

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 Contributions¹ 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.

¹ 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:²

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;

² 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

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