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,

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.

----------X

Hon. Robert B. Kugler

Civil Action No. 04-1512 (RBK) (AMD)

Reply to CFTC's Response to Defendants' Motions For Reconsideration & Disqualification

Motion Day January 5, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

In The 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

Defendants.

BRIEF OF DEFENDANT ROBERT W. SHIMER IN REPLY TO PLAINTIFF CFTC'S RESPONSE TO MOTIONS OF ROBERT W. SHIMER AND VINCENT FIRTH FOR RECONSIDERATION & FOR DISQUALIFICATION

I. PRELIMINARY STATEMENT

Defendant Robert W. Shimer ("Shimer") acting *pro se* submits this Brief in Reply to the Commodity Futures Trading Commission's (CFTC's) Response to Shimer's and Vincent Firth's (Firth's) motions for reconsideration and disqualification dated December 14, 2006 and received in the mail by Shimer on Monday evening, December 18, 2006. Plaintiff is correct that the mere receipt of an unfavorable judicial decision is not sufficient grounds to move for either reconsideration or for disqualification. The truth of that statement, however, is necessarily based on the premise that the decision at issue has fairly and accurately applied the law to the facts and that the conclusions found in the judicial decision are based upon reasons that are at least arguably the result of a fair, impartial and deliberative thought process.

The thinking behind any written decision is clearly reflected in the words used when that decision is composed. Contrary to a verbal offhand comment the beauty of a written decision (even one that is unpublished) lies in the fact that the words actually used to construct the decision are now there for all to see and read. The words used by the author convey the

reasoning and logic behind whatever conclusions are found within that decision. It is always appropriate, necessary, right and proper to challenge with constructive criticism any decision (judicial or otherwise) offered without reasonable support for the conclusions it contains. Conclusions offered in any walk of life that appear to be arbitrary and unreasonable should always be subject to challenge and review. In the judicial context that principal is recognized and preserved by the concept of appellate review.

When an administrative agency such as Plaintiff purports to extend its regulatory authority to entities and persons not previously regulated it is the obligation and responsibility of the federal courts to exercise those most prized intellectual faculties known as reason, clear thinking and common sense in the course of any decision that purports to allow the exercise of that extended authority. It was, therefore, incumbent upon the district court in the present instance to engage in an inquiry whether such an extension of regulatory authority to Plaintiff was ever intended by Congress. A one line conclusion about the intent of Congress without any attendant analysis or evidence that a reasonable inquiry preceded the offered conclusion is not sufficient under any reasonable standard.

When Plaintiff cited to a previous decision such as *CFTC v. Heritage* Capital *Advisory Services, Ltd.* [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,627 (N.D. Ill. 1982) and stated as its reason for citing that case a similarity in facts to the matter at hand it is not appropriate for the Court to wholly ignore without reference or comment certified documentary evidence that purports to contradict Plaintiff's factual proposition. The willingness to look impartially and dispassionately at both sides of the issue presented is required if one seeks to avoid the application of appellate supervisory authority and/or the application of 28 U.S.C. § 455 (a).

It is also necessary and appropriate for the Court to review and read carefully the previous decision of *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986) that was first cited by Plaintiff in its brief dated April 1, 2004. When a defendant such as Shimer points out that such a decision does not at all support the proposition Plaintiff champions, an impartial examination of what that previous decision *actually said* is clearly expected. If a court today does not agree with a previous court's reasoning it is incumbent to explain why a new conclusion is appropriate.

The Court has never said it disagrees with the Ninth Circuit decision of *Lopez*. It has simply decided to agree with Plaintiff that the *Lopez* court really did not mean what it said. That argument requires more than simply citing to a case such as *Meredith v. ContiCommodity*

Services, Inc. Comm. Fut. L. Rep. (CCH) ¶ 21107, p. 24,462 (D.C. D.C. 1980) especially when the *Meredith* case was obviously cited in the *Lopez* decision. Unless there is some good reason to conclude otherwise it could be assumed by most reasonable observers of the human condition that the language of the *Lopez* court took the decision of *Meredith* into account before fashioning its clear unambiguous four part test. The Court's willingness to reject Shimer's insistence that the clear unambiguous language of *Lopez* be applied to the present matter becomes all the more unreasonable when the *Meredith* decision is examined and found to not provide any support at all for the Court's new "interpretation" of the clear language chosen by the *Lopez* court when fashioning its decision in 1986.

