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

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COMMODITY FUTURES TRADING :
COMMISSION, :
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Plaintiff, : Civil Action No. 04-1512
:
vs. :
:
EQUITY FINANCIAL GROUP LLC, TECH :
TRADERS, INC., VINCENT J. FIRTH and :
ROBERT W. SHIMER, :
:
Defendants. :
:
-----X

**MEMORANDUM OF DEFENDANTS EQUITY FINANCIAL
GROUP LLC, VINCENT J. FIRTH AND ROBERT W. SHIMER
IN OPPOSITION TO MOTION TO AMEND COMPLAINT**

Defendants Equity Financial Group LLC ("Equity"), Vincent J. Firth and Robert W. Shimer respectfully submit this memorandum in opposition to the motion of plaintiff Commodity Futures Trading Commission ("CFTC") to serve and file its proposed First Amended Complaint.

The proposed amended complaint, which comes immediately after Equity, Firth and Shimer consented to the issuance of a preliminary injunction against them based on the allegations of the original complaint, contains gratuitous, *ad hominem* rhetorical attacks against Shimer and Firth, and adds contradictory allegations of fraud that mis-characterize what the Private Placement Memorandum ("PPM") said about the procedure for verifying Tech Trader's results. These allegations unnecessarily damage Firth's and Shimer's reputations and unfairly affect their future ability to earn a living. Moreover, the additional allegations against Equity, Firth, and Shimer, had they been made at the time they consented to the preliminary injunction, would have had a significant bearing on their decision to consent and their approach to defending the case.

A. Ad Hominem Attacks on Firth's and Shimer's Characters

Paragraphs 17 and 18 gratuitously assert that Shimer and Firth "each had checkered pasts with prominent failures" and that Firth had "prior unsatisfactory business experiences and lending disputes that cast doubt upon his integrity." To the extent they are particularized, these assertions appear to be based solely on dishonest actions of other persons with whom Shimer and Firth dealt as intermediaries. The CFTC should not be permitted to amend the complaint to add gratuitous slurs on the characters of Shimer and Firth.

B. Unwarranted Accusations of Fraud.

The rest of the new allegations against Firth and Shimer are to the effect that they knew or should have known that accountant Vernon Abernethy's certifications of Tech Traders' trading results were fraudulent. This contention appears to be based solely on an underlying contention that they "recklessly agreed" to a "highly unusual procedure" under which they relied for ultimate verification of the trading results on Abernethy, who was hired by Murray and Tech Traders,

rather than on Shasta's own accountant (§ 22). The allegations misleadingly characterize what the PPM told the investors about the verification procedures; and they inexplicably ignore the role of Shasta's accountant, on whom Shimer and Firth relied to set up reliable verification procedures.

1. Allegations of the Proposed Amended Complaint

The proposed amended complaint alleges (§ 4) that Firth and Shimer represented to investors that all the trading was "reviewed and verified by an independent CPA, *i.e.*, Abernethy", and then alleges (tendentiously, and as though describing an arrangement that the PPM did not disclose to the investors) that they hired another CPA to purportedly receive the results from Abernethy and affirm them to investors, when "[i]n reality, Firth and Shimer merely instructed this second CPA to parrot the information Abernethy had supplied. This CPA did not perform an independent review. Firth and Shimer knew this second CPA did not perform an independent review. Equity, Firth and Shimer had no reasonable basis upon which to believe that the performance information supplied to actual and prospective participants had been verified."

In a similar vein, the proposed amended complaint elsewhere alleges (§ 45) that Equity, Shimer and Firth "knew that the performance figures reported by Abernethy were not audited failed to inform themselves of the precise trading documentation that Abernethy reviewed specifically knew that the balance of funds verified by Abernethy was meaningless in the absence of verification that Tech traders held sufficient funds to repay all claims against the 'super fund' either knew that the performance information was materially inaccurate or had no reasonable basis upon which to believe that it was accurate represented ... that an independent CPA had reviewed and verified the trading performance based upon ... the brokerage statements [and] also represented that [they] had retained at Shasta's own expense another independent CPA 'for the

purpose of verifying the profitability of Shasta's investment with the trading company,' even though all this second CPA did was to receive the rate of return figures and restate them."

2. What the PPM Actually Said About the Verification Procedure.

The PPM, however, explained to the investors that Shasta's accountant was going to rely on information provided by another accountant, who would remain unidentified but was deemed reliable by Shasta's accountant, regarding what the trading company's brokerage statements showed (PPM at 12-14). It said that Shasta was going to retain an independent certified public accounting firm (*i.e.* Putnam & Teague – *not* Abernethy), which was going to receive verification from another independent certified public accounting firm local to actual trading operations (*i.e.*, Abernethy's firm) that the local firm had reviewed original brokerage firm statements for all trading activity for each month (PPM at 12).

The local accountant was going to verify the results reflected in the statements to Shasta's accountant in accordance with procedures agreed upon between the two accountants. Shasta's accountant "can and will confirm to any Company member that it has performed standard due diligence and is satisfied as to the credentials and reliability of the CPA actually performing the physical review of the original brokerage statements for all System trading." The PPM stated that the local accountant would not be verifying to Shasta's accountant the accuracy of the information, but only that the information supplied accurately reflected what was on the broker statements. (PPM at 13.) Moreover, the PPM stressed that Shasta's accountant's only role was to serve as a conduit of information to be supplied by the local CPA who actually reviewed the statements (PPM at 14).

