

Not Reported in F.Supp.2d, 2006 WL 3346210 (D.Conn.)
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United States District Court,
 D. Connecticut.
SECURITIES and EXCHANGE COMMISSION, Plaintiff,
 v.
COMPETITIVE TECHNOLOGIES, INC., et al., Defendants.
Civil Action No. 3:04-cv-1331 (JCH).

Nov. 6, 2006.

Franklin C. Huntington, IV, Securities & Exchange Commission, Boston, MA, John B. Hughes, U.S. Attorney's Office, New Haven, CT, for Plaintiff.

D. Greg Blankinship, Jennifer Martin Foster, John A. Sten, Greenberg & Traurig, Boston, MA, David B. Zabel, Cohen and Wolf, P.C., Stephen M. Kindseth, Zeisler & Zeisler, P.C., Bridgeport, CT, Charles F. Willson, Nevins & Nevins, East Hartford, CT, Eliot B. Gersten, Gersten & Clifford, Hartford, CT, Michael J.C. Degnan, Robert W. Pearce, Law Offices of Robert Wayne Pearce, P.A., Boca Raton, FL, for Defendants.

RULING ON DEFENDANTS' MOTIONS TO STRIKE [DOC. NOS. 120 and 122] AND MOTIONS FOR SUMMARY JUDGMENT [DOC. NOS. 98 and 99]

JANET C. HALL, District Judge.

*1 The plaintiff, the **Securities and Exchange Commission** ("SEC"), brings this action against defendants, **Competitive**

Technologies, Inc. ("CTT"), Chauncey D. Steele, John R. Glushko, Thomas C. Kocherans, Richard A. Kwak, Sheldon A. Strauss, Stephen J. Wilson, and Frank McPike pursuant to sections 9(a), 10(b), 20(d), 21, and 27 of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and sections 17(a), 20, and 22 of the Securities Act of 1933. 15 U.S.C. §§ 77t, 77q(a), 77v(a), 78aa, 78i(a), 78j(b), 78t(e), 78u, 17 C.F.R. § 240.10b-5. In Counts I, II, and V, the SEC allege that CTT, McPike, and Kwak engaged in illegal manipulation of the stock price of CTT through "matched orders" and other forms of stock purchase manipulation, and aided and abetted Steele's fraudulent actions. In Count III, the SEC alleges that Kwak defrauded and misled purchasers of CTT stock by artificially inflating CTT's market price through his purchasing activity.

CTT, McPike, and Kwak have moved for summary judgment pursuant to Rule 56 of the Federal Rules. CTT, McPike, and Kwak have also moved to strike, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, the Declaration of Frank C. Huntington ^{FN1} ("the Huntington Declaration") (Doc. No. 113) and Tables A through O of the SEC's exhibits submitted in opposition to summary judgment. For the reasons set out below, defendants' motions are denied.

FN1. Huntington is the SEC's lead counsel in this matter.

I. DEFENDANTS' MOTION TO STRIKE

The defendants arguments supporting their Motion to Strike are: 1) that attorney affi-

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davits are disfavored; 2) that the Huntington Declaration does not comply with Rule 56(e) of the Federal Rules; 3) that the Huntington Declaration is based on inadmissible evidence; 4) that the Huntington Declaration is inadmissible under Rule 1006 of the Federal Rules of Evidence; and 5) that paragraphs twenty-seven and thirty-six of the Huntington Declaration are inadmissible statistical conclusions. The court finds that each of the arguments is without merit.

A. Attorney Affidavits

The Second Circuit has held that:

[t]he rule that an attorney's affidavit alone is insufficient to support a motion for summary judgment has its principal applicability when the dispositive facts as to which the moving party contends there is no genuine issue are historical facts relating to the events leading to the lawsuit, for the attorney usually lacks the requisite personal knowledge of these facts.

Sitts v. U.S., 811 F.2d 736, 741-42 (2d Cir.1987). Though it is clear that attorney affidavits are generally a poor source of evidence in making or opposing motions for summary judgment, the defendants have cited no authority that requires this court to strike the Huntington Declaration for the mere fact that it is an attorney affidavit. Indeed, attorney affidavits are acceptable when, as is largely the case here, a party uses them only as a vehicle through which to present admissible evidence relevant to the matter at hand. *North Trade U.S., Inc. v. Guinness Bass Import Co.*, 2006 WL 2263885 *2 (D.Conn. 2006).

B. Compliance with Rule 56(e)

*2 The court finds that the Huntington Declaration complies with Rule 56(e). In pertinent part, Rule 56(e) states:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in the affidavit shall be attached thereto or served therewith.

