UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff,* vs. 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 M. 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 WILLIAM J. BROWN, AS RECEIVER, IN SUPPORT OF MOTION FOR AN ORDER (I) APPROVING PLAN OF DISTRIBUTION OF ESTATE ASSETS AND (II) AUTHORIZING INTERIM DISTRIBUTIONS

William J. Brown, as Receiver, declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Receiver of McGinn, Smith & Co. Inc., et al. ("MS & Co.") appointed by the Court in this action pursuant to the Preliminary Injunction Order dated July 26, 2010 (Docket No. 96).

2. I make this Declaration in support of the Receiver's Motion for an Order (i) approving Plan of Distribution of assets of the MS Entities (as defined below) to investors and (ii) authorizing interim distributions to investors with allowed claims scheduled or timely filed in accordance with the Claims Procedure Order (as defined below).

PROCEDURAL BACKGROUND

3. On April 20, 2010, the Securities and Exchange Commission ("SEC") filed a Complaint initiating the above-captioned action (Docket No. 1). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the "MS Entities"). At the time of the Receiver's appointment, total bank account balances (not including some remote business operations whose bank accounts were not immediately visible to the Receiver's staff) were $485,491.63. (Docket No. 49 at 6).

4. On July 26, 2010, following a hearing, the Court entered an order granting the SEC's Motion for a Preliminary Injunction and appointing the Receiver as receiver, pending a final disposition of the action ("Preliminary Injunction Order") (Docket No. 96).

5. On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the "Complaint") (Docket No. 334).

6. The Preliminary Injunction Order authorizes the Receiver to, among other things, "use, lease, sell, and convert into money all assets of the MS Entities, either in public or

private sales or other transactions on terms the Receiver reasonably believes based on his own experience and input from his advisors to be most beneficial to the MS Entities and those entitled to the proceeds…" Preliminary Injunction Order, ¶ VII(m).

7. The family of MS & Co. companies continued to operate until April 20, 2010 when, upon request of the SEC, this Court appointed a Receiver ("Receiver"). The Receiver immediately assumed control over approximately 80 MS entities and 181 bank and brokerage accounts. With the brokerage business already jettisoned, there were five remaining primary operating businesses which were operated by the Receiver and his staff and ultimately sold or disposed of in transactions approved by the Court:

(i) Alarm Services – operating in Albany, New York servicing alarm contracts owned by eight related party entities. There were approximately 7,252 alarm customers throughout the United States.

(ii) Benchmark Communications LLC – operating in Metairie, Louisiana serving triple play (telephone, cable and Internet) contracts in three southeastern states.

(iii) White Glove Cruises, LLC – operating in Dania Beach, FL providing travel services to individuals and businesses including so-called adult themed cruises.

(iv) TDM and TDMM Cable Funding LLC – a series of triple play properties in South Florida jointly owned with unrelated entities and operated by a third party.

(v) Seton Hall Associates – an aged and deteriorating medical office building in Troy, New York subject to a ground lease and high vacancy rates.

8. The business structure that the Receiver assumed was highly leveraged. It appears that in order to attract investors, MS & Co. created Limited Liability Companies (LLC's) in conjunction with Trusts and Private Placement Memorandums ("PPM's") which issued fixed rate coupons. These debt instruments afforded the operating entities little room for error as there was never any equity contributed to the investments to provide for working capital. The debt

instruments for the LLC's were restructured twice when the cash flow was unable to support the leverage.

Compensation and Lifestyles of David L. Smith and Timothy M. McGinn

9. I believe that from 2004 to 2010 Smith and McGinn advanced to themselves from MS Entities in excess of $5.4 million in non-payroll compensation originally primarily categorized as loans but found by the criminal trial verdict to be income. These payments helped to fuel a lifestyle that could not be supported. By way of example McGinn owned at least three properties in Florida while owning MS & Co. and three well above average homes in the Albany Area. McGinn also owned a ski home in Stratton, Vermont and a time share in Beaver Creek, Colorado. McGinn also belonged to at least three golf clubs simultaneously and had the expense of two divorces. He was known to travel, enjoy fine wine and dine at the finest restaurants. Both McGinn and Smith were members of the exclusive Schuyler Meadows Golf Club in Albany, New York and Waterville Golf Club in Ireland.

10. Mr. Smith moved from a modest Clifton Park home to a beautiful home in Saratoga Springs, New York and owned a posh home in Vero Beach, Florida that was connected to an exclusive homeowners' association that included beach and golf rights. Smith previously owned a ski house in Killington, Vermont.

CLAIMS PROCEDURE

11. On March 9, 2012, in my capacity as Receiver, I filed a Motion ("Claims Procedure Motion") (Docket No. 466) for entry of an Order approving, among other things, the Receiver's proposed procedure for the administration of claims against the MS Entities.

12. On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated

April 17, 2012 ("Claims Procedure Order") (Docket No. 481). Each investor and known creditor of the MS Entities was mailed on May 1, 2012 an Access Notice describing the claims process and enclosing (i) Notice of the Claims Bar Date and Claims Procedure and (ii) a Claim Form. A confidential password providing access to the Claims Website at www.mcginnsmithreceiver.com was also provided. If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012, as further described in detail on the Receiver's Website.

13. The Claims Procedure Order established June 16, 2012 ("Bar Date") as deadline for creditors and investors to file claims against the MS Entities.

14. In accordance with the Claims Procedure Order, nearly six hundred creditors and investors timely filed claims prior to the Bar Date. In addition, more than 3,127 claims of investors and creditors were included on the schedules posted by the Receiver in accordance with the Claims Procedure Order.

