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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.	)	

RESPONSE OF EQUITY RECEIVER TO MOTIONS OF ROBERT W. SHIMER AND VINCENT J. FIRTH FOR STAY OF ORDER COMPELLING PRODUCTION OF TAX RETURNS, COMBINED WITH REQUEST FOR ENTRY OF RULE TO SHOW CAUSE

Robert W. Shimer ("Shimer") and Vincent J. Firth ("Firth") have again filed identical motions requesting a stay of Magistrate Judge Donio's September 1, 2006 Order (the "September 1, 2006 Order"), which compels them to produce select tax returns, pending their appeal of two separate and subsequently entered orders. The first order, entered by the Court on December 18, 2006, denied Shimer's and Firth's motions for reconsideration of the order denying their motions

for summary judgment on all counts of Plaintiff's amended complaint ("Reconsideration Order"). In the second order entered on the same day, the Court granted partial summary judgment in favor of Plaintiff ("Summary Judgment Order"). Shimer and Firth recently appealed both orders to the Third Circuit and have filed renewed motions seeking a stay of the September 1, 2006 Order.

BACKGROUND

Such antics by Shimer and Firth are nothing new. Indeed, these motions to stay the September 1, 2006 Order compelling them to produce tax returns to the Receiver are their *second* motions to stay this order. The first was predictably unsuccessful. On September 15, 2006, Shimer and Firth filed their initial motions to stay the September 1, 2006 Order. In those motions, they sought a stay pending their appeal of the September 1, 2006 Order to Judge Kugler (and pending resolution of their summary judgment motions) based on their contention they are not subject to receivership because they never operated a "commodity pool."

In his response to Shimer's and Firth's first stay motions, the Receiver attacked the merits of the motions, arguing that Shimer and Firth *repeatedly and unsuccessfully* raised the issue of whether Shasta was a commodity pool in dispositive motions before the Court. (*See* Oct. 4, 2005 Ct. Op. attached to the Declaration of Jeffrey A. Carr ("Carr Decl.") as Ex. A; Nov. 16, 2006 Ct. Op. attached to Carr Decl. as Ex. B; Dec. 18, 2006 Ct. Op. attached to Carr Decl. as Ex. C.) On March 14, 2007, Judge Kugler denied their appeal of the September 1, 2006 Order. (*See* Mar. 14, 2007 Ct. Order attached to Carr Decl. as Ex. D.) Two days later, Magistrate Judge Donio therefore denied their motions to stay the September 1, 2006 Order as moot. (*See* Mar. 16, 2007 Ct. Order attached to Carr Decl. as Ex. E.)

Here, again, Shimer and Firth request that the Court stay the September 1, 2006 Order. But this time around they base their request on pending interlocutory appeals of Judge Kugler's Reconsideration Order and Summary Judgment Order. In these appeals to the Third Circuit, Shimer and Firth argue yet again that Shasta is not a commodity pool, and, as a result, the Receiver has no legal basis on which to require them to produce tax returns.

While reluctant to devote receivership resources to another response to a virtually identical motion to stay, the Receiver is compelled to protect the interests of the receivership estate and, specifically, the Shasta Capital Associates, LLC ("Shasta") investors impacted by the conduct of Shimer and Firth. The Receiver therefore files this response to reiterate his position that Shimer's and Firth's motions to stay lack merit and to request that these motions be promptly denied.

ARGUMENT

A. Shimer And Firth (Again) Fail To Satisfy The Requirements For Obtaining A Stay Pending Appeal.

Shimer and Firth fail to address the requirements that parties seeking a stay pending appeal must establish. Those standards are: (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 that it is affected. *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)). They fail to meet their burden on even one of these standards.

1. No likelihood of success on the merits.

Shimer and Firth present no showing that they are likely to prevail on appeal. The record suggests that they cannot demonstrate any likelihood of success. Indeed, in support of their motions to stay, Shimer and Firth argue *only* that the Third Circuit has appellate jurisdiction over the matter.[1] (This issue of whether the Third Circuit has appellate jurisdiction in no way advances the merits of their appeal.) What is more, Shimer and Firth's argument fails. Under well-established Third Circuit precedent, the court of appeals lacks appellate jurisdiction over interlocutory orders where the district court either denies motions for summary judgment or partially grants such motions. *See Bines v. Kulaylat*, 215 F.3d 381, 384 (3d Cir. 2000) ("As a general rule, we have no jurisdiction under 28 U.S.C. § 1291 to review interlocutory orders such as a denial of summary judgment."). The Third Circuit, therefore, appears extremely likely to deny their joint appeal for lack of appellate jurisdiction.

