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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

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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BRIEF OF DEFENDANT ROBERT W. SHIMER IN SUPPORT OF MOTION FILED ON BEHALF OF HIMSELF AND MOTION FILED SEPARATELY BY VINCENT J. FIRTH PRO SE PURSUANT TO FEDERAL RULES 56(b) FOR SUMMARY JUDGMENT WITH RESPECT TO COUNTS I THROUGH V OF PLAINTIFF'S FIRST AMENDED COMPLAINT ALLEGING VIOLATIONS OF SECTIONS 4b(a)(2); 13b; 4*o*(1); 4k(2); 4m(1); & 13(a) OF THE COMMODITY EXCHANGE ACT, 7 U.S.C. §§ 6b(a)(2); 13c(b); 6*o*(1); 6k(2); 6m(1); & 13c(a).

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Defendant Robert W. Shimer ("Shimer") acting pro se submits this Brief in support of his Motion for Summary Judgment and in support of the separately filed Motion For Summary Judgment filed pro se by Vincent J. Firth ("Firth").

I. PRELIMINARY STATEMENT

During a telephone status conference on April 21, 2005 conducted by Magistrate Ann Maric Donio Defendants Shimer and Firth voluntarily withdrew without prejudice previously filed motions with the Court for summary judgment in this matter. By order dated April 22, 2005, Magistrate Ann Marie Donio dismissed without prejudice Defendant Shimer's previous motion for summary judgment and also dismissed without prejudice

Defendant Firth's previous motion for summary judgment. Acting *pro se* without benefit of outside legal counsel (by reason of the fact that previous legal counsel for both Defendant Shimer and Defendant Firth have withdrawn from this matter with permission of the Court) Defendant Shimer has now completed additional legal research and analysis of relevant case law and respectfully submits this Brief in support of Shimer's current motion for summary judgment with respect to Counts I through V of Plaintiff's First Amended Complaint.

As noted in Shimer's Reply dated June 8, 2005 to Plaintiff Commodity Futures Trading Commission's (hereinafter "Plaintiff" or "CFTC") Response to Shimer's currently pending motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) Plaintiff is an independent federal regulatory agency with a 30 year history of experience administering and enforcing the provisions of the Commodity Exchange Act (hereinafter "CEA") 7 U.S.C. § 1 *et seq.* and the Regulations promulgated thereunder.[1]

It is noteworthy and extremely relevant to the disposition of Defendant's currently renewed motion for summary judgment that with 30 years of experience regulating the commodity futures industry and with access to and actual knowledge (or *at the very least* constructive knowledge) of *every decision* apparently *ever made* in the last 30 years *by any federal court* with respect to the issue of what constitutes a "commodity pool" (as regulated by Plaintiff), Plaintiff has been painfully unable to offer to this Court *one single case* in which an entity such as Defendant Shimer's client Shasta Capital Associates, LLC (hereinafter "Shasta")] was *ever* held to be a "commodity pool" in the absence of the existence of a commodity trading account opened in the name of the purported "pool" entity.

It is a FACT that Plaintiff cannot refute (or Plaintiff would have cited as many cases as possible in the pleadings filed to date with this Court) that *in all instances*, any entity held by the federal courts to be a "commodity pool" *owned in its name a commodities trading account* that was either traded 1) illegally by the pool entity itself (and not a separate operator as required by CFTC regulations), or, 2) by a separate entity held to be the "operator" of the "pool" or, 3) traded by a separate entity or person (see, for example,

[1] See page one of Shimer's Reply dated June 8, 2005 generally citing to that observation in *Heritage Capital Advisory Services, Ltd.* Comm Fut. L. Rep. (CCH) ¶21,627 (N.D. Ill. 1982).

Heritage[2]) under purported authority given to that separate entity or person by either the "pool" or the pool's "operator".

As further pointed out to the Court previously in Shimer's Reply dated June 8, 2005, Plaintiff's own proposed substantial revisions on August 4, 1980 to Part 4 Rules (45 FR § 1600) specifically *narrowed* the definition of a "pool". In Plaintiff's own words:

> "As proposed and adopted, § 4.10(d) narrows the definition of the term "pool" by specifying that it is an entity "operated for the purpose" of trading commodity interests."[3]

It is a clear and obvious fact that Plaintiff drafted and then proposed and implemented (pursuant to its own rule making authority 25 years ago) what Plaintiff admits (in its own above cited words) was a *narrowing* of the definition of the term "pool".[4] It is also a fact (clearly recognizable by the Court) there is no case law to support Plaintiff's apparent deliberate mischaracterization of Shasta as a "commodity pool" because Plaintiff has had every opportunity and has failed to offer to the Court any controlling case law in support of its allegation that Shasta is a commodity pool.

The controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986) (offered by Plaintiff on page 2 of its Brief In Support of Plaintiff's Motion For *Ex Parte* Statutory Restraining Order And Preliminary Injunction) *specifically requires* the application of a four part test to determine whether or not an entity is a commodity pool within the meaning of the CEA. Shasta arguably fails to meet all four parts of the Lopez test but clearly fails at least three of those four tests.[5]

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[2] See *Heritage Capital Advisory Services, Ltd.* Comm Fut. L. Rep. (CCH) ¶21,627 (N.D. Ill. 1982). The Court is referred to Exhibit D of Shimer's previously filed Reply dated June 8, 2005 for a copy of the *Heritage* Court's decision.

[3] See Comm Fut. L. Rep. (CCH) ¶21,188 at p. 24,891 also specifically cited by the *Lopez* court (*Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986) at page 884. NOTE: Both pages 883 and 884 of this reference were previously attached for the benefit of the Court as Exhibit "A" to Shimer's previously filed Reply dated June 8, 2005.

[4] See also discussion and analysis of 17 C.F.R. § 4.10(d)(1) offered by Defendant Shimer at pages 4-6 of Shimer's previous Reply dated June 8, 2005 incorporated by this reference.

[5] See previous extensive discussion and analysis of *Lopez* incorporated by this reference and found in the following pleadings to date: 1) See pages 47-59 of Defendant Shimer's previously filed Brief dated April 13, 2005 in support of still pending Motions to Dismiss under Federal Rules 12(b)(1) and 12(b)(6); 2) See also pages 6-14 of Defendant Shimer's Reply dated June 8, 2005 to Plaintiff's Response. The text of the *Lopez* decision was also attached to Shimer's previously filed Reply dated June 8, 2005 as Exhibit "C".

The following fact is material, controlling and dispositive with respect to Defendant Shimer's renewed motion for Summary Judgment: the entity Shasta has never opened a commodity trading account *in its own name* nor has Shasta ever granted authority to any other entity *to trade in Shasta's name* for the account of Shasta. Plaintiff has neither alleged nor can Plaintiff provide to this Court any evidence to contradict this material and dispositive fact.[6] *Plaintiff has never alleged this critically important and necessary material fact anywhere in any pleading submitted to the Court* nor can Plaintiff provide any credible assurance to the Court that Plaintiff will be able to establish the existence of such a fact at trial because this fact simply does not exist.

To date Plaintiff has repeatedly attempted throughout its Original Complaint, First Amended Complaint and other pleadings to offer the Court Plaintiff's unsupported "conclusion" that Shasta is a commodity pool. Plaintiff well knows that absent a finding by this Court that Shasta is a "commodity pool", Plaintiff's First Amended Complaint provides to this Court absolutely no "nexus" or "connection" between the alleged actions of Defendants Equity Financial Group, LLC, Firth and Shimer ("Equity Defendants") and any activity regulated or proscribed by the Commodity Exchange Act. This lack of "nexus" or "connection" between the alleged activity of the Equity Defendants and the CEA is fatal under applicable case law to all five counts of Plaintiff's First Amended Complaint.

II. ARGUMENT

A. Summary Judgment for Defendant is Appropriate and Should Be Granted With Respect To Counts II Through IV of Plaintiff's First Amended Complaint Because An Essential And Dispositive Fact Critical To The Success Of These Counts Has Never Been Alleged By Plaintiff And Cannot Be Established Or Proven By Plaintiff At Trial Because This Critical And Dispositive Fact Does Not Exist.

It is true that "[t]he party seeking summary judgment bears the burden of establishing there is no genuine dispute as to any material fact in the case." *Clemons v. Dougherty County, Ga.* 684 F.2d 1365, 1368 (11th Cir. 1982). In describing that burden upon the moving party the Supreme Court has clearly stated that "...a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis

[6] Absent this critically material fact, Plaintiff's previous argument that Shasta is a commodity pool because Shasta meets the required four part test of Lopez cannot be sustained.

for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex v. Corp. v. Catrett* 477 U.S. 317, 323 (1986).

In the present matter, Defendant has more than met that required burden. Because Plaintiff originally cited *Lopez* on page 2 of its Brief In Support of Plaintiff's Motion For *Ex Parte* Statutory Restraining Order And Preliminary Injunction dated April 1, 2004 Plaintiff is hardly in a position to argue that *Lopez* is not controlling, nor has Plaintiff apparently ever made that argument to date in any of its later pleadings. It is, therefore, clear that entities held to be a commodity pool must meet the specific four part test enunciated by the Ninth Circuit in *Lopez.*

Plaintiff's current difficulty lies in the fact that Defendant Shimer (now free of the apparent constraints imposed by previous legal counsel) simply asks the Court to apply the four-part test of *Lopez* to the facts of Shasta. To that end there is no dispute with respect to the following material and dispositive fact: Shasta never opened a trading account to trade commodity futures in its own name and Shasta never authorized any other entity to trade a Shasta commodity futures account for the benefit of Shasta and its members. The controlling case law of *Lopez* previously cited by Plaintiff requires that fact to exist in order for Shasta to be held to be a commodity pool. Any attempt by Plaintiff to argue that Shimer's Attorney escrow account at Citibank meets that fourth test requirement of Lopez is absurd because the account required by the four part test of Lopez requires that funds be pooled into that account in question and obviously remain in that account in order to be traded in the name of the entity sought to be characterized as a "pool".

