

<p>District Court, Denver County, Colorado 1437 Bannock Street Denver, CO 80202</p> <hr/> <p>FRED J. JOSEPH,  Securities Commissioner for the State of Colorado,  Plaintiff,  v.  SEAN MICHAEL MUELLER, MUELLER CAPITAL MANAGEMENT, LLC, and MUELLER OVER UNDER FUND, LP,  Defendants.</p>	<p>DATE FILED: November 20, 2013 4:04 PM FILING ID: 375983F5A9B61 CASE NUMBER: 2010CV3280</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p>Attorneys for: C. Randel Lewis, Receiver Name: Michael T. Gilbert, #15009 John C. Smiley, #16210 John A. Chanin, #20749 LINDQUIST &amp; VENNUM L.L.P. Address: 600 17<sup>th</sup> Street, Suite 1800 South Denver, CO 80202 Phone No.: 303-573-5900 Fax No.: 303-573-1956 Email: <a href="mailto:mgilbert@lindquist.com">mgilbert@lindquist.com</a> <a href="mailto:jsmiley@lindquist.com">jsmiley@lindquist.com</a> <a href="mailto:jchanin@lindquist.com">jchanin@lindquist.com</a></p>	<p>Case Numbers: 2010CV3280</p> <p>Courtroom: 203</p>
<p><b>RECEIVER’S NOVEMBER 2013 REPORT</b></p>	

C. Randel Lewis, in his capacity as Receiver for Mueller Capital Management, LLC (“MCM”), Mueller Over Under Fund, LP, as well as any related businesses, including Mueller Partners, LP, MCM, LLC, and Mueller Fund, LP, submits this Report on the status of the Receivership.

**I. BACKGROUND**

1. On April 23, 2010, the Commissioner filed his Complaint for Injunctive and Other Relief. On April 27, 2010, this Court entered an Order Appointing the Receiver (the “Receivership Order”). The Receiver was appointed for Mueller Capital Management, LLC (“MCM”), Mueller Over Under Fund, LP, as well as any related businesses, including Mueller

Partners, LP, MCM, LLC, and Mueller Fund, LP (collectively, the “Business” or the “Estate”). *Receivership Order*, Findings ¶ 3. The evidence is clear that Sean Michael Mueller (“Mueller”) was operating the Business as a Ponzi scheme.

2. On November 1, 2010, Mueller pled guilty in Denver District Court to violating the Colorado Organized Crime Control Act, C.R.S. § 18-17-104(3), a class two felony, and Securities Fraud and Theft, both class three felonies. On December 6, 2010, he was sentenced to forty years in prison and ordered to pay in excess of \$65 million in restitution.

3. The Receiver has employed forensic accountants who have completed their investigation into the Business. The accountants have confirmed the following:

a. From 2000 through 2010, 148 separate persons or entities invested approximately \$147 million with Mueller. During its operation, the Business paid out approximately \$86 million to investors, partly in false returns on investments, partly as return of principal. Approximately \$38 million was lost in trading, approximately \$6 million was paid for various expenses, including Mueller’s personal expenses, and approximately \$7 million was paid to Mueller. Of the 148 investors, 95 lost a total of approximately \$72 million.

b. Between August 2002 and March 2010, Mueller created fraudulent account statements and sent them to investors to conceal his losses. Statements to investors purport to show that as of March 2010 (the last statements issued), investors held accounts worth approximately \$138 million. In reality, as of April 2010, the Business had assets on hand of little more than \$9 million.

## II. LITIGATION STATUS

4. **Net Winner Litigation.** The Receiver has diligently pursued recovery from “Net Winners” in the Ponzi scheme, *i.e.*, persons or entities who received payments from the Business that exceeded the amount of their principal investments.

