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,

Plaintiff,
vs.

EQUITY FINANCIAL GROUP LLC, et. al.,

Defendants.

Hon. Robert B. Kugler

Civil Action No. 04-1512

Motion Day July 6, 2007

----------X

BRIEF OF DEFENDANT ROBERT W. SHIMER IN SUPPORT OF MOTION FILED ON BEHALF OF HIMSELF *PRO SE* AND A SEPARATE SIMILAR MOTION OF DEFENDANT VINCENT FIRTH *PRO SE* FOR STAY OF TRIAL PENDING APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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, et. al.,

Motion Day July 6, 2007

Defendants.

----------X

BRIEF OF DEFENDANT ROBERT W. SHIMER IN SUPPORT OF MOTION FILED ON BEHALF OF HIMSELF *PRO SE* AND A SEPARATE SIMILAR MOTION OF DEFENDANT VINCENT FIRTH *PRO SE* FOR STAY OF TRIAL PENDING APPEAL

Defendant Robert W. Shimer ("Shimer") acting *pro se* submits this Brief in support of his Motion and a similar Motion submitted by Defendant Vincent J. Firth (Firth) for Stay of trial pending the current joint appeal of Shimer and Firth to the Third Circuit Court of Appeals.

I. PRELIMINARY BACKGROUND STATEMENT

Defendant Shimer filed a motion for summary judgment in the current matter last year dated July 7, 2005. The Plaintiff Commodity Futures Trading Commission (CFTC) filed a Response dated August 5, 2005 and Shimer filed a timely Reply dated August 13, 2005. The Court issued an opinion dated October 4, 2005 and an accompanying order dated the same day denying Shimer's summary judgment motion and denying a similar motion for summary judgment filed separately by Defendant Firth. The Court's opinion dated October 4, 2005 cited three separate conclusions as the basis for its decision:

1) That "Heritage involved an operation very similar to Shasta". (See the court's October 4 opinion, page 8); and,

2) That "Shasta satisfies the four factors of the Lopez test". (See the court's October 4, 2005 opinion, pages 7 and 8.); and,

3) That "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool" (See the court's October 4, 2005 opinion, page 9).

On April 7, 2006 Shimer filed a renewed motion for summary judgment dated April 6, 2006. Defendant Firth also separately filed a renewed motion for summary judgment. In support of his motion Shimer filed a brief dated April 6, 2006. Shimer's brief filed in support of his renewed motion for summary judgment was filed with the Court on April 7, 2006. Defendant Firth's renewed motion for summary judgment specifically referred to and relied upon the Shimer's brief.

Shimer's brief dated April 6, 2006 attached 5 separate Exhibits (Exhibits A-E) that provided extensive certified documentation from the case file of *CFTC v. Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, 26,379 (N.D. Ill. 1982) examined by Shimer in mid October, 2005 at the Federal Records Center in Chicago, Illinois. That documentation clearly contradicted the CFTC's argument found in its previous Response dated August 5, 2005 that the district court case of *Heritage* provided *any* support at all for the CFTC's claim that an entity factually similar to the entity Shasta had been previously found by a federal court to be a "commodity pool". The CFTC filed a Response dated April 20, 2006 to these new motions for summary judgment by Shimer and Firth. Shimer filed a timely Reply dated April 24, 2006.

By Opinion dated November 16, 2006 the district court again denied Shimer and Firth's respective motions for summary judgment with respect to all counts of the CFTC's amended complaint. Shimer and Firth filed respective Motions for Reconsideration dated December 4, 2006 supported by Shimer's brief of the same date. The district court denied those motions on December 18, 2006 and on that same date granted partial summary judgment to the CFTC.

On February 9, 2007 the District Court for the District of New Jersey received with the appropriate filing fee the timely Joint Notice of Appeal to the Third Circuit Court of Appeals of Shimer and Firth. By letter dated February 21, 2007 both Shimer and Firth were advised by the Office of the Clerk, United States Court of Appeals for the Third Circuit that their joint appeal had that day been assigned Docket No. 07-1433. Shimer and Firth's Joint Appeal challenges the district court's denial on December 18, 2006 of their respective motions for reconsideration of previous motions of Shimer and Firth dated April 6, 2006 for summary judgment with respect to all counts of the amended complaint of the Commodity Futures Trading Commission

("CFTC"). Their joint appeal also challenges the district court's order dated December 18, 2006 granting partial summary judgment to the CFTC.

