ROBERT W. SHIMER, ESQ., *pro se*
1225 W. Leesport Rd.
Leesport, PA 19533
(610) 926-4278

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	:	Motion Date: February 2, 2007
Defendants.	:	

DEFENDANT ROBERT W. SHIMER'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DENYING SUMMARY JUDGMENT ON VIOLATION OF 17 C.F.R. § 4.30.

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ROBERT W. SHIMER'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Defendant Robert W. Shimer ("Shimer") acting *pro se* responds to the motion of Plaintiff Commodity Futures Trading Commission (CFTC) for Reconsideration of the Court's denial of Count V of Plaintiff's First Amended Complaint.

I. THE CLEAR UNAMBIGUOUS LANGUAGE OF CFTC REGULATION 4.30 AND THE STATUTORY DEFINITION OF A CTA PROVIDES NO SUPPORT FOR PLAINTIFF'S COUNT V ALLEGATION AGAINST SHIMER

The briefs filed again and again by Plaintiff throughout this civil case reveal a unique Orwellian perspective that reflects a self interested willingness to basically ignore the simple proposition that specific words have specific meanings. Plaintiff's world is one of self serving and self created fantasy in which statutory and regulatory language crafted carefully with precision and great care is literally ignored in order to "somehow" in "someway" retroactively justify a five month botched initial "investigation" of Shimer's client Shasta. That initial investigation of Plaintiff failed (out of sheer ineptitude and negligence) to properly identify the later named defendant Coyt E. Murray. Through his company Tech Traders, Inc. (Tech), Murray apparently perpetuated for well over two years what is now clearly revealed to be an apparent and massive fraud against not only Shimer and Shimer's previous legal clients but also against many other individuals and entities mostly unknown to Shimer until the present civil action was filed.

But it gets even worse. The pretrial record shows the Plaintiff's ineptitude during its own investigation was so great and deep that Plaintiff informed Murray's attorneys that the present civil action was about to be filed. This action by Plaintiff without full knowledge of the facts provided unnecessary notice to Murray of the Plaintiff's impending filing. This notice provided by Plaintiff gave Murray sufficient time for Murray to withdraw several hundred thousand dollars from accounts he controlled and forward those funds to attorneys hired to defend himself in the civil action about to be filed! The Plaintiff's ineptitude was so great it took that agency another three months after the initial complaint was filed to simply name Murray and Abernathy as defendants and freeze their personal bank accounts. Most if not all of the difficulty encountered by Plaintiff in 2004 and 2005 in obtaining information otherwise readily available on Abernethy's hard drive in April of 2004 was self created.

The record in this case is very clear that Plaintiff failed to name in its initial Complaint the defendant Coyt E. Murray and the defendant J. Vernon Abernethy, (Abernethy). A CPA without previous known association with Murray and local to Tech's trading operation Abernethy consistently verified in writing on his letterhead to Shasta's CPA rate of return percentages for the entity Tech month after month. Those rate of return percentages were, in retrospect, clearly and consistently erroneous. The additional three months from April 1, 2004 until June 24, 2004 apparently gave Murray and Abernethy all the time necessary to meet one or more times, confer and organize (as best they could) their respective personal finances.

All of the above recited facts are, no doubt, a matter of great professional embarrassment to not only Plaintiff but to any of its employees responsible for Plaintiff's botched initial investigation that preceded its initial April 1, 2004 filing in this matter. The attorneys employed by Plaintiff whose names are found at the top of Plaintiff's Motion and supporting Memorandum dated December 28, 2006 are specific employees of Plaintiff's Chicago Enforcement Division that Shimer now affectionately refers to as the "Chicago Gang of Three". These attorneys have irresponsibly and intentionally continued the present legal action against Shimer and Shimer's previous legal clients for over two and one half years seeking massive civil fines in an effort to "cover" for the botched and incompetently managed investigation conducted by the Chicago office of the Plaintiff's Enforcement Division

A. Regarding the specific language of CFTC Regulation 4.30

Plaintiff's cite to the actual language of Regulation 4.30 (17 C.F.R. § 4.30) on page 1 of its Memorandum in support of its motion for reconsideration need not be repeated here. The facts of the present matter before the Court including the actual language of the Investment Agreement executed by and between Shasta and Tech clearly reveal that the entity Tech never "purchased", "margined", "guaranteed" or "secured" *any commodity interest* of Shimer's legal client Shasta Capital Associates, LLC (Shasta) notwithstanding the belabored "analysis" found on pages 3 and 4 of Plaintiff's Memorandum and applied by Plaintiff to "Exhibit 91".

