EXHIBIT

A

BROWN & CONNERY, LLP
By: Warren W. Faulk, Esquire
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Attorneys for Sterling ACS, Ltd.,
Sterling Casualty and Insurance, Ltd.,
Sterling Bank Limited,
Sterling Trust, Ltd.,
Sterling Investment Management Ltd.

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)** **AFFIDAVIT OF HOWELL W. WOLTZ**

HOWELL W. WOLTZ, being duly sworn, deposes and states as follows:

1. I am over the age of eighteen years and employed by Sterling ACS, Ltd as a Managing Director.

2. I submit this affidavit in support of the motion by Sterling ACS, Ltd., Sterling Casualty & Insurance, Ltd., Sterling Bank Limited, Sterling (Anguilla) Trust, Ltd., and Sterling Investment Management, Ltd. (collectively, the "Intervenors") to intervene in the above-captioned case and for a modification of this Court's Order dated April 1, 2004, permitting the release of their funds. Except for those facts alleged upon information and belief, I have personal knowledge of the facts and circumstances set forth herein.

EXHIBIT A

3. The complaint in this action neither names the Intervenors as defendants, nor makes any reference to culpable conduct by them. In fact, none of the Intervenors has ever had a regulatory issue, a customer complaint or any other blemish on their corporate records.

4. On April 1, 2004, this Court entered an order (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. Upon information and belief, the receiver then contacted financial institutions and accounts in the name of Tech Traders were frozen.

5. Included in the Tech Trader accounts was approximately $15.55 million of the Intervenors' funds. In addition, the receiver froze a $1.925 million account held in the name of Intervenor Sterling Trust (Anguilla), Ltd. because Tech Traders had a limited power of attorney to trade the account. As a consequence of this, the total funds belonging to the Intervenors now being restrained by the receiver amount to approximately $17.5 million.

6. The Intervenors received no notice of the complaint, motion for a restraining order or the restraint itself. Instead, in or about the week of April 12, 2004, they first learned of the restraint when they made an unannounced visit to Tech Traders' offices and found that the premises had been seized.

7. The Intervenors immediately spoke with the CFTC and the receiver. They explained that they were clients of Tech Traders with more than $17 million invested, that none of them had invested with Equity or Shasta and that the funds now being restrained were not part of the illegal commodities pool alleged in the complaint. The Intervenors also informed the CFTC and the receiver that $9.2 million of the funds seized had been wired only in the past thirty days. They further explained that they had revoked the instrument and had not allowed Tech Trader to use the limited trading power of attorney on the $1.925 million Sterling Trust (Anguilla), Ltd. account for more than a year.

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8. Thereafter, the Intervenors provided the CFTC and the receiver with account statements and wire transfer records for all their funds held by Tech Traders. Those records clearly demonstrate that the funds were not being transferred in from Shasta. In addition, the Intervenors informed the CFTC and the receiver that the restraint had placed the companies in a precarious financial position and that failure to release the funds could jeopardize the viability of four licensed entities, including St. Lucia's only international bank, a trust company and an insurance company under British territorial rule.

9. The Intervenors have continued to communicate and cooperate with the CFTC and the receiver. Notwithstanding this, the CFTC and the receiver have taken no action to assist Intervenors in avoiding the disastrous consequences that restraint of these funds have caused and will cause. Time is of the essence and, as described further below, the Intervenors may be forced to suspend all activity or possibly close their doors if the funds are not released.

Sterling ACS, Ltd.

10. Intervenor Sterling ACS, Ltd. ("ACS") is a financial and corporate services provider organized and licensed pursuant to the laws of The Bahamas. Its primary business is the formation and management of corporations for clients residing in various parts of the world.

11. ACS never has invested in Defendant Equity Financial Group, LLC or Shasta Capital Associates, LLC, and has had no business relationship with Defendants Vincent J. Firth or Robert J. Shimer.

12. ACS manages the entities that comprise the Strategic (Bahamas) Portfolio ("Strategic") and has caused them to invest with Tech Traders. As of February 29, 2004, the Strategic account at Tech Traders had a balance of $1,837,018.

13. The CFTC has used this Court's Order to restrain these funds. If the funds are not released, ACS will be out of compliance with minimum capital requirements and its license can be suspended. Six full time employees will be out of work.

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Sterling Casualty & Insurance, Ltd.

14. Intervenor Sterling Casualty & Insurance, Ltd. ("Insurance") is a Class One insurance company licensed under British law in the territory of Anguilla.

15. Insurance never has invested in Defendant Equity Financial Group, LLC or Shasta Capital Associates, LLC, and has had no business relationship with Defendants Vincent J. Firth or Robert J. Shimer.

16. Insurance forwarded $170,000 to Tech Traders during March 2004. I am informed and believe that this money was held in a segregated account with other Sterling Group investments in Rothenthal & Collins Group account no. 84084108.84102 and was never traded or co-mingled with non-Sterling Group funds. Nevertheless, the CFTC and or the receiver have used the Order to restrain these funds.

17. Because British territorial financial regulators require that lost or encumbered capital be reported to the regulators, Insurance has reported the incident. If this matter is not resolved in the very short term its license to do business will be suspended. Four full time employees will be out of work.

Sterling Bank Limited

18. Intervenor Sterling Bank Limited ("Bank") is a Class One bank licensed in the nation of Saint Lucia. Bank is St. Lucia's only international bank. For all intents and purposes it is the only banking entity the financial services supervisor has to oversee. Consequently, Bank remains under very close scrutiny and must provide monthly accounting to the supervisor.

19. Bank never has invested in Defendant Equity Financial Group, LLC or Shasta Capital Associates, LLC, and has had no business relationship with Defendants Vincent J. Firth or Robert J. Shimer.

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20. To maintain its banking license, Bank must have a minimum of $1,000,000 in liquid assets at all times. As of February 29, 2004, Bank had $339,422 of this liquid capital with Tech Traders. The CFTC and/or the receiver has used the Order to restrain all of these funds. As a result, Bank's capital is impaired. If the funds are not released, Bank's license likely will be suspended within a few days. Seven full time employees will be out of work.

21. Bank also sent $9,050,000.00 belonging to a client of Cardinal Investment Management (a third-party administrator in Nassau, Bahamas) to Tech Traders' account at Bank of America in March 2004. The funds belong to a large independent investment fund and – by agreement with Tech Traders – were maintained in a segregated account.

22. The funds were wired in March 2004 to the Bank of America account no. 000775597961, and were then to be transferred to the segregated Rosenthal & Collins Group account no. 84084108.84102. The first two installments ($6,000,000) were transferred, but the last installment of $3,050,000 on March 26, 2004 remains in the Bank of America account because the Order restrained the transfer. I am informed and believe that these funds were not traded or co-mingled with non-Sterling Group funds.

23. Although none of the funds were used for trading and were in a segregated account, the CFTC and/or the receiver used the Order to restrain all of the funds. This restraint threatens the viability of Bank. The funds do not belong to Bank; rather, Bank is serving as a custodian in exchange for a fee (1% per annum). If the funds are not released, the owners of the funds will certainly prompt St. Lucia regulators to suspend Bank. Seven full time employees will be out of work.

24. In addition, since the owners of the bank are guarantors of this custodial arrangement, they face financial ruin. Notably, the manager of the investment fund has indicated that the fund has retained an attorney to file suit against Sterling Bank in New Jersey if release of the funds is denied by the Court.

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Sterling Trust (Anguilla), Ltd.

25. Intervenor Sterling Trust (Anguilla), Ltd. ("Trust") is a Class One Trust company licensed under British law in the territory of Anguilla. Its business is the management of trusts for clients in all parts of the world.

26. Trust never has invested in Defendant Equity Financial Group, LLC or Shasta Capital Associates, LLC, and has had no business relationship with Defendants Vincent J. Firth or Robert J. Shimer.

27. The CFTC and/or the receiver used this Courts' order to restrain approximately $1,925,000 in an account held in Trust's name at Man Financial (account no. E G20 LOCAL 37923). The purported basis for the restraint is the fact that Tech Traders once had a limited power of attorney to trade against (but not access) the U.S. Treasury Bills held in the account. That power of attorney was revoked in a letter to Tech Traders in April 2003. According to the CFTC, the limited power of attorney to trade is sufficient to constitute "control" for the purposes of this Court's Order. Notably, as the CFTC is aware, Trust had suspended that discretionary trading more than a year ago because it was considered too risky for a Trust company.

28. If the funds are not released, Trust must report the restraint to its trust clients and British regulators. It is highly likely that these circumstances, if not corrected, will result in a license revocation.

29. As of February 29, 2004, Trust also had $419,023 of it own capital invested with Tech Traders. The CFTC and/or the receiver has used the Order to restrain these funds. As a regulated entity, Trust is required to maintain a certain minimum net liquid capital. It cannot do so with out the benefit of the vast majority of this capital. If the restrained funds are not released, Trusts license likely will be suspended. Five full time employees will be out of work.

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Sterling Investment Management, Ltd.

30. Intervenor Sterling Investment Management, Ltd. ("Management") is the Anguilla equivalent to a broker-dealer. It does no business with entities outside the Sterling Group of companies. Management never has invested in Defendant Equity Financial Group, LLC or Shasta Capital Associates, LLC, and has had no business relationship with Defendants Vincent J. Firth or Robert J. Shimer.

31. As a custodian for the clients of ACS, Bank and Trust, this company invested many millions of dollars with Tech Traders. As of February 29, 2004, the total amount of these funds was $5,579,300. None of these funds belong to Management. The CFTC and/or the receiver has used the Order to restrain the funds.

32. If the funds are not released, each of ACS, Trust and Bank will have to report the encumbrance to their respective clients and regulators. As a consequence, the entities would lose clients and likely have their licenses suspended and/or revoked. Two full time employees will be out of work.

33. In addition, Management sent additional custodial funds of $95,000 to Tech Traders' Bank of America account on or about March 17, 2004. These funds were transferred to the segregated Rosenthal & Collins Group account no. 84084108.84102. I am informed and believe that these funds were not traded or co-mingled with non-Sterling Group funds. Although none of the funds were used for trading and were in a segregated account, the CFTC and/or the receiver used the Order to restrain the funds.

34. During the entire period during which Tech Traders was trading the Intervenors's funds, the accounts accrued profits of approximately $2.24 million.

35. Based on the foregoing facts, I respectfully request that the Court grant the motion to intervene and order the CFTC and/or the receiver to release the Intervenors' funds. I

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believe that result is warranted, especially in light of the fact that the Intervenors are not defendants and will suffer irreparable harm if the money is not released.

Howell W. Woltz

Sworn to before me this
30th day of April, 2004.

