

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, LYNN A. 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)

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**RECEIVER’S REPLY TO RESPONSE OF STAN AND EVA RABINOVICH IN  
OPPOSITION TO THE NINTH CLAIMS MOTION OF WILLIAM J. BROWN, AS  
RECEIVER, FOR AN ORDER (A) DISALLOWING CERTAIN DISPUTED CLAIMS, (B)  
RECLASSIFYING CERTAIN DISPUTED CLAIMS, (C) APPLYING PREFERENTIAL  
PAYMENT OFFSET TO CERTAIN DISPUTED CLAIMS, AND (D) EXPUNGING  
PAPER CLAIMS**

William J. Brown, as Receiver (“Receiver”), by his counsel, Phillips Lytle LLP,  
respectfully submits (i) this Reply (“Reply”) to the Response of Stan and Eva Rabinovich in

Opposition to the Receiver’s Ninth Claims Motion for an Order (A) Disallowing Certain Disputed Claims, (B) Reclassifying Certain Disputed Claims, (C) Applying Preferential Payment Offset to Certain Disputed Claims, and (D) Expunging Paper Claims (Docket No. 1094) (“Rabinovich Objection”) filed by Stanley and Eva Rabinovich (together, the “Rabinovichs”) and (ii) the Declaration of William J. Brown, as Receiver, in Support of the Reply to the Response of Stan and Eva Rabinovich in Opposition to the Receiver’s Ninth Claims Motion for an Order (A) Disallowing Certain Disputed Claims, (B) Reclassifying Certain Disputed Claims, (C) Applying Preferential Payment Offset to Certain Disputed Claims, and (D) Expunging Paper Claims (“Brown Dec’l.”).<sup>1</sup>

**PRELIMINARY STATEMENT**<sup>2</sup>

The Rabinovichs argue in the Rabinovich Objection that the Rabinovich Claims should not be subject to disallowance or offset as a result of the so-called “bridge loans” made by Stanley Rabinovich in October 2007 and January 2009 (collectively, the “Loans”) because the Rabinovichs lacked actual knowledge of McGinn’s and Smith’s fraudulent scheme.<sup>3</sup> Even if the Rabinovichs lacked actual knowledge of the fraud, however, Stanley Rabinovich was aware of multiple circumstances at the time he made the Loans that should have been “red flags” indicating that harm could result. The Loans, although described as “bridge loans,” were documented and treated like investments in Firstline 07 Series B and TDMM Cable 09. Stanley Rabinovich was also aware that interest payments on other MS & Co. investments (including

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings assigned to them in the Memorandum of Law in Support of the Ninth Claims Motion of William J. Brown, as Receiver, for an Order (A) Disallowing Certain Disputed Claims, (B) Reclassifying Certain Disputed Claims, (C) Applying Preferential Payment Offset to Certain Disputed Claims, and (D) Expunging Paper Claims (Docket No. 1075) (“Memorandum”).

<sup>2</sup> No other response objecting to the relief sought by the Ninth Claims Motion has been filed or served other than the Rabinovich Objection.

<sup>3</sup> While the Rabinovichs also state that they seek an opportunity to seek discovery in connection with the disallowance or offset of the Rabinovich Claims, as of the date hereof, the Rabinovichs have made no request to the Receiver for any discovery.

those of his wife, Eva) were being suspended while the October 2007 Loan was still being repaid and well before he made the January 2009 Loan. Indeed, his son, Philip Rabinovich, was a top-selling broker at MS & Co. during this time (having sold \$16,206,500 in MS & Co. private placements) and was held to have violated the Securities Act for ignoring these very same “red flags” and continuing to sell MS & Co. investments. *See Order Making Findings and Imposing Remedial Sanctions, Frank H. Chiappone, et al.*, Order Release No. 10595 (Dec. 21, 2018). As a result, Philip Rabinovich’s claims against MS & Co. have been disallowed by this Court. *See Broker Claims Order (Docket No. 1043) at 4-5.*

The Loans were made recklessly by Stanley Rabinovich and resulted in harm to legitimate investors who were deceived into believing that the offerings had satisfied minimum funding requirements, as well as the subsequent investors whose investments repaid the Loans. Accordingly, the Rabinovich Claims should be disallowed, or, in the alternative, offset, due to Stanley Rabinovich’s inequitable conduct and unequal treatment. The fact that some of the Rabinovich Claims are held jointly by Stanley and Eva Rabinovich should not prevent disallowance or offset of such claims.

**THE RABINOVICH CLAIMS SHOULD BE DISALLOWED**

The Rabinovichs argue that the Rabinovich Claims should not be disallowed because Stanley Rabinovich lacked actual knowledge of McGinn’s and Smith’s fraud when making the Loans. The Receiver need not demonstrate that claimants possessed actual knowledge of the fraud to disallow claims based on a claimants’ involvement with a Ponzi scheme. *See Broker Claims Order at 8 (disallowing the claims of certain MS & Co. brokers, including Philip Rabinovich, due to their ignoring certain “red flags” in violation of the Securities Act).* Indeed, in many of the cases cited in the Rabinovich Objection, Courts approved the disallowance of

claims where the claimants participated in a fraudulent scheme without having actual knowledge of the fraud. *See, e.g., Sec. and Exch. Comm'n v. Bivona*, No. 16-cv-01386-EMC at \*42-44 (N.D. Cal. Sept. 13, 2017); *S.E.C. v. Pension Fund of Am. L.C.*, 377 Fed.Appx. 957, 963 (11th Cir. 2010); *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 660 (6th Cir. 2001).

Courts have also disallowed claims where the claimant “recklessly participated” in a fraudulent scheme. *See S.E.C. v. Forte*, Civil Nos. 09-63, 09-64, 2012 WL 1719145 at \*3 (E.D.Pa. May 16, 2012) (holding that investors who further a Ponzi scheme by their reckless behavior “are not ‘innocent’ and so are not entitled to the same relief as truly innocent investors”).

At the time Philip Rabinovich arranged for Stanley Rabinovich to make the Loans, Stanley Rabinovich should have realized that something was amiss at MS & Co. First, while Stanley Rabinovich claims to have believed he was making temporary bridge loans, the Loans were documented as investments. There was no loan documentation executed for the Loans - rather, Stanley Rabinovich executed subscription agreements and received interest payments as if he were a regular investor in the two offerings. *See* Broker Trial Tr. 3409:17-3410:5, 2116:23 - 2117:2; *see also* Ex. A to the Brown Dec’l. (excerpts of investment registers maintained at MS & Co. showing that the Loans were registered as investments).

Second, as an investor in a junior tranche of the Four Funds, Stanley Rabinovich received letters from Smith in January 2008 and April 2008 notifying investors that interest payments on the junior tranches of Four Funds Notes were being reduced and ultimately eliminated. *See* Exs. B and C to the Brown Dec’l. The first Loan was repaid in full in June 2008, well after Stanley Rabinovich was on notice that MS & Co. was struggling to pay investors. *See* Broker Trial Tr. 2092:12-13.. In October 2008, Stanley Rabinovich received a third letter from Smith, extending the maturity dates of the Four Funds Notes and further reducing interest payments on the Notes.

*See* Ex. D to the Brown Dec'1. Notwithstanding his knowledge that MS & Co. offerings were underperforming and unable to make payments to investors, Stanley Rabinovich agreed to make the second Loan in 2009 to help close the TDMM Cable 09 offering.<sup>4</sup>

By his own affidavit, Stanley Rabinovich is a self-admitted, highly-educated and sophisticated professional who believed he was making temporary bridge loans. *See* Aff. of Stanley Rabinovich ¶¶ 3, 5 - 6. The improper documentation of the Loans and the “red flags” raised by the Four Funds letters should have immediately caused Stanley Rabinovich to realize that harm could have resulted from his actions. *S.E.C. v. Forte*, 2012 WL 1719145 at \*3. The Loans allowed McGinn and Smith to close private placement offerings that otherwise would not have been fully funded. *See* Memorandum at 9-10; *see also* Obj. at 13 (describing the purpose of the Loans as satisfying the minimum funding required so a deal could close). After closing, McGinn and Smith were able to break escrow and access investor funds, which they then misused. *See* Memorandum at 9. The Loans also deceived legitimate investors, who believed that the minimum funding for those offerings had been achieved, and were improperly repaid out of funds raised through subsequent investors (who did not know their investments were being used to pay the Loans). *Id.* Not only did the Loans provided by Stanley Rabinovich allow McGinn and Smith to close offerings and perpetuate their Ponzi scheme, Stanley Rabinovich was repaid through the Ponzi scheme. Memorandum at 10. Stanley Rabinovich improperly received payments when he knew other MS & Co. investors were not being paid.