5. On April 22, 2011, the Receiver filed 13 separate complaints against investors seeking to recoup funds for the benefit of the Estate. In addition, the Receiver filed a 14<sup>th</sup> Complaint against KingRogerLee Partnership (“KRL”), and approximately 30 of its general partners. Two of the partners in KRL, the accountants William Saetveit (“Saetveit”) and William Schaefer (“Schaefer”), not only referred investors to Mueller, they each owned a 5% interest in the Business and each received substantial payments from Mueller and the Business as compensation.

6. **Net Winner Settlements.** All of the Net Winner cases have now been resolved at the trial court level, primarily through settlement. Most recently, after participating in a mediation with local counsel in Arizona, the Receiver obtained \$848,347 in settlement from a Net Winner in a case the Receiver had pursued in Arizona. The Estate has entered into settlements with 24 Net Winners and received settlement payments of \$5,452,690.17, a recovery of approximately 79% of the total claimed from those Net Winners. In addition, one settling Net

Winner has executed four promissory notes totaling \$200,000, which are secured by real property and which will mature in 2016.

7. **Net Winner Judgments.** On January 4, 2013, the Receivership Court entered summary judgment in the Receiver's favor and against Net Winner Steve Taylor for \$487,305.29, the total amount of his Net Winnings. Mr. Taylor has appealed but has deposited \$500,000 with the Receiver to satisfy any judgment pending resolution of his appeal. The appeal has been fully briefed; oral argument is set for January 14, 2014, and the Receiver expects the Court of Appeals will rule during the first half of 2014.

8. In February 2013, judgments for \$1 million each were entered against Saetveit and Schaefer. On May 15, 2013, Saetveit and Schaefer each filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code and the Receiver does not expect any material recovery from either estate.

9. **FINRA Arbitration against M.S. Howells.** On March 2, 2012, the Receiver filed an arbitration proceeding with the Financial Industry Regulatory Authority (FINRA) against M.S. Howells, Inc. and two of its employees. M.S. Howells was one of Mueller's introducing brokers. On or about October 8, 2013, after investigating the assets of the respondents in that proceeding and the availability of insurance coverage, the Receiver entered into a Settlement Agreement with M.S. Howells pursuant to which the Estate has received \$475,000.00.

10. **FINRA Arbitration against Jefferies.** On April 13, 2012, the Receiver filed a FINRA arbitration against Jefferies & Company, Inc. Jefferies was the clearing broker for M.S. Howells. In the arbitration against Jefferies, the Receiver seeks \$42 million in damages. Jefferies has vigorously defended using every available procedural means, which has necessitated extensive motion practice and briefing in both the trial and appellate courts.

11. Initially, on July 10, 2012, Jefferies filed a motion with the Receivership Court to stay the arbitration. In response, the Receiver filed both a response and a motion asking the Receivership Court to compel Jefferies to proceed with arbitration. On October 10, 2012, the Receivership Court denied Jefferies' motion and granted the Receiver's motion to compel arbitration. On November 13, 2012, Jefferies appealed that order. On April 8, 2013, the Colorado Court of Appeals dismissed Jefferies' appeal finding that there was not a final, appealable order. On May 20, 2013, Jefferies filed a Petition for Certiorari with the Colorado Supreme Court seeking to overturn the Receivership Court's order compelling arbitration. The Petition for Certiorari was fully briefed in June 2013; no order has yet been issued by the Colorado Supreme Court.

12. A nine-day arbitration hearing with Jefferies originally was scheduled to start on July 22, 2013. Discovery disputes and hearings thereon before the arbitration panel led to the Receiver filing an Amended Statement of Claim against Jefferies and to the arbitration hearing being rescheduled to January 20, 2014, which the Receiver does not expect will be continued.

13. **FINRA Arbitration Against Morgan Stanley.** On April 23, 2013, the Receiver filed a FINRA arbitration against Morgan Stanley & Co. Morgan Stanley is a primary broker

with whom Mueller traded commodity futures starting in June 2009. The arbitration claim seeks damages exceeding \$17.5 million.

