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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION,	:	Hon. Robert B. Kugler
Plaintiff, vs.	:	**Civil Action No. 04-1512**
EQUITY FINANCIAL GROUP LLC, TECH TRADERS, INC., TECH TRADER, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY		Motion Date: May 5, 2006
Defendants.		

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO PLAINTIFF'S RESPONSE TO MOTIONS FILED BY ROBERT W. SHIMER AND VINCENT J. FIRTH FOR SUMMARY JUDGMENT

Defendant Robert W. Shimer ("Shimer") acting *pro se* replies to the Response of Plaintiff Commodity Futures Trading Commission ("CFTC") to the respective Motions For Summary Judgment of both Shimer and Vincent J. Firth ("Firth"). Before addressing and replying to each of the 5 specific enumerated "reasons" offered by the CFTC in its Response, a few initial comments in Reply are appropriate.

To describe the first point offered by the CFTC on page 2 of its Response as an effective "argument" against granting Shimer and Firth's pending motions for summary judgment is to confer a status not really deserved. Plaintiff begins its Response by noting that: "Shimer and Firth *do not support their motion with any evidence*."[1] (Emphasis added). In all seriousness, has legal counsel for the CFTC ever read the Supreme Court decision of *Celotex v. Corp. v. Catrett* 477 U.S. 317, 323 (1986)? *Celotex* requires that summary judgment is appropriate and should be granted to the moving party if the moving party points out to the district court that the opposing party (Plaintiff) cannot establish "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [2] Shimer has repeatedly done that.[3]

In arguing that the current pending summary judgment motions of defendants Shimer and Firth are somehow deficient because Shimer and Firth are required to present affirmative "evidence" in support of their motion, the CFTC apparently prefers the position of the Circuit Court of Appeals For the District of Columbia that was specifically reversed and repudiated by the Supreme Court decision in *Celotex*. What is even more astounding about the CFTC's ability to virtually ignore what the Supreme Court actually said in *Celotex* is the further fact that the Supreme Court granted *certiorari* in that case because the Third Circuit *had not required* an affirmative evidentiary showing by the moving party seeking summary judgment in the case of *In re Japanese Electronic Products*, 723 F. 2d 238 (1983). As pointed out by the court, Certiorari was granted for the specific purpose of resolving the conflict between the D.C. and the Third Circuits. Plaintiff's first "argument" against the grant of summary judgment for Shimer and Firth is apparently couched as a proposal that the Court not only ignore the clear language and the decision of the Supreme Court in *Celotex* but also ignore a similar decision of the Third

[1] See page 2 of Plaintiff's Response.
[2] *Celotex v. Corp. v. Catrett* 477 U.S. 317, 322 (1986)
[3] See pages 5-7 of Shimer's Brief dated July 7, 2005 (Document 230) incorporated here by this reference and also page 34 of Shimer's recently filed Brief dated April 6, 2006.

Circuit Court of Appeals.

Plaintiff then veers from the absurd to the ridiculous on that same page 2 and on the following page 3 of its Response 1) by first offering a mischaracterization of Shimer's argument 2) by assuming that the activity of Shimer or Firth were equal or at all similar to the activity engaged in by Defendant Coyt E. Murray ("Murray') and 3) by suggesting in conclusion that a grant of summary judgment for Shimer and Firth would somehow "turn the oft-stated goal of the Commodity Exchange Act...to protect investors on its head." [4] Plaintiff has evidently been reduced to assuming the role of "Chicken Little" and now predicts that if summary judgment for Shimer and Firth is granted the sky will begin to fall with respect to the CFTC's ability to "protect investors". Obviously nothing could be further from the truth.

The CFTC argues on pages 2 and 3 of its Response that "Shimer and Firth's entire argument lies in the tortured assertion that a feeder fund like Shasta...is nevertheless not a commodity pool unless the principals of that feeder fund...follow the rules and regulations and trade money in the name of the pool...". Shimer has never argued in any brief submitted to the Court that his legal client Shasta is not a commodity pool simply because the manager of that business entity failed to register as a commodity pool operator or to put it in Plaintiff's word because Shimer, Firth or Equity failed to "follow the rules". No one in their right mind would ever attempt argue that an administrative agency's statutory authority to regulate can be circumvented by simply ignoring what that agency's regulations require!

