

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

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|--|---|------------------|
| SECURITIES AND EXCHANGE |) | |
| COMMISSION, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. |
| |) | 304CV1331 JCH |
| COMPETITIVE TECHNOLOGIES, INC., |) | |
| CHAUNCEY D. STEELE, JOHN R. GLUSHKO, |) | |
| THOMAS C. KOCHERHANS, RICHARD A. KWAK, |) | October 12, 2007 |
| SHELDON A. STRAUSS, STEPHEN J. WILSON |) | |
| and FRANK R. McPIKE, |) | |
| |) | |
| Defendants. |) | |

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO EXCLUDE CERTAIN RULE 1006 SUMMARIES**

Pursuant to Rules 403 and 1006 of the Federal Rules of Evidence, and in accordance with Paragraph 11 of the Final Pre-Trial Order dated January 26, 2007, Defendants Competitive Technologies, Inc. ("CTT"), Frank R. McPike, Jr. ("Mr. McPike"), Richard A. Kwak and Stephen J. Wilson (collectively, "Defendants") respectfully move this Court for an Order excluding Plaintiff Securities and Exchange Commission's ("Plaintiff" or "Commission") proposed Fed. R. Civ. P. 1006 summaries identified by the Commission as Plaintiff's Trial Exhibit Nos. 121 through 127, and 133 through 150.

INTRODUCTION

The Commission has indicated in both the Final Pretrial Memorandum filed by the parties on April 12, 2007 [Docket No. 156] and its List of Trial Exhibits [Docket No. 156, Exhibit 1] that it intends to introduce thirty (30) summaries of evidence at the trial of this

matter purportedly pursuant to Rule 1006 of the Federal Rules of Evidence. These charts purportedly summarize the telephone records of defendants (Plaintiff Exhibit Nos. 128 through 150) and trading data of defendants as it relates to the purchase and sale of CTT common stock during the relevant period (Plaintiff Exhibit Nos. 121 through 127).

The charts summarizing the trading activity of defendants during the relevant period were prepared by Paul Block, Esq, a staff attorney in the Commission's Division of Enforcement during the relevant period.¹ The charts summarizing the telephone records of defendants were prepared by Corliss Primavera, an investigator in the Commission's Boston office.

Although the Commission was explicitly warned by this Court in its Final Pretrial Order, and in its November 6, 2006 Order on Motion to Strike that it expected strict adherence to the Federal Rules concerning disclosures (November 6, 2006 Order at p. 5), Defendants did not receive a copy of the Commission's final proposed summaries until August 22, 2007 -- almost two full years after the close of discovery (which concluded on September 16, 2005).² Indeed, in the Final Pretrial Order this Court explicitly states in bold text that **"Failure to comply with this paragraph will result in the exclusion of exhibits not listed or exchanged, unless extreme prejudice would result."** See Final Pretrial Order at ¶ 11. A copy of this Order is attached hereto as Exhibit A. Each of these summaries must be independently verified prior to trial -- which is currently less than a month away (November 5, 2007).

¹ Mr. Block is currently a Branch Chief in the Commission's Boston office.

² What is more, on October 10, 2007, less than a week before the Final Pretrial Conference and with trial less than a month away, the Commission apparently seeks to introduce two summary tables prepared by Van Anthony of the Commission's Office of Economic Analysis and elicit Mr. Anthony's testimony regarding those tables. This is in direct contravention of Fed. R. Civ. P. 26(a)(3) as Mr. Anthony was not identified by the Commission as a potential witness, nor were the two summary tables identified or produced prior to the Commission's October 10, 2007 production.

By producing its summaries so close to trial -- and after the close of discovery -- the Commission has severely prejudiced Defendants by effectively preventing them from validating both the authenticity and admissibility of the underlying documents in support of the summaries as well as the accuracy and reliability of the data contained therein. These summaries should be excluded on that basis alone. However, these summaries, even if allowed despite their untimely introduction, fail to satisfy the requirements of Fed. R. Evid. 1006 and are therefore inadmissible.

ARGUMENT

I. THE COMMISSION'S SUMMARIES CREATED BY PAUL BLOCK AND CORLISS PRIMAVERA ARE NOT ADMISSIBLE UNDER RULE 1006 OF THE FEDERAL RULES OF EVIDENCE.

