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**In The United States District Court
For The District Of New Jersey
Camden Vicinage**

Commodity Futures Trading Commission,
Plaintiff,

vs.

Equity Financial Group LLC, Tech Traders, Inc.,
Tech Traders, Ltd., Magnum Investments, Ltd.,
Magnum Capital Investments, Ltd.,
Vincent J. Firth,
Robert W. Shimer, Coyt E. Murray, and
J. Vernon Abernethy,
Defendants.

Hon. Robert B. Kugler
District Court Judge

Civil Action No: 04-1512 (RBK)

CFTC's Reply Memorandum In
Support Of Motion For
Reconsideration Of Order Denying
Summary Judgment On Violation Of
17 C.F.R. § 4.30.

MOTION DATE: February 2, 2007

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Plaintiff Commodity Futures Trading Commission (“the Commission”) replies to Defendant Robert V. Shimer’s (“Shimer”) Response to the Commission’s Motion for Reconsideration. As set out below, Shimer fails to provide any legal or factual reason to deny summary judgment on the Commission’s claim that he aided and abetted Tech Traders’ violation of 17 C.F.R. § 4.30 (2006). For the reasons set out below and in the Commission’s initial Memorandum in support of its Motion for Reconsideration, the Court should grant the Commission’s motion for reconsideration and grant summary judgment on this claim.

A. Shimer’s Own Document Establishes that Tech Traders was a Commodity Trading Advisor (“CTA”).

Shimer claims in his Response that Shasta did not engage in commodity futures trading and that Tech Traders did not provide advice on its commodity futures trading within the meaning of Section 1a (6) of the Commodity Exchange Act, as amended (“the Act”), 7 U.S.C. § 1a (6) (2002). Shimer Response at 3 to 5. He provides no legal authority to support his interpretation of § 1a(6), which defines the term “CTA.” He also ignores the words of the Investment Agreement (Exhibit 91) between Tech Traders and Shasta, which he admits drafting. That Agreement provides that Tech Traders traded commodity futures contracts on behalf of Shasta: “...Tech has expressed its willingness to **accept funds from Shasta and place those funds on Shasta’s behalf with Tech’s U.S. brokerage firm** for the purpose of increasing Tech’s credit lines...” Exhibit 91 at 1 (emphasis added.) Shimer further provided that Tech Traders “shall **manage and trade the funds of Shasta using trading signals generated by Tech’s Synergy Stock Index Portfolio Trading System...** which takes a unique synergistic approach to the computerized **trading of futures contracts...**” Exhibit 91 at 5 (emphasis added). Trading the funds of another is a quintessential activity of a CTA. *See* Declaration of

Susan Koprowski at ¶ 4. (attached as Exhibit 1); CFTC Interpretative Letter No. 75-11, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,098 (Sept. 19, 1975) (attached as Exhibit 2). Thus, one who makes the trading decisions for another's funds is giving trading advice within the meaning of 7 U.S.C. § 1a (6)(2002).

B. An Entity can be both a CTA and a Commodity Pool Operator ("CPO").

Shimer also suggests that there is something nefarious in the fact that the Commission has alleged that Tech Traders is both a CPO and a CTA. Shimer Response at 5-6. Again, he cites no authority to support his proposition that one cannot be both. There is nothing in the definition of a CPO or CTA under the Act that makes these concepts mutually exclusive.

Compare 7 U.S.C. § 1a(5)(2002) to 7 U.S.C. § 1a(6)(2002).¹ An entity, or a person, can be both a CPO and a CTA, if that person or entity pools the funds of others for commodity futures trading and then makes the trading decisions for the pool. *See* CFTC Interpretative Letter No. 75-11 at 20,762- 20,763 (general partners of commodity pool were both CPOs and CTAs of pool); Declaration of Susan Koprowski at ¶ 4. Tech Traders pooled the funds of others to trade commodity futures contracts and made the trading decisions for the pool and is therefore both a CTA and a CPO.

