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Equity Receiver

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION,	)	
Plaintiff,	)	
vs.	)	**Civil Action No.: 04CV 1512**
EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, INC., TECH TRADERS, LTD., MAGNUM INVESTMENTS, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY,	)	**Honorable Robert B. Kugler**
Defendants.	)	

REPLY BRIEF OF EQUITY RECEIVER IN SUPPORT OF MOTION FOR ENTRY OF TURNOVER ORDER DIRECTED AT MCDERMOTT WILL & EMERY

Stephen T. Bobo, as Equity Receiver (the "Receiver") for defendants Equity Financial Group, LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, and Robert W. Shimer, by his attorneys, submits this reply brief in support of his motion for an Order directing the law firm of McDermott Will & Emery ("MWE") to turn over to the receivership estate the sum of $164,362.43 that MWE is holding.

Summary. MWE's response to the Receiver's motion for turnover order seeks an additional $90,110.69 of the now-frozen retainer funds for fees, without submitting any basis for the fees or any evidence that the fees are reasonable. In addition, some or all of the fees that MWE has already been paid may be recoverable under several legal and equitable principles, including but not limited to fraudulent conveyance and unjust enrichment. Finally, because MWE has refused to produce relevant documents in response to the Receiver's subpoena, the Receiver has filed a motion to compel, now pending in the United States District Court for the District of Columbia. Until the D.C. court rules on his motion to compel, the Receiver has no access to documents that bear on the reasonableness of MWE's fees. For all these reasons, if the Court does not grant the Receiver's motion for turnover order in its entirety, then the Court should hold the Receiver's motion in abeyance until MWE produces all the invoices for which it seeks fees *and* all documents responsive to the Receiver's subpoena, without which its entitlement to the fees cannot be determined.

The reasonableness of MWE's invoices for March through June 2004. Although it already has applied $81,637.57 of retainer funds towards its invoices while failing to resolve the CFTC issues for which it was retained, MWE seeks to apply an additional $90,110.69 of the now-frozen retainer funds towards its invoices dated March through June 2004. While Tech Traders, Inc. agreed to pay its fees for services rendered, MWE is only entitled to *reasonable* fees. See, e.g., Connelly v. Swick & Shapiro, P.C., 749 A.2d 1264, 1267 (App. D.C. 2000). In Connelly, a case between a law firm and its former client over a retainer agreement governing attorneys' fees, the District of Columbia Court of Appeals made this clear:

> We state at the outset what is probably clear to most, and that is that compensation paid to attorneys for legal services is largely a question of fundamental fairness. The goal is to compensate attorneys reasonably for professional services rendered in a manner where the client's obligation is

> understood in advance, and accepted as an objectively fair undertaking. Thus it is a familiar premise of long-standing, taking into account a variety of circumstances, that in determining legal fees, consideration should be given to the time and labor required, the difficulty of the questions involved, the particular skills required to serve as counsel in a given case, the customary fee for similar services, the results obtained, the length and nature of the lawyer-client relationship, as well as the experience, reputation and ability of counsel.

Id. (citing DC Rules of Prof. Conduct, Rule 1.5 and ABA Model Rules of Prof. Conduct, Rule 1.5). The Court, therefore, should not consider MWE's request for payment without determining whether some or all the fees paid by Tech Traders, Inc. are reasonable under the circumstances.

The fees do not appear reasonable on their face. First, MWE has charged for the services of at least six partners, one associate and one analyst at high billing rates, without accomplishing what the firm was retained to do. In fact, shortly after this Court shut down Tech Traders' operations, Mr. Murray told MWE how disappointed he was with MWE's services and its handling of the retainer funds. (See Murray letter to MWE letter dated May 24, 2004, attached hereto as Ex. I). Under such circumstances, a determination of the reasonableness of MWE's fees for March through April 8, 2004 (*and* its earlier bills for January and February 2004) would require, at the very least, a review of the relevant invoices and supporting documents evidencing MWE's services. MWE has inexplicably failed to provide the Court *or* the Receiver these documents, even though all three of its clients have expressly waived privilege and MWE has *already* produced its earlier invoices. And, MWE's fees for services purportedly provided on and after April 8, 2004 should be deemed presumptively unreasonable because MWE *terminated* its representation of all three clients effective that morning. (See S. Bobo Affidavit, attached to Motion for Turnover Order as Ex. A and Att. 2 to that Affidavit).

