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

CFTC'S SUPPLEMENTAL POST-TRIAL BRIEF

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CFTC'S SUPPLEMENTAL POST-TRIAL BRIEF

Plaintiff Commodity Futures Trading Commission ("the Commission" or "CFTC") respectfully submits this supplemental post- trial brief in support of its case against Defendants Equity Financial Group, LLC ("Equity"), Robert W. Shimer ("Shimer") and Vincent J. Firth ("Firth"). The CFTC refers the Court to its Trial Brief, filed August 20, 2007 (Docket Doc. 534) for a complete discussion of its claims, the evidence that supports those claims and its request for relief. The Commission also submits its updated Plaintiff's Proposed Findings of Fact and Conclusions of Law, with citations to the record set forth at trial. This record amply demonstrates that the CFTC has proven all of the facts it asserted in its Trial Brief and Proposed Findings of Fact submitted before trial and that its requests for relief should be granted. In this supplemental Brief, the Commission will touch upon new facts proven at trial that were not set forth in the pre-trial Findings of Fact, discuss some of the apparent defenses of the Defendants and discuss its requests for relief.

After the Court's extensive summary judgment findings, the Commission focused its evidence at trial on the remaining charges that dealt mainly with whether the Defendants knew or were reckless and acted in bad faith in not knowing that they were defrauding their investors and allowing Equity to operate in an unregistered status. The evidence adduced at trial clearly shows that the Commission has met its burden of proving that the Defendants were reckless and acted in bad faith in ignoring the Ponzi scheme that they helped to perpetuate and that they fraudulently misrepresented and omitted material facts to Shasta's investors. The Commission has therefore proven that the Defendants are liable on the Commission's remaining charges that they violated §§4b(a)(2)(i)-(iii) and 4*o*(1)(A) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii), 6*o*(1)(A) (2002) and that Shimer aided and abetted Equity's violation of 4m of the Act, 7 U.S.C. § 6m

(2002). The evidence has also shown that Shimer and Firth are liable for Equity's violations of §§ 4b and 4m as control persons under Section 13(b) of the Act, 7 U.S.C. § 13c(b)(2002), and that Defendant Equity, pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B)(2002), is liable for the violations of Firth and Shimer because the actions and omissions of Firth and Shimer were done within the scope of their employment with Equity.

I. ADDITIONAL FACTS PROVEN AT TRIAL

A. Murray's Continued Involvement with Fraudsters and Willingness to Help Shimer Pay Back Kaivalya Investors was a Red Flag.

Shimer was continuously impeached during his testimony about his knowledge of Murray's past trading record in 1999. His reluctance to give the Court a straight answer about what he knew about Murray's trading when Murray was supposed to be trading the $1.3 million Shimer collected from investors under the auspices of the Shimer-created Kaivalya shows that Shimer has something to hide. He is trying to hide the numerous red flags he had that Murray was not running a legitimate operation. In addition to the inconsistent stories Murray told Shimer about his previous trading experience, Murray's willingness to assist Shimer in paying back the Kaivalya investors, when he claimed to have no involvement with the misappropriation of their funds, is suspect. As Shimer explained at trial, Murray agreed to do so after Shimer told Murray he would otherwise report the misappropriation to Florida criminal authorities. (Findings of Fact ¶ 40).[1] The fact that Murray was willing to pay Shimer over $1 million to assure that he did not go to criminal authorities shows that Murray had something to hide.

The evidence at trial also showed that Shimer received information on two occasions that Murray was still doing business with LaTulippe and Leonard, the two people who allegedly

[1] References to the "Findings of Fact ¶" are to Plaintiff's Proposed Findings of Fact and Conclusions of Law submitted with this Brief.

absconded with the Kaivalya funds. (Pl. Ex. 1020; 9/5/07 Trial Tr. p. 50 l. 3- p. 51 l.1 (Shimer))[2]. He also testified that Murray was so eager to fund his system that he would take money from people who had defrauded investors. (Pl. Ex. 1022; 9/5/07 Trial Tr. p. 46 l. 16- p. 47 l. 1 (Shimer)). Someone who is running a Ponzi scheme who needs to continuously obtain fresh investor money to pay back old investors is not going to be discriminate about the source of funds. This was another red flag that Murray's operation was not legitimate.

B. Murray's Refusal to Verify 2000 and Early 2001 Results Was a Red Flag.

Shimer initially wanted Teague to verify Murray's 2000 and early 2001 trading results with brokerage statements sent directly from the futures commission merchant ("FCM"). Murray refused to do so and gave a nonsensical reason for not doing so – that the trading had been done by Magnum, a Murray-controlled entity, and not Tech Traders, also a Murray-controlled entity. (Findings of Fact ¶ 84). This reason makes no sense. It is also inconsistent with what Murray had told Shimer previously – that the Edgar money Shimer had given him in late 2000 and early 2001was being traded by Tech Traders. *Id.* Murray' refusal to verify these early results, coupled with his inconsistent stories about his 1999 trading was another red flag that Shimer ignored.

C. Defendants Recklessly Set Up a Flawed System for Verifying Tech Traders' Performance.

Shimer and Firth were on notice that the verification process Shimer set up was flawed but recklessly chose to ignore the warnings. Collis told Shimer that the work was specialized

[2] References to Pl. Ex. are to Plaintiff's exhibits entered into evidence at trial. As in the Findings of Fact, references to Trial Transcripts ("Trial Tr.") begin with the date of the testimony, and include the page number with line reference, and in parentheses, the name of the testifying witness.

and could not be done by any accountant.[3] (Findings of Fact ¶ 87). Shimer ignored Collis' concerns and continued his search for an accountant who was not so principled. Teague took the time to research CFTC and NFA rules on calculating rates of return for commodity pools and sent both Shimer and Firth detailed emails about the complexities of that calculation. (Findings of Fact ¶ 118). Shimer and Firth recklessly ignored her emails. Instead, Shimer insisted on his own simplistic formula for calculating the rate of return when he had no accounting experience and no experience calculating rates of return for an investment. (Findings of Fact ¶¶ 29, 113, 114, 117, 118). Firth ignored the whole process and recklessly and in bad faith relied on Shimer, whom he did not know. (Findings of Fact ¶¶ 38, 39, 79, 91, 95, 102, 103). Shimer's formula was flawed and lead to skewed results.[4] He accepted Abernethy as the CPA to perform the verification, even though he had been told by Collis that the engagement required special expertise and he knew that Abernethy had none. He also knew early on that Abernethy was desperate for work and had huge debt. (Findings of Fact ¶ 131). Shimer and Firth deliberately took advantage of this vulnerability by attempting to entice Abernethy to solicit the Shasta investment for them, an obvious conflict of interest. (Findings of Fact ¶ 132). Even though desperate for work Abernethy told Shimer when he first met him that verifying Tech Traders'

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[3] Shimer denies that he ever spoke to Collis because the "record" does not reflect such a conversation. (8/28/07 Trial Tr. p. 72 l. 21- p. 73 l. 22 (Shimer)). However, Collis recalls two conversations with a Pennsylvania lawyer who could only be Shimer. (Joint Ex. 2002 p. 29 l. 20-25, p. 30 l. 1- p. 37 l. 17 (Collis)). As stated in trial, the CFTC was not able to obtain all phone records relating to this matter, including phone records from Firth, nor did it obtain phone records from Alison Shimer, Shimer's wife, both potential places where Shimer may have made phone calls to Collis. (8/31/07 Trial Tr. p. 21 l. 7 to p. 22 l. 2 (McCormack)). Shimer could have made phone calls for any number of places. Collis is a disinterested third-party with no incentive to lie, whereas, Shimer's testimony was incredible throughout the trial. Therefore, the Commission submits that such conversations did take place and that the Court should so find.

