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UNITED STATES  
DISTRICT COURT

ROBERT W. SHIMER, ESQ., Pro se  
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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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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: May 19, 2006

Defendants.

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Defendant Shimer submits the following Statement of Material Facts that are both undisputed and disputed.

**MATERIAL FACTS THAT ARE NOT DISPUTED BY DEFENDANT SHIMER:**

1. The Ninth Circuit Court of Appeals case of *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9<sup>th</sup> Cir. 1987) is controlling case law with respect to the issue of whether an entity is a "commodity pool".
2. Lopez formulated a four-part test and pursuant to the holding of *Lopez*, all four parts of that test have to be found to exist in order for an entity to qualify as a commodity pool.
3. The fourth test required by the Lopez Court is that "transactions" (for investing in commodity futures) are "traded by a commodity pool operator *in the name of the pool*"

rather than in the name of an individual investor.” (Emphasis added).

4. That Defendant Coyt Murray is alleged to have operated a multi-million dollar fraud in that his company Defendant Tech Traders, Inc. (Tech”) allegedly solicited over \$47 million in investments by claiming to employ a portfolio trading system that purported to minimize risk and generate significant profits.
5. That while Tech and its certified public accountant Vernon Abernethy reported substantial monthly and quarterly gains, Tech was actually losing money trading.
6. That the rate of return numbers purportedly “verified” by Defendant Vernon Abernethy were not accurate.
7. That Vernon Abernethy consistently forwarded to Shasta’s CPA Elaine Teague of Puttman & Teague, Portland, Oregon the rate of return numbers he generated for Tech Traders.
8. That Elaine Teague regularly forwarded to Shasta’s manager Defendant Equity Financial Group, LLC (“Equity”) the exact same rate of return numbers that she received from Vernon Abernethy.
9. That all performance numbers posted on Shasta’s web site for the month of June, 2001, for the quarter of July, August and September, 2001 and for each and every individual calendar month from October, 2001 through and including February, 2004 were the exact same rate of return numbers provided to CPA Elaine Teague by CPA Vernon Abernethy.
10. That all performance numbers posted on Shasta’s web site for the month of June, 2001, for the quarter of July, August and September, 2001 and for each and every individual calendar month from October, 2001 through and including February, 2004 were the exact same rate of return numbers provided to Shasta’s manager Equity by Shasta’s CPA Elaine Teague.
11. That all performance numbers reported by Shasta’s manager Equity to members of Shasta for the months beginning January, 2002 until February, 2004 were the exact same rate of return numbers provided to CPA Elaine Teague by CPA Vernon Abernethy and forwarded by Elaine Teague to Shasta’s manager Equity.
12. Numerous separate entities in addition to Defendant Shimer’s client Shasta Capital Associates, LLC (“Shasta”) placed funds with Defendant Murray’s company Tech Traders in clear reliance upon the erroneous rate of return numbers reported by Vernon

Abernethy.

13. Commodity futures were never traded in the name of Shasta Capital Associates, LLC ("Shasta") from any sub account of Defendant Robert W. Shimer's attorney escrow account at Citibank.
14. Funds deposited to Robert W. Shimer's attorney escrow account by members of Shasta Capital Associates, LLC ("Shasta") did not ordinarily remain in that account for more than several days but were immediately transferred elsewhere as instructed.
15. The sub-escrow bank account of Defendant Robert W. Shimer's attorney escrow bank account at Citibank was the only account ever opened in the name of Shasta.
16. Shasta never opened or maintained any trading or bank account other than the sub-escrow account maintained under Shasta's Federal Tax ID number by attorney Robert W. Shimer at Citibank.
17. Shimer does not dispute the truth of Plaintiff's SMF # 71.

**MATERIAL FACTUAL STATEMENTS OFFERED BY PLAINTIFF CFTC THAT DEFENDANT SHIMER DISPUTES.**

1. Shimer specifically disputes Plaintiff's SMF 7 that any of the Equity Defendants "touted" the performance of the Shasta "commodity pool". None of the Equity Defendants ever acknowledged Shasta to be a commodity pool or ever referred to Shasta as a "commodity pool". (see Shimer Brief)
2. Shimer specifically disputes Plaintiff's SMF # 8 that any of the Equity Defendants ever specifically solicited anyone "to trade commodity futures contracts". (see Shimer Brief)
3. Shimer disputes Plaintiff's SMF #9 that Shimer and Firth "knew" that Tech Traders and Murray accepted money from third parties and pooled those funds with Shasta's funds. (see Shimer Brief)
4. Shimer specifically disputes Plaintiff's characterization of both his past and Firths' past as "checkered".
5. Shimer disputes that SMF 37 is factually accurate. Nothing ever drafted by Shimer refers to the fact that funds of the entity Shasta were "pool" funds".

