

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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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, and*

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 0/04/04,

*Intervenor.*

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**NOTICE OF HEARING ON FINAL APPLICATION OF  
BDO USA LLP FOR APPROVAL OF FEES AND EXPENSES**

PLEASE TAKE NOTICE that upon the Final Application of BDO USA LLP (“BDO”) for Approval of Fees and Expenses (“Application”), Phillips Lytle LLP as counsel to William J. Brown, as Receiver, on behalf of the Application of BDO will appear (unless otherwise directed by the Court) before the Hon. David R. Homer, United States Magistrate Judge, United States District Court for the Northern District of New York, James T. Foley U.S. Courthouse, 445 Broadway, Room 441, Albany, New York 12207, on **May 19, 2011 at**



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David L. and Lynn A. Smith Irrevocable  
Trust U/A 0/04/04,

*Intervenor.*

**FINAL APPLICATION OF BDO USA LLP  
FOR APPROVAL OF FEES AND EXPENSES**

BDO USA LLP (“BDO”), consultant to William J. Brown, as Receiver of Benchmark Communications LLC, one of the Receivership estates (“Benchmark”) in the above-referenced action, submits this application (“Application”) for an order approving final fees and expenses pursuant to Section XIV of this Court’s Preliminary Injunction Order (Docket No. 96) for the period of October 19, 2010 through October 31, 2010 (“Application Period”). In support of this Application, the Receiver respectfully represents:

1. On April 20, 2010, William J. Brown was appointed Receiver of McGinn, Smith & Co., Inc., et al., which included Benchmark as one of the Receivership estates.

Benchmark is a so-called “triple play” business providing cable, internet, and phone service to apartment and condominium complexes in the southeast Gulf coast area of the United States.

2. BDO provided consulting services to the Receiver in connection with the review of the financial history and operational and financial structure of Benchmark.

3. Based specifically on the expertise and knowledge of David J. Boland, CPA CTP, of BDO, BDO was retained by the Receiver to provide the services described above pursuant to written agreement.

4. BDO commenced its services to the Receiver on October 19, 2010 and completed its services on October 27, 2010.

5. All services for which compensation is sought herein were rendered by BDO to the Receiver solely in connection with this case and not on behalf of the creditors, individual equity holders or other person.

6. Prior to the period covered by this Application, BDO neither made an application nor received prior allowances for compensation or expense reimbursement for professional services provided in conjunction with this action.

7. To the Receiver’s knowledge, during the Application Period, BDO received no payment or promises for payment from any source for services rendered or to be rendered in any capacity whatsoever in connection with this case, and there is no agreement or understanding between BDO and any other person, other than members of the firm, for the sharing of compensation to be received for services rendered in this case.

8. BDO performed its responsibilities in a cost-effective manner commensurate with providing the high quality professional advice required by the Receiver.

9. As requested by the Receiver, Mr. Boland traveled from Dallas to the New Orleans area to meet with Benchmark's manager and to inspect and review Benchmark's financial history and financial and operational structure. The services were requested by the Receiver to validate what the Receiver had been told about the same, to assess whether special issues required attention before putting Benchmark up for sale, and to better understand Benchmark's financial statements. As a result, the Receiver received a report and certain items were addressed by Benchmark. BDO's services and expenses during the Application Period totaled \$2,280.00 for fees, and \$499.40 for expenses.

10. BDO's professional fees and expenses are set forth by day, professional, and task in the summary attached as **Exhibit A**.

11. BDO maintains records of the time expended by person as well as the actual out-of-pocket expenses incurred. BDO prepared and rendered its bill describing activities performed by day by professional.

12. Upon the Receiver's knowledge and belief, the compensation sought for approval herein is commensurate with the customary compensation charged by comparably skilled consultants. The hourly fees charged to clients are dependent upon the experience of the individuals assigned to the engagement.

