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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

Motion Day January 5, 2007

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BRIEF OF DEFENDANT ROBERT W. SHIMER IN SUPPORT OF MOTION FILED ON BEHALF OF HIMSELF *PRO SE* AND A SEPARATE SIMILAR MOTION OF DEFENDANT VINCENT FIRTH FOR DISQUALIFICATION PURSUANT TO 28 USC § 455(a) AND CANON 3C(1) OF THE CODE OF CONDUCT FOR UNITED STATES JUDGES

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For the District of New Jersey

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Plaintiff,		
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Defendant Robert W. Shimer ("Shimer") acting *pro se* submits this Brief in support of his Motion and a similar Motion submitted by Defendant Vincent Firth (Firth) for Disqualification of District Court Judge Robert B. Kugler pursuant to 28 U.S.C. § 455(a) and Canon 3C(1) of the Code of Conduct For United States Judges.

I. PRELIMINARY STATEMENT

It is the purpose of this brief to suggest that the Court's most recent decision dated November 16, 2006 denying Shimer's renewed motion for summary judgment dated April 6, 2006 demonstrates clear apparent bias towards Plaintiff and an apparent unwillingness on the part of Judge Robert B. Kugler to provide a fair hearing to both Shimer and Firth in the matter now before the Court. The Court's decision of November 16, 2006 so grievously misstates the

law and is so devoid of any rational basis for its decision[1] as to unfortunately leave Shimer with no alternative but to invoke 28 U.S.C. § 455(a) that requires disqualification "whenever a judge's impartiality "might reasonably be questioned" in a judicial proceeding. *In re: Kensington International Limited* 368 F.3d 289, 301 (3d Cir. 2004).

As indicated in footnote 1 below, Shimer's recent Motion for Reconsideration dated December 4, 2006 (and filed with the Court on the following day December 5, 2006) is specifically referenced here for the purpose of detailing the extraordinary and alarming inadequacies of the Court's November 16, 2006 opinion that arguably now must trigger serious due process concerns in light of all that has been provided in briefs filed previously with the Court.

Canon 3 C.(1) of The Code of Conduct For United States Judges ("Code of Conduct") reflects the spirit and intent of § 455(a) by requiring a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned". Shimer now requests that Judge Kugler voluntarily disqualify himself from further adjudication with respect to either Shimer or Firth. In making that request Shimer submits for the Court's consideration Shimer's contention that the Court's decision dated November 16, 2006 does more than merely meet that minimum standard of apparent partiality insisted upon by the Third Circuit Court of Appeals in past decisions. It is Shimer's sincere belief that the Court's decision of November 16, 2006 reflects such evidence of partiality as to rise to the standard of "clear and convincing" in light of the unnecessary similarity the court's opinion dated November 16, 2006 bears to its previous opinion of more than a year ago dated October 4, 2005.

Shimer files his motion and this supporting brief fully aware that both the purpose of the Code of Conduct and the above cited §455(a) "would be subverted" if either "were invoked by lawyers merely for tactical advantage in a proceeding."[2] That is not Shimer's purpose or his intent. Clearly there is no "tactical advantage" to Shimer for filing frivolously the current motion supported by this brief. That is especially true for someone in Shimer's position who appears before the Court as a *pro se* defendant now without the benefit of outside experienced legal counsel. Shimer has carefully reviewed the decisions of the Third Circuit Court of Appeals prior to filing the current motion and this supporting brief. That court has consistently stressed that "impartiality and the appearance of impartiality in a judicial officer are the sine

[1] See Shimer's Motion for Reconsideration and supporting Brief dated December 4, 2006 filed with the Court on Tuesday, December 5, 2006.
[2] See commentary to Canon 1, Code of Conduct For United States Judges.

quo non of the American legal system" (See *Alexander v. Primerica Holding, Inc.* 10 F.3d 155, 167 (3d Cir. 1993) citing to *Haines v. Ligggett Group Inc.* 975 F. 2d 81, 98 (3d. Cir. 1992) further citing to *Lewis v. Curtis* 671 F. 2d 779, 789 (3d Cir. 1982).

As recently as 2004 in *Kensington* at page 301 the Third Circuit Court restated its standard of review under 28 USC § 455(a) as follows:

> "Under § 455(a), if a reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality under the allocable standard, then the judge must recuse" *In re Prudential Ins Co. of America Sales Practices Litigation* 148 F.3d 283, 343 (3d Cir. 1998); see *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n* 107 F.3d 1026, 1042 (3d Cir. 1997) ("The standard for recusal is whether an objective observer reasonably might question the judge's impartiality."

Moreover, in 2004 the *Kensington* court at page 302 insisted that

> "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'" *Alexander*, 10 F.3d at 162 quoting *School Asbestos*, 977 F.2d at 776."

For the last 2 ½ years Shimer has watched while the Plaintiff CFTC has literally trashed Shimer's reputation in filing after filing in the present matter in the hope of simply "covering" for its past investigative negligence and incompetence. The clear legal deficiencies of Plaintiff's case are made all the more intolerable by the court's now apparent unwillingness to provide to Shimer the fair hearing that "due process" clearly requires. The Plaintiff's sheer arrogance and contempt for the concept "rule of law" is now clearly facilitated by the Court's decision dated November 16, 2006. That decision of the Court reflects a clear apparent willingness to allow Plaintiff's unchecked assertion of authority over Shimer to continue unabated. In *Alexander* The Third Circuit stated as follows:

> "[b]ecause 'justice must satisfy the appearance of justice' *Offut v. United States* 348 U.S. 11, 14, 75 S. Ct. 11, 99L.Ed. 11 (1954), it is our responsibility to exercise our supervisory authority, as reluctant as we always are to do so when it requires the reassignment of a case... We must "'preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice.' " *Haines v. Liggett Group, Inc.*, 975 F.2d at 98 (quoting *United States v. Torkington*, 874 F 2d 1441, 1447 (11th Cir. 1989)."

Shimer seeks without the necessary intervention of the Third Circuit Court the voluntary recusal of Judge Kugler. Shimer seeks a request from Judge Kugler to the Chief Judge of the

New Jersey District that a new judge be appointed to rule on all remaining matters either still pending before the court or that may later come before the court with respect to Defendants Shimer, Firth and the defendant entity Equity Financial Group, LLC (Equity"). The current partiality that apparently exists on the part of Judge Kugler with respect to the clear, logical common sense arguments of Shimer consistently supported by 1) the clear and unambiguous language of current case law, 2) the intent of Congress revealed by a fair and reasonable review of the legislative history of the 1974 amendments to the Commodity Exchange Act (CEA); 3) relevant and significant documentation provided for the Court's consideration as properly attached exhibits to Shimer's brief dated April 6, 2006 certified by the Federal Records Center in Chicago; and 4) a fair reading of Plaintiff's own rules and regulations consistent with all of the above now requires Judge Kugler's voluntary recusal.

In concluding his brief dated April 6, 2006 in support of his renewed motion for summary judgment of that same date Shimer attempted to remind the court that

> "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 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 lack of any reasonable basis for the three stated conclusions cited by the Court in its opinion dated November 16, 2006 and the striking lack of any substantive difference between the Court's October 4, 2005 Opinion and its latest Opinion dated November 16, 2006 leaves Shimer no recourse but to file the motion this brief is intended to support.

II ARGUMENT

A. Shimer's Motion For Disqualification Is Timely

On page 294 of its opinion in *In re Kensington International Limited* 368 F.3d 289, (3d Cir. 2004) the Third Circuit Court addressed the requirement of timeliness with respect to any motion that is filed seeking disqualification. The *Kensington* court stated that when such a motion is presented to the court, the concept of timeliness is intended to prevent a situation where the moving party holds "in reserve a recusal demand until such time that a party

perceives a strategic advantage…" . In *Kensington* the issue of the timeliness of the Petitioner's previous disqualification motion to the district court judge was discussed in the context of whether the Petitioner had received sufficient previous constructive knowledge of the basis for its recusal request and yet had not proceeded at the time such constructive knowledge became available to the Petitioner. The *Kensington* court concluded that the motion of the several petitioners before the district court in that matter were timely "[b]ecause the Petitioners did not themselves learn about the Advisors' conflict of interest …until shortly before they moved for disqualification…".[3]

Shimer was not put on sufficient notice of the Court's clear apparent bias against him and Defendant Firth until he actually received the Court's Opinion dated November 16, 2006. Shimer received that Opinion in the mail in the evening of the beginning of the Thanksgiving weekend, Friday November 24, 2006. Though the Court's recent Opinion was dated November 16, 2006 it was not entered until November 20, 2006 and the letter to Shimer enclosing that opinion was not actually mailed by the Court to Shimer until Tuesday, November 21, 2006.

Shimer spent the initial part of the ensuing week attending to urgent personal business and discussing the matter with another legal colleague. Shimer then, of necessity, because of the strict filing requirement imposed upon motions for reconsideration under L. Civ R. 7.1 (i) spent the latter part of the week of November 27th to December 1st drafting and part of the ensuing weekend editing his motion for reconsideration and supporting brief. That motion, notice of motion, supporting brief, proposed order and certificate of service were filed timely with the Court on the last day permitted by L.Civ R. 7.1(i) on Tuesday, December 5, 2006.

Shimer's motion for disqualification is now filed on Tuesday, December 12, 2006 merely seven days after the filing of his recent motion for reconsideration. Clearly Shimer has not sought to "hold back" his present decision to seek recusal in the hope of some future strategic advantage. Shimer has proceeded with his motion for disqualification, as distasteful as that decision has been to Shimer, with all deliberate and reasonable speed.

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[3] *Kensington*, at page 294.