6. Shimer disputes Plaintiff's SMF #38. (see Shimer Brief and relevant affidavit statement under oath by Shimer).
7. Shimer disputes Plaintiff's characterization of any fact stated in Plaintiff's SMF #50 as representing a "conflict".
8. Shimer disputes the accuracy of Plaintiff's SMF 53. There is no evidence in the record that Shimer "knew" Murray had accepted funds from entities other than Shimer's clients (or the limited referral of Sterling to Tech).
9. Shimer disputes Plaintiff's SMF # 57. (see Shimer Brief and attached Shimer Affidavit Exhibit L).
10. Shimer disputes Plaintiff's SMF # 67 that "Shimer "created" the procedure for verifying trading performance. All other "facts stated in SMF 67 are by themselves not essential or material facts to any violation of the CEA.
11. Shimer disputes that any of the facts stated in Plaintiff's SMF 69 are material by themselves to any alleged violation of the CEA. Shimer indicated again and again in writing to Shasta's CPA Elaine that he was depending upon her to arrive at an acceptable protocol for verifying Tech's trading performance. (see Shimer Brief and attached affidavits).
12. Shimer disputes Plaintiff's SMF 70. (see Shimer Brief).
13. Shimer disputes that any of the "facts" stated in Plaintiff's SMF 75 would require a conclusion that Abernethy was not independent. This is a decision that the trier of fact can only make after all evidence is introduced at trial (See Shimer Brief and affidavit attached thereto).
14. Shimer disputes many of the individual "facts" stated in Plaintiff's SMF 76. Any proper conclusion as to the reasonableness of Shimer and Firth's decisions with respect to the verification of Tech's trading performance can only be made after a trial on the merits. (See generally Shimer Brief).
15. Shimer disputes the facts cited by Plaintiff's SMF 81. (see specifically pages 4, 5 and 6 of Shimer's Brief and attached affidavit).
16. Shimer disputes as false and misleading the "facts" as stated in Plaintiff's SMF 82. (See Shimer Brief, page 10)
17. Shimer specifically disputes Plaintiff's "fact" as stated in Plaintiff's SMF 87 that Teague

never saw the "Agreement For Independent Verification of Shasta's Profits and Losses".

**FACTUAL STATEMENTS MADE BY PLAINTIFF THAT SHIMER DISPUTES AS TO MATERIALITY**

1. Shimer specifically disputes that the lack of clarity found in Shasta's PPM concerning Firth's NASD Series 7 license was a false statement. Firth held such a license and if that license had expired, that fact that was honestly overlooked by Firth and that Firth's Series 7 license was not current was not a fact material to any of Plaintiff's allegations contained in Counts II through V of the First Amended Complaint.
2. Shimer disputes (Plaintiff's SMF #12) that any bankruptcy filing in 1992 is a material fact. That filing was more than 5 year old and was not required by Plaintiff's regulations to be disclosed. Shimer also disputes that any defensive filing Firth may have made to protect himself from the Badische fraud perpetrated by other people is not a fact material to Plaintiff's allegations of Section 4o(1) fraud. Shimer also disputes that any bankruptcy filing by Firth was material to any alleged violation of the Commodity exchange Act by either any equity Defendant in light of the fact that Firth was not a signer on any bank account of Shasta's into which investors funds were initially forwarded of from which funds received by Shasta from Tech were returned to Shasta's investors nor did Firth ever represent that he would be doing any commodity futures trading for any member of Shasta, for the entity Shasta or for any other person or entity.
3. Shimer disputes (Plaintiff's SMF 12) that any lack of "research" on his part with respect to Firth's previous bankruptcy filing was material to any violation of the CEA alleged by Plaintiff. Firth never handled funds received from or sent back to Shasta's members nor was there any representation in any subscription document that Firth would be conducting any "trading" on behalf of Shasta or any individual member of Shasta.
4. Shimer disputes Plaintiff's SMF 13 that Shimer passed the Series 3 Test to be an AP of an entity not named in the Complaint 15 years ago as being both irrelevant and immaterial to any alleged violation of the CEA. Shimer will testify at trial that he never acted as an AP for any entity named Churchill Commodities and that he never engaged in the solicitation of commodity clients for any entity after passing that Series 3 test.

