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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION, : Hon. Robert B. Kugler

Plaintiff,

vs. **Civil Action No. 04-1512**

EQUITY FINANCIAL GROUP LLC, TECH TRADERS, INC., TECH TRADER, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY

Defendants.

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND POST TRIAL BRIEF OF DEFENDANT ROBERT W. SHIMER

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND POST TRIAL BRIEF OF DEFENDANT ROBERT W. SHIMER

I. REGARDING ALL COUNTS OF PLAINTIFF'S AMENDED COMPLAINT

Regarding the failure of the Heritage Case to supply any precedent in support of Plaintiff's allegation that the entity Shasta was a commodity pool

The *Heritage* case (*CFTC v. Heritage Capital Advisory Services, Ltd.* Comm. Fut. L. Rep. (CCH) ¶21,627, 26,379 (N.D. Ill. 1982) was relied upon in pretrial motions by Plaintiff as precedent favorable to Plaintiff's argument with respect to the commodity pool status of the entity Shasta. The facts of the entity Heritage were not at all similar to the facts of the entity Shasta in the present matter before the Court.

The district court in its opinion dated November 16, 2006 denying Shimer and Firth's motion for summary judgment did not comment on Federal Records Center certified *Heritage* case file documentation presented by Shimer as Exhibits A through E attached to Shimer's previous motion for summary judgment dated April 6, 2006. The *Heritage* case file documentation attached as Exhibits to Shimer's April 6, 2006 motion for summary judgment supported and confirmed Shimer's previous summary judgment argument dated April 6, 2006 that the facts of *Heritage* were not at all similar to the facts of Shasta in a very critical and important way determinative of Plaintiff's statutory jurisdiction over the defendants Shimer, Firth and Equity.

Part of the documentation provided to the district court and attached to Shimer's April 6, 2006 summary judgment motion was an Exhibit B. The seventh page of that Exhibit B was a certified correct copy of the CFTC's complaint for Temporary Restraining Order filed against the Defendant Heritage Capital Advisory Services. On that seventh page of Exhibit B, (which is page 6 of the CFTC's 1982 complaint filed against the entity Heritage) the CFTC alleges that

> "as to all types of accounts offered, FPB and Serhant have complete discretion in and control over the assets and funds of investors. As to the regular futures trading accounts, Serhant has been given powers of attorney from each customer."

The grant of a power of attorney in the context of commodity trading indicates that an account at an FCM has been opened *in the name of the investor* and then authority to trade that account is given by the investor to the CTA. Plaintiff's lead counsel in the trial just concluded confirmed Plaintiff's clear understanding of the significance of the grant of a power of attorney for indicating that an account has been opened *in the name of* the investor on August 28, 2007 at page 49, lines 12-21 where the following interchange between Ms. Streit and Mr. Shimer occurred:

> Ms Streit:
>
> "And that's typical commodity trading advisor arrangement is when a trader with a system takes power of attorney to trade an account, that the account stays in the name of the investor, right?
>
> Mr Shimer:
>
> "That's correct"

The above cited portion of the Trial Transcript indicates too clearly that Plaintiff knows the case of *Heritage* does not provide case law precedent for its extraordinary attempt to expand its jurisdiction to the defendant entity Equity Financial Group, LLC and, therefore, to the defendants Robert W. Shimer ("Shimer") and Vincent Firth ("Firth").

REGARDING COUNT I

Count I of Plaintiff's Amended Complaint alleges that Shimer and Firth committed fraud against the members of the entity Shasta Capital Associates, LLC ("Shasta") in violation of Section 4b(a)(2)(i)-(iii) of the CEA [7 U.S.C. §§ 6b(a)(2)(i)-(iii)].

A. Facts Disallowing application of Section 4b(a)(2)(i)-(iii) of the CEA [7 U.S.C. §§ 6b(a)(2)(i)-(iii)] to the alleged acts of Shimer and Firth

The entity Shasta never opened a commodity futures trading account in its name or in the name of any of its members at a brokerage account designated by the CFTC as a Futures Commission Merchant ("FCM")". (See Joint Pretrial Order stipulated fact # 76). Shasta's manager Equity never opened a commodity futures trading account in its own name, in the name of the entity Shasta or in the name of any of Shasta's members. (see Joint Pretrial Order stipulated fact # 77). The trial record is devoid of any evidence that any member of Shasta ever opened a commodity futures trading account in their name or that any member had a reasonable expectation of ever opening a commodity trading account in their name as a result of their membership in Shasta.

Shasta's members never believed based upon information provided to them in either Shasta's PPM (or by any other means written or verbal) that Shimer, Firth or Shasta or the entity Equity intended to open a commodity trading account in their name. Shasta member Paul M. McManigal stated under oath during the trial it was clear to him that Shasta was not doing any trading (Trial Transcript 8/30/07, page 19, lines 7-13). Shasta member Philip Tate also testified at trial that from his review of Shasta's Private Placement Memorandum (PPM), Shasta was not doing any trading. He understood that it was another group that was doing the trading (See trial Transcript 8/30/07, page 53, lines 14-20).

The only individual who ever entered orders to purchase or sell or actually purchased or sold commodity contracts for future delivery was the defendant Coyt E. Murray and his trading company Tech Traders, Inc. ("Tech"). [See first paragraph of all AUP letters issued by Vernon Abernethy (Plaintiff's Exhibit 1009)] that were also provided by Abernethy to Shasta's CPA Teague. (See Teague deposition transcript page 163, lines 12-25). The record is completely devoid of any evidence by Plaintiff that *anyone* other than the defendant Coyt E. Murray and his company Tech engaged in the trading of commodity futures and more specifically stock index futures.

B. Proposed conclusions of law and argument with respect to Count I

Conclusion: The actual language of a statute determines whether or not it is applicable to a specific behavior.

Conclusion: There is nothing ambiguous or unclear about the language of Section 4b(a)(2)(i)-(iii) of the CEA [7 U.S.C. §§ 6b(a)(2)(i)-(iii)].

Conclusion: The actual language of Section 4b disallows Plaintiff's success with respect to Count I of the amended Complaint.

Argument:

Previous decisions of the federal courts have unanimously recognized that Section 4b of the CEA (7 U.S.C. Sec. 6b) prohibits fraudulent misrepresentation in connection with the making of commodity futures contracts *on behalf of another person*. *Clayton Brokerage Co. of St. Louis, Inc v. CFTC* 794 F. 2d 573, 578 (11th Cir. 1986) citing Chipster v. Kohlmeyer & Co., 600 F.2d 1061 (5th Cir.. 1979); Moody v. Bach & Co., Inc. 570 F.2d 523 (5th Cir. 1978). See also T. Russo, 1 Regulation of the Commodity Futures and Options Markets, Secs. 12.32, 12.41 (1983).

Federal case law precedent requires that before an analysis of whether or not a violation of Section 4b occurred by reason of a defendant's misrepresentation or omission of a material fact with sufficient scienter to support a finding of fraudulent intent the facts of the case must indicate 1) that the alleged fraud was perpetrated against someone who *has* an FCM account from which an order or orders for the purchase or sale of futures contracts were capable of being conducted (per the clear language of the statute itself); or, 2) that the alleged fraud was perpetrated against someone who would *reasonably be expected* to open a commodity futures trading account *as a result* of the action or behavior of the defendant (see for example *CFTC v. Vartuli*, 228 F.3d 94, 101 (2d Cir. 2000) and also see *R&W Technical Services, Ltd. v. CFTC* 205 F.3d 165 (5th Cir. 2000) where that court engaged in an extensive discussion and analysis of the "in connection with" language of Section 4b of the CEA; or 3) that the alleged fraud was perpetrated against someone who did not have a commodity trading account at the time of the alleged fraudulent behavior of the defendant but who, in reliance upon certain representations of the defendant, later opened a commodity trading account in which losses were sustained.

(*Saxe v. E.F. Hutton & Co.* 789 F.2d 105, (2d Cir. 1986); see also *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-104 (7th Cir. 1977).

That fact that the entity Shasta had executed an investment agreement for the sharing of profits or losses with the entity Tech does not, as a matter of law, create the necessary "connection" required by the clear, specific and unequivocal language of the statue as that language has been interpreted by *all* prior federal case law precedent. The actual language of Section 4b and all prior case law precedent disallows a finding that Shimer violated Section 4b of the CEA as alleged in Count I of the Amended Complaint because the "other persons" Shimer is alleged to have defrauded (i.e. the members of Shasta) never entered an order to make a purchase of any commodity contract nor did they ever make a purchase of a commodity for future delivery nor did they ever expect to do that by virtue of being a member of Shasta and that finding is supported by a preponderance of the evidence adduced at trial.

III. REGARDING COUNTS I & II

There Is A Total Lack of Any Case Law Precedent Cited In Plaintiff's Trial Brief To Support A Finding Of Liability Under Section 4b(a)(2) and Section 4o(1)(A) the Commodity Exchange Act

An examination of e*very single case* cited by the CFTC for support of its allegation that Shimer and Firth committed either Section 4b(2) or Section 4*o*(1)(A) fraud reveals that the alleged fraud of the named defendant was perpetrated against someone who *has* a commodity trading account at an FCM account from which an order or orders for the purchase or sale of futures contracts were capable of being conducted by reason of the fact that in the vast majority of CEA related fraud cases the defendant was actively engaged in either the direct solicitation of orders to trade commodity futures by its clients or the defendant was actually trading commodity futures for the account of its clients.

In *CFTC v. RJ Fitzgerald,* 310 F.3d 1321 (11th Cir. 2002) cited by Plaintiff the defendant company RJ Fitzgerald was a registered introducing broker with the CFTC who opened commodity trading accounts on behalf of its customers. The distinction of

that particular case and its facts from the facts of the present matter is so dramatic and patently obvious no further discussion is necessary.

Slusser v CFTC, 210 F.3d 783 (7th Cir. 2000) falls into the same basic category--the defendant and companies he controlled were actively engaged in the trading of commodity futures. In the case of *Stotler & Co. v. CFTC*, 855 F.2d 1288 (7th Cir. 1988) again the defendant Stotler & Company was a futures trading house! The defendant Smith Barney Harris Upham & Co. in the *Hammond* case cited by the CFTC was clearly a brokerage firm. Nothing more need be said about the clear distinction between *that* defendant and Shimer, Firth or the entity Equity. The firm Nobel Wealth that was the defendant in *CFTC v Nobel Wealth Datan Info. Serv., Inc.* 90 F. Supp. 2d 676 (D.Md. 2000) was a company that offered a trading program which taught the rudiments of trading currencies which would enable the job-seeker to conduct highly lucrative trading. It also had a "trading floor," where rows of computer monitors were set up to display current prices of various foreign currencies. Again the contrast to the actual behavior of Shimer, Firth or the defendant Equity is dramatic. The defendant Baragosh in the cited case of *CFTC v. Baragosh*, 278 F.3d 319 (4th Cir. 2002) was an associated person of the firm Nobel Wealth.

In *CFTC v Rosenberg* 85 F. Supp 424 (D. NJ 2000) the defendant Rosenberg offered to introduce a James Stollenwerck ("Stollenwerck") to a registered trading firm so that Stollenwerck could open a trading account, but instead, used Stollenwerck's money to open an account in Rosenberg's own name and then pilfered the money for payment of his personal expenses. Again *as in every case* someone is actually opening a commodity trading account. In *Rosenberg* that particular defendant opened the trading account *in his own name* when it was supposed to be opened i*n the name of* the client Stollenwerck.

Plaintiff's cited case of *Drexel Burnham Lambert Inc. v. CFTC* 850 F.2d 742 (DC. Cir 1988) was a case in which the defendant company was alleged to have allowed unauthorized trading losses to occur from a trading account of a client of that firm. That particular case is clearly not factually compatible at all with the facts in the present matter. *First Commodity Corp. of Boston v. CFTC* 676 F.2d 1 (1st Cir. 1982) is equally not helpful to the CFTC because the facts of that case involved the defendant company that

had clients trading in coffee futures options. *CFTC v. American Metals Exchange Cor*p., 775 F. supp 767 D.N.J. 1991) was a case in which the defendant company issued a brochure that described the defendants' expertise, their ability to fulfill the contracts, the relatively risk-free nature of the investment and its profitability. The Court referred to AME's Brochure and noted the fact that the omissions and representations alleged were specifically in connection with that defendant's experience in the precious metals business and the security of the clients investments.

Cange v Stotler & Co. Inc., 826 F.2d 581 (7th Cir. 1987) was a case in which the defendant was a futures commission merchant ("FCM") who allegedly engaged in fraudulent and unauthorized trades for gold and silver futures contracts that were charged to the defendant's trading account. Once again, actual commodity trading is going on by the defendant and/or Plaintiff. *Lawrence v CFTC* 759 F.2d 767 (9th Cir. 1985) was a case in which the CFTC sought to enforce a previous fine imposed on Lawrence as the properly registered associated person of a commodity broker when Lawrence simply failed to pay that fine. *Haltmier v. CFTC* , 554 F. 2d 556 (2d Cir. 1977) is a case in which the defendant Haltmier allegedly entered on behalf of a customer into a number of commodity futures transactions without the customer's authorization or knowledge. Again the facts of that case speak for themselves.

There are several cases in which that the alleged fraud was perpetrated against someone who would *reasonably be expected* to open a commodity futures trading account *as a result* of the action or behavior of the defendant (see for example *CFTC v. Vartuli*, 228 F.3d 94, 101 (2d Cir. 2000) and also see *R&W Technical Services, Ltd. v. CFTC* 205 F.3d 165 (5th Cir. 2000) where that court engaged in an extensive discussion and analysis of the "in connection with" language of Section 4b of the CEA. And it is also true that Section 4b fraud [and therefore at least the required elements of Section 4*o*(1)(A)] has also been sustained when the alleged fraud was perpetrated against someone who did not have a commodity trading account at the time of the alleged fraudulent behavior of the defendant but who, in reliance upon certain representations of the defendant, later opened a commodity trading account in which losses were sustained.

(*Saxe v. E.F. Hutton & Co.* 789 F.2d 105, (2d Cir. 1986); see also *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-104 (7th Cir. 1977).

The real initial problem for the CFTC is that before the Court even begins its analysis of whether or not the alleged "representations" or "omissions" of the defendants Shimer and Firth were material or made with sufficient scienter to constitute commodity related fraud Plaintiff should provide the court with at least *one cited example* in which representations or omission in a factual context similar to the alleged representations or omissions of the defendants Shimer and Firth have been sustained as violations of either Section 4b(a)(2)(i)-(iii) of the CEA [7 U.S.C. §§ 6b(a)(2)(i)-(iii)] or Section 4*o*(1)(A) of the CEA 4*o*(1)(A) of the CEA [(7 U.S.C. § 6o(1)(A)].

The relevant facts of every single case cited in the body of Plaintiff's Trial brief dated August 20, 2007 have been summarized above for the Court. The Plaintiff has failed to provide the Court with *any* case law precedent that has found behavior as far removed form the actual trading of commodity futures as the behavior of Shimer and Firth to be a violation of either Section 4b(a)(2) as alleged in Count I or to be a violation of Section 4*o*(1)(A) as alleged in Count II.

The defendants Shimer, Firth and Equity did not violate Section 4b(a)(2) of the Commodity Exchange Act nor did they violate Section 4*o*(1)(A) of the Commodity Exchange Act by reason of the fact that the acts of the defendants as alleged by Plaintiff are insufficient as a matter of law to bring the alleged behavior of the defendants within the purview of the cited sections of the Commodity Exchange Act and Plaintiff has cited no case law precedent that would support a contrary conclusion.

IV. REGARDING THE SPECIFIC ALLEGATIONS CONTAINED IN COUNTS I & II OF PLAINTIFF'S AMENDED COMPLAINT

A. Facts regarding the issue of whether Shimer and Firth knowingly or recklessly misrepresented or failed to disclose material information about their expertise, qualifications and background

Regarding Firth

Firth did not divulge his previous bankruptcy filings to Shimer when Shasta's PPM was prepared. (Trial Transcript 9/4/07, page 9, lines 2-6). Firth felt that these past filings were not pertinent to his responsibilities as Equity's manager because he was not responsible in any way for handling investor money. (Trial Transcript 9/4/07 page 9, lines 7-10).

Firth's contribution was primarily his skill at doing administrative work and basically managing the members of Shasta in his capacity of manager of the entity Equity (trial Transcript 9/4/07, page 9, lines 11-19). The Plaintiff produced no evidence at trial to show that Firth did not perform those responsibilities with skill and professionalism. Firth had a Series 7 license and an insurance license but they had expired (Trial Transcript 9/4/07, page 10, lines 20-21). The PPM incorrectly indicated these licenses were still active. (Trial Transcript 9/4/07, page 10, lines 21-22). All other facts found in Shasta's PPM about Firth's past experience, sales and his experience with other companies was accurate and correct. (Trial Transcript 94/07, page 11, lines 2-8).

The Plaintiff has produced absolutely no evidence for the record that Firth ever purported to have any commodity related licenses, that Firth ever represented to anyone that he had any skill in analyzing or recommending commodity related trading programs or that he had any background at all in commodity related investments. Firth's lack of any experience in the field of commodity trading was apparent from the fact that no such experience for Firth was listed in Shasta's PPM. (See Plaintiff's Exhibit 1093, pages 21-22).

Regarding Shimer

Shimer had never managed a commodity pool. (Trial Transcript 8/27/07, page 181, lines 3-5). Plaintiff has produced no evidence for the record that Shimer had ever represented to anyone that he had managed a commodity pool nor is there any evidence in the record that Shimer ever represented to anyone that he had any skill managing a commodity pool.

Shimer was a Director and Shareholder of the entity Kaivalya Holding Group, Inc. (Trial Transcript 8/27/07, page 182, lines 7-8). The entity Kaivalya made several investments. (Trial Transcript 8/27/07, page 182, lines 12-15). Kaivalya made investments with funds obtained from other people that Shimer talked to. The people Shimer talked to about Kaivlaya were friends of Shimer's--people who knew Shimer. (Trial Transcript 8/27/07, page 182, lines 16-19). Kaivalya made three investments. Kaivlaya investors received 50-54% of their funds back from Kaivalya's first investment. Some of Kaivalya's early investors were repaid from funds through Shadetree's account at Tech (Trial Transcript, 8/27/07, page 6-9).

Kaivalya's second investment was not successful (Trial Transcript 8/27/07, page 186, lines 6-10). Kaivalya's third investment was with Jerry Latulipe and his partner Tom Leonard. Latulipe told Shimer that he had an exclusive relationship with a trader who had a system that was making impressive returns. (Trial Transcript 8/27/07, page 186, 17-23). Coyt Murray was the trader the funds were supposed to go to. (Trial Transcript 8/27/07, page 190, lines 24-25). This investment with Latulipe was not successful (Trial Transcript 8/27/07, page 191, lines 2-3).

Shasta investor Tom List testified that it was his understanding that Kaivalya's funds were absconded by someone named Jerry. (Trial Transcript 8/30/07, page 59, lines 17-20). Shasta investor Robert Richardson testified that he had been told by Shimer that Kaivalya's money had been absconded by the people who received Kaivalya's money. (Trial Transcript 8/31/07, page 31, lines 1-10). Tom List and Robert Richarson were two of Plaintiff's witnesses at trial who were previous investors in Kaivalya, who knew that Kaivalya lost money and had not been successful but invested in Shasta anyway.

Shimer has never denied that he was involved in three failed investments before Shasta. (Trial Transcript 9//4/07, page 62, lines 12-17). Shimer did not disclose Kaivalya's past failures to Shasta's investors who did not already know about the lack of Kaivalya's previous investment success.

Murray denied to Shimer that he had ever received any of Kaivalya's funds provided to Jerry Latulippe. (Trial Transcript 9/4/07, page 65, lines 8-24 and following page 66, lines 4-9).

Shimer is not mentioned at all in any of the subscription documents. Investors were told Shimer was the attorney for the entities Shasta and Equity. Shimer acted as legal counsel for both Shasta and Equity. (See generally Plaintiff's Exhibit 538).

CFTC v. R.J. Fitzgerald 310 F.3 1321 (11th Cir. 2002) and the other cited cases of See *Hammond v. Smith Barney Harris Upham & Co*., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) 24,617 (CFTC Mar.1, 1990); *CFTC v. Trinity Finan. Group, Inc*., Comm Fut. L. Rep. 27,179 (S.D. Fla. Sept. 29, 1997), aff'd in relevant part, *CFTC v. Sidoti*, 178 F.3d 1132 (11th Cir. 1999) all require that fraud does not exist as a matter of law with respect to both of the above cited sections of the CEA unless the CFTC establishes all three required elements: 1)that a misrepresentation , misleading statement or deceptive omission occurred was made; 2) that it was material; and 3) that it was made with scienter.

Regarding the materiality of the background of Firth and the previous failed investment experiences of Firth and Shimer

Nick Stephenson stated at page 163, line 4 of his deposition testimony as follows: "Again, investors flocked for the returns. That's what got everybody excited."

In the trial transcript of 8/31/07 at page 67, lines 13-25 the Court recognized the clear reality of the role that Tech's purported performance played in every investor's decision when it allowed into the record over Plaintiff's objection the following designation by Shimer in the Stephenson deposition: "…the returns was what drove most of us. Getting these net returns of 6 percent is why we all got into this in my opinion." (Stephenson Deposition page 63, lines 1-4).

John Evans was an investor in Shasta and testified at trial that when he searches for investments he looks for average returns per year of greater than 15% and what caught his eye about Shasta was the consistency and magnitude of the returns. (Trial Transcript, 8/29/07, page 64, lines 2-17). Evans asked about the minimum required investment and also about the lock up period. (Trial transcript 8/29/07, page 65, lines 7-11). The independent account verification was one of the things that was very attractive to him (Trial Transcript 8/29/07, page 65, lines 18-24). He invested in Shasta because of

the reasonable explanation for the consistency of the return stream and the fact that it was verified. (Trial Transcript 8/29/07, page 70, line 25 and following page 71, lines 1-5).

Tom Dent is a registered investment advisor. He was an investor in Shasta and testified at trial that his initial reaction was that Shasta's results were impressive to the extent they were initially hard to believe. (Trial Transcript 8/29/07, page 78, lines 5-8). He began following the web site in the fall of 2002 after he heard about Shasta from a friend of the family and invested in March of 2003. (Trial Transcript 8/29/07, page 76, lines24-25; page 78, lines 9-15). He had questions about performance and auditing. He was told by Firth that Shasta was not audited. (Trial Transcript 8/29/07, page 80, lines 5-15. Dent decided to invest in Shasta. (Trial transcript 8/29/07, page 84, lines 23-24). Dent liked Shimer's attention to detail but his main concern was the accuracy of the performance numbers. (Trial Transcript 8/29/07, page 85, lines 1-7). He talked to Teague and she told him she was checking the numbers. (Trial Transcript 8/29/07, page 86, lines 5-13).

Paul McManigal was another investor in Shasta. He noticed that the returns were steady at about 5% per month. (Trial Transcript 8/30/07, page 6, lines22-25). He invested because the returns were steady at about 5% a month, that Shimer was an attorney and that Shimer and Firth talked highly of the trader. (Trial Transcript 8/30/07, page 10, lines 11-16). McManigal talked to Teague. (Trial Transcript 8/30/07, page 9, lines 12-16). Steadiness of returns was a factor for him. (Trial Transcript 8/30/07, page 28, lines 18-20.

Philip Tate was another investor in Shasta who testified at trial. He has done investing most of his life and also had previous experience investing in commodities. (Trial Transcript 8/30/07, page 32, lines 1-5). Shasta's record of performance first caught Tate's attention as well as the relatively small required amount of the minimum investment. (Trial Transcript 8/30/07, page 32, lines 24-25 & page 33, lines 1-3). He invested because of the performance record. There was no hard sell from Firth. No hype. Everything seemed straightforward. (Trial Transcript 8/30/07, page 40, lines 5-10).

Robert Richardson was an investor in Shasta who had also placed funds with Kaivalya. He invested in Shasta because he wanted to make money. (Trial Transcript 8/31/07, page 33, lines 6-7). Steve Northridge also testified at trial as a Shasta investor

and commented: "…performance is always something you will look for…" (Trial Transcript 8/31/07, page 45, lines 3-10).

B. Argument: Shimer and Firth did not violate Section 4b(a)(2)(i)-(iii) of the CEA [7 U.S.C. §§ 6b(a)(2)(i)-(iii)] or Section 4*o*(1)(A) of the CEA 4*o*(1)(A) of the CEA [(7 U.S.C. § 6o(1)(A)] because they did not knowingly or recklessly misrepresented or failed to disclose material information about their expertise, qualifications and background

For its theory of Section 4b(a)(2) liability Plaintiff previously cited in its trial brief to *CFTC v. R.J. Fitzgerald* 310 F.3 1321 (11th Cir. 2002). In that case the court held that in order to establish liability for fraud, the CFTC has the burden of proving three elements: (1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality. See *Hammond v. Smith Barney Harris Upham & Co*., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) 24,617 (CFTC Mar.1, 1990); *CFTC v. Trinity Finan. Group, Inc*., Comm Fut. L. Rep. 27,179 (S.D. Fla. Sept. 29, 1997), aff'd in relevant part, *CFTC v. Sidoti*, 178 F.3d 1132 (11th Cir. 1999). Failure to establish any one of these elements is dispositive and precludes any finding of Section 4b(a)(2) fraud or deception. The Plaintiff's allegation of Section 4*o*(1)(A) fraud imposes a similar burden upon Plaintiff with respect all three of those same elements of fraud.

<u>The alleged representation or omissions of the defendants Shimer and Firth with respect to their past backgrounds and "business failures" were not "material" under federal case law interpreting the CEA.</u>

The issue of materiality is a mixed question of law and fact because it involves "the application of a legal standard to a particular set of facts". *TSC Industries v. Northway, Inc.* 426 U.S. 438, 450 (1976). The Supreme Court in *TSC Industries* at 445 further explained that the question of materiality "is an objective one" because it involves , "the significance of an omitted or misrepresented fact to a reasonable investor". The question then becomes how significant must the fact be. In other words, how *certain* must it be that the fact "would affect a reasonable investor's judgment".

In *TSC Industries* the Supreme Court rejected the standard that a fact is "material" just because an investor "might" consider it important. Citing the *TSC Industries* the case of *Securities & Exchange Commission v. Steadman* 798 F. Supp. 733, 740 (1991) agreed that

> "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important.... What the standard contemplates is a showing of a substantial likelihood that, under all of the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available."

