

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/CFH)

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 MEMORANDUM OF LAW IN RESPONSE TO MOTION
TO ENFORCE COMPLIANCE WITH COURT-APPROVED PLAN OF DISTRIBUTION**

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William J. Brown, as Receiver (“Receiver”) of McGinn, Smith & Co., Inc., et al. (“MS & Co.”), respectfully submits this Memorandum of Law in response (“Response”) to the Motion to Enforce Compliance with Court-Approved Plan of Distribution (Docket No. 911) (“Kang Motion”).

PRELIMINARY STATEMENT

Since the Memorandum-Decision and Order (“Plan MDO”) approving the Receiver’s Plan of Distribution became a final Order (“Plan”) (Docket No. 904), the Receiver finalized the McGinn Smith investor claims database, prepared the investor letter and Investor Questionnaire consistent with the Plan and contracted with a mailing and printing house for the automated mailing of 2,827 individualized investor letters, Investor Questionnaires and W-9 forms for each claim of McGinn Smith investors and those claimants who also filed paper claims in accordance with the claims procedure approved by the Court in 2012. Simultaneously, the Receiver posted a sample investor letter and Investor Questionnaire along with several status announcements and instructions on the Receiver’s website (www.mcginnsmithreceiver.com) so that investors would be able to anticipate and prepare information in order to be able to respond and complete the Investor Questionnaires when they were received by investors. Brown Dec’l. ¶ 3.¹

Investors were given a target date of February 28, 2017 by which to return to the Receiver the Investor Questionnaires and W-9 forms. In that interim period and thereafter, the Receiver and the Receiver’s Assistant,² received hundreds of mail and telephone inquiries dealing with the Plan process. The completed Investor Questionnaires and W-9 forms are now being processed by the Receiver’s staff as part of the distribution process. Brown Dec’l. ¶ 4.

¹ “Brown Dec’l. ¶ ___” refers to the Declaration of William J. Brown dated March 20, 2017 filed in support of the Response.

² Capitalized terms not otherwise defined in this Memorandum of Law shall have the meanings set forth in the Brown Dec’l.

SUMMARY OF RESPONSE

The Receiver is proceeding in full compliance with the Plan as approved by the Court. In that regard, the Receiver and his staff have communicated with investors consistent with the Plan as supported by the non-hearsay Declarations of the Receiver and the Receiver's Assistant filed in response to the Kang Motion. The Plan anticipated that ongoing collateral recoveries were still being pursued as in the so-called Piaker Action. The Kang Motion attributes false hearsay statements to the Receiver and the Receiver's Assistant and by seeking entry of an Order to make pro-rata distributions to plaintiffs in the Piaker Action "without further delay" ignores the Plan's approved distribution process and would establish a different collateral recovery rule for plaintiffs in the Piaker Action, which relief has already been rejected by the Court in the Plan MDO at pp. 11-13.

ARGUMENT

The Motion seeks a result not authorized and effectively rejected by the Plan MDO.

I. The Purported Hearsay Statements are False

Only two people in the Receiver's office respond to telephone and other investor questions. Brown Dec'l. ¶ 5. Furthermore, the Receiver is the only person who responds to questions concerning collateral recoveries (as that term is used in the Plan). Brown Dec'l. ¶ 6. The Receiver's Assistant responds to routine investor questions in accordance with the Receiver's instructions and does not respond to collateral recovery questions or anything concerning the Piaker Action. Receiver Assistant Dec'l. ¶ 4.³

As made clear in the Declarations of William J. Brown as Receiver and Karen M. Ludlow each dated March 20, 2017 filed simultaneously in support of this Response, no investor has been told that "they would not be eligible to receive their pro-rata share of distributions from

³ Receiver's Assistant Dec'l. ¶ ___" refers to the Declaration of Karen M. Ludlow dated March 20, 2017 filed in support of the Response.

the Receivership estate as long as they remained plaintiffs in the Piaker action” or that “they should withdraw from the Piaker action if they ever wanted to receive their share of distributions from the estate” or that “they should not bother returning the Investor Questionnaires provided by the Receiver, since they were plaintiffs in the Piaker action”. Brown Dec’l. ¶ 8; Receiver’s Assistant Dec’l. ¶ 4-5.

