

1 DAVID SMITH  
2 **Q We are going to introduce shortly the**  
3 **PPM, for instance, for FIIN.**  
4 **I'm going to ask you to point to us**  
5 **to that direction, but from your recall at this**  
6 **point, without introducing the exhibit currently,**  
7 **you're stating that the PPM indicates unlimited legal**  
8 **fees?**  
9 A You should be a lawyer. You have a  
10 nice way of misleading the question. I didn't say  
11 anything about the PPM. What I said was is that the  
12 indenture of the bonds gives full precedent over to  
13 the trustee and its agents, which include McGinn  
14 Smith Advisors, McGinn Smith Capital Holdings and  
15 McGinn Smith, period, to not only are they entitled  
16 first to their fees, they are also entitled to pay  
17 all their legal fees and they're indemnified from any  
18 actions taken against them. Indemnification refers  
19 to the ability to pay for their legal defense.  
20 **Q I am unfamiliar with the indenture.**  
21 **Is that something provided to the**  
22 **investing customer?**  
23 **I don't know that I have seen it in**  
24 **my reviews.**  
25 A I don't know, either. I don't think

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1 DAVID SMITH  
2 it was provided -- it's upon request in the PPM. I  
3 don't think it was provided at the beginning.  
4 **Q So from the average customer**  
5 **standpoint, what would they have to say what you just**  
6 **reflected?**  
7 A They would have the ability to  
8 request the indenture to understand what supports the  
9 underlying notes.  
10 **Q But the PPM itself did not spell it**  
11 **out?**  
12 A I don't know that for sure. I don't  
13 think so.  
14 **Q And how much was taken in fees in**  
15 **2010 from the four LLCs?**  
16 A We just took, I think, probably about  
17 \$300,000.  
18 **Q How about in 2009?**  
19 A I don't know. Maybe another hundred,  
20 hundred and a half. I don't know the number. I  
21 don't want to be held to that number.  
22 **Q And do you have that notated**  
23 **somewhere?**  
24 A Do I have it?  
25 **Q Where would you -- what would you**

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1 DAVID SMITH  
2 **refer to to see what fees were taken from the four**  
3 **notes?**  
4 A Our balance sheets and the Quicken  
5 notes. It's all allocated to the various funds and  
6 for the various three sources of payments.  
7 MR. NEWMAN: Going back to the  
8 300,000 that we talked about earlier,  
9 approximately 200,000 went to legal  
10 fees?  
11 THE WITNESS: Yeah. Just  
12 recently we paid 185 to Stradley and we  
13 paid 15 to Hacker & Murphy.  
14 MR. NEWMAN: And what about  
15 the remaining 100,000? What was done  
16 with that?  
17 THE WITNESS: I think that  
18 just went into the operating account of  
19 McGinn Smith but I am not certain. I am  
20 not certain of that number so I'm not  
21 going to -- I think -- I think it is  
22 pretty accurate but I am not going to  
23 swear to it.  
24 MR. NEWMAN: Did you receive  
25 any of that money personally?

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1 DAVID SMITH  
2 THE WITNESS: Personally, no.  
3 MR. NEWMAN: Any justified  
4 taking 300,000 out of entities that are  
5 in default?  
6 THE WITNESS: Because it's  
7 owed to us.  
8 MR. NEWMAN: Us being who?  
9 THE WITNESS: Us being the  
10 entities that I've referred to, McGinn  
11 Smith, McGinn Smith Advisors, and McGinn  
12 Smith Capital Holdings.  
13 MR. NEWMAN: And the 100 to  
14 150,000 that was taken out last year,  
15 where did that money go?  
16 THE WITNESS: I indicated I am  
17 not sure of that number, and I -- if it  
18 went anywhere, it went into those three  
19 entities.  
20 MR. NEWMAN: And again, you  
21 are a principal in all those entities,  
22 correct?  
23 THE WITNESS: That is correct.  
24 MR. NEWMAN: Did you receive  
25 any income from those?

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1 DAVID SMITH  
2 THE WITNESS: No.  
3 MR. NEWMAN: The entities  
4 received the income?  
5 THE WITNESS: The entities  
6 received the income to cover their  
7 expenses related to the funds.  
8 MR. NEWMAN: What expenses did  
9 the fund have during the fall? What was  
10 the \$150,000 in expenses the fund was --  
11 THE WITNESS: The funds  
12 continued to incur management expense.  
13 Again, it's accrued or had been accrued,  
14 but they are entitled to it. They  
15 continued to incur legal expenses.  
16 MR. NEWMAN: What are you  
17 managing that it's in default, correct?  
18 MR. FRANCESKI: I think we are  
19 confusing the payments to the note  
20 holders are in default, but the LLCs are  
21 still operating. They still have  
22 operating expenses.  
23 MR. NEWMAN: No monies are  
24 being paid to any of the customers or  
25 investors? It's all --

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1 DAVID SMITH  
2 MR. FRANCESKI: Yeah, sure.  
3 THE WITNESS: I repeatedly  
4 said I have given you the schedule that  
5 was paid. We made payments in '08. I  
6 made a payment at the end of '09. I  
7 made a paid in '10. How many times do I  
8 have to -- would you read that back?  
9 MR. NEWMAN: Let the record  
10 reflect the witness is raising his voice  
11 to that question.  
12 THE WITNESS: Let the record  
13 reflect that the counsel is hostile to  
14 the witness.  
15 MR. NEWMAN: Again, you are  
16 taking money out of an entity that's  
17 basically in default, \$150,000. How do  
18 you justify that as a managing principal  
19 and advisor taking that kind of money,  
20 the \$300,000 this year when the  
21 customers aren't being paid anything?  
22 MR. FRANCESKI: Objection.  
23 Asked and answered, and you don't need  
24 to answer it again.  
25 MR. NEWMAN: How do you

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1 DAVID SMITH  
2 justify?  
3 MR. FRANCESKI: Argumentative,  
4 it's been asked and answered.  
5 MR. NEWMAN: How do you  
6 justify that?  
7 MR. FRANCESKI: You don't need  
8 to answer it.  
9 THE WITNESS: There's legal  
10 costs that are due. That is a function  
11 of the funds. They have incurred legal  
12 costs, and they are due -- Mr. Franceski  
13 would like to get paid for his services.  
14 BY MR. RATTINER:  
15 **Q Why is that not the responsibility of**  
16 **MS Advisors?**  
17 A Because they are indemnified through  
18 the indenture. Legal defense and legal costs are  
19 indemnified.  
20 **Q And that's not something that you**  
21 **would disclose prominently in a PPM?**  
22 MR. FRANCESKI: Objection.  
23 What do you mean prominent?  
24 BY MR. RATTINER:  
25 **Q Disclose in a PPM. Forget the word**

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1 DAVID SMITH  
2 **prominent.**  
3 A I relied on my securities counsel to  
4 prepare the PPM. They prepared the PPM. I am not a  
5 lawyer.  
6 MR. NEWMAN: Did you review  
7 the PPM?  
8 THE WITNESS: Of course.  
9 MR. NEWMAN: Did you provide  
10 comments to the PPM?  
11 THE WITNESS: I am sure I did.  
12 MR. NEWMAN: And that was true  
13 for all four entities?  
14 THE WITNESS: That is correct.  
15 MR. NEWMAN: Who prepared the  
16 actual PPM?  
17 THE WITNESS: Gersten Savage.  
18 MR. NEWMAN: And who worked  
19 with the law firm in providing the  
20 information for the disclosure in the  
21 PPMs? Where did the information come  
22 from?  
23 THE WITNESS: The securities  
24 lawyers, they, quite frankly, do these  
25 things repeatedly and they know exactly

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1 DAVID SMITH  
2 what disclosures are to be put in a PPM.  
3 MR. NEWMAN: That is not my  
4 question. The question is who provided  
5 the information that was included in the  
6 PPMs to the law firm? Who gave them  
7 that information?  
8 MR. FRANCESKI: Objection,  
9 asked and answered.  
10 MR. NEWMAN: That has not been  
11 answered.  
12 THE WITNESS: The lawyers  
13 themselves put the information in.  
14 MR. NEWMAN: Where did the  
15 lawyers get the information from?  
16 THE WITNESS: I assume from  
17 their experience of writing hundreds of  
18 PPMs.  
19 MR. NEWMAN: Did you work with  
20 Gersten Savage in providing information  
21 to them so they could prepare the PPMs?  
22 THE WITNESS: I provided an  
23 outline of what the business plan was.  
24 I did not provide any information  
25 regarding security disclosures or

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1 DAVID SMITH  
2 anything else. That's not my job.  
3 MR. NEWMAN: When Gersten  
4 Savage -- rephrase that. Did they  
5 perform due diligence in connection with  
6 the PPMs? Do you know what that term  
7 is, due diligence?  
8 THE WITNESS: Yes, I do.  
9 MR. NEWMAN: Did they perform  
10 due diligence in connection with the  
11 offerings?  
12 MR. FRANCESKI: Objection.  
13 THE WITNESS: I don't know how  
14 due diligence would be performed on an  
15 offering.  
16 MR. NEWMAN: Did they meet --  
17 did you meet with the attorneys who  
18 prepared the PPM?  
19 THE WITNESS: Yes.  
20 MR. NEWMAN: And who was the  
21 attorney who actually prepared the PPMs?  
22 THE WITNESS: I don't know who  
23 they used on their staff. I think  
24 Arthur Marcus might have been one, Jay  
25 Kaplowitz might have been one, and third

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1 DAVID SMITH  
2 person would be Eric Roper, but I am not  
3 privy to the inner workings of the law  
4 firm and who they assigned what task.  
5 MR. NEWMAN: Well, I'm asking  
6 you about your personal contact with the  
7 law firm. Presumably you are able to  
8 answer that question?  
9 MR. FRANCESKI: I'm sorry,  
10 Mike. I don't mean to interrupt your  
11 question, but I am going to object to  
12 attorney-client privilege purposes. He  
13 told you he used a law firm.  
14 MR. NEWMAN: There's no  
15 privilege to who he meets with in  
16 preparation for a PPM.  
17 MR. FRANCESKI: He answered  
18 that. You asked him what information he  
19 provided.  
20 MR. NEWMAN: I'm asking him  
21 who he met with right now.  
22 MR. FRANCESKI: He already  
23 answered that. Answer it again,  
24 Mr. Smith, would you?  
25 MR. NEWMAN: How many meetings

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1 DAVID SMITH  
2 did you have with the attorneys for  
3 Gersten Savage in connection with each  
4 offering?  
5 THE WITNESS: Two, three. I  
6 don't recall.  
7 MR. NEWMAN: And were they in  
8 person, telephone, e-mails, combination?  
9 THE WITNESS: Person, probably  
10 some telephonic conversation.  
11 MR. NEWMAN: And was -- does  
12 that apply to all four of the different  
13 offerings?  
14 THE WITNESS: Yes.  
15 MR. NEWMAN: Who else met with  
16 the attorneys besides yourself?  
17 THE WITNESS: I can't recall  
18 anybody else.  
19 MR. NEWMAN: At the time the  
20 January 2008 letter was prepared by you,  
21 approximately how many of the  
22 investments were in default?  
23 THE WITNESS: I don't know.  
24 MR. NEWMAN: Approximately?  
25 THE WITNESS: I don't know.

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1 DAVID SMITH  
2 MR. NEWMAN: Was it more than  
3 5, more than 10, 25?  
4 THE WITNESS: I don't -- I  
5 don't know. Without reviewing the  
6 records, I am not going to answer that  
7 question.  
8 MR. NEWMAN: Why don't we show  
9 him the exhibit which lists all the  
10 different investments.  
11 MR. RATTNER: Referring back  
12 to Exhibit Number 1.  
13 BY MR. RATTNER:  
14 **Q Page 3 through the last page has each**  
15 **investment in there.**  
16 MR. FRANCESKI: Can I have  
17 Exhibit 1 back, please.  
18 THE WITNESS: (Reviewing).  
19 MR. FRANCESKI: Okay. There's  
20 no question.  
21 MR. NEWMAN: There's a  
22 question. He said he would like to take  
23 a look at the exhibit.  
24 THE WITNESS: That is not a  
25 question.

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1 DAVID SMITH  
2 MR. NEWMAN: Approximately how  
3 many of these investments were in  
4 default at the time you wrote this  
5 letter?  
6 THE WITNESS: By default,  
7 please?  
8 MR. NEWMAN: Or in arrearage,  
9 the payments hadn't been made? Or why  
10 don't we do this. Why don't you tell us  
11 first how many of these have been  
12 written off, and then tell us how many  
13 of these were in arrears?  
14 MR. FRANCESKI: On all four  
15 pages, Mike?  
16 MR. NEWMAN: Yes.  
17 THE WITNESS: (Reviewing).  
18 MR. FRANCESKI: Do you need to  
19 take a break to do that?  
20 THE WITNESS: No.  
21 (Reviewing). I think on Page 1 the only  
22 one that was clearly in default, and if  
23 it's listed here, I don't think it would  
24 have been written off. Let's see.  
25 There's a discount of 75 percent. But

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1 DAVID SMITH  
2 Smash Holdings was in arrearages.  
3 Palisades was in arrearages.  
4 MR. FRANCESKI: There are two  
5 Palisades on here, Dave.  
6 THE WITNESS: Yes. I think  
7 probably both of them were in  
8 arrearages. Cochise was already, I  
9 believe, settled by that time.  
10 MR. NEWMAN: What does that  
11 mean?  
12 THE WITNESS: We had brought a  
13 legal action against Pali Capital, who  
14 had been the underwriter of Cochise, and  
15 I think by the date that we are talking  
16 about, we had reached settlement with  
17 them.  
18 MR. NEWMAN: What was the  
19 settlement amount?  
20 THE WITNESS: Settlement was  
21 between Cochise and another one of their  
22 offerings, which I think in the  
23 aggregate amounted to about \$3 million,  
24 and the settlement was for about 2.2.  
25 MR. NEWMAN: So 2.2 was

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1 DAVID SMITH  
2 recovered by McGinn Smith Advisors? Who  
3 got that recovery?  
4 THE WITNESS: I believe the  
5 two funds involved were First  
6 Independent and First Excelsior.  
7 MR. NEWMAN: When was that  
8 payment made?  
9 THE WITNESS: Well, they are  
10 in the process of making those payments.  
11 The settlement was over time. We have  
12 been receiving payments on that basis.  
13 MR. NEWMAN: Okay. So there  
14 was a settlement reached for  
15 2.2 million; is that correct?  
16 THE WITNESS: That's  
17 approximately the number.  
18 MR. NEWMAN: Who were the  
19 parties to the settlement?  
20 THE WITNESS: First  
21 Independent Income Notes and First  
22 Excelsior.  
23 MR. NEWMAN: Is there a  
24 settlement agreement?  
25 THE WITNESS: Yes.

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1 DAVID SMITH  
2 MR. NEWMAN: And when was the  
3 agreement reached, approximately?  
4 THE WITNESS: I think it was  
5 at the end of -- I think it was sometime  
6 in '07, maybe the spring of '07.  
7 MR. NEWMAN: And when were the  
8 payments -- when was the first payment  
9 made under that settlement?  
10 THE WITNESS: Let me correct  
11 myself. I think maybe the payment was  
12 -- the settlement was in '08, because I  
13 think the first payment was in June of  
14 '08.  
15 MR. NEWMAN: For how much?  
16 THE WITNESS: I think the  
17 first payment was for 300,000.  
18 MR. NEWMAN: And where did  
19 that money go?  
20 THE WITNESS: It was allocated  
21 on a pro rata basis between the First  
22 Independent Income Notes and First  
23 Excelsior. My recollection was that one  
24 of them got 52 percent and the other got  
25 48 percent.

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1 DAVID SMITH  
2 MR. NEWMAN: Any other  
3 payments made?  
4 THE WITNESS: Yeah. There was  
5 another payment made in December of '08.  
6 There was another one --  
7 MR. NEWMAN: How much?  
8 THE WITNESS: I think it was  
9 400,000 maybe.  
10 MR. NEWMAN: Where did that  
11 money go?  
12 THE WITNESS: Same allocation,  
13 52/48.  
14 MR. NEWMAN: Okay. What else?  
15 THE WITNESS: CCI was in  
16 arrearages at that time.  
17 MR. NEWMAN: As far as this  
18 \$2.2 million settlement, you indicated  
19 700,000. What happened to the other  
20 1.5 million?  
21 THE WITNESS: Well, we got as  
22 far as December '08. In June of '09, we  
23 got, I think 450,000.  
24 MR. NEWMAN: Who received that  
25 money?

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1 DAVID SMITH  
2 THE WITNESS: 52/48 to First  
3 Independent and First Excelsior.  
4 MR. NEWMAN: Any other money?  
5 THE WITNESS: In December of  
6 '09, I believe it was 500,000.  
7 MR. NEWMAN: You believe?  
8 THE WITNESS: The same --  
9 MR. NEWMAN: 500,000?  
10 THE WITNESS: Yes.  
11 MR. NEWMAN: And where did  
12 that money go?  
13 THE WITNESS: 52/48.  
14 MR. NEWMAN: Anything else?  
15 Any other payments?  
16 THE WITNESS: There is a  
17 \$500,000 payment that they are in  
18 arrears on, and there is a \$300,000  
19 payment due in June of 2010.  
20 MR. NEWMAN: How much did the  
21 funds invest in Cochise?  
22 THE WITNESS: Approximately \$3  
23 million.  
24 MR. NEWMAN: So the settlement  
25 is for less than that, obviously?

