

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

SECURITIES AND EXCHANGE	:	Civil Action No. 304CV331 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.	:	

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

I. INTRODUCTION

The plaintiff Securities and Exchange Commissions (“SEC”) has sued defendant Richard Kwak (“Mr. Kwak”), alleging that he manipulated the market for, and closing price of, stock in Competitive Technologies, Inc. (“CTT”) during the period between July 1998 and June 2001 (the “Relevant Period”). Specifically, the SEC alleges that Mr. Kwak unlawfully manipulated the market by (a) placing “numerous late-day buy orders which raised or maintained the price of CTT stock at an artificially high level”; (b) placing “numerous matching buy orders for CTT stock for the purpose of offsetting pending or anticipated sell orders, creating a false or misleading appearance with respect to the market for CTT stock, and inducing others to purchase CTT stock”; and (c) selling CTT stock for his customers “while the price of CTT stock was artificially inflated due to” Mr. Kwak’s conduct alleged above.

The SEC cannot prevail on any of its claims because it is a matter of undisputed fact that:

- 1) Mr. Kwak purchased CTT stock for himself and his customers for the legitimate purpose of investing in CTT;
- 2) Mr. Kwak's purchases of CTT stock were for legitimate, non-fictitious customers and were executed on the open market at prices that were consistent with the prices paid by other investors in the market, and that were determined by market forces; there is no evidence that Mr. Kwak's purchases raised or maintained the price of CTT stock at an "artificial" level, meaning a level "above the investment value of the stock as determined by available information and market forces"; and
- 3) Mr. Kwak did not enter "matched" orders of substantially the same size, at substantially the same time, and at substantially the same price as any other defendant; and

Accordingly, defendant Mr. Kwak respectfully requests that the Court grant summary judgment in his favor on each claim by the SEC.

II. BACKGROUND FACTS

Mr. Kwak is 69 years old. Defendant Richard Kwak's Rule 56(a)(1) Statement, ¶ 1 (hereinafter "D.S., ¶ __"). He is married and has four children. *Id.* Mr. Kwak became a licensed securities broker in 1967, and, since that time, he has been in the employ of Francis I DuPont & Co., PaineWebber and Morgan Stanley DW Inc. (AMorgan Stanley≅), three of the top brokerage firms in this country. D.S., ¶ 1. In his 39 years as a broker, Mr. Kwak has never been disciplined, fined, or sanctioned in his capacity as a securities broker. *Id.*, ¶ 2. Prior to this

action, no one had ever initiated a lawsuit against Mr. Kwak based on his conduct as a securities broker and he had never been asked to testify before the SEC on any matter. Id.

During the 1980's, Mr. Kwak learned about CTT, which was in the business of acquiring the right to market various technologies. D.S., ¶ 3. Mr. Kwak purchased stock in CTT and began to follow the company's progress closely. Id. Mr. Kwak believed that CTT stock was an excellent long-term investment. Id., ¶ 4. Mr. Kwak believed that CTT was an ideal long-term investment, rather than a short-term investment, because the new or developing technologies to which CTT acquired the right to market require time and money to fully develop, patent, and market before they ultimately yield a profit to the company. Id. For this reason, Mr. Kwak recommended the stock to his customers as a long-term investment, and purchased the stock for himself and his family as a long-term investment. Id.

Between July 1987 and July 1998, Mr. Kwak purchased over 37,000 shares of CTT stock for himself and his family, and many of Mr. Kwak's customers purchased CTT stock as well. D.S., ¶ 5. During the eleven year period between 1987 and 1998, CTT stock moved up to the \$12.00 range, and down to the \$3.00 range several times. Id., ¶ 6. Consistent with the belief that CTT was a long term investment, irrespective of the highs to which CTT had risen and the lows to which it had fallen, Mr. Kwak and his customers primarily purchased CTT stock, and rarely sold it. Id., ¶ 7. By July 1998, CTT stock was trading in the \$9-11 range. Mr. Kwak and his family owned 30,350 shares of CTT stock, and approximately 75 of Mr. Kwak's 100 customers had also purchased varying amounts of CTT stock. Id., ¶ 8.

