



# Department of Justice

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Northern District of New York

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**FOUNDERS OF MCGINN, SMITH & CO., INC. CONVICTED  
OF CONSPIRACY, MAIL FRAUD, WIRE FRAUD,  
SECURITIES FRAUD, AND FILING FALSE TAX RETURNS**

Albany, New York — A federal jury in Utica returned its verdict following the four-week trial of Timothy M. McGinn and David L. Smith, former owners of the Albany broker-dealer McGinn, Smith & Co., Inc., announced United States Attorney Richard S. Hartunian, Toni M. Weirauch, Special Agent-in-Charge, Internal Revenue Service, Criminal Investigation, New York Field Office, and Andrew W. Vale, Special Agent-in-Charge, Federal Bureau of Investigation, Albany Division. After 4 days of deliberation, the jury convicted McGinn of 27 of 29 counts and Smith of 15 of 29 counts. Both defendants were convicted of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud, and filing false tax returns.

U.S. Attorney Hartunian commented, “With today's guilty verdicts against Timothy McGinn and David Smith, a measure of justice has been achieved for the many investors who placed their trust - and in some cases, their life savings - in these two men and their brokerage firm. While the harm they have caused may never be fully undone, this verdict sends the strong message that fraudulent business practices and tax cheating will not be tolerated. Law enforcement will do everything possible to bring to justice those whose greed and self- interest make them lose sight of their responsibilities to investors and regulators.”

U.S. Attorney Hartunian also thanked the many agents, investigators, and analysts from the Internal Revenue Service and the Federal Bureau of Investigation for their tireless efforts and dedication to seeing that justice was served. He also congratulated the trial team from the United

States Attorney's Office, including Deputy Criminal Chief Elizabeth C. Coombe, Assistant United States Attorneys Richard D. Belliss and Wayne Myers, and Information Technology Specialist Ron Kittelson, all of whom spent long hours preparing and presenting this complex case.

Special Agent-in-Charge Weirauch stated, "The guilty verdicts against Timothy M. McGinn and David L. Smith are a victory for the people of the Capital Region of New York and beyond. People must be able to trust those who invest money on their behalf. They must also trust that all Americans are paying their fair share of taxes. When that trust is violated, people suffer, and our economy as a whole suffers. IRS Criminal Investigation, along with our law enforcement partners, remains committed to ensuring that people who violate the law are held accountable for their actions."

Special Agent-in-Charge Vale stated, "The actions of Timothy M. McGinn and David L. Smith destroyed dreams and ruined lives, and although today's verdict will not erase the financial and emotional harm they caused, we hope their victims will find solace in knowing that they will now face consequences for their damaging actions. Today's verdict supports the commitment of the FBI and our law enforcement partners to bring to justice those individuals who engage in such fraudulent schemes."

According to the superseding indictment, the purpose of the conspiracy was to mislead investors and the Financial Industry Regulatory Authority, Inc. ("FINRA") regarding the safekeeping and use of investor money raised by 17 trusts, one corporation, and other entities; the risks of the trust offerings; the performance of the underlying income streams; the source of investor payments; and the improper diversion of investor money in order to obtain money from investors and enrich themselves. As a result of the defendant's conduct, the investors were not aware that the defendants

had diverted approximately \$4.1 million in connection with transactions related to the trusts for their own benefit and the benefit of another person.

The superseding indictment also alleged that, as part of the conspiracy, the defendants improperly diverted nearly \$1 million; directed false accounting entries regarding those transactions in response to a document request from the broker-dealer's regulator, FINRA; and caused the false accounting entries to be submitted to FINRA. The alleged improper diversions fell into two categories: (a) the improper diversion of more than \$473,000 of investor money from an escrow account to pay preferred clients who had unrelated investments (between May 15, 2008 and July 8, 2009); and (b) the improper diversion of \$525,000 from bank accounts for three unrelated investments to pay the broker-dealer's employees (between November 14, 2008 and April 15, 2009). The superseding indictment also alleged that the defendants improperly used a corporation to conceal and disguise the true nature of the payroll diversions by passing the money from the three unrelated investments through that corporation and then to the broker-dealer. Finally, the superseding indictment alleged that the defendants misled FINRA about the preferred client diversions 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 document request from FINRA; and (b) causing the submission of these false accounting entries to FINRA. The maximum potential penalties for count 1 include imprisonment for 30 years, to be followed by supervised release for 5 years, and a fine of the greater of \$1,000,000 or twice the gross pecuniary gain or loss.

