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Equity Receiver*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

COMMODITY FUTURES TRADING)	
COMMISSION,)	
)	No.: 04-cv-1512 (RBK)
Plaintiff,)	
)	
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.)	

**DECLARATION OF JEFFREY A. CARR IN SUPPORT
OF EQUITY RECEIVER'S RESPONSE TO MOTIONS OF
ROBERT W. SHIMER AND VINCENT J. FIRTH FOR STAY
OF ORDER COMPELLING PRODUCTION OF TAX RETURNS**

I, Jeffrey A. Carr, Esquire, of full age and duly sworn according to law upon my oath, do hereby depose and say:

1. I am an attorney in the State of New Jersey, admitted to this Court and an associate of the law firm of Pepper Hamilton LLP, counsel for Stephen T. Bobo, Equity Receiver in the above-captioned matter. I submit this Declaration in support of the Equity Receiver's

Response to the Motions of Robert W. Shimer and Vincent J. Firth for Stay of Order Compelling Production of Tax Returns.

2. Attached hereto as Exhibit A is a true and correct copy of the Court's October 4, 2005 Opinion.

3. Attached hereto as Exhibit B is a true and correct copy of the Court's November 16, 2006 Opinion.

4. Attached hereto as Exhibit C is a true and correct copy of the Court's December 18, 2006 Opinion.

5. Attached hereto as Exhibit D is a true and correct copy of the Court's March 14, 2007 Order.

6. Attached hereto as Exhibit E is a true and correct copy of the Court's March 16, 2007 Order.

7. Attached hereto as Exhibit F is a true and correct copy of a confidentiality agreement proposed by the Equity Receiver and forwarded to Shimer and Firth for consideration.

I declare under penalty of perjury that the above information is true and correct.

s/ Jeffrey A. Carr
JEFFREY A. CARR

Dated: April 9, 2007

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

<hr/>		:
COMMODITY FUTURES TRADING	:	
COMMISSION,	:	
	:	
Plaintiff,	:	Civil No. 04-1512 (RBK)
	:	
v.	:	OPINION
	:	
EQUITY FINANCIAL	:	
GROUP, LLC, et al.,	:	
	:	
Defendants.	:	
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	:	

KUGLER, United States District Judge:

Before the Court are motions by Defendants Robert W. Shimer, Vincent J. Firth, and Equity Financial Group, LLC, to dismiss the Counts against them in Plaintiff Commodity Futures Trading Commission's First Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or for failure to state a claim under Rule 12(b)(6). Also before the Court is Defendants' motion for summary judgment. For the reasons provided below, Defendants' motions will be denied in their entirety.

I. Background

The motions presently before the Court relate to the role of Robert W. Shimer ("Shimer"), Vincent J. Firth ("Firth"), and

Equity Financial Group, LLC ("Equity"), (collectively "Equity Defendants"), in a multi-million dollar commodity fraud operated by Defendants Tech Traders and its president Coyt Murray. Between June 2001 and April 2004, Tech Traders allegedly solicited over \$47 million in investments by claiming to employ a portfolio trading system that guaranteed significant annual returns. While 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, resulting in losses in excess of \$20 million. Tech Traders lost at least \$7 million in trading commodity futures contracts, and unlawfully appropriated investors' funds to pay salaries, expenses, and make disbursements under the guise of profit.

The Equity Defendants' liability arises from their control and operation of a related investment group, Shasta Capital Associates, LLC ("Shasta"), which was essentially a feeder fund for Tech Traders. The Commodity Futures Trading Commission ("CFTC" or "Plaintiff") alleges that the Equity Defendants solicited approximately \$15 million from 74 investors between June 2001 and March 2004, for the purpose of investing in Tech Traders. Shasta's Private Placement Memorandum informed investors that 99% of this money would be invested for the benefit of Shasta and 1% would be used for management costs. Upon receipt,

investor funds were deposited into Shimer's attorney escrow account and then transmitted to Tech Traders. Tech Traders pooled the Shasta funds with its other investment funds and used them, in part, to trade exchange-traded commodity futures contracts and foreign currency contracts.

