UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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.

RECEIVER'S OMNIBUS REPLY TO OBJECTIONS TO MOTION FOR AN ORDER (I) APPROVING PLAN OF DISTRIBUTION OF ESTATE ASSETS AND (II) AUTHORIZING INTERIM DISTRIBUTIONS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

ARGUMENT 2

POINT I THE CERTAIN INVESTORS AND FOWLER OBJECTIONS 2

A. The Receiver Has Broad Discretion in Structuring the Plan 3

B. The Offset Is Not Vague and Ambiguous 3

C. The Offset Is Equitable 4

D. The Collateral Recovery Offset Is Proper 6

POINT II THE RABINOVICH OBJECTION 8

POINT III THE JAT OBJECTION 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Amerindo Inv. Advisors Inc., 2014 WL 2112032, at *14 7

Amerindo Inv. Advisors Inc., 2014 WL 2112032, at *74 3

In re Barton,
249 B.R. 561 (Bankr. E.D. Wash. 2000) 12

Bendall v. Lancer Mgmt. Grp., LLC,
523 F. App'x 554 (11th Cir. 2013) 12

In re Berendt,
No. 07-35054-elpl3, 2008 WL 4410995 (Bankr. D. Or. Sept. 22, 2008) 12

In re Bleu Room Experience, Inc.,
304 B.R. 309 (Bankr. E.D. Mich. 2004) 12

Capital Consultants, LLC, 397 F.3d at 733 7

Commodity Futures Trading Comm'n v. Cook,
09-3332 (D. Minn. Oct. 19, 2010) ECF No. 494 6

Commodity Futures Trading Comm'n v. Walsh,
712 F.3d 735 (2d Cir. 2013) 5

In re Del Biaggio,
496 B.R. 600 (N.D. Cal. 2012) 7

In re Equity Funding Corp. of Am. Sec. Litig.,
603 F.2d 1353 (9th Cir. 1979) 6, 7

In re Kula,
107 B.R. 225 (Bankr. D. Neb. 1989) 13

In re Morton,
298 B.R. 301 (6th Cir. B.A.P. 2003) 11

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 9, 10

In re Reserve Fund Sec. & Derivative Litig.,
673 F. Supp. 2d 182 (S.D.N.Y. 2009) 5

In re Reserve Fund Sec. & Derivative Litig.,
673 F. Supp. 2d at 201 7

S.E.C. v. Amerindo Inv. Advisors Inc.,
No. 05 Civ. 5231 (RJS), 2014 WL 2112032 (S.D.N.Y. May 6, 2014) 3

S.E.C. v. Byers,
637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009), aff'd sub nom. *S.E.C. v. Malek*, 397 F. App'x 711 (2d Cir. 2010), aff'd sub nom. *S.E.C. vs. Orgel*, 407 F. App'x 504 (2d Cir. 2010) 3, 10

S.E.C. v. Capital Consultants, LLC,
397 F.3d 733 (9th Cir. 2005) 6

S.E.C. v. Credit Bancorp, Ltd.,
No. 99 Civ. 11395 (RWS), 2000 WL 1752979 (S.D.N.Y. Nov. 29, 2000), *aff'd,* 290 F.3d 80 (2d Cir. 2002) 10, 13

S.E.C. v. Malek,
397 F. App'x 711 (2d Cir. 2010), *aff'd sub nom. S.E.C. v. Orgel*, 407 F. App'x 504 (2d Cir.2010), *aff'd,* No. 14-2425, 2016 WL 761365 (2d Cir. Feb. 26, 2016) 3

S.E.C. v. Med. Cap. Holdings, Inc.,
09-0818 (C.D. Ca Aug. 27, 2013) ECF No. 1108 6

S.E.C. v. Merrill Scott & Assocs.,
No. 2:02 CV 39, 2007 WL 26981 (D. Utah Jan. 3, 2007) 10, 13

