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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)**

RESPONSE OF COMMODITY FUTURES TRADING COMMISSION TO DEFENDANT SHIMER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Plaintiff Commodity Futures Trading Commission ("CFTC" or "Commission") responds to Defendant Shimer's premature and unwarranted motion to compel production of documents by the CFTC and requests that the Defendant be assessed costs and fees for filing a motion in violation of the Federal Rules of Civil Procedure and the Court's Local Rules and when the CFTC has not refused to produce most of the documents he requests, even those rendered moot by the law of this case.

Defendant Shimer states in his Motion that he consulted with some "member" of the local bar about the Local Rules concerning discovery requests, but neither he nor his unnamed consultant have followed those Rules in filing this Motion. *See* Brief in Support of Defendant Robert W. Shimer's Motion to Compel Plaintiff Commodity Futures Trading Commission to Producer [sic] Documents ("Motion to Compel") at 4. He has already been cautioned by this Court that "further failures to comply with the Local Rules will not be permitted" when he filed a brief in support of a summary judgment that was over twice the length allowed by the Local Rules without receiving leave of Court first. *See* Opinion dated October 4, 2005("Opinion") at 4, n.2. [Document 266.] Despite this instruction from the Court, Defendant Shimer filed his premature and improper motion to compel apparently without consulting those Rules again, as the motion does not attach an "affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach an agreement", as required by Local Rule 37.1(b)(1) and by Federal Rule of Civil Procedure 37(a)(2)(A). Indeed, the Defendant made no effort to consult with the Commission about his document request before filing this Motion, although he sat across the table from the

Commission's Lead Trial Attorney for an entire day on December 21, 2005 during Ms. Teague's deposition and discussed his document requests to the Receiver with the Receiver's counsel at that time. When the Commission received the Motion to Compel out-of-the-blue, it immediately tried to reach Defendant Shimer. However, he apparently filed the Motion just before leaving on an extended month long vacation in an unreachable location. *See* January 5, 2006 Letter to Robert Shimer from Elizabeth M. Streit, attached as Exhibit A hereto and Brief in Support of Defendant's Opposition to the Temporary Equity Receiver's Motion to Compel Robert Shimer to Produce Tax Returns at 13. [Document 296]. Thus, the Commission has been forced to respond to his Motion although it is likely that the parties could have resolved many of the issues concerning his Document Request without Court intervention. Because of his failure to follow the Local Rules yet again, the Commission requests that the Court deny his motion to compel outright and assess the Commission's fees and costs in responding to the Motion in accordance with Federal Rule of Civil Procedure 37(a)(4)(B). *See Avent v. Solfaro,* 210 F.R.D. 91, 94-95 (court denies motion to compel filed by *pro se* incarcerated plaintiff who had not conferred with the opposing party before filing the motion, noting "[t]he above rules require parties to 'make a genuine effort to resolve the dispute' before resorting to a court's involvement. The 'meet-and-confer' requirement 'embodies a policy of encouraging voluntary resolution of pretrial disputes, in the interest of judicial and client economy and effective processing of cases.'")(citations omitted.)

Even if the Court considers Defendant Shimer's motion on its merits, it should be denied. Although Defendant Shimer's document requests are vague and overbroad, the Commission

agreed to produce documents in response to 35 of his 44 requests.[1] The only requests that the Commission did not agree to respond to involved requests that went solely to the Original Complaint, (*see* Requests 3, 4[2], 5, 9, 11, 12, and 13), Requests that were vague and overbroad (Request 21), Requests that called for solely privileged materials (Requests 24 and 27) and Requests that call for the creation of documents that do not already exist. (Requests 13a and 44).[3]

The Commission did not agree to produce documents that were solely responsive to the Original Complaint because that Complaint has been superseded by the First Amended Complaint, which greatly expanded the allegations against the original Defendants and added new parties. Defendant Shimer's Motion argues that because the Statutory Restraining Order was obtained on the allegations of the Original Complaint, documents relating solely to that Complaint are somehow relevant to the current action. But Defendant Shimer misses the point. The First Amended Complaint greatly expanded the allegations against Defendants Shimer, Firth and Equity Financial Group, LLC – if the Original Complaint, which contained fewer allegations and details of the fraud, was adequate to support the Statutory Restraining Order, the First Amended Complaint certainly is. Moreover, the Defendant has entered into a Consent Preliminary Injunction with the Commission which incorporates the Statutory Restraining Order.

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[1] Although he labels his request 1 through 44, 13 is actually three requests, labeled 13, 13a and 13b, Request 38 is identical to Request 36 and there is no Request 37.

[2] The Commission neglected to insert its Response to this Request in its Responses. Its response to Request 4 is the same as its responses to Requests 3 and 5.