Over the course of their relationship with Tech Traders, the Equity Defendants reported tremendous trading profits, even though Shasta was actually losing substantial sums through Tech Traders and apparently failed to generate any profit whatsoever. The Equity Defendants further misled investors by representing that these profit numbers were verified by an independent CPA, Defendant Abernethy, whose results were then affirmed by a second CPA. The CFTC alleges that the Equity Defendants knew or should have known that neither CPA's review was independent and that the results were therefore unverified.

Shimer, representing himself pro se, filed a motion to dismiss for failure to state a claim, a motion to dismiss for lack of jurisdiction, and a motion for summary judgment on April 14, 2005. Firth joined Shimer's motions on April 15, 2005, and Equity joined on April 28, 2005.¹ The motion for summary judgment

¹ On May 13, 2005, Shimer sent, but did not electronically file, a letter to the Court requesting the Court to extend his motion to dismiss to encompass Count V of Plaintiff's First Amended Complaint. Because Shimer failed to follow the proper procedure for amending motions under Local Rule 7.1, and because this Court now finds that Shimer's motion to dismiss has no merit, this Court will not consider Shimer's letter.

was dismissed without prejudice, pursuant to a status conference with Magistrate Judge Ann Marie Donio. Shimer and Firth later re-filed motions for summary judgment on July 8, 2005.

II. Discussion

A. Standard

Although the Equity Defendants have filed three separate motions, each motion uses essentially the same arguments to dispute the same point: whether Shasta is a "commodity pool" for the purposes of CFTC jurisdiction.² Because the parties' dispute is essentially one of law, founded on solely legal arguments, the standard this Court applies in resolving the dispute is of little import. Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (holding that where the question the court must address is solely a question of law, there is "no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment.").³

² Defendants spend over 170 pages of briefing belaboring this point in what can only be characterized as an abuse of the judicial process. Shimer's initial brief is approximately 92 pages, well in excess of the 40 pages authorized by Local Rule 7.2(b). Pursuant to a letter filed February 11, 2005, Shimer requested that the Court make an exception to this rule and permit his brief to stand. This Court will permit Shimer's overlong motion to stand, however, further failures to comply with the Local Rules will not be permitted.

³ Dismissal under Rule 12(b)(1) is appropriate only if the court lacks subject matter jurisdiction over the suit. A district court has jurisdiction where a well-pleaded complaint establishes that plaintiff's right to relief depends on resolution of a substantial question of federal law. See e.g., Franchise Tax Bd.

Accordingly, this Court will assess the merits of Defendants' argument through the lens of the summary judgment standard.

Summary judgment is only appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. Celotex, 477 U.S. at 330. The moving party may satisfy this burden by either (1) submitting affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's case. Id. at 331. If the moving party has not fully discharged its initial burden, its motion for summary judgment must be denied. Id. at 332.

B. Commodity Pool

Congress amended the Commodity Exchange Act and

of State of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 10 (U.S. 1983). If the plaintiff pleads a federal cause of action, the court should dismiss for lack of subject matter jurisdiction only where the claims are "so attenuated and unsubstantial as to be absolutely devoid of merit." Murrow v. Clifford, 502 F.2d 1066, 1068 (3d Cir. 1974). Because plaintiff CFTC's claims are neither frivolous nor devoid of merit, this Court has jurisdiction over the present suit. Accordingly, Defendants' motion to dismiss for lack of jurisdiction under 12(b)(1) will be denied.

established the CFTC in 1974 in an attempt to insure "fair practice and honest dealing on the commodity exchanges and provid[e] a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." S. Rep. No. 1131, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News, 5843, 5844; Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 883 (9th Cir. 1986). Defendants now argue that their company, Shasta, does not fall under the definition of a commodity pool and is therefore exempt from the jurisdiction of the CFTC.⁴

For the purposes of the Commodity Exchange Act, "[p]ool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 CFR § 4.10 (d) (1). As amended by Congress in 1992, a "commodity pool operator" is defined as:

any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market.
Pub L. No. 102-546, 106 Stat 3590 (1992).

⁴ Plaintiff asserts that Defendants need not be a commodity pool for the purposes of Count I and Count V of the First Amended Complaint. Because this Court finds that Shasta is a commodity pool, it does not reach the merits of the CFTC's argument.