13. The amounts requested by BDO are fair and reasonable given: (a) the complexity of the case; (b) the actual time expended; (c) the nature and extent of services rendered; (d) the value of such services; and (e) the costs of comparable services.

14. The Receiver believes this request for compensation is justified given the commensurate value of BDO's professional fees for the Application Period.

15. The Receiver does not expect BDO to provide any additional services to the Receiver.

16. Accordingly, this Application is made to the Court for compensation.

**NOTICE**

17. Notice of this Application is being served on the SEC and all parties who have filed a Notice of Appearance in this action. Additionally, it has been posted on the Receiver's website ([www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com)) for all investors and creditors to see. The Receiver submits that no other or further notice need be given.

WHEREFORE, the Receiver respectfully requests compensation of \$2,280.00 in fees and \$499.40 in expenses for the Application Period to be paid to BDO, and for such other and further relief as is proper.

Dated: Buffalo, New York  
March 28, 2011

PHILLIPS LYTTLE LLP

By /s/ William J. Brown

William J. Brown (Bar Roll #601330)

Todd A. Ritschdorff (Bar Roll #512601)

Attorneys for Receiver

Omni Plaza

30 South Pearl Street

Albany, New York 12207

Telephone No. (518) 472-1224

and

3400 HSBC Center

Buffalo, New York 14203

Telephone No.: (716) 847-8400

# **Exhibit A**



700 North Pearl  
Suite 2000  
Dallas, TX 75201  
Telephone: 214-969-7007  
Fax: 214-953-0722

Phillips Lytle LLP  
ATTN: William J. Brown  
3400 HSBC Center  
Buffalo, NY 14203-8400

November 1, 2010

Project # 0163203  
Invoice # 0163203 - 0001

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**Professional Services rendered as per agreement, dated October 19, 2010, between BDO USA LLP ("BDO") and William J. Brown of Phillips Lytle LLP as Receiver for Benchmark Communications LLC:**

**For the time period of October 19, 2010 through October 31, 2010:**

**Fees:**

David J. Boland	5.7	hours @	\$	400.00	2,280.00
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<b>Total Fees:</b>					<b>\$ 2,280.00</b>
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**Expenses:**

Airfare	427.40
Parking / Tolls	14.00
Transportation (Non-Air)	58.00

<b>Total Expenses:</b>	<b>499.40</b>
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<b>Total For This Invoice</b>	<b>\$ 2,779.40</b>
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Phillips Lytle LLP  
ATTN: William J. Brown  
3400 HSBC Center  
Buffalo, NY 14203-8400

Please Remit Payment to:

**BDO USA LLP**  
**P. O. Box 642743**  
**Pittsburgh, PA 15264-2743**

**Project # 0163203**

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**REMITTANCE ADVICE**

(Please return this REMITTANCE ADVICE with your payment)

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**Professional Services rendered as per agreement, dated October 19, 2010, between BDO USA LLP ("BDO") and William J. Brown of Phillips Lytle LLP as Receiver for Benchmark Communications LLC:**

<b>Current Invoice # 0163203 - 0001</b>	\$	<b>2,779.40</b>
Previous Balance Outstanding	\$ -	
<b>TOTAL OUTSTANDING BALANCE DUE TO DATE:</b>	<b>\$</b>	<b>2,779.40</b>

Payment Via Wire To:

PNC Bank, N.A.  
Pittsburgh, PA  
ABA# 031207607  
A/C #8013580178  
Swift #PNCCUS33

