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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,
vs.

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

Defendants.

Hon. Robert B. Kugler

Civil Action No. 04-1512

Motion Date: May 19, 2006

DEFENDANT ROBERT W. SHIMER'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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ROBERT W. SHIMER'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Robert W. Shimer ("Shimer") acting *pro se* responds to the motion for partial summary judgment and supporting over length Memorandum and voluminous "documentation" (effectively measured not by the page but by the pound) filed by Plaintiff Commodity Futures Trading Commission ("CFTC") in support of that motion.

I. *CELOTEX* AND THE OTHER CASES CITED BY PLAINTIFF ON PAGES 1 AND 2 OF ITS MEMORANDUM DO NOT SUPPORT A GRANT OF PARTIAL SUMMARY JUDGMENT TO PLAINTIFF

The first sentence of Plaintiff's over length Memorandum filed in support of its currently pending Motion For Partial Summary Judgment is correct: "The standard for considering a motion for summary judgment *is clear"*.[1] (Emphasis added). Plaintiff's difficulty is that the clarity of existing law does not support a grant of Plaintiff's motion.

On page 2 of its Memorandum Plaintiff cites the case of *Celotex Corp. v. Catrett* 477 U.S. 317, 323 (1986) in support for its motion. The moving party Defendant corporation Celotex was entitled to summary judgment because the Plaintiff Catrett had failed to offer to the district court any evidence in support of the essential and material fact of proximate cause upon which that Plaintiff had the burden of proof at trial. *Celotex* held that if a fact is absent, both material and essential to the case of the non moving party, summary judgment is appropriate and should be granted to the moving party.

Plaintiff seems confused on page 2 of its Memorandum by the terms "moving" and "non moving" party and the concept of "burden of proof". Plaintiff spends almost half of page 2 of its Memorandum following its cite to *Celotex* by citing the Third Circuit cases of *Harter v. GAF Corp.* 967 F.2d. 846 (3d Cir. 1992); *Pastore v. Bell Telephone Co. of Pennsylvania* 24 F. 2d 508 (3rd. Cir. 1994); *Jalil v. Avdel Corp.* 873 F.2d. 701 (3d Cir. 1989) in support of the quote that " (t)he non moving party (in this case the non moving party is Shimer and Firth) 'must make a showing sufficient to establish the existence of every element of his case, based on the affidavits or by the depositions and admissions on file'"[2] Plaintiff then concludes on page 2

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[1] See Plaintiff's 43 page Memorandum dated April 7, 2006, page 1 sentence 1.

[2] Why any of these cited cases are helpful to Plaintiff's position is a mystery. In *Jalil* the 3rd Circuit overturned the lower District Court's previous grant of summary judgment for the moving party respondent and Defendant Avdel Corp on the issue of retaliatory discharge, and sent the case back for a trial on the merits. In *Pastore* the 3rd

with another quote from Celotex found at pages 857-858 in the case *Watson v. Eastman Kodak Co.* 235 F. 3d. 851 (3rd Cir. 2000) that likewise does little to further Plaintiff's summary judgment argument.

The mystery surrounding Plaintiff's use of the above cited quotes is found in the fact that Shimer and Firth are not "making any case" –they do not bear the burden of proof in the matter before the Court. It is the Plaintiff CFTC *as the moving party* that bears the burden of establishing by a *preponderance of the evidence* at trial that Defendants Shimer and Firth specifically violated *any* of the Sections of the CEA as alleged. Apart from the merits of the case, Plaintiff CFTC also bears the burden (particularly with respect to Counts II through V) of establishing by a preponderance of the evidence that the entity Shasta meets all four tests of *Lopez v. Dean Witter Reynolds, Inc.* 805 F. 2d 880 (9th Cir. 1986).

Ignoring Plaintiff's confused discussion of moving and non moving parties the point to be addressed is as stated by the Supreme Court in *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986):

> "Rule 56(c) provides that, when a properly supported motion for summary judgment is made,[4] the adverse party 'must set forth specific facts showing that there is a genuine issue for trial'."[3]

II. MANY "FACTS" CRITICAL TO A FINDING FOR PLAINTIFF ARE CLEARLY DISPUTED BY SHIMER AND FIRTH AND SHOULD BE RESOLVED ONLY AT TRIAL

Apart from a summary judgment analysis with respect to the merits, as a condition precedent to the favorable grant of Plaintiff's current motion the Court must conclude as a matter of both fact and law that sufficient facts exist on the record to sustain a finding that the entity Shasta is a commodity pool—a decision that can only be reached by ignoring the legislative history of the CEA, the previous testimony of Plaintiff's own expert witness, current case law and the fact that Plaintiff has cited no federal case law in support of its conclusion that Shasta was a commodity pool.

