

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
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.
-----X

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

**NOTICE OF TENTH MOTION OF WILLIAM J. BROWN, AS RECEIVER,
FOR AN ORDER DISALLOWING UNRESOLVED PAPER CLAIMS**

PLEASE TAKE NOTICE that upon the Tenth Motion of William J. Brown, as Receiver for Order Disallowing Unresolved Paper Claims (“Motion”), Phillips Lytle LLP will move before the Hon. Christian F. Hummel, United States Magistrate Judge, United States District Court for the Northern District of New York, James T. Foley - U.S.

Courthouse, 445 Broadway, Albany, New York 12207-2924, on February 20, 2020 at 9:30 a.m., seeking an Order to be entered approving the Motion. No oral argument is requested.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Motion must be made in writing, and should be filed and served upon the undersigned at the address listed below in accordance with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Northern District of New York.

PLEASE TAKE FURTHER NOTICE that if no responses are timely filed and served with respect to the Motion, the Court may enter an Order granting the Motion and disallowing those Unresolved Paper Claims listed on Exhibit A to the Motion without further notice or opportunity to be heard offered to any party.

Dated: December 20, 2019

PHILLIPS LYTLE LLP

By /s/ Catherine N. Eisenhut
William J. Brown (Bar Roll #601330)
Catherine N. Eisenhut (Bar Roll #520849)

Attorneys for Receiver
Omni Plaza
30 South Pearl Street
Albany, New York 12207
Telephone No. (518) 472-1224

and

One Canalside
125 Main Street
Buffalo, New York 14203
Telephone No.: (716) 847-8400

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
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.
-----X

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

**TENTH MOTION OF WILLIAM J. BROWN, AS RECEIVER,
FOR AN ORDER DISALLOWING UNRESOLVED PAPER CLAIMS**

William J. Brown, as Receiver (“Receiver”), by his counsel, Phillips Lytle
LLP, moves (the “Motion”) for an order disallowing the seven filed paper claims identified
on the attached **Exhibit A**, and respectfully represents as follows:

SUMMARY OF MOTION

The Motion seeks to disallow certain paper claims (collectively, the “Unresolved Paper Claims”) filed by investors because there is no basis for the payment of such claims in the books and records of McGinn, Smith & Co., Inc. (“MS & Co.”). The Unresolved Paper Claims represent the last paper claims filed by investors that have not been consensually withdrawn or addressed in a motion previously filed by the Receiver.¹

The investors with Claim Numbers listed on **Exhibit A** filed paper claims for which there is no basis to make a distribution because those claims are No Liability Claims, Untimely Claims, or Non-Receivership Claims (each as defined below). If the filed paper claims listed on Exhibit A are not disallowed, then those investors who filed such claims would receive distributions to which they are not entitled to the detriment of investors with Receiver-granted claims. Exhibit A has been redacted to contain only claim numbers which have previously been provided to each investor, in accordance with the Court’s prior direction that investor names remain confidential.

PROCEDURAL BACKGROUND

1. On April 20, 2010, the Securities and Exchange Commission (“SEC”) filed a Complaint initiating the above-captioned action (Docket No. 1). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith including

¹ After filing the Ninth Claims Motion and the Abandoned Claims Motion (each as defined herein), the Receiver discovered that the seven Unresolved Paper Claims should have been included in the Ninth Claims Motion but were inadvertently omitted.

those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the “MS Entities”).

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

3. On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the “Complaint”) (Docket No. 334). On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) (“MDO”) granting the SEC’s motion for summary judgment. The Court entered judgments in favor of the SEC in 2015 (Docket Nos. 835, 836, 837). The MDO was affirmed on appeal in June 2016.

CLAIMS PROCEDURE

4. On March 9, 2012, the Receiver filed a Motion (“Claims Procedure Motion”) (Docket No. 466) for entry of an Order approving, among other things, the Receiver’s proposed procedure for the administration of claims against the MS Entities.

