

Christopher C. Ehrman (pro hac vice)
Jacob D. Krawitz (pro hac vice)
Brian T. Fitzsimons (pro hac vice)
Attorneys for Plaintiff
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Tel. 202-551-4950

Thomas M. Melton (4999)
Attorney for Plaintiff
U.S. Securities and Exchange Commission
15 West South Temple, Suite 1800
Salt Lake City, Utah 84101
Tel. 801-524-5796

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

BRIAN J. SMART, and
SMART ASSETS, LLC, a California limited liability
company,

DEFENDANTS.

Civil No. 2:09cv00224 (DAK)

Judge Dale A. Kimball

DECLARATION OF BRIAN T. FITZSIMONS IN FURTHER SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST
DEFENDANTS BRIAN J. SMART AND SMART ASSETS, LLC

I, BRIAN T. FITZSIMONS, declare:

1. I am an attorney with the Division of Enforcement of the United States Securities and Exchange Commission (the "SEC" or the "Commission"). I am currently a member in good standing of the bar of Pennsylvania.

2. I submit this Declaration in support of the SEC's Motion for a Preliminary Injunction and Other Relief.

3. The SEC commenced a formal investigation concerning Smart Assets, LLC ("Smart Assets") on or around January 23, 2009. On March 11, 2009, the SEC filed a complaint against the Defendants. During the course of the investigation and lawsuit, I have been an attorney working on the matter.

4. I base this Declaration on my personal knowledge, which I obtained during the investigation and discovery. This has included reviewing documents, bank account records, and written investor declarations, conducting telephone interviews of investors and persons with personal knowledge of Brian J. Smart's business dealings, taking the testimony of Brian J. Smart ("Smart") and the deposition of Smart as the designee of Smart Assets at its Rule 30(b)(6) deposition, as well as discussions with other members of the SEC staff and former counsel for Smart. Some of the below facts are based solely on the declarations and affidavits of investors, in conjunction with information they conveyed during witness interviews.

Jurisdiction and Venue

5. According to records maintained by the California Secretary of State, Smart Assets, LLC ("Smart Assets") is a private, limited liability company registered in the State of California.

6. Smart Assets principal place of business appears to be located in California. Smart Assets has, at various times, had offices in locations throughout Utah, including Salt Lake City.

7. Smart is a resident of Lehi, Utah and conducts most of his business in Utah. Smart is the only manager and only member of Smart Assets.

Facts

8. Since at least 2003, Smart, through his entity, Smart Assets, has misappropriated at least \$2 million of investors' funds in what is likely a Ponzi-like scheme through the use of misstatements and omissions. It appears that Smart's fraudulent scheme has developed through three phases. In phase one, Smart solicited client money by holding himself out as a financial planner. In phase two of his scheme, Smart, still holding himself out as a financial planner, issued promissory notes to investors paying a fixed rate of return ranging from 8.5% per year to 18% per year. Finally, in phase 3 of the scheme, Smart, representing himself as a "hard money" real estate lender, issued promissory notes paying fixed rates of return ranging from 15% per year to 10% per month.

9. In phases one and two of his scheme, Smart assured investors that their money would be invested in safe and secure investments. In reality, investors' monies were used for (1) Smart's personal expenses; (2) investment in real estate; (3) hard money loans; (4) investment in high risk companies; and (5) to pay other investors. In order to prolong his deceptive scheme, Smart gave investors apparently false account statements and product information sheets, and wrote emails describing fictitious investments in undisclosed mutual funds.

10. In phase three of his scheme, Smart stated that he would be using the money for hard lending in real estate, although the money was actually used to invest in at least one high risk company, to pay other investors, and for Smart's personal expenses.

11. During all phases, it appears that investor money was commingled in one account, which Smart drew upon to pay a myriad of personal expenses, and to pay investor "dividends" and redemptions. In total, Smart received at least \$2,300,000 from misled investors.

