IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION *Plaintiff,* v. 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 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.*	:	Case No. 1:10-CV-457-GLS-CFH

ORDER

AND NOW, this ____ day of _____, 2017, upon consideration of the Motion of Moving Investors, Deanna M. Ayers, *et al.* for Motion to Enforce Compliance with

Court-Approved Plan of Distribution, and any response thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and that the Receiver is to make pro rate distribution in accordance with the Terms of the Plan, including to the Moving Investors, without further delay.

BY THE COURT:

_____

Gary L. Sharpe, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION *Plaintiff*, v. 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 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*.	:	Case No. 1:10-CV-457-GLS-CFH **NOTICE OF MOTION TO ENFORCE COMPLIANCE WITH COURT-APPROVED PLAN OF DISTRIBUTION**

PLEASE TAKE NOTICE that Deanna M. Ayers, *et al.* (the "Moving Investors"), by and through their undersigned counsel, will move this Court before the Honorable Gary L. Sharpe,

United States District Judge, at the U.S. District Court, James T. Foley Courthouse, Suite 509, 445 Broadway, Albany, NY 12207, on April 6, 2017 at 9:00 a.m., for an order compelling the Receiver is to make distribution in accordance with the Terms of the Plan.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Rule 7(a)(1), Moving Investors intend to and reserve the right to file reply papers in support of this Motion.

Respectfully submitted,

KANG HAGGERTY & FETBROYT LLC

s/ Edward T. Kang

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ekang@KHFlaw.com
Attorneys for Moving Investors

Dated: March 3, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION *Plaintiff,* v. 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 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.*	:	Case No. 1:10-CV-457 (GLS/CFH)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE COMPLIANCE WITH COURT-APPROVED PLAN OF DISTRIBUTION

The Moving Investors (as defined below) seek an order from the Court compelling the Receiver, William J. Brown to comply with the court-approved plan of distribution and distribute

their pro rata share of the planned interim distribution to all investors, including the Moving Investors, without further delay.

I. BACKGROUND AND STATEMENT OF FACTS

This motion to enforce compliance of the Receiver, William J. Brown, with the court-approved plan of distribution (the "Motion") is brought by fifty-five (55) investors who were victims of the Ponzi scheme orchestrated by McGinn Smith & Co., Inc. and its related entities and affiliated brokers ("McGinn Smith") that is the subject of this action by the Securities and Exchange Commission. These investors (the "Moving Investors") are identified in Exhibit A to the accompanying Declaration of David P. Dean (the "Dean Decl."), and suffered losses from their investments in the various McGinn Smith investment vehicles totaling more than ten million dollars ($10,000,000).[1] The Moving Investors have all submitted claims to the Receiver in accordance with the Claims Procedure Order (Doc. No. 481) and none of the claims submitted are Disputed Claims. Dean Decl., ¶ 15.

The Moving Defendants' filing of the Piaker Action against the Piaker Defendants.

The Moving Investors are also plaintiffs in a separate civil action pending in the United States District Court for the Northern District of New York, captioned *Cupersmith et al. v. Piaker & Lyons, P.C. et al.*, Case No. 3:14-cv-01303-TJM-DEP (the "Piaker Action"). The Moving Investors, along with several additional investors who have since withdrawn from the Piaker Action, brought suit against Piaker & Lyons, P.C., and two of its principals, Ronald L. Simons and Timothy N. Paventi (the "Piaker Defendants") in September, 2014, alleging that the Piaker Defendants, McGinn Smith's accountants, auditors, and tax preparers, were liable to the Moving Investors for, among other things, aiding and abetting McGinn Smith's fraudulent conduct.

[1] The Receiver has attested that there are approximately $124,123,595 in total investor claims. (Doc. No. 847-2, ¶15, fn 1).

The Moving Investors have shouldered the burdens and costs of the Piaker Action for more than two years. During discovery, twenty-three of the Moving Investors were deposed by the Piaker Defendants. In the Piaker Action, the Moving Investors have engaged an expert witness, incurred aggregate costs to date of approximately $180,000, and are obligated to pay counsel a percentage of any recovery actually received. Counsel for the Moving Investors informed the Receiver of the Piaker Action shortly after the Piaker Action was filed; however, the Receiver has not taken any steps to pursue recovery from Piaker & Lyons on behalf of the entire class of McGinn Smith investors. Dean Dec., at ¶ 5.