As the CFTC recognizes in its trial brief the "substantial likelihood" test applies as well to issues of materiality under the CEA. See *Saxe v, E.F. Hutton & Co., Inc.* 789 F.2d 105, 109 (2nd Cir. 1986).

The real question when addressing the issue of the non disclosures by Shimer and Firth of their past business failures is this: is there really any credible evidence of a "substantial likelihood" that the disclosure of every embarrassing item of Firth's past that was introduced by the CFTC at trial would have *really* dissuaded any of Shasta's members from investing in the absence of any critical variance between the rate of return numbers reported by Abernethy and the Tech's actual rate of return numbers? In light of the repeated emphasis on the fact that almost all investors in Shasta who testified at trial named "performance" and the fact that the performance was CPA verified to be at the top of their list of factors in determining whether or not to invest is there really any credible evidence in the record that any member of Shasta would have foregone the reported rates of return simply because Shimer (who likewise had no role whatsoever in either the actual trading or verification of the trading performance) had been associated with the entity Kaivalya that had lost money through the misbehavior of others?

There was no evidence introduced at trial of any probative value that Shimer had ever engaged in fraudulent conduct himself—only the plain fact that Shimer had participated 3 times in an investment that had not succeeded. Shimer had never been sued in court and the first investment was still paying investors regularly at the time the

second and third investments were made. The actual circumstances and facts had extraordinary mitigating circumstances which of course were all irrelevant during the trial. Plaintiff's Exhibit 393 is clearly *not* credible evidence that Shimer ever engaged in fraud of any kind. That exhibit consists merely of unsubstantiated allegations made by another attorney being paid to posture on behalf of his client.

The fact that Shimer had been the victim of fraud several times may have some relevance to his ability to judge the integrity of others. Many people who have been in business for any length of time have often lost money. The world of investments is clearly a dangerous place. But Shasta's web site provided investors with as much information as Shimer and Firth had about the trading system itself. And Shimer has adequately discussed and adequately addressed elsewhere the issues of Firth and Shimer's alleged "recklessness" with respect to the verification of Tech's monthly rate of return.

Shimer had no more reason than any member of Shasta to doubt the accuracy of Abernethy's numbers. The written record clearly establishes that Teague reviewed and approved the procedures that she later described to both Firth, Shimer and the members of Shasta as a "mini audit". The basic inescapable reality is that there were two main factors that caused every member to finally invest in Shasta: the consistent performance and the fact that the trading company's performance was being verified by a CPA that was purportedly independent of that trading company.

The record indicates that whatever small apparent compromise to Abernethy's independence that might have occurred for a very short time in the spring and summer of 2002, that compromise was minimal in light of the fact that there was no evidence at all that there was any specific agreement to pay Abernethy a fee for referring people he knew to Shasta. Abernethy was adamant about that. Firth confirmed that fact and so did Shimer. The CFTC introduced no evidence other than the fact that Shimer apparently held some expectation of that in his own mind. But any expectation on the part of Shimer does not establish any actual lack of independence by Abernethy. After August there is literally *no evidence at all* in the record that Shimer or Firth had any reason to even suspect Abernethy was not acting responsibly and independent of Tech.

The CFTC introduced absolutely no evidence that Abernethy was not independent at the beginning of the engagement (other than the scattered and confusing references to the fact about something happening "upstream". It was never clear at all from Abernethy's testimony exactly when his supposed "lack of independence" from up stream reporting really happened. Events "upstream had absolutely no relevance at all to Abernethy's "independence" since he always seemed clear about the fact that he worked only for Murray and Tech. Not even the CFTC was willing to try and construct a "lack of independence" argument based on some misperception by Abernethy of Shimer's "up stream" role. There is no evidence that Firth and Shimer were ever aware of any fact that would lead them to believe that Abernethy was not completely independent after August of 2002. The performance of Tech before and after August 2002 was consistent. It was consistent from the very beginning.

There is no doubt that both Firth and Shimer failed to disclose information that, in retrospect, probably *should have been disclosed* to give all members of Shasta a more balanced picture of their respective backgrounds and it is certainly clear that would have been helpful to answer questions about the circumstances of those past embarrassing events in both Firth and Shimer's recent past. However, given the lack of any specific role by Shimer and Firth in the actual returns being reported would any of Shasta's members *really* walked away from a reported consistent CPA verified return of about 5% a month simply because Firth had declared bankruptcy as a protective measure? In almost every instance with the value of 20/20 hindsight without exception Shasta's members expressed the fact that they would have liked to have known all the facts so they could have asked more questions but…how material was Firth's real estate background to the performance of a trading system being operated by the trading company in North Carolina? How material was Shimer's and the Kaivalya's past association to people that had no connection at all to the trading being done by the entity Tech in 2001, 2002, 2003 and 2004? To conclude that the disclosure of the information the CFTC has alleged was not disclosed would have caused sophisticated, accredited investors to walk away from 5% a month being verified by a CPA is highly unlikely. There is a substantial likelihood that *every* investor in Shasta would have invested

anyway and to conclude otherwise is simply to ignore the attraction of Tech's purported numbers.

Moreover it was also clear that Shasta had members who knew very well about Kaivalya's past difficulties and invested anyway. Robert Richardson never was repaid for his Kaivalya investment but invested a substantial sum in Shasta. Why? For the returns. The determination of what the investors in Shasta would have done cannot be determined by what we now know about the facts of Tech's true performance in hindsight. That determination must be made in light of the information and the factors that really drove their decisions to invest in 2002 , 2003 or early 2004. Liability for fraud as the CFTC now seeks to impose upon Shimer and Firth is not established by the mere fact that certain embarrassing personal information was not disclosed that probably should have been. The facts of the present matter do not meet the required "substantial likelihood" test for concluding that the non disclosures of Shimer and Firth about their respective backgrounds were a material non disclosure.

Nick Stephenson was forthright when he recognized the obvious and overriding role of both the *amount* and the *consistency* of the returns in the decision of every investor to place funds with Shasta: "Again, investors flocked for the returns. That's what got everybody excited." (Stephenson Deposition, page 163, line 4).

In the trial transcript of 8/31/07 at page 67, lines 13-25 the Court recognized the clear reality of the role that Tech's purported performance played in every investor's decision when it allowed into the record over Plaintiff's objection the following designation by Shimer in the Stephenson deposition: "…the returns was what drove most of us. Getting these net returns of 6 percent is why we all got into this in my opinion." (Stephenson Deposition page 63, lines 1-4).

<u>The alleged representations or omissions of the defendants Shimer and Firth with respect to their past backgrounds and "business failures" were not made with scienter.</u>

The federal case law is clear that "mere negligence, mistake, or inadvertence" fails to meet section 4b's scienter requirement; "a degree of intent beyond carelessness or negligence" is necessary to violate this provision. *Hill v. Bache Halsey Stuart Shields.*, 790 F. 2d 817, 822 (10th Cir. 1986); Haltmier c. CFTC, 554 F.2d 556, 562 (2d cir. 1977).

(see *Drexel v. CFTC* 850 F.2d 742, 748 (DC. Cir. 1988). A reckless action, as the First Circuit said in reaching the same result, "is one that departs so far from the standards of ordinary care that it is very difficult to believe the [actor] was not aware of what he was doing." *First Commodity Corp v. CFTC*, 676 F.2d 1, 7 (1st Cir. 1982).

Another way of defining "recklessness" is "an extreme departure from the standards of ordinary care". *See, e.g., Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-79 (11th Cir.1988). For there to be recklessness, the defendant's conduct should involve "highly unreasonable omissions or misrepresentations... that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir.2001).

The non disclosures of Shimer and Firth's respective backgrounds do not even approach that required standard. Firth testified at trial that with respect to Badische "…all I was doing was doing working with project funding, mostly real estate funds. They were going to fund those particular real estate transactions I brought them." (Trial Transcript 8/27/07, page 152, lines 4-18). The record indicates that Firth's decision not to disclose his previous bankruptcy necessitated by his previous relationship with Badische was probably an ill considered erroneous decision and one might even argue it was negligent not to do so since he was the manager of the entity controlling Shasta. But as he describes in his trial testimony there was a certain logic to this decision on his part because he "didn't think it was pertinent at the time. I was doing mostly administrative work. I wasn't handling any money. I didn't feel it was going to affect the job I was doing." (Trial Transcript 9/4/07, page 9, lines 2-19). Certainly Firth had nothing to do with the actual trading going on in North Carolina by Murray's company Tech nor did Firth have any connection at all to the verification of Tech's monthly trading results being conducted by Abernethy according to procedures approved by Shasta's CPA Teague.

In Shimer's case, his past track record with Kaivalya, could have been and, in retrospect, should have been disclosed. No one would argue otherwise. But Shimer had satisfied himself that Murray had nothing to do with the loss Kaivalya had suffered. There is absolutely no evidence introduced into the record by the CFTC that Murray had ever received any of the funds from Kaivalya. So what was the real connection between

Shimer and Kaivalya's past unsuccessful investment activity and the ability of Murray's trading system to successfully predict intraday market movements to generate profit sharing with the entity Shasta?

Despite the CFTC's cite to the proper required standard of recklessness, the CFTC ignores the plain meaning of that term in pursuit of a standard of "strict liability" for Shimer's conduct. The CFTC's argument boils down to this: Shimer lost money three times in the past. He didn't disclose that to Shasta's investors. Therefore, his non disclosure was reckless. But that approach ignores any rational comparison between the facts in the present case and the facts of the very cases the CFTC cites in support of its position.

The case of *Drexel Burnham Lambert Inc. v. CFTC* , 850 F. 2d 742, 748 (D.C Cir. 1988 is the first case cited on page 23 of the CFTC's trial brief in support of its argument that sufficient recklessness somehow exists with respect to Shimer. But what were the actual facts of *Drexel* that supported a finding of recklessness there? There the court concluded that it was reckless under the CEA for a broker of the defendant to allow someone that he clearly knew had no specific authority to trade a corporate commodity account and place an unauthorized order to sell pork belly futures for the corporate clients' account when the trade was "patently at odds with the well-understood tax goals of the client's account". *Drexel*, at 744. Apart from the obvious fact that the "reckless" conduct in *Drexel* was directly related to the trading of commodity futures, there was clear knowledge on the part of the broker that what he allowed to happen was not authorized and specifically contrary to the client's goals.

What is particularly instructive is the CFTC's cite to the case of *Haltmier v. CFTC* 554 F.2d 556, 562 (2nd Cir. 1977) for the disarmingly deceptive quote: "It is enough that he acted deliberately." But the actual facts tell a much different story. Haltmier was an account executive with a registered futures commission merchant who entered into a number of commodity futures contracts on behalf of a customer without the customer's authorization or knowledge!

Shimer's obligation to disclose his past association with Kaivalya would only have been reckless under the recognized standard applied by the Courts if it had some direct connection to Shasta or the activities of Murray's trading. But Shimer had no direct role at all in the trading going on at Tech. The Court seemed determined at trial (see Trial Transcript 9/4/07, page 61, lines 2-25 and page 62, lines 1-25 and page 63, lines 1-8) to short cut Shimer's attempt to provide a balanced understanding of the collateral that had been provided to Kaivalya prior to the placement of that company's funds with Latulippe. If Shimer is to be exposed to the allegation that he was "reckless" in failing to disclose a previous investment loss, why is it not important to show that the loss itself was not due to an extreme departure from the standards of ordinary care by Shimer in the first place?

Despite the collateral Shimer had obtained to secure the transaction, his client still suffered an embarrassing loss of its funds to Latulippe and Leonard. But what did that have to do with Murray's ability to successfully trade? What did that have to do with Abernethy's verification of Tech's trading results? Shimer's motive for not disclosing what had happened to him was due more to embarrassment than anything else. In all fairness it should have been disclosed and it was not but that non disclosure does not rise to an extreme departure from ordinary care required by case law precedent.

C. Regarding the issue of whether Shimer and Firth knowingly or recklessly misrepresented or failed to disclose material information about their compensation and received funds they were not entitled to receive

Facts regarding whether Shimer and Firth knowingly or recklessly misrepresented or failed to disclose material information about their compensation and received funds they were not entitled to receive

Regarding the uncontradicted facts on the record about Shimer's first meeting with Murray in North Carolina

Shimer contacted Murray by telephone in the fall of 2000 and told him Latulippe and Leonard were using Murray's name to raise funds from people such as Shimer and entities such as Kaivalaya using stock collateral as a guarantee and then not returning the funds as agreed. Shimer told Murray Shimer had documentation to prove that. (Trial Transcript 9/4/07, page 64, lines 2-8). Murray expressed concern and asked to see the documentation. They set up a time and Shimer went to Murray's office to meet him. (Trial Transcript 9/4/07, page 64, lines 19-24). Shimer's impression of Murray when they met was similar to the impression he had during the lunch meeting in the Bahamas a year earlier. (Trial Transcript 9/4/07, page 65, lines 2-5).Shimer showed Murray the documentation Shimer had. (Trial Transcript 9/4/07 page 65, lines 8-9).

Murray was told by Shimer at that meeting in the fall of 2000 that Shimer was determined to get to the bottom of what the facts were. (Trial Transcript 9/4/07 page 65, lines 10-12). Murray was also told by Shimer that if Shimer went down to Florida to pursue Leonard and Latulippe civilly he might also refer the matter to the Florida State Attorney General's office and if that happened the documentation would lead to Murray. Shimer wanted to know if Murray was involved before he did that. (Trial Transcript 9/4/07 page 65, lines 12- 18). Murray reacted to the documentation and to what Shimer said by expressing concern. (Trial Transcript 9/4/07 page 65, lines 22-24).

Murray told Shimer that Murray had never received any funds from Latulippe and Leonard. (Trial Transcript 9/4/07 page 65, lines 23-25). Murray's reaction to this information and to the documentation Shimer showed Murray was low key. Murray was not defensive about the information or documentation he had been shown. (Trial Transcript 9/4/07 page 66, lines 1-3). At that meeting Murray's attitude appeared to Shimer to be akin to "how can I help you? How can I assure you I had nothing to do with what happened with Latulippe and Leonard?" (Trial Transcript 9/4/07 page 66, lines 4-9).

Early discussions between Shimer and Murray

Murray told Shimer that his system worked best when it was fully funded. ((Trial Transcript 9/4/07 page 69, lines 9-15). Murray's previous licensing arrangement with Pinder during 2000 was supposed to provide Murray's trading system with sufficient funds to operate properly. (Trial Transcript 9/4/07 page 69, lines 1-3.). Murray was supposed to provide regular follow up to Pinder's traders in the Bahamas at the end of trading. (Trial Transcript 9/4/07 page 69, lines 19-25). Shimer received the impression from Murray that it was Murray's original intention to travel back and forth a great deal to the Bahamas to train Pinder's people but he ended up trying to do the training by long distance (Trial Transcript 9/4/07 page 70, lines 3-9). Pinder's traders rarely called Murray as agreed to go over trades at the end of the day and learn how to trade the system properly. (Trial Transcript 9/4/07 page 70, lines 10-16). The licensing arrangement with Pinder was not working out. Pinder's attention was on a restaurant he owned n Florida. Trading by Pinder's traders stopped. (Trial Transcript 9/4/07 page 71, lines 2-9).

It appeared to Shimer that he and Murray had a mutual interest in working together in late 2000 and early 2001. Murray had a trading system that needed to be funded and Shimer wanted a solution to the past difficulty created by Latulippe and Leonard. (Trial Transcript 9/4/07, page 72, lines 16-20).

Regarding Tech's Profit Sharing Agreement with Shadetree

The entity Shadetree was a Trust established in the jurisdiction of Nevis by a Nevis attorney. (Trial Transcript 9/4/07 page 157, lines 18-20). Shadetree was the sole shareholder of the entity New Century Trading, LLC. (Trial Transcript 9/4/07 page 157, lines 23-25). New Century was formed as a foreign entity because Murray preferred that agreements be executed with Murray's Bahamas company Tech Traders Limited. (Trial Transcript 9/4/07 page 158, lines 1-4). Shimer had no objection to Murray's expressed desire to execute agreements with other foreign entities. (Trial Transcript 9/4/07 page 158, lines 7-10).

Shimer was not Shadetree's trustee. (Trial Transcript 9/4/07 page 158, lines 11-12). Shadetree's beneficiary was a Panamanian foundation. Shimer played no role at all in the formation of that foundation. (Trial Transcript 9/4/07 page 158, lines 13-15).

Shimer was secondary legal counsel to Shadetree. (Trial Transcript 9/4/07 page 158, lines 16-18). Shimer did not have any official authority to make any decisions for the trust in any capacity. (Trial Transcript 9/4/07 page 158, lines 19-21).

An Agreement dated August 3, 2001 was executed between Shadetree and Murray's company Tech that provided for sharing of any profits allocated to Murray's company as a result of the Investment Agreement previously executed between Shasta and Tech. The agreement between Shadetree and Tech was properly executed by Coyt Murray as President of Tech and by Elridge Glasford as Director of the entity Longview Financial Group, Ltd. the trustee of Shadtree. (See Plaintiff's Exhibit 96). Shasta's PPM never disclosed the existence or the terms of the Agreement executed between Tech and Shadetree. (Stipulated fact # 24).

Disbursements made from Shadetree's account at Tech were authorized in writing by Shadetree's trustee. (Trial Transcript 9/4/07 page 158, lines 22-24). Shimer never requested disbursements from Shadetree's account at Tech that were not authorized by Shadetree's trustee. (Trial Transcript 9/4/07 page 158, lines 25, page 159, lines 1-2). Though the profit sharing agreement between Shadetree and Tech was not disclosed, it was not Shimer's intention to keep that Agreement a secret but in retrospect it was a mistake on Shimer part not to disclose it. (Trial Transcript 9/4/07 page 159, lines 22-24).

Shimer did not believe that the existence of the profit sharing agreement between Shadetree and Tech would have made a difference even it was disclosed to investors because consistency of performance and the verification of that performance were probably the reasons investors became members of Shasta. (Trial Transcript 9/4/07 page 159, lines 12-16). The preferred rate of return provided in Shasta's Investment Agreement also played a large part in that belief by Shimer. (Trial Transcript 9/4/07 page 159, lines 17-18).

That preferred rate of return in Shasta's Investment Agreement with Tech (see Plaintiff's Exhibit 91, pages 3 & 4, Paragraph VII, subparagraphs A & B.) required that 2% of any beginning balance of Shasta at Tech be allocated to Shasta for the benefit of its members before any allocation of profit earned during that month was allowed to Tech. The effect of that provision was to put Shasta's members first and require that Tech's return on investment from trading each month exceed 2% per month before any

allocation of any profit was made to Tech. (See generally the above cited provisions of Plaintiff's Exhibit 91--the Shasta/Tech Investment Agreement).

The preferred return allocated to Shasta by Tech for the benefit of its members on investment was specifically referred to and described in Shasta's PPM provided to all Shasta members. (See Plaintiff's Exhibit 1093, pages 6 & 7 under the heading "Trading Company Profits") (See also Plaintiff's Exhibit 1093, page 14 under the heading "Profit Allocation Between The Company And The Trading Company".

The practical effect of the above cited preferred rate of return provision in Shasta's Investment Agreement with Tech was to place Shasta and its members first to receive a 2% return each month before Tech received a penny. (Trial Transcript 9/4/07 page 160, lines 4-7). Murray resisted that preferred rate of return provision initially during negotiation of Shasta's Investment Agreement. ((Trial Transcript 9/4/07 page 160, lines 7-13). The preferred rate of return allocated to Shasta was reduced to 1% per month from available profits each month after December 31. 2003 because by that time Tech had developed a sufficient performance track record. (Trial Transcript 9/4/07 page 160, lines 17-25).

Shimer did not see any probability or reason that the profit sharing agreement between Shadetree and Tech would have an impact or affect at all the rate of return being generated by Tech. (Trial Transcript 9/4/07 page 161, lines 9-15). Shimer likewise did not see any possible impact on the verification of Tech's rate of return being conducted by Abernethy. (Trial Transcript 9/4/07 page 161, lines 16-23). Shimer believed the existence of the Shadetree/Tech Agreement did not have any material impact at all on any critical aspect of Shasta's investment with Tech but agrees it would have been better to have disclosed it existence. (Trial Transcript 9/4/07 page 161, lines 24-25 & page 162, lines 1-9).

Shimer did not expect the profit sharing agreement with Shadetree to be a permanent arrangement. (Trial Transcript 9/4/07 page 162, lines 19-25). Murray was beginning to negotiate a change in the profit split in January of 2004. (Trial Transcript 9/4/07 page 162, lines 24-25). Shimer fully expected Murray to completely end the agreement between Tech and Shadetree. (Trial Transcript 9/4/07 page 163, lines 1-4). Shimer had no control over Shadetree's trustee and if Murray ended the profit sharing or

the relationship with Shadetree, Shadetree had no effective remedy. (Trial Transcript 9/4/07 page 164, lines 7-10). Shadetree began with zero assets and at the time this case was filed, as a result of the performance numbers reported Shadetree had about $1.9 or $2 million in its account at Tech. Shimer felt he had fulfilled his fiduciary responsibility to Shadtree by taking that trust from zero assets to two million in assets in 2 ½ years. (Trial Transcript 9/4/07 page 164, line 11-19).

Shimer also believed that there was the possibility that Murray might end the contractual relationship between Tech and Shasta and that possibility was discussed with several members of Shasta. (Trial Transcript 9/4/07 page 163, lines 8-15). Shimer shoved a lot of paperwork at Murray and knew Murray did not appreciate the paperwork that came his way from Shimer. (Trial Transcript 9/4/07 page 163, lines 17-25).

The Shadetree accounts prepared by Firth at Shimer's direction were never shown to Shadetrees' trustee. Shimer considered these accounts an unauthorized "wish list" but did expect remuneration for the work Shimer had done on Shadetree's behalf once Kaivalya was fully repaid. (Trial Transcript 9/4/07 page 164, lines 20-25, lines 22-24 & page 165, lines 1-6). Shimer received no remuneration at all during the entire year of 2001. He worked basically for free. (Trial Transcript 9/4/07 page 165, lines 7-10). Shimer had an expectation that Murray would be successful based upon what he saw in Murray's office and based upon what Teague told him about the procedures being used to verify the returns but there was never any guarantee. Everyone took that risk. (Trial Transcript 9/4/07 page 165, lines 11-22). There is a tremendous amount of risk involved in commodity trading and that risk was disclosed to Shasta's members in Shasta's PPM and every member of Shasta knew that such a risk existed. (Trial Transcript 9/4/07 page 165, lines 22-25).

Shimer knew there was always the risk that in the end there would be nothing to distribute from Shadetree. There could have been a draw down even if the reporting had been as it was represented and that was a risk everyone took going into this investment. (Trial Transcript 9/4/07 page 166, lines 1-9). Shimer did not have any reason to believe the reported numbers for Tech reported by Vernon Abernethy and conveyed to Shasta's CPA were inaccurate.

Argument: Shimer and Firth did not knowingly or recklessly misrepresent or fail to disclose material information about their compensation and receive funds they were not entitled to receive

Shimer's meeting with Murray in Murray's offices in NC was only the second time Shimer had ever met Murray. There is absolutely no evidence in the record that Shimer went to that first meeting at Murray's North Carolina office in the fall of 2000 asking Murray for help of any kind. Nor is there *any* credible evidence at all in the record that it was Shimer's intention when he met Murray for only the second time in a year that it was Shimer's intention or even Shimer's hope to strike some sort of "deal" and work with Murray. The CFTC's attempt to characterize the interaction between Shimer and Murray in late 2000 or 2001 as equivalent of "hatching some scheme" has no basis in fact and is not supported at all by any credible evidence.

It is not unreasonable to ask "why didn't the CFTC call Murray as a witness at trial?" Clearly they had that right and Murray could not have refused to testify as a witness for the CFTC. (See Consent Order for Permanent Injunction signed by Murray 3/27/07, paragraph 8, page 4). Plaintiff had every opportunity to try and impeach Shimer's credibility about the circumstances surrounding many of the initial meetings Shimer had with Murray as the relationship between the two developed. Shimer would have been restricted to cross examining Murray only on what he testified about. The CFTC had full control of that potential witness and yet chose not to call him at all. Shimer is, therefore, entitled to have his uncorroborated testimony at trial taken at face value and to be viewed as credible by the Court.

Murray's reaction to Shimer's documentation when Shimer showed it to him was not at all defensive. There is no credible evidence at all on the record that contradicts the fact that Murray expressed genuine concern at his first North Carolina meeting with Shimer—not just for the fact that Shimer and the company Kaivalya had been victimized but also for the fact that Murray's name was clearly on documentation that was in Shimer's possession. If Shimer decided to pursue his options in Florida there was a substantial likelihood that Murray might be dragged into either civil litigation or become the target of an investigation by Florida authorities to determine his involvement if any.

The uncontroverted testimony of Shimer during trial indicates that Murray's reasons for working with Shimer were not at all "inexplicable" (Plaintiff's trial brief dated August 20, 2007, page 7, sentence 2 of paragraph 2). Murray had a lot to gain (the possible funding of his system (as it purportedly needed to be funded) by working with an attorney and his clients. If Shimer decided to pursue his possible options against Latulippe and Leonard in Florida Murray also had a lot to lose if he was forced to spend unnecessary time proving to government authorities that he was not connected with Latulippe and Leonard in any way. This was true regardless of whatever he had actually done or not done. After all, his name was on the documentation Shimer had shown him.

There is absolutely no evidence in the record to contradict the fact that it was reasonable for Shimer to take Murray at his word that Murray had nothing to do with the fraud perpetrated by Latulippe and Leonard based upon Murrays' apparent attitude and demeanor. Shimer then and to this day has never seen any evidence that funds from Latulippe or Leonard were ever sent to Murray for trading nor has the CFTC produced any evidence that Murray ever received any funds from Leonard or Latulippe. Nor does the consent agreement signed by Murray support any inference that he ever received any funds from either Latulippe and Leonard or that he actively participated in any way in the fraud perpetrated by Latulippe and Leonard against Shimer and the entity Kaivalya.

