

U.S. DISTRICT COURT  
N.D. OF N.Y.  
FILED

OCT 11 2012

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

LAWRENCE K. BAERMAN, CLERK  
ALBANY

UNITED STATES OF AMERICA :

Criminal Number: 12-CR-028 (DNH)

v. :

VIOLATIONS:

18 U.S.C. § 1349 (Conspiracy);

18 U.S.C. § 1341 (Mail Fraud);

18 U.S.C. § 1343 (Wire Fraud);

15 U.S.C. §§ 78j(b) and 78ff;

17 C.F.R. § 240.10b-5 (Securities Fraud);

TIMOTHY M. MCGINN and  
DAVID L. SMITH,

26 U.S.C. § 7206(1) (Filing a False Return);

18 U.S.C. § 2 (Aiding and Abetting and Causing  
an Act to be Done)

Defendants. :

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

At all times relevant to this Superseding Indictment unless otherwise stated:

Relevant Persons and Entities

1. From in or about 1981 through on or about December 24, 2009, McGinn, Smith & Co. Inc. (the "broker-dealer") was a broker-dealer registered with the Securities and Exchange Commission ("SEC"). The broker-dealer's registration with the SEC allowed it to buy and sell securities for itself and others.

2. The broker-dealer's headquarters was in Albany, New York, and by in or about 2005, it had more than 30 registered representatives working in, among other places, its offices in Albany, Clifton Park, and New York, New York. In addition, the broker-dealer had a relationship with Lex and Smith Associates, Ltd. in King of Prussia, Pennsylvania.

3. Defendants TIMOTHY M. MCGINN and DAVID L. SMITH founded the broker-

dealer and each owned 50% of the broker-dealer until in or after about 2003, when MCGINN sold 20% of his interest in the broker-dealer to another person. From in or about September 2006 through in or about December 2009, both MCGINN and SMITH were active in the day-to-day management of the broker-dealer.

4. Among other things, the broker-dealer was engaged in the business of creating and selling unregistered securities pursuant to Regulation D of the Securities Act of 1933, 17 C.F.R. § 230.501 et seq. Sales of these unregistered securities were generally limited to certain types of investors including individuals who met minimum net worth and income requirements.

5. As part of the sales process, the broker-dealer provided investors with documents describing the unregistered securities known as private placement memoranda ("PPMs").

6. McGinn, Smith Capital Holdings, Corp. ("MS Capital") was a New York corporation owned by defendant TIMOTHY M. MCGINN (25.5%), defendant DAVID L. SMITH (25.5%), and another company controlled either directly or indirectly by MCGINN and SMITH (49%).

7. McGinn, Smith Holdings, LLC was a New York limited liability company owned by defendant TIMOTHY M. MCGINN (30%), defendant DAVID L. SMITH (50%), and another person (20%).

8. McGinn Smith Advisors, LLC was a New York limited liability company owned by McGinn, Smith Holdings, LLC and was registered as an investment advisor with the SEC.

9. From on or about September 29, 2006 through on or about January 21, 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH created the following limited liability companies which they controlled either directly or indirectly: TDM Cable Funding, LLC; NEI Capital LLC; TDMM Cable Funding, LLC; McGinn, Smith Funding LLC; and Cruise Charter

Ventures, LLC (collectively “the LLCs”).

10. McGinn, Smith Transaction Funding Corp. (“MSTF”) was a New York corporation controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH through McGinn, Smith Holdings LLC. From on or about May 2, 2008 through on or about November 26, 2008, the broker-dealer raised approximately \$6.8 million from investors for MSTF. According to the PPM for MSTF, investor money would be used to (a) provide capital to close financial transactions originated by the broker-dealer; (b) invest in other public and private securities; and (c) purchase \$1.5 million of the broker-dealer’s 2008 Series Cumulative Preferred Stock.

11. As direct and indirect owners of MSTF, defendants TIMOTHY M. MCGINN and DAVID L. SMITH owed a legal duty to investors requiring that they not put their own interests ahead of the interests of investors.

12. First Independent Income Notes, LLC (“FIIN”), First Excelsior Income Notes, LLC (“FEIN”), Third Albany Income Notes, LLC (“TAIN”), and First Advisory Income Notes, LLC (“FAIN”) (the “Four Funds”) were New York limited liability companies controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH through McGinn Smith Advisors, LLC. From in or about 2003 through in or about 2005, the broker-dealer raised more than \$90 million from investors for the Four Funds. MS Capital was the trustee for the Four Funds. As direct and indirect owners of the Four Funds, defendants TIMOTHY M. MCGINN and DAVID L. SMITH owed a legal duty to investors requiring that they not put their own interests ahead of the interests of investors. McGinn Smith Advisors, LLC was the investment adviser for the Four Funds. By December 2, 2007, the investments held by the Four Funds were worth approximately \$49 million less than the amount owed to investors and, as a result, during 2008, interest payments to some investors were cut,

while interest payments to other investors were suspended.

**The Trusts**

13. Between on or about October 23, 2006 and on or about July 10, 2009, on the following dates, defendants TIMOTHY M. MCGINN and DAVID L. SMITH used MS Capital to create the following 17 trusts ("the Trusts") as defined in declarations of trust for each of the Trusts:

<b>Name of Trust</b>	<b>Trust Creation Date</b>
TDM Cable Trust 06	10/23/06
TDM Verifier Trust 07	1/18/07
Firstline Trust 07	5/19/07
Firstline Sr. Trust 07	5/19/07
TDM Luxury Cruise Trust 07	7/11/07
Firstline Trust 07 Series B	10/15/07
Firstline Sr. Trust 07 Series B	10/15/07
TDM Verifier Trust 08	12/11/07
Integrated Excellence Jr. Trust 08	5/27/08
Integrated Excellence Sr. Trust 08	5/27/08
Fortress Trust 08	9/10/08
TDM Verifier Trust 09	12/12/08
TDMM Cable Jr. Trust 09	1/16/09
TDMM Cable Sr. Trust 09	1/16/09
TDM Verifier Trust 07R	1/29/09
TDM Verifier Trust 08R	6/30/09
TDMM Benchmark Trust 09	7/10/09

14. From in or about October 2006 through in or about December 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH used the broker-dealer to offer and sell

approximately \$37 million of unregistered securities to investors in the form of investments in the Trusts.