The District Court dismisses all but $50,000 claim in the Piaker Action.

On September 27, 2016, Judge McAvoy issued a Decision and Order (Doc. No. 147) in the Piaker Action, granting in part and denying in part the Piaker Defendants' motion for summary judgment. In his Decision and Order, Judge McAvoy found that although Moving Investors had established the elements of their aiding and abetting fraud claim against the Piaker Defendants, the claims of all but three of the Moving Investors – Peter Zakroff, Teresa Zakroff, and Ilene Nemeth – and all claims for investments made before September 11, 2008, were barred on statute of limitations grounds. Opinion, pp. 15-16.[2] The claims remaining after the dismissal of the pre-September 2008 claims total $50,000. At present, the Piaker Action is stayed, per Judge McAvoy's order of September 28, 2016 (Doc. No. 150).

The Moving Investors seek interlocutory appeal.

On January 25, 2017, in response to a motion by the Moving Investors, Judge McAvoy entered an order certifying his Decision and Order, and specifically the issue of the application of the statute of limitations to Moving Investors' pre-September 2008 claims, for interlocutory appeal

[2] The Zakroffs have since voluntarily withdrawn from the Piaker Action (Doc. No. 161).

(Doc. No. 155). The Moving Investors thereafter filed a petition for permission to appeal in the United States Court of Appeals for the Second Circuit on February 6, 2017 (Case No. 17-373). As of the date of this Motion, the petition is still pending in the Second Circuit. As the Piaker Action stands, then, the claims of all but one of the Moving Investors have been dismissed, and there has been no actual recovery by any of the Moving Investors. Any recovery for those investors in the Piaker Action will occur only upon the Second Circuit's granting leave to appeal, the court's reversing Judge McAvoy's Decision and Order, the Moving Investors' ultimately prevailing at trial upon remand (and withstanding any post-trial appeal by the Piaker Defendants), ***and*** the Moving Investors' actually collecting on a final judgment. Thus the prospect of the Moving Investors' receiving any actual collateral recovery from the Piaker Defendants in the future is highly uncertain.

This Court approved the Plan of Distribution.

On December 30, 2015, the Receiver filed a motion for approval of a Plan of Distribution (the "Plan of Distribution") (Doc. No. 847). The Plan of Distribution provides that a claimant will not be allowed to receive a disproportionate or double recovery. Doc. No. 847, Memorandum of Law, p. 10. Specifically, the Plan of Distribution requires each investor to certify the amount of any actual recovery from any other source related to McGinn Smith. *Id.* at p. 11. The Plan of Distribution provides that '[t]o the extent that 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." (Doc. No. 847-2, ¶ 21).

On October 31, 2016, this Court approved the Plan of Distribution of estate assets to McGinn Smith investors (Doc. No. 904). In approving the plan over various investors' objections, the Court found that the proposed Plan of Distribution, and specifically the collateral offset provision was not vague or inequitable because the provision makes clear that a reduction would be made from an investor's distribution only in an amount equal to "such compensation actually received" from another source. Doc. No. 904, p. 12.

Earlier this year, the Receiver sent the Moving Investors certain Investor Questionnaires and related materials in connection with implementation of the Plan of Distribution. A sample copy of this material posted on the Receiver's website is attached as Exhibit 1. The sample questionnaire under a heading "Collateral Recoveries" asks: "Did you receive, *or are you pursuing or intend to pursue,* a recovery from any other source related to McGinn Smith?" (emphasis added). The Questionnaire provides for a yes or no answer. The Questionnaire then asks: "If so, how much? (List separately for each Collateral Recovery) "Net Amount Received by Investor**"[3] Thus, although the initial question is vague, the Investor is only required to provide the amount actually received from another source after deducting the costs of obtaining the recovery.

The Receiver's departure from the Plan of Distribution and this Court's order.

