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**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

NOTICE OF MOTION FOR
SUMMARY JUDGMENT
PURSUANT TO FEDERAL
RULE OF PROCEDURE 56(b)

Defendants.

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PLEASE TAKE NOTICE that on Friday, May 5, 2006 at 10:00 A.M., or as soon thereafter as movant may be heard, the undersigned *pro se* defendant, Robert W. Shimer will move before the Hon. Robert B. Kugler, U.S.D.J., sitting at the U.S. District Courthouse at 4th and Cooper Streets, Camden, New Jersey, for an order granting Summary Judgment in favor of Defendant Shimer pursuant to Federal Rule 56(b) with respect to all Counts of Plaintiff's First Amended Complaint For Injunctive And Other Equitable Relief And Civil Monetary Penalties Under the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.*

ORAL ARGUMENT IS HEREBY REQUESTED.

In support of this motion, movant relies upon the Brief and its attached Exhibits submitted herewith. A proposed form of order granting the relief sought is also submitted.



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**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., : Motion For Summary Judgment
MAGNUM CAPITAL INVESTMENTS, LTD.,
VINCENT J. FIRTH, ROBERT W. SHIMER,
COYT E. MURRAY, & J. VERNON ABERNETHY

Defendants.

-----X

Pursuant to Federal Civil Procedure Rule 56(b) defendant Robert W. Shimer, Esq. *pro se* respectfully moves the Court for Summary Judgment for himself with respect to Counts I, II, III, IV and V of Plaintiff's First Amended Complaint For Injunctive and Other Equitable Relief And Civil Monetary Penalties Under the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* (hereinafter "CEA"). More specifically, Robert W. Shimer moves for Summary Judgment pursuant to Federal Rule 56(b) with respect to each of the following:

- 1) Plaintiff's claim in Count I that defendant Shimer violated Section 4b(a)(2) of the Commodity Exchange Act 7 U.S.C. § 6b(a)(2). Controlling federal case law requires that a motion for summary judgment by a Defendant be granted against Plaintiff if a material fact essential to Plaintiff's claim cannot be established and has no basis in fact. For

Plaintiff to succeed with respect to its allegation that Shimer violated Section 4b(a)(2) of the CEA Plaintiff must be able to show at trial 1) that Shimer engaged in an activity prohibited by the specific language of Section 4b(a)(2) of the CEA; and that 2) that the prohibited activity engaged in by Shimer affected persons intended to be protected by Section 4b(a)(2). The Supreme Court in *Merrill* (see Shimer Brief) interpreted the clear and unambiguous language of Section 4b(a)(2) to require that a transaction for either the purchase or sale of commodity futures contract on a commodity futures exchange occur for or on behalf of an alleged aggrieved party. Such a transaction did not occur on behalf of the entity Shasta in the absence of the existence of a commodity futures trading account opened in the name of Shasta for the benefit of members of the alleged Shasta pool and, therefore, neither the entity Shasta nor its manager Defendant Equity engaged in any activity specifically prohibited by the language of Section 4b(a)(2).

Count I of Plaintiff's Amended Complaint alleges that the alleged fraud occurred with respect to members of an alleged commodity pool. Controlling case law from the Ninth Circuit requires the existence of an account in the name of the alleged pool entity to exist from which commodity futures trading transactions occur before a commodity pool can be said to exist. Plaintiff has conceded in prior filings with the Court that no such account ever existed in the name of the entity Shasta (See *Lopez*-cited in Shimer's Brief). IN the absence of such a trading account in the name of Shasta Plaintiff cannot establish an essential material fact at trial necessary to prove that any member of Shasta is a "pool" member or participant as alleged in Count I of the Amended Complaint nor can Plaintiff establish that any activity specifically required by the language of Section 4b(a)(2) occurred that brings any member of the alleged Shasta "pool" within the protection of that Section of the CEA.

Defendant Shimer is entitled, therefore, as a matter of law, to summary judgment with respect to that part of Count I of Plaintiff's First Amended Complaintalleging a violation of Section 4b(a)(2) of the CEA because Plaintiff has not and cannot make a sufficient showing on an essential material fact necessary to sustain Plaintiff's allegation in Count I that Defendant Shimer violated Section 4b(a)(2)(i)-(iii) of the CEA. In support of his

motion for summary judgment with respect to Count I Defendant Shimer respectfully refers the Court to his Brief and Exhibits filed in support thereof;