Ignoring Plaintiff's bizarre attempt to lump together and treat as similar or equivalent the activities of Shimer, Firth and Murray, there exits no "rule " or "regulation" issued by Plaintiff stating something to the effect that: "any entity that seeks to profit from the actual commodity trading activity of others must register with Plaintiff." Such a "rule" or "regulation" imposing that sort of "affirmative duty" or "obligation" to register with Plaintiff would be absurd because it would require every business entity that ever placed funds with another entity that meets the definition of a "commodity pool" to also somehow register with Plaintiff.

To adopt Plaintiff's argument would suddenly subject to Plaintiff's commodity pool registration requirements every entity that received the funds of more than one individual and never traded commodity interests but simply placed its combined member or shareholder funds with an entity either properly registered as a commodity pool or one that is later determined to be required to register as a commodity pool. The only difference between Shasta and any other

[4] See pages 2 and 3 of Plaintiff's Response.

entity that places its funds with another separate entity that directly trades commodity futures for the expectation of pro-rated profit is the fact that in most instances entities that receive the funds of others and then engage in the trading of commodity interests in their own name are usually properly registered as commodity pools. Tech's apparent failure to properly register as a commodity pool operator did not, under Plaintiff's regulations, impose a similar affirmative obligation upon the manager of the separate entity Shasta.

Furthermore, the Plaintiff's rules and regulations do not prohibit investor entities such as Shasta or any other similar entity from being able to profit from the direct trading activities of another separate entity if that "other entity" engages in an activity recognized by the courts and Plaintiff as an activity that requires registration with Plaintiff. That's what all other participants of a commodity pool do—they profit pro-rata from the trading activities of the entity that receives and trades their funds. Plaintiff seems confused. It's not the *participants* of a commodity pool that are supposed to register with the CFTC—that obligation is only imposed upon the *operator* of the pool. Plaintiff has never gone so far as to ever argue that Defendant Equity is an unregistered CPO because it failed to register as the operator of Tech's apparent pool!

The most confusing and illogical aspect of Plaintiff's introductory "Chicken Little" argument is the hysterical conclusion that if Shimer and Firth's motions for summary judgment are granted that somehow the entity "...Tech Traders, which perpetrated a multi-million dollar commodity fraud, could escape all regulatory scrutiny by failing to follow the rules in structuring commodity pools." [5] The arguments and points made by Shimer with respect to the issue of whether or not the Defendant Equity was ever required to register with Plaintiff as a CPO have never provided any basis for allowing the entity Tech Traders, Inc. ("Tech") to make a similar argument in support of Tech's failure to properly register with Plaintiff. The activities of Defendant Tech clearly meet all of the four tests of *Lopez v. Dean Witter Reynolds, Inc.* 805 F2d 880 (9th Cir. 1986).

Defendants Murray, Abernethy and Tech have apparently agreed to enter into a settlement with Plaintiff. While Shimer is not privy to the terms of that proposed "settlement" the fact that Murray and his company Tech have apparently agreed to settle with Plaintiff is hardly support for Plaintiff's contention that Murray and his company Tech were able to "escape all regulatory scrutiny". Moreover, the nightmare that Defendants Shimer and Firth have been subjected to by Plaintiff for the past two years hardly qualifies as "escaping regulatory scrutiny".

[5] See Plaintiff's Response, page 3.

That "scrutiny" by Plaintiff of both Shimer and Firth for almost two and a half years combined with Plaintiff's continued insistence that a violation of its enabling statute and its regulations occurred by Shimer and Firth *in the absence of any evidence to support those allegations* is most troubling. Defendant Shimer respectfully suggests that the hysterical nature of Plaintiff's "Chicken Little" argument is driven more specifically by the embarrassment that a ruling in favor of Shimer and Firth would inflict upon both Plaintiff and Plaintiff's lead counsel than upon any imaginary effect such a ruling by the Court would have upon the effectiveness of the Commodity Exchange Act or Plaintiff's enabling regulations. [6]

I. Reply to Plaintiff's "Key Goal of the Act" Argument

There is nothing "selective" about Shimer's discussion of the legislative history of the Commodity Futures Trading Act of 1974 which created the CFTC. First of all, Shimer examined and discussed the exact same Senate Report 1131 cited in passing by the *Lopez* Court and recently referred to by the Court in its opinion dated October 4, 2005. Shimer will not overburden the Court by filing as an attached Exhibit that entire Senate Report. The Court has enough documentation to wade through at this point after the filing of Plaintiff's over length Motion for Partial Summary Judgment with its extensive attachments. Shimer's Response to *that* particular filing will be forthcoming.

