

ROBERT W. SHIMER, ESQ. *Pro se*

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

COMMODITY FUTURES TRADING :
COMMISSION, :
:

Hon. Robert B. Kugler

Plaintiff,

vs.

Civil Action No. 04-1512

EQUITY FINANCIAL GROUP LLC, TECH
TRADERS, INC., TECH TRADER, LTD.,
MAGNUM CAPITAL INVESTMENTS, LTD.,
VINCENT J. FIRTH, ROBERT W. SHIMER,
COYT E. MURRAY, & J. VERNON ABERNETHY

Motion to Dismiss For Failure To
State A Claim Upon Which Relief
Can Be Granted

Defendants.

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Pursuant to Federal Civil Procedure Rule 12(b)(6) defendant Robert W. Shimer, Esq. *pro se* respectfully moves the Court to dismiss for Failure To State A Claim Upon Which Relief Can Be Granted with respect to himself for all Five Counts of Plaintiff’s First Amended Complaint For Injunctive and Other Equitable Relief And Civil Monetary Penalties Under the Commodity Exchange Act, 7 U.S.C. §§ 1 *et se*. More specifically, Robert W. Shimer separately moves to dismiss pursuant to Federal Rule 12(b)6 with respect to each of the following:

- 1) Plaintiff’s claim that defendant Shimer violated Section 4b(a)(2) of the Commodity Exchange Act 7 U.S.C. §§ 6b(a)(2). Plaintiff’s allegation of violation of Section 4b(a)(2) by Defendant Shimer is dependent upon and requires a finding by this Court that defendant Shimer’s client Shasta Capital Associates, LLC (“Shasta”) was a “commodity pool” and that Defendant Shimer’s client Equity Financial Group, LLC (“Equity”) acted as a commodity pool operator (CPO) with respect to Shasta. The controlling case law authority cited by Plaintiff does not support Plaintiff’s characterization of Shasta as a

“commodity pool” and specifically requires just the opposite conclusion based upon the four part test laid down by the Ninth Circuit Court of Appeals in the case of *Lopez v. Dean Witter Reynolds, Inc.* There being no basis for the relief requested by Plaintiff’s First Amended Complaint against defendant Shimer with respect to this specific alleged violation of the Commodity Exchange Act, Defendant’s Motion should be granted. In support the Defendant respectfully refers the Court to his Brief filed with this Motion.

2) Plaintiff’s claim that defendant Shimer violated Section 13(b) of the Commodity Exchange Act, 7 U.S.C. §13c(b). Plaintiff’s allegation of violations of Section 13(b) by Defendant Shimer are dependent upon and require a finding by this Court that defendant Shimer’s client Shasta was a “commodity pool” and that Defendant Shimer’s client Equity acted as a commodity pool operator (CPO) with respect to Shasta. The controlling case law authority cited by Plaintiff does not support Plaintiff’s characterization of Shasta as a “commodity pool” and specifically requires just the opposite conclusion based upon the four part test laid down by the Ninth Circuit Court of Appeals in the case of *Lopez v. Dean Witter Reynolds, Inc.* There being no basis for the relief requested by Plaintiff’s First Amended Complaint against defendant Shimer with respect to these specific alleged violations of the Commodity Exchange Act, Defendant’s Motion should be granted. In support Defendant Shimer respectfully refers the Court to his Brief filed with this Motion.

3) Plaintiff’s claim that defendant Shimer violated Section 4o(1) of the Commodity Exchange Act, 7 U.S.C. §6o(1). Plaintiff’s allegation of violation of Section 4o(1) by Defendant Shimer is dependent upon and requires a finding by this Court that defendant Shimer’s client Shasta was a “commodity pool” and that Defendant Shimer’s client Equity acted as a commodity pool operator (CPO) with respect to Shasta. The controlling case law authority cited by Plaintiff does not support Plaintiff’s characterization of Shasta as a “commodity pool” and specifically requires just the opposite conclusion based upon the four part test laid down by the Ninth Circuit Court of Appeals in the case of *Lopez v. Dean Witter Reynolds, Inc.* There being no basis for the

relief requested by Plaintiff's First Amended Complaint against defendant Shimer with respect to this specific alleged violation of the Commodity Exchange Act, Defendant's Motion should be granted. In support Defendant Shimer respectfully refers the Court to his Brief filed with this Motion.

4) Plaintiff's claim that defendant Shimer violated Section 4k(2) of the Commodity Exchange Act, 7 U.S.C. §6k(2). Plaintiff's allegation of violation of Section 4k(2) by Defendant Shimer is dependent upon and requires a finding by this Court that defendant Shimer's client Shasta was a "commodity pool" and that defendant Shimer's client Equity acted as a commodity pool operator (CPO) with respect to Shasta. The controlling case law authority cited by Plaintiff does not support Plaintiff's characterization of Shasta as a "commodity pool" and specifically requires just the opposite conclusion based upon the four part test laid down by the Ninth Circuit Court of Appeals in the case of *Lopez v. Dean Witter Reynolds, Inc.* There being no basis for the relief requested by Plaintiff's First Amended Complaint against defendant Shimer with respect to this specific alleged violation of the Commodity Exchange Act, Defendant's Motion should be granted. In support Defendant Shimer respectfully refers the Court to his Brief filed with this Motion.

5) Plaintiff's claim that defendant Shimer violated Section 13(a) of the Commodity Exchange Act, 7 U.S.C. §13c(a). Plaintiff's allegation of violation(s) of Section 13(a) by Defendant Shimer are dependent upon and require a finding by this Court that defendant Shimer's client Shasta was a "commodity pool" and that Defendant Shimer's client Equity acted as a commodity pool operator (CPO) with respect to Shasta. The controlling case law authority cited by Plaintiff does not support Plaintiff's characterization of Shasta as a "commodity pool" and specifically requires just the opposite conclusion based upon the four part test laid down by the Ninth Circuit Court of Appeals in the case of *Lopez v. Dean Witter Reynolds, Inc.* There being no basis for the relief requested by Plaintiff's First Amended Complaint against defendant Shimer with respect to this specific alleged violation of the Commodity Exchange Act, Defendant's

Motion should be granted. In support Defendant Shimer respectfully refers the Court to his Brief filed with this motion.

Respectfully submitted,

s/ Robert W. Shimer
Robert W. Shimer, Esq.
1225 W. Leesport Rd.
Leesport, PA 19533
(610) 926-4278
(610) 926-8828 (fax)