C. Shimer's Ignorance of the Law is not a Defense.

Shimer's only defense to the Commission's charge that he aided and abetted Tech Traders § 4.30 violation is that he did not know § 4.30 existed when he was forming, running and providing legal advice to a multi-million dollar commodity pool. Shimer blurs the legal

¹ The Commission's Regulations contemplate that a person or entity can be both a CPO and a CTA and provides that if one is registered under the Act as a CPO, it need not register as a CTA if its commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so registered. 17 C.F.R. § 4.14 (a)(4) (2006).

distinction between knowingly engaging in certain conduct that is unlawful, which is sufficient for liability to attach, and engaging in certain conduct with knowledge that it is unlawful, which is too narrow of a standard.

It is well settled that ignorance of the law is no defense to purposeful and intentional action. *Lambert v. California*, 355 U.S. 225, 228 (1957). This well-settled legal principal applies to aiding and abetting liability under the Act just as it applies generally in the law. As the Commission stated in its Memorandum in support of its motion for summary judgment, the Commission has held that aiding and abetting liability under § 13(a) of the Act, 7 U.S.C. § 13c (a)(2002), attaches if Shimer “knowingly associate[d] himself with an unlawful venture, participate[d] in it as something that he wish[ed] to succeed and [sought] by his actions to make it succeed.” *In re Richardson Securities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,145 at 21,646 (CFTC Jan. 27, 1981); accord, *Bosco v. Serhant*, 836 F.2d 271, 279 (7th Cir. 1987), cert. denied, 486 U.S. 1956 (1988). Summary Judgment Memorandum at 33. In *In re Lincolnwood Inc.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,255 (CFTC Jan. 31, 1984), the Commission stressed that although the aider and abettor must act knowingly, “[n]othing in *Richardson* ... suggests that knowing participation and intentional assistance require the Commission to establish that the aider and abettor knew the principals’ activity was unlawful. Ignorance of the law is no more a defense for the aider and abettor than it is for the primary wrongdoer.”

Thus, in order for the Commission to prove that Shimer aided and abetted Tech Traders’ § 4.30 violation, it is only necessary to prove that Shimer knowingly participated in Tech Traders’ trading of Shasta funds in its own name, not that Shimer knew about § 4.30 when he provided that assistance to Tech Traders. The Commission has shown that Shimer did so

knowingly participate in the trading of Shasta funds in Tech Traders' name because he admittedly drafted the Investment Agreement that dictated that Shasta funds would be traded in Tech Traders name and the private placement memorandum that touted that fact. He also demonstrated that he wanted Tech Traders to trade the funds in its own name and drafted the Investment Agreement to make sure that the funds were so traded because, as he admits, he believed that if the funds were traded in Tech Traders' own name, Shasta would not be subject to a margin call. Shimer Response at 7. Thus, under the meaning of § 13(a) of the Act, as interpreted by the Commission and federal courts, Shimer aided and abetted Tech Traders' violation of § 4.30.

Nicholas v. Saul Stone & Co., LLC, 224 F.3d 179 (3rd Cir. 2000), does not require a contrary result. The defendant's ignorance of the law was not at issue in *Nicholas*. However, *Nicholas* did follow the 7th Circuit in *Damato v. Hermanson*, 153 F.3d 464, 470 (7th Cir. 1998), in finding that aiding and abetting in the context of the Act is congruent with aiding and abetting as defined by 18 U.S.C. § 2, the criminal statute for aiding and abetting liability. *Nicholas*, 224 F.3d at 189. Ignorance of the law is not a defense under this criminal statute. See *United States v. Gregg*, 612 F.2d 43, 51 (2d Cir. 1979) ("As Judge Learned Hand stated in *American Surety Co. of New York v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925): 'The word "willful," even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.'). See also *United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976); *U.S. v. Zehrbach*, 47 F.3d 1252 (3rd Cir. 1995), cert. denied 514 U.S. 1067 ("...proof of knowledge of illegality is not a burden of the government in a bankruptcy fraud case. The statutory requirement that the

underlying acts be performed 'knowingly' requires only that the act be voluntary and intentional and not that the person knows that he is breaking the law.")

