

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

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SECURITIES AND EXCHANGE COMMISSION,)
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Plaintiff,)
)
v.) Case No. 3:04-cv-1331-JCH
)
COMPETITIVE TECHNOLOGIES, INC.,) June 15, 2006
CHAUNCEY D. STEELE,)
JOHN R. GLUSHKO,)
THOMAS C. KOCHERHANS,)
RICHARD A. KWAK,)
SHELDON A. STRAUSS,)
STEPHEN J. WILSON and)
FRANK R. McPIKE,)
)
Defendants.)
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**PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT**

Plaintiff Securities and Exchange Commission (“Commission”) hereby opposes the motions for summary judgment filed by defendants Competitive Technologies, Inc. (“CTT”) and Frank R. McPike and by defendant Richard A. Kwak.¹ In support of its opposition to summary judgment, the Commission also relies upon the accompanying Local Rule 56(a)(2) Statement and the Declaration of Frank C. Huntington, Esq.

¹ When addressing the arguments raised by CTT and McPike, the Commission will refer to them collectively as “CTT”.

SUMMARY

This case involves a lengthy scheme to manipulate and inflate the price of CTT stock. CTT is based in Connecticut, and its stock is listed on the American Stock Exchange (“AMEX”). The ringleader of the scheme was defendant Chauncey D. Steele, then a broker in a Massachusetts office of Prudential Securities, Inc. (“Prudential”).² From at least July 1998 until June 2001, Steele and the other defendants artificially raised and maintained the price of CTT stock and created a false or misleading appearance with respect to the market for CTT stock through manipulative practices such as placing buy orders at or near the close of the market in order to inflate the reported closing price (a practice known as “marking the close”) and using accounts they controlled or serviced to place pre-arranged buy and sell orders in substantially similar amounts in order to minimize the negative impact on CTT’s price from sales of the stock (a practice known as “matched trades”). CTT and McPike, a senior corporate officer, actively participated in Steele’s manipulative scheme through a stock repurchase plan which CTT adopted in October 1998. On behalf of CTT – and usually in response to urgent phone calls from Steele – McPike placed numerous late-day purchase orders as well as purchase orders that matched pending or anticipated sell orders by Steele and other defendants.

The Commission has assembled a mountain of evidence documenting the defendants’ campaign to manipulate the price of CTT stock, in violation of Sections 9(a) and 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder. CTT and Kwak

² On July 11, 2005, the Court entered a consent judgment against Steele, permanently enjoining him from future violations of Sections 9(a) and 10(b) of the Exchange Act and Rule 10b-5, ordering him to pay \$58,106 in disgorgement (reflecting his commissions from his customers’ trading in CTT stock), and imposing a third-tier civil penalty of \$110,000.

ignore most of that damaging evidence – and the inevitable fact disputes which only the trier of fact can resolve – and ask the Court to draw inferences in their own favor that are wholly inappropriate on summary judgment. Accordingly, the motions for summary judgment should be denied.

**THE COMMISSION’S EVIDENCE
OF THE DEFENDANTS’ SCHEME**

A. Background³

Steele, Glushko, Kwak and Wilson were stockbrokers who believed that CTT stock had enormous potential for long-term profit and who bought large amounts of CTT stock for their themselves, their families, and their customers.⁴ Facts, ¶¶3-4, 6, 8, 20-25, 28-31, 34-35.

Kocherhans and Strauss were former stockbrokers who likewise believed in CTT’s potential and bought large amounts of CTT stock for themselves and their families. Facts, ¶¶5, 7, 26-27, 32-

33. During the relevant period, the total shares purchased by these defendants were:

Steele	664,800
Kwak	479,100
Wilson	231,300
Glushko	160,800
Strauss	75,400
Kocherhans	<u>62,600</u>
	1,602,500 ⁵

³ Citations to the facts set forth in the Commission’s Local Rule 56(a)(2) Statement are identified as “Facts, ¶__”.

⁴ For example, Kwak and his wife owned more than 54,000 shares of CTT stock as of June 2001, and more than 75% of his customers had bought CTT stock, including one customer who was then the company’s largest shareholder. Facts, ¶29.

⁵ Most of Strauss’s purchases were made through accounts for which Steele or Glushko were the brokers. He bought only 3,900 shares in transactions that did not involve Steele or Glushko. Facts, ¶33. The figure of 1,602,500 total shares credits Strauss with 3,900 shares

Facts, ¶45.

On October 12, 1998, CTT's Board of Directors authorized the company to repurchase up to 250,000 shares of its own stock. The Board's primary reason was its belief that CTT stock was undervalued. McPike was put in charge of the repurchase plan, and he made the day-to-day decisions about when to buy and how much to buy. Facts, ¶¶36-38. Between October 1998 and March 2001, McPike caused CTT to buy a total of 161,300 shares.⁶ Facts, ¶42.

The defendants' aggregate purchases (1,763,800 shares) were a substantial portion of all trading in CTT stock during the relevant period. Indeed, the defendants' purchases comprised more than 10% of the entire trading volume. During eight different months, the defendants' purchases comprised more than 20% of the total volume. On 183 days (nearly 25% of the 756 trading days in the three-year period), the defendants' purchases comprised more than 25% of the daily volume, and on 32 days (4.2%), their purchases comprised more than 50% of the daily volume. Facts, ¶45.

B. The Defendants' Obsession with CTT Stock

Steele, Glushko, Kocherhans, Kwak, Strauss and Wilson became acquainted with each other prior to July 1998 through their mutual interest in CTT and their shared belief in the highly favorable long-term prospects for its stock. Facts, ¶46. They frequently spoke with each other

instead of 75,400 shares to avoid double-counting.

⁶ CTT intended for its purchases to qualify for the limited safe harbor from manipulation claims under Exchange Act Rule 10b-18. As a result, the company was not supposed to buy its stock within the last thirty minutes of trading or at a price higher than the greater of (1) the lowest current independent bid quote, or (2) the last independent sale on AMEX. A few of CTT's purchases failed to satisfy these conditions, although there is no evidence that this was deliberate.

on the telephone, with Steele initiating most of the calls and sometimes arranging conference calls. Facts, ¶¶46-47. During the relevant period, the number of Steele's phone calls with each of them was:

Kocherhans	4,119 ⁷
Kwak	2,500
Glushko	1,421
Wilson	957
Strauss	446

Facts, ¶48. Although Steele initiated most of the calls, some of the defendants called each other directly. For example, there were 645 calls between Kwak and Kocherhans during the relevant period. Facts, ¶49.