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1 DAVID SMITH  
2 THE WITNESS: Yeah. They had  
3 received some principal and interest the  
4 first year. I don't think it was a lot  
5 of principal, maybe 300,000, 200,000,  
6 and then the difference was, yes, so  
7 there was -- it was not total recovery  
8 of the funds in terms of a settlement.  
9 MR. NEWMAN: Where was the  
10 money -- or excuse me, was there a  
11 lawsuit filed?  
12 THE WITNESS: Yes.  
13 MR. NEWMAN: Where was it  
14 filed?  
15 THE WITNESS: It was multiple  
16 lawsuits. The initial lawsuit was filed  
17 by Pali versus the issuer, the promoter.  
18 The issuer counter sued against Pali.  
19 MR. NEWMAN: Who is Pali?  
20 THE WITNESS: Pali Capital is  
21 a broker-dealer out of New York.  
22 Subsequent to that, we filed suit, we  
23 meaning the LLCs filed suit against --  
24 initially against the issuer, and  
25 subsequently we brought an action

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1 DAVID SMITH  
2 against Pali, and subsequent to that we  
3 reached settlement with Pali.  
4 MR. NEWMAN: The lawsuit, was  
5 that state court or federal court?  
6 THE WITNESS: I don't know.  
7 MR. NEWMAN: Going through  
8 this first page or the third page, I  
9 guess, the list of investments, what  
10 else was in arrearages or in default?  
11 THE WITNESS: CCI was in  
12 arrearages.  
13 MR. NEWMAN: By how much?  
14 THE WITNESS: This is '07.  
15 Well, I would guess -- doesn't have the  
16 accrued interest. So I think it was a  
17 12 percent coupon. So that's roughly  
18 \$70,000 a year. It's in default for two  
19 years, about \$140,000 would be my guess.  
20 BY MR. RATTINER:  
21 **Q That's 140 in addition to the 643?**  
22 A I think the -- yes, I believe -- the  
23 643, I think, represents some accrued interest at  
24 some point because the total loans to CCI between the  
25 two LLCs was something close to a million, maybe just  
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1 DAVID SMITH  
2 a tad less, and so with a 643 number, I would have to  
3 assume that they got some accrued on there, and I  
4 couldn't tell you when that basically stopped. Let's  
5 see if we can find the other one.  
6 It does have some accrued, because if  
7 you go to First Excelsior, it's 549. So you've got  
8 roughly 50 plus 143, about 200,000 of accrued. So I  
9 am assuming it was accruals for probably the first  
10 year. They were making some payments, and then --  
11 but since we are in '07, I think those loans were  
12 made in '05, early '05, Spring of '05.  
13 So I think you are looking at  
14 probably all of '06 and all of '07 where there's  
15 arrearages that are not added to that total.  
16 **Q At what point do you stop accruing or**  
17 **do you stop accruing the interest?**  
18 A When they quit paying. In this  
19 particular instance, we talked about this a little  
20 earlier, CCI had reached out to a public company, had  
21 made a transfer of their notes to all their  
22 obligations, to a preferred stock, which was to be a  
23 preferred stock of a public company.  
24 So at that time we did not write the  
25 loan off because we were getting full value in the  
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1 DAVID SMITH  
2 preferred stock of the public company. At some point  
3 that transaction, as we said, did not reach an  
4 acceptable conclusion, and I think that that is  
5 sometime in '07, but I can't tell you exactly what  
6 the date was.  
7 MR. NEWMAN: Also on this page  
8 was in arrearage or in default?  
9 THE WITNESS: I think I  
10 covered them all, Mike.  
11 BY MR. RATTINER:  
12 **Q How about with regard to Exchange**  
13 **Boulevard, which I guess on here is EXBV?**  
14 A EXBV, I thought I mentioned that. If  
15 I didn't, the loan for \$500,000, I think, occurred in  
16 '06, showing some accrued there. I can't tell you at  
17 the end -- I would have to say at the end of '07 that  
18 clearly we were in arrearages of some amount, but I  
19 don't know, looking at that accrued of 68,444, I am  
20 not certain.  
21 **Q So if we just continue on with this**  
22 **sheet, Exchange Boulevard, as you are saying, was in**  
23 **some sort of arrearages as of 2007?**  
24 A I believe so, yes.  
25 **Q F4W?**

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1 DAVID SMITH  
2 A F4W was under a restructuring plan.  
3 They may or may not have been in arrearages at the  
4 end of '07.  
5 **Q And how about currently?**  
6 A Currently, they have just paid some  
7 of their arrearages, \$125,000. It's under another  
8 amendment to the plan. Going back to your question  
9 of '07, again, I think that loan was made in the fall  
10 of '06, and so in answer to your question, in  
11 December of '07, which is what time period we are  
12 talking about, I would believe they were in arrearage  
13 to some degree.  
14 **Q And what connection does McGinn Smith**  
15 **have to F4W?**  
16 **How was it introduced?**  
17 A It was introduced to us by a friend  
18 and client of mine who had a connection in the  
19 Pentagon and had run into someone in the armed  
20 services that was talking with F4W about their  
21 product. He was quite excited about the product,  
22 said you might want to call these guys and see how  
23 they are doing and what they are doing.  
24 So my recollection was, armed with  
25 that name, I made the initial contact. They are  
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1 DAVID SMITH  
 2 based out of Lake Mary, Florida, which is south of  
 3 Orlando. I visited the company. We had  
 4 negotiations. I believe -- you guys are killing me  
 5 with these dates, like I've got to remember them all,  
 6 you know, but I believe it was the summer of '06 that  
 7 I had that discussion and subsequently made a first  
 8 advance in the fall of '06. Could be '07, but I  
 9 think it was '06.

10 **Q And C4, is that Capital Center Credit**  
 11 **Corp.?**  
 12 A That is.

13 **Q And ownership of that entity?**  
 14 A That entity is owned by -- I believe  
 15 it is owned 100 percent by Tim and Dave. I don't  
 16 know -- I assume the break, it's 50/50, Tim McGinn,  
 17 excuse me, and Dave Smith.

18 **Q And what does that entity do?**  
 19 A That entity is basically a financing  
 20 vehicle. It, for years, was part of the alarm  
 21 business that we used, spent time acting as an  
 22 intermediary in terms of putting down bridge  
 23 financing until other permanent financing could be  
 24 formed.

25 **Q What is the revenue that C4**

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1 DAVID SMITH  
 2 **generates?**  
 3 A Now they don't generate any.

4 **Q How about in 2007?**  
 5 A I don't know. Minimal.

6 **Q So how was this 45,000 supposed to be**  
 7 **repaid?**  
 8 A Because it's all pledged to the fees  
 9 at the time.

10 MR. FRANCESKI: The fee is  
 11 pledged. I have an objection. I think  
 12 he got it backwards.

13 THE WITNESS: Who's got, me or  
 14 him?

15 MR. FRANCESKI: What is that?  
 16 THE WITNESS: Who got it  
 17 backwards?

18 MR. FRANCESKI: You said  
 19 pledged to the fees. I think you mean  
 20 fees were pledged to it.

21 THE WITNESS: Yes, I did have  
 22 it backwards. Virtually, all related  
 23 party investments defined in a credit  
 24 agreement as 20 percent or more, that  
 25 either Dave Smith, Tim McGinn,

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1 DAVID SMITH  
 2 affiliated parties owned, pledged their  
 3 fees from McGinn Smith Capital Holdings,  
 4 MS Partners, and MS Advisors to  
 5 collateralize the loan, and C to the 4th  
 6 was certainly part of that.

7 BY MR. RATTINER:  
 8 **Q How does that fall into place with**  
 9 **the indenture that you previously described?**  
 10 A I don't understand that question.

11 **Q Are these fees still due to FIIN?**  
 12 A The fees are not due to FIIN. The  
 13 fees are due to the entities that I just disclosed,  
 14 and they are pledged for any related party loan, of  
 15 which we had more than a 20 percent interest, and  
 16 they have been pledged from day one. So the payment  
 17 of, to your specific question, would be offset from  
 18 any fees that are due to those entities.

19 **Q All right. Let me make sure I**  
 20 **understand.**  
 21 **C4 borrowed \$44,000 from First**  
 22 **Independent?**  
 23 A Correct.

24 MR. FRANCESKI: 45.  
 25 MR. RATTINER: 45,000 I

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1 DAVID SMITH  
 2 apologize.

3 BY MR. RATTINER:  
 4 **Q Who owes that money to First**  
 5 **Independent?**  
 6 A C to the 4th supported by,  
 7 collateralized, assigned -- an assignment of the fees  
 8 from, in collective, in the aggregate of any fees due  
 9 from the four LLCs that are owed to those entities.

10 **Q So why is this still outstanding? Is**  
 11 **it still outstanding, number one?**  
 12 A Because we haven't chose to pay it.  
 13 And we could pay it anytime we wanted to take the  
 14 fees to ourselves and pay it, but it's fully  
 15 collateralized, the fees are due. They have been set  
 16 aside from ongoing periods, and, you know, it is a  
 17 function of do you want to offset it, do you want to  
 18 take the cash out, pay it here, pay it back? You  
 19 know, it's an exercise of mechanics.

20 **Q Okay. And what is the interest rate**  
 21 **on this loan?**  
 22 A Well, it is a complicated interest  
 23 rate, but I guess you will want to know the question,  
 24 so I will give it to you. Basically, the -- first,  
 25 to answer your question, it is 12 percent, I believe.

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1 DAVID SMITH  
2 It may be 10, it may be 12, but it's generally what  
3 we consider a market rate. There is the ability that  
4 if the fees are in a positive accrual, at the  
5 discretion of the borrower, it can be reduced to  
6 3 percent.  
7 **Q Has it been done?**  
8 A No. We have been just -- we've been  
9 carrying it.  
10 **Q So there's no accrual of**  
11 **approximately \$5,000 a year in fees being accrued**  
12 **somewhere?**  
13 A I don't know if they have accrued. I  
14 assume they have accrued it at the 12, but in terms  
15 of the adjustment, I couldn't tell you what it is. I  
16 mean, it's an analysis that has to be done. The  
17 theory behind the analysis is, is that at the time we  
18 took the 45,000, we could have taken it.  
19 We -- excuse me, McGinn Smith  
20 Advisors or McGinn Smith Capital Holdings or McGinn  
21 Smith & Company was entitled to the money, they could  
22 have taken the money at which point the LLCs would  
23 have earned nothing on the money.  
24 All right. So the theory is, is that  
25 if there is -- if you are in a positive accrual to

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1 DAVID SMITH  
2 those entities, MS Advisors, McGinn Smith Capital  
3 Holdings, McGinn Smith & Company, that, in fact, the  
4 LLCs are entitled to 3 percent, which is three more  
5 than they would have gotten had they just paid the  
6 money. If, in fact, you are in a negative accrual,  
7 and I am not sure that there was any time that we  
8 were, but if there was a case, then the argument  
9 would be advanced, that in fact you're advancing real  
10 money, in which case you are entitled to a real  
11 market rate, which is 12 percent.  
12 MR. NEWMAN: This formula you  
13 are describing in detail, is this  
14 specified in any documentation?  
15 THE WITNESS: Yeah. There's a  
16 credit agreement.  
17 MR. NEWMAN: There's a what?  
18 THE WITNESS: There's a credit  
19 agreement.  
20 MR. NEWMAN: Okay. When was  
21 that credit agreement signed?  
22 THE WITNESS: I think it was  
23 in '04 initially.  
24 MR. NEWMAN: And who are the  
25 parties to that agreement?

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1 DAVID SMITH  
2 THE WITNESS: MS Advisors, the  
3 four LLCs, and McGinn Smith & Company,  
4 and McGinn Smith Capital Holdings.  
5 MR. NEWMAN: And who  
6 represented the four LLCs in connection  
7 with this agreement? Who was acting on  
8 behalf of the four LLCs in negotiating  
9 this agreement?  
10 THE WITNESS: Well, I, as the  
11 managing partner, was.  
12 MR. NEWMAN: And who was  
13 acting on behalf of MS Advisors?  
14 THE WITNESS: Mr. McGinn.  
15 MR. NEWMAN: Pardon me?  
16 THE WITNESS: Mr. McGinn.  
17 MR. NEWMAN: And who was the  
18 third party to this agreement? I'm  
19 sorry. MS Advisors, the four LLCs, and  
20 who was the third entity?  
21 THE WITNESS: MS Capital  
22 Holdings.  
23 MR. NEWMAN: And who was  
24 acting on behalf of MS Capital Holdings  
25 in connection with this agreement?

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1 DAVID SMITH  
2 THE WITNESS: Mr. McGinn.  
3 MR. NEWMAN: But yet you have  
4 a majority stake in MS Advisors and  
5 McGinn Smith Capital Holdings, I  
6 understand your earlier testimony?  
7 THE WITNESS: That is correct.  
8 MR. NEWMAN: So you negotiated  
9 this agreement with Mr. McGinn?  
10 THE WITNESS: Well, the fact  
11 is it's very clear to be advantageous to  
12 the funds so that any negotiation was  
13 done was at our disadvantage. So to  
14 your point, as you're pursuing a  
15 conflict of interest, there is none  
16 because it's advantageous to the funds.  
17 MR. NEWMAN: Did you negotiate  
18 this agreement with Mr. McGinn?  
19 THE WITNESS: I don't -- Mr.  
20 McGinn represented and signed on behalf,  
21 and I signed on behalf of the funds,  
22 yes.  
23 MR. NEWMAN: So no negotiation  
24 involved?  
25 THE WITNESS: It was a

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1 DAVID SMITH  
2 discussion of what would be advantageous  
3 to the funds, and that's what we did.  
4 MR. NEWMAN: Was there a  
5 negotiation involved?  
6 THE WITNESS: There was a  
7 discussion.  
8 MR. NEWMAN: So there was a  
9 discussion. And the discussion was  
10 between you and Mr. McGinn?  
11 THE WITNESS: That is correct.  
12 MR. NEWMAN: Has FINRA been  
13 provided a copy of this credit  
14 agreement?  
15 THE WITNESS: I have no idea.  
16 They have asked for lots of documents.  
17 I don't know if -- I don't think so. I  
18 think they just asked for the loan  
19 documents. I don't think they've asked  
20 for credit or due diligence documents.  
21 I'm not sure.  
22 MR. NEWMAN: Well, I think  
23 we've asked for all loan documents. You  
24 wouldn't consider this to be a loan  
25 document?

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1 DAVID SMITH  
2 THE WITNESS: I don't know. I  
3 answered your question. You asked me if  
4 you got it, and I said I don't know.  
5 MR. NEWMAN: Okay. Now I'm  
6 asking you a separate question. Do you  
7 consider this to be a loan document?  
8 THE WITNESS: I consider it to  
9 be a security document.  
10 MR. NEWMAN: Okay. What is  
11 the difference?  
12 THE WITNESS: Loan document  
13 lays out the terms of the loan between  
14 the borrower and the lender.  
15 Security --  
16 MR. NEWMAN: This is -- go  
17 ahead.  
18 THE WITNESS: The security  
19 agreement, which is what your question  
20 was, is a document that basically  
21 identifies the collateral for the  
22 borrower -- or, excuse me, for the  
23 lender.  
24 MR. NEWMAN: So you don't  
25 consider this to be a loan agreement?

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1 DAVID SMITH  
2 MR. FRANCESKI: Objection.  
3 Asked and answered.  
4 MR. NEWMAN: I am just trying  
5 to make sure I understand the answer.  
6 Do you consider this to be a loan  
7 agreement?  
8 MR. FRANCESKI: I don't think  
9 the witness has an obligation to answer  
10 a question twice so that you understand  
11 it. He only has to answer the question.  
12 MR. NEWMAN: I don't think  
13 he's answered the question, so I'm  
14 asking it again.  
15 MR. FRANCESKI: It doesn't  
16 matter whether you think he did. I am  
17 objecting on the ground that he did.  
18 MR. NEWMAN: You can object to  
19 it. I want an answer to the question.  
20 MR. FRANCESKI: That's what I  
21 did.  
22 MR. NEWMAN: Does he consider  
23 this to be a loan agreement?  
24 THE WITNESS: Technically, no.  
25 I consider it a credit agreement -- or,

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1 DAVID SMITH  
2 excuse me, a security agreement.  
3 MR. NEWMAN: What is the  
4 document captioned, this agreement?  
5 What is it called? Is it called a  
6 credit agreement?  
7 THE WITNESS: I don't know.  
8 It's drawn up six years ago. I don't  
9 know. It's probably a security  
10 agreement. I think it would be a  
11 security agreement, but I don't know.  
12 MR. NEWMAN: When is the last  
13 time you referred to it?  
14 THE WITNESS: I don't know.  
15 MR. NEWMAN: Who drafted the  
16 language in the agreement?  
17 THE WITNESS: Originally, I  
18 believe I drafted the -- I and Mr.  
19 McGinn drafted it.  
20 MR. NEWMAN: Both of you did  
21 it together?  
22 THE WITNESS: We both had  
23 input, I don't know. Probably mostly my  
24 intent. Mr. McGinn was not with the  
25 firm at the time, although we consulted,

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1 DAVID SMITH  
2 but he was not active in the firm.  
3 MR. NEWMAN: You consulted  
4 with him even though he wasn't with the  
5 firm in 2004; is that what you are  
6 saying?  
7 THE WITNESS: He's my partner.  
8 He's a 30 percent interest in the firm,  
9 yes, I consulted with him often.  
10 MR. NEWMAN: Did you consult  
11 with him in connection with this  
12 agreement?  
13 THE WITNESS: Best of my  
14 recollection, I did. I don't know with  
15 certainty.  
16 BY MR. RATTINER:  
17 **Q If we continue on with this list, MS**  
18 **Preferred?**  
19 A Same.  
20 **Q Who is the ownership there?**  
21 A The ownership is -- MS Preferred is a  
22 preferred offering from McGinn Smith & Company. It's  
23 an 1987 preferred offering. The ownership of McGinn  
24 Smith & Company is 50 percent Dave Smith, 30 percent  
25 Tim McGinn, 20 percent Tom Livingston.

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1 DAVID SMITH  
2 **Q And what is the current value of the**  
3 **\$303,000 from the broker-dealer standpoint?**  
4 A The broker-dealer standpoint it would  
5 probably be zero.  
6 **Q And has this been written off on the**  
7 **books of First Independent?**  
8 A It's fully collateralized with the  
9 fees. Why would you write it off?  
10 **Q Is this accruing interest?**  
11 A It's accruing interest, yes.  
12 **Q At what rate?**  
13 A The rate of the preferred is a --  
14 it's reset every April 1st to July 1st, I am not sure  
15 which, at three and a half over the prevailing  
16 seven-year treasury rate, so it's approximately about  
17 6 percent.  
18 **Q And CSDS, what does that stand for?**  
19 A That stands for Century Same Day  
20 Surgery.  
21 **Q And what is your affiliation with**  
22 **Century the Same Day Surgery?**  
23 A Mine is at one point I served as  
24 chairman of the board.  
25 **Q And what is the current status of**

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1 DAVID SMITH  
2 **that \$40,000 book value?**  
3 A It's zero but collateralized by the  
4 fees.  
5 **Q And that's because you are a**  
6 **20 percent -- that falls under the 20 percent?**  
7 A Falls under 20 percent. I am not the  
8 20 percent owner but Mr. McGinn is.  
9 **Q Okay. M&S Partners, I believe, we**  
10 **discussed already. That's yourself and Mr. McGinn**  
11 **also?**  
12 A That's correct.  
13 **Q That's the same type situation?**  
14 A Yes.  
15 **Q Tartan Video?**  
16 A Tartan at that time was current and  
17 was fully paid.  
18 **Q Did they eventually merge or some**  
19 **sort with Palisades?**  
20 A Palisades ultimately bought Tartan,  
21 yes.  
22 **Q So what is the current status, on**  
23 **this document we will see a million dollars or more,**  
24 **as the book value?**  
25 A That's paid, fully paid.