[3] However, as its response to Request 13a, which asks the Commission to "name" people the Defendants defrauded, the Commission reminded Defendant Shimer that it had already provided a list of all Shasta investors in its Initial 26(a) Disclosures that were provided to all parties. The Commission also notes that Defendant Shimer's requests for the lists in Requests 13a, 13 b and 44 are an attempt to evade the limit of 25 Interrogatories set forth in Fed. R. Civ. P. 33 and agreed to by the parties in their Joint Report Of Rule 26(f) Scheduling Conference. Defendant Shimer has already served 25 Interrogatories on Plaintiff, which have been fully responded to.

The Defendant has not sought to overturn that Consent Preliminary Injunction. He **has** filed both a motion to dismiss the First Amended Complaint and a Motion for Summary Judgment, both of which have been denied. It is that First Amended Complaint which is operative here and which the Defendant needs to defend against. If he is indeed an individual of "limited resources" as he claims, he should use those resources seeking documents in support of the Complaint the Plaintiff seeks to prove, not a superseded one. Such documents are not relevant to this action, nor are they calculated to lead to the discovery of admissible evidence.

Defendant Shimer also complains about the Commission's response to his first 13 Requests and Request 16, ignoring the fact that the Commission has agreed to produce documents in response to many of those requests. The Commission has agreed to produce many of these documents despite the fact that many of these requests go to Defendant Shimer's rejected argument that Shasta was not a commodity pool because it did not directly trade commodity futures contracts in a futures commission merchant ("FCM") account in its own name. That argument has already been rejected by this Court.[4] To seek documents in support of information that is irrelevant to the live issues of this case is improper and unduly burdensome to the Plaintiff. In a case in which a defendant lost a motion to dismiss which challenged the Internal Revenue Service's federal taxing power, and then moved to compel the production of documents and answers to interrogatories that went to that issue, the court denied the motion to compel noting:

> [B]eyond seeking irrelevant and therefore inadmissible material, the request can also be characterized as one seeking a legal justification and argument rather than discoverable

[4] *See* Opinion at 10: "Defendants go to great lengths to argue that because the Shasta funds were not traded 'in the name of Shasta,' Shasta does not satisfy the fourth factor of the Lopez test and cannot be a commodity pool. Defendants' reading of the Lopez Court's language is far too literal……Besides arguing that Tech Traders did not invest Shasta's funds 'in the name of Shasta,' Defendants raise no evidence to suggest that Shasta is not a commodity pool."

> evidence. The government has already prevailed on these legal claims at the dismissal stage; discovery is not the proper forum to draw such arguments out further.
>
> At base, Defendants' requests involve burdens and expenses that clearly outweigh their likely benefit, given the availability of legal materials to the Defendants and the unimportance of the proposed discovery in resolving the issues at stake in this litigation. *See* Fed.R.Civ.P. 26(b)(2). The government has already responded to Defendants' motions to dismiss, in which they challenged the federal government's taxing jurisdiction over them. The Court rejected Defendants' arguments then, and it will not now issue an order compelling the government to respond to such arguments again through the improper and unduly burdensome route of discovery.

The United States of America v. Walton, 1997 WL718478 (W.D.N.C. 1997), attached as Exhibit B.

Thus, although the Commission has told Defendant Shimer that it will respond to those of his Requests 1 through 13 and 16 that do not relate solely to the Original Complaint, the production of such documents is not going to add anything meaningful to the real issues in this case. Defendant Shimer is just rearguing his motion to dismiss through the vehicle of a discovery request. The Plaintiff does not dispute that the trading accounts were not in the name of Shasta- the fact that they were in the name of Tech Traders is the basis of the Commission's Regulation 4.30 charge and its claim that Defendant Shimer aided and abetted that violation. The Plaintiff also does not dispute that Tech Traders made all the trading decisions for the "superfund" of which Shasta was a part. And Defendant does not dispute that, except for the fees taken out by Equity Financial, all the Shasta investors' funds passed through Shimer's attorney escrow account and were deposited in Tech Trader's bank account. *See* Shimer's Statement of Uncontested Facts at 2 ("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."). Some of that money was then transferred to Tech Trader's FCM accounts.

Because these are not disputed facts, the production of the voluminous bank and trading records which show this flow of money[5], is pointless and overly burdensome.

Nonetheless, the Commission was willing to make these voluminous documents available to Defendant Shimer at its offices in Chicago. However, it would be overly burdensome and expensive to produce the documents anywhere else. The Commission cannot send original documents to New Jersey and it would be time consuming and disruptive to the Commission's operation and prohibitively expensive to copy them all. In light of the limited utility of these documents to the unresolved issues of this case, the Court should require that Defendant review these documents at the Commission's office in Chicago or deny the Defendant's motion to compel documents responsive to requests that go to issues that have already been resolved in this case.

Besides Requests 1 through 13 and 16, Defendant Shimer does not refer specifically to any of his other 30 document requests, to many of which the Commission said it would produce documents.[6] Many of these requests are vague. It is unclear to the Commission what the Defendant is requesting. Because many of these requests are so vague, the Commission proposed to open all its non-privileged files to the Defendant and allow him to copy any he found relevant. However, he states that because of his "limited financial resources" and the "time burden" on him, the Commission should ship its extensive file across the country to him. If Defendant Shimer had the financial resources and time to take an extended month long

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[5] See Declaration of Joy McCormack, attached as Exhibit C hereto.

