

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

Case No. 1:10-CV-457
(GLS/CFH)

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, AND
DAVID L. SMITH, GEOFFREY R. SMITH,
Individually and as Trustee of the David L. and
Lynn A. Smith Irrevocable Trust U/A 8/04/04,
LAUREN T. SMITH, and NANCY MCGINN,

Defendants,

LYNN A. SMITH and
NANCY MCGINN,

Relief Defendants. and

GEOFFREY R. SMITH, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.
-----X

**NOTICE OF EIGHTH CLAIMS MOTION OF WILLIAM J. BROWN, AS
RECEIVER, FOR AN ORDER (A) DISALLOWING OR EQUITABLY
SUBORDINATING THE SMITH CLAIMS OR (B) OFFSETTING THE
JUDGMENT OBLIGATIONS WITH SMITH CLAIM DISTRIBUTIONS, AND
(C) EXPUNGING SMITH PAPER CLAIMS**

PLEASE TAKE NOTICE that upon the Eighth Claims Motion of William J. Brown, as Receiver, for an Order (A) Disallowing or Equitably Subordinating the Smith Claims or (B) Offsetting the Judgment Obligations with Smith Claim Distributions, and (C) Expunging Smith Paper Claims (“Motion”), Phillips Lytle LLP will move before the Hon. Christian F. Hummel, United States Magistrate Judge, United States District Court for the

Northern District of New York, James T. Foley - U.S. Courthouse, 445 Broadway, Albany, New York 12207-2924, on October 17, 2019 at 9:30 a.m., seeking an Order to be entered approving the Motion. No oral argument is requested.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Motion must be made in writing, and should be filed and served upon the undersigned at the address listed below in accordance with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Northern District of New York.

PLEASE TAKE FURTHER NOTICE that if no responses are timely filed and served with respect to the Motion, the Court may enter an Order granting the Motion, disallowing the Smith Claims and expunging the Smith Paper Claims without further notice or opportunity to be heard offered to any party.

Dated: September 11, 2019

PHILLIPS LYTTLE LLP

By /s/ Catherine N. Eisenhut
William J. Brown (Bar Roll #601330)
Catherine N. Eisenhut (Bar Roll #520849)
Attorneys for Receiver
Omni Plaza
30 South Pearl Street
Albany, New York 12207
Telephone No. (518) 472-1224

and

One Canalside
125 Main Street
Buffalo, New York 14203
Telephone No.: (716) 847-8400

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TIMOTHY M. MCGINN, AND :
DAVID L. SMITH, GEOFFREY R. SMITH, :
Individually and as Trustee of the David L. and :
Lynn A. Smith Irrevocable Trust U/A 8/04/04, :
LAUREN T. SMITH, and NANCY MCGINN, :

Defendants, :

LYNN A. SMITH and :
NANCY MCGINN, :

Relief Defendants. and :

GEOFFREY R. SMITH, Trustee of the :
David L. and Lynn A. Smith Irrevocable :
Trust U/A 8/04/04, :

Intervenor. :

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**EIGHTH CLAIMS MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR
AN ORDER (A) DISALLOWING OR EQUITABLY SUBORDINATING THE
SMITH CLAIMS OR (B) OFFSETTING THE JUDGMENT OBLIGATIONS
WITH SMITH CLAIM DISTRIBUTIONS, AND (C) EXPUNGING SMITH
PAPER CLAIMS**

William J. Brown, as Receiver (“Receiver”), by his counsel, Phillips Lytle LLP,
moves (the “Motion”) for an Order (a) Disallowing or Equitably Subordinating the Smith

Claims or (b) Offsetting the Judgment Obligations with Smith Claim Distributions, and (c) Expunging Smith Paper Claims (each as defined in the accompanying Declaration), and respectfully represents as follows:

The Receiver files the Motion to request entry of an Order (a) disallowing or equitably subordinating the Smith Claims listed on Exhibit A to the Motion or (b) in the alternative, offsetting the Judgment Obligations with Smith Claim distributions, and (c) expunging the Smiths' Paper Claims listed on Exhibit A to the Motion based on the accompanying Memorandum of Law and Declaration of William J. Brown, as Receiver ("Declaration"), each dated September 11, 2019.

RELIEF REQUESTED

The Receiver requests that the Court enter an Order substantially in the form attached as Exhibit B ("Order") (A) disallowing or equitably subordinating the Smith Claims listed on Exhibit A to the Motion or (B) in the alternative, offsetting the Judgment Obligations with Smith Claim distributions, and (C) expunging the Smiths' Paper Claims listed on Exhibit A to the Motion, together with such other and further relief as the Court deems just and proper.

The Receiver reserves all rights to object on any other basis to the claims of all investors or claimants, including the Smiths.

Dated: September 11, 2019

PHILLIPS LYTTLE LLP

By /s/ Catherine N. Eisenhut
William J. Brown (Bar Roll #601330)
Catherine N. Eisenhut (Bar Roll #520849)
Attorneys for Receiver
Omni Plaza
30 South Pearl Street
Albany, New York 12207
Telephone No. (518) 472-1224

and

One Canalside
125 Main Street
Buffalo, New York 14203
Telephone No.: (716) 847-8400

Exhibit A

Exhibit A

Smith Investor Claims

Claimant	Claim Number	Description of Investment or Nature of Claim	Amount of Asserted Claim	Paper Claim Amount
Lynn Smith	6499	McGinn Smith Firstline Funding, LLC	\$300,000	\$300,000
Lynn Smith	6502	TDMM Benchmark Trust 09 11%	\$145,000	\$145,000
Lynn Smith	6501	TDMM Benchmark Trust 09 10%	\$85,000	\$85,000
Lynn Smith	6503	TDMM Benchmark 09 9%	\$70,000	\$70,000
Lynn Smith	6500	McGinn Smith Funding LLC	\$20,000	\$20,000
Lynn Smith	6504	TDMM Cable Funding LLC	\$30,200.01	\$30,200.01
		TOTAL	\$650,200.01	
Geoffrey Smith	6475	TDM Luxury Cruise Trust 07 Contract Certificates 10% due 9/1/11	\$23,125	\$23,125
Geoffrey Smith	6476	TDM Verifier Trust 07R Contract Certificates	\$25,000	\$25,000
Geoffrey Smith	6474	TDM Cable Trust 06 9.25% 48 Months Contract Certificates 11/15/10	\$25,000	\$25,000
Geoffrey Smith	6472	Firstline Trust 07 B Junior Contract Certificates 11% due 10/1/12	\$19,839.23	\$19,839.23
Geoffrey Smith	6473	McGinn Smith Transaction Funding Corp.	\$25,000	\$25,000
Geoffrey Smith	6477	McGinn Smith Firstline Funding, LLC	\$10,000	\$10,000
		TOTAL	\$127,964	
Lauren Smith	6496	McGinn Smith Transaction Funding Corp.	\$25,000	\$25,000
Lauren Smith	6494	Firstline Trust 07 B Junior Contract Certificates 11% due 10/01/12	\$19,839.23	\$19,839.23
Lauren Smith	6495	Fortress Trust 08	\$19,911.10	\$19,911.10
Lauren Smith	6497	TDM Verifier Trust 07R Contract Certificates	\$25,000	\$25,000
Lauren Smith	6498	TDM Verifier Trust 08R Contract Certificate 9%	\$10,000	\$10,000
		TOTAL	\$99,750	

Exhibit B

UNITED STATES DISTRICT COURT
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DAVID L. SMITH, GEOFFREY R. SMITH,
Individually and as Trustee of the David L. and
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LAUREN T. SMITH, and NANCY MCGINN,

Defendants,

LYNN A. SMITH and
NANCY MCGINN,

Relief Defendants. and

GEOFFREY R. SMITH, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.
-----X

**ORDER APPROVING EIGHTH CLAIMS MOTION OF WILLIAM J. BROWN,
AS RECEIVER, FOR AN ORDER (A) DISALLOWING OR EQUITABLY
SUBORDINATING THE SMITH CLAIMS OR (B) OFFSETTING THE
JUDGMENT OBLIGATIONS WITH SMITH CLAIM DISTRIBUTIONS, AND (C)
EXPUNGING SMITH PAPER CLAIMS**

Upon the Eighth Motion of William J. Brown, as Receiver, for an Order (A) Disallowing or Equitably Subordinating the Smith Claims or (B) Offsetting the Judgment Obligations with Smith Claim Distributions, and (C) Expunging Smith Paper Claims; and notice of the Motion having been given to the Securities and Exchange Commission, each of the Smiths listed on Exhibit A to the Motion, by first class mail, and all parties who have

filed a Notice of Appearance in this action by ECF, and all creditors of the McGinn, Smith entities and other parties in interest via the Receiver's website, which notice is deemed good and sufficient notice; and the Court having deemed that sufficient cause exists; it is therefore

ORDERED, that the Motion is approved, and it is further

ORDERED, that each of the Paper Claims listed on Exhibit A to the Motion is expunged; and it is further

ORDERED, that each of the Smith Claims listed on Exhibit A to the Motion is disallowed; and the rights of the Receiver to object on any other basis to the claims of all investors or claimants is expressly preserved.

Dated: _____, 2019

HON. CHRISTIAN F. HUMMEL

Doc #4324729.3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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Defendants,

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NANCY MCGINN,

Relief Defendants,

- and -

GEOFFREY R. SMITH, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.
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**DECLARATION OF WILLIAM J. BROWN, AS RECEIVER, IN SUPPORT
OF EIGHTH CLAIMS MOTION FOR AN ORDER (A) DISALLOWING OR
EQUITABLY SUBORDINATING THE SMITH CLAIMS OR (B)
OFFSETTING THE JUDGMENT OBLIGATIONS WITH SMITH CLAIM
DISTRIBUTIONS, AND (C) EXPUNGING SMITH PAPER CLAIMS**

William J. Brown, as Receiver, declares, under the penalty of perjury, pursuant to 28

U.S.C. § 1746, as follows:

1. I am the Receiver of McGinn, Smith & Co. Inc., et al. (“MS & Co.”) appointed by the Court in this action pursuant to the Preliminary Injunction Order dated July 26, 2010 (Docket No. 96).

2. I make this Declaration in support of the Receiver’s Eighth Claims Motion (“Motion”) for an Order (a) disallowing or equitably subordinating the Smith Claims or (b) in the alternative, offsetting the Judgment Obligations with Smith Claim distributions, and (c) expunging the Smiths’ Paper Claims (each as defined below).

PROCEDURAL BACKGROUND

3. MS & Co. was a broker-dealer registered with the Securities and Exchange Commission (“SEC”) with its headquarters in Albany, New York from 1981 to 2009. From 2003 through 2010, the broker-dealer was owned by David L. Smith (“Smith” or “David Smith”), Timothy M. McGinn (“McGinn”), and Thomas E. Livingston.

