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

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| **Commodity Futures Trading Commission**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**Equity Financial Group LLC, Tech Traders, Inc., Vincent J. Firth, and Robert W. Shimer,**<br><br>**Defendants.** | **CIVIL ACTION NO. 04-cv-1512 (RBK-AMD)**<br><br>**REPLY BRIEF OF STERLING (ANGUILLA) TRUST, LTD.**<br><br>**RETURNABLE: NOVEMBER 5, 2004** |

## PRELIMINARY STATEMENT

Nothing in the CFTC's opposition papers asserts that it took any action to represent Sterling Trust's interests on the preliminary injunction motion. It is undisputed that as a non-party Sterling Trust had an interest in having accounts held in its name unfrozen – especially since the CFTC already had amended the complaint to name others. Yet, the CFTC's did not even attempt to have the Court consider Sterling Trust's position on the funds frozen at Man Financial. The reason is simple. It failed to raise the issue of the account with the Court because of the CFTC's clear conflict of interest. Accordingly, no effort was made to ensure that Sterling Trust received due process on the motion.

Having no basis in fact or law to oppose the motion, the CFTC resorts to exaggeration and pure fabrication. When stripped of the red herring issues, the CFTC makes three arguments. All of these arguments lack merit.

First, the CFTC argues that nothing has changed since this Court's ruling in May 2004. The CFTC is wrong. As is set forth more fully below, several things have changed. Most importantly, the CFTC violated this Court's trust and (in a clear conflict situation) failed to protect Sterling Trust's interest. The fact that the Court expressed the opinion that the CFTC would adequately represent Sterling Trust's interests is only relevant to show that it has failed to live up to the Court's expectations.

Second, the CFTC argues that the claims process will protect Sterling Trust's interest in the Man Financial account. This argument is misplaced. The fact is that the frozen funds in the Man Financial account were held in the name of Sterling Trust – an entity that is neither a defendant or a relief defendant. At a hearing on the preliminary injunction, the CFTC would have had the burden of proving that they were likely to succeed on the merits of their claim that the funds in that account properly belong to a defendant and are part of the receivership. The claims process simply is irrelevant to that issue.

Finally, it argues that FRCP 60 does not permit relief from the preliminary injunctive order. However, the law is clear that FRCP 60 has been interpreted to apply to preliminary injunctive orders.

## FACTS

Sterling Trust respectfully refers the Court to the facts set forth in its opening brief as well as those contained in the Declaration of Martin P. Russo, Esq., dated October 27, 2004, which is being filed with this Memorandum.

## DISCUSSION

### I. THE CFTC DID NOTHING TO REPRESENT STERLING TRUST'S INTERESTS ON THE PRELIMINARY INJUNCTION MOTION

The CFTC and the Receiver did nothing to represent Sterling Trust's interests on the preliminary injunction motion. There is no dispute. Not one line in the brief or three declarations submitted in opposition to this motion asserts that the CFTC or the Receiver mentioned, raised or presented Sterling Trust's interests to the Court. Moreover, there is no document, record or transcription of any attempt to protect Sterling Trust's interests on the motion. Taken in its best light, the CFTC and Receiver were negligent in not raising the issue for the Court. That view, however, would be entirely too optimistic – especially given the multiple scandalous and vexatious assertions made in the CFTC's papers.

The reality of the situation which rings true throughout the CFTC's papers is that the CFTC views Sterling Trust as an entity that had "a role in the fraud" which it cannot prove and, consequently, has no intention of protecting CFTC's interests. It is also a truism that both the CFTC and the Receiver had actual conflicts of interest with Sterling Trust that would require a private attorney to withdraw as counsel because he or she could not ethically represent both sides.

The CFTC was the movant and sought the preliminary injunction which would continue the freeze on the Man Financial account. The Receiver wished to maximize the

amount of assets he has to administer and was aligned with the CFTC. Without a preliminary injunction, the Receiver would have no receivership assets. Moreover, the Receiver has clarified that it was the CFTC that caused Trust's account at Man Financial to be frozen in the first instance. There can be no clearer disparity of interest than was presented on the motion – the CFTC and the Receiver wished to hold the money which Sterling Trust wants returned.

Based on the foregoing, it is clear that Sterling Trust was not represented on the preliminary injunction motion and has not been afforded due process. Consequently, the motion to intervene should be granted.

## II. THE CFTC'S BAD FAITH IS A CHANGED CIRCUMSTANCE

Since this Court's May 2004 Order, the CFTC failed to represent Sterling Trust's interests on the preliminary injunction motion. In opposition to this motion, the CFTC asserts that this motion should be denied because the Court previously ruled that it was satisfied that the CFTC and Receiver would adequately represent Sterling Trust's interests. CFTC Opposition Brief, pp. 5-6. Apparently the CFTC's argument is that Sterling Trust's interests were represented on the preliminary injunction motion because the Court had in the past said they would be protected – regardless of the fact that the CFTC did nothing to protect them. That is a wholly new interpretation of the law of the case doctrine and should be rejected.

