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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

**Commodity Futures Trading  
Commission**

**Plaintiff,**

**vs.**

**Equity Financial Group LLC,  
Tech Traders, Inc.,  
Vincent J. Firth, and  
Robert W. Shimer,**

**Defendants.**

**CIVIL ACTION NO. 04-cv-1512 (RBK-AMD)**

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO INTERVENE**

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Intervenor Sterling (Anguilla) Trust, Ltd. (“Trust”), through its undersigned counsel, submits this memorandum of fact and law in support of its motion to intervene for the limited purpose of moving for partial relief from this Court’s order dated August 24, 2004, (the “Order”) granting the CFTC’s preliminary injunction motion on consent.

## **PRELIMINARY STATEMENT**

Trust should be permitted to intervene for the limited purpose of moving, pursuant to FRCP 60 for relief from the Order which effects its \$1.925 million now frozen at Man Financial because no “party” to the case represented its interest.<sup>1</sup> As a non-party, Trust was forced to rely upon the CFTC and the Receiver to protect its interests. On the preliminary injunction motion the CFTC sought, *inter alia*, to keep Trust’s account at Man Financial frozen and had an interest which directly was adverse to Trust. While both the CFTC and the Receiver were aware of Trust’s continued opposition to their retention of the funds, they did nothing to promote that position. Trust did not consent to the preliminary injunction affecting its account at Man

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<sup>1</sup>Trust intends to seek relief from the Order pursuant to FRCP 60 (b)(5) on the grounds that “it is no longer equitable that the [Order] should have prospective application,” and/or pursuant to the “catchall” provision of FRCP 60(b)(6), which enables the Court to relieve Trust from the Order based upon “any other reason justifying relief from the operation of the [Order].” As set forth herein, and as Trust will demonstrate in a prospective FRCP 60(b) motion if allowed to intervene, the CFTC and the Receiver, in consenting to the issuance of the Order, have failed to protect the interests of Trust, notwithstanding the Court’s previous ruling that they would. Under these circumstances, and for the reasons set forth below, Trust is entitled to relief from the Order. See generally, Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO v. National Labor Relations Board, 64 F.3d 880, 888 (3d Cir. 1995) (“we believe that the generally applicable rule for modifying a previously issued [Order] is that set forth in Rule 60 (b)(5), i.e., ‘that it is no longer equitable that the judgment should have prospective application.’”); Marshall v. Board of Education, Bergenfield, New Jersey, 575 F. 2d 417, 425 (3d Cir 1978) (“the ‘prospective application’ clause of Rule 60(b)(5)... incorporates the time-honored rule that a ‘court of equity (may) modify an injunction in adaption to changed conditions.’”).

Financial and should be heard. Intervention is the only way in which Trust may be afforded the same *due process* was extended to the defendants (and which normally is provided to any person whose assets are seized). The CFTC likely would then have to demonstrate that it can meet the requirements of a preliminary injunction respecting Trust’s account, including a likelihood of success on the merits against Trust with respect to these funds and a balance of the hardships in its favor.<sup>2</sup>

### **FACTS**

The complaint in this action was filed on April 1, 2004. The CFTC alleged that the Defendants Equity Financial Group, LLC (“Equity”), Tech Traders, Inc. (“Tech Traders”), Vincent J. Firth and Robert W. Shimer engaged in a fraudulent multimillion dollar solicitation scheme which received \$5.7 million from accredited investors. (Compl. ¶ 2). The Defendants allegedly accomplished this scheme by offering accredited investors the opportunity to participate in an illegal commodities pool (“Shasta”) and enticing the investment by making false representations regarding the “astonishing” performance of the pool despite actual losses amounting to \$3.5 million. (Compl. ¶¶ 23-26, 35). According to the complaint, the funds invested by the accredited investors were accepted and traded by Tech Traders in its own name in violation of CFTC Regulation 4.30. (Compl. ¶¶ 59-64). The complaint did not name Trust as a defendant and did not allege that it engaged in any culpable conduct. After months of discovery, the CFTC amended its complaint to include additional parties and conduct. Trust is not named as a defendant or wrongdoer. (Amended Complaint).

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<sup>2</sup>Notably, the burden on a preliminary injunction hearing is different from that applied by this Court when Trust sought the emergency release of funds based on hardship.

Simultaneously with the filing of the complaint, the CFTC filed a motion for and *ex parte* statutory restraining order and preliminary injunction. In support of that motion, the CFTC submitted a memorandum of fact and law as well as exhibits which contained affidavits and other documents. Nothing in the CFTC's submissions makes reference to culpable conduct by Trust. Based upon the CFTC's papers, this Court entered an order dated April, 1, 2004 (the "Order") which, among other things, appointed a receiver, restrained the Defendants from transferring assets and gave the receiver the power to take control of funds and property traceable to customers as well as under the control of the Defendants. Thereafter, the Receiver contacted financial institutions and accounts in the name of Tech Traders were frozen. He also froze a \$1.925 million account held in Trust's name at Man Financial. The CFTC and Receiver justify this freeze based upon the theory that Tech Traders "controlled" the account because at one time it had a limited power of attorney to trade the account.

