ROBERT W. SHIMER, ESQ., Pro se
1225 W. Leesport Rd.
Leesport, PA 19533
(610) 926-4278

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		**MOTION DATE: June 17, 2005**
Defendants.		

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DEFENDANT ROBERT W. SHIMER'S REPLY TO PLAINTIFF CFTC'S RESPONSE TO THE EQUITY DEFENDANTS' MOTIONS TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) or 12(b)(6)

Defendant Robert W. Shimer (hereinafter "Defendant" or "Shimer") replies to the Response of Plaintiff Commodity Futures Trading Commission (hereinafter "Plaintiff" or "CFTC") to Defendant's previous motion to dismiss the First Amended Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or, in the alternative, under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

I. PRELIMINARY STATEMENT

Before specifically addressing Plaintiff's arguments made with respect to pending motions to dismiss submitted by Defendants Equity Financial Group, LLC, Vincent J. Firth and Robert W. Shimer (hereinafter "Equity Defendants") and before engaging in a refutation of Plaintiff's erroneous analysis of the *Lopez* decision, Defendant would point out, as stated in *CFTC v. Heritage Capital Advisory Services. Ltd., et al.* Comm. Fut. L. Rep. (CCH) ¶21,627 at 26,378 & 26,379 (N.D. Ill. 1982) that Plaintiff

> "is an independent federal regulatory agency which, since April 21, 1975, has been charged with the responsibility *for administering and enforcing* the provisions of the Act, 7 U.S.C. Sec 1 *et seq*. and the Regulations promulgated thereunder, 17 CFR Sec 1.0 *et seq*." (Emphasis added)[1]

It is, therefore, noteworthy and extremely relevant to the disposition of Defendant's pending motions that with 30 years of experience regulating the commodity futures industry and with access to (and *at 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 Shasta Capital Associates, LLC (hereinafter "Shasta")] has been held to have been 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 its Response) 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] *Heritage* at pages 26,378 & 26,379. NOTE: The Heritage decision is attached as Exhibit D.

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

Plaintiff's own proposed substantial revisions on August 4, 1980 to Part 4 Rules (45 FR § 1600) (attached hereto as Exhibit "A") 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]

At the risk of sounding facetious Defendant is tempted to remind Plaintiff that one may encounter all sorts of "pools" during a particularly busy day. There are swimming pools (pools in which swimming occurs), there are office pools (pools in which office duties are performed) and then, for purposes of this matter, there are "commodity pools" (pools that "trade" commodity futures). The federal courts have *never* recognized as a "commodity pool" an entity such as Shasta that 1) never opened a trading account to trade commodity futures in its own name and 2) never authorized *any entity* to trade a Shasta commodity futures account for the benefit of Shasta's members.

It is a 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". 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". 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's actual knowledge of all of these facts (clearly available to the Court on the face of the pleadings and in available case law) arguably raises Plaintiff's continued insistence that Shasta be characterized as a "commodity pool" to the level of an insubstantial and totally frivolous charge because Plaintiff's continued mischaracterization of

---

[2] See *Heritage Capital Advisory Services, Ltd.* Comm Fut. L. Rep. (CCH) ¶21,627 (N.D. Ill. 1982).

[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. Attached hereto as Exhibit A.

Shasta as a "commodity pool" clearly has no basis in Statute, Plaintiff's own regulations or case law.

It is also noteworthy to point out that, in stark contrast to both its Original and its First Amended Complaint, Plaintiff has finally demonstrated at least in the first paragraph of Section I of its Response entitled "FACTS" (see pages 1 & 2 of Plaintiff's Response) an ability to accurately recite facts in the matter currently before the Court. However it is disappointing to see that one has to look no further than paragraph two of that same first Section to find a willingness on the part of Plaintiff to once again descend to factual distortion.

The fourth to last sentence of this second paragraph of Plaintiff's Response states with reasonable accuracy that "...Equity Shimer and Firth hired another CPA to purportedly receive the results from Abernethy, affirm the results to inquiring participants and potential participants..."[4] But then Plaintiff's tendency to take liberty with the facts and the truth apparently becomes too irresistible. Plaintiff concludes that same sentence as follows: "...and vouch for the legitimacy of the investment and the persons involved."[5]

As pointed out in Shimer's previously filed Brief, *every member of Shasta* executed as a part of the subscription process, a document entitled "Agreement for Independent Verification of Shasta Capital Profits and Losses". A true and correct copy of that four page document is attached hereto as Exhibit "B". The Court's attention is specifically directed to paragraphs 12, 13 and 14 of that attached four page document.

The third to last sentence which ends the second paragraph of Plaintiff's Response further alleges in part that "Firth and Shimer merely instructed this second CPA to 'parrot' the information Abernethy supplied." (*quote marks supplied*).[6] The second to last sentence further alleges that "[t]his CPA did not perform an independent review and Firth and Shimer knew that she did not do so".[7] Plaintiff cites this last stated "fact" as if it carries some ominous implication. The Court is directed to the entire text of the attached Exhibit B which made crystal clear *to every member of Shasta* at the time they subscribed the specific and limited role of Shasta's CPA. For Plaintiff to continually mischaracterize the clear and

[4] See page 3 of Plaintiff's Response.
[5] See also page 3 of Plaintiff's Response.
[6] See also page 3 of Plaintiff's Response.
[7] See also page 3 of Plaintiff's Response.

obvious role of Shasta's CPA is an affront to the truth and represents a clear and continuing abuse of Plaintiff's enforcement authority.

All other references in Section I of Plaintiff's Response entitled "FACTS" amount to a mere recitation of the specific charges previously alleged in Plaintiff's First Amended Complaint against all of the Equity Defendants. These allegations are not "facts" at all but allegations that succeed or fail based upon the totally unsupported and erroneous conclusion of law that Shasta is a commodity pool—a conclusion that has no basis in either the CEA, Plaintiff's regulations or case law.

II. ARGUMENT

A. Plaintiff Has Failed In Its Response To Offer A Credible and Believable "Commodity Pool" Analysis Of Shasta In Light Of Its Own 25 Year Old Narrowly Drafted Definition Of The Term "Pool"

On page 10 of its Response Plaintiff first cites the definition of a "pool" found in its own Regulation 4.10(d)(1) 17 C.F.R § 4.10(d)(1) and then offers to this Court an interesting analysis that purports to "prove" that Shasta is a commodity pool under the cited definition. Essentially the factual analysis offered by Plaintiff on page 10 of its Response can be boiled down to the following: 1) Funds were deposited into Defendant Shimer's attorney escrow account at Citibank by members of Shasta 2) Defendant Shimer forwarded those funds to defendant Tech Traders as required by the provisions to Shasta's PPM. 3) Defendant Tech traded commodity futures contracts; 4) Defendants Firth and Shimer knew that Defendant Tech would use the funds forward by Shasta to trade commodity futures. Ergo because Tech is engaged in the activity of trading commodity futures, Shasta *must* be a commodity pool.