Charts and spreadsheets may be admissible as summaries under Fed. R. Evid. 1006, which provides that “[t]he contents of voluminous writings, recordings, or photographs which cannot be conveniently examined in court may be presented in the form of a chart, summary or calculation.” *See* Fed. R. Evid. 1006 (2007); *see also* U.S. v. Bray, 139 F.3d 1104, 1109-10 (6th Cir. 1998) (noting that “the contents of charts or summaries admitted as evidence under Rule 1006 must fairly represent [the] underlying documentary proof.”) (emphasis added). However, there are several preconditions to admitting a Rule 1006 summary chart. *Id.* Indeed, a party seeking to introduce summaries into evidence pursuant to Rule 1006 must satisfy five requirements: (1) the materials must be so voluminous that they cannot be conveniently examined in court by the trier of fact; (2) the proponent of the summary must have made the underlying materials available to the opposing party; (3) the underlying documents must be otherwise admissible; (4) the summary must be accurate and non-prejudicial; and (5) a proper foundation for the summary must be laid through the

testimony of the witness who prepared or supervised its preparation. *Id.* The Commission has failed to satisfy these requirements.

A. The Commission Failed To Lay A Proper Foundation For The Rule 1006 Summaries Created By Paul Block.

Fed. R. Evid. 1006 contemplates that a summary will have been prepared by a witness available for cross-examination, not by the lawyers trying the case. *See U.S. v. Grajales-Montoya*, 117 F.3d 356, 361 (8th Cir. 1997) (concluding that Rule 1006 does not allow for the admission of a summary “that was prepared by a lawyer trying the case and that restates and distills other properly admitted exhibits.”). That, however, is precisely what happened here.

The proposed summaries of the trading activity of defendants during the relevant period (Plaintiff Exhibit Nos. 121 through 127), were prepared by Paul Block -- a staff attorney with the Commission’s Enforcement Division during the relevant period. In an attempt to establish the adequacy of the summary and to assess the methodology used by Mr. Block in preparation of the proposed summaries as well as the accuracy and reliability of the data contained in the summaries, defense counsel conducted a deposition of Mr. Block on August 28, 2007. *See e.g. U.S. v. Bray*, 139 F.3d at 1110 (noting a proper foundation for a Rule 1006 summary can be laid through testimony of witness who prepared the exhibit); *see also U.S. v. Behrens*, 689 F.2d 154, 161 (10th Cir. 1982), *cert. denied*, 459 U.S. 1088, 103 S. Ct. 573, 74 L. Ed. 2d 934 (same).

During Mr. Block’s deposition, however, Frank Huntington, counsel for the Commission, repeatedly objected to questions surrounding the data compilation and creation of the summary exhibits and instructed Mr. Block not to answer on the basis that such questions were part of the “deliberative process” and part of the Commission’s “legal theory”

of the case. *See e.g.* Deposition of Paul Block (August 28, 2007), pp. 50-56 (attached hereto as Exhibit B). This tactical maneuver has prejudiced Mr. McPike by preventing him of the opportunity to adequately assess the methodology used by Mr. Block in preparation of the proposed summaries as well as the accuracy and reliability of the data contained in the summaries.

B. The Summaries Prepared By Mr. Block Are Inaccurate.

Courts have long required that district courts ascertain that summary charts “fairly represent and summarize the evidence upon which they are based.” *See U.S. v. Citron*, 783 F.2d 307, 316 (2d Cir. 1986) (noting that “unless chart fairly represents and summarizes underlying evidence, the chart is more likely to confuse or mislead the jury than it is to assist it.”); *see also U.S. v. Price*, 722 F.2d 88, 91 (5th Cir. 1983); *U.S. v. Keltner*, 675 F.2d 602, 606 (4th Cir.), cert. denied, 459 U.S. 832, 74 L. Ed. 2d 71, 103 S. Ct. 71 (1982). Fed. R. Evid. 1006 contemplates that “a summary will be admitted instead of, not in addition to, the documents that it summarizes.” *See U.S. v. Grajales-Montoya*, 117 F.3d 356, 361 (8th Cir. 1997) (internal citations omitted). Rule 1006 also requires that a summary document “must be accurate and non-prejudicial.” *See U.S. v. Bray*, 139 F.3d at 1110 (noting that the information on the document must summarize the information contained in the underlying documents “accurately, correctly, and in a non-misleading manner.”) (internal citations omitted). The Rule 1006 summaries created by Mr. Block in this matter [Plaintiff Exhibit Nos. 121 through 127], satisfy neither of these requirements.

