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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

vs.

EQUITY FINANCIAL GROUP LLC, TECH TRADERS, INC., TECH TRADER, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY

Defendants.

: Hon. Robert B. Kugler

**Civil Action No. 04-1512**

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

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

## I. PRELIMINARY STATEMENT

By order dated April 22, 2005, Magistrate Donio dismissed without prejudice Defendant Shimer and Firth's previous motion for Summary Judgment. Defendant Shimer then re-submitted to the Court a renewed Motion For Summary Judgment and supporting Brief both dated July 7, 2005. Defendant Firth also submitted a

separate Motion For Summary Judgment relying upon Shimer's Brief dated July 7, 2005. The Plaintiff submitted a Response dated August 5, 2005 to Shimer and Firth's summary judgment motions. Shimer and Firth submitted to the Court a Reply dated August 13, 2005 to Plaintiff CFTC's Response. On October 4, 2005 the Court issued an Opinion dated the same day in support of its Order denying both motions of Shimer and Firth for Summary Judgment and also denied Shimer and Firth and Equity Financial Group, LLC's previously filed motions to Dismiss. Defendants Shimer, Firth and Equity Financial Group, LLC ("Equity") are hereinafter referred to collectively as the "Equity Defendants".

In light of the apparent commodity law related "expertise" of Plaintiff and the fact that Shimer and Firth's previous outside legal counsel (from April, 2004 until his departure in the Spring of 2005) never voiced to the Court *any* of the points presented by Shimer with respect to the "commodity pool issue" it was not surprising the Court's opinion dated October 4, 2005 favored the position of Plaintiff.

On Monday October 17, 2005, Shimer spent considerable time in the Federal Records Center on South Pulaski Road in Chicago administered by the National Archives and Records Administration. Shimer conducted a review of all documentation still available with respect to the case of *CFTC v Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, 26,379 (N.D. Ill. 1982)—a case upon which the Plaintiff has repeatedly and exclusively depended for its stated proposition that previous case law supports the fact that entities "such as Shasta" have been held in the past to be commodity pools. Shimer now offers to the Court as attached Exhibits new information not previously available to the Court at the time of its October 4, 2005 decision that conclusively establishes:

1) that the facts of *Heritage* were not at all similar to the facts of Shasta;

2) that Plaintiff had no basis for citing the *Heritage* case for the proposition that previous case law supports a finding that Shasta is a commodity pool;

3) that the testimony of Plaintiff's own expert witness in *Heritage* called to testify with respect to the commodity pool issue supports Shimer's argument that an FCM account *in the name of* the alleged pool entity *is an essential and necessary prerequisite for the existence of a commodity pool;*

4) that the Enforcement Division of the CFTC, as Plaintiff in the *Heritage* case, was in a unique position to know that the 3 previously numbered representations are true and yet made statements in Briefs filed with the Court that both contradicted and ignored this critical information that would have been helpful to the Court in arriving at a proper conclusion with respect to the relevance of *Heritage* to the "commodity pool" issue.

The new *Heritage* related information attached hereto as Exhibits provides the Court with a new perspective on whether or not a correct decision was reached when it concluded in its opinion dated October 4, 2005 that "the Shasta transactions mirror those of… *Heritage*…[1] This new information obtained by Shimer makes it appropriate and reasonable that Shimer and Firth should renew their previous motions for summary judgment.

In the absence of any support from *Heritage the issue of whether or not a commodity pool can be said to exist (in the absence of a commodity trading brokerage account in the name of the entity alleged by the CFTC to be a commodity pool) clearly becomes an issue of first impression for the federal judiciary.* Issues of first impression should be decided with *all of the facts* before the Court and they should be decided by sound reasoning that allows the decision to stand as useful precedent for other courts to consider if faced with a similar issue in the future.

[1] See Opinion of the Court dated October 4, 2005, page 9.

Moreover when an issue such as the one now respectfully presented again for the Court's reconsideration involves the possible expansion of a federal agency's jurisdiction to business entities arguably never before regulated by that agency, a careful and sound analysis of previous case law, the Plaintiff's own definition and regulations as well as an adequate discussion of the legislative history of the relevant statute is appropriate.

The Plaintiff CFTC apparently "investigated" the entity Shasta for approximately 5 months and yet never once talked to Firth who controlled Shasta's Manager, never sought to talk to Shimer the attorney for both the entity Shasta and Equity and never sought to talk at all to Shasta's CPA firm in Portland Oregon who regularly conveyed to Shasta and its manager Equity the performance numbers being provided to her monthly in writing by Defendant Abernethy on his letterhead.

Even more curious is the fact that the CFTC never discussed any of its preliminary investigative concerns with Shasta's outside legal counsel—a partner of the prestigious law firm of Arnold & Porter who previously held the position of Director of the CFTC's own Division of Enforcement despite the fact that Arnold & Porter was disclosed as Shasta's attorney on a web site cited by Plaintiff in the Original and First Amended Complaint.

Defendant Shimer was recently told that most cases such as the one before the Court are settled before going to trial. In point of fact, Shimer was recently advised by Plaintiff's lead trial counsel that in all probability both Defendant Coyt Murray and Defendant J. Vernon Abernethy will follow the lead of most CFTC defendants and soon settle with Plaintiff. Unlike the Defendants Murray and Abernethy, neither Shimer nor Firth intend to settle with Plaintiff.

The purpose of this Brief is to suggest, through the introduction of new evidence not previously available to the

Court and through a clearer restatement of previous points and arguments made to the Court last summer, that Summary Judgment with respect to ALL counts of the First Amended Complaint is now appropriate and timely. Defendant Shimer asks the Court to view the points and arguments that follow with a fresh, open and unbiased mind since the "commodity pool" issue presented anew is truly one of first impression for the federal judiciary.

## II. ARGUMENT

### A. The Court Erred In Its Conclusion That "Heritage Involved An Operation Very Similar To Shasta"

The Court's Opinion dated October 4, 2005 concludes on page 9 that "Heritage involved an operation very similar to Shasta…". In reaching that conclusion, the Court cites the fact that funds were solicited in both instances from investors and that in both instances the funds of the investors were combined into a common bank account opened in the name of Heritage or Shasta.[2] The Court then states in its decision dated October 4, 2005 that both entities (meaning Heritage and Shasta) "then gave those funds to a third party for investment in the futures market."[3] That statement is not necessarily wrong—it is just factually incomplete in a very critical way. A similar factually incomplete statement was offered to the Court on page 14 of the CFTC's Response dated June 2, 2005 to Defendant Shimer's previously filed motions to dismiss.[4]

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[2] Defendant Shimer disputes that an attorney escrow account opened solely for the benefit of a client in to which funds were periodically sent only to be immediately forwarded for trading to another entity meets the "combining" requirement of the first Lopez test.

[3] See the Court's Opinion dated October 4, 2005, bottom of p. 9.

[4] On page 14 of Plaintiff's Response dated June 2, 2005 one finds this similar technically correct but factually incomplete statement: "Heritage and its principals had solicited investors

**1. The facts in the present matter before the Court are not at all "similar" to the facts of *Heritage*.**

The reason that the statements of both Plaintiff and the Court cited above are *factually incomplete* is because they fail to recognize the critical difference that goes to the heart of the "commodity pool" argument. That critical difference is the fact that the funds of *Heritage* were sent by the entity Heritage from a bank account in the name of the entity Heritage to FPB BUT … they were sent to a commodity trading brokerage account at FPB that had been previously opened by Heritage *in the name of Heritage* and over which FPB had only authority to trade pursuant to a specific power of attorney *executed by the owner of the account*. The "owner" of that investment and commodity trading account at FPB was the entity Heritage.