Not only did it make perfect sense that Murray work with Shimer and his clients—it made perfect sense to Shimer to work with Murray. Chasing two crooks all over Florida did not make much sense if Murray was willing to allocate a portion of any profit split his company received from trading funds to help repay Kaivalya's lenders. Shimer also knew from direct experience that if he pursued Leonard or Latulippe vigorously in Florida it would take resources he did not have. Litigation can often take years and there was no guarantee any of the funds could ever be located. Shimer's time was clearly better spent coming up with a positive solution if that was possible with Murray and his apparently brilliant intraday systematic approach to commodity futures trading.

Tech's Agreement with the separate properly formed Nevis entity Shadetree was executed by the authorized representatives of each party to that agreement and Plaintiff has introduced no evidence to the contrary. Moreover there is absolutely no evidence that

the Agreement executed by and between Tech and Shadetree was not executed in good faith at least by Shadetree. Shadetree's good faith can be reasonably inferred from the fact that Tech's rates of return had not yet been verified by Abernethy in August of 2001, nor had any funds been placed with Tech by Shasta as of the date of the Shadetree/Tech Agreement. No one knew what Tech's monthly verified rate of return would be prior to Abernethy's first AUP letter dated October 22, 2001. Shimer at all times acted in good faith when he drafted the profit sharing Agreement dated August 3, 2001 for the signature of the representatives of Shadetree and Tech and Plaintiff has produced absolutely no evidence to the contrary.

The failure to disclose the terms of the Agreement that existed between Tech and Shadetree was not a material omission.

In retrospect the existence of Tech's agreement to further share a part of its allocated profits should clearly have been disclosed. That is especially true in light of the fact that its non disclosure has been touted again and again throughout this matter by the CFTC as evidence of Shimer's apparent bad faith. But again the following question has to be honestly asked and answered by the Court: would the disclosure of this agreement and the reason for its creation have dissuaded any investor from placing funds with Shasta in the absence of any information or knowledge that the returns being reported were not accurate? Shimer's testimony that the agreement itself would probably have a relatively short existence once Kaivalya was repaid has not been contradicted at all by any credible evidence. Several investors had discussed their concern with both Shimer and Firth that Murray might take the same course of action with Shasta at a certain point in time if he had enough to trade peacefully on his own.

Every member of Shasta who had discussed that issue with Shimer had expressed their concern the "trader" might do that with respect to Tech's agreement with Shasta. If disclosure of the Tech/Shadetree Agreement had been made, the only real objection anyone would have (in light of the 5-6% return being allocated to them each month) was the possibility that they might get more if the Tech/Shadetree Agreement did not exist. But the 50/50 profit split after provision for Tech's expenses was a standard approach Murray took with every entity. Murray may have had sufficient reason to appease Shimer

in the short term but there was no reason for Murray to allocate more to Shasta and its members than the Shasta/Tech Agreement already provided.

There was an even less likelihood that any Shasta member would have honestly considered the Tech/Shadetree agreement to be a "deal breaker" in light of the unprecedented existence of the preferred return from available profits that was allocated to Shasta for its members. That sort of protection to an investor by requiring a trading entity to realize at least a 2% return per month before the trader was entitled to even receive an allocation for office overhead or salaries was literally unheard of in the industry. The bottom line is this: without any indication there was anything amiss with a consistent verified rate of return approximating 5-6% a month would any of Shasta's investors really "walked away" from a monthly return like that merely because the trader was willing to help Shasta's attorney solve a past problem that had nothing to do with Murray and no apparent influence at all on the outside CPA Abernethy who was conducting this monthly verification. The existence of the Agreement did not have any rational likelihood of affecting the trader's performance in any way.

An examination of the case law cited by Plaintiff in footnote 5 of page 22 of its trial brief indicates that in *every single one* of the cases cited, the individual or entity who failed to disclose a particular fee or commission agreement was *already registered* in some capacity with the CFTC. Full disclosure of fees in that sort of circumstance is critically important because the payment of a fee not disclosed may hide a preferential attitude about a particular fund or investment strategy on the part of the broker or investment firm. Knowing who is paying for what is *critical* in the broker/client context. The broker or the FCM is directly handling the client's money and/or likely to make certain investment recommendations to the client. How does the necessity and importance of full disclosure of fees in that context necessarily apply to the current matter where the Agreement between Shadetree and Tech had no actual impact or influence at all on either the trader or the verifying CPA or on the profit split already negotiated between Shasta and Tech that was already found to be eminently acceptable to all of Shasta's members.

The reality is that a preponderance of the evidence clearly indicates that there was no "substantial likelihood" that any of Shasta's members would have turned their back on

the Shasta investment in 2002, 2003 or early 2004 if the existence and terms of the Shadetree/Tech Agreement had been disclosed. Was it disclosed? No it was not. Should it have been disclosed? Yes it should have been disclosed. Was its non disclosure a material non disclosure for the purpose of attributing Section 4b2(a) or Section 40(1)(A) fraud to Shimer or Firth? No--not under the current standard required by existing case law precedent.

The failure to disclose the terms of the Agreement that existed between Tech and Shadetree was not an omission made with the required scienter.

In light of all of the above cited facts and argument the most that can be said for Shimer and Firth's failure to disclose the Shadetree/Tech Agreement was that its non disclosure was ill advised, stupid and at the very worst negligent. But where is the evidence sufficient to support that a preponderance of the evidence that this particular non disclosure was "an extreme departure from the standards of ordinary care". *See, e.g., Messer v. E.F. Hutton & Co.,* 847 F.2d 673, 677-79 (11th Cir.1988). Exactly was this non disclosure "highly unreasonable" or present a "danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it." *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194,

Where is the connection between the existence of this agreement and any aspect of the Shasta investment that Shasta's members considered significant or important when deciding to invest. The impact of the Shadetree/Tech Agreement had no impact on the return being earned by Shasta's members. There was even precedent known to Shimer though not introduced at trial that Tech had previously negotiated a 15% number for Tech's expenses prior to the splitting of profits from trading with another entity. There was no evidence presented by Plaintiff at trial that the terms of that agreement adversely affected the rate of return that Murray was willing to allocate to *Shasta and its members. The only effect the Shadetree/Tech agreement had was on Tech's* share of profits allocated to Tech under the Shasta/Tech agreement. If Tech was willing to be generous for a limited time with its own share of the properly allocated profits would that have really be a serious concern to Shasta's investors?

The connection between the Shadetree/Tech agreement and the verification process being performed by Abernethy was virtually non-existent. Where was the "danger" with respect to the consistency of Tech's performance or the validity of the verification of that performance being performed separately by Abernethy—both primary and obvious reasons prospective investors became members of Shasta. Where was the "danger" associated with Tech's separate willingness to benefit the entity Shadetree and the previous lenders of Kaivalya that were repaid as a result of written authorization received by Tech from Shadetree's trustee. The Court can be certain that if clear documentation in writing had *not* been received by Tech for every regular monthly disbursement made by Tech at Shadetree's specific direction to either Kaivalya or Equity Plaintiff would have made a point of that at trial. The Plaintiff never did for obvious reasons.

In retrospect with the advantage of 20/20 hindsight it is clear that payment to Kaivalya was made from funds that did not belong to the entity Shadetree. There is no evidence in the record Shadetree knew that was true at the time these payments occurred nor is there a preponderance of the evidence that Shimer knew or should have known that either. Shimer relied upon Teague to handle the development of the Agreed Upon procedures. The written record fully supports the undisputed fact that Shimer expressed that expectation to Teague on three separate occasions. Shimer never received *any* indication from her that his clear expressed expectation was wrong, misplaced or unrealistic.

On the contrary the evidence clearly shows that Abernethy's resume reflected reasonably sufficient background and skill to compute a rate of return from brokerage statements and the record also indicates that Teague apparently concurred and described to Shimer, Firth and several members of Shasta as a "mini audit" on more than one occasion the proposed verification procedures that had been explained to her by Abernethy on July 26, 2001. The responsibility of ensuring that the verification being performed by Abernethy each month was adequate for the purpose intended was a responsibility that Shimer clearly delegated to Teague and there is absolutely no evidence in the record that Teague ever declined that responsibility or indicated any reluctance to

assume that initial responsibility in the summer of 2001. Teague's after the fact deposition to the contrary is contradicted by the clear written record.

Shimer was fully justified in his expectation that the funds disbursed by Tech on the specific written authorization of the entity Shadetree for the benefit of the entity Kaivalya were funds of the entity Shadetree. The fact that we now know the verification procedure of Tech's trading performance was deficient is not sufficient reason to impose responsibility upon Shimer or Firth. That responsibility has properly fallen on the shoulders of those who have already consented in writing to assume financial responsibility for their fraudulent behavior.

D. Regarding whether Shimer and Firth knowingly or recklessly misrepresented or failed to disclose material information about their experiences in dealing with Coyt Murray and Tech Traders

Facts Regarding the issue of whether Shimer and Firth knowingly or recklessly misrepresented or failed to disclose material information about their experiences in dealing with Coyt Murray and Tech Traders

There were no red flags about Murray or his past that Shimer and Firth failed to disclose

Regarding Shimer's brief luncheon with Murray in 1999

Shimer met Murray for the first time in the Bahamas briefly in the fall of 1999 in the rather controlled context of a single luncheon meeting that may have lasted for an hour or hour and a half. (Trial transcript 9/4/07, page 58, lines 16-25, page 59, lines 1-25). Shimer did not see or encounter Murray again until the fall of 2000.

Shimer's association with Murray in 2000 & early 2001

Shimer told Murray on the phone that two individuals Jerry Latulippe and Thomas Leonard who had invited Shimer to the Bahamas to meet Murray in the fall of 1999 were raising funds using a company's stock as collateral to guarantee repayment of funds they sought to borrow. Shimer told Murray that Latulippe and Leonard had received funds from several persons including Shimer and a company associated with Shimer (Kaivalya

Holding Group, Inc.) and had not returned the funds as agreed. (See trial transcript 9/4/07, page 63, lines 24-25, and page 64, lines 1-8). Shimer had originally been told that the funds received by Latulippe would be placed with Murray for trading. Leonard later admitted to Shimer that the funds sent to Latulippe by Shimer and the company Kaivalya had not been placed with Murray as agreed. (Trial Transcript 9/4/07, page 63, lines 10-16).

When Shimer met with Murray in Murray's office in North Carolina in the fall of 2000, Murray assured Shimer that Murray had never received any of Kaivalya's funds from Latulippe or Leonard. (Trial Transcript 9/4/07 page 65, lines 8-24). Murray's office was equipped with many computers and had all the appearance of a legitimate trading office. (Trial Transcript 9/4/07 page 66, lines 11-19).

Murray's operation was a family business, He worked with two sons and a son-in-law. (Trial Transcript 9/4/07, page 67, lines 4-15). What Shimer was subsequently told over time by Murray about Murray's licensing arrangement with Hubert Pinder during 2000 was not inconsistent with what Shimer saw during his brief visit to the Bahamas in the fall of 1999. (Trial Transcript 9/4/07, page 68, lines 5-17). Pinder had the funds to trade the system in the Bahamas during 2000 but it was difficult to provide proper training and follow up by long distance from North Carolina and so the arrangement with Pinder was not successful. (Trial Transcript 9/4/07 page 70, lines 3-16). Murray's trading system was apparently always in a state of development or tweaking because it was a multi-component system and the markets were always changing so various systems would be optimized or changed depending on market conditions. (Trial Transcript 9/4/07, page 68, lines 16-25).

Murray needed funds to properly fund his trading system and Shimer was looking for a solution to the difficulty that Latulippe and Leonard had created. (Trial Transcript, 9/4/07, page 72, lines 16-20. The only loss Murray suffered that Shimer knew about prior to beginning a relationship with Murray was due to a power outage. (Trial transcript 9/4/07, page 73, lines 5-21). Shimer's conversations with Murray raised no red flags or inconsistencies about Murray or the trading system he purportedly developed with his son Lex. (Trial Transcript 9/4/07, page 74, lines 5-17).

Shimer learned that Murray was willing to receive funds from Latulippe or Leonard. (Trial Transcript 9/4/07 page 74, lines 18-20). Shimer sent Murray a fax introduced as Exhibit 1020 that told Murray if he planned to accept funds from Latulippe and Leonard, Shimer and Firth were not willing to continue the relationship with Murray and recommended that Murray issue a cease and desist letter to Leonard and Latulippe. (Trial Transcript 9/4/07, page 76, lines 4-21). Shimer's file contained a copy of a letter from Murray to Tom Leonard issuing a cease and desist letter to Leonard dated shortly after Plaintiff's Exhibit 1020. The letter from Murray to Leonard was admitted into evidence as Shimer Exhibit 1050. Knowledge that Murray had followed through and had issued that cease desist letter provided Shimer with comfort about Murray. (Trial Transcript, 9/4/07, page 81, lines 6-8).

The materials in the white three binders provided by Murray provided detailed and impressive information about Murray's purported trading system

Information about Murray's trading system was provided by Murray to Shimer and Firth in a white three ring binders. (Trial transcript 9/4/07, page 28, lines 21-25). Shimer attempted to provide as full and complete disclosure as possible of Murray's trading system from information about the trading system provided by Murray. (Trial Transcript 9/4/07, page 32, lines 23-25 & page 33, lines 1-4). Information about the trading system was provided to prospective members in Shasta's Private Placement Memorandum (Trial Transcript 9/4/07, page 33, lines 5-13). Information about the trading system was also provided on a web site available to investors. (Trial Transcript 9/4/07, page 33, lines 9-13). The reason for creating a web site was because Murray's trading system was quite complicated and the information was quite detailed. (Trial Transcript 9/4/07 page 34, lines 6-25 & page 35, lines 1-3).

Shimer Exhibit 59C was a color reproduction of one particular page of Plaintiff's black and white Exhibit 1001 and was introduced into evidence by Shimer to provide an accurate reproduction of what all pages of Plaintiff's Exhibit 1001 looked like when they were provided in color in the white three ring binders provided to Firth and Shimer by Murray. Page RS07643 of Plaintiff's Exhibit 1001 is an accurate color reproduction of

what that particular page looked like in the white 3 ring binder that Shimer received originally from Murray. (Trial Transcript 9/4/07, page 36, lines 6-16).

Page RS07643 displays the images generated on a computer monitor by a particular sub system (identified as NQ6M) of Murray's overall trading system created for a 6 minute intraday chart of the NASDAQ on December 21, 2000 . (Trial Transcript 9/4/07, page 36, lines 19-24). Shimer spent several pages of trial transcript describing his best recollection of what the various images on page RS07643 meant. (See trial Transcript 9/4/07, page 37, lines 10-25, page 38, lines 1-25, page 39, lines 1-25 and page 40, lines 6-25 and page 41, lines 1-25 and page 42 line 1-4. Shimer's trial testimony also referred to page RS07586 of Plaintiff's Exhibit 1001. That particular page summarized the various purported advantages of Murray's trading system. Shimer referred to several of those specific advantages in his trial testimony. (See trial Transcript 9/4/07, page 46, lines 17-25, page 46, lines 1-25; page 47, lines 1-25; page 48, lines 1-25, page 49, lines 1-25; page 50, lines 1-25; page 51, lines 1-25; and page 52, lines 1-7).

Paul McManigal, an investor in Shasta, stated that Murray's trading system as described on Shasta's web site was "unusual". (Trial Transcript 8/30/07, page 27, lines 6-8). McManigal was a retired physicist who worked in the aerospeace industry and had been making generally successful investments on his own since he was 20 years old. (Trial Transcript 8/30/07, page 5, lines 24-25 and page 6, lines 1-9). He reviewed Shasta's web site and spent time trying to understand the logic or how the trading system was put together. (Trial Transcript 8/30/07, page 25, line 25 & page 26, lines 1-23). Shasta investor Philip Tate testified after being shown Plaintiff's Exhibit 1053 (which reflects a portion of Shasta's web site that described the trading system's mathematics and trading strategy) and found the description there sufficiently impressive that it influenced his decision to invest. (Trial Transcript 8/30/07, page 34, lines 23-25 and page 35, lines 1-15).

Tom Dent testified that he liked the fact that the trading system was a day trading system which made him feel that aspect helped to minimize risk (Trial Transcript 8/30/07, page 101, lines 11-15). He also remembers the fact that the trading system consisted of multiple systems and that was impressive. (Trial Transcript 8/30/07, page 101, lines 23-25; and page 102, lines 1-10). Dent got his information from the web site. (Trial

Transcript 8/30/07, page 103, lines 14-16). Dent also knew the daughter of Jim Chambers and that she had told him her father had seen the trading system and was impressed by what he saw. (Trial Transcript 8/30/07, page 34, lines 23-25).

Nick Stephenson was a relatively sophisticated high net worth investor in Shasta (See Stephenson deposition page 10, lines 14-25 & page 11 lines 1-11). (See also Stephenson deposition page 12, lines 16-19). Stephenson actually visited Murray's trading offices and had an opportunity to speak directly with Murray about the trading system. (Stephenson Deposition page 121, lines 10-12). Stephenson put even more funds with Shasta in addition to his initial investment after his visit to Murray's office because he "felt that there was something pretty darn unique here." (Stephenson Deposition, page 148, lines 19-21). Stephenson also stated in his deposition testimony that he liked the idea that the system was "capturing little movements within the markets" to achieve what he describes as "stable returns". (Stephenson Deposition, page 60, lines 6-9).

The returns of the entity Edgar Holding Group in early 2001 reported to Shimer by Murray were not a "red flag"

In late February or early March, 2001 Shimer received written communication from Murray of the initial success of funds placed with Murray's company by the entity Edgar. (See Plaintiff's Exhibit 1130, page 1). Murray's letter advised Shimer that Murray had "achieved a gross profit of $90,796.00 of which $40, 858.20 was credited to Edgar's account for the period ending February 16, 2001. (See also Trial Transcript, 8/28/07, page 36, lines 7-9).

Sometime in early March Shimer received a second follow up communication from Murray confirming that as of the end of February, the *total* amount credited to the entity Edgar's account with Murray for the entire 6 week period of time that Edgar's funds had been in trade with Murray was $318,616.00. This new total balance reflected a total profit of $68,616.00 for the entire 6 week period that Edgar's funds had been in trade. (See page 2, Plaintiff's Exhibit 1130). This second communication indicated that as expressed as a percentage of Edgar's original investment Edgar's funds had earned a total

return before profit sharing of 60.382% in just 6 weeks. Plaintiff has produced no evidence into the record that directly contradicts the accuracy of the statement received by Shimer from Murray.

Murray's third written communication to Shimer is found as page 3 of Plaintiff's Exhibit 1130 in which Murray reported to Shimer a net profit of $16,568.00 for Edgar which represented a 5.2% net return on Edgar's previous ending net balance of $318, 616.00 effective March 31, 2001. (See Page 3 of Plaintiff's Exhibit 1130). This third communication from Murray refers to what he considered to be a bear market rally in the NASDAQ. Murray also refers in this same communication to four recent rates cuts by the Federal Reserve in as many months dropping the overnight Fed Funds Rate (the rate that banks lend to each other overnight) to 4.5%.

Murray's fourth written communication to Shimer is found as page 4 of Plaintiff's Exhibit 1130 in which Murray reported to Shimer an additional net credit to Edgar's account of $14,318.00 for the month of April, 2001 as well as a $40,000.00 debit. This communication purports to contain a rather technically oriented discussion of internal adjustments Murray was supposedly making to his trading system in response to market conditions.

Murray's fifth and last written report in letter format to Shimer (page 5 of Plaintiff's Exhibit 1130) reported an additional credit of $12,712.00 to the Edgar account as well as a withdrawal of $20,000.00.

In sum, the first four letter reports covering a period of 3 ½ months (from mid January until April 30, 2001 reflect an apparent total gross profit of approximately $190,855.00 which represented a return on investment of 75.11% over that 3 ½ month period. (See First 4 pages of Plaintiff's Exhibit 1130)[1]

The consent order signed by Murray on March 27, 2007 does not refute the possible accuracy of the information provided to Shimer for the limited time period covered by Murray's cited correspondence. Murray's consent order only recites the fact

[1] This overall gross return was calculated by adding together the following amounts:
$150.955.00 (the amount reported by Murray for the 6 week period ending February 28, 2001)
$36,820.00 (the approximate gross amount of profit necessary to equal the reported net to Edgar of $16,568.00 for the month of March).
$31,820.00 (the approximate gross amount of profit necessary to equal the reported net to Edgar of $14,318.00 for the month of April).
$190,855.00 and then dividing by $250,000.00 = 75.11%

that from the period of time from 1998 until April 1, 2004 Murray "pooled proprietary and pool participant funds" (See Consent Order of Permanent Injunction, page 6, first sentence of paragraph Numbered 4).

The consent order signed by Murray also states only that Murray lost $10,523,170.00 during the relevant time period which is not defined but is assumed to be from 1998 until April 1, 2004. (Consent Order for Permanent Injunction page 7, second full sentence of paragraph number 6 appearing on that same page 7). The consent Order does not specifically refer to the months of January, 2001, February 2001, March, 2001 or April, 2001 and reflects no specific findings with respect to whether Murray lost money or made money trading during the particular months covered by Plaintiff's Exhibit 1130.

Plaintiff would prefer the Court to assume that the returns in early 2001 were similar to those reported by Susan Koprowski for later months. Plaintiff has provided no evidence on the record that contradicts the stated returns reported to Shimer by Murray for the time period in early 2001 ending May 2001.

Argument: Shimer and Firth did not knowingly or recklessly misrepresent or fail to disclose material information about their experiences in dealing with Coyt Murray and Tech Traders

Shimer's association with Murray in the Bahamas in the fall of 1999 was brief and relatively inconsequential. His next meeting with Murray in the fall of 2000 and subsequent meetings with Murray in late 2000 and 2001 did not reveal any discrepancy with what he saw and heard in the Bahamas in 1999. (Trial Transcript 9/4/07 page 68, lines 5-9). Nor was there any discrepancy in Murray's later explanation to Shimer in Murray's offices in North Carolina of Murray's previous association with Hubert Pinder or the development of Murray's trading system and its previous use by Pinder in the Bahamas. (Trial Transcript 9/4/07, page 67, lines 17-25 and following page 68, line 1-15).

Plaintiff tried to make much at trial of an alleged "discrepancy" between Shimer's previous deposition testimony about the *source* of any information Shimer might have had about the licensing of Murray's trading system to Pinder at the time Shimer first met

Murray. (See Trial Transcript 8/28/07 page 15 lines 15-25 and page 16 lines 1-6). A careful reading of Shimer's previous deposition testimony indicates that Shimer never specifically stated during his previous deposition testimony that the *source* of any information he had at that time about the relationship that existed between Murray and Pinder came directly *from Murray* during that first meeting with Murray in the Bahamas. Plaintiff's counsel simply *assumed* that from Shimer's answer.

Plaintiff's counsel never asked Shimer any follow questions during his deposition for more information about the *actual circumstances* surrounding Shimer's first meeting with Murray. If she had, she would have been in more possession of the facts. Plaintiff's failure to elicit the fact that Shimer's first and only meeting with Murray occurred over lunch with 5 or 6 other people in attendance is not the fault of Shimer.

It was the individuals Tom Leonard and Jerry Latulippe that had invited Shimer to the Bahamas (Trial Transcript 9/4/07, page 58, lines 21-24). Leonard and Latulipe had evidently set up a luncheon opportunity for Shimer to meet Murray (Trial Transcript 9/4/07, page 59, lines 6-10). Several other people had lunch with Murray at that same time also apparently expecting to meet with Murray as well. (Trial Transcript 9/4/07, page 60, lines 5-10). Any information Shimer had at that time of his first meeting with Murray about *why* Murray was in the Bahamas or what his exact relationship was with Pinder would have more likely, therefore, come from previous conversations Shimer had with Leonard or Latulipe before Shimer even traveled to the Bahamas.

This is particularly true in light of the rather controlled circumstances of that meeting. Leonard and Latulippe's choice of a meeting over lunch with several other people, in retrospect, was probably an effective way to limit "one on one" exposure to Murray out of concern that Shimer might later try "circumvent" them and deal directly with Murray. (Trial Transcript 9/4/07, page 59, lines 6-16).

Plaintiff's willingness to try and "tell its version of the story" with insufficient facts is not new. This is a clear pattern found in the obvious fact (as mentioned previously on several occasions in several pretrial motion briefs) that Plaintiff filed its original complaint in this matter 1) without a clear understanding that it was the entity *Tech* that was doing all of the trading (Tech and Murray were not even named as defendants in the Original Complaint); 2) without any understanding of the relationship that clearly existed

between the local verifying CPA Vernon Abernethy and Shasta's CPA Teague; 3)without any knowledge that Vernon Abernethy even existed as Tech's local verifying CPA (Abernethy was not named as a defendant either in the Original Complaint).

Clearly there was no reasonable excuse for the CFTC Enforcement Division's lack of necessary information. Its "investigation" of Shasta had begun in the fall of 2003 or in earnest certainly by January of 2004 but the Original Complaint was not filed until April 1, 2004. During all of that time *not once* did the enforcement division in Chicago ever contact either Shasta's CPA Elaine Teague in Portland or Shasta's attorneys at Arnold & Porter in Washington, D.C. [2]

Instead, all sorts of unjustified assumptions were made and 4 months went by when more and more funds continued to come into Shasta without any indication to Shasta's manager or its legal counsel that the actual rate of return numbers received through Teague might not be accurate. Almost the entire shortfall difference between what will probably be returned to Shasta's investors by the Receiver and the amount of their original investment came into Shasta during that period of time.

Shimer never specifically stated that he was told *by Murray* while Shimer was in the Bahamas that Pinder had licensed Murray's system. This particular attempt by Plaintiff to impeach Shimer's overall credibility by harping on an alleged "discrepancy" between what Shimer said at trial and the way he answered a particular question 2 years ago during 5 days of deposition is clearly a tempest in a teapot. It is typical of what often happened throughout the trial.

There was absolutely nothing about Murray's demeanor or attitude or Murray's subsequent explanation during conversations with Shimer in North Carolina during late 2000 and early 2001 when Murray's previous relationship with Hubert Pinder and his unsuccessful licensing arrangement with Pinder were discussed that stood out in any way as a reason to believe that Murray had participated in *any previous* fraud or that Murray

[2] The CFTC cannot assert with any credibility that it did not have actual or, at the very least, constructive notice that Arnold & Porter represented Shasta because that fact was clearly posted on the Hedgeco web site (http://www.hedgeco.net/) specifically mentioned twice by Plaintiff in its Original Complaint filed April 1, 2004. (See Original Complaint ¶ 23, page 8 and Original Complaint ¶ 26, page 9).

planned to commit fraud against Shimer or Shimer's possible clients in the future. (Trial Transcript 9/4/07, page 74, lines 5-17).