Finally, MWE's post-termination invoices totaling $11,459.43 – for responding to "requests for information" from Murray and the Receiver (MWE's response, at 4) – are nothing short of absurd. These requests concern two items – the frozen funds and the Receiver's document subpoena discussed below. If MWE had turned over the funds and the requested documents, as the District of Columbia Rules of Professional Conduct *required* it to do, then it could not have billed for such ministerial tasks and this motion would have been moot. See DC Rules of Prof. Conduct, Rule 1.16(d) ("[A] lawyer is required to "take timely steps to the extent reasonably practicable to protect a client's interests" in connection with termination of representation, including "surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned."); see also In re Douglass, 859 A.2d 1069, 1085 (D.C. 2004) (imposing sanctions and 90-day suspension for violations of Rules of Professional Conduct, including Rule 1.16(d)).

All the funds at issue originated from Tech Traders, Inc.'s investors. This Court also should deny MWE's request for payment because some or all of the fees that MWE has already been paid may be recoverable under several legal and equitable principles, including but not limited to fraudulent conveyance and unjust enrichment. MWE now acknowledges that it received all of the retainer funds from the Tech Traders, Inc. (MWE's response, at 2). As is now known, at all times during MWE's representation, Tech Traders, Inc. was operating a Ponzi scheme, had no legitimate business operations, and was insolvent. And, all of Tech Traders, Inc.'s funds originated from defrauded investors.

MWE, moreover, has applied only $35,250.77 of the retainer towards invoices submitted to Tech Traders, Inc. It claims to have applied an additional $36,898.85 to invoices submitted to Tech Traders, Ltd. and $9,068.42 to invoices submitted to Murray in his individual capacity –

apparently without inquiring into why they were not paying their own invoices. If the Court determines that MWE did not give Tech Traders, Inc. reasonably equivalent value in exchange for some or all of these fees, then the payments would be recoverable under several legal and equitable principles, including but not limited to, fraudulent conveyance and unjust enrichment. MWE should not now be permitted to apply *additional funds* paid by Tech Traders, Inc. and originating from defrauded investors for services provided to third parties – Tech Traders, Ltd. and Coyt E. Murray in his individual capacity.

Ruling on this motion could wait until the Receiver's motion to compel is resolved.

On or about April 27, 2005, the Receiver served MWE with a Third Party Subpoena requesting all documents relevant to its representation of Tech Traders, Inc., Tech Traders, Ltd. and Coyt Murray but, notwithstanding its clients' privilege waiver and in violation of Rule 1.16(d) of the District of Columbia Rules of Professional Conduct, MWE continues to withhold production. On December 5, 2005, the Receiver filed a motion to compel those documents, which is pending in the United States District Court for the District of Columbia and is attached hereto as Ex. II (without exhibits). Unless this Court directs MWE to turnover all the funds it is now holding, the Receiver respectfully requests that this motion be held in abeyance until the D.C. court rules on his motion to compel and this Court has had an opportunity to review the additional documents that bear on the reasonableness of MWE's fees.

CONCLUSION

For the foregoing reasons, the Court either should grant the Receiver's motion for turnover order in its entirety OR hold the motion in abeyance until MWE produces all its invoices to Tech Traders, Inc., Tech Traders, Ltd. and Murray *and* all documents responsive to the Receiver's subpoena.

DATED: December 9, 2005

Respectfully submitted,
STEPHEN T. BOBO
Equity Receiver

By: s/ Jeffrey A. Carr
One of his attorneys

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I

Coyt E. Murray
1331C E. Garrison Blvd
Gastonia NC 28054
(704) 853-3820

May 24, 2004

David E. Aron
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096

Re: Tech Traders, Inc., Tech Traders, Ltd. and Coyt Murray

Dear David:

I am writing to express my concern with your billing-to-date and the situation surrounding the retainer fees. Beginning January 5, 2004, a total of $246,000 was sent to your firm to be held as retainer fees. Pursuant to your firm's policies and your letter of 2/13/04, this money is deposited in MWE's general accounts and applied to "legal fees and expenses on a monthly basis", with any unused portion returned "at the conclusion of the engagement".

