

JUL 29 2005

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CLARENCE MADDOX  
CLERK, USDC / SDFL / FTL

SECURITIES AND EXCHANGE )  
COMMISSION, )

Plaintiff, )

v. )

CONCORDE AMERICA, INC., ABSOLUTE )  
HEALTH AND FITNESS, INC., HARTLEY )  
LORD, DONALD E. OEHMKE, BRYAN )  
KOS, THOMAS M. HEYSEK, ANDREW M. )  
KLINE, AND PAUL A. SPREADBURY, )

Defendants, )

DASILVA, SA, VANDERLIP HOLDINGS, )  
NV, CHIANG ZE CAPITAL, AVV, RYZCEK )  
INVESTMENTS, GMBH, BARRANQUILLA )  
HOLDINGS, SA, )

Relief Defendants. )

CASE NO. 05-80128-CIV-ZLOCH/SNOW

**DEFENDANT DONALD E. OEHMKE'S  
MOTION TO VACATE FREEZE ORDER  
AND MEMORANDUM OF LAW  
IN SUPPORT**

COMES NOW Defendant, DONALD E. OEHMKE ("Oehmke"), by and through his undersigned counsel, pursuant to Fed. R. Civ. P. 7(b), Fed. R. Civ. P. 65(b), and paragraph 19 of this Court's Order, dated March 1, 2005, and hereby moves to vacate the March 1, 2005, Order on grounds set forth in the following Memorandum of Law:

**MEMORANDUM OF LAW**

**I. BACKGROUND AND PROCEDURAL HISTORY**

1. Plaintiff Securities and Exchange Commission ("Commission") commenced this action on February 14, 2005, against Defendants Concorde America, Inc., Absolute Health and Fitness, Inc., Hartley Lord, Donald E. Oehmke, Bryan Kos, Thomas M. Heysek, Andrew M. Kline, and Paul A. Spreadbury, alleging that these Defendants violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 promulgated thereunder by

having engaged in certain fraudulent schemes related to the purchase and sale of securities of Concorde America (“Concorde”) and Absolute Health and Fitness, Inc. (“AHFI”). The Commission also named DaSilva, SA, Vanderlip Holdings, NV, Chiang Ze Capital, Ryzcek Investments, and Barranquilla Holdings, SA, as Relief Defendants (“Relief Defendants”), alleging that Defendants Oehmke and Kos routed much of the fruits of the purported fraudulent scheme through these “nominee” entities.

2. On the same day the Complaint was filed, the Commission also filed an Ex Parte Motion for Temporary Freeze Order and Other Relief, seeking to freeze all of Mr. Oehmke’s assets (“Ex Parte Motion”). This Court entered a Temporary Restraining Order the following day directing the freeze of “any assets or property owned by, controlled by, or in the possession of Defendant Oehmke.” In addition, this Court ordered that, within five (5) business days, Mr. Oehmke take steps to repatriate all funds and assets, provide a written description of the said funds and assets, and file a sworn accounting with this Court.

3. Following a hearing on February 23, 2005, this Court on February 25, 2005, set, *sua sponte*, a status conference for February 28, 2005, to explore the Court’s authority to issue a freeze order. Defendant Kos filed a Statement Regarding the Authority of This Court to Enter An Asset Freeze Order, in which Mr. Oehmke joined. The Court held a status conference on February 28, 2005, during which the Commission made clear that it was relying on the three volumes of exhibits submitted in support of the Ex Parte Motion. At the conclusion of the conference, this Court stated: “I am going to uphold the agreement, if you will, that was entered into between the defense and the SEC for an extension of the asset freeze only until the court resolves the issue as to whether the court had jurisdiction to enter an asset freeze in the first

instance, and I will resolve that issue as quickly as possible.” (February 28, 2005 hearing transcript at page 50).

4. The Court also ordered the Commission to file a memorandum by March 3, 2005, addressing the issues raised in the Kos Notice and gave Kos and Oehmke until March 8, 2005, to file a memorandum of response. All parties filed their respective responses. On March 1, 2005, the Court issued the current Order (“Freeze Order”) that included a freeze of assets held by Defendants Kos and Oehmke and required certain other actions by Mr. Oehmke. Oehmke has complied with every requirement of the Freeze Order.

5. Discovery in this matter has begun. The Commission has made available to Defendants, pursuant to Fed. R. Civ. P. 26, documents, witness lists, and other evidence, consisting of approximately six boxes of documents and several CDs that it represents as non-privileged.

6. Mr. Oehmke has conducted a detailed review of the evidence submitted by the Commission in Support of its Ex Parte Motion. As described in detail below, rather than providing this Court with sufficient credible evidence, the Commission in its Memorandum of Law in Support of Asset Freeze (“Memorandum”) relied on innuendo, rank speculation, distortion, and misrepresentation of the facts to justify the Freeze Order.

7. Not only does the evidence not rise to the level of establishing a reasonable likelihood of success on the merits of this case, the Commission, as of the filing of this motion, could not provide Oehmke with an estimate of the amount of disgorgement sought from him.

8. In its Motion for Default Judgment, dated of April 25, 2005, the Commission admitted that it had not yet received complete bank records. On July 21, 2005, the staff told counsel for Oehmke that they could not provide any proposed disgorgement figure because they

were still awaiting financial records from off-shore entities. As a result, the staff had yet to complete their analysis of banking and brokerage records to determine the exact amount of potential disgorgement.<sup>1</sup> Despite this lack of critical information, the Commission alleged in its Ex Parte Motion that Oehmke had received over \$20 million dollars in illegal proceeds. Such unsupported claim by the Commission is at best reckless.

9. The Commission failed to conduct an adequate investigation prior to seeking the Freeze Order. The evidence gathered in haste is insufficient to support the Freeze Order. The Commission's failure to conduct a full investigation should not be rewarded by continuing such Freeze Order. Upon dispassionate analysis, the evidence relied on by Commission in support of its Ex Parte Motion falls woefully short of its intended purpose and does not provide an adequate basis for the Freeze Order.<sup>2</sup>

**II. THE EVIDENCE RELIED ON BY THE COMMISSION IN SUPPORT OF THE EX PARTE ASSET FREEZE ORDER FAILS TO MEET THE NECESSARY STANDARD TO SUPPORT THE ORDER AND HIGHLIGHTS THE SUBSTANTIAL DEFICIENCIES IN THE COMMISSION'S CASE**

**A. Legal Standard.**

10. To warrant continuation of the Freeze Order initially imposed on an *ex parte* basis, the Commission must at a minimum establish that it is likely to succeed on the merits of its claim. *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998); *SEC v. E.T.S. Payphones, Inc.*, 123 F. Supp. 2d 1349, 1355 (N.D. Ga. 2000), *rev'd on other grounds*, 300 F.3d 1281 (11<sup>th</sup> Cir. 2002). The Commission's determination that a violation occurred does not obviate the need for an

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<sup>1</sup> About June 20, 2005, the Commission provided counsel with documents received from First Curacao Bank relating to accounts maintained by the Relief Defendants. Oehmke was not identified as a beneficial owner or signatory for any of the Relief Defendant accounts at First Curacao.

<sup>2</sup> An example of the Commission's practice in this case of freeze first, investigate later occurred the last week of July 2005, when the Commission served a trial subpoena on a bank, apparently still in an effort to trace funds.

independent judicial determination. *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 806-807 (2<sup>nd</sup> Cir.1975).

The Court in *Management Dynamics* opined:

We scarcely mean to imply that judges are free to set to one side all notions of fairness because it is the SEC, rather than a private litigant, which has stepped into court. The securities laws like price control legislation in *Hecht Co v. Bowles*, 321 U.S. 321, 328-31 (1944), hardly evidence a Congressional intent to foreclose equitable considerations by the district court. As we said in *SEC v. Manor Nursing Care, Inc.*, 458 F.2d 63, 81,83,85-86 (2d Cir. 1970), “[I]n deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts.” But the statutory imprimatur given the SEC enforcement proceedings is sufficient to obviate the need for a finding of irreparable injury at least where the statutory prerequisite the likelihood of future violation of the securities laws has been clearly demonstrated.

*SEC v. Management Dynamics*, 515 F.2d at 808-809.

The Second Circuit in *SEC v. Unifund SAL* reasoned that:

even when applying the traditional standard of “likelihood of success,” a district court, exercising its equitable discretion, should bear in mind the nature of the preliminary relief the Commission is seeking, and should require a more substantial showing of likelihood of success, both as to violation and risk of recurrence, whenever the relief sought is more than preservation of the status quo. Like any litigant, the Commission should be obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous of the burdens of the injunction it seeks. In some cases a preliminary injunction can have very serious consequences...