Nor do any of the cases cited by Plaintiff on page 4 advance Plaintiff's argument. *Ping He (Hai Nam) Co. v. Nonferrous Metals, Inc.*, 22 F. Supp. 2d 94 (S.D. N.Y. 1998) was a case in which Plaintiff Ping He brought suit against Nonferrous Metals, Inc. ("NFM") claiming that NFM misrepresented itself as a registered commodity broker in order to induce Ping He to open an account with NFM. Ping He further claimed that after its account was opened it never authorized NFM to execute trades on its behalf but that NFM, nevertheless, improperly charged Ping He for large trading losses. How citing to any quote from that case furthers Plaintiff's argument is a mystery.

CFTC v. Schor, 478 U.S. 833 (1986) was a case in which William T. Schor and Mortgage Services of America, Inc., invoked the CFTC's reparations jurisdiction by filing complaints against petitioner ContiCommodity Services, Inc. (Conti), a commodity futures broker as a result of a debit balance in Schor's futures trading account at Conti. Schor alleged the debit balance was

[6] That embarrassment would be made all the more acute by the fact that Plaintiff's Original Complaint filed in this matter never named Murray (the real apparent perpetrator of the alleged fraud) as an initial defendant!

the result of Conti's numerous violations of the CEA. In the interest of eschewing "selectivity" let's put the partial quote cited by Plaintiff in its proper context:

> "The CEA broadly prohibits fraudulent and manipulative conduct *in connection with commodity futures transactions*. In 1974, Congress "overhaul[ed]" the Act in order to institute a more "comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." H.R.Rep. No. 93-975, p. 1 (1974). See Pub.L. 93-463, 88 Stat. 1389." [7] (Emphasis added)

Apart from the fact that the quote chosen by Plaintiff was made by the court in reference to specific "commodity futures transactions" allegedly made on behalf of Schor by defendant Conti (a fact that only furthers all of Shimer's arguments and his position rather than Plaintiff's) the facts of the *Shor* case, again, make Plaintiff's decision to cite that particular case a mystery.

The "kingpin" quote later cited on page 4 by Plaintiff from the case of *CFTC v. British American Commodity Options Corp.*, 560 F. 2d. 135, (2d Cir. 1977), cert denied, 438 U.S. 905 (1978) not only does little to further Plaintiff's position that the entity Shasta is a commodity pool but other comments made by the Second Circuit Court in that particular case could not be more helpful to Shimer. Again why Plaintiff chose to cite that particular case in support of its position is an even deeper mystery.

The cited case was an appeal to the Second Circuit of the district court's refusal to enter a preliminary injunction requested by the CFTC against the company British American Commodity Options Corp. While the "kingpin" quotation offered by Plaintiff is, indeed, found on pages 139-140 of that court's opinion, it is instructive to first see what that same court said on the previous page 138:

> "In the 1974 Amendments [1] to the Act, 7 U.S.C. § 1 et seq., Congress established the Commodity Futures Trading Commission and set up a comprehensive scheme for regulation of trading in commodity futures. *Central to this statutory scheme is the requirement that persons actively involved in commodities trading shall be registered with the Commission.*" [8] (Emphasis added)

The above quote makes the argument better than Shimer ever could concerning the issue of Congressional intent with respect to the registration requirements of the Commodity Exchange Act ("CEA"). Moreover the above quote from the Second Circuit was followed by a footnote that reads as follows: "2 See, e. g., 7 U.S.C. §§ 6d (futures commission merchants), 6e (floor

[7] *CFTC v. Schor* 478 U.S. 833, 836 (1986).
[8] *CFTC v British American Commodity Options Corp.*, 560 F. 2d. 135, 138 (2d Cir. 1977).

brokers), 6k (associates of futures commission merchants), and 6m (commodity trading advisors and commodity pool operators)."

Now that we have put Plaintiff's chosen "kingpin" quote in its proper context, let's see the full quote instead of Plaintiff's chosen selective excerpt:

> " **The intent of the congressional design is clear; persons engaged in the defined regulated activities within the commodities business are not to operate as such unless registered**, the Commission is charged in the first instance with determining the applicant's qualifications and whether proper grounds exist for refusing registration, and the Commission is empowered to seek injunctive prohibitions against violations of any provisions of the Act, including registration provisions. Registration is the kingpin in this statutory machinery, giving the Commission the information about participants in commodity trading which it so vitally requires to carry out its other statutory functions of monitoring and enforcing the Act. (Emphasis added) [9]

Plaintiff's difficulty is that controlling case law has provided four clear tests to determine if a commodity pool exists and Plaintiff's own expert witness in *Heritage* has provided further confirmation of the stand alone importance of Lopez test #4 by further confirming that opening a commodity trading account *in the name of* the purported pool entity is what a CPO does.[10] That essential, material element necessary for the entity Equity to qualify as a CPO requiring registration by Equity with Plaintiff is clearly missing in the current matter before the Court.