1. The standard for mandating summary judgment enunciated by the Supreme Court requires that Defendant's current motion for summary judgment with respect to Counts II through IV be granted

In *Celotex v. Corp. v. Catrett* 477 U.S. 317, 322 (1986) speaking for the Court, Justice Rehnquist stated:

> "Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." In our view, the plain language of Rule 56(c) *mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202 (1986). (Emphasis added)

Applying the above standard, to the facts of the present case, Summary Judgment for Defendant with respect to Counts II through IV of Plaintiff's First Amended Complaint is clearly "mandated" and appropriate. First of all it has been well over a year since the present action was filed against the Equity Defendants. Plaintiff has engaged in extensive discovery since April 1, 2004 and cannot argue with any credibility that it needs more time to determine if there exists a commodity trading account "in the name of Shasta".[7] It is clear and obvious to Plaintiff that no such account exists and there has been more than sufficient time for the Court to now conclude (based upon a lack of any evidence to the contrary) that no such commodity trading account ever existed in the name of Shasta.

In further support of this fact, the affidavit of Vincent Firth submitted as Exhibit "A" hereto states unequivocally under oath that he held the position of President of Shasta by virtue of Shasta's Operating Agreement and that he was and is the only person with any authority to act on behalf of Shasta and that he has never opened a commodity trading account in the name of Shasta on behalf of Shasta nor has he ever authorized any other person to act on behalf of Shasta in that regard nor to his knowledge has any commodity trading account ever existed in the name of Shasta.

[7] Much of Plaintiff's discovery now apparently has absolutely nothing to do with the Equity Defendants but rather entities and individuals (many of whom are completely unknown to either Shimer or Firth) who entered into direct relationships with Defendants Tech and Defendant Murray.

Clearly Plaintiff will bear the burden of establishing at trial that Shasta is a "commodity pool" in order to support a finding that Defendant Equity was the CPO of Shasta in order to sustain Counts II through IV of its First Amended Complaint against all of the Equity Defendants. But according to the controlling case law of *Lopez* an entity is not a commodity pool unless it satisfies all four tests of *Lopez* including the fourth test of *Lopez* that "the transactions are traded...*in the name of the pool*..." This fact is an essential element of Plaintiff's case. Under the clear above cited authority of *Celotex* Defendant Shimer is entitled *as a matter of law* to Summary Judgment with respect to all allegations contained in Counts II though IV of Plaintiff's First Amended Complaint because to succeed with respect to each of those Counts there must be a finding (as alleged by Plaintiff) that Equity acted as a CPO to Shasta.[8] And that fact is impossible if Shasta is not a commodity pool per the required four-part test of *Lopez*.

Moreover, as pointed out by Justice Rehnquist in the above cited quote from *Celotex* "a complete failure of proof concerning an essential element of the nonmoving party's case *necessarily renders all other facts immaterial*".[9] Counts II through IV of Plaintiff's First Amended Complaint are ripe for Summary Judgment in favor of Defendant because an essential fact absolutely critical to a finding that Shasta is a commodity pool has not been alleged nor established by Plaintiff because that fact simply does not exist.

2. Summary Judgment is an appropriate remedy whenever the CFTC seeks an unjustified expansion of its jurisdiction over entities that were never intended to be subjected to the CEA

Shimer would point out that the Supreme Court's *Celotex* decision with respect to when summary judgment is appropriate was specifically cited by the District Court in *Commodity Futures Trading Commission v. Mass Media Marketing, Inc.* 156 F.Supp.2d 1323, 1327 (S.D. Fla., 2001)[10] (hereinafter "*Mass Media*"). In *Mass Media* Judge Graham rejected the CFTC's attempt to offer to that court an overly broad definition of the CEA's phrase

[8] The Court is referred to the specific language and paragraphs that pertain to the Equity Defendants contained in Counts II through IV. All of the allegations contained in these Counts cannot be sustained as a matter of law if Equity was not and is not a Commodity Pool Operator.
[9] *Celotex v. Corp. v. Catrett* 477 U.S. 317, 322-323 (1986)
[10] Because of the case of *CFTC v Mass Media Marketing* is so directly on point and relevant to Defendant's present motion for summary judgment in the present matter a copy of that case is attached hereto as Exhibit "B".

"soliciting and accepting orders" in order to find (as then suggested by Plaintiff CFTC) that the defendants in *Mass Media* met the definition of an "Introducing Broker" and were, therefore, subject to the Plaintiff's Introducing Broker registration requirements. Noting previously in his opinion at page 1327 that "Introducing Brokers form a category of commodity futures market participants created by Congress in 1982" Judge Graham found that the interpretation offered to him by the CFTC in *Mass Media* for the phrase "soliciting and accepting orders" contradicted the CFTC's previously expressed interpretation of its own regulations:

> "First the CFTC's prior understanding of the objective behind the 1982 Introducing Broker registration requirement cannot be reconciled with the CFTC's current interpretation. In its Rules and Regulations, passed shortly after the 1982 amendments, the CFTC expressed its understanding of Congress' intent "to require registration as Introducing Brokers those persons who were formerly agents of FCM's".

In rejecting the CFTC's attempt to characterize the activities of the *Mass Media* defendants as the activity of an "Introducing Broker", Judge Graham stated:

> "In contrast, in the instant case, Defendants never introduced an account to an FCM or any registered entity. Defendants' general solicitation through their advertisements never involved the making of an offer to enter into a commodity transaction or assisting customers in carrying out such transactions."[11]

Judge Graham then concluded at page 1332:

> "After examining these relevant factors, and mindful of the deference due the CFTC's interpretation of the Act, the Court finds no permissible basis that would justify the CFTC's expansive interpretation of the Act's Introducing Broker registration requirement."

Judge Graham then also noted at page 1332 that "Congress has ample authority to expand the Act's registration requirement to include advertisers, such as Defendants. Congress, however, has not done so."[12] In *Mass Media* Judge Graham, therefore, granted the Defendants' Motion for Summary Judgment as to the Plaintiff CFTC's Count 2 that alleged a failure to register as both an Introducing Broker and as an Associated Person of an

[11] *CFTC v. Mass Media Marketing, Inc.* 156 F.Supp.2d 1323, 1331 (S.D. Fla., 2001).
[12] *CFTC v. Mass Media Marketing, Inc.* 156 F.Supp.2d 1323, 1332 (S.D. Fla., 2001).

Introducing Broker. The Court then also granted Summary Judgment to Defendants with respect to Plaintiff's Count 3 which alleged a violation of the CFTC's record-keeping requirements.

3. Plaintiff CFTC is not entitled to any deference in its attempt to "redefine" the term "pool" to include an entity such as Shasta that has never owned a commodity interest trading account in its name.

In the current matter before the Court Plaintiff's attempt to apply the term "commodity pool" to the entity Shasta should receive the same amount of deference given to that agency by the *Mass Media* court when the CFTC there attempted to redefine the term "Introducing Broker" to suit its purposes despite the existence of a previous contradictory interpretation by that same agency. In the present case Plaintiff proposed in 1980 a revised definition that clearly was then acknowledged by the CFTC to have had the effect of narrowing the definition of the term pool" found in its regulations at 17 C.F.R. § 4.10(d)(1). In the interest of brevity Defendant Shimer hereby incorporates by reference pages 4 to 6 of his Reply dated June 8, 2005 which provide further analysis of Plaintiff's current attempt to unjustifiably characterize the entity Shasta as a "commodity pool",

In the present case the CFTC seeks to impose a "re-interpretation" of the term "pool" that is not only contradicted by its previous statement in 1980 but has no support in the CEA and no support in any of its existing regulations. It is well understood by the federal courts that an agency interpretation that conflicts with a prior interpretation is entitled to considerably less deference than consistent interpretations. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 5115, 114 S.Ct. 2381, 2388, 129 L.Ed. 2d 405 (1994). In addition to the obvious conflict with its prior interpretation, Plaintiff's new interpretation of the term "pool" as applied to Shasta has absolutely no support in federal case law.

The Supreme Court has clearly held that no deference is due agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and *longstanding* agency interpretations must fall to the extent they conflict with statutory language." See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989) (hereinafter "*Betts*").