According to Plaintiff the definition of a "pool" found at 17 C.F.R 4.10(d)(1) *really means* that if Entity #1 sends funds to an Entity #2 that trades commodity futures, Entity #1 is automatically a commodity pool if those who forwarded the funds to Entity #2 *knew* that Entity #2 was engaged in trading commodity futures and would use the funds received to further Entity #2's own separate trading. What Plaintiff has apparently fabricated in defense of its position is an entirely new "test" without any basis in case law, Statute or Plaintiff's own regulations that now apparently allows the element of "scienter" to play a part in determining whether "Entity #1 in the above example is a "pool".

According to Plaintiff, no matter how removed from actual "trading of commodity interests" an entity might be, it is now a "pool" and subject to the regulatory reach of Plaintiff if the manager of the entity from which funds originate "knows" that the entity receiving those funds would engage in the trading of commodity futures from an account opened solely in the name of the separate entity that received the funds! How far down the line is Plaintiff permitted to go in search of "entities" to regulate? For example, Shasta had a member that was a family limited partnership that obviously "pooled" the funds of several family members (and perhaps other separate business entities) and forwarded them to Shasta for investment in Shasta and the purchase of membership shares of the Shasta entity. Is that family partnership now a commodity pool? By reason of Plaintiff's analysis whoever might "manage" that partnership is now a CPO and subject to registration with Plaintiff! What about a separate corporate entity that invested in that family partnership?

Plaintiff's analysis for determining what and what does not constitute a "pool" is akin to the situation that happens when one finds a loose thread on a sweater. Pulling on the first thread simply leads to another... and another.... That analysis of Regulation 4.10(d)(1) is patently *ridiculous* in light of the clearly stated intention of Plaintiff to specifically *narrow* the definition of a "pool" in its own regulations 25 years ago and is made even more ridiculous by the total lack of any case law Plaintiff can find that even *remotely* supports Plaintiff's position. What Plaintiff would clearly apparently prefer is to regulate by agency fiat and simply decide what entities might or might not be "pools" on a case by case basis.

Funds received into Defendant Shimer's attorney escrow account at Citibank were not received for the purpose of *trading* commodity interests. No "trading ever occurred from that attorney escrow account. They were received for the purchase of a stated number of member shares in Shasta.[8] The fact that funds received into Defendant Shimer's attorney escrow account were later forwarded (in strict accordance with Shasta's PPM) to the bank account of defendant Tech and were eventually traded by Defendant Tech in Tech's own trading account *does not* support a conclusion that Shasta was a "commodity pool".

As correctly stated by Plaintiff, Regulation 4.10(d)(1) defines a pool as "any investment trust, syndicate or similar form of enterprise *operated for the purpose of trading* commodity

[8] See Shasta's PPM found as Attachment 3 to Plaintiff's Appendix filed in support of Plaintiff's Motion For Statutory Restraining Order.

interests". (Emphasis supplied). As previously pointed out in Defendant's Preliminary Statement, that particular definition was adopted by Plaintiff 25 years ago in 1980 when Plaintiff then specifically stated that this definition "narrows the definition of the term "pool" by specifying that it is an entity "operated for the purpose" of trading commodity interests"[9].

Yet here is Plaintiff with 25 years of regulatory experience with its own "narrowly" crafted definition of the term "pool" purporting to offer to this Court the wildest and most overly broad interpretation imaginable of its own regulation! The words of the definition are clear and unambiguous. An entity is a "pool" under the intended definition if it is "operated" for trading. The words "operated" clearly refer to action by the pool entity itself-what the pool entity is doing-- "trading". Trading what? Commodity interests. If the entity that Plaintiff purports to characterize as a "commodity pool" is not actually trading commodity interests it is not a "pool" under the regulatory definition adopted by Plaintiff 25 years ago.

As pointed out previously in Defendant Shimer's Brief submitted in support of the pending motions, the fact that Plaintiff is responsible for administering the CEA does not mean that Plaintiff is free to apply any meaning it chooses to the otherwise clear and obvious intent of its own regulations.[10]

B. Refuting Plaintiff's "Lopez" Analysis

Turning to the important and significant case of *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986) (attached hereto as Exhibit "C") Plaintiff attempts to analyze *Lopez* and its four part test in a way that purports to align the *Lopez* decision with Plaintiff's wild and overly broad interpretation of its own regulation. In a convoluted attempt to "squeeze" the first test of *Lopez* into the facts of Shasta Plaintiff first states on page 11 of its Response that "No Shasta investor had an individual account." This statement by Plaintiff is offered to show that Shasta satisfied the first test of *Lopez* which is: "An investment organization in

[9] Comm Fut. L. Rep. (CCH) ¶21,188 at p. 24,891. See Also Exhibit "A".

[10] See *New York Currency Research v. CFTC* 180 F.3d 83 at p 88 (2nd Cir. 1999) where that court stated: "Although *Chevron* dealt only with an agency's interpretation of relevant federal statutes, similar principles apply to judicial review of an agency's interpretation of its own regulations. The court then continued its analysis at p. 89: "The Commission would have us proceed directly to the second step of Chevron, where its interpretation would be given controlling weight, and would have us affirm on this basis. But we decline to do so because here, under the first step, the Commission's interpretation contradicts the plain language of the statute and regulations; where such is the case, the "plain language of course controls," citing further to *United States v. Lewis*, 93 F.3d 1075, 1080 (2d Cir. 1996). See also page 83 of Defendant Shimer's previously filed Brief.

which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts".

The first clear and obvious problem with Plaintiff's strained analysis is that Plaintiff is evidently attempting to argue that because no individual investor of Shasta had an "account" at defendant Tech the first test of Lopez is satisfied. Plaintiff is apparently focusing on the entity Tech to make this argument since Tech is clearly the only entity that opened or maintained an account from which commodity interests were ever traded. The difficulty with this approach to reconciling Shasta with the first test of *Lopez* is that *Lopez* wasn't looking to see if an account is owned by some entity other than the one in which the stated "investors" are investing. That is absurd. Shasta's investors had absolutely no individual relationship with Tech and therefore no rational reason to ever have an "account" at Tech.

If Plaintiff purports to argue that individual investors did not have an account at Shasta that is patently not true and the fact that such a statement by Plaintiff is not true is obvious from a reading of Shasta's PPM previously provided to this Court by Plaintiff as an attachment to Plaintiff's Appendix filed in Support of Plaintiff's Motion For Statutory Restraining Order.[11] Every member of Shasta has their own capital account with Shasta because Shasta is a limited liability company.

Moreover the four tests of Lopez clearly have to be determined *in relation to each other*. The second test requires: "common funds used to execute transactions on behalf of the entire account". What account? The account of the "investment organization" being analyzed! The Plaintiff's own regulations do not define a "pool" as an entity that might be created or *organized* for the purpose of investing in another entity that separately trades commodity interests. Plaintiff's regulations specifically require that the pool be "operated" for the purpose of trading. How can an entity be considered a "pool" if it does not "operate" the account being referred to by the *Lopez* court?

