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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION,	:	Hon. Robert B. Kugler
Plaintiff, vs.	:	**Civil Action No. 04-1512**
EQUITY FINANCIAL GROUP LLC, TECH TRADERS, INC., TECH TRADER, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY		Motion Day January 5, 2007
Defendants.		

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BRIEF OF DEFENDANT ROBERT W. SHIMER IN SUPPORT OF MOTION FILED ON BEHALF OF HIMSELF *PRO SE* AND SEPARATE MOTION FILED BY VINCENT FIRTH PURSUANT TO L.Civ.R. 7.1(i) FOR RECONSIDERATION OF THE COURT'S DENIAL OF SHIMER AND FIRTH"S MOTIONS FOR SUMMARY JUDGMENT UNDER FEDERAL RULE 56(b)

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Defendant Robert W. Shimer ("Shimer") acting *pro se* submits this Brief in support of his Motion for Reconsideration of the Court's denial of Shimer's motion dated April 6, 2006 for summary judgment and in support of the separate similar motion for reconsideration filed timely by Defendant Vincent Firth (Firth). Both motions now filed with the Court request reconsideration of the Court's most recent opinion dated November 16, 2006 denying the summary judgment motions of both Shimer and Firth.

I. PRELIMINARY STATEMENT

Defendant Shimer filed a motion for summary judgment in the current matter last year dated July 7, 2005. The Plaintiff Commodity Futures Trading Commission (CFTC) filed a Response dated August 5, 2005 and Shimer filed a timely Reply dated August 13, 2005. The

Court issued an opinion dated October 4, 2005 and an accompanying order dated the same day denying Shimer's summary judgment motion and denying a similar motion for summary judgment filed separately by Defendant Firth. The Court's opinion dated October 4, 2005 cited three separate conclusions as the basis for its decision:

> 1) That "Heritage involved an operation very similar to Shasta". (See the court's October 4 opinion, page 8); and,
>
> 2) That "Shasta satisfies the four factors of the Lopez test". (See the court's October 4, 2005 opinion, pages 7 and 8.); and,
>
> 3) That "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool" (See the court's October 4, 2005 opinion, page 9).

On April 7, 2006 Shimer filed a renewed motion for summary judgment dated April 6, 2006. Defendant Firth also separately filed a renewed motion for summary judgment. In support of his motion Shimer filed a brief dated April 6, 2006. Shimer's brief filed in support of his renewed motion for summary judgment was filed with the Court on April 7, 2006. Defendant Firth's renewed motion for summary judgment specifically referred to and relied upon the Shimer's brief. The Court issued an opinion dated November 16, 2006 again denying the summary judgment motions of both Shimer and Firth.

The Court's opinion dated November 16, 2006 is remarkably and (with all due respect) suspiciously similar to its previous opinion dated October 4, 2005. The Court offers the exact same above cited conclusions as a reason to deny Shimer and Firth's renewed motions for summary judgment with respect to all counts of Plaintiff's First Amended Complaint. Conclusions initially in error are not made correct by mere repetition.

II. ARGUMENT

A . The Court erred in concluding that the facts in *Heritage* and the facts of Shasta are similar and the Court cannot avoid the appearance of partiality to the Plaintiff in violation of 28 U.S.C. § 455(a) unless and until the Court specifically addresses and discusses the factual information, points and arguments contained in Section IIA of Shimer's brief dated April 6, 2006.

The Third Circuit Court of Appeals is very clear about the appropriate standard of behavior necessary for district court judges to avoid the appearance of partiality that triggers disqualification under 28 USC § 455(a). The proper standard to be applied under § 455(a)

was discussed at length in the 2004 opinion of *In re: Kensington International Ltd.* 368 F. 3d 289 (3rd cir. 2004). The *Kensington* court began its discussion of the proper standard for disqualification under that section of the United States Code at page 301 of its opinion by stating:

> "Whenever a judge's impartiality "*might reasonably be* questioned" in a judicial proceeding, 28 U.S.C. § 455(a) requires that the judge disqualify himself. The test for recusal under § 455(a) is whether a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality *might reasonably* be questioned." (Emphasis added)

The appropriate standard is simply whether a reasonable man with knowledge of all the circumstances "...would harbor doubts about the judge's impartiality..." See *In re Prudential Ins. Co. of America Sales Practices Litigation* 148 F.3d 283 at 343 (3d Cir. 1998). *Kensington* cited further to *Selkridge v. United of Omaha Life Ins. Co.* 360 F.3d 155, 167 by further pointing out "The standard for recusal is whether an objective observer might question the judge's impartiality."

According to the *Kensington* court "[a] party moving for disqualification under § 455(a) *need not show actual bias* because § 455(a) 'concerns not only fairness to individual litigants, but, equally important, it concerns "the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge *who appears to be tainted*" ' " (emphasis added) *Kensington* at page 302 citing to *Alexander v. Primerica Holdings, Inc* 10 F.3d 155, 162 (3d Cir. 1993) quoting *In re School Asbestos Litigation* 977 F. 2d 764,776 (3d Cir. 1992) further citing to *Liljeberg v. Health Servs. Acquisition Corp.* 486 U.S. 847, 859-60 (1988).

In *Alexander* as well as in *Kensington* the Third Circuit court did not indicate that it felt that either judge in question had engaged in *actual bias.* (see *Alexander* at page 163 and *Kensington* at page 294.) In granting petitioner's request for disqualification of Judge Lechner pursuant to § 455(a) in *Alexander* the court noted at page 166 that it was "not unaware of the problems confronting district judges who are charged with bias or the appearance of bias...nonetheless, an inherent aspect of a judge's position when the oath of judicial office is taken, is that the judge will be seen and heard only thorough his or her opinions."

1. Shimer's motion for summary judgment cannot be reasonably denied without fairly and reasonably answering in any opinion denying that motion the question posed by Shimer on page 30 of his previous brief dated April 6, 2006.

Shimer respectfully requests that the Court reconsider its conclusion with respect to the factual similarity between the present matter and the case of *CFTC v. Heritage Capital Advisory Services, Ltd. et al* Comm. Fut. L. Rep (CCH) ¶ 21,627 (N.D. Ill 1982). Shimer specifically refers the Court back to his brief dated April 6, 2006 filed in support of his renewed motion for summary judgment and specifically *incorporates by this reference that previous brief filed by Shimer with the court*.

Shimer would specifically and pointedly request, with all due respect, that in the course of reconsidering its opinion dated November 16, 2006 the court *actually take the time to read* Exhibits A through E attached to his previous brief dated April 6, 2006. Section IIA of that brief dated April 6, 2006 spends 8¾'s pages (pages 5 though most of page 13) painstakingly discussing the Exhibits attached to that brief and the information contained therein. The Court's apparent willingness to again conclude that the case of *Heritage* is useful precedent for finding that Shimer's previous legal client Shasta is a commodity pool under the Commodity Exchange Act (CEA) is not only misplaced and in error—it flies in the face of the clear documentation contained in those five attached Exhibits that clearly support a contrary conclusion.

The testimony of the CFTC's own expert witness, one Charlotte Ohlmiller found in Exhibit E attached to and specifically referenced on pages 29 through half of page 32 of Shimer's previous brief dated April 6, 2006 (but more specifically on page 30) clearly confirms that *even members of the general public* must open a commodity trading account at a futures commission merchant (FCM) in order to become 'involved" in the futures markets. That statement is apparently true and can be taken by the court to be true since there is absolutely no evidence or documentation that has ever been introduced by the Plaintiff CFTC into the pretrial record of the current matter to contradict that previous expert witness testimony of Ms. Ohlmiller offered by the CFTC in the *Heritage* case.

Moreover before the court can come to the conclusion that the entity Shasta is a commodity pool within the meaning of the (CEA) it is *absolutely incumbent* that the court avoid the possibility that its impartiality might be later questioned. [See 28 U.S. C. § 455(a)]. It is, therefore, incumbent that if the court is determined to again deny Shimer's motion for summary

judgment, it must fairly, dispassionately and reasonably address and answer the following question basically proposed on page 30 of Shimer's April 6, 2006 brief:

> "if members of the general public must apparently open a commodity futures trading account at an FCM to become "involved" in the futures market according to the CFTC's own expert witness in *Heritage* how can any court reasonably conclude that an entity such as Shasta that never opened such an account or had such an account opened in its name is a commodity pool?

