In The United States District Court
For the District of New Jersey

COMMODITY FUTURES TRADING COMMISSION,	:	**Civil Action No. 04CV 1512**
Plaintiff	:	
	:	**Honorable Robert B. Kugler**
vs.	:	
	:	
EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, INC., TECH TRADERS, LTD., MAGNUM INVESTMENTS, LTD., MAGNUM CAPITAL INVESTMENTS LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY	:	
Defendants	:	

ALISON E. SHIMER'S OPPOSITION TO THE EQUITY RECEIVER'S MOTION TO DISALLOW CLAIM

Alison E. Shimer ("Alison") hereby files this opposition to the motion of Stephen T. Bobo ("Receiver") dated November 13, 2007 seeking to disallow her claim in its entirety as a legitimate member in good faith of the entity Shasta Capital Associates, LLC ("Shasta"). In support of her opposition to the Receiver's motion Alison states as follows:

Alison Shimer's Participation in the Investor Claim Process

The Receiver cannot and apparently does not dispute that Alison was a member of Shasta and that funds in the amount of $150,000.00 were transferred by bank wire to a bank account in the name of the entity Shasta opened under the Federal Tax ID Number of the entity Shasta. Nor can the Receiver dispute that Shasta's bank account existed as a sub account at Citibank, New York of the attorney escrow account of Robert W. Shimer ("Robert"). The Shasta bank account that received Alison's funds was the same account that received all funds of every member of Shasta. Nor can the Receiver dispute that the funds were received by the entity Shasta for the purchase of member shares of the entity Shasta *solely* in the name of Alison. Nor can the

Receiver dispute that Shasta account number 126-SC-2601 was established solely in the name of Alison and that Alison received regular monthly statements from the manager of Shasta just as did all other members of Shasta.

Nor can the Receiver legitimately dispute the fact that the $150,000.00 was wired to Shasta's bank account from a checking account at Patriot Bank in which Alison was *the primary account holder* because all bank statements issued for that account by Patriot Bank place her name first and were issued under the social security number of Alison—not Robert. The fact that Robert is also a signer on that account does not make the funds any less Alison's.

The source of Alison's investment in Shasta came from a first mortgage on a single family dwelling with address of 414 Allendale Way, Camp Hill, PA now jointly owned by Robert and Alison. As a precondition for the loan, Alison became a joint title owner of that financed property, is currently listed on the deed as a joint owner of the property and Alison executed and is jointly liable for the mortgage proceeds. It is, therefore, not at all "undisputed" "that the funds invested in Alison's name came from her husband…". [1] The funds that were invested in Alison's name came from a property on which she was a joint title holder at the time the mortgage was issued and represented funds on which she is jointly and severally liable to repay. The Receiver well knows this to be true and yet blithely ignores these all important details.

On page 4 of his motion and also attached as Exhibit B to his Motion the Receiver points to certain previous deposition testimony of Robert in an attempt by the Receiver to somehow "convince" the court that the funds invested by Alison came "only" from Robert. But clearly the deed to the financed property and the note obligations signed at closing when the loan proceeds were disbursed tell a very different story. And the Receiver well knows this to be true. The fact that Robert may have been the sole owner of the property prior to the financing does not eliminate the fact *that Alison was a joint owner of the property at the time the property was financed.* The funds disbursed at closing were as much Alison's as they were Robert's.

Robert's deposition testimony only acknowledged his role in the mortgage lien that secured the Camp Hill real estate. It does not at all purport to exclude the fact that Alison participated equally and jointly with Robert in the financing necessary to obtain the loan proceeds that were eventually invested in Shasta. The Receiver's "version" of the facts also

[1] See Receiver's Motion dated November 13, 2007, Page 5, Sentence 1 of Paragraph number 12.

ignores the fact that Alison became a joint title holder with Robert at the time the Camp Hill property was financed and it also clearly ignores Alison's joint and several liability for the amount borrowed.

Nor does the fact that Alison clearly deferred to Robert to actually execute the wire transfer from the Patriot Bank account on which they were both authorized to sign somehow magically sever Alison's claim to the funds that were wired to the entity Shasta *for her clear and sole benefit*. It should not be necessary to point out to the Court that Robert was the clear and logical choice to effect this wire transfer for Alison's benefit since the receiving bank account was a bank account of Robert's legal client and, therefore, an account for which Robert had the necessary routing and account number information. Why shouldn't I ask my husband to do that for me?