The primary topic of conversation during these thousands of phone calls was CTT. The defendants discussed current news about the company, its financial performance, and relevant developments in the technology sector. In particular, they discussed the intra-day performance of CTT stock, including the current price, the price trend, the volume of activity, recent large orders, pending buy or sell orders, and the activities of the AMEX specialist. (The broker defendants had online access to real-time trade and quotation activity in CTT stock.) Facts, ¶¶50-51.

In addition, Steele bombarded CTT, and especially McPike, with phone calls. Steele made 1,848 phone calls to CTT, and someone at CTT made 47 calls to Steele. Facts, ¶52. When he was unable to reach McPike, Steele often left messages which the CTT receptionist wrote on message slips for McPike. Facts, ¶53.

⁷ All references to phone calls are limited to calls lasting thirty seconds or more. The defendants' phone records identify hundreds of additional calls of less than thirty seconds, but it is likely that many of those shorter calls did not involve an actual conversation.

It is no exaggeration to say that Steele was obsessed with CTT stock.⁸ The CTT message slips show that Steele was tracking the stock price minute by minute and order by order, and he complained dramatically when the price fell (“we’re getting killed”) or a large sell order appeared (“just had 10,000 shares dumped”). Facts, ¶55. The message slips also reflect Steele’s belief that the AMEX specialist was conspiring with various unidentified “shorters” to drive the price down (“specialist is trying to bring the stock down to 3”). Facts, ¶57.

Based on the number of their conversations with Steele and their own testimony, it is apparent that Glushko, Kocherhans, Kwak, Strauss and Wilson were also obsessed with CTT stock to some extent. All of them followed the stock avidly and believed that, one day, their substantial investment in CTT stock would pay off enormously. More specifically, all of them followed the intra-day movement of the stock price, often calling Steele or each other for current information. Facts, ¶¶24, 26, 28, 32, 34, 46, 50-51. Further, they shared Steele’s belief that the AMEX specialist, perhaps in league with the mysterious “shorters”, was trying to drive down the price of CTT stock. Facts, ¶56.

C. The Defendants’ Late-Day Trades in CTT Stock

Steele placed more than 1,000 of his purchase orders after 3:00 p.m. Steele’s late-day purchases comprised a far higher percentage of his total purchases than the post-3:00 p.m. purchases by market participants other than the defendants:

⁸ The other defendants have testified that Steele was always talking about CTT stock and always encouraging them to buy more shares. Facts, ¶54.

Executed after:	Purchases by Steele		Purchases by Non-Defendants	
3:00 p.m.	1,081	46.1%	4,728	21.7%
3:15 p.m.	903	38.5%	3,869	17.7%
3:30 p.m.	588	25.1%	3,004	13.8%
3:45 p.m.	290	12.0%	1,935	8.9%
Total Purchases	2,347		21,814	

Ninety-five of Steele's purchases (4.0% of his total) were the last trade of the day and set the closing price. [Facts, ¶59.] Steele submitted so many late-day purchases that Prudential sometimes prohibited him from submitting purchases after 3:30 p.m. Facts, ¶22.

Steele admitted to Strauss (and, most likely, to the other defendants) that he was trying to push up the stock price before trading closed on AMEX at 4:00 p.m. Facts, ¶58. Steele's late-day purchases were typically a series of small orders (usually 100 or 200 shares each) – a practice which, according to the AMEX specialist, would indeed tend to push up the price before the close. Facts, ¶19. The actual impact of Steele's late-day purchases on the stock price confirms the specialist's testimony, as Steele's post-3:00 p.m. purchases were much more likely to cause an uptick, and much less likely to cause a downtick or zero minus tick, than the post-3:00 p.m. purchases by market participants other than the defendants:

Price Change	Post-3:00 p.m. Purchases by: Post-3:00 p.m.			
	Steele		Non-Defendants	
Uptick	635	46.1%	1,153	24.4%
Zero Plus	267	24.7%	1,335	28.2%
Zero Minus	83	7.7%	872	18.4%
Downtick	94	8.7%	11,346	28.5%
= 1 st Trade	2	0.2%	22	0.0%
	1,081		4,728	

Facts, ¶59.

The CTT message slips reflect Steele's intent to push up the price of CTT stock as well as his concern that if the price failed to go up, public investors would not want to buy CTT stock:

“Need help... No one wants to buy stock that's not going up.”

“The stock is at 15/16. He couldn't get it up higher.”

“Failed once again getting it to 6.”

“It took 5,000 shares of buying to make up for the 500 shares [that had been sold].”

“Had it up to 16th. Specialist was in front. Sold at 7.”

Facts, ¶¶60, 75.

Steele frequently urged Glushko, Kocherhans, Kwak, Strauss and Wilson to place purchase orders late in the trading day, and he sometimes suggested that they break up their orders into smaller parts to maximize the upward effect on the stock price. Facts, ¶¶61-62. Each of these defendants did in fact submit an above-average number of purchase orders that were executed after 3:00 p.m.:

Executed after:	Glushko	Kocherhans	Kwak	Strauss	Wilson	Non-Def.
3:00 p.m.	28.3%	37.9%	39.9%	39.4%	33.5%	21.7%
3:15 p.m.	23.6%	34.5%	34.5%	32.8%	29.4%	17.7%
3:30 p.m.	19.4%	28.7%	28.5%	26.7%	24.6%	13.8%
3:45 p.m.	13.7%	23.0%	18.1%	18.3%	19.0%	8.9%
4:00 p.m.	3.8%	1.7%	2.5%	3.3%	5.2%	1.4%

Facts, ¶¶63, 65, 67, 69, 70, 73. Strauss actually admitted that he entered his late-day purchases in an attempt to push up the stock price and counteract the AMEX specialist's supposed efforts to

push the price down, and that he hoped a rise in the price would encourage others to buy CTT stock. Facts, ¶¶69, 74.

The defendants' phone records reveal a steady stream of calls, most involving Steele, virtually every day from 2:00 p.m. until, and often after, the close of trading at 4:00 p.m. Many of the defendants' late purchases were entered within minutes of a call with Steele. Some of these purchases were entered after 4:00 p.m. for execution the Pacific Exchange. Facts, ¶¶72.

