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

Commodity Futures Trading Commission, Plaintiff, v. Equity Financial Group LLC, Tech Traders, Inc., Vincent J. Firth, and Robert W. Shimer, Defendants.	Hon. Robert B. Kugler Magistrate Judge Ann Marie Donio **Civil Action No: 04-1512 (RBK)**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT AND IN RESPONSE TO MEMORANDUM OF DEFENDANTS EQUITY FINANCIAL GROUP, LLC, VINCENT J. FIRTH AND ROBERT W. SHIMER IN OPPOSITION

Plaintiff Commodity Futures Trading Commission ("CFTC" or "Plaintiff") seeks leave to file an amended complaint. Plaintiff submitted its proposed amendment less than three months

after filing this action. The proposed amendment adds two individuals (Coyt E.Murray and J. Vernon Abernethy) and three related corporate entities (Tech Traders, Ltd., Magnum Investments, Ltd. and Magnum Capital Investments, Ltd.) as party defendants, adds fraud and registration charges with respect to one individual defendant (Robert W. Shimer) and one corporate defendant (Tech Traders, Inc.), and elaborates on the allegations concerning another (Vincent J. Firth). The litigation and accompanying discovery are in very early stages, and future discovery is altered little by the proposed amendment. The scheduled preliminary injunction hearing is more than a month away, giving defendants ample time to prepare. Under these circumstances, Rule 15(a) of the Federal Rules of Civil Procedure counsels that "leave to amend shall be freely given," especially as "justice so requires."

Defendant Tech Traders, Inc. answered the original complaint and has not submitted an objection to the proposed amendment, which principally expands this action against persons and entities related to Tech Traders.

Defendants Equity Financial Group LLC, Firth and Shimer also answered the original complaint and entered into a consent order of preliminary injunction based on the original complaint. They, however, object to the proposed amendment. In conclusory fashion, they cry that the amendment "reeks of bad faith" in making allegedly *ad hominem* attacks on Firth's and Shimer's characters; makes unwarranted accusations of fraud; mischaracterizes the evidence; fails to add one of Firth's and Shimer's agents as a party defendant; and otherwise prejudices Firth and Shimer. Although Firth and Shimer are obviously distressed about their predicament, that does not present grounds for denying the amendment.

I. Leave to Amend the Complaint Shall be Freely Given

After an answer has been filed, the plaintiff may amend only with leave of court or the written consent of the opposing parties, but "leave shall be freely given if justice so requires." Fed.R.Civ.P. 15(a); *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). The Supreme Court has instructed that although "the grant or denial of an opportunity to amend is within the discretion of the District Court, ... outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Rule 15(a) "embodies the liberal pleading philosophy of the federal rules" in order to ensure that claims will be decided on the merits. *Adams v. Gould*, 739 F.2d 858, 864 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985); *Dole v. Arco Chemical Co.*, 921 F.2d 484, 487 (3d Cir. 1990). The same standard applies when considering a request to add or drop parties. *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 654 (3d Cir. 1998).[1]

Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility. *Shane*, 213 F.3d at 115; *In re Burlington Coat Factory Securities Lit.*, 114 F.3d 1410, 1434 (3d Cir. 1997). These factors have been interpreted to mean that "prejudice to the non-moving party is the touchstonefor the denial of an amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993).

"Prejudice" involves the serious impairment of the defendant's ability to present its case. *Dole*, 921 F.2d at 486-86. The issue of prejudice requires that the court focus on the hardship of

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[1] The decision whether to grant or to deny a motion for leave to amend rests within the sound discretion of the district court. *Rolo*, 155 F.3d at 654. Thus, the Court of Appeals reviews a district court's decision granting or denying leave to amend a complaint for abuse of discretion. *Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186, 193 (3d Cir. 2001). However, if the appellate court is reviewing factual conclusions that a district court made while considering a Rule 15 motion, its standard of review is clear error. *Id.*

the defendants if the amendment were permitted. *Adams*, 739 F.2d at 868. In determining what constitutes "prejudice," the court considers whether the assertion of the new claim would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or would significantly delay the resolution of the dispute. *Adams*, 739 F.2d at 869. Thus, prejudice normally arises when a plaintiff seeks leave to amend in mature cases. A motion to amend a complaint may be properly denied as unduly prejudicial to the defendants when it is made on the eve of trial or after the close of discovery. *See, e.g., Harter v. GAF Corp.*, 150 F.R.D. 502, 509 (D.N.J. 1993) (citing cases).

