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**In The United States District Court
For The District Of New Jersey
Camden Vicinage**

Commodity Futures Trading Commission,
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.

Hon. Robert B. Kugler
District Court Judge

Hon. Ann Marie Donio
Magistrate

Civil Action No: 04-1512 (RBK)

**Reply to Defendant Shimer's
Response to Plaintiff's Motion in
Limine**

Plaintiff, Commodity Futures Trading Commission, through its attorneys, hereby respectfully responds to Defendant Shimer's Response to Plaintiff's Motion in Limine to Deem Untimely Objections by Defendants Firth and Shimer in the Pretrial Order Waived ("Plaintiff's Motion in Limine"). For the reasons set forth below, Plaintiff is asking that Defendant Shimer's Response to Plaintiff's Motion in Limine be stricken from the record as it is untimely, and in the alternative the objections made by Defendants Firth and Shimer in the Pretrial Order relating to foundation, hearsay, "incomplete," not best evidence, characterization, speculation, non-responsive answer to question, leading question, facts not in evidence, vagueness, confusing, witness not qualified to answer, as well as an objection to "tone" that could have been cured at the time of the deposition be deemed waived as supported by Plaintiff's Motion in Limine filed on July 30, 2007 (Docket Doc. 522).¹ Additionally, Plaintiff asks this Court to again strike Defendant Shimer's May 17, 2007 letter from the record.

I. Defendant Shimer's Response to Plaintiff's Motion in Limine is Untimely and Should be Stricken From the Record

Defendant Shimmer filed his Response to Plaintiff's Motion in Limine on August 14, 2007 (Docket Doc. 530).² Pursuant to Magistrate Judge Donio's letter dated June 8, 2007,

¹ Defendant Shimer makes many arguments about Firth's ability to defend himself in this matter. Those arguments will not be addressed as Shimer does not represent Firth.

² Defendant Shimer makes many unsupported personal attacks in his Response to Plaintiff's Motion in Limine. During discussions regarding the pretrial order, Defendant Shimer stated that he was unaware of Federal Rule of Civil Procedure 32 and didn't know that he would not be able to subpoena witnesses to testify beyond the District of New Jersey or within the 100 mile range of the Courthouse. Defendant Shimer is now claiming that one deposition was not noticed properly, and that depositions deliberately took place while he was not available as a way to keep him from attending. Defendant Shimer sporadically appeared at the depositions during the course of this discovery. Defendant Shimer also alludes that Attorneys for Plaintiff, Receiver, and Witness Teague would risk their licenses by lying on the record regarding Shimer's presence at Teague's continued deposition. Not only are Shimer's statements false, but also bordering on defamation.

motions in limine were to be filed by four weeks prior to trial and "...any opposition thereto shall be filed one week thereafter." (Docket Doc. 509). Therefore, motions in limine were due to be filed on July 30, 2007, with responses due to be filed by August 6, 2007.³ Defendant Shimer was aware by at least July 21, 2007 that the trial date was set for August 27, 2007. (Ex. 1). Additionally, service of Plaintiff's Motion in Limine was sent to Shimer by U.S. Mail on July 30, 2007, and again sent to Shimer via email on August 1, 2007. Thus, at the very latest, the reply to Plaintiff's motion in Limine was due by August 8, 2007. Notably, Magistrate Judge Donio's June 8, 2007 letter was sent after motions in limine were specifically discussed at the pretrial conference on June 5, 2007. Magistrate Judge Donio specifically asked each party whether they planned on filing a motion in limine. Defendant Shimer knew Plaintiff was considering filing a motion in limine at the time of the pretrial conference. Since Defendant Shimer's Response to Plaintiff's Motion in Limine was filed after the deadline, it should be stricken from the record.