15. According to the PPMs prepared for the offering and sale of these investments in the Trusts, after deducting fees and other deal costs, such as underwriting fees, investor money would be provided to one of the LLCs or MSTF, which had entered into or would enter into an agreement with a third party requiring payments from the third party. Those agreements were related to (a) burglar alarm, broadband, cable, and telephone services; (b) loans to companies providing those services; (c) guaranteed payment units (scheduled payments) from an entity providing capital to companies providing those services; and (d) luxury cruise charters and travel agencies (the "Agreements").

16. According to the PPMs, investors would receive principal and interest payments ranging from 7.75% to 13% over twelve to sixty-six months. When there were two classes of contract certificates – the senior and junior classes – the senior certificates offered a lower interest rate and a higher priority of repayment, while the junior certificates offered a higher interest rate and a lower priority of repayment.

17. According to the PPMs, the broker-dealer would receive approximately \$2.2 million in underwriting fees from the Trusts. Between in or about 2006 and 2009, the broker-dealer received in excess of \$6 million in connection with transactions related to the Trusts, of which approximately \$1.8 million was paid directly from the Trusts and booked as underwriting fees. Approximately 80% of the more than \$6 million paid to the broker-dealer consisted of investor money.

18. The trustee for each of the trusts was MS Capital, and, according to the PPMs, the trustee would not receive any fees for its services.

19. As direct and indirect owners of MS Capital, defendants TIMOTHY M. MCGINN and DAVID L. SMITH owed a legal duty to investors requiring that they not put their own interests ahead of the interests of investors.

20. With the exception of TDM Cable Trust 06, the declarations of trust for all of the Trusts, which were attached to the PPMs, limited the use of investor money to the direct or indirect acquisition of revenue streams created by the Agreements and temporary investments in (1) certificates of deposit; (2) short term AAA rated debt obligations regularly traded on a recognized exchange in the United States; or (3) obligations issued by the United States Treasury or other obligations backed by the full force and credit of the United States (the "Permitted Investments").

**Defendants MCGINN and SMITH Fail to Disclose to Investors in the Firstline Trusts That The Borrower Had Filed a Bankruptcy Petition and That Investors Had Been and Would Be Paid with Money Improperly Diverted from Unrelated Entities**

21. Firstline Security, Inc. ("Firstline") was a Utah corporation engaged in the business of selling primarily residential security alarm contracts.

22. ADT Security Services, Inc. ("ADT") was Firstline's dealer for security alarm contracts, and ADT had a security interest in all alarm contracts generated by Firstline.

23. On or about May 9, 2007, defendant TIMOTHY M. MCGINN, as Chairman of McGinn, Smith Funding LLC, executed an agreement with Firstline promising to lend Firstline approximately \$2.8 million secured by alarm contracts generated by Firstline (the "May Loan"). From in or about September 2007 through in or about April 2012, Firstline was required to make monthly payments on the May Loan.

24. On or about May 19, 2007, MS Capital formed Firstline Trust 07 for the purpose of acquiring two classes in the Firstline financing.

25. Between on or about May 24, 2007, and on or about January 4, 2008, the broker-dealer raised approximately \$3.7 million from investors who purchased unregistered securities from Firstline Trust 07 and Firstline Sr. Trust 07 (the "Firstline Trusts") in return for monthly payments on their investments to be paid from the revenue stream produced by the May Loan. In connection with these sales, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to Firstline Trust 07 and Firstline Sr. Trust 07 investors that in connection with the May Loan they had paid themselves \$620,000 from McGinn, Smith Funding LLC above and beyond what was disclosed in the PPMs.

26. From in or about September 2007 through in or about December 2007, Firstline made the scheduled monthly payments on the May Loan.

27. On or about August 8, 2007, Firstline's Chief Executive Officer told defendant TIMOTHY M. MCGINN that ADT had informed Firstline that Firstline was in breach of its dealer agreement, and on October 4, 2007, Firstline's attorney told McGinn, Smith Funding LLC that ADT might sue Firstline and seek more than \$7.5 million in damages related to the breach (the "Potential ADT Litigation").

28. Beginning on or about August 8, 2007, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose the Potential ADT Litigation to the existing and prospective Firstline Trust investors.

29. On or about October 4, 2007, defendant TIMOTHY M. MCGINN, as Chairman of McGinn, Smith Funding LLC, executed an agreement with Firstline promising to lend Firstline approximately \$2.4 million secured by alarm contracts generated by Firstline (the "October Loan"). From in or about January 2008 through in or about October 2012, Firstline was required to make

monthly payments on the October Loan.

30. Between in or about October 29, 2007, and in or about June 16, 2008, the broker-dealer raised approximately \$3.2 million from investors who purchased unregistered securities from Firstline Trust 07 Series B and Firstline Sr. Trust 07 Series B (the "Firstline Series B Trusts") in return for monthly payments on their investments from the revenue stream produced by the October Loan. In connection with these sales, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to Firstline Series B Trust investors (a) the Potential ADT Litigation; and (b) that in connection with the October Loan they planned to pay themselves \$315,000 from McGinn, Smith Funding LLC above and beyond what was disclosed in the PPMs.

31. On or about November 20, 2007, ADT filed a lawsuit in Arapahoe County, Colorado against Firstline, the broker-dealer, and others alleging that Firstline was in breach of the dealer agreement and seeking the appointment of a receiver for Firstline (the "ADT Litigation").

32. Between on or about November 20, 2007 and June 16, 2008, in connection with the sale of contract certificates for the Firstline Series B Trusts, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, in violation of their legal duty to disclose material information to investors, concealed, disguised, and failed to disclose the ADT Litigation to existing and prospective Firstline Series B Trust investors.

33. Beginning in or about January 2008, Firstline stopped making payments on the May Loan and failed to make its first payment on the October Loan.

34. On or about January 25, 2008, Firstline filed a voluntary petition for Chapter 11 bankruptcy in United States Bankruptcy Court in the District of Utah.

35. From in or about January 2008 through in or about September 2009, Firstline made

no payments on the May and October Loans, and there was no income stream to make payments to investors.

