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**In The United States District Court
For The District Of New Jersey
Camden Vicinage**

Commodity Futures Trading Commission,
Plaintiff,

vs.

Equity Financial Group LLC,
Tech Traders, Inc., Tech Traders, Ltd.,
Magnum Investments, Ltd., Magnum
Capital Investments, Ltd., Vincent J. Firth,
Robert W. Shimer, Coyt E. Murray, and
J. Vernon Abernethy,
Defendants.

Hon. Robert B. Kugler
District Court Judge

Hon. Ann Marie Donio
Magistrate

**Civil Action No: 04-1512
(RBK)**

**Plaintiff's Proposed Findings
of Fact and Conclusions of
Law**

I. FINDINGS OF FACT

A. The Parties and Overview of the Fraud

1. Plaintiff Commodity Futures Trading Commission (“Commission” or “CFTC”) is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 1 *et seq.* (2002), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* (2007). (Answer of Equity, Shimer and Firth to the First Am. Compl. (Docket Doc. 79) (hereinafter “Answer”) at ¶ 1; Joint Final Pretrial Order (Docket Doc. 508) Stipulated Fact 1 (hereinafter “Stip. Fact”).

2. Defendant Equity Financial Group, LLC, (“Equity”) is a New Jersey limited liability company formed on September 1, 1998, with an address of 3 Aster Court, Medford, New Jersey 08055. (Answer at ¶ 1; Stip. Fact 4). Equity was the manager of Shasta Capital Associates, a Delaware limited liability company. (Stip. Fact 4).

3. Defendant Vincent J. Firth (“Firth”) resides in Medford, New Jersey and is the President and sole shareholder of Equity. (Answer at ¶1; Stip. Fact 2).

4. Defendant Robert W. Shimer (“Shimer”) resides or resided in Leesport, Pennsylvania and was legal counsel for Shasta and Equity at all relevant times. (Answer at ¶¶ 1, 31; Stip. Fact 3).

5. Shasta was a commodity pool. *CFTC v. Equity Fin. Group*, No. 04-1512, 2006 WL 3751911 (D.N.J. Dec. 18, 2006) (Docket Doc. 419) (“CFTC Summ. J. Op.”) at 6 ; *CFTC v. Equity Fin. Group*, No. 04-1512, 2006 WL 3359418 (D.N.J. Nov. 16, 2006) (Docket Doc. 409); *CFTC v. Equity Fin. Group*, No. 04-1512, 2005 WL 2864784 (D.N.J.

Oct. 4, 2005) (Docket Doc. 266). But for 1% of initial deposits, Shasta's funds fed to the Tech Traders' "super fund" master pool (8/28/07 Trial Tr. p. 93 l. 4-9 (Shimer)).¹

6. Equity was the commodity pool operator ("CPO") for Shasta. (CFTC Summ. J. Op. p. 6).

7. New Century Trading LLC ("New Century"), is a Nevis, West Indies limited liability company whose manager was Allied International Management, Ltd. (Stip. Fact 5).

8. New Century was formed by an attorney by the name of Liburd on the Island of Nevis, West Indies in April of 2001 at the direction of Shimer. Shimer suggested the formation of this entity to permit accredited foreign investors to invest in Tech Traders. New Century had two investors, International Investment Alliance and Metalchem. Later, Shimer formed Shasta as a Delaware Limited Liability Company. (Stip. Fact 34).

9. Edgar Holding Group, Inc. ("Edgar") was a Delaware corporation formed in December 2000 of which Firth was president and Shimer was the chief financial officer. Edgar collected at least \$180,000 in funds from four outside investors to invest with Coyt E. Murray. (Stip. Fact 6).

10. Tech Traders, Inc. ("TTI") was a Delaware corporation located in Gastonia, North Carolina. (Stip. Fact 7).

11. Tech Traders, Ltd. ("TTL") was a foreign corporation organized under the laws of the Bahamas. It was a sister company to Tech Traders, Inc. and was party to a "Service Agreement" dated June 1, 2001, providing that Tech Traders, Ltd. would place

¹ An eight day Bench Trial was held from August 27, 2007 through September 6, 2007. References to the trial transcript ("Trial Tr.") begin with the date of the testimony, and include the page number with line reference, and, in parentheses, the name of the testifying witness.

investment funds with Tech Traders, Inc. for trading. (Stip. Fact 8).

12. TTI and TTL generally shared common ownership, office space and employees. Most investor funds were held in bank or future commission merchant (“FCM”) accounts carried in the name of TTI. As there was no meaningful distinction between them, they are hereafter referred to generally as “Tech Traders.” (Stip. Fact 9).

13. Magnum Investments, Ltd. (“Magnum”) was incorporated as a South Carolina corporation in 1991, but is not in good standing. Magnum was party to a “Service Agreement” dated June 1, 2001, purportedly providing that Magnum would place investment funds with Tech Traders, Inc. for trading. (Stip. Fact 10).

14. Magnum Capital Investments, Ltd. (“MCI”) was a foreign corporation organized under the laws of the Bahamas. It is a sister company to Magnum Investments, Ltd. and was party to a “Service Agreement” dated June 1, 1999, purportedly providing that MCI would send investment funds for placement with Magnum for trading. (Stip. Fact 10).

15. Coyt Murray (“Murray”) was the president and chief executive officer of Tech Traders and was Tech Traders’ primary contact person in dealing with potential participants. Murray also controlled Magnum and MCI. Murray and Tech Traders operated out of an office in Gastonia, North Carolina. Murray represented to Firth and Shimer that Tech Traders used a “portfolio” system for successful trading of selected exchange-traded financial futures contracts, including the NASDAQ 100 and S&P 500. He told Firth and Shimer that the success of the portfolio system derived from the fact that it utilized many different, allegedly non-correlated, separate systems traded concurrently on different time frames using proprietary algorithms, which not only helped filter out market noise for the purpose of more correctly determining the real direction of market trends, but also would

balance and smooth the performance of the system. (Stip. Fact 12).

16. Firth and Shimer acted as salespeople for Shasta. They were associated persons (“APs”) of Equity. (CFTC Summ. J. Op. p. 10).

17. Neither Firth nor Shimer were registered as APs for Equity. (CFTC Summ. J. Op. p. 10).

18. Equity is not registered with the CFTC in any capacity. (CFTC Summ. J. Op. p. 6).

19. From June 2001 through April 1, 2004, defendants Firth and Shimer, acting individually and through Equity, solicited \$15,113,498.11 in outside investors’ funds through Shasta and \$295,143.81 in outside investor funds through New Century for trading by Tech Traders in commodity futures contracts. Equity, acting through Firth and Shimer, and Firth and Shimer individually, touted the “astonishing” performance of the Shasta commodity pool, claiming that the pool had earned trading profits of approximately 100% per annum since inception. (Stip. Fact 13).

20. Defendants Tech Traders and Murray solicited and accepted net deposits of \$13,883,381.20 from Shimer’s escrow account and \$295,143.81 directly from New Century to trade commodity futures contracts. In total, Tech Traders received a total of \$43,132,522.01 from Shasta and other investors. At the time Tech Traders’ assets were frozen by the Court, Tech Traders, Inc. had returned a total of \$11,984,471 of principal to investors, paid \$617,942.19 in fictitious profits to investors, and from 2001 to April 1, 2004, lost \$7,605,407 million trading commodity futures contracts and other financial instruments in the accounts that held Shasta, and other third-party funds. Tech Traders also transferred over \$2.4 million to Equity and to bank accounts controlled by Shimer or Firth. In order to

make its investors whole, the receivership estate of Tech Traders, Inc. would need approximately \$15.1 million. (The Commission's information about the final losses to the investors of Tech Traders and Shasta are contingent upon the final report of the Receiver. Any figures used here are subject to final costs of the Receiver, accruing interest and recoveries to the various estates). (Stip. Fact 14).

21. Murray often stated to Shimer and Firth that other individuals and/or entities had loaned money to his companies or had placed funds with his various companies for trading solely in the name of Murray's various companies. (Stip. Fact 15). Firth and Shimer knew that Tech Traders and Murray pooled these funds with Shasta's funds. (Pl. Exs. 91, 489 at 2; 8/27/07 Trial Tr. p. 77 l. 8-10 (Firth); 8/28/07 Trial Tr. p. 101 l. 12-13 (Shimer)). The Investment Agreement between Shasta and Tech Traders also provided that Shasta's funds would be intermingled with the funds of Tech Trader's other investors and that all investors' funds would be treated equally in the superfund. (Stip. Fact 27). Shimer drafted and Firth signed this Investment Agreement. (Pl. Ex. 91; 8/28/07 Trial Tr. p.101 l. 5-7 (Shimer)).

22. Firth was the sole signatory on Equity's bank account and made decisions on disbursements out of that account. Firth also issued the monthly account statements to Shasta and New Century investors. (Stip. Fact 16). He reviewed, approved and distributed Shasta's Private Placement Memorandum (CFTC Summ. J. Op. p. 15; Answer at ¶¶ 29, 30, 48). Firth is a controlling person of Equity.

23. Firth was registered in the securities industry as a registered representative of several broker-dealers between 1981 and 1990. (Answer at ¶ 30). The Shasta PPM states that Firth holds an NASD Series 7 license, creating the impression that the license is current.

(Answer at ¶ 49; Pl. Exs. 1093 at 21, 1070 at 15, 461 at 15; Stip. Fact. 17; 9/4/07 Trial Tr. p. 10 l. 17- p. 11 l. 1 (Firth)).

24. Firth had no experience with commodity pool accounting, no training in pool statement preparation and no experience with back office operations of a commodity pool. (CFTC Summ. J. Op. p. 15). The Shasta PPM does not disclose this lack of experience. (Answer at ¶ 49; Pl. Exs. 1093, 1070, 461).

25. Firth and his wife filed for bankruptcy under Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (2003) (Pl. Ex. 4). The Shasta PPM failed to disclose that information. (Answer at ¶ 49; Pl. Exs. 1093, 1070, 461; 8/27/07 Trial Tr. p. 116 l. 1- p. 117 l. 4 (Firth)). This information would have been important to a Shasta investor's decision to invest. (8/29/07 Trial Tr. p. 87 l. 19- p. 88 l. 2 (Dent); 8/29/07 Trial Tr. p. 72 l. 13-25 (Evans); 8/30/07 Trial Tr. p. 44 l. 2-15 (Tate); 8/31/07 Trial Tr. p. 56 l. 17- p. 57 l. 4 (Northridge); Joint Ex. 2003 p. 138 l. 21- p.139 l. 6 (Stevenson)).

26. Shimer did not perform any research to find out if Firth had ever filed for bankruptcy. (8/28/07 Trial Tr. p. 97 l. 7-9 (Shimer)).

27. Shimer was legal counsel for Shasta and Equity. He is an attorney and has been a member of the Massachusetts Bar since 1973. (Stip. Fact 18).

28. From June to December 1986, Shimer was registered as an AP of Churchill Commodities, a former CPO that had been registered with the Commission. From December 1988 to April 1989, he was registered as an AP of Capital Management Partners, a former introducing broker. (Answer at ¶¶ 29, 31; 8/27/07 Trial Tr. p. 175 l. 3-5 (Shimer)). He took and passed the Series 3 examination required for APs in the futures industry in 1986. (8/27/07 Trial Tr. p. 174 l. 15-21 (Shimer)).

29. Shimer's only experience trading commodity futures contracts before forming Shasta was an account his wife had open for six to eight months in the late 90's. He does not have an accounting degree. Before Shasta, he had never managed a commodity pool, never prepared commodity pool statements, and had no experience with commodity pool accounting procedures. In 2001 when he formed Shasta, he did not remember much about commodity trading. (8/27/07 Trial Tr. p. 180 l. 15- p. 181 l. 23 (Shimer); 9/4/07 Trial Tr. p. 53 l. 4-7 (Shimer)).

B. The Defendants' Past Business Dealings

30. Beginning in the fall of 1999, Firth introduced several parties to Badische Trust to secure financing. Badische absconded with the parties' commitment fees. At least two parties that Firth introduced to Badische brought legal action against Firth and secured judgments or other relief against Firth. (Answer at ¶ 18; Pl. Exs. 1000, 1121, 1139; 8/27/07 Trial Tr. p. 118 l. 24- p. 121 l. 18, p. 122 l. 19- p. p. 124 l. 10 (Firth)). The Shasta PPM does not disclose this failed investment deal or the fact that Firth was sued by people he solicited for financing deals. (Pl. Exs. 1093, 1070, 461; 8/27/07 Trial Tr. p. 124 l. 17-22 (Firth)). Firth's previous failed investments and the fact that he had been sued by people he solicited for financing deals would have been important to a Shasta investor's decision to invest. (8/29/07 Trial Tr. p. 88 l. 10-16, p. 102 l. 16- p. 103 l. 1 (Dent); 8/29/07 Trial Tr. p. 73 l. 1-16 (Evans); 8/30/07 Trial Tr. p. 44 l. 16- p. 45 l. 17 (Tate); 8/31/07 Trial Tr. p. 57 l. 5-22 (Northridge)).

31. In January 1999, Shimer was involved in the formation of a Nevada corporation called Kaivalya Holding Group, Inc. ("Kaivalya"). (8/27/07 Trial Tr. p. 181 l. 24- p. 182 l. 1 (Shimer)). Shimer was a director and shareholder in Kaivalya. (8/27/07

Trial Tr. p. 182 l. 1-10 (Shimer)). In 1999, through Kaivalya, Shimer and others collected money from investors for three different investments, all of which ultimately failed. (8/27/07 Trial Tr. p. 182 l. 11-21 (Shimer)).

