UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/CFH)**
McGINN, SMITH & CO., INC., et al.,	:	
Defendants.	:	

PLAINTIFF'S REPLY BRIEF IN RESPONSE TO OBJECTIONS TO THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION

Plaintiff Securities and Exchange Commission (SEC) respectfully submits this reply brief in response to the objections filed to the Receiver's proposed Plan of Distribution.

THE OBJECTIONS ARE WITHOUT MERIT AND SHOULD BE DENIED

The SEC fully supports the Receiver's proposed Plan of Distribution. The pro rata distribution of pooled assets proposed by the Receiver is the fairest and most equitable approach to distributing the limited assets in the Receivership to the more than 800 victims of the fraud. In addition, the Receiver has been thorough and effective in generating recoveries from an estate with many illiquid and hard-to-value assets.

The two objections to the collateral recovery offset (filed by Stephen Fowler and by a group of forty-four other investors), and the objection to the timing of the distribution (filed by Stan and Eva Rabinovich), are without merit. For the reasons set forth below, and also in the Receiver's reply brief, the objections should be denied and the proposed Plan of Distribution approved.

The Offset for Collateral Recoveries is Appropriate

Under the proposed Plan, payments to investors will be reduced on a dollar-for-dollar basis to the extent an investor received a recovery from a third party. This type of offset is commonplace in Receiver distributions arising from SEC actions.

Of the more than 800 victims of the McGinn Smith fraud, forty-five victims received settlement payments from NFS, the clearing firm used by McGinn Smith from December 2005 through September 2009. Seeking to maximize their recovery, these forty-five investors argue that their distributions should not be reduced by the amount of their recovery from NFS. For the benefit of all 800 investors, however, the objections of this small minority of investors should be denied. Allowing the offset for collateral recoveries ensures equality among investors because not all investors had the means or opportunity to pursue third party recoveries.

Denying the offset would materially reduce the funds available to the other 750 investors (the Receiver's reply brief provides the exact amount of the reduction, which is subject to the Court's confidentiality orders). This would materially disadvantage the vast majority of investors who had no recovery from NFS.

The offset helps ensure equality of treatment among investors, which is a primary goal of the Receiver's pro rata plan of distribution. This type of plan has been consistently endorsed by Courts in the Second Circuit, where "the case law . . . is quite clear that pro rata distributions are the most fair and most favored in receivership cases." *SEC v. Byers*, 637 F.Supp.2d 166, 176 (S.D.N.Y. 2009) ("'the use of a pro rata distribution has been deemed especially appropriate for fraud victims of a 'Ponzi scheme'", quoting *SEC v. Credit Bancorp*, 290 F.3d 80, 89 (2d Cir. 2002)). This Court has "broad equitable authority when considering a plan of distribution." *Byers*, 637 F. Supp.2d at 174. *See also FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y.

1992) ("one common thread keeps emerging out of the cases involving equity receiverships—that is, a district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration").

The objections, if sustained, would defeat the purposes of a pro rata recovery by creating distinctions among investors according to which clearing firms processed their investments. The objectors argue that denying the objection would "disincentivize" future fraud victims from pursuing third-party recoveries. Fowler Mem. at 8. When the equities are balanced, however, the certainty that 750 investors would receive a smaller payout if the offset is stricken is a more compelling consideration than the speculative chance that a victim of a fraud sometime in the future might be "disincentivized."

The Objection of Stan and Eva Rabinovich Is Without Merit

Although the investors have been waiting for years for the first interim distribution, Stan and Eva Rabinovich seek further delay in order to have their claims, and all other disputed claims, adjudicated first. This objection should be denied. There is no authority, and the Rabinoviches cite to none, requiring objections in these circumstances to be adjudicated before an interim distribution. In any event, there is no prejudice to the Rabinoviches because the Receiver will create a reserve in an amount sufficient to pay the disputed, contingent or unliquidated claims.[1] *See SEC v. Michael Kenwood Capital Mgt., LLC*, __ Fed.Appx. __, 2015 WL 7422345, *3 (2d Cir. Nov. 23, 2015) (distribution allowed to proceed in spite of objections because amount in dispute was "set aside in a reserve fund"; affirming district court order

[1] Stan Rabinovich is the father of Philip Rabinovich, a former McGinn Smith broker who, in an administrative proceeding, was found to have violated the federal securities laws through his sales of McGinn Smith securities. *Matter of Anthony, et al.*, Rel. No. 745, 2015 WL 779516 (Init. Dec. Feb. 25, 2015) (P. Rabinovich's appeal to Comm'n pending). The Initial Decision describes a transaction in which Stan Rabinovich loaned $600,000 to an McGinn Smith entity and was repaid eight months later with funds from other investors. 2015 WL 779516, at *52

granting Receiver's motion for approval of distribution plan).

CONCLUSION

The SEC respectfully requests that the Court deny the objections and approve the Receiver's proposed Plan of Distribution.

Dated: March 9, 2016
New York, New York

Respectfully submitted,

/s *David Stoelting*

David Stoelting
Attorney Bar Number: 516163
Kevin P. McGrath
Attorneys for Plaintiff
Securities and Exchange Commission
200 Vesey Street, Suite 400
New York, NY 10281
Telephone: (212) 336-0174
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/CFH)**
McGINN, SMITH & CO., INC., et al.,	:	
Defendants.	:	

DECLARATION OF SERVICE

I, David Stoelting, pursuant to 28 U.S.C. § 1746, certify that on March 9, 2016, I filed on the Court's ECF system the following document:

Plaintiff's Reply Brief in Response to Objections to the
Receiver's Proposed Plan of Distribution;

and sent by US Mail and email a copy of the above-referenced document to:

Nancy McGinn
426-8th Avenue
Troy, NY 12182
nemcginn@yahoo.com

Dated: March 9, 2016
New York, New York

/s *David Stoelting*

David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
200 Vesey Street, Suite 400
New York, NY 10281
Telephone: (212) 336-0533
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov