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KEVIN V. RYAN (CSBN 118321)
United States Attorney

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FILED

SEP 29 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CR 04 20179 **JI**
CR No. **PVT**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
SUSAN K. POWELL and)
MICHAEL J. JOHNSTON,)
)
Defendants.)

VIOLATIONS: 18 U.S.C. § 371--
Conspiracy; 18 U.S.C. § 1341 -- Mail Fraud;
18 U.S.C. § 1956(h) -- Conspiracy to Commit
Money Laundering; 18 U.S.C. §
1957--Engaging In Monetary Transactions In
Property Derived From Mail Fraud; 26
U.S.C. § 7201--Tax Evasion; 26 U.S.C. §
7206(1)--False Subscription of Tax Return;
26 U.S.C. § 7206(2)--Aiding and Abetting
Presentation Of A False Tax Return; 18
U.S.C. § 982 --Criminal
Forfeiture

SAN JOSE VENUE

INDICTMENT

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

At all times relevant to this Indictment:

1. Defendant Michael J. Johnston was the president and chief executive officer of a graphics advertising and design company in Los Gatos, California. Between 1995 and 1999, this company was known, successively, as "The Source Group," and, "Catapult Design Group." Beginning in 1999, this company was known as "Transcend Advertising and Design."

INDICTMENT

1
2 2. Defendant Susan K. Powell was employed as vice-president of marketing of "24 Hour
3 Fitness," a Pleasanton, California company that operates personal fitness gyms in Northern
4 California and elsewhere. In the position of vice-president of marketing, a part of her
5 responsibilities included decision-making authority over marketing strategies on behalf of 24
6 Hour Fitness.

7 THE CONSPIRACY

8 COUNT ONE: (18 U.S.C. § 371--Conspiracy)

9 4. On or about and between December 31, 1996, and January 31, 2000, the County of
10 Santa Clara, Northern District of California, and elsewhere, the defendants

11 SUSAN K. POWELL and
12 MICHAEL J. JOHNSTON

13 did knowingly and willfully conspire to commit offenses against the United States, that is, the
14 defendants conspired to:

15 a. Devise and execute a scheme to defraud 24 Hour Fitness, and to obtain money and
16 property by means of false and fraudulent pretenses, representations, and promises, specifically
17 by submitting to 24 Hour Fitness invoices containing false information regarding the production
18 costs of print materials produced by defendant Johnston's graphic advertising and design
19 company, and thereafter gaining the authorization and facilitation of payments from 24 Hour
20 Fitness to defendant Johnston's graphic advertising and design company which were grossly in
21 excess of the fair market value for the services provided, and for the purpose of executing such
22 scheme use the United States mails to send payments to defendant Johnston which included
23 payments for the falsely inflated costs, in violation of Title 18, United States Code, Section 1341.

24 MANNER AND MEANS OF THE CONSPIRACY

25 5. It was part of the conspiracy that defendant Powell, in her position as vice-president
26 of marketing of 24 Hour Fitness, outsourced a portion of the print advertising accounts for 24
27 Hour Fitness to defendant Johnston's graphic advertising and design company.

28 6. It was further part of the conspiracy that Johnston submitted invoices to Powell at 24
Hour Fitness for the production of print advertising material by his company which falsely

1 inflated the actual cost of producing the material.

2 7. It was further part of the conspiracy that defendant Powell knowingly used her
3 position as a vice-president of marketing at 24 Hour Fitness to approve payment to Johnston for
4 the falsely inflated invoices.

5 8. It was further part of the conspiracy that Powell caused payments for the falsely
6 inflated invoices to be sent by U.S. mail from 24 Hour Fitness offices in Carlsbad, California to
7 Johnston's graphic advertising and design company in Los Gatos, California.

8 9. It was further part of the conspiracy that upon receiving the payments from 24 Hour
9 Fitness for the falsely inflated invoices, Johnston deposited the checks received into his business
10 checking account.

11 10. It was further part of the conspiracy that Johnston "kicked back" (that is, paid) a
12 portion of the falsely inflated costs to Powell by writing her third-party checks, making payments
13 on her credit card bills, and making payments on her cellular phone bills.

