

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, LYNN A. 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 MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR  
ORDER IN AID OF ADMINISTRATION (A) APPROVING USE OF  
UNCLAIMED FUNDS TO PAY ADMINISTRATIVE EXPENSES AND  
ALLOWED CLAIMS OF OTHER INVESTORS AND (B) APPROVING  
DISTRIBUTION OF DE MINIMIS AMOUNTS TO INVESTORS IN  
CONTEMPLATION OF A POTENTIAL FOURTH INVESTOR  
DISTRIBUTION**

PLEASE TAKE NOTICE that upon the Motion of William J. Brown, as  
Receiver for Order in Aid of Administration (A) Approving the Use of Unclaimed Funds to  
Pay Administrative Expenses and Allowed Claims of Other Investors, and (B) Approving

Distribution of De Minimis Amounts to Investors in Contemplation of a Potential Fourth Investor Distribution (“Motion”), and upon the Declaration of William J. Brown dated April 14, 2022 filed in support of the Motion, Phillips Lytle LLP moves this Court before the Honorable Gary L. Sharpe, Senior United States District 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, for an Order to be entered approving the Motion. No oral argument is requested.

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

PLEASE TAKE FURTHER NOTICE that if no responses are timely filed and served with respect to the Motion, the Court may enter an Order granting the Motion, approving the use of funds from unclaimed investor distributions described in Exhibit B to the Motion to pay administrative expenses and allowed claims of other investors and approving the distribution to approximately 16 investors of De Minimis Distributions (as defined in the Motion) in contemplation of a potential future fourth distribution to investors with allowed claims without further notice or opportunity to be heard offered to any party.

Dated: April 14, 2022

PHILLIPS LYTLE LLP

By /s/ Catherine N. Cervone  
William J. Brown (Bar Roll #601330)  
Catherine N. Cervone (Bar Roll #520849)

Attorneys for Receiver  
Omni Plaza  
30 South Pearl Street  
Albany, New York 12207  
Telephone No. (518) 472-1224

and

One Canalside  
125 Main Street  
Buffalo, New York 14203  
Telephone No.: (716) 847-8400

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., :  
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TIMOTHY M. MCGINN, AND :  
DAVID L. SMITH, LYNN A. 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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**MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR ORDER IN AID OF  
ADMINISTRATION (A) APPROVING USE OF UNCLAIMED FUNDS TO PAY  
ADMINISTRATIVE EXPENSES AND ALLOWED CLAIMS OF OTHER  
INVESTORS AND (B) APPROVING DISTRIBUTION OF DE MINIMIS AMOUNTS  
TO INVESTORS IN CONTEMPLATION OF A POTENTIAL FOURTH INVESTOR  
DISTRIBUTION**

William J. Brown, as Receiver (“Receiver”), by his counsel, Phillips Lytle LLP,  
moves (the “Motion”) for an Order in Aid of Administration in the form attached as Exhibit

A (a) approving the use of funds from unclaimed investor distributions to pay administrative expenses and allowed claims of other investors and (b) approving the distribution to approximately 16 investors of De Minimis Distributions (as defined below) (who otherwise would not receive a distribution) in contemplation of a potential future fourth distribution to investors with allowed claims (“Fourth Distribution”).

### **RELIEF REQUESTED**

The Receiver files this Motion to benefit investors, since it is now likely that the Receiver will be able to make a Fourth Distribution of approximately \$1,489,122 to investors with allowed claims promptly after approval of this Motion as a result of the pending recovery of additional assets. Assuming that the Receiver will be able to achieve a Fourth Distribution, upon approval of the relief requested herein, the Receiver intends to move expeditiously to commence such a distribution, given that many of the defrauded investors are elderly.

By this Motion, the Receiver seeks approval to use Unclaimed Funds (as defined below) to pay administrative expenses and allowed claims of other investors, consistent with the terms of the Plan of Distribution (as defined below), prior to transferring the funds eventually remaining in this receivership estate to the United States Treasury. The Receiver further seeks approval to make *de minimis* distributions in the amount of less than \$50.00 to approximately 16 investors with allowed claims in any potential future distributions, notwithstanding the provisions of Article VIII of the Plan of Distribution.