[6] Before the Defendant filed his Motion, Commission staff had already spent considerable time reviewing and pulling potentially responsive documents from its files. It also circulated Defendant's Document Request to all its Divisions and Offices seeking any other potentially relevant documents and made sure it had any potentially relevant documents gathered in one location. *See* Exhibit C at ¶ 2.

vacation in an unreachable location[7], a trip to Chicago should not be a burden to him. It would be extremely burdensome, disruptive to the Commission's business and time consuming to ship the voluminous records that might be responsive to Defendant Shimer's overbroad and vague requests. Therefore, the Commission requests that the Court order the Defendant to come to Chicago to review the Commission's files and arrange for photocopies at his expense or require Defendant to consult with Plaintiff, as he should already have done, in an attempt to narrow his requests.

Although he is representing himself *pro se*, Defendant Shimer is an attorney who has been licensed to practice law for over 32 years. *See* Shimer Deposition Transcript Excerpts, attached as Exhibit D hereto. His continued failure to follow the Local Rules is inexcusable and has caused both the Commission and this Court undue expense and time yet again. It is particularly outrageous that he filed a motion to compel, after spending an entire day with the Commission's counsel without discussing his document request, then took off for an entire month and became unreachable. Because of his repeated flaunting of the rules, the Commission requests its costs and fees in responding to his unwarranted Motion to Compel.[8]

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[7] The Commission is concerned about the source of funds financing Defendant Shimer's extensive vacation as his assets are supposed to be frozen and he claims to have no current source of income.

[8] The Commission notes that the Defendant responded to the Commission's very focused twelve document requests to him by producing two emails from investors and stating that they were "typical of the email sent to six other investors in Shasta" without producing those six emails and producing no other documents. Before the Commission asks the Court to intervene in this dispute, it will await Defendant's return and consult with him in an attempt to reach agreement, as required.

Date: January 20, 2006

Respectfully submitted,

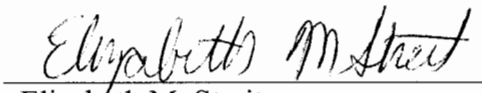

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EXHIBIT A

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DIVISION of
ENFORCEMENT

January 5, 2006

Robert Shimer
1225 W. Leesport
Leesport, PA 19533

Re: CFTC v. Equity Financial Group, et al., Case No. 04-CV-1512-RBK (D.N.J.)

Dear Mr. Shimer:

I was surprised to learn that you had filed a motion to compel concerning your document request without consulting with me first. Maybe you are unaware of the duty to confer with opposing counsel before you file discovery motions. That is the rule in every jurisdiction in which I have practiced, and the District of New Jersey is no exception – please see Local Rule 37.1(b)(1) which requires that "[d]iscovery motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach an agreement."

I believe that if you had called me, we could have worked out at least some of the issues you raise in your motion. For instance, your statement in your brief that I have "refused" to produce any documents in response to your requests numbered 1 through 13 and 16 is simply wrong – despite my objections to the relevancy of many of your requests, I did agree to produce documents in response to your requests numbered 1, 2, 6, 7, 8, 10, 13b and 16. I also told you in response to 13a what document **does** exist that is responsive to your request.

Your other issue appears to be with our production of documents here in Chicago. Because so many of your requests are very broad and/or vague, we do not know exactly what you are looking for. Our paper file alone is well over 250,000 documents. It would be logistically and financially overburdensome for us to ship our entire file to New Jersey. We thought we would let you have access to our entire non-privileged, relevant file here and let you make copies of whatever you want. If you cannot swing that financially, then we need to talk about narrowing your requests to obtain a smaller subset that we can copy and send to you.

As for your responses to our document request and requests to admit, I request a conference with you. Again I would hope that we can work out at least some of the issues so that we don't have to involve the Court in all of our discovery disputes.

I attempted to email you the text of this letter but received a reply that your mailbox is disabled. Your response to the Receiver's motion to compel indicates that you are apparently on an extended month long vacation and are not reachable. I also tried to call you yesterday but just

EXHIBIT A

received an answering machine. It is unfortunate that you filed your motion without consulting with me first, as you could have saved both of us, and the Court, a lot of time.

Please call me when you return to the country so that we can confer about your responses to our document request and requests to admit.

Sincerely,

Elizabeth M. Streit
Lead Trial Attorney

EXHIBIT B

Not Reported in F.Supp., 1997 WL 718478 (W.D.N.C.), 80 A.F.T.R.2d 97-6586, 97-2 USTC P 50,734

(Cite as: 1997 WL 718478 (W.D.N.C.))