Plaintiff's citation to its own Interpretative Letter No. 97-44 and the references therein to "customers" or to the "solicitation" of "customers" and to a single quote from a Subcommittee of the House Permanent Select Committee on Small Business that refers to the "investing public" ignores the fact that commodity futures "customers" and the investing public (in the context of commodity futures) are those individuals or entities that open an account *in their name* at an FCM in order to engage in the activity of trading commodity futures contracts. (See the specific testimony of the Plaintiff's own expert witness Charlotte Olhmiller referenced on page 30 of Shimer's Brief dated April 6, 2006 about how the "investing public" public gets "involved" in trading commodity futures). The investing public must either choose to open a commodity trading account at an FCM approved by Plaintiff and invest directly themselves or, in the alternative, to become a commodity pool participant and invest through that pool entity.

---

[9] *CFTC v British American Commodity Options Corp.*, 560 F. 2d. 135, 139-140 (2d Cir. 1977).
[10] See Shimer Brief dated April 6, 2006, pages 31 &32.

Plaintiff's "consumer protection argument" basically ignores the fact that its own enabling statute specifically defines the categories of persons or entities subject to the CEA's registration requirements. The entity Shasta simply does not meet the necessary requirements of a pool to qualify its manager Equity as a CPO. A reference to the word "customer" or the words "investing public" in either CFTC Interpretive Letter No. 97-44 or in the cited House Subcommittee is barely a sufficient basis for the Court to ignore establish controlling case law and the persuasive testimony of the Plaintiff's own expert witness in *Heritage*.

The way that Plaintiff keeps trying to mischaracterize the facts is a further indication of the persuasiveness and correctness of Shimer's position. On page 5 of its Response Plaintiff harps on the fact that Shasta's members were "solicited" by Shimer and Firth. Plaintiff's problem is Shasta's members were solicited to purchase limited liability company member shares—not to trade commodity futures contracts. On page 5 Plaintiff acknowledges that Shimer and Firth did not trade themselves "but instead transferred the funds to Tech Traders to trade for them".

With this language Plaintiff again tries to characterize the trading activity of Tech as apparently, somehow, *at least the moral equivalent* of trading by Shimer and Firth or Equity. Tech was not trading "for" Shimer, Firth or "for" the entity Equity (as Shimer's proxy or Firth's proxy or Equity's proxy) nor was he trading as the proxy "for" any of Shasta's members. Murray was trading *for the account of his own company Tech* and no amount of linguistic gymnastics on the part of Plaintiff can or will change that reality.

II. Plaintiff's "Feeder Fund" Argument Found In Section II Of Its Response Is An Illogical Circular Argument That Does Not Eliminate Or Replace Application Of The Four Tests of *Lopez*

On page 7 of its Response Plaintiff begins its "feeder fund" analysis by citing and highlighting a portion of the statutory definition of a CPO found at 7 U.S.C. § 7(a)(1)(5) and then follows that by again reciting its own regulatory definition of the term "pool". Plaintiff apparently ignores the fact that the controlling decision of *Lopez v. Dean Witter Reynolds, Inc.* 805 F2d 880 (9th Cir. 1986) originally cited on page 2 of its original Brief filed in support of Plaintiff's Motion For *Ex Parte* Statutory Restraining Order And Preliminary Injunction found that statutory definitions were not sufficient to resolve the issue of whether or not a particular entity was a commodity pool:

"While numerous courts have dealt with the concept of commodity pools in the

abstract, few have specifically attempted to define what constitutes a pool. The Commodity Exchange Act fails to provide any assistance in this regard." [11]

If the *Lopez* court had found the statutory definition of a CPO as compelling as the Plaintiff now suggests, that court would not have found it necessary to engage in the compilation of previous federal case law that resulted in that court's four clear specific tests to determine whether or not a commodity pool exists under any particular set of facts. It is also important to remember that the definition of the term "pool" found at 17 C.F.R. § 4.10(d)(1) was also available to the *Lopez* Court at the time of its decision in 1986. It is instructive to note that this definition of the term "pool" offered again by Plaintiff on page 7 of its Response was never acknowledged by the *Lopez* court as even a ***helpful starting point*** in determining what does and what does not constitute a "commodity pool" in the context of real world facts often presented to a court for determination.

