

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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**RESPONSE OF RECEIVER TO CROSS-MOTION
OF DAVID AND LYNN SMITH**

William J. Brown, as Receiver (“Receiver”), by his counsel, Phillips Lytle LLP, files this Response to the Cross-Motion of David and Lynn Smith (Docket No. 508) (“Cross-Motion”), and respectfully states as follows:

1. The Receiver joins in the SEC’s request for a temporary suspension of the

SEC's Motion (Docket No. 505) ("SEC Motion") and the Cross-Motion for the reasons stated in the SEC's Opposition.

2. If the Court does not (a) temporarily suspend the SEC Motion and the Cross-Motion or (b) deny the Smith's Cross-Motion to release monies from the Receivership estate to satisfy or purchase the existing Citizens Bank mortgage, the Receiver requests that, if the Court does consider granting the Cross-Motion in whole or in part, it be granted at a minimum only after the following:

(i) An inspection of the premises by the Receiver and his professionals which would examine the condition, marketability and value of the premises since no on-property inspection by the Receiver has been conducted;

(ii) The establishment of an appropriate payment mechanism to compensate the Receivership estate for the Smiths living at the premises for free since defaulting on the payment of their real property taxes and mortgage debt; and

(iii) The filing of a report with the Court by the Receiver of his findings and recommendations following his inspection of the premises.

Dated: August 3, 2012

PHILLIPS LYTTLE LLP

By /s/ William J. Brown
William J. Brown (Bar Roll #601330)
Todd A. Ritschdorff (Bar Roll #512601)

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CERTIFICATE OF SERVICE

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on August 3, 2012, a true and correct copy of the Response of Receiver to Cross-Motion of David and Lynn Smith 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:

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Dated: August 3, 2012

/s/ Karen M. Ludlow
Karen M. Ludlow