5. On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated April 17, 2012 (Docket No. 481) (“Claims Procedure Order”). Each investor and known creditor of the MS Entities was mailed on May 1, 2012 an Access Notice describing the claims process and enclosing (i) Notice of the Claims Bar Date and Claims Procedure and

(ii) a Claim Form. Brown Dec'l. ¶7.² A confidential password providing access to the Claims Website at www.mcginnsmithreceiver.com ("Claims Website") was also provided. *Id.* If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. *Id.* All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012 ("Bar Date"), as further described in detail on the Receiver's Website. Claims Procedure Order at 2. Any investor who was required to file a paper claim and who failed to do so on or before the Bar Date is barred, estopped, and enjoined from asserting such claim. *Id.*

6. In accordance with the Claims Procedure Order, nearly six hundred creditors and investors timely filed paper claims prior to the Bar Date. Brown Dec'l. ¶8. In addition, more than 3,127 claims of investors and creditors were included on the schedules posted by the Receiver on the Claims Website in accordance with the Claims Procedure Order. *Id.*

7. The Receiver conducted an initial review of the paper claims timely filed by creditors and investors in accordance with the Claims Procedure Order and determined it was necessary to establish a reserve as to investor claims totaling approximately \$23,617,190 since those claims have been listed by the Receiver as disputed, contingent or unliquidated. Brown Dec'l. ¶9.

² "Brown Dec'l. ¶ ___" refers to the Declaration of William J. Brown dated December 20, 2019 filed in support of the Motion.

PLAN OF DISTRIBUTION PROCESS

8. On December 30, 2015, the Receiver filed a Motion (Docket No. 847) (“Plan Distribution Motion”) to seek approval of (i) a plan of distribution of assets of the MS Entities to investors (“Plan of Distribution”); and (ii) interim distributions to investors with allowed claims scheduled or timely filed in accordance with the Claim Procedure Order.

9. On October 31, 2016, the Court entered a Memorandum-Decision and Order (Docket No. 904) (“Plan Distribution Order”) granting the Plan Distribution Motion, approving the Plan of Distribution, and allowing the Receiver to make interim distributions as set forth in the Plan Distribution Motion.

10. Among other things, the Plan of Distribution provides for a reserve for disputed claims to allow the Receiver to make initial distributions, but to also provide for funds to be reserved until any objections to disputed claims can be heard and decided by final order of the Court. As of December 19, 2019, \$6,858,400.24 has been distributed to investors with allowed claims as a First Distribution. Brown Dec’l. ¶12.

CLAIMS MOTIONS

11. To date, the Receiver has filed nine Motions objecting to various investor claims (collectively, the “Claims Motions”). *See* Docket Nos. 937, 974, 984, 1009, 1025, 1052, 1056, 1067, and 1075. The Court has entered Orders granting five of the Receiver’s Motions. *See* Docket Nos. 966, 990, 1042, and 1043. Four of the Receiver’s Motions remain *sub judice*.

12. On February 15, 2018, the Receiver filed a Claims Motion (Docket No. 974) (“Second Claims Motion”) to seek disallowance of certain filed Paper Claims for

which there is no basis for payment in the books and records of MS & Co. On April 13, 2018, the Court entered an Order granting the Second Claims Motion and disallowing the Paper Claims (Docket No. 990) (“Second Claims Order”).

13. On October 11, 2019, the Receiver filed the 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. 1075) (“Ninth Claims Motion”). In the Ninth Claims Motion, the Receiver sought to disallow and expunge all remaining paper claims that were not previously disallowed by the Second Claims Order for which there is no basis in the records of MS & Co. to make a distribution.