Plaintiff's cite to its "investee pool" definition found at 17 C.F.R. § 4.10(d)(4) or the definition of "major investee pool" found at 17 C.F.R. § 4.10(d)(5) does nothing to further the basic issue of whether or not the entity Shasta qualifies as a "pool" entity. Both of these definitions clearly presuppose the existence of a "pool" and are simply more specific additional definitions for various classification of entities already found to be a "pool".

Plaintiff's confusing analysis of its regulations found at 17 C.F.R. § 4.13 [specifically Sections 4.13(a)(3) and Section 4.13(a)(4)] simply furthers Shimer's argument if one looks closely. Section 4.13(a)(3) offers an exemption from the otherwise requirement of registration if the pool engages *in a "de minimis" level of trading*. PLAINTIFF'S BRIEF CLEARLY DISCLOSES THAT SOME LEVEL OF TRADING BY THE POOL *IS CLEARLY ASSUMED BY THESE REGULTIONS!* How does a regulation that offers an exemption to an entity that only engages in "de minimis" trading help Plaintiff's argument that an entity such as Equity must register as a CPO when the alleged "pool" entity it is supposed to have "operated" has NEVER engaged in *any trading*? What kind of logic is that? Is it Plaintiff's argument that since the CFTC has authority to waive registration for pool entities that only engage in *some* trading (but only trading that the CFTC views as "de minimis") that fact somehow confers on Plaintiff authority to regulate alleged pool entities that have never engaged in *any* trading? Does that argument really make any sense at all?

[11] *Lopez v. Dean Witter Reynolds, Inc.* 805 F2d 880, 883 (9th Cir. 1986)

What is apparently confusing here is Plaintiff's use of the term "fund of funds" or "feeder fund" or "Master Feeder Fund" throughout its Response with respect to the entity Shasta but more particularly in this section of its Brief to describe an entity that somehow automatically qualifies as a commodity pool just because the CFTC applies one of those particular labels to the alleged pool entity. At the bottom of page 9 Plaintiff concludes:

> "In accordance with the Commission's position that a feeder fund is a commodity pool, Commission staff has issued guidelines to CPOs on how to make a fund-of-fund disclosures."

An entity such as Defendant Equity does not automatically become a CPO simply because it happens to manage an entity the CFTC wants to describe or label as a "feeder fund". The CFTC can come up with all of the various "fund" definitions it wants to describe entities that already qualify as a "commodity pool" " but those creative definitions do not automatically serve as some sort of "waiver" of the four tests of *Lopez!* Describing an entity such as Shasta as a "feeder fund" hardly serves as a logical reason to ignore *Lopez*.

Plaintiff's "logic" evidently goes something like this. Shasta is a "feeder fund" for the pool entity Tech because Shimer, from his attorney escrow account, transmitted Shasta's funds for investment to the alleged pool entity Tech. The guidance offered by the CFTC to CPOs that are feeder funds to other pool entities shows that feeder funds are registered under the CEA. Therefore, Shasta is a commodity pool because the Plaintiff has described Shasta as a feeder fund! That is the logical equivalent of "Dogs are four legged animals with fur. Dogs that sometimes bite mailmen should be securely chained. Therefore my pet must be a dog that must be chained because it has four legs and fur!" The logical absurdity of Plaintiff's argument found in Section II of its Response *is reason enough* for the Court to award summary judgment on all counts to Defendants Shimer and Firth.

III. Plaintiff's Contention That Shasta Is A Commodity Pool Has No Support In Previous Case Law.

It is difficult to decide whether to applaud or cry at Plaintiff's offered effort in Section III of its Response Brief. One can only imagine the surprise of Plaintiff to discover that Shimer was able to actually uncover the true facts of the *CFTC v Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, 26,379 (N.D. Ill. 1982) and present them to the Court for reconsideration of its previous conclusion that "the Shasta transactions mirror those of

(Heritage)".[12] Shimer believes the Court was simply misled into that conclusion by specific misrepresentations found in Briefs previously filed in this matter by Plaintiff attempting to mischaracterize or obscure the facts of *Heritage* and equate them with the facts of Shasta.[13]

Plaintiff states at the bottom of page 10 that "(t)he 'evidence' Shimer cites does not clear up the record on the name on any trading accounts." Given the clear "reputational stake" Plaintiff has in this matter, it is unlikely that Plaintiff would accept the direct testimony of the principals of the entity Heritage or of Serhant himself confirming the existence of an account at FPB "in the name of" Heritage.