A commodity pool is distinguished from other investment entities by the aggregation of investors' funds into a single account. Funds from the account are then invested without regard to the source of specific funds, and the profits and losses are distributed pro rata among the investors. In Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 884 (9th Cir. 1986), the Ninth Circuit articulated four requirements to ascertain the presence of a commodity pool: "(1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor." Id.; see also Nilsen v. Prudential-Bache Securities, 761 F. Supp. 279, 292 (S.D.N.Y. 1991) (citing Lopez, 805 F.2d at 884) ("Essentially, a commodity pool operator is one who manages an investment fund, similar to a mutual fund, in which the assets of several investors are invested together with gains or losses shared pro rata by the participants."); Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 ("In a commodity pool, all investors' funds are placed in a single account. Transactions are then executed on behalf of

the entire account and not allocated to any particular investor. The investors' profits and losses are then allocated by shares to individual investors based on their contribution to the fund.").

Courts have been adamant that where funds are not actually commingled, a commodity pool does not exist. Thus, the Lopez Court held that the enterprise at issue was not a commodity pool because "not all accounts traded the same contracts," and "[t]herefore, not all accounts shared a pro rata profit or loss." Id. at 884. Similarly, in Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 (D.D.C.1980), a case relied upon in Lopez, the Court found that the fact that the funds were not pooled into a single account precluded the enterprise from being a commodity pool, since "the profitability of plaintiff's investment was actually dependent only upon [defendant's] success or failure in trading for plaintiff's account even if it was coincidental with the profitability of the accounts of other investors." Id. Although the defendant did not give each account individual consideration and often invested various investors' funds in similar enterprises, the funds were not actually pooled.

Unlike the defendant entities in Lopez and Meredith, Shasta actually pooled investor accounts. Shasta satisfies the four factors of the Lopez test: (1) the funds of individual investors were pooled in Defendant Shimer's equity account; (2) these

commingled funds were then transferred en masse to Tech Traders to be invested in commodity futures, without distinguishing between the funds of individual investors; (3) investors believed that gains from the Tech Traders operation would be allocated pro rata, depending on the relative amount of their investment; and (4) trades were made on behalf of the pool rather than in the name of individual investors. Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool.

The fact that Shasta did not invest in commodity futures directly, but instead transferred funds to Tech Traders to invest does not affect Shasta's status as a commodity pool. In fact, the Shasta transactions mirror those in Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd., Comm. Fut. L. Rep. (CCH) ¶ 21,627, p. 26,384 (N.D. Ill.1982), another case formulating the basis for the Lopez decision. Heritage involved an operation very similar to Shasta: defendants solicited funds from individual customers, combined those funds into a common investment account⁵ where the funds were commingled, and then gave those funds to a third party for investment in the futures market. In Heritage, the Court held that because investors expected to share profits and losses on a

⁵ Defendants in Heritage actually deposited funds into two different accounts, both of which contained the commingled funds of a variety of customers.

("CEA").¹

Summary judgment is only appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. Celotex, 477 U.S. at 330. The moving party may satisfy this burden by either (1) submitting affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's case. Id. at 331. If the moving party has not fully discharged its initial burden, its motion for summary judgment must be denied. Id. at 332.

¹ Defendants asserted the same arguments in motions to dismiss filed on April 14, 2005. In denying those motions, this Court used the summary judgment standard. The Court stated that "because the parties' dispute [wa]s essentially one of law, founded on solely legal arguments, the standard this Court applie[d] in resolving the dispute [wa]s of little import." Commodity Futures Trading Comm'n v. Equity Financial Group, LLC, et al., No. 04-1512, 2005 WL 2864784, at *2 (D.N.J. Oct. 4, 2005) (citing Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (holding that where the question the court must address is solely a question of law, there is "no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment.")). Therefore, in denying Defendants' motions for summary judgment, this Court uses the same analysis used in its Opinion of October 4, 2005.

B. Commodity Pool

Congress amended the Commodity Exchange Act and established the CFTC in 1974 in an attempt to insure "fair practice and honest dealing on the commodity exchanges and provid[e] a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." S. Rep. No. 1131, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News, 5843, 5844; Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 883 (9th Cir. 1986). Defendants now argue that their company, Shasta, does not fall under the definition of a commodity pool. Therefore, Defendants argue that because Plaintiff cannot establish that Shasta is a commodity pool under the CEA, Plaintiffs likewise cannot establish all the elements of the five counts asserted in the Complaint.

