

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 PURCHASE AGREEMENT WITH HUNT TELECOMMUNICATIONS,
LLC WITH RESPECT TO THE PURCHASE OF ALL LLC INTERESTS OF
BENCHMARK COMMUNICATIONS, 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 an Agreement with Hunt Telecommunications, LLC (“Hunt”) with respect to the

purchase of all of the outstanding equity interests of Benchmark Communications, LLC (“Benchmark”), free and clear of all liens, claims and encumbrances, if any, which shall attach to the proceeds of the sale, and in support thereof, represents as follows:

SUMMARY OF MOTION

The Motion seeks approval of an Agreement with Hunt (“Agreement”). The Agreement provides for the purchase by Hunt all of the outstanding equity interests of Benchmark (the “LLC Interests”), an entity for which TDMM Cable Funding LLC (“TDMM”) is the sole member, in exchange for cash payments totaling \$350,000 (“Purchase Price”). In addition, the estate retains the cash on hand estimated at closing to be approximately \$120,000, except for any cash for customer deposits which shall remain the property of Benchmark (which deposits shall include any prepayments for service the month following closing), a \$60,000 termination fee claim, and discontinued assets which are of a de minimus value. Both Benchmark and TDMM are MS Entities (as defined below). Benchmark provides so-called “triple play” (telephone, cable and Internet) services at a number of apartment complexes in the Southeast Gulf region of the United States. 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 is TDMM.

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. Sale Transaction

3. TDMM is the sole member of Benchmark and holder of the LLC Interests. The Receiver has attempted to sell the LLC Interests for several years including previously through a broker. None of those efforts proved to be successful until now.

4. On September 17, 2013, Hunt contacted the Receiver via electronic mail to express its interest in purchasing the LLC Interests.

5. On October 7, 2013, counsel to Hunt sent a proposed purchase agreement for the purchase of the LLC Interests by Hunt.

6. Following a period of negotiations between the Receiver and counsel to Hunt, the parties agreed upon the terms of the Agreement. A copy of the Agreement is attached as

Exhibit A.

7. The essential terms of the Agreement are as follows:¹

a) Subject to Court approval, TDMM shall sell to Hunt, and Hunt shall purchase from TDMM, the LLC Interests held by TDMM as of the Closing Date free and clear of all liens, claims and encumbrances, if any;

¹ Reference should be made to the Agreement for its complete terms. Capitalized terms used but not defined in this Motion shall have the meanings ascribed to them in the Agreement.

b) In consideration for the purchase of the LLC Interests, Hunt shall:

(i) deliver a deposit in the amount of \$50,000 to the Receiver by wire transfer upon the signing of the Agreement by Hunt; and (ii) on the Closing Date, transmit payment in the aggregate sum of \$300,000 in cash to the Receiver via wire transfer to an account designated by the Receiver, to which any liens, claims and encumbrances shall attach;

c) On the Closing Date, the Receiver shall deliver to Hunt (i) a Bill of Sale for the LLC Interests; (ii) an order from this Court approving the sale of the LLC Interests to Hunt free and clear of all liens and encumbrances; (iii) any membership interest certificates available reflecting the ownership of the LLC Interests, duly endorsed in blank; (iv) any and all books and records of Benchmark or copies thereof as may be reasonably requested by Hunt; (v) a payoff letter in form and substance reasonably satisfactory to Hunt from certain secured creditors of Benchmark providing for the release of all security interests relating to such indebtedness; and (vi) signed counterparts of any and all documentation and certificates as the parties may reasonably require in connection with the transactions contemplated by the Agreement;

d) On the Closing Date, Hunt shall deliver to the Receiver (i) the balance of the Purchase Price by wire transfer and application of the Deposit; and (ii) signed counterparts of any and all documentation and certificates as the parties may reasonably require in connection with the transactions contemplated by the Agreement;

e) After the Closing Date, TDMM and Benchmark shall no longer have any responsibility to provide any services related to their business, provided that TDMM and the Receiver shall cooperate with Hunt to receive FCC approval for the transaction, if such approval has not already been obtained;

f) Hunt shall maintain all records relating to the transaction and interests and assets sold thereunder for a minimum of four years and shall provide the Receiver and his designees with reasonable access to such information following the Closing Date.

g) The Agreement is subject to the approval of its terms by this Court subject to higher and better offers; and

h) The Agreement is subject to the approval of the United States Federal Communications Commission of the transfer of all FCC licenses, which condition can be waived by Hunt.

