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

UNITED STATES
DISTRICT COURT

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 APPEAL OF
COURT'S ORDER DATED
SEPTEMBER 1, 2006
COMPELLING PRODUCTION
OF TAX RETURNS

Defendants.

Hearing Date: October 20, 2006

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PLEASE TAKE NOTICE that on Friday, October 20, 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, (pursuant to L Civ. R. 72.1(c)(1)(A) to appeal the Court's order issued by Magistrate Ann Marie Donio dated September 1, 2006 compelling production to the Equity Receiver of certain tax returns of Defendant Shimer for the calendar years 1999 through 2003.

More specifically Defendant Shimer appeals the Court's order that grants the Receiver's Motion to Compel directed to Defendant Shimer and specifically appeals that portion of the order directing Defendant Shimer to produce his tax returns for the years 1999 through 2003 to the Receiver Stephen T. Bobo.

ORAL ARGUMENT IS HEREBY REQUESTED.

In support of this Notice of Appeal, movant provides the following basis for objection to the Court's previous order as required by L. Civ R. 72.1(c)(1)(A):

- 1) It is clear established federal case law that federal agencies such as Plaintiff CFTC have only such authority as has been conferred upon them by Congress (see previous Shimer Brief dated April 6, 2006).
- 2) Plaintiff CFTC's purported authority to name Shimer as a defendant in the current matter before the court alleging a violation of the Commodity Exchange Act ("CEA") was critically dependent upon Plaintiff CFTC's allegation contained in both the Original and First Amended Complaint Plaintiff's that Shimer's previous legal client Defendant Equity Financial Group, LLC ("Equity") was a Commodity Pool Operator (CPO) under current law.
- 3) Absent the ability of Plaintiff to establish that the entity Shasta Capital Associates, LLC ("Shasta") was a commodity pool under current law, there is no basis now for concluding that the entity Equity was a commodity pool operator.

- 4) Absent an activity of Shimer specifically prohibited by the CEA that brings him within the purview of that statute there is no basis for the continued appointment of a Temporary Receiver with respect to Shimer pursuant to the authority conferred upon Plaintiff CFTC by Congress in Section 6c(a) of the CEA, 7 USC § 13a-1(a).
- 5) The activities alleged by the Plaintiff CFTC against Shimer do not fall within the purview of the CEA absent a finding that the entity Equity was a CPO under current law.
- 6) Absent the authority conferred upon Plaintiff to seek appointment of a Receiver with respect to Shimer pursuant to Section 6c(a) of the CEA, 7 USC § 13a-1(a) the Receiver Stephen T. Bobo has no legal basis for asserting any right or authority over Defendant Shimer and , therefore, no right to seek copies of Shimer's the tax returns.
- 7) Absent a statutory basis for the authority asserted by the Receiver over Defendant Shimer, Defendant Shimer should not be ordered by this Court to provide tax returns to the Receiver.
- 8) In support of this appeal of the Court's order Defendant Shimer relies upon his brief dated April 6, 2006 previously filed with the Court in support of his pending motion for Summary Judgment and his Reply Brief dated April 24, 2006 which stated in part as follows:
 - a. The only precedent Plaintiff CFTC has cited in support of its deceptive argument that "feeder funds such as Shasta have been found to be commodity pools")¹ is the case of *CFTC v Heritage Capital Advisory Services* ("Heritage").
 - b. Shimer's Brief dated April 6, 2006 attached extensive documentary evidence in the form of attached Exhibits A-E providing the Court with certified copies of documents retrieved with respect to the *Heritage* case from the National Archives and Records Administration in Chicago that directly contradicted Plaintiff's repeated erroneous assertion that the facts of Shasta are "similar" to the facts of *Heritage*.
 - c. In light of the clear and obvious factual disparity between *Heritage* and the current matter before the Court, the Plaintiff CFTC is without any legal

¹ See pages 3-5 of Plaintiff's previous Response dated August 4, 2005 to Shimer's previous Brief dated July 7, 2005

precedent for its contention that an entity such as Shasta is a commodity pool because the entity Shasta admittedly never opened a commodity trading account *in its name* at a futures commission merchant (FCM) *or ever represented to anyone* that it intended to open such an account.