B. The Three Conclusions Offered In The Court's Opinion Dated October 4, 2005 And Offered Again In Its Recent Opinion Dated November 16, 2006 For Denying Shimer's Motion For Summary Judgment Require An Objective Reasonable Observer To Harbor Doubts About The Court's Impartiality And, Therefore, Satisfy The Required Standard For Disqualification Of Judge Kugler Under 28 U.S.C. § 455(a) As Well As The Standard Applied By The Third Circuit Court of Appeals In The Exercise Of Its Supervisory Authority To Order The Assignment Of Another Judge Whenever Such An Order Becomes Necessary To Uphold The Integrity Of The Federal Judiciary.

The Court's opinion dated October 4, 2005 and its Opinion dated November 16, 2006 purported to offer three separate conclusions for its decision to deny Shimer and Firth's motion dated July 7, 2005 for summary judgment:

1) That "Heritage involved an operation very similar to Shasta". (See both court opinions, page 8); and,

2) That "Shasta satisfies the four factors of the Lopez test". (See both court opinions, 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 both court opinions, page 9).

1. Regarding the Court's conclusion about the similarity between the facts of *Heritage* and the facts of Shasta

The Court's erroneous conclusion on page 8 of both its opinion dated October 5, 2005 and its Opinion dated November 16, 2006 that "Heritage involved an operation very similar to Shasta" is a clear misstatement of fact. If the erroneous nature of that conclusion was not apparent to Judge Kugler on October 4, 2995 when the Court's first opinion was issued it would have been virtually impossible for him to have reached that same conclusion again on November 16, 2006 if he had actually reviewed the certified documentation attached as Exhibits to Shimer's brief filed in support of Shimer's renewed motion for summary judgment dated April 6, 2006. Judge Kugler's apparent willingness to virtually ignore *without the slightest mention or reference to any of the significant certified documentation* provided by Shimer culled directly from the case file of *CFTC v. Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶ 21,627, 26,379 (N.D. Ill. 1982) at the Federal Records Center in Chicago not only requires the application of 28 USC § 455(a) to his Opinion dated November

16, 2006 but that clear and obvious willingness by Judge Kugler violates practically every Canon found in the Code of Conduct For United States Judges.

a. The Court was provided and yet ignored clear, relevant testimony offered by the CFTC's own expert witness in Heritage and significant portions of the CFTC's complaint, and defense pleadings as well as a description of how client accounts were handled by the person in charge of the brokerage firm where the entity Heritage opened its commodity trading account

Shortly after Shimer received a copy of the Court's opinion with its stated conclusion about the similarity of the facts in the *Heritage* case to the facts of Shasta Shimer spent Monday, October 17, 2005 at the Federal Records Center in Chicago obtaining certified ribbon bound documentation including both the pleadings and certain testimony in the *Heritage* case. The *Heritage* case was previously first cited by Plaintiff. The Court was clearly informed of Shimer's Federal Records Center research in Shimer's brief dated April 6, 2006. [4] Moreover the Court was also provided with access to this documentation in the form of five Exhibits marked as Exhibits A through E. Those 5 separate exhibits contained statements from the CFTC's own complaint filed in the *Heritage* case, defense pleadings, a description of how client accounts were handled by the person in charge of the brokerage firm where the entity Heritage opened its commodity trading account and selected transcripts of testimony by Charlotte Ohlmiller an expert witness called specifically by the Plaintiff CFTC during the *Heritage* Preliminary Injunction hearing held on Thursday, October 21, 1982 before the Honorable Stanley J. Roszkowski, District Judge.

b. Regarding the expert testimony offered by the CFTC's own witness

First of all, it is highly significant with respect to the potentially dispositive "commodity pool" issue now before the Court that the expert testimony of the CFTC's own witness in *Heritage* (provided to the Court as part of Exhibit E attached to Shimer's April 6, 2006 brief) clearly and specifically confirmed *beyond any doubt* that opening a commodity futures trading account at a Futures Commission Merchant (FCM) is what a member of the general investing public *must do* if he or she wants to engage in the trading of commodity futures contracts. As clearly pointed out to the Court on page 30 of Shimer's brief dated April 6, 2006, in response to a question on direct examination by legal counsel for the CFTC asking how a member of the

[4] See pages 2 and 3 of Shimer's brief dated April 6, 2006 in support of his renewed motion for summary judgment.

"investing public might get involved in the futures market" the CFTC's expert witness, Ms Charlotte Ohlmiller, answered that question as follows:

> "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" [5]

The *Kensington* court's "objective observer" [6] might be tempted to wonder why individual members of the "investing public" can apparently trade commodity futures contracts all day long from their own personal commodity trading account at an FCM and never have to register with the CFTC. But Shasta's manager (the defendant Equity) would have to register as a commodity pool operator of the purported commodity pool entity Shasta (according to the logic of the court) even though the entity Shasta never had a commodity trading account opened in its name by anyone—including its manager Equity.

Would the *Kensington* court's "objective observer" be further tempted to consider it curious and strange that the record in the matter currently before the Court also clearly reflects the fact that the CFTC has agreed that no such commodity trading account at a FCM was ever opened *by anyone* in the name of Shasta?[7] Perhaps the *Kensington* Court's "objective observer" might find all of this even more curious in light of the fact that commodity "pools" are entities so critical to the CFTC's authority to regulate commodity "trading" that the Plaintiff found it necessary to provide in its rules and regulations *a specific definition* for the term commodity "pool" [8] and that definition specifically defines commodity "pools" as entities "operated" for the purpose of "trading commodity interests".

On pages 30 and 31 of his April 6, 2006 brief Shimer respectfully asked the Court an important and relevant question in light of the previously cited expert testimony of the CFTC's own witness in *Heritage*. The Court was respectfully asked to include an answer to that question in its forthcoming opinion. An "objective observer" could reasonably conclude that Shimer's question on pages 30 and 31 of his brief was not only relevant but highly significant to the "commodity pool" issue currently before the court. The silence and apparent unwillingness or inability of the Court to answer Shimer's question in its Opinion dated

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[5] See page 30 of Shimer's brief dated April 6, 2006 citing to page 154 of the *Heritage* hearing transcript found as page 2 of the attached Exhibit E.
[6] See *Kensington*, pages 301 & 302.
[7] See footnote 1 found on page 1 of the CFTC Response dated August 5, 2005 to Shimer's previous motion for summary judgment dated July 7, 2005.
[8] See 17 C.F.R. § 4.10(d)(1).

November 16, 2006 might cause the *Kensington* court's "objective observer" to reasonably question the court's impartiality. [9]

If all of the above was not enough to certainly create the *appearance* of lack of impartiality on the part of the Court to *Kensington's* "objective observer" Shimer's brief dated April 6, 2006 further clearly pointed out to the Court on pages 31 and 32 that, 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, that same expert witness for the CFTC stated as clearly as the English language can possibly convey:

> "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*."[10] (Emphasis added).

And if the above quote were not enough, Shimer's brief dated April 6, 2006 also pointed out to the Court on page 32 that Ms Ohlmiller is later asked on cross examination by legal counsel for the *Heritage* defendants the following question: "The Operator of the commodity pool, what does he do?" Ms Ohlmiller responds:

> The operator—the commodity pool operator is the person who solicits the funds 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*."[11] (Emphasis added).

So… let's try to get all of this straight: members of the "investing public" *must* open a commodity trading account at a FCM and, in addition to merely opening a bank account for the alleged pool entity, entities that are CPO's *must* also 1) open a commodity futures trading account; 2) that account must be opened *in the name of* the commodity pool; 3) that commodity trading account must be opened at a brokerage firm designated by the CFTC as a futures commission merchant; 4) the funds from the alleged pool entity's bank account must be deposited into the "commodity pool trading account"; 5) then the entity that is the CPO of the "pool" entity "can begin trading commodity futures contracts". *However, in the present case involving the Equity Defendants* those apparent requirements are inexplicably suspended for

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[9] See *Kensington*, at pages 301 and 302.
[10] See page 31 of Shimer's brief dated April 6, 2006. See also pages 174 and 175 of the *Heritage* hearing transcript attached as Exhibit E to Shimer's same brief.
[11] See page 32 of Shimer's brief dated April 6, 2006 citing to page 181 of the *Heritage* preliminary injunction hearing that appears as page 12 of Exhibit E attached to Shimer brief.

some unknown and unstated reason other than the Plaintiff's clear and obvious desire to find the Equity Defendants liable for "something". The fact that the pretrial record in the present case indicates that the Plaintiff has clearly admitted that no such account at an FCM in the name of the alleged "pool" entity was ever opened by Equity (or for that matter by anyone else) does not seem to matter to the Court. The fact that the entity Equity never opened any such commodity trading account *in the name of* the alleged pool entity Shasta at an FCM and, therefore, could not possibly have done any of the other specific actions the CFTC's expert says are necessary to be a CPO (i.e. "go to a futures commission merchant", "deposit funds in a commodity pool trading account" and "begin trading") apparently does not matter in the least! According to the Court the entity Shasta is a "commodity pool" contrary to and in spite of the direct and cross examination testimony of the CFTC's own expert witness!

That "conclusion" of the Court (found first in its opinion dated October 4, 2005 and now in its most recent opinion dated November 16, 2006 will, of course, be used by the Court at some later time to justify its "logical" conclusion that Shasta's manager Equity failed to "register" as the CPO of the "pool" entity Shasta in violation of Plaintiff's regulations as alleged in the Plaintiff's amended complaint! Does all of this make *any sense at all to any one* other than the Court? Would the *Kensington* Court's "objective observer" be tempted to reasonably conclude that the Court has effectively transported all parties in this matter with Alice to Wonderland?

c. Regarding the highly relevant information contained in the primitive offering documents used by the Heritage Defendants

Shimer's brief dated April 6, 2006 also specifically discussed a particular document that was a part of the primitive offering materials that were provided to investors by the entity Heritage. Sub exhibit C to Exhibit A was a two page document that was a part of those offering materials. That two page document was written on the letterhead of Financial Partners Brokerage, Inc. (FPB) (the firm that conducted all futures trading for the entity Heritage) and purported to explain how the entity FPB purchased United States Treasury Bills for its "customers". One of the quotes from the FPB document provided to the Court stated:

> "These United States Treasury Bills are purchased in your name and credited to your account." [12]

[12] See first page of Sub Exhibit C to Exhibit A attached to Shimer's brief dated April 6, 2006.

