

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/DRH)

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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**MOTION OF WILLIAM J. BROWN, AS RECEIVER, FOR AN ORDER  
APPROVING SETTLEMENT WITH VERIFIER CAPITAL HOLDINGS LLC  
WITH RESPECT TO THE REDEMPTION OF GUARANTEED PAYMENT UNITS  
AND COMMON UNITS ISSUED TO TDM CABLE FUNDING, LLC AND  
MCGINN SMITH FUNDING, LLC FREE AND CLEAR OF LIENS,  
CLAIMS AND ENCUMBRANCES**

William J. Brown, as Receiver (the “Receiver”) for certain of the Defendants and other entities in this action, by his counsel, Phillips Lytle LLP, moves (the “Motion”) for an order approving a settlement with Verifier Capital Holdings LLC (“Verifier”) with respect to the

redemption of guaranteed payment units and common units issued to TDM Cable Funding, LLC (“TDM Funding”) and McGinn Smith Funding, LLC (“McGinn Funding”), respectively, free and clear of all liens, claims and encumbrances, if any, which shall attach to the proceeds of the settlement, and in support thereof, represents as follows:

### **SUMMARY OF MOTION**

The Motion seeks approval of a settlement with Verifier (“Settlement”), an entity in which two Receivership entities hold certain interests. The Settlement provides for the redemption of such interests, and certain releases by and to the Receivership entities, in exchange for a cash payment of \$4,000,000. The SEC does not object to the Motion.

### **BACKGROUND**

#### **A. General Background**

1. On April 20, 2010, the Securities and Exchange Commission (the “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 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”). Among the MS Entities are TDM Funding and McGinn Funding.

2. On July 22, 2010, the Court entered the Preliminary Injunction Order (Docket No. 96) appointing the Receiver as permanent receiver over the MS Entities. 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, Paragraph VIII(m), Docket No. 96).

**B. Background Relating to Verifier**

3. Verifier provides specialized financing programs to the security alarm industry by purchasing some or all of their security alarm monitoring accounts at a multiple of recurring monthly revenue and sub-contracting back to the seller service and monitoring obligations in respect of the purchased accounts for a fixed percentage of the recurring monthly revenue received from the underlying customers. Verifier is a limited liability company incorporated under the laws of the State of Florida. Verifier is unrelated to either TDM Funding or McGinn Funding although Matthew Rogers was at least at one time a 2.67% Member of Verifier.

4. Before the commencement of this action, Verifier issued certain guaranteed payment units (“GPUs”) to TDM Funding. The GPUs are represented by Article V of Verifier’s Amended and Restated Operating Agreement and Schedule 5.01 thereof (“Operating Agreement”), the relevant portions of which are attached as **Exhibit A**. The GPUs were issued to TDM Funding in exchange for \$6,164,000 in cash Capital Contributions<sup>1</sup> and a \$536,000 commission fee due to McGinn Smith. While the GPUs may be transferred with the “prior Approval of the [Verifier] Board of Directors, which may be [sic] not be unreasonably withheld or delayed”, all Guaranteed Payments shall be made from Available Cash. Verifier’s Board of Directors may, and in the case of these GPUs determined, that the payment is not in the best interest of the Company and its Members as a Group. Consequently, Verifier suspended payments to the Receiver based on purported cash flow issues on September 29, 2010.

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<sup>1</sup> Capitalized terms used but not defined in this Motion shall have the meanings given to them in the Operating Agreement.

5. Also before the commencement of this action, Verifier issued 133,333 common units of Verifier (“Common Units,” and together with GPUs, the “Securities”) to McGinn Funding. The Securities have no readily available public market for sale or disposition.

6. As of the date of this Motion, TDM Funding is the holder of record of the GPUs and McGinn Funding is the holder of record of the Common Units.

7. A copy of Verifier’s consolidated statement of cash flow for the five-month period ending May 31, 2013 is attached as **Exhibit B**.

**C. Redemption Transaction**

8. On August 6, 2013, following an extended period of negotiations between the Receiver and Verifier’s counsel, Verifier’s counsel sent a letter to the Receiver on behalf of Verifier proposing to redeem the Securities and release all claims pertaining thereto, in exchange for \$4,000,000 to be paid in cash on the closing date of the redemption (the “Closing Date”). Verifier has previously repaid \$2,181,213 to Receivership entities out of a total cash consideration paid for the GPUs of \$6,146,000 not including the \$536,000 commission fee. The offer was made contingent upon, among other things, this Court’s approval of the terms of the Settlement.

9. Verifier ultimately transmitted to the Receiver a proposed Redemption Agreement (“Agreement”) which is now consistent with the terms set forth in the offer letter and the Receiver’s communications with Verifier. A copy of the Agreement is attached as **Exhibit C**.