36. From in or about January 2008 through in or about September 2009, the Firstline and Firstline Series B Trusts continued to make approximately \$2 million in payments to investors by diverting money from trusts and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH, including, among other trusts and entities, TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; TDM Verifier Trust 07R; and TDM Cable Funding, LLC when, as MCGINN and SMITH then well knew, this was not a permitted use of investor funds in those trusts as defined by the relevant PPMs and the declarations of trust. Defendant TIMOTHY M. MCGINN directed these improper diversions of funds, which misled the Firstline and Firstline Series B investors into believing that the income streams in which they had invested were performing well.

37. From in or about January 2008 through in or about September 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to existing and prospective Firstline and Firstline Series B investors that (a) Firstline had defaulted on the May and October Loans; (b) Firstline had filed for bankruptcy; and (c) contrary to the PPMs for the Firstline and Firstline Series B Trusts, investor payments had been and would be made using money improperly diverted from entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH including, among other trusts and entities, TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; TDM Verifier Trust 07R; and TDM Cable Funding, LLC.

38. From in or about January 2008 through in or about September 2009, defendants

memorandum from the general counsel for the broker-dealer. The memorandum falsely stated that (a) post-bankruptcy investor payments had been funded by an unidentified lender when, as MCGINN and SMITH then well knew, the payments to investors had been made with money improperly diverted from trusts and entities controlled by MCGINN and SMITH; and (b) Firstline had concealed the Potential ADT Litigation when, as MCGINN and SMITH then well knew, Firstline had disclosed the Potential ADT Litigation approximately two years earlier.

**Defendants MCGINN and SMITH Fail to Disclose to Investors in the Integrated Excellence Trusts that Their Money Would be Improperly Diverted to Pay Investors in Unrelated Entities and that They Had Been and Would be Paid with Money Improperly Diverted from Unrelated Entities**

41. Integrated Excellence, Inc. was a Georgia corporation engaged in the business of selling residential security alarm contracts. Integrated Excellence Funding, LLC was a Georgia corporation created for the purpose of obtaining capital for Integrated Excellence, Inc.

42. On or about May 27, 2008, MS Capital formed Integrated Excellence Sr. Trust 08 and Integrated Excellence Jr. Trust 08 ("the Integrated Excellence Trusts") for the purpose of acquiring two classes in the Integrated Excellence Funding, LLC financing.

43. On or about May 28, 2008, defendant TIMOTHY M. MCGINN, as Chairman of MSTF, executed an agreement with Integrated Excellence Funding, LLC promising to lend money to Integrated Excellence Funding, LLC secured by alarm contracts generated by Integrated Excellence, Inc. From on or about May 29, 2008 through on or about August 1, 2008, Integrated Excellence Funding, LLC borrowed approximately \$697,815 under the terms of that agreement (the "Integrated Excellence Loans").

44. Between in or about June 2008 and in or about August 2013, Integrated Excellence Funding, LLC was required to make monthly payments on the Integrated Excellence Loans.

45. Between on or about June 9, 2008 and on or about September 26, 2008, the broker-dealer raised approximately \$1.2 million from investors who purchased unregistered securities from the Integrated Excellence Trusts in return for monthly payments on their investments to be paid from the revenue stream produced by the Integrated Excellence Loans.

46. On or about July 1, 2008 and on or about July 15, 2008, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, who were officers and owners of the Trustee for Integrated Excellence Sr. Trust 08, for their own benefit and without authorization, improperly diverted \$85,000 from an escrow account holding investor funds for Integrated Excellence Sr. Trust 08 to their personal bank accounts, and between in or about July 2008 and in or about April 2010, MCGINN and SMITH concealed, disguised, and failed to disclose to investors that they had done so.

47. In or about August 2008, defendant TIMOTHY M. MCGINN directed that \$142,000 be improperly diverted from an escrow account holding investor funds for Integrated Excellence Jr. Trust 08 and be used to make investor payments to Firstline Sr. Trust 07 investors and TDM Luxury Cruise Trust 07 investors, and from in or about August 2008 through in or about April 2010, defendants MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to (a) Integrated Excellence Jr. Trust 08 investors that they did so when, as MCGINN and SMITH then well knew, this was not a permitted use of investor funds as defined by the PPMs and declarations of trust; and (b) Firstline Sr. Trust 07 and TDM Luxury Cruise Trust 07 investors that, contrary to the relevant PPMs and declarations of trust, their investor payments had been and would be made using money improperly diverted from the Integrated Excellence Jr. Trust 08.

48. From in or about June 2008 through in or about December 2009, Integrated

Excellence Funding, LLC, through another entity, made monthly payments on the Integrated Excellence Loans totaling approximately \$244,709, which loan payments were not sufficient to cover payments of approximately \$283,159 due to the Integrated Excellence investors.

49. Between in or about June 2008 and in or about December 2009, defendant TIMOTHY M. MCGINN directed that the Integrated Excellence Trusts continue to make payments due to investors by diverting money from trusts and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH, including, among other trusts and entities, TDM Luxury Cruise Trust 07 and TDMM Cable Sr. Trust 09 when, as MCGINN and SMITH then well knew, this was not a permitted use of investor funds as defined by the relevant PPMs and the declarations of trust, and between in or about June 2008 and in or about February 2010, MCGINN and SMITH concealed, disguised, and failed to disclose to investors in the TDM Luxury Cruise Trust 07 and TDMM Cable Sr. Trust 09 that they had done so. These payments misled the Integrated Excellence Trust investors into believing that the income streams in which they had invested were performing well.

50. Between in or about June 2008 and in or about February 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to the Integrated Excellence investors that (i) the Integrated Excellence Loans were not generating sufficient revenue to make monthly investor payments; and (ii) contrary to the PPMs for the Integrated Excellence Trusts, investor payments had been and would be made using money improperly diverted from trusts and entities controlled by MCGINN and SMITH including, among other trusts and entities, TDM Luxury Cruise Trust 07 and TDMM Cable Sr. Trust 09.

**Defendants TIMOTHY M. MCGINN and DAVID L. SMITH Improperly \$998,000 from McGinn, Smith Transaction Funding Corp. and Three of the Four Funds and Direct False Accounting Entries Regarding These Transactions**

51. In or about May 2008, defendant TIMOTHY M. MCGINN identified his best clients whose investments in, among other things, the Four Funds, would no longer be paying them as much as they had been promised, and MCGINN decided to continue to pay them by improperly diverting money from unrelated entities.