*SEC v. Unifund SAL*, 910 F.2d 1028, 1039 (2<sup>nd</sup> Cir. 1990) (citations omitted).

11. To hold Oehmke liable for the funds maintained in the Relief Defendants’ accounts, the Commission must demonstrate that Oehmke had control over the funds in these accounts or over the Relief Defendants themselves. Section 20(a) of the Exchange Act provides:

Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person

acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

Section 20(a) holds persons and entities falling within the definition of “controlling persons” liable to the same extent as the persons they control.

12. The term “control” is defined as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 CFR § 230.405. The determination centers on whether the defendant’s control over the violator is sufficient; or alternatively, the Commission must demonstrate “culpable participation” in the violation by the controlling person. The Eleventh Circuit follows the “power to control” test, in which the plaintiff must prove: 1) that the defendant “had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws” and 2) that the defendant also had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability.” *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396 (11th Cir. 1996).

13. As this Memorandum will show, the Commission has not demonstrated that Oehmke had the requisite control to be held liable for the funds maintained in the accounts of the Relief Defendants. The evidence put forward by the Commission does not support a finding of control under the Eleventh Circuit’s “power to control” test.

14. The issue before this Court is whether or not the Commission is entitled to maintain a freeze on Oehmke’s assets based on the evidence presented to this Court. As set forth in Section IIB-D, *supra*, the Commission has failed to provide sufficient evidence to demonstrate that Defendant Oehmke participated in the current alleged violations. Further, continuing the

freeze will substantially harm Mr. Oehmke by depriving him of property that the Commission has failed to connect to the alleged fraud.

**B. Insufficiency of Evidence.**

15. The Commission submitted 61 exhibits in support of its Ex Parte Motion. These exhibits, the Commission asserts, prove that Oehmke and others did the following: (1) orchestrated two fraudulent campaigns to artificially inflate the prices of Concorde and AHFI stock; (2) dumped Oehmke's stock; and (3) diverted those ill-gotten gains to offshore accounts, using the Relief Defendants as nominees. The Commission further asserted that Oehmke and others used these offshore accounts to put their assets beyond the reach of the United States government, thus making an immediate asset freeze even more imperative because of a "strong probability" that Oehmke would continue to dissipate fraudulently obtained funds.<sup>3</sup>

16. The Freeze Order rose, and should fall ultimately, on the Declaration of Timothy Galdencio, an SEC accountant ("Galdencio Declaration"). Relying solely on the documents reflecting limited trading authority over Relief Defendant brokerage accounts, Galdencio and the Commission asserted that Oehmke received millions of dollars from the transactions in the Relief Defendants' brokerage accounts.

17. The claim that Oehmke received funds is a gigantic leap of faith. The Commission intentionally disregarded the fact that the exhibits to Galdencio's Declaration failed to establish that: (1) Oehmke traded or received any of the proceeds from trading in these accounts; (2) the Relief Defendants were nominees for Oehmke; and (3) Oehmke controlled any

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<sup>3</sup> This claim was belied by the staff at the February 28, 2005, hearing where counsel for Commission stated: "In this case the commission had concerns that there was substantial funds that could be paid towards disgorgement that were being funneled off-shore. The commission tracked this behavior *for months* and felt that it needed to request the Court's intervention to put a stop to that." (Transcript of February 28, 2005 hearing p. 12). By admitting a several months' wait, the staff conceded that no exigent circumstances existed warranting the Asset Freeze.

of these accounts. A cursory review of the information relied on by Galdencio both in his declaration and in his sworn testimony before this Court exposes the deficiencies and insufficiencies in the Commission's case.

18. Once stripped of its histrionic and melodramatic rhetoric, the Commission's Memorandum and three volumes of evidence supporting the Commission's Motion are replete with unsupported self-serving statements and legal conclusions, none of which sustain the Commission's burden.

**1. The Limited Trading Authorizations Relied on by the Commission Do Not Support the Claim that Oehmke Had "Control" Over the Relief Defendants' Accounts.**

19. The basis for the Freeze Order was that Oehmke allegedly received millions in "illegal" profits from the Relief Defendants. Thus, failure to prove this allegation would be fatal to the Ex Parte Motion and the entire case. The most critical document in the Commission's mass of purported evidence is a document called a "Limited Trading Authorization" ("LTA"). The Commission would have this Court believe that these LTA's granted Oehmke control over these Relief Defendants' brokerage accounts and the funds maintained in them. Absent such control, the Commission's case against Oehmke unravels.

20. This document is called a "Limited Trading Authorization" for a reason the Commission chose to ignore. The LTA authorizes the "undersigned agent," only to "buy, sell (including short sales) and trade in any and all securities of any kind, including without limitation, stocks, bonds, securities futures and commodities and any other securities and/or puts, calls, options, or other contracts relating to the same on margin or otherwise . . . ." (See reference to GD Exh. 7 at page nine *supra*.<sup>4</sup>) The LTA continues: "This authorization is limited

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<sup>4</sup> Exhibits referred to in Galdencio Declaration cited as GD Exh. \_\_\_\_.



to purchase (cash or margin), and sales transactions only and *does not afford the Authorized Agent authority to transfer securities and/or disburse funds from the undersigned account.*”

(Emphasis added.)

21. Oehmke, as limited authorized agent, could only enter orders to buy and sell securities for the benefit of the Relief Defendants’ brokerage accounts. Moreover, there is no evidence that Oehmke entered such orders. He was not authorized to transfer securities into or from the Relief Defendants’ accounts as the Commission has alleged. Most importantly, Oehmke could not receive or disburse funds from these accounts. This alone renders the fatal blow to the Commission’s alleged justification for the Freeze Order because Oehmke’s lack of control of the Relief Defendants’ accounts prevented him from disbursing funds from those accounts.

22. Finally, the Commission, in its three volumes of exhibits, presented no evidence establishing that any of the Relief Defendants were Oehmke’s nominees. Since the Commission has failed to make any showing that the Relief Defendants were Oehmke’s nominees, there was not and is not a basis for the Freeze Order.

**2. Galdencio’s Declaration and Supporting Documentation Do Not Support Commission Claims that Oehmke Controlled or Directly Profited from the Relief Defendants’ Accounts**

23. The only evidence offered by the Commission to support its allegations that Oehmke controlled and profited from the Relief Defendants’ accounts is the Galdencio Declaration and supporting exhibits. When objectively examined, this evidence is deficient and fails to support the Commission’s claims.

**a. DaSilva, SA**

24. The Commission, at page 3 of its Memorandum, alleged that: (1) Oehmke transferred two million shares of Concorde America stock to the DaSilva account at Sunstate Equity Trading (Sunstate) (GD Exh. 1 at ¶4(d) and GD Exh. E); (2) Oehmke had trading authority over the DaSilva account at Sunstate (GD Exh. 1 and GD Exh. K); and (3) from July to August 2004, Oehmke sold Concorde stock netting DaSilva \$1.8 million in illegal profit (GD Exh. 1 at ¶7d and GD Exh. P).

25. GD Exh. 1 is the Galdencio Declaration. GD Exh. E is merely the front page of four Concorde certificates, # 2114 –2117, in the name of DaSilva, and GD Exh. P is Galdencio’s analysis of DaSilva trading in Concorde. Oehmke’s name does not appear on any of these exhibits, nor do the exhibits show that Oehmke transferred the Concorde stock. GD Exh. K contains an LTA, which Galdencio relied on to support the allegation that Oehmke had full control over the account. Yet, the document only identified “Yvette Sands” as the individual account holder. Oehmke’s name is handwritten as the undersigned’s agent, but the block entitled “Individual to whom Discretion is Given” is blank. Oehmke’s signature, while required, is not on the document, nor is the signature of the branch manager approving the authorization. Further, DaSilva is not identified in the entity account holder block, nor has an authorized officer of DaSilva signed the LTA. Thus, Galdencio and the Commission have relied on an unexecuted document as proof of DaSilva’s contractual delegation of authority to Oehmke.

26. The Commission ignored this hole in its evidence and, instead, wrongly concluded and represented to this Court, without any evidentiary support, that Oehmke controlled this account, transferred shares from it, and sold securities maintained in this account.

**b. Vanderlip Holdings, NV**

27. The Commission's evidence concerning Oehmke and Vanderlip Holdings, NV ("Vanderlip"), is no more compelling than its DaSilva failure. The Commission alleged, at page 3, of the Memorandum that: (1) Oehmke had trading authority over the Vanderlip brokerage account at Sunstate (GD Exh. 1. at ¶6B and GD Exh. H); (2) he transferred shares of Concorde to Vanderlip's brokerage account at Sunstate (GD Exh. 1 at ¶4b and GD Exh. C); and (3) in August 2004, Oehmke ordered the sale of stock, netting Vanderlip more than \$4,330,000.00 in illegal profits (GD Exh. 1 at ¶7b and GD Exh. N).