### **PROCEDURAL BACKGROUND**

1. On April 20, 2010, the Securities and Exchange Commission (“SEC”) filed a Complaint initiating the above-captioned action (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 including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the “MS Entities”).

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 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 (the “Complaint”) (Docket No. 334). On February 17, 2015, the Court issued its Memorandum-Decision and Order (Docket No. 807) (“MDO”) granting the SEC’s motion for summary judgment. The Court entered judgments in favor of the SEC in 2015 (Docket Nos. 835, 836, 837). The MDO was affirmed on appeal in June 2016.

**PLAN OF DISTRIBUTION PROCESS**

4. On December 30, 2015, the Receiver filed a Motion (Docket No. 847) (“Plan Distribution Motion”) to seek approval of (i) a plan of distribution of assets of the MS Entities to investors (“Plan of Distribution”) and (ii) interim distributions to investors with allowed claims scheduled or timely filed in accordance with the Court-approved claims procedure.

5. On October 31, 2016, the Court entered a Memorandum-Decision and Order (Docket No. 904) (“Plan Distribution Order”) granting the Plan Distribution Motion, approving the Plan of Distribution, and allowing the Receiver to make interim distributions as set forth in the Plan Distribution Motion.

6. Since entry of the Plan Distribution Order, the Receiver has diligently pursued reconciliation of thousands of investor claims, including the filing of ten claim objection motions, which claims reconciliation process concluded in October 2020. Brown Dec’1 ¶8.<sup>1</sup> As a result, there are 861 investors with allowed claims of \$110,467,889. *Id.*

7. Commencing in May 2017 and concluding in May 2021, the Receiver completed three rounds of distributions to those investors with allowed claims, all in accordance with the terms of the Plan and the Plan Distribution Order. Brown Dec’1 ¶9. To date, the Receiver has completed distributions in the approximate aggregate amount of \$21,738,980 to investors with allowed claims. These distributions amounted to a 23.84% recovery to those investors. *Id.*

8. As of April 8, 2022, there is \$615,630 on hand in Receiver accounts, including a reserve of \$237,500 for ongoing operating expenses, administrative expenses, contingent taxes, and professional fees incurred until the wind-down of the Receivership is completed. Brown Dec’1 ¶10. The Receiver expects to soon recover approximately \$1,110,992 from discovered escheated deposits allowing the Receiver to make an unexpected additional approximate 1.348% distribution to investors with allowed claims. This would increase the total amount paid to investors with allowed claims to 25.19%. *Id.*

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<sup>1</sup> “Brown Dec’1 ¶\_\_” refers to the Declaration of William J. Brown dated April 14, 2022 filed in support of the Motion.

9. As of April 14, 2022, there are twenty-three claims for which checks for second and/or third distributions have not yet been claimed, representing an aggregate amount of approximately \$85,686 (“Unclaimed Funds”). Brown Dec’1 ¶11. Attached as Exhibit B is a list of claim numbers for which there are Unclaimed Funds and the distribution round to which such Unclaimed Funds relate (“Unclaimed Funds List”).

10. Certain investors with claims listed on the Unclaimed Funds List have Unclaimed Funds from both the second and third rounds of investor distributions. The checks mailed to this group of investors during the second round of investor distributions were either returned to the Receiver as undeliverable or the Receiver and his staff subsequently discovered that the investor had passed away. Brown Dec’1 ¶12. For security reasons, the Receiver cancelled these checks and commenced efforts to locate and contact the affected investors or their estates and to obtain the necessary paperwork to re-issue the checks. For security reasons, the Receiver also did not issue distribution checks to these investors in the third round of investor distributions. *Id.*

11. The remaining investors with claims listed on the Unclaimed Funds List have Unclaimed Funds from the third round of investor distributions. Distribution checks were mailed to these investors and have not yet been cashed. Each distribution check sent by the Receiver to investors states that it is “void after 90 days.” Brown Dec’1 ¶13. The uncashed checks from the third round of distributions have been outstanding for not less than 278 days. *Id.*

