

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 DUPLICATIVE PAPER CLAIMS**

PLEASE TAKE NOTICE that upon the Motion of William J. Brown, as Receiver, for an Order disallowing certain filed paper claims as duplicative (“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 November 16, 2017 at 9:30 a.m., seeking an Order to be entered approving the Motion.

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.

-----X

**MOTION OF WILLIAM J. BROWN, AS RECEIVER,
FOR AN ORDER DISALLOWING DUPLICATIVE 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 **Exhibit A** as duplicative of claims listed on the Claims Website (as defined below), and respectfully represents as follows:

SUMMARY OF MOTION

This Motion seeks to disallow duplicative paper claims filed by investors for the same amounts as given to those same investors by the Receiver in the 2012 claims process in

order to pay investors on only one claim for each allowed investment. If the duplicative paper claims are not disallowed, then those investors who filed such claims would have two rather than one claim for each such investment. The Receiver considers this Motion as purely procedural and not substantive. Investors with allowed claims who agreed with the claim amounts posted by the Receiver in 2012 on the confidential Claims Website did not have to file a paper claim. The investors with the Claim Numbers listed on **Exhibit A** filed duplicative paper claims nevertheless. Exhibit A has 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 21, each investor whose claim is listed on Exhibit A will receive an explanatory letter with this Motion. Brown Dec'1. ¶2.¹

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 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'1. ¶3.

¹ “Brown Dec'1. ¶__” refers to the Declaration of William J. Brown dated June [__], 2017 filed in support of the Motion.

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'l. ¶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'l. ¶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'l. ¶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 Exhibit A, many other duplicative paper claims have already been withdrawn by written investor consent through communications with the Receiver. *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.² Brown Dec'l. ¶11.

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.

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

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.

13. The Receiver has examined the filed paper claims and the claims on the Claims Website and has determined that the filed investor paper claims identified on Exhibit A (collectively, the “Duplicative Claims”) are duplicative of the corresponding claims on the Claims Website. Brown Dec’l. ¶15.

RELIEF REQUESTED

14. By this Motion, the Receiver requests that the Court enter an order disallowing the Duplicative Claims. The surviving investor claims will remain on the Claims Website, subject to any other objections by the Receiver. This relief is necessary to allow the Receiver to ensure equal treatment among the investors and to avoid any investors receiving a double recovery during the Plan of Distribution process. In addition, disallowance of the Duplicative Claims will provide a more accurate assessment of the claims of investors, which will ultimately result in the efficient distribution of the assets of the MS Entities.

BASIS FOR RELIEF

15. The Duplicative Claims represent paper claims filed by investors that are duplicative of claims listed on the Claims Website. As set forth on Exhibit A, the Duplicative

Claims are in the exact amount of the claims listed on the Claims Website. There are other filed paper claims which contain different claim amounts which will be subject to a subsequent motion.

16. Elimination of paper claims which are duplicative of others furthers the main objective of equality in the distribution of receivership assets. There is no legal or equitable basis for payment of the same claim more than once, and elimination of redundant claims will enable the Receiver to maintain a list of claims that more accurately reflects the proper existing claims.

17. Further, disallowance of the duplicative paper claims enables the Receiver to properly administer the assets of the receivership and ensure that the distribution process is not improperly delayed. As distributions are currently underway, it would be inequitable and inappropriate for investors to receive distributions on account of the Duplicative Claims because such recoveries would dilute the pool of receivership funds available to pay investors with valid, non-duplicative claims.

18. Therefore, to avoid the possibility of an investor receiving duplicative or multiple recoveries on its claim to the detriment of other investors, the Receiver requests that the Court disallow the Duplicative Claims listed on Exhibit A.

19. The Receiver reserves all rights to object on any other basis to the claims of investors or claimants including those on Exhibit A.

MEMORANDUM OF LAW

20. 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

21. 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), 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 claims are listed on Exhibit A 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 duplicative 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. ¶16.

22. The Receiver requests that the Court enter an order granting the relief requested in this Motion without a hearing with respect to those Duplicative 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").