28. Again, GD Exh. 1 is the Galdencio Declaration. GD Exh. C is four stock certificates, # 2110-2113, totaling two million shares of Concorde stock in the name of Vanderlip Holdings, NV. GD Exh. N is Galdencio's analysis of Vanderlip trading in Concorde. Initially, Oehmke is not mentioned in GD Exhs. C or N, nor do these exhibits show that Oehmke is the one who transferred or sold the Concorde stock. GD Exh. H, contains an LTA, the only evidence relied on by the Commission that asserts Oehmke had a connection to the account. As with the DaSilva LTA, it fails to identify the corporate entity. It does bear an account number and Oehmke's signature. As previously noted, by the terms of the LTA, Oehmke could only "*buy, sell (including short sales) and trade in any and all securities of any kind. . . .*" For purposes of the Ex Parte Motion, the mere fact that Oehmke had authority to trade is insufficient. Indeed, according to the LTA, a person named Dicienzo Storr is identified as the account holder, who also had authority to trade in this account.<sup>5</sup> Finally, the LTA specifically precluded Oehmke

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<sup>5</sup> Additionally, discovery, which the Commission provided to Oehmke, proves that Fertina Turnquest held a full trading authorization and statutory durable power of attorney over this account. These documents permitted her to buy and sell securities in the account, to withdraw funds, and to transfer securities from the account. Additionally, Turnquest had similar authority over the DaSilva account. (See Exhibit 1.)

from disbursing funds from this account. Again, the authority to trade, by itself, is far from compelling evidence to prove that Oehmke profited from trading.

**c. Chiang Ze Capital, AVV**

29. The Commission, at page 4 of its Memorandum, alleged that: (1) Oehmke and Defendant Kos had trading authority over the Chiang Ze accounts at Sunstate and Electronic Access Direct (“EAD”) (GD Exh. 1 at ¶6(c) and GD Exhs. I and J); (2) Oehmke transferred one million shares of Concorde stock for the benefit of the Chiang Ze Sunstate account (GD Exh. 1 at ¶4(c) and GD Exh. D); and (3) in August 2004, Oehmke and Kos sold Chiang Ze’s shares of Concorde, netting Chiang Ze more than \$1,696,000.00 in profits (GD Exh. 1 at ¶7(c) and GD Exh. O).

30. GD Exh. 1 is the Galdencio Declaration. GD Exh. D is two Concorde stock certificates, # 2126 and # 2127, in the name of Chiang Ze, while GD Exh. O is Galdencio’s analysis of Chiang Ze trading in the Sunstate account. Again, these exhibits do not in any way prove Oehmke’s purported involvement in any transfer or sale of Concorde stock from this account.

31. Chiang Ze is an example of the Commission’s misstating the evidence. The Commission’s Memorandum would have the Court believe that Oehmke had trading authority over both the Sunstate and EAD accounts and that Oehmke was involved in the trading that took place in the Sunstate account during July and August 2004 (GD Exh. O). GD Exh. I contains the following documents relating to the Chiang Ze Sunstate account # 4202-0347: (1) a corporate account agreement for the Sunstate account executed by Mavis Chaitan as President and Secretary of Chiang Ze; (2) a power of attorney by Chiang Ze, executed by Chaitan, granting power of attorney to Fertina Turnquest; and (3) a statutory durable power of attorney executed

by Chaitan, in the names Bryan Kos and Jeremy Jaynes. GD Exh. I contains no document connecting Oehmke to Sunstate account # 4202-0347. There is no LTA with Oehmke's name on it for this account or any evidence that Oehmke had anything to do with this account. GD Exh. J contains two documents relating to EAD account # 14300867. The first document is a two page New Account Approval Form, dated October 5, 2004, listing Oehmke as an authorized person for the account. The second document is an LTA signed by Oehmke, dated October 1, 2004, that was faxed from Ventana Consultants on October 25, 2004. These documents are dated October 2004, two to three months *after* the alleged illegal trading of Concorde by Chiang Ze took place. Nevertheless, despite evidence to the contrary, the Commission still presented this as "proof" to the Court, making an argument based on supposition and hope that Oehmke was involved with the July – August 2004 transactions in the Sunstate account.

**d. Ryzcek Investments, GMBH**

32. The Commission, at page 4 of its Memorandum, alleged that: (1) Oehmke had trading authority for the Ryzcek accounts at Sunstate and Newbridge (Mem. Exh. 60)<sup>6</sup>; (2) he was listed as the contact person for Ryzcek at Sunstate (Mem. Exh. 60); and (3) from May to July 2004, Oehmke acquired 6,055,000 shares of AHFI stock for the benefit of the Ryzcek account (GD Exh. 1 at ¶8(a) and GD Exh. S).

33. GD Exh. 1 is the Galdencio Declaration. GD Exh. S is ten (10) Absolute Health stock certificates, # 3099-3107, 3110, in the name of Ryzcek, along with transfer agent records reflecting the transferring of the shares to Ryzcek. Nowhere in GD Exh. S does Oehmke's name appear, nor does this exhibit prove that Oehmke acquired these shares. Mem. Exh. 60 contains documents that allegedly establish Oehmke's trading authority over the two accounts. However,

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<sup>6</sup> Exhibits referred to in the Memorandum are cited to as Mem. Exh. \_\_\_\_.

as with Chiang Ze, the documents contained in Mem. Exh. 60 are not as the Commission represents. There is an LTA for account #42020339, bearing a fax stamp of March 8, 2004. It has what appears to be Oehmke's name handwritten on the first line. The section identifying the person given the discretion is blank. Neither Mr. Oehmke nor anyone else has signed the document.<sup>7</sup> There is also a New Account Form Approval, dated February 24, 2004, for the same account identifying Oehmke as an authorized person. Further, there is a single sheet of paper, labeled Notes and Comments for Ryzcek account # 42020339, containing a handwritten entry dated March 8, 2004, stating that Donald Oehmke was added to trading authority, but there is no LTA to support this statement.

34. Mem. Exh. 60 also contains an LTA executed by Oehmke that was faxed to Sunstate on October 5, 2004, long after the alleged Concorde scheme occurred. However, that LTA bears no account number, nor does it identify the corporate entity to which it applies. Finally, there is a Trading Authorization, dated August 9, 2004, bearing account # 954413, for the Newbridge Ryzcek account. Oehmke's name is handwritten on the document, identifying him as the authorized agent. The first sentence of the document states: "This document authorizes the appointed agent to *solely* enter trading instructions on behalf of the client." (Emphasis Added.) In other words, this is an LTA. Thus, there is no evidence connecting Oehmke to any of the alleged transactions occurring from May to July 2004, as alleged by the Commission.

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<sup>7</sup> The exhibit also contains two unexecuted Full Trading Authorization documents, neither of which is in Oehmke's name. Unlike the LTA, the Full Trading Authorization contains the following language: "You are authorized to follow the instructions of the Authorized Agent in every respect concerning the undersigned's account with you, and *to make deliveries of securities and payment of monies to him or as he may direct.*" (Emphasis Added.) No such language appears on any of the LTA's in the name of Donald Oehmke. This evidence supports further the fact that Oehmke did not have the ability to delivery money from these accounts. Indeed, had the Relief Defendants chosen to give him such authority, they could have.

**e. Barranquilla Holdings, SA**

35. Barranquilla Holdings, SA (“Barranquilla”), represents the final chapter of the Commission’s evidentiary failure. According to the Commission, Barranquilla held accounts at Newbridge and EAD. The Commission, at page 5 of its Memorandum, alleged that: (1) Oehmke had trading authority for both Barranquilla accounts (GD Exh. 1 at ¶6(a), GD Exhs. F and G); (2) Oehmke transferred one million shares of Concorde stock into the Barranquilla Newbridge account (GD Exh. 1 at ¶4(a) and GD Exh. B); (3) Barranquilla netted over \$5 million in profit from sales of Concorde (GD Exh. 1 at ¶7(a) and GD Exh. M); (4) in August 2004, Oehmke bought 20,000 shares of AHFI through Barranquilla’s Newbridge account, gaining profits of \$11,000.00 (GD Exh. 1 at ¶10(a) and GD Exh. X); (5) Oehmke transferred the remaining shares to the Barranquilla account at EAD, selling nearly 4.5 million shares between mid-November and December 2004; and (6) Oehmke realized a net profit of approximately \$9.4 million from his sales of AHFI (GD Exh. 1 at ¶10(b) and GD Exh. X).