12. The Receiver’s staff has attempted to contact the investors with Unclaimed Funds by phone calls to the investor’s phone number of record and by letter to the investor’s address of record to confirm whether the investors received their distribution



checks and to obtain the necessary paperwork to re-issue distribution checks, as needed. Brown Dec'1 ¶14. The Receiver's staff also used online resources to search for updated addresses and phone numbers for investors. The investors with claims listed on the Unclaimed Funds List did not respond to the Receiver's attempts to contact them, did not respond to the Receiver's requests for updated paperwork, or the Receiver's staff discovered through online research that the investor had passed away. *Id.*

### **BASIS FOR RELIEF**

13. The district court has broad power and discretion to determine relief in an equity receivership. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001). “In equity receiverships resulting from SEC enforcement actions, district courts have very broad powers and wide discretion to fashion remedies and determine to whom and how the assets of the Receivership Estate will be distributed.” *S.E.C. v. Detroit Mem'l Partners, LLC*, No. 1:13-cv-1817-WSD, 2016 WL 6595942 at \*5 (N.D. Ga. Nov. 8, 2016) (internal quotation omitted). “It is within a district court's discretion to approve a distribution plan proposed by a receiver—and to defer to the receiver's choices for the plan's details—so long as the plan is ‘fair and reasonable.’” *Sec. & Exch. Comm'n v. Amerindo Inv. Advisors Inc.*, No. 5-CV-5231, 2016 WL 10821985, at \*3 (S.D.N.Y. May 20, 2016) (quoting *Sec. Exch. Comm'n v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)) (internal citation omitted).

**a. The Use of Unclaimed Funds to Pay Administrative Expenses and Allowed Claims of Other Investors is Consistent with the terms of the Plan of Distribution.**

14. The relief requested by the Receiver in the Motion falls within the scope of the Court-approved Plan of Distribution. Article XIII of the Plan of Distribution

provides that the Receiver may seek Orders in Aid of Administration necessary to carry out the purpose and effect of the Plan of Distribution so long as any such Order does not adversely materially affect the treatment of investors with allowed claims. Plan of Distribution at 13.

15. Article XI of the Plan of Distribution contemplates that the Receiver may use the Unclaimed Funds to pay the administrative expenses of the Receivership and allowed claims, including the allowed claims of investors. Article XI of the Plan of Distribution further provides that funds from checks that have not been cashed, that were not delivered or that were returned to the Receiver shall be held in a residual account and, after all expenses, administrative claims and allowed claims of investors have been paid in accordance with the Plan of Distribution, such amounts will transferred to the United States Treasury. Plan of Distribution at 14.

16. The use of the Unclaimed Funds to pay administrative expenses and allowed claims of other investors does not adversely affect the treatment of investors because the affected investors will have had sufficient notice to claim their distributions. The Receiver has made all reasonable efforts to contact the investors with Unclaimed Funds to encourage them to claim their distributions. In order to give these investors a final opportunity to claim their distributions, the Receiver will provide to all investors with a claim listed on the Unclaimed Funds List at their address of record a notice of this Motion and an explanatory letter substantially in the form attached as Exhibit C and will also post an explanation of this Motion on the Receiver's website ([www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com)). Brown Dec'1 ¶15.

17. For the avoidance of doubt, the Receiver is not seeking to disallow the claims listed on the Unclaimed Funds List and, to the extent there is a future distribution to investors with allowed claims, investors with claims listed on the Unclaimed Funds List would remain eligible to receive such a distribution.<sup>2</sup>

**b. *De minimis* Distributions to Investors with Allowed Claims is Consistent with the Goals of the Plan of Distribution**

18. Article VIII of the Plan of Distribution contemplates that the Receiver may retain *de minimis* distributions for distribution to investors with allowed claims. Plan of Distribution at 13. Pursuant to the terms of Article VIII of the Plan of Distribution, to the extent that the Receiver holds a distribution of less than \$50.00 (a “De Minimis Distribution”) for the benefit of an investor with an allowed claim, such claim shall be deemed expunged and the De Minimis Distribution shall vest with the Receiver for distributions to other investors holding allowed claims. Plan of Distribution at 13. The foregoing Plan of Distribution provisions affect approximately 16 investors should a Fourth Distribution be achieved by the Receiver. Brown Dec’1 ¶17.

