UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 05-80128-ZLOCH/SNOW

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,

and

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

Relief Defendants.

PLAINTIFF SEC'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY INJUNCTION ORDERING AN ASSET FREEZE AND OTHER RELIEF

I. INTRODUCTION

Plaintiff Securities and Exchange Commission (the "Commission") seeks a preliminary injunction to continue the asset freeze already imposed in this case against Defendants Donald Oehmke, Bryan Kos and the five Relief Defendants. A preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure is necessary to prevent Oehmke, Kos, and the Relief

Defendants from dissipating the currently frozen proceeds of the fraudulent pump-and-dump scheme they perpetrated on the investing public.

As explained in more detail in this memorandum, Oehmke, Kos, and others orchestrated fraudulent promotional campaigns that artificially inflated the stock price of two thinly-traded startup companies, Concorde America, Inc. ("Concorde") and Absolute Health and Fitness, Inc. ("Absolute Health"), both of which had no assets, no revenues and no business. After achieving their goal of inflating both companies' stock price, Oehmke and Kos dumped their shares and diverted their ill-gotten gains to offshore accounts using the Relief Defendants as nominees.

The Commission brought this action in February 2005 and sought an emergency, *ex parte* asset freeze to stop the flow of investors' funds out of the country. The Court entered an asset freeze after the Commission demonstrated through exhibits and sworn testimony that Oehmke and Kos had violated the securities laws during the promotional campaigns, had directed the sale of Concorde and Absolute Health stock, and had retained the proceeds through the Relief Defendants.

Oehmke has sought to lift the asset freeze even though – after six months – he still has not complied with the Court's Order to provide a full and complete sworn accounting. One of the remedies the Commission sought then and seeks now is an accounting from Oehmke, Kos, and each of the Relief Defendants of the funds they diverted. The Commission also seeks disgorgement of those profits. Both disgorgement and, as this Court recognized in its Order of August 5, 2005, an accounting, are equitable remedies justifying an asset freeze. Even though this Court specifically ordered Oehmke and Kos to provide complete accountings, neither has done so, necessitating a continuation of the asset freeze.

Rather than account for the fraudulent profits he received, Kos asserted his Fifth Amendment privilege against self-incrimination – adverse inference. Oehmke ostensibly provided an accounting, but as this memorandum demonstrates, misled the Court and failed to account for approximately $3.7 million he received as a result of the fraud in this case. The Relief Defendants have failed to make an appearance in this case and are in default.

The Commission has spent the last six months gathering records to do what Oehmke, Kos and the Relief Defendants have not – reveal what funds they received from the sale of Concorde and Absolute Health stock. As detailed in Section III below, various bank and brokerage account records confirm that Oehmke received at least $3.7 million and Kos received at least $250,000 through offshore accounts they each control. The evidence gathered thus far indicates both Oehmke and Kos received even more money, but the SEC has not yet been able to trace all the illicit trading profits in this case because many of the accounts in question are located offshore, and obtaining those records requires the cooperation of foreign institutions not subject to this Court's jurisdiction.

In contrast to those amounts, the asset freeze has preserved only approximately $852,000 in accounts Oehmke controls, and $75,000 in accounts Kos controls. Since the amounts already traced to Oehmke and Kos are far greater, and because Defendants are clearly attempting to shi additional ill-gotten gains from the Court through an intricate web of offshore accounts, foreign entities and other devices, the Commission asks the Court to enter a preliminary injunction continuing the asset freeze against these two Defendants unless and until they can show they have at least $3.95 million plus prejudgment interest set aside to satisfy their potential disgorgement obligations.[1]

[1] Based on the Commission's analysis of bank records to date, defendants are liable for $3.95 million in disgorgement plus prejudgment interest, however discovery is ongoing and the Commission anticipates receiving

The conduct of the Relief Defendants, whom Oehmke and Kos controlled, provides additional grounds for a preliminary injunction. Because all of the Relief Defendants' U.S. brokerage accounts had been emptied before the Commission filed this lawsuit, and because the remainder of the Relief Defendants' bank and other financial accounts are located offshore, the Commission has been unable to secure a freeze of any funds traceable to them. Meanwhile, the Relief Defendants' brokerage account records show they made approximately $22.9 million in profits trading Concorde and Absolute Health stock. To ensure that any disgorgement order is meaningful, the Court must maintain the asset freeze over the Relief Defendants unless and until they can show they have at least $22.9 million set aside to satisfy their potential disgorgement obligations.[2]

Finally, the Commission asks the Court to order Oehmke, Kos, and the Relief Defendants to immediately provide full and complete accountings, and repatriate any funds or other assets held in foreign accounts.

II. DEFENDANTS AND RELIEF DEFENDANTS

1. Defendants and Relief Defendants Who Are The Subject Of This Motion

Oehmke, of Kalamzoo, Michigan, owns Ventana Consultants, Ltd. and Ventana Consultants of Pennsylvania ("Ventana of PA"), two consulting companies through which he purchased and traded Concorde and Absolute Health stock. Michigan Corporate Records of

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additional records from offshore banks that may increase the total amount of trading proceeds received by Oehmke and Kos.

[2] The Commission has located a small amount of money traceable to the Relief Defendants in foreign bank accounts. The Commission is attempting to secure the cooperation of foreign governments in freezing those funds, but cannot do so if the Court lifts the asset freeze in this case. The Commission has reason to believe its ongoing attempts to trace funds wired out of the Relief Defendants' U.S. brokerage accounts will result in locating additional money to be frozen.

Ventana Consultants, Ltd., Ex. 3; Pennsylvania Corporate Records of Ventana of PA, Ex. 4.[3] In 1991, the NASD barred Oehmke from the securities industry for participating in a fraudulent scheme to make improper use of customer funds, disseminating misleading sales literature, and failing to maintain adequate supervisory procedures, among other things. NASD Certified Copies of Web Central Registry Depository Documents, Ex. 5.

Kos, of Montreal, Canada, coordinated the Concorde and Absolute Health promotional campaigns. He hired promoters Thomas Heysek and Andrew Kline to prepare analyst reports, and Paul Spreadbury to prepare press releases, tout sheets, and voice mail scripts concerning these two stocks. Testimony Transcript of Thomas Heysek ("Heysek Test."), Ex. 6 at 69; Testimony Transcript of Andrew Kline ("Kline Test."), Ex. 7 at 25; Testimony Transcript of Paul Spreadbury ("Spreadbury Test."), Ex. 8 at 32-33. In addition, Kos hired Heysek to produce a video interview touting Absolute Health. Transcript of Absolute Health Video ("Video Tr.") Ex. 9; Declaration of Thomas Flynn ("Flynn Decl."), Ex. 10 at ¶¶ 6-8. Kos also hired a company to maintain a website touting the stocks. Kos e-mail of June 22, 2004 and I-Max e-mail to Kos of June 30, 2004 ("I-Max e-mails"), Ex. 11.

Barranquilla Holdings, SA, ("Barranquilla") is a company incorporated in Anguilla which held accounts at three U.S. brokerages. Oehmke had trading authorization for all three

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[3] The Court may consider all the declarations and other exhibits submitted in support of this motion as evidence in support of the request for a preliminary injunction. It is well established that Rule 65(a) allows for consideration of affidavits and hearsay materials in a preliminary injunction hearing. *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) ("at the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if 'weighing all the attendant factors, including the need for expedition,' the evidence is 'appropriate given the character and objectives of the injunctive proceeding,'"); *CBS Inc. v. Primetime 24 Joint Venture*, 9 F.Supp.2d 1333, 1341-42 (S.D. Fla. 1998) (hearsay evidence admissible without exception at preliminary injunction hearing due to need for expedition); *McLaughlin v. Williams*, 801 F. Supp. 633, 642 (S.D. Fla. 1992) (court admitted hearsay evidence in the form of letter from doctor with personal knowledge of the contents of the letter); *SEC v. Prater*, 289 F.Supp.2d 39, 50 n.7 (D. Conn. 2003) (court may rely on affidavits and hearsay evidence, among other things, in considering a motion for a preliminary injunction).

Barranquilla brokerage accounts and used two of them to trade in Concorde and Absolute Health stock. Barranquilla Certificate of Incorporation, Ex. 12; Newbridge Securities Corporation ("Newbridge") Account Opening Documents, Composite Ex. 13; Newbridge Trading Authorization, Ex. 14; Sunstate Equities Trading, Inc. ("Sunstate") Account Opening Documents, Composite Ex. 15; Sunstate Trading Authorization, Ex. 16; Electronic Access Direct ("Electronic Access") Account Opening Documents, Composite Ex. 17; Electronic Access Trading Authorization, Ex. 18.

Chiang Ze Capital, AVV, ("Chiang Ze") is a Trinidadian corporation that held accounts at three U.S. brokerages. Chiang Ze Certificate of Incorporation, Ex. 19; Newbridge Account Opening Documents, Composite Ex. 20; Sunstate Account Opening Documents, Composite Ex. 21; Electronic Access Account Opening Documents, Composite Ex. 22. Oehmke had authority to trade in two of these brokerage accounts and traded Concorde and Absolute Health shares in these accounts. Declaration of Daniel Kantrowitz ("Kantrowitz Decl.") Ex. 23 at ¶¶ 4, 6; Electronic Access Trading Authorization, Ex. 24. Kos had authority to trade both Concorde and Absolute Health shares at the third brokerage house. Sunstate Trading Authorization, Ex. 25.

Ryzcek Investments, GMBH ("Ryzcek") is a Trinidadian corporation that held accounts at three U.S. brokerages. Oehmke had trading authorization in two of these brokerage accounts through which he traded shares in Absolute Health. Ryczek Certificate of Incorporation, Ex. 26; Newbridge Account Opening Documents, Composite Ex. 27; Newbridge Trading Authorization, Ex. 28; Electronic Access Account Opening Documents, Composite Ex. 29; Electronic Access Trading Authorization, Ex. 30. Kos had authority to trade both Concorde and Absolute Health stock at a third Ryzcek account at the Sunstate brokerage house. Sunstate Account Opening Documents, Composite Ex. 31; Sunstate Trading Authorization, Ex. 32.