For the purposes of the CEA, "[p]ool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 CFR § 4.10 (d) (1). As amended by Congress in 1992, a "commodity pool operator" is defined as:

any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market.

Pub L. No. 102-546, 106 Stat 3590 (1992).

A commodity pool is distinguished from other investment entities by the aggregation of investors' funds into a single account. Funds from the account are then invested without regard to the source of specific funds, and the profits and losses are distributed pro rata among the investors. In Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 884 (9th Cir. 1986), the Ninth Circuit articulated four requirements to ascertain the presence of a commodity pool: "(1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor." Id.; see also Nilsen v. Prudential-Bache Securities, 761 F. Supp. 279, 292 (S.D.N.Y. 1991) (citing Lopez, 805 F.2d at 884) ("Essentially, a commodity pool operator is one who manages an investment fund, similar to a mutual fund, in which the assets of several investors are invested together with gains or losses shared pro rata by the participants."); Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 ("In a commodity pool, all investors' funds are placed

in a single account. Transactions are then executed on behalf of the entire account and not allocated to any particular investor. The investors' profits and losses are then allocated by shares to individual investors based on their contribution to the fund.").

Courts have been adamant that where funds are not actually commingled, a commodity pool does not exist. Thus, the Lopez Court held that the enterprise at issue was not a commodity pool because "not all accounts traded the same contracts," and "[t]herefore, not all accounts shared a pro rata profit or loss." Id. at 884. Similarly, in Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 (D.D.C.1980), a case relied upon in Lopez, the Court found that the fact that the funds were not pooled into a single account precluded the enterprise from being a commodity pool, since "the profitability of plaintiff's investment was actually dependent only upon [defendant's] success or failure in trading for plaintiff's account even if it was coincidental with the profitability of the accounts of other investors." Id. Although the defendant did not give each account individual consideration and often invested various investors' funds in similar enterprises, the funds were not actually pooled.

Unlike the defendant entities in Lopez and Meredith, Shasta actually pooled investor accounts. Shasta satisfies the four factors of the Lopez test: (1) the funds of individual investors

were pooled in Defendant Shimer's equity account; (2) these commingled funds were then transferred en masse to Tech Traders to be invested in commodity futures, without distinguishing between the funds of individual investors; (3) investors believed that gains from the Tech Traders operation would be allocated pro rata, depending on the relative amount of their investment; and (4) trades were made on behalf of the pool rather than in the name of individual investors. Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool.

The fact that Shasta did not invest in commodity futures directly, but instead transferred funds to Tech Traders to invest does not affect Shasta's status as a commodity pool. In fact, the Shasta transactions mirror those in Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd., Comm. Fut. L. Rep. (CCH) ¶ 21,627, p. 26,384 (N.D. Ill.1982), another case formulating the basis for the Lopez decision. Heritage involved an operation very similar to Shasta: defendants solicited funds from individual customers, combined those funds into a common investment account² where the funds were commingled, and then gave those funds to a third party for investment in the futures market. In Heritage, the Court held

² Defendants in Heritage actually deposited funds into two different accounts, both of which contained the commingled funds of a variety of customers.

that because investors expected to share profits and losses on a pro rata basis, the enterprise was a commodity pool, regardless of the fact that it was a third party who conducted the actual investment activities. Id.

Defendants argue that because the Shasta funds were not traded "in the name of Shasta," Shasta does not satisfy the fourth factor of the Lopez test and cannot be a commodity pool. Defendants' reading of the Lopez Court's language is too literal. The Court intended the fourth factor to distinguish cases, such as Meredith, where investments are made in many of the same enterprises in the name of individual investors without pooling funds together in a single account. The appellation given the actual transaction is irrelevant, so long as it is a pooled fund and not conducted in the names of individual customer accounts. See In re Slusser, 1998 WL 537342 at n.36 (holding that entities at issue were commodity pools even though "[t]he pools were not traded in the name of the pool . . . [t]he key to the fourth factor is that the funds were not traded in the name of any individual investor, as was the case with the pools at issue here."). This pooling is clearly present here.