14 OVERT ACTS IN FURTHERANCE OF THE CONSPIRACY

15 11. In furtherance of the conspiracy and to effect its objects, the defendants Susan K.
16 Powell and Michael J. Johnston committed and caused to be committed the following overt acts,
17 in the Northern District of California and elsewhere:

18 Checks Mailed from 24 Hour Fitness to Johnston Containing Payments For Falsely Inflated
19 Billings

20	<u>OVERT</u> <u>ACT</u>	<u>DATE</u>	<u>CHECK #</u>	<u>AMOUNT</u>	<u>FROM</u>	<u>TO</u>
21	a.	7/20/97	313638	\$60,016.12	24 Hour Fit. Carlsbad, California	Source Group Los Gatos, California
22						
23	b.	7/2/98	005930	\$70,465.57	24 Hour Fit. Carlsbad, California	Catapult Los Gatos, California
24						
25	c.	2/5/99	047648	\$108,519.44	24 Hour Fit. Carlsbad, California	Catapult Los Gatos, California
26						

27	<u>OVERT</u> <u>ACT</u>	<u>DATE</u>	<u>CHECK #</u>	<u>AMOUNT</u>	<u>FROM</u>	<u>TO</u>
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1	d.	6/4/99	067151	\$71,008.12	24 Hour Fit. Carlsbad, California	Catapult Los Gatos, California
2						
3	d.	8/12/99	077808	\$78,859.10	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
4						
5	e.	11/2/99	088942	\$105,963.46	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
6						
7	f.	11/17/99	091873	\$47,925.59	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
8						
9	g.	12/21/99	096698	\$37,071.36	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
10						
11	i.	1/27/00	101957	\$104,715.25	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
12						
13	j.	2/18/00	105916	\$101,257.29	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
14						

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH FIVE: (18 U.S.C. § 1341 – Mail Fraud)

12. The factual allegations contained in Paragraphs One through Three and Count One are realleged and incorporated herein.

13. On or about the dates indicated for each Count, in Santa Clara County, Northern District of California and elsewhere, the defendants

SUSAN K. POWELL and
MICHAEL J. JOHNSTON,

for the purpose of executing a scheme to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, namely, the scheme described in Count One, did send and cause to be sent through the United States mails the following items:

<u>COUNT</u>	<u>DATE</u>	<u>CHECK #</u>	<u>CHECK AMOUNT</u>	<u>FROM</u>	<u>TO</u>
2	11/17/99	091873	\$47,925.59	24 Hour Fit.	Transcend

				Carlsbad, California	Los Gatos, California
3	12/21/99	096698	\$37,071.36	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
4	1/27/00	101957	\$104,715.25	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California
5	2/18/00	105916	\$101,257.29	24 Hour Fit. Carlsbad, California	Transcend Los Gatos, California

All in violation of Title 18, United States Code, Section 1341.

Enhancement Allegations for Counts One through Six

A. The loss attributable to each of Counts One through Five as a result of defendant Johnston's and defendant Powell's fraudulent scheme was more than \$500,000 but not more than \$800,000.

B. Defendant Powell abused her position of private trust in a manner that significantly facilitate the commission and concealment of the fraud against 24 Hour Fitness.

COUNT SIX: (18 U.S.C. § 1956(h)–Conspiracy to Launder Monetary Instruments)

14. The factual allegations contained in paragraphs One through Three and Counts One through Five of this Indictment are realleged and incorporated herein.

15. On or about and between December 31, 1996, and January 31, 2000, in Santa Clara County, in the Northern District of California, and elsewhere, the defendants

SUSAN K. POWELL and
MICHAEL J. JOHNSTON

did knowingly and intentionally conspire to engage in monetary transactions in criminally derived property of a value greater than \$10,000 affecting interstate commerce which in fact was derived from specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341, as set forth in Counts One through Five, in violation of Title 18, United States Code, Section 1957.

MANNER AND MEANS OF THE CONSPIRACY

1 16. The manner and means by which the conspiracy was carried out included the
2 following:

3 a. From in or about December 31, 1996, through January 31, 2000, the defendants
4 engaged in specified unlawful activity, to wit, mail fraud, as charged in Counts One through Five
5 of the Indictment.

