Elizabeth M. Streit, Lead Trial Attorney
Scott R. Williamson, Deputy Regional Counsel
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
SW-9752
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, New Jersey 08101
856-757-5412
PB-5422

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 District Court Judge Hon. Ann Marie Donio Magistrate **Civil Action No: 04-1512 (RBK)**

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CFTC'S REPLY TO THE STERLING ENTITIES' RESPONSE TO CFTC'S OBJECTIONS

The Sterling Entities'[1] Response to the CFTC's Objections shows on its face that they have failed to support their claims to the limited funds held by the Receiver in this case. Despite their assertions over the last eight months that identification of the beneficial owners of the funds the Sterling Entities gave to Tech Traders would expose them to unspecified criminal exposure in foreign lands, when finally called upon to provide authority for those assertions, they utterly fail to do so. Moreover, their continued resistance to producing Defendant Vernon Abernethy's back-up tape, which is subject to two Court Orders, providing the deposition of Vernice Woltz, the sole witness in support of their unsuccessful attempt to obtain the lion's share of the frozen funds at the beginning of this case, and producing foreign bank records that would show the source of the funds used for their Tech Traders' investments, exposes their continued attempts to obtain a significant portion of the frozen funds here while obfuscating their role in the fraud.

I. The Sterling Entities' Claims Should be Denied Because They Have Failed to Comply with the Court's August 23, 2004 Order to Identify All Persons Having a Beneficial Interest and Have Failed to Show that Compliance with this Order Would Expose Them to Liability Under Foreign Law.

Judge Kugler's Order of August 23, 2004 states as follows:

> In order to submit a valid claim to the funds held by the Receiver, investors must identify to the Receiver the nature and extent of their interest in the receivership assets, as well [as] the identity of all persons *having a beneficial interest of any kind* in their account with the Defendants. (emphasis added).

The Sterling Entities argue in their Response that the word "persons" should be interpreted to include corporations, partnerships and trusts, because such a definition of "person''

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[1] As defined by Sterling and the CFTC for purposes of these proceedings, the Sterling Entities refers to the following claimants to the Receiver's proposed distribution of funds: Sterling ACS, Ltd., Sterling Alliance Ltd., Sterling Casualty & Insurance Ltd., Sterling Bank Limited, Sterling Investment Management, Ltd. and Strategic Investment Portfolio LLC.

is contained in the Commodity Exchange Act, 7 U.S.C. § 1 (2002) ("the Act") and its Regulations, 17 C.F.R. § 1 (2004). However, they provide no support for such an interpretation of the Court's Order and this Court should not adopt such an interpretation.

An examination of Sterling's claim forms (Exhibit CC to their Response) as well as their correspondence to the Receiver marked as Exhibits F and I to their Response, shows that the true beneficial owners of the funds subject to the Sterling Entities' claims are buried under layers of holding companies and trusts. A list of trusts and "settlors" that appear to be limited liability corporations is not helpful to determining a fair and equitable distribution to the natural persons who are entitled to distributions of the limited funds available and cannot be what the Court meant when it ordered disclosure of any persons having a beneficial interest *of any kind.*[2]

For months, the Sterling Entities nonetheless have resisted providing that information to the Commission and the Receiver, on the unsupported grounds that doing so would violate foreign laws.[3] Now when finally called to the carpet, they present wholly inadequate support for refusing to comply with the Court's Order.

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[2] As the Receiver explained in his Memorandum in Support of Motion of Equity Receiver for Authority to Make Interim Distribution on Account of Investor Claims, at 5-6 ("Receiver Memorandum"), many of the investors in Tech Traders consisted of groups of individuals who pooled their funds for investment in Tech Traders. In order to ensure the equitable allocation of any distribution of frozen funds amongst investors, he has proposed that the authorized representative of each investment group be required to submit to the Receiver a proposed means of allocating the distribution of funds amongst those having a beneficial interest in the funds. Receiver Memorandum at 23-24. In order to assure that such distributions are fair and equitable, the Receiver needs to know the beneficial owner of the funds. Moreover, as set out below, the Commission needs to know the natural persons having beneficial interests to determine whether there have been any violations of the Act.