4. On April 20, 2010, the SEC filed a Complaint initiating the above-captioned action (Docket No. 1) against the above-captioned Defendants and Relief Defendants, including Smith’s wife, Lynn A. Smith (“Lynn Smith”). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants McGinn and Smith, including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the “MS Entities”).

5. On July 26, 2010, following a hearing, the Court entered an order granting the SEC’s Motion for a Preliminary Injunction and appointing the Receiver as

receiver, pending a final disposition of the action (“Preliminary Injunction Order”) (Docket No. 96).

6. On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the “Complaint”) (Docket No. 334) adding David Smith’s and Lynn Smith’s children as defendants: Lauren T. Smith (“Lauren Smith”) and Geoffrey Smith (“Geoffrey Smith”), individually and in his capacity as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (“Smith Trust”). On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) (“MDO I”) granting the SEC’s motion for summary judgment as to McGinn’s and Smith’s violations of the securities laws, which was affirmed on appeal by the United States Court of Appeals for the Second Circuit. *See Sec. Exch. Comm’n v. Smith*, 646 Fed. Appx. 42 (2d Cir. 2016). On March 30, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 816) (“MDO II”) granting the SEC’s motion for summary judgment as to Lynn Smith, Geoffrey Smith, and Lauren Smith, which was also affirmed by the Second Circuit Court of Appeals. *See Sec. Exch. Comm’n v. Smith*, 646 Fed. Appx. 42 (2d Cir. 2016).

7. Generally, McGinn and Smith “orchestrated an elaborate Ponzi scheme, which spanned over several years, involved dozens of debt offerings, and bamboozled hundreds of investors out of millions of dollars.” MDO I at 7. McGinn and Smith raised over \$136 million between 2003 and 2010 in over twenty unregistered debt offerings, including the Four Funds -- FAIN, FEIN, FIIN, and TAIN -- and various Trust Offerings, by representing that investor money would be “invested,” when instead it was “funneled” into various entities owned or controlled by McGinn and Smith. That money

was then used to fund unauthorized investments and unsecured loans, make interest payments to investors in other entities and offerings, support McGinn's and Smith's "lifestyles," and cover the payroll at MS & Co. MDO I at 7.

LYNN SMITH'S MISCONDUCT AND FRAUDULENT TRANSFER OF ASSETS

8. As to Lynn Smith, this Court stated that "her actions . . . carry with them a circumstantial stench." MDO II at 8. In 2010, Lynn Smith failed to disclose to the SEC and the Court the existence of a certain Annuity Agreement that provided for annual payments of \$489,000 to be made by the Smith Trust to David Smith and Lynn Smith. MDO II at 24; *see also* Memorandum-Decision and Order (Nov. 11, 2010), at 5-7 (Docket No. 194). In the absence of the Annuity Agreement, the Court found that the SEC did not demonstrate that it would succeed in proving that David Smith possessed any interest in the Smith Trust, leading the Court to terminate the Temporary Restraining Order and the asset freeze as to the Smith Trust. *See* Memorandum-Decision and Order (July 7, 2010), at 40-41 (Docket No. 86). After entry of the July 2010 Memorandum-Decision and Order, an aggregate amount of \$925,119 was transferred out of the Smith Trust to, among others, Lynn Smith, Geoffrey Smith, and Lauren Smith.¹ MDO II at 22. The subsequent discovery of the Annuity Agreement caused the Court to enter another Memorandum-Decision and Order in November 2010, reinstating the freeze as to the Smith Trust's assets. *See* Memorandum-Decision and Order (Nov. 11, 2010), at 20 (Docket No. 194), *aff'd Smith v. Sec. Exch. Comm'n*, 432 Fed. Appx. 10 (2d Cir. 2011). The Court eventually determined that

¹ The \$925,119 transferred from the Smith Trust includes almost \$600,000 that was used by the Smith Trust to purchase the Great Sacandaga Lake Property from Lynn Smith. MDO II at 22-23.

the assets of the Smith Trust should be applied to satisfy David Smith's disgorgement obligation. MDO II at 45.

9. The Court found evidence of "fraud, misrepresentation, and misconduct" in Lynn Smith's conduct concealing the Annuity Agreement. Memorandum-Decision and Order (Nov. 11, 2010), at 20, n. 17. The Court ordered sanctions against Lynn Smith, finding "overwhelming evidence of deliberate concealment and misrepresentation" by Lynn Smith and that Lynn Smith acted with subjective bad faith in failing to disclose the existence of the Annuity Agreement. Memorandum-Decision and Order (July 20, 2011), at 16, 19 (Docket No. 342), *aff'd Sec. Exch. Comm'n v. Smith*, 710 F.3d 87 (2d Cir. 2013).² The Court also found that Lynn Smith had violated Section 276 of New York Debtor and Creditor Law by making the post-July 2010 transfers from the Smith Trust with the "actual intent . . . to hinder, delay or defraud either present or future creditors." MDO II at 51-52.

10. Finally, the Court found that Geoffrey Smith and Lauren Smith were the recipients of certain of the fraudulent transfers made by Smith and Lynn Smith from the Smith Trust. MDO II at 50.

SMITH JUDGMENT OBLIGATIONS

11. On June 25, 2015, the Court entered a Final Judgment as to David Smith (Docket No. 835) ("D. Smith Judgment"). David Smith was ordered to disgorge \$99,101,350 ("Disgorgement Obligation"). *See* D. Smith Judgment at 6. The outstanding principal balance of Smith's Disgorgement Obligation remains greater than \$92,523,199.

² In connection with the SEC's motion for sanctions, Lynn Smith was ordered to pay \$51,232 for attorney's fees and costs to the SEC, which amounts remain unpaid. *See* Docket No. 399.

12. On June 25, 2015, the Court entered a Final Judgment as to Lynn Smith, Lauren Smith and Geoffrey Smith (Docket No. 837) (“Smith Claimant Judgment”) ordering that Lynn Smith, Geoffrey Smith, and Lauren Smith return the fraudulently transferred Smith Trust assets that they received. Lynn Smith was found jointly and severally liable with David Smith for the return of the fraudulent transfers, and the Court ordered each of the Smiths to return the assets that they received to the Receiver for distribution to defrauded investors (collectively with the Disgorgement Obligation, the “Judgment Obligations”). Smith Claimant Judgment at 3. Lauren Smith satisfied her Judgment Obligations and, on August 24, 2016, the Court entered a satisfaction of judgment as to Lauren Smith. Geoffrey Smith remains obligated to return a principal amount of \$221,500, plus interest. Lynn Smith remains obligated to return a principal amount of \$220,868, plus interest, in addition to being jointly and severally liable for Geoffrey Smith’s Judgment Obligations.³

GEOFFREY SMITH’S EMPLOYMENT AT MS & CO.

13. Geoffrey Smith was a registered broker working at MS & Co. from 2006 through to 2009. Geoffrey Smith Deposition (Nov. 16, 2011) 23:16-17, 27:10-12.⁴ As compensation, Geoffrey received a salary from MS & Co., as well as a commission for the investment products that he sold. *Id.* 27:3-9. Geoffrey Smith marketed and sold private placements, including investments in the Trust Offerings. *Id.* at 53:6 - 55:3. The “Trust

³ These amounts reflect the reduction in the Judgment Obligations made by the Court in the Smith Claimant Judgment to account for the proceeds received in connection with the Receiver’s sale of the Sacandaga Lake Property. Smith Claimant Judgment at 4. The Court reduced Lynn Smith’s Judgment Obligations by \$324,751 and Geoffrey Smith’s Judgment Obligations by \$75,000. *Id.*

⁴ An excerpt of Geoffrey Smith’s Deposition dated November 16, 2011 is attached to the Brown Dec’l. as Exhibit A.

Offerings” were investment vehicles that sold trust certificates to investors. MDO I at 13. Funds raised by investment in a particular Trust Offering were diverted and used instead to pay investors in other Trust Offerings. McGinn and Smith also took millions from the Trust Offering proceeds for their own use. *Id.* at 14-15.

SMITH ASSERTED CLAIMS

14. The Smiths collectively assert seventeen claims against the Receivership (collectively, the “Smith Claims”), as listed on Exhibit A to the Motion. Lynn Smith asserts six claims against the Receivership in the aggregate amount of \$650,200 (“Lynn Smith Claims”), Geoffrey Smith asserts six claims against the Receivership in the aggregate amount of \$127,964 (“Geoffrey Smith Claims”), and Lauren Smith asserts five claims against the Receivership (“Lauren Smith Claims”) in the aggregate amount of \$99,750.

LAUREN SMITH INVESTMENTS

15. The Lauren Smith Claims arise out of investments that were made in her name between November 2007 and August 2009 (collectively, the “Lauren Smith Investments”). Excerpts from the original investment registers showing the dates that the Lauren Smith Investments were made are attached here as Exhibit B (the “Investment Registers”). The Investment Registers, which were excel spreadsheets maintained internally at MS & Co. to track investments, have been redacted to protect certain personal information, as well as to remove certain extraneous information. The original aggregate principal amount of the Lauren Smith Investments was \$110,000. *See* Ex. A.

16. Lauren Smith testified in a deposition that, between March 2007 and May 2009, she went through a “rough period,” during which time Smith and Lynn Smith

paid Lauren Smith's rent. MDO II at 17; Lauren Smith Deposition (Nov. 28, 2011) 84:17-25, 85:1-23.⁵ Lauren Smith also did not know anything about her investments other than that they existed. *Id.* 24:18-22. Further, Lauren Smith testified that she did not know where the money came from that was invested in her name in MS & Co. entities and that she did not know how much money was invested in her name. *Id.* 25:21-23, 24:23-25. She also testified that Geoffrey Smith controlled her investments and made all investment decisions on her behalf. *Id.* 26:2-7.

17. I believe that the Lauren Smith Investments were funded from the ill-gotten proceeds of the scheme. I reached this conclusion by considering Lauren Smith's financial difficulties during the period between 2007 and 2009 and the financial support Lauren Smith received from her parents during that time. In light of these circumstances, it is unlikely that Lauren Smith invested \$110,000 of her own money in MS & Co. entities. Moreover, Lauren Smith testified that she had no knowledge regarding the source of the funds, which were invested during the height of Smith's Ponzi scheme. Thus, I presume that the Lauren Smith Investments were made with funds belonging to David Smith, obtained through the fraudulent Ponzi scheme.

CLAIMS PROCEDURE

18. On March 9, 2012, in my capacity as Receiver, I filed a Motion ("Claims Procedure Motion") (Docket No. 466) for entry of an Order approving, among other things, the Receiver's proposed procedure for the administration of claims against the MS Entities.

⁵ An excerpt of Lauren Smith's Deposition dated November 28, 2011 is attached here as Exhibit C.

19. On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated April 17, 2012 (“Claims Procedure Order”) (Docket No. 481). A confidential password providing access to the Receiver’s Claims Website at www.mcginnsmithreceiver.com (“Claims Website”) was also provided. If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012, as further described in detail on the Claim’s Website.

20. The Smiths submitted seventeen paper claims (“Paper Claims”) presumably because the Receiver listed each of the Smiths’ claims as “Disputed,” which are described on Exhibit A to the Motion.

PLAN OF DISTRIBUTION PROCESS

21. On December 30, 2015, the Receiver filed a Motion to seek approval of (i) a plan of distribution of assets of the MS Entities to investors; and (ii) interim distributions to investors with allowed claims scheduled or timely filed, which Motion was granted by a Memorandum-Decision and Order entered by the Court on October 31, 2016 (Docket No. 904).

22. As of July 25, 2019, \$6,578,150.28 has been distributed to investors with allowed claims as a First Distribution. I estimate that investors will receive, at most, a total recovery ranging from approximately 13.5% to 21.7%, depending upon the outcome of certain claim objections. *See* Third Written Status Report of the Receiver (Docket No. 925).

CLAIMS MOTIONS

23. To date, the Receiver has filed seven Motions objecting to various investor claims. *See* Docket Nos. 937, 974, 984, 1009, 1025, 1052, 1056. The Court has entered Orders granting five of the Receiver’s Motions.⁶ *See* Docket Nos. 966, 990, 1042, 1043. Two of the Receiver’s Motions remain *sub judice*.

24. Following the submission of the Motion, I intend to file a final omnibus claims objection motion to resolve the treatment of what I believe are all remaining disputed claims. Once all claims motions have been resolved by final order of this Court, I intend to commence a second distribution to investors with allowed claims, and to begin the process of concluding this Receivership.

NOTICE

25. In connection with service of the Motion and all accompanying papers, including this Declaration, I will cause to be mailed to each of the Smiths listed on Exhibit A to the Motion, a copy of the Motion and related pleadings.

Dated: September 11, 2019

/s/ William J. Brown
William J. Brown

Doc #4324727.4

⁶ Among the Orders entered by the Court was the Order granting the Receiver’s third claims Motion seeking disallowance of certain claims of former MS & Co. brokers, entered on March 6, 2019 (Docket No. 1043) (“Broker Claims Order”).

Exhibit A

Geoffrey R. Smith

November 16, 2011

21

1 G. Smith

2 A. That's correct.

3 Q. Is the description of your professional

4 biography accurate to your knowledge?

5 A. Yes.

6 Q. It references the CFA program, do you see

7 that?

8 A. Yes.

9 Q. You've passed all three levels of the CFA

10 program?

11 A. I have.

12 Q. Passed the level 1 exam in December of 2007,

13 the level 2 exam in June of 2008, and the level 3 exam in

14 June of 2009; is that correct?

15 A. Correct.

16 Q. There's reference to a gentleman named Tim

17 Walsh, do you see that?

18 A. Yes, I do.

19 Q. Okay. How did you get to know Tim Walsh?

20 A. Tim Walsh's wife, Theresa, was an employee at

21 McGinn, Smith. She was basically running an investment

22 banking business for small to medium sized media

23 companies. She had been running her own business in

24 London for a while and then moved back to the states and

25 not exactly sure how she came to McGinn, Smith, but her

22

1 G. Smith

2 office was located next to mine and I began to work as

3 her assistant for quite a while building financial models

4 and attending meetings with companies that she was

5 working with. Tim happened to come into her office on a

6 personal matter, they were meeting with a life insurance

7 agent I think, and she happened to be on a phone call so

8 he kind of stumbled into my office and we just started

9 talking and he kind of told me about what it was that he

10 did for a living, which was to enter barter transactions

11 in the retail or manufacturing industries.

12 Q. Okay. Her name is Theresa Walsh?

13 A. That's right.

14 Q. When did she work at McGinn, Smith?

15 A. You know, I can't be exactly sure when she

16 started, but it was sometime in early to mid 2009.

17 Q. About how long did she work there?

18 A. Oh, I think probably until October of 2009,

19 maybe she had left just prior to that.

20 Q. When did you join McGinn, Smith full time?

21 A. Let me think about that.

22 Q. Just note on this e-mail the bottom of the

23 first page it says "In late 2007 I decided that my career

24 as a commodities trader was not going anywhere, and I

25 left to work at McGinn, Smith full time." Does that

23

1 G. Smith

2 sound right?

3 A. Yeah, that jogs my memory a little bit.

4 Q. Why did you decide to join McGinn, Smith full

5 time?

6 A. Well, I was -- I guess you can say I was

7 struggling as a commodities trader, although that's

8 relative because I wasn't losing money, but I just wasn't

9 making as much money as my peers and I also saw some

10 career opportunities by focusing more of my time at

11 McGinn, Smith. You know, I liked the idea of working

12 with my father and it just seemed like a better fit for

13 me.

14 Q. When did you started working part time at

15 McGinn, Smith?

16 A. Pretty sure in October of '06, somewhere

17 around the fall of 2006.

18 Q. How did your duties change when you became a

19 full-time employee?

20 A. Well, when I was a part-time employee I was

21 originally working as what was going to be a trading

22 assistant for two gentlemen that had been hired to start

23 a proprietary equity trading business -- they ended up

24 never executing one trade -- and just trying to develop

25 that and it didn't work out and they left.

24

1 G. Smith

2 During that time I was a registered broker at the

3 firm and had begun marketing some private placements.

4 When I went full time there, I continued with being a

5 registered broker, but I also added some

6 responsibilities. I was trying to procure some

7 institutional business on the private placement side,

8 trying to get some other broker/dealers to offer our

9 products, so I was making calls to registered investment

10 advisories and other broker/dealers.

11 Q. Why were you looking for other broker/dealers

12 to offered McGinn, Smith products?

13 A. No other reason than to grow the business.

14 Q. Who did you market the McGinn, Smith private

15 placements to when you were a part-time employee?

16 A. I marketed them to colleagues of mine on the

17 commodities exchange.

18 Q. Anyone else?

19 A. My sister and I were both investors, but other

20 than that, no.

21 Q. Were you and your sister investors in the --

22 let's get back to that in a little bit.

23 Who did you report to when you started full

24 time at McGinn, Smith?

25 A. I reported to both Andy Guzzetti and Brian



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Geoffrey R. Smith

November 16, 2011

25

1 G. Smith

2 Mayer.

3 Q. Were you in the New York office?

4 A. I was.

5 Q. The entire time you were there?

6 A. Yes. Well, let me clarify. When the New York

7 office went into their moving stage in October of 2009, I

8 began working from home for that period of time and then

9 actually decided to move back up to Saratoga in -- at the

10 end of April of 2010, so I never actually worked in the

11 Albany office, but I was intending to.

12 Q. Did you attend regular meetings of McGinn,

13 Smith brokers?

14 A. Yes.

15 Q. You attended the periodic sales calls that

16 Andy Guzzetti ran?

17 A. I did.

18 Q. How often did those take place?

19 A. I think they were weekly.

20 Q. Do you recall giving presentations at those

21 meetings?

22 A. Yes, I did.

23 Q. What was the general subject matter of those

24 presentations?

25 A. At some point, I'm trying to think exactly

26

1 G. Smith

2 when it was, but at some point I was making presentations

3 on structured products that were offered by larger tiered

4 firms. I did some presentations on reverse convertible

5 securities and on principal protected CDs.

6 Q. You're familiar with the Four Funds, Finn,

7 Fontaine and Fein?

8 A. Yes.

9 Q. Did you have a role in marketing any of those

10 private placements?

11 A. No.

12 Q. Were you invested at all in any of those

13 private placements?

14 A. I was not invested in the Four Funds.

15 Q. Your sister was not invested in those either?

16 A. No.

17 Q. Were there any investments made in the Four

18 Funds for your benefit or on your behalf?

19 A. Not that I'm aware of.

20 Q. How were you compensated at McGinn, Smith?

21 A. Through my time there in a couple of different

22 ways. When I was part time, I was -- I don't know if I

23 was paid on an hourly basis or simply on a weekly basis,

24 but I remember earning about REDACT a week. And I think

25 that I was -- I think that it was just I was paid REDACT a

27

1 G. Smith

2 week.

3 Q. When you were full time, you got a salary and

4 bonus plus commissions?

5 A. That's right. And I also -- I also was able

6 to earn commissions when I was part time. When I became

7 full time I had a salary of REDACTED a year plus

8 commissions and then at some later point my salary was

9 cut to REDACTED

10 Q. Your salary was cut around 2009; does that

11 sound right?

12 A. Yeah.

13 Q. How were the commissions calculated?

14 A. Well, each product had a specific commission

15 assigned to it and, you know, whether it was public

16 stocks or public securities or private placements and

17 then there was a split with the company and I can't

18 exactly remember how that split was calculated, but I'm

19 pretty sure that it was a REDACTED split up until some level

20 of business and then it progressively paid the broker

21 more than the company.

22 Q. Let's just back up. For example, if you sold

23 a client publicly traded equity, GE let's say, what kind

24 of commission would you get on it?

25 A. It's pretty tough for me to answer because I

28

1 G. Smith

2 didn't really do much brokerage for clients in the public

3 space. I know that there was some leniency within the

4 guidelines of the NASD rules, I guess they're FINRA rules

5 now, to mark up securities or charge a commission and I

6 just never did any of those transactions.

7 Q. What do you mean about the guidelines FINRA

8 and NASD as far as mark ups and commissions?

9 A. Well, and it's been a really long time since I

10 took the Series 63 exam, but I remember there being

11 guidelines on public security commissions that were not

12 set in stone. They were just guidelines and to be honest

13 I can't remember what those, what those numbers were.

14 Something like 5 percent is in my head, but I couldn't be

15 sure.

16 Q. Okay. You have a general understanding that

17 there's a 5 percent guideline for those products,

18 correct?

19 A. Yeah.

20 Q. Did you ever sell any mutual funds to your

21 clients?

22 A. Yes. I think I sold two, two closed end

23 mutual funds that basically traded like stocks and I

24 think it was only two of them.