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1 DAVID SMITH  
2 **Q And who is that paid to?**  
3 A It's paid to First Independent  
4 Income.  
5 **Q Okay. If we turn to the next page,**  
6 **Page 4, you'll see the fund name is TAIN, T-A-I-N?**  
7 A Okay.  
8 **Q Refer to this Page 4. We will try to**  
9 **go over the names that we haven't already discussed.**  
10 **107th we've discussed already.**  
11 **Do you have ownership in 107th?**  
12 A No. Well, 107th, as I have testified  
13 earlier, is 100 percent owned by MS Holdings.  
14 **Q Okay. Outset IT -- alseT IP?**  
15 A And your question, Chris?  
16 **Q Affiliations with McGinn Smith?**  
17 A Zero.  
18 **Q Mr. Livingston's affiliation?**  
19 A No longer is affiliated with alseT.  
20 **Q At the time back in 2007 or earlier?**  
21 A Close. In -- is this date  
22 December 31st, '07 or --  
23 **Q Well, the e-mail itself is**  
24 **December 2nd, I believe it was?**  
25 A At that time he was still affiliated

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1 DAVID SMITH  
2 with alseT.  
3 **Q And what was his title?**  
4 A I believe he was serving as president  
5 of alseT.  
6 **Q And how was it introduced to McGinn**  
7 **Smith?**  
8 A By Mr. Livingston. It wasn't  
9 introduced to McGinn Smith. It was introduced to the  
10 LLCs.  
11 **Q I'm sorry.**  
12 A We are trying to keep things on the  
13 record. We just want to be accurate.  
14 **Q And would Mr. Livingston's ownership**  
15 **in the entities we discussed qualify for the**  
16 **20 percent?**  
17 A It would not.  
18 **Q Okay. It would only qualify for**  
19 **yourself and Mr. McGinn?**  
20 A And our affiliates.  
21 MR. FRANCESKI: Can I ask  
22 something? Just for the record, this is  
23 spelled small a-l-s-e-capital T?  
24 THE WITNESS: Yeah. That is  
25 the marketing ingenious of --

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1 DAVID SMITH  
2 MR. FRANCESKI: That is the  
3 way.  
4 THE WITNESS: That is the way  
5 it's supposed to be spelled. Actually,  
6 for the record, it's Tesla spelled  
7 backwards. It was a --  
8 BY MR. RATTINER:  
9 **Q -- last name?**  
10 A Yes.  
11 **Q Aquatic Development, any affiliation**  
12 **with McGinn Smith?**  
13 A No.  
14 **Q How was it introduced to McGinn Smith**  
15 **or to TAIN, however you want to word it? I**  
16 **apologize.**  
17 A That's all right. The principal of  
18 Aquatic Development is a well-known business --  
19 Albany businessman who sought our assistance.  
20 **Q And what is the current status?**  
21 A Current status is, I believe it is  
22 interest only, and I think he is -- at this time he  
23 was current. I think in '09, I think he missed his  
24 last quarterly payment.  
25 **Q How much is currently due based on**

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1 DAVID SMITH  
2 **this \$1.4 million number?**  
3 A I don't know. That principal has  
4 been paid down again from '07. It was being  
5 amortized. I can't tell you off the top of my head  
6 what the balance is. The rate is at a 15 percent  
7 rate, so whatever the balance is times .15 divided by  
8 four.  
9 **Q We are going to skip down some lines**  
10 **here, HSK?**  
11 A HSK.  
12 **Q Any affiliation?**  
13 A No affiliation.  
14 **Q And that is a Mr. Kaufman?**  
15 A That's Mr. Kaufman, yes.  
16 **Q And how did he get introduced to**  
17 **TAIN?**  
18 A Mr. Kaufman has been a long-time  
19 client of the firm. He's a well-known financier  
20 throughout -- both nationally and certainly  
21 throughout the state. Probably done business off and  
22 on with him for 15 years.  
23 **Q What is the current status?**  
24 A Current status is it's current. That  
25 is a loan and in real estate development in your

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1 DAVID SMITH  
2 backyard here, at Crystal Springs North, if you guys  
3 are familiar with that.  
4 **Q And we are going to skip down a few**  
5 **more. We will go into Pacific. Any affiliation?**  
6 A Pacific -- Pacific falls under the  
7 20 percent. It's iffy, but we threw it in there. It  
8 is a trust, and who owns that trust, I don't know,  
9 but we have considered it McGinn Smith entity.  
10 **Q Who specifically is it affiliated to**  
11 **make the 20 percent?**  
12 A That's what I just said, I don't  
13 know. It is a trust formed, and I don't know how  
14 that ownership works out, but it's an offering of  
15 ours and so we took the responsibility for it.  
16 **Q And what does Pacific do? What does**  
17 **Pacific do?**  
18 A Pacific was an alarm, a grantor trust  
19 that purchased Alarm Contracts and amortized those  
20 contracts, et cetera.  
21 MR. ROWEN: Beyond the  
22 offering, what role do you or any other  
23 McGinn Smith entities have at Pacific?  
24 THE WITNESS: We are the  
25 administrator, I guess, you know. I

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1 DAVID SMITH  
 2 think probably the trustee is McGinn  
 3 Smith Capital Holdings. That was  
 4 generally the way we did it. I don't  
 5 know why it would be any differently  
 6 there. So -- and that would really be  
 7 the only affiliation, I guess. As the  
 8 trustee, we administered the receipt of  
 9 the funds and the payments and that sort  
 10 of thing.  
 11 MR. ROWEN: Thank you.  
 12 BY MR. RATTINER:  
 13 **Q Pine Street Capital Partners, we know**  
 14 **you are a managing member. Explain to us what Pine**  
 15 **Street Capital Partners is in terms of how it works.**  
 16 **From our review of some of the documents, it looks**  
 17 **likes it's a line of credit?**  
 18 A No. No. I apologize. That was  
 19 totally inappropriate.  
 20 MR. FRANCESKI: I think what  
 21 Mr. Rattiner is asking you, what was  
 22 given by TAIN to Pine Street? Was that  
 23 a line of credit? He wasn't asking what  
 24 Pine Street does.  
 25 THE WITNESS: No. No.

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1 DAVID SMITH  
 2 Actually, TAIN made an investment in  
 3 Pine Street Capital Partners, bought the  
 4 limited partnership interest in Pine  
 5 Street Capital Partners. Pine Street  
 6 Capital Partners, when they raised their  
 7 capital, bifurcated their offering in  
 8 the form of a 9 percent bond, or  
 9 9 percent coupon bond, and a more  
 10 traditional limited partnership of  
 11 subscription called when needed.  
 12 Pine Street Capital is a  
 13 mezzanine fund that provides credit  
 14 facilities to, again, private companies.  
 15 They are much more specific in terms of  
 16 years of profitability, revenues. They  
 17 are sort of a mid-market company. I  
 18 don't think they have made any  
 19 investments in the public sector. It's  
 20 almost all private.  
 21 BY MR. RATTINER:  
 22 **Q Okay.**  
 23 A And they sold -- they sold units or  
 24 subscriptions of which TAIN was an investor.  
 25 **Q You said it was called when needed.**

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1 DAVID SMITH  
 2 **I guess how does that differ from the line of credit**  
 3 **scenario you gave?**  
 4 A Well, in limited partnerships  
 5 generally when these entities raise capital, because  
 6 they don't want to be, in effect, obligated to pay  
 7 either coupon returns or even equity returns until  
 8 they have in fact employed the money, they have a  
 9 system in place that says, we can issue a call, a  
 10 cash call, to be specific.  
 11 So if you are an investor, and they  
 12 have determined that they are going to make an  
 13 investment in XYZ Corporation, and that investment is  
 14 going to be \$2 million, then if I am an investor in  
 15 10 percent of the fund, as a 10 percent investor, I  
 16 am going to get a call for \$20,000. And that \$20,000  
 17 then comes in, and that's basically the traditional  
 18 way that most of these funds operate.  
 19 Ours was different in that -- ours,  
 20 Pine Street Capital, was different in that it had a  
 21 second element which was a 9 percent bond that was  
 22 kind of the permanent capital when it first started,  
 23 which was 40 percent of the commitment. So if you  
 24 made a commitment of \$200,000 to Pine Street Capital  
 25 Partners, you were obligated to pay \$80,000

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1 DAVID SMITH  
 2 initially, 40 percent of the 200. The remaining  
 3 \$120,000 would be called as it need be. Now, it gets  
 4 more complicated than that. If you want --  
 5 **Q No. For sake of time we will hold**  
 6 **you off there. But I guess in terms, how did that**  
 7 **jibe with the notes strategies in terms of the TAIN**  
 8 **then had to set aside -- I forget TAIN's total**  
 9 **investment, was it \$2 million?**  
 10 A No. I think TAIN had a much larger  
 11 investment, \$5 million.  
 12 **Q So TAIN has \$5 million investment.**  
 13 **Did they put \$5 million on the shelf for the call**  
 14 **feature?**  
 15 A No. No. What they did was they were  
 16 obligated to manage their affairs so that if the call  
 17 came, they were in a position to meet it.  
 18 Now, having said that, there are all  
 19 sorts of nuances that go on with that. Some of the  
 20 calls -- for example, Pine Street Capital and similar  
 21 entities virtually never call all the money that you  
 22 are committed to. And the reason is, is because they  
 23 also turn over investments.  
 24 So if somewhere between the first  
 25 year and the sixth or seventh year, when that entity

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DAVID SMITH

was to mature or conclude, wrap up its affairs, they have made a loan or they've made an investment of \$3 million to XYZ, and at the end of two years, XYZ finds the capital to basically retire that loan or get a better rate, or whatever, maybe they go public, whatever, that money is returned and therefore now the next investment, maybe Pine Street Capital doesn't need a cash because they got the \$2 million back.

So there are some -- the only certainty you know is that the likelihood is that you're not going to put up the entire amount, but you don't know what that amount is going to be.

**Q When was the last call for any one of the four notes?**

A There was a cashless call in 2009. Cashless call is kind of what I just described where the call goes out but you don't have to send the money in. I think -- and I'm pretty sure there was a call in '08. I know there was a call in '07. I am not certain about '09.

**Q If a call were to happen in 2010, how would that be satisfied by the notes?**

A If there is a call in 2010 -- there's

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DAVID SMITH

not going to be a call in 2010 because they are making no more investments. They are just winding up their affairs.

**Q PSCP is?**

A Yes.

**Q If you can go into that a little further.**

A Well, they have a life of the fund. And this is a fund, by the way. This is not an operating company. This is an investment fund. And their life was five years, and they started in '04, actually started taking subscriptions, I believe, in '05. And they were allowed to get one extension. So the bonds were retired at the end of '09, and basically they are making no new investments.

They are going to be -- they are in the process of raising capital for fund two, and they are just winding down the remaining investments, which I think -- I think they made a total of nine investments. I think four of them have turned over or retired, if that's the correct term, which leaves them roughly five remaining investments that have varying degrees of maturity between now and, I think, 2011.

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DAVID SMITH

**Q And how much does PSCP owe the four note entities?**

A Well, they don't owe any now. I mean -- I mean, in terms of -- they won't have any obligation going further, that is my point.

**Q Is there a current outstanding debt to the note entities?**

A No.

**Q That's all been repaid?**

A They never had a debt.

**Q Can you explain that? In reading PSCP's annual audit, you will see that there's -- because it's an ownership stake -- I guess, why is there no debt?**

A Because there's two elements to -- if you are an investor in PSCP, there's two elements. There's the 40 percent bond, okay, in which case that's their asset owed by PSCP. They have retired that.

**Q Retired and paid back the funds?**

A Paid back, yes.

**Q Okay.**

A Second element is the limited partnership, which is an equity ownership, so they

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DAVID SMITH

don't owe anybody any money. It's their equity investment. And what I am saying is that over the next two years as those remaining investments in Pine Street Capital are hopefully successfully retired, it's what we would all hope for, as those monies come in, they will be distributed to their investors, which in this case Third Albany Income Notes is one of them. So they will be getting money in, not sending money out.

**Q How much is due to them coming in the four notes?**

A I don't know. I would have to look at the balance sheet, whatever it is carried at. They started at five. We retired some. I hate to guess. My attorney kills me when I do that, but --

**Q Okay.**

A I am guessing it is a million and a half.

**Q And you anticipate all of that being collected?**

A Yeah. So far all assets are performing well.

**Q Okay. We will move onto SAI Jr, what is the affiliation?**

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1 **DAVID SMITH**

2 A SAI Jr, that piece of SAI Jr has a  
3 limited guarantee with McGinn Smith Capital Holdings.

4 **Q Is that for all under the 20 percent**  
5 **category?**

6 A No. I believe that this was part of  
7 a group of investments that TAIN bought, and without  
8 just seeing the name, and without seeing the loan  
9 document, I can't tell you for sure. But I think it  
10 was, in which case the LLC had the ability to put  
11 back the investment at 80 percent of purchase value,  
12 and so SAI in and of itself is now defunct. So if  
13 you were to carry that, assuming my recollection is  
14 correct, of that \$5,200, you would basically say that  
15 \$4160 is good.

16 **Q And how about Smash Holdings?**

17 A Smash Holdings is one that I will  
18 write down severely if not entirely this year. It's  
19 been in litigation. It's been in litigation for two  
20 years. Smash Holdings was a Joint Venture with Fox  
21 Pictures. They issued three movies, all of which  
22 seemed to be quite successful, but somehow that money  
23 never got its way back to the investors. There's  
24 been litigation. We bought it through another  
25 broker/dealer.

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1 **DAVID SMITH**

2 We chat with them, and from time to  
3 time, and they tell us that it's still in litigation,  
4 but I am not optimistic in these kind of enterprises.

5 **Q And the connection there was this**  
6 **other broker-dealer?**

7 A It was actually a gentleman that I  
8 had met -- that I had met through working with  
9 Palisades Pictures. And he was doing a \$25 million  
10 offering with Fox Pictures. They raised 17 million  
11 at the time. They were looking for some closing  
12 financing. We negotiated a special deal to conclude  
13 that financing and get paid, be the first ones out,  
14 and that never happened.

15 **Q Okay. SPT4?**

16 A SPT4 is, they are amortizing.  
17 Whatever is carried out in that balance sheet is, I  
18 believe, the amortized amount.

19 **Q And the affiliation, if any?**

20 A None, I mean -- well, at one point we  
21 made an offering of these Alarm Contracts back in --  
22 quite a while ago, I think in the late '90s, maybe  
23 early 2000. But we have no ownership. So when you  
24 say affiliation, I have no ownership.

25 **Q Did -- the offering was originally**

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1 **DAVID SMITH**

2 **SPT1, that would have been four offerings in total?**

3 A No. I think my recollection was that  
4 there were four separate offerings of SPT -- the  
5 acronym is Security Participation Trust, and it was  
6 sort of innovative way to finance Alarm Contracts,  
7 but I think we used that designation because that was  
8 a specific pool of assets that were bought.

9 **Q Okay. 74 State Street?**

10 A 74 State Street has not been current  
11 since March '09. So in '07 it was current. But it's  
12 not current at the moment.

13 **Q And the affiliation, if any?**

14 A Again, McGinn Smith did a placement  
15 for some preferred stock, but we have no ownership.

16 **Q Okay. GSC?**

17 A GSC, no ownership. The GS stands for  
18 Goldman Sachs. It was a bunch of Goldman Sachs guys  
19 that did an REIT to invest in RMBSs and CMBSs,  
20 commercial mortgage-backed securities and residential  
21 mortgage-backed securities. GSC in June of '09 has  
22 filed for bankruptcy, and we will be writing that  
23 entirely off.

24 MR. NEWMAN: And what was the  
25 affiliation with GSC?

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1 **DAVID SMITH**

2 **THE WITNESS: Zero.**

3 MR. NEWMAN: I want to go back  
4 to SPT4. You said that was a series of  
5 different Alarm Contract offerings?

6 **THE WITNESS: Yeah. I think**  
7 **Chris's question was how did four -- he**  
8 **wanted to know if it was part of one,**  
9 **and my recollection was that back in the**  
10 **late '90s, we were very active in the**  
11 **home security alarm business. That was**  
12 **one of our offerings. Those assets**  
13 **became available, and we purchased that**  
14 **pool of assets, and I have to believe we**  
15 **identified them as SPT4 to distinguish**  
16 **that pool of assets.**

17 MR. NEWMAN: Okay. Let's be  
18 specific. Pool of assets, what exactly  
19 did the LLC invest in? What type of  
20 security was it?

21 **THE WITNESS: Home security**  
22 **Alarm Contracts. They are residential**  
23 **Alarm Contracts that are under contract**  
24 **by a home owner to make a specific**  
25 **payment for a specific period of time.**

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1 DAVID SMITH  
2 MR. NEWMAN: Is that pooled  
3 into some kind of security?  
4 THE WITNESS: No.  
5 MR. NEWMAN: So the LLC is  
6 actually buying or investing in the  
7 Alarm Contracts?  
8 THE WITNESS: That is correct.  
9 MR. NEWMAN: Now, does SPT4  
10 raise money from investors?  
11 THE WITNESS: Years ago they  
12 did, yeah, but then those assets were  
13 purchased by the LLC.  
14 MR. NEWMAN: SPT4 raises --  
15 SPT4, what is the entity, the  
16 corporation, LLC? What is the  
17 ownership?  
18 THE WITNESS: They are  
19 generally done under a grantor trust.  
20 Most of our transactions were done in  
21 that fashion.  
22 MR. NEWMAN: Okay. So who was  
23 the trustee on that trust?  
24 THE WITNESS: I don't remember  
25 specifically but more likely than not

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1 DAVID SMITH  
2 McGinn Smith Capital Holdings.  
3 MR. NEWMAN: All right. So  
4 McGinn Smith Capital Holdings owns a  
5 stake in that trust?  
6 THE WITNESS: No. Just the  
7 trustee. They don't own any stake.  
8 MR. NEWMAN: So who actually  
9 owns -- who are the beneficial owners of  
10 that?  
11 THE WITNESS: Basically the  
12 note holders.  
13 MR. NEWMAN: I am talking  
14 prior to the investment.  
15 THE WITNESS: The note  
16 holders.  
17 MR. NEWMAN: Okay. And the  
18 note holders were individuals who  
19 invested in the offering?  
20 THE WITNESS: That is correct.  
21 MR. NEWMAN: And does the  
22 investment of the LLC take out or pay  
23 off the note holder's investment?  
24 THE WITNESS: If it was  
25 maturing and the assets were for sale,

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1 DAVID SMITH  
2 yes.  
3 MR. NEWMAN: Well, do you  
4 know?  
5 THE WITNESS: I just answered  
6 yes.  
7 MR. NEWMAN: Okay. You sort  
8 of framed it like a hypothetical.  
9 THE WITNESS: Well, I didn't  
10 mean to. I mean, I was trying to  
11 distinguish between if there was a  
12 maturity date or if there was not a  
13 maturity date. And if there is a  
14 maturity date, then the answer to your  
15 question would be affirmative. If there  
16 is not a maturity date, it wouldn't be  
17 affirmative. So I was wrestling with  
18 that distinction.  
19 MR. NEWMAN: Okay. That's  
20 fine. SPT4, was there an offering,  
21 memorandum or prospectus that was used  
22 to sell that investment?  
23 THE WITNESS: Sure.  
24 MR. NEWMAN: And when was the  
25 offering made, approximately?