Below is a list of invoices received since retaining your firm totalling $39,340.24;

Invoice # 1353237	3/23/04	Tech Traders Inc.	$ 9,068.42	Paid
Invoice # 1353235	3/23/04	Tech Traders Ltd.	$10,171.10	Paid
Invoice # 1353136	3/23/04	Coyt Murray	$ 9,487.95	Paid
Invoice # 1363243	4/29/04	Coyt Murray	$ 8,860.55	Open
Invoice #1366403	5/12/04	Coyt Murray	$1,752.22	Open

On 1/5/04, we sent your firm $20,000, our check #1633. The first two invoices must have been covered by this amount. As per your e-mail of 1/19/04, we then sent you an additional $25,000 (that same day) by our check #1645. You informed us that 50% would be applied to each account, Tech Ltd. and Tech Inc.

An additional $50,000 in retainer fees was sent to you on 2/11/04, our check #1653 and in March we sent two wires totaling $151,000 (3/30- $60,000 and 3/31 - $50,000). We were instructed by e-mail on 2/12/04 that $25,000 was being placed into a separate account for Coyt Murray. It appears that the 3/23/04 invoice #1353136 was paid with the

retainer fees and it should follow that the other two open invoices would come from the balance of this $25,000 account. You had ample time to apply the credit to these charges.

Our records indicate that we should have a balance of $206,659.76 in retainer fees. This balance reflects a deduction of $10,612.77 (the two open invoices). We have not heard from your firm as to the status of this money. At one point, we were informed that someone would find out if the money could go into a trust fund for attorney fees. Again, no one from your firm has contacted us in regard to this matter. As far as we know, our money is still in your bank account and, may be drawing interest as you read this letter.

In comparison, we sent your requested funds promptly, sometimes on the same day they were requested. We expected the same expedient type service in return. Needless to say, we have been completely disappointed in your firm and its representation.

In regard to the invoices billed to me personally (#'s 1353136, 1363243, & 1366403), none of the itemized services are of the nature I agreed to in our agreement letter of 2/13/04. I had declined the Cayman Islands proposal and the charges seem to be thrown "my way" since the chances of collecting from Tech Inc. and Tech Ltd. are slim at the present. If you would care to elaborate on these invoices in question, it would be appreciated.

My experience with your law firm has been anything except professional and rewarding. My opinion is that you did not act on my behalf for the benefit of the companies. I retained your services for specific reasons that were never satisfied and then you pulled out on me when my back was completely up against the wall. Also, in retrospect, it seems that your neglect has caused me to be in a worse position than if you had acted responsibly.

It is very discerning that I have to demand what is mine from a profession that represents honesty and integrity. I will expect to hear from you soon as to where the matter stands in regard to what McDermott, Will & Emery owes Tech Traders.

Sincerely,

Coyt E. Murray

CEM/vw

Enclosures

Cc: Melvyn Falis
Marty Kaplan
Gusrae, Kaplan & Bruno
Budd Hallberg

II

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

COMMODITY FUTURES TRADING COMMISSION,	JUDGE: Ellen Segal Huvelle
Plaintiff,	DECK TYPE: Miscellanous
vs.	DATE STAMP: 12/05/2005
EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, INC., TECH TRADERS, LTD., MAGNUM INVESTMENTS, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY,	CASE NUMBER 1:05MS00493
Defendants.	

EQUITY RECEIVER'S MOTION TO COMPEL
MCDERMOTT WILL & EMERY
TO PRODUCE DOCUMENTS RESPONSIVE TO SUBPOENA

Comes now Stephen T. Bobo, duly appointed equity receiver in the above-captioned action, and moves for an order compelling non-party witness McDermott, Will & Emory to produce documents the Receiver requested by subpoena, and in support thereof, files the accompanying brief. As described in the brief, the Receiver made a good faith effort to secure these documents without court action.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

COMMODITY FUTURES TRADING COMMISSION,	)	
Plaintiff,	)	
vs.	)	**No. _____**
EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, INC., TECH TRADERS, LTD., MAGNUM INVESTMENTS, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY,	)	
Defendants.	)	

EQUITY RECEIVER'S MOTION TO COMPEL
MCDERMOTT WILL & EMERY
TO PRODUCE DOCUMENTS RESPONSIVE TO SUBPOENA

Stephen T. Bobo, as Equity Receiver (the **"Receiver"**) for defendants Tech Traders, Inc., Tech Traders, Ltd. and others, by his attorneys, requests that the Court enter an order directing the law firm of McDermott Will &Emery (**"MWE"**) to produce documents responsive to a subpoena served upon it on April 28, 2005.

