

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**KINETIC INVESTMENT GROUP, LLC and
MICHAEL SCOTT WILLIAMS,**

CASE NO.: 8:20-cv-394

Defendants, and

**KINETIC FUNDS I, LLC,
KCL SERVICES, LLC d/b/a LENDACY,
SCIPPIO, LLC, LF 42, LLC, EL MORRO
FINANCIAL GROUP, LLC, and KIH, INC.,
f/k/a KINETIC INTERNATIONAL, LLC,**

Relief Defendants.

**RECEIVER'S MOTION TO (i) APPROVE DETERMINATION OF BROKERAGE
ACCOUNT MARGIN OBLIGATION; (ii) PARTIALLY LIQUIDATE INVESTOR
ACCOUNTS TO SATISFY MARGIN OBLIGATIONS; (iii) REPAY REMAINING
MARGIN BALANCE; AND (iv) TRANSFER MAJORITY OF REMAINING
RECEIVERSHIP CASH ASSETS TO FIDUCIARY BANK ACCOUNTS**

Mark A. Kornfeld, Esq., in his capacity as the court-appointed Receiver (the "Receiver") for Defendant Kinetic Investment Group, LLC and Relief Defendants Kinetic Funds I, LLC, KCL Services, LLC d/b/a Lendacy, Scipio, LLC, LF 42, LLC, El Morro Financial Group, LLC, and KIH Inc., f/k/a Kinetic International, LLC (collectively, the "Receivership Entities"), files this Motion to (i) Approve Determination of Brokerage Account Margin Obligations; (ii) Partially Liquidate Investor Accounts to Satisfy Margin Obligations; (iii) Repay Remaining Margin Balance; and (iv) Transfer Majority of Remaining

Receivership Cash Assets to Fiduciary Bank Accounts (the “Motion”). In support, the Receiver states as follows.

I. INTRODUCTION

Since the Court ordered his appointment on March 6, 2020 (Doc 34), the Receiver and his team of retained professionals have been working relentlessly in order to efficiently preserve assets, minimize costs and maximize the potential recovery to Kinetic Funds I LLC (“Kinetic Funds”) investors. The Receiver has set forth some of those activities in the previously filed First Interim Report (Doc 60) filed on April 30 2020 (the second interim report is to be filed on or before July 30, 2020) and the First Fee Application filed on May 15, 2020 (Doc. 73). Some of those relevant activities (without limitation) include:

- (1) Successfully obtaining turnover by Defendant Williams of a luxury apartment complex purchased by Mr. Williams with monies traced back to investor funds (Doc 105);
- (2) Identifying and securing a historic commercial building in Old San Juan purchased with monies traced back to investor funds and initiating efforts to market and liquidate the property for the benefit of investors;
- (3) Identifying and securing over \$8 million in cash (which most recently includes liquidating more than \$200,000 in gold coins) which is currently being held in the Receiver’s fiduciary bank accounts; and
- (4) The liquidation of Kinetic Funds securities positions at Interactive Brokers resulting in more than \$13 million in cash proceeds which are currently being secured at Interactive Brokers, as well as identifying and investigating the source and ownership of:
 - (i) over \$9 million in securities held in two Kinetic Funds sub-accounts at Interactive Brokers which appear to be separately maintained and managed by Mr. Williams for the individual benefits of the Thomas Fogarty Trust (“Fogarty Trust”) and his son Jonathan Fogarty (collectively, the “Fogarty Accounts”)¹;

¹ The Fogarty Trust and Jon Fogarty (the “Fogarty Investors”) are sophisticated and wealthy investors whose relationship with Williams dates back to at least the early 2000s. The Fogarty

(ii) a large negative margin balance of approximately -\$4.4 million (and growing) contained within a Kinetic Fund sub-account ending in x4167 belonging to the Fogarty Trust (the “4167 Account”); and

(iii) a separate Kinetic Funds sub-account at Interactive Brokers (with an account number ending in x2028) with a negative margin balance of approximately \$7.7 million (and growing) (the “Margin Account”).

The instant motion arises out of the Receiver’s fiduciary obligations to maximize recoveries of investor assets for the benefit of all Kinetic Funds investors. The Receiver is charged with doing equity for the entirety of Kinetic Funds Investors and cannot prefer one investor over another in his investigation and recommendations to the Court.

The Receiver was troubled to discover the existence of over -\$12 million in outstanding margin debt owed to Interactive Brokers across the various Kinetic Funds sub-accounts, including the significant balances in both the 4167 Account and the Margin Account. This debt could and would significantly reduce the assets available to be returned for the benefit of ALL Kinetic Funds investor victims (and, by extension, other creditors). With interest continuing to accrue against this sizeable margin balance, the Receiver’s priority is to take steps to substantially reduce that outstanding balance while also ensuring that receivership assets are not used to satisfy non-receivership margin obligations.

Accordingly, the Receiver directed his lead counsel and other retained professionals to conduct a comprehensive, forensics investigation into the historical origin of the Margin Account in order to determine whether the obligation to repay the current outstanding balance

Investors were also some of the earlier investors in the various sub-funds offered by Kinetic Funds and its predecessors and maintained those investments as of the Receiver’s appointment. The requested relief sought in this motion is independent of the Fogarty Investors’ investments in Kinetic Funds.

for the Margin Account rested with Kinetic Funds in full, in part, or not at all. This has included investigating (and where possible, obtaining supporting documentation) Kinetic Funds' and its predecessors' brokerage account activity dating back nearly ten years. The relief requested in this motion is directed only to the investigation and repayment of the Margin Account balance, as the Receiver's investigation into the 4167 Account margin obligations is ongoing.

