone records shows that Kwak entered the order a few minutes after getting off the telephone with his client. Def. Ex. B(2).

(2) Kwak called Steele approximately 50 minutes after Steele entered his client's order, and then waited another 3 hours and 40 minutes before he entered his client's order for 400 shares.⁴

October 10, 2000: (1) Steele called Kwak at about the same time that he entered an order to sell 200 shares; and (2) Kwak then waited more than 40 minutes to enter his client's order to purchase 300 shares.

October 20, 2000: (1) Steele did not contact Kwak either before or after he entered his 9:17 am order to sell 280 shares to solicit a "matching" purchase; and (2) Kwak called Steele approximately 3 hours after Steele entered the order, and then waited for more than 3 more hours after the conversation to enter his client's order to purchase 200 shares.

November 22, 2000: (1) Steele called Kwak around the time that Steele entered an order to sell 100 shares; (2) Kwak then waited for 2 hours before he entered his client's order to purchase 200 shares.

December 7, 2000: (1) Steele did not contact Kwak either before or after he entered his orders to sell 400 shares to solicit a "matching" purchase; and (2) Kwak called Steele 35 minutes later, and then entered his client's orders to purchase 600 shares.

December 19, 2000: (1) Steele entered an order to sell 250 shares at 9:11, but waited more than 1 hour to call Kwak; and (2) Kwak then waited more than 5 hours before entering his client's order to purchase 200 shares.

December 20, 2000: (1) Kwak and Steele spoke on the telephone on a number of occasions between 10:09 am and 2:44 pm; (2) thereafter Steele entered orders to sell a total of 500 shares for his clients, VanHartes (300 shares) and Belloff (200), after which Kwak entered orders to purchase a total of 900 shares for his clients Roles (500 shares – this client purchased 2,500 more shares the next day), and Dudnick (400 shares –this client also purchased 600 more shares later that day).

January 8, 2001: (1) Steele called Kwak at 11:21 am, and did not, thereafter, contact Glushko to inform him of any purchases that Kwak purportedly intended to make; (2) more than 20 minutes later, at 11:46 am, Glushko called Steele, but Steele did not thereafter contact Kwak to inform him of any sales that Glushko purportedly intended to make; (3) Kwak called Steele more than 1 hour later, at 12:51 pm, and Steele returned Kwak's call approximately 50 minutes later, at 1:39; Steele did not then contact Glushko to inform him of any purchases Kwak purportedly intended to make; (4) 20 minutes later, at 1:57 pm, Glushko entered an order to sell 500 shares for his client, Federbush, but did not contact either Steele or Kwak to inform them that he had entered the sell order and to solicit a "matching" purchase; (5) at 2:08 pm, Kwak called Steele and then waited approximately 1 ½ hours, until 3:36, to enter his client's orders to purchase 1,000 shares (this client purchased an additional 2,000 shares the next day). SEC Exhibits A & N; Def. Exhibit B(1).

⁴ Even the SEC's incomplete chronology of telephone records shows that Kwak received a telephone call from this client at 12:25, he returned the call at 12:42, and entered his client's order at 1:18. Def. Exhibit B(2).

January 9, 2001: (1) Steele entered an order to sell 200 shares for his client, Belloff at 9:25 am, and waited 1 ½ hours after he entered the order, until 10:51 am, to contact Kwak; and (2) Kwak waited for 3 hours after the conversation, until 1:51 pm, to enter his client's order to purchase 400 shares of stock (this client had purchased 600 shares earlier in the day, and purchased 1,000 more shares later in the day). SEC Exhibits A & N.

January 12, 2001: (1) Steele entered an order to sell 200 shares at 9:22 am, and did not contact Kwak either immediately before or after, to solicit a matching purchase; and (2) Kwak entered his client's order to purchase 200 shares 25 minutes later, at 9:46. The parties had not contacted each other since 2:48 pm, the previous day.

January 16, 2001: (1) Steele called Kwak at 10:02, about the time that Steele entered an order to sell 200 shares; and (2) Kwak then waited more than one and a half hours, before entering his client's order to purchase 200 shares.