This motion arises from a case filed by the Commodity Futures Trading Commission (**"CFTC"**) in the United States District Court for the District of New Jersey to halt a fraudulent commodity trading operation and to obtain appropriate equitable relief. The Receiver for the corporate defendants files this motion to compel McDermott Will & Emery, the law firm that represented two of those defendants and their principal, to produce documents responsive to his subpoena. Because the defendants have waived all applicable privileges for purposes of the

subpoena, MWE has no legitimate basis for withholding the documents. Even if it were to assert such a basis, the Receiver is entitled to the documents because he cannot obtain the substantial equivalent by other means and the documents are vital to the Receiver's court-ordered duties.

FACTUAL BACKGROUND

I. The CFTC Litigation

1. On April 1, 2004, Judge Robert B. Kugler of the United States District Court for the District of New Jersey appointed the Receiver as equity receiver for Tech Traders, Inc. and others in Commodity Futures Trading Commission v. Equity Financial Group, LLC, et al., Case Number 04CV 1512 (D. N.J.) (**"the CFTC Litigation"**), for the purpose of "marshalling, preserving, accounting for and liquidating assets" of the Defendants and ordered him to "[i]nitiate ... or become party to any actions or proceedings ... necessary to preserve or increase the assets of the Defendants." The Receiver is an attorney in private practice in Chicago, Illinois. (See Statutory Restraining Order and Order Appointing Receiver, attached hereto at Ex. A).

2. From at least May 2001 through April 1, 2004, Tech Traders, Inc. allegedly received in excess of $43 million from others for the purpose of trading commodity futures. Tech Traders, Inc. pooled these funds, but deposited only a portion of them in commodity futures trading accounts it maintained in its own name. Throughout the relevant time period, Tech Traders, Inc. lost millions of dollars of investor funds through trading commodity futures contracts. (See First Amended Complaint, attached hereto as Ex. B).

3. At all relevant times until at least April 1, 2004, Coyt E. Murray (**"Murray"**) controlled Tech Traders, Inc. Although it reported consistent, high monthly performance numbers to participants, Tech Traders, Inc. allegedly lost and/or misappropriated millions of

dollars, leaving a shortfall in excess of $15 million. In short, Tech Traders, Inc. ran a Ponzi scheme operation in which relatively large gains were reported to investors even though the economic activities of the company actually resulted in large losses. (See First Amended Complaint, attached hereto as Ex. B).

4. Murray also controlled Tech Traders, Ltd. He formed Tech Traders, Ltd. ostensibly to handle foreign transactions in Nassau, Bahamas. Little or no actual business appears to have been done through that entity. No financial records or trading accounts have been identified for Tech Traders, Ltd., and the only bank account found in its name is with a Bahamian bank that was shut down and placed under the control of a provisional liquidator in March 2001. Although certain investors signed investment agreements bearing the name of Tech Traders, Ltd., their funds were deposited in a commingled Tech Traders, Inc. bank account and some or all of those funds were transferred to trading accounts maintained in the name of Tech Traders, Inc. Tech Traders, Ltd. therefore appears to have had little or no separate economic existence.

5. As alleged in the CFTC Litigation, neither Tech Traders, Ltd. nor Tech Traders, Inc. was ever registered with the CFTC in any capacity or ever filed for an exemption from registration, in violation of the Commodity Exchange Act, 7 U.S.C. § 1 et seq.

6. On April 1, 2004, Judge Kugler entered an order freezing the assets and records of Tech Traders, Inc. in the CFTC Litigation. The order prohibited Tech Traders, its "agents, successors, assigns, and attorneys" and all persons "acting in concert or participation with them" who receive actual notice of the freeze order from withdrawing or dissipating Tech Traders' funds, "wherever situated." (See Statutory Restraining Order and Order Appointing Receiver,

attached hereto at Ex. A). MWE is one of the entities that received actual notice of the freeze order.

7. On August 24, 2004, the Court incorporated the Statutory Restraining Order and Order Appointing Receiver into the Consent Order of Preliminary Injunction Against Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd. and Coyt E. Murray.

II. The Role of McDermott Will & Emery and the Documents at Issue

8. On December 31, 2003, Tech Traders, Inc. and Tech Traders, Ltd. (together **"Tech Traders"**) retained MWE to provide legal services in connection with their compliance with CFTC regulations and registration requirements. (See retention letters, attached hereto as Ex. C).