"'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *Burlington*, 114 F.3d at 1434. In assessing "futility," the District Court applies the same standard of legal sufficiency as applies under Rule 12(b)(6), Fed.R.Civ.P. *Shane*, 213 F.3d at 115. Similarly, a District Court has discretion to deny a plaintiff leave to amend where the plaintiff was put on notice as to the deficiencies in his complaint, but chose not to resolve them. *Rolo*, 155 F.3d at 654.

II. Firth and Shimer Have Not Been Prejudiced

The proposed First Amended Complaint does not pose any prejudice to defendants within the meaning of Rule 15(a). The defendants have not unnecessarily expended any resources, and the gravamen of the case – at least as to Messrs. Firth and Shimer – has not changed in any unforeseen way.

Plaintiff did not unduly delay in preparing the amendment. The case was filed on April 1, 2004, and the proposed amendment was tendered on June 24, some three weeks before the then-scheduled date for the preliminary injunction hearing. That hearing has been continued to August 23, thereby giving all parties ample time to prepare.

The proposed amendment does not affect discovery in any significant way. Plaintiff has deposed only two individuals, both of whom would have been deposed in any event. The bulk of testimonial discovery lies ahead.

This case is a large, complicated, multi-party matter. Shortly after filing the case, Plaintiff became aware that the Shasta Capital Associates commodity pool operated by Equity, Firth and Shimer did not stand by itself, but was a feeder pool into a master pool operated by Tech Traders and Coyt Murray. Plaintiff announced in open court its intention to file an amendment, so no parties were surprised. Indeed, to the extent that the proposed First Amended Complaint names Murray and other Tech Traders entities as additional party defendants, the reaction of defendants Firth and Shimer has been one of anxious anticipation.

The original complaint focused on Firth's and Shimer's roles in soliciting participation interests in the Shasta commodity pool, little being then known about the roles of Murray and Tech Traders. The proposed amended complaint represents an expansion, alleging that Murray and Tech Traders engaged in fraud in operating their master pool, while also alleging that the accountant they retained to verify the results, J. Vernon Abernethy, played a key role.

Messrs. Firth and Shimer appear mainly disappointed that the amendment does not shift more allegations of wrongdoing to Murray and the Tech Traders defendants. The proposed amendment makes no change in the ultimate charges against Firth, but it does expand charges as to Shimer, putting Shimer on a level with Firth. As alleged, Shimer was the detail person for the Shasta defendants. Plaintiff fully expects to develop the facts underlying these allegations in discovery. The fact that the proposed amendment alleges that Shimer violated the federal commodity laws is not the type of prejudice cognizable under Rule 15(a).

At the end of this case, even if Firth and Shimer are able to establish by a preponderance of the evidence that they did not directly know that the Shasta results they reported to investors were "too good to be true", they are not necessarily absolved of liability under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (2002) ("the Act"), *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (1988)(recklessness is sufficient to satisfy scienter requirement of § 4b of the Act, 7 U.S.C. § 6b(a)(2)(i)). Plaintiff has good ground to support the proposed allegations. Firth and Shimer were not innocents, but committed independent violations of the federal commodity laws to the detriment of third parties. The proposed amendment fairly and with particularity alleges those violations. It is too early to sort out the precise responsibility among Firth, Shimer, Murray and Abernethy or to apportion fault and liability among them for the losses Plaintiff believes they caused.

Firth and Shimer suggest that prior knowledge of the amendment "would have had a significant bearing on their decision to consent [to a preliminary injunction] and their approach to defending the case." Yet in the past three weeks they have not sought to withdraw their respective consents and advised Plaintiff of their desire to contest the motion at hearing. They have not indicated how they would have changed their approach to defending the case – especially since the ultimate charges as to them have not particularly changed. Such speculation is an insufficient basis to support denial of the motion for leave to amend.

III. The Allegations of the Proposed First Amended Complaint Tell a Fair Story About the Individual Defendants

The allegations of the proposed amended complaint contain characterizations about the business experiences of Firth and Shimer that constitute "fair comment" to be drawn from the facts. The allegations tell a story about Firth and Shimer that undoubtedly those who invested in Shasta would have wanted to know before they committed their funds. The allegations are not

personal attacks on the individuals themselves, but information that a reasonable investor likely would have considered material in making his investment decision.