19. The purpose of the Plan of Distribution is to set forth the procedures to distribute the liquidated assets of the MS Entities to the investors with allowed claims who were harmed by the actions of David Smith and Timothy McGinn. Article VIII of the Plan of Distribution was drafted in an effort to reduce costs and increase efficiency in processing distributions to investors with allowed claims. Brown Dec’1 ¶16. The Receiver believes, however, that if there were to be a Fourth Distribution to investors, the small number of investors whose distribution would be a De Minimis Distribution would not create an

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<sup>2</sup> If sufficient funds remain after the Unclaimed Funds are distributed to other investors with allowed claims or used to pay administrative expenses.

excessive expense or burden on the Receivership. Brown Dec'1 ¶17. Making the De Minimis Distributions where not too costly or burdensome would also avoid disproportionate harm to that small group of investors who would otherwise not receive any distribution. In an effort to distribute as much of the assets of the MS Entities as possible to the investors, the Receiver seeks approval to make De Minimis Distributions in the potential Fourth Distribution.

20. The Receiver also seeks to expressly reserve the right to decline to make De Minimis Distributions, in accordance with Article VIII of the Plan of Distribution, in the event that the Receiver determines, in his sole discretion, that making De Minimis Distributions would be too costly or burdensome for the Receivership.

#### **MEMORANDUM OF LAW**

21. Since the basis for the relief requested is within the scope of the Plan of Distribution and is further set forth in this Motion, the Receiver requests that any requirement for a separate memorandum of law be waived.

#### **NOTICE**

22. The Receiver will give notice of the Motion to the Securities and Exchange Commission, all parties who have filed a Notice of Appearance in this action by ECF, and all creditors and parties in interest via the Receiver's website ([www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com)), as well as posting at the top of the Receiver's website an explanation of the Motion. Additionally, notice by first class mail, together with the explanatory letter attached as Exhibit C, will be given to all investors with a claim number listed on the Unclaimed Funds List. Brown Dec'1. ¶18.

**CONCLUSION**

23. Authorizing the Receiver to use the Unclaimed Funds to pay the allowed claims of other investors and to make De Minimis Distributions will permit the Receiver to maximize the amount of the recovered assets of the MS Entities transferred to investors with allowed claims. Assuming that the Receiver will be able to achieve a fourth distribution, such investors stand to recover only approximately 25.19% of their claims against MS & Co. As such, any distributions that the Receiver can expeditiously make to investors with allowed claims will be impactful for those investors.

WHEREFORE, as requested in the Motion, the Receiver requests that the Court enter an Order in Aid of Administration (a) approving the use of the Unclaimed Funds to pay administrative expenses and allowed claims of other investors and (b) approving the making of De Minimis Distributions in any potential future distributions.

Dated: April 14, 2022

PHILLIPS LYTLE LLP

By /s/ Catherine N. Cervone  
William J. Brown (Bar Roll #601330)  
Catherine N. Cervone (Bar Roll #520849)  
Attorneys for Receiver  
Omni Plaza  
30 South Pearl Street  
Albany, New York 12207  
Telephone No. (518) 472-1224

and

One Canalside  
125 Main Street  
Buffalo, New York 14203  
Telephone No.: (716) 847-8400

# *Exhibit A*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION

*Plaintiff,*

vs.

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(GLS/CFH)

McGINN, SMITH & CO., INC.,  
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McGINN, SMITH CAPITAL HOLDINGS CORP.,  
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TIMOTHY M. MCGINN, AND  
DAVID L. SMITH, LYNN A. 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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**ORDER APPROVING MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR  
ORDER IN AID OF ADMINISTRATION (A) APPROVING USE OF UNCLAIMED  
FUNDS TO PAY ADMINISTRATIVE EXPENSES AND ALLOWED CLAIMS OF  
OTHER INVESTORS AND (B) APPROVING DISTRIBUTION OF DE MINIMIS  
AMOUNTS TO INVESTORS IN CONTEMPLATION OF A POTENTIAL FOURTH  
INVESTOR DISTRIBUTION**

