



NEW YORK  
REGIONAL OFFICE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
100 PEARL STREET, SUITE 20-100  
NEW YORK, NY 10004-2616

March 14, 2025

**VIA ECF**

The Honorable Anne M. Nardacci  
United States District Court  
Northern District of New York  
James T. Foley U.S. Courthouse  
445 Broadway, First Floor  
Albany, NY 12207

**Re: SEC v. McGinn, Smith & Co., Inc., et al., 10-cv-457-AMN-PJE (N.D.N.Y.)**

Dear Judge Nardacci:

Plaintiff Securities and Exchange Commission respectfully submits this letter seeking approval of the proposed final consent judgments as to 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, "MS Entities"). The proposed judgments, if approved, would enjoin the MS Entities from violating the provisions of the federal securities laws the Second Amended Complaint alleges they violated, and make them jointly and severally liable for disgorgement of \$62,690,000, plus prejudgment interest of \$12,000,000. The proposed judgments do not include a civil penalty.

The MS Entities have been under the control of the Court-appointed Receiver, William J. Brown, since this case was filed on April 20, 2010. ECF Nos. 5 at 19-21 (TRO); 96 (Preliminary Injunction Order). In 2015, when final judgments were entered against the other defendants and relief defendants, Judge Sharpe, at the request of the Receiver and the SEC, agreed to defer entry of final judgments as to the MS Entities "until the bulk of the funds held for investors have been distributed and the receivership is preparing to close." ECF Nos. 816 at 53; 1245 (docket order). The Receiver's status report filed April 30, 2024, states the fourth and final distribution to investors has been completed, and that the Receiver was engaged in various "wrap-up" activities. ECF No. 1256. As a result, this is an appropriate time to enter the final judgments as to the MS Entities.

The disgorgement amount of \$62,960,000 was determined by applying the same analysis used by Judge Sharpe in determining the disgorgement owed by Defendants David L. Smith and Timothy M. McGinn: "the proper metric for calculating disgorgement in Ponzi scheme cases is subtracting the amount returned to investors from the total amount raised through the fraudulent offerings." *SEC v. McGinn, Smith & Co., Inc.*, 98 F. Supp. 3d 506, 520 (N.D.N.Y. 2015) (cleaned up). The offerings by the MS Entities raised \$85,960,000. As the Receiver has

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collected and distributed approximately \$23,000,000, the disgorgement amount in the proposed judgments is \$62,960,000, plus prejudgment interest of \$12,000,000.<sup>1</sup>

The proposed judgments are fair, reasonable, and, with respect to the requested relief, do not disserve the public interest under the standards set forth in *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 294 (2d Cir. 2014). The Court, therefore, should approve the proposed judgments, which would resolve all of the claims asserted by the SEC in this action.

Respectfully submitted,

/s/ David Stoelting  
David Stoelting  
Securities and Exchange Commission  
*Attorney for Plaintiff*

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<sup>1</sup> The funds collected and distributed by the Receiver also reduce the amounts owed by Defendants David L. Smith and Timothy M. McGinn as a result of the final judgments entered against them in 2015. ECF Nos. 835, 836, 840.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

No. 10-cv-457-AMN-PJE

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, GEOFFREY R. SMITH, 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.*

[PROPOSED] FINAL JUDGMENT AS TO 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

The United States Securities and Exchange Commission (“SEC”), having filed a  
Complaint on April 20, 2010, against, among others, 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 (the “MS Entities”), alleging that the MS Entities and Defendants David L. Smith (“Smith”) and Timothy M. McGinn (“McGinn”) violated the federal securities laws;

The Court, on April 20, 2010, having entered an Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief and, on July 22, 2010, having granted the Commission’s motion for a preliminary injunction, entered the Preliminary Injunction Order (ECF No. 96) which, among other things, appointed William J. Brown as Receiver (the “Receiver”) over the MS Entities pending the final disposition of this action;

The Court, having granted the SEC’s motion for summary judgment against Smith and McGinn (ECF Nos. 807, 816) and, on June 25, 2015, entered Final Judgments as to Smith and McGinn (ECF Nos. 835, 836);