The clear language of the District Court itself pointing to this fact has been previously discussed at length by Defendant Shimer on page 13 of his previously filed Reply dated June 8, 2005 and also by Defendant Shimer on pages 4, 5 and 6 of his previously filed Reply dated August 13, 2004. The Court is now simply reminded in the interest of brevity that the *Heritage* court referred to the fact that "FPB offered three types of investment accounts" [5] and further that the *Heritage* court followed a description of each of those three accounts with the following statement: "…that as to all types of accounts offered, FPB and Serhant had complete discretion in and control over the assets and funds of its customers." [6]

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for FPB, combined the investors' funds and forwarded them to FPB for investment".

[5] See *CFTC v Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, 26,379 (N.D. Ill. 1982)

[6] See *CFTC v Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, 26,380 (N.D. Ill. 1982)

**2. A review of information with respect to *Heritage* obtained from the Federal Records Center in Chicago supports the critical and crucial distinction between the facts of Heritage and the facts of Shasta.**

a. The offering materials shown to prospective investors in *Heritage* support the clear distinction between the facts of the defendant Heritage and the facts of Shasta.

Exhibit A attached hereto is a 15 page document sealed and signed by Dunana Davis for Pamela A. Wegner, Director of Records Center Operations for the National Archives and Records Administration Federal Records Center located on South Pulaski Road in Chicago, Illinois. Defendant Shimer retains the original of this ribbon bound document in his files but has also filed with all similar Exhibits obtained from the Federal Records Center in Chicago a sworn affidavit that the copies attached hereto as Exhibits A-E are true and correct copies of documents in Shimer's possession that all bear the Federal Records Center original seal and signature of authenticity.

Exhibit A consists partially of a 3 page Declaration Under Penalty of Perjury of Edward C. Luke. Mr. Luke was one of the investors who placed funds with the entity Heritage. As referenced in his Declaration, attached and made a part of Exhibit A are 8 separate exhibits hand labeled in dark pen as exhibits "A" though "H". These 8 sub-exhibits (contained within attached Exhibit A) comprised according to Mr. Luke's sworn Declaration the extraordinarily primitive offering materials provided to him by the Defendants in the *Heritage* matter. These materials are described hereafter as "sub-exhibits A-H" of the attached Exhibit A for purposes of clarity and are described by Mr. Luke as "disclosure materials" on page 3 of his Declaration.

Mr. Luke states on page 2 of his Sworn Declaration that as described to him by Ward Weaver … "Serhant bought $100,000.00 T-Bills at the current discount rate and would use the discount to speculate on the futures T-Bill market." Mr. Luke further states

in that same paragraph of his Declaration that "…my $10,000.00 would be combined with others to buy one $100,000.00 T-Bill."

The relevance of Exhibit A to the issue of the clear factual distinction that exists between the entity Shasta and the entity Heritage is found in the two pages identified as sub-exhibit C of the enclosed Exhibit A. Sub-exhibit C is a two page document on the letterhead of Financial Partners Brokerage, Inc. ("FPB") that described for Heritage investors exactly how FPB purchased T-Bills for its "customers". The Court's attention is particularly directed to paragraph 1 on page 1 of sub-exhibit C which states in part:

> "These United States Treasury Bills are purchased *in your name and credited to your account.*" (Emphasis added)

Paragraph 2 found on page 1 of sub-exhibit C further explains:

> "The United States Treasury Bills and your cash excess will be recorded on a computerized statement on the next business day following your investment of funds. The transactional statement will show all of the transactions *in your account*, both in the cash and futures market." (Emphasis added)

Paragraph 4 on page 2 of sub-exhibit C further describes (in language similar to that found in the *Heritage* Court's decision) FPB's proposed activity with respect to the futures market:

> "Our customary involvement in the United States Treasury Bill futures market is done on a spread basis, whereby one particular maturity is purchased and another is sold simultaneously."

The Court's attention is particularly directed to paragraph 5 on page 2 of sub-exhibit C which purports to assure FPB's customers:

> "Furthermore, the only financial future to be utilized will be United States Treasury Bills and no other future contract whatsoever will be traded *in your account unless specific authorization by you is given to us.*" (Emphasis added)

It should be absolutely clear when this disclosure document of FPB provided to its customers is read in conjunction with the District Court's description of the three types of accounts offered to its "customers" by FPB, that the entity Heritage, as a customer of FPB, *had a brokerage account in its name at FPB in which United States Treasury Bills were purchased for the specific account of the entity Heritage.*

Sub-exhibit C of the attached Exhibit A provides a clear picture of the *exact relationship* between the entity FPB and all of its "customers" including the entity Heritage. The description offered by FPB in the above cited Exhibit and obviously provided to prospective investors of Heritage such as Mr. Luke, is the description of a typical commodity trading brokerage account arrangement whereby a customer (in this case the entity Heritage) opens a commodity trading account *in the name of the customer* at a brokerage firm designated by the CFTC as a futures commission merchant and then gives specific written trading authority to trade the customer's account pursuant to a power of attorney authorization.

b. The Complaint For Temporary Restraining Order and Preliminary Injunction filed by the CFTC in the *Heritage* case clearly alleges and, therefore, confirms beyond any reasonable doubt that Defendant Serhant and his brokerage firm FPB were trading customer funds including the funds of the Defendant entity Heritage pursuant to a power of attorney arrangement.

The first 7 pages of Exhibit B attached hereto are the first 7 pages of the CFTC's Complaint seeking Equitable Relief against the Heritage defendants Heritage Capital Advisory services, Ltd., Jeffrey W. Weaver, and his father Ward A. Weaver. Shimer also obtained all pages of Exhibit B from the Federal Records Center in Chicago.

The Court's attention is directed to paragraph 15 found on page 6 of Exhibit B where it is alleged by the Plaintiff CFTC that FPB "offered three types of investment accounts." The

Court's attention is further directed to paragraph 16 found on that same page 6 of Exhibit B wherein the Plaintiff also alleges that "In addition to those three types of accounts, FPB and Serhant received investor funds solely for the purchase of United States Treasury Bills *on behalf of those investors.*" (Emphasis added).

The Court's attention is specifically directed to *the entire text* of paragraph 17 found on pages 6 and 7 of attached Exhibit "B". Shimer points out to the Court that a review of page 26,380 of the reported decision issued by the *Heritage* Court only recites the first sentence of paragraph 17 of Exhibit B. The second and third sentences of paragraph 17 of the CFTC's Complaint are *never quoted* by the *Heritage* Court. They are cited below because they confirm the arrangement that the entity FPB had with its customers including the entity Heritage:

> "As to the regular futures accounts, Serhant *has been given powers of attorney from each customer. Pursuant to that discretion and control FPB and Serhant* actively handled the accounts and, in the regular futures trading account, *has actively traded commodity futures on behalf of those customers.*" (Emphasis added)

In light of the clear language of the CFTC's own Complaint in the *Heritage* matter exposed in Exhibit B, the CFTC is hardly in a position to now claim with any credibility at all (as it tried to do on page 5 of its Response dated August 5, 2005 with respect to *Heritage*) that "(t)he case is silent on the ownership of the commodity trading account." [7]

c. Shasta's relationship to defendant Tech was radically different from the relationship that existed between Heritage and FPB.

Contrast the above described relationship between Heritage and its brokerage firm FPB with the contractual relationship

[7] See page 5 of Plaintiff's Response To Robert W. Shimer and Vincent J. Firth's Motion For Summary Judgment dated August 5, 2005.

that existed between Shasta and Tech. Once funds were wired to Tech's bank account, Tech had complete control over those funds. No written authorization in the form of a power of attorney or otherwise was ever necessary from Shasta with respect to any trading activity of Tech. As fully disclosed in Shasta's PPM and on Shasta's web site, trading was being conducted pursuant to a trading system owned and operated by the trading company (Tech) *in the name of the trading company* from commodity trading accounts at various FCM's opened by Tech *in the name of Tech*. The only right Shasta had was a contractual right to profit or loss sharing with Tech according to the terms of that profit sharing agreement disclosed in Shasta's PPM.