This evidence – the enormous number of phone calls with Steele and the many purchase orders placed within minutes of those calls, the defendants' testimony that Steele constantly asked them to place late-day purchase orders, Strauss's testimony that he and Steele placed late-day orders in an attempt to push the price up in order to counteract the AMEX specialist and attract new investors, and the CTT message slips reflecting Steele's focus on the intra-day stock price and his clear intent to push up the price – all supports a strong inference that the defendants' above-average number of late-day trades was no coincidence – in other words, that Glushko, Kocherhans, Kwak, Strauss and Wilson were coordinating their efforts with Steele and helping him to push up the stock price before the end of trading.⁹

The AMEX specialist detected a pattern of small, late-day purchase orders, often submitted after the price had fallen, which he believed were intended to – and often did – raise

⁹ Many of Kwak's post-3:00 p.m. purchases were entered shortly after a telephone call with Steele. For example, on November 22, 1999, Steele spoke with Kwak at 4:04 p.m., Kwak entered a 300-share order for a customer at 4:11 p.m., the order was executed on the Pacific Exchange at 4:15 p.m., and the purchase caused the day's trading to end on an uptick. Similarly, on June 14, 2000, Steele spoke with Kwak at 4:00 p.m. and 4:12 p.m., Kwak entered a 500-share order for a customer at 4:13 p.m. and entered a second 500-share order for the same customer at 4:17 p.m., the orders were executed on the Pacific Exchange at 4:17 p.m. and 4:20 p.m. respectively, and the second purchase caused the day's trading to end on an uptick. Facts, ¶¶68.

the price of CTT stock before the close. Facts, ¶76. The actual price impact of the defendants' late-day purchases confirms the specialist's testimony, as the post-3:00 p.m. purchases by Glushko, Kocherhans, Kwak, Strauss and Wilson were much more likely to cause an uptick, and much less likely to cause a downtick, than the post-3:00 p.m. purchases by market participants other than the defendants:

Price Change	Post-3:00 p.m. Purchases by:					Post-3:00 p.m. Purchases by Non-Defendants
	Glushko	Kocherhans	Kwak	Strauss	Wilson	
Uptick	43.8%	62.1%	48.4%	38.0%	37.3%	24.4%
Zero Plus	21.3%	21.2%	30.8%	22.5%	18.1%	28.2%
Zero Minus	21.3%	9.1%	9.5%	23.9%	25.3%	18.4%
Downtick	11.2%	6.1%	11.4%	15.5%	19.3%	28.5%
= 1 st Trade	2.2%	1.5%	0.0%	0.0%	0.0%	0.0%

Facts, ¶77.

D. Steele's Cross Trades

On more than fifty occasions, Steele submitted offsetting purchase and sell orders for different customers that were executed together. In half of these occasions, he placed a sell limit order for one customer and then, thirty minutes or even several hours later (after the stock price had moved upwards), he placed a market purchase order of comparable size for another customer. The sell limit order and the market purchase order were then executed as opposite sides of the same transaction. In the other half of the occasions, he placed a sell order for one customer and a few seconds or minutes later placed a purchase order of comparable size for another customer. The sell and purchase orders were then executed as opposite sides of the same transaction. Facts, ¶79.

Steele's cross trades were much more likely to cause an uptick, and much less likely to cause a downtick or zero minus tick, than transactions by market participants other than the defendants:

Price change	Cross Trades by Steele		All Trades by Non-Defendants
	Count	Percentage	
Uptick	30	57.7%	22.1%
Zero Plus	16	30.8%	22.7%
Zero Minus	1	1.9%	19.6%
Downtick	2	3.8%	26.4%
= 1 st Trade	3	5.8%	9.1%

Facts, ¶80. The significant disparity in price impact, coupled with the abundant evidence that Steele was obsessed with the intra-day price of CTT stock, supports a strong inference that Steele crossed these trades in order to minimize any downward impact which his customers' sales would otherwise have had on the stock price.

E. The Defendants' Matched Trades

Steele and the other defendants participated in numerous transactions in which one of them placed a sell order, another one placed a purchase order of similar size, and the orders were executed within seconds or, in many instances, at the same time as opposite sides of the same transactions. Given the volume of the defendants' transactions in CTT stock, some of these transactions were no doubt pure coincidence. However, the defendants' phone records suggest that many of these transactions were no coincidence at all. Facts, ¶82. In other words, the evidence supports a strong inference that, on some occasions, the defendants coordinated the

orders, so that at least one defendant, if not both of them, submitted his order with knowledge that an order of substantially similar size had been, or was about to be, submitted.

Many of the matched trades involved Steele and Kwak. The Commission has identified eighteen occasions when Steele placed a sell limit order for one of his customers, often before the market opened at 9:30 a.m., and then – usually one or more hours later and after one or more phone calls with Steele – Kwak submitted a purchase order of comparable size for one of his customers. The orders were then executed as opposite sides of the same transaction. Just like Steele’s cross trades, these matched trades minimized any possible downward impact on the stock price. Indeed, fourteen of the transactions (77.8%) were executed on an uptick and none was executed on a downtick or zero minus tick. Facts, ¶83.

F. McPike’s Assistance to Steele

Steele repeatedly asked MCPike to contact the AMEX specialist and obtain information about the intra-day market for CTT stock, particularly the identity of persons who had sold, or had submitted pending orders to sell, CTT stock. Facts, ¶¶85-86. MCPike regularly obtained such information from the AMEX specialist, and he frequently shared the information with Steele, who often proceeded to share it with the other defendants. Indeed, CTT’s phone records show more than forty occasions when someone from CTT (almost certainly MCPike) called the AMEX specialist within only five minutes of a call from Steele. Facts, ¶¶87.88.

More importantly, Steele repeatedly asked MCPike to buy stock for the repurchase program. As MCPike testified, Steele told him that the company’s purchases would “help the cause” by offsetting recent or pending sales. Facts, ¶89. The CTT message slips reflect Steele’s urgent appeals for “help”:

“Getting killed. 1,700 at 8. 800 sold. Need help.”
“Down to 6 7/8. Needs help.”
“There is 400 on AMEX if you could pick it up. Need your help.”
“Need to buy 5000 9/16... Needs it fast.”
“The company is dying. Needs your help.”
“Desperate for help. Dropping a point a day.”
“Stock is down to 8 7/8. Needs help.”
“There is an order at 9 that they need you for.”
“We have a big market order to sell. Must speak with you.”

