

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.

-----X

**NOTICE OF RECEIVER’S OMNIBUS MOTION FOR APPROVAL OF (I)
DESTRUCTION OF FILES, RECYCLING OF COMPUTERS AND OTHER WIND-UP
ACTIVITIES, (II) CONTINUATION OF RECEIVERSHIP TO
ACCOMPLISH FOREGOING, AND (III) TERMINATION OF THE
RECEIVERSHIP AND DISCHARGE OF THE RECEIVER, ALL
FOLLOWING COMPLETION OF FINAL DISTRIBUTIONS TO INVESTORS WITH
ALLOWED CLAIMS AND THE FILING OF THE RECEIVER’S FINAL REPORT**

PLEASE TAKE NOTICE that upon the omnibus motion for an order approving the (i) destruction of files, recycling of computers and other wind-up activities, (ii) continuation of the Receivership to accomplish the foregoing, and (iii) termination of the Receivership and discharge of the Receiver, all following the completion of final distributions to investors with allowed claims and the filing of the Receiver’s Final Report (“Motion”), Phillips Lytle LLP will

move before the Hon. Gary L. Sharpe, United States Judge, United States District Court for the Northern District of New York, James T. Foley - U.S. Courthouse, 445 Broadway, Albany, New York 12207-2924, on September 3, 2020, at 9:00 a.m. (ET), seeking an Order to be entered approving the Motion. No oral argument is requested.

PLEASE TAKE FURTHER NOTICE that attached is the Motion and Declaration of the Receiver in support of the Motion. The complete Motion is filed with the United States District Court and will be available for review at the Office of the Clerk, United States District Court, Northern District of New York, James T. Foley - U.S. Courthouse, 445 Broadway, Albany, New York 12207-2924, or online, at the Court's website (www.nynd.uscourts.gov). Copies can also be obtained upon written request from Phillips Lytle.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Motion must be made in writing in accordance with the Federal Rules of Civil Procedure and the Local Rules of Civil Procedure for the United States District Court for the Northern District of New York.

Dated: July 24, 2020

PHILLIPS LYTLE LLP

By /s/ Catherine N. Eisenhut

William J. Brown

Catherine N. Eisenhut

Attorneys for Receiver

One Canalside

125 Main Street

Buffalo, New York 14203

Telephone No. (716) 847-8400

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Defendants,

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OF FILES, RECYCLING OF COMPUTERS AND OTHER WIND-UP
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FOLLOWING COMPLETION OF FINAL DISTRIBUTIONS TO INVESTORS WITH
ALLOWED CLAIMS AND THE FILING OF THE RECEIVER’S FINAL REPORT**

William J. Brown, as Receiver (“Receiver”), by his attorneys, Phillips Lytle LLP, moves (the “Motion”) for an order approving the (i) destruction of files, recycling of computers and other wind-up activities, (ii) continuation of the Receivership to accomplish the foregoing, and (iii) termination of the Receivership and discharge of the Receiver, all following the

completion of final distributions to investors with allowed claims and the filing of the Receiver's Final Report, and respectfully represents as follows:

Procedural Background

1. On April 20, 2010, the Securities and Exchange Commission ("SEC") filed a Complaint initiating the above-captioned action (Docket No. 1) in the United States District Court for the Northern District of New York ("Court"). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which appointed William J. Brown, Esq. as temporary receiver ("Receiver") with respect to certain of the defendants and other entities in this action (collectively, the "Receivership Entities"). Brown Dec'l. ¶2.¹

2. On July 26, 2010, following a hearing, the Court entered an order granting the SEC's Motion for a Preliminary Injunction and appointing the Receiver as permanent receiver, pending a final disposition of the action ("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). On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) partially granting the SEC's motion for summary judgment. On March 30, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 816) ("MDO II") granting the remainder of the SEC's motion for summary judgment. In connection with MDO II, the Court deferred entering judgment for certain receivership defendants - 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, and

¹ "Brown Dec'l. ¶ __" refers to the Declaration of William J. Brown dated July 24, 2020 filed in support of the Motion.