**3. Defendant Shimer's Federal Records Center Research confirms the obvious--that the facts of *Heritage* are completely compatible and in conformity with the enunciated four part test of *Lopez*.**

That the 1982 case of *CFTC v Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, p. 26377 (N.D. Ill. 1982) is completely compatible with the later case of *Lopez v. Dean Witter Reynolds, Inc.* 805 F2d 880 (9th Cir. 1986) should come as no surprise to anyone since the Ninth Circuit Court of Appeals in *Lopez* cited *Heritage* when formulating its four tests for determining whether or not a commodity pool can be said to exist under any set of particular facts. The *Heritage* defendants had opened a brokerage account *in the name of* the entity Heritage at the brokerage firm of FPB for the purchase of US Treasury Bills and for the limited trading of US Treasury Bills futures contracts.

All trading was done by FPB for the benefit of the account of Heritage as disclosed in the offering materials created in part by FPB (see sub-exhibit C of Exhibit A attached hereto discussed previously) and provided by the *Heritage* defendants to prospective Heritage investors. Moreover, as also revealed by

the allegations contained in the CFTC's own Complaint, trading in the name of all FPB customers (including the entity Heritage) was accomplished by FPB pursuant to a written power of attorney document executed by each customer.

In *Lopez*, the Court was faced with the question of whether or not Dean Witter's CGAP pooled account was, indeed, a commodity pool. The *Lopez* court concluded that a commodity pool did *not* exist under the facts of *Lopez* simply because *one* of the four required tests recited was not met--test #3 (which requires pro rata sharing of profits and losses by commodity pool participants). In both *Heritage* and in *Lopez* the existence of a commodity trading account *in the name of* the alleged pool entity was evident and obvious. The two cases of Heritage and *Lopez* are completely compatible as one would expect if *Lopez* chose to cite *Heritage* in formulating its four clear and specific tests.

a. The *Heritage* Defendants never argued that a commodity trading account *in the name of* the entity Heritage did not exist.

The *Heritage* Defendants never argued during the Preliminary Injunction Hearing or in any other filing with the Heritage court that a commodity trading account in the name of defendant Heritage did not exist. In fact the Answer filed by legal counsel on behalf of the Heritage defendants clearly confirms the fact that the entity Heritage had opened an account *in its name* at FPB.

The Court's attention is directed to pages 8 and 9 of Exhibit "B" attached hereto which are the 1st and 7th pages of the Heritage Defendants' Answer to the CFTC's Complaint. The first sentence of the Heritage Defendant's Answer to Paragraph 17 of the CFCT's Complaint reads:

> "Defendants admit that as to the single account offered by Serhant to Heritage investors, Serhant had complete control and discretion over investors funds and that defendants had no control or discretion

over investor funds except as follows…"

The Heritage defendants argued that Heritage was not a commodity pool because they did not "control" the investment decisions being made by Serhant and/or FPB from the Heritage brokerage account at FPB.[8] That argument was not sufficient to preclude a proper finding by the *Heritage* Court that the entity Heritage was, indeed, a commodity pool in light of previous existing case law. (See opinion of *Heritage*, generally).

b. Defendant Shimer's Research at the Federal Records Center also revealed that a party intimately connected to the present matter is in a unique position to know and remember the facts of *Heritage*.

During his review of all documents found at the Federal Records Center in Chicago, Defendant Shimer discovered that it is, truly a small world. Shimer discovered that Stephen T. Bobo, the Equity Receiver selected by the CFTC and appointed by the Court in the present matter was a CFTC attorney in 1982 assigned by the CFTC to help litigate the *Heritage* case. (See first page of attached Exhibit "D"). While it has been a number of years since the *Heritage* case was argued the attached *Heritage* related exhibits in all likelihood will refresh Mr. Bobo's recollection with respect to the issue of whether or not the entity Heritage did, indeed, have a commodity trading account *in its name* at the brokerage entity FPB.

**B. The Court Erred In Adopting Plaintiff's Argument That The Four Tests Enunciated By The Apparently Controlling Case Of**

[8] See Exhibit "C" attached hereto also obtained by Defendant Shimer from the Federal Records Center in Chicago. The Court's attention is specifically directed to the fourth and fifth pages of that Exhibit "C" which are marked as pages 29 and 30 of the Court's Findings of Fact and Conclusions of Law in the *Heritage* matter. The Court's attention is specifically directed to paragraph 86 therein.

**_Lopez_ Allow An Analysis Of More Than One Account Owned and Controlled By Separate Entities Located In Different States**

**1. The *Meredith* Case does not support the Court's conclusion that Defendant Shimer erred in a literal interpretation of Lopez.**

On page 10 of its Opinion dated October 4, 2005, the Court concludes that "Defendants' reading of the *Lopez* Court's language is far too literal." In support of this conclusion the Court cites to the case of *Meredith v. ContiCommodity Services, Inc.* Comm. Fut. L. Rep.. (CCH) ¶ 21107, p. 24,462 (D.D.C. 1980) (a case also cited by the *Lopez* court in the course of its decision). The Court concludes on October 4, 2005 that the fourth test of *Lopez* was only intended to distinguish cases such as *Meredith* where investments are made in the name of individual investors and not in the name of a pool entity.

With all due respect, *Meredith* is not the only possible reason the fourth test reads the way it does. In light of the clear language and sequence of the first two tests of *Lopez*, the language of Test #4 is a logical and necessary conclusion of the specific language found in the first two tests! The only way the Court's reference to *Meredith* makes sense as the *only* supposed motivation for articulating the fourth test the way it was articulated by *Lopez* is if one is willing to accept the premise of Plaintiff that all four tests of *Lopez* are somehow severable and are not meant to be read together coherently and *applied to the account of the entity that is alleged to be a commodity pool.*

**2. The four tests of *Lopez* are NOT severable from each other but must be read together with respect to one account *owned by the entity alleged to be a commodity pool*.**

Both the Plaintiff and now the Court in its opinion dated October 4, 2005 argue that the "pooling" requirement of *Lopez* test #1 is easily found in an attorney escrow account established for the benefit of Shasta at Citibank, N.Y. That

account never contained more than 5 member funds at any one time and, usually never for more than a few days before funds were forwarded to Tech Traders, Inc. By the time Plaintiff (and now the Court) arrive at test #4, Plaintiff and the Court are in North Carolina discussing a commodity trading account that only existed *in the name of* the entity Tech Traders, Inc. What is even more confusing about the Court's use of *Meredith* to justify its interpretation of the fourth test of Lopez is the fact that not only did the Defendant Tech not trade the individual accounts of Shasta's *members* but Tech never traded any account specifically *in the name of Shasta*!

a. The Court's analysis of *Lopez* adopted from Plaintiff ignores the factual context that gave rise to the *Lopez* decision

In light of the new information just provided to the Court with respect to *Heritage* the Court may want to re-examine its previous willingness to defer to the CFTC's questionable *Lopez* analysis with respect to the entity Shasta--especially since the Plaintiff's *Lopez* analysis ignores *the very context* in which the *Lopez* decision was written. The *Lopez* court was analyzing *one account*--the CGAP account of Dean Witter. There is absolutely nothing in the *Lopez* decision that says or *even implies* that it would be appropriate to apply test #1 to an attorney escrow account in New York for an entity such as Shasta and then to find that the requirement of test #4 is satisfied by a commodity trading account opened *in the name of* another wholly unrelated entity---the defendant Tech Traders, Inc. in North Carolina!

In adopting this "bifurcated" approach to analysis of the *Lopez* decision the Court, in its October 4, 2005 decision, seems to have even become confused about the name or identity of the account from which the "pooling" requirement of test #1 was

satisfied.[9] Given the sheer number of errors and what appear to be deliberate factual misstatements by Plaintiff in its Original (and then its First Amended Complaint) it is easy to understand why *Plaintiff* might choose to ignore the obvious factual context of the *Lopez* decision.

b. The Court's analysis of *Lopez* adopted from Plaintiff ignores the clear language of all four tests themselves.

