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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 **Civil Action No: 04-1512 (RBK)(AMD)** **CFTC'S MOTION TO STRIKE DEFENDANT SHIMER'S UNAUTHORIZED SURREPLY** **MOTION DATE: August 4, 2006**

Pursuant to L.Civ.R. 7.1(d)(6), plaintiff Commodity Futures Trading Commission ("CFTC" or "Commission") moves to strike the unauthorized sur-reply to the second Motion for Summary Judgment filed by Defendant Robert V. Shimer pursuant to a letter to the Court on June 26, 2006.

On May 31, 2006, after briefing on the parties' respective summary judgment motions was completed, Shimer sent a letter to the Court recanting his previously sworn deposition testimony. Although the recantation and the method in which he communicated with the Court were troubling, the Commission chose to ignore the disturbing indiscretion because the testimony he recanted was not particularly material to the issues before the Court in the Commission's summary judgment motion. However, a second improper communication cannot be ignored.

L.Civ.R.7.1(d)(6) provides that "[n]o sur-replies are permitted without permission of the Judge or Magistrate Judge to whom the case is assigned." Shimer's June 26, 2006 letter attempts to reargue his second summary judgment motion, on which he seeks relief on grounds already rejected by this Court. The fact that the case he attaches, *Goldstein v. Securities and Exchange Commission,* No. 04-1434 (D.D.C. June 23, 2006), was decided after briefing on his summary judgment was complete, does not give him license to file his unauthorized sur-reply via letter. The *Goldstein* case does not address the issues raised by Shimer's summary judgment motion. It has nothing to do with the definition of a "commodity pool", which was the only issue raised by Shimer's two summary judgment motions. It had nothing to do with the Commodity Exchange Act or the Commission's regulations thereunder. Therefore, it did not raise any new case law that Shimer needed to bring to the Court's attention.

In *Goldstein*, the United States District Court for the District of Columbia vacated a new rule enacted by the Securities and Exchange Commission("SEC") termed the "Hedge Fund Rule" which required that previously exempt hedge fund advisers who advised funds with more than 15 "shareholders, limited partners, members or beneficiaries" register with the SEC. The Court found the SEC misinterpreted § 203(b)(3) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3)b)(3), which exempts from registration "any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients." The Hedge Fund Rule defines clients to include shareholders, limited partners, members or beneficiaries of a hedge fund, rather than just the fund itself. The D.C. Circuit Court found that Congress did not intend that the participants in a hedge fund be considered the "clients" of the investment adviser and noted that the SEC had not considered the participants in a fund to be the clients of the adviser until enactment of the Hedge Fund Rule. *See* Slip. Op. at 11-12. This ruling is entirely inapposite to the issues in front of this Court.

Shimer's entire argument for shirking his responsibilities in this case hinges on his hyper-technical reading of *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986) from which he crafts a requirement that the trading account used to trade commodity futures contracts must be in the name of the commodity pool for the entity to be defined as a commodity pool. The *Goldstein* case sheds no light on this issue, which has been thoroughly briefed twice and ruled on by the Court. The CFTC has not enacted any new rule. Its definition of a "pool" and Congress' definition of a commodity pool operator have remained the same for many years. Nowhere in the Congressional record or in the regulations promulgated by the Commission will one find a requirement that a trading account must be traded in the **name** of the pool before that entity can be found to be a commodity pool. In fact, there is no requirement that there even **be** a

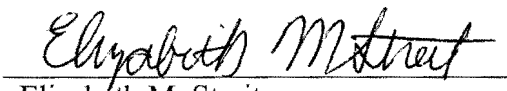
trading account- as there often is not in Ponzi schemes where money is collected for trading commodity future contracts but never placed in a trading account.

Shimer claims that the Commission has suddenly attempted to re-define the term "commodity pool" in this case and points to the testimony of a CFTC investigator from 25 years ago, taken out of context, as evidence that the Commission, and Congress apparently, required that there exist a trading account in the name of a pool before an entity could be deemed a commodity pool. As pointed out in the Commission's Response to Shimer's and Firth's Second Motion for Summary Judgment, Shimer deliberately misconstrues Ms. Ohlmiller's testimony. *See* Response at 11. Nowhere does she say that a trading account in the pool's name is an essential or integral requirement of a commodity pool. Moreover, her testimony does not constitute prior agency policy or practice. The Commission's Response presents substantial support that the Commission has considered and treated fund of funds such as Shasta as commodity pools for many years. Shimer continues to ignore this support, as he did in his Reply, apparently believing that the more times he can burden this Court with strained and illogical arguments and irrelevant cases, the more he furthers his attempts to escape liability.

The *Goldstein* case adds nothing to the Court's decision-making here. Shimer should not be allowed to use its issuance as an excuse to file an unauthorized sur-reply. The letter should be stricken from the record.

Date: July 7, 2005

Respectfully submitted,



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