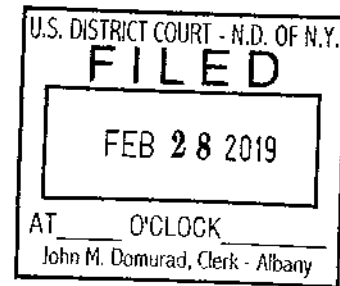


**Philip S. Rabinovich**  
73 Holly Lane  
East Hills, New York 11577



February 26, 2019

**By Federal Express**

Hon. Christian F. Hummel  
United States District Court for the  
Northern District of New York  
James T. Foley U.S. Courthouse  
445 Broadway  
Albany, New York 12207

**Re: SEC v. McGinn Smith, 10-cv-457**  
**Receiver's Uncontested Motion to Expunge My Claim**

Dear Judge Hummel:

I recently received documents filed by the Receiver (No. 1032) and the SEC (No. 1035) in connection with the Receiver's Motion to Disallow the Broker Claims. I was surprised to see that the Receiver and the SEC included references to me in these documents, because I never submitted any opposition to the Motion when it was originally filed in March 2018. I did not then, and do not now, oppose the relief that the Receiver sought in his Motion nearly a year ago.

I do, however, want to clarify certain points made by the Receiver and the SEC in their recent submissions, and request that references to individual investors contained in the numerous documents attached to the SEC's filing be redacted from the public record. I also ask that the Court post this letter to the public docket.

When the Receiver filed this Motion in March 2018 (No. 985), he argued that my claims should be disallowed or equitably subordinated, claiming that I "recklessly sold private

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placements in the Four Funds and the Trust Offerings to unsuspecting investors.” To support this accusation, the Receiver relied on an initial, non-final or binding decision by an administrative law judge (“ALJ”) with which I vigorously disagreed and had appealed to the Commission based on the evidence and law, including that the ALJ was not constitutionally appointed. On June 21, 2018, this initial, non-final, non-binding decision was nullified in its entirety by the United States Supreme Court in Lucia v. SEC. The Receiver did not update the Court on this material development for more than seven months.

The Receiver is correct that Lucia “created an extraordinary situation.” It established that respondents in SEC administrative proceedings, including myself, had been subjected to unconstitutional proceedings, which I had all along maintained.

In Lucia, the Supreme Court determined that the SEC’s administrative law judges were unconstitutional, and the “appropriate remedy for an adjudication tainted with an appointments clause violation is a new hearing before a properly appointed official.” As a result, the Commission remanded my case for a new hearing before a constitutionally-appointed ALJ.

In advance of my new hearing, the SEC contacted my attorneys and proposed to settle the case. The SEC proposed to drop all claims based in fraud if I would agree to a “no admit, no deny” cease-and-desist order for a negligence-based violation and pay disgorgement. As part of the settlement, the SEC also agreed that there would be no civil penalties or any industry bar or suspension. To avoid years of more costly litigation, I accepted the SEC’s settlement proposal, provided I would have the opportunity to comment on the SEC’s order before it was submitted to the Commission for final approval. I wanted to be sure that the order made clear that this was solely a negligence-based settlement, not a fraud-based settlement. The

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order was finalized and approved by the Commission on a “no admit no deny” basis solely for a negligence-based violation.

Suffice it to say, I was more than surprised and disturbed that, after the Commission entered its negligence-only final order, the Receiver filed an unnecessary “supplement” to the Motion, which I had never contested. Notwithstanding the Receiver’s erroneous assertion that the findings in the Commission’s order are “similar” to those in the now-nullified initial, non-binding decision issued by the unconstitutional administrative law judge in 2015, the order is very clear that the only violation found is based solely in negligence. See Order ¶¶ 17(a), 26, 41. (The copy of the order that the Receiver attached to his January 29, 2019 submission is covered in black marks making the key “negligence” language in paragraph 17(a) unreadable. The clerk of the court subsequently posted a clear, readably copy.).


I was similarly surprised and disturbed that the SEC made any filing, let alone one that refers repeatedly to “fraud” and references the initial, non-binding decision of the ALJ that was nullified by the Supreme Court’s decision in Lucia. The SEC well knows that the final order in my case was based solely in negligence. Yet, by submitting more than 30 exhibits as well as a declaration from its expert witness, the SEC suggests there may have been fraud, even though the SEC abandoned any claim of fraud in the order approved by the Commission. Such unwarranted “piling on” by the SEC is more than unseemly, especially given that (1) the Supreme Court nullified the initial, non-binding decision of the ALJ in its entirety, (2) the Commission approved a negligence-only order, (3) I have never contested the relief sought in the Receiver’s Motion, and (4) during the settlement of the administrative proceeding, the SEC told my counsel it had nothing to do with the Receiver and his consideration of investor claims.

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The recent filings by the Receiver and the SEC, and in particular their references to me, are, most charitably put, unnecessary and inaccurate. Because they will regrettably remain in the public record, I ask that the Court direct the SEC to redact any references to individual investors that are contained within the numerous exhibits attached to its unnecessary filing.

I appreciate the Court's attention to these matters.

Respectfully yours,



Philip S. Rabinovich, *pro se*

cc: John M. Domurad  
Clerk of the Court  
James T. Foley U.S. Courthouse  
Room 509  
445 Broadway  
Albany, New York 12207-2936

David Stoelting  
William J. Brown, Receiver

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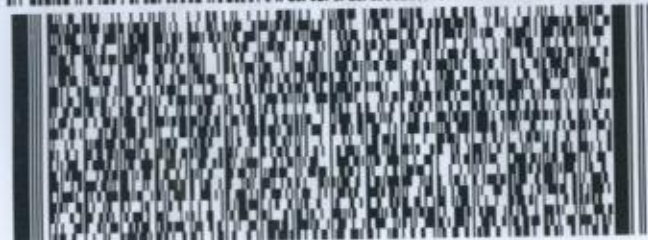
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