



**Phillips Lytle** LLP

VIA CM/ECF

December 20, 2013

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-00457-GLS-CFH  
Letter Motion Seeking Order in Aid of Administration with respect to the sale of  
Smith Trust Sacandaga Lake Property

Dear Judge Hummel:

Following up from last Friday's pre-motion conference, I respectfully request the entry of an Order in Aid of Administration (in the form of attached **Exhibit A**) with regard to the sale of the Smith Trust Sacandaga Lake Property consistent with Your Honor's Memorandum-Decision and Order (Docket No. 647) ("Sacandaga Property MDO").

By way of background, the Court previously entered a sale process order in its Memorandum-Decision and Order with respect to the sale of the Smith Vero Beach property (Docket No. 263, pgs. 10-11), and, with respect to the McGinn Niskayuna residence (Docket No. 276).

With respect to the Sacandaga Lake Property sale, the Receiver has encountered some difficulty with respect to the initial sale process and in his efforts to maintain the property. For example:

1. The Receiver was informed on December 2, 2013 that access to the property could only be gained through Lynn A. Smith upon her return from Colorado on January 8, 2014. See e-mail chain with Smith Trust trustee attached as **Exhibit B**.

ATTORNEYS AT LAW

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

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The Receiver needs access to the Sacandaga Lake Property for listing the property for sale, access for showings, and restoration of electric service as described below. The Receiver believes that changing the building locks after Mrs. Smith returns to New York State on January 8, 2014 will best accomplish that goal while providing a new set of keys to Mrs. Smith, the Receiver and the realtor. No lock box will be used in the sale process because the Receiver's real estate agent will be present at each showing.

2. The Receiver previously approved a roof replacement on the white cottage at the Sacandaga Lake Property on the understanding that the Smiths or their neighbor would take responsibility for supervising the repairs and the proper completion of the project. The Receiver was informed by the Smith Trust trustee that the project was properly completed, and, consequently, the Receiver issued payment. Upon a subsequent physical inspection of the property, the Receiver learned that the electrical service to the white cottage was physically removed from the building when the roof was replaced and had not been reinstalled. The Smith Trust trustee informed the Receiver he would not pursue completion of that work following the issuance of the Sacandaga Property MDO. See attached Exhibit B.
3. The Receiver is also concerned based on a recent communication that the insurance brokers who insure the property (there are two pursuant to Smith historical practices) may not agree as to which insurance policy covers which portion of the camp. The Receiver intends to place the insurance, if possible, with only one broker so that there is assurance of coverage.
4. A letter dated December 11, 2013 from James Linnan, Esq., counsel for the Smith Trust, attached as **Exhibit C** indicates additional areas of disagreement that the Receiver has encountered. The Receiver intends to reasonably oversee the management of the property out of concern that the Smith Trust no longer believes that it has an interest in the property as a practical matter.



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Accordingly, the Order attached as Exhibit A represents the form of Order that the Receiver requests be entered promptly on notice to the Smith Trust following an opportunity for the Smith Trust to object if it wishes to do so. The Receiver does not intend to access the property absent exigent circumstances prior to the return to the area by Lynn Smith on January 8, 2014. The Receiver intends to access the property on either January 9 or 10, 2014, hopefully with Mrs. Smith's cooperation. The Receiver would change the locks at that time providing a set of keys to the Smith Trust trustee or his designee, and the Receiver would cause the personal property in the residential buildings to be inventoried at that time in cooperation with Mrs. Smith if she is available to do so.