12. In March 2001, Smart, acting as a life insurance salesman for AIM Association, Inc. (“AIM”)—an insurance brokerage located in California—sold an \$100,000 annuity to Paul Brown and Katherine Brown. In April 2003, Smart convinced the Browns to cancel their annuity at a loss by telling them that he would invest their money in investment products that would provide steady income for retirement. The Browns invested an additional \$80,000 with Smart based on his misrepresentation. In 2005, Paul Brown died, and Smart convinced Katherine Logan-Brown (“Brown”) to invest the death benefit of over \$145,000 with him, by misrepresenting to Brown that the money would be invested in an “S & P” index mutual fund and other securities, and by telling Brown that he would invest the majority of the money in a very safe investment. A true and correct copy of the Brown affidavit is attached to this Declaration as Exhibit 1.

13. In order to further his scheme and deception, Smart gave Brown what appear to be fabricated account statements that misstated, *inter alia*, the balance of her account and the interest rate earned on her account. The account statements gave the appearance that Brown’s money was held in a separately managed account and invested in securities offering fixed rates of return. A true and correct copy of the account statements given to Brown is attached to this Declaration as Exhibit 2.

14. Smart furnished Brown with an apparently fabricated product information sheet describing the non-existent Smart Assets, LLC product “Safe Guard VI,” which stated that “[c]lients can realize above average returns without risking loss of principal” and that it is “[d]esigned for clients primarily interested in a fixed rate strategy.” A true and correct copy of the product information sheet given to Brown is attached to this Declaration as Exhibit 3.

15. Brown's money was not used as Smart represented, and was not held in a separate account. Brown's money was pooled with the money of other investors in a single account held by Smart Assets, for which Smart was the sole member. The money was then likely used for (1) Smart's personal expenses; (2) investment in real estate; (3) hard money loans; (4) investment in high risk companies; and (5) to pay other investors.

16. Brown, under the impression that Smart was acting as he had represented, referred her friend Lisa-Maria Padilla ("Padilla") to Smart for his financial planning services.

17. In 2004, Smart met with Padilla and her mother Virginia, and convinced them to invest the assets of the Padilla Family Trust—approximately \$1.1 million dollars—in an annuity. At this time, Smart still worked as a life insurance salesman with AIM. Shortly thereafter, in or around September 2004, Smart left AIM. In March 2005, Padilla was appointed sole trustee of the family trust. Smart, still holding himself out as being affiliated with AIM, quickly moved in, and convinced Padilla to invest the trust assets with him based on myriad misrepresentations. Smart memorialized the conversation in an email that he sent to Padilla, stating: (1) that her money would be invested "into Low [*sic*] risk or fixed funds offering Principal [*sic*] guaranteed protection with above average returns;" (2) that the fixed rate funds offer 5.5% returns; (3) that her remaining \$425,000 would be invested with a "ROI (return on investment) company called Golden Key investments [*sic*]" offering "principle [*sic*] guaranteed product;" (4) that the investments were "very solid and safe;" and (5) that the investment could be "turned into a stretch IRA, passing the gains tax free to it's [*sic*] beneficiaries." A true and correct copy of the Padilla affidavit is attached to this Declaration as Exhibit 4. A true and correct copy of an email from Smart to Padilla is attached to this Declaration as Exhibit 5.

18. Padilla's money was not used as Smart represented, and was not held in a separate account. Padilla's money was pooled with other investors' money, and was used for highly speculative investments, Smart's personal expenses, and to pay other investors.

19. Both Padilla and Brown received "dividend" payments from Smart. The payments came from the Smart Assets bank account where the investor money was pooled. For both investors, the dividend payments stopped, and the total payments represented a mere fraction of the total amount invested with Smart. Over the last several years, Padilla and Brown have repeatedly requested account information and money from Smart. Smart has not satisfied these requests. A true and correct copy of a Smart Assets bank account statement is attached to this Declaration as Exhibit 6.