DaSilva, SA, ("DaSilva") is a company incorporated in Anguilla which maintained a U.S. brokerage account, through which Oehmke traded in Concorde stock. DaSilva Certificate of Incorporation, Ex. 33; Sunstate Account Opening Documents, Ex. 34; Sunstate Trading Authorization, Ex. 35.

Vanderlip Holdings, NV, ("Vanderlip") is a company incorporated in Anguilla. Vanderlip Certificate of Incorporation, Ex. 36. Like DaSilva, Vanderlip had a U.S. brokerage account, through which Oehmke traded in Concorde shares. Sunstate Account Opening Documents, Ex. 37; Sunstate Trading Authorization, Ex. 38.

2. Other Defendants

Concorde is a Nevada corporation, with its principal place of business in Boca Raton, Florida. Nevada Corporate Records for Concorde, Ex. 39; Florida Corporate Records for Concorde, Ex. 40. Concorde's purported business was recruiting Latin American workers for employment in Europe. Concorde Press Release of July 28, 2004, Ex. 41.

Absolute Health is a Nevada corporation with its purported principal place of business in Greensboro, North Carolina, and which claimed to operate health and fitness centers. Nevada Corporate Records for Absolute Health, Ex. 42. On December 15, 2004, the Commission suspended trading of this stock. Trading Suspension Order, Ex. 43.

Hartley Lord is president of Concorde. Florida Corporate Records for Concorde, Ex. 40. He participates in Concorde's day-to-day operations and has authority over all of its activities. Testimony Transcript of Hartley Lord ("Lord Test."), Ex. 44 at 38-42. In 1981, Lord consented to a permanent injunction against future violations of the anti-fraud provisions of the federal securities laws based on his involvement in a stock manipulation scheme. NASD Certified Documents, Ex. 45.

Thomas Heysek prepared an analyst report for Kos concerning Concorde and produced a promotional video for Absolute Health. Heysek Analyst Report, Ex. 46; Video Tr., Ex. 9; Heysek Testimony, Ex. 6 at 96-103; Flynn Dec, Ex. 10 at ¶¶ 6-8. Heysek has been associated with three broker-dealers that terminated him for misconduct ranging from unauthorized trading to improper handling of customer funds. NASD Web Central Repository Document, Ex. 47.

Andrew Kline prepared analyst reports for Kos on Concorde and Absolute Health. Kline Test., Ex. 7 at 28-30. Kline previously served a five-year sentence in a Bolivian jail for a drug offense. *Id.* at 12-15.

Paul Spreadbury was hired by Kos to prepare press releases, tout sheets, and websites promoting Concorde and Absolute Health. Spreadbury Test., Ex. 8 at 32-33; Concorde Tout Sheet, Ex. 48; Absolute Health Tout Sheet, Ex. 49.

III. FACTUAL BACKGROUND

A. The Concorde Scheme

1. Concorde's Reverse Merger

In mid-June 2004, Lord met with Oehmke and Kos to discuss a proposed reverse merger between Concorde and MBC Food Corporation, a publicly traded shell corporation Oehmke owned. Lord Test., Ex. 44 at 47-56; Testimony of Mauricio Madero O'Brien, ("Madero Test.") Ex. 50 at 131-136; Oehmke e-mail of June 13, 2004, Ex. 51. Concorde was purportedly in the business of sending Latin American agricultural workers to Europe. Almerimar Direct Labor Agreement ("Almerimar Agreement"), Composite Ex. 52; Concorde Press Release of July 28, 2004, Ex. 41. During that meeting, Oehmke and Kos revealed their plans to promote Concorde, which included a videotaped interview with Lord. Lord Test., Ex. 44 at 50-51; Oehmke e-mail of June 18, 2004, Composite Ex. 53. Lord told Oehmke and Kos these plans were premature

because Concorde had no business operations and had not yet sent any workers to Europe. Lord Test., Ex. 44 at 51.

Also during the meeting, Lord provided Kos with portions of an agreement he claimed obligated Concorde to provide 150,000 workers in 2004, and 50,000 workers in 2005, to a Spanish company by the name of Almerimar, S.A. Almerimar Agreement, Ex. 52. Lord also showed Kos charts depicting Concorde's projected gross income and placement of workers under the Almerimar Agreement for 2004 and 2005. Raul Mendez e-mail of July 5, 2004, Ex. 54.

A few days later, Oehmke and Lord entered into an agreement under which Oehmke, through Ventana of PA offered Lord $1 million for 10 million shares of Concorde stock. Letter from Michael Spadaccini of June 29, 2004, Ex. 55; Plan of Merger, Composite Ex. 56. Oehmke received all the shares but initially paid Lord only a portion of the $1 million. Lord Test., Ex. 44 at 98-100, 110-19.

2. Pumping Concorde's Stock

a. The Analysts' Reports

Even before the June meeting with Lord, Kos retained Heysek and Kline to prepare analyst reports about Concorde. Kline e-mail of June 16, 2004, Ex. 57; Heysek e-mail of June 8, 2004, Ex. 58. Despite Lord's misgivings about promoting Concorde, Oehmke and Kos proceeded to coordinate the promotional campaign. Lord Test., Ex. 44 at 93-94, 98; Oehmke e-mail of June 18, 2004, Composite Ex. 53; Kline e-mail of June 16, 2004, Composite Ex. 57. In the course of preparing their analyst reports, Heysek and Kline communicated by phone and e-mail with Lord five to ten times about Concorde's operations and future business. Heysek Test., Ex. 6 at 107; Kline Test., Ex. 7 at 64-66. For example, in a June 18, 2004 e-mail to Heysek,

Lord cautioned him not to "deviate from the party line," of Concorde providing Spanish-speaking workers to European businesses. Lord e-mail to Heysek of June 18, 2004, Ex. 59.

Heysek finished a draft of his report in early July, and sent it to Kos and Lord for their review. Heysek e-mail of July 1, 2004, Ex. 60. The draft report made baseless share price and revenue projections. *Id.;* Heysek Analyst Report, Ex. 46. For example, Heysek predicted Concorde's share price would rise from $3 per share to a $6.69 "near-term target price" and between $25 to $30 within 12 months. Heysek e-mail of July 1, 2004, Ex. 60; Heysek Analyst Report, Ex. 46. He also estimated revenue and net income for Concorde of $630 million and $399 million, respectively, for 2004. Heysek e-mail of July 1, 2004, Ex. 60; Heysek Analyst Report, Ex. 46. Heysek's report projected revenue of $673 million and net income of $465 million for 2005, and $421 million of revenue and $289 million of net income for 2006. Heysek e-mail of July 1, 2004, Ex. 60; Heysek Analyst Report, Ex. 46. Heysek based these projections on information Kos provided and the charts Lord gave him. Heysek Test., Ex. 6 at 93; Concorde Business Plan, Ex. 61. The Heysek report projected significant revenues in 2006, even though the Almerimar Agreement, Concorde's only actual or purported contract, contemplated the placement of workers only in 2004 and 2005. Heysek Analyst Report, Ex. 46.

Heysek knew or was reckless in not knowing his Concorde projections were false and misleading. After reviewing Heysek's report, Lord told Heysek his projections were "ridiculous," and that Concorde had not sent any workers to Spain. Lord Testimony, Ex. 44 at 54. Although Heysek had never seen the Almerimar Agreement, he told Lord he put the numbers in the report to support selling the stock at $3 per share. *Id.* Heysek also knew the charts Lord gave him did not provide any projected revenues or placement of workers for 2006.

Plan of Merger, Ex. 56. Although Lord told Heysek his numbers were ridiculous, Heysek did not significantly change his report. Revised Heysek Analyst Report, Ex. 62.

Even though Lord knew the projections in Heysek's report were impossible for Concorde to achieve and depended on unrealistic numbers, Lord still allowed "Oehmke's PR people" to publish the report. Lord Test., Ex. 44 at 53-61; Lord e-mail to Mendez of June 18, 2004, Ex. 63; Heysek e-mail of June 30, 2004, Ex. 64. Lord knew Kos and Heysek intended to disseminate the report to the investing public, and he allowed that to occur despite knowing the report was full of false and misleading information. Lord Test., Ex. 44 at 124-30.

Kos reviewed and approved Heysek's report, even though he also knew or was reckless in not knowing the information in it was false and misleading. Mendez e-mail of July 5, 2004, Ex. 54; Heysek Test., Ex. 6 at 96-98. Because Kos had met with Lord and discussed Concorde's actual operations, he knew or was extremely reckless in not knowing Concorde could not achieve the spectacular results Heysek's report touted. Lord Test., Ex. 44 at 47-52.

In addition, Oehmke received Heysek's report before it was published. On July 2, 2004, Raul Mendez, a Concorde employee working with Lord, e-mailed Oehmke, among others, drafts of both Heysek reports and a report prepared by Kline which is discussed below. Mendez e-mails of July 2 and July 5, 2004, Ex. 65. Oehmke knew Concorde could not achieve the results Heysek claimed because he had met with Lord and knew there was no substantive basis for Heysek's description of Concorde's current operations. Lord Test., Ex. 44 at 47-52.

Heysek's reports appeared on two websites, WinningStockPicks.net and USPennyStocks.com in July and August 2004. Declaration of Walter Mathews ("Mathews Decl."), Ex. 66 at ¶ 3. Kos controlled the content of the websites, with Heysek and Kline providing some content. Heysek Test., Ex. 6 at 58-59; Kline Test., Ex. 7 at 28-29; Spreadbury

Test., Ex. 8 at 34-35. The website featured Concorde as a "winning pick" and a "Strong Buy Recommendation," with a projected price of $30 per share. Mathews Decl. at ¶ 3, Ex. 66. The WinningStockPicks.net website contained the same baseless information as did the Heysek report, including the statement that Concorde stock will "see a price of $38.00 per share over the next 6 months." *Id.* at ¶ 1. The website also repeated Heysek's revenue projections and the website boasted that Concorde had entered into a three-year contract with the Spanish *government* that would "result in $2.6 billion in revenue and earnings aggregating $9.23 a share." *Id.* Kos specifically authorized the content of the WinningStockPicks.net website urging Spreadbury to "let it rip tomorrow right at market open" with the title "WSP Presents CNDD 1000% Profit Potential!" so it would have the maximum impact Kos e-mail to Spreadbury of July 27, 2004, Ex. 67.