Facts, ¶90. On many occasions, Steele asked McPike to buy specific amounts at specific prices at specific times. Facts, ¶91. The CTT message slips reflect Steele’s very specific instructions to McPike:

“Hurry. Short window of opportunity. Shares are at 13/16. Buy anything less than 900.”
“500 at 3/4 if you could.”
“Needs another 500 at 1 1/4 quickly.”
“There is 500 at 1/4. Would be great if you could take it.”
“There is 400 at 8 3/4 to buy on the American.”
“Could you get as much of the 500 on the Midwest as possible?”
“Need for you to buy 400 at 8 1/8.”
“3/16 bid is still there. Now there is 800 at 3/8. Pls be quick”
“Not too late to buy 200 8 15/16, 200 8 1/4 & 200 1/4. It’s 3/8 last on the American.”
“Could you buy 200 at 7/8?”
“Be ready. Buy at 7/8. Please get it fast.”
“Need a bid for 6 5/8.”
“Need bid of 6 1/16 ASAP.”
“Needs a bid of 7 11/16 200.”
“Needs a bid of 7.80.”
“Could you do 200 to 300 at 7.25?”
“Bid 200 8 5/16 to keep specialist honest.”

Facts, ¶92. On some occasions, Steele asked McPike to buy its stock at a price higher than the current bid price. Facts, ¶95. Once again, the CTT message slips contain examples of these requests:

“1000 7 11/16. Pls buy them. Be ready to at 7/8 or 8.”
“By mistake he thinks you have a bid in at 7 1/4 for 200 instead of 7 3/16 200.”

“Any way to get bid up to 6 9/16 for 300?”
 “Needs 400 at a 1/8 before it’s too late. Then be ready for 1/4 etc.”
 “Need you to buy 600 at 3/4. Have a bid ready at 11/16. He has to know when you can do this. It must be soon.”
 “Need to buy 400 at 11/16. Need to bid 200 5/8. Then get a ticket for 3/4.”
 “Now only 100 at 3/4 FAST. Then be ready for 7/8 tick.”
 “Buy 400 at 7/8. Bid 13/16.”
 “Bid of 200 7 1/2. Ready to buy at 5/8 or 3/4.”
 “Need a bid of 200 6 15/16. Be ready to go at 7 1/8 & 7 1/4.”
 “Stock is at 1/4. Bid of 300 at 7 3/16. Be ready to buy at 3/8.”
 “Bid 200 at 15/16. Ready to buy 400 Midwest at 7.”
 “Still need bid of 200 3/4. Buy 200 at 7 Midwest as soon as it reaches 7.”
 “Raise bid to 5/8 for 200.”
 “We need 200 bid at 1/8 or higher.”
 “Rush on the bid. 200 at 11/16 then 200 at 5/8 then uptick.”

Facts, ¶¶96-97.

Steele’s detailed requests to McPike support a strong inference that Steele hoped to use CTT’s purchases to eliminate pending sell orders and push up the price of CTT stock. A few of the message slips make Steele’s intentions crystal clear:

“Buy 500 at 3/4 on AMEX & 1,500 in the Midwest. It would clear up on large overhang. 10 minutes.”
 “Need you to buy 1,500 at 8 13/16 or all the good work will be undone.”
 “Need to bid for 200 11/16 before they can down tick it.”
 “Stock is up to 7.90. There is a 1,000 at 7 for sale. If you could buy some of that it would keep the stock up.”

Facts, ¶¶96-97.

McPike admitted that he sometimes placed an order to buy CTT stock in response to Steele’s requests. Facts, ¶98. An analysis of the defendants’ phone calls, the CTT message slips, and CTT’s purchases supports a strong inference that this happened on many occasions. McPike caused CTT to buy its stock on 119 different days, and he received calls from Steele on 106 of those days (89.0%). CTT’s purchases were executed in 256 separate transactions, of which 181 (70.7%) were made within thirty minutes of a phone call between Steele and CTT, and 134

(52/3%) were made within only ten minutes of such a call. Facts, ¶99. Further, many of CTT's purchases correspond closely to specific requests which Steele left in message slips shortly before the purchase was executed. Examples include:

7/30/99: Steele left a message for McPike at 3:14 p.m. that 10,000 shares had just been dumped. Nine minutes later, CTT bought 2,000 shares. McPike admitted that this particular purchase may have been intended to stabilize the stock price after the sale of 10,000 shares.

8/24/99: Steele left a message for McPike at 3:06 p.m. that 500 shares were available at \$5.69. Seven minutes later, CTT bought 400 shares at \$5.69.

11/2/99: Steele left a message for McPike at 1:56 p.m. that it "would help" if CTT bought 1,000 shares. Ten minutes later, CTT bought 1,000 shares.

11/3/99: Steele left a message for McPike at 3:04 p.m. that the price was \$5.81 and that CTT should "buy anything less than 900." Eleven minutes later, CTT bought 500 shares at \$5.81.

11/11/99: Steele left a message for McPike at 2:51 p.m. that 500 shares were available on the AMEX. Nine minutes later, CTT bought 500 shares on the AMEX.

1/5/00: CTT bought 500 shares for \$5.25 at 3:11 p.m., four minutes after a call from Steele. Eight minutes after CTT's purchase, Steele left a message for McPike that he "needs another 500 at a 1/4 quickly."

9/22/00: Steele left a message for McPike at 1:45 p.m. that 400 shares were available on the AMEX at \$8.75. Sixteen minutes later, CTT bought 400 shares at \$8.75 on the AMEX.

9/26/00: Steele left a message for McPike at 3:08 p.m. that he needed CTT to buy 1,500 shares at \$8.94 "or all the good work will be undone." Nineteen minutes later, CTT bought 300 shares at \$8.94.

10/2/00: Steele left a message for McPike at 2:52 p.m. that 200 shares are "there at 9." Eleven minutes later, CTT bought 200 shares at \$9.00.

11/1/00: Steele left the following message for McPike at 10:25 a.m.: "Very important you call. Tragedy." Steele left this message just after the price of CTT stock had fallen from \$8.38 to \$8.13 per share. Ten minutes later – in the very next transaction – CTT bought 800 shares for \$8.25.

11/3/00: Steele left a message for McPike at 2:37 p.m. about 800 shares offered at \$8.38. At 3:00 p.m. – in the very next transaction – CTT bought 800 shares at \$8.38.

11/8/00: Steele left a message for McPike at 11:43 a.m. asking if he could buy 200 shares offered at \$8.13. At 12:21 p.m., CTT bought 200 shares at \$8.13. Steele left another message for McPike at 2:31 p.m.: “It should be at 3/16 [\$8.13] in a few seconds.” That minute, CTT bought 500 shares at \$8.13.

11/9/00: Steele left a message for McPike at 12:03 p.m. that 700 shares were being offered at \$7.75. Sixteen minutes later, CTT bought 600 shares at \$7.75.

11/13/00: Steele left a message for McPike at 2:45 p.m. asking him to “up the bid to 6 7/8 [\$6.88].” Twenty-five minutes later – in the very next transaction – CTT bought 200 shares at \$6.88.