10. The essential terms of the Agreement are as follows:<sup>2</sup>

a) Subject to Court approval, Verifier shall redeem all of the issued and outstanding GPUs held by TDM Funding as of the Closing Date free and clear of all liens, claims and encumbrances, if any;

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<sup>2</sup> Reference should be made to the Agreement for the complete terms of the Settlement.

b) Subject to Court approval, Verifier shall also redeem all of the issued and outstanding Common Units held by McGinn Funding as of the Closing Date free and clear of all liens, claims and encumbrances, if any;

c) In consideration for the redemption of the Securities, on the Closing Date, Verifier shall transmit payment in the aggregate sum of \$4,000,000 in cash to the Receiver via wire transfer to an account designated by the Receiver on the Closing Date to which any liens, claims and encumbrances shall attach;

d) On the Closing Date, and upon payment by Verifier for the redemption of the Securities, (i) the Receiver shall irrevocably waive, release, covenant not to sue and forever discharge Verifier, as issuer of the securities, as well as its affiliates, subsidiaries, and parent corporation(s), including all of their respective predecessors, successors, members, managers, officers, employees, attorneys, insurers, agents, partners, trustees, administrators or other representatives and assigns, but expressly not including Mathew Rogers, from and against any and all claims, debts, liabilities, demands, obligations, costs, expenses, actions and causes of action of every nature, character and description, whether known or unknown, accrued or contingent based on or arising from the sale and purchase of the GPUs and Common Units, and (ii) Verifier shall deliver a reciprocal release to the Receiver;

e) The Agreement is subject to the approval of its terms by this Court.

11. The Receiver's analysis indicates that the Receivership estates are benefitted by entering into the Agreement for at least the following reasons:

a) The redemption of the Securities will result in the payment of \$4,000,000, which will be deposited into a Receivership account.

b) The Agreement constitutes the cost-effective, efficient liquidation of a significant asset (in terms of amount) of the MS Entities especially since the Securities are not readily liquid investments.

c) The cash payment will provide additional value to the benefit of the Receivership estates.

12. The Receiver has analyzed that the recovery to creditors of these estates is improved by the execution of the Agreement. The Agreement will allow a significant infusion of cash for the benefit of investors. After carefully analyzing the terms of the proposed transaction, the Receiver has determined that the offer proposed by Verifier constitutes reasonable value for the GPUs and Common Units and that the terms of the Agreement are fair and reasonable under the circumstances.

### **SALE PROCEDURES**

13. To ensure the maximization of proceeds for TDM Funding and McGinn Funding which benefit the MS Entities and those entitled to the proceeds, the Receiver sought the approval of the Court by letter dated September 11, 2013 to market and, if necessary, auction the Securities for the highest and best consideration. The following are the procedures by which the Receiver shall market and, if necessary, auction the Securities:

a) Upon entry of the letter Order filed in conjunction with this Motion, the Receiver transmit copies of the Motion to parties who have expressed interest in acquiring the Securities and shall conspicuously post on the Receiver's website relating to this case (<http://mcginnsmithreceiver.com>) general details of the proposed redemption of the Securities along with the deadline for submissions of competing bids for the Securities;

b) Any competing offers for the purchase of the Securities must be on the same terms as set forth in the Agreement;

c) To the extent that the Receiver receives one or more bona fide offers to purchase the Securities in accordance with the Procedures, an auction will be held at the offices of Phillips Lytle LLP, Omni Plaza, 30 South Pearl Street, Albany, New York 12207, two (2) business days prior to the date and time set by the Court for this Motion;

d) There is no break-up fee if Verifier is not the highest and best bidder at the auction. There will be a minimum overbid at the auction of \$50,000.

e) The sale of the Securities to Verifier or, alternatively, the winning bidder at the auction, will be approved by this Court;

f) The Receiver, in his reasonable discretion, may take such other actions as necessary to ensure that the marketing, auction and sale procedures are in accordance with his duty to maximize the value of the Securities for the benefit of the MS Entities and those entitled to the proceeds.

14. Timing is of the essence in completing the Settlement. Verifier's offer, which is contingent upon this Court's approval of its terms, contemplates an expected closing date for the redemption transaction of no later than October 16, 2013, time being of the essence.

#### **BASIS FOR RELIEF**

15. The relief requested herein is authorized by the Preliminary Injunction Order and applicable law, and additionally is appropriate because it preserves and enhances the value of both TDM Funding and McGinn Funding for the benefit of the MS Entities and those entitled to the proceeds.

16. This court clearly has the authority to freeze assets and to permit sales of such assets. That authority authorizes a court in cases such as this to exercise "broad equitable discretion." S.E.C. v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997); see also SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (explaining the equitable powers

granted to the district court and holding that when there is “a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy.”).

17. The Preliminary Injunction Order mandates that the assets be maintained without dissipation of their value. (Preliminary Injunction Order, Paragraph VIII). Therefore, if the value of an asset is at risk of dissipation so that funds available to investors could be diminished in the event the SEC ultimately obtains a judgment, the Court may act to prevent such dissipation. S.E.C. v. Am. Bd. of Trade, Inc., 830 F.2d 431, 436 (2d Cir. 1987). In addition, the Court also has the power to enter an order approving the Agreement under § 21(d)(5) of the Securities Exchange Act of 1934, which provides that in SEC actions, "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." See also S.E.C. v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) ("federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws") (citations omitted).