Rather, the Receiver has told investors to complete and return the Investor Questionnaires and W-9 forms, and if the amount of a collateral recovery could not yet be ascertained, then monies for the claim would be reserved pending a determination of the collateral recovery amount and the calculation of its effect, if any, on the investor’s distribution amount. Brown Dec’l. ¶¶ 9-10. The Receiver did not tell investors in the Piaker Action what to do. Brown Dec’l. ¶ 10.

II. The Court-Approved Plan Deals with the Piaker Action

At the time of the formulation of the Plan in 2015, the Receiver was aware of the existence of the so-called Piaker action and other FINRA arbitrations which could possibly result in collateral recoveries for McGinn Smith investors. Brown Dec’l. ¶¶ 11-12. Accordingly, for this reason, the Memorandum of Law in support of the Motion of William J. Brown, as Receiver, for an Order (I) Approving Plan of Distribution of Estate Assets and (II) Authorizing Interim Distributions (Docket No. 847) expressly states on page 11 the following:

“A claimant will not be allowed to receive a disproportionate or double recovery under the Plan. Before the Receiver makes any distributions under the Plan, investors will receive a notice from the Receiver requiring the investor to certify, as a condition of receiving payment, whether the investor has applied for or received any compensation for their claimed loss from sources other than the Receivership and, if so, the amounts of such compensation actually received. Those investors will not receive payment under the Plan unless they return the certification and provide the appropriate information regarding collateral recoveries. To the extent an investor receives one or more collateral recoveries, the Receiver will reduce payments to such an investor to the extent

necessary to ensure that all allowed investor claims are treated equally with respect to the percentage of their allowed claim amounts they recover from all sources as of the date of the payments.”

Additionally, the Receiver’s Omnibus Reply to Objections to Motion for an Order

(I) Approving Plan of Distribution of Estate Assets and (II) Authorizing Interim Distributions

(Docket No. 883) at page 5 states, in relevant part:

“...assuming the Plan is approved, the Certification that the Receiver will send concerning collateral recoveries will require that each investor certify that if they pursue or recover any other collateral recoveries in the future, then they must disclose those recoveries to the Receiver for an appropriate adjustment. Thus, while the chances of future recoveries may be slim, it will nonetheless be accounted for.”

The Receiver intended to calculate the amount of all collateral recoveries, whenever and however received, in arriving at the distribution amount for McGinn Smith investors. Brown Dec’l. ¶ 13.

Thus, the Kang Motion’s assertion at page 7 that the Receiver “neither sought nor obtained approval to withhold pro rata interim distributions from investors with pending claims against third parties for which there have been no actual recovery” is incorrect. No effort is being made by the Receiver to deny any investor the right to receive their pro rata share of the pending distribution by reason of their being plaintiffs in the Piaker Action, as alleged by the Motion. Rather, the Receiver is treating all investors alike, while conveying the facts and allowing investors to make up their own mind.

III. The Motion Seeks Different Treatment for the Piaker Action Investors

By seeking entry of an Order to compel the Receiver to make pro-rata distributions in accordance with the terms of the Plan “without further delay”, ignores the Plan’s approved distribution process and would establish a different collateral recovery rule for plaintiffs in the

Piaker Action, which relief has already been rejected by the Court in the Plan MDO. If distributions were made to holders of allowed claims who remain plaintiffs in the Piaker Action prior to a determination of whether they will receive any collateral recoveries from that lawsuit, those investors would be paid monies which might otherwise be reduced in accordance with the collateral recovery rules under the approved Plan. As a practical matter, it would become impossible to recover or address amounts which might be overpaid. Brown Dec'1. ¶ 13. Just because plaintiffs in the Piaker Action make their own determination that they would prefer to proceed with a distribution under the Plan at this time and be dismissed from the Piaker Action with prejudice, which might have an adverse economic impact on the Kang Haggerty and Fetbroyt LLC law firm, is not reason to give an advantage to one relatively small group of potential collateral recovery recipients over the hundreds of other McGinn Smith defrauded investors.

CONCLUSION

For the foregoing reasons, the Receiver requests that the Motion be denied, and for such other and further relief as is appropriate.