The SEC's chronology of this day also shows that (1) Kwak called Steele at 11:48; (2) Steele entered an order to sell 200 shares a few minutes later, at 12:01; and (3) Kwak waited for almost one hour to enter his client's order to purchase 200 shares.

It is thus apparent that, even drawing all of the inferences in the SEC's favor that the SEC claims a jury could draw from the evidence (i.e., that the parties communicated their trading activity during their telephone conversation and that Kwak exercised complete discretion over the size and timing of his client's orders), the only conclusion a jury could reasonably draw from the telephone records is that Kwak made an effort not to enter orders for his clients at substantially the same time, or for substantially the same size, as those of the other defendants.

B. The SEC Has Not Presented Evidence From Which A Jury Could Conclude That It Is More Likely Than Not That Kwak Engaged In Manipulative Transactions Within The Meaning of Section 9(a)(2), Section 10(b) and Rule 10b-5

1. The SEC Has Admitted That Kwak and His Clients Purchased CTT Stock Because of Their Legitimate Investment Interest In CTT

The SEC has admitted that Kwak, at all times:

- 1) bought CTT stock for himself and his family and recommended it to his clients based on a sincere belief that the stock was a good long-term investment (P.S. & D.S., ¶¶ 4, 9);

- 2) bought CTT stock on the open market for legitimate clients at prices established by the market (P.S. & D.S., ¶¶ 16, 17, 20 [2nd sentence]);
- 3) paid prices for CTT stock that were consistent with the prices paid by other investors in the market at the time (P.S. & D.S., ¶ 20 [2nd sentence]);
- 4) never entered an order to purchase the stock as a price that was higher than the prevailing market rate for the stock at the time of his purchase (P.S. & D.S., ¶ (P.S. & D.S., ¶ 20 [2nd sentence]));
- 5) did not have, and did not exercise, discretionary authority to purchase CTT stock for any of his clients accounts and none of his clients ever asserted that he had improperly entered orders to purchase the stock for their accounts (P.S. & D.S., ¶¶ 18-19);
- 6) personally invested over \$335,000 in CTT stock at the prices the SEC alleges were artificially inflated, in transaction that the SEC does not claim directly promoted the alleged manipulative scheme in any way (P.S. & D.S., ¶¶ 10-11);
- 7) did not intended to profit from any increases in the price of CTT stock allegedly caused by his purchases of the stock for himself and his clients but, instead, intended to profit from increases in the value of the stock caused by the *company's* profitability (P.S. & D.S., ¶ 9);
- 8) did not attempt to profit from any alleged increase in the price of CTT stock allegedly caused by his purchases of stock for himself and his clients by selling the stock at the higher prices allegedly caused by these purchases, to the contrary, he personally purchased hundreds of thousands of dollars worth of CTT stock at these allegedly higher prices in transactions that the SEC does not contend promoted the alleged manipulation in any way. (P.S. & D.S. ¶¶10-11, 14-15);
- 9) did not, in fact, profit by selling the stock at the allegedly higher stock prices allegedly caused by his purchases of stock for himself and his clients, including by foregoing over \$1 million dollars in profit he would have made had he sold his stock at the peak of the market (P.S., § 1, ¶ 29; P.S. & D.S., ¶¶ 13-15); but
- 10) instead, had, and executed, both for himself and his clients, a long-term investment strategy with respect to CTT stock, which involved primarily buying and holding the stock, regardless of the highs to which it rose or the lows to which it fell. (P.S. & D.S., ¶¶ 4-7, 9, 10, 13-15.)