Shimer's only defense to the Commission's aiding and abetting charge is that he did not know of the existence of § 4.30. He has admitted he drafted the agreement by which Tech Traders traded Shasta funds in Tech Traders' name. This is sufficient for liability to attach under § 13(a) of the Act.

For all the reasons set forth above and in its initial memorandum in support of its motion for reconsideration, the Commission respectfully requests that the Court reconsider its ruling denying the Commission's motion for summary judgment on its claim that Shimer aided and abetted Tech Trader's 4.30 violation.

Date: January 22, 2007

Respectfully submitted,

/s/ Elizabeth M. Streit

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EXHIBIT 1

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Vincent J. Firth,
Robert W. Shimer, Coyt E. Murray, and
J. Vernon Abernethy,
Defendants.

Hon. Robert B. Kugler
District Court Judge

Hon. Ann Marie Donio
Magistrate

Civil Action No: 04-1512 (RBK)

**MOTION DATE: February 2,
2007**

**DECLARATION OF SUSAN KOPROWSKI
IN SUPPORT OF CFTC's MOTION FOR RECONSIDERATION OF ORDER
DENYING SUMMARY JUDGMENT ON VIOLATION OF 17 C.F.R. § 4.30.**

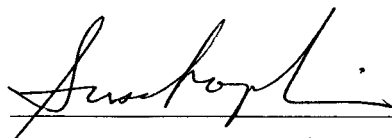
EXHIBIT 1

I, Susan Koprowski, make the following declaration based upon my personal knowledge.

1. I am employed as a Manager in the Compliance Department of National Futures Association (“NFA”) in Chicago, Illinois. NFA is the organization that handles certain aspects of the Commodity Futures Trading Commission’s (“CFTC”) regulation of the futures industry, including registration, review of disclosure documents, financial reporting, and audits of its members. I’ve been with the NFA for 11 years.
2. My current resume which sets forth my qualifications, and work experience is attached as Exhibit 1. As set forth in more detail in my resume, my job responsibilities include reviewing and approving Disclosure Documents for commodity trading advisor (“CTA”) members and commodity pools. I also provide outside parties with interpretations of NFA Rules and CFTC Regulations.
3. I have been asked by the CFTC to comment upon what activities are typical of a CTA and whether a Commodity Pool Operator (“CPO”) can act as a CTA to the pools it operates.
4. A CTA is an individual or organization which, for compensation or profit, advises others, directly or indirectly, as to the value of or the advisability of buying or selling futures contracts or commodity options. Providing advice includes exercising trading authority or making the trading decisions over a customer’s account as well as giving advice through written publications or other media. A CPO may act as the CTA to the pools it operates without additional registration requirements. This is a common occurrence. In fact, more than half of the pool disclosure documents that are filed with NFA indicate that the CPO makes the trading decisions for its pools.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

January 22, 2007
Dated


Susan Koprowski

ATTACHMENT 1

Susan Koprowski

**Experience: National Futures Association, Chicago, December 1998 to Present
Manager, Compliance Department**

- Represent and promote National Futures Association's (NFA) organizational initiatives, including educational initiatives by interacting with NFA Members and Industry Representatives
- Speak and participate at industry events and panel discussions
- Provide outside parties, including Members, with interpretation of NFA Rules and the Commodity Futures Trading Commission's (CFTC) regulations
- Provide other agencies with advise and give opinion with regard to CFTC Regulations and NFA Rules
- Review daily segregation figures for apparent concerns
- Review and approve applicant financial statements
- Supervise, train and review Analysts/Senior Analysts in all areas
- Serve as final review on Commodity Trading Advisor (CTA), Commodity Pool Operator (CPO), and Introducing Broker (IB) compliance and financial audits
- Answer the general public's questions regarding the interpretations of NFA rules and CFTC regulations
- Prepare disciplinary letters, acceptance letters and other correspondence to be issued to member firms
- Provide auditors with training regarding NFA's interpretation of Rules and Regulations
- Participate in performance management functions