Dated: March 20, 2017

PHILLIPS LYTLE LLP

By /s/ William J. Brown
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Attorneys for the Receiver

UNITED STATES DISTRICT COURT
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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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**DECLARATION OF WILLIAM J. BROWN, AS RECEIVER,
IN RESPONSE TO MOTION TO ENFORCE COMPLIANCE
WITH COURT-APPROVED PLAN OF DISTRIBUTION**

William J. Brown, as Receiver, declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Receiver of McGinn, Smith & Co. Inc., et al. (“MS & Co.”)

appointed by the Court in this action pursuant to the Preliminary Injunction Order dated July 26, 2010 (Docket No. 96).

2. I make this Declaration in support of the Receiver's Response to the Motion to Enforce Compliance with Court-Approved Plan of Distribution ("Kang Motion") (Docket No. 911).

BACKGROUND FACTS

3. Since entry of the Memorandum-Decision and Order ("Plan MDO") approving the Receiver's Plan of Distribution became a final Order ("Plan") (Docket No. 904), the Receiver finalized the McGinn Smith investor claims database, prepared the investor letter and Investor Questionnaire consistent with the Plan and contracted with a mailing and printing house for the automated mailing of 2,827 individualized investor letters, Investor Questionnaires and W-9 forms for each claim of McGinn Smith investors and those claimants who also filed paper claims in accordance with the claims procedure approved by the Court in 2012. Simultaneously, the Receiver posted a sample investor letter and Investor Questionnaire along with several status announcements and instructions on the Receiver's website (www.mcginnsmithreceiver.com) so that investors would be able to anticipate and prepare information in order to be able to respond and complete the Investor Questionnaires when they were received by investors.

4. Investors were given a target date of February 28, 2017 by which to return to the Receiver the Investor Questionnaires and W-9 forms. In that interim period and thereafter, the Receiver and the Receiver's Assistant,¹ received hundreds of mail and telephone inquiries dealing with the Plan process. The completed Investor Questionnaires and W-9 forms are now being processed by the Receiver's staff as part of the distribution process.

¹ Capitalized terms not otherwise defined in this Memorandum of Law shall have the meanings set forth in the Brown Dec'l.

THE KANG MOTION

5. There are only two people in the Receiver's office who answer the phone and respond to McGinn Smith investor questions: myself and my assistant, Karen M. Ludlow ("Receiver's Assistant").

6. I am the only person who responds to investor questions as to collateral recoveries as that term is used under the McGinn Smith Plan of Distribution.

7. The Receiver's Assistant (along with the Receiver) responds to routine investor questions or requests dealing with such matters as address changes, requests for a duplicate confidential password for the claims website, the need to receive duplicate investor letters, Investor Questionnaires and W-9's, and Plan of Distribution claims and distribution status.

8. At no time did I tell a McGinn Smith investor that (a) "they would not be eligible to receive their pro rata share of distributions from the receivership estate as long as they remained plaintiffs in the Piaker Action" or (b) "that they should withdraw from the Piaker Action if they ever wanted to receive their share of distributions from the estate", or (c) "that they should not bother returning the investor questionnaires provided by the Receiver, since they were plaintiffs in the Piaker Action", as asserted in the Motion. Kang Law Firm Memorandum, p. 5; Dean Dec'1 ¶¶ 11,14.²

9. Rather, in responding to any investor question about a pending or future collateral recovery, my response was consistent: complete and return the Investor Questionnaires and W-9's and if the amount of a collateral recovery could not yet be ascertained,

² "Kang Law Firm Memorandum, p. ___" refers to the Memorandum of Law in Support of Motion to Enforce Compliance with Court-Approved Plan of Distribution (Docket No. 911-1); "Dean Dec'1 ¶ ___" refers to the Declaration of David P. Dean, Esq. dated March 3, 2017 (Docket No. 911-3), each filed in support of the Kang Motion.

then monies for the claim would be reserved pending a determination of the collateral recovery amount and the calculation of its effect, if any, on the investor's distribution amount.

10. On two occasions I recall being asked what I would need to receive to evidence "withdrawal" from the Piaker Action. I told those investors a final Order dismissing them with prejudice from the lawsuit. I did not offer guidance or suggest what they should do.