The Court, in a text order dated November 23, 2023, deferred entering final judgment for the MS Entities until the Receiver completes the fourth and final distribution to the victims;

The SEC, in a Status Report filed May 2, 2024, stated that the fourth and final distribution has been substantially completed (ECF No. 1257);

The MS Entities, having acknowledged service of the summons and Complaint, and the Receiver, who has authority to enter into this Final Judgment and bind the MS Entities, having executed the annexed Consent of 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 (the “Consent”), annexed hereto and incorporated herein, in which the MS Entities waive

the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure and, without admitting or denying the allegations contained in the SEC's Complaint (except as to jurisdiction, which are admitted), and waive any right of appeal from this Final Consent Judgment as to 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 ("Final Judgment"):

**I.**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED**, that Defendants McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp. are permanently enjoined and restrained from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;  
or
- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser

by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

- (A) any investment strategy or investment in securities,
- (B) the prospects for success of any product or company,
- (C) the use of investor funds,
- (D) compensation to any person,
- (E) McGinn, Smith & Co., Inc.'s, McGinn, Smith Advisors, LLC's, and McGinn, Smith Capital Holdings Corp.'s qualifications to advise investors; or
- (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp. officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp. or with anyone described in (a).

## **II.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that Defendants McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp.; are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)]

and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person

by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

- (A) any investment strategy or investment in securities,
- (B) the prospects for success of any product or company,
- (C) the use of investor funds,
- (D) compensation to any person,
- (E) McGinn, Smith & Co., Inc.'s, McGinn, Smith Advisors, LLC's, and McGinn, Smith Capital Holdings Corp.'s qualifications to advise investors; or
- (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) McGinn, Smith

& Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp. officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp. or with anyone described in (a).

### III.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that Defendant McGinn, Smith & Co., Inc. is permanently restrained and enjoined from violating, directly or indirectly, Section 15(c)(1) of the Exchange Act [15 U.S.C. § 78o(c)(1)] and Rule 10b-3 promulgated thereunder [17 C.F.R. § 240.10b-3] by using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

- (A) any investment strategy or investment in securities,
- (B) the prospects for success of any product or company,
- (C) the use of investor funds,
- (D) compensation to any person,
- (E) McGinn, Smith & Co., Inc.'s, qualifications to advise investors; or
- (F) the misappropriation of investor funds or investment proceeds.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who



receive actual notice of this Final Judgment by personal service or otherwise: (a) McGinn, Smith & Co., Inc.'s officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with McGinn, Smith & Co., Inc. or with anyone described in (a).

**IV.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED,** that Defendants McGinn, Smith & Co., Inc. and McGinn, Smith Advisors, LLC, are permanently restrained and enjoined from violating Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)] and Rule 206(4)-8 promulgated thereunder [17 C.F.R. § 275.206(4)-8] by the use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, (i) to employ any device, scheme, or artifice to defraud any client or prospective client, (ii) to engage in any transaction, practice, or course of business which operates as fraud or deceit upon any client or prospective client, or (iii) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any client or prospective client, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any client or prospective client, about:

- (A) any investment strategy or investment in securities,
- (B) the prospects for success of any product or company,
- (C) the use of client funds,
- (D) compensation to any person,
- (E) McGinn, Smith & Co., Inc.'s and McGinn, Smith Advisors, LLC's qualifications to advise clients; or

(F) the misappropriation of client funds or investment proceeds.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) McGinn, Smith & Co., Inc.'s and McGinn, Smith Advisors, LLC's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with McGinn, Smith & Co., Inc. and McGinn, Smith Advisors, LLC with anyone described in (a).

**V.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that Defendants First Advisory Income Notes, LLC; First Excelsior Income Notes, LLC; First Independent Income Notes, LLC; and Third Albany Income Notes, LLC are permanently restrained and enjoined from violating Section 7(a) of the Investment Company Act of 1940 ("Company Act") [15 U.S.C. § 80a-7(a)] by, directly or indirectly:

(a) offering for sale, selling or delivering after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offering for sale, selling, or delivering after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by the use of the mails or any means or instrumentality of interstate commerce; or

(b) purchasing, redeeming, retiring, or otherwise acquiring or attempting to acquire, by the use of the mails or any means or instrumentality of interstate commerce, any security

or any interest in a security, whether the issuer of such security is such investment company or another person; or

(c) controlling any investment company which does any of the acts enumerated in (a) or

(b) above; or

(d) engaging in any business in interstate commerce.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) the First Advisory Income Notes, LLC; First Excelsior Income Notes, LLC; First Independent Income Notes, LLC; and Third Albany Income Notes, LLC officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with the First Advisory Income Notes, LLC; First Excelsior Income Notes, LLC; First Independent Income Notes, LLC; and Third Albany Income Notes, LLC or with anyone described in (a).