Exhibit A

EXHIBIT A

| Claim Number | Description of Investment or Nature of Claim | Amount of Claim on Receiver's Website | Paper Claim Amount |
|---------------------|--|--|---------------------------|
| 4101 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$25,000.00 | \$25,000.00 |
| 4102 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$50,000.00 | \$50,000.00 |
| 4103 | FIIN SECURED SENIOR NOTES | \$31,826.50 | \$31,826.50 |
| 4104 | TAIN SECURED SENIOR SUBORDINATED NOTES 7.75% DUE 12/15/2009 | \$50,000.00 | \$50,000.00 |
| 4105 | FIIN SECURED SENIOR SUBORDINATED NOTES DUE 12/15/2008 | \$50,000.00 | \$50,000.00 |
| 4147 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$25,000.00 | \$25,000.00 |
| 4148 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$100,000.00 | \$100,000.00 |
| 4355 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$50,000.00 | \$50,000.00 |
| 4451 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$50,000.00 | \$50,000.00 |
| 4737 | FIRSTLINE TRUST 07 B SENIOR CONTRACT CERTIFICATES 9.50% DUE 10/01/11 | \$57,937.45 | \$57,937.45 |
| 4744 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$25,000.00 | \$25,000.00 |
| 4745 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$10,000.00 | \$10,000.00 |
| 4778 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$47,000.00 | \$47,000.00 |
| 4814 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$10,000.00 | \$10,000.00 |
| 4815 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE 36 | \$10,000.00 | \$10,000.00 |
| 4834 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$525,000.00 | \$525,000.00 |
| 4835 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$250,000.00 | \$250,000.00 |
| 4863 | TAIN SECURED SENIOR SUBORDINATED NOTES 7.75% DUE 12/15/2009 | \$165,000.00 | \$165,000.00 |
| 4876 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE TDMVER 18 | \$100,000.00 | \$100,000.00 |

EXHIBIT A

| Claim Number | Description of Investment or Nature of Claim | Amount of Claim on Receiver's Website | Paper Claim Amount |
|---------------------|--|--|---------------------------|
| 4879 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$25,000.00 | \$25,000.00 |
| 4880 | TDM CABLE TRUST 06 10% CONTRACT CERTIFICATES DUE 11/15/10 | \$20,000.00 | \$20,000.00 |
| 4881 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$10,000.00 | \$10,000.00 |
| 4889 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$25,000.00 | \$25,000.00 |
| 4890 | TDM CABLE TRUST 06 10% CONTRACT CERTIFICATES DUE 11/15/10 | \$20,000.00 | \$20,000.00 |
| 4891 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$10,000.00 | \$10,000.00 |
| 4909 | FIRSTLINE TRUST 07 9.25% SENIOR CONTRACT CERTIFICATES DUE 09/01/10 | \$22,120.90 | \$22,120.90 |
| 4910 | TDMM CABLE SR TRUST 09 9% | \$19,483.15 | \$19,483.15 |
| 4970 | FIIN SECURED SENIOR SUBORDINATED NOTES DUE 12/15/2008 | \$5,000.00 | \$5,000.00 |
| 4971 | FIIN SECURED SENIOR SUBORDINATED NOTES DUE 12/15/2008 | \$20,000.00 | \$20,000.00 |
| 4972 | TAIN SECURED SENIOR SUBORDINATED NOTES 7.75% DUE 12/15/2009 | \$10,000.00 | \$10,000.00 |
| 5179 | FAIN 10.25% SECURED JUNIOR NOTES DUE 11/15/2010 | \$50,000.00 | \$50,000.00 |
| 5180 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$20,000.00 | \$20,000.00 |
| 5181 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$40,000.00 | \$40,000.00 |
| 5182 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$50,000.00 | \$50,000.00 |
| 5254 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE 36 | \$10,000.00 | \$10,000.00 |
| 5355 | McGinn, Smith Firstline Funding, LLC | \$25,000.00 | \$25,000.00 |
| 5383 | FAIN 10.25% SECURED JUNIOR NOTES DUE 11/15/2010 | \$40,000.00 | \$40,000.00 |
| 5384 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$25,000.00 | \$25,000.00 |
| 5385 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$25,000.00 | \$25,000.00 |
| 5386 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$50,000.00 | \$50,000.00 |
| 5444 | TDM Cable Funding LLC | \$50,000.00 | \$50,000.00 |
| 5471 | McGinn, Smith Transaction Funding Corp. | \$250,000.00 | \$250,000.00 |
| 5472 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$25,000.00 | \$25,000.00 |