Both McGinn and Smith were convicted on Counts 21 through 26 (securities fraud), which relate to the failure to disclose improperly diverted fees to investors in violation of federal securities laws. Counts 21 and 22 relate to \$100,000 in fees paid in connection with TDM Verifier Trust 08,

and Counts 23 through 26 relate to approximately \$855,000 in fees paid in connection with Fortress Trust 08. All of these transaction fees were paid with investor money. The maximum potential penalty for each of Counts 21 through 26 is imprisonment for 20 years, supervised release for 3 years, and a fine of \$5,000,000.

McGinn and Smith were also both convicted on the tax charges arising from their failure to declare the improperly diverted money on their personal tax returns for tax years 2006 through 2008 (Counts 27-29 for McGinn and Counts 30-32 for Smith). McGinn and Smith later described the money as “loans,” but did not list them as such on personal financial statements. When FINRA discovered the false loan accounting entries for the diverted money, the defendants misled FINRA by directing the creation of backdated promissory notes. The maximum potential penalty for each of Counts 27 through 32 is imprisonment for 3 years, supervised release for 1 year, and a fine of \$100,000.

Both McGinn and Smith were convicted on Count 10, and McGinn was convicted of Counts 4 through 6 and 11 through 13.<sup>1</sup> Those mail and wire fraud counts relate to the Firstline Series B Trusts, which raised money from investors in connection with a loan of \$2.4 million to Firstline Security, Inc., a company that generated alarm contracts. The superseding indictment alleged that the defendants did not tell investors when Firstline filed for bankruptcy and defaulted on loans. In addition, their firm sold approximately \$600,000 of one of the Firstline investments without any disclosure of the bankruptcy or defaults. McGinn directed that investors receive \$2 million of lulling payments by transferring money from other entities controlled by McGinn and Smith.

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<sup>1</sup>The maximum potential penalty for each of Counts 4 through 20 is imprisonment for 30 years, supervised release for 5 years, and a fine of the greater of \$1,000,000 or twice the gross pecuniary gain or loss.

McGinn and Smith were both convicted on Count 14, and McGinn was convicted on Count 7. Those mail and wire fraud counts relate to the Integrated Excellence Trusts, for which the defendants raised about \$1.2 million from investors in connection with a loan to benefit Integrated Excellence, Inc., which generated alarm contracts. The superseding indictment alleged that the defendants knew that the payments received from the loan were not sufficient to pay investors, but McGinn directed that investors receive lulling payments by transferring money from other entities controlled by McGinn and Smith.

McGinn and Smith were both convicted of Counts 8 and 9. Those mail fraud counts related to the improper diversion of investor money from an escrow account to pay preferred clients who had unrelated investments.

McGinn was also convicted on Counts 15 and 16. Those counts involved the diversion of approximately \$142,000 of investor money from an escrow account to make payments to investors in other trusts.

Both McGinn and Smith were convicted on Count 17, which involved \$35,000 Smith took directly from an escrow account holding investor funds for Integrated Excellence Sr. Trust 08. McGinn was convicted on Counts 18, 19, 20 which involved approximately \$310,000 that McGinn took directly from escrow accounts holding investor funds.

This case was investigated by the Internal Revenue Service, Criminal Investigation and the Federal Bureau of Investigation. This case is being prosecuted by Assistant United States Attorneys Elizabeth C. Coombe, Richard D. Belliss, and Wayne Myers.

The sentencings are set for June 28, 2013 at 10:00 am for McGinn and 11:00 am for Smith.

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