After receipt of this material, a number of the Moving Investors have been informed by the Receiver and his staff that they would not be eligible to receive their pro rata share of distributions from the receivership estate as long as they remained plaintiffs in the Piaker Action; that they should withdraw from the Piaker Action if they ever wanted to receive their share of distributions from the estate, and that they should not bother returning the investor questionnaires provided by the Receiver, since they were plaintiffs in the Piaker Action. Dean Decl. ¶¶ 10-11, 14. As a result

[3] "The net amount is the amount received by Investor after all fees are applied."

of such communications, in recent weeks, nine investors dismissed their claims in the Piaker Action because they believe that they will not receive a distribution from the estate if they remain in the Piaker Action. These investors have informed counsel that due to their current financial situations, they decided to follow the advice of the Receiver and dismiss their claims so they could receive their share of the planned interim distribution. Dean Decl. ¶¶ 12-13.

One such investor lost more than $400,000 from his investments in McGinn Smith, and spent approximately $7,500 out of pocket in costs and expenses pursuing recovery against the Piaker Defendants in the Piaker Action. Dean Decl. ¶ 11. This investor also traveled to Syracuse, New York from his home in Pennsylvania to be deposed by the Piaker Defendants. *Id*. After a discussion with the Receiver, however, in which this investor was told that he would not receive a distribution from the estate while his claim in the Piaker Action was pending, he voluntarily dismissed his claim in the Piaker Action, because his financial situation did not allow him to wait any more time to receive a distribution. *Id*.

Counsel for Moving Investors sent a letter to the Receiver on February 10, 2017, addressing these issues, which are contrary to the express terms of the Plan of Distribution. A copy of this letter to the Receiver is attached to the Dean Decl. as Exhibit B. To date, however, counsel has not received a response from the Receiver.

II. ARGUMENT

A court-appointed receiver, including the Receiver here, is a fiduciary, and is "bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary." *In re Crespo*, 561 B.R. 25, 34 (Bankr. D. Conn. 2016) (quoting *Crites, Inc. v. Prudential Ins. Co. of Am.*, 322 U.S. 408, 414 (1944). Further, the Receiver is an officer of the court, and acts as under the supervision of the court. *S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th

Cir. 1992). The Moving Investors seek an order of this Court to enforce the Plan of Distribution as presented by the Receiver, and approved by the Court. The Receiver, in submitting the Plan of Distribution for court approval (Doc. No. 847), indicated that "[t]o 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.*" Doc. No. 847, p. 11 (emphasis added). The Court, in approving the Plan of Distribution, also focused on collateral payments *actually received* by investors in calculating their distribution payments:

> The Receiver explains that the defrauded investors who receive third party recoveries will have their allotted distribution from the receivership estate reduced on a dollar for dollar basis. This is confirmed by the offset provision's language that reductions will be by "such compensation actually received."

Doc. No. 904, pp. 11-12 (internal citations and quotations omitted).

Neither the Receiver's proposed plan, nor the Court's order approving the Plan of Distribution, permits the Receiver to discourage claimants from pursuing claims against third parties, such as Piaker & Lyons, for a collateral recovery or to delay making pro rata distributions indefinitely due to investors' pending, unliquidated claim against a third party. The Receiver neither sought nor obtained approval to withhold pro rata interim distributions from investors with pending claims against third parties for which there has been no actual recovery. Here, given the current posture of the Piaker Action, any actual collateral recovery is uncertain in time, likelihood, and amount. Further, while the Plan of Distribution indicates that additional procedures will apply to disputed claims, the Receiver has given no indication that the Moving Investors' claims are considered to be disputed, or otherwise ineligible for a distribution.

The Moving Investors have not actually received any compensation in connection with the Piaker Action. Given Judge McAvoy's order dismissing more than ninety-nine percent of the monetary claims in that lawsuit combined with the uncertainty of the appeals process, they are unlikely to actually receive any compensation in the foreseeable future. Yet the timing and uncertainty of recovery in the Piaker Action, combined with the Receiver's position has led multiple investors to withdraw from the Piaker Action and forego any chance they have of recovering any portion of their losses from the Piaker Defendants.