9. On February 13, 2004, Murray retained MWE in his individual capacity "for the purpose of forming certain entities." (See retention letter, attached hereto as Ex. D).

10. As of April 8, 2004, MWE terminated its representation of Tech Traders, Inc., Tech Traders, Ltd. and Murray. (See termination letters, attached hereto as Ex. E).

11. Between January 1, 2004 and April 1, 2004, Tech Traders, Inc. paid MWE a total of $246,000 in retainer funds. Of this $246,000, MWE applied $81,637.57 towards invoices submitted to Tech Traders, Inc., Tech Traders, Ltd. and Murray in his individual capacity. According to MWE, it froze the remaining $164,362.43. (See MWE letter dated May 20, 2004, attached hereto as Ex. F).

12. On or about April 28, 2005, the Receiver served MWE with a Third Party Subpoena Requesting Production of Documents related to MWE's representation of Tech

Traders, Inc., Tech Traders, Ltd. and/or Murray (the **"MWE Subpoena"**). (See MWE Subpoena, attached hereto as Ex. G).

13. On or about May 20, 2005, MWE served the Receiver with its response to the MWE Subpoena asserting various objections. In particular, MWE objected to the MWE Subpoena "to the extent it calls for the disclosure of information that MWE regards as being subject to the attorney-client privilege, as constituting attorney work product, or as being otherwise immune from discovery."

14. Notwithstanding these objections, on May 26, 2005, MWE produced certain documents bates-stamped MWE 0001-0621. (See MWE letter dated May 20, 2005, attached hereto as Ex. H). In so doing, MWE acknowledged that, as Receiver, Mr. Bobo stands in the shoes of Tech Traders, Inc. and Tech Traders, Ltd. and therefore holds any privileges belonging to those entities. (See MWE email dated May 26, 2005, attached hereto as Ex. I). As of May 26, 2005, MWE appears not to have withheld any documents on the basis of attorney-client privilege on behalf of Tech Traders, Inc. or Tech Traders, Ltd.

15. MWE nonetheless withheld "approximately three boxes of documents" from production. (See MWE letter dated June 24, 2005, attached hereto as Ex. J). In a letter dated June 24, 2005, MWE provided the Receiver's counsel the following bare-bones description of the three bases for withholding those documents:

> (1) MWE internal communications, drafts, attorney notes and similar documents considered to be work product (unless sent to the client); and (2) MWE communications with Arnold & Porter and consultants or potential consultants considered to be work product (unless sent to the client). In addition, we withheld as privileged a small number of documents related to our representation of Coyt E. Murray in setting up new hedge funds.

(See id.).

16. In a letter dated July 1, 2005, the Receiver's counsel challenged MWE's position with respect to MWE's first two categories of withheld documents, urged MWE to reconsider its position and requested a telephonic "meet and confer" if it did not intend to produce all requested documents. Specifically, the Receiver's counsel stated:

> [W]e are concerned about the first two categories of withheld documents identified in your letter and ask that you reconsider your position regarding those documents. ....
>
> As to the first category, we do not understand your refusal to produce "MWE internal communications, drafts, attorney notes and similar documents." First, if you intended to claim "work product" protection because the documents were prepared in anticipation of litigation or for trial, your description is insufficient to enable us to contest that claim under Rule 45. Second, from our overall knowledge of the circumstances and our review of MWE's billing statements, it does not appear that any of the documents could have been prepared in anticipation of litigation or for trial and thus entitled to "work product" protection. We thus urge you to reconsider your position and produce those documents immediately.
>
> Your claim of protection is even more tenuous with respect to the second category of withheld documents that you characterize as communications with Arnold & Porter ("A&P"). We understand that MWE and A&P discussed a joint defense agreement among Shasta Capital Associates, LLC, Tech Traders, Ltd., and Tech Traders, Inc. But, we do not understand how MWE's communications with A&P about such an agreement and before such an agreement was executed is entitled to protection under any theory. In any event, as equity receiver, Mr. Bobo stands in the shoes of those entities and controls any applicable privileges. .... We thus urge you to reconsider your position and produce those documents immediately.

(See letter to MWE letter dated July 1, 2005, attached hereto as Ex. K).