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<sup>4</sup> Philip Rabinovich was also aware of these same issues with the Four Funds in early 2008 and this Court found these problems to be among the red flags that should have prompted further inquiry by Philip Rabinovich and ultimately supported the disallowance of his claims. *See* Broker Claims Order at 6.

**IN THE ALTERNATIVE, THE RABINOVICH CLAIMS SHOULD BE SUBJECT TO  
OFFSET**

If the Rabinovich Claims are not disallowed, they should, in the alternative, be subject to offset with respect to the amounts received on account of the Loans. The Rabinovichs argue first that the Rabinovich Claims cannot be offset because Stanley Rabinovich lacked actual knowledge of McGinn's and Smith's fraudulent scheme. This Court has previously approved offsets for preferential payments received by certain investors who did not possess actual knowledge of the fraud. *See Preferred Investor Order at 6-7.*<sup>5</sup> The offset was applied to those preferred investors because they received preferential payments that were not the legitimate proceeds of their investments and that other similarly situated investors did not receive. Preferred Investor Order at 2.

Second, the Rabinovichs argue that Stanley Rabinovich was not a "preferred investor" as the United States Attorney's Office used the term during the criminal trial of McGinn and Smith. Obj. at 11. Stanley Rabinovich is a "preferred investor" in the sense used by the United States Attorney and by the Preferred Investor Order because he received early and irregular payments from McGinn and Smith that were not generated through his investments and that other similarly situated investors did not receive. The Loans, documented as investments, were improperly repaid with funds raised from purchases by subsequent investors and long before the maturity date of the offerings. Memorandum at 10. The purpose of an offset for preferential payments like the one sought by the Receiver here is to treat the recipients of such payments like other similarly situated investors who did not receive such payments. Preferred Investor Order at 2. It would otherwise be inequitable to allow Stanley Rabinovich to share fully in the distributions

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<sup>5</sup> "Preferred Investor Order" refers to the Summary Order granting the relief requested in the Receiver's Fourth and Fifth Claims Motions entered on March 6, 2019 (Docket No. 1042).

made to other investors without any accounting for the \$850,000 of improper repayments that he received from MS & Co.

Finally, the Rabinovichs argue that the Rabinovich Claims cannot be offset because the Loans were bona fide loans outside of the scope of the Plan of Distribution.<sup>6</sup> The Loans were not bona fide loans: they were documented and treated as investments and were redeemed with funds raised through subsequent investor purchases.<sup>7</sup> See *Welch v. C.I.R.*, 204 F.3d 1228, 1230 (9th Cir. 2000) (noting that among the factors assessed to determine if a transaction is a true loan include whether the promise to repay is evidenced by a note or other instrument, whether a fixed schedule for repayments was established, whether the borrower had a reasonable prospect of repaying the loan and whether the lender had sufficient funds to advance the loan; and whether the parties conducted themselves as if the transaction were a loan).

Meanwhile, Stanley Rabinovich is an investor (for other monies provided) in MS & Co. and the Rabinovich Claims - and any distributions owed in connection therewith - are subject to the Plan of Distribution. The Court has previously approved preferential payment offsets against distributions for investor claims where the preferential payment at issue was not a “distribution” made on account of an investment but rather an arbitrary preferential payment made to an investor that other similarly situated investors did not receive. Preferred Investor Order at 6-7. Contrary to the Rabinovichs’ assertions in the Rabinovich Objection, there is no requirement that such a preferential payment be a distribution owed on account of an investment for the Court to approve an offset for such payment.

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<sup>6</sup> The Rabinovichs contend that the test to determine if a transaction is a bona fide loan is whether the parties intended repayment. *Bergersen v. C.I.R.*, 109 F.3d 56, 59 (1st Cir. 1997) (examining whether a payment was a shareholder dividend or a loan in a tax dispute). Applying this test would result in most, if not all, McGinn Smith investors being considered lenders, as they too expected repayment of their investments upon maturity.

<sup>7</sup> The Guzzetti cross-examination cited in the Rabinovich Objection is inapposite here because it does not explain why, if the Loans were bona fide, they were not documented as loans.

**JOINT RABINOVICH CLAIM**

The Rabinovichs argue that the claim held jointly by Stanley Rabinovich and Eva Rabinovich in the amount of \$454,664.29 (“Joint Claim”) should not be subject to any disallowance or offset because Eva Rabinovich did not make the Loans and did not receive the repayments of the Loans. According to the Rabinovich Objection, the only way the Joint Claim may be reduced or offset as a result of the Loans is if Stanley Rabinovich’s behavior is imputed to Eva Rabinovich. Obj. at 3-6. The Court need not take this step, however, because the Joint Claim is owned jointly by Stanley Rabinovich and is therefore subject to disallowance or offset as a result of his actions, without imputing his conduct to Eva Rabinovich.

Under New York law, “[t]he opening of a joint bank account creates a rebuttable presumption that each named tenant is possessed of the whole of the account so as to make the account vulnerable to the levy of a money judgment by the judgment creditor of one of the joint tenants.” *Viggiano v. Viggiano*, 532 N.Y.S.2d 874, 875 (N.Y. App. Div. 2d Dep’t 1988). This presumption may be rebutted by providing proof that no joint tenancy was intended or that the joint account had been opened for convenience only. *Signature Bank v. HSBC Bank USA, N.A.*, 889 N.Y.S.2d 242, 918 (N.Y. App. Div. 2d Dep’t 2009). Otherwise, the judgment creditor may reach the entirety of the contents of the jointly held account. *See S.E.C. v. Smith*, 646 Fed.Appx. 42, 43 (2d Cir. 2016) (rejecting Lynn Smith’s argument that this Court erred by applying all of the assets in a stock account jointly held with husband to satisfy final judgment against husband); *New York Community Bank v. Bank of America, N.A.*, 93 N.Y.S.3d 7 (N.Y. App. Div. 1st Dep’t 2019) (holding that judgment creditor was entitled to turnover of the entire contents of a jointly owned safety deposit box where only one joint tenant was the judgment creditor); *JRP Old Riverhead, Ltd. v. Hudson City Sav. Bank*, 965 N.Y.S.2d 914, 914 (N. Y. App. Div. 2d Dep’t



2013) (holding that judgment creditor was not required to establish that judgment debtor was the sole contributor of funds of jointly owned account to obtain turnover of the funds in the account).<sup>8</sup>

The Rabinovichs have offered no evidence to rebut the presumption that Stanley Rabinovich is not possessed of the “whole of” the Joint Claim or that the Joint Claim results from an investment made solely with Eva Rabinovich’s funds. Thus, entirety of the Joint Claim may be subject to disallowance or offset even though Eva Rabinovich did not make the Loans or receive repayment of the Loans. *See also* Broker Claims Order at 9 (disallowing claims held jointly by certain MS & Co. brokers and non-broker third parties based on the brokers’ misconduct).

#### **EVA RABINOVICH INDIVIDUAL CLAIMS**

Eva Rabinovich holds two claims individually: one claim for TDM Cable Trust in the amount of \$15,000 (Claim No. 6122) and one claim for FEIN Secured Senior Notes in the amount of \$919,953.59 (Claim No. 6123) (together, the “Individual Claims”). The Rabinovichs argue that these claims should not be disallowed or offset. In connection with the preparation of this Reply, the Receiver has discovered additional records confirming that that the Individual Claims (while initially a joint claim with Stanley) are not now shared jointly with Stanley Rabinovich. Accordingly, the Receiver concedes that the Individual Claims are not subject to disallowance or offset as a result of Stanley Rabinovich’s conduct in making the Loans. The Receiver expressly reserves all rights to object to the Individual Claims on any other basis.

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<sup>8</sup> *But see Crane v. Crane*, 609 N.Y.S.2d 362, 666 (N.Y. App. Div. 2d Dep’t 1994) (holding that the Family Court erred in concluding that respondent had no ownership interest in proceeds of jointly owned bank account where statutory presumption under New York Banking Law § 675(b) is that respondent owned a one-half interest in account); *Velocity Invs., LLC v. Kawski*, 21 Misc.2d 276, 283-84 (City Court of Dunkirk 2008) (“As a matter of law, the opening of a joint account is prima facie evidence . . . that the judgment debtor’s interest is limited to 50% of the amount on deposit in the account . . .”).