6 b. It was part of the conspiracy that, upon receiving the proceeds of the unlawful
7 activity as a result of defendant Powell's authorization, defendant Johnston deposited checks
8 which contained in excess of \$10,000 in fraudulently obtained proceeds into his business
9 account.

10 c. It was further a part of the conspiracy that, after depositing the checks
11 containing the fraudulently obtained proceeds into his business bank account, defendant Johnston
12 paid defendant Powell a "kick back" from the criminally derived proceeds using business checks
13 and personal checks.

14 OVERT ACTS IN FURTHERANCE OF THE CONSPIRACY

15 17. In furtherance of the conspiracy and to effect its objects, the defendants, and
16 others, committed the following overt acts in the Northern District of California and elsewhere:

17 24 Hour Fitness Checks Deposited By Johnston Into His Business Checking Account

18 <u>OVERT</u>			
19 <u>ACT</u>	<u>DATE</u>	<u>CHECK #</u>	<u>AMOUNT</u>
20 a.	7/29/97	31368	\$60,016.12
21 b.	7/3/98	005930	\$70,465.67
22 c.	2/12/99	047648	\$108,519.44
23 d.	6/11/99	067151	\$71,008.12
24 e.	7/21/99	073436	\$78,859.10
25 f.	11/5/99	088942	\$105,963.46
26 g.	11/24/99	091873	\$47,925.59
27 h.	12/29/99	096698	\$37,071.36

28 <u>OVERT</u>			
<u>ACT</u>	<u>DATE</u>	<u>CHECK #</u>	<u>AMOUNT</u>

- i. 1/3/00 101957 \$104,715.25
- j. 2/25/00 105916 \$101,257.291

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS SEVEN THROUGH TEN: (18 U.S.C. § 1957--Engaging in Monetary Transactions With Funds Derived From a Specified Unlawful Activity)

18. The factual allegations contained in Paragraphs One through Three and Counts One through Six are realleged and incorporated herein.

19. On or about the dates indicated for each Count, in Santa Clara County, Northern District of California and elsewhere, the defendant

MICHAEL J. JOHNSTON,

did knowingly engage in monetary transactions in criminally derived property of a value greater than \$10,000 affecting interstate commerce which in fact were derived from specified unlawful activity, that is, mail fraud in violation of Title 18, United States Code, Section 1341, as set forth in Counts One through Five, to wit: the deposit of the following checks which contained in excess of \$10,000 in criminally derived proceeds, fraudulently obtained pursuant to the scheme described in Count One, into his business checking account:

<u>COUNT</u>	<u>DATE</u>	<u>CHECK #</u>	<u>CHECK AMOUNT</u>
7	11/24/99	091873	\$47,925.59
8	12/29/99	096698	\$37,071.36
9	1/31/00	101957	\$104,715.25
10	2/25/00	105916	\$101,257.29

All in violation of Title 18, United States Code, Section 1957.

Enhancement Allegations for Counts Seven through Ten

A. The loss attributable to each of Counts Seven through Ten as a result of defendant Johnston's and defendant Powell's fraudulent scheme was more than \$500,000 but not more than \$800,000.

B. The defendants both knew that the funds were the proceeds of specified unlawful

1 activity.

2 C. The total value of funds laundered by defendant Johnston and defendant Powell
3 pursuant to the scheme was more than \$600,000 but not more than \$1,000,000.

4 D. Defendant Powell abused a position of trust in a manner that significantly facilitated
5 the commission and concealment of the fraud against 24 Hour Fitness.