This investigation now confirms that approximately -\$5.79 million of the current Margin Account balance (as well as any interest deemed appropriate by the Court) was (as more fully described and explained, *infra*) originally incurred by and for the sole benefit of the separately managed Fogarty Accounts - and **not Kinetic Funds**. As such, the Receiver submits that it would be fundamentally unfair and inequitable to Kinetic Funds investors if their limited assets were used to repay that substantial non-receivership obligation. Rather, the obligation to repay the -\$5.79 million margin balance incurred for the Fogarty Investors' behalf and currently included in the Margin Account balance rests solely with the Fogarty Investors.

In an attempt to avoid motion practice, the Receiver shared his findings and supporting documentary evidence as to the Margin Account obligations with the Fogarty Investors' counsel both telephonically and in writing to seek resolution of the issues and repayment to the estate.² The Fogarty Investors have indicated that they do not intend to repay any of the Margin Account obligations (or any other margin obligations) and would instead, seek to "intervene" in the current litigation. Accordingly, the Receiver seeks the Court's permission

² See Declaration of Jordan D. Maglich (Doc. 109), ¶ 3 Ex. 1.

and authorization to:

- (1) Partially liquidate the Fogarty Accounts to generate an amount (net of fees and commissions) sufficient to repay the -\$5,786,178.52 margin balances incurred by and on behalf of the Fogarty Investors prior to the June 2014 transfer to Interactive Brokers and any subsequent interest deemed proper by the Court;
- (2) Repay any remaining balance in the Margin Account (after using the liquidated proceeds from the Fogarty Accounts to pay down the -\$5,786,178.52 margin balance incurred by and on behalf of the Fogarty Investors prior to the June 2014 transfer to Interactive Brokers and any subsequent interest deemed proper by the Court) using funds from Kinetic Funds' sub-accounts at Interactive Brokers; and
- (3) Transfer \$7.5 million of the remaining Kinetic Funds cash assets (after all margin obligations have been repaid) from Interactive Brokers to the Receiver's fiduciary account which would leave approximately \$3.5 million of Kinetic Funds assets in cash at Interactive Brokers pending the remainder of the Receiver's investigation.

The Receiver respectfully submits that the relief sought herein is fair and equitable and in the best interests of the Kinetic Funds investors.

II. RELEVANT BACKGROUND

A. Procedural Background And The Order Appointing Receiver

1. On February 20, 2020, the Commission filed a complaint (the "Complaint") (Doc. 1) in the United States District Court for the Middle District of Florida (the "Court") against the Defendants Kinetic Investment Group and Williams and Relief Defendants, alleging that the Defendants violated the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940 by making false or materially misleading representations to investors and that over \$6 million of investor funds was misappropriated to fund other business ventures and pay for other unauthorized expenses. Doc. 1 ¶¶ 4, 28-38.

2. The Complaint alleged that the scheme involved securities offerings made on behalf of Kinetic Funds, a purported hedge fund with a sub-fund structure managed by Kinetic Investment Group and Williams. *Id.* ¶ 2. Defendants represented to investors that the largest sub-fund, KF Yield (the “KFYield Fund”), invested all of its assets in income-producing U.S. listed financial products hedged by listed options. *Id.* Potential investors were told that the KFYield Fund was a liquid investment that would “maintain 90% principle [sic] protection” and that an investor could redeem their principal investment “100% . . . without penalties” with a 30-day written notice. *Id.* ¶¶ 2, 28. Investors in the KFYield Fund, which attracted the near-entirety of investor funds entrusted to Kinetic Funds, were routinely provided with documentation from Bloomberg’s reporting service that claimed the KFYield Fund had achieved positive annual returns every year since inception. *Id.* ¶ 24. As the Commission alleged, these and other representations were false. *See, e.g.*, Docs. 2-3.

3. On March 6, 2020, the Court entered the Order Appointing Receiver. Among other things, the Order Appointing Receiver directed the Receiver to “[t]o take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto” Doc. 34 at ¶ 7.B.

B. The Fogarty Investors’ Lengthy Relationship With Defendant Williams

4. The Fogarty Investors are wealthy accredited investors with considerable investment experience whose relationship with Defendant Williams dates back to at least the early 2000s.³ The Receiver was provided with a Power of Attorney form signed by the

³ Thomas Fogarty, the beneficial owner of the Fogarty Trust, is a renowned medical surgeon

Fogarty Trust in November 2002 bestowing Williams with full trading authority including the ability “to purchase and borrow...from, sell...lend...and to otherwise enter into transactions of any kind...” See Declaration of Jordan D. Maglich filed contemporaneously with this Motion (Doc. 109) (“Maglich Decl.”), ¶ 4 Ex. 2.

5. The Power of Attorney form was related to an agreement between the Fogarty Trust and Defendant Williams pursuant to which Defendant Williams would be compensated for implementing an options-trading strategy to manage and hedge the Fogarty Trust’s significant position in Johnson and Johnson (“J&J”) shares.

6. Shortly thereafter, the Fogarty Trust directed the transfer of 62,928 shares of J&J stock to Aquila Securities, LLC (“Aquila”) to be managed by Williams. Maglich Decl. ¶ 5 Ex. 3.