**CONCLUSION**

The Receiver requests that the Court (i) overrule the Reply, (ii) enter an Order substantially in the form attached to this Reply as Exhibit 1 (A) disallowing the Disputed Claims listed on Exhibit A to the Motion, other than the Individual Claims, as indicated on the attached proposed Order, (B) reclassifying the Disputed Claims listed on Exhibit B to the Motion, (C) applying a Preferential Payment Offset to the Disputed Claims listed on Exhibit C-1 to the Motion, and (D) expunging the paper claims listed on Exhibits A, C-2, D-1, D-2, and D-3 to the Motion, and (iii) grant such other and further relief as the Court deems just and proper.

Dated: November 25, 2019

PHILLIPS LYTTLE LLP

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION :

*Plaintiff,* :

vs. :

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

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, LYNN A. 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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**ORDER APPROVING NINTH CLAIMS MOTION OF WILLIAM J. BROWN, AS  
RECEIVER, FOR AN ORDER (A) DISALLOWING CERTAIN DISPUTED  
CLAIMS, (B) RECLASSIFYING CERTAIN DISPUTED CLAIMS, (C)  
APPLYING PREFERENTIAL PAYMENT OFFSET TO CERTAIN DISPUTED  
CLAIMS, AND (D) EXPUNGING PAPER CLAIMS**

Upon the Ninth Claims Motion of William J. Brown, as Receiver, for an Order  
(A) Disallowing Certain Disputed Claims, (B) Reclassifying Certain Disputed Claims, (C)  
Applying Preferential Payment Offset to Certain Disputed Claims, and (D) Expunging Paper  
Claims; and notice of the Motion having been given to the Securities and Exchange Commission,  
each of the claimants listed on each Exhibit to the Motion, by first class mail, and all parties who  
have filed a Notice of Appearance in this action by ECF, and all creditors of the McGinn, Smith

entities and other parties in interest via the Receiver's website, which notice is deemed good and sufficient notice; and the Court having deemed that sufficient cause exists; it is therefore

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

ORDERED, that each Remar-Lex Claim, together with each Remar-Lex Paper Claim, listed on Exhibit A to the Motion as attached to this Order is disallowed; and it is further

ORDERED, that each Rabinovich Claim other than those claims marked as "Individual Claim", together with each Rabinovich Paper Claim, listed on Exhibit A to the Motion as attached to this Order is disallowed; and it is further

ORDERED, that the ADT Claims listed on Exhibit B to the Motion as attached to this Order are reclassified to unsecured claims and are disallowed; and it is further

ORDERED, that the HSK Claim is reclassified to a secured claim to the extent of the value of the collateral and as an unsecured claim for any deficiency in accordance with the Plan of Distribution; and it is further

ORDERED, that the application of the Preferential Payment Offset to reduce the distributions to Preferred Investors is approved as set forth on Exhibit C-1 to the Motion as attached to this Order and each of the Preferred Investor Paper Claim listed on Exhibit C-2 to the Motion as attached to this Order is disallowed; and is further

ORDERED, that each of the paper claims listed on Exhibits D-1, D-2, and D-3 to the Motion as attached to this Order are disallowed; and the rights of the Receiver to object on any other basis to the claims of all investors or claimants is expressly preserved.

Dated: \_\_\_\_\_, 2019

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HON. GARY L. SHARPE

# *Exhibit A*

Claim No.	Last Name	First Name	Description	Amount	Paper Claims
6192	Remar & Lex	Kimellen & William F	FAIN SECURED SENIOR NOTES	\$45,997.68	Filed duplicate paper claim
6193	Remar & Lex	Kimellen & William F	FAIN SECURED SENIOR NOTES	\$18,399.07	Filed duplicate paper claim
6122 <b>(Individual Claim)</b>	EVA	RABINOVICH	TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10	\$15,000.00	Filed duplicate paper claim
6123 <b>(Individual Claim)</b>	Eva	Rabinovich	FEIN SECURED SENIOR NOTES	\$919,953.59	Filed discrepant paper claim for \$1,000,000
6125	Stan	Rabinovich	Cruise Charter Ventures, LLC	\$100,000.00	Filed duplicate paper claim
6126	STAN	RABINOVICH	FIIN 10.25% SECURED JUNIOR NOTES DUE 12/15/2008	\$200,000.00	Filed duplicate paper claim
6127	STAN	RABINOVICH	FIRSTLINE TRUST 07 11% JUNIOR CONTRACT CERTIFICATES DUE 05/01/12	\$179,542.00	Filed discrepant paper claim for \$200,000
6128	STAN	RABINOVICH	TDM LUXURY CRUISE TRUST 07 CONTRACT CERTIFICATES 10% DUE 9/1/11	\$185,000.00	Filed discrepant paper claim for \$200,000
6129	STAN	RABINOVICH	TDMM CABLE SR TRUST 09 9%	\$5,434.92	
6130	Stan	Rabinovich	FEIN SECURED SENIOR NOTES	\$919,953.59	Filed discrepant paper claim for \$1,000,000
6131	Stan	Rabinovich	McGinn, Smith Firstline Funding, LLC	\$300,000.00	Filed duplicate paper claim
6132	STANLEY	RABINOVICH	FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009	\$75,000.00	Filed duplicate paper claim
6133	STANLEY	RABINOVICH	PACIFIC TRUST	\$18,991.94	Filed discrepant paper claim for \$24,000
6134	STANLEY	RABINOVICH	TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10	\$20,000.00	Filed duplicate paper claim
6135	Stanley B & Eva	Rabinovich	TAIN SECURED SENIOR NOTES	\$454,664.29	Filed discrepant paper claim for \$500,000
6136	STANLEY B & EVA	RABINOVICH	TDMM BENCHMARK TRUST 09 08%	\$0.00	

# ***Exhibit B***

Claim No.	Last Name	First Name	Description of Claim	Amount	Current Classification	Proposed Reclassification	Explanation
4107D	ADT Security Services, Inc.	Sally Edison- McGuireWoods LLP	No Liability, TDM Cable Funding LLC	\$3,746,151.70	Investor Claim	Unsecured Claim	Claimant asserts a claim for unsecured contractual payment obligation
(Paper Claim)	ADT Security Services, Inc.		TDM Cable Funding LLC	\$3,746,151.70	Investor Claim	Unsecured Claim	Claimant asserts a claim for unsecured contractual payment obligation
(Paper Claim)	ADT Security Services, Inc.		Prime Vision Communications L	\$3,746,151.70	Investor Claim	Unsecured Claim	Claimant asserts a claim for unsecured contractual payment obligation
5328	HSK Funding Inc.		107th Associates LLC	\$1,030,000.00	Investor Claim	Secured Claim to the extent of the value of the collateral and Unsecured Claim for any deficiency	Claimant asserts a claim for secured debt obligation



# ***Exhibit C-1***

Claim Nos.	Claim Description	Claim Amount	Proposed First Distribution (10%)	Total Preferential Payments Received	Source of Preferential Payment	Proposed First Distribution After Application of Offset
5444D	TDM Cable Funding LLC	\$50,000	\$5,000.0	\$4,098.98	TDM	\$901.02
5812D	McGinn, Smith Funding LLC	\$125,000	\$12,500.0	\$134,700.00	MSF	(\$122,200.00)
6164	McGinn Smith Funding, LLC	\$50,000	\$5,000.0	\$4,098.96	TDM	\$901.04**
6234D	TDM Cable Funding LLC	\$25,000	\$2,500.0	\$1,983.39	TDM	\$516.61
6492D	TDM Cable Funding LLC	\$50,000	\$5,000.0	\$4,890.65	TDM	\$109.35
6312D	TDMM Benchmark Trust 09 12%	\$150,000	\$15,000.0	\$837,588.17	MSF	(\$687,588.17)

\*\*This investor also received preferential payments, as described in greater detail in the Seventh Claims Motion, and the Receiver has sought to apply an offset of \$780,435 to distributions owed in connection with all of this investor's claims

# ***Exhibit C-2***

Claim Nos.	Claim Description	Claim Amount	Paper Claim	Reason for Disallowance
5444D	TDM Cable Funding LLC	\$50,000	\$50,000	Duplicate
6492D	TDM Cable Funding LLC	\$50,000	\$44,823	Discrepant**
6312D	TDMM Benchmark Trust 09	\$150,000	\$150,000	Duplicate

\*\*This Preferred Investor filed a discrepant paper claim reducing the principal amount of the scheduled claim to account for the Preferential Payments received. By the Motion, the Receiver proposes to reduce the distributions to be made to this Preferred Investor, rather than the principal amount of the claim.