The SEC alleges that in July 1998, after spending his entire life as a law abiding citizen and responsible husband, father and stock-broker, and at a time when the stock was trading well above its historic average, Mr. Kwak suddenly chose to risk his career, reputation and indeed his

very liberty, by participating in an illegal scheme to “inflate” and “maintain” the price and market for CTT stock. Complaint, ¶ 4. Specifically, the SEC alleges that between July 1998 and June 2001, Mr. Kwak “timed” his orders for CTT stock to “maximize the positive effect on the price, particularly the closing price, of CTT’s stock,” “made multiple small purchases at arranged times and prices in order to give the misleading appearance of investor interest,” and “arranged numerous matched trades . . . in order to minimize the downward effect of sell orders on the stock price.” Complaint, ¶ 4. The SEC alleges that these “systematic efforts were intended to – and did – raise or at least maintain the closing price of CT stock and create a false and misleading appearance with respect to the market for CTT stock” and to aid and abet defendant Chauncey Steele’s (“Mr. Steele”) manipulation of the market. Id., ¶¶ 4, 5.

The following facts regarding Mr. Kwak’s trading in CTT stock during the Relevant Period are not subject to dispute, and preclude any finding that Mr. Kwak intended to, or did, manipulate the market for CTT stock:

- During the Relevant Period, Mr. Kwak purchased CTT stock for himself and his customers because he believed it was a good investment. D.S., ¶ 9. As the SEC itself has alleged, Mr. Kwak at all times believed that “CTT would finally generate substantial profits, the stock price would soar, and current CTT shareholders . . . would strike it rich.” Id., citing, Complaint, ¶ 20.

- During the Relevant Period, Mr. Kwak and his family personally invested over \$335,000 in CTT stock at the prices which the SEC contends Kwak caused to be, and knew to be, artificially inflated. D.S., ¶ 10. The majority of these purchases are not even claimed to have directly promoted the alleged manipulative scheme in any way. Id., ¶ 11.¹

¹ Out of 24 separate purchases of CTT stock in Mr. Kwak’s accounts during the relevant time period, the SEC has only identified one purchase that was allegedly intended to offset the sale of CTT stock by another party and only 5

- During the Relevant Period Mr. Kwak did not sell a single share of his or his family's CTT stock at the allegedly inflated prices allegedly created by the alleged scheme. D.S. ¶ 12,² even though he and his family would have received net proceeds of over \$1.25 million dollars if they had sold their stock at the height of the market. D.S., ¶ 14.

- All of Mr. Kwak's transactions in CTT stock were for legitimate, non-fictitious customers. D.S., ¶ 16.

- Mr. Kwak's transactions in CTT stock were entered for execution in the open market. D.S., ¶ 17.

- Mr. Kwak always attempted to achieve "best execution" for his customers – meaning that he attempted to purchase the stock for them at the best possible price in the market that was available at the time. D.S., ¶ 20. There is no evidence that Mr. Kwak ever entered 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. Id.

- Mr. Kwak did not have discretionary authority to trade in any of his customers' accounts, did not take discretion in those accounts and, as a practice, Mr. Kwak entered his customer's orders soon after receiving confirmation of their desire to place the order. D.S., ¶ 18. Mr. Kwak only delayed entering an order if he believed that, by doing so, he could obtain the stock for his customer at a more favorable price. Id.

- None of Mr. Kwak's customers ever asserted that Mr. Kwak had improperly entered orders to purchase CTT stock for their accounts. D.S., ¶ 19.

purchases that were executed after 3:00pm. D.S., ¶ 11. Only one of these 5 so-called "late day" purchases allegedly established the closing price, and it established that price at a price that was *lower* than the stock otherwise would have closed. Id. At least 12 of Mr. Kwak's other purchases for himself and/or his family were also at a price that was lower than the preceding trade. Id.

² Mr. Kwak sold his CTT stock on only one occasion during the Relevant Period. This sale was at one of the lowest prices of the period, and Mr. Kwak suffered a loss on the sale. D.S., ¶ 13.

