

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/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.

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**MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR AN AMENDMENT
TO ORDER (I) APPROVING A PROCEDURE FOR THE ADMINISTRATION OF
CLAIMS; (II) ESTABLISHING A DEADLINE FOR FILING OF CLAIMS; AND
(III) APPROVING THE FORM AND MANNER OF NOTICE THEREOF**

William J. Brown, as Receiver (‘Receiver’) for the entity Defendants in this
action and certain other entities, by his counsel, Phillips Lytle LLP, moves (the “Motion”) for an
amendment to the Court’s Order (I) Approving a Procedure for the Administration of Claims;
(II) Establishing a Deadline for Filing of Claims; and (III) Approving the Form and Manner of

Notice Thereof (“Claims Procedure Order”) (Docket No. 475) entered March 27, 2012, pursuant to Fed. R. Civ. P. 59(e), and respectfully represents as follows:¹

INTRODUCTION

1. The Receiver files the Motion to request entry of an Amended Claims Procedure Order (a) extending each of the dates for posting the Schedules on the secure website and mailing of the Claims Site Access Notice and the Claims Notice to investors and creditors by up to 14 days each, and (b) fixing the Claims Bar Date as 60 days from the entry of the Amended Claims Procedure Order. This request is made as a result of the SEC’s request to the Receiver on April 12, 2012 to allow additional time for the SEC to reconsider the methodology being used to calculate each investor and creditor’s claim. After review and consultation, the SEC again agreed with the existing approach, but a new production schedule at the printer and mailing company needed to be established necessitating this request.

BACKGROUND

2. 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”).

3. On July 26, 2010, the Court entered an order granting SEC’s Motion for a Preliminary Injunction and appointing the Receiver as permanent receiver with the consent of

¹ All capitalized terms used in this Motion but not otherwise defined have the meaning given to them in the Claims Procedure Motion (Docket No. 466).

defendants Timothy M. McGinn and David L. Smith (“Preliminary Injunction Order”) (Docket No. 96).

4. On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (Docket No. 334).

5. The Preliminary Injunction Order authorizes the Receiver to, among other things, “use, lease, sell, and convert into money all assets of the MS Entities, either in public or private sales or other transactions on terms the Receiver reasonably believes based on his own experience and input from his advisors to be most beneficial to the MS Entities and those entitled to the proceeds...” Preliminary Injunction Order, ¶ VII(m).

CLAIMS PROCEDURE MOTION

6. On March 9, 2012, the Receiver filed a Motion (“Claims Procedure Motion”) (Docket No. 466) for entry of the Claims Procedure Order, (i) approving the procedure for the administration of claims against the MS Entities, as summarized below (“Claims Procedure”); (ii) establishing a deadline by which creditors and investors of the MS Entities (“Creditors and Investors”) must file a proof of claim against the MS Entities if necessary under the Claims Procedure (“Claims Bar Date”); and (iii) approving the proposed form and manner of publication of notice of the Claims Bar Date and the Claims Procedure.

7. In particular, the Receiver proposed in the Claims Procedure Motion to establish schedules of all known claims against the MS Entities listing, among other things, the scheduled principal amount of the claim as reflected in the Receiver’s records.

8. The Claims Procedure Motion stated the rationale for creating schedules based upon the principal amount of all known claims against the MS Entities as follows:

“For the purposes of establishing the scheduled amount of each claim, the Receiver has determined that all payments made to investors shall constitute payments of principal unless the applicable MS Entity provided the investor with a Form 1099 in

connection with the payment, indicating that the payment constituted a payment of interest, rather than principal. It is unlikely that all principal amounts due investors will be repaid because recoverable assets are unlikely to be sufficient. For this reason, interest is not included in the Receiver's calculation."

Claims Procedure Motion, at 5, fn 4.

9. On March 27, 2012, the Court granted the Claims Procedure Motion and entered the Claims Procedure Order at Docket No. 475.

10. In addition to approving the Claims Procedure proposed in the Claims Procedure Motion, the Claims Procedure Order established certain deadlines including the Claims Bar Date.

11. While the SEC reviewed the Claims Procedure Motion prior to filing and expressed no objection, on Thursday, April 12, 2012, the SEC requested the Receiver for the first time to delay the printing and mailing of the Claims Site Access Notice and the Claims Notice to all investors and creditors to permit the SEC to again review with the Receiver the methods for calculating the amount of investor claims. Consequently, the Receiver advised the printing and mailing company to not produce the investor and creditor mailing which were ready to be mailed on Tuesday, April 17, 2012.

12. Following further sampling and discussion on April 12 and 13, 2012, the SEC agreed that the Receiver's methodology appeared to be the best process available under the circumstances of this case subject to a continuing review of whether a different approach would be advisable although that analysis would take at least another four weeks to complete.

13. As a result of the foregoing, the posting of the Schedules, the mailing of the Claims Site Access Notice, and the mailing and publication of the Claims Notice has been

delayed because the Receiver was unwilling to incur the cost of printing and mailing while the process was under review.

RELIEF REQUESTED

14. Because of the production time needed by the printing and mailing company, the Receiver respectfully requests that the Court enter an amended Claims Procedure Order in the form attached as **Exhibit A** (“Amended Claims Procedure Order”), extending the (i) Receiver’s deadline to post the Schedules until fourteen (14) days after entry of the Amended Claims Procedure Order, (ii) the Access Notice Deadline to fourteen (14) days after entry of the Amended Claims Procedure Order, and (iii) the Claims Bar Date to sixty (60) days following entry of the Amended Claims Procedure Order. On that timeline, if the proposed Amended Claims Procedure Order were entered on April 17, 2012, the Schedules would be posted by May 1, 2012, the Access Notice Deadline (i.e. the mailing to investors and creditors) would be May 1, 2012, and the Claims Bar Date would be June 19, 2012 rather than May 28, 2012.

15. The Receiver further requests that the Court approve the revised Claims Notice in the form attached as **Exhibit B**. The Claims Notice has been revised to reflect the intervening developments.

16. The Receiver believes that the Amended Claims Procedure Order is necessary to ensure that Creditors and Investors will have sufficient time to review the Schedules listing claim amounts based upon the SEC Procedure, as well as the other notices to be provided by the Receiver.

17. Prominent notice of the amended dates would be posted to the Receiver’s website upon entry of the Amended Claims Procedure Order.

WHEREFORE, the Receiver respectfully requests entry of the Amended Claims Procedure Order, and for such other relief as may be appropriate.

Dated: April 16, 2012

PHILLIPS LYTTLE LLP

By /s/ William J. Brown

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