While “the principles governing admissibility of evidence do not change on a motion for summary judgment,” district courts in this circuit have broad discretion in determining the admissibility of evidence. *Raskin v. Wyatt Co.*, 125 F.3d 55, 64-65 (2d Cir.1997); *see also Burt Rigid Box, Inc. v. Travelers Property Cas. Corp.*, 302 F.3d 83, 92 (2d Cir.2002) (finding that trial judges have broad discretion in determining preliminary questions of admissibility).

The Huntington Declaration sets forth the various table summaries of the SEC's investigation into the defendants' alleged activities. Though, as the defendants assert, neither Huntington nor the staff of the SEC have personal knowledge of the defendants' alleged activity, the SEC staff does have personal knowledge of their investigation into this matter. Furthermore, the SEC has submitted each table mentioned in the Huntington Declaration with its Opposition and has represented to this court that each table will be introduced at trial by a non-attorney member of the SEC staff. Opp. at 8 (Doc. No. 127). Thus, the court does not deem it appropriate to strike the Huntington Declaration on this ground.^{FN2}

FN2. While the court does not strike the Huntington Declaration, it

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is puzzled by the SEC'S apparent belief, in light of the SEC's Rule 56(a)(2) statement and exhibits submitted in opposition to summary judgment, that the declaration itself has any notable probative value. As lead attorney in this case, Huntington certainly could not testify at trial about any of the matters set forth in his declaration. D. Conn. L. Civ. R. 83.13 Only those staff members not directly prosecuting this case would be competent in this regard. The court accepts that the SEC submitted the Huntington Declaration to avoid presenting affidavits from the SEC staff members actually responsible for compiling the data at issue. Proceeding in this manner, while perhaps appearing more efficient, resulted in an additional motion and the expenditure of more time by the parties and the court.

C. Admissibility of Evidence Underlying the Huntington Declaration

The defendants next assert that the Huntington Declaration should be stricken because it is based on inadmissible evidence. According to the defendants, the Huntington Declaration does not attach or authenticate the documents upon which it relies, and it relies on a document withheld from the defendants. However, as mentioned above, each of the tables summarizing the SEC's investigation that the Huntington Declaration references is attached with the SEC's Opposition. ^{FN3} In addition, the evidence underlying these tables—the defendants' phone and brokerage records, and CTT message slips relating certain phone calls between the defendants—all present colorable bases for admission as business records under Rule 803(5) or as recorded

recollections under Rule 803(6). With the exception of the NYSE Database, all of the evidence underlying the SEC's tables have been produced to the defendants during discovery. The court therefore does not find a sufficient basis to strike on this ground.

FN3. The court will address the admissibility of these summaries below.

With regards to the NYSE Database, which the court finds would be admissible under Rule 803(17) as a market report, the SEC admits that the document was not produced during the discovery. The SEC explains that it did not discover the database until sometime during the course of its preparations for summary judgment. Though the court ultimately concludes that the SEC's failure to turn over the NYSE Database was an innocent oversight, this in no way changes the court's conviction that this was also a very serious oversight. The defendants' right to the discovery of this document, and the SEC's obligation to provide it, are beyond dispute. However, to the extent that the SEC has represented its willingness to turn the document over for expert examination, and to the extent that nothing offered by the defendants suggests that the SEC intends otherwise, Opp. at 5, the court sees no reason to strike the submission at this time.

*3 In light of the court's concern with allowing the defendants a proper opportunity to dispute the SEC's conclusions with regards to the NYSE database, the court orders that the SEC turn over the NYSE database to the defendants by November 13, 2006, if it has not done so already. The defendants will have until December 21, 2006 to disclose an additional expert under Rule 26(e), and the deposition of said ex-

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pert must take place by January 12, 2006. Both parties, but especially the SEC, should note that future mishaps of this nature will not be tolerated by the court.

D. Admissibility of Tables A Through O Under Federal Rule of Evidence 1006.

Rule 1006 of the Federal Rules of Evidence provides, in relevant portion, that “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.” Fed.R.Evid. 1006. The defendants contest the factual summaries represented in Tables A through O because, in their view, the materials summarized therein are not voluminous; the NYSE Database, relied upon in each table, was not produced during discovery; the materials underlying the table are inadmissible; the tables are not accurate; and the SEC cannot lay a proper foundation to admit the tables.

The SEC represents that the hard copies of the files from which the tables in question were created fill more than ten boxes. Opp. to Motion to Strike at 6. In addition, the SEC maintains that a number of the electronic databases from which it created these tables, such as records of Steele's alleged telephone calls to the other defendants, are also rather large. *Id.* Further complicating the clear presentation of evidence, the SEC claims, is the fact that data relevant to this motion are scattered throughout these files. *Id.* The defendants do not challenge the SEC's factual assertions. As the court is satisfied that the SEC's summarization of the evidence compiled in this case is appropriate under Rule 1006 of the Federal Rules of Evidence,^{FN4} it denies the Motion to Strike on this ground.