One has to admire the chutzpah of Plaintiff in several respects. It is total chutzpah to denigrate (as Plaintiff does near the top of page 10 of its Response dated April 20, 2006) information that provides greater Heritage factual clarity as "a federal records search of a 24 year old trial record". The age of the Heritage matter did not seem so important to Plaintiff last August when it spent almost 3 pages beginning on page 3 of its Brief dated August 5, 2005 discussing Heritage under the topic heading "Feeder Funds Such As Shasta Have Been Found To Be Commodity Pools".

But the level of chutzpah rises to a new level (even for Plaintiff) when the CFTC unabashedly makes the following statement at the bottom of page 10 and at the top of page 11 of its April 20, 2006 Response:

> "But the name on the trading account is not relevant here. Whatever that name was, that fact was not at issue in the Heritage Court's decision that Heritage was a commodity pool…"

Of course it wasn't an "issue" in *Heritage*. It was not an issue for the very reason that an account opened in the name of the entity Heritage was clear and obvious to all parties to the Heritage matter 25 years ago and it should be clear and obvious to everyone in the present matter before the Court (except, of course for Plaintiff but… as a wise man once said: "It is impossible to wake a man who is merely pretending to be asleep").

Why would Defense counsel for the entity Heritage and its principals try to make an issue of a fact that was clear and obvious? The issue in Heritage was control. As previously pointed out by Shimer, the Heritage court properly dismissed the *Heritage* Defendants' claim that the

[12] See the Court's Opinion dated October 4, 2005, page

[13] See pages 3- 5 of Plaintiff's Response dated August 5, 2005 to Shimer's Brief in support of his previous Motion For Summary Judgment dated July 7, 2005; see also page 15 of Plaintiff's Response dated June 2, 2005 to Shimer's previous Motion to Dismiss.

entity Heritage was not a commodity pool simply because they delegated all trading control to Serhant and FPB and the Complaint filed in *Heritage* by Plaintiff confirms that fact. (See the specific power of attorney delegation allegation in that Complaint previously cited by Shimer.[14]

The information contained on pages 11 and 12 of Plaintiff's Response is more interesting for what it does not contain than for what it does. Why does Plaintiff spend so much time on page 11 continuing to discuss *Heritage* and no time at all attempting to rebut Shimer's argument with respect to the more current and controlling case of *Lopez*? Why don't we see any sort of effort to rebut Shimer's point that all four *Lopez* tests cannot be "severed" from each other but clearly should be applied to the same "account" of the entity that is alleged to be a commodity pool? The silence coming from Plaintiff with respect to that point is deafening.

The lack of any response from Plaintiff about the testimony of Plaintiff's own expert witness in Heritage is also instructive. Why is it that Plaintiff does not have a logical, reasonable response to the following question posed by Shimer in his Brief dated April 6, 2006: "If members of the general public must open an account *in their name* at a FCM to become "involved" in the futures market, how is it that entities such as Shasta can be construed by the CFTC to be "commodity pools" without any evidence that the alleged pool entity ever engaged in or ever represented *to anyone* that it *intended* to engage in that most basic activity clearly required of the general public? Evidently even the most creative minds at the CFTC passed on that particular opportunity! The CFTC's best strategy for Ms. Olhmiller's entire testimony in Heritage specifically quoted by Shimer in his Brief dated April 6, 2006 seems to be to simply ignore it and hope that the Court will do the same.

Shimer offers one final comment with respect to page 12 of Plaintiff's Response. At the bottom of that page Plaintiff ends its Section III argument with basically the following statement:

> "They (meaning Shimer and Firth) have not cited any case, or pointed to any statutory or regulatory provision that requires that a trading account be traded in the name of (sic) pool before that entity can be found to be a commodity pool."

Shimer has "cited" the same case first cited by Plaintiff: the case of *Lopez*. Further analysis of the clear and specific 4th test and its logical relationship to tests #1 and #2 need not be repeated here. Moreover, Plaintiff's footnote reference on page 13 of its Response to the recent case of

[14] See page 10 of Shimer Brief dated April 6, 2006.

CFTC v. Brockbank, 2006 W.L. 223835 (D. Utah 2006) does nothing to impair the necessity of applying all four tests of *Lopez* when determining whether or not a commodity pool exits for the purpose of Shimer and Firth's current motion before the Court.

