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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION, : Hon. Robert B. Kugler

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Plaintiff,
vs. **Civil Action No. 04-1512**

EQUITY FINANCIAL GROUP LLC, TECH TRADERS, INC., TECH TRADER, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY

Defendants.

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DEFENDANT ROBERT W. SHIMER'S RESPONSE TO PLAINTIFF'S MOTION IN LIMINE

Defendant Robert W. Shimer ("Shimer") acting *pro se* responds to Plaintiff's recently filed motion in limine to deem untimely objections by Shimer and Defendant Vincent J. Firth ("Firth") to certain deposition testimony that Plaintiff seeks to introduce as admissible evidence at trial. These legitimate objections of Shimer and Firth are found in the Pretrial Order duly executed previously by all parties. In essence the Commodity Futures Trading Commission ("CFTC") a federal agency plaintiff suddenly asks in its current motion now before the Court for the right to literally suspend in a civil action against *pro se* defendants who are generally unfamiliar with the Federal Rules of Civil Procedure the rules of evidence with respect to parts of the deposition testimony of Elaine Teague ("Teague") Susan Lee ("Lee") Nicholas Stephenson ("Stephenson") and Robert Collis "Collis"). Moreover, Plaintiff waited a month and

a half after receiving the previous stated objections of Shimer and Firth in the Pretrial Order signed by all parties before filing its current motion dated July 30, 2007 only 28 days before trial is scheduled to begin.

In support of its current motion the CFTC continues a pattern consistently employed by this federal agency plaintiff to literally ignore obvious and apparent facts that are not to its liking. Watching the CFTC pick and choose which "facts" to place before the Court to support any particular position of this Plaintiff (including the current issue of "reasonableness of notice" and "purported waiver" now before the Court) is literally like watching a small bird hop from branch to branch on a berry bush rejecting those berries that do not suit its fancy and selecting only what appears to be most advantageous to its appetite. In addition, the particular factual "berries" chosen by the CFTC are then regularly subjected to a process of marvelous "spin" seen only in the best managed political campaigns.

The current civil matter has become in many ways a "must not lose" politically charged scenario for this particular federal agency plaintiff. The current motion should be rejected by the Court as an inappropriate factually skewed attempt by Plaintiff to manipulate the Federal Rules of Civil Procedure in order to resuscitate and make admissible evidence that clearly is not admissible under generally accepted rules of evidence by all state and federal courts.

It should not be necessary to remind the Court that Shimer and Firth are *pro se* defendants. Firth is not an attorney. There is absolutely no basis for the Court to conclude that Firth has any familiarity whatsoever with the Federal Rules of Civil Procedure. As a father of three children Firth has been required to devote literally all of his time to providing financial support for his family for the past three years since the initial complaint was filed. He has no time whatsoever to travel around the country following this federal agency Plaintiff to various deposition locations that included Atlanta Georgia, Charlotte North Carolina, Chicago Illinois as well as various other locations and simply sitting and listening without compensation of any kind to deposition testimony controlled by the Plaintiff when Firth has absolutely no working experience or knowledge of the rules of evidence.

While Firth has received what might technically be considered to be "reasonable" notice with respect to depositions conducted by Plaintiff his lack of training and knowledge of the law seriously degrades his ability to properly object to a particular question or answer during a deposition controlled by Plaintiff. For the CFTC to attempt to now propose that the rules of evidence be vitiated with respect to the defendant Firth, a short time before trial is scheduled to begin, is truly outrageous and is a clear affront to every conceivable concept of fairness.

The very language of Fed. R. Civ. Pro. 32(d)(3)(B) cited by Plaintiff on page 5 of its current motion assumes that one who must object to the form of the question being asked by an opposing party during a deposition has at least an imputed ability to understand the improper way in which the question was framed. That knowledge and understanding can at least be imputed to an attorney who has passed the bar of any jurisdiction *and is physically present* at a deposition but fails to object. This federal agency plaintiff seeks in its motion to use the language of Fed. R. Civ. Pro. 32(d)(3)B) to its evidentiary advantage against a *pro se* defendant such as Firth with little or no knowledge whatsoever of the rules of evidence and with no legal education or experience whatsoever. This sort of tactic is an affront to basic concept of fairness. The current motion of Plaintiff suggests a lack of confidence by the CFTC with respect to much of its selected deposition testimony when the Rules of Evidence are applied.

Shimer is a contract attorney. He has literally no litigation experience and specifically has never before had reason to participate in litigation in the federal courts. He has never litigated previously in the federal courts. His only familiarity with the Federal Rules of Civil Procedure is what he might remember as the result of his Civil Procedure class in law school more than 30 year ago. As this case has unfolded Shimer has diligently attempted to familiarize himself sufficiently with the Federal Rules to respond appropriately on a case by case basis in this civil action as circumstances require.