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1 DAVID SMITH  
2 THE WITNESS: I believe, as I  
3 testified, it was in late '90s, maybe  
4 2000.  
5 MR. NEWMAN: And how much  
6 money was raised?  
7 THE WITNESS: I don't recall.  
8 MR. NEWMAN: Approximately?  
9 THE WITNESS: Approximately --  
10 most of our offerings were in the 2 to  
11 \$3 million range. So I would suspect it  
12 was a similar amount.  
13 MR. NEWMAN: And McGinn Smith  
14 is, as you said, a trustee for the trust  
15 that owns?  
16 THE WITNESS: I believe, to  
17 the best of my knowledge, McGinn Smith  
18 Capital Holdings, that's generally who  
19 we used.  
20 MR. NEWMAN: And McGinn Smith  
21 Capital Holdings receive an annual fee  
22 for acting as trustee?  
23 THE WITNESS: No.  
24 MR. NEWMAN: What fee does  
25 McGinn Smith Capital Holdings receive?

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1 DAVID SMITH  
2 THE WITNESS: Zero.  
3 MR. NEWMAN: So McGinn Smith  
4 receives a placement fee for selling  
5 the --  
6 THE WITNESS: Yes.  
7 MR. NEWMAN: -- units for  
8 SPT4?  
9 THE WITNESS: Yes.  
10 MR. NEWMAN: And at the time  
11 the LLC invested in SPT4, the money has  
12 been raised, the Alarm Contracts have  
13 been purchased, invested in. What is  
14 the status of that investment at the  
15 time the Alarm Contracts are purchased  
16 by the LLC? Were they in default or  
17 were the payments current?  
18 THE WITNESS: No, there's not  
19 a default with Alarm Contracts. When  
20 you buy Alarm Contracts, you basically  
21 buy a cash flow. The cash flow is  
22 identified by recurring monthly revenue.  
23 It's called RMR in the trade.  
24 MR. NEWMAN: Okay.  
25 THE WITNESS: There's a built

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1 DAVID SMITH  
2 in attrition or assumption that one  
3 makes that there's going to be a certain  
4 number of contracts that are going to  
5 not renew, maybe they quit paying.  
6 There is a contract that is -- you  
7 lawyers have a term for it. I can't  
8 remember what it is. But it's basically  
9 if they default and they can prove you  
10 didn't have proper service, they don't  
11 have to pay. Help me out.  
12 MR. FRANCESKI: I am not sure  
13 I can.  
14 THE WITNESS: Anyway, the  
15 whole reason I am bringing that up is  
16 because there is a contract between the  
17 homeowner and the issuer of the Alarm  
18 Contract, but the ability to enforce is  
19 very -- is hard.  
20 We have collection agencies,  
21 we have attorneys, but the real world  
22 is, you are not going to go in and pull  
23 the wires out of the guy's house. If he  
24 chooses not to pay, he basically says,  
25 well, the alarm didn't work. So, you

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1 DAVID SMITH  
2 know -- so when you do these kind of  
3 investments, you know that there's going  
4 to be a certain amount of people that  
5 are not going to be there at the end of  
6 the day.  
7 So your question, Mike, was  
8 are they in default, no. Have you lost  
9 some of the contracts, yes. And so when  
10 you make a new purchase, you always use  
11 an evaluation of what the RMR is at  
12 that -- any given time, and there's a  
13 multiple of that RMR. I am telling you  
14 more than you want to know, I can tell  
15 by your look.  
16 MR. NEWMAN: That's fine. I  
17 understand the general concept. So  
18 basically there's a cash flow analysis  
19 is done based on certain number of Alarm  
20 Contracts or security alarms, security  
21 holders not paying their monthly  
22 payment.  
23 THE WITNESS: More  
24 importantly, the ones that are paying.  
25 MR. NEWMAN: So there's a

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1 DAVID SMITH  
2 set -- there's a minimum amount that's  
3 needed to pay the promise return to the  
4 Alarm Contract holders?  
5 THE WITNESS: Right. And  
6 it's -- those contracts are a function  
7 of a number of things, not the least of  
8 which is how mature they are. The more  
9 mature they are, the better. If I go  
10 out and sell you a new Alarm Contract,  
11 and you are a new owner, maybe you think  
12 it is a pretty neat idea, but after a  
13 year you've never turned it on, or maybe  
14 you've had six false alarms and you're  
15 real tired of it so you decide you are  
16 not going to do it. Most of these  
17 contracts are for three years. After  
18 the three year or the fifth year, if  
19 that guy is still renewing and still  
20 paying, you got him for life. He's  
21 there for 20 years.  
22 MR. NEWMAN: Okay. But the  
23 investors in the note offering, they are  
24 promised a certain return on their  
25 investment?

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1 DAVID SMITH  
2 THE WITNESS: Well, I wouldn't  
3 go so far as to use the word promise,  
4 but, yes, there is a coupon attached  
5 with the investment that feeds their  
6 return, yes.  
7 MR. NEWMAN: And that return  
8 is a monthly return or a quarterly  
9 return?  
10 THE WITNESS: Some were done  
11 monthly, some were done quarterly.  
12 MR. NEWMAN: What were the  
13 majority of the investors in this SPT4?  
14 What were they receiving monthly?  
15 THE WITNESS: Early on -- most  
16 of our deals we did on a monthly basis.  
17 At some point the administrator of that  
18 got really difficult, the administration  
19 of that got difficult. We switched to  
20 quarterly. I don't remember if SPT,  
21 whether it was monthly or quarterly.  
22 MR. NEWMAN: All right. So at  
23 the time the LLCs invest in SPT4, were  
24 payments current on -- the monthly  
25 required payment, were they being made

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1 DAVID SMITH  
2 as required or were there payments  
3 reduced for some reason?  
4 THE WITNESS: What we did was  
5 determine whether the recurring monthly  
6 revenue was equivalent to the purchase  
7 price. We do an analysis. We do an  
8 analysis of the description and the  
9 maturity of the contracts because we  
10 want to know should we make an  
11 assumption going forward of 10 percent  
12 or 12 percent or 20 percent, all of  
13 which has a major impact of what you are  
14 going to pay.  
15 The RMR or the valuation in  
16 this business ranges from 40 times to a  
17 hundred times. Breaks just sold their  
18 company last week for 60 times.  
19 MR. NEWMAN: You are providing  
20 more information.  
21 MR. FRANCESKI: I think you  
22 were at a different level, weren't you,  
23 Mike?  
24 MR. NEWMAN: I am trying to  
25 find out.

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1 DAVID SMITH  
2 THE WITNESS: You are trying  
3 to find out what we paid for them,  
4 that's what I am trying to give you --  
5 MR. FRANCESKI: No, he's  
6 trying to find out --  
7 MR. NEWMAN: We are talking  
8 over each other. First of all, let me  
9 finish my question or the court reporter  
10 is going to hit both of us over the head  
11 with a book. What I'm asking you is I  
12 think a simple question. Maybe I am not  
13 framing it in a way you can understand.  
14 But when investors invest in  
15 these Alarm Contracts, they are  
16 expecting promise to receive a certain  
17 return. Now, what I want to know is at  
18 the time the LLCs invested or buy out  
19 the interest in SPTC4 -- SPT4, had the  
20 payments been made as promised in the  
21 prospectus?  
22 THE WITNESS: Yes.  
23 MR. NEWMAN: The payments  
24 weren't behind or there weren't lesser  
25 payments being made?

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1 DAVID SMITH  
2 THE WITNESS: No.  
3 MR. NEWMAN: Or reduced amount  
4 being paid?  
5 THE WITNESS: No.  
6 MR. NEWMAN: Why is this not  
7 considered to be an affiliated  
8 transaction given the fact that McGinn  
9 Smith Capital Holdings is the trustee of  
10 the alarm -- for the Alarm Contracts?  
11 Why is that not considered to be an  
12 affiliated transaction?  
13 THE WITNESS: When you refer  
14 to affiliated transaction --  
15 MR. NEWMAN: Do you consider  
16 this to be an affiliated transaction?  
17 MR. FRANCESKI: You mean for  
18 the collateral mortgage?  
19 THE WITNESS: No. We don't  
20 have any ownership, we have no  
21 beneficial -- economic benefit from  
22 owning it. So it's not considered -- I  
23 guess as you're defining an affiliate,  
24 whether we had an economic stake in the  
25 company, in which case that was the

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1 DAVID SMITH  
2 defining -- the 20 percent was sort of  
3 the defining -- is that where we are,  
4 talking about the collateral?  
5 MR. NEWMAN: Right.  
6 THE WITNESS: No, we had no  
7 economic benefit in that whatsoever.  
8 MR. NEWMAN: And who made the  
9 determination or who was able to act on  
10 behalf of SPT4 and sell that interest to  
11 the LLC? Who represents the SPT4  
12 contract?  
13 THE WITNESS: The note  
14 holders -- that basically either are  
15 represented by the trustee or they are  
16 represented by the fact that they had  
17 reached maturity, in which case there's  
18 really not a decision.  
19 MR. NEWMAN: Well, in this  
20 case who made the decision on behalf of  
21 SPT4 Alarm Contract holders to sell  
22 their interest to the LLC?  
23 THE WITNESS: The trustee  
24 represented them.  
25 MR. NEWMAN: And that's McGinn  
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1 DAVID SMITH  
2 Smith Capital Holdings?  
3 THE WITNESS: SPT4, my  
4 recollection, I am quite certain of  
5 this, is that there was not a decision  
6 to be made that the asset had matured.  
7 The contracts would be sold to, in  
8 effect, meet the maturity or meet the  
9 obligation and therefore the trustee  
10 acts on their behalf to sell those  
11 contracts.  
12 MR. NEWMAN: So the trustee  
13 made the decision to sell the contracts  
14 to the LLC?  
15 THE WITNESS: Yeah, the  
16 trustee for the notes.  
17 MR. NEWMAN: And the trustee  
18 is McGinn Smith Capital Holdings?  
19 THE WITNESS: To the best of  
20 my recollection.  
21 MR. NEWMAN: And that was you?  
22 THE WITNESS: McGinn Smith  
23 Capital Holdings.  
24 MR. NEWMAN: You, you're  
25 McGinn Smith Capital Holdings?  
Page 267

1 DAVID SMITH  
2 THE WITNESS: I am an officer  
3 of McGinn Smith Capital Holdings.  
4 MR. NEWMAN: Who made the  
5 decision in this particular instance to  
6 sell the Alarm Contracts to the LLC?  
7 THE WITNESS: The decision was  
8 made, but I guess I am not articulating  
9 myself very well. The investment in  
10 SPT4 had matured, so it's not a  
11 decision. They have to be sold. They  
12 have to basically -- to return the money  
13 to the investors --  
14 MR. NEWMAN: Right.  
15 THE WITNESS: -- they have to  
16 be sold. So you go out into the  
17 marketplace and you sell them.  
18 MR. NEWMAN: Right, and you  
19 don't have to sell this to the LLC? It  
20 can be sold to anybody?  
21 THE WITNESS: That is correct.  
22 MR. NEWMAN: You made the  
23 decision on behalf of McGinn Smith  
24 Capital Holdings to sell these contracts  
25 to the LLC?  
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1 DAVID SMITH  
2 THE WITNESS: That is correct.  
3 MR. NEWMAN: And you as the  
4 advisor of the LLC made the  
5 determination to invest in these  
6 contracts?  
7 THE WITNESS: That is correct.  
8 MR. NEWMAN: Do you see any  
9 conflict of interest in that?  
10 THE WITNESS: No, no more than  
11 happenings on Wall Street every day.  
12 MR. NEWMAN: What does that  
13 mean?  
14 THE WITNESS: That means it's  
15 the nature of the business. When  
16 underwriters raise money, raise capital,  
17 they get warrants, they get stock. It  
18 is the way the business works.  
19 MR. NEWMAN: Doesn't it have  
20 to be disclosed? Aren't conflicts of  
21 interest supposed to be disclosed?  
22 THE WITNESS: We have all  
23 sorts of disclosures in our PPM that we  
24 will buy and sell securities that are  
25 affiliated with McGinn Smith, as long as  
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1 DAVID SMITH  
2 the prices are fair market value, and  
3 it's not being done at any price greater  
4 than fair market value, it's totally  
5 appropriate. It's right there in the  
6 prospectus. So it was disclosed.  
7 MR. NEWMAN: Did McGinn Smith  
8 Capital Holdings receive any fees,  
9 compensation in connection with the sale  
10 of the Alarm Contracts to the LLC?  
11 THE WITNESS: No.  
12 MR. NEWMAN: At the time the  
13 LLC invested in the Alarm Contracts,  
14 were any of the Alarm Contract holders  
15 or investors complaining to McGinn Smith  
16 Capital Holdings about their investment  
17 or inquiring about what was going to  
18 happen with their investment or anything  
19 like that?  
20 THE WITNESS: No.  
21 MR. NEWMAN: From what you  
22 could determine, the investors were  
23 satisfied?  
24 THE WITNESS: Very satisfied.  
25 MR. NEWMAN: Listen to my  
Page 270

1 DAVID SMITH  
2 question. Were satisfied with their  
3 investments?  
4 THE WITNESS: Yes.  
5 MR. NEWMAN: Pine Street  
6 Capital Partners, what is your  
7 affiliation with Pine Street Capital  
8 Partners?  
9 THE WITNESS: Personal  
10 affiliation?  
11 MR. NEWMAN: Yes.  
12 THE WITNESS: I am a managing  
13 member of the management team Pine  
14 Street Capital Management, LP, I think  
15 is the proper designation.  
16 MR. NEWMAN: Pine Street  
17 Capital, LP is the limited partnership?  
18 THE WITNESS: That is the  
19 limited partnership, yes.  
20 MR. NEWMAN: And you are a  
21 managing member of that partnership?  
22 THE WITNESS: No. I'm a  
23 managing member of the management team.  
24 I think the definition -- or, excuse me,  
25 the description of the management team  
Page 271

1 DAVID SMITH  
2 is Pine Street Capital Management, LP.  
3 MR. NEWMAN: Okay. I need a  
4 chart.  
5 THE WITNESS: There's a  
6 difference. I mean, the limited  
7 partnership are the investors.  
8 MR. NEWMAN: Right.  
9 THE WITNESS: And then over  
10 here you have the management company.  
11 MR. NEWMAN: Right. All  
12 right. That's fine. There is a  
13 management -- management company that  
14 manages the limited partnership?  
15 THE WITNESS: Correct.  
16 MR. NEWMAN: Okay. And that,  
17 I'm sorry, what was the name of that  
18 entity?  
19 THE WITNESS: I believe the  
20 name of the management is Pine Street  
21 Capital Partners Management, LP.  
22 MR. NEWMAN: And that is a  
23 limited partnership, too?  
24 THE WITNESS: Yes.  
25 MR. NEWMAN: And you're the  
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1 DAVID SMITH  
2 managing member of that partnership?  
3 THE WITNESS: I am a member.  
4 I am not the managing member.  
5 MR. NEWMAN: What is your  
6 stake?  
7 THE WITNESS: I think the  
8 stake of the management company is  
9 2 percent, and my stake of the  
10 management company is 20 percent. So  
11 that would be .4 percent.  
12 MR. NEWMAN: Okay. And how  
13 long have you held that stake?  
14 THE WITNESS: I was a founder.  
15 MR. NEWMAN: And who else is  
16 involved in Pine Street Capital Partners  
17 Management?  
18 THE WITNESS: There are two  
19 other individuals.  
20 MR. NEWMAN: Who are they?  
21 THE WITNESS: Timothy Wells  
22 and Michael Lash.  
23 MR. NEWMAN: Michael Lash.  
24 Either of those two individuals have any  
25 affiliation with McGinn Smith?  
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1 DAVID SMITH  
2 THE WITNESS: No.  
3 MR. NEWMAN: Pine Street --  
4 THE WITNESS: I would like to  
5 clarify something.  
6 MR. NEWMAN: Sure.  
7 THE WITNESS: In regards to my  
8 ownership in Pine Street Capital Limited  
9 Partnership Management, I am a nominee.  
10 I am a nominee for McGinn Smith &  
11 Company.  
12 MR. NEWMAN: What does that  
13 mean?  
14 THE WITNESS: Well, that  
15 simply means that at the time that we  
16 formed it, I wanted McGinn Smith &  
17 Company to be the owner. Mr. Lash and  
18 Mr. Wells were more comfortable in  
19 having me personally because they didn't  
20 know the outcome, if you will, of a  
21 corporate entity maybe get sold,  
22 maybe -- who knows.  
23 I did not want to be -- have  
24 an ownership stake in something that my  
25 partners did not have an ownership stake

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1 DAVID SMITH  
2 in, both Mr. McGinn and Mr. Smith. So  
3 it was well known and disclosed that I  
4 am simply the nominee, which means that  
5 any benefits that flow get passed  
6 through to McGinn Smith & Company.  
7 MR. NEWMAN: Is there an  
8 agreement to that effect?  
9 THE WITNESS: I don't know. I  
10 don't think so. There's an agreement  
11 between Mr. Lash and Mr. Wells and  
12 myself, and our accountant is familiar  
13 with it, and we've basically assigned  
14 whatever benefit that ever came in, was  
15 assigned to McGinn Smith away from me.  
16 I don't think --  
17 MR. NEWMAN: You're McGinn  
18 Smith, too, aren't you, I mean, you and  
19 Mr. McGinn?  
20 THE WITNESS: I have partners,  
21 so, yeah, I mean, that was the whole  
22 point.  
23 MR. NEWMAN: You and Mr.  
24 McGinn and Mr. Livingston?  
25 THE WITNESS: That's correct.

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1 DAVID SMITH  
2 MR. NEWMAN: So you are not  
3 sure there's an agreement?  
4 THE WITNESS: I don't think  
5 there's an agreement. I think there's  
6 just a --  
7 MR. NEWMAN: It's all verbal?  
8 THE WITNESS: Verbal  
9 agreement, yes.  
10 MR. NEWMAN: And the verbal  
11 agreement is that you're a nominee, and  
12 just so I understand what that means --  
13 well, explain to me again what that  
14 means.  
15 THE WITNESS: Basically, any  
16 benefits that would accrue will pass  
17 from me to McGinn Smith & Company so  
18 that I am not benefiting in this case at  
19 the expense of my partners.  
20 MR. NEWMAN: What is the  
21 ownership of Pine Street Capital, LP?  
22 THE WITNESS: Well, there's,  
23 you know, a variety of investors. I  
24 don't have the list in front of me, but  
25 it's a broad variety of investors.

