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In The United States District Court
For The District Of New Jersey
Camden Vicinage

Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Hon. Robert B. Kugler **Civil Action No: 04-1512 (RBK)** **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE RENEWED MOTION OF STERLING TO INTERVENE** **Return Date: November 5, 2004**

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Plaintiff Commodity Futures Trading Commission ("Plaintiff" or the "Commission") respectfully submits this memorandum of fact and law in opposition to the renewed motion of Sterling (Anguilla) Trust, Ltd. to intervene in this matter.

I. INTRODUCTION

On April 30, 2004, Sterling (Anguilla) Trust, ("Sterling" or "Sterling Trust") along with Sterling ACS, Ltd., Sterling Casualty & Insurance, Ltd., Sterling Bank Limited and Sterling Investment Management, Ltd. (the "Sterling Entities") moved to intervene in this action and to release between $13.675 and 17.5 million of the approximately $20 million that has been frozen for the benefit of all investors in this large, complicated commodity pool fraud. After a two and a half day evidentiary hearing, this Court denied the Sterling Entities' motions. Now, Sterling Trust renews its motion to intervene "for the limited purpose" of moving under Federal Rule of Civil Procedure 60 for relief from a preliminary order of this Court, the Consent Order of Preliminary Injunction against Tech Traders, Inc., Tech Traders, Ltd. Magnum Investments, Ltd., Magnum Capital Investments, Ltd. and Coyt E. Murray ("Tech Traders Consent Order"), entered by this Court on August 24, 2004. *See* Docket #72; Sterling Memorandum of Law in Support of Motion to Intervene ("Sterling Brief") at 2. Sterling has raised no new facts here and there has been no change in the status quo sufficient to revisit this issue. [1] If anything, even further doubt has been cast on the

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1 The Declaration of Warren W. Faulk should be disregarded. It is purely legal argument and thus violates Local Rule 7.2(a) that states that affidavits shall be restricted to statements of fact within the personal knowledge of the affiant and shall not contain argument of the facts and law. Sterling Trust has not supported its motion with any facts whatsoever.

ownership of the funds being held in Man Financial account number E G20 LOCAL 37923 a.k.a. E G30 LOCAL 37923, ("Account #37923"). The facts about the ownership of those funds will be fully aired in the claims process, which the Receiver has begun and which will afford Sterling Trust ample opportunity to be heard on its entitlement to those funds in accordance with its due process rights. A motion under Rule 60 attacking the Tech Traders Consent Order is not the proper mechanism for determining that entitlement because there has been no final judgment in this case.

II. FACTS

Although Sterling Trust continues to ignore it, the scope and complexity of the fraud in this matter is much greater than was known at the time the original Complaint was filed in April. Since that time, the Commission has been very busy investigating the people and entities involved in the fraud and, along with the Court-appointed Receiver, tracing the flow of money and determining whether investors were net "winners" or "losers". We have learned that Tech Traders ran a "super-fund" and that the participants in that fund included other commodity pools such as Shasta that fed into the Tech Traders pool and had a number of pool participants itself. As a result of initial investigation, the Commission amended its complaint to expand the charges against the existing Defendants and to add several Tech Trader entities, Coyt E. Murray, their principal, and J. Vernon Abernethy, the accountant who verified Tech Trader's false trading results. That investigation continues, as does the Receiver's work in obtaining a full accounting of the approximately $46 million that Tech Traders took in over the life of the fraud.

Part of the process of sorting out the equities here and determining what investors are owed is the claims process that has already been instituted by the Receiver. Claims

forms were mailed on August 27, 2004 and were due on September 27, 2004. Sterling Trust has availed itself of that process and submitted a claim to the funds in Account #37923.[2] It is through that claims process that it can attempt to prove that all the funds in that account belong to it. Meanwhile, the Receiver continues to hold the funds frozen in Account #37923 in that account and has not commingled the funds with other estate assets. *See* Bobo Affidavit at ¶ 10. That account continues to earn interest and has earned $34,188 in interest since the asset freeze was entered. *See* McCormack Declaration at ¶3.

While Sterling Trust will have an opportunity to establish its right to the funds in Account #37923, evidence gathered since the hearing in May casts even more doubt on its right to those funds. Questions about the Sterling Entities, and their principals' involvement with Defendants in this case, including Coyt Murray and the former President of Sterling Insurance and Casualty, J. Vernon Abernethy, continue to arise. Contrary to Sterling's claims in its claims form and its Brief and as shown in the Declaration of Joy McCormack, attached as Exhibit A hereto ("McCormack Declaration"), ¶2, all but $350,000 of the deposits into Account #37923 can be traced to Tech Traders or other non-Sterling entities. Even the $350,000 is not necessarily Sterling funds; the Commission has just not been able to trace their source yet. *Id.* While most, if not all, of the funds in that account derived from sources other than Sterling, Sterling has

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[2] The claim form submitted is woefully deficient and does not identify the source of the funds into Account #37923. For instance, the claim form details a series of transfers in the amount of $45,000 and identifies Sterling Trust as the company making the transfer. *See* Affidavit of Stephen T. Bobo, ¶ 8 attached as Exhibit D ("Bobo Affidavit"). The claim form thus ignores the evidence admitted at the May hearing, which showed that those transfers were "interest" payments made by Tech Traders and came from the super fund bank account that consisted almost exclusively of investor money. *See* excerpts of transcript of May 14, 2004 hearing, attached as Exhibit C hereto, p. 49.

already withdrawn $925,000 from that account. *Id.* at ¶3. Thus, not only is it unlikely to establish a right to any of the funds in that account, the Receiver may very well have a claim against it as to the funds it has already withdrawn.