EXHIBIT A

| Claim Number | Description of Investment or Nature of Claim | Amount of Claim on Receiver's Website | Paper Claim Amount |
|---------------------|---|--|---------------------------|
| 5473 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE 36 | \$25,000.00 | \$25,000.00 |
| 5499 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$50,000.00 | \$50,000.00 |
| 5531 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$45,000.00 | \$45,000.00 |
| 5546 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE 36 | \$50,000.00 | \$50,000.00 |
| 5547 | FAIN SECURED SENIOR SUBORDINATED NOTES | \$100,000.00 | \$100,000.00 |
| 5548 | FIIN SECURED SENIOR SUBORDINATED NOTES DUE 12/15/2008 | \$55,000.00 | \$55,000.00 |
| 5549 | TAIN SECURED SENIOR NOTES | \$9,093.29 | \$9,093.29 |
| 5550 | TAIN SECURED SENIOR NOTES | \$4,546.64 | \$4,546.64 |
| 5551 | TAIN SECURED SENIOR NOTES | \$113,666.07 | \$113,666.07 |
| 5554 | FIIN SECURED SENIOR NOTES | \$9,093.29 | \$9,093.29 |
| 5555 | FIIN SECURED SENIOR NOTES | \$150,039.22 | \$150,039.22 |
| 5556 | FAIN SECURED SENIOR NOTES | \$25,758.70 | \$25,758.70 |
| 5557 | FAIN SECURED SENIOR NOTES | \$27,598.61 | \$27,598.61 |
| 5558 | FAIN SECURED SENIOR SUBORDINATED NOTES | \$125,000.00 | \$125,000.00 |
| 5559 | TAIN SECURED SENIOR NOTES | \$45,466.43 | \$45,466.43 |
| 5560 | TAIN SECURED SENIOR NOTES | \$54,559.72 | \$54,559.72 |
| 5561 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE 36 | \$100,000.00 | \$100,000.00 |
| 5563 | FIRSTLINE TRUST 07 9.25% SENIOR CONTRACT CERTIFICATES DUE 09/01/10 | \$55,302.25 | \$55,302.25 |
| 5694 | TDMM Cable Funding LLC | \$100,000.00 | \$100,000.00 |
| 5702 | TDMM BENCHMARK TRUST 09 12% | \$25,000.00 | \$25,000.00 |
| 5781 | FIIN SECURED SENIOR SUBORDINATED NOTES DUE 12/15/2008 | \$75,000.00 | \$75,000.00 |
| 5782 | FIIN SECURED SENIOR SUBORDINATED NOTES DUE 12/15/2008 | \$125,000.00 | \$125,000.00 |
| 5783 | McGinn, Smith Capital Holdings Corp. | \$50,000.00 | \$50,000.00 |
| 5784 | McGinn, Smith Transaction Funding Corp. | \$25,000.00 | \$25,000.00 |
| 5785 | McGinn, Smith Transaction Funding Corp. | \$75,000.00 | \$75,000.00 |
| 5832 | FIRSTLINE TRUST 07 B SENIOR CONTRACT CERTIFICATES 9.50% DUE 10/01/11 | \$82,767.79 | \$82,767.79 |
| 5833 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE 36 | \$115,000.00 | \$115,000.00 |
| 5834 | TDM VERIFIER TRUST 08 CONTRACT CERTIFICATE 36 | \$130,000.00 | \$130,000.00 |