Thus, for example, a reasonable investor likely would have considered it material that Shimer had solicited in excess of $1 million investment funds for Kaivalya Holding Group, Inc., a company in which Shimer was an officer and principal, but that the funds were never invested. Similarly, a reasonable investor likely would have considered it material that Firth, who was portrayed in Equity's Private Placement Memorandum as a successful businessman, did not have a uniformly successful business past. Specifically, the allegation that several parties whom Firth had introduced to a lender to secure financing lost their commitment fees when the lender allegedly absconded with the parties' funds is fairly described as an "unsatisfactory business experience."[2]

IV. The Fact that the First Amended Complaint Does Not Name Every Individual and Entity Having Potential Liability Is Not a Ground to Deny the Amendment

Firth and Shimer complain that the proposed First Amended Complaint "strangely" ignores the role of Shasta's accountant in the fraud, suggesting an attempt by the CFTC to unfairly shift the professional responsibilities of the Shasta accountant to Firth and Shimer and then charge Firth and Shimer with the accountant's "incompetence and derelictions of duty." The accountant was Firth and Shimer's agent. It is a curious argument.

At first blush, the CFTC's exercise of prosecutorial discretion in not naming yet other defendants is not a ground for denial of the proposed amendment.[3] The fact that the CFTC has

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[2] To the extent Firth and Shimer contend the matter is scurrilous, their remedy is a motion to strike pursuant to Rule 12(f), Fed.R.Civ.P.

[3] As stated in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." In short, "'the conscious exercise of some selectivity in enforcement is not itself a

sought leave to file a First Amended Complaint does not preclude the possibility of filing a second amendment. There is no requirement that the CFTC name every party that might have violated the federal commodity laws and, in any event, to have done so would certainly have delayed filing of the amendment. Such a delay would not have served the interests of justice. It is more important that the legal process join the principal participants first than wait to file a perfect complaint.

V. Firth and Shimer Fail to Establish that the Amendment is a "Futile Gesture"

Firth and Shimer adduce no grounds to support a claim of futility – i.e., "that the complaint, as amended, would fail to state a claim upon which relief could be granted." *Burlington*, 114 F.3d at 1434. Notably, Firth and Shimer answered the original complaint. The proposed amendment adds no new charges against Firth or Equity, and the new charges against Shimer are alleged with particularity. They will have an opportunity to answer or otherwise plead to the First Amended Complaint.

The cases denying leave to amend cited by Firth and Shimer are fundamentally distinguished from the case at bar: in each, the plaintiff's request for leave to amend was made well after judgment had been granted. The respective courts each had before it a record establishing that the proposed amendments were futile. *See Wilson v. Am. Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989) (leave to amend denied after summary judgment had been granted and the proposed amendment failed to cure deficiencies); *Roth v. Garcia Marquez*, 942 F.2d 617 (9th Cir. 1991) (affirming dismissal of action and subsequent denial of motion to amend breach

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federal constitutional violation' so long as 'the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *United States v. Goodwin*, 457 U.S. 368 at 380 n.11 (1982), *quoting Bordenkircher v. Hayes*, 434 U.S. 357, 364, *quoting Oyler v. Boles*, 368 U.S. 448, 456 (1962). *See also Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute.")

of contract complaint on grounds of futility where it was clear that no binding contract had been formed between parties); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 204 (7th Cir. 1985) (district court refused to permit second amended complaint after dismissing action where plaintiff's pleadings did not provide a "'factual predicate to support the crux' of his claims"); *Figgie Intern., Inc. v. Miller*, 966 F.2d 1178 (7th Cir. 1992) (after granting summary judgment against plaintiff, motion for leave to amend denied on basis of undue delay and bad faith where plaintiff presented no competent evidence that was not previously available).

WHEREFORE, Plaintiff Commodity Futures Trading Commission respectfully requests that the Court grant it leave to file the First Amended Complaint.

Dated: July 19, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 19, 2004, true and correct copies of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT** were served on the below-named attorneys by email followed by U.S. Mail at the below listed addresses.

Venice Bickham

Dated: July 19, 2004

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