First of all, the issue before the court in *Brockbank* was a *jurisdictional* one. That district court was not about to allow the defendant to succeed on either a 12 (b)(1) or (6) motion simply by alleging that one or more of the tests of Lopez was not met. Is it not likely the *Brockbank* court's "comment" that the existence of a CPO is not dependent on the existence of a "pool" would survive any amount of thoughtful legal scrutiny. Finally the *Brockbank* court's comment that *Lopez* is not "controlling authority" is clearly not an argument Plaintiff is in a position to make to the Court. In support of this off hand comment the *Brockbank* court refers to the fact that the Third Circuit referred to *Lopez* in a footnote in the case of *Nicholas v. Saul Stone & Co.*, 224 F.3d 179, 181 n 4 (3rd Cir., 2000). The Third Circuit footnote reference to the *Lopez* case was *favorable* and was made in the context of a case in which all of four *Lopez* tests were clearly met--hardly a basis for anyone to conclude or argue that *Lopez* is not "controlling".

IV. The Equity Defendants' Conduct Was Not "In Connection With" Commodity Futures Trading

Plaintiff offers no opposing argument at all for Shimer's contention that the language of Section 4b of the CEA is clear and unequivocal. The statutory analysis required by *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) does not allow an administrative agency such as the CFTC to offer interpretations that contradict the clear language and words of its own enabling statute. Shimer has adequately briefed the "in connection with" issue previously and refers the Court to his Brief dated April 6, 2006 which also incorporated by reference certain other portions of Shimer's previous brief dated July 7, 2005.

Because Shimer's previous Brief dated July 7, 2005 tied its Section 4b "in connection with" argument solely to whether or not Shasta was a "commodity pool", the Court found no need to address or discuss that Section 4b issue in its previous decision dated October 4, 2005. What Plaintiff evidently prefers to conveniently overlook is that Shimer has effectively made two separate arguments with respect to Section 4b in his Brief dated April 6, 2006.

Shimer still continues to point to the clear language of Section 4b of the CEA 7 U.S.C § 6(b) and the "in connection with" language found there. Those specific words if given their clear

meaning require some sort of "nexus" between the alleged activities of Shimer and Firth and the specific activity prohibited by that particular section of the CEA. As Shimer points out, without a finding that Shasta is a commodity pool, absolutely no "connection" exists at all between the alleged activities of Shimer and Firth and the activity proscribed by Section 4b of the CEA.

But Shimer's Brief dated April 6, 2006 now offers a second and equally compelling argument for the fact that Section 4b cannot be applied to the alleged activities of Shimer, Firth and Equity. Plaintiff tries to couch Shimer's discussion of *Merrill Lynch, Pierce, Fenner & Smith v. Curran* 456 U.S. 353 (1982) as inapplicable to the question of whether or not Section 4b applies to the activities of any of the Equity Defendants. While it is true that *Merrill* concerned a private right of action issue, the legislative history discussion of the Supreme Court and more particularly *the court's specific discussion of who could be considered to be a beneficiary of Section 4b's language is clearly as instructive now as it was then.* The analysis engaged in by the Supreme Court in *Merrill* about who might receive the protection of Section 4b may no longer be necessary when discussing the issue of private rights of action in light of the specific private right of action legislation passed by Congress in 1982 found at 7 U.S.C. § 25 but the important point of *Merrill* that Plaintiff would prefer to overlook is that *the language of Section 4b has not changed since Merrill.* Merrill's discussion of who was intended to be protected by Section 4b is certainly instructive in deciding whether or not a particular alleged activity falls within the particular acts that are specifically prohibited today by that section of the CEA.

Plaintiff is not entitled to apply the language of Section 4b to Shimer or Firth simply because employees of Plaintiff may "feel" or "believe" that such an application is "right" or "just" or "appropriate". There is no room in the law for interpreting clear statutes that impose severe financial penalties upon private citizens as applicable to private citizens such as Shimer or Firth merely because some government employee "wants" that to happen for whatever private "reason" they may harbor.

The statement of Judge Graham in *CFTC v. Mass Media Marketing, Inc* 156 Fed Supp. 2d 1323 (S.D. Fla. 2001) previously cited by Shimer bears repeating once again only because it *is clearly relevant and applicable* to the present matter before the Court. Moreover, the following statement of Judge Graham is completely compatible with the Supreme Court's analysis of Section 4b of the CEA in *Merrill*:

> "The CFTC has cited to no portion of the Act or the Act's legislative history that confers the CFTC with the authority to impose its anti-fraud rules and regulations

on entities who do not participate in commodity trading transactions."[15]

The burden of proof is upon Plaintiff to show that Section 4b of the CEA is applicable to the Equity Defendants—not upon Shimer and Firth to show that it is not. In the absence of any evidence that any sort of commodity account was ever opened or intended to be opened by either Shimer, Firth, Equity or Shasta for or on behalf of any member of Shasta and, in the absence of any allegation that any member of Shasta ever expected to open a commodity trading account on their own behalf as a result of the activities or representations of any of the Equity Defendants or, that a commodity transaction would ever be executed specifically for or on their behalf, Plaintiff has no basis for alleging a violation of Section 4b by any of the Equity Defendants and Shimer's motion and Firth's motion for summary judgment with respect to Count I of the first Amended Complaint should be granted.