## VI.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that Defendants McGinn, Smith & Co., Inc.; 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 are permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce

or of the mails to sell such security through the use or medium of any prospectus or otherwise;

- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or
- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) McGinn, Smith & Co., Inc.; 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 officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with McGinn, Smith & Co., Inc.; 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 or with anyone described in (a).

**VII.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that 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 are jointly and severally liable for disgorgement of \$62,690,000, representing profits gained as a result of the conduct alleged in the Second Amended Complaint, plus prejudgment interest of \$12,000,000.

**VIII.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: Albany, New York  
\_\_\_\_\_, 2025

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

No. 10-cv-457-AMN-PJE

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, GEOFFREY R. SMITH, 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.*

**CONSENT OF 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**

1. William J. Brown, as Receiver (the "Receiver") of 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 (the “MS Entities”), having accepted service of the summons issued to the MS Entities and the Complaint in this action, having read and understood the terms of the annexed Final Judgment as to 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 (“Final Judgment”), with the authority granted to him under the Preliminary Injunction Order dated July 22, 2010 (Docket No. 96) (“PI Order”), appears and admits the jurisdiction of this Court over the MS Entities and over the subject matter of this action, waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure and, without admitting or denying the allegations contained in the Complaint of Plaintiff Securities and Exchange Commission (“SEC”), except as to jurisdiction, which is admitted, hereby consents to the entry, without further notice, of the Final Judgment in the form annexed hereto and incorporated by reference herein.

2. Without admitting or denying the allegations of the Second Amended Complaint (except as provided herein in paragraph 1 and except as to personal and subject matter jurisdiction, which the MS Entities admit), the MS Entities hereby consent to the entry of the final judgment in the form attached hereto (the “Final Judgment”), and incorporated by reference herein, which, among other things:

- a) permanently restrains and enjoins Defendants McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp. from violating Section 17(a) of the Securities Act of 1933 (the “Securities Act”) [15 U.S.C. § 77q(a)]

by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

- (A) any investment strategy or investment in securities,
- (B) the prospects for success of any product or company,
- (C) the use of investor funds,
- (D) compensation to any person,
- (E) McGinn, Smith & Co., Inc.'s, qualifications to advise investors; or
- (F) the misappropriation of investor funds or investment proceeds;

b) permanently restrains and enjoins Defendants McGinn, Smith & Co., Inc.; McGinn, Smith Advisors, LLC; and McGinn, Smith Capital Holdings Corp. from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5] by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

- (A) any investment strategy or investment in securities,
- (B) the prospects for success of any product or company,
- (C) the use of investor funds,
- (D) compensation to any person,
- (E) McGinn, Smith & Co., Inc.'s, qualifications to advise investors; or



(F) the misappropriation of investor funds or investment proceeds;

c) permanently restrains and enjoins Defendant McGinn, Smith & Co., Inc. from violating Section 15(c)(1) of the Exchange Act [15 U.S.C. § 78o(c)(1)] and Rule 10b-3 promulgated thereunder [17 C.F.R. § 240.10b-3] by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

(A) any investment strategy or investment in securities,

(B) the prospects for success of any product or company,

(C) the use of investor funds,

(D) compensation to any person,

(E) McGinn, Smith & Co., Inc.'s, qualifications to advise investors; or

(F) the misappropriation of investor funds or investment proceeds;

d) permanently restrains and enjoins Defendants McGinn, Smith & Co., Inc. and McGinn, Smith Advisors, LLC, from violating Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)] and Rule 206(4)-8 promulgated thereunder [17 C.F.R. § 275.206(4)-8] by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