Testimony of Block and Mark A. Gera show that Mr. Block’s Rule 1006 summaries are neither accurate nor complete. During his testimony, Mr. Block testified that a column he created in his Rule 1006 charts captioned “Buy Quantity” related solely to the amount of

CTT's repurchases of its own common stock. Later testimony by Mark Gera, and the admission of his trial counsel on record, however, show that is not accurate.

Specifically, Mr. Block testified:

A: Okay. On Block Exhibit 121, you'll see a buy order executed at 13:33:02 for 200 shares, at 3.875. If you go down to the fourth line on Block Exhibit 2, you'll see a "Buy Quantity" of 200 shares at 3.875, and that was executed at the same time of 13:33:02. You'll notice that the size of that order was 1,000 shares. Again, having not looked at this in a few months, I have to refresh my memory here, looking at each trade, but it appears from this that maybe it was an order for a thousand shares, of which only 200 got filled.

Block Transcript at p. 124 (a copy of this document is attached hereto as Exhibit C).

Later that same day, during the deposition with Mark Gera, he too was asked about the same order:

Q: What's the fourth row where you have a thousand, but then you have a buy quantity of 200?

A: This goes back to my comment earlier. There were other trades that aren't on this sheet, which would have made up the other 800 shares.

Q: Where would they be?

A: From anyone besides the repo account, it could have been from someone at some other firm. It could have been from UBS or -- if you look at the full AMEX report, you'd see where the other shares went. **We have only a small piece of it here.**

* * *

Q: So whose order is "Size" representing?

A: It's for the full amount of shares that went through at that price at that time.

Q: So "Size" does not represent the size of an order by Competitive Technologies?

A: It could.

Q: But it doesn't necessarily?

A: No.....Sometimes it is and sometimes it's not, **but there are other people in the marketplace at the same time buying those shares at the same price.**

* * *

Q: It's neither here nor there, but that's actually different than what Paul [Block] testified about this morning.

MR. HUNTINGTON: I don't think so.

MR. STEN: Yes, but that's okay.

MR. HUNTINGTON: Actually -- well, he might have been mistaken. You're right, and he was wrong on that.

Mark A. Gera Transcript at pp. 60-64 (copies of which are attached here as Exhibit D).

Because the Rule 1006 summaries of Mr. Block are admittedly incomplete and based on inaccurate understanding of their source materials, they should be excluded.

C. The Rule 1006 Summaries Created By Ms. Primavera Are Inaccurate, Misleading And Prejudicial.

1. The Rule 1006 summaries created by Ms. Primavera are inaccurate and misleading.

The Commission alleges that defendants engaged in a fraudulent scheme to manipulate and inflate the price of CTT common stock during the period from July 1998 through June 2001. In support of these allegations, and in an attempt to show that the defendants were "acting in concert" in the purported scheme, the Commission relies almost exclusively on defendants' telephone records. These telephone records have been summarized by Ms. Primavera into eighteen (18) summary exhibits [Plaintiff Exhibit Nos. 133 through 150]. Given the pivotal role these summaries will play in the trial of this matter and the Commission's almost exclusive reliance on these documents, it is essential that the information contained therein accurately and correctly summarize the underlying documents in a non-misleading manner. That, however, is not the case here. Indeed, Ms. Primavera's testimony from her August 29, 2007 deposition reveals serious issues that call into question

the accuracy and reliability of the data contained in the charts and render them misleading and unduly prejudicial.

First, the reliability of the Rule 1006 summaries is called into question given Ms. Primavera's acknowledgement that telephone records were "sometimes compiled by...student interns" (Primavera Trans. at 15:1-6) and that she relied on the work of others and did not confirm the accuracy of all of the work of others by cross-checking against the original documents. *See* Primavera Tans. 32:11-23.

