

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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**RECEIVER’S (I) REPLY TO SMITHS’ JOINT MOTION FOR
MODIFICATION OF THE PRELIMINARY INJUNCTION ORDER
TO RELEASE ASSETS TO PAY CRIMINAL TAX OBLIGATIONS
AND (II) JOINDER IN SEC’S MEMORANDUM OF LAW IN OPPOSITION**

William J. Brown, as Receiver (“Receiver”) for the entity Defendants in this action and certain other entities, by his counsel, Phillips Lytle LLP, responds to the Motion of David L. Smith and Lynn A. Smith for Modification of the July 22, 2010 Preliminary Injunction Order to Release Assets to Pay Taxes Due and Owing (“Motion”) (Docket No. 576), and respectfully states as follows:

BACKGROUND

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 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. 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).

4. Subsequent to the Preliminary Injunction Order, this Court has entered several Orders directing the Receiver to oversee and perform other duties with respect to certain assets of the Smith Trust and Lynn A. Smith. See, e.g. Docket Nos. 263 and 478.

THE RECEIVER’S CLAIMS PROCESS

5. As described below, the Receiver’s claims process and the establishment of a claims bar date by this Court pre-date any other claim to assets held by the Receiver.

6. On March 9, 2012, the Receiver filed a Motion (“Claims Procedure Motion”) (Docket No. 466) for entry of an Order approving, among other things, the Receiver’s proposed procedure for the filing of claims (as distinguished from equity interests) against the

MS Entities by creditors and investors. The Court approved the Motion and established June 19, 2012 as a bar date (“Bar Date”) for the filing of claims against the estates.

7. The Receiver has reviewed and reconciled substantially all of the investor and creditor claims since the Bar Date.

8. Total claims asserted against the MS Estate (as defined in the Preliminary Injunction Order) total approximately \$124,123,595. The Receiver intends to (i) object to certain claims including duplicate claims and claims for which no record exists in the books and records of the Receivership estates, and (ii) disallow or subordinate claims asserted by insiders and other persons or entities who received favorable or other special treatment. The Receiver presently estimates that claims to which objections will be asserted total in the range of \$23,617,190. Thus, under any event, total investor claims will likely exceed \$100 million¹.

9. The Receiver currently has cash on hand of approximately \$14,141,311². Of that amount, the following cash amounts were generated from purported assets of Lynn Smith, the Smith Trust, or the Smiths’ Vero Beach property:

Lynn Smith	\$1,498,828
Smith Trust	\$1,456,722
Smith Trust	\$ 436,965
Vero Beach Sale Proceeds	<u>\$ 84,838</u>
Total	\$3,477,353

¹ Until completion of the claims allowance process and adjudication of claims objections by the Court, these numbers remain approximate. No claims were asserted by the IRS.

² The balances are subject to clearing deposits and checks written.

JOINDER

10. The Receiver joins in the Memorandum of Law filed by the Securities and Exchange Commission (“SEC Memorandum”) in opposition to the Motion and strenuously opposes any payment of the Smiths’ tax liability from monies or property held by the Receiver.³

CONCLUSION

The Motion should be denied for the reasons stated herein and in the SEC Memorandum.

Dated: July 1, 2013

PHILLIPS LYTTLE LLP

By /s/ William J. Brown
William J. Brown (Bar Roll #601330)
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

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³ Presumably, Timothy McGinn may seek to rely upon any benefit gained by the Smiths through the Motion for the payment of his own tax liability.