32. In the first investment Shimer and others collected \$669,000 from investors. (8/27/07 Trial Tr. p. 182 l. 22-25 (Shimer)). Shimer collected \$345,000 of that amount, \$272,000 of which he collected in an attorney escrow account. (8/27/07 Trial Tr. p. 183 l. 1- p. 184 l. 13 (Shimer)). Although investors received some payments for about a year, they did not recover their principal. (8/27/07 Trial Tr. p. 184 l. 14-23 (Shimer)). The investment became the focus of a major FBI investigation. (8/27/07 Trial Tr. p. 184 l. 24- p. 185 l. 3 (Shimer)). Shimer repaid only some of these investors' principal, using funds derived from Tech Traders through Shimer and Firth's Shadetree account, as described below. Shimer paid back people he brought into the investment first. (Stip. Fact 19; 8/27/07 Trial Tr. p. 185 l. 4-14 (Shimer)).

33. The second Kaivalya investment was a total disaster too. Shimer and others collected \$325,000 from investors for this second investment, none of which was recovered. (8/27/07 Trial Tr. p. 185 l. 15- p. 186 l. 12 (Shimer)). The investors were later partially repaid principal from funds derived from Tech Traders. (Stip. Fact 19).

34. The third Kaivalya investment was made through intermediaries Jerry LaTulippe ("LaTulippe") and Tom Leonard ("Leonard"). Shimer became involved in this new investment to pay back the Kaivalya investors who invested in the earlier failed deals. (Joint Ex. 2000 p. 65 l. 4- p. 66 l. 3 (Perkins)). LaTulippe told Shimer that he had an exclusive relationship with a trader who was obtaining phenomenal results trading. (8/27/07 Trial Tr. p. 186 l. 13- p. 187 l. 13 (Shimer)). That trader was Coyt Murray. Shimer went to

the Bahamas and met Coyt Murray. Murray told Shimer that he had licensed his trading system to Hubert Pinder, who had a trading platform in the Bahamas. (8/27/07 Trial Tr. p. 187 l. 14-18, p. 188 l. 11- p. 189 l. 22 (Shimer)). Leonard or LaTullippe told Shimer that Murray's system was averaging 10% returns per day. (8/27/07 Trial Tr. p. 190 l. 10-21 (Shimer)). After this meeting in the Bahamas, Shimer collected over \$1,300,000 from investors to invest in Murray's trading system and wired the money to an account in the name of Good Works, which he was told was a company controlled by LaTulippe. (8/27/07 Trial Tr. p. 190 l. 22- p. 191 l. 3 (Shimer)).

35. This third investment through Kaivalya also failed. (8/27/07 Trial Tr. p. 191 l. 4-5 (Shimer); 9/4/07 Trial Tr. p. 62 l. 12-17 (Shimer)). LaTulippe absconded with the money. (9/4/07 Trial Tr. p. 63 l. 23- p. 64 l. 8 (Shimer); 8/27/07 Trial Tr. p. 70 l. 17- 22 (Firth)). Some of these investors were also later repaid part or all of their Kaivalya investments from payments Tech Traders gave to Shimer. (Stip. Fact 19).

36. Shimer received pressure from investors who had not been repaid from the three failed investment deals. He was desperate to keep them quiet. Investors in the third Kaivalya deal had been given promissory notes that were drafted by Shimer. Shimer gave at least one or two of these investors' personal promissory notes, obligating Shimer to pay them back. Some investors threatened to sue him and/or his associates or go to governmental authorities to complain about their loss. (Pl. Exs. 203, 393; 8/27/07 Trial Tr. p. 192 l.1.1- p. 193 l. 8, p. 194 l. 16-25 (Shimer); 8/28/07 Trial Tr. p. 55 l. 9- p. 57 l. 13 (Shimer)).

37. Shimer did not disclose the failed Kaivalya investment history to potential Shasta investors or to Elaine Teague. The Shasta PPM did not disclose these facts either. (Answer at ¶ 51; Pl. Exs. 1093, 1070, 461, 404 at RSC 00350; Joint Ex. 2003 p. 40 l. 10-18

(Stevenson); Joint Ex. 2004 p. 318 l. 11- p. 320 l. 19 (Teague); 8/29/07 Trial Tr. p. 88 l. 3-5 (Dent); 8/29/07 Trial Tr. p. 73 l. 17- 23 (Evans); 8/30/07 Trial Tr. p. 45 l. 24- p. 46 l. 1 (Tate)). This failed investment history would have been important to an investor's decision to invest in Shasta. (Joint Ex. 2003 p. 40 l. 19- p. 41 l. 15 (Stevenson); 8/29/07 Trial Tr. p. 88 l. 6-9, p. 102 l. 16- p. 103 l.1 (Dent); 8/29/07 Trial Tr. p. 73 l. 17- p. 74 l. 3 (Evans); 8/30/07 Trial Tr. p. 45 l. 24- p. 46 l. 9 (Tate); 8/31/2007 Trial Tr. p. 57 l. 23 – p. 58 l. 4 (Northridge)).

C. The Formation of Shasta

38. Firth and Shimer met in the fall of 1999 through LaTulippe. Shimer was introduced as LaTulippe's lawyer. Firth learned before organizing Shasta that LaTulippe had taken investor money from Shimer for an investment with Murray and absconded with it. (8/27/07 Trial Tr. p. 69 l. 10- p. 71 l. 15 (Firth)). This was the only business experience Firth had with Shimer prior to forming Shasta. *Id.*

39. Firth performed no due diligence on Shimer before agreeing to manage Equity. (8/27/07 Trial Tr. p. 71 l. 6- p. 72 l. 19, p. 73 l. 2-4, p. 73 l. 20- p. 74 l. 2, p. 76 l. 4-6 (Firth)).

40. In the fall of 2000, Shimer tracked down Murray to find out what had happened to the \$1.3 million of investor money he had collected for Murray's trading system. Murray told Shimer that he had never received the money from LaTulippe that was supposed to be invested in his trading system. (8/27/07 Trial Tr. p. 198 l. 10-25 (Shimer)). Shimer showed Murray some documentation that implicated Murray in Leonard and LaTulippe's fraud and told Murray that he was considering reporting Leonard and LaTulippe to Florida criminal authorities. Because of this threat, and even though he claimed never to have

received the Kaivalya funds, Murray agreed to help Shimer repay the Kaivalya investors if Shimer placed funds for trading with him. (Joint Ex. 2000 p. 85 l. 14- p. 86 l. 10 (Perkins); 8/27/07 Trial Tr. p. 199 l. 1-9, 13-19 (Shimer); 9/5/07 Trial Tr. p. 37 l. 22- p. 38 l. 21 (Shimer)). The fact that Murray was willing to help Shimer repay Kaivalya investors to avoid exposure to criminal authorities should have been a red flag to Shimer that Murray's operation was not legitimate.

41. Murray told Shimer he was just beginning to trade and that he had been back-testing his trading system for a year, although he had told Shimer in 1999 he licensed it to Pinder the year before. (8/28/07 Trial Tr. p. 17 l. 8-12 (Shimer)). Although Shimer had been told by LaTulippe and Leonard that Murray was successfully trading the system in 1999 through Pinder, Shimer did not ask Murray a lot of questions about his relationship with Pinder. Murray told Shimer that he had returned money to Pinder after being advised by his attorneys to do so because Pinder was misusing investor funds. Murray also told Shimer that he returned money given to him for trading to Pinder after suffering a trading loss. (8/28/07 Trial Tr. p. 18 l. 16- p. 20 l. 1 (Shimer)). Murray's inconsistent stories about his past trading history should have been a red flag.

42. The solution that Shimer and Murray agreed on to solve Shimer's Kaivalya debt was for Murray to share his "profits" with Shimer. (Joint Ex.2000 p. 313 l. 9-17 (Perkins)). The two struck a deal by which Murray would share profits otherwise allocated to him with a Nevis trust called Shadetree. (Pl. Ex. 96; 8/27/07 Trial Tr. p. 202 l. 19- p. 203 l. 8 (Shimer)). This trust had no bank account. (8/27/07 Trial Tr. p. 203 l. 12-16 (Shimer)). All payments made by Murray pursuant to this agreement were made to domestic bank accounts that Shimer controlled. (Pl. Exs. 1146, 1152; 8/28/07 Trial Tr. p. 6 l. 8-11, 19-21

(Shimer); 8/30/07 Trial Tr. p. 147 l. 11-25, p. 149 l. 4-14, p. 155 l. 24- p. 157 l. 22

(McCormack)). Both Firth and Shimer had internal Shadetree “accounts.” (Pl. Ex. 441 at pp. 61-68; 8/27/07 Trial Tr. p. 203 l. 25- p. 204 l. 25, p. 206 l. 7-9 (Shimer)).

43. Sometime before June 30, 2001, Shimer drafted Shasta’s Private Placement Memorandum (“PPM”), Operating Agreement, Subscription Agreement, the Agreement for Independent Verification of Shasta Capital Profits and Losses and Investor Questionnaire. He was also responsible for all of Shasta’s filings with the Securities and Exchange Commission and for all required notice filings in every state. Shimer also tried to review every document Firth sent out for Equity. In addition to preparing legal documents for Equity, Shimer also approved all subscription documents submitted to Shasta, accepted participant funds and deposited them into his attorney escrow account for further transmittal to Tech Traders and other entities and was Equity’s primary contact person for dealing with Murray. He spoke to Murray on almost a daily basis over the course of their relationship. (Stip. Fact 21; CFTC Summ. J. Op. at 17; Pl. Exs. 1161, 1162). Shimer was a controlling person of Equity.

44. After an initial 1% or 2% preferential rate of return to Shasta investors, Tech Traders was entitled to 15% of the “profits” from trading for trading and operational expenses and 50% of any remaining “profits”, under the terms of the Shasta Private Placement Memorandum. (Stip. Fact 22).

45. On August 3, 2001, Shimer and Murray formalized the agreement to share profits under the auspices of Shadetree by executing an agreement between Tech Traders Ltd. and Shadetree. Shimer drafted this agreement. The agreement provided that Tech Traders would allocate 5% of the 15% of “profits” for trading and operational expenses

provided for in the Shasta PPM to Shadetree and ½ of the 50% of any remaining “profits” allocated to Tech Traders under the Shasta PPM to Shadetree. This agreement and the \$1.3 million paid under it were not disclosed in any version of the Shasta PPM and were not otherwise disclosed to Shasta investors, potential investors or to Teague. (Stip. Fact 23; Pl. Exs. 1093, 1070, 1046, 461; 8/27/07 Trial Tr. p. 202 l. 15-18, p. 203 l. 3-11 (Shimer); 9/4/07 Trial Tr. p. 159 l. 8-11 (Shimer); (9/5/07 Trial Tr. p. 114 l. 14- p. 115 l. 15 (Shimer)). In fact, Shimer concealed the Shadetree account from Teague, stressing to Murray that Putnam & Teague should “never” receive Shadetree account statements. (Pl. Ex. 1046; 9/5/07 Trial Tr. p. 113 l. 17- p.115 l.15 (Shimer)).

46. Many of the payments Tech Traders made to Shadetree were actually wired to an account in the name of Kaivalya that was under the control of Shimer. Payments of \$1,314,930 were wired to this account under the control of Shimer. (Pl. Ex. 1152). This secret split of the profits would be used to compensate Shimer and repay the Kaivalya investors, but it was also used to pay a mortgage for Firth and for Shimer to give \$82,000 to a former Kaivalya associate and principal of Universe, David Perkins and to pay Vernon Abernethy a referral fee for referring an investor to Shasta. (Pl. Exs. 443, 1045; 8/27/07 Trial Tr. p. 219 l. 10 p. 220 l. 10 (Shimer); 8/28/07 Trial Tr. p. 7 l. 11-20; p. 8 l. 8- p. 9 l. 5 (Shimer); Joint Ex.2000 p. 280 l. 3-17 (Perkins); 8/30/07 Trial Tr. p. 158 l. 15-20, p. 159 l. 9-14, p. 167 l. 17- p. 168 l. 6 (McCormack)). Shimer’s gratitude towards Murray for his willingness to assist Shimer with his “Tom and Jerry” problem caused him to ignore the many red flags that Murray’s operation was a fraud. (Pl. Ex. 414 at RSC 00346).

47. Firth knew that Kaivalya investors were owed a lot of money and about the secret profit split to Shadetree that was not disclosed in the Shasta PPM. (Stip. Fact 24).

48. Shasta investors would have wanted to know about this secret Shadetree deal before they invested in Shasta. (Joint Ex. 2003 p. 70 l. 6- p. 72 l. 12 (Stevenson); 8/29/07 Trial Tr. p. 83 l. 11- p. 84 l. 20 (Dent); 8/29/07 Trial Tr. p. 70 l. 11-24 (Evans); 8/30/07 Trial Tr. p. 46 l. 19- p. 47 l. 17 (Tate)).

49. Shasta had no separate bank account, but operated solely through Shimer's attorney escrow account. Shimer opened that account, was the sole signatory on it and controlled all funds deposited to it by Shasta investors and wired out to Tech Traders. (Stip. Fact 29).