The USPennyStocks.com website, which listed Heysek as a Senior Analyst and Editor, repeated virtually every false statement about Concorde found on WinningStockPicks.net, and Heysek's report, including claiming that Concorde had contracts with European countries and companies to provide a Latin American workforce. Mathews Decl., Ex. 66 at ¶ 5. It also projected a $38 per-share price for Concorde stock in six months. *Id.*

Kline also prepared a report he sent to Kos for approval in June 2004. Kline e-mail of June 29, 2004, Ex. 68; Kline Analyst Report with Lord's Initials, Ex. 69. It made outlandish projections similar to those in the Heysek report. For example, Kline said he expected Concorde's share price to rise from $3 to $38 in six months and to $84 in 12 to 18 months. *Id.* Kline used the highest possible number of workers Concorde could have placed with Almerimar to compute these projections. *Id.*; Mendez e-mail of July 5, 2004, Ex. 54. However, these

figures were utter fantasy because Concorde had yet to place a single worker anywhere or generate any revenue in 2004. Kline Test., Ex. 7 at 81; Lord Test., Ex. 44 at 54.

Lord reviewed Kline's report and told him the projections were "ridiculous" because Concorde had not yet placed any workers. Lord Test., Ex. 44 at 54. Lord also told Kline, who had never even seen the Almerimar Agreement, he was falsely assuming Concorde would be able to provide the maximum number of workers specified in the agreement. *Id.* Just as with Heysek's report, Lord knew the statements in Kline's report were false and the projections were baseless. *Id.* Yet, to assure that Oehmke paid Concorde the balance of the $1 million he had promised to pay for Concorde's stock, Lord felt compelled to initial and approve Kline's draft report. *Id.* at 50-55, 163-64, 173-75; Kline Analyst Report, Ex. 69.

Oehmke received an e-mail from a Concorde employee on July 2, 2004, attaching a draft of Kline's report. Mendez e-mails of July 2 and July 5, 2004, Ex. 65. Because of his meeting with Lord, Oehmke knew or was extremely reckless in not knowing that Kline's reports were false and baseless. Lord Test., Ex. 44 at 47-52. Kos also received copies of Kline's report, both from Lord and Kline, prior to its dissemination. Kline e-mail of July 4, 2004 with Final Concorde Report ("Final Kline Analyst Report"), Ex. 70. For the same reasons stated above, Kos knew or was extremely reckless in not knowing the report contained false statements and baseless projections.

Kline prepared a final version of his report that repeated the misrepresentations discussed above, and added new false and misleading statements. Final Kline Analyst Report, Ex. 70. For example, Kline predicted Concorde's share price would be $84 in 2006, with estimated revenues of more than $2 billion and a profit margin of 75.3%. *Id.* Kline's report falsely told investors that Concorde "is Cash Flow positive now," and "will offer strong profits in its first year of

operation." *Id.* Finally, like Heysek, Kline failed to disclose that the Almerimar Agreement only contemplated the placement of workers in 2004 and 2005, and therefore his revenue and income projections for 2006 were baseless. *Id.* The report was also posted on WinningStockPicks.net and USPennyStocks.com in July and August 2004. Mathews Decl., Ex. 66 at ¶¶ 4-6.

b. Unauthorized Press Releases

Around the same time Heysek and Kline were preparing their reports, Kos separately hired Spreadbury to write press releases, tout sheets and content for two websites, as well as scripts for a voice-mail campaign, to promote Concorde. Spreadbury Test., Ex. 8 at 32-33. On July 28, 2004, Spreadbury issued his first Concorde press release via PR Newswire. Press Release of July 28, 2004, Ex. 41. The Pink Sheets website and other media outlets also circulated this release. *Id.* Spreadbury used the Heysek and Kline reports Kos provided him to prepare the press release. Spreadbury Test., Ex. 8 at 255. The release, entitled "First Global 'Monster' Employment Placement Service Launched – Concorde America to Place approximately 200,000 Workers in Spain," announced Concorde had developed a "unique solution" to the lack of workers in Spain to "perform duties in agriculture, hospitality, sanitation, security and other jobs," and touted a "new agreement with the Spanish government." Press Release of July 28, 2004, Ex. 41.

The press release quoted Lord as stating "[t]he recent agreement with Spain is the tip of the proverbial iceberg . . . [o]nce this first contract is underway and others can see for themselves our global solution in action, we anticipate the floodgates to open." *Id.* The press release also quoted Julio Aspe, a purported employee of Concorde, claiming that Concorde afforded workers great opportunities. *Id.* Aspe explained that while Latin Americans earned about $60 a month in

their own countries for domestic or service work "for doing the same work in Spain, Italy or Germany, they can earn over $1000 a month . . . they can provide their families back home with health and dental insurance and even be part of a pension plan." *Id.*

Virtually every fact in this press release was a lie. First, it stated that Concorde had a contract with the Spanish *government*, rather than a Spanish *company*. *Id.* Second, Spreadbury manufactured the quote from Aspe, an associate of Lord's, not employed by Concorde. Spreadbury Test., Ex. 8 at 63-64. Aspe never made the statement attributed to him. *Id.* Third, Spreadbury made up the quote from Lord. *Id.* In fact, Spreadbury never even spoke to Aspe or Lord before issuing the release, purportedly on behalf of Concorde. *Id.*

Both Oehmke and Kos received Spreadbury's press release prior to its publication. Kos e-mail of July 28, 2004, Ex. 41. In addition, Kos specifically directed Spreadbury to disseminate it. *Id.* Both Oehmke and Kos knew or were extremely reckless in not knowing the information in the press release was baseless because for starters, Spreadbury had made up quotes. Spreadbury Test., Ex. 8 at 63-65. In addition, even a quick review of the Almerimar Agreement or a brief conversation with anyone at Concorde would have revealed Concorde had no agreement with the Spanish government. Lord Test., Ex. 44 at 79.

Lord eventually saw the press release and telephoned Spreadbury to ask how it had come to be issued without his approval, and to inform him of the false statements in it. Spreadbury Test., Ex. 8 at 100-108. Spreadbury then called Kos, and the two agreed to publish a second press release, ostensibly to correct the errors in the first. *Id.*

Twelve days after the first release, Spreadbury published the second one. Concorde Press Release of August 9, 2004, Ex. 71. He deleted the quotes attributed to Lord and Aspe, and substituted the reference to the government of Spain with "one of Spain's largest agricultural

firms." *Id.* He also changed Concorde's contact person to John Richey. *Id.* The second release, however, was no more truthful than the first. For example, John Richey did not exist. Spreadbury Test., Ex. 8 at 109. The release also omitted disclosing the fact that Concorde had no revenues and had not placed a single worker anywhere. Concorde Press Release of August 9, 2004, Ex. 71.

When Lord learned of Spreadbury's two false press releases, Lord directed Concorde to issue a corrective press release on August 11, 2004, disclaiming them. Concorde Disclaimer Press Release of August 11, 2004, Ex. 72. Distributed after the market closed that day, Concorde's press release indicated that: no one had contacted Concorde about the information in the first two releases; Spreadbury did not have any relationship with Concorde; Concorde did not have a contract with the Spanish government; Concorde had not made an announcement about its future earnings; and it had not specified the number of workers it could supply under any contract. *Id.*

c. Tout Sheets and Voice Mails

Concurrently with the unauthorized press releases, Kos coordinated a massive tout sheet and voice-mail campaign to promote Concorde. Kos paid Spreadbury to prepare the tout sheets, published under the banner of "The Best Penny Stock Picks!" Spreadbury Test., Ex. 8 at 72-73; Concorde Tout Sheet, Ex. 48. Spreadbury used the false and misleading information from the Heysek report and his press releases to create the tout sheets. Spreadbury Test., Ex. 8 at 80-81. The tout sheets contained extraordinary predictions concerning Concorde's revenues and stock price potential. Concorde Tout Sheet, Ex. 48. One tout sheet projected Concorde's price to rise from $4.50 per share to $38 in 6 months and $84 in 12 months. *Id.* That same tout sheet

declared that its projections "seem almost conservative" with Concorde having a "market value" of $1.2 billion. *Id.*

Spreadbury also authored the script for the voice-mail campaign promoting Concorde as a "hot stock pick," with contracts valued at "over $1 billion," and a projected price of $30 per share. Spreadbury Test., Ex. 8 at 258-59. Kos coordinated the voice-mail campaign, hiring a production company to record the voice messages and disseminate them. *Id.* at 175, 205. Kos knew or was extremely reckless in not knowing the voice-mail scripts were false because Lord had told him Concorde had no revenues and had yet to place any workers. Lord Test., Ex. 44 at 50-51. Kos nevertheless orchestrated the promotional campaign.

3. Effect on the Market

Investors responded to the massive media campaign. In just one week in early August 2004, Concorde's stock price rose from $3.70 to $8.90 per share. Yahoo! Finance Company Events for Concorde, Ex. 108. However, after Concorde's corrective press release, Concorde's stock plummeted on August 12, 2004, closing at $2.51 per share. *Id.* Although Concorde's stock price and volume later fluctuated due to further touting, it has since declined in price and volume, and presently trades at approximately $.03 per share. *Id.* However before this precipitous drop in price, Oehmke and Kos had dumped most of the shares they controlled, either directly or through the Relief Defendants, to make enormous profits.