25 Q. Did you ever sell any annuity bonds?



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Geoffrey R. Smith

November 16, 2011

<p style="text-align: right;">53</p> <p>1 G. Smith</p> <p>2 Q. And you'll see there's a number of them listed</p> <p>3 on Exhibit 362. I'm just going to list a few and you can</p> <p>4 tell me whether or not you marketed them.</p> <p>5 A. Mm-mm.</p> <p>6 Q. Did you market the TDM Cable Trust 06 deal?</p> <p>7 A. Yes.</p> <p>8 Q. Did you sell it?</p> <p>9 A. Yes.</p> <p>10 Q. Did you sell the TDM Verifier Trust 07 deal?</p> <p>11 A. Yes.</p> <p>12 Q. Did you sell First Line Senior Trust 07?</p> <p>13 A. No.</p> <p>14 Q. Which first lines did you sell?</p> <p>15 A. I sold First Line Junior Trust 07 and I sold</p> <p>16 First Line Junior Trust Series B.</p> <p>17 Q. How about TDM Luxury Cruise 07?</p> <p>18 A. Yes.</p> <p>19 Q. Did you sell TDM Fair Fire Trust 08?</p> <p>20 A. What was the name of that one?</p> <p>21 Q. TDM Fair Fire Trust 08.</p> <p>22 A. Oh, yes.</p> <p>23 Q. How about the Cruise Charter Ventures Trust?</p> <p>24 A. I recall marketing it, delivering a couple</p> <p>25 prospectuses and did not sell any of it.</p>	<p style="text-align: right;">55</p> <p>1 G. Smith</p> <p>2 Q. The TDMM Benchmark Trust 09?</p> <p>3 A. Yes.</p> <p>4 Q. Okay.</p> <p>5 MR. NEWVILLE: Do you want to take a</p> <p>6 quick break for five minutes?</p> <p>7 (Whereupon, the proceedings have been</p> <p>8 recessed.)</p> <p>9 (Whereupon, Exhibit 363 was marked for</p> <p>10 identification, on this date.)</p> <p>11 BY MR. NEWVILLE:</p> <p>12 Q. Mr. Smith, I've just handed you what's been</p> <p>13 marked as Plaintiff's Exhibit 363. A one-page document</p> <p>14 Bates number MS-E-1429736 containing two e-mails. The</p> <p>15 first one is an e-mail from Andrew Guzzetti dated</p> <p>16 February 15, 2007 to all brokers and then a reply to</p> <p>17 Mr. Guzzetti apparently from you. Do you recognize this</p> <p>18 document, Mr. Smith?</p> <p>19 A. No.</p> <p>20 Q. Do you have any reason to believe that you did</p> <p>21 not send the reply e-mail at the top?</p> <p>22 A. No reason.</p> <p>23 Q. Take a look at the two lines in the e-mail</p> <p>24 from Andrew Guzzetti, it's To All - Brokers.</p> <p>25 A. Mm-mm.</p>
<p style="text-align: right;">54</p> <p>1 G. Smith</p> <p>2 Q. Why didn't you sell any of it?</p> <p>3 A. My investors weren't interested.</p> <p>4 Q. It was the Infinity Cruise, right?</p> <p>5 A. Yes, it was.</p> <p>6 Q. Is that what your investors weren't interested</p> <p>7 in or was there something else?</p> <p>8 MR. FEATHERSTONHAUGH: Objection to form.</p> <p>9 A. I can't remember why they weren't interested.</p> <p>10 Q. How about McGinn, Smith Transaction Funding</p> <p>11 Corp., did you sell that trust?</p> <p>12 A. Yes.</p> <p>13 Q. Fortress Trust 08?</p> <p>14 A. Yes.</p> <p>15 Q. TDMM Cable Junior Trust 09?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. How about the TDMM Cable Senior Trust</p> <p>18 09?</p> <p>19 A. I don't think I sold any of that. I don't</p> <p>20 remember selling the senior portion.</p> <p>21 Q. It doesn't appear on this list, Exhibit 362;</p> <p>22 is that correct?</p> <p>23 A. Yeah, I don't see it there.</p> <p>24 Q. How about the TDM Verifier Trust 07 and 08R?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">56</p> <p>1 G. Smith</p> <p>2 Q. Do you understand what that e-mail is?</p> <p>3 A. Yeah, he had an e-mail list that had all of</p> <p>4 the McGinn, Smith brokers on it.</p> <p>5 Q. You were on that e-mail list, correct?</p> <p>6 A. Yep.</p> <p>7 Q. So you received e-mails that were sent to the</p> <p>8 all-brokers list during the period of time that you</p> <p>9 worked at McGinn, Smith?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. Your reply e-mail from February 16th on</p> <p>12 Exhibit 263 asks "Also are we accepting accredited</p> <p>13 investors only at this point?" Do you recall any</p> <p>14 response to your request about accredited investors?</p> <p>15 A. No.</p> <p>16 Q. Do you recall discussing whether the TDM</p> <p>17 offering would be open only to accredited investors?</p> <p>18 A. No.</p> <p>19 Q. Were all of your clients accredited investors?</p> <p>20 A. No, most of them weren't.</p> <p>21 Q. Your e-mail also asks "Are we still requiring</p> <p>22 that the client do the two year and four year in equal</p> <p>23 amounts?" Do you see that?</p> <p>24 A. Yes.</p> <p>25 Q. What is your understanding of that</p>



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Exhibit B

COMNAME	CITY	STATE	INVST REGISTRATION	PRD DESC	PRD DESC2	TOTPAID ¹	TICKETED AMOUNT	TOTPAYMENTS	FIRST PAYMENT	LAST PAYMENT	INVST STATUS
Lauren Smith	Saratoga Springs	NY	LAUREN T SMITH	FIRSTLINE TRUST 07 SERIES B	JUNIOR CONTRACT CERTIFICATES 11% DUE 10/01/12	25000	25000	1	01-Nov-07	01-Nov-07	OPEN
Lauren Smith	Saratoga Springs	NY	LAUREN T SMITH	FORTRESS TRUST 08	CONTRACT CERTIFICATES	25000	25000	1	25-Sep-08	25-Sep-08	OPEN
Lauren Smith	Saratoga Springs	NY	LAUREN T SMITH	TDM VERIFIER TRUST 07R CONTRACT CERTIFICATES	9% DUE 08/15/2010	25000	25000	1	18-May-09	18-May-09	OPEN
Lauren Smith	Saratoga Springs	NY	LAUREN T SMITH	TDM VERIFIER TRUST 08R CONTRACT CERTIFICATE	9% DUE 12/31/10	10000	10000	1	10-Aug-09	10-Aug-09	OPEN
Lauren Smith	Saratoga Springs	NY	LAUREN T SMITH	McGinn Smith Transaction Funding Corp	8.0% Participating Notes Due 7/1/2012	25000	25000	1	21-May-08	21-May-08	OPEN

¹This column represents the amount paid at the time the investment was made

Exhibit C

Lauren Smith

November 28, 2011

<p style="text-align: right;">21</p> <p>1 L. Smith</p> <p>2 A. Mm-hmm.</p> <p>3 Q. How often did you -- how much time did you</p> <p>4 spend at your parent's house?</p> <p>5 A. Just weekends here and there in the summer,</p> <p>6 holidays.</p> <p>7 Q. How often would you say you spoke to your</p> <p>8 parents during that period of time?</p> <p>9 A. Very often. My family is close.</p> <p>10 Q. Would you say you spoke to your mother and</p> <p>11 father at least once a week?</p> <p>12 A. More. Five times a week.</p> <p>13 Q. During the 2006 to 2009 time period did your</p> <p>14 father ever tell you anything about the business affairs</p> <p>15 of McGinn Smith?</p> <p>16 A. No.</p> <p>17 Q. Did you ever ask him how his business was</p> <p>18 going or how he was doing at work?</p> <p>19 A. No.</p> <p>20 Q. That topic of conversation never came up?</p> <p>21 A. It did not.</p> <p>22 Q. Did you ever talk about the McGinn Smith</p> <p>23 business at all with your mother during the 2006 to 2009</p> <p>24 time period?</p> <p>25 A. No, I did not.</p>	<p style="text-align: right;">23</p> <p>1 L. Smith</p> <p>2 A. To my knowledge, no.</p> <p>3 Q. Do you know what your father's role was in</p> <p>4 those funds?</p> <p>5 A. I do not.</p> <p>6 Q. And to your knowledge no investments were ever</p> <p>7 made in those funds on your behalf, were they?</p> <p>8 A. I don't know.</p> <p>9 Q. To your knowledge, were any investments made</p> <p>10 on your behalf in those funds?</p> <p>11 A. No.</p> <p>12 Q. Do you recall speaking with your father at any</p> <p>13 time during say the 2008 to 2009 time period about</p> <p>14 difficulties that McGinn Smith was undergoing?</p> <p>15 A. No.</p> <p>16 Q. Did you ever speak to your brother about his</p> <p>17 work at McGinn Smith?</p> <p>18 A. No.</p> <p>19 Q. Did you know that your brother was working at</p> <p>20 McGinn Smith?</p> <p>21 A. Yes, I did.</p> <p>22 Q. When did you learn that?</p> <p>23 A. When he took the job which was -- I don't</p> <p>24 recall the year. I remember he worked in New York City</p> <p>25 for my father after he left his trading job. I have no</p>
<p style="text-align: right;">22</p> <p>1 L. Smith</p> <p>2 Q. Have you read the complaint that was filed by</p> <p>3 the SEC? There's been a variety of different complaints</p> <p>4 but I'm just wondering whether you read any of them that</p> <p>5 were filed against McGinn Smith and your father?</p> <p>6 A. No.</p> <p>7 Q. You haven't read any of the complaints?</p> <p>8 A. I have not.</p> <p>9 Q. Are you familiar with the fact that the SEC's</p> <p>10 case involves a number of debt offerings that have been</p> <p>11 referred to as the four funds?</p> <p>12 A. I don't know.</p> <p>13 Q. Have you ever heard of a debt offering called</p> <p>14 First Independent Income Notes?</p> <p>15 A. I have not.</p> <p>16 Q. First Excelsior Income Notes?</p> <p>17 A. No.</p> <p>18 Q. Third Albany Income Notes?</p> <p>19 A. No.</p> <p>20 Q. First Advisory Income Notes?</p> <p>21 A. No.</p> <p>22 Q. You've never heard of any of those offerings?</p> <p>23 A. I have not.</p> <p>24 Q. So to your knowledge you had no investments in</p> <p>25 any of those funds?</p>	<p style="text-align: right;">24</p> <p>1 L. Smith</p> <p>2 clue when that was.</p> <p>3 Q. Do you know what kind of work he was doing?</p> <p>4 A. No.</p> <p>5 Q. You had an investment account -- a couple of</p> <p>6 investment accounts at McGinn Smith, correct?</p> <p>7 A. I believe so.</p> <p>8 Q. Well I have seen records of a Roth IRA</p> <p>9 account. Does that sound right?</p> <p>10 A. Yes.</p> <p>11 Q. There was a separate investment account that</p> <p>12 was an individual investment account, correct?</p> <p>13 A. Yes.</p> <p>14 Q. Who did you speak to about those accounts if</p> <p>15 anyone?</p> <p>16 A. I didn't speak to anyone. I don't handle</p> <p>17 them.</p> <p>18 Q. What was your understanding of the purpose of</p> <p>19 those accounts?</p> <p>20 A. I knew that I had accounts. I knew my brother</p> <p>21 took care of those accounts, and to me, that's all I</p> <p>22 knew.</p> <p>23 Q. Did you know about how much money was in the</p> <p>24 accounts?</p> <p>25 A. I did not.</p>



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Lauren Smith

November 28, 2011

25

1 L. Smith

2 Q. Did you ever see the account statements?

3 A. No.

4 Q. Did you ever talk to your brother about the

5 accounts at all?