SANDRA J. MORRISON
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAY 23, 2006

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EXHIBIT

B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Commodity Futures Trading Commission,	) Civil Action No.
	) 04 CV 1512
Plaintiff,	)
v.	)
EQUITY FINANCIAL GROUP LLC, TECH TRADERS, INC., VINCENT J. FIRTH, and ROBERT W. SHIMER,	)
Defendants.	)

9:13 A.M.
December 10, 2004
Charlotte, North Carolina

FEDERAL RULE 30 DEPOSITION

OF

HOWELL W. WOLTZ

ORIGINAL

Adams & Holt, inc.
VERBATIM COURT REPORTING SERVICES

401 Rensselaer Avenue / Charlotte, NC 28203 / (704) 334-4602 / 800-435-0419

EXHIBIT B

to the incorporation because we had already paid for the incorporation.

Q. What did -- where are the incorporation documents?

A. In Nassau, in the Bahamas.

Q. Who signed them?

A. Probably Mrs. Turnquest, who handles most of the incorporation work.

Q. You said you put in -- I forgot what you said. Some fees?

A. $2,000 to incorporate, and I don't know, negligible. There was no capitalization to speak other than get the company name registered and the incorporation done.

Q. Did anybody else put any money into it?

A. That's what I don't recall, if we ever got repaid. We basically advanced the $2,000.

Q. What is Sterling Alliance Limited?

A. Sterling Alliance Limited is a Bahamian corporation.

Q. Do you have some involvement with it?

A. Yes.

Q. What is your involvement?

A. I am a part owner.

Q. What does Sterling Alliance Limited do?

A. Right now, nothing.

Q. Is it still a -- is it an inactive corporation or is

it still --

A. No. It's still been kept active by paying the fees, but it is currently inactive other than a recipient of funds due back from this particular case.

Q. Is Sterling Alliance Limited investing some funds with Tech Traders?

A. Correct.

Q. What did it used to do?

A. That was originally created to be a holding company for shares and Benchmark Bahamas Limited, which is a publicly traded company.

Q. Anything else?

A. And to make this particular investment. Those are the only two activities they ever had, and the benchmark monies were returned, and we never were issued the shares.

Q. Why were the benchmark monies returned?

A. Because investments in Bahamian companies, there are two levels. First of all, there are Bahamian companies owned by Bahamians. Then they have a completely separate act, corporate act for international business companies. International business companies can be owned by anybody, anywhere. Bahamian corporations, however, must only have Bahamian ownership, and unless the Central Bank's

exchange control department approves foreign ownership, they are very, very reluctant to do that because they are very sensitive. Being a small nation of only 370,000 people, they don't want foreigners coming in and taking over their critical industries and financial organizations and things of that nature. So we paid the money and were loaned shares with the application made to the Exchange Control. That process dragged on for 2-1/2 years, and approval was never given by the Exchange Control Department. So when situations hit that hurt our cash flow, we just asked for the capital back and forewent our possible position.

Q. Now, is Julian Brown the president of benchmark?

A. Yes, he is. To the best of my knowledge, he is.

Q. What is his role?

A. President.

Q. What does he do as president?

A. I don't know. You need to ask him that.

Q. Where does he live?

A. In the Bahamas.

Q. You said you were part owner of Sterling Alliance. Who else owns it?

A. Vernice Woltz.

Q. Anybody else?

A. No.
Q. What is Mr. Brown's role with the Sterling entities?
A. None.
Q. Excuse me?
A. I said, "none."
Q. He has no role with them?
A. No role.
Q. Did he at one time?
A. No.
Q. He never had a role with any of the Sterling entities?
A. No role.
Q. What is Alliance Investment Management?
A. That is a licensed Bahamian brokerage firm.
Q. Do you have any involvement with it?
A. No.
Q. How do you know about it?
A. It's a pretty small place. I don't think -- there are only two or three licensed brokers in the nation.
Q. So it's one of the broker/dealers in the Bahamas?
A. Correct.
Q. Do you know who runs it?
A. Julian Brown.
Q. Do you know anybody else who works for it?
A. Mr. Christian Saunders.

MR. RUSSO: You need to be very specific and very careful here because Ms. Streit is asking you about after you received the subpoena, what you did. Okay. And so she really is interested in what you did, but the answer you just gave her was confusing, and it made it sound like you had asked the Sterling entities to produce documents in response to that subpoena which is not what happened; correct?

THE WITNESS: No.

Q. You're talking about the documents you gave to the receiver back in April?

A. Correct.

Q. Now, what I'm trying to figure out here is if there are documents that are responsive to our subpoena that have not been produced to us because it is your position or your attorney's position those documents belong to Sterling entities, and so that you don't personally have to produce them. For instance --

A. I'm not aware of anything that hasn't been produced.

Q. Okay. Because, for instance, Exhibit 151 is an E-mail from you that I would find responsive to the subpoena that was not produced. So I don't know if

it exists or it's been deleted from your computer, or whether you didn't search for such things because they were considered to be Sterling Bank documents. So that's what I'm trying to figure out.

A. That is incorrect, but we delete all E-mails daily. So I don't keep any E-mail records unless they would refer to a specific instruction from a client possibly or something like that. I would think that that would be forwarded onto whoever is the trustee, if I happen to get a copy and they didn't, but I don't keep any E-mails.

Q. All right. So any E-mails that you send to people you delete that day?

A. Delete them every day.

Q. Let me ask this question, though. Are there documents that are responsive to our subpoena that are held by any Sterling entity? I just want to be clear about that.

A. Not to my knowledge.

Q. All right. After this meeting in Murray's office -- have you looked in your deleted folder for E-mails?

A. Toshiba has my deleted folder.

Q. Toshiba.

A. Yes. I had to replace the hard disk twice since May because of crashes, and they just completely rebuilt

the computer all together.
Q. When did your computer crash?
A. Actually, it's been to Toshiba on five occasions since May for repairs. They're centered in Louisville, Kentucky. In fact, I'm not using it anymore.
Q. Toshiba is who you have your computer through?
A. Correct. Yes.
Q. You said you replaced your hard drive?
A. I didn't. They did because it would not work.
Q. When was it replaced?
A. Twice, according to what they said. Once in early summer. Once in late summer. I've requested replacement, and that's under review.
Q. Since that time -- the subpoena was served, I believe in early November. Did you look at your deleted folders file then to see if there were any E-mails that are responsive?
A. Well, the delete -- I delete the deleted folder every day. I delete my E-mails every day.
Q. A lot of computer programs, when you delete an E-mail, go into a deleted folder, which --
A. Which you have to put into the trash.
Q. So you double deleted them?
A. I delete everything every day.

Q. So would those E-mails exist on your hard drive somewhere?
A. Not that I know of.
Q. Can you check with someone to see if that's the case?
A. Well, Toshiba has those hard drives. So Toshiba is who you would need to check with. I would assume they destroyed things that they replace, but I don't know.
Q. Well, can I ask you and your counsel if you can check with Toshiba to see if they have the hard drives and whether anything can be recovered from them?
A. Is that -- am I a defendant now?
Q. No. But I think it's responsive to the subpoena, and so --

MR. RUSSO: We'll take the request under advisement. Please put it in a letter, and we'll respond.

Q. At the meeting in the summer, late spring of 2002, did anything else happen at that meeting that you want to tell us about?
A. Mr. Abernethy came in, and they introduced him as the accountant that was the third party CPA that reviewed the original trading statement, and he went through basically what he did for the group. He also showed me one of his letters that would describe the

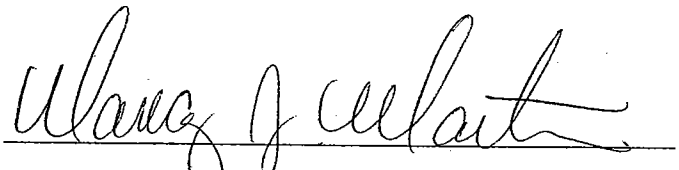
STATE OF NORTH CAROLINA)
)
COUNTY OF MECKLENBURG)

C E R T I F I C A T E

I, Nancy J. Martin, CSR 9504, Notary Public, do hereby certify that HOWELL W. WOLTZ was duly sworn by me prior to the taking of his deposition; that his said deposition was taken and transcribed by me; and that the foregoing three hundred fifty nine (359) are a true and accurate transcript of the testimony of said HOWELL W. WOLTZ. I further certify that the persons were present as stated.

I further certify that I am not of counsel for or in the employment of any of the parties to this action, nor am I interested in the result of the said action.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this 16th day of December, 2004.



NANCY J. MARTIN, CSR No. 9504
Notary Public

My Commission Expires: September 13, 2009

EXHIBIT

C

No. 41 of 2000

AN ACT TO PROVIDE FOR THE LICENSING AND REGULATION OF FINANCIAL AND CORPORATE SERVICE PROVIDERS AND FOR CONNECTED PURPOSES

[Date of Assent – 29th December, 2000]

18 of 2001 **{Incorporating amendments of 31st August 2001}**

Enacted by the Parliament of The Bahamas.

Short title and commencement.

1.(1) This Act may be cited as the Financial and Corporate Service Providers Act, 2000.

(2) This Act shall come into operation on such day as the Minister may appoint by notice in the Gazette.

Interpretation.

2. In this Act -

"auditor" means a public accountant licensed under the provisions of the Public Accountants Act, 1991; **No. 8 of 1991.**

"financial and corporate services" means the provision of financial and corporate services for profit or reward in or from within The Bahamas and includes -

(a) the conduct or the carrying on of financial services in or from The Bahamas, including on-line financial services;

EXHIBIT C

(b) the registration or management and administration of international business companies incorporated or existing under the International Business Companies Act, 2000 ;

(c) the provision of registered agent services and registered office services for companies mentioned in paragraph (b);

(d) the provision of directors or officers for companies mentioned in paragraph (b);

(e) the provision of nominee shareholders for companies mentioned in paragraph (b);

(f) the provision of partners for partnerships registered and existing under the Exempted Limited Partnership Act, 1995; and

No. 10 of 1995.

(g) the provision of registered agent services and registered office services for partnerships registered and existing under the Exempted Limited Partnership Act, 1995;

No. 10 of 1995.

"Inspector" means the Inspector of Financial and Corporate Services appointed under section 12;

"licence" means a licence granted under subsection (4) of section 4;

"licensee" means a person holding a licence under this Act;

"Minister" means the minister responsible for companies.

PART II

LICENCES

Requirement for licence.

3. Subject to section 20 and notwithstanding any other law or practice, no person shall carry on the business of financial and corporate services in or from within The Bahamas unless that person has obtained a licence under this Act for those purposes.

Application for licence.

4.(1) An application for a licence under this Act shall be made to the Inspector in the form specified in the Schedule.

Schedule.

(2) The Minister may by order prescribe different types of licences subject to such terms and conditions as is deemed necessary.

(3) The Inspector shall in granting a licence take into account the following -

(a) whether the applicant is a fit and proper person;

(b) whether the applicant is qualified to carry out the business of a financial and corporate service provider;

(c) the professional reputation and experience of the applicant;

(d) whether each officer, director or manager of the applicant is a fit and proper person to act as such;

(e) in the case of an application by a partnership, whether each partner is a fit and proper person to act as such; and

(f) whether the applicant, if an individual, is resident

in The Bahamas or, if a company, is registered under the Companies Act, 1992.