15. The Receiver has conducted an initial review of the claims timely filed by creditors and investors in accordance with the Claims Procedure Order and determined that it is necessary to establish a reserve as to investor claims totaling approximately $23,617,190 since those claims have been listed by the Receiver as disputed, contingent or unliquidated.[1] Generally speaking, the number of claims to which the Receiver will assert an objection are relatively few in comparison to the total number of claims. Objections will primarily be asserted on the grounds that the claimant seeks fictitious interest, a difference in ending balances (the Receiver

[1] There are approximately $124,123,595 in total investor claims.

has used a net loss approach which is calculated on a "money in, money out" basis - i.e., money paid into the scheme minus any money returned to the investor), and claims that warrant objection or subordination on various legal grounds because of preferred treatment that those claims received by Messrs. McGinn and Smith or others, relationships with the defendants, or similar grounds.

ASSETS AVAILABLE FOR DISTRIBUTION

16. The receivership estate has, as of December 11, 2015, $21,843,329 in cash on hand. Of this amount, $5,031,369 is attributable to Smith family or Smith Trust assets which remain the subject of appeals to the Second Circuit. The latter amount will be held back pending the outcome of those appeals. While the estate continues to collect assets for distribution to investors, it also has ongoing expenses including for payment of taxes, storage charges, telecommunications and computer expenses, postage, professional fees, and the part-time salary of one employee.

17. The Receiver estimates that the value of the remaining property of the MS Entities which is subject to further recovery could be an additional several million dollars, although no assurance can be made as to when and if these more difficult recoveries will be achieved.

CALCULATION OF CLAIM AMOUNT

18. As set forth in the Claims Procedure Motion, for the purposes of establishing the scheduled amount of each claim, the Receiver has determined that all payments made to investors shall constitute payments of principal unless the applicable MS Entity provided the investor with a Form 1099 in connection with the payment, indicating that the payment constituted a payment of interest, rather than principal.

19. In certain circumstances, the Receiver was unable to determine whether a particular investor received payments of interest because the relevant account history data is not readily retrievable or no longer exists. MS & Co. did not maintain a unified customer history system.

20. Even in cases where the Receiver possesses or could possibly recreate the relevant account history, the Receiver and the SEC determined when establishing the Claims Procedure Motion in 2012 that the time and expense associated with extracting the relevant payment history from the data would be prohibitive even if it could be accomplished. In addition, the Receiver would not be able to verify the accuracy of the payment history.

DISTRIBUTION PROCESS

21. A claimant will not be allowed to receive a disproportionate or double recovery under the Plan. Before the Receiver makes any distributions under the Plan, investors will receive a notice from the Receiver requiring the investor to certify, as a condition of receiving payment, whether the investor has applied for or received any compensation for their claimed loss from sources other than the Receivership and, if so, the amounts of such compensation actually received. Those investors will not receive payment under the Plan unless they return the certification and provide the appropriate information regarding collateral recoveries. To 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. All investors will also need to return to the Receiver properly completed tax forms such as IRS Form W-9.

PUBLICATION OF PAYMENT SCHEDULES

22. Due to the need to obtain certification concerning collateral source recoveries from investors, the Receiver will file, on a rolling basis, schedules of payments to be made under the Plan at least ten days prior to the subject payments being made. The Receiver does not propose to include in any public filing the names or other information that will individually identify those who will receive payments. Instead, the schedules will, subject to the Court's approval, include claim ID numbers and the amount of the associated payments, but will not contain information from which the individual investor can be identified. Individual investors will receive their claim ID number in the collateral source mailing package.

Dated: December 29, 2015

/s/ William J. Brown
William J. Brown

Doc #01-2587738.8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff,* vs. 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 M. 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 OF WILLIAM J. BROWN, AS RECEIVER, FOR AN ORDER (I) APPROVING PLAN OF DISTRIBUTION OF ESTATE ASSETS AND (II) AUTHORIZING INTERIM DISTRIBUTIONS

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William J. Brown, as Receiver ("Receiver") of McGinn, Smith & Co., Inc., et al. ("MS & Co."), respectfully submits this Memorandum of Law in support of his motion ("Motion") for an Order (i) approving the Receiver's Plan of Distribution of assets of the MS Entities[1] to investors (the "Plan of Distribution" or "Plan") and (ii) authorizing interim distributions to investors with allowed claims in accordance with the Claims Procedure Order.[2] The MS Entities consist of the entities subject to the Receivership listed on attached Exhibit A.

PRELIMINARY STATEMENT

I. Background

Since April 2010, the Receiver has recovered substantial assets on behalf of the MS Entities and for the benefit of over 800 defrauded investors including income from ongoing business operations, litigation settlements, the proceeds of sales of operating entities, so-called investments, loan repayments, and real property owned by certain of the Defendants. The Receiver's website (www.mcginnsmithreceiver.com) contains the lengthy history of the action and this receivership. As of December 11, 2015, $21,843,329 is held by the Receiver. Brown Dec'l. ¶ 16. Additional payments on settlements achieved by the Receiver will continue to be made for the next few years and there remain several difficult assets yet to liquidate and others which should be available following appeals which should bring additional value to investors.[3] The Securities and Exchange Commission ("SEC") recently prevailed in its civil action against the Defendants which commenced this Receivership through the entry of final judgments in June 2015 against David L. Smith (Docket No. 835) and Timothy M. McGinn (Docket Nos. 836 and

[1] Capitalized terms not otherwise defined in this Memorandum of Law shall have the meanings set forth in the Declaration of William J. Brown dated December 29, 2015 ("Brown Dec'l.") submitted in support of the Motion.

[2] The Receiver believes based on current and anticipated recoveries that there will be insufficient monies to make any distributions to pre-Receivership creditors and equity holders who are subordinated to investors with allowed claims under this Plan of Distribution.

[3] There are additional assets to collect and monetize from the Smith family and the Smith Trust as a result of the SEC's civil judgment against them which is on appeal, certain brokers as a result of an SEC administrative action which is also on appeal, and certain other remaining assets.