50. The Shasta PPM entitled Equity to a management fee of 5% of profits generated by the Tech Traders' trading system. In addition to taking out payments pursuant to this 5% management fee, Shimer and Firth took out other payments pursuant to the undisclosed Shadetree agreement with Tech Traders. Shimer and Firth also took out \$335,000 more from Equity than the 5% management fee allowed. (Pl. Ex. 1155; 8/31/07 Trial Tr. p. 10 l. 2-5, p. 14 l. 12-14 (McCormack)).

D. The Defendants' Solicitations and the Bases for Those Solicitations

51. Equity solicited interest in Shasta by various means, including individual solicitations by Shimer and Firth, distribution of the PPM drafted by Shimer, and reviewed and approved by Firth, operation of a website, <http://www.shastacapitalassociates.com> (the "Shasta website"), and provision of information to third parties that tout hedge funds to investors on various web sites, including <http://www.hedgeco.net>, <http://www.barclaygrp.com>, and <http://www.hedgefundresearch.com>. The Shasta website reflected the identical trading performance of Tech Traders as reported beginning June 2001 through February 2004, by Tech Traders' accountant, Vernon Abernethy. As of March 2004,

the web site reported purported returns totaling over 130% for the period March 2003 to February 2004. (Stip. Fact 24). The high returns and track record reported on the websites influenced investors' decisions to invest in Shasta. (Pl. Exs. 51, 1057; 8/30/07 Trial Tr. p. 32 l. 23- p. 33 l. 13, p. 40 l. 5-15 (Tate); 8/31/07 Trial Tr. p. 44 l. 22- p. 45 l. 10, p. 46 l. 20- p. 47 l. 3 (Northridge)). At least one investor was skeptical and questioned Firth about the consistent high returns. (8/29/07 Trial Tr. p. 64 l. 13- p. 65 l. 2 (Evans)).

52. Shimer knew that it was important that Tech Traders' trading system be fully and adequately disclosed and the primary way in which that disclosure was provided to Shasta investors was through the website. (9/4/07 Trial Tr. p. 32 l. 23- p. 33 l. 13 (Shimer)).

53. All members and prospective members of Shasta were provided with the URL address of Shasta's web site. (Stip. Fact 75).

54. Each investor or potential investor in Shasta received one of three different versions of the Shasta PPM: a) Plaintiff's Exhibit 1093, sent to all investors or prospective investors between June 30, 2001 and February 18, 2003; b) Plaintiff's Exhibit 1070, sent to all investors or prospective investors between February 18, 2003 and September 2, 2003; and c) Plaintiff's Exhibit 461, sent to all investors or prospective investors from September 2, 2003 until April 1, 2004. (Stip. Facts 67-69). Investors relied on the PPM and believed it contained all relevant information pertaining to Shasta and Equity. (Pl. Exs. 461, 1070, 1093; 8/30/07 Trial Tr. p. 38 l. 5-17 (Tate); 8/31/07 Trial Tr. p. 48 l. 3-19 (Northridge); 8/29/07 Trial Tr. p. 68 l. 23- p. 70 l. 1 (Evans)).

55. HedgeCo's website touted Shasta as a top performing hedge fund and featured Shasta as the hedge fund of the week during the week of March 14, 2004. According to the hedgeco.net site, Shasta was up over 8% net of all fees for January and February 2004 and

had also achieved net returns of 107.54% in 2002 and 92.02% in 2003. Equity, through Firth and Shimer, supplied all of this performance information to Hedgeco and other third parties knowing that Hedgeco and other third parties would publish it. (Stip. Fact 25).

56. Shimer received from Murray written technical information and a description of Tech's trading system. Shimer incorporated that information received from Murray, and made minor editorial changes in the information on Shasta's web site that described Tech's trading system. All information that did not specifically refer to Tech's trading system, how it worked, the philosophy behind it and how it was developed was written by Shimer, and published with the technical help of James George. (Stip. Fact 26).

57. In 2001, Murray had presented Shimer and Firth with a three ring binder that described his trading system. (Pl. Ex. 1001). He told Shimer and Firth that the information contained in the three ring binder was proprietary and represented a unique application of math algorithms to a trading system he and his son had developed. (8/29/07 Trial Tr. p. 25 l. 12- p. 27 l. 19 (Shimer)). This material in the three ring binder was replicated on the Shasta website, which described the traders' trading system as a unique one that the trader had developed himself. Shimer also told investors that the trader developed the system himself. (Stip. Fact 26; 8/30/07 Trial Tr. p. 30 l. 12-19 (McManigal); 8/30/07 Trial Tr. p. 62 l. 19-23 (List); 8/31/07 Trial Tr. p. 33 l. 23-25, p. 34 l. 1 (Richardson)).

58. On January 10, 2001, Coyt A. "Lex" Murray, sent Shimer an email describing Tech Trader's trading system. Lex was Coyt E. Murray son and worked with Murray. Lex stated that the system had hypothetically made 52.7% in 19 days which was a 26,291 annual percentage rate. Murray's three ring binder also described hypothetical trading results of an annual percentage rate equivalent of 714%. Shimer knew that it was not realistic that the

system could obtain these results in real time trading. (Pl. Ex. 339; 8/28/07 Trial Tr. p. 30 l. 14- p. 31 l. 2 (Shimer); 9/5/07 Trial Tr. p. 21 l. 18- p. 22 l. 7 (Shimer)). Nonetheless, he relied on these hypothetical trading results in soliciting Shasta investors. (Docket Doc. 159-11 at 6-7; Docket Doc. 356 at 10).

59. On February 17, 2004, Dennis Meyer emailed Firth alleging copyright and piracy violations for the math pages on Shasta's website. (Pl. Ex. 1002 at RS07116-07119; 8/27/07 Trial Tr. p. 114 l. 8-21, p. 115 l. 4-12 (Firth)). Meyer told Firth and Shimer that the math pages on Shasta's website, which they had received from Murray's three ring binder were exact copies from Meyer's copyrighted manual. (8/27/07 Trial Tr. p. 115 l. 4-12 (Firth); 8/29/07 Trial Tr. p. 22 l. 22- p. 23 l. 10, p. 25 l. 12- p. 26 l. 19 (Shimer)). Shimer wrote Murray about these communications. (Pl. Ex. 1002; 8/27/07 Trial Tr. p. 114 l. 2-21 (Firth)). Shimer and Firth were concerned because when they received the information from Murray in 2001, Murray had told them that Murray's son developed the math portions of the system. (8/27/07 Trial Tr. p. 115 l. 16-18 (Firth); 8/28/07 Trial Tr. p. 22 l. 5-10, 25, p. 23 l. 1-2 (Shimer)). When Shimer confronted Murray after the contact by Meyer, Murray told him that he had licensed Meyer's system and that he was not using the system anymore. (8/29/07 Trial Tr. p. 27 l. 1-19 (Shimer)). The information that Meyer had complained about was still on the Shasta website on February 23, 2004. (8/31/07 Trial Tr. p. 19 l. 15-20 (McCormack)). Shimer never told Shasta investors that the website contained Meyer's copyrighted materials and that the trading system described on the Shasta website was therefore not unique to the trader that would be trading their money. (9/5/07 Trial Tr. p. 15 l. 6-25 (Shimer)). This revelation that Murray was passing off someone else's copyrighted material as part of his unique trading system should have been a red flag to Shimer and Firth.

60. With limited exceptions, Equity, acting through Firth and Shimer, and Firth and Shimer individually did not identify to actual or prospective Shasta investors the identity of Tech Traders. (Stip. Fact 28).

61. Equity, Firth and Shimer used the mail and interstate telephone lines to communicate with investors. (CFTC Summ. J. Op. at 7, 16, 18).

62. Murray used the term “credits,” rather than profits, on the account statements he issued to investors and told Shimer to use that term on the Shasta statements from Tech Traders that Shimer created. (8/28/07 Trial Tr. p. 136 l. 14- p. 137 l. 4 (Shimer)). He described the term to Shimer as a posting to the account of conditional profit. (Stip. Fact 30; 8/28/07 Trial Tr. p. 137 l. 5-7 (Shimer)). Murray also used the term “credits” in describing what his trading system did. (9/5/07 Trial Tr. p. 21 l. 18-21 (Shimer)). The fact that Murray would not state that his trading system made profits was a red flag that his system did not make profits.

E. Shimer’s Early Solicitations and the Red Flags Arising There From

63. On February 16, 2001, Shimer sent Murray a letter about a prospective investor David Kaplan, who was the developer of a condominium Shimer and his wife owned. (Pl. Ex. 404; 8/28/07 Trial Tr. p. 37 l. 2-4, 21-25, p. 38 l. 1-5 (Shimer)). Shimer told Murray in the letter that he had told Kaplan that he had a client that was trading the futures market with real success, that Murray and his trading company were his legal clients and that he had been following Murray’s trading progress for a year. None of these representations were true. (8/28/07 Trial Tr. p. 41 l. 2-4, 9-15 (Shimer)). Shimer also told Murray that he had told Kaplan that Kaplan would receive 3% return on his investment each month, that 15% would be subtracted for trading and operational expenses, and that remaining profit

would be split 50/50. He asked Murray not to tell Kaplan about the failed Kaivalya deal with LaTulippe and Leonard (“the Tom and Jerry fiasco”) or the further profit splitting arrangement with Firth and Shimer. (Pl. Ex. 404 at RSC 349, 350, 351; 8/28/07 Trial Tr. p. 40 l. 8- 13, p. 42 l. 14- p. 43 l. 9 (Shimer)).

64. On March 1, 2001, Shimer wrote another letter to Murray about their meeting with Kaplan. The letter mentioned that Murray was uncomfortable with Kaplan’s questions. (Pl. Ex. 1118 at 1). Kaplan had asked Murray how much money he had in trade, how much profit Murray had made and through which future commission merchants (“FCMs”) he traded. Shimer noted in his letter to Murray that Kaplan’s question was legitimate and was simple due diligence on his part. Shimer noted an inherent conflict between Murray’s need to maintain his financial privacy and an investor’s need to receive information. (Pl. Ex. 1118 at 1).

65. Murray was concerned about keeping his own finances private. Murray’s desire for financial privacy extended to a concern that the amount he or his companies had in trade was no one else’s business. Murray expressed this concern on his part for financial privacy to both Shimer and to Firth and to anyone else who would ask him how much of his own funds Murray had in trade. Murray continued to express this concern for financial privacy to Shimer whenever Shimer was present and the issue of how much money Murray had in trade was raised by some other party. Murray also expressed this same concern to Shimer whenever it came up in conversations Murray had with Shimer. (Stip. Fact 31).

66. Kaplan was willing to let Murray trade his money pursuant to a power of attorney in an account in Kaplan’s name. Under such an arrangement, the investor keeps control of his money and the trader cannot misappropriate funds. (8/28/07 Trial Tr. p. 49

I. 8-25 (Shimer))

67. Other investors had expressed an interest in letting Murray or Tech Traders trade their funds in accounts held in the investors' names. However, Murray told Shimer that he was concerned that the investor could reverse engineer his system if the investor saw trading account statements. (Stip. Fact 32). Murray's unwillingness to trade investor funds held in the investors' accounts was a red flag that Murray wanted to hide his actual trading results.

68. David Kaplan never became a New Century or Shasta investor. (Stip. Fact 33).

69. After Shimer's meeting with Kaplan and Murray, Shimer told Murray that potential investors would want some assurance that Murray had demonstrated in real time with real dollars an ability to perform consistently and successfully in the futures market. It was then that he first mentioned the idea of obtaining independent verification of Tech Traders returns to Murray. (Pl. Ex. 1118 at 1 and 6; 8/28/07 Trial Tr. p. 58 l. 11-14 (Shimer); 9/4/07 Trial Tr. p. 82 l. 19- p. 83 l. 7 (Shimer)).

70. The Shasta PPM was designed to meet Murray's desire for privacy while providing comfort to investors that the trading results were legitimate. (Pl. Ex. 414 at RSC 00347). It provides that all funds invested with the trading company will be traded in the name of the trader but does not disclose the name of the trader. It also provides for independent verification of the trader's trading results through two undisclosed CPAs. (Pl. Ex. 1093 at 11, 18; Pl. Ex. 1070 at 8, 12; Pl. Ex. 461 at 8, 13).

71. Since Shimer and Firth did not reveal the name of Tech Traders to potential investors or allow potential investors to conduct any of their own due diligence on Tech Traders or the trading system, it was incumbent on them to conduct adequate due diligence on Tech Traders, Murray and Murray's trading system. (Joint Ex. 2003 p. 139 l. 7-20 (Stevenson); 9/5/07 Trial Tr. p. 24 l. 21- p. 25 l. 2 (Shimer)).

72. The Shasta PPM represented to potential investors that Equity, as Manager of Shasta, conducted due diligence on Tech Trader's results and trading system. (CFTC Summ. J. Op. at 15).

73. The PPM assured investors that Equity had adequate information about Tech Traders' system and real time trading, although Firth, Equity's President and sole shareholder never saw any documentation of Tech Traders' trading results. (CFTC Summ. J. Op. at 15; 9/4/07 Trial Tr. p. 22 l. 1-12 (Firth)). He mainly relied on Shimer's statements to him that Shimer had placed personal money through Edgar with Tech Traders and received good results. (CFTC Summ. J. Op. at 15). Firth didn't even understand the independent verification process that was put in place to aid investors. *Id.*

74. Shimer knew that Tech Traders had investors other than Shasta as early as May 2001. He also knew that Tech Traders could be jeopardized by large withdrawals by those investors. (Pl. Ex. 85 at 2).