No. 18 of 1992.

(4) An appeal against a decision to refuse to grant a licence shall be made to the Supreme Court.

(5) The Inspector shall cause notice of the grant of a licence under this Act to be published in the Gazette.

Fees.

5.(1) An application under section 4 shall be accompanied by such fee as the Minister may by regulations prescribe.

(2) The issue of a licence under section 4 shall be subject to the payment of such fee as the Minister may by regulations prescribe.

Duration of licence.

6.(1) A licence issued under this Act is valid until the 31st December of the year in which it is issued but is renewable as of the 1st January in each year thereafter for a further period of one year upon payment of such fee as the Minister may by regulations prescribe.

(2) The Inspector before renewing a licence under this Act shall take into consideration those matters referred to in section 4(3).

Notification of change in particulars of licensee.

7. Where a change occurs in the particulars of a licensee as set out in the application for the licence, the licensee shall within thirty days, inform the Inspector of the change.

Display of licence.

8. A licence issued under this Act shall be prominently displayed on the premises where the business of financial and corporate services is carried on.

Register of management companies.

9.(1) The Inspector shall maintain a register in which shall be entered the following particulars -

(a) the name of the licensee;

(c) the address of the licensee;

(d) the location of the registered office; and

(d) the date the licence was issued.

(2) The register shall be open to inspection by the public.

18 of 2001 *(Section 10 is repealed)*

PART III

TRANSFERABILITY OF SHARES AND CHANGES IN DIRECTORS

Shares, etc. not to be issued or transferred without approval.

11.(1) No shares in a company or partnership licensed under this Act shall be issued, transferred or otherwise disposed of without the prior written approval of the Inspector.

(2) No appointment of directors of a company licensed under this Act shall be made without the prior written approval of the Inspector.

(3) Any change of officers of a company shall be notified to the Inspector.

PART IV

ADMINISTRATION

Inspector of Financial and Corporate Services.

12.(1) The Minister shall appoint an Inspector of Financial and Corporate Services for the purposes of ensuring the proper administration of this Act.

(2) The Inspector shall be a body corporate with perpetual

succession and a common seal with power to acquire hold and dispose of land and other property of whatever kind and to sue and be sued.

(3) The functions of the Inspector are -

(a) to maintain a general review of financial and corporate services in The Bahamas;

(b) on an annual basis and when required by the Minister, at the expense of the licensee, to conduct on-site and off-site examinations of the business of the licensee for the purpose of satisfying himself that the provisions of this Act, the Financial Transactions Reporting Act, 2000, the International Business Companies Act, 2000 and any other law are being complied with and in such cases where the Inspector is unable to conduct such examination, to appoint an auditor, at the expense of the licensee, to conduct such examination and to report thereon to the Inspector.

(4) In the performance of his duties under this Act the Inspector may at all reasonable times –

(a) require a licensee to produce for examination such of his books, records and other documents that the licensee is required to maintain pursuant to section 15; and

(b) require a licensee to supply such information or explanation,

as the Inspector may reasonably require for the purpose of enabling him to

perform his functions under this Act.

(5) The Inspector may, with the approval of the Minister authorize in writing any person or persons to assist him in the performance of his functions under this Act.

Con-fiden-tial-ity.
18 of 2001

12A. (1) Subject to subsections (2) and (3), the Inspector or any officer, employee, agent or adviser of the Inspector who discloses any information relating to -

(a) the affairs of the Inspector;

(b) any application made to the Inspector;

(c) the affairs of a licensee; or

(d) the affairs of a client of a licensee,

that he has acquired in the course of his duties or in the exercise of the Inspector's functions under this or any other law is guilty of an offence and shall be liable on summary conviction to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding three years.

(2) Subsection (1) shall not apply to a disclosure -

(a) lawfully required or permitted by any court of competent jurisdiction within The Bahamas;

(b) for the purpose of assisting the Inspector to exercise any functions conferred on him by this Act, by any other Act or by regulations made thereunder;

(c) in respect of the affairs of a licensee or of a client of a licensee, with the consent of the licensee or client, as the case may be, which consent has been voluntarily given;

(d) where the information disclosed is or has been available to the public from any other source;

(e) where the information disclosed is in a manner that does not enable the identity of any licensee or of any client of a licensee to which the information relates to be ascertained;

(f) to a person with a view to the institution of, or for the purpose of -

(i) criminal proceedings,

(ii) disciplinary proceedings, whether within or outside The Bahamas, relating to the exercise by a counsel and attorney, auditor, accountant, valuer or actuary of his professional duties,

(iii) disciplinary proceedings relating to the discharge by a public officer, or a member or employee of the Inspector of his duties; or

(g) in any legal proceedings in connection with -

(i) the winding-up or dissolution of a licensee, or

(ii) the appointment or duties of a receiver of a licensee.

(3) Subject to subsection (6), the Inspector may disclose to an overseas regulatory authority information necessary to enable that authority to exercise regulatory functions including the conduct of civil or administrative investigations and proceedings to enforce laws, regulations and rules administered by that authority.

(4) In deciding whether or not to exercise its power under subsection (3), the Inspector may take into account -

(a) whether the inquiries relate to the possible breach of a law or other requirement which has no close parallel in The Bahamas or involve the assertion of a jurisdiction not recognised by The Bahamas; and

(b) the seriousness of the matter to which the inquiries relate and the importance to the inquiries of the information sought in The Bahamas.

(5) The Inspector may decline to exercise its power under subsection (3) unless the overseas regulatory authority undertakes to make such contribution towards the cost of the exercise as the Inspector considers appropriate.

(6) Nothing in subsection (3) authorises a disclosure by the Inspector unless -

(a) the Inspector has satisfied himself that the intended recipient authority is subject to adequate legal restrictions on further disclosures which shall include the provision of an undertaking of confidentiality; or

(b) the Inspector has been given an undertaking by the recipient authority not to disclose the information provided without the consent of the Inspector; and

(c) the Inspector is satisfied that the assistance requested by the overseas regulatory authority is required for the purposes of the overseas regulatory authority's regulatory functions including the conduct of civil or administrative investigations or
proceedings to enforce laws, regulations and rules administered by that authority; and

(d) the Inspector is satisfied that information provided following the exercise of his power under subsection (3)

will not be used in criminal proceedings against the person providing the information.

(7) Where in the opinion of the Inspector it appears necessary in relation to any request for assistance received from an overseas regulatory authority to invoke the jurisdiction of a Stipendiary and Circuit Magistrate in obtaining information requested by the overseas regulatory authority, the Inspector shall immediately notify the Attorney-General with particulars of the request, and shall send him copies of all documents relating to the request, and the Attorney-General shall be entitled, in a manner analogous to amicus curiae, to appear or take part in any proceedings in The Bahamas, or in any appeal from such proceedings, arising directly or indirectly from any such request.

(8) The Inspector may provide information that it has acquired in the course of its duties or in the exercise of its functions under this or any other law to any other regulatory authority in The Bahamas where it considers such information may be relevant to the functions of such other regulatory authority.

(9) In this section-

"overseas regulatory authority" means an authority which in a country or territory outside The Bahamas exercises functions corresponding to any functions of the Inspector.

PART V

COMPLIANCE MEASURES FOR LICENSEES

Duty to maintain professional

13.(1) Every licensee shall -

(a) maintain a high standard of professional conduct in the performance of his duties as a licensee; and

conduct.

(b) refrain from engaging himself or any of his employees in any illegal or improper conduct.

(2) No licensee shall indulge in any activity, whether within or outside The Bahamas, that may reflect adversely on other service managers or the reputation of The Bahamas as an international financial centre.

Obligation of a licensee to clients.

14.(1) Where any request is made to a licensee by a client to provide financial or corporate services, the licensee shall verify the identity of the client.

(2) A licensee shall obtain from each client who instructs him -

(a) details of the client's principal place of business, business address, telephone, facsimile, telex numbers and electronic address of the principals or professionals concerned with the client;

(b) two sources of reference to provide adequate indication on the reputation and standing of the client.

(3) A licensee shall keep a record in respect of each client, including the name and address of the beneficial owners of all international business companies incorporated and or existing under the International Business Companies Act, 2000, and the name and address of all partners registered under

No. 10 of 1995.

the Exempted Limited Partnership Act, 1995 on behalf of the client and any information obtained under subsection (1).

No. 18 of 2001.

(4) The following shall be exempt from the provisions of subsections (2)(b) and (3) -

(a) any financial institution regulated by the Central Bank of The Bahamas, The Securities Commission of The Bahamas, The Registrar of Insurance, or the Gaming Board; only where the financial institution is instructing a licensee on behalf of its client;

(b) a financial institution located in a jurisdiction specified in the First Schedule to the Financial Transactions Reporting Act, 2000 which is regulated by a body having equivalent regulatory and supervisory responsibilities as the Central Bank of The Bahamas, the Securities Commission of The Bahamas, The Registrar of Insurance, or the Gaming Board; only where the financial institution is instructing a licensee on behalf of its client;

(c) a publicly traded company or mutual fund listed on The Bahamas International Stock Exchange or any other Stock Exchange prescribed by Regulations made under the Financial Transactions Reporting Act, 2000 and approved by the Securities Commission of The Bahamas;

(d) a regulated mutual fund as defined in section 2(1) of the Mutual Funds Act, 1995 or a regulated mutual fund located in a country specified in the First Schedule to the Financial Transactions Reporting Act, 2000 and regulated by a body having equivalent regulatory and supervisory responsibilities as the Securities Commission of The Bahamas.

(5) Where the service provided to a client is for any reason discontinued, the record kept in his case pursuant to subsection (2) shall continue to be maintained for a period of not less than six years from the date of discontinuation.

Keeping record of clients.

15. In addition to the requirement of section 13(2), a licensee shall 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.

Suspension

16.(1) Where the Inspector is of the opinion that a licensee is -

of licence.

(a) acting contrary to section 11 or fails to provide access to any document under section 12(4) or fails to obtain any information for the purposes of section 14; or

(b) in contravention of this Act or any other law,

the Inspector may require him forthwith to take such steps as may be necessary to rectify the matter, and may forthwith suspend the licence.

(2) A suspension shall not exceed a period of thirty days unless extended from time to time by an order of the court on application of the Inspector on the grounds that it is in the public interest that the suspension continue and specifying the duration of such period of further suspension, which shall not itself exceed sixty days each at any one time.

Revocation of licence.

17.(1) The Inspector may -

(a) by order, revoke the licence of a licensee -

(i) if the Inspector is of the opinion that the licensee is carrying on his business in a manner detrimental to the public interest, the interest of the companies managed by him or to the reputation of The Bahamas;

(ii) if the licensee has ceased to carry on financial and corporate services; or

(iii) if the licensee becomes bankrupt or goes into liquidation or is wound up or otherwise dissolved.

(2) An appeal under this section shall not operate as a suspension of the revocation.

Offences.