**Cargill Investor Services, Chicago, June 1998 to December 1998
Partnership Fund Accountant**

- Account for 13 domestic and foreign trading funds
- Calculate daily net asset values for reporting purposes
- Generate monthly reports and calculate complicated fees for periodic filings to the SEC, CFTC, NFA and Federal and State IRS agencies
- Perform analysis of funds on a monthly basis

**National Futures Association, Chicago, June 1995 to June 1998
Field Supervisor**

- Led teams through the administration of financial and operational examinations of broker/dealers (B/D), futures commission merchants (FCM), CPOs, CTAs and IBs (Travel exceed 40%)
- Analyzed financial statements submitted by B/Ds, FCMs and CPOs for GAAP, capital requirements and adverse variances
- Analyzed disclosure documents submitted by NFA Members

- Consulted with member firms on the development and implementation of effective internal control procedures
- Provided on-the-job training and written performance evaluations to team members

Streeterville Ace Hardware, Inc., Chicago, March 1994 to May 1995
Office Manager and Bookkeeper

- Establish the general ledger system for three retail stores
- Post all entries and generate monthly financial statements
- Analyze finances for new capital purchases
- Head A/P, A/R and payroll
- Compute monthly sales tax and reconcile all bank accounts
- Manage and train back office support

Education: DePaul University Chicago
MBA, Finance Concentration, June 2005
Loyola University Chicago
BBA, Accounting Concentration, January 1995

Licenses: Series 3, 1999
Series 7, 2001

EXHIBIT 2

Registration of General Partners of Commodity Pool

Executive Vice President, since reports issued by [the Trade Association] are not considered the kind of services contemplated by the definitions of the CFTCA. Reports by the Association dealing with silver are in keeping with one of the [Association's] objectives which is to keep the members and the public informed on the facts about silver as a raw material. Such activities are not undertaken to encourage transactions for the purchase or sale of commodities for future delivery on contract markets.

Neither the Association nor its Executive Vice President holds out to the public as a commodity trading advisor.

Reports on silver issued by the Association deal primarily with supply and demand

factors in the cash market. This material, considered as background information, is intended as a service to the membership in their normal business of using an important raw material in a form of manufacture. Information dealing with supply and demand factors is an element to be considered by management in price considerations; however, the extent to which such information is used in management decisions to enter futures markets would be incidental to the major purpose of the reports.

In view of the foregoing, the Association requests a "no-action" letter on the question of registration as a Commodity Trading Advisor.

[¶ 20,098] CFTC Interpretative Letter No. 75-11 (Registration of General Partners of Commodity Pool as Operators and Trading Advisors).

Commodity Futures Trading Commission, Office of the General Counsel, Trading and Markets, September 19, 1975. Correspondence in full text.

Commodity Pool Operators—Definition—General Partners of a Pool—Registration.—The individual general partner of a limited partnership commodity pool, who is also a principal of the pool's corporate general partner which is already registered as a commodity pool operator, must nevertheless register separately since he exercises discretion over the use of the pool's funds. Each general partner of a pool who directs, supervises or controls, either jointly or severally, the solicitation, acceptance or receipt of the funds or property comprising a pool, or the investment, use or other disposition of such funds or property is a "commodity pool operator" within the meaning of the definition at Sec. 2(a)(1) of the Commodity Exchange Act.

A general partner who contributes capital to, and shares in the profits or losses of the enterprise, but who *in fact* does not exercise such discretion need not register, although the backgrounds of all general partners will be considered by the CFTC in reviewing the applications of the partner or partners who exercise such discretion.

See ¶ 4400, "Definitions" division, and ¶ 7760, "Registration" division.

Commodity Trading Advisors—Definition—General Partners of a Commodity Pool—Registration—Possible Exclusion.—The individual general partner and the corporate general partner (whose principal is the individual) of a limited partnership commodity pool are both "commodity trading advisors", when the individual makes all management and investment decisions (as an individual general partner and in his capacity as chief executive of the corporation), the corporation is directly compensated by the pool by a management fee and an incentive fee of 10% of net profits, and the individual is indirectly compensated by way of dividends or by the payment of salary by the corporation.

