

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION :

*Plaintiff,*

vs.

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

McGINN, SMITH & CO., INC., :  
McGINN, SMITH ADVISORS, LLC :  
McGINN, SMITH CAPITAL HOLDINGS CORP., :  
FIRST ADVISORY INCOME NOTES, LLC, :  
FIRST EXCELSIOR INCOME NOTES, LLC, :  
FIRST INDEPENDENT INCOME NOTES, LLC, :  
THIRD ALBANY INCOME NOTES, LLC, :  
TIMOTHY M. McGINN, AND :  
DAVID L. SMITH, GEOFFREY R. SMITH, :  
Individually and as Trustee of the David L. and :  
Lynn A. Smith Irrevocable Trust U/A 8/04/04, :  
LAUREN T. SMITH, and NANCY McGINN, :

*Defendants,*

LYNN A. SMITH and  
NANCY McGINN,

*Relief Defendants. and*

GEOFFREY R. SMITH, Trustee of the  
David L. and Lynn A. Smith Irrevocable  
Trust U/A 8/04/04,

*Intervenor.*

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**NOTICE OF MOTION OF WILLIAM J. BROWN, AS RECEIVER,  
FOR AN ORDER DISALLOWING PAPER CLAIMS**

PLEASE TAKE NOTICE that upon the Motion of William J. Brown, as Receiver, for an Order disallowing certain filed paper claims (“Motion”), Phillips Lytle LLP will move before the Hon. Christian F. Hummel, United States Magistrate Judge, United States District Court for the Northern District of New York, James T. Foley - U.S. Courthouse, 445 Broadway, Albany, New York 12207-2924, on April 19, 2018 at 9:30 a.m., seeking an Order to be entered approving the Motion.

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

PLEASE TAKE FURTHER NOTICE that if no responses are timely filed and served with respect to the Motion or any claim listed in Exhibits A through C to the Motion, the Court may enter an Order granting the Motion and disallowing any claim without further notice or opportunity to be heard offered to any party.

Dated: February 15, 2018

PHILLIPS LYTTLE LLP

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

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Individually and as Trustee of the David L. and :  
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LAUREN T. SMITH, and NANCY MCGINN, :

*Defendants,*

LYNN A. SMITH and  
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*Relief Defendants. and*

GEOFFREY R. SMITH, Trustee of the  
David L. and Lynn A. Smith Irrevocable  
Trust U/A 8/04/04,

*Intervenor.*

-----X

**SECOND MOTION OF WILLIAM J. BROWN, AS RECEIVER,  
FOR AN ORDER DISALLOWING PAPER CLAIMS**

William J. Brown, as Receiver (“Receiver”), by his counsel, Phillips Lytle LLP,  
moves (the “Motion”) for an order disallowing the filed paper claims identified on the attached

**Exhibits A through C**, and respectfully represents as follows:

**SUMMARY OF MOTION**

The Motion seeks to disallow certain paper claims filed by investors because there  
is no basis for the payment of such claims in the books and records of McGinn, Smith & Co.,

Inc. (“McGinn Smith”). The investors with Claim Numbers listed on **Exhibit A** filed paper claims in different amounts than their Receiver-granted claims (the “Discrepant Claims”). The investors with Claim Numbers listed on **Exhibit B** filed paper claims for which there is no basis to make a distribution because those claims are Duplicate Claims, No Liability Claims, Non- Receivership Claims, or Excluded Claims (each as defined below). The investors with Claim Numbers listed on **Exhibit C** have filed either Discrepant Claims, Duplicate Claims, No Liability Claims, Non-Receivership Claims or Excluded Claims. If the filed paper claims listed on Exhibits A through C are not disallowed, then those investors who filed such claims would receive distributions to which they are not entitled to the detriment of investors with Receiver-granted claims. The Exhibits have been redacted to contain only claim numbers which have previously been provided to each investor. The Court previously directed that investor names remain confidential. As described in paragraphs 26-27 below, each investor whose claim is listed on Exhibits A through C will receive an explanatory letter with this Motion. Brown Dec’l. ¶2.<sup>1</sup>

### **PROCEDURAL BACKGROUND**

1. On April 20, 2010, the Securities and Exchange Commission (“SEC”) filed a Complaint initiating the above-captioned action (Docket No. 1). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the “MS

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<sup>1</sup> “Brown Dec’l. ¶ \_\_” refers to the Declaration of William J. Brown dated February 15, 2018 filed in support of the Motion.

Entities”). At the time of the Receiver’s appointment, total bank account balances (not including some remote business operations whose bank accounts were not immediately visible to the Receiver’s staff) were \$485,491.63. Brown Dec’l. ¶3.

2. On July 26, 2010, following a hearing, the Court entered an order granting the SEC’s Motion for a Preliminary Injunction and appointing the Receiver as receiver, pending a final disposition of the action (“Preliminary Injunction Order”) (Docket No. 96).

3. On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the “Complaint”) (Docket No. 334). Judgments in favor of the SEC were entered in 2016.

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).

### **CLAIMS PROCEDURE**

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 administration of claims against the MS Entities.

6. On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated April 17, 2012 (“Claims Procedure Order”) (Docket No. 481). Each investor and known creditor of the MS Entities was mailed on May 1, 2012 an Access Notice describing the claims process and enclosing (i) Notice of the Claims Bar Date and Claims Procedure and (ii) a Claim Form.