S.E.C. v. Mgmt. Sols., Inc.,
Civil No. 2:11-cv-01165-BSJ, 2013 WL 594738 (D.Utah Feb. 15, 2013) 12

S.E.C. v. Parish,
No. 2:07-CV-00919-DCN, 2010 WL 5394736 (D.S.C. Feb. 10, 2010) 6

S.E.C. v. Spongetech Delivery Sys., Inc.,
98 F. Supp. 3d 530 (E.D.N.Y. 2015) 12

S.E.C. v. Wang,
944 F.2d 80 (2d Cir. 1991) 7

Sec. & Exch. Comm'n v. Stanford Int'l Bank,
09-0298 (N.D. Tex. Jan. 11, 2013, May 30, 2013) ECF Neb. 1766-1 at 11-12 and 1877 6

S.E.C. v. Credit Bancorp, Ltd.,
290 F. Supp. 2d 418 (S.D.N.Y. 2003) 7

In re Stephenson Assocs., Inc.,
206 B.R. 609 (Bankr. N.D. Ga. 1997) 12

In re Woolaghan,
140 B.R. 377 (Bankr. W.D. Pa. 1992) 12

Statutes

11 U.S.C. § 547 6

PRELIMINARY STATEMENT

William J. Brown, as Receiver ("Receiver") of McGinn, Smith & Co., Inc., et al. ("MS & Co."), respectfully submits this (i) omnibus reply ("Reply") and (ii) the Confidential Declaration of William J. Brown, as Receiver with Respect to Objections of Certain Investors and Stephen Fowler as to Collateral Recoveries dated March 9, 2016[1], to objections filed in response to the Receiver's motion ("Motion") for an Order (i) approving the Receiver's Plan of Distribution of assets of the MS Entities[2] to investors (the "Plan of Distribution" or "Plan") and (ii) authorizing interim distributions to investors with allowed claims in accordance with the Claims Procedure Order (Docket No. 847).

This Reply addresses the following objections in turn below: (i) Objection of Certain Investors, filed February 16, 2016 (Docket No. 862) and supplemented (under seal) on February 23, 2016 (Docket No. 878) (collectively, "Certain Investors Objection"); (ii) Stephen Fowler's Objection, filed February 16, 2016 (under seal) (Docket No. 865) ("Fowler Objection"); (iii) Response of Stan and Eva Rabinovich, filed February 16, 2016 (Docket No. 868) ("Rabinovich Objection"); and (iv) Limited Opposition of JAT Construction Co., Inc. Defined Benefit Pension Plan, Joseph Allegretta and Suzanne Allegretta, filed January 29, 2016 (Docket No. 856) ("JAT Objection").

The MS Entities consist of the numerous entities subject to the Receivership including those listed on Exhibit A attached to the Receiver's Memorandum of Law in support of the Motion (Docket No. 847). For the reasons explained below, the Court should dismiss the objections and grant the Motion in full.

[1] The Receiver has filed a Motion to file the Confidential Declaration under Seal (Docket No. 882) since the two page Declaration contains confidential information.

[2] Capitalized terms not otherwise defined herein shall have the meanings set forth in the Memorandum of Law submitted in support of the Motion.

STATEMENT OF FACTS

The relevant facts are set forth in the Memorandum of Law ("Memo of Law") submitted in support of the Motion (Docket No. 847).

ARGUMENT

POINT I

THE CERTAIN INVESTORS AND FOWLER OBJECTIONS

The Certain Investors Objection and the Fowler Objection (together, the "Collateral Recovery Objections") collectively object to the Plan's provision for applying an offset for investors' collateral recoveries from third parties (the "Offset"). The Plan's Offset provision states:

> A claimant will not be allowed to receive a disproportionate or double recovery under the Plan. Before the Receiver makes any distributions under the Plan, investors will receive a notice from the Receiver requiring the investor to certify, as a condition of receiving payment, whether the investor has applied for or received any compensation for their claimed loss from sources other than the Receivership and, if so, the amounts of such compensation actually received. Those investors will not receive payment under the Plan unless they return the certification and provide the appropriate information regarding collateral recoveries. To the extent an investor receives one or more collateral recoveries, the Receiver will reduce payments to such an investor to the extent necessary to ensure that all allowed investor claims are treated equally with respect to the percentage of their allowed claim amounts they recover from all sources as of the date of the payments.