Moreover, while the Sterling Entities continue to press this Court to release funds to them, they and their principals are attempting to evade the jurisdiction of this Court and to obfuscate and delay the investigation of their role in this fraud. The Commission has learned that the principals of all the Sterling Entities, Howell and Vernice Woltz, are preparing to flee the country. See Declaration of Elizabeth M. Streit, attached as Exhibit B hereto ("Streit Declaration"), ¶14. Moreover, the Sterling Entities and their principals have stymied the Commission's investigation of this massive fraud by their failure to return property of a Defendant that is subject to the Consent Order of Preliminary Injunction Against J. Vernon Abernethy (Docket #70)(Abernethy Consent Order") and the Tech Traders Consent Order and to cooperate in providing information to the Commission. As set out in the Streit Declaration, Defendant J. Vernon Abernethy claims that he gave a backup tape of his computer containing evidence relevant to this proceeding to Walter Hannen, President of Sterling Bank who gave it to Vernice Woltz, Sterling's witness at the May hearing. Streit Declaration at ¶2. Although Mr. Abernethy and the Commission have demanded return of the backup tape and the Commission has attempted several times to subpoena Ms. Woltz and Mr. Hannen, it has yet to be returned. *Id.* at ¶13. Moreover, the Commission has subpoenaed relevant documents from Mr. Hannen and Ms. Woltz, but they have evaded service of those subpoenas and though they and their attorney have actual notice of the subpoenas' contents, have refused to date to

produce any records relating to the Sterling Entities.[3] *Id.* Now Ms. Woltz plans to flee the country to evade returning defendant property subject to this Court's Consent Orders. The Sterling Entities' continued attempts to pressure this Court to release funds to them before serious questions about their role in this fraud can be answered, their failure to respond to the Commission's requests for information, their violation of this Court's Order in failing to return Mr. Abernethy's back-up tape from his computer, coupled with the Woltzs' plan to flee the country, is very troubling and cautions against any premature release of funds to any of the Sterling Entities.

III. LEGAL ARGUMENT

A. Sterling Trust's Motion Should be Denied Because It Still Does Not Meet the Requirements for Intervention as of Right Under Federal Rule of Civil Procedure 24 (a).

Nothing has changed since the May hearing that should alter the decision of this Court that Sterling Trust has not met its burden of showing a right to intervene in this action. The Court found then that the Sterling Entities had met the first two criteria under Fed. R. Civ. Pro. 24(a). Their application for intervention was timely and they have an interest in the litigation. See generally Exhibit C. The Commission still does not dispute that Sterling Trust, like the hundreds of other investors in this case, has an interest in this litigation. Nor does it dispute that this second application is still timely, though it questions the further expenditure of judicial, party, and receivership resources revisiting this issue. However, this Court found in May that the Sterling Entities' interests were

[3] The only records they have produced to date are copies of work papers of Mr. Abernethy's that have been produced by Mr. Abernethy already.

adequately represented by the Commission and the Receiver. See Exhibit C at 45. That is still the case.

Sterling Trust claims that the Commission's interest is somehow adverse because it moved for entry of the Tech Traders Consent Order. Sterling does not understand the purpose of a preliminary injunction. A preliminary injunction prohibits the Defendants from violating those provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1 et seq. (2002) and Commission Regulations, 17 C.F.R. §§ 1 et seq. (2004) with which they were charged. It also maintains a freeze on their assets and otherwise maintains the status quo while the Commission and the Receiver determine how and to whom the limited frozen assets are distributed. The purpose of a preliminary injunction is not to determine pool participant rights to those assets. Thus, even had there been a hearing on the Commission's preliminary injunction motion, Sterling Trust's rights to the funds in Account #37923 would not have been an issue. The proper venue for that issue is the claims process that has already been instituted by the Receiver.