Thus, the PPM disclosed that Shasta's accountant was not going to perform any

independent review, but merely relay information supplied by a local accountant whose credentials and reliability Shasta's accountant was satisfied with, and that that information was going to be generated based on procedures agreed upon between Shasta's accountant and the local accountant. If this arrangement gave Firth and Shimer "no reasonable basis upon which to believe that the performance information supplied to actual and prospective participants had been verified," as alleged in the proposed amended complaint, ¶ 4, at least it was disclosed to the investors, contrary to the impression fostered by the proposed amended complaint.

3. The Proposed Amended Complaint Ignores the Role of Shasta's Accountant.

The proposed amended complaint alleges that Abernethy "reported materially inaccurate performance gains, despite possessing documents that disclosed huge trading losses" (¶ 3); he "failed to conduct the agreed-upon procedures consistent with professional standards" (¶ 6.c); he "was not qualified to perform the agreed upon procedures engagement", which was poorly designed in the first place, and he "failed to inform Equity, Firth, Shimer and others about these material deficiencies in the engagement" (¶ 24). Strangely, however, the proposed amended complaint makes no reference to Shasta's accountant's failure to inform her own clients – Equity, Firth and Shimer -- that the procedures they relied on her to work out with Abernethy to protect their interests were flawed.

It goes on to allege that Abernethy reported as trading gains amounts that actually represented new funds being invested, despite Shasta's having specifically expressed concern that the results not be skewed in this fashion; that Murray and Tech Traders supplied incomplete information to Abernethy; and that Abernethy actually received documents that on their face showed

substantial losses, and was notified about losses by a principal of one of the Sterling entities (¶¶ 25-26).

The proposed amended complaint presents Shasta's accountant as a mere puppet of Shimer, who is tendentiously alleged to have "instructed this second CPA to parrot the information Abernethy supplied" (¶ 4), developed the agreed upon procedures with Murray and Abernethy (¶¶ 23, 31), "coordinated the activities of Abernethy and a second 'Certified Public Accounting Firm' retained by Equity" and "coached the second CPA on how to handle questions posed by potential and actual participants" (¶ 31) – as though Shasta's accountant (who is never even identified by name, let alone made a party to this action) had no professional responsibilities to Shimer, Firth and Shasta's investors. The proposed amended complaint thus unfairly seeks to shift to Shimer and Firth the professional responsibilities of Shasta's accountant, and then charge them with the accountant's incompetence and derelictions of duty.

C. Leave to Amend Should Be Denied As to Equity, Firth, and Shimer Based on Bad Faith, Undue Prejudice and Futility.

Leave to file an amended complaint "shall be freely given when justice so requires," Fed.R.Civ.P. 15(a), and should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). In this case, bad faith, undue prejudice to Equity, Shimer and Firth, and futility of amendment are all present.

A district court does not abuse its discretion in denying a motion to amend when amending the pleading would be a futile act. An amendment is a "futile gesture" if the amended pleading could not survive a motion for summary judgment. *Wilson v. American Trans Air, Inc.*, 874

F.2d 386 (7th Cir 1989); *Roith v. Garcia Marquez*, 942 F.2d 617 (9th Cir.1991). Refusal is also proper ““where the party moving to amend has not shown that the proposed amendment has substantial merit.”” *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 204 (7th Cir. 1985)(quoting *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir.1979)). See also *Figgie Intern. Inc. v. Miller*, 966 F.2d 1178, 1181 (7th Cir.1992)(“Figgie's request to amend was also taken in bad faith. Not only did Figgie mischaracterize, and continues to mischaracterize the plainly irrelevant Arthur Andersen memorandum, but it failed to introduce any relevant evidence to support its request to amend.... Given the absence of supporting evidence, Figgie's request for leave to amend was baseless and made in bad faith.”)

In this case, the allegations of the proposed amended complaint that accuse Equity, Shimer and Firth of fraud in connection with the verification procedures are based on blatant mischaracterizations of the representations on this subject contained in the PPM, and further show bad faith in their studious and unjustifiable efforts to airbrush Shasta's accountant out of the picture. Shasta's accountant is not even referred to by name. These allegations could not survive a motion for summary judgment and reck of bad faith, as do the gratuitous references to Shimer's and Firth's supposed “checkered pasts” and to Firth's “prior unsatisfactory business experiences and lending disputes” supposedly “cast[ing] doubt upon his integrity.” Firth and Shimer also are clearly prejudiced by such allegations, particularly after they consented to the issuance of a preliminary injunction against them. The motion to add these allegations against Shimer and Firth should be denied.

D. Conclusion

For the foregoing reasons, Plaintiff's motion should be denied insofar as it seeks to add paragraphs 4 (fourth through ninth sentences), 17, 18, 22 (third sentence), 23 (first sentence), 31 (eighth sentence) and 45 (second through fifth and seventh through ninth sentences) in the proposed amended complaint.

Dated: New York, New York
July 9, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2004, I served the within MEMORANDUM IN OPPOSITION TO MOTION TO AMEND COMPLAINT on the below-named attorneys by mailing true and correct copies of said documents to them at the addresses indicated below:

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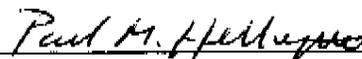
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