52. Between on or about May 15, 2008 and on or about July 8, 2009, defendant TIMOTHY M. MCGINN, who was an officer and owner of McGinn, Smith Transaction Funding Corp., without authorization, improperly diverted more than \$473,000 from an escrow account holding investor funds for MSTF to pay the preferred clients when, as MCGINN then well knew, this was not a permitted use of investor funds as defined by the PPM. Between in or about May 2008 and in or about April 2010, MCGINN and SMITH concealed, disguised, and failed to disclose to MSTF investors in that MCGINN had done so.

53. In or about November 2008 and April 2009, the broker-dealer did not have sufficient funds available to pay its employees, and on or about November 14, 2008, November 28, 2008, and April 15, 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH (a) without authorization, improperly diverted \$525,000 from three of the Four Funds to pay the broker-dealer's employees, when as MCGINN and SMITH then well knew, this was not a permitted use of investor funds as defined by the PPMs for the Four Funds; and (b) improperly used MSTF to conceal and disguise the true nature of these transactions by passing the money from three of the Four Funds through MSTF and then to the broker-dealer. From in or about November 2008 through in or about April 2010, MCGINN and SMITH concealed, disguised, and failed to disclose to the Four Fund

investors that they had done so.

54. From on or about October 12, 2009 through in or about April 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH misled the broker-dealer's regulator, Financial Industry Regulatory Authority, Inc. ("FINRA"), about the diversions for the preferred clients and the payroll diversions by (a) directing the creation of false accounting entries to conceal the true nature of these transactions in response to a September 30, 2009 document request from FINRA; and (b) causing the submission of these false accounting entries to FINRA.

**Defendants TIMOTHY M. MCGINN and DAVID L. SMITH Improperly Divert \$4.1 Million for Their Own Benefit and the Benefit of a Senior Managing Director of the Broker-Dealer**

55. Between on or about October 2, 2006 and on or about August 28, 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH for their own benefit and the benefit of Matthew Rogers, a senior managing director of the broker-dealer, and without authorization, improperly diverted approximately \$4.1 million above and beyond what was disclosed in the relevant PPMs from the LLCs; Integrated Excellence Sr. Trust 08; TDMM Cable Jr. Trust 09; and McGinn, Smith Transaction Funding Corp. ("MSTF") as follows when, as MCGINN and SMITH then well knew, these transfers were not a permitted use of investor funds as defined by the relevant PPMs and declarations of trust:

- (A) Between on or about October 2, 2006 and on or about August 28, 2009, in connection with transactions related to many of the Trusts, MCGINN and SMITH improperly diverted approximately \$3.8 million from the LLCs to their own and Rogers's personal bank accounts and to pay \$40,000 to Waterville Golf Links in Ring of Kerry, Ireland for a membership for Rogers;

- (B) In or about July 2008, MCGINN and SMITH, who were officers and owners of the Trustee for Integrated Excellence Sr. Trust 08 (MS Capital), improperly diverted approximately \$85,000 directly from an escrow account holding investor funds for Integrated Excellence Sr. Trust 08 to their personal bank accounts;
- (C) On or about April 30, 2009, MCGINN, who was an officer and owner of the Trustee for TDMM Cable Jr. Trust 09 (MS Capital), improperly diverted approximately \$30,000 directly from an escrow account holding investor funds for TDMM Cable Jr. Trust 09 to his personal bank account; and
- (D) From on or about August 22, 2008 through on or about July 8, 2009, MCGINN improperly diverted approximately \$230,000 from MSTF, to his personal bank accounts, and on or about February 27, 2009, MCGINN repaid \$100,000 of the money that he had taken.

56. Between in or about October 2006 and in or about April 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to investors in the Trusts that for their own benefit and the benefit of Matthew Rogers and without authorization they had improperly diverted approximately \$4.1 million from the LLCs; Integrated Excellence Sr. Trust 08; TDMM Cable Jr. Trust 09; and MSTF above and beyond what was disclosed in the relevant PPMs. MCGINN received approximately \$1,616,142 (approximately \$1,386,142 of which was related to the Trusts), and SMITH received approximately \$1,567,000.

57. Between in or about October 2006 and in or about August 2009, defendant TIMOTHY M. MCGINN used the money that had been improperly diverted to his personal bank

accounts for, among other things: (a) expenses related to his homes in Niskayuna, New York (at least \$129,997) and Boca Raton, Florida (at least \$63,808); (b) thoroughbred race horses (at least \$39,458); (c) alimony (at least \$147,942); (d) loan payments to defendant DAVID L. SMITH and his wife (at least \$255,000); (e) country club expenses at, among others, Waterville Golf Links in Ring of Kerry, Ireland; Pine Tree Golf Club in Boynton Beach, Florida; and Schuyler Meadows in Loudonville, New York (at least \$54,414); (f) payments to investment accounts (at least \$62,250); and (g) income tax payments (at least \$89,642).

58. Between in or about October 2006 and in or about August 2009, defendant DAVID L. SMITH used the money that had been improperly diverted to his personal bank accounts for, among other things: (a) expenses related to his homes in Orchid Island, Florida (at least \$145,445) and Saratoga Springs, New York (at least \$86,334), (b) country club expenses at among others, Waterville Golf Links in Ring of Kerry, Ireland; Orchid Island Golf and Beach Club in Vero Beach, Florida; Schuyler Meadows in Loudonville, New York; and Saratoga Golf and Polo Club in Saratoga, New York (at least \$57,928); (c) payments to investment accounts (at least \$810,000); and (d) income tax payments (at least \$145,092).

**Defendants TIMOTHY M. MCGINN and DAVID L. SMITH Direct  
False Accounting Entries Regarding the Improperly Diverted \$4.1 Million  
and Fail to Declare It On Their Tax Returns**

59. In or about October 2007, defendant DAVID L. SMITH directed accountants at the broker-dealer and an outside accounting firm to reclassify transactions regarding money improperly diverted in 2006 from TDM Cable Funding, LLC to the personal bank accounts of MCGINN, SMITH, and Rogers as “loans” when, as he then well knew, (a) they were not “loans”; (b) they were not a permitted use of investor funds as defined by the PPM and the declaration of trust for TDM

Cable Trust 06; and (c) they were not disclosed in the TDM Cable Trust 06 PPM as “loans.”