Third Albany Income Notes, LLC (collectively, the “MS Entities”) - until the bulk of the funds held for investors with allowed claims have been distributed and the receivership is preparing to close. MDO II at 53. The Court directed that the Receiver shall inform the Court in writing once the funds have been distributed to investors and he is ready to close the receivership, so that the Court may enter judgment against the MS Entities. *Id.*

4. The Court entered judgments in favor of the SEC in its action against David L. Smith, Lynn Smith, the Smith Trust, Geoffrey Smith, Lauren Smith and Timothy McGinn in June and July 2015 (Docket Nos. 835, 836, 837). The Second Circuit upheld those judgments in its decision dated April 18, 2016.

5. A Plan of Distribution was filed on December 30, 2015 (Docket No. 847) (“Plan of Distribution”), and a Memorandum-Decision and Order approving the Plan of Distribution was entered on October 31, 2016 (Docket No. 904). The investor and creditor claims bar date and the equity claims bar date have long passed following the successful administration of claims notice procedures. There were approximately \$124,123,595 in investor claims, some of which have been subject to objection on various grounds. At present, it appears likely that relatively small additional collections to further increase investor recoveries are possible, although they remain subject to negotiations and serious contingencies, and other primarily equity positions may be worthless. Brown Dec’l. ¶6.

6. On July 7, 2020, the Court entered Orders approving three pending motions filed by the Receiver including the Receiver’s Ninth and Tenth claims motions and the Order (Docket No. 1128) (“Abandoned Claims Order”) granting the relief requested in Receiver’s Motion (Docket No. 1090) for an order in aid of administration approving a final procedure (“Final Notice Procedure”) for notice and abandonment of claims of lost investors and

investors with incomplete claim files and expunging abandoned claims and incomplete claims (Docket No. 1128). Of the ten claim objection motions filed by the Receiver, eight have resulted in final Orders. The Receiver presently anticipates that no further claim objection motions will need to be filed. Brown Dec'1. ¶7.

7. As of July 10, 2020, there is \$15,751,583 on hand in Receiver accounts, with approximately \$6,848,952.88 having been distributed to investors with allowed claims through the Fifty-Seventh Payment Schedule of Investor Distributions (not all checks having cleared). Brown Dec'1. ¶8. The process of issuing first distribution checks representing 10% of allowed claim amounts to investors is continuing as investors provide missing information or signed documents as requested by the Receiver or in response to the Final Notice Procedure. All post-Receiver obligations are current and paid on a current basis other than the amounts sought in professional fee applications and the monies held in the Receiver's accounts are unencumbered. When this estate was commenced in April 2010, there was \$485,491.63 on hand. *Id.*

8. The SEC, with the Receiver's assistance, has recently filed and obtained turnover orders on the judgments to collect frozen assets of David Smith, Lynn Smith, the Smith Trust, and Timothy McGinn. Brown Dec'1. ¶9.

9. With the entry of the Abandoned Claims Order and the Orders granting the relief requested in the Ninth and Tenth claim objection motions, the Receiver intends to (a) complete the Final Notice Procedure, (b) calculate the amount of the distribution pool less a reserve for administrative claims including taxes and make a second distribution to investors,² and (c) begin to wrap-up and conclude the estate. Final tax returns for at least 30 Receivership

² A third and final distribution to investors is possible depending on the amount of any retained reserve remaining.

Entities (including trusts and disregarded entities) have already been prepared and filed, and the returns for the remaining two entities (with one of them having nine disregarded entities) will be prepared so they can be promptly filed assuming no further unresolved issues once all final distributions are made. The filing of the remaining final tax returns need to await the disposition of the remaining receivership assets. Brown Dec'1. ¶10.

10. In an effort to be prepared to conclude the estate, the Receiver files this Motion for approval to accomplish several remaining administrative tasks, all contingent on completing a final distribution to investors with allowed claims and the filing of the Receiver's Final Report, as follows:

- a. Authorization for the destruction of paper files and recycling of computers which are presently in storage, except for the records necessary to support tax returns which have or will be filed.³
- b. A continuation of the Receivership to complete the Final Notice Procedure, the final distribution to creditors, the payment of administrative claims and taxes, and the destruction of records and computers, and to resolve any pending litigation.
- c. A formal termination of the Receivership and discharge of the Receiver after final distributions to investors with allowed claims have been made, final tax returns have been filed, the Receiver's Final Report has been filed, and a judgment has been entered against the MS Entities.