In *Betts* the District Court had granted summary judgment in favor of appellee Betts, finding that appellant PERS' retirement scheme was discriminatory on its face in that it denied benefits to certain employees on account of age. The District Court had rejected PERS' reliance on § 4(f)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), which exempts from the Act's age discrimination prohibitions certain actions taken in observance of "the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, *which is not a subterfuge* to evade the purposes of [the Act]." (Emphasis added). The Court of Appeals affirmed, agreeing with the District Court that the exemption of § 4(f)(2) of the ADEA is available only to plans that can provide such cost justifications or establish a substantial business purpose. The Supreme Court noted that the District Court in granting summary judgment for appellee Betts had relied, in part, upon Regulations of the Department of Labor found at 29 CFR § 1625.10 (1988). 29 CFR § 1625.10(a)(1) stated that the purpose of the exemption to the ADEA provided by Section 4(f)(2) was

> "to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations,"[13]

The Supreme Court also noted that the Department of Labor's regulations had further defined the term "subterfuge" used in section 4(f)(2) of the ADEA as follows:

> "In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 CFR § 1625.10(d) (1988).[14]

Noting that various other lower courts had previously relied upon the definition of "subterfuge" found in the Department of Labor's cited regulations the Supreme Court reversed. The Court stated: "this approach to the definition of subterfuge cannot be squared with the plain language of the statute." In the previous case of *United Air Lines, Inc. v. McMann,* 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977) the Court had previously found that term "subterfuge" to mean:

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[13] *Public Employees Retirement Sys. V. Betts*, 492 U.S. 158, 170 (1989).
[14] *Public Employees Retirement Sys. V. Betts*, 492 U.S. 158, 170 (1989).

> "a scheme, plan, stratagem, or artifice of evasion," which, in the context of § 4(f)(2), connotes a specific "intent . . . to evade a statutory requirement."

The Court concluded that this plain meaning of the term "subterfuge" "includes a subjective element that the regulation's objective cost-justification requirement fails to acknowledge". The Court then stated:

> " Ignoring this inconsistency with the plain language of the statute, appellee and the EEOC suggest that the regulation represents a contemporaneous and consistent interpretation of the ADEA by the agencies responsible for the Act's enforcement and is therefore entitled to special deference. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600, n.17, 101 S. Ct. 817, 823, n. 17, 66 L.Ed. 2d 762 (1981); see also *Chevron U.S.A. a. Natural Resources Defense Council, Inc.* 467 U.S. 837, 104 S. Ct. 2778, 81 L, Ed. 2d 694 (1984) But, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. *Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language*." (Emphasis added).

Appelle *Betts* and the EEOC had argued that deference should be given to "contemporaneous and long standing agency interpretations of its own regulations". Plaintiff CFTC is not even in a position to at least posit that much of an argument for deference with respect to its "newly discovered" definition of the term "pool" found at 17 CFTC 4.10(d)(1). The definition of the term "pool" (as stated in Plaintiff's regulations) is clear and unambiguous. So is the Statutory definition of the term "commodity pool operator" enunciated by Congress.[15] Plaintiff now, literally "out of the blue", seeks to suddenly apply the term "pool" to the entity Shasta in order to characterize Defendant Equity as a CPO despite the fact that such an attempt by Plaintiff's part is 1) contrary to Plaintiff's previous statement made in 1980 when the definition of the term "pool" was admittedly "narrowed" according to Plaintiff and 2) finds absolutely no support in controlling federal case law.

[15] The Court is referred to page 86 of Defendant's previous Brief dated April 13, 2005 where in the relevant statue found at 7 U.S.C. § 1(a)(5) defining a commodity pool operator was stated as follows: "any person…who…accepts or receives from others, funds…directly…for the purpose of trading in any commodity for future delivery on or subject to the rules of a contract market…"

4. Counts II through IV specifically require a finding that Shasta is a commodity pool to survive Defendant's current motion for Summary Judgment

Turning to Plaintiff's First Amended Complaint, Count II attempts in relevant part to apply the provisions of Section 4*o*(1) of the CEA to all of the Equity Defendants. This section of the CEA specifically prohibits CTAs, CPOs or their APs (associated persons) from using the mails or interstate commerce to defraud clients or prospective clients. To therefore successfully allege a violation of Section 4*o*(1) of the CEA with respect to all of the Equity Defendants, it absolutely critical to the success of all of Plaintiff's Count II allegations that the entity Defendant Equity be characterized by Plaintiff as a CPO (as the *commodity pool operator* of the *commodity pool* Shasta).

To that end the Plaintiff first alleges in paragraph 72 of its First Amended Complaint that "Equity acted as a CPO..." and in paragraph 73 that "Firth and Shimer acted as APs to Equity in that they solicited pool participants to invest in Shasta." In paragraph 74 Plaintiff alleges a violation of Section 4*o*(1) of the CEA by "Equity, Firth and Shimer" in that the acts and practices alleged in paragraphs 72 and 73 "operated as a fraud upon commodity pool participants". Plaintiff further alleges a violation of Section 4*o*(1) of the CEA by Defendant Equity in Paragraph 75 by reason of the fact that the acts and omissions alleged in Count II "were done within the scope of their employment with Equity". Finally Paragraph 76 further alleges that Defendants Firth and Shimer violated Section 13(b) of the CEA by reason of the fact that they "directly or indirectly, controlled Equity..." [16]

In Count III Plaintiff attempts in relevant part to apply the provisions of Section 4m(1) of the CEA to all of the Equity Defendants. This section of the CEA requires entities that are CPOs to register with Plaintiff. To therefore successfully allege a violation of Section 4m(1) of the CEA with respect to all of the Equity Defendants, it absolutely critical to the success of all of Plaintiff's Count III allegations that the entity Defendant Equity be characterized by Plaintiff as a CPO (as the *commodity pool operator* of the *commodity pool* Shasta).

To that end the Plaintiff first alleges in paragraph 79 that Defendant Equity violated Section 4m(1) of the CEA in that "Equity acted as a CPO... without the benefit of registration...". In paragraph 80 Defendants Firth and Shimer are alleged to have directly

[16] See page 29, of Plaintiff's First Amended Complaint.

controlled Equity and "are thereby liable for Equity's violation of Section 4m(1) pursuant to Section 13(b) of the Act...". In Paragraph 81 Shimer is alleged to have violated Section 13(a) of the CEA by aiding and abetting Equity's violation of Section 4m(1) by accepting funds into Shimer's attorney escrow account.[17]

In Count IV Plaintiff attempts in relevant part to apply the provisions of Section 4k(2) of the CEA to Defendants Shimer and Firth. This section of the CEA requires APs (associated persons) of CPOs to register with Plaintiff. To therefore successfully allege a violation of Section 4k(2) of the CEA with respect to Defendants Shimer and Firth, it absolutely critical to the success of Plaintiff's Count III allegations that the entity Defendant Equity be characterized by Plaintiff as a CPO (as the *commodity pool operator* of the *commodity pool* Shasta).

To that end Plaintiff first alleges in paragraph 86 that "Firth and Shimer were each associated with Equity, a CPO...in a capacity that involved the solicitation of funds...in Shasta, a commodity pool without the benefit of registration, in violation of Section 4k(2) of the Act..." In Paragraph 87, Plaintiff alleges that "the actions and omissions of Firth and Shimer were done within the scope of their respective employment with Equity. Therefore Equity is also liable for Firth's and Shimer's violations of Section 4k(2) of the Act..."[18]

Every single one of the above cited allegations against the Equity Defendants contained in Counts II, III and IV of Plaintiff's First Amended Complaint are premised on and are completely dependent upon the success of Plaintiff's attempt to mischaracterize the entity Shasta as a "commodity pool" as the term "pool" is specifically defined at 17 C.F.R. § 4.10(d)(1). Absent a finding by this Court that Shasta is indeed a "commodity pool" as alleged by Plaintiff, it is impossible *as a matter of law* for Equity to be held to be a CPO as alleged by Plaintiff because it is virtually impossible for a commodity pool *operator* to exist in the absence of a "pool" to operate.

If Defendant Equity is not a CPO, then the acts as alleged by Plaintiff in Counts II, III and IV with respect to the Defendants Equity, Firth and Shimer cannot be sustained as a violation of the CEA. If Equity is not a CPO, then Plaintiff has not alleged a violation of the CEA by Equity, Firth or Shimer in Counts II, III and IV of its First Amended Complaint

[17] See page 30, of Plaintiff's First Amended Complaint.
[18] See pages 31-32, of Plaintiff's First Amended Complaint.

and Defendant's motion for Summary Judgment with respect to Counts II, III and IV of Plaintiff's First Amended Complaint should be granted.

5. Congress has ample authority to expand the definition of commodity pool to entities such as Shasta should Congress choose to do so.

Defendant Shimer would also point out that just as in *Mass Media*, (where Plaintiff sought to "expand" the definition of the term "Introducing Broker" beyond the clear intent of Congress in order to impose CFTC registration and record keeping requirements upon those defendants), Judge Graham resisted that attempt by Plaintiff and, instead, granted Summary Judgment for the *Mass Media* Defendants noting that if Congress chose to expand the definition of "Introducing Broker" to include the activities of the *Mass Media* defendants it was free to do so. [19]

Plaintiff, in the present matter, *once again* seeks to abandon any willingness to be governed by its own clear previous clarifying statement associated with its rule making authority in 1980 when the proposed revised definition of the term "pool" was, at that time, clearly described by Plaintiff to result in a "narrowing" of the definition of the term "pool' to apply only to an entity "'operated for the purpose' of trading commodity interests." Defendant Shimer respectfully asks the Court to find Judge Graham's conclusion with respect to the activities of the *Mass Media* defendants equally applicable to Shimer and the other Equity Defendants in the present matter.