840) following their criminal convictions on February 7, 2013 and criminal sentencing on August 7, 2013 to 10 and 15 years, respectively, in federal prison. Additionally, the SEC also obtained final judgments against the other defendants in the civil action, Lynn A. Smith, Lauren T. Smith and Geoffrey R. Smith (collectively, "Smith Parties"), and Nancy McGinn (Docket No. 837). David Smith and the Smith Parties have appealed those judgments to the United States Court of Appeals for the Second Circuit. Until the Smith Parties' appeal is decided (likely in 2016), approximately $5,031,369 of the monies held by the Receiver for distribution to investors and other property available for distribution owned or controlled by David Smith or the Smith Parties will be held back for subsequent distributions to investors in the unlikely event the Smith Parties ultimately prevail in any portion of their current appeals.

From 2012 to mid-2015, the Receiver, who had filed hundreds of tax returns on behalf of the MS Entities, was engaged in efforts to obtain confirmation from the Internal Revenue Service that the investors as victims have priority over the United States. On December 30, 2013, the Receiver filed a motion with the Court (Docket No. 658) seeking to compel a resolution with the IRS. Eventually, in 2015, the Receiver obtained a letter from the Tax Division of the Department of Justice, on behalf of the IRS, which, after additional analysis conducted by the Receiver's tax professionals, allows the Receiver to proceed with distributions.

II. The Plan of Distribution

The Receiver has completed an initial review of the claims filed by investors and creditors of the MS Entities pursuant to the Claims Procedure Order. He has determined that it is the best interests of the MS Entities and all investors of the MS Entities to make an interim distribution of the assets of the MS Entities at this time.

As further described below, the Receiver's proposed Plan of Distribution will pool the assets of various MS Entities and distribute the pooled assets (after payment of administrative

expenses and secured claims, if any) to investors with allowed claims on a pro rata basis without any distinction based upon the particular MS Entity or any purported payment priority underlying the applicable claim or investment. In the interest of ensuring an equitable distribution to all classes of investors, the proposed Plan of Distribution does not give effect to any purported pre-receivership subordination arrangements governing the investors' investments with the MS Entities for the reasons described below.

The Receiver believes that the proposed Plan of Distribution as described below is fair and equitable with respect to all parties in interest.

STATEMENT OF FACTS

MS & Co. was a broker-dealer registered with the SEC with its headquarters in Albany, New York from 1981 to 2009. From 2003 through 2010, the broker-dealer was owned by David L. Smith (50%), Timothy M. McGinn (50%; 30% after 2004), and Thomas E. Livingston (20% after 2004). The company maintained branch offices in Clifton Park, New York and Manhattan until MS & Co. was closed by FINRA in December 2009.

On April 20, 2010, the SEC filed a Complaint initiating this action (Docket No. 1). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith, known as the "MS Entities". At the time of the Receiver's appointment, total bank account balances (not including some remote business operations whose bank accounts were not immediately visible to the Receiver's staff) were $485,491.63. (Docket No. 49 at 6).

On July 26, 2010, following a hearing, the Court entered an order granting the SEC's Motion for a Preliminary Injunction and appointing the Receiver as receiver, pending a final disposition of the action (Docket No. 96).

On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the "Complaint") (Docket No. 334).

When the Receiver assumed control over approximately 80 entities and 181 bank and brokerage accounts, the brokerage business was already jettisoned, and there were five remaining operating businesses which were operated by the Receiver and his staff and ultimately sold or disposed of in transactions approved by the Court:

1. Alarm Services - operating in Albany, New York servicing alarm contracts owned by eight related party entities. There were approximately 7,252 alarm customers.
2. Benchmark Communications LLC - operating in Metairie, Louisiana serving triple play contracts (telephone, cable, broadband) in three Southeastern states.
3. White Glove Cruises, LLC - operating in Dania Beach, Florida providing travel services to individuals and businesses including so-called adult-themed cruises.
4. TDM and TDMM Cable Funding LLC - a series of triple play properties in South Florida jointly owned with unrelated entities and operated by a third party.
5. Seton Hall Associates - an aged and deteriorating medical office building in Troy, New York subject to a ground lease and high vacancy rates.

Brown Dec'l. ¶ 7.

The business structure that the Receiver assumed was highly leveraged. It appears that in order to attract investors MS& Co. created Limited Liability Companies ("LLC's") in conjunction with Trusts and Private Placement Memorandums ("PPM's") which issued fixed rate coupons. These debt instruments afforded the operating entities little room for error as there

was never any equity contributed to the investments to provide for working capital. The debt instruments for the LLC's were restructured twice by David Smith and Timothy McGinn when the cash flow was unable to support the leverage. Brown Dec'l. ¶ 8.

On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) ("MDO") granting the SEC's motion for summary judgment and making findings of fact and conclusions of law relevant to the basis for the Plan, as follows:

I. MS Entities

Timothy McGinn and David Smith, individually and through various entities that they owned and controlled, orchestrated an elaborate Ponzi scheme, which spanned over several years, involved dozens of debt offerings, and bamboozled hundreds of investors out of millions of dollars." MDO at 7. McGinn and Smith raised over $136 million between 2003 and 2010 in over twenty unregistered debt offerings, including the Four Funds -- FAIN, FEIN, FIIN, and TAIN -- and various trust offerings, by representing that investor money would be "invested," when instead it was "funneled" into various entities owned or controlled by Timothy McGinn and David Smith. That money was then used to fund unauthorized investments and unsecured loans, make interest payments to investors in other entities and offerings, support Timothy McGinn and David Smith's "lifestyles," and cover the payroll at MS & Co.. MDO at 7.

In addition to the SEC's civil action, a parallel criminal case was also commenced against Timothy McGinn and David Smith. *United States vs. Timothy M. McGinn and David L. Smith*, United States District Court for the Northern District of New York (1:12-cr-28). After a four-week jury trial, McGinn and Smith were found guilty of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud, and filing false tax returns.

The scheme to defraud revolved primarily around three different types of offerings: (i) the Four Funds, (ii) approximately twenty separate trust offerings (the "Trust Offerings"), and (iii) offerings through McGinn Smith Transaction Funding Corporation ("MSTF"). MDO at 9.