H

Motions, Pleadings and Filings

United States District Court, W.D. North Carolina.
UNITED STATES OF AMERICA, Plaintiff
v.
Barbara Akers WALTON, Burnell J. Walton, Robert C. Akers, The Divine Mission Company, Neilson Investment Company, Cambridge Trust Company, Ltd., Ellenson Company, Carolina Management Company, Colonial Heritage Corp., and Oxford Charter Corp., Defendants.
No. Civ 1:94CV207.

Aug. 22, 1997.

Lawrence P. Blaskopf, Department of Justice, Washington, D.C. for plaintiff.

Barbara Akers Walton, Burnell J. Walton, Waynesville, N.C., pro se.

MEMORANDUM AND ORDER

THORNBURG, J.

*1 **THIS MATTER** is before the Court on Plaintiff's Motion for Partial Summary Judgment, filed July 7, 1997. Defendants Barbara Akers Walton and Burnell J. Walton timely responded to Plaintiff's Motion by separate but essentially similar memorandums filed July 30, 1997. For the reasons set forth below, Plaintiff's summary judgment motion will be denied.

I. BACKGROUND

In this civil action, the United States alleges that the Defendants engaged in a fraudulent scheme to evade their federal income tax liability for the years 1980, 1981 and 1982. The scheme is said to involve the Waltons transferring real estate to sham holding entities so as to place those assets beyond the reach of the Internal Revenue Service ("IRS"). The Waltons, who are proceeding *pro se,* have maintained throughout the litigation that the IRS has no power to tax them. Further, they have insisted that they did not engage in any fraudulent transfers of assets and that they received no taxable income in the years 1990-1982.

In moving for summary judgment, the United States seeks to have the Court adjudge Defendant Burnell Walton indebted in the total amount of $614,072.44 as of June 30, 1997, and Barbara Akers Walton indebted in the total amount of $2,407,855.99. Those amounts reflect the total sums, including deficiencies, fines, and interest, that the IRS has now assessed against the Defendants. See Exhibits A & B, Declaration of Lawrence P. Blaskopf, *attached to* Plaintiff's Motion for Partial Summary Judgment, filed July 7, 1997. The United States contends that by showing these timely assessments, it has established a *prima facie* case entitling it to have these assessments reduced to enforceable judgments.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue of material fact and judgment for the moving party is warranted as a matter of law. Fed.R.Civ.P. 56(c). A genuine issue exists if a reasonable jury considering the evidence could return a verdict in favor of the non-moving party. Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.1994) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

The moving party has the initial burden to show a lack of evidence to support its opponent's case. *Shaw, supra,* (citing *Celotex Corp., v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). This showing does not require the moving

EXHIBIT B

party to prove the absence of a genuine issue of material fact but only note its absence. *Holland v. High-Tech Collieries, Inc.*, 911 F.Supp. 1021, 1025 (N.D.W.Va.1996) (citing *Celotex, supra*). If this showing is made, the burden then shifts to the non-moving party, who must convince the Court that a triable issue does exist. *Shaw, supra.* Such an issue will be shown "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* A "mere scintilla" of evidence will not suffice to defeat summary judgment. *Id.*

***2** In considering the facts of the case for the purposes of a summary judgment motion, the Court views the pleadings and materials presented in a light most favorable to the non-moving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Where facts are in legitimate dispute, such disputes are resolved in favor of the non-moving party. *Id.*, at 587; *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir.1995).

B. Application

The IRS is correct in stating that it may establish *a prima facie* case by showing that timely assessments were made against a taxpayer. *See, e.g., United States v. Pomponio* [80-2 USTC ¶ 9820], 635 F.2d 293, 796 (4th Cir.1980). This is so because, as a general matter, "the Commissioner's determination of deficiency is presumed correct, and the taxpayer bears 'the burden of proving it wrong.' " *Cebollero v. C.I.R.* [92-2 USTC ¶ 50,327], 967 F.2d 986, 990 (4th Cir.1992) (quoting, *Welch v. Helvering* [3 USTC ¶ 1164], 290 U.S. 111, 115, 54 S.Ct. 8, 78 L.Ed. 212 (1933)). Of course, where this presumption is in fact established, it will not fall asunder at the summary judgment stage to "a bare allegation by the taxpayer in an affidavit that the underlying income is not taxable....." *United States v. Fetter* [97- 2 USTC ¶ 50,617], 1997 WL 433521, *3 (D.Or. June 24, 1997).

The presumption, however, will not arise in the first instance where the "Commissioner has no evidence that the Taxpayer [ ]actually received income during the periods at issue." *Williams v. Commissioner* [93-2 USTC ¶ 50,404], 999 F.2d 760, 764 (4th Cir.), *cert. denied,* 510 U.S. 965, 114 S.Ct. 442, 126 L.Ed.2d 376 (1993). *See Weimerskirch v. Commissioner* [79-1 USTC ¶ 9359], 596 F.2d 358, 361, 362 (9th Cir.1979) (Commissioner may not rely on presumption of correctness of deficiency "in the absence of a minimal evidentiary foundation" beyond IRS calculations, such as "by showing net worth, back deposits, cash expenditures, or source and application of funds"): *Portillo v. Commissioner* [91-2 USTC ¶ 50,304], 932 F.2d 1128, 1133 (5th Cir.1991) (no presumption of correctness arises where notice of deficiency lacked any "ligaments of fact" and Commissioner relied solely upon naked assertion); *Tokarski v. Commissioner* [CCH Dec. 43,168], 87 T .C. 74, 1986 WL 22155 (1986) (before presumption given effect in unreported illegal income case, Commissioner must come forward with evidence linking the taxpayer to an income producing activity where there was no evidence that the Taxpayer had received anything during the period at issue).