[3] Compare Exhibit K to Sterling's Response, an August 31, 2005 letter to Streit from Russo ("..the substance of the subpoena [to Walter Hannen and Vernice Woltz] ...is overly broad inasmuch as it threatens to compromise unrelated confidential information in the possession of entities which employ my clients and ,consequently, *implicates the privacy laws of St. Lucia, Anguilla and the Bahamas (which provide for criminal penalties for unauthorized disclosure of certain information)* to Exhibit A to Sterling's Response, a September 29, 2004 letter to Streit

As support for their refusal to disclose beneficial interests, the Sterling Entities present Exhibits W and BB to their Response. The first two pages of Exhibit W purport to be an opinion letter from a Miriam Curling to Howell Woltz. The letter states that disclosure of "beneficiaries of the Trusts" would place Woltz "in serious jeopardy both personally and corporately" and "could leave you open to lawsuits and legal actions being instituted against you jointly and severally by each and every beneficiary" and further "could result in severe fines and custodial sentences..." In the letter, Curling mentions "the Banks and Trust Companies Regulation Act and The Banks and Trust Companies Regulation, Chapter 316, but does not state which provisions of the Act would be violated by the disclosure of persons with beneficial interests. Moreover, she does not state to which Sterling Entities these Acts would apply. Notably, she appears to be a Bahamian lawyer (though that is not established in the record anywhere) and is citing to laws that appear to apply to Bahamian banks and trust companies. However, according to the Affidavit Howell Woltz filed last year in support of Sterling's first motion to intervene and unfreeze funds, Sterling Bank Ltd. is a St Lucia bank (see Exhibit A hereto at ¶18) and Sterling Trust (Anguilla), Ltd. is an Anguillan entity (Exhibit A at ¶25). Thus, it would not appear that Bahamian bank or trust laws would apply to these entities. The only Sterling claimants that are Bahamian entities are Sterling ACS, Ltd. and Sterling Alliance, Ltd., neither of which is a bank

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from Russo ("In its current form, the subpoena seeks to compel my clients to produce information and documents *in violation of Bahamian and Anguillan law.....[T]he act of producing such information would be the equivalent of a felony under the laws of those foreign jurisdictions...and are punishable by fines up to $500,000 and imprisonment for as many as 10 years for each violation.*") Exhibit P to the Sterling Response, Streit's response to Russo's September 29 letter, asks for a citation to the foreign laws he claimed prohibited Vernice Woltz and Walter Hannen from responding to the subpoena. No citation was provided until an April 4, 2005 letter from Russo to Streit (Exhibit J to Sterling Response) in which Russo refers to several laws not recited in Sterling's Response.

or trust company. See Exhibit A at ¶ 10, and pp. 55-58 of Howell Woltz Deposition, attached as Exhibit B hereto.

In fact, as Howell Woltz stated in his Affidavit, Sterling ACS, Ltd. is a "financial and corporate services provider organized and licensed pursuant to the laws of The Bahamas." Exhibit A at ¶ 10. The Bahamian Act that governs financial and corporate service providers contains no prohibition on disclosing beneficial interests but instead, requires a licensee under the Act to obtain details about each of its clients' businesses and to keep records with respect to each client, including the name and address of the beneficial owners of all international business companies. See An Act to Provide for the Licensing and Regulation of Financial and Corporate Service Providers and for Connected Purposes, attached Exhibit C hereto, §14.(2) and (3). It also requires a licensee to "maintain adequate information on a file about each client so as to enable the licensee to fulfil the obligations under the Act and any rules and regulations made thereunder and any other law" (§15) and states that "any licensee who fails to comply with section 14(3) commits an offence and is liable on summary conviction to a fine of fifty thousand dollars" (§18(7)). Thus, it appears that the Act that governs Sterling ACS, Ltd. requires that entity to inquire about and keep records about its clients, including beneficial owners, to comply with the law, which could include complying with this Court's Order.