Circuit refused to overturn the district court's grant of summary judgment to the moving party Defendant Bell of Pennsylvania finding that Plaintiff Pastore (with the burden of proof) was not able to provide the district court with any evidence of elements necessary to sustain alleged violation of the Sherman Act by Defendant. In *Harter*, the 3rd Circuit reversed the District Court's previous grant of summary judgment for the moving Defendant GAF finding, contrary to the District Court, that all four necessary elements of Plaintiff's age discrimination complaint were met and that summary judgment was therefore inappropriate.

[3] *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986)

A. Controlling Summary Judgment Supreme Court Case Law Requires That Plaintiff's Motion for Partial Summary Judgment Be Denied.

But separate and apart from that difficult threshold issue for Plaintiff, summary judgment for Plaintiff on the merits particularly with respect to the allegation of Section 4*o*(1) fraud is clearly inappropriate and should be denied if critical facts relied upon by Plaintiff will be contradicted by specific documentary evidence offered by Defendants. Citing generally to 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983) the Supreme Court has unequivocally stated in *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986) that "disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment".

Citing further to the case of *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) the *Anderson* Court further noted that "summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." The Court in *Anderson* further stated in summary:

> "it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes, supra,* and *Cities Service, supra,* indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra,* 391 U.S., at 288-289, 88 S.Ct., at 1592.

There are significant critical factual issues that must be resolved by the Court with respect to Plaintiff's allegation of CEA Section 4(*o*)(1) fraud that can only be decided after weighing and considering *all of the evidence* at trial. Shimer concedes one "fact" that no one apparently disputes. That is the fact that the trading performance rate of return percentages conveyed by Abernethy to Teague and then conveyed by Teague to the Equity Defendants were not accurate. That fact *alone* is not sufficient for the Court to conclude that Shimer or Firth violated Section 4*o*(1) of the CEA. Whether or not a violation of Section 4*o*(1) exists should only be made after resolution of many specific and critically important factual questions. Because the Court did not grant Shimer's recent request to go slightly over length in his Response to Plaintiff's recent over length partial summary judgment filing with hundreds of pages of attachments, Shimer is constrained by space limitations to pointing out just a few significant factual issues with respect to the allegation of Section 4*o*(1) fraud that cannot be

fairly resolved in light of Supreme Court summary judgment case law in the absence of a trial on the merits:

1) Did Shimer act responsibly and reasonably by suggesting in writing by fax to Murray on March of 2001 (see Shimer affidavit attached as Exhibit A) that Tech's trading performance should be subjected to independent CPA review and verification?

2) Was it reasonable for Defendant Shimer to initially suggest that review and verification be performed by a CPA he previously knew and trusted? (See Plaintiff's SMF # 60). (See also Exhibit A)

3) Despite Plaintiff's arguments to the contrary, was it reasonable for Shimer and Firth to expect that a CPA with the credentials of Vernon Abernethy as reflected on his resume (see Shimer Affidavit Exhibit B and attachment) would be able to review monthly commodity brokerage statements generated by Tech and compute a simple rate of return? (See also Shimer Affidavit Exhibit C and two separate monthly commodity statements previously known to Shimer attached thereto.)

4) Was it reasonable for Shimer and Firth to conclude that such a computation was possible by Abernethy since neither Abernethy nor Teague ever informed either Shimer or Firth that such a computation would not result in reliable verification. (See affidavits of Shimer and Firth attached hereto as Exhibits D and E). Nor is it at all clear why such a computation would not have been accurate.[4]

5) Was it reasonable for Shimer and Firth to conclude that Abernethy was, indeed, reviewing original brokerage statements as a part of his monthly verification of Tech's trading performance? This question is critically significant in light of the fact that Shasta's CPA Elaine Teague has testified under oath in a deposition conducted by Shimer on Wednesday, December 21, 2005 that based upon her conversations with Abernethy in July of 2001 *Teague believed that Abernethy was, indeed, reviewing original brokerage statements of Tech as an essential part of the verification of Tech's monthly rate of return* because Abernethy assured her in one or more telephone conversations that he *would be reviewing original brokerage statements* as an essential part of his rate of return verification each month. (See Shimer affidavit Exhibit F).

