

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY McGINN,

**Case No.: 1:10-CV-457
(GLS/DRH)**

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.

NOTICE OF MOTION

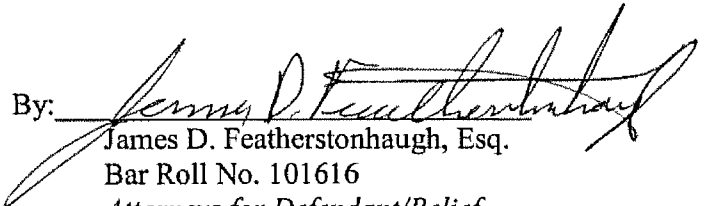
PLEASE TAKE NOTICE, that upon all the pleadings and proceedings heretofore had herein, the supporting attorney Affidavit of James D. Featherstonhaugh, the Affidavit of John D'Aleo, and accompanying Memorandum of Law, the Relief Defendant/Defendant, Lynn A. Smith moves before a term of this Court to be held on the 20th of August, 2014, or at any other date convenient to the Court, before the Honorable Gary L. Sharpe, United States District Judge, United States District Court for the Northern

District of New York, 445 Broadway, Albany, New York for an Order pursuant to Federal Rule of Civil Procedure 56 for partial summary judgment which terminates the allegations against Lynn Smith in her capacity as a Relief Defendant.

PLEASE TAKE FURTHER NOTICE, that pursuant to U.S. Magistrate Judge Christian F. Hummel's scheduling Order dated June 26, 2014, responsive papers, if any, shall be filed by August 4, 2014.

Dated: July 2, 2014

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TIMOTHY M. MCGINN, AND DAVID L. SMITH,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY MCGINN,

**Case No.: 1:10-CV-457
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and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

**MEMORANDUM OF LAW
IN SUPPORT OF RELIEF DEFENDANT/DEFENDANT
LYNN A. SMITH'S MOTION PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 56 FOR PARTIAL SUMMARY JUDGMENT**

Submitted by:

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PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 56 now pending before the Court is Relief Defendant/Defendant Lynn A. Smith's motion for partial summary judgment against the Plaintiffs, the Securities and Exchange Commission (the "SEC" or "Commission").

The SEC's cause of action against Lynn Smith is premised on the theory that she is an appropriate relief defendant because various McGinn Smith entities deposited money into her individual stock account after 2003 when the alleged fraudulent scheme involving the "four funds" began. Dkt. No. 86 at 31. The SEC's alternative contention if Lynn Smith is not properly named as a relief defendant, is that David Smith is a joint owner of Lynn Smith's stock account and other Smith family assets. Id.

Where is the proof? That fundamental question has been asked repeatedly by counsel to Lynn Smith since this case was commenced over four years ago by the SEC. Throughout two separate amended complaints and all stages of discovery, the SEC has relied on conclusory allegations contending Lynn Smith received various ill-gotten gains without providing any consideration. The SEC has yet to identify any specific and meaningful evidence to support their allegations against Lynn Smith. Although the SEC has been successful in preliminary rulings that applied the "substantial likelihood of success" standard, this Motion allows the Plaintiff's allegations to be decided upon on the actual proof before the Court.

Lynn Smith now moves the Court for partial summary judgment because the SEC has not created a genuine issue of material fact as to whether she is an appropriate relief defendant that: (a) received assets into her stock account which contained ill-gotten gains, and (b) does not have a legitimate claim to those assets. Accordingly, Lynn Smith respectfully submits that no issue of fact remains that establishes a direct cause of action against her in her capacity as a relief defendant.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when the moving party demonstrates that "there is no genuine issue as to any material fact...". Fed. R. Civ. P. 56(c)(2). Under Rule 56, a "genuine" dispute exists when a rational fact finder, considering the evidence in the summary judgment record, could find in favor of the non-moving party. Ricci v. DeStefano, 557 U.S. 557, 586 (2009). A fact is considered "material" if it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The Second Circuit has determined the nonmoving party, in this instance the SEC, cannot "escape summary judgment by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture." Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990). The nonmoving party must "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (U.S. 1986); See also, Alhovsky v. Ryan, et al., 658 F.Supp.2d 526, 531 (S.D.N.Y. 2009) (The nonmoving party must present "specific facts showing that there is a genuine issue for trial.") (quoting Fed. R. Civ. P. 56(c). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation". Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998).

Once the moving party has established that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence showing a genuine issue remains, thus requiring resolution at trial. United States v. An Antique Platter of Gold, 991 F. Supp. 222, 228 (S.D.N.Y. 1997); Glazer v. Formica Corp., 964 F.2d 149, 154 (2d Cir. 1992). To survive a motion

for summary judgment, the nonmoving party must make an affirmative showing of specific issues sufficient to establish that a genuine dispute of material fact remains. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

STATEMENT OF MATERIAL FACTS

For a more complete statement of procedural posture of this action the Relief Defendant refers the Court to the Affidavit of James D. Featherstonhaugh filed in support of this motion. Pursuant to Northern District Local Rule 7.1(a)(3), the following facts are either undisputed or described in the light most favorable to the nonmoving party. Costello v. City of Burlington, 632 F.3d 41, 45 (2d Cir. 2011).

1. The individual stock account in the name of Lynn A. Smith, held at RMR Wealth Management, account number [REDACTED] 0916, was initially created in 1969 with a \$60,000 initial investment that came from an inheritance from her father's estate. Dkt. Nos. 86 at 7, 23 at 4, 69-1 at 4.

2. Lynn Smith's individual brokerage account has remained at all times, in her individual name. Dkt. Nos. 86, 23 at 4, 69-1 at 4.

3. The Plaintiff's theory of allegedly fraudulent activity began in 2003. See, Dkt. No. 334 at 2 (quoting "from at least 2003 through April 2010, McGinn and Smith used MS & Co., a registered broker-dealer and investment adviser, MS Advisors, an investment adviser, and MS Capital, as well as dozens of affiliated entities they own or control (collectively, "the McGinn Smith Entities"), to raise over \$136 million in more than 20 unregistered debt offerings. The debt offerings, including the Four Funds and numerous trust entities (the "Trusts"), have been sold to more than 900 investors").

4. In November of 2002, Lynn Smith's stock account was valued at \$3,617,797.00. On March 31, 2010 Lynn Smith's stock account was valued at \$2,118,511.06. See, Lynn Smith brokerage statement from November 2002, and March 2010.

5. Lynn Smith has been married to David Smith since 1968. Dkt. No. 23.

6. David Smith has been the broker of record of Lynn Smith's individual stock account since the mid-1970's until he surrendered his securities licenses due to the related criminal investigation. Dkt. Nos. 86 at 34, Dkt. No. 23.

7. David Smith, as the broker of record for Lynn Smith's individual stock account, had discretionary authority over the account at all times. Dkt. No. 87-89. See also, Preliminary Injunction Hearing Transcript at page 327 quoting:

LYNN SMITH – DIRECT- STOELTING

Q: And did Mr. Smith have authority to buy or sell securities in this stock account without getting your approval first?

A: Without getting my approval?

Q: Yes.

A: Did he have a discretionary – as he – when he was a stock broker? I pretty much always gave approval.

Q: Okay. But my question was whether he could have the authority to buy or sell securities on his own without asking you first.

A: He could.

Q: So I think you referred to that as discretionary authority?

A: I believe a lot of investors have that with their brokers. And he was my husband.

Q: I'm just trying to establish that he did have discretionary authority.

A: Yes. Yes.

Q: And could Mr. – did Mr. Smith have the authority to take – to make cash – to take cash out of the account without your approval?

A: No.

8. On June 5, 2009 Lynn Smith made a \$366,000 bridge loan to TDMM Cable Funding. Dkt. No.23, ¶27 (quoting “two payments, one for \$160,800 and one for \$175,00 were

made to my account from TDMM Cable in repayment of a loan in the amount of \$366,000 which I made to TDMM cable from my stock account on 6/5/04.”).

9. The bridge loan was repaid to Lynn Smith in two installments; one for \$160,800 and one for \$175,000 from TDMM Cable in repayment of a loan in the amount of \$366,000 which was made to TDMM Cable from Lynn Smith’s stock account on June 5, 2004. Id.

10. A June 5, 2009 promissory note in the amount of \$366,000 reflects a loan Lynn Smith made to TDMM Cable Funding. See, June 5, 2009 Promissory Note payable to Lynn A. Smith signed by Timothy McGinn.

11. The TDMM Cable Jr. Trust 09 Preferred Placement Memorandum states:

TDM will use the proceeds of the loan together with funds provided by TDMM Cable Sr. Trust 09 to purchase the operating assets and customer accounts of Broadband Solutions LLC and HipNET LLC and to pay certain pre-closing expenses estimated to be approximately \$400,000.

Dkt. No. 4-19 at 8-9.

12. Lynn Smith’s brokerage account statement from April 2006 indicates a check received for \$4,500 on April 13, 2006. See, John D’Aleo Preliminary Injunction hearing testimony at Dkt. No. 87-89 at 431, lines 10-17 (quoting “A: Okay. Item two is a check received on April 13, 2006. I’m looking now at the statement, the first document which is funds received into Lynn Smith’s accounts. That shows a check received on that date for 4500...”).

13. Lynn Smith’s brokerage account statement from October 4, 2006 also indicates a similar deposit for \$85,000. See, John D’Aleo Preliminary Injunction hearing testimony at Dkt.no.87-89, p.431, lines 18-24 (quoting “...[t]he next item is an item on October 4th, 2006, in the amount of \$85,000. That we were able to find because you provided me with the copy of a check from Tim McGinn that indicated that it was a partial repayment of a loan that had been made...”).

14. On October 15, 2004 Tim McGinn signed a promissory note valued at \$970,000 which was addressed to Lynn A. Smith. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 432, lines 17-21 (quoting "A: Yes. That is a promissory note dated October 15th, 2004, for the \$970,000 that Mr. McGinn borrowed from Lynn Smith...").

15. The October 2004 statement to Lynn Smith's brokerage account indicates a deposit equal to the amount of \$970,000. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 432, lines 21-24 (quoting "Q: Did you cross check the date of the check and the amount against the Lynn Smith account statement? A: Yes, I did.).

16. On May 14, 2007 a deposit of \$100,000 was made into Lynn Smith's brokerage account. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, lines 9-13 (quoting "...I believe that it probably was attached in the second page of Exhibit 15G. Shows the check, made payable to the amount of a hundred thousand dollars, and the memo says loan.").

17. The May 14, 2007 deposit into Lynn Smith's brokerage account was the partial repayment of a promissory note signed by Tim McGinn and the memo section states "loan". Id.

18. On November 29, 2007 Lynn Smith made a \$375,000 bridge loan from her brokerage account to McGinn Smith Funding. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, lines 21-25 (quoting "...This relates to repayment of a bridge loan in the amount of 375,000 that was made by Miss Smith on November 29th, 2007, to McGinn Smith Funding").

19. On December 21, 2007 Lynn Smith received a deposit from a wire transfer in the amount of \$380,000 into her brokerage account. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, line 10- 434, line 18 (quoting "...Next item is item seven.

It's dated 12/20/2007. Also says transaction. Check received in the amount of \$300,000. Okay...").

20. This transaction was complicated by the fact that the repayment of the bridge loan originally went to David Smith's account at M&T Bank on December 12, 2007 in error. After David Smith discovered the error, he transferred \$380,000 to Lynn Smith's account on December 21, 2007. Id.

21. On February 4, 2009 Lynn Smith's brokerage account received a deposit of \$38,430.46. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 435, lines 18-20 (quoting "[i]t was funds that, no question, belonged to David Smith. He simply deposited this \$38,000 into his wife's account").

22. On February 20, 2009 a deposit from David Smith in the amount of \$326,304.11 was made into Lynn Smith's brokerage account. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 436, lines 19-21 (quoting "[t]he next item is what we refer to as item 11. It's a deposit on February 20th, 2009. It is from David Smith in the amount of \$326,304.11").

23. As it relates to the deposit into Lynn Smith's brokerage account on March 18, 2010 in the amount of \$100,000, it was made as a repayment of a loan made to TDMM Benchmark on March 16, 2010. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89, at 438, lines 24-26 (quoting "A. Yes. We have item 13, which was a deposit on March 18, 2010, in the amount of \$100,000.").

ARGUMENT

THE COURT SHOULD GRANT PARTIAL SUMMARY JUDGMENT IN FAVOR OF LYNN SMITH BECAUSE THE EVIDENCE BEFORE THE COURT HAS NOT CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER LYNN SMITH IS A PROPER RELIEF DEFENDANT.

Rule 56(c) mandates summary judgment against a party who fails to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial. Fed. R. Civ. P. 56. In such a situation, there can be "no genuine issue as to any material fact," due to the failure of proof concerning an essential element of the nonmoving party's case which renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (U.S. 1986). Moreover, the summary judgment analysis is not altered by the fact that the plaintiff in this case is the Securities and Exchange Commission. See, SEC v. Research Automation Corp., 585 F.2d 31, 33-34 (2d Cir. 1978). Notably, one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims. Celotex, at 323-324.

A. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER LYNN SMITH ALLEGEDLY RECEIVED ILL-GOTTEN GAINS.

Lynn A. Smith recognizes that this Court has the equitable power to order relief against someone who is not alleged to be a securities law violator if he (a) "has received ill-gotten funds" and (b) "does not have a legitimate claim to those funds. SEC v. Cavanagh, 155 F.3d 129, 136 (2d Cir. N.Y. 1998). However, a critical inquiry of the Cavanagh test turns upon the "legitimate claim" analysis. Which begs the question – Is Lynn Smith a mere custodian of assets gratuitously received or has she provided consideration for the assets received?

A third party with a legitimate claim in the funds sought will preclude that person from being a proper relief defendant. Janvey v. Adams, 588 F.3d 831 (5th Cir. 2009); SEC v. Cavanagh,

155 F.3d 129, 136 (2d Cir. N.Y. 1998). A legitimate claim to funds is established when a relief defendant shows that some services were performed for consideration. F.T.C. v. Bronson Partners, LLC, 674 F. Supp. 2d 373, 392 (D. Conn. 2009). Such an ownership interest or legitimate claim does not require possession of the full bundle of ownership rights that may exist in various types of property. SEC v. Founding Ptnrs. Capital Mgmt., 639 F.Supp 2d 1291, 1294 (M.D. Fla. 2009).

The SEC has spilled much of their ink alleging that “Lynn Smith received more than \$1.8 million from Smith and the Securities Defendants during the period of the fraud”. Dkt. No. 334, ¶112. As case law has recognized, simply making a speculative statement without any specific evidence does not create a genuine issue of fact as to whether Lynn Smith (a) received ill-gotten gains and (b) has a legitimate claim to those funds. The SEC has made no effort to allege what source of funds constitute ill-gotten gains, the dates the funds were allegedly transferred, or the accounts from which they were transferred. All of which is necessary to make the critical determination whether these assets are in fact derived from ill-gotten funds. A further analysis of the SEC’s Second Amended Complaint reveals the lack of evidence supporting a direct claim against Lynn Smith as a relief defendant. Paragraphs 81-87 of the Second Amended Complaint specifically alleges that:

The TDMM Cable Trust 09

81. On January 19, 2009, MS & Co. launched an offering of \$1,550,000 of 9.00% three-year notes in TDMM Cable Senior Trust 09 (“Senior 09 Tranche”) and an offering of \$1,325,000 of 11% 54-month notes in TDMM Cable Junior Trust 09 (“Junior 09 Tranche,” collectively “TDMM Cable 09”). The Senior and Junior offerings sold out.

82. The PPM stated that after MS & Co. took a placement agent fee of 5% of the amount raised for Senior 09 Tranche and 8% of the amount raised for Junior 09 Tranche, the balance, about \$2.7 million, would be loaned to TDM Cable Funding, which would use the proceeds to acquire all the operating assets and customer contracts of Broadband Solutions LLC and HipNET LLC (both of which purportedly provided “triple play” service to communities in Florida). The PPMs

also state that TDM Cable Funding would pay MS & Co. an additional \$400,000 for "acquisition negotiations, legal and due diligence activities"-- making MS & Co.'s total fee \$583,500 or 20.3% of the gross proceeds of the offering.

83. Not satisfied with the disclosed fees, MS & Co. used a total of at least 54% of the funds raised to: (i) make payments to McGinn, McGinn's son, Smith, relief defendant L. Smith, MS Partner 4 and an Albany politician; (ii) to cover MS & Co.'s payroll between January and April 2009; and (iii) to pay investors in other Trust entities. The following is a summary of McGinn's misuse use of TDMM Cable 09 investor funds:

84. During January 2009, MS & Co. raised the first \$554,000 from investors for the Senior 09 Tranche. On January 30, 2009, McGinn transferred \$475,000 from the Trust to TDM Cable Funding, and transferred \$413,000 from the TDM Cable Funding to MS & Co., where it was immediately used to cover the firm's payroll.

85. In February 2009, McGinn again transferred large sums of money from the TDMM Cable Senior Trust account to TDM Cable Funding and then to MS & Co to make MS & Co.'s mid-February and end of February payroll. The following months, McGinn again transferred substantial amounts from the TDMM Cable 09 Trust accounts to MS & Co. to cover the March 31 and April 30 payrolls.

86. McGinn also transferred a total of at least \$99,000 to McGinn's personal account; more than \$21,000 to McGinn's son (apparently a lawyer who worked for MS & Co.); more than \$105,000 to a MS & Co. affiliate called Mr. Cranberry; \$18,750 to an Albany politician's law firm; at least \$70,000 to MSTF; \$26,500 to Verifier 07; \$10,000 to Firstline Trust; \$25,000 to a senior MS & Co. officer \$24,000 to Smith; **and more than \$335,000 to Smith's wife, relief defendant L. Smith.** (Emphasis added).

87. The transfers described above total \$1,646,040 -- nearly three times the fees to which MS & Co. entities were entitled pursuant to the PPMs, and more than half of the gross offering proceeds

After reviewing the Commission's Second Amended Complaint it became apparent that the allegations are not supported by the evidence now before the Court. The allegations are nothing more than generalized statements contending money was transferred to Lynn Smith from various McGinn Smith entities. The only evidence identified by the Commission is a single isolated transfer of money that went into Mrs. Smith's brokerage account in 2009 equal to \$335,000.

However, sworn testimony from Lynn Smith establishes a legitimate interest in the payment of \$335,000. The \$335,000 deposit is actually two separate repayments. One for \$160,800 and one for \$175,000 made to Mrs. Smith's account from TDMM Cable in partial repayment of a short-term loan in the amount of \$366,000. Dkt. No. 23; Dkt. No. 69. In an affidavit submitted by Lynn Smith supporting a motion to dismiss, she previously explained the details of the transaction as follows:

26. The first payment referenced, \$335,000, in or about June and July of 2009, was actually two separate payments, which are correctly stated in paragraph 26 of the Complaint. Two payments, one for \$160,800 and one for \$175,000 were made to my account from TDMM Cable in repayment of a loan in the amount of \$366,000 which I made to TDMM Cable from my stock account on June 5, 2004. I have annexed hereto and made a part hereof a copy of the note as Exhibit A. It is my belief that the original note is in the possession of the United States Government and presumably accessible to the SEC. I have also annexed as Exhibit B. the account statements that evidence the withdrawal of the principal amount of that loan and the receipt, in the form of the two deposits, representing partial payment of that loan.
27. The undisputed fact is that a \$366,000 loan was made by me, with my specific consent, to TDMM Cable, and was carried out by my husband. I specifically discussed the loan with him, approved it as an investment from my stock account, and was entitled to be repaid. In fact, TDMM still owes me approximately \$35,000 in principal plus accrued interest.
29. The Commission also alleges that I received "many other payments from McGinn Smith Entities" (Complaint ¶94), but the Complaint does not indicate those funds allegedly received resulted from ill-gotten gains or that I did not otherwise have a legitimate right to the funds. Nor does the Commission specify the approximate amount of those payments that would justify the freezing of all my personal assets...

Dkt. No. 69-1.

Given Lynn Smith's arm's-length transactions, and even viewing the evidence in light most favorable to the nonmoving party, the SEC has not created a genuine issue of fact that supports the allegation that Lynn Smith received ill-gotten gains of \$335,000.

In the Plaintiff's response to the Defendant's Interrogatories, the Plaintiff's attempt to create an issue of fact by relying on a "list of facts that Plaintiff 'contend[s] or believe[s] supports Plaintiff's allegation that monies allegedly received by Smith were ill-gotten gains or illegal profits results from the Defendant's fraud." See, Plaintiff's Response to Interrogatory No. 3, dated February 24, 2011.

Once again, nothing in the so-called "list of facts" is actual proof or evidence that establishes an issue of material fact as it relates to Lynn Smith's receipt of ill-gotten gains. The Plaintiff's response to Lynn Smith's Interrogatories merely falls in line of the Plaintiff's repeated efforts of offering only speculation and bare allegations. The SEC's response to Interrogatory No. 3 states:

Response to Interrogatory No. 3:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to the following non-exhaustive list of facts that Plaintiff "contend[s] or believe[s] supports Plaintiff's allegation that monies allegedly received by Smith were ill-gotten gains or illegal profits resulting from the Defendant's fraud:"

- The facts contained and exhibits referenced in the Declaration of Israel Maya filed in support of Plaintiff's April 20, 2010 Order to show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to Exhibits 1-4, 19, 30-38, 40-41, 44-46, 48-50, 58-62, 67;
- The facts contained and exhibits referenced in the Declaration of Lara Shalov Mehraban filed in support of Plaintiff's April, 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to paragraph 26 and Exhibits 1-4, 14, 20, 244-25, 33-38, 54, 58-60, 67;
- The facts contained in the Declaration of Roseann Daniello filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to paragraph 25;
- The facts contained in the Affidavit of Lynn Smith filed May 21, 2010, including but not limited to paragraphs 13, 14 and 33;
- The May 27, 2010 deposition of Lynn Smith and all exhibits thereto;

- The facts contained and exhibits referenced in the Supplemental Declaration of Roseann Daniello filed June 3 2010 including but not limited to Exhibits 1-4;
- The exhibits referenced in the Supplemental Declaration of Lara Shalov Mehraban filed June 3, 2010;
- The facts contained and exhibits referenced in the Declaration of David Stoelting filed in support of the August 3, 2010 Order to Show Cause, including but not limited to exhibits 1-2, 3-4, 6-17, 23, 34, 46;
- The June 9, 2010 testimony of William Brown at the preliminary injunction hearing;
- The June 9, 2010 testimony of Roseann Daniello at the preliminary injunction hearing;
- The June 9-10, 2010 testimony of David McQuade at the preliminary injunction hearing;
- The June 10, 2010 testimony of Lynn Smith at the preliminary injunction hearing;
- The June 10-11, 2010 testimony of John D'Aleo at the preliminary injunction hearing;
- The June 11, 2010 testimony of David Wojeski at the preliminary injunction hearing;
- The exhibits introduced at the preliminary injunction hearing held June 9-11, 2010 including but not limited to exhibits 20-25, 74-75, 77-82.

First, Relief Defendant/Defendant, Lynn A. Smith brings to the Court's attention that none of the declarations submitted by the SEC attorneys and accountants – Lara Shalov Mehraban, Israel Maya, and Roseann Daniello are based on personal knowledge, but rather are mere speculation or compilation. The declarations continue to collectively rely on the basic fact that “more than \$335,000 [went] to Smith's wife, Lynn Smith.” Dkt. Nos. 4-2, 4-3, 4-4. Each declaration fails to recognize that Lynn Smith provided consideration in the form of a loan to TDMM Cable Funding for the \$335,000 payment. Roseann Daniello's testimony at the preliminary injunction hearing under cross-examination best illustrates the SEC's shortcomings.

BY MR. FEATHERSTONHAUGH :

- Q. Miss Daniello, the rest of your declarations goes on for three or four pages showing transfers back and forth between entities, is that correct?
- A. That's correct.
- Q. Do you have any personal knowledge as to the reason for any of those transfers?
- A. No.
- Q. Any knowledge as to the purpose of these transactions.
- A. No.

Dkt. No. 87 at 114.

Surely, the three declarations submitted by the Commission's own employees which lack any personal knowledge concerning the transfers, cannot be construed as creating a genuine issue of material fact as to whether Lynn Smith received ill-gotten gains. Since these three declarations offer nothing more than allegations and lack any meaningful evidence, it is a further indication of the Commission's lack of due diligence.

Second, the SEC haphazardly relies on the facts contained in the Affidavit of Lynn Smith filed May 21, 2010, to create a material issue of genuine fact as to whether she received ill-gotten gains or provided consideration for the funds received. Again, the SEC efforts must fail. For instance, paragraph 33 for which the SEC specifically relies on, actually supports Lynn Smith's position that the SEC has not created an issue of fact. Paragraph 33 explains the facts and circumstances surrounding each transaction in question. Thus, Lynn Smith's affidavits and the testimony from the preliminary injunction hearing do not create a genuine issue of material fact as to whether Lynn Smith received ill-gotten gains or whether she gave legitimate consideration for those funds.

Third, the testimony of John D'Aleo, cited by the SEC, also does not support any allegations of ill-gotten gains. Although Mr. D'Aleo's testimony is listed in the Plaintiff's "list of

facts”, his testimony clearly establishes that Lynn Smith did not receive ill-gotten gains, and did provide consideration for the money she received. Mr. D’Aleo’s testimony is best summarized in paragraph 12 and 13 of his Affidavit submitted in support of this motion, which states:

12. The money that was deposited into Lynn Smith’s individual brokerage account was made in repayment of previous loans that she agreed to furnish, and those deposits do not constitute Lynn Smith’s “ill-gotten gains”. As a result, Lynn Smith has a legitimate claim to deposits she received from McGinn Smith entities.

13. The bridge loans that Lynn Smith made from her individual brokerage account to various McGinn Smith entities was valuable consideration given in exchange for the amount of repayment.

See, Affidavit of John D’Aleo, dated July 2, 2014.

The SEC, bears the ultimate burden of persuasion that its ultimate disgorgement award against a relief defendant, if realized, reasonably approximates the amount of the alleged ill-gotten gains. SEC v. Aimsi Techs., Inc., 650 F. Supp.2d 296, 304 (S.D.N.Y. 2007), citing, SEC v. Opulentica, 479 F. Supp.2d 319 (S.D.N.Y. 2007). The SEC has not even come close to fulfilling this burden. In a line of cases that plaintiff provided relief defense counsel for the proposition that the SEC is not required to trace ill-gotten funds to individual accounts, it is evident that the courts still require some legitimate evidence of the reasonable approximation of the illegal profits gained from alleged fraudulent activity. See SEC v. Unifund SAL, 910 F.2d 1028 (2d Cir. N.Y.1990); SEC v. Aragon Capital Mgmt. LLC, 672 F.Supp.2d 421 (S.D.N.Y. 2009); SEC v. Shapiro, 494 F.2d 1301 (2nd Cir. 1974); SEC v. Seibald, 1997 U.S. Dist. LEXI 14940, 1 (S.D.N.Y. Sept. 29, 1997); SEC v. Glauberman, 1992 WL 175270 (S.D.N.Y. July 16, 1992).

In this case, the SEC has made no effort to ascertain the reasonable value of Defendants’ alleged ill-gotten gains nor to identify what “gains” were alleged “ill-gotten”. Instead, the SEC has elected to seize the vast majority of the individual assets belonging to members of the Smith

family. In light of the fact that the Plaintiffs have failed to even attempt to quantify the amount of illicit profits received, the SEC has not created a genuine issue of material fact that would preclude Lynn Smith from being awarded with partial summary judgment in her favor.

B. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER LYNN SMITH HAS A LEGITIMATE CLAIM TO THE ALLEGED ILL-GOTTEN GAINS.

The second element of the Cavanagh test focuses on whether a relief defendant has a “legitimate claim” to the assets in question. Cavanagh at 136. A party that gave consideration in exchange for property has a “legitimate claim” to it, and therefore cannot be treated as a relief defendant. SEC v. Ross, 504 F.3d 1130, 1142 (9th Cir. 2007) (rejecting nominal defendant designation for party who had legitimate claim to compensation for services rendered); CFTC v. Hanover Trading Corp., 34 F.Supp. 2d 203, 205-07 (S.D.N.Y. 1999) (fact that party had received funds as commissions for investor solicitation services suggested legitimate claim to funds).

The Second Restatement of Contracts defines consideration as a performance or a return promise that must be bargained for. See, Restatement (Second) of Contracts §71. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. Id. Therefore a party who lends assets in exchange for repayment, gives valuable consideration for the money received. Courts have recognized that “the paradigmatic example of a nominal defendant is a ‘bank or trustee [that] has only a custodial claim on the property’” at issue. Ross at 1141, SEC v. Colello, 139 F.3d 674, 677 (9th Cir. 1998); See also, SEC v. Martino, 255 F.Supp. 2d 268, 288-89 (S.D.N.Y. 2003) (relief defendants had no legitimate claim to yacht that defendant had paid for and placed in relief defendants’ name).

Relief Defendant, Lynn A. Smith respectfully submits that the SEC has not only failed to create an issue of fact as to whether she received ill-gotten gains, but also failed to establish a factual issue as to whether Lynn Smith has a legitimate claim to the money received into her stock account from various McGinn Smith entities. Although the Commission's Second Amended Complaint has a separate section titled "Transfers to L. Smith and N. McGinn Without Consideration," presumably to satisfy the second element of the Cavanagh test, the SEC has purposely ignored the fact that the money Lynn Smith received was the repayment of various bridge loans she had made in the past. Paragraphs 112-114 of the Second Amended Complaint allege that:

Transfers to L. Smith and N. McGinn Without Consideration

112. L. Smith received more than \$1.8 million from Smith and the McGinn Smith Entities during the period of the fraud. For example, L. Smith received \$375,000 in December 2007; \$325,000 in June and July 2009; \$100,000 in March 2010; and \$185,000 in October 2006 and May 2007. L. Smith received many other payments from McGinn Smith Entities.

113. L. Smith provided no consideration for these transfers.

114. L. Smith maintained a brokerage account at MS & Co. which in 2010 was transferred to NFS/RMR Capital Management (the "Stock Account"). Smith exercised beneficial ownership and unfettered control over the Stock Account for at least fifteen years. L. Smith allowed Smith, McGinn and the McGinn Smith Entities to draw upon the Stock Account for business and personal needs without restrictions, and the Stock Account served as a de facto financing arm for Smith and McGinn and the McGinn Smith Entities during the period of the fraud. L. Smith allowed Smith to use the Stock Account as a personal line of credit to further his personal and professional interests. Internal e-mails during the period of the fraud show McGinn Smith employees freely transferring money into and out of the Stock Account, which contained ill-gotten gains.

The allegations in paragraph 112 of the Second Amended Complaint are supported by even less proof than what was established relating to the previously discussed \$335,000 transaction. These allegations *presume*, without any supporting evidence, that any assets that came from

McGinn Smith entities must have been derived from illegal profits. However, the SEC has not offered any proof that ties the receipt of the assets to any fraudulent act on the part of McGinn Smith entities. None of the Plaintiff's evidence even remotely suggests that the funds were derived from illegal profits resulting from the alleged fraud on investors. As a result, the SEC has failed to establish an issue of fact as to whether Lynn Smith gave consideration for the receipt of such monies. Furthermore, assuming *arguendo*, that the Court does find a genuine issue of material fact based on the small amount of evidence presented, the SEC's disgorgement figure if realized, should be limited to nothing more than the allegations in paragraphs 86 (allegation of \$335,000) and 112 (allegations of \$375,000, \$325,000, \$100,000, \$185,000) of the Second Amended Complaint which equals approximately \$1,320,000.

However, Relief Defendant, Lynn A. Smith submits that all issues of material fact as to whether she provided consideration for the monies deposited into her stock account from various McGinn Smith entities have been eliminated due to the testimony of John D'Aleo and the other proof now before the Court. Notably, the Commission has never refuted the testimony of John D'Aleo, who has been a witness in this case since the preliminary injunction hearing. Partial summary judgment in favor of Lynn Smith is appropriate because the Plaintiff has not met the requisite burden of proof needed to establish Lynn Smith as a proper relief defendant.

The conclusions and testimony submitted by Mr. D'Aleo, whom has been disclosed as an expert, strongly supports the fact that the majority of the money deposited into Lynn Smith's brokerage account was primarily the repayment of various bridge loans to McGinn Smith entities. It has never been disputed that Lynn Smith lent various McGinn Smith entities monetary amounts equal to those listed in paragraph 112, which constitutes valuable consideration, she has a legitimate claim in the amount of money she received in repayment. The overall evidence

presented by Mr. D'Aleo of the eight separate transaction in question, eliminate all issues of material fact as to the Second Amended Complaint's allegations of "Transfers to L. Smith and N. McGinn Without Consideration". Mr. D'Aleo's testimony establishes the following facts:

1. An April 13, 2006 statement from Lynn Smith's brokerage account indicates a check received for \$4,500. An October 4, 2006 statement also indicates a similar deposit for \$85,000, which correlates with a check provided to Lynn Smith from Tim McGinn for a partial repayment of a loan.
2. In my analysis of the brokerage account transactions, I also took notice of a promissory note for \$970,000 dated October 15, 2004 signed by Tim McGinn addressed to Lynn Smith which is also consistent with the dates of Lynn Smith's brokerage statement that indicated a deposit equal to the amount of \$970,000.
3. On May 14, 2007 another promissory note for \$100,000 was deposited in Lynn Smith's brokerage account. The promissory note was also signed by Tim McGinn and the memo states "loan".
4. As it relates to the bridge loan made by Lynn Smith from the assets in her brokerage account on November 29, 2007 to McGinn Smith Funding, the December, 2007 brokerage statement indicates the bridge loan being repaid through a wire transfer. Specifically, on December 21, 2007 a deposit of \$380,000 was made into Lynn Smith's brokerage account. This transaction was further complicated because the repayment of the bridge loan originally went to David Smith's account at M&T Bank on December 12, 2007 in error. After David Smith discovered the error, he transferred \$380,000 to Lynn Smith's account on December 21, 2007.
5. As it relates to the \$38,430.46 transfer on February 4, 2009 into Lynn Smith's brokerage account, there was no question that the funds belonged to David Smith. He simply deposited the \$38,430.46 into his wife's account.
6. The next transfer in question occurred on February 20, 2009 and was a deposit from David Smith in the amount of \$326,304.11. The only knowledge that I have as it relates to this transfer resulted from a conversation I had with Lynn Smith. I was informed that this transfer had something to do with the estate planning transfers among the parties, and that was the way the information was reported in the exhibits to the preliminary injunction hearing.
7. As it relates to a transaction on June 10, 2009 from TDMM Cable Funding in the amount of \$160,800, it is in connection to the repayment of a loan for

\$366,000 that was originally made on June 5, 2009. Additionally, the deposit into Lynn Smith's brokerage account on July 30, 2009 from TDMM Cable Trust in the amount of \$175,000 was also in connection with a partial repayment of the \$366,000 loan. The loan is illustrated through a June 5, 2009 promissory note in the amount of \$366,000.

8. As it relates to the deposit into Lynn Smith's brokerage account on March 18, 2010 in the amount of \$100,000, it was made as a repayment of a loan made to TDMM Benchmark on March 16, 2010.

The SEC has offered little to no proof beyond the speculative allegations in the Second Amended Complaint, and should no longer be able to rely on rulings that were decided on a "likelihood of success" standard. Relief Defendant Lynn Smith, however, has offered evidence in the form of affidavits and testimony from the preliminary injunction hearing which establishes that valuable consideration was given for the deposits from McGinn Smith entities. Simply stated, because the monies Lynn Smith received from McGinn Smith entities were in repayment of a loan, Lynn Smith provided consideration and has a legitimate claim to those funds. As a result, no genuine issue as to a material fact exists as to whether Lynn Smith has received ill-gotten funds or as to whether Lynn Smith has a legitimate claim to those funds. Accordingly, Lynn Smith should be awarded with partial summary judgment that terminates the claims against her as a relief defendant.

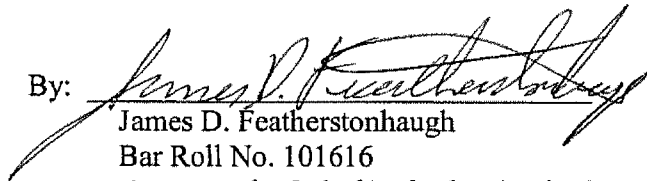
CONCLUSION

For the foregoing reasons the Court should determine that a genuine issue of material fact does not exist as to whether: (a) Lynn Smith received ill-gotten gains and (b) Lynn Smith has a "legitimate claim" to the monies in question given the consideration that she provided. Accordingly, the Court should grant partial summary judgment in favor of Lynn Smith which dismisses the claims against her in her capacity as a relief defendant.

Dated: July 2, 2014

Featherstonhaugh, Wiley & Clyne, LLP

By:



James D. Featherstonhaugh

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY MCGINN,

**Case No.: 1:10-CV-457
(GLS/DRH)**

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.

**AFFIDAVIT OF JAMES D. FEATHERSTONHAUGH IN SUPPORT
OF RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH'S
MOTION PURSUANT TO FEDERAL RULE OF CIVIL
PROCEDURE 56 FOR PARTIAL SUMMARY JUDGMENT**

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

JAMES D. FEATHERSTONHAUGH, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court and represent Lynn A. Smith, a Relief Defendant and Defendant in the instant proceeding. I submit this affidavit in support of Lynn A. Smith's motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56. This affidavit is submitted on my personal knowledge, the pleadings, court records, and on occasion, where noted, on information and belief.

2. Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when the moving party demonstrates that "there is no genuine issue as to any material fact...". The non-moving party must come forth with evidence that establishes a genuine dispute that requires resolution at trial.

3. The central issue in this motion is whether the record before the Court contains evidence which establishes a genuine issue of material fact that Lynn Smith, in her capacity as a Relief Defendant, has (a) received ill-gotten gains, and (b) whether she has a legitimate claim to the monies she received. Relief Defendant/Defendant respectfully submits that the SEC's vague assertions of unspecified evidence does not establish an issue of material fact as to whether Lynn Smith is an appropriate Relief Defendant. See, Second Amended Complaint, ¶¶81-87, 112-114, attached hereto as Exhibit "A".

4. The procedural posture of this action is complex. However, the causes of action against Lynn Smith, as a Relief Defendant, remain rather simple. The Securities and Exchange Commission has asserted a claim against Lynn Smith in her capacity as a relief defendant because various McGinn Smith entities deposited money into her individual stock account after 2003 when the alleged fraudulent scheme involving the "four funds" began. Dkt. No. 86 at 31. Alternatively, the SEC contends if Lynn Smith is not

properly named as a relief defendant, David Smith is a joint owner of Lynn Smith's stock account and other Smith family assets. Id. Lynn Smith strongly opposes these allegations.

5. It has never been disputed that Lynn Smith is the owner of an individual stock account currently held in her name at RMR Wealth Management, account number [REDACTED] 0916. See, Lynn A. Smith account statement from 03/01/10 to 03/31/10 attached as Exhibit "B". This represents the last statement to Defendant/Relief Defendant before her records were seized by the government. It is also not disputed that Lynn Smith's individual stock account was initially created in 1969 with a \$60,000 initial investment that came from an inheritance from her father's estate. Dkt. No. 86 at 7.

6. The Relief Defendant/Defendant recites a brief procedural history of this action. This case began with the SEC's initial complaint and temporary restraining order that froze nearly all of the Smith family assets and appointed a receiver on April 20, 2010. Dkt. No. 1-4. The SEC premised their case on securities enforcement with allegations of fraud and wrongdoing against Lynn Smith's husband, David Smith, and his business partner, Timothy McGinn. Id. The two men operated an Albany-based financial services company, McGinn, Smith & Co., Inc., which allegedly violated, *inter alia*, Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b). Id.

7. From June 9 through June 11, 2010 Magistrate Judge Homer held a hearing on the SEC's motion for emergency relief. Dkt. No. 87-89. One of the main issues heard was the extent to which assets held by Lynn Smith, as a Relief Defendant, could be subjected to an asset freeze order. Id. Magistrate Homer's Memorandum-Decision and Order ("MDO I") held that Lynn Smith's individual stock account was subject to the asset

freeze primarily because the account was used to loan money to McGinn Smith entities to cover operating expenses. Dkt. No. 86. Magistrate Homer also held that David Smith had discretion over the account during the course of his professional career. Id.

8. On August 3, 2010, the SEC filed an Amended Complaint, Motion for Reconsideration of MDO I, and an Application for Emergency Relief requesting that the Court refreeze the Smith Trust based on the discovery of a private annuity contract. Dkt. No. 103. On November 22, 2010 the Court issued Memorandum-Decision and Order (“MDO II”) which granted the SEC’s Motion for Reconsideration and leave to file an Amended Complaint. Dkt. No. 194.

9. Shortly thereafter the Smith Trust moved for reconsideration of MDO II. Dkt. No. 214. On January 11, 2011, Magistrate Homer issued MDO III which denied the Trust’s Motion for Reconsideration. Dkt. No. 254. Lynn Smith then moved pursuant to Rule 12 for dismissal of certain claims against her and her children. Dkt. No. 224. On May 6, 2011 Northern District Senior Judge Gary Sharpe issued a Decision and Order which denied the Relief Defendant/Defendant’s Motion to Dismiss. Dkt. No. 321. That Decision simply determined that the Complaint alleged facts plausibly suggesting a claim upon which relief could be granted. Id. Judge Sharpe went on to hold that MDO I, II and III were determined on:

Judge Homer’s findings...based on proof extracted from a condensed discovery, governed by the “substantial showing of likelihood of success” standard, and confined to evaluating the assets’ susceptibility to freezing. Thus, in light of these limitations... reliance on the law of the case doctrine here would seem to offend the well-settled principle that the doctrine be “only addressed to its good sense.”

Dkt. No. 321 at 20-22.

10. The standard for this Court to apply in this instant motion is not “likelihood of success,” but rather, whether the Plaintiffs have created a genuine issue of material fact based on the evidence now before the Court. Judge Sharpe’s Decision took notice of the fact that the SEC cannot rely on preliminary rulings to create a genuine issue of material fact, and the Relief Defendant/Defendant submits that all of the evidence presented to this point does not create an issue of fact against Lynn Smith as a Relief Defendant.

11. After the discovery of a private annuity contract, Magistrate Homer issued a Decision and Order imposing sanctions on Lynn Smith and various other parties in July of 2011. Dkt. No. 342. As it relates to Lynn Smith, the Sanction Order states:

On or before September 1, 2011, Lynn Smith shall disgorge to the Receiver on behalf of the Trust a total of \$944,848.00 jointly and severally with Dunn and Wojeski to the extent indicated below and shall pay to the SEC a total of \$51,232.00 for attorneys’ fees and costs incurred by the SEC; and if Lynn Smith fails to disgorge and pay such amounts on or before September 1, 2011:

- i. The SEC may have judgment against Lynn Smith for any amount which remains unpaid; and
- ii. The Receiver is granted leave on behalf of the Trust to take whatever action he deems in his judgment to be financially appropriate to obtain the maximum possible return on the Great Sacandaga Lake property, including the sale or rental of that property, in whole or in part, in which case Lynn Smith will be entitled to offset any amount recovered by the Receiver for the property, less costs, against the total amount owed.

Dkt. No. 342 at 50-51.

12. On May 16, 2014 the Receiver took possession and closed on the sale of the Great Sacandaga Lake property. Dkt. No. 693. The property had been built by Lynn Smith’s father approximately forty years prior and had remained in her family at all times. Dkt. No. 23 at 4. Upon information and belief, the sale of the Sacandaga property resulted

in net proceeds of \$546,204.16 which have been placed into a Receiver account pending further Court Order. Dkt. No. 693.

13. Two years earlier, on April 23, 2012, the Receiver also took possession and closed on a sale of the property located in Vero Beach, Florida that belonged to Lynn Smith. Upon information and belief, the Vero Beach property sold for \$1,120,000 with the Receiver's estate only retaining \$102,310.94 after payment of past-due taxes, assessments and mortgage. Dkt. No. 263; See also, www.mcginnsmithreceiver.com, "Announcements" #8 February 1, 2011 (updated as of March 7, 2011, March 26, and May 7, 2012): VERO BEACH PROPERTY HAS BEEN SOLD.

14. A related criminal trial began on January 7, 2013. See, Case 1:12-cr-00028 DNH. On February 6, 2013 a jury convicted David Smith of Conspiracy to Commit Mail and Wire Fraud (18 U.S.C. §§1343; 1341); Mail Fraud (18 U.S.C. §1341); Wire Fraud (18 U.S.C. §1343); Securities Fraud (15 U.S.C. §78(b)(ff)); and Filing a False Tax Return (26 U.S.C. §17206(1)). Case 1:12-cr-00028 DNH, Dkt. No. 108. David Smith's criminal restitution was calculated by Judge Hurd to be equal to \$5,989,736.00, of which \$241,014 is payable to the Internal Revenue Service, and \$5,748,722.00 is owed to the allegedly defrauded victims. See, David L. Smith Criminal Sentencing Memorandum attached hereto as Exhibit "C".

15. At the government's request, this case was stayed from March 26, 2012 through September 5, 2013 pending the outcome of the parallel criminal action. Dkt. Nos. 474, 589. During that time, a settlement conference was held between all parties in the chambers of Magistrate Hummel on April 30, 2013. Dkt. No. 565. There was no settlement agreement reached between the parties.

16. Magistrate Hummel's scheduling Order required that any SEC expert disclosure shall be made prior to March, 2014. Dkt. No. 672. The SEC did not disclose any expert witnesses. Lynn Smith submitted an expert report from John D'Aleo on May 5, 2014. Dkt. No. 690.

17. As it relates to the sum and substance of the claims against Lynn Smith, in her capacity as a relief defendant paragraphs 81 through 87 of the SEC's Second Amended Complaint, allege as follows:

The TDMM Cable Trust 09

81. On January 19, 2009, MS & Co. launched an offering of \$1,550,000 of 9.00% three-year notes in TDMM Cable Senior Trust 09 ("Senior 09 Tranche") and an offering of \$1,325,000 of 11% 54-month notes in TDMM Cable Junior Trust 09 ("Junior 09 Tranche," collectively "TDMM Cable 09"). The Senior and Junior offerings sold out.

82. The PPM stated that after MS & Co. took a placement agent fee of 5% of the amount raised for Senior 09 Tranche and 8% of the amount raised for Junior 09 Tranche, the balance, about \$2.7 million, would be loaned to TDM Cable Funding, which would use the proceeds to acquire all the operating assets and customer contracts of Broadband Solutions LLC and HipNET LLC (both of which purportedly provided "triple play" service to communities in Florida). The PPMs also state that TDM Cable Funding would pay MS & Co. an additional \$400,000 for "acquisition negotiations, legal and due diligence activities"-- making MS & Co.'s total fee \$583,500 or 20.3% of the gross proceeds of the offering.

83. Not satisfied with the disclosed fees, MS & Co. used a total of at least 54% of the funds raised to: (i) make payments to McGinn, McGinn's son, Smith, relief defendant L. Smith, MS Partner 4 and an Albany politician; (ii) to cover MS & Co.'s payroll between January and April 2009; and (iii) to pay investors in other Trust entities. The following is a summary of McGinn's misuse of TDMM Cable 09 investor funds:

84. During January 2009, MS & Co. raised the first \$554,000 from investors for the Senior 09 Tranche. On January 30, 2009, McGinn transferred \$475,000 from the Trust to TDM Cable Funding, and transferred \$413,000 from the TDM Cable Funding to MS & Co., where it was immediately used to cover the firm's payroll.

85. In February 2009, McGinn again transferred large sums of money from the TDMM Cable Senior Trust account to TDM Cable Funding and then to MS & Co to make MS & Co.'s mid-February and end of February payroll. The following months, McGinn again transferred substantial amounts from the TDMM Cable 09 Trust accounts to MS & Co. to cover the March 31 and April 30 payrolls.

86. McGinn also transferred a total of at least \$99,000 to McGinn's personal account; more than \$21,000 to McGinn's son (apparently a lawyer who worked for MS & Co.); more than \$105,000 to a MS & Co. affiliate called Mr. Cranberry; \$18,750 to an Albany politician's law firm; at least \$70,000 to MSTF; \$26,500 to Verifier 07; \$10,000 to Firstline Trust; \$25,000 to a senior MS & Co. officer \$24,000 to Smith; **and more than \$335,000 to Smith's wife, relief defendant L. Smith.** (Emphasis added).

87. The transfers described above total \$1,646,040 -- nearly three times the fees to which MS & Co. entities were entitled pursuant to the PPMs, and more than half of the gross offering proceeds.

Dkt. No. 334.

18. To combat these allegations Lynn Smith submitted sworn testimony which established a legitimate claim to the alleged payment of \$335,000. Dkt. No. 69. The SEC has not refuted the sworn testimony of Lynn Smith which stated:

26. The first payment referenced, \$335,000, in or about June and July of 2009, was actually two separate payments, which are correctly stated in paragraph 26 of the Complaint. Two payments, one for \$160,800 and one for \$175,000 were made to my account from TDMM Cable in repayment of a loan in the amount of \$366,000 which I made to TDMM Cable from my stock account on June 5, 2004. I have annexed hereto and made a part hereof a copy of the note as Exhibit A. It is my belief that the original note is in the possession of the United States Government and presumably accessible to the SEC. I have also annexed as Exhibit B. the account statements that evidence the withdrawal of the principal amount of that loan and the receipt, in the form of the two deposits, representing partial payment of that loan.

27. The undisputed fact is that a \$366,000 loan was made by me, with my specific consent, to TDMM Cable, and was carried out by my husband. I specifically discussed the loan with him, approved it as an investment from my stock account, and was entitled to be repaid. In fact, TDMM still owes me approximately \$35,000 in principal plus accrued interest.

29. The Commission also alleges that I received "many other payments from McGinn Smith Entities" (Complaint ¶94), but the Complaint does not indicate those funds allegedly received resulted from ill-gotten gains or that I did not otherwise have a legitimate right to the funds. Nor does the Commission specify the approximate amount of those payments that would justify the freezing of all my personal assets...

See, Lynn Smith Affidavit, dated June 9, 2010, attached hereto as Exhibit "D". Dkt. No. 69-1.

19. As a result, the proof before the Court establishes that Lynn Smith furnished consideration for the \$335,000 payment she received.

20. The Plaintiff's Second Amended Complaint also alleges in ¶112-113 that:

112. L. Smith received more than \$1.8 million from Smith and the McGinn Smith Entities during the period of the fraud. For example, L. Smith received \$375,000 in December 2007; \$325,000 in June and July 2009; \$100,000 in March 2010; and \$185,000 in October 2006 and May 2007. L. Smith received many other payments from McGinn Smith Entities.

113. L. Smith provided no consideration for these transfers.

Dkt. No. 334.

21. Once again, in response to these allegations the Relief Defendant/Defendant submits proof from a certified public account and with over forty years of experience which refuted the allegations. See, testimony of John D'Aleo dated June 11, 2010 at 421-445. John D'Aleo testified at the preliminary injunction hearing and submitted an Affidavit in support of this motion as proof that Lynn Smith furnished consideration for the payment of money questioned by the SEC. The Affidavit of John D'Aleo along with accompanying exhibits is attached hereto as Exhibit "E". Moreover, paragraph 11 of John D'Aleo's Affidavit describes with particularity how Lynn Smith provided consideration and why she did not receive ill-gotten gains from the McGinn Smith entities. The main conclusion by Mr. D'Aleo, who has been disclosed as an expert witness for Lynn Smith, is that:

12. The money that was deposited into Lynn Smith's individual brokerage account was made in repayment of previous loans that she agreed to furnish, and those deposits do not constitute Lynn Smith's "ill-gotten gains". As a result, Lynn Smith has a legitimate claim to deposits she received from McGinn Smith entities.

13. The bridge loans that Lynn Smith made from her individual brokerage account to various McGinn Smith entities was valuable consideration given in exchange for the amount of repayment.

23. In the Plaintiff's response to the Defendant's Interrogatories, the Plaintiff's attempt to create an issue of fact by relying on a "list of facts that Plaintiff 'contend[s] or believe[s] supports Plaintiff's allegation that monies allegedly received by Smith were ill-gotten gains or illegal profits resulting from the Defendant's fraud." See, Plaintiff's Response to Interrogatory No. 3, dated February 24, 2011, attached hereto as Exhibit "F".

24. After carefully reviewing the Plaintiff's so-called "list of facts," it contains nothing but mere allegations and speculative statements which do not establish a genuine issue of fact for trial.

25. For example, the Plaintiff's list of facts specifically relies on "[t]he June 9, 2010 testimony of William Brown at the preliminary injunction hearing". However a review of Mr. Brown's testimony reveals nothing that establishes a genuine issue of material fact against Lynn Smith. See, testimony of William Brown from the preliminary injunction hearing, attached hereto as Exhibit "G". The Relief Defendant/Defendant submits that Mr. Brown's testimony is construed as a summary and observances from his role as a Receiver. Mr. Brown testified at the hearing that he was not aware of any transfers to Lynn Smith, and had only become familiar with McGinn Smith & Co., Inc. in January of 2010.

26. Next, the Commission's "list of facts" also specifically references the following:

- The facts contained and exhibits referenced in the Declaration of Israel Maya filed in support of Plaintiff's April 20, 2010 Order to show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to Exhibits 1-4, 19, 30-38, 40-41, 44-46, 48-50, 58-62, 67;
- The facts contained and exhibits referenced in the Declaration of Lara Shalov Mehraban filed in support of Plaintiff's April, 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to paragraph 26 and Exhibits 1-4, 14, 20, 24-25, 33-38, 54, 58-60, 67;
- The facts contained in the Declaration of Roseann Daniello filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to paragraph 25;

See, Declarations of Roseann Daniello, Laura Shalov Mehraban, and Israel Maya dated April 20, 2010 attached hereto as Exhibit "H". These declarations continue to collectively rely on the basic fact that "more than \$335,000 [went] to Smith's wife, Lynn Smith". The Relief Defendant/Defendant also took notice that none of the declarations are based on personal knowledge, and testimony from the preliminary injunction establishes that the declarants did not know the reason as to the purpose of the transfers.

27. The Plaintiff's "list of facts" also references the FINRA testimony of David L. Smith in the attempt to create a genuine issue of material fact as to whether Lynn Smith (a) received ill-gotten gains or (b) provided consideration for the money she received. However, David Smith's testimony does not support the Plaintiffs causes of action against Lynn Smith. Page 796 of David Smith's FINRA testimony states:

DAVID SMITH TESTIMONY

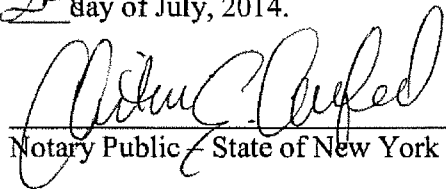
- Q: Do you have any investment accounts in your name?
A: I don't think so. I did years ago. It was small. May still be existing. There's no meaningful investment in it or dollars.
Q: Does your wife have any investment or brokerage accounts in which you have a beneficial interest or control?
A: No.
Q: That would apply for the last seven years?
A: Yes.

See, David Smith FINRA testimony attached hereto as Exhibit "I".

WHEREFORE, the Court should grant partial summary judgment in favor of Lynn Smith which discharges any direct claims against her in her capacity as a Relief Defendant because the Plaintiffs have failed to establish a genuine issue of material fact that would require resolution at trial.


JAMES D. FEATHERSTONHAUGH

Sworn to before me this
2nd day of July, 2014.


Notary Public / State of New York

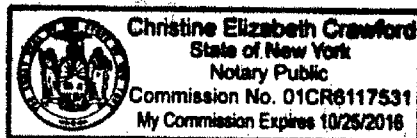


EXHIBIT A

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REGIONAL DIRECTOR
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
3 World Financial Center
New York, NY 10281-1022
(212) 336-0174 (Stoelting)

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

у.

10 Civ. 457 (GLS/DRH)

**McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, DAVID L. SMITH,
LYNN A. 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.

Plaintiff Securities and Exchange Commission (the "Commission") for its second amended complaint against McGinn, Smith & Co., Inc. ("MS & Co."), McGinn, Smith Advisors, LLC ("MS Advisors"), McGinn, Smith Capital Holdings Corp. ("MS Capital"), First Advisory Income Notes, LLC ("FAIN"), First Excelsior Income Notes, LLC ("FEIN"), First Independent Income Notes, LLC ("FIIN"), Third Albany Income Notes, LLC ("TAIN") (FIIN, FEIN, FAIN and TAIN are referred to collectively herein as the "Four Funds"), Timothy M. McGinn ("McGinn"), David L. Smith ("Smith"), Lynn A. Smith ("L. Smith"), Geoffrey R. Smith ("G. Smith"), Individually and as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Smith Trust"), Lauren T. Smith ("L.T. Smith"), and Nancy McGinn ("N. McGinn"), Defendants, and L. Smith and N. McGinn, Relief Defendants, alleges as follows:

SUMMARY OF ALLEGATIONS

1. This action arises from a fraud orchestrated by defendants McGinn, Smith and entities they control. From at least 2003 through April 2010, McGinn and Smith used MS & Co., a registered broker-dealer and investment adviser, MS Advisors, an investment adviser, and MS Capital, as well as dozens of affiliated entities they own or control (collectively, "the McGinn Smith Entities"), to raise over \$136 million in more than 20 unregistered debt offerings. The debt offerings, including the Four Funds and numerous trust entities (the "Trusts"), have been sold to more than 900 investors. The offering fraud already has caused significant investor losses, and this emergency action is intended to stop the fraud and preserve the status quo for the benefit of the victims.

2. McGinn, Smith, MS & Co., MS Advisors and MS Capital deceived investors in the Four Funds. They told investors that their money would be invested and that the McGinn Smith Entities' profits would depend on the spread between the cost of the investment and the

rate of return. Instead, the Defendants secretly funneled investor money to entities they owned or controlled, even though this was not permitted by offering materials. Defendants concealed from investors the truth about the Four Funds, including the fact that investor money was being routed to in-house entities controlled by Smith and McGinn and to other non-public and illiquid investments, and that these actions were having a disastrous impact on the investors.

3. In addition to the Four Funds, Smith and McGinn directed a series of smaller-scale offerings, primarily through various Trusts. The Trusts also were used as vehicles to funnel investor funds to various companies controlled by Smith and McGinn, contrary to the terms of the Private Placement Memoranda (PPMs). Investor money raised in offerings for the Trusts was routinely diverted to other McGinn Smith Entities as liquidity needs of the enterprise dictated. The Defendants also used offering proceeds to make unauthorized investments in and unsecured loans to speculative, financially troubled McGinn Smith Entities, to make MS & Co.'s payroll, to pay commission and transaction fees to McGinn Smith Entities, to make interest payments to investors in other entities, to support McGinn's and Smith's lifestyles, and to procure strippers for a "sexually themed" cruise.

4. During the period of the fraud, Smith and McGinn transferred substantial assets, including houses, cash and stock, with an intent to shield those assets from creditors.

5. The fraud has had a devastating impact on the investors. In 2009, Smith and McGinn received e-mails telling them the investors were wondering "if they've bought into a Ponzi Scheme," and a MS&Co. broker reported to McGinn and Smith that there are "many people who refer to our deals as a Ponzi Scheme."

6. As of September 2009, it appears that investors in the Four Funds were owed at least \$84 million, that the Four Funds had less than \$500,000 in cash on hand, and that their

remaining assets were worth only a small fraction of the amount owed to investors. Similarly, the Trusts have a negative equity of approximately \$18 million, and have never had the ability to pay the interest rates promoted to investors and also pay back principal. Nonetheless, McGinn and Smith continued to raise money from investors, using similar misrepresentations. During the first few months of 2010, contrary to representations to investors, McGinn and Smith continued to drain what little cash remained through payment of "fees" to themselves.

PROCEDURAL HISTORY

7. On April 20, 2010, in order to halt the ongoing fraud, maintain the status quo and preserve assets for injured investors, the Commission filed a Complaint and Order to Show Cause seeking emergency relief. At 2:00 p.m. on April 20, 2010, the Court granted the Commission's application for emergency relief and entered an Order freezing assets of the defendants and the relief defendant, L. Smith, including a brokerage account in the name of the Smith Trust; appointing a Receiver over the McGinn Smith Entities; and requiring the defendants and the relief defendant to produce verified accountings. The Order to Show Cause also provided for expedited discovery and scheduled a hearing on the Commission's motion for a preliminary injunction.

8. On May 28, 2010, the Smith Trust filed a motion to intervene for the limited purpose of asking the Court to lift the temporary restraining order and asset freeze as it related to the Smith Trust's brokerage account. On June 1, 2010, the Smith Trust's motion to intervene was granted.

9. Smith and McGinn consented to the preliminary injunction freezing their assets, and the Receiver consented as to the remaining defendants. The Smith Trust and L. Smith, however, opposed entry of the preliminary injunction.

10. On June 9, 10 and 11, 2010, following six weeks of discovery focusing on the Smith Trust and the Smiths' assets, the Court conducted a hearing on the Commission's motion for a preliminary injunction, and the motions of L. Smith and the Smith Trust to lift the asset freeze over their assets. During the hearing, the Court heard testimony from, among others, L. Smith, G. Smith, and David Wojeski, who had been named as Trustee when the original Trustee, Thomas Urbelis, resigned shortly after the Complaint was filed. Urbelis also testified at the hearing by way of deposition. L. Smith, G. Smith, Wojeski and Urbelis testified at the June 2010 hearing that the Smith Trust was nothing more than a simple family trust created by David and Lynn Smith for the sole purpose of benefitting their two children.

11. On July 7, 2010, the Court issued a memorandum-decision and order ("MDO I") that granted in part the Commission's motion for a preliminary injunction, and denied L. Smith's motion. As to the Smith Trust, the Court found that the Commission had not demonstrated that David Smith controlled the Trust or was the beneficial owner of the Trust; therefore, MDO I vacated the asset freeze as to the Trust.

12. On July 22, 2010, the Court entered the Preliminary Injunction Order.

13. On August 3, 2010, the Commission filed an Amended Complaint, motion for reconsideration of MDO I, and an application for emergency relief requesting that the Court, among other relief, again freeze the assets of the Smith Trust, based upon a previously undisclosed "Private Annuity Agreement" between David and Lynn Smith and the Smith Trust that gave the Smiths an interest in the assets of the Smith Trust.

14. On November 22, 2010, the Court issued a memorandum-decision and order ("MDO II") granting the Commission's motion for reconsideration of MDO I, and further finding that the Commission demonstrated a substantial likelihood of success of proving that

David and Lynn Smith created the Smith Trust and Annuity Agreement to avoid gift and capital gains taxes; and that David Smith maintained control of the Smith Trust to insure that the annuity payments back to the Smiths would be made. MDO II also found evidence of fraud, misrepresentation, and misconduct by those associated with the Trust in failing to disclose the Annuity Agreement. Accordingly, the Commission's motion for a preliminary injunction as to the Smith Trust was granted.

15. On December 1, 2010, following the submission of an emergency motion by the Commission, the Court issued a memorandum-decision and order finding that in September and October 2010, McGinn engaged in a fraudulent securities offering through an entity named Security Alarm Credit, LLC, and that this offering included misrepresentations and omissions of material facts. The Court enjoined the offering; enjoined McGinn from proceeding with any offering without prior Court approval; and found McGinn in contempt of the Preliminary Injunction Order.

VIOLATIONS

By virtue of the conduct alleged herein:

16. MS & Co., MS Advisors, MS Capital, McGinn and Smith, directly or indirectly, singly or in concert, have engaged and, unless restrained and enjoined will continue to engage in acts, practices, schemes and courses of business that constitute violations of Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] and Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder[17 C.F.R. § 240.10b-5];

17. MS & Co., MS Advisors, McGinn and Smith directly or indirectly, singly or in concert, have engaged and, unless restrained and enjoined, will continue to engage in acts,

practices, schemes and courses of business that constitute violations of Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 (the "Advisers Act") [15 U.S.C. §§ 80b-6(1)(2) and (6)] and Rule 206(4)-8 thereunder [17 C.F.R. §275.206(4)-8];

18. FAIN, FEIN, FIIN and TAIN have violated and, unless restrained and enjoined, will continue to violate Section 7(a) of the Investment Company Act of 1940 ("Company Act") [15 U.S.C. § 80a-7];

19. MS & Co., MS Capital, FAIN, FEIN, FIIN, and TAIN, McGinn and Smith directly or indirectly, singly or in concert, have violated and, unless restrained and enjoined, will continue to violate Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. § 77e];

20. MS & Co. violated and, unless restrained and enjoined, will continue to violate Section 15(c) (1) of the Exchange Act [15 U.S.C. § 78(o)(1)] and Rule 10b-3 [17 C.F.R. § 240.10b-3], and McGinn and Smith have aided and abetted such violation;

21. The fraudulent conveyance defendants – Smith, L. Smith, G. Smith, L.T. Smith, the Smith Trust, McGinn and N. McGinn – conveyed certain property with actual intent to hinder, delay or defraud either present or future creditors, or received such property, in violation of N.Y. Debtor & Creditor Law ("NYDCL") Section 276.

22. L. Smith and N. McGinn, as relief defendants, have received and retained ill-gotten gains from defendants' fraud.

JURISDICTION AND VENUE

23. The Commission brings this action pursuant to the authority conferred upon it by Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)], Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)], Section 209(d) of the Advisers Act, [15 U.S.C. § 80b-9(d)] and Section

42(d) of the Company Act [15 U.S.C. §80a-41(d)]. The fraudulent conveyance claim is brought under Section 276 of the NYDCL.

24. The Commission seeks final judgments: (i) restraining and permanently enjoining McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds from engaging in the acts, practices and courses of business respectively alleged against them herein; (ii) ordering McGinn, Smith, MS & Co., MS Advisors, MS Capital, the Four Funds, L. Smith and N. McGinn to disgorge any ill-gotten gains and to pay prejudgment interest thereon, jointly and severally; (iii) prohibiting McGinn from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. §78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)]; and (iv) imposing civil money penalties on certain defendants pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)], Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)], and Section 42(e) of the Company Act [15 U.S.C. § 80a-41(e)].

25. As to the fraudulent conveyance claim, the Commission seeks to have the fraudulent conveyances voided pursuant to Sections 276 and 278 of the NYDCL and to recover the property fraudulently conveyed or its equivalent value (and for attorneys' fees pursuant to Section 276-a of the NYDCL).

26. This Court has jurisdiction over this action pursuant to Sections 20(b) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b) and 77v(a)], Sections 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(e) and 78aa], Sections 42 and 44 of the Company Act [15 U.S.C. §§ 80a-41 and 80a-43] and Sections 209 and 214 of the Advisers Act [15 U.S.C. §§ 80b-9 and 80b-14].

This Court has jurisdiction over the fraudulent conveyance claim pursuant to 28 U.S.C. § 1345 and the Court's ancillary and/or supplemental jurisdiction.

