Elizabeth M. Streit, Lead Trial Attorney
Scott R. Williamson, Deputy Regional Counsel
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
SW-9752
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, New Jersey 08101
856-757-5412
PB-5422

In The United States District Court
For The District Of New Jersey
Camden Vicinage

Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Hon. Robert B. Kugler District Court Judge **Civil Action No: 04-1512 (RBK)(AMD)** **CFTC's Response To Defendants' Motions To Disqualify This Court And For Reconsideration Of Court's Denial Of Defendants' Motion For Summary Judgment** **MOTION DATE: January 5, 2007**

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Plaintiff Commodity Futures Trading Commission ("CFTC" or "Commission") responds to Defendants Shimer and Firth's unwarranted motion seeking to disqualify this Court from further consideration of this case ("Disqualification Motion" [Docket Document No. 415]) and their motion for reconsideration of the Court's denial of their motion for summary judgment ("Reconsideration Motion" [Docket No. 413]), both of which make essentially the same strained arguments. No longer content to engage in personal attacks against the Commission, the Defendants now attack the integrity of this Court in lengthy, meritless diatribes.[1] Both motions should be denied. The Defendants' receipt of an unfavorable ruling on their motion for summary judgment does not provide grounds to disqualify this Court, and they have raised no new or otherwise meritorious grounds warranting reconsideration of that ruling.

I. The Court's Impartiality in this Matter Cannot Reasonably Be Questioned.

This Court has issued two cogently reasoned decisions denying the Defendants' two motions for summary judgment. The Defendants' second motion raised no new arguments not made in the first. The only difference between the first and second motion was Shimer's inclusion of selected portions of the pleadings and trial record in *CFTC v. Heritage Capital Advisory Services, Ltd.* [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,627 (N.D. Ill. 1982). Now, Shimer is apparently piqued because the Court did not specifically address the documents he submitted from that case in its opinion denying the Defendants' second motion for summary judgment. Rather than conceding that, perhaps, the Court did not address these

[1] Defendant Shimer continues to ignore the Local Rules with his second brief, which is 15 pages longer than the allowed limit of 30 pages for 12 point proportional font set forth in Local Rule 7.2. He did not receive permission from the Court to file this over-sized brief.

documents because they were irrelevant and did not merit mentioning, he attacks the Court by accusing it of partiality to the Commission.

Under 28 U.S.C. § 455, a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[2] The Supreme Court has made clear that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States,* 510 U.S. 540, 555 (1994). Thus, the Third Circuit has "repeatedly stated that a party's displeasure with legal rulings does not form an adequate basis for recusal..." *Securacomm Consulting, Inc. v. Securacom Inc.,* 224 F.3d 273, 278 (3rd Cir. 2000), citing *In re TMI Litig.,* 193 F.3d 613, 728 (3rd Cir. 1999); *Jones v. Pittsburgh Nat'l Corp.,* 899 F.2d 1350, 1353 (3rd Cir. 1990). Defendants' accusations amount to no more than their disagreement with the Court's legal rulings. If the Court's legal rulings are in error, the proper avenue for redress is an appeal. "Almost invariably [judicial rulings] are proper grounds for appeal, not for recusal." *Liteky,* 510 U.S. at 555.

The two cases Shimer primarily cite in support of the Defendants' partiality accusation in both motions – *In re Kensington Intern. Ltd.,* 368 F.3d 289 (3rd Cir. 2004), and *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3rd Cir. 1993) – are inapposite. In *Kensington*, the Third Circuit found that two court-appointed advisors were representing tort claimants in another case who may have had claims identical to those in the case at issue at the same time that the court-appointed advisors were supposed to be giving neutral advice to the court. The court-appointed advisors were also taking positions as advocates that supported the defendant's position in the case at issue. The judge in that case also engaged in *ex parte* meetings that the advisors attended. The Third Circuit found that the circumstances of the advisors' conflict and the *ex parte*

[2] The Code of Conduct for United States Judges, Canon 3C(1), also cited by Defendants, tracks the language of 28 U.S.C. § 455(a).

meetings, if revealed to a reasonable person, would lead to a perception that the judge's impartiality might be seriously questioned. 368 F.3d at 318.

In *Alexander,* the Third Circuit found that, despite the fact that the appellate court had overruled the district judge's summary judgment ruling in favor of the defendant, it appeared from the judge's comments in open court that he persisted in the view that certain evidence the Third Circuit had discounted was dispositive. The judge also commented on the record that certain key witnesses may have committed perjury without hearing their testimony and accused the petitioners of acting in bad faith. Under these circumstances, the Third Circuit found that the district judge's impartiality might reasonably be questioned. However, noting that the *Liteky* case was then before the Supreme Court for a decision on whether apparent impartiality must stem from an extrajudicial source, the Third Circuit declined to decide the matter under 28 U.S.C. § 455(a). Instead, it exercised its supervisory authority to reassign the case to a different judge. 10 F.3d at 167.