Besides arguing that Tech Traders did not invest Shasta's funds "in the name of Shasta," Defendants raise no evidence to suggest that Shasta is not a commodity pool. Accordingly, Defendants motions will be denied.

Dated: 11/16/2006 s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES TRADING	:	
COMMISSION,	:	
	:	
Plaintiff,	:	Civil No. 04-1512 (RBK)
	:	
v.	:	OPINION
	:	
EQUITY FINANCIAL	:	
GROUP, LLC, et al.,	:	
	:	
Defendants.	:	

KUGLER, United States District Judge:

Before the Court are motions on reconsideration by Defendants Robert W. Shimer and Vincent J. Firth for summary judgment with respect to all counts in Plaintiff Commodity Futures Trading Commission's First Amended Complaint, pursuant to Federal Rule of Civil Procedure 56(b). For the reasons provided below, Defendants' motions will again be denied.

I. Background

The Court set forth the background of this case repeatedly in prior Opinions, and need not do so here. See Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2006 WL 3359418 (D.N.J. Nov. 16, 2006); see also Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2005 WL 2864784

(D.N.J. Oct. 4, 2005). On April 7, 2006, Defendants filed motions for summary judgment on all counts alleged in Plaintiff Commodity Futures Trading Commission's ("Plaintiff" or "CFTC") Complaint. On November 16, 2006, this Court issued an Opinion denying Defendants' motion. On December 5, 2006, Defendants moved for reconsideration, alleging, among other things, that the Court neglected to adequately address one argument with regard to why Defendants are entitled to summary judgment on Count One. The Court grants Defendants' motion for reconsideration to address that argument.

II. Standard of Review

Summary judgment is appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could find for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. Celotex, 477 U.S. at 330. The moving party may satisfy this burden by either (1) submitting affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) demonstrating to

the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's case. Id. at 331.

Once the moving party satisfies this initial burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). To do so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, to survive summary judgment, the nonmoving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Serbin, 96 F.3d at 69 n.2 (quoting Celotex, 477 U.S. at 322); Heffron v. Adamar of New Jersey, Inc., 270 F. Supp. 2d 562, 568-69 (D.N.J. 2003).

III. Class of Persons Protected by the CEA

Defendants argue that they never "engaged in any activity that can be described as the purchase or sale of a commodity futures contract . . . on behalf of . . . Shasta . . . Equity . . . or any member of Shasta." (Defs.' Br. in Supp. of Summ. J. at 37.) Therefore, Defendants assert they the Shasta members are not within the class of persons protected by § 4b of the Commodities Exchange Act ("the Act"), 7 U.S.C. § 6b(a)(2), and that Defendants never engaged in activity proscribed by that

section of the Act. (Id.) To support their argument, Defendants rely on the United States Supreme Court decision, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982), to support their argument.

Section 4b of the Act "by its terms makes it unlawful for any person to deceive or defraud any other person in connection with any futures contract." Id. at 389; 7 U.S.C. § 6b(a)(2). In Merrill, the Supreme Court examined the legislative history of the antifraud provision of the Act to determine if futures investors had an implied private right of action. Merrill, 456 U.S. at 395. In finding that an implied right of action existed, the Merrill Court determined that Congress intended "to protect all futures traders from price manipulation and other fraudulent conduct" Id. at 390.

Nothing in the Merrill opinion supports Defendants' argument. Moreover, Merrill was later overturned by statute when Congress amended the Act to include a private right of action. See 7 U.S.C. § 25. Regardless, the Merrill Court's discussion of the legislative intent of the antifraud provision is still an accurate analysis of the broad protections Congress meant to create when drafting the antifraud provision of the Act.

The crux of Defendants' argument is that neither Shasta's members, nor the Defendants, ever acted as buyers or sellers of commodities futures contracts (Defs.' Br. in Supp. of Summ. J. at

37.). The Defendants rely on the lack of a direct connection between themselves and the investors. However, the Equity Defendants solicited investors for Shasta, and the funds from those investors went into Defendant Shimer's attorney escrow account. Defendant Shimer then wired that money to Tech Traders, where it was pooled with other investors' funds and invested in commodity futures contracts. It is unclear how the Shasta members could not be within the class of persons protected by the antifraud provision of the Act, given that they invested in commodity futures contracts. Moreover, it is equally unclear how Defendants can say they did not have the requisite connection to the buying and selling of futures contracts to be within the purview of the antifraud provision of the Act.

