

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE
COMMISSION

:
: Case No. 1:10-CV-457
: (GLS/CFH)
:

Plaintiff,

v.

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 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.

**REPLY BRIEF IN SUPPORT OF MOTION TO ENFORCE COMPLIANCE WITH
COURT-APPROVED PLAN OF DISTRIBUTION**

The Moving Investors, as defined in the motion to enforce compliance with the court-approved plan of distribution filed March 3, 2017 (the “Motion”) (Doc. No. 911), hereby submit this reply brief in support of the Motion.

I. The Moving Investors Stand by the Facts Outlined in the Dean Declaration

The Receiver in his response to the Motion, and in the accompanying declarations of the Receiver and his assistant, disputes the facts contained in the Dean Declaration that accompanies the Motion. Specifically, the Receiver takes issue with the assertion that multiple clients in the Piaker action have been informed by the Receiver and his staff that they would not receive distributions from the receivership estate so long as they maintained their participation in the Piaker Action. *See* Dean Decl. ¶¶ 11 – 14.

By disputing that he or his staff told any plaintiffs in the Piaker Action “what to do,” the Receiver is arguing, presumably, that it is a mere coincidence that nine (9) plaintiffs in the Piaker Action have voluntarily dismissed their claims in that case (Case 14-1303 Doc. Nos. 158, 160, 162) since the Receiver’s office began sending out Investor Questionnaires to the Moving Investors and others in early February. In other words, the Receiver is arguing he has nothing to do with the nine plaintiffs’ voluntary withdrawals from the Piaker Action after having been plaintiffs in that action for about two and a half years.

The timing of these withdrawals, as well as the stated position of the Receiver with respect to the ability of these investors to receive interim distributions from the receivership estate, casts doubt on the Receiver’s claims, and strongly suggests that the withdrawal of the nine plaintiffs in the Piaker Action were not a mere coincidence.

II. The Relief Sought in the Motion is Consistent with the Plan of Distribution

The Receiver further contends that the Plan of Distribution deals with the claims of the Moving Investors, and that the Moving Investors are seeking preferential treatment through the Motion. These arguments are unconvincing.

As set forth in the Motion, regardless of what the Receiver may have argued in supplemental briefing papers, the Plan of Distribution as presented by the Receiver provides only that “[t]o 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.*” Doc. No. 847, p. 11 (emphasis added). The Court confirmed in its order approving the Plan of Distribution that distribution payments to investors would be offset only by “such compensation actually received.” Doc. No. 94, p. 12.

The Receiver has not contradicted the Moving Investors’ statement that none of their claims are considered to be disputed or otherwise ineligible for distribution. *See* Motion, Doc. No. 911, p. 7. The Moving Investors have completed the Investor Questionnaires as requested by the Receiver, and have answered truthfully that they have received no compensation from the Piaker Action. Further, they do not anticipate receiving any compensation from the Piaker Action in the foreseeable future, given the uncertainty in time, likelihood, and amount of any collateral recovery.

Contrary to the Receiver’s argument that the Moving Investors are seeking special treatment, the Moving Investors simply ask that their claims be treated like other investors under the Plan of Distribution, and that the Receiver be compelled to make distributions to all investors, including the Moving Investors, in an amount reduced only to the extent of collateral recoveries *actually received.*

III. Conclusion

For the foregoing reasons, as well as the reasons set forth in their initial Motion, the Moving Investors respectfully request that the Motion be granted, and that the Court enter an order compelling the Receiver to make distributions in accordance with the terms of the Plan of Distribution.