The clear and obvious facts that Plaintiff diligently seeks to avoid and to ignore with respect to Shimer were outlined in a letter dated May 17, 2007 provided to Plaintiff by Shimer and made a part of the original Pretrial Order. While Shimer finally agreed to remove that letter as a part of the amended Pretrial Order the outrageous nature of Plaintiff's current motion in limine requires that Shimer re-introduce his letter of May 17, 2007 into the record. That letter is now attached to this Response as Attachment A and is specifically incorporated into this Response of Shimer by this reference.

I. Notice to Shimer of the proposed deposition of Teague and Lee in January 2006 by the Plaintiff was not sufficiently "reasonable" under the Federal Rules to permit Plaintiff to now argue the untimeliness of Shimer's objections to certain deposition testimony of Teague and Lee found in the Pretrial Order executed by all parties.

As the record in this matter indicates, the Court by its Scheduling Order dated April 22, 2005 extended discovery until December 30, 2005 and required that all discovery be completed by that date. As Attachment A recounts, Shimer relied upon that order of the Court and made

travel arrangements to be out of the country throughout the month of January of 2006. Non refundable airline tickets were obtained by Shimer, his wife and his sister-in-law and other expenses were incurred in reliance upon that Scheduling Order issued by the Court.

During a telephone status conference call on November 3, 2006 Shimer specifically asked Magistrate Ann Marie Donio if the Court would be flexible in granting requests for the extension of discovery beyond the date of December 30, 2005 as stated in this Court's Scheduling Order dated April 22, 2005. The record indicates that Shimer was advised by Magistrate Donio at that time *that no such extension would be granted.* In reliance upon that representation Shimer undertook to notice the deposition of Elaine Teague in Portland, Oregon and despite many interruptions and a clear and obvious concerted strategy of distraction by both legal counsel for Teague, legal counsel for the Receiver and legal counsel for the CFTC Shimer completed his deposition examination of Teague on the noticed day of December 21, 2005 just before the Christmas holiday and the Court's previously scheduled cut off date for all discovery.

It should be pointed out and emphasized that from April 22, 2005 through December 30, 2005 the CFTC never sought to schedule the deposition of Elaine Teague within the 2005 calendar year time frame designated by the Court *despite the pivotal role she obviously played in this entire matter as the CPA of the entity Shasta Capital Associates, LLC.* It is reasonable to infer from this apparent lack of curiosity by the CFTC that until Shimer noticed the deposition of Teague for December 21, 2005 and secured her deposition testimony that day the CFTC apparently had no interest whatsoever in pursuing *any deposition discovery* with respect to Teague. It should also be noted that Plaintiff apparently had a similar lack of interest with respect to the necessity of taking the deposition testimony of Lee during the ample time period for concluding discovery originally set forth by the Court on April 22, 2005.

Regarding Plaintiff's deposition of Teague

Shimer's first "notice" that the CFTC intended to depose Ms Teague on January 12 and 13, 2006 was on December 21, 2005 when he was in Portland, Oregon nine days before he was scheduled to be out of the country on travel plans made months previously in reliance upon the Court's Scheduling Order dated April 22, 2005 and the response Shimer received from Magistrate Donio during the status conference call that occurred on November 3, 2005. Shimer's right to object to the form of the CFTC's questions or to the various answers of Ms Teague was never "waived" by Shimer under the theory cited by Plaintiff that they "could have

been cured at the time the deposition was taken" because Shimer was clearly not in attendance at the deposition of either Teague or Lee and he was not present for good and sufficient reason.

Contrary to Plaintiff's attempt to insert clearly erroneous information into the record on January 12, 2006 (see Plaintiff's reference on page 4 of its motion to "Ex 3 Teague Dep. P. 286 1. 14-15, p. 288 1. 23-24, page 289") neither Plaintiff's legal counsel nor the Receiver's legal counsel learned of the *reason* Shimer would not be able to attend any deposition taken by the CFTC in January of 2006 until Shimer filed with the Court just before his overseas departure a brief dated December 30, 2005 in opposition to the Receiver's previously filed motion to compel certain tax returns. Shimer rightfully did not trust either the Receiver or the Plaintiff to have any specific information about *why* he would be unable to attend a deposition scheduled in January until his opposition filing dated December 30, 2005.

In Portland on December 21, 2005, suddenly faced with the information *for the first time* at the end of a long and tiresome day that the CFTC would continue Teague's deposition at a time apparently agreed upon between Teague's legal counsel and the CFTC Shimer merely indicated he would not be in attendance. (See Attachment B affidavit of Shimer.) The written record on December 21, 2005 provides absolutely no corroboration that Shimer "waived" his right to attend the deposition or his right to object to the form of questions that the CFTC might ask Ms Teague. Shimer's affidavit attached as Exhibit B clearly contradicts the self serving attempt of the CFTC and legal counsel for Teague in Shimer's absence to conveniently "doctor" the record on the issue of Shimer's purported "waiver". As Exhibit B clearly indicates on December 21, 2005 Shimer merely acknowledged in Portland that if the continued deposition of Teague was indeed going to be scheduled for mid January, 2006 he was unable to attend.

