UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

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

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO EXCLUDE EVIDENCE OF PAST ACTS BY DEFENDANT THOMAS C. KOCHERHANS

Pursuant to Fed. R. Evid. 402, 403 and 404, and in accordance with Paragraph 11 of this Court's Final Pre-Trial Order of January 26, 2007, Defendants Competitive Technologies, Inc. ("CTT"), Frank R. McPike, Jr., Richard A. Kwak and Stephen J. Wilson hereby respectfully move this Court for an Order excluding the Plaintiff Securities and Exchange Commission ("SEC" or "Plaintiff") from introducing evidence of the prior disciplinary action taken against Defendant Thomas C. Kocherhans ("Mr. Kocherhans") by the National Association of Securities Dealers, Inc. ("NASD") ("NASD Action") on the basis that such evidence is irrelevant and inadmissible character evidence and where its probative value is substantially outweighed by unfair prejudice, confusion of the issues and misleading the jury.

INTRODUCTION

On December 6, 1995, the NASD entered a disciplinary order against Mr. Kocherhans in conjunction with trading activity that occurred from June through November 1991. The NASD concluded that Mr. Kocherhans violated the NASD's rules of fair practice by effecting a series of purchases in WICAT Systems, Inc. ("WICAT") common stock at or near the close of the market with the intent to cause the market for WICAT to close at a price higher than the previously reported trade, also referred to as "marking the close." *See* In the Matter of Kocherhans, 60 S.E.C. Docket 2210, 1995 WL 723989 (Dec. 6, 1995). A copy of the order is attached hereto as Exhibit A.[1] The NASD censured Mr. Kocherhans, fined him $50,500, suspended him from association with NASD members for one year, and required him to requalify by examination in the event that he wanted to return as a general securities representative. Id. at *1.

ARGUMENT

Allowing the introduction of the NASD Action, or of testimony concerning the NASD Action, would be highly prejudicial to Mr. Kocherhans and the other Defendants. No curative or limiting instruction to the jury can prevent it from being improperly influenced into believing that, because Mr. Kocherhans was found to have "marked the close" of the market of a security other than CTT, then his actions in regard to CTT common stock must have been in conformity with his prior manipulative acts. That is exactly the type of undue prejudice Rule 404(a) is designed to prevent. Moreover, any minimally probative value to Mr. Kocherhans' past acts to the allegations here (which took place between six and ten years before the events that are the subject of the instant action) is far outweighed by the prejudice to Mr. Kocherhans and the other Defendants. There is no evidence that the other Defendants

[1] The SEC has listed this order on its proposed Exhibit List as Exhibit 74.

engaged in these past instances of manipulation with Mr. Kocherhans. However, it is inevitable that, as the SEC paints a portrait of concerted action toward a common scheme, the other Defendants will be smeared by Mr. Kocherhans' past manipulative acts as the jury, consciously or not, will assume that the other Defendants also engaged in similar conduct with him, or even knew of his prior conduct.

I. CHARACTER EVIDENCE IS INADMISSIBLE TO PROVE CONFORMITY THEREWITH.

Rule 404(a) of the Federal Rules of Evidence provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ." *See* Fed. R. Evid. 404(a); *see also* Continental Cas. Co. v. Howard, 775 F.2d 876, 879 n.1 (7th Cir. 1985) (affirming verdict and exclusion of character evidence); Michelson v. United States, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); Fed. R. Evid. 404 advisory committee's note (2006) ("The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait."). Accordingly, this Court should exclude the NASD Action, as well as any attempt by the SEC to influence the jury though the presentation of evidence concerning the NASD Action against Mr. Kocherhans.