75. Shimer and Firth represented in the first Shasta PPM that Tech Trader's trading system had achieved profits of over 40% net to the investor during limited real time trading. (Pl. Ex. 1093 at 14). Shimer made similar representations in a letter to Universe manager David Perkins, which was distributed to Universe investors. (Pl. Ex. 1097 at 1, 2; 8/31/07 Trial Tr. p. 31 l. 17- p. 32 l. 8, p. 32 l. 12-22 (Richardson)). This representation was

based on the results Shimer had obtained through the Edgar investment. The representation was misleading because a) Shimer knew that Murray would not verify the Edgar results; b) Murray had never represented a return of over 40%; c) Shimer had calculated that return from sporadic letters Murray provided him that represented only dollar amounts allegedly in the Edgar account; and d) Murray never gave Shimer a consistent rate of return number. (Pl. Ex. 1130; 8/28/07 Trial Tr. p. 98 l. 9- p.100 l. 16 (Shimer)).

76. Shimer claimed to rely on the trading results obtained by Edgar and information Murray provided to Firth and Shimer on his Synergy Stock Index Trading program in deciding to solicit investors for Tech Traders' trading program. (Docket Doc. 159-11 at 6-8, 11).² This reliance was not reasonable because a) Shimer did not receive consistent and reliable information from Tech Traders on Edgar's trading results; and b) the information Murray provided to Shimer and Firth on his trading system was purely hypothetical. (Pl. Exs. 1001, 1130; 9/4/07 Trial Tr. p. 43 l. 23- p. 45 l. 1, p. 46 l. 11-16 (Shimer); 9/5/07 Trial Tr. p. 19 l. 5-15, p. 21 l. 22- p. 22 l. 7(Shimer)). Neither Shimer nor Firth ever reviewed a brokerage statement from any of Tech Traders' future commission merchants' accounts. (9/5/07 Trial Tr. p. 19 l. 16-22 (Shimer); 9/4/07 Trial Tr. p. 22 l. 1-6 (Shimer); 9/4/07 Trial Tr. p. 21 l. 20- p. 22 l. 12 (Firth)). The failure to do so was reckless.

² Although Shimer claimed to rely on the Edgar results when he filed his motion to dismiss in 2005, after Plaintiff's discovery showed the unreasonableness of that reliance, he tried to distance himself from his earlier assertions in the Joint Pretrial Order. *Compare* Docket Doc. No. 159-11 at 10 ("With the clear belief based upon Edgar's experience with Murray and Tech that the Synergy Trading System was working just as predicted by Murray's back testing data for calendar year 200 but wanting to be extra certain of the accuracy of the performance numbers...") *with* Docket Doc. No. 508 at 40 ¶ 6 ("The track record experienced by Edgar Holding Group, Inc. was never considered by either Shimer or Firth to be a sufficient basis for recommending the Tech Traders trading system to Shasta's investors. That track record played a significant but relatively small part in creating comfort in the mind of Shimer and Firth that Murray's trading system was, indeed, generating consistent profits.").

77. After initial meetings with Murray in 2000, several meetings during 2001 and intermittent meetings during early to mid 2002, Firth had little direct contact with Murray. But Firth touted the Shasta investment everyday to Shasta investors. (Stip. Fact 35; 8/27/07 Trial Tr. p. 90 l. 23- p. 91 l. 21 (Firth)).

78. Universe Capital Appreciation, LLC was the largest investor in Shasta. Universe accepted investment amounts that were less than the minimum investment of \$100,000 that was required by Shasta's PPM. (Stip. Fact 20).

F. The CPA Verification Process

1. Hiring J. Vernon Abernethy

79. It was Shimer's idea to obtain an independent certified public accountant ("CPA") to verify Tech Trader's trading results. (Stip. Fact 36). Firth never had any discussions with Murray about hiring a CPA to verify Tech Traders' trading results. (8/27/07 Trial Tr. p. 78 l. 7-12 (Firth)).

80. Originally, Shimer wanted Teague to perform the independent verification of Tech Trader's trading results. (Pl. Ex. 1118 at 6; 8/28/07 Trial Tr. p. 58 l. 19- p. 59 l. 9, p. 59 l. 15-19 (Shimer)). Neither Teague nor Shimer had any experience calculating rates of return for commodity pools. (Joint Ex. 2004 p. 306 l. 4- p. 307 l. 9 (Teague); 8/27/07 Trial Tr. p. 181 l. 14-16 (Shimer)). Teague told Shimer she did not have such experience. (Joint Ex. 2004 p. 307 l. 10- p. 308 l. 12 (Teague); 9/5/07 Trial Tr. p. 55 l. 1-4, 7-13 (Shimer)).

81. An important function of the CPA chosen to be Shasta's CPA was to receive calls from Shasta's members or prospective members from time to time and to confirm, if asked, the rate of return ("ROR") numbers being reported by Shasta to its members. (Stip. Fact 37).

82. Shimer chose Teague, who was a dear friend for 20 years for several reasons. Shimer knew that a larger, more well-known accounting firm may not want to take this engagement particularly in light of the fact that 2001 was a “post Enron” environment. From his past association with Teague, Shimer knew that Teague was honest. Shimer also knew that many CPAs are not willing to receive calls from someone they have never met and then confirm ROR information on the telephone that had been received from another CPA. (Stip. Fact 37).

83. When Shimer first suggested independent verification of Murray’s trading results, he suggested to Murray that Teague verify Murray’s trading results for 2000 and each calendar month of 2001 by reviewing trading statements sent directly to her from the futures commission merchant. If statements had been sent directly from the FCM, Murray could not alter them or provide selected information. (Pl. Ex. 1118 at 6; 8/28/07 Trial Tr. p. 60 l. 1-13, 25, p. 61 l. 1-4, p. 62 l. 4- p. 63 l. 1 (Shimer))

84. Shimer had placed \$250,000 through Edgar with Tech Traders in about January 2001. Murray sent him letters from January to May 2001 claiming extraordinary returns, such as a \$90,796 return in six weeks or less on a \$250,000 investment. However, Murray would not let anyone verify his results for 2000 or the first five months of 2001, including the returns reported in Edgar. His stated reason was because Magnum had done the trading rather than Tech Traders, even though he had told Shimer in January that the Edgar money was being traded through Tech. Shimer accepted this nonsensical reason and did not insist that the extraordinary results obtained through Edgar be verified by any outside source. (Pl. Exs. 1033, 1130; 8/28/07 Trial Tr. p. 27 l. 1-5, 23-25, p. 28 l. 1-7, p. 31 l. 23- p. 32 l. 3, p. 35 l. 25- p. 36 l. 9, p. 64 l. 14- p. 65 l. 22, p. 67 l. 20- p. 68 l. 6 (Shimer)).

Murray's refusal to verify the 2000 and early 2001 trading results was a red flag that those results were not as represented.

85. Teague wanted original brokerage statements sent to her. (8/27/07 Trial Tr. p. 78 l. 17-22 (Firth)). She was concerned that copies could be altered. (8/27/07 Trial Tr. p.79 l. 15-20 (Firth)). She also wanted to review Tech Trader's bank statements, so that she could verify how much money came into and went out of Shasta, determine how much was traded and verify profits and losses. (Joint Ex. 2004 p. 303 l. 7-17 (Teague)). Murray did not want original statements to be sent anywhere; he wanted statements to be reviewed in his office. Therefore, it was decided that a local CPA would perform the independent verification. (Stip. Fact 39; 8/27/07 Trial Tr. p. 79 l. 21-23 (Firth); 8/28/07 Trial Tr. p. 70 l. 12- p. 71 l. 1 (Shimer)).

86. Originally, Murray had planned to hire Robert Collis, a local CPA with Collis and Associates, to perform the independent verification of Tech Traders' trading performance. (8/28/07 Trial Tr. p. 71 l. 2-9 (Shimer)) Collis' accounting firm had performed audits of companies owned by Coyt Murray in the 70's and 80's and Collis had recently prepared Coyt Murray's personal tax returns. (Joint Ex. 2002 p. 9 l. 5- p. 10 l. 25 (Collis)). Collis declined the engagement, however, because of concerns that the business Tech Traders was in might need to be registered under the securities law, Collis and Associates did not have the expertise to verify performance returns for an investment and the CPA firm's insurer would require an extra premium to cover the engagement. (Pl. Ex. 588; Stip. Fact 40; Joint Ex. 2002 p. 16 l. 19-p. 19 l. 6, p. 24 l. 2-9, 20-25, p. 25 l. 1-5 (Collis)).

87. Sometime in 2001, Shimer had two phone conversations with Collis in which he attempted to persuade Collis to take the engagement, despite Collis' concerns that his firm

did not have the necessary expertise. He told Collis that the work involved only performing a simple calculation, that the work did not fall under SEC jurisdiction and that Tech Traders could pay any additional insurance premium for doing the work. Collis still declined the engagement. (Joint Ex. 2002 p. 29 l. 20- p. 32 l. 11, p. 33 l. 1-24, p. 35 l.4- p. 37 l. 23, p. 39 l. 23- p. 40 l.16 (Collis)). Shimer's phone conversations with Collis put him on notice that Tech Traders was operating in a regulated environment and that the work he was asking an accountant to perform was specialized and required the right expertise.

88. After Collis told Murray that he declined the proposed engagement, Murray decided to hire J. Vernon Abernethy ("Abernethy"), a local CPA, to review and verify Tech Traders' trading results, and supply a monthly trading performance rate of return figure to third parties. (Stip. Fact 40).

89. Abernethy was not qualified to verify the rate of return for Tech Traders' trading system. Prior to his Tech Traders' engagement, he had never calculated the rate of return for a commodity pool. He was not and is not aware that there exist CFTC regulations on how to calculate a rate of return for a commodity pool. He had never done any work for any kind of trading company before. He did not know when he undertook to do the work that Murray was involved in commodity futures trading. He had never seen a futures commission merchant's statement before and did not know how to read one. He never learned the difference between a month end brokerage statement, which shows all the additions and withdrawals from the commodity trading account for the month and a daily statement, which does not. (8/30/07 Trial Tr. p. 76 l. 21-23, p. 77 l. 20- p. 78 l. 8, p. 81 l. 16-20, p. 93, l.15-23, p. 141 l. 1-4, 24-25, p. 142 l. 1-13 (Abernethy); 8/30/07 Trial Tr. p. 145 l. 23- p. 147 l. 8 (McCormack)).

90. Shimer first met Abernethy in July 2001. (Stip. Fact 48). Shimer did nothing to investigate Abernethy's background other than review his resume. (Stip. Fact 46). Shimer never asked Abernethy whether Abernethy had ever looked at a commodity account statement before Abernethy began the verification process and did not know whether Abernethy had looked at such statements. (8/28/07 Trial Tr. p. 108 l. 4-9 (Shimer)). He never asked Abernethy whether he had any experience in the commodities industry. (9/5/07 Trial Tr. p. 62 l. 15-17 (Shimer)). He knew that Abernethy had no experience with commodity trading firms. (8/28/07 Trial Tr. p. 78 l. 25- p. 79 l. 2 (Shimer)). Shimer had many face-to-face meetings with Abernethy during the early days of the engagement and also spoke to him on the telephone frequently. (Pl. Exs. 39, 40, 44, 434, 489, 1024, 1161, 1162). Therefore, Shimer was well aware of Abernethy's lack of qualifications for the engagement.

91. Firth did nothing to investigate Abernethy's background and did not know what, if anything, Shimer or Teague had done to investigate Abernethy's background. (8/27/07 Trial Tr. p. 84 l. 4-21 (Firth)). By early 2002, Firth was uncomfortable with Abernethy and wanted Murray to replace him. But he never discussed replacing Abernethy with Murray. He did nothing to alleviate his concerns but express those concerns to Shimer. (8/27/07 Trial Tr. p. 88 l. 5-7, 14-25, p. 89 l. 1-7, p. 90 l. 8-10 (Firth)). Those concerns included a concern about the rate of return number being reported by Abernethy. On at least one occasion, Firth was concerned that the profits reported for that month incorrectly contained investor additions and expressed that concern to at least one investor. (8/31/07 Trial Tr. p. 54 l. 24- p. 55 l. 22 (Northridge)).

2. Hiring Elaine Teague For a Limited Purpose

92. Equity employed Teague for the limited purpose of receiving, without further

verification on her part, a rate of return number verified in writing by a CPA local to Tech's trading operation designated by Tech Traders and Murray and approved by Shasta. She was also retained by Equity to be available to members or prospective members of Shasta to receive their phone call(s) and to confirm that she knew the identity of the local CPA that provided her with a verified rate of return number for trading by Tech each month. She was also retained to confirm to Equity outside "hedge fund" performance numbers by contacting the management of those funds or, in the alternative, reviewing the web sites of those funds. She was also employed to issue end of year K-1's to all of Shasta's members and prepare Shasta's partnership return. (Stip. Fact 37).

93. Abernethy made it clear to Shimer from the first time he met Shimer that he would work only for Murray and would not be responsible for reporting or verifying trading performance for anyone else who was obtaining the rate of return numbers. Shimer told Abernethy that was all right because his close friend Teague would verify performance for Shasta. (8/30/07 Trial Tr. p.125 l. 6-24 (Abernethy)).

94. Teague did everything that was asked of her. (8/28/07 Trial Tr. p. 76 l. 11-19 (Shimer)). Teague was not an independent accountant. (9/4/07 Trial Tr. p. 99 l. 13-20 (Shimer)).

95. Firth had few dealings with Teague. Most of Teague's interactions on the engagement were through Shimer. (Stip. Fact 38).