The court's Opinion dated November 16, 2006 is strangely silent about the clear contradiction between the court's conclusion about the supposed similarity between the entity Heritage and Shasta and the above cited information found in the Heritage entity's own offering materials about how commodity futures contracts would be purchased by FPB in the name of its "customers". Clearly the entity Heritage was a "customer" of FPB. That fact is clear and obvious from the documentation provided to the Court by Shimer and is also clear from the *Heritage* Court's 1982 decision.

d. Regarding the highly relevant information contained in Heritage pleadings.

Shimer's brief dated April 6, 2006 also pointed out to the Court that the attached Exhibit B contained certified copies of pages from the CFTC's actual complaint in the *Heritage* case which clearly confirmed that the relationship between Heritage and FPB was *a traditional one* in which the funds of the customer (Heritage) were being traded by FPB pursuant to a power of attorney granted by the entity Heritage to FPB. Pages 9, 10 and 11 of Shimer's brief dated April 6, 2006 discussed and specifically cited relevant and clear language from the CFTC's own complaint in the Heritage case and then clearly distinguished the facts of Shasta from the facts as described in the CFTC's complaint.

The Court's opinion dated November 16, 2006 does not purport to explain how any of the cited language in the CFTC's complaint in *Heritage* squares with the Court's conclusion about the similarity between the facts of Shasta and the entity Heritage. The Court's conclusion about the similarity between the facts of Heritage and the facts of Shasta is a conclusion without any factual foundation. It is a conclusion *clearly contradicted* by 1) the CFTC's own witness in *Heritage*, 2) by the information contained in the offering materials provided by the entity Heritage to prospective investors and 3) by clear language of the CFTC's own complaint in the *Heritage* case as well!

e. The issue of whether an entity such as Shasta can be held to be a commodity pool in the absence of any evidence a commodity trading account was opened at an FCM in the name of the alleged pool entity is clearly a matter of first impression for the federal courts.

If the facts of *Heritage* are not at all "similar" to the facts of Shasta then the issue of whether 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 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. This the Court has not done. Shimer submits the unwillingness on the part of the Court to concede facts that should be otherwise obvious to any fair minded impartial observer and then arrive at a conclusion clearly contradicted by exhibits attached to Shimer's brief dated April 6, 2006 is inexcusable and conveys far more than the mere "appearance" of a lack of impartiality. The Court's bias in favor of the Plaintiff is clear and convincing.

f. Concluding points relevant to whether Judge Kugler violated the Third Circuit's § 455(a) standard of review and whether exercise of the Third Circuit's supervisory authority is now likely if Judge Kugler does not voluntarily recuse himself in light of the Court's November 16, 2006 conclusion about the similarity between the Heritage case and Shimer's previous legal client Shasta.

In light of all of the above Shimer offers the following concluding points and questions in support of his motion for disqualification of Judge Kugler by reason of the Court's unfounded conclusion in its opinion dated November 16, 2006 that the facts of Shasta and the *Heritage* case are similar:

1) Shimer's client Equity Financial Group, LLC (Equity) is alleged in Plaintiff CFTC's complaint to be an unregistered commodity pool operator (CPO) of the alleged "pool" entity Shasta. *All counts* of the Plaintiff's complaint against Shimer, Firth and Equity logically flow from this allegation about the CPO status of the defendant entity Equity.
2) In Shimer's brief dated April 6, 2006 filed in support of his motion for summary judgment with respect to all counts of Plaintiff's amended complaint Shimer first cited on page 30 Ms Charlotte Ohlmiller's previous expert witness testimony which concluded that for members of the general investing public to become "involved" in the futures market, they must open a commodity futures trading account at an FCM.
3) In light of Ms Ohlmiller's expert testimony in *Heritage* with respect to what members of the general investing public must do to become "involved" in the futures market Shimer's brief dated April 6, 2006 proposed a question similar to the following on page 30 of his brief: "if members of the general public must open a commodity futures trading account at an FCM to become "involved" in the futures market how is it that entities (such as Shimer's legal client Shasta) can be alleged by

the CFTC to be a "commodity pool" (a specialized commodity futures related entity defined very specifically by CFTC regulations) when there is no evidence that the entity Shasta ever had a commodity futures trading account at an FCM and there is no evidence that anyone (including Shimer's client Equity that is alleged to be the "operator" of the Shasta "pool") *ever opened, attempted to open or ever represented to anyone an intention to open such an account in the name of Shasta?*

4) The above question posed in Shimer's brief dated April 6, 2006 was readily known to Judge Kugler if he actually took the time to read that brief filed with the Court by Shimer on April 7, 2006.

5) The Plaintiff CFTC never attempted to even address let alone actually try to answer that question in its Response brief dated April 20, 2006.

6) That fact was also readily available and known to Judge Kugler if he ever took the time to read the CFTC's Response brief dated April 20, 2006.

7) If the reticence of the CFTC to answer Shimer's above cited question was somehow overlooked by Judge Kugler when he read the CFTC's Response brief dated April 20, 2006, Shimer was kind enough to specifically point out to the Court on page 11 of his Reply brief dated April 24, 2006 that the CFTC's Response brief dated April 20, 2006 was stunningly silent with respect to Shimer's previously posed question.

8) If Judge Kugler had actually read Shimer's Reply brief dated April 24, 2006 he would have known that the CFTC and the CFTC's lead counsel were unable to offer any effective rebuttal in the way of a coherent answer to Shimer's previously posed question.

9) On pages 31 and 32 of Shimer's brief dated April 6, 2006 filed in support of Shimer's motion for summary judgment Shimer also pointed out that the Plaintiff's own expert witness Charlotte Ohlmiller in the *Heritage* case confirmed under oath that Shimer's consistent position in all previous motions filed with the court had been correct. Shimer's client Equity is NOT a commodity pool operator (CPO) as that term is defined by the Commodity Exchange Act, because (according to that expert witness a CPO must first combine or "pool" funds from the investing public into a common bank account, (which Shimer's client Equity never did and which was never the purpose of Shimer's attorney escrow account) then the purported pool operator must also "go to a futures commission merchant" (which Shimer's client Equity never did); then at the futures commission merchant (FCM) the purported

pool operator must "open up a commodity futures trading account" (which Shimer's client Equity never did) and that commodity futures trading account must be opened "in the name of the pool" (which Shimer's client Equity never did and which never happened and the Plaintiff CFTC has admitted that no such account in the name of Shimer's client Shasta was ever created *by anyone*) so that the purported operator "can begin trading commodity futures contracts" (which Shimer's client Equity never did).

10) If Judge Kugler had actually read pages 31 and 32 of Shimer's brief dated April 6, 2006 he would have also known that the CFTC's current position that the pooling of investor funds in Shimer's attorney escrow bank account in New York and the subsequent regular transfer of those funds over the course of more than 2 years to the bank account of another entity located in North Carolina (unconnected *in any way* to either Shimer's clients Shasta or Equity except by contract) that performed all commodity futures trading *in that other entity's own name* for credit or debit *to that other entity's own FCM trading account* somehow, in some way, made Shimer's previous legal client Shasta a "commodity pool" and Shimer's previous legal client Equity a commodity pool operator *was specifically contradicted by the clear and unequivocal testimony of the CFTC's own expert witness* in the *Heritage* case.

11) Judge Kugler never attempted (in light of the clear and unequivocal testimony of the CFTC's own expert witness provided to him in Exhibit E attached to Shimer's summary judgment brief dated April 6, 2006 and all of the other information contained in the other Exhibits attached to that brief) to explain why the following statement found on page 8 of the Court's most recent opinion dated November 16, 2006 has any credibility or basis at all in reality: "Heritage involved an operation very similar to Shasta…".

12) If Judge Kugler actually read Shimer's brief dated April 6, 2006 and the attached Exhibits before issuing the court's decision dated November 16, 2006 why wasn't it incumbent upon him to discuss why he did not consider the question posed on pages 30 & 31 of Shimer's brief (stated in point 3 above) to be relevant and on point with respect to the dispositive issue of whether or not Shimer's previous legal client Shasta was a commodity pool?

13) Can a district court judge literally ignore without any discussion or explanation substantial and credible documentation that directly contradicts the conclusion found in his unpublished opinion?

14) All briefs with respect to Shimer's summary judgment motion dated April 6, 2006 were filed with the Court before the end of April, 2006 yet it took the Court *over 6 months* to issue its most recent decision dated November 16, 2006.

15) If one examines the specific paragraphs and language of the Court's opinion dated October 4, 2005 in response to Shimer's previous motion in 2005 for summary judgment and then compares that previous opinion to his unpublished opinion dated November 16, 2006 issued with respect to Shimer's April 6, 2006 motion for summary judgment one finds that both decisions *are exactly identical* except for a few words that are deminimis and inconsequential.

16) It appears from the similarity between both decisions of Judge Kugler that he not only figuratively but literally hit the "reprint" button on his computer and virtually issued for a second time *the exact same opinion issued over a year earlier on October 4, 2005* that includes, without further explanation or support, his conclusion that "Heritage involved an operation very similar to Shasta" (See the Court's Opinion dated November 16, 2006, page 8.)

17) Does that sort of apparent unwillingness to address *any of the arguments or points* presented in Shimer's brief dated April 6, 2006 with respect to the clear factual dissimilarity between the entities Heritage and Shimer's client Shasta and the fact that it took the Court *over 6 months to virtually issue the same opinion* issued on October 4, 2006 indicate a violation of Canon 3A(5) of the Code of Conduct for United States Judges requiring the prompt disposal of business before the court?