- Out of the Mr. Kwak's 682 purchases of CTT stock during the 3 year Relevant Period, the SEC has identified only **two** (2) occasions on which Mr. Kwak paid a higher price for CTT stock than other investors in the market had *already* paid for the stock on the very same day. D.S., ¶ 21. Both of these transactions occurred early in the day, and other investors purchased the stock at a substantially higher price later in the day. *Id.* Accordingly, the SEC does not contend that Mr. Kwak's purchases of CTT stock on these days were at a price that was higher than the prevailing market rate for CTT stock at the time of purchase. *Id.*

- The only order by Mr. Kwak that the SEC has identified as an alleged "matched trade," that could possibly be considered to be substantially similar in time and size is Mr. Kwak's alleged purchase of 200 shares at 9:46 a.m. to offset Mr. Steele's sale of 200 shares at 9:22 a.m. on January 12, 2001. D.S., ¶¶ 22, 23. Mr. Kwak entered that order pursuant to his customer's request and did not know that Mr. Steele had entered an order to sell 200 shares of CTT stock that morning. D.S., ¶ 22. Moreover, the market was trading at 39,000 shares on that day. *Id.* The SEC has no evidence that this alleged "match" was, or could have been, anything more than a coincidence or that Mr. Kwak would have had any reason to believe that a match of a few hundred shares, in a market trading at this volume, would affect the market in any way. *Id.*

As set forth herein, under these circumstances, the SEC cannot meet its burden to prove either that Mr. Kwak intended to manipulate the market for CTT stock, or that he did manipulate the market for CTT stock, as a matter of law.

III. ARGUMENT

A. STANDARD OF REVIEW

Summary judgment is appropriate where there are no genuine issues of material fact and where the facts demonstrate that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When the moving party presents a supported motion for summary judgment, the opposing party cannot rest upon mere allegations or denials but instead bears the burden of setting forth “specific facts showing that there is a genuine issue for trial.” See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The mere existence of some alleged factual issues will not defeat a properly supported motion for summary judgment. Id. Rather, without evidence that is both sufficient for a jury to return a verdict for the nonmoving party and “significantly probative,” there are no triable issues and the nonmoving party will not defeat a motion for summary judgment. Id. at 249.

In this case, there is no genuine issue of material fact as to the SEC’s claim that Mr. Kwak violated Sections 9(a) and 10(b) of the Exchange Act or Rule 10b-5, or that Mr. Kwak aided and abetted Mr. Steele’s violation thereof, and the Court should grant summary judgment in Mr. Kwak’s favor on these claims.

B. THE SEC CANNOT MEET ITS BURDEN OF PROOF WITH RESPECT TO THE FIRST TWO CLAIMS FOR RELIEF

To establish a violation of either Sections 9(a) (First Claim) or 10(b) (Second Claim) the SEC must prove, by a preponderance of the evidence, that Mr. Kwak not only (1) entered orders for CTT stock with the specific intent and purpose of manipulating the price of, or market for, CTT stock, but (2) that his trades did have a manipulative effect on the market. 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); Ray v. Lehman Bros. Kuhn Loeb, Inc., 624 F.Supp. 16, 22 (N.D.Ga. 1984). The court should enter judgment in Mr. Kwak's favor because the SEC cannot meet its burden.

1. Mr. Kwak and His Customers Purchased CTT Stock Because of Their Legitimate Investment Interest In CTT

The securities laws are intended to eliminate devices “used to persuade the public that activity in a security is a reflection of genuine demand instead of a mirage.” Ray, 624 F.Supp. at 20, citing, Stock Exchange Practices, Report of the Commission on Banking and Currency, S.Rep. No. 1455, 73d Cong.2d Sess. 54 (1934). Their purpose “is not to prohibit market transactions which may raise or lower the price of securities”; the laws do “not condemn extensive buying of a security or buying which raises the price of a security.” Id., quoting, Trane Co. v. O'Connor Securities, 561 F.Supp. 301, 304 (S.D.N.Y. 1983) and citing, Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 794 (2nd Cir. 1969). “If a person is merely trying to acquire a large block of stock for investment . . . his knowledge that in doing so he will affect the market price does not make his action unlawful.” 3 Bromberg & Lowenfeld on Securities Fraud & Commodities Fraud § 6:56 (2d Ed.), quoting, HR Rep. No. 1383, 73d Cong, 2d Sess 20 (1934); Crane, 419 F.2d at 794. “So long as the investor's motive in buying or selling a security is not to create an *artificial* demand for, or supply of, the security, illegal market manipulation is not established.” Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 383 (2nd Cir. 1973)) (emphasis added).