14. On July 22, 2013, Morgan Stanley filed a Motion to Lift Stay in the Receivership Court seeking to lift the litigation stay imposed by the Receivership Order so that Morgan Stanley could seek an injunction in another court to prevent the Receiver from pursuing his claims against Morgan Stanley before FINRA. On the same day, Morgan Stanley filed a “Contingent Answer” to the Receiver’s FINRA claims.

15. Morgan Stanley’s Motion to Lift Stay raised many of the same issues Jefferies had raised in its attempt to enjoin the Receiver from arbitrating his claims before FINRA. In response to Morgan Stanley’s motion, the Receiver filed a cross motion seeking to compel Morgan Stanley to proceed before FINRA. These motions and cross motions involved extensive briefing.

16. On October 25, 2013, the Receivership Court entered its Order Re: Morgan Stanley’s Motion to Lift Stay and Receiver’s Motion to Compel Arbitration. The Receivership Court denied Morgan Stanley’s Motion to Lift Stay, holding – as the Receiver had argued – that the Receivership Court is the appropriate forum for deciding whether the Receiver’s claims against Morgan Stanley are subject to arbitration. The Court also denied, without prejudice, the Receiver’s motion to compel arbitration, finding that the issue of arbitrability was not procedurally postured for a ruling before the Receivership Court. Morgan Stanley has filed a motion to reconsider the Court’s October 25th Order and/or to certify that Order for appeal. The Receiver’s response to that motion will be filed on or before December 5, 2013.

17. **FINRA Arbitration Against Bank of America Securities.** On October 28, 2013, the Receiver commenced a fourth FINRA Arbitration proceeding against Banc of America Securities, LLC, and Merrill Lynch, Pierce, Fenner & Smith Incorporated (“BOA”). Banc of America Securities held securities trading accounts from July/August 2004 through July 2008, for two of Mueller’s hedge funds, Mueller Partners, LP and Mueller Over Under Fund, LP. Banc of America Securities was subsequently acquired by and merged into Merrell Lynch, Pierce, Fenner & Smith Inc.

18. The Receiver’s claims against BOA are similar to his claims against Jefferies and Morgan Stanley and seek to recover \$49.4 million that was fraudulently transferred to BOA while it held the Mueller accounts. BOA has not yet responded to the Receiver’s Statement of Claim in that proceeding.

19. In summary, there are now three pending FINRA arbitration proceedings that seek damages exceeding \$108 million. Only the Jefferies case is currently set for trial. Each case involves complex legal and factual issues and each was filed after reviewing hundreds of thousands of pages of documents and consulting experts. As with any litigation, the outcome of these cases cannot be predicted with any degree of certainty, but before filing, the Receiver considered carefully the cost of the cases and their potential benefit to the Estate, and concluded it was in the best interest of the Estate to pursue the claims.

### III. ESTATE ASSETS

20. In addition to the \$5,452,690.17 obtained through settlements with Net Winners, and the \$475,000 from M.S. Howells, the Receiver has recovered \$368,453.05 from other sources, and holds the \$500,000 deposited pending the Taylor appeal and \$200,000 in promissory notes that mature in 2016: a total of \$6,627,690.17. Currently, there is approximately \$14.7 million in Receivership accounts, including the \$500,000 pending appeal which is held in a segregated account. Most of the Receivership funds are invested in United States Treasury Bonds of varying short-term maturities.

### IV. TAX MATTERS

21. The Receiver's tax professionals have filed final federal and state income tax returns for Mueller Capital Management, LLC, Mueller Over Under Fund, LP, Mueller Fund, L.P., and Mueller Partners, L.P. and have issued final Schedule K-1s to individual investors in these Funds.