II. Defendant Shimer's Reliance on His "Pro Se" Status Is Misplaced

In arguing that Plaintiff's Motion in Limine should be denied, Defendant Shimer again argues that he should be absolved from following any rules of this Court or general rules of litigation because he is "*Pro Se*" and has little litigation experience. However, *pro se* litigants are not exempt from following the Federal Rules of Civil Procedure. *Posadas de Puerto Rico, Inc. v. Radin*, 856 F.2d 399, 401 (1st Cir.1988); *See also, Segarra v. Messina*, 153 F.R.D. 22, 30 (N.D.N.Y. 1994) (When determining if Rule 11 Sanctions should be issued, "It is now well settled that *pro se* status will not shelter a litigant from sanctions."). Moreover, Defendant Shimer is a licensed attorney. When appearing *pro se*, licensed attorneys are held to the same

³ One of Shimer's frivolous arguments in his Response to Plaintiff's Motion in Limine is that Plaintiff delayed its filing of the Motion in Limine when Plaintiff was following Magistrate Judge Donio's direction.

standard as an attorney hired to defend a third-party. *Id.* (*Pro se* litigants are given some deference because of their lack of education and allowing a licensed attorney to hide behind *pro se* status is contrary to this reasoning.).

Defendant Shimer has shown that he is knowledgeable about the Court's rules and Federal Rules of Civil Procedure by attending hearings and filing over twenty motions, replies or briefs relating to this litigation, as well as an appeal to the Third Circuit. Notably, Shimer filed motions pursuant to Federal Rules of Civil Procedure 12(b), 56, and 72 and noticed a deposition pursuant to Federal Rules of Civil Procedure. In Defendant Shimer's Notice of Deposition of Elaine Teague, he stated that the deposition would be taken "...in accordance of the Federal Rules of Civil Procedure...", which would include Federal Rule of Civil Procedure 32. (*See* Docket Doc. 522, Ex. 2). Additionally, Shimer admits to having a Federal Rule of Civil Procedure class in law school. Defendant Shimer filed his *pro se* appearance on April 4, 2005. This has allowed him more than ample time to refresh his memory of the Federal Rules of Civil Procedure. Defendant Shimer should not now, over two years later, claim that he is unfamiliar with the rules. Defendant Shimer should be held to abide by the Court's rules and Federal Rules of Civil Procedure. Thus, since Defendants Shimer's Response to Plaintiff's Motion in Limine was filed after the deadline, Defendant Shimer's Response to Plaintiff's Motion in Limine should be stricken.

In the alternative, Defendant Shimer's deposition objections made in the Pretrial Order relating to foundation, hearsay, "incomplete," not best evidence, characterization, speculation, non-responsive answer to question, leading question, facts not in evidence, vagueness, confusing, witness not qualified to answer, as well as an objection to "tone" that could have been cured at the time of the deposition should be deemed waived as they are untimely. Defendant Shimer

sporadically attended depositions during this discovery process, attending nine out of twenty different depositions.⁴ Additionally, Defendant Shimer was present at the December 5, 2005 telephone status conference where Plaintiff's attorney discussed the need to extend the discovery deadline. (Docket Doc. 288; *see also* Streit Decl. attached hereto as Ex. 2). At the conference, Magistrate Donio extended discovery to conclude at the end of January 2006. (Docket Doc. 293). If Defendant Shimer had an issue with the deadline, like he now claims, he should have stated it on the record with all parties present. Through his own admission, Defendant Shimer stated that he did not inform the parties that he would be out of the country when he obtained those nonrefundable plans. One cannot force another to attend discovery proceedings. A party is required only to provide notice to the parties that depositions are taking place, which Plaintiff did in this matter. Once the notices of depositions were sent, Defendant Shimer then had the obligation to raise any issues he had relating to the taking of the deposition. Defendant Shimer's willful conduct in not attending depositions or not informing the parties that he couldn't hear should not be rewarded.⁵ "If a *pro se* litigant ignores a discovery order, he is and should be subject to sanctions like any other litigant." *Moon v. Newsome*, 863 F. 2d 835, 837 (11th Cir. 1989). Likewise, a *pro se* litigant, particularly a *pro se* lawyer litigant, must abide by the consequences of his past ignorance of the rules. As stated in Plaintiff's Motion in Limine filed

⁴ Defendant Shimer misstated that Plaintiff's Motion in Limine was "noticeably silent about when the CFTC advised Shimer of the date of Lee's proposed deposition in mid January." (Docket Doc. 530, p. 6). Service of Lee's deposition was addressed on page 3 of Plaintiff's Motion in Limine, and the Notice of Deposition for Arnold and Porter, Lee's employer, was included in exhibit 2. (Docket Doc. 522).