96. Teague had no input into the decision to employ Abernethy. (Joint Ex. 2004 p. 373 l. 8-10 (Teague)).

97. Although the PPM stated that Teague would perform due diligence on the qualifications and reliability of Abernethy, neither Shimer nor Firth did anything to assure

that Teague investigated Abernethy's background. (Pl. Ex. 1093 at 19; Pl. Ex. 1070 at 13; Pl. Ex. 461 at 13; Stip. Fact 46; 8/28/07 Trial Tr. p. 80 l. 1-4, p. 80 l. 23- p. 82 l. 9 (Shimer)).

98. One of the subscription documents that each Shasta investor received and signed was an Agreement for Independent Verification of Shasta Capital Associates Profits and Losses. (Pl. Ex. 1089; Stip. Fact 71). Shimer drafted this agreement. (8/28/07 Trial Tr. p. 150 l. 23- p. 151 l. 5 (Shimer)). Although the agreement described what Shasta's accounting firm was supposed to do for Shasta investors, Teague never saw the agreement. (Joint Ex. 2004 p. 532 l. 20- p. 533 l. 15 (Teague); 8/28/07 Trial Tr. p. 153 l. 4- p. 154 l. 3 (Shimer)).

99. Shimer was Teague's main point of contact on her Shasta engagement. (Stip. Fact 52). He was also her point of contact in dealing with Murray and Abernethy to develop agreed-upon procedures to verify the Tech Trader trading results. (Joint Ex. 2004 p. 302 l. 5-21, p. 322 l. 15-17, p. 439 l. 4-7, p. 440 l. 1-11 (Teague)). Shimer was central in dealing with any delays, miscommunications or issues in establishing the agreed upon procedures and verification process. (Pl. Exs. 39, 489; Joint Ex. 2004 p. 451 l. 16- p. 456 l. 11, p. 458 l. 13- p. 461 l. 6, p. 693 l. 4- p. 694 l. 15 (Teague); 8/28/07 Trial Tr. p. 82 l. 24- p. 84 l. 12, p. 84 l. 20- p. 86 l. 10 (Shimer)).

100. At the beginning of her engagement, Teague had expected to receive a report of trading performance created by Coyt Murray along with Abernethy's agreed upon procedures letter verifying the returns. (Stip. Fact 53). However, Shimer called her and told her that she would not receive the report because Murray had told him it contained information about funds other than Shasta's to which Murray did not want her to have access. (Pl. Ex. 37; Joint Ex. 2004 p. 415 l. 25- p. 417 l. 15 (Teague)).

101. Murray did not produce timely or accurate reports. (8/28/07 Trial Tr. p. 34 l. 9-11, p. 134 l. 13-22 (Shimer)). Sometime in early 2002, Shimer took over the drafting of Tech Traders' monthly reports (account statements) to Shasta that were supposed to originate with Tech Traders. (8/28/07 Trial Tr. p. 124 l. 4-10, p. 126 l. 22- p. 128 l. 23 (Shimer); 9/6/07 Trial Tr. p. 6 l. 6- p. 7 l. 4 (Shimer)). Firth knew that Shimer was preparing Tech Trader's reports to Shasta. (CFTC Summ. J. Op. at 15; 9/4/07 Trial Tr. p. 24 l. 20- p. 25 l. 8 (Firth)). The Shasta PPM stated that Equity, the Manager, was responsible for receiving on behalf of Shasta, a monthly statement from the Trading Company. (Pl Ex. 1070; Pl. Ex. 461 at 21; Pl. Ex. 1093 at 27.) Shimer and Firth fraudulently failed to disclose in the PPM that these statements were actually prepared by Shimer, not Tech Traders.

102. Teague relied on Tech Trader's report on Shasta as a third party confirmation of Shasta's balances with Tech Traders. (Joint Ex. 2004 p. 363 l. 5- p. 365 l. 7 (Teague)). Teague told Shimer that Shasta's beginning and ending balance information should come from Tech Traders, not Shasta and not Puttman & Teague. (Pl. Ex. 419; Joint Ex. 2004 p. 431 l. 3- p. 432 l. 18 (Teague)). She did not know that Shimer was preparing these Shasta's account statements. (CFTC Summ. J. Op. at 15; 9/6/07 Trial Tr. p. 9 l. 5-7 (Shimer)). Firth never told Teague that Shimer was preparing the Shasta account statements. (9/4/07 Trial Tr. p. 24 l. 20- p. 25 l. 8 (Firth)). Shimer actively concealed from Teague that he was preparing Shasta's account statements because he knew that she would not consider that adequate third party verification. (Pl. Exs. 437, 466, 502, 504; Joint Ex. 2004 p. 363 l. 4- p. 365 l. 7 (Teague); 9/6/07 Trial Tr. p. 4 l. 7- p. 5 l. 14, p. 8 l. 6 – p. 9 l. 7 (Shimer)).

3. Developing the AUP Process

103. Firth played no role at all in the development of the procedures for verifying

Tech Traders' rate of return. Firth relied on Shimer to develop a process to assure that Shasta's investors received accurate information about the performance of their Tech Traders' investment. (Stip. Fact 42; CFTC Summ. J. Op. at 15). This reliance was not reasonable. Firth was reckless to abdicate the responsibility to assure accurate investment performance totally to Shimer.

104. It was decided that Abernethy would perform the verification of Tech Traders' trading results through a set of Agreed Upon Procedures ("AUP"). These procedures were described in a letter that Abernethy sent each month to Murray ("AUP letter"). Each letter gave a monthly, and sometimes quarterly, return number. This AUP letter was then forwarded each month by Murray or Abernethy to Teague. Teague took Abernethy's performance number, inserted it into her own letter to Equity ("Verification Letter") and then forwarded her letter with the performance number obtained from Abernethy on to Firth. (Stip. Fact 41).

105. In November, 2001, Shimer revised a draft Verification Letter from Puttman & Teague to Equity to include explicit language that stated that Abernethy was granted full access to the in-house trading records of Tech Traders and was given the opportunity to review original brokerage statements. (Pl. Ex. 39; 8/28/07 Trial Tr. p. 142 l. 6- p. 143 l. 16 (Shimer)). Shimer sent this draft letter to Abernethy at Abernethy's request because Abernethy told Shimer he wanted to make sure Teague was not saying something he did not want her to say. (8/28/07 Trial Tr. p. 140 l.1- p. 141 l. 3 (Shimer)). Abernethy crossed out the language in the draft Verification Letter that stated he was granted full access to records and original brokerage statements. He replaced it with language which stated that Shasta Capital Associates has received and accepted as reasonable and reliable for the purpose for

which it is to be used the agreed-upon procedures established between Abernethy and Tech Traders. (Pl. Ex. 39; 8/28/07 Trial Tr. p. 143 l. 16- p. 145 l. 20 (Shimer); 8/30/07 Trial Tr. p. 99 l.1-25 (Abernethy)). Shimer did not tell Teague that Abernethy had made those changes to her letter. (Joint Ex. 2004 p. 515 l. 3- p. 517 l. 17 (Teague); 8/28/07 Trial Tr. p.147 l. 4-16 (Shimer)) He also did not object to Abernethy's changes but accepted them all word-for-word. (Pl. Ex. 40; 8/28/07 Trial Tr. p. 147 l. 1-2, 17-21, p. 148 l. 1-2 (Shimer)).

106. Although the PPM assures independent verification by a CPA and provides procedures whereby review and verification will take place, Firth never understood how the process worked. Instead, he relied on Shimer's representation that the process was sound. (CFTC Summ. J. Op. at 15). Firth acknowledged that the CPA verification process was put in place to provide comfort to investors that the trading results were authentic (Stip. Fact 47).

107. Shimer's reliance on Teague and Abernethy to assure that Shasta's investors received accurate information about the performance of their Tech Traders' investment was not reasonable. Given their lack of needed expertise, Teague's limited role and the numerous red flags about Abernethy discussed in these findings of facts, Shimer was reckless to rely on Teague and/or Abernethy to report accurate performance information.

108. Teague performed no independent review of the rate of return numbers provided to her by Abernethy. Nonetheless, Shimer and Firth made her available to answer investor questions. She was allowed to confirm the performance number each month, but she was not allowed to give investors the name of either Tech Traders or Abernethy. (Stip. Fact 42).

109. Shasta's investors believed that Teague was performing her own independent review of Tech Traders' performance. This belief was important to their decision to invest in

Shasta. (Joint Ex. 2003 p. 51 l. 12-25, p. 52 l. 1-23 (Stevenson); 8/29/07 Trial Tr. p. 85 l. 23- p. 86 l. 3, p. 86 l. 14- p. 87 l. 3, p. 97 l. 11-18 (Dent); 8/29/07 Trial Tr. p. 65 l. 18-24 (Evans); 8/30/07 Trial Tr. p. 9 l. 14- p. 10 l. 7 (McManigal); 8/30/07 Trial Tr. p. 63 l. 4-23 (List); 8/31/07 Trial Tr. p. 36 l. 23- p. 37 l. 19 (Richardson); 8/31/07 Trial Tr. p. 51 l. 25- p. 52 l. 13; p. 53 l. 17- p. 54 l. 9 (Northridge)).

110. Shimer deliberately made Teague available for investor calls to create the false impression that she was verifying the trading results. (9/5/07 Trial Tr. p. 52 l. 13- p. 53 l. 14 (Shimer)).

111. Teague never met Abernethy. (Stip. Fact 48). Teague spoke to Abernethy by phone on only four occasions. (Pl. Exs. 1161, 1162; Joint Ex. 2004 p. 488 l. 19- p. 489 l. 6 (Teague); 8/30/07 Trial Tr. p. 110 l. 1-20 (Abernethy)).

112. When Teague did call Abernethy to ask him a question about whether investments were marked to market at the end of the day or the end of the month, he told her that her questions were inappropriate and that she should ask Murray or her client. He expressed irritation that Shimer had made so many requests on him. (Pl. Ex. 514; Joint Ex. 2004 p. 629 l. 25- p. 631 l. 6 (Teague); 8/30/07 Trial Tr. p. 108 l. 15- p. 109 l. 25 (Abernethy)).

4. Tech Traders' Flawed Rate of Return Calculation

113. Shimer created the formula for determining profits in the Tech Trader accounts. He defined it in the Investment Agreement entered into between Shasta and Tech Traders. (Pl. Ex. 91; 8/28/07 Trial Tr. p. 101 l. 5-20, p. 104 l. 4- p. 105 l. 11, p. 118 l. 14- p. 119 l. 23 (Shimer); 9/5/07 Trial Tr. p. 83 l. 5-25 (Shimer)). Shimer believed it was a simple method that Shimer said anyone with sixth grade math skills could do, although

Abernethy told him it was not a simple process. (8/30/07 Trial Tr. p. 89 l. 7-20 (Abernethy); 8/28/07 Trial Tr. p. 114 l. 13-19 (Shimer)). Abernethy relied on this formula in verifying Tech Traders' monthly performance. (8/30/07 Trial Tr. p. 89 l. 21- p. 90 l. 12, p. 117 l. 17- p. 118 l. 9 (Abernethy)).

114. The formula Shimer set out in the Shasta/Tech Traders Investment Agreement for determining a rate of return is flawed. It is too simplistic because it relies only on FCM trading statements to calculate the rate of return, does not describe which accounts should or should not be included in the calculation or why, and does not describe how additions and withdrawals during the reporting period are to be treated. (8/28/07 Trial Tr. p. 105 l. 12-18, p. 106 l. 14-18 (Shimer); 8/29/07 Trial Tr. p. 136 l. 25- p. 138 l. 10 (Koprowski)). Therefore, application of his formula can, and did, lead to skewed performance results. (Pl. Exs. 91, 1061; 8/29/07 Trial Tr. p. 139 l. 1-10, p. 141 l. 13-18 (Koprowski))

115. Under the Shasta/Tech Traders Investment Agreement, Shimer and Murray determined what the term "available for trading" meant and therefore determined when Shasta deposits would be included in the rate of return calculation. (Pl. Ex. 91; 8/30/07 Trial Tr. p. 89 l. 24- p. 90 l. 12 (Abernethy); 9/4/07 Trial Tr. p. 154 l. 11- p. 155 l. 10 (Shimer); 9/5/07 Trial Tr. p. 58 l. 2-15 (Shimer)). This could lead to timing problems that could skew trading results. (Pl. Ex. 1061; 8/30/07 Trial Tr. p. 85 l. 15- p. 86 l. 2 (Abernethy); 8/29/07 Trial Tr. p. 120 l. 24- p. 121 l. 9, p. 141 l. 19- 25 (Koprowski)). Abernethy told Shimer that he would verify results that were already calculated by someone else but told Shimer that he could only report to Murray, not Shimer or Shimer's investors, because he had no control over the numbers used in the formula to calculate a rate of return. Murray and Shimer controlled the numbers used in the formula. (8/30/07 Trial Tr. p. 87 l. 4-20, p. 120 l. 16-

p. 121 l. 4, p. 122 l. 9- p. 123 l. 17 (Abernethy)).

116. At some point, Shimer and Murray agreed that they would assume that Shasta's funds began trading 8 days after Shimer sent them to Tech Traders. At the end of the month, Shimer would ask Murray how many trading days there had been in the month, then compute the rate of return on the funds based on the assumption that Tech Traders began trading them 8 days after Shimer sent the funds to it. (8/28/07 Trial Tr. p.120 l. 7- p. 121 l. 4 (Shimer)). Using this fiction of when the funds were "available for trading" enabled Shimer and Murray to manipulate the factors in the formula for determining the rate of return set out in the Investment Agreement between Shasta and Tech Traders. (Pl. Ex. 91 at 3; 8/29/07 Trial Tr. p. 139 l. 11-24 (Koprowski)).