II. The Four Funds

The Four Funds were single purpose, New York limited liability companies formed between September 2003 and October 2005. The PPM's for each of the Four Funds were substantively identical, and each offered $20 million worth of Notes, with the exception of TAIN, which offered $30 million. The offerings had three tranches of Notes, which paid quarterly interest of 5% to 10.25%, and promised a return of principal at maturity, in one, three, or five years. MDO at 10.

The PPM's stated that the net proceeds would be used "to acquire various public and/or private investments." The PPM's also stated that the Four Funds "may acquire such [i]nvestments directly, or from . . . an affiliate . . . or . . . managing member that has purchased the [i]nvestment," and that, if any of the Four Funds purchases an investment from a managing member or affiliate, the fund will "pay the same price for the [i]nvestment that [it] would have paid if [it] had directly purchased the [i]nvestment." MDO at 10-11.

McGinn and Smith, however, engaged in a course of conduct and dealings that were contrary to the PPM's. First, investor proceeds from the Four Funds were used to purchase contracts from pre-2003 trusts for the purpose of redeeming or making interest payments to investors. Second, the Four Funds used investor money to directly invest in, rather than purchase investments from, affiliates. In a November 2007 letter, Smith wrote that:

> One of the more troubling aspects of the [Four Funds] investments has been my willingness to make substantial investments in affiliated entities, both because they were available and in some cases . . . new investments were needed to support past investments. Thus, . . . the pattern was often the same; invest more money to support the original investment.

Many of the affiliated investments provided no cash flow to the Four Funds and were ultimately considered worthless. Finally, proceeds from the Four Funds were funneled through MSTF and then used to pay MS & Co.'s payroll. MDO at 11-12.

In late 2007, David Smith received an e-mail from David Rees, MS & Co.'s comptroller. Mr. Rees' responsibilities included preparing and maintaining the firm's financial statements-which showed a $48.8 million deficit in the Four Funds. Notwithstanding that deficit, Smith continued to solicit new investments in the Four Funds. In early 2008, interest payments to junior note holders were first reduced, and then later eliminated, which constituted a default. The reduction, and subsequent elimination, of interest payments were attributed by McGinn and Smith to the collapse of various debt and credit markets and the "sub prime mess." Certain preferred investors, however, continued to receive interest payments, but those payments came from MSTF funds, not proceeds from the Four Funds. In October 2008, David Smith sent a letter to all Note holders in the Four Funds, which outlined a restructuring plan, extended the maturity dates of the Notes, reduced interest payments for all tranches, and forfeited all future fees due to MS & Co.. MDO at 12-13.

III. The Trust Offerings

Commencing in October 2006, MS & Co. was the sales agent for the Trust Offerings, which sold trust certificates. Investors in the Trust Offerings were promised interest payments ranging from 7.75% to 13% per year, and a return of principal at maturity, which ranged from fifteen months to five years. Investors were advised that the proceeds raised by the Trust Offerings, minus certain disclosed fees and deal costs, would be invested in specific streams of receivables, such as the purchase of contracts for security alarm services, broadband cable services, telephone services, and luxury cruises. MDO at 13-14.

For each Trust Offering, however, less than the amount represented in the PPM was actually invested in the identified streams of receivables. The PPM's promised that, in aggregate, 85% of money raised from investors would be invested in the disclosed assets, but, in fact, only 58% of the money was invested as promised. The funds raised from the Trust Offerings paid fees to MS & Co. in excess of the fees disclosed in the PPM's. Although the PPM's disclosed combined maximum underwriting and other fees payable to MS & Co. of up to $3.2 million, from October 2006 through December 2009, MS & Co. received over $6.4 million in connection with the Trust Offerings, and, Smith, McGinn, and Matthew Rogers, a former senior managing director at MS & Co., personally took approximately $4.7 million from funds raised from the Trust Offerings. MDO at 14.

Like the Four Funds offerings, the investments that were made by the Trust Offerings did not generate sufficient returns to cover interest and principal payments owed to investors. Thus, contrary to the terms of the PPM's, in many instances, McGinn and Smith used investor funds from one offering - including the various Trust Offerings, the Four Funds, and MSTF - to cover interest and principal payments in other Trust Offerings. The Firstline Trust 07, Firstline Sr. Trust 07, Firstline Trust 07 Series B, and Firstline Sr. Trust 07 Series B offerings (collectively, the "Firstline Trusts") are good examples. MDO at 14-15.

The Firstline Trusts raised money from investors, which was then loaned to Firstline, Inc., an alarm company in Utah. The investors were to receive monthly payments from Firstline's revenue stream. Firstline, however filed for bankruptcy on January 25, 2008, and, after filing, failed to make its payments on the loans. The Firstline Trusts then used approximately $2 million from MSTF and other Trust Offerings, including TDM Cable Trust 06, TDM Verifier Trust 07R, and Integrated Excellence Jr. Trust 08, to pay interest to investors. Although McGinn and Smith knew about Firstline's bankruptcy almost immediately, they did

not disclose this information to investors, or to their brokers, who continued to sell Firstline certificates after the bankruptcy, without informing potential investors of Firstline's financial condition. Investors were not informed about Firstline's bankruptcy until September 2009. Although those investors were told that they would continue to receive monthly payments from Firstline receivables, money paid to those investors in Firstline again came from other Trust Offerings. MDO at 15-16.

Compensation and Lifestyles of David L. Smith and Timothy M. McGinn

From 2004 to 2010, Smith and McGinn advanced to themselves from MS Entities in excess of $5.4 million in non-payroll compensation originally primarily categorized by them as loans but found by the criminal verdict to be income. These payments helped to fuel a lifestyle that could not be supported. By way of example McGinn owned at least three properties in Florida while owning MS & Co. and three well above average homes in the Albany Area. McGinn also owned a ski home in Stratton, Vermont and a time share in Beaver Creek, Colorado. McGinn also belonged to at least three golf clubs simultaneously and had the expense of two divorces. He was known to travel, enjoy fine wine and dine at the finest restaurants. Both McGinn and Smith were members of the exclusive Schuyler Meadows Golf Club in Albany, New York and Waterville Golf Club in Ireland. Brown Dec'l. ¶ 9.