II. THE PREJUDICIAL EFFECT OF THE NASD ACTION FAR OUTWEIGHS ANY PROBATIVE VALUE.

Federal Rule of Evidence 404(b), which applies in both civil and criminal cases, provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b) (2007). Rule 404(b) also states that such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . " Id.; *see also* U.S. v. Sappe, 898 F.2d 878, 880 (2d Cir. 1990) (noting that "if offered for such a purpose, the evidence is still subject to the strictures limiting admissibility such as Fed. R. Evid. 402 and 403). However, to the extent that the predicate acts have any probative value pursuant to Fed. R. Evid. 404(b), the probative value must substantially outweigh the prejudicial effect of that evidence. *See* Fed. R. Evid. 403 (2007) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…"); *see also*
Ricciuti v. New York City Transit Auth., 1998 U.S. Dist. LEXIS 5083 (S.D.N.Y. 1998) (noting Fed. R. Evid. 404(b)'s balancing of whether the danger of undue prejudice outweighs the probative value of the evidence mirrors the criteria of Fed. R. Evid. 403). That is not the case here.

The prior NASD Action against Mr. Kocherhans does not satisfy the threshold for admissibility under Rule 404(b). The NASD Action is in no way probative of Mr. Kocherhans' conduct in the present matter involving his purported trading activity in CTT common stock as the underlying events occurred more than sixteen years ago. In addition,

any potential probative value of the NASD Action is far outweighed by the inevitable prejudice to Mr. Kocherhans and all of the other Defendants.

A. The Conduct In Question Occurred More Than Sixteen Years Ago.

The NASD Action should be excluded because the underlying events took place more than sixteen years ago. The trades at issue in the NASD Action occurred between June 3 and November 26, 1991. *Id.* at *1. However, the trades at issue here did not begin until more than six years later, beginning in July 1998 and ending in June 2001. *See* Final Pretrial Memorandum at p. 4. Courts reject evidence of past acts where they are remote in time on the basis that "common sense dictates that the older such evidence is, the less probative it becomes for present purposes." Glover v. Oppleman, 178 F. Supp. 2d 622, 632 (W.D. Va. 2001); s*ee also* Stair v. Lehigh Valley Carpenters Local 600, 813 F. Supp. 1116, 1119-20 (E.D. Pa. 1993) (granting "Defendants' motions in limine because the allegations concern events that are too remote in time to the events in the present action" where prior acts took place four years prior). The propriety of excluding evidence remote in time from the acts at issue is especially appropriate where there is no evidence of a similar conduct in the intervening time. *See* Glover, 178 F. Supp. 2d at 633. Given that the subject matter of the NASD Action occurred more than sixteen years ago, there is simply no probative value to the introduction of such evidence.

B. Any Probative Value Of The NASD Action Is Outweighed By The Inevitable Prejudice To The Defendants.

Even if the NASD Action is arguably relevant to show Mr. Kocherhans' intent in connection with the present action (which it is not), this Court should still exclude the NASD Action and any related testimony as being unduly prejudicial. *See* Cullen v. Margiotta, 811

F.2d 698, 716 (2d Cir. 1987) ("Even where evidence of similar acts is relevant under Fed. R. Evid. 404(b), the trial court is required by Fed. R. Evid. 403 to weigh the probative value of the evidence against the potential for, inter alia, undue prejudice and jury confusion.") (overruled on other grounds). Moreover, "[t]he court is accorded broad discretion to exclude relevant evidence if the probative value is substantially outweighed by the likelihood of jury confusion." *Id.* at 716-17.

In this case, the prejudice to the Defendants is manifest. There is a very real risk that the jury will be persuaded that, because Mr. Kocherhans engaged in "marking the close" in the past, he likewise did in the present case. Moreover, the other Defendants will suffer undue prejudice as the jury may infer that, if Mr. Kocherhans engaged in this type of conduct, they also engaged in similar conduct -- or at least knew that Mr. Kocherhans had.

CONCLUSION

For all the foregoing reasons, Defendants Competitive Technologies, Inc., Frank R. McPike, Jr., Richard A. Kwak and Stephen J. Wilson respectfully request that this Court exclude Plaintiffs' Exhibit 74 and any testimony or other evidence concerning the prior NASD Action involving Mr. Kocherhans.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jason C. Moreau, certify that on October 12, 2007, the foregoing motion to exclude 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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