Brown Dec'1. ¶11.

³ The Receiver previously filed a Notice of Intent to abandon and destroy certain records of the businesses in the Receivership as such records were "ancient" and of no utility to the Receiver, and therefore did not warrant the costs of moving and storage. See Docket No. 427.

Destruction of Business Records and Computers

11. The Receiver has held in storage at one remaining remote location the remaining paper business records of the Receivership entities and the computer data found on the business premises at the time of entry. Given the affirmance of this Court's judgment against the defendants, the pending second distribution to investors with allowed claims, and the anticipated completion of the tax returns,⁴ the Receiver now requests authorization to shred those records, wipe the hard drives of the computers to Department of Defense standards, and thereafter recycle those computers. There is no known reason to maintain either the computers, the records or any other property of the Receivership Entities after final distributions are made except for those records necessary to support tax returns which have or will be filed. Brown Dec'l. ¶ 12.

Final Notice Procedure

12. Since entry of the Abandoned Claims Order on July 7, 2020, the Receiver has commenced the Final Notice Procedure by posting on July 9, 2020 on the Receiver's website (<https://mcginnsmithreceiver.com>) ("Receiver's Website") the list of the names of investors who not responded to any of the Receiver's correspondence ("Lost Investors") and investors with incomplete claim files ("Incomplete Investors"). Also, on July 9, 2020, the Receiver caused to be mailed to all of the Lost Investors and Incomplete Investors a letter enclosing an informational questionnaire and a copy of the Abandoned Claims Order ("Final Notice Mailing"). Brown Dec'l. ¶13. In accordance with the terms of the Abandoned Claims Order, should any of the Lost Investors or the Incomplete Investors fail to respond to the Receiver by August 10, 2020, their claims will be struck and expunged. Since posting the names of the Lost Investors and Incomplete Investors to the Receiver's Website and sending the Final Notice

⁴ Copies of the check registers and bank account statements will be maintained by the Receiver for any statutory retention period.

Mailing, the Receiver has received some responses from Lost Investors and Incomplete Investors. *Id.*

Distribution to Investors With Allowed Claims

13. The Receiver has \$15,751,583 on hand as of July 10, 2020 in the Receivership accounts. That amount will decrease by payments to complete the first distribution to investors with allowed claims, payment of a second distribution to investors with allowed claims, ongoing storage expense until destruction, any taxes due, tax return preparation fees, fee applications filed and approved, and administrative costs including destruction-related costs. Brown Dec'l. ¶14.

14. Investors with allowed claims will receive distributions of those funds less administrative expenses. The Receiver intends to establish a reserve for administrative expenses of \$1,000,000 as illustrated on **Exhibit A**. Brown Dec'l. ¶15.

15. Pursuant to the priority of claims described in the Plan of Distribution, since allowed investor claims will not be paid in full, any unsecured claims asserted against the Receivership will not be paid. *See* Plan of Distribution Art. V.

16. The Receiver expects administrative claims to be asserted for the legal fees of Phillips Lytle LLP, as counsel to the Receiver, and the tax and accounting fees of Chiam pou Travis Besaw & Kershner LLP, as accountants for the Receiver, which are subject to Court approval. Brown Dec'l. ¶17.

17. Upon final distribution of the estate cash proceeds, the filing of final tax returns, and destruction of the remaining business records and recycling of computers, the Receiver will have completed his duties, provided that the tax returns are timely filed. Brown Dec'l. ¶18.

Continuation of the Receivership

18. In order to complete the Final Notice Procedure, the final distribution process, and the destruction of records and computers along with the filing of the tax returns, and the resolution of any pending litigation, the Receiver requests the continuation of the Receivership. The Receiver would file the Final Report (which shall notify the Court that judgment may be entered against the MS Entities) and a certification of the accomplishment of the foregoing, upon which the case would be automatically closed with entry of a judgment against the MS Entities and an Order terminating the Receivership and discharging the Receiver. A proposed form of such Order is attached as **Exhibit B**. Brown Dec'l. ¶19.

19. A copy of the Motion was provided to the SEC prior to filing, and the SEC supports the Receiver's proposed approach and has no opposition to the relief requested in the Motion. Brown Dec'l. ¶20.