18.(1) Any person who carries on the business of financial and

corporate services in or from within The Bahamas without obtaining a licence under this Act commits an offence and is liable on summary conviction to a fine of seventy-five thousand dollars and where the offence continues subsequent to conviction that person is liable to a fine of one thousand dollars for each day the offence continues.

(2) Subject to subsection (1), a person who with intent to deceive, by any act or omission contravenes any provision or requirement of this Act, commits an offence and is liable on summary conviction to a fine of one hundred thousand dollars.

(3) Any licensee who advertises inviting either directly or indirectly other parties to commit breaches of the law of the country in which such advertisement appears or to which such advertisement is directed, commits an offence and is liable on summary conviction to a fine of fifty thousand dollars.

(4) Any person who with intent to deceive, for any purposes of this Act makes any representation that he knows to be false or does not believe to be true, commits an offence and is liable on summary conviction to a fine of one hundred thousand dollars.

(5) Where a limited liability company is convicted of an offence under subsection (3), every director and every officer concerned with the management of the company is also liable to be convicted for that offence unless he satisfies the court that the offence was committed without his knowledge or consent or that he took all reasonable steps to prevent the commission of the offence.

(6) Any person who -

(a) assaults or obstructs the Inspector or other person in the performance of his functions under this section;

(b) contravenes any provision of this Act for which no punishment is specially provided,

commits an offence and is liable on summary conviction to a fine of ten thousand

dollars.

(7) 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.

Appeals.

19.(1) An appeal lies to the Supreme Court from any decision of the Inspector -

(a) revoking a licence under subsection (1) of section 17; or

(b) suspending a licence under subsection (1) of section 16.

(2) An appeal against the decision of the Inspector shall be by motion.

(3) The following procedure applies to appeals from the Inspector –

(a) the appellant within twenty-one days after the day on which the Inspector has given his decision shall serve a notice in writing, signed by the appellant or his attorney, on the Attorney-General of his intention to appeal and of the general grounds of his appeal, except that any person aggrieved by a decision of the Inspector may upon serving notice on the Attorney-General apply to the court within fourteen days after the day on which the Inspector has given his decision for leave to extend the time within which notice of appeal prescribed by this section may be served, and the court upon hearing the application may extend the time prescribed by this section as it deems fit;

(b) the Attorney-General shall within twenty-one days of receiving the notice of appeal obtain a copy of the Inspector's decision and transmit to the Registrar of the

Supreme Court without delay a copy thereof together with all papers relating to the appeal, except that the Inspector is not compelled to disclose any information if he considers that the public interest would suffer by such disclosure and a certificate given by the Inspector under the Public Seal is conclusive that disclosure is not in the public interest;

(a) the Registrar of the Supreme Court shall set down the appeal for hearing on such day as is convenient, and shall cause notice of the hearing to be published, in such manner as, the court may direct; and

(b) the court may adjourn the hearing of any appeal and may, upon the hearing thereof, confirm, reverse, vary or modify the decision of the Inspector or remit the matter with the opinion of the court thereon to the Inspector.

(4) An appeal against a decision of the Inspector shall not operate as a suspension of the decision of the Inspector.

Act not applicable to Banks and Trust Companies Regulation Act. Ch. 287.

20. This Act does not apply to a company licensed under the Banks and Trust Companies Regulation Act.

Regulations.

21. The Minister may make regulations generally for carrying out the purpose and provisions of this Act into effect, and specifically -

(a) prescribing anything by this Act authorized or required to be prescribed; and

(b) exempting any person or business, or class of persons or business, from any provision of this Act.

Minister may give directions.

22. The Minister may give to the Inspector directions of a general or of a specific nature as to the policy to be followed by the Inspector in the carrying out or pursuit of his functions as appear to the Minister requisite in the public interest and the Inspector shall give effect to any such directions.

Directions.

23. Without limiting or affecting section 21, the Minister may, from time to time, issue by publication in the Gazette, directions in relation to the inspection and such matters as he may think fit and appropriate and failure by any licensee to comply with the directions shall be taken into consideration when any action is proposed to be taken under section 16 or 17.

Transitional.

24. A person who at the date of the commencement of this Act is lawfully permitted to carry on the business of financial and corporate services including registered agents shall make an application within three months from the coming into force of this Act for a licence under this Act.

SCHEDULE **(Section 4(1))**

APPLICATION FOR A FINANCIAL AND CORPORATE SERVICES LICENCE

1. Name of applicant _____

2. Address of principal office of applicant and, in the case of a company, its registered office

_____

_____

3. In the case of a company, the names, addresses and nationalities of all directors

4. In the case of a company, the names, addresses and nationalities of all shareholders

5. In the case of a company, the names, addresses and nationalities of the beneficial owners of the company

6. In the case of a partnership, the names and addresses of all partners

7. In the case of a company, the names and addresses of all officers and managers

8. Names and addresses of attorneys, if any, for the applicant, together with a letter from the attorneys confirming that they act for the applicant

9. In the case of a company, the name and address of the registered office in The Bahamas upon which any required notices may be served

10. In the case of a company -

(a) a certified copy of a certificate of incorporation;

(b) a certified copy of Memorandum and Articles of Association; and

(c) a certificate of good standing.

11. A detailed resume, two character references in writing, one financial reference from a bank or trust company registered under the Banks and Trust Companies Regulation Act or registered in a country specified in the First Schedule to the Financial Transactions Reporting Act, 2000, a police certificate for

2001. the previous five years in respect of each shareholder, beneficial owner, officer and director.

12. Status for the purposes of the Exchange Control Regulations Act and any regulations made thereunder and in force at the date of the application.

13. A detailed overview/summary of internal control procedures to be put in place.

14. A synopsis of the company's anti money laundering policies along with a summary of the due diligence procedures with respect to the vetting of prospective clients.

15. Identification of the company's target market.

ARRANGEMENT OF SECTIONS

PART V

COMPLIANCE MEASURES FOR LICENSEES

EXHIBIT

D

2004 WL 2290736 (E.D.N.Y.), 175 L.R.R.M. (BNA) 2908

(Cite as: 2004 WL 2290736 (E.D.N.Y.))

United States District Court,
E.D. New York.
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
Frank BACCHI, et al., Respondents.
No. 04 MC 28(ARR).

filed Feb. 9, 2004.
June 16, 2004.
last filing June 17, 2004.

Norman Rothfeld, New York, NY, Lead Attorney, Attorney to be Noticed, for Al Mendez, (Defendant).

Stanley R. Zirkin, Contempt Litigation and Complaince Branch, Washington, DC, Lead Attorney, Attorney to be Noticed, for National Labor Relations Board, (Plaintiff).

OPINION AND ORDER

ROSS, J.

***1** I have received the Report and Recommendation on the instant case, dated May 19, 2004, from the Honorable Marilyn Dolan Go, United States Magistrate Judge. No objections have been filed. Having conducted a *de novo* review of the record, I hereby adopt the Report and Recommendation, in its entirety, as the opinion of the Court pursuant to 28 U.S.C. § 636(b)(1). Accordingly, the court hereby grants the petitioner's application for an order to enforce the investigative subpoenas and orders the respondents to comply with the investigative subpoenas.

SO ORDERED.

REPORT & RECOMMENDATION

GO, Magistrate J.

The National Labor Relations Board ("the Board") brings this application ("Board Appl.") seeking enforcement of investigative deposition subpoenas issued to officers and/or members of Local 3, International Brotherhood of Electrical Workers, AFL-CIO ("the Union"). The Honorable Allyne R. Ross has referred this application to me for decision. [FN1]

FN1. As a preliminary matter, I note that a motion to enforce an administrative subpoena must be addressed by a magistrate judge on a report and recommendation basis. *See NLRB v. Fraizer,* 966 F.2d 812, 917-18 (3d Cir.1992) (NLRB subpoeana); *U.S. v. Mueller,* 930 F.2d 10, 12 (8th Cir.1991) (IRS summons); *Aluminum Co. of America v. U.S. E.P.A.,* 663 F.2d 499, 501-02 (4th Cir.1981); *U.S. v. Wisnowski,* 580 F.2d 149, 150 (5 th Cir.1978) (IRS summons); *see also U.S. v. Construction Prods. Research, Inc.,* 73 F.3d 464, 469 (2d Cir.1996) (unlike discovery subpoenas, an order enforcing an adminsitrative investigative subpoeana is final and appealable).

BACKGROUND

The following facts are undisputed by the parties.

On September 30, 1982, the Board issued a Decision and Order finding that the Union had violated § 8(b)(4)(I) and (ii)(B) of the National Labor Relations Act by inducing and encouraging a work stoppage at a jobsite and by restraining and coercing neutral employers at another jobsite, for the purpose of involving neutral employees in the Union's primary dispute with General Dynamics Communications Company. *See* Board Appl., Exh. 1. The Board's order prohibited the Union from any further secondary boycott activity. *See id.* On June 17, 1983, the Second Circuit issued an order enforcing the Board's Decision and Order. *See id.,*

EXHIBIT D

Exh. 2.

On July 17, 1996, the Second Circuit entered a Consent Order against the Union prohibiting the Union from violating the June 17, 1983 order and engaging in secondary boycott activity. *See id.,* Exh. 3.

On or about April 22, 2003 and April 29, 2003, R. Gunzer Incorporated d/b/a Gunzer Electric and Hertz Corporation filed charges with the Board alleging that the Union had engaged in unlawful secondary boycott activities by picketing at or near the Hertz facility located at JFK airport. *See id.,* Exhs. 4, 5. The Union allegedly tried to force Mac-K Construction and Hertz Corporation, and their employees, to stop doing business with R. Gunzer Inc. unless Gunzer recognized and signed a collective bargaining agreement with the Union. *See id.*

On May 14, 2003, the Board's regional office issued an administrative complaint against Local 3 seeking injunctive relief. Affidavit of Polly Misra dated February 6, 2004 in Support of Application of the NLRB for a Summary Order (attached as Exh. 7 to the Board Appl.) ("Misra Aff.") at ¶ 7. The following day, the Board filed with this Court a petition for preliminary injunctive relief. *See Blyer v. Local Union No. 3,* CV 03-2469 (the "Boycott Action"). On June 2, 2003, the Honorable Raymond J. Dearie issued a preliminary injunction enjoining and restraining the Union from engaging in unlawful secondary boycott activities. Board Appl., Exh. 6; Boycott Action, ct. doc. 7.

***2** The Board's regional office also referred the matter to the Board's Contempt Litigation and Compliance Branch ("CLCB") to determine whether there was clear and convincing evidence that the Union violated the June 17, 1983 Judgment and the July 17, 1996 Consent Order and whether contempt proceedings should be initiated in the Second Circuit. Misra Aff. at ¶ 8. On July 7, 2003, the Board's regional office postponed indefinitely its administrative hearing pending investigation by the CLCB. *See id.;* Board Appl., Exh. 8.