In the fall of 2000 and in early 2001 Murray simply appeared to be in need of additional funds to properly fund what purported to be a trading system that was able to accurately predict short term market movements intraday. Working creatively with Murray to achieve Murray's funding goal seemed to be a more positive and fruitful way of possibly also recovering the funds that Latulippe and Leonard had misappropriated from Shimer's client Kaivalya than fruitlessly pursuing either of those individuals all over the state of Florida or to various offshore destinations. (Trial Transcript 9/4/07 page 71, lines 22-25 and page 72, lines 1-20).

Any continued willingness on the part of Murray to take funds from Latulippe or Leonard in the spring of 2001 was obviously a matter of concern to Shimer. (Trial Transcript 9/4/07, page 75, lines 16-25; page 76 lines 1-25; and page 77, lines 1-2). That concern on Shimer's part was alleviated by Murray's willingness to issue a cease and desist letter to both Leonard and Latulippe. (Trial Transcript 9/4/07, page 79, lines 10-13). Other than ambiguous innuendo, Plaintiff has introduced no evidence at trial of any fact material to Murray's past that either Shimer or Firth were under a duty to disclose to Shasta's investors.

The materials in the white three binders provided by Murray offered detailed and impressive information about Murray's purported trading system

As indicated by the detailed information provided by Shimer at trial, Murray's Synergy Trading System purported to be a comprehensive and brilliant use of traditional technical analysis combined with the use of what Murray called "rocket science" to create an intraday trading system that appeared to offer a natural hedge within itself to the risks otherwise inherent in the futures trading of stock indexes. Investors generally found impressive the description on Shasta's web site of the trading system provided to Shimer and Firth in the white three ring binders. With the exception of David Kaplan (who had other reasons not relevant for pretending to be interested in Murray's trading system) those who visited and saw Murray's trading system either invested or increased their

original investment. Tom Dent mentioned Jim Chambers as being someone that had visited Murray's office and seen the trading system. Chambers invested. Nick Stephenson not only invested but more than doubled his investment after visiting Murray's offices in November of 2003.

There was nothing about the description of the trading system itself that provided Shimer and Firth or anyone else with any inkling that Murray's information about that trading system was inaccurate or unrealistic. Just the opposite. The system as described on Shasta's web site purported to be a careful and detailed explanation of an exciting and sophisticated approach to minimizing the overall risk inherent in commodity futures trading. Plaintiff did not introduce any evidence at trial to establish that the description of the system itself as presented on Shasta's web site and as provided to Shimer and Firth in those two white three ring binders was anything other than a good faith reproduction of information that had been previously provided to Shimer and Firth by Murray.

Plaintiff's contested fact #9 in the Joint Pretrial Order that the material provided to Shimer and Firth by Murray in the white three ring binders was not a sufficient basis to recommend the trading system to investors is ridiculous for several reasons. First of all there is no evidence in the record that Shimer or Firth *ever* represented to *anyone* that the information describing the trading system available on Shasta's web site was, by itself, an adequate reason to invest. Nor is there any evidence that any investor, on his own, relied only on the web site's description of the trading system. Clearly any investment decision is the result of a number of factors. The description of Murray's trading system available for review on Shasta's web site was just one of many factors that contributed to whether or not an investor became a member of Shasta.

The returns of the entity Edgar Holding Group in early 2001 reported to Shimer by Murray were not a red flag to Shimer

The Court might be tempted to agree wholeheartedly with Plaintiff's predictable position that a gross rate of return of 75.11% in three and one half months on Edgar's initial $250,000.00 that began trading with Murray in mid January, 2001 was a red flag to Shimer about Murray and his trading system. But was it really? How "unrealistic" was

this reported total rate of return as of the end of April, 2001? The Court shut its eyes to receiving a balanced and fair answer to that question by refusing to allow Shimer to admit his Exhibit 2F into evidence. (Trial Transcript 9/4/07, page 103, lines 3-4). Shimer pointed out to the Court (at trial transcript 9/4/07, page 102, lines 7-15) that by introducing Shimer Exhibit 2F Shimer sought to include in the record information that there were, indeed, trading entities out there at or about this same time that were legitimately reporting what most people would consider to be unbelievable monthly rate of returns.

Plaintiff clearly preferred that the Court not review as a part of the record that the fully registered entity Hanseatic Discretionary Pool, LLC SB-2 filing with the SEC on July 6, 2001 reflected a rate of return of 47.77% for just the month of March, 2000 for that entity and an even *better* rate of return of 52.11% for the next month of April, 2000![3] (This information was also specifically referred to on page 15 of the Joint Final Pre-trial Order).

That information, if allowed into evidence by the Court over Plaintiff's objection, would have provided the Court with objective reliable confirmation that at least one registered trading entity had achieved an audited combined rate of return of 99.88% for only about 44 days of consecutive trading during the calendar year just prior to the year that the entities New Century and Shasta were formed—a track record that was 24.77 percentage points *higher* for 45 *fewer* days than what was being reported to Shimer by Murray in early 2001 as a result of the funds that had been placed with Murray by the entity Edgar Holding Group, Inc. ! And this SB-2 form was filed with the SEC on July 6, 2001—basically the same general time period for Murray's reports to Shimer. In short these sorts of returns are not usual. But just because they are extraordinary does not mean they are impossible to achieve. Given the purported sophistication of the trading system as it was represented to Shimer and Firth and that trading system's apparent ability to incorporate very sophisticated mathematical algorithms to predict intraday market

[3] The SEC web site URL on which this information is readily available under the EDGAR reporting system of the SEC is http://www.sec.gov/Archives/edgar/data/1077524/000106036901500006/hasb2701.txt

movements, it was not at all unrealistic for Shimer to legitimately conclude that Murray's reports, though extraordinary, were accurate.

In its post trial brief Plaintiff will undoubtedly seek to make much of the fact that the performance being reported by Murray to Shimer in those very early months of 2001 was, in and of itself, somehow a "red flag"--that Murray's performance was not at all "realistic" and that "Shimer either knew or should have known" that to be true. Since the Court was unwilling to allow Shimer to show that extraordinary performance *far better* than the reported performance of Murray's Synergy Trading System in early 2001 was not out of line with what fully audited and properly registered trading entities had been able to achieve, the Court should in all fairness, at least give no weight at all to Plaintiff's argument that the return reported by Murray for funds of the entity Edgar Holding Group, Inc. placed with Murray's company in early 2001 were an obvious "red flag" to Shimer about Murray and Murray's trading system.

Plaintiff would prefer to focus on what it seeks to imply were unrealistic returns being reported to Shimer by Murray in early 2001 while at the same time ignoring the extraordinary accuracy of Murray's overall unsolicited monetary analysis found in Murray's third communication to Shimer that reported his purported trading performance for Edgar's funds during the month of March, 2001. (see page 3 of Plaintiff's Exhibit 1130). Anyone familiar with the meltdown—especially in the NASDAQ market index that continued unabated until October of 2002 after the bear market rally that continued for approximately another 6 weeks (apparently just as predicted by Murray in this communication to Shimer in early April) will have to admit that the last two paragraphs of Murray's third communication to Shimer (found as page 3 of Plaintiff's exhibit 1130) were particularly insightful about the overall market trend as well as the ineffectiveness of Fed monetary policy in stemming the continuing 2001 market decline.

Unless this third communication from Murray to Shimer was simply copied by Murray from some other publication without Shimer's knowledge, this philosophical observation by Murray *written in the early part of April, 2001* about the ineffectiveness of four separate interest rate adjustments downward in as many months by the Fed in preventing a further erosion in market values reveals, in retrospect, an extraordinary

ability on the part of Murray to apparently predict a continuing bear market trend that basically continued in the NASDAQ for another 17 months until October 2002.

Regarding whether Shimer and Firth knowingly or recklessly misrepresented the rate of return numbers reported by the entity Shasta to its members

Facts regarding Shimer and Firth's reasonable basis for relying on Abernethy and Teague to verify a rate of return

Shimer brought a prospective investor David Kaplan to meet with Murray in February, 2001. (see Trial Transcript 9/4/07, page 82, lines 11-16). After that meeting with Kaplan Shimer concluded that independent verification of Murray's trading system was the only sound basis for moving forward in a relationship with Murray if outside investor funds were raised and placed with Murray. (See trial Transcript 9/4/07, page 83, lines 3-7). Plaintiff's Exhibit 1118 is a March 1, 2001 fax from Shimer to Murray and reflects Shimer's suggestion to Murray that the trading performance of his system be independently verified. Shimer suggests that his friend Elaine Teague perform that independent verification. (Trial Transcript, 9/4/07, page 83, lines 16-25).

On March 23, 2001 Shimer called Elaine Teague and spoke to her about that possibility. (See trial transcript, 9/4/07, page 85, lines 20-23). Shimer had not seen or spoken with Teague in about 10 years prior to his call on March 23, 2001 (See trial transcript, 9/4/07, page 87, lines 9-12). Teague was willing to perform independent verification of trading performance. She did not express any resistance or reluctance at that time to the idea of providing verification of trading performance as long as she received a copy of monthly original brokerage statements from the brokerage firm. (See trial transcript, 9/4/07, page 86, lines 7-18.) See also contemporaneous corroboration of Shimer's trial testimony provided by Shimer Exhibit 5-A.

Shimer faxed Teague a letter dated March 24, 2001 the day after his telephone conversation with her. (See Plaintiff's Exhibit 407). In this first written correspondence to Teague Shimer provided her with a brief description of Tech's trading system as it had been described to Shimer by Murray. (See Plaintiff's Exhibit 407, page 1 paragraph 1).

Shimer also discussed the services that New Century was seeking from Teague and her firm. (See Plaintiff's Exhibit 407, pages 2 and 3). Shimer specifically requested that Teague and her firm provide verification of the performance of the entity that Shimer described at that time only as the "private trading group". (Plaintiff's Exhibit # 407, page 3, subparagraph numbered 3). Though not specifically identified by Shimer by name at that time, the "private trading group" reference in this correspondence to Teague was the defendant Tech Traders--owned and controlled by Defendant Murray. The Plaintiff has never argued otherwise.

Shimer also indicated to Teague that a foreign Limited Liability Company, New Century Trading, LLC had not yet been formed but would be formed shortly to provide investors with access to a mix of various hedge funds with extraordinary track records apparently verified by independent audit. (See paragraph 3, page 1 of Plaintiff's Exhibit 407). Teague was provided with a brief description of four funds proposed for investment by New Century as well as the reported return on investment track record since inception for those particular funds. The first fund being considered for investment by New Century had a return on investment since its inception four years previously in January 1997 of 793.84%. (Subparagraph 1 of last paragraph on page 1 of Plaintiff's Exhibit 407). The second fund being considered had a track record of returning 1773.60% on investment in just 5 years since its inception in February, 1996. (Subparagraph 2 of last paragraph on page 1 of Plaintiff's Exhibit 407).

The third fund described in Shimer's fax to Teague boasted a 455.90% return on investment in just 5 years since its inception in January of 1996 (Subparagraph # 3 in that same paragraph continuing on page 2 of Plaintiff's Exhibit 407). The fourth fund since its inception 4 years previously in December of 1997 had returned 359.48% on investment. (Subparagraph 4 in that same paragraph continuing on page 2 of Plaintiff's Exhibit 407). Plaintiff knows the identity of each of the funds because they were later provided to Teague and identified by name in Shimer Exhibit 4. Shimer never received any feedback from Teague whether written or verbal that what Shimer was proposing to Teague at that time was beyond the ability of either Teague or her firm. (See trial transcript 9/4/07, page 89, lines 7-12).

Plaintiff's Exhibit # 408 is a follow up communication from Shimer to Teague dated April 7, 2001. Shimer provided Teague with a copy of New Century's newly completed Private Placement Memorandum (PPM) and specifically pointed out the sections and parts of that PPM for her review and approval. (See page 2 of Plaintiff's Exhibit #408).

Shimer also specifically referred to two other documents referenced at the bottom of page 2 of Exhibit #408 that were documents each investor in New Century would be required to sign that specified and clarified the role that Teague and her firm would play in the verification process. One document was an agreement between New Century and the investor to clarify the specific role that Teague and her firm would play in the verification process and the other document was a letter each investor would sign and send to Teague confirming much of what was included in the agreement document just described.

Both of these other two documents referred to at the bottom of Page 2 of Plaintiff's Exhibit 408 were documents similar in form and content to the documentation that Shasta's investors were later required to execute as a part of the Shasta subscription or post subscription process. The document referred to in the paragraph labeled #1 at the bottom of page 2 of Plaintiff's Exhibit #408 is similar in form and content to the Agreement for Independent Verification of Profits and Losses for the entity Shasta identified as Plaintiff's Exhibit # 1089. (Trial transcript 9/4/07, page 90, lines 2-11).

Shimer's reference to his request that Teague verify performance by reviewing brokerage firm statements (found in the first full paragraph on page 2 of Plaintiff's Exhibit 408) was a specific reference to the task Shimer was requesting with respect to the entity Tech Traders (Trial Transcript, 9/4/07, page 90, lines 12-15 and page 91, lines 1-4). Shimer never received any feedback from Teague in which she declined to perform the verifications tasks Shimer was proposing for New Century nor did Shimer ever receive any feedback from Teague that she was not competent to do what was being asked of her. (Trial Transcript 9/4/07, page 91, lines 10-21). The written record is devoid of any such written communication to Shimer from Teague.

Murray later suggested that a local CPA verify Tech's trading performance (Trial Transcript 9/4/07, page 91, lines 22-25). Shimer called Teague on June 22, 2001 to ask if

local verification of Tech's trading performance would be acceptable to her. (Trial transcript 9/4/07, page 92, lines 10-13). Shimer Exhibit #6 is a fax communication from Shimer to Murray dated the same day as Shimer's call to Teague. Shimer Exhibit #6 provides contemporaneous confirmation that Shimer did call Teague and that she gave her consent that a local CPA by the name of Rob Collis perform the local on site verification of Tech's performance provided that Collis assure her that he reviewed original brokerage statements as a part of his verification. (Paragraphs 1 & 2 of Shimer Exhibit #6).

Shimer's Exhibit #6 specifically refers to his belief that verification of trading profit would be expressed as a percentage of the opening account balance on the brokerage statements being reviewed. (See paragraph 1, Shimer Exhibit #6). Shimer also expressed his understanding and belief to Murray that the exact wording of any communication verifying Tech's trading performance be worked out between Collis and Teague. (See paragraphs 1 & 4 of Shimer Exhibit #6). (See also Trial Transcript, 9/4/07 pages 14-17). Shimer provided Murray with Teague's contact numbers and the best time for Collis to call Teague. (Shimer Exhibit #6, Paragraphs 3 and 5).

Two days after the date of Shimer Exhibit 6, Shimer sent on June 24, 2001 a 4 page fax to Teague referred to by Shimer in the trial transcript as Plaintiff Exhibit 415. Shimer forgot during the course of his testimony to move Plaintiff's Exhibit 415 into evidence. Plaintiff's Exhibit 415 was not admitted into evidence by Plaintiff. Plaintiff's Exhibit 415 is the same document as Plaintiff's Exhibit RS-7 admitted into evidence. In this fax communication (identified as Plaintiff's 415 by Shimer in the trial transcript which is Plaintiff's Exhibit RS-7) Shimer confirmed to Teague that he provided to Murray Teague's contact information and the best times for Collis to call her. (Trial Transcript 9/4/07, page 93, lines 14-17). (See also Plaintiff Exhibit RS-7, page 1, paragraph 1). Shimer also reiterated his expectation that Tech's profit or loss each month will be verified from brokerage statements (Plaintiff's Exhibit RS-7, page 1, Paragraph 2).

In addition to expressing his expectation that the two CPA's will have a conversation shortly, Shimer suggested that Teague ask Collis to provide her with a fax of Collis' trading verification with a letter follow up by mail. (Plaintiff Exhibit RS-7,

page 1, paragraph 2). Shimer specifically reiterated to Teague his expectation that the two CPAs will speak soon in that same paragraph of Plaintiff Exhibit RS-7.

Shimer also specifically indicated to Teague Shimer's expectation that the exact wording of whatever written confirmation Collis send Teague be a matter that should be worked out directly between the two CPA's. Shimer expressed that expectation to Teague more than once and at trial he testified as to the reasons why he held that expectation. (Trial Transcript 9/4/07, page 93, lines 18-25 and page 94, lines 1-8. (See Plaintiff Exhibit RS-7, paragraphs 3 and 4).

In paragraph 4 of his fax to Teague on June 24, 2001 (Plaintiff's Exhibit RS-7) Shimer referred to a two page attachment included as the final two pages of that Exhibit. (Trial Transcript 9/4/07, page 94, lines 20-24). Shimer testified about his reason for providing that two page attachment to Teague at that time at trial (see Trial transcript 9/4/07, page 94, line 25 & page 95, lines 1-10). Shimer referred to these final two pages as a draft attempt on his part to provide a starting point for the discussion he expected to occur between the two CPA's for working out the exact verbiage of Collis' letter to Teague. Shimer specifically and clearly expressed his expectation on page 1, paragraph 4 that the two CPAs would probably make changes to his attached draft or even "create something totally different". (See Plaintiff Exhibit RS-7, paragraph 4). (See also trial transcript 9/4/07, pages 95, lines 11-13). Shimer never received any feedback in writing from Teague that his expectation was wrong, misguided, misplaced or unrealistic that the two CPAs would together and work out between them the verification letter that Teague would receive. (Trial Transcript 9/4/07, page 94, lines 9-19).

Collis never called Teague, (Trial Transcript 9/4/07, page 95, lines 14-16). Shimer does not recall ever having a telephone conversation with Rob Collis. (Trial Transcript 9/4/07, page 95, 17-18). This recollection on the part of Shimer is corroborated by the fact that Shimer's phone records do not reflect any call ever being made by Shimer to any number in Gastonia identified with Collis or Collis' firm and is further corroborated by the fact that Shimer's fax communication to Teague at this time does not reflect any indication that Shimer called Collis (Trial Transcript 9/4/07, page 95, lines 19-25 & page 96, lines 1-13). Shimer produced all of his phone records to the CFTC. (Trial Transcript 9/4/07, page 96, lines 3-4).

Shimer Exhibit 4 is a fax communication that Shimer sent to Teague dated July 4, 2001. (Trial Transcript 9/4/07, page 96, lines 14-17). This communication provided Teague with the actual name of the funds listed but previously not identified to Teague and unidentified by name in New Century's PPM. Shimer asked Teague to contact each fund and/or visit their various web sites to verify that the performance numbers listed in New Century's PPM were accurate. (See Shimer Exhibit 4, pages 1-3). Teague later advised Shimer by e-mail on August 10, 2001 that the performance numbers Shimer had stated for the funds listed in Shimer Exhibit 4 were accurate. (See Trial Transcript 9/4/07, page 103, lines 5-11).

Shimer also advised Teague on page 4 of Shimer Exhibit 4 that the local CPA that would be verifying Tech's performance had changed. Murray did not provide Shimer with any explanation for why the local CPA had been changed. (Trial Transcript 9/4/07, page 103, lines 12-19). Shimer did not consider that it was a red flag to him that the local verifying CPA had changed. He merely passed that information on to Teague as his client's CPA. If Teague had a problem with the fact that the local CPA had been changed, Shimer expected that Teague would ask for more information why the change had occurred. (See Trial Transcript 9/4/07, page 103, lines 20-25 and the following page 104, lines 1-3). There is no contemporaneous indication in the record that Teague *ever* communicated *any* concern at all to Shimer about this purported change in the local verifying CPA.

As indicated by Shimer Exhibit 4 Shimer's wife accompanied him on his visit to North Carolina in early July, 2001. Shimer's wife also accompanied him on his first visit to meet Abernethy. The record indicates that Shimer met Abernethy for the first time on Friday, July 6, 2001. (See last paragraph of Shimer Exhibit 4 and Trial Transcript 9/4/07, page 104, lines 4-16). Contrary to Abernethy's confusing testimony about subjects discussed during his first meeting with Shimer, the meeting lasted about an hour and most of the meeting was a very simple "get to know you" meeting at Abernethy's condo in which golf and some politics were discussed. It was a cordial meeting in which Abernethy provided Shimer with his resume. (Trial transcript 9/4/07, page 104, lines 24-25 and the following page 105, lines 1-18). (See also corroborating testimony of Alison Shimer. (Trial Transcript 9/6/07 page 29, lines 11-25 & Page 30, lines 1-23).

The second and third pages of Shimer Exhibit 8 are the pages of the resume Abernethy gave Shimer. On return home Shimer faxed Shimer Exhibit 8 to Teague on Monday, July 9, 2001. (Trial Transcript, 9/4/07, page 105, lines 19-25 and the following page 106, lines 1-3). In Shimer Exhibit 8 Shimer once again reiterated his expectation to Teague that she work out the exact wording with Abernethy (See last sentence of Shimer Exhibit 8).

Shimer found Abernethy's CPA resume impressive and relevant to Abernethy's purported ability and willingness to review Tech's brokerage statements. The fact that Abernethy was a series 6 and series 63 registered representative for a broker dealer in Colorado particularly caught Shimer's attention. Shimer also noted that Abernethy had been an elected member of the North Carolina House of Representatives from 1987-1992. (Trial Transcript 9/4/07, page 106, lines 4-25 and page 107, lines 1-6).

Teague received Abernethy's resume from Shimer and apparently concluded that his resume reflected sufficient accounting skills to perform a rate of return verification for Tech. (Teague deposition, page 151, lines 10-17). (See also Teague deposition page 148 lines 13-25 and page 149, lines 1-14). Teague knew that Tech was trading commodity futures. (Teague deposition page 153, lines 13-19). Teague also knew or should have known that Tech's commodity futures trading included the trading of "various stock index futures" because every AUP letter Teague received from Abernethy specifically told her that in the very first paragraph of each AUP letter. (See first paragraph of all AUP letters founding Plaintiff's Exhibit 1009). Teague never sent Shimer any written communication in which Teague expressed a doubt about Abernethy's ability to perform a rate of return verification for Tech by a review of original brokerage statements. (Teague deposition page 153, lines 1-8).

The last sentence of the first page of Shimer Exhibit 8 again provided Teague notice that Shimer fully expected Teague and Abernethy to work out between them the text of whatever letter of verification Abernethy would send to Teague each month. Shimer never received any written communication from Teague indicating that expectation on the part of Shimer was misplaced. (Trial Transcript 9/4/07, page 107, lines 7-25).

Eight days after faxing Abernethy's resume to Teague Shimer sent another fax dated July 17, 2001 to Teague identified as Plaintiff Exhibit 419. (See Page 1 of Plaintiff Exhibit 419). This fax to Teague referred to a previous note Shimer had sent to Teague advising her that Abernethy was willing to take her call after 10:30 AM that day "to discuss the .protocol for verifying the numbers of Tech Traders every month" (See first sentence of Plaintiff Exhibit 419 and Trial Transcript 9/4/07, page 108, lines 8-25 and page 109, lines 1-2). Shimer attached a draft of two proposed letters and a one page proposed draft of a Report that were also included as a part of Plaintiff's Exhibit 419 (See pages 2-6 of Plaintiff's Exhibit 419). These two letters and the report had nothing to do with the proposed letter from Abernethy that would be sent to Teague. (See Trial Transcript 9/4/07, page 109, lines 3-19).

However in the context of referring to these attached draft documents sent to Teague for her review, for a second time in his cover page which is the first page of Plaintiff's Exhibit 419 Shimer expressed in the last sentence of his July 17, 2001 fax to Teague his expectation that Teague would provide input to Abernethy in "working out the verification protocol with Vernon Abernethy." (See last sentence of page 1 of Plaintiff's Exhibit 419).

Plaintiff's Exhibit 493 (the telephone records of Puttman & Teague for the time period in question) show that Teague did, in fact, call Abernethy on July 17, 2001 as suggested by Shimer. Teague spoke to Abernethy for 8.1 minutes on July 17, 2001. (Trial Transcript 9/4/07, page 110, lines 2-15). [See page 2 of Plaintiff's Exhibit 493 and specifically phone usage record for Puttman & Teague phone number (503) 223-5927].

Plaintiff's Exhibit RS-13 purports to be a 3 page fax from Teague to Shimer.[4] The second page is a copy of a fax dated July 17, 2001 that Abernethy apparently sent to Teague as a result of their first 8.1 minute telephone conversation on July 17, 2001. (See Teague Deposition, page 193, lines 1-11). The subject line of Abernethy's fax to Teague on July 17, 2001 says: "Agreed Upon Procedures Letter". The draft of the AUPs that Teague received from Abernethy on July 17, 2001 was the first time that she saw the actual procedures that Abernethy proposed to apply when verifying Tech's trading performance. (See Teague deposition page 194, line 5-10). Abernethy's fax to Teague specifically stated: "Your comments are appreciated". (See Plaintiff's Exhibit RS-13, page 2). Abernethy never sent Shimer a copy of Abernethy's July 17, 2001 fax to Teague (See Trial Transcript 9/4/07, page 112, lines 21-25 and page 113, lines 1-2). The third page of this exhibit RS-13 is a copy of an AUP letter dated July 17, 2001 on Abernethy's letterhead. This particular three page document now identified as RS-13 first appeared in the pre-trial record as Plaintiff's Exhibit S-1 introduced by the CFTC during Vernon Abernethy's deposition taken by the CFTC in 2004.

Plaintiff's Exhibit RS-12 is a four page exhibit. The first page is a fax from Teague to Abernethy dated July 20, 2001. Teague acknowledged in her deposition testimony that she replied to Abernethy by sending a fax to Abernethy dated July 20,

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[4]The first page of Plaintiff's Exhibit RS-13 is a hand written fax cover page purportedly addressed to Shimer reflecting the date of July 26, 2001. Though page 1 of Plaintiff's Exhibit RS-13 purports to be a fax sent to Shimer, Shimer never found a copy of this document in his files and reasonably assumed during his questioning of Teague about all three pages of this Exhibit of Plaintiff during her deposition testimony taken on December 21, 2005 that Teague had faxed it to Shimer and Shimer had merely misplaced it in his files. A later review of the phone records of Puttman & Teague for the month of July, 2001 (Plaintiff's Exhibit 493) revealed that no such fax was ever sent by Elaine Teague at Puttman & Teague to Shimer. Plaintiff has provided no corroborating documentation that Teague ever faxed the first or second page of Plaintiff's exhibit RS-13 to Shimer.