In other words, before the Commissioner's records of assessments based on unreported income can be found presumptively correct, the Government must establish a foundation linking the taxpayer with some underlying "tax generating activity." *Gold Emporium, Inc. v.. Commissioner* [90-2 USTC ¶ 50,443], 910 F.2d 1374, 1378 (7th Cir.1990): *see United States v. Smith,* 950 F.Supp. 1394, 1399 (N.D.Ind.1996) (same). Where no such link is established, a court is presented with a " 'naked' assessment without any foundation whatsoever," which may be " 'without rational foundation and excessive,' and not properly subject" to the presumption of correctness. *United States v. Janis* [76-2 USTC ¶ 16,229], 428 U.S. 433, 441, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) (emphasis in original). Here, the IRS has submitted certified records of assessments against the Defendants, but it has not submitted evidence in support of summary judgment linking those Defendants to any tax-generating activity. "Because the foundation for all of the assessments is not properly before the

court, the United States is not entitled to a judgment with respect to those assessments." *United States v. Hatfield* [96-2 USTC ¶ 50, 342]. 77 A.F.T.R.2d 96-1969, 1996 WL 153636, *6 (N.D.Ill.1996).

***3** If, at trial, the Commissioner adduces evidence linking the Defendants' assessments to taxable activities and income, the presumption of correctness will arise. "This burden is not substantial and requires only a minimal evidentiary foundation." *Smith,* 950 F.Supp. at 1399. Defendants will then have the opportunity to show, by a greater weight of the evidence, that the Commissioner's assessment was "arbitrary."

> That burden remains with the taxpayer, and never shifts to the government. If the taxpayer proves that the determination is arbitrary, the presumption of correctness vanishes. The trial then enters a second phase in which the issue is the correct amount of the deficiency. The government bears the burden of persuasion during this second phase.

Cebollero [92-2 USTC ¶ 50,327], 967 F.2d at 990 .

Thus, once the IRS presents a "minimal evidentiary foundation" linking its assessments against Defendants to some taxable activity, the Defendants will have the chance of producing evidence showing the *amounts* assessed against them to be arbitrary. If the Defendants do not show by a preponderance of the evidence that the Commissioner's determinations are arbitrary, those determinations *will* be presumed correct and the Court will not further inquire into the proper amount of the deficiency. To uphold the Commissioner's assessments as being not "arbitrary," the Court need only find that those assessments fall somewhere between "arbitrary and capricious" and "supported by substantial evidence ." *Selbe v. United States* [95-2 USTC ¶ 50,400], 899 F.Supp. 1524, 1525 (W.D.Va.1995); *Granse v. United States* [96-2 USTC ¶ 50,514], 892 F.Supp. 219, 223 (D.Minn.1995), *Lavnikevich v. United States* [88-2 USTC ¶ 9409], 692 F.Supp. 1437, 1439 (D.Mass.1988); *Loretto v. United States* [78-1 USTC ¶ 9110], 440 F.Supp. 1168, 1170 (E.D.Pa.1977). In essence, then, to show that the assessments are arbitrary, the Defendants must convince the Court by a preponderance of the evidence that the amount of the Commissioner's assessment is not rationally related to the amount that Defendants owe due to their failure to pay income taxes and the associated fines and penalties arising therefrom. *Once the IRS establishes its entitlement to a presumption of correctness, this will be the sole issue for trial concerning the Walton's tax liability.* An accompanying Order entered by the undersigned on this date establishes that both the Carolina Management Company and the Divine Mission are/were shell entities established by the Waltons as part of a plan to frustrate IRS collection efforts. That issue being determined, it will not be subject to argument or evidence at trial.

Nor will the Defendant Waltons, or Defendant Akers, be permitted to argue that the Commissioner's determination was "arbitrary" on the basis that the Defendants and their business dealings are immune from the federal taxing power. In fact, this Court earlier rejected as frivolous Defendants' assertions that they are not subject to the taxing power of the federal government or the jurisdiction of this Court. *See* Memorandum and Order, filed September 27, 1995, at 6-7. And, in a subsequent Order, the Court advised that further filings setting forth these unfounded, frivolous arguments would not be tolerated, and that "failure to comply with this directive will result in the imposition of sanctions." Order, filed November 1, 1995, at 3. As that Order set forth, Federal Rule of Civil Procedure 11 in pertinent part provides:

> ***4** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney *or unrepresented party* is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law

or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
Fed.R.Civ.P. 11(b) (emphasis added).