Clearly Congress "has ample authority" to extend the definition of "commodity pool" to entities similar to Shasta that invest funds with other separate entities engaged in the actual trading of commodity interest such as defendant Tech should Congress choose to do so. In the absence of action by Congress, Plaintiff CFTC has absolutely no authority to ignore its own specifically crafted rules and definitions that are in compliance with the CEA and extend on an ad hoc basis the term "pool" to any entity that it may choose.

> "The power of an administrative [agency] to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law ... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon V. United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965) (quoting *Manhattan Gen. Equip. Co. v.*

[19] *CFTC v. Mass Media Marketing, Inc.* 156 F.Supp.2d 1323, 1332 (S.D. Fla., 2001).

Commissioner, 297 U.S. 129, 134, 56 S. Ct. 397, 400, 80 L.Ed 528 (1936)."

6. Summary Judgment is not a disfavored procedural shortcut, but an integral part of the Federal Rules as a whole.

Returning to the Supreme Court's decision in *Celotex* the following quote from Justice Renhquist's decision[20] seems particularly appropriate now that the Court *finally* has before it *more than a year after this matter was first initiated by Plaintiff* an appropriate Motion for Summary Judgment:

> "The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)."[21]

The Plaintiff's proposed more narrow definition of the term "pool' in August of 1980 was consistent with the CEA and was consistent with all case law since that time including the now controlling four part test laid down by the Ninth Circuit Court of Appeals in *Lopez*. For over a year now the Equity Defendants, to their great personal and financial detriment have been subjected to Plaintiff's attempt to mischaracterize the entity Shasta as a "commodity pool" in order to subject these alleged defendants to Plaintiff's regulatory authority. Clearly summary judgment is now appropriate to further the interests of justice and in effect a timely determination of this action with respect to the Equity Defendants.

Defendant Shimer urges the Court to resist the apparent willingness of Plaintiff to stray from the authority of its enabling legislation by "creatively redefining" the term "commodity pool" with respect to the entity Shasta and to grant Shimer's motion for

[20] Defendant Shimer would also point out that Justice Rehnquist was joined by Justices White, Marshall , Powell and O'Connor in the majority opinion and that even though dissenting on other grounds Justice Brennan (joined by Justices Burger and Blackmun) specifically stated at page 329 "I do not disagree with the Court's legal analysis."
[21] *Celotex Corp. v. Catrett* 477 U.S. 317, 327 (1986)

Summary Judgment with respect to Counts II through IV of Plaintiff's First Amended Complaint.

B. Summary Judgment for Defendant is Appropriate and Should Be Granted With Respect To Count I of Plaintiff's First Amended Complaint

Count I of Plaintiff's First Amended Complaint alleges that each of the Equity Defendants violated Section 4b(a)(2)(i)-(iii) of the CEA. Plaintiff has provided the Court several abridged summary versions of the cited statute in both Plaintiff's First Amended Complaint and in Plaintiff's Response dated June 2, 2005 to Defendant's pending motions to dismiss. The Court is referred to the full text of the statutory language that applies to Count I attached as Exhibit "E" to Defendant's Reply dated June 8, 2005.

1. For Count I of Plaintiff's First Amended Complaint to be sustained, Plaintiff must show a "connection" between the alleged activities of the Equity Defendants and the CEA.

Plaintiff has previously described Section 4b(a)(2)(i)-(iii) of the CEA as prohibiting cheating and defrauding or attempting to deceive other persons "*in connection with* commodity futures trading for or on behalf of such persons". (Emphasis added) Specifically, the "in connection with" language of the Statute prohibits (in relevant part) fraud or deceit *in connection with* "orders to make, or the making of, contacts of sale of commodities".[22] Plaintiff's difficulty in the present matter is the fact that not one of the Equity Defendants ever engaged in "commodity futures trading" and, for that reason, had no connection with any order to make a contract for the sale of any commodity.

Clearly the CEA applies to those entities specifically defined by Congress whose activities have been determined to have a sufficient nexus or connection to commodity futures trading to require registration and regulation. These entities such as Introducing Brokers, CPOs and CTAs are specifically defined by the Statute. Since it is clear that none of the Equity Defendants ever gave any trading advice or actually traded any commodity futures for or on behalf of anyone, Plaintiff's sole ability to "connect" the Equity Defendants with the statutory prohibition found at 7 U.S.C. § 6(b)(a)(2) lies in Plaintiff's

[22] 7 U.S.C. § 6(b)(a)(2)

attempt to characterize the entity Shasta as a commodity pool and, therefore, allege that the Defendant Equity is a CPO of the Shasta "pool". Absent that "connection" or "nexus" between the Equity Defendants and the CEA Count I of Plaintiff's First Amended Complaint is as vulnerable to Defendant's motion for summary judgment as Counts II through IV.

2. Federal case law clearly and rightly holds that Federal Agencies are limited in their enforcement authority to the statutory authority conferred upon them by Congress.

Clearly administrative agencies such as Plaintiff are not free to enforce their enabling statutory authority against anyone they choose. Enforcement actions authorized by Congress are constrained to those individuals or entities that fall within whatever enforcement authority has been conferred upon them by Congress. To establish that the prohibitions contained in the CEA apply to any of the alleged activities of the Equity Defendants, Plaintiff must show a "connection" or "nexus" between those alleged activities and the activity proscribed by the statute. If Shasta is not a "commodity pool" that required nexus or connection to the CEA is lacking and summary judgment for Defendant is appropriate with respect to Count I.

The case of *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323 (S.D. Fla. 2001) is relevant and directly on point. Even though the district court found no basis under the CEA to hold that the *Mass Media* defendants were Introducing Brokers, the CFTC still sought to hold the *Mass Media* Defendants liable under the CEA's general anti-fraud provisions with respect to commodity option trading per the provisions of 7 U.S.C. § 6(c)(b). The CFTC argued in *Mass Media* that since the CEA authorizes the CFTC to promulgate rules and regulations, its regulation found at 17 C.F.R. § 33.10 (1982)[23] provided sufficient authority to sustain Count I which alleged fraud against the *Mass Media* defendants in connection with commodity options transactions. The *Mass Media* district court began its analysis with respect to Count I as follows:

> "Having determined that the Act's registration requirement is inapplicable to Defendants as advertisers, the Court's next inquiry is whether the CFTC may still enforce its anti-fraud regulations

[23] The language of the CFTC's anti-fraud rules with respect to commodity option trading closely track the language of the CEA's anti-fraud section sought by Plaintiff to be applied to the Equity Defendants.

As noted in footnote 23 on page 17 of this Brief the language of the CFTC's regulation at question in *Mass Media* is similar in all relevant respects to the "in connection with" language used by Congress in subparagraphs i-iii of the CEA's anti fraud section 4b(a)(2) that Plaintiff now seeks to enforce against the Equity Defendants. The only real substantive difference is that section Section 4c(b) of the CEA sought to be applied to the *Mass Media* defendants referred to commodity *option* transactions while Section 4b(a)(2) (sought to be applied to the Equity Defendants) refers to commodity *futures* transactions.

3. The specific allegations recited by Plaintiff in Count I of its First Amended Complaint require a finding that Shasta is a commodity pool in order to establish the requisite and the necessary "nexus" between the alleged acts of the Equity Defendants and the CEA

An examination of Count I of Plaintiff's First Amended Complaint reveals that *in every instance*, Plaintiff's only alleged nexus between the Equity Defendants and Plaintiff's Count I allegations of fraud is the purported connection supplied by Plaintiff's unsupported conclusion that the entity Shasta was a commodity pool. In paragraph 57 of the First Amended Complaint found on page 25 thereof Plaintiff specifically alleges that the Equity Defendants "willfully deceived or attempted to deceive *pool participants* or *prospective pool participants* by misrepresenting the performance of the commodity pool…"(Italics supplied). Paragraph 58 alleges that the actions and omissions of Defendants Shimer and Firth "were done within the scope of their employment with Equity…" (the alleged "commodity pool operator"). And finally paragraph 59 of Count I alleges that defendants Shimer and Firth "directly or indirectly controlled Equity…"

The only basis Plaintiff has been able to allege as a direct connection between the Equity Defendants and "commodity futures trading" and the authority conferred upon Plaintiff by the CEA is the CFTC's own unsupported "conclusion" (with no apparent basis in fact or law) that Shasta is a "commodity pool". Absent that conclusion there are no "pool" participants. And as Defendant has pointed out previously Plaintiff well knows that *every entity that has been characterized as a "commodity pool" by the federal courts has owned a commodity trading account opened in the name of the "pool" that was being traded by someone—either the pool itself, the pool's operator or some other entity authorized to trade the pool's account for the direct benefit of the pool.*

While it is true that Section 4b(a)2(i)-(iii) does not specifically refer to "commodity pools" or "commodity pool operators", Plaintiff well knows that absent the "commodity pool" nexus supplied by the unsupportable and unwarranted "conclusion" that Shasta is a commodity pool (found throughout its First Amended Complaint) *there is no connection* between the activities of any of the Equity Defendants and the specific and carefully defined language of Section 4b(a) which requires that for statutory jurisdiction of the CFTC to exist and to enforce a claim against any of the Equity Defendants the alleged "fraud or "deception" must have specifically occurred "in connection with any order to make, or the making of, any contract of sale or any commodity for future delivery made, or to be made, for or on behalf of any other person..."[26]

4. Plaintiff cannot now or at trial establish or prove a material and essential element of the four-part test required by controlling case law to sustain a finding by the Court that Shasta is a "commodity pool".