Moreover Teague further confirmed to Shimer during her sworn deposition on December 21, 2005 that she had stated that the verification procedure Abernethy was performing was the "equivalent of a mini audit" each month. (See Shimer affidavit F). Both

[4] See, for example, the statement of monthly activity for October, 2001 issued by GNI to Tech Traders marked as Exhibit 29 to Abernethy's deposition taken by the CFTC on June 8, 2004 attached to Shimer Affidavit Exhibit D.

Shimer, Shimer's wife and Firth will testify at trial that they specifically heard Ms Teague make that sort of representation at points in time long after Abernethy began providing regular verification of Tech's trading performance each month. These statements on the part of Teague, Shasta's CPA [clearly expected by Shimer to "work out" with the local verifying CPA the trading verification protocol (see Shimer affidavit Exhibit G)] were a sufficient basis for a trier of fact to conclude Shimer and Firth's belief was reasonable that Abernethy was, indeed, reviewing original brokerage statements (see Shimer Affidavit Exhibit F).

Plaintiff's allegation that Teague, Firth or Shimer did not know what Abernethy was reviewing as a part of his verification process each month (Plaintiff's SMF 70) is deceptive, misleading and is disputed by Shimer. That Teague did not know specifically what documentation Abernethy might have reviewed *in addition to Tech's original brokerage statements* is irrelevant to the reasonableness of Teague's belief that Abernethy was reviewing the critical documentation of original brokerage statements. Teague's belief was reasonable because she had no reason to disbelieve Abernethy when he assured her of that fact during their initial conversations in July of 2001 (see Shimer affidavit Exhibit F).

Plaintiff's recitation of the "facts" surrounding the opportunity afforded Abernethy in early November, 2001 to provide input with respect to the text of Teague's proposed "Independent Accountant Report on Agreed Upon Procedures" that would be sent to her client Equity (see Plaintiff SMF #81) does not require the Court as the trier of fact to conclude *at this point in time without all of the facts and testimony to be presented at trial* that either Shimer and/or Teague were put on notice in early November that Abernethy did not intend to review original brokerage statements.

The attachments to Shimer Affidavit Exhibit F confirm 1) Teague acknowledged by e-mail dated Monday, November 5, 2001, receiving from Shimer a copy of his proposed text for Teague's monthly Report to Equity. (See Shimer affidavit Exhibit F and attached Exhibit 21 of Shimer deposition of Teague); 2) Shimer's e-mail to Teague dated Tuesday, November 6, 2001 (see Shimer Affidavit Exhibit F and attached Exhibit 22 of Shimer deposition of Teague) specifically confirmed to her that she was correct in predicting that Abernethy would object to how Shimer had worded part of his previous draft. Shimer's e-mail also specifically refers to the fact that he provided Teague with a new draft *that incorporated all of Abernethy's proposed changes*. Since Teague had both Shimer's first draft and the new draft in front of her, the Court as the trier of fact could reasonably conclude at trial that it was not necessary for Shimer to actually provide Teague with a copy of his draft showing what language Abernethy had crossed

out because Teague was clearly provided with both Shimer's original draft and also the revised draft incorporating all changes proposed by Abernethy. Teague could simply compare the two drafts in front of her to see what changes Abernethy had proposed for her letter "Report' to Equity.

That Teague 1) accepted the language proposed by Abernethy for a letter she would be sending to Equity but never stated to Shimer or to anyone else including Firth that she believed Abernethy was not reviewing original brokerage statements (see Shimer Affidavit Exhibit D and Firth Affidavit Exhibit E); and, 2) also stated to Shimer and Firth that the verification being conducted by Abernethy was the equivalent of a mini audit (see Shimer Affidavit Exhibit F and Firth Affidavit Exhibit E)) supports the reasonableness of Shimer's belief that Abernethy was reviewing original brokerage statements as a part of his verification of Tech's rate of return.

The further fact that Abernethy never provided Shimer with any objection or contradiction (written or otherwise) to Shimer's e-mail to Abernethy dated Friday, March 15, 2002 (attached to Shimer affidavit Exhibit F and previously identified as Exhibit # 43 in Abernethy's deposition dated June 9, 2004) that clearly stated to Abernethy Shimer's continued expectation that Abernethy was reviewing Tech's original brokerage statements as a part of the rate of return verification Abernethy was performing is further evidence for the Court as the trier of fact at trial after hearing all of the evidence to conclude that this continued stated belief of Shimer was reasonable. (See also *significant last attachment* to Shimer Affidavit Exhibit D).

