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

**COMMODITY FUTURES TRADING  
COMMISSION,**

**Plaintiff,**

**vs.**

**Civil Action No.: 1:04CV1512(RBK)**

**EQUITY 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.**

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

Claimant, Thomas List, by and through his Attorneys, Deanna L. Koestel, Esquire and Norris, McLaughlin & Marcus, P.A. submits this response to legal 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 principle. No interest on the principle 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 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 of 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. According to the Receiver's Memorandum, "Shasta was a commodity pool operated by Shimer and Firth. It was organized in mid-2001 and began accepting investor funds at the beginning of 2002. The managing member of Shasta was Equity Financial Group, LLC., which was also controlled by Defendants, Shimer and Firth. Shasta took in approximately \$14 million from investors, deducted a 1 percent charge for expenses and sent the balance to Tech Traders to fund trading in the commodity futures markets. Shasta did not place any of the funds received from its investors in any other investments. Shasta had approximately 70 investors. Shasta received back approximately \$1.6 million from Tech Traders, and it disbursed this amount to certain of its investors." [See p. 7 para. 18]

9. The Receiver recommends the same pro rata distribution for claimants holding allowed claims who invested funds with Shasta shortly before the freeze order where those funds remained in Shasta's account at the time of the freeze order and were never transferred to Tech Traders for several reasons. [Receiver's Memorandum, p.12 para. 30]

10. The Receiver's first reason for including these Shasta Investors in the pro rata distribution even though they did not invest in Tech Traders was that "the Defendants who operated Shasta have a history of close dealings with Tech Traders and, at this time, it is unclear how much (or how little) these Defendants knew about the Ponzi Scheme" especially considering that Defendant Shimer was also counsel for Murray and Tech Traders. [See Receiver's Memorandum p.12 para.30]

11. The Receiver's second rationale is that "Shasta engaged in no investment

activity except through Tech Traders and exercised no discretion over the investor funds it received merely as a conduit to Tech Traders (with the exception of deduction 1 percent for legal and accounting fees from the amounts invested with it). [See Receiver's Memorandum p.12 para. 31]

12. Third, all who invested with Shasta did so for the sole purpose of participating in its commodity futures trading account with Tech Traders. Consequently, all Shasta investor funds were effectively "at risk" as soon as the funds were deposited with Shasta. Only the fortuitous entry of the freeze order on April 1, 2004 prevented these funds from being commingled with Tech Trader's funds. Shasta investors whose investments were the source of the funds remaining in the Shasta account at the time of the freeze order therefore should be entitled to the same pro rata share of the remaining receivership funds as other investors." [See Receiver's Memorandum p. 13 para.32]

13. Based upon the Receiver's own logic and rationale for including Shasta investors in the pro rata distribution the Kaivalya investors must also be included in the pro rata distribution.

14. Just as the Receiver considered the fact that the Defendants who operated Shasta had close dealing with Tech Traders, so to did the Defendants operating Kaivalya have close dealings with Shasta and Tech Traders. In fact, it is the exact same individual, Robert W. Shimer that lured Thomas List into investing in Kaivalya and then Shasta, which the Receiver acknowledges on page 22 paragraph 48 of his Memorandum. In addition, Defendant, Coyt E. Murray, who was involved with Shasta was also the same

individual involved with Defendant Shimer in running Magnum Investment, Ltd. (hereinafter "Magnum") and Kaivalya.

15. Kaivalya was supposed to be a pool of investor funds to be used for commodity trading through Magnum. As with most Ponzi schemes the Kaivalya funds never actually reached Magnum and instead were improperly diverted to other uses, which the Receiver has admittedly not identified. Thus, just as Shasta was to have invested and acted as a conduit for investment into Tech Traders so to was Kaivalya an investment conduit into Magnum.

