



Phillips Lytle LLP

VIA CM/ECF

April 17, 2018

Hon. Christian F. Hummel
United States Magistrate Judge
United States District Court
Northern District of New York
United States Courthouse
445 Broadway
Albany, NY 12207

Re: Securities and Exchange Commission vs. McGinn, Smith & Co., Inc., et al.
Case No. 1:10-cv-457
Extension Request by Frank H. Chiappone

Dear Judge Hummel:

We have seen the extension request filed late yesterday by Tuczinski, Gilchrist, Cavalier & Tingley, P.C. on behalf of Frank H. Chiappone. We are responding to it by this letter.

We have already communicated with Mr. Cavalier on two recent occasions regarding the Third Motion of the Receiver for an Order Disallowing Certain Claims (Broker Claims) (Docket Nos. 984, 985). A copy of our April 16, 2018 letter with our attached March 28, 2018 letter responding to Mr. Cavalier's March 26, 2018 letter are attached.

In summary, Mr. Cavalier's letter does not establish good cause for the failure to timely file responding papers as required by Local Rule 7.1(b)(3).

In the event the Court grants Mr. Cavalier's request, the Receiver requests (i) until May 4, 2018 to file any Reply, and (ii) that any extension order be limited solely to Frank H. Chiappone.

Very truly yours,

Phillips Lytle LLP

By 

William J. Brown

EEEht
Doc #01-3116089.1
Attachment

cc: Roland M. Cavalier, Esq. (via e-mail)

ATTORNEYS AT LAW

WILLIAM J. BROWN, PARTNER DIRECT 716 847 7089 WBROWN@PHILLIPSLYTTLE.COM

ONE CANALSIDE 125 MAIN STREET BUFFALO, NY 14203-2887 PHONE 716 847 8400 FAX 716 852 6100

NEW YORK: ALBANY, BUFFALO, CHAUTAUQUA, GARDEN CITY, NEW YORK, ROCHESTER | WASHINGTON, DC | CANADA: WATERLOO REGION | PHILLIPSLYTTLE.COM



Phillips Lytle LLP

Via E-Mail and U.S. Mail

April 16, 2018

Roland M. Cavalier, Esq.
Tuczinski, Gilchrist, Cavalier & Tingley, P.C.
P.O. Box 28
Troy, NY 12181

Re: Securities and Exchange Commission v. McGinn, Smith & Co. Inc. - Untimely
Response of Frank Chiappone
Case No. 1:10-CV-457

Dear Mr. Cavalier:

We received this morning from you via overnight courier the pleading entitled *Respondent Frank Chiappone's Response to the 3rd Motion of William J. Brown, as Receiver, for an Order Disallowing Certain Claims (Broker Claims)* ("Response"). The Response is dated April 13, 2018, and the Certificate of Service is dated the same date.

The Response is materially untimely since it was due to be filed and served no later than April 2, 2018. You were well aware of this date as a practicing attorney, from the Notice of Motion (Docket No. 984), and by your having received a response from us on March 28, 2018 (copy attached) responding to your March 26, 2018 letter (also attached), which made assertions that the facts recited in the Receiver's Memorandum of Law (Docket No. 985) were in error.

The Receiver's Third Motion objecting to broker claims was based solely on factual findings and not on any law cited in the Initial Decision. Irrespective of any legal issues associated with law or procedure involved in the Initial Decision, the Initial Decision's fact-finding is consistent with the facts as known by the Receiver and evident from the record.

Pursuant to Northern District of New York Local Rule 7.1(b)(3), "the Court shall not consider any papers required under this Rule that are not timely filed or are otherwise

ATTORNEYS AT LAW

WILLIAM J. BROWN, PARTNER DIRECT 716 847 7089 WBROWN@PHILLIPSLYTLLE.COM

ONE CANALSIDE 125 MAIN STREET BUFFALO, NY 14203-2887 PHONE 716 847 8400 FAX 716 852 6100

NEW YORK: ALBANY, BUFFALO, CHAUTAUQUA, GARDEN CITY, NEW YORK, ROCHESTER | WASHINGTON, DC | CANADA: WATERLOO REGION | PHILLIPSLYTLLE.COM



Roland M. Cavalier, Esq.
Page 2

April 16, 2018

not in compliance with this Rule unless good cause is shown." No good cause has or can be shown for your delay.

Accordingly, we reject the Response you sent by overnight courier to us delivered today as grossly untimely.

Very truly yours,

Phillips Lytle LLP

By

A handwritten signature in blue ink, appearing to read 'W. J. Brown', written over a horizontal line.

William J. Brown

EEEht
Doc #01-3115823.1
Attachment



Phillips Lytle LLP

Via E-Mail and U.S. Mail

March 28, 2018

Roland M. Cavalier
Tuczinski Gilchrist Cavalier Tingley, P.C.
500 Federal Street, 4th Floor
Troy, New York 12180

Re: Frank Chiappone - Third Motion to Disallow Broker Claims

Mr. Cavalier:

I am writing this letter in response to your March 26, 2018 letter. In your letter, you state that certain facts in the Memorandum of Law filed in support of the Receiver's Third Motion to Disallow Certain Claims (Docket No. 985) ("Memorandum") were made in error. Contrary to your assertions, the facts in the Memorandum are accurately cited from the Administrative Law Judge's ("ALJ") findings of facts in the Initial Decision entered in the underlying S.E.C. action against Mr. Chiappone ("Initial Decision").

To your first assertion, the Memorandum does not state that Mr. Chiappone was aware of the Firstline bankruptcy before he sold \$80,000 of Firstline notes in May 2008. Rather, the Memorandum correctly cites to the ALJ's finding that Mr. Chiappone was aware that Firstline investors were being paid with proceeds from other trusts before he sold Firstline notes in May 2008. *See* Initial Decision at 14.