On or about July 15, 2003, the CLCB issued an investigative subpoena to the Union requesting answers to interrogatories and the production of documents. Misra Aff. at ¶ 9. The Union, without objection, responded to the subpoena and identified respondents as persons with knowledge of the incidents being investigated by the CLCB. *See id.*

On or about December 12, 2003, the CLCB issued investigative subpoenas requiring respondents to appear for depositions which were served on respondent's counsel by certified mail. *See id.* at ¶ 10; Board Appl., Exh. 9. By letter dated December 20, 2003, respondents' counsel advised the CLCB that respondents refused to comply with the subpoenas absent judicial enforcement. Misra Aff. at ¶ 11; Board Appl., Exh. 10. However, respondents took no action to quash the subpoenas. Misra Aff. at ¶ 12.

DISCUSSION

Under 29 U.S.C. § 161(1), the Board is authorized to issue subpoenas requiring testimony or the production of evidence relating to "any matter under investigation or in question." *Brooklyn Manor Corp. v. NLRB,* No. 99 MC 117, 1999 WL 1011935, at *2 (E.D.N.Y. Sept.22, 1999); 29 U.S.C. § 161(1). This subpoena power enables the Board to "get information from those who best can give it and who are most interested in not doing so." *United States v. Morton Salt Co.,* 338 U.S. 632, 642, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Brooklyn Manor,* 1999 WL 1011935, at *2. The Board's investigative powers have been equated with that of a grand jury which may "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt,* 338 U.S. at 642-43; *In re McVane,* 44 F.3d 1127, 1135 (2d Cir.1995).

When the subject of a subpoena refuses to comply, the Board may apply for a court order requiring that person "to appear before the Board, its member, agent, or agency, there to produce evidence ... or to give testimony touching the matter under investigation or in question." 29 U.S.C. § 161(2). However, "[t]he court's role in a proceeding to enforce an administrative subpoena is 'extremely

limited." ' *RNR Enterprises, Inc. v. SEC,* 122 F.3d 93, 97 (2d Cir.1997); *In re McVane,* 44 F.3d at 1135 . The Board's subpoena must be enforced if it furthers a legitimate statutory purpose, if the information sought is reasonably relevant to that purpose, if the information sought is not already within the Commissioner's possession, and if the Board has observed the proper statutory procedures. *See United States v. Stuart,* 489 U.S. 353, 359, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989); *Morton Salt,* 338 U.S. at 652 ("it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"); *RNR Enterprises,* 122 F.3d at 96; *FEC v.. Larouche Campaign,* 817 F.2d 233, 234 (2d Cir.1987) (administrative subpoena must be enforced "so long as it is for a proper purpose, the information sought is relevant to that purpose, and the statutory procedures are observed"). "An affidavit from a governmental official is sufficient to establish a *prima facie* showing that these requirements have been met." *RNR Enterprises,* 122 F.3d at 97; *In re McVane,* 44 F.3d at 1136.

***3** A court's authority to review a subpoena's relevance is limited to determining whether the evidence sought "touches a matter under investigation." *Sandsend Fin. Consultants Ltd. v. Federal Home Loan Bank Bd.,* 878 F.2d 875, 882 (5th Cir.1989); *Brooklyn Manor,* 1999 WL 1011935, at * 2; *see also NLRB v. Frederick Cowan & Co., Inc.,* 522 F.2d 26 (2d Cir.1975) ("Since the evidence sought here did touch upon the matter in question and was not incompetent or irrelevant, the district court judge was not justified in refusing to enforce the subpoena"). Courts must "defer to the agency's appraisal of relevancy, which must be accepted so long as it is not obviously wrong." *RNR Enterprises,* 122 F.3d at 97; *In re McVane,* 44 F.3d at 1135.

The party seeking to quash a Board subpoena has the burden of demonstrating "that the subpoena is 'unreasonable' or was issued in bad faith or for an 'improper purpose,' or that compliance would be 'unnecessarily burdensome." ' *RNR Enterprises,* 122 F.3d at 97 (quoting *SEC v. Brigadoon Scotch Distrib. Co.,* 480 F.2d 1047, 1053 (2d Cir.1973)); *see In re McVane,* 44 F.3d at 1135; *Brooklyn Manor,* 1999 WL 1011935, at *3. "That burden is 'not easily met where ... the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." ' *Brooklyn Manor,* 1999 WL 1011935, at *3 (quoting *FTC v. Texaco,* 555 F.2d 862, 882 (D.C.Cir.1997)).

The Board contends that respondents have waived their objections to the subpoenas because respondents did not exhaust the administrative remedies provided in section 161(1) and the corresponding regulations. These applicable regulations require that a person seeking to revoke or quash a subpoena must file a petition with the Board within five days of receipt of the subpoena. *See* 29 C.F.R. § 102.31(b). In fact, the subpoenas at issue contained the warning that "[p]etitions to revoke must be received within five days of your having received the subpoena" and that "[f]ailure to follow these regulations may result in the loss of any ability to raise such objections in Court." *See* Board Appl., Exh. 9. Rather than filing a petition to quash, respondents, through counsel, advised by letter dated December 20, 2004 that they would not appear.

Having failed to exhaust their administrative remedies, respondents have waived any objections to the subpoenas other than on constitutional grounds or a claim that exhaustion would cause irreparable harm. *See Maurice v. NLRB,* 691 F.2d 182, 183 (4th Cir.1982); *EEOC v. Cuzzens of Georgia, Inc.,* 608 F.2d 1062, 1064 (5th Cir.1979); *NLRB v. McDermott,* 300 B.R. 40, 46 (D.Colo.2003); *EEOC v. City of Milwaukee,* 54 F.Supp.2d 885, 891 (E.D.Wisc.1999) (tardy objections to EEOC subpoenas precluded City defendant from raising any defenses to subpoenas); *EEOC v. County of Hennepin,* 623 F.Supp. 29, 31-32 (D.Minn.1985); *see also Frederick Cowan & Co.,* 522 F.2d at 28 (district court erred in reviewing findings of ALJ because respondent failed to exhaust administrative remedies). Thus, respondents are precluded from challenging the subpoenas in this Court.

***4** Respondents argue that they should be excused

from the exhaustion requirement because petitioning the Board to revoke the subpoenas would have been futile. The only authority respondents cite in support of this argument is Judge Butzner's dissenting opinion in *Maurice v. NLRB,* which even if good authority, is distinguishable. In dissenting, Judge Butzner reasoned that petitioning the Board would have been futile because the Board lacked jurisdiction to determine whether the subpoena violated the Attorney General's guidelines on issuing subpoenas to newspaper reporters, an issue not implicated here. 691 F.2d at 183-84. In contrast, there is no evidence that a petition to quash or modify the Board's subpoenas, in this case, would have been futile had respondents followed the proper procedure. In fact, the governing statute and regulations specify that the Board should rule on the enforcability of subpoenas. *See* 29 U.S.C. § 161(1); 29 C.F.R. § 102.31(b). This Court cannot predict what would have happened if respondents had pursued their administrative remedies by filing a petition with the Board. *See EEOC v. Deb Shops,* No. 94 C 5985, 1995 WL 579541, at *3 (N.D.Ill. Sept.29, 1995). Thus, respondents' failure to exhaust is not excused by futility.

Even assuming that respondents are not precluded from challenging the subpoenas in this Court, respondents have no meritorious defense. Respondents contend that the Board has failed to follow the proper statutory procedures because it is improper for the Board to issue investigative subpoenas after it has filed a complaint. According to respondents, "the Board's issuance of a Complaint concludes the investigatory stage of an Unfair Labor Practice proceeding." Respondents' Memorandum of Law in Opposition ("Resp.Opp.") at 5.

However, it is well settled that the commencement of civil proceedings does not terminate an administrative agency's investigative authority nor moot its administrative subpoena. *See In re McVane,* 44 F.3d at 1141; *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.Cir.1993); ***United States v.. Frowein,*** **727 F.2d 227, 231-32 (2d Cir.**1984). Given that the commencement of an actual lawsuit does not terminate the Board's investigative authority, the issuance of an administrative complaint cannot affect the Board's ability to issue an administrative subpoena.

Similarly, respondents argue that the Board is improperly issuing subpoenas to seek discovery for use in the administrative action. *See* Resp.'s Opp. at 3. However, to the extent information is wrongfully obtained through an investigative subpoena and used in a subsequent proceeding, "the subpoenaed party remains free to challenge the use of that information in the appeal from *that* proceeding." *Office of Thrift Supervision v. Dobbs,* 931 F.2d 956, 959 (D.C.Cir.1991) (emphasis in original); *see Walde,* 18 F.3d at 950; *Linde Thompson,* 5 F.3d at 1518 n. 8. Thus, any concerns that enforcement of the subpoenas would result in improper discovery in the administrative proceeding should be addressed in *that* proceeding.

***5** Respondents further argue that the deposition subpoenas are unlikely to produce additional information, pointing to the fact that respondent Joseph Bechtold testified at the preliminary injunction hearing and was subject to cross-examination by the Board. Resp. Opp. at 2, 4. However, the Board presented the affidavit of trial attorney Polly Misra stating that the Board does not possess the information sought by the investigative subpoenas. Misra Aff. at ¶ 13. Respondents' assertion that the Board has the information because of Mr. Bechtold's prior hearing testimony is not sufficient to rebut the *prima facie* showing in the Misra Aff.

In any event, the June 2, 2003 preliminary injunction hearing concerned the Union's alleged conduct in attempting to engage in an unlawful secondary boycott and picketing pending the Board's determination of the charges. Mr. Bechtold's testimony apparently was limited by Judge Dearie solely to the events that occurred on May 7, 2003. *See* Board's Reply Memorandum of Law, Exh. 11. Therefore, the Board is entitled to depose Mr. Bechtold since its contempt

investigation concerns issues besides the May 7, 2003 events. In light of this, respondents' argument that Mr. Bechtold's subpoena is abusive because he has already testified is meritless. *See* Resp. Opp. at 4.

Finally, respondents have failed to present any reason why the subpoenas served on other officials of the Union should not be enforced.

CONCLUSION

For the foregoing reasons, I recommend that the Board's application for the enforcement of investigative subpoenas be granted.

Copies of this report and recommendation have been sent by telecopier to the parties. Objections to the Report and Recommendation must be filed with the Clerk of Court, with a copy to the undersigned, by June 3, 2004. Failure to file objections within the time specified waives the right to appeal. *See* 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b).

SO ORDERED.