It is reasonable for the Court to also conclude after hearing all testimony with respect to the documents attached to Shimer's Affidavit Exhibit F that the fact that Abernethy preferred certain language in Teague's monthly letter Report to Equity was hardly a basis for Teague to suddenly conclude that Abernethy was retracting the clear assurance given to her in July, 2001 that he would, indeed, be reviewing original brokerage statements as a part of the verification process. Teague's comments to Shimer simply addressed her prediction about the issue of whether Abernethy would take "responsibility" for the performance statistics that he reviewed. Teague simply predicts in her e-mail dated Monday, November 5, 2001 to Shimer that "Vernon would probably not agree that the Tech Traders performance statistics are solely his responsibility".

Shimer's reply to Teague simply acknowledges that her "prediction" was correct. The fact that Abernethy clearly did not want any language that indicated that he was responsible for the accuracy of the performance statistics he was reviewing was not necessarily a repudiation of his previous commitment to conduct a review of brokerage statements! *The context of the*

correspondence in November of 2001 was not Abernethy's agreed upon procedures but simply the language of Teague's proposed Report to Equity. The Court can only draw a final conclusion about the weight to be given to the November, 2001 correspondence between Shimer, Abernethy and Teague after hearing all of the evidence at trial.

6) Was it reasonable for Shimer and Firth to continue to believe that Abernethy was reviewing Tech's Original Brokerage Statements every month in light of the fact that Teague, as Shasta's CPA never advised either Shimer or Firth that she had any doubt about whether Abernethy was reviewing Tech's original brokerage statements? (See Shimer affidavit D and Firth affidavit E)

7) Was the fact (currently not disputed by Plaintiff or any witness) that Elaine Teague agreed to receive and in fact did receive (without objection for well over 2 years for the benefit of her client Shasta) Vernon Abernethy's written verification of Tech's trading performance evidence sufficient to lead Shimer and Firth to reasonably conclude that the Agree Upon Procedures (AUPs) stated by Abernethy in his verification letter and consistently provided to Teague by Abernethy were reasonable and sufficient for the purpose intended?

8) Was the fact that Teague (as Shasta's CPA) never conveyed to Shimer or Firth (either verbally or in writing) that she questioned or in any way doubted that Abernethy was providing her with an accurate rate of return performance number sufficient to allow Shimer and Firth to reasonably conclude that the performance numbers being verified by Abernethy and conveyed to Shasta by Teague each month were accurate? (See attached Shimer Affidavit Exhibit D and Firth Affidavit Exhibit E).

9) Would the Court be justified in concluding (after a review of all of Shimer and Firth's attached affidavit testimony and other evidence to be introduced at trial) that Shimer and Firth's reliance upon the performance numbers being verified by Abernethy and conveyed each month by Teague to Shasta was reasonable in light of the fact that 1) other fully audited trading entities had achieved similar extraordinary rates of return[5] and 2) no documentary evidence has ever been introduced by Plaintiff to show that either Abernethy or Teague ever advised either Firth or Shimer in writing that the AUPs specifically referenced by Abernethy and received by Teague each month for verification of Tech's monthly trading performance would not be adequate for the purpose of verifying a trading rate of return as intended. (See Shimer Affidavit Exhibit D and Firth Affidavit Exhibit E).

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[5] See Shimer Affidavit Exhibit I and attached Table A of SB-2 filing of Hanseatic Discretionary Pool, LLC.

10) Is Shimer's affidavit G (and the attached three letters) sufficient documentary evidence for the Court as trier of fact to conclude that Shimer conveyed to Teague on more than one occasion and to Murray on at least one occasion in writing that he clearly expected Teague to work out with either Rob Collis (or later Vernon Abernethy) whatever verification protocol was reasonably necessary to effect the reliable verification of Tech's trading performance?

11) Is Plaintiff's contention credible that Shimer played a significant role in developing the text of the actual AUP letters that Abernethy consistently forwarded to Teague each month verifying a specific rate of return number? There does not exist any documentary evidence in the current pre-trial record that either Abernethy or Teague asked Shimer for any specific input on what should be included in the AUPs during the period of time that these AUPs were being developed by Abernethy and submitted to Teague for her approval (See Shimer Affidavit Exhibit H and attachments thereto.) Nor is there any documentation that Shimer ever forwarded to either Abernethy or Teague any written suggestion that uses the specific accounting related term "Agreed Upon Procedures" or that Shimer ever suggested to either Abernethy or Teague in writing any of the specific AUPs reflected in Abernethy's trading performance verification letters forwarded regularly to Teague (See statements 24-27 of Shimer Affidavit G).

