

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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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.*  
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Case No. 1:10-CV-457  
(GLS/CFH)

**FOURTH WRITTEN STATUS REPORT OF THE RECEIVER**

This Report describes relevant events respecting the status of the Receivership Estates at this time and also incorporates by reference updates which have been posted regularly on the Receiver's website since the commencement of this action (www.mcginnsmithreceiver.com).<sup>1</sup> This Report also supplements the First Report of the Receiver (Docket No. 49), the Second Written Report of the Receiver (Docket No. 425), and the Third Written Status Report of the Receiver (Docket No. 925) ("Receiver's Third Report"). The Receiver's Motion for an Order (I) Approving Plan of Distribution of Estate

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<sup>1</sup> The Receiver's website contains more detailed descriptions of many of these events and others which were reported to investors contemporaneously with their occurrence.

Assets (“Plan”) and (II) Authorizing Interim Distributions was approved by Court Order on October 31, 2016 (Docket No. 904).

### **Summary of Investor Distribution Events**

As reported in detail on pages 4 through 6 of the Receiver’s Third Report, the Receiver established procedures for the implementation of investor distributions once the Plan of Distribution was approved by the Court and became a final Order. Since April 28, 2017, thirty-nine Payment Schedules of Investor Distributions have been filed with the Court and posted to the Receiver’s website. As a result, \$6,308,283.64 has been distributed by the Receiver to investors through the Thirty-Ninth Payment Schedule of Investor Distributions. This amount does not include significant recoveries obtained by investors from collateral recoveries paid directly to investors from third party sources as reported on those Payment Schedules of Investor Distributions (Collateral Recovery Investors).

Out of a total of 2,846 claims, the Receiver’s staff has identified approximately 33 investors (several of whom have multiple investments) whose Investor Questionnaires were returned as undeliverable. The Receiver has sent follow-up mailings and Information Questionnaires in an attempt to locate those investors. Some have been located. Additionally, approximately 450 Investor Questionnaires have not been returned, and the Receiver has sent follow-up letters to each of those investors, which has produced some activity. The Receiver’s procedures for this follow-up take into account reasonable security measures to attempt to assure that the identified person is the actual investor or their legal representative.

The form of the distribution letter sent to investors with their checks or report of credits due to collateral recoveries are attached as **Exhibits A** and **B**, respectively. Those letters, as well as the Receiver’s website have, informed investors that there will be a second, and possibly third, distribution to investors once various claim objection motions are

resolved. The resolution of those claim objection motions will allow the Receiver to determine the total amount of allowed claims to be paid thus allowing calculation of the total percentage to be distributed to investors with allowed claims. Presently, two claims objection motions remain pending before the Court. Those motions are docketed at Docket Nos. 984 and 1009 on the Receiver's website. The Receiver, to date, has filed four claims objection motions, two of which have been resolved. The Receiver intends to file at least two additional claims objection motions.

One of the pending claims objection motions (Docket No. 984) is an objection to the claims of many former McGinn Smith brokers. For a further description of the status of the SEC's proceeding against these brokers and the Receiver's claim objection, see page 5 below.

The second distribution to investors with allowed claims will commence once all claims objection motions are resolved.

### **Storage Facilities**

During this period, the Receiver vacated two storage locations including a significant warehouse storage facility in Clifton Park, New York. This eliminated a monthly expense of approximately \$153.12 by shredding and disposing of ancient McGinn Smith records contained at those sites pursuant to prior Court approval. The Receiver continues to maintain another storage location containing more current McGinn Smith records. Virtually all other records are maintained in electronic form.

### **Tax Matters**

Since the commencement of the Receivership, the Receiver has filed in excess of 600 tax returns for the many McGinn Smith entities. Some of those entities are trusts, which by their terms, have expired, and final tax returns for those entities whose terms expired were filed in 2017. A list of those entities can be found on attached **Exhibit C**. A further group of trusts will terminate by their own terms in 2018. At that time, final tax returns will be filed for those entities. A list of those entities can be found on attached **Exhibit D**.

### **Smith Saratoga Residence**

Pursuant to a Consent Order (Docket No. 958) which has been filed under seal, the Receiver is in the process of selling, in conjunction with the Smith's, their Saratoga residence. The marketing of the house has been undertaken through a licensed real estate firm. Upon the closing of a sale of the house, a report will be filed with the Court and posted on the Receiver's website.