Upon the Motion for Order in Aid of Administration (A) Approving Use of  
Unclaimed Funds to Pay Administrative Expenses and Allowed Claims of Other Investors

and (B) Approving Distribution of De Minimis Amounts to Investors in Contemplation of a Potential Fourth Investor Distribution (“Motion”); and notice of the Motion having been given to the Securities and Exchange Commission, each of the claimants listed on Exhibit B to the Motion by first class mail at the address contained in the Receiver’s records, and all parties who have filed a Notice of Appearance in this action by ECF, and all creditors of the McGinn, Smith entities and other parties in interest via the Receiver’s website, which notice is deemed good and sufficient notice; and the Court having deemed that sufficient cause exists; it is therefore

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

ORDERED, that the Receiver is authorized to use the Unclaimed Funds<sup>3</sup> to pay allowed administrative expenses and allowed claims of other investors, and it is further

ORDERED, that the Receiver is authorized to make De Minimis Distributions to investors with allowed claims in the event of a potential Fourth Distribution, and it is further

ORDERED, that the Receiver’s rights to decline to make De Minimis Distributions to investors with allowed claims in the event that the Receiver has determined, in his sole discretion, that the making of such De Minimis Distributions is too costly or burdensome for the Receivership, are expressly preserved.

Dated: \_\_\_\_\_, 2022

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HON. GARY L. SHARPE

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<sup>3</sup> Capitalized terms used but not defined herein shall have the meaning assigned to them in the Motion.



# ***Exhibit B***

**Exhibit B - Unclaimed Funds List**

<b>Claim No.</b>	<b>Unclaimed Funds from 2nd Distribution</b>	<b>Unclaimed Funds from 3d Distribution</b>
6045	\$4,315.00	\$1,655.00
4651	\$1,000.00	\$384.00
4652	\$1,000.00	\$384.00
4653	\$2,313.00	\$887.00
5179	\$5,000.00	\$1,918.00
5180	N/A	\$767.00
5181	\$4,000.00	\$1,534.00
5182	N/A	\$1,918.00
5438	\$11,500.00	\$4,411.00
5439	\$3,000.00	\$1,151.00
6042	\$1,984.00	\$761.00
6043	\$3,982.00	\$1,527.00
6044	\$2,000.00	\$767.00
6012	\$1,726.00	\$662.00
6084	\$432.00	\$166.00
6308	\$4,000.00	\$1,534.00
6309	\$1,932.00	\$741.00
6310	\$2,500.00	\$959.00
6311	\$3,000.00	\$1,151.00
6560	\$2,500.00	\$959.00
6561	\$2,500.00	\$959.00
6710	N/A	\$1,151.00
6368	N/A	\$656.00

# *Exhibit C*

**William J. Brown, as Receiver  
of McGinn, Smith & Co., Inc., et al.**

Tel: 716.847.7089  
www.mcginnsmithreceiver.com

One Canalside  
125 Main Street  
Buffalo, NY 14203

**IMPORTANT NOTICE AFFECTING YOUR CLAIMS**

April 14, 2022

Re: McGinn Smith & Co. Inc. - Receiver's Motion for Order in Aid of Administration (A) Approving Use of Unclaimed Funds to Pay Administrative Expenses and Allowed Claims of Other Investors and (B) Approving Distribution of De Minimis Amounts to Investors in Contemplation of a Potential Fourth Investor Distribution

Dear Investor:

You are receiving a copy of the above-referenced Motion because there are one or more unclaimed distributions ("Unclaimed Distributions") associated with your claims listed on the Unclaimed Funds List attached as Exhibit B to the Motion and (1) the Receiver has been unable to send distribution checks to you at your address of record or (2) the Receiver had previously sent to you at your address of record one or more distribution check(s) and you did not cash or deposit the distribution check(s).

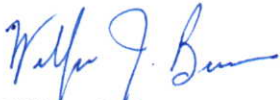
As set forth in the Motion, the Receiver is seeking an Order of the Court, in the form attached to the Motion as Exhibit A, authorizing the Receiver to, among other things, use Unclaimed Distributions to pay other allowed investor claims in a future distribution and/or allowed administrative expenses, consistent with the terms of the Court-approved Plan of Distribution.