Mr. Smith moved from a modest Clifton Park home to a beautiful home in Saratoga Springs, New York and owned a posh home in Vero Beach, Florida that was connected to an exclusive homeowners' association that included beach and golf rights. Smith previously owned a ski house in Killington, Vermont. Brown Dec'l. ¶ 10.

PLAN OF DISTRIBUTION

I. Claims Procedure

On March 9, 2012, the Receiver filed a Motion ("Claims Procedure Motion") (Docket No. 466) for entry of an Order approving, among other things, the Receiver's proposed procedure for the administration of claims against the MS Entities. Brown Dec'l. ¶ 11.

On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated April 17, 2012 ("Claims Procedure Order") (Docket No. 481). Each investor and known creditor of the MS Entities was mailed on May 1, 2012 an Access Notice describing the claims process and enclosing (i) Notice of the Claims Bar Date and Claims Procedure and (ii) a Claim Form. A confidential password providing access to the Claims Website at www.mcginnsmithreceiver.com was also provided. If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012, as further described in detail on the Receiver's Website. Brown Dec'l. ¶ 12.

II. Distributions

The Plan of Distribution as described herein contemplates multiple distributions of the assets of the MS Entities. As soon as practicable after the approval of this Motion, the Receiver will make an interim distribution from the available assets on hand to investors with allowed claims less a reserve for disputed claims as described below and a reserve for accrued and ongoing expenses. The Receiver intends to make further distributions as more assets come into existence, are liquidated, or appeals are decided.

A claimant will not be allowed to receive a disproportionate or double recovery under the Plan. Before the Receiver makes any distributions under the Plan, investors will receive a notice from the Receiver requiring the investor to certify, as a condition of receiving payment, whether the investor has applied for or received any compensation for their claimed loss from sources other than the Receivership and, if so, the amounts of such compensation actually received. Those investors will not receive payment under the Plan unless they return the certification and provide the appropriate information regarding collateral recoveries. To 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. All investors will also need to return to the Receiver properly completed tax forms such as IRS Form W-9. Brown Dec'l. ¶ 21.

Due to the need to obtain certification concerning collateral source recoveries from investors, the Receiver will file, on a rolling basis, schedules of payments to be made under the Plan at least ten days prior to the subject payments being made. The Receiver does not propose to include in any public filing the names or other information that will individually identify those who will receive payments. Instead, the schedules will, subject to the Court's approval, include claim ID numbers and the amount of the associated payments, but will not contain information from which the individual claimant can be identified. Individual claimants will receive their claim ID number in the collateral source mailing package. Brown Dec'l. ¶ 22.

III. Pro Rata Distribution

The Plan seeks to pool the assets of various MS Entities and distribute the pooled assets to investors on a pro rata basis. The Plan proposes to treat all investors equally without making any distinction based upon the particular MS Entity underlying the applicable claim or

investment. Stated differently, the pro rata share of the distribution with respect to each investor is calculated based upon the ratio of the allowed amount of the claim of the investor to the aggregate of all allowed claims of unsecured creditors and investors. Utilizing the pro rata distribution procedure results in each allowed investor claim receiving a distribution under the Plan.

In addition, as noted above, several of the Funds and Trusts issued notes in subordinated tranches. The terms of notes, indentures and related documents governing the issuance of the notes would arguably require that all senior note tranches be paid prior to payment on any of the subordinated note tranches. In order to ensure an equitable distribution, however, the Plan does not give effect to any pre-receivership subordination arrangements governing the investors' investments with the MS Entities.

IV. Calculation of Claim Amount

Under the Plan, the amount of an investor's claim has been determined pursuant to the Claims Procedure Order and was generally determined by the "net investment" method, i.e., the investor claim amount is equal to the amount of the initial investment(s) less any distributions received prior to the appointment of the Receiver. In certain instances, the records of distributions made to investors do not exist or were not readily accessible to the Receiver; therefore, the Receiver determined that all payments made to investors shall constitute payments of principal unless the applicable MS Entity provided the investor with a Form 1099 in connection with the payment, indicating that the payment constituted a payment of interest, rather than principal, as set forth in the Claims Procedure Motion..

V. Procedure for Calculating Distribution

The Plan proposes the following priority of claims: (1) administrative expenses; (2) secured creditors, if any; and (3) investors.

VI. Procedure for Disputed Claims

The Receiver has conducted an initial review of the claims timely filed by creditors and investors in accordance with the Claims Procedure Order and determined it is necessary to establish a reserve as to investor claims totaling approximately $23,617,190 since those claims have been listed by the Receiver as disputed, contingent or unliquidated.[4] A subsequent Motion will be filed with the Court notifying those investors whose claims are disputed. Disputed claims will not initially participate in the distribution process, but funds will be reserved until the objections to those claims can be heard and decided by final Order of the Court. Brown Dec'l. ¶ 15.

VII. Excluded Entities and Classes

The Receiver has elected to exclude claims filed with respect to SAI Trust 00 and SAI Trust 03 from the Plan because the assets of these entities were foreclosed on and liquidated prior to the commencement of the Receivership. Pre-receivership creditors and equity investors will not receive any distributions unless investors with allowed claims are paid in full.

VIII. DeMinimis Distributions

The Receiver shall not be required to make any distributions to investors with allowed claims aggregating less than $50. When the aggregate amount of distributions held by the Receiver for the benefit of an investor with an allowed claim exceeds $50, the Receiver shall distribute such distributions to the investor. If, at the time that the final distribution under this Plan is to be made, the distribution(s) held by the Receiver for the benefit of an investor with an allowed claim totals less than $50, such funds shall not be distributed to such investor, but rather, such claims shall be deemed expunged and such distribution(s) shall vest with the Receiver for distribution to administrative claims or other investors holding allowed claims.