27. Venue lies in the Northern District of New York, pursuant to Section 22 (a) of the Securities Act [15 U.S.C. § 77v(a)], Section 27 of the Exchange Act [15 U.S.C. § 78aa], Section 44 of the Company Act [15 U.S.C. § 80a-43] and Section 214 of the Advisers Act [15 U.S.C. § 80b-14]. The Defendants directly or indirectly, singly or in concert, have made use of the means and instrumentalities of interstate commerce, or of the mails, in connection with the transactions, acts, practices, and courses of business alleged herein. Certain of these transactions, acts, practices, and courses of business occurred in the Northern District of New York. For example, the main offices of MS & Co., MS Advisors, MS Capital, the Four Funds, and the various Trusts were located in Albany, New York and McGinn and Smith transacted business at those offices.

DEFENDANTS AND RELIEF DEFENDANTS

28. **Timothy M. McGinn**, age 62, is a resident of Schenectady, New York. He is the chairman, secretary, and co-owner of MS & Co. as well as treasurer and indirect co-owner of MS Advisors. From 2003 to 2006, McGinn served as Chief Executive Officer of Integrated Alarm Services Group, Inc. ("IASG"), a publicly traded company. He left IASG and returned to MS & Co. in the fall of 2006.

29. **David L. Smith**, age 65, is a resident of Saratoga Springs, New York. He is the president of MS & Co. and the managing member of MS Advisors. Until 2007, Smith also was the chief compliance officer of MS & Co. Smith owns about 50% of MS & Co. and about 50% of MS Advisors.

30. **McGinn, Smith & Co., Inc. ("MS & Co.")**, a registered broker-dealer and New York corporation founded in 1981 by Smith and McGinn, has its principal place of business at

99 Pine Street, Albany, NY. It is currently owned by Smith (50%), McGinn (30%), another partner ("Partner 3") (about 15%) and a fourth partner ("Partner 4") (about 5%). In April 2009, MS & Co. registered with the Commission as an investment adviser, and replaced MS Advisors as the adviser to the Funds. Throughout 2009, MS & Co. had about 53 employees, including about 35 registered representatives, and branch offices in Clifton Park, Manhattan and Boca Raton. On December 24, 2009, MS & Co. filed a partial BD-W in connection with winding down much of its broker-dealer business. On March 9, 2010, it also withdrew its investment adviser registration.

31. **McGinn Smith Advisors, LLC ("MS Advisors")** is a New York corporation with its principal place of business at 99 Pine Street, Albany, New York. MS Advisors is a wholly-owned subsidiary of McGinn, Smith Holdings LLC, which is owned 50% by Smith, 30% by McGinn and 20% by MS Partners. MS Advisors was registered as an investment advisor with the Commission from January 3, 2006 to April 24, 2009. It was the investment adviser to all of the Funds until April 2009, when it was replaced by MS & Co.

32. **McGinn, Smith Capital Holdings Corp. ("MS Capital")** is a New York corporation with its principal place of business at 99 Pine Street, Albany, New York. It is owned by MS Holdings LLC (52%), McGinn (24%) and Smith (24%). It is the indenture trustee for the Funds and the trustee for all the Trusts created between 2006 and 2009. Smith is president and McGinn is chairman of the board.

33. **First Independent Income Notes LLC ("FIIN"); First Equity Income Notes LLC ("FEIN"); First Albany Income Notes LLC ("FAIN") and Third Albany Income Notes LLC ("TAIN")** are New York corporations and unregistered investment companies with

their principal places of business at 99 Pine Street, Albany, New York. They are wholly-owned by MS Advisors.

34. **Geoffrey R. Smith**, age 30, a resident of New York, New York, is the son of Smith and L. Smith, and a beneficiary of the Smith Trust. G. Smith is also the Trustee of the Smith Trust. G. Smith became Trustee when he was substituted for the prior trustee, David M. Wojeski, on February 14, 2011. Wojeski was named as Trustee when the original Trustee, Thomas Urbelis, resigned on April 22, 2010.

35. **Lauren T. Smith**, age 28, a resident of Aspen, Colorado, is the daughter of Smith and L. Smith, and a beneficiary of the Smith Trust.

36. **Lynn A. Smith**, age 64, is the wife of Smith and a resident of Saratoga Springs, New York.

37. **Nancy McGinn**, age 50, is the wife of McGinn and a resident of Schenectady, New York.

FACTS

38. McGinn and Smith founded MS & Co. in 1980 and the firm registered as a broker-dealer in 1981. McGinn sold 40% of his interest in MS & Co. to Partner 3 in 2003 when he became the chief executive officer of IASG, but he returned to MS & Co. in 2006. Since then, he and Smith have actively controlled virtually every aspect of the McGinn Smith Entities' operations.

The Four Funds

39. Between September 2003 and October 2005, MS Advisors formed FAIN, FEIN, FIIN and TAIN. MS Advisors held 100% of the membership interest in each Fund and was their sole managing member. MS Advisors also served as investment adviser to the Four Funds.

Smith was responsible for the majority of the investment decisions for the Funds. Among other functions, McGinn served as signatory on behalf of various McGinn Smith Entities that received loans from the Funds.

40. MS & Co. acted as the placement agent for debt offerings by the Four Funds, raising a total of approximately \$90 million. MS Capital served as Trustee and Servicing Agent for each of the Four Funds. The Funds each had between 150 and 300 investors.

41. Each Fund invested more than 40% of its assets in securities. MS & Co. was required to, but did not, register each of the Funds as investment companies.

42. The terms of the offerings by the Four Funds, as disclosed in their "Confidential Private Placement Memoranda ("PPMs"), are summarized below:

OFFERING	DATE OF PPM	AGGREGATE PRINCIPAL AMOUNT	TYPES OF NOTES SOLD
FIIN	Sept. 15, 2003	\$20 million	5% Secured Senior Notes due 2004 7.5% Secured Senior Subordinated Notes due 2008 10.25% Secured Junior Notes due 2008
FEIN	Jan. 16, 2004	\$20 million	5% Secured Senior Notes due 2005 7.5% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009
TAIN	Nov. 1, 2004	\$30 million	5.75% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009
FAIN	Oct. 1, 2005	\$20 million	6% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2010

43. Each note holder was entitled to quarterly interest payments. The Secured Senior Subordinated and Secured Junior Note holders' rights to payments were subordinated to the rights of the Senior Secured Note holders.

44. The PPMs contained essentially identical disclosures, terms and conditions. They were prepared at Smith's direction and were reviewed by him for accuracy prior to commencement of each offering. Each PPM disclosed that the issuer was:

formed to identify and acquire various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio. . . .

45. Although the PPMs include broad disclosures about the risks of investing in the Four Funds, the disclosures regarding potential affiliated transactions, aside from payment of fees and commissions to affiliates, was limited to the following language:

[The Fund] may acquire Investments from our managing member or an affiliate of our managing member that has purchased the Investments. If the Investment is purchased from our managing member or any affiliate, we will not pay above the price paid by our managing member or such affiliate for the Investment, other than to reimburse our managing member or such affiliate for its costs and any discounts that it may have received by virtue of a special arrangement or relationship. In other words, if we purchase an Investment from our managing member or any of its affiliates, we will pay the same price for the Investment that we would have paid if we had purchased the Investment directly. We may also purchase securities from issuers in offerings for which McGinn, Smith & Co., is acting as underwriter or placement agent and for which McGinn, Smith & Co. will receive a commission.

46. The PPMs did not disclose that the Four Funds would make any loans to, transfers, or investments in, affiliated entities.

47. The Four Funds increasingly made unauthorized loans and transfers to and investments in affiliated McGinn Smith Entities. By September 2009, approximately one-half of all of the Four Funds' assets had been loaned to or invested in affiliated, often cash poor and

financially desperate McGinn Smith Entities. The PPMs suggested that the Four Funds were created to identify and invest in a wide spectrum of public and private investments that would “add value to our portfolio.” In fact, the Four Funds served the more limited purpose of loaning or investing the majority of their funds in financially troubled McGinn Smith Entities. Only about \$3.6 million of the approximately \$106 million raised by the Four Funds was invested in liquid, publicly traded companies.

48. The PPMs did not disclose that most of the McGinn Smith Entities were illiquid, had little or no revenues, or were in poor financial condition when they received the proceeds from the Four Fund offerings. The investments appear to have been preceded by little due diligence (none of which was done by persons independent of MS & Co.). The investments were generally dictated by liquidity needs of the McGinn Smith Entities.

49. For example, between 2005 and 2007, MS Advisors caused three of the Four Funds to loan nearly \$8 million to alseT IP, a start-up entity partly owned and managed by Partner 3. At least \$700,000 of those loans was immediately transferred to Partner 3 as salary. AlseT never made a penny, and never repaid any of the loans. By December 2007, an internal MS & Co. email shows that the chief financial officer placed the value of the Four Funds’ loans to alseT at zero. Nonetheless, MS Advisors caused two of the Four Funds to “loan” alseT an additional \$250,000 in February 2008, so that alseT could make additional payments to certain individuals.

50. By no later than 2006, McGinn, Smith, MS & Co., MS Advisors, MS Capital and the Four Funds knew or recklessly disregarded that the Four Funds could not redeem investor notes when they became due. For example, on December 21, 2006, an MS & Co. employee sent an email to Smith telling him that a TAIN investor wanted to redeem \$100,000 in TAIN notes

due December 15, 2006 and purchase \$100,000 in one of the Trusts (TDM 9.25%). Smith replied that the broker "needs to replace the \$100,000 before doing the trade." He continued: "I am running on fumes with all of these redemptions and cannot afford any more."

51. By the end of 2007, each of the Four Funds had already paid out millions more than the Four Funds had received in income from investments. As of September 30, 2009, since inception the Four Funds had revenues of only \$12.9 million and spent a total of \$37 million, for a combined total loss from operations of \$24 million.

52. By the end of 2007, the Four Funds' assets were worth a fraction of the amount owed to investors. According to an analysis in December 2007 by MS & Co.'s then-chief financial officer, the combined "book value" of the Four Funds was then only \$69,384,870 compared to total notes payable of \$86,046,000. Moreover, the CFO calculated that the "net realizable" amount in the Four Funds combined as only \$37,160,299, nearly \$48.9 million less than the amount owed to investors. Nonetheless, the Four Funds continued to raise money from investors without disclosing these facts.

Additional Misrepresentations and Omissions

53. On January 13, 2005, Smith wrote to a prospective investor that the purpose of TAIN "is to make investments, primarily in the form of secured loans, to private and public entities for purposes that include acquisition, equipment purchases, receivable financing and general corporate growth." At the time Smith wrote this letter, TAIN had made three investments. Only one of those three investments was secured, a loan for only \$830,000 out of a total of \$13.1 million in outstanding investments.

54. Smith steered another investor away from investing in blue chip stocks like General Electric as too risky, and told him that the Four Funds' private placements were safer investments.

55. On July 6, 2004, an MS & Co. broker told a prospective investor that:

The [FEIN] Notes represent a basket of asset backed securities with substantial cash flow, a history of performance and limited liquidity in the marketplace. The portfolio includes securities from both the public and private sector. Asset classes consist of bonds, notes, preferred stock, leases, mortgages, limited partnerships, and securitized cash flow instruments. Our most active market of ideas comes from small private placements (\$25 - \$50 million) offered by investment banks primarily to institutional investors. We take comfort in these ideas due to the fact that these offerings are usually proceeded [sic] with substantial due diligence, scrutinized by product and industry professionals, and underwritten by top-tier investment banking firms with an ongoing capability to assist with additional capital if necessary. . . . I feel this investment is a great way for you to earn an attractive yield while minimizing risk.

56. In fact, the "basket" of securities in which FEIN invested consisted mostly of promissory notes from MS & Co. affiliates that did not have "substantial cash flow" or "a history of performance." There is no evidence that any of the investments in FEIN resulted from "small private placements . . . offered by investment banks primarily to institutional investors." There is no evidence of any "due diligence," "scrutin[y] by product and industry professionals," or underwriting by "top-tier investment banking firms" for any of the investments made by the Four Funds at any time.

57. In addition, MS & Co. did not provide other investors with the relevant PPMs prior to their investments.

58. In order to maintain sufficient monies in the Four Funds to continue to make interest payments, MS & Co. encouraged investors to rollover their notes when they became due. As a result, McGinn, Smith, and MS & Co., and other entities were able to use what was, in effect, principal, to continue to make periodic interest payments.

Four Funds Restructuring

59. By as early as 2007, McGinn and Smith generally refused to honor investors' requests for the return of principal at the maturity of the notes, unless the customer's broker was able to find a new investor to replace the outgoing investor.

60. In January 2008, Smith sent a letter to certain investors in the Four Funds stating that the Four Funds had run into difficulty, which he falsely and misleadingly blamed as "primarily on liquidity" caused by the subprime crisis. In April 2008, Smith sent a second letter informing Four Fund investors that the problems cited in the January letter have "become more acute" and that, because two investments had eliminated their dividends or ceased distributions, the Four Funds were "forced" to eliminate the interest payments to Secured Junior Notes holders for the quarter. The letter also noted that MS Advisors had been advised by counsel that "distributions at this time quite probably reflect a return of capital and not interest, and therefore distributions at this time might be considered an invasion of principal due to the Senior and Senior Subordinated Note holders. This is a result of not knowing how and where to price our investments in these very illiquid markets."

61. In October 2008, Smith sent a letter to all Four Funds' note holders that falsely and misleadingly blamed the financial condition of the Four Funds on, among other things, the "current condition of the financial credit markets" and "financial crisis." It further stated that "the lack of liquidity in the credit markets . . . is the major issue that impacts your investment in the [Funds]."

62. These statements by Smith were false or misleading. The letters did not mention that affiliates of MS & Co., many of which were insolvent, owed the Four Funds tens of millions of dollars. These letters also omitted the material information that the value of the Four Funds'

assets was only 50 % or less of the amount owed investors, and falsely suggested that note holders had a reasonable prospect of eventually receiving their principal, pursuant to the restructuring plans.

63. The purported restructuring plan extended the maturity dates of the notes, some until 2023, and unilaterally reduced interest payments for all the note tranches. Since the 2008 restructuring, MS Advisors has made only reduced interest payments to the Secured Senior Note holders.

64. Smith also misrepresented that MS & Co. and the McGinn Smith Entities would be making their own “sacrifices” and would “forfeit” all annual fees and commissions as part of the note restructuring to “improve liquidity.” In fact, MS & Co. received approximately \$700,000 in fees in 2009 and \$275,000 in fees in 2010, after this letter was sent.

65. Notwithstanding the insolvency of the Four Funds, MS & Co. continued to sell and rollover investors’ notes in these Four Funds, including junior notes. Internal MS & Co. documents show new and rollover investments, including investments by customers of Smith, of at least \$736,500 in 2008 and \$130,500 in 2009. The firm apparently used these new investments in part to permit certain preferred investors to cash out.

66. Despite the dire condition of the Four Funds, Smith and McGinn and MS Advisors continued to divert the remaining moneys in the Four Funds to other financially troubled McGinn Smith Entities, such as Cruise Charter Ventures LLC (“CCV”) and TDM Luxury Cruise Trust 07 (“TDM Luxury”).

67. The PPMs also stated that the notes were being offered only to “accredited investors.” By MS & Co.’s own records, however, the Four Funds each had many unaccredited investors. According to MS & Co.’s records, as of March 20, 2006, FAIN had 30 unaccredited

investors; FEIN had 46 unaccredited investors; FIIN had 31 unaccredited investors; and TAIN had 75 unaccredited investors.

THE TRUST OFFERINGS

68. Between 2006 and 2009, MS & Co. acted as placement agent for: four Firstline Jr. and Sr. Trusts 07 offerings ("Firstline Trusts"), TDM Cable Trust 06 ("TDM Cable 06"), TDM Luxury Cruise Trust 07 ("TDM Cruise"), TDM Verifier Trust 07 ("Verifier 07"), TDM Verifier Trust 08 ("Verifier 08"); Cruise Charter Venture Trust 08 ("CCV Trust"), Fortress Trust 08 ("Fortress Trust"), Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08; TDM Verifier Trust 09; TDMM Benchmark Trust 09 ("Benchmark 09"), TDMM Cable Jr. and Sr. Trusts 09 ("TDMM Cable 09"), TDM Verifier Trust 07R; and TDM Verifier Trust 08R and other offerings, including affiliate McGinn Smith Transaction Funding Corp. ("MSTF").

69. The Trusts issued one or more tranches of notes and promoted interest rates ranging from 7.75 % to 13% *per annum*. Maturity dates varied from approximately 15 months to five years from the date of the offering.

70. Many of the Trusts were created to loan the offering proceeds, minus placement agent fees, to another McGinn Smith Entity ("the Conduit Entity"), which would then use those funds, minus substantial additional fees, to purchase specific contracts or receivables from a third entity, such as contracts for burglar alarm services or "triple play" (broadband, cable and telephone) services, or luxury cruise charters. The Trusts were generally left with only a promissory note and a "security" interest in the assets to be purchased by the Conduit Entity.

71. The Declaration of Trust typically defined "Permitted Investments" to mean a "promissory note" evidencing a loan from the Trust to the particular Conduit Entity. In addition, to the extent not employed for the loan from the Trust to the Conduit Entity, the Declaration permitted

temporary investments limited to (1) certificates of deposit; (2) regularly traded short term AAA rated debt obligations; or (3) U.S. Treasury obligations.

The PPMs Misled Investors as to the True Purpose of the Trusts

72. The true purpose of the Trusts was to structure a series of transactions that would allow various McGinn Smith Entities to siphon off millions of dollars in transaction fees and commissions and to serve the interest of McGinn Smith Entities, not the Trust investors. MS & Co. extracted enormous fees from these Trust deals, which were not clearly disclosed in the PPMs. The Trusts typically paid placement agent fees to MS & Co. of 5% to 9.5%. When the Trusts transferred funds to the Conduit Entity, that entity paid large fees to MS & Co. that were variously characterized as, among other things, "trust administration fees," "acquisition costs," "investment banking fees," "legal fees," and "due diligence fees." Those fees were sometimes as much as 20% or more of the gross proceeds of the offering.

73. Although many of these fees were disclosed in the Trust PPMs, the PPMs failed to disclose that certain of these fees, commissions or transaction costs overstated the true market value of the services performed, were unnecessary or were paid for services not performed or not performed with the customary degree of professional care and due diligence.

74. The PPMs also failed to disclose that, contrary to the terms of the Trust PPMs, large portions of the proceeds would be diverted to financially struggling McGinn Smith Entities, commingled with the offering proceeds of other Trusts, used to pay interest and principal to investors in other Trusts and to keep the financially failing McGinn Smith fraud scheme afloat.

75. While the Trust PPMs often disclosed that there "was a high degree of risk" associated with the investment, the PPMs failed to disclose that it was virtually certain that the Trusts would not be able to meet their obligations to pay the promised interest payments or to

repay principal, given the large percentage of proceeds siphoned off in commissions and transaction fees by McGinn Smith Entities before any investments were made, combined with unauthorized loans to affiliated entities.

76. McGinn and Smith have fraudulently maintained the illusion of success by funding interest payments with principal raised in other Trust offerings, at the expense of these investors. The following examples demonstrate how the Trusts have been used to benefit the McGinn Smith Entities, at the expense of Trust investors.

Benchmark 09 Trust PPM Misrepresented How Proceeds Would Be Used

77. On about July 27, 2009, MS & Co. launched an offering for the Benchmark 09 Trust. The PPM states that approximately \$1,950,000 of the \$3 million raised would be loaned to TDMM Cable Funding, which would use the loan proceeds to purchase the operating assets and “triple play” contracts of Benchmark LLC. TDMM Cable Funding would then purportedly use the earnings from this investment in Benchmark LLC to repay principal and interest due on the loan from the Benchmark 09 Trust.

78. According to the PPM, MS & Co.’s fees and expenses would total \$1,050,000, or 34% of the offering proceeds.

79. Contrary to the representations in the PPM, the net proceeds of the offering were used for many unauthorized purposes. For example, notwithstanding the PPM’s representation that money loaned by the Trust to TDMM Cable Funding would be used to acquire the assets of Benchmark LLC, McGinn directed that some of the money in the TDMM Cable Funding account be diverted to affiliated entities, including TDM Cable 06 and TDM Verifier 07 and TDMM Cable Sr Trust. Those funds were presumably used to pay “interest” to the various Trusts investors.

80. The Benchmark 09 Trust promised investors 10.5% interest on the notes, with a maturity date of five years. Given that defendants took 34% of the proceeds to themselves in fees and diverted additional monies to affiliated entities in unauthorized transfers, their representation that investors would be repaid out of the investment in Benchmark LLC was false, and McGinn, Smith, MS & Co. and MS Capital knew, or recklessly disregarded, that this representation was false. Nevertheless, McGinn continued to personally raise money for this offering as recently as December 10, 2009.

The TDMM Cable Trust 09

81. On January 19, 2009, MS & Co. launched an offering of \$1,550,000 of 9.00% three-year notes in TDMM Cable Senior Trust 09 ("Senior 09 Tranche") and an offering of \$1,325,000 of 11% 54-month notes in TDMM Cable Junior Trust 09 ("Junior 09 Tranche," collectively "TDMM Cable 09"). The Senior and Junior offerings sold out.

82. The PPM stated that after MS & Co. took a placement agent fee of 5% of the amount raised for Senior 09 Tranche and 8% of the amount raised for Junior 09 Tranche, the balance, about \$2.7 million, would be loaned to TDM Cable Funding, which would use the proceeds to acquire all the operating assets and customer contracts of Broadband Solutions LLC and HipNET LLC (both of which purportedly provided "triple play" service to communities in Florida). The PPMs also state that TDM Cable Funding would pay MS & Co. an additional \$400,000 for "acquisition negotiations, legal and due diligence activities"-- making MS & Co.'s total fee \$583,500 or 20.3% of the gross proceeds of the offering.

83. Not satisfied with the disclosed fees, MS & Co. used a total of at least 54% of the funds raised to: (i) make payments to McGinn, McGinn's son, Smith, relief defendant L. Smith, MS Partner 4 and an Albany politician; (ii) to cover MS & Co.'s payroll between January and

April 2009; and (iii) to pay investors in other Trust entities. The following is a summary of McGinn's misuse use of TDMM Cable 09 investor funds:

84. During January 2009, MS & Co. raised the first \$554,000 from investors for the Senior 09 Tranche. On January 30, 2009, McGinn transferred \$475,000 from the Trust to TDM Cable Funding, and transferred \$413,000 from the TDM Cable Funding to MS & Co., where it was immediately used to cover the firm's payroll.

85. In February 2009, McGinn again transferred large sums of money from the TDMM Cable Senior Trust account to TDM Cable Funding and then to MS & Co to make MS & Co.'s mid-February and end of February payroll. The following months, McGinn again transferred substantial amounts from the TDMM Cable 09 Trust accounts to MS & Co. to cover the March 31 and April 30 payrolls.

86. McGinn also transferred a total of at least \$99,000 to McGinn's personal account; more than \$21,000 to McGinn's son (apparently a lawyer who worked for MS & Co.); more than \$105,000 to a MS & Co. affiliate called Mr. Cranberry; \$18,750 to an Albany politician's law firm; at least \$70,000 to MSTF; \$26,500 to Verifier 07; \$10,000 to Firstline Trust; \$25,000 to a senior MS & Co. officer \$24,000 to Smith; and more than \$335,000 to Smith's wife, relief defendant L. Smith.

87. The transfers described above total \$1,646,040 -- nearly three times the fees to which MS & Co. Entities were entitled pursuant to the PPMs, and more than half of the gross offering proceeds.

The Verifier 08 Trust

88. In December 2007, MS & Co. launched an offering for the TDM Verifier 08 Trust. Verifier 08 offered up to \$3.85 million in 18-month notes and 36-month notes, with returns of 8.5% and 10%, respectively. The offering sold out.

89. The PPM represented that the net proceeds of the Trust, \$3,484,500, (after subtraction of MS and Co. 9.5% fee of \$365,750) were to be “advanced” by the Trust to McGinn Smith Funding LLC (“MS Funding”) for the purpose of purchasing \$3,000,000 face value of “guaranteed payment units” issued by Verifier Capital LLC, a company that “provides capital to security alarm dealers by purchasing some or all of their security alarm monitoring accounts.” A senior managing director of MS & Co. was the Chairman and 12.5% owner of Verifier Capital LLC.

90. The Trust has had to borrow money from other McGinn Smith Entities to make its scheduled interest payments.

91. Verifier 08 investors were deceived about the success of the Verifier 08 Trust with the first quarterly “interest” payment, which was actually a return of investor capital.

92. Thereafter, in order to make quarterly interest payments to Verifier 08 investors, the Verifier 08 Trust repeatedly borrowed funds from other McGinn Smith Entities. Furthermore, despite having income insufficient to make interest payments to investors, the Trust made numerous unauthorized loans to other McGinn Smith Entities.

The CCV Trust

93. McGinn, MS Capital and MS & Co. also deceived investors into unwittingly investing in a sexually-oriented charter cruise venture created by McGinn. In February 2008, MS & Co. launched a \$3,250,000 note offering for an entity 50% owned by an MS & Co.

affiliate called CCV. The PPM stated that CCV “is engaged in the business of procuring whole ship charters and selling the berths to various affinity groups.” The PPM stated that the net proceeds of the offering would be used to charter a ship and to “underwrite the marketing, sales and administrative expenses associated with selling [the] berths for the cruise.”

94. The PPM did not disclose that CCV operated under the name YOLO (You Only Live Once) Cruises, that the affinity group was sexually oriented, that strippers and go-go dancers would be procured to entertain passengers, that investor money would be used to buy insurance for these individuals and that YOLO was run by a woman with whom McGinn was romantically involved.

95. The PPM failed to disclose that instead of marketing charters to an unlimited variety of “affinity groups” as represented, the charters would only be marketed to a narrow niche of potential customers interested in cruises “involving sexually themed activities among and between consenting adults” (as belatedly disclosed in a PPM for a later offering) and that the charters would involve legally and morally questionable activities that investors might not want to be associated with.

96. McGinn was the managing member of CCV. He was involved in its day-to-day operations and was keenly interested in the activities aboard the cruise. McGinn “borrowed” from other Trusts and Funds to fund CCV.

97. Even though CCV lost \$1.5 million during its first 17 months of operation, McGinn and Smith nonetheless enriched themselves. CCV transferred at least \$50,000 to Smith, \$75,000 to McGinn, and paid at least \$245,000 to MS & Co. in “advisory fees.” CCV also paid McGinn’s son (an attorney and MS & Co. employee) \$7,240 for “consulting.” Between July 2008 and November 2009, CCV also transferred to McGinn more than \$156,000, purportedly to

pay credit card charges related to meals, travel and other expenses; and in June 2009, CCV transferred more than \$32,000 to White Glove Cruises, a Florida company managed by McGinn.

98. The CCV Trust also promised investors a 13% rate of interest on their notes, even though the Trust was to earn its investment return by loaning the money to CCV, which was obligated to pay back interest to the CCV Trust of only 10%.

The CCV Trust (2nd PPM)

99. In 2009, MS & Co. conducted a second CCV offering of \$400,000 raised from just three investors. The PPM falsely and misleadingly stated that CCV's loss for the period February 1, 2008 through June 2009 was \$870,000. In fact, MS & Co.'s internal books and records show a loss of nearly \$1.5 million during that period.

The Firstline Trusts

100. Firstline Trusts raised a total of \$7 million in 2007. According to the Firstline Trust 07 Junior PPM, dated October 19, 2007, the Firstline Trusts were created to acquire a tranche of financing secured by contracts owned or originated by Firstline Security, Inc., a security alarm company. In January 2008, Firstline Security filed for bankruptcy. Nonetheless, MS & Co. continued to sell notes in this offering without disclosing the bankruptcy filing to investors.

101. A December 7, 2009 email to McGinn reveals that Firstline loaned another McGinn Smith affiliated entity, known as Mr. Cranberry, more than \$2.27 million. Mr. Cranberry does not appear to be involved in the security alarm business.

MS & Co. Did Not Disclose that the Proceeds Would Be Commingled

102. A common feature of most of the Trust offerings was that the proceeds -- rather than being directly invested -- were "loaned" to an intermediate entity, most often TDM Cable

Funding (*see, e.g.* Verifier 07 (for the purchase of alarm contract receivables); TDM Luxury (luxury cabin cruise receivables); and TDM Cable 06 and TDMM Cable 09 Junior and Senior (triple play receivables)). However, instead of using the proceeds for the stated purpose, Smith and McGinn diverted the proceeds as needed to meet the cash needs of other McGinn Smith Entities.

103. As alleged above, on several occasions, McGinn transferred funds raised in the TDMM Cable 09 offerings to TDM Cable Funding, and then transferred those funds to MS & Co. for payroll.

**McGinn and Smith Have Taken Large Personal
“Loans” from Various McGinn Smith Entities**

104. McGinn, Smith and another senior MS & Co. employee frequently received substantial “loans” from the McGinn Smith Entities. Between October 2006 and October 2009, TDM Cable Funding “loaned” McGinn \$830,341, Smith \$694,000, and the senior MS & Co. employee \$563,000, for a total of nearly \$2.1 million. None of these loans has been repaid, and it does not appear that any interest has ever been paid.

105. McGinn and Smith each took a \$200,000 loan from the Firstline Trust. Firstline Securities filed for bankruptcy a few months after the four Firstline offerings raised about \$7 million. Although Firstline Trust investors are owed \$5.9 million, McGinn and Smith have not repaid the loans.

106. McGinn also authorized the following additional personal loans, none of which were evidenced by loan documentation: (i) from NEL, a McGinn Smith Entity, to Smith totaling \$360,000, to the senior MS & Co. employee totaling \$285,000 and to McGinn totaling \$340,000; and (ii) from TDMM Cable Funding to Smith totaling \$74,000, to the senior MS & Co. employee totaling \$25,000 and to McGinn totaling \$82,500.

McGinn and Smith Submitted Backdated Documents to FINRA

107. While under investigation by FINRA, McGinn, Smith and MS & Co. submitted numerous backdated promissory notes after FINRA requested loan documentation during its exam.

The Misuse of Funds and Deception Became More Desperate

108. The audited financial statements for MS & Co. for 2008 state that the firm had a loss of more than \$1.8 million, and includes a “going concern” clause. Virtually every day in 2009, McGinn obtained from his accounting staff a summary of the cash available in the bank accounts controlled by MS & Co., and a report of the immediate “funding needs.” The documentary evidence reveals a constant movement of money among dozens of MS & Co. affiliates and scores of bank accounts, designed to use any cash available to satisfy the most pressing funding needs – primarily the firm’s payroll, and payments to the personal accounts of McGinn and Smith, along with interest payments and redemption requests by investors threatening to complain to authorities.

109. Internal MS & Co. emails in 2009, including many by McGinn and Smith, reveal a constant need to raise millions of dollars, a growing desperation to make payroll, meet interest payments and assuage investors complaining of a Ponzi scheme, in order to keep their house of cards from collapsing. For example, on February 24, 2009, Smith emailed McGinn regarding an upcoming payroll. He stated: “We have been living on the edge for some time and Tim’s deals have kept us alive by fronting our profit. However, the \$200,000 + that we are losing every month is just too difficult to keep pace with.” On February 25, 2009, another MS & Co. Partner 3 emailed Smith: “In our many conversations over the last year, I came to understand the depths to which the firm has sunk relative to its revenue.” The liquidity problems were so severe that one

outside broker was forced to invest \$10,000 of his own money so one of his elderly customers could be redeemed.

110. Notwithstanding these financial woes, McGinn and Smith continued to solicit investors for the Four Funds and the Trusts throughout 2009 and into 2010, using the original Fund and Trust PPMs. In Smith's testimony provided to FINRA on February 12, 2010, Smith stated that MS & Co. continues to raise funds from new investors.

MS & Co. Has Paid for Luxuries for Smith and McGinn

111. From at least January 2004, MS & Co. made monthly payments on two cars for Smith (a Lexus and a Mercedes) totaling more than \$89,000, including payments of about \$17,000 in each of 2007 and 2008. MS & Co. made monthly payments on McGinn's behalf to exclusive country clubs, including the Schuyler Meadows Club, the Fort Orange Club and the Pine Tree Golf Club. In 2007 and 2008 alone, those payments totaled more than \$22,000.

Transfers to L. Smith and N. McGinn Without Consideration

112. L. Smith received more than \$1.8 million from Smith and the McGinn Smith Entities during the period of the fraud. For example, L. Smith received \$375,000 in December 2007; \$325,000 in June and July 2009; \$100,000 in March 2010; and \$185,000 in October 2006 and May 2007. L. Smith received many other payments from McGinn Smith Entities.

113. L. Smith provided no consideration for these transfers.

114. L. Smith maintained a brokerage account at MS & Co. which in 2010 was transferred to NFS/RMR Capital Management (the "Stock Account"). Smith exercised beneficial ownership and unfettered control over the Stock Account for at least fifteen years. L. Smith allowed Smith, McGinn and the McGinn Smith Entities to draw upon the Stock Account for business and personal needs without restrictions, and the Stock Account served as a de facto

financing arm for Smith and McGinn and the McGinn Smith Entities during the period of the fraud. L. Smith allowed Smith to use the Stock Account as a personal line of credit to further his personal and professional interests. Internal e-mails during the period of the fraud show McGinn Smith employees freely transferring money into and out of the Stock Account, which contained ill-gotten gains.

115. In the early 1990's, the Stock Account acquired 40,000 shares of a predecessor to Charter One Financial, Inc. ("Charter One") at a cost of \$10 per share. By the end of August 1999, the Stock Account had 110,735 shares of Charter One worth \$24.75 per share, or \$2,740,691. Each September from 1999 to 2002, Charter One issued a 5% stock dividend resulting in a total of an additional 21,269 shares added to the Stock Account. The Charter One stock also continued to appreciate during this time. During the period from August 1999 to September 2002, the Smiths sold a total of 24,530 shares of Charter One stock from the Stock Account for a gross profit of approximately \$800,000, and transferred an additional 2,574 shares of Charter One stock out of the Stock Account. By the end of September 2002, the Stock Account had 105,000 shares of Charter One stock worth over \$3 million.

116. Smith and L. Smith used the Charter One stock to further their business interests. On October 14, 2002, the 105,000 shares of Charter One stock were journaled out of the Stock Account, and were deposited into an account for KC Acquisition Corp, a McGinn Smith Entity.

117. The 105,000 shares of Charter One remained out of the Stock Account from October 14, 2002 to July 29, 2003, when the shares were journaled back into the Stock Account from the KC Acquisition Corp. account. Smith, as the treasurer of KC Acquisition Corp., signed the letter authorizing the transfer of shares back to L. Smith.

118. Smith also deposited significant personal assets into the Stock Account, including cash of \$38,430, the proceeds of a trust amounting to \$326,304, and a note receivable totaling \$410,000.

119. In an e-mail dated January 14, 2009 from Smith to McGinn, Smith stated that "Lynn and I have to shift money around between us."

120. In 2009, when an investigation by the Financial Industry Regulatory Authority (FINRA) into MS & Co. commenced, and as Smith and McGinn learned that they and their firm were named as Respondents in a number of FINRA arbitrations filed by investors, Smith and L. Smith began moving assets that had been jointly held into solely L. Smith's name.

121. In mid-2009, L. Smith opened up a checking account in her name for the first time and began depositing assets into this account which had previously been deposited into a joint account, including Smith's paychecks. These transfers were without consideration.

122. At the same time, a house in Vero Beach, Florida was transferred to L. Smith after being previously held in joint ownership. This transfer was without consideration.

123. From 2003 through March 2010, McGinn made numerous cash transfers from McGinn's account to an account in the name of N. McGinn. These transfers were without consideration.

Fraudulent Transfer to the Smith Trust

124. Smith and L. Smith created the Smith Trust pursuant to a Declaration of Trust dated August 4, 2004. Smith and L. Smith are the grantors of the Smith Trust. The named beneficiaries are their children, LT. Smith and G. Smith, who are 28 and 30 years old, respectively.

125. The Smith Trust had no assets when it was created. On August 31, 2004, Smith and L. Smith entered into the Annuity Agreement with the Smith Trust. Under the agreement, Smith and L. Smith agreed to sell 100,000 shares of Charter One stock to the Smith Trust in exchange for annuity payments from the Smith Trust of \$489,932 per year from September 26, 2015 until the last to die of Smith and L. Smith. The agreement states that the payment amount of \$489,932 is derived from an annuity interest rate of 4.6% per annum. Both Smith and L. Smith signed the agreement with the Smith Trust.

126. A separate one-page document entitled "Private Annuity" dated September 7, 2004 set forth a joint life expectancy for Smith and L. Smith of 31 years. The Smiths therefore have a joint life expectancy of 20 years from the date the payment obligations are scheduled to begin in September 2015. The annual payment of \$489,932, if paid out over the 20-year joint life expectancy, would therefore entitle Smith and/or L. Smith to receive payments of approximately \$10 million from the Smith Trust.

127. On May 4, 2004, Charter One publicly announced that it was being acquired in an all-cash deal by Citizens Financial Group, which paid \$44.50 per share. Smith and L. Smith knew, therefore, that their Charter One stock would be converted to cash as a result of the buy-out. The deal was completed on August 31, 2004.

128. On September 1, 2004, 100,000 shares of Charter One stock was transferred from the Stock Account to the Smith Trust account. At the time of this transfer, the fair market value of the Charter One stock was approximately \$4.45 million.

129. On the same day that the 100,000 shares were transferred from the Stock Account to the Smith Trust account on September 1, 2004, the cash merger occurred, resulting in the Smith Trust account being credited with \$4,450,000 in cash.

130. G. Smith and L.T. Smith, the named beneficiaries, never received a distribution from the Smith Trust from its creation until April 15, 2010, when G. Smith requested a distribution of \$95,000, which he testified was to give to his parents to pay their personal taxes. The funds were transferred directly from the Smith Trust to L. Smith's checking account.

131. When they transferred the Charter One stock to the Smith Trust account, Smith and L. Smith had the intent to hinder, delay or defraud present or future creditors. Their intent is shown by the following evidence:

132. First, at the time of the transfer, the FIIN and FEIN fraudulent offerings were well underway. The FIIN offering dated September 15, 2003 and the FEIN offering dated January 16, 2004 each raised \$20 million from investors, for a total of \$40 million. The private placement memoranda for both offerings did not permit investments in affiliates but Smith from the beginning invested with affiliates. Accordingly, as of December 31, 2003, 11% of the investments were with affiliates, and this grew to 32% by December 31, 2004. Smith therefore knew that he would likely become liable to the defrauded investors and/or to the Commission as a result of his ongoing violations of the federal securities laws.

133. In addition, at the time of the transfer to the Smith Trust, the liabilities of FIIN and FEIN far exceeded their assets; as a result, Smith knew that he would be unable to meet the payment obligations of these Funds to investors.

134. Second, at the time of the transfer, Smith was aware of the consequences of committing fraud and that his actions would result in significant financial loss. In a lengthy, undated, handwritten "personal confession" to McGinn, Smith wrote that:

The business has become addicted to the cash flow from the trust business, and without that we will have a difficult time surviving. . . . The default of the trusts will drastically reduce revenues, cause us to lose brokers and at least their confidence in us, bring on crushing litigation and devastating

publicity and I am convinced prosecution by regulators or worse. . . . I am overwhelmed by the thought of the financial losses, the humiliation, the perceived betrayal of trust. . . . I, unlike you, feel that we are vulnerable to criminal prosecution. . . .

[W]e are now in possession of indisputable empirical evidence that the new investments have no chance of ever being repaid in full. . . . For us not to allow for these deficits by setting up adequate reserves is, in my judgment, bordering on fraud, certainly, by not disclosing in the prospectus our poor history of collections, we are not providing the prospective investors an accurate picture of his risk. We both know why we don't make that disclosure – because such disclosure would cause our salesman to cease selling and investors to cease buying. Thus, we are misleading both our own employees and customers. . . . This is wrong. I strongly believe that in civil or criminal litigation we would lose badly on this point. . . .

[B]oth you and I are violating the high standards of integrity and ethics that have been the historical standard for us. That bothers me very very much. But what terrifies me is the possibility of being indicted for such conduct, and worse, the prospect of conviction. I cannot emphasize enough how strongly I feel about this point.

135. Third, in December 2003, Smith, L. Smith, McGinn, MS & Co. and other entities controlled by Smith and McGinn had been named as defendants in a securities fraud suit filed in the United States District Court for the Southern District of New York arising from the June 2003 initial public offering of IASG, *Meyers v. Integrated Alarm Services Group, Inc., et al*, 03-cv-09748 (S.D.N.Y.). A focus of the factual allegations in this complaint was two \$3 million loans by L. Smith to certain entities to facilitate a public offering of a company affiliated with Smith and McGinn. The Stock Account was used to make these loans. The complaint asserted 23 causes of action and sought \$3 million in damages for each claim. Upon information and belief, the case was settled in the spring of 2004 by the payment of \$200,000 to the plaintiff.

136. Fourth, as early as May 4, 2004, when the impending buy-out of Charter One was announced, Smith and L. Smith knew that the value of their stock holdings would increase substantially and would become cash as of the closing of the merger, which would result in

approximately \$4.5 million in cash in the Stock Account. The Smiths waited until the day of the buy-out before selling the stock to the Trust account pursuant to the Annuity Agreement. On that day, through a merger, the 100,000 shares of stock was converted into approximately \$4.5 million in cash. The creation of the Smith Trust and the transfer of the stock through the Annuity Agreement therefore served to shelter this large sum of cash.

137. Fifth, in 2003 and early 2004 the Broker-Dealer Inspection Program ("BDIP") of the SEC conducted an examination of MS & Co. In a letter to Smith from the BDIP dated February 26, 2004, Smith was put on notice of various "deficiencies and/or violations of law."

138. Finally, Smith and L. Smith concealed the existence of the Annuity Agreement when questions arose in 2010 in this matter regarding their assets, the Smith Trust, and the circumstances surrounding the transfer of the Charter One stock to the Smith Trust.

Additional Fraudulent Transfers

139. Smith and McGinn made other fraudulent transfers with an intent to hinder, delay or defraud creditors, as follows:

140. Pursuant to a deed dated October 19, 2009, McGinn transferred title to a house, located at 26 Port Huron Drive, Niskayuna, New York, to N. McGinn, for consideration of "less than \$100.00."

141. In 2009, Smith and L. Smith transferred title to a house in Vero Beach, Florida, which had been jointly held, to L. Smith.

142. In 2009, Smith and L. Smith caused a joint checking account at Bank of America to be transferred to L. Smith.

143. In July 2010, funds that had been fraudulently conveyed to the Smith Trust were transferred to G. Smith and L.T. Smith and others.

Fraudulent Transfers from the Smith Trust to G. Smith, L.T. Smith and L. Smith

144. On April 20, 2010, Plaintiff moved for a preliminary injunction which, *inter alia*, sought to freeze the assets of the Smith Trust.

145. To persuade the Court to unfreeze \$3.5 million in assets held by the Smith Trust, the then-trustee (David Wojeski), prior trustee (Thomas Urbelis), counsel for the Smith Trust (Jill Dunn), L. Smith and G. Smith misrepresented the nature and purpose of the Smith Trust and concealed the existence of the Annuity Agreement.

146. Wojeski, Urbelis, L. Smith, Dunn and G. Smith characterized the Smith Trust as a trust created solely to benefit G. Smith and L.T. Smith without disclosing that the Trust was created to pay a substantial annuity in the future to Smith and L. Smith. In fact, the Smith Trust was created as a vehicle to protect and preserve the assets of the Smiths from present and future creditors.

147. Following a hearing, on July 7, 2010, prior to the disclosure of the Annuity Agreement, the Court in MDO I vacated the asset freeze as to the Smith Trust.

148. Approximately \$944,848 was disbursed from the Smith Trust bank account from July 7, 2010 through August 3, 2010, when the Smith Trust was re-frozen. Those disbursements include the following:

149. L. Smith directly received \$449,878 directly from the Smith Trust in exchange for title to property on Great Sacandaga Lake (the "Lake Property") that had been held in L. Smith's name, and indirectly received \$150,000 through Geoffrey and Lauren Smith (down payment for Lake Property).

150. G. Smith received \$296,500, including \$75,000 that he gave to L. Smith as a down payment on the purchase by the Smith Trust of the Lake Property, and \$200,000, a

purported "investment" by the Smith Trust in a company G. Smith created, Capacity One Management LLC.

151. L.T. Smith received \$83,500, including \$75,000 that she gave to L. Smith as a down payment on the purchase of the Lake Property.

152. Jill Dunn, counsel for the Smith Trust, received \$101,096.

153. Wojeski, the trustee of the Smith Trust from May 2010 through January 2011, received \$13,874, including \$5,775.50 reimbursement for fees paid to title company and \$8,098.50 for trustee fees.

154. On August 3, 2010, the Court again froze the Smith Trust assets after Plaintiff filed a motion upon discovery of the Annuity Agreement which had been concealed by individuals affiliated with the Smith Trust.

155. Between July 7 to August 3, 2010, when it transferred approximately \$944,848 to G. Smith, L.T. Smith, L. Smith and others, the Smith Trust had the intent to hinder, delay or defraud present or future creditors. The Trust, through its Trustees, the beneficiaries, and others knew that the order in MDO I vacating the freeze as to the Smith Trust was obtained through fraud and misrepresentation. Their intent is shown by the following evidence:

156. First, the individuals affiliated with the Smith Trust, including the Trustees, the beneficiaries and L. Smith, knew but concealed the existence of the smoking-gun Annuity Agreement and concealed the fact that the Smith Trust was obligated to pay a substantial annuity to Smith and L. Smith.

157. Second, the prior trustee, Thomas Urbelis, was a party to the Annuity Agreement, had a copy of that agreement in his possession, knew that the Smith Trust was required to pay millions of dollars to the Smiths beginning in 2015, and knew that the Charter

One stock was sold to the Smith Trust in exchange for the annuity, not donated. Yet he failed to disclose any of these facts during his deposition in response to questions requiring disclosure and failed to produce the Annuity Agreement in response to a document request.

158. Third, Jill Dunn, counsel for the Smith Trust, knew that the Smith Trust was a “private annuity trust” and knew that there was a separate agreement creating the private annuity. Yet she filed a memorandum of law and declarations from Wojeski and L. Smith that she knew or recklessly disregarded were false, elicited testimony that was tailored to conceal the truth by implying that the “transfer” of stock was a gift, not a sale, and falsely stated to the Court that L. Smith had relinquished any and all interest whatsoever in the assets of the Smith Trust.

159. Finally, Wojeski, trustee at the time of the 2010 transfers, had a fiduciary duty to identify any obligation of the Trust, such as the Annuity Agreement. Wojeski, moreover, was required to conduct due diligence because he gave sworn oral and written testimony to the Court as the Trustee and legal representative of the Smith Trust. Wojeski nevertheless knew or recklessly disregarded that the Charter One stock was not donated but sold to the Trust in exchange for annuity payments and knew or recklessly disregarded that the Trust was contractually obligated to pay most or all of its assets back to Smith and L. Smith. Wojeski also testified that Smith and L. Smith had no interest in the Smith Trust, described the transfer of stock as a gift rather than as a purchase and sale, and failed to disclose that the Smith Trust was contractually obligated to pay its assets back to Smith and L. Smith.

160. Between July 7 to August 3, 2010, when L. Smith received \$449,878.00 directly from the Smith Trust and \$150,000 indirectly through her children, L. Smith had the intent to hinder, delay or defraud present or future creditors because she knew that the Court’s July 7,

2010 order unfreezing the Trust Assets was obtained through fraud and misrepresentation. Her intent is shown by the following evidence:

161. L. Smith was the donor of the Smith Trust and a party to the Annuity Agreement and thus knew that she and Smith had a right to receive millions in annuity payments from the Smith Trust. Yet L. Smith failed to disclose the Annuity Agreement in response to a document demand, submitted a false statement of assets and two false affidavits in May 2010 disclaiming her interest in the Smith Trust, and testified falsely during her deposition and in the preliminary injunction hearing.

162. Between July 7 and August 3, 2010, when G. Smith and L.T. Smith received over \$350,000.00 from the Smith Trust, they had the intent to hinder, delay or defraud present or future creditors because they knew that MDO I, which vacated the freeze as to the Trust, was obtained through fraud and misrepresentation. Their intent is shown by the following evidence which constitute "badges of fraud" with regard to the fraudulent conveyance claim:

163. First, G. Smith and L.T. Smith were told of the existence of the Smith Trust shortly after it was created in 2004; therefore, they knew or should have known that the true intent of the Trust was to pay a substantial annuity in the future to Smith and L. Smith pursuant to the Annuity Agreement.

164. Second, on or about Thanksgiving 2004, Smith discussed the Smith Trust with G. Smith and provided him with the trust agreement.

165. Third, on or shortly after Thanksgiving 2004, G. Smith had informed L.T. Smith that they were the named beneficiaries of the Smith Trust containing approximately \$4,000,000.00 set up by their parents.

166. Fourth, the conduct of G. Smith and L.T. Smith from 2004 through 2010 demonstrates their knowledge that the Trust was created not for their benefit but rather to hide the assets of their parents, David and Lynn Smith. For example, G. Smith and L.T. Smith never requested or received any distribution from the Smith Trust from its creation in 2004 through April 14, 2010, even though G. Smith had been working to start his own company since at least October 2009 and L.T. Smith was unemployed for a year during the 2008-2010 time period.

167. Fifth, from 2004 to 2010, G. Smith and L.T. Smith periodically received financial support directly from Smith and L. Smith rather than taking any distributions from the Smith Trust. Smith and L. Smith also paid the Smith Trust's taxes directly from their accounts rather than allowing the Smith Trust to pay its own tax liabilities. Upon information and belief, Smith and L. Smith undertook these actions to preserve the Trust assets and their interest in annuity payments.

168. Sixth, G. Smith and L.T. Smith knew or should have known that Smith made the investment decisions for the Smith Trust and received all of the trust account statements.

169. Seventh, the only distribution of Smith Trust assets to its stated beneficiaries before July 7, 2010 occurred on April 15, 2010, when G. Smith requested a distribution of \$95,000, which he gave to Smith and L. Smith to pay their personal taxes. The funds were transferred directly from the Smith Trust to L. Smith's checking account.

170. Eighth, the close family relationship between Smith, L. Smith, G. Smith and L.T. Smith, and Urbelis, who was a close family friend, is another of the badges of fraud.

171. Ninth, G. Smith and L.T. Smith knew that Smith faced substantial liability to creditors as a result of this action brought by the SEC, various FINRA arbitrations, and other

complaints by investors, and that the Court had frozen assets held by Smith or jointly held by Smith and L. Smith.

172. Tenth, G. Smith and L.T. Smith knew that the Smith Trust had been subject to the asset freeze in this matter and that substantial effort was undertaken in order to release the assets of the Smith Trust from the asset freeze.

173. Eleventh, with knowledge of falsity or reckless disregard of the truth, G. Smith testified at the preliminary injunction hearing that from 2004 onward he believed that the trust assets were owned by him and L.T. Smith equally, while failing to mention his parents' interest in annuity payments from the Smith Trust.

174. Twelfth, when the Smith Trust assets were released from the asset freeze, almost \$600,000 of the total amount distributed was provided to L. Smith, purportedly in exchange for the Lake Property. This transaction provided cash to L. Smith in exchange for the only other significant asset owned by Smith or L. Smith that was not subject to the asset freeze. L. Smith appears to have paid \$115,000 from these funds to her counsel.

175. Finally, upon information and belief, no independent appraisal or valuation of the Lake Property was completed before it was sold to the Smith Trust, and Smith, L. Smith, G. Smith and L.T. Smith have continued to share possession, benefit and use of the Lake Property.

FIRST CLAIM FOR RELIEF

Violations of Section 17(a) of the Securities Act

(Against MS & Co., MS Advisors, MS Capital, McGinn, and Smith)
(Antifraud violations)

176. Paragraphs 1 through 175 are realleged and incorporated by reference as if set forth fully herein.

177. The Fund and Trust certificates and notes are securities within the meaning of Section 2(1) of the Securities Act [15 U.S.C. § 77b(1) and Section 3(a)(10) of the Exchange Act [15 U.S.C. § 78c(a)(10)].

178. From at least 2005 through the present, MS & Co., MS Advisors, MS Capital, McGinn, and Smith, directly or indirectly, singly or in concert, by use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce or by the use of the mails, in connection with the offer or sale of securities, knowingly or recklessly: a) employed, are employing or are about to employ devices, schemes and artifices to defraud; b) have obtained, are obtaining or are about to obtain money and property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or c) have engaged, are engaging or are about to engage in transactions, practices or courses of business which have operated, operate or will operate as a fraud and deceit upon investors.

179. By reason of the foregoing, MS & Co., MS Advisors, MS Capital, McGinn, and Smith, directly or indirectly, singly or in concert, have violated, are violating, and unless restrained and enjoined will again Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

SECOND CLAIM FOR RELIEF

Violations of Section 10(b) of the Exchange Act and Rule 10b-5
(Against MS & Co., MS Advisors, MS Capital, McGinn, and Smith)
(Antifraud Violations)

180. Paragraphs 1 through 175 are realleged and incorporated by reference as if set forth fully herein.

181. From at least 2005 through the present, the MS & Co., MS Advisors, MS Capital, McGinn, and Smith, directly or indirectly, singly or in concert, by use of the means or

instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce or by the use of the mails, in connection with the offer or sale of securities, knowingly or recklessly: a) employed, are employing or are about to employ devices, schemes and artifices to defraud; b) have obtained, are obtaining or are about to obtain money and property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or c) have engaged, are engaging or are about to engage in transactions, practices or courses of business which have operated, operate or will operate as a fraud and deceit upon investors.

182. By reason of the activities herein described, the MS & Co., MS Advisors, MS Capital, McGinn, and Smith, singly or in concert, directly or indirectly, have violated, are violating, and unless restrained and enjoined will again violate Section 10(b) of the Exchange Act [15 U.S.C. §§78j(b)] and Rule 10b-5 [17 C.F.R. §240.10b-5] promulgated thereunder.

THIRD CLAIM FOR RELIEF

**Violations, and Aiding and Abetting Violations, of
Section 15(c)(1) Of The Exchange Act, 15 U.S.C. §78o(c)(1), and
Rule 10b-3, 17 C.F.R. §240.10b-3
(Against MS & Co. and aiding and abetting by McGinn and Smith)
(Violations of Antifraud Provisions by Brokers)**

183. Paragraphs 1 through 175 are realleged and incorporated by reference as if set forth fully herein.

184. MS & Co. engaged and is engaging in the business of effecting transactions in securities for the accounts of others, and therefore was and is a broker within the meaning of Section 3(a)(4) of the Exchange Act, 15 U.S.C. §78c(a)(4).

185. MS & Co., while a broker, directly or indirectly, by use of the mails or the means or instrumentalities of interstate commerce, has effected and is effecting transactions in, and has

induced and attempted to induce and are attempting to induce the purchase or sale of, securities by means of manipulative, deceptive, or other fraudulent devices or contrivances, including: (a) acts, practices, and courses of business that operated or would have operated as a fraud or deceit upon any person, including persons to whom MS & Co. offered and/or sold securities; and (b) making untrue statements of material fact and omissions to state a material fact necessary, in order to make the statements made, in light of the circumstances under which they were made, not misleading with knowledge or reasonable grounds to believe that such statements are untrue or misleading.

186. As part of and in furtherance of this violative conduct, MS & Co. offered and/or sold securities by making the material misrepresentations and omissions set forth herein.

187. MS & Co. knew, was reckless in not knowing, or had reasonable grounds to believe that said representations or omissions were false or misleading.

188. By reason of the foregoing, MS & Co. has violated, is violating, and unless restrained and enjoined, will again violate Section 15(c)(1) of the Exchange Act, 15 U.S.C. §78o(c)(1), and Rule 10b-3, 17 C.F.R. §240.10b-3.

189. To the extent McGinn and Smith were associated with MS & Co., and not acting brokers unassociated with a registered broker-dealer, McGinn and Smith each aided and abetted, and, unless restrained and enjoined, will again aid and abet, MS & Co's violations of Section 15(c)(1) of the Exchange Act, 15 U.S.C. §78o(c)(1), and Rule 10b-3, 17 C.F.R. §240.10b-3.

FOURTH CLAIM FOR RELIEF
Violations of Sections 206(1), 206(2) and 206(4)
of the Advisers Act and Rule 206(4)-8
(MS & Co., MS Advisors, McGinn and Smith)

190. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

191. From at least 2005 through the present, MS & Co. and MS Advisors, by use of the means or instrumentalities of interstate commerce or of the mails, and while engaged in the business of advising others for compensation as to the advisability of investing in, purchasing, or selling securities: (a) employed devices, schemes, and artifices to defraud; and (b) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon clients or prospective clients.

192. By reason of the foregoing, MS & Co. and MS Advisors, singly or in concert, directly or indirectly, violated Sections 206(1), 206(2) and 206(4) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)] and Rule 206(4)-8 thereunder [17 C.F.R. §275.206(4)-8].

193. McGinn and Smith, knowingly or recklessly provided substantial assistance to MS & Co. and MS Advisors and thereby directly or indirectly, singly or in concert, by use of the means or instrumentalities of interstate commerce, or of the mails, aided and abetted MS & Co. and MS Advisors' violations of Sections 206(1), 206(2) and 206(4)-2 of the Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)] and Rule 206(4)-2 thereunder [17 C.F.R. §275.206(4)-8].

FIFTH CLAIM FOR RELIEF

**Violations of Section 7(a) of the Investment Company Act
(FAIN, FEIN, FIIN and TAIN)**

194. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

195. FAIN, FEIN, FIIN and TAIN issued securities, in the form of notes, in what amounted to a public offering, and held themselves out as funds formed to identify and acquire various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, and any other investments that may add value to our portfolio.

196. Accordingly, FAIN, FEIN, FIIN and TAIN were investment companies under Section 3(a)(1) of the Company Act [15 U.S.C. § 80a-3(a)(1)], and were required to register as investment companies with the Commission under Section 7(a) of the Company Act [15 U.S.C. § 80a-7(a)]. FAIN, FEIN, FIIN and TAIN were never so registered and, while acting as investment companies, FAIN, FEIN, FIIN and TAIN offered, purchased and sold, redeemed or retired securities by the use of the mails and the means and instrumentalities of interstate commerce and engaged in business in interstate commerce.

197. By reason of the foregoing, FAIN, FEIN, FIIN and TAIN violated Section 7(a) of the Company Act [15 U.S.C. § 80a-7(a)].

SIXTH CLAIM FOR RELIEF

**Violations of Section 5(a) and 5(c) of the Securities Act
(MS & Co., MS Capital, the Four Funds, McGinn and Smith)**

198. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

199. The notes and certificates that MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith offered and sold as alleged herein constitute “securities” as defined in the Securities Act and the Exchange Act.

200. The FAIN, FEIN, FIIN and TAIN offerings were not limited to 35 or fewer non-accredited purchasers, and MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith could not reasonably have believed that the offering was so limited. Further, not all of the non-accredited purchasers satisfied the sophistication requirement of Rule 506(b)(2)(ii) of Regulation D [17 C.F.R. § 230.506(b)(2)(ii)], and MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith could not reasonably have believed that all such purchasers met the requirement at the time they invested.

201. MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith Investments singly or in concert, directly or indirectly, have made use of the means or instruments of transportation or communication in interstate commerce, or of the mails, to offer and sell securities through the use or medium of a prospectus or otherwise, or have carried or caused to be carried through the mails or in interstate commerce, by any means or instruments of transportation, securities for the purpose of sale or for delivery after sale, when no registration statement has been filed or was in effect as to such securities and when no exemption from registration was available.

202. By reason of the foregoing MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith singly or in concert, directly or indirectly, have violated, are violating, and unless enjoined will again violate Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

SEVENTH CLAIM FOR RELIEF
(Relief Defendants)

203. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

204. Relief Defendants L. Smith and N. McGinn were recipients, without consideration, of proceeds of the fraudulent and illegal sales of securities alleged above. The Relief Defendants profited from such receipt or from the fraudulent and illegal sales of securities alleged above by obtaining illegal proceeds under circumstances in which it is not just, equitable, or conscionable for them to retain the illegal proceeds. Consequently, L. Smith and N. McGinn have each been named as a Relief Defendant for the amount of proceeds by which each has been unjustly enriched as a result of the fraudulent scheme or illegal sales transactions.

205. By reason of the foregoing, L. Smith and N. McGinn should disgorge their ill-gotten gains, plus prejudgment interest.

EIGHTH CLAIM FOR RELIEF

Violations of Section 276 of New York Debtor and Creditor Law

(David Smith, Lynn Smith, Tim McGinn, Nancy McGinn,
the Smith Trust, Geoffrey Smith, and Lauren Smith)

206. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

207. McGinn, Smith and L. Smith made transfers with the actual intent to hinder, delay or defraud either present or future creditors, including the following:

- (a) 100,000 shares of Charter One stock from the Stock Account to the Smith Trust in 2004;
- (b) the Niskayuna house from McGinn to N. McGinn in 2009; and
- (c) the Vero Beach house from joint ownership to L. Smith in 2009.

208. The Smith Trust, N. McGinn and L. Smith received fraudulently conveyed assets.

209. G. Smith and L.T. Smith received funds after July 7, 2010 that had been fraudulently conveyed to the Smith Trust.

210. The Smith Trust made transfers with the actual intent to hinder, delay or defraud either present or future creditors, including the following:

- (a) \$150,000 to L. Smith indirectly through G. Smith and L.T. Smith for the Lake Property;
- (b) \$449,878.00 to L. Smith in exchange for the Lake Property;

- (c) \$296,500 to G. Smith, including \$75,000 that he gave to L. Smith as a down payment for the Lake Property and \$200,000 for a company he created;
- (d) \$83,500 to L.T. Smith, including \$75,000 that she gave to L. Smith as a down payment for the Lake Property.

211. Consequently, all fraudulent conveyances should be voided and set aside, and the property, or its equivalent value, recovered under Section 278 of New York Debtor and Creditor Law.

PRAYER FOR RELIEF

WHEREFORE, the Court having entered the Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief on April 20, 2010 (Dkt. 5); the Preliminary Injunction Order on July 22, 2010 (Dkt. 96); the Order to Show Cause on August 3, 2010 (Dkt. 104); and subsequent Orders concerning preliminary relief on November 22, 2010 (Dkt. 194), December 1, 2010 (Dkt. 207); December 22, 2010 (Dkt. 233) and February 1, 2011 (Dkt. 263);

WHEREFORE, the Commission respectfully requests that the Court grant the following additional relief:

I.

A Final Judgment finding that McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds each violated the securities laws and rules promulgated thereunder as alleged against them herein;

II.

A Final Judgment permanently restraining and enjoining McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds and their agents, servants, employees and attorneys and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from committing future violations of each of the securities laws and rules promulgated thereunder, or alternatively, from aiding and abetting such future violations, as respectively alleged against them herein.

III.

An Order directing the return of all assets transferred from the Smith Trust after July 7, 2010.

IV.

A Final Judgment directing McGinn, Smith, MS & Co., MS Advisors, MS Capital, the Four Funds, L. Smith, and N. McGinn to disgorge their ill-gotten gains, plus prejudgment interest.

V.

A Final Judgment directing McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds to pay civil money penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

VI.

A Final Judgment permanently prohibiting McGinn from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act

[15 U.S.C. §78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)];

VII.

A Final Judgment directing McGinn, Smith, N. McGinn, L. Smith, the Smith Trust, G. Smith and L.T. Smith to return all assets fraudulently conveyed, or their equivalent value, and to pay attorneys' fees pursuant to NYDCL §§ 276, 276-a and 278.

VIII.

Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 8, 2011

s/ David Stoelting
Attorney Bar Number: 516163
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Securities and Exchange Commission
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Of Counsel:
Andrew Calamari
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EXHIBIT B

100331 280 001116525 H 2
 DINOSAUR SECURITIES LLC
 C/O RMR WEALTH MANAGEMENT, LLC
 1 BATTERY PARK PLAZA
 NEW YORK, NY 10004

Account Number: 00916



YOUR FINANCIAL CONSULTANT IS OUR WEALTH MANAGEMENT LLC. OTHER SECURITIES THROUGH OTHER SECURITIES
 MEMBER OF FINANCIAL RMR WEALTH MANAGEMENT LLC IS NOT AN AFFILIATE OF FINANCIAL SECURITIES, LLC

LYNN A SMITH

YOUR FINANCIAL CONSULTANT IS
 GEOFFREY SMITH
 RR#: 086

FOR QUESTIONS OR UP-TO-DATE ACCOUNT INFORMATION:
 Local
 212 785 4377

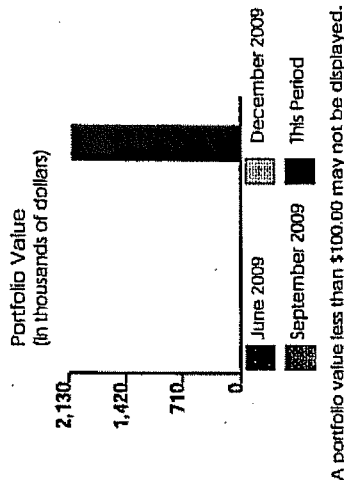
Statement Date: 03/01/10 to 03/31/10

SNAPSHOT

TOTAL PORTFOLIO
\$2,118,511.06

PORTFOLIO VALUE	This Period	Prior Period
Cash and Cash Equivalents	\$177,926.84	\$222,974.60
Securities	\$344,360.00	\$312,888.00
Other Securities	\$1,596,224.22	\$1,596,224.22
TOTAL PORTFOLIO VALUE	\$2,118,511.06	\$2,131,886.82

Your portfolio contains unpriced positions. The securities may be unpriced for various reasons including but not limited to unavailability of pricing or the security may not have value. Please contact your broker/dealer for further information.

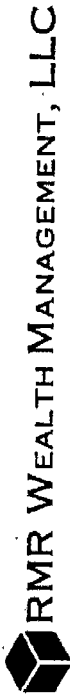


ACCOUNT ACTIVITY	This Period	Year-to-Date
Net Core Fund Activity	\$45,047.76	(\$177,926.84)
Net Additions and Withdrawals	(\$45,000.00)	\$176,526.56
Net Income and Expenses	(\$2.76)	\$1,475.28
Net Miscellaneous Activity	(\$45.00)	(\$75.00)

LEGEND

() Numbers in parentheses are debits or subtractions
 NFS = National Financial Services LLC

Account Number: 0916
 Account Name: SMITH
 Statement Date: 03/01/2010 to 03/31/2010

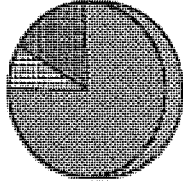


YOUR FINANCIAL CONSULTANT, DOWD BURNER & RMR WEALTH MANAGEMENT LLC, OFFERS SECURITIES THROUGH DOWD BURNER SECURITIES, MEMBER OF FINANCIAL SERVICES LLC. RMR WEALTH MANAGEMENT LLC IS NOT AN AFFILIATE OF DOWD BURNER SECURITIES, LLC.