Defendants also misquote and misconstrue the Supreme Court's decision in *Liteky* in their brief in support of the Disqualification Motion ("Disqualification Brief"). *See* Disqualification Brief at 37 [Docket No. 415]. In addition to finding that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion", what the Supreme Court stated was that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Defendants have not shown any such favoritism or antagonism by the Court here.

The entire basis of Defendants' accusation of bias is the Court's rulings on their summary judgment motions. We have none of the circumstances found in *Kensington* or *Alexander*. There have been no *ex parte* contacts. There have been no comments on the record prejudging the case. There has been no hint that some extrajudicial source is influencing the Court. Nothing has happened that would lead any reasonable person to question the Court's impartiality. The Defendants' accusations to the contrary are outrageous and should be summarily dismissed.

II. Defendants' Arguments do not Gain Legitimacy through Repetition.

Despite two opinions rejecting the Defendants' attempts to obtain a summary disposition in their favor, they persist in making the same unpersuasive arguments over and over again in both their Reconsideration Motion and their Disqualification Motion as if the mere repetition will somehow render them compelling. The Commission has fully briefed all the issues the Defendants try to resurrect. Rather than belabor these points, the Commission respectfully refers the Court to the Commission's Response to Shimer's and Firth's Second Motion for Summary Judgment [Docket No. 349] ("Response."). All of the documents Shimer unearthed from the *Heritage* case are fully discussed in the Response. The Commission will make just a few salient points here.

Defendants continue to harp on the 24-year-old trial testimony of a Commission witness, Ms. Charlotte Ohlmiller, as if it were dispositive in this case. As pointed out in the Commission's Response, Shimer deliberately misconstrues Ms. Ohlmiller's testimony. *See* Response at 11. Nowhere does she say that a trading account in the pool's name is an essential or integral requirement of a commodity pool. The Commission also discussed in its Response why the other documents from the underlying record in *Heritage* are irrelevant to the decision

here. As any well-seasoned lawyer should know, selected portions of an underlying trial transcript are not precedent – although the *Heritage* opinion is. And the name on the trading account was not at issue in that court's finding that a commodity pool existed.

Defendants also claim in their brief in support of their Reconsideration Motion ("Reconsideration Brief" [Docket No. 413]) that through this case, the Commission is now imposing registration requirements that have never existed on feeder funds. However, contrary to the Defendants' claim that there would be a "hue and cry" from entities that are feeder funds to investee pools if they had to register, Defendants have got it exactly right that "every investment entity that 'pools' or combines into any bank account the investment funds of more than one investor or member and then simply forwards those funds to another separate entity in order to benefit from the commodity trading activities of that other entity would be subject to the CFTC's registration regulations!" See Reconsideration Brief at 15 [Docket No. 413]. Such an investment entity would be considered a pool and its operator could be required to register as a CPO subject to certain exceptions and exemptions that may or may not be applicable. The Commission's Response at 7 through 10 shows that feeder funds such as Shasta are part of the Commission's regulatory structure and their commodity pool operators routinely register under Section 4m of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6m (2002).

The Defendants likewise persist in their hyper-technical and misguided reading of *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986), contending that the trading account used to trade commodity futures contracts must be in the name of the commodity pool for the entity to be defined as a commodity pool. Twenty-five years ago the Commission promulgated revisions to Part 4 of the Commission's regulations because the Commission had seen persons who were operating a pool but were conducting operations in their own name, and not in the

name of the pool! By those revisions the Commission adopted new rules that require a CPO to operate its pool as an entity cognizable as a legal entity separate from that of the pool operator, that require pool funds to be received in the pool's name, and that prohibit a CPO from commingling pool property with the property of any other person. (Regulations 4.20(a), 4.20(b) and 4.20(c), 17 C.F.R. §§ 4.20(a), 4.20(b) and 4.20(c) (2006), respectively.) "The purpose of these rules is to ensure the protection of pool participants." 46 FR 34310 (July 1, 1981). *See also* 46 FR 26004 (May 8, 1981). If the converse were the case – *i.e.*, that there can be no pool if the funds are *not* received in the name of the pool (or if the trading account is not carried in the name of the pool) – then any CPO could avoid the registration requirement simply by trading through an account carried in some other frivolously chosen name.

Defendants also complain that the Court did not address their arguments that legislative history supports their view that Shasta is not a commodity pool. Reconsideration Brief at 25, Disqualification Brief at 28-33. It is no wonder that the Court did not address their discussion of legislative history. None of it was on point, just as Defendants' discussion at pages 23-27 of their Second Summary Judgment Brief [Docket No. 335] sheds no light on the definition of a commodity pool, which is not defined in the Act or discussed in the legislative history. As for a CPO, which is defined in the Act, Defendants state in the Second Summary Judgment Brief that the "definition [of a CPO] is almost the exact same definition originally found in section 202 of Public Law 93-463 as originally enacted in 1974." Second Summary Judgment Brief at 23. Defendants admit that there is no other discussion of its meaning in the Congressional record and Defendants' citation to Section 4n of the Act, 7 U.S.C. § 6n, dealing with registration procedures for CPOs, and the Title of Title II of the Act say nothing about the definition of a commodity pool, or a CPO for that matter. There is therefore nothing in the Defendants' discussion of