Shimer is struck by the fact that in neither the Plaintiff's most recent Reply brief dated December 14, 2006 nor anywhere in the Court's Opinion of November 16, 2006 has either the Plaintiff or the Court attempted to directly address the arguments and points made previously by Shimer in support of his most recent motion for summary judgment. On November 16, 2006 the Court chose the path of simply pretending that the documentation and reasonable arguments and points previously provided by Shimer simply did not exist. Shimer supposes that approach is the silent corollary to the theory that if you tell a lie often enough people will begin to believe it is true. The silent "corollary" is apparently this: if you consistently ignore documentation and arguments you cannot directly address and refute with any reasonable analysis, perhaps the provider of that documentation and the proponent of those arguments will just give up and go away. Shimer's recent motions are proof positive that particular theory has little basis in fact.

Plaintiff's approach is more colorful. Plaintiff purports to recognize that Shimer has actually made an argument but then offers instead of any substantive analysis or direct refutation colorful adjectives such as "strained". Shimer is particularly fond of "meritless diatribes". Of course we are never treated to any real analysis of "why" a particular argument is "strained" or *why* Shimer's arguments merit being denigrated to the status of a diatribe.

Shimer's arguments are neither bitter nor are they abusive. Judicial decisions which lack any substantive basis cannot avoid deservedly sharp criticism. Respect for the law cannot long survive if judicial decisions cannot be defended on their merits. If Shimer's arguments are wrong, Plaintiff is encouraged to show sufficient intellectual integrity to address the argument itself head on and refute it instead of conjuring up colorful adjectives and inappropriate nouns. Plaintiff's approach to the issues presented by both motions of Shimer is better reserved for elementary school playground banter at recess.

II. Argument

A. The Court's Impartiality has been reasonably questioned by Shimer.

1. The Court's Opinions of October 4, 2005 and November 16, 2006 are not at all "cogently reasoned".

Plaintiff begins argument in its Response brief dated December 14, 2006 by contending that the Court "has issued two cogently reasoned decisions". Plaintiff's spends little time informing us of exactly *why* that conclusion has any merit and should be considered as true. The ability to "divine" the intentions of others must be contagious. First the Court purports to "know" without any stated reasonable basis what the *Lopez* court "intended" despite the *Lopez* court's choice of clear and unambiguous language. Now Plaintiff purports to suggest the reason why the Court virtually ignored without comment certified documentation from the *Heritage* case offered by Shimer as attached Exhibits to his summary judgment brief dated April 6, 2006. Plaintiff suggests the court's motive was because the documentation was "irrelevant and did not merit mentioning". (See Plaintiff Response Brief, page 2)

a) A lack of cogency is reflected in the Court's unwillingness to acknowledge in its Opinion dated November 16, 2006 the usefulness and relevancy of the documentation provided by Shimer with respect to the *Heritage* case.

What is noticeably absent from Plaintiff's Response brief discussion of the Heritage related documentation presented by Shimer is all of the following:

1) A rational explanation for why the direct testimony of the CFTC's own expert witness called to testify in *Heritage* on the subject of what constitutes a commodity pool is not relevant when the issue whether the entity Shasta is a commodity pool is a primary issue now before the Court.
2) An explanation of why the CFTC's current "commodity pool" argument with respect to the entity Shasta should not be considered by the Court to be self serving and devoid of all credibility when that argument is clearly contradicted directly in *Heritage* by testimony of the Plaintiff's own previous expert witness.
3) A rational explanation for why the fact that offering documentation actually used by the entity Heritage to solicit investors in Heritage containing a specific explanation by FPB to its "customers" on FPB letterhead that United States Treasury Bill

commodity futures contracts "are purchased in your name and credited to your account" is not relevant to the issue of whether the facts of Heritage were at all similar to the facts of Shasta when the pre-trial record in the present matter before the Court clearly shows that no commodity futures contracts of any sort were ever "purchased" by the trading entity Tech for a specific "account" of the entity Shasta.

4) An explanation of why the CFTC's contention that the facts of Heritage and the facts of Shasta are similar should not be considered by the Court to be self serving and devoid of all credibility when that argument is clearly contradicted directly by the clear representation found in that two page letter on FPB's letterhead attached as a part of Exhibit A to Shimer's summary judgment brief dated April 6, 2006.