16. All of the investors of Kaivalya participated in commodities future trading with Magnum through an unsecured loan and the promise of significant interest on the funds, plus one-half of the profits realized from the trading of those funds. [See Receiver's Memorandum p. 3 para. 8]

17. The Receiver acknowledges in his Memorandum, "[f]or reasons not yet fully known by the Receiver, the Magnum investment and trading activities appear to have been phased out during the period of early 2001 through the middle of 2002. After that point, Magnum continued to receive regular transfers of funds from Tech Traders, which it disbursed to a variety of payees. Many of those disbursements are still under review by the Receiver and his accountants." [See p.4 para. 11]

18. During the same time period, Coyt E. Murray began similar operations through the two Tech Trader entities. The principal place of business of Tech Traders was the Gastonia, North Carolina premises used by Magnum, and it conducted commodity trading activities similar to what Magnum had done. Many of the Tech Traders investors

placed funds with Tech Traders in transactions styled as loans in return for a fixed amount of interest, plus a substantial share of the trading profits, similar to Magnum investment activities. [See p. 4-5 para. 11, 12]

19. It is extremely important to note that Magnum was being phased out during the early part of 2001, which was the beginning of the time period when investment in Tech Trader is being examined.

20. Based upon the extreme similarities of the relationship of Kaivalya to Magnum as Shasta to Tech Traders the same rationale the Receiver articulated for Shasta's Investors being included in the pro rata distribution exists for Kaivalya's Investors.

21. Considering that the Court is attempting to untangle a Ponzi scheme, the Receiver's own investigation indicates that the funds invested in Kaivalya never made it into Magnum as promised because they were utilized to pay funds owed to Magnum's investors. Just as the funds invested into Tech Trader by Shasta went to pay back some of the investors of Kaivalya. This is the classic structure of a Ponzi scheme.

22. The Receiver's proposed position to not include Kaivalya investors in the pro rata distribution because their funds did not actually wind up in Magnum as promised, but were used to satisfy other earlier investors' principal in essence perpetuates the Ponzi scheme by the Receiver. Had the CFTC not intervened, some of Shasta's Investors would have received all or part of their principal back from the next level of new investors induced into investing in the next entity created.

23. The only fair resolution for all investors involved in this unfortunate

situation is to collapse all of the related entities and treat all of the defrauded investors in a fair pro rata distribution.

24. The Receiver's logic that the pro rata distribution method is superior to the tracing funds method for distributing claims undermines his rationale for not allowing Kaivalya's Investors to participate in the pro rata distribution.

25. "The Receiver considered the feasibility and effectiveness of allowing investors to trace their investments but rejected such an approach as both arbitrary and inequitable. Consistent with Cunningham and its progeny, tracing fictions would be inappropriate in this case, which involves multiple victims of fraud whose funds Defendant has commingled. Allowing one defrauded claimant to recover at the expense of another merely because the former has the good fortune of being able to trace his or her funds would be unjust. See SEC v. Credit Bancorp, Ltd., 194 F.R.D. 457, 463-64 (S.D.N.Y. 2000). Most Courts of Appeals also have expressly rejected tracing as a method of distribution in similar cases. [ ] In the words of Judge Learned Hand: "When the law adopts a fiction [such as the "first in , first out' method of tracing], it is, or at least it should be, for some purpose of justice. To adopt it here is to apportion a common misfortune through a test which has no relation whatever to the justice of the case." In re Walter J. Schmidt & Co., 298 F. 314, 316 (S.D.N.Y. 1923)." [See p.12 para. 29]

26. The Receiver quotes the above principle to justify his preference for pro rata distribution. This principle is also applicable to the issue that just because Kaivalya's Investors had the misfortune of not being able to trace their funds beyond Magnum, while Shasta investors had the fortune of tracing its funds to Tech Traders (because of the

intervention of this litigation and subsequent freeze order) Kaivalya investors should not be unjustly penalized because of the inability to trace their funds. The timing of the CFTC's action and this Honorable Court's intervention should not be the basis for treating these two investors differently.

27. Thomas List has lost his original principal investment with Kaivalya. That principal was returned to him and reinvested in Shasta, just the same as if his only investment were with Shasta. The net effect to Thomas List from investing in Kaivalya and Shasta is that he is negative \$-95,000.00 of his retirement funds. To ignore this ultimate result is to ignore Judge Learned Hand's principal, that simply because Thomas List was not one of the last investors who are able to trace all of his funds, the Receiver will treat Thomas List as if he never made an initial investment with Kaivalya and consider Kaivalya's return of principal as a withdrawal under the purposed interim claims distribution.