Even if the Banks and Trust Companies Regulation attached to Ms. Curling's letter somehow applies to Sterling ACS or Sterling Alliance, it provides an exception to the preservation of confidentiality if the licensee has the "express or implied consent of the customer concerned." See § 19. There has been no showing that the Sterling Entities have attempted to

obtain the consent of beneficial owners to reveal their identity.[4] Moreover, under § 19(3) of the Regulation, it appears that information may be disclosed in civil proceedings if held *in camera* and kept confidential between the court and the parties thereto.[5]

As for the Anguillan entities, which the Woltz Affidavit states are Sterling Casualty & Insurance, Ltd., Sterling Investment Management, Ltd. and Sterling Trust (Anguilla) Ltd. (Exhibit A at ¶¶ 14, 25, 30), Sterling provides no legal opinion or other interpretation of Anguillan law, but merely attaches the Confidential Relationships Ordinance, 1981 (Exhibit BB) to its Response.[6] Without further legal support, it is not clear that this Ordinance prohibits disclosure of the natural persons who are beneficial owners of the money invested by Sterling with Tech Traders. The Ordinance states that it does not apply to "confidential information given to or received by any professional person acting in the normal course of business or professional practice or with the consent, express or implied, of the relevant principal." See Exhibit BB to Sterling Response at 3(2). Assuming the beneficial owners would be considered the principals, again, Sterling has made no showing that it has sought their consent to reveal their identities. Moreover, the ordinance does not apply to confidential information given to or

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[4] In fact, the Curling "opinion" letter implies that the Sterling Entities' chief concern is that the beneficial owners will sue the Sterling Entities, which suggests that they have not even told these undisclosed persons that their money was invested in a Ponzi scheme and that they only stand to receive back a portion of it through this action. If that is the case, such an omission is fraudulent, and provides another compelling reason to disclose the beneficial owners to learn what representations were made to them about their investments and whether those representations were fraudulent under the Commodity Exchange Act.

[5] Although the Bahamian regulation uses the term *in camera*, because it states that the information will be kept confidential between the court and the parties, it appears to operate more like what would be called a protective order in the United States.

[6] Despite its assertions in an August 31, 2004 letter to the Commission (see Exhibit K to Sterling Response), the Sterling Entities have apparently abandoned their assertion that St. Lucia law prohibits disclosure of beneficial interests. Thus, there is no prohibition in disclosing any beneficial interests in Sterling Bank, Ltd., a St. Lucia entity (Exhibit A at ¶18).

received by a "professional person", which is defined to include "an attorney...a broker or other kind of commercial agent or adviser, a bank or other financial institution, any public officer or other government official or employee...." Under this definition, a government employee, such as an employee of the CFTC, appears to be a person to whom "confidential information" can be given without penalty.[7] The Sterling Entities have not shown why the Ordinance should not be so construed. They also have not made any showing that the directors or officers of Sterling Casualty & Insurance, Ltd., Sterling Investment Management, Ltd. and Sterling Trust (Anguilla) Ltd. are not "professional persons" to whom the Ordinance does not apply.

Other sections of the Ordinance also appear to allow disclosure of the beneficial owners of the clients of the Sterling Anguillan entities. The definition of "confidential information"[8] does not necessarily preclude disclosing the identity of the beneficial owners of clients. Also, under part 4 of the Ordinance, the only persons guilty of an offence for disclosure of "confidential information" are those who "divulge[] it to any person not entitled to possession thereof..." It would seem likely that because this Court ordered the information turned over to the Receiver, he would be entitled to possession of the information and the person who divulged the information would not be guilty of an offence under the Ordinance.

Thus, there are many unanswered questions about the applicability of the authorities Sterling cites to support their continued refusal to identify the natural persons who gave them

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[7] Under part 3, confidential information can be given to such government officials and employees "acting in the normal course of business or professional practice" which includes "compliance with such laws and legal processes as arises out of or in connection therewith..", which could be interpreted to include compliance with this Court's Order.