11/14/00: Steele left a message for McPike at 1:14 p.m. that he “needs 400 at a 1/8 [\$7.13] before it’s too late.” Sixteen minutes later, CTT bought 400 shares at \$7.13.

11/15/00: Steele left a message for McPike at 10:57 a.m. that he needed CTT to buy 600 shares at \$7.75. At 11:35 a.m., CTT bought 600 shares at \$7.75. Steele left another message for McPike at 11:44 a.m. that he now needed CTT to buy 500 shares at \$7.81. Twenty minutes later, CTT bought 500 shares at \$7.88.

11/17/00: Steele left a message for McPike at 10:24 a.m. that he needed CTT to buy 400 shares at \$7.69. Twenty minutes later, CTT bought 400 shares at \$7.69. Steele left another message for McPike that he now needed CTT to buy 200 shares at \$7.63. The time on that message slip was 11:11 a.m., but at 11:09 a.m. CTT bought 200 shares at \$7.63. Steele left a third message for McPike at 2:09 p.m. asking him to bid on 200 shares offered at \$7.69 “before they can down tick it.” Seven minutes later, CTT bought 200 shares at \$7.69.

11/20/00: Steele left a message for McPike at 3:23 p.m. that he needed CTT to buy 400 shares at \$7.88. Two minutes later, CTT bought 400 shares at \$7.88.

11/22/00: Steele left a message for McPike at 3:00 p.m. about 300 shares available on the Midwest exchange. Sixteen minutes later, CTT bought 300 shares on the Midwest exchange.

12/1/00: Steele left a message for McPike at 2:00 p.m. about 100 shares available at \$7.06. Steele left a second messages at 2:14 p.m. referring to 200 shares. At that moment, CTT bought 200 shares at \$7.06.

12/5/00: Steele left a message for McPike at 11:12 a.m. about 500 shares offered at \$6.75. Twenty-three minutes later, CTT bought 500 shares at \$6.75.

Facts, ¶100.

Steele often asked McPike to submit a purchase order just before the 3:30 p.m. deadline under Rule 10b-18. Facts, ¶93. The CTT message slips reflect Steele's concern that CTT submit an order before 3:30 p.m.:

“10 minutes to go. Bid @ 1/8. Buy @ 1/4.”

“Another 15 mins. to get a 1,000 at 3/4.”

“Last chance 1,000 at 5/8.”

“Do you have time to buy the 600 shares? You have 10 minutes.”

Facts, ¶94. Although McPike tried to avoid buying CTT stock after 3:30 p.m., his purchases were more likely to be executed between 3:00 p.m. and 3:30 p.m. than purchases by market participants other than the defendants, and four were executed after 3:30 p.m. despite McPike's precautions.

Executed after:	Purchases by CTT		Purchases by Non-Defendants
3:00 p.m.	86	33.6%	21.7%
3:15 p.m.	53	20.7%	17.7%
3:30 p.m.	4	1.6%	13.8%
3:45 p.m.	0	0.0%	8.9%

Facts, ¶¶73, 103.

The AMEX specialist observed that CTT's purchase orders often removed certain large pending sell orders and were followed by a series of small purchase orders that, the specialist believed, were intended to raise the stock price. Facts, ¶102. In fact, although CTT's purchases resulted in few upticks (consistent with the company's attempt to satisfy the price condition in

Rule 10b-18), its purchases also resulted in twice as many zero plus ticks and half as many downticks as the post-3:00 p.m. purchases by market participants other than defendants:

Price change	Post-3:00 p.m. Purchases by CTT		Post-3:00 p.m. Purchases by Non-Defendants
Uptick	6	7.0%	24.4%
Zero Plus	53	61.6%	28.2%
Zero Minus	14	16.3%	18.4%
Downtick	12	14.0%	28.5%
= 1 st Trade	1	1.2%	0.0%

Facts, ¶104. In other words, CTT's purchases were much more likely to maintain the stock price after an uptick than transactions by the market as a whole.

In addition, CTT sometimes bought shares that were sold by Steele or another defendant. An analysis of the defendants' phone records supports the inference that some of these matched trades were no coincidence – on eleven occasions, CTT purchased stock sold by another defendant shortly after one or more phone calls between Steele and CTT. Also, as with the Steele-Kwak matched trades, the CTT matched trades usually pushed up the price – seven were executed on an uptick and only one on a downtick. Facts, ¶101.

ARGUMENT

I. The Commission's Evidence Supports a Strong Inference that the Moving Defendants Violated the Federal Securities Laws

A. Section 9(a) of the Exchange Act

The Commission's First Claim for Relief rests upon Section 9(a) of the Exchange Act [15 U.S.C. §78i(a)], which prohibits several varieties of market manipulation. "The central purpose of section 9(a) is ... to keep an open and free market where the natural forces of supply

and demand determine a security's price." Trane Co. v. O'Connor Securities, 561 F.Supp. 301, 304 (S.D.N.Y.), *app. dism'd*, 718 F.2d 26 (2nd Cir. 1983).

The Commission's evidence supports a strong inference that CTT, McPike and Kwak violated Section 9(a)(1) in two respects: (1) by engaging in "matched trades" for the purpose of "creating a false or misleading appearance of active trading" in a security, as prohibited by Section 9(a)(1)(B), and (2) by engaging in "a series of transactions ... creating actual or apparent active trading" or "raising or depressing the price" of a security "for the purpose of inducing the purchase or sale of such security by others," as prohibited by Section 9(a)(2).

1. Matched Trades under Section 9(a)(1)(B)

Section 9(a)(1)(B) defines "matched trades" as the placing of:

an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same of different parties.

15 U.S.C. §78i(a)(1)(B). *See SEC v. Competitive Technologies, Inc.* ["SEC v. CTT"], 2005 WL 1719725, *6 (D.Conn. July 21, 2005), *citing SEC v. U.S. Environmental, Inc.*, 155 F.3d 107, 109 (2nd Cir. 1998).