[4] Shimer claimed in his closing argument that his formula for calculating a rate of return was only 9 one hundreds of one percent different than it should have been. (Trial Tr. 9/06/07 p. 54 l. 2-10 (Shimer)). But he provided no evidence whatsoever that to support that statement.

returns was not a simple process. (Findings of Fact ¶ 113). Abernethy also made it quite clear throughout the engagement that he worked only for Murray and did not consider himself responsible for reporting performance to anyone else. (Findings of Fact ¶¶ 93, 115). Abernethy's lack of experience, lack of independence, attempts to limit the engagement and later hostility towards Firth and Shimer were all obvious indications that he was not capable of and could not be trusted with verifying returns for Shasta's investors. Firth recklessly left the entire process in the hands of Shimer, even though he was not comfortable with Abernethy, and actively encouraged Abernethy to solicit for Shasta. Firth's and Shimer's reliance on Abernethy to verify Tech Traders' performance was not reasonable and they were reckless to do so.

Shimer's and Firth's handling of the verification process was not just reckless, it was actively deceptive. They used Teague to deceive investors. It is undisputed that she did nothing more to "verify" Tech Traders' returns than cut and past Abernethy's rate of return number into a letter to Firth and send it on. (Findings of Fact ¶¶ 92, 104, 108). Shimer and Firth used Teague to create the illusion that verification was occurring. Firth and Shimer have stipulated that an important function Teague served was to take investor calls to confirm the rate of return number being reported by Shasta to its members. (Findings of Fact ¶¶ 81, 106, 110). There was no purpose for her to take investor calls other than to provide false comfort that there were two CPAs verifying the returns. The investors all believed she was performing her own independent review. (Findings of Fact ¶¶ 109, 110). The Defendants put on no proof at trial to show that that belief was unreasonable.

D. Shimer and Firth Did Not Rely on Teague to Assure That Tech Traders' Performance Numbers Were Accurate.

The evidence also shows that Shimer and Firth did not rely on Teague. Firth has stipulated that he just relied on Shimer to develop a process to assure that Shasta's investors

received accurate information about the performance of their Tech Traders' investment and that he had almost no interaction with Teague. (Findings of Fact ¶¶ 95, 103). Shimer did not rely on Teague either—he put himself in the middle of every part of the verification process, from developing the AUP procedures to drafting the verification letter Teague sent to Firth to obtaining a minimum balance verification. (Findings of Fact ¶¶ 99, 100, 105, 138). When Teague tried to give him advice, he ignored it. (Findings of Fact ¶¶ 118, 140, 144; Pl. Ex. 470).[5]

Shimer and Firth also actively concealed information from Teague that might have caused her to end her engagement. (Findings of Fact ¶ 102; 9/5/07 Trial Transcript p.114 l. 4- p. 115 l. 15 (Shimer); 9/4/07 Trial Tr. p. 24 l. 20- p. 25 l. 8 (Firth)). Given this evidence, it is not believable that Shimer or Firth relied on Teague in any way. She is just a convenient scapegoat.

E. Shimer and Firth Have Put Forth No Evidence That Refutes the Commission's Evidence that They Knowingly or Recklessly Ignored the Need for Equity to Register with the CFTC as CPOs.

Shimer and Firth put forth no evidence to refute that they were warned repeatedly by Arnold & Porter that Shasta was a commodity pool and that it was exposed to charges that it was operating an unregistered and illegal commodity pool. (Findings of Fact ¶¶ 152, 153, 157-162). Their only defense appears to be that because Arnold & Porter did not tell them to register **Equity** rather than Shasta, they are off the hook. This is a ridiculous, hyper-technical argument. Ha d they registered Shasta rather than Equity, there would be no registration charge. Given the evidence adduced at trial that Shimer and Firth knew they had registration problems from at least October 2003 (and as to Shimer from 2001) and their failure to provide any meaningful defense,

[5] This evidence rebuts Shimer's argument that Teague's sworn testimony should be disregarded as after-the-fact self serving statements. The contemporaneous emails she sent Shimer, as well as his emails to her assuring her that Tech Traders would provide her Shasta's account statements and the third-party verification of balances she thought they provided are consistent with her later deposition testimony. (Pl. Exs. 437, 502, 504).

they should be held liable for the registration charges against them.

II. ARGUMENT

A complete discussion of the law applicable to the Commission's charges against the Defendants is set forth in the Commission's Trial Brief filed on August 20, 2007 (Docket Doc. 534) and we refer the Court to that discussion. We provide below a supplemental discussion on a few salient points.

A. The Defendants' Misrepresentations and Omission to Shasta Investors Were Material and Made with Fraudulent Intent.

Defendants appear to argue that their failure to inform the Shasta investors about their entitlement to 35% of Shasta's "profits" under the secret Shadetree agreement was not material information. A statement is material if "there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision." *Saxe v. E. F. Hutton & Co., Inc.*, 789 F.2d 105, 109 (2nd Cir. 1986); *see also R.J. Fitzgerald,* 310 F.3d at 1329-30; *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 447 (D.N.J. 2000) *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 686 (D. Md. 2000), *aff'd in part, vacated in part, sub nom. CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002). The investors who testified at trial stated that these omissions were all material information that they would have wanted to know before making, keeping or increasing their investment with Shasta. (Findings of Fact ¶ 42, 45, 48).[6]

Moreover, any kind of fees, including any agreements or understandings to receive distributions of profits greater than a person's pro rata share based on his/her contributions to a commodity pool have to be disclosed to investors under Regulation 4.24(i). 17 C.F.R. § 4.24(i)

[6] The evidence presented at trial also shows that all the other misrepresentations and omissions set forth in the Commission's Trial Brief were material and that Defendants deliberately made those representations and omissions. (Trial Brief, Docket Doc. 534 at 24-25; Findings of Fact ¶¶ 25, 30, 37, 48, 51, 54, 57, 75, 101, 109, 129, 133, 136, 144, 169).

(2006). Information required to be disclosed pursuant to Commission regulations is *per se* material and the Commission has often held that the failure to disclose a fee arrangement is a fraudulent omission. *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 27,701 at 48,305, 48,312 (CFTC July 19, 1999), *aff'd*, *Slusser v. CFTC*, 210 F.3d. 783, 786 (7th Cir. 2000). In *Slusser,* the Commission held that an introducing broker's failure to disclose that it had received commissions is a fraudulent material omission, where its prospectus said that its compensation would be limited to receiving a percent of profits. In the context of commodity options fraud, the Commission stated in *In re Rosenthal & Co.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 22,221 at 29,163, 29,177 (CFTC June 6 1984): "[W]e now hold that the omission to disclose fees and commissions is material, that the firm's sales agents violated Regulation 32.9 each time they failed to disclose commissions and fees in their telephone sales presentations to customers, and that the firm is liable as a principal for these violations by its agents." In *In re Citadel Trading Co. of Chicago, Ltd.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 23,082 at 32,182, 32,185 (CFTC May 12, 1986), the Commission held that a registered CTA and AP of an FCM had violated Sections 4b and 4o by soliciting accounts through deceptive means, including "failing to disclose material facts such as his commission-sharing arrangements" with the FCM, where "especially his failure to disclose his commission arrangement ... w[as] material." Id. at 32,187-88. In *In re JCC, Inc.,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 26,080 at 41,568, 41,576 and n.23 (CFTC May 12, 1994), *aff'd*, 63 F.3d 1557 (11th Cir. 1995), the Commission held that the solicitation activities of an FCM misled customers about material elements of the investment program, such as the size of the management fee.