14. On November 13, 2019, the Receiver filed the Motion for Order in Aid of Administration (A) Approving Procedure for Notice and Abandonment of Claims of Lost Investors and Investors with Incomplete Claim Files, (B) Approving Redistribution of Allocated Recoveries to Receivership Estate for Benefit of Investors with Allowed Claims, (C) Expunging Abandoned Claims and Incomplete Claims and (D) Disallowing Certain Remaining Paper Claims (Docket No. 1090) (“Abandoned Claims Motion”). In the Abandoned Claims Motion, the Receiver sought to disallow and expunge certain Remaining Paper Claims that were not addressed in the Ninth Claims Motion.

UNRESOLVED PAPER CLAIMS

15. After filing the Ninth Claims Motion and the Abandoned Claims Motion, the Receiver discovered that seven Unresolved Paper Claims were inadvertently omitted from the Ninth Claims Motion, for which the Receiver sincerely apologizes to the Court. The Receiver believes that all paper claims filed by investors have now either been

withdrawn with investor consent or addressed by this Motion or in the Claims Motions previously filed with the Court. Brown Dec'l ¶17. The Unresolved Paper Claims, as listed on Exhibit A attached to the Motion, may be categorized as Non-Receivership Claims, Untimely Claims, or No Liability Claims (each as defined below) and there is no basis for the Receiver to make a distribution on account of these claims. Brown Dec'l. ¶19.

16. Each investor who filed an Unresolved Paper Claim was recently sent a letter by the Receiver (or his counsel) regarding their paper claim. On either September 25, 2019 or November 27, 2019, the Receiver caused to be mailed to the last known address of each investor who filed an Unresolved Paper Claim a letter explaining why there is no basis in the Receiver's books and records to make a payment on account of such Unresolved Paper Claim and advising that the investor could speak with the Receiver (or his counsel) by phone to discuss any questions about their Unresolved Paper Claim. Three of the letters were returned to the Receiver as undeliverable and without a forwarding address. The Receiver did not receive any other responses to the letters. Brown Dec'l. ¶18.

RELIEF REQUESTED

17. By this Motion, the Receiver requests that the Court enter an order disallowing the Unresolved Paper Claims. This relief is necessary to allow the Receiver to ensure equal treatment among all investors and to avoid any investors receiving a recovery to which they are not entitled pursuant to the Plan of Distribution.

BASIS FOR RELIEF

18. Exhibit A is comprised of (a) No Liability Claims, (b) Untimely Claims, and (c) Non-Receivership Claims. No Liability Claims represent filed paper claims for investments which are not reflected in the books and records of MS & Co.. No Liability

Claims should be disallowed because there is no basis in the books and records of MS & Co. for the payment of such claims.

19. Untimely Claims represent paper claims filed after the Bar Date of June 19, 2012. Investors who filed Untimely Claims are barred, estopped, and enjoined from asserting such claim, pursuant to the Claims Procedure Order. The Untimely Claims should be disallowed because the holders of such claims are not entitled to assert such claims against the Receivership.

20. Finally, Non-Receivership Claims represent filed paper claims for investments in entities that are not part of the Receivership. Because these entities are not included in the Receivership, the Receiver cannot make distributions on account of these claims with Receivership funds. Accordingly, Non-Receivership Claims should be disallowed.

21. Elimination of the Unresolved Paper Claims furthers the main objective of equality in the distribution of Receivership assets because there is no legal or equitable basis to make distributions to investors on account of the Unresolved Paper Claims. Like the Paper Claims expunged by the sSecond Claims Order, there is no basis in the books and records of MS & Co. to pay the Unresolved Paper Claims and thus, it would be inequitable and inappropriate for investors to receive any such distributions because such recoveries would dilute the pool of receivership funds available to pay investors with valid claims in Receivership entities. Further, any such distributions would be in contravention of the procedures for calculating investor claims set forth in the Plan of Distribution and the Plan Distribution Order.

22. The Receiver reserves all rights to object on any other basis to the claims of investors or claimants including those on Exhibit A.

23. Distribution and is further set forth in this Motion, the Receiver requests that any requirement for a separate memorandum of law be waived.