⁵ Defendant Shimer also claims that he could not hear during the Stevenson deposition because he appeared by telephone. However, Defendant Shimer successfully cross examined Stevenson based on the direct questioning by Plaintiff. Moreover, throughout the discovery process, Plaintiff's attorney and investigator had appeared by telephone for several depositions, most notably, the Stevenson deposition.

on July 30, 2007, Shimer was properly noticed for the depositions and failed to object to the depositions in a timely manner.⁶ Waiving technical objections made after the deposition took place is appropriate here.

III. Defendant Shimer's May 17, 2007 letter Should Again Be Stricken From The Record

During the Pretrial Conference on June 5, 2007, Defendant Shimer agreed to strike his May 17, 2007 letter from the record, as well as any objections to submission of deposition transcripts of Susan Lee, Elaine Teague, Rob Collis, and Nicholas Stevenson so long as he received deposition transcripts that he was missing. Plaintiff submitted the transcripts, and the letter was stricken. Defendant Shimer now tries to again put the letter into evidence. Plaintiff objects as it contains false statements, as evidenced by Plaintiff's Motion in Limine and Shimer's own Response to Plaintiff's Motion in Limine, and Plaintiff abided by its obligations to Defendant Shimer. Plaintiff is not given ample time to address the issues created by Shimer's false statements in the May 17, 2007 letter as it is not proper to address these issues in the Response to the Motion in Limine. The proper time to make the objections Shimer is now trying to make in the May 17, 2007 letter was when notice of the depositions took place. Moreover, Defendant Shimer should not now, less than two weeks before trial, be allowed to object to the Collis transcript when he agreed to drop his objections to the use of deposition testimony if we gave him the transcripts (though he did not ask for the Collis transcript).

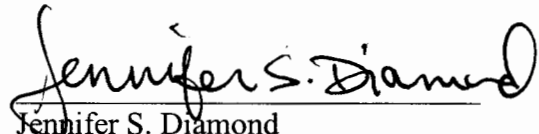
⁶ Defendant Shimer misstates the legal theory raised by Plaintiff on waiver of objections during depositions by claiming that waiver occurs only if the party has "no good reason" for failing to attend the depositions or if the party was present at the deposition and failed to object. (Def. Resp. Mot. in Limine p. 6). None of the cases cited in Plaintiff's Motion in Limine stand for the proposition that technical objections are not waived of someone has good reasons for not attending depositions." In fact one of the cases supports the proposition that the defendant waived its foundation objection when he failed to attend a deposition. See Pl. Mot. in Limine p. 5; see also, *SEC v. Merrill Scott & Assoc., LTD*, 2007 WL 1519068, *2 (D. Utah 2007) attached to Docket Doc. 522.

IV. CONCLUSION

As explained above, Defendant Shimer should not be considered above the law. For the reasons stated above, Plaintiff respectfully requests that this Court strike Defendant Shimer's Response to Plaintiff's Motion in Limine, or, in the alternative, deem objections in the Pretrial Order made by Defendant Shimer that could have been cured during the time the deposition was taking place waived because of their failure to object in a timely manner. Lastly, Plaintiff also requests that this Court again strike Defendant Shimer's May 17, 2007 letter from the record.

Date: August 20, 2007

Respectfully submitted,



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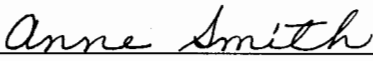
CERTIFICATE OF SERVICE

The undersigned non-attorney, Anne Smith, does hereby certify that on August 20, 2007 she caused a true and correct copy of the foregoing ***Reply to Defendant Shimer's Response to Plaintiff's Motion in Limine*** to be served upon the following persons via electronic mail and Federal Express:

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