Service of the Motion

20. Notice of this Motion will be served by First Class Mail on the SEC, the Internal Revenue Service, and the New York State Department of Taxation and Finance, and by ECF on all parties who have filed a Notice of Appearance in this action, as well as all creditors and parties in interest via the Receiver's Website. Brown Dec'l. ¶21.

WHEREFORE, as requested in the Motion, the Receiver requests that the Court authorize the (i) destruction of files, recycling of computers and other wind-up activities, (ii) continuation of the Receivership to accomplish the foregoing wind-up activities, and (iii) termination of the Receivership and discharge of the Receiver contingent upon the completion of final distributions to investors with allowed claims, the filing of the Receiver's Final Report and the filing of a certificate of completion.

Exhibit A

**Omnibus
Motion
Estimated Reserve Budget ***

	<u>Amount</u>
Professional Fees	\$ 400,000
Personnel & Taxes	\$ 81,000
Computer & Internet	\$ 51,000
Rent	\$ 18,900
Insurance	\$ 4,800
Operations	\$ 17,955
Reserve	<u>\$ 426,345</u>
 Grand Total	 \$ 1,000,000

* Calculated assuming operational period from January 1, 2021 through December 31, 2023, although the Receiver believes it is likely that the Receivership can conclude by early 2022.

Exhibit B

UNITED STATES DISTRICT COURT
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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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**ORDER GRANTING RECEIVER’S OMNIBUS MOTION FOR APPROVAL OF (I)
DESTRUCTION OF FILES, RECYCLING OF COMPUTERS AND OTHER WIND-UP
ACTIVITIES, (II) CONTINUATION OF RECEIVERSHIP TO ACCOMPLISH
FOREGOING, AND (III) TERMINATION OF THE RECEIVERSHIP AND
DISCHARGE OF THE RECEIVER, ALL FOLLOWING COMPLETION OF FINAL
DISTRIBUTIONS TO INVESTORS WITH ALLOWED CLAIMS AND THE FILING OF
THE RECEIVER’S FINAL REPORT**

Upon the Motion requesting approval of (i) destruction of files, recycling of computers and other wind-up activities, (ii) continuation of the Receivership to accomplish the foregoing, and (iii) termination of the Receivership and discharge of the Receiver, all following the completion of final distributions to investors with allowed claims and the filing of the Receiver’s Final Report dated July 22, 2020 (“Motion”); and notice of the Motion having been given by first class mail to the Securities and Exchange Commission, the Internal Revenue Service, the New York Department of Taxation and Finance, by ECF to all parties who have filed a Notice of Appearance in this action, and via the Receiver’s website to all creditors of the

McGinn, Smith entities and other parties in interest, which notice is deemed good and sufficient notice; and the Court having considered the Motion, the Court finds that cause exists to grant the relief requested therein; it is therefore

ORDERED, that the Motion is granted, and it is further

ORDERED, that, following the completion of the Final Notice Procedure and the final distribution to investors, the Receiver shall destroy by shredding all remaining paper business records of the Receivership Entities and wipe the hard drives of all computers of the Receivership Entities and thereafter dispose or recycle those computers, except for those records necessary to support tax returns which have or will be filed; and it is further

ORDERED, that the Receivership is continued to complete the Final Notice Procedure, the final distribution process, the destruction of records and computers, the filing of final tax returns, and the resolution of any pending litigation, with the Receiver to file a Final Report, which shall notify the Court that judgment may be entered against the MS Entities, and a certificate of completion with the Court upon completion of the foregoing tasks; and it is further

ORDERED, that upon the filing of the Final Report, a certificate of completion, and entry of a judgment against the MS Entities, the Receivership over the property of the Receivership Entities is terminated; and it is further

ORDERED, that upon the filing of the certificate of completion, the Receiver and his employees, agents, attorneys and representatives are hereby released from all further liability to this Receivership estate and to the Receivership Entities, and their successors, assigns, affiliates and subsidiaries and their respective creditors, claimants, beneficiaries and owners; and it is further

ORDERED, that all persons who receive notice of this Order, or of this proceeding, are enjoined from commencing or prosecuting any action against the Receiver or his agents in connection with or arising out of the Receiver's service to this Court in this Receivership, without leave of this Court and the Court will retain jurisdiction over this action for the purpose of enforcing the above injunctive; and it is further

ORDERED, that this Order is without prejudice to the Receiver's limited authority to process additional checks or refunds that might come to his attention in the process of checks or refunds as appropriate, as well as to dispose of by appropriate means any remaining property of the Receivership Entities.