The CFTC also argues that "even if there had been a hearing on the Commission's preliminary injunction motion , Sterling Trust's rights to the funds in Account #37923 would not have been an issue" because the purpose of a preliminary injunction is to maintain "a freeze on [the defendants'] assets and otherwise maintain [] the status quo while the Commission and the Receiver determine how and to whom the limited frozen assets are distributed." CFTC Opposition Brief, p. 6. The CFTC misses the point. Sterling Trust is not

a defendant and the Man Financial account was not in any of defendants' names. Accordingly, the issue on the preliminary injunction motion is whether the Man Financial account should continue to be frozen as part of the defendants' assets.

The CFTC has it all wrong when it asserts that Sterling Trust "still has done nothing to show it has a superior claim to the funds in Account #37923." CFTC Opposition Brief, p. 7. As an initial matter, the fact that the account is held in Sterling Trust's name is proof that it has a superior claim to those funds than other victims and that the they did not belong to the defendants. Indeed, we believe that is why the Receiver has been very careful to treat the Man Financial account differently than those assets held in the names of the defendants. Moreover, the CFTC is confused with respect to the elements required and burdens imposed on a preliminary injunction motion. It is the CFTC that had the burden to prove that it has a likelihood of success on the merits – that is, it had to demonstrate that the Man Financial account should be included as a defendant's asset for potential distribution to others.[1] See, e.g. Campbell Soup Co. v. Conagra, Inc., 977 F.2d 86,90 (3rd Cir. 1992) (to support a preliminary injunction plaintiff must show a likelihood of success on the merits). In this regard, Sterling Trust is no different than any other victim. If the CFTC sought a preliminary injunction freezing the assets of any non-party victim, it would be permitted to do so only after due process was provided to the victim whose assets were to be frozen. Moreover, even if Sterling Trust was a putative relief defendant, absent an action to recover distributions there is no justification to freeze its accounts.[2]

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[1] Notably, this burden differs from the burden which the Court applied in May 2004. On the preliminary injunction motion the CFTC had the burden of proof.

[2] On a preliminary injunction motion the Court is required to "consider the effect of the issuance of the preliminary injunction on other interested persons and the public interest." Bradley v. Pittsburgh Board of Education, 910 F. 2d 1172, 1175 (3rd Cir. 1990); see also,

Finally, the concept that Sterling Trust is not being harmed because it will have an opportunity to challenge the Receiver's recommendation is disingenuous. For more than six months Sterling Trust has been deprived of the opportunity to administer the trust funds, including the ability to alter the asset mix to maximize returns as well as to distribute funds to beneficiaries. Given the lack of progress reflected in the Receiver's declaration, it appears that a continued freeze will result in minimum returns on the assets and mounting losses for trust clients over the next year or more.

In sum, it is clear that the CFTC failure to represent or even raise Sterling Trust's interest on the preliminary injunction motion was not the ethical behavior contemplated by the Court's May 2004 order. If a preliminary injunction hearing is required to afford due process to affected defendants, it certainly is required for affected non-parties. The burden is upon the CFTC to demonstrate that the funds should continue to be frozen. The CFTC should be required to meet that burden and Sterling Trust should be permitted to intervene to ensure due process.

## III. THE CLAIMS PROCESS IS IRRELEVANT

The CFTC's argument that the claims process is adequate protection for the due process rights of Sterling Trust is fatuous and should be rejected. The issue on the preliminary injunction is not the level of distribution; rather, as described above, it is whether an account belonging to a victim should be frozen as part of the defendants' assets. The claims process is irrelevant to the issue of whether a non-party's funds should be frozen.

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Campbell Soup Co. v. Conagra, Inc., 977 F. 2d at 90 (same); Commonwealth of Pennsylvania v. U.S. Dept. Of Agriculture, 469 F. 2d 1387, 1388 (3rd Cir. 1972) (factor to consider on motion for preliminary injunction is whether it would harm other parties interested in the proceedings).

Indeed, the claims process equally is irrelevant to the issue of whether a defendant's funds should be seized or frozen.

This concept is best illustrated in the case of a defendant. Each of the defendants in this action were entitled to a preliminary injunction hearing because their assets were frozen in advance of any finding against them. The fact that the defendant might prevail and be entitled to recover his assets is crucial to this inquiry. Courts recognize that the seizure of assets is a drastic remedy which has negative effects upon the party subject to the order. Thus, the standard for issuance of a preliminary injunction has evolved to require a hearing which will give the court a comfort level that the assets being seized or frozen likely will be the subject of a judgment. Accordingly, the movant is required to demonstrate a likelihood of success on the merits.