EXHIBIT A

| Claim Number | Description of Investment or Nature of Claim | Amount of Claim on Receiver's Website | Paper Claim Amount |
|---------------------|---|--|---------------------------|
| 5835 | McGinn, Smith Firstline Funding, LLC | \$14,000.00 | \$14,000.00 |
| 5945 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$700,000.00 | \$700,000.00 |
| 6083 | TAIN SECURED SENIOR SUBORDINATED NOTES 7.75% DUE 12/15/2009 | \$200,000.00 | \$200,000.00 |
| 6122 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$15,000.00 | \$15,000.00 |
| 6125 | Cruise Charter Ventures, LLC | \$100,000.00 | \$100,000.00 |
| 6126 | FIIN 10.25% SECURED JUNIOR NOTES DUE 12/15/2008 | \$200,000.00 | \$200,000.00 |
| 6131 | McGinn, Smith Firstline Funding, LLC | \$300,000.00 | \$300,000.00 |
| 6132 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$75,000.00 | \$75,000.00 |
| 6134 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$20,000.00 | \$20,000.00 |
| 6312 | TDMM BENCHMARK TRUST 09 12% | \$150,000.00 | \$150,000.00 |
| 6325 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$25,000.00 | \$25,000.00 |
| 6331 | FIIN 10.25% SECURED JUNIOR NOTES DUE 12/15/2008 | \$30,000.00 | \$30,000.00 |
| 6336 | TDM CABLE TRUST 06 10% CONTRACT CERTIFICATES DUE 11/15/10 | \$20,000.00 | \$20,000.00 |
| 6337 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$14,000.00 | \$14,000.00 |
| 6346 | TDM CABLE TRUST 06 10% CONTRACT CERTIFICATES DUE 11/15/10 | \$20,000.00 | \$20,000.00 |
| 6347 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$20,000.00 | \$20,000.00 |
| 6401 | FIIN 10.25% SECURED JUNIOR NOTES DUE 12/15/2008 | \$25,000.00 | \$25,000.00 |
| 6467 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$10,000.00 | \$10,000.00 |
| 6468 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$50,000.00 | \$50,000.00 |
| 6473 | McGinn, Smith Transaction Funding Corp. | \$25,000.00 | \$25,000.00 |
| 6474 | TDM CABLE TRUST 06 9.25% 48 MONTHS CONTRACT CERTIFICATES 11/15/10 | \$25,000.00 | \$25,000.00 |
| 6475 | TDM LUXURY CRUISE TRUST 07 CONTRACT CERTIFICATES 10% DUE 9/1/11 | \$23,125.00 | \$23,125.00 |

EXHIBIT A

| Claim Number | Description of Investment or Nature of Claim | Amount of Claim on Receiver's Website | Paper Claim Amount |
|---------------------|--|--|---------------------------|
| 6477 | McGinn, Smith Firstline Funding, LLC | \$10,000.00 | \$10,000.00 |
| 6480 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$10,000.00 | \$10,000.00 |
| 6481 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$50,000.00 | \$50,000.00 |
| 6484 | FAIN SECURED SENIOR SUBORDINATED NOTES | \$15,000.00 | \$15,000.00 |
| 6485 | FAIN SECURED SENIOR SUBORDINATED NOTES | \$70,000.00 | \$70,000.00 |
| 6486 | FEIN SECURED SENIOR SUBORDINATED NOTES DUE 01/30/2009 | \$10,000.00 | \$10,000.00 |
| 6490 | TAIN SECURED SENIOR SUBORDINATED NOTES 7.75% DUE 12/15/2009 | \$20,000.00 | \$20,000.00 |
| 6494 | FIRSTLINE TRUST 07 B JUNIOR CONTRACT CERTIFICATES 11% DUE 10/01/12 | \$19,839.23 | \$19,839.23 |
| 6495 | FORTRESS TRUST 08 | \$19,911.10 | \$19,911.10 |
| 6496 | McGinn, Smith Transaction Funding Corp. | \$25,000.00 | \$25,000.00 |
| 6499 | McGinn, Smith Firstline Funding, LLC | \$300,000.00 | \$300,000.00 |
| 6500 | McGinn, Smith Funding, LLC | \$20,000.00 | \$20,000.00 |
| 6501 | TDMM BENCHMARK TRUST 09 10% | \$85,000.00 | \$85,000.00 |
| 6502 | TDMM BENCHMARK TRUST 09 11% | \$145,000.00 | \$145,000.00 |
| 6503 | TDMM BENCHMARK TRUST 09 9% | \$70,000.00 | \$70,000.00 |
| 6504 | TDMM Cable Funding LLC | \$30,200.01 | \$30,200.01 |
| 6599 | FAIN 10.25% SECURED JUNIOR NOTES DUE 11/15/2010 | \$30,000.00 | \$30,000.00 |
| 6600 | FEIN 10.25% SECURED JUNIOR NOTES DUE 01/30/2009 | \$45,000.00 | \$45,000.00 |
| 6601 | FIIN 10.25% SECURED JUNIOR NOTES DUE 12/15/2008 | \$106,000.00 | \$106,000.00 |
| 6602 | TAIN SECURED JUNIOR NOTES DUE 12/15/2009 | \$56,000.00 | \$56,000.00 |
| 6800 | FAIN SECURED SENIOR SUBORDINATED NOTES | \$20,000.00 | \$20,000.00 |
| 6813 | FAIN 10.25% SECURED JUNIOR NOTES DUE 11/15/2010 | \$25,000.00 | \$25,000.00 |
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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, :
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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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**DECLARATION OF WILLIAM J. BROWN, AS RECEIVER, IN
SUPPORT OF MOTION FOR AN ORDER DISALLOWING
DUPLICATIVE 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 Exhibit A to the Motion as duplicative of claims listed on the Claims Website (as defined below). Exhibit A has 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 16, each investor whose claim is listed on Exhibit A 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 (“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 Exhibit A, many other duplicative paper claims have already been withdrawn by written investor consent through communications with the Receiver.