NOTICE

24. The Receiver has sought to provide investors with Unresolved Paper Claims listed on Exhibit A appropriate notice and sufficient time to respond to the Motion. Accordingly, the Receiver has complied with the claim objection and notice procedures set forth in the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) as a form of best expression of law. Bankruptcy Rule 3007 requires that a claim objection must be filed and served at least thirty days before any scheduled hearing and that the objection must be served on the claimant by first class mail. Fed. R. Bankr. P. 3007(a)(1), (2). In accordance with Rule 7.1 of the Local Rules of Practice for the United States District Court for the Northern District of New York, the Receiver has filed and will serve the Motion on each investor holding a listed Paper Claim at least thirty-one days in advance of the scheduled return date of February 20, 2020.

25. The Receiver will give notice of the Motion to the Securities and Exchange Commission, all parties who have filed a Notice of Appearance in this action by ECF, and all creditors and parties in interest via the Receiver’s website (www.mcginnsmithreceiver.com), as well as posting at the top of the Receiver’s website an explanation of the Motion. Additionally, notice by first class mail will be given to all investors whose Unresolved Paper Claims are listed on Exhibit A. Brown Dec’l. ¶20.

26. The Receiver requests that the Court enter an order granting the relief requested in this Motion without a hearing with respect to those Unresolved Paper Claims for which an objection is not timely interposed. Disallowance of a claim without a hearing where there is no factual dispute is an appropriate and preferred procedure in federal receivership cases. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (holding that summary proceedings are favored in federal receivership cases because a summary proceeding “reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets”); *United States v. Fairway Capital Corp.*, 433 F. Supp. 2d 226, 241 (D. R.I. 2006) (“Receivership courts can employ summary procedures in allowing, disallowing and subordinating claims of creditors”).

CONCLUSION

WHEREFORE, based upon the foregoing, the Receiver respectfully requests entry of an Order disallowing the Unresolved Paper Claims listed on Exhibit A and for such other and further relief as is appropriate.

Dated: December 20, 2019

PHILLIPS LYTLE LLP

By /s/ Catherine N. Eisenhut

William J. Brown (Bar Roll #601330)

Catherine N. Eisenhut (Bar Roll #520849)

Attorneys for Receiver

Omni Plaza

30 South Pearl Street

Albany, New York 12207

Telephone No. (518) 472-1224

and

One Canalside

125 Main Street

Buffalo, New York 14203

Telephone No.: (716) 847-8400

Exhibit A

Claim No.	Description of Investment	Amount of Paper Claim	Reason for Disallowance
4111	Third Albany Income Notes/10.25% Secured Junior Notes due 12/15/09	\$30,000.00	No Liability
4402	None Provided	None Provided	No Liability
5265	None Provided	None Provided	Untimely and No Liability
5401	Vigilant Privacy Corporation	\$25,000.00	Non-Receivership
5756	None Provided	\$30,000.00	No Liability
6583	Atlantis Income Investor Notes, Atlantis Strategic Total Return Fund, MS Real Estate Capital Partners, CCI Group, Coventry Carelink	\$105,000.00	Non-Receivership
6857	Third Albany Income Notes, LLC	\$20,000.00	No Liability

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 TENTH MOTION FOR AN ORDER DISALLOWING UNRESOLVED
PAPER CLAIMS**

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

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

2. I make this Declaration in support of the Receiver's Tenth Motion ("Motion") for an Order disallowing the seven filed claims identified on Exhibit A to the Motion as having no basis in the books and records of McGinn, Smith & Co., Inc. ("MS & Co."). Exhibit A has been redacted to contain only claim numbers which have previously been provided to each investor, in accordance with the Court's prior direction that investor names remain confidential.

PROCEDURAL BACKGROUND

3. On April 20, 2010, the Securities and Exchange Commission ("SEC") filed a Complaint initiating the above-captioned action (Docket No. 1). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the "MS Entities").