Plaintiff's approach to reconciling the fourth test of *Lopez* with the facts of Shasta is to casually dismiss the language of the fourth *Lopez* test which clearly requires that "the transactions are traded by a commodity pool operator *in the name of the pool* rather than in the name of any individual investor". (Emphasis added). According to Plaintiff even though

[11] See for example pages 6, 15, 22 of Exhibit A-3 attached to Plaintiff's Appendix filed with this Court in support of Plaintiff's Motion for Statutory Restraining Order.

the *Lopez* court required (as a necessary part of its fourth test) that the "transactions" be "traded in the name of the pool" it isn't really *necessary* that any transaction ever occur in the name of *Shasta* (the entity that Plaintiff is attempting to characterize as a "pool"). The fact that Tech is effecting transactions solely in the name of Tech for the account of Tech is simply "a distinction without a difference"![12]

Plaintiff would also probably prefer this Court to ignore as a "distinction without a difference" the fact that Plaintiff has presented to this Court absolutely no decision by any federal district court or federal appellate court that has ever held an entity to be a "commodity pool" that has not had commodity interests traded *in its name* by either the operator of the pool entity or by another entity authorized to trade *for the account of the pool entity*.

C. Plaintiff's "Lopez" Analysis Is Not Aided By A Single Obscure Footnote By The ALJ In *Slusser*

Beginning on page 13 Plaintiff basically argues that the *Lopez* court did not really mean what it said when that Court specifically used the phrase "in the name of the pool" when enunciating the fourth part of its test. In support of this "argument" Plaintiff attaches as Exhibit A to its Response all 41 pages of an opinion written by a CFTC Administrative Law Judge.[13] Plaintiff's Exhibit A was attached to its Response for no apparent purpose other than to attach a short two line comment by that ALJ found in footnote 36, on the second to last page of this 41 page decision. The cited footnote in that decision is "seized upon" by Plaintiff because the ALJ makes the following statement in footnote 36: "The key element in the fourth test of Lopez is merely that funds are not traded in the name of an individual investor".[14]

Apparently eager to craft any argument, no matter how tenuous, Plaintiff concludes that since Shasta's funds were not traded in the name of any individual by Tech, therefore, "Shasta meets this key element of the fourth Lopez factor—none of the funds were held in the name of any individual investors of Shasta".[15] According to Plaintiff, the fact that

[12] See Plaintiff's Response, bottom of Page 12.
[13] In re Slusser, 1998 WL 537342 (C.F.T.C.)
[14] See Plaintiff's Exhibit A, page 41 of 42, FN 36.
[15] See Plaintiff's Response, page 13.

Shasta's funds were never traded in the name of Shasta as required by the specific and plain language of the fourth test of *Lopez* which requires that funds be traded "in the name of the pool" is now irrelevant.

Defendant would first point out that an obscure footnote by a CFTC ALJ is hardly "precedent" for contradicting the clear, obvious and controlling language used by the Ninth Circuit in *Lopez*. But even more importantly the ALJ's footnote 36 comment does not exist in a vacuum as Plaintiff would evidently prefer but rather in the context of the actual facts of the *Slusser* case.

In *Slusser* the defendants obtained control over two separate funds offered in a prospectus issued by a California entity known as International Participation Corporation (IPC). IPC raised money from numerous investors (mostly from Germany) using a prospectus that offered investors a choice between a number of different portfolios that would invest in American financial markets. The Seventh Circuit Court of Appeals received Defendant Slusser's petition for review of the CFTC order fining defendant Slusser and barring him from ever trading for life. That Court described the relevant portion of the IPC prospectus as follows: "Portfolios III and IV were to be invested in financial futures traded in America on a public exchange". [16]

IPC's prospectus set forth the terms under which the IPC funds were to be traded.[17] By Agreement defendant Slusser and an Indiana company that he controlled by the name of Vancorp Financial Services (VFS) "bound themselves to the terms of the IPC prospectus" and, (as specifically found by the CFTC ALJ) agreed "to accept all management and investing contracts responsibilities and rights" and to accept "sole responsibility…to protect, invest and account for the assets transferred and assigned". [18]

According to the Seventh Circuit Court of Appeals "Slusser failed to register with the CFTC as a "commodity pool operator" and its "associated person" even though he was managing a commodity pool--initially on behalf of IPC, then after the end of May 1989 in his

[16] *Slusser v. CFTC* 210 F.3d 783 at 783 & 784 (7th Cir. 2000)
[17] Plaintiff's Exhibit A, page 7, paragraph E. 27.
[18] Plaintiff's Exhibit A, page 7, paragraph E. 28.

own right, following a contractual assumption of IPC's position". [19] The ALJ in the matter further found that Slusser's company VFS and other Slusser affiliates received more than $29 million dollars in IPC Portfolio III and IV funds not only from IPC but also directly from individual IPC investors.[20]

As further described by the 7th Circuit Court, in addition to directly churning the commodity trading accounts over which Slusser had trading authority through companies he controlled "after assuming IPC's duties to the investors Slusser failed to adhere to the contractual limitations the prospectus placed on use of the funds, and in the process violated the Act and the implementing regulations by charging more than $3 million in improper commissions, devoting money to uses other than those allowed by the prospectus, commingling pool funds, and diverting investors' money to personal purposes."[21]

Defendant Slusser directly traded commodity futures in brokerage accounts opened by companies that he controlled. The funds traded by Slusser's companies were funds his companies received not only from IPC but also funds received directly from individual IPC investors. IPC's prospectus represented to IPC investors that the assets of IPC Fund III and IPC Fund IV would be invested by these particular funds in financial futures trading. Slusser through companies that he controlled engaged in direct trading of commodity interests through accounts that Slusser opened in the name of his companies.

By way of contrast, Shasta's PPM *never made any representation* that Shasta would be involved directly in the trading of commodity interests nor did Shasta's PPM ever represent that Shasta's manager Equity intended to directly engage in the trading of commodity interests nor were commodity future interests ever actually traded by either Shasta or in the name of Shasta by either its manager Equity or by any other entity.

Plaintiff's dependence on this obscure footnote in its Exhibit A is a further indication of the fact that Plaintiff has been unable to find any controlling case law on point that supports its argument that Shasta is a commodity pool. The ALJ's comment in footnote 36 was clearly made in an attempt to reconcile the "in the name of the pool" language of the fourth *Lopez* test to the fact that Slusser (through the companies he controlled) did not actually trade the money received from IPC funds III and IV *in the name of those particular IPC funds* but

[19] *Slusser v. CFTC* 210 F.3d 783, at p. 784 (7th Cir. 2000)
[20] Plaintiff's Exhibit A, page 9, paragraph F. 43.
[21] *Slusser v. CFTC* 210 F.3d 783, at p. 784 (7th Cir. 2000)

instead "opened and maintained trading accounts at several different brokerage houses"[22]. As also noted by the ALJ "all of the IPC money that was traded by VFS was done so in accounts held in the name of VFS"[23].