To date the court has not only failed to provide a reasonable answer to the above stated question, it has apparently *chosen to avoid any reference or mention* of that highly important and relevant question in its opinion. Further refusal or inability to answer that question while still denying Shimer's still pending motion for summary judgment implies that no such reasonable answer is readily available to the court. Defendant Shimer suggests, with all due respect, that any opinion of the court that purports to again deny Shimer's motion for summary judgment *without specifically addressing and providing a reasonable, fair, measured and logical answer to that question* is acting in an arbitrary and unreasonable manner and is exhibiting not just the *appearance* of partiality but clear partiality to the uncomfortable position plaintiff now finds itself in light of Shimer's ability to produce certified actual *Heritage* court documentation from the Chicago Federal Records Center to effectively rebut the previous unfounded position of Plaintiff that the facts of *Heritage* are at all "similar" to the facts of Shasta.

Whether or not the entity Shasta can be held to be a commodity pool not only in the absence of an essential material fact stated by apparently controlling case law to be essential to such a finding [see *Lopez v. Dean Witter Reynolds, Inc.* 805 F. 2d 880 (9th Cir. 1986)] but also in the face of the plaintiff's *own clear admission that no such trading account at an FCM in the name of the entity Shasta ever existed* [1] is an issue that is central and critical to Shimer's pending motion dated April 6, 2006 for summary judgment.

2. Shimer's motion for summary judgment cannot be reasonably denied without fairly and impartially addressing the full implications of the testimony of the CFTC's expert witness in *Heritage* found on pages 31 and 32 of Shimer's brief dated April 6, 2006.

On pages 31 and 32 of Shimer's brief dated April 6, 2006 the Court was also provided with the text of additional testimony provided by the CFTC's own expert witness Charlotte

[1] (see page 1 footnote 1 of the CFTC's previous Response dated August 5, 2005 to Shimer's previous motion for summary judgment dated July 7, 2005)

Ohlmiller both on direct questioning by legal counsel for the CFTC and also upon cross examination by legal counsel for the *Heritage* defendants. In that testimony the CFTC's expert witness Ms Ohlmiller confirmed under oath *the exact point* Shimer has, for more than a year, tried without success to point out to the court and which, for some inexplicable reason, the court has steadfastly, studiously and consistently resisted and ignored. In response to a question on direct examination by legal counsel for the CFTC in the *Heritage* matter about what a commodity pool operator (CPO) does, the CFTC's expert witness stated as clearly as the English language can possible convey as follows:

> "He puts it in 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, and *then he can begin trading* commodity futures contracts."[2] (Emphasis added)

That testimony of the CFTC's previous expert witness in the *Heritage* case literally shreds the CFTC's contention in the present matter that Shimer's previous legal client Equity acted as the CPO of the entity Shasta. If the CFTC has admitted (as it has) that a commodity futures trading account at a futures commission merchant (FCM) in the name of Shasta was never opened by the entity Equity (or by anyone else) since no such account in the name of Shasta exists anywhere how can Shasta's manager Equity be held to be a CPO if Equity never did *any* of the things the CFTC's own expert witness in *Heritage* said individuals or entities must do to be CPOs?

The court's opinion dated November 16, 2006 goes far beyond never adequately explaining how that inherent contradiction between the facts of the present matter can be squared with the above cited testimony of the plaintiff's expert witness in *Heritage*. By refusing to even acknowledge *in any way* that such expert testimony under oath in *Heritage even exists* the court's opinion dated November 16, 2006 creates far more than simply the *appearance* of impropriety and partiality—it provides a clear and obvious basis for any reasonable outside objective observer to conclude that a refusal *to even mention or refer in any way* to such relevant and potentially dispositive information is unreasonable, arbitrary and clear evidence of a willingness of the court to "do whatever is necessary" to virtually ignore without any obvious

[2] See page 31 of Shimer's brief dated April 6, 2006. See also pages 174 and 175 of the *Heritage* hearing transcript attached as a part of Exhibit E to that summary judgment brief.

reason substantial, credible information that is highly relevant and clearly favorable to Shimer's pending dispositive motion for summary judgment now before the Court.

Until the court addresses and explains in its opinion how it is possible to deny Shimer's motion for summary judgment despite the clear testimony of the CFTC's own expert witness in *Heritage* cited above and also on pages 31 and 32 of Shimer's brief dated April 6, 2006 such a denial cannot survive the clear standard imposed upon the court by 28 U.S. C. § 455(a).

3. Shimer's motion for summary judgment cannot be reasonably denied without fairly and impartially explaining why the offering material information contained in sub exhibit C of Exhibit A, and the cited relevant portions of the CFTC's complaint in *Heritage* and the *Heritage* Defendants' Answer found in Exhibit B (all specifically discussed in detail in Shimer's brief dated April 6, 2006) do not require a conclusion that the funds of the entity *Heritage* were clearly being traded under a traditional power of attorney conferred upon Robert Serhant by the entity Heritage to conduct commodity futures trading from a trading account opened *in the name of* the entity Heritage.

Defendant Shimer urges the Court to reconsider the erroneous conclusion found on page 8 of the November 16, 2006 opinion that: "Heritage involved an operation very similar to Shasta". In support of this request Shimer specifically refers the court generally to pages 5 through 13 of his brief dated April 6, 2006. Shimer further specifically asks the court how it is possible to conclude after actually examining sub-exhibit C to Exhibit A attached to Shimer's April 6, 2006 brief that the relationship between Robert Serhant's company Financial Partners Brokerage, Inc. was not a traditional arrangement whereby the customer grants to its broker a power of attorney to trade a commodity trading account opened *in the name of* the customer.

Clearly the language of sub-exhibit c to Exhibit A cited on page 8 of Shimer's April 6, 2006 brief describes such a usual and traditional arrangement. If that conclusion is not correct with respect to the facts of *Heritage*, it is incumbent upon the court to engage in at least *some discussion* of why that conclusion is not a correct one. The court has, to date engaged in no such discussion and the absence of such a discussion clearly violates the prohibition against *the mere appearance* of partiality found in 28 U.S.C. § 455(a). Why the court chose not to discuss this highly relevant information is not explained in its opinion. Ignoring highly relevant information that is favorable to the defendant's pending motion for summary judgment conveys neither the appearance nor the reality of impartiality.

Shimer would further point out that the Court's opinion dated November 16, 2006 is also strangely silent with respect to the discussion of the language of the Plaintiff's Complaint

For Injunctive Relief filed in *Heritage*. The relevant part of the Plaintiff's complaint in *Heritage* was attached to Shimer's brief dated April 6, 2006 as a part of Exhibit B. Shimer's discussion of the language of Plaintiff's complaint relevant to the issue of the supposed "similarity" between the entity Heritage and the entity Shasta is found on page 10 of his April 6, 2006 brief.

The court was specifically directed on page 10 of Shimer's April 6, 2006 brief to certain highly relevant language contained in paragraph 17 of the CFTC's complaint in the *Heritage* matter *not found anywhere in the Heritage opinion*. The second and third sentences of that paragraph 17 are highly relevant and particularly instructive with respect to the issue of whether or not the facts of Heritage are at all "similar" to the facts of Shasta. Yet the Court's opinion dated November 16, 2006 remains strangely silent about the clear implications of this additional information made available in good faith by Shimer while apparently choosing to champion a conclusion favorable to the Plaintiff that is directly contradicted by the very information contained in the CFTC's *Heritage* complaint!

One is not simply tempted—one is literally forced to conclude (to quote the Third Circuit) that any continued willingness of the court to specifically ignore the clearly relevant information contained in Exhibits A and B attached to Defendant Shimer's brief dated April 6, 2006 and Shimer's discussion of that information in his April 6, 2006 brief would create not just the appearance of impartiality and impropriety but "...an almost irrebutable presumption...". (See *Kensington* at page 308). Any further denial of Shimer's motion for summary judgment dated April 6, 2006 must adequately address and discuss the information made available to the Court in Exhibits A and B attached to Shimer's brief of that same date to avoid the *appearance* of impropriety disallowed by 28 U.S.C. § 455(a).