7. The Receiver investigation shows that Williams appeared to control Aquila and that Aquila’s primary if not exclusive role was to manage the Fogarty Investors’ assets. There were regular and numerous communications regarding the status of the Fogarty Trust’s J&J position and associated trading strategy between Williams (or individuals on his behalf) and professionals responsible for overseeing the Fogarty Trust’s assets.

8. As far back as 2005-2006, it appears that the Fogarty Trust’s J&J position was used as collateral to generate margin loans for the benefit of the Fogarty Trust. The Receiver located an email message between Defendant Williams and Jon Fogarty sent October 13, 2010

and inventor credited with numerous surgical patents including the Fogarty balloon catheter. See <http://sm.stanford.edu/archive/stanmed/2006fall/fogarty.html>. His other business endeavors include the creation and management of a venture capital fund, medical technology innovator, and the ownership of the Thomas Fogarty Winery in California.

in which Williams described the Fogarty Trust's use of a "credit facility" to "borrow capital" from Aquila to avoid a significant capital gains tax issue resulting from a "concentrated uninsured position in" a stock in 2005. Maglich Decl. ¶ 6 Ex. 4. In that email, Defendant Williams indicated that:

"[t]he utilization of the credit facility allowed [the Fogarty Trust] to sell the FOXH securities and retain 100% of the profits, while at the same time significantly reducing his tax liabilities.

If we had not used the credit facility and acquired the firm's assets for 60% of the value, Dr. Fogarty would have been exposed to several million in taxable gains."

Id.

9. Another email sent around that same time frame references the Fogarty Trust's significant margin balance. In an email dated July 6, 2010, Defendant Williams informed Jon Fogarty that his father's account's equity value was \$4.3 million and that his "father's account has been drawn down from initially taking out a few hundred thousand and the FOXH withdraw - **so it is pretty close the minimum balance against equity position.**" Maglich Decl. ¶ 7 Ex. 5. (emphasis added). Given the "minimum balance" of the margin loan, Williams suggested that the "best alternative" would be for the Fogarty Trust to transfer over more stock to "free up" cash. *Id.*

10. This significant margin balance (and related activity) continued to exist. In an email dated April 2, 2014 to Jon Fogarty, Williams referenced the significant margin activity taking place in the Fogarty Trust's J&J position and indicated that:

Currently your father's JNJ position has been used as a credit facility to cover the tax liability in the FOXH profits, was used to withdraw capital, and he is not subject to tax risk in the underlying or margin risk. Additionally, his position is hedged and dividends and unrealized gains

continues to build. **Your father has never made a payment, nor does he need to** - especially at these low interest rates as the dividends off-set the credit line interest payments currently. In essence the dividends are used to pay the interest and principal.

Maglich Decl. ¶ 8 Ex. 6 (emphasis added).

11. There is no evidence that either of the Fogarty Investors ever raised any concern, question, or criticism of the significant margin activity that had been taking place on their behalf during this period. To the contrary, the evidence shows that the Fogarty Investors were aware of, directed, and benefitted from this activity.

C. Kinetic Funds' Brokerage Account History

i. Bank of America/Merrill Lynch

12. At some point in 2013, Aquila moved all of its assets into Kinetic Funds and the Fogarty Investors also continued to maintain independent accounts that were separately managed by Williams at Bank of America/Merrill Lynch ("BOA/ML"). Maglich Decl. ¶ 9 Ex. 7.

13. Kinetic Funds' predecessor Kinetic Securities Trading ("KST") maintained various sub-accounts at BOA/ML. The Receiver recently obtained brokerage statements for KST's sub-accounts at BOA/ML during 2013 and 2014. In addition to showing the various sub-accounts representing KF Yield, KF Gold, and other sub-funds offered by Kinetic Funds, those statements also show two sub-accounts which were separately maintained for the benefit of Jon Fogarty and the Fogarty Trust, respectively.

14. One KST sub-account at BOA/ML with an account number ending in x73320 contained the large position of 62,928 shares of J&J that belonged to the Fogarty Trust (the "J&J Account"). See Declaration of Marcie Bour filed contemporaneously with this Motion

(Doc. 110) (the “Bour Decl.”) ¶ 7 Ex. 1. The second of the sub-accounts had an account number ending in x73321 that was held on behalf of Jon Fogarty and consisted of a single position in Gainsco stock (the “Jon Fogarty Account”). *Id.* ¶ 8 Ex. 2.

ii. The Fogarty Accounts’ Significant Margin Activity And Balances At BOA/ML

15. A review of the monthly statements for the J&J Account from January 1, 2013 to June 4, 2014 and other relevant documentation shows significant and frequent trading activity from the implementation of the options-trading hedging strategy for the J&J position. Bour Decl. ¶¶ 7-8 Ex. 3.

16. The J&J Account and Jon Fogarty Account were separately maintained and not otherwise commingled with any Kinetic Funds sub-funds while at BOA/ML. These accounts carried **sizeable margin balances that collectively totaled approximately -\$5.79 million as of June 4, 2014.** *Id.* ¶ 9 Ex. 3. The near-entirety of this combined margin balance was located in **the J&J Account which as of June 4, 2014 had a margin balance of -\$5,704,279.62.** *Id.* The remaining margin balance of -\$81,898.90 was held in the Jon Fogarty Account.⁴ *Id.*

17. For the time period from January 1, 2013 to June 4, 2014, the account statements for the J&J Account show that the margin balance in the J&J Account increased **from -\$4,626,985.57 to -\$5,661,243.15 and that this increase was entirely attributable to numerous options purchases, interest charged on the margin account and monthly**