The fact that Slusser had opened trading accounts in the name of VFS *instead of trading the IPC funds specifically in the name of those IPC funds* must have given the ALJ some concern in light of the clear and unambiguous fourth test requirement of Lopez. But given the facts of *Slusser*, the ALJ clearly was not dependent on his footnote 36 comment to justify his finding that Slusser's company VFS was, indeed, a commodity pool operator. As the ALJ points out in the sentence that immediately follows his reference to footnote 36: "...whether viewed in the manner in which Respondents received them (as two large funds, Funds III and IV), or in the manner in which Respondents traded them (as several smaller funds), the investment funds managed and controlled by Respondents were commodity pools".[24]

The mere fact that companies controlled by Slusser had received funds directly from individual IPC investors and then had pooled and combined those funds and traded them in accounts opened in the name of VFS along with other funds received directly from IPC was a sufficient factual basis *alone* under the *Lopez* test to hold that the accounts traded by Slusser were, indeed "commodity pools" and that Slusser's companies were, therefore, clearly acting as CPO's of those pooled trading entities.

Defendant Shimer would further point out to the Court that *even in the face of overwhelming evidence that defendant Slusser's company VFS was clearly engaged in activity that all rational people would agree was CPO activity*, in light of the clear language of *Lopez* the ALJ in *Slusser* apparently felt sufficiently constrained by *Lopez* to at least insert the footnote "comment" which Plaintiff now cites with such apparent enthusiasm.

Plaintiff has at best cited an obscure footnote comment by an ALJ while studiously ignoring the clear factual context in which that comment was made. To argue that comment provides a firm basis for holding that Shasta is a commodity pool simply because Tech did not trade Shasta's funds "in the name of any individual investor" is a bizarre argument at best, particularly in light of the factual context in which the ALJ's comment appears.

[22] See Plaintiff's Exhibit A, Page 9, Paragraph G. 46.
[23] See Plaintiff's Exhibit A, Page 9, Paragraph G. 49.
[24] See Plaintiff's Exhibit A, Page 24, last part of top paragraph.

D. Plaintiff's Cite To Heritage Likewise Does Not Support Plaintiff's "*Lopez*" Analysis Of Shasta

On page 13 of its Response Plaintiff correctly points out: "In stating its four part indicia of a pool, the *Lopez* court cited as support for its definition *Heritage Capital Advisory Services, Ltd.* Comm Fut. L. Rep. (CCH) ¶21,627 at 26,384 (N.D. Ill. 1982). (The entire opinion of the Heritage court is attached hereto as Exhibit "D"). Plaintiff's *Heritage* "argument" boils down to this: 1) since Defendant Shimer's previous analysis of *Lopez* pointed primarily to the fact that neither Shasta nor Shasta's manager (Defendant Equity) directly traded commodity interests; and, 2) since it is possible (as the *Heritage* court points out) for an entity to be held to be a commodity pool even though the "operator" of that pool does little or no actual trading, 3) ergo, Shasta must be a commodity pool. Plaintiff engages in a logical fallacy because Plaintiff overlooks an extremely important distinction between the facts found in *Heritage* and obvious facts about Shasta.

First we must begin from the position that *Heritage* and *Lopez* are completely compatible. Any other premise is absurd since the court in *Lopez* formulated its now famous four part test by specifically citing *Heritage* as Plaintiff duly notes. What Plaintiff apparently overlooks or, in the alternative, what Plaintiff *apparently hopes all of the Equity Defendants and the Court will overlook* is the critical aspect of the fourth part of the Lopez test which clearly requires that trading occur "in the name of the pool".

This "critical element" *clearly distinguishes Shasta from the facts of Heritage and the facts of every other case in which the federal courts have held a commodity pool to exist.* What the Plaintiff would ask the Court to virtually ignore is the following critically important factual distinction between the defendant Heritage and Shasta: Heritage maintained a commodity trading account in its name and directly engaged *in its own name* in the trading of commodity interests. Shasta did not. While it is true that in most instances trading of a commodity pool account is conducted by the pool's "operator", as the *Heritage* court pointed out on page 26,384, that is not always the case:

> "Other types of persons registered with the Commission may also do the trading of a commodity pool, including an associated person... or a floor broker. The identity of whomever does the trading must be disclosed to the participants in the commodity pool."

In *Heritage* actual trading was conducted by an entity known as Financial Partners Brokerage, Ltd. (FPB) and one Robert B. Serhant ("Serhant"). According to the *Heritage* court FPB offered three types of accounts to investors:

> "The first type of account is a regular futures trading account in which an investor deposits a sum of money to be invested solely in the futures markets for speculative purposes.[25]The second type is an account in which an investor deposits funds, most of which is then used by FPB to purchase a United States Treasury Bill at the current discount rate. The additional amount of customer funds representing the difference between the face value of the United States Treasury Bill and its actual purchase price is then traded in the futures Market.[26] In the third type of account approximately two thirds of the customer funds are used to purchase a United States Treasury Bill and the remaining one third is used to speculate in the futures market.[27]

The *Heritage* Court also further noted on page 26,380 with respect to a previous complaint that had been filed against FPB:

> "That as to all types of accounts offered, FPB and Serhant had complete discretion in and control *over the funds and assets of its customers*". (Emphasis Added)

That the accounts held at FPB were accounts opened in the name of the alleged "pool" entity (Heritage) is also clear from what the *Heritage* court said at page 26,384:

> The evidence shows that funds from the pool were forwarded to FPB and Serhant without regard to the distinct investment positions taken by Heritage customers. … Interest earned on the cash United States Treasury Bill and the gain or loss derived from the futures contracts *executed by FPB and Serhant on behalf of defendants* was paid to Heritage in a similar, albeit reverse fashion." (Emphasis added)

Because all commodity futures transactions that were executed by FPB or Serhant were obviously posted for direct credit or debit to the commodity trading account owned by the entity Heritage, defendant Heritage and all other defendants directly associated with Heritage

---

[25] NOTE: This type of account is ALWAYS *opened in the name of the customer*. Clearly this type of traditional customer account was one possible choice among the three offered by FPB to its clients.

[26] NOTE: Again the only difference between this type of account and the first option is the way the customer's funds are allocated. Only a small part of the customer's funds are actually traded in the name of the customer. The majority of the customer's funds remain in the T-Bill.

[27] NOTE: Again this type of account only differed in the amount of customer funds that are actually allocated to futures trading. See *Heritage Capital Advisory Services, Ltd.* Comm Fut. L. Rep. (CCH) ¶21,627 at 26,379 & 26,380 (N.D. Ill. 1982).

engaged in the "...trading in any commodity for future delivery on or subject to the rules of any contract market...".[28] By soliciting funds from individual investors of Heritage for the purpose of placing those funds into the commodity trading account of Heritage the defendants clearly met the definition of a commodity pool operator.[29]

Unlike the defendant Heritage, the entity Shasta (which Plaintiff seeks to classify as a "commodity pool" for obvious reasons) has never opened or owned a commodity trading account, and therefore has never conducted commodity futures trading *in its own name* nor has Shasta ever opened a commodity trading account and granted trading authority to any other entity to conduct trading *in the name of Shasta*. *Lopez* and *Heritage* are completely compatible. Shasta is not a commodity pool under the authority of *Heritage* nor is Shasta a commodity pool when the four part test of *Lopez* is applied to the facts of Shasta.