All of the exhibits attached to Shimer's brief dated April 6, 2006 deserve to be read and receive a fair and impartial review and analysis by the court. Shimer's affidavit attached to his brief dated April 6, 2006 stated under oath that he retains the original ribbon bound copies of Exhibits A through E in his possession and that the exhibits attached to his brief were true, accurate and correct copies of the original ribbon bound certified copies of the documents contained in Exhibits A through E still in Shimer's possession. The court is, therefore, required to consider the information contained in the properly certified documents attached to Shimer's brief dated April 6, 2006 marked as Exhibits A through E and specifically referenced in Shimer's affidavit. Both Shimer's affidavit and the exhibits themselves are sufficient under Federal Rule 56(e) to require the attention of the court in considering Shimer's Rule 56(b) summary judgment motion.

B. The Court erred in concluding that "Shasta satisfies the four factors of the Lopez test" and the Court cannot avoid the appearance of partiality to the Plaintiff in violation of 28 U.S.C. § 455(a) unless and until the Court specifically addresses and discusses the points and arguments contained in Section IIB of Shimer's brief dated April 6, 2006.

In addition to the supposed "similarity" between Shimer's previous legal client Shasta and the entity Heritage another reason given by the Court in its opinion dated November 16, 2006 for denying Shimer's motion for summary judgment was that Shimer's previous legal client Shasta satisfies all four parts of the *Lopez* test. In apparent support of that conclusion the court's opinion dated November 16, 2006 once again concluded (as it had in its opinion dated October 4, 2005) that Shimer's reading of the apparently applicable *Lopez* decision of the Ninth Circuit Court of Appeals (*Lopez v. Dean Witter Reynolds, Inc.* 805 F. 2d 880 (9th Cir. 1986) was "too literal".

1. A continued denial of Shimer's motion for summary judgment on reconsideration cannot survive § 455(a) scrutiny unless the court is willing to specifically engage in a discussion of why the "context and content" argument of Shimer found in Section IIB of his April 6, 2006 brief is not a legitimate approach to interpreting the clear language of *Lopez*.

Shimer's brief dated April 6, 2006 filed in support of Shimer's current motion for summary judgment pointed out to the Court in excruciating detail the error of the court's previous conclusion (found also in its opinion dated October 4, 2005) that Shasta qualifies as a commodity pool under the four part test enunciated by *Lopez*. Shimer spent 5 ¾ pages in his April 6, 2006 brief[3] in support of his current motion for summary judgment providing a clear and compelling analysis of the four tests and demonstrating that these four tests were not severable as the Plaintiff apparently contended but clearly must be *read together* and that all of the "tests" *must be applied to the same "account"* of the entity that is alleged to be a "commodity pool"! Shimer further pointed out in his April 6, 2006 brief that this way of reading the four tests enunciated by the *Lopez* court was the *only approach* that made any sense in light of *both the factual context* in which the four tests were enunciated by the *Lopez* court

[3] See pages 14 though 19 of that April 6, 2006 brief.

and also in light of *the specific language adopted and used* by the *Lopez* court in formulating these four clear and unequivocal tests. (See generally pages 14 through 19 of Shimer's April 6, 2006 brief incorporated by this reference).

Shimer challenges *anyone* (regardless of whether or not they have a legal background or legal training) to actually *read the Lopez decision* and then conclude *with any credibility* that the analysis offered by Shimer in his April 6, 2005 brief is contrary to the clear language and context of the *Lopez* decision. *Lopez* found that no prior court had attempted to set forth clearly all of the basic elements necessary for finding that a "commodity pool" exists under any particular set of facts. The Ninth Circuit court in *Lopez*, therefore, purported to do just that and laid out a very simple, clear and unequivocal test that consisted of four sub parts.

In creating these four tests the *Lopez* court stated in its opinion that reference to the language of the CEA was not sufficient or helpful in resolving under any particular set of facts the simple question: "What is a commodity pool?" The *Lopez* court then referred only to previous federal case law and compiled and enunciated the four tests that have been since cited with approval *by a number* of federal courts including the Third Circuit at least in a footnote[4]. To Shimer's knowledge, *no federal court* has *ever* stated that the four tests enunciated by *Lopez* for determining whether or not a particular entity is a "commodity pool" are wrong, incomplete or contrary to previous case law. The Plaintiff has *never* offered such an argument to the Court in any previous filing nor has the Court purported to offer *any analysis* of *Lopez* that would lead one to conclude that the court disagrees in any way with the specific language of the four tests enunciated by *Lopez*.

The *Lopez* Court then applied the four tests it had enunciated and held that *because one of those four tests was not present in the matter before it*, (pro rata distribution of profits) the Plaintiff's claim that the defendant was operating a "commodity pool" could not be sustained. *Anyone* able to read the English language and, who is, therefore, able to read the clear and unequivocal language used by the Ninth Circuit Court in formulating the content of these four tests can see without the need for any "deep" analysis that the language of test #2 follows logically from test #1. Furthermore the language chosen in test #4 is also a clear, logical and necessary extension of the language and meaning of the words used by the *Lopez* court in constructing tests #1 and #2.

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[4] See *Nicholas v. Saul Stone & Co.* 224 F.3d 179. (3d Cir 2000) (footnote 4 on page 181. The text of that footnote is found at the end of the Court's opinion.

Shimer's clear discussion of the interconnected nature of the four tests of *Lopez* found in Section IIB of his brief dated April 6, 2006 provided to the court a clearer and more persuasive argument than Shimer's brief dated July 7, 2005 for the logic and necessity that the language of test #4 of Lopez be simply read to mean what it actually says. Shimer pointed out in his brief dated April 6, 2006 that the language of test #4 *is clearly a logical and necessary extension of the language of tests #1 and #2.* In the absence of the critical material "fact" clearly and specifically required *not only by Lopez test #4 but also by implication in both tests #1 and #2* (a commodity trading account established *in the name of* the purported pool entity) Shimer's previous legal client Shasta literally fails three of the four tests of *Lopez*! In the absence of an essential material fact *(admitted not to exist in Plaintiff's Response brief dated August 5, 2005)* a ruling in favor of Shimer's motion for summary judgment is not only appropriate but ***required*** under the Federal Rules and Supreme Court case law. (In addition to Shimer's brief dated April 6, 2006 the court is respectfully also referred to the discussion of *Celotex Corp. v. Catrett* 477 U.S. 317 (1986) on pages 5 through 7 and the Federal Rule 56(b) discussion on page 15 of Defendant Shimer's Brief dated July 7, 2005 submitted in support of Shimer's summary judgment motion also dated July 7, 2005).

The Court's continued unwillingness to engage in *any discussion or refutation* of Shimer's *Lopez* analysis in any opinion issued in response to this reconsideration brief would clearly raise significant questions about the Court's required impartiality in the mind of the traditional "man on the street" (see *Kensington* at page 303). Shimer, therefore, now urges the court to abandon its previous unwillingness to *even mention* let alone specifically address the discussion of *Lopez* found on 5 ¾'s pages of Shimer's April 6, 2006 brief (See pages 14 through 19). Any such continued apparent willingness on the part of the Court to virtually ignore what appears to be a logical and straightforward analysis of the specific clear language of *Lopez* certainly raises a substantial question whether the Court truly has an adequate reason for rejecting the analysis offered by Shimer in support of his motion for summary judgment. In order to avoid disqualification under the clear standard enunciated by *Kensington* and the cases cited therein it is incumbent upon the court to engage and, if at all possible, refute Shimer's analysis if the court intends to again deny, on reconsideration, Shimer's motion for summary judgment.