Withholding distributions from investors who are simply pursuing third-party recoveries and have not yet received any actual collateral recovery would violate the express offset provision of the Plan of Distribution and would be inequitable to such investors. It also discourages investors from pursuing third-party recoveries, which is contrary to the interests of the receivership since actual collateral recoveries make additional funds available to remaining investors. As the court observed in *S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 741 (9th Cir. 2005), "equal treatment is a legitimate goal in itself, even if it to some extent conflicts with other legitimate goals. Second, clients still have an incentive to pursue third-party claims, and are still rewarded for their efforts, . . . since only half of any third-party recovery is deducted from the client's net loss claim."

Accordingly, the Moving Investors respectfully request that the Court enter an order enforcing the terms of the Plan of Distribution as approved by the Court and finding that the Moving Defendants shall not be denied the right to receive their pro rata share of the pending distribution by reason of their being plaintiffs in the Piaker Action. The Moving Investors further request the Court caution the Receiver not to represent to any of the Moving Investors that as long as they are plaintiffs in the Piaker Action, they will not receive their pro rata share of the planned distribution, and reiterating to the Receiver that the amount of distributions to the Moving Investors

from the receivership estate, shall only be reduced to the extent that the completed questionnaires of Moving Investors indicate they have "*actually received*" payments in a collateral recovery.

Although the Receiver's concerns relating to an investor's receiving a disproportionate or double recovery are understandable, such concerns do not justify his causing the Moving Defendants to abandon their claims against the Piaker & Lyons, especially when the probability of such "disproportionate or double recovery" is uncertain at best. The Receiver's conduct is not in the best interest of the Moving Defendants, the beneficiaries of the receivership.

III. CONCLUSION

For the foregoing reasons, Moving Investors request that the Motion be granted, and the Court enter an order compelling the Receiver to make distributions in accordance with the terms of the Plan.

Respectfully submitted,

KANG HAGGERTY & FETBROYT LLC

By: */s/ Edward T. Kang*

Edward T. Kang
123 South Broad Street, Suite 1670
Philadelphia, PA 19109
Tel: (215) 525-5850
Fax: (215) 525-5860
ekang@KHFlaw.com

Counsel for Moving Investors

Dated: March 3, 2017

EXHIBIT 1

William J. Brown, as Receiver
of McGinn, Smith & Co., Inc., *et al.*

Tel: 716.847.7089
www.mcginnsmithreceiver.com

One Canalside
125 Main Street
Buffalo, NY 14203

January 20, 2017

Claim No. 1234 A

Re: McGinn Smith Plan of Distribution and Claims Distribution Process

Dear McGinn Smith Investor:

I am pleased to enclose, in my capacity as Receiver, the following documents for you to complete and return which is the next step in returning to investors with allowed claims the money they deserve:

1. Investor Questionnaire (individualized for each investment you hold or claim);
2. W-9 Form; and
3. Self-addressed return envelope.

Please truthfully and accurately complete each Investor Questionnaire you receive in a legible manner. The Investor Questionnaire is to be signed under penalty of perjury and, along with the completed W-9 Form, returned in the enclosed envelope. You must apply postage before mailing the envelope with the completed materials.

As you undoubtedly know from the Receiver's website (www.mcginnsmithreceiver.com), the Plan of Distribution filed with the Court on December 30, 2015 at Docket No. 847 was approved by the Court on October 31, 2016 at Docket No. 904 and became final and no longer subject to appeal in December 2016. Given the cost of mailing updates to investors and parties in interest by U.S. Mail, the Receiver's website serves as the place at which investors can receive timely information and updates. I encourage you to check the website every few weeks.

Distributions will be made in groups on a rolling basis to holders of allowed claims as properly completed Questionnaires and W-9 Forms are returned. If your forms are incomplete, illegible or not returned, distributions will be delayed or not made.

In order to maintain an orderly process, I request that all completed materials be returned no later than February 28, 2017.

While the vast majority of investor claims are allowed and not disputed, if your claim is marked as Disputed on the Receiver's website, **D** or **P** is listed next to your Claim No. above, or is otherwise challenged as Disputed, the Receiver intends to file a Motion with the Court with notice given to you of a Court hearing to resolve issues regarding the claim.

PLEASE RETAIN THIS LETTER SINCE IT CONTAINS YOUR CLAIM NUMBER FOR THIS CLAIM WHICH YOU WILL NEED TO IDENTIFY PAYMENTS TO BE MADE TO YOU.

I thank you for your anticipated cooperation.