SUMMARY

PORTFOLIO VALUE		This Period	Year-to-Date
Cash and Cash Equivalents		\$177,926.84	\$222,974.60
Money Markets			
Equities			
Total Securities		\$344,360.00	\$312,688.00
Other Securities		\$344,360.00	\$312,688.00
Interest and Dividends		\$1,596,224.22	\$1,596,224.22
TOTAL PORTFOLIO VALUE		\$2,118,511.06	\$2,131,886.82
ACCOUNT ACTIVITY		This Period	Year-to-Date
BEGINNING BALANCE		\$0.00	
Core Fund Activity			
Core Funds Purchased		(\$79,987.24)	(\$347,995.82)
Core Funds Sold		\$125,035.00	\$170,068.98
NET CORE FUND ACTIVITY		\$45,047.76	(\$177,926.84)
Additions and Withdrawals			
Deposits		\$100,000.00	\$100,000.00
Other Additions and Withdrawals		(\$145,000.00)	\$76,526.56
NET ADDITIONS AND WITHDRAWALS		(\$45,000.00)	\$176,526.56
Income and Expenses			
Taxable Income		\$2.24	\$1,485.28
NET TAXABLE INCOME		\$2.24	\$1,485.28
TOTAL INCOME		\$2.24	\$1,485.28
Account Fees		(\$5.00)	(\$10.00)
TOTAL EXPENSES		(\$5.00)	(\$10.00)
NET INCOME AND EXPENSES		(\$2.76)	\$1,475.28
NET MISCELLANEOUS ACTIVITY		(\$45.00)	(\$75.00)
ENDING BALANCE		\$0.00	

PORTFOLIO ALLOCATION



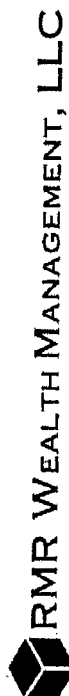
Money Markets 8.40%
 Equity 16.25%
 Other Securities 75.35%

Allocations for equities, fixed income, and other categories may include mutual funds and may be net of short positions. NFS has made assumptions concerning how certain mutual funds are allocated. Closed-end mutual funds listed on an exchange may be included in the equity allocation. The chart may not reflect your actual portfolio allocation. Consult your broker/dealer prior to making investment decisions.

DETAIL

Account Number: 00916
 Account Name: SMITH

Statement Date: 03/01/2010 to 03/31/2010



YOUR FINANCIAL CONSULTANT DOES NOT PROVIDE INVESTMENT ADVICE. RMR WEALTH MANAGEMENT, LLC OFFERS SECURITIES THROUGH AN AFFILIATE, RMR SECURITIES, LLC. RMR SECURITIES, LLC IS NOT AN AFFILIATE OF DISCOUNT SECURITIES, LLC.

PORTFOLIO VALUE

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information. Taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities.

Amortization, accretion and similar adjustments to cost basis have been provided for many fixed income securities (and some bond-like equities), however, they are not provided for certain types, such as short-term instruments, Unit Investment Trusts, foreign fixed income securities, or those that are subject to early prepayment of principal (pay downs). Where current year premium or acquisition premium amortization is provided, the prior years' cumulative amortization is reflected in the adjusted cost basis, but we cannot provide a breakdown or the total of such prior amortization amounts.

LIMITATION ON COST BASIS INFORMATION: NFS's cost basis information system has a cumulative lifetime limit on how much activity it can track for each individual security position in an account. For this purpose, each buy, sell, dividend, wash sale disallowed loss, stock split, stock merger, etc. is an event. For some customers, this limit can be reached with approximately 1500 events. Upon reaching the limit, the system no longer displays or tracks cost basis information for the affected position, and such information will usually show as not available or unknown. Once the limit is reached, all cost basis information for the affected position will need to be tracked and updated by you, the investor.

CASH AND CASH EQUIVALENTS 8.40%

Description	Symbol/Cusip	Account Type	Quantity	Price on 03/31/10	Current Market Value	Prior Market Value	Estimated Annual Income
Money Markets							
PRIME FUND - CAPITAL RESERVES CLASS	FPRXX	CASH	177,926.84	\$1.00	\$177,926.84	\$222,974.60	
7 DAY AVG NET YIELD .01%							
Dividend Option Reinvest							
Capital Gain Option Reinvest							
Total Cash and Cash Equivalents					\$177,926.84		

EQUITIES 16.25%

Description	Symbol/Cusip	Account Type	Quantity	Price on 03/31/10	Current Market Value	Prior Market Value	Estimated Annual Income	Total Cost Basis	Unrealized Gain (Loss)
Equity									
CMET FIN HLDGS INC COM	189758204		15,000	unavailable	unavailable	unavailable			
ACCREDITED INVS	RESSTK								
FIRST VIRTUAL COMMUNICATIONS INC	337484307		10,000	unavailable	unavailable	unavailable			
NO STOCKHOLDERS EQUITY 12/30/05	CASH								
Dividend Option Cash									
Capital Gain Option Cash									
Total								\$14,000.10	C

Account Number: 9916

Account Name: SMITH

Statement Date: 03/01/2010 to 03/31/2010



YOUR FINANCIAL CONSULTANT FORMERLY RMR WEALTH MANAGEMENT, LLC, OFFERS RECOMMENDATIONS THROUGH FINANCIAL SECURITIES
MEMBER OF FINANCIAL RMR WEALTH MANAGEMENT, LLC IS NOT A PART OF FINANCIAL SECURITIES, LLC

EQUITIES 16.25%

Description	Symbol/Cusip	Quantity	Price on 03/31/10	Current Market Value	Prior Market Value	Estimated Annual Income	Total Cost Basis	Unrealized Gain (Loss)
GENERAL ELECTRIC CO	GE	4,800	\$18.20	\$87,360.00	\$77,068.00	\$1,920.00		\$87,360.00
Estimated Yield 2.19%	CASH							
Dividend Option Cash								
Capital Gain Option Cash								
Next Dividend Payable: 04/26/10								
GENERAL ELECTRIC CO	GE	10,000	\$18.20	\$182,000.00	\$160,600.00	\$4,000.00	\$333,001.25	(\$151,001.25)
Estimated Yield 2.19%	MARGIN							
Dividend Option Cash								
Capital Gain Option Cash								
Next Dividend Payable: 04/26/10								
MCGINN SMITH & CO INC CDT PFD	580565208	750	\$100.00 AI	\$75,000.00	\$75,000.00			
SER 1987 ADJ RATE PRICE	RESSTK							
PROVIDED BY MCGINN SMITH BASED								
ON MGMT'S								
Total Equity				\$344,360.00		\$5,920.00	\$347,001.35	(\$63,641.25)
Total Equities				\$344,360.00		\$5,920.00	\$347,001.35	(\$63,641.25)

Total Securities

\$344,360.00
\$344,360.00
\$344,360.00

OTHER SECURITIES 75.35%

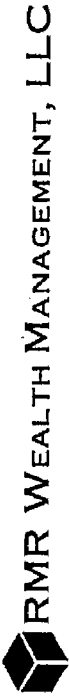
Description	Symbol/Cusip	Quantity	Price on 03/31/10	Current Market Value	Prior Market Value	Estimated Annual Income
PINE STREET CAPITAL PARTNERS LP	722999109	1,596,224.22	\$1.00 AI	\$1,596,224.22	\$1,596,224.22	
BASED ON MGMT'S UNCONFIRMED	CASH					
ESTIMATE OF NET ASSETS						
Total Other Securities				\$1,596,224.22		

TOTAL PORTFOLIO VALUE

\$2,118,511.06
\$5,920.00
\$347,001.35
(\$63,641.25)

Account Number: 40916
 Account Name: SMITH

Statement Date: 03/01/2010 to 03/31/2010



YOUR FINANCIAL CONSULTANT, DOMIC BURNETT & ASSOCIATES, LLC, OFFERS SECURITIES THROUGH DOMIC BURNETT & ASSOCIATES, LLC, A MEMBER OF FINANCIAL SERVICES LLC. RMR WEALTH MANAGEMENT, LLC IS NOT AN AFFILIATE OF DOMIC BURNETT & ASSOCIATES, LLC.

ADDITIONS AND WITHDRAWALS

Deposits

Date	Account Type	Transaction	Description	Quantity	Amount
03/18/10	CASH	WIRE TRANS FROM BANK	WR37152088		\$100,000.00
Net Deposits					\$100,000.00

Other Additions and Withdrawals

Date	Account Type	Transaction	Description	Quantity	Amount	Total Cost Basis	Realized Gain (Loss)
03/16/10	CASH	WIRE TRANS TO BANK	WD40680673		(\$100,000.00)		
03/18/10	CASH	WIRE TRANS TO BANK	WD40689980		(\$20,000.00)		
03/25/10	CASH	WIRE TRANS TO BANK	WD40713140		(\$25,000.00)		
Net Other Additions and Withdrawals					(\$145,000.00)		

NET ADDITIONS AND WITHDRAWALS

(\$45,000.00)

INCOME AND EXPENSES

Taxable Income

Date	Account Type	Transaction	Description	Quantity	Amount
03/31/10	CASH	DIVIDEND RECEIVED	PRIME FUND - CAPITAL RESERVES		\$2.24
			CLASS DIVIDEND RECEIVED		

Net Taxable Income

\$2.24

Total Income

\$2.24

Account Fees

Date	Account Type	Transaction	Description	Quantity	Amount
03/01/10	CASH	FEE PAID	SAFEKEEPING FEE CUSIP 189758204		(\$5.00)

Net Account Fees

(\$5.00)

Account Number: 0916
Account Name: SMITH

Statement Date: 03/01/2010 to 03/31/2010



YOUR FINANCIAL CONSULTANT, DOWD BURNER & RMR WEALTH MANAGEMENT, LLC OFFERS SERVICES THROUGH UNDAUNTED SECURITIES, MEMBER OF FINRA/SIPC. RMR WEALTH MANAGEMENT, LLC IS NOT AN AFFILIATE OF UNDAUNTED SECURITIES, LLC.

Total Expenses (\$5.00)

NET INCOME AND EXPENSES (\$2.76)

MISCELLANEOUS ACCOUNT ACTIVITY

Date	Type	Transaction	Description	Quantity	Amount
03/18/10	CASH	JOURNALED	WIRE FEE WD40680673		(\$15.00)
03/18/10	CASH	JOURNALED	WIRE FEE WD40689980		(\$15.00)
03/25/10	CASH	JOURNALED	WIRE FEE WD40713140		(\$15.00)
NET MISCELLANEOUS ACCOUNT ACTIVITY					(\$45.00)

FOOTNOTES AND COST-BASIS INFORMATION

NFS provided estimated cost basis (including cost basis and short sale proceeds) information provided to NFS by customers, realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information. Taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities. Customers should consult their tax advisors for further information.

For investments in partnerships, NFS does not make any adjustments to cost basis information as the calculation of basis in such investments requires supplemental information from the partnership on its income and distributions during the period you held your investment. Partnerships usually provide this additional information on a Form K-1 issued by April 15th of the following year.

C - Cost basis information (or proceeds from short sales) was provided by you. We treat it as original cost basis. For equities, we will adjust the cost basis for any corporate actions which our system supports from the date the security was transferred to the account. For asset-backed fixed income securities, we will adjust the cost basis for principal pay downs from the date the security was transferred to the account. We do not apply any wash sale rules to tax lots with customer-provided cost basis. In certain cases, when positions are transferred between accounts the cost basis information may be automatically transferred and deemed to be customer-provided.

MISCELLANEOUS FOOTNOTES

Callable Securities: Lottery - When street name or bearer securities held for you are subject to a partial call or partial redemption by the issuer, NFS may or may not receive an allocation of called/redeemed securities by the issuer, transfer agent and/or depository. If NFS is allocated a portion of the called/redeemed securities, NFS utilizes an impartial lottery allocation system, in accordance with applicable rules, that randomly selects the securities within customer accounts that will be called/redeemed. NFS' allocations are not made on a pro rata basis and it is possible for you to receive a full or partial allocation, or no allocation. You have the right to withdraw uncalled fully paid securities at any time prior to the cutoff date and time established by the issuer, transfer agent and/or depository with respect to the partial call, and also to withdraw excess margin securities provided your account is not subject to restriction under Regulation T or such withdrawal will not cause an undermargined condition.

Account Number: 00916
Account Name: SMITH

Statement Date: 03/01/2010 to 03/31/2010



YOUR FINANCIAL CONSULTANT, DOWNS BUSINESS AS RMR WEALTH MANAGEMENT, LLC, OFFERS SECURITIES THROUGH UNSECURED SECURITIES
MEMBER OF FINRA/SEC. RMR WEALTH MANAGEMENT, LLC IS NOT AN AFFILIATE OF DOWNS SECURITIES, LLC.

AI - Investments such as direct participation program securities (e.g., partnerships, limited liability companies, and real estate trusts which are not listed on any exchange), commodity pools, private equity, private debt and hedge funds are generally illiquid investments and their current values will be different from the purchase price. Unless otherwise indicated, the values shown on this statement for such investments have been provided by the management, administrator or sponsor of each program, or a third-party vendor without independent verification by National Financial Services LLC (NFS) or your broker/dealer and represent their estimate of the value of the investor's participation in the program, as of a date no greater than 18 months from the date of this statement. Therefore the estimated values shown herein may not necessarily reflect actual market values or be realized upon liquidation. If an estimated value is not provided, accurate valuation information is not available.

GLOSSARY Short Account Balances. If you have sold securities under the short sale rule, we have, in accordance with regulations, segregated the proceeds from such transactions in your Short Account. Any market increases or decreases from the original sale price will be marked to the market and will be transferred to your Margin Account on a weekly basis. Market Value - The Total Market Value has been calculated out to 9 decimal places, however, the individual unit price is displayed in 5 decimal places. The Total Market Value represents prices obtained from various sources, may be impacted by the frequency in which such prices are reported and such prices are not guaranteed. Prices received from pricing vendors use a variety of techniques to estimate value. These estimates, particularly for fixed income securities, may be based on certain minimum principal amounts (e.g. \$1 million) and may not reflect all of the factors that affect the value of the security, including liquidity risk. The prices provided are not firm bids or offers. Certain securities may reflect "N/A" or "unavailable" where the price for such security is generally not available from a pricing source. The Market Value of a security, including those priced at net value, may differ from its

CUSTOMER SERVICE: Please review your statement and report any discrepancies immediately. Inquiries or concerns regarding your brokerage account or the activity therein should be directed to your broker/dealer at the telephone number and address reflected on the front of this statement and National Financial Services LLC ("NFS") who carries your brokerage account and acts as your custodian for funds and securities deposited with NFS directly by you, through your broker/dealer, or as a result of transactions NFS processes for your account. NFS may be contacted by calling (800) 801-9942. Any oral communications regarding inaccuracies or discrepancies should be confirmed in writing to protect your rights. Including those under the Securities Investor Protection Act ("SIPA"). When contacting either NFS or your broker/dealer, remember to include your entire brokerage account number to ensure a prompt reply. Please notify the service center or your broker/dealer promptly in writing of any change of address.

ADDITIONAL INFORMATION Customer free credit balances are not segregated and may be used in NFS business, subject to the limitations of 17CFR Section 240.15c3-2 under the Securities and Exchange Act of 1934. You have the right to receive from NFS in the course of normal business operations, subject to open commitments in any of your brokerage accounts, any free credit balances to which you are entitled or any fully paid securities to which you are entitled and any securities purchased on margin upon full payment of any indebtedness to NFS. Interest on free credit balances awaiting reinvestment may be paid out at rates that may vary with current short-term money market rates and/or your brokerage account balances, set at the discretion of your broker/dealer and/or NFS.

Credit Adjustment Program. Accountholders receiving payments in lieu of qualified dividends may not be eligible to receive credit adjustments intended to help cover additional associated federal tax burdens. NFS reserves the right to deny the adjustment to any account holder and to amend or terminate the credit adjustment program.

Options Customers. Each transaction confirmation previously delivered to you contains full information about commissions and other charges. If you require further information, please contact your broker/dealer. Assignments of American and European-style options are allocated among customer short positions pursuant to a random allocation procedure, a description of which is available upon request. Short positions in American-style options are liable for assignment at any time. The writer of a European-style option is subject to exercise assignment only during the exercise period. You should advise your broker/dealer promptly of any material change in your investment objectives or financial situation, splits, dividends, and interest. Expected stock split, next dividend payable, and next interest payable information has been provided by third parties and may be subject to change. Information for certain securities may be missing if not received from third parties in time for printing. NFS is not responsible for inaccurate, incomplete, or missing information. Please consult your broker/dealer for more information about expected stock split, next dividend payable, and next interest payable for certain securities.

Equity Dividend Reinvestment Customers. Shares credited to your brokerage account resulted from transactions effected as agent by either: 1) Your broker/dealer for your investment account, or 2) through the Depository Trust Company (DTC) dividend reinvestment program. For broker/dealer effected transactions, the time of the transactions, the exchange upon which these transactions occurred and the name of the person from whom the security was purchased will be furnished upon written request. NFS may have acted as market maker in effecting trades in "over-the-counter" securities.

Retirement Contributions/Distributions. A summary of retirement contributions/distributions is displayed for you in the activity summary section of your statement. Income Reporting. NFS reports earnings from investments in Traditional IRAs, Rollover IRAs, SEP-IRAs and, Keoghs as tax-deferred income. Earnings from Roth IRAs are reported as tax-free income, since distributions may be tax-free after meeting the 5 year aging requirement and certain other conditions. A financial statement of NFS is available for your personal inspection at its office or a copy of it will be mailed to you upon your written request.

Statement Mailing. NFS will deliver statements by mail or, if applicable, notify you by e-mail of your statement's availability. If you had transactions that affected your cash balances or security positions held in your account(s) during the last monthly reporting period. At a minimum, all brokerage customers will receive quarterly statements (at least four times per calendar year) as long as their accounts contain a cash or securities balance.

Loads and Fees. In addition to sales loads and 12b-1 fees described in the prospectus, NFS or your

purchase price and may not closely reflect the value at which the security may be sold or purchased based on various market factors. Investment decisions should be made only after consulting your broker/dealer. Estimated Yield ("EY") and Estimated Annual Income ("EAI") - When available, the coupon rate of some fixed income securities is divided by the current market value of the fixed income security to create the EY figure and/or the current interest rate or more recently calculated dividends for certain securities are annualized to create the EAI figure. EAI and EY are estimates, and the income and yield might be lower or higher.

Additionally, estimates may include return of principal or capital gains which would render them overstated. EY reflects only the income generated by an investment; not changes in prices which fluctuate. These figures are based on mathematical calculations of available data, and have been obtained from information providers believed to be reliable, but no assurance can be made as to accuracy. Since the interest and dividend rates are subject to change at any time, and may be affected by current and future economic, political and business conditions, they should not be relied on for making investment, trading decisions, or tax decisions.

broker/dealer receives other compensation in connection with the purchase and/or the on-going maintenance of positions in certain mutual fund shares and other investment products in your brokerage account. This additional compensation may be paid by the mutual fund or other investment product, its investment advisor or one of its affiliates. Additional information about the source(s) and amount(s) of compensation as well as other remuneration received by NFS or your broker/dealer will be furnished to you upon written request. At time of purchase, fund shares may be assigned a transaction fee or no transaction fee status. At time of sale, applicable fees will be based on that status.

Margin. If you have applied for margin privileges and been approved, you may borrow money from NFS in exchange for pledging the assets in your account as collateral for any outstanding margin loan. The amount you may borrow is based on the value of securities in your margin account, which is identified on your statement. If you have a margin account, this is a combined statement of your margin account and special memorandum account other than your non-purpose margin accounts maintained for you under Section 220.5 of Regulation T issued by the Board of Governors of the Federal Reserve Board. The permanent record of the separate account, as required by Regulation T, is available for your inspection upon request.

NYSE and FINRA. All transactions are subject to the constitution, rules, regulations, customs, usages, rulings and interpretations of the exchange market and its clearing house, if any, where the transactions are executed, and of the New York Stock Exchange (NYSE) and of the Financial Industry Regulatory Authority ("FINRA").

The FINRA requires that we notify you in writing of the availability of an Investor Brochure that includes information describing FINRA Regulation's BrokerCheck Program ("Program"). To obtain a brochure or more information about the Program or FINRA Regulation, contact the FINRA Regulation BrokerCheck Program Hotline at (800) 289-9999 or access the FINRA's web site at www.finra.org.

New York Stock Exchange Rule 382 requires that your broker/dealer and NFS allocate between them certain functions regarding the administration of your brokerage account. The following is a summary of the allocation services performed by your broker/dealer and NFS. A more complete description is available upon request. Your broker/dealer is responsible for: (1) obtaining and verifying brokerage account information and documentation, (2) opening, approving and monitoring your brokerage account, (3) transmitting timely and accurate instructions to NFS with respect to your brokerage account, (4) determining the suitability of investment recommendations and advice, (5) operating, and supervising your brokerage account and its own activities in compliance with applicable laws and regulations including compliance with margin rules pertaining to your margin account, if applicable, and (6) maintaining required books and records for the services that it performs.

NFS shall, at the direction of your broker/dealer: (1) execute, clear and settle transactions processed through NFS by your broker/dealer, (2) prepare and send transaction confirmations and periodic statements of your brokerage account (unless your broker/dealer has undertaken to do so). Certain securities pricing and descriptive information may be provided by your broker/dealer or obtained from third parties deemed to be reliable, however, this information has not been verified by NFS. (3) act as custodian for funds and securities received by NFS on your behalf, (4) follow the instructions of your broker/dealer with respect to transactions and the receipt and delivery of funds and securities for your brokerage account, and (5) extend margin credit for purchasing or carrying securities on margin. Your broker/dealer is responsible for ensuring that your brokerage account is in compliance with federal, industry and NFS margin rules, and for advising you of margin requirements. NFS shall maintain the required books and records for the services it performs.

Securities in accounts carried by National Financial Services LLC ("NFS") are protected in accordance with the Securities Investor Protection Corporation ("SIPC") up to \$500,000 (including up to \$100,000 for cash awaiting reinvestment). NFS also has arranged for coverage above these limits. Neither coverage protects against a decline in the market value of securities, nor does either coverage extend to certain securities that are considered ineligible for coverage. For more details on SIPC, or to request a SIPC brochure, visit www.sipc.org or call 1-202-371-8300. Bank Deposit Sweep Program funds are SIPC protected until swept to a Program Bank at which time the funds may be eligible for FDIC insurance. Assets Held Away, commodities, unregistered investment contracts, futures accounts, loaned securities and other investments may not be covered. Mutual funds and/or other securities are not backed or guaranteed by any bank, nor are they insured by the FDIC and involve investment risk including possible loss of principal.

End of Statement

081222

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EXHIBIT C

UNITED STATES DISTRICT COURT

Northern

District of

New York

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

David Smith

Case Number: DNYN112CR000028-002

USM Number: 19471-052

William J. Dreyer
75 Columbia Street
Albany, NY 12210
518-463-7784

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☒ was found guilty on count(s) 1, 8-10, 14, 17, 21-26, and 30-32 of the Superseding Indictment on February 6, 2013
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

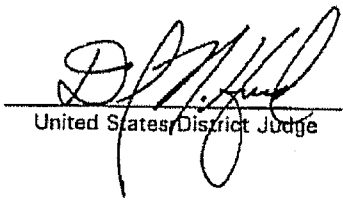
Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1343; 1341	Conspiracy to Commit Mail and Wire Fraud	11/17/09	1
18 U.S.C. § 1341	Mail Fraud	9/10/09	8-10
18 U.S.C. § 1343	Wire Fraud	7/1/08	14, 17
15 U.S.C. §§ 78j(b), 78ff	Securities Fraud	11/7/08	21-26
26 U.S.C. § 7206(1)	Filing a False Tax Return	10/15/09	30-32

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed in accordance with 18 U.S.C. § 3553 and the Sentencing Guidelines.☒ The defendant has been found not guilty on count(s) 2-7, 11-13, 15-16, and 18-20 of the Superseding Indictment on 2/6/2013.☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 7, 2013

Date of Imposition of Judgment


 United States District Judge

August 13, 2013

Date

AO 245B NNY(Rev. 10/05) Judgment in a Criminal Case
Sheet 2 — Imprisonment

Judgment — Page 2 of 6

DEFENDANT: David Smith
CASE NUMBER: DNYN112CR000028-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months on each of Counts 1, 8 through 10, 14, 17, and 21 through 26, and 36 months on each of Counts 30 through 32, all counts to run concurrently, for a total term of imprisonment of 120 months.

X The court makes the following recommendations to the Bureau of Prisons:

The defendant be designated to a facility close to his family in Saratoga Springs, New York.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: David Smith
CASE NUMBER: DNYN112CR000028-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 years on each of Counts 1, 8 through 10, 14, 17, 21 through 26, and 1 year on each of Counts 30 through 32, terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Deselect, if inapplicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment, or if such prior notification is not possible, then within five days after such change;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, import, or manufacture any and all controlled substance and all controlled substance analogues, as defined in 21 U.S.C. § 802, and any paraphernalia related to any controlled substances, except that possession and use of a controlled substance properly prescribed by a licensed medical practitioner is permitted;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
- 14) the defendant shall not possess a firearm, destructive device, or any other dangerous weapon;
- 15) the defendant shall provide the probation officer with access to any requested financial information; and
- 16) the defendant shall submit his or her person, and any property, house, residence, vehicle, papers, effects, computer, electronic communications devices, and any data storage devices or media, to search at any time, with or without a warrant, by any federal probation officer, or any other law enforcement officer from whom the Probation Office has requested assistance, with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by the defendant. Any items seized may be removed to the Probation Office or to the office of their designee for a more thorough examination.

DEFENDANT: David Smith
CASE NUMBER: DNYN112CR000028-002

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
2. The defendant shall participate in a program of financial and credit counseling. The program shall be approved by the United States Probation Office.
3. The defendant shall apply all monies he or she receives from any income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.
4. The Court finds there is a reasonably foreseeable risk that the defendant may engage in criminal conduct similar or related to the present offense or the defendant's past criminal conduct. Therefore, the Court directs the defendant to notify any employer of risks that may be occasioned by his criminal record or personal history or characteristics, and directs the probation officer to confirm the defendant's compliance with this notification requirement.
5. The Court has reliable information which indicates the defendant poses a low risk of future substance abuse, so the mandatory drug testing condition is suspended.

DEFENDANT'S ACKNOWLEDGMENT OF APPLICABLE CONDITIONS OF SUPERVISION

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

The conditions of supervision have been read to me. I fully understand the conditions and have been provided a copy of them.

Defendant

Date

U.S. Probation Officer/Designated Witness

Date

DEFENDANT: David Smith
CASE NUMBER: DNYN112CR000028-002

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 1,500	\$ 50,000	\$ 5,989,736

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Victims 1-841	\$5,748,722	\$5,748,722	1 st
Internal Revenue Service	\$241,014	\$241,014	2 nd

TOTALS	\$ <u>5,989,736</u>	\$ <u>5,989,736</u>

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: David Smith
CASE NUMBER: DNYN112CR000028-002

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ In full immediately; or
- B ☐ Lump sum payment of \$ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ D, ☐ E, ☐ F, or ☐ G below; or
- C ☐ Payment to begin immediately (may be combined with ☐ D, ☐ E, or ☐ G below); or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- E ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- F ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- G ☒ Special instructions regarding the payment of criminal monetary penalties:

The Court orders that any cash value of the assets collected thus far by the Receiver, William J. Brown, appointed by the Court in this case may be deducted from the total restitution amount and may be distributed to the victims by the Receiver as such assets are available for distribution, and for long as the Receiver is in operation. Any remaining restitution is due immediately, with any remaining restitution payable at a minimal rate of 25% of the defendant's gross income while incarcerated and a minimal rate of \$100 per month or 10% of the defendant's gross income, whichever is greater, upon his release from imprisonment. If at any time the defendant has the resources to pay full restitution, he must do so immediately. Payments may be forwarded to Lawrence K. Baerman, U.S. District Court Clerk, Federal Building, P.O. Box 7367, 100 South Clinton Street, Syracuse, New York 13261-7367

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to Clerk, U.S. District Court, Federal Bldg., 100 S. Clinton Street, P.O. Box 7367, Syracuse, N.Y. 13261-7367, unless otherwise directed by the court, the probation officer, or the United States attorney. If a victim cannot be located, the restitution paid to the Clerk of the Court for that victim shall be sent to the Treasury, to be retrieved if and when the victim is located.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

X Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Timothy M. McGinn, DNYN112CR000028-001, \$5,992,800 (total), \$5,748,722 (joint and several as to Victims 1-841)

☐ The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

\$6,336,440

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

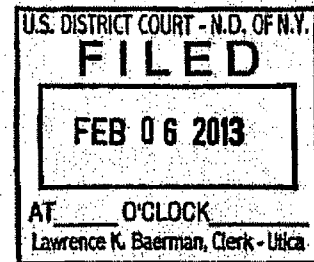
UNITED STATES OF AMERICA

-v-

1:12-CR-28

TIMOTHY M. MCGINN and DAVID L. SMITH,

Defendants.



VERDICT FORM

DAVID L. SMITH

ORIGINAL

FEBRUARY 1, 2013
Utica, New York

Court's Exhibit No. 4b

COUNT 1: CONSPIRACY TO COMMIT MAIL AND WIRE FRAUD

Do you find beyond a reasonable doubt that from on or about September 29, 2006, through about April 20, 2010, the defendant, David L. Smith, conspired with Timothy M. McGinn and others to commit mail and wire fraud?

 Not Guilty X Guilty

COUNT 2: MAIL FRAUD

Do you find beyond a reasonable doubt that in October 2007 the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a private placement memorandum as described in Count 2 of the superseding indictment?

 X Not Guilty Guilty

COUNT 3: MAIL FRAUD

Do you find beyond a reasonable doubt that on December 18, 2007, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a check as described in Count 3 of the superseding indictment?

 X Not Guilty Guilty

COUNT 4: MAIL FRAUD

Do you find beyond a reasonable doubt that on January 28, 2008, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a letter of authorization as described in Count 4 of the superseding indictment?

X Not Guilty _____ Guilty

COUNT 5: MAIL FRAUD

Do you find beyond a reasonable doubt that on May 15, 2008, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a check as described in Count 5 of the superseding indictment?

X Not Guilty _____ Guilty

COUNT 6: MAIL FRAUD

Do you find beyond a reasonable doubt that on June 6, 2008, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a subscription agreement as described in Count 6 of the superseding indictment?

X Not Guilty _____ Guilty

COUNT 7: MAIL FRAUD

Do you find beyond a reasonable doubt that on June 9, 2008, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a check as described in Count 7 of the superseding indictment?

☒ Not Guilty ☐ Guilty

COUNT 8: MAIL FRAUD

Do you find beyond a reasonable doubt that on July 17, 2008, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a cashier's check as described in Count 8 of the superseding indictment?

☐ Not Guilty ☒ Guilty

COUNT 9: MAIL FRAUD

Do you find beyond a reasonable doubt that on March 20, 2009, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed cashier's checks as described in Count 9 of the superseding indictment?

☐ Not Guilty ☒ Guilty

COUNT 10: MAIL FRAUD

Do you find beyond a reasonable doubt that on September 10, 2009, the defendant, David L. Smith, committed mail fraud by mailing or causing to be mailed a letter and memorandum as described in Count 10 of the superseding indictment?

 Not Guilty

 X Guilty

COUNT 11: WIRE FRAUD

Do you find beyond a reasonable doubt that on April 23, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a fax as described in Count 11 of the superseding indictment?

 X Not Guilty

 Guilty

COUNT 12: WIRE FRAUD

Do you find beyond a reasonable doubt that on May 10, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a fax as described in Count 12 of the superseding indictment?

 X Not Guilty

 Guilty

COUNT 13: WIRE FRAUD

Do you find beyond a reasonable doubt that on May 28, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a fax as described in Count 13 of the superseding indictment?

X Not Guilty _____ Guilty

COUNT 14: WIRE FRAUD

Do you find beyond a reasonable doubt that on July 14, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a fax as described in Count 14 of the superseding indictment?

_____ Not Guilty X Guilty

COUNT 15: WIRE FRAUD

Do you find beyond a reasonable doubt that on August 29, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a wire transfer as described in Count 15 of the superseding indictment?

X Not Guilty _____ Guilty

COUNT 16: WIRE FRAUD

Do you find beyond a reasonable doubt that on August 29, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a wire transfer as described in Count 16 of the superseding indictment?

☒ Not Guilty ☐ Guilty

COUNT 17: WIRE FRAUD

Do you find beyond a reasonable doubt that on July 1, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a wire transfer as described in Count 17 of the superseding indictment?

☐ Not Guilty ☒ Guilty

COUNT 18: WIRE FRAUD

Do you find beyond a reasonable doubt that on July 1 or 15, 2008, the defendant, David L. Smith, committed wire fraud by using or causing to be used a wire transfer as described in Count 18 of the superseding indictment?

☒ Not Guilty ☐ Guilty

COUNT 19: WIRE FRAUD

Do you find beyond a reasonable doubt that on August 22, 2008; September 8, 2008; October 22 or 27, 2008; November 7, 2008; or July 8, 2009, the defendant, David L. Smith, committed wire fraud by using or causing to be used a wire transfer as described in Count 19 of the superseding indictment?

X Not Guilty _____ Guilty

COUNT 20: WIRE FRAUD

Do you find beyond a reasonable doubt that on April 30, 2009, the defendant, David L. Smith, committed wire fraud by using or causing to be used a wire transfer as described in Count 20 of the superseding indictment?

X Not Guilty _____ Guilty

COUNT 21: SECURITIES FRAUD

Do you find beyond a reasonable doubt that on January 11 or 28, 2008, the defendant, David L. Smith, committed securities fraud by using or causing to be used a wire transfer as described in Count 21 of the superseding indictment?

_____ Not Guilty X Guilty

COUNT 22: SECURITIES FRAUD

Do you find beyond a reasonable doubt that on January 28, 2008, the defendant, David L. Smith, committed securities fraud by using or causing to be used a wire transfer as described in Count 22 of the superseding indictment?

____ Not Guilty X Guilty

COUNT 23: SECURITIES FRAUD

Do you find beyond a reasonable doubt that on September 29, 2008; or October 3 or 6, 2008, the defendant, David L. Smith, committed securities fraud by using or causing to be used a wire transfer as described in Count 23 of the superseding indictment?

____ Not Guilty X Guilty

COUNT 24: SECURITIES FRAUD

Do you find beyond a reasonable doubt that on September 29, 2008; or October 3 or 6, 2008, the defendant, David L. Smith, committed securities fraud by using or causing to be used a wire transfer as described in Count 24 of the superseding indictment?

____ Not Guilty X Guilty

COUNT 25: SECURITIES FRAUD

Do you find beyond a reasonable doubt that on October 3, 2008, the defendant, David L. Smith, committed securities fraud by using or causing to be used a wire transfer as described in Count 25 of the superseding indictment?

 Not Guilty

 X Guilty

COUNT 26: SECURITIES FRAUD

Do you find beyond a reasonable doubt that on November 7, 2008, the defendant, David L. Smith, committed securities fraud by using or causing to be used an email as described in Count 26 of the superseding indictment?

 Not Guilty

 X Guilty

COUNT 30: FILING A FALSE TAX RETURN

Do you find beyond a reasonable doubt that on or about October 17, 2007, the defendant, David L. Smith, filed or caused to be filed a false tax return for tax year 2006 as described in Count 30 of the superseding indictment?

 Not Guilty

 X Guilty

COUNT 31: FILING A FALSE TAX RETURN

Do you find beyond a reasonable doubt that on or about October 20, 2008, the defendant, David L. Smith, filed or caused to be filed a false tax return for tax year 2007 as described in Count 31 of the superseding indictment?

 Not Guilty

 X Guilty

COUNT 32: FILING A FALSE TAX RETURN

Do you find beyond a reasonable doubt that on or about October 15, 2009, the defendant, David L. Smith, filed or caused to be filed a false tax return for tax year 2008 as described in Count 32 of the superseding indictment?

 Not Guilty

 X Guilty

PROCEED TO THE NEXT PAGE, SIGN IN THE SPACE PROVIDED, AND NOTIFY THE MARSHAL THAT YOU HAVE REACHED A VERDICT.

Please sign and date this verdict form.

**YOUR VERDICT MUST BE UNANIMOUS.
ALL JURORS MUST SIGN.**

Dated: Feb. 6th, 2013

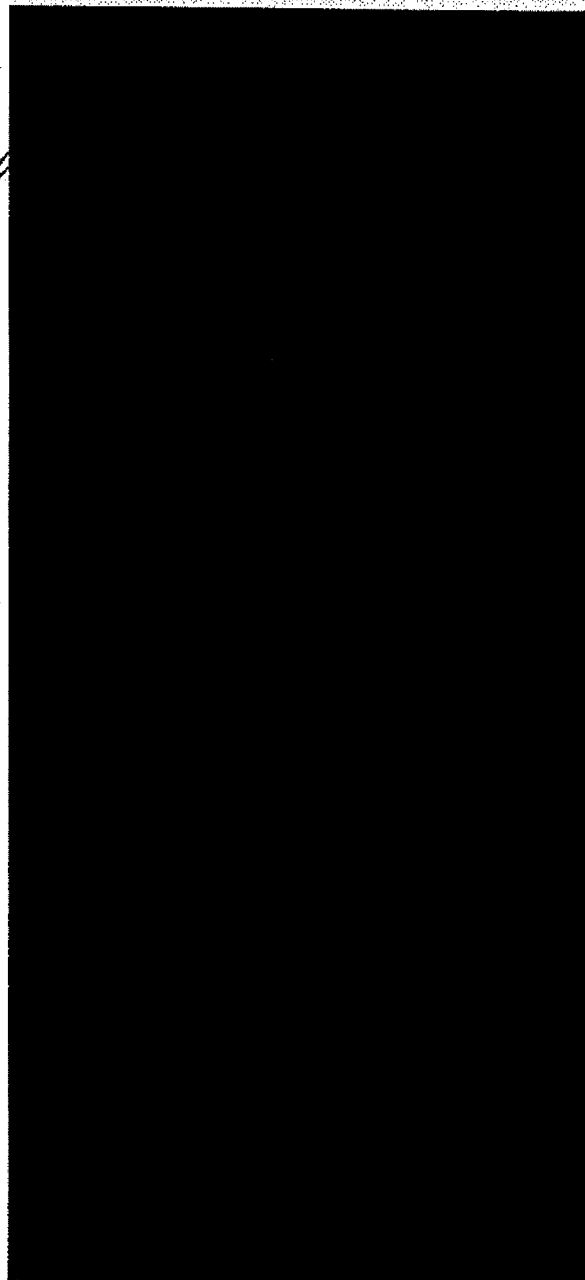


EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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,

**Civil Action No.: 1:10-CV-457
(GLS/DRH)**

Defendants, and

LYNN A. SMITH,

Relief Defendant.

AFFIDAVIT OF RELIEF DEFENDANT LYNN A. SMITH

LYNN A. SMITH, being duly sworn, deposes and says:

1. I respectfully submit this affidavit in support of Relief Defendant's Motion to Dismiss the Complaint (Complaint Doc. 1) filed by the Plaintiff Securities and Exchange Commission ("the Commission"), for lack of subject matter jurisdiction pursuant to F.R.C.P. 12(b)(1).

2. I have been named as a Relief Defendant in the above captioned action by virtue of my nearly 42-year marriage to David L. Smith. As a result, the Commission has frozen all of my independently held personal assets with the ultimate goal of seeking

disgorgement of an undisclosed amount of those assets in the event it is successful in its claims against the named Defendants.

3. I strenuously object to the overreaching, draconian actions of the federal government in attempting to deprive me of my personal life savings, which was started for me by my father more than fifty (50) years ago, based on the conclusory allegations that I have "received and retained ill gotten gains" (Complaint ¶12) and that I was a "recipient, without consideration, of proceeds of the fraudulent and illegal sales of securities" (Complaint ¶141).

4. I was born in Amsterdam, New York in September 1946, and was the only child of Wasil and Frances Laskevich. Both of my parents were the children of immigrants, with my father's parents having emigrated from Russia and my mother's parents from Lithuania. My father grew up in Springfield, Vermont as the youngest of six children. My mother was one of three children, and most of her family worked in the knitting mills of Amsterdam.

5. Following their marriage, my mother was a homemaker and my father a skilled laborer in the turbine section of the General Electric Foundry in Schenectady. Throughout my childhood, we lived in one flat of a two-family home in the east end of Amsterdam, with my grandmother occupying the other flat, as was common during that time among the Eastern European population in our community.

6. My parents were not educated people, but my father was very industrious and hard-working, always trying to make a better life for my mother and me. He was also a savvy entrepreneur. We lived modestly and my father used their savings to buy

land north of Amsterdam on Great Sacandaga Lake. On the weekends, he would single-handedly build summer cottages on small parcels of land and then sell the improved property at a profit. He used some of the money he made on these real estate transactions to buy more land and build more cottages. He used the balance of his profits to open an account and make investments with Hayden, Stone & Co., a brokerage house which, decades later, became Shearson/American Express.

7. My father enjoyed investing in the stock market. He had good instincts and was able to grow his investments into a nest egg which he intended to become my inheritance.

8. In approximately 1960, my parents bought their own two-family home in the Market Hill section of Amsterdam. David Smith lived with his parents about four houses down the street from our new home. I had known him in high school prior to our moving to his neighborhood and, a short time later, we began dating.

9. Dave graduated from Amsterdam High School in 1963, a year before me. I enrolled in Russell Sage College in the fall of 1964. We continued dating throughout college, and he returned home to Amsterdam after graduating from college in 1967. That summer, we became engaged, and a few months later, Dave began teaching at the East Main Street School in Amsterdam.

10. In May 1968, I graduated from college with a dual degree in Fine Arts and Elementary Education. A little more than a month after my graduation, my mother lost her seven year battle with breast cancer at the age of 50. My mother's death was a shock to my father, despite the length of her illness. His concern for my future increased

dramatically and prompted him to write and execute a will to provide for me in the event of his death.

11. Later that summer, Dave and I were married and I started teaching in the Amsterdam schools in September 1968. A short time later, he left for basic training with the Air National Guard. When he returned in the spring of 1969, he took a job with Marine Midland Bank in East Rochester. I planned to finish the school year in Amsterdam and then join him in Rochester and seek a new teaching position.

12. In March 1969, following a routine chest x-ray, my father was diagnosed with Brown Lung disease as a result of his many years working in the foundry for GE. He was admitted to the hospital a short time later and succumbed to the disease on July 7, 1969.

13. My father's will created a trust that allowed a portion of the estate to pass to me immediately and a portion to pass to me five years later. My father's estate included my parent's home in Amsterdam, my father's life insurance, his stock account and the property on Great Sacandaga Lake. Having lost both my parents very young, I have always respected the fact that my father, who did not expect to die at the age of 50, provided for my future. The property and stock account my father left me in 1969 was my rightful inheritance, and it is galling that the Commission wants to take that from me.

14. When we moved to Rochester, I used a broker in Rochester to manage my stock account, which remained with Hayden, Stone & Co. At that time, the account had approximately \$60,000 in it.

15. In 1973, we moved back to the Capital Region. We bought a small home in Clifton Park, for which I provided the down payment from my inheritance. I became a teacher at the Tecler School in Amsterdam, and Dave got a job as a stock broker with Bache & Co., a brokerage house, at which time I moved my stock account to Bache, and my husband began managing my account.

16. From the beginning of our marriage, my husband and I maintained a joint checking account, into which we deposited both of our paychecks and from which we paid our household bills. Throughout our marriage and continuing until the Court froze my checking account, I have paid the bills and managed our checking account.

17. Notwithstanding the fact that we had a joint checking account, the stock account and the real estate on Great Sacandaga, indeed my entire inheritance from my father's estate, have always been my separate property. The account and the real property have always been held in my name and my name alone throughout our entire marriage. Although I have allowed my husband a fair amount of discretion in making investment decisions for my stock account, ultimate decisions on the account were made by me and there has never been any confusion as to the ownership of the account.

18. Over the years, my account grew because of good investment decisions and positive returns on those investments. My husband managed my account with full knowledge that I considered that account to be our nest egg and something I would pass on to our children some day, just as my father had done for me. Under my husband's management, my account grew steadily over the years. By the late 1990's, I had accumulated upwards of \$6,000,000 in my account.

19. Sometime during my husband's employment with Bache, Tim McGinn, an engineer with GE, became a client of the firm. In the mid-1970's, Tim left GE and joined Bache as a stock broker. I met Tim and his wife socially through firm functions. His first wife and I remained close friends while our children were young.

20. My husband left Bache and worked for a few other brokerage houses over the next several years. I had no involvement in his work other than to attend social functions as his wife. I maintained my brokerage account, and my husband moved it with him in his client portfolio each time he moved to a new firm, as he did with his other clients. I received regular account statements from the firm, and we discussed general investment strategy and any transactions which required my specific approval and signature. On occasions, I agreed with his suggestions and on occasions, I disagreed. When I disagreed with the proposed investment, the transaction was not undertaken.

21. In approximately 1980, my husband and Tim McGinn formed McGinn, Smith & Co. in a one-room office in Twin Towers, in Albany, which they refurbished themselves. Four years later, they moved to 99 Pine Street. In both locations, my only role was to assist with decorating the offices. Since the inception of McGinn, Smith & Co., my involvement in the business was as a spouse and as a client. In my role as a spouse, I decorated their offices, sent in gifts and baked goods for the staff on holidays and birthdays, and hosted Christmas parties. In my role as a client, I received account statements and occasionally authorized transactions and investments with the advice of my stock broker/husband.

22. In 1982, with our second child on the way, we built a new home in Clifton Park. I was completely immersed in our children's lives and in managing our household for the next twenty years. Dave was making enough money for us to pay household expenses and support our family without me returning to work. The only times I used my stock account was for the benefit of our children, such as making a down payment on a house, buying a ski condo in the mid-1980's and paying for their college tuition.

23. My husband and I are both from humble beginnings and we have never lived a lavish lifestyle, as the Commission has alleged in its Complaint. Our children attended public schools, each excelling in their own ways, surrounded by a community of friends and parents who looked out for one another. We were involved in our children's activities, their school events and social activities, their sporting events and booster clubs. We have never dined out excessively, nor have we taken extravagant vacations. Our greatest enjoyment and fondest memories have come from our family life and the time we spend together.

24. The Commission has made conclusory allegations that I was the recipient of ill-gotten gains without consideration, but nowhere on the face of the Complaint does the Commission identify or quantify what it believes constitutes ill-gotten gains alleged to have resulted from defendants' purported illegal conduct. Nor does the Commission allege that I lack a legitimate claim to those funds it alleges I received from my husband or from any of the other Defendants. Therefore, it is not clear to me on what basis the Commission believes it has a claim against my assets as a relief defendant.

25. The Commission cites two specific amounts of money which were transferred into my brokerage account in 2009, \$335,000 (See Complaint ¶ 68, 71 and 94) and \$100,000 (Complaint ¶ 94), but does not allege that they were the product of illegal profits resulting from the Defendants alleged fraudulent conduct. In fact, it is alleged that the \$335,000 that was transferred to me came from the same pool of funds which were distributed to other individuals including "an Albany politician" and "investors in other trust companies." Since I am the only named Relief Defendant in this action, it does not appear on the face of the Complaint that this transfer was intended to support the alleged claim that I am the recipient of ill-gotten gains. To the extent it can be implied that it does, I have a legitimate claim and ownership in those funds.

26. The first payment referenced, \$335,000, in or about June and July of 2009, was actually two separate payments, which are correctly stated in paragraph 26 of the Complaint. Two payments, one for \$160,800 and one for \$175,000 were made to my account from TDMM Cable in repayment of a loan in the amount of \$366,000 which I made to TDMM Cable from my stock account on June 5, 2004. I have annexed hereto and made a part hereof a copy of the note as **Exhibit A**. It is my belief that the original note is in the possession of the United States Government and presumably accessible to the SEC. I have also annexed as **Exhibit B**, the account statements that evidence the withdrawal of the principal amount of that loan and the receipt, in the form of the two deposits, representing partial payment of that loan.

27. The undisputed fact is that a \$366,000 loan was made by me, with my specific consent, to TDMM Cable, and was carried out by my husband. I specifically discussed the loan with him, approved it as an investment from my stock account, and

was entitled to be repaid. In fact, TDMM still owes me approximately \$35,000 in principal plus accrued interest.

28. As to the alleged \$100,000 payment referenced in the Complaint at ¶94, I have no record of such payment or any record of receiving such an amount.

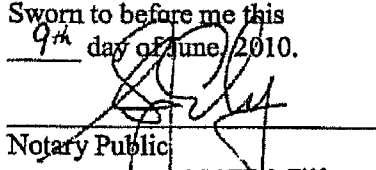
29. The Commission also alleges that I received "many other payments from McGinn Smith Entities" (Complaint ¶ 94), but the Complaint does not indicate those funds allegedly received resulted from ill-gotten gains or that I did not otherwise have a legitimate right to the funds. Nor does the Commission specify the approximate amount of those payments that would justify the freezing of all my personal assets. The statement for my brokerage account as of March 31, 2010, just three weeks before the TRO was granted, showed a balance of \$2,118,511.06 which exceeds the \$435,000 referenced by the Commission by \$1,683,511.06. Nevertheless, the Commission has frozen my entire account, presumably with the intent to seize all the assets and disgorge them in the event it is successful in its claim against the Defendants.

30. I have maintained an independent ownership interest in my accounts for decades. As with hundreds of other investors, my accounts were managed by the McGinn Smith firm and as such I received statements and proceeds pursuant to my personal investments with the firm. The SEC does not plead and cannot establish that I do not have a legitimate claim to my funds as it must do to invoke subject matter jurisdiction and obtain the requested disgorgement remedy from me. Consequently, the Commission's Complaint, as it pertains to me, should be dismissed.

WHEREFORE, I respectfully ask this Court to grant Relief Defendant's Motion to Dismiss on the grounds that the Court lacks subject matter jurisdiction as it pertains to this relief defendant.


LYNN A. SMITH

Sworn to before me this
9th day of June, 2010.


Notary Public

SCOTT J. ELY
Notary Public, State of New York
No. 02EL6184512
Qualified in Rensselaer County 13
Commission Expires Oct. 03, 20 13

Exhibit A

PROMISSORY NOTE

June 5, 2009

\$366,000.00

Albany, New York

For value received, the undersigned, **TDMM Cable Funding, LLC**, a Florida limited liability company (the "Borrower"), promises to pay to the order of **Lynn Smith**, (the "Lender"), the principal amount of **Three Hundred Sixty Six Thousand and 00/100 Dollars (\$366,000.00)** on or July 6, 2009 (the "Maturity Date"), as set forth below, together with interest from the date hereof on the unpaid principal balance from time to time outstanding until paid in full.

The interest rate shall be fixed at twenty-four percent (24.0%) per annum (the "Interest Rate").

Principal and interest shall be payable at 2 Rolling Brook Drive, Saratoga Springs, New York 12866, or at such other place as the Lender may designate in writing, in immediately available funds in lawful money of the United States of America without set-off, deduction or counterclaim. Interest shall be calculated on the basis of actual number of days elapsed in a 360-day year.

There shall be no prepayment premium in the event of any prepayment. In the event of a prepayment the Borrower shall pay interest to the Lender in the amount of one-half of one percent (0.5%) per week for each week, or any part of any week, that this Note remains unpaid.

At the option of the Lender, this Note shall become immediately due and payable without notice or demand upon the occurrence at any time of any of the following events of default (each, an "Event of Default"): (1) default of any liability, obligation or undertaking of the Borrower to the Lender, hereunder or otherwise, including failure to pay in full and when due any installment of principal or interest, or of any endorser or guarantor of any liability, obligation or undertaking, hereunder or otherwise, to the Lender, or default under any other loan document delivered by the Borrower, any endorser or guarantor, or in connection with the loan evidenced by this Note and the continuance thereof for ten (10) days after the due date; (2) failure of the Borrower to maintain aggregate collateral security value satisfactory to the Lender and the Borrower fails to cure such failure within ten (10) days after written notice is given to the Borrower by the Lender; (3) default of any material liability, obligation or undertaking of the Borrower or of any endorser or guarantor hereof to any other party and the Borrower fails to cure such default within ten (10) days after written notice is given to the Borrower by the Lender; (4) if any statement, representation or warranty heretofore, now or hereafter made in connection with the loan evidenced by this Note, or in any supporting financial statement of the Borrower or of any endorser or guarantor hereof shall be determined by the Lender to have been false in any material respect when made; (5) if the Borrower or any endorser or guarantor is a corporation, trust, partnership or limited liability company, the liquidation, termination or dissolution of any such organization, or the merger or consolidation of such organization into another entity, or its ceasing to carry on actively its present business or the appointment of a receiver for its property; (6) the death of the Borrower or of any endorser or guarantor hereof and, if any of the Borrower or any endorser or guarantor hereof is a partnership or limited liability company, the death of any partner or member; (7) the institution by or against the Borrower or any endorser or guarantor hereof of any proceedings under the Bankruptcy Code 11 USC §101 *et seq.* or any other law in which the Borrower or any endorser or guarantor hereof is alleged to be insolvent or unable to pay its debts as they mature, or the making by the Borrower or any endorser or guarantor hereof of an assignment for the benefit of creditors or the granting by the Borrower or any endorser or guarantor hereof of a trust mortgage for the benefit of creditors; (8) the service upon the Lender of a writ in which the Lender is named as trustee of the Borrower or of any endorser or guarantor hereof; (9) a judgment or judgments for the payment of money shall be rendered against the Borrower or any endorser or guarantor hereof, and

any such judgment shall remain unsatisfied and in effect for any period of thirty (30) consecutive days without a stay of execution; (10) any levy, seizure, attachment, execution or similar process shall be issued or levied on any of the property of the Borrower or any endorser or guarantor hereof which shall remain unsatisfied and in effect for any period of ten (10) consecutive days without a stay of execution; (11) the termination of any guaranty hereof; (12) the occurrence of such a material adverse change in the condition or affairs (financial or otherwise) of the Borrower or of any endorser, guarantor or other surety for any obligation of the Borrower to the Lender, or the occurrence of any other event or circumstance, such that the Lender, in its sole discretion, deems that it is insecure or that the prospects for timely or full payment or performance of any obligation of the Borrower or any endorser or guarantor hereof to the Lender has been or may be impaired.

Any payments received by the Lender on account of this Note shall, at the Lender's option, be applied first, to any costs, expenses or charges then owed to the Lender by the Borrower; second, to accrued and unpaid interest; and third, to the unpaid principal balance hereof. Notwithstanding the foregoing, any payments received after the occurrence and during the continuance of an Event of Default shall be applied in such manner as the Lender may determine. The Borrower hereby authorizes the Lender to charge any deposit account which the Borrower may maintain with the Lender for any payment required hereunder without prior notice to the Borrower.

If pursuant to the terms of this Note, the Borrower is at any time obligated to pay interest on the principal balance at a rate in excess of the maximum interest rate permitted by applicable law for the loan evidenced by this Note, the applicable interest rate shall be immediately reduced to such maximum rate and all previous payments in excess of the maximum rate shall be deemed to have been payments in reduction of principal and not on account of the interest due hereunder.

The Borrower represents to the Lender that the proceeds of this Note will not be used for personal, family or household purposes or for the purpose of purchasing or carrying margin stock or margin securities within the meaning of Regulations U and X of the Board of Governors of the Federal Reserve System, 12 C.F.R. Parts 221 and 224.

The Borrower and each endorser and guarantor hereof grant to the Lender a continuing lien on and security interest in any and all deposits or other sums at any time credited by or due from the Lender to the Borrower and each endorser or guarantor hereof and any cash, securities, instruments or other property of the Borrower and each endorser and guarantor hereof in the possession of the Lender, whether for safekeeping or otherwise, or in transit to or from the Lender (regardless of the reason the Lender had received the same or whether the Lender has conditionally released the same) as security for the full and punctual payment and performance of all of the liabilities and obligations of the Borrower and any endorser and guarantor hereof to the Lender and such deposits and other sums may be applied or set off against such liabilities and obligations of the Borrower or any endorser or guarantor hereof to the Lender at any time, whether or not such are then due, whether or not demand has been made and whether or not other collateral is then available to the.

No delay or omission on the part of the Lender in exercising any right hereunder shall operate as a waiver of such right or of any other right of the Lender, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or waiver of the same or any other right on any future occasion. The Borrower and every endorser or guarantor of this Note, regardless of the time, order or place of signing, waives presentment, demand, protest, notice of intent to accelerate, notice of acceleration and all other notices of every kind in connection with the delivery, acceptance, performance or enforcement of this Note and assents to any extension or postponement of the time of payment or any other indulgence, to any substitution, exchange or release of collateral, and to the addition or release of any other party or person primarily or secondarily liable and waives all recourse to suretyship and guarantor defenses generally,

including any defense based on impairment of collateral. To the maximum extent permitted by law, the Borrower and each endorser and guarantor of this Note waive and terminate any homestead rights and/or exemptions respecting any premises under the provisions of any applicable homestead laws.

The Borrower and each endorser and guarantor of this Note shall indemnify, defend and hold the Lender and her heirs, administrators, personal representatives, assigns and attorneys harmless against any claim brought or threatened against the Lender by the Borrower, by any endorser or guarantor, or by any other person (as well as from attorneys' reasonable fees and expenses in connection therewith) on account of the Lender's relationship with the Borrower or any endorser or guarantor hereof (each of which may be defended, compromised, settled or pursued by the Lender with counsel of the Lender's selection, but at the expense of the Borrower and any endorser and/or guarantor), except for any claim arising out of the gross negligence or willful misconduct of the Lender.

The Borrower and each endorser and guarantor of this Note agree to pay, upon demand, costs of collection of all amounts under this Note including, without limitation, principal and interest, or in connection with the enforcement of, or realization on, any security for this Note, including, without limitation, to the extent permitted by applicable law, reasonable attorneys' fees and expenses. Upon the occurrence and during the continuance of an Event of Default, interest shall accrue at a rate per annum equal to the aggregate of 4.0% plus the rate provided for herein. If any payment due under this Note is unpaid for 10 days or more, the Borrower shall pay, in addition to any other sums due under this Note (and without limiting the Lender's other remedies on account thereof), a late charge equal to 5.0% of such unpaid amount.

This Note shall be binding upon the Borrower and each endorser and guarantor hereof and upon their respective heirs, successors, assigns and legal representatives, and shall inure to the benefit of the Lender and its successors, endorsees and assigns.

The liabilities of the Borrower and any endorser or guarantor of this Note are joint and several; provided, however, the release by the Lender of the Borrower or any one or more endorsers or guarantors shall not release any other person obligated on account of this Note. Any and all present and future debts of the Borrower to any endorser or guarantor of this Note are subordinated to the full payment and performance of all present and future debts and obligations of the Borrower to the Lender. Each reference in this Note to the Borrower, any endorser, and any guarantor, is to such person individually and also to all such persons jointly. No person obligated on account of this Note may seek contribution from any other person also obligated, unless and until all liabilities, obligations and indebtedness to the Lender of the person from whom contribution is sought have been satisfied in full. The release or compromise by the Lender of any collateral shall not release any person obligated on account of this Note.

The Borrower and each endorser and guarantor hereof each authorizes the Lender to complete this Note if delivered incomplete in any respect. A photographic or other reproduction of this Note may be made by the Lender, and any such reproduction shall be admissible in evidence with the same effect as the original itself in any judicial or administrative proceeding, whether or not the original is in existence.

This Note shall be governed by the laws of the State of New York.

The Borrower and each endorser and guarantor of this Note each irrevocably submits to the nonexclusive jurisdiction of any Federal or state court sitting in New York over any suit, action or proceeding arising out of or relating to this Note. Each of the Borrower and each endorser and guarantor irrevocably waives, to the fullest extent it may effectively do so under applicable law, any objection it may now or hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim that the same has been brought in an inconvenient forum. Each of the Borrower

and each endorser and guarantor hereby consents to any and all process which may be served in any such suit, action or proceeding, (i) by mailing a copy thereof by registered and certified mail, postage prepaid, return receipt requested, to the Borrower's, endorser's or guarantor's address shown below or as notified to the Lender and (ii) by serving the same upon the Borrower(s), endorser(s) or guarantor(s) in any other manner otherwise permitted by law, and agrees that such service shall in every respect be deemed effective service upon the Borrower or such endorser or guarantor.

THE BORROWER, EACH ENDORSER AND GUARANTOR AND THE LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY, AND AFTER AN OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL, (A) WAIVES ANY AND ALL RIGHTS TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING IN CONNECTION WITH THIS NOTE, ANY OF THE OBLIGATIONS OF THE BORROWER, EACH ENDORSER AND GUARANTOR TO THE LENDER, AND ALL MATTERS CONTEMPLATED HEREBY AND DOCUMENTS EXECUTED IN CONNECTION HERewith AND (B) AGREES NOT TO SEEK TO CONSOLIDATE ANY SUCH ACTION WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CAN NOT BE, OR HAS NOT BEEN, WAIVED. THE BORROWER, EACH ENDORSER AND GUARANTOR AND THE LENDER EACH CERTIFIES THAT NEITHER THE LENDER NOR ANY OF ITS REPRESENTATIVES, AGENTS OR COUNSEL HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE LENDER WOULD NOT IN THE EVENT OF ANY SUCH PROCEEDING SEEK TO ENFORCE THIS WAIVER OF RIGHT TO TRIAL BY JURY.

Executed as an instrument under seal on the date first above written.

Witness:

Borrower:
TDMM Cable Funding, LLC

By: Timothy M. McGinn
Title: Managing Member

Exhibit B

This is a copy of the customer statement. The original has been mailed to the address of record.

Account Number: 3916
Account Name: SMITH

Statement Date: 07/31/2009 to 07/31/2009

McGinnSmith & Company, Inc.

Deposits			Amount
Date	Type	Description	Quantity
07/30/09	CASH	WIRE TRANS FROM BANK WFC3887948	\$176,000.00
Net Deposits			\$176,000.00

NET ADDITIONS AND WITHDRAWALS

INCOME AND EXPENSES

Taxable Income

Date	Account Type	Transaction	Description	Quantity	Amount
07/30/09	CASH	DIVIDEND RECEIVED	MCGINN SMITH & COMPANY LTD. FD SER 1987 ADJ RATE PRICES		\$1,134.36
07/27/09	CASH	DIVIDEND RECEIVED	GENERAL INVESTMENT CO		\$480.00
07/27/09	MAYFON	DIVIDEND RECEIVED	GENERAL INVESTMENT CO		\$1,000.00
07/31/09	CASH	DIVIDEND RECEIVED	PRIME FUND CAPITAL RESERVES CLASS DIVIDEND		\$4.96
08/20/09	CASH	INTEREST	PINE STREET CAPITAL PARTNERS L.P. FROM MT 6.000% 1/25/2008 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS INTEREST		\$2,484.01

Net Taxable Income

Total Income

NET INCOME AND EXPENSES

This is a copy of the customer statement. The original has been mailed to the address of record.

McGinnSmith & Company, Inc.

Account Number: 518
 Account Name: SMITH
 Statement Dates: 08/01/2008 to 08/30/2009

Core Funds Purchased

Settlement Date	Account Type	Transaction	Description	Quantity	Amount
08/08/09	CASH	REINVESTMENT	PRIME FUND - CAPITAL RESERVE	4.84	(\$4.84)
			CLASS REINVESTED @ \$1.00		

Net Core Funds Purchased

(\$180,368.04)

Core Funds Sold

Settlement Date	Account Type	Transaction	Description	Quantity	Amount
08/08/09	CASH	YOU SOLD	PRIME FUND - CAPITAL RESERVE	(398.030)	\$398,030.00
08/08/09	CASH	YOU SOLD	PRIME FUND - CAPITAL RESERVE	(10.018)	\$10,018.00
			CLASS @ 1		

Net Core Funds Sold

\$376,048.00

NET CORE FUND ACTIVITY

\$205,669.96

ADDITIONS AND WITHDRAWALS

Deposits

Date	Account Type	Transaction	Description	Quantity	Amount
08/08/09	CASH	WIRE TRANS FROM BANK	WR36631831		\$150,000.00
					\$150,000.00

Net Deposits

\$150,000.00

Other Additions and Withdrawals

Date	Account Type	Transaction	Description	Quantity	Amount	Total	Realized Gain (Loss)
08/08/09	CASH	WIRE TRANS TO BANK	WD00000002		(\$50,000.00)		
08/08/09	CASH	WIRE TRANS TO BANK	WD30000000		(\$318,000.00)		
08/08/09	CASH	WIRE TRANS TO BANK	WD00070073		(\$10,000.00)		
					(\$378,000.00)		

Net Other Additions and Withdrawals

(\$378,000.00)

NET ADDITIONS AND WITHDRAWALS

(\$216,200.00)

*McGinnSmith
& Company, Inc.*

Core Funds Purchased

Net Care Funds Purchased**Net Core Funds Bold**

ADDITIONS AND WITHDRAWALS

Other Additions and Withdrawals

NET ADDITIONS AND WITHDRAWALS

Account carried with National Financial Services LLC, Member NYSE, SIPC

EXHIBIT E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY MCGINN,

**Case No.: 1:10-CV-457
(GLS/DRH)**

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.

**AFFIDAVIT OF JOHN D'ALEO IN SUPPORT OF RELIEF
DEFENDANT/DEFENDANT LYNN A. SMITH'S MOTION
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 FOR
PARTIAL SUMMARY JUDGMENT**

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

JOHN D'ALEO, being duly sworn, deposes and says:

1. I respectfully submit this affidavit in support of Relief Defendant/Defendant, Lynn A. Smith's motion for partial summary judgment. I have been asked to prepare this Affidavit by counsel to Lynn Smith. I have previously testified in this action at the preliminary injunction proceeding held from June 9-11 of 2010. My complete testimony is attached hereto as Exhibit "A".

2. I am a Certified Public Account and have been the President of Devonshire Business Consulting, Inc. since 1993. I specialize in tax, business and financial planning. Prior to founding Devonshire Business Consulting, Inc. I was a partner at the accounting firm PricewaterhouseCoopers LLP in New York City from 1980 to 1993. I received my Certified Public Accounting license in 1972 from the State of New York.

3. I have prepared a summary and compilation of the deposits and withdrawals of the assets in Lynn A. Smith's individual brokerage account since 1999. I have examined various bank records, checks, and promissory notes in connection with the account. In other words, I have traced the flow of funds going in and coming out of Lynn Smith's brokerage account from 1999 through 2010. This information was made available during my testimony as Lynn Smith Exhibits 14 and 15 of which copies are attached hereto as Exhibit "B".

4. This Affidavit is limited to an analysis of the transaction in question relating to the individual brokerage account in the name of Lynn A. Smith, 2 Rolling Brook Drive, Saratoga Springs, New York, 12866. The account number is RMR-040916. The account is currently held at Dinosaur Securities, LLC, 404 Park Avenue South, New York, New York 10016. This Affidavit is focused on the allegations found in the Securities and Exchange Commission's Second Amended Complaint. Dkt. No. 334.

5. Lynn Smith has been named as a relief defendant, for allegedly (a) receiving “ill-gotten gains”, and (b) not having a “legitimate claim” to the funds received. As a result, the SEC seeks a disgorgement order against the assets contained in Lynn Smith’s brokerage account.