- d. The Illinois District Court case of *Heritage* cited frequently by Plaintiff is completely compatible with the apparently controlling four part test later enunciated by the Ninth Circuit Court of Appeals in the case of *Lopez v. Dean Witter Reynolds, Inc.*
- e. One obvious reason the two cases of *Heritage* and *Lopez* are completely compatible is the obvious fact that the later *Lopez* decision issued by the Circuit Court of Appeals for the Ninth Circuit cited the District Court case of *Heritage* when creating its clear four part test.
- f. The Temporary Equity Receiver Stephen T. Bobo is in a unique position to well know that the critically dispositive fact that a commodity trading account was, indeed, opened in the name of the entity Heritage in the *Heritage* case because Mr. Bobo, was an attorney assigned by Plaintiff CFTC to the case of *Heritage* when Mr. Bobo was an attorney employed by Plaintiff CFTC in 1982.
- g. The only way the four tests of *Lopez* make any sense at all is when they are *read together and applied to the account of the entity alleged to be a commodity pool*—just as they were applied by the Ninth Circuit when these four tests were enunciated by that Court in the *Lopez* case.
- h. The attorney escrow account of Defendant Shimer in New York—the only bank “account” ever opened in the name of the entity Shasta clearly fails most if not all four of the *Lopez* tests.
- i. The court in *Lopez* found that if even one of its four enumerated tests are not present, the entity in question is not a “commodity pool”.
- j. The legislative history of the Commodity Exchange Act *does not* support a finding that Congress intended that entities such as Defendant Equity are entities subject to the registration requirements of the CEA when they control or manage entities such as Shasta (that never opened commodity trading

accounts and never engaged in commodity trading or represented to anyone an intention to directly engage in the activity of commodity futures trading.

- k. The Plaintiff CFTC's admittedly "narrowed" definition of the term "pool" according to its own statements at the time that definition was revised in 1980 [now found at 17 C.F.R. § 4.10(d)(1)] specifically defines a "pool" to be an entity "operated for the purpose of trading commodity interests" and is completely compatible with both Defendant Shimer's stated analysis of the *Lopez* decision and the lack of any indication in the legislative history of the CEA that Congress intended that entities such as Equity be required to register with the CFTC as CPO's.
- l. To decide otherwise would be to broaden the definition of "commodity pool" far beyond the clear and obvious intent of Congress when the CEA was enacted.
- m. Such a decision is not compatible with the CFTC's enabling statute, the CFTC's regulations governing commodity pool operators and all known federal case law and would result in an unjustified broadening of the term "commodity pool" to business entities that have never in the history of the CEA been required to register with Plaintiff.
- n. The Regulations intended to apply to CPO's promulgated by the CFTC found at 17 C.F.R. §4.22 (CPO account statement requirements) §4.23 (CPO record keeping requirements) and at §4.24 (CPO disclosure requirements) are perfectly compatible with Defendant Shimer's discussion in his Brief filed with the Court in support of his motion for Summary Judgment dated April 6, 2006 of the *Lopez* and *Heritage* cases as well as Defendant Shimer's discussion of the legislative history of the CEA in that same Brief.
- o. The above cited regulations of the CFTC are incompatible *on their face* with Plaintiff's position with respect to the issue of whether or not the entity Equity is a commodity pool operator.
- p. The testimony of the CFTC's own expert witness in the *Heritage* case (as disclosed in Exhibit E attached to Shimer's April 6, 2006 Brief) supports and confirms Defendant Shimer's repeated assertion that the existence of a

commodity trading account opened at an FCM *in the name of the entity alleged to be a commodity pool* is a critical and essential prerequisite to any finding that the entity in question is a commodity pool.

- q. The testimony of the CFTC's own expert witness in the *Heritage* case also found in that same attached Exhibit E confirmed that for any member of the investing public to become "involved" in the futures market they must open an account at a brokerage firm known as a Futures Commission Merchant (FCM).
- r. If (according to the CFTC's own expert witness) members of the investing public *must open an commodity trading account at an FCM* to become "involved" in the futures market, how is it possible to sustain any argument by the CFTC 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—an specialized commodity related investment entity more "narrowly" defined by the CFTC over 25 years ago?
- s. Plaintiff never attempted to answer in the CFTC's Response dated April 20, 2006 the above pertinent and highly relevant question.

For all of the above stated reasons it is right and appropriate to grant Defendant Shimer's appeal of the Court's order dated September 1, 2006 and to rescind those portions of that order requiring Defendant Shimer to provide any more documentation of any kind to the Receiver Stephen T. Bobo and to issue an order removing Defendant Shimer from federal receivership.

A proposed form of order granting the relief sought is also submitted.

Dated: September 14, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on September 14, 2006 he caused copies of his Notice of Appeal of the Court's Order dated September 1, 2006, Proposed Order and Certificate of Service to be served upon the following parties at the address indicated below by First Class mail.

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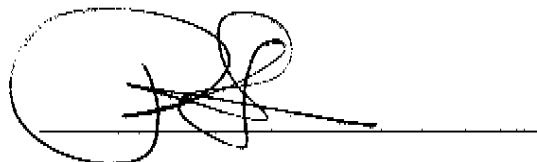
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