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.¹

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

¹ 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.

15. I have examined the filed paper claims and the claims on the Claims Website and have determined that the filed investor paper claims identified on Exhibit A to the Motion are duplicative of the corresponding claims on the Claims Website.

16. In connection with service of the Motion and all accompanying papers, including this Declaration, I will mail to all investors identified on Exhibit A 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 duplicative 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: September 20, 2017

/s/ William J. Brown
William J. Brown

Doc #05-486908.2

**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

September 21, 2017

Re: McGinn Smith Plan of Distribution Process/Objection to Duplicative 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 basis that it is duplicative of a claim listed on the Receiver's Claims Website (secure website within the Receiver's website at www.mcginnsmithreceiver.com to which you have been given confidential password access). To ensure that all investors receive an equal and equitable distribution, your Filed Paper Claim is being objected to since it is duplicative of the of the claim given to you in 2012 by the Receiver. Please refer to Exhibit A attached to the Motion for information regarding your claim that is being objected to.

If you believe that your Filed Paper Claim is not duplicative to your claim listed on the Claims Website, you may file and serve a written response to the Motion seventeen days before November 16, 2017, which is October 30, 2017, 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 claim(s) 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 claim granted to you by the Receiver or 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 duplicative paper claim.

Very truly yours,



William J. Brown
Receiver

EEEht
Doc #05-486912.2
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.

-----X

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

Upon the Motion of William J. Brown, as Receiver, for an Order disallowing duplicative filed paper claims; and notice of the Motion having been given to the Securities and Exchange Commission, each investor listed on Exhibit A 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 duplicative paper claims listed on Exhibit A to the Motion is disallowed, and the rights of the Receiver to object on any other basis to the claims of investors or claimants is expressly preserved.

Dated: November ____, 2017

HON. CHRISTIAN F. HUMMEL

Doc #01-3069418.1

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.

-----X

CERTIFICATE OF SERVICE

I, Karen M. Ludlow, being at all times over 18 years of age, hereby certify that on September 21, 2017, a true and correct copy of the Notice of Motion and Motion of William J. Brown, as Receiver, for an Order Disallowing Duplicative 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.cicarelli@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
- **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
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- **James D. Linnan** jdlinnan@linnan-fallon.com, lawinfo@linnan-fallon.com
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- **Andrew Park** apark@weirpartners.com, imarciniszyn@weirpartners.com
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- **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, mheppele@bsk.com
- **Walter Weir** wweir@weirpartners.com, smorris@weirpartners.com
- **Bryan M. Westhoff** bryan.westhoff@kayescholer.com
- **Benjamin Zelsermyer** bzlaw@optonline.net, steincav@aol.com

And, I hereby certify that on September 21, 2017, 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

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Boston, MA 02110-1727

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Buffalo, NY 14202-2107

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

Dated: September 21, 2017

/s/ Karen M. Ludlow

Karen M. Ludlow

Doc #01-3069497.1