[4] There are approximately $124,123,595 in total investor claims.

IX. Late Claims

Any claim which is deemed to be a late claim by the Receiver or by Final Order of the Court shall only be paid after all other investors with allowed claims have been paid in full.

X. Newly Discovered Assets

If additional assets are discovered, they will be monetized and the proceeds held and distributed in accordance with the Plan.

XI. Disposition of Undistributed Funds

A residual account will be established for any amounts remaining after distribution of all funds in the Receiver's accounts. The residual account will include as applicable funds reserved for future taxes and related expenses, funds from checks that have not been cashed, that were not delivered or that were returned to the Receiver, tax refunds for overpayment, or for waiver of IRS penalties. All funds remaining in the residual account will be transferred to the U.S. Treasury after all expenses, administrative claims and allowed claims of investors have been paid in accordance with the Plan.

XII. Fractional Cents

The Receiver shall not be required to make distributions or payments of fractional cents. Whenever any payment of a fraction of a cent under this Plan would otherwise be called for, the actual payment shall reflect a rounding of such fraction to the nearest whole cent (up or down), with half cents being rounded down.

XIII. Modifications and Amendments

The Receiver may alter, amend or modify the Plan or seek Orders in Aid of Administration as may be necessary to carry out the purpose and effect of the Plan as long as any such amendment or Order does not adversely materially affect the treatment of investors with allowed claims.

ARGUMENT

I. Applicable Standard

The district court "has broad authority to craft remedies for violations of the federal securities laws." *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009), aff'd sub nom. *S.E.C. v. Malek*, 397 F. App'x 711 (2d Cir. 2010), aff'd sub nom. *S.E.C. vs. Orgel*, 407 F. App'x 504 (2d Cir. 2010). This "broad authority" includes "the power to approve a plan of distribution proposed by a federal receiver." *Id.* In approving a plan of distribution, the "district court, acting as a court of equity, [is] afforded the discretion to determine the most equitable remedy." *S.E.C. v. Forex Asset Mgmt.*, 242 F.3d 325, 332 (5th Cir. 2001). In general, the district court "has the authority to approve any plan provided it is 'fair and reasonable.'" *Byers*, 637 F. Supp. 2d at 174 (quoting *S.E.C. v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)).

II. Pro Rata Distribution is Fair and Equitable

"Where investors' assets are commingled and the recoverable assets in a receivership are insufficient to fully repay the investors, 'equality is equity.'" *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 333 (7th Cir. 2010) (quoting *Cunningham v. Brown*, 265 U.S. 1, 13 (1924)). Applying this principle, courts have routinely held that "*pro rata* distribution of assets" is the appropriate remedy where "the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders." *S.E.C v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88-89 (2d Cir. 2002). "Distribution of assets on a pro rata basis ensures that investors with substantively similar claims to repayment receive proportionately equal distributions." *Wealth Mgmt. LLC*, 628 F.3d at 333. As a result, "pro rata distributions are the most fair and most favored in receivership cases." *Byers*, 637 F. Supp. 2d at 176.

In particular, "the use of a *pro rata* distribution has been deemed especially appropriate for fraud victims of a 'Ponzi scheme.'" *Credit Bancorp, Ltd.*, 290 F.3d at 89. Even in

circumstances which do not involve an actual "Ponzi scheme," pro rata distribution is appropriate where "any distinctions that might be drawn among parties receiving funds would be arbitrary or based on mere chance." *In re Reserve Fund Sec. and Derivatives Litig.*, 673 F. Supp. 2d 182, 196 (S.D.N.Y. 2009). In addition, in circumstances where investor funds are potentially subject to tracing analysis – an alternative method of distribution – the courts have nonetheless determined that pro rata distribution is equitable because "whether at any given moment a particular customer's assets are traceable is 'a result of the merely fortuitous fact that the defrauders spent the money of the other victims first.'" *Credit Bancorp, Ltd.*, 290 F. 3d at 89 (quoting *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996)).

Here, both elements justifying application of pro rata distribution are satisfied because each of the investors is similarly situated with respect to the MS Entities and the funds of the investors were commingled by the MS Entities.

A. The Investors are all Similarly Situated

In order for investors to be "similarly situated, . . . 'their circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances'." *Byers*, 637 F. Supp. 2d at 179-80 (quoting *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 101 (2d Cir. 2001)). Where the standards for pro rata distribution are otherwise met, "the separateness of the entities that possess or possessed investor money" generally does *not* preclude "a pooled, pro rata distribution of all the entities' funds." *S.E.C. v AmeriFirst Funding, Inc.*, Civ. Action No. 3:07-cv-1188-D, 2008 WL 919546, at *4 (N.D. Tex. Mar. 13, 2008). "[A] pooled distribution is equitable when the separate legal entities were involved in a unified scheme to defraud." *Id.; see also Byers*, 637 F. Supp. 2d at 181.

With respect to the "similarly situated" requirement, the court in *Byers* concluded that investors of separate receivership entities were "similarly situated" because, among other things,

(1) the separate entities had common management and (2) separate entities routinely pooled cash to pay operating expenses and make distributions. *See id.* Here, as in *Byers*, "the circumstances under which the . . . investors made their investments was sufficiently close to satisfy" the requirement that all investors are similarly situated. *Id.* At 180. First, all of the MS Entities were owned and/or controlled by McGinn and Smith. *See* Brown Dec'l. ¶ 3. Each of MS & Co., MS Advisors and MS Capital was involved in the creation and management of the Four Funds and the Trusts. Accordingly, it is clear that the separate MS Entities were under common management. Second, as set forth in the MDO at 11-12, 14-15, the MS Entities regularly transferred investor funds among the MS Entities in order to provide liquidity and to make payments to note holders. Lastly, there is no evidence that the circumstances of any investor funds are unique because his or her funds were "segregated in the manner of true trust accounts . . . or had never been placed in the defrauder's control." *See Credit Bancorp, Ltd.*, 290 F.3d at 90.