It is a matter of well-established law that, given these undisputed facts, the SEC cannot prevail on its manipulation claim, regardless of whether Kwak timed his purchases to maximize their positive effect on the price of the stock, and regardless of whether his purchases did

increase the price of, or market for, CTT stock. See In re College Bound Consolidated Litigation, 1995 WL 450486 at * 4-5, 7 (as a matter of law, market manipulation cannot be established where defendant's purchases are "at least in part, for hope of future investment income," and defendant personally purchased large quantities of stock in open market at allegedly inflated prices – "claims of 'closing the market' don't change this."); Sullivan v. Long, Inc., v. Scattered Corp., 47 F.3d 857, 864 (7th Cir. 1995) (noting that "the essence of the offense is creating 'a false impression of supply or demand,' which the plaintiff could not prove where there were real buyers and sellers on both sides of the allegedly manipulative transactions.)⁵

Indeed, the cases upon which the SEC relies (SEC Opp., p.21) only highlight the complete absence of essential evidence in this case. See SEC v. Schiffer, 1998 WL 307375 at * 4, 6 (S.D.N.Y. June 11, 1998) (holding that SEC made a prima facie showing that the defendant was guilty of market manipulation because it presented evidence showing defendants' use of nominee accounts; correspondence that revealed an "explicit strategy" to mark the close; and, "one of the hallmarks of manipulation," that the defendant profited from the alleged manipulation, by selling his stock in the company for \$15 million dollars.); SEC v. Resch-Cassin & Co., Inc., 362 F.Supp. 964, 976 (S.D.N.Y. 1973) (SEC was entitled to injunction on manipulation claim because it presented evidence which showed that defendants consistently published bid prices that were higher than anyone else; induced others to purchase shares at the

⁵ See also Mulheren, 938 F.2d at 368-371 (to prevail on claims under Section 9(a) and 10b-5, the plaintiff must establish that "when [defendant] purchased the security, he did so with the intent to raise its price rather than with intent to invest," which the plaintiff could not establish where the defendant failed to profit from the allegedly inflated price, and purchased significantly more shares than were necessary to raise the price, thereby placing himself at greater risk.); 3 Bromberg & Lowenfeld on Securities Fraud & Commodities Fraud § 6:56 (2d Ed.), quoting, Introductory text to SEC Sec. Exch. Act Rel. No. 3056 (Oct. 27, 1941) (broker's "failure to take advantage of the market price resulting from his buying would tend to show that he had not caused the rise in market prices for a manipulative purpose."); In the Matter of Edgerton, Wykoff & Co., Release No. 34-5263, 1955 WL 43201 at *8 (S.E.C. Release No.) (record did not sustain allegations of intent to manipulate where defendants did not take advantage of the peak market created by the allegedly misleading statements and conduct.)

bid price which they then purchased back, thereby creating a false appearance of a wider and active purchasing base; and made bids and purchases at successively higher prices even though there was no competition in the market that could justify the increasing prices.)

2. The SEC Has Not Presented Evidence From Which A Jury Could Conclude That It Is More Likely Than Not That Kwak Is Responsible for His Client's Post 3:00 Orders or Their Effect On The Price of the Stock

Even if the SEC's theory were legally viable, the SEC has failed to present evidence from which a jury could find that Kwak delayed entering his client's orders until after 3:00 pm for the purpose of increasing the closing price of the stock. SEC Opp., pp.21-22. Specifically, the SEC claims that a jury could infer that Kwak intentionally entered his client's orders to be executed after 3:00 pm for the purpose of increasing the closing price of the stock because:

(a) 14.4% more of Kwak's purchases were executed after 3:00, than purchases by "non-defendants." See SEC Opp., pp.21-22. However, it is a matter of undisputed fact that Kwak's purchases were, themselves, purchases by "non-defendants" (Kwak's clients), and the SEC has not offered any evidence that Kwak, rather than his non-defendant clients, was responsible for the post-3:00 orders that Kwak entered.⁶ SEC Exhibit L; P.S. & D.S., ¶ 18; Cf. Schiffer, supra