20. In 2005, Brown referred another one of her friends, Dagmar Chaplin-Lee ("Lee"), to the supposed financial planner.

21. Lee met Smart in early 2005, and by November of 2005, he had convinced her to invest \$200,000 with him by telling her: (1) that he would be putting the money in safe investments; (2) that she would always have access to her money; (3) that he was going to make Brown and Lee millionaires; and (4) that he was still affiliated with AIM. To make Lee "comfortable" with the investment, Defendants entered into a promissory note agreement with Lee, and gave her a membership certificate falsely purporting to give her 200,000 units of membership in Smart Assets. The note promised a fixed rate of 8.5% per year. As collateral for the note, Defendants offered a then defaulted \$870,000 promissory note. Smart did not disclose to Lee that this note was in default. Smart gave Lee apparently fabricated account statements containing various misstatements. The statements gave the appearance that Lee's money was held in a separately managed account and invested in securities offering an annual interest rate of

20.65%. A true and correct copy of the Lee affidavit is attached to this Declaration as Exhibit 7. A true and correct copy of a promissory note agreement between Lee and Smart is attached to this Declaration as Exhibit 8. A true and correct copy of an account statement given to Lee is attached to this Declaration as Exhibit 9. A true and correct copy of the membership certificate given to Lee is attached to this Declaration as Exhibit 10.

22. In February 2006, apparently based on Smart's prior misrepresentations, Lee invested another \$50,000 with Smart through a promissory note offering an 18% annual rate. A true and correct copy of a promissory note agreement between Lee and Smart is attached to this Declaration as Exhibit 11.

23. Lee's money was not used as Smart represented, and was not held in a separate account. Lee's money was pooled with other investors' money, and was used for highly speculative investments, Smart's personal expenses, and to pay other investors.

24. In February 2008, Smart told Lee that she and Brown's assets were invested in a Hawaiian real estate deal. One month later, Smart told Lee that they were invested in a company called Pharma Meds.

25. From February 2006 through August 2008, Smart gave Lee approximately \$52,500. The payments came from the Smart Assets bank account where the investor money was pooled. These payments to Lee have halted. Since 2007, Lee has repeatedly requested that Smart provide account information on her investments and has not received any such information. A true and correct copy of a Smart Assets bank account statement is attached to this Declaration as Exhibit 12.

26. Morris and Mary Jo O'Brien were other elderly investors that gave money to Smart during phase two of the scheme. The O'Briens held an annuity that they purchased

through an agent at an insurance brokerage named Asset Protection and Insurance Services (“APIS”). When that agent left APIS, Smart was assigned to them as their representative. Smart apparently convinced the O’Briens to cancel their annuity and invest the money with him by telling them that such an investment would be just as safe. Smart told them that he was a financial advisor, and claimed that they would be investing in a reputable company named Smart Assets. Smart failed to disclose to the O’Briens that Smart Assets was a company that was owned and controlled by Smart. Pursuant to several promissory notes offering between 12% and 15% interest per year, the O’Briens gave Smart over \$126,000 based on his misstatement. Smart gave the O’Briens apparently fabricated account statements containing various misstatements. The statements gave the appearance that the O’Briens’s money was held in a separately managed account and invested in securities offering an annual fixed interest rate of 12%. A true and correct copy of promissory note agreements between the O’Briens and Smart are attached to this Declaration as Exhibit 13. A true and correct copy of account statements given to the O’Briens is attached to this Declaration as Exhibit 14. A true and correct copy of the O’Brien affidavit is attached to this Declaration as Exhibit 15.

27. The O’Briens’s money was pooled with other investor money, used for highly speculative investments, misappropriated for Smart’s personal expenses, and paid to other investors. The O’Briens did not receive any of their money back.

28. In July 2006, Smart solicited Ryan and Joanna Smith (the “Smiths”) to invest in “hard money” real estate lending. In August 2006, Smart offered and sold a \$100,000 promissory note to the Smiths, offering a 10% per month rate of return. While Smart made some of the monthly payments on the note, the payments stopped January 2008. Eighteen months after their supposed real estate investment, Smart informed the Smiths that, rather than investing

their money in real estate as he had promised, their money was invested in a company that manufactures “slurry ice.” A true and correct copy of the Smith affidavit is attached to this Declaration as Exhibit 16. A true and correct copy of a promissory note agreement between the Smiths and Smart is attached to this Declaration as Exhibit 17.