In denying CTT's motion to dismiss, this Court held that the "pattern of trading" identified in the Complaint "supports the inference that matched orders occurred," that "a series of transactions occurred that created actual or apparent trading," and that the defendants acted with the requisite scienter. SEC v. CTT, 2005 WL 1719725 at *6. Indeed, the Court found it "clear that the pattern of phone calls between Steele and McPike in relation to the pattern of McPike's trading, as well as the substance of the phone messages that Steele left for McPike,

constitute strong circumstantial evidence of conscious misbehavior on the part of McPike and, through McPike, CTT.” *Id.* at *5.¹⁰

The Commission submits that the evidence set forth in its Local Rule 56(a)(2) Statement is even stronger than the allegations in the Complaint. The Commission has identified eleven occasions when CTT purchased shares of its stock sold by Steele or another defendant and where the evidence of prior phone calls between CTT and Steele supports a strong inference that when McPike placed each purchase order, he knew that Steele had placed a sell order of substantially the same size. On each occasion, CTT’s buy and the other defendant’s sell were then executed at the same time and at the same price. Similarly, the Commission has identified eighteen occasions when Kwak purchased shares of CTT stock sold by Steele and where the evidence of prior phone calls between Kwak and Steele supports a strong inference that when Kwak placed each purchase order, he knew that Steele had placed a sell order of substantially the same size. On each occasion, Kwak’s buy and Steele’s sell were then executed at the same time and at the same price. Moreover, the defendants’ testimony and the CTT message slips offer compelling evidence that Steele was constantly trying to minimize the price impact of sell orders, that Kwak and McPike were well aware of Steele’s efforts to affect the stock price, and that Kwak and McPike intended to help him by participating in these matched trades.

2. Manipulative Transactions under Section 9(a)(2)

Section 9(a)(2) is a more general anti-manipulation provision which makes it unlawful:

¹⁰ As the Court held in denying CTT’s motion to dismiss, McPike’s actions in implementing the stock repurchase program can be imputed to CTT. SEC v. CTT, 2005 WL 1719725 at *5 n.5.

[t]o effect ... a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

15 U.S.C. §78i(a)(2). The elements of a Section 9(a)(2) claim are: “(1) a series of transactions in a security creating actual or apparent trading in that security or raising or depressing the price of that security, (2) carried out with scienter and (3) for the purpose of inducing the security’s sale or purchase by others.” SEC v. CTT, 2005 WL 1719725 at *6, quoting SEC v. Malenfant, 784 F.Supp. 141, 144 (S.D.N.Y. 1992). Placing late-day trades in an attempt to influence the closing price (“marking the close”) and thus create a misleading appearance concerning the market for the stock is a violation of Section 9(a)(2). SEC v. Schiffer, 1998 WL 307375, *6 (S.D.N.Y. June 11, 1998); SEC v. Resch-Cassin & Co., Inc., 362 F.Supp. 964, 976 (S.D.N.Y. 1973).

In denying CTT’s motion to dismiss, the Court found that the Commission’s allegations supported the inference that CTT and McPike had effected manipulative transactions for purposes of Section 9(a)(2) with the requisite intent. SEC v. CTT, 2005 WL 1719725 at *6. The Commission submits that the evidence set forth in its Local Rule 56(a)(2) Statement offers even stronger support for the inference that these defendants violated Section 9(a)(2). The Commission has identified numerous occasions when McPike and Kwak placed late-day orders for CTT stock. Indeed, 273 of Kwak’s purchases (nearly 40% of his total) and 86 of CTT’s purchases (nearly 35% of its total) were executed after 3:00 p.m. While CTT tried to avoid making purchases after 3:30 p.m. because of Rule 10b-18, 195 of Kwak’s purchases (nearly

30%) were executed after 3:30 p.m. and 124 of his purchases (nearly 20%) were executed after 3:45 p.m.¹¹

The defendants' own testimony and the CTT message slips offer compelling evidence that Steele repeatedly asked McPike and Kwak (and the other defendants) to submit purchase orders late in the day in order to push up the price. The defendants' phone records indicate that many of the late-day purchases by CTT and Kwak were entered and/or executed shortly after a call with Steele. Further, the trade data shows that the late-day purchases by CTT and Kwak were much more likely to increase the stock price (in the case of Kwak) or at least maintain the price after an uptick (in the case of CTT) than the post-3:00 purchases by market participants other than the defendants. This evidence – that McPike and Kwak coordinated their late-day purchases with Steele in an often-successful attempt to increase the price of CTT stock before the close – thus supports a strong inference that these defendants violated Section 9(a)(2).

B. Fraudulent and Deceptive Conduct under Section 10(b) and Rule 10b-5

The Commission's Second Claim for Relief rests upon 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]. These provisions are violated “when a defendant (1) makes a material misrepresentation or a material omission as to which he had a duty to speak, or use[s] a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities.” SEC v. CTT, 2005 WL 1719725 at *4, *citing* SEC v. Prater, 289 F.Supp.2d 39, 52 (D.Conn. 2003).

¹¹ In one of its principal decisions on “marking the close”, the Commission upheld the NASD's sanctions against defendant Kocherhans for submitting 47 purchase orders in a security after 3:45 p.m. *See* Matter of Kocherhans, Release No. 34-36556, 1995 WL 723989 (Dec. 6, 1995).

Matched trades under Section 9(a)(1)(B) and manipulative trading under Section 9(a)(2) also violate Section 10(b) and Rule 10b-5. SEC v. Sayegh, 906 F.Supp. 939, 946 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 685 (2nd Cir. 1996) (manipulation under §9(a)(2)); SEC v. Kimmes, 799 F.Supp. 852, 859 (N.D.Ill. 1992), *aff'd*, 997 F.2d 287 (7th Cir. 1993) (matched trades); SEC v. Malenfant, 784 F.Supp. at 145 (matched trades); SEC v. Allison, 1982 WL 1560, *7 n.7 (D.Or. Jan. 1§7, 1982) (manipulation under §9(a)(2)).

In denying CTT's motion to dismiss, the Court found that the Commission's detailed allegations that the defendants placed late-day purchase orders and matching purchase orders for the purpose of creating a false or misleading appearance with respect to the market for CTT stock supported an inference that the defendants had engaged in fraudulent acts. SEC v. CTT, 2005 WL 1719725 at *5. The Court also found that the pattern of phone calls between Steele and McPike and the content of Steele's messages for McPike constituted "strong circumstantial evidence of conscious misbehavior" by McPike (which could be attributed to CTT). The Commission submits that the evidence set forth in its Rule 56(a)(2) Statement offers even stronger support for the conclusion that CTT and McPike, and Kwak as well, violated Section 10(b) and Rule 10b-5.¹²

C. Aiding and Abetting Steele's Violations

The Commission's Fifth Claim for Relief asserts that Kwak and McPike aided and abetted Steele's violations of Sections 9(a) and 10(b) of the Exchange Act and Rule 10b-5. To

¹² The evidence that Kwak sometimes sold shares of CTT stock as part of matched trades with other defendants supports the inference that he also violated Section 17(a) of the Securities Act [15 U.S.C. §77q(a)], which prohibits fraudulent or deceptive practices in the offer or sale of any securities.

establish liability for aiding and abetting a violation of the federal securities laws, the Commission must prove: “(1) a primary violation by another party; (2) knowledge of the violation by the aider and abettor and (3) substantial assistance by the aider and abettor.” SEC v. CTT, 2005 WL 1719725 at *7, quoting SEC v. Lybrand, 200 F.Supp.2d 384, 399 (S.D.N.Y. 2002).