Under the claims process, Sterling Trust and the other Sterling Entities will be notified of any proposed action that will affect their interests and will have the right to address those issues with the Receiver. As the Court found at the conclusion of the May hearing, "the obligation of the Court and the [R]eceiver is to be fair to all the parties that have claims to this fund." Exhibit C at 45. As the Court also pointed out in May, if Sterling Trust does not agree with the Receiver's recommended disposition, it can appeal that recommendation to this Court. *Id.*

Sterling Trust also makes the unsupported claim that it may be adversely affected because some of the funds in Account # 37923 could be "taken as disgorgement or fines

assessed against Tech Traders by the CFTC." That is untrue. Any money in any of the frozen accounts that is traceable to customers (and, as the Commission has found no evidence yet that the Tech Trader Entities were running a legitimate operation, it is likely that all or most of the funds will be traceable to customers) will be paid in restitution to Tech Trader pool participants in accordance with the Receiver's distribution plan. No such funds will go to the United States Treasury.[4]

When distilled to its essence, Sterling Trust's complaint is no different than it was in May. It wants its money back and it wants preference over all the other victims of this fraud. Yet, after two and a half days of hearing and a renewed motion to intervene, it still has done nothing to show it has a superior claim to the funds in Account #37923. The Court's denial of its intervention motion in May and the cases it relied on then are persuasive authority for again denying Sterling Trust's motion to intervene. See Exhibit C at 46; *CFTC v. Heritage Capital Advisory Services, Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984) (motion for intervention of a creditor of the defendant who claimed superior right to the funds as a beneficiary of a constructive trust denied); *CFTC v. Chilcott Portfolio Management, Inc.*, 725 F.2d 584, 586 (10th Cir. 1984) (motion for intervention of investor in fraudulent commodity pool who suggested his claim was entitled to priority denied).

[4] The Commission routinely requests that the court assess civil monetary penalties against defendants in civil injunctive actions. However, in cases where restitution is sought, particularly where a receiver has been appointed to marshall assets, restitution claims generally take precedence over civil monetary penalties. If a penalty is assessed, that penalty is paid to the United States Treasury, not the Commission. *See* 31 U.S.C. §§ 3701(b)(F), 3711 (2001).

B. The Claims Process Initiated by the Receiver Provides Sterling Trust with Sufficient Due Process.

Sterling Trust also claims that intervention is the only way in which the Trust can be afforded due process. Sterling Brief at 3. Although the full scope of the claims process has not yet been determined, that process will afford all pool participants adequate due process. The Receiver has sent pool participants claim forms and asked for documentation of their claims. See Bobo Affidavit, ¶4. He is in the process of requesting follow-up information for claims that are incomplete or fail to include sufficient supporting documentation. *Id.* at ¶6. When he has finished with that process, he will report his recommended distribution of the limited frozen funds to the Court. *Id.* at ¶9. The Court already noted in its May ruling on Sterling's first motion to intervene that it will afford claimants an opportunity to be heard if they object to the Receiver's recommended distribution. All known claimants have been and will be afforded adequate notice and an opportunity to be heard. This satisfies due process. See *CFTC v. Topworth International, Ltd.,* 205 F.3d 1107, 1113 (9th Cir. 2000), citing *SEC v. American Capital Invs., Inc.,* 98 F.3d 1133, 1146, (9th Cir. 1996) *abrogated on other grounds*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) ("But '[f]or the claims of nonparties to property claimed by receivers, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard." See also *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986) and *SEC v. Wencke*, 783 F.2d 829, 836-38 (9th Cir.), *cert. denied DeLusignan v. Gould,* 479 U.S. 818 (1986).

C. Sterling Trust Should Not be Allowed to Intervene Because It Cannot Move for Relief of the Preliminary Injunction Order Under Federal Rule of Civil Procedure 60.

Sterling Trust states that it seeks to intervene to move under Fed. R. Civ. Pro. 60(b)(5) or (6) for relief from the Tech Traders Consent Order. Even were it allowed to intervene, it could not move under Rule 60 for relief. Rule 60 applies only to final judgments. Neither of the case Sterling cites say otherwise. Each of them dealt with final judgments. While *Marshall v. Board of Education, Bergenfield, New Jersey*, 575 F.2d 417 (3d Cir. 1978) dealt with an injunction, it was a **permanent** injunction and thus a final judgment, a fact which Sterling conveniently ignores. The other case Sterling cites, *Building and Construction Trades Council of Philadelphia and Vicinity v. National Labor Relations Board*, 64 F.3d 880 (3rd Cir. 1995) also concerned a final judgment. Sterling mischaracterizes the case by substituting the word "order" for the word "judgment" in its quotation from the case. But its mischaracterization of the case does not change the rule, which applies only to final judgments. The Consent Order was not a final judgment and Sterling cannot move under its provisions for relief from a preliminary injunction.

IV. CONCLUSION

While its principals flee the country, conceal property of Defendant Abernethy in violation of this Court's Orders and refuse to provide information to the Commission, Sterling Trust once again imposes upon the limited resources of this Court to prefer its claim to funds over that of other investors. But once again, it has provided absolutely no legal or factual support for doing so. The proper forum for its claim to the funds in

Account #37923 is the claims process. It will have ample opportunity to prove those funds are its funds in that process. Its renewed motion to intervene should be denied.

Date: October 21, 2004

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