In this case, it is undisputed that Mr. Kwak's purchases of CTT stock for himself and his clients were a reflection of legitimate, not artificial, demand for the stock - Mr. Kwak purchased CTT stock for himself, his family and his clients because he had faith in the company and believed that CTT stock was a good investment for which its stock holders would reap financial

rewards as a legitimate result of its future profitability. D.S., ¶ 9. The fact that Mr. Kwak made absolutely no attempt to sell his CTT stock and profit from the “inflated” prices that he was allegedly responsible for creating – and, instead, continued to personally purchase hundreds of thousands of dollars worth of CTT stock at these allegedly “inflated” prices, conclusively belies any claim to the contrary. D.S., ¶ 10-15.

Given these undisputed facts, the SEC cannot prevail on its manipulation claim, regardless of whether Mr. Kwak’s purchases increased the price of, or market for, CTT stock. See 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.); In re College Bound Consolidated Litigation, 1995 WL 450486 at * 4-5, 7 (holding that plaintiffs could not prevail where allegations in complaint implied that defendant’s motivation for purchasing stock was, “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 - and “claims of ‘closing the market’ don’t change this.”); 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.)

2. Mr. Kwak's Trading Did Not Have A Manipulative Effect On CTT Stock

Even though Mr. Kwak purchased CTT stock for himself and his clients with a legitimate investment interest, the SEC alleges that Mr. Kwak is liable for market manipulation because he *timed* those purchases “to maximize the positive effect on the price” of CTT stock. Complaint, ¶¶ 4, 18, 20. As set forth in Section 1, *supra*, the SEC could not prevail on its claim of market manipulation even if it proved this allegation, because Mr. Kwak’s purchases, regardless of timing, were “a reflection of genuine demand instead of a mirage.” *Ray*, 624 F.Supp. at 20. Nevertheless, the SEC cannot establish the other legal elements of these claims even if it could establish a manipulative intent.

To prevail on its claim of market manipulation, the SEC must establish, by a preponderance of the evidence, that Mr. Kwak’s purchases not only increased the price of the security, but that these purchases increased the price of the security to an “artificial” level, meaning “a level above the investment value of the stock as determined by available information and market forces.” *U.S. v. Russo*, 74 F.3d 1383, 1394 (2nd Cir. 1996); *Mulheren*, 938 F.2d at 368.

Here, the SEC has absolutely no evidence that Mr. Kwak was responsible, either directly or indirectly, for any transactions that artificially inflated the price of CTT stock, including the closing price of the stock. The SEC has admitted that it has no evidence to support that Mr. 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. D.S., ¶ 20. Indeed, the SEC has identified only two (2) occasions in which Mr. Kwak purchased CTT stock at a price that was higher than

other investors in the market paid for the stock that very same day. D.S., ¶ 21. Moreover, there is compelling evidence that, on these two occasions, the price Mr. Kwak paid was actually lower than the investment value of the stock as determined by market forces: on both occasions, other investors subsequently paid far more for the stock later in the day. Id.

There is simply no evidence that Mr. Kwak engaged in any transactions, much less a “series of transactions,” that were intended to, or that did, raise the price of CTT stock to a level above the investment value of the stock as determined by available information and market forces. D.S., ¶ 20, 21. Instead, the undisputed evidence shows that, regardless of whether Mr. Kwak’s purchases resulted in increases in the price at which CTT stock traded, this increase was the result of normal market responses to the legitimate investment interest of Mr. Kwak and his clients – it was not a result of any attempt by Mr. Kwak to artificially inflate the stock price. Compare, Crane, supra (purchase of large volume of shares through a series of transactions at a price (\$49.08) substantially above the market price, while at the same time secretly arranging for others to purchase the acquired shares at a much lower price (\$44.50), was manipulative) with Trane, supra (active trading of stock over period of 9 months, resulting in acquisition of 15% of outstanding stock, “undoubtedly affected the price of the stock and induced purchases by others” but was not manipulative.); In Re College Bound Consolidated Litigation, supra (evidence that defendant purchased large volumes of stock at the close of the market, even if done for the purpose of causing the price of the stock to rise, was insufficient to establish claim of market manipulation where purchases were made on the open market at market prices.)