⁴ The Jon Fogarty Account had a margin balance of (\$93,472.87) as of December 31, 2012, and sporadically made purchases at Jon Fogarty’s direction. Bour Decl. ¶ 6 Ex. 2. Like the J&J Account, those purchases (and subsequent sales) increased (or decreased) the margin balance.

transfers to another sub-account of what appear to be management fees generated in and for the benefit of the J&J Account. *Id.* ¶ 10.⁵

18. There is no evidence that the collective margin balance of -\$5,786,178.52 incurred in the J&J Account and Jon Fogarty Account as of June 4, 2014 was incurred for any other purpose than to benefit those respective accounts (and not for any other individual or entity).

iii. KST Transfers All Accounts To Interactive Brokers In June 2014

19. In early June 2014, KST transferred all of its sub-accounts from BOA/ML to an account held by Kinetic Funds at Interactive Brokers. Bour Decl. ¶ 11. Kinetic Funds' account relationship with Interactive Brokers utilized what is known as a "Separate Trading Limit" ("STL") structure. In an STL structure, a client can transfer funds between a "master" account and other "sub-accounts" to implement specific trading strategies as well as to control the trading limits of each account. Under the STL structure, debits and credits for each sub-account - such as dividends, deposits, and margin interest - first flow through the master account and then are allocated to the relevant sub-account.

20. During this transition, KST transferred in securities positions totaling \$14.59 million and a negative cash balance (net margin loan) of -\$11,840,625.97 to a master sub-account within Kinetic Funds' Interactive Brokers account structure with an account number ending in x8796 (the "8796 Account").⁶ Bour Decl. ¶ 11 Ex. 4. As detailed below, this

⁵ The J&J position also generated quarterly dividends which, when received, were applied to reduce the margin balance.

⁶ On June 4, 2014, a transfer of the margin balance of -\$11,893,650.69 was made from the BOA/ML account to the Interactive Brokerage account. Then on June 24, 2014, an additional transfer was recorded in the amount of \$53,024.72. The net of these two ACAT amounts

negative cash balance included the negative margin balances in the J&J Account and the Jon Fogarty Account. *Id.* ¶ 11 fn. 2. The 8796 Account functioned as a clearing account for assets moved into specific sub-accounts.

21. In addition to sub-accounts established at Interactive Brokers for the sub-funds offered by Kinetic Funds including KF Yield and KF Gold (the “KF Sub-Funds”), a sub-account with an account number ending in x4167 was established at Interactive Brokers for the Fogarty Trust (the “4167 Account”) and a sub-account with an account number ending in x4170 was established at Interactive Brokers for Jon Fogarty (the “4170 Account”).⁷ Bour Decl. ¶ 12 Ex. 6.

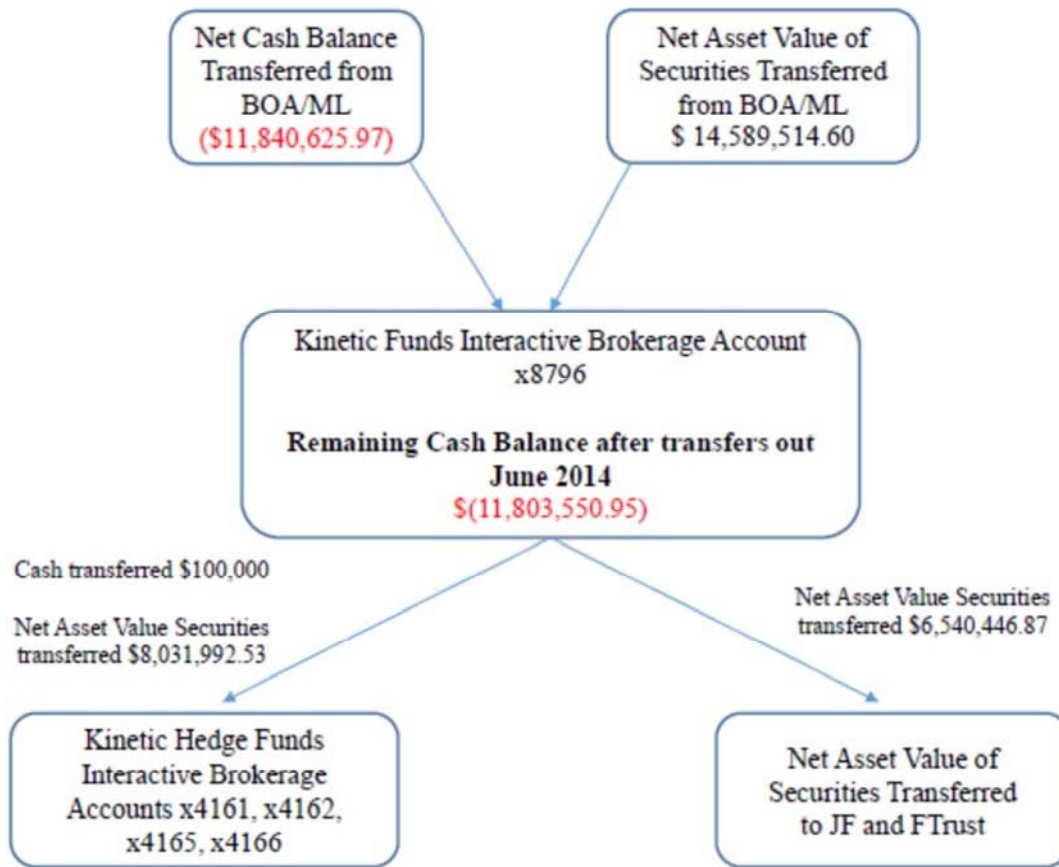
22. After the transfer to the 8796 Account, approximately \$8.13 million in securities positions were transferred to separate sub-accounts for the KF Sub-Funds. Bour Decl. ¶ 13 Ex. 5.⁸ The remaining securities positions totaling roughly \$6.54 million - nearly entirely comprised of the 62,928 J&J shares from the J&J Account - were transferred to the 4167 Account and the 4170 Account. *Id.* ¶ 14 Ex. 6.