Teague was specifically asked about her purported fax to Shimer dated July 26, 2001 during her deposition, (See Teague deposition page 188, lines 4-20). Teague's deposition testimony reveals what appears to be a very carefully worded equivocal answer to Shimer's question: "…did you send this fax to Mr Shimer on July 26, 2001?" Instead of answering "yes" or "no" she states "It appears that I did." (Teague deposition page 188, line 20).

2001. (See Teague deposition page 186, lines 14-21). The fax from Teague to Abernethy dated July 20, 2001 indicates that she reviewed Abernethy's fax to her dated July 17, 2001 and replied to Abernethy in part as follows: "I received your fax on agreed upon procedures-- this looks good to me". (See page 1 of Plaintiff's Exhibit RS-12). Teague acknowledged sending to Abernethy the fax that appears as the first page of Plaintiff's Exhibit RS-12. (See Teague deposition testimony page 186, lines 6-21). The phone records of Puttman & Teague also confirm the fact that Teague's fax of July 20, 2001 was indeed sent to Abernethy. (See Plaintiff's Exhibit 493, page 3 and the call detail for Puttman & Teague's phone number (503) 748-2828 which indicates that a .8 of a minute call was sent on 7/20/01 from the office of Puttman & Teague to the Gastonia phone number 704- 865-5449).

Following page 1 of Plaintiff's Exhibit RS-12 are three different draft copies of Abernethy's proposed Agreed Upon Procedures letter. Teague stated in her deposition testimony that she did not receive all three of these draft copies included as the 2nd, 3rd and 4th pages of Exhibit RS-12. Teague remembers receiving the first draft copy which is page 2 of Exhibit RS-12 and that is the page that says "draft" with the open letters on it (see Teague deposition testimony, page 186, lines 22-25, page 187, lines 1-25). There is no indication on Teague's reply fax to Abernethy dated July 20, 2001 that Shimer was copied with this fax nor is there any other written documentation in the record that Teague ever provided Shimer with a copy of her July 20, 2001 fax to Abernethy.

Four days after her first fax to Abernethy dated July 20, 2001 Teague sent Abernethy an e-mail dated July 24, 2001 (see Plaintiff Exhibit RS-15). In this e-mail to Abernethy Teague expressed concern to Abernethy about computation of the rate of return and the possible effect that additions and withdrawals might have on that computation. Teague's stated concern is specifically stated as a concern that "calculation of the rate… is not skewed by additions and withdrawals of monies during the month." (See third sentence of Plaintiff Exhibit RS-15).

Shimer, Firth and Teague all had a reasonable basis to believe that Abernethy was reviewing original brokerage statements as a part of the verification process.

The language drafted by Shimer in Exhibit 1089 (and all other documents drafted by Shimer in this entire matter) reflected the continuing reasonable belief by both Shimer and Firth that original brokerage statements were being reviewed by Abernethy as a part of the verification process. The record clearly reflects the fact that Shimer and Teague discussed the review of brokerage statements as an essential part of any verification of Tech's rate of return in their very first telephone call on March 23, 2001. (See confirm in both Plaintiff's Exhibit 407, page 3, paragraph numbered #3 & also contemporaneous confirmation found in Shimer Exhibit #5A).

All of Abernethy's AUP letters forwarded to Teague from October, 2001 until March 2004 purported to confirm a very specific monthly "rate of return". (All of these AUP letters are found in Plaintiff's Exhibit 1009). The record clearly reflects the fact that not only did Teague believe that a review of brokerage statements was important—she believed that it was impossible to "perform the service" without such a review. (Teague deposition testimony at page 160 lines 7-10). Moreover the belief of Teague as Shasta's CPA that Abernethy was reviewing original brokerage statements was a continuing one throughout the entire engagement because as Teague also indicated in her deposition testimony without the presence of such a review (of brokerage statements) she "…wouldn't have agreed to continue on at all." (Teague deposition, page 160, lines 8-11).

That Abernethy unequivocally committed to Teague to conduct a review of Tech's original brokerage statements as a part of his rate of return verification each month is beyond dispute. On July 26, 2001 Teague initiated a long 29.1 minute telephone conversation with Abernethy. [See Phone records of Puttman & Teague (page 2 of Plaintiff's exhibit 493) confirming that call from Puttman & Teague phone number (503) 229-5927 to Abernethy's phone number in Gastonia (704) 865-2906]. Teague also confirmed in her deposition testimony at page 404, lines 21-25 and page 405, lines 1-11 that during their telephone conversation on July 26, 2001 she and Abernethy discussed the agreed upon procedures letter that she had previously received from him and that he

"…described to me what he was going to be doing." (See also Teague Deposition Page 409, lines 23-25, & pages 410, 411, & 412 lines 1-25).

Teague also testified repeatedly in her deposition that Abernethy had assured her that his review of original brokerage statements would be an integral part of Abernethy's monthly verification process. (See Teague deposition page 158 lines 4-25 & page 159 lines 1-17.) See also Teague deposition testimony at page 160 lines 7-11: "He told me he was going to be looking at original brokerage statements. Without looking at original documents he wouldn't be able to perform the service". Abernethy also confirmed to Teague that he would be reviewing any other documents that might be necessary "to perform the service". (See Teague deposition page 201, lines 4-18). (See also Teague deposition, page 334, lines 6-12).

Regarding the November, 2001 development of Teague's Letter Report to Shasta

Teague first created a draft of the letter report that she proposed to send to her client Shasta with the help of her partner John Puttman. (See Teague deposition page 711, lines 7-11). Teague confirms in her deposition testimony that Shimer reviewed that first draft and made changes (see Teague deposition page 711, lines 11-12 "…and then it was further changed by Shimer." Shimer's changes to Teague's first draft specifically referred to the review of original brokerage statements. The exact language Shimer proposed is found in the trial transcript dated 8/28/07, page 143, line 8-15. Shimer then sent a copy of his proposed draft to Vernon Abernethy for his review. (See trial transcript 8/28/07 page 142, lines 6-11).

Abernethy made revisions to Shimer's draft that removed Shimer's suggested language and replaced it with language Abernethy proposed (See trial transcript 8/28/07 page 143, lines 17-19). Shimer then changed the language of Teague's proposed Letter Report to reflect all of the changes suggested by Abernethy and forwarded to Teague a copy of that new draft. (See trial transcript 8/28/07 page 143, lines 24-25). Both Teague and her partner John Puttman then reviewed the new draft of her proposed Letter Report incorporating all of Abernethy's changes that was sent to Teague by Shimer. (See Teague Deposition , page 711, lines 10-16).

Argument: Shimer and Firth did not knowingly or recklessly misrepresent the rate of return numbers reported by the entity Shasta to its members

Regarding Shimer's early communications with Murray and Teague

Shimer's separate written communications to both Murray and Teague in March of 2001 reflect a clear understanding by Shimer of the importance of legitimate outside verification of Tech's trading performance. There is no evidence at all in the record that Shimer and Firth were naïve enough to think that a contractual relationship would long survive without some sort of reliable outside confirmation that Murray's system was indeed performing as represented. David Kaplan's meeting with Murray in February simply highlighted and emphasized the importance of independent verification for the credibility of any client of Shimer that sought to place investor funds with Murray and Murray's trading system.

There was nothing unreasonable or inherently suspect in Shimer's choice of Teague. Teague had become a partner in a CPA firm in the intervening 10 years since they had last seen each other or spoke. It was reasonable for Shimer to assume she was qualified to do what he sought for his prospective client and the written record confirms and never contradicts in any way Shimer's testimony at trial that Teague's response was positive and enthusiastic.

Shimer's first written correspondence to Teague dated March 24, 2001 (Plaintiff's Exhibit 407) is a forth right, professional written follow up to their first telephone conversation the previous day. The fully audited performance numbers for all of the funds mentioned by Shimer were as impressive as they were extraordinary. The Plaintiff has never suggested at any time during trial and has introduced absolutely no evidence that the outside fund performance numbers provided by Shimer to Teague in Plaintiff's Exhibit 407 were overstated or incorrect. The fact that there were, indeed, funds capable of that level of performance gave great credibility to the representations that Murray was making about his own trading system.

Shimer proposed in his first written correspondence to Teague that verification of the trading performance of that entity be obtained by a direct review of the brokerage statements received by Teague from the brokerage firm. Shimer proposed that the

"percentage of increase or percentage of decrease" in the accounts examined be determined by Teague by comparing the opening and ending balances apparent on the face of the brokerage statements reviewed. Shimer's fax communication to Teague on March 24, 2001 does not purport to be an "instruction manual" to his CPA friend on how to compute a rate of return. The importance of properly accounting for additions or withdrawals from the brokerage accounts was implied as much as it was assumed

Teague's deposition testimony contradicts Shimer's testimony at trial about Teague's reaction to Shimer's request that she verify Tech's trading performance for Shimer's proposed client New Century. For example Teague contends at page 336, lines 18-22 of her deposition that "…we felt at Puttman & Teague" (meaning she and others there) that it could get quite complicated, depending on how many additions or withdrawals and how many brokerage accounts and so forth." On page 338 of Teague's deposition at lines 13-17 one finds the following statement: "…we were reluctant to perform this type of calculation because we didn't have that type of expertise. We hadn't done it before." Again on that same page of her deposition testimony Teague further contends: "We were just looking at it on the surface without the expertise and saying it could get very complicated, and we were not comfortable trying to perform that kind of service since we didn't have that experience."

Clearly it is a matter of great professional embarrassment to that Teague and her firm that she forwarded to her client Shasta for several years rate of return performance numbers received from Abernethy that, in retrospect, were erroneous. Plaintiff asks the Court to give greater credence to Teague's deposition testimony over Shimer's testimony at trial and believe that a partner in a CPA firm that has not spoken to a friend for over 10 years would not take the time to create even one short document—not even a single e-mail or fax that provides some contemporaneous corroboration of Teague's supposed "lack of expertise".

The written record supports Shimer's testimony and contradicts Teague's. The written record from March, 2001 through the time Plaintiff's civil action was filed does not contain *a single communication* from Teague to Shimer indicating that what Shimer was requesting of Teague and her firm in this first faxed written communication from Shimer dated March 24, 2001 was beyond Teague's ability or "expertise" *or beyond the*

ability or "expertise" of her firm. Moreover as we also know from the written record Teague never expressed *any* hesitancy about *Abernethy's* "expertise" to compute a rate of return from a review of original brokerage statements after simply reviewing his resume.

It is an extremely important point to note that Teague never provides the Court with an adequate explanation of *why* she did not have the "expertise" but apparently believed Abernethy did based solely upon his resume. (See Teague deposition page 148, lines 13-25 & page 149, lines 1-14). See also Teague deposition page 151, lines 10-17 & page 152. Moreover Teague apparently came to her conclusion about Abernethy's ability to perform Tech's rate of return verification from original brokerage statements even though Abernethy's resume reflected a lack of any specialized training in commodity futures and foreign exchange currency futures. (See Teague deposition, page 152, lines 5-9).

We also know from the record that when referring to the procedures that Abernethy was supposedly following to verify Tech's rate of return Teague again and again described those procedures as a "mini audit" to not only members of Shasta but to both Shimer and Firth as well. (See Teague deposition page 223, lines 9-25 & page 224, lines 1-14). This description by Teague is, no doubt, due to her reasonable reliance on the fact that Abernethy had assured her that more than just the brokerage statements themselves would be a part of his monthly verification review. (See Teague deposition, page 201, lines 4-18).

Plaintiff's Exhibit 408 is a significant document in the record for several reasons. It is significant because it again provides contemporaneous corroboration that Shimer had apparently not received *any* feedback from Teague at that time (April 7, 2001) that she harbored doubts about her ability to verify a rate of return from brokerage statements. It is also significant because it documents the fact that Shimer had provided Teague with a copy immediately of the Agreement for Independent Verification that would be signed by all of New Century's investors and it also references and attaches for Teague's review a proposed letter that all investors would sign verifying that they had executed the Agreement that set forth the role her firm would play in the verification process.

Teague claims in her deposition testimony that she never received a copy of the Independent Agreement for Shasta typified by Plaintiff's Exhibit 1089. Once again her

deposition testimony is at odds with the written record. Plaintiff's Exhibit 408 reflects not only Shimer's willingness but his eagerness to provide Teague with any document he reasonably believed pertained to her role in the verification process. The Plaintiff apparently asks the Court to draw some "dark conclusion" from Teague's deposition testimony that she never received a similar document from Shimer or Firth for the entity Shasta. First of all, that is simply not credible. She admits to receiving a copy of Shasta's original PPM dated June 30, 2001. (See Teague deposition, page 445 lines 21-24). Why would Shimer eagerly provide her almost immediately a similar document for the entity New Century Trading, LLC but intentionally withhold a document relevant to her role with the entity Shasta? That just does not make any sense.

If for some reason Teague *really* never received a copy of a document similar to Plaintiff's exhibit 1089 from either Firth or Shimer all she had to do was ask for a copy! She knew that such a document existed for New Century because the written record reflects the fact that she received one from Shimer in April of 2001. Plus Shasta's first PPM (Plaintiff's Exhibit 1093) specifically states at page 18, in the paragraph entitled "Trading Company Verification" that she would be receiving calls from Shasta's members and the following page 19 of that PPM states at the bottom of that page in the paragraph entitled "Acknowledgement By Members of Role of the Company's Certified Public Accounting Firm" that members who contact her would be required to execute a very specific document that explained her role in the verification process.

Regarding Rob Collis

Shimer Exhibit #6 is significant because again it provides an instance in which the written record confirms and supports Shimer's trial testimony and it contradicts and provides no support at all for Plaintiff's suggestion that Shimer was supposedly on the telephone in late June of 2001 or early July, 2001 trying to "cajole" Rob Collis into doing something Collis did not want to do. If Shimer had Collis's phone number or contact information it would not have been necessary to provide most of the information contained in Shimer Exhibit #6 to Murray because Shimer could have and probably

would have provided much of that information directly to Collis either by telephone or by fax.

Shimer Exhibit #6 is further contemporaneous corroboration that Shimer had no *expectation* at that time of *ever* being in direct communication with Collis because he expressed not once but twice in that fax communication his expectation that the two CPAs simply discuss the proposed verification directly between themselves. The fact that Shimer provided Murray with Teague's contact information and the best time to call indicates that Shimer received that specific information about Teague's schedule directly from Teague and that Teague expected Collis to call her. (See confirmation at Trial Transcript 9/4/07, page 92, lines 18-20). Plaintiff's Exhibit 415 provides further written confirmation of Shimer's reasonable expectation that the procedure for verifying Tech's rate of return would be worked out between Collis and Teague and further corroborates the lack of any direct telephone contact between Shimer and Collis.

Plaintiff will undoubtedly point to the fact that in his deposition testimony Rob Collis recounts at page 29, lines 20-25 a telephone conversation with an unknown person that Collis describes only as an "attorney from Pennsylvania". Collis could not remember his name (Collis Deposition, page 29, lines20-25). Given the fraud that is now known to have been perpetrated by Murray and has been admitted by Murray (See document 514 Consent Order of Permanent Injunction signed by the Court on 6/28/07) it is just as likely that Murray had someone else he knew pose as "an attorney from Pennsylvania" in an attempt to convince Collis to take the engagement.

Plaintiff has produced no written corroboration at all in the form of phone records or any other type of corroboration that Shimer was the person who called and spoke to Collis and attempted in any way to encourage Collis to take the verification engagement. The record supports just the opposite conclusion because: 1) The period of time between June 22, 2001 (the date of Shimer Exhibit 6) when Shimer first advised Teague that Collis was going to undertake local verification and July 3, 2001 (the date Shimer advised Teague that the local CPA had changed—see Shimer Exhibit 4) was relatively short—only 11 days; and, 2) The written record indicates that almost every conversation Shimer had with *anyone* was later documented in writing with a fax or some other form of written communication but no such communication exists from Shimer to *anyone*

(including Murray) reporting on the result of any telephone conversation between Shimer and Collis; and 3) as previously indicated by the text of Shimer Exhibit 6 on the date of that communication to Murray (June 22, 2001) Shimer apparently did not have any contact information for Collis.

The Plaintiff at trial in cross examination of Shimer attempted to distort out of all proportion Shimer's innocuous comment to Teague found on page 4 of Shimer Exhibit 4 that she would probably find the new CPA "easier for you to work with". Shimer expected that Collis would give Teague a call (see generally Plaintiff Exhibit RS-7). Collis never called Teague as expected. In that same last paragraph of Shimer Exhibit 4 Shimer is also informing Teague (based upon information that was most likely provided by Murray since there is no evidence of any communication between Shimer and Abernethy as of July 3, 2001) that the new CPA had visited Tech's office, had seen the trading operation and was impressed. (See last paragraph of Shimer Exhibit 4). Shimer's innocent comment to Teague that drew so much attention from Plaintiff at trial is just as likely a reflection of all the facts known to Shimer at that time than any inside "information" or impressions about Collis gleaned from surreptitious phone conversations for which no phone records exist.

Plaintiff's fixation on the above innocent comment by Shimer to Teague is one of many examples through out the record in this case where the Plaintiff seems doggedly determined to color every ambiguous statement and action of Shimer in the worst possible light taking advantage of the fraud perpetrated by Murray that is now clear to everyone courtesy of 20/20 hindsight. Ambiguous and innocuous statements do not aide Plaintiff in meeting its burden of proof.

Regarding the procedure established for verification by Teague of the performance of the outside hedge funds originally proposed for investment by New Century's PPM and Shasta's first PPM

The Trial Transcript of 9/4/07, page 97, lines 24 & 25, page 98, lines 1-25, page 99, lines 1-25, page 100, lines 1-21 indicates that the District Court was apparently reluctant at first to accept into evidence Shimer Exhibit 4 as evidence relevant to the care

Shimer was taking to ensure accurate reporting of the outside Hedge fund performance. The Court finally admitted Exhibit 4 into evidence (Trial Transcript 9/4/07, page 101, lines 8-9). The Court expressed apparent reluctance to accept the independent nature of the proposed activities of Teague in verifying the performance of these hedge funds (See specifically Trial Transcript 9/4/07, page 98, lines 8-22).

Teague's role was to provide investors with independent verification that the performance numbers being reported by Shimer's client with respect to these outside hedge funds were accurate. All of these funds were properly registered and had issued the required regulatory disclosure documents. (See Teague deposition testimony page 327, lines 15-25 and page 328, lines 1-13). Yet the Court seems to take the position that asking Teague to separately contact each of these funds and receive confirmation directly from the fund itself of its performance was not sufficient independent "verification" of the accuracy of the performance of each fund being reported by Shimer's client(s). (See Trial Transcript 9/4/07, page 98, lines 18-22).

What would the Court have Teague do before it was willing to accept the fact that Teague was performing an independent "verification" of the performance of properly registered outside hedge funds? If registration does not allow a CPA or any other professional or representative of a potential investor to accept the reported performance of a properly registered fund as a reliable and accurate indication of reported performance what is the perceived value of "registration"? Apart from being a member of the team that performs the actual *audit* of the fund such an understanding of the meaning of the word "verification" would seem to make it virtually impossible for the performance of *any* properly registered fund to be independently "verified" by *anyone*. The procedure established for Teague to "verify" the performance of the outside hedge funds for either her client New Century or later for her client Shasta was clearly appropriate and reasonable in light of the fact they were all audited properly registered funds.

Regarding Abernethy's resume

Clearly there was nothing in Abernethy's resume that Shimer received while meeting Abernethy for the first time in North Carolina that might alert Shimer to the fact that Abernethy was not qualified to review original brokerage statements and reported an accurate rate of return for the entity Tech. The record reflects that Shimer never received *any* negative feedback or expression of concern at all from Teague when she learned that the local CPA that would verify Tech's trading performance had changed. Teague received Abernethy's resume from Shimer after Shimer's return from North Carolina and after reviewing that resume came to the same conclusion as Shimer about Abernethy's apparent qualifications. Teague never questioned Abernethy's ability to perform an accurate verification of Tech's monthly performance. And certainly never gave Shimer any indication that Shimer's initial impression about Abernethy was misplaced.

Shimer's repeatedly stated expectation in written communications to both Murray and Teague that Teague and Abernethy should confer and agree on the text of any verification letter Teague received from Abernethy was a reasonable expectation and the record indicates that is exactly what happened.

While it is true that Shimer made calls to Murray, Teague and Abernethy during the month of July, 2001 there is no evidence as reflected in the written record that he played *any* role *at all* in the actual development of the AUP letter proposed by Abernethy and faxed by Abernethy to Teague on July 17, 2001. The attachments to *Shimer's* fax to Teague dated July 17, 2001 (Plaintiff's Exhibit 419) had nothing at all to do with Abernethy's proposed AUP letter. Other than wanting to help coordinate a time when the two CPA's could speak to each other Shimer's attention in mid July (as reflected by Plaintiff's Exhibit 419) was elsewhere--on creating a proposed first draft for Teague's Letter Report to Shasta. This first draft sent to Teague in July, 2001 was completely ignored and not adopted at all by Teague when Teague later created a first draft of her proposed Letter Report to Shasta in early November, 2001.

Nor is there any evidence that Shimer ever even *received* for his review and comment a copy of the AUP draft that Teague approved by her fax to Abernethy on July 20, 2001. Whatever concerns Teague had in her July 24, 2001 e-mail to Abernethy about

the importance of considering additions and withdrawals her deposition testimony indicates that her extended 29 minute telephone conversation with Abernethy on July 26, 2001 apparently clarified any questions she had about the procedures Abernethy proposed in his AUP draft faxed to her on July 17, 2001.

The written record reflects Shimer's consistent and continuing expectation that it was up to the two CPA's to work out the text of whatever letter Teague would receive each month from Abernethy. Shimer never received any feedback from Teague that this expectation on Shimer's part was misguided, wrong or unrealistic. (Trial Transcript 9/4/07, lines 9-19). That expressed expectation by Shimer time and time again to Teague contains within it the additional expectation that Teague would protect Shimer and Shimer's client by being thorough. Shimer relied upon Teague as the CPA that would be receiving Abernethy's verification each month to responsibly handle this critically important part of the project.

Shasta and New Century were Teague's clients. Teague clearly knew that every investor in either company and that her friend Shimer as legal counsel and that Firth as designated management of Shasta's manager were counting on her to get this verification procedure right. If there was any hesitancy or concern on the part of Teague as a CPA that what Vernon was proposing to do did not meet Teague's expectations of what she thought was necessary to adequately verify Tech's monthly performance it was her duty and responsibility to advise Shimer and/or Firth immediately. She never did that. The written record reflects that she never did that. And Teague's deposition testimony confirms that she never did that. How is it that the breakdown and failure of Abernethy to do what Teague clearly expected him to do is the fault of Shimer and Firth?

Shimer, Firth and Teague all had a reasonable basis to believe that Abernethy was reviewing original brokerage statements as a part of the verification process.

Shimer and Firth's belief that Abernethy was reviewing original brokerage statements was premised upon the clear unequivocal belief of Shasta's CPA Teague that Abernethy was doing that as a part of his regular verification. As previously indicated, the record reflects that this belief on Teague's part was clearly based upon at least one or

more telephone conversations Teague had directly with Abernethy—particularly the critical telephone conversation with Abernethy for 29 minutes on July 26, 2001.

Shimer and Firth relied upon Teague's position as Shasta's CPA to give them any indication if things were not as she expected them to be. That is why CPAs are hired by their clients. Teague's extraordinary willingness after the fact to dodge her primary responsibility as Shasta's CPA is simply not credible. Teague attempted at several points in her deposition to place the blame on *Shimer* for her understanding of what Abernethy was doing! (See for example page 142, lines 24-25 and page 143, lines 1-5 and lines 9-12 as well as page 144, lines 22-25 and page 145, lines 1-8). The argument that what Teague believed about what Abernethy was doing is the responsibility of Shimer is simply an example of the Plaintiff's willingness to throw any silly argument at the wall to see if it will stick.

Plaintiff's argument makes no sense for several reasons. First, Shimer had no direct knowledge of what Abernethy was doing and there is absolutely no evidence in the record that Shimer ever directly supervised Abernethy or purported to supervise Abernethy while Abernethy conducted his review of Tech's monthly performance. So all Shimer had to rely upon was nothing more than what Abernethy or Murray might have told Shimer. Why does a possible representation from Abernethy or (even worse--a representation from Murray to Shimer) make Shimer responsible for Teague's understanding of what Abernethy was doing? Why would what Shimer told Teague about Abernethy's behavior be more credible than what Abernethy told Teague directly?

Secondly, the written record indicates time and time again that Shimer expressed his consistent expectation in writing [See Shimer Exhibit #6 (Shimer fax to Murray dated 6/22/01); Plaintiff Exhibit RS-7 (Shimer fax to Teague dated 6/24/01); Shimer exhibit 8 (Shimer fax to Teague dated 7/9/01); and Plaintiff's Exhibit 419 (Shimer fax to Teague dated 7/17/01)] that the actual procedure that the local verifying CPA would follow to verify Tech's trading performance should be a matter to be worked out directly between that local CPA and Teague. This clear expectation expressed not less than four separate times in writing by Shimer in the space of less than one month (in which three of those times was in a written communication *directly to Teague*) indicates 1) that Shimer expected Teague to deal directly with the local verifying CPA and that 2) Teague (not

Shimer) should be clearly the source for Shimer's reliance and continuing understanding (and his client's reliance and continuing understanding) of the appropriateness of the procedure being used by Abernethy to verify Tech's monthly rate of return.

Regarding the November, 2001 development of Teague's Letter Report to Shasta

At pages 141-148 of the trial transcript on 8/28/07 Plaintiff tries to make much of the fact that Abernethy was given an opportunity in early November of 2001 to review the specific language of Teague's proposed letter to her client Shasta that would be issued following her receipt of Abernethy's AUP letter each month. Plaintiff points to the fact that Abernethy had crossed out language Shimer had suggested for that letter that specifically referred to his review of original brokerage statements. Plaintiff will no doubt argue that the act by Abernethy of crossing out the language in Shimer's draft somehow put Shimer on notice (but not Teague) that Abernethy would *not* be reviewing original brokerage statements (as he had previously committed to do) and that Shimer's knowledge of Abernethy's change and Shimer's willingness to ignore that "red light" warning from Abernethy was reckless.

