

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

**MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR AN
ORDER (I) APPROVING A PROCEDURE FOR THE
ADMINISTRATION OF EQUITY INTEREST CLAIMS; (II) ESTABLISHING
A DEADLINE FOR FILING PROOFS OF INTEREST; AND
(III) APPROVING THE FORM AND MANNER OF NOTICE THEREOF**

William J. Brown, as Receiver (“Receiver”) for the entity Defendants in this action and certain other entities, by his counsel, Phillips Lytle LLP, moves (the “Motion”) for an Order: (i) approving a procedure for the filing of all asserted equity interest claims in the MS Entities (as defined below) as described in more detail below; (ii) establishing a deadline for the

filing of proofs of interest against the MS Entities; and (iii) approving the form and manner of notice thereof, and respectfully represents as follows:

BACKGROUND

1. On April 20, 2010, the Securities and Exchange Commission (“SEC”) filed a Complaint initiating the above-captioned action (the “Complaint”) (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 (collectively, the “MS Entities”).

2. On July 26, 2010, the Court entered an order granting SEC’s Motion for a Preliminary Injunction and appointing the Receiver as permanent receiver with the consent of defendants Timothy M. McGinn and David L. Smith (“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).

4. The Preliminary Injunction Order authorizes the Receiver to, among other things, “use, lease, sell, and convert into money all assets of the MS Entities, either in public or private sales or other transactions on terms the Receiver reasonably believes based on his own experience and input from his advisors to be most beneficial to the MS Entities and those entitled to the proceeds...” Preliminary Injunction Order, ¶ VII(m).

5. On March 9, 2012, the Receiver filed a Motion (“Claims Procedure Motion”) (Docket No. 466) for entry of an Order approving, among other things, the Receiver’s proposed procedure for the filing of claims (as distinguished from equity interests) against the MS Entities by creditors and investors.

6. The Claims Procedure Motion was limited to claims by creditors and investors against the MS Entities and, therefore, did not address any claimed equity interests in the MS Entities.

7. At the hearing on the Claims Procedure Motion, the Court requested the Receiver to file a Motion for the approval of a process for administration of claims based upon equity interests (such as stock or membership interests) in the MS Entities (collectively, “Equity Claims”). The June 19, 2012 bar date established by the Claims Procedure Motion has passed, and that claims process has allowed the Receiver to assess how best to establish an equity interest process.

SUMMARY OF MOTION

8. By this Motion, the Receiver requests that the Court enter an order substantially in the form attached as **Exhibit A** (“Equity Claims Procedure Order”): (i) approving the procedure for the administration of Equity Claims against the MS Entities, as summarized below (“Equity Claims Procedure”); (ii) establishing a deadline by which the holders of equity interests in the MS Entities (collectively, “Equity Holders”) must file a proof of interest against the MS Entities if necessary under the Equity Claims Procedure (“Equity Claims Bar Date”); and (iii) approving the proposed form and manner of publication of notice of the Equity Claims Bar Date and the Equity Claims Procedure.

9. The Motion has been discussed with the SEC, and the SEC has been provided with a pre-filing copy of the Equity Claims Procedure and Equity Claims Bar Date proposed in this Motion and has expressed no opposition.

RELIEF REQUESTED

10. The Receiver believes that Equity Claims against the MS Entities will primarily, but not exclusively, consist of claims based upon shareholder (including all classes of stock such as common stock and preferred stock), partnership, or membership interests in the

following MS Entities: Health Enterprises Management, McGinn, Smith & Co., Inc., FGF Partners, GPV Associates, IP Investors, Portfolio Partners, Seton Hall Associates Limited Partners, 74 State Capital LLP, TNA Associates, Upstate Imaging Associates, M&S Partners, McGinn, Smith Holdings LLC, McGinn, Smith Firstline Funding LLC, Mr. Cranberry LLC, MSFC Security Holdings LLC, TDM Cable Funding LLC, TDMM Cable Funding LLC and White Glove Cruises LLC.