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1 DAVID SMITH  
2 MR. NEWMAN: Do you have any  
3 ownership interest or interest in that  
4 entity, direct interest?  
5 THE WITNESS: Personally?  
6 MR. NEWMAN: Yes.  
7 THE WITNESS: No.  
8 MR. NEWMAN: How about through  
9 any other entity other than Pine Street  
10 Capital Partners Management, LP? You  
11 don't have any other stake in Pine  
12 Street Capital, LP?  
13 THE WITNESS: Personally, that  
14 is the question, no.  
15 MR. NEWMAN: Or through any  
16 other entity? Let me change the  
17 question.  
18 THE WITNESS: Okay. Believe  
19 me, I am helping you.  
20 MR. NEWMAN: Other than what  
21 you have already testified to?  
22 THE WITNESS: My wife is an  
23 owner of Pine Street Capital Partners.  
24 We are investment, so that is the  
25 distinction.

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1 DAVID SMITH  
2 MR. NEWMAN: And what  
3 ownership does your wife have in that  
4 entity?  
5 THE WITNESS: She is probably  
6 close to a 10 percent ownership. I  
7 don't know the exact number but  
8 substantial owner.  
9 MR. NEWMAN: When did she  
10 acquire that interest?  
11 THE WITNESS: Initially, '04,  
12 I think when we did it. I think there  
13 was a subsequent purchase also.  
14 MR. NEWMAN: Why does your  
15 wife have an interest in that entity as  
16 opposed to yourself?  
17 THE WITNESS: Because my wife  
18 had the assets.  
19 MR. NEWMAN: Can you explain  
20 that?  
21 THE WITNESS: It's her money.  
22 MR. NEWMAN: You have separate  
23 finances?  
24 THE WITNESS: Yes.  
25 MR. NEWMAN: You and your  
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1 DAVID SMITH  
2 wife?  
3 THE WITNESS: Yes.  
4 MR. NEWMAN: How long has that  
5 been the case?  
6 THE WITNESS: Twenty years.  
7 MR. NEWMAN: What does your  
8 wife do for a living?  
9 THE WITNESS: She is a retired  
10 school teacher.  
11 MR. NEWMAN: A retired school  
12 teacher?  
13 THE WITNESS: Yes.  
14 MR. NEWMAN: When did she  
15 retire?  
16 THE WITNESS: 198 -- 1980,  
17 1981.  
18 MR. NEWMAN: Do you file  
19 separate tax returns?  
20 THE WITNESS: No.  
21 MR. NEWMAN: Do you file  
22 combined tax returns?  
23 THE WITNESS: Yes, joint.  
24 MR. NEWMAN: Besides your  
25 wife's interest in Pine Street Capital  
Page 279

1 DAVID SMITH  
2 Partners Management interest, do you  
3 have any other interest in Pine Street  
4 Capital LP either individually or  
5 through any other person or entity?  
6 THE WITNESS: Not that I am  
7 aware of.  
8 BY MR. RATTINER:  
9 **Q What is the value of Mrs. Smith's**  
10 **investment?**  
11 MR. FRANCESKI: Wait. Wait.  
12 No. No. I am going to instruct him not  
13 to answer. That's not any business of  
14 this inquiry.  
15 MR. NEWMAN: We think it's  
16 relevant.  
17 MR. FRANCESKI: He's  
18 identified --  
19 MR. NEWMAN: There's money  
20 that's going to -- to this entity,  
21 substantial amount of money from these  
22 offerings, and we are entitled to  
23 inquire about that. We absolutely  
24 disagree with that. I think it's very  
25 relevant.  
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1 DAVID SMITH  
2 MR. FRANCESKI: Well, I'm  
3 sorry. I disagree with you. We will  
4 have to agree to disagree. I'm telling  
5 him he doesn't have to answer the  
6 question.  
7 MR. NEWMAN: So let me  
8 understand, you're instructing him not  
9 to answer that question?  
10 MR. FRANCESKI: No. I'm  
11 telling him he doesn't have to answer  
12 the question. I am not instructing him  
13 to do anything. I'm telling him he  
14 doesn't have to answer.  
15 MR. NEWMAN: We are asking the  
16 question. We think it's relevant.  
17 MR. FRANCESKI: I understand  
18 that. I just advised my client I don't  
19 think he has to answer.  
20 THE WITNESS: What I will  
21 answer is that why don't we, when we  
22 have a break, I will confer with my  
23 counsel and I will come back with an  
24 answer.  
25 MR. NEWMAN: Okay. That's  
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1 DAVID SMITH  
2 fine. Pine Street Capital Partners,  
3 where is it located?  
4 THE WITNESS: That's located  
5 99 Pine Street. They lease space from  
6 us, from McGinn Smith & Company.  
7 MR. NEWMAN: So they are  
8 located in the same building that McGinn  
9 Smith is located in?  
10 THE WITNESS: That's correct.  
11 MR. NEWMAN: You say they  
12 lease space. Is there a lease agreement  
13 between McGinn Smith and Pine Street  
14 Capital?  
15 THE WITNESS: I don't believe  
16 there is a written lease agreement, no.  
17 MR. NEWMAN: Why not?  
18 THE WITNESS: It's been an  
19 arrangement that we have, and we don't  
20 have -- we trust them, I guess that's  
21 the answer.  
22 MR. NEWMAN: Do they actually  
23 have an office within -- on Pine Street?  
24 THE WITNESS: Mr. Lash has an  
25 office and Mr. Wells has an office.

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1 DAVID SMITH  
2 MR. NEWMAN: Within the  
3 building?  
4 THE WITNESS: Within the  
5 building, yes.  
6 MR. NEWMAN: Does Mr. Lash and  
7 Mr. Wells have other ventures besides  
8 Pine Street Capital?  
9 THE WITNESS: Not that I am  
10 aware of.  
11 MR. NEWMAN: Is there a sign  
12 on the door that says Pine Street  
13 Capital Partners or Pine Street Capital,  
14 LP?  
15 THE WITNESS: Door, front  
16 door?  
17 MR. NEWMAN: Anywhere.  
18 THE WITNESS: I don't believe  
19 so.  
20 MR. NEWMAN: Is there anything  
21 within either the interior or exterior  
22 of the building that identifies Pine  
23 Street Capital?  
24 THE WITNESS: Yes. I believe  
25 there's a sign on the -- there's signage

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1 DAVID SMITH  
2 on the first floor that identifies  
3 people, and I think Pine Street has  
4 their own sign, yes.  
5 MR. NEWMAN: Do you consider  
6 the investment by the LLCs in Pine  
7 Street Capital to be an affiliated  
8 investment?  
9 THE WITNESS: Again,  
10 affiliated as far as this collateral  
11 thing?  
12 MR. NEWMAN: Do you know what  
13 an affiliated party transaction is?  
14 THE WITNESS: Yeah.  
15 MR. NEWMAN: Did you consider  
16 this to be an affiliated party  
17 transaction?  
18 THE WITNESS: No. I define  
19 affiliated as anything more than  
20 10 percent, and we didn't have  
21 10 percent interest.  
22 MR. NEWMAN: Your wife had a  
23 10 percent interest?  
24 THE WITNESS: I don't know if  
25 she had a 10 percent interest.

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1 DAVID SMITH  
2 MR. NEWMAN: You just  
3 testified she had a 10 percent interest.  
4 THE WITNESS: I said  
5 approximately 10 percent.  
6 MR. NEWMAN: Okay. So what is  
7 it?  
8 THE WITNESS: I don't know. I  
9 don't know. I said approximately.  
10 Where can I define approximately? It  
11 may be 10, may not be 10.  
12 MR. NEWMAN: You don't know  
13 what interest your wife has, is that  
14 what you are telling us?  
15 THE WITNESS: I am telling you  
16 I don't know the exact interest.  
17 MR. NEWMAN: What do you think  
18 it is, sitting here today?  
19 MR. FRANCESKI: Objection,  
20 asked and answered.  
21 THE WITNESS: Approximate,  
22 10 percent.  
23 MR. NEWMAN: 10 percent would  
24 be the threshold for affiliated party  
25 transactions.

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1 DAVID SMITH  
2 THE WITNESS: She didn't have  
3 10 percent at the initiation.  
4 MR. FRANCESKI: Wait a minute.  
5 I thought you testified earlier that it  
6 was 20 percent was the threshold.  
7 THE WITNESS: Everybody is  
8 confusing everything. He's talking, I  
9 believe, about affiliate with McGinn  
10 Smith & Company, and he asked how I  
11 would define --  
12 MR. FRANCESKI: Don't believe  
13 anything.  
14 THE WITNESS: That's how I  
15 interpreted it.  
16 MR. FRANCESKI: Well, let's  
17 not interpret. I don't know what he  
18 means but don't answer a question until  
19 you know what he means. He's entitled  
20 to ask questions.  
21 MR. NEWMAN: Answer the  
22 question. Why wouldn't this be an  
23 affiliated party transaction?  
24 MR. FRANCESKI: I'm going to  
25 object because I don't think it's clear

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1 DAVID SMITH  
2 to the witness what you mean by  
3 affiliated transaction.  
4 MR. NEWMAN: No, I asked him  
5 what he meant and he answered.  
6 THE WITNESS: My wife is --  
7 her finances are totally separate from  
8 mine. She made less than a 10 percent  
9 investment initially. She has no  
10 business in terms of the management or  
11 anything else. She was an individual  
12 investor. She considered the  
13 investment, thought it was a good  
14 investment, turned out to be a good  
15 investment.  
16 MR. NEWMAN: How did she  
17 become aware of the investment?  
18 THE WITNESS: I talked to her  
19 about it.  
20 MR. NEWMAN: Did you suggest  
21 she invest in Pine Street Capital  
22 Partners?  
23 THE WITNESS: Yes.  
24 MR. NEWMAN: Why is that?  
25 MR. FRANCESKI: Wait a minute.

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1 DAVID SMITH  
2 I am going to object, again. We will  
3 talk about this at the break, Mike, but  
4 I don't think that is of any business of  
5 FINRA.  
6 MR. NEWMAN: It's absolutely  
7 of interest to FINRA, given the amount  
8 of money that's been -- again, we  
9 disagree with that.  
10 MR. FRANCESKI: I understand.  
11 I am going to disagree with you. I  
12 don't see any basis for you having any  
13 interest in what Mr. Smith's wife owns.  
14 MR. NEWMAN: What his wife  
15 owns 10 percent of an entity that money  
16 is invested in by these LLCs, that's  
17 currently relevant to this inquiry.  
18 This is not an independent investment.  
19 This is an entity that received millions  
20 of dollars of investor money, so --  
21 MR. FRANCESKI: Wait a minute.  
22 You are making all this up. That is not  
23 what the testimony is. His wife has a  
24 10 percent or less investment in Pine  
25 Street Capital Partners; is that

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1 DAVID SMITH  
2 correct?  
3 THE WITNESS: Correct.  
4 MR. FRANCESKI: Which is a  
5 fund. She is an investor just like  
6 there are a whole host of people out  
7 there who are investors. What in the  
8 world does that have to do with the LLCs  
9 also being a -- are they a co-invest,  
10 just like your wife, in the fund?  
11 THE WITNESS: Yes.  
12 MR. FRANCESKI: So the LLC is  
13 an investor and his wife is an investor.  
14 So what?  
15 MR. NEWMAN: So what? Well,  
16 there's a forum to debate.  
17 MR. FRANCESKI: I agree,  
18 there's a forum to debate that.  
19 MR. NEWMAN: Yeah, that's  
20 ridiculous. The question is why did  
21 you -- why did you recommend your wife  
22 to invest in this?  
23 THE WITNESS: Because I  
24 thought it would be a good investment,  
25 which it turned out to be an excellent

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1 DAVID SMITH  
 2 investment.  
 3 MR. FRANCESKI: Is that the  
 4 same reason you got the LLC to invest in  
 5 that?  
 6 THE WITNESS: Exactly.  
 7 MR. FRANCESKI: Did they make  
 8 an excellent investment?  
 9 THE WITNESS: Yes, they did.  
 10 MR. NEWMAN: Has your wife  
 11 received back all her money she's  
 12 invested?  
 13 THE WITNESS: They haven't  
 14 distributed all the money yet, no.  
 15 MR. NEWMAN: How much has your  
 16 wife received back from that investment?  
 17 MR. FRANCESKI: Objection.  
 18 That is not relevant. What is relevant  
 19 is has she gotten anything different in  
 20 terms of percentage than the LLCs have  
 21 gotten? You want to ask that question,  
 22 that --  
 23 MR. NEWMAN: That is a  
 24 different way of asking the same thing.  
 25 I will ask the question I want to ask.

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1 DAVID SMITH  
 2 It's relevant.  
 3 Did your wife receive back all  
 4 the money she has invested in it?  
 5 THE WITNESS: No.  
 6 MR. NEWMAN: How much back has  
 7 she received from a percentage  
 8 standpoint?  
 9 THE WITNESS: I think they  
 10 have gotten back close to 40 percent of  
 11 their money.  
 12 MR. NEWMAN: Who is they?  
 13 THE WITNESS: They are  
 14 investors. That's who we are talking  
 15 about.  
 16 MR. NEWMAN: I'm asking you  
 17 about your wife.  
 18 MR. FRANCESKI: Objection,  
 19 asked and answered.  
 20 MR. NEWMAN: I'm asking about  
 21 your wife. What has she received back?  
 22 How much did she actually put in?  
 23 THE WITNESS: Investors in  
 24 Pine Street Capital Partners, of which  
 25 my wife is one of them, has received

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1 DAVID SMITH  
 2 back approximately 20 percent.  
 3 MR. NEWMAN: How much has she  
 4 put in dollar-wise?  
 5 THE WITNESS: That is the  
 6 question that Dave Franceski told me not  
 7 to answer. So let's not try again.  
 8 MR. NEWMAN: Well, I am coming  
 9 back to it, so we can talk about it  
 10 during the break. I might have one or  
 11 two more questions on Pine Street.  
 12 MR. NEWMAN: Is Pint Street  
 13 Capital in the process of raising new  
 14 funds or new money?  
 15 THE WITNESS: Yes, they are.  
 16 MR. NEWMAN: Can you explain  
 17 what offering is going on in that  
 18 regard?  
 19 THE WITNESS: They have  
 20 re-registered as a SBIC, that is a Small  
 21 Business Investment Corp. With that  
 22 comes the advantage of basically being  
 23 able to leverage your equity capital up  
 24 by two times. I believe they are trying  
 25 to raise approximately \$25 million,

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1 DAVID SMITH  
 2 which will give them an investment  
 3 corpus or pool of capital of \$75  
 4 million. And they are pursuing the same  
 5 investment philosophy that they did in  
 6 Pine Street Capital 1.  
 7 MR. NEWMAN: Is that offering  
 8 ongoing as we sit here today?  
 9 THE WITNESS: It is.  
 10 MR. NEWMAN: When did it  
 11 commence?  
 12 THE WITNESS: I think they  
 13 started actively getting subscriptions  
 14 maybe the summer.  
 15 MR. NEWMAN: How much has been  
 16 raised?  
 17 THE WITNESS: I think they  
 18 have raised approximately \$10 million.  
 19 MR. NEWMAN: And the goal is  
 20 to raise, you said, 75 million -- or 25  
 21 to 75 million?  
 22 THE WITNESS: The goal is to  
 23 raise 25 million of which they can lever  
 24 up to 75 million.  
 25 MR. NEWMAN: Okay. And what

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1 DAVID SMITH  
2 is actually being offered to investors?  
3 What is the nature of the security?  
4 THE WITNESS: It's just a  
5 limited partnership. It's more  
6 traditional this time.  
7 MR. NEWMAN: What's been your  
8 involvement in the raising of funds for  
9 that -- for that offering?  
10 THE WITNESS: Basically zero.  
11 I'm no longer part of the management  
12 team. I think I am a special limited  
13 partner or something. I am not involved  
14 actively anymore.  
15 MR. NEWMAN: As of when?  
16 THE WITNESS: As of when they  
17 put the deal together, which I think  
18 probably was most of '09 they worked on  
19 it.  
20 MR. NEWMAN: So you are a  
21 special limited partner. What does that  
22 mean?  
23 THE WITNESS: You know, I am  
24 not sure. I just saw it in the document  
25 the other day. Myself and another

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1 DAVID SMITH  
2 gentleman were original founders, and I  
3 don't even know if there is -- I assume  
4 there must be some percentage ownership  
5 that goes with it, but I don't know what  
6 it is. I haven't had a discussion. But  
7 I am no longer a part of the management  
8 team, or I am no longer a member of Pine  
9 Street Capital Management.  
10 MR. NEWMAN: But you have an  
11 interest in the limited  
12 partnership?  
13 THE WITNESS: I don't know.  
14 As I said, I haven't had any discussions  
15 with Tim or Mike. Looked like I just  
16 happened to be reading the document last  
17 week and I noticed, and I think that was  
18 the designation and whether -- I am  
19 assuming it's going to involve some  
20 ownership otherwise why grant it.  
21 MR. NEWMAN: Well, you're  
22 assuming you have an ownership interest;  
23 you don't know?  
24 THE WITNESS: I don't know.  
25 That's what I just said. This is the

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1 DAVID SMITH  
2 note -- this is offering going forward.  
3 MR. NEWMAN: You don't know,  
4 sitting here today, what your ownership  
5 interest is in that?  
6 MR. FRANCESKI: Objection.  
7 Asked and answered.  
8 THE WITNESS: No.  
9 MR. NEWMAN: How would you  
10 refresh your recollection on that?  
11 THE WITNESS: I would have to  
12 ask Tim Wells.  
13 MR. NEWMAN: There's no  
14 agreements?  
15 THE WITNESS: No.  
16 MR. NEWMAN: Everything is  
17 verbal again?  
18 THE WITNESS: Yeah. I am not  
19 putting up any capital so -- it's, you  
20 know -- they evidently granted me some  
21 ownership of their entity, and I don't  
22 know what it is.  
23 MR. NEWMAN: You read the  
24 prospectus recently, you just indicated?  
25 THE WITNESS: No, I perused

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1 DAVID SMITH  
2 it. I saw that in it.  
3 MR. NEWMAN: Oh, you perused  
4 it. When did you peruse it?  
5 THE WITNESS: Sometime in the  
6 last week.  
7 MR. NEWMAN: What did it say  
8 about your ownership interest?  
9 THE WITNESS: I didn't see  
10 anything or I would have answered the  
11 question.  
12 MR. NEWMAN: What did it say  
13 about you?  
14 THE WITNESS: It just  
15 indicated that I was designated --  
16 again, I believe the designation was  
17 sort of a special limited partner but  
18 that may or may not have been the  
19 language.  
20 MR. NEWMAN: Did you ask him  
21 what that meant?  
22 THE WITNESS: I was perusing  
23 the document by myself. I haven't  
24 spoken to Mr. Wells.  
25 MR. NEWMAN: What involvement