Very truly yours,

William J. Brown, Receiver

Doc #01-3011494.2
Enclosures

Securities and Exchange Commission vs. McGinn, Smith & Co. Inc.
Investor Questionnaire Pursuant to Receiver's Plan of Distribution

This two-sided form is individualized for each investment you hold or claim per the Receiver's records. A Questionnaire will be mailed to you for each investment. Each form must be completed, properly signed, and returned to the Receiver in the enclosed envelope along with the completed W-9 Form.

No distribution checks will be paid to an Investor with an Allowed Claim until a Questionnaire has been properly completed for each investment and received by the Receiver.

* *

Name of Investor(s)	Description of Investment	Amount of Investment
John Doe **Claim No. 1234 A**	FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009	$10,000

Social Security Number(s) (for each owner) ______________________________

____

Mailing Address:

Street:______________________________Apt. #:__________

City:______________________State:__________Zip Code:__________

Telephone Number____(______)______________________________
Area Code

E-Mail Address______________________________

Is this investment held in an IRA? Yes____/No____. If so, provide name and address of Trustee where payment should be sent.

IRA Trustee Name______________________________

Trustee Address:

Street:______________________________

City:______________________State:__________Zip Code:__________

IRA Account No.______________________________

Collateral Recoveries

Did you receive, or are you pursuing or intend to pursue, a recovery from any other source related to McGinn Smith? For example, a recovery through FINRA, other lawsuit, or other type of recovery including insurance.

_____Yes _____No

If so, how much? (List separately for each Collateral Recovery)

	Net Amount Received by Investor**	**Source**
1.	$_____	_____ Name _____ Address _____ City State Zip Code
2.	$_____	_____ Name _____ Address _____ City State Zip Code
3.	$_____	_____ Name _____ Address _____ City State Zip Code

****** The net amount is the amount received by Investor after all fees are applied. Do not pro-rate among investments.

The undersigned certifies under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information contained in this Questionnaire is true and correct.

Dated: _____, 2017.

_____
(Printed Name of Investor 1)

_____
(Signature of Investor 1)

_____
(Printed Name of Investor 2)

_____
(Signature of Investor 2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION *Plaintiff*, v. 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 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*.	Case No. 1:10-CV-457 (GLS/CFH)

DECLARATION OF DAVID P. DEAN, ESQUIRE, IN SUPPORT OF MOTION TO ENFORCE COMPLIANCE WITH COURT-APPROVED PLAN OF DISTRIBUTION

I, David P. Dean, Esquire, declare as follows:

1. I am an attorney with the law firm of Kang Haggerty & Fetbroyt LLC. I am admitted to practice in the State Courts of Pennsylvania and Florida, as well as the United States District Courts for the Eastern District of Pennsylvania, Western District of Pennsylvania, Middle District of Florida, and the Third Circuit Court of Appeals. I have also been admitted *pro hac vice* in the Northern District of New York in the matter of *Cupersmith et al. v. Piaker & Lyons, et al.*, Case No. 3:14-cv-01303-TJM-DEP (the "Piaker Action").

2. I submit this Declaration in support of the Motion for an Order to enforce compliance by the Receiver with the Court-approved plan of distribution (the "Motion").

3. Kang Haggerty & Fetbroyt LLC represents fifty-five (55) investors in the Piaker Action (the "Moving Investors"), who invested in a number of different investment vehicles sold by McGinn Smith & Co., Inc., its related entities and affiliated brokers ("McGinn Smith"). The Moving Investors are specifically identified in Exhibit A attached hereto.

4. The Moving Investors suffered, in the aggregate, more than $10 million in losses from their investments.

5. In September 2014, the Moving Investors (and several additional investors who have since withdrawn) filed the Piaker Action, alleging that Piaker & Lyons, P.C. and two of its principals, Ronald L. Simons and Timothy N. Paventi (the "Piaker Defendants") – McGinn Smith's accountants, auditors, and tax preparers from 1992 until at least 2008 – were liable for, among other things, aiding and abetting McGinn Smith's fraud. Counsel for the Moving Investors informed the Receiver of the Piaker Action shortly after the Piaker Action was filed; however, the Receiver has not taken any steps to pursue recovery from Piaker & Lyons on behalf of the entire class of McGinn Smith investors.

