

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, :

vs. :

Case No. 1:10-CV-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, 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. :

-----X
**RECEIVER'S STATEMENT CONCERNING MOTIONS OF
DAVID L. SMITH AND TIMOTHY M. MCGINN TO USE
ASSETS TO PAY ATTORNEYS' FEES AND COSTS
AND JOINDER IN SEC'S OPPOSITION**

The Receiver in this action, William J. Brown, by his counsel, Phillips Lytle LLP,
files this Statement concerning the Motions ("Defendants' Motions") of David L. Smith (Docket

No. 440) (“Smith Motion”) and Timothy M. McGinn (Docket No. 439) (“McGinn Motion”) to use certain presently frozen assets to pay their attorneys’ fees and costs, and respectfully states as follows:

1. On April 20, 2010, the Securities and Exchange Commission (“SEC”) filed a Complaint initiating the above-captioned action (the “Complaint”) (Docket No. 1). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith (collectively, the “MS Entities”).

2. On July 26, 2010, the Court entered an order granting the SEC’s Motion for a Preliminary Injunction and appointing the Receiver as permanent receiver with the consent of defendants Timothy M. McGinn and David L. Smith (“Preliminary Injunction Order”) (Docket No. 96).

3. Given the magnitude of investors who appear to have lost most of their investments in the MS Entities, the Receiver makes this Statement to update the Court with regard to certain information as to assets asserted in the Defendants’ Motions.

Smith Motion

4. As to the Smith Motion, the Receiver observes as follows:

(a) As to the Vero Beach property in Orchid Island, the Receiver signed a contingent contract of sale on February 21, 2012. All of the contingencies to that contract have been removed as of this morning, March 8, except for the buyers’ required

admission as a member to the Orchid Island Golf & Beach Club. The equity to be realized by the estate from the sale is materially less than Mr. Smith projects in paragraph 47 of the Smith Motion. If requested, the Receiver can make the Court aware of the contract price and terms in-camera since the closing of the sale has not occurred. The SEC, the Smiths, and their counsel are all aware of the contract terms.

(b) The Waterville Golf Club interest may have been purchased with MS Entity funds, and Mr. Smith is in the best position to maximize its value with the least impact to investors.

McGinn Motion

5. As to the McGinn Motion, the Receiver observes as follows:

(a) There is no evidence that the so-called “Chinese Warlord Desk” or oriental rugs belong to Timothy McGinn personally. The desk was previously used at the offices of the MS Entities and understood by the Receiver to be owned by the MS Entities.

(b) There is no evidence that the Pine Tree and Waterville Golf Club memberships were purchased with truly personal funds of Mr. McGinn.

Joinder

6. The Receiver joins in the SEC’s Memorandum of Law in Opposition to the Defendants’ Motions (Docket No. 448).

7. To the extent the Court intends to grant the Defendants' Motions, the Receiver requests the Court to allow the Receiver to be heard on the issue of minimizing the financial impact on the unpaid investors of the MS Entities.

Dated: March 8, 2012

PHILLIPS LYTLE LLP

By /s/ William J. Brown

William J. Brown (Bar Roll #601330)

Joshua P. Fleury (Bar Roll #515418)

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

Doc # 01-2561796.2