23. A diagram of these transfers is below:

transferred is -\$11,840,625.97.

⁷ Despite the classification of the Fogarty Investors’ holdings at BOA/ML and Interactive Brokers as sub-accounts within Kinetic Funds’ account structure (i.e, technically appearing on paper as being owned by Kinetic Funds), the Fogarty Investors have maintained that their sub-accounts were always intended to remain separate and not be commingled with or otherwise considered Kinetic Funds assets.

⁸ From the date of transfer to the 8796 Account of the \$14.59 million in securities positions and the date of transfer out to the KF Sub-Funds, the value of the securities positions increased by a net of \$82,924.80.



24. A review of KST’s sub-accounts at BOA/ML as of May 31, 2014 shows that the respective securities positions and margin balances transferred to Interactive Brokers represented the total positions and margin balances in all sub-accounts held by KST at BOA/ML - including the positions and margin balances held in the J&J Account and Jon Fogarty Account. Bour Decl. ¶¶ 11-12 fn. 2.

iv. The Entirety Of The Fogarty Accounts’ Margin Obligations From BOA/ML Are Transferred To the Kinetic Funds Master Account At Interactive Brokers And Never Re-Allocated To The Fogarty Investors’ New Sub-Accounts At Interactive Brokers

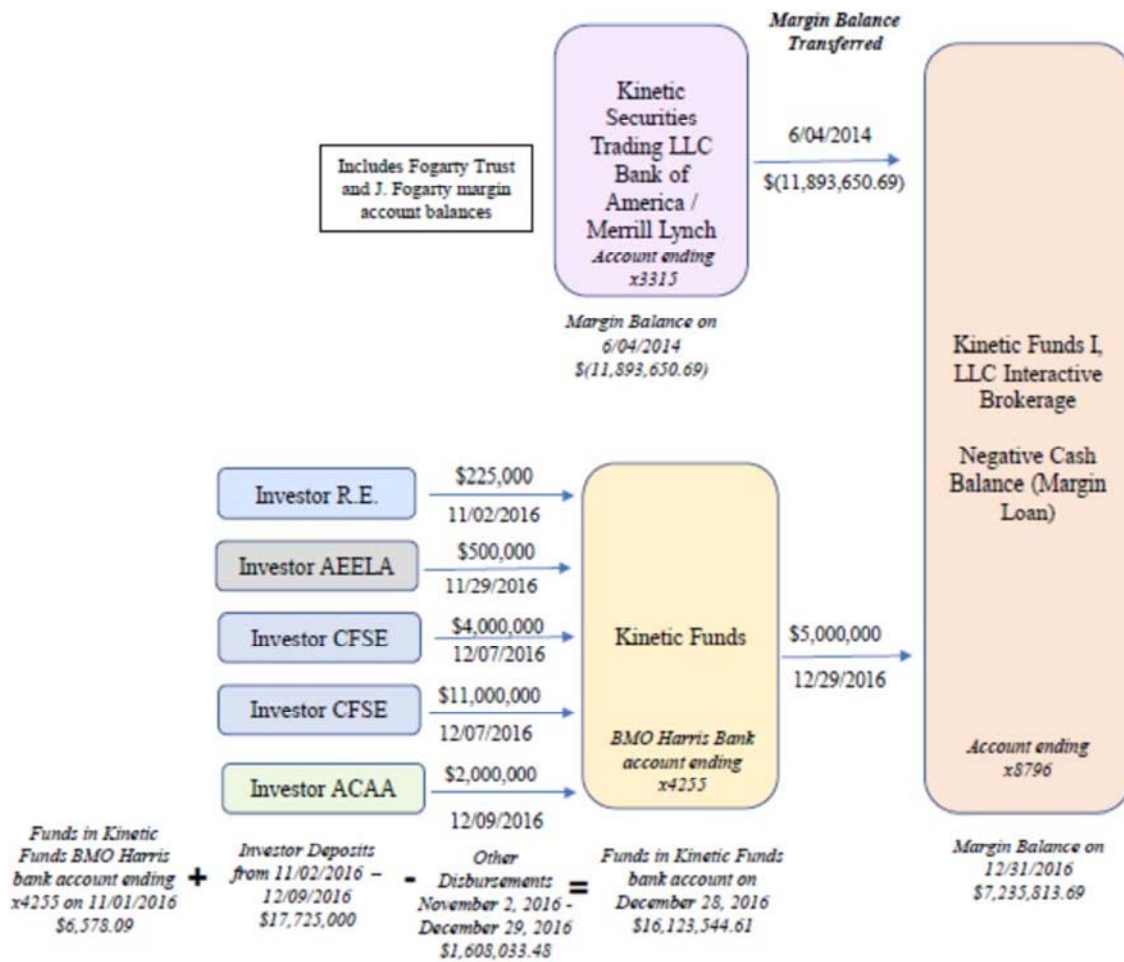
25. The statements obtained from Interactive Brokers show that the securities positions transferred from BOA/ML to Interactive Brokers were re-allocated to the various

sub-accounts (including the J&J Account) based on the respective sub-account holdings while at BOA/ML. Bour Decl. ¶¶ 13-14 Exs. 5-6. However, the same re-allocation did not take place for the approximately -\$11.40 million total net margin balance across the various BOA/ML sub-accounts which was transferred to and remained in the 8796 Account. *Id.* ¶ 15. Instead, the entire balance (including the balances attributable to the J&J Account and Jon Fogarty Account) remained in the 8796 Account for several years and grew to -\$12.24 million by December 2016. *Id.* ¶ 15 Ex. 7.