11. The Receiver does not reasonably expect based on his present knowledge that the Receivership estate will have sufficient funds after payment of the claims of Creditors and Investors (as defined in the Claims Procedure Motion) against the MS Entities and other expenses of the estate to make any distributions on account of Equity Interests.

12. The Receiver, nonetheless, believes that the proposed Equity Claims Procedure is the most efficient procedure for providing the Equity Holders with an opportunity to assert claims against the MS Entities in the event that distributions on account of Equity Claims are warranted and for purposes of clarity with respect to the legal rights associated with all such interests.

A. Equity Claims Procedure

13. The Receiver proposes the following Equity Claims Procedure:

I. *Schedules of Claims and Access Thereto*

14. Within fourteen (14) days of entry of the Equity Claims Procedure Order, the Receiver will establish schedules of all known Equity Claims against the MS Entities (“Equity Schedules”), substantially in the form attached as **Exhibit B**.

15. The Receiver will post the Equity Schedules to an internet site (“Equity Claims Site”) maintained by the Receiver, which is not intended to be accessible to the general public.¹

¹ Like the Claims Procedure set forth in the Claims Procedure Motion, the Receiver considered several methods to provide all Equity Holders and other parties in interest with access to the Equity Schedules. The Receiver further took into account the possibility that the password to the Equity Claims Site may be provided to

16. The Equity Schedules will list the name of each Equity Holder, their address, the nature of their equity interest, and the scheduled amount of the equity interest as reflected in the Receiver's records.

17. The Receiver will provide each Equity Holder listed in the Equity Schedules, by first class mail sent to each such Equity Holder at their last known address, post-marked on or before the date which is twenty-one (21) days after entry of the Equity Claims Procedure Order ("Access Notice Deadline"), with (i) a password and written instructions regarding how the Equity Holder may access the Equity Claims Site ("Equity Claims Site Access Notice") and (ii) a notice describing the Equity Claims Procedure and the Equity Claims Bar Date ("Equity Claims Notice") substantially in the form attached as **Exhibit C**. The SEC will also be provided with the password.

II. *Who Must File a Equity Claim Form*

18. Equity Holders who agree that the Equity Schedules accurately reflect their interests **do not** need to file a written claim.

19. Equity Holders will be required to file a written claim (each, a "Equity Claim Form"), substantially in the form attached as **Exhibit D**, only if:

- i. the Equity Holder does not receive the Equity Claims Site Access Notice on or before the Access Notice Deadline and, therefore, the claim of the Equity Holder is not scheduled by the Receiver or the address of the Equity Holder is not current; or
- ii. the interest of the Equity Holder is listed on the Equity Schedules as contingent, disputed, or unliquidated; or
- iii. the Equity Holder objects to the description (including address) as listed on the Equity Schedules.

other persons by the Equity Holders, notwithstanding the procedure proposed in this Motion. The Receiver has, nevertheless, concluded that establishing the Equity Claims Site is the most efficient and cost-effective method to ensure an open and transparent claims administration process in which all Equity Holders and other parties in interest have access to the Equity Schedules and other relevant information.

III. *Consequences for Failure to File a Equity Claim Form*

20. Unless otherwise ordered by the Court, any Equity Holder who is required to file a Equity Claim Form in accordance with the Equity Claims Procedure Order, but fails to do so, on or before the Equity Claims Bar Date, shall be barred, estopped and enjoined from asserting such claim against the MS Entities or the Receiver or receiving a distribution on account of such interest.

IV. *Method for Filing a Equity Claim Form*

21. In accordance with the Equity Claims Procedure Order, all Equity Claim Forms must be delivered by first-class mail, overnight courier, or hand-delivery to Phillips Lytle LLP, Attn: Karen M. Ludlow, 3400 HSBC Center, Buffalo, New York 14203, so as to be **actually** received by 5:00 p.m. (Eastern Time) on the Equity Claims Bar Date. Claim forms **may not** be delivered by facsimile or electronic mail.

B. Equity Claims Bar Date

22. In order to timely complete the claims administration process with respect to Equity Interests, the Receiver proposes that the Equity Claims Bar Date be established as sixty (60) days following entry of the Equity Claims Procedure Order. The Receiver anticipates that Equity Claims Bar Date would be in approximately December 2012.