In deferring to Plaintiff, the Court succumbed to the confusion generated by the Plaintiff's interpretation of the otherwise clear language of the four *Lopez* tests. As the Court notes in its opinion dated October 4, 2005,[10] the first test of Lopez refers to a "single account" into which the "funds of various" investors are "solicited and combined". That single account clearly must belong to the "investment organization" under scrutiny as a possible commodity pool. In the context of the present matter the entity subjected to this first "test" is the entity Shasta. Moreover, the purpose of that "account" as required by this first 'Test" is to "invest in commodity futures". The only "account" ever associated in any way with Shasta into which any solicited funds were combined (for a short time) was the attorney escrow account of Robert W. Shimer opened for and on behalf of his client Shasta at Citibank, N.A. in New York.

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[9] See page 8 of the Court's Opinion dated October 4, 2005 where the Court refers to "defendant Shimer's equity account" when referring to the pooling requirement of the first test of *Lopez*. It is not at all clear what account the Court is referring to. Defendant Shimer is not aware that he ever had an "equity" account. Is the Court referring to the attorney escrow account for the entity Shasta maintained at Citibank or the attorney escrow sub account Shimer opened for the benefit of his client Equity? Equity's sub account at Citibank never received any funds directly from Shasta investors.

[10] See the Court's Opinion dated October 4, 2005, page 7.

As the Court also notes in its opinion dated October 4, 2005 the second test is "common funds used to execute transactions *on behalf of the entire account*". (Emphasis added) Clearly the specific language contained in test #2 refers to the same "account" that is the subject of test #1. With all due respect, when were *any* commodity related "transactions" ever executed on behalf of Mr. Shimer's attorney escrow account at Citibank? When was the "entire" account (meaning all of the funds of Shasta) ever in Citibank for the purpose of complying with test #2? While Defendant Shimer focused most of his attention on the fourth test of Lopez in his previous Motion For Summary Judgment, it is clear and obvious that the "transactions" referred to by the *Lopez* Court in the *second Lopez* "test" are transactions that involve *the trading of commodity futures*. Because the transactions referred to in Test #2 must occur "on behalf of" the account that is the subject of Test #1, the language of Test #4 is really a statement of the logic required by the plain language of the first, second and fourth test, taken as a whole.

c. Summarizing the four *Lopez* tests in relation to each other

In summary, *Lopez* test #1 specifically defines the actual activity that is to occur from the account into which the alleged pool entity's funds are combined--commodity futures investing. *Lopez* test #2 requires that transactions are executed on behalf of the *entire* account subjected to Test #1. *Lopez* test #3 requires pro rata distribution of profits or losses sustained by the transactions referred to in Test #2. And *Lopez* Test #4 requires that the transactions (referred to in Test #2) are "traded by a commodity pool operator *in the name of the pool* rather than in the name of any individual investor". (Emphasis added).

If both the first and second test of *Lopez* are meant by their clear language to refer to the same "account" of the entity under scrutiny, and, if the second test refers to "transactions" which is clearly a reference to the activity of trading commodity futures, why is it reasonable or logical to suddenly apply test #4 to some other "account" not owned or controlled in any way by the entity under scrutiny (Shasta) when the specific language of test #4 clearly refers again to the "transactions" that were necessary to meet Test #2? Plaintiff's analysis of *Lopez* stretches the language specifically chosen by the Ninth Circuit beyond its clear, obvious meaning and context.

d. Defendant Shimer's analysis of *Lopez* is consistent with a clear and fair reading of the language specifically chosen by the Ninth Circuit to construct its four tests.

A clear and fair reading of the plain language of the *Lopez* four part test requires that an account *of the entity under scrutiny* be subjected to the four part test of *Lopez* to determine whether or not a commodity pool exists. Defendant Shimer's argument with respect to the entity Shasta is not a strained attempt to find some sort of clever "loophole" or to play "gotcha" with Plaintiff. It is a clear, logical argument that simply follows the clear, plain language and facts of the *Lopez* decision. The only time the arguments concerning the *Lopez* four part test become strained or illogical is when the Plaintiff purports to argue that the four tests of the *Lopez* Court do not mean what they clearly say.

A perfect example, with all due respect, is the Plaintiff's and the Court's reliance on the *Slusser* case wherein the Administrative Law Judge in that matter opines in an obscure footnote to his decision that the fourth test of *Lopez* was only meant to distinguish situations where investments are made by

individual investors in their own name—not in the name of a pool entity.

As previously discussed by Defendant Shimer in great detail on pages 8-11 of his Reply Brief dated June 8, 2005 the facts of *Slusser* [11] were clearly sufficient *on their face* to allow the ALJ to find that defendant Slusser controlled entities properly characterized as commodity pools without any strained interpretation of *Lopez*. An obscure footnote reference in *Slusser* by an ALJ employed by the CFTC does nothing to refute the logic and necessity of reading and applying the four tests of *Lopez* to a single account that belongs to and exists *in the name* of the entity under analysis. All four tests enunciated by the *Lopez* court must be read together and each "test" only makes sense if the language of each test is viewed in the context of the plain language of all other previously stated "tests".

The Plaintiff's position with respect to the four tests of *Lopez* is untenable not only on its face but it is particularly untenable in light of the new evidence now before the Court that conclusively demonstrates that NO PRECEDENT EXISTS IN THE FEDERAL COURTS FOR THE APPLICATION OF THE TERM "COMMODITY POOL" TO AN ENTITY SUCH AS DEFENDANT SHIMER'S CLIENT SHASTA. The obvious reason there is no such precedent becomes even more obvious when the legislative history of the CEA is examined.

**C. The Court Erred In Its Conclusion That An Entity Such As Shasta Was Intended By Congress To Be Regulated As A Commodity Pool By The CFTC.**

On page 9 of its Opinion dated October 4, 2005 the Court concludes ""Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool." [12] This

[11] *In RE: Slusser*1998 WL 537342.
[12] See the last sentence of the first paragraph on page 9. That first paragraph on page 9 actually begins on page 8 of the Court's Opinion dated October 4, 2005.

conclusion follows a three page analysis of case law in which the Court's discussion focused primarily on *Heritage*, *Lopez* and *Meredith*. It is unclear how a discussion of case law that is completely compatible with the conclusion that Shasta is not a commodity pool per the four tests of *Lopez* supports the Court's stated conclusion on page 9 concerning the intent of Congress. That lack of clarity is further compounded by the fact that neither *Lopez*, *Heritage*, nor *Meredith* engaged in an analysis of Congressional intent with respect to the commodity pool issue presently before the Court for re-consideration.

**1. The Court's Opinion dated October 4, 2005 engaged in no analysis of the legislative history of the CEA as amended by the Commodity Futures Trading Commission Act of 1974 to support the Court's conclusion regarding the intent of Congress with respect to an entity such as Shasta.**

In its opinion dated October 4, 2005 the Court begins its analysis of the "commodity pool" issue by citing a sentence from the introductory paragraph (entitled "Short Explanation") to Senate Report No. 93-1131 previously cited by the *Lopez* Court.[13] It is interesting to note that even though this particular selected sentence is one of several sentences in that introductory paragraph of the Senate Report, the sentence chosen by both *Lopez* and now the Court refers to the importance of "fair practice" and "honest dealing" on *the commodity exchanges*

[13] It should be noted that this one sentence from Senate Report No. 93-1131 is the only reference ever made in the *Lopez* decision to any part of the "legislative history" of the Commodity Futures Trading Commission Act of 1974 other than to point out in its decision that the CEA (as amended in 1974) did not provide the *Lopez* court with any assistance in resolving the threshold issue of whether or not Dean Witter's CGAP account was a commodity pool. (See *Lopez*, page 883). *Lopez* found it unnecessary to engage in any extensive analysis of the legislative history of the 1974 amendments to the CEA to construct its four tests. The four tests of Lopez were simply a compilation of previous case law.