6. More specifically, the SEC alleges in their Second Amended Complaint that during the period of the defendants’ fraudulent conduct Lynn Smith “received more than \$1.8 million from [David] Smith and the McGinn Smith Entities,” including “\$375,000 in December 2007; \$325,000 in June and July 2009; \$100,000 in March 2010...\$185,000 in October 2006 and May 2007[;]...[and] many other payments from McGinn Smith Entities.” Dkt. No. 334, ¶112-114.

7. The Second Amended Complaint also alleges that in 2003 David Smith “deposited significant personal assets into the Stock Account, including cash of \$38,430, the proceeds of a trust amounting to \$326,304, and a note receivable totaling \$410,000.” Id. at 118.

8. Based on these alleged activities, the SEC claims that: “Relief Defendant[] L[ynn] Smith...[was a] recipient[], without consideration, of proceeds of the fraudulent and illegal sales of securities alleged[;]...profited from such receipt or from the fraudulent and illegal sales of securities alleged...by obtaining illegal proceeds under circumstances in which it is not just, equitable, or conscionable for them to retain the illegal proceeds[;]...[and has] been named as a Relief Defendant for the amount of proceeds by which [she] has been unjustly enriched as a result of the fraudulent scheme or illegal sales transactions.” Id. at ¶ 204. Consequently, the SEC demands that “L. Smith...disgorge any ill-gotten gains” which she may have received in her individual brokerage account. Id.

9. As it relates to Lynn Smith's brokerage account, I am able to resolve the origin, nature and purpose of the transactions placed in question by the Securities and Exchange Commission. In reaching the following conclusions, I have drawn on over forty years of experience and knowledge as a Certified Public Accountant, and in my vast experience in tax return preparation and consulting services for individuals and businesses. As I examine additional materials and perform further analyses, I reserve the right to revise and supplement my opinions and conclusions.

10. Lynn Smith provided loans to McGinn Smith entities, and in return received various deposits in her brokerage account in repayment of those loans. As such, valuable consideration was given by Lynn Smith in exchange for the money deposited into her brokerage account from the various McGinn Smith entities.

11. As it relates to each specific transaction in question by the SEC, I hereby attest to the following material facts:

- a) An April 13, 2006 statement from Lynn Smith's brokerage account indicates a check received for \$4,500. An October 4, 2006 statement also indicates a similar deposit for \$85,000, which correlates with a check provided to Lynn Smith from Tim McGinn for a partial repayment of a loan.
- b) In my analysis of the brokerage account transactions, I also took notice of a promissory note for \$970,000 dated October 15, 2004 signed by Tim McGinn addressed to Lynn Smith which is also consistent with the dates of Lynn Smith's brokerage statement that indicated a deposit equal to the amount of \$970,000. See, Lynn Smith brokerage account statement from October 2004, attached hereto as Exhibit "C".
- c) On May 14, 2007 another promissory note for \$100,000 was deposited in Lynn Smith's brokerage account. The promissory note was also signed by Tim McGinn and the memo states "loan".
- d) Lynn Smith made a bridge loan from the assets in her brokerage account on November 29, 2007 to McGinn Smith Funding.

December, 2007 brokerage statement indicates the bridge loan being repaid through a wire transfer. Specifically, on December 21, 2007 a deposit of \$380,000 was made into Lynn Smith's brokerage account. This transaction was further complicated because the repayment of the bridge loan originally went to David Smith's account at M&T Bank on December 12, 2007 in error. After David Smith discovered the error, he transferred \$380,000 to Lynn Smith's account on December 21, 2007.

- e) As it relates to the \$38,430.46 transfer on February 4, 2009 into Lynn Smith's brokerage account, there was no question that the funds belonged to David Smith. He simply deposited the \$38,430.46 into his wife's account.
- f) The next transfer in question occurred on February 20, 2009 and was a deposit from David Smith in the amount of \$326,304.11. The only knowledge that I have as it relates to this transfer resulted from a conversation I had with Lynn Smith. I was informed that this transfer had something to do with the estate planning transfers among the parties, and that was the way the information was reported in the exhibits to the preliminary injunction hearing.
- g) Lynn Smith made a \$366,000 bridge loan to TDMM Cable Funding on June 5, 2009. This loan is illustrated through a promissory note in the amount of \$366,000. See, Promissory Note made payable to Lynn Smith, attached hereto as Exhibit "D".
- h) Additionally, the deposit into Lynn Smith's brokerage account on July 30, 2009 from TDMM Cable Trust in the amount of \$175,000 was also in connection with a partial repayment of the \$366,000 loan. The loan is illustrated through a June 5, 2009 promissory note in the amount of \$366,000.
- i) As it relates to the deposit into Lynn Smith's brokerage account on March 18, 2010 in the amount of \$100,000, it was made as a repayment of a loan made to TDMM Benchmark on March 16, 2010.

12. The money that was deposited into Lynn Smith's individual brokerage account was made in repayment of previous loans that she agreed to furnish, and those deposits do not constitute Lynn Smith's "ill-gotten gains". As a result, Lynn Smith has a legitimate claim to deposits she received from McGinn Smith entities.

13. The bridge loans that Lynn Smith made from her individual brokerage account to various McGinn Smith entities was valuable consideration given in exchange for the amount of repayment.

By:



JOHN D'ALEO, CPA

Sworn to before me this
2nd day of July, 2014.

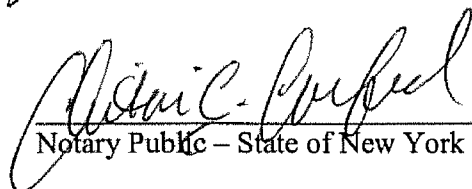
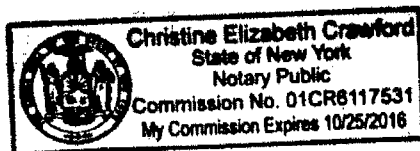

Notary Public – State of New York

EXHIBIT A

1 THE COURT: And, Miss Dunn, how about you?

2 MS. DUNN: I have one -- I'm going to use one
3 of Mr. Featherstonhaugh's witnesses and I have two brief
4 witnesses.

5 THE COURT: All right. Stand in recess for
6 15 minutes.

7 (Brief recess at 3:45 PM.)

8 (Court reconvened at 4:00 PM.)

9 THE COURT: The SEC rests?

10 MR. STOELTING: We rest, your Honor.

11 THE COURT: Mr. Featherstonhaugh, any
12 witnesses?

13 MR. FEATHERSTONHAUGH: Yes, your Honor. At
14 this time relief defendant Lynn Smith will call John D'Aleo.

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1 JOHN D'ALEO,

2 having been duly sworn by the Clerk of the Court, was
3 examined and testified as follows:

4 THE CLERK: Thank you. Please take the
5 witness stand.

6 This is John D'Aleo.

7 DIRECT EXAMINATION BY MR. FEATHERSTONHAUGH:

8 Q. Good afternoon, Mr. D'Aleo. Thank you for your
9 patience. Would you please tell us your current employment,
10 the nature of your current employment?

11 A. Yes. I'm president of my own company, Devonshire
12 Business Consulting. That's my current work experience.

13 Q. Could you briefly describe your education,
14 background, and work experience?

15 A. Yes. I graduated from St. Johns University in
16 1968 with a BBA in accounting. I subsequently got an MBA
17 from Bernard Baruch College in New York City, which is a
18 business school part of the community system. I passed my
19 CPA exam and became a CPA in 1972. When I graduated from
20 college, I immediately started with Coopers & Lybrand, the
21 successor firm is now PricewaterhouseCoopers. I was in the
22 New York City office from '68 through '80. I became a
23 partner in the New York City office. I was there for the
24 entire time except for the period I spent in the service; I
25 was in the Army for a period of time.

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1 I moved up to the Capital District in the latter
2 part of 1980 when the firm opened up an office here. I was
3 asked to come up and help start the office and to run the
4 tax practice. Which I did. So I've been with Coopers &
5 Lybrand from -- now PricewaterhouseCoopers, from '68 through
6 1993. When I left the firm, I started my own consulting
7 firm which is Devonshire Business Consulting.

8 Q. And have you and I known one and another for a
9 while?

10 A. We've known each other for probably over 20 years.

11 Q. And we've known each other professionally and
12 personally, is that right?

13 A. Yes. You were my client, tax client and business
14 client.

15 Q. And did there come a time when I called you and
16 spoke to you about the case that's being tried here today?

17 A. Yes, you did. It was -- I believe it was about
18 the 27th or 28th of April and you indicated you had some
19 matter you were dealing with and could I possibly help you
20 out. I went down to your office. We discussed certain
21 things. And you gave me the general outline of what you
22 might ask me to do. And we decided to go forward from
23 there. I signed an accounting service agreement, I believe
24 it was on April 29th. And you outlined some of the things
25 you needed.

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1 The first thing you indicated to me that you did
2 need was --

3 Q. Well, you indicated to me, did you not, that in
4 order to provide those services, you would need to be paid
5 for them; correct?

6 A. Absolutely.

7 Q. And I agreed to pay you for them?

8 A. Yes, you did.

9 Q. And, in fact, you're being paid for your time
10 today?

11 A. Absolutely.

12 Q. Is that correct?

13 A. Or hope to be.

14 Q. Now, that takes care of your side, as to my
15 obligation. What did I initially ask you to do?

16 A. Well, initially you had indicated that you had to
17 report back to the Court to provide a compilation of Lynn
18 Smith's assets. So we had a discussion about that. I made
19 certain inquiries. You provided me with certain
20 information.

21 I did speak to Lynn Smith to gather some of the
22 information. You showed me copies of certain documents you
23 had. You had copies of brokerage statements and a few other
24 things. And we decided the format would be in the form of a
25 compilation.

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1 Q. Let me just ask you if you can -- there's a
2 notebook to your left, if you can pick that up and just look
3 at Exhibit 13 while you're providing this testimony.

4 A. Yes. I have that.

5 Q. Okay. Please go ahead. I gave you what I had.

6 A. Okay. You gave me certain documents. And this,
7 what you see in front of you here is Exhibit 13, is a
8 compilation of that information put together in typical
9 format.

10 There's certain information I had to get from Lynn
11 about values and so forth, estimated values. And all that's
12 reflected in this particular document.

13 Q. Can you tell me, you used the word "compilation",
14 is that a term of art?

15 A. Yes, it is.

16 Q. Would you tell us what it is?

17 A. A compilation basically is an accumulation of
18 information to be reported in a standard fashion but it
19 doesn't require the accountant that's doing it to do any
20 analytical work or any kind of verification that would
21 normally be required either for review, which is the next
22 highest level, or an audit, which is even a higher level.
23 So this is the lowest level of accumulated data to be
24 reported.

25 Q. And I'm asking you to take a look at Exhibit 13,

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1 and I'm asking you if you actually prepared that document.

2 A. Yes, I did.

3 THE COURT: Is this Exhibit 13 in this
4 proceeding? The SEC's --

5 MR. FEATHERSTONHAUGH: Yes. This is Lynn
6 Smith's Exhibit 13, your Honor, but it's the one that
7 unfortunately I missed. It is the one duplicate. It is
8 also Plaintiff's Exhibit 75. We did the best we could. I
9 apologize for that.

10 THE COURT: That's okay.

11 BY MR. FEATHERSTONHAUGH:

12 Q. All right. With reference to that exhibit, that
13 was physically prepared by you, Mr. D'Aleo?

14 A. Yes, it is.

15 Q. And would you tell the Court and counsel here what
16 you relied on to prepare that?

17 A. Well, the information came from various sources.

18 THE COURT: Can you hold on for a second?

19 THE WITNESS: Absolutely. (Interruption.)

20 THE COURT: All right. I'm sorry. Go ahead.

21 A. There were certain documentation that you had
22 accumulated. For instance, there was a bank statement that
23 showed certain cash. There was information with respect to
24 Lynn's brokerage accounts. So we looked at that
25 information. That information is here.

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1 There were other things that we accumulated based
2 on discussions with Lynn Smith. For instance, the loan
3 receivables, we talked about that. That didn't show up any
4 place in the documents that I looked at. So they
5 indicated -- she, rather -- that they had these loan
6 receivables, which you see there, for one 900,000, and one
7 for 15,000.

8 She also indicated based on her assertion that
9 they had no face value even though the -- no market value,
10 rather, even though the face value was a total of 915,000.

11 Similarly, she indicated to me the property that
12 was owned either in her name or jointly. And that's
13 reflected here. If that's jointly held property, it shows
14 half the value and it's netted down by the amount of the
15 mortgages, the column of these particular values.

16 Q. Is that indicated in the footnote?

17 A. Yes, it is. It's in the footnotes.

18 Q. Okay. This document was ultimately shown to Lynn
19 Smith. And if you turn the page, it was Lynn Smith who
20 verified the document, correct?

21 A. Absolutely. Yes.

22 Q. Now, after we had completed that and sent it off
23 to the SEC, did there come a time when I asked you to do
24 some further work?

25 A. Yes, you did. You had indicated to me that you

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1 had information presented to you by the SEC that showed
2 various accounts that Lynn had amounts that were deposited
3 into the accounts. It might have been a security account, a
4 checking account. I think maybe there was some schedule for
5 the IRA. And you asked me if I could help you out and look
6 at that, and what documents I might need or further
7 information I might need to accumulate and assist you in
8 responding to the information that was on those particular
9 documents.

10 Q. I would like you to take a look at Lynn Smith
11 relief defendant's Exhibit 14.

12 A. Yes.

13 Q. And it is a three-page document. Is that the
14 document that I showed you?

15 A. Yes, it is.

16 Q. Now, have you altered that document to some
17 extent?

18 A. Yes, I did. The left hand column where it has
19 footnotes number listed down by row certain numbers, that
20 was not part of the document. I put this on the document so
21 we could have cross references to certain other information
22 that was going to be supplied.

23 Q. And that is true of both of the first two pages of
24 the document?

25 A. First three pages. All three pages.

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1 Q. Okay. All three pages of the document. Now, did
2 you prepare another document that those footnote numbers
3 relate to?

4 A. Yes, I did.

5 Q. And would you take a look under tab 15?

6 A. Yes. That's a document I prepared that we were
7 referring to that has the cross references to the footnotes
8 that are in the previous three pages.

9 Q. And did I indicate to you at the time I showed you
10 the original three-page document that I had, in fact,
11 received it from Mr. Stoelting who had inquired about these
12 transfers?

13 A. Yes. That was my understanding.

14 Q. And I asked you to look at all the material we had
15 and do whatever you could to explain each of the
16 transactions?

17 A. That's correct.

18 Q. Right?

19 A. Yes.

20 Q. And I take it you were able to explain some and
21 there's some that you were not able to explain?

22 A. Yes. Some of the information that's on these
23 three exhibits we had no further documentation to determine
24 the source of where it came from or what it was actually
25 for, simply because we didn't have the documents available

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1 to us that might have helped us in coming to those
2 conclusions.

3 Q. Can you -- and I'm going to take you to 15 and
4 have you take us right through the transfers in a minute,
5 but just before I do, to the best of your ability, can you
6 describe what you did have and what you were able to review
7 in trying to reconcile these transfers?

8 A. Well, the principal documents we looked at were
9 the so-called stock brokerage statements. That's the --
10 that's on the first particular exhibit. We also took a look
11 at some information that was provided to you as -- I think
12 as a result of me asking you certain questions to try to get
13 additional information that was provided to you through
14 various sources. And I had conversations with Lynn Smith to
15 get a better understanding what some of these things were.
16 And I had made requests of you to try to get further
17 information. And I believe that you accumulated certain
18 information based on data that maybe Dave Smith had also
19 given to you.

20 Q. Well, did I show you data that I got in response
21 to my discovery requests that actually the SEC gave to me?

22 A. Yes. Absolutely.

23 Q. Okay. Well, why don't you go ahead, item by
24 item...

25 MR. FEATHERSTONHAUGH: And it really won't

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1 take that long, your Honor. There aren't that many.

2 Q. Mr. D'Aleo, and tell us to what extent you can
3 resolve the origin and nature of the transactions that we
4 were asked about by the Security & Exchange Commission.

5 A. Okay. I would also make one additional point.
6 Some of the ITEMS that we did not have additional data for,
7 and this information I used what the explanation was of the
8 SEC, specifically with respect to items relating to cash
9 contributions to the IRA, simply because we could not get
10 our hands on the IRA statements they were not made available
11 to me.

12 But I think the way to approach this by looking at
13 the footnotes, everything that is indicated with an item one
14 next to it, simply is the information or the document source
15 or the use of the fund was not available to me and I could
16 not make a comment on those. So everything that's marked
17 with an item one is in that category. There was no
18 information.

19 Q. So just for an example, and we'll only do one,
20 that very first entry, on January 10th, 2006, you were
21 asked about it, it says a check was received in the amount
22 of \$6,301, to Lynn Smith's account; correct?

23 A. That's correct.

24 Q. And did I tell you that I had asked for copies of
25 the checks?

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1 A. I believe you may have. I couldn't say for
2 surety, but I know I made requests of you to try to find out
3 additional information, and we did not receive that
4 information.

5 Q. You did not receive it. And so it's footnote one,
6 and that means that we really have no idea where it came
7 from or what its purpose was?

8 A. That's correct.

9 Q. Go ahead.

10 A. Okay. Item two is a check received on April 13,
11 2006. I'm looking now at the statement, the first document
12 which is funds received into Lynn Smith's accounts. That
13 shows a check received on that date for 4500. Again, we had
14 no specific information about that other than the notation
15 that was on the original document from the SEC that said it
16 was a cash contribution from a prior -- for a prior year IRA
17 deposit.

18 The next item is an item on October 4th, 2006,
19 in the amount of \$85,000. That we were able to find because
20 you provided me with the copy of a check from Tim McGinn
21 that indicated that it was a partial repayment of a loan
22 that had been made. So that's what the footnote says,
23 partial repayment of loans to Tim McGinn. And then a copy
24 of the check was available to me.

25 THE COURT: I'm sorry. Are these all

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1 deposits into the Lynn Smith stock account?

2 THE WITNESS: Yes. Speaking -- this right
3 now is speaking about only deposits into Lynn Smith's stock
4 account.

5 THE COURT: All right. Thank you.

6 BY MR. FEATHERSTONHAUGH

7 Q. And if you'll take a look at Exhibit 15 G, as in
8 guy.

9 A. Yes. That is the copy of the check that you
10 showed me evidencing the \$85,000 payment into the account of
11 Lynn Smith. And it's from Timothy McGinn. And the memo
12 says on it interest and principal. And then we inquired as
13 to what that was, and were told by Miss Smith that that was,
14 in fact, a partial repayment of the loans that she had made.

15 Q. And I would direct your attention to the third
16 part of G.

17 A. Yes. That is a promissory note dated
18 October 15th, 2004, for the \$970,000 that Mr. McGinn
19 borrowed from Lynn Smith. You made that available to me,
20 and I have seen this document.

21 Q. Did you cross check the date of the check and the
22 amount against the Lynn Smith account statements?

23 A. Yes, I did.

24 Q. Okay. Go ahead then.

25 A. Okay. The next item, again, is item five, that's

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1 another 4500 -- excuse me -- a \$5,000 contribution that we
2 didn't have any specific detail on other than the reference
3 put in by the SEC that again it was a cash contribution for
4 a prior year IRA.

5 The next item, item six, which is on May 14, 2007,
6 is a check received in the amount of \$100,000. Item six...
7 Okay. That also relates to a partial repayment of a loan
8 from Tim McGinn, similar to the \$85,000 check we looked at
9 before. You showed me a copy of the check. And I believe
10 that it probably was attached in the second page of Exhibit
11 15G. Shows the check, made payable to amount to Lynn Smith,
12 signed by Timothy McGinn in the amount of a hundred thousand
13 dollars, and the memo says loan.

14 Next item is item seven. It's dated 12/20/2007.
15 Also says transaction. Check received in the amount of
16 \$300,000. Okay. This one is a little bit more involved.
17 It took some further analysis based on information that you
18 provided to me, some of which you had to go back and request
19 of Miss Smith, some of this information, to try to make a
20 better understanding of what this was.

21 This relates to repayment of a bridge loan in the
22 amount of 375,000 that was made by Miss Smith on
23 November 29th, 2007, to McGinn Smith Funding. And that
24 was evidenced by a copy of the December '07 brokerage
25 statement showing the wire transfers. And we have a copy of

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1 that; I see it; I believe it's in one of these references.

2 Q. It is in volumes one or two up there, but I don't
3 think you need to look at it.

4 A. Okay. So she made this 375,000 bridge loan on
5 November 29, 2007. A repayment of that loan in the total
6 amount of 376,438 was on December 12th of '07, deposited
7 in error in the M & T Bank account of Mr. David Smith. And
8 we also saw a copy of that particular deposit. Obviously,
9 since Lynn made the loan, it was an error, he paid it back
10 to David.

11 So we see the \$375,000 then going back and
12 ultimately, after they -- excuse me -- we saw the 376,438
13 going back. And that went back to David. And since he
14 realized that he knew right from the beginning when this
15 came to light that this was not supposed to be given to him,
16 he simply, as I understood it, rounded up the payment to
17 \$380,000 and transferred that to Lynn Smith, which was
18 deposited in her account on December 21 of '07.

19 So we saw those documents with respect to the
20 various statements that we had available to us.

21 Q. And the next three items that you were asked
22 about?

23 A. The next three items, miscellaneous checks
24 received on January 5 of 2010. One was for \$525. The next
25 was for \$708.33. The last was for 1,329.17. And those were

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1 all were indicated with an item notation of one. We simply
2 didn't have the information available to determine what
3 those payments are for, or where in fact they -- well, we
4 know where they ended up, but we didn't know what they were
5 for.

6 Q. Okay. Can we turn the page?

7 A. The next page is other funds received into Lynn
8 Smith's accounts. The second schedule that was provided by
9 the SEC to you. The first item is item we call item 8.
10 There was a transfer made on February 4, 2009, from the
11 account of Capital Center Credit Corporation in the amount
12 of 38,430.46.

13 Okay. We inquired as to what this was, and the
14 explanation we got was as follows. Capital Center Credit
15 Corporation was an entity that was around sometime in the
16 '90s. It had been some kind of active business. This
17 \$38,000 represented the balance in that particular account
18 and it was closed out. It was funds that, no question,
19 belonged to David Smith. He simply deposited this \$38,000
20 into his wife's account.

21 Okay. The next item is on March 3, 2006. It's a
22 payment from McGinn, Smith & Company. It references M & T
23 Bank in the amount of \$20,000. We have a cross reference of
24 one, which means that we were not able to determine what
25 that was for, other than the fact that it actually was

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1 deposited in her account on that date.

2 The next item is a check received on January 16,
3 2009, from Pine Street principles. It says Pine Street
4 principles. Pine Street principle partners I believe. In
5 the amount of \$166,020. That's our reference number nine.
6 This is an amount that we determined was a partial repayment
7 of a portion of the five percent notes due December 31, '09,
8 that was issued by Pine Street Capital Partners LLC.

9 The next item is an item on, also on January 16 of
10 2009. It's also from Pine Street. It's in the amount of
11 \$62,257. We reference that as item cross reference ten.
12 That is an amount which was explained as a return of equity
13 capital in Pine Street Capital Partners LLC. And, in fact,
14 in addition to the amount which we see deposited into the
15 account, it's also the amount shown on the schedule K-1 of
16 Lynn Smith in the Form 1065, which is the partnership
17 return, and shows in the capital reconciliation section as a
18 return capital. So that it meets that amount.

19 The next item is what we refer to as item 11.
20 It's a deposit on February 20th, 2009. It is from David
21 Smith in the amount of \$326,304.11. The only documentation
22 was a discussion, I think, I had with Lynn and maybe some
23 further information I got from you. And all I knew at this
24 point in time when I prepared this, it had something to do
25 with some estate planning transfers among the parties. And

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1 that's the way I reported it in this document.

2 The next item is cross reference item 12. It
3 relates to a transaction on June 10th, 2009, from TDMM
4 Cable Funding, in the amount of \$160,800. And this relates
5 to a partial repayment of a loan which I think has been
6 discussed earlier today, the \$366,000 loan was made on
7 June 5th of '09. And we saw statements showing where it
8 came out of. It actually was two transfers that came out of
9 Lynn's account. One in the amount of \$50,000, and 316,000.

10 Now, the reason why we found this information in
11 order to find -- determine what this particular repayment
12 was for, we kind of cross reference to see where the money
13 came from. We didn't normally look at amounts coming out of
14 her account, but in order to get a better understanding of
15 what this was, we found out it related to the \$366,000 loan.
16 So this is a partial repayment of \$160,800.

17 And I also would draw your attention to item 12,
18 which was deposited on July 30, 2009, also from TDMM Cable
19 Jr. Trust in the amount of \$175,000. And that also was a
20 partial repayment of the \$366,000 loan.

21 Q. Would you take a look at 15 F?

22 A. Yes.

23 Q. Is that the transaction we're talking about?

24 A. Yes. This is the promissory note dated June 5th,
25 2009, in the amount of \$366,000.

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1 Q. And there was a question, a couple of questions
2 earlier today about the interest rate on this note. Is that
3 expressed in the note?

4 A. Yes. It's shown as an interest rate shall be
5 fixed at 24 percent per annum.

6 Q. Can you tell me if that loan was repaid? I think
7 in the one case, the first repayment was made five days
8 after the loan was made, and the other one about 40 days,
9 what the effective interest rate received by the lender
10 would be?

11 A. I actually didn't evaluate that but, obviously --
12 not obviously. I believe since the amount was 106,800
13 included a certain amount of interest, and the 175 would
14 also include interest. I did not calculate the interest. I
15 cannot say without some surety that the amount paid did or
16 did not include the interest. But I would imagine the
17 repayment was consistent with this note, it may have
18 included the interest.

19 Q. So it was a matter of hundreds of dollars that
20 would have been owed?

21 A. Right. Because it was repaid in a very short
22 period of time.

23 Q. Okay. No, I think you have one more. I'm sorry.

24 A. Yes. We have item 13, which was a deposit on
25 March 18, 2010, in the amount of \$100,000. That's our cross

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1 reference 13.

2 Okay. This relates to a repayment of a loan made
3 to TDMM Benchmark on March 16, 2010. And we saw copies of
4 statements showing the outgoing wire. And we saw a copy of
5 the March statement from Mercantile showing the incoming
6 wire from Lynn Smith on 3/16/10. And the repayment was
7 actually two days later. It came back two days after it was
8 made.

9 Q. Okay. Now, that's the last question that was
10 posed concerning the stock account, right? We've reviewed
11 everything we know about those on the two pages?

12 A. That's correct.

13 Q. I also asked you to review the questions that have
14 been presented in connection with the checking account.

15 A. This was a little bit more problematic, in that we
16 didn't have access; at least I wasn't given access, I don't
17 think you had access to any checking account statements. So
18 I also indicated on this the various deposits that were made
19 and used similar type footnotes. A number of them had
20 number ones next to them, which indicated we could not get
21 the information.

22 The largest proportion of these deposits were a
23 series of deposits of David Smith's payroll check. And they
24 vary from amounts of 7,896 to a high of 17,731. And the
25 only information we had, which is what was provided and the

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1 data that was submitted by the SEC, is that these were, in
2 fact, deposits of payroll. We had no other indication to
3 determine that, but I have no reason to believe it was not
4 payroll deposit.

5 Q. And let me ask you, it reviews a number of
6 deposits, the first one starting in July 15th of '09,
7 right?

8 A. That's correct.

9 Q. So you have four and a half months left of '09.
10 And then the last one on April 8th of 2010?

11 A. That's the amount of 17,731...

12 Q. Right.

13 A. 08.

14 Q. Well, I know the amount, but that's the last --

15 A. Yes, it is.

16 Q. -- one we got, right?

17 A. April, April 8.

18 Q. So the time period covers about a nine month time
19 period?

20 A. Yes.

21 Q. And did the SEC total what the payroll deposits to
22 Mr. Smith were for that nine month period?

23 A. Yes. It totaled \$129,096.67.

24 Q. Okay. There are five more entries on the sheet.

25 Would you explain them?

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1 A. Okay. The next three supposedly are deposits that
2 came from David Smith's M & T account into Lynn's account.
3 They are amounts of varying dates, but amounts of \$4,000,
4 \$200, \$2,000. For a total of 6200. And the only reference
5 we have is the information that was on the SEC prepared
6 schedule. We had no further documentation as to what it was
7 for. We couldn't see any source material to determine what
8 it was.

9 The last item we looked at was a total of \$60,000
10 payments into Lynn Smith's accounts. It doesn't say when
11 they were or where they came from. It just says \$60,000.
12 But I believe, based on our investigation, that those simply
13 were an accumulation of wire transfers from Lynn Smith's
14 brokerage account into her checking account as follows:

15 On December 13 of '09, there was 15,000 deposited.
16 On February 16 of 2010, there was \$20,000 deposited. And on
17 March 25, 2010, there were \$25,000 deposited. All of these
18 being transferred from her brokerage account into her
19 checking account.

20 So we can't say without some surety what the
21 \$60,000 is because there is no detail given in the SEC
22 statement, but we believe relative to the timing of the
23 other items that are on the statement that it probably was
24 those three wire transfers.

25 Q. All right. Thank you, Mr. D'Aleo.

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1 Now I just have a couple of general accounting
2 questions for you if I might.

3 A. Mm-hmm.

4 Q. Sometime early yesterday --

5 A. Mm-hmm.

6 Q. -- there was a gentleman, who isn't here so I'll
7 apologize to him in absentia, I can't remember his name, but
8 I think he's a staff accountant or at least worked for the
9 SEC at some point, to whom I asked, is there the term
10 "affiliate", are there any accounting rules governing when
11 someone is an affiliate or not.

12 A. Well, I think the term "affiliate" is used in a
13 number of different instances for different purposes. It
14 usually relates to some form of control or ownership
15 interest, and it could vary from as low as 20 percent in
16 circumstances, certain circumstances it could be deemed to
17 be an affiliate of 20 percent. For instance, in the
18 relationship of the control of a foreign corporation, it
19 would be 50 percent. And in connection with an affiliate
20 being consolidated as part of a consolidated tax return or
21 financial statement, it could be as high as 80 percent. So
22 I don't think it's one particular meaning for that, but
23 there is an understanding that the definition of the word
24 "affiliate" and it is delineated for the purpose on which
25 you're trying to determine what it is.

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1 Q. Are you aware of any circumstances where an
2 ownership interest of less than 20 percent qualifies as to
3 be an affiliate?

4 A. It's not typical, no. Because I think it's deemed
5 if you've invested 20 percent, you're not really controlling
6 the particular entity.

7 Q. I have one final question for you, Mr. D'Aleo.
8 Can you take a look at Exhibit 79. And this would be
9 plaintiff's Exhibit 79. And let me just help you in the
10 interests of...

11 I would like you to take a look at the fourth
12 paragraph of that letter that was read here in court today.
13 It's just two sentences.

14 A. Yes.

15 Q. Do you see that?

16 A. I see that.

17 Q. Why don't you read it. Not everybody has a copy.

18 A. Okay. It says David L. and Lynn A. Smith have
19 elected to omit substantially all of the disclosures
20 required by generally accepted accounting principles. If
21 the omitted disclosures were included in the statement of
22 financial condition, they might influence the user's
23 conclusion about the financial conditions of David L. and
24 Lynn A. Smith. Accordingly, this statement of financial
25 condition is not designed for those who are not informed

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1 about such matters.

2 Q. Is that a common reference in accounting
3 compilations, language either identical to that or of that
4 type?

5 A. Yes. This, this -- the first paragraph says this
6 is a compilation. We have compiled the information. So
7 that is, as I indicated before, that's like the lowest level
8 of putting things together. And --

9 Q. All right. That's the same level as the
10 compilation --

11 A. Exactly.

12 Q. -- you did?

13 A. Yeah, right. There's certain required language
14 that has to go in the statements that are required by the
15 accounting rules. And although, obviously, we have to say
16 David L. and Lynn Smith, you refer to that, but it's not
17 uncommon for various disclosures that are required normally
18 in the gap, footnote disclosures, other details not to be
19 included in a compilation.

20 Q. So that -- is it at all unusual to see that
21 language attached to a compilation?

22 A. No. As a matter of fact, in certain instances, it
23 would be required.

24 MR. FEATHERSTONHAUGH: Thank you. I have
25 nothing further for this witness.

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1 THE COURT: Miss Dunn, any questions?

2 MS. DUNN: Your Honor, Mr. D'Aleo is a
3 summary witness for me as well, but for purposes of clarity,
4 I have no objection to Mr. Stoelting doing his
5 cross-examination of Mr. D'Aleo now, and then I would put on
6 my direct with him, if that would make sense for the record.
7 Or do you want -- I, I, I'm happy to go now if you would
8 like.

9 THE COURT: Why don't you go now, and then
10 Mr. Stoelting can cross-examine on both.

11 MS. DUNN: Okay.

12 MR. STOELTING: Actually, your Honor, it
13 would likely be Mr. McGrath.

14 THE COURT: I'm sorry. Mr. McGrath.

15 **DIRECT EXAMINATION BY MISS DUNN:**

16 Q. Mr. D'Aleo, did there come a time that an issue
17 came up during -- following your preparation of the asset
18 inventory for Lynn Smith that you were questioned as to why
19 you did not include within that asset inventory an NFS stock
20 account held under the name of the David and Lynn Smith
21 irrevocable trust by its trustee Thomas Urbelis?

22 A. Yes.

23 Q. And was there a reason that you -- or what was the
24 reason you didn't include that stock account in Lynn Smith's
25 inventory of assets?

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1 A. Well, it was first indicated to me when we
2 inquired that it was an irrevocable trust, and that if it is
3 an irrevocable trust, then the assets were transferred into
4 the trust, that those assets are not owned by David or Lynn
5 Smith but, in fact, are owned by the trust.

6 Q. Okay. Did you review the trust declaration?

7 A. I did. I have seen a copy of it. I can't say I
8 looked at every line of it, but I have seen the declaration
9 of trust.

10 Q. Did you reach any conclusions regarding it when
11 you reviewed it?

12 A. It was a relatively standard trust document. And,
13 accordingly, it would meet the criteria of being a trust. A
14 trust is a separate entity, a legal entity. It's a separate
15 taxpayer. The assets that are put into it are -- is funded,
16 are assets owned by that entity, the trust.

17 Q. And did there come a time that you signed an
18 accounting services agreement with my law firm?

19 A. Yes, I did.

20 Q. Do you recall the date that you signed that
21 agreement?

22 A. I believe it was May 17th.

23 Q. Of this year?

24 A. Of 2010. Excuse me.

25 Q. Okay. I'm going to show you intervenor Exhibits

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1 9, 4, 12, and 2, in that order. I apologize that they are
2 in that order and not in numerical order.

3 When I asked you to review this trust account for
4 me, did you indicate that you needed certain documents to
5 perform that review?

6 A. Yes. I thought it would be helpful to get copies
7 of the tax returns since that was would be the annual
8 summary of what happened. And you did supply me with tax
9 returns. And then, since one of the investments, income
10 items that was listed on the tax return was the investment
11 of the trust by Pine Street Capital Partners LP, you also
12 were able to obtain copies of the Form 1065, which is the
13 partnership agreement of the trust -- partnership tax return
14 of the trust, the schedule K-1, which is the amount reported
15 by each individual partner. And you obtained copies of the
16 K-1s for the Lynn and David Smith trust.

17 In addition, since we were looking at some of the
18 items of various deposits and an analysis of what was paid
19 out of the accounts, some of it obviously related to income
20 taxes, because we looked at the tax returns. And I made an
21 inquiry of you as to whether or not you could have the
22 trustee obtain what is known as an account transcript from
23 the Internal Revenue Service, which you did obtain.

24 What an account transcript is is basically a
25 summary of that particular taxpayer, showing the amount of

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1 tax, the amount of payments that were made, whether there
2 were estimated payments, extension payments, final payments,
3 if any penalties were imposed, if there was any interest
4 calculated. So you provided me with that information also.

5 Q. Did there come a time that you asked me to
6 obtained additional information concerning the trust
7 investment in Pine Street Capital Partners?

8 A. Yes, there is -- there was. And you obtained
9 information with respect to what's reported in these K-1s.
10 And I think you also had some other information you may have
11 gathered based on data that you received in connection with
12 the deposition of Mr. Welles.

13 Q. All right. And did you also consult with the
14 accountant? Did you consult with anyone related to the
15 trust outside of my law firm?

16 A. Yes. One of the schedules I prepared was a
17 summary of the taxes that were paid and due for the period
18 in which the trust existed and also the amount of taxes paid
19 or distributions that were made in connection with those
20 taxes.

21 And in connection with that evaluation, I did
22 speak to a Mr. Ron Simons who's a partner at the Piaker firm
23 who prepared these returns. And prior to the time we
24 actually received the transcripts from the Internal Revenue
25 Service, he was helpful in discerning some of the

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1 information that was on the tax return, specifically
2 relating to when estimated tax payments were made.

3 Q. Okay. Did Mr. Simons provide you with any
4 information concerning the manner in which the trust taxes
5 were paid?

6 A. He gave the amounts that were paid. He indicated
7 in a brief conversation I had with him that typically the
8 payments were made, he would fill out the tax returns, he
9 would provide the information to make the payments, and
10 occasionally those payments, as we determined based on
11 looking at the facts, either were paid directly by the
12 trustee, or in other cases may have been paid by David
13 Smith. And then we subsequently were able to trace that in
14 those cases, not in every case, but most of those cases, the
15 amounts that David Smith paid on behalf of the trust were,
16 in fact, reimbursed to David Smith by the trust.

17 Q. Okay. And did you -- did there come a time that
18 you reviewed the NFS brokerage account statements for the
19 trust?

20 A. Absolutely. We looked at all -- we looked at
21 every statement that was prepared during the period in which
22 the trust existed.

23 Q. Okay. I'm giving you intervenor Exhibit Number 5.
24 Are these the account statements which you said you reviewed
25 at my request?

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1 A. I would say without going through every one that
2 these are the statements for the years 2004 through the
3 first several months of 2010.

4 Q. All right. And can you take me through your
5 analysis of these account statements and describe for the
6 Court what you were doing as you were reviewing the
7 statements?

8 A. Well, basically, in looking at the statements, I
9 looked at the activity in the account from the period of
10 inception through this time in 2010, with a view to get a
11 better understanding of what happened within the trust. And
12 in doing that, I was able to put together a schedule showing
13 all the deposits to the trust and distributions or transfers
14 out of the trust from the time it was first funded in
15 September of 2005 through the period in March of 2010.

16 Q. All right. How did you determine how the trust
17 was first funded in September 2004?

18 A. Okay. I looked at the trust document, found that
19 it was actually formed on, I believe, August 4th of 2004.
20 And then in the tax return for 2004 year, it showed the sale
21 of certain stocks. Obviously, it had been funded by that
22 date. And then in looking at the statements for the trust
23 and also looking at Lynn Smith's personal statements, I was
24 able to determine that the fund -- excuse me -- the trust
25 was funded on September 1, 2005, by a transfer of 100,000

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1 shares of Charter One Financial.

2 Q. Are you sure it was September 1, 2005?

3 A. 4. Excuse me.

4 Q. And how did you get the information to indicate it
5 was funded in that manner?

6 A. By looking at the statement at the trust level, it
7 showed an incoming transfer of the 100,000 shares on
8 September 1st, and then looking at Lynn Smith's brokerage
9 statement, her individual brokerage stock statement, it
10 showed the transfer out to the account of the trust on that
11 date.

12 Q. All right. And that account statement for the
13 September 2004 period from Lynn Smith, Lynn Smith's stock
14 account, is that one of the documents you previously
15 testified to under examination by Mr. Featherstonhaugh?

16 A. Yes, it is.

17 Q. I'm handing you what I've marked as intervenor
18 Exhibits 3, 10 and 11. Are those the schedules that you
19 prepared at the conclusion of your examination?

20 A. Yes, they are.

21 Q. All right. And starting with the Intervenor
22 Exhibit 3.

23 A. Yes.

24 Q. The Smith irrevocable trust deposits, 2004 to
25 2010.

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1 A. Yes.

2 Q. Can you take the Court through this document,
3 explain how you arrived at these entries?

4 A. Okay. These are all deposits that went into the
5 account from the period September 1, 2004, up through and
6 including part of April 2010.

7 Basically, without going on a line by line basis,
8 it shows the initial contribution to the trust of a hundred
9 thousands of Charter One, which was then sold in the trust
10 on September 1, 2004, and the proceeds were 4,000,450. So
11 that was the large portion -- that was the portion in which
12 the trust was funded with.

13 And these other amounts that were additions were
14 either interest paid on the notes that were issued when they
15 acquired those notes, those two different purchases, one of
16 a hundred thousand, and one of 300,000. So this schedule
17 shows the deposits into the account of the interest. It
18 also shows some return of capital that was received into the
19 trust as a portion of the notes were being redeemed.

20 I could go through every line, but that's
21 basically what it is.

22 Q. Okay. So each of these entries listed as a
23 deposit, is that an amount that you obtained from the
24 account statements in Intervenor's Exhibit 5?

25 A. That's correct. Each of these were taken from and

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1 traced to the particular monthly statement that is indicated
2 on this schedule.

3 Q. All right. And if you look at the fourth grouping
4 of entries, do you see a date that says 8/21/2006?

5 A. Yes.

6 Q. Is there any significance to that?

7 A. Well, we realized that that was a typo. It's
8 supposed to be 3/31/2006. So --

9 Q. All right.

10 A. -- when this was prepared, there was an error.

11 Q. So that entry actually relates to -- that \$9,000
12 deposit relates to an entry on Exhibit 5, a deposit made on
13 March 21, 2006?

14 A. Exhibit 3?

15 Q. I'm sorry. Exhibit 5. The account statements.

16 A. Oh, yes. Yes.

17 Q. All right.

18 A. Each of these that are delineated here on the
19 schedule all relate to deposits or additions to the accounts
20 on the dates that are indicated, except for that one, there
21 was a typo.

22 Q. Okay. And you prepared this document?

23 A. Yes, I did.

24 Q. Do you have a pen with you, Mr. D'Aleo?

25 A. I do.

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1 Q. I'm going to ask you to correct that typographical
2 error on the exhibit since it has not yet been entered into
3 evidence?

4 A. Okay. I've done that.

5 Q. With that correction, is this document -- does it
6 accurately reflect all the deposits made into the Lynn and
7 David Smith irrevocable trust brokerage account from
8 September 2004 through April 16, 2010?

9 A. That's correct, it does.

10 Q. All right. Can you explain the bottom section of
11 that document, other contributions to trust?

12 A. Yes. What this shows, there was a period in which
13 the brokerage statements wouldn't show amounts related to
14 private placements. They just simply couldn't. Since they
15 couldn't value it, the clearing agent would not show that
16 asset. So what the bottom line -- bottom four lines are, is
17 it actually came back into the statement when it changed the
18 clearing agent. I believe it was on October 9, 2009. So it
19 then showed back on the statement.

20 Similarly, on September -- excuse me -- July 2,
21 2009, the partnership units, which also were not in the
22 statement because they wouldn't show private placements,
23 came back into the statement. So there really wasn't
24 technically a deposit. It was just a reintroduction of the
25 partnership units into the statement because they were never

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1 there before.

2 Q. Okay. And what is the reason you chose to include
3 it in this document?

4 A. Just for clarity and to be complete based on
5 increases in the values of that account in that time period.

6 Q. All right. Turning to Intervenor's Exhibit 10,
7 which is entitled David and Lynn Smith irrevocable trust
8 withdrawals 2004 to 2010, can you explain who you created
9 this statement and the source of the information is?

10 A. The source of the information was basically the
11 same, was looking at the various account statements and
12 seeing the amounts that came out. And they were, in fact,
13 limited as one, two, three, four ...

14 MR. McGRATH: I'm sorry. Do you have an
15 extra copy?

16 A. Okay. So to continue, these amounts were also
17 determined by looking at the individual statements for the
18 time period and that's reflected on this particular chart.

19 Q. Okay. Can you explain the first two entries, the
20 100,000 and the 300,000?

21 A. Yes. The 100,000 was taken out on December 27,
22 2004. The 300,000 was taken out on April 11, 2005. These
23 both were a subscription to the \$400,000 in nine percent
24 notes that the trust actually purchased in Pine Street
25 Capital Partners LP.

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1 Q. Okay. And the entry for April 18, 2005, can you
2 explain that entry --

3 A. Yes.

4 Q. -- and how you arrived at it?

5 A. Okay. On April 18, 2005, there was a withdrawal
6 of \$2,300. And determined that was a repayment to David
7 Smith to reimburse him for the 2004 trust taxes that were
8 actually paid from his personal account.

9 The way we got to that is we saw that the
10 distribution comes out in the amount of \$2,300 in another
11 exhibit which I assume we're going to get to, which is a
12 summary of all the tax returns. That is the amount,
13 cumulative amount of taxes paid in 2005 for both U.S. and
14 New York State.

15 Q. Did there come a time that you saw a -- any checks
16 written by David Smith representing his payment of that
17 \$2,300?

18 A. I think I made a request of you to try to get
19 those checks. And, yes, we did see those checks. One for
20 \$1,800 and one for -- 1800 and \$500, yes.

21 Q. And was there a package of documents that I
22 obtained from Thomas Urbelis at your request and provided to
23 you?

24 A. Yes, you did.

25 Q. And was the copy of David Smith's check in that

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1 package?

2 A. I believe it was.

3 Q. The next entry, April 18, 2006, in the amount of
4 \$92,105, does that indicate that amount was withdrawn from
5 the trust account on that date?

6 A. Yes, it does.

7 Q. Can you amplify on your explanation in this box
8 and explain how you arrived at this explanation?

9 A. Okay. This also was a total amount of 92,105
10 wired into the account of David Smith, again reimbursing him
11 for taxes. It was made up of two pieces. It actually is
12 made up of three pieces, excuse me.

13 The 2005 trust taxes equal the total 71,595, and
14 the first payment of the 2006 estimated taxes was \$16,000,
15 both of which were paid from David Smith's personal account.
16 There's a difference between that total and the 92,105, of
17 \$4510.

18 And further determination, I think what we found
19 was that, in fact, David Smith made an estimated tax payment
20 in the amount of \$4600 to New York State. And I believe we
21 saw a check for that. I do have to say, however, that since
22 we were unable to get the transcripts from New York State
23 because they were going to take four to six weeks, as
24 opposed to the IRS that gave it to us in two days, we have
25 not been able to document that. But the returns as filed

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1 did not show that additional \$4600 payment being made, but
2 we do have a check that I've seen in the amount of \$4600
3 that was made payable to New York State income tax that had
4 a reference for --

5 Q. Okay.

6 A. -- the trust payment.

7 Q. All right. Now you prepared this chart or last
8 updated it on June 4, 2010, is that correct?

9 A. That's correct.

10 Q. And if you could look at the documents I gave you,
11 Intervenor's Exhibit 2 is in front of you in that pile.
12 They are copies of four pages, copies of cancelled checks?

13 A. Yes.

14 Q. Can you take that out?

15 A. I have that.

16 Q. All right. Since you last updated this chart,
17 have -- did I provide you with those copies of cancelled
18 checks?

19 A. Yes, you did.

20 Q. Did you review the cancelled checks?

21 A. Yes, I did.

22 Q. And could you tell me if you drew any conclusions
23 as a result of your review of the cancelled checks
24 consecutively numbered 1742, 1743, 1744, and 1745?

25 A. These were payments all drawn on the M & T bank

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1 account of David Smith, and they were amounts that paid the
2 U.S. Treasury on 4/17/06, in the amount of \$16,000.

3 Q. Is that the first check written?

4 A. That's the first check.

5 Q. Is there any notation on that check that you could
6 tie to the trust tax return, such as a taxpayer ID number?

7 A. Yes. In the stamp on the back that shows where it
8 was being charged to or deposited, it has the trust federal
9 ID number starting with the series 55, which, in fact, is
10 the taxpayer identification number of the trust.

11 Q. And the next page, check number 1743?

12 A. That's made payable to New York State income tax
13 in the amount of \$4600. This is the check I just referenced
14 that we found out about that came out of the account of
15 David L. Smith payable to New York State income tax. And
16 that also was in connection with the trust. This is the
17 particular check that we've not been able to determine, in
18 fact, that the return included that amount. And since we've
19 not received the transcripts from New York State, we don't
20 know whether or not the state credited it. But it appears,
21 based on what's on this check, it is a payment in connection
22 with the New York State income tax.

23 Q. Okay. And the next two checks?

24 A. Okay. The next check is check number 1744. It's
25 dated April 17, '06, again drawn on the M & T bank account

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1 of David Smith, in the amount of 55,000... I'll have to
2 read this. I think it's 55,268.

3 Q. Okay. And the final check in that series?

4 A. Final check is check number 1745, also on
5 April 17, '06, in the amount of \$16,327, payable to New York
6 State income tax.

7 Q. All right. Mr. D'Aleo, if you add those four
8 checks together, what's the total amount that they
9 represent?

10 A. If you add these together, it comes to \$92,195, I
11 believe.

12 Q. And those checks were written on what date?

13 A. These were written on 4/17/06.

14 Q. And you determined from your review of the trust
15 account statements that the next day \$92,105 was wired from
16 the trust account to David Smith's account, is that correct?

17 A. That's correct. I think it's two days later. Oh,
18 some of them the 17th and some of them the 16th. Oh,
19 they're all dated the same date.

20 Q. Okay.

21 A. Excuse me, it is one day.

22 Q. Okay. Now, the next entry in your trust
23 withdrawal chart, June 30, 2006, can you explain that entry?

24 A. That is the amount of \$83,830.

25 Q. And let's take that with the following entry for

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1 \$129,678.

2 A. That is on December 20th of 2006.

3 Q. What do those two amounts of withdrawals
4 represent?

5 A. We were able to determine that all both of these
6 were capital calls for the Pine Street Capital Partners LP.

7 Q. How did you make that determination?

8 A. We made an inquiry -- I made an inquiry through
9 you. We were able to determine, I believe, based on the
10 deposition that was given by Mr. Welles, that, in fact,
11 these were amounts relating to capital calls.

12 Q. All right. Were you also able to tie those
13 amounts in any way to the K-1 -- the schedule K-1s issued by
14 Capital Street Partners to the trust?

15 A. Yes, I believe I was. They were shown as
16 withdrawals from the capital section of the tax returns.

17 Q. And that would be in 2006? The K-1s are in
18 Intervenor Exhibit 4.

19 A. I'm looking at that.

20 Q. Would the aggregate of those two amounts, \$83,830,
21 and \$129,678, would they show on the K-1 statement issued by
22 Pine Street Capital Partners to the trust?

23 A. Yes.

24 Q. In the tax year 2006? (crosstalk.)

25 A. If you look at the 2006 schedule K-1, which is a

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1 portion of the partnership return that goes to the
2 individual investor, the aggregate of those two amounts are
3 reported as capital contributed during the year, for a total
4 of 213,508.

5 Q. Okay. Is that box N of the K-1 for 2006?

6 A. It's box N, and it's the second line. It's
7 entitled capital contributed during the year.

8 Q. Okay. And the next line on your schedule,
9 April 15th 2008, can you explain that entry in your
10 explanation?

11 A. Okay. That's in the amount of 110,636. And when
12 we prepared the schedule summarizing the amounts that were
13 required to cover the taxes for 2007 for New York State and
14 for the U.S. for the trust, it totalled 110,636.

15 Q. Okay. And you drew those amounts from the tax
16 returns and from the account statements?

17 A. That's correct.

18 Q. All right.

19 A. And some of it was also duplicative work with
20 respect to New York -- the U.S. payment because it was
21 reported on the transcripts.

22 Q. Okay. And the next entry, April 15th, 2009?

23 A. That was April 15th. Oh, April 13th, 2009?

24 Q. The next entry on the trust of withdrawal
25 document.

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1 A. I have April 13th, 2009. 32,987? That is the
2 balance that was due for the 2008 federal taxes, 32,987.
3 And there was a check drawn from the trust in that amount.
4 Also on that date, there was a check for \$8,570, which is
5 the amount of the New York State final trust payment. And I
6 indicated on my schedule that even though the check was
7 drawn for 8570, the return shows 8573 as being due.

8 Q. Okay. And those two amounts, you reviewed
9 documentation of checks having been issued directly from the
10 NFS trust account to pay these taxes?

11 A. Yes.

12 Q. All right. And then the final entry on that
13 chart, can you explain what that is?

14 A. The final entry in the book chart is April 15,
15 of 2010 for \$95,000, which was the amount that was drawn and
16 deposited in the account of Lynn Smith. We were able to
17 determine two things. First, the total of \$20,000, which is
18 made up of a U.S. payment of 16,000 and a New York State
19 payment of 4,000, related to the extension payments for the
20 trust, for a total of 20,000.

21 And the additional amounts, the difference, the
22 \$75,000, we were able to determine was amounts that were
23 deposited in Lynn Smith's accounts for which they made
24 personal extension payments of sixty-six-five for the United
25 States and \$8,500 for New York State.

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1 Q. All right. Turning to the final exhibit in front
2 of you, Intervenor's Exhibit 11.

3 THE COURT: Do you have much longer, Miss
4 Dunn?

5 MS. DUNN: Very close.

6 THE COURT: Close?

7 MS. DUNN: Yes.

8 A. Yes.

9 Q. Can you explain this document, how you prepared it
10 and what it shows?

11 A. What this document shows is based on information
12 that was accumulated from the tax returns, from
13 conversations with Ron Simons at Piaker with respect to
14 estimated tax payments, and also with respect to reviewing
15 the account transcripts from the Internal Revenue Service.

16 Now, what this shows in some level of detail are
17 the tax payments, whether they were in connection with
18 estimated payments or final payments or carryovers from
19 extra payments in a prior year, and it tracks on a year by
20 year basis the tax liabilities and the payments made against
21 those liabilities. That's the top one-half of the schedule.

22 On the bottom, we summarize on the left-hand side
23 the payments that were made that relate to particular
24 periods and summarized by year. Those total 367,183, which
25 agrees to the total amount of the payments that were made

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1 for all the years, 367,183.

2 The bottom half on the right-hand side is a
3 summary of distributions that were made from the trust to
4 pay the taxes whether they were made in the form of direct
5 payments, by check to the tax authorities or by wires or by
6 payments made either by wire or by check to the account of
7 David Smith or Lynn Smith to pay the taxes that we just
8 discussed. That totals 266,601.

9 Q. All right. And based upon your review of all of
10 the documentation we've discussed and your preparation of
11 these charts and in your consultation with Ron Simons, the
12 accountant for the trust, were you able to reach a
13 conclusion as to whether or not all of the trust tax
14 liabilities were paid --

15 A. Yes.

16 Q. -- for all of the preceding years, dating back to
17 the taxable Year 2004.

18 A. Well, yeah, I think I would make one caveat. All
19 the payments for the years 2008 were made and the extension
20 payments were made for 2009. We don't know yet what the
21 final taxes are yet for 2009 because the returns haven't
22 been prepared.

23 Q. And with the exception of the two payments you
24 testified to that were made on April 15th, in the amount
25 of \$66,500 and \$8,500 to pay Lynn and David Smith's personal

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1 taxes, with the exception of those two amounts, were you
2 able to account for all of the money that has gone out of
3 the trust account since its inception?

4 A. Yes. I accounted for all the monies that went
5 out. The -- my analysis here determines that the actual
6 amounts of tax payments that were made out of the trust were
7 actually less than were made because the distributions in
8 certain cases David Smith was not reimbursed in total for
9 the amounts that he had paid personally.

10 Q. Okay. And do you -- can you tell us the amount of
11 money over the years that David Smith was not reimbursed
12 for?

13 A. Well, the total taxes equal 367,183. And the
14 amount of reimbursements were 266,601. So a difference of,
15 let's say, a hundred thousand dollars roughly.

16 Q. All right. Very good. Thank you.

17 THE COURT: We're going to take our evening
18 recess at this time. It appears we'll be back together
19 again tomorrow. I would propose 10:15, since I have another
20 matter on at 9:30. SEC have any thoughts on the subject?

21 MR. STOELTING: I think 10:15 is acceptable
22 to us.

23 THE COURT: Mr. Featherstonhaugh?

24 MR. FEATHERSTONHAUGH: 10:15 is fine with me,
25 your Honor.

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1 THE COURT: And Miss Dunn?

2 MS. DUNN: Is there -- do we have any play
3 with that to maybe start a little bit later? I have a
4 commitment tomorrow from 10 to 11. I was not anticipating
5 this hearing going this long.

6 THE COURT: I don't think any of us were.

7 MS. DUNN: If not, that's fine, I can make
8 adjustments.

9 THE COURT: I think you'll have to make
10 adjustments.

11 MS. DUNN: Okay. Thank you.

12 THE COURT: 10:15 tomorrow to the conclusion
13 or the death, whichever comes first. (laughter.) All
14 right?

15 We'll stand in recess.

16 (Court adjourned at 5:15 PM.)

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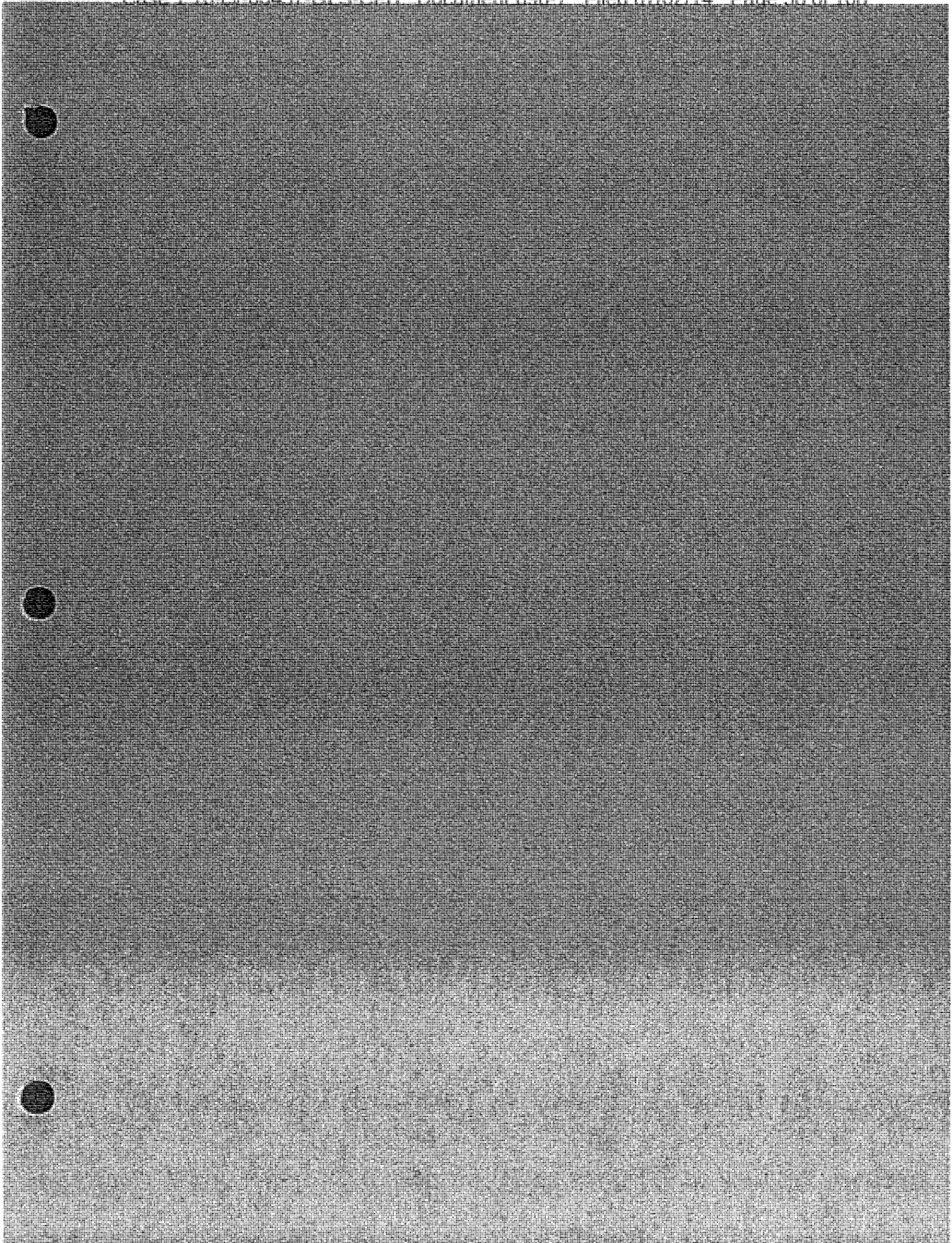
C E R T I F I C A T I O N

I, BONNIE J. BUCKLEY, RPR, CRR, Official Court
Reporter in and for the United States District Court,
Northern District of New York, do hereby certify that I
attended at the time and place set forth in the heading
hereof; that I did make a stenographic record of the
proceedings held in this matter and caused the same to be
transcribed; that the foregoing is a true and correct
transcript of the same and whole thereof.

BONNIE J. BUCKLEY, RPR, CRR
US Court Reporter - NDNY

DATED: JUNE 22, 2010

**BONNIE J. BUCKLEY, RPR, CRR
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1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF NEW YORK

3 -----
SECURITIES AND EXCHANGE COMMISSION

4 Plaintiff,

5 -versus-

10-CV-457

6 MCGINN, SMITH & CO., INC.,
7 MCGINN, SMITH ADVISORS, LLC,
8 MCGINN, SMITH CAPITAL HOLDINGS CORP.,
9 FIRST ADVISORY INCOME NOTES, LLC,
10 FIRST EXCELSIOR INCOME NOTES, LLC,
11 FIRST INDEPENDENT INCOME NOTES, LLC,
12 THIRD ALBANY INCOME NOTES, LLC,
13 TIMOTHY M. MCGINN and DAVID L. SMITH,
14 Defendants,
15 and LYNN A. SMITH,
16 Relief Defendant.

17 -----
18 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd)

19 held in and for the United States District Court,
20 Northern District of New York, James T. Foley United
21 States Courthouse, 445 Broadway, Albany, New York,
22 on FRIDAY, JULY 11, 2010, the HON. DAVID R. HOMER,
23 United States District Court Magistrate Judge, Presiding.

24 APPEARANCES:

25 FOR THE PLAINTIFF:

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

BONNIE J. BUCKLEY, RPR, CRR
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1 APPEARANCES (continued):

2

3 FOR THE RELIEF DEFENDANT LYNN A. SMITH:

4 FEATHERSTONHAUGH & WILEY LAW FIRM

5 BY: JAMES D. FEATHERSTONHAUGH, ESQ.

6

7 FOR THE TRUSTEE DAVID M. WOJESKI:

8 THE DUNN LAW FIRM

9 BY: JILL A. DUNN, ESQ.

10

11 FOR THE DEFENDANTS TIMOTHY MCGINN AND DAVID SMITH:

12 GREENBERG, TRAURIG LAW FIRM

13 BY: MICHAEL L. KOENIG, ESQ.

14

15 ALSO PRESENT:

16 LYNN A. SMITH, Relief Defendant

17 DAVID M. WOJESKI, TRUSTEE

18 RYAN SMITH

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* * * * *

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BONNIE J. BUCKLEY, RPR, CRR
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D'ALEO - CROSS - McGRATH

1 (Court convened at 10:10 AM.)

2 THE CLERK: Today is June 11, 2010. The time
3 is 10:10 AM. Securities & Exchange Commission versus
4 McGinn, Smith & Company, Incorporated, Docket Number
5 10-CV-457.

6 THE COURT: Good morning. Mr. D'Aleo, I
7 remind you that you are still under oath.

8 THE WITNESS: Yes, I understand that.

9 MR. McGRATH: Good morning, your Honor.

10 **CROSS-EXAMINATION BY MR. McGRATH:**

11 Q. Good morning, Mr. D'Aleo.

12 A. Good morning.

13 Q. Mr. D'Aleo, yesterday you were shown a document
14 that was marked as Intervenor's Exhibit 3 entitled Smith
15 irrevocable trust deposits 2004 to 2010. Do you have that
16 document handy there?

17 A. Yes. I have it in front of me now.

18 Q. All right. Now, just for clarification, that
19 document lists a number of deposits that were made into the
20 irrevocable trust from Pine Street Capital, correct?

21 A. That's correct.

22 Q. Weren't there other deposits into the Lynn Smith
23 irrevocable trust during those time periods aside from
24 income and interest earned from Pine Street?

25 A. Well, there was the original deposit of the shares

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1 that went in when the fund was funded -- the trust was
2 funded, rather, on September 1, 2004. Yeah, there were
3 shares that were put in, a hundred thousands shares of
4 Charter One Financial.

5 Q. Right. Were there any other deposits made into
6 that account during that period in terms of any other
7 holdings that the trust had?

8 A. I don't believe so.

9 Q. I would like to direct your attention now to Lynn
10 Smith Exhibit 14. It's in the binder, Volume III. Do you
11 have that in front of you? It's a thin binder.

12 A. Okay. Which number did you say?

13 Q. It's Exhibit 14.

14 A. Yes, I have that in front of me.

15 Q. Can you turn to -- the first page of that exhibit
16 is entitled funds received into Lynn Smith's account,
17 correct?

18 A. That's correct.

19 Q. Okay. Can you turn to the second page which is
20 also entitled funds received into Lynn Smith's account.

21 A. That's correct.

22 Q. Now, were these all transfers into the brokerage
23 account?

24 A. Yes, I believe there were.

25 Q. There are actually two accounts listed on this

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1 chart, though, aren't there? There's one that ends in 916
2 and one that ends in 912, if you look at the first page.

3 A. Okay. Yes. That also includes some contributions
4 that were made into a -- I assume that 912 is an IRA
5 account.

6 Q. All right. Sir, remember yesterday when the Judge
7 asked you whether the deposits were into the brokerage
8 account? I just want to clarify that there are actually two
9 accounts that were included on this chart, correct?

10 A. That's correct. There's two small contributions
11 that are indicated, they were cash contributions to the --
12 an IRA account.

13 Q. Okay. Thank you. All right if you could turn to
14 page 2 of that chart, please.

15 A. Mm-hmm.

16 Q. There's an entry, the top entry is dated 2/4/2009.

17 A. Correct.

18 Q. And it says transfer account Capital Center Credit
19 Corp.

20 A. Yes.

21 Q. And the amount is \$38,430.46, correct?

22 A. Yes. I see that.

23 Q. And your note, which is note 8 on Exhibit 15 --

24 A. Yes.

25 Q. -- states that this relates to final distribution

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1 from Capital Center Credit Corp. to David Smith which was
2 deposited into account of Lynn Smith, correct?

3 A. That's correct.

4 Q. It goes on to say documentation for this
5 transaction is not currently available.

6 A. That's correct.

7 Q. So just so I understand, this is a transfer that
8 David Smith made of a distribution that he received into
9 Lynn Smith's brokerage account, correct?

10 A. That's correct.

11 Q. All right. Now, going further down, there's an
12 entry on 2/20 -- and that was for \$38,438.46?

13 A. 430.46.

14 Q. 430.46.

15 A. Yes.

16 Q. Going further down, transaction on 2/20/2009?

17 THE COURT: Excuse me. What was the date of
18 that?

19 MR. McGRATH: That was 2/4/2009, your Honor.

20 THE COURT: Thank you.

21 BY MR. McGRATH:

22 Q. On 2/20/2009, there's an entry also entitled
23 transfer, correct?

24 A. That's correct. I see it.

25 Q. And it says Smith, David, and the amount is

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1 \$326,304.11. And you have a footnote 11 there. And that
2 was also transferred into Lynn Smith's brokerage account by
3 David Smith, correct?