5) A rational explanation for why the allegation found in Plaintiff's *Heritage* complaint that a traditional "powers of attorney" authorization was conferred upon the brokerage firm FPB by its "customers" to effect active commodity futures trading "on behalf of those customers" was not relevant to the issue of whether the facts of Heritage were at all similar to the facts of Shasta when no such "powers of attorney" authorization was ever executed by the entity Shasta as a part of the simple contractual relationship that existed between the entity Shasta and the trading entity defendant Tech Traders, Inc. (Tech).

6) A rational explanation why the entity Heritage should not be considered to be one of FPB's "customers" when the offering documentation provided by the entity Heritage to prospective investors included a letter on FPB letterhead (as described in point 3 above) that purported to describe how "customer" accounts were handled by FPB.

7) An explanation of why the CFTC's current contention that the facts of Heritage and the facts of Shasta are similar should not be considered by the Court to be self serving and devoid of all credibility when the CFTC's argument is clearly contradicted directly by the factual allegations associated with the "power of attorney" allegation found in the CFTC's own complaint filed in *Heritage*.

8) Why it was not reasonable and proper for the Court to at least address and explain why documentation attached to Shimer's summary judgment brief with respect to the facts of *Heritage* was not relevant when that documentation was offered by Shimer to contradict a representation first made by Plaintiff that asserted a similarity between the facts of Heritage and the facts of Shasta.

9) How can information offered by a defendant that purports to refute a factual contention made by Plaintiff not be "relevant" to that contention?

10) Was it really reasonable for the Court to conclude (as Plaintiff has apparently "divined") that the documentation offered by Shimer "did not merit mentioning"?

11) Doesn't documentation offered in good faith by a defendant (that most reasonable people would conclude to be clearly "relevant" documentation) deserve at least some short discussion of why the Court has concluded that documentation is not relevant and not deserving of any discussion at all?

b) A lack of cogency in the Court's Opinion dated November 16, 2006 is reflected in the court's unwillingness to discuss or refute in any way Shimer's "context and content" argument with respect to *Lopez*.

It is noteworthy that Plaintiff's Reply brief dated December 14, 2006 makes no effort at all to support its "cogency" argument by explaining why the Court would not be required to address and refute Shimer's "context and content" argument found on pages 9 through 12 of Shimer's reconsideration brief dated December 4, 2006. It is also noteworthy to see that Plaintiff has also never really tried to directly address or refute that argument. It is simply not appropriate for a federal agency such as Plaintiff to continuously harp upon the "repetitious nature" of a reasonable argument without ever directly addressing and refuting the argument itself.

Neither the Court nor the Plaintiff have provided any reasonable argument why the words chosen by the *Lopez* court should not be given their clear and unambiguous meaning in light of the context in which the four tests were devised. Just as it is obviously futile to try and awaken a man who is merely pretending to be asleep, Shimer's willingness to continue repeating a good and worthy argument has clearly fallen on deaf ears. Shimer remains optimistic that sooner or later this argument will reach an impartial and fair decision maker.

c) The lack of cogency in the Court's Opinion dated November 16, 2006 is also reflected in the Court's apparent unwillingness to recognize the clear distinction most reasonable people would acknowledge that exists between a bank "account" and a commodity futures trading "account" opened at a brokerage firm designated by the CFTC as a futures commission merchant.

It is noteworthy that Plaintiff's Response brief dated December 14, 2006 makes no effort at all to support its "cogency" argument by explaining why there is anything about the

Lopez decision that supports a finding that an entity such as Shasta that has only opened a sub bank account in its name as a part of an attorney escrow account somehow meets the four specifically stated tests of *Lopez*. Both the Plaintiff and the Court are strangely silent on the clear and obvious distinction between a bank account and a commodity trading account at a brokerage firm. Neither the Plaintiff nor the Court seem inclined to specifically address this particular argument head on.

It is clear to any reasonable person who reads the *Lopez* decision that the *Lopez* court applied its four tests to the commodity futures trading account of the defendant Dean Witter. Nowhere in any part of the *Lopez* decision is there *any reference* to that defendant's bank account. Nor can anyone who is in a clear and stable state of mind reasonably argue that a test previously applied to a defendant's commodity trading account should now, without good reason, suddenly be applied to a defendant related entity's bank account or, in the alternative suddenly applied to a bank account of one entity and the commodity trading account of another unrelated defendant entity in another state!