Second, the Rule 1006 summaries are deceptively misleading. For example, there is an implication that the summaries created by Ms. Primavera represent a complete record of all calls made by the defendants. That is not the case. It is the Commission that chose what information would be included in the charts. In fact, Ms. Primavera acknowledged that unless a particular phone call involved a cellular phone (the billing for which indicates both incoming and outgoing calls) or was initiated from a phone for which the Commission has records, the Commission would not know whether a particular call occurred.

Q: [W]ould it be fair to say with respect to the other telephone calls from other customers of other brokers who are Defendants in this case, in the list that you compiled, that those customers' telephone calls to the brokers would not be included on any of the charts that you created?

A: No.

Transcript of August 29, 2007 Deposition of Corliss Primavera ("Primavera Trans.") at 23:19-24:1. The fact that these Rule 1006 summaries exclude calls initiated by brokers' customers is significant, as those calls could persuade the jury that many of the purchases and sales of CTT stock associated with the Defendants were in fact initiated by customer calls, not as part of a manipulative scheme.

The Rule 1006 summaries are also misleading in that they fail to identify the type of call made, or even if the identified Defendants in fact spoke to each other. Ms. Primavera conceded that she could not tell if a call involved an actual conversation, one person leaving a message, or even if the caller was just left on hold for the entirety of the duration of the alleged call. Primavera Trans. 39:15-24; 62:21-63:3. Ms. Primavera likewise conceded that she was unable to determine whether the calls were conference calls involving more than one person. *See* Primavera Trans. at 38:3-12.

In many instances, the 1006 summaries imply that one of the Defendants participated in a phone call when in fact the Commission has no way to prove that it was the identified Defendant and not someone else at the same place of business. For example, Exhibit 137 is identified as “Telephone Calls Between CTT/McPike and Other Defendants and the AMEX Specialist from CTT/McPike Phone Records.” Similarly, Exhibit 143 is labeled “Telephone Calls Between CTT/McPike and Other Defendants.” However, as Primavera conceded, these calls could have been from or to anyone at CTT, not just Mr. McPike. *See* Primavera Trans. at 45:10-24. The same holds true for the calls from Prudential Securities, Inc. that the Commission contends were from Chauncey Steele -- in fact, the Commission has no way of knowing whether Mr. Steele or some other person at Prudential made and/or received the phone calls in question. *See* Primavera Trans. 40:13-41:19; 52:7-54:10.

Another misleading aspect of the Rule 1006 summaries prepared by Ms. Primavera is the duration of the calls documented on the charts. For example, in Plaintiff Exhibit No. 142 labeled “Telephone Calls between Wilson and Other Defendants From Wilson Telephone Records,” the duration of the calls are all listed as even one minute increments. All of these calls, however, were not so conveniently timed. *See* Primavera Trans. at 51:6-13. This is

significantly misleading given that numerous calls listed as lasting at least one minute could be the result of a person simply calling and hanging up rather than leaving a message.

Because the Rule 1006 summaries concerning telephone calls are inaccurate and deceptively misleading, they should be excluded in their entirety. *See In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 72-73 (2d Cir. 1980) (concluding that exclusion of chart was clearly within the trial court's discretion under Fed. R. Evid. 403); *see also U.S. v. Altruda*, 224 F.2d 935, 942 (2d Cir. 1955) (reversing judgment for government where admitted summary was "incomplete, inaccurate and misleading and the failure of the trial judge to sustain objection to its admission in evidence operated to the prejudice of the defendant.").

2. The Rule 1006 summaries created by Ms. Primavera are excessively cumulative.

Under Fed. R. Evid. 403, a court may exclude the "needless presentation of cumulative evidence." *See Fed. R. Evid. 403* (2007); *see also U.S. v. Clarke*, 390 F. Supp. 2d 131, 134 (D. Conn. 2005) (noting that the court has considerable discretion to avoid evidence that is cumulative); *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1200 (11th Cir. 1986) (affirming exclusion of internal corporate memorandum that summarized facts already in evidence). The Rule 1006 summaries created by Ms. Primavera fall into this category.