# ***Exhibit D-1***

**Exhibit D-1 - Discrepant Paper Claims**

Claim No.	Description of Investment	Amount of Allowed Claim	Amount of Paper Claim
6491	TAIN Secured Senior Notes	\$54,559.72	\$60,000.00
6487	Integrated Excellence Sr. Trust 08	\$10,254.75	\$15,000.00

#4449336.1

# ***Exhibit D-2***

## Exhibit D-2 - Duplicate Paper Claims

Claim No.	Description of Investment	Amount of Claim on Receiver's Website	Amount of Paper Claim
5562 **	FAIN Secured Senior Subordinated Notes	\$25,000.00	\$25,000.00
5608 **	Seton Hall Mortgage Note Holders	\$21,576.97	\$21,576.97
5779	FEIN Secured Senior Subordinated Notes Due 1/30/2009	\$10,000.00	\$10,000.00
5777	FAIN Secured Senior Subordinated Notes	\$10,000.00	\$10,000.00
5780	FEIN Secured Senior Subordinated Notes Due 1/30/2009	\$15,000.00	\$15,000.00
5778	FAIN Secured Senior Subordinated Notes	\$20,000.00	\$20,000.00
6100	FEIN 10.25% Secured Junior Notes Due 01/30/2009	\$25,000.00	\$25,000.00
6099	FEIN Secured Senior Subordinated Notes Due 1/30/2009	\$30,000.00	\$30,000.00
6101	TAIN Secured Junior Notes Due 12/15/2009	\$25,000.00	\$25,000.00
6102	FAIN Secured Senior Subordinated Notes	\$100,000.00	\$100,000.00
6103	TAIN Secured Senior Subordinated Notes 7.75% Due 12/15/2009	\$50,000.00	\$50,000.00
6751	TAIN Secured Senior Notes	\$100,026.14	\$100,026.14
6930	TDM Cable Trust 06 10% Contract Certificates Due 11/15/10	\$10,000.00	\$10,000.00

\*\* This investor has previously received a first distribution. Disallowance of this paper claim will not affect this investor's allowed claims.

#4449330.1



# ***Exhibit D-3***

## Exhibit D-3 - Other Paper Claims

Claim No.	Description of Investment	Amount of Paper Claim	Reason for Disallowance
4111	CMS Financial	\$31,000.00	Non-Receivership
	Atlantis Strategic	\$25,000.00	Non-Receivership
	SASB Int A/O 1/2	None given	Non-Receivership
	Integrated Alarm	\$10,100.00	Non-Receivership
	Federated Premier Muni	\$26,969.00	Non-Receivership
	Integrated Alarm	\$19,274.44	Non-Receivership
	Aim Invesco High Yield	\$13,393.00	Non-Receivership
	Evergreen Income Advantage	\$6,584.09	Non-Receivership
	FLB	\$41,000.00	Non-Receivership
	MS Real Estate Capital Partners	\$15,000.00	Non-Receivership
	Unknown	\$33,232.00	No liability
	SAI Trust	\$10,000.00	Excluded Entity
	SAI Trust	\$15,000.00	Excluded Entity
	SAI Trust	\$8,634.00	Excluded Entity
4355 **	CMS Financial	\$100,000.00	Non-Receivership
	CMS Financial	\$40,274.32	Non-Receivership
	Integrated Alarm	\$21,000.00	Non-Receivership
	CMS Financial	\$25,000.00	Non-Receivership
	SAI Trust 00	\$8,707.70	Excluded Entity
	CMS Financial	\$25,000.00	Non-Receivership
	SAI Trust 03	\$20,076.06	Excluded Entity
5401	CMS Financial	\$25,000.00	Non-Receivership
	SAI Trust 00	\$16,535.40	Excluded Entity
5527	TDM Verifier Trust 09 10% Contract Certificates		
	Due 12/31/11	\$10,000.00	Untimely Filed
	Christian Values Network, Inc.	\$25,000.00	Non-Receivership
	Faith and Family Values Network, Inc.	\$25,000.00	Non-Receivership
	SAI Trust	\$20,000.00	Excluded Entity
	CMS Financial	\$109,350.00	Non-Receivership
	CMS Financial	\$109,350.00	Non-Receivership
	CMS Financial	\$30,000.00	Non-Receivership

	SAI Trust 00		\$20,000.00	Excluded Entity
	CMS Financial		\$155,000.00	Non-Receiver'ship
6192	FIIN Secured Senior Note		\$22,733.21	No liability
	MS Real Estate Capital Partners		\$30,000.00	Non-Receiver'ship
	CMS Financial		\$30,000.00	Non-Receiver'ship
	CMS Financial		None given	Non-Receiver'ship
	CMS Financial		None given	Non-Receiver'ship
6453	SAI Trust 00		\$16,660.12	Excluded Entity
	SAI Trust		\$8,707.76	Excluded Entity
	SAI Trust 00		\$10,000.00	Excluded Entity
	CMS Financial		\$38,100.00	Non-Receiver'ship
	First Independent Income Notes LLC		\$25,000.00	No liability

\*\* This investor has previously received a first distribution. Disallowance of this paper claim will not affect this investor's allowed claims.

#4449342.1

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----X

SECURITIES AND EXCHANGE COMMISSION :

*Plaintiff,*

vs.

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

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, LYNN A. 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.*

-----X

**DECLARATION OF WILLIAM J. BROWN, AS RECEIVER, IN SUPPORT OF REPLY TO  
RESPONSE OF STAN AND EVA RABINOVICH IN OPPOSITION TO THE NINTH CLAIMS  
MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR AN ORDER (A) DISALLOWING  
CERTAIN DISPUTED CLAIMS, (B) RECLASSIFYING CERTAIN DISPUTED CLAIMS, (C)  
APPLYING PREFERENTIAL PAYMENT OFFSET TO CERTAIN DISPUTED CLAIMS, AND (D)  
EXPUNGING PAPER CLAIMS**

William J. Brown, as Receiver, declares, under the penalty of perjury, 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 Reply (“Reply”) to the Response of Stan and Eva Rabinovich in Opposition to the Receiver’s Ninth Claims Motion for an Order (A) Disallowing Certain Disputed Claims, (B) Reclassifying Certain Disputed Claims, (C) Applying Preferential Payment Offset to Certain Disputed Claims, and (D) Expunging Paper Claims (Docket No. 1094) (“Rabinovich Objection”) filed by Stanley and Eva Rabinovich (together, the “Rabinovichs”).

3. Excerpts from the original investment registers for the Firstline 07 Series B Trust and TDMM Cable 09 Trust are attached here as Exhibit A (collectively, the “Investment Registers”). The Investment Registers were excel spreadsheets maintained internally at MS & Co. to track investments.<sup>1</sup> The Investment Registers show that the Loans were registered as investments in Firstline 07 Series B and TDMM Cable 09.

4. Attached to this Declaration as Exhibit B is a copy of the January 2008 letter from David Smith to investors in the junior tranches of Four Funds Notes, notifying investors that interest payments were being reduced.

5. Attached to this Declaration as Exhibit C is a copy of the April 2008 letter from David Smith to investors in the junior tranches of Four Funds Notes, notifying investors that interest payments were being eliminated.

6. Attached to this Declaration as Exhibit D is a copy of the October 2008 letter from David Smith to all investors in the Four Funds Notes, notifying investors that interest

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<sup>1</sup> The Investment Registers have been edited to remove certain extraneous information.

payments on the Four Funds Notes were being reduced further and that the maturity dates of the Four Funds Notes were being extended.

