

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 ORDER
APPROVING (I) SALE AND BIDDING PROCEDURES WITH RESPECT TO
THE SALE OF WHITE GLOVE CRUISES, LLC, AND LUXURY CRUISE
RECEIVABLES, LLC, (II) TIME, DATE, PLACE AND MANNER OF NOTICE
FOR EACH OF THE AUCTION AND SALE HEARING, (III) AN ORDER
APPROVING THE SALE OF THE RECEIVER’S INTERESTS IN WHITE
GLOVE CRUISES, LLC AND LUXURY CRUISE RECEIVABLES, LLC FREE
AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER
INTERESTS,**

William J. Brown, as Receiver (the “Receiver”) for certain of the Defendants and other entities in this action, by his counsel, Phillips Lytle LLP, moves (the “Motion”) for an order (i) approving sale and bidding procedures with respect to the sale of substantially all of the assets

of White Glove Cruises, LLC and Luxury Cruise Receivables, LLC, (ii) fixing the time, date, place and manner of notice for each of the auction and sale hearing, and (iii) approving the sale of substantially all of the assets of White Glove Cruises, LLC and Luxury Cruise Receivables, LLC free and clear of liens, claims, encumbrances, and other interests¹, and in support thereof, represents as follows:

SUMMARY OF MOTION

White Glove Cruises, LLC (“White Glove”) and Luxury Cruise Receivables, LLC (“Receivables” and collectively with White Glove, the “Companies”) are both Receivership entities. The purpose of this Motion is to inform the Court of an offer received by the Receiver for the sale of substantially all of the assets of the Companies, to obtain approval for the sale of those assets to Caribbean World Travel Services Ltd. or its nominee (“Buyer”) pursuant to the Asset Purchase Agreement (“APA”) and a Bill of Sale, each substantially in the form attached as **Exhibits A and B**, respectively, and to establish a bidding process through which the Companies would be sold to the highest and best bidder if another bid was made according to the bidding terms. The proceeds from the sale will be placed in the Receiver’s account and used by the Receiver for the benefit of the estates of the MS Entities (as defined below) including repayment of creditors and investors.

BACKGROUND

I. General Background

1. On April 20, 2010, the Securities and Exchange Commission (“SEC”) filed a Complaint initiating the above-captioned action (the “Complaint”). Also, on April 20, 2010, this Court granted a Temporary Restraining Order, which, among other things, froze certain assets of

¹ The Receiver reserves the right to assume and assign the existing real property lease for White Glove’s business premises at 5555 Anglers Avenue, Suite 27, Dania Beach, Florida. The Buyer has negotiated a new lease with the landlord which is to relieve the Receiver of all existing liability under the current lease.

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”). Among the MS Entities are the Companies.

2. On July 22, 2010, the SEC amended the Complaint, and the Preliminary Injunction Order was entered, appointing the Receiver as permanent receiver with the consent of defendants Timothy M. McGinn and David L. Smith. 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, Para. VIII(m), Docket No. 96).

II. Background Relating to the Companies

3. White Glove is a travel agency located in Dania Beach (Ft. Lauderdale), Florida which pre-receivership operated at its Dania Beach, Florida location with Timothy McGinn appearing to have taken a material role in its management (*See First Report of Receiver* at p. 3) (Docket No. 49). White Glove has a national client base and specializes in booking cruises for individuals and groups predominantly on more luxurious cruise lines. It has approximately 17 employees all of whom work out of leased office space in the Ft. Lauderdale, Florida area. White Glove has had gross billings of between \$9.7 to \$12.4 million each of the past three years, but it also needs capital to increase its business which the Receiver is not in a position to do.