(which, of course, is exactly where all *actual trading* of commodity futures contracts occurs). This stated concern reflected in the introductory paragraph of Senate Report No. 93-1131 mirrored the concern of H.R. 13113, a House of Representatives Bill that had been referred to the Senate Committee on Agriculture and Forestry and was the subject of the Senate Report. The stated purpose of HR 13113 was to amend the Commodity Exchange Act "to strengthen the regulation of *futures trading*". (Emphasis added). See S. Rep. No. 1131, 93rd Con. 2d Sess., reprinted in 1974 U.S. Code Cong & Ad. News, 5843).

No other reference to the legislative history of the Commodity Futures Trading Commission Act of 1974 (hereinafter the "Act") is found in the Court's Opinion dated October 4, 2005. In light of the fact that the actual language of the sentence cited by the Court refers to a concern on the part of Congress for "fair trading" and "honest dealing" *on the exchanges* (where actual futures contract trading occurs), it is difficult to see how that single sentence from the Senate Report is at all helpful in determining that an entity that the CFTC admits has never opened a commodity trading account to trade futures contracts [14] can be said to be the type of entity that was of concern to Congress at the time the CEA was amended by the Act to create the CFTC in 1974.

**2. The legislative history of the CEA as amended by the Commodity Futures Trading Commission Act of 1974 provides no basis for the Court's conclusion that entities such as Shasta not engaged in the actual trading of commodity futures contracts were intended by Congress to be regulated by the newly created CFTC as commodity pools.**

[14] See footnote on Page 1 of the CFTC's Response dated August 5, 2005 to Shimer's previous Motion For Summary Judgment dated July 7, 2005.

a. A brief summary of the stated reasons given in Senate Report No. 93-1131 for the 1974 Act that amended the CEA creating the CFTC.

The purpose of the Act (constituting the 1974 amendments to the CEA that created the CFTC) was the need (as cited in Senate Report No 93-1131) for better and extended regulation of the existing commodity futures markets. The Senate Report noted that "since the 1968 amendments to the Commodity Exchange Act, there has been a major shift to a market-oriented economy. As a result futures markets are playing an increasingly important role in the pricing and marketing of the Nation's commodities." S. Rep. No. 1131, 93rd Con. 2d Sess., reprinted in 1974 U.S. Code Cong & Ad. News, 5843, 5858).

The Senate Report noted that: "(w)hile the futures markets in a number of agricultural commodities have been regulated in varying degrees since 1922, many large and important futures markets are completely unregulated by the Federal Government." [15] The list of unregulated markets included coffee, sugar, cocoa, lumber, plywood and various metals "including the highly sensitive silver market and markets in a number of foreign currencies". [16] The Senate Report thus concluded that "(a) person trading in one of the currently unregulated futures markets should receive the same protection afforded to those trading in the regulated markets". [17]

That same Senate Report noted an increased awareness by the consumer "that futures markets have a direct effect on such matters as his grocery bill and the cost of his home." [18] The Report concluded: "(i)n order to assure that futures markets operate properly and that the prices consumers pay are not

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[15] See S. Rep. No. 1131, 93rd Con. 2d Sess., reprinted in 1974 U.S. Code Cong & Ads. News, 5843, 5859).
[16] Ibid, page 5859.
[17] Ibid, page 5859.
[18] Ibid, page 5859

artificially high, careful and efficient supervision of the markets is essential." [19] The Senate Report also noted that "(t)he value of futures trading has reached $500 billion annually, substantially exceeding the value of securities trading on the various stock exchanges in this country." [20]

The Senate Report concluded in part: "(t)he importance of futures trading to the general public and to the Nation equals the importance of the securities markets. It is, therefore, time to establish a regulatory authority in the commodity field similar to the Securities and Exchange Commission..." [21] Most of the legislative history of the 1974 amendments to the CEA focuses on the formation of the CFTC, how that new agency should be constituted and the powers it should have to effect the important purpose of regulating commodity futures trading.

b. The sparse comments in Senate Report No. 93-1131 concerning Section 202 of the 1974 Act that amended the CEA to include a statutory definition of the term CPO point to a conclusion that is contrary to the conclusion of the Court on October 4, 2005.

On page 6 of its Opinion dated October 4, 2005 the Court cites the statutory definition of a CPO now found at 7 U.S. C. § 1a(5). That definition is almost the exact same definition originally found in section 202 of Public Law 93-463 as originally enacted in 1974.[22] Senate Report No 93-1131 indicates that the Senate Committee on Agriculture and Forestry basically approved without change the provisions of section 202 of the Act originally contained in House Bill H.R. 13113 for the regulation of both CTAs and CPOs. Section 202 of the Act contained the

[19] Ibid, page 5859.
[20] Ibid, pages 5859 & 5860.
[21] Ibid, page 5860.
[22] The only difference is the fact that the current definition substituted the word "that" for the word "which" in this phrase of the definition "…in a business that is of the nature…"

definition of a CPO cited by the Court on page 6 of its Opinion. [23]

The only comment the Senate Committee had with respect to Section 202 of the proposed Act was a concern "…that many individuals who are engaged in the buying and selling of commodities" might offer gratuitous "opinions on the value of commodities". The Senate Committee offered its opinion that any such "incidental" expressions would "…not bring either an employer or employee within the definition of 'commodity trading advisor' ". [24] This sole Committee comment with respect to Section 202 seems to reflect the clear expectation that individuals and entities referred to in Section 202 were expected by the Senate committee to be directly involved in the actual trading of commodity futures contracts.

c. The comments of Senate Report No. 93-1131 concerning Section 205 of the Act also lead to the exact opposite of the conclusion reached by the Court on October 4, 2005

Even more to the point, however, are the comments found in the Senate Committee's Report with respect to Section 205 of the Act. Section 205 of the Act amended the CEA by adding a section 4n that pertained generally to registration with the newly created CFTC of CTAs and CPOs. Subparagraph 4n(4)(B) of Section 205 of the Act assumed that principals of CPOs might, as individuals, in the course of operating the commodity pool, take "futures market positions" on their own behalf. [25] Any such

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[23] The Court cites to Pub L. No. 102-546 after the statutory definition of CPO. The current definition varies in no significant way from the definition contained in Section 202 of the 1974 Act as noted by previous footnote 22.

[24] See S. Rep. No. 1131, 93rd Con. 2d Sess., reprinted in 1974 U.S. Code Cong & Ads. News, 5843, 5864).

[25] For the full text of Sec 4n(4)(B) of P.L. 93-463 as enacted by Congress in 1974 see 1974 U.S. Code Cong & Ads. News, 93rd Con. 2d Sess. Volume 1, page 1601).

trading activity by individual principals of commodity pool operators had to be disclosed to pool participants.[26]

Subparagraph 4n(5) of Section 205 of the Act is even *more* on point. That subparagraph is now found currently codified at 7 U.S.C. § 6n(4) which states:

> "Every commodity pool operator shall regularly furnish statements of account to each participant in his operations. Such statements shall be in such form and manner as may be prescribed by the Commission and shall include complete information as to the current status of *all trading accounts in which such participant has an interest*. (Emphasis added)

The Senate Committee's only comment on the above language of the Act was to simply restate the above language.

Finally, subparagraph 4n(7) of Section 205 of the Act authorized the CFTC to revoke deny or suspend the registration of any CPO

> "…if the Commission finds that such denial, revocation or suspension is in the public interest and that–
> (A) the operations of such person disrupt or tend to disrupt orderly market conditions, *or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the price of commodities*." [27](Emphasis added)

Why would Congress ever deem it necessary to insert such a provision to ostensibly protect the integrity of the commodity futures markets if Congress did not clearly expect that the activities of CPOs would involve direct participation in commodity futures trading on recognized exchanges?

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[26] The following comment of the Senate Committee with respect to that particular subparagraph of section 205 generally is instructive: "Futures market positions taken or held by individual principals of commodity trading advisors or commodity pool operators would be required to be fully disclosed to subscribers, clients or participants…" See S. Rep. No. 1131, 93rd Con. 2d Sess., reprinted in 1974 U.S. Code Cong & Ads. News, 5843, 5873).