Despite all of the confusion Plaintiff has attempted to orchestrate about the back and forth interchanges by e-mail as well as fax that occurred between Shimer, Teague and Abernethy in early November, the record indicates merely that 1) Teague created a first draft (ignoring completely Shimer's previous draft of her proposed Letter Report faxed to her by Shimer back on July 17, 2001) and provided Shimer a copy by e-mail; 2) Shimer revised that draft and provided Teague by e-mail with a copy of his draft; 3) Shimer's draft was also forwarded by fax to Abernethy for his review; 4) Abernethy revised Shimer's draft and Shimer received those changes back by fax; 5) Shimer provided Teague by e-mail with a copy of Teague's proposed Letter Report that now included all of Abernethy's proposed changes ; 6) Teague and her partner John Puttman accepted the language proposed by Abernethy without comment or any expression of concern.

Teague and Puttman, therefore, had in front of them for their final review, 1) Teague's original draft; 2) Shimer's draft; and 3) Abernethy's draft of the proposed Puttman & Teague Letter Report. If Teague and Puttman had no apparent concern about

Abernethy's proposed changes to Shimer's draft why were Abernethy's proposed changes such a supposed "red flag" to Shimer? True, Teague and Putman did not see the actual letter document in which Abernethy had crossed out Shimer's language but Abernethy's proposed changes were obvious to both John Puttman and Elaine Teague by simply comparing Shimer's draft to Abernethy's.

Plaintiff asks the Court to conclude that all 3 drafts of a Letter Report (reviewed by both partners of Puttman & Teague) that 1) was reviewed by both partners; and 2) represented proposed language for a Letter Report that would be sent out *on that firm's letterhead* confirming a rate of return number each month *critically essential to the credibility of their client* would not and did not receive careful and complete scrutiny from both of that CPA firm's partners. And that the reason Puttman & Teague was somehow "deceived" and not put on notice of Abernethy's sudden and otherwise unannounced change in his previous firm commitment to Teague to review original brokerage statements was because of the surreptitious perfidy or, at the very least, the reckless behavior of Shimer!

As Shimer points out at Trial Transcript 8/28/07 page 144, lines 13-18 Abernethy's suggested language change included a reference to the fact that as the local verifying CPA (Abernethy) "obtained and compiled from an independent source corroborating evidence as to the performance statistics". The obvious reality is that the only "independent source" in this context would have only been original brokerage statements issued by Tech's brokerage firm. (Trial Transcript 8/28/07 page 145, lines 5-14).

Teague never expressed the expectation *anywhere* in her deposition testimony when she discusses these assurances she received from Abernethy that Tech's original brokerage statements would not come through Murray. A review of the previous cited pages and lines of Teague's deposition testimony clearly reveals that Teague was apparently not concerned about the fact that Murray would probably provide the original brokerage statements to Abernethy for Abernethy's review. As long as Abernethy would be looking at Tech's original brokerage statements, that fact was apparently sufficient to make Teague comfortable as Shasta's CPA and the record in its entirety reflects that to be true.

There is not a shred of evidence in the record that Teague, as Shasta's CPA, ever sounded any alarm to either Shimer or Firth about the agreed upon procedures Abernethy was purporting to perform. Likewise there is absolutely no evidence that Teague ever questioned the reliability of the performance numbers she was receiving from Abernethy. More importantly in the context of the e-mail exchange that occurred between Shimer and Teague during the early November period of time just discussed Teague clarified in her deposition exactly what she meant by the statement found in Plaintiff's Exhibit 426 which reflects an e-mail from Teague to Shimer sent at 1:11 PM on November 5, 2001 where she stated (after referring to the various methods used to compute performance for the various outside hedge funds): "I have no information on how the calculation was made for Tech Traders".

It is important for the purpose of clarification to understand clearly Teague was simply expressing that she did not know specifically *how* the calculation was made. (Teague Deposition page 272, lines 5-8). She specifically confirmed that she was *not* expressing any doubt about whether Abernethy was reviewing original brokerage statements. (Teague deposition page 272, lines 9-12). Nor was she expressing any uncertainty about whether Abernethy was expressing Tech's rate of return accurately. (Teague deposition page 272, lines 13-21 & also Teague deposition page 304, lines 9-15).

Shimer and Firth's belief that the rate of return being reported monthly to Shasta by Teague was reasonable since Teague confirmed in her deposition testimony (as previously noted) that if she had not believed that Abernethy was reviewing original brokerage statements she "…wouldn't have agreed to continue." (See Teague deposition page 160, lines 10-11). The record indicates that she did, in fact, continue to receive Abernethy's verification letters each and every month throughout this engagement and continued to forward to Shasta in her Letter Report the performance numbers for Tech that Abernethy provided to her.

The record, therefore, clearly indicates that the language that Abernethy proposed for the Letter Report that both John Puttman and Teague reviewed and approved and consequently sent regularly to the entity Shasta or Shasta's manager Equity did not change or shake Teague's faith in Abernethy's specific underlying commitment to her to

review brokerage statements and any other documents that were necessary to conduct an accurate verification of Tech's performance. (see specifically Teague deposition, page 201, lines 4-18).

If the Court is willing to conclude in spite of all the facts stated above that Shimer and Firth were, somehow "negligent" so be it. But that is not sufficient to impose the level of penalty that the CFTC now seeks to impose. Where is the requisite degree of reckless on the facts provided above? Do the above cited facts *really* support a finding that the behavior of Shimer and Firth "is one that departs so far from the standards of ordinary care that it is very difficult to believe the [actor] was not aware of what he was doing." *First Commodity Corp v. CFTC*, 676 F.2d 1, 7 (1st Cir. 1982). Given the repeated written communications to Teague that he fully expected her as Shasta's CPA to work out the details of the procedure that would be used to verify Tech's rate of return where is the extreme departure from the standards of ordinary care". *See, e.g., Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-79 (11th Cir.1988).

The rates of return being provided by Shimer and Firth to the members of Shasta were provided in good faith with the assurance by Shasta's CPA that they had been verified by a procedure that was a "mini audit". It was not reckless to rely upon the assurances of Shasta's CPA that what was being done by the local CPA Abernethy was all that should be done to ensure reliability of the reported ROR.

F.It was not reckless For Shimer and Firth to accept Minimum Account Verification

Facts regarding whether it was reckless For Shimer and Firth to accept Minimum Account Verification

Shimer had initially asked for minimum account verification in March of 2002.[5] There was no need for any serious discussion of this topic before funds began to

[5] But Shimer had included a reference to the desirability of account verification as early as March 24, 2001 in his early fax correspondence to Teague. (Plaintiff's Exhibit 407, page 3, third paragraph of #3).

come into Shasta. (Trial Transcript 9/4/07, page 141, lines 3-15). There was no apparent resistance from Murray for minimum account verification of Shasta. It seemed to Shimer that any resistance was coming from Abernethy. (Trial Transcript 9/4/07 page 141, lines 16-17). Plaintiff's Exhibit 44 is an e-mail from Shimer to Abernethy dated July 24, 2002 that attached two draft letters for a proposed exchange between Abernethy and Teague each month for verifying the amount on deposit in Tech's brokerage accounts for New Century and Shasta. Abernethy confirmed receipt of this e-mail during his testimony. (Trial Transcript 8/30/07, page 104, lines 13-19). Minimum account reporting began in the month of September after Shimer told Murray that if Abernethy was not willing to do it, Shimer would get Teague to do it. Plaintiff's Exhibit 1045, page 1, paragraph 4). Murray indicated to Shimer that Abernethy would do it. (Trial Transcript 9/4/07 page 148, line 25 and page 149, lines 1-13). Minimum account verification began in September (Trial Transcript 8/29/07, page 8, line 25 & page 9, line 1).

Argument: It was not reckless For Shimer and Firth to accept Minimum Account Verification

An interesting thing about Plaintiff's Exhibit 44 (never mentioned by Plaintiff) is the number of times Shimer puts Abernethy on notice of Shimer's expectation that Abernethy is reviewing Tech brokerage statements as a part of Abernethy's rate of return verification. Shimer's proposed letter from Teague to Abernethy (page 3 of Plaintiff's Exhibit 44) first refers to the term "Brokerage firm(s)" in the first sentence of the third paragraph. In the next sentence of that third paragraph Shimer first refers to Abernethy's "observation" of "brokerage firm statements" and then refers to "brokerage statements" again in that same sentence. In the following sentence Shimer ends the third paragraph with yet another reference to his stated expectation by referring to the term "brokerage accounts".

Another interesting thing about Plaintiff's Exhibit 44 is the fact that page 4 of that exhibit is the draft of a letter proposed by Shimer for Abernethy's reply to Teague. *That* document contained the term "brokerage accounts" twice and also mentioned

the separate terms “brokerage account statements” and “brokerage statements” in the course of just two short paragraphs.

Abernethy was put on clear unequivocal notice as of the date of his receipt of this e-mail from Shimer dated July 24, 2002 that both Teague and Shimer expected him to be reviewing brokerage statements as a part of his rate of return verification process. Abernethy knew that Teague had already reviewed and was “comfortable” with what Abernethy received from Shimer because Shimer told Abernethy that in the very first sentence of the e-mail.

Plaintiff has introduced no communication from Abernethy to either Shimer or Teague that purports to correct Shimer’s stated understanding of what Abernethy was supposed to be doing. Nor is there any testimony from Abernethy that he ever called either Shimer or Teague to correct their clear expectation of what Abernethy was supposedly doing each month nor is there any written corroboration of such a call.

Abernethy claims to have advised Shimer for over a year that what Shimer was suggesting in Plaintiff’s Exhibit 44 “wouldn’t work”. (Trial Transcript 8/30/07 page 105 lines 7-15). Until Shasta began receiving funds in late January or early February of 2002 there was really no need to even have that particular conversation with Abernethy. Why would there be a continuing conversation about a need that had not yet become necessary? And if Abernethy really had “…continued to tell him (Shimer) that…” why isn’t there even a short fax or even an e-mail to Shimer confirming the persistence of Abernethy’s purported continuing communications with Shimer?

On page 99 of the trial transcript from August 30, 2007 Plaintiff asks Abernethy about Plaintiff’s Exhibit 39 which contains the infamous “cross outs” by Abernethy in early November of language proposed by Shimer for a draft of Teague’s Letter Report to her client Shasta. Abernethy purports to claim that the reason he crossed out Shimer’s reference to a review of original brokerage statements was because “that’s not what I was agreeing to do so I crossed it out”. (Trial Transcript 8/30/07 page 99, line 22). Abernethy admitted that he received Plaintiff’s Exhibit 44 from Shimer almost 9 months later in mid July of 2002. That exhibit clearly refers no less than 8 separate times to various ways of describing brokerage statements and yet there is no indication that Abernethy felt the need to advise Shimer that a review of brokerage

statements was not what Abernethy was doing. Nor, apparently did he find it necessary to contact his colleague Teague and correct *her* understanding of their 29 minute telephone conversation that occurred on July 26, 2001.

One can assume for purposes of argument that Abernethy was sincere in early November of 2001 and honestly did not remember a 29 minute telephone conversation in the previous July of that year with Teague in which he described the procedures he would follow and in which he confirmed to her that original brokerage statements would be reviewed. If one is willing to give Abernethy the benefit of that doubt and believe Abernethy told the truth at Trial Transcript 8/30/07 page 99, line 22 his receipt of Exhibit 44 in July 2002 provided Abernethy with an additional opportunity to correct a clear and apparent miscommunication on the part of both Teague and Shimer about what Abernethy was really doing each month at Tech. Instead there is no communication whatsoever to either Teague or Shimer about his non review of brokerage statements.

Abernethy's lack of any communication to either Teague or Shimer after receiving Plaintiff's Exhibit 44 indicates either that he knew he was *supposed* to be reviewing brokerage statements and was afraid to admit to Teague or Shimer that he was really doing something far less than a full brokerage statement review or, he had decided at that time to intentionally cooperate with Murray to deceive Teague and her client Shasta by issuing a rate of return verification that had no basis in reality.

We are told by Abernethy in his trial testimony that the reason Shimer's request for a minimum account balance request "wouldn't work" was because "…I couldn't separate a portion of that pool". (Trial Transcript 8/30/07, page 105, line 17). But an examination of Plaintiff's Exhibit 44 indicates that Shimer was not asking Abernethy to separate out and identify any certain amount and attribute that amount to a certain entity. Shimer was simply asking what Teague also found to be very straight forward: please verify that the total balance in the brokerage accounts reviewed was greater than a specified amount.

Apparently Shimer's request was not as difficult as Abernethy imagined because though Abernethy did not comply with the two letter procedure suggested by Shimer,

Plaintiff's Exhibit 45 does indicate that Abernethy agreed to provide such a minimum amount verification and began providing that to Teague quarterly.

Based on Abernethy's verified rate of return Shimer believed that Shasta's account balance with Tech slightly exceeded $1.1 million as of the end of July, 2002 just as Abernethy verified in September. This initial willingness on Abernethy' s part to confirm exactly what Shimer believed to be true was hardly a red flag. Plaintiff contends that the fact that the actual amounts verified by Abernethy to Teague varied from time to time from the actual ending account balance for Shasta was a "red flag" to Shimer and Firth. But *Teague never sent out copies of the AUP letters she received from Abernethy to either Shimer or Firth.* Plaintiff seems willing to conveniently overlook that "fact". If Teague felt there was a reason to be concerned about an inappropriate dollar discrepancy between what Vernon was verifying and what Teague knew was an ending balance for the entity Shasta it was her responsibility to contact either Shimer or Firth. Teague received Tech's statements to Shasta from Firth. She knew exactly what her client Shasta purportedly had on deposit with Tech.

Plaintiff's Exhibit 1156 compares the exact balance of Shasta at Tech received by Shasta's manager Equity from Murray with the minimum balance verification number provided by Abernethy in his AUP letters to Teague. Teague knew that Abernethy was only verifying Shasta's balance each month. (See Plaintiff's Exhibit 449). It was also obvious from a review of the amounts Abernethy reported that he was reporting only in even hundred thousands. Plaintiff's Exhibit 1156 shows that there was a cumulative difference of $437,109.00 between Abernethy's verification total and Shasta's balance according to statements provided to Firth by Tech. Why would this total overall discrepancy (apparent only to Teague) be an alert to either Shimer or Firth when Teague never expressed any such concern to them?

A review of Plaintiff's Exhibit 449 reveals that Shimer told Teague to look for a verified total from Vernon of $12.5 million. The actual reported Shasta balance reported by Tech was only $12,076,871 as of the end of December, 2003 but Plaintiff's Exhibit 1156 shows that Abernethy actually verified $12.7 million in the accounts which was $100,000 *more* than the combined actual balances with Tech for both Shasta and New Century as of the end of December, 2003.

Returning briefly to Plaintiff's Exhibit 449, as Shimer pointed out to the Court in his closing argument, that exhibit shows clearly that the minimum balance reporting by Abernethy for just the amounts that Shasta had on deposit with Tech was clearly not a "red flag" for prospective investor Sonia Triester after discussing it with Teague on the phone. The Triester Corporation invested anyway. That same exhibit also shows that Teague's attitude about Abernethy's minimum balance reporting was relatively matter of fact about the subject: "They asked me if I was satisfied with that. I told them that it would be better if report covered all monies in fund but that was not the case." (See Exhibit 449). And finally what is also obvious is that this rather blasé attitude on the part of Teague was being expressed *in February of 2004* when all of those "discrepancies" had already been reported by Abernethy and forwarded to Teague in his AUP letters.

Finally, what Plaintiff's minimum balance "red flag" argument ignores is the fact that there was probably much more than the combined balance of all accounts known to Shimer (Shasta, New Century and Shadetree) in Murray's accounts at all times any way. A review of the six months for which we *do* have a total of all account balances at Tech in the record per the Plaintiff's expert witness Susan Koprowski (see Plaintiff's Exhibit 1079) reveals that *in every case* the total amount that Koprowski stated to be in all of Tech's accounts for the months of October, 2001, December 2001, January 2002, October 2002, April 2003 and May 2003 exceeded the combined total of the accounts of Shasta, New Century *and* Shadetree (excluding account 707).

What Plaintiff presented to the court in regard to the minimum account balance issue is a questionable witness in the form of Vernon Abernethy combined with a false argument. Plaintiff apparently argues that if the amount that actually was on deposit with Tech had been verified by Abernethy the problem at Tech would have been revealed. Nothing could be further from the truth. The actual amounts that Plaintiff's own Exhibit 1079 says *were* on deposit at Tech equaled or exceeded the total amounts that Shasta, New Century and Shadetree were *supposed to have on deposit* according to the monthly reports issued by Tech to each of those entities. The problem at Tech was *not* a lack of funds to equal what Shimer expected were on

deposit at Tech. The problem at Tech was the erroneous rate of return numbers Abernethy was consistently verifying to Teague.

As Shimer also pointed out in his closing argument at trial, the fact of the matter is that minimum account verification provided *some* comfort but that is not what everyone relied on. Confidence in the rate of return number literally precludes any substantial doubt about the theoretical deficiency of a minimum account balance verification. If the rate of return numbers were accurate, Murray had no reason to abscond with investor funds. Why risk jail and total disgrace if the trading system is generating a generous rate of return as reported by Abernethy to Teague? The rate of return numbers themselves were clearly an adequate assurance that all necessary funds for full repayment to investors were, indeed, in Tech's accounts. Plaintiff's Exhibit 449 clearly indicates that at least one sophisticated accredited investor saw and accepted that logic when the subject of minimum account balance verification was discussed with Teague in February of 2004.

G. It was not reckless for Shimer to first determine a new ending account balance for his client Shasta and then forward that computation to Murray for his concurrence.

Facts regarding whether it was reckless for Shimer to first determine a new ending account balance for his client Shasta and then forward that computation to Murray for his concurrence.

Shimer computed a new ending balance for his client Shasta as soon as Shasta received the official verified rate of return from Elaine Teague (Trial Transcript 9/4/07, page 151, lines 24-25 & Page 152, lines 1-2). Shimer computed the new ending balance instead of Firth because as the sole signer on Shasta's bank account Shimer had all information necessary to compute Shasta's new balance once the reported rate of return for the month was known (Trial Transcript 9/4/07 page 152, lines 3-16). Page 28 of Plaintiff's exhibit 1093 states that separate calculations will occur by Tech and Shasta to

compute any opening account balance. Shimer was only doing what Shasta's PPM said Shasta was entitled to do: separately verify the new account balance.

Shimer suggested the account format that was used by Tech. (Trial Transcript 9/4/07, page 153, lines 5-7). Shimer did not like Firth's previous excel format and Murray had a previous format and Shimer suggested another format that was agreed to by Murray. (Trial Transcript 9/4/07, page 153, lines 9-17). Shimer used that new format to compute the new account balance for his client Shasta. (Trial Transcript 9/4/07, page 153, lines 18-19). Shimer expected Murray to review Shimer's computation for accuracy and Murray did that and found errors in math from time to time and advised Shimer of the need for a correction. (Trial Transcript 9/4/07, page 153, lines 20-25 & Page 154, line1). If what Shimer computed was accurate it would save Murray time. Shimer believed Murray was a busy man and this accommodation would eliminate a piece of paperwork for Murray and as a courtesy save him some time. It would allow him to review Shimer's computation, confirm its accuracy and send the report on to Shasta's manager as Tech's report instead of requiring the development of two separate report formats. (Trial Transcript 9/4/07, page 154, lines 2-10).

Shimer always expected Murray to review any calculation of Shasta's ending balance carefully because he was reporting to Shasta what the new balance was. Shimer and Murray both had the rate of return number and both knew the amount of additions to the account each month. Shimer got feedback from Murray from time to time if Shimer made a mathematical error. (Trial Transcript 9/4/07, page 154, lines 13-15 & page 155, lines 1-16). Plaintiff's Exhibit 1046 is a fax from Shimer to Murray dated 12/2/02 asking him to review reports he received from Shimer for Shasta, New Century and Shadetree and to fax those reports out to the fax numbers provided. (Trial Transcript 9/4/07, page 155, lines 17-25 & page 156, lines 1-13).

Plaintiff's Exhibit 1052 is a fax from Shimer to Murray dated May 6, 2003 asking Murray to fax reports for December, '02, January and February to Shasta. (Trial Transcript 9/4/07, page 156, lines 22-25 & lines 1-3). On page 2 of Plaintiff's Exhibit 45 Shimer asked Murray to confirm Shimer's computation for Shasta July '02 account balance and if not to fax a new account statement to Equity and also provide a copy to Teague. (Trial Transcript 9/4/07, page 157, lines 4-9).

Firth received a copy of Tech's monthly report to Shasta directly from Murray. (Trial Transcript 9/4/07, page 14, lines 9-11). At first Murray would send the Shasta report by Fed Ex or DHL. Later he would fax them to Firth. (Trial Transcript 9/4/07, page 14, lines 12-16). As Shasta's manager, Firth faxed to Teague a copy of the Shasta report he received from Murray if he received the report from Tech by fax. (Trial Transcript 9/4/07, page 14, lines 17-25). Any Tech report to Shasta that Teague received from Firth was always a report Firth first received from Murray at Tech. (Trial Transcript 9/4/07, page 15, lines 1-4).

Argument: It was not reckless for Shimer to first determine a new ending account balance for his client Shasta and then forward that computation to Murray for his concurrence.

The format that Shimer used to first compute the new ending balance for his client was agreed upon jointly between Shimer and Murray. There is no evidence that Murray resisted the actual computation format that was adopted and used by Shimer in doing a preliminary computation of Shasta's new account balance after the rate of return was verified by Abernethy and conveyed to Teague. Shimer always waited for Teague to provide the official verified rate of return before he began his computation and the Plaintiff has not introduced any evidence in the record that purports to contradict this fact.

Plaintiff's basic argument is that it was reckless for Shimer and Firth to allow Murray to use the same format used by Shimer in verifying that the new ending balance for Shasta was correct. But isn't the accuracy of the underlying computation that is important? Plaintiff seems to be trying its best to simply construct an argument that focuses primarily on form over substance. This case was filed because the rate of return percentages being verified by Abernethy were *not* accurate. But now the Plaintiff wants to argue that even when the computation performed by Shimer was accurate, and was reviewed and verified by Tech somehow it was "reckless" for Shimer to allow the entity Tech Traders to adopt the same format, review Shimer's computation to ensure that it was accurate, and then forward that report to the entity Equity.

Admittedly Tech could have taken all the numbers and computations that went into Shimer's new balance computation, reformatted it completely and engaged in a brand new computation from scratch. But does that really make any sense? Why would that have been necessary? There was only one variable that was needed to be known before a new balance computation could be determined for the entity Shasta: that variable was the rate of return percentage that Teague received from Abernethy each month. Once that information was available to Shimer there was no other information necessary from any other outside source for Shimer to accurately compute Shasta's new ending balance.

As the sole signer on Shasta's sub account of Shimer's attorney escrow account at Citibank Shimer had before him every single new deposit that had been received for the benefit of Shasta and forwarded on to Tech that month. That bank account was also the only destination for any withdrawal that was made by Shasta from Tech that month. So Shimer knew exactly the amount of new additions to Shasta's account and he knew exactly the amount that had been withdrawn from Shasta's account that month. Teague received a copy of all of these bank statements from Shimer. (Trial Transcript 9/5/07, page 5, lines 23-25).

One does not need to approach the determination of what the new balance should be by needlessly creating two different report formats. One need only review and check to make sure that the new rate of return was properly applied to the account's beginning balance and know how many trading days applied to any new funds that were sent to Tech by Shasta that month. That's exactly what Tech did each and every month before Murray reviewed for accuracy the report just received from Shimer. Murray was then free to do whatever he wanted. He could have created a brand new report format as Plaintiff suggests was somehow required. Or he could simply adopt as his own the report he just reviewed and approved from Shimer. In the real world what is more likely to happen given that particular scenario.

What we have here is an argument by government that additional paperwork by Tech in the form of a completely new report format is a necessary prerequisite to avoid a charge of recklessness—not necessarily to assure greater reporting accuracy but merely to satisfy the argument that to ensure freedom from government scrutiny one cannot have too many different formats of the same identical information.

H. Shimer's proposed method for computing profits in the investment agreement between Tech and Shasta did not prevent Abernethy from properly computing a rate of return for the entity Tech

Facts regarding whether Shimer's proposed method for computing profits in the investment agreement between Tech and Shasta prevented Abernethy from properly computing a rate of return for the entity Tech

Abernethy specifically used the term "rate of return" and specifically referred to the "return" for the previous calendar month in every AUP letter he signed, addressed to defendant Murray and provided to Shasta's CPA Elaine Teague. (See all AUP letters found in Plaintiff's Exhibit # 1009). The first AUP letter issued by Abernethy was dated October 22, 2001 and refers to a "rate of return" for the single month of June, 2001 and a collective rate of return for the quarter of July, August & September, 2001. (See last page of Plaintiff's Exhibit 1009). The last AUP letter issued by Abernethy was dated March 13, 2004 and refers to a specific rate of return for the calendar month of February, 2004. (See first page of Plaintiff's Exhibit 1009).

Teague confirmed in her deposition testimony that she received from Abernethy AUP letters for all months from June, 2001 through February, 2004 now listed in Plaintiff's Exhibit 1009. (See Teague deposition page 163, lines 12-25 and page 165, lines 6-12). Elaine Teague understood what the term "rate of return" meant if that term were used in a sentence or in any context and stated in her deposition testimony that the term rate of return meant the performance return or the earnings on an investment for a particular period of time. (See Teague deposition page 167, lines 6-14).

Abernethy also confirmed in his deposition testimony that he knew what the term rate of return meant (See Trial Transcript, 8/30/07, page 116, lines 14-22. Abernethy's AUP letters (see Plaintiff's Exhibit 1009) never refer to or mention any part of the Investment Agreement executed by and between the entities Shasta and Tech Traders as a reference for the meaning of the term "rate of return" used by Abernethy in his AUP letters.