Brown Dec'1. ¶8. A confidential password providing access to the Claims Website at www.mcginnsmithreceiver.com ("Claims Website") was also provided. *Id.* If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. *Id.* All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012, as further described in detail on the Receiver's Website. *Id.*

7. The Claims Procedure Order established June 19, 2012 ("Bar Date") as deadline for creditors and investors to file claims against the MS Entities. Brown Dec'1. ¶9.

8. In accordance with the Claims Procedure Order, nearly six hundred creditors and investors timely filed paper claims prior to the Bar Date. Brown Dec'1. ¶10. In addition, more than 3,127 claims of investors and creditors were included on the schedules posted by the Receiver on the Claims Website in accordance with the Claims Procedure Order. *Id.* In addition to the claims listed on Exhibits A through C, many other paper claims have already been withdrawn by written investor consent through communications with the Receiver or per Court order. *Id.*

9. The Receiver conducted an initial review of the paper claims timely filed by creditors and investors in accordance with the Claims Procedure Order and determined it was necessary to establish a reserve as to investor claims totaling approximately \$23,617,190 since those claims have been listed by the Receiver as disputed, contingent or unliquidated.<sup>2</sup> Brown Dec'1. ¶11.

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<sup>2</sup> There are approximately \$124,123,595 in total investor claims. Brown Dec'1. ¶11, n. 1.

**PLAN OF DISTRIBUTION PROCESS**

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

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

12. Among other things, the Plan of Distribution provides for a reserve for disputed claims to allow the Receiver to make initial distributions, but to also provide for funds to be reserved until any objections to disputed claims can be heard and decided by final order of the Court. As of January 26, 2018, \$5,603,299.13 has been distributed to investors with allowed claims as a First Distribution. Brown Dec’l. ¶14.

**FIRST CLAIMS MOTION**

13. On September 21, 2017, the Receiver filed a Motion (Docket No. 937) (“First Claims Motion”) to seek disallowance of certain filed paper claims that were duplicative of the corresponding claims granted by the Receiver. On November 9, 2017, the Receiver filed a Statement (Docket No. 957) in furtherance of the First Claims Motion, adjourning the First Claims Motion with respect to those duplicative investor paper claims filed by investors whose Receiver-granted claims have been disputed by the Receiver. On December 28, 2017, the Court entered an Order granting the First Claims Motion and disallowing the duplicative paper claims other than with respect to those filed by investors with disputed claims (Docket No. 966).

14. The Receiver has examined the remaining filed paper claims that were not listed in the First Claims Motion. The Receiver has determined that there is no basis to make distributions on account of certain filed investor paper claims, as identified on Exhibits A through C (collectively, the “Paper Claims”). Brown Dec’l. ¶16.

**RELIEF REQUESTED**

15. By this Motion, the Receiver requests that the Court enter an order disallowing the Paper Claims. This relief is necessary to allow the Receiver to ensure equal treatment among all investors and to avoid any investors receiving a recovery to which they are not entitled pursuant to the Plan of Distribution.

**BASIS FOR RELIEF**

16. Exhibit A is comprised of Discrepant Claims, which are paper claims filed by investors for the same investments as their Receiver-granted claims but in different amounts. All Receiver-granted claims are based upon the records of McGinn Smith and represent principal balances. The differences in the amounts of the Receiver-granted claims and the Discrepant Claims filed by investors are likely due to one or more payments previously received by the investor in the form of principal or interest.<sup>3</sup> If the Discrepant Claims are not disallowed, investors will receive distributions in excess of the principal balance of their investments reflected in the books and records of McGinn Smith. This will dilute the pool of receivership funds available to pay investors with valid claims and will result in disparate treatment of holders of Discrepant Claims as compared to other investors. As such, the Discrepant Claims should be disallowed.

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<sup>3</sup> In the Plan Distribution Order, the Court approved the Receiver’s method of calculating investor claims based upon the principal balance of the investment as reflected in McGinn Smith’s books and records, as well as the treatment of certain pre-Receiver’ship interest payments as a reduction in principal. *See* Plan Distribution Order at 15 (Docket No. 904); Plan of Distribution at 6-7 (Docket No. 847).



17. Exhibit B is comprised of (a) Duplicate Claims, (b) No Liability Claims, (c) Non-Receivership Claims, and (d) Excluded Claims. Duplicate Claims represent paper claims filed by investors that are exactly duplicative and are in the exact amount of the claims listed on the Claims Website. The Duplicate Claims should be disallowed because there is no legal or equitable basis for payment of the same claim more than once,

18. No Liability Claims represent filed paper claims for investments which are not reflected in the books and records of McGinn Smith for a variety of reasons. No Liability Claims include investments that were redeemed before the Receivership, such as investments in RTC Trust 02 and Security Participation Trust. No Liability Claims also include filed paper claims for investments of which there is no record. No Liability Claims should be disallowed because there is no basis in the books and records of McGinn Smith for the payment of such claims.

19. Non-Receivership Claims represent filed paper claims for investments in entities that are not part of the Receivership. These entities include, among others, MS Real Estate Capital Partners, LLC, Integrated Alarm Services, Inc., and Coventry CareLink Holding Corp. (“Coventry”) (sometimes also known as CMS Financial Services). Because these entities are not included in the Receivership, the Receiver cannot make distributions on account of these claims with Receivership funds. In the case of Coventry claims, those investors hold direct claims against Coventry and not against the Receivership estate. Accordingly, Non-Receivership Claims should be disallowed.

