

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, 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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**SIXTH WRITTEN STATUS REPORT OF THE RECEIVER**

This Report describes relevant events respecting the status of the Receivership Estates at this time and also incorporates by reference updates which have been posted regularly on the Receiver’s website since the commencement of this action (www.mcginnsmithreceiver.com).<sup>1</sup> This Report also supplements the First Report of the Receiver (Docket No. 49), the Second Written Report of the Receiver (Docket No. 425), the Third Written Status Report of the Receiver (Docket No. 925) (“Receiver’s Third Report”),

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

the Fourth Written Status Report of the Receiver (Docket No. 1024), and the Fifth Written Status Report of the Receiver (Docket No. 1187) (“Receiver’s Fifth Report”). The Receiver’s Motion for an Order (I) Approving Plan of Distribution of Estate Assets (“Plan”) and (II) Authorizing Interim Distributions was approved by Court Order on October 31, 2016 (Docket No. 904).

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

As reported in detail on pages 4 through 6 of the Receiver’s Third Report, the Receiver established procedures for the implementation of investor distributions once the Plan of Distribution was approved by the Court and became a final Order. The Receiver has completed three distributions, as follows: (First) 10%, (Second) 10%, and (Third) 3.84% to investors with allowed claims subject to any applicable offsets. The third distribution round was completed in the spring of 2021. Thus, investors with allowed claims have received to date distributions totaling 23.84%, which exceeds the Receiver’s long-standing publicly announced recovery estimate of 13.5% to 21.7%.

Through the Third Distribution, the Receiver has paid over \$21,744,773 to investors with allowed claims. In conjunction with the investor distributions, the Receiver filed ten Claims Objection Motions involving approximately 519 claims, all of which were successfully determined.

In an Investor Update posted on the Receiver’s website on October 14, 2022, the Receiver notified investors and parties in interest that due to recently-discovered and successfully-recovered monies representing a former McGinn Smith investment, the Receiver intends to make a Fourth Distribution to investors with Allowed Claims. It is estimated that this distribution will be in the range of 1.264%, for a total of approximately \$1,400,000. If this distribution is made, it will bring total investor recoveries to 25.104%.

This information was also mailed to each investor by letter, a copy of which is attached to this Report as **Exhibit A**.

The timing of this potential Fourth Distribution is delayed, however, as a result of David L. Smith's continued litigation with the Securities and Exchange Commission. As reported in the June 25, 2021 Update to Investors on the Receiver's website, Mr. Smith filed a Motion to vacate the disgorgement judgment the SEC had obtained against him in 2015. In February 2022, the District Court ruled against Mr. Smith's Motion, but he subsequently filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit. Briefing on the appeal has been completed. Further scheduling by the Circuit Court is awaited. The Receiver expects a decision from the Second Circuit sometime in the late winter or early spring 2023. Assuming Mr. Smith is not successful and does not appeal further, a Fourth Distribution to investors with allowed claims should be made promptly after that.

Other than this potential Fourth Distribution, the Receiver does not anticipate any further distributions in this case. Investors have been advised to continue to review the Receiver's website at [www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com) for further updates. Additionally, investors have been advised to update the Receiver in writing if their address or account information has changed in any way.

#### **Storage Facility**

The Receiver continues to maintain a storage location containing the remaining McGinn Smith paper records. Virtually all essential records are maintained in electronic form. In the Fifth Written Status Report, the Receiver announced that he would begin to shred and destroy the records (except those necessary for tax matters) after completion of the Third Distribution in accordance with a prior Court Order. As a result of Mr. Smith's

Motion to vacate his disgorgement judgment, the Receiver delayed the record destruction process.

### **Tax and Entity Matters**

Since the commencement of the Receivership, the Receiver has filed more than 600 tax returns for the many McGinn Smith entities. Some of those entities are trusts, which by their terms, have expired, and final tax returns for those entities whose terms expired were filed in 2017 through 2020. The Receiver has also filed final tax returns for most of the other McGinn Smith entities other than those necessary to make the investor distributions.

The Receiver has filed with various states requests to dissolve the many inactive McGinn Smith entities as part of his wind-up activities. Until the closing of the Receivership, the Receiver intends to continue to file tax returns for those McGinn Smith entities which remain open in order to permit a potential Fourth Distribution.

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

As of November 25, 2022, estate assets total \$1,607,861 after payment of the First, Second and Third Distributions to investors with allowed claims. This compares favorably to the initial account balance of \$485,491.63 at the time of the commencement of the Receivership in 2010, as described in more detail in the First Report of the Receiver (Docket No. 49). While there are several minor and one potentially significant illiquid securities remaining to be liquidated if possible, the Receiver does not believe the monetization of those assets will likely occur due to a lack of value. Efforts will continue to monetize the illiquid investments if an opportunity arises.

### **Receiver Estate Wrap-Up**

Once an Order resolving Mr. Smith's pending appeal is entered, the Receiver will resume the completion of the remaining administrative, legal, tax and financial matters necessary to close these estates in furtherance of the Order Granting Receiver's Omnibus

Motion for Approval of (I) Destruction of Files, Recycling of Computers and Other Wind-Up Activities, (II) Continuation of Receivership to Accomplish Foregoing, and (III) Termination of the Receivership and Discharge of the Receiver, All Following Completion of Final Distributions to Investors With Allowed Claims and the Filing of the Receivers Final Report (Docket No. 1165). The Receiver will file a Final Report in accordance with the above-referenced Order once further developments occur.

Dated: December 2, 2022

PHILLIPS LYTTLE LLP

By /s/ William J. Brown  
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

Doc #10810750.1

**Exhibit A**

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

Tel: 716.847.7089  
www.mcginnsmithreceiver.com

One C  
125 Mail  
Buffalo, N

October 13, 2022

**Re: McGinn, Smith & Co. Inc. - Potential Fourth Distribution to Investors with  
Allowed Claims**

Dear Investor:

In my capacity as Receiver, I am happy to let you know that we recently discovered and successfully recovered a former McGinn Smith investment which was being held by the State of New York.

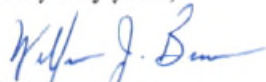
Consequently, the Receiver intends to make a Fourth Distribution to investors with allowed claims. I estimate that the distribution will be in the range of 1.264%, for a total of approximately \$1.4 million. If made, this would bring total investor recoveries to 25.104%.

Unfortunately, the timing of the distribution will be delayed as a result of David L. Smith's continued litigation with the Securities and Exchange Commission ("SEC"). On June 3, 2021, Mr. Smith filed a motion to vacate the disgorgement judgment the SEC had obtained against him in 2015. In February 2022, the District Court ruled against Mr. Smith's motion, but he subsequently filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit. The SEC's appeal brief is due to be filed later this month. I would expect a decision from the Second Circuit sometime in late Winter or early Spring 2023. Assuming Mr. Smith does not appeal further, a distribution to investors with allowed claims should be made promptly after that.

Other than this potential Fourth Distribution, I do not anticipate that there will be any further distributions in this case. Following the potential fourth distribution, I expect to close the estate.

**PLEASE CONTINUE TO REVIEW THE RECEIVER'S WEBSITE AT  
WWW.MCGINNSMITHRECEIVER.COM FOR FURTHER UPDATES. IF YOUR  
ADDRESS OR ACCOUNT INFORMATION HAS CHANGED IN ANY WAY, YOU  
MUST PROMPTLY NOTIFY ME IN WRITING BY MAILED LETTER SIGNED BY  
ALL OWNERS OF THE INVESTMENT(S), SENT TO THE ABOVE ADDRESS.**

Very truly yours,



William J. Brown  
Receiver

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