Moreover due to lack of funds, Shimer never saw the actual transcript of Teague's deposition testimony until the time that he was preparing his part of the Pretrial Order in May of 2007. Beovich Walter & Friend received from time to time during the period between the date of Teague's deposition and May of 2007 small incremental payments by Firth as partial payment toward the large outstanding balance due for the deposition conducted by Shimer on December 21, 2005. Until that outstanding balance was finally extinguished in May of 2007 Shimer never saw the actual transcript of the deposition he conducted.

Moreover, Shimer's ability to review the questions asked of Teague by Plaintiff and the Receiver's legal counsel on 12th, 13th and 14th of January 2006 were restricted to the bits and

pieces of that transcript provided as a part of Plaintiff's motion for partial summary judgment filed with the Court in the spring of 2006. Shimer never saw a complete transcript of the Teague deposition conducted by Plaintiff in January 2006 until Firth and Shimer finally were forced to pay an additional several hundred dollars they could not really afford in May of 2007 to finally receive (as a necessity in preparing the defendants' part of the Pretrial Order) those portions of the Teague deposition testimony taken on January, 2006 not previously provided as attachments to Plaintiff's motion for partial summary judgment. Shimer prepared his part of the Pretrial Order while reviewing for the first time in May of 2007 the entire transcript of Teague's January 2006 deposition testimony. (See Shimer affidavit found as Attachment B to this Response).

Regarding Lee

In footnote 1 on page 3 of its motion Plaintiff transforms Shimer's waiver on December 1, 2005 of an attorney client privilege clearly denied with respect to both Shimer and Firth by Lee during her January, 2006 deposition. Any such willingness to sign a document releasing Arnold & Porter from any perceived constraint imposed by a purported attorney client privilege hardly constitutes a specific waiver of the right to object to specific questions that might be inappropriately posed to an employee or partner of Arnold & Porter during a deposition. Plaintiff's motion in limine is noticeably silent about when the CFTC advised Shimer of the date of Lee's proposed deposition in mid January. Plaintiff chose to proceed with Lee's deposition [an attorney at Arnold & Porter—a law firm specifically selected by Shimer for the benefit of both of his clients Shasta Capital Associates, LLC ("Shasta") and Shasta's manager Equity Financial Group, LLC ("Equity")] on a date when the CFTC clearly knew Shimer would not be there!

All of the cases cited in support of "waiver" by Plaintiff in its motion stand only for the clear proposition that waiver occurs with respect to an objection based upon the form of the question, the use of facts not in evidence, leading questions, foundation, compound questions and answers calling for speculation *when the person with the imputed ability to object fails to attend the deposition for no good reason after notice or, in the alternative, is present at the deposition and no objection is raised*. The record clearly indicates that Shimer relied in good faith upon the Court's previously issued Scheduling Order confirmed again by Magistrate Donio on November 3 2005 and made irreversible travel arrangements in good faith in reliance upon that Scheduling Order.

Plaintiff's counsel, a purportedly experienced litigator, well knew what was appropriate to ask and the proper form that questions to Teague and Lee should take. Plaintiff took clear advantage of the fact that it had an unobstructed playing field in Shimer's absence for both the Teague and Lee depositions. Plaintiff's legal counsel asked questions she knew or should have known were inappropriately phrased in order to elicit often self serving or otherwise inadmissible answers from both Teague and Lee under the Rules of Evidence.

Plaintiff's "discovery" was suddenly allowed by the Court in late 2005 to extend well through February, 2006. The Plaintiff chose not to extend the professional courtesy to Shimer to wait until his return from his overseas trip before deposing both Teague and Lee in Shimer's presence. That was obviously a clear and more appropriate alternative to the path chosen by Plaintiff. Instead, Plaintiff showed Shimer no professional courtesy and sought to take full advantage of the fact that Plaintiff knew that Shimer would be out of the country and, therefore, not present at the depositions of Teague and Lee in mid January, 2006. To allow this federal agency Plaintiff to now turn that lack of professional courtesy and deliberate and unnecessary decision by Plaintiff into a reason to deny Shimer the right to properly object at trial (as reflected in the existing Pretrial Order executed by all parties) to what are deliberately phrased improper questions would be to turn the federal rules on their head in order to circumvent application of the rules of evidence otherwise clearly applicable to deposition testimony the Plaintiff now seeks to admit at trial. This is particularly so in light of the more extensive litigation experience of legal counsel for the CFTC

II. Shimer had notice of Stephenson's deposition but was on a cell phone in the mountains of North Carolina at the time the telephone deposition of Stephenson was conducted by Plaintiff and often could not clearly hear some the questions being asked by Plaintiff's legal counsel or the responses offered by Stephenson but did not constantly interrupt the deposition of Stephenson as a courtesy and did not receive a transcript of the Stephenson deposition from Plaintiff until shortly after Tuesday, June 5, 2007 following the Pretrial Conference.