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

5. On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the "Complaint") (Docket No. 334). On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) ("MDO") granting the SEC's motion for summary judgment. The

Court entered judgments in favor of the SEC in 2015 (Docket Nos. 835, 836, 837). The MDO was affirmed on appeal in June 2016.

CLAIMS PROCEDURE

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

7. On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated April 17, 2012 (Docket No. 481) (“Claims Procedure Order”). Each investor and known creditor of the MS Entities was mailed on May 1, 2012 an Access Notice describing the claims process and enclosing (i) Notice of the Claims Bar Date and Claims Procedure and (ii) a Claim Form. A confidential password providing access to the Claims Website at www.mcginnsmithreceiver.com (“Claims Website”) was also provided. If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012 (“Bar Date”), as further described in detail on the Receiver’s Website. Claims Procedure Order at 2. Any investor who was required to file a paper claim and who failed to do so on or before the Bar Date is barred, estopped, and enjoined from asserting such claim. *Id.*

8. In accordance with the Claims Procedure Order, nearly six hundred creditors and investors timely filed paper claims prior to the Bar Date. In addition, more

than 3,127 claims of investors and creditors were included on the schedules posted by the Receiver on the Claims Website in accordance with the Claims Procedure Order.

9. I conducted an initial review of the paper claims timely filed by creditors and investors in accordance with the Claims Procedure Order and determined that it was necessary to establish a reserve as to investor claims totaling approximately \$23,617,190 since those claims have been listed by the Receiver as disputed, contingent or unliquidated.

PLAN OF DISTRIBUTION PROCESS

10. On December 30, 2015, I filed a Motion (Docket No. 847) (“Plan Distribution Motion”) to seek approval of (i) a plan of distribution of assets of the MS Entities to investors (“Plan of Distribution”); and (ii) interim distributions to investors with allowed claims scheduled or timely filed in accordance with the Claim Procedure Order.

11. On October 31, 2016, the Court entered a Memorandum-Decision and Order (Docket No. 904) (“Plan Distribution Order”) granting the Plan Distribution Motion, approving the Plan of Distribution, and allowing the Receiver to make interim distributions as set forth in the Plan Distribution Motion.

12. Among other things, the Plan of Distribution provides for a reserve for disputed claims to allow the Receiver to make initial distributions, but to also provide for funds to be reserved until any objections to disputed claims can be heard and decided by final order of the Court. As of December 19, 2019, \$6,858,400.24 has been distributed to investors with allowed claims as a First Distribution.

CLAIMS MOTIONS

13. To date, in my capacity as Receiver, I have filed nine Motions objecting to various investor claims (collectively, the “Claims Motions”). *See* Docket Nos. 937, 974, 984, 1009, 1025, 1052, 1056, 1067, and 1075. The Court has entered Orders granting five of the Receiver’s Motions. *See* Docket Nos. 966, 990, 1042, and 1043. Four of the Receiver’s Motions remain *sub judice*.

14. On February 15, 2018, in my capacity as Receiver, I filed a Claims Motion (Docket No. 974) (“Second Claims Motion”) to seek disallowance of certain filed Paper Claims for which there is no basis for payment in the books and records of MS & Co. On April 13, 2018, the Court entered an Order granting the Second Claims Motion and disallowing the Paper Claims (Docket No. 990) (“Second Claims Order”).

15. On October 11, 2019, in my capacity as Receiver, I filed the 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. 1075) (“Ninth Claims Motion”). In the Ninth Claims Motion, the Receiver sought to disallow and expunge all remaining paper claims that were not previously disallowed by the Second Claims Order for which there is no basis in the records of MS & Co. to make a distribution.