(Memo. of Law at 11.) The Collateral Recovery Objections argue, inter alia, that the Offset is inequitable and improper. On the contrary, the Offset promotes equality among investors and is a provision commonly proposed by receivers and the SEC and authorized by courts.

Applying the Collateral Recovery Rule which the Receiver has determined is in the best interests of the estate and the more than 800 defrauded investors, would add to

the total recovery pool the net sums obtained by the Certain Investors and Stephen Fowler boosting the recovery to all investors while still treating all investors equitably.

A. The Receiver Has Broad Discretion in Structuring the Plan

"District courts have discretion to approve a receiver's proposed distribution plan as long as the plan is fair and reasonable." *S.E.C. v. Amerindo Inv. Advisors Inc.*, No. 05 Civ. 5231 (RJS), 2014 WL 2112032, at *14 (S.D.N.Y. May 6, 2014) (internal quotation marks omitted) (citing *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009) *aff'd sub nom. S.E.C. v. Malek*, 397 F. App'x 711 (2d Cir. 2010), *aff'd sub nom. S.E.C. v. Orgel*, 407 F. App'x 504 (2d Cir.2010), *aff'd,* No. 14-2425, 2016 WL 761365 (2d Cir. Feb. 26, 2016). Moreover, receivers have broad discretion to structure plans of distribution. *Amerindo Inv. Advisors Inc.*, 2014 WL 2112032, at *14 (finding that no objection required modification of receiver's plan, and stating "[i]n makings its decision, a court may defer to the receiver's choices for the plan's details and should give substantial weight to the SEC's views regarding a plan's merits."). As explained below, the Collateral Recovery Objections fail to demonstrate that the Offset is inequitable or otherwise improper. Particularly in light of the Receiver's broad discretion in structuring distributions, there is no basis to modify the Plan.

B. The Offset Is Not Vague and Ambiguous

The Certain Investors Objection argues that the Offset is vague and ambiguous. (Certain Investors Memorandum Obj. at 3.)[3] The Offset language does not need clarification, but rather confirms that the Offset contemplates a dollar-for-dollar reduction on the investor's distribution amount to the extent "of such compensation actually

[3] In a footnote, the Rabinovich Objection also objects to the Offset on the basis that it is "overly vague." (Rabinovich Obj. at 4 n.2)

received". In other words, the net collateral recovery amount received by the investor after payment of legal fees.

C. The Offset Is Equitable

The Collateral Recovery Objections argue that the Offset is inequitable for a variety of reasons, all of which are without merit. Indeed, the Offset promotes equality among investors by placing them in a more similar position than they otherwise would be if the collateral recoveries were not accounted for.

The Collateral Recovery Objections allege that that the Offset is inequitable because it "punishes" those investors who made efforts to pursue their own recoveries. (Certain Investor Memorandum Obj. a4; Fowler Obj. at 8-9.) This is incorrect for several reasons. First, the Offset will correspond to each investor's net recovery. Any costs associated with securing the collateral recovery will not be deducted from the investor's distribution. Thus, there is no financial penalty associated with the Offset. Second, those investors who secured collateral recoveries received their money earlier than those investors who are recovering only through the Plan distribution. During that time, the earlier-recovering investors have presumably invested and received returns on the funds received through their collateral recoveries. Contrary to being punished, these investors "hedged their bets" and received the benefit of the time value of money due to their earlier recovery.