B. Specific Examples Of Significant Facts Offered By Plaintiff That Are Disputed By Defendants Shimer and Firth

The above discussion clearly indicates the extent to which much of the documentation now presented to the Court by Plaintiff in its current motion will clearly be contradicted by specific documentary evidence offered by Defendants and testimony by both Shimer and Firth as well as other witnesses offered to distinguish, explain or completely disprove many of the specific "facts" offered by Plaintiff. The facts in this matter that are truly undisputed do not necessarily lead to the conclusion Plaintiff prefers. Plaintiff's current filing more closely resembles a tediously overlong position paper filled with the type of factual "spin" usually only seen when "facts" are issued by both major political parties during an election campaign.

1. A specific but not exhaustive list (in light of response brief space considerations) of facts offered by Plaintiff that are disputed by Shimer and Firth

Shimer disputes Plaintiff's assertion that the profit split Agreement that was executed by and between Shadetree and Tech was at all "material" to a decision of Shasta's members to place funds with Shasta. The profit split between Tech *and Shasta* was fully disclosed in

Shasta's PPM (see Shimer Affidavit Exhibit I), the amount of that split was consistent with other agreements that Murray had negotiated with other entities including Sterling (See Shimer affidavit Exhibit I). Furthermore, Shasta member Nick Stevenson admitted under oath in response to a question by Shimer (which is not included in the record of Stevenson's deposition testimony provided by Plaintiff) that *if the numbers being conveyed to Shasta by Teague were accurate* he probably would not have cared if Tech chose to allocate a part of its profits to another entity (see Shimer Affidavit Exhibit I).

Neither Shimer nor Firth sought to hide the existence of Shadetree (see Shimer affidavit I). It is highly doubtful that Plaintiff can find any member of Shasta willing to testify under oath at trial that *if the numbers being reported to Shasta were accurate* that member would not have invested with Shasta or continued to invest with Shasta simply because Shimer disclosed in Shasta's PPM that Tech had agreed to share a part of its allocated trading profit with another entity such as Shadetree.

Shimer also specifically disputes Plaintiff's allegation that Shimer and Firth knew Abernethy was not acting in a responsible and independent manner when verifying Tech's performance number. According to Abernethy's deposition testimony under oath (see Shimer Affidavit Exhibit J and attachment) Abernethy had no prior association with Murray that would have raised a question whether Murray and Abernethy might collaborate together to issue false or misleading performance numbers for Tech. Abernethy also testified under oath on June 9, 2004 in his deposition that he "had no agreement with anyone to get commissions from Shasta". (See Shimer affidavit Exhibit J and attachment) All of the other facts recited in Shimer's affidavit Exhibit J support the reasonableness of Shimer and Firth's belief that Abernethy was acting in an independent and professional manner.

Shimer specifically disputes as immaterial and irrelevant all of Plaintiff's alleged facts contained in Plaintiff's SMFs 16-21 All of these "facts" are not only misleading as stated by Plaintiff, they are incomplete bits of partial information that have absolutely no relevance at all to the specific allegation Plaintiff has made with respect to Shimer. The entity Kaivalya Holding Group, Inc., ("Kaivalya') has never been named as a defendant in the current matter nor has Plaintiff ever alleged that Shimer violated the CEA in any capacity with respect to the entity Kaivalya. These incomplete and misleading factual statements have been included in Plaintiff's current filing with the Court for the sole purpose of impugning the reputation of Shimer and have absolutely no probative value to Counts II through V that are the subject of Plaintiff's current partial summary judgment motion.

SMF #52 is just one example of how Plaintiff makes statements of fact that are not even supported by the cited documentary evidence. Plaintiff's SMF #52 (and its references to Plaintiff's cited back up documentation) was apparently inserted into Plaintiff's current filing to somehow convey the false impression that Shimer was willing to continue to work to place funds with Murray even after learning that Murray had been contacted by Leonard in early 2001. Nothing could be further than the truth. (See Shimer affidavit Exhibit K and attachments).