60. Between in or about October 2007 and in or about the fall of 2009, at the direction of defendants TIMOTHY M. MCGINN and DAVID L. SMITH, accountants at the broker-dealer continued to book the money that had been improperly diverted from the LLCs as “loans” when, as MCGINN and SMITH then well knew (a) they were not “loans,” (b) they were not a permitted use of investor funds as defined by the relevant PPMs and the declarations of trust, and (c) they were not disclosed in the relevant PPMs as “loans.”

61. Between in or about October 2007 and in or about October 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH and Matthew Rogers failed to declare the \$4.1 million improperly diverted for their own benefit on their federal income tax returns for tax years 2006, 2007, 2008, and 2009.

62. In or about November 2008 and in or about the spring of 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH did not include any of the money that had been improperly diverted for their own benefit as “loans” on audited personal financial statements prepared by their outside accountant.

63. From in or about September 2009 through in or about January 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH misled the broker-dealer’s regulator, Financial Industry Regulatory Authority, Inc. (“FINRA”), about the money that had been diverted from the LLCs by (1) directing the creation of backdated promissory notes to support the false “loan” accounting entries discovered by FINRA; and (2) causing the submission of the backdated promissory notes to FINRA.

64. On or about November 2, 2009, after discovering that defendant TIMOTHY M.

MCGINN had improperly diverted money from MSTF, defendant DAVID L. SMITH, to conceal the source of the diverted funds, directed an accountant for the broker-dealer to make a false accounting entry indicating that MCGINN had taken \$130,000 from NEI Capital LLC.

**Count One**  
**(Conspiracy to Commit Mail and Wire Fraud)**

65. Paragraphs One through Sixty-Four are hereby realleged and incorporated by reference as if fully set forth herein.

66. From on or about September 29, 2006 through on or about April 20, 2010, within the Northern District of New York and elsewhere, defendants TIMOTHY M. MCGINN and DAVID L. SMITH and others conspired to commit the following offenses:

a. **Mail Fraud**, by devising and intending to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, promises, and material omissions and for the purpose of executing such scheme and artifice and attempting so to do, knowingly placed, caused to be placed, and took and received in a post office and authorized depository for mail certain matters, documents, letters, and mailings to be sent or delivered by the United States Postal Service and/or by any private or commercial interstate carrier, in violation of Title 18, United States Code, Section 1341;

b. **Wire Fraud**, by devising and intending to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, promises, and material omissions, and for the purpose of

executing such scheme and artifice and attempting so to do, transmitted and caused to be transmitted by means of wire, radio, and television communication in interstate commerce any writings, signs, signals, and sounds, in violation of Title 18, United States Code, Section 1343.

#### **Purpose**

67. A purpose of the conspiracy was to mislead investors and FINRA regarding the safekeeping and use of investor money by the Trusts, McGinn, Smith Transaction Funding Corp. ("MSTF"), and the Four Funds; the risks of the Trust, MSTF, and Four Fund offerings; the performance of the underlying income streams; the source of payments to investors; and the improper diversion of investor money; all done in order to obtain money from investors and enrich themselves.

#### **Manner and Means**

68. MCGINN, SMITH, and their co-conspirators made and caused to be made numerous material misrepresentations and material omissions designed to mislead prospective and existing investors and FINRA regarding the risks of the Trust, MSTF, and Four Fund offerings; the use of investor money; the performance of the underlying income streams; the source of investor payments; and the improper diversion of investor money.

69. As a result of the material misrepresentations and material omissions by MCGINN, SMITH and their co-conspirators, investors in the Trusts were not aware that MCGINN and SMITH had improperly diverted money for their own use and without authorization directly from escrow accounts containing investor money for Integrated Excellence Sr. Trust 08 and TDMM Cable Jr. Trust 09.

70. As a result of the material misrepresentations and material omissions by MCGINN,

SMITH and their co-conspirators, investors in the Trusts were not aware that MCGINN and SMITH had improperly diverted money from an escrow account containing investor money for Integrated Excellence Jr. Trust 08 to make payments to Firstline Sr. Trust 07 and TDM Luxury Cruise Trust 07 investors.

71. As a result of the material misrepresentations and material omissions by MCGINN, SMITH, and their co-conspirators, investors in the Trusts were not aware that for their own benefit and the benefit of Matthew Rogers and without authorization, MCGINN and SMITH had improperly diverted \$3.9 million from the LLCs above and beyond what was disclosed in the PPMs.

72. As a result of the material misrepresentations and material omissions by MCGINN, SMITH, and their co-conspirators, investors in MSTF were not aware that (a) MCGINN, without authorization, had improperly diverted more than \$473,000 from an escrow account containing investor money for MSTF to pay the preferred clients; (b) MCGINN and SMITH had improperly used MSTF to conceal and disguise the improper transfer of \$525,000 from three of the Four Funds to the broker-dealer to pay the broker-dealer's employees, and (c) MCGINN, for his own benefit and without authorization, had improperly diverted \$230,000 from MSTF above and beyond what was disclosed in the PPM.

73. As a result of the material misrepresentations and material omissions by MCGINN, SMITH, and their co-conspirators, investors in the Four Funds were not aware that (a) MCGINN and SMITH, without authorization, had improperly used \$525,000 from the three of the Four Funds to pay the broker-dealer's employees; and (b) MCGINN and SMITH had passed that money through MSTF to conceal and disguise the true nature of the transactions.

74. As a result of the material misrepresentations and material omissions by MCGINN,

SMITH and their co-conspirators, investors in the Trusts were not aware of: (a) the Potential ADT Litigation; (b) the ADT Litigation; (c) Firstline's defaults on the May and October Loans; (d) Firstline's bankruptcy petition; (e) the failure of the underlying income streams to generate sufficient income to pay investors in the Firstline and Firstline Series B Trusts and the Integrated Excellence Trusts; and (f) the diversion of money to pay Firstline, Firstline Series B, and Integrated Excellence Trust investors.

75. Part of the manner and means of the conspirators' scheme to defraud consisted of misleading investors into believing that the income streams in which they had invested were performing well by making payments to investors with money improperly diverted from other trusts and entities controlled by MCGINN and SMITH.

76. Part of the manner and means of the conspirators' scheme to defraud consisted of misleading FINRA by directing the creation of false accounting entries and backdated promissory notes and then submitting those false accounting entries and backdated promissory notes to conceal and disguise the true nature of the transactions.