legislative history in their Second Summary Judgment Brief that "directly contradicts" the Court's conclusion that Shasta is the type of entity Congress authorized the CFTC to regulate as a commodity pool, as Defendants claim in their Disqualification Brief at 31 [Docket No. 415]. Nowhere in the Congressional record will one find a requirement that a trading account must be traded in the **name** of the pool before that entity can be found to be a commodity pool. Moreover, the Commission pointed out in its Response at 4 through 7 [Docket No. 349] that Commission Regulations and the Court's decision are fully in accord with the Congressional intention of customer protection – something the Defendants ignored during the time relevant to the Amended Complaint and continue to ignore in their futile attempts to obtain summary disposition here.

Finally, the Commission also has previously fully addressed the Defendants' repeated erroneous contention that the antifraud provisions of Section 4b of the Act, 7 U.S.C. § 6b, are inapplicable. (Reconsideration Motion at 28-30 [Docket No. 413]) "By its terms, Section 4b is not restricted in its application to instances of fraud or deceit 'in' orders to make or the making of contracts. Rather, Section 4b encompasses conduct 'in or in connection with' futures transactions. The plain meaning of such broad language cannot be ignored." *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-04 (7th Cir. 1977) (solicitation of accounts was "in connection with" futures transactions). *Accord, Saxe v. E.F. Hutton & Co.*, 789 F.2d 105, 109 (2d Cir. 1986) ("in connection with" requirement was satisfied with respect to broker's alleged misrepresentations as to risk of futures trading); *CFTC v. Vartuli*, 228 F.3d 94, 101 (2d Cir. 2000) (in sale of trading program, "[t]he intended and direct link between the advertisements and the currency trading rendered any misrepresentation in the advertising 'in connection with' the suggested futures transactions"). In short, Section 4b can be violated "where the actors are

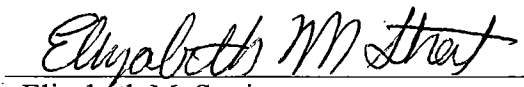
neither members of a contract market nor directly involved in the sale or purchase of the futures contracts; and where misrepresentations were made not about the underlying contracts to be traded, but about the quality of the source of the trading decisions." *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,743-44 (CFTC Mar. 16, 1999), *aff'd in part and rev'd in part and remanded sub nom. R&W Technical Services, Ltd. v. CFTC*, 205 F.3d 165 (5th Cir. 2000). Such is the case here.

III. Conclusion

There is no reason to reconsider the Court's ruling denying the Defendants' second motion for summary judgment. The Court has identified many well-reasoned, logical and persuasive reasons why the Defendants are entirely off-base. With the Disqualification Motion they have gone beyond the pale. The fact that a Court does not address all the illogical, unsupported and often incoherent arguments made by a party in its opinion does not mean that the Court did not consider those arguments for what they were worth. Parties do not get to dictate what a Court's opinion says. This Court's impartiality has not been reasonably questioned. The Court should summarily deny both the Defendants' Motion for Disqualification and their Motion for Reconsideration of its summary judgment ruling.

Date: December 14, 2006

Respectfully submitted,



Elizabeth M. Streit
Lead Trial Attorney
A.R.D.C. No. 06188119

Scott R. Williamson
Deputy Regional Counsel
A.R.D.C. No. 06191293

Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
(312) 596-0537 (Streit)
(312) 596-0520 (Hollinger)
(312) 596-0560 (Williamson)
(312) 596-0700 (office number)
(312) 596-0714 (facsimile)

CERTIFICATE OF SERVICE

The undersigned non-attorney, Anne Smith, does hereby certify that on December 14, 2006 she caused a true and correct copy of the foregoing ***CFTC's Response to Defendants' Motions To Disqualify This Court And For Reconsideration Of Court's Denial Of Defendants' Motion for Summary Judgment*** to be served upon the following persons by first class mail:

On behalf of Coyt E. Murray, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd.
Melvyn J. Falis
Martin H. Kaplan
Gusrae, Kaplan, Bruno & Nusbaum, PLLC
120 Wall Street
New York, NY 10005
mkaplan@gkblaw.com
mfalis@gkblaw.com

Defendant Robert W. Shimer, pro se
Robert W. Shimer
1225 West Leesport Rd
Leesport, Pennsylvania 19533
shimer@enter.net

On behalf of Equity Financial Group,
Samuel Abernethy
Paul Hellegers
Menaker and Hermann
10 E. 40th St., 43rd Floor
New York, NY 10014
SFA@mhjur.com

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, NJ 08055
triadcapital@comcast.net

Receiver
Stephen T. Bobo
Sachnoff & Weaver, Ltd.
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606

Anne Smith
Anne Smith, Secretary