Finally, it is noteworthy that in the 2000 amendments to the Act that created an express private right of action, Congress included the following language:

Any person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages . . . caused by such violation to any other person . . . who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract
. . . .

7 U.S.C. § 25(1)(B). Although this provision applies to private rights of action, and the instant matter is not a private right

of action, this language nevertheless demonstrates Congress's intent that a direct connection to the buying and selling of futures contracts is not required. Rather, Congress intended to afford broad protection to futures investors, whether the defendants directly or indirectly acted as futures sellers. Here, the Equity Defendants acted as a conduit for the Shasta investors' funds. The Court is at a loss to understand how Defendants can argue that they had no "connection" to the selling of futures contracts, and that Shasta's investors were not purchasers of futures contracts.

Defendants failed to establish that no genuine issue of material fact exists with regard to the antifraud count in Plaintiff's Complaint because a reasonable jury could disagree with Defendants' analysis in this case, and find for CFTC. Therefore, the Court denies Defendants' Motion for Summary Judgment on Count One.

IV. Remaining Arguments

For the remaining arguments in Defendants' Brief in Support of Summary Judgment, as well as the other arguments asserted in Defendants' Brief in Support of their Motion for Reconsideration, the Court incorporates by reference its Opinion dated November 16, 2006 which denied Defendants' motion for summary judgment.

The Court notes Defendants' concern that the Opinion is "suspiciously similar" (Defs.' Br. in Supp. of Mot. for Recons.

at 2) to its October 4, 2005 Opinion. However, "suspiciously similar" arguments yield "suspiciously similar" analysis.

Moreover, the Court notes that it will not engage in a fact-finding mission in the matter of Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd., Comm. Fut. L. Rep. (CCH) ¶ 21,627, p. 26,384 (N.D. Ill.1982).

Defendants go to great lengths to demonstrate that the cases are factually dissimilar by submitting documents related to the Heritage litigation. (Defs.' Br. in Supp. of Mot. for Summ. J. Exs. A, B, C, D, E.) The language of the Heritage opinion stands alone. This Court provided a thorough analysis of why Shasta is a commodity pool in its prior Opinions, and that analysis stands.

V. Conclusion

For the foregoing reasons, the Court denies Defendants' motion for summary judgment.

Dated: 12/18/2006

s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

EXHIBIT D

(Docket No. 390, 392)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

<hr/>		:
COMMODITY FUTURES TRADING	:	
COMMISSION,	:	
	:	
Plaintiff,	:	Civil No. 04-1512 (RBK)
	:	
v.	:	ORDER
	:	
EQUITY FINANCIAL	:	
GROUP, LLC, et al.,	:	
	:	
Defendants.	:	
<hr/>		:

THIS MATTER having come before the Court on motion by Defendants Vincent J. Firth ("Firth") and Robert W. Shimer ("Shimer") to appeal the September 1, 2006 Order of United States Magistrate Judge Ann Marie Donio that compelled Defendants Firth and Shimer to produce tax returns for the years 1999 through 2003; and the Court having considered the moving papers, and the opposition thereto; and

THE COURT NOTING that the only argument asserted by Defendants Firth and Shimer to support their motion is that Firth and Shimer are not subject to Receivership because they did not operate a "commodity pool," removing them from the purview of the Commodities Exchange Act; and

THE COURT FURTHER NOTING that this Court rejected these

arguments repeatedly in previous opinions, see, e.g., Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2006 WL 3359418 (D.N.J. Nov. 16, 2006); see also Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2005 WL 2864784 (D.N.J. Oct. 4, 2005); and

THE COURT FINDING that Defendants Firth and Shimer advance no new arguments to support their motion for appeal;

IT IS HEREBY **ORDERED** that the Defendants appeal is **DENIED**.

