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		Statement of Uncontested Facts
Defendants.		

In support of his Motion For Summary Judgment, Motion To Dismiss For Lack Of Subject Matter Jurisdiction and Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted Defendant Robert W. Shimer, Esq. *pro se* respectfully submits this statement of uncontested facts. The following facts are true and are either already established beyond any doubt by documents already in Plaintiff's possession or can and will be testified to under oath by both defendants Robert W. Shimer and Vincent J. Firth. Plaintiff cannot, with any credibility, represent to the Court that the following facts are not true:

1) That defendant Coyt E. Murray ("Murray") did represent to Shimer during a meeting in Murray's Gastonia office in the fall of 2000 that Murray and his son Coyt A. Murray ("Lex") had together developed a sophisticated, profitable computer assisted program for trading financial futures indexes;

2) That Murray did provide to both Shimer and Firth separate identical white 3 ring binders which provided extensive performance analysis of various sub components of Murray's

purportedly successful futures index trading program called at that time the Synergy Trading System;

3) That defendant Shimer did loan $150,000.00 to an entity created by Shimer named Edgar Holding Group, Inc., a Delaware corporation;

4)That Edgar did forward those funds representing Shimer's loan to Edgar in early 2001 to a company controlled by Murray for the purpose of placing those funds in trade using the Synergy Trading System;

5) That Murray did issue to Shimer in the early months of 2001 trading performance reports for the funds submitted to Murray's company by Edgar which represented to Shimer that Tech's operation of the Synergy Trading System was, indeed, very profitable;

6) That in at least one such report Murray offered a very sophisticated macroeconomic analysis about the interest rate policies of the Federal Reserve and its possible effect on the markets which later proved to be extraordinarily accurate;

7) That all requests for the withdrawal of funds made by Shimer on behalf of the company Edgar Holding Group, Inc were honored by Murray;

8) That all requests for the withdrawal of funds requested by Shimer for the benefit of his client Shasta Capital Associates, LLC were honored by Murray;

9) That there was never a $5.3 million discrepancy in the amount of funds submitted to Shimer's attorney escrow account by new members of Shasta and forwarded by Shimer to defendant Tech as suggested in Plaintiff's Original Complaint filed on April 1, 2004;

10) That banking records at Citibank clearly reflect that all funds received into defendant Shimer's attorney escrow account for the benefit of Shasta were indeed forwarded to Tech for the benefit of Shasta exactly in accordance with the requirements of Shasta's PPM.

Defendant Shimer further submits that with respect to the procedure to be followed for the verification of Tech's trading performance the following facts cannot be contested with any credibility by Plaintiff:

1) That by written correspondence dated March 1, 2001 (two months before Shasta Capital Associates, LLC was even formed) Shimer first proposed in a fax to Murray the use of an "objective, independent reliable discrete third party" to verify Tech's trading results;

2) That in that same fax Shimer suggested that Elaine Teague, a CPA with the firm of Puttman & Teague of Portland Oregon perform that trading performance verification;

3) That the written record further clearly discloses that CPA Elaine Teague, a partner in the firm of Puttman & Teague indicated to Shimer her willingness to perform trading performance verification of Tech;

4) That the written record also discloses that in a fax dated March 23, 2001 Shimer specifically notified Murray that Teague was "happy to act as an independent "verifier" of Tech's profitability each month;

5) That Shimer's fax to Murray dated March 23, 2001 further advised Murray that as a requirement for her willingness to perform that verification process Teague would require that "Tech's brokerage firm send a duplicate copy of its monthly statement to Tech directly to her at her office.";

6) That Shimer's fax of March 23, 2001 to Murray clearly advised Murray and put Murray on notice that Elaine Teague was willing to perform verification of Tech's trading performance provided that she had access to and was able to review as a part of that trading performance verification process defendant Tech's original unaltered brokerage statements;