18) Shimer notes that the commentary to Canon 3A(5) states that "In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard". Does Judge Kugler's opinion dated November 16, 2006 indicate that he even took the time to read Shimer's brief dated April 6, 2006?

19) If Judge Kugler did not read Shimer's brief, clearly the right to be heard is not fulfilled by simply accepting a brief from a defendant and then never reading it!

20) If Judge Kugler did actually read Shimer's brief, is the right to be heard fulfilled when substantial arguments contained in that brief and when significant and relevant certified documentation attached to that brief are basically ignored *and never even*

mentioned or alluded to during the course of the court's most recent opinion dated November 16, 2006?

21) Does that sort of apparent behavior on the part of the court also violate Canon 2A of that same Code when the language of that particular Canon addresses the issue of impropriety and discourages the *appearance* of impropriety?

22) Does that same behavior of Judge Kugler also violate Canon 1 of that same Code that insists that members of the federal judiciary uphold the *integrity* of the judiciary? Is there any integrity at all when a federal judge engages in such a flagrant disregard for both the substantial arguments presented in a defendant's brief and the documentation attached as certified Exhibits to that brief ?

2. Regarding the Court's conclusion that "Shasta satisfies the four factors of the *Lopez* test".

The Court's conclusion on page 8 of its Opinion dated October 4, 2005 and its Opinion dated November 16, 2006 that "Shasta satisfies the four factors of the Lopez test" is (a) contrary to clear unambiguous case law; b) contrary to logic and simple common sense; and, c) contrary to the facts as admitted by Plaintiff. The lack of logic and common sense in both Opinions of the Court with respect to this conclusion is exceeded only by the sheer clarity of the language of apparently controlling and cited case law. The illogical consequences of this conclusion would have been more obvious if the Court had maintained the attitude of impartiality required by decisions of the Third Circuit Court of Appeals cited previously in this brief and had not been driven so clearly by partiality and bias in favor of Plaintiff.

The reason provided by the Court in both of its decisions dated October 4, 2005 and its more recent Opinion dated November 16, 2006 for the above *Lopez* related "conclusion" in support of its decision denying Shimer's motion for summary judgment was 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". The Court concluded that Shimer's legal client Shasta Capital Associates, LLC (Shasta) met all four parts of the *Lopez* test for determining if a particular entity was a "commodity pool" and ruled accordingly.

a. The logical necessity of recognizing both the content and context of the four tests of Lopez.

Shimer's brief dated April 6, 2006 pointed out to the Court in excruciating detail the error of its previous Opinion dated October 4, 2005 concluding that Shasta qualifies as a commodity pool under the four tests enunciated by *Lopez*. Shimer spent 5 ¾ pages in his April 6, 2006 brief[13] in support of his renewed 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 all of the "tests" *must be applied to the same "account"* of the entity that is alleged to be a "commodity pool". Shimer 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 context* in which the four tests were enunciated by the *Lopez* court and in light of *the specific language used* by the *Lopez* court in formulating these four clear tests.

b. What the Lopez court said before enunciating its four tests.

Shimer challenges *anyone* (regardless of whether or not they have a legal background or legal training) to *read the Lopez decision*. In approaching the issue of "what constitutes a commodity pool" *Lopez* concluded that no prior court had attempted to set forth clearly to the *Lopez* court's satisfaction all of the basic elements necessary for finding that a "commodity pool" exists under any particular set of facts. The Ninth Circuit purported to do that and laid out a very simple, clear and unequivocal test that consists of four sub parts. In creating these four tests (or four sub-parts) the *Lopez* court stated in its opinion that reference to the language of the Commodity Exchange Act (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. 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

[13] See pages 14 though 19 of Shimer April 6, 2006 brief.

contrary to previous case law. *Lopez* has been often cited favorably either specifically or generally by later federal courts.[14]

> *c. The Lopez decision held that all four of its enumerated tests must be met before an entity can be held to be a commodity pool and this makes perfect logical sense because all four tests are inherently "interconnected" to each other and each test or sub-part flows from the previous" test" or "sub-part".*

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*, (the necessity of *pro rata* apportionment of profits and losses) 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 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.

When Shimer filed with the Court on April 7, 2006 his most recent motion for summary judgment dated April 6, 2006 he clarified his previous discussion of the four tests of *Lopez* found in his previous summary judgment motion dated July 7, 2005. Shimer pointed out, like the child in the familiar story "The Emperor's New Clothes" that not only was test #4 a logical and necessary extension of tests #1 and #2 but that in the absence of a critical "fact" that is clearly and unequivocally required by test #4, *(and which the Plaintiff CFTC has admitted does not exist)* Shimer's legal client Shasta was *not* a commodity pool per *Lopez* and that summary judgment in Shimer's favor was appropriate and required under the Federal Rules. That critical "fact" is a commodity trading account opened by anyone *in the name of* the alleged "pool" entity Shasta.

Now that logical argument *was clearly distasteful and embarrassing for the plaintiff CFTC* since *Lopez* was the only case *ever cited* by the plaintiff for the proposition that Shimer's legal client Shasta was a "commodity pool" when the CFTC's complaint was initially filed in April of 2004 alleging a violation of the Commodity Exchange Act (CEA) by both Shimer and his legal clients Firth and the entity Equity. Since the *Lopez* court had held that the absence of

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[14] See as just one relevant example from the Third Circuit: *Nicholas v Saul Stone & Co.* 224 F.3d 179 (3d. Cir. 2000) at page 190, footnote 4.

facts supporting the presence of its test #3 required a finding that the defendant in *Lopez* was *not* operating a "commodity pool" the clear lack of a critical "fact" specifically stated in the language of test #4 (the existence of a trading account at an FCM *in the name of* Shasta) – a fact that is undisputed by the Plaintiff CFTC would apparently, require, as in *Lopez*, a finding that the entity Shasta is, therefore, not a commodity pool.

d. The Court's "too literal" Lopez argument for denying Shimer's motion for summary judgment is an affront to the very foundation upon which all courts depend for continued respect.

Not so fast... According to both the plaintiff (and Judge Kugler in both his decision dated October 4, 2005 and his latest decision dated November 16, 2006) the *Lopez* court did not "really mean" what it said. Both Opinions of the Court accuse Shimer of being "too literal" in his interpretation of what the *Lopez* court "really meant". This particular argument places the Court on a very slippery slope. If judges like Judge Kugler can decide that previous decisions that are well written and clear "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 of the law is gone. Forget the concept of useful precedent.

Using the attitude and the decision of Judge Kugler in the present case as a model the law has lost all predictability and has now, literally, become an elaborate game of Russian roulette. Adopting the approach of the Court in its most recent decision dated November 16, 2006 every time a case is assigned to a judge in the New Jersey District the outcome no longer depends at all on what previous federal courts have said (with probably the decisions of the Third Circuit excepted) but simply becomes a matter of a judge's personal preference or predisposition. That particular approach to the law should not be acceptable to *anyone* familiar with the concept of respect for well reasoned previous precedent and the commonly held belief among most well informed citizens that the concept "rule of law" should still actually mean what it says.

e. The Court's "too literal" approach to the Lopez four part test is also an affront to the reasonable assumption that judicial opinions will not defy reason, logic and commonsense.

The Court is respectfully referred to Shimer's most recent brief dated December 4, 2006 filed on December 5, 2006 submitted in support of his motion for reconsideration of the same date. In addition to the fact that the Court chose for some inexplicable reason to redefine the

term "commodity pool" in a way that varies dramatically with the specific words previously chosen by the Ninth Circuit decision that Judge Kugler purports to cite as support for its conclusion, (see pages 12 through 15 of Shimer's brief dated December 4, 2006 hereby incorporated by this reference) the most extraordinary aspect of the Court's "too literal" argument with respect to Shimer's offered analysis of *Lopez* is that the Court's conclusion that "Shasta satisfies the four factors of the Lopez test" (found on page 8 of both Opinions dated October 4, 2005 and November 16, 2006) ignores the clear and obvious distinction between a "bank" account and a "commodity trading" account! (See specifically pages 22 through part of page 23 of Shimer's brief dated December 4, 2006 hereby incorporated by this reference).

In its apparent attempt to side *at any cost* with the Plaintiff the Court evidences a willingness to ignore a distinction that *Kensington's* "objective observer" would most certainly find bizarre to say the very least. The Court's Opinions dated October 4, 2005 and November 16, 2006 reflect the fact that the court has essentially decided to agree with the highly unusual *Lopez* argument offered by Plaintiff that the difference between an "account" at a bank and a commodity trading "account" opened at a brokerage firm designated by the CFTC as a futures commission merchant is basically a "distinction without a difference."[15]

The obvious fact that the *Lopez* court was not applying its four tests to that Defendant's "bank" account but to Dean Witter's CGAP account which was clearly a commodity futures trading account held at an FCM is apparently no reason at all for the Court to literally ignore the clear and obvious difference most sane people would make between these two highly different types of "accounts". Moreover, the fact that the case of *Meredith v ContiCommodity Services, Inc.* Comm Fut. L. Rep. (CCH) ¶ 21107, p. 24,462 (D.C.D.C. 1980) never referred to or discussed that defendant's "bank" account when purporting to offer a definition of a commodity pool and the fact that *Nilsen v. Prudential-Bache Securities* 761 F. Supp. 279 (S.D.N.Y. 1991) did not at all concern a "bank" account when it cited to *Lopez* is obviously a "literal" fact the Court is clearly willing to ignore in its pursuit of a decision favorable to the Plaintiff CFTC.

The Court's apparent willingness to apply the four tests of *Lopez* to the bank account of the entity Shasta when the facts in the record clearly indicate 1) that bank account was the only "account" ever opened *by anyone* in the name of Shasta; and, 2) that sole bank account under

[15] See the comment offered in the context of Plaintiff's previous *Lopez* argument on page 12 of the Plaintiff's Response brief dated June 2, 2005 to Shimer's previous brief dated April 13, 2005 filed in support of Shimer's previous motions of that same date to dismiss all counts of Plaintiff's amended complaint under Federal Rules 12(b)(1) & 12(b)(6).