The Collateral Recovery Objections also argue that the Plan is inequitable because it places those investors who sought their collateral recoveries early in a worse position than those who will wait until after the distribution is made to seek their recoveries. (Certain Investor Memorandum Obj. at 5-6; Fowler Obj. at 10.) This argument is also without merit for several reasons. First, the Receivership was commenced on April 20, 2010. The relevant statute of limitations for any claim that would result in a collateral

recovery has likely expired or will expire soon. Thus, the chances of an investor being able to successfully recover from a collateral source after receiving their full distribution are virtually nil. Second, assuming the Plan is approved, the Certification that the Receiver will send regarding collateral recoveries will require that each investor certify that if they pursue or recover any other collateral recoveries in the future, then they must disclose those recoveries to the Receiver for an appropriate adjustment. Thus, while the chances of future recoveries may be slim, it will nonetheless be accounted for.

Furthermore, contrary to the Collateral Recovery Objections, the Offset operates to put all investors in a more equal position. The Certain Investors and Fowler both admit that their collateral recoveries were the result of them bringing claims that not all other investors, or the Receiver, were able to pursue. (Fowler Obj. at 6; Certain Investor Memorandum Obj. at 5.) For example, not all investors received their statements from National Financial Services, LLC ("NFS"), and so all were not eligible to pursue NFS for recovery, as Mr. Fowler or the Certain Investors were able to do. Pro rata distribution is appropriate where "any distinctions that might be drawn among parties receiving funds would be arbitrary or based on mere chance." *In re Reserve Fund Sec. & Derivative Litig.*, 673 F. Supp. 2d 182, 196 (S.D.N.Y. 2009). Here, failure to account for the collateral recoveries through the Offset would defeat the pro rata scheme and divide distributions according to such arbitrary factors as which entity processed an investor's statements. Where, as here, investors are similarly situated, a true pro rata distribution is equitable. See *Commodity Futures Trading Comm'n v. Walsh*, 712 F.3d 735, 754 (2d Cir. 2013) (affirming pro rata distribution plan without application of "prudence premium" for certain investors where both groups had same investment goal, were treated the same in account statements, had commingled assets that were run as a Ponzi scheme, and were defrauded, among other

things). Moreover, the Offset promotes equality among investors by accounting for differences in age, sophistication or financial means among investors. Unlike Stephen Fowler and at least some of the Certain Investors, many if not most of the MS & Co. investors are not "accredited" investors or sophisticated financiers and were not in a position or able to pursue litigation or arbitration with third parties.

The Bankruptcy Code, a codified equitable proceeding, likewise promotes equality of recovery among creditors by application of the preference recovery rules in 11 U.S.C. § 547.

Finally, the Fowler Objection argues that other investors would not be any worse off if the Offset were not made. (Fowler Obj. at 10-11) This argument is incorrect. In reality, every dollar attributable to a collateral recovery that is not deducted from an investor's distribution is one less dollar that is available to be distributed among all investors. Thus, investors will be detrimentally impacted if the Offset is not applied.

D. The Collateral Recovery Offset Is Proper

Provisions such as the Offset that account for recoveries from collateral sources are both proper and commonly-utilized. *See, e.g., S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005); *In re Equity Funding Corp. of Am. Sec. Litig.*, 603 F.2d 1353 (9th Cir. 1979); *S.E.C. v. Parish*, No. 2:07-CV-00919-DCN, 2010 WL 5394736, at *9-10 (D.S.C. Feb. 10, 2010); Proposed Order & Order, *S.E.C. v. Stanford Int'l Bank*, 09-0298 (N.D. Tex. Jan. 11, 2013, May 30, 2013) ECF Neb. 1766-1 at 11-12 and 1877; Memorandum of Law at 10, *Commodity Futures Trading Comm'n v. Cook*, 09-3332 (D. Minn. Oct. 19, 2010) ECF No. 494 (motion granted pursuant to Order entered Nov. 1, 2010, ECF No. 514); Updated Report & Request to Approve at 2, *S.E.C. v. Med. Cap. Holdings, Inc.*, 09-0818 (C.D. Ca Aug. 27, 2013) ECF No. 1108 (approved pursuant to Order entered Sept. 25, 2013, ECF