Shimer also specifically disputes Plaintiff's grossly misleading allegation (see SMF #82) that Tech's monthly reports to Shasta did not come directly from Tech. See Shimer deposition page 889, line 16 and Shimer deposition, page 890, lines 5-11. This is just another very specific example of Plaintiff's willingness to "shade the truth" and report as true facts that are not substantiated by the exhibits and testimony attached to Plaintiff's motion. Space constraints prevent further specific examples. By overwhelming the Court with hundreds of pages of documentation Plaintiff's strategy is to offer the Court the choice of 1) spending day after day after day verifying the evidence cited by Plaintiff or 2) simply take Plaintiff at its word.

2. Many of Plaintiff's facts cited in its abusively overlong list are either irrelevant or not sufficiently material by themselves to support a grant of summary judgment for Plaintiff at this time

Due to space constraints the following is only a partial list of "facts" offered in Plaintiff's Statement of Material Facts (SMF) that are either 1) irrelevant or 2) not sufficiently material that their presence alone, if true, would require summary judgment for Plaintiff in light of opposing and contrary facts that will be presented at trial by Defendants Shimer and Firth

a. SMFs # 3, 8, 10, 33, 34, 37, 39, 41, 104-125: None of these facts support any alleged violation of the CEA unless an additional fact (a trading account *in Shasta's name*) is present as required by existing case law to establish the fact that Shasta is a commodity pool. All pleadings fail to allege that fact and Plaintiff has previously admitted that fact does not exist.

b. SMF #6 is not material evidence of a violation of the CEA by Shimer or Firth. That Murray made the statements recited to Shimer and Firth is true but if Shimer and Firth had substantial evidence and a reasonable basis to believe those statements were true at the time they were made by Murray, the facts recited by Plaintiff do not constitute a violation of the CEA. (See Shimer Affidavit Exhibit L attaching a small part of the extensive 120 page documentation provided to both Shimer and Firth by Murray consisting of extensive technical details about the purported effectiveness and profitability of Murray's trading system).

c. SMF # 9—Plaintiff has presented no evidence that Shimer and Firth had direct knowledge that Murray received any significant funds for commodity trading from individuals or entities other than Shasta. Shimer and Firth's only reason to believe that might be true were representations made from time to time by Murray. (See Shimer affidavit Exhibit D).

d. SMF #15: That Firth was the victim of the Badische fraud perpetrated by others is not a fact material to any alleged violation of the CEA.

e. SMFs #22, 23, 24, 25, 26, 27, 28, 29, 30, 34, 97-103 & 126-129: These "facts" are not "material" to any specifically alleged violation of the CEA by either Shimer or Firth. (See Shimer Affidavit Exhibit I regarding SMF #29 & 30, and the entity Shadetree).

e. SMFs 84-96 The probative "material" value of all of these facts is lessened and called into question by Affidavits attached as Exhibits D, E, F, G & H. and all documentary evidence attached thereto. The weight to be given to any of these facts alleged by Plaintiff should only be sorted out after a trial on the merits.

C. Controlling Summary Judgment Case Law From the Third Circuit Requires The Court To Draw Factual Inferences Most Favorable To The Equity Defendants In Deciding whether to Grant Summary Judgment To Plaintiff.

The Third Circuit case of *Pastore v. Bell Telephone Co. of Pennsylvania* 24 F. 2d 508 (3rd. Cir. 1994) citing to the case of *Big Apple BMW v BMW of North America* 974 F. 2d 1358, 1363 (3rd Cir. 1992) makes it clear that "inferences should be drawn in the light most favorable to the non moving party, (i.e. Shimer) and where the non moving party's evidence contradicts the movant's then the non movant's must be taken as true." [6] (Reference to "Shimer" added). Applying that standard to the present case precludes a grant of Plaintiff's motion in light of the innumerable facts legitimately disputed by Shimer. Plaintiff CFTC (*with the burden of proof in this matter*) asks the Court to spend countless hours if not days wading through a morass of documentation more properly used in an attempt to impeach or contradict the direct or cross examination testimony of Shimer and Firth and their witnesses at trial.

III. <u>PLAINTIFF'S CURRENT MOTION FOR PARTIAL SUMMARY JUDGMENT CONTINUES A TRADITION OF DELIBERATE MISINFORMATION AND FACTUAL DISTORTION</u>

[6] See *Pastore* on page 512 quoting from Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

One fact all parties including the Court can agree upon is that Defendant Coyt E. Murray ("Murray') is alleged to have "operated" a "multi-million dollar fraud in that his company Defendant Tech Traders allegedly solicited over $47 million in investments by claiming to employ a portfolio trading system that guaranteed significant profits." [7] Another "fact" apparent to the Court and now, (*finally* to Plaintiff) is the fact that "(w)hile Tech Traders *and its supposedly independent certified public accountant (CPA) Defendant J. Vernon ("Abernethy"),* reported substantial monthly and quarterly gains, Tech Traders was actually hemorrhaging money at a remarkable rate…".[8] (Emphasis added).