29. There are other people that apparently invested money with the Defendants, including, but not limited to, Janet Cherrington, Shawn McCord, and Jason Fifield. The extent of their investment with Smart, and any underlying misrepresentations made by Smart, is not yet known, as Smart asserted the Fifth Amendment when asked about the investors during the deposition of Smart Assets.

30. Rather than placing investor funds in mutual funds or other safe, liquid investments, Smart likely used investor funds to make highly speculative investments in real estate and companies, to make hard money loans, for his own personal use, and to pay previous investors.

31. Defendants pooled investor money into a single bank account held in the name of Smart Assets. From this account, Smart made payments to investors, transferred money to his personal checking account, made sizeable withdraws, and, on one occasion, wrote a check to his wife Kelly Smart for \$23,000. Smart used the account to pay his personal mortgage expenses, to pay his personal credit cards, to pay Kelly Smart’s personal credit cards, and for various other personal expenses. A true and correct copy of Smart Assets bank account statements and a check to Kelly Smart are attached to this Declaration as Exhibit 18. A true and correct copy of a letter sent to Padilla from Smart’s former counsel is attached as Exhibit 19.

32. Defendants also used unwitting investor money to invest in real estate. Defendants used at least \$125,000 of investor money to purchase a property in Coalville, Utah.

Defendants also attempted to purchase real estate in Draper and Park City, Utah and Maui, Hawaii.

33. In or around 2005, Smart gave a person named Kate Edwards (“Edwards”) \$870,000 pursuant to a promissory note. The promissory note was backed by commercial real estate. At some point, Edwards failed to repay the note and Smart took possession of the Edwards building. Smart told a business associate that he was leveraging the Edwards property for a large, highly speculative land investment in Draper, Utah. According to the same business associate, Smart also borrowed money on real estate after it had been foreclosed upon. It now appears that Smart used Padilla’s investment to invest in the failed Edwards deal.

34. Smart used investor money to make highly speculative investments in companies. Smart teamed up with the firm Golden Key Investments (“Golden Key”) to invest in a slurry ice manufacturer called Vision Natural. Golden Key eventually failed after one of the principals of Vision Natural purportedly absconded with investor funds. Smart never told investors that their investment in Vision Natural was lost. In addition, Smart apparently used investor monies to make failed investments in high risk companies named Pharma Meds and McFarland and Hullinger.

35. According to bank records, nearly all of the over \$2 million given to Smart by investors is gone.

36. After repeated postponements granted at the request of Smart and his lawyers, Smart was noticed for his Rule 30 deposition on June 3, 2009. Smart failed to appear. On the following day, Smart attended the Rule 30(b)(6) deposition of Smart Assets as the company’s sole controlling member. At the deposition, Smart asserted his Fifth Amendment privilege against self incrimination with regard to numerous questions touching several subjects that

incriminated him personally, including the following: (1) the Smart account statements given to investors; (2) the product information sheets given to investors; (3) the promissory notes that he sold to investors; (4) the membership certificate that he gave to Lee; (5) what he told investors when soliciting their investments; (6) how he invested investor money; and (7) how he otherwise used investor money. Specifically, Smart asserted the Fifth Amendment when questioned regarding: (1) whether he told investors he was going to invest their money in safe, principal guaranteed investments; (2) whether he made misstatements to investors when soliciting their money; (3) whether he used investor money for his own personal use; (4) whether he used investor money to invest in real estate; (5) whether he used investor money to invest in hard lending; (6) whether he misled investors regarding how he was going to use their money; (7) whether he commingled investor money in a single account; (8) whether he gave investors false and misleading account statements; (9) whether he gave investors false and misleading product information sheets; (10) whether he paid investors with other investor money; (11) whether he misled investors to think that he was affiliated with AIM after he left AIM; (12) whether he routinely misled investors regarding the status of their investments; (13) whether he transferred investor money into his personal checking account; (14) whether he used investor money to pay his mortgage; (15) whether he used investor money to pay his personal credit cards; (16) whether he used investor money to issue a \$23,000 check to his wife; and (17) whether he orchestrated a scheme to defraud investors. A true and correct copy of the relevant excerpts from the transcript of the Smart Assets deposition taken on June 4, 2009 is attached to this Declaration as Exhibit 20.