The Court is specifically referred to page 6 of Attachment A with respect to the deposition testimony of Stephenson. In addition the Court is referred to Attachment C which is an affidavit by Shimer in which he cites the fact that the circumstances in which he was present at the deposition of Stevenson by cell phone while traveling in the mountains of North Carolina provided a less that optimal opportunity to effectively hear and respond to some of the questions posed by the CFTC's legal counsel and the reply provided by Stephenson. Moreover

the fact that Shimer is a *pro se* defendant with absolutely no litigation experience certainly permits the Court in the interest of fundamental fairness to exercise its discretion and entertain for consideration at trial the legitimate objections with respect to the Stephenson deposition testimony now contained in the Pretrial Order previously executed by all parties.

Certainly Shimer's lack of litigation experience removes the stated concern expressed in *Bahamas Agr. Industries Ltd. v. Riley Stoker Corp.*, 526 F 2d 1174,1181 (6th Cir. 1975) quoted by Plaintiff at the top of page 6 of its motion. As a *pro se* defendant with little or no previous working knowledge of the Federal Rules Shimer is clearly not knowledgeable counsel engaged in some sort of "strategy" of waiting for trial to present his objections to Stephenson's deposition testimony. The issue here is whether the Court should exercise its discretion in light of *all of the facts now before it* and choose in favor of full application of the rules of evidence at trial over the attempt by Plaintiff to seek the admission of testimony that is otherwise objectionable under the rules of evidence.

Plaintiff is free without objection from Shimer to call Mr. Stephenson as a live witness at trial. Shimer is reasonably certain that Defendant Firth would not oppose the live testimony at trial of Stevenson. That alternative was certainly preferable to Shimer on May 17, 2007 as reflected in Attachment A and is certainly preferable to Shimer today as an alternative to testimony offered in the form of a deposition transcript. If the deposition transcript of Stephenson is offered by Plaintiff in lieu of live testimony by that witness in light of the federal agency status of the Plaintiff (and the *pro se* status of defendants Shimer and Firth) Shimer respectfully suggests that fundamental fairness dictates that any testimony contained in Stephenson's deposition transcript should properly be subject to such objections as are now stated in the final Pretrial Order signed by all parties.

III. Regarding the deposition testimony of Rob Collis

The Court is respectfully referred to pages 5 and 6 of Attachment A (Shimer's letter to Plaintiff's legal counsel dated May 17, 2007) for Shimer's reasons for objecting to the introduction into evidence of any deposition testimony of Collis for any purpose other than to confirm that he chose to decline Coyt Murray's request that Collis verify the trading performance of the entity Tech Traders, Inc.

IV. CONCLUSION

Plaintiff's most recent motion in limine is a clear testament to the Plaintiff's recognition of the clear inadmissibility of much of the deposition testimony it would like to submit in lieu of live witness testimony in support of the remaining counts of the Amended Complaint. Plaintiff basically is saying to the Court, "Much of the deposition testimony that we would like to introduce at trial would not otherwise be admissible under the rules of evidence but we would certainly appreciate any help you can give us by engaging in the legal fiction that a waiver of Shimer and Firth's right to object to this improper testimony has actually occurred".

This is a Plaintiff that clearly expected to literally wear Shimer and Firth down and extract a settlement from those defendants without the necessity of an actual trial on the merits. A settlement is clearly unlikely and it is obvious that Shimer and Firth are willing, if necessary, to go to trial on the merits of the remaining counts of the Amended Complaint. A close review of both Shimer and Firth's properly registered objections in the Pretrial Order and the Rules of Evidence has now become a source of sufficient concern for this Plaintiff to prompt the current motion in limine now before the Court.

It is an impossible task for the federal courts to attempt to "balance" in some way the inherent financial inequities that might naturally exist between private civil litigants. However when one of the parties is a federal government agency with virtually *unlimited financial resources* and the defendants are without any litigation experience, without means and, therefore, *forced to represent themselves at trial* one can only shake one's head in disbelief that the CFTC would so clearly and carefully pick and chose its facts and then attempt to distort the existing record in support of Plaintiff's current request that the Court conclude that a waiver of Shimer and Firth's right to exclude otherwise inadmissible evidence has occurred.

Date: August 10, 2007

Respectfully submitted,

s/ Robert W. Shimer
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