7) That the written record does not contradict the fact that Shimer relied upon Teague's stated willingness to conduct such a trading performance review of Tech and concluded that such a review of Tech's original brokerage statements by Teague would be sufficient for a CPA such as Teague to determine the monthly trading performance of defendant Tech and to verify the same to Shimer's legal clients Allied International Management, Ltd the manager of New Century Trading, LLC and also Equity Financial Group, LLC the manager of Shasta Capital Associates, LLC;

8) That there is absolutely no evidence in the record to support the conclusion that such a review of Tech's original brokerage statements by Teague would not have provided an accurate verification of Tech's trading performance to Shimer's clients Shasta and defendant Equity;

9) That Murray later suggested that actual review of Tech's trading performance be conducted by a CPA local to Tech's trading operations;

10) That the written record supports a finding that Shimer asked Teague if she were willing to receive such a local trading performance verification for the benefit of Shimer's clients New Century and Shasta and that Teague agreed provided that the local verifying CPA reviewed original unaltered brokerage statements as an essential part of that local trading performance review and verification;

11) That there is nothing in the record to support the conclusion that a competent review of Tech's brokerage account statements by any such local CPA firm would not have resulted in an accurate report of defendant Tech's trading performance;

12) That specific written confirmation of Teague's requirement for local CPA verification in lieu of her own direct verification was conveyed to Murray by Shimer in a fax dated June 22, 2001 in which Shimer stated as follows: "I just spoke with Elaine Teague of Puttman & Teague in Portland, Oregon. She is perfectly willing to work with Rob Collis and have him first receive the monthly statement from the brokerage firm.";

13) That Shimer's fax to Murray dated June 22, 2001 also stated: "As long as he is willing to verify to her that he has indeed seen a true unaltered original copy of the brokerage statement, I don't think she will care whether it comes directly to him from the brokerage firm or whether you deliver it to him after your 24 hour review.";

14) That there is absolutely no evidence in the written record that Shimer ever received any correspondence from Murray in which Murray ever objected to Shimer's proposal that Tech's original brokerage statements be reviewed by a certified public accountant as a part of the proposed Trading verification process each month;

15) That the written record does not contain any evidence that Murray ever indicated to either Shimer or Firth that Murray would not permit any CPA chosen for the task of trading verification to have access to Tech's original brokerage statements in order to perform a monthly verification of Tech's trading performance;

16) That the written record supports the conclusion that Shimer was initially told by Murray that Murray had chosen Rob Collis of the local CPA firm of Collis, Wilson & Associates to perform local verification of Tech's trading performance each month;

17) That as a result of receiving the information stated in line 16 above from Murray, Shimer did draft the text of a possible verification letter that might be sent each month from Rob Collis to Elaine Teague.

18) That Shimer provided a copy of his suggested text to Murray for the purpose of forwarding that text to Rob Collis;

19) That Shimer also forwarded to Elaine Teague by fax that same suggested text of the letter Shimer proposed that Collis send to Teague every month;

20) That the text of Shimer's suggested draft letter bears absolutely no resemblance to the final verification letter that was sent by the local verifying CPA to Teague;

21) That Shimer's suggested draft letter from Collis to Teague clearly acknowledged Shimer's understanding that the two CPA's would probably work out a wording for the Collis letter to Teague other than the wording proposed by Shimer;

22) That the written record supports the conclusion that Murray later suggested substituting a local Gastonia CPA by the name of J. Vernon Abernethy instead of Rob Collis;

23) That other than the testimony of Vernon Abernethy in his deposition dated June 8, 2004 no documentary evidence exists in the record to support Plaintiff's allegation that defendant Shimer created or played any significant role in the creation of the specific "Agreed Upon Procedures" letter eventually forwarded each month by Abernethy to Teague;

24) That the written record shows that Teague received a proposed draft of the "Agreed Upon Procedures letter from Abernethy in mid July and replied by fax dated July 20, 2001 July to Abernethy "This looks good to me". ;

25) That nothing in the written record of correspondence between Abernethy and Teague in July 2001 reflects the fact that defendant Shimer was a part of the final decision making process as to what the "Agreed Upon Procedures" letter would say;

26) That a document entitled "Agreement For Independent Verification of Shasta Capital Profits and Losses" accompanied every subscription package sent to prospective Shasta members;