B. Investor Funds were Commingled

With respect to the second requirement justifying pro rata distribution, courts have concluded "that, due to the fungibility of money, *any* commingling is enough to warrant treating all the funds as tainted." *Byers*, 637 F. Supp. 2d at 177. Here, clear evidence exists that the MS Entities commingled investor funds. As set forth in the MDO, the MS Entities regularly diverted investor funds to provide liquidity to affiliated MS Entities. In addition, on frequent occasions, the MS Entities transferred investor funds from entity to entity in order to provide funds to make regularly scheduled payments on the notes.

In this respect, the court's decision in *Byers* is instructive. The court in *Byers* concluded that sufficient evidence of commingling existed based upon an accounting analysis showing "a consistent pattern in which the principals of [the company] would move money throughout the

corporate family without regard to any corporate formalities." *Byers*, 637 F. Supp. 2d at 178. Here, as in *Byers*, "there is some evidence that commingling occurred, and the law does not appear to require more than that." *Id*.

In any event, the court in *AmeriFirst Funding, Inc.* concluded that, even though there was "no commingling of funds among . . . three [separate] entities, there [was] an equitable basis to pool their funds in a pro rata distribution to all investors." *AmeriFirst Funding, Inc.*, 2008 WL 919546, at *4. The court reasoned that a pooled, pro rata distribution was equitable because the various receivership entities were "closely related" and possessed "unity of governance." *Id.* The court further held, even where a receivership entity which was controlled by a different individual, that entity's assets should nonetheless be pooled because the entity "played an integral role in furthering the fraud" by assisting in the sale of fraudulent investments. *Id*. Here, as noted above, each of the MS Entities was under common control and management and each entity played a role in the fraud perpetrated by McGinn and Smith. As a result, pro rata distribution is appropriate here, even if this Court concludes that the evidence of commingling is insufficient.

III. The Proposed Method of Calculating Claim Amounts is Fair and Equitable

As noted above, the Plan generally establishes the allowed amount of an investor's claim as the amount of the initial investment(s) less any distributions received prior to the appointment of the Receiver. In cases where the records of distributions made to investors do not exist or were not readily accessible to the Receiver; however, the Receiver elected to fix the applicable claim amount as the amount of the original investment. Under the circumstances, this method of calculating the allowed claim amount is fair and equitable.

There is clear evidence that, in the vast majority of instances, pre-receivership interest payments were made with later investors' payments or funds transferred from other MS Entities,

rather than actual payments of interest from income generated by the entity obligated on the note. As a result, treating pre-receivership interest payments – where sufficient evidence of the payments exists – as a principal payment is equitable. *See generally AmeriFirst Funding, Inc.*, 2008 WL 919546, at *5.

In addition, there is no basis to contest the Receiver's decision to fix the allowed claim amount as the amount of the original investment in cases where records of pre-receivership payments either do not exist or are not readily retrievable. The Receiver has determined that, in light of the condition of the books and records of the MS Entities, any effort to reconstruct the baseline payment data for certain investors to determine the amount pre-receivership interest payments would be time-consuming, expensive and subject to error. As a result, the Receiver has determined that use of the amounts established by the Claims Procedure Order or the original investment amount is more practical and avoids further depletion of estate assets and delay of distributions. *See generally Id*.

IV. The Proposed Treatment of Subordinated Note Claims is Fair and Equitable

As discussed above, the Plan proposes to treat all note holders equally, regardless of any purported pre-receivership subordination arrangements governing the investors' investments with the MS Entities.

In approving a plan of distribution, the district court "have the power to 'classify claims sensibly.'" *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 333 (7th Cir. 2010). "This power includes the authority to subordinate the claims of certain investors to ensure equal treatment." *Id*. Here, the Receiver has considered treating investor claims in accordance with pre-receivership subordination arrangements. This procedure, however, likely would result in subordinated note investors receiving no distribution under the Plan.

The Receiver has determined that equal treatment among investors in warranted because all of the investors – senior and subordinate – were victimized by a fraud. As a result, no inequity arises from failing to give effect to the pre-receivership subordination arrangements.

Commodity Futures Trading Comm'n v. Walsh, 712 F.3d 735 (2d Cir. 2013) provides support for pro rata distribution notwithstanding certain distinctions between investors. In *Walsh*, Ponzi scheme investors objected to a pro rata distribution plan because it allowed investors who made "riskier" investments to fare just as well as those who made "safer" investments, arguing that these groups were not similarly situated. *Id*. at 750. As a general principle, the Second Circuit stated that a "receiver devising a distribution plan is not required to apportion assets in conformity with misrepresentations and arbitrary allocations that were made by the defrauder," because doing so would effectively give control over the distribution to the defrauder. *Id.* at 749.

Despite the existence of separate "investment vehicles," one of which was regulated while the other was not, the Second Circuit upheld the determination that "the mere choices of different investment vehicles did not mean that the two groups of defrauded investors in this case were meaningfully dissimilar." *Id.* at 751. To summarize the relevant factors guiding approval of a pro rata distribution, the Court related that "the long history of commingling, defendants' operation of [the vehicles] as if they were a single entity, and defendants' employment of fraudulent accounting practices" supported the finding that the assets "could not be reliably unraveled." *Id.* at 753; *see also Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 496 B.R. 744, 757-58 (S.D.N.Y. 2013) (apply *Walsh* to uphold net-equity distribution plan in SIPA context), aff'd sub nom., *In re Bernard L. Madoff Inv. Sec. LLC*, 779 F.3d 74 (2d Cir. 2015), cert denied sub nom., *Peshkin v. Picard*, 136 S. Ct. 218 (2015); *S.E.C. v. Founding Partners Capital*

Mgmt., No. 2:09-cv-229-FTM-29SPC, 2014 WL 2993780, at * 7 (M.D. Fla. July 3, 2014) (citing *Amerifirst* to note that commingling is not required in order to approve pro rata distribution).