An analysis of Plaintiff Exhibit Nos. 133 through 150 reveals numerous duplicative entries that improperly distort the number of calls actually placed during the relevant period and create the perception of volume. For example, for Defendants Glushko, Kwak, Steele, and Wilson the Commission utilizes three charts consisting of (1) defendant and "customer calls"; (2) defendant and "other defendant calls"; and (3) defendant and calls "from all

sources.” *See e.g.* Plaintiff Exhibit Nos. 133, 138, and 144. Not surprisingly, there is an overlap in the charts. For example, Exhibit 136 (“Telephone Calls Between Wilson and Customers Calls On Trade Dates and Day Before Trade Dates”) lists a call on October 21, 1998 at 1:43 to Charles Phillips. This same call appears again on Exhibit 149 (“Wilson Telephone Calls with Customers and Other Defendants”). Similarly, Exhibit 142 (“Telephone Calls Between Wilson and other Defendants”) lists a call between Wilson and Defendant Chauncey D. Steele (“Steele”) on April 23, 1999 at 6:05. This same call is also repeated on Exhibit 149 as well as Exhibit 147 (“Steele telephone calls from all sources”).

In addition, Plaintiff Exhibit No. 150 (“Telephone Calls Between Defendants”) includes all of the calls identified in Plaintiff Exhibit Nos. 133 through 149. The result is that each call between the Defendants is listed at least three times -- once on each of the charts purportedly summarizing the calls from each of the Defendants to any other defendant, and again on Exhibit 150. However, the duplication does not end there. When Ms. Primavera compiled Plaintiff Exhibit No. 150, she failed to ensure that each call was only listed once and further indicated that differences in the way a call was recorded on different phone records resulted in the same call being listed more than once:

- Q. Then after you had done all of the searches for all of the individuals or entities, you took that series of smaller charts, and you compiled it into the bigger chart that’s marked as Exhibit 150?
- A. Yes.
- Q. Now, after you compiled all of those smaller charts into this larger chart, did you exercise any discretion in terms of adding or deleting any numbers from the bigger chart, because they may have been redundant?

- A. They could be redundant, because two phone records from different places could record a different amount of time, a length of time on a call, because the different phone companies have different ways of counting it. So there could be redundancy.
- Q. There could be redundancy in Exhibit 150?
- A. There could be, yes.
- Q. For example, if there were a cellphone call --if there were two cellphone calls, and each cellphone telephone record compiled the incoming call and the outgoing calls, and you took a cellphone record for one Defendant and for another Defendant, and put it in a larger trunk, you could have that telephone number listed twice --
- A. Yes.
- Q. Did you go through Exhibit 150 to check for that redundancy?
- A. No, because it's more complete if there are two different -- I mean, if the same call is put in there twice, it's more complete.

Primavera Trans. at 35:12-36:24.

Plaintiff Exhibit No. 150 is 330 pages long. Meanwhile, Plaintiff Exhibit Nos. 133 through 149 are a combined 1,544 pages long. The size of Plaintiff Exhibit No. 150 can largely be attributed to the duplication and the needless introduction of cumulative evidence and should be excluded as unduly prejudicial under Fed. R. Evid. 403. Indeed, these summary charts do not fairly or accurately summarize the underlying evidence and will mislead and confuse the jury by creating the impression that the volume of calls between the Defendants was far greater than actually occurred. This Court should therefore exclude the above-referenced 1006 summaries as cumulative and unduly prejudicial. *See In re Beverly Hills Fire Litigation*, 695 F.2d 207, 218 (6th Cir. 1982) (finding no abuse of discretion where trial court excluded cumulative evidence). Excluding these summaries will not create an undue burden on the Commission, as it can still rely on the underlying phone records.

CONCLUSION

For all the foregoing reasons, Defendants respectfully requests that this Court exclude the Commission's Fed. R. Evid. 1006 summary charts (Plaintiff Exhibit Nos. 121 through 127 and 133 through 150) in their entirety.

Respectfully Submitted,

**COMPETITIVE TECHNOLOGIES, INC., and
FRANK R. McPIKE, Jr.**

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CERTIFICATE OF SERVICE

I, Jason C. Moreau, certify that on October 12, 2007, the foregoing Memorandum Of Law 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 on October 12, 2007 to defendants' counsel of record and to the defendants who have appeared *pro se*:

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