Shasta's federal tax ID number existed merely as the sub account of Shimer's *attorney escrow* account at Citibank defies, reason, logic and pure common sense. Such a decision is reminiscent of the arbitrary decisions regularly handed down by the Red Queen who presides in Wonderland.

The Court's willingness to first *even* attempt to *apply* the four tests of *Lopez* to the bank account of Shasta and then *to actually hold* that those four tests *are met* by necessarily including in that analysis a FCM account held by another completely separate entity in the name of that separate entity in another state[16] constitutes more than just the *appearance* that the Court is either unwilling or incapable of meeting the "objective observer" standard of review imposed by the Third Circuit in *Kensington* and other cases cited therein. As indicated on page 23 of Shimer's brief dated December 4, 2006 such a decision by the Court is sufficient for *Kensington's* "objective observer" to literally question the Court's sanity.

f. Concluding points relevant to the question of whether Judge Kugler violated the Third Circuit's § 455(a) standard of review and whether the Third Circuit will exercise its supervisory authority if Judge Kugler does not voluntarily recuse himself in light of the Court's November 16, 2006 conclusion that "Shasta satisfies the four factors of the Lopez test".

1) The first test enunciated by the *Lopez* court to determine whether an entity is a "commodity pool is: "an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts".
2) The Court apparently concluded in both its Opinion dated October 4, 2005 and its opinion dated November 16, 2006 that a sub account of Shimer attorney escrow account at Citibank in New York into which funds of Shasta's members were only placed temporarily under the Federal Tax ID number of the entity Shasta until subscription paperwork was verified before those funds were transferred to a bank account of the defendant Tech Traders, Inc (Tech) satisfies the first test of *Lopez* and qualifies the entity Shasta as a "commodity pool".
3) The Court apparently arrived at the conclusion that Shimer's attorney escrow account satisfied the first test of *Lopez* and qualified the entity Shasta as a "commodity pool" even though no commodity futures contracts were ever

[16] See Shimer's brief dated April 6, 2006, pages 14 through part of page 15 incorporated by this reference.

purchased for or by Shasta from Shasta's bank account that existed solely as a sub account of Shimer's attorney escrow account.

4) The Court apparently arrived at its conclusion that Shimer's attorney escrow account satisfied the first test of *Lopez* and therefore qualified the entity Shasta as a commodity pool even though all actual commodity futures trading was only and always conducted by the defendant entity Tech *in the name of* Tech from commodity futures trading accounts opened solely *in the name* of Tech.

5) The Court apparently arrived at the conclusion that Shimer's attorney escrow bank account satisfied the first test of *Lopez* and qualified the entity Shasta as a "commodity pool" even though it is impossible to directly "invest in commodity futures contracts" from a bank account.

6) The Court concluded that the entity Shasta satisfies the first test of *Lopez* even though when discussing this first test, on page 8 of both its decision dated October 4, 2005 and November 16, 2006 the Court evidences its confusion about the facts by alleging that individual investor funds "were pooled in Defendant Shimer's equity account". No account of that name ever received any pooled investor funds.

7) The second test enunciated by the *Lopez* court to determine whether an entity is a "commodity pool is: "common funds used to execute transactions on behalf of the entire account."

8) The Court apparently arrived at the conclusion that Shimer's attorney escrow bank account satisfied the second test of *Lopez* and qualified the entity Shasta as a commodity pool even though the word "transactions" in this second test clearly refers to the activity of directly "investing in commodity futures contracts" (see test #1).

9) The Court apparently arrived at the conclusion that Shimer's attorney escrow bank account satisfied the second test of *Lopez* even though no such commodity futures "transactions" of any sort were ever "executed" by anyone "on behalf of" Shasta's bank account which existed solely as a sub-account of Shimer's attorney escrow account.

10) The Court apparently arrived at the conclusion that Shimer's attorney escrow bank account satisfied the second test of *Lopez* even though the only funds that were ever used to actually execute commodity futures contracts were funds located in a futures commission merchant commodity futures trading account owned and operated by

the defendant entity Tech in a state other than the state where Shimer's attorney escrow account was located.

11) The Court apparently arrived at the conclusion that Shimer's attorney escrow bank account in New York satisfied the second test of *Lopez* even though test #1 specifically refers to a "single" account and the language of test #2 clearly refers to a specific type of activity that is supposed to occur from the account described in test #1.

12) The third test enunciated by the *Lopez* court to determine whether an entity is a "commodity pool" is: "participants share pro rata in accrued profits or losses from the commodity futures trading."

13) The Court apparently arrived at the conclusion that Shimer's attorney escrow bank account in New York satisfied the third test of Lopez thereby qualifying Shimer's legal client Shasta as a commodity pool even though no profits or losses ever accrued to anyone "pro rata" from commodity futures trading from Shasta's bank account which existed as a sub-account of Shimer's attorney escrow account.

14) The fourth test enunciated by the *Lopez* court to determine whether an entity is a "commodity pool" is: "the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor."

15) The Court apparently arrived at the conclusion that the entity Shasta qualified as a commodity pool under the fourth test of *Lopez* even though the alleged "operator" of the Shasta pool (the entity Equity) never traded any commodity futures contracts on behalf of either the entity Shasta or on behalf of anyone else.

16) The Court apparently arrived at the conclusion that the entity Shasta qualified as a commodity pool under the fourth test of Lopez even though no "transactions" were ever traded *in the name* of Shasta by the alleged CPO entity Equity nor were any "transactions" traded in the name of Shasta by anyone else.

17) The Court apparently arrived at the conclusion that the entity Shasta qualified as a commodity pool under the fourth test of *Lopez* despite the fact that the entity Shasta never had a commodity trading account at an FCM *in its name* thereby making any trading *in the name of* the entity Shasta virtually impossible.

18) The Court concluded on page 8 of both its opinion dated October 4, 2005 and its opinion dated November 16, 2006 as follows "The fact that Shasta did not invest in

commodity futures directly but instead transferred funds to Tech Traders to invest does not affect Shasta's status as a commodity pool."

19) The Court comes to this conclusion despite the fact that the clear unequivocal language of the four *Lopez* tests do not *in any way* support that conclusion and instead, *directly contradict that conclusion.*

20) The Court comes to that conclusion even though no other case *throughout the entire federal judiciary* before and since *Lopez* has ever held that a commodity pool exists in the absence of a commodity trading account *in the name of* the alleged "pool" entity.

21) The Court comes to that conclusion about the entity Shasta by citing the case of *Heritage* as support for that conclusion even though the Court was provided with clear certified documentation from the actual case file of *Heritage* in the form of Exhibits A through E attached to Shimer's brief dated April 6, 2006 that clearly contradict the fact that the *Heritage* case supports that conclusion.

22) The Court's attempt to find support for this conclusion by citing to the case of *Heritage* becomes even more bizarre *in light of the fact that the Heritage case was specifically cited by the Lopez court when that court enumerated the four clear unequivocal tests that directly contradict the Court's conclusion.*

23) On page 9 of its Opinion dated November 16, 2006 the Court purports to "know" exactly what the *Lopez* court "intended" when that court formulated the language of its fourth clear and unequivocal test by citing to the case of *Meredith v. ContiCommodity Services, Inc.*

24) The basis for the Court's purported "knowledge" about what the *Lopez* court actually "intended" when it formulated its fourth test (see page 9 of both opinions dated October 4, 2005 and November 16, 2006) must be either a crystal ball or a Ouija board or some other as yet "unnamed source" because a fair reading of the actual language found in the district court *Meredith* opinion clearly does not provide any support for being cited as a source of this purported "knowledge" about what the *Lopez* court intended when it formulated test #4.

25) That *Meredith* is somehow a legitimate "source" for the Court's secret "knowledge" about the intentions of the *Lopez* court when test #4 was formulated is undermined by the fact that the district court in *Meredith*, on page 24,462 of its opinion, uses

language about what constitutes a commodity pool that is basically found *in all four tests of Lopez!*

26) That *Meredith* should be support for the Court's radical interpretation of what the *Lopez* court actually "meant" when test #4 was formulated is further undermined by the fact that a clear fair reading of the only sentence found in the entire *Meredith* opinion that could possibly masquerade as the source of the Court's secret "knowledge" is this one: "Transactions are then executed on behalf of the entire account and not allocated to any particular investor." (See page 24,462 of the *Meredith* opinion).

27) How the "transactions" specifically referred to in *Meredith* (note the exact same word specifically used by the *Lopez* court in formulating both tests #2 and #4) can be executed "on behalf of the entire account" without that account being *in the name of* the purported pool entity is a mystery unanswered by the Court since if the account under discussion does not belong to the purported "pool" entity under analysis who does it belong to?

28) The Court's willingness to shred logic and common sense in a unusually bizarre effort to avoid ruling in favor of Shimer and Defendant Firth with respect to their renewed motions for summary judgment dated April 6, 2006 by basically ignoring not only the clear unequivocal language found in the *Lopez* opinion itself but also *the factual context in which the Lopez court enumerated those four clear tests* is clear evidence of the Court's overwhelming personal and professional bias in favor of the plaintiff CFTC.

29) Shimer's brief dated April 6, 2006 filed with the court on the next day April 7, 2006 spent 5½ pages (from page 14 through almost all of page 19) specifically pointing out to the Court that *given the factual context in which all four of the Lopez tests were formulated,* Lopez test #4 cannot be severed and somehow considered separately from all of the other tests as the Plaintiff CFTC has desperately argued again and again in every filing before the Court.