2004 WL 2290736 (E.D.N.Y.), 175 L.R.R.M. (BNA) 2908

END OF DOCUMENT

EXHIBIT

E

DUE DILLIGENCE
STATE OF NORTH CAROLINA

COMMODITY FUTURES TRADING COMMISSION	)	
Plaintiff	)	**Judge Robert B. Kugler**
	)	CASE NUMBER:
Vs.	)	**1:04CV-01512-RBK-AMD**
EQUITY FINANCIAL GROUP,LLC ,VINCENT J. FIRTH, ROBERT SHIMER J. VERNON ABERNETHY, COYT E. MURRAY, TECH TRADERS, INC., TECH TRADERS, LTD. MAGNUM INVESTMENTS, and MAGNUM CAPITAL INVESTMENTS, LTD.	)	**(Currently pending the District of New Jersey)**
Defendants		

PERSONALLY APPEARED BEFORE ME **KATHY ANDERSON**, who, being duly sworn, says that she is a citizen of the United States, over the age of twenty-one, and not a party to the action and that she did **NOT** serve the **SUBPOENA FROM THE WESTERN DISTRICT OF NORTH CAROLINA** to **VERNICE WOLTZ** located at: **255 WOLTZ LANE, ADVANCE, NC 27006**.

COMMENTS:

4-20-2005 8:20pm—NO ONE HOME 4-21-2005 6:10PM—NO ONE HOME**

4-23-2005 9:10AM—MATURE WOMAN OF INDIAN DECENT ANSWERED THE DOOR AT 255 WOLTZ LANE, ADVANCE, NC 27006. SHE SAID HER NAME WAS "CENTRA", THE WOLTZ FAMILY HAD MOVED 2 MONTHS AGO TO THE BAHAMAS. SHE STATED THEY WERE WORKING ALL OVER THE WORLD— THEY DID BUSINESS IN AUSTRALIA AND DOMINICA. SHE HAD NO IDEA IF THEY WOULD RETURN TO NORTH CAROLINA OR WHEN.

NOTE: THE HOUSE NO LONGER HAS MANY SHOES AT THE DOOR AS IT DID WHEN I FIRST SERVED THE WOLTZ'S, NO TOOLS OR OTHER BELONGINGS WERE SEEN AROUND THE PORCH OR IN THE YARD. THEY ARE BUILDING STONE GATEPOSTS ON THE DRIVEWAY. A LOCKING GATE WILL SOON BE IN PLACE. LAND ON THE RIGHT SIDE OF THE DRIVE HAS FOR SALE SIGNS.

Race: **Indian** Sex: **F** Ht: **5'5"-5'6"** **WT: 130** **AGE: 40-45** Hair: **Black**

To the best of my knowledge and belief, said person was not engaged in the US Military at the time of service.

KATHY ANDERSON, Davie, NC

SWORN TO BEFOR ME this 25TH
Day of APRIL, 2005
Notary Public

A-1 Services
222 Holly Lane
Mocksville, NC 27028

M. E. MILLER
NOTARY PUBLIC
DAVIE COUNTY, N.C.
My Commission Expires 1-20-2007

EXHIBIT E

EXHIBIT

F

Declaration under penalty of perjury of
J. Vernon Abernethy pursuant to 28 U.S.C. § 1746

I, J. Vernon Abernethy, hereby declare as follows:

1. This statement is being made voluntarily and I authorize its use by the Commodity Futures Trading Commission ("CFTC") or its representatives in any adjudicatory proceeding pertaining to the matters described herein.

2. I am over 18 years of age and reside in Gastonia, North Carolina.

3. I am a defendant in the matter captioned: U.S. CFTC v. Equity Financial Group, et al.

4. On or about April 7, 2004, I met Attorney Elizabeth Streit and Receiver Stephen Bobo, at the office of my attorney at the time, Martin L. Brackett in Charlotte, North Carolina. Through my attorney, I produced records to the CFTC and Mr. Bobo. Mr. Bobo asked me if I had any other records in my possession which were relevant to this case. I told him that I also had relevant electronic files on the computers in my home office. Mr. Bobo instructed me to preserve those files.

5. In my home office, I have a total of three computers: two desktops and a laptop computer. The laptop computer is a Hewlett Packard brand computer. The two desktops can be distinguished by the name and model description of the computers. The desktop computers generally sit side-by-side on the same desk in my office. The desktop on the left-hand side is named "JVERNON" and carries the model description "ACER 56X MAX" (hereinafter "JVERNON"). The desktop computer on the right-hand side is named "JVA" and carries the model description "ACER 36X MTRP" (hereinafter "JVA").

EXHIBIT F

6. All three computers were used in my capacity as an agent for Tech Traders, as President of Sterling Casualty & Insurance, Ltd., as a member of Strategic Investment Portfolio, and an agent of the Sterling Companies. The computers were also used in my capacity as a certified public accountant with a tax preparation business and for my personal needs.

7. Within twenty-four hours of meeting Mr. Bobo and Ms. Streit, I had an external backup tape media device created to image the two desktop computers, JVERNON and JVA. No backup was made of the Hewlett Packard laptop computer.

8. During the week of April 12, 2004, at the instruction of Walter Hannen, the president of Sterling Bank, and/or Howell Woltz, I created a spreadsheet to summarize my agreed upon procedure reports, along with the supporting documentation used to prepare such reports. This spreadsheet was saved on the JVERNON computer.

9. On or about April 13, 2004 in the evening, Mr. Hannen, Defendant Coyt E. Murray, Howell Woltz, and Vernice Woltz visited my home office. During that visit, Mr. Hannen and Defendant Murray sat in my office, while Howell and Vernice Woltz worked in my dining room. At this meeting, Defendant Murray and myself observed Mr. Hannen installing programs, downloading and creating files from the JVA and JVERNON computers. At that meeting, Mr. Hannen asked me for a copy of the computer files and I gave him the backup tape of the JVA and JVERNON computers. Mr. Hannen instructed me that I should not keep the backup tape in the same physical location of the computers and later that evening left with that tape.

10. Also at the April 13 meeting, Howell and Vernice Woltz were giving me names and addresses of political officials that we knew so I could write letters about this action. In fact, I sent such a letter to on April 14 to Congressman Cass Ballenger in an

attempt to schedule a meeting time for myself and Mr. Woltz to request assistance on this matter. (A copy of that letter is attached as Attachment 1).

11. Another day during the week of April 12, 2004, Mr. Hannen came to my office in the morning. During that meeting, I witnessed Mr. Hannen working on both the JVA and JVERNON computers. He specifically worked on the spreadsheet discussed in paragraph 8 above. I was looking over his shoulder asked what he was doing to the spreadsheet. I was concerned that my work product was being manipulated so I later printed it and produced it to Ms. Streit. (A copy of the spreadsheet is attached as Attachment 2.)

12. On or about April 22, 2004, I asked Mr. Hannen to return the backup tape. Mr. Hannen told me that Vernice Woltz, the chief financial officer for the Sterling Companies, had taken it to the Bahamas.

13. Between April 22 and August 2004, I repeatedly asked Mr. Hannen to return the backup tape. To date, the backup tape has not been returned.

14. During discussions with Ms. Streit in August and October 2004, I informed her of the existence of the backup tape and that the tape had been tendered to Mr. Hannen.

15. The backup tape contains electronic files pertaining not only to Tech Traders and the other parties in this matter, it also contains electronic files pertaining to my work in the capacity of President of Sterling Casualty & Insurance, Ltd. and as a member of Strategic Investment Portfolio. The backup tape contains electronic files pertaining to my general tax practice including confidential personal and financial information of all of my customers and my personal electronic files as well.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of April 2005.

J. Vernon Abernethy

April 27, 2005

ATTACHMENT

1

J. Vernon Abernethy
Certified Public Accountant
413 South Chester Street, Gastonia, NC 28052
Voice (704) 865-2906 FAX (704) 865-5449
e-mail: jvacpa@carolina.rr.com

FAX

Wednesday Morning, 1:02AM
April 14, 2004

TO: The Honorable Cass Ballenger **Fax To: 202 225 0316 828 327 8311**

FROM: J. Vernon Abernethy

SUBJECT: I Urgently Need Your Attention Regarding The Commodity Futures Trading Com.

Congressman Ballenger:

Please allow me and one of my business partners an audience with you at your earliest convenience either in Washington or Hickory regarding what is clearly an abusive tactic on behalf of the CFTC regarding a business I am associated with. Without charge of any wrong doing, we are being forced out of business by having hundreds of thousands of dollars frozen in trading accounts that are not subject to any complaint or investigation.

Cass, I will fly to Washington, or meet you in Hickory or any other point of contact so that I may be able to share with you what is happening. For reference see CFTC v. Equity Financial Group LLC; Tech Traders, Inc.; Vincent Firth and Robert W. Shimer, Civil Action No. 04-1512.

None of those mentioned above have anything to do with the Sterling Group of Companies Accounts, which have been frozen as a roughshod tactic that is being, used against this group of companies. We have been totally cooperative with the Receiver and the representative of the CFTC, and shocked that they are being so aggressive with us. I promise you, Cass, The Sterling Group has done nothing that involves it with this case under investigation. What is occurring here is wrong, very wrong! I urgently need to discuss this with you person to person. Please give me and one of my business associates an opportunity to meet with you as soon as possible. We are dead in the water. We are being wiped out for no reason. I know you have a full plate before you, but this is extremely wrong to be treated as we are by the CFTC, Cass. I plead for your attention. My contact information follows below.

J. Vernon Abernethy, CPA
704 616 9165 Cellular (best)
704 865 2906 Office Voice
704 865 5449 Fax
jvacpa@carolina.rr.com

cc: Howell Woltz, The Sterling Group of Companies

ATTACHMENT 1

ATTACHMENT

2

MICROSOFT EXCEL - TRANSFERS
CREATED : THURS, 4/15/04 2:05PM

ACCESSED & PRINTED 9/15/04

A/C #	1/31/03	2/28/03	3/31/03	4/30/03	5/31/03	6/30/03	7/31/03	8/31/03
88760	15041	15041	15041	15041	15041	15041	15041	15041
23967	41256	41256	41256	41256	41256	41256	41256	41256
36715	410738	433279	435846	336029	374687	429855	580698	998249
36745	221977	143554	176429	164149	160306	71175	124244	120624
17612								
36744	160277	182278	189377	169031	158880	158880	158880	158880
36992	368772	299567	369571	309235	315826	265413	241997	241997
36878	415788	335487	379763	306925	392379	395584	355696	12273
37579	181099	129898	168815	169948	168360	168360	168360	168360
37927	905970	905970	905970	905970	905970	905970	905970	905970
84102							200000	244638
84103							200000	263909
84104							200000	300000
84105								
84106								
29163								
17619								
84107								
37923			471741	619500	619500	619500	619500	619500
36991						164292	144286	137487
Not Traded								
T-Bills							1600000	1600000
Surplus								
Strategic 9110								
Stragic Inv.								
DV								
Shasta 1								
Shasta 2								
R&D								
Forex 29187								
Forex 29163								
Forex 29164								
ds in Txfr @ Bank								
Reserves								
Reserves								
Reserves								