If you wish to claim any Unclaimed Distributions to which you may be entitled, you must either cash the distribution checks that you have received or you must contact the Receiver regarding the Unclaimed Distributions by calling Karen M. Ludlow at (716) 218-4404 **IMMEDIATELY**.

**IF YOU DO NOT CASH YOUR DISTRIBUTION CHECKS OR CONTACT THE RECEIVER, AND IF THE COURT ENTERS AN ORDER GRANTING THE RELIEF REQUESTED IN THE MOTION, ANY REMAINING UNCLAIMED DISTRIBUTIONS MAY BE USED TO PAY ADMINISTRATIVE EXPENSES AND OTHER INVESTORS' ALLOWED CLAIMS IN THE EVENT THAT THERE IS A FUTURE DISTRIBUTION TO INVESTORS AND SUCH UNCLAIMED DISTRIBUTIONS MAY NO LONGER BE AVAILABLE TO YOU.**

**If you wish to contact the Receiver regarding your Unclaimed Distributions, or if you have any questions regarding the above, kindly call Karen M. Ludlow at (716) 218-4404.**

Very truly yours,



William J. Brown  
Receiver

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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*Defendants,*

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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 SUPPORT OF  
MOTION FOR ORDER IN AID OF ADMINISTRATION (A) APPROVING USE OF  
UNCLAIMED FUNDS TO PAY ADMINISTRATIVE EXPENSES AND ALLOWED  
CLAIMS OF OTHER INVESTORS AND (B) APPROVING DISTRIBUTION OF DE  
MINIMIS AMOUNTS TO INVESTORS IN CONTEMPLATION OF A POTENTIAL  
FOURTH INVESTOR 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 Motion (“Motion”) for an Order in Aid of Administration (a) approving the use of the Unclaimed Funds (as defined below) to pay administrative expenses and allowed claims of other investors and (b) approving the making of De Minimis Distributions (as defined below) (who otherwise would not receive a distribution) in contemplation of a potential future fourth distribution to investors with allowed claims (“Fourth Distribution”).

**PROCEDURAL BACKGROUND**

3. On April 20, 2010, the Securities and Exchange Commission (“SEC”) filed a Complaint initiating the above-captioned action (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 including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the “MS Entities”).

4. 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 receiver, pending a final disposition of the action (“Preliminary Injunction Order”) (Docket No. 96).

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**PLAN OF DISTRIBUTION PROCESS**

6. On December 30, 2015, I filed a Motion (Docket No. 847) (“Plan Distribution Motion”) to seek approval of (i) a plan of distribution of assets of the MS Entities to investors (“Plan of Distribution”) and (ii) interim distributions to investors with allowed claims scheduled or timely filed in accordance with the Court-approved claims procedure.

7. On October 31, 2016, the Court entered a Memorandum-Decision and Order (Docket No. 904) (“Plan Distribution Order”) granting the Plan Distribution Motion, approving the Plan of Distribution, and allowing the Receiver to make interim distributions as set forth in the Plan Distribution Motion.

8. Since entry of the Plan Distribution Order, I have diligently pursued reconciliation of thousands of investor claims, including the filing of ten claim objection motions, which claims reconciliation process concluded in October 2020. As a result, there are 861 investors with allowed claims of \$110,467,889.

9. Commencing in May 2017 and concluding in May 2021, I have completed three rounds of distributions to those investors with allowed claims, all in accordance with the terms of the Plan and the Plan Distribution Order. To date, I have

completed distributions in the approximate aggregate amount of \$21,738,980 to investors with allowed claims. These distributions amounted to a 23.84% recovery to those investors.

10. As of April 8, 2022, there is \$615,630 on hand in Receiver accounts, including a reserve of \$237,500 for ongoing operating expenses, administrative expenses, contingent taxes, and professional fees incurred until the wind-down of the Receivership is completed. I expect to soon recover approximately \$1,110,992 from discovered escheated deposits permitting an unexpected additional approximate 1.348% distribution to investors with allowed claims. This would increase the total amount paid to investors with allowed claims to 25.19%.