The CFTC cannot establish now or at trial a majority of the material and essential factual elements of the required four-part test required by *Lopez*. *It is beyond any doubt that the critical fourth test required by Lopez certainly does not exist with respect to Shasta.* Moreover, Plaintiff was not able to provide to the district court in *Mass Media* and it is similarly unable to provide this Court any portion of the CEA or that Act's legislative history that confers upon Plaintiff "the authority to impose its anti-fraud rules and regulations on entities who do not participate in commodity trading transactions." See *Mass Media* at page 1334.

In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, (1986). Defendant Shimer urges the Court to resist the apparent willingness of Plaintiff to stray from the authority of its enabling legislation by "creatively redefining" the term "commodity pool" with respect to the entity Shasta and to grant Shimer's motion for Summary Judgment with respect to Count I of Plaintiff's First Amended Complaint.

[26] See 7 U.S.C. § 6b(a)(2)(i)-(iii) attached to Defendant's Reply dated June 8, 2005 as Exhibit "E".

order to sustain any possibility of that required nexus between the cited regulation and the alleged activity of Defendant Shimer. In an attempt to create that "connection", Plaintiff first alleges in paragraph 102 on page 34 of its First Amended Complaint that "Tech Traders was the CTA for Shasta and others in that, for compensation or profit, it advised *the Shasta commodity pool* and others as to the advisability of trading in commodity futures contracts." (Emphasis added).

In the following paragraph 103 Plaintiff further alleges: "As CTA *for the Shasta pool* and others Tech Traders violated Regulation 4.30 by accepting their funds and trading them in its accounts at FCMs under its own name" (Emphasis added). And finally in the following paragraph 104 Plaintiff further alleges: "Shimer aided and abetted Tech Trader's violation of Regulation 4.30 pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a), by drafting an investment agreement between Shasta and Tech Traders that provides that *pool funds* will be held in the name of Tech Traders." (Emphasis added).

As stated previously with respect to Count I, Plaintiff well knows that absent the "commodity pool" nexus supplied by the unsupportable and unwarranted "conclusion" that Shasta is a commodity pool (found throughout its First Amended Complaint) there is no "connection" between the activities of Defendant Shimer as alleged in Count V and either Plaintiff's Regulation 4.30 or Section 13(a) of the CEA.

3. The allegation that defendant Tech acted as a CTA with respect to Shasta is a critical element of Plaintiff's Count V allegation against Shimer and is dependent in a similar, fatal way upon a finding that the entity Shasta is a commodity pool.

Even more significant and critical to Plaintiff's Count V allegation against Defendant Shimer is the necessity that Plaintiff be able to establish that defendant Tech acted as a CTA with respect to Shasta. As pointed out in Defendant Shimer's previous Brief in support of the now pending motions of the Equity Defendants to dismiss, a CTA is specifically defined by the CEA as follows:

> "...the term "commodity trading advisor" means any person who (i) for compensation for profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in- (I) *any contract of sale of a commodity for future delivery* made to be made or subject to the

rules of a contract market..."[28] (Emphasis added)

Absent Plaintiff's unsubstantiated and merit less conclusion that Shasta is a "commodity pool", the necessary connection to "trading" and "any contract of sale of a commodity for future delivery" cannot be sustained and the alleged "CTA" relationship between Tech and Shasta is seen to be what it is--simply a figment of Plaintiff's imagination.

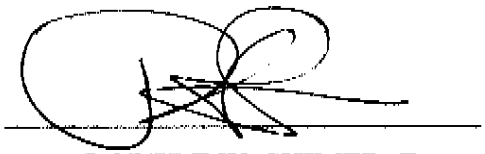
For all of the reasons stated above and in light of Defendant's previous argument and analysis previously offered with respect to Plaintiff's clear inability to establish that the entity Shasta is a commodity pool in order to sustain Count I and Counts II through IV of the First Amended Complaint, (incorporated hereby with this reference to Count V) the Court is also respectfully requested to grant Defendant Shimer's motion for summary judgment with respect to Count V of Plaintiff's First Amended Complaint.

III. CONCLUSION

It is with extraordinary disappointment and frustration that upon previous review of both Exhibits L and M attached to Shimer's Reply dated June 8, 2005, Defendant Shimer concluded upon review of Plaintiff's regulations 4 years ago in the fall of 2001 without the benefit of knowing that the Ninth Circuit Court of Appeals (cited by the CFTC as controlling case law) basically agreed with his initial conclusion that absent trading "in the name of Shasta" his client did not meet the definition of a "commodity pool" and, therefore, need not register with the CFTC. Now, four years later, Defendant Shimer has found sufficient reasoning in *Lopez* (and a lack of any contradictory federal case law) to conclude with some justification (especially after a review of the district court's analysis in *Mass Media*) that his initial analysis with respect to his client Shasta was correct.

For all of the reasons set forth above, Defendant respectfully requests the Court to grant Shimer's Motion For Summary Judgment with respect to Counts I through V of Plaintiff's First Amended Complaint.

Date: July 7, 2005



ROBERT W. SHIMER, Esq.

[28] 7 U.S.C. § 1a(6).

EXHIBIT "A"

Affidavit of Vincent J. Firth

I, Vincent J. Firth, hereby state that I reside at 3 Aster Court, Medford NJ 08055 and do further state under oath the following:

1) That I was named as the initial Manager of Shasta Capital Associates, LLC (hereinafter ("Shasta" or "Company")) in the Company's Certificate of Formation filed with the Office of Secretary of State of the State of Delaware on May 22, 2001; and,

2) That Article VI of Shasta's Operating Agreement (entitled "Management") executed by myself and all members of the Company states that the business of the Company shall be managed for the duration of the Company's existence by Equity Financial Group, LLC (hereinafter "Equity") a New Jersey limited liability company; and,

3) That I am the Manager of Equity and in the position as Manager of Equity exercised sole management authority over Shasta; and,

4) That Article VI of Shasta's Operating Agreement also states, in part, that "To the extent that the manager finds it necessary and desirable, the Manager may appoint Mr. Firth to also hold the position of President of the Company and all Members executing this Operating Agreement hereby consent to that appointment of Mr. Firth."; and,

5) That I did, from time to time, act on behalf of Shasta as its President per the authority conferred upon me by Shasta's Operating Agreement; and,

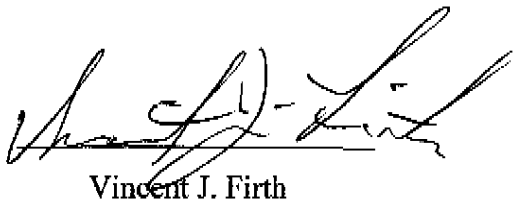
6) That by reason of my sole and exclusive control of the entity Equity and by reason of the fact that am the only individual authorized by Shasta's Operating Agreement to act on behalf of Shasta I am the only person with authority to execute any type of bank or other account opening documents for and on behalf of Shasta; and,

7) That I never had any reason or occasion to ever execute on behalf of Shasta or to open with a brokerage firm or Futures Commission Merchant (FCM) an account on behalf of or in the name of Shasta from which commodity interests or commodity futures could be traded in the name of Shasta for the benefit of Shasta or any of its members; and,

8) That Shasta never opened such an account for the purpose of trading commodity interests or commodity futures on my authority or with my knowledge; and,

9) That I am not aware of any such account for the trading of commodity interests or commodity futures ever being opened on behalf of Shasta without my authority; and,

10) That I can categorically state that no such trading account was ever opened in the name of Shasta for the benefit of Shasta or its members.



Vincent J. Firth

State of New Jersey}

}ss

County of Burlington}

On this 6th day of July, 2005, before me, Jacquelyn Titus, a Notary Public personally appeared Vincent J. Firth who, being satisfactorily identified to me, did first state under oath that all statements contained in his affidavit are true and correct and then did execute this affidavit in my presence for the purpose stated therein.

IN WITNESS WHEREOF I have hereunto set my hand and official seal on the above stated date.

Jacquelyn Titus

Notary Public

JACQUELYN TITUS
NOTARY PUBLIC OF NJ
MY COMMISSION EXPIRES 6/25/08

My Commission Expires: 6/25/08

"Exhibit "B"

156 F.Supp.2d 1323
COMMODITY FUTURES TRADING COMMISSION, Plaintiff,
v.
MASS MEDIA MARKETING, INC. a Florida corporation; Commodity Referral Service, Inc., a/k/a Commodities Referral Service, Inc., a Florida Corporation and Rolando Nanasca, individually and as an officer and director of Mass Media Marketing, Inc. and Commodity Referrals Service, Inc.
No. 97-1492-CIV-GRAHAM.
United States District Court, S.D. Florida, Miami Division.
March 20, 2001.

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Lawrence H. Norton, Daniel R. Salsburg, Jodi Siff, Commodity Futures Trading Commission, Office of General Counsel, Washington, DC, for plaintiff.

Robert Lawrence Bonner, Lorelei Jane Van Wey, Lawrence Brett Lambert, Homer Bonner & Delgado, Miami, FL, for defendants.

ORDER

GRAHAM, District Judge.

THIS CAUSE came before the Court upon Defendants' Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment [D.E.100] and Plaintiffs' Motion for Partial Summary Judgment [D.E.101].