No. 1124). Within the Second Circuit, courts have applied similar offsets for the purpose of equalizing recoveries among investors. *See S.E.C. v. Wang,* 944 F.2d 80 (2d Cir. 1991) (applying offset for recovery related to options traders' gains involving the same underlying security); *In re Reserve Fund Sec. & Derivative Litig.*, 673 F. Supp. 2d at 201 (applying offset for "straddler" investors) (citing *Capital Consultants, LLC*, 397 F.3d at 733 and *In re Equity Funding Corp. of Am. Sec. Litig.*, 603 F.2d at 1353).

The Collateral Recovery Objections point to *Securities & Exchange Commission v. Credit Bancorp, Ltd.,* 290 F. Supp. 2d 418, 424 (S.D.N.Y. 2003), in an attempt to demonstrate that the Offset is improper; however, that case is easily distinguishable from the instant action. In *Credit Bancorp*, the plan proposed by the receiver did not include a provision for collateral recovery offset, which is the exact opposite of the instant case. Certain investors objected on that basis. Although the court declined to impose such a provision in the plan, this outcome is consistent with the deference that courts afford receivers in fashioning plans of distribution. *See Amerindo Inv. Advisors Inc.*, 2014 WL 2112032, at *14. Similarly, the Court should defer to the Receiver's distribution scheme and decline to remove the Offset from the Plan.

The Collateral Recovery Objections also erroneously argue that any reduction to investors' recoveries is improper because they would not recover one hundred percent of their claim even if the Offset were not applied. (Fowler Obj. at 11; Certain Investor Memorandum Obj. at 6.) The cases cited in support of this argument are inapposite, as they are cases decided under the federal bankruptcy code and the holding is limited to that context. *See In re Del Biaggio*, 496 B.R. 600, 605 (N.D. Cal. 2012) ("I determine that the California Reduction–of–Claim Approach is not intended to apply to claims asserted in a federal bankruptcy case"). The Collateral Recovery Objections cite no authority that would

apply this principle to cases outside the bankruptcy context, including the instant case. Such an extension is not warranted.

Moreover, Stephen Fowler's citation to cases in which the trustee conditioned distributions on assigning claims to the estate is without merit. (See Fowler Obj. at 8.) Those cases, which all are governed by the Securities Investor Protection Act (SIPA) statutory scheme, are factually distinct from the instant case. Here, the Plan does not mandate the assignment of claims or otherwise seek to obtain ownership of investor's claims; on the contrary, the Receiver has allowed investors to pursue those claims, and secure the attendant collateral recoveries, on their own.

For the reasons explained above, the Collateral Recovery Objections are without merit. The Court should decline to remove the Offset from the Plan.

POINT II

THE RABINOVICH OBJECTION

The claims administration process in this case was established pursuant to Court Order. (See Receiver Motion for Order Approving a Procedure for the Administration of Claims, etc. (Docket No. 466) and Order Approving a Procedure for the Administration of Claims, etc. (Docket No. 475). Pursuant to that process, the Receiver posted to the Receiver's website schedules of all known claims against the MS Entities which stated whether a claim was disputed, contingent or unliquidated. If a creditor or investor agreed that the Schedules accurately reflected their claims and the amounts thereof and such claims were not listed as disputed, contingent or unliquidated, no claim needed to be filed. The Court's prior Order expressly reserved "the right of the Receiver to file appropriate proceedings in this Court to object to claims and/or establish a procedure for

resolution of claims disputes . . ." (Docket No. 475, page 2). Only a minority of investors had their claims designated as disputed, contingent or unliquidated.

