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UNITED STATES  
DISTRICT COURT

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

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COMMODITY FUTURES TRADING :  
COMMISSION, :

Plaintiff,

Hon. Ann Marie Donio

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  
Defendants.

Hearing Date: October 20, 2006

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**REPLY OF ROBERT W. SHIMER TO THE EQUITY RECEIVER'S RESPONSE TO  
SHIMER'S REQUEST FOR APPEAL FROM ORDER COMPELLING PRODUCTION  
OF TAX RETURNS**

Defendant Robert W. Shimer ("Shimer") became aware on Friday, October 13, 2006 *as the result of a telephone call* on that day between Shimer and Vincent Firth ("Firth") of the fact that Stephen T. Bobo ("Receiver") through his attorneys Matthew H. Adler and Jeffery Carr of Pepper Hamilton purportedly filed with the Court on October 5, 2006 a response to Shimer's motion dated September 14, 2006 for stay of the Court's previous order compelling production of certain tax returns of Shimer pending appeal. By e-mail dated Sunday, September 15, 2006 (see Exhibit A attached hereto) Shimer was (for the first time) provided a copy of the Receiver's Response via e-mail attachment from Firth to Shimer. Shimer *just received yesterday* on October 16, 2006 a copy in the mail of the Receiver's Response filing as required by L. Civ. Rule 7.1(d)(2).

This lack of timely notice to Shimer of the Receiver's purportedly filed Response is disturbing. An essential aspect of procedural due process is the requirement of proper and timely notice of all court related filings to parties as required by the above cited local Rule. In light of the lack of professional and personal integrity exhibited by the Plaintiff and Plaintiff's lead counsel in the matter currently before the Court (as has been specifically pointed out again and again by Shimer in several separate briefs filed previously with the Court) Shimer requested in e-mail correspondence to the Receiver's attorney Jeffrey Carr dated Monday, October 16, 2006 an assurance that this lack of notice of the Receiver's filing was not intentional.

With the receipt of the Receiver's Response later that same day, it is now obvious that the Receiver's response was not mailed by the Receiver's attorneys at Pepper Hamilton but was mailed by the Receiver from his law firm in Chicago. Attached to this Reply as Exhibit B is a sworn affidavit by Shimer that he did finally receive from the Receiver on October 16, 2006 (*eleven days after the Receiver's Response was purportedly filed*) a copy of the Receiver's Response to Shimer's previous appeal from the Court's order compelling production of tax returns. This delay in service upon Shimer of the Receiver's Response is inexcusable.

L Civ Rule 7.1(d)(3) allows a party to file a Reply "...within seven calendar days after service of the opposition papers." Shimer's attached sworn affidavit overcomes any presumption that Shimer was properly noticed in a timely manner by the Receiver or his attorneys. Shimer's Reply is hereby dated Tuesday, October 17, 2006 one calendar day after receiving from the Receiver a copy of the Receiver's Response and only two days after first seeing the Receiver's Response courtesy of an e-mail from Firth. Shimer's Reply is hereby filed the following day, Wednesday, October 18, 2006 with the Court via Federal Express.

The Receiver correctly points out in his Response that Shimer's first motion for summary judgment was denied by the Court. While that may be true, Shimer provided substantial documentation never before available to the Court in support of his renewed summary judgment motion dated April 6, 2006. Exhibits A through F attached to Shimer's brief filed in support of his renewed and now pending motion for summary judgment exposed for every fair minded person to see the deliberate factual misrepresentations continually engaged in by Plaintiff Commodity Futures Trading Commission ("CFTC") with respect to the alleged "similarity" between the facts surrounding Shimer's legal client Shasta Capital Associates, LLC and the facts

of *CFTC v Heritage Capital Advisory Services, Inc. et al* Comm. Fut. L. Rep. (CCH) ¶ 21,627 (N.D. Ill. 1982).