November 25, 2019

/s/ William J. Brown  
William J. Brown

Doc #4579433.1

# *Exhibit A*

CLT TYPE	COMNAME	INVT REGISTRATION	PRD DESC	PRD DESC2	TOTAL PAID	TICKETED AMOUNT	CURRENT VALUE	TOTAL INVOICED	TOTAL OWED	TOTAL PAYMENTS	FIRST PAYMENT	LAST PAYMENT	INVT STATUS	INVT MATURITY DATE
INDIV	Stan Rabinovich	STAN RABINOVICH	FIRSTLINE TRUST 07 SERIES B	JUNIOR CONTRACT CERTIFICATES 11% DUE 10/01/12	600000	600000	0	600000	0	1	29-Oct-07	29-Oct-07	CLOSED	01-Oct-12
INDIV	Stan Rabinovich	STAN RABINOVICH	TDMM CABLE SR TRUST 09	CONTRACT CERTIFICATES	13921.87	250000	6973.87	13921.87	0	3	30-Jan-09	08-Jul-09	RESOLD	02-Feb-12



# ***Exhibit B***

January 15, 2008

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: \$ \_\_\_\_\_ Third Albany Income Notes, LLC – Internal Investment # \_\_\_\_\_  
Registration: \_\_\_\_\_

Dear: \_\_\_\_\_

As an investor in one of the following mezzanine debt funds (FUNDS) managed by McGinn, Smith Advisors (MSA), we thought that it was important to communicate with you the general status of the funds, our view on the current credit markets and their impact on your fund, how MSA views the markets going forward, and steps that we are considering to address the present credit conditions.

The FUNDS include:

- First Independent Income Notes, LLC
- First Excelsior Income Notes, LLC
- Third Albany Income Notes, LLC
- First Advisory Income Notes, LLC

Each of the LLC's has three series of notes that have been issued: Senior Notes, Senior Subordinated Notes, and Junior Notes, all with varying interest rate coupons and maturities. In each of the LLC's, the notes starting with the Senior down through the Junior have a primary call on the assets and cash flow of the various investments in each of the LLC's. Thus, the Senior Notes receive all of the income and asset value of the entire LLC until satisfied, followed by the Senior Subordinate Notes, and finally the Junior Notes are entitled to asset coverage and cash flow only after the Senior and Senior Subordinate Notes are satisfied. You are an investor in the Junior Notes.

MSA is the sole equity member of all the FUNDS, and therefore as the managing member is responsible for all the decisions impacting the business of the FUNDS. MSA has a fiduciary responsibility to manage the FUNDS in a manner consistent with the investment goals and to best preserve the assets of the FUNDS.

Over the last several months, a number of investors have inquired as to the impact on the FUNDS due to the turmoil, and in some cases collapse, of the various debt and credit markets, as a result of the sub-prime mortgage debt crises that started to boil over in July of 2007. As the impact has grown, and in our judgment the crisis shows less and less probability of being resolved quickly and easily, MSA has begun an effort to get

ahead of events and formulate strategies that will protect the value of the LLC's and your investment in them.

While the media, including newspapers and financial publications, have provided a daily accounting of the credit market crisis and the subsequent financial impact, I realize some of you may not be in a position or have the interest to follow what has been taking place, so I have provided a brief summary. First, it should be understood that the credit crisis is primarily a result of the major Wall Street investment banks and the largest commercial banks in the country developing and marketing a variety of investment instruments built on a shaky foundation of sub prime mortgages. Sub prime mortgages can be defined as those mortgages offered to borrowers with spotty credit, mortgages that required too little equity, mortgages on properties in less desirable areas or where the supply of housing was growing beyond the demand, and where the terms of the mortgage often emphasized "teaser rates" or interest only requirements early in the amortization schedule. While these types of mortgages carry a high risk of default, the early years of the recent housing boom produced unusually low rates of default and created a false sense of security for the mortgage lenders.

In pure destructive power, the sub prime mess has become Wall Street's version of Hurricane Katrina. It has reeked havoc on the nation's largest brokerage firm, Merrill Lynch, and biggest bank, Citigroup, which have announced billions of dollars in losses and have fired their celebrated CEOs. Dozens of similar companies in the mortgage business have folded completely. As stunning as today's losses are, more carnage lies ahead. Wall Street banks are holding tens of billions in risky securities on their books, and no one seems to have any idea what they are worth. The follow on crisis is that confidence in the value of all securities, but mostly the smaller and more illiquid securities, is destroyed. Investors are reluctant to pay any price because they are not sure what the real value is, and if they are forced to sell them in the future they may do so only by slashing prices. Thus, investors go on strike and refuse to bid any price. In addition, many of these securities were purchased with debt. As prices go down, lenders require more security through increased equity. To get equity and raise cash, investors have to sell the illiquid securities. With no real markets, prices are driven forever lower, and a vicious cycle is started. In a high number of cases, there is simply no price that investors are willing to pay, and the value of the securities must be further marked down, generally based on some theoretical model put together by the investment bankers. That is why Merrill Lynch predicted a \$4.5 billion sub prime loss for the third quarter, then jolted investors and analysts three weeks later by announcing that its real default was \$7.9 billion, or 76% more than the initial estimate. And just last week, Merrill Lynch again announced an increase in their losses to over \$15 billion dollars, approximately 3 ½ times their original estimate. And Merrill is not alone. Losses on CDO's, asset backed securities, and other structured products include announced losses by Citigroup (\$9.8 billion, followed by an additional \$24 billion dollars as of January 14<sup>th</sup>). UBS (\$4.4 billion), and Morgan Stanley (\$3.7 billion). These conditions, aside from producing real and enormous losses for the holders of these debt instruments are creating a far more difficult problem for the capital markets in general. The aforementioned lack of liquidity, or the inability to sell ones investments, causes enormous difficulty throughout the investment cycle. For example, companies who are looking to raise equity either in the private or public markets often borrow capital in the form of short term debt in order to



“bridge” the time between the present and when they can complete their equity offering, a time that can easily take up to one year. This type of credit has become increasingly scarce as lenders are withdrawing from the markets until they have a better level of comfort regarding risk and their own financial condition. Merger and acquisition activity that is often financed with debt has dramatically decreased. The last six months has seen daily announcements of the withdrawal of financings for these types of transactions. Meanwhile, the funds at the heart of the situation known as structured investment vehicles or SIV’s – need to find investors for billions of dollars coming due in the next six to twelve months. However, as ratings firms come out with reports that lower the ratings of these type of securities, this causes a further depression in the value of those investments and a large number of buyers are now precluded from investing because their corporate indenture prevents them from investing in lower rated securities. Holders of the SIV notes are bearing the brunt of this fallout because they face two options: they risk losing money if the SIV sells assets at a loss in order to meet their capital needs, including the payment of maturing notes, or try to provide liquidity for the SIV’s by buying more of its debt. The FUNDS in which you are invested have some of those similar problems.

The impact on the FUNDS from the aforementioned credit crisis has primarily been on liquidity and the upcoming need to sell assets in the next year to pay off maturing notes. While there have been losses in the FUND’s investments, we have a limited and manageable exposure to the real estate markets, including the mortgage market. Our real concern is the present and future ability to sell our present investments at a value that is needed to meet the FUND’s obligations. When managing the FUND’s assets, MSA always had to be mindful of meeting the future liquidity needs. It was always anticipated that those needs would be able to be met through a combination of having some of the assets mature at approximately the same time as its liabilities, that some of the assets would be invested in public securities with a ready market, that the FUNDS would have the ability to raise new capital from either present or new investors, and that some of the assets would be able to be sold to other investors. The credit crisis has impacted all of those strategies, and unless the markets dramatically improve over the next year, we will face the same challenges that we do today.

As mentioned previously, there presently is no market at fair prices that exist for non-public debt securities. Investors are now looking for the safest most liquid securities until the crisis is better understood or is resolved. In addition, many of the investments in these companies are dependent on new financings to have the capital to pay off their existing debt to the FUNDS. Several of our investments fall into this category. For example, we have an investment in several of the FUNDS in a company that provides print and advertising financing for the independent film industry. For the last nine months they have had a commitment from an investment bank to raise approximately \$10 mm in equity, contingent on the company’s ability to secure a credit line of \$10-15 mm. That capital is to be used to retire their obligation to the FUNDS. To date, the company has been unable to procure the credit line, and thus the equity raise has been put on hold. They have no source of funds to repay us until that capital raise is completed. Thus, we have no choice but to extend their debt, probably past the time when our obligations to our debt holders are due. Another example is a company that we have financed that is in the business of evaluating and providing capital to companies based on the worth of the

company's intellectual property. A major investment bank has given the company a term sheet that will provide \$750 million of financing over the next five years. However, the original structure called for a substantial portion of that capital to be provided up front and that would be used to repay our debt. The investment bank is now only willing to provide the capital on a staggered basis over the next five years, with the result that while we are confident of being repaid in full, it is not likely that we will be paid out until the fourth and fifth year of their commitment. Again, a decision that will impact our liquidity for next year.