The Rabinovich Objection first argues that the Receiver's Plan of Distribution violates the Claimants' due process rights because the claimants are ineligible to receive the interim distribution. (Rabinovich Obj. at 3.) Nothing could be further from the truth. Due process requires that a party is entitled to notice "of such nature as reasonably to convey the required information" and "a reasonable time for those interested to make their appearance" before a party's rights may be adjudicated. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The fatal flaw in the Rabinovich Objection is that it is based on the premise that the Motion seeks to, among other things, adjudicate the claims of the Claimants. To the contrary, the Motion expressly provides that the Rabinovich's claims and all other disputed claims will be adjudicated at some future date. (Memo. of Law at 13.) ("Disputed claims will not initially participate in the distribution process, but funds will be reserved until the objections to those claims can be heard and decided by final Order of the Court.") (Memo of Law at 13). Revealingly, the Rabinovich Objection fails to cite a single case that supports the proposition that (i) any objections to claims must be adjudicated before any distribution to claimants is made; and (ii) a party must receive notice and an opportunity to be heard before its claim can be classified as disputed.[4]

The Rabinovich's argue that case law supports the proposition that the Rabinovich's are entitled to notice and an opportunity to respond before their claims can be excluded from the interim distribution. (Rabinovich Obj. at 3-4). Each case cited by the

[4] Stan and Eva Rabinovich are the parents of a former McGinn Smith broker who was barred from the securities industry for 12 months and ordered to disgorge commissions of $158,542 and pay actual penalty of $130,000 pursuant to February 25, 2015 SEC Initial Decision which is on appeal. (Receiver's website (www.McGinnSmithReceiver.com at February 25, 2015 (current update). Additionally, the Receiver's records reveal that Stan and Eve Rabinovich received frequent Note redemptions when other investors were not so fortunate.

Rabinovich's, however, for this proposition involves the exclusion of claimants from receiving any distribution, as opposed to delaying distribution subject to a subsequent claims objection procedure. *See Byers*, 637 F. Supp. 2d at 184 (held receiver must provide notice to those parties involved in the fraudulent scheme before such parties may be disqualified from receiving a distribution); *S.E.C. v. Credit Bancorp, Ltd.*, No. 99 Civ. 11395 (RWS), 2000 WL 1752979, at *43-44 (S.D.N.Y. Nov. 29, 2000) (held that the Securities and Exchange Commission must propose a procedure for excluding "potential insiders" from "any distribution plan"), *aff'd,* 290 F.3d 80 (2d Cir. 2002); *S.E.C. v. Merrill Scott & Assocs.*, No. 2:02 CV 39, 2007 WL 26981 at *2 (D. Utah Jan. 3, 2007) (Securities and Exchange Commission sought to exclude certain categories of victims from receiving any distribution of funds in the receivership estate).

The Motion does not seek an order of the Court expunging or disallowing the claims. Rather, the Motion contemplates an interim distribution to those claimants whose claims are liquidated, non-contingent and undisputed, which are the vast majority of the investors. Those investors with disputed claims are not forever barred from receiving any funds from the receivership estate, but rather are subject to a claims objection process where each claimant will receive notice and an opportunity to be heard before a determination will be made whether such claimants are to receive any distributions in this case. (Memo. of Law at 13.)

Under the Plan, the burden is on the Receiver to serve the holders of claims that are disputed with a formal claim objection that sets forth the basis for the objection and persuade the Court at a hearing that the claim should be disallowed or reduced, as applicable. The contemplated notice and an opportunity to be heard satisfies due process under *Mullane*.

Further, to provide an additional layer of protection to those claimants with disputed claims, the Plan of Distribution provides for the creation of a reserve totaling the aggregate amount to otherwise be distributed for the claims listed by the Receiver as disputed, contingent or unliquidated. (Memo. of Law at 13.) ("The Receiver … has determined it is necessary to establish a reserve as to investor claims totaling approximately $23,617,190 since those claims have been listed by the Receiver as disputed, contingent or unliquidated.") Accordingly, there is no risk of prejudice to those claimants whose claims are ultimately determined to be meritorious.