20. Finally, Excluded Claims represent paper claims filed for investments in entities that were excluded from the Receivership by the Plan Distribution Order. These entities include SAI Trust 00 and SAI Trust 03, which were foreclosed on and liquidated before the

commencement of the Receivership. The Excluded Claims should be disallowed because holders of such claims are not entitled to any further distribution following the foreclosure and liquidation of these entities.

21. In January 2018, the Receiver sent letters to the investors who filed Paper Claims listed on Exhibit A and Exhibit B explaining why the Receiver determined such claims could not be paid. An example of such a letter is attached to the Motion as **Exhibit D**. The Receiver explained that, while each investor retained the right to keep their claims and to be heard with respect to their claims, the Receiver would file an objection to the Paper Claims unless the investor agreed to voluntarily withdraw their Paper Claims. The Receiver enclosed with each letter an agreement to withdraw the Paper Claims for the investor's signature, along with a self-addressed return envelope, to be returned by February 2, 2018. The investors with claims listed on Exhibit A and Exhibit B did not return an executed agreement at the time of filing the Motion.

22. Exhibit C is comprised of Discrepant Claims, No Liability Claims, Non-Receivership Claims, Duplicate Claims, and Excluded Claims that did not receive a letter in January 2018 enclosing an agreement to withdraw the Paper Claims and a self-addressed return envelope. However, the investors with claims listed on Exhibit C did receive, prior to January 2018, correspondence from the Receiver explaining the basis on which their Paper Claims could not be paid, that the investors could retain their claims and the right to be heard with respect to their claims, and that the Receiver would move to disallow such claims unless the investor agreed by signed letter to withdraw the claims. As of the date of the Motion, the investors with Paper Claims listed on Exhibit C have not elected to withdraw their paper claims.

23. Elimination of the Paper Claims furthers the main objective of equality in the distribution of Receivership assets because there is no legal or equitable basis to make distributions to investors on account of the Paper Claims. There is no basis in the books and records of McGinn Smith to pay the Paper Claims and thus, it would be inequitable and inappropriate for investors to receive any such distributions because such recoveries would dilute the pool of receivership funds available to pay investors with valid claims in Receivership entities. Further, any such distributions would be in contravention of the procedures for calculating investor claims set forth in the Plan of Distribution and the Plan Distribution Order.

24. The Receiver reserves all rights to object on any other basis to the claims of investors or claimants including those on Exhibits A through C. To the extent investors listed on Exhibits A through C have allowed claims, those claims will be processed and paid once a final order has been entered ruling on this Motion.

#### **MEMORANDUM OF LAW**

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

#### **NOTICE**

26. The Receiver has sought to provide investors with Paper Claims listed on Exhibits A through C appropriate notice and sufficient time to respond to the Motion. Accordingly, the Receiver has complied with the claim objection and notice procedures set forth in the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) as a form of best expression of law. Bankruptcy Rule 3007 requires that a claim objection must be filed and served at least thirty days before any scheduled hearing and that the objection must be served on the claimant

by first class mail. Fed. R. Bankr. P. 3007(a)(1), (2). In accordance with Rule 7.1 of the Local Rules of Practice for the United States District Court for the Northern District of New York, the Receiver has filed and will serve the Motion on each investor holding a listed Paper Claim at least thirty-one days in advance of the scheduled return date of April 19, 2018.

27. The Receiver will give notice of the Motion to the Securities and Exchange Commission, all parties who have filed a Notice of Appearance in this action by ECF, and all creditors and parties in interest via the Receiver's website ([www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com)), as well as posting at the top of the Receiver's website an explanation of the Motion. Additionally, notice by first class mail will be given to all investors whose Paper Claims are listed on Exhibits A through C along with a letter in the form attached as Exhibit A to the Brown Dec'l. notifying each investor of (i) the Motion; (ii) the relief sought by the Receiver in the Motion; (iii) the deadline for filing any responses to the Motion; and (iv) that failure to file a response to the Motion may result in disallowance of the investor's paper claim(s), and the inability of the investor to receive a distribution on account of such paper claim, without any further notice or opportunity to be heard offered. Brown Dec'l. ¶17.

28. The Receiver requests that the Court enter an order granting the relief requested in this Motion without a hearing with respect to those Paper Claims for which an objection is not timely interposed. Disallowance of a claim without a hearing where there is no factual dispute is an appropriate and preferred procedure in federal receivership cases. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (holding that summary proceedings are favored in federal receivership cases because a summary proceeding "reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets"); *United States v. Fairway Capital Corp.*, 433 F. Supp. 2d 226, 241 (D. R.I. 2006)

(“Receivership courts can employ summary procedures in allowing, disallowing and subordinating claims of creditors”).

**CONCLUSION**

29. The Receiver believes that the Motion will permit equitable and efficient distribution of the assets of the receivership.

WHEREFORE, based upon the foregoing, the Receiver respectfully requests entry of an Order disallowing the Paper Claims listed on Exhibits A through C, and for such other and further relief as is appropriate.