In short, there is not a single "fact" in the Receiver's Motion that justifies a finding by the Court that the funds did not clearly belong to me at the time they were sent to Citibank for my benefit. I am a legitimate member of Shasta and I am legally entitled to the same treatment from the Receiver as every other legitimate member of Shasta. I have a right to be included in any proposed final distribution from the Receivership estate. The funds sent to Shasta were funds that legally belonged to me and no amount of factual somersaults by the Receiver can change or alter that hard reality. They were sent to the entity Shasta for my benefit. I was a legitimately registered member of Shasta and never withdrew any funds. I am entitled to receive the same disbursement as every other member of Shasta who placed funds and did not request a withdrawal.

The Receiver also refers to the "inequity" of allowing me to fully participate in a final distribution of the receivership estate citing the fact that an alleged total of $210,000.00 was received into the Patriot account on which my husband and I are signers. My husband worked tirelessly for over three and one half years as an attorney for Shasta and the entity Equity. He worked for almost a year and a half before he ever received a penny from Shasta's manager for his labor.

All funds he received back from the entity Tech in 2001 were simply a return of the principal amount placed by the entity Edgar with Tech. The Receiver honestly represents in his Motion that my husband received only $210,000.00 for all of the legal work he did in 3 ½ years. That total payment amounts to less than $70,000.00 per year for the time he spent on the

Shasta/Tech project. That is truly pitiful compensation in light of the initial uncertainty that Tech's performance would be verified as profitable and that the proposed project would continue to be apparently viable. To argue that those funds, received in good faith by my husband Robert with no knowledge of the fraud being perpetrated by Coyt E. Murray and his company Tech, should be cited as an "equitable" argument against my participation as a member of Shasta is not only an insult—it is absurd.

The Receiver also cites as a part of his "equitable" argument my receipt from the entity Equity of the small sum of $12,000.00 for one year's worth of office assistance provided to my husband Robert during that year. The fact that I provided office support to my husband constantly for over 3 years and that my assistance to Robert was finally recognized in 2003 in some small way by that relatively meager payment from the entity Equity is no evidence at all that I "involved" myself in "the affairs of Equity Financial Group and Shasta and their dealings with Tech Traders." My husband could not have hired an assistant to give him anything even close to the office support I provided to him as he worked out of my family home in Leesport.

I strongly dispute any conclusion offered by the Receiver that my husband and I have "wrongfully profited" from his work for the entity Shasta. Since when does over three years of constant good faith work for which you are paid a fair amount qualify as "wrongful profit"?

Regarding the Court's Previous Rulings with Respect to Robert

As has been previously pointed out to the Court in my husband Robert's previous dispositive motion for summary judgment dated April 6, 2006 the Commodity Futures Trading Commission's (CFTC's) sole basis for asserting any jurisdiction over him has been its repeated attempt to mischaracterize the entity Shasta as a "commodity pool" in support of its further mischaracterization of the entity Equity Financial Group, LLC ("Equity") as the "operator" of the alleged "pool" entity Shasta. Based upon that apparently questionable legal "characterization" the CFTC has attempted to assert purported enforcement authority over my husband citing several sections of the Commodity Exchange Act ("CEA"), 7 USC §§ 1 *et seq*.

The Receiver points on page 3 of his Motion to the District Court's denial of Robert's previous dispositive motions for summary judgment. In paragraph #8 found on pages 3 and 4 of his Motion the Receiver also refers specifically to certain language found in the District Court's Opinion and Order dated December 18, 2006 that granted partial summary judgment to the

CFTC. As the Receiver well knows, all final orders of the district court are subject to appellate review. In light of previous motions that have been filed by my husband Robert in this matter it should not come as a surprise to anyone if my husband Robert files a timely appeal from the previous Opinions and Orders already issued by the District Court.