6 COUNT ELEVEN: (26 U.S.C. § 7201–Tax Evasion)

7 20. On or about and between January 1, 1997, and October 14, 1998, in Santa Clara
8 County, in the Northern District of California, and elsewhere, the defendant

9 SUSAN K. POWELL

10 did willfully attempt to evade and defeat part of the income tax due and owing by her to the
11 United States of America for the calendar year 1997, by the following means:

12 a. preparing and causing to be prepared, and signing and causing to be
13 signed, a false and fraudulent U.S. Individual Income Tax Return,
14 Form 1040, which was filed with the Internal Revenue Service on
or about October 14, 1998, wherein taxable income was understated
by approximately \$64,896.13, and tax due and owing was understated
by approximately \$20,818.66;

15 b. deriving the unreported income through an illegal source, namely, the
16 receipt of illegal kickbacks from defendant Johnston pursuant to the
17 mail fraud conspiracy described in Count One, and incorporated herein
by reference;

18 c. directing defendant Johnston not to issue Forms 1099 for the kickback
19 payments pursuant to the mail fraud conspiracy;

20 d. directing Johnston to structure the kickback payments pursuant to the
21 mail fraud conspiracy to avoid reporting requirements;

22 e. structuring the kickback payments received pursuant to the mail fraud
23 conspiracy into bank accounts to avoid reporting requirements.

24 All in violation of Title 26, United States Code, Section 7201.

25 COUNT TWELVE: (26 U.S.C. § 7201–Tax Evasion)

26 21. On or about and between January 1, 1998, and October 15, 1999, in Santa Clara
27 County, in the Northern District of California, and elsewhere, the defendant

28 SUSAN K. POWELL

did willfully attempt to evade and defeat part of the income tax due and owing by her to the
United States of America for the calendar year 1998, by the following means:

1 a. preparing and causing to be prepared, and signing and causing to be
2 signed, a false and fraudulent U.S. Individual Income Tax Return,
3 Form 1040, which was filed with the Internal Revenue Service on
4 or about October 15, 1999, wherein taxable income was understated
5 by approximately \$49,335.72, and tax due and owing was understated
6 by approximately \$15,431.65;

7 b. deriving the unreported income through an illegal source, namely, the
8 receipt of illegal kickbacks from defendant Johnston pursuant to the
9 mail fraud conspiracy described in Count One, and incorporated herein
10 by reference;

11 c. directing defendant Johnston not to issue Forms 1099 for the kickback
12 payments pursuant to the mail fraud conspiracy;

13 d. directing Johnston to structure the kickback payments pursuant to the
14 mail fraud conspiracy to avoid reporting requirements;

15 e. structuring the kickback payments received pursuant to the mail fraud
16 conspiracy into bank accounts to avoid reporting requirements.

17 All in violation of Title 26, United States Code, Section 7201.

18 COUNT THIRTEEN: (26 U.S.C. § 7201—Tax Evasion)

19 22. On or about and between January 1, 1999, and October 10, 2000, in Santa Clara
20 County, in the Northern District of California, and elsewhere, the defendant

21 SUSAN K. POWELL

22 did willfully attempt to evade and defeat part of the income tax due and owing by her to the
23 United States of America for the calendar year 1999, by the following means:

24 a. preparing and causing to be prepared, and signing and causing to be
25 signed, a false and fraudulent U.S. Individual Income Tax Return,
26 Form 1040, which was filed with the Internal Revenue Service on
27 or about October 10, 2000, wherein taxable income was understated
28 by approximately \$81,301.00, and tax due and owing was understated
by approximately \$24,151.31;

b. deriving the unreported income through an illegal source, namely, the
receipt of illegal kickbacks from defendant Johnston pursuant to the
mail fraud conspiracy described in Count One, and incorporated herein
by reference;

c. directing defendant Johnston not to issue Forms 1099 for the kickback
payments pursuant to the mail fraud conspiracy;

d. directing Johnston to structure the kickback payments pursuant to the
mail fraud conspiracy to avoid reporting requirements;

e. structuring the kickback payments received pursuant to the mail fraud
conspiracy into bank accounts to avoid reporting requirements.

All in violation of Title 26, United States Code, Section 7201.

1 COUNT FOURTEEN: (26 U.S.C. 7206(1)–False Subscription of Tax Return)

2 23. On or about October 14, 1998, in Santa Clara County, in the Northern District of
3 California, and elsewhere, the defendant

4 SUSAN K. POWELL

5 did willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040, for the 1997
6 calendar year, which was verified by a written declaration that it was made under the penalties of
7 perjury and was filed with the Internal Revenue Service, which she did not believe to be true and
8 correct as to every material matter, in that, on line 22, such return reported \$135,800 in total
9 income, whereas, as she then knew and believed, her total income was substantially higher than
10 the reported amount.