Dated: February 15, 2018

PHILLIPS LYTTLE LLP

By /s/ Catherine N. Eisenhut

William J. Brown (Bar Roll #601330)

Catherine N. Eisenhut (Bar Roll #520849)

Attorneys for Receiver

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# *Exhibit A*

**EXHIBIT A****Discrepant Claims**

<b>Claim Number</b>	<b>Description of Investment</b>	<b>Amount of Allowed Claim</b>	<b>Amount of Paper Claim</b>
4707A	TAIN Secured Junior Notes Due 12/15/2009	\$148,000.00	\$173,000.00
4776A	Seton Hall Mortgage Note Holders	\$ 8,630.83	\$ 8,603.83
5363P	Firstline Trust 07B Junior Contract Certificates 11% Due 10/01/12	\$ 7,935.69	\$ 10,000.00
5494P	FAIN Secured Senior Notes	\$ 22,998.83	\$ 25,000.00

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# ***Exhibit B***



**EXHIBIT B****Paper Claims**

<b>Claim Numbers</b>	<b>Description of Investment</b>	<b>Amount of Paper Claim</b>	<b>Reason for Disallowance</b>
4258A	TDM Verifier Trust 07R Contract Certificates	\$ 10,000.00	Exact duplicate of Receiver-granted claim in the amount of \$10,000
4259A	TDMM Benchmark Trust 09 8%	\$ 10,000.00	Exact duplicate of Receiver-granted claim in the amount of \$10,000
4776A	SAI Trust 00	\$ 10,000.00	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution
5535A	Coventry CMS	\$ 8,000.00	Claim for investment in non-Receivership entity
5535A	Series One Bond #245	\$ 8,000.00	Claim for investment in non-Receivership entity
5738A	SAI Trust 03	\$ 38,610.75	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution
5753P (no allowed claims)	Unknown	Unknown	No liability claim
6566P (no allowed claims)	Unknown	\$ 25,000.00	No liability claim
6710A	TAIN Secured Senior Subordinated Notes 7.75% Due 12/15/2009	\$ 30,000.00	Exact duplicate of Receiver-granted claim in the amount of \$30,000
6760P (no allowed claims)	One Liberty Ppty	Unknown	Claim for investment in non-Receiver entity

<b>Claim Numbers</b>	<b>Description of Investment</b>	<b>Amount of Paper Claim</b>	<b>Reason for Disallowance</b>
6760P (no allowed claims)	RTC	\$ 50,000.00	No liability claim
6760P (no allowed claims)	Integrated Alarm	\$ 50,000.00	Claim for investment in non-Receiver entity
6760P (no allowed claims)	CCI	\$ 50,000.00	Claim for investment in non-Receiver entity
6760P (no allowed claims)	Coventry/CMS	\$ 50,000.00	Claim for investment in non-Receiver entity

# *Exhibit C*

**EXHIBIT C****Paper Claims Held by Investors Who Received Correspondence Before January, 2018**

<b>Claim Numbers</b>	<b>Description of Investment</b>	<b>Amount of Allowed Claim(s) (if applicable)</b>	<b>Amount of Paper Claim</b>	<b>Reason for Disallowance</b>
No Number Assigned	Miscellaneous no liability investments		\$ 33,232.00	No liability claim
4417A	TAIN Secured Senior Subordinated Notes 7.75% Due 12/15/2009	\$120,000.00	\$120,000.00	Exact duplicate of Receiver-granted claim
5248P	No Liability, Third Albany Income Notes LLC		\$450,000.00	No liability claim
5249P	No Liability, Third Albany Income Notes LLC		\$450,000.00	No liability claim
5238A - 5244A	Coventry Carelink Holding Corp Series One Bonds		\$235,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5244A	Integrated Alarm Services		\$ 60,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Third Albany Income Notes		\$450,000.00	No liability claim
5238A - 5242A	CMS Financial Services Corp.		\$200,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Coventry Carelink Holding Corp Series One Bonds		\$ 35,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Integrated Alarm Services		\$ 60,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Integrated Alarm Services		\$100,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Integrated Alarm Services		\$300,000.00	Claim for investment in non-Receiver-ship entity
5243A - 5244A	CMS Financial Services Corp.		\$200,000.00	Claim for investment in non-Receiver-ship entity

<b>Claim Numbers</b>	<b>Description of Investment</b>	<b>Amount of Allowed Claim(s)</b> (if applicable)	<b>Amount of Paper Claim</b>	<b>Reason for Disallowance</b>
5243A - 5244A	Coventry Carelink Holding Corp. Series One Bonds		\$200,000.00	Claim for investment in non-Receiver-ship entity
5243A - 5244A	Integrated Alarm Services, Inc.		\$ 60,000.00	Claim for investment in non-Receiver-ship entity
5243A - 5244A	Integrated Alarm Services, Inc.		\$100,000.00	Claim for investment in non-Receiver-ship entity
5243A - 5244A	Integrated Alarm Services, Inc.		\$300,000.00	Claim for investment in non-Receiver-ship entity
5243A - 5244A	ExchangeBlvd.com		\$100,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	ExchangeBlvd.com		\$100,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Worldwide Auction Solutions Inc.		Unknown	Claim for investment in non-Receiver-ship entity
5243A - 5244A	Coventry Carelink Holding Corp.		\$200,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Coventry Carelink Holding Corp.		\$200,000.00	Claim for investment in non-Receiver-ship entity
5238A - 5242A	Coventry Carelink Holding Corp. Series One Bonds		\$ 35,000.00	Claim for investment in non-Receiver-ship entity
5353P - 5354P	Firstline Trust 07 9.25% Senior Contract Certificates Due 09/01/10	\$ 88,483.60	\$100,000.00	Duplicate of Receiver-granted claims in different amount
5356P	No Liability, TDM Verifier Trust 08		\$ 50,000.00	No liability claim
5357P	No Liability, TDM Verifier Trust 08		\$ 50,000.00	No liability claim
5358P	No Liability, Firstline Sr. Trust 07		\$100,000.00	No liability claim
5403A - 5404A	Seton Hall Mortgage Note Holders	\$ 43,153.94	\$ 43,153.94	Exact duplicate of Receiver-granted claims
5468P	No Liability, TDM Cable Trust 06		\$ 90,000.00	No liability claim

