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U.S. DISTRICT COURT
DISTRICT OF NEW JERSEY
LEESPORT, PA

**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

Defendant's Statement of
Material Facts Pursuant To
L. Civ Rule 56.1

Defendants.

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Pursuant to L.Civ.R 56.1, Defendant Robert W. Shimer submits the following Statement of Material Facts in support of his motion for summary judgment:

MATERIAL FACTUAL STATEMENTS OFFERED BY DEFENDANT SHIMER THAT ARE NOT DISPUTED BY PLAINTIFF:

1. The Ninth Circuit Court of Appeals case of *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir, 1987) is controlling case law with respect to the issue of whether an entity is a "commodity pool".
2. Lopez formulated a four-part test and pursuant to the holding of *Lopez*, all four parts of that test have to be found to exist in order for an entity to qualify as a commodity pool.
3. The first test required by Lopez is that funds of various investors are combined into a single account for the purpose of investing in commodity futures.

4. The second test required by Lopez is that the common funds in that single account are used to execute transactions on behalf of the entire account.
5. The transactions referred to in test #2 are commodity futures trades.
6. The account referred to in test #2 is the same account referred to in test #1.
7. The fourth test required by the Lopez Court is that the "transactions" referred to in Test #2 (the trading of commodity futures contracts) are "traded by a commodity pool operator *in the name of the pool* rather than in the name of an individual investor." (Emphasis added).
8. Commodity futures were never traded in the name of Shasta Capital Associates, LLC from any sub account of Defendant Robert W. Shimer's attorney escrow account at Citibank.
9. Funds deposited to Robert W. Shimer's attorney escrow account by members of Shasta Capital Associates, LLC ("Shasta") did not ordinarily remain in that account for more than several days but were immediately transferred elsewhere as instructed.
10. The sub-escrow bank account of Defendant Robert W. Shimer's attorney escrow bank account at Citibank was the only account ever opened in the name of Shasta.
11. Shasta never opened or maintained any trading or bank account other than the sub-escrow account maintained under Shasta's Federal Tax ID number by attorney Robert W. Shimer at Citibank.

MATERIAL FACTUAL STATEMENTS OFFERED BY DEFENDANT AS TO WHICH DEFENDANT BELIEVES NO GENUINE ISSUE EXISTS:

1. Shasta Capital Associates, LLC never opened a trading account in its name with an FCM or with an introducing Broker to an FCM from which commodity futures were traded or from which commodity futures were intended to be traded and Plaintiff cannot offer to the Court now or at trial any evidence to the contrary.
2. The Subscription documents of Shasta Capital Associates, LLC did not state that Shasta Capital Associates, LLC or that Shasta's Manager Defendant Equity Financial Group, LLC intended to open a commodity trading account in the name of Shasta to trade commodity futures and Plaintiff cannot offer to the Court now or at trial any evidence to the contrary

3. There does not now exist nor has there ever existed an account *in the name of* Shasta Capital Associates, LLC, LLC from which commodity futures were traded by either a) by Shasta's Manager Equity Financial Group, LLC or b) by any other entity and Plaintiff cannot offer to the Court now or at trial any proof to the contrary.
4. If Shasta Capital Associates, LLC as organized and operated does not meet all four parts of the *Lopez* Court's test, Shasta Capital Associates, LLC is not a commodity pool.
5. If Shasta Capital Associates, LLC is not a commodity pool, then it is impossible for defendant Equity Financial Group, LLC to be considered a CPO (commodity pool operator) by the Court.

Dated: April 6, 2006



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