[8] Under part 2 of the Ordinance, "confidential information" includes "information concerning any property, or relating to any business of a professional nature or commercial transaction which has taken place, or which any party concerned contemplates may take place, which the recipient thereof is not, otherwise than in the normal course of business or professional practice authorized by the principal to divulge."

money to invest with Tech Traders. The Court's Order requires that this information be disclosed and the Sterling Entities have not shown that any foreign law prohibits that disclosure. Therefore, they should be required to identify the natural persons having beneficial interests in the frozen funds.

II. THE DISCOVERY THE CFTC SEEKS FROM STERLING IS PROPER AND SHOULD BE ALLOWED

The Sterling Entities argue that the CFTC's use of the discovery tools under the Federal Rules of Civil Procedure to determine their role in the massive fraud at issue in this case is improper; but they cite no authority for that proposition. "[I]t is well-settled that the commencement of civil proceedings does not terminate an administrative agency's investigative authority..." *National Labor Relations Board v. Bacchi,* 2004 WL 2290736 (E.D.N.Y. 2004), citing *In re McVane,* 44 F.3d 1127, 1141 (2d Cir. 1995), *RTC v. Walde,* 18 F.3d 943, 949-50 (D.C. Cir. 1994), *Linde Thompson Langworty Kohn & Van Dyke v. RTC,* 5 F.3d 1508, 1518 (D.C. 1993); *United States v. Frowein,* 727 F.2d 227, 231-32 (2d Cir. 1984)(investigative subpoenas enforced after civil case filed)(attached as Exhibit D hereto). There is nothing in the Commodity Exchange Act or its Regulations thereunder that prohibits the Commission from engaging in discovery like any other party to civil litigation. The sections of the Regulations cited by Sterling concerning the authority to conduct investigations, 17 C.F.R. § 11.2, or the issuance of administrative subpoenas, § 11.4, do not prohibit the Commission from investigating Sterling's role here under the Federal Rules of Civil Procedure.

It is true that the Commission **could** conduct an administrative investigation of the Sterling Entities under the Act and Regulations. However, that would be eminently unfair to the other parties to this litigation. Sterling fails to point out that all such administrative investigations are private and confidential. 17 C.F.R. § 11.3. Thus, all information and

documents obtained during the course of such an investigation, whether obtained pursuant to a subpoena or not, and all investigative proceedings, are treated as non-public. This means any investigative testimony would be private and could not be attended by parties to this action. During the deposition of Howell Woltz, to which all parties received notice, he made many statements concerning the roles of defendants Coyt Murray and Vernon Abernethy in the fraud. If the investigation had been private, those parties would not have had access to this information to defend themselves. Moreover, the Sterling Entities are intimately connected to the facts of this case. The president of one of the claimants, Sterling Casualty & Insurance, as well as the a Director of another Sterling claimant, Strategic Investment Portfolio, is defendant Vernon Abernethy, who the Commission alleges worked closely with defendant Coyt Murray and "verified" fraudulent performance numbers. Each of these entities, through Howell and Vernice Woltz, had many dealings with these defendants. Certainly, the facts of what they knew about the fraud are relevant, both to their possible liability under the Act and to the evidence they can provide to support the Commission's allegations against the named defendants. Each of the Commission's attempts to conduct discovery of the Sterling Entities has been relevant and reasonably calculated to lead to the discovery of admissible evidence, which the Sterling Entities admit is the standard under Rule 26. See Sterling Response at 9.[9]

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[9] Sterling makes vague, unsupported claims that the CFTC is trying to avoid either the "constitutional" or the congressional" protections afforded to them. See Sterling Response at 1, 11. Conducting relevant discovery about Sterling's role in this case in a public forum under the Federal Rules of Civil Procedure does not violate any Constitutional or Congressional (if there is such a thing) protections afforded them. Sterling witnesses have the same or better protections under the Federal Rules of Civil Procedure, than under 17 C.F.R. § 11.7, which Sterling cites. They have detailed notice, through the First Amended Complaint, about the subject matter of the CFTC's investigation. In an administrative investigation, they would only be allowed to inspect a Formal Order of Investigation, which would only tell them what violations of the Act are potentially implicated, without any factual detail and would not be allowed to obtain a copy. In this litigation, Sterling witnesses can order copies of their deposition straight from the court