CONCLUSION

The Receiver requests that the Court enter an Order substantially in the form attached as Exhibit B (i) approving the Receiver's Plan of Distribution of assets of the MS Entities to investors and (ii) authorizing an interim distribution to investors with claims scheduled or timely filed in accordance with the Claims Procedure Order, together with such other and further relief as the Court deems just and proper.

Dated: December 29, 2015

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Attorneys for the Receiver

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Exhibit A

Schedule of Receivership Entities

107th Associates LLC Trust 07
107th Associates LLC
74 State Street Capital LP
Acquisition Trust 03
Capital Center Credit Corporation
CMS Financial Services
Cruise Charter Ventures LLC dba YOLO Cruises
Cruise Charter Ventures Trust 08
First Advisory Income Notes LLC
First Commercial Capital Corp.
First Excelsior Income Notes LLC
First Independent Income Notes LLC
FirstLine Junior Trust 07
FirstLine Senior Trust 07
FirstLine Trust 07
Fortress Trust 08
Integrated Excellence Junior Trust
Integrated Excellence Junior Trust 08
Integrated Excellence Senior Trust
Integrated Excellence Senior Trust 08
IP Investors
James J. Carroll Charitable Fund
JGC Trust 00
KC Acquisition Corp.
KMB Cable Holdings LLC
Luxury Cruise Center, Inc.
Luxury Cruise Holdings, LLC
Luxury Cruise Receivables, LLC
M & S Partners
McGinn, Smith & Co.
McGinn, Smith Acceptance Corp.
McGinn, Smith Advisors
McGinn, Smith Alarm Trading
McGinn, Smith Asset Management Corp.
McGinn, Smith Capital Holdings
McGinn, Smith Capital Management LLC
McGinn, Smith Financial Services Corp.
McGinn, Smith FirstLine Funding LLC
McGinn, Smith Funding LLC
McGinn, Smith Group LLC
McGinn, Smith Holdings LLC
McGinn, Smith Independent Services Corp.
McGinn, Smith Licensing Co.
McGinn, Smith Transaction Funding Corp.
Mr. Cranberry LLC
MS Partners
MSFC Security Holdings LLC
NEI Capital LLC
Pacific Trust 02
Point Capital LLC
Prime Vision Communications LLC
Prime Vision Communication Management Keys Cove LLC
Prime Vision Communications of Cutler Cay LLC
Prime Vision Funding of Cutler Cove LLC
Prime Vision Funding of Key Cove LLC
RTC Trust 02
SAI Trust 00
SAI Trust 03
Security Participation Trust I
Security Participation Trust II
Security Participation Trust III
Security Participation Trust IV
Seton Hall Associates
TDM Cable Funding LLC
TDM Cable Trust 06
TDM Luxury Cruise Trust 07
TDM Verifier Trust 07
TDM Verifier Trust 07R
TDM Verifier Trust 08
TDM Verifier Trust 08R
TDM Verifier Trust 09
TDM Verifier Trust 11
TDMM Benchmark Trust 09
TDMM Cable Funding LLC
TDMM Cable Jr Trust 09
TDMM Cable Sr Trust 09
Third Albany Income Notes LLC
Travel Liquidators, LLC
White Glove Cruises LLC
White Glove LLC

Exhibit B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*, vs. 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 M. 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)

[PROPOSED] ORDER APPROVING RECEIVER'S
PLAN OF DISTRIBUTION

Upon the Motion of William J. Brown, as Receiver, for an Order (I) Approving Plan of Distribution of Estate Assets and (II) Authorizing Interim Distributions (Docket No. __) ("Motion"), and a hearing having been held on January __, 2016, and after considering the Motion, any responses, objections, or replies thereto, the arguments of counsel, and the evidence

in the record, and no objections having been filed or sustained by the Court, and sufficient notice of the Motion having been given, upon due deliberation and for good cause shown, it is hereby

ORDERED, that the Motion is approved; and it is further

ORDERED, that to the extent an investor with an allowed claim receives one or more collateral recoveries, the Receiver will reduce payments to such investor to the extent necessary to ensure that all investors with allowed 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; and it is further

ORDERED, that the distribution process shall begin within ninety (90) days of the date of the entry of this Order; and it is further

ORDERED, that the Receiver shall send a notice (the "Certification Notice") to each investor asking for certification, as a condition of receiving payment, regarding whether they have applied for or received compensation for their claimed losses from sources other than the Receivership and, if so, the amount of such compensation. Investors must provide the necessary certification within sixty (60) days of the date they receive the Certification Notice; and it is further

ORDERED, that payments under the Plan shall be made on a rolling basis as certifications in response to Certification Notices are received and processed. Prior to making a group of payments pursuant to the Plan, the Receiver shall file a schedule of the payments to be made. Each such schedule shall be filed at least ten (10) days prior to the subject payments being made. The schedules shall include claim ID numbers and the amount of the associated payments but shall not contain information from which the individual investors can be identified; and it is further

ORDERED, that all payments pursuant to the Plan shall be made via check. If payment is being made to compensate for losses that derive from accounts jointly owned by or otherwise associated with two or more investors, the check shall be jointly payable to all such investors and require the full endorsement of all such investors; and it is further

ORDERED, that each check shall state on its face that it will be void if not cashed within 90 days from the date of issue. The investor(s) to whom the check was originally issued may submit a written request for reissuance to the Receiver within 180 days of the original date of issuance of the check. All funds represented by void checks not timely reissued shall revert to the Receivership Estate; and it is further

ORDERED, that any investor(s) who receives a payment pursuant to the Plan shall be deemed to have released the claims(s) for which payment was made to the extent of the payment. Each investor's allowed claim amount shall be reduced, dollar for dollar, by the total amount received pursuant to the Plan.

Dated: January __, 2016

_____

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