<b>Claim Numbers</b>	<b>Description of Investment</b>	<b>Amount of Allowed Claim(s)</b> (if applicable)	<b>Amount of Paper Claim</b>	<b>Reason for Disallowance</b>
5469P	Firstline Trust 07B Junior Contract Certificates 11% Due 10/01/12	\$ 15,871.38	\$ 20,000.00	Duplicate of Receiver-granted claims in different amount
5470P	Firstline Trust 07B Senior Contract Certificates 9.50% Due 10/01/11	\$ 24,830.34	\$ 30,000.00	Duplicate of Receiver-granted claims in different amount
5474P	No Liability, Firstline Sr. Trust 07		\$ 6,233.00	No liability claim
5475P	No Liability, Firstline Sr. Trust 07		\$ 6,175.00	No liability claim
5476P	No Liability, McGinn Transaction Funding Corp.		\$ 58,300.00	No liability claim
5477P	No Liability, TDM Cable Trust 06		\$ 2,505.00	No liability claim
5478P	No Liability, TDM Verifier Trust 08		\$ 2,500.00	No liability claim
6470P	TDM Verifier Trust 07		\$ 90,000.00	No liability claim
6469P	Integrated Excellence Sr Trust 08	\$ 73,492.38	\$100,485.00	Duplicate of Receiver-granted claim in different amount
6482P	Integrated Excellence Sr Trust 08	\$ 73,492.38	\$100,485.00	Duplicate of Receiver-granted claim in different amount
6483P	No Liability, TDM Verifier Trust 08		\$ 90,000.00	No liability claim
6599A-6602A	SAI00		\$ 10,000.00	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution
6599A-6602A	SAI00		\$ 15,000.00	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution
6599A-6602A	SAI00		\$ 10,000.00	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution
6599A-6602A	SAI00		\$ 15,000.00	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution

<b>Claim Numbers</b>	<b>Description of Investment</b>	<b>Amount of Allowed Claim(s)</b> (if applicable)	<b>Amount of Paper Claim</b>	<b>Reason for Disallowance</b>
6599A-6602A	Unknown		\$ 20,000.00	No liability claim
6602A	Third Albany Income Note, LLC	\$56,000.00	\$ 110,000.00	Investor partially redeemed this investment, which resulted in a reduced Receiver-granted claim
6602A	Third Albany Income Notes LLC (second identical paper claim)	\$56,000.00	\$ 110,000.00	Investor partially redeemed this investment, which resulted in a reduced Receiver-granted claim
6599A-6602A	SAI Trust 00		\$ 70,000.00	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution
6599A-6602A	SAI Trust 03		Unknown	Claim for investment in entity excluded from Receivership pursuant to Plan of Distribution
6599A-6602A	RTC Trust 02		\$ 100,000.00	No liability claim

# *Exhibit D*



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

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Tel: 716.847.7089  
www.mcginnsmithreceiver.com

One Canalside  
125 Main Street  
Buffalo, NY 14203

January 25, 2018

Re: McGinn Smith & Co. Inc.

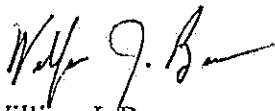
Dear Investor:

In reviewing your claim file, we have determined that you filed one or more paper claims on account of certain investments with McGinn Smith & Co., Inc.

If you filed the paper claim(s) because you disagree with the claim(s) granted to you by the Receiver, you certainly have the right to retain those claims, which will eventually be resolved when the Receiver files a formal objection to them and the Court issues an Order. You have the right to be heard. I believe, however, that the Receiver's books and records are correct, and any difference likely is the result of payments which you received.

The Receiver will need to object to your paper claim(s) before being able to process your Receiver granted claim(s). If however, you agree with the Receiver granted claim(s) and wish to expedite the process, please return the enclosed letter agreeing to expunge your paper claim(s). If you agree to expunge the paper claim(s), we will promptly process your Receiver granted claim(s). If you wish to proceed in that fashion, please sign and return the enclosed Agreement to Withdraw Paper Claim(s) by February 2, 2018. A pre-addressed return envelope is enclosed for your use.

Very truly yours,



William J. Brown  
Receiver

EEEH  
Doc #01-3095871.1  
Enclosure

[Paper Claim Letter]

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

**DECLARATION OF WILLIAM J. BROWN, AS RECEIVER, IN  
SUPPORT OF SECOND MOTION FOR AN ORDER DISALLOWING PAPER CLAIMS**

William J. Brown, as Receiver, declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Receiver of McGinn, Smith & Co. Inc., et al. (“MS & Co.”)

appointed by the Court in this action pursuant to the Preliminary Injunction Order dated July 26,

2010 (Docket No. 96).