Dated: March 14, 2007

s/Robert B. Kugler

ROBERT B. KUGLER

United States District Judge

EXHIBIT E

[Doc. No. 391, 393]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC,
et al.,

Defendants.

Civil No. 04-1512-RBK-AMD

ORDER

THIS MATTER having come before the Court by way of motions by Defendant Robert W. Shimer [No. 391] and Defendant Vincent J. Firth [No. 393] seeking a stay of the Court's Order of September 1, 2006 requiring Defendants Shimer and Firth to produce copies of certain income tax returns, pending appeal of the September 1, 2006 Order to the District Judge and pending resolution of Defendants' summary judgment motions; and

The Court noting that the District Court by Order dated November 16, 2006 denied Defendants' motions for summary judgment. Thereafter, Defendants Shimer and Firth filed motions for the reconsideration of the November 16, 2006 Order. By Order dated December 18, 2006 the District Court granted Defendants' motions for reconsideration, and upon reconsideration the District Court

denied Defendants' motions for summary judgment. By Order dated March 14, 2007, the District Court denied Defendants' appeal of this Court's September 1, 2006 Order compelling the production of certain tax records; and the Court finding that Defendants have asserted no other basis for the stay; and the Court having considered this matter pursuant to FED. R. Civ. P. 78; and for good cause shown,

IT IS on this 16th day of March, 2007

ORDERED that Defendants' motions to stay are hereby **DENIED** as moot.

s/ Ann Marie Donio
ANN MARIE DONIO
United States Magistrate Judge

cc: Hon. Robert B. Kugler

EXHIBIT F

CONFIDENTIALITY AGREEMENT

This Agreement is entered into as of the ____ day of September, 2006.

WHEREAS, Stephen T. Bobo (the "Receiver"), in his capacity of Equity Receiver for Vincent J. Firth ("Firth") and Robert W. Shimer ("Shimer") in the case of CFTC v. Equity Financial Group, LLC, No. 04 CV 1512, pending in the U.S. District Court for the District of New Jersey (the "Court"), requested production of certain income tax returns from Firth and Shimer.

WHEREAS, Firth and Shimer objected to the Receiver's requests, and the Receiver brought motions to compel. On September 1, 2006, the Court entered an order granting the Receiver's motions with respect to Shimer's tax returns for 1999 through 2003 and Firth's tax returns for 2004 and 2005 (collectively, the "Tax Returns").

WHEREAS, the Receiver has offered to treat the Tax Returns as confidential and Firth and Shimer desire to protect the confidentiality of their Tax Returns.

It is hereby agreed that the following provisions will govern the Receiver's handling of the Tax Returns.

1. The Firth and Shimer Tax Returns shall be used by the Receiver and his professionals only in connection with this case, shall be labeled as "Subject to a Confidentiality Agreement" and shall not be disclosed to any person or persons except as provided in subsequent paragraphs of this Agreement or as may be directed by subsequent orders of the Court.

2. The Receiver and his professionals who shall have access to the documents hereunder shall take reasonable precautions to prevent any disclosure of the information contained therein in any manner inconsistent with this Agreement.

3. If the Receiver intends to use the Tax Returns at a deposition, as an exhibit to a pleading to be filed with the Court, or as an exhibit for an evidentiary hearing before the Court, the Tax Returns shall be designated as “Subject to a Confidentiality Agreement” and, if filed with the Court, the Receiver shall seek leave to file them under seal.

4. Notwithstanding any other provision of this Agreement, nothing herein shall restrict the Receiver’s obligation pursuant to orders of the Court to share such information with the Commodity Futures Trading Commission.

5. Notwithstanding any other provision of this Agreement, nothing herein shall restrict the Receiver’s obligations to produce any of the Tax Returns in response to a valid subpoena issued in any judicial or administrative proceeding; provided however, that should the Receiver receive such subpoena and determine that he is required produce the Tax Returns, or a portion of them, in response to the subpoena, the Receiver will give the party that produced the Tax Returns written notice of this determination ten (10) days prior to production of the Tax Returns. It will be the responsibility of the party that produced the Tax Returns to seek to quash said subpoena.

Stephen T. Bobo
Equity Receiver

Vincent J. Firth

Robert W. Shimer