I. *STATEMENT OF FACTS*

The following facts are undisputed. Mass Media Marketing, Inc. ("Mass Media") and Commodity Referral Service, Inc. ("CRS") (collectively "Defendants") are Florida advertising, marketing, video production and syndication companies whose marketing services range from advertising Ginsu knives and exercise equipment to promoting culinary schools and private universities. Rolando Nanasca ("Nanasca") is the President of both companies.

In 1995, Defendants added commodity futures to their marketing curriculum. Commodity futures involve the purchase of an option to buy or sell a particular commodity, such as unleaded gasoline, at a predetermined price on or before a given date. Defendants' marketing services entailed producing, directing and arranging for the broadcast of 60-second commercials and 30-minute long infomercials ("advertisements") touting the benefits of commodity futures investments. Each advertisement urged viewers, who had at least $5,000 to invest, to call a toll-free number featured in the advertisement to obtain information on how to profit from investments in commodity options. Once a viewer placed a call to the toll-free number, the answering service operator would ask what product or service the viewer was calling about. If the viewer was calling in reference to a commodities advertisement, the answering service operator would give the caller a short description of the product or service being offered and would try to obtain the callers name, address and telephone number in order to create a "lead."

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Defendants marketed two forms of advertisements, sponsored and non-sponsored. Sponsored advertisements were advertisements that Defendants created and broadcasted on behalf of a commodity broker registered with the Commodity Futures Trading Commission ("CFTC"). A registered commodity broker, also known as an Introducing Broker, essentially operates as a brokerage firm that solicits potential investors to place orders on commodity options. An Introducing Broker would seek the marketing services of Defendants to produce an advertisement approved by the Introducing Broker and featuring the Introducing Broker's name. Defendants would agreed to sell a specified number of leads generated by the advertisement to the sponsoring Introducing Broker. Any excess leads would be sold to other Introducing Brokers whose names did not appear in the advertisement.

Non-sponsored ("blind") advertisements were not approved by an Introducing Broker and did not include the name of an Introducing Broker in the advertisement. The leads generated from blind advertisements were sold on a random basis to any interested Introducing Broker. The contents of blind advertisements were ultimately approved by Nanasca who is not registered as a commodity broker.

Sponsored and blind advertisements essentially claimed that existing supply and demand factors in the cash market for a particular product, such as unleaded gasoline or soy beans, make options on that product's futures contracts "predictable" and "logical" and an investor had a "legitimate chance of doubling, tripling, or even quadrupling" his money. One advertisement described the manner in which commodities trading function as follows:

We're discussing some common-sense approaches for investing in the commodities futures market and how to know when to invest.

One of the most direct approaches in determining your investment in commodities options is what is known as trends. If you analyze and act upon a sound trend, then the profits can be astounding.

There are many reasons that trends develop in commodities, but one of the more common reasons are of the cyclical nature, commodities such as unleaded gasoline and heating oil, for example. There's a much larger demand for heating oil in the winter, for obvious reasons. And for unleaded gasoline, the demand increases in the summer when people drive the most. These are seasonal trends, where the movement in price becomes predictable.

(CFTC's Exhibit 10, at 19-20). The advertisements assured viewers that although investment in commodities "[is] not for everybody, and it does involve risk," (CFTC's Exhibit 12, at 22) such "risks are, in fact, predetermined" and "known." (CFTC's Exhibit 16, at 6, 14).

Nanasca wrote most of the scripts for the advertisements produced by Defendants or had otherwise the "final say-so on the scripts." (Nanasca 10-1-96 Dep. pp. 193-195). Nanasca never "really researched" the background of commodities trading or the "way that commodities markets actually work[sic]" prior to writing the scripts and airing the advertisements. (Nanasca 10-1-96 Dep. p. 194). Instead, Nanasca based the advertisements' contents primarily on radio advertisements which he thought "sounded exciting," though he never took any steps to verify the accuracy of such information. (Nanasca 10-1-96 Dep. pp. 193-194).

Defendants also engaged in a program called "evaluated plus leads" whereby Defendants telephoned individuals who once

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responded to an advertisement. If the individual reestablished their interest, then Defendants sold that lead to any interested Introducing Broker. The marketing and advertising services provided by Defendants never required Defendants to enlist callers to become Introducing Brokers' customers or to collect any money from callers. Rather, any discussions with callers about commodity investments occurred once the Introducing Broker purchased the leads from Defendants and contacted the prospective customers.

The National Futures Association ("NFA") is the commodity futures and options industry's self-regulatory organization. (Discoll Declaration at 3). In the early 1990's, the NFA determined that some Introducing Brokers provided prospective investors with misleading information about the seasonality trends of commodities when soliciting their orders. Most of these Introducing Brokers received severe monetary penalties or were otherwise subjected to disciplinary action. To remedy this situation, on May 16, 1996, the NFA issued a notice stating that seasonality claims were a violation of its rules. In early 1997, Nanasca discovered that the NFA "frowned upon" blind advertisements because "someone's got to be responsible for the contents of those advertisements." Consequently, Nanasca voluntarily ceased to broadcast blind advertisements.

II. *PROCEDURAL BACKGROUND*

On May 8, 1997, the CFTC filed a three-count Complaint against Mass Media, CRS and Nanasca, in his individual capacity, for alleged violations of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 6(c)(b), 6d, 6k (1994) and the rules and regulations the CFTC promulgated thereunder, 17 C.F.R. §§ 33.10, 3.3, and 33.8 (1996). Specifically, the CFTC alleged that: (1) Mass Media, CRS and Nanasca committed fraud in connection with commodity options transactions in violation of the CFTC's regulations (Count I); (2) Mass Media

and CRS acted as Introducing Brokers and Nanasca as an associated person of an Introducing Broker, without first registering with the CFTC in violation of the Act (Count II); and (3) Mass Media, CRS and Nanasca violated the record-keeping requirements of the CFTC's regulations (Count III). The CFTC sought a preliminary injunction, which the Court entered after the parties stipulated to the terms. The injunction directs Defendants to refrain from broadcasting any advertisements unless they first receive a letter from the NFA not opposing their broadcast. Moreover, Defendants are enjoined from providing leads to any entity other than the sponsor of the particular advertisement from which the lead is derived.

Defendants moved for judgment on the pleadings, or in the alternative, for summary judgment seeking judgment on all counts of the Complaint. The CFTC cross-filed a motion seeking partial summary judgment on all counts. After due consideration of the parties' pleadings, exhibits, affidavits, and oral arguments, the Court holds that Defendants are entitled to summary judgment on all counts of the Complaint.

III. *STANDARD OF REVIEW*

The purpose of summary judgment is to determine "whether there is a need for trial—whether in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact ..." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is not a procedural shortcut. Instead, it is "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,*

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477 U.S. 317, 327, 106 S.Ct. 2548, 2550, 91 L.Ed.2d 265 (1986).

A court may grant summary judgment only if it appears through pleadings, depositions, admissions and affidavits 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.*, 477 U.S. at 322, 106 S.Ct. at 2552; *Real Estate Financing v. Resolution Trust Corporation*, 950 F.2d 1540, 1543 (11th Cir.1992); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir.1988), *cert. denied*, 490 U.S. 1084, 109 S.Ct. 2110, 104 L.Ed.2d 670 (1989). "The party seeking summary judgment bears the exacting burden of demonstrating that there is no genuine dispute as to any material fact in the case." *Clemons v. Dougherty County, Ga.*, 684 F.2d 1365, 1368 (11th Cir.1982).

In order for the court to determine whether the movant has met this burden, the evidence and all factual inferences therefrom must be viewed in the light most favorable to the non-moving party. *Clemons*, 684 F.2d at 1368, *citing Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Further, a dispute over a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. If the evidence is merely colorable or not significantly probative, a court may grant summary judgment.

IV. *DISCUSSION*

This case requires the Court to engage in two stages of analysis. Initially, the Court will determine whether the Act's Introducing Broker registration requirement is applicable to Defendants advertisers. Lastly, the Court will inquire whether the CFTC may validly enforce its anti-fraud regulations on Defendants. Both are purely legal issues of first impression that require the Court to employ canons of statutory interpretation and construction. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

A. Introducing Broker Registration Requirement

Introducing Brokers form a category of commodity futures market participants created by Congress in 1982. *See* 7 U.S.C. § 1. Prior to 1982, Introducing Brokers acted as independently affiliated "agents" of Futures Commission Merchants ("FCM").[1] S.Rep. No. 97-384, at 40 (1982). The main function of such agents was to procure business for FCMs. *See Id.* at 111. These unregistered agents operated free from regulation due to a gap in the Act's registration requirement which precluded jurisdiction by the CFTC over such agents. *See Id.* at 40. In 1982, the CFTC advised Congress that the number of agents had increased significantly, and that FCMs who used their services "have often disavowed any responsibility for violations of the Act by these `agents.'" *Id.* To remedy

the ambiguity and the resulting uncertainties of the agents' regulatory status, the CFTC proposed that "each 'agent' of a futures commission merchant be required

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to register as an associated person of that futures commission merchant." *Id.*

Congress, however, opted to resolve the problem by amending the Act to require all persons who solicit or accept customer orders for FCMs to register either as "associated persons" of the FCMs, or as part of a new class of registrants called Introducing Brokers.[2] *Id.* at 112. Unlike associated persons of a FCM, Congress viewed Introducing Brokers as independent entities that solicited and accepted customer orders, but used the services of FCMs for clearing, record keeping and retaining customer funds. *See id.* at 41.