17. The Receiver's counsel followed up on this request by leaving a voicemail for Jana Baldwin at MWE, in another attempt to schedule a telephonic "meet and confer" regarding the production of documents. MWE never responded to that voicemail.

18. In a letter dated July 18, 2005, Murray's current counsel informed MWE that Murray had agreed to waive the attorney-client privilege and requested that MWE produce to the CFTC and the Receiver "any documents they request from your files." (See letter to MWE letter

dated July 18, 2005, attached hereto as Ex. L). In response, on July 26, 2005, MWE produced a small set of additional documents bates-stamped MWE 0622-0648. (See MWE letter dated July 26, 2005, attached hereto as Ex. M).

19. These additional twenty-seven pages hardly approach the three boxes that MWE admittedly has withheld from production. After this small additional production, the remaining documents that MWE continues to withhold from production apparently fall into one of the following two categories identified in its June 24, 2005 letter:

> (1) MWE internal communications, drafts, attorney notes and similar documents considered to be work product (unless sent to the client); and (2) MWE communications with Arnold & Porter and consultants or potential consultants considered to be work product (unless sent to the client).

(See MWE letter dated June 24, 2005, attached hereto as Ex. J). These remaining documents, apparently withheld on a claim of "work product" protection, are the subject of this motion to compel.

ARGUMENT

I. MWE's Failure to Produce the Documents Violates the Rules of Professional Conduct

The District of Columbia Rules of Professional Conduct govern disposition of client files when a lawyer terminates representation of the client. Under Rule 1.16(d), a lawyer is required to "take timely steps to the extent reasonably practicable to protect a client's interests" in connection with termination of representation, including "surrendering papers and property to which the client is entitled." Although Rule 1.16(d) also provides that the lawyer "may retain papers relating to the client to the extent permitted by Rule 1.8(i)," this exception does not apply here because Rule 1.8(i) only permits a lawyer to impose a lien upon a client's files to secure payment of fees. Comment 9 to the Rule explains the narrow exception to Rule 1.16(d):

> Paragraph (i) of this Rule states a narrow exception to Rule 1.16(d): a lawyer may retain anything the law permits--including property--except for files. As to files, a lawyer may retain only the lawyer's own work product, and then only if the client has not paid for the work. However, if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product. Furthermore, the lawyer may not retain the work product for which the client has not paid, if the client has become unable to pay or if withholding the work product might irreparably harm the client's interest.

As explained above, MWE cannot find shelter under this narrow exception because Tech Traders not only does not owe MWE fees but, in fact, has *overpaid* MWE. In sum, MWE violated Rule 1.16(d) by refusing to produce all requested documents to which the Receiver, standing in the shoes of Tech Traders, is entitled. See In re Douglass, 859 A.2d 1069, 1085 (D.C. 2004) (imposing sanctions and 90-day suspension for violations of Rules of Professional Conduct, including Rule 1.16(d)).

II. MWE Has Failed to Demonstrate That the Documents are Protected Work Product

Even if MWE were entitled to withhold work product – which it is not – it has failed to provide a description sufficient to satisfy its burden under Rule 45(d) of the Federal Rules of Civil Procedure to establish that the documents are entitled to "work product" protection. Second, from the Receiver's overall knowledge of the circumstances and his review of MWE's billing statements, it does not appear that any of the documents could have been prepared in anticipation of litigation or for trial. (See MWE invoices, attached hereto as Ex. N). The Receiver therefore requests that this Court conduct an *in camera* review of the documents to assess the validity of MWE's claim.

III. The Receiver Has a Substantial Need For The Withheld Documents

Even if the Court were to determine that the documents are conditionally protected as attorney "work product," the Receiver still is entitled to production of the documents because he

cannot obtain the substantial equivalent of the material by other means. Both Hickman v. Taylor, 329 U.S. 495, 511 (1947), and Rule 26(b)(3) recognize that work-product protection, even if properly asserted, is not absolute and work-product materials must be produced when the party seeking the discovery demonstrates substantial need for the materials and substantial hardship in obtaining the materials by alternative means.

It is generally recognized that a federal equity receiver may bring suit to "accomplish the objective of the suit for which his or her appointment was made, or under the specific directions of the appointing court, or pursuant to his general duties to receive, control, and manage the receivership property." 12 Wright, Miller & Marcus, Federal Practice & Procedure § 2984 (2d ed. 1997).