Plaintiff's motive for ignoring that clear and obvious distinction is obvious. Plaintiff has pursued Shimer and his clients for over 2 and one half years without any statutory authority to do so. Plaintiff has more than merely its reputation to lose if Shimer's arguments are placed before an impartial decision maker. That Plaintiff should, therefore, continue to prefer the two existing opinions of the Court dated October 4, 2005 and November 16, 2006 that lack any reasonable basis in fact or law should come as no surprise to anyone.

d) A lack of cogency in the Court's Opinion dated November 16, 2006 is reflected in its willingness to find an intention contrary to the clear and unambiguous meaning of the language chosen by the *Lopez* court in constructing test #4 when the only stated "source" for a different intent is the *Meredith* case.

It is noteworthy that Plaintiff's Reply brief provides *no reason at all* why Shimer's conclusion is incorrect when Shimer argues that *Meredith* provides absolutely no basis for the Court's willingness to abandon the clear and unambiguous language chosen by the *Lopez* court for its test #4. It is not necessary to repeat here Shimer's previous discussion of *Meredith*. The Court is respectfully referred to pages 17 to 20 of Shimer's motion for reconsideration dated December 4, 2006. The contrast between the extensive analysis of *Meredith* offered by Shimer and the lack of any such analysis by Plaintiff speaks for itself.

e) A lack of "cogency" is found in the dearth of any clear reason or analysis in the Court's decision dated November 16, 2006 for its conclusion that "Shasta is precisely the form of entity Congress authorized the CFCT to regulate as a commodity pool".

It is likewise noteworthy that Plaintiff's Response brief provides *no reason at all* why Shimer is incorrect when Shimer argues that the Court's Opinion dated November 16, 2006 lacks any sound basis for its conclusion that Congress intended that entities such as Shasta be regulated by the CFTC. The reason for this lack of argument from Plaintiff is obvious—there is no such analysis contained anywhere in the Court's opinion. As previously stated the Court's Opinion dated November 16, 2006 stands in stark contrast to decisions issued by both the Supreme Court and other federal courts when presented with the issue of the intent of Congress with respect to the Commodity Exchange Act (CEA).

2. The Third Circuit cases cited in Plaintiff's Response Brief do not preclude the application of 28 U.S.C. § 455(a) or the supervisory authority of the Third Circuit Court to the district court and its Opinion dated November 16, 2006

Plaintiff's willingness to repeat the text of 28 U.S.C. § 455(a) and then cite to *United States v. Liteky* 510 U.S. 540 (1994) clearly does not preclude a finding under current case law that sufficient evidence of bias and lack of impartiality can never trigger application of § 455(a). That possibility was clearly discussed by Justice Scalia and Shimer's previous cite to that discussion need not be repeated here. (see Shimer Disqualification Brief, pages 37-39)

Plaintiff attempts to characterize Shimer's motions for reconsideration and disqualification as "no more than [a] disagreement with the Court's legal rulings." (See Plaintiff's Reply brief, page 2). There is no need to spend much time refuting that particular self serving statement. A fair reading of both briefs filed with the Court by Shimer reveals a clear and sufficient basis for the two recent motions filed by both Shimer and Firth.

Plaintiff tries to "distinguish" the facts of *In re: Kensington International Limited* 368 F.3d 289 (3rd cir. 2004) and *Alexander v. Primerica Holdings* 10 F.3d 155 (3rd Cir. 1993) from the facts of the present case. The extrajudicial source issue has already been adequately addressed by Shimer in his previous briefs and does not need to be repeated here. If it becomes necessary Defendant Shimer is perfectly willing to let the Third Circuit Court decide if the facts in the present matter and the two Opinions issued by the district court denying Shimer and Firth's motions for summary judgment justify either application of 28 U.S.C. § 455(a) and/or exercise of the Third Circuit's supervisory authority over the district court.