23. The Receiver believes that the proposed Equity Claims Bar Date will provide all Equity Holders with ample opportunity to review the Equity Schedules, consult with the Receiver, if they so choose, or to submit an Equity Claim Form in accordance with the Equity Claims Procedure Order, if required.

C. Notice of Equity Claims Procedure and Equity Claims Bar Date

24. In order to assure that any Equity Holders who wish to assert claims against the MS Entities which are not listed on the Equity Schedules have an opportunity to participate in the claims administration process, the Receiver proposes to publish notice of the Equity Claims Procedure and the Equity Claim Bar Date as follows:

- i. The Receiver will publish the Equity Claims Notice and/or an advertisement describing the material terms of the Equity Claims Procedure and the Equity Claims Bar Date, two (2) times per week for two (2) weeks, in the Albany Times Union;
- ii. The Receiver will provide the Equity Claims Notice and/or a press release describing the material terms of the Claims Procedure and the Equity Claims Bar Date to news media in the Albany, New York area, including: Albany Times Union, Troy Record, The Daily Gazette, Albany Business Journal, and the ABC, NBC, CBS and Fox News affiliates in the Albany-Troy-Schenectady market; and
- iii. The Receiver will prominently post to the Receiver's website copies of this Motion, the Equity Claims Procedure Order, the Equity Claim Form, and the Equity Claims Notice.

25. As noted above, the Receiver will provide a copy of the Equity Claims Notice by first class mail to each Equity Holder listed in the Equity Schedules.

CONCLUSION

26. The Receiver believes that the Equity Claims Procedure proposed in this Motion will permit efficient administration of the claims of Equity Holders against the MS Entities.

27. Based upon the foregoing, the Receiver respectfully requests that the Court find that the proposed Equity Claims Procedure and Equity Claims Bar Date serve the best

interests of the receivership estate and the Equity Holders, and that the proposed notice of the Equity Claims Procedure and Equity Claims Bar Date is adequate.

WHEREFORE, the Receiver respectfully requests entry of an Order (i) granting this Motion, (ii) approving the Equity Claims Procedure and the Equity Claims Bar Date; (iii) approving the proposed form and manner of notice of the Equity Claims Procedure and Equity Claims Bar Date as set forth in the Motion, and (iv) for such other relief as may be appropriate.

Dated: October 2, 2012

PHILLIPS LYTTLE LLP

By /s/ William J. Brown
William J. Brown (Bar Roll #601330)
Joshua P. Fleury (Bar Roll #515418)
Attorneys for Receiver
Omni Plaza
30 South Pearl Street
Albany, New York 12207
Telephone No. (518) 472-1224

and

3400 HSBC Center
Buffalo, New York 14203
Telephone No.: (716) 847-8400

Doc # 01-2571720.4

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
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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**ORDER (I) APPROVING A PROCEDURE FOR THE
ADMINISTRATION OF EQUITY INTEREST CLAIMS; (II) ESTABLISHING
A DEADLINE FOR FILING PROOFS OF INTEREST;
AND (III) APPROVING THE FORM AND MANNER OF NOTICE THEREOF**

Upon the Motion of William J. Brown, as Receiver, for an Order (I) Approving a Procedure for the Administration of Equity Interest Claims; (II) Establishing a Deadline for Filing Proofs of Interest; and (III) Approving the Form and Manner of Notice Thereof dated October 1, 2012 (“Motion”) (Docket No. ____), the Court having held a hearing thereon and no objections being sustained thereto, and good cause appearing therefor, it is hereby

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

ORDERED, that all claims based upon equity interests in the MS Entities (as defined in the Motion) shall be asserted in accordance with the Equity Claims Procedure (as defined in the Motion); and it is further;

ORDERED, to the extent required by the Equity Claims Procedure, Equity Claims (as defined in the Motion) shall be filed in writing with Phillips Lytle LLP, Attn: Karen M. Ludlow, 3400 HSBC Center, Buffalo, NY 14203, substantially in the form of the Equity Claim Form attached as Exhibit D to the Motion, and it is further