III. THE DEPOSITION OF VERNICE WOLTZ SHOULD TAKE PLACE BEFORE ANY HEARING ON STERLING'S CLAIMS

Sterling has no answer to the clear evidence that Vernice has tried very hard to evade service of any subpoena on her. What does she have to hide?[10] Sterling claims that it is the CFTC's "failures" that have resulted in the CFTC "not obtaining consent to accept service of certain subpoenas." Sterling Response at 5. The CFTC has not accepted Sterling's "offer" to accept service of a subpoena on Ms. Woltz because that consent is conditioned on Sterling counsel's restrictions on what questions can be asked of her. See Sterling Response at 7. ("[I]f the CFTC agreed 'to limit the subpoena to areas that properly are the subject of the above-referenced action and which would not expose my clients to prosecution by foreign governments, they will consider consenting to service.") Those restrictions apparently are to limit questions to areas they consider "properly" the subject of this action and to avoid questions that would expose Ms. Woltz to the supposed criminal penalties she faces if she reveals information about beneficial owners. Id. As set out in Part I of this Memorandum, Sterling has utterly failed to substantiate that Ms. Woltz faces any criminal exposure at all. And, as set out in Part II of this Memorandum, Sterling's restricted view of the limitations of discovery under the Federal Rules of Civil Procedure are also unsupported by citation to any case law or statute. The CFTC should not be so restricted in its questioning.

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reporter. Under § 11.7, a witness in an administrative proceeding must ask for a copy of their transcript and may, for "good cause" be limited to inspection of the official transcript. Other protections afforded witnesses under § 11.7, the right to counsel during testimony and the right to assert the 5th Amendment, are also afforded them in civil litigation.

[10] Apparently, the Woltzs will go to great measures to avoid service of subpoenas on them. The Commission has tried three more times since its Objection was filed to serve Ms. Woltz. As noted in the Due Diligence Report filed by the process server, attached as Exhibit E hereto, a woman answering the door at their North Carolina residence stated that the Woltzs have moved to the Bahamas. They are apparently also building a fence to restrict access to their property.

The CFTC recommends to the Court that the issue of whether the natural persons who are beneficial owners of the funds Sterling invested for them in Tech Traders should be disclosed be decided by the Court before the deposition of Ms. Woltz takes place. After the Court decides that issue, if Sterling counsel continues to refuse to accept service of a subpoena on Ms. Woltz, the CFTC will continue to attempt to serve Ms. Woltz and/or will file a motion to compel her deposition in the Middle District of North Carolina.[11]

But the deposition of Ms. Woltz should take place before any hearing on Sterling's claims. She is the Chief Financial Officer of Sterling ACS and on the Board of Directors and/or an owner of several other Sterling Entities. See Objection of the Commodity Futures Trading Commission to the Claims of the Sterling Entities ("CFTC Objection") at 1, nt 3. She was the sole Sterling witness at the hearing on the Sterling Entities' first motion to intervene and release funds. Ms. Woltz has information that will bear on claims issues on this case. Moreover, as stated in the Declaration of J. Vernon Abernethy, attached as Exhibit F hereto and discussed below, Ms. Woltz was apparently present at meetings in Mr. Abernethy's home shortly after this case was filed during which Sterling Bank President Walter Hannon tampered with Defendant Abernethy's computer and she apparently took the back-up tape of computer records Mr.