B. Plaintiff's attempt to "resurrect" it's previous "feeder fund" arguments briefed in both 2005 and in 2006 (and to which Shimer provided an adequate reply both times) does not help to now overcome the clear deficiencies that Shimer finds in the Court's Opinion dated November 16, 2006

Plaintiff offers on page 5 of its recent Response brief a renewed "feeder fund" argument for the proposition that the entity Shasta should be considered to be a commodity pool. How that particular argument serves as an argument against Shimer's cited deficiencies in the Court's Opinion dated November 16, 2006 is a mystery. This is particularly true since the Court never specifically addressed or mentioned in any way Plaintiff's previous feeder fund arguments. The "feeder fund" argument was posited by Plaintiff in its Response brief dated August 5, 2005 to Shimer's first motion for summary judgment dated July 7, 2205 (See generally pages 6 through 10 of that Response).

On pages 7 through 9 of its Plaintiff's Response brief dated April 20, 2006 Plaintiff resurrected its feeder fund argument once again by referencing the exemption to registration found at 17 C.F.R. § 4.13(a)(3) in the "fund of funds" context. Plaintiff purported to argue in that brief that some small amount of actual commodity trading by an alleged feeder fund entity (deminimis trading) required an entity to seek and obtain an exemption from registration. Therefore, somehow that fact should logically bring an entity such as Shasta within the definition of a commodity pool even though Shasta has *never engaged in any* commodity futures trading. Shimer properly disposed of that failed logic on pages 7 to 9 of his Reply brief dated April 24, 2006.

C. All other remaining arguments found in Plaintiff's Response brief do not provide any reason why Judge Kugler should not disqualify himself.

1. **Regarding Plaintiff's *Lopez* argument**

Shimer's position with respect to the actual language found in the *Lopez* decision has always been that words in a carefully crafted judicial decision should be given their clear meaning. Plaintiff's response to that reasonable position on page 5 of its current Response brief is to hysterically describe that argument as "hyper-technical" and "misguided." This position of Plaintiff has certain 1984 "Orwellian" overtones to it. Basically Plaintiff's position seems to be that words will now mean whatever a government agency says they will mean. Don't bother to consult your dictionary. No further argument from Shimer with respect to *that* particular position of Plaintiff is necessary.

The Court should not be tempted as it has been previously to take any of the Plaintiff's *Lopez* arguments very seriously. Plaintiff's current position with respect to *Lopez* is merely a product of situational ethics. Plaintiff simply seeks to win at any cost. If that should ever actually happen in the present case the *Lopez* decision will most assuredly be reinterpreted again in whatever way best suits Plaintiff's intended purpose.

2. **Regarding Plaintiff's argument that a finding that Shasta is not a "commodity pool" by reason that no trading ever occurred "in the name of" Shasta will somehow encourage or permit future violations of 17 C.F. R. §§ 4.20(a), 4.20(b) and 4.20(c) by "others".**

On page 6 Plaintiff purports to argue that Shimer's clear and logical arguments with respect to the entity Shasta somehow threaten the protection afforded to real pool participants in Plaintiff's regulations found at 17 C.F.R. §§ 4.20(a), 4.20(b) and 4.20(c). Plaintiff turns logic on its head and argues that if Shasta (that never engaged in any trading of any commodity futures) is not held to be a pool then entities or individuals that engage in actual trading might somehow avoid CPO status by engaging in some sort of "name game" with respect to the funds they are actually trading. If the Plaintiff is willing to argue now (against all reason and logic) that an entity such as Shasta (that has *never* engaged in *any* trading) is a commodity pool, it should not be difficult for Plaintiff in the future to properly enforce its regulations against those entities or individuals that engage in some sort of surreptitious *actual trading*.

3. **Regarding Plaintiff's attempt to justify the Court's lack of any analysis in support of its conclusion regarding the intent of Congress with respect to alleged "pool" entities such as Shasta.**

Plaintiff offers a bizarre but fascinating argument that turns out to be more helpful to Shimer's position than Plaintiff realized when its Response brief dated December 14, 2006 was filed with the Court. On page 6 of its recent Response brief Plaintiff purports to come to the aide and support of the Court's conclusion that "Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool." Plaintiff concludes that "[i]t is no wonder that the Court did not address their discussion of legislative history" ("their" refers to both Shimer and Firth). Plaintiff purports to justify the complete lack of any discussion by the Court of Shimer's analysis of the legislative history of the CEA by asserting that "none of it was on point…"

The reason given by Plaintiff for why Shimer's actual research into the legislative history of the CEA was not "on point" is that the CEA does not specifically define the term "commodity pool". That is a true statement. What Plaintiff chose to completely ignore (or chose to overlook) is that Shimer's legislative history research was not undertaken to prove that Shasta is not a commodity pool. Shimer engaged in his analysis of the legislative history of the CEA *only* because the Court first offered in its October 4, 2005 Opinion an inaccurate conclusion with respect to the intent of Congress that purported to specifically include the entity Shasta.