6. On September 27, 2016, Judge McAvoy issued a Decision and Order (Doc. No. 147) granting in part and denying in part the Piaker Defendants' motion for summary judgment, finding that although Moving Investors had established the elements of their aiding and abetting fraud claim against the Piaker Defendants, the claims of all but three of the Moving Investors – Peter Zakroff, Teresa Zakroff, and Ilene Nemeth – and all claims for investments made before September 11, 2008, were barred on statute of limitations grounds, and dismissed those claims from the Piaker Action. The remaining claims in the Piaker Action for the post-2008 investments made by the Zakroffs and Ms. Nemeth total $50,000, and have been stayed by the court pending appeal to the United States Court of Appeals for the Second Circuit. [1]

7. On January 25, 2017, in response to a motion by the Moving Investors, Judge McAvoy entered an order in the Piaker Action (Doc. No. 155) certifying for interlocutory appeal the question of the application of the statutes of limitations governing Moving Investors. On February 6, 2017, Moving Investors filed a Petition for Permission to Appeal in the United States Court of Appeals for the Second Circuit, which is currently pending.

8. Therefore, all but three of the Moving Investors have had their claims against the Piaker Defendants dismissed in their entirety, and the remaining three investors have had their claims severely limited. The prospect for recovery in the Piaker Action is extremely uncertain, and is highly unlikely to occur in the near term.

9. Earlier this month, the Moving Investors have received the investor questionnaire from the Receiver, in connection with the planned distribution to investors pursuant to the Plan of Distribution approved by this Court on October 31, 2016 (the "Plan").

[1] The Zakroffs have since voluntarily withdrawn from the Piaker Action (Doc. No. 161).

10. A number of the Moving Investors have contacted our firm to seek guidance with respect to answering the Receiver's questionnaire concerning collateral recovery truthfully and accurately, particularly given the current procedural posture of the Piaker Action and the uncertainty surrounding the possibility and/or timing of any potential recovery against the Piaker Defendants.

11. One of this firm's clients in the Piaker Action indicated to me that he had spoken with the Receiver directly, and was told that he would not be able to receive a distribution pursuant to the Plan until after the Piaker Action was final. This was a client with investments totaling over $400,000, who had paid out of pocket costs of nearly $7,500 in the Piaker Action, and who had traveled to Syracuse, New York to be deposed in the Piaker Action. This client further relayed that the Receiver advised him that he would only be able to receive an interim distribution from the McGinn Smith receivership if he dropped his claim in the Piaker Action.

12. Because of the Receiver's advice, this client told me that he felt he had no other choice, and that given his current financial situation he could not risk waiting for a receivership distribution that may not come for multiple years, and withdrew from the Piaker Action.

13. In total, nine clients have withdrawn from the Piaker Action since February 15, 2017 as a result of the prospect that they would not receive payment under the Plan should they still be plaintiffs in the Piaker Action.

14. An additional client indicated that she had contacted the Receiver's office, and was told by the Receiver's staff that because she had a pending claim in the Piaker Action, she would not be receiving a distribution pursuant to the Plan, and should not return the investor questionnaires provided to her.

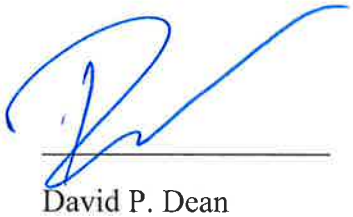
15. The Moving Investors have all submitted claims to the Receiver in accordance with the Claims Procedure Order (Doc. No. 481) and none of the claims submitted are Disputed Claims.

16. My understanding and belief is that the Moving Investors have completed the questionnaires they received from the Receiver, reflecting that they have not received any actual recovery from the pending Piaker Action or from any other source and are entitled to receive a pro rata share of the interim distribution in accordance with the Plan of Distribution.

17. On February 10, 2017, this office sent a letter to the Receiver addressing these issues, which are contrary to the express terms of the Plan of Distribution. A copy of this letter to the Receiver is attached to this Declaration as Exhibit B. To date, however, counsel has not received a response from the Receiver.