By letter dated February 28, 2007 Shimer and Firth as well as the CFTC received a request from the Legal Division of the Office of the Clerk to submit written arguments either in support or opposition to dismissal of the appeal for lack of appellate jurisdiction in light of the general rule that orders denying summary judgment are generally not considered final decisions of the district court as required by 28 U.S.C. § 1291. The CFTC by its Assistant General Counsel Merry Lynn, Esq. provided a timely written response dated March 12, 2007 in the form of a motion to dismiss for lack of appellate jurisdiction. Shimer and Firth filed a joint twenty six page written argument dated March 19, 2007 hand delivered and filed March 20, 2007 with the clerk of the Third Circuit Court.

On March 27, 2007 Plaintiff CFTC received Shimer and Firth's opposition to dismissal of the appeal for lack of appellate jurisdiction. By letter dated March 29, 2007 Plaintiff CFTC filed a Reply to Shimer and Firth's opposition to dismissal for lack of appellate jurisdiction. Upon his receipt of Plaintiff's Reply Shimer received permission from the case manager to file a Response and did so on Monday April 2, 2007. Firth submitted under separate cover his own Response that incorporated by reference the points and arguments made by Shimer.

The written arguments submitted by both Shimer and Firth in opposition to dismissal of their current appeal and the Plaintiff CFTC's arguments in support of dismissal of Shimer and Firth's current appeal for lack of appellate jurisdiction have now been submitted to a panel of the Third Circuit Court.

II. ARGUMENT

A. It is likely the Third Court of Appeals Will Find That Appellate Jurisdiction Exists With Respect To The Current Pending Appeal Of Shimer and Firth

1. Applicability of the "collateral order" doctrine.

As noted previously Shimer and Firth filed a timely 26 page written argument in opposition to dismissal of their current appeal for lack of appellate jurisdiction. That written argument clearly acknowledged the general rule that *in most instances* the denial of a defendant's motion for summary judgment is ordinarily not a "final decision" of a district court as required by 28 U.S.C. § 1291. However there is a well established exception to that general

rule found in the "collateral order" doctrine established by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.* , 337 U.S. 541 (1949). As a result of *Cohen* and later cited Supreme Court cases it is well recognized by the Third Circuit Court that *in some instances* an order of a district court that would not otherwise be considered "final" will be held to have sufficient "finality" for purposes of granting appellate jurisdiction pursuant to 28 U.S.C. § 1291 if it 1) determines the disputed question; 2) resolves an important issue completely separate and apart from the merits of the action; and 3) would be effectively unreviewable on appeal from a final judgment. Shimer and Firth pointed out to the appellate court in their written argument dated March 19, 2007 that all three of the above requirements of the collateral order doctrine are met in the currently pending appeal.

a. *The district clearly determined the disputed question*

With respect to the first requirement for satisfying the collateral order doctrine Shimer and Firth pointed out to the appellate court that the disputed legal question upon which Shimer and Firth's respective motions for summary judgments were based was whether the non defendant entity Shasta Capital Associates, LLC ("Shasta") was a "commodity pool". A negative answer would have required a grant of Shimer and Firth's motions for summary judgment. The district concluded on October 4, 2005 (record document no. 266) and again on November 16, 2006 (record document no. 409-1) that the entity Shasta was a "commodity pool" and refused to reconsider that decision when Shimer and Firth's motion for reconsideration were denied on December 18, 2006. The disputed legal question has, therefore, been clearly determined by the district court and Shimer and Firth pointed that clear fact out to the Third Circuit Court in their joint written argument dated March 19, 2007 opposing dismissal for lack of jurisdiction.

b. *The district court order purported to resolve several important issues completely separate and apart from the merits of the action.*

With respect to the second requirement for satisfying the collateral order doctrine Shimer and Firth pointed out to the appellate court that the district court's decision about the "commodity pool" status of Shasta purported to resolve several important legal issues that were separate and apart from the merits: 1) whether the first test of *Lopez v. Dean Witter Reynolds, Inc.* 805 F. 2d 880 (9th Cir. 1986) can be applied to an attorney escrow account used solely to transmit a client's funds to a completely separate non client entity that engages in commodity trading (the district court apparently answered "yes" that question) ; 2) whether any

of the other tests enunciated by *Lopez* can somehow be applied not to the entity under scrutiny as a possible commodity pool (i.e. the entity Shasta) but to another completely separate entity [the defendant trading entity Tech Traders, Inc ("Tech")] to satisfy the applicability of the other *Lopez* tests to the non trading entity under scrutiny (Shasta). The district court apparently also answered "yes" to that question by reason of its decisions dated October 4, 2005 and November 16, 2006 and its further denial of Shimer and Firth's motions for reconsideration.