Shimer is well aware that the CEA does not purport to specifically define the term "commodity pool" What is interesting about the lack of any definition of the term commodity pool in the CEA is that apparently the Court is not so aware. The fact that Plaintiff should choose to cite this fact to try and discredit the legitimacy of Shimer's research only serves to actually help make Shimer's overall point about the unreasonableness of the Court's "intent of Congress" conclusion.

The Plaintiff's argument against Shimer really serves to highlight the fact that the Court's conclusion as stated not only in its October 4, 2005 Opinion but as stated again in its November 16, 2006 Opinion purports to assume that a "commodity pool" definition *does exist* in the CEA! One need only go back and actually read the exact words used by the Court on page 9 of its decision dated October 4, 2005 and on page 8 of the Court's Opinion dated November 16, 2006. The Court in both opinions refers directly to the intent of Congress with respect to the term commodity pool and further purports to find in the CEA the expression of an "intent" by Congress that pool entities such as Shasta be "regulated".

Both Opinions of the Court seem blithely unaware of the fact that the CEA does not ever provide a definition for the term "pool" or "commodity pool". If that is true, how is it that the Court can conclude with any credibility at all that Congress intended Shasta to be "precisely the form of entity" to be regulated by the CFTC "as a commodity pool"? The Court's stated conclusion about the intent of Congress with respect to entities such as Shasta also seems to indicate that the Court is completely unaware of the fact that the CEA's registration requirements apply only to the *operator* of the purported pool entity—*not to the pool entity itself.*

That the entity Shasta did not allegedly violate any provision of the CEA or the Plaintiff's regulations is found in the obvious fact the entity Shasta is not named as a defendant in the current civil matter currently before the Court. Only the alleged "operator" of the pool—

the entity Equity is charged with a violation of the CEA! All of the allegations with respect to Shimer flow from his relationship with the entity Equity that is alleged to be a CPO. The CEA specifically defines the term CPO as the district court has previously noted. The CFTC's regulations found at 17 C.F.R. §§ 4.20, 4.21, 4.22 and 4.23 impose these regulatory requirements only upon the *operator* of the pool —not upon the pool entity itself.

Furthermore, Shimer's basis for challenging the Court's clear and obvious lack of impartiality was not the mere fact that the court never referred specifically to Shimer's research in its Opinion dated November 16, 2006. Shimer's primary argument is that the Court clearly did not undertake to conduct *any research of its own* before coming to the specific conclusion found on page 9 of its October 4, 2005 Opinion and then again on page 8 of its November 16, 2006 opinion and that fact is clear and obvious from a reading of both Opinions. This clear lack of *any research at all* with respect to a statute in which Judge Kugler purports to twice find a certain and specific "intent" of Congress with respect to Shimer's client Shasta is more than unreasonable—such behavior by a judge is truly inexcusable.

This behavior of Judge Kugler shows such a clear bias in favor of Plaintiff and Plaintiff's position that Judge Kugler is literally willing to come to a conclusion about what Congress intended with respect to entities known as "commodity pools" even though *it is a virtual impossibility for anyone to discover the "intent" of Congress with respect to entities that might be "commodity pools" by examining the language of the CEA itself.* This is true (as Plaintiff has so accommodatingly pointed out on page 6 of its Response brief) because Congress clearly never even attempted to formulate the definition of a commodity pool anywhere in the CEA!

That same conclusion about the obvious inability to glean any useful knowledge about what a commodity pool might actually be from the CEA itself was, of course, clearly stated by the *Lopez* court itself on page 883 of its decision before it formulated the four clear tests that the district court seems so determined to now misapply to the entity Shasta! Judge Kugler is deeply tainted by clear bias against the defendants Shimer, Firth and the entity Equity (Shasta's manager) and that fact should be obvious to any impartial and objective observer reviewing both of his Opinions in the light of the clear and unambiguous language of apparently controlling case law.