[11] Sterling asserts that the subpoena served on Ms. Woltz violated FRCP 45(a)(3)(B) which provides that an attorney as officer of the court may issue and sign a subpoena if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice. They are apparently asserting that Ms. Streit, who signed the subpoena, is not authorized to practice in New Jersey. However under Local Rule 101.1(f), "an attorney admitted to practice in any United States District Court may practice before this Court in any proceeding in which he or she is representing the United States or any of its officers or agencies." Ms. Streit is admitted to practice in the State of Illinois and is admitted to the United Stated District Court for the Northern District of Illinois. See Declaration attached as Exhibit A to CFTC Objection. She is representing an agency of the United States government. Therefore, she is authorized to sign any subpoenas in this case.

Abernethy created to the Bahamas. She should be questioned under oath about these activities, which, if true, raise very serious issues about evidence tampering in this case.

IV. THE STERLING ENTITIES HAVE NOT PRODUCED ALL EVIDENCE RELEVANT TO A DETERMINATION OF CLAIMS DISTRIBUTION

Contrary to its claims in its Response, Sterling has not produced all responsive information requested by the CFTC in its March 14, 2005 letter. As Sterling counsel admitted at the hearing on this matter on April 8, Sterling withheld production as to documents it claims are already in the CFTC's possession. See Exhibit G to Sterling Response. The Court ordered Sterling to produce such documents. To date, it has failed to do so. [12]

Sterling also has failed to produce any foreign bank records that would show the source of funds used by the Sterling Entities to invest in Tech Traders. In its Response, Sterling conveniently ignores the fact that the CFTC limited its requests 7 and 9 in its March 14, 2005 letter (Exhibit E to the Response) to information that would show the source of funds that were eventually deposited with Tech Traders, although it acknowledges the CFTC's limitation in an April 4, 2005 letter, attached as Exhibit J to its Response. As limited, this request for information is relevant both to the claims process and to CFTC's understanding of Sterling's role in this case. The CFTC has analyzed the known domestic bank accounts in the name of the Sterling Entities and traced the funds that directly or indirectly funneled through the Tech Trader accounts. However, there were transfers of funds between Sterling's foreign bank accounts and

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[12] It is well-settled that the fact that documents may already be in the possession of a party is not a sufficient reason to withhold production. See e.g. *FDIC v. Renda,* 126 F.R.D. 70 (D. Kan. 1989) ("Even if the plaintiffs are in possession of certain documents which they requested from defendants, the plaintiffs are entitled to review those documents which are in the defendants' control. Such a review is necessary for the plaintiffs to fully understand the nature of defendants' knowledge of the fraudulent transactions herein at issue.") See also *Ramsay G.C. Evans Sales & Mfg.*, 196 Bankr. 114, 115 (E.D.Ark. 1996), *The Walt Disney Co. v. DeFabiis*, 168 F.R.D. 281 (1996), *Cook v. Rockwell International Corp.*, 161 F.R.D. 103, 105 (D. Co. 1995), *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.,* 181 F.R.D. 229,239 (W.D.N.Y. 1998).

Tech Traders. The Commission needs records of those transfers to complete the analysis. See Declaration of Joy McCormack , attached as Exhibit G hereto, at ¶ 3.

Completion of this analysis will assist the Receiver in knowing the source of the funds Sterling deposited in the Tech Traders' accounts to determine the persons with beneficial interests in those funds and the amounts of their interests. The CFTC also needs this information to determine the source of funds deposited with Tech Traders to determine how Sterling obtained those funds, what Sterling told its clients about the use of those funds and whether Sterling employees or principals made any misrepresentations in soliciting the funds. This is particularly crucial here because of the Sterling principals' surprising failure to retain documents in this case. Although the Sterling Entities produced a few documents, they produced only a handful of redacted emails, with no explanation of why they were redacted or whose emails they were. See Exhibit T to Sterling Response. Howell Woltz apparently routinely destroys his emails. See pp 104-107 of Howell Woltz Deposition Transcript, attached as Exhibit B. The Sterling Entities have no written policy with respect to email retention and delete all their emails from their server and from employees' hard drives. See Exhibit J to Sterling Response. And the President of Sterling Bank, Walter Hannen, who signed its claim form in this case, retains no documents responsive to this matter. See Exhibit A to CFTC Objections at ¶2, 4 and 9.