27) That *every* member of Shasta executed as an essential part of the Subscription process the "Agreement" referred to in line 26 above;

28) That from early 2002 until late 2003 every new member of Shasta signed and sent to Teague *confirmation* of the fact that they had executed, as a standard part of the subscription process, the Agreement referred to in line 26 above;

29) That this confirmation to Teague from approximately 50 members of Shasta from early 2002 until late 2003 took the form of a letter addressed directly to Teague by those members of Shasta acknowledging that each member had signed and understood the Agreement referred to in line 26 above;

30) That the very first part of that letter signed and sent by approximately 50 of Shasta's new members directly to Elaine Teague of Puttman & Teague beginning in early 2002 until late 2003 stated, in part, as follows:

> "It is my further understanding that your ability to verify information with respect to the Trading Company is possible as the result of a protocol procedure established between your firm and a certain independent certified public accounting firm located in the local area of the Trading Company.";

31) That there is absolutely no indication in the written record that Teague ever expressed any objection for over 1½ years to this particular statement that was clearly a part of the letter sent to her by approximately 50 members of Shasta;

32) That it is not unreasonable to conclude that Teague believed that statement to be true based upon the fact that she never objected to the truth of the above referenced statement;

33) That the proposed text of the Agreement referred to in paragraph 26 above was provided by defendant Shimer to Teague at the beginning of her engagement with Shasta for her review and approval and that document further served the purpose of confirming to her in writing by the following recital her understanding with respect to the requirement that unaltered brokerage statements were to be examined as a part of the trading verification process:

> "WHEREAS, the independent certified public accounting firm performing the on site review and verification shall be provided with access to the above referenced original unaltered copies of those brokerage statements; …";

34) That Paragraph 6 of that same Agreement referred to in line 26 above authorized the Designated Partner (Teague) to provide the following information to any member of Shasta who might call her:

a) That the Designated Partner has received separate written verification *that the original unaltered brokerage statements reporting Trading Company results were reviewed* and verified by an independent certified public accountant for the monthly reporting period in question. (Emphasis added).;

35) That the record in this matter supports the conclusion that Teague never indicated in writing to either Shasta, Equity, Shimer or Firth that it was not her understanding that original brokerage statements were to be reviewed as a basis for generating verification of Tech's trading results each month;

36) That the written record clearly supports the fact that Teague expected Abernethy's verification of Tech's trading each month to include an examination of Tech's original brokerage statements;

37) That the written record includes no evidence at all that Teague ever conveyed to Abernethy the fact that she expected his verification of Tech's trading performance each month to not be based upon a review of Tech's original brokerage statements;

38) That defendant Abernethy received a copy of Shasta's Private Placement Memorandum dated June 30, 2001 from defendant Firth in late October or early November 2001 long before any funds were received by Shasta (and about the time that Abernethy first began providing written verification to Elaine Teague on his letterhead of Tech's trading performance);

39) That the above referenced PPM of Shasta (numbered 11 and bearing Abernethy's name) is found in the record as a part of CFTC exhibit #54 to Abernethy's deposition taken on July 1, 2004);

40) That on page 18 of that particular PPM of Shasta under the heading "Independent Verification Of Hedge Fund and Trading Company Profits" (and more specifically under the sub heading "Trading Company Verification") the following information was clearly made available to and received by Abernethy without apparent objection, comment or dispute by Abernethy to either Teague, Shimer or Firth:

> "The Manager of the Company shall choose and employ at the Company's sole expense the same outside Certified Public Accounting firm (disclosed to *every* member of Shasta as Elaine Teague of Puttman & Teague) for the purpose of verifying the profitability of the Company's investment with the Trading Company. Each month this accounting firm shall receive direct verification from another accounting firm located near the Trading Company that *an original unaltered copy of the Trading Company's brokerage firm statement for the month in question*, was duly examined for the purpose of determining the applicable profit or loss for the month expressed as a percentage of the Trading Company's opening account balance at the beginning of the month." (Emphasis added);