FN4. The defendants also contend that the tables are inadmissible because there is a discrepancy between the SEC's discovery responses concerning the trading volume in CTT stock and the SEC's representation of CTT trading volume contained in the Huntington Declaration and Tables A through O. Similarly, the defendants also assert that there are internal discrepancies as to CTT trading volume during the relevant periods within Tables A through O. As a jury would have to determine for itself at trial whether these tables accurately reflect the underlying data, the court does not find these challenges sufficient to warrant the exclusion of the tables. *See Yousef v. United States*, 327 F.3d 56, 157-58 (2d Cir.2003).

E. Statistical Conclusions in Paragraphs 27 and 36

Lastly, the defendants argue that Paragraphs 27 and 36 of the Huntington Declaration, which describe two tables purporting to show the defendants' trade activity after 3:00 p.m., are inadmissible. The defendants assert that, because the data in these tables advance statistical analyses, the SEC is required to submit this evidence through an expert witness.

The court sees no basis for this assertion. Rule 1006 of the Federal Rules of Evidence clearly permits a party to submit calculations of the data upon which it relies. Fed.R.Evid. 1006. Further, both of the cases the defendants cite for the proposition that expert testimony is required to introduce statistics derive from the highly distinguishable context of discrimination law. *See Wingfield v. United Techs. Corp.*,

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678 F.Supp. 973, 980-81 (D.Conn.1988) and *Zottola v. City of Oakland*, 32 Fed.Appx. 307, 313 (9th Cir.2002). The court therefore denies the Motion to Strike on this ground as well.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

*4 CTT and McPike also move for summary judgment on the SEC's claims for relief under Sections 9(a) and 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. McPike and Kwak move for summary judgment on the SEC's claims of aiding and abetting Steele's violations of Section 9(a) and 10(b) of the Exchange Act and Rule 10b-5. Kwak moves separately for summary judgment on the SEC's claims for relief under Sections 9(a) and 10(b) of the Exchange Act and Rule 10b-5, as well as on the SEC's claim for relief that Kwak defrauded and misled the purchasers of CTT stock in violation of Section 17(a) of the Exchange Act.

A. Standard of Review

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *White v. ABCO Engineering Corp.*, 221 F.3d 293, 300 (2d Cir.2000). Once the moving party has met its burden, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial," *Anderson*, 477 U.S. at 255, and present such evidence as would allow a jury to find in his favor in order to defeat the motion. *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir.2000).

In assessing the record, the trial court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *Anderson*, 477 U.S. at 255; *Graham*, 230 F.3d at 38. "This remedy that precludes a trial is properly granted only when no rational finder of fact could find in favor of the non-moving party." *Carlton*, 202 F.3d at 134. "When reasonable persons, applying the proper legal standards, could differ in their responses to the question" raised on the basis of the evidence presented, the question must be left to the jury. *Sologub v. City of New York*, 202 F.3d 175, 178 (2d Cir.2000).

B. Discussion

The law relevant to this case under the Securities Exchange Act and the Exchange Act is well established. The court has previously detailed this law in an earlier Ruling (Doc. No. 73) denying CTT and McPike's Motion to Dismiss. See *SEC v. Competitive Technologies, Inc.*, 2005 WL 1719725 (D.Conn.2005). The court sees no reason to repeat that discussion here.^{FN5}

FN5. While the court has not previously set out the law concerning Section 17(a) of the Exchange Act, which is relevant to Kwak's Motion for Summary Judgment, Kwak's argument on this section are dependent upon his challenges to the SEC's charges under Section 9(a) and 10(b) of the Exchange Act. Kwak Opp. at 15. Therefore, the court need not address Kwak's Section 17(a) challenges separately.

Based upon the evidence and supporting documents submitted by the parties, the court finds that the SEC has created genu-

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ine issues of material fact sufficient to sustain each of the challenged claims for relief. Broadly, the court concludes that there are issues of material fact as to whether the defendants engaged in matched or otherwise manipulative trading of CTT stock. In particular, there are issues of fact as to, *inter alia*, the connection between and import of the defendants' telephone conversations and messages with each other; whether McPike's purchasing of CTT stock at market price still constitutes a matched order; whether McPike placed purchase orders with knowledge of other defendants' offsetting sell orders; whether the defendants' CTT purchases had a material effect on the market for CTT stock; and whether Kwak coordinated his CTT stock transactions with Steele while intending to manipulate CTT's stock price and induce its purchase by others. Because of these material issues of fact, the court denies the Motions for Summary Judgment.

III. CONCLUSION

*5 For the foregoing reasons, the defendants Motions to Strike (Doc. Nos. 120 and 122) and Motions for Summary Judgment (Doc. Nos. 98 and 99) are **DENIED**.

SO ORDERED.

D.Conn.,2006.
S.E.C. v. Competitive Technologies, Inc.
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3346210 (D.Conn.)

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