30) Shiimer's brief dated April 6, 2006 clearly pointed out to the Court on page 33 that the plaintiff CFTC's desperate desire to avoid a ruling of summary judgment in Shimer's favor on all counts of the amended complaint did not justify shredding logic and common sense and also ignoring the clear fact that the requirement that an alleged "pool" entity have an account *in its name* (from which commodity futures

contracts are traded for the pro rata benefit of all its members) *is simply a reflection of the fact that what a "pool" entity does is to simply act as a collective investment surrogate for what individual members of that "pool" would have to do if they wanted to trade commodity futures contracts in their own name*-open an account *in their own name* at an FCM. That irrefutable fact--that an account must be opened at a FCM by anyone wishing to become "involved" in commodity futures trading was clearly testified to by the CFTC's own expert witness during the Preliminary Injunction hearing in *Heritage*.

31) A question that might be of great concern to the Third Circuit in reviewing the reasonableness of Judge Kugler's decision should Judge Kugler refuse to recuse himself in response to Shimer's current motion for disqualification is this: "why was the Court so apparently determined to seek and literally "create" on its own an interpretation other than the one obviously required by the clear and unequivocal language of *Lopez* when the obvious requirement that a trading account *in the name of* the alleged "pool" entity was also clearly confirmed by the CFTC's own expert witness in *Heritage* and the Court was provided documentation of that fact and had that information available to it for over 6 months before issuing its recent Opinion dated November 16, 2006?

32) Another question that might be of concern to the Third Circuit in reviewing the reasonableness of Judge Kugler's decision (should Judge Kugler refuse to recuse himself in response to Shimer's current motion for disqualification) is this: why is it that the Court's opinion dated November 16, 2006 does not address or acknowledge *any of the substantial arguments made in Shimer's brief dated April 6, 2006* that discuss (in the course of 5½ pages) not only the necessity of accepting the meaning of the clear language used by the Ninth Circuit in formulating the four *Lopez* tests but, just as importantly, recognizing the inherent logic and necessity of the language chosen by the *Lopez* court in light of consistent previous legal precedent and the clear factual context that gave rise to those four specific tests?

33) Can a district court judge literally ignore without any discussion or explanation substantial and credible arguments offered by a defendant that directly contradict the conclusion found in his unpublished opinion?

34) All briefs with respect to Shimer's summary judgment motion dated April 6, 2006 were filed with the Court before the end of April, 2006. It took the Court *over 6 months* to issue its most recent decision dated November 16, 2006.

35) If one examines the specific paragraphs and language of the Court's opinion dated October 4, 2005 in response to Shimer's previous motion dated July 7, 2005 for summary judgment and then compares that previous opinion to the Court's unpublished opinion dated November 16, 2006 issued with respect to Shimer's April 6, 2006 motion for summary judgment one finds that both decisions *are exactly identical* except for a few words that are deminimis and inconsequential.

36) It appears from the similarity between both decisions of the Court that Judge Kugler not only figuratively but literally hit the "reprint" button on his computer and virtually issued for a second time *the exact same opinion issued over a year earlier on October 4, 2005 without ever any discussion or analysis of the clear and substantial Lopez related arguments that were contained in Shimer's April 6, 2006 brief.*

37) Does that sort of apparent unwillingness to address *any of the arguments or points* presented in Shimer's brief dated April 6, 2006 with respect to the four clear and unequivocal tests found in *Lopez* and the fact that it took the Court *over 6 months* to virtually issue the same opinion issued on October 4, 2006 indicate a violation of Canon 3A(5) of the Code of Conduct for United States Judges?

38) Shimer notes that the commentary to Canon 3A5 states that "In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard". Does the Court's opinion dated November 16, 2006 indicate that Judge Kugler even took the time to read any of the substantial arguments with respect to the four clear tests of *Lopez* contained in Shimer's brief dated April 6, 2006?

39) If Judge Kugler did not read Shimer's brief, clearly the right to be heard is not fulfilled by simply accepting a brief from a defendant and then never reading it!

40) If Judge Kugler did actually read Shimer's brief dated April 6, 2006, is the "right to be heard" fulfilled when *substantial arguments* contained in that brief and when *significant and relevant documentation attached to that brief relevant to the consistency of the four tests of Lopez with the clear facts of Heritage* are basically

ignored and *never mentioned or even alluded to* during the course of the Court's most recent opinion dated November 16, 2006?

41) Does that sort of apparent behavior on the part of Judge Kugler also violate Canon 2A of that same Code of Conduct when the language of that particular Canon addresses and discourages the *appearance* of impropriety?

42) Does that same behavior of Judge Kugler also violate Canon 1 of that same Code of Conduct that insists that members of the federal judiciary uphold the *integrity* of the judiciary?

43) Is integrity demonstrated when a federal judge engages in such a flagrant disregard for both the substantial arguments presented in a defendant's brief and the documentation attached as Exhibits to that brief ?

3. Regarding the Court's conclusion that "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool".

a. The Court's Opinion dated November 16, 2006 is inherently arbitrary and unreasonable.

The Court's conclusion on page 9 of its Opinion dated October 4, 2005 that "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool" could *perhaps* be simply explained away on October 5, 2005 as harmless error due simply to an overloaded case docket. The fact that the Court *failed to mention* and *apparently paid absolutely no attention whatsoever* in its latest opinion dated November 16, 2006 to the well researched and accurate legislative history of the 1974 Amendments to the Commodity Exchange Act (CEA) offered by Shimer in his brief in support of his renewed motion for summary judgment dated April 6, 2006 provides far more than the mere "appearance" of partiality to *Kensington's* "objective observer". (See *Kensington*, pages 301 & 302).

The four corners of the Court Opinion dated November 16, 2006 provide *absolutely no indication whatsoever* that Shimer ever addressed the Court's previous conclusion about the "intent" of Congress in his brief of April 6, 2006. It is as if every word, sentence and paragraph provided on pages 22 through 26 of Shimer's brief simply did not exist! It would not be unreasonable for an objective observer to conclude after reviewing both Shimer's brief of April 6, 2006 and then the Opinion of the Court dated November 16, 2006 that the Court's attitude

with respect to Shimer's renewed motion for summary judgment was: "my mind is made up don't confuse me with either the facts or the law".

This failure to address *in any way* the legislative history provided by Shimer in his April 6, 2006 brief that points clearly to a conclusion contrary to the conclusion offered by the Court on October 4, 2005 and then, once again, to deny Shimer's motion for summary judgment on November 16, 2006 *creates the appearance* of a clear lack of impartiality. The Court's Opinion dated November 16, 2006 not only invites but arguably *requires* the application of both the provisions of 28 USC § 455(a) and the Code Of Conduct For United States Judges to its decision and the resulting exercise, if necessary by the Third Circuit Court, of its supervisory authority.

Moreover the Court's Opinion dated November 16, 2006 is not merely lacking in comment with respect to Shimer's legislative history information and research. There is absolutely no indication that the Court conducted *any* separate legislative history research of its own! How did the Court arrive at its stated conclusion about the "intent" of Congress? What information did the Court consider? The Court provides absolutely no indication. A Ouija board? A Crystal ball? Some other source? One can only wonder.

The Court's willingness to arrive at its "conclusion" about the intent of Congress with respect to the 1974 amendments to the CEA *in both* of its above cited opinions without *any discussion either time* of the actual legislative history of the CEA stands in stark contrast by comparison to the measured, deliberate and responsible way the Supreme Court and other impartial federal courts (both at the district court and the appellate level) have approached and discussed an issue or question that requires determining the intent of Congress expressed in the CEA. The obvious failure of the Court to discuss *in any way* the legislative history of the CEA that supposedly supports a denial of Shimer's motion for summary judgment evidences more than simply the "appearance" of partiality towards Plaintiff or, in the alternative, a bias against Defendant Shimer. The Court's partiality is clear, obvious and compelling and arguably rises to the extraordinary level of denial of due process.

A competent and fair review of the legislative history of a statute is always expected to avoid unsupported arbitrary conclusions such as the one now offered twice by the Court. 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 in conflict with that intent revealed by a reasonable review and analysis of the CEA's legislative history is inherently arbitrary and unreasonable. Such an Opinion (when generated figuratively,

and perhaps literally, by hitting the "reprint" key on the Court's computer) does far more than merely violate the Third Circuit's "objective observer" standard of review found in its decisions in both *Kensington* and *Alexander*. The Court's Opinion dated November 16, 2006 arguably violates the due process clause of the United States Constitution.

b. *Summary of points relevant to whether Judge Kugler violated the Third Circuit's § 455(a) standard of review and whether the exercise of the Third Circuit's supervisory authority is now likely if Judge Kugler does not voluntarily recuse himself in light of the Court's November 16, 2006 conclusion that* "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool."

1) When Shimer received the Court's opinion dated October 4, 2005 last fall denying his previous motion for summary judgment, he noted that the Court's opinion dated October 4, 2005 did not purport to provide any independent analysis of the 1974 amendments of the Commodity Exchange Act (CEA) but, instead referred only to a single sentence about the purpose of the 1974 amendments to the Commodity Exchange Act found on page 883 of the apparently controlling case *Lopez v. Dean Witter Reynolds, Inc.* 805 F. 2d 880 (9th Cir. 1986).[17]
2) The *Lopez* case did not engage in any legislative analysis of the 1974 amendments to the CEA because the issue it addressed was resolved by summarizing previous federal case law into a clear four part test.
3) The quote from *Lopez* cited by the Court in its Opinion dated October 4, 2005 simply referred to the obvious fact that Congress had amended the CEA to insure "fair practice and honest dealing on the commodity exchanges" and "provid(e) a measure of control over forms of speculative activity that demoralize the markets…".
4) A single sentence in an introductory paragraph to Senate Report 93-1131 that refers to the concern by Congress about activity on the exchanges (where trading actually occurs) does not, by itself, indicate an intent on the part of Congress to authorize the CFTC to regulate entities such as Shimer's client Shasta that do not directly engage in or conduct commodity futures trading on any exchange.
5) After discussing two federal cases that did not engage in any analysis of the legislative history of the CEA the Court offered the conclusion that the entity Shasta

[17] Shimer refers to *Lopez* as "apparently controlling" because both opinions of the Court dated October 4, 2005 and November 16, 2006 purport to treat *Lopez* as "controlling".

was exactly the type of entity "...Congress authorized the CFTC to regulate as a commodity pool." (See page 8 of the Court's opinion dated October 4, 2005.)