117. The formula set out in the Shasta/Tech Traders Investment Agreement does not provide enough information to conduct a proper analysis of a rate of return. (Pl. Ex. 1061 at 10; Pl. Ex. 91; 8/29/07 Trial Tr. p. 139 l. 5-10 (Koprowski)). The Agreement does not describe how additions and withdrawals are to be adjusted or disclose which accounts will be excluded from the analysis or why they should be excluded. (Pl. Ex. 91 at 3; Pl. Ex. 1061 at 10; 8/29/07 Trial Tr. p. 138 l. 20-22, p. 136 l. 25- p. 137 l. 13 (Koprowski)).

118. Teague sent Shimer emails in which she explained that there were four different CFTC approved methods of calculating rates of return in connection with hedge funds that she was following for Shasta. (Pl. Exs. 423, 426, 432; 8/28/07 Trial Tr. p. 113 l. 13- p. 117 l. 9 (Shimer)). She also sent one of these emails to Firth. (Pl Ex. 433; 8/27/07 Trial Tr. p. 80 l. 17-22 (Firth)). She told Shimer that she did not have any information on how the performance calculation was done for Tech Traders. (Pl. Ex. 426; 8/28/07 Trial Tr. p. 108 l. 10-14 (Shimer)). These hedge funds all had registered commodity pool operators

and all used more complicated methods for determining rates of return than the method established by Shimer. Shimer found Teague's emails describing the various approved methods confusing. He did not try to understand them. He knew that the approved methods were more complicated than what Abernethy was doing to calculate a rate of return. (8/28/07 Trial Tr. p. 110 l. 24- p. 113 l. 2 (Shimer)).

119. Teague asked Abernethy what method he was using to calculate the rate of return for Tech Traders. (Pl. Ex. 431). Abernethy did not answer her question. (Stip. Fact 50). However, Shimer told her that the method being used was not a CFTC approved method, but a simpler method that he had set up. (Joint Ex. 2004 p. 542 l. 23- p. 544 l. 22 (Teague)).

120. It was reckless for Shimer to create his simplistic formula for determining profits, and ignore the information Teague gave him that his method was wrong and reckless for Firth to acquiesce in the use of Shimer's formula.

121. Abernethy, claiming to use the formula for determining profit that was written into the contract between Shasta and Tech Traders by Shimer, did not properly account for all additions and withdrawals into the Tech Traders superfund, thus skewing those results and producing a positive rate of return number when there was actually a negative rate of return. (Pl. Ex. 91; Stip. Fact 44).

122. In order to properly calculate a rate of return for a commodity pool, a person must have a general knowledge of the futures industry, an understanding of the nature of the fees the commodity pool incurs, an understanding of the agreement between the commodity pool and its participants; all documentation detailing the transactions that occurred during the given time for which the rate of return is to be calculated and be able to read and understand

a monthly FCM statement.. (Pl. Ex. 1061 at 5-7; 8/29/07 Trial Tr. p. 118 l. 17- p.119 l. 1 (Koprowski)). If the pool accepts additions and withdrawals other than at the end or the beginning of a reporting period, the pool should account for these additions and withdrawals by using one of the four alternative methods approved by the CFTC for computation of a rate of return. (Pl. Ex. 1061 at 5-7; 8/29/07 Trial Tr. p. 120 l. 9- p.121 l. 24 (Koprowski)).

123. In order to perform a rate of return calculation using any approved method, a person would have to have available cash receipts and disbursements journal, general ledger, participants' subsidiary ledger, bank and trading account statements and other documents relevant to income and expenses. (Pl. Ex. 1061 at 7; 8/29/07 Trial Tr. p. 119 l. 17- p. 120 l. 8, p. 122 l. 9-20 (Koprowski)).

124. Abernethy never had full access to Tech Traders' records and never received brokerage statements or bank statements directly from the FCM or bank. He received brokerage statements from Murray and did not know if they had been altered before he received them. Abernethy also did not have access to Tech Traders' cash receipts and disbursements journal or to any other documents relative to income or expenses. He received only whatever documents Murray gave him and Murray did not give him all the records he requested. (8/30/07 Trial Tr. p. 90 l. 13- p. 91 l. 4, p. 91 l. 16- p. 95 l. 12, p. 96 l. 4- p. 97 l. 13 (Abernethy)).

125. Firth, Shimer and Teague did not know what Abernethy was reviewing to arrive at a rate of return. (Pl. Ex. 426; 8/28/07 Trial Tr. 108 l. 10-14 (Shimer); 9/4/07 Trial Tr. p. 22 l. 17-19 (Firth)). Shimer knew that Teague did not know what Murray was giving Abernethy to review to determine a rate of return number and he never asked Murray either. (Pl. Ex. 470; 8/28/07 Trial Tr. p. 148 l. 5- p. 150 l. 22 (Shimer)). However, Shimer knew that

Abernethy did not have full access to the records necessary to compute an accurate rate of return. (Pl. Ex. 39; 8/28/07 Trial Tr. p. 142 l. 6- p. 143 l. 16 (Shimer)).

126. Abernethy found the verification work to be difficult to do. Because Shimer kept telling him the work was simple, Abernethy thought he was doing something wrong and began to just accept information from Murray. This compromised his independence. (8/30/07 Trial Tr. p. 124 l. 4-19 (Abernethy)).

127. The verification process was slow to get started in 2001. (8/28/07 Trial Tr. p. 82 l. 10-12 (Shimer); 8/30/07 Trial Tr. p. 88 l.14-24 (Shimer)). Though Abernethy was hired in July 2001, his first AUP letter verifying returns was not issued until October 2001. (Pl. Ex. 1009). Abernethy tried repeatedly to get into the Tech Traders' office to start the verification process but kept being put off by Coyt. This was frustrating to Shimer because he considered it a simple process. (Stip. Fact 51; 8/28/07 Trial Tr. p. 84 l. 13-19 (Shimer); 8/30/07 Trial Tr. p. 88 l. 14- p. 89 l. 6 (Abernethy)).

128. Abernethy produced AUP letters or reports covering Tech Traders' trading performance from June 2001 through February 2004. (Answer ¶ 25; Stip. Fact 43).

129. Abernethy reported only a quarterly rate of return for July, August and September 2001 as requested by Shimer. (Pl. Ex. 1009 at 42; 8/30/07 Trial Tr. p. 101 l. 3-6, 17-21 (Abernethy)). However, Shimer wanted to report monthly rates of return on the Shasta website, so he reported a monthly rate of return for the months July, August and September 2001 on the Shasta website that was a mathematical average of the purported quarterly return for those months. (Pl. Ex. 51). Although he learned by June 2002 that Murray had actually suffered a loss in September 2001, he did not change the Shasta website or the PPM to reflect this fact. (Pl. Ex. 1039; 8/28/07 Trial Tr. p. 92 l. 11-22 (Shimer); 8/31/07 Trial Tr. p. 19

l. 23, p. 20 l. 2 (McCormack)). Firth knew about the September 2001 loss as well but did nothing to change the website or the PPM to reflect that loss. (Pl. Ex. 1076 at RCF 003606-07; Pl. Ex. 51; 8/27/07 Trial Tr. p. 107 l. 21- p. 108 l. 4, p. 126, l. 3-25, p. 127 l. 1-14, p. 128 l. 7-18 (Firth)). This was deceptive to Shasta investors.

130. The AUP letters Abernethy produced showed gains for every month or quarter reported on from June 2001 through February 2004. Abernethy reported double-digit gains for at least 23 of the 33 months during this period. The worst performance reported was a purported gain of 4.11% for the month of June 2001, and the next worst performance reported was a purported gain of 9.02% for the month of January 2004. (Stip. Fact 45).

5. Abernethy's Lack of Independence

131. When he met Abernethy in July 2001, Shimer learned that Abernethy was getting divorced and splitting up his CPA practice which he had shared with his wife. Abernethy was in the process of moving out of his office and building up his practice again out of his home. He had accumulated a lot of debt in connection with the divorce and division of his practice. (8/28/07 Trial Tr. p. 77 l. 3- p. 78 l. 7 (Shimer); 8/30/07 Trial Tr. p. 75 l. 19- p. 76 l. 8, p. 76 l. 24- p. 77 l. 3, p. 81 l. 24- p. 82 l. 10 (Abernethy)). Abernethy's financial problems continued into 2002 and Shimer knew those problems caused Abernethy a great deal of concern and worry. (8/28/07 Trial Tr. p. 159 l. 11-18 (Shimer); 8/30/07 Trial Tr. p. 112 l. 7-15 (Abernethy)). Murray suggested that Equity allow Abernethy to solicit investors for it to make extra money. Firth and Shimer asked Abernethy to introduce them to people who might invest in Shasta. (Pl. Ex. 18; 8/27/07 Trial Tr. p. 87 l. 5-21 (Firth)). Abernethy did refer and solicit potential investors to Shimer and Firth and brought one into the Shasta pool – Jerry Pettus. (8/27/07 Trial Tr. p. 85 l. 7-9 (Firth); 8/28/07 Trial Tr. p. 157

l. 11-24 (Shimer)). Shimer expected to obtain a lot more referrals to Shasta from Abernethy. Shimer believed that Abernethy hoped that referral fees from referring the Shasta investment would lift Abernethy out of his financial difficulties. Firth also expected that Abernethy would solicit investors for Shasta and be paid for it. (Answer ¶ 28; Pl. Exs. 18, 1024; 8/27/07 Trial Tr. p. 160 l. 11- p. 161 l. 18 (Firth); 8/28/07 Trial Tr. p. 160 l. 3-8, p. 160 l. 19- p. 161 l. 1, p. 161 l. 6- p. 162 l. 18, p. 163 l. 15- p. 164 l. 10 (Shimer)).

132. Although the Shasta PPM stated that the CPA who verified the trading system's performance was independent, and Shimer knew that it was important that the accountant who verified returns be independent, Firth and Shimer made no effort to maintain Abernethy's independence. In fact, they both urged Abernethy to solicit the Shasta investment for them and attempted to entice Abernethy with referral fees, knowing that he had financial difficulties. (Pl. Exs. 18, 1024; 8/30/07 Trial Tr. p. 129 l. 12- p. 130 l. 4 (Abernethy); 8/27/07 Trial Tr. p. 87 l. 9-21 (Firth); 8/28/07 Trial Tr. p. 156 l. 8-18 (Shimer); 9/5/07 Trial Tr. p. 99 l. 16-23 (Shimer)). Shimer and Firth knew that Abernethy was not independent and thus the representation in the PPM that they would provide independent verification of trading profits generated by the trader's system was false. (Pl. Ex. 1093 at 17-18; Pl. Ex. 1070; Pl. Ex. 461 at 12-13).

133. It would have been important to Shasta's investors to know that Abernethy was not independent and solicited investments for Shasta because such solicitation was a conflict of interest. (Joint Ex. 2003 p. 53 l. 24- p. 55 l. 2 (Stevenson); 8/29/07 Trial Tr. p. 87 l. 4-18 (Dent)).

134. Shimer and Firth had a falling out with Abernethy in August 2002. Abernethy went to the Bahamas to meet with Howell Woltz, the principal of the Sterling Companies,

which were other Tech Traders' investors. At that time, Abernethy's attitude to Shimer and Firth changed. (8/28/07 Trial Tr. p. 165 l. 2-20 (Shimer); 8/27/07 Trial Tr. p. 88 l. 5- p. 89 l. 4 (Firth)). Murray told Shimer in approximately August 2002 that Abernethy was going to work with Howell Woltz to make extra money by doing finance or accounting work to help Jerry Pettus set up some sort of company in the Bahamas to import music CD's into the US. Abernethy was also going to solicit captive insurance business for Woltz and Sterling. (Stip. Fact 58). Shimer did not care what other activities Abernethy was involved in so long as he provided the numbers Shimer expected. (8/28/07 Trial Tr. p. 165 l. 21- p. 167 l. 10 (Shimer)).

135. In 2003, Shimer wanted Murray to take Abernethy out of the process of verifying a minimum balance because he thought Abernethy was too chummy with Woltz and might tell Woltz about Shasta's funding success. (Pl. Ex. 47 at 2; 9/5/07 Trial Tr. p. 100 l. 4- p. 104 l. 10 (Shimer)). Shimer and Firth thus had information that Abernethy may have been still been involved in activities with other Tech Traders' investors that would compromise his independence. They recklessly ignored this information because Abernethy was verifying the double digit returns they expected.

G. The Minimum Account Verification

136. The Shasta PPM stated that Teague would tell investors if Tech Traders held enough funds in its brokerage account to satisfy Shasta's deposits to it. (Pl. Ex. 461 at 13; Pl. Ex. 1079 at 13; Pl. Ex. 1093 at 18). Shimer included this service to provide comfort to investors that Tech Traders had enough money on deposit to cover Shasta's deposits to it. However, he knew that Tech Traders had investor funds other than Shasta's and that Murray would not tell Shimer the total amount of investor funds Tech Traders held. Moreover, the

Shasta PPM did not disclose that the trading company had other investors. (8/30/07 Trial Tr. p. 30 l. 4-11 (McManigal)). Thus, the assurance Teague could provide was meaningless. (Pl. Exs. 461, 1070, 1093; 8/29/07 Trial Tr. p. 7 l. 11-19 (Shimer)). Also, Shimer included this statement in the PPM before he ever received Abernethy's agreement to verify Shasta's balance. Although he repeatedly asked Abernethy to verify Shasta's balance, Abernethy refused to do so. (8/30/07 Trial Tr. p. 102 l. 19- p. 103 l. 12, p. 105 l. 5-21 (Abernethy)). Because Abernethy would not verify that Tech Traders had enough on deposit to satisfy Shasta's deposits to it, Teague could not provide this assurance either. Therefore, the statement that she would do so in the PPM was a misrepresentation.