The Defendant Waltons, in responding to the Government's call for summary judgment, have once again advanced the same frivolous arguments they were warned not to make at risk of violating Rule 11. By so doing, they expose themselves to sanctions.

The Court hereby gives notice to Defendants Barbara Akers Walton and Burnell J. Walton that pending resolution of this suit on the merits, the Court will provide them with an opportunity to show cause why sanctions should not issue against them for violating the Court's clear warnings to desist from making frivolous arguments as to their immunity from the federal taxing power. Those arguments, in summary, contend that the federal government lacks jurisdiction to collect income taxes because: (1) Defendants' ideological status insulates them from the federal taxing power; (2) Defendants' cannot be taxed because they did not file tax returns for the subject years; and (3) some constitutional infirmity impairs the power of the IRS to assess taxes in the first instance.

Failure to show just and reasonable cause will result in the issuance of Court-ordered sanctions pursuant to Fed.R.Civ.P. 11(c). The Defendants are also hereby warned that they will not be allowed to make such frivolous arguments at trial; those arguments are no longer viable in this case, and Defendants will not be permitted to impede the fact-finding mission of this Court by arguing them further before the jury.

III. ORDER

IT IS, THEREFORE, ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED that following trial Defendants Barbara Walton and Burnell J. Walton appear and show cause why sanctions should not be imposed upon them for continuing to file frivolous arguments in direct contravention of prior Court warnings to desist therefrom.

ORDER

THIS MATTER is before the Court on several motions of the parties. Defendants Barbara Walton, Robert Akers, and B.J. Walton filed motions to compel on July 2, 1997. The United States responded to those motions July 3, 1997. Defendant Robert Akers filed his motion to continue the above-captioned trial from the September trial calendar August 13, 1997. The United States filed a motion for sanctions for discovery misconduct June 19, 1997.

***5** For the reasons set forth below, the Defendants' motions will be denied and the Plaintiff's motion granted.

I. DISCUSSION

A. Motions to Compel and to Continue

The Defendants' motions to compel allege that the United States should be ordered to answer various interrogatories and requests for production. According to the Defendants, the United States has abused the discovery process by objecting to and failing to satisfy Defendants' requests and inquiries. The Court has reviewed the Defendants' interrogatories and requests for admission as well as the government's response thereto and concludes that Defendants' complaints are misplaced. The government has, simply, refused to respond to requests that it produce legal justifications for its actions. One such typical request seeks "documentation from the legislature of North Carolina surrendering jurisdiction to ... the United States." United States' Responses to Barbara Walton's Request for Production of Documents at 22, *attached to* Barbara Walton's Motion to

Compel. The United States objects to that request "on the basis that the information sought is not reasonably calculated to lead to the discovery of admissible evidence." *Id.*

The response of the United States is appropriate, given that this Court has already rejected Defendants' challenges to the federal taxing power at the dismissal stage. Defendants' request seeks information irrelevant to the live issues of this case, which at this point are the nature, scale and status of Defendants' federal tax liability--not the taxing jurisdiction of the federal government over North Carolina residents. Moreover, beyond seeking irrelevant and therefore inadmissible material, the request can also be characterized as one seeking a legal justification and argument rather than discoverable evidence. The government has already prevailed on these legal claims at the dismissal stage; discovery is not the proper forum to draw such arguments out further.

At base, Defendants' requests involve burdens and expenses that clearly outweigh their likely benefit, given the availability of legal materials to the Defendants and the unimportance of the proposed discovery in resolving the issues at stake in this litigation. *See* Fed.R.Civ.P. **26(b)(2)** The government has already responded to Defendants' **motions** to **dismiss**, in which they challenged the federal government's taxing jurisdiction over them. The Court rejected Defendants' arguments then, and it will not now issue an order compelling the government to respond to such arguments again through the improper and unduly burdensome route of discovery.

Accordingly, Defendants' motions to compel will be denied. Defendant Aker's motion for a continuance, based on the same alleged discovery abuses, will likewise be denied.

B. Motion for Sanctions

The Government has moved for sanctions pursuant to Fed.R.Civ.P. 37(b)(2)(A) based on the failure of a representative of Carolina Management Company or The Divine Mission to appear for noticed depositions. On May 13, 1997, the United States served notice on the parties of this case that it would be taking the depositions of representatives of Carolina Management Company and The Divine Mission in Asheville on June 10, 1997. *See* Exhibit A, Notice of Depositions, *attached to* Motion for Sanctions, filed June 20, 1997. According to Albert S. Lagano, attorney for those two entities, notice was not served on their present trustee or trust officer, though the identity of that trustee was known to the government. Because the Defendants do not plan to call those non-party persons as witnesses, attorney Lagano suggests that the government subpoena them. At the same time, Lagano opines that the reason no "representatives" showed up for the deposition is that no current representatives with knowledge of the matters noticed in the deposition in this case exist. Accordingly, counsel concludes, there are no grounds for sanctions.