Very truly yours,

Phillips Lytle LLP

By 

William J. Brown

EEEht  
Doc #01-2739588.1

cc: David Stoelting, Esq.  
Kevin McGrath, Esq.  
E. Stewart Jones, Esq.  
James D. Linnan, Esq.  
William Dreyer, Esq.  
James Featherstonhaugh, Esq.  
Nancy McGinn

# *Exhibit A*

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

**ORDER IN AID OF ADMINISTRATION  
OF MEMORANDUM-DECISION AND ORDER  
(DOCKET No. 647)**

**WHEREAS**, the Court previously granted the Commission’s request for a preliminary injunction order freezing the assets of the David L. and Lynn A. Smith Irrevocable Trust (Docket No. 104) (the “Freeze Order”); and

**WHEREAS**, the three properties located on or adjacent to Sacandaga Lake in Broadalbin, New York titled to the David L. and Lynn A. Smith Irrevocable Trust (“Smith Trust”) are currently subject to the Freeze Order (collectively, the “Sacandaga Lake Property”); and

**WHEREAS**, by Memorandum-Decision and Order dated November 22, 2013 (Docket No. 647) (“Sacandaga Property MDO”), the Court directed the Receiver to sell the Sacandaga Lake Property; and

**WHEREAS**, the Receiver has requested in a letter Motion dated December 20, 2013 the entry of an Order in Aid of Administration to govern the sale of the Sacandaga Lake Property in a form similar to the Orders which governed the prior sales of the Smith Vero Beach property and the McGinn Niskayuna residence;

**NOW, THEREFORE,**

**I.**

**IT IS ORDERED** that the Court-appointed Receiver, William J. Brown (the “Receiver”), is given sole authority to take all necessary steps to oversee a sale of the Sacandaga Lake Property, including the retention of a real estate agent, and the Freeze Order is hereby modified to permit the Receiver or the Smith Trust (with the Receiver’s prior written consent) to enter into a contract for the purchase and sale of the Sacandaga Lake Property, and to administer the sale process, maintain the property in the interim, and close a sale of the Sacandaga Lake Property subject to the following terms and conditions:

A. The Receiver shall provide the Smith Trust trustee, his counsel (Linnan & Fallon, LLP), and the Commission with a copy of any contract proposed to be accepted for sale of all or a portion of the Sacandaga Lake Property (the “Contract”) within three days of its execution, along with a proposed list of distributions (the “Distribution List”) to be made from the proceeds of such sale. The Distribution List may include, among other things, any liens on the Sacandaga Lake Property, and any usual and customary costs of closing, including broker, attorney, and recording fees, and transfer taxes.

B. The Smith Trust may, within two business days from the delivery of the Contract and the Distribution List, object to the terms of the Contract, and such objections may include the sale price or the proposed distributions. The Court will resolve such objections on motion by the Smith Trust or the Receiver if the parties do not reach agreement on such objections. The Smith Trust, the Commission, and the Receiver shall not object to a request for an expedited hearing.

C. The balance of any funds remaining after payment of the Distribution List shall be deposited into an interest bearing bank account of the Receiver to be held in escrow until further order of this Court.

D. The Commission and the Receiver shall provide such documents any purchaser of all or a portion of the Sacandaga Lake Property may reasonably require to evidence the Commission's and the Receiver's consent and authority to convey title to all or any portion of the Sacandaga Lake Property.

E. The Receiver shall consult with the Smith Trust, and the Smith Trust shall cooperate with the Receiver in the maintenance, access, listing, showing and closing of the sale of all or a portion of the Sacandaga Lake Property. In that regard, the Receiver (i) shall take an inventory of the visible personal property in the three cottages on the Sacandaga Lake Property, (ii) is authorized to change on or after January 9, 2014 the three cottage door locks and provide a set of new lock keys to the Smith Trust trustee or his designee, the realtor engaged by the Receiver to list the Sacandaga Lake Property for sale, and the Receiver, (iii) shall procure and maintain insurance in such amounts and coverages as the Receiver deems appropriate, (iv) shall be responsible to maintain and restore utility service, (v) shall otherwise oversee the reasonable preservation of the Sacandaga Lake Property, and (vi) shall take such other steps as the Receiver deems prudent consistent with the Sacandaga Property MDO.

**II.**

**IT IS FURTHER ORDERED** that, except as expressly modified herein, the Preliminary Injunction Order dated July 22, 2010 (Docket No. 96), as modified by subsequent Orders of this Court, remains in full force and effect.