Shimer also made the statement in closing that in order to find Defendants liable for their

failure to disclose the Shadetree agreement the Court must find that the omission was made with the specific intent to defraud Shasta's investors. (9/6/07 Trial Transcript at p. 69 l.1-4 (Shimer)). This is an incorrect statement of the law. The Commission need not prove that the Defendants possessed an evil motive or intent to injure a customer, or that they did not subjectively want to cheat or defraud their customers. *Cange v. Stotler & Co. Inc.*, 826 F.2d 581, 589 (7th Cir. 1987); *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985) ("Proof of an evil motive is unnecessary"). "It is enough that he acted deliberately." *Haltmier v. CFTC*, 554 F.2d 556, 562 (2nd Cir. 1977). Shimer and Firth drafted and approved the PPM, respectively, and deliberately did not disclose the profit-sharing agreement with Tech Traders. The Commission has proven that the Defendants intended to defraud their investors.

Therefore, as set forth in the Commission's Trial Brief , amply supported by the evidence cited in the Commission's Proposed Findings of Fact and Conclusions of Law filed with this brief, the Commission has proven that the Defendants violated 4b(a)(2)(i)-(iii) and 4*o*(1)(A) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii), 6*o*(1)(A) (2002).

B. Shimer Aided and Abetted Equity's Violation of Section 4m(1).

The Defendants set forth no evidence at trial to rebut the proof the Commission described in its Trial Brief and established at trial that Shimer had the requisite knowledge that Shasta was a commodity pool as early as 2001, before he took in any investor funds, and that both Shimer and Firth were told in October 2003 that Shasta was a commodity pool and warned repeatedly over the ensuing months that they were exposed to charges that they were running an illegal commodity pool. (Findings of Fact ¶¶ 148-150, 152-153, 157-159, 162). Therefore, under the law set forth in the Commission's Trial Brief and the evidence established at trial, Shimer is liable under § 13(a) of the Act, 7 U.S.C. § 13c(a)(2002) for aiding and abetting Equity's § 4m(1)

violation of the Act.

C. Firth and Shimer are Liable as Controlling Persons for Equity's Violations.

The evidence has established that both Shimer and Firth are controlling persons of Equity. (Findings of Fact ¶¶ 22, 43). Because control may be exercised jointly, several persons may simultaneously be controlling persons of the same corporation. *JCC, Inc.*, 63 F.3d 1557 (three controlling persons in fraudulent solicitation scheme); *CFTC v. Baragosh,* 278 F.3d 319, 330 (4th Cir. 2002) *cert. denied*, 123 S.Ct. 415 (2002) They are liable as controlling persons for Equity's violations of §§ 4b, 4*o* and 4 m, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b)(2002) because they either knowingly induced, directly or indirectly, the violative acts of Equity or failed to act in good faith. *Monieson v. CFTC*, 996 F.2d 852, 858 (7th Cir. 1993); *CFTC v. R.J. Fitzgerald, Inc.* 310 F.3d 1321, 1334 (11th Cir. 2002).

Firth both knowingly induced and failed to act in good faith with respect to Equity's violations of §§ 4b, 4*o* and 4m. All the evidence that established that Firth was reckless in failing to investigate Tech Traders, Murray, Shimer or the accountant verification process also establishes that he did not act in good faith and is therefore liable for Equity's §§ 4b and 4*o* violations. He also knowingly induced Equity's failure to register under § 4m and did not act in good faith when he failed to register Equity despite Arnold & Porter's repeated warnings that Shasta was an illegal commodity pool. As the president of Equity, the manager of Shasta, he had a fiduciary duty to Shasta's investors to assure that Shasta's investment was sound and that it was in regulatory compliance. His failure to do so was reckless and in bad faith. *See In re First Nat'l Trading Corp.,* Comm. Fut. L. Rep. (CCH) ¶ 25,813 (CFTC Aug. 24, 1993) (holding that President and CEO of corporation lacked "good faith" supervision when he was responsible for establishing, maintaining, and enforcing a meaningful compliance system, including insuring

that the compliance officer performed compliance duties properly, yet he abrogated these supervisory responsibilities). Thus, Firth should be held liable as a controlling person of Equity under Section 13(b) of the Act.

Shimer is also liable as a controlling person of Equity. His actions in ignoring the repeated warning signs that Murray's operation was not legitimate and in ignoring Arnold & Porter's repeated warnings that Equity was operating an illegal commodity pool show his recklessness and lack of good faith. *See Monieson v. CFTC,* 996 F.2d 852, 860-61 (7th Cir. 1993) (holding that Chairman of the Board acted recklessly in not supervising the company's supervision system with reasonable diligence where he never took any solid step towards investigating the many warnings he received that two brokers were placing trades without account identifications and were frequently allocating trades.) Therefore, both Shimer and Firth should be held liable as a controlling person of Equity under Section 13(b) of the Act.

D. Equity is Liable for the Acts of Firth and Shimer.

Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2002), provides that "the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official agent, or other person." *Stotler & Co. v. CFTC*, 855 F.2d 1288, 1291-92 (7th Cir. 1988) (principal is held liable for acts of his agents); *Rosenthal & Co. v. CFTC*, 802 F.2d 936, 966 (7th Cir. 1986) (principals are strictly liable for the acts of the agents even if the agents are not employees).

Firth's actions, described above, were done within the scope of his employment with Equity, and Shimer's actions were done within the scope of his acts as agent and AP of Equity. Therefore, Equity is liable for Firth's and Shimer's violations of § 4*o* and § 4k(2).

III. RELIEF REQUESTED

A. Imposition Of A Permanent Injunction

Because enforcement proceedings under Section 6c of the Act, 7 U.S.C. § 13a-1(2002), involve the public interest rather than a private controversy, the equitable jurisdiction of the district court is very broad, and the court's equitable powers are broader and more flexible than in private controversies. *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979), citing *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946).

An action for a statutory injunction, such as this action which is grounded in Section 6c of the Act, 7 U.S.C. § 13a-1, need not meet the requirements for an injunction imposed by traditional equity jurisprudence. The CFTC must show only two things to obtain permanent injunctive relief: first, that a violation of the Act has occurred and second, that there is a reasonable likelihood of future violations. *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978); *accord, CFTC v. British American Commodity Options Corp*., 560 F.2d 135, 141 (2nd Cir. 1977), *cert denied*, 438 U.S. 905 (1978); *Hunt* 591 F.2d at 1220, 1223 (actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations.) *Accord, CFTC v. Rosenberg,* 85 F.Supp.2d 424, 454 (D.N.J. 2000).

The Court has already found several violations of the Act here by all Defendants in summary judgment and the evidence shows that the Defendants are liable for the remaining

charges the Commission has brought against them. The second requirement for permanent injunctive relief has also been established here -- that there is a reasonable likelihood that Firth, Shimer and Equity will engage in future violations unless enjoined.