37. At the deposition of Smart Assets, Smart admitted that approximately \$870,000 of Padilla's money was used to make a failed "hard money" loan. A true and correct copy of the

relevant excerpts from the transcript of the Smart Assets deposition taken on June 4, 2009 is attached to this Declaration as Exhibit 21.

38. Brown gave Smart \$325,126 in total. A true and correct copy of the Brown affidavit is attached to this Declaration as Exhibit 1.

39. Lee gave Smart \$251,039 in total. A true and correct copy of the Lee affidavit is attached to this Declaration as Exhibit 7.

40. Padilla gave Smart \$1,372,798 in total. A true and correct copy of the Padilla affidavit is attached to this Declaration as Exhibit 4.

41. The O'Briens gave Smart \$126,764 in total. A true and correct copy of the O'Brien affidavit is attached to this Declaration as Exhibit 15.

42. Ida Wilson ("Wilson") gave Smart \$165,000 in total. A true and correct copy of the Wilson affidavit is attached to this Declaration as Exhibit 32.

43. The Smiths gave Smart \$100,000 in total. A true and correct copy of the Smith affidavit is attached to this Declaration as Exhibit 16.

44. The Smiths received payments from the Smart Assets bank account where the investor money was pooled. A true and correct copy of a Smart Assets bank account statement is attached to this Declaration as Exhibit 22.

45. Smart had complete control over client cash once investors gave it to him. The money was initially deposited into a Smart Assets bank account over which Smart exercised sole control.

46. Padilla gave Smart \$1,372,798 and received twenty-three "dividend" payments from the Smart Assets bank account totaling \$78,970. Padilla thus lost \$1,293,828. A true and

correct copy of a spreadsheet summarizing payments to Padilla is attached to this Declaration as Exhibit 23.

47. Brown gave Smart \$325,126 and received "dividend" payments from Smart totaling \$88,180. Brown thus lost \$236,945. A true and correct copy of a spreadsheet summarizing payments to Brown is attached to this Declaration as Exhibit 24.

48. Lee gave Smart \$251,039 and received nine "dividend" payments from the Smart Assets bank account totaling \$52,500. Lee thus lost \$198,539. A true and correct copy of a spreadsheet summarizing payments to Lee is attached to this Declaration as Exhibit 25.

49. Wilson gave Smart \$165,000 and received no money back. A true and correct copy of the Wilson affidavit is attached to this Declaration as Exhibit 32.

50. The O'Briens gave Smart \$126,764 and received no money back. A true and correct copy of the O'Brien affidavit is attached to this Declaration as Exhibit 15.

51. The Smiths gave Smart \$100,000 and received "dividend" payments from Smart totaling \$62,000. The Smiths thus lost \$38,000. A true and correct copy of the Smith affidavit is attached to this Declaration as Exhibit 16.

52. Smart did not track, record, or monitor the status of money he collected from his clients. A true and correct copy of the Robert G. Wing affidavit is attached to this Declaration as Exhibit 26.

53. Smart transferred \$114,091 in investor money from his Smart Assets bank account to his personal checking account. Much of this money was used for personal and family expenses. A true and correct copy of a spreadsheet summarizing transfers to Smart's personal checking account is attached to this Declaration as Exhibit 27.