⁶ While Kwak had discretion to postpone entering a client's purchase to achieve "best execution" for his client (D.S., ¶ 18), there is no evidence that Kwak could control the time of day that his client *placed* the order with him. The SEC has not offered any evidence to show that Kwak delayed entering his client's orders, or that Kwak could have entered the post-3:00 orders any earlier than he did given the timing of his client's orders. In those cases where the SEC has been able to identify a particular client's number in the telephone records, the records confirm that Kwak regularly entered his client's orders shortly after he received them. Def. Exhibit B(1) (e.g., **10/6/98**: Call with client at 12:27, order entered 12:36; **10/8/98**: Call with client at 1:54, order entered at 1:59; **10/9/98**: Call from client at 2:33, order entered 2:51, call from client at 3:43, order entered 3:57; **11/3/98**: call with client at 3:24, order entered 3:36; **12/21/98**: call with client at 11:04, order entered 11:08; **1/5/99**: call with client at 10:39, order entered 10:43; **4/14/99**: call with client at 1:35, order entered 1:39; call with client at 2:36, order entered 3:10; **4/27/99**: call from client 11:24, order entered 11:28, call from client 3:51, order entered 3:53; **5/4/99**: call from client 11:59, order entered 12:10, call from client 1:35, order entered 2:10; **5/6/99**: call from client 3:42, order entered 3:44; **7/8/99**: call from client 12:30, order entered 12:34, *but not executed by AMEX specialist until 3:30*; **8/2/99**: call from client 11:59, order entered 12:03; **8/10/99**: call from client 11:36, order entered 12:24, *but not executed by AMEX specialist until 3:40*); **1/8/00**: call from client at 2:40, order entered 2:50;

(where SEC presented evidence that defendant used nominee accounts that he controlled to make closing purchases). Without such evidence, there is no basis from which a jury could attribute the timing of any of these orders, much less all of these orders, to Kwak, as the SEC has done.

Moreover, the SEC has not provided the analysis that would be necessary to allow a jury to draw any inference from this alleged statistic. Wingfield v. United Technologies Corp., 678 F.Supp. 973 (D.Conn. 1988) (Blumenfeld, J.) (holding that expert statistical interpretation, including standard deviation analysis, is required to admit statistical conclusions).

(b) many of Kwak's post-3:00 pm purchases on behalf of his clients were entered and/or executed "shortly after a call with Steele," the SEC has not presented any analysis or evidence from which a jury could draw a causal relationship between the telephone calls and Kwak's orders. First, the SEC has not presented any evidence to support its assertion that, during these telephone calls, Steele "repeatedly asked . . . Kwak . . . to submit purchase orders late in the day in order to push up the price." SEC Opp., p.22; P.S., § A, ¶ 62. Kwak's testimony was that Steele "was constantly looking for buyers. And it was not any particular time of day." Exhibit 4, p.234:1-20, pp.235:19-236:12. Kwak further testified that there were only two occasions when Steele called him later in the day and asked whether he had buyers, and that those occasions were "way back," maybe in 1990, which is 8 years before the alleged manipulation. SEC Exhibit 4, p.234:1-20.⁷

Second, the conclusion that the SEC claims a jury could reach, that Kwak entered post-3:00 orders in response to Steele's alleged request that Kwak do so, founders on the underlying assumption, **for which the SEC has not provided any supporting evidence, and which the**

2/4/00: call from client at 3:43, order entered 3:49; 6/5/00: call from client 3:31, order entered 3:49;
6/8/00: call from client at 4:09, order entered 4:13; 6/20/01: call from client 3:34, order entered 3:38).

⁷ Kwak also did not testify, as the SEC claims, that Steele ever "suggested breaking up a purchase order into a series of smaller orders that would cause a larger increase in the stock price." Compare, P.S., ¶ 61 with, SEC Exhibit 4, pp.232, 236 (cited in support of this proposition.)

undisputed evidence contradicts, viz. that Kwak *could* simply choose to place orders for hundreds of shares of CTT stock costing thousands of dollars, for his clients' accounts, at his discretion. P.S. & D.S., ¶¶ 18, 19. There is no disputed fact: Kwak did not have such discretion, and the SEC has failed to present any evidence that Kwak exercised such discretion. Id. Finally, the SEC has failed to provide any analysis to correlate the telephone calls with Kwak's post-3:00 purchases. Wingfield, supra. The SEC's summaries show that, in fact, there is no correlation. Less than half of Kwak's alleged 273 post-3:00 purchases occurred within a half an hour of a telephone call between the parties. SEC Exhibit I.