2. The Court's opinion dated November 16, 2006 appears to insist upon using words to describe a commodity pool that do not at all convey the same meaning of the words specifically chosen by the *Lopez* court and also by the CFTC when the Plaintiff's own regulatory definition of the term "pool" was narrowed over 25 years ago

After reiterating on page 5 of its opinion dated November 16, 2006 the statutory definition of a "commodity pool operator" (clearly found by *Lopez* to not be very helpful in determining whether or not a "commodity pool" exists under any particular set of facts) the court begins its "commodity pool" analysis on page 6 by making a statement that is not necessarily wrong but, as Shimer has previously pointed out in the context of his *Heritage* discussion, is simply incomplete in a very critical way (see first paragraph of section IIA on page 5 of Shimer's brief dated April 6, 2006). The court offers (in light of the clear language of *Lopez*) the following incomplete statement about what constitutes a "commodity pool" on page 6 of its November 16, 2006 opinion:

> "A commodity pool is distinguished from other investment entities by the aggregation of investors funds into a single account. Funds from the account are then invested without regard to the source of specific funds, and the profits and losses are distributed pro rata among investors".

Clearly funds of the purported pool entity have to be "aggregated" or "pooled" into a single account. It is also true that funds from the account are then "invested" without regard to "the source" of those funds. However, what the court apparently seems determined to ignore is that specific words have specific meanings. The word "invest" is accurate as far as it goes but the word "invest" does not specifically convey exactly what a "pool" entity does. For example, *the members* of a commodity pool "invest" when they become members of the pool entity. The fact that a pool member funds are "invested" eventually in an activity that involves commodity futures trading does not necessarily mean that members of a commodity pool are themselves a "commodity pool" subject to the registration requirements of the CEA!

The Court seems determined for some inexplicable reason to ignore the fact that the language of *Lopez* is far more specific and detailed about what a commodity pool *actually does* with the funds of its members that it "pools". A commodity pool does not merely "invest". That word is correct *but it does not go far enough.* To be a "commodity pool" (according to *Lopez* test #2) the purported pool entity *uses the pooled funds of its members* to "execute transactions" "on behalf of the entire account". What *Lopez* is clearly requiring in test #2 is far more than just the vague activity of "investing". *Lopez* requires that the pool actually "execute transactions". What transactions? *The buying and selling of commodity futures contract on a recognized*

futures exchange. And it should also be noted that the "account" referred to in test #2 is clearly the same "single account" into which the funds are initially "pooled" as described in Test #1.

The typical "man on the street" required by *Kensington* would certainly be inclined to ask himself why is the distinction between the rather vague word "investing" and actual participation in the execution of specific "transactions" so difficult for the court to grasp? What possible reason could the court have for ignoring that clear and obvious distinction? Why is the court's offered "definition" of a commodity pool found on page 6 of its November 16, 2006 opinion so woefully lacking in such important specificity? A lack of impartiality and an apparent unwillingness to rule in a manner favorable to the defendant Shimer certainly is one explanation. It is the "*appearance* of impropriety" not *actual* bias that governs the application of 28 U.S.C. § 455(a) according to the Third Circuit.

The members of a pool clearly don't "execute transactions" do they? No. That is the daily activity of the pool entity itself. The members of a "pool" play absolutely no part in the actual daily *investment activities* of the pool entity. The members of a pool (to use the court's favorite word) simply "invest". The *members* of a "commodity pool" enjoy (hopefully) the investment *benefit* of being a member of an entity that engages in "transactions" that involve the buying and selling of commodity futures transactions *in the name of the pool entity*. However, much like a limited partner in a limited partnership or the member of a limited liability company the *members* of a pool do not at all participate in the day to day trading activities of the pool expected to hopefully generate the investment profits all members of the pool seek.

One finds the same sort of clear unequivocal specificity in the plaintiff CFTC's own definition of the term "pool" found at 17 C.F.R. § 4.10 (d) (1). According to the CFTC itself when the existing definition of a pool (that actually *narrowed the definition* of a pool) was offered to the public over 25 years ago on August 14, 1980 the CFTC explained its new proposed definition then as follows:

> "As proposed and as adopted § 4.10 (d) narrows the definition of the term "pool" by specifying that it is an entity "operated for the purpose" of trading commodity interests" [5]

[5] See Comm Fut. L. Rep. (CCH) ¶21,188 at p. 24,891 also specifically cited by *Lopez* at page 184. This document was reproduced for the benefit of the Court and attached as Exhibit A to Shimer's previous Reply brief dated June 8, 2005 to Plaintiff CFTC Response to Shimer previous brief and motions under Rule 12(b)(1) and (6) dated April 13, 2005.

The CFTC's existing definition requires that the purported "pool" be "operated" for the purpose of "trading". Shimer has already provided the court with the dictionary definition of the word "operate". [6] The CFTC's definition does *not* purport to define as a "pool" an entity simply "organized" for the purpose of "investing" in commodity futures. Words have specific meanings. Courts and regulatory agencies hopefully use the words they choose very carefully and specifically to convey what they mean and intend. Clearly that is what the *Lopez* court apparently did when it enunciated its clear four part definition of what constitutes a "pool". That is also what the Plaintiff CFTC apparently did over 25 years ago when it offered its more narrow definition of what a "pool" entity is.

Shimer uses the word "apparently" in both of the above last two sentences of the above paragraph because in the absence of any evidence to the contrary it is clearly reasonable to conclude that both the *Lopez* court and the Plaintiff chose their words very carefully. In the context of what the *Lopez* court clearly purported to do when it enunciated its four part test and in the context of exercising its rule making authority by more narrowly redefining the term "pool" that had been first subjected to public comment it would be unreasonable and contrary to common sense to conclude that either the *Lopez* court or the CFTC hastily chose words whose meaning was not carefully considered beforehand.

Trading by the alleged pool entity itself *in the name of the pool entity* (however deminimis that trading might be) *has to occur* to meet the regulatory definition offered by Plaintiff and to meet the clear meaning of the words specifically chosen by the *Lopez* court when its four part test was devised. That Shimer has, without success, been making this same, clear unequivocal argument to the court now in different ways for over 1 ½ years to no avail has been a frustrating experience to say the least.

Looking more specifically at what Shimer's previous legal entity Shasta did it is clear that the entity Shasta was merely "organized" for the purpose of "investing" with the entity Tech Traders, Inc. ("Tech") and other entities that purported to engage specifically in the trading of commodity futures contracts from accounts established *in the name of* the entity that was actually doing the trading. That activity by the entity Shasta *is not sufficient* under either the plaintiff's own regulatory definition or under the four tests of *Lopez* to allow the court to now conclude that Shasta is a "commodity pool". Words have specific meanings. If the CFTC wants to specifically propose that the definition of a commodity pool be changed to read in a

[6] See pages 26 and 27 of Shimer's brief dated April 6, 2006.

way compatible with the court's apparent desire to find the existence of a "pool" in the activities of Shasta we would have to see the definition of a "pool" changed by the CFTC to read something akin to the following:

> "A pool is an entity organized for the purpose of investing in such a manner as to realize benefit or to suffer loss as the result of the trading of commodity futures contracts."

One can only imagine the hue and cry that would arise from entities that are now simply members of a commodity pool if *that* "new" definition were adopted by the CFTC. Suddenly every investment entity that "pools" or combines into any bank account the investment funds of more than one investor or member and then (like Shasta) simply forwards those funds to another separate entity in order to hopefully benefit from the commodity trading activities of that other entity would be subject to the CFTC's registration regulations! The CFTC has absolutely no regulatory requirement now that an entity that is simply a member of a commodity pool register in any way with that agency nor does any rational reading of the CEA support any such authority of the CFTC to suddenly require members of pools to register simply because they are a pool member.

And one can just imagine the confusion of numerous existing pool members that are entities with more than one shareholder or member trying to suddenly comply with the CFTC's CPO account statement requirements found at 17 C.F.R. § 4.22, the CFTC's CPO record keeping requirements found at 17 C.F.R. § 4.23 and the CFTC's CPO disclosure requirements found at 17 C.F.R. § 4.24!!! Yet according to the CFTC "impossibility" is no defense if this federal agency suddenly decides they want to "regulate" *you!*[7]

The "new" definition for a commodity pool proposed above by Shimer would certainly make the CFTC happy at least in the context of the present matter before the court. The past two opinions of the court dated October 4, 2005 and November 16, 2006 seem to indicate that the court is absolutely determined to engage in an artful substitution of words that don't fully and accurately convey the same meaning used by the words found in either the plaintiff's regulatory definition of the term "pool" or the words specifically and apparently carefully chosen by the *Lopez* court when it enunciated its specific four part test that purported to simply summarize and explain what previous federal courts had concluded commodity pools do. If

[7] See page 16 of the CFTC's Response brief dated June 2, 2005 where the CFTC responded to Shimer's attempt in his brief dated to point out that the agency's CPO regulations as written do not apply to entities that do not engage in the actual trading of commodity contracts by characterizing Shimer's argument as a meritless "impossibility defense" !

such an artful substitution of critical words is continued by the court in response to Shimer's present motion for reconsideration it seems almost impossible for the court to avoid *the appearance* of partiality to *Kensington's* "man on the street".

