

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

JAN 26 2012

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
LAWRENCE K. BAERMAN, CLERK
ALBANY

UNITED STATES OF AMERICA :

Criminal Number: 1:12-CR-028-DNH

v.

VIOLATIONS:

18 U.S.C. § 1349 (Conspiracy);

18 U.S.C. § 1341 (Mail Fraud);

18 U.S.C. § 1343 (Wire Fraud);

15 U.S.C. §§ 78j(b) and 78ff;

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

TIMOTHY M. MCGINN and
DAVID L. SMITH,

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

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

Defendants.

One Forfeiture Allegation

INDICTMENT

THE GRAND JURY CHARGES:

At all times relevant to this Indictment unless otherwise stated:

Relevant Persons and Entities

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

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

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

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

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

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

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

8. McGinn, Smith Transaction Funding Corp. was a New York corporation controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH through McGinn, Smith Holdings LLC, a New York limited liability company owned by defendant DAVID L. SMITH (50%),

defendant TIMOTHY M. MCGINN (30%), and another person (20%). From on or about May 2, 2008 through on or about November 26, 2008, the broker-dealer raised approximately \$6.8 million from investors for McGinn, Smith Transaction Funding Corp. According to the PPM, investor money would be used to (a) provide capital to close financial transactions originated by the broker-dealer; (b) invest in other public and private securities; and (c) purchase \$1.5 million of the broker-dealer's 2008 Series Cumulative Preferred Stock.

The Trusts

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

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

Name of Trust	Trust Creation Date
TDMM Cable Sr. Trust 09	1/16/09
TDM Verifier Trust 07R	1/29/09
TDM Verifier Trust 08R	6/30/09
TDMM Benchmark Trust 09	7/10/09

10. From in or about October 2006 through in or about November 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH used the broker-dealer to offer and sell approximately \$37 million of unregistered securities to investors in the form of investments in the Trusts.

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

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

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

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

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

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

The Firstline Trusts

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

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

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

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

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

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

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

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

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

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

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

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

concealed, disguised, and failed to disclose the ADT Litigation to existing and prospective Firstline Series B Trust investors.

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

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

31. From in or about January 2008 through in or about September 2009, Firstline made no payments on the May and October Loans, and there was no income stream to make payments to investors.

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

33. From in or about January 2008 through in or about September 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to existing and prospective Firstline and Firstline Series B investors that (a) Firstline had defaulted on

the May and October Loans; (b) Firstline had filed for bankruptcy; and (c) contrary to the PPMs for the Firstline and Firstline Series B Trusts, investor payments had been and would be made using money improperly diverted from entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH including, among other trusts and entities, TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; TDM Verifier Trust 07R; and TDM Cable Funding, LLC.

34. From in or about January 2008 through in or about September 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to investors in TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; and TDM Verifier Trust 07R that money had been improperly diverted to make payments to Firstline and Firstline Series B investors when, as MCGINN and SMITH then well knew, this was not a permitted use of investor funds as defined by the PPMs and the declarations of trust.

35. From on or about January 25, 2008 through on or about June 16, 2008, after Firstline filed for bankruptcy, the broker-dealer sold unregistered securities for Firstline Trust 07 Series B and Firstline Sr. Trust 07 Series B including approximately \$600,000 of unregistered securities for Firstline Trust 07 Series B to replace an investment made by a broker's father and, in connection with those sales, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to these new investors that (a) Firstline had defaulted on the May and October Loans; (b) Firstline had filed for bankruptcy; and (c) contrary to the PPMs for the Firstline and Firstline Series B Trusts, investor payments had been and would be made using money improperly diverted from trusts and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L.

SMITH including, among other trusts and entities, TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; TDM Verifier Trust 07R; and TDM Cable Funding, LLC.

36. On or about September 10, 2009, more than 19 months after Firstline filed for bankruptcy and defaulted on the May and October Loans, defendants TIMOTHY M. MCGINN and DAVID L. SMITH first notified Firstline and Firstline Series B investors of Firstline's January 25, 2008 bankruptcy filing and the defaults on the May and October Loans by mailing investors a memorandum from the general counsel for the broker-dealer. The memorandum falsely stated that (a) post-bankruptcy investor payments had been funded by an unidentified lender when, as MCGINN and SMITH then well knew, the payments to investors had been made with money improperly diverted from trusts and entities controlled by MCGINN and SMITH; and (b) Firstline had concealed the Potential ADT Litigation when, as MCGINN and SMITH then well knew, Firstline had disclosed the Potential ADT Litigation approximately two years earlier.