B. The Absolute Health Scheme

1. Absolute Health's Purported Merger

In 2004, Kos and Oehmke used a similar pump-and-dump scheme to artificially inflate the price of Absolute Health's stock. In early 2004, Kos and his associate Jeremy Jaynes met with Randall Rohm, the majority owner of two companies that own and operate several fitness

centers in North Carolina. Declaration of Randall Rohm ("Rohm Decl."), Ex. 73 at ¶ 3. Kos and Jaynes proposed that Rohm merge his business with a shell company, Ornate Holdings, Inc. ("Ornate"). *Id.* Oehmke was the majority shareholder of Ornate through Ventana Consultants. Action By Written Consent of the Majority Shareholder of Ornate, Ex. 74. The new company to be called Absolute Health would purportedly manage fitness facilities. Rohm Decl., Ex. 73 at ¶¶ 10-14. Kos, Jaynes and Rohm discussed initiating a public offering of the proposed new company's stock. *Id.* at ¶ 3. Flynn Decl., Ex. 10 at ¶ 3. Rohm, however, never agreed to the merger and ceased discussions with Kos and Jaynes. Rohm Decl., Ex. 73 at ¶¶ 6, 8.[4]

2. Pumping the Stock

Although they knew the merger had not occurred, Oehmke and Kos again engaged Heysek, Kline and Spreadbury to promote Absolute Health's stock. Oehmke and Kos hired the same false promoters they had used in Concorde, Heysek, Kline and Spreadbury, to create tout sheets, websites, voice mail spams, a promotional video and false "analyst" reports, all of which contained false and misleading information concerning Absolute Health. Spreadbury Test., Ex. 8 at 39-40, 156-57, 169-76, 250-52; Kos e-mail of July 12, 2004, Ex. 75; Heysek Test., Ex. 6 at 161-70; Kline Test., Ex. 7 at 29.

a. Tout Sheets and Voice Mails

Kos orchestrated a massive tout sheet campaign to promote Absolute Health. At Kos's direction, Spreadbury promoted Absolute Health through tout sheets titled "The Best Penny Stock Picks!" Spreadbury Test., Ex. 8 at 263-65; Absolute Health Tout Sheet, Ex. 49.

[4] Absolute Health produced a copy of an agreement and plan of merger which purportedly contains Rohm's signature. While a signature appears under Rohm's name on the supposed merger agreement, Rohm testified that he never executed any agreement to merge either of his holding companies with Absolute Health. Ex. 73 at ¶¶ 8, 9. Thus, the Commission believes that this document was a forgery.

Spreadbury claimed Absolute Health was a "strong buy recommendation" because Absolute Health owned several fitness centers in the Southeast and was a regional leader in the health and fitness industry. *Id.* Absolute Health, however, did not own any fitness centers and had no business operations or revenues. Rohm Decl., Ex. 73 at ¶ 14. Kos knew the information contained in the tout sheets was false because Rohm never executed the merger agreement. *Id.* at ¶ 5, 6, and 8.

The tout sheets also made outrageous statements about Absolute Health's growth and financial picture, claiming it would be expanding its operations by 300% and tripling in size from four to twelve fitness centers. Absolute Health Tout Sheet, Ex. 49. In addition, the tout sheets projected Absolute Health's stock would "jump almost 300%" in price and that its revenues would double within a year. *Id.* Spreadbury sent the proposed tout sheets to Kos, who approved them and arranged to disseminate them to the public through unsolicited mass faxing campaigns. Spreadbury Test., Ex. 8 at 204-205, 263-65; Spreadbury e-mails of June 21 and June 23, 2004, Ex. 76. Kos paid Spreadbury for these efforts. Spreadbury Test., Ex. 8 at 228.

In addition, Kos coordinated a voice-mail spam campaign to promote Absolute Health. Spreadbury drafted the scripts for the voice messages and Kos approved them. Spreadbury Test., Ex. 8 at 250-52. The scripts contained the same false and misleading information about Absolute Health's operations as the tout sheets. Voice Mail Tr., Ex. 77. For example, one message said Absolute Health's stock price would rise to $4 a share and urged investors to consult the WinningStockPicks.net website. *Id.*; Spreadbury Test., Ex. 8 at 160-176. That website, which Kos controlled, featured Spreadbury's tout sheets promoting Absolute Health. Spreadbury Test., Ex. 8 at 160-176, 258-60. Kos knew or was extremely reckless in not knowing that the voice mails were false because Absolute Health was a shell with no business

and no revenues. There was simply no basis on which to make such predictions. Kos nevertheless reviewed and approved the tout sheets and voice mail campaign. Spreadbury Test., Ex. 8 at 160-162.

b. Website Promotion Containing Bogus Analysts' Reports

Kos simultaneously engaged Heysek and Kline, the same analysts that prepared bogus reports for Concorde, to promote Absolute Health on WinningStockPicks.net and USPennyStocks.com. Heysek Test., Ex. 6 at 58-59 and 162-170; Kline Test., Ex. 7 at 29-30, 49-53. Heysek claimed on WinningStockPicks.net that Absolute Health's "revenues and earnings are expected to at least double every year through 2006," and touted a 12-month target stock price of $5 per share. WinningStockPicks.net Website, Ex. 78. In addition, the website stated Absolute Health was in the process of acquiring and consolidating health clubs, and expected to generate revenue of $10 million per year. *Id.* Information about the company also appeared on two other websites, Pennystockpro.com and Hotstockfinder.com. Declaration of Paul Anderson, Ex. 79 at ¶ 3. Pennystockpro.com contained similar outrageous claims about Absolute Health. The website trumpeted a "600% Profit Potential in 6 Months," with incredible revenue predictions of $1.6 million for 2004, $4.9 million for 2005, and $13.5 million for 2006. *Id.* Similarly, it touted a stock price increase from $1.30 per share to $10 in six months. *Id.* Hotstockfinder.com repeated the same baseless assertions, stating that "revenues and earnings are expected to double every year through 2006." *Id.* Kos specifically approved the content of the websites and advised how to direct internet traffic to those sites. I-Max e-mails, Ex. 11. Kline echoed these extraordinary predictions on USPennyStocks.com. USPennyStocks.com Website, Ex. 80.

c. Video Promotion

In addition, Kos retained Heysek to produce an internet video broadcast about Absolute Health. Heysek Test., Ex. 6 at 104. Heysek provided a script to two of Rohm's fitness center employees whom Jaynes selected to appear in the video. Flynn Decl., Ex. 10 at ¶¶ 4-7, 9. The employees, following Heysek's script, falsely said Absolute Health owned and operated three fitness centers and was considering buying eight more. *Id.* at ¶ 10. The video also claimed Absolute Health would generate more than $23 million in revenue in 2004 and possibly $100 million in three years. Declaration of Michael Smith, Ex. 81 at ¶ 3. This projection was baseless because Absolute Health owned no fitness centers. Rohm Decl., Ex. 73 at ¶ 8. It had no revenue, no clients, no employees and no prospects. *Id.* at ¶ 8.

Oehmke and Kos knew or were reckless in not knowing the entire promotional campaign was false and misleading. They knew the Absolute Health tout sheets, faxes, websites and video were factually baseless because Absolute Health did not own any fitness centers or generate any revenues. *Id.* at ¶ 8. They knew Rohm never agreed to the proposed merger and that Absolute Health was merely a successor to a shell corporation controlled by Oehmke. *Id.* at ¶ 14; Action By Written Consent of the Majority Shareholder of Ornate Holdings, Inc., Ex. 74.

3. Effect on the Market

Investors responded to Absolute Health's media campaign. From early June to December 2004, the stock price rose from 55 cents to more than $5 per share with heavy fluctuation during the time periods when Oehmke and Kos traded. Yahoo! Finance Company Events for Absolute Health, Ex. 109. For example, Absolute Health's stock sank to a 52-week low of 55 cents on October 21, 2004, and then spiked again to a high of $5.09 during trading on December 1, 2004. *Id.* Prior to the drop in price, Oehmke and Kos dumped the shares they

controlled either directly or through the Relief Defendants and in the process made enormous profits.

C. Proceeds of the Fraud

Oehmke and Kos sold millions of shares of both companies' stock taking advantage of the sharp increases in the stocks' prices the fraudulent promotional campaigns generated. Oehmke and Kos ordered trades of Concorde and Absolute Health stock held in the Relief Defendants' various brokerage accounts. As a result of these trades, the Relief Defendants netted approximately $22.9 million in profits. Oehmke and Kos, through the Relief Defendants' accounts, sold their stock during the fraudulent touting campaigns and funneled the proceeds of the sales from the Relief Defendants' brokerage accounts to offshore bank accounts. Tullis Decl., Ex. 1 at ¶¶ 5, 8; Galdencio Decl., Ex. 2 at ¶¶ 4-10. As detailed below, at least $3.95 million was then transferred from these offshore accounts back to Oehmke and Kos. Galdencio Decl., Ex. 2 at ¶¶ 5-9.

1. Absolute Health Trading and Tracing Proceeds

In March and April 2004, one of Oehmke's companies, Ornate, transferred 23.5 million of its shares to Victoria Management, Ltd. ("Victoria"), IMA Advisors, Inc. ("IMA"), and Brazos Partners ("Brazos"). Ornate Subscription Agreement, Composite Ex. 82; Interwest Transfer Documents, Composite Ex. 83. These three entities then transferred their shares, now renamed as Absolute Health, to Relief Defendants Barranquilla, Chiang Ze, Ryzcek, and Ventana Consultants. Interwest Transfer Documents, Composite Ex. 84. Subsequently, each of the Relief Defendants and Ventana Consultants deposited their Absolute Health shares at various U.S. brokerages whose trading activities either Oehmke or Kos controlled. The trades are specifically detailed as follows:

a. Barranquilla's Brokerage Accounts

On July 23, 2004, Barranquilla deposited 4.5 million Absolute Health shares in an account it held at the Newbridge brokerage firm and began trading. Newbridge Receipt of Stock Certificates, Composite Ex. 85. Oehmke had trading authority over this account and was the only person who directed the broker at Newbridge to buy and sell the stock. Newbridge Trading Authorization, Ex. 14; Kantrowitz Decl., Ex. 23 at ¶¶ 4, 6, 7-8.

On November 8, 2004, Barranquilla transferred its 4.5 million shares of Absolute Health into its brokerage account at Electronic Access. Electronic Access Security Movement Statement, Composite Ex. 86; Oehmke also had trading authority over the Electronic Access account. Electronic Access Trading Authority, Ex. 18.