While past misconduct does not necessarily lead to the conclusion that there is a likelihood of future misconduct, it is "highly suggestive of the likelihood of future violations." *Hunt* 591 F.2d at 1220; *British American Commodity Options Corp.* 560 F.2d at 141. Courts look to the "nature of the past misconduct, whether the defendant's business interests place him in a position where future violations are possible, the persistence of the violating conduct and whether the defendant has maintained that his conduct was blameless to determine whether an injunction is appropriate." *Rosenberg* 85 F. Supp.2d at 454, *citing Hunt* 591 F.2d at 1220 (collecting cases) and *CFTC ex. rel Kelly v. Skorupskas* 605 F.Supp. 942-43(E.D. Mich 1985).

Shimer and Firth's past business dealings, in which they solicited money from others for fraudulent business deals, shows their propensity to engage in businesses that operate as a fraud. Shimer's conduct in this case is particularly egregious – he lost over $1.3 million of investors' money in the three failed business deals and then to solve that problem, created Shasta to obtain the secret "profits" through Shadetree to pay back Kaivalya investors, agreed to an ambiguous and simplistic formula for verifying trading results that was subject to manipulation, agreed to the selection of an incompetent CPA who was subject to influence and to conditions on the verification process that made it more likely that a fraud could be perpetuated and ignored other red flags that would indicate Tech Traders was a fraud. Firth solicited investors through the vehicle of Equity to invest over $15 million without doing any due diligence on the investment, even though he had previously lost investor money, also ignored red flags and otherwise relied entirely on Shimer, whom he knew had set up Shasta to deal with his Kaivalya problem.

Although only a "reasonable likelihood of future violations" is required under the *Hunt* standard, the pervasive nature of Firth's and Shimer's misconduct, coupled with their past experience in enticing investors to invest in fraudulent schemes indicates there is a substantial likelihood of future violations.

Another indication that future violations are likely as noted in *Rosenberg,* is whether the defendant has maintained that his conduct was blameless. It was clear from the case that Shimer and Firth put on that they blamed everyone else except themselves for losing millions of dollars of investors' money, causing great hardship to some of those investors. (8/30/07 Trial Tr. p. 61 l. 16-25, p. 65 l. 4-18 (List); 8/31/07 Trial Tr. p. 38 l. 13-18, p. 41 l. 4-15 (Richardson); *see generally* 8/27/07 Trial Tr. p. 44 l. 7- p. 67 l. 11 (Shimer and Firth's Opening) and 9/6/07 Trial Tr. p. 41 l. 24- p. 76 l. 15 (Shimer's Closing)). Because they blame Teague, Abernethy, and Lee for the fraud they perpetrated, and believe themselves blameless, it is likely they would engage in such conduct again. Under these circumstances, a permanent injunction is warranted against Shimer and Firth and their conduit, Equity.

As the Commission set out in its First Amended Complaint, the Defendants should be permanently enjoined from a) engaging in conduct in violation of Sections 4b(a)(2), 4k, 4m(1) and 4*o*(1) of the Act; b) directly or indirectly soliciting or accepting any funds from any person in connection with the purchase or sale of any commodity futures or options contract;
c) engaging in, controlling, or directing the trading of any commodity futures or options accounts, on their own behalf or for or on behalf of any other person or entity, whether by power of attorney or otherwise; d) introducing customers to any other person engaged in the business of commodity futures and options trading; e) issuing statements or reports to others concerning

commodity futures or options trading; and f) otherwise engaging in any business activities related to commodity futures or options trading.

A specific injunction against commodity related business activity, in addition to a more general injunction not to violate the provisions of the Act with which they are charged, is necessary here because of the pervasiveness of the Defendants' misconduct and their failure to show any remorse for the harm they have inflicted on their investors. Although injunctive relief should be tailored to address specific harms and not impose unnecessary burdens on lawful activity, courts may enjoin otherwise legitimate conduct in order to prevent future violations. *F.T.C. v. Verity International, Ltd.* 335 F. Supp.2d 479, 500 (S.D.N.Y. 2004) *aff'd in part, vacated on other grounds,* 443 F. 3d 48 (2nd Cir. 2006), *cert denied sub nom. Verity International, Ltd. v. F.T.C.*, 127 S. Ct. 1868 (2007) (defendants enjoined from engaging in any capacity in the provision of any audiotext or videotext services to U.S. customers), citing *F.T.C.* v. *Five-Star Auto Club, Inc.* 97 F. Supp.2d 502, 536 (S.D.N.Y. 2000) (defendants permanently enjoined from participating in any multi-level marketing); *F.T.C. v. Micom,* No. 96-0472(SS) 1997 WL 226232 (S.D.N.Y. Mar. 12, 1997) (defendants permanently prohibited from engaging in business of preparing or filing government licenses.) (Attached hereto as Attach. A). Therefore, the Defendants should be enjoined from all the conduct described above.

B. AWARDS OF RESTITUTION AND DISGORGEMENT SHOULD BE ENTERED

It is well settled that, in CFTC injunctive actions, ancillary orders of disgorgement and/or restitution may issue. *CFTC v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 583-584 & n.16 (9th Cir. 1982) (affirming district court award of disgorgement and noting that "future compliance may be more definitely assured if one is compelled to restore one's illegal gains"), *citation omitted*; *CFTC v. U.S Metals Depository Co.*, 468 F. Supp 1149, 1163 (S.D.N.Y 1979)

(ancillary relief in the form of disgorgement awarded because to permit defendants to retain even a portion of their illicit profits "would impair the full impact of the deterrent force that is essential if adequate enforcement of the Act is to be achieved; [o]ne requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom"). *CFTC v. Noble Wealth Data Information Services, Inc.* at 693 , *aff'd in part rev'd in part on other grounds*, *CFTC v. Baragosh,* 278 F.23d 319 (4th Cir. 2002) *cert. denied*, 123 S.Ct. 415 (2002). *See generally F.T.C. v. Gem Merchandising Corp.*, 87 F.3d 466, 469 (11 Cir. 1996)("[A]bsent a clear command to the contrary, the district court's equitable powers are extensive. Among the equitable powers of a court is the power to grant restitution and disgorgement.")

This Court has previously approved an interim distribution plans to Shasta investors, including Universe. *See* Order Dated 9/26/05 (Docket Doc. 257); Order Dated 10/27/05 (Docket Doc. 279); Order Dated 03/10/06 (Docket Doc. 329); Order Dated 04/16/06 (Docket Doc. 346); Order Dated 04/17/06 (Docket Doc. 348); and Order Dated 04/25/06 (Docket Doc. 354). Under these Orders, Shasta investors received interim distributions of 36.5% of allowed claims from funds that were frozen and placed under receivership when this case was filed. These investors are still owed 63.5% of their claims. Just before trial, the Receiver estimated the amount still owed at $4,543,903.31. (Docket Doc. 543; Court Ex. 1). As set forth in the Receiver's Affidavit, the amount owed is estimated at this time because it is dependent on several factors, including the ruling of the Court on the Receiver's pending motion to fix non-investor claims against Tech Traders and his motion to make a final distribution to all investors, including Shasta

investors. The Commission requests that the Court order restitution and pre-judgment interest be paid [7] and that the amount be fixed after the Receiver makes his final distribution.