A third legal issue completely separate and apart from the merits was the issue of whether the clear and unambiguous language of the apparently controlling *Lopez* decision is compatible with the legal determination that an entity that has never opened a commodity trading account in its name at an FCM is, nevertheless, a "commodity pool". The district court by reason of its decisions dated October 4, 2005 and November 16, 2006 and by reason of its denial of Shimer and Firth's motions for reconsideration apparently answered "yes" to that particular question as well.

A fourth legal question separate and apart from the merits was whether there is any federal case law precedent at all to support a finding that an entity without a commodity trading account opened *in its name* at an FCM can be held to be a "commodity pool". The district court's opinions dated October 4, 2005 and November 16, 2006 ignored substantial evidence presented by Shimer that pointed to a contrary answer and apparently answered "yes" to that question as well.

A fifth legal question separate and apart from the merits was whether the Commodity Exchange Act (CEA) reflects an intention by Congress to regulate as a "commodity pool" entities such as the non defendant entity Shasta that have never opened a commodity futures trading account at an FCM. The district court came to the conclusion in both of its opinions dated October 4, 2005 and November 16, 2006 denying Shimer and Firth's separate motions for summary judgment that such an intention on the part of Congress was found in the CEA despite the obvious fact (implied by the *Lopez* decision itself) that the CEA does not purport to ever define the term "commodity pool".

c. *The district court's order of November 16, 2006 denying Shimer and Firth's separate motions for summary judgment and the district court's denial of the defendants' motions for reconsideration on December 18, 2006 would be effectively unreviewable on appeal from a final judgment.*

Shimer and Firth also pointed out to the appellate court that the most important collateral legal issue presented by the current appeal of Shimer and Firth actually goes to the very heart of the final requirement for applicability of the "collateral order" doctrine. That issue is: "Does the CFTC have any right whatsoever derived from its specific statutory enforcement authority to proceed to trial with respect to both Shimer and Firth (as well as with respect to the defendant entity Equity) if Shimer, Firth and Equity were never subject to the CFTC's "jurisdiction" in the first place?

Shimer and Firth's 26 page written argument in opposition to dismissal for lack of appellate jurisdiction provided the Third Circuit Court with an extensive Supreme Court case law analysis with respect to this threshold "jurisdictional" issue upon which all counts of the CFTC's amended complaint arguably depend. If the CFTC has no right to proceed to trial by reason of its lack of any enforcement authority over Shimer and Firth (and for that matter the defendant entity Equity as well) there exists *as a matter of law* a mirror entitlement by Shimer and Firth not to stand trial—not as a defense but as an entitlement grounded in the very fundamental concept of due process itself.

It is arguably a violation of due process clause of the Fifth Amendment to force specifically named private citizen defendants such as Shimer and Firth to endure the hardship and distractions of a trial on the merits if the federal agency plaintiff had no statutory authority to name them as defendants in the first place. It is a well settled basic axiom of administrative law that Federal agencies only have authority to "…effect the will of Congress as expressed by the statute." *Dixon v. United States* 381 U.S. 68, 74 (1945).

The denial of Shimer and Firth's motions for summary judgment by the district court is a decision that is effectively unreviewable if the appellate court should wait to decide the issue presented on appeal until after a trial on the merits. That is true because after a trial on the merits the constitutional right of Shimer and Firth not to be forced to endure the hardship of a trial will have been effectively denied.

For all of the reasons stated above, it is likely that upon review of Shimer and Firth's written argument in opposition to dismissal for lack of appellate jurisdiction the Third Circuit court will hold that appellate jurisdiction exists under the "collateral order" doctrine and will proceed to a review of the merits of the basic legal question presented by the appeal: is the non defendant entity Shasta a "commodity pool"? If the appellate court determines that the clear unequivocal language of *Lopez* simply means what it says, and that, indeed, there is no federal case law precedent supporting plaintiff's position it is likely that defendants Shimer and Firth

will be entitled to summary judgment with respect to all counts of Plaintiff's amended complaint.

2. Third Circuit case law precedent provides an additional basis for appellate jurisdiction separate and apart from the "collateral order" doctrine.

The other basis for granting appellate jurisdiction need not be discussed in detail in this brief but is found in case law of the Third Circuit cited in Shimer and Firth's written argument dated March 19, 2007 for the proposition that if summary judgment is granted for the appellee, the appellate court has jurisdiction to consider the denial of the appellant's motion for summary judgment. It is true that the district court granted only partial summary judgment to the CFTC. However, as Shimer and Firth's written argument clearly points out every count upon which the CFTC was granted summary judgment hangs on the slender and tenuous thread that the entity Shasta is truly a "commodity pool".