In denying McPike’s motion to dismiss, the Court found that the Commission had sufficiently alleged Steele’s primary violations and had offered detailed allegations showing that “McPike had knowledge of Steele’s behavior and provided him with substantial assistance in performing, among other acts, matched orders.” *Id.* at *7. The Commission submits that the evidence set forth in its Local Rule 56(a)(2) Statement offers even stronger support for the Court’s conclusion that McPike aided and abetted Steele’s violations.¹³ The Commission also submits that its evidence that Kwak likewise submitted numerous late-day orders and participated in matched trades as requested by Steele supports a strong inference that Kwak too aided and abetted Steele’s violations.

II. The Moving Defendants Are Not Entitled to Summary Judgment

A. The Summary Judgment Standard

Summary judgment is appropriate “only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” Johnson v. Connecticut Dept. of Corrections, 2006 WL 1153780, *2 (D.Conn. Apr. 26, 2006); Ben-Dor v. Lorbert, 2005 WL

¹³ For example, besides submitting numerous late-day orders and participating in matched trades as requested by Steele, McPike frequently obtained market information from the AMEX specialist about pending sales and passed that information on to Steele.

2406009, *3 (D.Conn. Sept. 29, 2005). The moving party bears the burden of showing that no genuine factual dispute exists. *Id.* “When reasonable persons applying the proper legal standards could differ in their responses to the questions raised on the basis of the evidence presented, the question is best left to the [trier of fact].” *Id.*

B. The Defendants Ask the Court to Draw Improper Inferences in Their Own Favor

This case is extremely fact intensive. As reflected in its Local Rule 56(a)(2) Statement, the Commission has assembled a substantial amount of evidence which, the Commission believes, supports a strong inference that the defendants violated the federal securities laws. At the same time, the Commission’s claims rest in large part on inferences to be drawn from the evidence, and the Commission recognizes that it could not obtain summary judgment in its own favor. The heavily fact-driven nature of this case likewise precludes CTT and Kwak from obtaining summary judgment, even though they ask the Court to draw several inferences in their own favor.

CTT contends that it could not have engaged in manipulation because it made public disclosures about the repurchase program. The inferences to be drawn from CTT’s public disclosures are for the trier of fact, and the trier of fact may base its decision on the fact that CTT did not disclose the following: (1) McPike, the person handling the repurchase program, was inundated with calls from Steele, who was blatantly trying to manipulate the price of CTT stock; (2) Steele regularly asked to McPike to submit specific bids and to buy specific blocks of stock,

often at prices higher than the current bid; and (3) McPike sometimes submitted purchase orders in response to Steele's requests.¹⁴

Kwak contends that he could not have intended to manipulate the price of CTT stock because he genuinely believed that the stock was a good long-term investment, or CTT's argument. Kwak's decision not to sell his family's holdings of CTT stock (and thus to forego more than \$800,000 in net profits that could have been realized in March 2000) certainly does underscore his belief in CTT's long-term potential. But the trier of fact could easily draw an inference unfavorable to Kwak – that he had every incentive to manipulate the stock price in the short term because any slightly inflated prices which his family paid now would be repaid, and then some, when CTT hit the jackpot down the road.

C. There Is a Fact Dispute about the Link between Steele's Phone Calls and McPike's Purchases

CTT and McPike argue at length that there are “no objective facts” supporting any connection between the hundreds of phone calls which Steele made to CTT, the dozens of messages which Steele left for McPike, and the purchase orders which McPike placed for CTT. In making this argument, they rely upon their expert's determination that there is no statistical correlation between Steele's phone calls and McPike's purchases. (Apparently, Steele made so many phone calls to CTT that from a statistical perspective, there is no meaningful difference between the days when McPike placed purchase orders and the days when he did not.)

¹⁴ CTT's argument about public disclosure also proves too much. Public disclosure cannot immunize an issuer from manipulation claims – otherwise, there would be no need for the limited safe harbor in Rule 10b-18 because an issuer adopting a repurchase plan could always disclose it publicly and thus obtain complete protection.

However, the Commission's claim does not rest upon statistics but upon McPike's sworn investigative testimony – which surely constitutes an “objective fact” and which CTT and McPike conveniently ignore – that he sometimes submitted purchase orders in response to Steele's requests.¹⁵ Of course, McPike downplayed how often he actually did so, but that simply raises a credibility issue for the trier of fact. The important point is that McPike's sworn admissions establish that he sometimes acceded to Steele's requests for “help” by placing a purchase order.¹⁶

D. There Is a Fact Dispute about Defendants' Matched Trades

CTT argues that it cannot possibly be found to have participated in matched trades for purposes of Section 9(a)(1)(B) because McPike only placed market orders for CTT and because both sides' experts agree that it is impossible for two persons to guarantee that offsetting buy and sell market orders will be matched on the AMEX, even if submitted in close proximity. One problem with CTT's argument is that Section 9(a)(1)(B) does not require the person submitting

¹⁵ Given the damning admissions in his investigative testimony, it is not surprising that the sworn declaration which McPike submitted in support of the summary judgment motion does not even mention Steele, let alone offer a flat denial of any link between his purchases and Steele's calls. Likewise, it is not surprising that CTT's expert did not interview McPike, did not investigate whether any of CTT's purchases tracked any of Steele's specific requests as reflected in the message slips, and did not even consider the specific content of Steele's messages when performing his analysis. [Lundelius Dep. at 66-68.]

¹⁶ CTT also asserts, without any real explanation, that the message slips are not “competent” evidence of communications from Steele to McPike. Given McPike's testimony that the message slips were written by CTT's receptionist, that he got them from her desk, and that he sometimes responded to them by returning Steele's call or by placing a purchase order, it is hard to understand the argument. See Facts, ¶¶52-53. In any event, it is surely for the trier of fact to decide, drawing inferences from the content of the messages and from McPike's conduct, whether McPike did or did not act in response to a particular message.

the trade to know for certain that his trade will be executed as part of a match. The statute merely requires that when the person submits his order, he knows that an offsetting order of similar size, price and time has been or will be entered by another party. 15 U.S.C. §78i(a)(1)(B).