That no such "purchasing" margining" "guaranteeing" or "securing" of a "commodity interest" *of* the entity Shasta ever occurred by the entity Tech is, of course, because during the entire duration of the straightforward contractual relationship that existed between Shasta and Tech the entity Shasta never sought or ever obtained a "commodity interest" as the result of the

actions of anyone.[1] In attempting to "fashion" or create a CTA relationship between Tech and Shasta where none exists, Plaintiff conveniently ignores the clear language of its own regulatory requirement that the "commodity interest" be one that is "of the client". The simple and straightforward *contractual relationship* that existed between the entity Tech and the entity Shasta did not make Shasta the "client" of Tech within the meaning of that word as it is used in Regulation 4.30. But according to Plaintiff "black is white" and "up is down" and "green is blue" etc. etc. etc.

B. Regarding the specific definition of a Commodity Trading Advisor (CTA) found at 28 U.S.C. § 1a(6).

The Court is clearly correct in its conclusion that Plaintiff has not established that the entity Tech acted as the CTA of the entity Shasta. One need only read the statutory definition of a CTA found at 7 U.S.C. § 1(a)(6) to see that is true. What is totally amazing to Shimer is Plaintiff's willingness to go on and on as it does on page 2 of its Memorandum about the "need" of a "client" of a CTA to "...know when to get into and when to get out of, a particular market." The fact that the entity Shasta never actually requested or required any such information about any sort of commodity futures trading from the defendant Tech seems to matter very little to Plaintiff. If only Lewis Carroll were still alive to somehow incorporate a small portion of Plaintiff's recent Memorandum into a revised edition of "Through the Looking Glass"... The cases cited again on pages 2 and 3 of the CFTC's Memorandum are now all familiar friends like the White Rabbit. In previous summary judgment briefs Shimer has clearly and adequately distinguished all of these cases from the facts of Shasta.

Plaintiff concludes on page 3 "...that Tech Traders advised Shasta about trading commodity futures trading..." That statement is factually incorrect and stating and restating that "conclusion" again and again does not suddenly make it true. Plaintiff's insistence on characterizing any written agreement between Tech and Shasta as "advice" to Shasta is misplaced and erroneous. Tech never "advised" Shasta about *anything* to do with commodity trading. That is true because Shasta never engaged or intended to engage in commodity trading and, therefore, never sought Tech's "advice" with respect to that specific activity and neither

[1] The Court is directed to the CFTC's specific regulatory definition of the term "commodity interest" defined at 17 C.F.R. § 4.10(a)(1) as "any contract for the purchase or sale of a commodity for future delivery...".

Shasta nor its manager ever represented to anyone that Shasta intended to ever seek such "advice" *from anyone*.

In order for a CTA relationship to exist between two entities, the flow of information about the advisability of trading must flow from the "advisor" to the "advisee". There is not a shred of evidence that Tech ever functioned in any advisory capacity whatsoever with respect to "trading in any contract of sale of a commodity for future delivery" by Shasta. Shasta never intended to engage in the "trading" of futures contracts nor did Shasta ever represent to *anyone* at *anytime* that Shasta ever intended or contemplated for itself the "trading in any contract of sale of a commodity for future delivery". For that reason Shasta never had any reason to solicit the "advice" of Tech for that purpose nor did Tech ever have any reason to offer such "advice" to Shasta.

The language of the statutory definition of a CPA found at 7 U.S.C. § 1a(6) clearly indicates that the "advice" (which goes to the heart of the CTA relationship defined by the Statute) must be directed either 1) to someone or some entity that already owns a trading account at a brokerage firm (the typical CTA relationship) or 2) to someone or some entity that has expressed an *intention* to open such an account for the purpose of trading or 3) to someone or some entity at least *contemplating* the opening of such an account. "Trading" as that word is specifically used in the statutory definition of a CTA can only occur from an account opened for that purpose by someone or some entity that seeks to specifically engage in that activity. In the absence of at least an *intention* by the advisee to engage in the specific activity of "trading", there is absolutely no need for the exchange of trading "advice".