2) Plaintiff's claim in Count I that Defendant Shimer violated Section 13(b) of the Commodity Exchange Act, 7 U.S.C. §13c(b) by knowingly inducing Defendant Equity's alleged violation of Section 4(b)(2)(i)-(iii) of the Commodity Exchange Act 7 U.S.C. §§ 6b(a)(2)(i)-(iii). For the reasons just stated in the above paragraph 1 Plaintiff cannot establish at trial an essential material fact necessary for the Court to conclude that Defendant Equity, as the manager of the entity Shasta, violated Section 4b(a)(2) of the CEA. Absent such a showing there is no basis for a finding that Shimer violated Section 13 (b) of the CEA as alleged. In support of his motion for summary judgment with respect to this portion of Count I Defendant Shimer respectfully refers the Court to his Brief and Exhibits filed in support thereof;

3) Plaintiff's claim in Count II that defendant Shimer violated Section 4o(1) of the CEA 7 U.S.C. §6o(1). Controlling federal case law requires that a motion for summary judgment by a Defendant be granted against Plaintiff if a material fact essential to Plaintiff's claim cannot be established and has no basis in fact. For Plaintiff to succeed with respect to its allegation that Shimer violated Section 4o(1) of the CEA Plaintiff must be able to establish that the entity Shasta is a "commodity pool" and that Defendant Equity is, therefore, the "operator" of that alleged "commodity pool". Controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* requires that for an entity such as Shasta to be a "commodity pool" it must own *in its name* a trading account from which commodity interests were traded on its behalf. Because no such account in the name of Shasta ever existed, Shasta is not a "commodity pool" and, therefore, Defendant Shimer is entitled, as a matter of law, to summary judgment with respect to Count II of Plaintiff's First Amended Complaint because Plaintiff has not and cannot make a sufficient showing on an essential element necessary to sustain Plaintiff's allegation in Count II that Defendant Shimer violated Section 4o(1) of the CEA. In support of his motion for summary judgment with respect to this allegation contained in Count II Defendant Shimer

respectfully refers the Court to his Brief and Exhibits filed in support thereof;

4) Plaintiff's claim in Count II that Defendant Shimer violated Section 13(b) of the Commodity Exchange Act, 7 U.S.C. §13c(b) by knowingly inducing Defendant Equity's alleged violation of Section 4o(1) of the CEA, 7 U.S.C. §6o(1). Controlling federal case law requires that a motion for summary judgment by a Defendant be granted against Plaintiff if a material fact essential to Plaintiff's claim cannot be established and has no basis in fact. For Plaintiff to succeed with respect to its allegation that Shimer violated Section 13(b) of the CEA Plaintiff must be able to establish that the entity Shasta is a "commodity pool" and that Defendant Equity is, therefore, the "operator" of that alleged "commodity pool". Controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* requires that for an entity such as Shasta to be a "commodity pool" it must own *in its name* a trading account from which commodity interests were traded on its behalf. Because no such account in the name of Shasta ever existed, Shasta is not a "commodity pool" and, therefore, Defendant Shimer is entitled, as a matter of law, to summary judgment with respect to Count II of Plaintiff's First Amended Complaint because Plaintiff has not and cannot make a sufficient showing on an essential element necessary to sustain Plaintiff's allegation in Count II that Defendant Shimer violated Section 13(b) of the CEA. In support of his motion for summary judgment with respect to this allegation contained in Count II Defendant Shimer respectfully refers the Court to his Brief and Exhibits filed in support thereof;

5) Plaintiff's claim in Count III that Defendant Shimer violated Section 13(b) of the Commodity Exchange Act, 7 U.S.C. §13c(b) by knowingly inducing Defendant Equity's alleged violation of Section 4m(1) of the CEA, 7 U.S.C. §6m(1). Controlling federal case law requires that a motion for summary judgment by a Defendant be granted against Plaintiff if a material fact essential to Plaintiff's claim cannot be established and has no basis in fact. For Plaintiff to succeed with respect to its allegation that Shimer violated Section 13(b) of the CEA by inducing Defendant Equity's failure to register as a commodity pool operator (CPO) Plaintiff must be able to establish at trial that the entity Shasta is a "commodity pool" and that Defendant Equity is, therefore, the "operator" of

that alleged “commodity pool”. Controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* requires that for an entity such as Shasta to be a “commodity pool” it must own *in its name* a trading account from which commodity interests were traded on its behalf. Because no such account in the name of Shasta ever existed, Shasta is not a “commodity pool” and, therefore, Defendant Shimer is entitled, as a matter of law, to summary judgment with respect to that part of Count III of Plaintiff’s First Amended Complaint alleging a violation of Section 13(b) of the CEA because Plaintiff has not and cannot make a sufficient showing on an essential element necessary to sustain that alleged violation by Shimer. In support of his motion for summary judgment with respect to this allegation contained in Count III Defendant Shimer respectfully refers the Court to his Brief and Exhibits filed in support thereof;