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1 DAVID SMITH  
2 have you had in raising money?  
3 THE WITNESS: None.  
4 MR. NEWMAN: Who's been  
5 selling the limited partnership  
6 interest?  
7 THE WITNESS: Mr. Wells and  
8 Mr. Lash.  
9 MR. NEWMAN: Who are they  
10 registered with?  
11 THE WITNESS: They are  
12 registered as principals. They are not  
13 doing it through a BD offering.  
14 MR. NEWMAN: Okay. So  
15 their -- this is -- can you explain  
16 that? They are registered as  
17 partnerships?  
18 THE WITNESS: They are  
19 principals in the entity. Principals  
20 have the right to raise capital for  
21 their own business enterprise. They  
22 don't have to go through a  
23 broker-dealer.  
24 MR. NEWMAN: But neither one  
25 of those individuals is registered,

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1 DAVID SMITH  
2 correct?  
3 THE WITNESS: That is  
4 correct -- excuse me, let me take that  
5 back. I think -- I think Tim Wells was  
6 registered with McGinn Smith at some  
7 point. I think that he was, yes. Mike  
8 Lash is not. I think Tim Wells was.  
9 MR. NEWMAN: Do you know how  
10 long he was registered?  
11 THE WITNESS: Probably from  
12 the time -- you know, he was -- before  
13 he went on this enterprise, I would say  
14 probably 2004/2005.  
15 MR. NEWMAN: His registration  
16 ended in 2005?  
17 THE WITNESS: No. I believe  
18 his registration started with McGinn  
19 Smith & Company.  
20 MR. NEWMAN: When did it end?  
21 THE WITNESS: I don't know if  
22 it has ended, that was my point. I  
23 don't think it has. I mean, I don't see  
24 a reason why it would have ended.  
25 MR. NEWMAN: Is he presently

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1 DAVID SMITH  
2 soliciting limited partnership interest?  
3 THE WITNESS: No.  
4 MR. NEWMAN: How do you know  
5 that?  
6 THE WITNESS: Oh, is he as a  
7 principal of Pine Street Capital  
8 Partners, yes.  
9 MR. NEWMAN: But he's also  
10 registered with McGinn Smith?  
11 THE WITNESS: I believe he is,  
12 yes.  
13 MR. NEWMAN: How can he be  
14 soliciting limited partnership interest  
15 given the fact that McGinn Smith is no  
16 longer conducting business?  
17 THE WITNESS: Because he's not  
18 doing it on behalf of McGinn & Smith.  
19 McGinn & Smith is not a placement agent.  
20 McGinn & Smith is not getting any  
21 compensation. He's doing it as a  
22 principal of Pine Street Capital  
23 Partners.  
24 MR. NEWMAN: Were there any  
25 commissions being paid in connection

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1 DAVID SMITH  
2 with that offering?  
3 THE WITNESS: No. No.  
4 MR. NEWMAN: Have any  
5 commissions been paid?  
6 THE WITNESS: No.  
7 MR. NEWMAN: At any point in  
8 time you received any fees or monies,  
9 either individually or through any  
10 affiliates, in connection with that  
11 offering?  
12 THE WITNESS: No.  
13 MR. NEWMAN: Let's take a  
14 break.  
15 (Whereupon a Recess is Taken.)  
16 BY MR. RATTINER:  
17 **Q All right. We are back on the**  
18 **record. We are going to continue with Exhibit Number**  
19 **1. We are on Page Number 4 at this point.**  
20 **Have about three more to go on this**  
21 **side, and two more to go on this document.**  
22 **Next one is Vigilant?**  
23 **A What page are you at, Chris?**  
24 **Q Page Number 4, with the funded theme**  
25 **Third Albany.**

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1 **DAVID SMITH**  
2 A Okay. Yeah. Vigilant. And the  
3 question is?  
4 **Q Is affiliation to McGinn & Smith?**  
5 A No.  
6 **Q And what is the connection?**  
7 A Connection was there was, on McGinn  
8 Smith's placement of agent offer of investment in  
9 that, I believe it was a stock and bond offering.  
10 **Q How much was raised? Was this 235**  
11 **raised or more?**  
12 A I think we eventually raised about \$2  
13 million. So there was an initial offering of about a  
14 million two, and then I think there was a subsequent  
15 offering of about 600,000.  
16 **Q So that TAIN to participate in the**  
17 **race, is that what this is?**  
18 A TAIN made a -- bought an interest in  
19 Vigilant, yes.  
20 **Q And what is the current status?**  
21 A Current status is they are still  
22 trying to sell the company.  
23 **Q And have they paid the 235 back?**  
24 A They have not -- it's still an  
25 investment in that company.

Page 302

1 **DAVID SMITH**  
2 **Q And have they been paying interest?**  
3 A It's converted to -- I believe it is  
4 now converted to stock.  
5 **MR. NEWMAN:** When was the  
6 offering?  
7 **THE WITNESS:** Let's see. It  
8 was when Scott Weissman was my  
9 investment banker. He's been gone for  
10 four years. So probably in '05, maybe  
11 '06, but I think '05.  
12 **MR. NEWMAN:** What was being  
13 offered?  
14 **THE WITNESS:** I believe it was  
15 an offering -- it was a unit sort of  
16 offering that had a debt component of a  
17 coupon with 10, maybe 10 and a quarter,  
18 and it had some common stock. I think  
19 for each \$50,000 you got 15,000 shares  
20 of stock or something. I may be  
21 confusing it with bid stock, but I think  
22 that's what it was.  
23 **MR. NEWMAN:** Vigilant was a  
24 startup?  
25 **THE WITNESS:** Vigilant was a

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1 **DAVID SMITH**  
2 startup, yes.  
3 **MR. NEWMAN:** Was there an  
4 offering of memorandum or prospectus?  
5 **THE WITNESS:** Yes, there was.  
6 **MR. NEWMAN:** How was it  
7 described from a risk standpoint?  
8 **THE WITNESS:** It was  
9 described, as you would expect, as high  
10 degree of risk.  
11 **MR. NEWMAN:** Why was this an  
12 appropriate investment for the limited  
13 liability company?  
14 **THE WITNESS:** Because the  
15 limited liability company is attempting  
16 to build market share in certain areas,  
17 and this was a particular area that we  
18 had an interest in, software encryption.  
19 Most of our tech investments were in  
20 software related areas, and that's why.  
21 **MR. NEWMAN:** There was no  
22 public market for these shares, this was  
23 a private offering?  
24 **THE WITNESS:** Private offering  
25 right now or was private offering at the

Page 304

1 **DAVID SMITH**  
2 time, yes.  
3 **MR. NEWMAN:** And McGinn Smith  
4 was the placement agent?  
5 **THE WITNESS:** Yes.  
6 **MR. NEWMAN:** What was the fee  
7 McGinn Smith received for that offering?  
8 **THE WITNESS:** I would believe  
9 it to be the traditional fee which was 8  
10 to 10 percent.  
11 **MR. NEWMAN:** Was there a  
12 minimum amount that had to be sold for  
13 this offering, mini/max deal? What was  
14 the nature of the offering?  
15 **THE WITNESS:** Generally,  
16 there's mid-maximum, probably five  
17 hundred to a million, something like  
18 that.  
19 **MR. NEWMAN:** At the time that  
20 the LLC invested in Vigilant had the  
21 minimum amount been raised?  
22 **THE WITNESS:** I believe so.  
23 **MR. NEWMAN:** And I think you  
24 testified that there's no other  
25 affiliation between McGinn Smith and its

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1 DAVID SMITH  
2 affiliates and Vigilant?  
3 THE WITNESS: That is correct.  
4 MR. NEWMAN: Other than  
5 placement agent?  
6 THE WITNESS: That is correct.  
7 BY MR. RATTINER:

8 **Q And the last one on the sheet says**  
9 **DFR.**

10 A DFR is the symbol, it is a public  
11 company. It was not a public company at the time.  
12 Stands for Deerfield. It was basically an REIT that  
13 invested in RMBS real estate mortgage-backed  
14 securities and commercial-backed securities,  
15 underwritten by, I believe, Deutsche Bank, Steve  
16 Nicholas, Friedman Billings, maybe.

17 **Q Were the notes allowed to purchase**  
18 **stock on a margin basis?**

19 A We did not purchase stock on a margin  
20 basis, but I don't believe there was any prohibition  
21 in the prospectus that referred to our ability to  
22 incur other debt. Quite frankly, I think it -- I  
23 think we were silent to it.

24 **Q And the number next to the DFR, is**  
25 **that 7.58, is that your cost basis, \$7.58?**

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1 DAVID SMITH  
2 A I wouldn't think so. I would think  
3 that would probably be where the stock was selling at  
4 the time because we made a large investment of \$5  
5 million, and it is a \$15 private placement offering  
6 which they subsequently took public at approximately  
7 the same price about a year later.

8 So December '07 my guess is that is a  
9 notation by whoever put this together. Did we  
10 determine this was Dave's work?

11 **Q Yes, Dave Rees.**

12 A Probably that's what stock was  
13 selling.

14 **Q And what was the affiliation, if any,**  
15 **with McGinn Smith?**

16 A None.

17 **Q And how did you become aware of**  
18 **Deerfield Triarc?**

19 A My recollection of this one was -- as  
20 I said, I think Stephen Nicholas was one of the  
21 underwriters, and we did some work with a guy by the  
22 name of Rich Kendrick, who was an investment banker  
23 with them, and they were particularly high on this,  
24 and I think that's where my best of my recollection  
25 where I got it from.

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1 DAVID SMITH  
2 **Q In this investment here, this**  
3 **2.4 million, was that made through NFS?**  
4 A Yes. I had to think for a minute.  
5 Yeah, we have a brokerage account at NFS and so it  
6 was made through them, yes.

7 **Q All right. And did you have any**  
8 **margin calls on the Deerfield Triarc?**

9 A On?

10 **Q Deerfield Triarc?**

11 A No, I don't believe we were ever on  
12 margin. I don't think we ever used margin.

13 **Q Move on to Page 5. And in this case**  
14 **the fund is First Excelsior?**

15 A Yep.

16 **Q Let's talk about Cherokee. What is**  
17 **it?**

18 A Cherokee is -- we have actually  
19 chatted about Cherokee a little bit. That is the  
20 partner of Cochise, and when we talked about the  
21 settlement with Pali and the allocation of 52/48,  
22 those of you who are quick with the math will tell us  
23 whether that's the 48 or the 52.

24 **Q So this is part of the 2.2 million?**

25 A That is correct.

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1 DAVID SMITH  
2 **Q And Christopher's we already spoke**  
3 **about?**

4 A Right.

5 **Q JV?**

6 A JV is an affiliate. I answered  
7 questions that you haven't asked yet.

8 I apologize, Mr. Franceski.

9 **Q No, that's totally fine.**

10 A I think there was a couple of  
11 investments there. JV was a group that was  
12 affiliated with Century Same Day Surgery -- that name  
13 has come up before, CSDS -- they were in the process  
14 of being bought out by a group called Surgical  
15 Synergies out of St. Louis, needed capital. We  
16 guaranteed that one because of the affiliation, and,  
17 you know, it was done in anticipation of a deal  
18 getting done. It was done in anticipation of getting  
19 a good short-term investment, but because of  
20 ownership in JV by both Mr. McGinn and myself, we  
21 threw that in.

22 **Q What does JV stand for?**

23 A Joint Venture.

24 **Q Okay. And who else is affiliated**  
25 **with Joint Venture other than yourself and Mr.**

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1 **DAVID SMITH**

2 **McGinn?**

3 A At the same time we did the Century  
4 Same Day Surgery, which is an ambulatory surgical  
5 center, if you are familiar with that concept, I  
6 believe we did that back in 1995, close to that,  
7 yeah.

8 JV Associates was the financing group  
9 that put it together. They were primarily doctors,  
10 mostly surgeons. I think there was one pathologist,  
11 ten partners. Mr. McGinn and I were two of those  
12 partners. We owned 10 percent a piece. The other  
13 doctors owned the 80.

14 And at the time we were looking to  
15 advance that credit. The other doctors weren't in a  
16 position or willing to put it up, so, you know, we  
17 felt we had a strong obligation to the community. It  
18 had been a bit of a thing in the community for over  
19 10 years, 60 employees, and we felt that because of  
20 that we would guarantee it. Quite frankly, we would  
21 get our money back because we are selling the  
22 transaction, but it never happens.

23 **Q This was a bridge loan?**

24 A This was basically a bridge loan,  
25 yeah.

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1 **DAVID SMITH**

2 A RTC is more Alarm Contracts, pool of  
3 contracts that we bought.

4 **Q And what's the -- so now, again, so**  
5 **McGinn Smith Advisors or McGinn Smith Capital**  
6 **Holdings is the managing member?**

7 A Yeah, I guess -- no, I don't know who  
8 is the managing member of that. I mean, we sort of  
9 control it through -- we service the account. I  
10 don't know if there is any direct ownership, but I  
11 think we have taken -- that was -- that was a piece  
12 of a spinoff of a group that went with a public  
13 company, and I think, again, it was a grantor trust.  
14 I don't know if we have any direct ownership. I  
15 don't -- I just don't know.

16 **Q How does this differ -- rather than**  
17 **going through a whole host of questions, how does**  
18 **this differ than the SPT4?**

19 A Only that it was a partial piece, and  
20 you're testing my memory really well, but I believe  
21 that RTC was originally part of a much larger piece  
22 that was sold to -- or not sold to, but was absorbed  
23 by integrated alarm when it went public in 2003.

24 And I think there was a remaining  
25 piece with a particular dealer, and I think that

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1 **DAVID SMITH**

2 **Q And did you do any raises for JV**  
3 **outside of the bridge loan?**

4 A No.

5 **Q And that's currently been not paid?**

6 A That is correct.

7 **Q Raging River?**

8 A Raging River was an entity out of  
9 North Carolina -- let me think a minute -- in the  
10 basically wholesale clothing business, imported soft  
11 goods, primarily sweat shirts, T-shirts. Went  
12 through a dying process, then sold them to major  
13 retailers.

14 Deal was brought to me by Mike Lash,  
15 who I can't remember exact relationship, but he had a  
16 relationship with the party. Mike used to work at  
17 Fleet Bank of Boston, and I think maybe he dealt with  
18 them through that. I don't remember. At any rate,  
19 we advanced that money, had personal guarantees.  
20 That will be written off -- was written off by  
21 this -- I am not sure exactly when it was written  
22 off, but if it hasn't been, it should be. I think it  
23 was. I think it was written off, you know, virtually  
24 about two years after we made the loan.

25 **Q And what about RTC?**

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1 **DAVID SMITH**

2 remained in the RTC Trust, didn't get sold. I think  
3 85 percent of it got sold to IASG, and I think this  
4 represented 15 percent, and, you know, it's performed  
5 reasonably well, it's amortizing out. It is a group  
6 of contracts.

7 **Q What is the current status?**

8 A It's current.

9 **Q Okay. On this document a few lines**  
10 **down we will see alarm, what looks to be contracts,**  
11 **but it was cut off, of 3 million 7.**

12 **Do you know what that is?**

13 A It looks like it's probably part of  
14 the SPT groups that we bought and the amortized  
15 amount. That would be my guess.

16 **Q And what is the current status of**  
17 **that?**

18 A It's amortizing, paid.

19 MR. RATTINER: I think that's  
20 all we have with this. We are done with  
21 that exhibit at this point.

22 I am going to introduce  
23 Exhibit Number 3.

24 (Whereupon Exhibit 3 is  
25 Marked.)

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1 DAVID SMITH  
2 BY MR. RATTINER:  
3 **Q In front of you is Exhibit Number 3,**  
4 **Mr. Smith, and this is identified as the First**  
5 **Advisory Income Notes restructuring plan. They are**  
6 **identified by Bates Stamp number MGS 0016098 and it**  
7 **goes through MGS 0016106.**  
8 MR. FRANCESKI: Chris, would  
9 you hold that thought?  
10 (Whereupon a Discussion is  
11 Held Off the Record.)  
12 BY MR. RATTINER:  
13 **Q This was provided to the staff as**  
14 **part of our request regarding the use of proceeds**  
15 **documentation and things of the sort.**  
16 **So this will walk us through --**  
17 **first, I ask who created this document?**  
18 A I believe the answer is I did.  
19 **Q Okay. And is this document similar**  
20 **or mainly similar to the other three known entities?**  
21 A Yes. We sent the same document to  
22 all four LLCs.  
23 **Q The differences would be basically**  
24 **the dates in terms of payments, you had indicated**  
25 **before?**

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1 DAVID SMITH  
2 A There's a -- yeah, a minor  
3 discrepancy in dates. As I said, two of them I think  
4 pay on the 15th of October, that cycle, the October  
5 cycle.  
6 **Q Okay.**  
7 A One pays on October 31 and one pays  
8 on November.  
9 **Q Want to identify this as well as the**  
10 **October 2008 letter that was sent out to the**  
11 **investors?**  
12 **Which investors would receive this?**  
13 **Which tranche of investors?**  
14 A This -- all investors received this.  
15 **Q Okay. If you turn to Bates number**  
16 **ending 6105.**  
17 A Okay.  
18 **Q Go down to the third paragraph, five**  
19 **lines down.**  
20 A Yep.  
21 **Q It says, MSA and its affiliate McGinn**  
22 **Smith & Company will be making its own sacrifice.**  
23 **Management fees, commissions and administrative fees**  
24 **aggregate, approximate \$2,750,000 a year per year for**  
25 **all of our funds that are part of this**

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1 DAVID SMITH  
2 **reorganization. In an effort to improve liquidity,**  
3 **we have agreed to forfeit all such future fees while**  
4 **this reorganization plan is in effect. Legal fees**  
5 **attributed to the defense of our actions and fees**  
6 **incurred in the pursuit of recovery of any**  
7 **investment -- recovering any of our investments will**  
8 **be the responsibility of the funds.**  
9 **I just want to break this statement**  
10 **down. Here again, this document, will let it speak**  
11 **for itself obviously, states that we have agreed to**  
12 **forfeit all such fees.**  
13 **How does that differ from the fact**  
14 **that you did take fees in 2009 and 2010 subsequent to**  
15 **this letter?**  
16 A Same answer: A, it only refers to  
17 future fees; and B, this was the document that I  
18 started to speak of before and couldn't find the  
19 language, but this clearly talks about legal fees, if  
20 there are legal fees incurred, they will be not part  
21 of the statement, I guess, for lack of a better  
22 description.  
23 **Q So, again, we don't see anywhere in**  
24 **this document that says accrued legal fees will be**  
25 **paid.**