4. The Receiver’s interest in the Companies arose of the following pre-Receivership events. Luxury Cruise Center, Inc. (“Luxury Cruise”) (which was owned by a third party) was

the sole member of Receivables. TDM Cable Funding, LLC (“TDM”) was a “preferred interest holder” of Receivables entitled to various payments based upon its capital contributions to Receivables. In effect, TDM was merely a lender to Receivables. Receivables defaulted on its obligations to TDM and also to McGinn, Smith Funding, LLC (“Funding”), which had also provided a loan jointly to Luxury Cruise and Receivables. TDM and Funding held security interests encumbering all of the assets of Luxury Cruise and Receivables. Those entities foreclosed and acquired all of the assets of Luxury Cruise and Receivables as a result of a secured creditors’ sale on December 2, 2008. White Glove had been acting as the agent of TDM and Funding to operate the business formerly conducted by Luxury Cruise and to collect the accounts receivable of Receivables.

III. Background Relating to the Buyer

5. The Buyer, Caribbean World Travel Services Ltd., owns the Caribbean’s largest and leading travel management company with 22 offices in eight islands. It is part of the Sun Group Inc. which is a large and growing family of companies based in Barbados with offices throughout the Caribbean. The Buyer owns car rental, travel, jeep safari, and other travel related businesses.

6. The Receiver has received an offer from Buyer to purchase the Companies for a total purchase price of \$575,000.00 in cash plus Buyer’s assumption of White Glove’s obligations under that certain Lease between Wilson Hollywood Showroom, LLC as Landlord and White Glove as Tenant for premises at 5555 Anglers Avenue, Suite 27, Dania Beach, Florida 33312 (“Lease”). Additionally, the Receiver will also be repaid any reimbursements due from cruise lines for reimbursements and promotional trips. Not included in the assets being sold are (i) any tax refunds or tax credits of the Company and/or Receivables arising from or related to the

Business prior to the Closing Date, (ii) billings and reimbursements due from cruise line and travel businesses for marketing and travel costs paid or incurred prior to Closing, (iii) all cash and other security in the form of bonds or otherwise posted or placed as security including, without limitation, any utility or landlord deposit, and (iv) all claims of Seller, Receiver, MS Entities, Company and Receivables other than claims against customers or cruise lines of Sellers arising after the Closing.²

MOTION

7. This Motion seeks approval for the sale of the Companies to the Buyer for \$575,000 cash and other consideration after a bidding process described below. The Receiver considers this to be a market price offer under the circumstances.

8. The salient terms of the purchase offer are:³
- a. \$575,000 in cash on closing;
 - b. Assumption or cancellation of the Lease and all other obligations of the business effective as of the closing of the sale including payable and other obligations;
 - c. The return to the Receiver of all non-customer deposits currently held by or due to the Companies;
 - d. The Buyer shall pay a deposit of \$50,000 upon signing the APA which will be held in escrow by counsel for the Receiver;⁴

² In 2011, the Receiver negotiated a sale of the Companies to the then current manager who, at the last moment, went to work for a competitor along with some of the best sales agents. The Receiver believes that he holds claims against the competitor and others arising out of those events. Those claims are expressly not being sold as part of the sale.

³ Reference should be made to the APA for the exact terms of the sale.

⁴ The Receiver has received the deposit.

- e. The sale is WITHOUT RECOURSE, REPRESENTATION OR WARRANTY;
- f. The sale is free and clear of all liens and encumbrances of record;
- g. Continued maintenance of books and records with access for the Receiver and his professionals and agents for up to six years;
- h. There are no brokers associated with the transaction; and
- i. The closing shall occur no later than the June 25, 2012 unless waived by the parties.