Dated: _____, 2020

HON. GARY L. SHARPE

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LAUREN T. SMITH, and NANCY MCGINN, :

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LYNN A. SMITH and :
NANCY MCGINN, :

 Relief Defendants, and :s

GEOFFREY R. SMITH, Trustee of the :
David L. and Lynn A. Smith Irrevocable :
Trust U/A 8/04/04, :

 Intervenor. :
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Case No. 1:10-CV-457
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**DECLARATION OF WILLIAM J. BROWN, AS RECEIVER,
IN SUPPORT OF OMNIBUS MOTION FOR APPROVAL OF (I) DESTRUCTION
OF FILES, RECYCLING OF COMPUTERS AND OTHER WIND-UP
ACTIVITIES, (II) CONTINUATION OF RECEIVERSHIP TO
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ALLOWED CLAIMS AND THE FILING OF THE RECEIVER'S FINAL REPORT**

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

follows:

1. I make this declaration in support of the Receiver's Omnibus Motion for an order requesting approval of (i) destruction of files, recycling of computers and other wind-up activities, (ii) continuation of the Receivership to accomplish the foregoing, and (iii) termination of the Receivership and discharge of the Receiver, all following the completion of final distributions to investors with allowed claims and the filing of the Receiver's Final Report, as defined herein ("Motion").

Procedural Background

2. On April 20, 2010, the Securities and Exchange Commission ("SEC") filed a Complaint initiating the above-captioned action (Docket No. 1) in the United States District Court for the Northern District of New York ("Court"). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which appointed myself, William J. Brown, Esq. as temporary receiver ("Receiver") with respect to certain of the defendants and other entities in this action (collectively, the "Receivership Entities").

3. On July 26, 2010, following a hearing, the Court entered an order granting the SEC's Motion for a Preliminary Injunction and appointing the Receiver as permanent receiver, pending a final disposition of the action ("Preliminary Injunction Order") (Docket No. 96).

4. 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). On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) partially granting the SEC's motion for summary judgment. On March 30, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 816) ("MDO II") granting the remainder of the SEC's motion for summary judgment. In connection with MDO II, the Court

deferred entering judgment for certain receivership defendants - 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, and Third Albany Income Notes, LLC (collectively, the “MS Entities”) - until the bulk of the funds held for investors with allowed claims have been distributed and the receivership is preparing to close. MDO II at 53. The Court directed that the Receiver shall inform the Court in writing once the funds have been distributed to investors and he is ready to close the receivership, so that the Court may enter judgment against the MS Entities. *Id.*

5. The Court entered judgments in favor of the SEC in its action against David L. Smith, Lynn Smith, the Smith Trust, Geoffrey Smith, Lauren Smith and Timothy McGinn in June and July 2015 (Docket Nos. 835, 836, 837). The Second Circuit upheld those judgments in its decision dated April 18, 2016.

6. A Plan of Distribution was filed on December 30, 2015 (Docket No. 847) (“Plan of Distribution”), and a Memorandum-Decision and Order approving the Plan of Distribution was entered on October 31, 2016 (Docket No. 904). The investor and creditor claims bar date and the equity claims bar date have long passed following the successful administration of claims notice procedures. There were approximately \$124,123,595 in investor claims, some of which have been subject to objection on various grounds. At present, it appears likely that relatively small additional collections to further increase investor recoveries are possible, although they remain subject to negotiations and serious contingencies, and other primarily equity positions may be worthless.

7. On July 7, 2020, the Court entered Orders approving three pending motions filed by the Receiver including the Receiver’s Ninth and Tenth claims motions and the

Order (Docket No. 1128) (“Abandoned Claims Order”) granting the relief requested in Receiver’s Motion (Docket No. 1090) for an order in aid of administration approving a final procedure (“Final Notice Procedure”) for notice and abandonment of claims of lost investors and investors with incomplete claim files and expunging abandoned claims and incomplete claims (Docket No. 1128). Of the ten claim objection motions filed by the Receiver, eight have resulted in final Orders. The Receiver presently anticipates that no further claim objection motions will need to be filed.