On August 24, 2004, the Court signed the Order which granted the CFTC's motion for a preliminary injunction and, *inter alia*, permits the Receiver to hold the "assets" of the named defendants. Trust's \$1.925 million account improperly was included in these assets. Trust denies that the funds belong to or were under the control of Tech Traders and can prove that the funds used to purchase the treasury bills in the account belong exclusively to Trust. Because it is not a defendant, Trust was not afforded an opportunity to oppose the preliminary injunction which affects its funds. It now moves to intervene and seeks *due process* from this Court.

## ARGUMENT

### **I. TRUST IS ENTITLED TO INTERVENE AS OF RIGHT**

Trust must be permitted to intervene in this action because the Order permits \$1.925 million of its funds to be frozen, no party represented its interest and its ability to protect its interest will be impeded by the disposition of this action. Federal Rule of Civil Procedure 24(a)(2) sets forth the criteria for intervention as a matter of right:

Upon timely application anyone shall be permitted to intervene in an action... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a) (2). Courts have interpreted this rule to allow intervention as a matter of right if the following criteria are met : 1) the application for intervention is timely; 2) the applicant has a sufficient interest in the litigation; 3) the interest may be affected or impaired as practical matter by the disposition of the action; and 4) the interest is not adequately represented by the existing party in the litigation. See, e.g., Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3<sup>rd</sup> Cir. 1995) (granting motion to intervene as of right); see also, SEC v. Flight Transportation Corp., 699 F.2d 943, 947 (8<sup>th</sup> Cir. 1983) (same).

In determining whether the intervention motion is timely courts consider: 1) the stage of the proceeding; 2) the prejudice that delay may cause the parties; and 3) the reason for the delay. Mountain Top, 72 F.3d at 369. “[C]ourts should be reluctant to dismiss a request for intervention as untimely” since in the case of intervention as a matter of right “the would-be

intervenor may be seriously harmed if he is not permitted to intervene . . .” 7C Wright , Miller & Kane, Federal Practice & Procedure §1916 at 425 (1986).

An applicant has a sufficient interest in the litigation if it is one that is “significantly protectable.” Donaldson v. United States, 400 U.S. 517, 531 (1971). A “significantly protectable” interest has been defined as a “legal interest as distinguished from interests of a general and indefinite character . . . The applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene.” Harris v. Pernsley, 820 F.2d 592, 601 (3<sup>rd</sup> Cir. 1987). A proposed intervenor must also establish that his interest might become impaired or affected by the disposition of the action in his absence. Mountain Top, 72 F.3d at 368.

An applicant has met the burden of showing his interest in the litigation are not adequately represented if he established that the “representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10 (1972). Even if the interests are not adverse, intervention should be permitted where they are significantly disparate. See, e.g., Flight Transportation, 699 F.2d at 948. (allowing intervention where interests were disparate).

In this case it is clear that intervention as of right is appropriate. There can be no dispute that this motion is timely. It is made within days of learning that the Court decided the preliminary injunction motion on consent and that no attempt was made to have the Court consider Trust’s interests. Indeed, since the motion was granted by consent order, the Court never had any opportunity to consider the issues or “evidence” relating to Trust’s account at Man Financial.

There also can be no dispute that Trust has a sufficient interest in the litigation and that its interest may be impaired by the disposition of the motion. Not only does the failure to release the funds continue to harm Trust's clients by tying up their funds indefinitely, but a significant portion of the \$1.925 million of Trust's funds could be distributed to other Tech Traders investors, paid to the Receiver as fees or taken as disgorgement or fines assessed against Tech Traders by the CFTC.

Finally, the CFTC's and the Receiver's interests on the preliminary injunction motion clearly were adverse to Trust's interest. The CFTC was the movant and sought the preliminary injunction. The Receiver wished to maximize the amount of assets he has to administer and was aligned with the CFTC. Without a preliminary injunction, the Receiver would have no receivership assets. Indeed, it was the Receiver who caused Trust's account at Man Financial to be frozen in the first instance. Thus, there can be no credible assertion that either the CFTC or the Receiver took any action to advocate Trust's interest on the preliminary injunction motion. There can be no clearer disparity of interest than was presented on the motion - - the CFTC and the Receiver wished to hold the money which Trust wants returned.

Based on the foregoing, intervention as of right should be permitted.

**CONCLUSION**

Since Trust's interests were not represented on the preliminary injunction motion, it should be permitted to intervene as of right to move for relief from the Order with respect to its account at Man Financial.

Respectfully submitted,

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