[27] For the full text of Sec 4n(7) of P.L. 93-463 as enacted by Congress in 1974 see 1974 U.S. Code Cong & Ad. News, 93rd Con. 2d Sess. Volume 1, page 1601).

d. Even the language specifically chosen by Congress to describe Title II of the Act itself (which contains Sections 202 and 205) points to the opposite conclusion reached by the Court on October 4, 2005

All provisions of the 1974 Act that pertain to CPOs and CTAs are found in Title II of that Act. Title I of that Act pertained solely to the creation of the CFTC and related provisions. The specific language used to describe the purpose and intent of Title II of the Act is directly instructive and once again points to a conclusion contrary to that of the Court. Title II is entitled: "REGULATION OF TRADING AND EXCHANGE ACTIVITIES". If the activities of CTAs and CPOs were not intended by Congress to directly affect trading and the exchanges on which trading occurs at the time the 1974 Act was passed, why would Congress place all statutory provisions that describe and affect CTAs and CPOs in Title II and use *those specific words* to describe Title II of the Act?

**D. Plaintiff's Own Narrow Definition Of The Term "Pool" Found At 17 C.F.R. § 4.10(d)(1) Is Completely Compatible With The Controlling decision Of *Lopez* And The Above Cited Legislative History of the 1974 Act Amending The CEA And Does Not Support A Finding That The Entity Shasta Is A Commodity Pool.**

Defendant Shimer previously pointed out to the Court in his Reply Brief dated June 8, 2005 that Plaintiff, pursuant to its own rule making authority, specifically *narrowed* the definition of the term "pool" on August 14, 1980 by specifying that a pool "is an entity 'operated for the purpose' of trading commodity interests". [28] The exact text of that revision was provided previously to the Court as Exhibit A to Defendant Shimer's previously filed Reply Brief dated June 8, 2005.

[28] Comm. Fut. L. Rep. (CCH) ¶21,188 at p. 24,891.

The word "operate" directly refers to the verb "trading". Webster's Seventh New Collegiate dictionary offers several definitions for the word "operate": The first definition found is "to perform a work or labor." "To bring about, to cause to function" "manage". What specific "work" are we talking about here? The actual trading of commodity interests.

This interpretation is consistent with the clear and unequivocal language of the four tests of *Lopez*. Neither the revised narrowed definition of the term "pool" offered to the public in 1980 by Plaintiff nor the *Lopez* decision itself allow any room for characterizing as "commodity pools" entities that do not engage in the conduct of trading commodity interests in their own name. This interpretation of Lopez and Plaintiff's own definition is completely consistent with the Legislative history of the 1974 Act indicated by Senate Report 93-1131.

*To decide otherwise would require every entity with more than one shareholder or member that forwarded funds to the entity Shasta to register with Plaintiff as a commodity pool. Such a decision would also require every single investor entity other than Shasta that directly forwarded funds to Defendant Tech Traders, Inc. for investment to also register as a commodity pool if the entity wiring funds to Tech forwarded the combined or pooled funds of more than one individual or business entity! Such an interpretation of the term "commodity pool" is not "narrow"--it is excessively broad and inconsistent with the specific reporting and other requirements that Plaintiff's own regulations apply to commodity pool entities.*

**E. The CFTC's CPO Account Statement Requirements Found at 17 C.F.R. §4.22, its CPO Record Keeping Requirements Found at 17 C.F.R. §4.23 & its CPO Disclosure Requirements Found At 17 C.F.R. §4.24 Require The Purported "Operator" Of The Alleged "Pool" Entity To Have Access To Information that Is Impossible To Obtain And Provide To Anyone Unless The CPO Being Subjected to These Regulations Has Access To A Commodity Trading Account From**

**Which Transactions Are Being Conducted In The Name Of The Pool Entity That It "Operates"**

**1. The CPO account statement requirements of 17 C.F.R. § 4.22(a)**

The CFTC's own regulations for reporting to "pool" participants found at 17 C.F.R. § 4.22 make it *virtually impossible* for any business entity (including but not limited just to Shasta and its manager Equity) that forwarded funds to Defendant Tech Traders, Inc. to comply with the Account Statement requirements specifically enumerated, for example, at 17 C.F.R. § 4.22 (a). That section requires that Account Statements of Income (Loss) "must separately itemize the following information:

(i) The total amount of realized net gain or loss on *commodity interest positions liquidated during the reporting period;*
(ii) The change in unrealized net gain or loss on *commodity interest positions liquidated during the reporting period;*
(iii) The total amount of net gain or loss from all other transactions in which the pool engaged during the reporting period, including interest and dividends earned on funds not paid as premiums; …
(vi) The total amount *of all brokerage commissions during the reporting period;*
(vii) The total amount *of other fees for commodity interest and other investment transactions* during the reporting period (Emphasis added)

All of this information required to be reported to pool participants is *only available* to an entity that *actually trades commodity interests and owns and maintains an account in its name from which that trading occurs.*

**2. The CPO record keeping requirements of 17 C.F.R. § 4.23**

Consistent with Defendant Shimer's analysis of *Lopez* the record keeping requirements imposed upon commodity pool operators by 17 C.F.R. § 4.23(a) not only presuppose but also clearly require access to an account from which commodity

interests are being traded in the name of the alleged pool entity:

> "(a) *Concerning the commodity pool*:
> (1) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized."

The "operator" of a pool subject to regulation by Plaintiff the pool entity must clearly own an FCM account from which commodity interests are traded. 17 C.F.R. § 4.23 (a) (7) requires the following specific record keeping:

> "(7) Copies of each confirmation *of a commodity interest transaction of the pool*, each purchase and sale statement and each monthly statement for the pool *received from a futures commission merchant*." (Emphasis added).

**3. The CPO Disclosure Requirements of 17 CFR § 4.24**

17 CFR § 4.24(s) clearly anticipates that at a certain point in time pool entities will initiate the actual trading of "commodity interests" and requires that sort of information to be contained in the pool disclosure document:

> (s) *Inception of trading and other information.* (1) The minimum aggregate subscriptions that will be necessary for the pool *to commence trading commodity interests.* (Emphasis added).

**F. The Testimony Of The CFTC's Own Expert Witness In the *Heritage* Case Contradicts The Plaintiff's Position Today That The Entity Shasta Is A Commodity Pool.**

In the *Heritage* case the CFTC called an expert witness—Charlotte Ohlmiller to testify in the hearing conducted before the U.S. District Court for the Northern District of Illinois, Eastern Division with respect to her expert knowledge generally

about how the futures markets operate but more particularly about the necessary factual requirements for finding that a commodity pool exists. Relevant portions of Ms. Ohlmiller's direct testimony solicited by Mr. Constantine J. Gekas, Esq. legal counsel for the CFTC and a portion of cross examination of Ms. Ohlmiller by Mr. Paul Homer, Esq, legal counsel for one or more of the *Heritage* Defendants are provided by Exhibit E attached hereto. The transcript pages comprising Exhibit E were also obtained by Shimer from the archives of the Federal Records Center in Chicago.

**1. The CFTC's expert witness in *Heritage* confirmed on direct examination by the CFTC's legal counsel that all members of the investing public must open an account at a FCM in order to become "involved" in the futures markets.**

Page 154 of the hearing transcript is found as the second page of Exhibit E. In response to a question on direct examination by Mr. Gekas asking how a member of the "investing public might get involved in the futures market" Ms. Ohlmiller correctly replies:

> "a member of the investing public must open an account with a brokerage house which has been designated by the CFTC as a futures commission merchant." [29]

**2. If members of the general public must open an account at a FCM to become "involved" in the futures market how is it that entities can be alleged by the CFTC to be "commodity pools" without any evidence that the alleged commodity pool entity ever engaged in the most basic activity required of the general public?**

Shimer respectfully asks the Court to please address and answer the following important and critically relevant question: How is it that any member of the "investing public" (whether an individual or a business entity) must open an account at a FCM in order to become "involved" in commodity futures trading

[29] See page 154 of the Heritage hearing transcript, found on page 2 of Exhibit E.