18. In this case, the Settlement will maximize the value of the MS Entities, and, additionally will mitigate the legal and financial risk to the MS Entities and those entitled to the proceeds.

#### **MEMORANDUM OF LAW**

19. Since the basis for the relief requested herein under the Permanent Injunction Order and applicable law is set forth herein, the Receiver requests that any requirement for a separate memorandum of law be waived.

**NOTICE OF HEARING**

20. The Receiver will give notice of this Motion by posting the Motion on the Receiver's website (www.mcginnsmithreceiver.com) as well as posting at the top of the Receiver's website an explanation of the Motion with the hearing date established by the Court. Notice will also be given by ECF to (a) counsel of record including counsel to Messrs. McGinn and Smith, (b) all parties who have filed notices of appearance, and (c) parties who have expressed to the Receiver an interest in acquiring the Securities.

**HEARING DATE**

21. By separate letter to the Court, the Receiver is requesting that a hearing to consider approval of the Motion be held on October 2 or 3, 2013.

**CONCLUSION**

22. As such, for the reasons set forth herein, the Receiver requests entry of an Order (i) setting a hearing date to approve the Agreement; (ii) approving the Agreement, and (iii) provide such other relief as is necessary and proper.

Dated: September 11, 2013

PHILLIPS LYTTLE LLP

By /s/ William J Brown  
William J. Brown (Bar Roll #601330)  
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

Attorneys for Receiver

# *Exhibit A*

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**VERIFIER CAPITAL HOLDINGS LLC**

**AMENDED AND RESTATED  
OPERATING AGREEMENT**

**December 7, 2010**

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4.07. Liability of Members to Company. Unless otherwise provided in this Agreement, no Member shall be liable to any other Member or to the Company by reason of such Member's actions in connection with the Company, except in the event of a violation of any provision of this Agreement, fraud, gross negligence or dishonest conduct.

4.08. Attorneys' Fees. All of the indemnities provided in this Agreement shall include reasonable attorneys' fees, including appellate attorneys' fees, and court costs.

4.09. Subordination of Other Rights to Indemnity. The interests of the Members in any proceeds of the Company by way of repayment of loans, return of any Capital Contributions, or any distributions from the Company, shall be subordinated to the right of the Members to the indemnities provided by this Article IV.

4.10. Survival of Indemnity Provisions. Except as otherwise specifically provided herein, all of the indemnity provisions contained in this Agreement shall survive a Member's ceasing to be a Member hereunder.

## **ARTICLE V** **GUARANTEED PAYMENTS UNIT**

5.01. Capital Contribution. The Holder of the Guaranteed Payments Unit, as identified on Schedule 5.01 hereto has made Capital Contributions in the amounts set forth on the table provided on Schedule 5.01 hereto, as such table may be amended from time to time in accordance with this Agreement and upon Approval of the Board of Directors.

5.02. Restrictions on Transfer. The Holder of the Guaranteed Payments Unit may not Transfer the Guaranteed Payments Unit to any Person, other than its Affiliates, except with the prior Approval of the Board of Directors, which may be not be unreasonably withheld or delayed. The Board of Directors may require as a condition of any Transfer that the transferor assume all costs incurred by the Company in connection therewith and furnish an opinion of counsel, satisfactory to the Company, that the proposed Transfer complies with applicable law, including federal and state securities laws, and does not cause the Company to be an investment company as such term is defined in the Investment Company Act of 1940, as amended. Notwithstanding anything contained herein to the contrary, no Guaranteed Payments Unit shall be transferred if, by reason of such Transfer, the classification of the Company as a partnership for federal income tax purposes would be adversely affected or jeopardized, or if such transfer would have any other substantial adverse effect for federal income tax purposes.

(a) Guaranteed Payments. Except as otherwise provided in this Agreement, the Holder of the Guaranteed Payments Unit shall be entitled to receive cash payments as provided in Schedule 5.01 hereto.

(b) No distributions of Available Cash or property may be made to any Member pursuant to Section 7.01 or 7.02 until after the Guaranteed Payments Unit has been completely redeemed pursuant to Section 5.04, and no Tax Distribution may be made to any Member pursuant to Section 7.04 unless all cumulative Guaranteed Payments accrued as of the date of the Tax Distribution have been made to the Holder of the Guaranteed Payments Unit.

5.03. Special Capital Account. The Company shall establish a Special Capital Account for the Holder of the Guaranteed Payments Unit which shall be equal to the Capital Contribution made by the Holder of the Guaranteed Payments Unit and shall not be increased or decreased by any Profits or Losses of the Company or by the amount of any Guaranteed Payment made to the Holder of the Guaranteed Payments Unit. The Special Capital Account of the Holder of the Guaranteed Payments Unit will be decreased by all payments other than Guaranteed Payments made under Section 5.02 and pursuant to Section 12.03.

5.04. Redemption. Unless otherwise agreed to by and between the Company and the Holder of the Guaranteed Payments Unit, the Company may redeem the Guaranteed Payments Unit at any time, in whole or in part, by paying the Holder of the Guaranteed Payments Unit the cumulative amount of any Guaranteed Payments due and outstanding as indicated on the table set forth on Schedule 5.01 hereto, plus all or a portion of the Capital Contribution as indicated on said table made pursuant to Section 5.01. The Guaranteed Payments Unit shall be completely redeemed on the liquidation of the Company in accordance with Section 12.03 hereof.