Here, as in the case of a defendant, the CFTC should be required to show that it likely can prove that the Man Financial account belongs to a defendant. If it can not meet its burden – which it cannot – control of the Man Financial account must be returned to Sterling Trust. The CFTC argues that Sterling Trust should wait until the Receiver decides how much of its funds will be distributed to others before it is heard with respect to the account. That plan provides Sterling Trust with fewer rights than the defendants in this case and does not afford due process because it would allow the Receiver to continue to deprive Sterling Trust of its assets without the CFTC meeting its burden. Accordingly, the motion to intervene should be granted.

## IV. RULE 60 APPLIES TO PRELIMINARY INJUNCTIVE ORDERS

The CFTC attempts to convince this Court that even if Sterling Trust's arguments for intervention are sound, its motion still should not be granted because FRCP 60 may only be

used to challenge final judgments. This is an incorrect statement of the law. It is well established that Rule 60(b) (5) and (6) may be used to challenge a preliminary injunction order. See, e.g., New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 967 (2d. Cir. 1983) (" the power of a court of equity to modify a decree of injunctive relief is long-established, broad and flexible.")

In Generation X International Corp. v. No Excuses Sportswear, Ltd., No. 98 Civ. 1935, 1998 WL249177 (S.D.N.Y. May 18, 1998), the defendant sought modification of a preliminary injunction order pursuant to Rule 60(b)(5) on the ground that the facts upon which the preliminary injunction were based were inaccurate and therefore it would be inequitable for the order to have prospective application. The Court granted the defendant's motion and noted that "[a]lthough by its terms Rule 60(b)(5) pertains to final orders, it has been interpreted to extend to the modifications of preliminary injunctions." Id. at 2; see also, Board of Governors of Federal Reserve System v. Pharaon, 140 F.R.D. 642, 648 (S.D.N.Y. 1991) (same); Consolidated Gold Fields PLC v. Anglo American Corp. of South Africa, Ltd., 713 F. Supp. 1455 (S.D.N.Y. 1989); Manhattan Cable Television, Inc. v. Cable Doctor, Inc., 824 F. Supp. 34, 35 ( S.D.N.Y. 1993) (granting motion under Rule 60(b)(6) for relief from an order).

Here, as in Generation X International, Sterling Trust appropriately intends to seek relief from the August 24, 2004 preliminary injunction order pursuant to FRCP 60 (b)(5) and (6). If permitted to intervene, Sterling Trust will demonstrate in its motion that the CFTC and the Receiver, in consenting to the issuance of the Order, have failed to protect their interests.

## V. THE CFTC'S ATTEMPT TO PREJUDICE THIS COURT SHOULD BE REJECTED

In a transparent attempt to prejudice the Court on this motion, the CFTC utilizes the "facts" section of its brief to make improper arguments. These arguments should be rejected as a whole. The CFTC's improper arguments fall into two categories. First, the CFTC attempts to argue the merits of the preliminary injunction motion by misdirection and slight of hand. Second, the CFTC mischaracterizes the level of cooperation received from Vernice Woltz, Howell Woltz and Sterling Trust with accusations of "flight" and "obfuscation" to make it appear as if they have some "role in the fraud." CFTC Opposition Brief, p. 4.

To say that the CFTC plays fast and loose with the "facts" is an understatement. The CFTC's brief is so far over the top that even the declarations of its own personnel do not support the accusations made. As set forth more fully below, the CFTC's argument of the merits of the preliminary injunction should be rejected because it is both intentionally misleading and improper on this motion. Similarly, the Ms. Streit's attack[3] upon the Woltz family should be rejected inasmuch as it both unsupported by the facts (see Russo Declaration) and irrelevant to the issue of whether the CFTC failed to represent Sterling Trust's interests.

### A. So-called "Facts" Relating to the Merits

The CFTC's attempts to argue the merits of the preliminary injunction motion in the "facts" section of its brief is improper. The only issue presented by this motion is whether Sterling Trust should be permitted to intervene to move for relief from the preliminary

[3] We respectfully request that the Court seal all filings associated with this motion to intervene to prevent the publication of Ms. Streit's libelous statements. Should the CFTC's brief reach the internet, it would cause great damage to the Woltz' professional reputation. It is improper to use a court filing to slander another person, especially when the defamatory statements are irrelevant to the legal issue.

injunction order pursuant to FRCP 60 because the CFTC failed to represent its interests. Should Sterling Trust prevail, the merits of the preliminary injunction motion then appropriately would be argued after an appropriate exchange of discovery and a hearing at which witnesses could be cross-examined. In other words, due process requires a hearing and a level playing field – something the CFTC wishes to avoid at all costs.