Disgorgement should also be ordered against all Defendants. Equity should o be ordered to disgorge the payments it received from Tech Traders as management fees and Shimer and Firth should be ordered to disgorge the amounts they received from Equity and pursuant to the secret profit splitting arrangement they had with Murray. Equity obtained $612,500; Shimer profited from this scheme in the amount of $1,452,117 and Firth profited by $450,313. Thus, Equity should disgorge $612,500 plus prejudgment interest of $172,281.82, for a total of $784,781.82. Shimer should disgorge $1,452,117, plus prejudgment interest of $408,446.30, for a total of $1,860,563.30. Firth should disgorge $450,313 plus prejudgment interest of $126,662.44, for a total of $576,975.44.

Shimer may argue that the amounts of money he received from Tech Traders that he used to reimburse Kaivalya investors should not be attributed to him and that he should not be ordered to disgorge those amounts. However, he should be ordered to repay those amounts as well. It was clear from the evidence presented at trial that Murray paid Shimer at Shimer's direction by wiring money to accounts that Shimer controlled. (Findings of Fact ¶¶ 42, 46). Shimer was directly indebted to some Kaivalya investors, to whom he had given personal notes (some of which were repaid with recycled Tech Traders funds (8/31/07 Trial Tr. p. 9 l. 10-22 (McCormack)). He was also threatened with lawsuits and possible exposure to governmental authorities. (Findings of Fact ¶ 36). Paying the Kaivalya investors with funds he obtained from

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[7] The Commission calculated pre-judgment interest in accordance with quarterly interest rates published by the IRS for each quarter beginning April 1, 2004 and ending December 31, 2007 (using an assumption of no rate changes between November and December) for its claims for disgorgement and civil monetary penalties and suggests that pre-judgment interest be calculated in the same manner on the final restitution amount.

Tech Traders kept these investors quiet, avoided lawsuits against him and allowed him to move on to the Shasta scheme. By paying the Kaivalya investors back, Shimer also maintained or restored his relationship with these investors, enabling him to solicit them again for the Shasta investment. (8/30/07 Trial Tr. p. 73 l. 8-18 (List)). Thus, the evidence shows that the payments to Kaivalya directly benefited Shimer and should be disgorged by him.

Also, because some of the Shasta investors were also Kaivalya or Edgar investors and were paid back on their Kaivalya or Edgar investments with recycled Tech Traders' funds, their claims were reduced by the amount of their Kaivalya repayments. The Commission requests that Shimer be ordered to pay a portion of his disgorgement obligation to these investors in the amounts set forth in Exhibit 1 to the Declaration of Joy McCormack, attached hereto as Attach. B.

C. CIVIL MONETARY PENALTIES SHOULD BE IMPOSED

Civil monetary penalties should also be assessed against Equity, Shimer and Firth pursuant to Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1)(2002), which provides that this Court may impose a civil penalty in the amount of "not more than the higher of $100,000[8] or triple the monetary gain to the person for each such violation." "The purpose of sanctions under the Act is twofold: 'to further the [Act's] remedial policies and to deter others in the industry from committing similar violations.'" *Reddy v. CFTC,* 191 F.3d 109, 123 (2d Cir. 1999). This Court should assess a civil monetary penalty that is appropriate to the gravity of the Defendants' offenses and is sufficient to act as a deterrent. *Miller v. CFTC,* 197 F.3d 1227, 1236 (9th Cir.

[8] Pursuant to 17 C.F.R. §143.8(a)(1)(ii) (2006) the statutory maximum applicable to violations under Section 6(c) of the Act was increased from $100,000 to $120,000 per violation for violations committed on or after October 23, 2000 and to $130,000 per violation for violations committed on or after October 23, 2004.

1999). In this case, the gain to Equity was $612,500, to Firth was $450,313 and to Shimer was $1,452,117. Triple those amounts are: Equity $1,837,500; Firth: $1,350,939 and Shimer: $4,356,351. Civil penalties in these amounts are warranted here where these gains were appropriated from investor funds and, in part, pursuant to a secret profit sharing arrangement with Tech Traders that was not disclosed to the investors.

D. FEES AND COSTS SHOULD BE IMPOSED.

The Commission also requests that the Defendants be ordered to pay fees and costs as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2)(1994).

IV. CONCLUSION

The evidence established at trial amply demonstrates that Shimer and Firth have violated §§ 4 b, and 4*o*(1)A) of the Act, that Shimer has aided and abetted Equity's § 4m violation, that Shimer and Firth are liable for Equity's violation of §§4b, 4m and 4*o* as controlling persons and that Equity is liable as principal for Shimer's and Firth's §§4m, 4*o* and 4k violations. The Court has already found in summary judgment that Shimer and Firth violated §§ 4*o*(1)(B) and 4k of the Act, that Equity is liable for their violations pursuant to § 2(a)(1)(B) of the Act and that Shimer aided and abetted Tech Traders' Regulation 4.30 violation. Therefore, this Court should grant a permanent injunction on those charges as well as those proven at trial, enjoin Defendants from soliciting for commodities trading or engaging in commodities trading or other commodities activities and impose a restitution award against Equity, Shimer and Firth, jointly and severally, in an amount to be set after the Receiver's final distribution, plus prejudgment interest. The Court should also order Equity to disgorge $612,500 plus prejudgment interest of $172,281.82, for a total of $784,781.82; Shimer to disgorge $1,452,117, plus prejudgment interest of $408,446.30, for a total of $1,860,563.30 and Firth to disgorge $450,313 plus prejudgment

interest of $126,662.44, for a total of $576,975.44. Finally, the Commission requests that the Court order civil monetary penalties of $1,837,500 against Equity, $4,356,351 against Shimer and $1,350,939 against Firth and that the Defendants by ordered to pay the Commission's fees and costs.

Date: November 6, 2007

Respectfully submitted,

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ATTACHMENT A

C
F.T.C. v. Micom Corp.
S.D.N.Y.,1997.

United States District Court, S.D. New York.
FEDERAL TRADE COMMISSION
v.
MICOM CORP., Joseph M. Viggiano, and Lawrence Williams.
CIV. No. 96-0472 (SS).

March 12, 1997.

FINDINGS OF FACTS, CONCLUSIONS OF LAW, FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AS TO DEFENDANTS MICOM CORPORATION AND JOSEPH VIGGIANO

SOTOMAYOR, District Judge.

***1** On January 23, 1996, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), the Federal Trade Commission ("FTC" or "Commission"), filed the Complaint against the defendants for a permanent injunction and other relief, including restitution to consumers. On January 23, 1996, this Court issued, *ex parte,* a Temporary Restraining Order (the "TRO") proposed by the Commission. Subsequently, the Court, pursuant to stipulations agreed to by the parties, extended the TRO until April 19, 1996. By Order dated April 15, 1996, this Court entered a Preliminary Injunction against defendants Micom Corporation ("Micom") and Joseph M. Viggiano ("Viggiano"). Because of its inability to effect service, the FTC dismissed the action against defendant Lawrence Williams without prejudice.

The FTC moves for summary judgment, pursuant to Rule 56, Fed.R.Civ.P., as to defendants Viggiano and Micom. For the reasons to be discussed, I hereby GRANT the FTC's motion for summary judgment and enter the following Final Judgment and Order as to Micom Corporation and Joseph Viggiano (collectively the "defendants").

