

Norris, McLaughlin & Marcus, P.A.

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**COMMODITY FUTURES TRADING :
COMMISSION, :**

Plaintiff, :

vs. :

**FINANCIAL GROUP, LLC, TECH
TRADERS, INC., TECH TRADERS,
LTD., MAGNUM CAPITAL
INVESTMENTS, LTD., VINCENT J.
FIRTH, ROBERT W. SHIMER,
COTY E. MURRAY, and J.
VERNON ABERNETHY**

Defendants. :

Civil Action No.: 04CV1512

Honorable Robert B. Kugler

**CLAIMANT, THOMAS LIST'S (CLAIM No: 37) RESPONSE TO
FACTUAL ISSUES IN THE EQUITY RECEIVER'S OBJECTIONS**

Claimant, Thomas List, by and through his attorneys, Norris, McLaughlin & Marcus, P.A., submits this response to factual issues in the equity receiver's objections. In support of his response, Thomas List, states as follows:

1. Thomas List's original investment in Kaivalya Holding Group, Inc. (hereinafter "Kaivalya") was for \$47,500.00 under the terms of a Promissory Note which provided for repayment of his principal. No interest on the principal invested in Kaivalya was ever paid to Thomas List, however, he did eventually receive the return of his principal by checks from Kaivalya.

2. Thomas List received two (2) checks from Kaivalya on August 7, 2003. The first check from Kaivalya was Patriot Bank check number 620 for \$12,500.00 and the second was Patriot Bank check number 622 for \$5,000.00.

3. Thomas List received a third check from Kaivalya, Patriot Bank check number 631 for \$15,000.00 on October 17, 2003.

4. As the Receiver has acknowledged, Thomas List began investing in Shasta Capital Associates, LLC. (hereinafter "Shasta") once again through, Defendant, Robert W. Shimer, by wiring \$95,000.00 from his retirement funds to Shasta pursuant to the Subscription Agreement.

5. The total amount of funds Thomas List invested with Shasta was \$95,000.00.

6. It is irrefutable that Thomas List invested \$47,500.00 in Kaivalya and was repaid his original investment. It is also irrefutable that he invested \$95,000.00 in Shasta, resulting in a total loss of \$95,000.00 with no net recovery of any type.

7. Both Kaivalya and Shasta are entities controlled by Defendants, Robert W. Shimer and Coyt E. Murray, which is admitted by the Receiver in his Memorandum In Support of Motion of Equity Receiver For Authority to Make Interim Distribution On Account Of Investor Claims (hereinafter "Receiver's Memorandum"). [See p. 22 para. 48-51]

8. Despite the Receiver's admission that Defendants, Shimer and Murray were involved with Kaivalya, Magnum, Shasta and Tech Traders, and their similarities, he treats these entities as if they are unrelated and not part of the Ponzi scheme.

9. Kaivalya investors invested in Magnum for commodity trading just as Shasta investors invested in Tech Traders for commodity trading. The physical location where Magnum

conducted its business activities in Gastonia, North Carolina, is the same exact location that Tech Traders utilized for its business activities. Lastly, the time frame for when Magnum appears to have ended operations is the same time frame when the Receiver has begun reviewing the records and activities of Tech Traders. [See "Receiver's Memorandum" p.4 para. 12]

10. The Receiver has made factual assertions that the funds paid by Kaivalya check number 620 for \$12,500.00, check number 622 for \$5,000.00 and check number 631 for \$15,000.00 were from Tech Traders. To date, no documentation or factual analysis has been provided or disclosed to Thomas List to support this hypothesis.

11. The alleged basis in support of the Receiver's hypothesis is that since Kaivalya had no significant earnings of its own then the funds paid by Kaivalya most have come from another source. The Receiver has proposed that this other source was Tech Trader, but has yet to provide any documentation or factual basis for this conclusion to Thomas List. The Receiver has not identified or defined his basis for alleging Kaivalya had no other significant sources of funds between July 2002 and March 2004. [See "Receiver's Memorandum" p. 23 para. 49]

12. The Receiver has also assumed that neither Kaivalya's or Magnum's funds were ever invested or commingled with Tech Trader funds. It is impossible for the Receiver to reach this conclusion since he has previously acknowledged that the transaction surrounding Magnum are not yet completely understood. Based upon the lack of information and understanding regarding Magnum's activities it is impossible for the Receiver to determine the type, extent or length of involvement Magnum played in this unfortunate Ponzi scheme. [See "Receiver's Memorandum" p. 4 para. 11]

13. The Receiver has not established that the funds paid by Kaivalya to Thomas List have come from any source other than Kaivalya.

14. The Receiver has also not established that Kaivalya did not invest directly into Tech Traders or indirectly through Magnum or another entity controlled by Defendants, Shimer, Firth and/or Murray.

15. The Receiver has provided no factual basis or legal principal for pursuing the principal returned to some investors but not others.

16. The only factual basis as to why the Receiver has pursued the return of Thomas List's principal from Kaivalya is because he controls the funds presently and can exercise a set off without having to incur all of the legal cost of recapturing this property that he acknowledged was the major reason why he was not pursuing all investors who received a return of principal but did not reinvest with Shasta. [See "Receiver's Memorandum" p. 14 para. 35]

17. Since all of the facts surrounding Magnum's involvement in the Ponzi scheme are admittedly unknown, and the Receiver admits Magnum may need to be included in the claims process and distribution, it is premature to make an interim distribution at this stage of the investigation.

18. If any interim distribution were to be made an escrow must be established with funds sufficient to protect the interest of Kaivalya and Magnum investors' disputed claims.

19. The Receiver has identified the legal bankruptcy concepts of preference and fraudulent transfer as the basis for his guidance for determining and proposing the claims process and interim distribution. Just as these legal concepts are well suited to resolving this Ponzi scheme, so to would a creditors' committee, comprised of investors who have the ability to vote for or against a proposed plan of distribution, be useful and equitable, in determining how best to distribute the Investors' funds. The Receiver is using investor funds for his fees and that of his

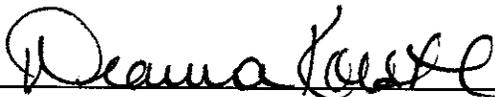
counsel, while the claims of the investors are being paid by the investors in piecemeal fashion, which is simply inequitable.

20. There is no rational factual basis set forth by the Receiver or otherwise available to deny Thomas List a proportionate recovery of his pre-freeze Shasta investment of \$95,000.00.

21. Thomas List will be irreparably harmed if the suggested interim distribution occurs and he is excluded. Other investors who would be repaid a 38% pro rata distribution will be unjustly enriched at Thomas List's expense if the proposed interim distribution is made. The proposed interim distribution should include a payment of 38% of his \$95,000.00 as his fair and equitable pro rata share of pre freeze investment funds.

Respectfully Submitted,

Norris, McLaughlin & Marcus, P.A.

By: 
Deanna L. Koestel, Esquire
Attorneys for Thomas List

Date: 5/12/05

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VERIFICATION

I, Thomas List, verify that the statements made in the Response To Factual Issues In The Equity Receiver's Objection are true and correct to the best of my knowledge, information and belief.

I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A., 4904, relating to unsworn falsification to authorities and the laws of the United States of America.

Date: 5-11-2005


Thomas List