Please Reference: Project #0163203



**BENCHMARK COMMUNICATIONS LLC**

**TIME SUMMARY FOR SERVICES PERFORMED  
DURING THE PERIOD OF  
OCTOBER 19, 2010 THROUGH OCTOBER 31, 2010**

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**CONSULTING SERVICES**

<u>DATE</u>	<u>DESCRIPTION</u>	<u>NAME</u>	<u>HOURS</u>	<u>AMOUNT \$</u>
10/20/10	Review Benchmark financial documents in preparation for 10/25/10 meeting with Mark Guidry, President Benchmark LLC, in Metairie, LA.	D. Boland	1.2	480.00
10/25/10	Travel time from Dallas Love Field to New Orleans International Airport at one-half flight time of 1 hour 15 minutes.	D. Boland	0.6	240.00
10/25/10	Meeting with Mark Guidry to review financial and operating history of Benchmark as it relates to possible financial recovery by the Receiver.	D. Boland	3	1,200.00
10/25/10	Travel time from New Orleans International Airport to Dallas Love Field at one-half flight time of 1 hour 15 minutes.	D. Boland	0.6	240.00
10/27/10	Telephone conference with Receiver regarding observations of Benchmark operations based on meeting with Mark Guidry.	D. Boland	0.3	120.00
<b>Total for services</b>			<u>5.7</u>	<u>2,280.00</u>
<u>PROFESSIONAL</u>		<u>RATE</u>	<u>HOURS</u>	<u>AMOUNT \$</u>
D. Boland		\$ 400.00	5.7	2,280.00
			<u>5.7</u>	<u>2,280.00</u>



**BENCHMARK COMMUNICATIONS LLC**

**SUMMARY OF EXPENSES INCURRED  
DURING THE PERIOD OF  
OCTOBER 19, 2010 THROUGH OCTOBER 31, 2010**

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**CONSULTING SERVICES**

<u>DATE</u>	<u>EXPENSE</u>	<u>DESCRIPTION</u>	<u>AMOUNT \$</u>
10/25/10	Airfare	Round trip flight between Dallas Love Field and New Orleans International	\$ 427.40
10/25/10	Taxi	From New Orleans International to Benchmark Communications	29.00
10/25/10	Taxi	From Benchmark Communications to New Orleans International	29.00
10/25/10	Parking	Dallas Love Field	14.00
	<b>Total Expenses</b>		<b>\$ 499.40</b>

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*Intervenor.*

---

**ORDER APPROVING FINAL APPLICATION  
OF BDO USA LLP FOR APPROVAL  
OF FEES AND EXPENSES**

Upon the Final Application of BDO USA LLP (“BDO”) for Approval of Fees and Expenses dated March 28, 2011 (“Application”) for an order approving consulting fees and expenses; and notice of the Application having been given to the Securities and Exchange Commission and all parties who have filed a Notice of Appearance in this action and all creditors of the McGinn Smith Entities and other parties in interest via the Receiver’s website, which

notice is deemed good and sufficient notice; and the Court having determined that sufficient cause exists; it is therefore

ORDERED, that the Application is approved such that (i) compensation for services rendered between October 19, 2010 and October 31, 2010 (“Application Period”) in the amount of \$2,280.00 is allowed as a final allowance, and (ii) reimbursement of expenses advanced by BDO during the Application Period in the amount of \$499.40 is allowed as a final disbursement payment; and it is further

ORDERED, that the Receiver is authorized and directed to pay the amounts as allowed pursuant to this Order.

Dated: April \_\_, 2011

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Hon. David R Homer  
United States Magistrate Judge

Doc # 01-2453535.1

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*Intervenor.*

**CERTIFICATE OF SERVICE**

I, Karen M. Hatch, being at all times over 18 years of age, hereby certify that on March 29, 2011, a true and correct copy of the Notice of Hearing and Final Application of BDO USA LLP for Approval of Fees and Expenses 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:

Charles C. Swanekamp  
Jaeckle, Fleischmann Law Firm  
12 Fountain Plaza  
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Buffalo, NY 14202

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Urbelis & Fieldsteel, LLP  
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Boston, MA 02110-1727

Jill A. Dunn, Esq.  
The Dunn Law Firm PLLC  
99 Pine Street, Suite 210  
Albany, NY 12207

Dated: March 29, 2011

/s/ Karen M. Hatch  
Karen M. Hatch