The Rabinovich's also argue that due process requires that the Receiver state the basis for categorizing the Claimants' claims as disputed. (Rabinovich Obj. at 3-4.) As set forth above, the rights of the Claimants are not subject to adjudication at this time, so this argument is, at best, premature. In any event, the Motion provides a list of the common bases for listing certain claims as disputed, contingent or unliquidated. *See* Brown Dec'l ¶15 ("Objections will primarily be asserted on the grounds the claimant seeks fictitious interest, a difference in ending balances … , and claims that warrant objection or subordination on various legal grounds because of preferred treatment that those claims received by Messrs. McGinn and Smith or others, relationships with the defendants, or similar grounds.")

Moreover, the procedure for resolving disputed claims set forth in the Motion is common in an insolvency proceeding. As a corollary, in a bankruptcy case, there is no deadline for a debtor in possession or trustee to object to the claims of a bankruptcy estate. *See In re Morton*, 298 B.R. 301, 309-10 (6th Cir. B.A.P. 2003) (holding that "[n]either the Bankruptcy Code nor Bankruptcy Rules contain a bar date or deadline for filing objections to claims in a chapter 13 case and we will not read one into the law where none exists" in reversing the bankruptcy court's decision overruling the debtor's objection because it was

filed post-confirmation); *In re Barton*, 249 B.R. 561, 566 (Bankr. E.D. Wash. 2000) ("If Congress had intended objections to claims to be filed prior to Chapter 13 plan confirmation, it would have been a simple matter to write such a deadline into the statute"); *In re Berendt*, No. 07-35054-elpl3, 2008 WL 4410995 at *3 (Bankr. D. Or. Sept. 22, 2008) (holding that "there is no deadline for objecting to a claim"); *In re Woolaghan*, 140 B.R. 377, 380 (Bankr. W.D. Pa. 1992) ("neither the Bankruptcy Rules nor the Code dictate a time limitation and the objection did not prejudice the claimant in any way"). This body of law is instructive because of the limited case law regarding deadlines to object to claims in the receivership context. *See Bendall v. Lancer Mgmt. Grp., LLC*, 523 F. App'x 554, 557 (11th Cir. 2013) ("Given that a primary purpose of both receivership and bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors, we will apply cases from the analogous context of bankruptcy law, where instructive, due to the limited case law in the receivership context"); *S.E.C. v. Spongetech Delivery Sys., Inc.*, 98 F. Supp. 3d 530, 557 (E.D.N.Y. 2015) ("The standards applicable in bankruptcy court, while not determinative in an equitable receivership, may still 'be instructive as to general principles of law or [in] determining what is equitable.'") (alteration in original) (quoting *S.E.C. v. Mgmt. Sols., Inc.*, Civil No. 2:11-cv-01165-BSJ, 2013 WL 594738, at *2 (D.Utah Feb. 15, 2013)).)

In bankruptcy cases, claims objections are routinely filed after a plan of reorganization is confirmed and bankruptcy courts consistently have dismissed challenges by creditors to such claim objections on the basis that they were untimely. *See, e.g.*, *In re Bleu Room Experience, Inc.*, 304 B.R. 309, 316 (Bankr. E.D. Mich. 2004) (holding that the doctrine of res judicata did not estop Chapter 11 debtor from objecting to creditor's claim post-confirmation); *In re Stephenson Assocs., Inc.*, 206 B.R. 609, 612 (Bankr. N.D. Ga. 1997)

(disallowing claim in Chapter 11 case based on debtor's post-confirmation claim objection holding that "in Chapter 11 cases generally, objections to claims are not required to be filed prior to confirmation of a plan"); *In re Kula*, 107 B.R. 225 (Bankr. D. Neb. 1989) (holding that claim objection of examiner appointed under confirmed Chapter 11 plan was timely despite being filed approximately two years and four months after date of confirmation). The purpose of this practice is often to reduce costs in the administration of the estate and to avoid unfairly prejudicing those claimants with valid, undisputed claims. That is precisely the objective being served by the Plan of Distribution here.