ORDERED, that the last day for Equity Holders (as defined in the Motion) to file a claim against the MS Entities is fixed as December __, 2012 (“Equity Claims Bar Date”). Unless otherwise ordered by the Court, any Equity Holder who is required to file an Equity Claim Form in accordance with this Order, but fails to do so, on or before the Equity Claims Bar Date, shall be barred, estopped and enjoined from asserting such claim against the MS Entities or the Receiver or receiving a distribution on account of such claim, and it is further

ORDERED, that the form and substance of the Equity Claims Notice attached to the Motion as Exhibit C and the manner of publication of the Equity Claims Notice and other notice of the Equity Claims Procedure and Equity Claims Bar Date as set forth in the Motion is appropriate. The Equity Claims Notice shall be served by U.S. Mail, First Class postage prepaid within 21 days after entry of this Order on each Equity Holder known to the Receiver at the most recent address contained in the Receiver’s records, and otherwise published as set forth in the Motion, and it is further

ORDERED, that the right of the Receiver to file appropriate proceedings in this Court to object to claims and/or establish a procedure for resolution of claims disputes is reserved.

Dated: October __, 2012

Hon. Christian F. Hummel
United States Magistrate Judge

Doc # 01-2573751.4

Exhibit B

S.E.C. vs. McGinn, Smith & Co., Inc., et al.
SCHEDULE OF HOLDERS OF EQUITY CLAIMS

Equity Holder's Name, Mailing Address <u>Including Zip Code</u>	Description of <u>Interest</u>	IRA <u>Interest Held</u>	Disputed <u>Yes/No</u>	Unliquidated <u>Yes/No</u>	Contingent <u>Yes/No</u>
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Exhibit C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, :

vs. :

Case No. 1:10-CV-457
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McGINN, SMITH & CO., INC., :
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McGINN, SMITH CAPITAL HOLDINGS CORP., :
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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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NOTICE OF EQUITY CLAIMS BAR
DATE AND PROCEDURE

NOTICE IS HEREBY GIVEN that William J. Brown, as Receiver (“Receiver”) in this action, with approval of the Court, has established a procedure for asserting equity claims against McGinn, Smith & Co., Inc. and the other entities listed on Schedule 1 (collectively, the

“MS Entities”) to this Notice. This procedure does not involve creditors or investors who hold non-equity claims (such as money claims) against the MS Entities since those claims were part of a prior process which had a June 19, 2012 bar date.

1. Filing Deadline

The deadline for filing equity claims against any of the MS Entities is **December __, 2012.**

2. Procedure for Review and Filing of Claims

The Receiver will establish schedules (“Equity Schedules”) of all known interests against the MS Entities. Each known equity interest holder listed on the Equity Schedules established by the Receiver should receive a letter postmarked on or before **November __, 2012**, which will contain, among other things, a password and instructions for access to a secure website maintained by the Receiver (“Equity Claims Site Access Notice”). The website will contain Equity Schedules listing the names and addresses of equity interest holders, the nature of the equity interest, a description of the interest as reflected in the Receiver’s records, and whether the interest is contingent, disputed, or unliquidated. If the equity interest holder agrees with the description (including their address) for their interest(s) and the description(s) as scheduled by the Receiver on the Equity Schedules on the website and the interest(s) is/are not listed as disputed, contingent or unliquidated, the equity interest holder does not need to take any further action. The interests in that event will be treated in accordance with the rights due the equity interest, subject to the right of the Receiver to object to the interest at a later date or amend the description of the interest, but only after giving notice by first class mail of such an intention with an opportunity to object to any such equity interest holder.

3. Who Must File a Claim Form

Each equity interest holder **MUST** submit a properly completed claim form to the Receiver if the equity interest holder: (A) does not receive the Equity Claims Site Access Notice and, therefore, the interest is not scheduled by the Receiver or the address of the equity interest holder on the Receiver's records is incorrect; (B) is the holder of an interest which is listed on the Schedules as contingent, disputed, or unliquidated; or (C) objects to the description including the mailing address listed on the Schedules in respect of any interest.