A second problem with CTT's argument is that there is obviously a fact dispute about whether McPike placed his purchase orders with knowledge of the defendants' offsetting sell orders.¹⁷ As outlined above, the Commission's evidence indicates that, on at least ten occasions, phone calls between Steele and CTT (almost certainly McPike) preceded the purchase in which CTT bought stock from Steele or another defendant. CTT may deny the connection, but the trier of fact could easily find that the phone calls between Steele and McPike, combined with McPike's knowledge that Steele was perpetually worried about the impact of sales on the stock price – supports the inference that McPike entered the orders with knowledge that CTT's purchases would offset another defendant's sales.

E. There Is a Fact Dispute about the Price Impact of CTT's Purchases

CTT and McPike argue that they cannot possibly be found to have engaged in market manipulation because CTT's purchases were generally small, thus tending to minimize their price impact, and because, in their expert's view, CTT's purchases did not materially affect the market for CTT stock. The expert based the latter opinion on the lack of a statistical correlation between CTT's purchases and the daily closing price.

¹⁷ The same is true for the matched orders between Kwak and Steele, as is evident from the many fact disputes identified in the Commission's response to paragraph 23 in Kwak's Rule 56(a)(1) Statement.

There is a fact dispute about the price impact of CTT's purchases. As the AMEX specialist testified, CTT's purchases helped to remove pending sell orders from the market, leaving room for other defendants to submit their own purchase orders and push up the price. Facts, ¶102. The specialist also testified that, with a thinly-traded stock like CTT, a series of small purchases can push the price up before the close of trading, and he often received a series of small, late-day purchases which, he believed, were intended to – and often did – push up the price before the close. Facts, ¶¶19, 76. On many days, CTT's purchases were indeed part of a series of small purchases by defendants executed after 3:00 p.m. and, as the phone records suggest, orchestrated by Steele.

Further, CTT's expert focused on the impact of CTT's purchases on the closing price, while ignoring the evidence about the actual impact of CTT's purchases on the intra-day price. He justified this approach by asserting that intra-day price movement as reflected in upticks and downticks is of little importance. [Lundelius Report at 23-24.] However, since he apparently did not read Steele's messages for McPike in any detail, he may be unaware of just how obsessed with the intra-day price Steele actually was. Indeed, the message slips and McPike's own testimony suggest that Steele frequently begged him to submit purchase orders in order to stabilize the intra-day price, and in fact, McPike's purchases for CTT were much more likely to be executed on a zero plus tick (thus maintaining the price after an uptick), and much less likely to be executed on a downtick or zero minus tick, than purchases by the market as a whole. In short, there is a fact dispute about the impact of CTT's purchases that only the trier of fact can resolve.

F. There Is a Fact Dispute about CTT's Purchases after 3:00 p.m.

CTT argues that it cannot possibly be found to have engaged in “marking the close” because its purchases were executed before 3:30 p.m. and because there is uncertainty about when McPike’s purchase orders were actually entered. Both arguments raise fact disputes which cannot be resolved at this stage.

The fact that CTT tried to avoid buying stock after 3:30 p.m. does not negate a manipulation claim. CTT stock was thinly traded, and a purchase between 3:00 p.m. and 3:30 p.m. often became the last trade of the day.¹⁸ Further, Steele routinely tried to orchestrate purchases of CTT stock after 3:00 p.m., the number of purchases which McPike submitted between 3:00 p.m. and 3:30 p.m. well exceeded the average for the rest of the market, and CTT’s purchases were often executed shortly after a call with Steele.

Also, CTT exaggerates the uncertainty about when McPike’s orders were entered. CTT and McPike agree that he submitted market orders, not limit orders. The AMEX specialist and both sides’ experts agree that market orders on AMEX are almost always executed within one minute, and usually within twenty seconds. Facts, ¶¶11-13. As a result, the trier of fact could easily infer that the time when CTT’s purchases were entered was at most a few minutes before the orders were executed.

G. There Is a Fact Dispute about Kwak’s Purchases

Kwak also contends that he cannot possibly have engaged in market manipulation because all his purchases were for himself, his family, or real customers (as opposed to “fictitious” persons), and because there is no evidence that any of his purchases were executed at

¹⁸ In fact, a purchase executed prior to 3:30 p.m. was the last trade on 10% of the days, and a purchase executed prior to 3:00 p.m. was the last trade on 4% of the days. Facts, ¶17.

an “artificial” level. Both arguments miss the point. The Commission does not contend that Kwak submitted purchases for “fictitious” people or at “artificial” prices. On the contrary, real trades for real people at real market prices can constitute market manipulation if the elements required by Section 9(a), 9(b) and 10(b) are present. In this case, the trier of fact must determine: (1) whether Kwak submitted purchases for his family and his customers in coordination with sales by Steele (the matched trades) and as part of Steele’s scheme to push up the price (the late-day trades), and (2) whether Kwak intended these transactions to create a false or misleading appearance or to raise the stock price for the purpose of inducing purchases by others. As set forth above, the Commission has proffered detailed evidence to support an affirmative answer to both questions.

H. There Is a Fact Dispute about McPike’s Intent

CTT and Kwak argue that they are entitled to summary judgment because there is no evidence that they intended to commit fraud. CTT relies upon cases involving private securities class actions in which the plaintiffs lacked specific evidence of scienter and relied instead on general assertions that a corporate officer has a financial incentive to maintain the company’s stock price. Those decisions have no relevance here, since McPike admitted that an increase in the price of CTT stock would help his chances of becoming permanent CEO (a very specific motive), and since this Court has already ruled that Steele’s phone calls, the message slips, and the pattern of McPike’s purchases “constitute strong circumstantial evidence of conscious misbehavior on the part of McPike and, through McPike, CTT.” SEC v. CTT, 2005 WL 1719725 at *5. Only the trier of fact can decide whether McPike was motivated to help Steele in part by his desire to become permanent CEO.

CONCLUSION

For the reasons set forth above, the defendants' motions for summary judgment should be denied.

Respectfully submitted,

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Dated: June 15, 2006

CERTIFICATE OF SERVICE

I, Frank C. Huntington, certify that on June 15, 2006, the foregoing Plaintiff's Opposition to Defendants' Motions for Summary Judgment was filed electronically with the Court. Notice will be sent by e-mail to all parties through the Court's electronic filing system (and by mail to parties not registered with the system), and the filing may be accessed through the Court's system. In addition, the undersigned has caused a paper copy to be served by first-class mail to defendants' counsel of record and to the defendants who have appeared *pro se*:

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