(according to the CFTC's own expert witness in *Heritage*) BUT an entity that purportedly qualifies as a "commodity pool" (a specialized commodity related investment entity specifically re-defined *more narrowly* by the CFTC over 25 years ago and required by the CFTC to conform to all of the disclosure and reporting requirements found at 17 C.F.R. §§4.22, 4.23 and 4.24) DOES NOT (unlike the general investing public) have to have an account at a FCM *in its own name* to distribute commodity trading profits and losses pro rata to its pool participants per *Lopez*? Does that position, evidently championed by the CFTC now since July of 2005 really make any sense at all?

**3. The CFTC's own expert witness in Heritage confirmed under oath that commodity pools exist when the CPO of the pool opens a futures trading account *in the name of the pool* at a FCM.**

At the bottom of page 172 of the transcript of the *Heritage* District Court hearing reconvened at 11:00AM on Thursday, October 21, 1982, [30] Mr. Gekas asks Ms. Ohlmiller "what's a commodity pool?" Ms. Ohlmiller answers that question in more general terms on page 173 of the Hearing transcript [31] but gets much more specific on page 174 of the Hearing transcript [32] where in response to Mr. Gekas' specific question about what a CPO does with the funds that he receives from the investing public Ms. Ohlmiller replies:

> "He puts it into a common fund in a bank account, …in the name of the pool--and from there he has to go to a futures commission merchant, open up a commodity futures trading account *in the name of the pool*, and deposit funds into the commodity pool trading account." (Emphasis added)

[30] Page 172 of the Hearing transcript is the third page of Exhibit E..
[31] Page 173 of the Hearing transcript is the fourth page of Exhibit E.
[32] Page 174 of the Hearing transcript is the fifth page of Exhibit E.

As if the above answer of Ms. Ohlmiller were not enough for purposes of the point Shimer has consistently tried to make to the Court since last July, on cross examination of Ms. Ohlmiller by Paul Homer, Esq. (found at page 181 of the Heritage Hearing transcript) Mr. Homer solicits the following response from Ms. Ohlmiller upon asking her "The Operator of the commodity pool, what does he do?" [33]

> "The operator--the commodity pool operator is the person who solicits the funds and puts them into a common bank account or a common fund. He then goes to a brokerage house and *must open a commodity account and put the funds into the commodity account at the brokerage house.*" (Emphasis added).

Plaintiff's consistent position that the entity Shasta is a commodity pool or that the defendant entity Equity is a CPO is clearly contradicted by the CFTC's own expert witness in *Heritage*.

**G. Summary Judgment For The Equity Defendants With Respect To All Counts of Plaintiff's First Amended Complaint Is Mandated By Clear Federal Case Law Precedent**

**1. The existence of a commodity trading account *in the name of* the alleged pool is a material and essential fact in determining whether or not a commodity pool exists.**

If the *Lopez* court, the legislative history and background of the CEA as amended in 1974, the CFTC's own expert witness, the CFTC's own narrowed definition of a "pool", the CFTC's own regulations, and, last but certainly not least, all federal precedent before and since *Lopez* consistently agree with Defendant Shimer's position that an account *in the name of the purported pool entity* at a brokerage firm designated by the CFTC as an futures commission merchant is an essential and a material factual prerequisite to a finding that a commodity pool exists, then the lack of any such account for the entity Shasta requires

[33] Page 181 of the Hearing transcript is the twelfth page of Exhibit E.

summary judgment for Shimer and Firth with respect to *all Counts* of the Plaintiff's First Amended Complaint.

The use of the phrase "in its name" was not used ONLY by the *Lopez* Court in constructing its fourth test. Those exact words were also used by the CFTC's expert witness in *Heritage*! This phrase is not some highly technical but non-critical "requirement" that one might argue need not apply to the particular facts of situations such as Shasta (as the CFTC has repeatedly argued since last July). The requirement that a commodity trading account exist for the alleged pool entity is an obvious, logical, and essential requirement given the fact that the pool entity *is simply a collective surrogate for what the individual members of the investing public could do on their own*--open an account at a FCM and directly trade commodity interests from that account according to whatever trading system they chose to develop or employ.

**2. Plaintiff has previously acknowledged in writing and the controlling person of Shasta's manager has provided to the Court as a previously attached Exhibit a sworn affidavit that a commodity trading account in the name of Shasta never existed.**

Attached as Exhibit "A" to Shimer's Brief dated July 7, 2005 and filed in support of Shimer and Firth's previous renewed motions for summary judgment was a sworn affidavit of Firth--the only controlling person of Shasta's manager Equity. That affidavit clearly and unequivocally represented to the Court that Firth was the only person with authority to open any sort of account for and on behalf of the entity Shasta and that no commodity trading account was ever opened in the name of Shasta by either himself or anyone else acting under his authority and that such an account was never intended to be opened. [34] In

[34] See the full text of Exhibit "A" attached to Shimer's Brief dated July 7, 2005 filed previously with the Court.

Plaintiff's Response dated August 5, 2005 to Shimer and Firth's renewed Motions For Summary Judgment, the CFTC clearly admitted in a footnote on page 1 of its Brief that a commodity futures trading account was never opened in the name of Shasta. [35]

**3. The standard for mandating summary judgment enunciated by the Supreme Court requires that the motions of Shimer and Firth for summary judgment with respect to Counts II through IV of Plaintiff's First Amended Complaint be granted.**

The standard enunciated for granting summary judgment when there is no genuine issue as to a material fact was enunciated by Justice Rehnquist at page 322 in *Celotex Corp* v. *Catrett* 477 U.S. 317 (1986). The Court is referred to the relevant quote from *Celotex* found on pages 5 & 6 of Shimer's previous Brief dated July 7, 2005 filed with the Court in support of Shimer's previous motion for summary judgment.[36] Moreover, as previously pointed out by Shimer in his Brief dated July 7, 2005, summary judgment is not a disfavored procedural shortcut but an integral part of the Federal Rules as a whole. See the relevant cite to the Supreme Court's *Celotex* decision found on page 15 of Shimer's previous brief dated July 7, 2005[37]

There is absolutely no question that Shasta's status as a commodity pool is obvious and critical to Plaintiff's ability to prevail with respect to Counts II through IV of the First Amended Complaint under controlling case law. *Since the existence of a commodity trading account in the name of Shasta is critical to a finding that Shasta is a commodity pool, the absence of that critically dispositive fact mandates summary*

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[35] See footnote on page one of Plaintiff's Response dated August 5, 2005 to Shimer and Firth's renewed motions for Summary Judgment.

[36] See Shimer Brief dated July 7, 2005, pages 5 and 6 hereby incorporated by this reference.

[37] See Shimer Brief dated July 7, 2005, page 15 hereby incorporated by this reference.

*judgment for Shimer and Firth with respect to Counts II through IV of Plaintiff's First Amended Complaint and summary judgment should be granted.*

**4. Summary judgment should also be granted to Shimer and Firth with respect to Count I of Plaintiff's First Amended Complaint.**

a. For the allegations of Count I to be sustained against the Equity Defendants the clear language of Section 4b(a)(2)(i)-(iii) of the CEA requires that the alleged fraud occur specifically "in connection with" orders placed for or on behalf of some "other person" for the purchase or sale of commodities for future delivery.

Section 4b(a)(2)(i)-(iii) of the CEA[38] basically prohibits cheating and defrauding or attempting to deceive other persons "*in or in connection with* orders to make, or the making of, contracts of sale of commodities, for future delivery, made or to be made, for or on behalf of such other persons. " (Emphasis added) The Supreme Court had occasion to identify those "other persons" and to specifically discuss and analyze the anti-fraud language of Section 4b of the CEA in *Merrill Lynch, Pierce Fenner & Smith v J.J. Curran, et al* 456 US 353 (1982) (hereinafter "*Merrill*"). In that particular case the Court engaged in an analysis of the history of futures trading and more specifically the history of futures trading related legislation enacted by Congress beginning in 1921.