(A) any investment strategy or investment in securities,

- (B) the prospects for success of any product or company,
  - (C) the use of investor funds,
  - (D) compensation to any person,
  - (E) McGinn, Smith & Co., Inc.'s, qualifications to advise investors; or
  - (F) the misappropriation of investor funds or investment proceeds;
- e) permanently restrains and enjoins Defendants First Advisory Income Notes, LLC; First Excelsior Income Notes, LLC; First Independent Income Notes, LLC; and Third Albany Income Notes, LLC from violating Section 7(a) of the Investment Company Act of 1940 (“Company Act”) [15 U.S.C. § 80a-7(a)];
- f) permanently restrains and enjoins Defendants McGinn, Smith & Co., Inc.; 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 from violating Section 5 of the Securities Act [15 U.S.C. § 77e]; and
- g) orders 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 to be jointly and severally liable for disgorgement of \$62,690,000, representing profits gained as a result of the conduct alleged in the Second Amended Complaint, and prejudgment interest of \$12,000,000.

3. The Receiver, on behalf of the MS Entities, waives the right, if any, to a jury trial and to appeal from the entry of the Final Judgment.

4. The Receiver, on behalf of the MS Entities, agrees that this Consent of 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 (“Consent”) shall be incorporated by reference in and made part of the annexed Final Judgment with the same force and effect as if fully set forth therein.

5. The Receiver, on behalf of the MS Entities, waives the right, if any, to appeal from the Final Judgment.

6. The Receiver, on behalf of the MS Entities, enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the SEC or any member, officer, employee, agent, or representative of the SEC to induce the MS Entities to enter into this Consent.

7. Consistent with 17 C.F.R. § 202.5(f), this Consent resolves only the claims asserted against the MS Entities in this civil proceeding. The Receiver, on behalf of the MS Entities, acknowledges that no promise or representation has been made by the SEC or any member, officer, employee, agent, or representative of the SEC with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability. The Receiver, on behalf of the MS Entities, waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. The Receiver, on behalf of the MS Entities, further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has

consequences that are separate from any sanction imposed in an administrative proceeding. In addition, in any disciplinary proceeding before the SEC based on the entry of the injunction in this action, the Receiver, on behalf of the MS Entities, understands that he shall not be permitted to contest the factual allegations of the complaint in this action.

8. The Receiver, on behalf of the MS Entities, understands and agrees to comply with the SEC's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5(e). In compliance with this policy, the Receiver, on behalf of the MS Entities, agrees: (i) not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the Complaint or creating the impression that the Complaint is without factual basis; (ii) will not make or permit to be made any public statement to the effect that the MS Entities do not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that the MS Entities do not deny the allegations; and (ii) that upon the filing of this Consent, the MS Entities hereby withdraw any papers filed in this action to the extent that they deny any allegation in the Complaint. If the Receiver, on behalf of the MS Entities, breaches this agreement, the SEC may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects the MS Entities': (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the SEC is not a party.

9. The Receiver, on behalf of the MS Entities, waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to pursue reimbursement of attorney's fees or other fees, expenses, or costs expended by the MS Entities to defend against this action. For these purposes, the MS

Entities agree that they are not prevailing parties in this action since the parties have reached a good faith settlement. The foregoing shall not preclude the Receiver or his professionals from being compensated in accordance with the PI Order.

10. The Receiver, on behalf of the MS Entities, will not oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

11. The Receiver, on behalf of the MS Entities, waives service of the Final Judgment and agrees that entry of the Final Judgment by the Court and filing with the Clerk of the Court will constitute notice to the MS Entities of its terms and conditions. The Receiver, on behalf of the MS Entities, further agrees to provide the SEC's counsel in this action within thirty days after the Final Judgment is filed with the Clerk of the Court, with an affidavit or declaration stating that the MS Entities have received and read a copy of the Final Judgment.

12. The Receiver, on behalf of the MS Entities, agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Final Judgment.

13. The Receiver, on behalf of the MS Entities, agrees that the SEC may present the annexed Final Judgment to the Court for signature and entry without further notice.

  
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William J. Brown  
As the Court-appointed Receiver for the MS Entities