Although the Sterling Entities only retained a handful of emails, the CFTC has obtained emails sent to and received from Howell and Vernice Woltz and Walter Hannen from Defendant Vernon Abernethy and the principals of one of Sterling's investors who came forward and contacted the Receiver and the CFTC. These emails provide important information on the representations made by Sterling to their investors about Tech Traders. The CFTC needs to

know the identities of Sterling's other investors to determine what they were told and to seek to obtain any documentation that was sent to those investors by Sterling.

Therefore, because foreign bank records and other evidence of money transfers to Sterling clients that were deposited in Tech Trader's accounts are necessary to complete the analysis of money Sterling placed with Tech Traders to determine its source, both for fair and equitable distribution of the receivership estate and to determine Sterling's role in the fraud, they should be produced. Likewise the documents Sterling promised to produce on the record on April 8, 2005 should be produced.

V. STERLING SHOULD BE IMMEDIATELY REQUIRED TO PRODUCE THE BACKUP TAPE OF DEFENDANT VERNON ABERNETHY'S COMPUTERS WHICH WAS ILLEGALLY CONFISCATED IN THE EARLY DAYS OF THIS LITIGATION AND WHICH MAY REVEAL EVIDENCE TAMPERING

Sterling's conduct in withholding Defendant Vernon Abernethy's backup tape is outrageous and cannot be condoned. For eight months, since late August, they have delayed and stalled in producing the tape. They have attempted to confuse the Court and the Commission on what exactly was backed up and to whom it belongs. Now that the Commission has learned more about how the backup tape was taken from Abernethy, Sterling's continuing refusal to turn over the tape is even more disturbing.

In order to respond to Sterling's assertions about the backup tape in its Response, the Commission talked recently to Vernon Abernethy. See Declaration of J. Vernon Abernethy, attached as Exhibit F hereto and Declaration of Joy McCormick, attached as Exhibit G hereto. It became clear during the course of that discussion that what was backed up was **not** the laptop computer that Sterling claims belongs to it and which the Commission previously imaged and analyzed. See Exhibit G at ¶¶ 4-6. As Abernethy states in his declaration, within 24 hours of the Receiver's instructions to preserve his computer files, Abernethy directed the imaging of his two

desktop computers. Exhibit F at ¶ 7. According to Abernethy, within days of creating that backup, he received a series of visits from Walter Hannen, Howell Woltz and Vernice Woltz, in one instance accompanied by Defendant Coyt Murray. Exhibit G at ¶ 9-11. Hannen, who in response to a Commission subpoena claimed to have no responsive documents, installed programs, downloaded and created files on Abernethy's computer. Id. at ¶9, 11. He had access to those computers for two days. Id. As Abernethy states, the computers contained documents created is his capacities as an agent of Tech Traders, President of Sterling Casualty & Insurance, a claimant, a member of Strategic Investment Portfolio, another claimant, and an agent of the Sterling Companies as a whole. Id. at ¶ 6[13]. These computers contained relevant evidence that the Receiver, who recognized Abernethy as a crucial witness even before he was sued, told Abernethy to preserve. Hannen may have altered or destroyed that evidence. The backup tape, created before the Woltzs, Hannen and Defendant Coyt Murray made their visits to Abernethy's home, may contain the only remaining copy of that evidence.

The Court should disregard all Sterling's arguments to justify why they should not be required to return the tape. The backup tape is **not** their property – it is a backup of Abernethy's desktop computers created specifically at the instructions of the Receiver appointed by the Court in this matter, who has been charged by this Court to preserve books and records of the Defendants, including all financial and accounting records. See Part IV ¶B of the Statutory Restraining Order, attached to Exhibit L to Sterling's Response. It belongs to Abernethy, not Sterling. According to Abernethy, it contains both documents relevant to this case, as well as documents wholly irrelevant to Sterling that relate to him personally and to his outside