- 6) Plaintiff’s claim in Count III that Defendant Shimer violated Section 13(a) of the CEA, 7 U.S.C. §13c(a) as an alleged principal of Equity by accepting funds in an attorney escrow account thereby aiding the alleged violation by Equity of Section 4m(1) of the CEA, 7 U.S.C. §6m(1). Controlling federal case law requires that a motion for summary judgment by a Defendant be granted against Plaintiff if a material fact essential to Plaintiff’s claim cannot be established and has no basis in fact. For Plaintiff to succeed with respect to its allegation that Shimer violated Section 13(a) of the CEA Plaintiff must establish that the entity Shasta was a “commodity pool” and that Defendant Equity was, therefore, the “operator” of that alleged “commodity pool” and required to register under Section 4m(1) of the CEA. Controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* requires that for an entity such as Shasta to be a “commodity pool” it must own *in its name* a trading account from which commodity interests were traded on its behalf. Because no such account in the name of Shasta ever existed, Shasta is not a “commodity pool”. Therefore, Defendant Shimer is entitled, as a matter of law, to summary judgment with respect to Count III of Plaintiff’s First Amended Complaint alleging a violation of Section 13(a) of the CEA by Shimer because Plaintiff has not and cannot make a sufficient showing on an essential element necessary to sustain Plaintiff’s allegation in Count III that Defendant Equity was a CPO required to register under Section 4m(1) of the CEA. In support of his motion for summary judgment with respect to this allegation

contained in Count III Defendant Shimer respectfully refers the Court to his Brief and Exhibits filed in support thereof;

7) Plaintiff's claim in Count IV that Defendant Shimer violated Section 4k(2) of the CEA, 7 U.S.C. §6k(2) by failing to register as an alleged AP (Associated Person) of Equity. Controlling federal case law requires that a motion for summary judgment by a Defendant be granted against Plaintiff if a material fact essential to Plaintiff's claim cannot be established and has no basis in fact. For Plaintiff to succeed with respect to its allegation that Shimer violated Section 4k(2) of the CEA Plaintiff must be able to "connect" Shimer's alleged acts to the CEA. That "connection" is critically dependent upon a finding by the Court that the entity Shasta is a "commodity pool" and that Defendant Equity is, therefore, the "operator" of that alleged "commodity pool". Controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* requires that for an entity such as Shasta to be a "commodity pool" it must own *in its name* a trading account from which commodity interests were traded on its behalf. Because no such account in the name of Shasta ever existed, Shasta is not a "commodity pool" and, therefore, Defendant Shimer is entitled, as a matter of law, to summary judgment with respect to Count IV of Plaintiff's First Amended Complaint because Plaintiff has not and cannot make a sufficient showing on an essential element necessary to sustain Plaintiff's allegation in Count IV that Defendant Shimer violated Section 4k(2) of the CEA. In support of his motion for summary judgment with respect to this allegation contained in Count IV Defendant Shimer respectfully refers the Court to his Brief and Exhibits filed in support thereof;

8) Plaintiff's claim in Count V that defendant Shimer violated Section 13(a) of the Commodity Exchange Act, 7 U.S.C. §13c(a) by aiding and abetting defendant Equity's violation of Regulation 4.30 (17 C.F.R. § 4.30). Controlling federal case law requires that a motion for summary judgment by a Defendant be granted against Plaintiff if a material fact essential to Plaintiff's claim cannot be established and has no basis in fact. For Plaintiff to succeed with respect to its allegation that Shimer violated Section 13(a) of the

CEA Plaintiff must be able to “connect” Shimer’s alleged acts to the CEA. That “connection” is critically dependent upon a finding by the Court that the entity Shasta is a “commodity pool” and that Defendant Equity is, therefore, the “operator” of that alleged “commodity pool”. Controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* requires that for an entity such as Shasta to be a “commodity pool” it must own *in its name* a trading account from which commodity interests were traded on its behalf. Because no such account in the name of Shasta ever existed, Shasta is not a “commodity pool” and, therefore, Defendant Shimer is entitled, as a matter of law, to summary judgment with respect to Count V of Plaintiff’s First Amended Complaint because Plaintiff has not and cannot make a sufficient showing on an essential element necessary to sustain Plaintiff’s allegation in Count V that Defendant Shimer violated Section 13(a) of the CEA. In support of his motion for summary judgment with respect to this allegation contained in Count V Defendant Shimer respectfully refers the Court to his Brief and Exhibits filed in support thereof;

Date: April 6, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on April 6, 2006 he caused a true and correct copy of the foregoing Brief with supporting Exhibits, Motion for Summary Judgment, Notice of Motion, Statement of Material Facts Pursuant to L. Civ. Rule 56.1, Affidavit of Robert W. Shimer, Esq., Certificate of Service and Proposed Order to be sent via regular U.S. Mail to the following.

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