137. Shimer wanted Abernethy to verify that Tech Traders had sufficient funds on deposit with its brokerage firms to cover the amount Shasta and a small foreign fund, New Century, had on deposit with Tech Traders and spoke to Abernethy about performing this additional verification. (Stip. Fact 55). He told Teague that he did not need verification of Tech Traders' actual balance, although Tech Traders had other investors besides Shasta and New Century. (Pl. Exs. 44, 48, 85, 434; 8/29/07 Trial Tr. p. 7 l. 11-19 (Shimer)).

138. Shimer drafted a letter to Abernethy from Teague and a reply from Abernethy to Teague which would verify that the amount of funds Tech Traders held in brokerage accounts exceeded Shasta's and New Century's deposits with Tech Traders. He sent the proposed verification letters to Abernethy. (Pl. Ex. 44). Shimer told Teague that Abernethy had told Shimer that he would not verify anything with regard to a foreign company like New Century but would only verify that Tech Traders had enough on deposit to cover Shasta's deposits. Shimer told Teague that was fine as New Century investors would probably not call and ask her about Tech Traders' balances. Teague talked to Shimer about why

Abernethy could not confirm New Century's balances too and Shimer told her he did not understand why Abernethy would not but Shimer was willing to go ahead with a minimum account verification that included only Shasta. (Stip. Fact 56).

139. Abernethy found Shimer's draft minimum verification letters objectionable and would not use them. Instead, he agreed only to add a sentence quarterly to the bottom of his AUP letter that stated that funds in Tech Trader's brokerage accounts exceeded a certain amount. (8/30/07 Trial Tr. p. 106 l. 3- p. 107 l. 17 (Abernethy)). This sentence did not verify how much Shasta had on deposit with Tech Traders. (9/5/07 Trial Tr. p. 91 l. 9- p. 92 l. 3 (Shimer)). The first such sentence, added to a letter dated September 1, 2002, stated that total funds in the brokerage accounts as of July 31, 2002 exceeded \$1.1 million. However, at the time, Shimer and Firth believed that Shasta, New Century and Shadetree alone had a combined balance of \$1,556, 685. (Pl. Exs. 44, 1156; 8/29/07 Trial Tr. p. 10 l. 17- p. 12 l. 12, p. 12 l. 16- p. 15 l. 10, p. 16 l. 11-14 (Shimer)). On three occasions, Abernethy verified a minimum balance that was lower than the amount Shasta's statements reflected it had on deposit with Tech Traders. (Pl. Ex. 1156; 8/31/07 Trial Tr. p. 18 l. 3-12 (McCormack)). In fact, six of the seven times that sentence appeared in Abernethy's letters, the combined balances of Shasta and New Century, according to their account statements, were higher than the amounts appearing on the letter. (Pl. Ex. 1156).

140. Teague had ongoing concerns that Tech Traders did not provide monthly verification that it had a minimum amount of money in its trading account to cover all investors' deposits to the super fund. This was necessary to ensure that Tech Traders could pay all accounts in full should the fund close abruptly. In lieu of the verification, Tech Traders would only provide monthly verification that it had enough money on hand to cover

Shasta's deposit. Teague found this verification useless and of no consequence because Tech Traders' ability to cover only Shasta's deposits was meaningless when there were other investors in the super fund. Teague expressed her concerns about the minimum account verification to Shimer. Shimer indicated that he did not understand Tech Traders' hesitation to verify the total amount of funds under management, but he accommodated Murray and Tech Traders on this issue despite Teague's protestations and the concerns of some investors. (Pl. Ex. 449; CFTC Summ. J. Op. at 17-18).

141. Shimer had to press Abernethy and Murray to get Abernethy to provide the balance verification, even though Shimer thought it would be a simple task. After Shimer suggested to Murray that Teague could replace Abernethy and provide the requested balance verification Murray told Shimer that Abernethy would do it. (Stip. Fact 57).

142. Firth knew about Abernethy's minimum account verification that verified an amount that only dealt with Shasta deposits. (Pl. Exs. 516, 531; 8/27/07 Trial Tr. p. 128 l. 19- p. 130 l. 18 (Firth)).

143. By January 2004, Shimer was pressing Murray to provide a verification that Tech Traders had on deposit enough funds to cover Shasta, New Century and Shadetree. He warned Murray that Arnold & Porter had told him the CFTC would view Tech Traders as a Ponzi scheme because the numbers were so good. He asked Murray for a monthly verification that Tech Traders had enough on deposit to satisfy all three entities, which had a combined balance of almost \$15 million by that time. However, Abernethy and Murray only asserted that Tech Traders had \$12.7 million on deposit. (Pl. Ex. 48; 8/29/07 Trial Tr. p. 15 l. 11- p. 17 l. 10, p. 18 l. 18- p. 19 l. 8 (Shimer)).

H. An Audit of Tech Traders or Shasta

144. The Agreement for Independent Verification of Shasta Capital Associates Profits and Losses stated that there would be an audit at the end of each year although Shasta never had an audit. (Pl. Ex. 1089). Teague told Shimer that an audit of Shasta would not be meaningful because Tech Traders had all Shasta's funds. Shimer never explained to Shasta's investors that an audit of Shasta itself would not be meaningful. (Stip. Fact 71; 8/28/07 Trial Tr. p. 153 l. 12-17, p. 154 l. 15-23, p. 155 l. 13- p. 156 l. 2 (Shimer)).

145. Murray and Tech Traders repeatedly refused an audit. Shimer attributed Murray's hesitation about an audit to his eccentricities and stated that Murray resisted an audit out of concern that it would reveal his trading methods. Firth did not think it likely that an auditor would try to figure out Murray's trading methods. Teague also clearly articulated to Shimer that an audit would not reveal any proprietary information. Despite what Teague told him, Shimer never doubted Murray's reasons for refusing an audit, and gave Murray "some accommodation because the numbers were so good." (CFTC Summ. J. Op. at 17).

146. Tech Traders' refusal to submit to an audit would have been important to Shasta investors' investment decision. (Joint Ex. 2003 p. 76 l. 4-17 (Stevenson); 8/29/07 Trial Tr. p. 80 l. 16- p. 81 l. 2 (Dent)).

I. Notice of Equity's Registration Requirements

147. Firth and Shimer knew or should have known that Equity should have been registered as a CPO or filed an exemption from registration.

148. The issue of whether Shasta had to register as a CPO with the CFTC first came up in the fall of 2001 while Shimer and Firth were trying to solicit investors for Shasta.

A lawyer friend of Shimer's put him in touch with someone named Chuck who worked for Chase Manhattan Bank ("Chase"). Chuck asked if Shasta was required to register with the CFTC. Shimer then researched CFTC regulations and put together a memorandum containing no legal analysis that wrongly concluded that Shasta did not have to register as a CPO. (Pl. Ex. 411; 8/29/07 Trial Tr. p. 35 l. 5- p. 36 l. 1 (Shimer)). Shimer forwarded the memorandum to his lawyer friend who forwarded it to Chuck who forwarded it to Chase's legal department. Shimer claims to have received a verbal response through the lawyer friend that Shasta did not have to register. (8/29/07 Trial Tr. p. 38 l. 19- p. 40 l. 1 (Shimer)). Shimer did not consult with the CFTC or the NFA about whether his analysis was correct. (8/29/07 Trial Tr. p. 38 l. 16-21 (Shimer)). Shimer knew that Equity had to be registered and/or operated in bad faith in concluding that it did not need to register based on his legal research and inadequate legal advice he received.

149. Shimer was aware in 2001 from his review of section 4.13 of CFTC regulations that even if an exemption was available under Section 4.13 the CPO had to file a notice of exemption with the NFA or the CFTC. (Stip. Fact 59).

150. After receiving this third-hand verbal feedback, Shimer did nothing more until 2003 to determine Shasta's or Equity's registration requirements. (8/29/07 Trial Tr. p. 34 l. 8-11, 17-21, p. 35 l. 9- p. 36 l. 1, p. 36 l. 5- p. 40 l. 17 (Shimer); 9/4/07 Trial Tr. p. 167 l. 6- p. 168 l. 3, p. 168 l. 25- p. 169 l. 8 (Shimer)). In the fall of 2003, a prospective investor, Mark Munson, called the CFTC with investor Nicholas Stevenson to inquire about Shasta's registration requirements. (Joint Ex. 2003 p. 80 l. 3- p. 81 l. 20 (Stevenson); 8/27/07 Trial Tr. p. 97 l. 14-16 (Firth); 8/29/07 Trial Tr. p. 40 l.13-21 (Shimer)). Munson and Stevenson were told that Shasta was required to register and called Shimer and Firth to tell them that. (Joint

Ex. 2003 p. 79 l. 24- p. 81 l. 20 (Stevenson); 8/27/07 Trial Tr. p. 96 l. 19- p. 97 l. 19 (Firth)). After receiving this phone call from Munson and Stevenson, Firth and Shimer hired Arnold & Porter to review Shasta's registration requirements. (Pl. Exs. 538, 657; 8/27/07 Trial Tr. p. 97 l. 14-24 (Firth); 8/29/07 Trial Tr. p. 40 l. 18- p. 41 l. 3 (Shimer)).

151. Shasta hired Arnold & Porter in October 2003. Arnold & Porter attorneys Geoffrey Aronow ("Aronow") and Susan Lee ("Lee") worked on the engagement. Aronow was Director of Enforcement of the CFTC from 1995 to 1999 and Lee served as Chief of Staff of the CFTC from 1996 to 1999. Most of Lee's contact on the engagement was with Shimer. (Stip. Fact 60).

152. At the beginning of the engagement in October 2003, Arnold & Porter told Shimer and Firth that Shasta was a commodity pool, and that they believed Tech Traders was a commodity pool. Arnold & Porter also told Shimer that Tech Traders had registration requirements and that Shasta or Equity's registration requirements would hinge on Tech Traders' registration status. (Pl. Ex. 1038; Joint Ex. 2001 p. 21 l. 16- p. 23 l. 14 (Lee); 8/27/07 Trial Tr. p. 99 l. 2-12 (Firth); 8/29/07 Trial Tr. p. 42 l.7- p. 44 l. 19 (Shimer)). Arnold & Porter also told Shimer at the beginning of the engagement that Tech Traders could not trade Shasta's funds in its own name or commingle its funds with Shasta's. The firm told Shimer that aspect of the relationship between Shasta and Tech Trader's would have to be changed. (Joint Ex. 2001 p. 30 l.17- p. 31 l. 2, p. 31 l. 7-20 (Lee)).

153. Arnold & Porter reviewed Shimer's legal analysis, which Shimer updated in 2003, which concluded that Shasta was not a commodity pool because it was not directly trading commodity futures contracts and told him that the firm disagreed with that analysis. The firm told him that he was not taking into account the Commission regulations that state

that a fund-of-funds, like Shasta, is itself a commodity pool. The firm also told him his analysis that Shasta or Equity did not receive compensation because it was only paid if there were profits was incorrect. (Pl. Ex. 411; Joint Ex. 2001 p. 57 l. 13- p. 59 l. 19 (Lee)).

154. Arnold & Porter told Shimer that Equity might qualify for an exemption from registration as a fund-of-funds if Tech Traders was in regulatory compliance. However, the firm needed to know more about Tech Trader's structure to complete its analysis. Shimer understood that Equity would have to file for an exemption if it qualified for one. (Joint Ex. 2001 p. 11 l. 17- p. 15 l. 9, p. 23 l. 5-p. 24 l. 5 (Lee); 8/29/07 Trial Tr. p. 44 l. 21-23 (Shimer)).

155. Arnold & Porter told Shimer and Firth that because Shasta's registration requirements hinged on Tech Trader's registration requirements, it was advisable to go to the CFTC with Tech Traders to cure regulatory deficiencies. (Stip. Fact 61).

156. Arnold & Porter advised Shimer that Tech Traders should retain its own counsel experienced in commodities law to determine its requirements to register under the Commodity Exchange Act. (Stip. Fact 62).

157. Arnold & Porter told Shimer that Shasta should meet with the CFTC with Tech Trader's counsel as soon as possible to attempt to cure any regulatory deficiencies. (Stip. Fact 63). Although Arnold & Porter expressed a sense of urgency in contacting the CFTC, Shimer reported to Arnold & Porter that Tech Traders did not share that sense of urgency. (Pl. Exs. 544, 548; 8/29/07 Trial Tr. p. 50 l. 22- p. 51 l. 4 (Shimer)). Lee sent Shimer two emails in December 2003, on the 2nd and the 11th, in which she emphasized the urgency in meeting with the CFTC to deal with regulatory issues. (Pl. Exs. 543, 553; 8/29/07 Trial Tr. p. 45 l. 1- p. 46 l. 4, p. 51 l. 19- p. 52 l. 7 (Shimer)). Firth received both of these

emails. (Pl. Exs. 543, 553; 8/27/07 Trial Tr. p. 100 l. 17- p. 101 l. 15 (Firth)). In the email on December 2, 2003, Lee told Shimer that her firm was growing increasingly concerned about Tech Trader's failure to come forward on registration issues and its motives for ignoring Shimer's suggestions to seek counsel on the matter. (Pl. Ex. 543). Lee also told Shimer that Arnold & Porter was concerned that Shasta was exposed to charges that it was operating an unregistered and illegal commodity pool. (Pl. Ex. 543; 8/29/07 Trial Tr. p. 45 l. 1- p. 46 l. 4 (Shimer)).