The fact that Plaintiff *doesn't like* the fact that Shasta is not a commodity pool is hardly a sufficient reason for this Court to ignore a 25 year history of applicable case law. Nor is it sufficient reason to virtually ignore Plaintiff's own carefully crafted definition of a "pool" when Plaintiff proposed a revised "more narrow" definition 25 years ago on August 4, 1980 and adopted then the definition that still exists today at 17 CFR 4.10(d)(1).[30]

E. Defendant's Motion To Dismiss Counts II Through IV For Lack of Subject Matter Jurisdiction Is Permissible Under Applicable Case Law And Should Be Granted.

That Shasta is not a commodity pool clearly has serious implications for this Court's subject matter jurisdiction with respect to Counts II through IV of Plaintiff's First Amended Complaint. Absent a finding by this Court that Shasta is a commodity pool, Plaintiff has no legal basis to allege the Equity Defendants violated any of the provisions of the CEA cited by Plaintiff in Counts II though IV of its First Amended Complaint.

Plaintiff clearly has been authorized by Congress to enforce the provisions of the CEA and regulations promulgated there under by Plaintiff. Clearly Congress has given no authority to *any federal agency* to simply fabricate jurisdiction by charging private citizens with a violation of a federal statute that does not apply to the actual activity of those being

[28] This is the relevant part of the statutory definition of a CPO found at 7 U.S.C. 1a(5)
[29] See *Heritage Capital Advisory Services, Ltd.* Comm Fut. L. Rep. (CCH) ¶21,627 at 26,386 (N.D. Ill. 1982).
[30] See again Exhibit 'A" attached hereto.

charged. In *Commodity Futures Trading Commission v. Clothier* 788 F. Supp 490 at 492 (D.Kan. 1992) the court stated at the outset:

> "Defendants correctly note that the burden is upon the Commission to establish subject matter jurisdiction over a party."

Both Congress and Plaintiff (under the authority conferred upon Plaintiff by Congress) have carved out very specific definitions that apply to very specific entities and very specifically defined commodity trading related activity of those entities. Plaintiff has authority to enforce only those very specific commodity trading related violations outlined in the CEA. [31]

Absent a finding by the Court that the entity Shasta is a commodity pool, Counts II through IV allege no actionable violation of the CEA by the Equity Defendants. Moreover, this Court need look no further than the pleadings in this matter to date and applicable case law readily available to the Court to determine that is true.

As noted by Plaintiff in its Original Complaint filed April 1, 2004, the CEA

> "establishes a comprehensive system for regulating *the purchase and sale* of commodity futures contracts and options on commodity futures. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the Commission to seek injunctive relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of the Act or any rule, regulation or order thereunder."[32] (Emphasis Added)

As clearly admitted by Plaintiff, the subject matter jurisdiction of this Court in the present matter is strictly limited to violations of the CEA. Moreover as stated above by Plaintiff the jurisdiction of this Court to entertain any request by Plaintiff for injunctive relief based upon the allegations found in Counts II through IV is dependent upon whether or not the activity alleged violates the provisions of the Statute.

The Court now has access to Plaintiff's Original Complaint, Plaintiff's First Amended Complaint and attached Exhibits, Defendant Shimer's Brief filed in support of Defendants' several Motions to Dismiss, Plaintiff's Response thereto and now Defendant Shimer's Reply.

---

[31] See generally *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323 (S.D. Fla. 2001).

[32] See Page 5 of Plaintiff's Original Complaint For Injunctive and Other Relief dated April 1, 2004.

These pleadings provide a clear and sufficient basis to determine *as a matter of law* whether jurisdiction existed *ab initio* in this matter with respect to Counts II through IV of Plaintiff's First Amended Complaint.

Moreover the determination of whether or not the entity Shasta is a commodity pool is not a peripheral issue that need wait to be determined by a consideration of the merits of Counts II through IV at a later time. In the interest of judicial economy and in equity and fairness to defendants if the Court can reasonably determine whether or not subject matter jurisdiction exists with respect to Counts II through IV Defendant respectfully requests the Court to decide this significant issue now.

The issue of whether or not this Court has subject matter jurisdiction with respect to Counts II through IV of Plaintiff's First Amended Complaint is clearly dependent upon whether or not the entity Shasta is a commodity pool. That issue has now been adequately addressed and briefed by both parties. No further findings of fact outside of the pleadings themselves are necessary. The issue now before the Court is simply a matter of law---has Plaintiff properly established to the satisfaction of this Court a violation of the Statute as alleged in Counts II through IV in order to confer upon this Court jurisdiction to entertain the injunctive relief requested by Plaintiff.

1. *Bell v. Hood* and related cases do not prevent the Court from granting Defendant's pending Rule 12(b)(1) motion

Defendant submits that under the "wholly insubstantial and frivolous" standard recognized by the Supreme Court in *Bell V. Hood* 327 U.S. 678, 682-83 (1946) Counts II through IV of Plaintiff's First Amended Complaint are sufficiently insubstantial *on their face* in light of existing case law to merit dismissal for lack of subject matter jurisdiction for the following reason.

Webster's Seventh New Collegiate Dictionary defines the word "insubstantial" as follows: "Lacking substance or reality: imaginary. Lacking firmness or solidity." Plaintiff was well acquainted with its own definition of the term "pool" currently found at 17 C.F.R. 4.10(d)(1) at the time that both its Original and First Amended Complaint were filed against the Equity Defendants. And in the 25 years that have now passed since Plaintiff proposed a more narrow revision of the term "pool" on August 4, 1980 *not a single court* has upheld the definition of a commodity pool presently sought by Plaintiff to justify the allegations made

against Equity Defendants in Counts II through IV. Moreover as the federal agency charged with enforcing the CEA, plaintiff was obviously in a *unique position to know full well at the time of the filing of its Original and First Amended Complaint that Shasta was not a commodity pool.* Lacking any support for Counts II through IV in its own definition of a "pool" and lacking the support of any case law, nevertheless, Plaintiff chose to submit to the Court wholly frivolous and insubstantial charges in Counts II through IV--charges *clearly dependent on their face* that Shasta was a commodity pool.

In response to Defendant's Brief filed in support for the now pending motion to dismiss under Rule 12(b)(1) Plaintiff has been unable to submit to this Court *any* binding case law to support Plaintiff's conclusion that Shasta is a commodity pool. On the face of the Plaintiff's pleadings it is clear that Shasta has never owned *in its name* nor "operated" in its name in any manner a commodity trading account.

The controlling case law of *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986) cited by Plaintiff in its Brief originally submitted to this Court in support for Plaintiff's Motion For *ExParte* Statutory Restraining Order and Preliminary Injunction *over a year ago* has now been exhaustively discussed by Defendant Shimer in both his recent Brief offered in support of the pending motions, by Plaintiff in its Response, and in this Reply by Defendant to Plaintiff's Response. Plaintiff's legal conclusion that Shasta is a commodity pool *has no basis in existing Statute, Regulation or case law* and as the federal agency charged by Congress with enforcement of the CEA *Plaintiff knew or should have known that the allegations contained in Counts II through IV were wholly lacking in substance and could not and would not be sustained on their face.*

Moreover in *Bell v. Hood* 327 U.S. 678, 683 (1946), when referencing the "frivolous and insubstantial" exception the court did not indicate that one need show the Plaintiff's cause to both frivolous *and* insubstantial but only that it is at least one or the other:

> "Respondents' contention does not show that petitioners' cause is insubstantial or frivolous,..."