6 A. No.

7 Q. Did you ever sign paperwork for the accounts?

8 A. Yes.

9 Q. Describe to me what happened when you signed

10 paperwork for the accounts?

11 A. There's a little yellow tab that says

12 "sign here". I pick up the pen, sign where I'm supposed

13 to sign and I give them back to my brother.

14 Q. Was there a reason you didn't take additional

15 interest in these accounts?

16 A. Because I don't understand what they mean.

17 And if it's something that was setup for me, that's fine,

18 but the money that I make goes into my bank account. And

19 that's something I wouldn't understand so I just have had

20 no interest in that.

21 Q. Where did the money come from that went into

22 your investment accounts at McGinn Smith?

23 A. I don't know.

24 Q. Did you ever speak to anyone about it?

25 A. No.

26

1 L. Smith

2 Q. Who had the ability to control those

3 investment accounts?

4 A. My brother.

5 Q. He made all the investment decisions for those

6 accounts?

7 A. Yes.

8 Q. Did your father have any input on the

9 investment decisions for those accounts?

10 A. I don't know.

11 Q. Did you ever speak to your brother about the

12 investment decisions that were being made in those

13 accounts?

14 A. No.

15 Q. Was it your understanding that the money in

16 those accounts was your money to do with whatever you

17 wanted to do?

18 A. Yes.

19 Q. Did you understand that you had the ability to

20 withdraw and redeem funds from those investment accounts?

21 A. Yes.

22 Q. Did you ever request funds from those

23 accounts?

24 A. No, I did not.

25 Q. Why not?

27

1 L. Smith

2 A. Because the money in those accounts to my

3 understanding was money that was for my future, it wasn't

4 money that needed to be pulled out to go shopping with.

5 It was money that was setup so I could maybe start a

6 business or buy a house one day in my future.

7 Q. Your testimony sitting here today is that you

8 had no idea what that money was invested in?

9 A. No idea.

10 Q. How did you know that the funds were being put

11 to use in a proper way?

12 A. I don't understand.

13 Q. Well you testified that your brother exercised

14 control over those investments, correct?

15 A. Yes.

16 Q. How did you make sure that he wasn't, for

17 example, wasting the money in those accounts or spending

18 it on his own purposes?

19 A. Because in my family we love and trust each

20 other. He's my brother, bottom line.

21 Q. Did he ever tell you what your investment

22 accounts were being invested in?

23 A. No.

24 Q. Did you know whether they were being invested

25 in McGinn Smith debt offerings?

28

1 L. Smith

2 A. I don't.

3 Q. You don't know one way or the other?

4 A. I don't.

5 Q. And you didn't know one way or the other?

6 A. No.

7 Q. I'm going to hand you a document that's been

8 marked as Exhibit 362. This exhibit was previously

9 marked at your brother Geoff Smith's deposition. And

10 I'll represent to you that it is a list of various

11 clients that were your brother's clients. Do you see

12 document Exhibit 362?

13 A. Yes.

14 Q. I realize there are a lot of entries here but

15 if you look near the top of the first page, the name

16 Lauren Smith is listed?

17 A. Mm-hmm.

18 Q. Address REDACTED in Saratoga

19 Springs; do you see that?

20 A. Yes.

21 Q. Is it your understanding that that refers to

22 you?

23 A. Yes.

24 Q. Under that entry there is an investment of

25 looks like \$25,000 in a product that's called First



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Lauren Smith

November 28, 2011

<p style="text-align: right;">81</p> <p>1 L. Smith</p> <p>2 July 14th as well?</p> <p>3 A. Yes.</p> <p>4 Q. Is it your understanding that those are credit</p> <p>5 card payments?</p> <p>6 A. Yes.</p> <p>7 (Exhibit 416 marked for identification.)</p> <p>8 Q. Handing you what's been marked as Exhibit 416.</p> <p>9 This is another stack of documents that was provided to</p> <p>10 us by your counsel today. Would you agree with me there?</p> <p>11 A. Yes.</p> <p>12 Q. What are the documents stapled together as</p> <p>13 Exhibit 416?</p> <p>14 A. The first one is my checking account at Alpine</p> <p>15 Bank. The next one is an e-mail requesting documents to</p> <p>16 U.S. Bank. And the third one is a section of my</p> <p>17 Wells Fargo bank account.</p> <p>18 Q. And it appears these are some duplicate copies</p> <p>19 of the bank account records we looked at as Exhibit 414,</p> <p>20 right?</p> <p>21 A. Yes.</p> <p>22 Q. Do you recall that the closing of the sale of</p> <p>23 the camp property occurred somewhere around July 22,</p> <p>24 2010?</p> <p>25 A. I do not recall an exact date.</p>	<p style="text-align: right;">83</p> <p>1 L. Smith</p> <p>2 Q. So it would be reasonable to assume that Geoff</p> <p>3 would have some involvement in it, right?</p> <p>4 A. It would but I'm not going to assume.</p> <p>5 Q. He told you that he was going to take care of</p> <p>6 the transfer of the ownership of the camp property,</p> <p>7 right?</p> <p>8 A. Yes.</p> <p>9 Q. Did you speak to anyone else about their role</p> <p>10 in transferring the ownership of the camp property?</p> <p>11 A. No, I did not.</p> <p>12 Q. Did you receive periodic transfers of funds</p> <p>13 from your parents in order to pay the rent, pay bills,</p> <p>14 that sort of thing?</p> <p>15 MR. ELY: Any timeframe?</p> <p>16 MR. NEWVILLE: At any time after 2006.</p> <p>17 A. What do you mean by periodic, like coming in</p> <p>18 on a regular basis?</p> <p>19 Q. Let's just talk about any payments.</p> <p>20 A. Yes. I've had help from my mom when I was</p> <p>21 short rent, if I wanted that brand new dress in a store</p> <p>22 window. If I didn't exactly have the money, as any</p> <p>23 daughter would do she reaches out to her mom.</p> <p>24 (Exhibit 417 marked for identification.)</p> <p>25 Q. I'm handing you what's been marked</p>
<p style="text-align: right;">82</p> <p>1 L. Smith</p> <p>2 Q. Do you recall that there was a date and time</p> <p>3 in which the ownership of the properties was transferred?</p> <p>4 A. Yes.</p> <p>5 Q. Do you recall that certain people got together</p> <p>6 and signed documents that transferred ownership of the</p> <p>7 camp property?</p> <p>8 A. Yes.</p> <p>9 Q. Did you attend that closing?</p> <p>10 A. No, I did not.</p> <p>11 Q. Were you in New York at all during July of</p> <p>12 2010?</p> <p>13 A. No.</p> <p>14 Q. Were you in New York at all during the period</p> <p>15 of time that the trust assets were unfrozen during</p> <p>16 mid-2010?</p> <p>17 A. No.</p> <p>18 Q. Your e-mail to Mr. Wojeski, you sent that --</p> <p>19 A. From Colorado.</p> <p>20 Q. Did you have any understanding of who was</p> <p>21 taking care of the transfer of the camp property</p> <p>22 ownership?</p> <p>23 A. No.</p> <p>24 Q. You spoke to Geoff about it, correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">84</p> <p>1 L. Smith</p> <p>2 Exhibit 417. Exhibit 417 is a number of copies of</p> <p>3 canceled checks from the David L. Smith and Lynn A. Smith</p> <p>4 account made out to Lauren T. Smith. These are copies</p> <p>5 that we pulled together and I'd just like you to take a</p> <p>6 look and confirm whether the signature endorsing the</p> <p>7 checks is indeed your signature on all of these checks in</p> <p>8 Exhibit 417?</p> <p>9 A. Yes.</p> <p>10 Q. So the first check in the series is dated</p> <p>11 March 27, 2007. Do you see that check number 4071?</p> <p>12 A. Yes.</p> <p>13 Q. In the amount of \$1,000 payable to you?</p> <p>14 A. Yes.</p> <p>15 Q. Do you recall anything about that \$1,000 check</p> <p>16 that was made out to you?</p> <p>17 A. Yes. I went through a little bit of a rough</p> <p>18 period. I lived in an apartment that was about \$2,200.</p> <p>19 My parents helped me pay my rent for a year in Boston.</p> <p>20 Q. There are additional \$1,000 checks in April,</p> <p>21 May, June, July, August, nothing in September, but then</p> <p>22 again October 1, 2007, November 3, 2007, November 25,</p> <p>23 2007, December 14, 2007 and December 28, 2007. I think I</p> <p>24 lost count but there's a number of \$1,000 transfers</p> <p>25 there, correct?</p>



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Lauren Smith

November 28, 2011

85

1 L. Smith

2 A. Yes.

3 Q. A number of \$1,000 checks there, correct?

4 A. Yes.

5 Q. And I'm just curious why you wouldn't take a

6 distribution from the trust for that kind of money?

7 A. The distribution from the trust -- the trust

8 was setup. I didn't know I had access to the money. The

9 trust had been setup for my future. If I'm a little

10 short on rent I feel I can ask my mom and my family for

11 some support, for some help without digging into money

12 that is suppose to be set aside for later in my life.

13 Q. Again we've got additional checks from

14 February, March, April, May and June of 2008 in the

15 amount of \$1,000. Do you see that?

16 A. Mm-hmm.

17 Q. In addition another \$1,000 check in December

18 of '08, a \$2,000 check in March of '09, a \$2,200 check in

19 May of '09. Do you see those?

20 A. Yes.

21 Q. How would you describe these additional

22 checks?

23 A. They were still money to help pay my rent.

24 Q. Did you provide anything in return for the

25 checks that are referenced in Exhibit 417?