36. GD Exh. 1 is Galdencio’s Declaration. GD Exh. B is two Concorde stock certificates, # 2128-2129, in the name of Barranquilla Holdings, SA. GD Exh. M is Galdencio’s analysis of Concorde America transactions in the Newbridge Barranquilla account.<sup>8</sup> GD Exh. X is Galdencio’s analysis of AHFI transactions in both Barranquilla accounts. None of these exhibits are evidence of Oehmke transferring or trading in these accounts. GD Exh. F contains documents relating to the Newbridge account # 954430. The only document bearing Oehmke’s name is a New Client Worksheet, Additional Party Only Form, containing Oehmke’s address,

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<sup>8</sup> GD Exh. M is another of the Commission’s misrepresentations of the evidence. The Commission stated that in August 2004 Barranquilla “netted” approximately \$5,233,700.00 from sales of Concorde stock. This actually represents transactions from August 5 to August 11, 2004. The Commission fails to mention that from August 12 to August 18, 2004, 885,000 shares of Concorde were purchased in this account at a cost of \$5,704,619.00, resulting in a net loss of \$470,865.83 in this account.

contact numbers, and some personal information. It does not identify to which account it applies, since the account number space is blank. The only person identified in GD Exh. F as having authority over this account is Connie Oystermann-Webbe. Finally, the section of the Additional Party Form requiring the broker to sign an acknowledgment stating “the information contained herein has been obtained from the Client” is blank. Thus, there is no way of determining whether the document has any connection to Barranquilla, let alone support the contention that Oehmke had any authority over the Newbridge Barranquilla account or that he acquired any shares of stock on behalf of Barranquilla. Accordingly, the Commission has failed to produce any evidence that Oehmke had any kind of authority whatsoever, including trading authority, over the Newbridge account or that he ever acquired any shares on Barranquilla’s behalf.

37. GD Exh. G is comprised of Sunstate documents relied on by the Commission to support allegations concerning the EAD Barranquilla account # 14302137. There is an LTA for this account naming Don Oehmke as an authorized agent signed by Oehmke and dated October 12, 2004. This represents the sole piece of evidence presented by the Commission linking Oehmke to the account. However, rather than supporting the Commission’s allegations, the LTA itself proves that Oehmke could not have engaged in the conduct as alleged by the Commission. As discussed in Section IIB *infra*, under the terms of the LTA, Oehmke merely had the “authorization” to trade securities in the account and was prohibited from transferring securities into or out of such account and, importantly, could not distribute funds from the account. Even assuming that Oehmke did engage in trading in this account, a fact for which there is no evidence, that, by itself, fails to establish that he personally profited from the transactions, as the



Commission alleges. Once again, there is no evidence that Oehmke received or benefited from the funds in the Relief Defendants' accounts.

38. The fact that the LTA specifically prohibits Oehmke from "disbursing funds from the account" renders the Commission's allegation and representation that Oehmke "realized a net profit of approximately \$9.4 million" nothing more than pure speculation and conjecture, unsupported by anything remotely resembling evidence.

39. The evidence offered by the Commission to support its allegations of Oehmke's control over the Relief Defendants' brokerage accounts fails to reach the level of competent evidence needed to sustain the Commission's burden.<sup>9</sup>

### **C. Misstatements of Evidence**

#### **1. Misstatements as to Concorde**

40. In its zeal to obtain its Freeze Order, the Commission engaged in numerous instances of misstating facts in its Memorandum. While some examples are more egregious than others, the cumulative effect is to give the "evidence" much greater weight than warranted.

41. First, the Commission has alleged that false reports by Thomas Heysek led to an increase in the price of Concorde and AHFI stock. It alleged that "Heysek finished a draft of his report in late June and sent it to Oehmke, Kos, and Lord for approval Exh. 14 at 53." (Memorandum at p. 8). The Commission is relying on this evidence to establish Oehmke's

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<sup>9</sup> Galdencio's Declaration (Mem. Exh. 1 at page 8) has a section entitled "Documents Review-Wire Transfer Records." Specifically, paragraphs 12a and b of his Declaration note that \$1,172,876.00 was transferred from Ryzcek and \$4,134,865.00 was transferred from the Chiang Ze Sunstate account to an unidentified account # 41001143506 at SunTrust. The clear implication is that Oehmke, Kos or the Relief Defendants were behind this SunTrust account. However, the Commission, at the time the Motion was filed, possessed evidence that conclusively proved that this account was in the name of the law firm of Bush Ross. Moreover, the Commission presented no evidence that these monies in the Bush Ross account either went to Oehmke or that he benefited from them. This is another example of the inadequate investigation conducted by the staff since it is clear that the staff was in possession of records as early as August 2004, which proved that this account belonged to Bush Ross. Nevertheless, in total disregard of this evidence, the staff proceeded to present it to the Court in such a fashion as to imply some illicit activity by the defendants.

knowledge of and participation in the dissemination of allegedly false information about Concorde. However, a review of page 53 reveals no mention of draft reports being sent to anyone for approval.

42. Second, at page 11 of its Memorandum, the Commission states: “Yet, to assure that Oehmke paid Concorde the balance of the \$1 million he had promised to pay for Concorde’s stock, Lord initialed and approved Kline’s draft report. Exh. 41; Lord e-mail dated June 28, 2004; Exh. 43.” These exhibits do not substantiate this allegation. Mem. Exh. 41 is Kline’s draft report. Mem. Exh. 43 is an email from Hartley Lord to Raul Mendez, which is Lord’s compilation of emails between Bryan Kos and him, in which Kos refers to the movement of money upon receipt of unidentified documents. The actual Kos email, to which Lord refers, is not part of the exhibit. Mem. Exh. 43 does not support the Commission’s claim that Lord, to get money from Oehmke, initialed the report. Indeed, Lord’s comment to his counsel Jere Ross,<sup>10</sup> referring to Bryan Kos, is quite telling: “Tell this kid that I don’t lie. I have been doing this before he was a gleam in his daddy’s eye. I used to be in show business just like him. I closed the act and that is what is about to happen.” (Mem. Exh. 43). These are not the words of a man who was allegedly forced to sign a document.<sup>11</sup>

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<sup>10</sup> Jere Ross represented Concorde America, Ventana Consultants, and Bryan Kos during the time in which the events leading to the Commission’s investigation occurred. Moreover, Ross represented both Ventana Consultants and Concorde America in the Concorde transaction. Despite these representations, Ross represented Hartley Lord, Raul Mendez, Mauricio Mendez, Concorde America and himself during the Commission’s investigation. Mr. Ross seems to have an interesting interpretation of the conflict rules. While the Commission did raise with Ross and those clients he represented in the investigation the potential conflict issue, perhaps more was required given the circumstances. Ross’ involvement in the activity underlying the Commission’s case raises substantial attorney-client privilege issues. Perhaps, the Commission should have sought judicial intervention to ensure that there would be no violation of attorney-client privilege for those individuals and entities represented by Ross during the investigation.

<sup>11</sup> The Commission offered no testimony from Lord substantiating the allegation that he initialed the document to get money from Oehmke.

43. A third example of the Commission's misrepresenting the evidence concerns the allegation that Oehmke and Kos reviewed and approved the July 28, 2004, press release regarding Concorde. The Commission relies on Mem. Exh. 47, a one-page email from Bryan Kos to Paul Spreadbury, telling Spreadbury to "send this one," referring to a Concorde America press release. Kos appears to be forwarding an email from Oehmke, the subject of which is "FW: CNDD Press Release – Revised." There are several problems with the Commission's view. First, the email merely shows that a press release was forwarded to Oehmke from an unidentified source and that Oehmke forwarded the press release to Kos. This is not proof that Oehmke, read, reviewed, or approved the press release. Further, the email does not support the notion that Kos reviewed the press release. Additionally, there is no press release attached to the email. Thus, there is no way of knowing whether the press release referred to in the email is the same one that the Commission alleges to be false.

44. Fourth, the Memorandum at page 13 alleges that "Oehmke and Kos knew or were reckless in not knowing the information in the press release was baseless because Spreadbury made up quotes. (Exh. 10 at 63-65)." There is no evidence showing that Oehmke or Kos were aware that the press release was without basis or that they were reckless in not knowing. The cite relied upon is Spreadbury's testimony admitting he made up quotes in the July 28, 2004, press release. Spreadbury did not testify that Oehmke or Kos were aware of this fabrication or that they had reason to know that the quotes were false.