4. When and Where to File a Claim Form

All claim forms must be delivered by first-class mail, overnight courier, or hand-delivery to Phillips Lytle LLP, Attn: Karen M. Ludlow, 3400 HSBC Center, Buffalo, New York 14203, *so as to be actually received* by 5:00 p.m. (Eastern Time) on the Claims Bar Date. Claim forms **may not** be delivered by facsimile or electronic mail.

5. What to File

The form for submitting any such claim is available on the Receiver's website (www.mcginnsmithreceiver.com) in the 'Equity Interests' section at the top of the first page. A copy of the form may also be requested in writing addressed to:

Phillips Lytle LLP
Attn: Karen M. Ludlow
3400 HSBC Center
Buffalo, NY 14203

If you require a receipt for your claim, please enclose an extra copy of the claim form (without exhibits) and a stamped, self-addressed envelope.

Dated: October 2, 2012

PHILLIPS LYTTLE LLP

By _____

William J. Brown (Bar Roll #601330)

Joshua P. Fleury (Bar Roll #515418)

Attorneys for Receiver

Omni Plaza

30 South Pearl Street

Albany, New York 12207

Telephone No. (518) 472-1224

and

3400 HSBC Center

Buffalo, New York 14203

Telephone No.: (716) 847-8400

Doc # 01-2553708.8

Exhibit D

Name of Debtor: (check box next to the entity you are making a claim against):

Diversified Lending Group, Inc. Applied Equities, Inc.

Case Number:

CV 09-01533-R-SS

Name of Creditor (The person or other entity to whom the debtor owes money or property):

Name and address where notices should be sent:

TEL: () -

Email Address:

Check box to indicate that this claim amends a previously filed claim.

Claim Number: (If known)

Filed On: / /

Name and address where payment should be sent (if different from above):

Name:

Address 1:

Address 2:

Address 3:

Address 4:

Address 5:

TEL: () -

Email Address:

Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach a copy of statement giving particulars.

Carefully read instructions included with this Claim Form before completing. In order to have your claim considered for payment, complete ALL applicable questions. The original of this Claim Form must be sent to: Diversified Lending Group, Inc., c/o Omni Management Group, LLC, 16161 Ventura Boulevard, Ste. C PMB #608, Encino, CA 91436. In order for the claim to be processed it must be received on or before MM DD, 2010 at 5:00 p.m. P.S.T.

1. Amount of Claim or Investment:

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Please list total amount of claim or investment.

Please check this box if claim includes amount other than investment (interest or other charges in addition to the principal amount invested). Attach an itemized statement detailing additional amounts.

2. Please provide last four digits of social security number:

and/or account number which identifies creditor to debtor:

3. Total Payments Received:

\$.

Please list the total amount of payments received from the debtor during the period of investment.

4. Documentation: Please attach all evidence which supports your claim. Please include copies of items such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments and security agreements. You may also attach a summary describing your claim and cataloging attached documentation.

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain.

THIS SPACE IS FOR COURT USE ONLY

Date / / Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

I assert this claim against the Debtor whose name I have checked above. I understand and agree that all of my claims will be adjudicated by the Court presiding in this matter. I declare that the information contained herein as true and correct under penalties of perjury.

Signature

Printed Name

Title

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
SECURITIES AND EXCHANGE COMMISSION :

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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

CERTIFICATE OF SERVICE

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on October 2, 2012, a true and correct copy of the Motion of William J. Brown, as Receiver, for an Order (I) Approving a Procedure for the Administration of Equity Interest Claims; (II) Establishing a Deadline for Filing Proofs of Interest; and (III) Approving the Form and Manner of Notice Thereof 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, and by First Class Mail to the parties indicated below:

- **Alison B. Cohen** acohen@gkblaw.com
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-

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Cooper, Erving & Savage, LLP
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Albany, NY 12207

Dated: October 2, 2012

/s/ Karen M. Ludlow
Karen M. Ludlow