Even if the Third Circuit were to agree to hear their appeal (after concluding it has appellate jurisdiction), Shimer and Firth fail to show that they could ever prevail on the merits of their appeal. The Court has considered this issue in detail on three separate occasions, and each time it has concluded that Shasta is not a commodity pool. (*See* Oct. 4, 2005 Ct. Op. attached to Carr Decl. as Ex. A; Nov. 16, 2007 Ct. Op. attached to Carr Decl. as Ex. B; Dec. 18, 2006 Ct. Op. attached to Carr Decl. as Ex. C.)

Additionally, their stay motion amounts to a collateral attack on the Court's June 24, 2004 Consent Order of Preliminary Injunction and Other Ancillary Relief Against Equity

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[1] In support of their argument, Shimer and Firth contend that the collateral order doctrine applies here. They have, however, misinterpreted this doctrine. This doctrine is narrow and is limited to a small class of cases where the court's order: (1) conclusively determines the disputed question; (2) resolves an important issue wholly separable from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *Bines*, 215 F.3d at 385. This doctrine does not apply here because the issue on appeal is not separable from the underlying merits, but rather central to the case, and Shimer and Firth can certainly appeal a final judgment on this issue.

Financial Group, LLC, Vincent Firth, and Robert W. Shimer to which they expressly agreed (the "Consent Order"). In a disingenuous (and obviously last-ditch) attempt to avoid producing their tax returns to the Receiver, Shimer and Firth claim that their agreement to the Consent Order was "uninformed." According to Shimer and Firth, their counsel's advice that they consent to the continuation of the receivership was tainted, and they were unaware of the legal landscape surrounding the claims asserted against them.[2] Shimer and Firth implicitly argue therefore that they should not be bound by the Consent Order. Their argument is meritless. Nearly three years ago, Shimer and Firth *agreed* to the Consent Order. They cannot now circumvent the Consent Order and its mandates simply by arguing that they were "uniformed." The Receiver therefore has the authority, as well as the obligation, to carry out his functions under the terms of this order.

2. The balance of harm favors the Receiver.

Shimer and Firth also fail to show that they would be irreparably harmed if the Court does not stay the September 1, 2006 Order and that the receivership estate would suffer no harm from such a stay. As the Court is aware, the Receiver has offered to treat the tax returns as confidential. Following issuance of the September 1, 2006 Order, the Receiver drafted a confidentiality agreement and sent it to Shimer and Firth. A copy of that proposed agreement is attached to the Carr Declaration as Exhibit F. Neither Shimer nor Firth ever responded to the Receiver regarding the proposed agreement. In light of the proposed confidentiality protections, any potential harm to them from producing their tax returns would be minimal at most.

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[2] Shimer and Firth attempt to muddy the waters regarding the effect of the Consent Order by suggesting that a payment of a portion of their attorneys' fees to their counsel from receivership funds authorized by that order was somehow improper. The existence and rationale of this payment was discussed at length with Plaintiff CFTC and fully disclosed to the Court in connection with the entry of this order, to which both Shimer and Firth expressly consented. This matter is irrelevant to the issues presented by the renewed stay motion.

Without first reviewing the tax returns, it is difficult to determine the harm to the receivership estate and the investors if the Court were to grant the stay. Given the extent of Shimer and Firth's fierce resistance to producing these returns, it is fair to infer that that there would be substantial injury to the receivership estate from not producing them. In any event, establishing this element is the burden of the movants, and Shimer and Firth do not even attempt to meet this burden.

3. Granting a stay is contrary to the public interest.

The public interest is certainly affected in this case. This case was brought to generally advance the public interest, and the Receiver's obligations are to carry out the Court's orders, which are in the public interest. In addition, allowing Shimer and Firth to avoid the requirements of the Consent Order and this Court's September 1, 2006 Order while pursuing yet another meritless appeal would detract from the confidence of the public generally, and of the Shasta investors specifically, in the ability of the judicial system to deal with the problems created by the actions of the Defendants.

B. The Court Should Enter A Rule To Show Cause Upon Shimer And Firth.

Almost a month has passed since the Court entered its March 14, 2007 Order denying Shimer's and Firth's motions to appeal the September 1, 2006 Order, yet they have failed to produce their tax returns. The Receiver therefore requests that the Court enter a rule requiring Shimer and Firth to show cause why they should not be held in indirect civil contempt of this Court for failing to obey the September 1, 2006 Order compelling them to produce the tax returns. The Receiver requests that the hearing date on the Rule to Show Cause be set at the first available date.

For all of these reasons, the Receiver strongly opposes the stay motions of Shimer and Firth as without merit and requests that they be denied. Additionally, the Receiver respectfully requests that the Court: (i) enter a rule to show cause requiring Shimer and Firth to show cause why they should not be held in contempt of Court for violating the Court's September 1, 2006 Order; (ii) at the time of the show cause hearing, enter an appropriate sanction that will ensure prompt and continuing compliance with the Court's orders; and (iii) grant such other and further relief as the Court deems just and appropriate under the circumstances.

DATED: April 9, 2007

Respectfully submitted,

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