45. Fifth, one of the more egregious examples of the Commission's inaccurate depictions of the evidence relates to the allegation that "Concorde's transfer agent issued the company the 10 million shares without restrictive legend through six third party nominee entities Oehmke and Kos controlled. (Exh. 1 at ¶4, and Exh. 52 Oehmke emails dated June 23 and July

13, 2004)” (Memorandum at p. 15). GD Exh. 1, the Declaration, provides no evidence corroborating the Commission claim. The two Oehmke emails contained in Mem. Exh. 52 present a different set of problems for the Commission. The June 23, 2004, email is from Fertina Turnquest at Sterling Group to Oehmke providing him with the addresses of entities, including the Relief Defendants. Moreover, it instructs Oehmke that, if he is sending any shares, to send them directly to Turnquest’s office. The Commission fails grasp the significance that this email *was in response* to an email from Oehmke requesting the contact addresses for the Relief Defendants to enable the transfer agent to issue certificates for securities other than Concorde.<sup>12</sup> If these were nominee accounts Oehmke controlled, as the Commission contends, he would have no need to request the addresses. Moreover, Turnquest’s request that the certificates be sent to her proves further Oehmke’s lack of control.

46. In the July 13, 2004, email Oehmke advises Turnquest that she will be receiving stock certificates “in the names of her clients” and that she must acquire stock powers to deposit the shares with a brokerage firm. Again, if Oehmke controlled the Relief Defendants, he could have provided the stock powers himself and sent them to the brokerage firm. Indeed, if Oehmke had control, Turnquest was superfluous. These two emails in no way establish that the Relief Defendant accounts are third party nominee accounts controlled by Oehmke. If anything, the June 23 and July 13 emails prove that Oehmke lacked control over these accounts.

47. Finally, as to Concorde, the Commission alleges: “Oehmke and Kos received the initialed report and authorized the dissemination of its content despite knowing or being reckless

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<sup>12</sup> There is another troubling aspect to the June 23, 2004, email. The Commission presents it as a two-page email, the second page consisting solely of the email signature for Oehmke and Ventana Consultants, PA. However, this second page is not part of the email. Specifically, the second page does not contain a VC bates stamp that was placed on all documents produced to the Commission by Ventana Consultants. Moreover, since this is an email sent by Turnquest to Oehmke, there is no reason why Oehmke’s signature would appear at the end of the email.

in not knowing Concorde's prospects were misrepresented because they knew Concorde had no revenues and had not placed any workers anywhere." (Memorandum at p. 11). To support this allegation, the Commission cites to "Testimony Transcript of Donald E. Oehmke, Exh. 44 at 47 and Testimony Transcript of Bryan Kos, Exh. 45 at 51-52." The natural assumption is that Oehmke and Kos affirmatively testified to these facts. However, a review of these transcripts reveals that Oehmke and Kos asserted their Fifth Amendment Privileges to the Commission's questions. This varies greatly from the Commission's presentation of the evidence to the Court. While it is permissible to draw an adverse inference when a party refuses to testify in response to evidence offered against him, silence itself is insufficient to support an adverse decision. Such silence in conjunction with other evidence against the defendant *could* support that result. However, such a determination is to be made by a court and not one of the parties in the action.<sup>13</sup> By presenting the exercise of the Fifth Amendment Privilege as an affirmative admission, the Commission misapprehended the allowable inference in civil proceedings from the exercise of the Fifth Amendment. At minimum, the Commission should have made known that its assertions were premised on taking an adverse inference and not stated that Oehmke and Kos had made affirmative admissions.

## **2. Misstatements as to Absolute Health**

48. The Commission's evidence supporting its allegations regarding AHFI fares no better. Among the documents the Commission relied on in support of its allegation that "Oehmke controlled a shell corporation that masqueraded as Absolute Health" (Memorandum at page 2) is Mem. Exh. 6, which the Commission describes as "Ornate Holdings Majority

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<sup>13</sup> *Securities and Exchange Commission v. Graystone Nash, Inc.*, 25 F3d 187, 191 (3<sup>rd</sup> Cir. 1994), citing *Baxter v. Palmigiano*, 425 U.S. 308, 317-318 (1976).

Shareholder” document. The Commission’s description of Mem. Exh. 6, is simply misleading. Oehmke signed the document as “Authorized Signatory of the Majority Shareholder” and not as the majority shareholder of Ornate. Apart from the fact that the document does not address the control of Ornate, the shell that became AHFI, the Commission’s suggested inference that Oehmke’s control of the shell is in some way unlawful or nefarious is unfounded.

49. The Commission alleges, at page 16 of the Memorandum, that: “Oehmke and Kos engaged Heysek, Kline and Spreadbury to promote AHFI’s stock by creating tout sheets, faxes, websites, voice mail spams and a promotional video. Exh. 10 at 39-40, 156-57, 169-76, 250-52; Spreadbury email dated July 12, 2004, Exh. 54; Ex 8 at 161-70; Ex. 9 at 29.” Simply put these citations provide no evidence supporting the Commission’s allegations.

50. Testimony excerpts of Paul Spreadbury in Mem. Exh. 10, make no mention of Oehmke or show that Oehmke engaged Spreadbury to do anything. Indeed, pages 250-252 do not even pertain to AHFI. As for Mem. Exh. 54, the Spreadbury email, Oehmke is not listed as a recipient or sender, nor is he mentioned in the email.<sup>14</sup>

51. Mem. Exh. 8 is investigative testimony of Thomas Heysek. The only reference to Oehmke in pages 161-170 is the fact the Oehmke and Heysek had dinner with others in Montreal, and Heysek testified no business was discussed at the dinner and further that he never discussed any specific companies with Oehmke. (See Exhibit 3.)

52. Finally, Mem. Exh. 9 is investigative testimony of Andrew Kline. Kline’s testimony at page 29 concerns whom he believes Heysek worked for. Kline does not mention

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<sup>14</sup> Additionally, Spreadbury testified that he had never met with or spoken to Oehmke. Any information Spreadbury had concerning Oehmke was as a result of a hearsay from a third party and not based on personal knowledge. (See Exhibit 2.)

Oehmke. Indeed, Kline testified that while he knew of Oehmke, he never met or spoken to him and that to his knowledge Oehmke was not involved with Concorde. (See Exhibit 4.)

**D. Exculpatory Evidence Ignored by the Commission**

53. In addition to misstating, misrepresenting, and failing to provide evidence cited in its Memorandum, the Commission received evidence during its investigation affirmatively establishing that Oehmke did not have any control over the securities and proceeds maintained in the Relief Defendants' brokerage accounts. Specifically, the Commission received from Sunstate, five separate "Affidavits of Sole Ownership," one for each of the Relief Defendants (Exhibit 5). Each affidavit states that the affiant is the "sole owner of the business so conducted and no other person, firm or corporation has any interest therein." The affiants further state that all the property in the name of the company "belongs to me [the affiant] and is my sole property."

54. Yvette Sands, the affiant for DaSilva, executed the affidavit on July 16, 2004. DiCienzo Storr, the affiant for Vanderlip Holdings, executed the affidavit on July 16, 2004. Mavis Chaitan, the affiant for Chiang Ze Capital, AVV, executed the affidavit on February 24, 2004. Dematee Mohan, the affiant for Ryzcek, executed the affidavit on February 23, 2004. Connie Ostermann-Webbe, the affiant for Barranquilla, executed the affidavit on August 13, 2004. No other person is identified on any of these affidavits as being the owner of the companies or any of the companies' properties.

55. The devastating impact of these affidavits on the Commission's case cannot be overstated. Here is clear and conclusive evidence that, contrary to the Commission's allegations, Oehmke did not have any control over the Relief Defendants. These affidavits, without more, warrant vacating the Freeze Order.

**III. CONCLUSION**

56. The Commission produced no evidence connecting Oehmke with the promotional efforts allegedly engaged in by several of the other Defendants. Moreover, the Commission failed to produce evidence, other than conclusory language of the Commission, that in any way proves Oehmke knew that the information being provided by Concorde's own officers and employees was false.

57. Ultimately, the foundation, upon which the Commission built its case against Oehmke, is insufficient and flawed. Without its foundation, the case, as with the proverbial house of cards, must and does collapse.<sup>15</sup>

WHEREFORE, Defendant DONALD OEHMKE respectfully requests this Honorable Court to enter an Order vacating the March 1, 2005 Order freezing Donald Oehmke's assets and for such other and further relief as this Court deems appropriate.