28. With the knowledge that a Ponzi Scheme has taken place, the mere fact the Receiver has not yet linked the Tech Traders funds directly with Magnum should not be the basis for ignoring all of the other similarities, such as the same Defendants being involved in all of the entities, the same physical business location for Magnum and Tech Traders, the correlation of time frames for beginning and ending operations of Magnum and Tech Traders, and the exact same mechanism of using a promissory note for the principal investment to obtain new investment funds. This is a scheme which utilizes many entities, which the Receiver must collapse into a single pool for recovery in a

manner that is fair to all defrauded investors or Thomas List and others like him are paying for Tech Trader investors' recovery.

29. The only difference between Shasta's and Kaivalya's Investors is the ability to trace their funds. To treat similarly situated investors differently because of that basis alone is to go against the Receiver's own determination for how best to distribute the claim funds he championed in his Memorandum.

30. The Receiver's characterization of the repayment of funds from Kaivalya to Thomas list as a withdrawal against his subsequent investment in Shasta also goes against the Receiver's own determination set forth on page 14 paragraph 35, which states, "the legal basis for recovering such withdrawals which did not exceed the amount invested also seems questionable to the extent that investors received them in good faith, without knowledge of any fraud and in exchange for value provided to the Defendant". To do equity here, the Receiver must look under all the shells of this shell game; not pick and choose to keep funds of investors of one entity at the expense of another.

31. Despite the Receiver's own recommendation not to proceed to recover the principal returned to Kaivalya Investors, he has done exactly that against Thomas List's amount returned from Kaivalya and reinvested in Shasta through its attempt to set off.

32. The Receiver has determined not to proceed against investors of Kaivalya who kept the return of their principal rather than reinvesting it in Shasta because the Receiver already has control the funds invested in Shasta and therefore does not have to incur the cost of trying to recapture the amounts returned to the Kaivalya Investors who

did not reinvest in Shasta. This basis for treating Thomas List differently from the other Kaivalya Investors who did not invest in Shasta is patently unfair and inequitable.

33. The Receiver's treatment of Thomas List's claim is even more arbitrary considering he admittedly does not yet have all of the records of Magnum investors and creditors to determine whether they are still owed anything by Magnum. Nor has the Receiver set up any type of claims process for Magnum investors. [See Receiver's Memorandum p. 8,9 para. 22,23]

34. The Receiver acknowledges that "[a]s the Magnum situation becomes clearer, the Court will be in a position to determine whether Magnum should be consolidated with Tech Traders for purposes of distribution or be treated separately." [See p. 9 para. 23]

35. Based upon the Receiver's statement regarding the lack of present understanding of Magnum records and transactions and the likelihood that Magnum may be consolidated with Teach Traders it is entirely premature and inappropriate to begin any distribution of funds with this admitted lack of clarity and information.

36. Even though Thomas List does not agree to all of the legal conclusions, principles, and logic utilized by the Receiver, the application of his reasoning or his conclusion dictates that the interim claim distribution must be postponed until the Receiver has completed his investigation and understands all of the transactions and records of Magnum and its relationship with Tech Traders, without which the Receiver cannot make a fair or thorough recommendation, and neither the Court or Thomas List

can be apprised of all relevant facts necessary for a fair and appropriate resolution of the many defrauded investors.

37. After the Receiver has fully completed its investigation and has a complete working knowledge of all of the entities involved, Thomas List's investment of \$95,000.00 with Shasta should be returned on the same pro rata basis as all other Shasta investor that made contributions prior to the freeze order.

38. If the Receiver proposes to treat Thomas List's Kaivalya return of principal as a set off, then he should seek to recover all principal paid back to all Kaivalya investors, regardless of whether they reinvested in Shasta.

39. Similarly, if the Receiver attempts to recover principal from Kaivalya investors, then he should attempt to recover from all entities controlled by the Defendants, including investors of Tech Trader who already received their principal back in order to include those funds in the pro rata distribution to all defrauded investors.

40. Regardless of the difficulties of collecting principal already paid, the receiver should either proceed to recover returned principal against all investors or none of them.

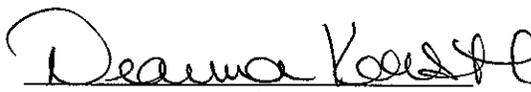
41. There is no rational basis at law either set forth by the Receiver or otherwise available to deny Thomas List a proportionate recovery of his pre-freeze Shasta investment of \$95,000.00.

42. 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

Date:

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**VERIFICATION**

I, Thomas List, verify that the statements made in the Response To Legal 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: 5-4-2005

Thomas E List  
Thomas List