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1 DAVID SMITH  
2 **This says forfeit all fees?**  
3 A Well, you know, this isn't a  
4 contract. This is something that I represented to  
5 investors, and it's not drawn as a legal document.  
6 It's not legally binding by either us or them. It is  
7 a representation I made. We have lived up to it, and  
8 if we needed a better wordsmith, I apologize, but  
9 it's not a contract.  
10 MR. NEWMAN: It says legal  
11 fees attributed to defense of our  
12 actions. What did you mean by our  
13 actions?  
14 THE WITNESS: If the funds or  
15 its agents are sued, they are entitled  
16 to defend themselves.  
17 BY MR. RATTINER:  
18 **Q Did this require a vote of the note**  
19 **holders?**  
20 A No.  
21 **Q Whose determination was it to use**  
22 **this language specifically?**  
23 A I guess I would be the author of most  
24 of it.  
25 **Q Who else would you have consulted**

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1 **DAVID SMITH**  
2 **with, if anyone?**  
3 A I am sure I ran it by Mr. McGinn, Mr.  
4 Livingston, Mr. Carr.  
5 **Q And does this letter speak about the**  
6 **current status of the notes, do you recall?**  
7 A Yeah, I think -- I mean, I think  
8 it --  
9 **Q Versus just the overall economic**  
10 **condition?**  
11 A It says, result of losses incurred in  
12 the fund's investments, total illiquidity for the  
13 vast majority. I mean, I think that speaks to it,  
14 yeah.  
15 **Q At any point in time did you identify**  
16 **to the investors the current value of the notes?**  
17 A No. They have no idea what that  
18 value was.  
19 MR. NEWMAN: Was there an  
20 indemnification provision in the  
21 offering memorandum which said that the  
22 fund investors would be paying legal  
23 expenses incurred in the defense of  
24 arbitrations?  
25 THE WITNESS: I don't know if

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1 **DAVID SMITH**  
2 it's in the memorandum. I have stated  
3 earlier it's in the bond indenture which  
4 was available to the investors.  
5 MR. NEWMAN: You don't know if  
6 it was disclosed in the offering  
7 memorandum?  
8 THE WITNESS: That is correct.  
9 MR. NEWMAN: And as I  
10 understand from your earlier testimony,  
11 and correct me if I am wrong, but not  
12 all the monies that were taken out in  
13 2009 and 2010 were used to pay legal  
14 fees?  
15 THE WITNESS: I don't believe  
16 I stated that. What I stated was is  
17 that there are a large number of fees  
18 and there still exists a large number of  
19 fees that had occurred before 2008 that  
20 were owed to the various entities.  
21 Those fees have been pledged,  
22 as we have talked this afternoon, to a  
23 number of the loans that were made by  
24 what we will call as related parties,  
25 maybe not the exact language anyone

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1 **DAVID SMITH**  
2 wants to use, but I think everybody  
3 knows what we are talking about, and  
4 fees that had still not been taken by  
5 the firm or MS Advisors.  
6 MR. NEWMAN: But at the time  
7 of this restructuring, there is also a  
8 large amount of money was outstanding to  
9 the people who invested in these limited  
10 liability companies?  
11 THE WITNESS: That is right,  
12 but they stand behind those who are  
13 entitled to the fees.  
14 MR. NEWMAN: In your judgment?  
15 THE WITNESS: No, not my  
16 judgment. That's what the document  
17 says.  
18 MR. NEWMAN: Which document?  
19 THE WITNESS: Bond indenture.  
20 MR. NEWMAN: Which wasn't  
21 described in the offering memorandum?  
22 MR. FRANCESKI: Objection.  
23 Been asked and answered. The memorandum  
24 says what it says. It's in writing.  
25 MR. RATTINER: We are done

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1 **DAVID SMITH**  
2 with that exhibit.  
3 MR. NEWMAN: Did you consider  
4 the description of how the note  
5 holders -- or, excuse me, the LLC  
6 investors were going to be responsible  
7 for legal fees? Do you consider that to  
8 be a material fact?  
9 MR. FRANCESKI: Objection.  
10 You may answer.  
11 THE WITNESS: I don't know the  
12 answer to that.  
13 MR. NEWMAN: Do you understand  
14 that you have to disclose, as an issuer,  
15 material facts not in the offering  
16 memorandum?  
17 THE WITNESS: I understand  
18 that you can't anticipate all events.  
19 In 2003 and 2004 I don't think anybody  
20 anticipated the events of 2007, 2008.  
21 MR. NEWMAN: To go back to my  
22 question, do you understand as an issuer  
23 or a underwriter, somebody who has been  
24 participating in several offerings, you  
25 are required to disclose material facts

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1 DAVID SMITH  
2 in offering memorandum?  
3 THE WITNESS: And I believe we  
4 did. I think we disclosed all major  
5 risks. I think if you look at the risk  
6 disclosure section covers virtually  
7 everything imaginable.  
8 MR. NEWMAN: Did you believe  
9 that the payment of -- potential payment  
10 of legal fees and expenses to be a  
11 material fact requiring disclosure?  
12 THE WITNESS: Again, my  
13 attorneys wrote the document.  
14 MR. FRANCESKI: I object, but  
15 go ahead.  
16 MR. NEWMAN: I'm asking you.  
17 THE WITNESS: I just said my  
18 attorneys wrote the document.  
19 MR. NEWMAN: I'm asking you  
20 did you consider it to be a material  
21 fact?  
22 THE WITNESS: I didn't  
23 consider it. The attorneys wrote the  
24 document.  
25 MR. NEWMAN: You reviewed that  
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1 DAVID SMITH  
2 document?  
3 THE WITNESS: I am not a  
4 lawyer.  
5 MR. NEWMAN: Did you review  
6 the document?  
7 THE WITNESS: I did review the  
8 document.  
9 MR. NEWMAN: Did you sell --  
10 MR. FRANCESKI: Let me object.  
11 We are arguing with each other here.  
12 MR. NEWMAN: I am not arguing.  
13 He's arguing. I am trying to ask  
14 questions.  
15 THE WITNESS: You're arguing.  
16 MR. NEWMAN: No, I'm asking a  
17 question.  
18 MR. FRANCESKI: Well, now  
19 you're both arguing with each other.  
20 MR. NEWMAN: I'm asking a  
21 relevant question.  
22 MR. FRANCESKI: But that's for  
23 another day.  
24 MR. NEWMAN: You may not agree  
25 with it.  
Page 323

1 DAVID SMITH  
2 MR. FRANCESKI: A court's  
3 going to tell us some day whether or not  
4 the disclosures were adequate in the  
5 memorandum. Why are we arguing with  
6 this witness? He understands that it  
7 has to contain material items. He gets  
8 guidance from counsel on that, and he's  
9 told you that you --  
10 MR. NEWMAN: Are you done now  
11 with your opening argument?  
12 MR. FRANCESKI: I am  
13 suggesting let's save us some time here.  
14 A court is going to decide that some  
15 day. He can't help you with that.  
16 MR. NEWMAN: He's the one --  
17 his company raised millions of dollars  
18 from investors with offering memorandum.  
19 MR. FRANCESKI: And he said he  
20 relied on counsel for that.  
21 MR. NEWMAN: Look, I'm  
22 asking -- you're interjecting now. You  
23 are not objecting, you are making  
24 speeches.  
25 MR. FRANCESKI: Don't tell me  
Page 324

1 DAVID SMITH  
2 what I am doing. I am here to represent  
3 my client. I don't need your guidance  
4 on what I'm doing here.  
5 MR. NEWMAN: I don't need to  
6 agree with what you're saying either. I  
7 am here representing FINRA.  
8 MR. FRANCESKI: But don't tell  
9 me what I am doing. I know what I'm  
10 doing.  
11 MR. NEWMAN: I know what you  
12 are doing, you're interjecting and  
13 you're making speaking objections.  
14 MR. FRANCESKI: I am not  
15 making speaking objections.  
16 MR. NEWMAN: You certainly  
17 are. Make your objection and then we  
18 will deal with it. That's all.  
19 MR. FRANCESKI: I am trying to  
20 prevent you two from arguing with each  
21 other here. You asked that question I  
22 don't know how many times today, and  
23 he's consistently given you the same  
24 answer. It's not going to change.  
25 MR. NEWMAN: Did you believe  
Page 325

1 DAVID SMITH  
 2 as a person who was selling these  
 3 limited liability interests, millions of  
 4 dollars of these limited liability  
 5 interests, did you believe you had an  
 6 obligation to disclose material facts in  
 7 the offering memorandum?  
 8 MR. FRANCESKI: Objection.  
 9 Asked and answered.  
 10 I'm sorry, Dave. I can't do  
 11 anything other than object.  
 12 THE WITNESS: I believe the  
 13 material facts had to be disclosed, and  
 14 that I believe the attorneys, who have  
 15 far more experience than me as a lay  
 16 person covered it, wrote it in the  
 17 memorandum. They have written hundreds  
 18 of memorandums, and I believe they are  
 19 quite skilled and capable of doing what  
 20 they do and they did.  
 21 MR. NEWMAN: Why was a legal  
 22 fee provision in a trust indenture  
 23 agreement versus the offering  
 24 memorandum?  
 25 THE WITNESS: I don't know.

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1 DAVID SMITH  
 2 MR. NEWMAN: Did you discuss  
 3 that with your attorneys?  
 4 THE WITNESS: No.  
 5 MR. FRANCESKI: Wait. You  
 6 don't have to answer that. That's a  
 7 privileged question, and Mr. Newman  
 8 knows that.  
 9 MR. NEWMAN: I can ask if he  
 10 discussed that. I am not asking the  
 11 substantial of the conversation.  
 12 MR. FRANCESKI: It implies the  
 13 substance of the conversation.  
 14 MR. NEWMAN: Again, we  
 15 disagree.  
 16 MR. FRANCESKI: Well, we are  
 17 going to disagree. That one is a  
 18 privilege -- that invades the privilege.  
 19 MR. NEWMAN: I don't believe  
 20 so.  
 21 MR. FRANCESKI: Let me finish  
 22 my objection, please. That invades the  
 23 privilege. You ask a witness whether he  
 24 discussed a topic with his attorney, it  
 25 implies a privileged communication. He

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1 DAVID SMITH  
 2 does not have to answer that.  
 3 MR. NEWMAN: Do you have  
 4 e-mail communications between -- with  
 5 your attorneys regarding the offering  
 6 memorandum?  
 7 THE WITNESS: I don't think  
 8 so.  
 9 MR. NEWMAN: All your  
 10 discussions were in person or over the  
 11 phone?  
 12 THE WITNESS: Correct.  
 13 BY MR. RATTINER:  
 14 **Q Who laid out the fees in the**  
 15 **memorandum?**  
 16 A The fees regarding the commission  
 17 fees, regarding the management fees, regarding the  
 18 administrative fees?  
 19 **Q Correct.**  
 20 A That was done basically at our  
 21 direction.  
 22 **Q So you would have provided the law**  
 23 **firm in this case that guidance?**  
 24 A Yeah. They were all very  
 25 traditional, private placements are typically

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1 DAVID SMITH  
 2 10 percent. We charged 8 percent over 5 years. We  
 3 charged the 1 percent management fee, which general  
 4 fees ran from 1 to 2 percent. So we were on the low  
 5 side. And the administrative side, which includes  
 6 tax return preparation, traveling, all the other  
 7 salaried employees that go with it, it was more than  
 8 reasonable.  
 9 **Q Did the funds pay any salaries**  
 10 **directly --**  
 11 A No.  
 12 **Q -- to any individual employed by**  
 13 **McGinn Smith?**  
 14 A No. I am going to quit anticipating  
 15 your question. I apologize.  
 16 **Q How about Brian Cooper?**  
 17 A No.  
 18 **Q The funds never paid Brian Cooper?**  
 19 A No.  
 20 **Q Does a broker-dealer pay the**  
 21 **individuals employed by PSCP?**  
 22 A The broker-dealer, I believe, has an  
 23 arrangement where we pay on the payroll cycle and  
 24 then get reimbursed immediately thereafter. I think  
 25 as an accommodation, we throw them in our payroll

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1 DAVID SMITH  
 2 cycle, they get paid, and then they reimburse the  
 3 firm.  
 4 So I guess the answer to your  
 5 question is yes, but they are not paying them only as  
 6 an accommodation. They get the money back. They are  
 7 not paying anything for them.  
 8 MR. ROWEN: I am going to take  
 9 another --  
 10 THE WITNESS: No, you can't.  
 11 No. These two guys, that's it. Rees  
 12 told me you were the toughest guy of the  
 13 whole crowd.  
 14 MR. RATTINER: Let me rest my  
 15 vocals.  
 16 MR. ROWEN: We have touched on  
 17 the concept of being collateralized  
 18 against fees, some of these loans, and  
 19 I'm just trying to make sure we are  
 20 clear on our end so that we are on the  
 21 same page.  
 22 One of the four LLCs, in some  
 23 cases, loaned money or loaned some kind  
 24 of transaction with an entity that had a  
 25 minimum 20 percent ownership by McGinn

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1 DAVID SMITH  
 2 Smith or someone in the family; is that  
 3 the --  
 4 THE WITNESS: That is correct.  
 5 MR. ROWEN: That is the  
 6 scenario. Okay. In that case, if I'm  
 7 understanding correctly, that loan is  
 8 collateralized against --  
 9 THE WITNESS: Fees.  
 10 MR. ROWEN: -- fees that would  
 11 be received by MS Advisors and/or MSCH?  
 12 THE WITNESS: Correct.  
 13 MR. ROWEN: Okay. Whose fees  
 14 are we talking about? Are we talking  
 15 about the LLCs fees or are we talking  
 16 about the fees of the entity with  
 17 20 percent or more ownership?  
 18 THE WITNESS: We are talking  
 19 about the fees that are due and payable  
 20 to the entities of McGinn Smith Capital  
 21 Holdings and MS Advisors and McGinn  
 22 Smith & Company, doing payable each and  
 23 every year for services performed.  
 24 Okay. Those fees, if they  
 25 were not taken, which they were not, we

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1 DAVID SMITH  
 2 used to, in effect, collateralize  
 3 investments that we felt had a  
 4 relationship of conflict, if you will,  
 5 whatever you want to call it. Our  
 6 concern was is that if we are going to,  
 7 in effect, advance money to some entity  
 8 that we have an interest in, then we  
 9 ought to be responsible for it.  
 10 The obvious choice could have  
 11 been is that we could have taken our  
 12 fees and never made the loan. We, in  
 13 fact, made the loan and collateralized  
 14 the fees, and it's an offset  
 15 transaction. It's totally transparent,  
 16 and, quite frankly, advantageous to the  
 17 funds.  
 18 MR. NEWMAN: Transparent to  
 19 who?  
 20 THE WITNESS: Transparent to  
 21 anybody who looks at the books.  
 22 MR. NEWMAN: Did you give a  
 23 copy of that agreement to the investors?  
 24 THE WITNESS: No. It was  
 25 subsequent to the -- we didn't

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1 DAVID SMITH  
 2 contemplate making loans to anybody when  
 3 we raised the capital. We didn't know  
 4 who the eventual customers or recipients  
 5 were going to be.  
 6 MR. NEWMAN: At what point did  
 7 you make your first loan?  
 8 THE WITNESS: I think the  
 9 first loan that that issue came up was C  
 10 to the 4th, and I think that was in  
 11 maybe 2004.  
 12 MR. NEWMAN: And at that  
 13 point -- I don't know have the dates in  
 14 front of me, but not all the offerings  
 15 had commenced at that point, the LLC  
 16 offerings, correct?  
 17 THE WITNESS: That is correct.  
 18 MR. NEWMAN: There were a  
 19 couple of LLC offerings subsequent to  
 20 that?  
 21 THE WITNESS: There was, I  
 22 think, one subsequent to that.  
 23 MR. NEWMAN: And which one was  
 24 that?  
 25 THE WITNESS: That would have

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1 DAVID SMITH  
2 been First Advisory.  
3 MR. NEWMAN: And was there any  
4 disclosure in the First Advisory  
5 offering memorandum about potential for  
6 loans?  
7 THE WITNESS: Only the same  
8 language that basically said that there  
9 was potential to lend money to  
10 affiliates -- affiliates, I guess, is  
11 the right word.  
12 MR. NEWMAN: That's in the  
13 offering memorandum?  
14 THE WITNESS: I believe so,  
15 yes.  
16 MR. NEWMAN: Is that similar  
17 language in the other three offering  
18 memorandum?  
19 THE WITNESS: I think  
20 the three -- the four offerings language  
21 is quite similar all the way through.  
22 MR. NEWMAN: That there's a  
23 potential to lend money by the LLC to an  
24 affiliate?  
25 THE WITNESS: I think the

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1 DAVID SMITH  
2 discussion, and you will have to excuse  
3 me, it's been a while since I read them,  
4 but my recollection is the discussion  
5 talks about lending money to affiliates,  
6 and if it is done -- or make an  
7 investment in an affiliate, and it's  
8 permissible as long as it's done at a  
9 price that's either market value driven  
10 or comparable to what would be done with  
11 anyone else, something to that effect.  
12 MR. NEWMAN: I am not asking  
13 about investors now. I'm asking about  
14 lending.  
15 THE WITNESS: Well, yeah,  
16 that's -- same thing. I mean, it talks  
17 about it in the same sentence or the  
18 same few sentences.  
19 MR. NEWMAN: So to your  
20 recollection --  
21 THE WITNESS: To the best of  
22 my recollection.  
23 MR. ROWEN: So to make sure  
24 I'm understanding correctly, it is the  
25 fees that are collateralized against

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1 DAVID SMITH  
2 would be the fees that the four LLCs  
3 would be paying either the  
4 broker-dealer, MS Advisors or MSCH?  
5 THE WITNESS: Correct.  
6 MR. ROWEN: Okay. So when we  
7 had the example we talked about earlier  
8 where CCCC still had an open -- I  
9 believe it was \$45,000 to FIIN, in that  
10 scenario, because CCCC is no longer able  
11 to pay that off, there should be \$45,000  
12 not paid by the LLCs to either the  
13 broker-dealer, MS --  
14 THE WITNESS: Absolutely.  
15 MR. ROWEN: Okay. Did that  
16 happen?  
17 THE WITNESS: Yes. I mean, if  
18 you go back, and we are doing a full  
19 analysis, which I am sure you guys will  
20 ask for, but there was probably over \$4  
21 million of those fees that were never  
22 taken, and they were taken for the  
23 reasons is that they were signed against  
24 various investments.  
25 I mean, otherwise we would

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1 DAVID SMITH  
2 have taken them. And so they, you know,  
3 there's -- there's specific names that  
4 are -- that we have identified that fall  
5 into that category, and we have gone  
6 through a number of them with Chris. I  
7 don't know if we got them all, but I  
8 think the total amount of those related  
9 investments that are collateralized was  
10 somewhere in the range of \$2.8 million.  
11 BY MR. RATTINER:  
12 **Q That would be loans to affiliates?**  
13 **A** Loans or investments. I mean, I  
14 think -- for example, MS Preferred, I mean, that's  
15 not a loan, it's -- it was an investment in our  
16 preferred stock. It was an investment that, quite  
17 frankly, for 88 consecutive quarters paid on time  
18 until we got to 2009. But nonetheless, when we made  
19 it, we considered that to be a related party of  
20 conflict of interest -- I shouldn't be throwing those  
21 words around, but, you know, I think we all know what  
22 we are talking about. So that was part of the  
23 collateral.  
24 MR. ROWEN: Okay. Just so I  
25 am clear, the purchase of the MS