V. Plaintiff's Count V Requires A Finding That Shasta Was A Commodity Pool To Survive Shimer and Firth's Current Motions For Summary Judgment

Shimer found no need to reiterate his previous arguments for summary judgment with respect to Count V—not, as Plaintiff suggests, because there is "no good argument". Clearly if Shasta is not an entity that engaged in the trading of commodity futures contracts *in its name* (as all "commodity pools" do to some degree—however de-minimis), Count V dissolves like fine sugar in warm water. Count V is clearly, in Plaintiff's own words, dependent upon a finding that Shasta is a commodity pool. Plaintiff states at the bottom of page 14 of its Response:

> "...Tech Traders was the...'CTA' for Shasta in that, for compensation or profit, it advised the Shasta *pool* as to the advisability of trading in commodity futures contracts." (Emphasis added)

VI. Conclusion

Should entities that combine the funds of their members or shareholders and do not trade themselves but, instead, invest by placing some of all of their funds with *other entities* that conduct commodity trading solely *in the name of those other entities* be defined as commodity pools subject to the registration requirements of Plaintiff? Clearly Congress has ample authority to extend the definition of "commodity pool" and the commodity pool registration requirements of the CEA to entities such as Shasta and to revise the current clear language of the anti-fraud provisions of Section 4b of the CEA and apply that section of the CEA to entities and persons

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

who control entities such as Shasta if Congress so chooses. To date, Congress has not chosen to do that.

Would extending the CFTC's commodity pool registration requirements to entities such as Shasta (that do not directly trade futures contracts) help, in any way, to maintain the integrity of commodity futures trading or the integrity of the exchanges on which that trading occurs? If not, why would a revision of the clear anti-fraud language of Section 4b be necessary?

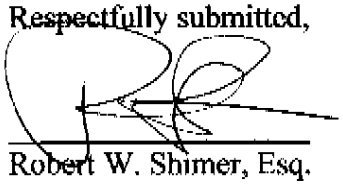
If this country is truly governed by the "rule of law" the law must be applied fairly and equally to all—to both the governed and the government. In the absence of action by Congress, the CFTC has absolutely no authority to 1) ignore both consistent existing federal case law and the legislative history of its own enabling statute, 2) ignore its own rules and regulations and 3) to ignore the previous testimony of its own expert witness in *Heritage* and extend, on an *ad hoc* basis, the term "pool" to any entity such as Shasta simply in order to bring Defendant Equity (not presently required under current law to register with Plaintiff) within the purview of the CPO registration requirements of Plaintiff's enabling statute. Shimer's previous cite to *Dixon v. United States*, 381 U.S. 68 (1965) on page 40 of his Brief dated April 6, 2006 need not be repeated here.

Except for the defendant entity Tech Traders, Inc. Plaintiff basically spent almost 5 months "investigating" the entity Shasta and then filed an Original Complaint that clearly ignored the real culprits (Murray and Abernethy) and named as defendants two individuals (Shimer and Firth) and one entity (Equity) (collectively comprising the Equity defendants) that are not, under current law, subject to the registration requirements or anti-fraud provisions of Section 4b of Plaintiff's enabling statute.

For all of the reasons stated in this Reply to Plaintiff's Response and all the reasons previously stated in Shimer's Brief dated April 6, 2006, the Summary Judgment motions of Shimer and Firth should be granted.

Date: April 24, 2006

Respectfully submitted,



Robert W. Shimer, Esq.
1225 W. Leesport Rd.
Leesport, PA 19533
(610) 926-4278

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on April 24, 2006 he caused a true and correct copy of the foregoing Reply dated April 24, 2006 to Plaintiff's Response dated April 20, 2006 to be sent via regular U.S. Mail to the following.

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

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

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

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

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

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

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

Robert W. Shimer, *pro se*
1225 W. Leesport Rd.
Leesport, PA 19533
(610) 926-4278