Tech apparently misrepresented to several entities (including Shasta and its manager Equity) the ability of Tech to profitably trade the accounts of Tech. That Tech was willing to allocate a portion of any of its own trading profits to entities such as Shasta that agreed by contract to place funds with Tech is not sufficient to create a CTA relationship between Tech and Shasta. Nor is it sufficient to create a CTA relationship between Tech and any of the other many separate entities that also sent funds to Tech's bank accounts with the expectation that Tech would be successful in its trading and would honor whatever specific contractual profit sharing commitment was executed between the parties.

Plaintiff's inherent language problem is that any information provided by Tech to others about the effectiveness of Tech's own trading is not "advice" to others about commodity trading. It is simply *information* about the commodity trading that Tech purported to do in its own name on its own for its own account. Information conveyed to another only becomes

"advice" by a CTA if it is offered to enable the "other" to decide about the value or advisability of trading. The trading advised about is trading that is contemplated by the "other" –not trading by the one providing the advice from an account solely in the advisor's name.

That Tech pooled or combined the funds of others and then traded those funds from its own accounts arguably satisfies, in retrospect, the definition of a "commodity pool". Again and again Murray represented to everyone who ever asked that he was not required to register because he qualified for an exemption from registration. That Tech operated a "commodity pool" without properly registering is a problem for Tech—not for the many entities including Shimer's client Shasta that innocently forwarded funds to Tech based upon representations by Murray about the effectiveness of a trading system (developed by Murray or Tech) and confirmed month after month by local CPA defendant Abernethy.

It was reasonable for Shimer to assume that since no trading ever occurred in the name of his client Shasta that all trading was clearly being conducted in the name of Tech or in the name of one or more of the many other entities that Murray purportedly controlled. However Murray chose to structure the actual trading accounts from which trading occurred was Murray's responsibility not Shimer's. Shimer never saw any of the specific application forms that Murray filled out when a particular trading account was opened at Refco or Mann Financial or at any of the other FCMs that Murray may have chosen nor was it expected or necessary that Shimer have access to that sort of information. And clearly there is no evidence in the pre-trial record that Murray *ever shared* any of that sort of information with Shimer. The determining factor for Shimer in concluding that his client Shasta was not a commodity pool was the clear and obvious fact that no trading ever occurred *in the name of* Shasta. Given the actual definition of a CTA the fact that Murray and Tech were not advising anybody about anything never gave Shimer concern that Tech *might* be violating some unknown regulation of Plaintiff that related to the activities of CTAs.

Plaintiff states on page 3 without any factual foundation that "…Tech Traders made the trading decisions for Shasta…" All sorts of individuals and entities send their funds to other individuals or entities that trade commodity futures specifically *in the name of* the pool type of entity. The entity that actually engages in trading the combined funds of others is called a "commodity pool". According to Plaintiff's "Tech is the CTA of Shasta" argument every commodity pool (whether properly registered with Plaintiff or not) that trades *in the name of* the pool entity (as it is supposed to do per *Lopez*) is now also wearing the hat of a CTA for every member of the pool entity.

Plaintiff's basic problem is that it is so anxious to find that "somehow" in "some way" Shimer violated "some regulation" of Plaintiff. Count V of Plaintiff's Amended Complaint is merely an attempt by Plaintiff to throw anything and everything at Shimer in the hope that the Court will become sufficiently confused to simply defer to Plaintiff's "expertise" and allow "something" to stick. The result is that the Plaintiff engages in a confusing and bizarre display of situational ethics jumping form CTA to CPO throughout its complaint in the hope the Court will merely succumb to all of these meritless allegations and conclude that Shimer must be guilty of "something".