This SEC has utterly failed to present the type of evidence necessary to justify an inference that it is more likely than not that Kwak entered orders to purchase stock for a manipulative purpose at Steele's request. Mulheren, at 367-369, 372 (evidence of telephone calls, without more, was not sufficient to support finding of manipulation, as jury would be required to engage in "rank speculation.") Cf., Schiffer, supra (where SEC presented written correspondence expressly stating things such as "Why don't you ask Solow to have someone buy 5,000 to 10,000 shares this morning, just to give us a boost" and that defendant subsequently did so through accounts he controlled.)

(c) these purchases were "more likely to increase the stock price" than "post-3:00 purchases by market participants other than the defendants," it is a matter of undisputed fact that Kwak's purchases were, themselves, purchases by market participants other than the defendants" (Kwak's clients), and that Kwak never entered an order to purchase the stock at a price that was higher than the prevailing market rate for the stock at the time of his order. SEC Exhibit L; P.S. & D.S., ¶¶ 18, 19, 20 (2nd sentence). In the absence of evidence that Kwak determined the size or price of these orders, there is no basis from which a jury could attribute any increases in the

price of the stock, much less all of the increases, to Kwak, as the SEC has done. Cf. Resch-Cassin (defendant was offering to buy the stock at specific prices that were higher than anyone else was paying and successively increasing its bid price).

2. The SEC Has Not Presented Evidence That Kwak's Trading Had A Manipulative Effect On CTT Stock

There is also no evidence that Kwak was responsible, either directly or indirectly, for any transactions that inflated the price of CTT stock to “a level above the investment value of the stock as determined by available information and market forces,” which is necessary for the SEC to prevail on its claim of market manipulation. U.S. v. Russo, 74 F.3d 1383, 1394 (2nd Cir. 1996); Mulheren, 938 F.2d at 368. To the contrary, the SEC has admitted that it has no evidence to support that Kwak ever issued an order to purchase CTT stock at a price that was higher than the prevailing market rate for CTT stock at the time of his purchase. P.S., ¶ 20; D.S., ¶ 20.

3. All of The SEC's Arguments and Evidence Are Fatally Defective Because They Fail To Account for Kwak's Sale of CTT Stock

All of the SEC's arguments and evidence in support of its claim that Kwak was engaged in a manipulative scheme to increase the price of CTT stock are fatally defective because they fail to account for Kwak's sale of CTT stock. As a matter of law, in determining whether Kwak was engaged in a scheme to increase the price of CTT stock, Kwak's purchases of CTT stock cannot be viewed in a vacuum (Mulheren, at 371), which is precisely what the SEC attempts to do by disregarding all of Kwak's sales of CTT stock.⁸

⁸ The impropriety of the SEC's tactic is evident if one considers only Kwak's sales of the stock during the Relevant Period. Looking only at Kwak's sales, Kwak could more easily be accused of participating in a scheme to depress the price of CTT stock, because 88.75% of Kwak's sales of CTT stock either caused the stock price to decrease (downtick), or “maintained” a decrease in the stock price that had occurred as the result of the previous sale (zero minus tick), and many of Kwak's sales were entered and executed shortly after a transaction in which the stock price had increased. Def. Exhibit B(1).