77. As part of the conspiracy, the broker-dealer routinely used the United States mail, private mail carriers, electronic mail, interstate facsimiles, and interstate wire transfers from financial institutions located outside New York State to send investment documents, PPMs, and investor payments. The broker-dealer also routinely obtained investor money through interstate wire transfers from financial institutions located outside New York State and through mailings delivered by the United States Postal Service and private mail carriers. Most of these mailings came to and from Albany and Clifton Park in the Northern District of New York.

78. The use of the mails and interstate wires was foreseeable, and MCGINN and SMITH

were aware that use of the mails and interstate wires would follow in the ordinary course of business.

**Overt Acts in Furtherance of the Conspiracy**

79. In furtherance of the agreement, combination, and conspiracy and to effect the objects thereof, the defendants and co-conspirators committed the following overt acts, among others, in the Northern District of New York and elsewhere:

80. In or about October 2007, SMITH directed accountants at the broker-dealer and an outside accounting firm to reclassify transactions regarding more than \$1 million improperly diverted in 2006 from TDM Cable Funding, LLC to the personal bank accounts of MCGINN, SMITH, and Rogers as “loans” when, as he then well knew, (a) they were not “loans”; (b) they were not a permitted use of investor funds as defined by the PPM and the declaration of trust for TDM Cable Trust 06; and (c) they were not disclosed in the TDM Cable Trust 06 PPM as “loans.”

81. On or about January 11, 2008, MCGINN sent an electronic mail message directing that \$19,500 be wire transferred to his personal bank account from McGinn, Smith Funding LLC related to TDM Verifier Trust 08.

82. On or about February 28, 2008, in response to an electronic mail message from a broker asking “whether TDM Verifier and/or Firstline could have the same problem(s) as [Securities Associates International, Inc.]” and noting that “[i]f TDM or Firstline became slow pay or defaulted, what are the provisions to protect our clients?” MCGINN sent an electronic mail message falsely assuring him, “Everything OK with Verifier and Firstline.”

83. On or about April 9, 2008, MCGINN directed an employee of the broker-dealer not to send a letter explaining problems with an investment to two of the preferred clients.

84. Between on or about April 23, 2008 and June 16, 2008, MCGINN allowed brokers

to re-sell \$600,000 of contract certificates in Firstline Trust 07 Series B to redeem an investment made by a broker's father without making any changes to the PPM when, as MCGINN then well knew, (a) Firstline had defaulted on the May and October Loans; (b) Firstline had filed for bankruptcy; and (c) contrary to the PPM, investor payments had been and would be made using money improperly diverted from trusts and entities controlled by MCGINN and SMITH as described in greater detail in paragraph 39.

85. On or about July 1, 2008, MCGINN sent an electronic mail message directing that \$35,000 be transferred from the Integrated Excellence Sr. Trust 08 escrow account to his personal bank account and that \$35,000 be transferred from the Integrated Excellence Sr. Trust 08 escrow account to SMITH's personal bank account.

86. On or about July 15, 2008, MCGINN sent an electronic mail message directing that \$15,000 be transferred from the Integrated Excellence Sr. Trust escrow account to his personal bank account .

87. On or about July 15, 2008, August 14, 2008, September 17, 2008, October 21, 2008, December 19, 2008, January 16, 2008, February 17, 2009, March 20, 2009, April 24, 2009, June 25, 2009, and July 8, 2009, MCGINN sent electronic mail messages directing that a total of \$55,000 be transferred from an escrow account holding investor money for MSTF to J.C. who was not an investor in MSTF.

88. On or about August 22, 2008, September 8, 2008, October 22, 2008, October 27, 2008, and November 7, 2008, MCGINN sent electronic mail messages directing that a total of \$200,000 be transferred from an escrow account holding investor money for MSTF to his personal bank account.

89. On or about August 29, 2008, MCGINN sent an electronic mail message directing that \$97,000 be wire transferred from an escrow account holding investor money for Integrated Excellence Jr. Trust 08 to a Firstline Sr. Trust account to pay Firstline investors.

90. On or about September 29, 2008, MCGINN sent electronic mail messages directing that \$100,000 be transferred to his personal bank account and \$20,000 be transferred to SMITH's bank account from the NEI Capital LLC account related to Fortress Trust 08.

91. On or about November 14, 2008, SMITH directed that \$125,000 be transferred from accounts for two of the Four Funds to a MSTF account, and between on or about November 14, 2008 and on or about November 17, 2008, MCGINN and SMITH directed that the money be used to pay the broker-dealer's employees.

92. On or about November 26, 2008, SMITH directed that \$150,000 be transferred from accounts for three of the Four Funds to a MSTF account, and between on or about November 26, 2008 and on or about November 28, 2008, MCGINN and SMITH directed that the money be used to pay the broker-dealer's employees.

93. On or about April 14, 2009, SMITH directed that \$250,000 be transferred from accounts for three of the Four Funds to a MSTF account, and between on or about April 14, 2009 and on or about April 15, 2009, MCGINN and SMITH directed that the money be used to pay the broker-dealer's employees.

94. On or about April 30, 2009, MCGINN sent an electronic mail message to Mercantile Bank causing a wire transfer of \$30,000 to be made from an escrow account holding investor funds for TDMM Cable Jr. Trust 09 to his personal bank account.

95. On or about September 10, 2009, MCGINN and SMITH directed that a letter and

memorandum to be sent to investors in Firstline Trust 07, Firstline Sr. Trust 07, Firstline Trust 07 Series B, and Firstline Sr. Trust 07 Series B which, as described in further detail in paragraph 40 contained false statements.

96. On or about October 12, 2009, MCGINN and SMITH directed an accountant at the broker-dealer to make false accounting entries to conceal the improper diversions for the preferred clients and payroll.

97. On or about October 14, 2009, MCGINN and SMITH caused accounting records to be submitted to FINRA which contained newly created false entries concealing the improper diversions for the preferred clients and payroll.

98. On or about November 2, 2009, MCGINN and SMITH directed the creation of backdated promissory notes to conceal and disguise the true nature of more than \$1.8 million that they had received from TDM Cable Funding LLC.

99. On or about November 2, 2009, after discovering that MCGINN had improperly diverted \$230,000 from MSTF to his personal bank account, SMITH directed an accountant at the broker-dealer to make false accounting entries indicating that MCGINN had taken \$130,000 from NEI Capital LLC.