The Integrated Excellence Trusts

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

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

39. On or about May 28, 2008, defendant TIMOTHY M. MCGINN, as Chairman of McGinn, Smith Transaction Funding Corp., executed an agreement with Integrated Excellence

Funding, LLC promising to lend money to Integrated Excellence Funding, LLC secured by alarm contracts generated by Integrated Excellence, Inc. From on or about May 29, 2008 through on or about August 1, 2008, Integrated Excellence Funding, LLC borrowed approximately \$697,815 under the terms of that agreement (the "Integrated Excellence Loans").

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

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

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

43. In or about August 2008, defendant TIMOTHY M. MCGINN directed that \$142,000 be improperly diverted from an escrow account holding investor funds for Integrated Excellence Jr. Trust 08 and be used to make investor payments to Firstline Sr. Trust 07 investors and TDM Luxury Cruise Trust 07 investors, and from in or about August 2008 through in or about April 2010, defendants MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to (a) Integrated Excellence Jr. Trust 08 investors that they did so when, as MCGINN and SMITH then

well knew, this was not a permitted use of investor funds as defined by the PPMs and declarations of trust; and (b) Firstline Sr. Trust 07 and TDM Luxury Cruise Trust 07 investors that, contrary to the relevant PPMs and declarations of trust, their investor payments had been and would be made using money improperly diverted from the Integrated Excellence Jr. Trust 08.

44. From in or about June 2008 through in or about December 2009, Integrated Excellence Funding, LLC, through another entity, made monthly payments on the Integrated Excellence Loans totaling approximately \$244,709, which loan payments were not sufficient to cover payments of approximately \$283,159 due to the Integrated Excellence investors.

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

46. Between in or about June 2008 and in or about February 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to the Integrated Excellence investors that (i) the Integrated Excellence Loans were not generating sufficient revenue to make monthly investor payments; and (ii) contrary to the PPMs for the Integrated Excellence

Trusts, investor payments had been and would be made using money improperly diverted from trusts and entities controlled by MCGINN and SMITH including, among other trusts and entities, TDM Luxury Cruise Trust 07 and TDMM Cable Sr. Trust 09.

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

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

- (A) Between on or about October 2, 2006 and on or about August 28, 2009, in connection with transactions related to many of the Trusts, MCGINN and SMITH improperly diverted approximately \$3.8 million from the LLCs to their own and Rogers's personal bank accounts and to pay \$40,000 to Waterville Golf Links in Ring of Kerry, Ireland for a membership for Rogers;
- (B) In or about July 2008, MCGINN and SMITH, who were officers and owners of the Trustee for Integrated Excellence Sr. Trust 08 (MS Capital), improperly diverted approximately \$85,000 directly from an escrow account holding investor funds for Integrated Excellence Sr. Trust 08 to their personal

bank accounts;

- (C) On or about April 30, 2009, MCGINN, who was an officer and owner of the Trustee for TDMM Cable Jr. Trust 09 (MS Capital), improperly diverted approximately \$30,000 directly from an escrow account holding investor funds for TDMM Cable Jr. Trust 09 to his personal bank account; and
- (D) From on or about August 22, 2008 through on or about July 8, 2009, MCGINN improperly diverted approximately \$230,000 from McGinn, Smith Transaction Funding Corp., to his personal bank accounts, and on or about February 27, 2009, MCGINN repaid \$100,000 of the money that he had taken.

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

49. Between in or about October 2006 and in or about August 2009, defendant TIMOTHY M. MCGINN used the money that had been improperly diverted to his personal bank accounts for, among other things: (a) expenses related to his homes in Niskayuna, New York (at least \$129,997) and Boca Raton, Florida (at least \$63,808); (b) thoroughbred race horses (at least

\$39,458); (c) alimony (at least \$147,942); (d) loan payments to defendant DAVID L. SMITH and his wife (at least \$255,000); (e) country club expenses at, among others, Waterville Golf Links in Ring of Kerry, Ireland; Pine Tree Golf Club in Boynton Beach, Florida; and Schuyler Meadows in Loudonville, New York (at least \$54,414); (f) payments to investment accounts (at least \$62,250); and (g) income tax payments (at least \$89,642).