By way of example, the CFTC's "facts" section attempts to mislead this Court with respect to the ownership of the funds in the Man Financial account. Ms. McCormack submitted a declaration which included the "results" of her investigation, and the CFTC used her conclusions to argue that possibly no funds belong to Sterling Trust. The flaw in the CFTC's argument is that McCormack intentionally is disingenuous. Her chart at "Attachment 3" mischaracterizes $1,500,000 of Sterling Trust's funds which were transferred from the brokerage firm of LaMasurier, James and Chinn Ltd. to Man Financial as belonging to "Mr. James & Mr. Chinn"[4]. This assertion is as fatuous as alleging that funds held at in an account at Morgan Stanley Dean Witter et al. belong to Mr. Morgan & Mr. Stanley. The only credible evidence of ownership is the affidavit of Ms. Dematee Mohan which confirms that the funds belong to Sterling Trust. The CFTC's attempt to do an end run around due process by arguing the merits on this motion appears to be motivated by its need to avoid having Sterling Trust expose the systematic error in McCormack's investigation which makes "Attachment 3" wholly inaccurate and useless.

Similarly, the CFTC asserts in footnote 2 of its Brief that Tech Traders directly transferred funds into the Man Financial account. That is not true, and it is not what the

[4] This conclusion directly is contradicted by the sworn affidavit of Ms. Dematee Mohan which was submitted to the Receiver as part of the claims process. See Exhibit B to Russo Declaration.

Receiver has affirmed in his declaration. Again the CFTC is intentionally misleading the Court. Both evidence at the May hearing and the original Bobo affidavit (dated May 6, 2004) are clear that any fee payments by Tech Traders were transferred to a bank account at BB&T, not Man Financial. The CFTC and the Receiver simply took the position that subsequent deposits by Sterling Trust should be tied to those fee payments. Notably, this argument directly contradicts the CFTC's assertion that funds co-mingled in an account become fungible and no longer have a distinct identity. Nevertheless, the point is that the "fact" asserted by the CFTC in footnote 2 of its brief is nothing more than argument. Moreover, it was completely accurate for Sterling Trust to file a claim form which indicates that Sterling Trusts made the transfers in question from its bank account to Man Financial. The CFTC apparently has difficulty distinguishing its positions from established facts.

Based on the foregoing, it is clear that not only is it improper to argue the merits on this motion, but also that the CFTC's alleged "facts" are unreliable and nothing more than argument. Given the lack of credibility of the positions espoused, one might question if the CFTC and Receiver ever will represent Sterling Trust's interests. One thing is certain, however, the improper argument should not be considered by the Court in determining this motion.

**B. <u>Mudslinging</u>**

In the course of two pages the "facts" section of the CFTC's brief accuses Sterling Trust and Vernice and Howell Woltz of the following:

- attempting to evade the jurisdiction of this Court
- obfuscating and delaying investigation of "their" role in the fraud
- preparing to flee the country

- stymieing the Commission's investigation of this massive fraud
- evading service of subpoenas
- refusing to produce any records relating to the Sterling Entities
- planning to flee the country to evade returning defendant property

None of these assertions are true or have any basis in fact. We respectfully refer the Court to the Russo declaration as well as the attachments to the Streit declaration for an accurate portrayal of the events in question. Those documents clearly demonstrate that Vernice and Howell Woltz and Sterling Trust have fully and voluntarily cooperated with the CFTC and produced information and documents. The one exception is that Ms. Woltz refused to consent to service of a subpoena which would have required her to violate the laws of the Bahamas and Anguilla and subject her to serious criminal penalties.

While none of the purported "facts" have merit, the allegations regarding "flight" are particularly offensive. In the course of one paragraph Ms. Streit asserts that the CFTC has learned that Vernice and Howell Woltz are preparing to flee the country three separate times. Yet Ms. Streit's declaration says nothing of "flight"; rather, it simply annexes an e-mail which was sent to clients of the Sterling Group announcing a long contemplated relocation to be closer to their place of business in Nassau, Bahamas. The e-mail is so innocuous and self-explanatory that there is no reasonable explanation for this hyperbole. See Attachment 13 to the Streit declaration. Indeed, why would Sterling Trust seek to intervene in this action for the second time, thereby subjecting Mr. and Mrs. Woltz and the company to discovery on notice, if their intentions were to "flee" the country to avoid and evade jurisdiction and discovery.

The CFTC's accusations and hyperbole appear to be an attempt to win over the Court by disparaging a victim seeking due process. Whatever the motivation, they clearly are inappropriate and should not be considered in deciding the motion to intervene. In addition, based on the complete lack of any factual basis, the Court should seal the motion papers to protect the professional reputations of Vernice and Howell Woltz.

## CONCLUSION

Based on the foregoing, the Russo declaration and the moving papers filed by Sterling Trust, this Court should grant the motion to intervene and seal the papers filed in connection with this motion.

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