### **Liquid Assets of the Estate**

As of September 24, 2018, estate assets total \$15,224,233 after deduction for the \$6,308,283.64 distributed to investors with allowed claims. This compares favorably to the initial account balance of \$485,491.63 at the time of the commencement of the Receivership in 2010, as described in more detail in the First Report of the Receiver (Docket No. 49). There are several minor and one potentially significant illiquid securities remaining to be liquidated if possible. Although efforts to monetize these illiquid investments, consisting of private equity investments and subordinated securities, have been attempted from time to time, buyers have not been located. Those efforts will continue.

**SEC Proceeding Against McGinn Smith Brokers**

As reported on the Receiver's website on September 24, 2013, the SEC charged ten McGinn Smith brokers with ignoring red flags which should have led them to conduct more due diligence into the securities they were recommending to their customers. The Receiver testified twice in the proceeding on behalf of the SEC. On February 25, 2015, the SEC prevailed in the broker proceeding. Among the remedies granted was disgorgement of commissions plus interest against seven brokers and a civil money penalty which, if the broker decision is upheld on appeal and collected, will be added to defrauded investor recoveries. The broker appeal was heard by the Commission on August 15, 2017.

As a result of a recent U.S. Supreme Court decision in the case of Kokesh v. Securities and Exchange Commission, the broker decision needs to be retried by a different SEC judge. A new judicial assignment has been made, and the case is awaiting retrial or other resolution.

Dated: October 12, 2018

PHILLIPS LYTTLE LLP

By /s/ William J. Brown  
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and

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Buffalo, New York 14203  
Telephone No.: (716) 847-8400

# ***Exhibit A***

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

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Tel: 716.847.7089  
www.mcginnsmithreceiver.com

One Canalside  
125 Main Street  
Buffalo, NY 14203

[DATE]

Re: First Investor Distribution Check

Dear McGinn Smith Investor:

Enclosed is a check representing your First Investor Distribution. This check is for ten percent of your allowed claim. If you have more than one McGinn Smith investment, you will receive a separate letter and check for ten percent of each allowed claim.

The enclosed check will be void if not cashed within ninety days. Please cash the check promptly.

As stated on the Receiver's website, it is estimated that total distributions to investors with allowed claims will range between approximately 13.5 to 21.7 percent.

We expect there to be at least one more distribution to investors with allowed claims at a later date following resolution of disputed claims, the collection of additional assets, and the calculation of collateral recoveries.

Very truly yours,

William J. Brown  
Receiver

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Doc #01-3064618.1

# ***Exhibit B***



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

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Tel: 716.847.7089  
www.mcginnsmithreceiver.com

One Canalside  
125 Main Street  
Buffalo, NY 14203

[DATE]

Re: First Investor Distribution Check (Collateral Recovery Investor)

Dear McGinn Smith Investor:

Enclosed is a check representing your First Investor Distribution. This check is for ten percent of your total allowed claims after deducting your reported total collateral recovery in accordance with the Court-approved Plan of Distribution. Please refer to the December 18, 2017 Announcement on the Receiver's website ([www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com)) for a more detailed description.

The enclosed check will be void if not cashed within ninety days. Please cash the check promptly.

The enclosed check represents the first distribution for all of your investments. This means that those investors who have some or all of their McGinn Smith investments in IRA's will need to determine what portion of the enclosed payment constitutes a "restorative payment" to the IRA(s) and then pay that "restorative payment" into the IRA(s). It is the responsibility of the IRA owner to maintain appropriate documents demonstrating that the amount he or she paid to the IRA(s) as a "restorative payment" is, in fact, a "restorative payment". Investors should consult with their own financial advisor for further advice on how to calculate a "restorative payment".

As stated on the Receiver's website, it is estimated that total distributions to investors with allowed claims will range between approximately 13.5 to 21.7 percent.

We expect there to be at least one more distribution to investors with allowed claims at a later date following resolution of disputed claims and the collection of additional assets.

Very truly yours,

William J. Brown  
Receiver

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Doc #01-3064618.24A  
Enclosure

# *Exhibit C*

Firstline Sr. Trust 07

Firstline Trust 07 Series B

Firstline Sr. Trust 07 Series B

Pacific Trust 02

TDM Cable Trust 06

TDM Luxury Cruise Trust 07

TDM Verifier Trust 07

TDM Verifier Trust 08

Firstline Trust 07

# *Exhibit D*

Fortress Trust 08

Integrated Excellence Jr. Trust 08

Integrated Excellence Sr. Trust 08

TDM Verifier Trust 09