MRS. STREET: This is the worksheet you asked for. Vann

A/C #	1/31/03	2/28/03	3/31/03	4/30/03	5/31/03	6/30/03	7/31/03	8/31/03
88760	n/a	0	0	0	0	0	0	0
36715	n/a	22541	2567	-99817	38658	55168	150843	417551
36745	n/a	-78423	32875	-12280	-3843	-89131	53069	-3620
17612	n/a	0	0	0	0	0	0	0
36878	n/a	-80301	44276	-72838	85454	3205	-39888	-343423
37927	n/a	0	0	0	0	0	0	0
84102	n/a	0	0	0	0	0	200000	44638
84103	n/a	0	0	0	0	0	200000	63909
84104	n/a	0	0	0	0	0	200000	100000
84105	n/a	0	0	0	0	0	0	0

CFTC 202-05-0001

ATTACHMENT 2

84106	n/a	0	0	0	0	0	0	0
29163	n/a	0	0	0	0	0	0	0
17619	n/a	0	0	0	0	0	0	0
84107	n/a	0	0	0	0	0	0	0
37923	n/a	0	471741	147759	0	0	0	0
Not Traded	n/a	0	0	0	0	0	0	0
T-Bills	n/a	0	0	0	0	0	1600000	0
Surplus	n/a	0	0	0	0	0	0	0
Strategic 9110	n/a	0	0	0	0	0	0	0
Stragic Inv.	n/a	0	0	0	0	0	0	0
DV	n/a	0	0	0	0	0	0	0
Shasta 1	n/a	0	0	0	0	0	0	0
Shasta 2	n/a	0	0	0	0	0	0	0
R&D	n/a	0	0	0	0	0	0	0
Forex 29187	n/a	0	0	0	0	0	0	0
Forex 29163	n/a	0	0	0	0	0	0	0
Forex 29164	n/a	0	0	0	0	0	0	0
Reserves	n/a	0	0	0	0	0	0	0
Reserves	n/a	0	0	0	0	0	0	0
Reserves	n/a	0	0	0	0	0	0	0
		-136183	551459	-37176	120269	-30758	2364024	279055

9/30/03	10/31/03	11/30/03	12/31/03	1/31/04	2/29/04	
15041	15041	44217				
41256	41256					
455672	376434	331215	315187			
120624	121798	128143	137654			
	443836	439585				
158880						
241997						
469878	444496	444496	444496			
168360						
905970	905970	905970				
291684	462650	872029				
380788	540887	961690				
282761	385011	389381				
	378745	863711				
	414094	904505				
619500	619500					
237487						
	1750000	1750000				
	296858	341858				
	400000					
	319000					

9/30/03	10/31/03	11/30/03	12/31/03	1/31/04	2/29/04	Total
0	0	29176	-44217	0	0	-15041
-542577	-79238	-45219	-16028	-315187	0	-410738
0	1174	6345	9511	-137654	0	-221977
0	443836	-4251	-439585	0	0	0
457605	-25382	0	0	-444496	0	-415788
0	0	0	-905970	0	0	-905970
47046	170966	409379	-872029	0	0	0
116879	160099	420803	-961690	0	0	0
-17239	102250	4370	-389381	0	0	0
0	378745	484966	-863711	0	0	0

OVERFLOW FROM PAGE 1

0	414094	490411	-904505	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	-619500	0	0	0	0
0	0	0	0	0	0	0
-1600000	1750000	0	-1750000	0	0	0
0	296858	45000	-341858	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	400000	-400000	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
0	0	0	0	0	0	0
-1538286	4013402	821480	-7479463	-897337	0	-1969514
						-1969514

O VERFLOW FROM PAGE 2

THIS IS A two PAGE WORKSHEET. PAGES 1 & 3 MAKE UP FIRST PAGE. PAGES 2 & 4 MAKE UP SECOND PAGE.

WALT HANNAN WORKED ON THIS REPORT ON MY COMPUTER ON 4/15/04. IT IS IN LARGE FONT BECAUSE I WAS looking over his shoulder AND told him I couldn't see THE NUMBERS. THERE ARE "NOTES" THAT ARE imbedded IN THE WORKSHEET CAPTIONED "JVERNON ABERNETHY". WALT HANNAN ENTERED THAT Info. NOT ME.

Howell Woltz called after HANNAN had WORKED WITH This REPORT for ABOUT 10 to 20 MINUTES. HANNAN SAID to Woltz," I've discovered A TREND " (OR "WE'VE discovered A TREND." I'M NOT SURE Which.)

I ASKED HANNAN WHAT HE MENT. HE SAID, it would be best if I didn't WORK WITH This file. I THINK he MADE A COPY of it, but I CAN'T SAY for SURE.

I HAVE NEVER DONE ANYTHING WITH This file. I'VE just left it AS it WAS when HANNAN stopped working ON it IN MY office AT MY HOUSE.

9/15/04

EXHIBIT

G

Declaration under penalty of perjury of
Joy McCormack pursuant to 28 U.S.C. § 1746

I, Joy McCormack, hereby declare as follows:

1. I am a Futures Trading Investigator with the Division of Enforcement of the United States Commodity Futures Trading Commission ("Commission" or "CFTC"), an independent regulatory agency of the United States Government. I have been employed with the Commission's Division of Enforcement since 1999.

2. As part of the investigation conducted by the Division of Enforcement into the facts surrounding the case of CFTC v. Equity Financial Group, et al., I have been assigned the task of identifying entities that may have collected individual investor funds for the purpose of making investments with any of the defendants. One such group of entities is the Sterling Group of Companies.[1] During the course of this investigation I have conducted research, obtained documents, reviewed bank and trading records, and conducted various analyses.

3. Since June 2004, I began to obtain bank records for the known domestic accounts in the names of the Sterling Group of Companies. During this investigation, I have analyzed those bank records. Specifically, I conducted analysis to trace funds which directly or indirectly funneled through the master bank account in the name of Tech Traders, including the cash flow in the Man Financial trading account referred to as "#37923." To date, I continue to await full compliance from certain financial institutions

[1] The term "Sterling Group of Companies" shall include, but not be limited to: Sterling Trust (Anguilla) Ltd.; Sterling Casualty & Insurance, Ltd.; Sterling Bank Limited; Sterling Alliance, Ltd.; Sterling ACS, Ltd.; Strategic (Bahamas) Portfolio; Sterling Investment Management, Ltd.; Sterling Investment Management, Inc.; Strategic Investment Portfolio, LLC; and Sterling Trust, Ltd.

to complete the analysis of the domestic accounts. From my analysis, I traced several transactions directly and indirectly between foreign bank accounts of the Sterling Group of Companies and Tech Traders master bank account. To date, I have not received the foreign bank account records in the names of the Sterling Group of Companies which would be necessary to complete such analysis.

4. In September 2004, I spoke to Defendant J. Vernon Abernathy ("Defendant Abernathy") regarding the Commission's request to retrieve a laptop used in his home office. Defendant Abernethy consented to the search and retrieval of information from a Hewlett Packard brand 2180 model laptop with the serial number of CNF33906KQ ("the laptop").

5. Also in September 2004, the Commission made a request of technical assistance to the Chicago Regional Computer Forensics Laboratory Office ("CRCFL"), a forensic laboratory run as a collaborative resource by federal and local law enforcement. The scope of the Commission's request to the CRCFL was to forensically examine the hard drive of the laptop for any indication of computer "wiping" activity, indications of spreadsheets, word documents, financial records, email, excel documents, a list of the executable programs loaded on the laptop, and any dates associated with the deletion of files. The request was assigned to Special Agent James Coleman ("SA Coleman").

6. On or about September 24, 2004, I received the laptop from Defendant Abernethy. I personally delivered the laptop to the CRCFL on September 27, 2004, for the purpose of conducting the requested forensic analysis of the hard drive. Specifically, the hard drive contained on the laptop was a Hitachi brand IC25N060ATMR04-0 model with the serial number of 2679301F3P1MA (the "hard drive").

7. October 27, 2004, I retrieved the laptop including hard drive and returned both to Defendant Abernethy.

8. On January 27, 2005 and April 26, 2005, I received reports from SA Coleman regarding his analyses of the hard drive. The reports total over 600 pages of information. The reports provide a listing of information about the computer analyzed and a listing of the electronic files retrieved from such analysis. The listings are separated into the categories of MS Excel Documents, Spreadsheet Documents, Documents, Email Files, and "EXE" Files (executable files) as loaded on the machine on the date the computer was last accessed. An example of a report entry is shown below and reflects detailed information such as the file name, when the file was last accessed, when the file was created, when the file was last written to, whether the file had been deleted or not, the size of the file, and full path to the file:

1) Name Srinivasa Allocation.xls
Last Accessed 04/12/04 08:16:52PM
File Created 01/27/04 12:52:42PM
Last Written 03/25/03 08:39:32AM
Is Deleted
Logical Size 17,920
Physical Size 20,480
Physical Sector 9,450,079
Hash Value ad0b0b859f6a13a920f83b5c4a5bf270
Full Path 04-CGRCFL-0213\CGRCFL007864\C\My Documents JVA\Caribbean Files\Bahamas Files\Bahama Spreadsheets\Jack Ragu File\Srinivasa Allocation.xls

9. Since the reports are voluminous, I reviewed and summarized the reports as reflected below:

MS EXCEL DOCUMENTS: 95 FILES RETRIEVED*
SPREADSHEET DOCUMENTS: 99 FILES RETRIEVED*

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28TH day of April 2005.

Joy H. McCormack
Investigator

EXHIBIT

H

Westlaw

Not Reported in F.Supp.2d
2002 WL 31954396 (D.Del.)
(Cite as: 2002 WL 31954396 (D.Del.))

H

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, D. Delaware.
LIAFAIL, INC., Plaintiff and Counterclaim Defendant
v.
LEARNING 2000, INC., James Richard Story, III, individually, Antonio Santini, individually, ILC, Inc., SFD, Inc,. and S & S Enterprises, Defendants and Counterclaim Plaintiffs and Third-Party Plaintiffs,
v.
Frank STUCKI, Third-Party Defendant.
Nos. C.A. 01-599 GMS, C.A. 01-678 GMS.

Dec. 23, 2002.

MEMORANDUM AND ORDER

SLEET, J.

I. INTRODUCTION

***1** On June 5, 2001, the plaintiff and counter-claim defendant, Liafail, Inc. ("Liafail") filed a complaint in the United States District Court for the Western District of Kentucky, setting forth various contractual theories of liability. The United States District Court for the Western District of Kentucky transferred this case to the United States District Court for the District of Delaware on August 29, 2001. This case became Civil Action Number 01-599-GMS.

On October 9, 2001, Learning 2000, Inc ("L2K") commenced Civil Action Number 01-678-GMS in the United States District Court for the District of Delaware. In that complaint, L2K alleges that Liafail violated, *inter alia,* Section 43 of the Lanham Act, 15 U.S.C. § 1125(a); Section 2532 of the Delaware Uniform Deceptive Trade Practices Act, and the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d).

By stipulation of the parties, the court consolidated Civil Actions 01-599-GMS and 01-678-GMS on November 2, 2001.

Presently before the court is L2K's motion for relief from spoliation of evidence. For the following reasons, the court will grant this motion in part.