MSA has determined that we need to be very proactive over the next year to be in a position to overcome these credit market conditions and the lack of liquidity now present. If we have learned anything in being in the business for over 30 years, it is that a financial crisis is never solved in a short time or without substantial pain to investors. We don't believe that this one will be any different. We believe that the credit markets are likely to continue to be under very severe pressure and that a two to three year time horizon is the minimum for a return to normality.

MSA has spent the last several months reviewing a variety of strategies that will address the present problems and give our investors liquidity within a reasonable time frame from what they had originally expected.

First, any strategic approach has to recognize the capital structure of the FUNDS that calls for assets and cash flow to be pledged in their entirety to the most senior class of securities. Thus, as notes mature next year we need to be in a position to first retire the senior one year notes. We are confident that we will be in a position to maintain the current level of interest, and as long as conditions do not materially worsen; we will be able to retire the debt on a timely basis. The second class of securities issued by the LLCs is the Senior Subordinated Notes. Here too, as long as present conditions remain relatively stable, we believe that the current rate of interest will be maintained. However, the ability to retire the entire issue at the same time as the Senior notes is most unlikely. Our present thinking is that these notes will have to be extended for two-three years in order to establish the capital resources to pay off the debt. The third class of securities, the junior notes, present the biggest challenge because they are subordinate to the claims on assets and cash flow of the senior securities. In order to meet the obligations of the Senior securities, the FUNDS have to pledge all of their cash flow to them, **thus at the present time the rate of interest is being reduced to 5% on the Junior notes until such time as some of our investments return to a timely cash flow or we can refinance our debt or raise additional capital.** MSA is presently working on plans to provide the needed liquidity and help some of our investments restructure their debt in order to meet their obligations.

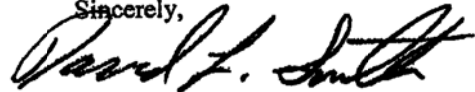
**MSA is making a significant contribution to increasing the cash flow for all of the Funds by suspending the commissions due to McGinn, Smith & Co., the advisory fee due to MSA, and the administrative fee due to McGinn, Smith Capital Holdings. These fees for the combined Funds amount to \$2,827,500, annually.**

Over the next year we will hopefully be able to get a better handle on how to evaluate our investments. This difficulty to evaluate remains the number one problem for credit markets today. During this summer's credit crunch, more than 80% of investors in bonds tied to the mortgage market said they had trouble obtaining price quotes from their bond dealers. "Michael Vranos, recently told investors in his large hedge-fund company, Ellington Management Group, that he was suspending investor redemptions because he couldn't figure out values for some of the fund's investments". "There is no way to determine values that would be simultaneously fair both to investors redeeming from the funds and to investors remaining in the funds", he wrote in a September 30<sup>th</sup> letter. Recently the Federal Reserve, in a move to make credit markets more liquid, announced a plan that is designed to enable banks to borrow money directly from the Fed at below-market rates. However, there can be no assurances that this plan will ease the current credit and liquidity crisis.

In conclusion, MSA believes that by trying to get out in front of the problem of having sufficient liquidity by next year when the FUNDS notes become due, they are both doing the right thing and will lesson the anticipated challenges a year from now. **The Senior and Senior Subordinated note holders will maintain current interest payments, while Junior note holders will have their interest reduced to 5%.** Over the course of the year we will communicate with you regarding the progress and plans that we are making to address the liquidity needs for next December. Our obvious goal is first preservation of your investment and second to maximize cash flow to the FUNDS in order to have sufficient cash to meet the interest payments.

If there are any questions concerning this communication, please contact your McGinn, Smith & Co. representative.

Sincerely,



David L. Smith  
Managing Member  
McGinn, Smith Advisors

# *Exhibit C*

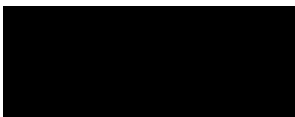


*McGinn Smith  
& Company, Inc.*

Investment Bankers • Investment Brokers

6 Executive Park Dr.  
Clifton Park, NY 12065  
518-348-0060  
Fax 518-348-0107  
www.mcginnsmith.com

April 11, 2008



Re: \$25000 First Independent Income Notes, LLC – Internal Investment # 1800  
Registration:

Dear

In our communication of January 15, 2008 we outlined for you the negative impact that the present credit crisis resulting from the sub-prime mortgage collapse was having on First Independent Income Notes (FIIN), LLC. We provided the background leading to the crisis and reasons why we felt it was likely to worsen before the markets were able to stabilize. We cited the tremendous losses that the major commercial and investment banks were being forced to take and that these losses were spreading to institutions worldwide and to credit markets far beyond the mortgage business. We mentioned that the major impact was on market liquidity and that debt holders were being forced to sell securities and investments at prices below fair market value in an effort to deleverage their balance sheets and to meet forced margin calls. Unfortunately, all the problems that we cited have become more acute, and by now the daily news brings repeated announcements of the adverse effects the crisis is having on the general economy and of major financial institutional failures such as the collapse of Bear Stearns, Inc.

The central theme for all fixed income investments and managed funds of such investments has been the inability to refinance their investments and thus be forced to cease or eliminate interest payments and distributions. Leading the way in this category has been the area of Auction Rate Securities (ARS) which are long term municipal bonds, corporate bonds, and preferred stocks that are traded at auctions that set the instrument's interest rate and ultimately the price of the security. The market in total is somewhere around \$320 billion and it is estimated that \$80 billion or 25% of the market has recently failed. These investments were often marketed as substitutes for money market accounts with a higher yield. Many businesses invested their excess cash in these instruments and now find themselves not only not receiving interest, but with no access to their cash as well. The good news is that the majority of the underlying investments are still paying interest, but the funds just are not able to refinance them at rates that allow them to pay investors their principal.

Since our last communication with you, two of our investments have been forced to eliminate their dividend or cease distributions. One was a result of their loss of refinancing from a bank that was a major lender to Countrywide Credit, the country's largest sub-prime mortgage lender and who suffered major losses from that relationship and had to withdraw their commitment. The other was a holder of only AAA mortgages and who in November assured us that they were at limited risk and the dividend was safe. In February, they were forced to sell most of their portfolio to meet margin calls and suffered losses that have wiped out their earnings

GOVERNMENT  
EXHIBIT

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and their ability to pay their dividend. This in turn has put increased pressure on our cash flow and our ability to meet our obligations. Consequently, we are being forced to eliminate the interest payment to the Junior Subordinated debt holders for this quarter.

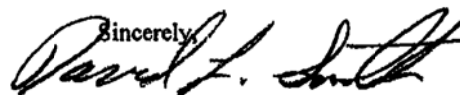
In keeping with our goal to solve the longer term problem of capital preservation we have been working on two fronts. First, we are working with individual companies within our portfolio to help them gain access to capital that would allow them to operate during this crisis. I am pleased to report, that in two of our investments we have been successful and that I am confident that later in the year both of these companies will be successful in obtaining permanent financing that will bring liquidity back to our investment.

The second area is to restructure the Funds, or at least the Junior Subordinated debt, in order to have a plan that will provide investors with an eventual exit. The issues here are complex because of the need to preserve the rights of the Senior and Senior Subordinated Noteholders. We have engaged securities counsel to assist us with the restructuring, but they have not yet been willing to provide a legal opinion as to a particular course of action. One of the ideas that we are pursuing is that instead of a total restructuring that will carry the risk that the Senior Noteholders might find objectionable we will keep the structure intact, but offer Junior Subordinated Noteholders an opportunity to receive equity in other investments that will provide them an additional source of return for their investment in the FUNDS.

In addition to having the cash flow in the FUNDS recently reduced and therefore causing us to suspend the quarterly interest for the Junior Subordinated Noteholders, we have also been advised by counsel that distributions at this time quite probably reflect a return of capital and not interest, and therefore distributions might be considered an invasion of the principal due to the Senior and Senior Subordinated Noteholders. This is a result of not knowing how and where to price our investments in these very illiquid markets. We have also heard from several Junior Subordinated Noteholders that until market conditions become clearer, they would rather suspend their distributions which are taxable interest in order to preserve future distributions of return of capital which of course are not taxable.