Congress refused to require agents who were independent business entities to become branch offices of the FCMs who clear their trades or to impose vicarious liability on FCMs for the actions of an independent entity. *Id.* at 41. At the same time, however, Congress acknowledged the need to "guarantee accountability and responsible conduct of such persons," who "deal with commodity customers and, thus have the opportunity to engage in abusive sales practices." *Id.* at 41 and 111. Hence, the Act defines an Introducing Broker as:

any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant) engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contact market who does not accept any money, securities or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

7 U.S.C. § 1a(4).

In the instant case, the CFTC claims that by soliciting and referring prospective investors to Introducing Brokers, Defendants have themselves acted as unregistered Introducing Brokers in violation of the Act. The CFTC interprets the phrase "soliciting or in accepting orders" contained in the definition of an Introducing Broker as covering a whole range of conduct, including Defendants' solicitation to the public through television advertisements. In contrast, Defendants assert that the plain language of the Introducing Broker registration requirement excludes them from registration because they are advertising production companies that neither solicit orders, nor accept orders from customers. Defendants posit that the phrase "soliciting or in accepting orders" cannot conceivably cover general solicitation to the public through television advertisements, which neither invite nor accept the placement of an order.

The Court's analysis of an agency's interpretation of a statute follows the two-step framework of *Chevron Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, the Court must inquire "whether Congress has directly spoken to the precise question at issue," in which case the Court "must give effect to [the] unambiguously expressed intent of Congress." *Id.* However, if the "statute is silent or ambiguous with respect to the specific issue," the Court must employ the second step and defer to the agency's interpretation, but only if such an interpretation is "based on a permissible construction of the statute." *Id.* at 843, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694.

1. *Chevron Framework*

The first step of *Chevron* requires the Court to focus on the plain language of the

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statute to ascertain whether Congress' intent is clear and unambiguous. *Id.* "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1818, 100 L.Ed.2d 313 (1988). The Court shall assume that in drafting legislation, Congress said what it meant. *United States v. LaBonte*, 520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997).

Giving the words used in the Act their ordinary meaning, the Court finds that the phrase "engaged in soliciting or in accepting orders" contained within the definition of an Introducing Broker is subject to several interpretations. The Court cannot naturally discern whether Congress intended the term "soliciting" to modify the

term "order" or if Congress intended the term "soliciting" to remain open-ended. The Act does not define the term "soliciting" nor does it explain its application. Even assuming the Court were to accept either party's interpretation of the phrase, the Court is still unable to determine whether the definition applies to advertisers. Accordingly, the Court finds the phrase to be ambiguous and will proceed to the second step of the *Chevron* analysis to determine whether the CFTC's interpretation of the phrase "engaged in soliciting or in accepting orders" is a permissible interpretation of the Act.

The CFTC interprets the phrase "engaged in soliciting or accepting orders" as covering customer "solicitation[ ] for compensated referral to other registrants so that a trading relationship can be initiated and the customer's orders executed." (Driscoll Declaration at 19). Based on this interpretation, the CFTC concludes that Defendants' activities fall within the Act because:

Mass Media produces and arranges for the broadcast of its advertisements and infomercials for the sole purpose of obtaining the names, phone numbers and addresses of individuals who may be interested in purchasing options. Mass Media's entire activities are tied to the number of leads that they generate. It is compensated on a per-lead basis by the IBs to which the leads are sold and it pays, in some cases, for television air time on a per-lead basis as well. It also licenses these leads to IBs and attempts to relicense these leads to other IBs after a period of time.

(Driscoll Declaration at 21-22).

To support its interpretation of the phrase "soliciting or accepting orders," the CFTC relies substantially on the United States Supreme Court's characterization of the phrase "solicitation of orders" *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992). In *Wrigley,* the Supreme Court construed a provision of the Interstate Commerce Tax, 15 U.S.C. § 381(a)(1), that confers immunity from state income taxes on any company whose business activities in that state consist only of "solicitation of orders" for interstate sales. The issue before the *Wrigley* Court was whether and to what extent, a gum manufacturer's representative's activities constituted "solicitation of orders" where the activities neither explicitly nor implicitly proposed a sale. *Id.* at 223, 112 S.Ct. 2447. The Court concluded that the phrase "solicitation or orders" in the Interstate Commerce Tax Act cannot be interpreted narrowly to cover only actual request for purchases but included the entire process associated with inviting an order. *Id.* On the other hand, the Court held that the phrase should not be interpreted so broadly to include all activities that are routinely, or even closely associated with solicitation or are customarily performed by salesmen. *Id.*

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The facts of *Wrigley* are inapposite to the facts in this case because the Court is determining a business' tax immunity pursuant to an immunity provision contained in the Interstate Commerce Tax Act. However, the Supreme Court's discussion of the activities that would constitute "solicitation of orders" is nonetheless helpful to this analysis. Pursuant to *Wrigley,* a key question in determining whether an activity constitutes "solicitation of orders" is whether the only objective for conducting the activity is to facilitate requests for purchases. If so, the activity is the solicitation of an order. *Id.* at 227, 112 S.Ct. 2447. On the other hand, if "there is a good reason" to conduct the activity that is not entirely ancillary to requesting purchases, activity that the company would have reason to engage in anyway, then it is probably not the solicitation of an order. *Id.* To elucidate this point the *Wrigley* Court gave two examples:

[p]roviding a car and a stock of free samples to salesmen is part of `solicitation of orders,' because the only reason to do it is to facilitate requests for purchases ... [however] employing salesmen to repair or service the company's products is not part of the `solicitation of orders,' since there is good reason to get that done whether or not the company has a sales force.

Id. at 227, 112 S.Ct. 2447. After applying this reasoning and considering other relevant factors, the Court cannot conclude that the CFTC's interpretation of the phrase "engaged in soliciting or in accepting orders" is a permissible interpretation of the Act.

First, Defendant advertisers' primary goal is to obtain leads, not orders for commodity futures. The CFTC's expert opines that Defendants' "entire activities are tied to the number of leads that they generate" and Defendants conduct their advertisements "for the sole purpose of obtaining the names, phone numbers and addresses of individuals who may be interested in purchasing options." (Driscoll Declaration at 20). Defendants never collected any money from viewers of the advertisements and never received compensation for the number of callers who subsequently opened accounts through an Introducing Broker. Accordingly, the Court finds that

Defendants' main objective in broadcasting the advertisements was to facilitate the collection of leads, not to facilitate the purchases of orders for futures contracts.

Second, Defendants have a "good reason" to conduct their advertising activities that is not entirely ancillary to requesting purchases. Through their advertisements, Defendants find individuals who may become prospective commodity customers. As such, Defendants' activities are better characterized as those of a customer finder rather than an Introducing Broker. The Act, however, does not require a person who acts as a customer finder to register as an Introducing Broker. *See Carr v. Phoenix Futures, Inc.*, 1991 WL 121184, *2 (E.D.N.Y. June 24, 1991) (holding that a customer finder is not required to register under the Act).[3] Moreover, unlike Introducing Brokers, whose compensation is commensurate with the orders obtained, Defendants receive compensation for the leads regardless of the Introducing Broker's success in soliciting, accepting or introducing an order to an FCM. Hence, Defendants have a "good reason" for conducting their solicitation activities that is not ancillary to requesting purchases. Accordingly, the Court finds that Defendants'

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activities fail to meet the *Wrigley*'s rationale and do not amount to "solicitation of orders"

Other factors similarly fail to support the CFTC's interpretation of the Introducing Broker registration requirement. First, the CFTC's prior understanding of the objective behind the 1982 Introducing Broker registration requirement cannot be reconciled with the CFTC's current interpretation. In its Rules and Regulations, passed shortly after the 1982 amendments, the CFTC expressed its understanding of Congress' intent "to require registration as Introducing Brokers those persons who were formerly agents of FCMs" or who "performed the types of activities traditionally engaged in by agents." *See* Introducing Brokers and Associated Persons of Introducing Brokers, Commodity Trading Advisors and Commodity Pool Operators; Registration and Other Regulatory Requirements, 48 Fed.Reg. 35248 (Aug. 3, 1983). The CFTC proceeded to describe those types of traditional activities: "[h]istorically, agents have carried all of their accounts on a fully-disclosed basis with an FCM which provided `back office' services for those accounts... which had been introduced by the agent to the carrying FCM." 48 Fed.Reg. at 14935. The CFTC expressed no concern about advertisers or entities who simply generate and sell leads to Introducing Brokers. The Court finds this factor to be specifically relevant because based on the CFTC's prior interpretation of the Introducing Broker requirement, Defendants would not be required to register under the Act.