At the height of the Absolute Health fraudulent promotional campaign, the Electronic Access account made more than $9.2 million in trading profits through sales of Absolute Health stock. Tullis Decl., Ex. 1 at ¶¶ 3(a), 8, 9(c). Barranquilla wired these proceeds to its offshore account at First Curaçao International Bank ("FCIB"). Tullis Decl., Ex. 1 at ¶ 11(a); Galdencio Dec., Ex. 2 at ¶¶ 4-5. Of Barranquilla's approximately $9.2 million in trading proceeds from both brokerage accounts, Oehmke received at least $1.6 million through entities he directly controlled. Galdencio Decl., Ex 2 at ¶ 5; Michigan Corporate Records for Ventana, Ex. 3; Declaration of Reinaldo Conejo ("Conejo Decl."), Ex. 87 at ¶¶ 3-5. [5]

b. Chiang Ze's Brokerage Accounts

On May 25, 2004, Chiang Ze deposited into its account at Newbridge the 3.5 million Absolute Health shares it had received from Brazos. Interwest Transfer Documents, Composite

[5] As of January 25, 2005, Oehmke was listed as the director and chairman of Storage Innovations Technologies, a company that received trading proceeds from Relief Defendants. Conejo Decl., Ex. 87 at ¶¶ 3-5.

Ex. 88; Newbridge Receipt of Stock Certificate, Ex. 89. Just as with the Barranquilla accounts, Oehmke controlled the trades for this Newbridge account. Kantrowitz Decl., Ex. 23 at ¶¶ 3-4, 6.

On June 8, 2004, Chiang Ze transferred 3.5 million shares from Newbridge into its account at Sunstate. Sunstate Receipt of Stock Certificate, Composite Ex. 90. Kos had trading authority over this account. Sunstate Trading Authority, Ex. 25. During the same time period that Kos was overseeing the fraudulent promotion of Absolute Health stock, this account reaped $4.38 million in trading profits. Tullis Dec., Ex. 1 at ¶¶ 3(c), 7(a). Chiang Ze wired these proceeds to FCIB. Tullis Dec., Ex. 1 at ¶¶ 3(c), 11(b); Galdencio Dec., Ex 2 at ¶¶ 4, 6.

Chiang Ze also maintained a third brokerage account at Electronic Access over which Oehmke had trading authority and which received more shares of Absolute Health stock. Electronic Access Trading Authority, Ex. 24; Electronic Access Security Movement Report, Ex. 91. While defendants touted Absolute Health, Chiang Ze made more than $4.3 million in trading profits from sales of these shares. Tullis Decl., Ex. 1 at ¶ 7(a). Chiang Ze wired its trading profits to its offshore account at FCIB. Tullis Decl., Ex. 1 at ¶ 11(b). A minimum of $975,000 was then transferred to entities controlled by Oehmke. Galdencio Decl., Ex. 2 at ¶ 6; Michigan Corporate Records, Ex. 3; Conejo Decl., Ex. 87. Specifically, Oehmke received $150,000 in his name, while Oehmke's company, Ventana Consultants, received an additional $575,000, and Storage Innovations received $400,000, all from Chiang Ze. Galdencio Dec., Ex. 2 at ¶ 6.

c. Ryzcek's Brokerage Accounts

Ryzcek deposited the six million Absolute Health shares it received from Victoria into its account at Newbridge on May 24, 2005. Interwest Transfer Documents, Composite Ex. 92; Newbridge Receipt of Stock Certificates, Composite Ex. 93. Oehmke controlled the trading of shares in this account. Newbridge Trading Authority, Ex. 28; Kantrowitz Decl., Ex. 23 at ¶ 4, 6.

Over the course of two months in August and September 2004, Ryzcek transferred Absolute Health shares from Newbridge to its Electronic Access brokerage account. Electronic Access Security Movement Statement, Composite Ex. 94. Oehmke had authority to trade stock in this account as well. Electronic Access Trading Authorization, Ex. 30. Ryzcek also had an account at Sunstate, over which Kos had trading authority. Sunstate Trading Authorization, Ex. 32. While investors were receiving materially false and misleading information about Absolute Health, Ryzcek's brokerage accounts netted approximately $76,000 in trading profits. Tullis Dec., Ex. 1 at ¶¶ 3(e), 5.

d. Ventana's Brokerage Account

During this same time period, Oehmke also traded 100,000 Absolute Health shares issued to Ventana Consultants by Brazos and deposited with Newbridge. Interwest Transfer Documents, Composite Ex. 95; Newbridge Deposit Documents, Composite Ex. 96. Ventana made a profit of $81,068.88 trading this Absolute Health stock. Tullis Decl., Ex. 1 at ¶ 3(f), Ex. F, ¶¶ 5-6.

e. Trading Proceeds Wired To Other Offshore Accounts

In addition to the payments described above, Bovee Enterprises ("Bovee") and Jasmine Takamine ("Jasmine"), two entities with accounts at FCIB, received cash transfers from Barranquilla and Chiang Ze's brokerage accounts. Galdencio Decl., Ex. 2 at ¶ 8. From August through December 2004, Bovee received wires totaling $5.5 million from Barranquilla and $4.5 million from Chiang Ze. *Id.* Bovee then paid out $1 million to Ventana Consultants. *Id.;* Michigan Corporate Records, Ex. 3. From July through October 2004, Chiang Ze wired $2.2 million to Jasmine, another entity with accounts at FCIB. Galdencio Decl., Ex. 2 at ¶ 6. On

August 23, 2004, Jasmine disbursed $250,000 to another Vanderlip account on which Kos is a signatory. Galdencio Dec., Ex. 2 at ¶ 9, Ex. H, I.

2. Concorde Shares and Tracing Proceeds

The Defendants conducted a similar fund transfer scheme by trading shares of Concorde. Through Ventana of PA, Oehmke purchased 10 million shares of Concorde common stock. Interwest Transfer Documents, Ex. 97. The next day, Oehmke transferred six million of those shares to four of the Relief Defendants. Cancelled Concorde America Stock Certificate, Composite Ex. 98; Interwest Transfer Documents, Composite Ex. 99. The Relief Defendants received Concorde shares as follows:

a. Barranquilla received 1 million Concorde shares in its account at Newbridge on July 20, 2004. Newbridge Receipt of Concorde Stock Certificates, Composite Ex. 100. Oehmke controlled the trading in this account. Newbridge Trading Authorization, Ex. 14; Kantrowitz Decl., Ex. 23 at ¶¶ 4, 6. During the Concorde fraudulent promotional campaign, Barranquilla netted approximately $5.8 million in profits through its sale of Concorde stock. Tullis Decl., Ex. 1 at ¶¶ 8-10(b).

b. Chiang Ze received 1 million Concorde shares in its Sunstate account on July 23, 2004. Sunstate Receipt of Concorde Stock Certificates, Composite Ex. 101; Declaration of Kimberly Miller, ("Miller Decl."), Ex. 102.[6] Kos had trading authority for this account. Sunstate Trading Authorization, Ex. 25. During the fraudulent Concorde promotional campaign, Chiang Ze netted more than $898,000 through sales of Concorde stock. Tullis Decl., Ex. 1 at ¶¶ 8-10 (a).

[6] Penson Financial Services, Inc., reissued the original Concorde stock certificates transferred to Chiang Ze, Da Silva and Vanderlip to facilitate trading in these shares. Penson acts as a clearing agent for Sunstate's trades. This reissuance caused the Concorde certificates to bear a different stock certificate number, however they were the same shares originally issued to these entities. Declaration of Kimberly Miller, Ex. 102.

c. DaSilva maintained a brokerage account at Sunstate over which Oehmke had trading authority. Sunstate Trading Authorization, Ex. 35. On July 23, 2004, Da Silva received 2 million Concorde shares in this account. Sunstate Receipt of Concorde Certificates, Composite Ex. 103; Miller Decl., Ex. 102. DaSilva netted more than $1.8 million through sales of Concorde stock while the stock was being fraudulently promoted. Tullis Decl., Ex. 1 at ¶¶ 8-10(c).

d. Vanderlip received two million in an account it held at Sunstate in July and August 2004. Sunstate Receipt of Concorde Stock Certificates, attached as Composite Ex. 104; Miller Decl. Ex. 102.[7] Oehmke had authority over the Vanderlip account at Sunstate to buy, sell and trade shares. Sunstate Trading Authorization, Ex. 38. Vanderlip then transferred its Concorde shares from Sunstate to its account at Electronic Access for trading. Electronic Access Security Movement Report, Ex. 105. Overall, Vanderlip made approximately $26,000 trading Concorde stock. Tullis Decl., Ex. 1 at ¶¶ 8-9.

e. Ventana also traded in Concorde stock through its account at Newbridge from July 30, 2004 through August 4, 2004. Tullis Decl., Ex. 1 at ¶ 3(f), Ex. F. Oehmke controlled the trading in this account. Kantrowitz Dec, Ex. 23 at ¶ 6. During the Concorde fraudulent promotional campaign, Ventana netted $5,263.96 in trading profits. Tullis Decl., Ex. 1 at ¶ 9.

In total, as a result of their trading activities, Relief Defendants' brokerage accounts netted more than $8.5 million in profits from trading Concorde stock. Tullis Decl., Ex. 1 at ¶ 8. The Commission believes that additional bank records will show millions in direct and indirect payments to Oehmke, Kos and entities they control.[8]

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[7] The Vanderlip account opening documents show Penson Financial Services, Inc., because that firm acted as the clearing agent for Sunstate's trades.

[8] The Commission has subpoenaed the SunTrust bank trust account records of the Bush Ross law firm, which received proceeds from the Relief Defendants' brokerage accounts during the Concorde promotional campaign. One of the firm's partners, Jeremy Ross, Esq., advised the Commission that absent a Court Order, he will not produce the firm's trust account records because counsel for Oehmke and Kos advised him to assert the attorney-

IV. LEGAL ARGUMENT

A. An Adverse Inference Should Be Drawn From Defendants' Exercise Of The Fifth Amendment

Oehmke and Kos exercised their Fifth Amendment privilege during their testimony to every relevant question (other than their personal identification information), and Kos asserted the privilege instead of filing a sworn accounting. Sworn Testimony Transcript of Donald E. Oehmke, September 13, 2004, Ex. 106; Sworn Testimony Transcript of Bryan Kos, September 13, 2004, Ex. 107. Courts may draw an adverse inference may be drawn against parties to civil actions when they refuse to testify in response to probative evidence offered against them. *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976); *United States v. A Single Family Residence*, 803 F.2d 625, 629 n. 4 (11th Cir. 1986) (district court drew a permissible inference from failure to testify that testimony would not have been favorable to the corporation's position); *FDIC v. Elio*, 39 F.3d 1239 (1st Cir. 1994) (district court entitled to draw negative inference against defendant who was recipient of fraudulent transfer); *SEC v. Cherif*, 933 F.2d 403, 412 (7th Cir. 1991) (affirming preliminary injunction where court took adverse inference from assertion of Fifth Amendment); *SEC v. Scott*, 565 F.Supp. 1513 (S.D.N.Y. 1983) (evidence of scienter was bolstered by defendant's exercise of Fifth Amendment privilege).