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

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

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

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

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

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

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

56. On or about November 2, 2009, after discovering that defendant TIMOTHY M. MCGINN had improperly diverted money from McGinn, Smith Transaction Funding Corp.,

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

Count One
(Conspiracy to Commit Mail and Wire Fraud)

57. Paragraphs One through Fifty-Six are hereby realleged and incorporated by reference as if fully set forth herein.

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

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

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

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

Purpose

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

Manner and Means

60. MCGINN, SMITH, and their co-conspirators made and caused to be made numerous material misrepresentations and material omissions designed to mislead prospective and existing investors regarding the risks of the Trust and McGinn, Smith Transaction Funding Corp. offerings; the use of investor money; the performance of the underlying income streams; the source of investor payments; and the improper diversion of investor money.

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

62. As a result of the material misrepresentations and material omissions by MCGINN, SMITH and their co-conspirators, investors in the Trusts were not aware that MCGINN and SMITH

had improperly diverted money from an escrow account containing investor money for Integrated Excellence Jr. Trust 08 to make payments to Firstline Sr. Trust 07 and TDM Luxury Cruise Trust 07 investors.

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

64. As a result of the material misrepresentations and material omissions by MCGINN, SMITH, and their co-conspirators, investors in the Trusts and McGinn, Smith Transaction Funding Corp. were not aware that MCGINN, for his own benefit and without authorization, had improperly diverted \$230,000 from McGinn, Smith Transaction Funding Corp. above and beyond what was disclosed in the PPM.

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

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

and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH.

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

68. The use of the mails and interstate wires was foreseeable, and defendants TIMOTHY M. MCGINN and DAVID L. SMITH were aware that use of the mails and interstate wires would follow in the ordinary course of business.

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

COUNTS TWO THROUGH EIGHT
(Mail Fraud)

69. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

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

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

<u>Count</u>	<u>Date</u>	<u>Matter or Thing</u>	<u>Address</u>
2	10/2007	A private placement memorandum for Firstline Trust 07 Series B	<u>Delivered to:</u> T.B. Guilderland, NY
3	12/18/2007	A \$50,000 check from M. & K.D. to purchase contract certificates from Firstline Sr. Trust 07 Series B	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
4	01/28/2008	A letter of authorization for a \$30,000 wire transfer from H.C. to purchase contract certificates from Firstline Sr. Trust 07 Series B	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
5	05/15/2008	A \$50,000 check from R. & S. B. to purchase contract certificates from Firstline Trust 07 Series B	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
6	06/06/2008	A subscription agreement for Firstline Trust 07 Series B	<u>Delivered from:</u> R. & J. P. Schenectady, NY
7	06/09/2008	A \$100,000 check from B.S. to purchase contract certificates from Integrated Excellence Sr. Trust 08	<u>Delivered to:</u> McGinn, Smith & Co. Inc. Clifton Park, NY
8	09/10/2009	A letter and memorandum from McGinn Smith Capital Holdings Corp. regarding Firstline Trust 07 Series B to A.G.	<u>Delivered from:</u> McGinn, Smith & Co. Inc. Clifton Park, NY

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

COUNTS NINE THROUGH EIGHTEEN
(Wire Fraud)

72. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

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

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

<u>Count</u>	<u>Date</u>	<u>Writing, Sign, or Signal</u>	<u>Origin</u>	<u>Destination</u>
9	04/23/2008	Facsimile related to B.K.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
10	05/10/2008	Facsimile related to A.C.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
11	05/28/2008	Facsimile related to T.R.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA

<u>Count</u>	<u>Date</u>	<u>Writing, Sign, or Signal</u>	<u>Origin</u>	<u>Destination</u>
12	07/14/2008	Facsimile related to S.J.T.W.'s purchase of contract certificates from Integrated Excellence Sr. Trust 08	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
13	08/29/2008	Wire transfer of \$97,000 to Firstline Sr. Trust 07	Integrated Excellence Jr. Trust 08 Mercantile Bank account ending in 3994 Boca Raton, Florida	Firstline Sr. Trust 07 M & T bank account ending in 5028 Albany, New York
14	08/29/2008	Wire transfer of \$45,000 to TDM Luxury Cruise Trust 07	Integrated Excellence Jr. Trust 08 Mercantile Bank account ending in 3994 Boca Raton, Florida	TDM Luxury Cruise Trust 07 M & T bank account ending in 5234 Albany, New York
15	07/01/2008	Wire transfer of \$35,000 to David L. Smith	Integrated Excellence Sr. Trust 08 Mercantile Bank account ending in 3983 Boca Raton, Florida	David L. Smith M & T bank account ending in 9965 Albany, New York
16	07/01/2008 07/15/2008	Wire transfers totaling \$50,000 to Timothy M. McGinn	Integrated Excellence Sr. Trust 08 Mercantile Bank account ending in 3983 Boca Raton, Florida	Timothy M. McGinn M & T bank account ending in 9504 Albany, New York
17	08/22/2008 09/08/2008 10/22/2008 10/27/2008 11/07/2008 07/08/2009	Wire transfers totaling \$230,000 to Timothy M. McGinn	McGinn, Smith Transaction Funding Corp. Mercantile Bank account ending in 3083 Boca Raton, Florida	Timothy M. McGinn M & T bank accounts ending in 9504 & 2675 Albany, New York
18	04/30/2009	Wire transfer of \$30,000 to Timothy M. McGinn	TDMM Cable Jr. Trust 09 Mercantile Bank account ending in 4139 Boca Raton, FL	Timothy M. McGinn M & T bank account ending in 2675 Albany, New York

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

COUNTS NINETEEN THROUGH TWENTY-FOUR
(Securities Fraud)

75. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

76. On or about the following dates, each such date constituting a separate count of this Indictment, within the Northern District of New York and elsewhere, the defendants TIMOTHY M. MCGINN and DAVID L. SMITH, and others, willfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce and the mails, in connection with the purchase and sale of any securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; and (c) engaging in transactions, acts, practices, and courses of business which operated or would operate as a fraud and deceit upon persons in connection with the following transactions:

<u>Count</u>	<u>Date</u>	<u>Transaction</u>
19	01/11/2008 01/28/2008	Wire transfers related to TDM Verifier Trust 08 totaling \$50,000 from the McGinn, Smith Funding LLC Mercantile bank account ending in 1635 to the Timothy M. McGinn M & T bank account ending in 9504
20	01/28/2008	Wire transfer related to TDM Verifier Trust 08 of \$50,000 from the McGinn, Smith Funding LLC Mercantile bank account ending in 1635 to the David L. Smith M & T bank account ending in 9965
21	09/29/2008 10/03/2008 10/06/2008	Wire transfers related to Fortress Trust 08 totaling \$210,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the Timothy M. McGinn M & T bank account ending in 9504
22	09/29/2008 10/03/2008 10/06/2008	Wire transfer related to Fortress Trust 08 totaling \$360,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the David L. Smith M & T bank account ending in 9965

<u>Count</u>	<u>Date</u>	<u>Transaction</u>
23	10/03/2008	A wire transfer related to Fortress Trust 08 of \$245,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the Matthew Rogers Citicorp Florida bank account ending in 9958 related to Fortress Trust 08
24	11/07/2008	Electronic mail message from tmmcginn@mcginnsmith.com to Mercantile Bank employees in Boca Raton, Florida related to Fortress Trust 08

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

COUNTS TWENTY-FIVE THROUGH TWENTY-SEVEN
(Filing False Returns)

77. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

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

<u>Count</u>	<u>Date Return Filed</u>	<u>Tax Year</u>	<u>Amount Reported at Line 22</u>
25	10/18/2007	2006	\$598,577
26	10/20/2008	2007	\$537,850
27	10/15/2009	2008	\$383,219

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

COUNTS TWENTY-EIGHT THROUGH THIRTY

(Filing False Returns)

79. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

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

<u>Count</u>	<u>Date Return Filed</u>	<u>Tax Year</u>	<u>Amount Reported at Line 22</u>
28	10/17/2007	2006	\$487,337
29	10/20/2008	2007	\$475,160
30	10/15/2009	2008	\$501,199

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

Forfeiture Allegations

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

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

83. Upon conviction of the offenses in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5 set forth in Counts Nineteen through Twenty-Four of this Indictment, which are realleged and incorporated by reference as if fully set forth herein, defendants TIMOTHY M. MCGINN and DAVID L. SMITH shall forfeit to the United States, pursuant to 18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7), and 1961(1), and 28 U.S.C. § 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses.

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


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

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

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

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

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By: 
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