FINDINGS OF FACTS

Defendants have not submitted any responsive papers to the FTC's motion for summary judgment. Accordingly, the facts as set forth in the FTC's Local Rule 3(g) Statement dated February 7, 1997, remain uncontroverted. I adopt as findings, and incorporate them herein by reference, the undisputed facts set forth in the government's Local Rule 3(g) Statement. *See United States v. All Right, Title Interest in Real Property,* 77 F.3d 648, 657 (2d Cir.1996) (where claimant did not submit a Rule 3(g) Statement, "the facts set out in the government's Rule 3(g) Statement were deemed admitted").

CONCLUSIONS OF LAW

1. This is an action by the FTC pursuant to Sections 5 and 13(b) of the FTC Act, 15 U.S.C. § § 45 and 53(b). The Commission has the authority under the FTC Act to seek the relief it has requested. This Court has jurisdiction of the subject matter of this case and jurisdiction over Joseph Viggiano and Micom Corporation ("Micom").

2. I adopt herein any Finding of Fact previously incorporated which might more properly be deemed a Conclusion of Law.[FN1]

> FN1. After satisfying myself fully that the FTC's proposed Conclusions of Law are fully supported by the record submitted by them in support of their motion and by law, I have adopted the FTC's Conclusions of Law with little editing.

3. By clear and substantial evidence, the Commission has shown that Joseph Viggiano and Micom have engaged in, and are likely to continue to engage in, deceptive acts and practices in violation of Section 5(a) of the FTC Act.

4. Specifically, since at least November 1994, Viggiano, Micom, and their agents, through their telemarketing operation, offered and sold application preparation and filing services for licenses issued by the Federal Communications Commission ("FCC").

5. Viggiano, Micom, and their agents falsely and misleadingly represented to potential and actual customers that: (a) they were highly likely to earn substantial profits through leasing or selling their licenses to paging businesses; (b) they would derive

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Attach. A.

income or profit from their licenses without constructing a paging system themselves; (c) no entity or individual could obtain multiple paging licenses directly from the FCC for use in a given geographic area; (d) the FCC typically required a paging license applicant to submit or conduct engineering studies, site analyses, environmental impact statements, service coverage maps, or interference studies for the types of licenses acquired through defendants' services; (e) the purchase of paging licenses through defendants' application services was a relatively low risk, excellent investment likely to generate substantial profits; and (f) their customers would receive a 100 percent refund for payments to Micom for any license they did not receive.

***2** 6. Although Micom's customers received Service Agreements which contained risk disclosures, the FTC has proven by clear and substantial evidence that the disclosures were inadequate in light of the overall effect of the repeated misrepresentations made by Viggiano, Micom, and their agents in promotional materials and sales pitches.

7. Viggiano's and Micom's false representations were material to consumers because they pertained directly to the quality and effectiveness of Viggiano's and Micom's services. Micom's clients each paid substantial fees for Micom's services. Viggiano and Micom failed to perform the promised application and filing services for a considerable number of clients. Viggiano and Micom did not refund these fees to their clients despite their failures to provide the requested services. In total, Micom received at least $1,650,000 from its customers.

8. Joseph Viggiano, by his own admission, personally and directly participated in the offer and sale of Micom's services to clients and potential clients, using the name "James Templeton". Viggiano received at least $474,000 from Micom. Viggiano was an owner and the chief financial officer of Micom and was involved in the day-to-day operation of Micom. He disseminated sales and product information to Micom's sales persons, orally and in writing, and distributed material concerning the false and misleading information described in Paragraph 5 above. He instructed Micom's engineering consultants to apply for specific licenses in specific geographic areas. Viggiano was the primary contact with these consultants concerning their license application preparation for Micom's customers. Viggiano admitted to responding to customers' complaints concerning the conduct and misrepresentations of salespersons, using the name "James Templeton".

9. Viggiano was in a position to control the deceptive practices of Micom, had actual or constructive knowledge of such practices, and failed to stop such practices. In addition, Viggiano had actual or constructive knowledge of Micom's failure to perform services for its customers, but failed to remedy or redress such failures. Viggiano is therefore liable under Section 5(a) of the FTC Act.

10. Prior to forming Micom with Lawrence Williams, Viggiano worked as a telemarketer selling FCC licenses. Viggiano was in the process of setting up another telemarketing operation to broker FCC licenses when this Court's *ex parte* TRO was issued.

11. Based on the record before this Court, the Court finds that there is no genuine issue as to any material fact, and the FTC is entitled to judgment as a matter of law, pursuant to Rule 56, Fed.R.Civ.P.

12. Section 13(b) of the FTC Act authorizes a court to grant a permanent injunction against any provision of law enforced by the Commission. This Court is persuaded that there is a danger of recurrent violation and a reasonable likelihood of future violations by Viggiano and Micom which justify the issuance of injunctive relief. The Court bases this upon past practices and the likelihood of future practices being similar to those in which Viggiano has previously engaged. Viggiano had knowledge of Micom's unlawful practices, and the failures to perform services for which Micom received thousands of dollars. Moreover, the unlawful conduct and failures to perform were not isolated. Thus, the Court finds that a broad Permanent Injunction is warranted under the circumstances.

***3** 13. Under Section 13(b) of the FTC Act, the Court has the equitable power to order the monetary equivalent of recission. The Court concludes that Viggiano and Micom violated the FTC Act as discussed above and are therefore liable, jointly and severally, for $1,600,000, the amount received by Micom from its customers (less refunds) which fairly approximates the injury caused by Viggiano and Micom to their clients.

ORDER

For purposes of this Order the following terms shall have the meanings specified below:

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A. "Investment" or "Investment Offering" shall mean any service, product or interest, including any partnership, interest in any partnership, or other beneficial interest, tangible or intangible, that in any way are (1) offered for sale, traded or sold, to be held, wholly or in part, for purposes of economic benefit, profit, or income, or (2) offered for sale, traded or sold, based on representations, wholly or in part, express or implied, about past or future income, appreciation, or resale value.

B. "Business of Telemarketing" shall mean the offer for sale or sale of a product or service that in any way involves telephonic sales presentations, unless such activities primarily involve regular, substantial, and continuing face-to-face contact between the offeror or seller and all or substantially all of the offerees or buyers.

C. "Assisting others engaged in the Business of Telemarketing" shall mean providing any of the following goods or services to any person or entity that is engaged in the Business of Telemarketing or plans to engage in the Business of Telemarketing in the immediate future: (1) procuring or providing office space or equipment; (2) procuring or providing financial support; (3) formulating, or participating in the formulation of, any sales script or sales outline for use in telemarketing; (4) providing training, instruction, advice, or information for use in telemarketing; (5) formulating, or participating in the formulation of, any sales brochures, contracts, or other marketing materials; (6) receiving or responding to consumer inquiries; or (7) receiving or responding to consumer complaints.

D. "Telemarketed Product" or "Telemarketed Service" shall mean the offer for sale or sale of any product or service, including but not limited to partnership, interest in any partnership, or other beneficial interests, tangible or intangible, that in any way are offered for sale or, sold through telephone sales presentations, unless such activities primarily involve regular, substantial, and continuing face-to-face contact between the offeror or seller and all or substantially all of the offerees or buyers.

E. "Notice to the Commission" shall mean that Joseph Viggiano provides the required information in writing, signed by him, to:
Associate Director for Service Industry Practices
Federal Trade Commission
6th and Pennsylvania Avenue, N.W., Room H-200
Washington, D.C. 20580

*4 Re: *FTC v. Micom Corp. et al.*
File X960024

Notice shall be sufficient if sent by First Class mail, postage pre-paid or personally delivered to the above addressee.