[13] Abernethy also states that the computers contained documents used for his public accounting business outside of his work for Tech Traders and the Sterling Entities, and personal documents. Exhibit F at ¶6.

accounting practice. The CFTC has **not** analyzed the desktop computers so it does **not** have copies of what was on that computer. Although the Commission has provided a summary of the information contained in reports it received of what was deleted from the laptop computer in Exhibit G attached hereto, it does not have such a report for the desktop computers because such an analysis has not been done. And even if the Commission were to accept Sterling's assertion that the backup tape contains some documents the Commission already has, it is still entitled to those documents. See *Liafail v. Learning 2000, Inc.*, 2002 WL 31954396 (D.De. 2002) (plaintiff ordered to produce documents the plaintiff believed were already in the defendant's possession due to defendants' computer file restoration efforts), attached as Exhibit H hereto. The law does not permit a third party to this case, who has taken a defendant's property, to dictate what is "relevant" to the matter.

Sterling is also wrong that their taking of and retention of the backup tape is not in violation of the Court's Orders. They have violated two court orders – the Statutory Restraining Order entered by this Court on April 1, 2004 and the Consent Order of Preliminary Injunction Against J. Vernon Abernethy entered in August, 2004, both of which were attached to the Commission's September 1, 2004 letter demanding the return of the tape. That letter is attached as Exhibit L to Sterling's Response. Part I of Statutory Restraining Order prohibits Defendants' agents and "all persons insofar as they are acting in active concert or participation with [defendants]" from directly or indirectly "[d]estroying, altering, concealing or disposing of any books, records, electronically stored data or other documents, wherever stored concerning the Defendants..." As its accountant, Abernethy was Tech Trader's agent and was a person "acting in active concert or participation with" Tech Traders. The Sterling principals who went to Abernethy's house and started tampering with his computers certainly knew this. Howell Woltz

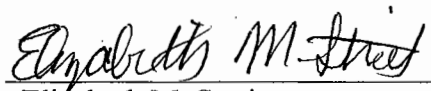
had visited the Tech Traders' office the week before, found the Receiver and Streit there and was told about and likely given the Restraining Order. See Exhibit A at ¶¶ 3,6. Despite this knowledge, Woltz and his colleagues went to Abernethy's home, accompanied by the Defendant alleged to have committed a massive fraud, Coyt Murray, performed unknown functions on Abernethy's computers and seized the backup tape made to preserve evidence in this case. This is outrageous conduct. The fact that they have held onto this evidence for eight months compounds the violation. Sterling should be required to turn over that tape immediately.

CONCLUSION

Sterling's Response demonstrates that this matter is not ripe for a hearing on their claims. Before any money can be distributed to them, all Sterling Entities must disclose the natural persons who are beneficial owners of the funds Sterling invested in Tech Traders. This is necessary both to a fair and equitable distribution of the frozen funds and to the CFTC's investigation of Sterling's solicitation of its clients whose money wound up at Tech Traders. Sterling has failed to show that any foreign law prohibits such disclosure and the Court has so ordered it. Sterling has also failed to show that there is any authority that prohibits the CFTC from conducting discovery of Sterling's role in this fraud, where that discovery is both relevant and reasonably calculated to lead to the discovery of admissible evidence in accordance with Rule 26. Therefore, Sterling should be ordered to comply with the CFTC's discovery request, produce Vernice Woltz for deposition and produce foreign bank records and other evidence of transfers of money from Sterling clients that were deposited with Tech Traders. Finally, the Sterling Entities should be ordered to immediately turn over Vernon Abernethy's backup tape, which was specifically created to preserve evidence in this case.

Date: April 28, 2005

Respectfully submitted,



Elizabeth M. Streit
Lead Trial Attorney
A.R.D.C. No. 06188119

Scott R. Williamson
Deputy Regional Counsel
A.R.D.C. No. 06191293

Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
(312) 596-0537 (Streit)
(312) 596-0520 (Hollinger)
(312) 596-0560 (Williamson)
(312) 596-0700 (office number)
(312) 596-0714 (facsimile)