Because Oehmke and Kos refused to answer all questions concerning this matter, the Court should infer that if they had testified the testimony would not have been favorable to their positions. This supports the Court's entry of the preliminary injunction, the asset freeze and the other relief the Commission requests. *United States v. Two Parcels of Real Property*, 868 F. Supp. 306, 311 (M.D. Ala. 1994) (granting summary judgment based on probative evidence and inference that because defendants invoked Fifth Amendment, their testimony "would not have

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client privilege. The Commission intends to file a separate motion compelling production of the firm's trust account records.

been favorable to their position"). *See also SEC v. Prater*, 289 F. Supp.2d. at 50 (defendant's invocation of the Fifth Amendment weighed in favor of issuing preliminary injunction against him). Thus, the Court should keep in mind Oehmke's and Kos's complete lack of substantive testimony and their failure to file accountings when considering the evidence that an injunction and asset freeze is appropriate.

B. Oehmke And Kos Violated The Anti-Fraud Provisions Of The Securities Laws

1. Violations of Section 10(b)

The Commission's Complaint alleges Oehmke and Kos violated Section 10(b) of the Exchange Act and Rule 10b-5, which proscribe fraudulent conduct in connection with the purchase or sale of securities. *U.S. v. Naftalin*, 441 U.S. 768, 773 (1979). These provisions prohibit making any untrue statement of material fact or omitting to state material facts in connection with the purchase or sale of securities. A fact is material under the securities laws if a "reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *SEC v. Carriba Air, Inc.* 681 F.2d 1318, 1327 (11th Cir. 1982). The Commission must also show Oehmke and Kos acted with scienter. *SEC v. Chemical Trust,* No. 00-8015-CIV-Ryskamp, 2000 WL 33231600 at *9 (S.D. Fla. Dec. 19, 2000)(defendants' knowing distribution of offering materials they knew contained false and misleading information established requisite scienter).

2. Oehmke and Kos Made False Statements and Omissions

A defendant makes a false statement when he "acting alone or with others, creates a misrepresentation." *In re Enron Corp. Sec.*, 235 F.Supp.2d 549, 588 (S.D. Tex. 2002). Section 10(b) and Rule 10b-5 permit violations to be established against defendants who, with scienter, participate in a course of business or a "device, **scheme**, or artifice" that operates as a fraud on

sellers or buyers of stock, even if the defendants did not make a false statement. *Id.* (emphasis added); *See also, Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-53 (1972). *See also SEC v. Zandford*, 535 U.S. 813, 819-22 (2002) (continuous series of unauthorized sales of securities and personal retention of proceeds without client's knowledge properly viewed as a course of business that operated as a fraud in connection with the sale of securities); *Santa Fe Indus. v. Green*, 430 U.S. 462, 475-76 (1977) (Section 10(b) covers deceptive practices and conduct).

Here, Oehmke and Kos made false statements and omissions within the meaning of Section 10(b) and Rule 10b-5 by orchestrating two multi-media campaigns endorsing companies that had little, if any, business. They executed this plan by hiring and directing promoters to tout Concorde and Absolute Health stock through factually baseless analyst reports, tout sheets, press releases and the internet, knowing the information was false and misleading.

More specifically, Oehmke and Kos approved analyst reports Heysek and Kline wrote for dissemination to the public in various forms, including on websites, through Spreadbury's press releases and tout sheets and in voice messages. They did the same with Absolute Health, even producing a video broadcast on the internet. They approved widespread distribution of these materials even though they knew (1) Concorde was a fledgling company with no revenues, no profits, and not even one worker in Spain or anywhere else in the world, and (2) Absolute Health had absolutely no business and only existed as a renamed shell company.

This conduct makes them liable under Section 10(b) and Rule 10b-5 because they were involved in creating, editing or reviewing false statements that reached investors. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1471 (2nd Cir. 1996) ("primary liability may be imposed not only on persons who made fraudulent misrepresentations **but also on those who had knowledge**

of the fraud and assisted in its perpetration") (internal quotation marks and citation omitted) (emphasis added); *Enron*, 235 F.Supp.2d at 588 (adopting Commission's definition that to "make" a false statement under Rule 10b-5, a person "can be a primary violator if he or she writes misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else") (emphasis added); *McNamara v. Bre-X Minerals Ltd.*, 57 F.Supp.2d 396, 426 (E.D. Tex. 1999) ("if a defendant played a 'significant role' in preparing a false statement actually uttered by another, primary liability will lie"); *In re Sunbeam Sec. Litig.*, 89 F.Supp.2d 1326, 1342 (S.D. Fla. 1999) (any complex securities fraud case is likely to have "multiple violators" who each participated at some level in creating a misrepresentation). Accordingly, Oehmke and Kos made false statements and omissions within the meaning of the federal securities laws.

3. Oehmke and Kos's False Statements and Omissions Were Material

An omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). *See also Carriba Air*, 681 F.2d at 1323.

Here, Oehmke and Kos approved Concorde promotional materials that:

- Misrepresented that Concorde had contracts with European countries and the Spanish government, when, in reality, all Concorde had was a single contract with a Spanish company;
- Projected hundreds of millions of dollars in revenue and profits for Concorde based on workers the company was going to send to Europe while neglecting to mention that Concorde in reality had never placed a worker and had no revenue;
- Projected astronomical share price increases for Concorde based on projections the company president classified as "ridiculous" and impossible to achieve; and

- Made up people and quotes.

With regard to Absolute Health, Oehmke and Kos approved and disseminated promotional materials to the investing public that:

- Falsely stated Absolute Health owned and was in the process of acquiring fitness centers when, in fact, it owned nothing and had no prospects of acquiring any fitness centers; and

- Falsely stated Absolute Health had revenues when it did not.

In sum, Oehmke and Kos were intricately involved in producing and distributing materials about the two companies that misstated virtually every relevant fact about them. On their face, these misrepresentations and omissions were material. In deciding whether to buy the stock of Concorde and Absolute Health a reasonable investor would certainly consider the fact that neither company had the business the promotional materials claimed. A reasonable investor obviously would want and need to know that Absolute Health did not own any fitness centers. A reasonable investor would further consider it extremely important to know that the president of Concorde had rejected the factual bases of the revenue and stock price projections about the company. It is hard to imagine misrepresentations and omissions being more material.

4. Oehmke and Kos Acted With Scienter

The evidence establishes that Oehmke and Kos acted with scienter, which the courts have defined as either knowing misconduct or severe recklessness – an extreme departure from the standards of ordinary care. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976); *Carriba Air*, 681 F.2d at 1322. Added to this evidence is Oehmke and Kos's assertion of the Fifth Amendment privilege from which the Court should infer they acted with the requisite scienter *See Scott*, 565 F.Supp. at 1533 (drawing negative inference from defendant's exercise of Fifth

Amendment that he acted with requisite scienter, knowledge and intent that he violated the securities laws).

Here, the evidence overwhelmingly shows Oehmke and Kos knew, or were severely reckless in not knowing, the entire promotional campaign they orchestrated was false and misleading. Kos reviewed and approved the public distribution of the analyst reports Heysek and Kline prepared about Concorde, and the tout sheets and press releases Spreadbury created. The analyst reports and Spreadbury's first press release both said Concorde had a three-year contract with the Spanish *government*, which Kos knew or was extremely reckless in not knowing was false. The analyst reports also contained revenue and share-price projections for Concorde based on figures Kos knew Concorde's president had termed ridiculous. The analyst reports further stated Concorde would have extraordinary revenues and profits in 2006, when Kos knew or was reckless in not knowing Concorde had no contracts to support **any** revenue or profit projections for that year.

With regard to Absolute Health, because he was involved in meetings between the principals, Kos knew that no merger between Oehmke's company and the holding companies that actually owned fitness centers ever occurred. Therefore, he knew that Absolute Health's promotion as an up-and-coming fitness center owner was a complete sham. Under these circumstances, Kos acted with the requisite scienter.

Similarly, Oehmke knew the touting was false because he also was involved in meetings between the principals that his company had never acquired any fitness centers. Yet he knew Kos and others were distributing promotional materials to the public that falsely claimed Absolute Health was a fitness center owner. As with Kos, Oehmke knew Absolute Health had no business, no revenues and no fitness centers, and he was aware of the fraudulent promotional

campaign and promotional materials containing revenue and profit projections in the hundreds of millions of dollars. Oehmke also knew that Concorde had no business and no revenue and had yet to place even a single worker in Spain. Therefore, Oehmke plainly acted with scienter.

5. The Conduct Was In Connection With The Purchase and Sale Of Securities

The Commission must show that the fraudulent conduct of Oehmke and Kos occurred in connection with the purchase or sale of securities. The Supreme Court has held that the federal courts should broadly interpret this "in connection with" requirement of the securities laws to effectuate their remedial purpose. *Zandford,* 535 U.S. at 819. Statements or omissions made with regard to trading in general, not just particular transactions, meet the "in connection with" requirement. *In re Carter-Wallace Sec. Litig.*, 150 F.3d 153, 156 (2nd Cir. 1998) (company statements in technical medical journals were in connection with trading of securities); *SEC v. Rana Research,* 8 F.3d 1358, 1362 (9th Cir. 1993) (press releases were in connection with stock trading); *In re Ames Dep't Stores Inc. Stock. Litig.*, 991 F.2d 953, 966 (2d Cir. 1993) (annual reports and Commission filings met "in connection with" test).