What is also undisputed is the fact that *numerous* separate and independent parties, in addition to Defendant Shimer's legal client Shasta Capital Associates, LLC ("Shasta"), evidently also placed funds with Defendant Murray's company Tech Traders *in clear reliance* upon the erroneous monthly rate of returns being "verified" in writing by CPA Defendant J. Vernon Abernethy ("Abernethy") and transmitted by Abernethy (not only to Shasta's CPA Elaine Teague) but to the entity Sterling and perhaps other parties that were unknown to the Equity Defendants prior to the filing of Plaintiff's Complaint.[9]

One of the most interesting aspects about the matter now before the Court is the remarkable fact that except for the defendant entity Tech the Plaintiff spent almost 5 months "investigating" the entity Shasta and then filed an Original Complaint that completely ignored the real culprits (Murray and Abernethy). The CFTC Enforcement Division's failure to identify and name Murray and Abernethy as a result of its initial "investigation" (and then to post as an excuse on its web site the fact that it had proceeded initially based upon "limited information") is like watching a man walk into a room with his eyes closed, bump into unfamiliar objects from time to time and then exit the room and claim that his inability to describe the room or its contents with any accuracy was due to a lack of available information.

Plaintiff's lead counsel told Shimer in a conversation in Philadelphia in February, 2006 during the depositions of the Lists, Green and Omaha Boy that if he did not submit to Plaintiff's desire to "settle" with respect to "all defendants" that Plaintiff would offer "information" at trial that would "embarrass" Shimer to his friends and family. Making good on that "threat" and evidently taking inspiration from the Easter season, Plaintiff's most recent filing with the Court

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[7] See Opinion of the Court dated October 4, 2005, page 2.

[8] See Opinion of the Court dated October 4, 2005, page 2.

[9] That Abernethy clearly understood parties placing funds with Tech were doing so in reliance upon his "verification" of Tech's performance number is clear from the "I can verify that" statement made by a cartoon type figure created by Abernethy to represent himself (see last attachment to Exhibit J identified as Exhibit 68 to Abernethy's deposition taken on July 1, 2004).

is an extraordinary attempt to virtually bury the Court in a pretrial mountain of disputed facts offered with the apparent intent to publicly "crucify " the respective reputations of both Shimer and Firth. The Plaintiff's Statement of Material Facts and its Memorandum filed in support of its current Motion For Partial Summary Judgment is a predictable continuation of a tradition begun with the Original Complaint that ignores clear and obvious exculpatory facts and deliberately twists and misstates others in a manner that evidences a lack of both personal and professional integrity.

A. Plaintiff's willingness to cleverly "shade" the truth and offer to the Court factual statements that are not true began with the Original Complaint filed on April 1, 2004

On April 1, 2004 the Plaintiff filed its Original Complaint with the Court. Factual misstatements by Plaintiff in its Original Complaint fall into two basic categories: 1) those intended to create a false sense of urgency for the implementation of a statutory restraining order against all of the Equity Defendants (and consequently for sending armed U.S. Marshals to the home of Firth--an individual who clearly never had control over *any* of the funds transmitted to the entity Shasta by Shasta's members); and, 2) those intended to justify Plaintiff's allegation that the entity Shasta was a "commodity pool" and, ergo, that the entity Equity was an unregistered Commodity Pool Operator (CPO).

The cleverly worded false insinuation that a $5.3 million dollar "discrepancy" existed between the amounts received into Shimer's attorney escrow account over time for Shasta and the amounts actually forwarded by Shimer to Tech falls into the first category. That misrepresentation is found on page 10 of the Original Complaint in paragraphs 28 and 29.

The second set of false statements pertain directly to the "commodity pool" issue briefed again by Shimer on April 6, 2006. In retrospect, with the benefit of 20/20 hindsight, it is now apparent that Plaintiff knew it was on shaky legal ground without any legal precedent for its allegation that the entity Shasta was a commodity pool even at the time that Plaintiff filed its Original Complaint. Nevertheless, Plaintiff carefully crafted and inserted certain false factual allegations into its Complaint that appeared to support its position with respect to the commodity pool status of the entity Shasta.