5.05. Tax Treatment. The Guaranteed Payments made pursuant to this Article V are intended by the parties to be treated as guaranteed payments for purposes of Section 707(c) of the Code, pursuant to which the Company will deduct the Guaranteed Payments when made and the Holder of the Guaranteed Payments Unit will include such amount as ordinary income when received. The Company and the Holder of the Guaranteed Payments Unit agree not to take any position inconsistent with the treatment of the Guaranteed Payments as guaranteed payments under Section 707(c) of the Code.

## **ARTICLE VI**

### **CAPITAL CONTRIBUTIONS AND LIABILITY OF MEMBERS**

6.01. Capital Accounts. The Company shall establish and maintain a Capital Account for each Member. The Percentage Interest and the Capital Account balance of each Member as of the date of this Agreement are set forth on Schedule A hereto.

6.02. Initial Capital Contributions.

(a) Each of the Members has made a Capital Contribution in the amount of cash and property having an agreed Fair Market Value, set forth opposite his, her or its name on Schedule A hereto.

(b) No loan made to the Company by any Member or the Board of Directors shall constitute a Capital Contribution to the Company for any purpose.

6.03. No Withdrawal of or Interest on Capital. No Member shall have the right to withdraw and receive any distribution from the Company as a result of such withdrawal, and no Member shall have the right to receive the return of all or any part of his, her, or its Capital Contributions or Capital Account, or any other distribution, except as provided in this Agreement. No Member shall have any right to demand and receive property of the Company in exchange for all or any portion of his, her, or its Capital Contributions or Capital Account,

## SCHEDULE 5.01

### GPU HOLDER AND PAYMENTS

1. TDM Cable Funding LLC (the "Holder of the Guaranteed Payments Unit") currently holds the Guaranteed Payments Units as issued in accordance with the table set forth below:

Guaranteed Payment Units	Par Value	Issue Date	Holder	Cash Coupon	Total Return		
					Redemption Before Year 6	Redemption Between Year 6-10	Redemption After Year 10
Issue 1	\$2,000,000	1/30/2007	TDM Cable Funding LLC	12.00%	16.00%	17.00%	20.00%
Issue 2	\$650,000	4/13/2007	TDM Cable Funding LLC	12.00%	16.00%	17.00%	20.00%
Issue 3	\$2,125,000	12/11/2007	TDM Cable Funding LLC	12.00%	16.00%	17.00%	20.00%
Issue 4	\$875,000	1/11/2008	TDM Cable Funding LLC	12.00%	16.00%	17.00%	20.00%
Issue 5	\$1,050,000	12/31/2008	TDM Cable Funding LLC	12.50%	16.00%	17.00%	20.00%
<b>Total</b>	<b>\$6,700,000</b>						

2. The Holder of the Guaranteed Payments Unit shall be entitled to receive payment sufficient to provide such Holder with an annual internal rate of return of twelve percent (12%) per annum on its Unreturned Capital for the period beginning on the respective issue date of the Guaranteed Payment Units as noted in the table hereinabove ("GPU Issue Date") and ending on the date the Unreturned Capital is completely redeemed pursuant to Section 5.04. The Guaranteed Payments shall be made on March 31, June 30, September 30 and December 31 of

each Fiscal Year. All Guaranteed Payments shall be made from Available Cash. Such Guaranteed Payments shall be payable whether or not the Company has Profits for any period of time during the relevant Fiscal Year; provided, however, the restrictions set forth in this Schedule 5.01 shall not prevent the Board of Directors, in the exercise of and as required by its fiduciary duties as determined by the Board of Directors after consultation with its outside legal counsel, from making a good faith determination that the payment of such Guaranteed Payments is not in the best interest of the Company and its Members as a group.

3. The Holder of the Guaranteed Payments Unit shall be entitled to receive an additional Guaranteed Payment (the "GPU Kicker") on the redemption, in whole or in part, of the Guaranteed Payments Unit with respect to the amount of the Unreturned Capital being paid to the Holder of the Guaranteed Payments Unit as a result of the redemption, in whole or in part, of the Guaranteed Payments Unit as follows:

- (a) if the redemption occurs on or before the end of the six (6) year period beginning on the particular GPU Issue Date, the date of this Agreement, then the GPU Kicker shall be an amount necessary to increase the annual internal rate of return to sixteen percent (16%);
- (b) If the redemption occurs after the six (6) year period beginning on the particular GPU Issue Date but ending on or before the ten (10) year period beginning on the particular GPU Issue Date, then the GPU Kicker shall be an amount necessary to increase the annual internal rate of return to seventeen percent (17%); and
- (c) If the redemption occurs after the end of the ten (10) year period beginning on the particular GPU Issue Date, then the GPU Kicker shall be an amount necessary to increase the annual internal rate of return to twenty percent (20%).