The omissions and misrepresentations Oehmke and Kos made were in connection with securities trading. They approved distributing promotional materials about Concorde and Absolute Health rife with omissions and misrepresentations for the express purpose of interesting investors in buying the stock of both companies. They knew the promoters were posting and communicating the false information through channels aimed specifically at potential purchasers of stock. Their long-term goal, of course, was to drive up the stock prices of both companies so they could, in turn, sell their own shares (or those of the Relief Defendants) for the highest price possible. Thus, their conduct was in connection with the purchase and sale of securities. *SEC v. Corporate Relations Group*, Case No. 6:99-cv-1222, 2003 U.S. Dist. Lexis 24925 at *31 (M.D.

Fla. March 28, 2003) (promoters' conduct was in connection with the purchase and sale of securities because it acquired and sold stock it recommended that others buy); *SEC v. Blavin*, 557 F. Supp. 1304, 1310-11 (E.D. Mich. 1983) (statements were made in connection with the purchase and sale of securities because sole purpose of newsletter was to recommend stock the promoter-defendant sold).

C. An Order Freezing Assets Is Warranted To Preserve Investor Funds

In its Complaint, the Commission seeks injunctive relief, disgorgement of the Defendants' ill-gotten gains, an accounting, an asset freeze, repatriation of foreign funds, prejudgment interest and civil penalties. Here, the ancillary remedy of an asset freeze is appropriate to prevent Oehmke and Kos from dissipating the proceeds of their fraudulent scheme, to require Kos and Oehmke to provide sworn accountings of the ill-gotten gains they received, and to ensure sufficient funds are ultimately available to satisfy any final judgment the Court might enter ordering the payment of disgorgement, prejudgment interest or civil penalties.

1. Standard for Obtaining a Preliminary Injunction

Under Rule 65, the Court may issue a preliminary injunction after providing notice to the adverse party. Fed. R. Civ. P. 65; Order of August 5, 2005, D.E. 91. Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), entitles the Commission "upon a proper showing" to a preliminary injunction. *SEC v. Unifund SAL*, 910 F.2d 1028, 1035 (2d Cir. 1990); *SEC v. Lybrand*, Case No. 00Civ.1387, 2000 WL 913894 *1, *9 (S.D.N.Y. July 6, 2000). This "proper showing" has been described as a "justifiable basis for believing, derived from reasonable inquiry and other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged in violations of the statutes involved." *SEC v. General Refractories Co.*, 400 F. Supp. 1248, 1254 (D.D.C. 1975).

Such a showing is made when the Commission presents a *prima facie* case that the Defendants have violated the law, and that there is a likelihood of a risk of repetition. *Lybrand*, 2000 WL 913894 at *9; *SEC v. Cavanaugh*, 155 F.3d 129, 132 (2d Cir. 1998). Unlike private litigants, the Commission need not demonstrate irreparable harm or the unavailability of an adequate remedy at law. *Lybrand*, 2000 WL 913894 at *9. As shown in the facts set forth above, the Commission is easily able to demonstrate that the Defendants have violated the securities laws set forth below, and will continue to violate them if not immediately enjoined from their fraudulent activity.

As this Court has found, Rule 65 is the mechanism by which courts may grant emergency relief freezing assets. *SEC v. Asset Recovery and Management Trust, S.A.*, 340 F.Supp.2d 1305, 1309-10 (M.D. Ala. 2004) (court analyzed whether magistrate's order freezing assets should be regarded as a temporary restraining order or a preliminary injunction under Rule 65, regardless of the fact that magistrate's order was not so labeled and concluded it should be treated as a preliminary injunction); *Trafalgar Power Inc. v. Aetna Life Ins. Co.*, 131 F.Supp.2d 341, 350 (N.D.N.Y. 2001) (court is empowered to grant preliminary relief freezing assets in case seeking equitable relief under Rule 65).

An asset freeze "facilitates enforcement of any disgorgement remedy that might be ordered" and may be granted "even in circumstances where the elements required to support a traditional SEC injunction have not been established." *Unifund*, 910 F.2d at 1041. Indeed, an asset freeze requires a *lesser* showing than a preliminary injunction. *Cavanaugh*, 155 F.3d at 132 ("an asset freeze requires a lesser showing; the SEC must establish only that it is likely to succeed on the merits"); *Unifund*, 910 F.2d at 1041 (asset freezes appropriate "even in circumstances where the elements required to support a traditional SEC injunction have not been established").

2. The Court's Broad Equitable Powers

Pursuant to their general equity powers, federal courts may order ancillary relief to effectuate the purposes of the federal securities laws. *Levi Strauss & Co. v. Sunrise Int'l Trading Co.*, 51 F.3d 982, 987 (11th Cir. 1995) (a request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze); *SEC v. Posner*, 16 F.3d 520, 521-22 (2d Cir. 1994) (courts have "broad equitable power in securities cases to fashion appropriate ancillary remedies necessary to grant full relief"); *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990); *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980); *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1103 (2d Cir. 1972) (district court's entry of asset freeze as ancillary relief to effectuate the purpose of the securities laws was proper exercise of its equity powers); *SEC v. Current Financial*, 62 F.Supp.2d at 66 (D.D.C. 1999) ("District courts have the equitable power to use ancillary remedies to preserve assets"); *SEC v. R.J. Allen & Assoc.*, 386 F. Supp. 866, 881 (S.D. Fla. 1974) (once the equity jurisdiction of the court has been invoked by a securities law violation, the Court possesses the necessary power to fashion an appropriate remedy).

When there are concerns that defendants might dissipate assets, or transfer them beyond the jurisdiction of the Court, the Court need only find some basis for inferring a violation of the federal securities laws in order to impose an asset freeze. *Unifund SAL*, 910 F.2d at 1041-42. *See also SEC v. Margolin*, 1992 U.S. Dist. LEXIS 14872 at *19-*20 (S.D.N.Y. Sept. 30, 1992) (court issued freeze order based on "sufficient showing" that an asset freeze was necessary to prevent defendants from "secreting or dissipating" assets); *SEC v. Grossman*, 1987 U.S. Dist. LEXIS 1666, at *35-*36 (S.D.N.Y. Feb. 17, 1987) ("[a]n order freezing assets may be imposed even in the absence of a preliminary injunction"). Indeed, it is well settled that a court may impose an interim asset freeze in

order to preserve funds for a number of equitable remedies, including disgorgement, and subject *all assets owned* by a defendant to the freeze up to the amount of the defendant's "ill-gotten gains." *CFTC v. American Metals Exchange Corp.*, 991 F.2d 71, 79 (3d Cir. 1993); *SEC v. Current Financial Serv., Inc.*, 783 F. Supp. 1441, 1443 (D.D.C. 1992). Such a broad asset freeze is generally necessary to ensure that a future disgorgement order will not be rendered meaningless. *See, e.g., United States v. Cannistraro*, 694 F. Supp. 62, 71-72 (D.N.J. 1988); *SEC v. Vaskevitch*, 657 F. Supp. 312, 315 (S.D.N.Y. 1987); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1347 (2d Cir. 1974); *R.J. Allen*, 386 F. Supp. at 881 ("[a]s to the issue of an asset freeze, the court certainly has the ability to ensure that the defendants' assets are not secreted or dissipated before entry of final judgment concluding this action").

To ensure compensation to victims of securities fraud, courts commonly maintain an asset freeze when a defendant's potential liability for disgorgement, prejudgment interest and civil penalties exceeds the value of the frozen property. *SEC v. Comcoa, Ltd.*, 887 F. Supp. 1521, 1524 (S.D. Fla. 1995); *Current Financial Services*, 62 F. Supp. 2d at 67-68 (holding that it was reasonable to maintain an asset freeze over *all* of defendant's assets and rejecting a request for attorneys' fees because the potential disgorgement the SEC could receive far exceeded the amount of frozen funds); *Grossman*, 887 F.Supp. at 661; *SEC v. Roor*, 1999 WL 553823 (S.D.N.Y. July 29, 1999) (refusing to release any of defendant's funds to pay counsel because there was "a likelihood that defendant would soon have significant personal liabilities to the government and victims of the fraud").

In addition, there is no requirement that frozen assets be traceable to the fraud and, in fact, courts typically freeze funds and assets not so traceable. *See e.g. Grossman*, 887 F.Supp. at 661 ("[i]t is irrelevant whether the funds affected by the assets freeze are traceable to the illegal

activity"); *aff'd*, 101 F.3d 109 (2d Cir. 1996); *SEC v. Glauberman*, 1992 WL 175270, 1 (S.D.N.Y. 1992) (rejecting defendant's argument that funds subject to disgorgement must be traced "dollar for dollar" to the illegal activity, and noting that defendant cannot take refuge in having commingled his profits with his other personal funds"); *SEC v. Belmonte*, 1991 WL 214252 (S.D.Fla. 1991).

3. A Freeze Over Oehmke and Kos's Assets is Appropriate

Here, the Commission has presented more than a sufficient basis for inferring that Oehmke and Kos violated the federal securities laws by fraudulently promoting the stock of Concorde and Absolute Health to drive up the price of both for their own gain. As set forth above, Oehmke and Kos orchestrated two multi-media campaigns endorsing companies that had little, if any, business. They specifically directed promoters to tout Concorde and Absolute Health stock through factually baseless analyst reports, tout sheets, press releases, voice-mails and the internet, knowing the information was false and misleading.

Once the fraudulent promotional campaign was in place, Oehmke and Kos ordered the trading of these shares in Relief Defendants' brokerage accounts. Specifically, Oehmke controlled both companies that issued the Concorde and Absolute Health stock to Relief Defendants. Michigan Corporate Records, Ex. 3; Pennsylvania Corporate Records, Ex. 4; Action By Written Consent, Ex. 74. Then, Oehmke exercised his trading authority to sell the stock held by all five Relief Defendants' brokerage accounts. For example, the Newbridge broker took his trading instructions from Oehmke, not the nominees, and had very little contact with the nominees. Kantrowitz Decl., Ex. 23 at ¶¶ 3, 4, 6-8; Newbridge Trading Authorizations, Exs. 14, 28. Oehmke also could order trades for the Barranquila, DaSilva and Vanderlip accounts at Sunstate brokerage, and enjoyed the same authority over the Electronic Access accounts for Barranquilla, Chiang Ze and Ryzcek. Sunstate Trading Authorizations, Exs. 16, 35,

38; Electronic Access Trading Authorizations, Exs. 18, 24, 30. Similarly, Kos had authority to trade the Chiang Ze and Ryzcek accounts with Sunstate. Sunstate Trading Authorizations, Exs. 25, 32.