The lack of the presence of a commodity trading account established *in the name of* the entity Shasta *and the critical significance of that fact* for clearly distinguishing the facts of Shasta from the direct commodity trading activities of the entity Heritage has already been adequately and extensively briefed by Shimer as the Receiver and his attorneys well know. That lack of factual similarity between the entity Heritage and Shimer's client Shasta clearly exposed a "fact" that the CFTC as Plaintiff was not able to rebut: *the total lack of any precedent anywhere throughout the entire federal judiciary* to support the conclusion that an entity "such as Shasta" (not directly engaged in the trading of commodity futures contracts) can, somehow, be reasonably considered to be a "commodity pool".

The inability of the Receiver to now provide the Court with any new evidence of a relevant precedent that might overcome Shimer's "lack of federal precedent argument" only serves to further emphasize the correctness of that previous assertion on April 6, 2006 by Shimer. The silence now coming from the Receiver and his attorneys in their recent Response dated October 5, 2006 is deafening on this particularly significant point. That silence is all the more significant in light of the fact revealed to the Court for the first time in Shimer's brief dated April 6, 2006 that the Receiver was in a unique position to personally know the facts in the *Heritage* case as an attorney assigned to that case by the CFTC in 1982. If the facts of *Heritage* were not clearly contrary to those of Shasta why didn't the Receiver now provide specific rebuttal to the documentary evidence previously submitted by Shimer in the Exhibits A through E attached to Shimer's brief dated April 6, 2006?

Moreover, the apparent inability of the Receiver and his attorneys to advance any specific new argument to contradict the many other *significant arguments and points* made by Shimer in his brief dated April 6, 2006 and the Receiver's willingness to rely upon the arguments made in the CFTC's Response brief dated April 20, 2006 makes it unnecessary for Shimer to spend any significant amount of time reiterating arguments and points already on the record and also found in Shimer's Reply brief dated April 24, 2006.

The clear lack of any previous federal precedent for each and every count of the CFTC's First Amended Complaint clearly moves the Receiver's assertion of any authority whatsoever over Shimer and his legal clients into new and uncharted waters. As Shimer has meticulously

pointed out to the Court, such a venture by the Receiver without any existing precedent should be based upon a sound and thorough analysis of the purpose and intent of Congress when the Commodity Exchange Act (“CEA”) was enacted. This is particularly so in light of the clear fact that the source of all purported authority for the Receiver to ask Shimer for even the time of day is dependent upon finding some connection between the CEA and the activities of Shimer and his legal clients Shasta and Equity. The Court is reminded once again of the clear and succinct way in which the Second Circuit Court of Appeals described the purpose and intent of the CEA:

“In the 1974 Amendments to the Act, 7 USC § 1et seq., Congress established the Commodity Futures Trading Commission and set up a comprehensive scheme *for regulation of trading in commodity futures. Central to this statutory scheme is the requirement that persons actively involved in commodities trading shall be registered with the Commission.*”<sup>1</sup> (Emphasis added)

Where are the *facts* in the matter currently before the Court indicating that *any of the Equity Defendants* and/or the entity Shasta (in the words of the Second Circuit) were “actively involved in commodities trading” and, therefore, required to register in any way with Plaintiff CFTC?

The federal judiciary *is replete with similar such statements* made by Courts in other than just the Second Circuit familiar with the CEA and its legislative history. It is hardly necessary or appropriate in light of all the points previously briefed and now before the Court to now provide any such extended case list to the Court. It is clear and obvious from the Plaintiff’s own initial pleading that the *only basis* the Receiver has ever had to assert *any authority* over Shimer and Firth is derived from the specific authority Congress conferred upon Plaintiff CFTC by the CEA. Absent such authority over Shimer or any of his clients, the Receiver is without any authority to require any further document production by Shimer or any of Shimer’s previous clients.

It should also be noted that by choosing to specifically rely upon the CFTC’s Response brief dated April 20, 2006, the Receiver in his Response dated October 5, 2006 has likewise chosen to “pass” on the following question that apparently will remain forever unanswered by both the CFTC and the now the Receiver: If (according to the CFTC’s own expert witness in the *Heritage* case in which the Receiver was clearly physically present to personally hear Charlotte Ohlmiller’s testimony) members of the investing public *must open a commodity trading account at an FCM* to become “involved” in the futures market, how is it possible to sustain any

<sup>1</sup> *CFTC v British American Commodity Options Corp.*, 560 F. 2d. 135, 138 (2d Cir. 1977).

argument by the CFTC (or now the Receiver) that an entity such as Shasta *that has never opened a commodity trading account at any FCM in its name*) somehow qualifies as a commodity pool—a specialized commodity related investment entity requiring specific registration with the CFTC that was more “narrowly” defined by the CFTC over 25 years ago after extensive public comment and feedback?