# ***Exhibit B***

VERIFIER CAPITAL HOLDINGS LLC  
CONSOLIDATED STATEMENT OF CASH FLOW  
5 MONTHS ENDED MAY 31, 2013

Cash Flows from Operating Activities	
Net loss	\$ <u>(1,032,549)</u>
Adjustments to reconcile net loss to net cash provided by (used in) operating activities	
Gain on disposal of discontinued operations	(243,713)
Depreciation, amortization and impairment of subscriber contracts	645,629
Bad debt expense	15,072
RMIP Compensation	47,587
(Increase) decrease in operating assets	
Accounts receivable	192,615
Other receivables	(13,294)
Prepaid expenses	(72,637)
Inventory	(70,914)
Other assets	736
Increase (decrease) in operating liabilities	
Accounts payable and accrued expenses	(20,414)
Deferred revenue	(175,120)
Total adjustments	<u>305,547</u>
Net cash (used in) operating activities	<u>(727,002)</u>
 Cash Flows from Investing Activities	
Purchases of property and equipment	(275,114)
Purchases of subscriber contracts and intangibles, net of holdbacks	(168,311)
Increase in purchase holdbacks	189
Net investing activities from discontinued operations	<u>243,713</u>
Net cash (used in) investing activities	<u>(199,523)</u>
 Cash Flows from Financing Activities	
Proceeds from sale of membership unit subscriptions	94,824
Proceeds from drawings on revolving line of credit	3,928,006
Payments on revolving line of credit	<u>(3,252,701)</u>
Net cash provided by financing activities	<u>770,129</u>
 Net decrease in cash and cash equivalents	(156,396)
Cash and cash equivalents, 1/1/13	<u>215,917</u>
Cash and cash equivalents, 5/31/13	<u>\$ <u>59,521</u></u>

# *Exhibit C*

## REDEMPTION AGREEMENT

This Redemption Agreement (this "Agreement") is made as of September 10, 2013 by and between Verifier Capital Holdings LLC, a Florida limited liability company (the "Company"), TDM Cable Funding, LLC, a New York limited liability company ("TDM"), and McGinn Smith Funding, LLC, a New York limited liability company ("MSF").

**WHEREAS**, on April 20, 2010, William J. Brown, Esq. was appointed temporary receiver (the "Receiver") by the United States District Court for the Northern District of New York in the action entitled *Securities and Exchange Commission v. McGinn, Smith & Co. Inc., et al.* (Case No. 1:10-cv-00457-GLS-CFH) for TDM and MSF, amongst other entities listed on Exhibit A to the Order to Show Cause, Temporary Restraining Order and Order Freezing Assets and Granting Other Relief (Docket No. 5). The receivership was made permanent by a Preliminary Injunction Order dated July 22, 2010 (Docket No. 96) ("Preliminary Injunction Order").

**WHEREAS**, pursuant to Paragraph VIII of the above-referenced Preliminary Injunction Order, the Receiver has been empowered to

“(a) Take and retain immediate possession and control of all of the assets ... of [TDM and MSF], and assume all rights and powers set forth in the applicable management agreements, by-laws, LLC agreements or any other controlling agreements;

...

(m) Use, lease, sell, and convert into money all assets of [TDM and MSF], 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 [TDM and MSF] and those entitled to the proceeds ....”

**WHEREAS**, as of the date hereof, TDM is the holder of record of certain Guaranteed Payment Units (the "GPUs") issued by the Company, the terms and conditions of which are contained in that certain Amended and Restated Operating Agreement of the Company dated December 7, 2010.

**WHEREAS**, as of the date hereof, MSF is the holder of record of 133,333 Common Units of the Company (the "Common Units").

**WHEREAS**, the Receiver, in his capacity as Receiver of TDM and MSF, desires to have all of the GPUs and the Common Units redeemed by the Company, and the Company desires to so redeem such GPUs and Common Units according to the terms and conditions set forth herein which have been negotiated and agreed to by the parties hereto.

**NOW THEREFORE**, in consideration of the foregoing and of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto covenant and agree as follows:

1. Recital are True. The above recitals are true and correct and incorporated herein.
2. Redemption of GPUs. Subject to (a) the terms and conditions set forth herein and (b) the approval of this Agreement by the United States District Court for the Northern District of New York ("Sale Order"), at the Closing (defined below), the Company does hereby redeem, and TDM does hereby sell, assign, transfer, convey and deliver unto the Company, all of TDM's right, title and interest in and to the GPUs and any other right, title, interest and/or claim that TDM or any affiliate thereof may have in any past, present, or future distributions of cash or equity interests. To the best knowledge of the Receiver, the GPUs constitute TDM's entire interest in the Company (collectively the "Redeemed GPUs").
3. Redemption of Common Units. Subject to (a) the terms and conditions set forth herein and (b) the approval of this Agreement by the United States District Court for the Northern District of New York, at the Closing (defined below), the Company does hereby redeem, and MSF does hereby sell, assign, transfer, convey and deliver unto the Company, all of MSF's right, title and interest in and to the Common Units and any other right, title, interest and/or claim that MSF or any affiliate thereof may have in any past, present, or future distributions of cash or equity interests. To the best knowledge of the Receiver, the Common Units constitute MSF's entire interest in the Company (collectively the "Redeemed Common Units" and collectively with the Redeemed GPUs, the "Redeemed Interest").
4. Consideration. As full consideration for the redemption of the Redeemed Interest, at the Closing the Company shall pay to the Receiver, as the duly authorized agent for each of TDM and MSF, the aggregate sum of Four Million and No/100 Dollars (\$4,000,000.00) (the "Consideration").
5. Closing.
  - (a) Location; Date. The closing for the transactions contemplated hereby (the "Closing") shall be held at the offices of the Receiver located at 3400 HSBC Center, Buffalo, New York 14203 at mutually agreeable date and time but in any event no later than October 16, 2013, time being of the essence, but following the receipt of all necessary third party approvals which shall be promptly pursued. The date on which the Closing occurs is referred to herein as the "Closing Date."
  - (b) Deliveries. Subject to the terms and conditions contained herein:
    - (i) On the Closing Date, the Receiver shall deliver to the Company:
      - (A) a fully executed copy of this Agreement;
      - (B) an order of the United States District Court for the Northern District of New York approving the transactions contemplated by this Agreement; and
      - (C) such other instruments of conveyance and transfer, in form reasonably satisfactory to the Receiver, the Company and its counsel, as shall be reasonably necessary and effective to transfer and assign to, and vest in, the Company all



of TDM's, MSF's and/or the Receiver's right, title and interest in and to the Redeemed Interest.

(ii) On the Closing Date, the Company shall deliver to the Receiver the following:

- (A) an executed copy of this Agreement; and
- (B) the Consideration via wire transfer to the following account:

**McGinn Smith Funding, LLC**  
Payee: William J Brown, Receiver  
for McGinn, Smith Funding, LLC  
Account number: 9851722034  
ABA: 022000046

M&T Bank  
80 State Street  
Albany, NY 12207

6. Representations and Warranties of the Company. The Company represents and warrants to the Receiver as follows:

(a) Organization and Good Standing. The Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Florida.

(b) Due Authorization. The execution and delivery of this Agreement and the redemption of the Redeemed Interest as herein provided has been duly authorized by the Board of Directors of the Company.

(c) Authority and Validity. The Company has the capacity and authority to execute, deliver and perform its obligations under this Agreement and the other documents executed or required to be executed by the Company in connection with this Agreement.

(d) Binding Effect. This Agreement and the other documents executed or required to be executed in connection with this Agreement are, or will be when executed and delivered, the legal, valid and binding obligations of the Company, enforceable in accordance with their terms, except as limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the enforcement of creditors' rights generally.

(e) Necessary Approvals and Consents. Except as provided in this Agreement, to the knowledge of the Company, no authorization, consent, permit or license or approval of, or declaration, registration or filing with, any person or governmental or regulatory authority or agency is necessary for the execution and delivery by the Company of this Agreement and the other agreements executed or required to be executed in connection with this Agreement, and the consummation of the transactions contemplated by this Agreement.

(f) Accuracy of Information Furnished. No representation or warranty by the Company in this Agreement contains any untrue statement of a material fact or omits to state any material fact necessary to make the statements herein or therein, in light of the circumstances under which they were made, not false or misleading.

(g) No Breach. The execution of this Agreement will not, as of the Closing or thereafter, constitute a breach of any material agreement to which the Company is a party.

(h) Ownership of Redeemed Interest. To the best of the Company's knowledge, the Redeemed Interest constitutes TDM's and MSF's sole interests in and to the Company.

(i) Reliance. The foregoing representations and warranties are made by the Company with the knowledge and expectation that the Receiver is placing complete reliance thereon.

7. Representations and Warranties of the Receiver. The Receiver represents and warrants to the Company as follows:

(a) Ownership of Redeemed Interest. To the best of the Receiver's knowledge, TDM and MSF are the record and beneficial owners of all the Redeemed GPUs and the Redeemed Common Units, respectively, all of which when transferred by the Receiver will be free and clear of all liens, claims and encumbrances of any kind, and the Receiver has full legal right, power and authority, to sell and deliver the Redeemed Interest under this Agreement and the Sale Order. To the best of the Receiver's knowledge, the Redeemed Interest constitutes TDM's, MSF's and the Receiver's sole interests in and to the Company.

(b) Authority and Validity. The Receiver has the capacity and authority to execute, deliver and perform his obligations (and those of TDM and MSF) under this Agreement and the Sale Order.

(c) Binding Effect. This Agreement is or will be, when executed and delivered, the legal, valid and binding obligations of each of TDM, MSF, and the Receiver, enforceable in accordance with their terms, except as may be limited by bankruptcy or other factors generally affecting creditors rights.

(d) Necessary Approvals and Consents. Except as provided in this Agreement, the Preliminary Injunction Order and the Sale Order, no authorization, consent, permit or license or approval of, or declaration, registration or filing with, any person or governmental or regulatory authority or agency is necessary for the execution and delivery by the Receiver of this Agreement and the other agreements executed or required to be executed in connection with this Agreement, and the consummation of the transactions contemplated by this Agreement.