86

1 L. Smith

2 A. No.

3 Q. These were gifts to you?

4 A. Yes.

5 Q. About how much money would you say you

6 received over the 2006 to 2009 time period from your

7 parents as gifts?

8 A. I don't know. If you would like to add these,

9 be my guest.

10 Q. Did you receive any funds from your parents

11 during the 2010 time period?

12 A. No. I don't recall.

13 Q. After the SEC filed its lawsuit at any point

14 in time up until today do you recall any gifts from your

15 parents?

16 A. No.

17 Q. Do you recall whether your mother gave you a

18 \$10,000 gift after the camp properties were transferred

19 into ownership?

20 A. I was given money. I was just married this

21 past September 24, 2011. I was given \$10,000 from my

22 parents. Again, that you will see in my Alpine Bank

23 account which I will not be touching because now that is

24 my future money.

25 Q. Is it your understanding that your parents

87

1 L. Smith

2 also gave your brother Geoff a gift in the amount of

3 \$10,000?

4 A. I don't know.

5 Q. Geoff didn't get married, did he?

6 A. No, he did not.

7 Q. I think we discussed this before, but after

8 the SEC filed its lawsuit you were aware that your

9 parents assets had been frozen, correct?

10 A. Yes.

11 Q. You're aware that their documents had been

12 seized by the FBI?

13 A. Yes.

14 Q. Were you in New York at all during the time

15 that occurred?

16 MR. ELY: Is this the first time they

17 froze or the second time?

18 MR. NEWVILLE: When the documents were

19 seized by the FBI.

20 A. No, I was not here.

21 Q. You're aware that your parents were undergoing

22 some serious financial difficulties as a result of the

23 asset freeze, weren't you?

24 A. Yes.

25 Q. And you're aware that a lot of work was done

88

1 L. Smith

2 in order to release the trust from the asset freeze, were

3 you not?

4 A. Yes.

5 Q. And you're aware that a lot of work was done

6 to attempt to release your mother's stock account from

7 the asset freeze, were you not?

8 A. I do not know.

9 Q. You were aware that it was very important to

10 your parents to release the trust assets from the asset

11 freeze in order to help them pay their living expenses,

12 weren't you?

13 A. I do not know.

14 Q. You're aware that your parents had substantial

15 living expenses during that period of time they were not

16 able to pay, correct?

17 A. Correct.

18 Q. And you're aware that your parents were

19 incurring substantial legal fees that they were not able

20 to pay, correct?

21 A. Correct.

22 Q. So at the time the camp property ownership was

23 transferred, you knew that your parents required money in

24 order to fund their living expenses and their legal fees,

25 right?



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, :

vs. :

Case No. 1:10-CV-457
(GLS/CFH)

McGINN, SMITH & CO., INC., :
McGINN, SMITH ADVISORS, LLC :
McGINN, SMITH CAPITAL HOLDINGS CORP., :
FIRST ADVISORY INCOME NOTES, LLC, :
FIRST EXCELSIOR INCOME NOTES, LLC, :
FIRST INDEPENDENT INCOME NOTES, LLC, :
THIRD ALBANY INCOME NOTES, LLC, :
TIMOTHY M. MCGINN, AND :
DAVID L. SMITH, GEOFFREY R. SMITH, :
Individually and as Trustee of the David L. and :
Lynn A. Smith Irrevocable Trust U/A 8/04/04, :
LAUREN T. SMITH, and NANCY MCGINN, :

Defendants, :

LYNN A. SMITH and :
NANCY MCGINN, :

Relief Defendants. and :

GEOFFREY R. SMITH, Trustee of the :
David L. and Lynn A. Smith Irrevocable :
Trust U/A 8/04/04, :

Intervenor. :

-----X

**MEMORANDUM OF LAW IN SUPPORT OF
EIGHTH CLAIMS MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR
AN ORDER (A) DISALLOWING OR EQUITABLY SUBORDINATING THE
SMITH CLAIMS OR (B) OFFSETTING THE JUDGMENT OBLIGATIONS
WITH SMITH CLAIM DISTRIBUTIONS, AND (C) EXPUNGING SMITH
PAPER CLAIMS**

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William J. Brown, as Receiver (“Receiver”) of McGinn, Smith & Co., Inc. (“MS & Co.”), respectfully submits this Memorandum of Law in support of his Eighth Claims Motion (“Motion”) for an Order (a) disallowing or equitably subordinating the Smith Claims or (b) in the alternative, offsetting the Judgment Obligations with Smith Claim distributions, and (c) expunging the Smiths’ Paper Claims (each as defined in this Memorandum).

PRELIMINARY STATEMENT

The Receiver intends that this Motion and one additional claims objection motion to be filed in the next few weeks will conclude the claims objection process in this Receivership, allowing the Receiver, when the motions are decided, to make a second distribution to investors with allowed claims and to begin to conclude this Receivership.

From 2003 to 2010, David L. Smith and Timothy M. McGinn orchestrated an elaborate Ponzi scheme through which more than 900 investors were defrauded. Investors in MS & Co. now stand to recover only a small fraction of the principal amount of their investments.

Among the Defendants and Relief Defendants in this action are David Smith’s wife, Lynn A. Smith, and his children, Geoffrey R. Smith and Lauren T. Smith (collectively, the “Smiths”). The Court has found that, in addition to fraudulently transferring the assets of the Smith Trust, Lynn Smith engaged in fraud by concealing certain facts about the Smith Trust from the SEC and the Court, ultimately allowing almost one million dollars to be transferred from the Smith Trust to the Smiths. The Court has also entered judgments against each of the Smiths ordering the return of the fraudulently transferred assets. Lynn Smith and Geoffrey Smith have yet to satisfy the judgments.

Each of Lynn Smith, Geoffrey Smith, and Lauren Smith have asserted claims against the Receivership: Lynn Smith asserts claims in the aggregate amount of \$650,200, Geoffrey Smith asserts claims in the aggregate amount of \$127,964, and Lauren Smith asserts claims in the aggregate amount of \$99,750. Accordingly, the Receiver seeks to disallow, or equitably subordinate, the Smiths' asserted claims due to their inequitable conduct. In the alternative, the Receiver seeks to use any distributions that may be owed the Smiths on account of their asserted claims to offset the Smiths' outstanding judgment obligations.

By disallowing the Smiths' asserted claims, or using their distributions to offset the outstanding Judgment Obligations, the Receiver will increase the amounts available in the distribution fund for innocent investors in MS & Co. The Smiths benefitted directly and indirectly from David Smith's fraud - it would be inequitable for the Smiths as beneficiaries of the fraud to recover from the fund created for innocent, defrauded investors who were harmed by David Smith's scheme.

Finally, the Receiver seeks to disallow the paper claims filed by the Smiths, which are exact duplicates of their asserted claims already recorded on the books of the Receivership.

STATEMENT OF FACTS

MS & Co. was a broker-dealer registered with the Securities and Exchange Commission ("SEC") with its headquarters in Albany, New York from 1981 to 2009. From 2003 through 2010, the broker-dealer was owned by David L. Smith ("Smith" or "David Smith"), Timothy M. McGinn ("McGinn"), and Thomas E. Livingston.

On April 20, 2010, the SEC filed a Complaint initiating the above-captioned action (Docket No. 1) against the above-captioned Defendants and Relief Defendants, including Smith's wife, Lynn A. Smith ("Lynn Smith"). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants McGinn and Smith, including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the "MS Entities"). Brown Dec'l. ¶4.¹

On July 26, 2010, following a hearing, the Court entered an order granting the SEC's Motion for a Preliminary Injunction and appointing the Receiver as receiver, pending a final disposition of the action ("Preliminary Injunction Order") (Docket No. 96).

On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the "Complaint") (Docket No. 334) adding David Smith's and Lynn Smith's children as defendants: Lauren T. Smith ("Lauren Smith") and Geoffrey Smith ("Geoffrey Smith"), individually and in his capacity as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Smith Trust"). On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) ("MDO I") granting the SEC's motion for summary judgment as to McGinn's and Smith's violations of the securities laws, which was affirmed on appeal by the United States Court of Appeals for the Second Circuit. *See Sec. Exch. Comm'n v. Smith*, 646 Fed.Appx. 42 (2d. Cir. 2016). On March 30, 2015, the Court issued its Memorandum-

¹ "Brown Dec'l. ¶ __" refers to the Declaration of William J. Brown dated September 11, 2019 filed in support of the Motion.

Decision and Order (Docket No. 816) (“MDO II”) granting the SEC’s motion for summary judgment as to Lynn Smith, Geoffrey Smith, and Lauren Smith, which was also affirmed by the Second Circuit Court of Appeals. *See Sec. Exch. Comm’n v. Smith*, 646 Fed.Appx. 42 (2d. Cir. 2016).

Generally, McGinn and Smith “orchestrated an elaborate Ponzi scheme, which spanned over several years, involved dozens of debt offerings, and bamboozled hundreds of investors out of millions of dollars.” MDO I at 7. McGinn and Smith raised over \$136 million between 2003 and 2010 in over twenty unregistered debt offerings, including the Four Funds -- FAIN, FEIN, FIIN, and TAIN -- and various Trust Offerings, by representing that investor money would be “invested,” when instead it was “funneled” into various entities owned or controlled by McGinn and Smith. That money was then used to fund unauthorized investments and unsecured loans, make interest payments to investors in other entities and offerings, support McGinn’s and Smith’s “lifestyles,” and cover the payroll at MS & Co. MDO I at 7.

A. Lynn Smith’s Misconduct and Fraudulent Transfer of Assets

As to Lynn Smith, this Court stated that “her actions . . . carry with them a circumstantial stench.” MDO II at 8. In 2010, Lynn Smith failed to disclose to the SEC and the Court the existence of a certain Annuity Agreement that provided for annual payments of \$489,000 to be made by the Smith Trust to David Smith and Lynn Smith. MDO II at 24; *see also* Memorandum-Decision and Order (Nov. 11, 2010), at 5-7 (Docket No. 194). In the absence of the Annuity Agreement, the Court found that the SEC did not demonstrate that it would succeed in proving that David Smith possessed any interest in the Smith Trust, leading the Court to terminate the Temporary Restraining Order and the asset

freeze as to the Smith Trust. *See* Memorandum-Decision and Order (July 7, 2010), at 40-41 (Docket No. 86). After entry of the July 2010 Memorandum-Decision and Order, an aggregate amount of \$925,119 was transferred out of the Smith Trust to, among others, Lynn Smith, Geoffrey Smith, and Lauren Smith.² MDO II at 22. The subsequent discovery of the Annuity Agreement caused the Court to enter another Memorandum-Decision and Order in November 2010, reinstating the freeze as to the Smith Trust's assets. *See* Memorandum-Decision and Order (Nov. 11, 2010), at 20 (Docket No. 194), *aff'd Smith v. Sec. Exch. Comm'n*, 432 Fed. Appx. 10 (2d Cir. 2011). The Court eventually determined that the assets of the Smith Trust should be applied to satisfy David Smith's disgorgement obligation. MDO II at 45.