### V. SUMMARY OF ESTATE LIABILITIES

22. On September 30, 2010, this Court entered its Order establishing a procedure for parties to submit claims against the Estate and setting a claims bar date of November 30, 2010. Approximately 94 claims have been submitted by investors exceeding \$110 million. An additional 5 claims have been submitted by other creditors totaling approximately \$430,000.<sup>1</sup>

23. To date, six fee applications have been submitted to and approved by the Court, resulting in the following payments:

Receiver Fees	\$ 547,456.25
Receivership Disbursements	\$ 31,058.46
Attorneys' Fees – Lindquist & Venum LLP	\$1,700,818.76
Costs – Lindquist & Venum LLP	\$ 84,906.63
Receivership Accounting	\$ 7,587.00
Forensic Accounting (Rubin Brown)	\$ 424,882.05
Out-of-State Legal Fees (Richards Kibbe; Snell & Wilmer; Nisen & Elliott)	\$ 237,996.59
Total	\$3,034,705.74

<sup>1</sup> Many investors have filed claims seeking to recover the fictitious profits reported to them on the fraudulent account statements. The Receiver does not express any opinion on the legitimacy or value of the claims that have been submitted.

24. On November 20, 2013, the Receiver filed a seventh fee application for the following fees and costs:

Receiver Fees	\$ 89,625.00
Receivership Disbursements	\$ 8,543.49
Attorneys' Fees – Lindquist & Vennum LLP	\$ 446,753.75
Costs – Lindquist & Vennum LLP	\$ 32,933.74
Receivership Accounting	\$ 641.25
Forensic Accounting (Rubin Brown)	\$ 80,205.50
Out-of-State Legal Fees (Snell & Wilmer)	\$ 35,512.22
Consulting Fees (Kern Consulting/Grand Teton Consulting)	\$ 61,442.35
Total	\$ 755,657.30

## VI. TIMING OF DISTRIBUTIONS

25. The pending FINRA arbitration proceedings against Mueller's brokers involve damage claims exceeding \$108 million. The Receiver cannot predict the outcome of those proceedings or the amount of any recovery. The potential recovery is, however, substantial and could dramatically affect proposed distributions. The Receiver does not anticipate proposing a final plan of distribution until all of the FINRA proceedings are resolved. The Receiver has periodically considered making interim distributions in this case, but given the pending litigation and the amount of claims asserted against the Estate, does not believe it to be in best interest of creditors to do so. The Receiver will continue to evaluate the potential of making interim distributions.

Dated: November 20, 2013.

**LINDQUIST & VENNUM L.L.P.**

*original signature on file*

By: /s/ Michael T. Gilbert

Michael T. Gilbert, #15009

John C. Smiley, Esq., #16210

John A. Chanin, Esq. #20749

Counsel for C. Randel Lewis, Receiver

## CERTIFICATE OF MAILING

The undersigned hereby certifies that on November 20, 2013, a true and correct copy of the foregoing **RECEIVER'S NOVEMBER 2013 REPORT**, was served via ICCES and/or first class U.S. Mail, postage prepaid, on the following:

Russell B. Klein  
Sueanna Johnson  
Colorado Attorney General  
1300 Broadway, 8<sup>th</sup> Floor  
Denver, CO 80203

David Goldberg, Esq.  
Greenberg Traurig LLP  
Tabor Center  
1200 17<sup>th</sup> Street, Suite 2400  
Denver, CO 80202

Mollie B. Hawes, Esq.  
Miller & Steiert P.C.  
1901 West Littleton Boulevard  
Littleton, CO 80120

Miles M. Gersh, Esq.  
Miles M. Gersh LLC  
1860 Blake Street, Suite 300  
Denver, CO 80202-5904

Bart B. Burnett, Esq.  
Horowitz & Burnett, P.C.  
1660 Lincoln, Suite 1900  
Denver, CO 80264

Emma J. Skivington, Esq.  
Gordon & Rees LLP  
555 17th Street, Suite 3400  
Denver, CO 80202

*All investors and creditors listed on the service list for this case, which is maintained in the Receiver's records.*

/s/ Sue Toms (original signature on file)