Oehmke and Kos's trades of Concorde and Absolute Health shares generated approximately $22.9 million in illegal gains wired to offshore nominee accounts. Tullis Dec., Ex. 1 at ¶¶ 5, 8, 11 (a) and 11 (b). An accounting analysis of the brokerage account statements and the bank records reveals that Barranquilla's $9.2 million trading profits were wired to FCIB and then disbursed, at least in part, to Oehmke. *Id.;* Galdencio Decl., Ex. 2 at ¶ 5. Chiang Ze also wired its trading proceeds to FCIB, and later transferred funds to Oehmke. Tullis Dec., Ex. 1 at ¶ 11(b); Galdencio Decl., Ex. 2 at ¶ 6. Other FCIB accounts received trading proceeds and wired these to Relief Defendants as well, with at least one disbursement to Kos. Galdencio Decl., Ex. 2 at ¶¶ 5, 6, 8, 9.

Oehmke and Kos have failed to comply with this Court's Order dated March 1, 2005, which required a sworn accounting to the Court and the Commission, therefore, the current value of their assets is unknown.[9] They also failed to answer relevant questions concerning their assets during their testimony. To date, the Commission has been able to track more than $3.97 million in direct payments to Oehmke and Kos. The Commission is still attempting, however, to track what happened to the millions of additional dollars earned through the pump and dump scheme.

Even if Oehmke and Kos are held liable only for the $3.97 million they directly received, that is far greater than the approximately $927,000 frozen. However, Oehmke and Kos may well

[9] On March 8, 2005, Oehmke provided the Commission with a sworn accounting, under penalty of perjury, which purportedly accounted for all of Oehmke's proceeds derived from sales of Concorde and Absolute Health stock. Oehmke disclosed that he received only approximately $86,000 from Ventana Consultant's sales of Absolute Health and Concorde shares. Oehmke failed to account for any of the $3.7 million in proceeds he received from Relief Defendants that can be directly traced to sales of Concorde and Absolute Health stock. Galdencio Decl., Ex 2 at ¶¶ 5, 6, 8. Thus, Oehmke's accounting is unreliable if not perjurous.

be liable for all of the fraudulent profits dispersed in this scheme at the expense of investors, because when two or more individuals or entities collaborate or have close relationships in engaging in the securities laws violations, they may be held jointly and severally liable for the entire amount of the fraud. *See e.g. SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3rd Cir. 1997) (holding a defendant jointly and severally liable for disgorgement); *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1191-92 (9th Cir. 1998) (holding defendant who was chairman, CEO and majority shareholder jointly and severally liable with corporate defendant); *SEC v. Berger*, 244 F.Supp.2d 180 (S.D.N.Y. 2001) (holding defendant jointly and severally liable with corporation because he conceived of the fraud and controlled the corporate defendant). Oehmke and Kos will also be liable for prejudgment interest and civil penalties.

Under either scenario, Oehmke and Kos's potential liability greatly exceeds their assets currently frozen. So far, the Court's orders have resulted in $938,000 in frozen funds. There remains a shortfall of millions of dollars in unaccounted for money that that the Court may order disgorged. The Commission has been unable to determine where millions of this money went. As a result, the Court should keep the freeze in place and not release funds from any of Oehmke and Kos's assets. *SEC v. Bremont,* 954 F.Supp. 726, 733 (S.D.N.Y. 1997) (denying defendant's motion to use frozen assets where defendants had asserted Fifth Amendment privilege, and as a result, court could not determine whether frozen assets exceeded the request for damages); *SEC v. Schiffer,* Case No. 97 Civ. 5853, 1998 WL 307375, *7 (S.D.N.Y. June 11, 1998) (continuing previous asset freeze where Defendant asserted Fifth Amendment and refused to provide sworn accounting because Court had to assume that all of Defendant's accounts were traceable to fraud); *FTC v. International Charity Consultants, Inc.*, Case No. CV-S-94-195-DWH, 1994 WL 263887, *1, *3 (D. Nev. April 26, 1994) (denying motion to relax asset freeze after Defendants

refused on Fifth Amendment grounds to provide financial information because of the substantial amount of potential liability and the limited amount of funds thus far discovered by the receiver).

In addition, there also a well-founded basis for concluding that, absent an asset freeze, Oehmke and Kos will continue to dissipate investor funds. For example, Oehmke has already funneled at least $ 3.7 million of trading profits into offshore accounts. Tullis Decl., Ex. 1 at ¶¶ 3, 4, 11 (a) and (b); Galdencio Decl., Ex. 2, ¶¶5, 6, 8. Similarly, Kos has funneled approximately $250,000 of trading profits into offshore accounts through the various relief defendants. Tullis Decl., Ex. 1 at ¶¶ 11 (b); Galdencio Decl., Ex. 2, ¶9. Thus, an immediate order freezing Oehmke and Kos's assets is needed to prevent them from further transferring funds so as not to render any order for disgorgement and prejudgment interest meaningless.

4. The Court Should Keep Relief Defendants' Assets Frozen

A continued asset freeze is also appropriate as to the Relief Defendants. Federal courts may order equitable relief, such as disgorgement, against a party who is not accused of wrongdoing where that party received ill-gotten funds without a legitimate claim to those funds. *Cavanaugh*, 155 F.3d at 136 (federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action); *SEC v. Colello*, 139 F.3d at 674, 676 (9th cir. 1998); *Cherif*, 933 F.2d at 414, n.11; *SEC v. Heden*, 51 F.Supp.2d 296, 299 (S.D.N.Y. 1999). In addition, ample authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong." *Colello*, 139 F.3d at 676 (nominal defendant required to disgorge more than $2 million received from stock fraud where he failed to prove that he received the funds as compensation for his services in arranging letters of credit); *Heden*, 51 F.Supp.2d at

299; *Elfindepan*, 2002 WL 31165146 at *4; *Chemical Trust*, 2000 WL 33231600 at *11. *See also, SEC v. Infinity Group*, 993 F. Supp, 324, 331 (E.D. Pa. 1998), *aff'd*, 212 F.3d 180 (3d Cir. 2000) (relief defendants ordered to disgorge funds received from Ponzi scheme, including donation to religious organization and funds transferred to charitable trust and other organizations for which no consideration was given); *SEC v. Antar*, 831 F.Supp. at 380, 400 (D.N.J. 1993).

Here, the Relief Defendants' profits indisputably came from the Oehmke and Kos's trading of Concorde and Absolute Health stock, generated through the fraudulent pump and dump scheme Oehmke and Kos orchestrated. Services rendered in furtherance of a fraud do not constitute a legitimate claim on the ill-gotten gains of the fraud. *Infinity Group Co.*, 993 F. Supp. at 331. Moreover, as between the investors and a Relief Defendant, the relief defendant has "no bona fide claim of title to any of the securities offering's proceeds." *Chemical Trust,* 2000 WL 33231600 at *11; *see also Antar*, 831 F.Supp. at 402 (nominal defendants should not be allowed to retain funds that are the product of securities fraud at the expense of defrauded investors).

Because Oehmke and Kos used the Relief Defendants' accounts to shelter the proceeds of their fraud, the Court should also freeze the Relief Defendants' assets in order to effectuate relief. *See SEC v. Hickey*, 322 F.3d 1123 (9th Cir. 2003) (court's broad power to reach assets of third parties in order to effect order in securities fraud actions authorized the freeze of non-parties' assets to protect and give life to disgorgement and contempt orders); *Cherif*, 933 F.2d at 414, n.11 (equitable relief from a non-party is available if non-party possesses illegally obtained profits but has no legitimate claim to them). Here, the trading records show Oehmke and Kos effectuated trades and then transferring the proceeds to their nominee offshore accounts to reap millions. In a short period of time, Oehmke and Kos profited from their fraud, transferring more than $8.5 million

in profits from Concorde trades and $14.4 million of illicit gains from Absolute Health trades to offshore nominee accounts beyond the reach of this Court. Thus, this Court should also freeze Relief Defendants' assets to prevent their dissipation and allow recovery of these ill-gotten gains.

D. An Order Requiring Repatriation Of Funds

The Commission may seek repatriation of the proceeds of illegal securities transactions. *See FTC v. Affordable Media, LLC,* 179 F.3d. 1228 (9th Cir. 1999); *SEC v. Antar*, slip op., No. 89 Civ. 3773 1990 SEC LEXIS 183 (Jan. 29, 1990) (D.N.J. January 24, 1990). Here, the Commission has identified offshore nominee accounts in the Bahamas through which Oehmke and Kos have conducted their trading and dumping of Concorde and Absolute Health stock. In addition, the Commission has information identifying bank accounts in Curacao, which may contain proceeds of this fraud. Therefore, an order repatriating from abroad all funds resulting from the fraudulent conduct is appropriate. If the Commission obtains a money judgment against the proposed defendants, all of the illegally obtained assets they control should be available to satisfy that judgment. Accordingly, the Commission requests authorization to seek a repatriation order against the proposed defendants.

E. An Order Prohibiting Destruction Or Alteration Of Records And Requiring Sworn Accountings

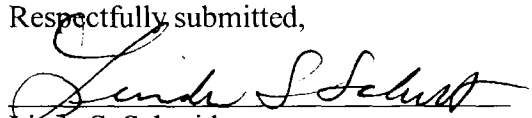
The Commission also seeks an order prohibiting all of the Defendants and Relief Defendants from destroying or altering records. This order will prevent the disappearance or destruction of documents before investors' claims can be adjudicated and help assure that whatever equitable relief might ultimately be appropriate is available. *R.J. Allen*, 386 F. Supp. at 866. The Commission also seeks an Order requiring Oehmke and Kos to file with this Court, within twenty days, sworn written accountings, signed by Oehmke and Kos under penalty of perjury.

V. CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for an order of preliminary injunction freezing Defendants Oehmke, Kos and the Relief Defendants' assets, providing a full accounting and repatriation of funds and preventing the destruction or alteration of documents and any other relief this Court deems appropriate.

August 22, 2005

Respectfully submitted,

By: 

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-80128-CV-ZLOCH
DE#97

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