Respectfully submitted,

SOTIRIS A. PLANZOS  
New York Bar No. 1856095  
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Attorneys for Defendant, DONALD E. OEHMKE  
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Fax: (202) 457-6315


- and -

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<sup>15</sup> The Commission previously, in February 2005, agreed to permit Mr. Oehmke use of funds for legal fees. The parties have attempted to negotiate a further modification to the Freeze Order. In these negotiations, the Commission expressed a willingness to alter the freeze to allow Mr. Oehmke to earn a living; however, the SEC refused the request for attorneys' fees. The inescapable conclusion is that the Commission would modify the freeze to allow Mr. Oehmke to increase the pool of funds available for disgorgement, but will not allow him to use monies earned to defend himself.



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By:   
RICHARD A. SERAFINI  
Florida Bar No. 0972037

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S.

Mail on this 29<sup>th</sup> day of July, 2005 on the following:

Linda S. Schmidt  
Robert K. Levenson  
Chih-Pin Lu  
U.S. Securities and Exchange Commission  
Southeast Regional Office  
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Jeremy Ross, Esq.  
Bush Ross Gardner Warren & Rudy, P.A.  
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Tampa, Florida 33602  
*Counsel for Defendants Hartley Lord and  
Concorde America, Inc.*

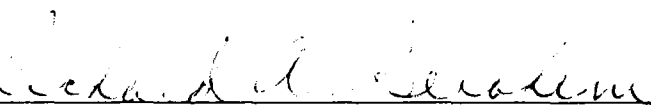
Steven Gourley, Esq.  
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Thomas M. Heysek, *pro se*  
P.O. Box 2515  
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RICHARD A. SERAFINI

07/22/2004 17:47 3258030

PAGE 02

Jul 22 2004 4:54PM Sunstate Equity Trading, 561-989-8003

P. 3

07/22/2004 11:58 3258030

PAGE 06

Account # 4200-1907

**PENSON FINANCIAL SERVICES**  
1700 Pacific Ave., Suite 1400, Dallas, Texas 75201

**FULL TRADING AUTHORIZATION**  
(With privilege to withdraw money and/or securities)

Gentlemen:

The undersigned hereby authorizes Esteban Torres as the undersigned's agent and attorney-in-fact (Authorized Agent) to buy, sell (including short sales) and trade in any and all securities of any kind, including without limitation stocks, bonds, securities futures and commodities and any other securities and/or puts, calls, options or other contracts relating to the same on margin or otherwise (collectively "securities"), in accordance with your terms and conditions for the undersigned's account and risk, and in the undersigned's name or number on your books.

You are authorized to follow the instructions of the Authorized Agent in every respect concerning the undersigned's account with you, and to make deliveries of securities and payment of money to him or as he may order and direct. In all matters and things aforementioned, as well as in all other things necessary or incidental to the purchase or conduct of the account of the undersigned, the Authorized Agent is authorized to act for the undersigned and in the undersigned's behalf in the same manner and with the same force and effect as the undersigned might or could do with respect to purchases, sales, trades, transfers of securities and/or disbursements of funds as well as with respect to all other things necessary or incidental thereto.

This authorization and indemnity shall benefit you, your successors and assigns, as well as introducing brokers for which you clear. This authorization shall apply to all accounts of the undersigned or in which the undersigned has an interest, whether previously opened, now open or opened in the future, with you, your predecessor firms or any introducing brokers for which you clear, and all previous, current and future transactions in any and all such accounts. All prior transactions for the undersigned by the Authorized agent are ratified in all respects.

The undersigned hereby agrees to indemnify and hold you harmless from and to pay you promptly on demand any and all losses arising therefrom or debit balances thereon. This authorization and indemnity is in addition to (and in no way limits or restricts) any rights which you may have under any other agreement or agreements between the undersigned and you. This authorization and indemnity is also a continuing one and shall remain in full force and effect until revoked by the undersigned by a written notice actually received by you at the above address, marked to the attention of your compliance officer, but such revocation shall not affect any liability in any way resulting from transactions entered prior to such revocation.

Very truly yours,

Individual Account Holders:

Name: <u>DeClemente SORR</u>	Signature: <u>[Signature]</u>	Date: <u>7/22/04</u>
Joint Name:	Signature:	Date:

Entity Account Holders (Corporation, Partnership, Trust, Estate):

Name of Entity:	Authorized Officer Name:
Authorized Officer	Date:

Individual to Whom Discretion is Given:

Name: <u>Esteban Torres</u>	Signature: <u>[Signature]</u>		
SSN, Fed ID, Cadeta, NITK	ID #		
ID Type:	Exp. Date:	Issued By:	Issue Date:

Approved By: (Branch Manager/Compliance)

Name: <u>[Signature]</u>	Signature:	Date: <u>7/23/04</u>
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Account # 4202-1907

### Statutory Durable Power of Attorney

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, AND TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTHCARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, DICENZO STORR (insert the name and address), my social security number being N/A (insert your proper social security number), appoint

FERTNA TORNOUES (insert the name and address of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.  
TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.  
TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

- |   |                                |  |   |
|---|--------------------------------|--|---|
| <u>    </u> INITIAL   | A. real property transactions; | <u>    </u> INITIAL  | H. estate, trust, and other beneficiary transactions; |
| <u>    </u> B. tangible personal property transactions;               |                                | <u>    </u> I. claims and litigation;  |   |
| <u>  ✓  </u> C. stock and bond transactions;                          |                                | <u>    </u> J. personal and family maintenance;  |   |
| <u>    </u> D. commodity and option transactions;                     |                                | <u>    </u> K. benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service. |   |
| <u>  ✓  </u> E. banking and other financial institution transactions; |                                | <u>    </u> L. retirement plan transactions;   |   |
| <u>  ✓  </u> F. business operating transactions;                      |                                | <u>    </u> M. tax matters;  |   |
| <u>    </u> G. insurance and annuity transactions;                    |                                | <u>    </u> N. ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU  |   |

NEED NOT TO INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

#### SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS TO YOUR AGENT.

In addition to the statutory powers granted pursuant to the categories initialed above, if (C) or (D) are initialed, the powers granted are extended to include the power to establish or close accounts with one or more brokers, dealers or investment advisors and to liquidate or distribute funds or property from any such accounts to any person, including the agent or attorney-in-fact hereunder.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

- A. This power of attorney is not affected by my subsequent disability or incapacity.
- ~~B. This power of attorney becomes effective upon my disability or incapacity.~~

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor (s) to that agent:

Signed this 16<sup>th</sup> day of July, 2009

\_\_\_\_\_  
(Your signature)

\_\_\_\_\_  
(Signature of agent)

#### Notary Public:

\_\_\_\_\_ personally appeared before me, and proved on the basis of satisfactory evidence to be the person whose name appears above.

Miriam Curley July 16, 2009  
Notary Public Signature Date

State of New Providence My Commission Expires: N/A  
Commonwealth of  
The Bahamas

04/2003

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PAGE 01

JUL 22 2004 4:54PM Sunstate Equity Trading, 561-989-8003

P.2

Account # 4202-1915

**PENSON FINANCIAL SERVICES**  
1700 Pacific Ave., Suite 1400, Dallas, Texas 75201

**FULL TRADING AUTHORIZATION**  
(With privilege to withdraw money and/or securities)

Gentlemen:

The undersigned hereby authorizes Tertra Durbin as the undersigned's agent and attorney-in-fact (Authorized Agent) to buy, sell (including short sales) and trade in any and all securities of any kind, including without limitation stocks, bonds, securities futures and commodities and any other securities and/or puts, calls, options or other contracts relating to the same on margin or otherwise (collectively "securities"), in accordance with your terms and conditions for the undersigned's account and risk, and in the undersigned's name or number on your books.

You are authorized to follow the instructions of the Authorized Agent in every respect concerning the undersigned's account with you, and to make deliveries of securities and payment of moneys to him or as he may order and direct. In all matters and things aforementioned, as well as in all other things necessary or incidental to the furtherance or conduct of the account of the undersigned, the Authorized Agent is authorized to act for the undersigned and in the undersigned's behalf in the same manner and with the same force and effect as the undersigned might or could do with respect to purchases, sales, trades, transfers of securities and/or disbursements of funds as well as with respect to all other things necessary or incidental thereto.

This authorization and indemnity shall benefit you, your successors and assigns, as well as introducing brokers for which you clear. This authorization shall apply in all accounts of the undersigned or in which the undersigned has an interest, whether previously opened, now open or opened in the future, with you, your predecessor firms or any introducing brokers for which you clear, and all previous, current and future transactions in any and all such accounts. All prior transactions for the undersigned by the Authorized agent are ratified in all respects.

