

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/DRH)

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, DAVID L. SMITH,
LYNN A. SMITH, DAVID M. WOJESKI, Trustee of
the David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04, GEOFFREY R. SMITH,
LAUREN T. SMITH, and NANCY MCGINN,

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

DAVID M. WOJESKI, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

AMENDED NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the Memorandum of Law in Support of Plaintiff's Motion to Modify the Asset Freeze to Allow the Sale of the Vero Beach Property and to Appoint the Receiver to Oversee the Sale dated December 15, 2010; the Declaration of Kevin P. McGrath dated December 15, 2010, and the exhibits thereto; the Declaration of William J. Brown dated December 13, 2010, and the exhibit thereto, and upon all prior proceedings and filings herein,

plaintiff Securities and Exchange Commission will move, on Thursday, January 20, 2011, at 9:30 a.m., or at any other date convenient to the Court, before the Honorable David R. Homer, United States Magistrate Judge, United States District Court, Northern District of New York, 445 Broadway, Albany, NY, for an order modifying the asset freeze to allow for the sale of the Vero Beach property and appointing the Receiver to oversee the sale;

PLEASE TAKE FURTHER NOTICE that copy of the proposed Order, as revised, is annexed hereto; and

PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7.1(b)(2), opposition papers must be filed and served not less than seventeen days prior to the return date.

Dated: New York, NY
December 16, 2010

Respectfully submitted,

s/ David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
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LAUREN T. SMITH, and NANCY MCGINN,**

Defendants,

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NANCY MCGINN,**

Relief Defendants, and

**DAVID M. WOJESKI, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,**

Intervenor.

**ORDER MODIFYING ASSET FREEZE
TO ALLOW THE SALE OF CERTAIN PROPERTY**

WHEREAS on April 20, 2010, the Commission filed a Complaint and an Order to Show Cause seeking emergency relief and, on that same date, the Court granted the Commission's request for a temporary restraining order that, among other things, froze the assets of the defendants and the relief defendant (the "Freeze Order") and, on July 22, 2010,

the Court entered the Preliminary Injunction Order that, among other things, continued the Freeze Order over the assets of the defendants and relief defendant; and

WHEREAS, the property located at [REDACTED], Vero Beach, Florida is currently subject to the Freeze Order (the “Florida Property”);

NOW, THEREFORE,

I.

IT IS ORDERED that the Court-appointed Receiver, William J. Brown (the “Receiver”), is given sole authority to take all necessary steps to effectuate a sale of the Florida Property, including the retention of a prominently known real estate agent in that community, and the Freeze Order is hereby modified to permit the Receiver or the Smiths (with the Receiver’s prior written consent) to enter into a contract for the purchase and sale of the Florida Property, and to close a sale of the Florida Property subject to the following terms and conditions:

A. The Receiver shall provide the Commission with a copy of any contract proposed to be accepted for sale of the Florida Property (the “Contract”) within three days of its execution, along with a proposed list of distributions (the “Distribution List”) to be made from the proceeds of such sale. The Distribution List may include, among other things, the mortgagor of the Florida Property, and any usual and customary costs of closing, including broker, attorney, and recording fees, and transfer taxes.

B. The Commission may within one week from the delivery of the Contract and the Distribution List object to the terms of the Contract, and such objections may include the sale price or the proposed distributions. The Court will resolve such objections on motion by the Commission or the Receiver if the Commission and the Receiver do not reach agreement

on such objections. The Commission and the Receiver shall not object to a request for an expedited hearing.

C. The balance of any funds remaining after payment of the Distribution List shall be paid to the Clerk of this Court, together with a cover letter identifying the Smiths as defendants in this action, setting forth the title and civil action number of this action and the name of this Court, and specifying that payment is made pursuant to this Order. The Receiver shall send a copy of the documents sent to the Clerk of the Court to David Stoelting, Senior Trial Counsel, Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, New York 10281-1022, and to the Smiths. The Clerk shall deposit the funds in an interest bearing account with the Court's Registry Fund. These funds, together with any interest and income earned thereon, shall be held by the Registry Fund until further order of this Court.

E. The Commission and the Receiver shall provide such documents as the purchaser of the Florida Property may reasonably require to evidence the Commission's and the Receiver's consent and authority to convey title to the Florida Property.

F. The Receiver shall consult with the Smiths, and the Smiths shall cooperate with the Receiver in the listing, showing and closing of the sale of the Florida Property

II.

IT IS FURTHER ORDERED that, except as modified herein and in the Court's Decision dated November 22, 2010, the Preliminary Injunction Order entered August 3, 2010 remains in full force and effect.

Dated: Albany, New York
_____, 2011

DAVID R. HOMER
United State Magistrate Judge