***6** As has been noted by defense counsel, Fed.R.Civ.P. 37(b)(2) permits sanctions for failure to make discovery or to cooperate in discovery where such failure is in contravention of a court-entered order to compel such cooperation. *See* Fed.R.Civ.P. 37(a), (b). Yet the Court also possesses the power to enter sanctions for failure to appear for a properly noticed deposition, Fed.R.Civ.P. 37(d). Counsel for the Defendants admits that he was noticed for a deposition of a "representative" of the Divine Mission and Carolina Management Company, but he complains that no notice was served upon the trustee of Carolina Management or The Divine Mission. Of course, the duty to discern who shall represent an entity is *not* the duty of party seeking discovery of it--it is the duty of the entities themselves, and their legal counsel.

> A party may in the party's notice ... name as the deponent a public or private corporation or a partnership or association ... and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the

> matters on which the person will testify.... The person so designated shall testify as to matters known or reasonably available to the organization.

Fed.R.Civ.P. 30(b)(6).

The Government's notice of depositions in this case specifies matters of particularity to be discussed (the real estate at issue in this case) and more general issues as well ("the contributions of assets to these entities, the expenditures of assets by these entities, and the organizational structures of these entities") (Exhibit A to Plaintiff's Motion for Sanctions, filed June 20, 1997). When served with this notice, Lagano plainly failed to designate witnesses who might be available for deposition. Moreover, while counsel has informed the Court that Carolina Management and The Divine Mission have a trustee, Lagano failed to produce that trustee for deposition on the basis that such trustee is not a named party to the action nor is the trustee "representing" the entities in this lawsuit. And, remarkably, Lagano now states to the Court that neither Carolina Management or the Divine Mission has any representatives whatsoever.

That claim is belied by the record. Mr. Lagano, the attorney who claims that there are no representatives of The Divine Mission and Carolina Management Company, has already been declared their "representative" in all matters relating to the taxes due of the Waltons. *See* Exhibit C, Power of Attorney and Declaration of Power of Attorney, *attached to* United States' Response In Opposition to Carolina Management Company's, the Divine Mission's and Ellenson Company's Motions to Dismiss. Furthermore, Lagano has identified a rather obvious "representative" who possesses responsive knowledge in the form of Edgar W. Cox, Jr., whom Lagano identified as trustee of the two entities. Of course, the fact that Cox is not named as a party, or has not been subpoenaed, does nothing to change that reality. The Divine Mission and Carolina Management Company were noticed for a deposition in a location convenient to the situs of the properties allegedly owned by them, and it was their duty to designate and produce knowledgeable representatives as requested. Objections to the form or place of the deposition could have been dealt with by application for a protective order. See Fed.R.Civ.P. 37(d) (Failure to appear "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).") Instead, Lagano called on the appointed day to report that no representative would be appearing. Once the Government informed Lagano that it would be seeking the applied-for sanctions for the failure of The Divine Mission and Carolina Management Company to appear, Lagano stated that he would consider the matter over the weekend and call the Government back. He never did.

*7 The failure of The Divine Mission and Carolina Management Company to appear for a properly noticed deposition was in violation of Fed.R.Civ.P. 37(d). The Court is therefore empowered to make such orders in regard to that failure as are just, including:

> An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

Fed.R.Civ.P. 37(b)(2)(A).

The behavior of The Divine Mission and Carolina Management Company in this matter suggests that the interests of justice will be served by the Court's establishment of the following facts as true for the purposes of this case:

(1) that Carolina Management Company and The Divine Mission were established as part of a plan to frustrate the Internal Revenue Service's ability to collect income taxes from Barbara Akers Walton and Burnell J. Walton;

(2) that The Divine Mission and Carolina Management Company were effectively controlled by Barbara Akers Walton, Burnell J. Walton and/or Robert C. Akers:

(3) that The Divine Mission and Carolina Management Company were not obligated to pay

consideration for the properties at issue in this case that are in the name of those entities; and

(4) that The Divine Mission and Carolina Management Company did not pay consideration for properties at issue in this case held in the name of those entities.

The Defendants are warned that these facts will not be subject to dispute at trial.

II. ORDER

IT IS, THEREFORE, ORDERED that the motions to compel filed by Defendants Barbara Walton, Robert Akers, and B.J. Walton be, and hereby are **DENIED.**

IT IS FURTHER ORDERED that Defendant Robert Akers' motion to continue be, and is **DENIED.**

IT IS FURTHER ORDERED that the Plaintiff's motion for sanctions for discovery misconduct be, and hereby is **ALLOWED.**

Not Reported in F.Supp., 1997 WL 718478 (W.D.N.C.), 80 A.F.T.R.2d 97-6586, 97-2 USTC P 50,734

Motions, Pleadings and Filings (Back to top)

• 1:94CV00207 (Docket) (Nov. 08, 1994)

END OF DOCUMENT

EXHIBIT C

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

I, Joy McCormack, hereby declare as follows:

1. I've been assigned as the investigator to the investigation conducted by the Division of Enforcement in the case of CFTC v. Equity Financial Group, et al. During the course of this case, I have requested, subpoenaed and otherwise received voluminous pages of records.