158. On December 11, 2003, Lee spoke to Shimer again about her firm's concerns and the urgency of coming forward to the CFTC. (Pl. Ex. 548). Shimer had met face-to-face with Coyt Murray the day before. He reported to Lee that Murray continued to assert that Tech Traders did not have to register and that he was concerned that any registration would require him to disclose his specific trades and trading strategies to investors. Lee told Shimer, and reiterated the concern in an email copied to Firth, that Arnold & Porter was concerned that Murray did not have a correct understanding of Tech Trader's legal obligations, including an obligation to register once it accepted other investor's funds. Lee also told Shimer that CPO registration would not require Tech Traders to disclose specific trades or trading strategy. (Pl. Ex. 548; 8/29/07 Trial Tr. p. 47 l. 18- p. 50 l. 16 (Shimer)).

159. Lee also told Shimer that Arnold & Porter was concerned that as of December, Tech Traders had had two months to obtain counsel and had not yet done so. Shimer told Lee in response that Shasta had had to exercise patience with Tech Traders and let it proceed at its own pace. Lee repeated Arnold & Porter's concern expressed in the December 2, 2003 email, that Shasta could be exposed to charges that it was an illegal commodity pool and that it aided and abetted Tech Trader's operation of an illegal

commodity pool, which could expose it to substantial penalties and a trading ban. (Pl. Ex. 548; 8/29/07 Trial Tr. p. 50 l. 22- p. 51 l. 18 (Shimer)). These concerns were repeated yet again in a memorandum Arnold & Porter sent to Shimer and Firth on December 18, 2003. (Pl. Ex. 553; 8/27/07 Trial Tr. p. 100 l. 17-21 (Firth); 8/29/07 Trial Tr. p. 51 l. 19- p. 53 l. 20 (Shimer)).

160. Shimer repeated Lee's concerns to Murray in a letter on December 12, 2003. (Pl. Ex. 549). He told Murray that he had been thinking about how to avoid a CFTC enforcement action. *Id.* He reiterated Arnold & Porter's concerns that Shasta was taking an unnecessary risk in failing to contact the CFTC first and that Lee had told him that one of the possible enforcement actions could be that Shasta would be forced to withdraw all its funds from trade with Tech Traders. *Id.*

161. Lee also told Shimer that Shasta could not just register on its own if Tech Traders was not in regulatory compliance. She told Shimer and Firth that Shasta would likely have to sever its relationship with Tech Traders if it met with the CFTC without Tech Traders. (Stip. Fact 64).

162. Aronow told Shimer and Firth that Murray was apparently unable to articulate why Tech Traders did not need to register under the Commodity Exchange Act and that Tech Traders needed to get legal representation to determine its position so that Arnold & Porter could represent Shasta's interests. He also expressed the urgency in doing so that Lee had expressed to Shimer. (Stip. Fact 65).

163. Shimer often told Lee that Coyt Murray was a secretive man that had to be treated with kid gloves. (Stip. Fact 66). Shimer could work with him but had to exercise patience because Murray had made it clear that Shasta would not be allowed to trade through

Tech Traders if Shasta did not like the way Tech Traders traded. Shimer told Lee that Shasta wanted to continue to trade through Tech Traders because it was a very good opportunity for them. (Pl. Ex. 538 at 1; Pl. Ex. 548; Joint Ex. 2001 p. 105 l 19- p 108 l. 1 (Lee)).

164. Shimer and Firth did not want to jeopardize their relationship with Tech Traders and did not want to stop trading. Therefore, Shimer continued to try to cajole Murray into registering and neither Shimer nor Firth ever registered Equity. (Pl. Ex. 553; 8/29/07 Trial Tr. p. 54 l. 20- p. 55 l. 4, p. 56 l. 18-20, p. 57 l. 2-7, p. 58 l. 19- p. 59 l. 20 (Shimer); 8/30/07 Trial Tr. p. 14 l. 2-18 (McManigal)).

165. Arnold & Porter did not suspect that Shasta was involved in a fraud. Shimer and Firth did not tell the firm about aspects of their relationship with Murray that might have lead them to suspect a fraud. (Pl. Ex. 538; Joint Ex. 2001 p. 28 l. 20- p. 30 l. 16, p. 31 l. 21- p. 32 l. 17, p. 34 l. 4- p. 40 l. 4, p. 45 l. 8- p. 48 l. 21, p. 76 l. 6-18, p. 77 l. 1- p. 78 l. 11, p. 79 l. 13- p. 80 l. 16 (Lee); 8/29/07 Trial Tr. p. 59 l. 21- p. 60 l. 14 (Shimer)).

166. Firth and Shimer continued soliciting funds for Shasta, and did not make any attempts to register Equity. (8/27/07 Trial Tr. p. 99 l. 7-14 (Firth); 8/29/07 Trial Tr. p. 46 l. 23- p. 47 l. 15, p. 55 l. 20- p. 56 l. 1 (Shimer)). Shimer explained that no one wanted to take action that would result in stopping trading “so long as the numbers were still there.” (8/29/07 Trial Tr. p. 55 l. 23- p. 56 l. 20 (Shimer)).

167. From November 2003 to April 2004, Shasta took in over \$8.5 million from investors. (Pl. Ex. 1157; 8/27/07 Trial Tr. p. 99 l. 2- p. 100 l. 4 (Firth)).

J. Notice of the CFTC Investigation

168. Shimer and Firth knew that the CFTC was investigating Shasta in the fall of

2003. (Pl. Exs. 48, 543; 8/29/07 Trial Tr. p. 16 l. 15-20, p. 32 l. 24- p. 33 l. 5, p. 45 l. 13-24 (Shimer); 8/27/07 Trial Tr. p. 99 l. 2- p. 100 l. 4 (Firth); 9/4/07 Trial Tr. p. 19 l. 20-25 (Firth)).

169. Neither Firth nor Shimer disclosed to prospective investors that the CFTC was investigating Shasta. This fact would have been important to investors. (8/29/07 Trial Tr. p. 90 l. 17-24 (Dent); 8/30/07 p. 18 l. 17-24 (McManigal); 8/31/07 Trial Tr. p. 38 l. 19-25, p. 39 l. 1-9 (Richardson); 8/29/07 Trial Tr. p. 74 l. 3-13 (Evans)).

K. Restitution and Disgorgement

170. Shasta pool participants are owed estimated restitution of \$4,543,903.31. (This amount is subject to change pending the Receiver's final report and final distribution). (Court Ex. 1; Docket Doc. 543).

171. Defendant Equity made illegal gains of \$612,500 during the relevant time period. (Pl. Ex. 1149; 8/30/07 Trial Tr. p. 165 l. 7-15 (McCormack)).

172. Defendant Shimer made illegal gains of \$1,452,117 during the relevant time. (Pl. Ex. 1150; 8/30/07 Trial Tr. p. 166 l. 7- p. 167 l. 21 (McCormack)).

173. Defendant Firth made illegal gains of \$450,313 during the relevant time period. (Pl. Ex. 1148; 8/30/07 Trial Tr. p. 169 l. 11- p. 170 l. 9 (McCormack)).

II. CONCLUSIONS OF LAW

1. Shimer and Firth had fiduciary relationships to Shasta's investors. (CFTC Summ. J. Op. at 16, 18).

2. Equity is a Commodity Pool Operator (“CPO”) and violated 4m(1) when it failed to register as such. (CFTC Summ. J. Op. at 6-7).

3. Defendants Firth and Shimer acted as Associated Persons (“APs”) for Equity and violated 4k(2) when they failed to register as such. (CFTC Summ. J. Op. at 10-11).

4. Tech Traders was a Commodity Trading Advisor (“CTA”) and violated Commission Regulation § 4.30 (CFTC Summ. J. Reconsideration Op. at 7-8, Docket Doc. 472). Shimer aided and abetted Tech Traders’ violation of Commission Regulation § 4.30 because he knew that Tech Traders violated § 4.30 and intentionally assisted in Tech Traders’ violation by “drafting documents that governed these violations...” (CFTC Summ. J. Reconsideration Op. at 10). Specifically, Shimer aided and abetted Tech Trader’s Regulation 4.30 violation because: 1) Tech Traders violated 4.30 by trading Shasta’s funds in its own name; 2) Shimer knew that Tech Traders was trading Shasta funds in its own name; and 3) Shimer intentionally assisted Tech Traders in committing this violation by drafting the PPM and the Investment Agreement which allowed Tech Traders to trade Shasta funds in its own name. (CFTC Summ. J. Reconsideration Op. at 6-10).

5. While acting as an AP for Shasta, a CPO, Firth violated Section 4o(1)(B) of the Act by acting intentionally using interstate commerce to engage in a business that operated as a fraud when he sent the PPM to investors and the PPM had the effect of defrauding or deceiving potential investors. (CFTC Summ. J. Op. at 12-16). While acting as an AP for Shasta, a CPO, Shimer violated Section 4o(1)(B) of the Act by acting intentionally using interstate commerce to engage in a business that operated as a fraud when he ignored numerous warning signs relating to Tech Traders and Murray, and his inaction had the effect of perpetrating a fraud on Shasta’s investors. (CFTC Summ. J. Op. at 16-18). Those warning

signs included Shimer himself producing Tech Traders' reports to Shasta when the PPM stated that Tech Traders would produce them, the lack of monthly verification of the amount in Tech Traders trading accounts, the fact that Tech Traders would only verify that the amount in their trading accounts was enough to cover Shasta's investors (Teague had informed Shimer that this number was useless), and Murray and Tech Traders' repeated refusal of an audit. (CFTC Summ. J. Op. at 17-18).

6. Firth and Shimer acted as agents of Equity, and committed their violations of Sections 4o(1)(B), 4m(1) and 4k(2) while acting as agents of Equity. Thus, Equity is liable for Firth and Shimer's violations of the Act pursuant to 7 U.S.C. § 2(a)(1)(B). (CFTC Summ. J. Op. at 21).

7. Equity, Shimer and Firth cheated or defrauded or attempted to cheat or defraud and willfully deceived or attempted to deceive pool participants or prospective pool participants by misrepresenting and failing to disclose material information about their expertise, qualifications, background and compensation, and their experiences in dealing with Coyt Murray and Tech Traders, making misrepresentations about the accountant verifying Shasta's balance with Tech Traders and about Tech Traders' producing account statements to Shasta in the PPM, recklessly misrepresenting the performance of the Shasta commodity pool and the role of the independent CPA Abernethy and affirming CPA Teague, and accepting disbursements to which they were not entitled, all in violation of Section 4b(a)(2)(i)-(iii) of the Act. Defendant Equity, pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), is liable for the violations of Firth and Shimer because the actions and omissions of Firth and Shimer were done within the scope of their employment with Equity. Firth and Shimer are liable for the violations of Equity as controlling persons,

pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), since they, directly or indirectly, controlled Equity and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Equity's violation of Section 4b(a)(2)(i)-(iii) of the Act.

8. Equity, Firth, and Shimer knowingly or recklessly employed or were employing a device, scheme, or artifice to defraud any client or participant or prospective client or participant by misrepresenting and failing to disclose material information about their expertise, qualifications, background and compensation, and their experiences in dealing with Coyt Murray and Tech Traders, making misrepresentations about the accountant verifying Shasta's balance with Tech Traders and about Tech Traders' producing account statements to Shasta in the PPM, recklessly misrepresenting the performance of the Shasta commodity pool and the role of the independent CPA Abernethy and affirming CPA Teague, and accepting disbursements to which they were not entitled, all in violation of Section 4o(1)(A) of the Act, 7 U.S.C. § 6o(1)(A). Defendant Equity, pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), is liable for the violations of Firth and Shimer because the actions and omissions of Firth and Shimer described above were done within the scope of their employment with Equity. Firth and Shimer are liable for the violation of Section 4o(1)(A) of Equity as controlling persons, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), since they, directly or indirectly, controlled Equity and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Equity's violation of Section 4o(1) (A) of the Act.

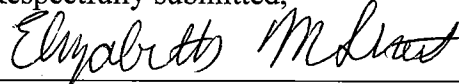
9. Shimer knowingly accepted Shasta participants' funds in an escrow account entitled Robert W. Shimer escrow, attorney escrow account, Shasta Capital Associates, LLC, on behalf of Equity, an unregistered CPO, when he knew that Shasta was a commodity pool

and that therefore its manager, Equity was a CPO. Consequently, Shimer committed or willfully aided, abetted, counseled, commanded, induced or procured the commission of, Equity's violation of Section 4m(1) of the Act, or acted in concert with Equity in such violation, or willfully caused an act to be done or omitted which if directly performed or omitted by him or another would be a violation of Section 4m(1) of the Act, and is liable for the violation of Section 4m(1) of the Act by Equity as a principal pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a).

10. Firth and Shimer are liable for Equity's violation of Section 4m(1) as controlling persons, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b), since they, directly or indirectly, controlled Equity knowing that it was an unregistered CPO and therefore did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Equity's violation of Section 4m(1).

Date: November 6, 2007

Respectfully submitted,



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