2. I make this Declaration in support of the Receiver's Motion ("Motion") for an Order disallowing the filed claims identified on Exhibits A through C to the Motion as having no basis in the books and records of McGinn, Smith & Co., Inc. ("McGinn Smith"). The Exhibits have been redacted to contain only claim numbers which have previously been provided to each investor. The Court previously directed that investor names remain confidential. As described below in paragraph 17, each investor whose claim is listed on Exhibits A through C will receive an explanatory letter with this Motion.

### **PROCEDURAL BACKGROUND**

3. On April 20, 2010, the Securities and Exchange Commission ("SEC") filed a Complaint initiating the above-captioned action (Docket No. 1). Also, on April 20, 2010, this Court granted a Temporary Restraining Order (Docket No. 5), which, among other things, froze certain assets of the above-captioned Defendants and Relief Defendants, and appointed the Receiver as temporary receiver with respect to numerous entities controlled or owned by Defendants Timothy M. McGinn and David L. Smith including those listed on Exhibit A to the Preliminary Injunction Order entered in this action (Docket No. 96) (collectively, the "MS Entities"). At the time of the Receiver's appointment, total bank account balances (not including some remote business operations whose bank accounts were not immediately visible to the Receiver's staff) were \$485,491.63. (Docket No. 49 at 6).

4. On July 26, 2010, following a hearing, the Court entered an order granting the SEC's Motion for a Preliminary Injunction and appointing the Receiver as receiver, pending a final disposition of the action ("Preliminary Injunction Order") (Docket No. 96).

5. On August 3, 2010, the SEC filed an Amended Complaint (Docket No. 100). On June 8, 2011, the SEC filed a Second Amended Complaint (the “Complaint”) (Docket No. 334).

6. 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).

### **CLAIMS PROCEDURE**

7. On March 9, 2012, in my capacity as Receiver, I 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 administration of claims against the MS Entities.

8. On March 27, 2012, the Court entered an Order granting the Claims Procedure Motion (Docket No. 475), which was subsequently amended by an Order dated April 17, 2012 (“Claims Procedure Order”) (Docket No. 481). Each investor and known creditor of the MS Entities was mailed on May 1, 2012 an Access Notice describing the claims process and enclosing (i) Notice of the Claims Bar Date and Claims Procedure and (ii) a Claim Form. A confidential password providing access to the Claims Website at [www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com) (“Claims Website”) was also provided. If an investor or creditor agreed with the description and amount of their claim(s) as listed on the Claims Website and the claim(s) were not listed as disputed, contingent or unliquidated, the investor or creditor did not need to take any further action. All other investors and creditors needed to timely file a paper claim before the bar date of June 19, 2012, as further described in detail on the Receiver’s Website.

9. The Claims Procedure Order established June 19, 2012 (“Bar Date”) as deadline for creditors and investors to file claims against the MS Entities.

10. In accordance with the Claims Procedure Order, nearly six hundred creditors and investors timely filed paper claims prior to the Bar Date. In addition, more than 3,127 claims of investors and creditors were included on the schedules posted by the Receiver in accordance with the Claims Procedure Order. In addition to the claims listed on Exhibits A through C, many other paper claims have already been withdrawn by written investor consent through communications with the Receiver or per Court order.

11. I conducted an initial review of the paper claims timely filed by creditors and investors in accordance with the Claims Procedure Order and determined that it was necessary to establish a reserve as to investor claims totaling approximately \$23,617,190 since those claims have been listed by the Receiver as disputed, contingent or unliquidated.<sup>1</sup>

#### **PLAN OF DISTRIBUTION PROCESS**

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

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

14. Among other things, the Plan of Distribution provides for a reserve for disputed claims to allow the Receiver to make initial distributions, but to also provide for funds

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<sup>1</sup> There are approximately \$124,123,595 in total investor claims.

to be reserved until any objections to disputed claims can be heard and decided by final order of the Court. As of January 26, 2018, \$5,603,299.13 has been distributed to investors with allowed claims as a First Distribution.

**FIRST CLAIMS MOTION**

15. On September 21, 2017, I filed a Motion (Docket No. 937) (“First Claims Motion”) to seek disallowance of certain filed paper claims that were duplicative of the corresponding claims granted by the Receiver. On November 9, 2017, I filed a Statement (Docket No. 957) in furtherance of the First Claims Motion, adjourning the First Claims Motion with respect to those duplicative investor paper claims filed by investors whose Receiver-granted claims have been disputed by the Receiver. On December 28, 2017, the Court entered an Order granting the First Claims Motion and disallowing the duplicative paper claims other than with respect to those filed by investors with disputed claims (Docket No. 966).

16. I have examined the remaining filed paper claims that were not listed in the First Claims Motion and have determined that there is no basis in the books and records of McGinn Smith to make distributions on account of certain filed investor paper claims, as identified on Exhibits A through C.