As stated above, the Receiver has been appointed in the CFTC Litigation for the purpose of marshaling and liquidating the assets of Tech Traders and others and has been authorized and directed to initiate actions or proceedings necessary to preserve or increase the assets of Tech Traders and others. (See Statutory Restraining Order and Order Appointing Receiver, attached hereto at Ex. A). Among other things, the Receiver has a duty to investigate the conduct of professionals who provided services to Tech Traders, Inc. and Tech Traders, Ltd. during the relevant time period and the fees they charged for those services. MWE is one of those professionals.

The Receiver has a substantial need to review all MWE documents relating to its representation of Tech Traders, Inc., Tech Traders, Ltd. and Murray in order to assess the adequacy of MWE's legal services, the propriety of MWE's fees and MWE's application of retainer funds towards its invoices, among other things.

During the time that MWE was counseling Tech Traders, Inc. regarding its regulatory issues with the CFTC – Tech Traders, Inc. received over $18 million of investor funds. The Receiver is charged with investigating whether MWE breached its duty of care in any manner, including by failing to advise Tech Traders, Inc. to refrain from receiving additional investor funds until its registration and regulatory issues with the CFTC were resolved.

MWE collected $246,000 from Tech Traders, Inc. without resolving the CFTC issues for which it was retained. In addition, at all times during MWE's representation, Tech Traders, Inc. was engaged in a Ponzi scheme, had no legitimate business operations, and was insolvent. MWE applied only $35,250.77 of the retainer from Tech Traders, Inc. towards invoices submitted to Tech Traders, Inc. MWE claims to have applied an additional $45,967.27 of the funds received from this insolvent entity towards invoices submitted to others – i.e., $36,898.85 to invoices to Tech Traders, Ltd. and $9,068.42 to Murray in his individual capacity – apparently without questioning their solvency or inquiring into why they were not paying their own invoices.[1]

In addition, on May 24, 2004, Murray sent a letter to MWE expressing clear disappointment in MWE's handling of retainer funds and in the services provided. (See Murray letter to MWE letter dated May 24, 2004, attached hereto as Ex. P). In that letter Murray, for example, questioned MWE's fees in connection with "the Cayman Island proposal" because he apparently had declined that proposal. MWE now has withheld from the Receiver all its correspondence with Murray regarding this proposal that Murray form a hedge fund in the Cayman Islands to avoid registration with the CFTC. (See Sample Withheld Documents, attached hereto as Ex. Q). Not only is it impossible to determine how MWE's communications

[1] On November 15, 2005, in the CFTC Litigation, the Receiver filed a motion for entry of an order directing MWE to turn over the frozen $164,362.43 to the receivership estate. (See Brief Of Equity Receiver In Support Of Motion For Entry Of Turnover Order Directed At McDermott Will & Emery, attached hereto as Ex. O (without attached exhibits)).

with Murray regarding forming a hedge fund in the Cayman Islands is protected work product, but MWE's self-serving refusal to produce its correspondence with Murray and others regarding the proposal is a clear abuse of the discovery process.

In short, the only evidence that the Receiver has obtained from MWE regarding the propriety of its fees and the quality of its services raises sufficient red flags to merit a detailed and through assessment of potential claims and therefore heightens the Receiver's need to review all MWE documents related to its representation of Tech Traders, Inc., Tech Traders, Ltd. and Murray. The Receiver simply cannot obtain this necessary evidence by alternative means because Murray – the only representative of Tech Traders, Inc and Tech Traders, Ltd. who had any contact with MWE – has invoked the protection of the Fifth Amendment and refused to give testimony in the CFTC Litigation. The Receiver thus simply cannot carry out the required investigation without a thorough review of all MWE documents relating to its representation.

CONCLUSION

For the foregoing reasons, the Court should grant the Receiver's motion to compel.

DATED: December 2, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tracey Erwin, on oath hereby certify that I caused copies of the **EQUITY RECEIVER'S MOTION TO COMPEL MCDERMOTT WILL & EMERY TO PRODUCE DOCUMENTS RESPONSIVE TO SUBPOENA** to be served upon:

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Tracey Erwin

CERTIFICATE OF SERVICE

I, Bina Sanghavi, on oath hereby certify that I caused copies of the **REPLY BRIEF OF EQUITY RECEIVER IN SUPPORT OF MOTION FOR ENTRY OF TURNOVER ORDER DIRECTED AT MCDERMOTT WILL & EMERY** to be served upon:

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