100. On or about November 17, 2009, MCGINN and SMITH caused the submission to FINRA of backdated promissory notes created to conceal and disguise the true nature of more than \$1.8 million that they had received from TDM Cable Funding LLC.

In violation of Title 18, United States Code, Section 1349.

**COUNTS TWO THROUGH TEN**  
**(Mail Fraud)**

101. Paragraphs One through Sixty-Four and Sixty-Seven through One Hundred are hereby realleged and incorporated by reference as if fully set forth herein.

102. From in or about September 2006 through in or about December 2009, in the Northern District of New York and elsewhere, defendants TIMOTHY M. MCGINN and DAVID L. SMITH devised and intended to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and to obtain money and property by means of material false and fraudulent pretenses, representations, promises, and material omissions and attempting to do so.

103. For the purpose of executing such scheme and to obtain money and property by means of material false and fraudulent pretenses, representations, promises, and material omissions and attempting to do so, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, in the Northern District of New York and elsewhere, on or about the following dates knowingly placed, caused to be placed, and took and received in a post office and authorized depository for mail certain matters, documents, letters, and mailings to be sent or delivered by the United States Postal Service and/or by any private or commercial interstate carrier, the following matters and things to and from the addresses listed below:

<u>Count</u>	<u>Date</u>	<u>Matter or Thing</u>	<u>Address</u>
2	10/2007	A private placement memorandum for Firstline Sr. Trust 07 Series B	<u>Delivered to:</u> T.B. Guilderland, NY
3	12/18/2007	A \$50,000 check from M. & K.D. to purchase contract certificates from Firstline Sr. Trust 07 Series B	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
4	01/28/2008	A letter of authorization for a \$30,000 wire transfer from H.C. to purchase contract certificates from Firstline Sr. Trust 07 Series B	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
5	05/15/2008	A \$50,000 check from R. & S. B. to purchase contract certificates from Firstline Trust 07 Series B	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
6	06/06/2008	A subscription agreement for Firstline Trust 07 Series B	<u>Delivered from:</u> R. & J. P. Schenectady, NY
7	06/09/2008	A \$100,000 check from B.S. to purchase contract certificates from Integrated Excellence Sr. Trust 08	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
8	07/17/2008	A \$92,301.26 cashier's check from McGinn, Smith Transaction Funding Corp. Mercantile Bank account ending in 3083	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Albany, NY
9	03/20/2009	Four cashier's checks totaling \$5,511 from McGinn, Smith Transaction Funding Corp. Mercantile Bank account ending in 3083	<u>Delivered to:</u> B. F. Loudonville, NY
10	09/10/2009	A letter and memorandum from McGinn Smith Capital Holdings Corp. regarding Firstline Trust 07 Series B to A.G.	<u>Delivered from:</u> McGinn, Smith & Co. Inc. Clifton Park, NY

All in violation of Title 18, United States Code, Section 1341.

**COUNTS ELEVEN THROUGH TWENTY**  
**(Wire Fraud)**

104. Paragraphs One through Sixty-Four and Sixty-Seven through One Hundred are hereby realleged and incorporated by reference as if fully set forth herein.

105. From in or about September 2006 through in or about December 2009, in the Northern District of New York and elsewhere, defendants TIMOTHY M. MCGINN and DAVID L. SMITH devised and intended to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and to obtain money and property by means of material false and fraudulent pretenses, representations, promises, and material omissions and attempting to do so.

106. For the purpose of executing such scheme and artifice, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, in the Northern District of New York and elsewhere, on or about the dates listed below, knowingly transmitted and caused to be transmitted by means of wire communication in interstate commerce the following writings, signs, and signals, specifically, facsimile transmissions and money transfers, as described below:

<u>Count</u>	<u>Date</u>	<u>Writing, Sign, or Signal</u>	<u>Origin</u>	<u>Destination</u>
11	04/23/2008	Facsimile related to B.K.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
12	05/10/2008	Facsimile related to A.C.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
13	05/28/2008	Facsimile related to T.R.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
14	07/14/2008	Facsimile related to S.J.T.W.'s purchase of contract certificates from Integrated Excellence Sr. Trust 08	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
15	08/29/2008	Wire transfer of \$97,000 to Firstline Sr. Trust 07	Integrated Excellence Jr. Trust 08 Mercantile Bank account ending in 3994 Boca Raton, Florida	Firstline Sr. Trust 07 M & T bank account ending in 5028 Albany, New York

<u>Count</u>	<u>Date</u>	<u>Writing, Sign, or Signal</u>	<u>Origin</u>	<u>Destination</u>
16	08/29/2008	Wire transfer of \$45,000 to TDM Luxury Cruise Trust 07	Integrated Excellence Jr. Trust 08 Mercantile Bank account ending in 3994 Boca Raton, Florida	TDM Luxury Cruise Trust 07 M & T bank account ending in 5234 Albany, New York
17	07/01/2008	Wire transfer of \$35,000 to David L. Smith	Integrated Excellence Sr. Trust 08 Mercantile Bank account ending in 3983 Boca Raton, Florida	David L. Smith M & T bank account ending in 9965 Albany, New York
18	07/01/2008 07/15/2008	Wire transfers totaling \$50,000 to Timothy M. McGinn	Integrated Excellence Sr. Trust 08 Mercantile Bank account ending in 3983 Boca Raton, Florida	Timothy M. McGinn M & T bank account ending in 9504 Albany, New York
19	08/22/2008 09/08/2008 10/22/2008 10/27/2008 11/07/2008 07/08/2009	Wire transfers totaling \$230,000 to Timothy M. McGinn	McGinn, Smith Transaction Funding Corp. Mercantile Bank account ending in 3083 Boca Raton, Florida	Timothy M. McGinn M & T bank accounts ending in 9504 & 2675 Albany, New York
20	04/30/2009	Wire transfer of \$30,000 to Timothy M. McGinn	TDMM Cable Jr. Trust 09 Mercantile Bank account ending in 4139 Boca Raton, FL	Timothy M. McGinn M & T bank account ending in 2675 Albany, New York

All in violation of Title 18, United States Code, Section 1343.

**COUNTS TWENTY-ONE THROUGH TWENTY-SIX**  
**(Securities Fraud)**

107. Paragraphs One through Sixty-Four and Sixty-Seven through One Hundred are hereby realleged and incorporated by reference as if fully set forth herein.