4 A. That's correct.

5 Q. And the note that you have, footnote 11 on Exhibit
6 15, says relates to estate planning transfers between
7 spouses, correct?

8 A. That's correct.

9 Q. This is based on your conversation with Lynn
10 Smith, that you got that information?

11 A. I believe I did.

12 Q. All right. So am I interpreting this correctly to
13 state that David Smith transferred \$326,304.11 into Lynn
14 Smith's brokerage account on that date?

15 A. That's correct.

16 Q. Okay. Now, if you can look at the third page of
17 Exhibit 14.

18 A. I have that in front of me.

19 Q. Okay. Where it says footnote 15, there's an item,
20 it doesn't have a date, the source says Smith, Lynn total,
21 and the amount is \$60,000.

22 A. Yes, I see that.

23 Q. All right? And your footnote 15 on Exhibit 15
24 states relates to three transfers from Lynn Smith brokerage
25 account to her checking account, and then you give the dates

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1 of the three transfers; 11/13/09, \$15,000; 2/16/10, \$20,000;
2 and 3/25, and you say 1 here?

3 A. Obviously a 10.

4 Q. 10. \$25,000. What was the basis for your
5 footnote 15?

6 A. Okay. I think I testified yesterday that we did
7 not know what made up that \$60,000. We had -- and I assume
8 from the timing that it was these three transfers, but I
9 don't have any specific documentation as to what the amounts
10 were because the schedule that relates to this item 15 on
11 the SEC document doesn't indicate what the source is. So I
12 can't say as I sit here today with absolutely surety that
13 those are the three transfers. I just believe it to be the
14 three transfers.

15 Q. Okay. And did you look at the Lynn Smith checking
16 account and identify three transfers into that account on
17 the dates identified in the footnote 15, with those amounts
18 associated with them?

19 A. Into her checking account? No, I did not see it
20 in her checking account because we didn't have checking
21 account statements available to us.

22 Q. So I'm just confused then. Help me understand.
23 Where did you get the dates and amounts if you didn't look
24 at the checking account?

25 A. I believe what I testified to is that we didn't

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1 know exactly what the -- where this went other than this is
2 what the schedule says. I saw those amounts coming out of
3 the brokerage accounts, those three transfers from her
4 brokerage statements, and those amounts totalled \$60,000.

5 Q. Okay. So the entry, for example, on 11/13/09,
6 \$15,000, you obtained that from looking at Lynn Smith's
7 brokerage account?

8 A. That's correct. All three of those notations in
9 front of you are distributions out of the stock brokerage
10 account.

11 Q. So -- but what made you believe that that money
12 went into the checking account? Did you have any basis for
13 that belief?

14 A. Other than what is indicated here on the schedule
15 prepared by the SEC. It says Lynn Smith total. I just
16 assumed that. The truth of the matter is when we looked at
17 the schedule we did not know where it went. So...

18 Q. Okay. So did you talk to Lynn Smith and ask her
19 where the money went?

20 A. I don't recall speaking to her, but it doesn't
21 mean I did not speak to her.

22 Q. But you have no recollection of speaking to her
23 regarding those three transfers?

24 A. Not specifically.

25 Q. And so would it be fair to say then you also don't

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1 know what, if anything, she did with that money --

2 A. That would be --

3 Q. -- once it was transferred out of the brokerage
4 account?

5 A. That would be a fair statement.

6 Q. You tried to be as thorough as you could in
7 preparing these charts, correct?

8 A. That's correct.

9 Q. And you spoke to her regarding other transactions
10 that are reflected on these charts, correct?

11 A. Yes.

12 Q. And you're stating that you don't recall and your
13 documents don't indicate that you spoke with her regarding
14 the actual end transfer here?

15 A. No, I can't recall having spoken to her
16 specifically about that.

17 Q. Okay. Now, I would like to direct your attention
18 to intervenor 10, which is a document entitled David and
19 Lynn Smith irrevocable trust withdrawals 2004 to 2010. Do
20 you have that document in front of you?

21 A. Give me a minute.

22 Q. Yup.

23 A. I have that in front of me now.

24 Q. And you testified at some length about this
25 document yesterday, do you recall?

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1 A. That's correct.

2 Q. I would like to direct your attention to -- I'm
3 just going to focus on several of these transactions. The
4 first one is dated 4/15/2008. And the amount in the column
5 is \$110,636. Do you have that?

6 A. I do. I see that.

7 Q. And then in the right your explanation is wire
8 transfer for payment of 2007 U.S. and N.Y.S, which New York
9 State, correct?

10 A. That's correct.

11 Q. Trust taxes and 2008 trust estimates?

12 A. That's correct.

13 Q. Now, again, you testified at some length about the
14 documents that you looked at in connection with preparing
15 this chart yesterday. Just for my clarification, did you
16 actually look at the checks that would support the payment
17 by David Smith of the taxes on behalf of the trust in 2007
18 for federal and state taxes?

19 A. As I sit here today, I can't say specifically. I
20 believe I did. But I did have some other method of
21 determining those payments, because with -- at least with
22 respect to the federal payment, we have the account
23 transcript from the IRS showing that payment -- or portion
24 of that payment that relates to the federal taxes that's
25 detailed on Exhibit 11. And I believe I saw the checks but

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1 I would not say without some surety because I've seen so
2 many documents recently, but I believe I have seen those
3 checks.

4 Q. But the IRS account that you looked at, that
5 doesn't tell you who paid that money, it just shows the
6 amount of money that was actually paid, correct?

7 A. That's correct.

8 Q. And yesterday do you remember Miss Dunn showed you
9 a series of checks relating to some of the earlier taxes
10 that were paid by David Smith?

11 A. That's correct.

12 Q. I believe it was in connection with -- it might
13 have been 2004, 2005, I'm not sure, but she showed you the
14 actual checks that reflected payments by David Smith out of
15 this checking account to the IRS and to the New York State
16 tax authority, correct?

17 A. That's correct.

18 Q. And she did not show you yesterday checks that
19 would support payments by David Smith in connection with the
20 2007 federal and state tax returns, correct?

21 A. And the 2008 estimates.

22 Q. And the 2008 estimates.

23 A. To the best of my knowledge, no, she did not show
24 them to me yesterday, that's absolutely correct.

25 Q. So as you sit here today are you sure that you've

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1 seen actual checks that document payments by David Smith on
2 behalf of the trust for the 2007 and 2008 federal and state
3 tax returns?

4 A. Well, as I sit here this morning I cannot
5 specifically recall having seen those checks. I believe I
6 have seen them, but I couldn't confirm it.

7 Q. What's the basis for your belief?

8 A. Well, I -- because I saw a number of different
9 documents. I may or may not have seen those checks. I did
10 see the wire transfer going out for this amount that
11 specifically related to the aggregate of payments that were
12 made on that date and I believe related to the payments for
13 those specific taxes.

14 Q. Well, you saw the wire transfer from the
15 irrevocable trust to David Smith's bank account?

16 A. That's correct.

17 Q. But you didn't see -- at least you're not
18 testifying right now that you saw the checks, correct?

19 A. That's correct.

20 Q. Okay. Now, let me direct your attention to the
21 entry on 4/13/2009, in the amount of \$32,987. And the
22 column on the right says explanation, 2008 U.S. final trust
23 tax payment; correct?

24 A. That's correct.

25 Q. I'm going to ask you the same question for that

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1 one. Did you see the actual check that was written by David
2 Smith to the IRS to support that payment?

3 A. As I sit here today, I can't recall having seen
4 that check. It doesn't mean I didn't see it, but I don't
5 recall having seen that check.

6 Q. It doesn't mean that you did either, correct?

7 A. That's correct.

8 Q. And the same question with respect to the next
9 entry, 4/13/2009, \$8,570, and it says 2008 New York State
10 final trust tax payment return shows 8,573.

11 A. My answer would be the same to that.

12 Q. Meaning you don't recall one way or another
13 whether you saw a check to support that?

14 A. That's correct.

15 Q. Okay. Now, Mr. D'Aleo, you've been an accountant
16 your whole professional life, correct?

17 A. That's correct.

18 Q. You detailed for the Court your training and your
19 extensive experience?

20 A. Yes.

21 Q. Have you prepared tax returns on behalf of trusts
22 during the course of your career?

23 A. I have.

24 Q. And by the way, have you ever performed any
25 services for David or Lynn Smith prior to being retained by

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1 Mr. Featherstonhaugh in connection with this case?

2 A. Individually, no.

3 Q. On behalf of any entity associated with them?

4 A. Yes, I did. Back sometime I believe in the '90s,
5 when I still was a partner at what is now

6 PricewaterhouseCoopers, we were involved in a deal they did
7 in connection with building the civic center up in Saratoga,
8 but I believe that was sometime in the 1990s.

9 Q. And I'm sorry, what did you do on their behalf?

10 A. The firm was involved in assisting in the
11 preparation of projections that went into that offering
12 document.

13 Q. And what was your role?

14 A. As a partner, probably overseeing the project.

15 Q. So getting back to my question, sorry I
16 interrupted you there...

17 A. That's okay.

18 Q. The -- you've prepared tax returns on behalf of
19 trusts?

20 A. Yes, I have.

21 Q. Approximately how many tax returns if you could
22 estimate over the course of your career?

23 A. Hundreds.

24 Q. Okay. And, in fact, you prepared tax returns on
25 behalf of irrevocable trusts?

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1 A. Yes.

2 Q. And New York irrevocable trusts -- or maybe that's
3 not the -- it's the federal trust, correct?

4 A. That's correct.

5 Q. All right. So you're familiar with the tax
6 consequences of an irrevocable trust?

7 A. I am.

8 Q. What is the benefit to the donor in terms of tax
9 consequences for placing money in an irrevocable trust on
10 behalf of the donor's children?

11 A. Well, the asset is being transferred, the
12 ownership of the asset is being transferred from the
13 individual to the trust. The trust owns that asset. So
14 anything having to do with the future activity of that
15 specific asset, whether it generates income or appreciates,
16 depreciates, that's all reportable by the trust and goes to
17 the benefit or the detriment of the trust.

18 Q. Now, you understand in this case there's been
19 testimony that there was approximately \$400,000 in stock
20 that was donated to the trust, the irrevocable trust when it
21 was first created?

22 A. I don't believe --

23 MISS DUNN: Objection. That's a
24 mischaracterization of the testimony.

25 BY MR. McGRATH:

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1 Q. Do you recall how much stock was donated?

2 THE COURT: Hold on.

3 MR. McGRATH: I'm sorry. I'll rephrase the
4 question.

5 THE COURT: Thank you.

6 BY MR. McGRATH

7 Q. You've looked at all the documentation relating to
8 the irrevocable trust, correct?

9 A. I can't say I looked at every piece of
10 documentation related to the trust.

11 Q. All right. Let me direct your attention to
12 Intervenor Exhibit 3.

13 A. Yes.

14 Q. Do you have that?

15 A. I do.

16 Q. On the top -- and you prepared this schedule?

17 A. I did.

18 Q. All right. And on the top of it it has a date,
19 9/1/2004?

20 A. Correct.

21 Q. It says deposits amount, \$4,450,000. And
22 explanation, 100,000 shares Charter One Financial. Do you
23 see that?

24 A. I do.

25 Q. What does that mean when you prepared that? What

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1 did that mean to you?

2 A. That amount was transferred from the account of
3 Lynn Smith -- trust -- her brokerage account into the
4 account of the trust, and it was sold on that date. It's a
5 hundred thousand shares, the market value on that date was
6 4,450,000.

7 Q. So when the shares -- after the shares were
8 transferred into the trust, they were sold, and they had a
9 sale price of 4,450,000, correct?

10 A. That's correct. Yup.

11 Q. Do you know what the value of the stock was when
12 it was originally purchased?

13 A. I do not. I don't know anything -- all I know
14 about the stock I had seen a brokerage statement, Lynn
15 Smith's brokerage statement, the earliest one was sometime
16 in 1990, and those shares were in that account. Excuse me,
17 1999. And the shares were in the account at that particular
18 time.

19 Q. Were you aware of the fact that there was a
20 sizable appreciation in the value of the stock from the time
21 it was originally purchased and when it was sold after being
22 received into the trust?

23 A. I would assume there was an appreciation in
24 connection with the company being taken over by Charter
25 Financial.

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1 Q. Okay. So just stepping back to square one, with
2 respect to the donor contributing stock into an irrevocable
3 trust, what are the tax consequences to the donor at the
4 point where the contribution is made?

5 A. It's a transfer --

6 Q. If any.

7 A. If any. It's a transfer of that asset out of
8 their ownership into the ownership of the trust.

9 Q. Is there a gift tax associated with that?

10 A. There could or could not be, based on what the
11 circumstances were.

12 Q. And could you just describe generally what type of
13 circumstances would factor into whether or not there's tax
14 consequences with respect to a gift tax?

15 A. There's a difference between what's known as a
16 basis of the shares in the hands of the donor and the shares
17 when it's contributed typically is considered to be a gift.
18 I'm not saying that's the case in every circumstance, but
19 that's the general rule.

20 Q. So if a person has stock that, just as an example,
21 they purchased on day one for one dollar and it's
22 contributed to the irrevocable -- to an irrevocable trust
23 and it's sold the next day and it's got a hundred dollars in
24 value, what would the tax consequences be to the donor?
25 Would they be taxed based on the one dollar contribution or

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1 the one hundred dollar appreciated value?

2 A. The donor wouldn't be taxed at all on the sale of
3 the shares inside the trust.

4 Q. Okay. Once an asset is placed in the trust, an
5 irrevocable trust we're talking about now, if there's
6 distribution out from the trust to a beneficiary, are there
7 tax consequences associated with the distribution to the
8 beneficiary?

9 A. There can be. The income generated in the trust
10 could be allocated to the people that receive it, or the
11 trust could choose to pay the tax at the trust level and
12 just distribute out cash on an after-tax basis.

13 So it would vary based on what the trustee wanted
14 to do, or what was actually being distributed out. If
15 there's income in the trust and then there's a distribution,
16 it wouldn't necessarily have to be. That income is
17 allocated to the beneficiary because the trust would pay the
18 tax.

19 Q. Assume for a moment that there's no income, that
20 there's just a donation say of a million dollars into a
21 trust, and then a hundred thousand of that million dollar
22 contribution is distributed to a beneficiary. Would that be
23 recognized as income by the beneficiary?

24 A. Not necessarily. It could be distribution of an
25 asset. Probably in most cases it is a distribution of an

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1 asset.

2 Q. With no tax associated with that distribution to
3 the beneficiary?

4 A. Not if the tax was paid at the trust level.

5 Q. Okay. Now, do you understand that if a donor
6 contributes assets to an irrevocable trust, creditors of the
7 donor cannot typically reach those trust assets? Is that
8 one of the benefits of an irrevocable trust?

9 A. That's my understanding.

10 Q. Okay. And you've prepared -- as you just said,
11 you prepared tax returns on behalf of irrevocable trusts?

12 A. That's correct.

13 Q. In your experience, does the trustee of the trust
14 normally issue checks to pay the trust, federal and state
15 taxes?

16 A. They can. They could order somebody else to. The
17 could maybe give directions. I mean I've seen situations
18 where they just -- an asset is held in a specific account
19 and they said to whoever the holder is, issue checks to the
20 U.S. Treasury, such and such, issue checks to the New York
21 State income tax, a certain amount.

22 Q. When you say the holder, you mean the holder of
23 the asset that's in the trust?

24 A. That's correct. What I mean, where it's
25 deposited. So if it's in the brokerage account, they could

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1 give instructions to the brokerage account, please send a
2 check for X amount of dollars to the U.S. Treasury.

3 Q. Because the brokerage account actually has control
4 of that asset?

5 A. It has physical control of that asset.

6 Q. Right. And are there other instances where the
7 trustee of the trust writes the check him or herself?

8 A. That could be true. And they would have to get
9 reimbursed for the amount. If they paid it out of their own
10 account are you speaking of?

11 Q. No, no, I'm saying out of an account that's in the
12 name of the trust.

13 A. The trust has a checking account and it's
14 available to the trustee and that's possible, one way of
15 doing it, yes.

16 Q. Wouldn't that be the typical way of doing it?

17 A. I would say there isn't any typical way. I've
18 seen accounts where there are no checking accounts
19 associated with a particular asset.

20 Q. How typical is that a trustee would ask a third
21 party, not the holder of the asset, but some third party
22 that ostensibly has no ownership or control over the trust
23 to write a check out of that person's personal account to
24 pay the taxes? How typical is that in your experience?

25 A. I would say it's not typical, but it's not that it

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D'ALEO - REDIRECT - DUNN

1 couldn't be done. But I would say it's not typical.

2 Q. Well, physically it can be done, but in your
3 experience have you ever seen that happen other than in this
4 case?

5 A. I cannot recall whether I have or not.

6 Q. Okay.

7 MR. McGRATH: No further questions. Thank
8 you.

9 THE COURT: Thank you. Any redirect?

10 MR. FEATHERSTONHAUGH: Nothing, your Honor.

11 THE COURT: Miss Dunn, anything further?

12 MISS DUNN: Yes, just briefly, your Honor.

13 **REDIRECT EXAMINATION BY MISS DUNN:**

14 Q. Mr. D'Aleo, Mr. McGrath asked you a few questions
15 about the entry on Intervenor's Exhibit 10, which you made
16 related to April 15th, 2008. Can you take a look at that?

17 A. Yes.

18 Q. And can you explain how it is that you came to the
19 conclusion that the \$110,636 of that withdrawal was used
20 dollar for dollar for the trust 2007, 2008 taxes? And if
21 you need to refer to the trust tax returns or intervenor 11,
22 feel free to do so.

23 A. Okay. Looking at Exhibit 11, as I explained
24 yesterday, the whole top section of that chart indicates the
25 taxes for the various years, the estimated tax payments that

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1 were made and the final tax payments that may have been
2 made, extension payments that were made. And then that
3 information was summarized by date in the bottom left-hand
4 corner.

5 I draw your attention to the summary where it says
6 summary tax payments about halfway down for the dates, where
7 it says April 15, 2008, you see a payment of \$30,000,
8 aggregate payment of 30,000, which is described in more
9 detail above. And --

10 Q. What is that 30,000 in the aggregate of?

11 A. The 30,000 is the aggregate of an estimated tax
12 payment made on, I think it was -- this shows it as being
13 4/15/08, to the U.S. Treasury for 24,000, and a payment to
14 New York State in the amount of 6,000, for a total of
15 30,000.

16 Q. How did you determine that those were the
17 estimated payments made to the U.S. Treasury and New York
18 State Tax and Finance Department on those dates?

19 A. Well, with respect specifically to -- well, first
20 of all, they were claimed on the return as those payments,
21 both the New York State and the federal return. And in
22 addition, and looking at the transcripts for the 2008 U.S.
23 return, we saw an estimated payment that was claimed on the
24 return was, in fact, credited to the account of the trust in
25 the amount of 24,000.

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1 Q. All right. So does that indicate that the U.S.
2 Treasury received \$24,000 on that date?

3 A. It does.

4 Q. And that it was credited to the taxpayer ID number
5 associated with this trust?

6 A. Yes, it does.

7 Q. Go on.

8 A. The 6,000, as I explained yesterday, which relates
9 to the estimated tax payment for New York State, we
10 attempted, I believe, to get transcripts from New York State
11 similar to the IRS. They were told -- we were told it would
12 take four to six weeks, so we have not received that.
13 However, the tax return, as prepared, showed the credit for
14 that \$6,000 payment against the total tax liability that was
15 due.

16 Q. Okay. And in that chart below, summary of tax
17 payments, what is the second entry related to 4/15/2008?
18 What is that amount, \$80,636? What does that represent and
19 where did you ascertain that amount?

20 A. Okay. If you look at the top of that chart
21 relating to the 2007 tax year, there was a payment made, an
22 extension payment made on 4/15/08, in the amount of 62,582,
23 for the federal -- to the U.S. Treasury, and a payment made
24 for \$18,054 to New York, totalling 80,636.

25 Again, with respect to the federal payment, we saw

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1 that amount being credited both on a tax return and shown to
2 be credited in the account transcript that we got from the
3 Internal Revenue Service.

4 With respect to the New York State payment, we saw
5 the credit of the New York State return. And since we had
6 not been able to receive the account transcripts from New
7 York State, we couldn't further document it that way, but it
8 was in an amount that was claimed on the return filed.

9 Q. So the 30,000 and the 80,636 is what represents
10 the 110,636 on your summary chart of trust withdrawals?

11 A. Yes.

12 Q. Okay. And with respect to those payments that you
13 testified were made in April 2007, that make up that entry,
14 were you also able to determine based on the following year
15 tax returns that there were no penalties or interest imposed
16 as a result of a failure to pay the taxes in the prior year?

17 A. That's correct.

18 Q. And did the account transcripts that we were able
19 to obtain from the IRS on Tuesday of this week, did they
20 also confirm that there were no penalties related to the
21 non-payment of the taxes for 2007, 2008?

22 A. Well, let me just verify. I think in the
23 transcripts, in certain instances, show penalties required,
24 because there may have been late payments. But they're all
25 in these totals. So the amount of the final tax, including

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1 whatever penalty, because if you look at the chart where it
2 says -- about halfway down the left-hand column it says
3 final tax and then in paren it says plus penalties. If
4 there was a penalty that was assessed or paid on the return,
5 it's in these totals. So there's nothing that I'm aware of
6 that's above and beyond these amounts.

7 Q. Okay. Understanding your testimony that the
8 actual returns for 2009 have not yet been filed, I believe
9 you testified that an extension was filed and an extension
10 payment was filed this April for 2009, is that correct?

11 A. That's correct.

12 Q. Okay. So segregating that for 2008, 2007, and
13 going back for the life of the trust, have you, have you
14 reached any conclusions with respect to the payments of the
15 trust taxes up to and including tax year 2008?

16 A. Yes. Based on what I've seen, both the tax
17 returns and transcripts, I could state that as far as I know
18 all the taxes that were required to be paid, any penalties
19 that were required to be paid, in fact were paid in all the
20 years through 2008.

21 Q. Okay. And Mr. McGrath also asked you about the
22 entries on the withdrawal chart for -- related to April 13,
23 2009. Can you take a look at those two entries? One is for
24 \$323,987, which you state relates to the 2008 U.S. final
25 trust tax payment. And the second entry is for \$8,570,

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1 which you state relates to the 2008 New York State final
2 trust tax payment. And you note that the return shows
3 \$8,573 due.

4 And did you testify -- Mr. McGrath asked you
5 whether you had seen checks demonstrating the payment of
6 those taxes from David Smith. Do you recall that testimony?

7 A. Yes.

8 Q. And you said you didn't recall whether you had
9 actually seen any such checks or not?

10 A. That's correct.

11 Q. All right. I'm going to show you -- I believe
12 this document is a part of one of the plaintiff's exhibits.
13 I don't have the number, so I'm going to mark it Intervenor
14 Exhibit 14.

15 Mr. D'Aleo, handing you what's been marked for
16 identification as Intervenor 14, which is among the
17 materials that the plaintiff has provided to me in this
18 litigation. Is this one of the documents that you reviewed
19 in conducting your examination of the trust tax payments?

20 A. It is now, I recall this document, yes, I do.

21 Q. And what does this document relate to?

22 A. It relates to a request to Tom Urbelis, the
23 trustee, to accept this letter of authorization -- excuse
24 me. It's a letter written to McGinn, Smith signed by Thomas
25 Urbelis, trustee. It says: Please accept this letter as

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1 authorization to issue two checks from the account as
2 follows: \$32,987 payable to, quote, U.S. Treasury. \$8,570
3 payable to, quote, New York State income tax. Thank you for
4 your prompt attention to this matter. And there's a
5 signature block, which is not signed here, but it says
6 Thomas Urbelis, trustee.

7 Q. All right. Thank you. And is it -- understanding
8 that this document is not signed, and we may not have been
9 able to confirm whether it was signed because we didn't have
10 those documents, did this document -- did reading this
11 document point you in any particular direction to determine
12 what these two payments were for?

13 A. Well, yes. Obviously, it explains what they're
14 for. At least what years they relate to -- excuse me --
15 what year they relate to or what the payments are for. And
16 those amounts are coincidental and they agree to the
17 balances that were due to the U.S. Treasury and to New York
18 State relating to that particular tax year. It agreed to
19 the amount on the return, and, therefore, agreed to what I
20 had on Exhibit 11.

21 Q. All right. So it agreed with it with the
22 exception of the \$3 difference that you noted on your chart,
23 is that correct?

24 A. That's correct.

25 Q. Okay. And Mr. McGrath also asked you whether you

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1 tracked any other payments into the trust stock account at
2 NFS. Do you recall that question?

3 A. I do.

4 Q. And I believe you told him that your deposit sheet
5 noted all deposits into the account. Were there other
6 accruals within the account such as interest on the initial
7 purpose of the trust?

8 A. There were a number of transactions within the
9 brokerage account itself that might be interest on cash
10 balances. It could be security transactions. I honestly
11 didn't go through it in detail because those were all
12 internal to the brokerage account itself.

13 Q. Okay. So those transactions that you didn't
14 include in this deposit summary were amounts that never left
15 the trust account, is that correct?

16 A. That's correct.

17 Q. They were transactions within the account?

18 A. Yes.

19 Q. So any of the deposits that you showed were
20 external, such as the initial funding of the account and the
21 payments and distributions and interest payments from Pine
22 Street Capital into the account, is that correct?

23 A. That's correct. There might have been minor
24 distributions for wire fees and so forth, but that was all
25 internal to the account.

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1 MISS DUNN: Okay. Nothing further, your
2 Honor. Thank you.

3 MR. McGRATH: Just very brief, your Honor.
4 Just one document. (Pause.)

5 **RE-CROSS EXAMINATION BY MR. McGRATH:**

6 Q. All right. Mr. D'Aleo, Intervenor Exhibit 14 that
7 you were just shown, the document dated April 13...

8 A. I think she took that back.

9 Q. Yeah, yeah, I have it here.

10 A. Okay. Yeah.

11 Q. And I'm happy to show it to you again. It's
12 unsigned. It's from allegedly from -- not allegedly, but
13 it's got a signature for Thomas Urbelis, trustee, right?

14 A. That's correct.

15 Q. And it says under his name, please accept this
16 letter as your authorization to issue two checks from the
17 above account. And it's addressed to McGinn, Smith & Co.,
18 correct? You want to look at it again?

19 A. No, no. I remember that, yeah.

20 Q. Okay. In the amounts of 32,987 and then \$8,570.
21 So this document shows that a check was requested to be
22 issued from McGinn, Smith, right?

23 A. I think it shows it was requested to be
24 distributed from whatever that account number is.

25 Q. Right. But it's addressed to McGinn, Smith & Co.,

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1 correct?

2 A. Yeah, according -- yes, the letter is addressed to
3 them.

4 Q. Yeah. And my questions were, just to clarify,
5 that you hadn't seen checks issued by David Smith in
6 connection with these two checks, right? Do you remember my
7 question?

8 A. Yes.

9 Q. My questions were whether or not you had seen
10 checks issued by David Smith. And you said at first you
11 might have, but you weren't sure.

12 A. Right.

13 Q. Right.

14 A. That's correct.

15 Q. So, so the fact is you didn't see checks issued to
16 David Smith in connection with these two amounts to the
17 Treasury and New York State, right?

18 A. That's correct.

19 MR. McGRATH: Okay. That's all. Thank you.

20 THE COURT: Anything else, Miss Dunn?

21 MISS DUNN: No. Thank you, your Honor.

22 THE COURT: Thank you. You may step down.

23 (Witness John D'Aleo excused.)

24 THE COURT: Mr. Featherstonhaugh, any further
25 witnesses.

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JEFFREY SMITH - DIRECT - DUNN

1 MR. FEATHERSTONHAUGH: None, your Honor. At
2 this point, Relief Defendant Lynn Smith rests.

3 THE COURT: Thank you. Miss Dunn, any
4 witnesses?

5 MISS DUNN: Yes, your Honor. The trust calls
6 Jeffrey Smith.

7 **JEFFREY SMITH,**
8 having been duly sworn by the Clerk of the Court, was
9 examined and testified as follows:

10 **DIRECT EXAMINATION BY MISS DUNN:**

11 Q. Good morning, Mr. Smith.

12 A. Good morning.

13 Q. Can you please tell us your educational
14 background?

15 A. Sure. I graduated from high school in 1998 and
16 went on to attend Lehigh University. I graduated in 2002
17 with a BS in finance.

18 Q. Do you have any post-graduate education or
19 certifications?

20 A. Yes. I recently was awarded the chartered
21 financial analyst designation.

22 Q. Are you presently employed?

23 A. I am.

24 Q. Can you tell us your employment?

25 A. I'm employed by a company by the name of Access

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EXHIBIT B

Lynn A. Smith
Statement of Net Assets
As of March 31, 2010

	Market Value
Cash	
Checking (BOA # 4830-2713-5287) (as of 3/25/10)	\$ 1,678
Individual Retirement Account	
RMR Wealth Management, LLC (#RMR-950912) (account held at Dinosaur Securities, LLC)	\$ 29,279 (3)
Investment Accounts	
RMR Wealth Management, LLC (#RMR-040916)	\$ 2,118,511
CMET Financial Holdings, Inc	\$ 600,000 (1) (3)
First Virtual Communications, Inc	0 (1) (3)
Loans Receivable	
T. McGinn (\$900,000 face value)	\$ 0 (2)
T. McGinn (\$15,000 face value)	\$ 0 (2)
Unpriced Investments/Loans Receivable	
Coventry Carelink	\$ 150,000 (3)
Mobil Security	\$ 25,000 (3)
Benchmark Trust	\$ 150,000 (3)
Real Property	
Primary Residence (held jointly-50% value shown): 2 Rolling Brook Drive Saratoga Springs, New York 12866	\$ 306,000 (3) (4)
Residence: 906 Orchid Point Way Vero Beach, Florida 32963	\$ 829,000 (3) (5)
Camp: Betor Road Broadalbin, New York	\$ 600,000 (3)
Personal Property	
Furniture (\$50,000), jewelry (\$150,000), artwork (\$15,000)	\$ <u>215,000</u> (3)
Total Estimated Value of Net Assets	\$ 5,024,468

Notes:

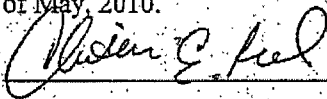
- (1) Held at Dinosaur Securities LLC, but not priced within statement
- (2) Assumed worthless as of 3/31/10
- (3) Estimated fair market values provided by owner
- (4) Net of 50% of mortgage debt totaling \$388,000 or \$194,000
- (5) Net of mortgage debt of \$871,000

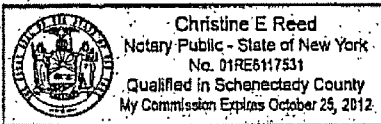
VERIFICATION

I, Lynn A. Smith have reviewed a document dated as of March 31, 2010 prepared as a compilation by John D'Aleo, CPA as noted in his attached letter dated May 3, 2010. I provided the information to Mr. D'Aleo to assist him in his preparation of this document and I have personally reviewed the document and believe that it fairly represents my own personal assets, liabilities and general financial condition as of March 31, 2010.


LYNN A. SMITH

Sworn to before me this 5th day
of May, 2010.





Funds Received into Lynn Smith's Accounts

Draft 5/12/2010

Footnote #	Date	Transaction	Funds To Lynn Smith	Lynn Smith's Account Number	Lynn Smith's Bank or B-D	Notes
1	1/12/2006	Check received	\$6,301.00	40916	NFS	
1	1/12/2006	Check received	\$10,000.00	40916	NFS	
1	2/6/2006	Check received	\$4,246.58	40916	NFS	
2	4/13/2006	Check received	\$4,500.00	350912	NFS	Cash Contribution prior yr IRA
3	10/4/2006	Check received	\$85,000.00	40916	NFS	
4	1/10/2007	Check received	\$26,000.00	40916	NFS	
5	4/9/2007	Check received	\$5,000.00	350912	NFS	Cash Contribution prior yr IRA
1	5/14/2007	Check received	\$4,200.00	40916	NFS	
6	5/14/2007	Check received	\$100,000.00	40916	NFS	
75	12/20/2007	Check received	\$380,000.00	40916	NFS	
1	1/5/2010	Check received	\$525.00	40916	NFS	
1	1/5/2010	Check received	\$708.33	40916	NFS	
1	1/5/2010	Check received	\$1,329.17	40916	NFS	
	Total		\$627,810.08			

Funds Received into Lynn Smith's Accounts

Draft 5/12/2010

Date	Transaction	Account	Account Number	Bank or B-D	Funds To Lynn Smith	Lynn Smith's Account Number	Lynn Smith's Bank or B-D
2/4/2009	Transfer	Capital Center Credit Corp.	18178	NFS	\$38,430.46	MSA-040916	NFS
3/3/2006		McGinn Smith & Company	4734	M&T Bank	\$20,000.00	MSA-040916	NFS
1/16/2009	Check received	Pine St Ptn			\$166,020.00	MSA-040916	NFS
1/16/2009	Check received	Pine St Ptn Invd Cap			\$62,257.00	MSA-040916	NFS
2/20/2009	Transfer	Smith, David	2208	NFS	\$326,304.11	MSA-040916	NFS
6/10/2009		TDDMM Cable Funding	9077	Mercantile	\$160,800.00	MSA-040916	NFS
3/18/2010		TDDMM Cable Funding	3077	Mercantile	\$100,000.00	MSA-040916	NFS
7/30/2009		TDDMM Cable Jr. Trust 09	14139	Mercantile	\$175,000.00	MSA-040916	NFS
				Total	\$1,048,811.57		

Lynn Smith
Bank of America
Account # 463027135267
Funds Received

Draft 5/12/2010

Date	Source	Source Account Number	Source Bank	Deposits	Notes
1/12/2010	McGinn Smith Advisors LLC	569	M&T	\$5,000.00	
	McGinn Smith Advisors LLC Total			\$5,000.00	
7/15/09	McGinn Smith Payroll, Smith David	4734	M&T Bank	\$7,896.60	ck 2439
8/3/2009	McGinn Smith Payroll, Smith David			\$7,896.60	
8/14/2009	McGinn Smith Payroll, Smith David			\$7,896.60	
9/2/2009	McGinn Smith Payroll, Smith David			\$8,234.85	
9/15/2009	McGinn Smith Payroll, Smith David			\$8,888.56	
10/2/2009	McGinn Smith Payroll, Smith David			\$8,888.56	
10/15/2009	McGinn Smith Payroll, Smith David			\$8,888.56	
11/5/2009	McGinn Smith Payroll, Smith David			\$8,888.56	
12/17/2009	McGinn Smith Payroll, Smith David			\$8,888.56	
12/31/2009	McGinn Smith Payroll, Smith David			\$6,775.39	
1/15/2010	McGinn Smith Payroll, Smith David			\$6,775.39	
1/29/2010	McGinn Smith Payroll, Smith David			\$6,775.38	
2/6/2010	McGinn Smith Payroll, Smith David			\$6,775.39	
3/2/2010	McGinn Smith Payroll, Smith David			\$17,731.08	
4/8/2010	McGinn Smith Payroll, Smith David			\$129,096.67	
10/28/2009	Smith, David	9965	M&T	\$4,000.00	ck 2211
11/18/2009	Smith, David	9965	M&T	\$200.00	ck 2246
12/4/2009	Smith, David	65	M&T	\$2,000.00	ck 2263
	Smith, David Total			\$6,200.00	
	Smith, David & Lynn Total			\$250.00	
	Smith, Lynn Total			\$60,000.00	
	Smith, David	965	M&T	\$2,500.00	ck 2275
12/7/2009	Smith, David Total			\$2,500.00	
	Grand Total			\$203,046.67	

Footnote #

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EXHIBIT C

McGINN, SMITH & Co., INC.

OFFICE SERVICING YOUR ACCOUNT
One Capital Center
99 Pine Street, 5th Floor
Albany, NY 12207
Tel: (518) 449-5131
Fax: (518) 449-4894

CLEARANCE AGENT
Bear, Stearns Securities Corp.
One Metropolitan Center North
Brooklyn, New York 11201-3858
(212) 272-1000

ACCOUNT EXECUTIVE DAVID L. SMITH
VISIT OUR WEBSITE www.mcginnsmith.com

What's In This Statement

Financial Summary	3	LYNN A SMITH
Your Portfolio Holdings	4	2 ROLLING BROOK DRIVE
Transaction Detail	5	SARATOGA SPRINGS NY 12866

STATEMENT PERIOD October 1, 2004
THROUGH October 29, 2004
ACCOUNT NUMBER 405-04091 800
TAXPAYER NUMBER On File
LAST STATEMENT September 30, 2004

Your Portfolio at a Glance

NET CREDIT BALANCE	2,088,972	Cash & Equivalent
NET EQUITY THIS PERIOD	\$2,088,972	
NET EQUITY LAST STATEMENT	2,097,228	
CHANGE SINCE LAST STATEMENT	-8,256	

*This portfolio includes one or more unpriced securities that are not reflected in the Total Value of Securities and the Net Equity This Period.

Market Value of Your Portfolio

Current market value	\$2,088,972
Last statement's market value	\$2,097,228

SIPC This summary is for informational purposes only. It is not intended as a tax document. This statement should be retained for your records. See reverse side for important information.

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2 of 5

STATEMENT BACKER IS PRINTED ON THIS PAGE

CLEARANCE AGENT
Barr, Stearns Securities Corp.
One Montecito Center North
Brooklyn, New York 11201-3858
(212) 272-1000
LYNN A SMITH

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Albany, NY 12207
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Fax: (518) 449-4894

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Cash Flow Analysis

	THIS PERIOD
Opening Balance	\$2,097,228.16
Dividends/Interest	1,744.16
Amount Credited	\$1,744.16
Funds Withdrawn	-10,000.00
Amount Debited	\$-10,000.00
Net Cash Activity	-8,255.84
Closing Balance	\$2,088,972.32

Cash Balance Summary

	OPENING	CLOSING
Cash	2,097,228.16	2,088,972.32
Net Cash Balance	\$2,097,228.16	\$2,088,972.32

Income Summary

	THIS PERIOD	YEAR TO DATE
Dividends	0.00	88,200.00
Credit Balance Int.	1,744.16	10,194.25
Total	\$1,744.16	\$98,394.25

Portfolio Composition

Cash/Cash Equivalent	2,088,972
Total	\$2,088,972

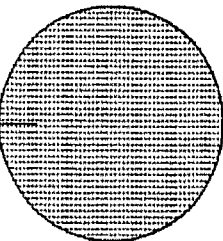
CLEARANCE AGENT

Best, Stearns Securities Corp.
One Greenwich Center North
Brooklyn, New York 11201-3858
(212) 272-1000

LYNN A SMITH

STATEMENT PERIOD October 1, 2004
THROUGH October 29, 2004

ACCOUNT NUMBER 405-04091 800
TASAPAYER NUMBER On File
LAST STATEMENT September 30, 2004

**Your Portfolio
Allocation**

Cash & Equivalents
100%

Unshaded portions denote debt balance and/or short market values. The allocation percentages is derived from the absolute market value of your portfolio.

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McGINN, SMITH & Co., INC.

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 One Capital Center
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 Albany, NY 12207
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 Fax: (518) 449-4894

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 Brooklyn, New York 11201-3859
 (212) 272-1000

LYNN A SMITH

4 of 5

Your Portfolio Holdings**CASH & CASH EQUIVALENTS**

DESCRIPTION	SYMBOL/USRP	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME	CURRENT YIELD (%)
CASH BALANCE				2,088,972		
TOTAL CASH & CASH EQUIVALENTS				\$2,088,972		

EQUITIES**Equities & Options**

DESCRIPTION	SYMBOL/USRP	ACCT TYPE	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME	CURRENT YIELD (%)
CNET FIN HLDGS INC ACCREDITED INVS	189758204	CASH	15,000	Unpriced			
Total Equities & Options					\$0	\$0	\$0
TOTAL EQUITIES					\$0	\$0	\$0

YOUR PRICED PORTFOLIO HOLDINGS

\$2,088,972

STATEMENT PERIOD October 1, 2004
 THROUGH October 29, 2004

ACCOUNT NUMBER 405-04091 800
 TAXPAYER NUMBER On File
 LAST STATEMENT September 30, 2004

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McGINN, SMITH & Co., Inc.

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 (212) 272-1000

LYNN A SMITH

5 of 5

Transaction Detail**DEPOSITS AND WITHDRAWALS**

STATEMENT PERIOD October 1, 2004
 THROUGH October 29, 2004
 ACCOUNT NUMBER 405-04091 800
 TAXPAYER NUMBER On File
 LAST STATEMENT September 30, 2004

DATE	TRANSACTION	DESCRIPTION	DEBIT AMOUNT	CREDIT AMOUNT
10/08/04	FND WIRED	MDA#NB874601 FND WIRED TO MFRS AND TRADERS TR CD AC6050089865 FD#01769	10,000.00	
TOTAL			\$-10,000.00	

INTEREST

DATE	DESCRIPTION	SYMBOL/CUSIP	QUANTITY	RATE (%)	DEBIT AMOUNT	CREDIT AMOUNT
10/21/04	INTEREST ON CREDIT BALANCE ACCT 405-04091 At 01.000000% 09/21 - 10/20					1,744.16
TOTAL						\$1,744.16

STOP

***** End of Statement*****

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EXHIBIT D

PROMISSORY NOTE

June 5, 2009

\$366,000.00

Albany, New York

For value received, the undersigned, **TDMM Cable Funding, LLC**, a Florida limited liability company (the "Borrower"), promises to pay to the order of **Lynn Smith**, (the "Lender"), the principal amount of **Three Hundred Sixty Six Thousand and 00/100 Dollars (\$366,000.00)** on or July 6, 2009 (the "Maturity Date"), as set forth below, together with interest from the date hereof on the unpaid principal balance from time to time outstanding until paid in full.

The interest rate shall be fixed at twenty-four percent (24.0%) per annum (the "Interest Rate").

Principal and interest shall be payable at 2 Rolling Brook Drive, Saratoga Springs, New York 12866, or at such other place as the Lender may designate in writing, in immediately available funds in lawful money of the United States of America without set-off, deduction or counterclaim. Interest shall be calculated on the basis of actual number of days elapsed in a 360-day year.

There shall be no prepayment premium in the event of any prepayment. In the event of a prepayment the Borrower shall pay interest to the Lender in the amount of one-half of one percent (0.5%) per week for each week, or any part of any week, that this Note remains unpaid.

At the option of the Lender, this Note shall become immediately due and payable without notice or demand upon the occurrence at any time of any of the following events of default (each, an "Event of Default"): (1) default of any liability, obligation or undertaking of the Borrower to the Lender, hereunder or otherwise, including failure to pay in full and when due any installment of principal or interest, or of any endorser or guarantor of any liability, obligation or undertaking, hereunder or otherwise, to the Lender, or default under any other loan document delivered by the Borrower, any endorser or guarantor, or in connection with the loan evidenced by this Note and the continuance thereof for ten (10) days after the due date; (2) failure of the Borrower to maintain aggregate collateral security value satisfactory to the Lender and the Borrower fails to cure such failure within ten (10) days after written notice is given to the Borrower by the Lender; (3) default of any material liability, obligation or undertaking of the Borrower or of any endorser or guarantor hereof to any other party and the Borrower fails to cure such default within ten (10) days after written notice is given to the Borrower by the Lender; (4) if any statement, representation or warranty heretofore, now or hereafter made in connection with the loan evidenced by this Note, or in any supporting financial statement of the Borrower or of any endorser or guarantor hereof shall be determined by the Lender to have been false in any material respect when made; (5) if the Borrower or any endorser or guarantor is a corporation, trust, partnership or limited liability company, the liquidation, termination or dissolution of any such organization, or the merger or consolidation of such organization into another entity, or its ceasing to carry on actively its present business or the appointment of a receiver for its property; (6) the death of the Borrower or of any endorser or guarantor hereof and, if any of the Borrower or any endorser or guarantor hereof is a partnership or limited liability company, the death of any partner or member; (7) the institution by or against the Borrower or any endorser or guarantor hereof of any proceedings under the Bankruptcy Code 11 USC §101 *et seq.* or any other law in which the Borrower or any endorser or guarantor hereof is alleged to be insolvent or unable to pay its debts as they mature, or the making by the Borrower or any endorser or guarantor hereof of an assignment for the benefit of creditors or the granting by the Borrower or any endorser or guarantor hereof of a trust mortgage for the benefit of creditors; (8) the service upon the Lender of a writ in which the Lender is named as trustee of the Borrower or of any endorser or guarantor hereof; (9) a judgment or judgments for the payment of money shall be rendered against the Borrower or any endorser or guarantor hereof, and

any such judgment shall remain unsatisfied and in effect for any period of thirty (30) consecutive days without a stay of execution; (10) any levy, seizure, attachment, execution or similar process shall be issued or levied on any of the property of the Borrower or any endorser or guarantor hereof which shall remain unsatisfied and in effect for any period of ten (10) consecutive days without a stay of execution; (11) the termination of any guaranty hereof; (12) the occurrence of such a material adverse change in the condition or affairs (financial or otherwise) of the Borrower or of any endorser, guarantor or other surety for any obligation of the Borrower to the Lender, or the occurrence of any other event or circumstance, such that the Lender, in its sole discretion, deems that it is insecure or that the prospects for timely or full payment or performance of any obligation of the Borrower or any endorser or guarantor hereof to the Lender has been or may be impaired.

Any payments received by the Lender on account of this Note shall, at the Lender's option, be applied first, to any costs, expenses or charges then owed to the Lender by the Borrower; second, to accrued and unpaid interest; and third, to the unpaid principal balance hereof. Notwithstanding the foregoing, any payments received after the occurrence and during the continuance of an Event of Default shall be applied in such manner as the Lender may determine. The Borrower hereby authorizes the Lender to charge any deposit account which the Borrower may maintain with the Lender for any payment required hereunder without prior notice to the Borrower.

If pursuant to the terms of this Note, the Borrower is at any time obligated to pay interest on the principal balance at a rate in excess of the maximum interest rate permitted by applicable law for the loan evidenced by this Note, the applicable interest rate shall be immediately reduced to such maximum rate and all previous payments in excess of the maximum rate shall be deemed to have been payments in reduction of principal and not on account of the interest due hereunder.

The Borrower represents to the Lender that the proceeds of this Note will not be used for personal, family or household purposes or for the purpose of purchasing or carrying margin stock or margin securities within the meaning of Regulations U and X of the Board of Governors of the Federal Reserve System, 12 C.F.R. Parts 221 and 224.

The Borrower and each endorser and guarantor hereof grant to the Lender a continuing lien on and security interest in any and all deposits or other sums at any time credited by or due from the Lender to the Borrower and each endorser or guarantor hereof and any cash, securities, instruments or other property of the Borrower and each endorser and guarantor hereof in the possession of the Lender, whether for safekeeping or otherwise, or in transit to or from the Lender (regardless of the reason the Lender had received the same or whether the Lender has conditionally released the same) as security for the full and punctual payment and performance of all of the liabilities and obligations of the Borrower and any endorser and guarantor hereof to the Lender and such deposits and other sums may be applied or set off against such liabilities and obligations of the Borrower or any endorser or guarantor hereof to the Lender at any time, whether or not such are then due, whether or not demand has been made and whether or not other collateral is then available to the.

No delay or omission on the part of the Lender in exercising any right hereunder shall operate as a waiver of such right or of any other right of the Lender, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or waiver of the same or any other right on any future occasion. The Borrower and every endorser or guarantor of this Note, regardless of the time, order or place of signing, waives presentment, demand, protest, notice of intent to accelerate, notice of acceleration and all other notices of every kind in connection with the delivery, acceptance, performance or enforcement of this Note and assents to any extension or postponement of the time of payment or any other indulgence, to any substitution, exchange or release of collateral, and to the addition or release of any other party or person primarily or secondarily liable and waives all recourse to suretyship and guarantor defenses generally,

and each endorser and guarantor hereby consents to any and all process which may be served in any such suit, action or proceeding, (i) by mailing a copy thereof by registered and certified mail, postage prepaid, return receipt requested, to the Borrower's, endorser's or guarantor's address shown below or as notified to the Lender and (ii) by serving the same upon the Borrower(s), endorser(s) or guarantor(s) in any other manner otherwise permitted by law, and agrees that such service shall in every respect be deemed effective service upon the Borrower or such endorser or guarantor.

THE BORROWER, EACH ENDORSER AND GUARANTOR AND THE LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY, AND AFTER AN OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL, (A) WAIVES ANY AND ALL RIGHTS TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING IN CONNECTION WITH THIS NOTE, ANY OF THE OBLIGATIONS OF THE BORROWER, EACH ENDORSER AND GUARANTOR TO THE LENDER, AND ALL MATTERS CONTEMPLATED HEREBY AND DOCUMENTS EXECUTED IN CONNECTION HERewith AND (B) AGREES NOT TO SEEK TO CONSOLIDATE ANY SUCH ACTION WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CAN NOT BE, OR HAS NOT BEEN, WAIVED. THE BORROWER, EACH ENDORSER AND GUARANTOR AND THE LENDER EACH CERTIFIES THAT NEITHER THE LENDER NOR ANY OF ITS REPRESENTATIVES, AGENTS OR COUNSEL HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE LENDER WOULD NOT IN THE EVENT OF ANY SUCH PROCEEDING SEEK TO ENFORCE THIS WAIVER OF RIGHT TO TRIAL BY JURY.

Executed as an instrument under seal on the date first above written.

Witness:

Borrower:
TDMM Cable Funding, LLC

By: Timothy M. McGinn
Title: Managing Member

EXHIBIT F

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/DRH)

**McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, DAVID L. SMITH,
LYNN A. SMITH, DAVID M. WOJESKI, Trustee of
the David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04, GEOFFREY R. SMITH,
LAUREN T. SMITH, and NANCY MCGINN,**

Defendants,

**LYNN A. SMITH, and
NANCY MCGINN,**

Relief Defendants, and

**DAVID M. WOJESKI, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,**

Intervenor.

**PLAINTIFF'S RESPONSES AND OBJECTIONS
TO RELIEF DEFENDANT/DEFENDANT
LYNN A. SMITH'S FIRST SET OF INTERROGATORIES**

Dated: February 24, 2011

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff Securities and Exchange Commission ("SEC" or "Plaintiff") responds as follows to Relief Defendant/Defendant Lynn A. Smith's ("L. Smith") First Set of Interrogatories ("Interrogatories").

GENERAL RESPONSES AND OBJECTIONS

Plaintiff asserts the following responses and objections to these Interrogatories in their entirety and incorporates such objections in Plaintiff's response to each Interrogatory:

1. Plaintiff has previously produced or made available for inspection and copying to all parties certain documents and disclosures that contain information that is responsive to these Interrogatories. These include (a) Plaintiff's Mandatory Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) ("Initial Disclosures"), served September 21, 2010; (b) Plaintiff's First Supplemental Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) ("Supplemental Disclosures"), served September 30, 2010; (c) Plaintiff's responses to discovery requests propounded by L. Smith, or any other party and served on L. Smith; (d) Plaintiff's filings in this litigation and exhibits thereto; (e) all exhibits and testimony introduced at all hearings in this litigation, including but not limited to the preliminary injunction hearing held on June 9, 10, and 11, 2010 and the evidentiary hearing held on November 16 and 17, 2010; and (f) the information contained in Plaintiff's Responses and Objections to Fourth Request for the Production of Documents by Relief Defendant/Defendant Lynn A. Smith, served February 16, 2011.

2. Plaintiff has previously made available for inspection and copying by L. Smith at Plaintiff's offices at a mutually agreeable time its pre-complaint investigative files in this matter, excluding privileged or otherwise undiscoverable material. *See* Initial Disclosures; Supplemental Disclosures.

3. For documents and information responsive to these Interrogatories, Plaintiff refers L. Smith to the chart entitled "Subpoenas Sent and Document Productions Received as of February 16, 2011," attached as Exhibit A to Plaintiff's Responses and Objections to Fourth Request for the Production of Documents by Relief Defendant/Defendant Lynn A. Smith ("Exhibit A"). Plaintiff will make available for inspection and copying the document productions listed in Exhibit A at Plaintiff's offices at a mutually agreeable time.

4. With respect to those Interrogatories calling for facts and information that Plaintiff will rely on to support or prove its claims against L. Smith and other parties, Plaintiff will disclose its trial exhibits pursuant to the Uniform Pretrial Scheduling Order.

5. This response is made without waiver, and with express reservation of: (a) all objections as to the competence, relevance, materiality, and admissibility of the responses and their subject matter; (b) all objections as to any privilege(s) applicable to the responses and their subject matter; (c) the right to object to the use of the responses on any grounds in any proceeding in this action; (d) the right to object on any grounds to any demand or request for further response to these Interrogatories or any other discovery relating to the same matter; and (e) the right at any time to amend, correct, add to, strike, delete, supplement or clarify any of the responses.

6. Plaintiff objects to these Interrogatories to the extent that they require information protected from disclosure by the attorney-client privilege, the law enforcement privilege, the deliberative process privilege, the attorney work product doctrine or any other applicable privilege or doctrine.

7. Nothing in these responses to these Interrogatories is intended as or shall be construed to be a waiver of any privileges or doctrines.

8. Plaintiff objects to these Interrogatories to the extent that they seek information that is beyond the scope of information specified in Rule 33 of the Federal Rules of Civil Procedure.

9. Plaintiff objects to these Interrogatories to the extent that they call for information that is not relevant to this action, or not reasonably calculated to lead to the discovery of admissible evidence.

10. Plaintiff's responses shall not be construed so as to limit in any way the facts or evidence that Plaintiff may offer or rely upon at trial of this action or at any pretrial hearing. Plaintiff reserves the right to offer or rely on witnesses and other evidentiary sources that Plaintiff has not expressly referred to in response to any Interrogatory.

11. The responses to these Interrogatories represent the best information presently known to Plaintiff. Discovery is ongoing, and Plaintiff reserves the right to supplement or revise its responses to these Interrogatories.

12. The foregoing General Responses and Objections are incorporated into each Specific Response and Objection below as fully set forth therein.

SPECIFIC RESPONSES AND OBJECTIONS

Interrogatory No. 1:

Please identify each and every person you intend to call as a witness to support your contention that Lynn Smith is a properly named Relief Defendant.

Response to Interrogatory No. 1:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its Initial Disclosures and Supplemental Disclosures, which identify individuals likely to have discoverable information. Plaintiff will disclose its trial witnesses pursuant to the Uniform Pretrial Scheduling Order and any revisions or modifications the Court may make thereto.

Interrogatory No. 2:

Please identify each and every person you intend to call as a witness to support your substantive claims that Lynn Smith violated § 276 of the New York State Debtor and Creditor Law.

Response to Interrogatory No. 2:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its response to Interrogatory No. 1.

Interrogatory No. 3:

Please identify every fact and every way that you contend or believe supports Plaintiff's allegation that monies allegedly received by Smith were ill-gotten gains or illegal profits resulting from the Defendant's fraud alleged in paragraph 16 of the Amended Complaint.

Response to Interrogatory No. 3:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to the following non-exhaustive list of facts that Plaintiff "contend[s] or believe[s] supports Plaintiff's allegation that monies allegedly received by Smith were ill-gotten gains or illegal profits resulting from the Defendant's fraud:"

- The facts contained and exhibits referenced in the Declaration of Israel Maya filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to Exhibits 1-4, 19, 30-38, 40-41, 44-46, 48-50, 58-62, 67;
- The facts contained and exhibits referenced in the Declaration of Lara Shalov Mehraban filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to paragraph 26 and Exhibits 1-4, 14, 20, 24-25, 33-38, 54, 58-60, 67;
- The facts contained in the Declaration of Roseann Daniello filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to paragraph 25;
- The facts contained in the Affidavit of Lynn Smith filed May 21, 2010, including but not limited to paragraphs 13, 14 and 33;

- The May 27, 2010 deposition of Lynn Smith and all exhibits thereto;
- The facts contained and exhibits referenced in the Supplemental Declaration of Roseann Daniello filed June 3, 2010, including but not limited to Exhibits 1-4;
- The exhibits referenced in the Supplemental Declaration of Lara Shalov Mehraban filed June 3, 2010;
- The facts contained and exhibits referenced in the Declaration of David Stoelting filed in support of August 3, 2010 Order to Show Cause, including but not limited to Exhibits 1-2, 3-4, 6-17, 23, 34, 46;
- The June 9, 2010 testimony of William Brown at the preliminary injunction hearing;
- The June 9, 2010 testimony of Roseann Daniello at the preliminary injunction hearing;
- The June 9-10, 2010 testimony of David McQuade at the preliminary injunction hearing;
- The June 10, 2010 testimony of Lynn Smith at the preliminary injunction hearing;
- The June 10-11, 2010 testimony of John D'Aleo at the preliminary injunction hearing;
- The June 11, 2010 testimony of David Wojeski at the preliminary injunction hearing; and
- The exhibits introduced at the preliminary injunction hearing held June 9-11, 2010, including but not limited to Exhibits 20-25, 74-75, 77-82.

Interrogatory No. 4:

Please set forth with specificity the source of any alleged ill-gotten funds and how such funds were derived from the fraudulent activities alleged against Defendants.

Response to Interrogatory No. 4:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to the following non-exhaustive list of facts that "specif[y] the source of any alleged ill-gotten funds and how such funds were derived from the fraudulent activities alleged against Defendants:"

- The facts contained and exhibits referenced in the Declaration of Israel Maya filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to Exhibits 1-4, 10, 19, 23, 30-39, 40-42, 44-50, 55, 58-62, 67;
- The facts contained and exhibits referenced in the Declaration of Lara Shalov Mehraban filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, including but not limited to paragraph 26 and Exhibits 1-4, 5-11, 13-20, 24-25, 33-38, 53, 54, 58-61, 65-67
- The facts contained in the Declaration of Roseann Daniello filed in support of Plaintiff's April 20, 2010 Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief;
- The facts contained and exhibits referenced in the Supplemental Declaration of Roseann Daniello filed June 3, 2010, including but not limited to Exhibits 1-4;
- The exhibits referenced in the Supplemental Declaration of Lara Shalov Mehraban filed June 3, 2010;
- The facts contained and exhibits referenced in the Declaration of David Stoelting filed in support of August 3, 2010 Order to Show Cause, including but not limited to Exhibits 1-2, 6-17;
- The facts contained and exhibits referenced in the Declaration of Roseann Daniello filed in support of August 3, 2010 Order to Show Cause, including Exhibit 1;
- The facts and exhibits contained in the Declaration of Paul Zindell filed in support of Plaintiff's November 3, 2010 Application for an Expedited Order to Show Cause why Defendants Timothy M. McGinn and David L. Smith Should not be Held in Contempt, including but not limited to Exhibits 1-4;
- The facts and exhibits contained in the Declaration of David Stoelting filed in support of Plaintiff's November 3, 2010 Application for an Expedited Order to Show Cause why Defendants Timothy M. McGinn and David L. Smith Should not be Held in Contempt, including but not limited to Exhibits 1-14;
- The June 9, 2010 testimony of William Brown at the preliminary injunction hearing;
- The June 9, 2010 testimony of Israel Maya at the preliminary injunction hearing;
- The June 9, 2010 testimony of Roseann Daniello at the preliminary injunction hearing;

- The June 9, 2010 testimony of Bernard Malmud at the preliminary injunction hearing;
- The June 9-10, 2010 testimony of David McQuade at the preliminary injunction hearing;
- The June 10, 2010 testimony of Timothy Welles at the preliminary injunction hearing;
- The June 10, 2010 testimony of Lynn Smith at the preliminary injunction hearing;
- The June 10-11, 2010 testimony of John D'Aleo at the preliminary injunction hearing;
- The June 11, 2010 testimony of David Wojeski at the preliminary injunction hearing; and
- All exhibits introduced at the preliminary injunction hearing held June 9-11, 2010.

Interrogatory No. 5:

Please provide with specificity each and every fact that supports your contention that David L. Smith "exercised beneficial ownership" over Lynn Smith's brokerage account as alleged in paragraph 109 of the Amended Complaint.

Response to Interrogatory No. 5:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to the following non-exhaustive list of facts that "supports [its] contention that David L. Smith "exercised beneficial ownership" over Lynn Smith's brokerage account:"

- The facts contained in the Affidavit of Lynn Smith filed May 21, 2010, including but not limited to paragraphs 13, 14 and 33;
- The May 27, 2010 deposition of Lynn Smith and all exhibits thereto;
- The June 9, 2010 testimony of Roseann Daniello at the preliminary injunction hearing;
- The June 10, 2010 testimony of Lynn Smith at the preliminary injunction hearing;
- The June 10-11, 2010 testimony of John D'Aleo at the preliminary injunction hearing; and

- Exhibits introduced at the preliminary injunction hearing held June 9-11, 2010, including but not limited to Exhibits 2, 72, 81, 118.

Interrogatory No. 6:

Please identify every fact and every way that you contend or believe supports your allegation that Lynn Smith was the recipient of illegally obtained proceeds from fraudulent sales of securities and that the receipt of each proceed were received by Lynn Smith without consideration as alleged in paragraph 166 of the Amended Complaint.

Response to Interrogatory No. 6:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its response to Interrogatory Nos. 3 and 4.

Interrogatory No. 7:

Please set forth with specificity how you contend or believe that the \$1.8 million that Lynn Smith allegedly received from one or more of the Defendants as alleged in paragraph 107 of the Amended Complaint were derived from the fraudulent activities of any of the Defendants.

Response to Interrogatory No. 7:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its responses to Interrogatories Nos. 4 and 8.

Interrogatory No. 8:

Please identify each and every transaction the SEC intends to rely on to show a transfer of ill gotten gains into any account of Lynn Smith. For each transfer, please specify:

- (i) the date of the transfer;
- (ii) the amount of the transfer;
- (iii) the source of funds or accounts from which the transfer was made;
- (iv) whether the transfer was made without consideration; and
- (v) identify any witness the SEC intends to call in connection with the specific transactions identified in this Interrogatory.

Response to Interrogatory No. 8:

Without waiving the General Responses and Objections, Plaintiff refers the facts and exhibits contained in the Supplemental Declaration of Roseann Daniello, filed June 3, 2010, including but not limited to Exhibits 2-4. With respect to "whether the [transfers listed in Exhibit A were] made without consideration," Plaintiff refers L. Smith to her May 27, 2010 deposition and all exhibits introduced thereto; her testimony at the preliminary injunction hearing; and all exhibits introduced at the preliminary injunction hearing. With respect to "any witness the SEC intends to call in connection with the specific transactions identified in this Interrogatory," Plaintiff refers L. Smith to its response to Interrogatory No. 1.

Interrogatory No. 9:

Please specify each and every fact you will rely on to prove Lynn Smith violated Section 17(a) of the Securities Act as set forth in Plaintiffs First Claim for Relief in the Amended Complaint.

Response to Interrogatory No. 9:

Plaintiff objects to this Interrogatory because it is based on a misstatement and mischaracterization of the allegations in the Amended Complaint.

Interrogatory No. 10:

Please specify each and every fact you will rely on to prove Lynn Smith violated Section 10(b) of the Exchange Act and Rule 10b-5 as set forth in Plaintiff's Second Claim for Relief in the Amended Complaint.

Response to Interrogatory No. 10:

Plaintiff objects to this Interrogatory because it is based on a misstatement and mischaracterization of the allegations in the Amended Complaint.

Interrogatory No. 11:

Please specify each and every fact you will rely on to prove Lynn Smith violated Section 15(c)(1) of the Exchange Act and Rule 10b-3 as set forth in Plaintiff's Third Claim for Relief in the Amended Complaint.

Response to Interrogatory No. 11:

Plaintiff objects to this Interrogatory because it is based on a misstatement and mischaracterization of the allegations in the Amended Complaint.

Interrogatory No. 12:

Please specify each and every fact you will rely on to prove Lynn Smith violated Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 as set forth in Plaintiff's Fourth Claim for Relief in the Amended Complaint.

Response to Interrogatory No. 12:

Plaintiff objects to this Interrogatory because it is based on a misstatement and mischaracterization of the allegations in the Amended Complaint.

Interrogatory No. 13:

Please specify each and every fact you will rely on to prove Lynn Smith violated Section 7(a) of the Investment Company Act as set forth in Plaintiff's Fifth Claim for Relief in the Amended Complaint.

Response to Interrogatory No. 13:

Plaintiff objects to this Interrogatory because it is based on a misstatement and mischaracterization of the allegations in the Amended Complaint.

Interrogatory No. 14:

Please specify each and every fact you will rely on to prove Lynn Smith violated Section 5(a) and 5 (c) of the Securities Act as set forth in Plaintiff's Sixth Claim for Relief in the Amended Complaint.

Response to Interrogatory No. 14:

Plaintiff objects to this Interrogatory because it is based on a misstatement and mischaracterization of the allegations in the Amended Complaint.

Interrogatory No. 15:

Please specify each and every fact you will rely on to prove Lynn Smith violated Section 276 of the New York Debtor and Creditor Law as set forth in Plaintiff's Eighth Claim for Relief in the Amended Complaint. Please set forth in detail:

- (i) the specific asset that is alleged to have been fraudulently conveyed;
- (ii) the date of the alleged fraudulent conveyance;
- (iii) the amount of the transfer;
- (iv) the source of funds or accounts from which the transfer was made; and
- (v) identify any witness the SEC intends to call in connection with the specific transactions identified in this Interrogatory

Response to Interrogatory No. 15:

Without waiving the General Responses and Objections, Plaintiff will rely on the following non-exhaustive list of facts to "prove Lynn Smith violated Section 276 of the New York Debtor and Creditor Law," including but not limited to:

- In 2009, L. Smith conveyed assets previously held in a joint checking account with her husband, David Smith, to an individual checking account in her name;
- In 2009, David and Lynn Smith transferred title to a vacation property in Vero Beach, Florida from joint title into the name of Lynn Smith alone; and
- On August 31, 2004, L. Smith conveyed 100,000 shares of Charter One Financial stock previously held in L. Smith's brokerage account to David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 while maintaining a previously undisclosed and significant ownership interest in the trust assets.
- The facts contained in the Affidavit of Lynn Smith filed May 21, 2010;
- The May 27, 2010 deposition of Lynn Smith and all exhibits thereto;

- The June 9, 2010 testimony of Roseann Daniello at the preliminary injunction hearing;
- The June 10, 2010 testimony of Lynn Smith at the preliminary injunction hearing;
- The June 10 & 11, 2010 testimony of John D'Aleo at the preliminary injunction hearing;
- The exhibits introduced at the preliminary injunction hearing held June 9-11, 2010, including but not limited to Exhibits 75, 77, 118.

With respect to "any witness the SEC intends to call in connection with the specific transactions identified in this Interrogatory," Plaintiff refers L. Smith to its response to Interrogatory No. 1.