5. Shimer also disputes as immaterial to Section 4o(1) fraud any correspondence referred to by Plaintiff between himself and a health insurer. (See Plaintiff's SMF # 14).
6. Shimer disputes as immaterial and irrelevant to any of Plaintiff's allegations contained in Counts II through V of the First Amended Complaint Firth's experience with Badische (SMF # 15).
7. Shimer disputes as irrelevant and immaterial all of Plaintiff's SMFs 16 through 21. (See Shimer Brief). Shimer also disputes as misleading, deceptive and incomplete most or all of these facts recited by Plaintiff (see Shimer Brief).
8. Shimer disputes the factual accuracy of Plaintiff's SMFs #22 through 28 and further states that even if some of these statements may be partially true none of those alleged facts are directly material to Plaintiff's allegation that Shimer violated a specific section of the Commodity Exchange act (CEA).
9. Shimer specifically disputes that Plaintiff's SMFs 29 and 30 are at all material to a violation of the CEA and do not allege any wrong doing by Shimer. (See Shimer Brief and more specifically Shimer Affidavit Exhibit I)
10. Shimer disputes that Plaintiff's SMF 31 alleges any fact "material" to a violation of the CEA.
11. Shimer disputes that any of Plaintiff's SMFs 32 thorough 36 allege any fact that is "material" to any violation of the CEA.
12. Shimer disputes many of the facts alleged in Plaintiff's SMFs 37 through 50 as being stated in a deliberately deceptive manner and, in addition, are not, in and of themselves, facts that are essentially "material" to any violation of the CEA.
13. Shimer disputes Plaintiff's SMF 51 as being a material fact essential to a violation of the CEA.
14. Shimer disputes both the relevancy and materiality of Plaintiff's SMF #52. (See Shimer Brief and cited affidavit)
15. Shimer disputes the materiality of Plaintiff's SMFs 53, 54, 55 56 & 58.. (See Shimer Brief with respect to SMF 53)
16. Shimer disputes that Plaintiff's SMFs #59 and 60 are facts essential and "material" to a violation of the CEA. (See Shimer Brief)
17. Shimer disputes the fact that Plaintiff's SMF #61 is a fact essential and material to any

- alleged violation of the CEA in light of the many facts cited by both Firth and Shimer in attached affidavits to Shimer's Brief.
18. Shimer disputes that Plaintiff's SMFs 62 through 66 are at all essential or material to any alleged violation of the CEA.
  19. Shimer disputes that Plaintiff's SMFs 72 through 73 are at all essential or material to any alleged violation of the CEA. That Firth relied upon Shimer is not material if that reliance by Firth was reasonable. (See Shimer Brief). The reasonableness of that reliance by Firth can only be determined by a trial on the merits with all the evidence presented.
  20. Shimer disputes that any of the facts stated in Plaintiff's SMF #74 are material and essential to a finding of a violation of the CEA. There is no evidence in the record that Teague ever communicated any concern to Shimer or Firth about 1) that Abernethy might not be reviewing original brokerage statements or 2) that the performance numbers being conveyed to her by Abernethy were not accurate. Any verbal statements made by Teague to the contrary will be disputed at trial by both the direct testimony of Shimer and Firth and documentary evidence (See Shimer Brief and attached affidavits).
  21. Shimer disputes that Plaintiff's SMF 77 is relevant to the reasonableness of Shimer and Firth's belief about the trading verification process in the absence of any written documentation that Shasta's CPA ever conveyed any doubt to either Shimer or Firth that the procedures that she initially stated in writing "looked good to her" and that she received consistently each month were not producing an accurate rate of return. (see Shimer Brief and attached affidavits of Shimer and Firth).
  22. Shimer disputes that Plaintiff's SMFs 78, 79 and 80 are material and essential to a finding that the CEA was violated by any of the Equity Defendants.
  23. Shimer disputes that any facts in Plaintiff's SMF 83, 84, 85, 86 and 87 are material and essential to a finding that the Equity Defendants violated the CEA.
  24. Shimer disputes that the facts recited in Plaintiff's SMFs 88-96 that pertain to the issue of minimum account balance verification are material and essential by themselves to a finding that any of the Equity Defendants violated the CEA. The evidentiary weight of these "facts" is significantly diminished by facts alleged as true in Shimer and Firth's affidavits attached to Shimer's Brief. (See also generally Shimer Brief)
  25. Shimer disputes that Plaintiff's "other red flag" points (see Plaintiff's SMFs 97- 103

allege facts that are material and essential to a finding that the Equity Defendants violated the CEA in light of facts alleged as true by Shimer and Firth in affidavits attached to Shimer's Brief.

26. Shimer disputes that Plaintiff's SMFs 104 through 125 are at all material or essential to Plaintiff's allegation that the Equity Defendants violated any of the registration requirements of the CEA. Shimer notes that this issue has been adequately disputed and previously briefed by Shimer.
27. Shimer disputes that any of Plaintiff's SMFs 126-129 are material and essential to any alleged violation of the CEA by any of the Equity Defendants.

Dated: May 4, 2006



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