However, the CFTC has proposed (at ¶ 20,053) an exclusion from the definition (proposed Reg. § 1.54 at ¶ 3189), which is applicable to certain persons who are registered as commodity pool operators. The inquirer was notified that no enforcement action would be taken, until a final determination is made regarding the proposal, on the basis of the failure to register, against any person falling within the proposed exclusion.

See ¶ 4375, "Definitions" division, and ¶ 7625, "Registration" division.

[CFTC Staff Reply]

This is in response to your letter of June 19, 1975, requesting interpretations of sec-

tion 2(a)(1) of the Commodity Exchange Act, as amended ("Act"), as it affects your client, [M Corporation].

20,762

New Developments

11-10-75

Registration of General Partners of Commodity Pool

From your letter and the Offering Circular dated May 27, 1975, which you enclosed therewith, we understand the facts to be as follows: [M Corporation] acts as one of two general partners of a limited partnership, [X] ("Fund"), which has been formed for the purpose of buying and selling commodities futures contracts. The other general partner of the Fund is [Mr. W], who is also president, a director and a principal shareholder of [M]. All management and investment decisions for the Fund shall be made solely by the general partners in their sole discretion, and, in all cases, [Mr. W] will make such decisions in his capacity as [M's] chief executive officer and as an individual general partner of the Fund. [M] will receive a fee for managing the Fund, plus an annual incentive fee equal to 10% of the net profits. [Mr. W] will not be compensated directly by the Fund, but may be compensated indirectly in connection with his activities with the Fund by way of dividends from [M] or by payment of a salary by [M]. [M] has filed an application for registration as a commodity pool operator under the Act with the Commodity Futures Trading Commission ("Commission"). We understand from the Commission's New York Office that [M] has been registered as a commodity pool operator under the Act, and that [Mr. W] has recently applied for registration as a commodity pool operator.

You have asked whether, in addition to [M], [Mr. W], as a general partner of the Fund, is required to apply for registration as a commodity pool operator under the Act, and whether [M] and/or [Mr. W] should register as a commodity trading advisor under the Act.

In providing for the registration and regulation of commodity pool operators, Congress was concerned with persons (1) soliciting unsophisticated traders and (2) misappropriating invested funds. This is apparent from the requirements that a pool operator maintain books and records available for inspection, disclose to pool participants the futures market positions of each of its principals and furnish statements of account to each pool participant,¹ from the emphasis in section 2(a)(1) on

the handling of the funds and property of others, and from the fact that the legislative history of the commodity pool operator provisions refers to the loss by "unsophisticated traders" of "substantial amounts of money."²

In view of these expressions of Congressional concern, this Office is of the opinion that where two or more general partners of a limited partnership commodity pool direct, supervise or otherwise control, jointly or severally, the solicitation, acceptance or receipt of the funds or property which comprise the commodity pool, or the investment, use or other disposition of such funds or property, each of such partners is a commodity pool operator and must register as such under the Act.³ This is not to say that the Act contemplates the registration of each general partner of a commodity pool operator who contributes capital to, or shares in the profits or losses of, the enterprise. Provided such general partner does not, *in fact*, exercise the direction, supervision or control over the pool's funds or property referred to above, we do not believe that the Act requires that such general partner register as a commodity pool operator. Of course, the background of all general partners will be considered by the Commission in reviewing the application for registration of the partner or partners who, in fact, exercise such direction, supervision or control.⁴

We believe that this interpretation is consistent with the purposes and objectives of the Act concerning commodity pool operators, particularly those provisions providing sanctions and remedies regarding certain acts of registered pool operators.⁵ This interpretation also gives effect to the broad discretion granted to the Commission by section 4n(7) of the Act, since, under certain circumstances, the Commission may deem it advisable to deny, revoke or suspend the registration of a particular partner but to permit the other partner or partners to operate or continue to operate the commodity pool for the benefit of the pool's participants.

Based upon the foregoing, it is the opinion of this Office that [Mr. W] is a commodity pool operator as defined in section

such duplication exists, we are of the view that the requirements of these sections would be satisfied if the necessary disclosure and statements were furnished jointly in the name of all the general partners.