3. The Court's opinion dated November 16, 2006 purports to cite to cases that do not, under any stretch of the imagination, provide a reasonable basis or authority for ignoring the clear and specific words chosen by the *Lopez* Court in formulating its four part test.

a. Regarding *Nilsen v. Prudential-Bache Securities*

After reiterating the four tests of *Lopez* on page 6 of its opinion dated November 16, 2006 the court cites to *Nilsen v. Prudential-Bache Securities* 761 F. Supp. 279, 292 (S.D N.Y. 1991) apparently in search of a quote "somewhere" "somehow" that purports to agree with the court's own incomplete definition of a commodity pool. The quote from *Nilsen* offered by the Court on page 6 of its opinion dated November 16, 2006 is misplaced and fails to provide the court with *any support at all* for its apparent and inexplicable willingness to reinterpret and revise in a manner favorable to plaintiff the clear meaning of the words chosen carefully by the Ninth Circuit court in *Lopez*. The quote and the cite to *Nilsen* on page 6 was clearly undertaken by the court with the *apparent* unrealistic expectation that defendant Shimer would simply take the court at its word that *Nilsen* was at all truly relevant to the court's new proposed way of redefining the term "commodity pool".

The truth is the defendant in *Nilsen* was never alleged to have operated a commodity pool nor was the absence or presence of a commodity pool a real issue at all in that case. It is truly extraordinary that in search of an *apparent* willingness to side with the Plaintiff in the present matter the court's opinion seeks confirmation of the correctness of its own incomplete definition by citing to a decision such as *Nilsen*. The court's willingness to find and then cite a random "Lopez quote" from a case such as *Nilsen* while pretending that the cited quote represents a careful or serious confirmation of its own "reinterpretation" of *Lopez* is just the sort of apparent lack of partiality that triggers the application of 28 U.S.C. § 455(a).

In *Nilsen* the plaintiff Terje Nilsen alleged that the defendant Prudential-Bache Securities, Inc, a "futures commission merchant" lied about and then churned Nilsen's commodity option trading account thereby committing fraud in violation of section 4b and 4o of the CEA. (See *Nilsen* at page 282). How a case that is initiated as a result of Nilsen's substantial losses suffered as the alleged result of alleged unauthorized churning of his commodity trading account at an FCM is a case that is at all helpful in determining whether or

not an commodity trading account at an FCM must exist per *Lopez in the name of* an entity such as Shasta is truly a mystery that can only be explained by the court should it choose to engage in such any such explanation.

One of the pivotal issues the court addressed in *Nilsen* was whether or not the arbitration agreement that existed between the Plaintiff and the Defendant applied to all trades executed by the defendant on behalf of the Plaintiff's option trading account or only to trades executed by the Defendant on contract markets regulated by the CFTC. (See *Nilsen* at page 285). After a lengthy discussion of the "contract market" issue with respect to the plaintiff's claim that defendant also violated section 4*o* of the CEA the *Nilsen* court noted on page 288 of its decision that:

> "...§4o of the CEA is entirely inapplicable to plaintiff's claims because that section applies only to "commodity trading advisors" and "commodity pool operators," of which defendant is not alleged to be either..."

After discussing the plaintiff's churning and unauthorized trading claims the *Nilsen* court returns briefly on page 292 to a discussion of the obvious inapplicability of § 4*o* of the CEA. In support of its conclusion that § 4*o* of the CEA is inapplicable to the defendant the *Nilsen* court simply quotes the statutory definitions of a CTA and CPO found according to the court at 7 U.S.C. §2 (which, as noted, Lopez found not to be particularly helpful in determining whether or not a commodity pool exists with respect to any certain set of facts) and then makes the gratuitous statement purporting to summarize *Lopez* cited by the Court in its opinion dated November 16, 2006 on page 6!

b. Regarding *Meredith v. ContiCommodity Services, Inc.*

The court cites *Meredith v. ContiCommodity Services, Inc.* Comm. Fut. L. Rep. (CCH) ¶ 21,107, 24,462 several times for varying propositions that are not at all supported by that decision if one simply takes the time to actually understand the facts of *Meredith* and then simply reads what the *Meredith* court actually said. First of all it seems a bit disingenuous for the court to try to cite *Meredith* for the proposition that *Lopez* did not really mean what it said when it is clear from a reading of *Lopez* that *Meredith* was one of the previous cases cited by the *Lopez* court in formulating its four specific tests. Instead of arguing that the *Lopez* court did not "understand" the case that it cited, the court prefers to contend that any misunderstanding should be attributed to Shimer. On page 9 of its opinion dated November 16, 2006 the court purports to "know" what the *Lopez* court "really meant" when it chose the language it did for

the fourth test. On that page of its opinion we find the following quote after accusing Shimer of a "too literal" interpretation of the words chosen by *Lopez* for its fourth test:

> "The Court intended the fourth factor to distinguish cases, such as Meredith, where investments are made in many of the same enterprises in the name of individual investors without pooling funds together in a single account."

First of all there is more than just one "reason" for why the *Lopez* court selected the exact words it did in formulating its fourth test. Shimer has adequately addressed previously one of the most obvious-- that the specific language chosen for the fourth test is simply a clear, logical and necessary extension of the specific language of Tests #1 and Tests #2. (See Shimer brief dated April 6, 2006 pages 14 through 17). Another separate possible "reason" the fourth test reads, literally, the way it does is the fact (pointed out previously by Shimer on page 33 of his brief dated April 6, 2006) that the pool entity itself is merely a surrogate alternative for what investing members of the general public must do if they wish to become "involved" in the futures markets-open an account *in their name* at an FCM! (See the CFTC's expert witness testimony in Heritage discussed previously). When members of the general public become members of a "commodity pool" the account is, of course opened not *in their name* but in the name of the pool itself—just as *Lopez* described.

This last particularly logical "reason" also seriously undermines the court's strained attempt to "find" an alternative "meaning" to the otherwise clear and unequivocal language chosen by the *Lopez* court when formulating the fourth test. Why should the *Lopez* court use the exact words it chose merely to "distinguish" a case like *Meredith* that is not being cited by *Lopez* for any reason other than to apparently justify the *Lopez* court's compilation of *all four* of the tests it enunciated? The *Lopez* court doesn't purport to single *Meredith* out as justification for any particular test. In fact just the opposite is true.

Apart from the fact that no language exists at all in the *Lopez* opinion that provides *any basis at all* for arriving at the court's conclusion that *Meredith* was merely cited to "distinguish" the language of the fourth test it should also be obvious to anyone willing to actually read the *Meredith* decision that *Meredith* actually discusses *all* of the *Lopez* tests! But in *Meredith* two of the tests were simply combined. On page 24,462 of its opinion the *Meredith* court states:

> "An actual commodity pool would clearly meet all three parts of the *Howey* test and be an investment contract subject to the securities laws. In a commodity pool, all investors funds are placed in a single account. The transactions are then executed on behalf of the entire account and not allocated to any particular investor. The investor's profits and losses are then allocated by shares to individual investors based on their contribution to the fund."

It is very clear that the above cited quote really refers (albeit in slightly different language) to *all four* of the *Lopez* tests. The second sentence of the above quote contains the substance of *Lopez* test #1. The third sentence above begins with language similar to the language of *Lopez* test#2 (transactions are "executed on behalf of the entire account") and the last sentence of the above paragraph reflects the substance of *Lopez* test #3. If as *Meredith* suggests, transactions are, indeed, executed on behalf of the entire account rather than in the name of an individual investor then the trading account from which those "transactions" are executed by logical necessity would clearly be *in the name of* the pool entity itself and not in the name of an individual investor. *Lopez* simply to clarify with greater specificity with its test #4 what is implied when "transactions" are "executed on behalf of the entire account".