17. In connection with service of the Motion and all accompanying papers, including this Declaration, I will mail to all investors identified on Exhibits A through C to the Motion a letter notifying each investor of (i) the Motion; (ii) the relief sought by the Receiver in the Motion; (iii) the deadline for filing any responses to the Motion; and (iv) that failure to file a response to the Motion may result in disallowance of the investor's paper claim(s), and the inability of the investor to receive a distribution on account of such paper claim, without any further notice or opportunity to be heard offered. A copy of the form letter to be sent to investors upon the filing of this Motion is attached to this Declaration.

Dated: February 15, 2018

/s/ William J. Brown

William J. Brown

Doc #01-3098062.4

# *Exhibit A*



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

Tel: 716.847.7089  
www.mcginnsmithreceiver.com

One Canalside  
125 Main Street  
Buffalo, NY 14203

February 15, 2018

Re: McGinn Smith Plan of Distribution Process/Objection to Paper Claims

Dear McGinn Smith Investor:

Enclosed is a Motion I have filed as Receiver (“Motion”) seeking to disallow your filed paper claim(s) (“Filed Paper Claim”) on the grounds that there is no basis for the payment of such claims. To ensure that all investors receive an equal and equitable distribution on account of their Receiver-granted claims, your Filed Paper Claim is being objected to. Please refer to the Exhibits attached to the Motion for information regarding your claim. The Motion will not affect any allowed claim granted to you on the Receiver’s Claims Website, located at [www.mcginnsmithreceiver.com](http://www.mcginnsmithreceiver.com).

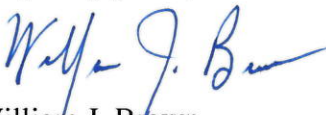
If you wish to contest the Receiver’s determination that your Filed Paper Claim is not entitled to a distribution, you may file and serve a written response to the Motion seventeen days before April 19, 2018, which is April 2, 2018, in accordance with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Northern District of New York. Oral responses to the Motion may not be considered by the Court.

You may expedite the review of your Receiver-granted claim(s), if any, for allowance and payment by sending me a letter agreeing to withdraw your paper claim(s) prior to the Motion being considered by the Court.

If you need another confidential password to access the Receiver’s Claims Website, you may request it in writing addressed to the Receiver at the address above.

**YOUR FAILURE TO FILE A RESPONSE TO THE MOTION MAY RESULT IN DISALLOWANCE OF YOUR FILED PAPER CLAIM, AND YOUR INABILITY TO RECEIVE A DISTRIBUTION ON ACCOUNT OF YOUR FILED PAPER CLAIM, WITHOUT ANY FURTHER NOTICE OR A HEARING ON THE MOTION.** The Motion will not affect the right of the Receiver to object to your claim(s) on any other basis. You do not need to respond to the Motion if you agree to the disallowance of your Filed Paper Claim.

Very truly yours,



William J. Brown  
Receiver

Doc #01-3098034.4  
Enclosures

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION :

*Plaintiff,*

vs.

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

McGINN, SMITH & CO., INC., :  
McGINN, SMITH ADVISORS, LLC :  
McGINN, SMITH CAPITAL HOLDINGS CORP., :  
FIRST ADVISORY INCOME NOTES, LLC, :  
FIRST EXCELSIOR INCOME NOTES, LLC, :  
FIRST INDEPENDENT INCOME NOTES, LLC, :  
THIRD ALBANY INCOME NOTES, LLC, :  
TIMOTHY M. McGINN, AND :  
DAVID L. SMITH, GEOFFREY R. SMITH, :  
Individually and as Trustee of the David L. and :  
Lynn A. Smith Irrevocable Trust U/A 8/04/04, :  
LAUREN T. SMITH, and NANCY McGINN, :

*Defendants,*

LYNN A. SMITH and  
NANCY McGINN,

*Relief Defendants. and*

GEOFFREY R. SMITH, Trustee of the  
David L. and Lynn A. Smith Irrevocable  
Trust U/A 8/04/04,

*Intervenor.*

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**ORDER APPROVING MOTION OF WILLIAM J. BROWN, AS RECEIVER,  
FOR AN ORDER DISALLOWING PAPER CLAIMS**

Upon the Motion of William J. Brown, as Receiver, for an Order Disallowing Paper Claims; and notice of the Motion having been given to the Securities and Exchange Commission, each investor listed on Exhibit A, Exhibit B and Exhibit C to the Motion by first class mail, and all parties who have filed a Notice of Appearance in this action by ECF, and all creditors of the McGinn, Smith entities and other parties in interest via the Receiver’s website, which notice is deemed good and sufficient notice; and the Court having deemed that sufficient cause exists; it is therefore

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

ORDERED, that each of the filed paper claims listed on Exhibit A, Exhibit B and Exhibit C to the Motion is disallowed; and the rights of the Receiver to object on any other basis to the claims of all investors or claimants is expressly preserved.

Dated: April \_\_\_\_, 2018

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HON. CHRISTIAN F. HUMMEL

Doc #01-3098042.2

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION :

*Plaintiff,*

vs.