E. "And" and "or" shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I. PROHIBITED BUSINESS PRACTICES

A. IT IS THEREFORE ORDERED that Micom and Joseph Viggiano, and their officers, directors, agents, servants, employees, salespersons, attorneys, corporations, subsidiaries, affiliates, successors, assigns, and other entities or persons directly or indirectly under his control, and all persons or entities in active concert or participation with him who receive actual notice of this Order by personal service, or otherwise, are hereby permanently restrained and enjoined from the promotion, advertising, marketing, sale, or offering for sale of:

(i) any application preparation or filing service for any licenses or permits issued by the United States government, or any agency thereof; and

(ii) any Investment or Investment Offering which involves, or has as a component of such Investment or Investment Offering, any license or permit, or any interest in any license or permit, issued by the United States government.

B. IT IS FURTHER ORDERED that Micom and Joseph Viggiano, and their officers, directors, agents, servants, employees, salespersons, attorneys, corporations, subsidiaries, affiliates, successors, assigns, and other entities or persons directly or indirectly under its or his control, and all persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, in connection with the promotion, advertising, marketing, sale, or offering for sale of Investments, Investment Offerings, Telemarketed Products or Telemarketed Services, are hereby permanently restrained and enjoined from:

(i) Falsely representing, in any manner, directly or by implication, any fact material to any investment or investment offering, including (without limitation) the riskiness, liquidity, market value, resale value, or

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expected income to be derived from said investment or investment offering; and

(ii) Falsely representing, in any manner, directly or by implication, any fact material to any Telemarketed Product or Telemarketed Service;

(iii) Falsely representing, or failing to disclose, any other fact material to a consumer's decision to purchase their services or products;

(iv) Conducting or participating in the Business of Telemarketing without compliance with all applicable federal and state registration and bond requirements; and

(v) Violating any provision of the federal Telemarketing Sales Rule ("the Rule"), as set forth at 16 C.F.R. Part 310, or as the Rule may hereafter be amended.

IT IS FURTHER ORDERED that the prohibitions contained in this Section apply to any oral and written representations, and to assisting others in the making of any false representations delineated in this Section. The prohibitions in this Section shall be in addition to any restrictions and prohibitions contained in other Sections of this Order.

II. BOND REQUIREMENT

***5** IT IS FURTHER ORDERED that Joseph Viggiano, whether directly or indirectly through any persons or entities under their control, are hereby permanently enjoined and restrained from engaging in the Business of Telemarketing or Assisting others engaged in the Business of Telemarketing, unless, prior to engaging in the Business of Telemarketing or Assisting others engaged in the Business of Telemarketing, they first obtain a performance bond ("the Bond") in the principal sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000). The terms and conditions of the Bond requirement are as follows:

A. The Bond shall be conditioned upon compliance with Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the Telemarketing Sales Rule, 16 C.F.R. Part 310, and with the provisions of this Order. The Bond shall be deemed continuous and remain in full force and effect as long as Joseph Viggiano continue to engage in the Business of Telemarketing, or assists others in the Business of Telemarketing. Joseph Viggiano shall maintain the Bond for a period of five (5) five years after he provides Notice that he has ceased to engage in the Business of Telemarketing, or ceased to assist others in the Business of Telemarketing. The Bond shall cite this Order as the subject matter of the Bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Section 5(a) of the FTC Act, the federal Telemarketing Sales Rule, the provisions of this Order, or to any other violation of law;

B. The Bond required pursuant to this Section shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each state in which Joseph Viggiano, or any entity directly or indirectly under his control, is doing business and that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring. The Bond shall be in favor of both: (1) the Federal Trade Commission for the benefit of any consumer injured as a result of any activities that required obtaining the Bond; and (2) any consumer so injured;

C. The Bond required pursuant to this Section is in addition to, and not in lieu of, any other bonds required by federal, state, or local law;

D. At least ten (10) days before commencing in any activity that requires obtaining the Bond, Joseph Viggiano shall provide Notice to the Commission describing in reasonable detail said activities, and include in such Notice a copy of the Bond obtained;

E. Joseph Viggiano shall not disclose the existence of the Bond to any consumer or other purchaser or prospective purchaser of any Telemarketed Service or Product, without simultaneously making the following disclosure: "THE BOND IS REQUIRED BY ORDER OF THE U.S. DISTRICT COURT AS PART OF A FINAL ORDER AGAINST JOSEPH VIGGIANO in *FTC v. Micom Corp., et al., Civ. No. 96-0472, U.S. District Court for the Southern District of New York.*" This disclosure shall be made by Joseph Viggiano in all sales materials, and on the front side of all documents sent to customers to acknowledge orders and/or the receipt of funds. The disclosure shall be set forth in a clear and conspicuous manner, separated from all other text, in 100 percent black ink against a light background, in print at least as large as the main text of the sales material or document, and enclosed in a box containing only the required disclosure.

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III. MONETARY RELIEF

*6 IT IS FURTHER ORDERED that Judgment is hereby entered in favor of the Federal Trade Commission against Joseph Viggiano and Micom Corporation, jointly and severally, in the amount of ONE MILLION, SIX HUNDRED THOUSAND DOLLARS ($1,600,000).

Any funds received by the Commission pursuant to this section shall be deposited in an account maintained by the Commission or its agent. Upon the final disposition of this action, said funds shall be either (1) distributed as redress to consumers, or (2) paid to the U.S. Treasury, if such distribution is deemed impractical. The Commission shall submit a plan for the disbursement of funds to the Court for review and approval. In establishing this plan, the Commission shall have full and sole discretion to determine the criteria and parameters for participation by injured consumers in a redress program, and may delegate any and all tasks connected with such redress program to any individuals, partnerships, or corporations, and pay the fees, salaries, and expenses incurred thereby in carrying out said tasks from the funds received pursuant to this section.

IV. RECORDKEEPING REQUIREMENTS

IT IS FURTHER ORDERED that, for seven (7) years from the date of entry of this Order, Joseph Viggiano, and his agents, servants, employees, attorneys, and all other persons or entities in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, in connection with the advertising, promotion, offering for sale or sale of any Investment, Investment offering, Telemarketed Product or Telemarketed Service, are hereby enjoined and restrained from:

A. Destroying, concealing, transferring, or otherwise disposing of any correspondence to or from customers or law enforcement authorities, lead sheets, personnel records, shipping and mailing records maintained in the ordinary course of business, and exemplar copies of all written promotional material, scripts, and training materials;

B. Failing to make and keep records about any transaction between (1) Joseph Viggiano, directly or indirectly, or through any business owned, managed, or controlled by him, directly or indirectly, and (2) any customer. Such records shall include the following: the customer's name; his or her address; his or her telephone number; a description of the good, service, or interest purchased; the dollar amounts the customer paid; the sales agent's name; and the date of the sale(s);

C. Failing to make and keep books, records of cash disbursements and receipts, bank and other financial account statements that, in reasonable detail, accurately reflect the assets and liabilities, owners' equity, sources of revenue, expenses, and disposition of assets for all business entities owned, managed, or controlled by Joseph Viggiano, directly or indirectly;

D. Failing to make and keep records that reflect, for every complaint or refund request by any customer of Joseph Viggiano, or by any customer of any business owned, managed, or controlled by him, directly or indirectly, whether such complaint or refund request is received directly or indirectly or through any third party: (1) the customer's name, address, telephone number and the dollar amount paid by the customer; (2) the written complaint, if any, and the date of the complaint or refund request; (3) the basis of the complaint, including but not limited to the name of any salesperson or agent complained against, and the nature and result of any investigation conducted concerning the validity of the complaint; (4) each response and the date of the response; (5) any final resolution and the date of the resolution; and (6) in the event of a denial of a refund request, the reason for such denial, or if the complaint was cured, the basis for determining that the complaint was cured.

