

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) (“Receiver’s Website”).¹ 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)

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

(“Receiver’s Third Report”), the Fourth Written Status Report of the Receiver (Docket No. 1024), the Revised Fourth Written Status Report of the Receiver (Docket No. 1026), and the Fifth Written Status Report of the Receiver (Docket No. 1187). 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).

**Smith Renewed Litigation and Interruption of
Investor Distributions and Estate Closing**

The initiation by defendant, David Smith, on June 3, 2021 of further litigation threatening to recapture distributions already made to defrauded investors and forestalling the making of the Fourth Distribution and the closing of this estate finally came to an end after an almost two and one-half years with the U.S. Supreme Court’s denial of Smith’s petition for writ of certiorari on October 30, 2023. Mr. Smith’s efforts during that period to vacate the SEC’s 2015 judgment against him in this action only exacerbated the litigation delay previously suffered by the defrauded investors in the period from 2010 through 2016 due to the continued litigation and multiple appeals pursued by Messrs. Smith and McGinn in both their criminal and civil cases.

With further efforts by Smith to extend his litigation journey now concluded, the Receiver was pleased to announce on the Receiver’s Website on October 30, 2023 that a Fourth Distribution to investors with allowed claims would begin soon given the denial of Mr. Smith’s petition for writ of certiorari.

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 aggregating 23.84% to investors with allowed claims

subject to any applicable offsets. Commencing on or about January 22, 2024 and concluding by approximately February 9, 2024, the Receiver will make a Fourth Distribution of 1.20% each to investors with allowed claims subject to any applicable offsets. Thus, investors with allowed claims will have received distributions totaling 25.04%, which exceeds the Receiver's long-standing publicly announced recovery estimate of 13.5% to 21.7%. Consequently, investors should have their final payments before March 2024.

At the completion of the Fourth Distribution, the Receiver will have paid over \$23,006,903 to investors with allowed claims.

The distribution letter to be sent to investors with their Fourth Distribution checks is attached as **Exhibit A**.

Storage Facility

The Receiver has maintained a storage location containing the remaining McGinn Smith paper records. Virtually all essential records are maintained in electronic form. The Receiver has now begun to shred and destroy those paper records (except those necessary for tax matters) in accordance with a prior Court Order.

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 remaining final tax returns should all be filed by late 2024 after conclusion of the Fourth Distribution process.

The Receiver has filed with various states requests to dissolve the many inactive McGinn Smith entities as part of his wind-up activities.

Liquid Assets of the Estate

As of December 8, 2023, estate assets total \$1,562,594 after payment of the first three distributions to investors with allowed claims. Efforts have and continue to be made to monetize an illiquid investment consisting of primarily subordinated securities. Those efforts will continue.

Receiver Estate Wrap-Up

The Receiver now turns to 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 Receiver's Final Report (Docket No. 1165). A final Receiver's Report will be filed prior to year-end 2024 in accordance with that Order.

Dated: December 14, 2023

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

Exhibit A

Receiver's Fourth Distribution Check Letter

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

Tel: 716.847.7089
www.mcginnsmithreceiver.com

One Canalside
125 Main Street
Buffalo, NY 14203

January 22, 2024

Re: Fourth McGinn Smith Investor Distribution Check

Dear McGinn Smith Investor:

Enclosed is your check representing your Fourth Investor Distribution. This check is a final distribution of 1.2% on your allowed claim after application of any applicable offsets. If you have more than one McGinn Smith investment being treated under the court-approved Plan of Distribution, you will receive a separate letter and check for 1.2% of each allowed claim. The Receiver has now paid to investors holding allowed claims a total of 25.04% of the amount of their allowed claims subject to allowed offsets or deductions.

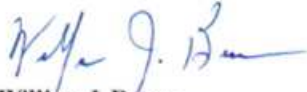
The enclosed check will be void if not cashed within 90 days. Please cash the check promptly. The Receiver does not intend to reissue uncashed checks since the estate is being closed.

The Receivership will now complete its wind-down and is expected to cease all material activities by the fourth quarter of 2024.

A Sixth Written Status Report of the Receiver is available on the Receiver's website (www.mcginnsmithreceiver.com) in an Investor Update dated December 14, 2024. The Receiver's Final Report will be subsequently filed with the Court and available on the Receiver's website.

It has been my honor to assist you.

Very truly yours,



William J. Brown
Receiver

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Doc #11575031.2
Enclosure

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TIMOTHY M. MCGINN, AND
DAVID L. SMITH, GEOFFREY R. SMITH,
Individually and as Trustee of the David L. and
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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 December 14, 2023, I caused to be served a true and correct copy of the Sixth Written Status Report of the Receiver (“Sixth Status Report”) was caused to be served by email 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
- **Certain McGinn Smith Investors**apark@weirpartners.com
- **Elizabeth C. Coombe** elizabeth.c.coombe@usdoj.gov, paul.condon@usdoj.gov, CaseView.ECF@usdoj.gov,kelly.ciccarelli@usdoj.gov
- **William J. Dreyer** wdreyer@dreyerboyajian.com, bhill@dreyerboyajian.com, lowens@dreyerboyajian.com,coconnell@dreyerboyajian.com
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- **Bryan M. Westhoff** bryan.westhoff@kayescholer.com
- **Benjamin Zelsermyer** bzlaw@optonline.net, steincav@aol.com

And, I hereby certify that on December 14, 2023, I caused to be mailed, via first class mail using the United States Postal Service, a copy of the Sixth Status Report to the individuals listed below:

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Dated: December 14, 2023

/s/ Karen M. Ludlow
Karen M. Ludlow