2. Upon receiving and reviewing Defendant Shimer's Request to Produce Documents, in due diligence to respond to Defendant Shimer's request, I spent several hours of time as follows:

a. discussed with counsel and paralegal on the case;

b. to locate potentially responsive documents, assisted in the circulation of the request to the entire Commission;

c. preliminarily reviewed entire case file for potentially responsive categories of documents; and

d. reviewed file for quantity of potentially responsive documents.

3. Assuming I have correctly interpreted what documents the request seeks, then it appears that the potentially responsive documents would exceed 250,000 pages.

4. This estimate does not include a review of electronic media, such as cd-rom or floppy disks. There are an estimated 20 cd-rom, 1 zip drive and 10 floppy disks in this file. As I understand it, each megabyte of data may contain approximately 500 pages of information. Using that formula, our file could contain an additional 4.4 million pages of information which would need to reviewed to determine whether they fall within the scope of Defendant Shimer's request.

EXHIBIT C

Dated: January 20, 2006

Joy H. McCormack
Investigator

EXHIBIT D

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.	)	Civil Action No. 04-1512

The discovery deposition of **ROBERT W. SHIMER**, taken pursuant to notice and the Federal Rules of Civil Procedure for the United States District Courts, reported by Susan Soble, a Certified Shorthand Reporter and Notary Public for the County of Cook and State of Illinois, at 525 West Monroe Street, Suite 1100, Chicago, Illinois, on Tuesday, October 18, 2005, at the hour of 9:10 o'clock a.m.

SUSAN SOBLE ASSOCIATES, P.C.
Certified Shorthand Reporters
1460 North Clark Street - 2611
Chicago, Illinois 60610
(312) 988-9868

EXHIBIT D

A Post high school, I graduated from Rutgers University in 1969.

Q What was your degree in?

A Bachelor of Arts.

Q In what?

A History.

Q Any further education, formal training after that?

A I received a JD from Boston University in 1973.

Q Any other post graduate work?

A No.

Q Have you received any kind of training in financial investments?

A Training. Well, training in financial investments. I assume you may be referring to the fact that I did take the Series 3 test at one time and passed it.

Q Have you taken any other exams in the financial area such as the Series 7?

A No.

Q And you were registered at one time in the futures industry?

A Apparently so, yes.

Q You say apparently so. Why do you say apparently so?

A Well, I passed the test. There was a friend of

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, Susan Soble, Certified Shorthand Reporter for the State of Illinois and County of Cook, do hereby certify that I reported in shorthand the proceedings had in the above-entitled cause, and that the foregoing is a true and correct transcript of said proceedings.

In witness whereof, I have hereunto set my hand and affixed my seal at Chicago, Illinois, this 25th day of October, 2005.

"OFFICIAL SEAL"
Susan Soble
Notary Public, State of Illinois
My Commission Exp. 09/02/2006

Susan Soble

Susan Soble, C.S.R. #84-902
Notary Public.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

- - -

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.

Wednesday, November 16, 2005

Volume V

Continued oral deposition of ROBERT W. SHIMER, taken pursuant to notice, was held in the offices of Pepper Hamilton, 3000 Two Logan Square, 18th & Arch Streets, Philadelphia Pennsylvania, commencing at 9:15 a.m., on the above date, before Frances A. Valiante, a Professional Court Reporter and Notary Public.

- - -

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Philadelphia, Pennsylvania 19103
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ORIGINAL

report a murmur, so you have to audibly say yes.

A. Yes.

Q. Have you spoken with anyone other than of your wife regarding your deposition?

A. No.

Q. What is your birth date?

A. March 23, 1946.

Q. You are a lawyer, right?

A. Yes.

Q. In which States have you taken the bar exam?

A. Massachusetts.

Q. When did you pass the bar in Massachusetts?

A. 1973.

Q. Do you keep your Massachusetts license current?

A. Yes.

Q. When were you admitted to the U.S. Supreme Court?

A. I don't recall, I think in 1982.

Q. How did that come about?

C E R T I F I C A T E

I hereby certify that the witness was duly sworn by me and that the deposition is a true record of the testimony given by the witness.

Frances A. Valiante

Frances A. Valiante
Dated: November 30, 2005

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or supervision of the certifying shorthand reporter.)

CERTIFICATE OF SERVICE

The undersigned non-attorney, Venice Bickham, does hereby certify that on **January 20, 2006** she caused a true and correct copy of the foregoing *Response of Commodity Futures Trading Commission to Defendant Shimer's Motion to Compel Production of Documents* to be served upon the following persons via regular U.S. Mail:

On behalf of Coy E. Murray, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd.
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Venice Bickham
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