11 All in violation of Title 26, United States Code, Section 7206(1).

12 COUNT FIFTEEN: (26 U.S.C. 7206(1)–False Subscription of Tax Return)

13 24. On or about October 15, 1999, in Santa Clara County, in the Northern District of
14 California, and elsewhere, the defendant

15 SUSAN K. POWELL

16 did willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040, for the 1998
17 calendar year, which was verified by a written declaration that it was made under the penalties of
18 perjury and was filed with the Internal Revenue Service, which she did not believe to be true and
19 correct as to every material matter in that, on line 22, such return reported \$211,068 in total
20 income, whereas, as she then knew and believed, her total income was substantially higher than
21 the reported amount.

22 All in violation of Title 26, United States Code, Section 7206(1).

23 COUNT SIXTEEN: (26 U.S.C. 7206(1)–False Subscription of Tax Return)

24 25. On or about October 10, 2000, in Santa Clara County, in the Northern District of
25 California, and elsewhere, the defendant

26 SUSAN K. POWELL

27 did willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040, for the 1999
28 calendar year, which was verified by a written declaration that it was made under the penalties of
perjury and was filed with the Internal Revenue Service, which she did not believe to be true and

1 correct as to every material matter in that, on line 22, such return reported \$234,453 in total
2 income, whereas, as she then knew and believed, her total income was substantially higher than
3 the reported amount.

4 All in violation of Title 26, United States Code, Section 7206(1).

5 COUNT SEVENTEEN: (26 U.S.C. 7206(2)—Aiding In The Preparation of a False Tax Return)

6 26. On or about October 14, 1998, in Santa Clara County, in the Northern District of
7 California, and elsewhere, the defendant

8 MICHAEL J. JOHNSTON

9 did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation
10 to the Internal Revenue Service of a U.S. Individual Income Tax Return, Form 1040, for Susan
11 Powell for the 1997 calendar year, which was false and fraudulent as to a material matter, in that,
12 on line 22, it reported \$135,800 in total income, whereas, as the defendant then knew and
13 believed, Powell's total income was substantially higher than the reported amount.

14 All in violation of Title 26, United States Code, Section 7206(2).

15 COUNT EIGHTEEN: (26 U.S.C. 7206(2)—Aiding In The Preparation of a False Tax Return)

16 27. On or about October 15, 1999, in Santa Clara County, in the Northern District of
17 California, and elsewhere, the defendant

18 MICHAEL J. JOHNSTON

19 did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation
20 to the Internal Revenue Service of a U.S. Individual Income Tax Return, Form 1040, for t Susan
21 Powell for the 1998 calendar year, which was false and fraudulent as to a material matter, in that,
22 on line 22, it reported \$211,068 in total income, whereas, as the defendant then knew and
23 believed, Powell's total income was substantially higher than the reported amount.

24 All in violation of Title 26, United States Code, Section 7206(2).

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28 COUNT NINETEEN: (26 U.S.C. 7206(2)—Aiding In The Preparation of a False Tax Return)

1 28. On or about October 10, 2000, in Santa Clara County, in the Northern District of
2 California, and elsewhere, the defendant

3 MICHAEL J. JOHNSTON

4 did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation
5 to the Internal Revenue Service of a U.S. Individual Income Tax Return, Form 1040, for Susan
6 Powell for the 1999 calendar year, which was false and fraudulent as to a material matter, in that,
7 on line 22, it reported \$234,453 in total income, whereas, as the defendant then knew and
8 believed, Powell's total income was substantially higher than the reported amount.

9 All in violation of Title 26, United States Code, Section 7206(2).

10 Enhancement Allegations for Counts Eleven through Nineteen

11 A. The tax loss attributable to each of counts 11-19 resulting from defendant Powell's tax
12 evasion and subscription of false tax returns for the years 1997, 1998, and 1999, and defendant
13 Johnston's aid and assistance of defendant Powell's presentation of false tax returns for the years
14 1997, 1998, and 1999, was more than \$40,000, but not more than \$70,000.