Interrogatory No. 16:

Please set forth with specificity each and every fact you will rely on to support your allegation that Lynn Smith intentionally and fraudulently conveyed certain assets in her brokerage account into the Smith Trust as alleged in the Amended Complaint. Please set forth in detail:

- (i) the specific asset that it is alleged to have been fraudulently conveyed;
- (ii) the date of said conveyance;
- (iii) the recipient of each conveyance;
- (iv) the amount alleged to have been conveyed; and
- (v) identify and witness the SEC intends to call in connection with this allegation.

Response to Interrogatory No. 16:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its response to Interrogatory No. 15.

Interrogatory No. 17:

Please specify each fact that you contend or believe supports your allegation that Lynn Smith had the intent to hinder, delay or defraud present or future creditors as a result of the transfer of certain stock from her brokerage account to the Smith Trust as alleged in the Amended Complaint, specifically in paragraphs 127, 128, 129, 130, 131, 132 and 133.

Response to Interrogatory No. 17:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its response to Interrogatory No. 15.

Interrogatory No. 18:

Please specify each and every fact you believe supports your contention that Lynn Smith, as the transferee of the Vero Beach, Florida residence, intended to hinder, delay or defraud creditors as a result of such transfer.

Response to Interrogatory No. 18:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its response to Interrogatory No. 15.

Interrogatory No. 19:

Please specify each and every fact you believe supports your contention that Lynn Smith was the recipient of a fraudulently conveyed joint checking account and how you believe Lynn Smith intended to hinder, delay or defraud creditors as a result of such alleged conveyance.

Response to Interrogatory No. 19:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its response to Interrogatory No. 15.

Interrogatory No. 20:

Please identify the name, title, agency, address, [and] telephone number of any office or individual who has custody and control of any documents that are responsive to the interrogatories set forth herein.

Response to Interrogatory No. 20:

Without waiving the General Responses and Objections, Plaintiff refers L. Smith to its Initial Disclosures and Supplemental Disclosures, which identify individuals likely to have discoverable information, and to Exhibit A to Plaintiff's Responses and Objections to Fourth

Request for the Production of Documents by Relief Defendant/Defendant Lynn A. Smith, which lists document productions received by Plaintiff.

Interrogatory No. 21:

Please provide the names of those individuals who participated in the drafting of the Plaintiff's responses to these Interrogatories.

Response to Interrogatory No. 21:

Without waiving the General Responses and Objections, the individuals listed below participated in the drafting of these responses and objections.

Dated: February 24, 2011

Plaintiff Securities and Exchange Commission

By: s/David Stoelting

Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
Telephone: (212) 336-0533
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov

Of Counsel:

Lara Shalov Mehraban
Haimavathi V. Marlier

EXHIBIT G

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1 receiver William Brown.

2 THE CLERK: Raise your right hand.

3 WILLIAM J. BROWN,

4 having been duly sworn by the Clerk of the Court, was
5 examined and testified as follows:

6 THE CLERK: William J. Brown, B-R-O-W-N.

7 THE WITNESS: Correct.

8 THE CLERK: Thank you. Please take the
9 stand. William J. Brown.

10 MS. MEHRABAN: Good morning, your Honor.

11 THE COURT: Good morning.

12 **DIRECT EXAMINATION BY MS. MEHRABAN:**

13 Q. Mr. Brown, please describe your educational
14 background after high school.

15 A. I attended LeMoyne College in Syracuse, graduated
16 from there in 1973, work for three years in higher
17 education, and then I went to Boston College Law School,
18 from which I graduated with honors in 1979. And since that
19 time I've been an attorney with Phillips, Lytle, LLP, and
20 its predecessor Phillips, Lytle, Hitchcock, Blaine and
21 Huber. I became a partner approximately five and a half to
22 six years after I joined the firm, and I've been practicing
23 in the bankruptcy and restructuring practice of our firm
24 since I finished a rotation nine months into my start of the
25 firm. I'm now the partner in charge of that practice, firm

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1 wide.

2 Q. Okay. What has been previously marked as
3 Plaintiff's Exhibit 114...

4 MS. MEHRABAN: Should I hand it up?

5 A. I have it.

6 Q. Okay. What is 114?

7 A. It's my vitae resume.

8 Q. Okay. And does it accurately reflect your
9 educational and professional experience at least with
10 respect to public matters?

11 A. Yes. I mean there would be hundreds of other
12 matters as to which the restructuring workout of the --
13 whatever the nature of the matter, generally would be some
14 form of financial extremist, was not in the public domain
15 but was a private company, that that would not be listed
16 here in a public document.

17 Q. When did you first hear of McGinn, Smith?

18 A. End of January 2010.

19 Q. And were you named receiver for McGinn, Smith and
20 related entities by the Court on April 20th?

21 A. I was.

22 Q. What have you done as receiver since April 20th?

23 A. Well, I've -- I filed my first report last week,
24 last Friday, and all the parties should have a copy of that,
25 and provided a chamber's copy to the Court. This has turned

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1 out to be a somewhat interesting and in some ways daunting
2 assignment. It has all the burdens and responsibilities of
3 an extremely large receivership.

4 You know, I woke up that afternoon to find out
5 that there were 82 entities associated with the
6 receivership. And that afternoon and that evening and the
7 next several days and weeks, quite frankly, have been an
8 information gathering adventure. I have gotten very good
9 cooperation from the employees in Albany and elsewhere who
10 remain on site. But the immediate task when you have an
11 event like this is to try and bring normalcy and to make
12 sure you have control of the most significant assets,
13 particularly cash.

14 My first concern was would we be able to pay gross
15 payroll on time; who did it need to be paid to. I found out
16 that there were off site locations through the East Coast
17 and the Gulf Coast that required payroll management.

18 So after interviewing the on site employees in
19 Albany, who were primarily with -- not with the broker
20 dealer, because the broker dealer, I found out, had
21 terminated its operations in December and transferred in
22 some fashion those operations to another company in Clifton
23 Park, New York, I went about making sure we had control of
24 the bank accounts and cash.

25 For example, on that first evening, I learned

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1 that, in talking with the employees, that there was
2 approximately \$200,000 in float against one of the bank
3 accounts. And I was told that most of those checks in float
4 were investor payments. I was given a number that afternoon
5 of bank balances of approximately \$480,000, plus, minus.
6 And so a \$200,000 clearing would have been a significant
7 impediment in my view. And while the freeze order should
8 have been in place, I contacted, because I knew an in-house
9 lawyer at that particular bank at about 7:00 that night at
10 his house to try and begin the process to assure that the
11 freeze was in place. He worked with me for the next hour,
12 was able to get his legal processing staff on the phone, and
13 we confirmed the freeze and those checks were returned.

14 The following days were a question of securing
15 property, finding out what property we had, the bank
16 accounts, shutting down credit cards which we, you know,
17 found a number of, in case there were remote charges, and
18 trying to assess the businesses.

19 I had each of the operating entities that I could
20 identify prepare a cash flow projection for me for 90 days,
21 because one of my concerns was that they were operating on
22 at least a cash flow neutral basis. Because it is a
23 maximum, a maximum bankruptcy receivership, that a receiver
24 should not incur debts that it cannot pay for. I came to
25 the view that those entities appeared to be operating on a

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1 cash flow neutral basis. And we've continued on at least
2 that basis since. All payrolls have been paid. I think the
3 situation has been normalized. There are always the hiccups
4 that result.

5 We've begun to look into the various assets. I've
6 been out to visit some real property sites I'm going to
7 another one tomorrow to consider how to handle it, manage
8 it, and possibly how to dispose of it, because I think a
9 disposition was anticipated pre the receivership. We've had
10 accountants come in for a day to review the cash flow
11 processes that I've established to see if they concur with
12 the controller's view of whether they're adequate or not,
13 and I have a gotten a sign off on that.

14 There were several immediate issues. And to
15 identify those and to make sure I wasn't going to step on a
16 literal land mine, because there was just so much
17 information that I could never myself in the short term
18 determine, I asked Messrs. McGinn, Smith and Smith if they
19 would meet with me on a -- I called it, quite frankly, a --
20 not a Who Shot John episode. I wanted them to be and their
21 counsel to be candid with me about my immediate short term
22 concerns. And they and their counsel arranged that for a
23 Sunday night following my appointment. And that was helpful
24 to me. It helped me identify one or two situations that we
25 were able to unravel after that, one of which is reported in

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1 my receiver's report, and it involved Carnival Cruise Lines.
2 We're at risk of losing an almost \$500,000 -- \$425,000
3 deposit that had already been made to Carnival. It was in
4 the fall. Carnival could have swept it but for the stay the
5 Court imposed. But eventually we were at material risk of
6 losing it. There was no practical legal strategy that I
7 could employ to save that deposit, absent fulfillment to the
8 contract in some way or its sale or modification. There was
9 a further deposit due of approximately \$84,000. And there
10 were additional penalties that I could incur as receiver up
11 to about another \$171,000 if this cruise was under booked.
12 So all and all, the estate, you know, was exposed to, you
13 know, an almost \$700,000 liability, and there was a \$425,000
14 deposit there. My objective was to get as much of that
15 deposit back, get out of the cruise situation, and avoid
16 both reputational and economic risk. I think through the
17 good auspices of Carnival, after some initial prodding and
18 encouragement from me, we came to a position where a
19 substantial amount of the deposit was returned. The cruise
20 contract was cancelled and we exchanged releases, and I
21 treated it as a termination of an unfavorable contract.
22 I've been told so far that the stakeholders in the case view
23 it as a positive result.

24 So we're near -- if, if the receivership becomes
25 permanent, I think we're near the start of a second phase of

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1 the case. And, and that would be to figure out how in an
2 economic way to truly ascertain the value of assets and the
3 amount of the liabilities. I have preliminary balance
4 sheets which, on a balance sheet basis, would indicate that,
5 in large measure, not in all measure, but in a large
6 measure, most of the assets are balance sheet negative.
7 Now, what that turns into in real world experience, I don't
8 know yet. But as I started to say at the beginning, this
9 case has all the burdens of a large case without the assets
10 to run a large case. To bring in a team of forensic
11 accountants is probably not the ideal way to proceed. But
12 we have to find out if we can identify these assets and
13 figure out what to do with them in a way using other means
14 if that's possible. And I'm about to begin to explore that.

15 I've gotten many calls from investors. Obviously,
16 I can't speak to all of them. Many of them are upset. We
17 had one potentially angry situation that did not turn into
18 anything, but we've adopted security procedures that I think
19 are appropriate. And -- but most of the people express
20 their concern about their life savings or their pension.

21 I established a website immediately, and we've
22 posted all the pleadings there. And when investors call, we
23 tell them essentially two things; we refer them to the
24 website, we tell them communications will be posted there,
25 and that I will be communicating with them in a letter

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1 communication sometime in the foreseeable future. Because
2 it will be an expense for that site -- mailing to that group
3 of people. But until I can get them all focused on
4 electronic communications, I will have to do at least one
5 mailing, in my view, and the access database has been -- as
6 requested has been brought up to speed to be able to do that
7 when we're ready.

8 I think that is a summary.

9 Q. Thank you. I'm going to direct your attention to
10 Exhibit 116, please.

11 A. Yes.

12 Q. 116. What is that?

13 A. It's the first report of the receiver. It's got
14 an ECF stamp of docket number 49 on it.

15 Q. Thank you. On page three of the report, you
16 mention that on the -- I believe the second day of the
17 receivership, you came upon an employee preparing a Form D
18 filing with the SEC?

19 A. Yes.

20 Q. Can you explain that please?

21 A. Did you say could I explain it?

22 Q. Yes.

23 A. I was doing management by walking about and
24 observing who was doing what and what was going on in the
25 midst of a little bit of chaos. And I saw on a -- as I

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1 recall I think, it was a computer screen, I don't think it
2 was a piece of paper on a desk. But there was paper. What
3 was clear to me was a form being completed. So as I was
4 dealing with other employees, I asked what this person was
5 doing. And I was told that he was completing a SEC Form D.

6 Q. Who was that employee?

7 A. Matthew McGinn.

8 Q. Did you find out any other information about the
9 filing?

10 A. Well, as I would with anybody, I then asked, you
11 know, why, what were the circumstances, if he could explain
12 that to me. And he did.

13 Q. What did he say?

14 A. He said it was required to be filed in connection
15 with the first line offering.

16 Q. Anything else that you remember?

17 A. I -- no. He said nothing else about it.

18 Q. All right. You mentioned that you met with
19 Messrs. McGinn, Smith and Smith on one occasion. Have you
20 met with them since then?

21 A. I've actually met with them at least three times,
22 possibly four. I'd have to think. But at least three
23 times.

24 Q. Okay. And the first occasion was the Sunday
25 evening, I believe you said?

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1 A. It was a Sunday evening, after the receivership,
2 for me to solely ascertain, by going through entities, if
3 they could alert me to issues that they thought I should
4 bring my attention to for the benefit of the estates.

5 Q. Okay. When did you next meet with them?

6 A. (No response.)

7 Q. Approximately.

8 A. Without looking at my calendar, I can't remember.
9 It would have been the following week, in all likelihood.
10 That same week. They asked for copies of documents they
11 needed. They informed me they would be able to respond to
12 requests contained in the order to show cause and the
13 temporary restraining order. And as with the other requests
14 I've gotten, I accommodated that. I had some staff get that
15 information together, and we had used an outside IT vendor
16 to help get some of it. And there's a logical reason for
17 that. Most of the current records had been seized pursuant
18 to a search warrant, so that we have some electronic
19 records, and we used the electronic records to try and
20 provide them the information they requested.

21 Q. What was the purpose for the other meetings with
22 Messrs. McGinn and Smith?

23 A. I've had one other meeting that I recall. I've
24 had interim conversations, again for the same general
25 purposes, document requests. I had a recent meeting at

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1 their request, which I readily agreed to, to discuss the
2 form of preliminary injunction. They had two questions
3 about two provisions, and we discussed that, and I produced
4 clarity about what I was intending.

5 Q. Okay. You mentioned having spoken to some
6 investors, right?

7 A. Yes.

8 Q. Approximately how many investors have you spoken
9 to?

10 A. I didn't do an audit before I came here, but I
11 would think it's at least in the range of at least 15 to 20.

12 We have several procedures. If they call, a daily
13 phone log has been maintained with their contact information
14 for me to return calls periodically. And -- but they are
15 told to go to the website. And that seems to satisfy most
16 for now.

17 But I've talked to in that range. Plus I've
18 talked to secured creditors. I've talked to vendors. I've
19 talked to partners, you know, in the sense of the people who
20 are in the deals. The phone has been hot.

21 Q. You mentioned, I believe, that when you first came
22 in as a receiver, there was about 480,000, I think you said,
23 in the bank accounts; is that accurate?

24 A. My report actually sets it forth on page 6,
25 section 4.

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1 On the date of the receivership -- now -- and
2 this -- we're always looking at bank balances about a day
3 old because the posting would be as of that night, but it
4 would be for bank business the day before. So as of
5 April 19, the amount on hand in the accounts that were
6 visible to us was \$485,491.63.

7 Q. Okay. And currently -- I'm sorry. That was for
8 all McGinn, Smith entities?

9 A. That was for all the frozen bank accounts.

10 Q. And currently how much is in those accounts?

11 A. As of June 2, when I had the staff do this
12 calculation, those same accounts had balances of
13 \$750,763.38, not including the Carnival deposit return of
14 \$222,397. So getting close to a million dollars.

15 Q. Okay. And that's also in your report on page 6?

16 A. That's in my report. But, you know, that \$750,000
17 amount does not take into account checks in float that we
18 would have written and would be clearing. Any time we're
19 receiving revenues and we're paying bills. So it's a
20 dynamic number, as we would say.

21 Q. Are you aware of any transfers to Lynn Smith of
22 funds?

23 A. Pardon me?

24 Q. Of funds to Lynn Smith.

25 MR. FEATHERSTONHAUGH: I'm going to object to

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1 the form of that question, your Honor, unless it's --

2 THE COURT: I understand. Overruled.

3 A. I need to think about that just for a minute.

4 (Pause.)

5 Q. Do you want me to rephrase the question?

6 A. No. You're asking me, am I aware of any monies
7 transferred to her.

8 THE COURT: While he's thinking, was the
9 question in time directed to after Mr. Brown became the
10 receiver, or at any time?

11 MS. MEHRABAN: At any time. Has he come
12 across anything in his receivership that reflects a transfer
13 to Lynn Smith.

14 THE COURT: Before or after April of 20?

15 MS. MEHRABAN: Before or after April 20th. I
16 can expand the question directly --

17 A. Now, you've asked a different question. You asked
18 me about any transfer. We have not done a forensic
19 accounting in any sense yet. I'm aware of transfers.

20 Q. Okay. What are you aware of?

21 A. I'm aware of the provision of benefits in terms of
22 what I understand to be a car rental, and there are other
23 benefits that were provided to Messrs. McGinn and Smith that
24 ...

25 MR. FEATHERSTONHAUGH: Your Honor, I'm going

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1 to object and ask that that answer be stricken. I
2 understood he was asked about Lynn Smith and not Messrs...

3 THE COURT: Well, I haven't heard the whole
4 answer yet, but I understand the point of your question --
5 the point of your objection. It's limited to Lynn Smith,
6 but it's possible there were ultimate transfers through
7 David Smith or Mr. McGinn to Lynn Smith. I don't know where
8 he's going with his answer. Let me hear it first.

9 A. I can put a fine pencil on it. Let me give you
10 one example.

11 As part of my initial investigation with regard to
12 insurance, the existence of insurance, because God knows I
13 want insurance, I asked about motor vehicles because I had
14 found out in one instance that there was a purported
15 employee who had a motor vehicle in their possession that
16 was titled to a McGinn, Smith entity, but there was no lien
17 on the vehicle and payroll deductions were being taken to
18 repay the car loan.

19 As part of that request, I learned that we were
20 making car payments, or had been making car payments on --
21 for the benefit of -- or out of -- to Mr. McGinn or to the
22 benefit of the Smiths and McGinns. And one vehicle I was
23 told, a Lexus, was driven by Mrs. Smith. And I'm now
24 dealing with that, because our insurance renews at the end
25 of June, and I'm going to have to deal with it, the vehicle

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1 and the insurance issues.

2 Q. Okay. You mentioned receiving and responding to
3 information requests from Timothy McGinn and David Smith,
4 right?

5 A. Information requests? Yes.

6 Q. Have you received requests for information from
7 other people?

8 A. Yes.

9 Q. How have you responded?

10 A. They've all gotten the information fairly quickly.
11 I had one situation regarding the Pine Street entities who,
12 you know, are going to be subject to your Honor's order this
13 morning, for information. And that information contained
14 the names of other investors, having nothing to do with this
15 proceeding, independent third-parties. And I asked that
16 that information be treated as confidential. I -- my
17 concern was, because I was aware of litigation going on at
18 the time here, even though I, as receiver, had obtained a
19 general extension of the time to appear and answer from the
20 plaintiff, I asked that the information be treated as
21 confidential. And that resulted in an exchange of e-mails
22 about whether that was or was not necessary. I maintain my
23 position that it was necessary; that I would turn over and
24 did turn over that same day the information, but I did so on
25 the grounds that it had to be treated as confidential,

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1 redacted or filed under seal, because I saw no appropriate
2 purpose for Pine Street to be revealing the names of
3 third-party investors who have nothing to do with this
4 proceeding.

5 Q. Have you ever refused to give anyone information
6 that's been requested?

7 A. No.

8 Q. Okay. Have you --

9 A. I've discussed it with Mr. Featherstonhaugh. For
10 example, he made a document request. We immediately chatted
11 about it as to whether it should be this document or that
12 document. In less than 15 seconds, I think we reached
13 agreement.

14 Q. Have you reviewed the proposed preliminary
15 injunction order?

16 A. I have.

17 Q. Okay. And do you consent to the entry of the
18 proposed preliminary injunction order --

19 A. I do.

20 Q. -- on behalf of the corporate defendants?

21 A. On behalf of the corporate defendants, I do.

22 Q. Okay. I'm going to direct your attention to a
23 couple of paragraphs in that preliminary injunction order.
24 I only have one copy. This was electronically filed.

25 A. I have a copy with me.

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1 Q. Okay. I'm going to direct your attention to
2 paragraph 8(c).

3 A. Yes.

4 Q. Can you please explain the intended purpose of
5 that paragraph?

6 A. This was one of the two provisions that I
7 discussed with the parties last week. And it was to assure
8 them. And we added a new sentence at the end as to my
9 intentions. I am not asking the Court to effect a
10 substantive consolidation of the estates at this time. That
11 is a melding of the assets and liabilities. At this time it
12 wouldn't be appropriate. I don't know if that is warranted,
13 or it's warranted in part, or not warranted at all. But to
14 administer these estates, to pay payroll, to pay vendors, to
15 pay professional fees, I believe it is necessary for any
16 responsible receiver, and for the Court to approve, a
17 provision that says those administrative expenses can be
18 paid out of any estate. Because the estates are so thin.
19 And I met with the parties, and they agreed to -- and, and
20 once they understood that, there was agreement.

21 Q. Okay. I'm also going to direct your attention to
22 paragraph 8(1).

23 A. Okay. I offered to make a representation about
24 this paragraph. This is the borrowing paragraph. And it
25 allows me to exercise my discretion to borrow up to a

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1 hundred thousand dollars. They asked if I would agree to
2 remove the paragraph. I -- my response, and I told them
3 that I would make a representation to the Court, that it is
4 not my intention to borrow. These estates appear to be over
5 leveraged as it is, but I needed to have a provision so that
6 should we have a hiccup that I cannot imagine at this point,
7 for example, expecting a several hundred thousand dollar
8 collection that doesn't come in and I have a \$15,000
9 payroll, payroll that Friday, I would need to do something
10 in my view, to bridge that gap, as long as I was satisfied.
11 But I also told them that I would not do that, absent
12 conferring with all the key stakeholders first, even though
13 I have the discretion to do it. And the party were
14 satisfied with that.

15 Q. What -- going back to your earlier testimony about
16 the Form D, what happened after you spoke to Mr. McGinn
17 about the Form D?

18 A. There --

19 THE COURT: Are you talking about Matthew
20 McGinn?

21 MS. MEHRABAN: Yes. Matthew. Thank you.

22 A. I had met the prior evening an individual who was
23 the, quote, in-house counsel to the entities, and I
24 suggested that we have a conference. And we just sat down
25 in his office and we went further, what it was about, why it

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1 was being done. I asked him to give me a Form D. Which he
2 did. And I reviewed it. And I explained that I was not in
3 a position as receiver and now in charge of these entities
4 to make the representations and warranties that were
5 required to sign and file a Form D with the Securities and
6 Exchange Commission and that we would not be able to do
7 that. And they understood that, they understood, that
8 decision was fine.

9 Q. What is a Form D?

10 A. Form D is a form, I believe required to be filed
11 in connection with private offerings.

12 MS. MEHRABAN: I have no further questions.

13 THE COURT: Thank you. Mr. Featherstonhaugh,
14 any questions?

15 MR. FEATHERSTONHAUGH: I have a couple, your
16 Honor.

17 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

18 Q. Mr. Brown, good morning. It's still morning. In
19 your report and I believe in your testimony here today, you
20 indicated that there -- the receivership that you are now in
21 charge of covers some 82 entities, is that correct?

22 A. Well, I -- as of sometime today, it might only be
23 80.

24 Q. All right. Two -- that's right. This morning,
25 two of them are out. Well, let me ask you about that. Of

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1 those entities, is it true that five of the entities were
2 investment funds?

3 A. I don't know what you mean by that. Are you
4 taking about FAIN and TAIN?

5 Q. Yes. And Pine Street Capital, the one that as of
6 this morning may leave.

7 A. Well, if -- I don't really want to talk about Pine
8 Street because they're leaving the scene, but they're the
9 one that I probably know best at the moment. They are an
10 entity that raised monies to invest in, you know, what I
11 would call portfolio companies, other companies as mezzanine
12 or subordinate. To that extent, I would agree, but I'm not
13 familiar with the term you used.

14 Q. All right. Well, let me ask you this: Was --
15 and, I believe me, I understand your familiarity will verify
16 from entity to entity, but let me ask you about First
17 Advisory Income Notes Income Notes. Was that also a fund
18 that invested in other entities and mezzanines debt and did
19 essentially the same things as Pine Street Capital Partners?

20 A. I can't answer your question today because I've
21 not done the investigation to go back, as I did more or less
22 with Pine Street because I was aware of their attempt to be
23 released from the receivership.

24 Q. All right.

25 A. So I -- in a non-professional conclusion, I'm

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1 aware that the entity you mentioned made investments in
2 other entities.

3 Q. Okay. In addition -- and, again, just your
4 general knowledge, in addition to what I have referred to as
5 investment funds, and you've used two examples, can you
6 describe generally the nature of the other I guess it would
7 be 77 entities?

8 A. Well, they, they take different forms. There are
9 many -- when money was, if I can use the colloquial term,
10 raised, they often created several entities with very
11 similar names. There might have been a trust entity. Then
12 there might have been what I would call an operating entity.
13 And sometimes it was a third possibly. So of the 80 or 82
14 entities, depending upon how you look at it, many of them
15 are non-operating. Just financial -- just a financial
16 vehicle of some type.

17 Q. Are some of the them operating entities?

18 A. Yes.

19 Q. And you've mentioned that some of them are trusts.
20 Are some of them operating businesses?

21 A. Well, on the list? Yes.

22 Q. Okay. And you have -- I believe you testified
23 that the -- if there is a -- and I guess with the consent
24 order, there will be a second stage to the receivership,
25 that one of the first things you would do in that stage is

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1 to try to ascertain the asset value and the liabilities of
2 each of the entities.

3 A. Well, I've already done that in an informal way.
4 In fact, I did that in the first four days. On the Friday
5 following my appointment, I had had forms prepared for --
6 one for each entity. And I asked the embedded staff to as
7 quickly as possible that day or by the next day, because I
8 was meeting with Messrs. McGinn, Smith and Smith that
9 Sunday, to prepare for me a description of what the entity
10 was, what its assets and liabilities were; you know, big
11 picture. And by Friday evening I had all of that back. And
12 for the principal entities, I had the balance sheets that
13 existed as of that time with, in some cases, explanatory
14 notes.

15 Q. All right. But in your direct testimony, you
16 said, I believe, I think I actually can quote you here, I
17 don't know yet what this means in real terms.

18 A. Correct. I said that.

19 Q. Okay. And your first step in the second stage of
20 the receivership would be to go forward and do that entity
21 by entity?

22 A. Oh, absolutely. You know, I'll give you more than
23 you want perhaps in this testimony. I mean, to put it into
24 reality, in doing this work for so many years, there's one
25 thing to look at a balance sheet and say oh, great, you

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1 know, it's -- I have equity of X. But the reality is what
2 can I sell that building for today. The balance sheet may
3 not be a test of the real market value of whatever the prime
4 asset or assets are.

5 So, for example, you know, I was up in Latham two
6 and a half weeks ago some people say crawling through an
7 abandoned building. You know, I'm going to another one
8 tomorrow morning to go examine the boiler room. And it's
9 that type of examination that will need to be done.

10 Q. Now, you also testified that there's apparently
11 some cash flow going on within these businesses, is that
12 correct?

13 A. Yes.

14 Q. And you have made at least -- and I wasn't sure I
15 understood this answer, so I'll give you a chance to
16 elaborate. You made an effort to determine that -- I wasn't
17 sure if it was most or all or some of the entities were at
18 least cash flow neutral.

19 A. Any of the ones where I was being asked to pay
20 vendors or to pay payroll that had employees, I needed a
21 reasonable assurance based upon the employees who were
22 running those businesses, that they were at least cash flow
23 neutral. Okay? And hopefully that's still true.

24 Q. Do you know of the entities that are within your
25 receivership, how many were included in that review?

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1 A. Ah, yes.

2 Q. Could you tell us?

3 A. Yes.

4 Q. You don't have to name them. I'm just after the
5 number of them. You are certainly free to name them if you
6 want.

7 A. Yeah. Four, primarily. They all carried the
8 largest payrolls. There are other entities under them for
9 which they may pay the bills because they're service
10 companies. But four, primarily. I believe that there is
11 another layer that I've not quite gotten at yet. There's a
12 series of companies that I'm informed are operated by yet
13 another company in the southeast under a management
14 agreement that I truly don't understand yet, but I'm not
15 being asked to pay that payroll or fund it at the moment.

16 Q. Now, with respect to Pine Street Capital Partners,
17 which you indicated is the one you're most familiar with,
18 correct?

19 A. Well, the type of company you asked me about.

20 Q. Right. The investment funds. Are any of the
21 other companies that are within the scope of your
22 receivership investors in Pine Street Capital Partners?

23 A. There are -- I would want to see the list before I
24 answered that question, but I can tell you off the top of my
25 head that there are parties who are investors who are either

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1 relief defendants or associated with the individual
2 defendants who are investors. The trustee of one of the
3 trusts who has since resigned is also an investor in Pine
4 Street.

5 Q. Do you know if any of the other four funds that
6 are within your receivership are investors?

7 A. I don't recall if they -- I don't think they are
8 at the moment, but I would like to see the sheet before I
9 said more.

10 Q. Okay. You mentioned in response to Miss
11 Mehraban's question that you were aware of some kind of
12 provision of services to Lynn Smith. Do you recall that
13 answer?

14 A. I recall the Q and A.

15 Q. And you mentioned that you had some knowledge of a
16 car lease, is that correct?

17 A. That is correct. I've seen it.

18 Q. And you mentioned -- can you -- you mentioned that
19 you understood or you had heard that Lynn Smith drove a car
20 that was leased by one of the entities?

21 A. The car in question is a Lexus. And when I made
22 inquiry about the vehicles, I was told that Mrs. Smith was
23 the driver of that vehicle, and that that vehicle is on the
24 company's insurance policy.

25 Q. Do you know which company's insurance policy it's

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1 on?

2 A. I believe they have a consolidated policy, but I
3 believe the lease, the car lease is McGinn Smith & Co., Inc.

4 Q. Do you know if McGinn, Smith & Co., as part of the
5 compensation of their principals, provided them with a car?

6 A. I have seen Excel spreadsheets that reveal a tally
7 of expenses that were reimbursed against a purported, my
8 word is allowance. They don't call it that though. But I
9 also asked if 1099s were issued for those benefits, and
10 while I haven't examined it myself, I was told that the
11 1099s were not issued.

12 Q. And those were benefits provided to Mr. Smith and
13 Mr. McGinn?

14 A. Pretax. I've been informed pretax, yes.

15 Q. In that, in that review, did you see any specific
16 benefits on that Excel spreadsheet that were provided to
17 Mrs. Smith?

18 A. I do not recall seeing Mrs. Smith's name, but for
19 most of the time in question, there were two vehicles. And
20 I was --

21 Q. Well, you're still talking about the Lexus.

22 A. Yes.

23 Q. I'm asking about anything other than that.

24 A. Um...

25 Q. That you recall.

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1 A. I don't know how the health care -- I know health
2 care was being provided. There were country club
3 memberships. And presently I don't draw any conclusions
4 about whether it was appropriately part of the compensation
5 or not, but it was being provided.

6 Q. And it was compensation that was being provided to
7 Mr. Smith and Mr. McGinn?

8 MS. MEHRABAN: Objection.

9 A. That is correct. Directly to them. Yes.

10 Q. Thank you.

11 MR. FEATHERSTONHAUGH: I'm sorry. Did you
12 have an objection?

13 MS. MEHRABAN: I was just objecting that you
14 were incorrectly summarizing what he was saying.

15 THE COURT: Overruled.

16 A. Your Honor, I can answer the prior question that
17 counsel had about --

18 THE COURT: Well, that's all right. There's
19 no question pending at the moment. Just wait for the next
20 question.

21 THE WITNESS: Oh, I deferred him though, but
22 I recall the answer.

23 THE COURT: That's all right. Let
24 Mr. Featherstonhaugh ask another question, and then you can
25 answer.

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BROWN - CROSS - FEATHERSTONHAUGH

1 Mr. Featherstonhaugh.

2 BY MR. FEATHERSTONHAUGH:

3 Q. If you have something you would like to say,
4 Mr. Brown, go ahead.

5 A. Well, I would like to be as complete as possible
6 but as accurate as possible. You asked me about whether
7 there were any other entities essentially as Pine Street
8 investors.

9 Q. Yes. If you -- entities that were within your
10 receivership --

11 A. Yeah.

12 Q. -- that you're aware of.

13 A. And, and, and those persons and entities are
14 listed in the proposed Pine Street dismissal order.

15 Q. Okay. Thank you.

16 MR. FEATHERSTONHAUGH: I have no further
17 questions for Mr. Brown.

18 THE COURT: Miss Dunn, any questions?

19 MS. DUNN: I have no questions, your Honor.

20 THE COURT: Thank you. Mr. Koenig, I'm not
21 going to keep calling on you to see if you want to ask any
22 questions, but I will give you this opportunity.

23 MR. KOENIG: Thank you. No, your Honor. If
24 I do have any, I'll ask just ask the Court for --

25 THE COURT: All right. Thank you.

BROWN - CROSS - FEATHERSTONHAUGH

1 Any redirect?

2 MS. MEHRABAN: None. Thank you.

3 THE COURT: All right. Thank you. You may
4 step down.

5 THE WITNESS: Thank you, your Honor.

6 (Witness William Brown excused.)

7 THE COURT: Before we call the next witness,
8 just a housekeeping matter, as to the exhibits, there will
9 be one set that will be designated the exhibits for the
10 hearing. I assume it's going to -- the SEC intends theirs
11 to be the ones that are in front of the witness, is that
12 correct?

13 MR. STOELTING: The -- yes, your Honor.

14 THE COURT: I have not ruled on the
15 admissibility of anything. Given the looser rulings of
16 evidence that apply to this hearing, my thought would be
17 that we would proceed with those exhibits, and at the close
18 of the hearing, I'll hear any objections any party may have.
19 This turns to rules and procedures for evidence on its butt,
20 but it seems appropriate for the way we're proceeding. Any
21 objection to that? Mr. Stoelting?

22 MR. STOELTING: No objection, except that
23 those are the exhibits on plaintiff's witness list. We
24 don't have any copies of any of their exhibits.

25 THE COURT: Well...

BROWN - CROSS - FEATHERSTONHAUGH

1 MR. FEATHERSTONHAUGH: Well, first of all, no
2 objection, your Honor. Secondly, I believe you have
3 everything but one. You don't have them in a handsome
4 binder like you provided me with.

5 THE COURT: But have you provided them to the
6 SEC?

7 MR. FEATHERSTONHAUGH: Yes.

8 THE COURT: All right. Miss Dunn, any
9 objection to the procedure?

10 MS. DUNN: No.

11 THE COURT: And as to your exhibits, have
12 they been provided to the SEC?

13 MS. DUNN: They've been provided to the SEC
14 either through the motion filings that have already occurred
15 or they are exhibits that were in the possession of the SEC
16 such as exhibits to deposition transcript.

17 THE COURT: Mr. Stoelting?

18 MR. STOELTING: I'm sorry, your Honor, maybe
19 I missed something in the last couple of days, but I haven't
20 received any exhibits from either Mr. Featherstonhaugh or
21 Miss Dunn. If they're saying that there are things that are
22 already in the record in one way or another, maybe they're
23 already in our binders. But I haven't --

24 MR. FEATHERSTONHAUGH: We can talk about it
25 during the lunch.

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MAYA - DIRECT - McGRATH

1 THE COURT: During the lunch hour, perhaps
2 you can clarify that among yourselves.

3 All right. SEC's next witness.

4 MR. STOELTING: Your Honor, we call Israel
5 Maya.

6 **ISRAEL MAYA,**

7 having been duly sworn by the Clerk of the Court, was
8 examined and testified as follows:

9 THE CLERK: This is Israel Maya, M-A-Y-A.

10 **DIRECT EXAMINATION BY MR. McGRATH:**

11 Q. Mr. Maya, would you give us your educational
12 background after high school please?

13 A. I have a Bachelor of Science in accounting from
14 Brooklyn College.

15 Q. And what year did you graduate college?

16 A. 1978.

17 Q. What is your major?

18 A. Accounting.

19 Q. Can you describe your work history?

20 A. My career started back in '81 as a compliance
21 examiner at the commodities Exchange. And after that I
22 became assistant controller for a small broker dealer.
23 After that, I was in compliance again for the National
24 Futures Association which is a regulatory agency. After
25 that, I joined the New York Stock Exchange also as a -- in

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EXHIBIT H

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

10 Civ. ____ ()

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,

Defendants, and

LYNN A. SMITH,

Relief Defendant.

DECLARATION OF ROSEANN DANIELLO

I, Roseann Daniello, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Staff Accountant in the Enforcement Division of the New York Regional Office of the Securities and Exchange Commission and have been employed by the Commission since May 1992. My duties include analyzing brokerage records, bank records, business records, and research regarding related individuals, all in relation to Commission investigations to enforce the federal securities laws. This declaration is in support of the Commission's Emergency Application for a Temporary Restraining Order, Preliminary Injunction, Expedited Hearing and Other Relief.

2. I received a B.B.A. in Finance from Iona College in 1991. I began my career with the Commission as a Securities Compliance Examiner in May 1992 and have worked on numerous investigations and litigations.

3. I have reviewed bank records obtained pursuant to subpoena from several banks, including M&T Bank and Mercantile Bank. The records were voluminous and included such documents as account opening forms, monthly account statements and debit and credit memoranda.

4. Listed below are selected transfers that were identified based on monthly account statements. However, I was unable to determine the nature of many transfers because we did not receive complete backup information from the banks.

TDM Cable Trust LLC 06

5. The Mercantile bank account of TDM Cable Trust 06 shows ten transfers from the TDM Cable Trust 06 account at Mercantile Bank to a FIIN account:

- \$1,030,000 on November 29, 2006;
- \$795,000 on December 8, 2006;
- \$150,000 on December 11, 2006;
- \$35,000 on December 12, 2006;
- \$100,000 on December 14, 2006;
- \$100,000 on January 5, 2007;
- \$70,000 on January 26, 2007;
- \$70,000 on January 30, 2007;
- \$50,000 on February 2, 2007; and
- \$50,000 on February 5, 2007.

6. The bank records also show that TDM Cable Trust LLC 06 made the following transfers to an entity named MR Cranberry LLC:

- \$49,000 on February 13, 2007; and
- \$372,000 on March 23, 2007.

7. There was also a transfer of \$10,000 from TDM Cable Trust LLC 06 to TDM Verifier Trust 09 on January 8, 2009.

8. The M&T bank records of TDM Cable Trust 06 show the following transfers to a FEIN account:

- \$14,500 on 3/19/08;
- \$5,000 on 4/29/08; and
- \$20,000 on 12/1/08.

9. The M&T bank records of TDM Cable Trust 06 show the following deposits:

- \$50,000 from FIIN on 2/7/07;
- \$22,200 from MR Cranberry LLC on 3/1/07;
- \$25,000 from TAIN on 3/3/08;
- \$25,000 from FEIN on 3/10/08;

TDM Verifier Trust 07

10. Mercantile Bank records show several transfers by TDM Verifier Trust 07:

- \$872,000 to MR Cranberry LLC on June 4, 2007;
- \$145,000 to FAIN on June 15, 2007; and
- \$100,000 to TDM Verifier Trust 08 on February 14, 2008.

11. M&T Bank records show several transfers by TDM Verifier Trust 07:

- \$100,000 to TDM Verifier Trust 08 on 3/25/08;

- \$19,600 to TDM Verifier Trust 08 on 11/25/08; and
- \$75,000 to TDM Verifier Trust 08 on 4/1/09.

12. M&T Bank records show the following deposits into TDM Verifier Trust 07's

account:

- \$44,000 from McGinn Smith Transaction Funding on 5/15/08;
- \$76,500 from TDM Cable Financing LLC on 8/18/08;
- \$76,500 from TDM Verifier Trust 08 on 11/20/08;
- \$77,000 from McGinn Smith Transaction Funding on 2/17/09;
- \$49,000 from TAIN on 2/18/09;
- \$99,500 from TAIN on 2/19/09;
- \$50,000 from TDM Verifier Trust 08 on 4/2/09; and
- \$72,000 from McGinn Smith Transaction Funding on 5/15/09.

Firstline Sr. Trust 07

13. Mercantile Bank records show several transfers by Firstline Sr. Trust 07:

- \$594,000 to MR Cranberry LLC on 6/8/07;
- \$682,000 to FAIN on 6/15/07;
- \$124,000 to FAIN on 6/15/07;
- \$250,000 to MR Cranberry LLC on 6/22/07;
- \$760,000 to MR Cranberry LLC on 6/27/07;
- \$924,000 to MR Cranberry LLC on 8/1/07; and
- \$110,300 to MR Cranberry LLC on 8/7/07.

14. M&T Bank records also show a \$17,114.17 deposit from TDM Cable Financing LLC into Firstline Sr. Trust 07's account on 9/4/07.

TDM Luxury Cruise Trust 07

15. M&T Bank records show the following transfers from TDM Luxury Cruise Trust 07:

- \$84,000 to McGinn Smith Funding LLC on 4/4/08;
- \$89,000 to McGinn Smith Transaction Funding on 7/1/08;
- \$83,000 to TDM Verifier Trust 08 on 10/1/08;
- \$25,000 to Firstline Sr. Trust 07 on 12/1/08;
- \$839.57 to TDM Cable Funding LLC Trust 06 on 12/5/08;
- \$5,500 to TDMM Cable Sr. Trust 09 on 3/2/09;
- \$4,000 to Integrated Excellence Sr. Trust on 3/2/09;
- \$105,000 to Firstline Sr. Trust 07 on 3/31/09;
- \$10,000 to McGinn Smith Transaction Funding on 5/1/09;
- \$32,500 to TDM Verifier Trust 09 on 7/6/09;
- \$25,000 to TDM Verifier Trust 08 on 7/6/09;
- \$12,500 to Firstline Sr. Trust 07 on 7/6/09;
- \$27,000 to Firstline Sr. Trust 07 on 8/4/09;
- \$27,000 to TDMM Cable Sr. Trust 09 on 8/4/09;
- \$6,000 to MS Funding on 2/1/10; and
- \$1,565 to TDMM Cable Sr. Trust 09 on 3/4/10.

16. M&T Bank records show the following deposits into TDM Luxury Cruise Trust 07's account :

- \$90,000 from McGinn Smith Funding LLC on 3/5/08;
- \$45,000 from Integrated Excellence Jr. Trust on 8/29/08;
- \$68,000 from TDM Verifier Trust 07R on 6/4/09;
- \$27,000 from Firstline Sr. Trust 07 on 8/4/09; and
- \$77,000 from FIIN on 9/9/09.

Firstline Sr. Trust 07 Series B

17. Mercantile Bank records show the following transfers from Firstline Sr. Trust 07 Series B to McGinn Smith Funding:

- \$504,000 on 11/27/07;
- \$350,000 on 12/17/07;
- \$114,000 on 12/28/07; and
- \$215,000 on 2/1/08.

TDM Verifier Trust 08

18. Mercantile Bank records show the following transfers from TDM Verifier Trust 08:

- \$100,000 to Luxury Cruise Charter Inc. Payables on 1/29/08; and
- \$100,000 to TDM Verifier Trust 07 on 2/15/08.

19. Mercantile Bank records show the following deposits into TDM Verifier Trust 08's account:

- \$100,000 from TDM Verifier Trust 07 on 2/14/08;
- \$25,000 from FEIN on 3/21/08; and
- \$340.01 from TDM Verifier Trust 07 on 4/1/08.

Fortress Trust 08

20. M&T Bank records show the following transfers from Fortress Trust 08:

- \$45,000 to FIIN on 11/5/08; and
- \$1,400 to TDMM Cable Sr. Trust 09 on 10/1/09.

21. There was also a \$45,000 deposit from FIIN into Fortress Trust 08's account on 11/3/08.

TDMM Cable Jr. Trust 09

22. Mercantile Bank records show the following transfers from TDMM Cable Jr. Trust 09 to McGinn Smith Transaction Funding:

- \$15,000 on April 22, 2009;
- \$11,000 on April 24, 2009;
- \$60,000 on April 30, 2009;
- \$53,000 on May 1, 2009;
- \$27,000 on May 5, 2009;
- \$26,500 on May 15, 2009; and
- \$78,500 on July 2, 1009.

23. Bank records also show a transfer of \$34,000 from TDMM Cable Jr. Trust 09 to MR Cranberry LLC on April 30, 2009.

24. There was also a transfer of \$30,000 from TDMM Cable Jr. Trust 09 to Timothy McGinn on April 30, 2009.

25. On July 30, 2009, records show a transfer of \$175,000 from TDMM Cable Jr. Trust 09 to an account at National Financial Services in the name of Lynn Smith.

TDMM Cable Sr. Trust 09

26. M&T Bank records show the following transfers from TDMM Cable Sr. Trust 09:

- \$4,800 to Integrated Excellence Sr. Trust on 5/5/09;
- \$4,300 to TDMM Cable Jr. Trust 09 on 5/5/09;
- \$1,750 to TDMM Cable Jr. Trust 09 on 7/1/09;
- \$5,000 to Integrated Excellence Sr. Trust on 7/2/09;
- \$1,800 to TDMM Cable Jr. Trust 09 on 8/12/09;
- \$2,520.83 to TDMM Cable Jr. Trust 09 on 9/15/09;
- \$2,520.84 to TDMM Cable Jr. Trust 09 on 10/15/09;
- \$1,400 to Fortress Trust 08 on 10/26/09; and
- \$2,514.47 to TDMM Cable Jr. Trust 09 on 11/19/09.

27. M&T Bank records show the following deposits into TDMM Cable Sr. Trust 09's account:

- \$5,500 from TDM Luxury Cruise 07 on 3/2/09;
- \$12,146 from TDMM Cable Jr. Trust 09 on 7/2/09;
- \$27,000 from TDM Luxury Cruise 07 on 8/4/09;
- \$74,000 from FIIN on 9/9/09; and
- \$1,400 from Fortress Trust 08 on 10/1/09.

TDM Verifier Trust 07R

28. Mercantile Bank records show the following transfers from TDM Verifier Trust 07R:

- \$68,000 to TDM Luxury Cruise Trust on 6/4/09;
- \$67,000 to TDM Verifier Trust 08 on 7/6/09;
- \$67,000 to Firstline Sr. Trust on 8/4/09;
- \$25,000 to TDM Verifier Trust 08 on 8/11/09;
- \$52,000 to TDM Verifier Trust 08 on 10/5/09; and
- \$15,000 to TDM Verifier Trust 09 on 10/6/09.

29. M&T Bank records show the following deposit into TDM Verifier Trust 07R's account:

- \$67,437.50 from TDM Cable Funding LLC on 6/4/09.

Integrated Excellence Sr. Trust 08

30. Mercantile Bank records show the following transfers from Integrated Excellence Sr. Trust 08:

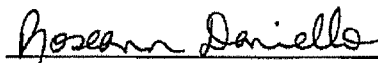
- \$755.68 to Fortress Trust 08 on 7/30/09; and
- \$166.66 to Integrated Excellence Jr. Trust on 10/1/09.

MR Cranberry LLC

31. Mercantile Bank records show a \$532,871 transfer from MR Cranberry LLC to FAIN on 8/10/07.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 19, 2010
New York, New York


Roseann Daniello

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. ____ ()

**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,**

Defendants, and

LYNN A. SMITH,

Relief Defendant.

DECLARATION OF LARA SHALOV MEHRABAN

I, Lara Shalov Mehraban, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney in the Enforcement Division of the New York Regional Office of the Securities and Exchange Commission ("Commission"). I have been employed with the Commission since September 2007. I make this declaration in support of the Commission's application for expedited relief against defendants McGinn Smith & Co., Inc. ("MS & Co."), McGinn Smith Advisors LLC ("MS Advisors"), McGinn Smith Capital Holdings LLC ("MS Capital"), First Advisory Income Notes, LLC ("FAIN"), First Excelsior Income Notes ("FEIN"), First

Independent Income Notes ("FIIN"), Third Albany Income Notes ("TAIN"), Timothy M. McGinn and David L. Smith, and relief defendant Lynn A. Smith, including imposing a receivership on the assets of the defendants and all of the other entities controlled by McGinn and/or Smith (collectively the "McGinn Smith Entities").

FIIN, FEIN, TAIN AND FAIN (THE "FUNDS")

2. Between September 2003 and October 2005, MS & Co. acted as the placement agent for four unregistered debt offerings by the Funds, raising a total of approximately \$106 million from approximately 150 to 300 investors. (App. Exs. 1 to 4 (Fund Private Placement Memoranda); Maya Decl. at ¶ 20.) MS Advisors held 100% of the membership interest in the Funds and was their sole managing member. MS Advisor also served as the investment advisor to the Funds.

3. The terms of the offerings by the Funds, as disclosed in their private placement memoranda ("PPMs"), are summarized below:

OFFERING	DATE OF PPM	AGGREGATE PRINCIPAL AMOUNT	TYPES OF NOTES SOLD
FIIN	Sept. 15, 2003 (App. Ex. 1)	\$20 million	5% Secured Senior Notes due 2004 7.5% Secured Senior Subordinated Notes due 2008 10.25% Secured Junior Notes due 2008
FEIN	Jan. 16, 2004 (App. Ex. 2)	\$20 million	5% Secured Senior Notes due 2005 7.5% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009
TAIN	Nov. 1, 2004 (App. Ex. 3)	\$30 million	5.75% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009

FAIN	Oct. 1, 2005 (App. Ex. 4)	\$20 million	6% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2010

4. According to the PPMs, each note holder was entitled to quarterly interest payments. The Secured Senior Subordinated and Secured Junior Note holders' rights to payments were subordinated to the rights of the Senior Secured Note holders.

5. The PPMs contain essentially identical disclosures, terms and conditions. They were prepared at Smith's direction and were reviewed and commented on by him. (App. Ex. 20, at 205.) The PPMs for the Funds describe the type of investments that would be acquired:

various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio (individually an "Investment" and collectively, the "Investments").

(App. Exs. 1 to 4, at 1.)

6. The PPMs do not authorize investments in entities affiliated with McGinn and Smith, and they do not disclose that investor funds will be used to invest in entities affiliated with McGinn and Smith. Instead, in the section entitled "Affiliated Transactions," the PPMs specifically state that the Funds may acquire "Investments" from affiliates that have already purchased such "Investments":

We may acquire Investments from our managing member or an affiliate of our managing member that has purchased the Investments. If the Investment is purchased from our managing member or any affiliate, we will not pay above the price paid by our managing member or such affiliate for the Investment, other than to reimburse our managing member or such affiliate for its costs and any discounts that it may have received by virtue of a special arrangement or relationship. In other words, if we

purchase an Investment from our managing member or any of its affiliates, we will pay the same price for the Investment that we would have paid if we had purchased the Investment directly. . . .

(App. Exs. 1 to 4, at 17.)

7. Although the PPMs include broad, generic disclosures about, among other things, the potential illiquidity of the notes, considerable fees, conflicts of interests and the risk of loss of the investment, the PPMs do not disclose that about half of the investments made by the Funds could (and eventually would) be in McGinn Smith Entities. (App. Exs. 34 to 38.)

8. The PPMs also represent that the Funds would invest in a wide range of investments. (App. Exs. 1 to 4, at 17.) This notion was reinforced in letters soliciting investors, such as a July 6, 2004 letter from a MS & Co. broker to a prospective investor, in which he wrote:

The [FEIN] Notes represent a basket of asset backed securities with substantial cash flow, a history of performance and limited liquidity in the marketplace. The portfolio includes securities from both the public and private sector. Asset classes consist of bonds, notes, preferred stock, leases, mortgages, limited partnerships, and securitized cash flow instruments. Our most active market of ideas comes from small private placements (\$25 - \$50 million) offered by investment banks primarily to institutional investors. We take comfort in these ideas due to the fact that these offerings are usually proceeded [sic] with substantial due diligence, scrutinized by product and industry professionals, and underwritten by top-tier investment banking firms with an ongoing capability to assist with additional capital if necessary. . . . I feel this investment is a great way for you to earn an attractive yield while minimizing risk.

App. Ex. 56.

9. Contrary to these representations, there does not appear to have been significant "due diligence," "scrutin[y] by product and industry professionals," or underwriting by "top-tier investment banking firms" for any of the investments made

by the Funds at any time. Moreover, the supposed "basket" of securities consisted in large part of promissory notes from MS & Co. affiliates that did not have "a history of performance," at least not good performance as implied by the phrase in the context in which it was used.

10. The PPMs also state that the notes were being offered only to "accredited investors." By MS & Co.'s own records, however, the Funds each had many unaccredited investors. According to MS & Co.'s records, as of March 20, 2006, FAIN had 30 unaccredited investors; FEIN had 46 unaccredited investors; FIIN had 31 unaccredited investors; and TAIN had 75 unaccredited investors. (App. Ex. 67, at 368.)

11. Moreover, several investors that I interviewed with another SEC staff attorney stated that MS & Co. did not provide them with a PPM prior to their investment. One investor told us that Smith steered him away from investing in blue chip stocks such as General Electric, as too risky, and told him that the MS & Co. private placements were safer.

12. The Funds are not registered as investment companies. Another SEC staff attorney performed an analysis of the Funds' assets to determine whether they were securities. She prepared a spreadsheet analyzing each of the Fund's investments. She looked at the documents underlying each investment. Based on this review, she determined that the Funds owned various types of securities in the form of notes, stock, and indebtedness. She concluded that, as of September 30, 2009, FIIN had 85% of its assets invested in securities, 88% of FAIN's assets were invested in securities, 67% of FEIN's assets were invested in securities, and 75% of TAIN's assets were invested in securities, based on the definition of "security" in the Investment Company Act. (Her

analysis is included in the Appendix at Exhibits 34 to 37.) I reviewed my colleague's analysis and the documents on which it was based.

13. Accordingly, as discussed in Section I.E of the accompanying Memorandum of Law, the Funds are investment companies, and should have registered as such.

THE TRUST OFFERINGS

14. Since November 2006, MS & Co. has created at least 18 trusts that have raised at least \$23 million. (App. Ex. 65.) Some trusts have conducted two offerings. MS Capital, or another McGinn Smith Entity, has been the trustee for each of these Trusts and MS & Co. has been the placement agent for each offering. The SEC staff has obtained PPMs for 13 of these offerings which are included in the Appendix at Exhibits 5 to 11 and 13 to 18.

15. Unlike the Fund offerings, which included very broad investment parameters, the Trust PPMs explained that each Trust was created for a highly specific purpose, *i.e.*, to purchase specific contracts and/or receivables related to long-term contracts for burglar alarm services or "triple play" (broadband, cable and phone) services, or the sale of luxury cruise cabins. (App. Exs. 5 to 11 and 13 to 18.)

16. Between 2006 and 2009, MS & Co. acted as placement agent for: four Firstline Jr. and Sr. Trust 07 offerings, TDM Cable Trust 06, TDM Luxury Cruise Trust 07, TDM Verifier Trust 07, TDM Verifier Trust 08, Cruise Charter Venture Trust 08, Fortress Trust 08, Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08, TDM Verifier Trust 09, TDMM Benchmark Trust 09, TDMM Cable Jr. and Sr. Trusts 09, TDM Verifier Trust 07R, and TDM Verifier Trust 08R.

17. Each of the Trusts issued one or more tranches of notes to investors. The notes promised interest rates ranging from 7.75% to 13% per annum, and stated that principal would be paid at the maturity date, which varied from about 18 months to about five years from the date of the offering.

18. According to the Trust PPMs, each Trust would use the funds raised in the offering (minus placement agent fees) to make a loan to another intermediary McGinn Smith Entity which would then use those funds (minus substantial additional fees) to purchase from a third entity contracts and/or receivables related to either alarm contracts, "triple play" (broadband, cable and phone service), or luxury cruise cabins. (E.g., App. Ex. 5, at 4.) McGinn, Smith and/or Matthew Rogers (a senior managing director at MS & Co. and frequent business partner of McGinn and Smith) sometimes also had an ownership interest in the third entity from which the assets were purchased. The Trusts were generally left no asset other than a loan to another McGinn Smith Entity and a purported "security" interest in the assets to be purchased by that entity. (*Id.*)

19. The Declarations of Trust obtained by the SEC staff typically defined "Permitted Investments" to mean a promissory note ("the Note") evidencing a loan from the Trust to the intermediary McGinn Smith Entity. In addition, to the extent not employed for that loan, the Declaration permitted temporary investments limited to (1) certificates of deposit; (2) regularly traded short-term AAA rated debt obligations; or (3) U.S. Treasury obligations. (E.g., App. Ex. 7, at Ex. A.)

20. MS & Co. extracted enormous up-front fees from the Trusts, some of which appear to be for dubious or non-existent services:

TDMM Cable 09

21. For example, in the January 2009 TDMM Cable 09 Trust offering, MS & Co. raised \$2,875,000, purportedly for the purchase of triple-play service contract receivables. (App. Exs. 14 and 15.) The TDMM Cable 09 PPMs state that, after the payment of \$183,500 in underwriting fees by the Trust, the Trust would loan the net proceeds to TDM Cable Funding, which would then pay MS & Co. an additional \$400,000 for “acquisition negotiations, legal and due diligence activities”—making MS & Co.’s total fee \$583,500, or 20.3% of the gross proceeds of the offering. (App. Ex. 14, at 1, 5; Ex. 15, at 1, 6.)

22. In addition to the hefty 20.3% fee provided by the PPM, MS & Co. actually took as “fees” even more funds raised in the offering for a total of at least \$1.64 million of the offering proceeds (which is nearly three times the amount of the disclosed fee). Instead of using the funds raised in the TDMM Cable 09 Trust offering for the purposes stated in the PPM, McGinn and Smith used the money raised from investors primarily to cover MS & Co.’s firm’s payroll during the first four months of 2009.

23. On January 30, 2009, for example, McGinn personally instructed his bankers to transfer \$475,000 from the Trust to TDM Cable Funding, and then to transfer \$413,000 from the TDM Cable Funding to MS & Co., where it was immediately used to cover the firm’s payroll. (App. Ex. 67, at 55.)

24. In February 2009, McGinn again instructed his bankers on two occasions to transfer large sums of money from a TDMM Cable 09 account to TDM Cable Funding and then to MS & Co. (App. Ex. 67, at 88, 112.) On the first occasion, the funds were

immediately used to pay MS & Co.'s mid-February payroll (App. Ex. 67, at 78.); and on the second occasion to make the end of February payroll.

25. The following months, McGinn again transferred substantial amounts from the TDMM Cable 09 Trust accounts to MS & Co. to cover the March 31 and April 30 payrolls. (App. Ex., 67 at 198, 222 and 224.)

26. Not all money misappropriated by MS & Co. from the TDMM Cable 09 accounts went to MS & Co. for payroll. McGinn also instructed his bankers to transfer a total of at least \$99,000 to McGinn's personal account; more than \$21,000 to McGinn's son Matthew (apparently a lawyer who worked for MS & Co.); more than \$105,000 to a MS & Co. affiliate called Mr. Cranberry; \$18,750 to politician John Faso's law firm; at least \$70,000 to MSTF; \$26,500 to Verifier 07, another Trust; \$10,000 to Firstline Trust; \$25,000 to Rogers; \$24,000 to Smith; and more than \$335,000 to Smith's wife, Lynn Smith. (App. Ex. 67, at 228, 232, 237, 249 and 267.)

TDMM Benchmark Trust 09

27. In the Benchmark 09 Trust, for example, the PPM disclosed that MS & Co. would receive a "selling commission" of 5.5%, an additional 1.5% "nonaccountable marketing allowance," and a 1% "wholesale" fee from the trust. The cover page of the PPM thus proclaimed that the fees paid by the Trust would be 8% of total sales. (App. Ex. 18.)

28. Although this representation implies that the total fees paid by investors to MS & Co. would not exceed 8%, the PPM later disclosed that MS & Co. would indirectly receive an additional 26% of the offering proceeds in fees before any investor funds were even invested. As the PPM states, the Trust would loan 92% of the offering fees (after

MS & Co.'s initial fees were taken out) to MS & Co. affiliate TDMM Cable Funding.

TDMM Cable Funding would then spend approximately "\$625,000 on "acquisition costs" (broken down in the PPM as \$75,000 for "legal," \$150,000 for "due diligence," and \$400,000 for "investment banking"). (*Id.*, at 8.)

29. Thus according to the PPM only about \$1,950,000 of the \$3 million raised would be used for investment. The other \$1,050,000 went directly to inflated fees for these dubious or non-existent services. The PPM further contained language stating that such fees may not be returned to the Trust even if the contemplated investment did not occur. (*Id.*, at 6.)

30. The Benchmark 09 Trust PPM further states that the certificates issued to investors would earn 10.5% interest per year, paid monthly, with the certificates due after five years. (App. Ex. 18, at 1.)

31. These exorbitant fees, and the high rate of return promised to investors, required the Benchmark 09 Trust to earn a fairly spectacular rate of return on its investments in order to honor its obligations to investors. McGinn, Smith, MS & Co., and MS Capital knew or should have known that the Trust would not be able to earn a sufficient return on its investments to pay interest to investors and return their principal.

Additional Misstatements in Trust PPMs

TDM Cable Trust 06

32. The PPM for TDM Cable Trust 06 is dated November 13, 2006. It states that the offering is for a maximum of \$3,550,000 in certificates, in 24-month and 48-month certificates, at 7.75% and 9.25% respectively. (App. Ex. 5)

33. The PPM states that TDM Cable Trust 06 “will advance funds to TDM Cable Funding, LLC,” and that TDM Cable Funding will use the “net proceeds from the Offering . . . to purchase the Preferred Return cash flow stream arising out of”: (1) the sale of cable TV, broadband internet, and fiber optic telephone services to homeowners in Cutler Cay and Keys Grove, Florida; and (2) “certain preferred payments received in connection with the purchase of the ADT Note.” (App. Ex. 5 at 4.)

34. The PPM does not disclose that the entities selling assets to TDM Cable 06 were also controlled by MS & Co. In addition, bank accounts of TDM Cable Trust 06 show several transfers of funds that appear contrary to the terms of the PPM, including transfers to FIIN, FEIN, TAIN, and other McGinn Smith Entities. (*See* Daniello Decl. at ¶¶ 5 to 9.)

TDM Verifier Trust 07

35. The PPM for the TDM Verifier Trust 07 is dated February 23, 2007. It states that the maximum offering amount is for \$3,475,000 in twelve- and twenty-four month certificates, receiving 8.25% and 9% interest, respectively. (App. Ex. 6.)

36. The PPM states that the Trust will advance funds to TDM Cable Funding LLC, which after fees, will be used to purchase “guaranteed payment units,” from Verifier Capital LLC. (*Id.* at 4.)

37. Bank accounts of TDM Verifier Trust 07 show several transfers of funds that appear contrary to the terms of the PPM, including transfers to FAIN and other McGinn Smith Entities. (*See* Daniello Decl. at ¶¶ 10 to 12.)

Firstline Sr. Trust 07

38. The PPM for Firstline Senior Trust 07 is dated May 19, 2007. The PPM states that the maximum offering amount is for \$1,850,000 in forty-month certificates, receiving 9.25% interest. (App. Ex. 7.)

39. The PPM states that the Trust will "apply the entire net proceeds of the Offering to the purchase of the Senior Tranche of Financing" secured by a portfolio of home alarm contracts owned by Firstline Security, Inc. (*Id.* at 4.)

40. A bank account of Firstline Sr. Trust shows several transfers of funds that appear contrary to the terms of the PPM, including transfers to FAIN and another McGinn Smith Entity. (*See* Daniello Decl. at ¶ 13.)

TDM Luxury Cruise Trust 07

41. The PPM for TDM Luxury Cruise 07 is dated July 16, 2007. The PPM states that the maximum offering amount will be \$3,630,000 of certificates due on September 1, 2011, paying 10% per year. (App. Ex. 8.)

42. The PPM further states that, after the payment of fees, the Trust will advance funds to TDM Cable Funding LLC, which in turn has purchased \$1,450,000 in a preferred interest in Luxury Cruises and has committed to made an additional capital contribution in Luxury Cruises of \$1,555,000. (*Id.* at 4.)

43. The bank records for TDM Luxury Cruise Trust 07 show several transfers of funds that appear contrary to the terms of the PPM, including transfers to various McGinn Smith Entities. (*See* Daniello Decl. at ¶¶ 15-16.)

Cruise Charter Ventures Trust 08

44. The PPM for Cruise Charter Ventures Trust 08, dated February 14, 2008, states that the maximum offering amount is \$3,250,000 in 13% certificates due March 1, 2010. The PPM states that “[t]he net proceeds from the Offering will be lent to [Cruise Charter Ventures LLC, or “CCV”] for the charter of the M/V Sapphire Princess and the sale, marketing and administrative expenses associated with selling 2,678 berths for the cruise.” (App. Ex. 11, at 4.)

45. The PPM did not disclose that Cruise Charter Ventures operated under the name YOLO (You Only Live Once) Cruises. The PPM did not disclose that YOLO Cruises is a sexually-oriented affinity group, that MS & Co. would procure strippers to entertain passengers, and that investor money would be used to, among other things, buy insurance for the strippers. (App. Ex. 67, at 82-84, 221.) The Cruise Charter Ventures LLC PPM, dated September 25, 2009, contains a somewhat more complete disclosure. (See App. Ex. 19, at 5.)

46. McGinn was the managing member of YOLO. He and other MS & Co. employees were heavily involved in the day-to-day operations of YOLO, and were well aware of the activities on the cruise. (App. Ex. 67, at 218.)

47. This venture apparently was unsuccessful. By June 30, 2009, CCV had lost \$1.5 million. (App. Ex. 25, at 60.)

ADDITIONAL OFFERINGS

48. During the same period that the Trusts were created, MS & Co. also acted as placement agent for at least nine other offerings, including a 2008 offering for newly created affiliate McGinn Smith Transaction Funding that raised \$6.87 million, and two

2008 offerings for Christian Values Network, that raised a total of \$3.51 million. PPMs for two of these offerings are included in the Appendix at Exhibits 12 and 19.

**MCGINN AND SMITH HAVE TAKEN LARGE
PERSONAL "LOANS" FROM VARIOUS MCGINN
SMITH ENTITIES AND FALSIFIED LOAN DOCUMENTS**

49. McGinn, Smith and Rogers frequently received substantial personal "loans" from McGinn Smith Entities. For example, between October 2006 and October 2009, TDM Cable Funding "loaned" McGinn \$830,341, Smith \$694,000 and Rogers \$563,000. (App. Ex. 53.) Smith testified that none of these loans have been repaid and no interest has been paid on the loans. (*See, e.g.*, App. Ex. 20, at 378, 381, 387.) Based on their testimony to FINRA, McGinn and Smith apparently believed that they were entitled to the money as compensation, and had no intention of paying the loans back. (App. Ex. 20, at 383-85 and App. Ex. 25, at 83 and 95-97.)

