

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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**JOINT STATUS REPORT OF THE SECURITIES
AND EXCHANGE COMMISSION AND THE RECEIVER**

Plaintiff Securities and Exchange Commission (“SEC”) and the Receiver, William J. Brown, jointly submit this Status Report in response to the Court’s Text Order dated October 24, 2023 (Docket No. 1245) requesting “a status report on the issue of the deferral of judgment as to the receivership defendants.”

The Receiver has completed three distributions of more than \$21,744,773 to investors with allowed claims. The Receiver was prepared to commence a fourth and final distribution as a result of the discovery of unclaimed monies with New York State, as reported to investors on October 14, 2022, in an investor update on the Receiver’s website (www.mcginnsmithreceiver.com) and in the Sixth Written Status Report of the Receiver dated December 2, 2022 (Docket No. 1236).

On June 3, 2021, however, Defendant David L. Smith (“Smith”) filed a motion under Federal Rule of Civil Procedure 60(b)(4) seeking an order declaring this Court’s 2015 disgorgement order “void” and returning approximately \$4.3 million to him (Docket No. 1195). In his motion, Smith also asked that the Receiver “refrain from disbursing funds [to investors] until after this motion is decided.” *Id.* As a result, the Receiver refrained from making the fourth distribution.

This Court denied Smith’s Rule 60(b) motion on February 10, 2022 (Docket No. 1222). The Second Circuit affirmed, and also subsequently denied, Smith’s request for an *en banc* hearing. *S.E.C. v. Smith*, No. 22-746 (2d. Cir. Apr. 7, 2023, and June 12, 2023). On October 30, 2023, the U.S. Supreme Court denied Smith’s petition for a writ of certiorari.

With all appeals now exhausted, the Receiver will promptly commence the steps to make the fourth distribution to investors with allowed claims, and to recommence the final steps to conclude the receivership estate as previously reported in the Receiver’s Fifth Written Status Report (Docket No. 1187). Until the fourth distribution is completed, the SEC and the Receiver respectfully request that the Court defer entering judgment for the Receivership Defendants.

The Receiver undertakes to notify the Court when the fourth distribution is concluded, which is estimated to occur in the first quarter of 2024, and will submit proposed Final Judgments to the Court at that time.

Dated: November 1, 2023

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION

By /s/ David Stoelting
David Stoelting
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By /s/ William J. Brown
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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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CERTIFICATE OF SERVICE

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on November 2, 2023, I caused to be served a true and correct copy of the Joint Status Report of the Securities and Exchange Commission and the Receiver (“Joint Status Report”) was 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
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And, I hereby certify that on November 2, 2023, I caused to be mailed, via first class mail using the United States Postal Service, a copy of the Joint Status Report to the individuals listed below:

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Dated: November 2, 2023

/s/ Karen M. Ludlow

Karen M. Ludlow