11. As of April 14, 2022, there are twenty-three claims for which checks for second and/or third distributions have not yet been claimed, representing an aggregate amount of approximately \$85,686 (“Unclaimed Funds”). Attached as Exhibit B to the Motion is a list of claim numbers for which there are Unclaimed Funds and the distribution round to which such Unclaimed Funds relate (“Unclaimed Funds List”).

12. Certain investors with claims listed on the Unclaimed Funds List have Unclaimed Funds from both the second and third rounds of investor distributions. The checks mailed to this group of investors during the second round of investor distributions were either returned to the Receiver as undeliverable or I and the Receiver’s staff subsequently discovered that the investor had passed away. For security reasons, these checks were cancelled and I commenced efforts to locate and contact the affected investors or their estates and to obtain the necessary paperwork to re-issue the checks. For security reasons, I also did not issue distribution checks to these investors in the third round of investor distributions.



13. The remaining investors with claims listed on the Unclaimed Funds List have Unclaimed Funds from the third round of investor distributions. Distribution checks were mailed to these investors and have not yet been cashed. Each distribution check sent by the Receiver to investors states that it is “void after 90 days.” The uncashed checks from the third round of distributions have been outstanding for not less than 278 days.

14. The Receiver’s staff has attempted to contact the investors with Unclaimed Funds by phone calls to the investor’s phone number of record and by letter to the investor’s address of record to confirm whether the investors received their distribution checks and to obtain the necessary paperwork to re-issue distribution checks, as needed. The Receiver’s staff also used online resources to search for updated addresses and phone numbers for investors. The investors with claims listed on the Unclaimed Funds List did not respond to the attempts to contact them, did not respond to requests for updated paperwork, or the Receiver’s staff discovered through online research that the investor had passed away.

15. In order to give investors with claims listed on the Unclaimed Funds List a final opportunity to claim their distributions, I will provide to all investors with a claim listed on the Unclaimed Funds List at their address of record a notice of this Motion and an explanatory letter substantially in the form attached to the Motion as Exhibit C and will also post an explanation of this Motion on the Receiver’s website ([www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com)).

16. The purpose of the Plan of Distribution is to set forth the procedures to distribute the liquidated assets of the MS Entities to the investors with allowed claims who

were harmed by the actions of David Smith and Timothy McGinn. Article VIII of the Plan of Distribution was drafted in an effort to reduce costs and increase efficiency in processing distributions to investors with allowed claims.

17. The Plan of Distribution provisions governing De Minimis Distributions to investors with allowed claims will affect approximately 16 investors should a Fourth Distribution be achieved. I believe, however, that if there were to be a Fourth Distribution to investors, the small number of investors whose distribution would be a De Minimis Distribution would not create an excessive expense or burden on the Receivership.

18. In connection with service of the Motion and all accompanying papers, including this Declaration, I will give notice of the Motion to the Securities and Exchange Commission, all parties who have filed a Notice of Appearance in this action by ECF, and all creditors and parties in interest via the Receiver's website ([www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com)), as well as posting at the top of the Receiver's website an explanation of the Motion. Additionally, notice by first class mail, together with the explanatory letter attached as Exhibit C to the Motion, will be given to all investors with a claim number listed on the Unclaimed Funds List.

Dated: April 14, 2022

/s/ William J. Brown  
William J. Brown

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 April 14, 2022, a true and correct copy of the Notice of Motion and Motion of William J. Brown, as Receiver, for an Order in Aid of Administration (A) Approving Use of Unclaimed Funds to Pay Administrative Expenses and Allowed Claims of Other Investors and (B) Approving Distribution of De Minimis Amounts to Investors in Contemplation of a Potential Fourth Investor Distribution (“Unclaimed Funds Motion”) was 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 as indicated below:

- **William J. Brown** wbrown@phillipslytle.com,khatch@phillipslytle.com
- **Roland M. Cavalier** rcavalier@tcglegal.com
- **Certain McGinn Smith Investors** apark@weirpartners.com
- **Frank H. Chiappone** chiappone55@gmail.com
- **Linda J. Clark** lclark@barclaydamon.com,jsmith@hiscockbarclay.com
- **Elizabeth C. Coombe** elizabeth.c.coombe@usdoj.gov, CaseView.ECF@usdoj.gov, kelly.ciccarelli@usdoj.gov