50. In particular, Smith admitted that he received a \$350,000 loan from TDM Cable Funding on October 2, 2006, and that McGinn and Rogers each received loans of approximately the same amount on or around the same date. (App. Ex. 20, at 384.) Smith testified that the loans were "accommodations" for the officers of the company for services performed. Smith admitted that other than his role as an equity owner of TDM Cable Funding, however, he did not personally perform any services to justify the loan he received. (*Id.*)

51. McGinn admitted in his testimony before FINRA that he and Smith each took a \$200,000 loan from the Firstline Trust. (App. Ex. 25, at 68.) Firstline Securities filed for bankruptcy a few months after the four Firstline offerings raised about \$7

million. According to McGinn, as of April 2009, Firstline Securities still owes the Firstline Trust \$5.9 million, but McGinn and Smith have not re-paid their loans. (*Id.*)

52. McGinn admitted during his FINRA testimony that several promissory notes were created and backdated in response to FINRA's request for documentation of the loans during its exam of MS & Co. (App. Ex. 24, at 171-180.)

53. MS & Co. also admitted to FINRA that, in 2008 and 2009, McGinn had authorized a number of additional personal loans, which were not evidenced by loan documentation. MS & Co.'s list of these loans is attached to the Appendix at Exhibit 54.

**MS & CO.'S FINANCIAL CONDITION
DETERIORATED AND THE SCHEME BEGAN TO UNRAVEL**

54. The Funds have lost money in each year of their existence and, at least since late 2007, have been insolvent. (App. Ex. at 33.)

55. It appears that shortly after inception, the Funds were not able to return principal to investors when notes became due. On December 21, 2006, an MS & Co. employee sent an email to Smith telling him that a TAIN investor wanted to redeem \$100,000 in TAIN notes due December 15, 2006 and purchase \$100,000 in one of the Trusts (TDM 9.25%). Smith replied to her that the broker "needs to replace the \$100,000 before doing the trade." He continued: "I am running on fumes with all of these redemptions and cannot afford any more. Please inform Andy [Guzzetti, MS & Co.'s head salesman]." (App. Ex. 67, at 9.) At the time of this email, the notes that Smith referred to as being "redeemed" were already a week past maturity. Other emails show investors being redeemed only when new investors are found to replace them. (E.g., App. Ex. 67, at 16, 92, 205 and 287.)

56. In January 2008, Smith sent a letter on behalf of MS Advisors to the Secured Junior Note holders in the Funds, stating that Funds had run into financial difficulty, and falsely placing blame for the Funds' difficulty on "the subprime crisis." The letter continued that the impact on the Funds of the subprime crisis was "primarily on liquidity" and that it is "unlikely" that the Funds would be able to retire the Secured Junior Notes at maturity. The letter stated that interest on the Secured Junior Notes was being reduced to 5% "until such a time as some of our investments return to a timely cash flow or we can refinance our debt or raise additional capital." The letter concluded that MS Advisors was "making a significant contribution to increasing the cash flow for all of the Funds by suspending the commissions due to [MS & Co. and MS Capital]." (App. Ex. 58.)

57. In April 2008, MS Advisors wrote to these investors again informing them that all of the problems cited in the January letter have "become more acute." The letter noted that, due to the fact that two of the Funds' investments had eliminated their dividends or ceased distributions, the Funds were "forced" to eliminate the interest payments to the holders of the Secured Junior Notes for this quarter. The letter noted that MS Advisors had been advised by counsel that "distributions at this time quite probably reflect a return of capital and not interest, and therefore distributions at this time might be considered an invasion of principal due to the Senior and Senior Subordinated Noteholders. This is a result of not knowing how and where to price our investments in these very illiquid markets." (Examples of these letters are attached to the Appendix as Exhibits 59 and 60.)

58. In October 2008, Smith sent a letter on behalf of MS Advisors to all classes of note holders in the Funds informing them that because of the “current condition of the financial credit markets” and “financial crisis,” MS Advisors had determined that the Funds were unable to retire the note due November 15, 2008 and would require a restructuring plan for all three classes of note holders. The plan extended the maturity dates and reduced interest payments for all the note tranches. The letter reiterated MS Advisor’s pledge to discontinue taking fees from the Funds, stating:

We understand that many of you have personal liquidity issue due to retirement or other financial needs and this plan may put a hardship on you. [MS Advisors and MS & Co.] will be making its own sacrifice. Management fees, commission, and administrative fees aggregate to approximately \$2,750,000 for all of our Funds that are part of the reorganization. In an effort to improve liquidity we have agreed to forfeit all such feature fees while this reorganization plan is in effect.

(App. Ex. 61.)

59. Audited financial statements for MS & Co. for 2008 show that the firm had a loss of more than \$1.8 million during that year. The audit includes a “going concern” clause. (App. Ex. 66.)

60. As reflected in the emails described below, as 2009 progressed, there was a growing desperation at McGinn Smith to make payroll, to assuage complaining investors, and to generally keep the house of cards from falling.

61. On January 5, 2009, Brian Cooper (a senior accountant at MS & Co.) sent McGinn an email entitled “good news,” that contained a list of “funding needs” and the “funds available” to meet those needs. There was about \$8,000 more in funds available than funds needed. (App. Ex. 67, at 28) The accounts containing funds often

did not belong to the entities needing funding. These funding availability/needs emails appear to have occurred at least weekly in 2009. (Some additional examples are included in the Appendix at Exhibit 67, at 53, 218, 219, 236, 240, and 270.)

62. On January 20, 2009, McGinn emailed MS & Co.'s head of sales, Andrew Guzzetti, "We will need to collect a minimum of 2 million by Jan 30." (App. Ex. 67, at 49.)

63. On February 10, 2009, in an email to McGinn, David Rees (MS & Co.'s CFO) wrote, "any possibility of receiving some of the remaining fees by Friday? Payroll is on the 13th. I would have paid it Monday the 16th, but that is a bank holiday." McGinn responded, "Sales are pretty slow. I may be able to do \$100,000, but that's all." (App. Ex. 67, at 78.)

64. On February 16, 2009, William Lex, a registered representative at MS & Co., emailed McGinn asking "Will the 2/15/09 TDM 07 redemptions be made to client accounts on 2/17/09." McGinn responded, "Depends on how much is collected on roll offering." (App. Ex. 67, at 89-90.) Lex replied: "Wrong answer." McGinn then responded: "Bill, what do you expect me to do?" And Lex replied: "Lend money to the TDM 07 until the new sales come in. If it were my deal, that is what I would do. Please don't think I'm being a smart ass. I am just desperate to keep some credibility with my clients so they will keep investing in McGinn, Smith & Co., Inc. products." (*Id.*)

65. On February 24, 2009, Smith emailed Livingston (a principal at MS & Co., who owned 20% of the holding company), with a copy to McGinn, "I am forwarding the Friday's payroll, which is approximately \$182,000. Dave [R]ees

informs me that we have \$75,000 of payables that can't be put off. We have approximately \$30,000 to meet the above. I really don't know how we are going to survive." (App. Ex. 67, at 97.)

66. A few hours later, Smith emailed Livingston telling him that he would have to instruct Rees to delete paychecks for McGinn, Livingston and himself, among others, and to pay no bills except health insurance. He then noted: "We have been living on the edge for some time, and Tim's deals have kept us alive by fronting our profit. However, the \$200,000+ that we are losing every month is just too difficult to keep pace with (App. Ex. 67, at 98.) (As described above, MS & Co. used the proceeds of the TDMM Cable 09 Trust offering to make this payroll.)

67. On February 25, 2009, Livingston emailed Smith, "In our many conversations over the last year, I came to understand the depths to which the firm has sunk relative to its revenue." (App. Ex. 67, at 99.) In a series of lengthy emails on March 2 & 3, 2009 email he elaborated, stating among other things, "Decisions have been made over the last year that I have had zero say in that I would rather not put in an email but put me at risk." (Emphasis added.) (App. Ex. 67, at 136-140.)

68. On February 27, 2009, Smith emailed Livingston discussing the difficulties facing McGinn Smith. He noted that he would be "working on solutions over the weekend, including plans for a cold calling group." He also noted that McGinn sent \$125,000 to McGinn Smith to cover payroll and shore up capital "but as we all know that is a temporary solution." (App. Ex. 67, at 114.)

69. On March 5, Rees emailed McGinn that another \$100,000 would be coming in from a new sale of TDM Verifier Trust 07 and asking McGinn for his "priority list" for who should be redeemed. (App. Ex. 67, at 148.)

70. On March 11, 2009 Smith emailed Livingston, "I am working from home today on how I am going to raise \$175m by Friday for MSC." (App. Ex. 67, at 171.)

71. On March 16 and 17, 2009, in an email discussion between Lex and Smith, with copies to McGinn and Guzzetti, regarding redemption on behalf of seven of his client of a total of \$125,000 in TDM Verifier 07 notes:

Lex wrote: "I believe if we don't get my clients redeemed immediately if not sooner, we could be facing regulatory complaints. I think making the redemptions happen is cheaper than dealing with complaints. Please advise that my clients will be redeemed today so I can communicate that fact to my clients."

Smith responded the next day: "It would be helpful if you could sell the \$125,000 worth of redemptions. We have not moved any of this product for weeks, which is causing the bottleneck. Do you have anything pending?"

Lex responded a few minutes later: "When the TDM was given to the sales force to sell about 20 months ago, we were not told that investors could only redeem if a new client took them out. My clients continue to ask me if they've bought into a Ponzi Scheme and I've tried to reassure them that that is not the case. This current situation is not helping me to build confidence with clients who have hundreds of thousands of dollars in McGinn, Smith Investments. I NEED TO HEAR BEFORE NOON TODAY THAT THESE CLIENTS ARE GOING TO BE REDEEMED THIS WEEK"

(App. Ex. 67, at 176-77) (underline emphasis added; capital emphasis in original).)

72. On March 16, Guzzetti sent an email saying that three of his clients “are making noise about their TDM Verifier Redemptions.” McGinn responded that he had sent one of the clients a partial payment the prior week. (App. Ex. 67, at 174.)

73. On March 27, 2009, Rees emailed McGinn, “any commission \$ available for McGinn, Smith? I believe we are owed about \$50K.” McGinn responded, “Don’t know yet. Depends on collections and where we stand on April 1 distributions. Does not look promising.” (App. Ex. 67, at 189)

74. On March 27, 2009, McGinn emailed Cooper in response to Cooper’s list of funding obligations and availability: “Will I get the rest of the analysis today? I need to know how much I can get from Verifier and TDM Luxury Cruise.” (App. Ex. 67, at 194.)

75. On April 7, 2009, in an email to McGinn, Smith and Guzzetti, Lex wrote, “I just got off the phone with [Investor] who has been calling for almost two months to get his TDM redemption. He is one of many people who refer to our deals as a Ponzi Scheme.” (App. Ex. 67, at 204 (emphasis added).)

76. On April 8, 2009, Lex wrote an email to Smith with copies to McGinn and Guzzetti that one of his clients should be redeemed out of TDM 07: “I purchased a \$10,000 note in my 401(K) on April 1, 2009 so that this elderly couple could be promptly redeemed.” Smith responded to Lex on the same day, “I am having [your clients] taken care of tomorrow. We have \$75,000 ticketed, but uncollected. I just did \$100,000 that should be processed by next Wednesday. \$30,000 of the ticketed has to go to Frank Chiappone as he sold the new notes. \$25,000 has to be allocated to another client who is making lots of noise. That leaves \$120,000 available to take care of your

remaining [clients who are owed] \$105,000, assuming noone else has a critical situation.” (App. Ex. 67, at 205.)

77. On May 24, 2009, Shea wrote McGinn and Smith that they would just be able to cover payroll “but it is very tight.” He continued: “We will need a cash infusion next week to cover certain expenses including last month’s health care. We need to address the rent situation as well.” (App. Ex. 67, at 229.)

78. On June 5, 2009, Smith personally loaned McGinn Smith \$366,000. (App. Ex. 67, at 266.)

79. In another email, dated July 15, 2009, Lex emailed Guzzetti, with copies to McGinn and Smith, asking: “When will you be redeeming the \$25,000 TDM Verifier note for [certain investors]? [One of these investors] renewed his \$75,000 note and I don’t want to be embarrassed and have him lose confidence in the McGinn Smith deals. He is a candidate for more investments unless he loses confidence. He invested in his alarm deal and renewed this investment despite having \$300,000 tied up in FIIN, TAIN and FAIN (\$100,000 in each). LETS NOT BLOW IT. WE NEED TO MAINTAIN INVESTOR CONFIDENCE IN MCGINN SMITH DEALS!!!!!!!!!!!!!!” (App. Ex. 67, at 263 (emphasis in original).)

80. On August 11, 2009, Cooper emailed Smith to ask him to approve a \$25,000 redemption out of TDM Verifier 08r. He proposed that the funds would come out of TDM Verifier 07r’s account (which had a balance of \$66,106) and noted that a broker had a \$50,000 commitment “scheduled to come in Mid Augusts that can be used to return the \$25,000 to the 07r account.” (App. Ex. 67, at 271.)

81. On November 2, 2009, Smith emailed McGinn: "The following people will not be paid today" for a total of just over \$43,000. Included in the list are McGinn, Smith and Mathew Rogers, among others. (App. Ex. 67, at 320.)

82. On December 14, 2009, Cooper emailed McGinn and Smith with charts of bank balances and overdue interest payments. One chart showed interest payments that were due on November 1, and December 1, 2009 to investors in six entities totaling \$320,000. The bank accounts for those entities held only about \$27,000. (App. Ex. 67, at 3636-64.)

THE SCHEME APPEARS TO BE ONGOING

83. Notwithstanding these financial woes, MS & Co. continued to solicit investors for the Funds and the existing Trusts, as well as new Trusts and other entities throughout 2009.

84. It appears that MS & Co. used the original PPMs for these sales. The final known investor in the Funds, who purchased FEIN notes on April 28, 2009, received an email containing the 2004 PPM for FEIN. The 2004 FEIN PPM did not include any disclosures about the current financial condition of FEIN, including the fact that the Junior noteholders would not be paid interest that quarter.

85. As another example, in September 2009, a MS & Co. broker emailed McGinn and asked whether there were any material changes in the TDMM Cable 11% notes that had been originally offered in the beginning of 2009. McGinn replied, "No." (App. Ex. 67, at 291.)

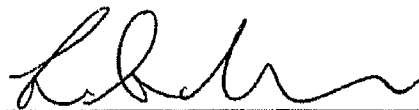
86. MS & Co. appears to have been continuing to raise funds for the McGinn Smith Entities as late as December 2009. In a December 10, 2009 email, for

example, McGinn notes that he sold \$125,000 of the Benchmark 09 Trust. (App. Ex. 67, at 354.)

87. Given the cash flow problems of the Funds and the Trust, as well as the other McGinn Smith Entities, it is likely that any new investor funds are also being used to continue the defendants' fraudulent scheme.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York
April 19, 2010

A handwritten signature in black ink, appearing to read 'Lara Shalov Mehraban', is written over a horizontal line.

Lara Shalov Mehraban

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

10 Civ. ____ ()

**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,**

Defendants, and

LYNN A. SMITH,

Relief Defendant.

DECLARATION OF ISRAEL MAYA

I, Israel Maya, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Staff Accountant in the Broker-Dealer Inspection Program at the New York Regional Office of the Securities and Exchange Commission, and have been employed by the Commission since August 2003. My duties include conducting examinations of registered broker-dealers as well as to assist the Commission's Division of Enforcement. This declaration is in support of the Commission's Emergency Application for a Temporary Restraining Order, Preliminary Injunction, Expedited Hearing and Other Relief.

2. I received a B.S. in Accounting from Brooklyn College in 1978. Prior to coming to work at the Commission in 2003, I had 25 years of experience in the accounting, financial

services and brokerage industries, and I worked as an examiner at several regulatory agencies and as a controller and chief financial officer.

3. This declaration is based on my personal knowledge, information and belief. Among the sources of my information and the bases of my belief are documents obtained and reviewed by the Commission staff, including records obtained by subpoena from several banks that maintain accounts for certain defendants and entities affiliated with the defendants, including monthly account statements, transfer records, opening documents. I have also reviewed records and other documents obtained from the Financial Industry Regulatory Authority ("FINRA"), which conducted an investigation of the McGinn and Smith and entities they control. In addition, I reviewed transcripts of testimony of McGinn, Smith and others taken by FINRA.

4. The records from FINRA include 35 Quicken files for various entities. Quicken is an accounting software where income and expenses are posted to generate financial reports, such as balance sheets, income statements, and source and uses of funds. It has the capabilities to convert data in Excel and Adobe Reader format or PDF. Financial reports may be generated for various time periods. It appears that many of the entities controlled by McGinn and Smith used Quicken software. The Quicken files I reviewed were obtained by FINRA during FINRA's investigation of McGinn Smith, and were provided to the staff of the Commission. To facilitate my analysis, I converted these Quicken files into Excel spreadsheets.

5. This declaration is submitted for the purpose of supporting the Commission's motion for expedited relief. I have not set forth each and every fact that I know about the events and occurrences referred herein. To the extent that there are assertions herein concerning dates and numbers, they are approximate based upon information and evidence gathered to date.

DEFENDANTS

6. **Timothy M. McGinn ("McGinn")**, age 62, is a resident of Schenectady, New York. McGinn is licensed as a registered representative and hold the following securities licenses: Series 4; Series 24; Series 51(Municipal Fund Securities Principal); Series 53 (Municipal Securities Principal); Series 63 (Uniform Securities Agent State Law). App. Ex. 27 (copy of FINRA's Central Registration Depository ("CRD") for McGinn).

7. **David L. Smith ("Smith")**, age 65, is a resident of Saratoga Springs, New York. Smith is licensed as a registered representative and holds the following securities licenses: Series 4 (Registered Options Principal); Series 7 (General Securities Representative); Series 24 (General Securities Principal, and Financial) and Series 27 (Operational Principal). App. Ex. 26 (CRD).

8. **McGinn, Smith & Co., Inc. ("MS & Co.")**, a New York corporation with its principal place of business in Albany, NY, has been a registered broker-dealer since 1980. App. Ex. 28 (CRD). MS & Co. is owned by Smith (50%), McGinn (30%) and Livingston (20%), and has been the placement agent for many securities offerings, including the FIIN, FAIN, FEIN and TAIN offerings. On April 20, 2009, MS & Co. registered as an investment advisor with the Commission, making it a dual registrant for the period between April 20, 2009 and December 24, 2009, when the broker dealer ceased operations and filed a partial Form BDW (Broker Dealer Withdrawal) with the Commission.

9. **McGinn, Smith Advisors LLC ("MS Advisors")** is a New York corporation with its principal place of business in Albany, New York. MS Advisors is owned by Smith (50%), McGinn (30%) and Livingston (20%). MS Advisors, the investment adviser to the FIIN, FAIN,

FEIN and TAIN offerings, was registered as an investment advisor with the Commission from January 3, 2006 to April 24, 2009. App. Ex. 29.

10. **McGinn, Smith Capital Holdings Corp. ("MS Capital")** is a New York corporation with its principal place of business in Albany, NY. MS Capital is owned by MS Holdings (52%), Smith (24%) and McGinn (24%). MS Capital is the trustee for all three tranches of the FIIN, FAIN, FEIN and TAIN offerings.

11. **First Advisory Income Notes, LLC ("FAIN")**, a New York limited liability company owned by MS Advisors, is located at 99 Pine Street, Albany, NY. App. Ex. 4.

12. **First Excelsior Income Notes, LLC ("FEIN")**, a New York limited liability company owned by MS Advisors, is located at 99 Pine Street, Albany, NY. App. Ex. 2.

13. **First Investment Income Notes ("FIIN")**, a New York limited liability company owned by MS Advisors, is located at 99 Pine Street, Albany, NY. App. Ex. 1.

14. **Third Albany Income Notes, LLC ("TAIN")**, a New York limited liability company owned by MS Advisors, is located at 99 Pine Street, Albany, NY. App. Ex. 3.

RELIEF DEFENDANT

15. Lynn A. Smith is the wife of David Smith.

THE FOUR FUNDS NOTE OFFERINGS

16. The FIIN PPM, dated September 15, 2003, states that the offering was for \$20 million and that three types of notes were offered: 5% secured senior notes due in 2004; 7.5% senior secured subordinated notes due in 2008; and 10.25% secured junior notes due in 2008. App. Ex. 1.

17. The FEIN PPM, dated January 16, 2004, states that the offering was for \$20 million and offered three types of notes: 5% secured senior notes due in 2005; 7.5% secured senior subordinated notes due in 2007; and 10.25% secured junior notes due in 2009. App. Ex. 2.

18. The TAIN PPM, dated November 1, 2004, states that the offering was for \$30 million and offered three types of notes: 5.75% secured senior notes due in 2005; 7.75% secured senior subordinated notes due in 2007; and 10.25% secured junior notes due in 2009. App. Ex. 3.

19. The FAIN PPM, dated October 1, 2005, states that the offering was for \$20 million and offered three types of notes: 6% secured senior notes due in 2006; 7.75% secured senior subordinated notes due in 2008; and 10.25% secured junior notes due in 2010. App. Ex. 4.

20. As of October 9, 2009, according to the staff's analysis, FIIN had 183 investors, FAIN had 207 investors, FEIN had 242 investors and TAIN had 279 investors. *See also* Exhibit 30 (email to Smith dated February 12, 2008, listing numbers of "families" and "investments" in each of the Four Funds).

21. Using the Quicken records for FIIN, FAIN, FEIN and TAIN, I prepared a summary of assets, liabilities and ownership equities for all Four Funds. App. Ex. 31. This summary chart shows that the Four Funds raised a total of \$106,941,500 from investors since 2003. App. Ex. 31. The Funds have returned a total of \$23,137,500 to investors in redemptions, sales, cancels and payouts. App. Ex. 31.

22. The Funds' principal obligation to investors as of September 30, 2009 is \$83,804,000. As of September 30, 2009, the Funds had a total of \$475,974.57 in cash in its bank accounts. App. Ex. 31.

23. I have analyzed the assets and liabilities of the Four Funds. The Funds liabilities have exceeded its assets from the initial FIIN offering in 2003. From December 2003 through September 2009, moreover, the gap between the Funds' equity and the amount due to investors has grown considerably. I prepared a chart showing the widening gap between the Four Funds between 2003 and 2009. App. Ex. 32.

24. Using the Quicken records, I generated a consolidated income statement for the Four Funds. The income statement shows that from December 31, 2003 through September 30, 2009, the Four Funds had a total income of \$12,963,768.49. App. Ex. 33. During this period, the Four Funds spent a total of \$37,031,137.20. *Id.* Accordingly, the Four Funds had a total loss from operations of \$24,067,368.71. *Id.*

25. I also generated balance sheets for each of the Four Funds. See App. Exhs. 34 (FIIN); 35 (FEIN); 36 (TAIN); and 37 (FAIN). In addition, I generated a consolidated balance sheet for the Four Funds. App. Ex. 38.

26. The balance sheets set forth the percentage of investments with entities affiliated with McGinn, Smith or entities they control. App. Ex. 38. The percentage of investments increased over time. As of year end 2003, it appears that 21% of investments were with affiliates. The percentage appears to have increased to 35% (2004), 39% (2005), 45% (2006), 47% (2007) and 47% (2008). As of September 30, 2009, the percentage of investments with affiliates increased to 48.8%. App. Ex. 38.

27. The investments by the Four Funds that were not with affiliates were for the most part with nonpublic entities. Based on the Funds' records, only \$3.6 million appears to have been invested in liquid, publicly traded investments; however, my review of these publicly traded investments revealed that the actual market value was just \$1.5 million as of September

30, 2009. Due to the absence of a quoted market and the illiquidity of the remaining investments, I was not able to determine a valuation for the remaining assets.

28. The Quicken records value that the assets held by the Four Funds were carried at a book value of \$69,785,312.63 as of September 30, 2009. However, the actual value of the portfolio was far less, because the portfolio consisted almost entirely of investments in nonpublic companies, about half of which were affiliated with McGinn, Smith, or entities they controlled. The significant overvaluation is acknowledged in an e-mail sent to David Smith on December 2, 2007 by MS & Co.'s chief financial officer, David Rees. App. Ex. 67, at 10-15. The Rees e-mail contrasts the "book value" of the portfolio with the "net realizable" value. Rees concludes that the book value at the time (\$69,384,870) is \$32 million greater than what he stated was the net realizable value (\$37,160,299). *Id.*

29. Many of the remaining assets have incorrect valuations. For instance, on a consolidated basis as of September 30, 2009, FIIN, FAIN, FEIN and TAIN list asset values of \$6.2 million in Palisades Entertainment; \$2 million in an investment titled GSC Capital Corp.; and \$1.2 million is attributed to an investment in CCI Group, Inc. The Quicken records, however, show no cash flow from Palisades since December 27, 2006, no cash flow attributable to the GSC Capital Corp. since May 27, 2007 and no cash flow from CCI Group since November 30, 2008. My research also disclosed that Asset Holding Corp. (formerly known as GSC Capital Corp.) filed for bankruptcy on June 30, 2009 and CCI Group declared bankruptcy on September 27, 2007.

30. My analysis of the September 30, 2009 Quicken balance sheets for FIIN, FAIN, FEIN and TAIN show that \$26 million of the outstanding \$46 million in loans (or 56%), were to entities affiliated with McGinn and Smith or entities they control. The same analysis also

showed that 88% of outstanding loans appear to be non-performing since they have not paid principal or interest for at least six months and in some instances since inception. App. Ex. 40 (loan analysis of Four Funds).

31. My analysis discloses a pattern of monetary transfers of funds, coded as "investments" on the firm's Quicken records, between FIIN, FAIN, FEIN and TAIN and the other affiliated entities. Many of these "investments" appear to be interest free loans, which appear to have been made simply to provide cash to an affiliated entity for the purpose of satisfying a specific need, such as a pending investor redemption and pending investor interest payments. Smith and McGinn often signed the transaction documents on behalf of both parties, as in a promissory note for \$300,000 dated February 9, 2008 between FAIN and 107th Associates. App. Ex. 55. The notes were signed by McGinn, on behalf of 107th Associates, LLC, as Managing Member of 107th Associates, LLC. McGinn owns 30% of 107th Associates, LLC. The \$300,000 was used by 107th Associates to finance CMS Financial, a company of which Smith is the Chairman of the Board and McGinn is the Vice Chairman of the Board. As of December 31, 2007, FAIN had invested \$3.1 million in Coventry Resources Corp. (a/k/a CMS Financial).

32. I also conducted an analysis of sources and uses of funds for the period ended September 30, 2009. The source and use of funds statements (App. Ex. 41) generated from Quicken records shows the sources of money received by the Funds and how the money was used. As of September 30, 2009, FIIN, FAIN, FEIN and TAIN had \$222.4 million deposited into their bank accounts. This amount includes funds received from investors (\$107 million), funds returned from investments (\$40.8), loans received from affiliated entities (\$15 million), and income (\$12.9 million).

33. As of the same date, FIIN, FAIN, FEIN and TAIN had \$221.9 million in disbursements. The "Uses of Funds" include how the monies were used, such as money used to redeem investors' notes (\$23 million), pay interest expenses (\$26 million), funds used for investments and loans to affiliated entities (\$54.8 million), and make other investments (\$59.8 million). The net of all the sources and uses of monies is the cash balance of \$475,974.57 remaining in the Fund's bank accounts, as of September 30, 2009. See App. Exhs. 33, 41 (showing sources and used of funds for the Four Funds combined).

34. Despite the deteriorating condition of the Four Funds, and despite sending out several letters in 2008 notifying investors of events of default (App. Exs. 58-62), Smith and McGinn and their sales force continued to sell interests in FIIN, FAIN, FEIN and TAIN to new investors at par value. During 2008 and 2009, the Four Funds raised, or rolled over, an additional \$3.6 million from investors. App. Ex. 39.

VERIFIER 08 OFFERING

35. In addition to the Four Funds, McGinn and Smith since 2003 engaged in two dozen investment banking transactions. App. Ex. 42.

36. In about December 2007, McGinn Smith initiated an offering for Verifier08, which offered up to \$3.85 million in 18-month notes and 36-month notes, with returns of 8.5% and 10%, respectively. App. Ex. 10.

37. The Verifier 08 PPM stated that "the net proceeds from the Offering will be lent by the Trust Fund to MS Funding for the purpose of purchasing \$3,000,000 face value of Guaranteed Payment Units issued by the Verifier Capital LLC." App. Ex. 10, at 4-6.

38. McGinn Smith also represented to Verifier08 investors in the Verifier08 "Declaration of Trust" that any unused funds above the \$3 million used to purchase guaranteed

payment units ("GPUs") would only be invested in the most conservative manner. Specifically, the Declaration of Trust states that, to the extent any funds are not employed for the purposes of the loan to MS Funding, the funds may be used for "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 face [sic] and credit' of the United States." App. Ex. 10 (Exhibit "A").

39. However, funds were used to make loans to other entities controlled by McGinn and Smith. For example, the trustee transferred \$100,000 from Verifier 08 to Luxury Cruise Center Inc., a Florida corporation affiliated with Cruise Charter Ventures LLC, an entity owned by M & S Partners which organizes and markets "lifestyle" cruises for couples and single women. App. Ex. 19. McGinn is the managing member of Cruise Charter Ventures, which also does business as YOLO (You Only Live Once) Cruises. App. Ex. 44.

40. Verifier 08 does not appear to have received any return on its \$3 million investment in GPUs. Verifier08's only source of funds, other than Verifier08 investors, has been loans from other entities controlled by Smith and McGinn. In fact, the vast majority of the interest payments (totaling \$591,000) made to Verifier08 investors was funded by loans from other entities controlled by McGinn and Smith. App. Ex. 45.

41. Some of the payments made to Verifier08 investors as "interest" were actually a return of investor capital. For example, on February 15, 2008, Verifier08 transferred \$100,000 (of the money raised from investors) from its escrow account to another affiliated Entity, TDM Verifier Trust 07. On March 27, 2008, TDM Verifier Trust 07 returned these funds to Verifier 08's operating account (without any payment of interest). At the time of this deposit the

Verifier08 operating account had a zero balance, and no other funds were deposited into that account until April 15, 2008. Nonetheless, the Quicken records reflect that, between April 1, 2008 and April 11, 2008, approximately \$51,000 was used to make initial interest payments to the Verifier08 noteholders. Thus, unbeknownst to these noteholders, their interest payments were funded not by any return on an underlying investment, but by the return of a portion of the funds they had invested. App. Ex. 46.

42. Verifier 08 used new investor funds to redeem prior investors. I reviewed TDM Verifier Trust 08's escrow account bank statement at Mercantile Bank for July 2009 and saw that six certain investors deposited a total of \$225,000 (\$50,000, \$15,000, \$10,000, \$100,000, \$40,000 and \$10,000) into the account. I confirmed that the liability, "Due to Investors", increased on the Quicken records and that these deposits reflected new investor funds.

43. On July 28, 2009, \$184,500 was transferred from TDM Verifier Trust 08's Mercantile Bank to M&T Bank in Albany. On July 29, 2009, \$130,000 was transferred to National Financial Services ("NFS"), the financial institution that clears transactions for MS & Co. and their clients. The next business day, on July 30, 2009, an additional \$2,762.50 was transferred from M&T Bank to NFS. I reviewed NFS's securities receipts journals for July 30, 2009 and observed that NFS received TDM Verifier Trust 08 notes (Cusip-Number 872998MCO) for four different investors, for \$130,000 (\$10,000, \$40,000, \$45,000, and \$35,000).

44. I also reviewed the brokerage statements prepared by NFS for these four individuals. Each individual was a client of MS & Co. and each redeemed their previously purchased TDM Verifier08 notes on July 30, 2009. I verified that the redemption amount agreed to the amounts indicated on TDM Verifier Trust 08 Quicken records. The redemptions totaled

\$130,000 in principal plus \$2,762.50 in interest. App. Ex. 47. My review of the TDM Verifier Trust 08 cash balance during the relevant period showed that without the \$225,000 in deposits from the six new investors, there would not have been sufficient funds to redeem the earlier four investors.

TDM CABLE FUNDING LLC

45. The staff also identified a series of transactions which enriched Smith, McGinn and Rogers. TDM Cable Funding LLC borrowed funds from and used the borrowed funds to make payments to other McGinn Affiliated Entities and to make favorable loans to McGinn, Smith and Rogers.

46. On September 29, 2006, FIIN loaned TDM Cable Funding LLC ("TDM Cable") \$2,625,000. TDM Cable is an affiliate controlled by McGinn, Smith, and Rogers. According to information provided by MS & Co. to FINRA, TDM Cable Funding was formed "to purchase certain assets associated with private operated cable systems (POCs) providing cable TV, internet access, telephones, and security alarm systems to homeowners associations generally in gated communities." App. Ex. 48. Prior to the loan, TDM Cable's bank account had a zero balance. Immediately after receiving the \$2,625,000 from FIIN, according to the Quicken records, TDM Cable paid a \$275,000 underwriting fee to MS & Co., loaned more than \$352,000 to McGinn, loaned \$350,000 to Smith and loaned another \$350,000 to Rogers. According to the terms of these three loans, McGinn, Smith and Rogers had to pay only 3% interest and no interest or principal was due until October 2012. App. Ex. 49.

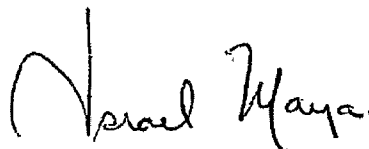
47. Following these initial loans, Smith, McGinn and Rogers continued to take loans from TDM Cable Funding. In total, Smith received \$694,000, McGinn received \$830,000 and Rogers received \$563,000. App. Exs. 49-50. Despite the terms of the loans, my review of the

Quicken records revealed no interest has accrued on these loans nor has TDM Cable Funding received any repayments since the loans were issued.

48. Although the FIIN note was repaid by TDM Cable Funding, the loans to the individuals have not been repaid to TDM Cable Funding. *See* App. Ex. 40 (summarizing loans to McGinn and Smith). In addition, according to his testimony provided to FINRA, Smith stated that he received \$600,000 from TDM Cable as a loan for payment as an officer. App. Ex. 23 at 1045.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 19, 2010
New York, New York

A handwritten signature in cursive script, appearing to read "Israel Maya", is written above a horizontal line.

Israel Maya

EXHIBIT I

1 BEFORE THE FINANCIAL INDUSTRY

2 REGULATORY AUTHORITY

3

4 -----

5 In the Matter of

6 MCGINN SMITH & COMPANY

7 20090179845

8 -----

9

10

11 VOLUME III

12 INVESTIGATIVE TESTIMONY OF

13 DAVID SMITH

14 WOODBRIDGE, NEW JERSEY

15 FEBRUARY 3, 2010

16

17

18

19

20 ATKINSON-BAKER, INC.

21 COURT REPORTERS

22 Telephone: 1-800-288-3376

23 Website: www.depo.com

24 REPORTED BY: S. ARIELLE SANTOS, RPR, CSR, CLR

25 FILE NO.: A400C31

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1	BEFORE THE FINANCIAL INDUSTRY	1	
2	REGULATORY AUTHORITY	2	EXAMINATIONS
3		3	
4	-----	4	Witness Page
5	In the Matter of	5	DAVID SMITH
6	MCGINN SMITH & COMPANY	6	BY MR. NEWMAN 790
7	20090179845	7	BY MR. RATTINER 804
8	-----	8	BY MR. NEWMAN 849
9		9	BY MR. RATTINER 850
10	Continued Investigative testimony of DAVID SMITH,	10	BY MR. ROWEN 885
11	taken at FINRA, 581 Main Street, 7th Floor, Woodbridge, New	11	BY MR. RATTINER 889
12	Jersey, on February 3, 2010, commencing at 9:30 a.m.	12	
13		13	
14		14	EXHIBITS - RETAINED
15		15	
16		16	Exhibit Page
17		17	Exhibit 22, private placement memorandum for 861
18		18	First Independent Income Notes, Bates
19		19	MGS 0014648 through MGS 0014691
20		20	
21		21	
22		22	
23		23	
24		24	
25		25	
	Page 787		Page 789
1	APPEARANCES:	1	DAVID SMITH
2		2	DAVID SMITH, Having been previously sworn, Continues to
3	BY - CHRISTOPHER RATTINER	3	testify:
4	BY - STEVEN ROWEN	4	
5	BY - MICHAEL NEWMAN	5	EXAMINATION
6	BY - GARY JAGGS	6	BY MR. NEWMAN:
7	BY - MICHAEL PAULSEN	7	Q Back on the record.
8	BY - REBECCA SMITH	8	Mr. Smith is here for the
9	BY - ROBERT MCCARTHY	9	continuation of his testimony that we started a
10	FINRA	10	couple of days ago.
11	581 Main Street, 7th Floor	11	Is there any -- are there any issues,
12	Woodbridge, New Jersey 07095	12	loose ends we need to discuss before we start the
13	Representing FINRA.	13	examination?
14		14	A Don't have any.
15	BY - DAVID FRANCESKI, JR., ESQ.	15	Q Okay. Couple of things I want to go
16	STRADLEY, RONON, STEVENS & YOUNG LLP	16	over from the last couple of days. The first thing
17	2600 One Commerce Square	17	is, there was a reference to an upcoming arbitration
18	Philadelphia, Pennsylvania 19103	18	or trial that you are involved with.
19	Tel: 215-564-8000	19	A Yes.
20	Representing Witness.	20	Q Can you explain what that is?
21		21	A I will do my best. It's a bit of a
22	ALSO PRESENT:	22	bizarre theory of law, but I guess that's what we all
23	JOSEPH CARR	23	seek to remedy.
24		24	Sometime ago, certainly within, I
25		25	think it was 2009, we received a -- I guess a
	Page 788		Page 790

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1 DAVID SMITH
2 complaint or suit, whatever, from the Bankruptcy
3 Court of CCI, which is Caribbean Club. That's an
4 investment that you have seen in the LLCs. And
5 Caribbean Club was a development project in the
6 Caribbean, as the name implies. It was headed by an
7 investment banker and broker by the name of Mark
8 Casolo. I will try to make this short. Casolo moved
9 on in '05, continued with that project and --
10 MR. FRANCESKI: "Moved on"
11 meaning?
12 THE WITNESS: Moved on to
13 another brokerage firm. Excuse me.
14 Transferred his license to a firm by the
15 name of Westrock Securities. And
16 somewhere after leaving us, joining
17 Westrock, I am thinking '07, basically
18 after a series of finances and what have
19 you, it went into bankruptcy.
20 Bankruptcy trustee is -- I
21 guess the best way I can describe it is
22 he's attempting to recover the placement
23 fees that McGinn Smith received in
24 raising some capital on the theory that
25 Casolo, who well after the placement

Page 791

1 DAVID SMITH
2 BY MR. NEWMAN:
3 Q Is there another arbitration you're
4 participating in?
5 A There's an arbitration scheduled for
6 March 1st.
7 Q Who is the customer?
8 A [REDACTED]
9 Q [REDACTED] was an investigator in
10 the LLC investments?
11 A I think he has some LLCs. The bulk
12 of his dollars that I think the complaint revolves
13 around is in the CCI with Casolo. Casolo was his
14 broker. And they had a number of private placements.
15 The LLCs were to some degree, but I think most of the
16 money and most of the complaint revolves around CCI.
17 Q Do you have anything else scheduled
18 in the way of upcoming hearings or arbitrations?
19 A No. Between now and March 1st, you
20 mean?
21 Q In the next six months?
22 A In the next six months, yeah, um,
23 there's -- there is one in May. I think there's
24 literally one in every month. There is one in May,
25 there is one in June, I think July. There's about

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1 DAVID SMITH
2 took place, in an effort to basically
3 right the ship or give more guidance to
4 it, was appointed an officer and
5 chairman of the board.
6 And the theory in the
7 bankruptcy court is, I guess, that he
8 was then in a dual role, and so that any
9 -- so that he should have been raising
10 the capital and not McGinn Smith. The
11 fact is McGinn Smith had already raised
12 it, been sold by brokers, they were paid
13 commissions and the court is now
14 attempting to lay a claim to those
15 commissions, so...
16 Doesn't seem to have much
17 logic to me, but then again that's where
18 we are at. They've come back. I think
19 they started out with some -- Joe could
20 maybe help me, but about 700,000,
21 they've offered to settle for, I think,
22 three times in the last month. So that
23 will suggest their case isn't that good.
24 But I believe it is scheduled for
25 somewhere around the 20th of this month.

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1 DAVID SMITH
2 eight arbitrations out there. And I think they have
3 scheduled maybe three or four.
4 Q Are those the arbitrations that you
5 referred to on Monday that have been filed by the
6 attorney in Albany?
7 A Yes.
8 Q Tim O'Connor?
9 A Tim O'Connor, yes.
10 Q Your personal bank accounts -- you
11 said M&T Bank is where you maintain your personal
12 account?
13 A That is correct.
14 Q How long have you maintained an
15 account at M&T?
16 A M&T and its predecessor, which was
17 Union National Bank, I think as long as I've been
18 downtown with McGinn Smith, which would probably be,
19 you know, 29 years.
20 Q Is it an account in your name or is
21 it a joint account?
22 A It's in my name.
23 Q Other than that account, have you
24 held any other bank accounts over the last seven
25 years?

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1 **DAVID SMITH**
2 A Just in my name?
3 **Q Yes.**
4 A I don't think so.
5 **Q How about in joint name with your**
6 **wife?**
7 A Yeah, I think I've, at some time, had
8 a joint account with her. I don't know when or
9 where. I think generally her account is used to pay
10 bills. I think it was joint, maybe it's not -- it's
11 not joint now. It's just in her name.
12 **Q So her bank account is used to pay**
13 **your family expenses?**
14 A Right.
15 **Q Personal expenses?**
16 A Right.
17 **Q Is that account at M&T Bank too?**
18 A No. I think it's Bank of America.
19 **Q How long has it been at Bank of**
20 **America?**
21 A Probably since we have been in
22 Saratoga, which is six years.
23 **Q Is that your primary family bank**
24 **account?**
25 A Yes.

Page 795

1 **DAVID SMITH**
2 **Q And you use that account to pay your**
3 **own personal expenses?**
4 A Yes.
5 **Q Do you have any investment accounts**
6 **in your name?**
7 A I don't think so. I did years ago.
8 It was small. May still be existing. There's no
9 meaningful investments in it or dollars.
10 **Q Does your wife have any investment or**
11 **brokerage accounts in which you have a beneficial**
12 **interest or control?**
13 A No.
14 **Q That would apply for the last seven**
15 **years?**
16 A Yes.
17 **Q I want to ask a couple more questions**
18 **about the LLC offerings. The First Independent**
19 **Income Notes LLC Private Placement is dated**
20 **September 15, 2003.**
21 **Do you know when in reference to that**
22 **date the concept -- let me rephrase that.**
23 **When in reference to September 15,**
24 **2003 you determined to raise funds for that entity;**
25 **when you first decided to create that entity?**

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1 **DAVID SMITH**
2 A I believe I testified yesterday the
3 thought was sometime in the spring of that year. I
4 believe I met with Gersten Savage, spring-summer and
5 initiated the offering in September, as you pointed
6 out.
7 **Q First Excelsior is dated January 16,**
8 **2004.**
9 **Same question: When in reference to**
10 **that date did you first decide to raise funds through**
11 **that entity?**
12 A It would have been -- actually, I
13 thought it was in November of '04. I'm obviously
14 wrong.
15 The thought came after the completion
16 or probably near-completion of First Independent
17 Income Notes. I testified yesterday, would do so
18 again today, that that offering was quite successful
19 and there was a demand for some -- you know,
20 continuing the concept.
21 So the thought would have come -- I
22 believe First Independent Income Note sold out within
23 a couple of months. So I would guess that you're
24 talking at the end of November then that First
25 Excelsior, the thought came to. And I thought we

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1 **DAVID SMITH**
2 initiated it then, but definitely not until January.
3 **Q Third Albany Income Notes, the PPM is**
4 **dated November 1st, 2004. Same question for that**
5 **offering.**
6 A Basic same answer as First Excelsior:
7 Was ultimately completed, continued interest. And I
8 don't know exactly when we started putting those
9 thoughts together, but probably in September '04,
10 maybe August '04.
11 **Q Last one is First Advisory, which is**
12 **dated October 1, 2005. Same question for that.**
13 A Probably had thoughts, you know,
14 three months earlier, so summer of '05.
15 **Q Did any of these four LLCs go on**
16 **simultaneously?**
17 **Were there any occasions when**
18 **interests were being sold in more than one of the**
19 **LLCs at the same time?**
20 A Not for the original subscription, I
21 don't believe.
22 **Q There was no overlapping investments**
23 **for the original --**
24 A No.
25 **Q -- Investments?**

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH A No. There might have been secondary sales, but not at the original subscription. MR. MCCARTHY: I just want to make sure I understand a couple of questions. We are going to go back to where Mike just started. Mike was asking about your personal bank accounts, yourself and your wife. I want to clarify: Any other bank accounts, including trusts, where you're the trustee or the beneficiary or have a beneficial interest? THE WITNESS: There is -- there's an irrevocable trust. I believe the trustee is Thomas Urbelis. Beneficiaries, I believe, are my children. MR. MCCARTHY: Where is that trust held? THE WITNESS: "Held" meaning, the account? MR. MCCARTHY: The account's held.	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH know, for life insurance policies, stuff like that. MR. MCCARTHY: There would be a company that issued the policy. THE WITNESS: Oh, yeah. I think it is Lutheran Brotherhood, something like that. MR. MCCARTHY: Any others? THE WITNESS: That's all I can think of at the moment. MR. MCCARTHY: What about offshore? THE WITNESS: No offshore accounts. MR. MCCARTHY: There are no -- THE WITNESS: No. MR. MCCARTHY: -- offshore? THE WITNESS: No. MR. MCCARTHY: What about bank accounts for corporations that you are a -- have a substantial interest in, outside of the McGinn Smith entities? THE WITNESS: Outside the McGinn Smith entities, referring, Bob,
	Page 799		Page 801
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH THE WITNESS: The account is held at NFS. MR. MCCARTHY: Any others? THE WITNESS: There was a QTIP Trust that was formed through some estate planning a few years ago. It turned out it was not funded properly. I don't -- I am not that familiar with exactly the tax laws, but ultimately we had to unfund it, unwind it. I don't think it exists anymore. But maybe QTIP trusts don't have a way of dying. There's no funds in it, but it may still exist. There's a life insurance trust, and I think that's in the name of my wife. I don't -- I think the kids are beneficiaries. I possibly would be the beneficiary. MR. MCCARTHY: What firm is that held with? THE WITNESS: I don't think it's any firm. I think it's just -- I think it's a life insurance trust, you	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH to the four that we have been talking about? MR. MCCARTHY: Talking affiliated companies with McGinn Smith, personally affiliated, outside the brokerage business. THE WITNESS: Well, I guess there's a long list. There's things like M&S Partners. That is a bank account at M&T. There is -- McGinn Smith Capital Holdings has a bank account. I suspect M&S -- M&S Holdings has a bank account. TDM, which we've talked about over the last couple of days, has an operating account. I am not sure where that is. It may be North Carolina for a bank that we used to do business with. Or maybe at M&T. You know, I have -- there's a list, to make life easy for both of us, that Brian Cooper produces every day that has all the operating accounts. Some of them are that I have involvement in, and some of them are entities that
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1 DAVID SMITH 2 have been formed and continue to 3 operate. 4 If I had access to that, it 5 would make both of our lives easier. If 6 you would like to get that, I would do 7 that for you. 8 MR. MCCARTHY: Okay. Let's do 9 that. 10 But aside from that, outside 11 that list that you're going to produce. 12 THE WITNESS: No. I've given 13 you all that I can think of. 14 MR. NEWMAN: Are there any 15 accounts which you have signatory 16 authority that would not be included on 17 that list in terms of an entity or 18 corporate account? 19 THE WITNESS: No. 20 MR. MCCARTHY: Would the same 21 hold true for any non-bank accounts, 22 brokerage accounts, any types of 23 accounts? 24 THE WITNESS: That would, yes. 25 MR. FRANCESKI: Let me say Page 803	1 DAVID SMITH 2 A I don't even pay Mr. [REDACTED] 3 Q Did he invest in any of the four 4 LLCs? 5 A Yes, I think his IRA had an 6 investment. He's been a client of mine for 30 years. 7 Q What is the status of his investment? 8 A Status of his investment is, he's -- 9 the only investment that I -- I shouldn't say that. 10 I think he has two investments 11 remaining: One in Pine Street Capital Partners, and 12 he was an investor in SAI International. 13 Q Did he invest at any point in time in 14 LLC? 15 A Yes. 16 Q Did he redeem those? 17 A He redeemed those. 18 Q Okay. We discussed a little bit 19 yesterday -- I believe it was yesterday, if not, 20 Monday, also IP. 21 How much money was loaned to also 22 IP; do you recall? 23 A I believe it was in the 7 or 8 24 million dollar range, notwithstanding accrued 25 interest. I think the accrued interest now has Page 805
1 DAVID SMITH 2 this for the record. I believe we 3 provided -- not we, McGinn Smith, 4 provided some of that information in 5 various forms in response to various 6 information requests up until now. And 7 Mr. Smith is going by recollection today 8 and should not be held against him if 9 his recollection doesn't -- isn't 10 complete as to all those accounts. 11 MR. MCCARTHY: No problem. 12 Okay. 13 MR. RATTINER: Who is [REDACTED] 14 [REDACTED]? 15 THE WITNESS: [REDACTED] 16 is an attorney out of Boston, long-time 17 friend of mine. I have known him since 18 the seventh grade. 19 20 EXAMINATION 21 BY MR. RATTINER: 22 Q Any of the four LLCs paid Mr. 23 Urbelis? 24 A No. 25 Q Okay. Page 804	1 DAVID SMITH 2 brought the total investment up to the 9 to 10 3 million dollar range. 4 MR. FRANCESKI: Were you 5 asking Chris about loans -- when you 6 said "loans," did you mean loans by the 7 LLCs? 8 MR. RATTINER: Correct. 9 BY MR. RATTINER: 10 Q And what is the current account 11 condition of also IP? 12 A It's still operating. It has -- 13 since January '09, in my judgment, has lost most of 14 its current possibilities. January of '09, they were 15 still seriously negotiating and had a strong interest 16 from Fortress for \$100 million financing. 17 Prior to that, in end of '07, which 18 was when we thought the fortunes were best going to 19 be served, they were in very serious negotiations 20 with Goldman Sachs to provide a \$500 million line of 21 credit -- credit facility. 22 Since January of '09, the Fortress 23 deal seems to have escaped them and their activities 24 are very, very limited. As far as I know, they are 25 still trying to operating within the concept of Page 806

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1 DAVID SMITH
2 getting financing, but they have not been successful
3 to date.

4 **Q And have they come to you, alseT --**
5 **come to you or McGinn Smith or the LLCs for**
6 **additional funding in 2009?**

7 A There was an additional financing
8 provided for them outside of the LLCs. And I can't
9 remember if that -- I don't think it was in '09. I
10 think it was in '08. It's a thing called IP Partners
11 or something of that nature. Didn't raise a lot of
12 money. Raised -- well, that's always relative, I
13 guess. I think they raised maybe four, five, six
14 hundred thousand dollars.

15 **Q Is that in addition to the 7 to 8**
16 **million?**

17 A Yes. That was outside of the LLCs.

18 **Q What was their liability at that**
19 **point during that raise of the 400, 500?**

20 A It was still strong. They were still
21 negotiating -- they still had the -- if my dates are
22 correct, it was either the Fortune negotiation was
23 still going on or the Goldman Sachs thing was still
24 alive.

25 They were actually taking a new
Page 807

1 DAVID SMITH
2 you know, a three- to six-month transaction from
3 the -- right from the initiation. There looked to be
4 very promising funding opportunities.

5 The original funding that they
6 developed and intended was a fund, if you will, that
7 they were going to sell to institutional investors,
8 generally one or two institutional investors. It was
9 patterned after the Pharma Fund, which was a
10 billion-dollar fund or \$500 million fund that had
11 been successfully raised in which White & Case had
12 been the counsel. That's how alseT arrived at using
13 White & Case. And it was designed to basically --
14 with those dollars -- and they would be take-down
15 dollars. But nonetheless it would be a \$500 million
16 fund. Provide credit facilities to some Pharma, but
17 their focus was going to be on technology and to
18 basically use the IP, intellectual property, which
19 is: copyrights, patents, trademarks, whatever it
20 might be, to support the loans.

21 Generally those companies have cash
22 flow ongoing. They have a business. And the
23 question is, for them to get financing, what do they
24 use? And they use future cash flows from the
25 technology. Risk always says technology can become
Page 809

1 DAVID SMITH
2 business tack in an attempt to get operating
3 revenues, and they were going to focus on litigation
4 IP. And it was primarily used to fund that.

5 They had probably half a dozen
6 letters of interest, commitment at that time. But
7 whether it's lack of funding or lack of credit
8 availability, probably a little of both, it's been
9 difficult for them to move forward.

10 **Q How is the agreement -- we saw the**
11 **agreement for alseT that was provided by the firm.**
12 **And it mentioned that it was a credit agreement.**

13 **Do you recall?**

14 A It was initially a credit agreement
15 that was drawn up by their counsel, David Goldstein
16 of White & Case. Basically provided for facility --
17 sort of a grid line of credit. Although my
18 recollection is there was no amount stipulated
19 that -- I think the language of it was McGinn Smith
20 or their affiliates. It was never meant to go to
21 McGinn Smith, obviously. I think that was sort of an
22 error in drafting from White & Case.

23 But basically, the financing was done
24 on a quarterly basis. They submitted budgets. The
25 intent always was that it was going to be basically,

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1 DAVID SMITH
2 obsolete. This is where the alseT Group brought
3 their expertise.

4 Two of the leading players in that
5 group, a gentleman by the name of David Kennedy, a
6 gentleman by the name of Stephen Willis, both had
7 experience in evaluating IP, and more importantly
8 what the future cash flows would be. So that was
9 their whole purpose.

10 **Q What was your understanding of the**
11 **use of funds that are being loaned by the LLCs to**
12 **alseT, the 8 million or so dollars?**

13 A It was quite specific. They had a
14 budget, presented me a budget every quarter. And it
15 was, you know, initially -- well, really never
16 changed. I mean, the bulk of their expenses were
17 administrative salary and legal, as they were putting
18 the transactions together. There was marketing
19 costs. They had -- I believe they had two
20 facilities. They had a facility in Chicago and they
21 had a facility in Atlanta.

22 Am I talking too much?

23 MR. FRANCESKI: It would be
24 easier if you let him go after what he's
25 after rather than going over the whole

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1 DAVID SMITH 2 transaction. 3 BY MR. RATTINER: 4 Q The loans that are made by the LLCs 5 were to fund the operating expenses of alseT? 6 A Yes. 7 Q What was Mr. Livingston's position at 8 the time the loans were made at alseT? 9 A I think there was -- there were 10 different time periods. Mr. -- just answer the 11 question. 12 MR. FRANCESKI: Whatever he 13 asked -- he will get there quicker. 14 THE WITNESS: Mr. Livingston 15 initially had no position, and at some 16 point became an officer and, I believe, 17 president of the enterprise. 18 BY MR. RATTINER: 19 Q Okay. How was alseT introduced to 20 McGinn Smith? 21 A Through Mr. Livingston. 22 Q What was his connection to alseT at 23 that time? 24 A Well, alseT hadn't been formed. His 25 connection was -- is that -- I think as early as Page 811	1 DAVID SMITH 2 Q Is Mr. Livingston still affiliated 3 with alseT? 4 A He's not. 5 MR. NEWMAN: Some questions 6 about alseT. According to the 7 information we have, Quicken records, 8 there's over \$8 million that was 9 invested in alseT by the LLCs 10 cumulatively. 11 Does that sound accurate? 12 MR. FRANCESKI: Objection. 13 You may answer. 14 THE WITNESS: I may answer? 15 MR. FRANCESKI: Yes. I object 16 to the form of the question. 17 THE WITNESS: Yeah. That 18 sounds about right, yes. 19 MR. NEWMAN: Over what period 20 of time was this \$8 million invested? 21 MR. FRANCESKI: Same 22 objection. 23 THE WITNESS: I would -- to 24 the best of my recollection, funding 25 probably started in '04, '05, continued Page 813
1 DAVID SMITH 2 2001, maybe 2002, he had been working with Mr. 3 Willis; and they had talked about the concept for 4 some period of time -- excuse me. And ultimately 5 they put the concept together. And ultimately it was 6 brought to our attention for -- our attention, 7 meaning the LLCs, for funding possibilities. 8 Q Based on current day, does the 9 investment have any chance of being repaid? 10 A I would say it's very small. Very 11 small. 12 Q Has it been written off yet? 13 A No. Because in '09, as I indicated a 14 few moments ago, we were still quite hopeful that the 15 Fortress deal would take place. I met with their 16 investment banker, Heather Smith from Deutsche Bank. 17 She was quite encouraged by it. But I think by the 18 summer of '09 that seemed to have diminished. And I 19 haven't heard anything encouraging since. 20 Q Does alseT have any revenues at this 21 point? 22 A I don't believe they have any 23 revenues. I think -- I know they haven't closed the 24 deal. And I haven't seen any litigation revenues, so 25 I don't believe so. Page 812	1 DAVID SMITH 2 through -- certainly maybe '07. So it 3 was maybe a three-year period, two-year 4 period -- two-and-a-half, three-year 5 period. 6 MR. NEWMAN: Whose decision 7 was it to invest these funds in this 8 entity? 9 MR. FRANCESKI: Same 10 objection. 11 THE WITNESS: Well, the 12 management of the LLCs, which was 13 primarily during those years myself, but 14 certainly that was the one of the 15 projects that Mr. Livingston was 16 obviously intimately involved with. 17 MR. NEWMAN: Was it your 18 decision to invest this money? 19 THE WITNESS: Yes. 20 MR. FRANCESKI: Meaning? 21 "Your" meaning? 22 MR. NEWMAN: You personally. 23 Did you decide that that was a good 24 investment? 25 THE WITNESS: No. It was -- Page 814

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1 DAVID SMITH
2 representing MS Advisors, yes. I was a
3 managing member of MS Advisors, yes.
4 MR. NEWMAN: Why was it a good
5 investment? Let me back up. At the
6 time this money was initially invested,
7 elseT was a startup company with no
8 revenues --
9 THE WITNESS: That is correct.
10 MR. NEWMAN: -- is that
11 correct?
12 When had it been established
13 versus when the initial funding was made
14 by the LLCs?
15 THE WITNESS: It could have
16 been established for probably three to
17 six months, I am not certain.
18 MR. NEWMAN: And what sort of
19 due diligence did you do to determine
20 that this was a good investment for the
21 LLCs?
22 THE WITNESS: Extensive.
23 MR. NEWMAN: Can you explain
24 what that was?
25 THE WITNESS: We interviewed
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1 DAVID SMITH
2 the due diligence on behalf of the LLC
3 -- I'm sorry, the advisor?
4 THE WITNESS: Mr. Livingston
5 did the bulk of the due diligence.
6 MR. NEWMAN: What was your
7 involvement in the due diligence?
8 THE WITNESS: I basically
9 reviewed the due diligence that Mr.
10 Livingston gathered.
11 MR. NEWMAN: At the time Mr.
12 Livingston was doing this due diligence,
13 what was his connection, affiliation,
14 involvement with elseT, if any?
15 THE WITNESS: I don't believe
16 he had any.
17 MR. NEWMAN: At what point did
18 Mr. Livingston become president of
19 elseT?
20 THE WITNESS: I believe it was
21 about a year later, but I am not
22 absolutely certain.
23 MR. NEWMAN: So between the
24 time he performed the due diligence and
25 the time he became president, did he
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1 DAVID SMITH
2 the management. We checked the
3 backgrounds. We did exhaustive study on
4 intellectual property opportunities. We
5 thought it was the most exciting capital
6 -- new capital-raising opportunity that
7 I have seen, ever.
8 I think it will ultimately
9 prove to be a major part of the way
10 companies finance themselves going
11 forward. We thought we would be -- we
12 thought funds would have the opportunity
13 to be on the cusp of a new financing,
14 have a pipeline of financing opportunity
15 for years and years to come. Quality of
16 the players in the space were all major
17 finance players; major investment banks,
18 ranging from Goldman Sachs to Bear
19 Sterns to Lehman. All rest in peace.
20 So it was a -- you know, there
21 were hundreds of articles written on it,
22 lots of major players in the space. And
23 we thought it was a great opportunity.
24 MR. NEWMAN: So in terms of
25 the actual due diligence, who performed
Page 816

1 DAVID SMITH
2 have any interim connection or
3 involvement with -- direct involvement
4 with elseT during that time period?
5 THE WITNESS: He was basically
6 working the concept, I mean, on behalf
7 of MS Advisors, you know, trying to
8 review or do the due diligence on the
9 proposals that they have made.
10 So when you say "involvement,"
11 he was interfacing with, you know,
12 Willis, Kennedy, ultimately a gentleman
13 by the name of Larry Rosenberg;
14 interfacing with David Goldstein, the
15 attorney for White & Case. So his
16 involvement was extensive, yes.
17 MR. NEWMAN: But in terms -- I
18 think you explained he was involved in
19 the due diligence. What I am getting at
20 is, what involvement or role did he have
21 with elseT directly, if any?
22 THE WITNESS: I don't believe
23 he had any direct involvement with elseT
24 until he ultimately joined the firm as
25 an officer.
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1 DAVID SMITH
2 MR. NEWMAN: So approximately
3 a year after the initial investment is
4 made by one or more of the LLCs, Mr.
5 Livingston joins -- becomes an officer
6 of alseT?
7 THE WITNESS: That's to the
8 best of my recollection.
9 MR. NEWMAN: AlseT was a
10 corporation?
11 THE WITNESS: I believe it was
12 a C corp, yes.
13 MR. NEWMAN: Did Mr.
14 Livingston own any shares or interest in
15 alseT prior to becoming an officer?
16 THE WITNESS: I think it was
17 contemporaneously. I am not sure.
18 MR. NEWMAN: It's possible he
19 may have had an ownership interest prior
20 to becoming president?
21 MR. FRANCESKI: Objection.
22 THE WITNESS: I don't think
23 so.
24 MR. NEWMAN: So once he
25 becomes president, are there further

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1 DAVID SMITH
2 had unfortunately got a sunk cost and
3 the -- as I mentioned earlier, when that
4 investment was started, the sense was --
5 is that the principals were within a
6 quarter or two quarters at most of
7 getting their funding. That's how it
8 was represented. And there were
9 negotiations going on.
10 MR. FRANCESKI: Let me stop
11 you there. I don't think Mr. Newman
12 asked you whether generally the idea
13 concerned you. He was asking --
14 THE WITNESS: No, it didn't.
15 MR. FRANCESKI: -- did it
16 concern you that Livingston was
17 associated with alseT?
18 THE WITNESS: No, it didn't.
19 MR. NEWMAN: You weren't
20 concerned about the potential conflict
21 of interest?
22 THE WITNESS: Not in a
23 material way, no.
24 MR. NEWMAN: What does that
25 mean?

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1 DAVID SMITH
2 monies invested by the LLCs in alseT?
3 THE WITNESS: Yes.
4 MR. NEWMAN: Approximately how
5 much was invested -- approximately how
6 much was invested by the LLCs with alseT
7 after the point in time Mr. Livingston
8 became president?
9 THE WITNESS: Well, the budget
10 started out at about 200,000 a month.
11 And then I think that budget was intact
12 for the first year. And then it grew to
13 300 and maybe 400 a month, so -- as they
14 added staff, et cetera. So taking the
15 medium point, it could have been half of
16 that, 4 million.
17 MR. NEWMAN: Did it concern
18 you as the principal with the investment
19 advisor who is making investment
20 decisions on behalf of these LLCs that
21 you were investing in an entity in which
22 one of the officers of that entity was a
23 member of McGinn Smith?
24 THE WITNESS: It concerned me
25 from the standpoint that we had -- we

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1 DAVID SMITH
2 THE WITNESS: It was not a
3 major concern of mine.
4 MR. NEWMAN: Did you have any
5 concerns about it?
6 THE WITNESS: I really -- no.
7 Because I really looked to the
8 principals of Kennedy & Willis as the
9 driving bus. Those were the critical
10 parties to the transaction.
11 MR. NEWMAN: Mr. Livingston,
12 what was his equity stake when he became
13 an officer of alseT?
14 THE WITNESS: It was about
15 18 percent.
16 MR. NEWMAN: Did that change
17 at any point in time?
18 THE WITNESS: Changed in late
19 '07 or early '08.
20 MR. NEWMAN: In what respect?
21 THE WITNESS: Went to zero.
22 MR. NEWMAN: Why is that? He
23 sold his interest.
24 THE WITNESS: No. There was a
25 major dispute between the principals.