The record contains no document from Abernethy to either Shimer or Teague or to anyone else that purports to qualify the meaning of the term "rate of return" used in his AUP letters to mean "profit" or "profits" as that term was specifically defined in paragraph V the Investment Agreement executed by and between Equity as the manager of Shasta and Tech Traders. The Investment Agreement executed by and between the entities Shasta and Tech is found as Plaintiff's Exhibit #91. Paragraph V of the Investment Agreement between Shasta and Tech does not contain the term "rate of return". At trial Abernethy testified under oath that he intended the term rate of return in his AUP letters to Murray to mean profits as that term was defined in the Investment Agreement between Shasta and Tech (Trial Transcript 8/30/07 page 117, lines 20-25 and page 118, lines 1-8).

Argument regarding whether Shimer's proposed method for computing profits in the investment agreement between Tech and Shasta prevented Abernethy from properly computing a rate of return for the entity Tech

Plaintiff will undoubtedly point to Abernethy's testimony at trial (Trial Transcript 8/30/07 page 117, lines 20-25 and page 118, lines 1-8) in support of an argument that Shimer constructed a flawed procedure for verification of Tech's rate of return each month. Plaintiff's argument is basically found in her cross examination of Shimer in the Trial Transcript 8/28/07, page 117 lines 10-25, page 118, lines 1-25, page 119, lines 1-25 and page 120, lines 1-2.) and can be very generally summarized as follows: "The Agreement between Shasta and Tech drafted by Shimer somehow imposed a restriction on Abernethy's ability to properly compute a rate of return for the entity Tech." Plaintiff's argument is flawed in a number of ways.

First of all Abernethy had clearly undertaken to perform an important responsibility by verifying a rate of return that he knew or should have known would be relied upon by others in making investment decisions. If he had a problem with the way the Investment Agreement between Shimer's client Shasta and Tech defined "profit" or "profits" and perceived the terms of that Agreement to compromise or prevent him from adopting a particular method he preferred for computing a rate of return that differed

from the approach outlined in the Investment Agreement for computing Shasta's allocated profit or profits Abernethy had an obligation to contact Shimer and advise Shimer of that fact. Agreements can be modified or amended.

Agreements are modified or amended all the time. Nothing about that Agreement was cast in stone. There is absolutely no evidence in the record that Abernethy as the CPA hired by Tech ever contacted Shimer and informed him of any difficulty Abernethy had with the language of Paragraph V of the Investment Agreement. Abernethy's clear failure to alert Shimer to some purported "discrepancy" between the language contained in the Investment Agreement and Abernethy's chosen approach to computing a rate of return is not the fault of Shimer.

Secondly Paragraph V only purports to define the term "Profit" or "Profits" as those terms were used in the Agreement. That required a unique approach because Shasta funds were in trading accounts of Tech that also contained other funds belonging to either Tech or other funds belonging to other investors. Therefore, what Shimer described as the "percentage of increase or decrease" for Tech's entire account(s) had to be applied only to the funds of Shasta if a specific dollar amount of "Profit" to be allocated to the entity Shasta was to be determined.

Paragraph V of the Shasta/ Tech Investment Agreement did not purport to set out in a definitive way how the "percentage of increase or decrease" (i.e. rate of return) for the entire account at Tech was to be specifically computed or determined. Paragraph V only recognized the necessity and importance of properly accounting for additions or withdrawals to any Tech account or accounts examined during the month when that percentage of increase or decrease was actually computed. The approach outlined in Paragraph V for accurately determining the proper amount of "profit" or "profits" to allocate to Shasta was simply an approach for determining the what the new dollar amount of Shasta's ending account balance at Tech would be after trading for the month had ended. That ending account balance was, of course, the amount that would be used as Shasta's beginning account balance with Tech for the following calendar month.

Apart from the absurdity of Plaintiff's apparent attempt to "blame" Shimer for Abernethy's lack of feedback to Shimer about how Abernethy may have viewed or interpreted the Investment Agreement between Shasta and Tech any argument by

Plaintiff that subparagraph A of paragraph XII of the Investment Agreement (Plaintiff's Exhibit # 91) somehow "tied" Abernethy's hands in properly computing an accurate rate of return for Tech fails unless Abernethy actually followed the Investment Agreement in his attempt to compute a rate of return for Tech! What should be clear and obvious to any impartial and objective observer is that Abernethy clearly didn't *do* what the Investment Agreement required him to do if he was going to use the Investment Agreement as an instructional guide for how he was supposed to compute Tech's rate of return:

1) If Abernethy actually followed the Investment Agreement between Shasta and Tech the first two sentences of paragraph XII of the Investment Agreement required him to receive from Tech "an original unaltered copy (copies) of monthly statement(s) received from its brokerage firm(s)…" (see bottom of page 6 and top of page 7 of Plaintiff's Exhibit # 91). Abernethy never did that. According to Abernethy's own sworn testimony he apparently capitulated almost immediately to Murray's suggestion that Murray just provide Abernethy with what turned out to be meaningless summaries prepared by Murray. (SeeTrial transcript 8/30/07, page 90, lines 19-25 and page 91, lines 1-6).

2) Paragraph V of the Investment Agreement required that any computation of what Shimer described as the " 'percentage of increase' or 'percentage of decrease' of Tech's entire pooled trading accounts…" would require recognition of the importance of "…the effect of any amounts withdrawn by investors during the month or new amounts added to Tech's account(s) during the month." According to the sworn testimony of the Plaintiff's own expert Susan Koprowski Abernethy's computation of Tech's rate of return in many instances ignored the effect of additions and subtractions to Tech's accounts thereby skewing the rate of return he was reporting to Tech and conveying to Teague. (Trial transcript, 8/29/07, page 135, lines 16-21). See also Plaintiff's Exhibit 1061, "Report of Susan C Koprowski Expert Opinion" page 7 , paragraph number 10 which concludes that the Rate of return for the months of January 2002 and May 2003, were examples of months in which the rate of return computation was performed by Abernethy "…without properly adjusting for additions and withdrawals made throughout the month."

If Abernethy ignored specific language in the Investment Agreement that specifically told him what documents he had to review and what information he had to take into account if he was going to use the Shasta/Tech Investment Agreement as his "instructional manual" on how to compute Tech's monthly "rate of return" it is difficult to understand how the Court could possibly give any credence at all to Plaintiff's bizarre argument that the Investment Agreement executed between Shasta and Tech somehow either "tied" Abernethy's hands or affected Abernethy's behavior in any way at all when it came to the critically important task of computing Tech's rate of return.

This willingness on Abernethy's part to ignore the critical effect that additions and withdrawals would have on the computation of any rate of return performance of Tech for any given month represents incomprehensibly negligent behavior on the part of Abernethy –particularly in light of the fact that Abernethy had received a fax from Teague dated July 24, 2001 that alerted him to that specific concern on the part of Teague when she stated in that particular fax: "our concern is with the rate of return per month but also the calculation of the rate and that it is not skewed by additions and withdrawals of monies during the month." (See cited text in Plaintiff's Exhibit # 38).

Abernethy's entire sworn testimony at trial about what he actually did to verify a rate of return for the entity Tech (see generally Trial Transcript 8/30/07 beginning at page 86, line 14 through page 97, line 13) seems even more bizarre in light of two additional facts that Plaintiff is unable to dispute:

1) Abernethy received Teague's e-mail correspondence dated July 24, 2001 identified as Plaintiff's Exhibit # 38 advising him of the importance of properly accounting for the effect of additions and withdrawals only two days before his 29 minute telephone conversation with Teague on July 26, 2001. (See previously cited Plaintiff's Exhibit 493).
2) In that July 26, 2001 telephone conversation Abernethy specifically assured Teague he would not only be reviewing original brokerage statements (Teague deposition page 160, lines 7-11) but also any other documents that might be pertinent to an accurate computation of Tech's rate of return. (See Teague deposition page 201, lines 4-18). See also Teague deposition, page 334, lines 6-12.

Plaintiff apparently argues that Shimer is somehow responsible for the irresponsible mess that Abernethy made of Tech's trading verification because of Shimer's legitimate attempt to appropriately and accurately define the term "profits" for a very specific purpose in the Shasta/Tech Investment Agreement. That argument is absurd for all of the reasons stated above.

Both Abernethy and Teague as CPAs knew what the term "rate of return" meant. They were both apparently competent CPAs based upon Abernethy's resume and based upon Teague's position as partner of Puttman & Teague. Abernethy and Teague also both clearly knew and understood that Shasta expected to receive a trading performance report from Abernethy through Shasta's CPA Teague each month that was purportedly the result of a verification process worked out between them. How could two CPA's apparently screw up the reporting of a term they both understood ("rate of return") verified according to a specific procedure described by both as an "Agreed Upon Procedure" proposed by the one and approved by the other?

I. Regarding whether Shimer and Firth knowingly or recklessly misrepresented the independent role of CPA Vernon Abernethy and Shasta's CPA Elaine Teague.

Facts regarding the disclosure of the respective roles of both Abernethy and Teague to all Shasta investors

An agreement similar to Plaintiff's Exhibit 1089 was a document that was received and required to be signed by every investor in Shasta as a part of the subscription process. (See Stipulated Fact 71 and Trial Transcript 8/28/07 page 151, lines 6-8). All references in that document to an "Accounting Firm" referred to Teague's CPA firm of Puttman & Teague and the reference to "Designated Partner" in that document referred to Elaine Teague (see Trial Transcript 8/28/07 page 152, lines 8-11). Teague's specific role as Shasta's CPA was disclosed to Shasta's members in a separate Agreement (similar to Plaintiff's Exhibit 1089) that all members were required to sign. (Stipulated Fact 42, paragraph 2, sentence 2).

Plaintiff's Exhibit 1089 specifically advised every member of Shasta in writing that the role of Teague's firm with respect to verification of the monthly performance number was limited to *receiving* the rate of return verification and *reporting* that information to Shasta: (See page 1 of Plaintiff's Exhibit 1089, in the fifth paragraph that begins with "whereas" it states : "the Accounting Firm and the Designated Partner...*have also agreed to receive and report to Shasta* the separate verification of another certified public accounting firm that will physically review the original unaltered brokerage statements of the Trading Company each month to provide independent verification of the percentage of profit and/or loss experienced by the Trading Company for the month…").

The limited role that Teague and her accounting firm were to play in the actual verification process was also further confirmed and fully disclosed in Shasta's PPM. (See the paragraph numbered 6 in Plaintiffs Exhibit 1093, page 20). All members of Shasta verified prior to being admitted as a member of Shasta that they were an accredited investor by filling out and submitting an Investor questionnaire. An investor questionnaire similar to the one admitted into evidence as Shimer Exhibit 60 executed by Shasta member Thomas List was executed by all members of Shasta as an integral part of the subscription documents required to become a member of Shasta. There is no evidence in the record nor has Plaintiff ever alleged that any member of Shasta did not execute an Investment Questionnaire similar to Shimer exhibit 60.

As reflected in the 7th paragraph on page 1 of Plaintiff's Exhibit 1089, all members of Shasta were given access to Teague as the "designated partner" at the "Accounting Firm". They were given her phone number and were clearly able to call and speak to her if they had a question. (See for example trial testimony of Shasta investor Tom Dent--Trial Transcript 8/29/07, page 95, lines 23-24). (See also Shasta PPM—Plaintiff's Exhibit 1093, page 18, paragraph 2 under the heading "Trading Company Verification"). See also Plaintiff's Exhibit 449 which provides an example of the open and frank interchange that was not only possible between all of Shasta's members and Teague but was probably typical if they simply picked up the phone and gave her a call. Teague was willing to take calls from Shasta's members and in fact did take those calls

from time to time. (Teague deposition page 279, lines 13-17). There is absolutely no evidence in the record that Teague ever failed to talk to any member of Shasta who called and had a question about her role as Shasta's CPA or a question about the effectiveness of the verification procedures being performed by the local verifying CPA.

Conclusion: The separate roles of Abernethy and Teague were adequately disclosed to all investors

Argument regarding the disclosure of the respective roles of both Abernethy and Teague to all Shasta investors

The role of Abernethy as the local CPA responsible for locally reviewing original brokerage statements each month and reporting a specific rate of return to Shasta's CPA was obvious and understood by every member of Shasta. Plaintiff has never argued otherwise. With respect to Teague, the Agreement document represented by Plaintiff's Exhibit 1089 clearly informed all members of Shasta as knowledgeable accredited investors that Teague and her firm were only performing a "receive and report" function. If any Shasta investor claimed at trial that he had a different impression of Teague's role that was clearly not the fault of Shimer or Firth. Unusual or out of the ordinary investments such as Shasta—especially ones that are reporting extraordinarily good consistent investment returns require a careful scrutiny and study of *all* documentation that is provided to investors as a part of the subscription process.

Shasta's PPM was as clear as possible about the role of "the Company's accounting firm" (i.e. Puttman & Teague) in the rate of return verification process. In the paragraph identified as #6 on page 20 of Shasta's PPM (Plaintiff's Exhibit 1093) it clearly informed all prospective investors in Shasta that the role of the Company's accounting firm was only that of being a "neutral provider of information" and that the accounting firm was "not in a position to certify or guarantee the accuracy of that information".

Several investors reported at trial they had the impression that Teague was playing a far more active role in the verification process. However it is hardly a legitimate criticism of Shimer or Firth if an investor 1) never carefully read the documents provided to them or 2) later forgot what they had previously read. Moreover

but equally important is the fact that if an investor ever had any question about Teague's role in the verification process, all they had to do was pick up the phone and call her. Teague and the name of her firm and her contact information was provided to all investors when they became a member of Shasta and there is no evidence in the record that contradicts that obvious fact. Nor has Plaintiff ever alleged that Shimer or Firth attempted to hide the identity or contact information of Shasta's CPA from any member of Shasta. How is it Shimer or Firth's fault if an investor who purports to be "accredited" was not willing to call Shasta's CPA if they had any question about the role she or her firm played in the verification process?

Moreover it was clear or should have been clear to all investors that Shasta's accounting firm was located in Portland, Oregon. The fact that the trading entity was located in North Carolina was not kept from any investor and Plaintiff never made the allegation at trial or purported to introduce any evidence that any member of Shasta did not know of the significant distance between the location of Puttman & Teague and the CPA doing the on site verification of trading.

Assume for the purpose of argument that *despite* the clear language of both Shasta's PPM (Plaintiff's Exhibit 1093) and the language of the Agreement for Verification (Plaintiff's Exhibit 1089) an investor in Shasta harbored the misunderstanding that Teague was playing a more "active" role in the verification process by somehow "checking" the work of the verifying local CPA. Exactly what would that additional "verification" by Teague have been given the obvious physical distance separating the two CPA's? Any summary sent to her was just an unverified summary. What was she supposed to with *that*? Check Abernethy's ability to add or subtract numbers on a page? Absent actual access to original brokerage statements, any secondary "check" by Teague was as useless as the "cut and paste" Plaintiff derided so consistently whenever possible at trial. And yet "cut and paste" was all Teague was supposed to do (Teague Deposition page 279, lines 18-24) and that was what every member of Shasta was told she was doing.

The screen of plain common sense has to be applied to any testimony at trial by a member of Shasta that they expected or believed that Teague was doing more than what was represented in the written documentation they were provided. Teague's job was

simply to "receive" the trading verification reported by another CPA and then "report" that to Shasta. She was a "neutral provider of information" that was previously provided to her. That is what she was supposed to do, that is exactly what she did.

Despite all of Plaintiff's arguments to the contrary Shimer (as legal counsel to the entities Shasta and Equity) prepared documents that 1) provided a clear description to Shasta's members of the limited role that Shasta's CPA would play in the verification process and 2) provided all members of Shasta with the opportunity for direct access to Teague and her firm to ask any question they might have about her role in the verification process. The members of Shasta have absolutely no excuse for not knowing exactly what Teague's role was in the verification of the trading company's reported rate of return.

Regarding the importance of the role of Puttman & Teague

Though Teague obviously played a limited role that does not mean her role in the "verification process" was not significant in many ways for members of Shasta. She served as a readily available point of contact to provide verification to any member of Shasta who elected to call her: 1) That she knew the identity of the local CPA purportedly verifying the trading company's rate of return on site; 2) That she did in fact receive written verification of a rate of return from that local verifying CPA each and every month of the engagement; 3) That the rate of return she received was indeed the rate of return being reported by Shasta and its manager to Shasta's members; 4) That the agreed upon procedures that she believed the verifying CPA was performing as a part of the rate of return verification process included a review of original brokerage statements; 5) That she considered the procedures the verifying CPA was performing as explained and confirmed to her by that local CPA to be a "mini audit".

Abernethy and Teague were independent CPAs

Facts Regarding Teague's Independence

Shimer had not seen or spoken to Teague for about 10 years when he made first contact with her on March 23, 2001 (Trial Transcript 9/4/07 page 87 lines 9-22). Shimer

proposed Teague's name to Murray as the CPA to verify Tech's monthly rate of return in a fax dated March 1, 2001indentified as Plaintiff's Exhibit 1118.
That fact that Shimer was a friend did not impair her independence. (Teague deposition page 286, lines 6-13).

Argument Regarding Teague's Independence

The fact that Teague was a friend did not jeopardize her independent status as Shasta's CPA. That is particularly true given the amount of time that had passed since Shimer had spoken to her. Many professionals have friends as clients. There is absolutely no sound basis for the argument that the professional nature of a CPA's services are compromised because they are retained by a friend.

Facts Regarding Abernethy's Independence

There is no evidence in the record that Abernethy had any association with Murray prior to the time he was hired by Murray to verify Tech's performance. Abernethy met Murray when he came to Abernethy's office in May of 2001. (Trial Transcript 8/30/07 page 77, lines 4-8). Firth was not aware of any evidence or information that Abernethy knew or had a prior association with Murray before Abernethy was hired (Trial Transcript 8/27/07 page 163, lines 12—17).

Abernethy had completed his first verification of Tech's performance for the months of June, and the quarter July, August and September prior to October 22, 2001. (See last page of Plaintiff's Exhibit 1009). Before Abernethy received Firth's e-mail dated October 29, 2001 identified as Plaintiff's Exhibit 18 Abernethy had expressed excitement to Firth about Murray's financial numbers. Abernethy wanted to refer clients to Shasta. Firth told him it was ok to talk to them but then to refer them to Firth (Trial Transcript 8/27/07 page 160, lines 14-20). Firth's understanding was that Abernethy's expectation was not to be paid a fee for the referral but that Abernethy was interested in the possibility of becoming a full time CPA for Shasta later on. (Trial Transcript 8/27/07 page 161, lines 9-16). Abernethy expressed his expectation and hope that Abernethy might secure the accounting business of Murray. (Trial Transcript 8/30/07 page 86, lines

21-23). Abernethy confirmed during redirect examination by the Plaintiff his hope or expectation that he might pick up more accounting business from Shasta as well as from Jerry Pettus and Ron Peoples as a result of the networking he was doing through Shasta. (Trial Transcript 8/30/07, page 135 lines 17-25 and page 1-21).

Firth confirmed in his trial testimony that there was no discussion of a fee to Abernethy at the time of Plaintiff's Exhibit 18 (Trial Transcript 8/27/07, page 160, lines 21-23). Firth did not convey any agreement to Abernethy that Abernethy would receive a fee for referring investors to Shasta. Any referral he would have made would be without compensation (Trial Transcript 8/27/07 page 161, lines 22-25 & page 162, lines 1-3). Firth was not opposed to Abernethy talking to someone about Shasta and then giving their name and number to Firth. (Trial Transcript page 162, lines 4-12). Abernethy confirmed that this was also Abernethy's understanding of his role as well. (Trial Transcript 8/30/07 page 114, lines 4-7). Abernethy clearly confirmed there was never any specific agreement between him and either Shimer or Firth to pay Abernethy a referral fee or commission. (Trial Transcript 8/30/07 page 128 lines17-25 & page 129 lines 1-6). Abernethy had discussions with Shimer and Firth about the possibility of commissions but he wasn't interested in that. He just wanted to grow his accounting business (Trial Transcript 8/30/07 page 129 lines 15-25 and page 130, lines 1-10). Abernethy confirmed that Shimer and Firth later made it clear there were no contracts, no commissions. (Trial Transcript 8/30/07 page 137, lines 10-14).

Abernethy also confirmed in response to a question by the Court that Firth and Ron Peoples were reviewing a golf course project (Trial Transcript 8/30/07, page 139, lines 6-16). Abernethy also confirmed that Firth proposed and discussed the possibility of a golf course project with Jerry Pettus. (Trial Transcript 8/30/07, page 139, lines 16-23),

Abernethy thought he was independent at first but then later realized he was not independent. (Trial Transcript 8/30/07 page 121 lines 10-13). Abernethy's conclusion about his independent status was discussed in the context of being able to get the information he hoped from Murray. (Trial Transcript 8/30/07, page 121, lines 14-18 & page 122, lines 4-8). Abernethy also states that he perceived an independence problem even during his first meeting with Shimer in early July 2001 but that particular problem of his "independence" was in reporting to Shimer. (Trial Transcript 8/30/07 page 122

lines 13-16). Abernethy attempts to clarify his perceived "independence" problem with respect to Shimer as being what Abernethy describes as an "upstream" problem. (Trial Transcript 8/30/07, page 125, lines 6-9 & later lines 20-24). Abernethy's stated reason for why he perceived an "upstream" problem to exist with respect to Shimer was evidently because both Shimer and Murray "were involved in the fund". (Trial Transcript 8/30/07, page 125, lines 9-10). Abernethy said he felt he was "independent" at the beginning of the engagement because Shimer advised him Shimer had a friend "that could do that additional work". (Trial Transcript 8/30/07, page 125, lines 20-25)

Abernethy's excitement about what he was seeing when he verified Murray's numbers was obvious to Shimer every time Shimer and Firth interacted with Abernethy. He would say oh, I know someone who might be interested in this. Abernethy may have used that excitement to generate new accounting business for himself. (Trial Transcript 9/4/07, page 147, lines 8-21). When Abernethy began referring people to Shasta that created the potential for undermining his independence. We never sat down with Vernon and got into a specific conversation with him about paying him a referral fee but it became clear to Shimer that a line had been crossed. (Trial Transcript 9/4/07 page 147, line 22-25 & page 148, lines 1-10).

On July 16, 2002 Shimer sent Murray a fax in which he discusses with Murray several topics that touch on the issue of Abernethy's independence. (Plaintiff's Exhibit 1024). Abernethy went to the Bahamas at about the same time in July of 2002 as Plaintiff's Exhibit 1024. (Trial Transcript 9/4/07 page 148, lines 6-13). (See also Alison Shimer confirmation of time of Abernethy's trip to Bahamas at Trial Transcript 9/6/07 page 31, lines 10-25). Upon his return from the Bahamas Abernethy had developed a new attitude about Shimer and Firth that removed any question about Abernethy's independence after August, 2002. (Trial Transcript 9/4/07 page 148, lines 11-21).

No referral activity by Abernethy to Shasta occurred after August, 2002. (Trial Transcript 9/4/07, page 148, lines 22-24).

Argument Regarding Abernethy's Independence

The Plaintiff alleges in both its Amended Complaint and in its trial brief that Abernethy was not "independent" and that Shimer and Firth both somehow "knew" he was not independent. The Plaintiff's allegation of Abernethy's lack of independence is based upon the assertion that there was apparently some sort of agreement or understanding between Firth, Shimer and Abernethy that Abernethy would receive a fee or commission for referring investors to Shasta. Both Firth, Shimer and Abernethy all testified consistently at trial that there was never *any* specific agreement between them for the payment of a referral fee or commission to Abernethy for referring people to Shasta.

Mr. Abernethy (the Plaintiff's supposed "star" witness) specifically testified that he did not want and never expected to ever receive a fee or commission for referring people to Shasta. The consistent testimony of Shimer, Firth and Abernethy about the lack of any agreement for the payment of fees to Abernethy excludes Plaintiff's ability to establish by a preponderance of the evidence that such an agreement ever existed. The only way the Plaintiff can overcome *that* evidentiary hurdle would be to try to argue against the credibility of its own witness on this issue. Clearly there is no preponderance of the evidence that an agreement between Shimer, Firth and Abernethy ever existed for the payment of any commission to Abernethy.

Clearly the evidence confirms that Abernethy did tell people about Shasta and did refer people to Shasta. But the act of referring people to Shasta does not in and of itself serve to compromise Abernethy's independence unless there was an expectation *by Abernethy* that he would receive a fee or commission for that referral. Abernethy consistently and adamantly testified that he had no such expectation. His consistent testimony at trial and in response to a specific question by the Court Abernethy stated that he advised both Shimer and Firth that receiving a commission for any referral to Shasta "…wasn't interesting to me." (Trial Transcript 8/30/01 page 129, line 21). Instead of putting words in Abernethy's mouth this is exactly how Abernethy described his expectation for any referrals he made to Shasta:

> " What I was trying to do was network with them hoping that one of the clients that I referred them to , I wanted to do some business with him on

> other matters. So, just like with Mr. Murray if could continue to do work for him, I would get his accounting, bookkeeping and tax. I was simply trying to network with a group of people that I felt were sophisticated investors and that were who able to help me grow my practice." (Trial Transcript 8/30/07, page 129, lines 21-25 & page 130, lines 1-4).

Abernethy's expectation that any networking activity he did with Shasta would help grow his accounting business was hardly a compromise of his "independence" with respect to the rate of return verification he was also doing for the entity Tech. Even the CFTC will probably not attempt to "float" that particular argument. Abernethy was clearly entitled to do whatever he thought might be helpful or necessary to grow his core accounting business after his divorce.

There is evidence in Shimer's fax communication to Murray on July 16, 2002 (Plaintiff's Exhibit 1024) that Shimer held an expectation in his own mind that regardless of whether or not a specific agreement existed with Abernethy and regardless of what Abernethy might expect, that some sort of credit to Abernethy should occur if someone actually became a member of Shasta. But what is also apparent in Shimer's fax communication to Murray is his dissatisfaction about the way Abernethy was talking about Shasta by pressing too hard. It was clear to both Shimer and Firth that Abernethy was excited about what he saw when he verified Tech's returns. That excitement only served to further confirm to them that what Abernethy was reporting to Teague was accurate. Why would a CPA become excited at seeing trading losses?

But Abernethy's excitement about what he apparently thought he saw at Tech and his apparent need to grow his accounting business was really not helping Shasta. Shimer pointed that out to Murray on page 2 of his fax to Murray dated July 16, 2002. Shimer told Murray that Abernethy's referral style was really doing more harm than good and that Shasta's web site was the way that Shimer preferred to receive referrals about Shasta—not Abernethy. One does not have to read between the lines to see that Shimer is clearly not happy with the referral activity that Abernethy was doing for Shasta and is basically telling Murray that Shasta's web site is all that is necessary—that there is really no need for Abernethy to engage in any more referral activity for Shasta.

