



TO BE FILED UNDER SEAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 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, DAVID L. SMITH,
LYNN A. SMITH, DAVID M. WOJESKI, Trustee of
the David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04, GEOFFREY R. SMITH,
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.

**ORDER MODIFYING ASSET FREEZE
TO ALLOW THE SALE OF CERTAIN PROPERTY**

WHEREAS, on April 20, 2010, the Commission filed a Complaint and an Order to Show Cause seeking emergency relief and, on that same date, the Court granted the Commission's request for a temporary restraining order that, among other things, froze the assets of the defendants and the relief defendant (Docket No. 5) (the "Freeze Order") and, on July 22, 2010, the Court entered the Preliminary Injunction Order that, among other things,

continued the Freeze Order over the assets of the defendants and relief defendant (Docket No. 96) and appointed William J. Brown as Receiver (“Receiver”); and

WHEREAS, on June 26, 2015, the Court entered its Final Judgment as to Defendant David L. Smith (Docket No. 835), and its Final Judgment as to Defendant Lynn A. Smith (Docket No. 837) (collectively, the “Judgments”); and

WHEREAS, the property located at 2 Rolling Brook Drive, Saratoga Springs, New York is currently owned by David L. Smith and Lynn A. Smith (collectively, the “Smiths”) and is subject to the Freeze Order (the “New York Property”);

WHEREAS, the Smiths have agreed with the Commission and the Receiver to a process for the orderly sale of the New York Property and the manner in which the net proceeds of sale will be distributed therefrom; and

WHEREAS, Citizens Bank, N.A. f/k/a RBS Citizens, N.A., as the successor by merger to Charter One Bank, N.A. (“Citizens Bank”) is the holder of the Note and a mortgage on the New York Property to secure repayment of the Note, and Citizens Bank has agreed with the Receiver to accept the sum of \$500,000.00 plus attorney’s fees in an amount not to exceed \$7,500.00, plus any additional advances for taxes and/or insurance made after the date hereof in order to protect its security interest in the New York Property, and in doing so has agreed to waive interest, late charges and fees currently aggregating approximately \$110,000.00 in consideration of the Receiver causing a consensual sale process of the New York Property to be undertaken, which the Smiths, the Commission and the Receiver have agreed to under the terms of this Order upon its approval by the Court.

NOW, THEREFORE,

I.

IT IS ORDERED that Lynn A. Smith (“L. Smith”) shall promptly list the property for sale at a price and on terms agreed to by the Receiver pursuant to a listing agreement with a recognized real estate broker with counsel for the sale being Michael Kinum, Esq. or such other attorney reasonably acceptable to L. Smith and the Receiver, and the Freeze Order is hereby modified to permit L. Smith (with the Receiver’s prior written consent) or the Receiver to enter into a contract for the purchase and sale of the New York Property, and to close a sale of the New York Property subject to the following terms and conditions:

A. L. Smith shall provide the Receiver with access to the New York Property to permit the Receiver to assess its condition. The Receiver’s obligations under this Order, and the division of the net closing proceeds set forth in Section I.D *infra*, are contingent upon the Receiver’s inspection of the New York Property and his determination that the Property has been maintained in a manner conducive to the sale.

B. The Receiver shall provide the Commission and the attorneys for Citizens Bank with a copy of any contract proposed to be accepted for sale of the New York Property (the “Contract”) within three days of its execution, along with a proposed list of distributions (the “Distribution List”) to be made from the proceeds of such sale. The Distribution List may include, among other things, the mortgage payoff amount, and any usual and customary costs of closing, including broker, attorney, and recording fees, and transfer taxes.

C. The Commission may within two business days from the delivery of the Contract and the Distribution List object to the terms of the Contract, and such objections may include the sale price or the proposed distributions. The Court will resolve such

objections on motion by the Commission or the Receiver if the Commission and the Receiver do not reach agreement on such objections. The Commission and the Receiver shall not object to a request for an expedited hearing. Upon request of the Commission, the Receiver shall provide at the Commission's expense an appraisal of the fair market value of the New York Property, done by an appraiser reasonably acceptable to the Receiver and the Commission.

D. From the net closing proceeds (after payment of the usual and customary expenses of closing as estimated on the Distribution List, including the payoff amount due Citizens Bank hereunder), the Receiver shall receive 45 percent of such proceeds for the benefit of the Receivership estate, and L. Smith shall receive 55 percent of such proceeds. David L. Smith ("D. Smith") shall not be entitled to receive any of the proceeds. The Receiver shall cause a copy of the closing documents to be sent to David Stoelting, Senior Trial Counsel, Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, New York 10281-1022, to the attorney for Citizens Bank, and to L. Smith.

E. The Commission, L. Smith, and the Receiver shall provide such documents as the purchaser of the New York Property may reasonably require to evidence the Commission's, L. Smith's (including under power of attorney given to her by David Smith), and the Receiver's consent and authority to convey title to the New York Property.

F. The Receiver shall consult with L. Smith, and L. Smith shall cooperate with the Receiver in the listing, showing and closing of the sale of the New York Property

II.

IT IS FURTHER ORDERED that, except as expressly modified herein, the Judgments and prior Orders of this Court remain in full force and effect.

III.

IT IS FURTHER ORDERED, that this Order shall be unsealed and made a part of the public record upon the Receiver filing promptly following the sale a statement in the docket of this case that the sale of the New York Property has closed and the proceeds have been received.

Dated: Albany, New York
November 9, 2017



Christian F. Hummel
United State Magistrate Judge