16. On November 13, 2019, in my capacity as Receiver, I filed the Motion for Order in Aid of Administration (A) Approving Procedure for Notice and Abandonment of Claims of Lost Investors and Investors with Incomplete Claim Files, (B) Approving Redistribution of Allocated Recoveries to Receivership Estate for Benefit of Investors with Allowed Claims, (C) Expunging Abandoned Claims and Incomplete Claims and (D)

Disallowing Certain Remaining Paper Claims (Docket No. 1090) (“Abandoned Claims Motion”). In the Abandoned Claims Motion, the Receiver sought to disallow and expunge certain Remaining Paper Claims that were not addressed in the Ninth Claims Motion.

UNRESOLVED PAPER CLAIMS

17. After filing the Ninth Claims Motion and the Abandoned Claims Motion, I discovered that seven Unresolved Paper Claims were inadvertently omitted from the Ninth Claims Motion, for which I sincerely apologize to the Court. I believe that all paper claims filed by investors have now either been withdrawn with investor consent or addressed by this Motion or in the Claims Motions previously filed with the Court.

18. Each investor who filed an Unresolved Paper Claim was recently sent a letter by the Receiver (or his counsel) regarding their paper claim. On either September 25, 2019 or November 27, 2019, the Receiver caused to be mailed to the last known address of each investor who filed an Unresolved Paper Claim a letter explaining why there is no basis in the Receiver’s books and records to make a payment on account of such Unresolved Paper Claim and advising that the investor could speak with the Receiver (or his counsel) by phone to discuss any questions about their Unresolved Paper Claim. Three of the letters were returned to the Receiver as undeliverable and without a forwarding address. The Receiver did not receive any other responses to the letters.

19. I have examined the seven Unresolved Paper Claims listed on Exhibit A to the Motion and have determined that there is no basis in the books and records of MS & Co. to make distributions on account of the Unresolved Paper Claims.

NOTICE

20. In connection with the service of the Motion and all accompanying papers, including this Declaration, I will cause to be mailed to each claimant listed on Exhibit A attached to the Motion a copy of the Motion and related pleadings.

Dated: December 20, 2019

/s/ William J. Brown

William J. Brown

Doc #4641146.2

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

**ORDER APPROVING TENTH MOTION OF WILLIAM J. BROWN, AS
RECEIVER, FOR AN ORDER DISALLOWING UNRESOLVED PAPER
CLAIMS**

Upon the Tenth Motion of William J. Brown, as Receiver, for an Order
Disallowing Unresolved Paper Claims; and notice of the Motion having been given to the
Securities and Exchange Commission, each investor listed on Exhibit A 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 of the filed paper claims listed on Exhibit A to the Motion is 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

HON. CHRISTIAN F. HUMMEL

Doc #4641245.1

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, 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 December 20, 2019, a true and correct copy of the (i) Tenth Motion of William J. Brown, as Receiver, for an Order Disallowing Unresolved Paper Claims ("Tenth Motion"), and (ii) Declaration of William J. Brown, as Receiver, in Support of Tenth Motion (collectively, "Tenth Motion Papers") 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:

- **William J. Brown** wbrown@phillipslytle.com, khatch@phillipslytle.com
- **Roland M. Cavalier** rcavalier@tcglegal.com
- **Certain McGinn Smith Investors** apark@weirpartners.com
- **Frank H. Chiappone** chiappone55@gmail.com
- **Linda J. Clark** lclark@barclaydamon.com, jsmith@hiscockbarclay.com
- **Elizabeth C. Coombe** elizabeth.c.coombe@usdoj.gov, CaseView.ECF@usdoj.gov, kelly.ciccarelli@usdoj.gov
- **William J. Dreyer** wdreyer@dreyerboyajian.com, lburkart@dreyerboyajian.com, bhill@dreyerboyajian.com, lowens@dreyerboyajian.com, coconnell@dreyerboyajian.com