Judge Kugler's apparent bias is so great that he was virtually willing to ignore the obvious fact that his purported "conclusion" about the intent of Congress with respect to the "commodity pool" status of the entity Shasta found in both of his Opinions *is contradicted by*

the very Lopez decision he purports to rely on elsewhere in both Opinions. With all due respect, Shimer urges Judge Kugler to simply do the right thing and recuse himself. Otherwise, this matter will definitely be placed before the Third Circuit Court by Petition for Writ of Mandamus.

Shimer appreciates the unconscious assistance of Plaintiff in demonstrating to Shimer and reminding him of how partial and biased Judge Kugler's stated conclusion truly is about the intent of Congress with respect to the commodity pool status of an entity such as Shasta. One need only review Shimer's legislative research into the intent of Congress (see pages 21 through 26 of Shimer's brief dated April 6, 2006) to see that it clearly was not only relevant and helpful but squarely on point. Clearly Shimer's good faith effort to provide Judge Kugler with useful legislative history analysis should have been at least peripherally discussed as a part of any impartial judicial decision denying Shimer's motion for summary judgment—a motion that specifically addresses the ultimate issue of liability of Shimer, Firth or Equity under the CEA and Plaintiff's regulations.

4. **Regarding Plaintiff's attempt to justify the Court's lack of any mention of Shimer's non "commodity pool" summary judgment argument respect to Count I of Plaintiff's amended complaint.**

Plaintiff begins an argument on page 7 of its brief offered in support of the Court's failure to ever mention in either of its two Opinions Shimer's summary judgment argument regarding Count I of Plaintiff's amended complaint. Plaintiff's theory here seems to be that the cases cited on page 7 (also found previously on pages 12 & 13 of Plaintiff's brief dated August 5, 2005) filed in Response to Shimer's motion for summary judgment dated July 7, 2005 are so overwhelmingly favorable to Plaintiff that it was never necessary for the Court to ever bother to convey to Shimer any basis for the Court's decision to side with Plaintiff with respect to Shimer's Count I argument.

That the Court should respond in a favorable knee jerk fashion to Plaintiff now clearly comes as no surprise to Shimer in light of the Court's recent "reprint" decision of November 16, 2006. Plaintiff's current cite to cases that were clearly and adequately distinguished by Shimer on pages 18-20 of Shimer's Reply brief dated August 13, 2005 clearly does justify the Court's total lack of any reference to Shimer's arguments. It is neither necessary nor appropriate to spend any space in this brief distinguishing all of the cases cited on pages 7 & 8 of Plaintiff.'s Response. Suffice it to say that Plaintiff has not cited a single case in which a federal court has

found the "in connection" language of Section 4b of the CEA to apply to instances where the named defendant never engaged in *any* commodity trading *or engaged in any behavior that would reasonably cause anyone else to engage in commodity trading.*

The cases cited by Plaintiff involve situations primarily where a commodity futures trading program was sold by the defendant to the public with misrepresentations about how well the trading program would actually perform. Shasta never engaged in any commodity trading. Shasta's members never had any reasonable expectation that they would be engaged in commodity futures trading as a member of Shasta. As Shimer previously pointed out to the Court on page 19 of his Reply brief dated August 13, 2005 Plaintiff's mis-cited case of *R & W Technical Services, Ltd. v. CFTC* 205 F.3d 165 (5th Cir. 2000) stated at page 173:

> "respondents misled potential purchasers of their system concerning trading profits and trading risks in order to induce customers to trade *and there is ample evidence to show that they did trade.*" (Emphasis added)

There is absolutely no evidence *anywhere in the record* that the actions of Shimer or any of his clients caused any member of the entity Shasta or anyone else to trade commodity futures contracts. The defendant Murray was trading futures for the account of his company Tech without any encouragement or assistance from Shimer, Firth or the entity Equity. The Plaintiff's cite to case law briefed and previously cited by both Plaintiff and Shimer provides *absolutely no basis* for the Court to simply ignore the substantial Count I summary judgment argument of Shimer in his brief dated April 6, 2006.

III. CONCLUSION

Plaintiff's Response brief dated December 14, 2006 contains absolutely no basis or justification for the extraordinary deficiencies found in both the Court's Opinion dated October 4, 2005 and the Court's latest Opinion dated November 16, 2006. Judge Kugler is respectfully requested to disqualify himself and allow another judge to reconsider Shimer's motion for summary judgment.

Date: December 20, 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 December 20, 2006 he caused a true and correct copy of the foregoing Brief in Reply to Plaintiff's Response 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 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