v. Kinetic Funds Investors, Not The Fogarty Investors, Assume And Repay The Outstanding Margin Obligations

26. On or around December 29, 2016, Kinetic Funds caused a payment of \$5 million to be made from its bank account at BMO Harris, which held investor funds (the “KF Bank Account”), to the 8796 Account, which served to reduce the outstanding balance of the margin balance transferred over from BOA/ML in June 2014. Bour Decl. ¶ 15 Ex. 7.

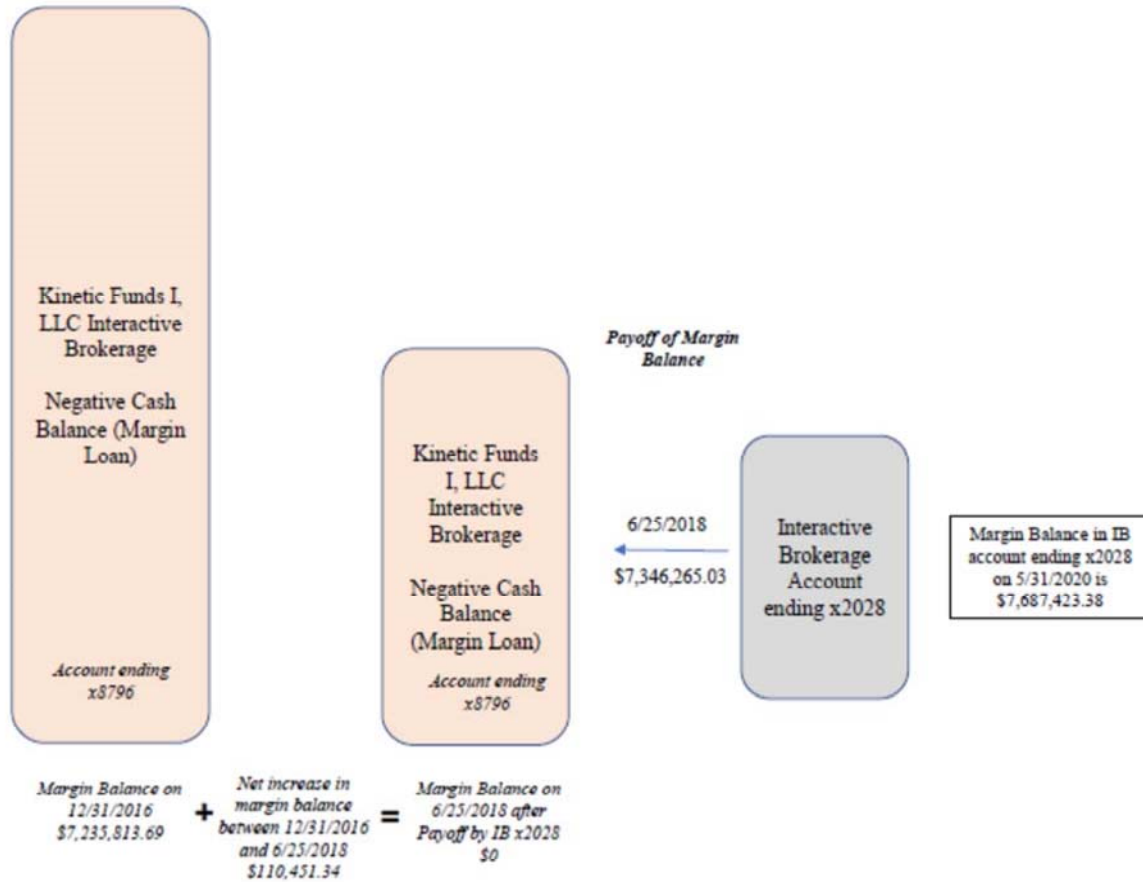
27. Investor funds deposited with Kinetic Funds were used to make this \$5 million payment. *Id.* ¶ 16. As of November 1, 2016, the balance of the KF Bank Account was \$6,578.09. *Id.* ¶ 16 Ex. 8. It was only after collective investor deposits of \$17,725,000 in November 2016 and December 2016 were made that the KF Bank Account had adequate funds to make the \$5 million transfer to the 8796 Account on December 29, 2016. *Id.* The funds used to make this payment were investor dollars that were supposed to be invested in the KFYield fund, not to pay down Kinetic Funds’ existing margin balance. A diagram of this activity is below:



28. Following this partial repayment of the 8796 Account’s margin balance in December 2016 using new deposits from Kinetic Funds investors, no activity other than the accrual of margin interest took place in the 8796 Account until June 2018. Bour Decl. ¶ 17.