II. BACKGROUND

On October 30, 2001, pursuant to Federal Rule of Civil Procedure 26(a)(1), Liafail identified its national sales manager, Steve Sborov ("Sborov") as "likely to have discoverable information concerning the writings at issue in Liafail's complaint and/or Liafail's claims, contentions or defenses relating thereto; including, but not limited to, discoverable information concerning the day-to-day operations of Learning 2000; and Learning 2000's complaint against Liafail and its principals and/or Learning 2000's claims relating thereto."

On November 2, 2001, L2K and Liafail stipulated that "they will preserve all documents, data compilations and tangible things that are in their possession, custody or control, which are relevant or could lead to the discovery of relevant information concerning each party's claims in the above-captioned lawsuit." On November 20, 2001, L2K served requests for production of documents directed to Liafail. The requests sought, among other things:

(1) all documents concerning Liafail's marketing, sale, or distribution of the Lifetime Library;
(2) all documents concerning any marketing and sales materials provided by Liafail or representatives involved in the sale or marketing of the Lifetime Library or Learning 2000 Lifetime Library;
(3) all documents concerning all work product produced by Liafail's representatives engaged in the marketing, sale, and distribution of the Lifetime Library; and
(4) all demonstration, sales, and marketing materials for the Lifetime Library used and/or created by Liafail, its agents, employees or representatives.

The requests further asked Liafail to identify and describe "any document requested herein [that] was formerly in your possession, custody or control and has been lost or destroyed or otherwise disposed of...."

***2** In response to these requests, Sborov gave Liafail

EXHIBIT H

the L2K-issued laptop that he had been using while gaining knowledge of the day-to-day operations of L2K, both as its sales representative and as its national sales manager. Upon receiving the laptop, L2K alleges that Liafail's Vice-President, Keith Hanson ("Hanson") purged all the files from the computer. L2K further alleges that Liafail made no effort to preserve the Sborov files by copying them onto another hard drive, disk or other medium before their destruction.

L2K was able to reconstruct some, but not all, of the Sborov files. L2K maintains that, as far as can be ascertained, virtually all of the Sborov Files were relevant to the issues in this litigation. Indeed, L2K argues that, not only were they relevant, the documents were highly incriminating. For example, according to L2K, the documents included an e-mail received by Sborov, and forwarded to Stucki, which established that, in July 2001, Laifail sales representatives were promoting the Lifetime Library by using L2K marketing materials. L2K also points to an e-mail which it claims establishes that, two months later, Liafail sales representatives were still promoting the Lifetime Library by using a demonstration CD that had "Learning 2000[ ] splashed all over" it. The e-mail also implicated Stucki's knowledge of these actions. L2K maintains that, to date, Liafail has denied that the conduct evidenced by these e-mails occurred. Alternatively, Liafail denies that it had any notice that its sales representatives engaged in the conduct described in these e-mails.

One week before the close of discovery, L2K alleges that it discovered additional spoliation during Frank Stucki's ("Stucki") deposition. At his deposition, Stucki testified that he "trashed two laptops in the last seven months." Specifically, he testified that he dropped the first laptop when he was staying at somebody's house in Arizona. The second laptop "slipped out of [his] hands" at home. During his deposition, he maintained that the information on both laptops was destroyed.

With respect to the first laptop ("the 1700 laptop"), Stucki initially testified that "[t]here was nothing on there that--regarding this litigation...." Later, he contradicted his claim of irrelevance by testifying that whatever was on that laptop was made available to litigation counsel before he disposed of it. L2K now maintains that Liafail's counsel has not confirmed that the files from the 1700 laptop were in fact searched and produced. Nor has it clarified whether (1) it made an independent judgment as to whether the documents on the 1700 laptop were responsive, or (2) whether it simply relied on Stucki's layperson's view of what he believed to be discoverable.

With respect to the second laptop ("the 1720 laptop"), Stucki was unable to confirm that everything on that laptop was made available to his counsel before it was destroyed. Liafail's counsel itself refused to confirm whether it had, in fact, searched the files on the laptop and whether responsive documents were produced or identified on a privilege log.

***3** In response, Liafail now contends that L2K "already has in its possession the documents at issue in the instant motion." Specifically, Liafail has submitted affidavits to the effect that all of the relevant information was removed from the laptop computers, saved, and then made available to L2K.

III. DISCUSSION

A. The Disputed Files

L2K contends that, in the past, Liafail has maintained that the information L2K now seeks was inadvertently destroyed and is no longer available for production. In response to the present motion, however, Liafail has brought forth affidavits, albeit of questionable validity given its previous assurances that the information no longer exists, that the information does indeed exist and is available for production. *See* Liafail's Answer Brief at 4-5. Liafail even goes so far as to indicate, without any citations to record evidence to support its claims, that the files "where relevant and appropriate" have been produced to L2K. *See id. at* 2-4 (stating that all relevant information from the Sborov laptop had been produced and that backup files of this information exist). Liafail's current position on the whereabouts of the discovery sought indicates that Liafail may have engaged in questionable discovery tactics. Nevertheless, because on the record before the court, it is unclear what has been produced, and what must still be produced, the court will not immediately sanction Liafail. Rather, it will first afford Liafail the opportunity to correct or clarify the discovery record by producing the requested documents which it has claimed are available, or by producing the Bates Numbers of documents which it claims it has already produced. [FN1]

FN1. This order includes the production of all relevant documents within the meaning

of Federal Rule of Evidence 401, including those which Liafail has conceded it did not produce due to "marginal relevance." *See* Liafail's Answer Brief at 7, n. 6. The order further includes information which Liafail believes L2K already has in its possession due to its own computer file restoration efforts. *See e.g. Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 181 F.R.D. 229, 240 (W.D.N.Y.1998) (holding that the defendants "must produce requested documents ... regardless of whether Plaintiff is also in possession of the documents.").

B. Sanctions

For the following reasons, should Liafail chose not to heed the court's order and produce the documents of which it claims to have possession, the court will order sanctions against it in the form of an adverse inference jury instruction.

Where the nature of the alleged breach of a discovery obligation is the non-production of evidence, the court has broad discretion in fashioning an appropriate sanction. *See Residential Funding Corp. v. Degeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir.2002). In exercising its discretion, the court may impose an adverse inference instruction where: (1) the party having control over the evidence had an obligation to timely produce it; (2) the party had a "culpable state of mind;" and (3) the missing evidence is "relevant" such that a reasonable trier of fact could find that it would support the other party's claim or defense. *See id.* Liafail has not argued that the discovery at issue was, or is, out of its control, nor that it did not have an obligation to timely produce it. Thus, the court concludes that the first prong of the test has been met. It will now address the remaining two prongs.

With regard to the culpability prong, the court finds that, should Liafail disregard this order, it will have acted in bad faith. Specifically, if Liafail does not produce the requested files, it will then be in the position of having intentionally misrepresented the availability of the evidence before the court on this motion.

***4** Further informing the court's decision on this point are the clear discrepancies in Liafail's two versions of the events, which tend to demonstrate bad faith on its part. For example, in his present affidavit, Stucki testified that attempts were made to save the contents of the 1700 laptop, and that, indeed, the contents were saved. *See* Stucki Affidavit at ¶ 4. During his earlier deposition, however, Stucki testified that the contents of the 1700 laptop were "destroyed," and that no attempts were made to retrieve the documents from that laptop. *See* Stucki Deposition at 1366.

Additionally, Stucki's affidavit claims that the entire contents of the 1720 laptop were transferred to the old 1700 laptop and that "[t]he transfer was successful and ... no documents or filed were omitted from the transfer and none were deleted." Stucki Affidavit at ¶ 6. Stucki further states in his affidavit that, "I have reviewed the contents of the 1700 laptop I now use and have confirmed that all potentially relevant information which was contained on it ... has been made available to my counsel." *Id.* at ¶ 8. The court finds it difficult to reconcile this statement with Liafail's counsel's earlier representation that both laptops were discarded because they could not be repaired. *See* June 20, 2002 Letter from W. Bruce Baird to Sean K. Hornbeck (stating that the Stucki computers "were not repairable [and] they were disposed of long ago.").

Finally, the court is satisfied that the requested discovery documents are relevant, such that a "reasonable trier of fact could infer that 'the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction." ' *Residential Funding Corp.*, 306 F.3d at 109. Liafail has put Stucki's scienter at issue in this litigation by denying that he had knowledge of certain events. Accordingly, the identity of the documents he had stored on his laptops may be probabtive of what he knew or should have known.

With regard to the relevance of the Sborov files, L2K has represented that, based on the information it was able to salvage, the files were relevant to the issues in this litigation. By way of example, L2K has provided an e-mail received by Sborov, and forwarded by Stucki, which allegedly establishes that, in July 2001, Liafail sales representatives were promoting the Lifetime Library by using L2K marketing materials. *See* Liafail's Opening Brief, Ex. K.

Additionally, the court notes that a jury would be permitted to infer that Liafail's bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party. *See Residential Funding Corp.*, 306 F.3d at 109. Accordingly, the court finds that the requisite

relevance factor has been satisfied.

IV. CONCLUSION

Thus, while it would be entirely appropriate for the court to sanction Liafail immediately based on the conflicting stories Liafail has espoused in an apparent attempt to perform an end-run around both L2K's discovery requests and the current motion, the court nevertheless concludes that the more just route is to allow Liafail to correct its apparent wrongs before imposing sanctions. [FN2]

> FN2. In light of counsel's joint request for additional time to respond to the motions in limine, and the need to move the trial to a later date as a result of this request, the court finds this solution to be imminently fair to both parties.

*5 For the aforementioned reasons, IT IS HEREBY ORDERED that:

1. L2K's Motion for Relief from Spoliation of Evidence (D.I.260) is GRANTED as follows:
2. Liafail shall produce any and all relevant documents, files, or the like, originating from the Sborov laptop, as well as the 1700 and 1720 laptops, within thirty (30) days of the date of this order.
3. Should Liafail not comply with this order, the court will order sanctions against it in the form of an adverse inference jury instruction.
4. L2K's requests for costs as a result of Liafail's alleged misconduct is DENIED at this time.

2002 WL 31954396 (D.Del.)

Motions, Pleadings and Filings **(Back to top)**

- 1:01CV00678 (Docket) (Oct. 09, 2001)
- 1:01CV00599 (Docket) (Sep. 04, 2001)

END OF DOCUMENT

CERTIFICATE OF SERVICE

The undersigned, a non-attorney, does hereby certify that on April 28, 2005, she caused true and correct copies of the foregoing ***CFTC'S REPLY TO THE STERLING ENTITIES' RESPONSE TO CFTC'S OBJECTIONS and MOTION TO FILE BRIEF IN EXCESS OF FIFTEEN PAGES, INSTANTER*** to be served via electronic mail and federal express mail:

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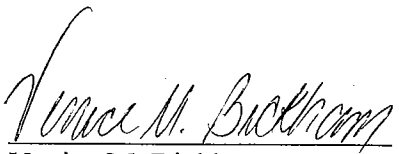

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