41) That Shimer's understanding that Abernethy was reviewing Tech's original brokerage statements as a part of the verification process was conveyed to Abernethy in an e-mail sent by Shimer to Abernethy dated March 23, 2002;

42) That the "Agreed Upon Procedures" referred to in Abernethy's monthly trading verification letters supplied each month to Teague did not cause Teague, in her capacity as Shasta's CPA, to suspect that Abernethy was not reviewing Tech's original brokerage statements each and every month;

43) That the written record does not reflect any communication from Teague to either Shimer or Firth in which she stated clearly *or even implied* that she suspected Abernethy was not reviewing Tech's original brokerage statements each and every month as a part of the verification procedure conducted by Abernethy;

44) That recitals in the Agreement referred to in line 26 above and in other paragraphs in the body of that document explained to each member of Shasta the role of the two separate CPA's that were a part of the trading verification process;

45) That the Agreement referred to in line 26 above reiterated and further disclosed to every member the limited role that Shasta's CPA would play in the actual month to month verification of the Trading Company's reported performance;

46) That Shasta's PPM disclosed the fact that Shasta's CPA would not be directly verifying the "Trading Company's" (ie. Tech's) trading performance but would simply rely upon a verification received from a CPA firm local to that trading operation;

47) That the Agreement referred to in line 26 above also disclosed to every member of Shasta that Shasta's accounting firm would be receiving actual trade performance verification from another CPA firm local to the trading operation;

48) That the name of the Certified Public Accounting Firm retained by Shasta (Puttman & Teague) and the name of the Designated Partner of that Firm (Elaine Teague) were always provided to each and every member of Shasta;

49) That Shasta's CPA (Teague) was sufficiently confident that if the "Agreed Upon Procedures" referred to by Abernethy every month were followed as represented by Abernethy, that she was willing to convey to Shasta those trading performance results knowing full well that Shasta's manager and Shasta's members would rely upon those performance numbers in making investment decisions;

50) That the simple mathematical skills required of Abernethy of being able to subtract, add and divide and the ability to collectively locate a beginning and ending balance on all of Tech's brokerage statements generated for its FCM accounts were the only skills necessary to arrive at a return on investment number generated by Tech *if Abernethy were to conscientiously perform an examination of Tech's brokerage statements each month properly taking into account new funds deposited and amounts withdrawn during the month*;

51) There is nothing in the record or on Vernon Abernethy's resume indicating that Defendant Abernethy, as a certified Public accountant, did not possess these minimal mathematical and cognitive skills;

52) That the brokerage account statements of Tech clearly indicated whenever new funds were ever added by either bank wire or by inter-account transfer had defendant Abernethy chosen to review those brokerage statements as expected by Teague, Shimer and Firth;

53) That e-mail correspondence from Teague to Abernethy in late July, 2001 clearly advised Abernethy that Teague and her clients would be relying upon the trading verification being conducted by Abernethy;

54) That no evidence exists in the record available to Plaintiff proving or even directly suggesting in any way that Shimer or Firth knew that the actual trading performance by Tech was different from the performance being verified by Abernethy and provided to Shasta each month by Teague;

55) That all performance numbers of Tech and the Synergy Trading System reported on Shasta's web site or reported directly to members of Shasta to determine the amount to be debited or credited to each member's account each month were the exact same performance numbers reported each month by defendant Abernethy to Teague and consequently reported to defendant Equity.

56) That defendant Equity never posted any trading performance number of Tech or the Synergy Trading System (later described as the Synergetic Portfolio Trading System) on Shasta's web site or issued a monthly statements to members of Shasta unless and until Equity had received confirmation that Abernethy had verified that performance number and represented the same in writing to Teague.

57) That defendant Firth never disclosed to defendant Shimer that Firth had declared bankruptcy in 1992 or at any other time.

58) That said bankruptcy had occurred 9 years prior to the time that Shasta was formed and such protection was sought to protect Firth and his family as the result of actions taken by a partner of Firth's in a golf course real estate investment.