Dated: Albany, New York  
December \_\_\_\_, 2013

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HON. CHRISTIAN F. HUMMEL  
United States Magistrate Judge

Doc #01-2739497.2



# ***Exhibit B***

**William J. Brown**

---

**From:** Geoffrey Smith <gsmith2307@gmail.com>  
**Sent:** Monday, December 02, 2013 2:46 PM  
**To:** William J. Brown  
**Cc:** jdl@linnan-fallon.com  
**Subject:** Re: Smith Trust - Sacandaga Camp/Follow Up

Bill,

I just sent you the electric bills. There are no keys with neighbors, so they can't be provided until my Mom returns to NY, which I believe is January 8th. As it's apparent that I have absolutely no control over any assets of the trust I have not made any arrangements for the power.

Thanks,

Geoff

On Mon, Dec 2, 2013 at 10:40 AM, William J. Brown <[WBrown@phillipslytle.com](mailto:WBrown@phillipslytle.com)> wrote:

Geoff,

Just following up on my question below regarding whether there is a set of keys with a neighbor.

Also, I have not received any recent utility bills from you. Do you have them?

Finally, did you make any arrangements to have the electrical service repaired/restored to the white camp building per my prior email inquiry.

Bill

William J. Brown  
Partner



One Canalside

125 Main Street  
Buffalo, NY 14203-2887  
Phone [716 847 7089](tel:7168477089)  
Mobile [917 864 8740](tel:9178648740)  
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Mobile [917 864 8740](tel:9178648740)  
Fax [212 308 9079](tel:2123089079)  
[WBrown@phillipslytle.com](mailto:WBrown@phillipslytle.com)  
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**From:** William J. Brown  
**Sent:** Monday, November 25, 2013 4:13 PM  
**To:** 'Geoffrey Smith'  
**Cc:** [jd1@linnan-fallon.com](mailto:jd1@linnan-fallon.com)  
**Subject:** RE: Smith Trust - Sacandaga Camp

Is there a local set of keys I can obtain, e.g. from a neighbor?

**From:** Geoffrey Smith [<mailto:gsmith2307@gmail.com>]  
**Sent:** Monday, November 25, 2013 3:48 PM  
**To:** William J. Brown  
**Cc:** [jd1@linnan-fallon.com](mailto:jd1@linnan-fallon.com)  
**Subject:** Re: Smith Trust - Sacandaga Camp

Bill,

My mother has come to Colorado for the Holidays. I don't believe she brought the keys here with her. She returns to New York on January 8th.

Geoff

On Mon, Nov 25, 2013 at 1:33 PM, William J. Brown <[WBrown@phillipslytle.com](mailto:WBrown@phillipslytle.com)> wrote:

I am writing pursuant to Judge Hummel's November 22, 2013 Memorandum-Decision and Order directing me, in my capacity as Receiver, to proceed with the sale of the Sacandaga Lake property.

I will keep you informed of the process I intend to follow once it is established. I do expect to list the property for sale in the near future. While I know you do not favor such an approach, I welcome any suggestions you have concerning a sale process which will now proceed.

My first request of you is to send to me by either Certified Mail, Return Receipt Requested or by recognized overnight courier, signature required, a working set of keys for each of the buildings on the property. I would like to receive those this week.

Our Buffalo office moved over the weekend. Our new address is:

William J. Brown, Esq.

Phillips Lytle LLP

One Canalside

125 Main Street

Buffalo, NY 14203-2887.

My phone numbers remain the same.

Bill

**We've Moved!**

As of November 25, 2013, please note our new address below:

**William J. Brown**  
Partner



One Canalside  
125 Main Street  
Buffalo, NY 14203  
Phone [716 847 7089](tel:7168477089)  
Mobile [917 864 8740](tel:9178648740)  
Fax [716 852 6100](tel:7168526100)

The New York Times Building  
620 8th Avenue  
23rd Floor  
New York, NY 10018  
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# *Exhibit C*

**William J. Brown**

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**From:** William J. Brown  
**Sent:** Thursday, December 12, 2013 3:00 PM  
**To:** jdl@linnan-fallon.com  
**Cc:** James Featherstonhaugh; 'Geoff Smith'; 'Stoelting, David' (StoeltingD@SEC.GOV); 'McGrath, Kevin' (McGrathK@SEC.GOV)  
**Subject:** SEC vs. McGinn Smith - Sacanadaga Property/Response  
**Attachments:** Lt to William Brown outling client's objections to sale of property at this time of year.doc

Jim,

I have your letter from yesterday (attached).