- **William J. Dreyer** wdreyer@dreyerboyajian.com, lburkart@dreyerboyajian.com, bhill@dreyerboyajian.com, lowens@dreyerboyajian.com, coconnell@dreyerboyajian.com
- **Catherine N. Cervone** ccervone@phillipslytle.com
- **Scott J. Ely** sely@elylawpllc.com, shm@fwc-law.com
- **James D. Featherstonhaugh** jdf@fwc-law.com, jsm@fwc-law.com, cr@fwc-law.com, shm@fwc-law.com
- **Brad M. Gallagher** bgallagher@barclaydamon.com
- **James H. Glavin , IV** hglavin@glavinandglavin.com
- **Bonnie R. Golub** bgolub@weirpartners.com
- **James E. Hacker** hacker@joneshacker.com, sfebus@joneshacker.com, thiggs@joneshacker.com
- **Erin K. Higgins** EHiggins@ckrpf.com
- **Benjamin W. Hill** ben@benhilllaw.com, rmchugh@dreyerboyajian.com, coconnell@dreyerboyajian.com
- **E. Stewart Jones , Jr** esjones@joneshacker.com, mleonard@joneshacker.com, pcampione@joneshacker.com, kjones@joneshacker.com
- **Edward T. Kang** ekang@khflaw.com, zbinder@khflaw.com, jarcher@khflaw.com, kkovalsky@khflaw.com
- **Nickolas J. Karavolas** nkaravolas@phillipslytle.com
- **Jack Kaufman** kaufmanja@sec.gov
- **Michael A. Kornstein** mkornstein@coopererving.com
- **James P. Lagios** james.lagios@rivkin.com, kathyleen.ganser@rivkin.com, Stanley.Tartaglia@rivkin.com
- **Kevin Laurilliard** laurilliard@mltw.com
- **James D. Linnan** jdlinnan@linnan-fallon.com, lawinfo@linnan-fallon.com
- **Haimavathi V. Marlier** marlierh@sec.gov
- **Jonathan S. McCardle** jsm@fwc-law.com
- **Kevin P. McGrath** mcgrathk@sec.gov
- **Lara S. Mehraban** mehrabanl@sec.gov, marlierh@sec.gov
- **Michael J. Murphy** mmurphy@carterconboy.com, epappas@carterconboy.com, abell@carterconboy.com
- **Craig H. Norman** cnorman@chnesq.com, jbugos@coopererving.com
- **Andrew Park** apark@weirpartners.com, imarciniszyn@weirpartners.com
- **Thomas E. Peisch** TPeisch@ckrpf.com, apower@ckrpf.com
- **Terri L. Reicher** Terri.Reicher@finra.org
- **Sheldon L. Solow** sheldon.solow@kayescholer.com, kenneth.anderson@kayescholer.com
- **David P. Stoelting** stoeltingd@sec.gov, mehrabanl@sec.gov, mcgrathk@sec.gov, paleym@sec.gov, wbrown@phillipslytle.com
- **Charles C. Swanekamp** cswanekamp@bsk.com, mhipple@bsk.com
- **Justin S. Weddle** jweddle@weddlelaw.com
- **Bryan M. Westhoff** bryan.westhoff@kayescholer.com
- **Benjamin Zelsermyer** bzlaw@optonline.net, seincav@aol.com

And, I hereby certify that on April 14, 2022, I mailed, via first class mail using the United States Postal Service, copies of the Unclaimed Funds Motion to the individuals listed below and on the investors with the claim numbers listed on the attached Exhibit B which was filed with the Motion herewith.

Nancy McGinn  
426-8th Avenue  
Troy, NY 12182

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

Greenberg Traurig, LLP  
54 State Street, 6th Floor  
Albany, NY 12207

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

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

Bond, Schoeneck & King PLLC  
Avant Building - Suite 900  
200 Delaware Avenue  
Buffalo, NY 14202-2107

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

Justin S. Weddle, Esq.  
Weddle Law PLLC  
250 W. 55th Street, 30th Floor  
New York, NY 10019

Dated: April 14, 2022

/s/ Karen M. Ludlow  
Karen M. Ludlow