8. As of July 10, 2020, there is \$15,751,583 on hand in Receiver accounts, with approximately \$6,848,952.88 having been distributed to investors with allowed claims through the Fifty-Seventh Payment Schedule of Investor Distributions (not all checks having cleared). The process of issuing first distribution checks representing 10% of allowed claim amounts to investors is continuing as investors provide missing information or signed documents as requested by the Receiver or in response to the Final Notice Procedure. All post-Receiver obligations are current and paid on a current basis other than the amounts sought in professional fee applications and the monies held in the Receiver’s accounts are unencumbered. When this estate was commenced in April 2010, there was \$485,491.63 on hand.

9. The SEC, with the Receiver’s assistance, has recently filed and obtained turnover orders on the judgments to collect frozen assets of David Smith, Lynn Smith, the Smith Trust, and Timothy McGinn.

10. With the entry of the Abandoned Claims Order and the Orders granting the relief requested in the Ninth and Tenth claim objection motions, the Receiver intends to (a) complete the Final Notice Procedure, (b) calculate the amount of the distribution pool less a

reserve for administrative claims including taxes and make a second distribution to investors,¹ and (c) begin to wrap-up and conclude the estate. Final tax returns for at least 30 Receivership Entities (including trusts and disregarded entities) have already been prepared and filed, and the returns for the remaining two entities (with one of them having nine disregarded entities) will be prepared so they can be promptly filed assuming no further unresolved issues once all final distributions are made. The filing of the remaining final tax returns need to await the disposition of the remaining receivership assets.

11. In an effort to be prepared to conclude the estate, the Receiver files this Motion for approval to accomplish several remaining administrative tasks, all contingent on completing a final distribution to investors with allowed claims and the filing of the Receiver's Final Report, as follows:

a. Authorization for the destruction of paper files and recycling of computers which are presently in storage, except for the records necessary to support tax returns which have or will be filed.²

b. A continuation of the Receivership to complete the Final Notice Procedure, the final distribution to creditors, the payment of administrative claims and taxes, and the destruction of records and computers, and to resolve any pending litigation.

c. A formal termination of the Receivership and discharge of the Receiver after final distributions to investors with allowed claims have been

¹ A third and final distribution to investors is possible depending on the amount of any retained reserve remaining.

² The Receiver previously filed a Notice of Intent to abandon and destroy certain records of the businesses in the Receivership as such records were "ancient" and of no utility to the Receiver, and therefore did not warrant the costs of moving and storage. See Docket No. 427.

made, final tax returns have been filed, the Receiver's Final Report has been filed, and a judgment has been entered against the MS Entities.

Destruction of Business Records and Computers

12. The Receiver has held in storage at one remaining remote location the remaining paper business records of the Receivership entities and the computer data found on the business premises at the time of entry. Given the affirmance of this Court's judgment against the defendants, the pending second distribution to investors with allowed claims, and the anticipated completion of the tax returns,³ the Receiver now requests authorization to shred those records, wipe the hard drives of the computers to Department of Defense standards, and thereafter recycle those computers. There is no known reason to maintain either the computers, the records or any other property of the Receivership Entities after final distributions are made except for those records necessary to support tax returns which have or will be filed.

Final Notice Procedure

13. Since entry of the Abandoned Claims Order on July 7, 2020, the Receiver has commenced the Final Notice Procedure by posting on July 9, 2020 on the Receiver's website (<https://mcginnsmithreceiver.com>) ("Receiver's Website") the list of the names of investors who not responded to any of the Receiver's correspondence ("Lost Investors") and investors with incomplete claim files ("Incomplete Investors"). Also, on July 9, 2020, the Receiver caused to be mailed to all of the Lost Investors and Incomplete Investors a letter enclosing an informational questionnaire and a copy of the Abandoned Claims Order ("Final Notice Mailing"). In accordance with the terms of the Abandoned Claims Order, should any of the Lost Investors or the Incomplete Investors fail to respond to the Receiver by August 10, 2020, their

³ Copies of the check registers and bank account statements will be maintained by the Receiver for any statutory retention period.

claims will be struck and expunged. Since posting the names of the Lost Investors and Incomplete Investors to the Receiver's Website and sending the Final Notice Mailing, the Receiver has received some responses from Lost Investors and Incomplete Investors.