29. On June 25, 2018, a separate sub-account owned by Kinetic Funds (and not the Fogarty Investors) with an account number ending in x2028 (the “2028 Account”) generated a different margin loan of -\$7,346,265.03 which was transferred to the 8796 Account. *Id.* ¶ 17 Ex. 9. This transfer fully repaid the margin balance in the 8796 Account which was 7,336,638.53 as of May 31, 2018 as well as interest for May of \$9,626.50. *Id.* In essence,

this transaction moved the margin balance from the 8796 Account to the 2028 Account. A diagram of these transactions is below:



30. The 2028 Account’s margin balance has continued to grow since being generated to repay the remaining margin balance in the 8796 Account. *Id.* Ex. 9. As of May 31, 2020, the balance of the 2028 Account was -\$7,687,423.38 and has continued to accrue interest. Bour Decl. ¶ 17 Ex. 9.

vi. The Fogarty Investors Have Not Made Any Margin Payments On The Balances Transferred Over From BOA/ML

31. There is no evidence that the Fogarty Investors ever repaid any portion of the margin balances incurred by their respective accounts at BOA/ML before the accounts were

transferred to Interactive Brokers in June 2014 despite the fact that their accounts generated a significant amount of margin activity. As the account statements from BOA/ML show **for just the 17-month period from January 1, 2013 to June 4, 2014, the Fogarty Investors' collective margin balance increased by over \$1 million** from a balance of -\$4,720,458.44 as of January 1, 2013 to -\$5,786,178.52 as of June 4, 2014, and this increase was solely caused by options trading and management fees in those two sub-accounts. *Id.* ¶¶ 7-9 Exs. 1-3. The evidence also shows significant margin activity prior to this period which was attributable to and for the benefit of the Fogarty Investors. *See, supra* ¶¶ 4-10; Maglich Decl. ¶ 8 Ex. 6 (Williams tells Jon Fogarty in April 2014 that "[y]our father has never made a payment...").

32. Likewise, the evidence shows that the Fogarty Accounts' margin obligations were effectively "reset" to zero between June 2014 and July 2014 when the accounts were transferred to Interactive Brokers and their previous margin balances of approximately -\$5.79 million were essentially assumed by Kinetic Funds. *Id.* ¶ 18. The margin balance subsequently accrued in the 4167 Account is separate and independent from the margin balance incurred by the J&J Account at BOA/ML and the Receiver continues to investigate what portion of this balance is attributable to (and thus the obligation of) the Fogarty Investors.

33. The Fogarty Investors' position that Defendant Williams somehow incurred millions of dollars in margin obligations for their sub-accounts at BOA/ML without their knowledge or authority is contradicted by evidence showing that the Fogarty Investors directed, were aware of, and authorized the accrual of approximately -\$5.79 million in margin loans on their behalf over a period of time leading up to June 4, 2014. Among other uses, the

Fogarty Trust authorized Williams to utilize margin to finance a tax avoidance strategy and the implementation of an options strategy to hedge the J&J position. *See supra* ¶¶ 4-10.

34. The consistent use of millions of dollars in margin borrowing over time by Williams in furtherance of the trading strategy authorized by and benefitting the Fogarty Investors was repeatedly, fully and clearly disclosed in communications and various written account statements displaying the Fogarty Investors' monthly positions. Those statements were at all times either delivered to the Fogarty Investors (and/or their agents) and/or available to them as part of their ability to monitor their investments.

III. MEMORANDUM OF LAW

A. The Court Has Broad Equitable Powers In Administering This Receivership

The Court has extremely broad power to supervise an equity receivership resulting from an SEC enforcement action and to determine the appropriate actions to be taken in the administration of the receivership. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E. C. v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002) (A court imposing a receivership assumes custody and control of all assets and property of the receivership and it has broad equitable authority to issue all orders necessary for the proper administration of the receivership estate); *S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *Elliott*, 953 F.2d at 1566; *S.E.C. v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982).

As a primary purpose for appointing a receiver is to conserve the existing estate, the court may enter such orders as may be appropriate and necessary for a receiver to fulfill his duty to preserve and maintain the property and funds within the receivership estate. *See, e.g.*,

S.E.C. v. Malek, 397 F. App'x 711, 713 (2d Cir. 2010); *Official Comm. Of Unsecured Creditors of Worldcom, Inc. v. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006). Indeed, these equitable powers can trump otherwise valid rights a party might otherwise have to an asset through asset tracing or other principles. *SEC v. Pension Fund of Am. L.C.*, 2006 WL 8433996, at *9 (S.D. Fla. 2006) (citing *S.E.C. v. Credit Bancorp, Ltd.*, 2000 WL 1752979, at *15 (S.D.N.Y. 2000)). In granting such relief, it is appropriate for the district court to use summary proceedings that comply with due process. *SEC v. Pension Fund of America L.C.*, 2010 WL 1794388, at *4 (11th Cir. 2010).

B. Equity Dictates That The Fogarty Investors, Not Kinetic Funds, Benefitted From And Should Thus Be Responsible For Repaying Their Respective Margin Balances Incurred Up To June 4, 2014 With Accrued Interest

The Receiver's investigation shows that the Fogarty Investors (and primarily the Fogarty Trust) knowingly approved and benefitted from borrowing against their holdings (again, primarily Fogarty Trust's J&J position) with Defendant Williams' assistance over a lengthy period for a variety of purposes. These efforts resulted in the accrual of roughly -\$5.79 million in margin balances in the J&J Account and Jon Fogarty Account at BOA/ML as of June 4, 2014 that remained unpaid and were assumed by Kinetic Funds following the transfer to Interactive Brokers. There is no evidence that anyone other than the Fogarty Investors were the beneficiaries of these actions, and the use of limited Kinetic Funds assets to repay the Fogarty Investors' margin obligations would be wholly inequitable and substantially deplete available funds to distribute to victims.