11. At the time of the formulation of the Plan of Distribution in 2015, I was aware of the existence of the so-called Piaker Action and other FINRA arbitrations which could possibly result in collateral recoveries for McGinn Smith investors. Accordingly, for this reason, the Memorandum of Law in Support of Motion of William J. Brown, as Receiver, for an Order (I) Approving Plan of Distribution of Estate Assets and (II) Authorizing Interim Distributions (Docket No. 847) expressly states on page 11 the following:

"A claimant will not be allowed to receive a disproportionate or double recovery under the Plan. Before the Receiver makes any distributions under the Plan, investors will receive a notice from the Receiver requiring the investor to certify, as a condition of receiving payment, whether the investor has applied for or received any compensation for their claimed loss from sources other than the Receivership and, if so, the amounts of such compensation actually received. Those investors will not receive payment under the Plan unless they return the certification and provide the appropriate information regarding collateral recoveries. To the extent an investor receives one or more collateral recoveries, the Receiver will reduce payments to such an investor to the extent necessary to ensure that all allowed investor claims are treated equally with respect to the percentage of their allowed claim amounts they recover from all sources as of the date of the payments." (Emphasis added).

The "date of payments" means the date when distributions are made to particular investors by the Receiver.

12. Additionally, the Receiver's Omnibus Reply to Objections to Motion for an Order (I) Approving Plan of Distribution of Estate Assets and (II) Authorizing Interim Distributions (Docket No. 883) at page 5 states, in relevant part:

“...assuming the Plan is approved, the Certification that the Receiver will send concerning collateral recoveries will require that each investor certify that if they pursue or recover any other collateral recoveries in the future, then they must disclose those recoveries to the Receiver for an appropriate adjustment. Thus, while the chances of future recoveries may be slim, it will nonetheless be accounted for.” (Emphasis added).

13. It was my intention and remains my intention, as Receiver, to calculate the amount of all collateral recoveries whenever received by an investor with an allowed claim in arriving at the distribution amount paid to any relevant McGinn Smith investor since recovering distributions already paid to an investor would be a practical impossibility if a collateral recovery were later received by that investor.

March 20, 2017

/s/ William J. Brown
William J. Brown, Receiver

Doc #01-3024521.1

UNITED STATES DISTRICT COURT
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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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**DECLARATION OF KAREN M. LUDLOW IN
RESPONSE TO MOTION TO ENFORCE COMPLIANCE
WITH COURT-APPROVED PLAN OF DISTRIBUTION**

Karen M. Ludlow declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I, Karen M. Ludlow, am the assistant to William J. Brown, the Receiver in this action. I have worked with the Receiver for over 20 years and do so on a daily basis.
2. I make this Declaration in support of the Receiver’s Response to the Motion to Enforce Compliance with Court-Approved Plan of Distribution (“Kang Motion”) (Docket No. 911).

3. I respond and attend to routine administrative questions asked by McGinn Smith investors as directed by and instructed by the Receiver.

4. After approval of the Plan of Distribution by this Court, the Receiver instructed me how to answer routine investor questions regarding the Plan. More involved questions are referred to the Receiver for a response. Consequently, I have not and would not respond to investor questions about collateral recoveries or the so-called Piaker Action. If I receive such questions, I direct those questions to the Receiver.

5. I have reviewed the Declaration of David P. Dean, Esq. filed in support of the Motion and, in particular, paragraph 14. I have not told any investor “that because she had a pending claim in the Piaker Action, she would not be receiving a distribution pursuant to the Plan, and should not return the investor questionnaires provided to her”.

6. I was recently out of the office for one day. My replacement, who is a full-time Phillips Lytle employee, was instructed not to answer investor questions but to refer all questions to the Receiver. I reconfirmed with her that she did not answer investor questions during my one-day absence.

March 20, 2017

/s/ Karen M. Ludlow
Karen M. Ludlow

Doc #01-3024526.1

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF NEW YORK

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 SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, :

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 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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CERTIFICATE OF SERVICE

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on March 20, 2017, a true and correct copy of the (i) Receiver’s Memorandum of Law in Response to Motion to Enforce Compliance with Court-Approved Plan of Distribution, (ii) Declaration of William J. Brown, as Receiver, in Response to Motion to Enforce Compliance with Court-Approved Plan of Distribution, and (iii) Declaration of Karen M. Ludlow in Response to Motion to Enforce Compliance with Court-Approved Plan of Distribution (“Response Documents”) were 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:

- **William J. Brown** wbrown@phillipslytle.com,khatch@phillipslytle.com
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And, I hereby certify that on March 20, 2017, I mailed, via first class mail using the United States Postal Service, a copy of the Response Documents to the individuals listed below:

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Dated: March 20, 2017

/s/ Karen M. Ludlow
Karen M. Ludlow