The Court found evidence of "fraud, misrepresentation, and misconduct" in Lynn Smith's conduct concealing the Annuity Agreement. Memorandum-Decision and Order (Nov. 11, 2010), at 20, n. 17. The Court ordered sanctions against Lynn Smith, finding "overwhelming evidence of deliberate concealment and misrepresentation" by Lynn Smith and that Lynn Smith acted with subjective bad faith in failing to disclose the existence of the Annuity Agreement. Memorandum-Decision and Order (July 20, 2011), at 16, 19 (Docket No. 342), *aff'd Sec. Exch. Comm'n v. Smith*, 710 F.3d 87 (2d Cir. 2013).³ The Court also found that Lynn Smith had violated Section 276 of New York Debtor and Creditor Law by making the post-July 2010 transfers from the Smith Trust with the "actual intent . . . to hinder, delay or defraud either present or future creditors." MDO II at 51-52.

² The \$925,119 transferred from the Smith Trust includes almost \$600,000 that was used by the Smith Trust to purchase the Great Sacandaga Lake Property from Lynn Smith. MDO II at 22-23.

³ In connection with the SEC's motion for sanctions, Lynn Smith was ordered to pay \$51,232 for attorney's fees and costs to the SEC, which amounts remain unpaid. *See* Docket No. 399.

Finally, the Court found that Geoffrey Smith and Lauren Smith were the recipients of certain of the fraudulent transfers made by Smith and Lynn Smith from the Smith Trust. MDO II at 50.

B. Smith Judgment Obligations

On June 25, 2015, the Court entered a Final Judgment as to David Smith (Docket No. 835) (“D. Smith Judgment”). David Smith was ordered to disgorge \$99,101,350 (“Disgorgement Obligation”). *See* D. Smith Judgment at 6. The outstanding principal balance of Smith’s Disgorgement Obligation remains greater than \$92,523,199. Brown Dec’l. ¶ 11.

On June 25, 2015, the Court entered a Final Judgment as to Lynn Smith, Lauren Smith and Geoffrey Smith (Docket No. 837) (“Smith Claimant Judgment”) ordering that Lynn Smith, Lauren Smith, and Geoffrey Smith return the fraudulently transferred Smith Trust assets that they received. Lynn Smith was found jointly and severally liable with David Smith for the return of the fraudulent transfers, and the Court ordered each of the Smiths to return the assets that they received to the Receiver for distribution to defrauded investors (collectively with the Disgorgement Obligation, the “Judgment Obligations”). Smith Claimant Judgment at 3. Lauren Smith satisfied her Judgment Obligations and, on August 24, 2016, the Court entered a satisfaction of judgment as to Lauren Smith. Geoffrey Smith remains obligated to return a principal amount of \$221,500, plus interest. Lynn Smith remains obligated to return a principal amount of \$220,868, plus interest, in addition to being jointly and severally liable for Geoffrey Smith’s Judgment Obligations.⁴ Brown Dec’l. ¶ 12.

⁴ These amounts reflect the reduction in the Judgment Obligations made by the Court in the Smith Claimant Judgment to account for the proceeds received in connection with the Receiver’s sale of the Sacandaga Lake

C. Geoffrey Smith's Employment at MS & Co.

Geoffrey Smith was a registered broker working at MS & Co. from 2006 through to 2009. Geoffrey Smith Deposition (Nov. 16, 2011) 23:16-17, 27:10-12.⁵ As compensation, Geoffrey received a salary from MS & Co., as well as a commission for the investment products that he sold. *Id.* 27:3-9. Geoffrey Smith marketed and sold private placements, including investments in the Trust Offerings. *Id.* at 53:6 - 55:3. The "Trust Offerings" were investment vehicles that sold trust certificates to investors. MDO I at 13. Funds raised by investment in a particular Trust Offering were diverted and used instead to pay investors in other Trust Offerings. McGinn and Smith also took millions from the Trust Offering proceeds for their own use. *Id.* at 14-15.

D. Smith Asserted Claims

The Smiths collectively assert seventeen claims against the Receivership (collectively, the "Smith Claims"), as listed on Exhibit A to the Motion. Lynn Smith asserts six claims against the Receivership in the aggregate amount of \$650,200 ("Lynn Smith Claims"), Geoffrey Smith asserts six claims against the Receivership in the aggregate amount of \$127,964 ("Geoffrey Smith Claims"), and Lauren Smith asserts five claims against the Receivership ("Lauren Smith Claims") in the aggregate amount of \$99,750. Brown Dec'1. ¶ 14.

Property. Smith Claimant Judgment at 4. The Court reduced Lynn Smith's Judgment Obligations by \$324,751 and Geoffrey Smith's Judgment Obligations by \$75,000. *Id.*

⁵ An excerpt of Geoffrey Smith's Deposition dated November 16, 2011 is attached to the Brown Dec'1. as Exhibit A.

E. The Lauren Smith Investments

The Lauren Smith Claims arise out of investments that were made in her name between November 2007 and August 2009 (collectively, the “Lauren Smith Investments”). Brown Dec’l. ¶ 15. Excerpts from the original investment registers showing the dates that the Lauren Smith Investments were made are attached to the Brown Dec’l. as Exhibit B (the “Investment Registers”). The Investment Registers, which were excel spreadsheets maintained internally at MS & Co. to track investments, have been redacted to protect certain personal information, as well as to remove certain extraneous information. The original aggregate principal amount of the Lauren Smith Investments was \$110,000. *Id.*

Lauren Smith testified in a deposition that, between March 2007 and May 2009, she went through a “rough period,” during which time Smith and Lynn Smith paid Lauren Smith’s rent. MDO II at 17; Lauren Smith Deposition (Nov. 28, 2011) 84:17-25, 85:1-23.⁶ Lauren Smith also did not know anything about her investments other than that they existed. *Id.* 24:18-22. Further, Lauren Smith testified that she did not know where the money came from that was invested in her name in MS & Co. entities and that she did not know how much money was invested in her name. *Id.* 25:21-23, 24:23-25. She also testified that Geoffrey Smith controlled her investments and made all investment decisions on her behalf. *Id.* 26:2-7.

F. Claims Procedure

On March 9, 2012, the Receiver filed a Motion (“Claims Procedure Motion”) (Docket No. 466) for entry of an Order approving, among other things, the Receiver’s proposed procedure for the administration of claims against the MS Entities.

⁶ An excerpt of Lauren Smith’s Deposition dated November 28, 2011 is attached to the Brown Dec’l. as Exhibit C.

On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated April 17, 2012 (“Claims Procedure Order”) (Docket No. 481). A confidential password providing access to the Receiver’s Claims Website at www.mcginnsmithreceiver.com (“Claims Website”) was also provided. *Id.* If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. *Id.* All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012, as further described in detail on the Claim’s Website.

The Smiths submitted seventeen paper claims (“Paper Claims”) presumably because the Receiver listed each of the Smiths’ claims as “Disputed,” which are described on Exhibit A to the Motion. Brown Dec’l. ¶ 20.

G. Plan of Distribution Process

On December 30, 2015, the Receiver filed a Motion to seek approval of (i) a plan of distribution of assets of the MS Entities to investors and (ii) interim distributions to investors with allowed claims scheduled or timely filed, which Motion was granted by a Memorandum-Decision and Order entered by the Court on October 31, 2016 (Docket No. 904). As of July 25, 2019, \$6,578,150.28 has been distributed to investors with allowed claims as a First Distribution. Brown Dec’l. ¶22. The Receiver estimates that investors will receive, at most, a total recovery ranging from approximately 13.5% to 21.7%, depending upon the outcome of certain claim objections. *See* Third Written Status Report of the Receiver (Docket No. 925).

H. Claims Motions

To date, the Receiver has filed seven Motions objecting to various investor claims. *See* Docket Nos. 937, 974, 984, 1009, 1025, 1052, 1056. The Court has entered Orders granting five of the Receiver's Motions.⁷ *See* Docket Nos. 966, 990, 1042, 1043. Two of the Receiver's Motions remain *sub judice*.

Following the submission of the Motion and this Memorandum, the Receiver intends to file a final omnibus claims objection motion to resolve the treatment of what he believes are all remaining disputed claims. Once all claims motions have been resolved by final order of this Court, the Receiver intends to commence making a second distribution to investors with allowed claims and to begin the process of concluding this Receivership. Brown Dec'1. ¶ 24.

ARGUMENT

A. The Smith Claims Should be Disallowed or Equitably Subordinated

The Smiths should not receive any distributions an account of the Smith Claims. “[A] district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration.” Broker Claims Order at 4 (quoting *F.D.I.C. v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. 1992); *see also Smith v. Sec. Exch. Comm’n*, 653 F.3d 121, 127 (2d Cir. 2011) (“Once the equity jurisdiction of the district court property has been invoked, the court has power to order all equitable relief necessary under the circumstances.” (internal quotation omitted))). This includes the discretion of district courts to classify claims sensibly in order to achieve and

⁷ Among the Orders entered by the Court was the Order granting the Receiver's third claims Motion seeking disallowance of certain claims of former MS & Co. brokers, entered on March 6, 2019 (Docket No. 1043) (“Broker Claims Order”).

equitable result. See *S.E.C. v. Enter. Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009); *S.E.C. v. Infinity Grp. Co.*, 226 Fed. Appx. 217, 218 (3d Cir. 2007). “It is within a district court’s discretion to approve a distribution plan proposed by a receiver—and to defer to the receiver’s choices for the plan’s details—so long as the plan is ‘fair and reasonable.’” *Sec. & Exch. Comm’n v. Amerindo Inv. Advisors Inc.*, No. 5-CV-5231, 2016 WL 10821985, at *3 (S.D.N.Y. May 20, 2016) (quoting *Sec. Exch. Comm’n v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)) (internal citation omitted).

District courts have used their broad equitable powers to disallow claims in equity receiverships based on the conduct of the claimants. For example, the courts have permitted equity receivers to exclude claimants from receiving distributions where such claimants were involved in the “development, implementation, and/or marketing” of a fraudulent Ponzi scheme. See, e.g., *S.E.C. v. Byers*, 637 F.Supp.2d 166, 183 (S.D.N.Y. 2009) (approving distribution plan where employees who actively participated in a Ponzi scheme were excluded from receiving distributions).