3. Mr. Kwak Did Not Engage In Illegal Match or Cross Trades

To prevail on its claim that Mr. Kwak engaged in illegal “matched trades” the SEC must establish that Mr. Kwak “enter[ed] an order” to purchase or sell CTT stock (1) with knowledge

that an order for the purchase or sale of CTT stock (2) of substantially the same size; (3) at substantially the same price, has or will be entered (4) at substantially the same time by or for the same or different parties, (5) for the 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. 15 U.S.C. § 78i(a); Wright v. Securities and Exchange Comm'n, 112 F.2d 89, 93 (2nd Cir. 1940)(reversing SEC order expelling petitioner from membership in national exchanges based on alleged manipulation). The SEC also cannot meet its burden to establish this claim.

The SEC has purported to identify 30 occasions on which Mr. Kwak allegedly engaged in a “matched trade.” D.S. ¶¶ 22-23. As set forth in detail in defendant Mr. Kwak’s Rule 56(a)(1) Statement, at least 29 out of these 30 alleged “matches” were entered at substantially different times and were for substantially different amounts of stock; the Specialist merely partially filled one order with an order by another defendant. Because Section 9(a) “must be strictly construed since a violation of it may be punished as a crime,” this evidence is insufficient as a matter of law to establish an illegal “matched trade.” Wright, 112 F.2d at 93-94.

Accordingly, out of the defendants’ 4,326 purchases of CTT stock that the SEC has identified on the AMEX trade run, and all of defendants’ sales of CTT stock during the 3 year Relevant Period, the SEC has only identified one purchase by Mr. Kwak that the Specialist “matched” with the sale of CTT stock by another defendant, that could possibly be considered substantially similar in size and time of entry: Mr. Kwak’s alleged purchase of 200 shares at 9:46 a.m. purportedly to offset Mr. Steele’s sale of 200 shares at 9:22 a.m on January 12, 2001. D.S., ¶¶ 22-23. Mr. Kwak entered this order for a legitimate customer, whose order he did not solicit

and who determined the timing of this trade. D.S., ¶ 22.³ Mr. Kwak did not know that Mr. Steele planned to sell 200 shares of CTT stock that morning, and Mr. Kwak had no other purpose than to fulfill his customer's orders. Id. Moreover, the market was trading at 39,000 shares on that day. Id. There is simply no basis to support that the parties could have intentionally matched their orders,⁴ or have believed that a match of a few hundred shares, in a market trading at this volume, would affect the market in any way. Even assuming the SEC could establish the elements of a matched trade, this is, at best, a "minor incident" that cannot support a claim of market manipulation. Trane Co., supra.

Finally, the SEC could not prevail on its claim, even if all 30 of the orders that the SEC has identified were substantially similar in time of entry, price and size because Mr. Kwak did not disclose his purchases or sale of CTT stock to any of the other defendants either prior to or when he placed his orders, and the other defendants did not disclose this information to him. D.S., ¶ 29.

4. The SEC Cannot Meet Its Burden To Prove Any Of The Other Traditional Badges Of Manipulation

In addition to being unable to show that Mr. Kwak intended to manipulate the market, that Mr. Kwak did manipulate the market, that he profited from his alleged manipulation, or that his conduct was economically reasonable, the SEC cannot show the other "traditional badges of manipulation" – masked purchases, market control and domination, or the collapse of the market following the conclusion of the alleged manipulation. In re College Bound, at *6-7, citing, Mulheren, supra. First, it is undisputed that all of Mr. Kwak's purchases were for legitimate,

³ There is only a single alleged "matched" trade that the SEC claims to be able to show that Mr. Kwak solicited, and the records show that Mr. Kwak did not, and could not possibly have, "timed" this order to correspond with Steele's order to sell CTT stock. D.S., ¶ 23(1).