As Plaintiff further points out in its Response, *Bell* was further expounded upon in *Growth Horizons, Inc. v Delaware County*, 983 F.2d 1277 (3rd Cir, 1993). In further elaborating the proper standard to consider granting a Rule 12(b)(1) motion the Court in *Growth Horizons,*

therefore never traded commodity interests in its own name, nor did Shasta authorize any other entity including its manager Equity to ever trade an account in Shasta's name. This fact never appears *anywhere* in Plaintiff's pleading. Nor can Plaintiff dispute the accuracy of this clear, obvious and irrefutable fact unless Plaintiff's counsel is willing to commit perjury.

Where is the doubt about the lack of supporting case law for Plaintiff's unfounded allegation that Shasta is a commodity pool? If any such supporting case law existed, Plaintiff would most certainly have cited the same to the Court by now. The Court need go no further than the pleading in this matter to reasonably conclude that Defendant has met its burden of establishing that Plaintiff is unable, "beyond all doubt" to establish a most critical and necessary element of Counts II through IV of Plaintiff's First Amended Complaint.

1. Giving all reasonable inferences to Plaintiff's alleged facts in Counts II though IV, Defendant's Rule 12(b)(6) motion should be granted

Even accepting as applicable the standard noted by Plaintiff in citing *Blaw Knox Retirement Plan v. White Consol. Ind.*, 998 F. 2d 1185, 1888 (3d Cir. 1993) which requires the Court to give "all reasonable inferences that can be drawn from the alleged facts in the light most favorable to [the Plaintiff]" Defendant respectfully suggests to the Court that in the present instance Defendant's Rule 12(b)(6) motion is appropriate with respect to Counts II through IV of Plaintiff's First Amended Complaint and that Defendant's motion should be granted.

In order to be able to give a "reasonable inference" to an alleged fact, the fact must first be alleged. A review of the entire pleading submitted by Plaintiff in support of Counts II through IV of the First Amended Complaint fails to disclose *anywhere in those pleadings* the allegation that Shasta maintained a commodity trading account "in its name" as required by the controlling decision of *Lopez*.

It would, therefore, be virtually impossible for this Court to construe any reasonable inference from the facts alleged by Plaintiff in its First Amended Complaint that Shasta is a commodity pool because Plaintiff has not alleged anywhere in its First Amended Complaint those facts with respect to Shasta that controlling case law requires. Since the issue of whether or not Shasta is a commodity pool is readily discernible from the facts pleaded by Plaintiff (and, by an examination of case law) the Court need look no further than the

pleadings themselves and the embarrassing lack of any case law in Plaintiff's favor to conclude that if Shasta had engaged in *any activity* that provided any reasonable basis for concluding that Shasta is a commodity pool, clearly Plaintiff would have included such an allegation in its pleading. Absent a factual allegation by Plaintiff sufficient to allow the Court to construe all reasonable inferences in favor of Plaintiff based upon that factual pleading Counts II through IV of Plaintiff's First Amended Complaint cannot survive Defendant's pending Rule 12(b)(6) motion to dismiss.

2. Accepting as true all pleaded facts as alleged in Counts II through IV Defendant's Rule 12(b)(6) motion should be granted

Accepting as true all pleaded facts as alleged in Counts II through IV of the First Amended Complaint does not help Plaintiff survive Defendant's pending Rule 12(b)(6) motion unless the Plaintiff has pleaded all facts necessary to establish the purported violations of the CEA as alleged. Despite Plaintiff's clear demonstrated willingness to consistently distort facts in its pleadings Plaintiff has never alleged in *any* pleading that Shasta ever opened, maintained, traded under its own authority or granted (to any other entity) the authority to trade commodity interests in the name of Shasta. As Defendant has ably demonstrated, absent the fact that Shasta owned a trading account from which commodity "transactions" were traded "in the name of the pool" as required by controlling case law, Counts II through IV are insufficient as a matter of law on their face and Defendant's Rule 12(b)(6) motion should be granted.

3. Plaintiff's oft repeated allegation that Shasta is a commodity pool is simply a conclusory allegation or legal conclusion masquerading as fact that need not be accepted as true by the Court

As previously stated in Defendant Shimer's Brief filed in support of the pending Rule 12(b)(6) motion before the Court, Plaintiff repeatedly refers to Shasta as a "commodity pool" throughout its First Amended Complaint as if constant repetition will somehow "make it so". Plaintiff's allegation that Shasta is a commodity pool is not a fact at all but an unsubstantiated conjecture and conclusion of law with no basis in fact or law.

It is well established that the Court need not accept conclusions of law stated in a complaint when it is considering a Rule 12(b)(6) motion to dismiss for failure to state a claim. See *Jeffery Y. v. St. Marys Area Sch. Dist.* 976 F. Supp. 852, 854-855 (W.D. Pa 1997) wherein the district court (after acknowledging the fact that the court must accept as true all the facts alleged in the complaint and view them in the light most favorable to the Plaintiff also noted:

> "However, a court is not compelled to accept conclusions of law as stated in the complaint. *Papasan v. Allain*, 478 U.S. 265, 286 92 L. Ed. 2d 209, 106, 106 S. Ct. 2932 (1986)."

Moreover the Supreme Court in *Papasan* specifically stated at the page above quoted by *Jeffery* that the court was "not bound to accept as true a legal conclusion couched as a factual allegation."

See also *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998) conclusory allegations need not be taken as true. *See also* 2 Moore's Federal Practice § 12.34[1][b] at 12-61 (3d Ed. 2000): "[c]onclusory allegations or legal conclusions masquerading as facts will not suffice to prevent a motion to dismiss." See also *In re Sofamor Danek Group, Inc.* 123 F.3d 394, 400 (6th Cir. 1997) cert denied, 140 L.Ed. 2d 813 (1998) in which that court, while recognizing the general rule that a District Court may not grant a Rule 12(b)(6) motion based upon disbelief of factual allegations in the complaint, affirmed the lower court's decision to granted defendant's Rule 12(b)(6) motion to dismiss by stating:

> "Nevertheless, our standard of review "require[s] more than the bare assertion of legal conclusions." Id. "[W]e need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987).

Applying all of the above cited case law to the First Amended Complaint, Plaintiff's unsupported assumption and conclusion that Shasta is a commodity pool need not be accepted as true by the court in determining whether or not to grant Defendant's Rule 12(b)(6) motion. Plaintiff's allegation that Shasta is a "commodity pool" is a critical element to Plaintiff's ability to sustain Counts II through IV. Plaintiff's contention found throughout Counts II through IV that the entity Shasta is a "commodity pool" is literally a conjecture or supposition with literally no factual or legal foundation.

Plaintiff clearly has alleged insufficient facts as a matter of law to sustain a finding by this Court under any applicable Statute, regulation or case law that Shasta is, indeed, a commodity pool and, therefore, Defendant respectfully requests that the Court grant Defendant's Rule 12(b)(6) motion to dismiss with respect to Counts II through IV of Plaintiff's First Amended Complaint.