We do expect to have a better picture by next quarter as to a specific plan of action available to us going forward and of course the hope that markets will at least stabilize and stop retreating. However, we repeat, we do not view this crisis to be easily settled or to exhaust itself anytime soon. There has been severe and long lasting damage to the U.S. and world financial markets that will require patience to work through.

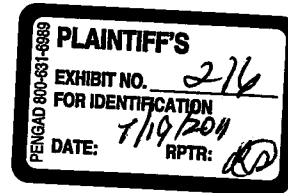
As always, if there are any questions regarding your account or this memorandum, please contact your McGinn, Smith & Company representative.

Sincerely,  


David L. Smith  
Managing Member  
MS Advisors, LLC

DLS/gbg

# *Exhibit D*



**First Independent Income Notes, LLC**

99 Pine Street  
Albany, NY 12207  
Phone 518-449-5131  
Fax 518-449-4894

October 13, 2008

RE [Redacted]

Re: \$5,000 First Independent Income Notes 7% due 12/15/08  
Internal Investment # [Redacted]  
Registration: [Redacted]

Dear Mr. & Mrs. [Redacted]

*copy*

This communication is being sent to investors of First Independent Income Notes, LLC (the FUND) in each of the three classes of Notes, Senior, Senior Subordinated, and Junior maturing on December 15, 2008. The purpose of the communication is to apprise you of the status of your investment and also inform you of the restructuring plan that has been presented to the FUND's Trustee, McGinn, Smith Capital Holdings Corp. by the FUND's managing member, McGinn, Smith Advisors, LLC.

McGinn, Smith Advisors, LLC (MSA) has determined that as a result of losses incurred in the FUND's investments and the total illiquidity for the vast majority of the FUND's investments it is not possible to redeem the Notes on the due date of December 15, 2008 and will require a restructuring of all classes of Notes. In restructuring the notes, MSA has taken into account the responsibility of the Trustee to address both the principal and interest payments due to the Senior noteholders and therefore must reschedule future interest and principal payments for all three classes of noteholders, giving priority to the Senior noteholders. Based on best estimates of current cash flow and present liquidity, MSA has developed a plan that alters scheduled interest and principal payments for all three classes. All three classes are having their maturities extended and their interest payments reduced. MSA has the responsibility to manage the FUND consistent with the provisions of the note's indenture and in a manner that best protects the assets of the FUND. Accordingly, MSA will be presenting a plan outlined later in this communication that in its sole judgment provides for an orderly liquidation of assets, payment of reasonably expected cash flows, and gives priority to the Senior Noteholders over the Senior Subordinated Noteholders and the Junior Noteholders. The plan takes into account that current conditions in financial credit markets presently offer

no liquidity for almost any financial instrument other than U.S. Treasury Notes and Bonds. The investments in the FUND are primarily non public securities that presently have no secondary market for resale and in fact do not have the ability to even establish a fair market value. The plan makes assumptions that cannot be relied upon with any certainty. Events in the US and world financial markets have been changing with a degree of volatility never before experienced at any time in history. The Credit market crisis that started approximately 18 months ago with the troubles in the sub prime mortgage market has accelerated to the point that threatens to impair the entire world's financial foundations and has spread from Wall Street to Main Street. Under these conditions, any planning has to be subject to changing events. We have assumed that markets will continue to be unstable and primarily illiquid for at least two years. The damage to the world's banking system and investment markets is very severe and in our judgment will dramatically change the nature of markets for years to come. While governments, worldwide are rushing to shore up the system with liquidity and taking steps to restore confidence the fact is that no one knows what the ultimate impact of their actions and the reaction of markets will be. What was initially a financial crisis is now a full blown worldwide economic crisis with unknown consequences. MSA is fully confident that financial markets will eventually stabilize and that investor confidence and liquidity will be restored. Anything less is just not acceptable, and therefore the allocation of resources, new efforts of governmental oversight and regulation, and cooperation on a global scale of financial markets is expected to ultimately resolve the present crisis. But the aforementioned intervention in markets will certainly change the way markets work and with any change comes the need for patience and time for investors to first understand and then accept those changes.

As I write this memo the US Stock Market has just finished the day with the Dow Jones Industrial average down over 500 points and down almost 900 points for the last two days. This of course is subsequent to the "rescue bill" or formally the "Emergency Economic Stabilization Act of 2008" signed into law last Friday after several weeks of Congressional wrangling. While in my opinion this was a necessary first step, the idea in some circles that its ultimate passage would bring instant cure to what was ailing the credit markets was ill founded. The stock market's decline is just a symptom of the credit crisis, and while I am in total sympathy for all of us suffering market losses, the real issue is the total lack of liquidity in the credit markets. This is the major issue that impacts your investment in the FUND. Lack of liquidity simply means that there are no efficient markets to buy and sell investments because investors have lost confidence that they can fairly judge what those investments are worth. As the events of the mortgage markets and eventually all fixed income markets played out over the last 18 months, investors repeatedly got burned on making a decision to invest. A sophisticated hedge fund investor made a \$1.8 billion investment last April in Washington Mutual, the country's largest saving bank, only to see it reduced to zero after being taken over by the FDIC last month. National political leaders assured us this summer that Fannie Mae and Freddie Mac, our two leading GSE (Government Sponsored Enterprises) mortgage lenders, were financially sound only to be declared bankrupt and taken over by the FDIC in mid September. Three of the five largest investment banks, Bear Stearns, Merrill Lynch, and Lehman Brothers no longer exist. AIG, the world's largest insurance

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company required an \$85 billion cash infusion and equity investors were wiped out. Hundreds of banks and mortgage companies have been closed including the forced sales of Wachovia to Wells Fargo and Citi Corp. Virtually all financial institutions have had to either cut or eliminate dividends in order to strengthen their balance sheets. Other evidence of the cessation of liquidity in the credit markets include:

- 1.) billion dollar hedge funds such as D.B. Zwirn and Pardus Capital Management refused to allow investors to redeem because they were unable to sell assets to raise cash
- 2.) last week \$120 billion of commercial paper not marketable, causing companies to lose liquidity for normal operating functions like payroll
- 3.) despite a lowering of interest rates, banks refusing to lend overnight to other banks from fear of not knowing the financial soundness of the borrower
- 4.) Reserve Money Market Fund assets fall below the one dollar redemption price and overnight withdrawal of \$40 billion of the \$60 billion in assets forces the fund to cease redemptions
- 5.) The College Fund, who manages assets for 1500 college endowments and their operating funds restrict access to their money market fund to 38% of their deposits and state that 100% of your capital won't be available until 2010

There are hundreds of other examples that have occurred and demonstrate the liquidity crisis. Most of you are aware of this because the media has been giving this story full attention for months. The reason that it is important for you to be aware of the freezing of the credit markets is because it impacts the investments in the FUND in a variety of ways. First, if the most liquid and strongest investment assets such as money market funds, commercial paper, and mortgages are having difficulty in finding buyers, than the ability for almost all other assets to have liquidity is impossible. Second, if forced to sell these assets in order to redeem the notes, the market price would be far below fair market value. As an example, Merrill Lynch in July, in an effort to get some of these assets off their balance sheet and receive cash, sold \$30 billion worth for just 22 cents on the dollar. And even then, the buyer forced Merrill Lynch to finance 75% of the purchase with a non-recourse loan which meant the true cost of the purchase was just 6 cents on the dollar. Third, many of the assets, including loans of the companies in our portfolio, were dependent on subsequent financing in order to repay us. Often, our loans were bridge loans to companies until they could get permanent financing through stock or bond offerings. The initial public offerings (IPO's) hit a 5 year low in July and included only some of the most visible companies in the world such as Visa International. Of the 25 billion dollars in offerings through July, Visa accounted for 18 billion dollars, leaving just 6 billion dollars for the other 23 companies taken public. Thus, the companies in our portfolio have been totally shut out, and in several instances the capital raises included money to satisfy their debts to us or to provide us with liquidity for our investments. When these offerings will once again be available is not determinable, but it is not likely to be anytime soon.