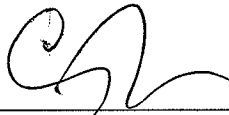
The SEC cannot meet its burden to prove that Kwak's trading in CTT stock shows a pattern of manipulating the stock price upward, by limiting its evidence to Kwak's purchases of the stock (which are more likely to increase the price of the stock), and disregarding Kwak's sales of the stock (which are more likely to decrease the price of the stock), any more than an employee can meet its burden to prove that his employer's promotion decisions show a pattern of age discrimination, by limiting his evidence to his employer's entry level promotions (which are more likely to involve younger workers), and disregarding his employer's senior level promotions (which are more likely to involve older workers). See e.g., Martincic v. Urban Redevelopment Authority of Pittsburgh, 844 F.Supp. 1073, 1075 (data limited to promotions "from entry level positions which, we assume, ordinarily go to younger workers" was not probative of whether defendant had a pattern of age discrimination with respect to promotions.)

IV. CONCLUSION

Kwak did not attempt to profit from the appreciation in the stock's value during the period of the alleged manipulation – instead, he personally invested over \$335,000 in CTT stock during that period, at prices that the SEC contends were artificially inflated. P.S. & D.S., ¶¶ 10, 14, 15. If, in fact, Steele was engaged in a scheme to manipulate the price of CTT stock, based on the undisputed evidence, there is only one conclusion that a jury could reasonably reach: Kwak was a victim, not a participant, of that scheme.

For the foregoing reasons, defendant Richard Kwak respectfully requests that the court enter judgment in his favor on each and every count against him.

DEFENDANT,
RICHARD A. KWAK

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2006, a copy of the foregoing was served by

first class U.S. mail, postage prepaid, on the following:

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EXHIBIT 1

TO

RICHARD KWAK'S

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF ALLEGED MATCHED TRADES

Date	Time Placed	Time Difference	Shares Bought/Sold	Shares Difference	Shares Traded Between Orders ¹	Price of Order	Party
8/5/98	9:26 10:00	34 min.	200 S 1,000 B	800	3,500	No evidence ² No evidence	STEELE KWAK
11/4/98	9:18 10:49	1 hr. & 31 min.	200 S 300 B	100	500	No evidence No evidence	STEELE KWAK
11/5/98	9:18 3:34	6 hrs. & 16 min.	200 S 2,000 B ³	1,800	5,900	No evidence No evidence	STEELE KWAK
5/5/99	9:28 11:46	2 hrs. & 18 min.	300 S 500 B	200	300	No evidence No evidence	STEELE KWAK
8/4/99	9:08 10:08	1 hr.	275 S 1,000 B ⁴	725	500	No evidence No evidence	STEELE KWAK
8/31/99	9:37 Unk.	Unknown ⁵	1,600 S 1,600 B	0	Unknown	No evidence No evidence	KWAK WILSON
11/3/99	9:24	1 hr & 9 min.	200 S	0	0	No evidence	STEELE

¹ This column identifies the number of shares traded on the market between entry of the sell order and buy order of the alleged matched trade based on the SEC's Exhibit A.

² The SEC has failed to present any evidence regarding the price at which the parties' ordered the stock, relying, focusing, instead, on the price and time of execution. SEC Exhibit N. Every purchase of a security on the exchange is, necessarily, matched with a sale of the security, and is executed at the same time and at the same price as its corresponding sale. For this reason, the time and price of execution is completely irrelevant to a determination of whether a party is guilty of engaging in an illegal matched trade. See 15 U.S.C. § 78i(a) (specifically referring to the price of the order and the time of entry, not execution.)

³ The SEC's Exhibit N erroneously states that Kwak's customer ordered 500 shares. See SEC Exhibit A; Def. Ex. B(1). The transaction was also not executed at the "highest price of day so far" as the SEC claims. Compare SEC Exhibit A (showing an order executed for \$4.25 immediately before Kwak's order was executed for \$4.25).

⁴ The SEC's Exhibit N erroneously states that Kwak's customer ordered 500 shares. See SEC Exhibit A; Def. Ex. B(1)

⁵ The SEC has not offered any evidence as to when Wilson entered his order, which may have even been the previous day. Kwak would have no reason to sell 1,600 shares in order to offset the effect of Wilson's purchase of shares.