(e) Survival of Representations. The representations and warranties made within this Agreement will be correct in all material respects on and as of the Closing Date. Furthermore, these representations and warranties shall inure to the benefit of the Company, its successors and assigns.

(f) Reliance. The foregoing representations and warranties are made by the Receiver with the knowledge and expectation that the Company is placing complete reliance thereon.

8. Release of Disputes and Controversies.

(a) The Receiver, on behalf of TDM and MSF, for TDM's and MSF's affiliates, subsidiaries, parent corporation(s), and all of their respective predecessors, successors, directors, officers, members, managers, employees, attorneys, insurers, agents, partners, stockholders, trustees, administrators, assigns and anyone acting or claiming on their individual or joint and several behalf (collectively, the "MS Representatives"), hereby irrevocably waives, releases, covenants not to sue and forever discharges the Company, its affiliates, subsidiaries, and parent corporation(s), including all of their respective predecessors, successors, members, managers, officers, employees, attorneys, insurers, agents, partners, trustees, administrators or other representatives and assigns but expressly not including Matthew Rogers, from and against any and all claims, debts, liabilities, demands, obligations, costs, expenses, actions and causes of action of every nature, character and description, whether known or unknown, accrued or contingent based on or arising from the sale and purchase of the GPUs and the Common Units held by TDM and MSF, respectively.

(b) The Company and its affiliates, subsidiaries, parent corporation(s), and all of their respective predecessors, successors, directors, officers, members, managers, employees, attorneys, insurers, agents, partners, stockholders, trustees, administrators, assigns and anyone acting or claiming on their individual or joint and several behalf (collectively, the "Company Representatives"), hereby irrevocably waives, releases, covenants not to sue and forever discharges the Receiver, TDM and MSF and their respective affiliates, subsidiaries, and parent corporation(s), including all of their respective predecessors, successors, members, managers, officers, employees, attorneys, insurers, agents, partners, trustees, administrators or other representatives and assigns but expressly not including Matthew Rogers from and against any and all claims, debts, liabilities, demands, obligations, costs, expenses, actions and causes of action of every nature, character and description, whether known or unknown, accrued or contingent based on or arising from the sale and purchase of the GPUs and the Common Units held by TDM and MSF, respectively.

9. Entire Agreement. This Agreement (including the exhibits and schedules hereto) constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof, and no party shall be liable or bound to the other in any manner by any representations or warranties not set forth herein.

10. Successors and Assigns. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors and permitted assigns. Neither this Agreement nor any rights, interests or obligations hereunder may be assigned by any party hereto without the prior written consent of all other parties hereto, and any purported assignment in violation of this Section 10 shall be null and void.

11. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall for all purposes be deemed to be an original and all of which shall constitute the same instrument.

12. Headings. The headings of the articles and sections of this Agreement are inserted for convenience only and shall not be deemed to constitute part of this Agreement or to affect the construction hereof.

13. Construction. As used in this Agreement, the words "herein," "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular article, section, paragraph or other subdivision.

14. Modification and Waiver. Any of the terms or conditions of this Agreement may be waived in writing at any time by the party that is entitled to the benefits thereof, and this Agreement may be modified or amended by a written instrument executed by all parties hereto. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by all of the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision hereof (whether or not similar) nor shall such waiver constitute a continuing waiver.

15. Exhibits; Schedules. All exhibits and schedules annexed hereto are expressly made a part of this Agreement as though fully set forth herein.

16. Notices. All notices of communication required or permitted hereunder shall be in writing and may be given by (a) depositing the same in United States mail, addressed to the party to be notified, postage prepaid and registered or certified with return receipt request, (b) delivering the same in person to an officer or agent of such party, (c) telecopying the same with electronic confirmation of receipt.

If to the Company, addressed to it at:

Verifier Capital Holdings, LLC  
Attention: Aaron Wray  
7280 Palmetto Park Road  
Suite 306  
Boca Raton, Florida 33433 U.S.A.  
Facsimile: 561.910.3836

with a copy, which shall not constitute notice, to:

Adams and Reese LLP  
Attention: William C. Perez  
701 Poydras Street, 45<sup>th</sup> Floor  
New Orleans, Louisiana 70139  
Email: William.perez@arlaw.com  
Facsimile: 504.586.6564

If to TDM, MSF or the Receiver, addressed thereto at:

Phillips Lytle LLP  
Attention: William J. Brown  
3400 HSBC Center  
Buffalo, NY 14203-2887  
Email: WBrown@phillipslytle.com  
Facsimile: 716.852.6100

or to such other address as any party hereto shall specify pursuant to this Section 16 from time to time.

17. Governing Law. THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE UNITED STATES OF AMERICA AND THE STATE OF NEW YORK (WITHOUT GIVING EFFECT TO ANY CONFLICTS OR CHOICE OF LAWS PROVISIONS WHICH WOULD CAUSE THE APPLICATION OF THE DOMESTIC SUBSTANTIVE LAWS OF ANY OTHER JURISDICTION).