Shimer and Firth pointed out to the appellate court that the fact that the CFTC chose not to seek summary judgment with respect to Count I is arguably not a bar to appellate jurisdiction at this time nor is the fact that summary judgment was not granted to the CFTC with respect to specific other counts of the amended complaint a bar to appellate jurisdiction at this time per Third Circuit case law cited in Shimer and Firth's written argument dated March 19, 2007. All counts of the CFTC's amended complaint with respect to Shimer and Firth cannot arguably be sustained *as a matter of law* if the non defendant entity is not a commodity pool. There is no need for any further determination of the truth of *any* additional facts at trial that impact *any of the counts in the CFTC's amended complaint against Shimer and Firth* if the entity Shasta is truly not a commodity pool per *Lopez*.

B. Shimer's Current Motion Satisfies The Requirements For Obtaining A Stay Pending Appeal

The requirements for a party seeking a stay pending appeal are as follows: 1) Whether the appellant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably harmed absent a stay and, conversely whether issuance of the stay will substantially injure other parties interested in the proceeding; and 3) where the public interest lies to the extent it is affected. See *Republic of Philippines v. Westinghouse Elec. Corp.* 949 F.2d 653, 658 (3d Cir. 1991) citing *Hilton v. Braunskill*, 481 U.S. 770,776 (1987).

1. Shimer and Firth are likely to succeed on the merits if the Third Circuit Court finds appellate jurisdiction to exist in light of the clear unambiguous language of the apparently controlling Ninth Circuit decision in *Lopez* and the clear lack of any precedent favoring Plaintiff's position on the potentially dispositive "commodity pool" issue

It is not necessary for defendants Shimer and Firth to reiterate their potentially dispositive "commodity pool" argument. In light of the likelihood that appellate jurisdiction will be found to exist either under the "collateral order" doctrine or the other basis outlined by Shimer and Firth in their written argument submission to the Third Circuit Court it should be enough for the district court to recognize that it is more likely that the appellate court will apply an interpretation to the *Lopez* decision that gives recognition to the fact that words simply mean what they say. If that basic approach to interpreting language and the meaning of the language contained in the *Lopez* decision is adopted by the appellate court during a review of the merits of the appeal it is highly likely that Shimer and Firth will prevail on appeal.

The unwillingness or inability of the district court to address the significant documentary evidence presented by Shimer in the Exhibits attached to Shimer's April 6, 2006 motion for summary judgment is another indication that Shimer's conclusion with respect to *Heritage* is correct. The extensive documentation from the actual case file of Heritage clearly supports Shimer's position and provides absolutely no support at all for Plaintiff's untenable position that there is federal precedent for the proposition that an entity without a commodity trading account *in its name* is a "commodity pool". In short, if appellate jurisdiction is granted in the current appeal it is highly likely that Shimer and Firth will prevail on appeal and that their respective motions for summary judgment will be granted.

2. To impose upon *pro se* Defendants Shimer and Firth the requirement of enduring a long, tedious and potentially unnecessary trial on the merits is to impose irreparable harm upon both Shimer and Firth.

A trial on the merits of the remaining counts of Plaintiff's amended complaint will literally impose upon the *pro se* defendants Shimer and Firth the time hardship of a trial on the merits that will literally last for many, many weeks. The time of actual trial itself does not include the weeks Shimer will have to spend with no compensation preparing for his own defense. During this pre-trial period as well as during the extended period of time of the trial itself neither Shimer or Firth will be able to earn a living nor do anything that is critically necessary to support themselves or their families.

Plaintiff's recently filed pretrial disclosure indicates that Plaintiff proposes to call no less than 25 witnesses with respect to the issue of purported liability and to call another 4 witnesses with respect to the issue of damages as well as an expert witness. For the testimony of just one of those witnesses Plaintiff proposes to introduce approximately 320 pages of prior deposition testimony—much of which consists of self serving answers provided by this witness at a time when Plaintiff knew Shimer would not be able to attend and object to either the form of the question or the unnecessary length of the non responsive self serving answers offered by that witness.

In addition to these numerous witnesses, Plaintiff proposes to introduce at trial no less than 303 individual exhibits referencing thousands of pages of documents. Defendant Shimer has just served upon Plaintiff a pretrial disclosure that lists no less than 148 exhibits and an additional 38 exhibits for a total of 186 exhibits to be offered by the defendants at trial. Moreover Shimer may be forced to subpoena for testimony at trial no less than three witnesses listed by the Plaintiff. Direct examination of these three witnesses by Shimer *alone* may literally take anywhere from several days to a week or more. The proposed trial will impose an extraordinarily heavy financial, physical and mental burden on the families of these *pro se* defendants and on the *pro se* defendants themselves who have absolutely no prior litigation experience.