I was in the process of preparing an agreed order which would have implemented substantially the same procedures as had existed in the prior real property sales in this case which I have conducted (the Smith Vero Beach property and the McGinn Niskayuna residence). Those procedures worked without a problem, but I can conclude from your letter that I will be unable to reach any sort of agreement with you and your clients at this time.

I made the decision to retain a snowplowing service after giving consideration to all positions with respect to the matter. In the end, I determined that plowing was in the best interests of the estate. In fact, the private entrance road to the Smith camp is plowed at the expense of the owners on that road.

You asked me to advise you of my intentions. They are simple. I now intend to ask the Court to enter an Order in aid of administration in order to provide access and other terms necessary so that I can accomplish my duties as directed by the Court.

Bill

## LINNAN & FALLON, LLP

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SHAWN T. MAY

December 11, 2013

**VIA E-MAIL (WBrown@phillipslytle.com)**  
**& REGULAR MAIL**

William J. Brown, Esq.  
Phillips, Lytle  
One Canalside  
125 Main Street  
Buffalo, NY 14203-2887

**Re: Securities and Exchange Commission v. McGinn, Smith & Col, Inc., et. al.**  
**Case No.: 1:10-CV-457**

Dear Mr. Brown:

My client, Geoffrey Smith, acting in his capacity as the Trustee of the Trust, has expressed some concerns concerning your maintenance and oversight of the Sacandaga Lake property. I am cutting and pasting Mr. Smith's concerns here:

1. Brown is not the trustee and was only given authority to oversee the sale or rental of the camps. He is now exceeding his authority by spending the trust's money for unnecessary expenditures.
2. His proposal to contract to have the road plowed this winter is not necessary, a waste of the trust's assets, and potentially detrimental and libelous to the trust. The road has not been plowed in 70 years that the property has been in Lynn Smith's family. The camps have been winterized and secured for the season. There is no possible reason to access them because a sale could never be consummated until a prospective buyer had the opportunity to view the property in the Spring/summer. The area where the camps are located are desolate in the winter, with only one permanent resident in the entire area. By opening the road, access is given to vandals and those intending on breaking into unattended properties for the purpose of removing property that doesn't belong to them.
3. As trustee I am not comfortable with anyone having access to the property until I have had the opportunity to inventory all of the personal property in the camps and make arrangements to have it removed for the benefit of my mother, my sister and myself, to whom the property belongs to.



William J. Brown, Esq.  
December 11, 2013  
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4. The property in the winter is potentially dangerous to anyone walking around it. There is tremendous snow and ice build up on the roofs and surrounding trees. If that snow and ice were to fall upon anyone, the result could be serious injury or even death. The potential liability from such an accident would have an extreme negative impact on the assets of the trust.

Therefore, as attorney for the Trust, I must advise you that we formally object to the plowing of the road and the listing of the real property prior to a proper inventory and removal of the personal property contained therein. We further object to the showing of the property during the winter months, as set forth by Mr. Smith. This property was not designed or built to be accessed in the winter and is not occupied, or occupyable, in the winter months. Plowing the road and opening access to this remote property will increase the probability of vandalism and/or theft and will subject the property to potential liability claims for individuals who venture upon it.

In addition to the foregoing, as someone who has previously owned real property in the Adirondacks and who is familiar with the property surrounding the Great Sacandaga, this is quite simply not the time to be listing or showing summer vacation properties. The potential resale value of this property will be at its best in the Spring when the property can easily be accessed and the Summer use of the property will be on display.

As the property has been appropriately winterized and closed for the season, there will be nominal expenses associated with maintaining the property until Spring.

Please advise your intentions.

Very truly yours,

JAMES D. LINNAN

JDL:phb

cc: James D. Featherstonhaugh, Esq. (via e-mail)  
Geoffrey Smith (via e-mail)