18. Waiver Of Jury Trial. EACH OF THE PARTIES HERETO HEREBY VOLUNTARILY AND IRREVOCABLY WAIVES TRIAL BY JURY IN ANY ACTION OR OTHER PROCEEDING BROUGHT IN CONNECTION WITH THIS AGREEMENT, ANY OF THE RELATED AGREEMENTS OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.

19. Severability. In case any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired thereby.

20. Expenses. The Company and the Receiver shall be solely responsible for their respective costs and expenses incurred in connection with the transactions contemplated hereby.

21. Third Party Beneficiaries. No person or entity shall be a third-party beneficiary of the representations, warranties, covenants and agreements made by any party hereto.

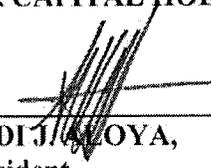
22. Number and Gender of Words. Whenever the singular number is used, the same shall include the plural where appropriate, and words of any gender shall include each other gender where appropriate.

23. Further Assurances. From time to time after the Closing, at the request of any other party but at the expense of the requesting party, the Company or the Receiver, as the case may be, will execute and deliver any such other instruments of conveyance, assignment and transfer, and take such other action as the other party may reasonably request in order to consummate or evidence the transactions contemplated hereby.

[SIGNATURE PAGE FOLLOWS.]

**IN WITNESS WHEREOF**, the parties have executed and delivered this Agreement as of the date first written above.

**VERIFIER CAPITAL HOLDINGS LLC**

By:   
\_\_\_\_\_  
**ADDI J. AYOYA,**  
**President**

**TDM CABLE FUNDING, LLC**

By: \_\_\_\_\_  
**WILLIAM J. BROWN,**  
**Receiver**

**MCGINN SMITH FUNDING, LLC**

By: \_\_\_\_\_  
**WILLIAM J. BROWN,**  
**Receiver**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES AND EXCHANGE COMMISSION :

*Plaintiff,*

vs.

Case No. 1:10-CV-457  
(GLS/DRH)

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

**ORDER APPROVING MOTION OF WILLIAM J. BROWN, AS RECEIVER,  
FOR AN ORDER APPROVING SETTLEMENT WITH VERIFIER  
CAPITAL HOLDINGS LLC WITH RESPECT TO THE REDEMPTION OF  
GUARANTEED PAYMENT UNITS AND COMMON UNITS ISSUED TO  
TDM CABLE FUNDING, LLC AND MCGINN SMITH FUNDING LLC**

Upon the Motion of William J. Brown, as Receiver, for an Order Approving a Settlement with Verifier Capital Holdings LLC with Respect to the Redemption of the Guaranteed Payment Units and Common Units Issued to TDM Cable Funding II, LLC and McGinn Smith Funding LLC (Docket No. \_\_\_\_ ) (“Motion”),<sup>1</sup> and a hearing having been held in connection therewith, and

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<sup>1</sup> Capitalized terms used herein and not otherwise defined herein shall have the meaning ascribed to such terms in the Motion.

no objections having been filed or sustained by the Court, and sufficient notice of the Motion having been given, upon due deliberation and for good cause shown, it is hereby

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

ORDERED, that the Settlement (as defined in the Motion) and all the terms set forth therein including the exchange of the described releases, are hereby approved in their entirety and all liens, claims and encumbrances, if any, shall attach to the proceeds of the Settlement.

Dated: October \_\_, 2013

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HON. CHRISTIAN F. HUMMEL  
UNITED STATES MAGISTRATE JUDGE

Doc #05-437674.3

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.*

-----X

**CERTIFICATE OF SERVICE**

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on September 11, 2013, a true and correct copy of the Motion of William J. Brown, as Receiver, for an Order Approving the Settlement with Verifier Capital Holdings, LLC with Respect to the Redemption of the Guaranteed Payment Units and Common Units Issued to TDM Cable Funding, LLC and McGinn Smith Funding, LLC Free and Clear of Liens, Claims and Encumbrances 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 the method specified on the parties indicated below:

**First Class Mail**

Nancy McGinn  
7 Crowsnest Court  
Waterford, NY 12188

**First Class Mail**

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

**First Class Mail**

Michael L. Koenig, Esq.  
Greenberg Traurig, LLP  
54 State Street, 6th Floor  
Albany, NY 12207

**First Class Mail**

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

**First Class Mail**

Jill A. Dunn, Esq.  
The Dunn Law Firm PLLC  
99 Pine Street, Suite 210  
Albany, NY 12207

**Overnight Courier**

Robert L. Hamberger  
AGI Corporate Finance Limited  
10 Hazelhurst Road  
Burnham  
Bucks  
SL1 8EE

Dated: September 11, 2013

Doc #01-2691823.1

**First Class Mail**

Michael Kornstein, Esq.  
Cooper, Erving & Savage, LLP  
39 North Pearl Street, 4th Floor  
Albany, NY 12207

**Overnight Courier**

Jerry Markowitz, Esq.  
Markowitz Ringel Trusty Hartog  
Suite 1800  
9130 South Dadeland Boulevard  
Miami, FL 33156

/s/ Karen M. Ludlow  
Karen M. Ludlow