The Supreme Court in *Merrill* held that actual purchasers and sellers of futures contracts have standing to enforce alleged fraudulent practices described both by the language of Section 4b as well as other provisions of the CEA designed to prevent price manipulation. In order to arrive at that conclusion the Court first reviewed what it described as the three classes of persons upon whom "futures trading has a

[38] 7 U.S.C. § 6(b)(a)(2)

direct financial impact…" [39] The court noted that the first category of such persons are known as "hedgers"--those who are interested in actually selling or buying the commodity. The *Merrill* Court further noted on page 359 that "(t)hose who seek financial gain *by taking positions in the futures market generally* are called 'speculators' or 'investors'" and recognized that without the participation of speculators *who engage directly in futures market trading* by often taking the opposite side of those who are hedgers (see the Supreme Court's previous discussion on previous page 358 of its Decision) "futures markets 'simply would not exist' " [40]. (Emphasis added) The third class of persons upon whom futures trading has a "direct financial impact" are "the futures commission merchants, the floor brokers and the persons who manage the market" [41]

On page 389 of its decision in *Merrill* the Supreme Court recited the anti-fraud language of Section 4b of the CEA after first noting:

> "(t)he characterization of persons who invest in futures contracts as "speculators" does not exclude them from the class of persons protected by the CEA. The statutory scheme could not effectively protect the producers and processors who engage in hedging transactions without also protecting the other participants in the market *whose transactions over exchanges* necessarily must conform to the same trading rules." [42] (Emphasis added).

The Merrill court then concluded: "…all purchasers or sellers of futures contracts—whether they be pure speculators or hedgers—necessarily are protected by § 4b". [43] In the next paragraph on that same page 389 the *Merrill* court noted: "The legislative history quite clearly indicates that *Congress intended to*

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[39] See *Merrill Lynch Pierce Fenner & Smith v. Curran et al* 456 US 353, 359 (1982).
[40] Ibid at page 359
[41] Ibid at page 359
[42] Ibid at page 389
[43] Ibid at page 389

*protect all futures traders* from price manipulation and other fraudulent conduct violative of the statute."[44] (Emphasis added).

Plaintiff's difficulty with respect to Count I according to the clear analysis of *Merrill* is the fact that none of the Equity Defendants ever engaged in any activity that can be described as a purchase or sale of a commodity futures contract transaction over any exchange for or on behalf of either the entity Shasta, the entity Equity or for or on behalf of any member of Shasta. If the members of the entity Shasta are not among the class of persons for whom Section 4b of the CEA was intended to protect against fraud and the Equity Defendants never engaged in any activity proscribed by Section 4b of the CEA how can Count I be sustained in the face of Shimer's current motion for Summary Judgment? Shasta's members are not "investors" or "speculators" in the sense required by the legislative history of the CEA (as noted by *Merrill*) because they never took a "position in the futures market" as either a buyer or seller of a commodity futures contract. Nor did the entity Shasta, nor did the entity Defendant Equity.

b. As required by the clear and unambiguous language of Section 4b(a)(2)(i)-(iii) of the CEA no "connection" exists between the alleged activities of the Equity Defendants and the activity prohibited by Section 4(b)(2) in the absence of a finding that the entity Shasta is a "commodity pool"

Disregarding (merely for the purpose of argument) *Merrill's* relevant analysis of the clear language of Section 4b(2) of the CEA, the Court is also specifically referred to the extensive "in connection with" analysis previously provided by Shimer on pages 16 through 20 of his previous Brief dated July 7, 2005. [45]

The only "connection" ever purportedly alleged by Plaintiff that might bring the Equity Defendants arguably within the very

[44] Ibid at page 390

[45] Pages 16-20 of Shimer's previous Brief dated July 7, 2005 are specifically incorporated herein by this reference.

specific and narrow language of Section 4b(a)(2)(i)-(iii) is the allegation that members of Shasta were "pool participants" since "operators" of commodity pools are required to register with the CFTC and commodity pools regularly engage directly in commodity trading for the benefit of their pool participants.

In Count I with respect to the Equity Defendants Plaintiff specifically alleges that the purported "fraud" occurred with respect to "pool participants" or "prospective pool participants" by "misrepresenting the performance of the commodity pool". [46] Absent the existence of a commodity pool, the allegations found in paragraph 57 of Plaintiff's First Amended complaint are not only factually inaccurate but they fail to allege any activity of the Equity Defendants that arguably "connects" them in any way to any section of the CEA including Section 4b(a)(2)(i)-(iii) of that Act.

c. Federal agencies are limited in their enforcement authority to the statutory authority conferred upon them by Congress.

The case of *Commodity Futures Trading Commission v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323 (S.D. Fla. 2001) is relevant and directly on point. However it is not necessary to repeat the *Mass Media* analysis presented previously to the Court on pages 17, 18 and 19 of Shimer's Brief dated July 7, 2005 in support of his previous Motion for Summary Judgment. That discussion is hereby incorporated by reference.

Shimer suggests that the *Mass Media* court's employment of the two step analysis required by *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) is appropriate for determining the issue of whether summary judgment is also required with respect to Count I. *Chevron* requires that if the intent of Congress is clear from

[46] See paragraph 57 found on page 25 of Plaintiff's First Amended Complaint.

the plain language of the statute under analysis that is the law notwithstanding any suggested federal agency interpretation to the contrary. The language of Section 4b(a)(2)(i)-(iii) of the CEA [7 U.S.C. § 6(b)(a)(2)] is just as clear and unambiguous as the *Mass Media* court found the language of 7 U.S.C. § 6c(b). Moreover, as just discussed, the Supreme Court decision in *Merrill* makes it abundantly clear that persons who are neither purchasers nor sellers of commodity futures contracts, are not among the class of persons protected by the anti-fraud provisions of Section 4b of the CEA.

The following statement of Judge Graham in *Mass Media* is relevant and applicable with respect to the present matter before the Court because his statement is completely compatible with the Supreme Court's analysis of Section 4b of the CEA in *Merrill*:

> "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."[47]

Neither Shasta, the members of Shasta nor the Equity Defendants ever participated in commodity transactions as either purchasers or sellers of commodity interests on a commodity exchange.

**5. Summary judgment should be granted to Shimer with respect to Count V of Plaintiff's First Amended Complaint.**

The specific arguments made previously by Defendant Shimer found on pages 21, 22 and 23 of his previous Brief dated July 7, 2005 in support of Shimer's previous Motion For Summary Judgment need not be repeated here in the interest of space. They are hereby incorporated by this reference.

[47] *CFTC v. Mass Media Marketing, Inc.* 156 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001).

## III. CONCLUSION

If we are truly a nation of laws, the law must apply to the government as well as to the governed--no matter how embarrassing, (politically, administratively or otherwise) that result might be. In the absence of action by Congress, the CFTC has absolutely no authority to 1) ignore consistent existing federal case law and the legislative history of its own enabling statute, 2) ignore its own rules and regulations and 3) ignore the previous testimony of its own expert witness in *Heritage* and extend, on an *ad hoc* basis, the term "pool" to any entity that it may choose.

> "The power of an administrative [agency] to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law ... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon V. United States*, 381 U.S. 68, 74, 85 S. Ct. 1301, 1305, 14 L.Ed.2d 223 (1965) (quoting *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134, 56 S. Ct. 397, 400, 80 L. Ed. 528 (1936)."

For all of the reasons previously stated, the Summary Judgment motions of Shimer and Firth should be granted. If legal counsel for the entity Equity Financial Group, LLC chooses to file a similar motion for Summary Judgment, Equity's motion should be granted.

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Respectfully submitted,

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