The undersigned hereby agrees to indemnify and hold you harmless from and to pay you promptly on demand any and all losses arising therefrom or debit balances thereon. This authorization and indemnity is in addition to (and in no way limits or restricts) any rights which you may have under any other agreement or agreements between the undersigned and you. This authorization and indemnity is also a continuing one and shall remain in full force and effect until revoked by the undersigned by a written notice actually received by you at the above address, marked to the attention of your compliance officer, but such revocation shall not affect any liability in any way resulting from transactions initiated prior to such revocation.

Very truly yours,

**Individual Account Holders:**

Name: <u>Yvette Sands</u>	Signature: <u>[Signature]</u>	Date: <u>07/16/04</u>
Joint Name:	Signature:	Date:

**Entity Account Holders (Corporation, Partnership, Trust, Estate):**

Name of Entity:	Authorized Officer Name:
Authorized Officer	Date:

**Individual to Whom Discretion is Given:**

Name: <u>Tertra Durbin</u>	Signature: <u>[Signature]</u>		
SSN, Fed ID, Cedula, NIT#	ID #		
ID Type:	Exp. Date:	Issued By:	Issue Date:

**Approved By: (Branch Manager/Compliance)**

Name:	Signature: <u>[Signature]</u>	Date: <u>7/23/04</u>
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Account # 4202-1915

### Statutory Durable Power of Attorney

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, AND TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTHCARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, YVETTE SANDS  
(insert the name and address), my social security number being N/A (insert your proper social security number), appoint PERLINA TORRES QUEST  
(insert the name and address of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.  
TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.  
TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

- |                 |   |                |   |
|-----------------|---|----------------|---|
| <u>    </u> A.  | real property transactions;                           | <u>    </u> H. | estate, trust, and other beneficiary transactions;  |
| <u>  ✓  </u> B. | tangible personal property transactions;              | <u>    </u> I. | claims and litigation;  |
| <u>    </u> C.  | stock and bond transactions;                          | <u>    </u> J. | personal and family maintenance   |
| <u>  ✓  </u> D. | commodity and option transactions                     | <u>    </u> K. | benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service. |
| <u>  ✓  </u> E. | banking and other financial institution transactions; | <u>    </u> L. | retirement plan transactions;   |
| <u>  ✓  </u> F. | business operating transactions;                      | <u>    </u> M. | tax matters;  |
| <u>    </u> G.  | insurance and annuity transactions;                   | <u>    </u> N. | ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU  |

NEED NOT TO INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

#### SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS TO YOUR AGENT.

In addition to the statutory powers granted pursuant to the categories initialed above, if (C) or (D) are initialed, the powers granted are extended to include the power to establish or close accounts with one or more brokers, dealers or investment advisors and to liquidate or distribute funds or property from any such accounts to any person, including the agent or attorney-in-fact hereunder.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

- A   This power of attorney is not affected by my subsequent disability or incapacity.
- ~~B~~ This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor (s) to that agent:

Signed this 16<sup>th</sup> day of July, 2004

Yvette Sands  
(Your signature)

[Signature]  
(Signature of agent)

#### Notary Public:

\_\_\_\_\_ personally appeared before me, and proved on the basis of satisfactory evidence to be the person whose name appears above.

Marian Curley  
Notary Public Signature

July 16, 2004  
Date

State of: New Providence  
Bahamas

My Commission Expires: N/A

COPY

141

1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2

3 In the Matter of: )

4 )

5 CONCORDE AMERICA, INC. ) File No. FL-03104-A

6 )

7

8 WITNESS: Paul A. Spreadbury

9 PAGES: 141 through 290

10 PLACE: Securities and Exchange Commission

11 801 Brickell Avenue, Suite 1800

12 Miami, Florida 33131

13 DATE: Tuesday, August 17, 2004

14

15 The above-entitled matter came on for hearing from

16 10:35 a.m. to 3:45 p.m. pursuant to notice.

17

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24 Diversified Reporting Services, Inc.

25 (202) 467-9200

0003923



1           Q     For the record, this is an e-mail dated July 31,  
2     2004 from Bryan Kos to Paul Spreadbury, the subject, "Forward  
3     Concorde America Mexican Employment Project." There's a  
4     misspelling there. Would you take a look at that, please.  
5     Do you recognize that document?

6           A     Mauricio Madero. Yes.

7           Q     And can you tell us generally what this is about?

8           A     It was just more information about Concorde  
9     America. I don't even remember what I did with it.

10          Q     This is information that was background information  
11     for you to prepare the press releases, and use in the fax and  
12     e-mail releases?

13          A     No. I never really read this information. I  
14     believe that this particular e-mail was for me to forward on  
15     to Knobias.com, for that purpose to get them to put it up  
16     there.

17          Q     Well, let me ask you about some of the people that  
18     are mentioned here.

19          A     Yes, sir.

20          Q     The original e-mail, which follows on the same  
21     page, is dated Tuesday, May 11, 2004, to BKOS@i-ops.com.  
22     That's Bryan Kos' e-mail address, correct?

23          A     Yes, sir.

24          Q     All right, and it's sent from ventanalt@aol.com.  
25     Are you familiar with that e-mail address?

1           A     Yes, sir.

2           Q     Who is that e-mail address for?

3           A     Donald Oehmke.

4           Q     Do you know what Oehmke's relationship to Kos is?

5           A     Specifically, no.

6           Q     Do you have any ideas?

7           A     I know that Bryan consults him often on things. It  
8 is my opinion that Donald Oehmke is a high-up on this thing.  
9 It is my opinion that he is one of the guys who organizes all  
10 this stuff, and I'm getting this from my conversations with  
11 Steven Kirsch.

12          Q     Did you have any sense of the independently?'

13          A     No. I guess my impression was that Donald Oehmke  
14 was some kind of lawyer, and that was because of the  
15 disclaimer at the bottom of this e-mail. That's what made me  
16 think he was a lawyer or something.

17          Q     You had mentioned earlier that Mr. Oehmke might  
18 have been present at the meeting in Raleigh, North Carolina?

19          A     Only because in a subsequent conversation, which I  
20 cannot remember the date, it was a casual conversation I had  
21 with Bryan Kos about that meeting and how it was interesting  
22 to meet characters like Schmelvis, and he had said well, Don  
23 was pretty interesting, too, right?

24                 Don who, I don't know. It could have been that  
25 other Don, the other Don I told you about earlier, but so I



1 don't know.

2 Q Do you have any idea who this Mauricio Madero is?

3 A No, but that's the Mauricio that - I've never met  
4 him, and I've never e-mailed him, and I've never spoken with  
5 him, but based on the conversations that I've been in where  
6 they bring up the name Mauricio, it is my impression that he  
7 is a participant in the management of Concorde America.

8 Q Do you know why Oehmke might have materials that,  
9 it says here are the project documents from Mauricio Madero,  
10 do you know why Oehmke would have received documents from  
11 Madero to forward to Bryan Kos?

12 A I do not know why.

13 Q Let me show what we'll have marked next as CA-16.

14 (SEC Exhibit Number CA-16 was marked  
15 for identification.)

16 BY MR. LU:

17 Q For the record, this is an e-mail dated July 27,  
18 2004 from Bryan Kos to Paul Spreadbury, with a copy to  
19 don@ventanaconsultants.com, and it's got a subject, "Check  
20 Out HCTP." It gives a web site for Knobias.com,  
21 K-n-o-b-i-a-s. First of all, do you recognize this e-mail,  
22 Mr. Spreadbury?

23 A Yes, I do.

24 Q And can you tell us generally what this is about?

25 A This fellow, Oehmke, had come across this

CERTIFIED  
COPY

1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION:

2

3 In the Matter of: )

4 ) File No. Fl-3104

5 CONCORDE AMERICA )

6 WITNESS: Tom Heysek

7 PAGES: 1 through 172

8 PLACE: Securities and Exchange Commission

9 5670 Wilshire Boulevard

10 Los Angeles, CA

11 DATE: Wednesday, August 25, 2004

12

13 The above-entitled matter came on for hearing,

14 pursuant to notice, at 10:30 a.m.

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24 Diversified Reporting Services, Inc.

25

(202) 467-9200



0006545

1 Q I want to go back to the dinner you had with Mr.  
2 Emky. What subjects did you discuss?

3 A There was no business. I don't recall a topic.

4 Q You never discussed any specific companies?

5 A No.

6 Q You never discussed any companies you wrote about?

7 A As a matter of fact, I think we were all attending  
8 an art show at that time. I would have to go and double check  
9 on this. It was not business.