Such an appeal is made even more likely by the clear fact (as pointed out previously by my husband in his Motion for Summary Judgment previously filed with the Court dated April 6, 2006 as well as in his Reply Brief dated April 24, 2006) that:

1) The only precedent the CFTC has *ever* been able to cite in support of its argument that "feeder funds such as Shasta have been found to be commodity pools")[2] is the case of *CFTC v Heritage Capital Advisory Services* ("Heritage").
2) Robert's Summary Judgment 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 the CFTC's repeated erroneous assertion that the facts of Shasta are "similar" to the facts of *Heritag*e.
3) In light of the clear and obvious factual disparity between *Heritage* and the facts surrounding the entity Shasta the CFTC is without any legal precedent for its contention that an entity such as Shasta is a commodity pool. That is true because the entity Shasta 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.
4) The Illinois District Court case of *Heritage* cited frequently by the CFTC is completely compatible with the apparently controlling four part test for determining if an entity is a "commodity pool" enunciated by the Ninth Circuit Court of Appeals in the case of *Lopez v. Dean Witter Reynolds, Inc.*
5) One obvious reason the two cases of *Heritage* and *Lopez* are completely compatible is the fact that the later *Lopez* decision issued by the Circuit Court of Appeals for the

[2] See pages 3-5 of the CFTC's Response dated August 4, 2005 to Robert's Summary Judgment Brief dated July 7, 2005.

Ninth Circuit cited the District Court case of *Heritage* when creating its clear four part test.

6) The Receiver is personally 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 the Receiver was an attorney employee of the CFTC in 1982 at the time the CFTC's complaint was filed against the entity Heritage Capital Advisory Services and the official court records in that case clearly show that Stephen T. Bobo was specifically assigned to the *Heritage* case.

7) 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.

8) The only "account" ever opened by the entity Shasta was a bank account that existed as a sub account of my husband Robert's attorney escrow account at Citibank and that "account" clearly fails most if not all four of the *Lopez* tests.

9) The *Lopez* Court found that if even one of its four enumerated tests are not present, the entity in question is not a "commodity pool".

10) The legislative history of the Commodity Exchange Act *does not* support a finding that Congress intended that entities such as Shasta's manager Equity should be entities subject to the registration requirements of the CEA when they control or manage entities such as Shasta that never open commodity trading accounts and never engage in any commodity trading or represent to anyone any intention to directly engage in the activity of commodity futures trading.

11) The 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 my husband Robert's previously 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.

12) To decide otherwise broadens the definition of "commodity pool" far beyond the clear and obvious intent of Congress when the CEA was enacted.

13) Such a decision would not be 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 the CFTC.

14) 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 my husband'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 his discussion of the legislative history of the CEA in that same Brief.

15) The above cited regulations of the CFTC are incompatible *on their face* with the CFTC's position with respect to the issue of whether or not the entity Equity is a commodity pool operator.

16) The testimony of the CFTC's own expert witness in the *Heritage* case (as disclosed in Exhibit E attached to Robert's April 6, 2006 Brief) supports and confirms Robert's repeated assertion throughout this matter 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.

17) The testimony of the CFTC's own expert witness in the *Heritage* case 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).*

18) If (according to the CFTC's own expert witness) members of the investing public *must* open a commodity trading account at an FCM to become "involved" in the futures market, how is it possible to sustain on appeal 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—a specialized commodity related investment entity more "narrowly" defined by the CFTC over 25 years ago.

19) The CFTC has never attempted to answer in its Response Brief dated April 20, 2006 the above pertinent and highly relevant question.

In light of all of the above stated reasons why an appeal is likely from any final decision of the District Court and the fact that the success of any appeal by my husband Robert would 1) vitiate any jurisdiction of the Receiver over Robert and 2) remove any and all purported obstacles to properly including me in a final distribution of assets of the receivership estate I urge the district court to allow the Receiver to close the receivership estate but only with respect to all other Shasta member claimants except for myself.

The Receiver should be required by the Court to hold in reserve an amount equal to the amount that I would be entitled to receive as a legitimate member of Shasta if the legal arguments offered by the CFTC in this matter with respect to my husband's alleged commodity related fraud are found on appeal to be without legal basis or merit. In light of the Receiver's clear and obvious personal knowledge surrounding the true facts of the only case relied upon by the CFTC in its fruitless search for any precedent at all in support of its civil action against both the entity Equity and my husband Robert I would urge the Receiver to voluntarily concur with my suggested proposal for closing the Receivership estate with respect to all Shasta members except for myself.

November 23, 2007

Respectfully submitted,

s/ Alison E. Shimer
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