Based on the instant facts, equity requires that the Fogarty Investors should be responsible for their portion of the accrued margin balance in the 2028 Account that was

incurred for their benefit up to June 4, 2014. Here, the Receiver has presented uncontroverted evidence demonstrating that the margin balances accrued in the J&J Account and Jon Fogarty Account at BOA/ML were consistently and solely generated for the Fogarty Investors' benefit and that no benefit whatsoever flowed to Kinetic Funds. Bour Decl. ¶¶ 9 Ex. 3. Inexplicably, those margin balances were not re-allocated to the 4167 Account or the 4170 Account following the June 2014 transfer to Interactive Brokers. Bour Decl. ¶ 15.

Instead, the combined margin balance of -\$5,786,178.52 attributable to the J&J Account and Jon Fogarty Account as of June 4, 2014 was effectively assumed by and paid off by Kinetic Funds through the \$5 million payment of investor funds in December 2016 and the generation of the separate margin loan in the 2028 Account. *Id.* ¶¶15-17. **There is no evidence that the Fogarty Investors repaid any portion of that balance following the transfer to Interactive Brokers.** The relief sought by the Receiver squares with the Court's broad equitable authority to preserve and maintain funds in the Receivership Estate marshalled for the benefit of victims - and, by extension, to avoid the inequitable expenditure of limited Receivership Estate funds to satisfy non-receivership obligations.

Denying the Receiver's Motion and permitting the Fogarty Accounts to avoid repaying their margin obligations generated up to June 4, 2014 would lead to an inequitable result that would unjustly enrich the Fogarty Investors at the (significant) expense of other Kinetic Funds investors. Under the account structure at Interactive Brokers, Kinetic Funds is the legal owner of the various sub-accounts and thus legally responsible for any obligations on those sub-accounts. Thus, the entire roughly -\$7.7 million margin balance in the 2028 Account would necessarily have to be satisfied out of investor funds currently in the KF Sub Funds if the Court

determined that the Fogarty Accounts were not responsible for their share of that balance accrued at BOA/ML. Doing so would significantly deplete the net assets available to be transferred to the Receiver's fiduciary bank accounts and ultimately available for distribution to investors.

Accordingly, the Receiver requests that the Court enter an Order (i) approving his determination that the Fogarty Investors are responsible for repayment of the -\$5,786,178.52 margin balance generated in the J&J Account and Jon Fogarty Account as of June 4, 2014 as well as accrued interest at a rate determined by the Court; (ii) directing the partial liquidation of the 4167 Account and 4170 Account and the contemporaneous transfer to the Receiver of an amount equal to the sum of the Fogarty Investors' corresponding -\$5,786,178.52 margin balance as of June 4, 2014 as well as accrued interest at a rate determined by the Court; (iii) directing the Receiver to repay the remaining margin balance in the 2028 Account and transfer \$7.5 million of the remaining proceeds in Kinetic Funds sub-accounts to the Receiver's fiduciary accounts at ServisFirst Bank; (iv) authorizing the Receiver to continue his investigation of the current margin balance in the 4167 Account and, as necessary and equitable, release the 4167 Account and 4170 Account back to the Fogarty Investors; and (v) providing any further relief that is just and proper.

IV. CONCLUSION

For the reasons set forth above, the Receiver respectfully requests that this Court grant this Motion.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), the undersigned certifies that counsel for the Receiver conferred with counsel for Jon Fogarty and the Fogarty Trust, the Commission and Defendant Williams prior to filing this Motion. Counsel for Jon Fogarty and the Fogarty Trust has indicated they oppose the requested relief. Counsel for the Commission has indicated the Commission does not oppose the requested relief. Counsel for Defendant Williams did not take a position on the requested relief.

QUARLES & BRADY LLP

/s/ Jordan D. Maglich

Jordan D. Maglich, Esq.

Florida Bar No. 0086106

Zachary S. Foster, Esq.

Florida Bar No. 111980

101 E. Kennedy Blvd., Ste. 3400

Tampa, FL 33602

Telephone: (813) 387-0300

Facsimile: (813) 387-1800

jordan.maglich@quarles.com

zachary.foster@quarles.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to the following counsel of record:

Christine Nestor, Esq.
Stephanie N. Moot, Esq.
John T. Houchin, Esq.
Barbara Viniestra, Esq.
Securities and Exchange Commission
801 Brickell Avenue, Suite 1950
Miami, FL 33131
nestorc@sec.gov
moots@sec.gov
houchinj@sec.gov
viniestrab@sec.gov
Counsel for Plaintiff

Timothy W. Schulz, Esq.
Timothy W. Schulz, P.A.
224 Datura Street, Suite 815
West Palm Beach, FL 33401
e-service@twslegal.com

Jon A. Jacobson, Esq.
Jacobson Law, P.A.
224 Datura Street, Suite 812
West Palm Beach, FL 33401
jjacobson@jlpa.com
e-service@jlpa.com
Counsel for Defendant Michael Williams

I FURTHER CERTIFY that on this 22nd day of July, 2020, I served a copy of the foregoing by U.S. Mail and e-mail to the following:

Maria S. Bellafronto, Esq.
Hopkins & Carley
70 South First Street
San Jose, CA 95113
mbellafr@hopkinscarley.com
Counsel for Jon Fogarty and the Fogarty Trust

/s/ Jordan D. Maglich
Attorney