PROPOSED SALE PROCEDURES

9. To ensure the maximization of the Companies for the benefit of the MS Entities and those entitled to the proceeds, the Receiver seeks approval of the following procedures to market and, if necessary, auction the Companies for the highest and best consideration:

- (i) Upon entry of an Order scheduling a hearing on this Motion, the Receiver shall conspicuously post on the Receiver's website relating to this case (<http://mcginnsmithreceiver.com>) general details of the proposed sale of the Companies along with the deadline for submissions of competing bids for the Companies;
- (ii) The Receiver will promptly distribute to individuals who have expressed, or who, in response to the Receiver's publication of the sale, express, interest in the Companies with a due diligence package, subject to the signing by such individual of a confidentiality agreement;
- (iii) Any competing offers for the Purchase of the Companies must be on the same terms as set forth in the APA;

- (iv) To the extent that the Receiver receives one or more bona-fide offers to purchase the Companies in accordance with these procedures, an auction will be held at the offices of Phillips Lytle LLP, Omni Plaza, 30 South Pearl Street, Albany, New York 12207 two business days prior to the date and time set by the Court for this Motion;
- (v) There is no break-up fee if the Buyer is not the highest and best bidder at the auction. There will be a minimum overbid at the auction of \$50,000;
- (vi) The sale of the Companies to the Buyer or, alternatively, the winning bidder at the auction, will be approved by this Court;
- (vii) The Receiver, in his reasonable discretion, may take such other actions as necessary to ensure that the marketing, auction and sale procedures are in accordance with his duty to maximize the value of the Companies for the benefit of the MS Entities and those entitled to the proceeds.

10. Timing is of the essence in completing the sale of the Companies. The Buyer has agreed to the APA on the condition that the sale close on or before June 25, 2012. This expedited timetable is necessary because an important component of the consideration for the sale is the Buyer taking control of the operations to make certain investments and upgrades.

BASIS FOR RELIEF

11. The relief requested herein is authorized by the Preliminary Injunction Order and applicable law, and additionally is appropriate because it preserves the value of the Companies for the benefit of the MS Entities and those entitled to the proceeds.

12. This court clearly has the authority to freeze assets and to permit sales of such assets. That authority authorizes a court in cases such as this to exercise “broad equitable discretion.” S.E.C. v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997); see also SEC v. Manor

Nursing Centers, Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (explaining the equitable powers granted to the district court and holding that when there is “a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy.”).

13. The Preliminary Injunction Order mandates that the assets be maintained without dissipation of their value. (Preliminary Injunction Order at page 5). Therefore, if the value of an asset is at risk of dissipation so that funds available to investors could be diminished in the event the SEC ultimately obtains a judgment, the Court may act to prevent such dissipation. S.E.C. v. Am. Bd. of Trade, Inc., 830 F.2d 431, 436 (2d Cir. 1987). In addition, the Court also has the power to enter the proposed Order under § 21(d)(5) of the Securities Exchange Act of 1934, which provides that in SEC actions, "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." See also S.E.C. v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) ("federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws") (citations omitted).

14. In this case, the proposed sale is likely to maximize the value of the Companies, and, additionally to mitigate the risk that the value of the Companies further diminish to the detriment of the MS Entities and those entitled to the proceeds. It is difficult for a travel agency business to thrive under the specter of this action and the Receivership, and the purchase price is based on the value of the Companies' which can deteriorate with time. The proposed sale would monetize the value of the Companies, and the procedures set forth herein provide for higher and better offers to better ensure that the Companies is sold for the greatest consideration.

MEMORANDUM OF LAW

15. Since the basis for the relief requested herein under the Permanent Injunction Order and applicable law is set forth herein, the Receiver requests that any requirement for a separate memorandum of law be waived.

CONCLUSION

As such, for the reasons set forth herein, the Receiver requests entry of an Order: (i) approving the procedures set forth herein for the marketing and auction of the Companies pursuant to the terms set forth herein, (ii) approving such procedures on an expedited basis to allow the Receiver to begin as soon as possible such marketing procedures, (iii) setting a hearing date for approval of the sale of the Companies to the Buyer or the highest and best bidder at the auction, as the case may be, consistent with closing such sale on or before June 25, 2012, and (iv) providing such other relief as is necessary and proper.

Dated: June 7, 2012

PHILLIPS LYTTLE LLP

By /s/ William J. Brown
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