B. Specific Examples of False Factual Statements Made To The Court by Plaintiff In The Original Complaint

The first false statement made by Plaintiff that falls into the second category described above is the following statement found on page 8 of the Original Complaint in paragraph C. 23:

> "Since approximately June 2001 *they have solicited investors to purchase commodity futures contracts* using a "unique computerized approach called the 'Synergetic Portfolio Trading System.'" [10] (Emphasis added)

The second "category 2" false statement in Plaintiff's Original Complaint is the following found on page 9 in Paragraph C. 24:

> "According to its Private Placement Memorandum, Equity also claims that *its trading system*, called the "Synergy Trading System" in the Private Placement Memorandum has resulted in "astonishing performance,"..." [11] (Emphasis added)

Plaintiff's statement in the above cited paragraph C. 23 attempts to directly link the Defendants Equity and Firth to the very specific activity of soliciting investors to "purchase commodity futures contracts". Neither Firth nor Equity ever solicited *anyone* to "purchase a commodity futures contract" and the Plaintiff well knew or should have known that was true based upon the clear language contained in Shasta's PPM and all other subscription documents provided to every prospective Shasta member.

Plaintiff's statement in the above cited paragraph C. 24 alleges that the trading system used to purchase commodity futures contracts belonged in some way or was owned or controlled by the Defendant Equity. That was clearly not true and that fact was clearly evident to anyone proficient in the English language who actually took the time to read Shasta's PPM. Ownership of a trading program that is actually trading commodity futures implies the existence of an account owned by the entity that owns or controls the trading system used to trade futures contracts. This deliberate factual misstatement was simply another clever attempt by Plaintiff to directly "link" the alleged activities of Defendant Equity to the actual purchase or sale of commodity futures contracts and thus invoke Plaintiff's statutory authority.

VI. CONCLUSION

Plaintiff's current filing with the court is an abuse of the judicial process for many reasons. It is an abuse of the judicial process (in light of the hodge-podge of innumerable "facts" open to contrary interpretation and explanation) to ask the Court to short circuit defendant Shimer and Defendant Firth's basic due process right to the fairness guaranteed by a

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[10] Plaintiff's Original Complaint, page 8, paragraph C. 23.

[11] Plaintiff's Original Complaint, page 9, paragraph C. 24.

trial on the merits in which witnesses and evidence can be effectively challenged by the defendants through cross examination and the introduction of rebuttal testimony and evidence.

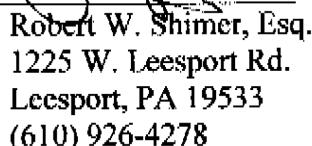
It is an abuse of the judicial process for the Plaintiff to continuously cite throughout the latter part of its supporting Memorandum case law offered to support Plaintiff's Count II allegation of Section 4*o*(1) fraud when *each and every case so cited in that Memorandum* reflects facts that do nothing to support Plaintiff's "commodity pool argument" with respect to the entity Shasta by demonstrating again and again that *no precedent exists* for holding such an entity to be a "commodity pool" *without a commodity trading account in its name.* It is an abuse of the judicial process to file as a public document open to viewing by anyone on the internet the signature of Shimer's wife. It is an abuse of the judicial process to disguise an assassination of a private citizen's reputation as a legitimate motion for summary judgment.

It is an abuse of the judicial process for Plaintiff to privately "threaten" Shimer with public embarrassment if he does not settle a matter pursued by Plaintiff contrary to the prior testimony of its own expert witness in *CFTC v Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, 26,379 (N.D. Ill. 1982) and continued to the great financial detriment of Shimer and Firth without any clear legal precedent or statutory authority.

It is an even greater abuse of the judicial process for a government agency such as Plaintiff and its employees to follow through on that sort of "threat" and to relentlessly crucify Shimer and Firth's respective reputations with skewed and factually incomplete past "information" irrelevant to the allegations found in Plaintiff's Complaint. Defendant Shimer and Firth have fought back and will continue that fight for as long as it takes to regain their reputations. Shimer and Firth will never "settle" with Plaintiff and become scapegoats for the enormous fraud apparently perpetrated against the entity Shasta and many other similarly situated entities by Defendant Murray with the apparent eager assistance of Defendant Abernethy—both of whom were inexplicably never even mentioned in the Original Complaint filed April 1, 2004 to Plaintiff's obvious continuing embarrassment.

Date: May 3, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on May 4, 2006 he caused a true and correct copy of the foregoing Response to the Plaintiff's Motion For Partial Summary Judgment to be served via First Class U.S. Mail upon the following:

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