Moreover Shimer’s success with respect to his current appeal is all the more likely if the Court is willing to revisit in a fair and impartial way the arguments made by Shimer in his brief dated April 6, 2006—particularly when one examines all other arguments and facts in light of the clear and unequivocal decision of the Ninth Circuit court in the apparently controlling case of *Lopez v Dean Witter Reynolds, Inc.* 805 F. 2d 880 (9<sup>th</sup> Cir. 1986). That case and its four part test has been briefed *ad nauseum* by Shimer. Further argument with respect to that particular case which the Court apparently seems inclined to treat as controlling is unnecessary at this time.

Shimer has not “waived” any argument currently before the Court as a result of Shimer’s currently pending motion for summary judgment dated April 6, 2006. All arguments offered in support of that motion were properly briefed and filed in a timely manner with the Court. That summary judgment challenge to all counts of the CFTC’s complaint goes to the very heart of the Receiver’s contention that he has any authority to compel Shimer to do anything.

Moreover the fact that the Receiver’s purported authority over Shimer does not stand on its own *but is directly derived from the CFTC’s purported authority over Shimer* only underscores and reinforces the propriety of an appeal from the Court’s previous order for Shimer to produce documents the Receiver arguably has no authority to request in the first place. The Receiver’s “waiver” argument is internally illogical and absurd. It is a transparently desperate attempt to obtain from Shimer what the Court may soon decide the Receiver has no authority to request. How can an argument properly pending before the Court be waived when the issue it presents is a matter of first impression for the federal judiciary, is well argued and briefed by Shimer and is clearly dispositive of the very issue presented by Shimer’s current appeal?

The Receiver’s reliance upon a “previous consent” argument in the face of substantial evidence and clear case law authority that challenges the very basis for his purported authority over Shimer in the first place only serves to underscore the correctness of Shimer’s position. There is nothing in the Federal Rules that precludes a party from later pointing out to the court a previous mistake or oversight. Shimer’s pending motion for summary judgment is just one such

example. Moreover the circumstances surrounding the Receiver's ability to first obtain Shimer and Firth's previous "consent" in the summer of 2004 present a literal "minefield" of potential future difficulties for legal counsel. In the interest of space the Court is specifically referred to the circumstances surrounding that consent provided in Shimer's Reply to the Receiver's Response to Shimer's request for stay pending appeal filed today. Those particular comments are hereby incorporated by this reference. Clearly lack of informed consent hardly provides a legitimate basis for subjecting Shimer or his clients to the Receiver's purported authority if there is no basis in law or fact to sustain any of the counts of the CFTC's complaint (as amended) that gave rise to this receivership in the first place!

The clear fact that all authority of the Receiver over Shimer and Firth is derived from the Plaintiff CFTC's complaint naming Shimer and Firth as defendants clearly makes Shimer's current appeal from the Court's order dated September 1, 2006 compelling tax returns appropriate and timely. The Receiver clearly lacks now and has lacked any authority over Shimer and Firth since the summer of 2004 if the counts of the amended complaint by Plaintiff cannot survive Shimer's motion for summary judgment. Clearly the effect of this dispositive motion by Shimer still pending before the Court, if granted, transcends and makes moot any previous arguments made to the Court by either the Receiver in his motion to compel tax returns or by Shimer in his filed opposition to that motion.

For all of the above cited reasons Shimer respectfully requests that his current appeal from the Court's previous order compelling production to the Receiver of certain tax returns be granted and that no further order be issued with respect to these tax returns until such time as a decision on Shimer's pending motion for summary judgment is issued by the Court.