6) In the Spring of 2006 Shimer spent time in a nearby law library researching the legislative history of the CEA as reflected in Senate Report 93-1131 referred to in the one sentence from *Lopez* cited by the Court in its Opinion dated October 4, 2005.

7) In Shimer's brief dated April 6, 2006 Shimer provided the Court with 4½ pages of detailed analysis of the 1974 amendments as reflected in Senate Report 93-1131 as well as sections of Title II of the 1974 Amendments to the CEA that specifically referred to the activity of "commodity pool operators."[18]

8) Shimer's brief dated April 6, 2006 pointed out that the Court's one line conclusion about the intent of Congress was not at all supported by Senate Report 93-1131 nor was it supported by specific provisions of Title II of the 1974 amendments to the CEA. Shimer provided the Court with specific provisions from that legislation to support his conclusion.

9) All of the points Shimer made in his brief dated April 6, 2006 were available to Judge Kugler if he ever read Shimer's brief.

10) Plaintiff's brief dated April 20, 2006 did not contradict or dispute any of the specific details of legislative history Shimer provided in his April 6, 2006 brief.

11) The fact that the Plaintiff did not point out any deficiency in the specific legislative history analysis Shimer provided in his brief dated April 6, 2006 was evident and apparent to Judge Kugler if he read Plaintiff's Response to Shimer's brief.

12) The Court's recent opinion dated November 16, 2006 makes no mention whatsoever of any of the points contained in Shimer's brief nor did that opinion attempt in any way to point out the error of either the analysis or commentary Shimer had previously provided in his brief regarding the legislative intent of Congress when the 1974 amendments to the CEA were enacted.

13) Judge Kugler never attempted in any way to explain in his most recent decision dated November 16, 2006 why the following statement found on page 8 of that most recent Opinion has any credibility or basis at all in reality: "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool." ...".

[18] See pages 22 through 26 of Shimer's brief dated April 6, 2006 filed in support of his motion for summary judgment.

14) If Judge Kugler actually read Shimer's brief dated April 6, 2006 wasn't it incumbent upon Judge Kugler to discuss in the Opinion of the Court dated November 16, 2006 why the Court continued to assert its conclusion about the intent of Congress with respect to entities situated similarly to Shimer's legal client Shasta?

15) Can a district court judge such as Judge Kugler literally ignore *without any discussion or explanation* substantial and credible arguments with respect to the intent of Congress that are based upon an actual analysis of the 1974 amendments of the CEA and Senate Report 93-1131 found in Shimer's brief dated April 6, 2006 that directly contradict the one line conclusion found in Judge Kugler's unpublished opinion dated November 16, 2006 when that one line conclusion is unsupported by any apparent research into legislative intent conducted by the Court?

16) All briefs with respect to Shimer's summary judgment motion dated April 6, 2006 were filed with the Court before the end of April, 2006. It took the Court *over 6 months* to issue its most recent decision dated November 16, 2006.

17) If one examines the specific paragraphs and language of the Court's opinion dated October 4, 2005 in response to Shimer's previous motion for summary judgment dated July 7, 2005 and then compares that previous Opinion to the Court's most recent unpublished opinion dated November 16, 2006 issued with respect to Shimer's April 6, 2006 motion for summary judgment one finds that both decisions *are exactly identical* except for a few words that are deminimis and inconsequential.

18) It appears from the similarity between both decisions of the Court that Judge Kugler not only figuratively but literally hit the "reprint" button on his computer and virtually issued for a second time *the exact same opinion issued over a year earlier on October 4, 2005* that includes without further explanation or support his conclusion that "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool." (See the Court's Opinion dated November 16, 2006, page 8.)

19) Does that sort of apparent unwillingness to address *any of the arguments or points* presented in Shimer's brief dated April 6, 2006 with respect to the intent of Congress to allow regulation by the CFTC of entities situated similarly to Shimer's legal client Shasta indicate a violation of Canon 3A(5) of the Code of Conduct for United States Judges?

20) Shimer notes that the commentary to Canon 3A(5) states that "In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard". Does Judge Kugler's opinion dated November 16, 2006 indicate that he even took the time to read Shimer's brief dated April 6, 2006?

21) If Judge Kugler did not read Shimer's brief, clearly Shimer's right to be heard is not fulfilled by simply accepting a brief from a defendant such as Shimer and then never reading it.

22) If Judge Kugler read Shimer's brief, is the "right to be heard" fulfilled when substantial arguments about the legislative intent of Congress with respect to an issue addressed in that brief (potentially favorable to Shimer's then pending motion for summary judgment) are basically ignored and never even mentioned or alluded to during the course of the Court's most recent opinion dated November 16 2006?

23) Does that sort of apparent behavior on the part of Judge Kugler also violate Canon 2A of that same Code when the language of that particular Canon addresses and discourages the *appearance* of impropriety?

24) Does that same behavior of Judge Kugler also violate Canon 1 of that same code that insists that members of the federal judiciary uphold the *integrity* of the judiciary?

25) Is there any integrity at all displayed when a federal judge engages in such an apparent flagrant disregard for accurate legislative history offered in a defendant's brief designed to provide significant and reliable insight into the intent of Congress with respect to a particular issue that has the potential for favorably disposing of that defendant's pending motion for summary judgment?

C. **The Court's lack of impartiality is also reflected in the fact that the Court is apparently unwilling in both of Its Opinions to accurately state the material fact not in dispute that requires summary judgment for Shimer with respect to all counts of Plaintiff's amended complaint.**

1. The Court's apparent unwillingness to accurately state the undisputed "material fact" at the heart of Shimer's summary judgment motion now briefed *ad nauseum* by both Shimer and Plaintiff requires recusal to avoid the clear appearance of partiality in favor of plaintiff

In addition to the three specific conclusions of the Court discussed above in section II B both Opinions of the Court dated October 4, 2005 and November 16, 2006 reflect an apparent unwillingness to properly state the "material fact" Shimer has continued to allege is

undisputedly missing that requires summary judgment for Shimer with respect to all counts of the Plaintiff's amended complaint. If the Court's misstatement is intentional recusal is clearly appropriate under the standard of review set forth by the Third Circuit in *Kensington*. If the Court's misstatement is inadvertent due to an unwillingness to give this dispositive issue the attention and consideration it deserves, recusal and assignment of another judge is, likewise, appropriate under both the Third Circuit's decisions in *Kensington* and *Alexander* because such an unwillingness evidences a clear disposition to favor Plaintiff which reflects an improper *appearance* of bias by the Court.

Regardless of the reason for the Court's misstatement, at this point in time, it is inexcusable that the court has now twice misstated the material fact that is not disputed. After the number of pages that have been submitted in briefs to date for the Court's consideration the clear unwillingness of the Court to properly frame the dispositive material fact at the heart of both Shimer's motion for summary judgment dated July 7, 2005 and his more recent similar motion dated April 6, 2006 requires recusal and assignment of another judge to rule on Shimer's now pending motion for reconsideration of the Court's recent denial of Shimer's motion for summary judgment.

At the bottom of page 3 of his recent unpublished decision 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").

With all due respect, Shimer has *never argued in any brief* that the alleged *existence* of the entity Shasta as a commodity pool is the "material fact" that is missing. The clear, simple "material fact" Shimer has consistently referred to in his summary judgment brief filed with the Court dated July 7, 2005 and Shimer's recent brief dated April 6, 2006 is the existence (or in the present case the non existence) of a commodity trading account at a FCM established *in the name of* the entity that is alleged to be a commodity pool. The presence of that particular "material fact" determines whether a particular entity meets at least three of the four tests (Tests #1, #2 and #4) propounded by the Ninth Circuit Court of Appeals in *Lopez* for determining the existence of a "commodity pool". The record in the present matter indicates the plaintiff has freely and clearly admitted this "material fact" does not exist. Whether or not the entity Shasta is a commodity pool *is a legal conclusion. That legal conclusion* is one to be drawn from the

undisputed non existence of a commodity trading account opened at an FCM *in the name of* Shasta that must necessarily be present to satisfy all four parts of the tests for the apparently controlling case law definition of a "commodity pool".

2. The Court's unwillingness to properly frame the "material fact" issue results in a continued mischaracterization of Shimer's summary judgment argument

Judge Kugler's unwillingness to clearly and honestly state what the "material fact" is that is in dispute that supports Shimer's motion for summary judgment results in the following confused mischaracterization of Shimer's summary judgment argument on page 9 of both the Court's Opinion dated October 4, 2005 and its 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, what happened to the expert witness testimony in *Heritage* placed before the Court as certified attachments to Shimer's April 6, 2006 brief? But more on point, 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". It is clearly true that Tech never traded Shasta's funds in Shasta's name. But that argument is ridiculous and illogical and truly misses the point.

What Shimer has clearly pointed out to the Court again and again in both Shimer's previous brief dated July 7, 2005 in support of his motion of that same date for summary judgment and what Shimer has continued to point out 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 are being traded (or at least capable of being traded) *in the name of Shasta by anyone*, Shasta is simply not a "commodity pool" as that specific type of entity is now defined by the four part test of *Lopez*. If the Court does not understand the clear difference between the argument it has now twice mischaracterized and the argument just stated above in the immediately preceeding sentence *that inability alone* is a sufficient basis to require recusal of Judge Kugler and the appointment of another judge to rule on Shimer's now pending motion for reconsideration.