⁴ Defendants Frank McPike and Competitive Technologies, Inc. explain in their Motion for Summary Judgment, filed concurrently herewith, that it is, in fact, almost impossible for a buyer and seller to intentionally match their trades on the AMEX. Defendant Mr. Kwak incorporates herein by reference the evidence and arguments submitted by McPike and CTT to support this fact.

non-fictitious customers and that Mr. Kwak executed his purchases and sales on the open market. D.S., ¶¶ 16, 17; Mulheren, at 371 (fact that transactions were not “masked” and were made on the open market refutes a claim of manipulation.)

Second, where, as here, there is no claim that Mr. Kwak engaged in “masked orders,” or engaged in similar deceptive conduct, the SEC “must show **daily** market domination over an **extended** period of time to sustain a claim of manipulation.” In re College Bound, at * 7 (emphasis added). The undisputed evidence in this case shows that Mr. Kwak did not dominate and control the market for CTT stock. During the relevant period, Mr. Kwak’s trading in CTT stock accounted for an average of only 2.8% of the total volume traded. D.S., ¶ 24. The occasions on which Mr. Kwak’s trading accounted for any measurable percentage of trading in CTT stock, or established the closing price of the stock, were sporadic, at best. Id. This evidence is insufficient to establish that Mr. Kwak dominated or controlled the market for CTT stock. See, Ray, 624 F.Supp. at 22 (plaintiff could not establish market domination at a time when defendant’s trades only accounted for approximately 2% of the total trading volume.); Mulheren, 938 F.2d at 371 (describing case where defendants’ trading constituted more than 50% of the overall trading for a 1 year period, and case where defendant’s trading consistently comprised 28.8% of the days’ volume for a 4 month period as cases where market control and domination was established.); In re College Bound, at * 7 (market domination during 2 months in the course of a 6 month period is insufficient); M S Wien & Co., 24 S.E.C. 4, 12-13 (1946) (where defendant was responsible for 98% of total face amount traded during the relevant period.)

Finally, the SEC has admitted that the market for CTT stock did not collapse after defendants ceased their alleged manipulation. D.S., ¶ 25. To the contrary, for the month preceding January 6, 2005, CTT stock traded between \$9.50 and \$11.26 per share. Id., ¶ 26.

C. THE SEC CANNOT MEET ITS BURDEN OF PROOF WITH RESPECT TO ITS THIRD CLAIM FOR RELIEF

The SEC also cannot prevail on its third claim that, when Mr. Kwak entered orders to sell CTT stock, he defrauded and misled the purchasers of the stock in violation of Section 17(a) of the Exchange Act (15 U.S.C. § 77q(a)) because the market price was “artificially inflated” as a result of his purchasing activity. Complaint, Third Claim, ¶¶ 60, 61. The SEC cannot prevail on this claim because, as set forth in Sections (A) and (B), supra, there is no evidence that the price of CTT stock was artificially inflated. It is a matter of undisputed fact that Mr. Kwak’s purchases of CTT stock for himself and his clients were the result of a legitimate investment interest, and were at prices established in the open market that were consistent with the price paid by other investors in the market. D.S., ¶¶ 4, 9, 20, 21. These purchases thus cannot be found to have “artificially” inflated the price of the stock. In the absence of any evidence that the stock price was artificially inflated, the SEC cannot meet its burden to show that Mr. Kwak made any false representation in the sale of CTT stock or that he entered orders to sell the stock with an intent to defraud.