Second, the Act's legislative history, which delineates the underlying purpose of the Introducing Broker registration requirement, makes not a single reference to advertisers or an intent by Congress to regulate as Introducing Brokers entities who neither invite, nor accept the placement of an order. Instead, by enacting the Introducing Broker registration requirement Congress aimed to "resolve[ ] any uncertainty as to the status of agents of future commission merchants [FCM]," and to regulate individuals in their activities of soliciting orders for futures contracts. *See* H.R. REP. No. 97-565, at 49 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3898. Congress resolved to authorize the CFTC to regulate agents of FCMs who have the means and incentive to engage in abusive sales practices while soliciting possible investors to open trading accounts with a FCM. *See id.*

In contrast, in the instant case, Defendants never introduced an account to an FCM or any registered entity. Defendants' general solicitation through their advertisements never involved the making of an offer to enter into a commodity transaction or assisting customers in carrying out such transactions. Each advertisement produced by Defendants was assigned a toll-free number. Once a viewer placed a call to the toll-free number, the answering service operator would ask what product or service the viewer was calling about. If the viewer was calling in reference to a commodities advertisement, the answering service operator would give the caller a short description of the product or service being offered and then would try to obtain the callers name, address and telephone number in order to create a lead.[4]

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After collecting all the leads from the answering service, Defendants sold the leads to Introducing Brokers. Any meaningful discussions with callers in regards to investing in or placing an order for commodities only occurred once an Introducing Broker purchased the leads from Defendants and contacted the prospective customers. Therefore, Defendants lack the means and incentive to create the scenario for potential misconduct during the solicitation process that triggered Congressional enactment of the Introducing Broker registration requirement in 1982.

Third, the CFTC has introduced no evidence to establish that Defendants' advertisements have caused commodity investors the type of harm Congress intended to prevent by enacting the Introducing Broker

registration requirement. On the contrary, the record shows that the CFTC is effectively protecting the public by imposing strict solicitation guidelines on Introducing Brokers. The CFTC's expert confirms that the NFA has taken "several disciplinary actions against Members [Introducing Brokers] for the foregoing promotional practices." (Driscoll Declaration at 17). Moreover, Introducing Brokers are subject to serious monetary penalties, including customer restitution, if they fail to fully disclose to prospective investors the risks involved in commodity investments, especially when the investor's interest in commodities stems from television advertisements. *See Scheufler v. Stuart*, 1997 WL 599871 (C.F.T.C.) (Introducing Broker held liable for failure to fully disclose realistic profit and risk information to infomercial viewer). Hence, the evidence before the Court supports the view that the "simple act of referral does not directly jeopardize the interests of the investing public." *See Carr*, 1991 WL 121184, at *2. After examining these relevant factors, and mindful of the deference due the CFTC's interpretation of the Act, the Court finds no permissible basis that would justify the CFTC's expansive interpretation of the Act's Introducing Broker registration requirement.

Congress has ample authority to expand the Act's registration requirement to include advertisers, such as Defendants. Congress, however, has not done so. The phrase "soliciting or accepting orders" does not cover Defendants' activities. To adopt the CFTC's definition of an Introducing Broker and require Defendants to register as such would amount to impermissible law making and would constitute a deviation from clear Congressional intent to "eliminate the unregistered statutory category of agents of an FCM." H.R.REP. NO. 97-444, p. 47 (1983). For the foregoing reasons, the Court grants Defendants' Motion for Summary Judgment as to Counts II and III.[5]

B. The CFTC's Anti-fraud Regulations

Having determined that the Act's registration requirement is inapplicable to Defendants as advertisers, the Court's next inquiry is whether the CFTC may still enforce its anti-fraud regulations against Defendants. The CFTC contends that it has the authority to impose anti-fraud regulations on Defendants, even if Defendants do not meet the Introducing Broker registration

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requirement. Defendants contend that the CFTC's anti-fraud regulations, to the extent the CFTC seeks to enforce them against Defendants, are invalid because they enlarge the CFTC's jurisdiction beyond the authority granted to the CFTC by Congress. Therefore, Defendants make a substantive challenge to the CFTC's anti-fraud regulations, for which the Court must employ the two-step *Chevron* analysis as already set forth above.

As stated earlier, the first step in the *Chevron* framework requires the Court to ascertain whether Congress clearly expressed its intent in the Act's language. If the Court is able to ascertain Congress' unambiguously expressed intent from the plain language of the Act, that is the law and the inquiry ends. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. The Act provides that:

No person shall offer to enter into, enter into or confirm the execution of any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guarantee" or "decline guarantee" contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

7 U.S.C. § 6c(b) (1997).

This language is clear and unambiguous and neither party suggests otherwise. This provision prohibits persons who offer to enter into, enter into or confirm the execution of any transaction involving any commodity, to do so contrary to CFTC's rules and regulations. Accordingly, any rules or regulations promulgated by the CFTC, including the anti-fraud regulations at issue in this case, are applicable only to entities who engage in the activities listed in § 4c(b).

The CFTC, however, does not claim that Defendants engaged in any of these activities. The CFTC instead asserts that § 4c(b) of the Act empowers the CFTC to promulgate rules and regulations, and urges the Court to focus on the plain language of the CFTC's anti-fraud rules, which state:

It shall be unlawful for any person directly or indirectly

(a) to cheat or defraud or attempt to cheat or defraud any other person;

(b) to make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof;

(c) To deceive or attempt to deceive any other person by any means whatsoever

in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

17 C.F.R. § 33.10 (1982). According to the CFTC, Defendants "fall squarely" within its anti-fraud regulations because through their advertisements they engaged in fraud, "directly or indirectly" "in connection with" commodity options "by any means whatsoever." Moreover, the CFTC contends that the "in connection with" language of its anti-fraud regulations is identical to language contained in the Securities Exchange Act.

A federal agency may possess broad powers to enact rules and regulations as it deems appropriate to effectuate legislative mandates. However, a federal agency may not make law or operate to create rules in disharmony with the congressional statute it administers. *Legal Envtl. Assistance Found. Inc. v. U.S. Envtl. Protection Agency*, 118 F.3d 1467, 1473 (11th Cir.1997). In this case, perceiving

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that the statutory language disfavors its position, the CFTC extracts its jurisdictional authority from its own rules and regulations. The CFTC has cited to no portion of the Act or the Act's legislative history that confers the CFTC with the authority to impose its anti-fraud rules and regulations on entities who do not participate in commodity trading transactions.

The CFTC has likewise identified no legal authority which would support a federal agency's imposition of its rules and regulations on entities who neither are, nor should be governed by the statute. Instead, the cases cited by the CFTC involved entities who, although unregistered, had direct participation in the commodity market or were otherwise required to be registered with the CFTC, and all involved alleged violations of the Act's anti-fraud provision, not the CFTC's anti-fraud regulations.[6] The CFTC, however, does not contend that Defendants violated the Act's anti-fraud provision, which is narrower in jurisdictional scope than the CFTC's anti-fraud regulations. Finally, the fact that portions of the CFTC's anti-fraud regulations are similar to the anti-fraud provision of the Securities Exchange Act is irrelevant to the inquiry into the CFTC's jurisdiction in this case.

Given the straightforward statutory command, the Court ends its inquiry at the first step of *Chevron*. The Act clearly and unambiguously permits the CFTC to enforce its rules and regulations only on entities who "offer to enter into, enter into or confirm the execution of any transaction involving any commodity regulated by the Act." Hence, the Court finds that while the CFTC may liberally choose how to promulgate its rules, the CFTC cannot choose to impose them on entities who the Act clearly excludes. The CFTC's anti-fraud regulations are therefore inapplicable to Defendants and Summary Judgment in their favor as to Count I is appropriate.

V. *CONCLUSION*

Based on the foregoing analysis, it is

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is hereby GRANTED. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment is hereby DENIED. It is further

ORDERED AND ADJUDGED that all pending motions are DENIED as moot. It is further

ORDERED AND ADJUDGED that the parties are hereby DIRECTED to file a proposed form of Final Judgment for entry herein within twenty days from the date of this Order. It is further

ORDERED AND ADJUDGED that this case is hereby CLOSED for administrative purposes.

Notes:

1. FCMs function as the commodity market's equivalent of a securities brokerage house, soliciting and accepting orders and funds for futures contracts and extending credit in connection therewith. *See First American Discount Corp. v. Commodity Futures Trading Commission*, 222 F.3d 1008 (C.A.D.C.2000).

2. Like Introducing Brokers, Associated Persons of an FCM solicit futures orders and deal directly with the public, but do so under the supervision and control of the FCM that clear their orders.

3. The Court does not rely on this opinion from the Eastern District of New York as binding precedent. *See Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir.1991). Rather, the Court refers to the District Court opinion as persuasive authority.

4. Excerpt from Nanasca's deposition on October 1, 1996:

> Q. Do they [answering service operators] give out any information when a caller calls in, or do they —
>
> Nanasca. No. Their—their job is to capture information. That's it.
>
> They'll ask if there's a—they'll say, what is this about?
>
> And then there's one line sentences, complimentary information package about commodities, you know commodities broker, whatever the description is on that product. It could be shorts, or it could be exercise equipment. And they have a small explanation as to what, you know, product or service that is being offered. But that's it. That's all they have is one or two sentences, I think, where—for some reason twenty-four characters comes to mind is what you got to explain.
>
> (Nanasca 10-1-96 Dep. pp. 111-112).

5. Because the Court has determined that neither Mass Media nor CRS is an Introducing Broker under the Act, Nanasca need not register as an Associated Person of an Introducing Broker pursuant to 7 U.S.C. § 6k(1). On the same basis, the Court finds that Defendants committed no violations of the Introducing Broker record keeping requirement.

6. *See Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir.1977) (registered FCM violated Act's anti-fraud provision); *CFTC v. Savage*, 611 F.2d 270 (9th Cir.1979) (unregistered trader, who should have registered as Commodity Trading Advisor, violated Act's anti-fraud provision); *CFTC v. Avco Fin. Corp.*, 28 F.Supp.2d 104 (S.D.N.Y.1998) (unregistered individuals providing personalized trading advice violated registration and anti-fraud provision of Act).