Respectfully submitted,

KANG HAGGERTY & FETBROYT LLC

By: /s/ Edward T. Kang
Edward T. Kang
123 South Broad Street, Suite 1670
Philadelphia, PA 19109
Tel: (215) 525-5850
Fax: (215) 525-5860
ekang@KHFlaw.com

Counsel for Moving Investors

Dated: March 24, 2017

- Benjamin W. Hill bhill@dreyerboyajian.com, coconnell@dreyerboyajian.com, jcantoni@dreyerboyajian.com
- Bonnie R. Golub bgolub@weirpartners.com
- Bryan M. Westhoff bryan.westhoff@kayescholer.com
- Charles C. Swanekamp cswanekamp@bsk.com, mhepple@bsk.com
- Craig H. Norman cnorman@chnesq.com, jbugos@coopererving.com
- David P. Stoelting stoeltingd@sec.gov, mcgrathk@sec.gov, mehrabanl@sec.gov, paleym@sec.gov, wbrown@phillipslytle.com
- E. Stewart Jones, Jr esjones@joneshacker.com, kjones@joneshacker.com, mleonard@joneshacker.com, pcampione@joneshacker.com
- Elizabeth C. Coombe elizabeth.c.coombe@usdoj.gov, CaseView.ECF@usdoj.gov, kelly.ciccarelli@usdoj.gov, paul.condon@usdoj.gov
- Erin K. Higgins EHiggins@ckrpf.com
- Haimavathi V. Marlier marlierh@sec.gov
- Jack Kaufman kaufmanja@sec.gov
- James D. Featherstonhaugh jdf@fwc-law.com, cr@fwc-law.com, jsm@fwc-law.com, shm@fwc-law.com
- James D. Linnan jdlinnan@linnan-fallon.com, lawinfo@linnan-fallon.com
- James H. Glavin, IV hglavin@glavinandglavin.com
- James P. Lagios jlacios@icrh.com, rlaport@icrh.com
- Jonathan S. McCardle jsm@fwc-law.com
- Joshua M. Newville newvillej@sec.gov
- Kevin Laurilliard laurilliard@mltw.com, chandler@mltw.com
- Kevin P. McGrath mcgrathk@sec.gov
- Lara S. Mehraban mehrabanl@sec.gov, marlierh@sec.gov
- Michael A. Kornstein mkornstein@coopererving.com
- Michael J. Murphy mmurphy@carterconboy.com, abell@carterconboy.com, tcozzy@carterconboy.com
- Richard L. Reiter reiterr@wemed.com, richard.reiter@wilsonelser.com
- Scott J. Ely sely@elylawpllc.com, shm@fwc-law.com
- Sheldon L. Solow sheldon.solow@kayescholer.com, kenneth.anderson@kayescholer.com
- Terri L. Reicher Terri.Reicher@finra.org
- Thomas E. Peisch TPeisch@ckrpf.com, apower@ckrpf.com
- Walter Weir wweir@weirpartners.com, smorris@weirpartners.com
- William J. Brown wbrown@phillipslytle.com, khatch@phillipslytle.com
- William J. Dreyer wdreyer@dreyerboyajian.com, bhill@dreyerboyajian.com, coconnell@dreyerboyajian.com, lowens@dreyerboyajian.com

VIA First Class Mail Only:

Judith A. Newcomb
David G. Newcomb
224 Independence Way
Mount Bethel, PA 18343

Thomas J Urbelis
Urbelis & Fieldsteel, LLP
155 Federal Street
Boston, MA 02110-1727

Nancy McGinn
426-8th Ave.
Troy, NY 12182

Martin H. Kaplan, Esq.
Gusrae, Kaplan, Bruno &
Nusbaum PLLC
120 Wall Street
New York, NY 10005

Michael L. Koenig, Esq.
Greenberg Traurig, LLP
54 State Street, 6th Floor
Albany, NY 12207

The Shoma Group
3470 NW 82nd Ave., Suite
988
Doral, FL 33122

RBS Citizen, N.A.
Cooper Erving & Savage LLP
39 North Pearl Street
4th Floor
Albany, NY 12207

Iseman, Cunningham,
Riester & Hyde, LLP
9 Thurlow Terrace
Albany, NY 12203

By: /s/ Edward T. Kang
Edward T. Kang
123 South Broad Street, Suite 1670
Philadelphia, PA 19109
Tel: (215) 525-5850
Fax: (215) 525-5860
ekang@KHFlaw.com

Counsel for Moving Investors

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