59) That any recent Bankruptcy filing that occurred in 2000 or later by Firth was not disclosed to Shimer and was engaged in by Firth solely as a measure to protect himself from the result of fraud perpetrated upon Firth by the Badische trust.

60) That Firth was a victim not a participant in the fraud perpetrated by the Badische trust.

61) That Firth had been called as a witness by federal authorities in the criminal trial of those who perpetrated the Badische trust fraud upon others.

62) That neither Shimer nor Firth ever personally received from defendant Murray or any of defendant Murray's companies an amount even close to the collective amount of $2 million as alleged or implied by Plaintiff in paragraph 47 of Plaintiff's First Amended Complaint.

63) That all funds received by Edgar Holding Group, Inc were either a repayment of the amount of Edgar's principal or interest payments due Edgar as the result of agreements executed in due course by authorized representatives of both Edgar, Tech and other parties.

64) That Dekko Management International, Ltd. was not "created to allow smaller onshore investors to compound their investment profits tax free in an offshore environment" as alleged by Plaintiff in paragraph 33b of Plaintiff's First Amended Complaint.

65) That neither Dekko nor DHRM ever accepted any investment from "onshore investors" to "compound their investments tax free" nor does Plaintiff have any evidence that either of these companies ever accepted any such investment from "on shore investors".

66) That New Century had only 2 investors that invested through New Century with Murray's companies Tech Traders, Inc or Tech Traders, Ltd and both of those two companies were properly formed legitimate foreign entities upon which proper due diligence was performed by a reputable law firm in Nassau Bahamas prior to their investment in New Century or, in the alternative, Plaintiff has absolutely no evidence that these statements and representations are not true.

67) That Shimer is not now nor has he ever held the position of "secretary" of Kaivalya Holding Group, Inc. as alleged in paragraph 33 of Plaintiff's First Amended Complaint (nor has he ever held any position as an officer of that corporation).

68) That Firth was never President of Longview Financial Group, Ltd. (nor has he ever held any other position as officer, shareholder or controlling person of that company) nor has Shimer ever been an officer or shareholder of that company nor has Shimer ever acted in any way as a controlling person of that entity nor does the Plaintiff have any evidence to support these allegations found in paragraph 33f of Plaintiff's First Amended Complaint.

Defendant Shimer further submits that the following facts with respect to the issue of Defendant Abernethy's "Independence" cannot be contested with any credibility by Plaintiff:

1) That Abernethy met Murray for the first time in 2001 in the context of apparently seeking a CPA to perform trading performance verification for Tech;

2) That there is no evidence in the record confirming that a past history of *any* collusion existed between Abernethy and Murray;

3) That Abernethy confirmed under oath in his deposition dated June 8, 2004 that he had never met Murray before Murray came into his CPA office in 2001;

4) That there is no evidence in the written record that Abernethy began actively seeking to refer prospective investors to Shasta until early 2002;

5) That Abernethy referred only one person to Shasta who actually became a member of Shasta;

6) That the person referred to Shasta by Abernethy who actually became a member of Shasta only remained a member of Shasta for about 1 ½ months and then withdrew from Shasta at the end of July, 2002;

7) That there is no evidence in the written record that Abernethy ever referred *any* other people to Shasta after July 2002;

8) That there is absolutely *no evidence* in the record that Shimer and Firth had *any* knowledge of or even *suspected* that Abernethy was working closely with Howell Woltz after July 2002 to specifically place funds with Tech through any Sterling managed entity.

Defendant Shimer further submits that the following facts with respect to another company known to trade commodity futures cannot, with any credibility, be contested by Plaintiff:

1) That the EDGAR reporting system found on the SEC's web site reveals that an SB-2 filing dated July 6, 2001 for just one of the Commodity Trading Advisors previously referred to in Shasta's first PPM shows a yearly performance number for one of the various funds under management by that particular CTA to be 258.02% for the year 2000;
2) That, for that particular CPA audited fund the above yearly performance number for calendar year 2000 was the result of the following monthly performance numbers reported during that year: For February 2000: 18.75%; For March, 2000: 47.77%; For April, 2000: 52.11%; For July, 2000: 9.60%; For November, 2000: 15.50%; and for December, 2000: 10.84%;
3) That the same SB-2 filing for the above referenced CTA reflects a return for that same fund in the month of January, 2001 of 10.40%;
4) That a separate pooled fund managed by the same group and reflected on the same SB-2 filing shows a return for calendar year 2001 of 181.48%; for calendar year 1998: 293.08%; and for calendar year 1996: 93.05%;
5) That two other separate pool funds also managed by that same group and reflected on that same SB-2 filing show a return for calendar year 1996 of 157.19% and 105.56% respectively;

Defendant Shimer further submits to the Court that the following facts with respect to his efforts to ascertain whether or not his clients Equity and Shasta were required to register with Plaintiff cannot be contested by Plaintiff with any credibility:

1) That Defendant Shimer, before any funds were received by Shasta, prepared a memorandum in the fall of 2001 in which he specifically examined the issue of whether or not either of his clients Shasta or Equity qualified as either a CTA or CPO under the CFTC's regulations and concluded that neither of his clients were a CTA or CPO;
2) That Shimer received, in the fall of 2001 through a legal colleague, confirmation of this opinion by Shimer when that legal colleague advised Shimer by telephone that a certain client of that legal colleague had forwarded Shimer's Memorandum on the issue of whether or not Shasta

or Equity met the definition of a CPO or CTA and that the client's legal department apparently agreed with Shimer's conclusion;

3) That Shimer requested representation on behalf of both his clients Shasta and Equity by the prestigious law firm of Arnold & Porter in a letter dated October 24, 2003;

4) That the partner at Arnold & Porter contacted by Shimer on behalf of both his clients Shasta and defendant Equity was Geoffrey Aronow;

5) That Aronow held the position of Director of Plaintiff's Enforcement Division from 1995 to 1999;

6) That the expressed purpose of Shimer's letter was to request a review by Arnold & Porter of the issues previously addressed by Shimer in his Memorandum written in the fall of 2001 with respect to the issue of whether or not his clients Equity and Shasta met the definition of either a CPO or CTA;

7) That Shimer's letter dated October 24, 2003 to Aronow further specifically requested Aronow to contact Plaintiff on behalf of both of his clients Shasta and Equity;

8) That Shimer's letter of October 24, 2003 to Aronow further expressed a willingness on Shimer's part and on the part of his clients Equity and Shasta to voluntarily take any remedial action necessary to comply with Plaintiff's registration requirements if such registration were deemed necessary and requested Aronow's assistance in that endeavor;

9) That the written record reflects that Shimer provided Aronow with a copy of all of Shasta's subscription documents including a copy of the Investment Agreement executed by and between Shasta and defendant Tech;

10) That the written record reflects that Aronow's primary advice conveyed to either Firth or Shimer was that defendant Tech probably would need to register as a CPO;

11) That there is nothing in the written record that indicates that Aronow ever expressed any concern about the fact that the Investment Agreement by and between Shasta and Tech might specifically subject either, Shimer, Firth or Equity to potential liability under the CEA or the Plaintiff's regulations;

12) That the written record shows that again and again in November and December of 2003 and in the early months of 2004 Shimer repeatedly urged defendant Murray to retain appropriate legal counsel to represent Tech and to take whatever action was necessary to satisfy the CFTC as to Tech's trading activities and registration responsibility;

13) That Murray told Shimer that Murray had sought the advice of outside legal counsel in the Charlotte, North Carolina area with respect to the issue of whether or not Murray was required to register with the CFTC;

14) That Murray further represented and confirmed to Shimer Murray had been informed by legal counsel that Murray and/or his company qualified for an exemption from any such registration;

15) That the case of *Lopez v Dean Witter Reynolds, Inc* is specifically cited on page 2 of Plaintiff's Brief In Support of Plaintiff's Motion For *Ex Parte* Statutory Restraining Order and Preliminary Injunction for the proposition that defendant Shimer's client Shasta was a Commodity Pool.

Respectfully submitted,

s/ Robert W. Shimer
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