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

a) The sale of the LLC Interests will result in the aggregate cash payment of \$350,000, which will be deposited into a Receivership account. The estate will also retain approximately \$120,000 of cash on hand, except for any cash for customer deposits which shall remain the property of Benchmark (which deposits shall include any prepayments for service for the month following closing), the \$60,000 termination fee claim, and the discontinued assets or the proceeds thereof. Between the signing of the Agreement and the approval of the Motion by the Court, Benchmark shall pay all payables in the ordinary course of business when due.

b) The Agreement constitutes the cost-effective, efficient liquidation of a significant asset (in terms of amount) of TDMM.

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

C. Secured Claim Against Benchmark Assets

9. The MS Entities acquired Benchmark in 2009. The sellers of Benchmark at that time (Mark Guidry, Jason Veasey, Warren Gottsegen and Benjamin Bronston) took back a seller

Note in the principal amount of \$525,000 secured by all the assets of Benchmark. During the Receivership, the Receiver has paid interest on the Note. While the MS Entities may have overpaid for Benchmark, the sellers appear to be arms length bona fide sellers.

10. In order to be able to satisfactorily pursue a sale of the Benchmark LLC interests or assets, the Receiver entered into an agreement with the sellers pursuant to the letter agreement attached as **Exhibit B**. In essence, the sellers will release all of their claims, liens and encumbrances on the Benchmark assets upon the closing of the Agreement. After the MS Entities receive the first \$300,000 of the closing proceeds, the next \$178,000 will be paid to the sellers as principal on the loan. The sellers will receive 60%, and the MS Entities will receive 40% of any recovery of the \$60,000 Legacy Tower termination fee collected by the Receiver. At the present time, there is a principal balance on the seller note of \$250,000 plus interest.

11. 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 Hunt constitutes reasonable value for the LLC Interests and that the terms of the Agreement are fair and reasonable under the circumstances.

SALE PROCEDURES

12. To ensure the maximization of proceeds for TDMM which benefit the MS Entities and those entitled to the proceeds, the Receiver sought the approval of the Court by letter dated November 12, 2013 to market and, if necessary, auction the LLC Interests for the highest and best consideration. The following are the procedures (“Procedures”) by which the Receiver shall market and, if necessary, auction the LLC Interests:

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

b) Any competing offers for the purchase of the LLC Interests 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 LLC Interests in accordance with the Procedures, an auction will be held at the offices of Phillips Lytle LLP, HSBC Center, Buffalo, New York 14203, at least 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 Hunt is not the highest and best bidder at the auction. There will be a minimum overbid at the auction of \$20,000.

e) The sale of the LLC Interests to Hunt 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 LLC Interests for the benefit of the MS Entities and those entitled to the proceeds.

13. Timing is of the essence in completing the sale of the LLC Interests. Hunt's offer, which is contingent upon this Court's approval of its terms, contemplates an expected closing date for the sale transaction of no later than December 2, 2013 effective as of November 30, 2013, time being of the essence.

BASIS FOR RELIEF

14. 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 TDMM for the benefit of the MS Entities and those entitled to the proceeds.

15. 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.”).

16. 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).

17. In this case, the sale of the LLC Interests as contemplated by the Agreement 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

18. 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

19. 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 LLC Interests.

HEARING DATE

20. By separate letter to the Court, the Receiver is requesting that a hearing to consider approval of the Motion be held on November 22, 2013.

CONCLUSION

21. 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: November 12, 2013

PHILLIPS LYTTLE LLP

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