¹ Act, sections 4n(1), 4n(7) and 8a(2).

² Act, sections 4o and 14.

¹ Act, sections 4n(4)(A), 4n(4)(B) and 4n(5).
² H. R. Rep. No. 95-975, 93rd Cong., 2d Sess. (1974), p. 79.

³ We recognize that such registration may result in duplication of the disclosure and statements of account required by sections 4n(4)(B) and 4n(5), respectively. To the extent that

Registration of General Partners of Commodity Pool

2(a)(1) of the Act and is required to register as such thereunder.

Based upon the above facts and considerations, we are also of the opinion that both [M] and [Mr. W] are commodity trading advisors as defined in section 2(a)(1) of the Act.⁶ However, with respect to your inquiry as to whether [M] and/or [Mr. W] should register as a commodity trading advisor under the Act, we enclose a copy of the Commission's proposed rule dated July 3, 1975 to exclude certain persons from the definition of a commodity trading advisor. One of the proposed exclusions concerns a commodity pool operator which is duly registered as such under the Act and which meets certain other specified criteria. You may wish to consider the contents of the proposed rule in light of the views expressed in this letter and of the activities of [M] and [Mr. W] with respect to the Fund.

We point out that the enclosed rule is only in proposed form and there is no assurance that it will be adopted by the Commission, or, if adopted, that it will be adopted in its present form.

In particular, we draw your attention to the following paragraph in the enclosed *Federal Register* notice:

The Commission recognizes that publishing this rule for comment will cause some uncertainty with regard to the registration status of those persons who might be within the proposed exclusions. To alleviate that uncertainty somewhat, it has been determined that until such time as the Commission reviews the comments received respecting this proposed rule and determines whether to adopt the rule as proposed, in an amended form, or not at all, no enforcement action will be taken, on the basis of failure to register, against any person who is within the proposed exclusion.

[Letter of Inquiry]

This firm acts as legal counsel for [M] Financial Corporation, a [state] corporation. [M] acts as one of the two general partners for a newly formed [state] limited partnership which will operate under the name [X] (the "Fund"). The other General Partner is [Mr. W], an individual, who is the President, a director and a principal shareholder of [M].

⁶ We do not believe that the definition of commodity trading advisor requires that the "compensation or profit" flow directly from the person or persons advised. It is sufficient that

All compensation paid by the Fund will be paid to the corporate general partner. [Mr. W] will not be directly compensated, in any manner, by the Fund. Any indirect compensation that he might receive in connection with his activities with the Fund will be by way of dividends from [M] (if any) or by payment of his salary by [M]. In all cases, [Mr. W] will be making the decisions on behalf of the Fund in his dual capacity; i.e., as [M's] chief executive officer and as an individual general partner. Further information concerning the Fund and its operations will be found in the enclosed Offering Circular.

[M] has filed an Application for Registration as a Commodity Pool Operator with your New York office. [Mr. W] has not separately applied for registration as a commodity pool operator. However, in a review of the Commodity Future Trading Commission Act of 1974 (the "Act") and the regulations promulgated by the Commodity Future Trading Commission ("CFTC"), two questions have arisen.

The first question posed by this fact situation and the Act is as follows: In a situation where a commodity pool operation is structured in the form of a limited partnership and there is both a corporate and individual general partner, and all compensation is paid to the corporate general partner, should the individual general partner also make separate application for registration as a Commodity Pool Operator?

All the relevant information concerning the individual general partner is provided in [M's] Application for Registration as a Commodity Pool Operator since [Mr. W] is a principal shareholder, an officer and a director of [M]. Presumably, the approval of [M's] application will be heavily dependent upon CFTC approval of [Mr. W's] individual qualifications. Thus, it would seem to be a duplicative registration process to require the principal of a Registrant to separately register when he acts solely in activities in which the Registrant [M] acts. Therefore, it would not be inappropriate for the CFTC to exclude by rule, or otherwise, principals of a Registrant when they act solely in the related activities of the Registrant.

The second question relates to whether or not [M] and/or [Mr. W] should regis-

the compensation or profit is to result wholly or in part from the furnishing of the services specified in section 2(a)(1).