Finally, the Plan of Distribution is not "unfair and inequitable" because the timing of payments differs between those claimants who hold undisputed, non-contingent, liquidated claims and those claimants whose claims are to be objected to. Rabinovich Objection, at 4-5. Two of the cases cited in the Rabinovich Objection approved a partial distribution. *See Merrill Scott & Assocs., Ltd.*, 2007 WL 26981, at *2; *Credit Bancorp, Ltd.*, 2000 WL 1752979, at *27. The Plan of Distribution is equitable because it treats all investors equally in that it contemplates pro rata payment of each claim, subject to certain conditions being satisfied, including a certification by each investor whether the investor has applied for or received any compensation for their claimed loss from sources other than the Receivership. Requiring that those investors with undisputed claims wait until all disputed, unliquidated and contingent claims are evaluated and resolved would lead to an inequitable result because investors' recoveries whose claims are already deemed to be meritorious would be unnecessary delayed and additional administrative costs would accrue to the detriment of the receivership estate and all investors.

POINT III

THE JAT OBJECTION

The Plan of Distribution already provides the information sought in the JAT Objection although admittedly not in all one location.

First, the Allegrettes and JAT both already know from multiple prior conversations with the Receiver that their claims are not listed as disputed, contingent or unliquidated on the confidential claims website to which they have access. Accordingly, the Receiver does not intend to object to those claims, and they will receive one or more distributions under the Plan provided that the Plan is approved by the Court, and the Allegrettes comply with the Plan's process requirements (*i.e.* returning the completed Certification and IRS forms) in order to receive distributions.

Second, the approximate total distribution under the Plan can be calculated using paragraphs 15 and 16 of the Brown Dec'l as follows: There are approximately $124,123,595 in total investor claims with approximately $23,617,190 being subject to a possible claims objection. The Receiver has $21,843,329 on hand as of December 11, 2015 with $5,031,369 of that amount attributable to Smith family or Smith Trust assets which are still subject to appeal. Thus, the distributions could range from approximately 13.5% to 21.7%. The 13.5% estimate would be realized if the Smith and Smith Trust appeals are decided in favor of the Smiths and no claims objections are sustained. The 21.7% estimate would be realized if the Smith and Smith Trust appeals are decided in favor of the SEC and all claims objections are sustained.

As these calculations make clear, there is a range of results without taking into account the positive effect application of the Collateral Recovery rule could have for the

vast majority of investors. The distribution amount is also affected by ongoing estate expenses and recoveries as described in Brown Dec'l ¶ 16.

CONCLUSION

The Receiver requests that the Court dismiss the objections and enter an Order substantially in the form attached as Exhibit B to the Motion (i) approving the Receiver's Plan of Distribution of assets of the MS Entities to investors and (ii) authorizing an interim distribution to investors with claims scheduled or timely filed in accordance with the Claims Procedure Order, together with such other and further relief as the Court deems just and proper.

Dated: March 9, 2016

PHILLIPS LYTLE LLP

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Doc #05-471924.9

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION	:	
	:	
Plaintiff,	:	
	:	Case No. 1:10-CV-457
vs.	:	(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.	:	

CERTIFICATE OF SERVICE

I, Sinead A. Tyrone, being at all times over 18 years of age, hereby certify that on March 9, 2016, a true and correct copy of the Receiver's Omnibus Reply to Objections to Motion for an Order (I) Approving Plan of Distribution of Estate Assets and (II) Authorizing Interim Distributions ("Reply") was 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, as follows:

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And, I hereby certify that on March 9, 2016, I mailed, via first class mail using the United States Postal Service, a copy of the Reply to the individuals listed below:

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Dated: March 9, 2016

/s/ Sinead A. Tyrone
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