Contrary to the court's strained and rather convoluted attempt to "interpret" what *Lopez* supposedly "intended" by test #4 based solely upon the *Meredith* court's use of the phrase "and not allocated to any particular investor" the facts of Meredith themselves are clearly NOT the reason the *Meredith* court found it necessary to add that phrase at the end of the third sentence above. In *Meredith* the defendant had been given authority by the Plaintiff to trade the Plaintiff's discretionary commodity account. Before the *Meredith* court was the defendant's motion for summary judgment with respect to count VI A of Plaintiff's amended complaint alleging that the defendant had also violated the Securities Act of 1933 by inducing the Plaintiff to open a discretionary commodity trading account and authorize a representative of the defendant to trade the account.

Most of the *Meredith* opinion *has nothing at all to do with the subject of commodity pools*. Before the *Meredith* court was the issue of whether or not a discretionary commodity trading account is a "security" within the meaning of the Securities Act of 1933. The court granted defendant's motion for summary judgment with respect to Count VI A holding that such an account was not a security. The court's decision turned upon a discussion of the Supreme Court decision of *SEC v. Howey* Co. 328 U.S. 293 (1946) which had enumerated three tests for determining if a particular transaction qualifies as an investment contract.

Before the Meredith court was the more specific question of whether the arrangement whereby the defendant was authorized to trade the plaintiff's discretionary commodity account (in addition to several other separate discretionary accounts owned by other people) provided the "common enterprise" requirement of *Howey*. The plaintiff agreed that the defendant Cale did not actually "pool" the funds of the plaintiff with funds of other discretionary accounts the

defendant traded for other discretionary account owners. However because transactions for the benefit of all of the separate discretionary trading accounts were executed "in the aggregate" the Plaintiff argued that fact was sufficient to somehow justify a finding by the court that a "defacto" commodity pool existed thus providing the missing "common enterprise" element sufficient to justify a finding under the three tests of Howie that a investment contract existed. The Meredith court disagreed.

The *Meredith* court's grant of summary judgment to the defendant turned on its conclusion that absent an actual "pooling" of funds from the various separate investors (essentially the first *Lopez* test) it was not possible to find that the simultaneous operation of several separate discretionary trading accounts was sufficient to meet the common enterprise test of *Howey*. How the court uses the *Meredith* decision to "intuit" an otherwise unstated "intention" on the part of the *Lopez* court with respect to the specific language found in the fourth *Lopez* test is clearly a mystery.

The court's conclusion about the real "intent" of *Lopez* with respect to that court's fourth test clearly has no sound basis in the decision of *Lopez. Nor is there a reasonable basis for arriving at that conclusion by examining the facts and the actual issue before the court in Meredith.* The question that arises then is whether this sort of unsubstantiated conclusion that literally goes to the very heart of the issue now before the court would *appear* to a reasonable man on the street to indicate not only a partiality on the part of the court to the plaintiff but an *unreasonable partiality* for the plaintiff.

If the integrity of the federal judiciary is one of the primary objectives of 28 U.S.C. § 455(a) in addition to ensuring fairness to individuals (See *Alexander* at page162) it is incumbent on the court to abandon its claim to an ability to "intuit" or "divine" the intention of the *Lopez* court with respect to the clear and unequivocal language of test #4. Instead of looking elsewhere, perhaps the answer to the "intent" of the *Lopez* court lies simply in the specific words chosen when all four parts of that test were enunciated.

Any decision by this court issued in response to this motion for reconsideration that continues to rely upon an ability to "divine" a purpose or intention contrary to the clear language of *Lopez* cannot survive the Third Circuit's clear willingness to apply the provisions of § 455(a) to avoid even *the appearance* of impropriety.

c. Regarding *In re Slusser*

Little discussion is required here to point out the inadequacy of a single one line footnote in an administrative law judge's opinion as a sufficient basis for the court to literally ignore the clear language contained in all four tests of *Lopez*. Shimer has adequately distinguished the facts of *In re: Slusser* 1998 WL 537342 from the facts surrounding Shasta in his Reply brief dated June 8, 2005 to the CFTC's Response to Shimer's previous motions to dismiss under Federal Rules 12(b)(1) and 12(b)(6). Shimer refers the court to that Reply brief and specifically incorporates by this reference his discussion of the *Slusser* case which begins on page 8 and ends on page 11 of his Reply brief dated June 8, 2005.

Shimer would remind the court that 1) Slusser, through companies that he controlled actually *engaged in the direct trading of commodity interests* through accounts that Slusser opened *in the name of* his companies; 2) the mere fact that companies controlled by Slusser had received funds directly from individual IPC investors and then had pooled and combined those funds *and traded them in accounts opened in the name of VFS* along with other funds received directly from IPC was a sufficient factual basis *alone* under *Lopez* to hold that the accounts actually traded by Slusser were, indeed, commodity pools and that Slusser's companies were, therefore, clearly acting as CPOs of those pooled trading companies.

In light of the fact that all other cases cited by the court in its opinion dated November 16, 2006 *do not* provide any reasonable support for denying Shimer's motion for summary judgment it is inherently unreasonable for the court to deny again in a future opinion Shimer's motion for summary judgment on the basis of an obscure footnote in an opinion issued by an individual who works for the Plaintiff as an Administrative Law Judge (ALJ) when a fair and impartial review of the facts of *Slusser* clearly indicate that the ALJ had a sound basis for holding Slusser to be a CPO under the clear language of the four part test of *Lopez without the comment offered in footnote 36 found on page 40 of his opinion.*

Future dependence by the court on the *Slusser* case as a basis for denying Shimer's motion for summary judgment would be inherently *unreasonable* not only in light of the clear testimony offered by the CFTC's own expert witness in *Heritage* that directly contradicts the off hand comment by the CFTC's own ALJ in his cited footnote and would certainly convey the appearance of partiality and require disqualification under § 455(a) in light of the clear dissimilarity between the facts of the *Heritage* case and the current matter before the court if the documentation provided as Exhibits A through E attached to Shimer's previous brief dated

April 6, 2006 are reviewed and considered as they should be. If the "commodity pool" issue before the court truly is one of first impression (as indicated by Shimer in his brief dated April 6, 2006 and the documentation contained in the Exhibits thereto) the footnote in *Slusser* provides *literally no basis* for continuing to deny Shimer's motion for summary judgment.

> 4. It is virtually impossible for the court to avoid the clear appearance of impropriety if any future opinion is issued denying Shimer's motion for summary judgment unless that new opinion discuses and recognizes the clear distinction between an "account" at a bank and an "commodity trading "account" at a FCM and provides a rational basis for applying the *Lopez* four part test to an attorney escrow bank account in the name of the purported pool entity.

The court's real problem with citing *Slusser*, *Heritage*, *Meredith*, *Nilsen* (and of course *Lopez)* to justify the plaintiff's proposition that the entity Shasta is a commodity pool is that the court in its opinion dated November 16, 2006 is attempting to apply to "oranges" a test that was clearly created by *Lopez* to apply to "apples". In its apparent willingness to unreasonably side with plaintiff and conclude that the entity Shasta is a "commodity pool" the court has clearly ignored (at the expense of all reason and common sense) a simple but critical fact: all of the cases the court has chosen to cite refer to trading "accounts" at FCM's whenever they either refer to the tests of *Lopez* or when they purport to formulate the elements of a commodity pool test themselves.

In every case without exception the cases cited discuss or refer to FCM "accounts" held by someone or some entity from which it is possible to buy and sell commodity futures contracts or options on those contracts. They are *not ever* referring to simple bank "accounts". The clear and obvious reason for that, of course, is that one cannot buy and sell futures contracts from bank accounts. The four tests of *Lopez* make no sense at all if one tries to apply them to a bank "account". Yet that is what the court has done in its decision dated November 16, 2006. *Meredith* was clearly not referring to a bank "account" when it purported to set forth the basic elements of a commodity pool[8] nor, clearly, was *Lopez*. The CGAP account of Dean Witter Reynolds, Inc. discussed by the *Lopez* court was an FCM account that traded commodity futures for Dean Witter's clients who participated in that CGAP program offered by Dean Witter.