District courts have also used their broad equitable powers to “subordinate the claims of certain investors to ensure equal treatment.” *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 333 (7th Cir. 2010). The district court has “the equitable power to subordinate one claim to another if it finds that the creditor’s claim, while not lacking a lawful basis nonetheless results from inequitable behavior on the part of that creditor.” *S.E.C. v. Am. Bd. of Trade*, 719 F.Supp. 186, 196 (S.D.N.Y. 1986) (internal quotation omitted).

The Smith Claims should be disallowed, or equitably subordinated, to the claims of innocent MS & Co. investors. First, Lynn Smith’s fraudulent conduct in concealing the Annuity Agreement and in making fraudulent transfers of the Smith Trust

assets was directly injurious to defrauded investors. The Court found that Lynn Smith had acted in subjective bad faith by concealing the Annuity Agreement and later sanctioned Lynn Smith for her misconduct, which sanctions were later upheld by the Second Circuit Court of Appeals. *See Sec. Exch. Comm'n v. Smith*, 710 F.3d 87 (2d Cir. 2013). In addition, the Court found that Lynn Smith violated Section 276 of New York Debtor and Creditor Law by making the post-July 2010 transfers from the Smith Trust to, among others, Geoffrey Smith and Lauren Smith, with “actual intent . . . to hinder, delay or defraud either present or future creditors.” MDO II at 51-52.

Lynn Smith’s conduct in concealing the existence of the Annuity Agreement and making fraudulent transfers from the Smith Trust directly resulted in the transfer of almost one million dollars out of the Smith Trust, of which \$442,368 has not yet been recovered for distribution to defrauded investors. In addition, the Receiver and the SEC have had to expend time and resources trying to collect the fraudulently transferred assets. Accordingly, the Lynn Smith Claims should be disallowed, or equitably subordinated, due to her fraudulent and inequitable conduct.

The Geoffrey Smith Claims should be disallowed, or equitably subordinated, on the basis of Geoffrey Smith’s participation in the Ponzi scheme. Geoffrey Smith sold investments in the Trust Offerings while he was employed as a registered broker at MS & Co., which Trust Offerings were part of David Smith’s Ponzi scheme. Brown Dec’1. ¶ 13. Investors who purchased Trust Offering investments, including investors who purchased from Geoffrey Smith, are among the defrauded MS & Co. investors and will receive, at the very most, only approximately 21.7% of their original investments. Thus, Geoffrey Smith’s conduct serves as a basis to disallow, or equitably subordinate, the Geoffrey Smith Claims.

Finally, the Smiths are not like the innocent investors who were defrauded out of millions of dollars by David Smith. They are David Smith's immediate family, and all benefitted in some way or another from David Smith's fraud. As David Smith's wife, Lynn Smith shared in the "lavish" lifestyle funded by the fraud and at the expense of innocent investors who trusted David Smith with their investments. Geoffrey Smith similarly profited from the Ponzi scheme, earning commissions on his sales of Trust Offering investments. Even Lauren Smith benefitted from her parents' wealth, receiving financial assistance from David and Lynn Smith at the height of the fraud at MS & Co. It would simply be inequitable to permit these beneficiaries of the fraud that fleeced unknowing investors out of millions of dollars to retain claims against the Receivership created to redistribute whatever can be recovered to the defrauded investors.

B. In the Alternative, Distributions on Account of the Smith Claims Should Offset The Outstanding Judgment Obligations

To the extent that any of the Smiths is entitled to a distribution on account of the asserted Smith Claims, any such distribution should remain with the Receivership to offset the outstanding Judgment Obligations.

1. Distributions Otherwise Owed to Geoffrey Smith and Lynn Smith Should Be Used to Offset Their Outstanding Judgment Obligations

Both Geoffrey Smith and Lynn Smith have unsatisfied Judgment Obligations. Geoffrey Smith is asserting claims in the aggregate of \$127,964. If Geoffrey Smith were entitled to a first distribution of ten percent on account of his asserted claims, he would receive \$12,796. Geoffrey Smith's Judgment Obligations, however, remain unsatisfied in the amount of \$221,500, plus interest. Lynn Smith is asserting claims in the aggregate of \$650,200 and a first distribution of ten percent would amount to \$65,020. Pursuant to the

Smith Claimant Judgment, Lynn Smith remains responsible for the return of \$220,868, plus interest, in addition to being jointly and severally liable for Geoffrey Smith's Judgment Obligations.

It would be most efficient to for the Receiver to use any distributions that otherwise would be owed to Lynn Smith or Geoffrey Smith to offset their outstanding Judgment Obligations until the Judgment Obligations are satisfied in full. The Smith Claimant Judgment orders the Smiths to pay the Judgment Obligations to the Receiver and orders the Receiver to add all payments made by the Smiths to the distribution fund for the benefit of the defrauded investors. Smith Claimant Judgment at 4. Using any distributions to offset the outstanding Judgment Obligations would conserve the resources of both the Receivership and the SEC, who would otherwise have to proceed to make distributions to Lynn Smith and Geoffrey Smith and then pursue a turnover order to collect the proceeds from the Receiver or recover the distributions from Lynn Smith and Geoffrey Smith only to pay the proceeds to the Receiver.

2. Distributions Otherwise Owed to Lauren Smith Should Be Used to Offset the Disgorgement Obligation

In addition, the Receiver believes that the Lauren Smith Investments were funded from the ill-gotten proceeds of the scheme and that Lauren Smith therefore has no legitimate claim to any distributions made on account of the Lauren Smith Claims. Brown Dec'1. ¶ 17. Generally, "federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) received ill-gotten funds; and (2) does not have a legitimate claim to those funds." *S.E.C. v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998). The Receiver reached this conclusion considering Lauren Smith's financial difficulties during the period between 2007 and 2009

and the financial support Lauren Smith received from her parents during that time. In light of these circumstances, it is unlikely that Lauren Smith invested \$110,000 of her own money in MS & Co. entities. Moreover, Lauren Smith testified that she had no knowledge regarding the source of the funds, which were invested during the height of Smith's Ponzi scheme. Thus, the Receiver presumes that the Lauren Smith Investments were made with funds belonging to David Smith, likely obtained through the fraudulent Ponzi scheme. *Id.*

Pursuant to the D. Smith Judgment, Smith remains obligated to disgorge profits unlawfully obtained through the Ponzi scheme. The outstanding principal balance of Smith's Disgorgement Obligation is at least \$92,523,199. Lauren Smith is asserting claims in the aggregate amount of \$99,750, and a first distribution of 10%, assuming she were entitled to one, would be approximately \$9,975. As the Lauren Smith Claims likely arise out of the proceeds of David Smith's fraud and Lauren Smith has no legitimate claim to such funds, any distributions owed with respect to the Lauren Smith Claims should be used to offset David Smith's outstanding disgorgement obligations.

C. The Paper Claims Should be Expunged

The Paper Claims described on Exhibit A to the Motion should be expunged because, as described above, there is no basis to justify a distribution on account of the Smith Claims. Exhibit A lists the Paper Claims filed by the Smiths, which are exactly duplicative and in the exact amount of the asserted Smith Claims. The Paper Claims should be expunged because there is no legal or equitable basis for payment of the Smith Claims.

D. Summary Proceedings are Appropriate

The Receiver has sought to provide the Smiths with appropriate notice and sufficient time to respond to the Motion. Accordingly, the Receiver has complied with the

claim objection and notice procedures set forth in the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) as a form of best expression of law. Bankruptcy Rule 3007 requires that a claim objection must be filed and served at least thirty days before any scheduled hearing and that the objection must be served on the claimant by first class mail. Fed. R. Bankr. P. 3007(a)(1), (2).

In accordance with Rule 7.1 of the Local Rules of Practice for the United States District Court for the Northern District of New York, the Receiver has filed and will serve the Motion on each of the Smiths at least thirty-one days in advance of the scheduled return date of October 17, 2019. The Receiver will give notice of the Motion to the SEC, all parties who have filed a Notice of Appearance in this action by ECF, and all creditors and parties in interest via the Receiver’s website (www.mcginnsmithreceiver.com), as well as posting at the top of the Receiver’s website an explanation of the Motion. Additionally, notice by first class mail will be given to each of the Smiths. Brown Dec’1. ¶25.

The Receiver requests that the Court enter an order granting the relief requested in this Motion without a hearing with respect to those Smith Claims for which an objection is not timely interposed. Disallowance or adjustment of a claim without a hearing where there is no factual dispute is an appropriate and preferred procedure in federal receivership cases. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (holding that summary proceedings are favored in federal receivership cases because a summary proceeding “reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets”); *United States v. Fairway Capital Corp.*, 433 F. Supp. 2d 226, 241 (D. R.I. 2006) (“Receivership courts can employ summary procedures in allowing, disallowing and subordinating claims of creditors”).

CONCLUSION

The Receiver requests that the Court enter an Order substantially in the form attached to the Motion as Exhibit B (a) disallowing or equitably subordinating the Smith Claims or (b) in the alternative, applying Smith Claim distributions to offset the Judgment Obligations, and (c) expunging the Smiths' Paper Claims, together with such other and further relief as the Court deems just and proper.

Dated: September 11, 2019

PHILLIPS LYTTLE LLP

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

Case No. 1:10-CV-457
(GLS/CFH)

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN, AND
DAVID L. SMITH, GEOFFREY R. SMITH,
Individually and as Trustee of the David L. and
Lynn A. Smith Irrevocable Trust U/A 8/04/04,
LAUREN T. SMITH, and NANCY McGINN,

Defendants,

LYNN A. SMITH and
NANCY McGINN,

Relief Defendants. and

GEOFFREY R. SMITH, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

-----X

CERTIFICATE OF SERVICE

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on September 12, 2019, a true and correct copy of the (i) Notice of Motion and Eighth Claims Motion of William J. Brown, as Receiver, for an Order (A) Disallowing or Equitably Subordinating the Smith Claims or (B) Offsetting the Judgment Obligations with Smith Claim Distributions, and (C) Expunging Smith Paper Claims (“Eighth Claims Motion”), (ii) Declaration of William J. Brown, as Receiver, in Support of Eighth Claims Motion, and (iii) Memorandum of Law in Support of Eighth Claims Motion (collectively, “Eighth Claims Motion Documents”) were caused to be served by e-mail upon all parties who receive electronic notice in this case pursuant to the Court’s ECF filing system, and by First Class Mail to the parties indicated below:

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And, I hereby certify that on September 12, 2019, I mailed, via first class mail using the United States Postal Service, copies of the Eighth Claims Motion Documents to the individuals listed below:

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Dated: September 12, 2019

/s/ Karen M. Ludlow
Karen M. Ludlow