15 B. Defendant Powell failed to report income exceeding \$10,000 from criminal activity in
16 each of the years 1997, 1998, and 1999.

17 COUNT TWENTY: (18 U.S.C. § 982 -- Forfeiture)

18 1. The allegations of Paragraphs One through Three and Counts One Through Ten of this
19 Indictment are realleged and by this reference fully incorporated herein for the purpose of
20 alleging forfeiture to the United States of America pursuant to the provisions of Title 18, United
21 States Code, Section 982.

22 2. As a result of the offenses alleged in Counts One through Ten above, the defendants

23 SUSAN K. POWELL and
24 MICHAEL J. JOHNSTON,

25 shall forfeit to the United States the following property:

26 a. All property, real and personal involved in violation of Title 18, United States Code,
27 Section 1341, and Title 18, United States Code, Section 1957, or conspiracy to commit such
28 offenses, for which the defendants are convicted, and all property traceable to such property,
including the following: 1) all money or other property that was the subject of each transaction,

1 transmission, or transfer in violation of Sections 1341 and 1957; 2) all commissions, fees, and
2 other property constituting proceeds obtained as a result of those violations; and 3) all property
3 used in any manner or part to commit or to facilitate the commission of those violations.

4 b. A sum of money equal to the total amount of money involved in each offense, or
5 conspiracy to commit such offense, for which the defendant is convicted. If more than one
6 defendant is convicted of an offense, the defendants so convicted are jointly and severally liable
7 for the amount involved in such offense.

8 c. Pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18,
9 United States Code, Section 982(b), each defendant shall forfeit substitute property, up to the
10 value of the amount described in the enhancement allegations to Counts One through Six of this
11 indictment (\$770,407.22) if, by act or omission of the defendant, the property described in the
12 enhancement allegations to Counts One through Six, or any portion thereof, cannot be located
13 upon the exercise of due diligence; has been transferred, sold to or deposited with a third party;
14 has been placed beyond the jurisdiction of the court; has been substantially diminished in value;

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1 or has been commingled with other property which cannot be divided without difficulty;
2 including but not limited to the following items of property and the real property located at the
3 location identified in item iv:

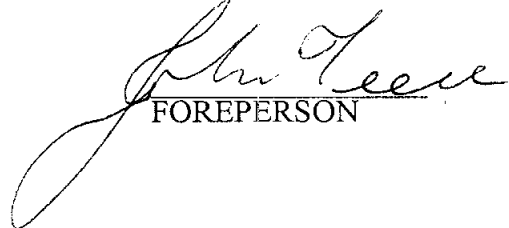
- 4 i. 1997 BMW 328i, vehicle identification number WBABK8320VET99997,
California License Number 3WNT181;
- 5 ii. 1999 Nautique Super Sport Ski Boat, hull number CTC 97006G899, vessel number
6 CF 6141 PK, with Trailer;
- 7 iii. 1999 Chevrolet Tahoe, vehicle identification number 3GNEK18R9XG197353,
California License Number 4FRE998;
- 8 iv. Residence located at 16505 Englewood Avenue, Los Gatos, California

9 All in violation of Title 21, United States Code 853, and Title 18, United States Code
10 Section 982, 1341, and 1956.

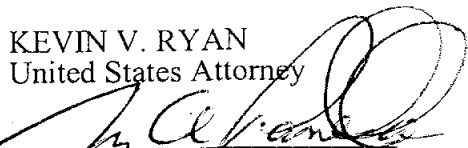
11 DATED:

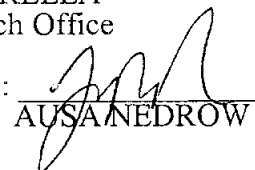
12 9-29-04

A TRUE BILL.

13 
14 FOREPERSON

15 KEVIN V. RYAN
16 United States Attorney

17 
18 MATTHEW A. PARRELLA
Chief, San Jose Branch Office

19 (Approved as to form: 
AUSA NEDROW