3. The grant of a stay will not injure other parties.

This civil action was commenced by Plaintiff in April 1, 2004—more than 3 years ago. It appears that except for the *pro se* defendants Shimer and Firth (and Equity--the defendant entity controlled by Firth) there are no other defendants that plan to defend themselves at trial. All other defendants have apparently either settled or are in the process of settling with Plaintiff. The relatively short amount of time that it will take the Third Circuit Court to address the issue of appellate jurisdiction (currently before that court now for over 45 days) does not place the Plaintiff or any of Plaintiff's witnesses at any discernible disadvantage.

The Plaintiff is a federal agency. Clearly there is little or no impact at all upon Plaintiff if a specific trial date is not set until the Third Circuit Court has had sufficient time to at least address the issue of appellate jurisdiction. Clearly if appellate jurisdiction is granted it would not be appropriate to proceed to trial until a decision on the merits of the appeal is rendered

given the jurisdictional nature of the issue on appeal that goes to the very heart of the Plaintiff's right to require the remaining defendants to proceed to trial.

4. There is a clear public interest in not setting a trial date until the Third Circuit Court rules with respect to Shimer and Firth's current joint appeal

a. *There is a clear public interest in preserving the constitutional rights of private pro se defendants*

At the very heart of the "commodity pool" issue now presented on appeal is a significant constitutional argument grounded in that basic element that constitutes a free society. Every member of the public has the absolute right to be free from unauthorized harassment and regulatory bullying by agencies of their own government. That basic due process right has now been asserted and is at the very heart of the appeal now before the Third Circuit Court. The defendants have a constitutional right to resist any effort of Plaintiff to proceed to trial until the appellate court determines the initial issue of appellate jurisdiction. If appellate jurisdiction is granted, it is in the public interest that the concept of "rule of law" be preserved and that any further proceeding in the district court be stayed until it is conclusively determined that the Plaintiff does indeed have a right to proceed to trial on the merits with respect to the remaining counts of the amended complaint.

b. *There is a clear public interest in protecting pro se private citizen defendants from the hardship of an extended trial that may not ever be necessary.*

No private citizen should ever be forced by the federal courts to endure the hardship of a potentially unnecessary trial on the merits. A trial requires an enormous expenditure of financial resources, time and takes a heavy toll on all involved—but most particularly upon those who may be named as defendants. If the right of the Plaintiff to proceed to trial is properly raised and questioned as it has been in the current appeal now pending before the Third Circuit Court it is clearly in the public interest that the district court stay any requirement that defendants Shimer and Firth expend any more of their time and financial resources until it is determined that appellate jurisdiction will not be granted and that it is appropriate and timely for a trial to be scheduled.

c. *There is a clear public interest in protecting private citizens from the regulatory action of a federal agency that may have no regulatory authority over those particular citizens in the first place.*

Plaintiff is a federal agency constrained by the specific statutory language of its enabling statute. The issue presently on appeal challenges the very right of that agency to continue to pursue any civil remedy against the defendants Shimer Firth and the entity Equity in the absence of some "connection" between the activities of these particular defendants and the behavior either proscribed or specifically required of them by the Commodity Exchange Act. There is an obvious and clear public interest in restricting federal agencies to only those areas of regulatory enforcement specifically delegated to them by Congress.

d. *There is also a clear public interest in judicial economy.*

A trial on the merits with respect to the remaining counts of Plaintiff's amended complaint should not be scheduled until the appellate court has had sufficient time to decide 1) whether appellate jurisdiction exists and, if so, 2) whether Shimer and Firth are entitled to summary judgment with respect to all counts of Plaintiff's amended complaint. It makes no sense at all to take up any further time of the district court until the initial issue of appellate jurisdiction is decided. If appellate jurisdiction is granted it clearly makes no sense to proceed with a trial that may never be necessary.

III. CONCLUSION

For all of the reasons cited above Shimer and Firth respectfully request that pending a decision of the Third Circuit Court with respect to the issue of appellate jurisdiction the district court stay scheduling a date for trial. Shimer and Firth further respectively request that if the appellate court determines that appellate jurisdiction exists the district court stay any further proceeding until their current appeal is heard by the appellate court and a decision is issued on the merits of that appeal

Dated: May 24, 2007

Respectfully submitted,

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