Distribution to Investors With Allowed Claims

14. The Receiver has \$15,751,583 on hand as of July 10, 2020 in the Receivership accounts. That amount will decrease by payments to complete the first distribution to investors with allowed claims, payment of a second distribution to investors with allowed claims, ongoing storage expense until destruction, any taxes due, tax return preparation fees, fee applications filed and approved, and administrative costs including destruction-related costs.

15. Investors with allowed claims will receive distributions of those funds less administrative expenses. The Receiver intends to establish a reserve for administrative expenses of \$1,000,000 as illustrated on Exhibit A to the Motion.

16. Pursuant to the priority of claims described in the Plan of Distribution, since allowed investor claims will not be paid in full, any unsecured claims asserted against the Receivership will not be paid. *See* Plan of Distribution Art. V.

17. The Receiver expects administrative claims to be asserted for the legal fees of Phillips Lytle LLP, as counsel to the Receiver, and the tax and accounting fees of Chiam pou Travis Besaw & Kershner LLP, as accountants for the Receiver, which are subject to Court approval.

18. Upon final distribution of the estate cash proceeds, the filing of final tax returns, and destruction of the remaining business records and recycling of computers, the Receiver will have completed his duties, provided that the tax returns are timely filed.

Continuation of the Receivership

19. In order to complete the Final Notice Procedure, the final distribution process, and the destruction of records and computers along with the filing of the tax returns, and the resolution of any pending litigation, the Receiver requests the continuation of the Receivership. The Receiver would file the Final Report (which shall notify the Court that judgment may be entered against the MS Entities) and a certification of the accomplishment of the foregoing, upon which the case would be automatically closed with entry of a judgment against the MS Entities and an Order terminating the Receivership and discharging the Receiver. A proposed form of such Order is attached as Exhibit B to the Motion.

20. A copy of the Motion was provided to the SEC prior to filing, and the SEC supports the Receiver's proposed approach and has no opposition to the relief requested in the Motion.

Service of the Motion

21. Notice of this Motion will be served by First Class Mail on the SEC, the Internal Revenue Service, and the New York State Department of Taxation and Finance, and by ECF on all parties who have filed a Notice of Appearance in this action, as well as all creditors and parties in interest via the Receiver's Website.

22. Accordingly, the Receiver requests that the Court authorize the (i) destruction of files, recycling of computers and other wind-up activities, (ii) continuation of the Receivership to accomplish the foregoing wind-up activities, and (iii) termination of the Receivership and discharge of the Receiver contingent upon the completion of final distributions to investors with allowed claims, the filing of the Receiver's Final Report and the filing of a certificate of completion.

Dated: July 24, 2020

/s/ William J. Brown
William J. Brown

#8522877.4

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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CERTIFICATE OF SERVICE

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on July 24, 2020, a true and correct copy of the (i) Notice of Motion and Receiver’s Omnibus Motion for Approval of (I) Destruction of Files, Recycling of Computers and Other Wind-Up Activities, (II) Continuation of Receivership to Accomplish Foregoing, and (III) Termination of the Receivership and Discharge of the Receiver, All Following Completion of Final Distributions to Investors With Allowed Claims and the Filing of the Receiver’s Final Report (“Motion”), and (ii) Declaration of William J. Brown, as Receiver, in Support of the Motion (collectively, “Motion 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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- **Frank H. Chiappone** chiappone55@gmail.com
- **Linda J. Clark** lclark@barclaydamon.com,jsmith@hiscockbarclay.com

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- **Benjamin Zelsermyer** bzlaw@optonline.net, seincav@aol.com

And, I hereby certify that on July 24, 2020, I mailed, via first class mail using the United States Postal Service, copies of the Motion Documents to the individuals listed below.

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ATT: Office of Counsel
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Internal Revenue Service
IRS Advisory Collection Group
1 Clinton Avenue & N. Pearl Street
Albany, NY 12207

Dated: July 24, 2020

/s/ Karen M. Ludlow
Karen M. Ludlow