Plaintiff's argument that "Tech is the CTA of Shasta" is an altogether silly and meritless argument that basically ignores the clear meaning of language found in the statutory framework of the Commodity Exchange Act (CEA). It also ignores all prior case law and the specific language of Plaintiff's own regulations. Plaintiff's "Tech is the CTA of Shasta" argument is a bizarre argument without factual foundation whatsoever simply born of a clear and increasingly urgent situational necessity.

II. A GRANT OF SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF"S ALLEGATION THAT SHIMER "AIDED AND ABETTED" TECH'S VIOLATION OF CFTC REGULATION 4.30 IS CLEARLY INAPPROPRIATE IN LIGHT OF EXISTING THIRD CIRCUIT CASE LAW

Plaintiff's argument for summary judgment with respect to Count V of Plaintiff's amended complaint is a virtual fantasy world in which Shimer somehow "knew" that Tech was acting as the CTA of his client Shasta. As just pointed out previously in this brief a review of both the facts in the present matter and the specific language contained in both Regulation 4.30 and the definition of CTA found at 7 U.S.C. § 1a(6) does not support a finding that Tech ever acted as the CTA of the entity Shasta.

It is not necessary to re-recite summary judgment case law. For the Court to grant Plaintiff's motion for summary judgment with respect to Count V of its Amended Complaint the Court must find it to be factually conclusive without dispute that: 1) Shimer had knowledge of Tech's intent to violate CFTC regulation 4.30; 2) Shimer had the intent to further that violation; and 3) Shimer committed some act in furtherance of Tech's objective to violate Regulation 4.30.[2]

[2] See *Nicholas v. Saul Stone & Co.* 224 F.3d 179, 189 (3d Cir. 2000) citing with approval *Damato v. Hermanson* 153 F.3d 464 (7th Cir. 1998).

First of all, there is no "evidence" at all in the record that Shimer ever knew that Regulation 4.30 even existed at the time that Shasta's PPM and the Investment Agreement between Shasta and Tech were drafted. Certainly the much analyzed "Investment Agreement" executed by and between Shasta and Tech (see pages 3 & 4 of Plaintiff's Memorandum) does not provide any indication at all that Shimer was aware of any such regulation. Shasta's PPM is equally devoid of any such indication. The fact that Shimer is an attorney is hardly "undisputed" evidence of Shimer's specific knowledge of an obscure regulation like Plaintiff's Regulation 4.30.

The fact that Shimer knew that only those entities listed on a commodity trading account at an FCM can be called upon to satisfy a margin call is simply an obvious logical fact Shimer wanted to make clear in the investment agreement. Shasta's PPM merely recites the obvious fact that responsibility of a margin call from trading by the "Trading Company" would fall solely on that entity and not on Shasta or its members. That statement in Shasta's PPM simply served as specific written reassurance to Shasta's members that the contractual relationship between Shasta and the "Trading Company" would never result in a margin call to Shasta's members. Shimer would remind the Court that Tech was never specifically identified in Shasta's PPM to prevent circumvention of Shasta's relationship with Tech.

The pre-trial record indicates that Murray set up his trading arrangement the way he did because that is what Murray decided to do on his own. There is absolutely no evidence at all in the record to support Plaintiff's "conclusion" that "Murray and Shimer planned to trade Shasta's money this way."[3] Such a fanciful unsupported "conclusion" by Plaintiff is clearly not an undisputed material fact requiring summary judgment!

Murray always appeared to Shimer to be fully satisfied about the issue of Tech's compliance with the CFTC's registration requirements. Shimer's primary concern as legal counsel to Shasta and Equity was the lack of any violation of CFTC registration regulations *by those entities.* Shimer continues to believe that his initial conclusion in the fall of 2001 that his previous client Shasta was not acting as a "commodity pool" and that his previous client Equity was, therefore, not acting as the CTA of the entity Shasta will eventually be confirmed, if necessary, on appeal. Plaintiff's willingness to fantasize about what Shimer did or did not know about the content or even the existence of Regulation 4.30 is hardly credible evidence of Shimer's state of mind or willingness by Shimer to help Tech violate that particular regulation.