I hereby certify under penalty of perjury that the foregoing statements are true and correct. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

Dated: March 3, 2017



David P. Dean

Exhibit A

The Moving Investors

The "Moving Investors" consist of Deanna M. Ayers, Garth S. Borel, Elizabeth C. Borel, Richard L. Bove, Lynn A. Bove, James J. Burke, Kathleen A. Connell, Sharon L. Criniti, Charles Criniti, Henry S. Crist, Mary S. Dale, Gerald Dittman, Kathy Dittman, Alice J. Forsyth, Susan J. Forsyth, George M. Gavin, Nancy A. Gavin, Angus T. Gillis, Joanne V. Gillis, Katherine C. Glasgow, Richard L. Harnish, Cynthia Harnish, Joanne M. Judge, Paul E. Oppenheimer, Joseph J. Mayberry, Mary Alice Mayberry, Russell Mazda, John Morrison, Nancy Morrison, Ellen L. Myers, Ray M. Myers, Ilene K. Nemeth, Robert Nemeth, Paul Pavlishin, Dolores Pavlishin, Mary Wanda Peters, Cynthia Robbins, Albert K. Rogers, Ruth C. Rogers, Patricia E. Seigford, William L. Seigford, David T. Shannon, Kathleen M. Shannon, Esther D. Spurrier, David J. Spurrier, Harvey T. Starr, Susan Starr, Roy A. Sullivan, Linda M. Sullivan, Charles W. Trainor, Patricia M. Trainor, John M. Vanasek, Mary E. Vanasek, Anne H. Vossenberg, and Robert J. Wargo.

Exhibit B

Kang Haggerty & Fetbroyt LLC
COUNSELORS AT LAW

EDWARD T. KANG
Direct Dial: (215) 525-5852
ekang@KHFLaw.com

February 10, 2017

Via First Class Mail and Email
William J. Brown, as Receiver
of McGinn, Smith & Co., Inc., *et al.*
One Canalside
125 Main Street
Buffalo, NY 14203
wbrown@phillipslytle.com

Re: ***Neal A. Cupersmith, et al. v. Piaker & Lyons, P.C., et al.***
U.S.D.C. for the Northern District of NY, No.: 3:14-cv-01303-TJM-DEP

Dear Mr. Brown:

This firm represents more than sixty investors who suffered losses as a result of the Ponzi scheme perpetrated by McGinn Smith and are currently plaintiffs in the above-referenced action against Piaker & Lyons – McGinn Smith's accountants – and two of its principals. As you may know, the claims of sixty-four plaintiffs were dismissed by the District Court in October of 2016, and we are currently petitioning the Second Circuit for leave to appeal that decision.

It has come to our attention that you have spoken with some of our clients, and have advised them that unless they drop out of the suit against Piaker & Lyons, their share of distribution from the McGinn Smith receivership will be delayed indefinitely. First, it is improper for you to give our clients advice of any kind with respect to their suit against Piaker & Lyons, and we demand that you cease doing so immediately. Second, while you as Receiver may be entitled to hold back funds to account for an investor's recovery from another source, you are not entitled to do so where such a claim is outstanding, especially here where the posture of the case and length of the appeals process makes any assignment of value to the claim highly speculative. The claims our clients hold against Piaker & Lyons constitute contingent assets under the Generally Accepted Accounting Principles. See Statement of Financial Accounting Standards No. 5 issued by the Financial Accounting Standards Board. These contingent assets are not recognized in the accounts because they may never be realized. Your actions to penalize those investors who have pursued their case against Piaker & Lyons even though they have not realized any gains are contrary to your duties and fiduciary obligations.

Moreover, as we have indicated before, our clients' suit against Piaker & Lyons should be considered as separate from any recovery by McGinn Smith investors generally. Our clients have borne the expense of the suit against Piaker & Lyons out of their own pockets. Other investors had an opportunity to join the suit, and did not. You, as Receiver, also had an opportunity to pursue a recovery from Piaker & Lyons, and did not. Our clients should not be penalized on account of their efforts, nor should other investors or the receivership benefit at our clients' expense.

Again, we demand that you refrain from advising our clients with respect to their suit against Piaker & Lyons. If necessary, we will bring a claim against you for tortious interference with existing contractual relations.

Very truly yours,

Edward T. Kang

ETK:DPD:jhp

c.c.: Clients