G. Count I of Plaintiff's First Amended Complaint Requires A Finding That Shasta Is A Commodity Pool To Survive Defendant's Pending Motions To Dismiss Either Under Rule 12(b)(1) Or, In The Alternative, Under Rule 12(b)(6)

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 to Defendant's motion to dismiss. It would be useful for purposes of the analysis that follows to provide to the Court the full text of the statutory language that applies to Count I and that text is attached hereto as Exhibit "E". Plaintiff has described this statute as prohibiting cheating and defrauding or attempting to deceive other persons "in connection with commodity futures trading for or on behalf of such persons".[34] Plaintiff's difficulty in the present matter is the fact that not one of the Equity Defendants were ever engaged in "commodity futures trading" either on behalf of themselves or anyone else.

Such a lack of nexus between any actions specifically proscribed by Section 4b of the CEA and the actual activities of the Equity Defendants is fatal to the success of Count I of Plaintiff's First Amended Complaint. See *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323 (S.D. Fla. 2001). In that case the CFTC sought to hold the defendants liable and to enforce the anti fraud provision of the CEA found at 7 U.S.C. § 6c(b) against those defendants despite the fact that the court had found that the CEA's introducing broker registration provisions did not apply to the defendants.

Applying the required test of *Chevron*[35] the court first addressed the question of whether or not Congress clearly expressed its intent in the CEA's anti fraud language found at 7

[34] See Plaintiff's Response, page 8.

[35] *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, U.S. 837, , 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

U.S.C. § 6c(b). Finding that the language of the statute to be "clear and unambiguous" the court stated:

> "This language is clear and unambiguous and neither party suggests otherwise. …Accordingly, any rules or regulations promulgated by the CFTC, including the antifraud regulations at issue in this case, are applicable only to entities who engage in the activities listed in § 4c(b).[36]

The language of the CFTC's rules in the above cited case almost exactly track the statutory 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 refers to commodity *option* transactions while Section 4b(a)(2) refers to commodity *futures* transactions.

Granting Defendant's motion for Summary judgment against the CFTC the Court concluded:

> "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 case cited by the CFTC involved entities who, although unregistered, had direct participation in the commodity market…"[37]

While it is true that the above cited analysis of the district court occurred in the context of a motion for summary judgment by the defendant Mass Media Marketing, that district court's analysis is instructive and, the Equity Defendant's respectfully suggest, entirely relevant to a disposition of their pending motions to dismiss.

An examination of Count 1 of Plaintiff's First Amended Complaint reveals that *in every instance*, Plaintiff's only alleged nexus between the Equity Defendants and Plaintiff's Count 1 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

---

[36] *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323, 1333 (S.D. Fla. 2001)

[37] *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323, 1334 (S.D. Fla. 2001)

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…"

As fully admitted by Plaintiff the anti-fraud provision of the CEA cited as a basis for Count I of the Plaintiff's First Amended Complaint prohibit "cheating and defrauding or attempting to cheat or defraud …other persons "in connection with commodity futures trading for or on behalf of such persons". As clearly stated in the relevant paragraphs of Count I the only basis Plaintiff has been able to allege as a direct connection between the Equity Defendants and "commodity futures trading" is the unsupported conclusion 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…"[38]

For all of the reasons stated above and in light of Defendant's previous argument and analysis previously provided herein in reference to Counts II through IV of the First

[38] See 7 U.S.C. § 6b(a)(2)(i)-(iii) attached hereto as Exhibit "E".

Amended Complaint with respect to the impact of the Plaintiff's clear inability on the face of the pleadings to establish that the entity Shasta is a commodity pool, the Court is respectfully requested to grant Defendant's pending Rule 12(b)(1) motion to dismiss Count I of Plaintiff's First Amended Complaint.

In the alternative, in light of Defendant's previous argument and analysis offered in reference to Counts II through IV, with respect to the impact of the Plaintiff's clear inability on the face of the pleading to establish that the entity Shasta is a commodity pool the Court is respectfully requested to grant Defendant's pending Rule 12(b)(6) motion to dismiss Count I of Plaintiff's First Amended Complaint.

H. Count V as specifically alleged by Plaintiff is similarly dependent upon a finding that Shasta is a "commodity pool"

Count V of Plaintiff's First Amended Complaint alleges that defendant Shimer "aided and abetted" defendant Tech's violation of Plaintiff's Regulation 4.30 in violation of Section 13(a) of the CEA. As discussed in Defendant Shimer's Brief previously submitted in support of the Equity Defendants' pending motions to dismiss, Count V of Plaintiff's First Amended Complaint represents a "through the looking glass" allegation that Plaintiff well knows stands absolutely no chance of being sustained on the merits in light of the requirements recognized by applicable case law as necessary to sustain a charge of "aiding and abetting".[39]

In support of both of Defendant's motions to dismiss Count V, attached hereto as Exhibit "F" is a copy of Defendant Shimer's e-mail message to Geoffrey Aronow dated Friday, October 24, 2003 at 1:30 PM referencing all subscription documents of Shasta as well as a copy of the Investment Agreement that existed between Shasta and defendant Tech. Attached as Exhibit "G" is a copy of Mr. Aronow's reply to Defendant Shimer's 1:30 PM e-mail. Also Attached as Exhibit "H" is a copy of Defendant Shimer's follow up e-mail message of that same day at 4:50 PM October 24, 2003 indicating that to save time Shimer was attaching Shasta's Private Placement Memorandum, Shasta's Operating Agreement, Subscription Agreement, Investor Questionnaire, and Agreement For Independent Verification of Shasta Profits and Losses.

[39] See pages 88 & 89 of Defendant Shimer's Brief submitted in support of the pending motions.

Attached as Exhibit "I" is a true and correct copy of Shimer's cover letter dated October 24, 2003 addressed to Geoffrey Aronow, partner in the Washington, D.C. firm of Arnold & Porter. As Exhibit "I" clearly discloses, Shimer requested Aronow be retained on behalf of *both* of his clients Shasta and Defendant Equity to review Shimer's previous conclusions about both his clients Equity and Shasta and to specifically contact Plaintiff on behalf of both Equity and Shasta to advise the CFTC of the willingness of his clients to pursue any registration by either of his clients that might be deemed necessary by Plaintiff.

Attached as Exhibit "J" is a copy of the Federal Express tracking receipt for that letter and the enclosures referred to therein. Also attached as Exhibit "K" is a copy of Geoffrey Aronow's "bio" that Defendant Shimer pulled from Arnold & Porter's web site on October 24, 2003. Note that this exhibit indicates that Aronow occupied the position of former Director of Enforcement of Plaintiff from 1995 until 1999. Also attached as Exhibit "L" is a true and correct copy of defendant Shimer's legal memorandum that he prepared for a prospective member of Shasta back in the fall of 2001 concluding that neither Shasta nor Defendant Equity need register with the CFTC. Attached as Exhibit "M" is a true and correct copy of Defendant Shimer's revised version of Exhibit "L" created approximately 4 days before defendant Shimer's correspondence with Aronow on October 24, 2003.[40]

Also attached as Exhibits "N" and "O" are two legal memorandums (both with e-mail cover sheets) from Arnold & Porter provided to Defendant Shimer by that law firm. Exhibit "N" is dated December 18, 2003 and Exhibit "O" is dated February 27, 2004. As confirmed by the e-mails from Arnold & Porter that accompanied each memorandum, they were both provided to Defendant Shimer at Shimer's specific request by the firm of Arnold & Porter in an effort to motivate defendant Tech to retain legal counsel and to address the likelihood that Tech would have to register with Plaintiff as a commodity pool operator.

Nowhere in either of these Exhibits was Shimer ever advised that Defendant Tech was arguably acting as a CTA to Shimer's client Shasta and because of that fact the drafting of either the Investment Agreement that existed between Shasta and Defendant Tech or the drafting of Shasta's PPM by Shimer or that the act of transmitting funds from Defendant

[40] Defendant Shimer points out that both Exhibits "L" and "M" conclude based upon no knowledge at the time of the 9th Circuit case of *Lopez* that Shasta is not a commodity pool essentially because Shasta had no trading account in its name and did no actual trading of commodity interests.

Shimer's attorney escrow account at Citibank might constitute a violation of Section 13(a) of the CEA by "aiding and abetting" Tech's alleged violation of Regulation 4.30.

Revisiting the previously cited case of *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323 (S.D. Fla. 2001) Defendant Shimer cites again from that Court's decision granting the motion for Summary judgment of the Defendants in that matter:

> "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.... 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 under the Act'"[41]

In a manner similar to Count I, Count V also specifically depends, *as pleaded*, upon establishing a nexus between the actions of Defendant Shimer that are alleged to be a violation of Section 13(a) of the CEA in furtherance of Tech's alleged violation of Regulation 4.30, 17 C.F.R. § 4.30 and the "execution of any transaction involving any commodity regulated under the Act". Absent some such a "connection", Plaintiff clearly has no legal authority to seek or impose upon Defendant Shimer injunctive relief or monetary damages for the innocently conducted activities of Shimer alleged by Plaintiff in Count V.

The allegation in Count V that Defendant Shimer aided and abetted defendant Tech's alleged violation of Regulation 4.30 *as specifically pleaded* requires a finding that Shasta is a commodity pool in order to sustain any possibility of that required nexus. 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

[41] *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323,1334 (S.D. Fla. 2001)

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."

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.

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 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..."[42]

Absent Plaintiff's unsubstantiated and unsupportable conclusion that Shasta is a "commodity pool", the necessary connection to "trading" and "any contract of sale of a commodity for future delivery" can no longer 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 provided with respect to Counts II through IV of the First Amended Complaint and Plaintiff's clear inability on the face of the pleadings to establish that the entity Shasta is a commodity pool, the Court is respectfully requested to grant Defendant's pending Rule 12(b)(1) motion to dismiss Count V of Plaintiff's First Amended Complaint with respect to Defendnat Shimer.

[42] 7 U.S.C. § 1a(6).

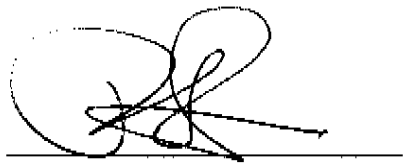
In the alternative, in light of Defendant's previous argument and analysis offered in reference to Counts II through IV with respect to the impact of the Plaintiff's clear inability on the face of the pleading to establish that the entity Shasta is a commodity pool the Court is respectfully requested to grant Defendant's pending Rule 12(b)(6) motion to dismiss Count V of Plaintiff's First Amended Complaint with respect to Defendant Shimer.

III. CONCLUSION

It is with extraordinary disappointment and frustration that in reviewing both Exhibits L and M attached hereto, Defendant Shimer discovered that he had initially made the same argument over 4 years ago in the fall of 2001 without the benefit of knowing that the Ninth Circuit Court of Appeals (in a case that the CFTC has cited 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 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 either the pending motions to dismiss Counts I through V of Plaintiff's First Amended Complaint under Rule 12(b)(1), or, in the alternative, to grant the pending motions to dismiss Counts I through V of Plaintiff's First Amended Complaint under Rule 12(b)(6).

Date: June 8, 2005



Robert W. Shimer, Esq

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on June 9, 2005 he caused a true and correct copy of the foregoing Reply of Defendant to Plaintiff's Response, to be sent via regular U.S. Mail to the following.

Elizabeth M. Streit, Esq.
Commodity Futures Trading Commission
525 West Monroe St., Suite 1100
Chicago, Illinois 60661

Stephen T. Bobo, Esq. (Receiver)
Bina Sanghavi, Esq.
Raven Moore, Esq.
Sachnoff & Weaver, Ltd.
10 South Wacker Drive, Suite 4000
Chicago, Illinois 60606-7507

On behalf of Equity Financial Group, LLC
Samuel F. Abernethy, Esq.
Menaker and Herrmann
10 E. 40th St., 43rd Floor
New York, NY 10016-0301

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, New Jersey 08055

AUSA Paul Blaine, Esq
Camden Federal Building
401 Market Street, 4th Floor
Camden, NJ 08101

On behalf Coyt E. Murray, Tech Traders, Inc. Ltd.,, Magnum Investments, Ltd., & Magnum Capital Investments, Ltd.
Cirino M. Bruno, Esq.
Martin H. Kaplan, Esq.
Melvyn J. Falis, Esq.
Gusrae, Kaplan, Bruno & Nusbaum, PLLC
120 Wall Street
New York, New York 10005

Defendant J. Vernon Abernethy, pro se
Mr. Jack Vernon Abernethy
413 Chester Street
Gastonia, NC 28052

ROBERT W. SHIMER, *pro se*

Inc. apparently acknowledged that dismissal for lack of subject matter jurisdiction is "appropriate" if

> "the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as to not involve a federal controversy"[33]

Counts II through IV of Plaintiff's First Amended Complaint lack all substance, are totally implausible in light of its Plaintiff's own 25 year old published definition of the term "pool" and are foreclosed from finding any support in any case law because such support clearly does not exist and for those reasons, based solely on the pleadings, the Court should grant Defendant's Motion previously submitted under Rule 12(b)(1) with respect to Counts II through IV.

F. Defendant's Motion to Dismiss Counts II through IV for Failure to State a Claim Upon Which Relief Can Be Granted Is Appropriate And Permissible And Should Be Granted.

Defendant recognizes that under applicable case law the party moving for dismissal under Rule 12(b)(6) bears the burden of persuasion. *Kehr Packages, Inc. v. Fidelcor, Inc.* 926 F.2d 1406 (3d. Cir 1991). Moreover though Defendant recognizes that a Rule 12(b)(6) motion is generally disfavored, still the courts have recognized that such a motion is justified and should be granted if it appears beyond doubt that Plaintiff can prove no set of facts to support its claim. See *United States Abatement Corp. v Mobil Exploration & Producing*, 39 F.3d 556, 559 (5th Cir. 1994). See also *Conley v. Gibson* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) where the court stated:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The pleadings in this matter show that the "beyond doubt" standard of *Conley* has clearly been met by Defendant. Where is there room for "doubt"? There is "no doubt " that the entity Shasta never opened or established a commodity trading account in its own name and

[33] *Growth Horizons, Inc.* at page 1280