20,764

New Developments

11-10-75

Registration of General Partners of Commodity Pool

ter as a Commodity Trading Advisor. A Commodity Trading Advisor is defined, *inter alia*, as follows:

Any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery

[M] will receive as compensation from the Fund, an annual fee equal to 3% of the net assets payable $\frac{1}{4}$ of 1% monthly, plus an annual incentive fee equal to 10% of the net profits, computed and paid quarterly. Thus, [M] will be deemed to receive compensation for the services it renders to Fund.

The question then becomes whether the services [M] renders the Fund are characterized in such a manner that it would be deemed to be engaged "in the business of advising others" directly "as to the value of commodities or as to the advisability of trading in any commodity for future delivery".

Under current interpretations of federal and state securities laws relating to the licensing of "investment advisors", a general partner acting in his capacity as general partner is not deemed to be an advisor. As a result, a general partner is not required to register under the Investment Advisors Act nor similar state Blue Sky laws. As a legal principle, [M] is trading for its own account; *i.e.*, a general partner is charged with the duty to effect trading transactions on behalf of the partnership. A general partner might be compared, functionally, to a corporate officer who makes investment decisions on behalf of the corporation. Clearly, in that situation, a corporate officer would not be required to register as an "investment advisor" under the various state and federal securities laws. Presumably, this interpretation, in light of the purpose of the Act, would be also applicable here.

Further, the general partner is registering as a Commodity Pool Operator and the information required by the Application for Registration as a Commodity Trading Advisor is duplicative of the information provided when registering as a Commodity Pool Operator. Thus, dual registration (*i.e.*, registering as both a Commodity Pool Operator and a Commodity Trading Advisor) would appear to serve no useful regulatory purpose. Although not present in this situation, it is clear that if the gen-

eral partner, apart from his direction of a "commodity pool", had additional advisory activities, it should be required to register. However, in the situation posed, [M] performs no other function in the commodities futures area other than as a Commodity Pool Operator for the Fund. Therefore I do not believe it appropriate nor required that [M] register as a Commodity Trading Advisor.

With respect to [Mr. W], the above arguments are equally applicable to him. Additionally, it would appear that he would not be required to register as a Commodity Trading Advisor since he is not compensated by the Fund for his activities as a general partner. As I previously indicated, [Mr. W] will be compensated solely by [M] by salary and dividends, if any. Thus, he would not be deemed to be a person who "for compensation or profit" is engaged in the business of advising others.

By this letter two questions have been raised which are in response to the CFTC's notice contained in the May 12, 1975 Federal Register calling for requests for interpretations and exclusions with respect to two categories: Commodity Pool Operators and Commodity Trading Advisors. In summary, these questions are:

1. If a limited partnership (which is a commodity pool operation) has both a corporate and an individual general partner and the individual general partner is also a principal of a corporate general partner which has registered as a Commodity Pool Operator, is the individual general partner also required separately to register as a Commodity Pool Operator?

2. Is a Commodity Pool Operator deemed to be a Commodity Trading Advisor solely as a result of his activities in acting as a general partner of a partnership which compensates him only for duties performed on behalf of the partnership?

Your formal or informal response or interpretation to the above two questions would, I believe, greatly clarify this "gray" area of the Act and the existing promulgated regulations. Further, your response will facilitate our clients in complying with the Act. Given the urgency of time, *i.e.*, the July 18, 1975 registration date, any informal thoughts that you might be willing to communicate to me by telephone would be greatly appreciated. I can be reached of course, at the number listed above for my firm.

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CERTIFICATE OF SERVICE

The undersigned, Anne Smith, a non-attorney, does hereby certify that on January 22, 2006, she caused a true and correct copy of the foregoing **CFTC's Reply Memorandum In Support Of Motion for Reconsideration Of Order Denying Summary Judgment On Violation Of 17 C.F.R. § 4.30** to be served upon the following persons by email and first class mail:

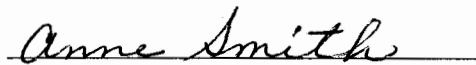
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