3. The fact that the defendant Tech did not trade Shasta's funds in the name of Shasta *does not* automatically confer "commodity pool" status upon the entity Shasta as both Opinions of the Court suggest.

In the present matter before Judge Kugler, the defendant entity Tech was clearly, in retrospect, operating as a commodity pool and the plaintiff CFTC has arguably alleged that legal conclusion appropriately in its complaint. But what Judge Kugler fails to acknowledge because he does not understand the argument (or because his apparent personal and professional bias against Shimer and Firth is so extreme) is *the fact that the defendant Tech did not trade Shasta's funds in the name of Shasta does not automatically confer upon the entity Shasta the sudden status of a "commodity pool".*

The relationship that the entity Shasta had with the Defendant Tech Traders 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 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 plaintiff CFTC (including a failure to properly register with the plaintiff CFTC and an apparent failure to trade the pool entity's funds by a separate individual or entity as the "operator" of the "pool") create a reason to conclude that the separate and distinct entity Shasta is "somehow, someway" suddenly a "commodity pool" thereby requiring registration by its manager the defendant Equity. What Tech did or did not do is the responsibility of Tech and defendant Coyt E. Murray who owned and managed Tech.

What Shasta did or did not do is the only basis for determining the "commodity pool" issue with respect to the entity Shasta. Clearly Plaintiff wishes that were not true. Given the lack of both law and facts in support of its position the Plaintiff has argued its case admirably for past year and a half. Based upon the specific language adopted by the Court in trying to fashion an opinion in favor of Plaintiff apparently the Court also shares this wish harbored by Plaintiff. However wishing for the illogical and untrue has no place in judicial decisions of the federal district courts.

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 be required to

register with the plaintiff CFTC as a CPO of the "pool" entity Shasta under either of the following two factual scenarios:

1) If the entity Shasta (or any individual or other entity) had separately established 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 also forwarded a part of Shasta's funds to the separate entity defendant Tech to trade in the name of Tech; or,

2) If Shasta or its manager Equity *or anyone else* had opened an account *in Shasta's 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 *Heritage* case).

E. The Lack Of Any Substantive Basis For The Court's Three Conclusions Offered In Support Of Its Decision To Deny Shimer's Motion For Summary Judgment Both On October 4, 2005 And Again On November 16, 2006 And The Fact That The Court Literally Hit The "Reprint" Button On Its Computer To Create Its Most Recent Opinion Dated November 16, 2006 Satisfies The Supreme Court Standard For Applicability of 28 U.S.C. § 455(a) By Revealing "a deep seated favoritism" Toward Plaintiff And "such a high degree of... antagonism" to the Reasonable Arguments Of Shimer "as to make fair judgment impossible"

In 1993 the Supreme Court granted certiorari in the case of *Liteky v. United States* 510 U.S. 540 (1994). The issue before the Court was whether required recusal under 28 USC § 455(a) is subject to the limitation known as the "extrajudicial source" doctrine. Justice Scalia rendered the Opinion of the Court and began by citing to the reasons Petitioner Liteky alleged the District Court's previous denial of his motion for disqualification to be improper.

The District Judge had denied Petitioner Liteky's motion to disqualify stating that matters arising from judicial proceedings were not a proper basis for recusal. Petitioner Liteky appealed claiming that the refusal of the District Judge to recuse himself was a violation of § 455(a). Liteky was accused of performing various misdemeanor acts of vandalism against the Fort Benning military installation. Petitioner Liteky alleged bias based on certain behavior and statements of the District Judge *in a previous trial* in 1983 in which similar acts of vandalism were allegedly performed against the same military installation by another defendant. The

behavior of the District Judge alleged by Petitioner Liteky as a basis for disqualification at Liteky's later trial did *not even begin* to approach the level of impropriety of Judge Kugler recited previously by Shimer in this brief. It is, therefore, unnecessary to engage in an extended comparative discussion at this time in the interest of space.

Justice Scalia first reviewed the legislative history of federal statutes enacted by Congress with respect to the issue of judicial recusal. He began by noting that "[s]ince 1792 federal statutes have compelled district judges to recuse themselves when they have an interest in the suit or have been counsel to a party."[19] He further stated that "[n]ot until 1911, however was a provision enacted requiring district-judge recusal for bias *in general*."[20] Justice Scalia noted that the current federal statute reflecting the general bias provision enacted in 1991 is now found at 28 U.S.C. §144.

The Supreme Court noted in *Liteky* that courts of appeals had generally followed the doctrine formulated by Justice Douglas in the 1966 case of *United States v. Grinnell* 384 U.S. 563, 583 (1966) requiring that alleged bias under §144 "must stem from an extrajudicial source".[21] Noting that *Grinnell* was the only Supreme Court case to actually recite the "extrajudicial source" doctrine the *Liteky* decision also recognized that both the Fourth and the Fifth Circuit Courts had expressed a "pervasive bias" exception to the "extrajudicial source" requirement with respect to the provisions §144::

> "...even in cases in which the "source" of the bias or prejudice was clearly the proceedings themselves (for example, testimony introduced or an event occurring at trial which produced unsuppressible judicial animosity), the supposed doctrine would not necessarily be applied. See *Davis v. Board of School Comm'rs of Mobile County* 517 F.2d 1044, 1051 (CA5 1975) (doctrine has pervasive bias exception) cert denied 425 U.S. 944 (1976); *Rice v. McKenzie*, 581 F.2d 1114, 1118 (CA4 1978) (doctrine "has always had limitations").[22]

Writing for the Court, Justice Scalia then turned to the language of 28 U.S.C. § 455 and noted that prior to that statute's amendment in 1974 "...§ 455 was nothing more than the then-current version of the 1821 prohibition against a judge's presiding who has an interest in the case or a relationship to a party."[23] The Court noted, however, that in 1974 amendments to 28 U.S.C. § 455 made "massive changes" resulting in the language of that statute as it exists today.

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[19] *Liteky v. United States* 510 U.S. 540, 544 (1994).
[20] *Liteky* at page 544.
[21] See *Litkey* at page 544 citing to *Grinnell* at page 583.
[22] See *Litkey* at pages 545 & 546.
[23] *Liteky*, at page 546.

Before discussing § 455(a) specifically the Court looked at the specific provision of § 455(b)(1) which "duplicated the grounds for recusal set forth in § 144 ('bias or prejudice')"[24] and concluded after a discussion of Court of Appeals case law that

> "the origin of the "extrajudicial source" doctrine, and the key to understanding its flexible scope (or the so-called "exceptions" to it), is simply the pejorative connotation of the words "bias or prejudice." ... The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate...because it is undeserved..."[25]

Justice Scalia's opinion then turned to the specific language of § 455(a) and rejected the Petitioner Liteky's "plain language" argument offered to require recusal for the particular statements and behavior alleged to have occurred in a previous trial (conducted by the same District Judge) for similar acts by a different defendant against the same military facility. Justice Scalia concluded that

> "[a] similar "plain language" argument could be made, however, with regard to §§ 144 and 455(b)(1): they apply *whenever* bias or prejudice exists, and not merely when it derives from an extrajudicial source."[26]

For Justice Scalia and the majority of justices the issue of whether a particular request for recusal is improperly denied when requested on proper motion of a party is found in the "pejorative connotation of the terms 'bias' and 'prejudice' " which demand "that they be applied to judicial predispositions that go beyond what is normal and acceptable."[27] There is *absolutely nothing* in the Court's *Liteky* opinion that offers any support for a refusal by Judge Kugler to recuse himself in the current matter requiring a decision with respect to the term "commodity pool" as that term is defined by the Plaintiff's regulations and as that term has been further clarified by the apparently controlling case law decision of *Lopez*.

While *Liteky* holds that the extrajudicial source doctrine applies to § 455(a) the Court was clearly unwilling to rule out the possibility that judicial rulings could *of themselves* become a source for invoking the provisions of § 455(a):

> "...judicial remarks...ordinarily do not support a bias or partiality challenge... they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."

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[24] *Liteky*, at page 548.
[25] *Liteky*, at page 550.
[26] *Liteky*, at page 552.
[27] *Liteky*, at page 552.

III. CONCLUSION

In light of all of the above it should be clear to any reasonable and fair minded person (regardless of whether or not they have had any formal training in the law) that 1) the Court's unwillingness in its Opinion dated November 16, 2006 to acknowledge or even comment *in any way* on the credible and substantial arguments contained in Shimer's brief dated April 6, 2006 that specifically addressed the three conclusions found previously in the Court's October 4, 2005 Opinion was arbitrary and clearly unreasonable; 2) that such a failure by the Court to address or even mention in any way Shimer's credible and well researched points and arguments is an affront to the very concept of due process itself which requires *at the very minimum* that a member of the federal judiciary provide a fair and impartial opportunity to be heard to every defendant before his court; 3) that Judge Kugler's apparent total disregard for this basic concept of due process of law is further emphasized and exacerbated by the obvious fact that he apparently never took the time to properly research and file an opinion on November 16, 2006 that was *in any way* different from the opinion that he had issued over a year previously on October 4, 2005 even though he had been provided new certified documentation not before him prior to October 4, 2006; and 4) that the 6 month plus period of time it took for Judge Kugler to simply hit the "re-print" button on his computer cannot be justified no matter how crowded his docket might be with other matters.

Judge Kugler apparently does not have the time, the inclination, or the willingness to fairly and properly review and then accurately discuss in a meaningful way the substantial and dispositive "commodity pool" issue currently before him raised by Shimer's brief dated April 6, 2006. It is respectfully suggested that Judge Kugler voluntarily recuse himself from any pending or future motion or appeal filed by Shimer and Firth. Judge Kugler should request that the Chief Judge of the New Jersey District assign another district judge to review and decide Shimer's motion for reconsideration and any other appeal by defendants Shimer and Firth.

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Respectfully submitted,

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