To your second assertion, the fact that Mr. Chiappone was aware of the redemption policy was a factual finding made by the ALJ. *See* Initial Decision at 12. The fact that Mr. Chiappone was aware of this redemption policy, along with other very troubling facts including red flags, while continuing to sell private placements to unknowing investors only supports the Receiver's position that Mr. Chiappone's reckless behavior - and the resulting harm to unsuspecting investors - should disqualify him from participating in distributions with those harmed investors.

CATHERINE N. EISENHUT

DIRECT 716 847 8323 CEISENHUT@PHILLIPSLYTL.COM

ATTORNEYS AT LAW

ONE CANALSIDE 125 MAIN STREET BUFFALO, NY 14203-2887 PHONE 716 847 8400 FAX 716 852 6100

NEW YORK: ALBANY, BUFFALO, CHAUTAUQUA, GARDEN CITY, NEW YORK, ROCHESTER | WASHINGTON, DC | CANADA: WATERLOO REGION | PHILLIPSLYTL.COM



Roland M. Cavalier
Page 2

March 28, 2018

As you have failed to identify any substantive errors of fact in the Memorandum, there is nothing for us to correct.

Very truly yours,

Phillips Lytle LLP

A handwritten signature in blue ink that reads "Catherine N. Eisenhut". The signature is fluid and cursive, with a prominent initial 'C' and a long horizontal stroke at the end.

By

Catherine N. Eisenhut

CNE
Doc #01-311194.2

Rec'd 3/30/18
WB
- flc



**Tuczinski Gilchrist
Cavalier Tingley**
ATTORNEYS AT LAW
TRUST • INTEGRITY • SERVICE

Roland M. Cavalier
rcavalier@tgtflegal.com
(518) 238-3759 ext. 208

March 26, 2018

William J. Brown, Receiver
One Canalside
125 Main Street
Buffalo, NY 14203

Re: Third Motion to Disallow Broker Claims

Mr. Brown:

I represent Frank Chiappone in connection with the SEC proceedings brought against various McGinn Smith brokers. I have reviewed the papers in your motion to disallow or subordinate claims made by certain brokers who invested in private placement securities offered by McGinn Smith & Company. I represent only Mr. Chiappone as to your Third Motion

I am writing this letter as I believe your motion papers contain certain errors as regards statements made relating to Mr. Chiappone. We are therefore asking that you submit a further statement to Judge Hummel, correcting those errors.

The primary error is your statement that Mr. Chiappone sold \$80,000 in notes issued by Firstline at a time when he was aware that Firstline had filed for bankruptcy. This is not correct. In fact, Mr. Chiappone's sale of \$80,000 in Firstline took place well more than a year (actually, 16 months) before he first found out that Firstline was in bankruptcy. Mr. Gamello testified that he first learned of the Firstline bankruptcy at a September, 2009 meeting (Tr. 5952- 5953). Mr. Chiappone also testified that he first learned of the Firstline bankruptcy in September, 2009, and that he was very upset upon learning that MS & Co. had known of the bankruptcy which occurred in January of 2008 (Tr. 2578-2579 and Tr. 5573-5575). In fact, MS & Co. kept that information from the brokers for some 19 months after Firstline actually filed for Bankruptcy (Tr. 5575). Mr. Chiappone's sale of Firstline offerings were all done well before he (or any of the other brokers) learned of the Firstline bankruptcy. See Palen Exhibit 4c (within SEC Ex. 2), which clearly shows that Mr. Chiappone's first sale of Firstline occurred on June 1, 2007 and his last sale of Firstline occurred on May 15, 2008. Also incorrect is the statement that Mr. Chiappone spoke to Mr. Smith about the Firstline situation, when in fact he called Mr. McGinn before he sold Firstline in April 2008 and was assured that the deal was proceeding as it was when the notes were first offered in 2007. Tr. 5572

William J. Brown, Receiver
March 26, 2018
Page 2 of 2

Another error is found in your March 23, 2018 filing, in which you claim that Mr. Chiappone sold private placement investments even though there was a redemption policy in place. I direct your attention to page 93 of the ALJ's Initial Decision, wherein she specifically did not find that the alleged redemption policy, stating:

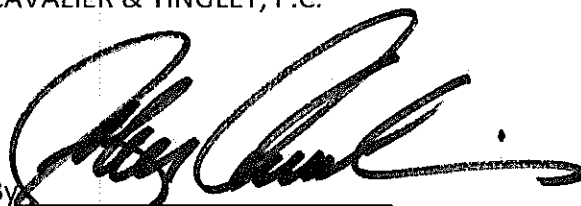
"The preponderance of the evidence does not support the claim that MS & Co. had a redemption policy that was, in these circumstances, a red flag that warranted investigation. ... However, there is no evidence that a registered representative who did not find a new purchaser was ever unable to redeem a client. It was reasonable for the registered representatives to accept MS & Co.'s efforts to create a secondary market for illiquid securities and Smith's preference for resales rather than having to liquidate assets to meet redemptions." (Initial Decision, at page 93).

Although not relevant to the issues in your motion, you should know that Mr. Chiappone worked at MS & Co. from 1988 (not 1998) to December of 2009.

On behalf of Mr. Chiappone, I request that you correct these errors in your submissions to Judge Hummel.

Very truly yours,

TUCZINSKI, GILCHRIST,
CAVALIER & TINGLEY, P.C.

By: 

Roland M. Cavalier

RMC/lam

cc: Frank Chiappone