[8] The "account" being analyzed by *Meredith* was an individual discretionary commodity trading account opened at an FCM.

The court's opinion dated November 16, 2006 attempts to treat these two separate types of "accounts" (FCM brokerage trading accounts and bank accounts) as if they were one and the same or at least sufficiently equivalent to each other to be interchangeable from one *Lopez* test to another. They clearly are not and even "the average layperson"[9] is able to grasp what would be not only an *apparent* but a *clear impropriety* if the court should choose to act as if these two radically different types of "accounts" are one and the same in a future opinion issued in response to Shimer's motion for reconsideration. In any future opinion with respect to the "commodity pool" issue now before the court on Shimer's motion for reconsideration if the court is not willing to address and recognize the radical distinction between not just a "bank account" (but a sub account of *an attorney escrow* "bank account") and a FCM futures trading "account" it is not only behaving in a way that would cause a reasonable "man on the street[10] to clearly question the court's impartiality—it is acting in a way that would probably cause an "average person on the street"[11] to justifiably question the court's sanity.

5. The court's "too literal" argument offered for ignoring the clear unambiguous language of *Lopez* is arbitrary, unreasonable and fosters unpredictability in the law by purporting to stand for the principal that it is acceptable practice in the federal courts in the absence of a clear and sufficient well argued reason to simply "rewrite" the clear meaning of otherwise well reasoned previous case law precedent.

According to both the plaintiff and the court in its latest decision dated November 16, 2006 the *Lopez* court did not really mean what it said. The court's opinion accuses Shimer of being "too literal" in his interpretation of what the *Lopez* court "really meant" in test #4. That approach to decision making places the judiciary on a very slippery slope. If the court can decide that previous decisions such as *Lopez* that use clear unambiguous language and are well written and appear reasonable "do not really mean what they say" and then overlay an interpretation *that violates both the context and clear meaning of the language used by the previous court* all predictability in the law is gone. Exactly how does the concept of reliable precedent fit into that approach to the law?

Such an attitude does not merely convey the *appearance* of impropriety. Such an attitude carries within it the potential for confirming the worst fears of *Kensington's* "man on

[9] See *Kensington* at page 302.
[10] See *Kensington* at page 303.
[11] See *United States v. Jordan* 49 F.3d 152, 156-57 (5th Cir. 1995).

the street"—that individual members of the federal judiciary are willing to simply become a law unto themselves. Decisions that are arbitrary and unreasonable do far more damage to the federal judiciary than merely conveying the "appearance" of impropriety. Such decision making represents an assault on the very concept of due process that underlies our entire judicial system.

Every court that issues a decision on an issue of importance to the litigants before it is expected to apply clear precedent to the matter before it if such precedent exists. If no precedent exists then it is not only expected, it is *required* that the court apply the tools of sound reasoning and logic when an opinion is fashioned. However, when clear, well reasoned applicable precedent *does exist* (as it apparently does in the case of *Lopez*) it is incumbent that the necessity of predictability in the law be honored in the absence of good reason to ignore either the law previously enunciated and applied or in the presence of a sufficient factual disparity between the previous and present matter to justify distinguishing the case at hand.

It is highly doubtful that a well reasoned opinion can be drafted that applies the four tests of *Lopez* to the entity Shasta and finds all four tests to be satisfied without ignoring the critical distinction between merely an "account" in a bank and an "account" opened at an FCM and without literally ignoring the previous expert testimony offered by the CFTC's own expert witness in the *Heritage* matter. It is certainly within the court's prerogative to attempt that task should it still find sufficient reason to do so.

To date such a well reasoned opinion has not been forthcoming from the court and Shimer has little doubt that neither the "man on the street" nor (more importantly) the Third Circuit would disagreed with Shimer. Absent such an analysis and absent some good reason not yet offered why the clear language of *Lopez* decision should not be applied to the facts of Shasta (as enunciated by the Ninth Circuit), the court is encouraged to abandon its attempt to rule in favor of the plaintiff in spite of both the facts and in spite of apparently controlling case law precedent. Shimer's motion for summary judgment should be granted.

C. The Court erred in concluding that "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool" and the Court cannot avoid the appearance of partiality to the Plaintiff in violation of 28 U.S.C. § 455(a) unless and until the Court offers an impartial discussion of the legislative history of the 1974 amendments to the CEA and the actual provisions of the CEA that provides reasonable support for its conclusion.

The court's opinion dated November 16, 2006 is startlingly devoid of any analysis of the legislative history of the Commodity Exchange Act (CEA) in support of its unsubstantiated conclusion that "Shasta is precisely the form of entity Congress authorized the CFTC to regulate".[12] One need only examine the careful analysis offered by the Supreme Court itself and by responsible members of the federal appellate and district court judiciary when it is necessary for other courts to determine the intent of Congress with respect to the purpose and intent of the Commodity Exchange Act to see the stark contrast between those decisions and the decision recently issued by the court.

A competent and fair review of the legislative history of a statute is always not only expected but required to avoid unsupported arbitrary conclusions such as the one offered in the court's November 16, 2006 opinion. A judicial opinion that contains virtually no analysis of the legislative history of the pertinent statutory authority while offering a conclusion with respect to the intent of Congress that is actually in conflict with the intent revealed by a reasonable review and analysis of the CEA'a legislative history[13] is inherently arbitrary and unreasonable and clearly risks triggering the provisions of 28 U.S.C. § 455(a) under the decisions of the Third Circuit previously cited in this brief.

D. The court's opinion dated November 16, 2006 fails to properly enunciate the "material fact" not in dispute that requires summary judgment for Shimer with respect to counts II through V of Plaintiff's first amended complaint under current case law and that failure requires the court to reconsider its opinion and issue a new opinion that complies with existing summary judgment case law.

With all due respect, the court's recent opinion dated November 16, 2006 reflects an apparent lack of understanding of what the "material fact" is that Shimer has alleged is missing in the present matter that requires the grant of Shimer's motion for summary judgment with respect to counts II through V of plaintiff's first amended complaint under current Supreme

[12] See page 8 of the court's opinion dated November 16, 2006.
[13] See pages 19 through 26 of Shimer's brief dated April 6, 2006.

Court summary judgment case law.[14] At the bottom of page 3 of the court's opinion dated November 16, 2006 the court incorrectly summarizes Shimer's summary judgment argument by asserting the following mischaracterization:

> "...that Plaintiff cannot establish that Shasta is a "commodity pool" which is a material fact necessary to bring this action within the ambit of the Commodities Exchange Act ("CEA").

Shimer has never argued in any brief filed with the court that the alleged *existence* of the entity Shasta as a commodity pool is the "material fact" that is missing. The "material fact" Shimer has consistently referred to in his brief dated April 6, 2006 and filed with the court on April 7, 2006 is the existence (or in the present case the non existence) of a FCM commodity trading account established *in the name of* the entity Shasta that is alleged by plaintiff to be a "commodity pool". The presence or absence of that particular "material fact" determines whether or not a particular entity meets not just the fourth test but *all* four parts of the clear and unequivocal test propounded by *Lopez* for determining whether or not a particular entity is or is not a "commodity pool".

Whether or not the entity Shasta is or is not a commodity pool *is a legal conclusion* to be drawn from the existence or non existence of all material facts that are necessary to satisfy the case law definition of a "commodity pool". This apparent confusion on the part of the court about what the "material fact" is that is in dispute that supports Shimer's motion for summary judgment with respect to counts II through V of plaintiff's first amended complaint results in the following mischaracterization of Shimer's summary judgment argument found on page 9 of the court's opinion dated November 16, 2006:

> "Besides arguing that Tech Traders did not invest Shasta's funds "in the name of Shasta," Defendants raise no evidence to suggest that Shasta is not a commodity pool."

