UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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NEW YORK
REGIONAL OFFICE

August 4, 2025

VIA ECF
The Honorable Anne M. Nardacci
United States District Court
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, First Floor
Albany, NY 12207

Re: *SEC v. McGinn, Smith & Co., Inc., et al.*, 10-cv-457-AMN-PJE (N.D.N.Y.)

Dear Judge Nardacci:

Plaintiff Securities and Exchange Commission respectfully submits this letter in response to the Court's Text Order dated July 22, 2025 (the "Order"), asking the SEC to address the calculation of the proposed disgorgement amount for Defendants McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; McGinn, Smith Capital Holdings Corp.; First Advisory Income Notes, LLC ("FAIN"); First Excelsior Income Notes, LLC ("FEIN"); First Independent Income Notes, LLC ("FIIN"); and Third Albany Income Notes, LLC ("TAIN") (collectively, "MS Entities"). Specifically, the Order required the SEC to address "how the process of subtracting certain sums described at Dkt. No. 809 at 5-8 (under the 'Amounts Returned to Investors' heading) and the figures shown in Dkt. No. 809-2 relate to the current proposed disgorgement calculation [in the SEC's letter filed March 14, 2025 (the '3/14/25 letter')]."

The 3/14/25 letter (Dkt. No. 1265) stated that the proposed disgorgement amount of $62,960,000 was determined by subtracting the amount returned to investors from the total amount raised through the fraudulent offerings. As the MS Entities raised $85,960,000, and the Receiver has collected and distributed approximately $23,000,000, the disgorgement amount in the SEC's 3/14/25 letter was $62,960,000, plus prejudgment interest of $12,000,000. As a result of an oversight, however, the SEC's disgorgement calculation did not include a reduction for interest payments to investors in the FAIN, FEIN, FIIN and TAIN offerings.

The Order referenced Dkt. No. 809, filed March 3, 2015, which contained the SEC's submissions in support of disgorgement following the Court's grant of the SEC's motion for summary judgment as to Defendants David Smith and Timothy McGinn. Among these submissions was a declaration from the Court-appointed Receiver, William J. Brown, stating that the "total interest expense returned to the investors" in all the fraudulent offerings before the filing of this case on April 20, 2010 was $29,172,312. Dkt. No. 809-1, ¶ 13. In a ruling dated March 30, 2015, the District Court calculated disgorgement by subtracting this amount from the total amount raised from investors. *SEC v. McGinn, Smith & Co., Inc.*, 98 F. Supp. 3d 506, 520 (N.D.N.Y. 2015). The Second Circuit affirmed. *SEC v. Smith*, 646 Fed. Appx. 42, 43 (2d Cir.

2016) (affirming District Court's calculation of disgorgement as "the amount obtained from investors, minus the amount returned to investors via interest and other payments").

The SEC's 3/14/25 letter included a $23 million reduction for amounts paid to investors by the Receiver. To be consistent with the approach taken by this Court in 2015 regarding the individual Defendants, however, the 3/14/25 letter should also have included a reduction for interest payments to the FAIN, FEIN, FIIN and TAIN investors made before the filing of this action. *See* Dkt. 809-2 (summarizing total interest paid to investors in FAIN, FEIN, FIIN and TAIN offerings). The undersigned SEC counsel has discussed this approach with Mr. Brown, the Receiver, and he agrees.

As a result, the SEC staff intends to: (1) seek the Commission's approval for revised disgorgement and prejudgment interest numbers, a process which can take six to eight weeks; and (2) submit to the Court a revised proposed final consent judgment if and when Commission approval is obtained. The SEC will either submit the revised proposed judgment to the Court, or provide a further status report, on or before October 11, 2025.

Respectfully submitted,

/s/ David Stoelting
David Stoelting
Securities and Exchange Commission
Attorney for Plaintiff