[3] See page 5 of Plaintiffs Memorandum

Shimer never had a discussion with Murray about either the contents or existence of Regulation 4.30 and for that reason the pre-trial record clearly does not reflect that any such communication between Shimer & Murray ever took place. Nor is Shimer aware of any conversation in which Murray ever indicated to anyone else an awareness of Regulation 4.30 or its possible application to Tech. Summary judgment based upon fantasized inferences by Plaintiff and the Chicago "gang of three" about what Murray and/or Shimer "knew" about Regulation 4.30 is a conclusion one might expect from Alice's Queen of Hearts.

Plaintiff's "evidence" of action taken by Shimer in furtherance of Tech's violation of Regulation 4.30 is the innocuous fact that, as legal counsel for the entity Shasta Shimer drafted the Investment Agreement that existed between his client Shasta and Tech. That fact *does not* by itself convey *any knowledge* about the existence or applicability of Regulation 4.30 to Tech nor does that Agreement itself ever refer in any way to that obscure Regulation of Plaintiff. A fact clearly in the pretrial record (that Plaintiff would prefer to conveniently ignore) is that the former head of its own Enforcement Division Geoffrey Aronow (Aronow) was retained as outside legal counsel by Shimer for the prospective benefit of his client Shasta and his client Equity in October of 2003 when the issue of Shasta's possible status as a "commodity pool" was raised by an outside third party.

Aronow was a partner in the prestigious Washington D.C. law firm of Arnold and Porter. Because of his former position as head of Plaintiff's Enforcement Division, Aronow was referred to Shimer as a purported *expert in commodity related law*. There is not a single indication *anywhere in the record* that Aronow *ever mentioned the existence* of Plaintiff's Regulation 4.30 to Shimer let alone *the possible applicability of that Regulation* to the facts of Shasta or Shasta's relationship with Tech. And that was true *for the entire 5 months* that Aronow and his firm were retained as outside legal counsel representing the entity Shasta. During that entire 5 month period of time Aronow had in his possession beginning in late October of 2003 from Shimer *all subscription materials provided to prospective Shasta members including Shasta's PPM and a copy of the investment agreement that existed between Shasta and Tech.*

If a supposed commodity law "expert" such as Aronow never mentioned the existence or possible applicability of Regulation 4.30 to Shimer after supposedly reviewing both Shasta's PPM and the Investment Agreement existing between Shasta and Tech and after being specifically informed of the details of that contractual arrangement in Shimer's cover letter dated October 24, 2004 why does it make any sense to impute knowledge of Regulation 4.30

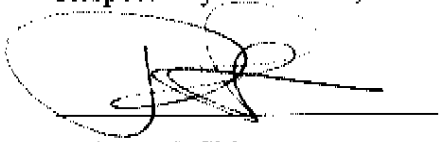
and Tech's alleged violation of that Regulation to Shimer? Plaintiff's ridiculous conclusion that the language of the investment agreement between Tech and Shasta or the language of Shasta's PPM reflects some sort of "conspiracy" between Shimer and Murray to violate Plaintiff's Regulation 4.30 is a conclusion that is unsupported, self serving and absurd.

III. CONCLUSION

Plaintiff seeks reconsideration of the Court's Order dated December 18, 2006 with respect to Plaintiff's ridiculous allegation found in Count V of its amended complaint that Shimer allegedly "aided and abetted" Tech's alleged violation of Regulation 4.30. Self serving "conclusions" by Plaintiff are hardly undisputed material facts. For all of the reasons stated above Shimer respectfully requests that Plaintiff's motion for reconsideration be denied.

Date: January 10, 2007

Respectfully Submitted,



Robert W. Shimer
1225 W. Leesport Rd.
Leesport, PA 19533
(610) 926-4278

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on January 10, 2007 he caused a true and correct copy of the foregoing Response to the Plaintiff's Motion For Reconsideration and Certificate of Service to be served via First Class U.S. Mail upon the following:

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

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 of Equity Financial Group, LLC
Samuel F. Abernethy, Esq.
Menaker and Herrmann
10 E. 40th St., 43rd Floor
New York, NY 10016-0301

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, New Jersey 08055

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

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
120 Wall Street
New York, New York 10005

Robert W. Shimer, *pro se*
1225 W. Leesport Rd.
Leesport, PA 19533
(610) 926-4278