Dated: Tuesday, October 17, 2006

Respectfully submitted,



Robert W. Shimer, Esq.  
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(610) 926-4278  
(610) 926-2600 (fax)

EXHIBIT A

--- Original Message ---

**From:** Vincent Firth

**To:** Robert Shimer

**Cc:** Alison Shimer

**Sent:** Sunday, October 15, 2006 9:35 AM

**Subject:** Bobo responses

Bob,

I have attached in pdf format, the responses from Bobo on the Stay and Appeal. The top of the page says it was filed on 10/05/2006! Why didn't we get it until a week later? US Mail does not take a week!

Also, it states of a hearing on October 20th! How do we find out if that is accurate?

by the way - if you don't have Adobe Reader, you can download it FREE from the Adobe Acrobat website. Here is the site:

[http://www.adobe.com/products/acrobat/readstep2\\_allversions.html](http://www.adobe.com/products/acrobat/readstep2_allversions.html)

Vince

Exhibit B

Affidavit of Robert W. Shimer, Esq.

I, Robert W. Shimer, hereby state that I reside at 1225 W. Leesport Road, Leesport, PA 19533 and that that I am a member in good standing of the Massachusetts Bar and do further state under oath the following:

1. That I received for the first time on Sunday, October 15, 2006 a copy of the Receiver's Response to both my previously filed request for stay pending appeal and my previously filed Notice of Appeal by e-mail as an attachment from Vince Firth.
2. That prior to receipt of that e-mail from Vince Firth I had no notice by mail or any other means that the Receiver intended to file a Response to either above cited previous filing on my part.
3. That in the afternoon of Monday October 16, 2006 I finally received by regular mail from the Receiver in Chicago a copy of his Response filing with respect to both my request for stay and notice of appeal.
4. That if the Receiver's attorneys at Pepper Hamilton mailed me a copy of the Receiver's Response from the offices of Pepper Hamilton I never received any such correspondence in the mail.
5. That all of the above statements are true and correct stated under penalty of perjury.

A handwritten signature in black ink, appearing to be 'Robert W. Shimer', written over a horizontal line.

Robert W. Shimer, Esq.

State of Pennsylvania}

}ss

County of Berks}

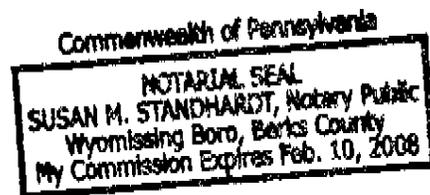
On this 17<sup>th</sup> day of October, 2006, before me, Susan M. Standhardt, a Notary Public personally appeared Robert W. Shimer who, being satisfactorily identified to me, did first state under oath that all statements contained in his affidavit are true and correct and then did execute this affidavit in my presence for the purpose stated therein.

IN WITNESS WHEREOF I have hereunto set my hand and official seal on the above stated date.

Susan M. Standhardt

Notary Public

My Commission Expires: Feb 10, 2008



**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on Tuesday, October 17, 2006 he caused copies of his Reply to the Receiver's Response to Shimcr's Appeal From Order Of September 1, 2006 Compelling Production of Tax Returns and Certificate of Service to be served upon the following parties at the address indicated below by First Class mail.

Elizabeth M. Streit, Esq.  
Commodity Futures Trading Commission  
525 West Monroe St., Suite 1100  
Chicago, Illinois 60661

AUSA Paul Blaine, Esq  
Camden Federal Building  
401 Market Street, 4th Floor  
Camden, NJ 08101

Stephen T. Bobo, Esq. (Receiver)  
Bina Sanghavi, Esq.  
Raven Moore, Esq.  
Sachnoff & Weaver, Ltd.  
10 South Wacker Drive, Suite 4000  
Chicago, Illinois 60606-7507

*On behalf Coyt E. Murray, Tech Traders, Inc. Ltd.,  
Magnum Investments, Ltd., & Magnum  
Capital Investments, Ltd.  
Cirino M. Bruno, Esq.  
Martin H. Kaplan, Esq.  
Melvyn J. Falis, Esq.  
Gusrae, Kaplan, Bruno & Nusbaum, PLLC*

***On behalf of Equity Financial Group, LLC***  
Samuel F. Abernethy, Esq.  
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