- **Catherine N. Eisenhut** ceisenhut@phillipslytle.com
- **Scott J. Ely** sely@elylawpllc.com,shm@fwc-law.com
- **James D. Featherstonhaugh** jdf@fwc-law.com,jsm@fwc-law.com,cr@fwc-law.com,shm@fwc-law.com
- **Brad M. Gallagher** bgallagher@barclaydamon.com
- **James H. Glavin , IV** hglavin@glavinandglavin.com
- **Bonnie R. Golub** bgolub@weirpartners.com
- **James E. Hacker** hacker@joneshacker.com, sfebus@joneshacker.com, thiggs@joneshacker.com
- **Erin K. Higgins** EHiggins@ckrpf.com
- **Benjamin W. Hill** ben@benhilllaw.com, rmchugh@dreyerboyajian.com, coconnell@dreyerboyajian.com
- **E. Stewart Jones , Jr** esjones@joneshacker.com,mleonard@joneshacker.com,pcampione@joneshacker.com,kjones@joneshacker.com
- **Edward T. Kang** ekang@khflaw.com, zbinder@khflaw.com, jarcher@khflaw.com,kkovalsky@khflaw.com
- **Nickolas J. Karavolas** nkaravolas@phillipslytle.com
- **Jack Kaufman** kaufmanja@sec.gov
- **Michael A. Kornstein** mkornstein@coopererving.com
- **James P. Lagios** james.lagios@rivkin.com, kathyleen.ganser@rivkin.com, Stanley.Tartaglia@rivkin.com
- **Kevin Laurilliard** laurilliard@mltw.com
- **James D. Linnan** jdlinnan@linnan-fallon.com,lawinfo@linnan-fallon.com
- **Haimavathi V. Marlier** marlierh@sec.gov
- **Jonathan S. McCardle** jsm@fwc-law.com
- **Kevin P. McGrath** mcgrathk@sec.gov
- **Lara S. Mehraban** mehrabanl@sec.gov,marlierh@sec.gov
- **Michael J. Murphy** mmurphy@carterconboy.com, epappas@carterconboy.com, abell@carterconboy.com
- **Craig H. Norman** cnorman@chnesq.com, jbugos@coopererving.com
- **Andrew Park** apark@weirpartners.com,imarciniszyn@weirpartners.com
- **Terri L. Reicher** Terri.Reicher@finra.org
- **Sheldon L. Solow** sheldon.solow@kayescholer.com, kenneth.anderson@kayescholer.com
- **David P. Stoelting** stoeltingd@sec.gov, mehrabanl@sec.gov,mcgrathk@sec.gov,paleym@sec.gov,wbrown@phillipslytle.com
- **Charles C. Swanekamp** cswanekamp@bsk.com,mhepple@bsk.com
- **Bryan M. Westhoff** bryan.westhoff@kayescholer.com
- **Benjamin Zelsermyer** bzlaw@optonline.net,seincav@aol.com

And, I hereby certify that on December 20, 2019, I mailed, via first class mail using the United States Postal Service, copies of the Tenth Motion Documents to the individuals listed on Exhibit A attached to the Tenth Motion and to the individuals listed below:

Nancy McGinn
426-8th Avenue
Troy, NY 12182

Thomas J Urbelis
Urbelis & Fieldsteel, LLP
155 Federal Street
Boston, MA 02110-1727

Greenberg Traurig, LLP
54 State Street, 6th Floor
Albany, NY 12207

Martin H. Kaplan, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, NY 10005

RBS Citizen, N.A.
Cooper Erving & Savage LLP
39 North Pearl Street
4th Floor
Albany, NY 12207

Iseman, Cunningham, Riester & Hyde, LLP
9 Thurlow Terrace
Albany, NY 12203

Charles C. Swanekamp, Esq.
Bond, Schoeneck & King PLLC
Avant Building - Suite 900
200 Delaware Avenue
Buffalo, NY 14202-2107

David G. Newcomb
Judith A. Newcomb
224 Independence Way
Mount Bethel, PA 18343

Dated: December 20, 2019

/s/ Karen M. Ludlow
Karen M. Ludlow