54. Smart used his Smart Assets bank account check card for: \$40,183 in personal credit card payments; \$16,728 in retail purchases; \$17,757 in personal mortgage expenses; \$2,762 for restaurants; \$2,367 for gas; \$2,109 for hotels; \$1,606 for car rentals; \$1,426 for phone bills; and \$6,245 in other personal expenses. A true and correct copy of a spreadsheet summarizing spending from the Smart Assets bank account is attached to this Declaration as Exhibit 28.

55. Smart used investor money to pay for his wife's personal expenses. From the Smart Assets bank account, Smart wrote checks to Kelly Smart totaling \$26,400, and made \$3,012 in payments to her personal credit card. A true and correct copy of checks written to Kelly Smart from the Smart Assets bank account is attached to this Declaration as Exhibit 29.

56. Smart withdrew \$1,193,921 from his Smart Assets bank account. This money was used for personal expenses, investment in real estate, to make "hard money" loans, and to invest in failed companies. A true and correct copy of a spreadsheet summarizing withdrawals from the Smart Assets bank account is attached to this Declaration as Exhibit 30.

57. Smart wired at least \$461,700 from his Smart Assets bank account for use in highly speculative investments in real estate and companies. The bulk of this money went to American Enterprise Investment Services, Inc., Fuerte Real Estate Investment Group, Golden Key Investments, Metro National Title Trust, Jake Consulting Int., and First Guarantee Capital. A true and correct copy of a spreadsheet summarizing transfers from the Smart Assets bank account is attached to this Declaration as Exhibit 31.

58. Smart used investor money to invest in real estate in Coalville, Utah, and may have used investor money to invest in real estate in Draper, Utah, Park City, Utah, and Maui, Hawaii.

59. Smart used investor money to make highly speculative investments in companies including Pharma Meds, Inc., McFarland and Hullinger, Inc., and Vision Natural, Inc.

60. Smart controlled all aspects of Smart Assets, LLC.

61. Smart was the only person involved with soliciting his investors.

62. Smart was the only person involved with handling investor money.

63. Smart was the only person involved with allocating investor money.

64. Smart told investors that their investments would be allocated to low risk funds with principal guaranteed protection. However, Smart knew or should have known that the money was either being invested in (1) real estate; (2) high risk companies; or (3) hard money lending; or being used to (4) pay his own personal expenses.

65. Smart did not disclose to Lee that her promissory note was secured with an \$870,000 promissory note that was already in default.


66. Smart paid investors with other investor money. Smart pooled investor money into a single bank account, and made "dividend" payments to some of the investors from the pooled funds.

67. In December 2005, Wilson invested \$165,000 with Smart and Smart Assets pursuant to a proposed "safe" hard money loan opportunity. It is unclear how Wilson's money was used by Smart. Wilson has not received any of her money back. A true and correct copy of the Wilson affidavit is attached to this Declaration as Exhibit 32.

68. A true and correct copy of the unpublished opinion for SEC v. Safevest LLC, et al., Case No. SACV 08-0473-JVS(MLGx), slip op. at 6 (C.D. Cal. June 29, 2009) is attached to this Declaration as Exhibit 33 pursuant to D.U. Civ. R. 7-2.

I affirm under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 2009.



BRIAN T. FITZSIMONS

INDEX OF EXHIBITS

- Exhibit 1: A true and correct copy of the Katherine Logan-Brown (“Brown”) affidavit
- Exhibit 2: A true and correct copy of the account statements given to Brown
- Exhibit 3: A true and correct copy of the product information sheet given to Brown
- Exhibit 4: A true and correct copy of the Lisa Marie Padilla (“Padilla”) affidavit
- Exhibit 5: A true and correct copy of an email from Smart to Padilla
- Exhibit 6: A true and correct copy of a Smart Assets bank account statement
- Exhibit 7: A true and correct copy of the Dagmar Chaplin Lee (“Lee”) affidavit
- Exhibit 8: A true and correct copy of a promissory note agreement between Lee and Smart
- Exhibit 9: A true and correct copy of an account statement given to Lee
- Exhibit 10: A true and correct copy of the membership certificate given to Lee
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