D. THE SEC CANNOT MEET ITS BURDEN OF PROOF WITH RESPECT TO ITS FIFTH CLAIM FOR RELIEF⁵

The SEC also cannot prevail on its final claim that Mr. Kwak aided and abetted defendant Mr. Steele’s manipulation of the market. To prevail on this claim, the SEC must prove that: (1) Mr. Steele violated a securities law, (2) Mr. Kwak knew of the violation, and (3) Mr. Kwak substantially assisted in Mr. Steele’s violation of the securities law. See Mason v. Burkett, 756 F.Supp. 679, 681 (D.Conn. 1991) (Eginton, J.), citing, Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir.1983). The SEC cannot prevail on its claim even assuming *arguendo* that the SEC could

⁵ The SEC’s Fourth Claim for Relief is directed solely to defendant Steele. Accordingly, Mr. Kwak does not address this claim in his motion.

prove that Mr. Steele manipulated the market for CTT stock, because there is absolutely no evidence that Mr. Kwak knew that Mr. Steele was doing so, or that Mr. Kwak substantially assisted Mr. Steele in doing so. Indeed, all of the evidence is to the contrary.

First, the SEC cannot prove that Mr. Kwak knew of Mr. Steele's alleged manipulation of the price of CTT stock. While the SEC has alleged that Mr. Kwak "knew from [his] hundreds of phone calls with Mr. Steele that he was attempting to influence the price of CTT stock" (Complaint, ¶ 69), the SEC has absolutely no evidence to support this allegation, which is untrue. D.S., ¶ 29. Indeed, the SEC cannot even show which, if any, of these telephone calls resulted in a conversation between the parties. In fact, on many of the occasions that the telephone records show a telephone call to Mr. Kwak, he was on the telephone with a client or otherwise unavailable, and the parties did not speak to each other. D.S., ¶ 30. A jury could only infer that Mr. Steele disclosed his alleged scheme to Mr. Kwak during their telephone calls by engaging in "rank speculation" regarding the substance of those calls. Mulheren, at 367-369, 372. The inference of knowledge that the SEC seeks to draw from the telephone calls is "no more valid than others equally supported by reason and experience," (Mulheren, at 367-369, 372), viz. that the parties, who were both closely following CTT, were merely exchanging their thoughts on the company and its stock movement, and their predictions regarding the company's future profitability and stock movement.

Second, the SEC cannot prove either that Mr. Kwak entered orders to purchase CTT stock for the purpose of assisting Mr. Steele to manipulate the price of CTT stock, or that he could have reasonably believed that he was doing so. As set forth herein, it is a matter of undisputed fact that Mr. Kwak purchased CTT stock for himself and his customers for the purpose of investing in CTT and of earning profits from the future legitimate increase in the

stock's value that Mr. Kwak was confident would occur. D.S., ¶¶ 4, 9. Moreover, as set forth herein, the SEC cannot meet its burden to show that Mr. Kwak's trading contributed to artificially inflating the price of CTT stock. D.S., ¶¶ 20-21.

In sum, the SEC cannot meet its burden to prove that Mr. Kwak knew, or even reasonably could have known, of Mr. Steele's alleged unlawful intent; that Mr. Kwak acted with the intent to substantially assist Mr. Steele in his alleged scheme; or that Mr. Kwak did substantially assist Mr. Steele in his alleged scheme. Accordingly, summary judgment on this claim is warranted. See Mason, at 681 (granting defendant's motion for summary judgment on claim of aiding and abetting violation of securities laws.)

IV. CONCLUSION

It is a matter of common knowledge that, between 1999 and March 2000, technology related stocks, almost without exception, went through one of the greatest inflationary bubbles in history. There is no genuine issue of fact: Mr. Kwak's purchases of CTT stock during this time did not create or aid in the creation of an artificial market in CTT stock. The SEC has admitted that, when Mr. Kwak entered purchases of CTT stock for himself, his family and his customers during this time, he did so with the hope of earning future legitimate investment income based on his sincere belief that CTT would be profitable, and that Mr. Kwak purchased the stock on the open market, for legitimate customers, at market prices.

For these reasons, it is also beyond dispute that Mr. Kwak's purchases of CTT stock, and the price movement of the stock, if any, caused by these purchases, were "a reflection of genuine demand." As a matter of law, neither the alleged timing of Mr. Kwak's telephone calls, nor the timing of his purchases of CTT stock, can transform this genuine demand into a mirage that could, or did, mislead the investing public.

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