*CM*



So what is next for what former Chairman of the Federal Reserve, Alan Greenspan, has identified as the once in a century financial crisis? First, the Federal Government continues to be active through all of its agencies. As mentioned earlier, Congress recently passed a bill that is to provide \$700 billion dollars to help purchase some of these distressed assets and restore liquidity to the banks so that they can begin to make the loans and provide the credit that allows our economy to begin to function normally. The SEC has decreed that short selling in financial stocks is no longer permitted until further notice. The FDIC has instituted an insurance program for money market funds. They have raised FDIC insurance on bank deposits from \$100,000 per account to \$250,000. This week they have opened the discount window, normally reserved only for banks, to allow for the purchase of commercial paper. Those actions are designed to both restore a semblance of confidence and provide sufficient liquidity for the most critical markets of our economy. However, time is what ultimately is required for banks and financial institutions to deleverage their balance sheets and restore sufficient liquidity that will allow them to once again start lending to businesses and consumers. J.P. Morgan, one of our leading financial institutions, believes that credit losses will eventually exceed 4 trillion dollars and that the housing price decline will bottom out down 30% from 2006 levels and last until 2010.

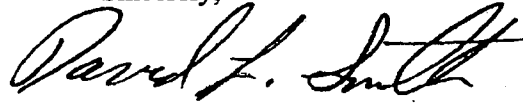
MSA has tried to evaluate and model the impact of the current crisis on its own investments and put forth a plan that provides for all classes of note holders to first get their principal back and second provide them with some return on their investment in the interim. We have communicated with some of you earlier in the year indicating that MS was working on a plan to meet those objectives, mindful of the Senior notes and the subordination issues of the other two classes. Anything that we would have proposed earlier this year certainly would have already proven to be too optimistic. Thus, our current plan we believe to be very achievable, and we are hopeful that as markets and liquidity are restored to a more normal operational mode, we in fact may be able to accelerate the repayment. However, we must emphasize that we are in uncharted waters and what we have learned from the last 18 months is to expect the unexpected.

The plan calls for immediate implementation on the next interest payment due date. We have taken great care, and with consultation with our attorneys, to present a plan that we believe to be fair, protect all classes, and still give priority to the rule of seniority. We understand that many of you have personal liquidity issues due to retirement or other financial needs and this plan may put a personal hardship on you. MSA and its affiliate McGinn, Smith & Co. will be making its own sacrifice. Management fees, commissions, and administrative fees aggregate approximately \$2,750,000 per year for all of our FUNDS that are part of this reorganization. In an effort to improve liquidity we have agreed to forfeit all such future fees while this reorganization plan is in effect. Legal fees attributed to defense of our actions and fees incurred in the pursuit of recovering any of our investments will be the responsibility of the FUNDS. The plan will be implemented for the benefit of all investors. Obviously, to be fair and acceptable to all investors, we cannot entertain a different approach for individual investors. If circumstances change in the future, hopefully for the better, we reserve the right to restructure and implement a new plan.

CMH

In conclusion, we thank you in advance for your patience and understanding of the very difficult position that we are in. If there are any questions regarding your accounts or this memorandum, please contact your McGinn, Smith & Company representative.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Smith". The signature is fluid and cursive, with a large initial "D" and "S".

David L. Smith  
Managing Partner  
McGinn, Smith Advisors

DLS/gg

COPY

The attached is the restructuring plan for First Independent Income Notes, LLC (FIIN) for the Senior, Senior Subordinated, and Junior Noteholders. This Schedule makes no attempt to configure the benefit of asset sales beyond approximately 8% per year of the capital base for the first 6 years due to the manager's inability to predict the timing and price received for asset sales. While we believe that the market environment will remain difficult for the first 2-3 years for asset sales, we remain optimistic that the market should improve subsequent to that period. Fifty percent of the proceeds of those sales will be a return of principal to the Senior noteholders until they are paid in full. Subsequently, the same 50% of asset sales will be returned as principal to the Senior Subordinated noteholders. When both Senior and Senior Subordinated noteholders are paid out in full, distribution of future sales to the Junior noteholders will be at the discretion of MSA, deemed to be consistent with successfully being able to return full principal to those Junior noteholders.

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The attached is the restructuring plan for First Independent Income Notes, LLC (FIIN) for the Senior, Senior Subordinated, and Junior Noteholders. This Schedule makes no attempt to configure the benefit of asset sales beyond approximately 8% per year of the capital base for the first 6 years due to the manager's inability to predict the timing and price received for asset sales. While we believe that the market environment will remain difficult for the first 2-3 years for asset sales, we remain optimistic that the market should improve subsequent to that period. Fifty percent of the proceeds of those sales will be a return of principal to the Senior noteholders until they are paid in full. Subsequently, the same 50% of asset sales will be returned as principal to the Senior Subordinated noteholders. When both Senior and Senior Subordinated noteholders are paid out in full, distribution of future sales to the Junior noteholders will be at the discretion of MSA, deemed to be consistent with successfully being able to return full principal to those Junior noteholders.

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**First Independent Income Notes, LLC  
Restructuring Plan of October 2008**

**I. Senior Notes 7%, due December 15, 2008**

Payments: October 15<sup>th</sup>  
January 15<sup>th</sup>  
April 15<sup>th</sup>  
July 15<sup>th</sup>

1. Starting October 15, 2008 through July 15, 2009  
Annual rate of 5%, interest only
2. Starting October 15, 2009 through October 15, 2014  
Annual rate of 5%  
10 year amortization
3. Maturity – October 15, 2014

Example of \$100,000 note:

1<sup>st</sup> year: 5% interest  
4 quarterly payments of \$1,250

2<sup>nd</sup> – 6<sup>th</sup> year - 5% interest, 10 year amortization  
20 quarterly payments of \$3,192.14

Maturity payment - \$56,179.51

*Note: 50% of all liquidated investment proceeds will be applied immediately to principal.*

**II. Senior Subordinated Notes 7.5%, due December 15, 2008**

Payments: October 15<sup>th</sup>  
January 15<sup>th</sup>  
April 15<sup>th</sup>  
July 15<sup>th</sup>

*Copy*

1. 1<sup>st</sup> payment October 15, 2010 through July 15, 2013  
Annual rate of 3%,  
10 year amortization
2. Starting October 15, 2013 through July 15, 2020  
Annual rate of 6%  
7 year amortization

Final payment July 15, 2020

Example of \$100,000 note:

- |           |  |
|-----------|--|
| Year 1-2  | no payments  |
| Year 3-5  | 3% interest, 10 year amortization<br>12 quarterly payments of \$2,903.02 |
| Year 6-12 | 6% interest, 7 years amortization<br>28 quarterly payments of \$3,215.20 |

*Note: Starting in year 7, 50% of all liquidated investment proceeds will be applied immediately to principal.*

III. Junior Subordinated Notes 10.25%, due December 15, 2008

Payments: October 15<sup>th</sup>  
January 15<sup>th</sup>  
April 15<sup>th</sup>  
July 15<sup>th</sup>

1. 1<sup>st</sup> payment October 15, 2010 through July 15, 2014  
5% principal only
2. Starting October 15, 2014 through July 15, 2023  
Annual rate of 5%,  
15 year amortization
3. Maturity July 15, 2003

Example of \$100,000 note:

- |           |   |
|-----------|---|
| Year 1-2  | no payments   |
| Year 3-6  | 5% principal only 16 quarterly payments of \$1,250        |
| Year 7-15 | 5% cpn, 15 year amortization<br>36 payments of \$1,903.19 |

Maturity payment - \$39,251.93

**C101**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES AND EXCHANGE COMMISSION

*Plaintiff,*

vs.

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

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.*  
-----X

**CERTIFICATE OF SERVICE**

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on November 25, 2019, a true and correct copy of the (i) Receiver’s Reply to Response of Stan and Eva Rabinovich in Opposition to the Ninth Claims Motion of William J. Brown, as Receiver, for an Order (A) Disallowing Certain Disputed Claims, (B) Reclassifying Certain Disputed Claims, (C) Applying Preferential Payment Offset to Certain Disputed Claims, and (D) Expunging Paper Claims (“Reply”) and (ii) Declaration of William J. Brown, as Receiver, in Support of Reply (collectively, “Reply Documents”) were caused to be served by e-mail upon all parties who receive electronic notice in this case pursuant to the Court’s ECF filing system, and by First Class Mail to the parties indicated below:

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- **Benjamin Zelermyer** bzlaw@optonline.net, seincav@aol.com

And, I hereby certify that on November 25, 2019, I mailed, via first class mail using the United States Postal Service, copies of the Reply Documents to the individuals listed below:

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Glavin and Glavin  
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PO Box 40  
Waterford, NY 12188

Dated: November 25, 2019

/s/ Karen M. Ludlow  
Karen M. Ludlow