Shimer's fax to Murray does indicate that Shimer was at least willing to do what was clearly inappropriate—to give Abernethy credit for any actual referral that

Abernethy made to Shasta. But Shimer's clear dilemma about how to deal with Abernethy was apparently resolved at about that same time. Abernethy went off to the Bahamas. Shimer believed that trip was a business due diligence trip for Jerry Pettus (Trial Transcript 9/4/07 page 144, lines 16-25 & page 145, lines 1-11). Abernethy came back and ended any and all referral activity to Shasta. As Shimer's testimony indicated, he considered that change of attitude on Abernethy's part to be a positive event. (Trial Transcript 9/4/07, page 146, lines 11-20).

There is no evidence that Abernethy ever expected anything more from his referral activities to Shasta than a gain in his accounting business. Abernethy was clearly attempting to simply get back on his feet financially by rebuilding an accounting practice after his recent divorce. There is also no evidence that any further referral was ever made to Shasta by Abernethy after July or August of 2002. At that time Shasta had only about 5 or perhaps 6 members and that included Jerry Pettus--the one referral of Abernethy that actually became a member of Shasta and then immediately withdrew his funds in mid August, 2002. While it is certainly true that Shimer's expressed willingness in July, 2002 to give Abernethy some sort of credit was inappropriate Shimer was relieved of trying to dissuade Abernethy from engaging in any more referral activity by Abernethy's apparent change of attitude upon Abernethy's return from the Bahamas.

Shimer's inappropriate expression of willingness to give Abernethy credit in a fax to Murray does not translate into a lack of independence on the part of Abernethy unless there is some evidence that Abernethy was actually aware of that expressed willingness on the part of Shimer and that Abernethy engaged in referral activity with the expectation of compensation. No such evidence exists in the record. On the contrary, Abernethy's own testimony confirms that he never held that expectation and had expressed that directly to both Shimer and Firth.

The fact that Abernethy received a single lone payment of approximately $900.00 from Shadetree through Murray for referring Pettus to Shasta is not sufficient evidence to support a finding that Abernethy was not independent and that Shimer and Firth knew or should have known he was not independent. Abernethy's testimony confirms that he never expected to receive any payment like that for referring Pettus to Shasta. His testimony also indicates that it was necessary for Murray to actually explain to him why

he was paid that amount (Trial Transcript 8/30/07, page 138, lines 1-7). That payment was more of an unnecessary "wipe the slate clean" gift to Abernethy than anything else.

What *is* confusing about Abernethy's testimony is his insistence that there was a lack of independence on his part 1) because Murray would not give him what he originally expected (Trial Transcript 8/30/07, page 121, lines 14-18 & page 122, lines 4-8); and/or 2) because he perceived there to be a conflict with Shimer because of "upstream" reporting. There is no evidence that Abernethy's first stated reason was ever communicated to anyone. If he experienced any difficulty obtaining whatever he had told Teague he would receive from Murray to perform the verification engagement, it was Abernethy's clear responsibility to either a) insist on receiving what was needed to do the job he had undertaken to do or, b) quit. Apparently he did neither.

Abernethy's second stated reason simply does not make any sense. Abernethy testified that reporting to Shimer would present a problem of independence for Abernethy. But Abernethy was only reporting to Murray. And there is no evidence that anyone ever asked him to report to Shimer. Abernethy tries to explain why reporting to Shimer would raise an issue of independence by citing to this aspect of Shimer's purported lack of independence:

> "you weren't independent from the, from the, from the very beginning
> Question by Shimer:
> I wasn't independent from you or from Mr. Murray? I'm just trying to establish—
> Answer by Abernethy:
> From the pool."

Abernethy's stated reason for concluding that an issue of lack of independence apparently existed with respect to Shimer was because Shimer had an investment in the pool. (Trial Transcript 8/30/07 page 120, lines 16-20). But why that should raise an issue for Abernethy with respect to Shimer but not Murray is not explained because Abernethy also clearly refers to the fact that he believed that both Shimer and Murray "had investments in the pool" (Trial Transcript 8/30/07 page 120, line 20).

What is even more confusing about this particular testimony is the fact that Abernethy purports to state that there was no independence issue at first with respect to Murray but later that changed. But his stated reason wasn't because Murray had "an interest in the pool" even though he had previously acknowledged he knew that.

Abernethy's reason that an independence problem existed with respect to Murray was because Abernethy "wasn't able to get the information as I had hoped to originally" (Trial Transcript 8/30/07 page 121, lines 16-17). It is highly unlikely the Plaintiff will seize upon this part of Abernethy's testimony as evidence that somehow Shimer and Firth knew or should have known Abernethy was not independent. This testimony would certainly be of assistance to Plaintiff in making a case for the fact that Shimer and Firth were aware of Abernethy's lack of mental clarity and competence if only this testimony had been available to Shimer or Firth at the time Abernethy was originally hired by Tech in 2001.

REGARDING COUNT III

With respect to Shimer's alleged violation of Section 13(a) of the CEA [7 U.S.C. § 13c(a)]

Facts regarding whether Shimer acted as the principal of the entity Equity

Vincent Firth ("Firth") was the manager of the entity Equity. (Trial Transcript 8/27/07 page 72, lines 14-19) (See also Plaintiff Exhibit 1090, page 9, Article VI, section 6.1, sentence 3). The sole member, sole shareholder and president of Equity was Firth (Trial Transcript 8/28, page 96, lines 16-20). The record is completely devoid of any evidence that Firth appointed Shimer to any position of authority with respect to the entity Equity.

The entity Equity was the manager of Shasta Capital Associates, LLC ("Shasta"). (See Plaintiff Exhibit 1090, page 9, Article VI, section 6.1, sentence 1; See also Plaintiff's Exhibit 1092, page 21, "Manager"). According to Shasta's PPM the manager of Shasta was vested with "broad and exclusive authority" over the company Shasta (see Plaintiff's Exhibit 1093, page 22, "Certain Transactions" , subparagraph entitled "General"). As the manager of the entity Equity, Firth was entitled to be appointed as President of the entity Shasta (See Plaintiff Exhibit 1090, page 9, Article VI, section 6.1, sentence 4). The Operating Agreement of the entity Shasta (see Plaintiff exhibit 1090) does not indicate anywhere that Shimer held a management position with that company.

Nor is Shimer mentioned at all in Shasta's PPM (Plaintiff Exhibit 1090) on the pages 21and 22 just cited under the topic heading "Manager".

Shimer acted as legal counsel to both the entities Shasta and Equity. (Trial Transcript 8/27/07 page 164, lines 11-13. Shimer was the sole signer on a bank account of the entity Shasta that existed a part of Shimer's attorney escrow account (see Stipulated fact 29). All funds received into Shasta's bank account were received on behalf of the entity Shasta. There is no credible evidence in the record that Shimer acted as a principal of the entity Equity when Shimer received funds into his attorney escrow account for the benefit of the entity Shasta.

Conclusion: The preponderance of evidence supports a finding that Shimer did not act as a principal of the defendant entity Equity.

Argument:

Shimer's role as legal counsel for the entity Shasta and as legal counsel for the entity Equity is not sufficient, as a matter of law, to support a finding that Shimer acted as a principal of the separate entity Equity. Clearly Shimer was acting as Shasta's legal counsel in his control of Shasta's bank account because Shasta's account at Citibank was a part of Shimer's attorney escrow account at that bank. That role by Shimer did not even confer upon Shimer the status of a principal *of the entity Shasta*. The primary benefit of Shasta's Citibank account flowed to the entity Shasta and its members on whose behalf funds were forwarded to the trading entity Tech. The record is devoid of any evidence that Shimer acted as a "principal" of the entity Equity in the traditionally accepted sense or that he *ever* held himself out to anyone as a principal of either Shasta or its manager Equity.

Facts regarding whether Shimer aided and abetted Equity's purported violation of Section 4(m)1 of the CEA.

Shimer took and passed the Series III test in 1985 or 1986. (Trial Transcript 9/4/07, page 47, lines 16-20 & Trial Transcript 9/4/07, page 52, lines24-25, and page 53, lines 1-3). Shimer remembered very few details about the subject matter of that particular test in 2001. (Trial Transcript 9/4/07, page 53, lines 4-7). Shimer never used any of the information he learned while studying for that test after taking the Series III test. (Trial

Transcript 9/4/07, page 53, lines 16-18). There is no credible evidence in the record that Shimer studied the CEA, or had any specific knowledge of any of the provisions of the CEA or the Plaintiff's regulations promulgated under that Act until after the entity Shasta was formed.

In the fall of 2001 Shimer was referred to a large NY investment bank by a legal colleague (Trial Transcript 9/4/07, page 166, lines 15-17). A Vice President at that bank who handled medical related private placements expressed an interest in Shasta but asked Shimer if registration with the CFTC was necessary. Shimer replied that he had reviewed the definitions of a commodity pool operator and commodity trading advisor and concluded that registration was not necessary. (Trial Transcript 9/4/07, page 167, lines 6-17).

That VP asked for a copy of Shasta's PPM. Shimer prepared a legal memorandum to accompany that PPM because he knew that the registration issue would receive review by that investment firm's legal department. Shimer's memorandum sent to that VP is identified as Plaintiff's Exhibit 411. (Trial Transcript 9/4/07, page 167, lines 18-25 and page 168, lines 1-7). Shimer's memo concluded based upon an analysis of the definition of a CPO provided by the National Futures Association that neither Shasta nor Equity were CPOs. (See Plaintiff's Exhibit #411, Question #2 on page 1 and first three paragraphs of page 2). The identify of that bank as the investment firm of JP Morgan Chase and the fact that Shimer's telephone conversation occurred on October 22, 2001 is confirmed by a contemporaneous fax from Shimer to Murray. (See Plaintiff's Exhibit 1029 and Trial Transcript 9/4/07, page 168, lines 8-22).

On or about December 11, 2001 Shimer received a telephone call from his legal colleague that had introduced and referred Shimer to that Vice President at JP Morgan Chase. Shimer's legal colleague told Shimer that Shimer's previous conclusions about the lack of any necessity that Shimer's clients register with the CFTC had been confirmed by the legal department of JP Morgan Chase. The fact that Shimer received this confirmation and the approximate date is confirmed by Plaintiff's Exhibit 1049. (Trial Transcript 9/4/07, page 168, line 25, & page 169, lines 1-21). See also Trial transcript 8/29/07, page 39, lines 21-23).

Shimer's legal clients Shasta and Equity did not trading commodity futures contracts on behalf of themselves or on behalf of anyone else. (Stipulated facts 76 & 77). Firth did not believe that Shimer's role as attorney for Shasta or Equity required Shimer to have any specific knowledge of commodity trading. Firth, as the manager of the entity Equity which acted as manager of Shasta reviewed legal documents drafted by Shimer and found them to be adequate. (Trial Transcript 8/27/07 page 164, lines 11-24).

The issue of CFTC registration arose again in October of 2003. (Trial Transcript 9/4/07, page 169, lines 4-7). The firm of Arnold & Porter was selected by Shimer in the fall of 2003 to review the possibility that Shimer's initial conclusion in the fall of 2001 was incorrect about the necessity of registration with the CFTC by either of his clients Shasta and Equity. See stipulated fact # 60. (See also trial transcript 8/29/07, page 41, lines 1-5) At that time, Geoffrey Aronow was a partner in the law firm of Arnold & Porter. (See Plaintiff's Exhibit # 549, page 4). Shimer chose the firm of Arnold & Porter to review the issue of CFTC registration because of Aronow's previous background in commodity futures related issues. Aronow previously held the position of Director of Enforcement of the CFTC from 1995 to 1999. (See stipulated fact # 60).

Shimer sent Aronow a four page letter dated October 24, 2003 (Plaintiff's Exhibit 538) that provided detailed factual information about the contractual relationship between his client Shasta and the trading entity that was Coyt E. Murray's company Tech Traders, Inc. ("Tech"). Shimer's letter advised Aronow on page 3, paragraphs 5 & 6 of the JP Morgan Chase confirmation Shimer had previously received in December of 2001. Aronow was specifically told that Shimer was concerned about the question of CFTC registration with respect to both his client Shasta and Shasta's manager Equity in light of the fact that the registration issue had just been raised anew by a prospective member of Shasta who had directly contacted the CFTC. (See Plaintiff Exhibit #538, page 4, paragraphs 1 and 2).

Aronow was specifically informed in Shimer's letter dated October 24, 2003 that the entity Shasta had a manager (see Plaintiff Exhibit #538, page 2, paragraph 4, sentence #1 and page 3 of that same exhibit, paragraph 5, sentence #1). Aronow was also specifically informed that the manager of the entity Shasta was the entity Equity Financial Group, LLC. (See Plaintiff's Exhibit # 538, page 4, paragraph 1, sentence #2.)

See also that same Exhibit, page 4, paragraph 2, sentence 1). Aronow was also specifically asked to represent both of Shimer's clients--the entities Shasta and Equity with respect to the question of whether or not either entity might have to register with the CFTC. (See Plaintiff's Exhibit #538, page 4, paragraph 2). Aronow was also requested to notify either the NFA or the CFTC as appropriate if Aronow concluded based upon the information provided to him by Shimer that either of Shimer's clients were required to register as a CTA or CPO. (See Plaintiff's Exhibit #538, page 4, paragraph 3).

Shimer's letter also made it clear to Aronow that 1) Shimer was seeking out and relying upon the expertise and advice of Aronow and his firm to determine when it would be prudent or necessary to contact the CFTC on behalf both his clients (Shasta and Equity); and 2) that *both* clients of Shimer were requesting "…help and assistance in 'running interference' with the CFTC by assuring them that any lack of necessary filing or notice was not intentional and that my clients are willing to take any corrective action that might be necessary." (Plaintiff's Exhibit # 538, page 4, paragraph 3, sentence 2).

In response to Shimer's October 24, 2004 letter Arnold & Porter under Aronow's signature sent to 3 Aster Court, Medford, NJ 08055 a client engagement letter addressed to Vincent Firth and the entity Shasta Capital Associates, LLC dated "as of October 24, 2003" purporting to accept only Shasta's request for representation "…in connection with certain Commodity Futures Trading Commission ("CFTC") regulatory issues." (See Plaintiff's Exhibit # 535, page 1, paragraph 1).

Plaintiff CFTC has been unable to provide any evidence to the Court that any written warning or advice from Arnold & Porter was ever provided to either Shimer, Firth Shasta or Equity by either Aronow or Aronow's legal colleague Susan Lee that Shimer's legal client Equity might have a potential CFTC registration problem.

Susan Lee was an attorney and also a partner at the firm of Arnold & Porter whose previous work experience included serving as the Chief of Staff of the CFTC from 1996 until 1999. (see stipulated fact # 60). See also page 5 of Plaintiff Exhibit 549 for confirmation of Lee's status as partner in that firm. Susan Lee, in her deposition dated Monday, January 23, 2006 stated that the Commodity Exchange Act (CEA) is a complicated act and that the regulations of the CFTC promulgated under that act are complicated. (See Susan Lee deposition page 67, lines 7-9).

On December 2, 2003 Susan Lee expressed her concern to Shimer in an e-mail that the entity *Shasta* might be "exposed to charges that it is operating an unregistered and therefore illegal commodity pool." (See Plaintiff's Exhibit # 543, sentence 3 of that e-mail). The CFTC has never alleged that the entity Shasta operated an unregistered pool. (See Original Complaint and Amended Complaint of Plaintiff).

Susan Lee appears confused throughout the entire time period of Arnold & Porter's representation of the entity Shasta about the critical difference between a "commodity pool" and a "commodity pool *operator*" (CPO). Susan Lee prepared and sent a legal memo specifically addressed to Shimer in mid December, 2003 that was drafted at the specific request of Shimer. (see first page of Plaintiff's Exhibit 553). The actual memo provided by Susan Lee consistently frames the paramount issue of her memo to be whether or not the entity *Shasta* might be considered to be a CPO. (See Plaintiff's Exhibit 553, page 2 which is page 1 of Lee's actual memo). See also Trial Transcript 8/27/07 page 147, lines 2-6. Lee's memo to Shimer in mid December of 2003 also specifically expresses concern about whether the entity "…Shasta should be registered as a CPO." (see Plaintiff's Exhibit # 553, page 3 which is page 2 of Lee's Memo). The Plaintiff CFTC in its Original and Amended Complaint never alleged that the entity Shasta violated any provision of the CEA or any regulation of the CFTC promulgated under that Act by failing to register as a CPO with the Plaintiff. (See generally Plaintiff's Original and Amended Complaint).

That Arnold and Porter from time to time in written communications to Shimer or Firth expressed a sense of urgency about the necessity of contacting the CFTC as soon as possible was not new information to Shimer or Firth. Shimer had already conveyed his clear understanding of the importance of timely contact with the CFTC when he sent his initial letter dated October 24, 2004 to Aronow asking for representation with respect to his clients about the CFTC registration issue. (See Plaintiff's Exhibit 538).

In an e-mail to Susan Lee ("Lee") dated 12/2/03 Vince Firth ("Firth") specifically advised Lee that the CFTC had contacted an investor in Shasta with questions about the entity Shasta. Firth specifically asked Lee in that same e-mail if it would "help" if Lee contacted the CFTC and advise that agency that she was "working with us". (See Plaintiff's Exhibit # 544, page 2, sentence 2 of paragraph 3 of that e-mail). Lee responded

to Firth's question about the advisability that Arnold & Porter contact the CFTC on behalf of their client Shasta by stating to Firth in an e-mail reply also dated December 2, 2003 that "…we would not recommend that you (we) contact the CFTC until we have a clearer understanding of what Tech is going to do." (see Plaintiff's Exhibit # 544, page 1).

Firth continued to press Susan Lee to at least contact the CFTC in Chicago on behalf of Shasta and let them know Shasta was represented by Arnold & Porter. In one particular phone conversation with Lee that occurred between Christmas and New Year in 2003 Firth offered to place a call to the CFTC in Chicago himself. Lee's response continued to be that the best advice was to wait so that the entities Shasta and Tech could go in together. (See Trial Transcript 9/4/07 page 17, lines 16-25 and page 18, lines 1-25). There is no evidence in the record that Aronow or Lee ever contacted the CFTC on behalf of their client Shasta and discussed their representation of Shasta with the enforcement division of the CFTC.

Conclusion: Shimer did not aide and abet Tech's alleged violation of section 4m(1) of the CEA [7 U.S.C. § 6m(1)].

Argument:

The Third Circuit has recognized that courts generally have defined aiding and abetting by referring to the Restatement of Torts, Section 876(b) (1939) and the criminal concept of aiding and abetting. *Rochez Brothers, Inc. v. Rhodes* 527 F. 2d 880, 886 (3rd Cir. 1975). To impose liability as an aider and abettor the *Rochez* Court at 886 confirmed that it is necessary to find three distinct elements: (1) The existence of an independent wrongful act; (2) knowledge by the aider and abettor of that wrongful act; and (3) substantial assistance in effecting that wrongful act. *Landy v. FDIC*, 486 F.2d 139, 162, 163 (3d Cir. 1973) cert denied 416 U.S. 960 (1974). See also *Nicholas v. Saul Stone & Co.* 224 F.3d 179 (3rd Cir. 2000) citing with approval the 7th Circuit case of *Damato v. Hermanson* 153 F. 3d 464 (7th Cir. 1998) for the proposition that the elements required to find aiding and abetting in the civil context are the same as those applied in the criminal context (18 U.S.C. Sec 2). Under that standard the court must specifically find not only that the entity Equity violated Section 4m(1) of the CEA but must further also find by a

preponderance of the evidence that Shimer knew of this violation and by his conduct substantially assisted Equity's violation.

The record in the present matter shows absolutely no knowledge by Shimer of the alleged wrongful act of Equity nor does it show "substantial assistance in effecting the wrongful act". There is no evidence that Shimer did not prepare his legal memo now identified in the record as Plaintiff's Exhibit 411 in good faith. That memo indicates that Shimer based his conclusion on the lack of any commodity trading account *in the name of* either of his clients. The Ninth Circuit Court's decision in *Lopez v Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986) appears to agree with Shimer about the importance of the existence of a commodity account *in the name of* the alleged pool entity.

Moreover the record indicates that Aronow was clearly informed of Equity's status as Shasta's manager and yet chose to represent only Shimer's client Shasta—an entity that has never been alleged to have violated any of the Plaintiff's registration requirements. The record also reflects a complete lack of any indication by *anyone* at Arnold & Porter that the entity Equity might be required to register with Plaintiff.

In light of all of the facts proposed above by Shimer with respect to this aiding and abetting issue if a partner in a prestigious law firm who is the former Director of Enforcement of the CFTC did not apparently catch Equity's potential liability for not registering, and if a former Chief of Staff of that same agency seems again and again in writing to confuse the terms "commodity pool" and "commodity pool operator" how can this Court conclude that Shimer (with little previous knowledge of a complicated Statute and the CFTC's complicated regulations) aided and abetted Equity's purported violation when his October 24, 2003 letter also indicated a willingness to comply with any registration requirement that Aronow might advise was required?

Regarding Shimer's alleged violation of Section 13(b) of the CEA (7 U.S.C. § 13c(b)

Facts regarding whether Shimer acted as a controlling person of the entity Equity

Shimer incorporates by this reference the proposed facts previously stated with respect to the issue of whether Shimer acted as a principal of the entity Equity. In addition, Shimer points to the fact that the signature card for Equity's bank account at Farmer's & Mechanics Bank does not list Shimer as a signer on *that* account. What is also interesting is the fact that the bank signature card for *Shasta's* account at Citibank (which would have reflected the fact that Shasta's account was opened under Shasta's tax ID and was opened at the authorization not of Shimer but by Firth as Shasta's President) is correctly missing from the list of purported "Shimer and Firth controlled entities" found in the record as Plaintiff's Exhibit 1146.

Conclusion: existing case law cited by the CFTC does not support a finding that Shimer "controlled" the entity Equity.

Argument:

Shimer incorporates by this reference all of the previous arguments previously presented with respect to the issue of whether Shimer acted as a principal of the entity Equity but substitutes the word "controlling person" for any previous reference to the word "principal". A "controlling person" under Section 13(b) of the CEA is one who controls the alleged violator *Armstrong v. Commodity Futures Trading Commission* 12 F. 3d. 401, 405 (3rd Cir. 1993). "Control" means to possess directly or indirectly the power to direct or cause the direction of the management and policies of an entity." *Monieson v. CFTC* 996 F 2d 852, 858 (7th Cir. 1993); *CFTC v. R.J. Fitzgerald, Inc*. 310 F.3d 1321 (11th Cir. 2002) are two cases for "control" cited by the CFTC in its trial brief.

The two cases cited by the CFTC to support its argument that Shimer "controlled" the entity Equity do not support the CFTC's argument merely because many of Shimer's decisions as legal counsel were adopted by Firth. The Court in the *Fitzgerald* case noted at page 1334 that "Raymond Fitzgerald openly *concedes* that he was a "controlling person" at RJFCO".

In *Monieson* the Court began its opinion at page 854 by noting that the individual in question--Brian Monieson "was a major figure in the commodity futures industry. As chairman of the Chicago Mercantile Exchange from 1983 to 1985 and founder, chairman of the board, and majority stockholder of GNP Commodities…". The entity GNP Commodities was, of course, the entity that Monieson was alleged to "control". These sorts of facts are hardly comparable to the CFTC's attempt to hold Shimer liable as a controlling person simply because as legal counsel his advice and guidance was given deference by Firth. The CFTC asks the Court to basically ignore the fact that all final decision authority over Equity rested firmly and legally with Firth.

Regarding the issue of whether Shimer & Firth did not act in good faith and knowingly induced the purported violation of the entity Equity in violation of Section 13(b) of the CEA.

Shimer incorporates by this reference all proposed facts previously stated with respect to the issue of whether Shimer violated Section 13(a) of the CEA by aiding and abetting Equity's purported violation of Section 4(m)1 of the CEA.

Conclusion of Law: Shimer & Firth did not act in bad faith and knowingly induce the purported violation by the entity Equity in violation of Section 13(b) of the CEA

Argument:

In support of the proposed conclusion that he did not act in bad faith and knowingly induce the purported violation of the entity Equity Shimer hereby incorporates by this reference all previous argument offered in support of his proposed conclusion that he did not, as a principal of Equity in violation of Section 13(a) of the CEA, aid and abet Equity's purported violation of Section 4(m)1 of the CEA.

To make Shimer liable under Section 13(b) a showing of mere negligence on the part of Shimer is insufficient. Plaintiff has to show by a preponderance of the evidence that Shimer's behavior in the fall of 2001 in connection with the issue of whether or not the entity Equity was required to register with the CFTC was reckless. *Monieson* at 860 citing *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 959 (5th Cir. 1981), citing *Earnst & Earnst v. Hochfelder*, 425 U.S. 185, 209 (1975).

The Court may well conclude that it was negligent of Shimer to rely at the time upon a verbal telephone confirmation (from a legal colleague) that Shimer's conclusions in his previous legal memo (Plaintiff's Exhibit 411) were correct. Plaintiff attempted during the trial to belittle that particular communication from Shimer's legal colleague as "third hearsay" (Trial Transcript, 8/29/07, page 39, lines 17-25 & page 40, lines 1-12). Plaintiff's comment is clever but it is also silly. Few people purport to live their lives according to the rules of evidence. Shimer received that call from a legal colleague who had just spoken to a Vice President of one of the largest investment banking firms in the world.

In light of al of the above, Shimer did not willfully aid and abet a violation of Section 4m(1) of the CEA by Equity and that Shimer did not knowingly induce a similar violation by Equity.

VI. CONCLUSION

For all of the reasons stated above, Defendant Shimer requests the Court find that Shimer did not violate Section 4b(a)(2)(i)-(iii) of the CEA [7 U.S.C. §§ 6b(a)(2)(i)-(iii)] and that Shimer did not violate Section 4*o*(1)(A) of the CEA 4*o*(1)(A) of the CEA [(7 U.S.C. § 6o(1)(A)]. Shimer further requests that the Court find that Shimer did not violate Section 13(a) of the CEA [7 U.S.C. § 13c(a)] or Section 13(b) of the CEA [7 U.S.C. § 13c(b)].

November 6, 2007

Respectfully Submitted,

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