V. MONITORING PROVISIONS

*7 IT IS FURTHER ORDERED, to monitor compliance with this Order, that:

A. Joseph Viggiano shall provide Notice to the Commission within ten (10) days of the entry of this Order, of his business address, (and residential address if he conducts any business from said address), mailing address for receipt of notice and service of process (if different from his business/residence address), telephone numbers, and employment status, including but not limited to the name, address, and telephone number of his current employer(s), and his job description;

B. For a period of seven (7) years from the date of entry of this Order, Joseph Viggiano shall provide Notice to the Commission within ten (10) days of any changes in his residence or mailing address or

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employment status, including but not limited to the names, addresses, and telephone numbers of his new employer(s), and his new job description;

C. For a period of seven (7) years from the date of entry of this Order, if Joseph Viggiano becomes engaged in the Business of Telemarketing, or becomes affiliated, in any capacity, with a business entity, the activities of which include the advertising, promotion, offering for sale or sale of any Investment, Investment Offering, the Business of Telemarketing, Telemarketed Product or Telemarketed Service, Joseph Viggiano shall:

(1) within ten (10) days of beginning such affiliation, provide Notice to the Commission which shall include his new business address and telephone number; the name of the business's principals and Joseph Viggiano's supervisors, a description of the business's activities and Joseph Viggiano's duties and responsibilities;

(2) provide a copy of this Order to all salespersons Joseph Viggiano supervises, within ten (10) days of beginning such supervision;

(3) provide a copy of this Order to any person whom he or the business employs (whether designated as an employee, independent contractor, consultant, or otherwise) if Joseph Viggiano participates as a principal, director, officer, majority owner, partner, or other controlling party, in such business entity, within ten (10) days of beginning of his employment;

(4) upon providing a copy of this Order as described in subparagraphs C.3 and C.2 above, Joseph Viggiano shall obtain a signed statement from each recipient acknowledging receipt of the Order, and giving the recipient's residential address and telephone number. Joseph Viggiano shall maintain each such statement as part of his business records. Should any recipient fail or refuse to provide Joseph Viggiano with a signed statement, Joseph Viggiano shall prepare a signed statement that such recipient has been provided a copy of this Order, and that provides the recipient's residential address and telephone number. Joseph Viggiano shall maintain each such signed statement as part of his business records; and

D. For a period of seven (7) years from the date of entry of this Order, Joseph Viggiano shall:

(1) permit representatives of the Commission, within forty-eight hours of receipt of written notice from the Commission, access during normal business hours to any office, or facility storing documents, of any business owned by him, or of which he is a principal, director, officer, partner, or other controlling party, to inspect and copy all documents belonging to such business or him, relating in any way to any matter subject to this Order;

***8** (2) refrain from interfering with any duly authorized representatives of the Commission who seek to interview his employers, employees (whether designated as employees, consultants, independent contractors or otherwise), or agents, about any matter relating in any way to any matter subject to this Order; and

(3) upon written request by any duly authorized representative of the Commission, submit written reports (under oath, in requested), and produce documents, on forty-eight hours notice, relating in any way to any matter subject to this Order.

Provided, that the Commission may otherwise monitor the compliance of Joseph Viggiano with this Order by all lawful means available, including but not limited to the use of compulsory process, the taking of depositions or oral testimony, and the use of investigators posing as consumers or suppliers.

VI. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

VII. ENTRY OF THIS JUDGMENT

IT IS FURTHER ORDERED that there being no just reason for delay of entry of this judgment, and, pursuant to Fed.R.Civ.P. 54(b), the Clerk shall enter this Order as a final judgment immediately.

SO ORDERED.

S.D.N.Y.,1997.
F.T.C. v. Micom Corp.
Not Reported in F.Supp., 1997 WL 226232 (S.D.N.Y.), 1997-1 Trade Cases P 71,753

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ATTACHMENT B

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

DECLARATION OF INVESTIGATOR JOY MCCORMACK
IN SUPPORT OF CFTC's POST-TRIAL BRIEF

ATTACHMENT B

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

I, Joy McCormack, hereby make the following declaration in support of CFTC's Post-Trial Brief:

1. I am the investigator assigned to the investigation conducted by the Division of Enforcement ("DOE") of the U.S. Commodity Futures Trading Commission ("CFTC") in the case of CFTC v. Equity Financial Group, et al.

2. From my various work on this matter, I made the following observations:

A. Certain Shasta and Universe pool participants received repayments of their earlier Kaivalya and Edgar investments from funds that are traceable to Tech Traders.

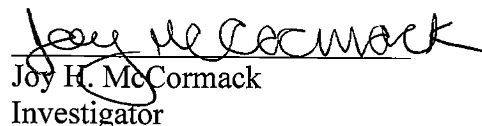
B. As a result of those repayments, the distributions on their claim amounts were reduced, as recommended by the Receiver, Mr. Stephen Bobo, pursuant to orders of this Court;

C. I analyzed the reduction in their distribution amounts and compiled a summary of the analysis in a chart.

D. The chart, which is attached as Exhibit 1, reflects the net reduction amounts of such investors' distributions.

3. I have conferred with the Receiver about the information contained in Exhibit 1 and he has not indicated any objections to the figures contained in it. In addition, this analysis is supported by the information contained in the Receiver's Motion for Authority to Make Final Distribution. See, docket no. 555, Schedules B and D to the Affidavit of Stephen T. Bobo.

Dated: November 5, 2007



Joy H. McCormack
Investigator

EXHIBIT 1

LISTING OF INVESTOR CLAIMANTS AFFECTED BY REPAYMENTS FROM KAIVALYA AND EDGAR

Pool Invested With	Name of Investor Claimant	Tech Traders Funds Received from Kaivalya or Edgar which reduced the distributions on their respective claim amounts [1]
Universe Capital Appreciation	COOPER, ROBERT	$7,350
Universe Capital Appreciation	GRAVES, AMANDA	$25,000
Shasta Capital Associates	GREEN, MARSHA	$72,765
Universe Capital Appreciation	GUBLER, CORY	$0
Shasta Capital Associates	LIST, THOMAS & NANCY	$39,501
Shasta Capital Associates	MARRONGELLE, JEFFREY & BARBARA	$25,000
Shasta Capital Associates	OMAHA-BOY, NANCY	$103,950
Universe Capital Appreciation	SCHMALZ, HARRY	$20,000
Universe Capital Appreciation	TRINIDAD/VICO/PINNACLE	$16,798
Universe Capital Appreciation	WEDEL, HARLAND & DONNA	$30,000

[1] This is estimated in accordance with the various claim settlements entered into with the Receiver assuming an estimated value of the recovery to Shasta Estate in the amount of 69.3% and recovery to the Universe pool participants in the amount of 62.7%

EXHIBIT 1