10 Q Have you ever discussed with Mr. Emky any other  
11 companies you have written about?

12 A I don't know. No.

13 MS. SCHMIDT: This is Linda Schmidt in Miami. I just  
14 wanted to let you know I am going to be leaving and I just  
15 wanted to note that for the record. It is approximately a  
16 little after midnight in Miami and I believe Gary Miller will  
17 remain.

18 MR. GOURLEY: I admire both of you.

19 MR. LU: Goodnight.

20 MS. SCHMIDT: Thank you.

21 BY MR. LU:

22 Q Let's move on the to the next subject. I'm going  
23 t1QAo show you what we will have marked as CA64.

24 (SEC Exhibit CA64 was marked for  
25 identification.)

1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2

**CERTIFIED  
ORIGINAL**

3 In the Matter of: )

4 ) File No. FL-3104

5 Concorde America )

6 WITNESS: Andrew Martin Kline

7 PAGES: 1 through 174

8 PLACE: Securities and Exchange Commission

9 5670 Wilshire Boulevard

10 11th Floor

11 Los Angeles, CA

12 Date: Tuesday, October 5, 2004

13

14 The above-entitled matter came on for hearing,

15 pursuant to notice, at 9:54 a.m.

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24 Diversified Reporting Services, Inc.

25 (202) 467-9200



0003017

1 200,000 workers, and my understanding was that they all  
2 had signed contracts to this effect. In other words, the  
3 deal was complete for the first 200,000 workers.

4 Q Do you know whether anyone ever saw the contracts  
5 between the actual agricultural concerns, whether it was  
6 a farm or something, and the broker?

7 A I'm not sure what contracts Bryan Kos saw, but he  
8 continually assured me that he and a partner -- and I have  
9 this memory that he said Jeremy once, but I don't know for  
10 sure. But he and a partner had both seen the contracts,  
11 is how they put it, which I assumed was for the whole  
12 show.

13 Q Do you know whether that was Jeremy Jaynes?

14 A I don't know.

15 Q Did you ever hear Kos ever refer to a person named  
16 Donald Oemke?

17 A No, but I've heard that name.

18 Q Okay. How do you know Donald Oemke?

19 A He was the -- I know of Donald Oemke, I do not  
20 know Donald Oemke. I've never spoken to the man or  
21 corresponded with the man. But I was told he was the  
22 president or CEO of Storage Technologies or Storage  
23 Innovations Technologies. I spoke with the president and  
24 the -- Andrew Alspach regarding Storage Technologies when  
25 I compiled my report, and Don Oehmke was listed as his

1 boss, I think the chairman of that company. Other than  
2 that reference, I have no knowledge whatsoever of that  
3 person.

4 Q Do you know whether Oehmke was involved in  
5 Concorde America?

6 A I don't know. Not to my knowledge.

7 Q So you only know of him through Storage  
8 Innovations Technologies?

9 A Correct.

10 Q Do you know whether Concorde America had ever sent  
11 any workers to Europe?

12 A They told me that they were going to start at the  
13 beginning of August sending 1,000 per day. By that time I  
14 had finished the report by over a month, and it was not my  
15 concern anymore.

16 Q All right. Did you know -- did you know whether  
17 Concorde had sent any workers to Europe at the time that  
18 you were writing your report?

19 A They told me they hadn't as of yet, but that they  
20 had the contract to do so.

21 Q Okay. Do you know whether Concorde was receiving  
22 any revenues at the time that you prepared your report?

23 A I don't know.

24 Q What did you base your revenue projections on?

-- - - - -

PENSON FINANCIAL SERVICES, INC.  
AND/OR BROKER DEALERS FOR WHICH IT CLEARS

AFFIDAVIT OF SOLE OWNERSHIP

CITY OF ANGULLA  
PROVINCE OF ANGULLA  
STATE OF \_\_\_\_\_  
COUNTRY OF ANGULLA

YUETTE SANDS being duly sworn, deposes and says:

I am engaged in business under the assumed name and style of \_\_\_\_\_

DA SILVA S.A.

in the City of \_\_\_\_\_

Country of ANGULLA

I am the sole owner of the business so conducted and no other person, firm or corporation has any interest therein.

All property in the name of DA SILVA S.A.  
belongs to me and is my sole property.

Yvette Sands

Sworn to before me at the CITY OF NASSAU  
of THE ISLAND OF NEW PROVIDENCE  
in the COMMONWEALTH of THE BAHAMAS

this 16<sup>th</sup> day of JULY 2004

Miriam Cutler  
A Commissioner of Oaths or  
Notary Public

SUNSTATE 0327



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14302145

**PENSON FINANCIAL SERVICES, INC.  
AND/OR BROKER DEALERS FOR WHICH IT CLEARS**

**AFFIDAVIT OF SOLE OWNERSHIP**

CITY OF ANGUILLA

PROVINCE OF ANGUILLA

STATE OF

COUNTRY OF ANGUILLA

Dennis Scott being duly sworn, deposes and says:

I am engaged in business under the assumed name and style of

VANDELIP HOLDINGS N.V.

in the City of

Country of ANGUILLA

I am the sole owner of the business so conducted and no other person, firm or corporation has any interest therein.

All property in the name of VANDELIP HOLDINGS N.V. belongs to me and is my sole property.

[Signature]

Sworn to before me at the CITY OF NASSAU  
of New Providence Island  
in the Commonwealth of The Bahamas

this 16<sup>th</sup> day of July 2004

[Signature]  
A Commissioner of Oaths or  
Notary Public



EAD 000491  
Confidential Treatment Requested by  
Electronic Access Direct, Inc.



**FENSON FINANCIAL SERVICES, INC.  
AND/OR BROKER DEALERS FOR WHICH IT CLEARS**

**AFFIDAVIT OF SOLE OWNERSHIP**

14300867

CITY OF TRINIDAD  
PROVINCE OF TRINIDAD & TOBAGO  
STATE OF \_\_\_\_\_  
COUNTRY OF TRINIDAD

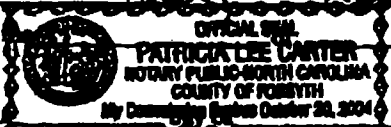
MAVIS CHANTAN being duly sworn, deposes and says:  
I am engaged in business under the assumed name and style of CHIANG  
Ze Capital A.V.U.  
in the City of \_\_\_\_\_  
Country of TRINIDAD

I am the sole owner of the business so conducted and no other person, firm or corporation has any interest therein.

All property in the name of CHIANG ZE CAPITAL A.V.U. belongs to me and is my sole property.

Mavis Chantan

Sworn to before me at the 24th  
of February 2004  
in \_\_\_\_\_  
this \_\_\_\_\_ 19\_\_\_\_



Patricia Lee Carter

A Commissioner of Oaths or Notary Public

**PENSON FINANCIAL SERVICES, INC.  
AND/OR BROKER DEALERS FOR WHICH IT CLEARS**

14302137

**AFFIDAVIT OF SOLE OWNERSHIP**

CITY OF

PROVINCE OF

STATE OF

COUNTRY OF

ANGUILLA

CONNIE OSTELMAN WREX being duly sworn, deposes and says:

I am engaged in business under the assumed name and style of \_\_\_\_\_

BARBANGUILLA HOLDINGS S.A.

in the City of ANGUILLA

Country of ANGUILLA

I am the sole owner of the business so conducted and no other person, firm or corporation has any interest therein.

All property in the name of BARBANGUILLA HOLDINGS S.A. belongs to me and is my sole property.

[Signature] X

Sworn to before me at the \_\_\_\_\_

of \_\_\_\_\_

in the \_\_\_\_\_ of \_\_\_\_\_

this 13<sup>th</sup> day of August 2004

[Signature]

A Commissioner of Oaths or  
Notary Public



14301261

**PENSON FINANCIAL SERVICES, INC.  
AND/OR BROKER DEALERS FOR WHICH IT CLEARS**

**AFFIDAVIT OF SOLE OWNERSHIP**

CITY OF NASSAU, BAHAMAS

PROVINCE OF BAHAMAS

STATE OF

COUNTRY OF BAHAMAS

Demeter Mohan being duly sworn, deposes and says:

I am engaged in business under the assumed name and style of Ryzcek  
Investments GmbH

in the City of NASSAU

Country of BAHAMAS

I am the sole owner of the business so conducted and no other person, firm or corporation has any interest therein.

All property in the name of Ryzcek Investments GmbH belongs to me and is my sole property.

[Signature]

Sworn to before me at the \_\_\_\_\_

of \_\_\_\_\_

in the Island of New Providence

this 23<sup>rd</sup> day of February 192004

Miriam Curley  
A Commissioner of Oaths or  
Notary Public