With all due respect, Shimer has never argued *anywhere* in any brief that the reason Shasta is not a commodity pool is simply because the defendant Tech did not invest Shasta's funds "in the name of Shasta". That statement by the court conveys an apparent misunderstanding about what a commodity pool is and does and what the members of a

[14] See Shimer's brief dated April 6, 2006 pages 32 through 34. See also pages 5 and 6 of Shimer previous brief dated July 7, 2005 filed in support of Shimer's previous July 7, 2005 motion for summary judgment incorporated by this reference.

commodity pool do and do not do. What Shimer has clearly pointed out to the court in both his previous brief dated July 7, 2005 in support of Shimer's previous motion of that same date for summary judgment and what Shimer pointed out again to the court in his brief dated April 6, 2006 is that *in the absence of any account specifically opened in the name of Shasta from which commodity futures were being traded in the name of Shasta by anyone*, Shasta is simply not a "commodity pool" as that specific type of entity is specifically defined by the four part test of *Lopez*.

In the present matter before the court, the defendant entity Tech was apparently, in retrospect, operating as a commodity pool and the plaintiff CFTC has alleged that legal conclusion in its complaint. The above cited quote on page 9 of its opinion seems to indicate that the court is gripped by a basic misunderstanding. The court's apparent conclusion (based upon the above cited quote) arguably conveys a misunderstanding so deep about "commodity pools" as to practically convey the appearance of *intentional* bias against the defendants Shimer, Firth and Equity. Clearly *the mere fact that the defendant Tech did not trade Shasta's funds in the name of Shasta does not, alone, automatically confer upon the entity Shasta the sudden status of a "commodity pool"*.

The relationship the entity Shasta had with the Defendant entity Tech was similar in many ways to the relationship that any other "member" of a commodity pool bears to the pool entity itself: members of a pool transfer their funds to the pool entity and then the funds of the individual or entity member are traded *in the name of the pool entity* by the commodity pool operator. The fact that the pool entity Tech traded the entity Shasta's funds the same way any commodity pool would trade a member of that pool's funds does not automatically and suddenly confer "commodity pool" status upon the entity Shasta no matter how badly the plaintiff CFTC (or apparently the court) wishes that could be true. Nor does the fact that the entity Tech apparently violated several separate regulations of the plaintiff CFTC including a failure to properly register with the plaintiff CFTC create a reason to conclude that the separate and distinct entity Shasta is "somehow, someway" suddenly a "commodity pool" thereby requiring registration as a CPO by its manager the defendant entity Equity.

In the matter now before the court the entity Shasta could properly be considered to be a commodity pool under current case law, the Commodity Exchange Act and the plaintiff CFTC's own regulations and the manager of Shasta (the defendant Equity) would have been required to register with the plaintiff CFTC as a CPO of the "pool" entity Shasta under either of the following two hypothetical factual scenarios:

1) If the entity Shasta (or any individual or other entity) had separately established on behalf of Shasta a commodity trading account from which commodity futures contracts were being traded *in the name of* Shasta *and, in addition to that separate trading activity,* either Shasta or its manager Equity had also forwarded a part of Shasta's funds to the separate entity Tech to trade *in the name of* Tech; or,

2) If Shasta had opened an account *in its own name* at a futures commission merchant, and then authorized the entity Tech (or any other entity or any individual) to specifically conduct commodity futures trading from that pooled account *in the name of* the entity Shasta that contained funds invested by Shasta's separate members. (The exact factual scenario that existed in the case of *Heritage*).

E. **The court's opinion dated November 16, 2006 does not address *or even mention* the non "commodity pool" related argument for summary judgment with respect to Count I of Plaintiff's first amended complaint contained in Shimer's brief dated April 6, 2006 and such apparent failure requires the court to reconsider its opinion and issue a new opinion that addresses that argument in a manner compatible with the requirements of existing summary judgment case law.**

On pages 35 through 37 of his brief dated April 6, 2006 in support of his motion of that same date for summary judgment with respect to Count I of Plaintiff's first amended complaint alleging a violation of Section 4b(a)(2)(i)-(iii) of the CEA (7 U.S.C. § 6b(a)(2)(i-iii) Shimer argues for summary judgment with respect to that Count I without any reliance on the "commodity pool" issue clearly relevant to the other counts of plaintiff's complaint. On those specific pages of his brief Shimer pointed to where the Supreme Court discussed in *Merrill Lynch Pierce Fenner & Smith v. JJ Curran, et al* 456 U.S. 353 (1982) what parties were intended by Congress (as revealed by a thorough analysis of the CEA's legislative history) to receive the anti-fraud protection of Section 4b of the CEA.

While it is true that the "private right of action" issue that was the focus and reason for the Court's analysis in *Merrill* of the CEA's legislative history concerning the intent of Congress with respect to Section 4b of the CEA was later superseded by congressional legislation that explicitly enumerated private rights of action the legislative analysis performed by *Merrill* with respect to the basic classes of persons to whom section 4b of the CEA offers protection is still as valid now as it was in 1982 when *Merrill* was decided.

There have been no changes or amendments to Section 4b of the CEA that would require a different analysis than the one offered by the Supreme Court in *Merrill* at the time that case was decided.

It is not necessary for Shimer to simply repeat here what was stated clearly enough on pages 35 through 37 of his summary judgment brief dated April 6, 2006. The court is referred to those specific pages for relevant quotes from the *Merrill* decision and relevant analysis by Shimer. What is clear from the Supreme Court's legislative history analysis of Section 4b of the CEA is a very specifically drafted statute that is confined to very specific fraudulent activity described clearly in the language of Section 4b. Persons not specifically engaged in the trading of commodity futures contracts either as hedgers or as speculators as those terms are explained in *Merrill* were not, according to the Supreme Court, intended to be protected by Section 4b. Shasta's members were neither.

In addition, the clear unambiguous language of section 4b itself requires that the fraud proscribed by that section occur "in connection with orders to make, or the making of, contracts of sale of commodities…" (See 7 U.S.C. § 6(b)(a)(2) cited on page 35 of Shimer's brief.) The CFTC has never alleged that Shimer, Firth, or the defendant Equity ever specifically engaged in any activity proscribed by section 4b. Moreover since Shasta's members never engaged in either hedging or speculative trading of commodity futures contracts they are not within the class of persons according to *Merrill* that Congress intended be protected by the specific fraudulent behavior proscribed by Section 4b of the CEA.

To date the court has literally failed to address *in any way* the issue of whether or not Shimer , Firth or the defendant Equity fall within the purview of Section 4b. It might appear to a reasonable man on the street informed of the content of pages 35 thorough 37 of Shimer's April 6, 2006 brief that the failure of the court to even mention or make any reference to this argument offered by Shimer evidences bias or at the very least a lack of impartiality.

A reasonable man "on the street" might also be justified in concluding that a court that literally ignores an argument offering a credible reason why a defendant against whom CEA Section 4b fraud has been alleged should have that allegation dismissed is acting out of partiality to the plaintiff and, therefore, unreasonably. Clearly under the standard of review cited by the Third Circuit cases referred to previously in this brief that discuss the application of 28 U.S.C. § 455(a) the failure of the court to provide a decision with respect

to Section II G 4. of Shimer's previous brief dated April 6, 2006 in any opinion issued in response to Shimer's current motion for reconsideration would be grounds for triggering the application of § 455(a).

III. CONCLUSION

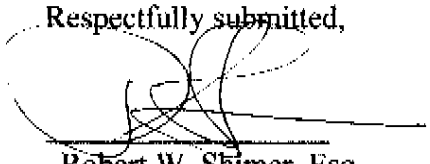
If the facts of *Heritage* are not at all similar to the facts of Shasta then the issue of whether or not an entity such as Shasta that has *never* opened a commodity trading account *in its name* at a futures commission merchant can be held to be a "commodity pool" is an issue that is truly one of first impression for the federal judiciary. As Shimer pointed out previously to the court on page 3 of his brief dated April 6, 2006 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. To date the court has failed to do that.

It is absolutely incumbent upon the court to undertake that task impartially without the appearance of bias against the Defendants Shimer, Firth and Equity and without the appearance of favor towards the plaintiff. Any other approach to the issue of first impression now before the court for reconsideration clearly conveys sufficient *appearance* of impropriety as to require the application of 28 U.S.C. § 455(a) per the previously cited decisions of the Third Circuit Court of Appeals and that court's *clear right* to exercise supervisory authority over the district courts within the Third Circuit.

For all of the reasons stated above Shimer respectfully requests that the court honor Shimer's motion for reconsideration and issue a new opinion capable of surviving § 455(a) scrutiny.

Dated: December 4, 2006

Respectfully submitted,



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