108. On or about the following dates, each such date constituting a separate count of this Superseding Indictment, within the Northern District of New York and elsewhere, the defendants TIMOTHY M. MCGINN and DAVID L. SMITH, and others, willfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce and the mails, in connection with the purchase and sale of any securities, did use and employ manipulative and

deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; and (c) engaging in transactions, acts, practices, and courses of business which operated or would operate as a fraud and deceit upon persons in connection with the following transactions:

<u>Count</u>	<u>Date</u>	<u>Transaction</u>
21	01/11/2008 01/28/2008	Wire transfers related to TDM Verifier Trust 08 totaling \$50,000 from the McGinn, Smith Funding LLC Mercantile bank account ending in 1635 to the Timothy M. McGinn M & T bank account ending in 9504
22	01/28/2008	Wire transfer related to TDM Verifier Trust 08 of \$50,000 from the McGinn, Smith Funding LLC Mercantile bank account ending in 1635 to the David L. Smith M & T bank account ending in 9965
23	09/29/2008 10/03/2008 10/06/2008	Wire transfers related to Fortress Trust 08 totaling \$210,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the Timothy M. McGinn M & T bank account ending in 9504
24	09/29/2008 10/03/2008 10/06/2008	Wire transfer related to Fortress Trust 08 totaling \$360,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the David L. Smith M & T bank account ending in 9965
25	10/03/2008	A wire transfer related to Fortress Trust 08 of \$245,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the Matthew Rogers Citicorp Florida bank account ending in 9958 related to Fortress Trust 08
26	11/07/2008	Electronic mail message from <a href="mailto:tmcmcginn@mcginnsmith.com">tmcmcginn@mcginnsmith.com</a> to Mercantile Bank employees in Boca Raton, Florida related to Fortress Trust 08

All in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 2.

**COUNTS TWENTY-SEVEN THROUGH TWENTY-NINE**  
**(Filing False Returns)**

109. Paragraphs One through Sixty-Four and Sixty-Seven through One Hundred are hereby realleged and incorporated by reference as if fully set forth herein.

110. On or about the following dates, each such date constituting a separate count of this Superseding Indictment, in the Northern District of New York, defendant TIMOTHY M. MCGINN

willfully made and subscribed to the following joint U.S. Individual Income Tax Returns for the following tax years, each of which (a) was prepared in the Northern District of New York; (b) was filed with the Internal Revenue Service; (c) was verified by a written declaration that it was made under the penalties of perjury; and (d) defendant TIMOTHY M. MCGINN did not believe to be true and correct as to every material matter, to wit: the returns, at line 22, reported the following amounts as income when, as defendant TIMOTHY M. MCGINN then well knew, the total income he had received during each year was substantially in excess of that amount:

<u>Count</u>	<u>Date Return Filed</u>	<u>Tax Year</u>	<u>Amount Reported at Line 22</u>
27	10/18/2007	2006	\$598,577
28	10/20/2008	2007	\$537,850
29	10/15/2009	2008	\$383,219

All in violation of Title 26, United States Code, Section 7206(1).

**COUNTS THIRTY THROUGH THIRTY-TWO**  
(Filing False Returns)

111. Paragraphs One through Sixty-Four and Sixty-Seven through One Hundred are hereby realleged and incorporated by reference as if fully set forth herein.

112. On or about the following dates, each such date constituting a separate count of this Superseding Indictment, in the Northern District of New York, defendant DAVID L. SMITH willfully made and subscribed to the following joint U.S. Individual Income Tax Returns for the following tax years, each of which (a) was prepared in the Northern District of New York; (b) was filed with the Internal Revenue Service; (c) was verified by a written declaration that it was made under the penalties of perjury; and (d) defendant DAVID L. SMITH did not believe to be true and correct as to every material matter, to wit: the returns, at line 22, reported the following amounts as

income when, as defendant DAVID L. SMITH then well knew, the total income he had received during each year was substantially in excess of that amount:

<u>Count</u>	<u>Date Return Filed</u>	<u>Tax Year</u>	<u>Amount Reported at Line 22</u>
30	10/17/2007	2006	\$487,337
31	10/20/2008	2007	\$475,160
32	10/15/2009	2008	\$501,199

All in violation of Title 26, United States Code, Section 7206(1).

#### **Forfeiture Allegations**

113. The allegations contained in Counts One through Twenty of this Superseding Indictment are realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

114. Upon conviction of the offenses in violation of Title 18, United States Code, Sections 1341, 1343, and 1349 set forth in Counts One through Twenty of this Superseding Indictment, defendants TIMOTHY M. MCGINN and DAVID L. SMITH shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses.

115. Upon conviction of the offenses in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5 set forth in Counts Twenty-One through Twenty-Six of this Superseding Indictment, which are realleged and incorporated by reference as if fully set forth herein, defendants TIMOTHY M. MCGINN and DAVID L. SMITH shall forfeit to the United States, pursuant to 18 U.S.C. §§ 981(a)(1)(C),

1956(c)(7), and 1961(1), and 28 U.S.C. § 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses.

116. If any of the property described above, as a result of any act or omission of the defendants:

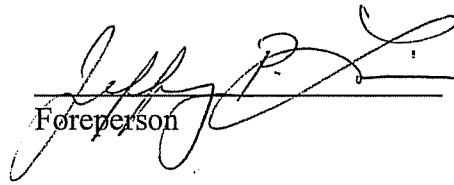
- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with, a third party,
- (c) has been placed beyond the jurisdiction of the court;
- (d) has been substantially diminished in value; or
- (e) has been commingled with other property which cannot be divided without difficulty;

the United States of America shall be entitled to forfeiture of property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

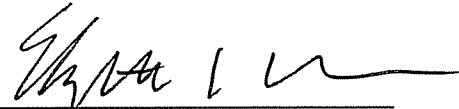
117. The intent of the United States of America to forfeit such property includes a money judgment in the amount of \$8,000,000 representing the total dollar amount constituting or derived from proceeds traceable to the offenses of conviction.


All pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

A TRUE BILL,

  
Foreperson

RICHARD S. HARTUNIAN  
United States Attorney

By:   
Elizabeth C. Coombe  
Assistant U.S. Attorney

By:   
Richard D. Belliss  
Assistant U.S. Attorney