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

McGINN, SMITH & CO., INC., :  
McGINN, SMITH ADVISORS, LLC :  
McGINN, SMITH CAPITAL HOLDINGS CORP., :  
FIRST ADVISORY INCOME NOTES, LLC, :  
FIRST EXCELSIOR INCOME NOTES, LLC, :  
FIRST INDEPENDENT INCOME NOTES, LLC, :  
THIRD ALBANY INCOME NOTES, LLC, :  
TIMOTHY M. McGINN, AND :  
DAVID L. SMITH, GEOFFREY R. SMITH, :  
Individually and as Trustee of the David L. and :  
Lynn A. Smith Irrevocable Trust U/A 8/04/04, :  
LAUREN T. SMITH, and NANCY McGINN, :

*Defendants,*

LYNN A. SMITH and  
NANCY McGINN,

*Relief Defendants. and*

GEOFFREY R. SMITH, Trustee of the  
David L. and Lynn A. Smith Irrevocable  
Trust U/A 8/04/04,

*Intervenor.*

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**CERTIFICATE OF SERVICE**

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on February 15, 2018, a true and correct copy of the Notice of Motion and Second Motion of William J. Brown, as Receiver, for an Order Disallowing Paper Claims (“Motion”) was caused to be served by e-mail upon all parties who receive electronic notice in this case pursuant to the Court’s ECF filing system, and by First Class Mail to the parties indicated below:

- **William J. Brown** wbrown@phillipslytle.com,khatch@phillipslytle.com
- **Certain McGinn Smith Investors**apark@weirpartners.com
- **Elizabeth C. Coombe** elizabeth.c.coombe@usdoj.gov, paul.condon@usdoj.gov, CaseView.ECF@usdoj.gov,kelly.ciccarelli@usdoj.gov
- **William J. Dreyer** wdreyer@dreyerboyajian.com, bhill@dreyerboyajian.com, lowens@dreyerboyajian.com,coconnell@dreyerboyajian.com
- **Scott J. Ely** sely@elylawpllc.com,shm@fwc-law.com
- **James D. Featherstonhaugh** jdf@fwc-law.com,jsm@fwc-law.com,cr@fwc-law.com,shm@fwc-law.com
- **James H. Glavin** , IVhglavin@glavinandglavin.com
- **Bonnie R. Golub** bgolub@weirpartners.com

- **James E. Hacker** jhacker@joneshacker.com, sfebus@joneshacker.com, thiggs@joneshacker.com
- **Erin K. Higgins** EHiggins@ckrpf.com
- **Benjamin W. Hill** bhill@dreyerboyajian.com, cjoy@dreyerboyajian.com, coconnell@dreyerboyajian.com
- **E. Stewart Jones**, resjones@joneshacker.com, mleonard@joneshacker.com, pcampione@joneshacker.com, kjones@joneshacker.com
- **Edward T. Kang** ekang@khflaw.com, mlagoumis@khflaw.com, jarcher@khflaw.com, jpark@khflaw.com, golberding@KHFlaw.com
- **Jack Kaufman** kaufmanja@sec.gov
- **Michael A. Kornstein** mkornstein@coopererving.com
- **James P. Lagios** jlagios@icrh.com
- **Kevin Laurilliard** laurilliard@mltw.com, chandler@mltw.com
- **James D. Linnan** jdlinnan@linnan-fallon.com, lawinfo@linnan-fallon.com
- **Haimavathi V. Marlier** marlierh@sec.gov
- **Jonathan S. McCardle** jsm@fwc-law.com
- **Kevin P. McGrath** mcgrathk@sec.gov
- **Lara S. Mehraban** mehrabanl@sec.gov, marlierh@sec.gov
- **Michael J. Murphy** mmurphy@carterconboy.com, abell@carterconboy.com, tcozzy@carterconboy.com
- **Joshua M. Newville** newvillej@sec.gov
- **Craig H. Norman** cnorman@chnesq.com, jbugos@coopererving.com
- **Andrew Park** apark@weirpartners.com, imarciniszyn@weirpartners.com
- **Thomas E. Peisch** TPeisch@ckrpf.com, apower@ckrpf.com
- **Terri L. Reicher** Terri.Reicher@finra.org
- **Richard L. Reiter** reiterr@wemed.com, richard.reiter@wilsonelser.com
- **Sheldon L. Solow** sheldon.solow@kayescholer.com, kenneth.anderson@kayescholer.com
- **David P. Stoelting** stoeltingd@sec.gov, mehrabanl@sec.gov, mcgrathk@sec.gov, paleym@sec.gov, wbrown@phillipslytle.com
- **Charles C. Swanekamp** cswanekamp@bsk.com, mhepple@bsk.com
- **Walter Weir** wwair@weirpartners.com, smorris@weirpartners.com
- **Bryan M. Westhoff** bryan.westhoff@kayescholer.com
- **Benjamin Zelermyer** bzlaw@optonline.net, steincav@aol.com

And, I hereby certify that on February 15, 2018, I mailed, via first class mail using the United States Postal Service, a copy of the Motion to the individuals listed below:

Nancy McGinn  
426-8th Avenue  
Troy, NY 12182

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

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

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

RBS Citizen, N.A.  
Cooper Erving & Savage LLP  
39 North Pearl Street  
4th Floor  
Albany, NY 12207

Iseman, Cunningham, Riester & Hyde, LLP  
9 Thurlow Terrace  
Albany, NY 12203

Charles C. Swanekamp, Esq.  
Bond, Schoeneck & King PLLC  
Avant Building - Suite 900  
200 Delaware Avenue  
Buffalo, NY 14202-2107

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

Timothy J. O'Connor, Esq.  
29 Wards Lane  
Albany, NY 12204

Dated: February 15, 2018

/s/ Karen M. Ludlow

Karen M. Ludlow

Doc #01-3100698.1