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1 DAVID SMITH 2 And as a part of the negotiations, 3 Mr. Livingston forfeited his stake. 4 MR. NEWMAN: Was there -- was 5 there litigation that resulted? 6 THE WITNESS: There was no 7 litigation, no. 8 MR. NEWMAN: Do you know how 9 much compensation Mr. Livingston 10 received from alseT while he was an 11 officer of that entity, approximately 12 how much money he received? 13 THE WITNESS: I would -- this 14 is really approximate, probably seven -- 15 six, seven hundred thousand dollars. 16 MR. NEWMAN: And the source of 17 those funds were monies that had been 18 invested by the LLCs in alseT? 19 THE WITNESS: I believe so, 20 yes. 21 MR. NEWMAN: Did that concern 22 you, again, from a conflict-of-interest 23 standpoint? 24 THE WITNESS: It did not, 25 because I was aware of the total Page 823	1 DAVID SMITH 2 to work and physically work in the 3 offices of McGinn Smith? 4 THE WITNESS: He did. 5 MR. NEWMAN: Did that apply 6 during the time period we are talking 7 about for -- while the money is being 8 invested by the advisor and alseT? 9 THE WITNESS: Yes. Yes. 10 BY MR. RATTINER: 11 Q Did alseT sublease space from 45 12 Broadway? 13 A I don't believe they sublet it. We 14 provided space for them. I don't think there was any 15 actual compensation. There were offices for one 16 party, which was Mr. Rosenberg, who was domiciled in 17 New York. The other gentleman were not domiciled in 18 New York. So space was made available to Rosenberg 19 for -- and he'd probably come in three, four days a 20 week. 21 Q So in his case he didn't have to move 22 because the offices were in the same location as Mr. 23 Livingston? 24 A Mr. Livingston worked out of Albany. 25 Q Oh, I apologize. Page 825
1 DAVID SMITH 2 management contract of all the parties 3 and what was required. 4 MR. NEWMAN: This is -- as I 5 understand it, correct me if I am wrong, 6 this entity never earned any revenues? 7 THE WITNESS: It never earned 8 any revenues because it never got its 9 funding. It was absolutely critical 10 that it get substantial funding. And it 11 never got its funding; and of course, as 12 we got into '07 and '08, the 13 possibilities of getting funding 14 diminished greatly. 15 MR. NEWMAN: Mr. Livingston's 16 involvement in McGinn Smith during this 17 time was what? What was his position 18 with McGinn Smith? 19 THE WITNESS: He held a 20 position of senior vice president. He 21 worked in the syndicate area. But most 22 of his efforts -- or good deal of his 23 time was devoted to alseT once he became 24 an officer of alseT. 25 MR. NEWMAN: Did he continue Page 824	1 DAVID SMITH 2 A That's all right. 3 Q So he remained in Albany? 4 A He remained in Albany. 5 MR. NEWMAN: All right. So 6 the initial investment in alseT is 7 approximately how much? 8 THE WITNESS: 300,000. 9 MR. NEWMAN: At the time that 10 money is invested, what is your 11 expectation as the investment advisor as 12 to when alseT is going to be generating 13 the return for the limited liability 14 companies? 15 THE WITNESS: Three to six 16 months. 17 MR. NEWMAN: So after six 18 months there was no return, correct? 19 THE WITNESS: There was no 20 return. 21 MR. NEWMAN: And further 22 dollars are invested by you as the 23 advisor on behalf of the limited 24 liability companies and alseT? 25 THE WITNESS: That is correct. Page 826

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1	DAVID SMITH	1	DAVID SMITH
2	MR. NEWMAN: At what point did	2	Mr. Goldstein was negotiating with
3	you become concerned that you're	3	Goldman Sachs for \$500 million, which
4	investing millions of dollars of these	4	would have taken us totally out, and we
5	investment funds in an entity that's not	5	would have -- I would no longer have had
6	generating any returns for the advisor	6	those concerns. That did not happen.
7	or the LLCs?	7	MR. NEWMAN: So the funding
8	THE WITNESS: Well, I am	8	was done on a quarterly basis?
9	always concerned, from day one. But the	9	THE WITNESS: Yes.
10	opportunities that were being discussed	10	MR. NEWMAN: And that started
11	and were indicated to me were close to	11	in '03 and continued through '0 --
12	fruition were numerous, and they seemed	12	THE WITNESS: I don't think it
13	to always be within 30 days of a	13	started in '03. I don't think I said
14	closing. And so one of the more	14	that.
15	difficult propositions for a money	15	MR. NEWMAN: '04.
16	manager is once one crosses the Rubicon,	16	THE WITNESS: I think it was
17	there's a subcost and you're always	17	in the '04, '05 area.
18	attempting to weigh whether you cut the	18	MR. NEWMAN: And continued
19	cord or whether you continue to fund to	19	through '07?
20	protect your costs. I think that's	20	THE WITNESS: I don't know
21	probably one of the most difficult	21	exactly when we basically finally made
22	decisions one ever makes. And it's	22	that decision that just said -- my guess
23	never an easy one.	23	is, we -- best of my recollection, I had
24	In our case, because the	24	actually reduced the budget
25	promises of funding were so, in our	25	dramatically. Did still provide some
	Page 827		Page 829
1	DAVID SMITH	1	DAVID SMITH
2	judgment, real and available and within	2	funding with the hope that that Goldman
3	our grasp, that we continued to make	3	Sachs deal would go through. I think
4	that decision. And, of course, every	4	subsequent to that, as we got into '08,
5	time one makes that decision, the next	5	we -- we terminated funding. And that's
6	time it becomes more difficult, because	6	when we attempted to make an outside
7	you're sunk cost has gone up, the	7	transaction, just again, to get him
8	capital you have committed.	8	through the period when we can get this
9	So in answer to your question,	9	closing. And I think we raised
10	which again, I do it at more length than	10	another -- outside of funds, I think we
11	my attorney would like, it was always a	11	raised another 5 or 6 thousand dollars.
12	concern. But each and every quarter	12	MR. NEWMAN: Where was that
13	that went by we believed on the basis of	13	raised from?
14	the representations from the individuals	14	THE WITNESS: It was raised
15	of aiseT and the people that they were	15	from McGinn Smith.
16	talking to; and we had conversations	16	MR. NEWMAN: Meaning McGinn
17	with those people that funding was going	17	Smith made that investment directly?
18	to happen.	18	THE WITNESS: No, meaning --
19	And, unfortunately, it did not	19	MR. NEWMAN: Or as an
20	happen. And as I said, in December of	20	offering?
21	'07, when we were sort of at the	21	THE WITNESS: It was an
22	crossroads, that was when we thought we	22	offering, yes.
23	finally had put it to bed with Goldman	23	MR. NEWMAN: How many
24	Sachs, we had a letter from Goldman	24	investors were there in that offering?
25	Sachs, they had representation.	25	THE WITNESS: I don't think a
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1	DAVID SMITH	1	DAVID SMITH
2	lot. Nine or ten is a number that comes	2	And from that point, it was
3	to mind.	3	quarter-by-quarter of "Let's get this
4	MR. NEWMAN: Were they	4	thing closed."
5	accredited investors?	5	MR. NEWMAN: Now, these
6	THE WITNESS: Yes.	6	conversations you testified you were
7	MR. NEWMAN: When was that	7	having with representatives of alseT
8	offering?	8	concerning the status of the investment
9	THE WITNESS: I am thinking it	9	and the entity, were those documented
10	was in the spring to June, July of '08.	10	through e-mails, letters, memos, at any
11	MR. NEWMAN: Was there a	11	time?
12	private placement memorandum?	12	THE WITNESS: If there's any
13	THE WITNESS: Yes, there was.	13	letters, they would be documented. Most
14	MR. NEWMAN: Did that private	14	of the conversations by -- were
15	placement memorandum discuss the	15	telephonically. And no, I didn't write
16	operating history of alseT?	16	things up. I think -- I'm certain
17	THE WITNESS: Yes.	17	there's some e-mails. I think I've seen
18	MR. NEWMAN: And the rest of	18	some e-mails between me and Kennedy --
19	the investment?	19	myself and Kennedy.
20	THE WITNESS: Yes.	20	MR. NEWMAN: Who is Kennedy?
21	MR. NEWMAN: How risky did you	21	THE WITNESS: Kennedy was one
22	consider this investment to be at the	22	of the principals of alseT, really the
23	time it was made on behalf of the LLCs?	23	business guy behind the enterprise.
24	THE WITNESS: Well, as a	24	MR. NEWMAN: Did -- did you
25	startup it had risk. But again, the	25	maintain a file, a due diligence file,
	Page 831		Page 833
1	DAVID SMITH	1	DAVID SMITH
2	company or the group had moved well	2	or any other file for alseT -- for the
3	along in terms of the formation, their	3	alseT IP investment?
4	business plan and discussions with	4	THE WITNESS: I did.
5	funding sources. So as I have	5	MR. NEWMAN: Is that file
6	indicated, there was the belief that	6	still at McGinn Smith?
7	those -- that that funding commitment	7	THE WITNESS: It is.
8	was going to take place immanently.	8	MR. NEWMAN: And what is in
9	In fact, when we made the	9	that file, generally speaking?
10	first commitment, to the best of my	10	THE WITNESS: It's extensive.
11	recollection, was that they had already	11	I mean, it is a drawer, includes -- I
12	formed an offering document, a mutual --	12	haven't looked at it in a while. It
13	or a limited partnership offering	13	includes the budget proposals. It
14	document called alseT IP Fund, or	14	includes articles on the industry.
15	something of that nature. It was --	15	Includes previous transactions done in
16	again, to the best of my recollection,	16	that same space. But also includes, I
17	it was a \$500 million offering. And	17	am sure, some privileged things between
18	they were talking to people like the	18	them and their attorney. But it's an
19	Teachers Retirement of Ontario, Canada;	19	extensive file. It's long, it's a
20	Probata, out in California. And they	20	drawer.
21	had substantial interest from Deutsche	21	MR. NEWMAN: The Staff will
22	Bank and people of -- you know, serious	22	request a copy of that. We will confirm
23	people in the capital-raising side.	23	that in writing, but we are going to
24	And then it didn't happen.	24	request a copy of that file.
25	And they moved on to some other form.	25	THE WITNESS: Okay.
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1	DAVID SMITH	1	DAVID SMITH
2	MR. NEWMAN: Now, what	2	that four years later there's still a
3	efforts, if any, have you made -- has	3	possibility of success with alseT?
4	the investment advisor made on behalf of	4	MR. FRANCESKI: Objection.
5	the LLCs to recover any of the monies	5	That question is argumentative.
6	that were invested by the LLCs in alseT	6	MR. NEWMAN: Do you still
7	IP?	7	think there's a possibility of success
8	THE WITNESS: We continue to	8	four years after the fund?
9	think the best way to recover is to in	9	THE WITNESS: Yes.
10	effect have the business plan work. And	10	MR. NEWMAN: Did -- have you
11	so as I've said, as late as spring of	11	made any attempt to recover any of the
12	'09, there was still discussions with	12	money that Mr. Livingston was paid in
13	them and their investment banker. They	13	connection with alseT IP?
14	were negotiating directly at that time	14	THE WITNESS: I have not.
15	with Fortress, which is a large hedge	15	MR. NEWMAN: And why is that?
16	fund. Fortress was talking about	16	THE WITNESS: When that would
17	providing funding in the hundred million	17	take the form of litigation, which I
18	dollar range.	18	just spoke about, I don't think it's in
19	We have conversed with them	19	the best interest of the LLCs until such
20	through probably the summer, fall of	20	time as one decides that there is no
21	'09, seen what their status was. They	21	other action to take.
22	were at that time attempting to change	22	Number two, I'm not a lawyer,
23	their business plan to get some	23	but that was salary that was paid to Mr.
24	immediate revenues. And that was a	24	Livingston as part of alseT. And my
25	business plan that was going to involve	25	unprofessional and uninformed assumption
	Page 835		Page 837
1	DAVID SMITH	1	DAVID SMITH
2	representing litigants in IP lawsuits.	2	would be that would be very difficult to
3	And I don't believe at this point	3	gather.
4	they've had any revenue. So shortly we	4	MR. NEWMAN: Have you had a
5	were planning on having a discussion to	5	discussion with him or asked him to
6	see if, in fact, they -- what the level	6	return any of the money he received from
7	of their funding source is; what they're	7	alseT?
8	going to do personally, and then see	8	THE WITNESS: I have not.
9	what the consequences are going to be.	9	MR. NEWMAN: Do you know what
10	MR. NEWMAN: Have you, on	10	he did to earn \$700,000 for a non
11	behalf of the advisor and the LLCs, made	11	income-producing startup company?
12	any demand, filed any legal action, made	12	THE WITNESS: He acted on
13	any legal claim to recover any of the	13	behalf of alseT. He was the president
14	monies that were invested?	14	of the company, and carried out those
15	THE WITNESS: No. Because	15	duties.
16	when you do that you basically eliminate	16	MR. NEWMAN: While he was
17	any opportunity to ever get any funding.	17	registered with McGinn Smith?
18	The minute you file any sort of legal	18	THE WITNESS: That is correct.
19	action, you can basically remove any	19	MR. NEWMAN: Did you, either
20	opportunity to get funding. And so that	20	individually or through any of the
21	is a step that, in my judgment, you	21	affiliated entities you are involved
22	don't take until you absolutely have	22	with, receive any monies, payments,
23	written the enterprise off and there's	23	funds, loans from alseT IP?
24	no possibility of success.	24	THE WITNESS: No.
25	MR. NEWMAN: You still think	25	MR. NEWMAN: How about Mr.
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1 DAVID SMITH 2 Livingston, in connection with this 3 litigation? 4 THE WITNESS: Did Mr. 5 Livingston receive any? 6 MR. NEWMAN: No. Did Mr. 7 Livingston pay you -- 8 THE WITNESS: No. 9 MR. NEWMAN: Based on the 10 investment that was made in alseT, did 11 you receive any monies, funds or loans 12 from Mr. Livingston? 13 MR. FRANCESKI: "You" meaning? 14 MR. NEWMAN: You, 15 individually, or through any of your 16 companies? 17 THE WITNESS: No. 18 MR. PAULSEN: Was MS Advisors' 19 decision to terminate funding to alseT 20 the source of the dispute between 21 Livingston and the firm and alseT 22 itself? 23 THE WITNESS: No. The 24 decision -- no. No. 25 MR. PAULSEN: Can you Page 839	1 DAVID SMITH 2 They articulated the position. 3 And I never received confirmation of 4 this other than through Willis and 5 Kennedy. But their position was that 6 Goldman Sachs, as one of the conditions 7 in making the funding, was that they 8 felt that Livingston was not additive -- 9 value additive to the process any 10 longer. 11 Livingston, of course, had a 12 different point of view. Livingston's 13 point of view, I think, would be best 14 characterized as saying "I basically 15 developed the concept," which he did. 16 "I brought the parties together," which 17 he did. "I found the principals and the 18 expertise; did the great deal of due 19 diligence; made contact with the law 20 firm; I was the driving force." And in 21 a nutshell, it was his position that now 22 that all of that had been accomplished 23 and that they were on the cusp of an 24 enormous success, which a \$500 million 25 funding from Goldman Sachs would have Page 841
1 DAVID SMITH 2 elaborate on the dispute itself? 3 THE WITNESS: And that 4 dispute -- 5 MR. PAULSEN: Between alseT 6 and Livingston. 7 THE WITNESS: Yes. 8 MR. FRANCESKI: The answer to 9 that is yes or no. 10 THE WITNESS: Yes. 11 MR. PAULSEN: Would you do so, 12 please. 13 THE WITNESS: Certainly. In 14 December of '07, maybe a little later 15 than that, I believe it was 16 December '07, it came to my attention 17 that there was evidently -- had been an 18 ongoing dispute between Livingston and 19 the other members of alseT. And without 20 going into detail that I am not familiar 21 with, I would characterize that as -- 22 that the other principals of alseT felt 23 that Livingston was going to be an 24 impediment to the funding from Goldman 25 Sachs. Page 840	1 DAVID SMITH 2 ensured enormous success, that -- that 3 they were basically looking to force him 4 out. He was not prepared to do that, 5 and threatened litigation against those 6 individuals. 7 MR. FRANCESKI: Let me stop 8 you there. I don't mind you giving 9 these details. But please make clear 10 when you are talking about firsthand 11 knowledge or knowledge gained through 12 somebody else, so they can understand 13 the credibility of what you are saying. 14 THE WITNESS: Okay. Fair 15 enough. I, as someone who stood in the 16 middle, got some of these thoughts that 17 I am giving to you from both sides. So 18 you must take that into consideration, 19 as I did. 20 There's always something in 21 the middle. Everybody has an agenda. 22 So I reached out to Kennedy and Willis. 23 In fact, I met with them in New York. 24 Obviously I got Livingston's side of the 25 story. Page 842

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1 DAVID SMITH
2 I was terribly concerned from
3 the standpoint of the LLCs that this was
4 our best and last chance to get
5 basically our money back and continue to
6 have the opportunities that I thought
7 were going to be enormous for the LLCs.
8 And so I was agitated, to say
9 the least, at the position that Mr.
10 Livingston was taking. I am not saying
11 anything out of school, he's well aware
12 of it.
13 I implored him to reach a
14 settlement. I did my best, and Mr.
15 McGinn was also involved, to bring the
16 parties together. I had numerous
17 conversations with David Goldstein from
18 White & Case who was their counsel,
19 numerous conversations with Mr. Kennedy,
20 Mr. Rosenberg and Mr. Willis. And,
21 obviously, numerous conversations with
22 Mr. Livingston.
23 I believe the question you
24 asked, the dispute between Mr.
25 Livingston and myself, and so with that

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1 DAVID SMITH
2 background you can assume that there was
3 some friction between the two of us and
4 there were, you know, some heated
5 exchanges between the two of us. I felt
6 that at that point Mr. Livingston needed
7 to sacrifice whatever personal gain he
8 might make for the good of the LLCs,
9 that it was not -- I think the word I
10 used was brinkmanship. I didn't
11 appreciate pushing the envelope right to
12 the edge to in effect see if he was
13 going to prevail or not. Because the
14 consequences of my judgment were
15 draconian. I mean, they were just
16 enormous.
17 And I know, having been in
18 this business for 30 years, how fickle
19 funding is; that you have a very small
20 window to get funding done. And people
21 like Goldman Sachs, if you don't dance
22 to their tune, they don't hang around.
23 They got lots of opportunities. And in
24 my judgment that's exactly what
25 happened. But at any rate at some

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1 DAVID SMITH
2 point, and I believe it was January,
3 after Mr. Livingston had engaged
4 separate counsel, I, as the managing
5 member of the LLC, fashioned an
6 agreement that would give Mr. Livingston
7 some compensation going forward, not
8 immediate, but only if they had some
9 success and only after the LLCs were
10 entirely paid out. You know, ultimately
11 he signed off on that. He resigned from
12 elseT. And I guess with some passage of
13 time our passions subsided. And Tom and
14 I worked together again for some period
15 of time. But that is the genesis of it.
16 MR. PAULSEN: So if I
17 understand you correctly, his
18 consideration of filing suit against
19 elseT, as you said it, would have
20 compromised the last chance, as you
21 stated, to get the money back on behalf
22 of the LLCs?

23 THE WITNESS: People who were
24 providing funding --

25 MR. PAULSEN: Is that a yes or

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1 DAVID SMITH
2 a no?
3 THE WITNESS: Yes.
4 MR. PAULSEN: So I guess that
5 would have been in early 2008, I believe
6 you said?
7 THE WITNESS: The question
8 again, Mike?
9 MR. PAULSEN: When he left --
10 or the dispute between Livingston and
11 elseT was late '07 or early 2008?
12 THE WITNESS: Well, that is
13 when it came to my attention.
14 MR. PAULSEN: Okay.
15 THE WITNESS: The principals
16 of elseT told me that the origin
17 started, I think, that summer.
18 MR. PAULSEN: Of '07?
19 THE WITNESS: Of '07.
20 MR. PAULSEN: So when did you
21 come to the agreement -- or when did you
22 and Livingston agree or discuss that
23 agreement, as you just referenced, kind
24 of shook hands, if you will. And at
25 that point in time there may have still

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1 DAVID SMITH
2 been an opportunity -- I guess in your
3 mind there was still potential to
4 recouping monies back from the LLCs?
5 THE WITNESS: Yeah. As I
6 indicated -- well, to answer your
7 question, that took place, to the best
8 of my recollection, December '07,
9 January '08.
10 MR. PAULSEN: Okay.
11 THE WITNESS: The
12 opportunities for alseT continued
13 through -- the last real serious
14 negotiation took place as late as
15 January through March of '09. That was
16 with Fortress. The Goldman Sachs
17 opportunity faded sometime in '08. I
18 don't know exactly when.
19 MR. PAULSEN: I guess I'm
20 curious at what point, as Mike Newman
21 was asking earlier, do you say that the
22 likelihood of recouping any monies for
23 the LLCs is just not there and perhaps
24 you consider filing suit to get some of
25 that money back?

Page 847

1 DAVID SMITH
2 MR. FRANCESKI: That's all.
3
4 EXAMINATION
5 BY MR. NEWMAN:
6 Q Do you know how much the limited
7 liability companies have paid in legal fees,
8 approximately?
9 A To date?
10 Q To date.
11 A I believe the only fees that they
12 have paid were in the lawsuit against Pali Capital.
13 And I don't think they were extensive. Maybe
14 \$30,000. Easy for me to say.
15 Q So you are not including the amount
16 that was paid in the end -- or, excuse me, January of
17 this year, \$200,000 in legal fees?
18 A No. Those monies -- \$200,000 in
19 legal fees were fees that were directed to McGinn
20 Smith to pay. They weren't considered legal fees of
21 the funds.
22 Q They were paid out of the LLC pot of
23 money?
24 MR. NEWMAN: You're shaking
25 your head.

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1 DAVID SMITH
2 THE WITNESS: I mean, you just
3 -- at some point it may come to that.
4 You just don't know. The fact is, is
5 that -- my experience, and maybe it's
6 not that extensive, but in the few times
7 that we have, in fact, gone that route
8 for the funds against an individual,
9 we've never recovered.
10 MR. FRANCESKI: May I ask --
11 I'm sorry. May I ask a clarifying
12 question?
13 MR. PAULSEN: Sure.
14 MR. FRANCESKI: Are you
15 finished?
16 THE WITNESS: I'm finished.
17 MR. FRANCESKI: Dave, if you
18 filed suit on behalf of the LLCs, as Mr.
19 Paulsen and Mr. Newman have asked you,
20 who would have paid the attorneys' fees
21 involved in that suit?
22 THE WITNESS: Well, the
23 limited liability companies.
24 MR. FRANCESKI: The LLCs?
25 THE WITNESS: The LLCs.

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1 DAVID SMITH
2 MR. FRANCESKI: Go ahead and
3 finish your question.
4 BY MR. NEWMAN:
5 Q I believe the legal fees were paid
6 out of the operating accounts of the LLCs, the
7 \$200,000 in legal fees that were paid?
8 A Yes.
9 Q What other legal fees have been paid
10 by the LLCs?
11 A I don't believe any.
12 Q That question goes to monies that
13 were in the operating accounts?
14 A Right. Do I need to clarify that?
15 As far as I know Pali Capital and the \$200,000. I
16 don't think there's any -- I am not aware of any
17 others.
18
19 EXAMINATION
20 BY MR. RATTINER:
21 Q Are you defining -- if I can clarify.
22 Are you defining legal fees as going
23 after a company for monies owed to you?
24 A I don't believe Mike delineated that
25 question.

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1 DAVID SMITH 2 Q I am just trying to figure out how -- 3 you are saying only -- not only, but \$200,000 in 4 legal fees were, I guess, from the funds through 5 McGinn Smith to the attorney? 6 A Right. 7 Q Are there other legal fees that have 8 been taken from the funds and passed through whatever 9 entities to eventually end up in a law firm or to pay 10 for the legal expenses? 11 MR. FRANCESKI: Let me object. 12 It's not a pass-thru. And don't know 13 whether you mean anything pejorative 14 about pass through. 15 MR. RATTINER: No. 16 MR. FRANCESKI: The LLCs have 17 obligations to certain entities. They 18 satisfy those obligations. The entities 19 have then used the funds to satisfy 20 those obligations to pay their 21 obligations. 22 MR. RATTINER: These 23 obligations are specific to the legal 24 fees that were due, not the underwriting 25 fees. We are not talking about the Page 851	1 DAVID SMITH 2 BY MR. RATTINER: 3 Q The source of the funds that were 4 paid to Mr. Francheski's firm were from where, the 5 original funds? 6 MR. FRANCESKI: Source of 7 funds. Money is fungible. But I think 8 what you need to know is who wrote the 9 check. 10 MR. RATTINER: No, I am not 11 asking who wrote the check. 12 MR. FRANCESKI: We can argue 13 about that later. 14 MR. NEWMAN: The question 15 was -- and I think the witness 16 understood and answered it. And we can 17 go back over it again. But funds, legal 18 fees that were paid out of the LLC 19 operating funds. 20 MR. FRANCESKI: No. That is 21 what I am saying. 22 THE WITNESS: No. We better 23 go back over it. 24 MR. FRANCESKI: Yeah. Be 25 clear about it, Dave. Page 853
1 DAVID SMITH 2 underwriting fee or the administrative 3 fee. 4 THE WITNESS: The only other 5 fee -- I think what you're talking 6 about, Chris, as I've testified, that I 7 can recall, is fees that went to Gersten 8 Savage on behalf of recovering monies 9 from Pali Capital. 10 BY MR. RATTINER: 11 Q Okay. And we discussed Shutts & 12 Bowen. For instance, we showed that \$260,000. 13 Is that being classified differently 14 than this context? 15 A That Shutts & Bowen didn't come from 16 the LLCs. 17 Q I'm sorry. Correct. 18 MR. FRANCESKI: Nor did the 19 \$200,000. That was paid by the LLCs to 20 the people who received it. It's not -- 21 MR. RATTINER: There's a 22 disconnect between you and your client. 23 MR. FRANCESKI: I don't know 24 whether there's a disconnect between me 25 and my client or between him and you. Page 852	1 DAVID SMITH 2 THE WITNESS: Give me a 3 chance. Lots of guys are firing at me. 4 I testified yesterday, and I 5 will re-clarify for any purposes. We 6 have indicated that there are a number 7 of fees due to McGinn Smith and McGinn 8 Smith entities. We are all clear on 9 that. 10 At some point yesterday -- and 11 I was following up, I think, to Mike's, 12 under the same vein, is that recently 13 some of those funds, to your point, 14 source of funds, were paid. And then 15 somebody yesterday, or the day before, 16 asked me "What were those funds used 17 for?" And I said, "They were used to 18 pay our legal fees." I don't know if 19 one can be any clearer. 20 Now, from the actual 21 obligation to your point of the funds 22 using legal fees to recover monies or 23 something like that, my answer is: The 24 only one that I can recall is Pali 25 Capital, which was paid to Gersten Page 854

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1 DAVID SMITH
2 Savage. And to the best of my
3 knowledge, it was in the \$30,000 range,
4 but I don't know.
5 BY MR. RATTINER:
6 **Q So the legal fees that were recently**
7 **paid in January of 2009 were -- you utilized the**
8 **underwriting income that you accrued to pay those**
9 **fees?**
10 A That's correct.
11 **Q So you no longer owed that**
12 **underwriting income?**
13 A That is correct.
14 MR. FRANCESKI: Can we take a
15 short break? I've got a case going on
16 back in Philadelphia.
17 MR. NEWMAN: Let's go off the
18 record.
19 (Whereupon a recess is taken.)
20 MR. NEWMAN: Back on the
21 record.
22 THE WITNESS: Would you play
23 back the entire exchange regarding the
24 fees discussion that we had with Chris
25 and maybe Mike and maybe -- maybe both

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1 DAVID SMITH
2 THE WITNESS: Fees were paid
3 to McGinn Smith which were owed, which
4 were then -- the source of those funds
5 were the -- of the LLCs. But they were
6 paid to McGinn Smith who then paid their
7 legal fees. Not paid by the funds.
8 That is the critical point I want to
9 make sure that nobody has any confusion
10 about.
11 BY MR. RATTINER:
12 **Q How does that differ from the**
13 **October 2008 letter where it says that the funds will**
14 **no longer pay fees; however, they will pay legal**
15 **expenses?**
16 A Because it differs. They didn't pay
17 legal fees on behalf of the funds in that instance.
18 Those fees, again, were paid to McGinn Smith. They
19 were owed to McGinn Smith. They were owed prior to
20 the letter. And that's what they are used for.
21 **Q Going forward, is it the fund's**
22 **intention to use excess revenues, excess monies to**
23 **pay legal fees?**
24 A If it's on behalf of the funds, yes.
25 If it's on behalf of the funds.

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1 DAVID SMITH
2 Mikes. I am concerned that it's -- I
3 want to make sure that everybody has an
4 exact set of facts.
5 The last five minutes of the
6 exchange, seems to be some discrepancy
7 as to what was conveyed; and I don't
8 want to leave here not knowing that what
9 was conveyed was the truth.
10 MR. NEWMAN: Okay. That's
11 fine. I think we wanted to know what
12 legal fees have been paid by the LLCs.
13 That was the general question.
14 THE WITNESS: Right.
15 MR. NEWMAN: Do you want --
16 THE WITNESS: I would like to
17 hear what was said so I know the record
18 reflects the truth.
19 MR. NEWMAN: Okay.
20 (Whereupon record is read
21 back.)
22 THE WITNESS: I believe I'm
23 clear. Is anyone else unclear?
24 MR. NEWMAN: I think we
25 understand what you are testifying to.

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1 DAVID SMITH
2 **Q Let's take the arbitration for Mr.**
3 **the \$805,000, assuming it's due and owed?**
4 A That is a fee that is incurred at
5 McGinn Smith.
6 **Q And it would be paid by who?**
7 A Paid by McGinn Smith.
8 **Q By reimbursement of the LLCs?**
9 A If they are entitled to money, yes.
10 The other clarification I would like
11 to make -- I don't think it's material, but the -- in
12 terms of the inclusion of all fees, there were I'm
13 certain organizational expenses at the time these
14 LLCs were formed. Gersten Savage I'm certain billed
15 me and, obviously, the LLCs paid those fees. I was
16 not thinking of those at the time I gave my answer.
17 **Q I can't recall off the top of my head**
18 **other law entities that he used.**
19 **Were there other law firms that these**
20 **four notes or the LLCs would have used other than**
21 **Gersten Savage?**
22 A Actually that is a good point. I did
23 forget. Yes. There were when they represented
24 certain loan transactions, yes. Roemer & Mano is one
25 that comes to mind. I can't think of any others.

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1 DAVID SMITH
2 That's a good point. We have at times used law firms
3 to close transactions, yes.
4 MR. FRANCESKI: Chris, to your
5 question about -- generally about LLC
6 obligations that you've asked about
7 before, I don't know if this is of any
8 interest to the staff, but just so you
9 all recognize this, all of the investors
10 in the LLCs, in their subscription
11 agreements, agreed to indemnify the LLCs
12 for any misrepresentations or breach of
13 warranties that they made in those
14 subscription agreements. And I don't
15 think the LLCs have resolved what to do
16 about those representations of
17 warranties. But, certainly, if I were
18 counseling the LLCs, I would suggest the
19 LLCs look closely about what to do about
20 those representations and warranties.
21 BY MR. RATTINER:
22 Q How would payments be made -- more
23 payments made to Matt McGinn from the LLCs?
24 A I don't know. Matt McGinn is an
25 associate counsel. Might have done some limited work
Page 859

1 DAVID SMITH
2 on behalf of the LLCs. I am not -- would have been
3 under Mr. Carr's direction. So I am not sure.
4 Q Would that be classified as legal
5 expense?
6 A If he's acting on behalf of the LLCs,
7 yes.
8 Q Would that be included as part of --
9 in terms of -- I know they say Gersten Savage.
10 The other entity's Roemer?
11 A It would. I can't recall exactly
12 what work he did, but it would be, yes.
13 Q With regard to alseT, did alseT
14 borrow any money from McGinn Smith?
15 A I don't believe so.
16 Q The only funding that you are aware
17 of is the \$8 million or -- the plus \$8 million that
18 was loaned from the LLCs?
19 A While in addition to the follow-on
20 offering, yes.
21 Q Correct. Okay.
22 MR. NEWMAN: I have one more
23 question, that was a debt investment by
24 the LLCs?
25 THE WITNESS: Yes.
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1 DAVID SMITH
2 MR. NEWMAN: How is that
3 documented or memorialized? What
4 documents show that the --
5 THE WITNESS: There's a loan
6 agreement --
7 MR. NEWMAN: Was there a loan
8 document?
9 THE WITNESS: Best of my
10 recollection, there was a line of credit
11 document. I think we provided that to
12 FINRA.
13 MR. NEWMAN: Do we have that?
14 Do we have the line of credit agreement?
15 MR. RATTINER: I am going to
16 introduce Exhibit Number 22.
17 (Whereupon Exhibit 22 is
18 marked.)
19 MR. RATTINER: I only have one
20 for counsel. I didn't make additional
21 copy for counsel. Except I can't see
22 it.
23 BY MR. RATTINER:
24 Q Mr. Smith, in front of you is the
25 private placement memorandum for First Independent
Page 861

1 DAVID SMITH
2 Income Notes. And it's identified by Bates stamp MGS
3 0014648. And it continues through MGS 0014691.
4 Do you recognize this document?
5 A I do.
6 Q Was this document the one we
7 previously discussed created by Gersten Savage?
8 A Yes.
9 Q What was your input with this
10 document? Or maybe I will rephrase.
11 Did you approve this document?
12 A Yes.
13 Q And prior to approving it, did you
14 review it?
15 A Yes.
16 Q Where are the fees disclosed on
17 page -- let's stick with the first page here
18 identified by the last four numbers of the Bates
19 stamp 4648.
20 What does that tell us towards the
21 bottom part of the document in a grid form?
22 A Document shows that of the initial
23 offering price, there is a 2 percent placement agent
24 fee for that initial subscription.
25 Q And how does that reflect the fees
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1 **DAVID SMITH**
2 that you previously identified to us?
3 Is that the same as the underwriting
4 fee?
5 A That is the same as the -- part of
6 the underwriting fee. It's then indicated that that
7 fee is an annual fee in addition to other fees that
8 we are talking about, the advisory fee and the
9 trustee fee.
10 Q So what is the difference between the
11 private agent -- placement agent commission fee and
12 the underwriting fee?
13 A Nothing.
14 Q Okay. Where on this page does it say
15 this 2 percent is an annual fee?
16 A I don't believe it says it on that.
17 That's designed to indicate how much money is coming
18 out of the initial offering. Then the LLCs incur
19 additional expenses which are discussed and disclosed
20 in the memorandum.
21 Q And on this page does it identify
22 that you will be investing in affiliate entities from
23 the first page?
24 A First page is silent to what -- other
25 than the form of investments of any investments.

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1 **DAVID SMITH**
2 Q Okay. And we are going to continue
3 on.
4 This offering was available to both
5 accredited and non-accredited investors?
6 A Non accredited to the limited extent
7 of 35 non-accredited, 506 of Reg D.
8 Q Can you turn to Bates stamp number
9 ending in 4657.
10 Are you there?
11 A Hm-hm.
12 Q 4657, the second sentence states that
13 "Subscriptions will be accepted only from accredited
14 investors as that term is defined in Reg D
15 promulgated under the Securities Act."
16 How does that differ from your
17 previous testimony?
18 A Because I believe Reg D gives an
19 exemption for 35 non-accredited investors.
20 Q So you're saying that in this
21 case you're basing it on a Reg D exemption not by the
22 fact that it says accredited investors only here?
23 A Absolutely. That's always been part
24 of the exemption that there's 35. It's well known.
25 Q If we can turn back a few pages to

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1 **DAVID SMITH**
2 Bates stamp 4654.
3 A I am there.
4 Q And the business section, where in
5 that section does it say that you will make
6 investments in affiliated entities? Or does it say?
7 A It says "We may acquire such
8 investments directly or from our managing member or
9 affiliate of us or managing member that has purchased
10 the investment," et cetera, et cetera.
11 Q That would be an investment that's
12 held?
13 A It's investments held in -- that
14 there will clearly have the ability to commence loans
15 and investments in those entities.
16 Q Where is that clearly?
17 A That is my interpretation. That's my
18 counsel's interpretation. And that is evidently the
19 interpretation of everyone but yourself.
20 Q What sentence were you specifically
21 reading from?
22 A I was reading from the end of the
23 fourth sentence. We may acquire such investments
24 directly or from our manage member or an affiliate of
25 us -- of our managing member. There's purchase of

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1 **DAVID SMITH**
2 the investment. If the investment is purchased -- if
3 it is purchased, suggesting there's others -- from
4 the managing member or any affiliate, we will not pay
5 above the price paid by our managing member or such
6 affiliate of the investment, other than to reimburse
7 our managing member or such affiliate for its costs,
8 discounts received by virtue of a special arrangement
9 or relationship. In other words, through purchase
10 and investment from our managing member or any
11 affiliate, we will pay the same price that we would
12 have paid had we directly purchased the investment.
13 We also may purchase securities from
14 issuers in offerings in which McGinn Smith & Company
15 is acting as underwriter or placement agent, for
16 which McGinn Smith & Company will receive a
17 commission.
18 We may retain the investments beyond
19 the term of the notes, sell such investments during
20 the term of the notes, or offer the notes to
21 preferred investors.
22 Q Thank you.
23 A That's basically it.
24 Q How does that relate to the loans
25 that we're discussing, however? This is regarding --

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1 **DAVID SMITH**
2 in the way it's read and the way you've read it, it's
3 regarding the investments that are made in other
4 entities. You can buy those investments from those
5 entities.
6 I don't see the verbiage where it was
7 discussed the loans that are made in affiliates?
8 A Well, I think without trying to parse
9 the words of my attorneys who drafted this, the clear
10 intent was that investment and loans are analogous.
11 We repeatedly talked about that. And I generally try
12 to correct myself. This was an operating company
13 with a -- the primary goal of its business was to
14 make loans. I think the term "investments" is
15 maybe -- is used sometimes as a substitute. But that
16 is the clear intent of ourselves and counsel when
17 they drafted it.
18 MR. NEWMAN: Does it say
19 anywhere in the private placement
20 memorandum what you just stated; that
21 the primary purpose of this entity was
22 to act as an operating company that was
23 going to be making loans?
24 THE WITNESS: I don't know
25 without reading it. But that's

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1 **DAVID SMITH**
2 certainly what was conveyed to
3 investors.
4 MR. NEWMAN: Can you take a
5 second and look through the private
6 placement memorandum and tell us if you
7 find language like that.
8 MR. FRANCESKI: We are talking
9 about a very long document. If you want
10 him to read every page, Mike, he
11 certainly will do that.
12 THE WITNESS: Let's start on
13 page 1.
14 MR. NEWMAN: Okay.
15 THE WITNESS: "It has been
16 formed to identify and acquire various
17 public and/or private investments, which
18 may include, without limitation: Debt
19 securities, collateralized debt
20 obligations, bonds, equities securities,
21 trust preferreds, collateralized stock,
22 convertible stock, bridge loans, leases,
23 mortgaged equipment leases, security
24 cash flow instruments and any" --
25 MR. FRANCESKI: You said

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1 **DAVID SMITH**
2 security. It's "securitized."
3 THE WITNESS: Securitized.
4 Thank you.
5 -- "cash flow instruments and
6 any other investments that may add value
7 to our portfolio."
8 Word "loans" is in the third
9 line.
10 BY MR. RATTINER:
11 Q Under "bridge loans"?
12 A That is correct.
13 Q Not loans by itself?
14 MR. FRANCESKI: I am going to
15 object.
16 MR. NEWMAN: It says what it
17 says.
18 MR. FRANCESKI: It says what
19 it says.
20 MR. NEWMAN: Okay. Is there
21 anything -- I am not going to ask you.
22 THE WITNESS: I mean, I can
23 read the rest of it, Mike if you want,
24 if it's going to be helpful.
25 MR. NEWMAN: No. I am not

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1 **DAVID SMITH**
2 going to ask you to read through the
3 whole private placement memorandum.
4 Maybe you can just take a look
5 at the summary. I see in the business
6 description it has the same -- looks
7 like the same description that's on the
8 first page of the document which you
9 just read.
10 Other than that, is there
11 anything else in the summary that
12 relates to your statement that this was
13 going to be -- the primary purpose of
14 this entity was to be an operating
15 company that was going to be making
16 loans?
17 THE WITNESS: Summary is on
18 what page?
19 MR. NEWMAN: Begins on Bates
20 14654. Continues through 14657.
21 THE WITNESS: (Reviewing).
22 Page 14655 under "Security."
23 Once again, word "loans" is referenced.
24 (Reviewing). I don't see
25 anymore under there.

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1 DAVID SMITH 2 Risk factors. 3 (Reviewing). 4 Page 60, under "We will be 5 adversely affected when investments are 6 pre-paid or defaulted." 7 MR. FRANCESKI: I think Mr. 8 Newman only asked about the summary. 9 You're beyond the summary. 10 MR. NEWMAN: That's fine. We 11 can spend a few more minutes if he 12 thinks there are other sections that 13 address that topic. That's fine. 14 THE WITNESS: Page 8 says "May 15 default." Certainly the word "default" 16 is associated with loans. 17 (Reviewing). 18 Again on page 9, "Use of 19 proceeds." Where loans is mentioned. 20 Same page under "Business," mentioned 21 again. 22 MR. NEWMAN: What is your 23 understanding of the term "Bridge loan"? 24 THE WITNESS: Bridge loan is 25 generally a loan that is provided until Page 871	1 DAVID SMITH 2 Smith just took those and made the 3 revisions to the names of the entity and 4 any other changes? 5 THE WITNESS: I don't believe 6 so. Pay a fee every time. 7 MR. NEWMAN: I have a question 8 on page 17, under "Suitability 9 requirements." It states that "Each 10 investor must represent in writing that 11 it qualifies as an accredited investor." 12 THE WITNESS: Where are we, 13 Mike? 14 MR. NEWMAN: On page 17 under 15 "Suitability requirements." 16 THE WITNESS: Hm-hm. 17 MR. NEWMAN: It says, "Each 18 investor must represent in writing that 19 it qualifies as an accredited investor." 20 MR. FRANCESKI: Question is? 21 MR. NEWMAN: Question is: We 22 have already discussed that there were 23 non-accredited investors in this 24 offering, correct? 25 THE WITNESS: That is correct. Page 873
1 DAVID SMITH 2 such time as it can be repaid through 3 another financing, which would include 4 equity, recapitalization, restructuring. 5 Page 10, "Description of the 6 notes." It's basically the same 7 language, but it's again repeated on 8 page 10 in the third paragraph. 9 (Reviewing). 10 Page 12, "Securities" 11 mentioned again. 12 That completes my review of 13 the memorandum. 14 MR. NEWMAN: Did Gersten 15 Savage actually prepare the private 16 placement memorandums for all four of 17 the offerings? 18 MR. FRANCESKI: Objection. 19 Asked and answered. 20 THE WITNESS: Best of my 21 knowledge. 22 MR. NEWMAN: This wasn't a 23 situation where they prepared the 24 initial private placement memorandum and 25 then for the subsequent ones McGinn Page 872	1 DAVID SMITH 2 MR. NEWMAN: How do you 3 reconcile that fact with this language? 4 MR. FRANCESKI: Objection; 5 asked and answered. 6 But you can answer again. 7 THE WITNESS: The writing that 8 we're referring to is the questionnaire. 9 Language in the questionnaire clearly 10 defines what is an accredited investor. 11 And again under Reg D, the exemption 12 applies in these instances to 35 -- you 13 can accept 35 non-accredited investors. 14 BY MR. RATTINER: 15 Q We are going to turn to page Bates 16 stamped as 14656. 17 You see "Use of proceeds"? 18 What does that represent? Is that 19 only based on the initial raise? 20 A Yes. 21 Q And if we go down below you will see 22 "Plan of Distribution," second paragraph, what does 23 that represent? Is that 2 percent -- what would that 24 2 percent be? 25 A That 2 percent fee is the initial Page 874

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1 DAVID SMITH 2 plan of distribution, that's covered on the front 3 cover, yes. 4 Q And that's equivalent to the 5 underwriting fee? 6 A That's equivalent to the underwriting 7 fee, yes. 8 Q Where does it say here that it's an 9 annual fee? 10 MR. FRANCESKI: Objection; 11 asked and answered. 12 MR. RATTINER: Not with regard 13 to this section. 14 MR. FRANCESKI: He says it is 15 the same language, same idea. 16 MR. NEWMAN: I don't think 17 it's been asked an answered. 18 THE WITNESS: The annual fee 19 is mentioned several times throughout. 20 It's not on this page. 21 MR. RATTINER: Okay. 22 MR. NEWMAN: Why wouldn't that 23 be included in the summary of the 24 offering? 25 THE WITNESS: Because this is Page 875	1 DAVID SMITH 2 You may answer. 3 THE WITNESS: Because when you 4 do an offering and you are trying to 5 identify what the net dollars are going 6 to be at the time the offering is 7 subscribed for and concluded, you don't 8 list -- I've never seen it listed -- 9 ongoing fees. I mean, this is basically 10 saying that we are raising \$20 million, 11 we are taking 2 percent of it, and so 12 initially \$19.6 million is going to be 13 accredited to the LC. 14 Subsequent to that, the LLC 15 incurs all sort of expenses. They incur 16 organizational expenses; they include 17 the advisory fees that we talked about. 18 They are going to include legal fees 19 when they close loans. I mean, those 20 are operating costs of the LLC. This 21 is -- my understanding is that this is 22 trying to reflect and properly so the 23 offering costs at the time of 24 subscription. 25 BY MR. RATTINER: Page 877
1 DAVID SMITH 2 a -- generally the offering costs are 3 identified, which -- the initial 4 2 percent fee, which is deducted from 5 the proceeds, is what is asked for and 6 is identified both here and on the front 7 page. 8 After that, there are ongoing 9 expenses of the LLCs which are then 10 identified in other parts of the 11 prospectus. They include the trustee 12 fee, which is not identified here. They 13 include additional annual commission 14 fees, which is not identified here but 15 is identified in several sections; and 16 the advisory fee. 17 MR. NEWMAN: I guess we are 18 wondering why that information -- these 19 other -- those other fees that you just 20 referenced, including the annual 21 2 percent fee you testified to, are not 22 included in the initial cover page or 23 the memorandum or in the summary of the 24 offering? 25 MR. FRANCESKI: Objection. Page 876	1 DAVID SMITH 2 Q If we can turn to page 14 of 60. 3 MR. FRANCESKI: Do you mind if 4 I ask a follow-up question? 5 Mr. Smith, as far as you're 6 concerned, is the disclosure process you 7 described with respect to underwriting 8 fees versus ongoing expenses, is the way 9 this private placement memorandum deals 10 with it, as far as you understand, 11 custom and practice in the industry? 12 And did you do this under advice of 13 counsel? 14 A Yes. 15 BY MR. RATTINER: 16 Q Just so the record is clear, and we 17 discussed this before, just so it's in the same 18 question, is this PPM substantially similar to the 19 other three PPMs -- 20 A Yes. 21 Q -- the other three LLCs? 22 Are there any other notable 23 differences other than -- 24 (Pause in the proceedings.) 25 THE WITNESS: I believe it is, Page 878

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1 DAVID SMITH
2 with the one exception that we have
3 chatted about a couple of times, and
4 that was the senior subordinate.
5 MR. FRANCESKI: Please note my
6 objection, "Asked and answered" but I
7 got it in late.
8 BY MR. RATTINER:
9 Q Okay. We will turn to page 14660.
10 And four paragraphs down, are these
11 the fees you have been referencing?
12 A (Reviewing).
13 MR. FRANCESKI: The ongoing
14 fees?
15 MR. RATTINER: Correct.
16 THE WITNESS: You are talking
17 about under the risk factors of subtitle
18 "We may be unable to finance our
19 operations"?
20 BY MR. RATTINER:
21 Q Correct?
22 A Then they're talking about cash
23 liquidity; talking about incentive commissions at
24 2 percent annually over the term of the notes.
25 Q Let's stay there. Is that your

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1 DAVID SMITH
2 Q Are the salesmen paid an incentive
3 commission of 2 percent?
4 A It is -- not exactly that. There are
5 modifications.
6 Q And those are --
7 A The seniors were paid at a rate of
8 1 percent. This is -- now, you are talking about --
9 maybe I am parsing words.
10 Are you talking about the gross
11 commission or are you talking about the net
12 commission? I should have asked that. The gross
13 commission is, in fact, 2 percent, yes.
14 Q But the salesmen aren't getting
15 that --
16 A That's correct.
17 Q -- the way it's worded?
18 A That's correct.
19 Q So the salesmen are actually
20 getting --
21 A Yeah. That's what I was trying to
22 get at.
23 That suggests that the salesmen is
24 getting the entire amount. And in our industry, I
25 think it's -- you think in terms of commissions in

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1 DAVID SMITH
2 underwriting fee?
3 A That is our underwriting -- well no,
4 that is not an underwriting fee, I guess. It is what
5 it says it is: It's to the managing members
6 salesman, so...
7 Q That's an additional fee?
8 A That's -- it says it's an incentive
9 commission. And I guess the underwriting fee would
10 be reflective of the 2 percent the first year. This
11 is identified as an incentive commission.
12 Q Yesterday we discussed there's total
13 fees of 3.25 percent ongoing for the term, I guess
14 four or five years, depending on which LLC?
15 A That is correct.
16 Q Where does this fall in with that
17 3.25 percent? Or does it?
18 A It does fall. We talked about the
19 2 percent commission, which is the language
20 identified here. We are talking about the management
21 fee of 1 percent, which is the second line. And the
22 third line is the administration fee of .25 percent.
23 Q What is the last .25 percent?
24 A That's in there. It's never been
25 paid. Never been accrued. Damn.

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1 DAVID SMITH
2 terms of gross, but that isn't what they put in their
3 pocket, so...
4 Q So the house keeps a percentage?
5 A The house keeps a percentage.
6 Q What does the rep actually get out of
7 that?
8 A Well, it varies.
9 Q Over the three tranches?
10 A No -- well, yes, yes.
11 Q And then varies per rep?
12 A Per rep, yes.
13 Q What's this, a typical pay out?
14 A Yes. The --
15 MR. FRANCESKI: Was there a
16 typical at McGinn Smith; is that what
17 you mean?
18 MR. RATTINER: I don't care
19 about everybody else.
20 THE WITNESS: The payout plan
21 was, is that the -- for the senior
22 tranche, the salesmen got 1 percent, and
23 then at whatever payout he was at. And
24 that varied with different parties.
25 MR. FRANCESKI: I think --

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1 DAVID SMITH 2 BY MR. RATTINER: 3 Q As an example, if Lex, for instance, 4 is at an 80 percent payout, he'd get 80 percent of 5 1 percent? 6 A That is correct. 7 MR. FRANCESKI: Chris was 8 asking, is there a typical rep payout; 9 is that -- 10 MR. RATTINER: With regard to 11 these. 12 What we are saying is 13 2 percent is the gross paid to the 14 broker-dealer. The broker-dealer -- 15 does the broker-dealer have a typical 16 payout of that 2 percent to the brokers 17 that they employ. 18 So I think we are on the same 19 page. 20 THE WITNESS: I think so. 21 MR. FRANCESKI: In other 22 words, is there a percentage typically 23 paid to brokers? 24 THE WITNESS: Right. With 25 some differences. The vast majority of Page 883	1 DAVID SMITH 2 the four years, five years, respectively? 3 A That is correct. 4 MR. FRANCESKI: Let me object 5 to that. It's not Mr. Smith. One of 6 the LLCs did not pay for the entire term 7 of the note? Or am I wrong about that? 8 It was a five-year note but only paid 9 four years. If I am wrong I am wrong. 10 THE WITNESS: No. That was -- 11 the broker himself, I think, was -- only 12 got for four years, but not the firm. 13 14 EXAMINATION 15 BY MR. ROWEN: 16 Q The incentive commissions that we 17 spoke of, those incentive commissions are specific to 18 this one offering and no other offerings or no other 19 raises? 20 A No. They are specific to any 21 subscription by an investor that's in place. So if 22 -- you're -- are we talking about what's going to go 23 to the reps? Or are we talking about gross? I guess 24 we need -- 25 Q I am trying to understand what is Page 885
1 DAVID SMITH 2 them received anywhere between 50 and 3 60 percent payout, depending on when 4 they were hired, what their compensation 5 was. 6 BY MR. RATTINER: 7 Q If we are going to that number 8 specifically, what was the number based on? 9 So 1 percent was for the seniors? 10 A Right. 11 Q And then the individual broker? 12 A Right. Got his respective payout, 13 whatever he was -- had been agreed upon. 14 And then the senior subordinate 15 tranche and the third tranche, the junior tranche was 16 also at 2 percent. 17 Q 2 percent. So the full payout, their 18 percent of 2 percent? 19 A Okay, now, we -- seniors got a 20 1 percent gross. Senior subordinates got 2 percent 21 gross. Junior's got 2 percent gross. Off of those 22 gross, each respective rep gets whatever payout he 23 may have been in agreement with. 24 Q Understood. 25 And that's for the term of the note, Page 884	1 DAVID SMITH 2 disclosed here. 3 A What this -- what this references is 4 the percentage of the value of the cost value of the 5 notes at the time. 6 Q The notes specific to this private 7 placement memorandum? 8 A That is correct. 9 Q Okay. Since -- and this private 10 placement memorandum was specific to one offering. 11 Why -- why would this line -- this 12 disclosure of the incentive commissions not be 13 displayed in either the offering summary or on the 14 page that is Bates stamped 14654 on the summary 15 section specific to the offering; why instead is it 16 on the third page of risk factors? 17 MR. FRANCESKI: Objection. 18 Asked and answered. 19 THE WITNESS: I guess I am not 20 sure I totally understand the question, 21 Steve; would you repeat it. 22 BY MR. ROWEN: 23 Q This incentive commission is specific 24 to the offering. 25 Why would it not be disclosed in the Page 886

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1 DAVID SMITH 2 offering summary as opposed to the third page of risk 3 factors? 4 MR. FRANCESKI: Objection. 5 THE WITNESS: I believe the 6 answer was, when we are talking about 7 the summary we are talking about the 8 summary of the offering as it is made 9 and until it's completed. And I have 10 then indicated that subsequent to that 11 there are expenses that are incurred by 12 the LLC, and those are disclosed because 13 they're, you know, I guess conflict 14 disclosures, what have you. 15 And then from a risk 16 standpoint, it is obviously suggesting 17 that -- and informing. Not suggesting, 18 but it's informing the investor that his 19 own liquidity can be impacted by the 20 fact that there are fees payable on 21 expenses payable. And that is a 22 legitimate risk factor. 23 BY MR. ROWEN: 24 Q So you agree though that the 25 incentive commissions as related to this offering -- Page 887	1 DAVID SMITH 2 THE WITNESS: I've answered 3 the best way I can. I think you're 4 reaching for legal conclusions that I am 5 not prepared to answer. You know. I 6 think this is an expense. It's been 7 disclosed. Whether it's -- to meet your 8 definition, I am not in a position to 9 answer that, Steve. So I will have to 10 take a pass. 11 12 EXAMINATION 13 BY MR. RATTINER: 14 Q To follow-up on Steve's point, why is 15 this labeled as a risk and not a fee? 16 MR. FRANCESKI: Objection. 17 THE WITNESS: It's labeled as 18 a risk because as I just suggested to 19 Steve if, in fact, you are trying to 20 determine what various risk might arise 21 so that an investor might not get a 22 timely payment or get a payment at all, 23 there are going to be potential expenses 24 ahead of him. And it will impair the 25 ability to get paid. One of them is Page 889
1 DAVID SMITH 2 MR. FRANCESKI: Objection. 3 MR. NEWMAN: What is the 4 objection? 5 MR. FRANCESKI: Again, he's 6 arguing with the witness. He's trying 7 to throw in the words "related to this 8 offering." Mr. Smith has explained to 9 him that commissions that fall out of 10 the total proceeds of the offering upon 11 closing are disclosed on page 1 and 12 expenses later on, which -- I don't even 13 use the term related to the offering, 14 but it doesn't change the answer. The 15 expenses that come out later on are 16 disclosed elsewhere. That's all. It is 17 what it is. We will argue about whether 18 it should be on page 1 or -- 19 MR. NEWMAN: I'm asking if 20 this is an offering expense to be paid 21 at a later date? Or is this a separate 22 expense away from the offering? That's 23 what I am trying -- 24 MR. FRANCESKI: He answered 25 that. Page 888	1 DAVID SMITH 2 these fees. And that, I think, is a 3 risk factor and certainly one that's 4 appropriately disclosed, especially as 5 it relates to the affiliate parties that 6 are involved. It's generally what you 7 are trying to do. 8 MR. NEWMAN: What guidance, if 9 any, did the firm give its sales force 10 regarding the description and disclosure 11 of fees as they were presenting these 12 investments to prospective investors? 13 THE WITNESS: The fees were 14 all disclosed. 15 MR. FRANCESKI: The question 16 was what guidance did you give to the 17 salesmen about how to talk about the 18 fees? 19 Is that what you are asking, 20 Mike? 21 MR. NEWMAN: Right. 22 THE WITNESS: Okay. That's 23 what I was about to say. 24 We disclosed to the brokers 25 what the level of fees were, that they Page 890

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1 DAVID SMITH
2 were to be translated to the clients. I
3 mean, the fees are what they were. I
4 mean, I don't know if there was an
5 extensive discussion other than "This is
6 what it is going to cost. This is going
7 to be the impact on the LLCs every year
8 in terms of its carrying cost," which
9 include -- you know, we repeatedly
10 talked about our cost of capital being
11 in the eleven-and-three-quarter-percent
12 range. And that would be a reflection
13 of the average rate -- weighted average
14 rate of the three classes of notes,
15 which approximate somewhere about a
16 eight-and-a-half-percent level if you
17 weight the ten and a quarter and the
18 approximately five to six and the seven,
19 seven and a half, you know, whatever the
20 rates were, you are going to arrive at a
21 weighted rate of about eight-and-a-half
22 percent. If you add another
23 three-and-a-quarter percent, which is
24 the two, the one, the quarter --
25 notwithstanding that I missed that other

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1 DAVID SMITH
2 quarter percent that was available --
3 you come to around
4 eleven-and-three-quarters percent. And
5 that was what was conveyed to the sales
6 force, that's our cost to capital. So
7 that's our bogie, to use the term, that
8 that's basically -- when you're -- which
9 really begs the question in terms of
10 risk, everyone understood, you know,
11 with that bogie, you are making loans,
12 you are making capital commitments and
13 credit facilities with that bogie in
14 mind. And that was -- to answer your
15 question, that's what was conveyed.
16 MR. NEWMAN: Eleven and
17 three-quarters.
18 THE WITNESS: At the time
19 that's what it was, yes.
20 MR. NEWMAN: What did the LLCs
21 generate in the way of income, returns
22 on a percentage basis annually from 2000
23 -- 2003 through 2006, approximately?
24 THE WITNESS: I believe three
25 of the four were profitable. I think

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1 DAVID SMITH
2 FAIN was not the first year, but I don't
3 know the numbers. I would have to, you
4 know, go back.
5 MR. NEWMAN: What is the
6 approximate percentage we are talking
7 about?
8 THE WITNESS: Approximate
9 percentage was that they were covering
10 their expenses and had some profit, but
11 I don't -- that's all -- that's what it
12 was basically designed to do.
13 MR. NEWMAN: Was there ever --
14 let me rephrase that.
15 Did the LLCs ever earn
16 sufficient investment returns to pay the
17 required interest payments and the
18 expenses of the LLCs?
19 THE WITNESS: Absolutely.
20 MR. NEWMAN: And that applied
21 throughout the 2003 through 2006 time
22 period.
23 THE WITNESS: Best of my
24 recollection, they did. As I said, I
25 believe there was one of the funds the

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1 DAVID SMITH
2 first year, organizational costs, what
3 have you; but, yes.
4 MR. NEWMAN: Again, my asking
5 that question, I'm not talking about
6 giving people back what they invested in
7 principal, I am talking about actual
8 returns?
9 THE WITNESS: Correct.
10 Income, is what you would be looking at.
11 MR. NEWMAN: Right.
12 BY MR. RATTINER:
13 Q I asked you yesterday that there was
14 an indenture.
15 How many customers requested the
16 indenture, that you recall?
17 A I don't know.
18 Q Who were they requesting an indenture
19 from?
20 A MS Advisors.
21 Q And do you recall if any were
22 requested?
23 A I believe one or two. But I don't
24 know if it came directly from a customer, attorney.
25 And are you talking at time of

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1 DAVID SMITH 2 purchase? Are you talking any time -- 3 Q Throughout the life of the loan. 4 A Maybe one or two, but I couldn't tell 5 you who. 6 MR. ROWEN: How about at time 7 of purchase? 8 THE WITNESS: I don't think 9 any. 10 BY MR. RATTINER: 11 Q How about representatives, were they 12 provided with the indenture? 13 A I don't believe so. It was 14 available, but it was not passed out to them. 15 Q Did any representative request an 16 indenture? 17 A Not to my recollection. 18 MR. ROWEN: Did any ask 19 questions about the indenture? 20 THE WITNESS: I don't recall. 21 I mean, they were told -- hopefully they 22 would know if they were told, there's an 23 indenture with a bond offering, so... 24 But I don't recall specifically if 25 anybody asked any questions. Page 895	1 DAVID SMITH 2 MR. FRANCESKI: Correct. So 3 if there is something you really want to 4 know in the next six minutes, please... 5 THE WITNESS: Page 16, did you 6 say? 7 BY MR. RATTINER: 8 Q Yes, page 16. 9 What did this form of compensation 10 represent? 11 We see a \$400,000 total commission 12 with a footnote of one and the reimbursement of 13 expenses of \$50,000? 14 A The total commissions represent the 15 2 percent of the 20 million. The \$50,000 I would 16 have to -- I wouldn't assume. I do know. I don't 17 know if it was exact, but the legal costs and the due 18 diligence costs associated with the preparation of 19 the memorandum, printing of that sort, I think the 20 \$50,000 was designed to, you know, cover that; 21 although, I do think Gersten's fee was pretty much 22 \$50,000 the first year. That's my recollection. 23 Q And this is, again, the -- only the 24 onset fees described here? 25 A That is correct. Page 897
1 DAVID SMITH 2 MR. ROWEN: You said they were 3 told that there was an indenture with 4 the bond offering? 5 THE WITNESS: I said I would 6 hope that salesmen in the securities 7 business would understand with a bond 8 offering there's an indenture. And I 9 don't recall any broker to your specific 10 question asking me either questions, 11 which I think was your last question, or 12 requesting it. I have no recollection 13 of any of that happening. 14 BY MR. RATTINER: 15 Q If we can turn to page 14669, Bates 16 stamp. 17 MR. FRANCESKI: It's almost 18 five to 12:00, gentlemen. I want to 19 give everybody a heads up, we are 20 concluding at 12:00. You guys tend to 21 always want to ask questions too after 22 we've tell you we've expired. Today we 23 are not going to give you that. 24 MR. RATTINER: Once the 25 expiration happens. Page 896	1 DAVID SMITH 2 Q Where is that stated? 3 MR. FRANCESKI: Where is what 4 stated? 5 BY MR. RATTINER: 6 Q That this is only the initial fee? 7 MR. FRANCESKI: Are the words 8 there? Yes or no: Are the words there? 9 THE WITNESS: (Reviewing). 10 No. 11 MR. NEWMAN: Let's go off the 12 record for one minute. 13 (Whereupon a recess is taken.) 14 MR. RATTINER: Back on the 15 record. 16 MR. MCCARTHY: I just want to 17 go back and clarify the yearly costs. 18 You mentioned, and please correct me if 19 I am wrong, eleven and a quarter 20 percent? 21 THE WITNESS: No. I think I 22 used eleven and three-quarters. 23 MR. MCCARTHY: 24 Eleven-and-three-quarters percent. That 25 was what you would need to earn to cover Page 898

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH costs; to pay out the -- THE WITNESS: For the income, yeah. That's your bogie. MR. MCCARTHY: And that eleven and three-quarters is on the par value; is that correct? THE WITNESS: That is correct. MR. MCCARTHY: So since you are not getting the full par value right off the top, you are taking 2 percent off, that figure is going to start to go up, correct? THE WITNESS: If you divide it by .98, I guess it would have some impact, yeah. MR. MCCARTHY: As the funds decreased in value -- you testified yesterday that at some point in 2007 and 2008 they were worth 80 percent, 70 percent. So, again, that yearly percentage to try to break even is going higher and higher and higher? THE WITNESS: Not necessarily. Because the value of the underlying	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH you are going to have expectations of disappointments. And so therefore, if you are going to be -- if you look at the portfolio of loans, a great number of the loans yielded far in excess of eleven-and-three-quarters percent. You know, generally, the lowest coupon was for what was in the 12 percent range; but there was 14 percent coupons, 15 percent coupons. The things that we invested in the private placement entities that were offered with InCaps and DeKania were returning on an income basis 24 percent in the first years. So you had -- you always, you know, are looking to -- to your point, is what was the fixed bogie? And then if you had disappointments, yes, you would presumably need to get income elsewhere. Well, that's why you had investments that were returning higher rates of return. MR. MCCARTHY: It would seem
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH investment may in effect have gone down, but the income that it's generating may have stayed the same. To your point, if there are impaired or defaulted investments or investments that are not accruing anymore, yes, then your argument is correct. That means -- MR. MCCARTHY: Argument? THE WITNESS: Well, your thesis would suggest that other investments would have to pay more. And, in fact, that's an excellent point, because that's exactly why when people manage these types of funds -- and I mentioned this in my testimony yesterday, anyone that goes into a company, such as this -- I mean, banks don't expect to make a hundred percent returns on their loans, they always expect to have some default rates. And they are lending to presumably AAA credits. So as you go down the credit-worthiness trail, if you will,	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	DAVID SMITH to me in looking through the balance sheet that there were more disappointments than higher returns; is that correct? MR. FRANCESKI: What are you referring to -- THE WITNESS: I guess that's why we are here, isn't it? You know, what if I had invested in all preferred stock of Citicorp, Wachovia, General Motors, Lehman Brothers, Bear Stearns, how would we be doing? Would we be sitting here? We'd have the same record, the same record for the investors, but my guess is we wouldn't be sitting here. You guys wouldn't have called me in if I invested in those entities, and the results would have been worse. So... Yes, we have had a lot of disappointments, Bob, and nobody feels it more than me. A lot of people that feel it. MR. MCCARTHY: Just one

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1 DAVID SMITH 2 last -- and I just want to make sure 3 that our figures are accurate, Palisades 4 Pictures, total investment of the funds 5 of about 13.9 million. Is a big chunk 6 of that still outstanding? 7 THE WITNESS: About 6 million 8 is outstanding, yes -- maybe 7 million, 9 I think. 10 MR. MCCARTHY: And the 11 prospects of paying back that 6 or 7 12 million? 13 THE WITNESS: Prospects of 14 that is that they have been in the queue 15 for approximately two years to do a 16 public offering. They had an engagement 17 with Laidlaw. Never got off the ground. 18 We actually started in '07 with those 19 discussions. Obviously, as we got to 20 '08, had no -- still -- I talked to 21 Mr. Roberti just before I arrived here, 22 tells me he's still in negotiations, 23 still talking with Laidlaw, still 24 expects to do it later this year. And 25 we are negotiating on behalf of the LLCs Page 903	1 DAVID SMITH 2 come up with a date in the next couple 3 of weeks and -- your coming back today 4 for a few hours has made a difference in 5 terms of the time we are going to spend 6 with you next time. We appreciate you 7 coming back for a few hours this 8 morning. 9 And at this point, if counsel 10 has anything else they want to add, we 11 will go off the record, otherwise... 12 MR. FRANCESKI: Yeah. Let's 13 go off the record. 14 MR. NEWMAN: Okay. Off the 15 record. 16 (Whereupon testimony adjourned 17 for the day at 1:00 p.m..) 18 19 20 21 22 23 24 25 Page 905
1 DAVID SMITH 2 as to how and what form that might be 3 and why that -- how that would result in 4 total return of the LLC's capital. 5 THE WITNESS: I have one 6 question. 7 MR. FRANCESKI: Yes. 8 THE WITNESS: Have we gotten 9 any of the Stockholm syndrome yet? 10 Nobody is familiar with the Stockholm 11 syndrome? 12 MR. RATTINER: None of us have 13 it. 14 THE WITNESS: None of us have 15 it. Well, that's too bad from my point. 16 Thank you. 17 MR. NEWMAN: That will 18 conclude our questioning. But we are -- 19 we are going to reserve the right to 20 have you back again for more testimony. 21 There's still some outstanding 8210 22 requests and there are a couple of 23 issues we haven't had a chance to go 24 through today. So we still -- we do 25 want you to come back. So we need to Page 904	1 I, S. Arielle Santos, C.S.R., a Registered Professional 2 Reporter, Certified Shorthand Reporter, Certified LiveNote 3 Reporter do hereby certify: 4 That prior to being examined, the witness named in the 5 forgoing deposition, was by me duly sworn to testify the 6 truth, the whole truth, and nothing but the truth. 7 That said deposition was taken before me at the time and 8 place set forth and was taken down by me in shorthand and 9 thereafter reduced to computerized transcription under my 10 direction and supervision, and I hereby certify the foregoing 11 deposition is a full, true and correct transcript of my 12 shorthand notes so taken. 13 I further certify that I am neither counsel for nor 14 related to any party to said action nor in anywise interested 15 in the outcome thereof. 16 17 18 S. Arielle Santos 19 Registered Professional Reporter 20 Certified Shorthand Reporter - #2116 21 Certified LiveNote Reporter 22 Notary Exp. 4/2011 23 24 25 Page 906