	10:33		200 B				No evidence	KWAK
3/22/00	1:38	18 min.	200 S	1,300	300		No evidence	STEELE
	1:56		1,500 B				No evidence	KWAK
6/23/00	8:51	4 hrs. & 27 min.	200 S	200	11,300		No evidence	STEELE
	1:18		400 B				No evidence ⁶	KWAK
10/10/00	9:07	42 min.	200 S ⁷	100	0		No evidence	STEELE
	9:49		300 B				No evidence	KWAK
10/20/00	9:17	6 hrs. & 8 min.	280 S	80	6,000		No evidence	STEELE
	3:25		200 B				No evidence	KWAK
11/22/00	9:35	1 hr. & 57 min.	100 S ⁸	100	0		No evidence	STEELE
	11:32		200 B				No evidence	KWAK
12/7/00	9:30	37 min.	400 S	200	300		No evidence	STEELE
	10:07		600 B ⁹				No evidence	KWAK
12/19/00	9:11 ¹⁰	6 hrs. & 10 min.	250 S	50	18,700		No evidence	STEELE
	3:21		200 B				No evidence	KWAK
12/20/00	2:54	7 min.	500 S	400	3,600		No evidence	STEELE
	3:01		900 B ¹¹				No evidence	KWAK

⁶ The SEC's Exhibit N erroneously states that this trade was executed at "the highest price of the day so far." See Def. Exhibit B(1) (showing previous trade executed at \$9.00) Later that day, the price of the stock went up to \$9.63 despite Steele's sale of an additional 700 shares of CTT stock without the benefit of any alleged offsetting "matches" by any of the other defendants. Def. Exhibit B(1)

⁷ The SEC's Exhibit N erroneously states that Steele's order was for 280 shares. See, Def. Ex. B(1).

⁸ The SEC's Exhibit N erroneously states that Steele's order was for 180 shares. See Def. Exhibit B(1). Kwak's client purchased an additional 600 shares a few minutes after his order for 200 shares was executed. Id.

⁹ The SEC's Exhibit N erroneously states that Steele's order for Belloff was for 250 shares and that Kwak's order for Sather was for 300 shares. See SEC Exhibit A & Def. Exhibit B(1). The SEC's Exhibit N also erroneously states that this trade was executed on an "uptick." See Def. Exhibit B(1).

¹⁰ There is nothing in the documents produced by the SEC, including the AMEX audit trail to even support that Steele entered a sell order for Belloff for 250 shares at 9:11, or that this order was matched, at 3:22 pm, with Kwak's order for his client. Def. Exhibit B(1). The audit trail appears to conflict with the SEC's theory because it shows that a 100 share sell order for Belloff was executed at 11:06 am, and that two 200 share sell orders for Belloff was executed at 3:06 pm. Id. None of these orders were matched with Kwak's order for his client. Id.

1/8/01	1:57 3:36	1 hr. & 39 min.	500 S 1,000 B ¹²	500	1,100	No Evidence No Evidence	GLUSHKO KWAK
1/9/01	9:25 1:51	4 hrs. & 26 min.	200 S 400 B ¹³	200	4,000	No evidence No evidence	STEELE KWAK
1/12/01	9:22 9:46	24 min.	200 S 200 B	0	0	No evidence No evidence	STEELE KWAK
1/16/01	10:05 11:35	1 hr. & 30 min.	200 S 200 B	0	6,500	No evidence No evidence	STEELE KWAK
1/16/01	12:01 12:58	57 min.	200 S 200 B	0	7,700	No evidence No evidence	STEELE KWAK

¹¹ The SEC's Exhibit N erroneously states that Kwak's client Roles only ordered 300 shares, and his client Dudnick only ordered 200 shares. See Def. Exhibit B(1).

¹² The SEC's Exhibit N erroneously states that Kwak's client only purchased 500 shares. See SEC Exhibits A. This client purchased an additional 2,000 shares the next day. Def. Exhibit B(1).

¹³ This claimed "match" is even more untenable because Kwak's 400 share order was part of a larger order for 1,000 shares for the same client, who also purchased an additional 1,000 shares the next day. Exhibit B(1).