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 2 preferred stock, was that done directly  
 3 through McGinn Smith & Company, the  
 4 broker-dealer, or was that a third-party  
 5 transaction?  
 6 THE WITNESS: Well, it was  
 7 done through -- you mean on the initial  
 8 offering?  
 9 MR. ROWEN: I mean whatever  
 10 one of the four funds purchased.  
 11 THE WITNESS: There was --  
 12 generally, the way it worked, and I say  
 13 generally, I can't say every time, but I  
 14 would think most of the time, McGinn  
 15 Smith had a preferred offering in 1987.  
 16 It was an intrastate offering, which  
 17 meant it had public market capability.  
 18 It could trade as long as it traded  
 19 within a New York State resident. From  
 20 time to time we had people who redeemed  
 21 stock, wanted to redeem their stock, and  
 22 I would guess of the purchase that we  
 23 made, it was all part of that offering  
 24 which was originally, I think, about a  
 25 \$3 million offering, and it fluctuated

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 2 from time to time. At any given time  
 3 there might be 3 million outstanding,  
 4 there might be 2 million outstanding.  
 5 But the capitalization of the offering,  
 6 I believe, was \$3 million.  
 7 MR. NEWMAN: Can we go off the  
 8 record for one second.  
 9 (Whereupon a Discussion is  
 10 Held Off the Record.)  
 11 MR. ROWEN: We will go back on  
 12 the record. I am not sure if I got the  
 13 answer to my question, though. When the  
 14 four funds purchased preferred stock of  
 15 McGinn Smith & Company, would they have  
 16 purchased it from the broker-dealer or  
 17 would they have purchased it from a  
 18 third party who was already holding that  
 19 preferred stock?  
 20 THE WITNESS: And I think my  
 21 answer was, as I said in general, since  
 22 the offering was in 1987, stock that  
 23 would be re-offered would be from  
 24 clients who were looking for a buyer or  
 25 possibly the firm had bought it from the

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1 DAVID SMITH  
 2 original investor or maybe a subsequent  
 3 investor, and it was in inventory, in  
 4 which case they sold it.  
 5 I can't tell you specifically.  
 6 I don't even know if all four funds  
 7 bought it. I would have to look at the  
 8 balance sheet. It's quite possible.  
 9 But if the offering was in '87, it was  
 10 over and done with. So any transactions  
 11 that you are buying, the LLCs are  
 12 buying, are from either directly from a  
 13 client who would probably be running it  
 14 through the firm, in other words, they  
 15 would sell it to the firm because that  
 16 is the mechanism. They could redeem --  
 17 they could redeem the stock to McGinn  
 18 Smith, in which case it would be on our  
 19 balance sheet, in our inventory, and if  
 20 we subsequently wanted to resell it, we  
 21 had the perfect right to do that, and  
 22 that may have been the scenario,  
 23 probably the scenario.  
 24 MR. ROWEN: Okay. So then if  
 25 we go back a step, the fees that were

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1 DAVID SMITH  
 2 taken out of the four LLCs in 2010 or in  
 3 2009, they would have still been an  
 4 active accrued payable on the LLCs books  
 5 even after factoring in the indentures  
 6 and any -- any fees that would not be  
 7 received based on any failures of a  
 8 20 percent owned entity?  
 9 THE WITNESS: That is correct.  
 10 In addition to those fees pledged, I  
 11 think that was your question?  
 12 MR. ROWEN: Right.  
 13 THE WITNESS: Yes.  
 14 BY MR. RATTINER:  
 15 **Q Where are those numbers tied out?**  
 16 **What document would we see?**  
 17 **We did see something that we will**  
 18 **introduce shortly.**  
 19 A You know, Brian Cooper's working on  
 20 it. I mean, I know the numbers in my head. There's  
 21 approximately \$600,000 that still remains, after and  
 22 above all those things, after the legal fees. We  
 23 have even set aside, although I will ultimately give  
 24 legal opinion on this, is that on the underwriting  
 25 side, there was, I think, about \$700,000 that was due

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1 DAVID SMITH  
2 to McGinn Smith.  
3 And the question is if that portion  
4 of it is collected, is that an obligation to the  
5 brokers who, in effect, sold it? And we have set it  
6 aside as if it is. Frankly, I am not sure if the  
7 brokers are no longer employed with you, you know,  
8 there's all sorts of questions regarding that.  
9 But we have -- we are going to set  
10 that aside and make sure that those dollars are not  
11 spent until that question gets answered.  
12 BY MR. RATTINER:  
13 **Q First Independent -- the PPM was**  
14 **dated September 15th, 2003.**  
15 **How long before that point was the**  
16 **idea created for First Independent?**  
17 A I think I probably started thinking  
18 about it in the spring of '03. The firm, as you  
19 know, if you have looked at its history -- that's it.  
20 I am done. Spring of '03.  
21 **Q Whose idea was it?**  
22 A It was my idea.  
23 **Q And did you have any discussions with**  
24 **anybody else at that point?**  
25 A Yes. I had discussions with Mr.

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1 DAVID SMITH  
2 Livingston. I had discussions with Mr. McGinn. I  
3 think that would probably be the extent of it.  
4 **Q At that point did you put together a**  
5 **business plan?**  
6 A Put together a business plan in my  
7 head. I don't think I wrote anything out.  
8 **Q And I guess what did you provide to**  
9 **Gersten Savage?**  
10 **Obviously, they had the legal**  
11 **language for the document itself, but obviously**  
12 **there's specific information related to McGinn Smith?**  
13 A We -- my recollection was I had  
14 several discussions with their legal staff. I think  
15 I started with Eric Roper, R-o-p-e-r.  
16 MR. FRANCESKI: Let me just  
17 caution you, Dave. Don't go into  
18 substance of discussions with your  
19 counsel. The fact of the discussion is  
20 fine.  
21 THE WITNESS: I guess maybe  
22 that's the end.  
23 BY MR. RATTINER:  
24 **Q I am not sure where you left off.**  
25 A I am not sure what you asked me. Did

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1 DAVID SMITH  
2 you ask me who?  
3 **Q I asked in terms of what you would**  
4 **have provided some specifics about McGinn Smith, the**  
5 **fee structure of sorts, the term?**  
6 A I think all of that was in discussion  
7 with my counsel. It was over a period of meetings,  
8 you know. We had a concept, they were helpful in  
9 sort of pulling that concept together, both from a  
10 regulatory and a legal standpoint, and from there the  
11 idea was created.  
12 **Q And for the spring of '03, I guess**  
13 **the document is created sometime in the summer of '03**  
14 **or spring to summer, to production?**  
15 A Yeah.  
16 **Q And they came to production in**  
17 **September.**  
18 **From that time frame, when does First**  
19 **Excelsior come into mind?**  
20 A First Excelsior came into mind  
21 probably within a couple of months because the  
22 concept took hold with the sales force very quickly.  
23 MR. FRANCESKI: We were -- the  
24 question was when did First Excelsior  
25 come in to be? That was the question.

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1 DAVID SMITH  
2 THE WITNESS: I would say  
3 around October of '03.  
4 BY MR. RATTINER:  
5 **Q How long did it take to sell out**  
6 **First Independent?**  
7 A I don't know specifically, probably a  
8 month, month and a half. It wasn't very long. It  
9 went pretty quickly.  
10 **Q Did First Excelsior come after the**  
11 **selling of all the 20 million for First Independent?**  
12 A I don't know that.  
13 **Q How are the income notes introduced**  
14 **to the sales force?**  
15 A Well, they were described as a, you  
16 know, collateral -- similar to collateralized debt  
17 obligation, CDO, that there was going to be three  
18 tranches of investors. They were going to be all  
19 note obligations. I am quite certain we talked about  
20 the third tranche being similar, as in most CDO's,  
21 the bottom tranches are, for all practical purposes,  
22 equity tranches.  
23 **Q What do you mean by that?**  
24 A Well, when you do a CDO, and some of  
25 them have as many as 15 or 20 tranches, you know,

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2 starting from AAA because they are so over  
3 collateralized, as you work your way down the ladder,  
4 in effect, the bottom tranches, that's where all the  
5 risk is. They are the last guys to get paid, and  
6 quite frankly, they are getting equity type returns.

7 The traditional equity return for a  
8 hundred years is 10 percent, so you are paying 10 and  
9 a quarter. That's an equity return. It's not a debt  
10 return.

11 **Q So you are likening it to an equity**  
12 **but it's being sold as debt?**

13 A Clearly sold as debt but it was also  
14 described as similar equity tranche as in CDOs.

15 **Q After the PPM was produced by Gersten**  
16 **Savage, did you have to approve it, prior to sending**  
17 **it out to your sales force?**

18 A Yeah. They sent me a draft, and I --  
19 we read through it, and there was -- I am sure if  
20 there were corrections or changes, I put my two cents  
21 in and ultimately we got a complete draft, yeah.

22 **Q Do you remember how many times it**  
23 **went back and forth?**

24 A No.

25 **Q Who did the introduction to the sales**

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2 to be viewed as equity investors.

3 **Q What would the risk tolerance be for**  
4 **somebody who's investing in a senior note?**

5 MR. FRANCESKI: I am going to  
6 object, but if you can answer it, go  
7 ahead.

8 THE WITNESS: Well, I don't  
9 think that is a question that can be  
10 answered specifically. I mean,  
11 there's -- everybody has different risk  
12 tolerance under different conditions,  
13 you know. I mean, we have run into guys  
14 with \$10 million, and they don't want to  
15 take any risk. And then, you know, the  
16 minute their neighbor is making money  
17 they got, how come you are not giving me  
18 more risk?

19 But in general it was our  
20 feeling, level of comfort, that on the  
21 senior level was that the asset coverage  
22 would be quite good, and it would be  
23 comparable to buying, you know, a  
24 corporate bond.

25 I don't know if I use that

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2 **force, who at McGinn Smith?**

3 A I did.

4 **Q And was that during one of the**  
5 **typical 411 p.m. calls?**

6 A No, I don't at First Independent. We  
7 weren't doing the typical 411 phone calls. Andy  
8 Guzzetti hadn't joined us yet. That was sort of his  
9 innovation. We at various times had weekly sales  
10 calls. They were generally Monday morning. But we  
11 didn't -- I don't know if we had the regularity that  
12 Guzzetti brought to it. So I don't know if it was in  
13 the morning or afternoon.

14 **Q Okay. Now, what were the**  
15 **representatives told about the suitability of this**  
16 **investment?**

17 A Well, we went through the, you know,  
18 the three tranches and the various levels of  
19 seniority and the various obvious -- I shouldn't use  
20 the word obvious -- that the senior tranche was, in  
21 our judgment, suitable to a very broad band of  
22 investors.

23 The senior subordinates were  
24 obviously taking on more risk and would have to be  
25 viewed in that way, and the junior tranche would have

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2 language. I have no idea whether I use  
3 that language, I am just answering your  
4 question.

5 MR. RATTINER: Sure.

6 MR. NEWMAN: Who was this  
7 investment suitable for?

8 THE WITNESS: I believe I  
9 answered that for -- Chris's question on  
10 the senior tranche, I think it was  
11 suitable for almost all investors, in my  
12 judgment. For the junior tranche, it  
13 was clearly suitable for people who were  
14 willing to take equity risk. And the  
15 senior subordinate tranche I would throw  
16 somewhere in the middle.

17 BY MR. RATTINER:

18 **Q Were you ultimately responsible for**  
19 **determining suitability?**

20 A Well, I guess the buck stops with me,  
21 yes. I mean, the -- as the issuer or as managing  
22 member, we rely on the subscription documents, et  
23 cetera. From the broker-dealer standpoint, you know,  
24 it varied -- at the time of FIIN and FEIN, I guess  
25 maybe all of them I was a compliance officer, yes, so

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2 I guess I would have that responsibility.

3 **Q For someone that did not have a**  
4 **brokerage account with NFS, they are just doing the**  
5 **LLCs, what information would you have on that person**  
6 **to determine it was a suitable investment?**

7 A Well, we would have the  
8 questionnaire, first of all, which basically listed  
9 income, level of risk, level of experience, and then  
10 we would be depending on the registered rep who  
11 would -- it would be his client, and we relied a  
12 great deal on his assessment of the suitability.

13 **Q And what about during your approval**  
14 **process, would you then go to the rep and ask for**  
15 **some sort of crib note sheet that he had on it?**

16 A Not every time, no.

17 **Q So at the time you're approving for**  
18 **suitability at the end of the chain, what would you**  
19 **be reviewing?**

20 You reviewed the subscription  
21 agreement, which captured a name?

22 A Is the question related to the  
23 non-McGinn Smith investors?

24 **Q No -- well, non-broker-dealer.**

25 A Non-broker-dealer?

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2 banks, the money center banks were not interested in.  
3 3 and 4 and \$5 million loans. In fact, they were  
4 interested in hundred million dollar loans.

5 Your local regional bank was not in a  
6 position to do that. He didn't have the expertise.  
7 He didn't have the interest. It wasn't there. So  
8 there was an enormous market to basically service  
9 clients in that sector and that you could get -- as a  
10 result of that you could get very generous returns,  
11 which in the equity -- or, excuse me, in the  
12 mezzanine space runs typically 14 to 20 percent.  
13 Coupons are generally 12 to 14. There's sometimes a  
14 payment in kind coupons, which are another two or  
15 three, and often you get some equity piece or some  
16 ability to get some equity.

17 So that was a space, and that's what  
18 we talked about almost exclusively to the reps. This  
19 is what this business was that we were interested in,  
20 and it was not an investment company. We were not  
21 making -- we are not buying bonds of IBM or we are  
22 not buying distressed bonds.

23 We were operating as a limited  
24 liability company in the specialty finance business,  
25 and we were going to try to build that business, and

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2 **Q Correct.**

3 A I would be relying primarily on the  
4 questionnaire and the level of suitability that they  
5 indicated and the subscription document that  
6 basically indicates their level of risk  
7 accreditation.

8 **Q What were the representatives told**  
9 **regarding what the income notes would hold?**

10 A Not much of anything. We didn't  
11 know, you know. I mean, we indicated to them that we  
12 would be making a wide variety of investments in -- I  
13 used that word incorrectly. We would be making a  
14 wide variety of, primarily, loans to companies that  
15 were, for the most part, going to be in the private  
16 sector.

17 We were strong advocates of what is  
18 known as mezzanine financing. I mean, at the same  
19 time we basically promoted Pine Street Capital  
20 Partners, which was also in the mezzanine business,  
21 different mission, but asset class, a lot of the  
22 same. And our belief then and still is, is that it  
23 was an asset class that was terribly underserved,  
24 that the banks -- the whole finance system had moved  
25 to basically mega transactions. The commercial

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2 that's basically the message that went through the  
3 reps.

4 **Q And this isn't in my script but what**  
5 **differentiated you versus PSCP, you being the four**  
6 **notes?**

7 A We had a very broad range of  
8 investment vehicles that we could use. Because we  
9 had had an experience in cash flow in asset-backed  
10 securities, such as the alarm notes and things of  
11 that nature, we didn't want to basically not be  
12 involved in that.

13 Pine Street was very specific to  
14 lending to strictly corporations that had a fixed  
15 level of revenues, generally in the 5 to \$10 million  
16 range over the last three years. They had  
17 requirements that they were going to be profitable, I  
18 think, for the last three years, was one of their  
19 requirements.

20 They would not do assets outside of a  
21 pure commercial loan. So, you know, they had no  
22 ability to do leases or to do mortgages or to do  
23 intellectual property financings, all of that. Our  
24 approach was, is that we -- the type of companies we  
25 were likely to being involved with needed a much

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2 broader innovative sense of financing.  
3 I mean, if you looked at -- if you  
4 looked at some companies, in some space, if you are  
5 doing it strictly out of credit basis, as Pine Street  
6 Capital was, you couldn't make that loan. On the  
7 other hand, they may have assets that they might have  
8 intellectual property, they might have assets that  
9 there is not sufficient income there at the company  
10 level but that the asset went to. So it was a broad  
11 array of vehicles.  
12 **Q And what was their default rate?**  
13 A Pine Street? They haven't had any.  
14 MR. NEWMAN: Let's go off the  
15 record for a minute.  
16 (Whereupon a Recess is Taken.)  
17 MR. ROWEN: Back on the record  
18 at approximately 5:25. Can you explain  
19 to me what is TDM Cable?  
20 THE WITNESS: TDM Cable is a  
21 business that monetizes cash flows from  
22 both the cable business, the internet  
23 business and the alarm business.  
24 Generally done in gated communities  
25 where the real estate developer

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2 attempted to capture some of those  
3 revenues for himself by putting together  
4 the infrastructure for both alarm and  
5 cable and internet and then would  
6 sublease it to the major carriers.  
7 Recent years, as real estate  
8 developers have gotten into difficulty,  
9 they are looking for ways to get some  
10 cash and so there's some interesting  
11 plays where you can buy them out and be  
12 able to monetize those, and that's TDM  
13 Cable. I don't know if it's at the  
14 company or if there might have been a  
15 specific offering. I think there was a  
16 specific offering for TDM Cable, but I  
17 don't spend a lot of time on that.  
18 That's mostly Mr. McGinn, but that is  
19 the basic business behind it.  
20 MR. ROWEN: Are you aware of  
21 how many TDM Cable entities there are?  
22 THE WITNESS: You mean  
23 offerings or -- I don't know. I don't  
24 know the answer to that.  
25 MR. ROWEN: Okay. Were

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2 offerings made in trust of their own or  
3 were the offerings made directly for the  
4 main entity TDM Cable?  
5 THE WITNESS: I think mostly  
6 in the offerings of their own, specific  
7 projects, specific collateral, specific  
8 financing.  
9 MR. ROWEN: Those entities  
10 would loan money to TDM Cable?  
11 THE WITNESS: The  
12 infrastructure might be that TDM Cable  
13 would, in effect, purchase the assets,  
14 and then they would loan money against  
15 it, against those assets. Again, I am  
16 not -- I am not that familiar with the  
17 inner workings of it.  
18 MR. ROWEN: Who are the owners  
19 of TDM Cable?  
20 THE WITNESS: The owners are  
21 Mr. McGinn, myself, and Mr. Rogers,  
22 Matthew Rogers.  
23 MR. ROWEN: What are the  
24 percentages?  
25 THE WITNESS: I think it is a

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2 third, a third, a third. I think we are  
3 equal owners.  
4 MR. ROWEN: When was this  
5 entity formed?  
6 THE WITNESS: Couple of years  
7 ago. I mean, I don't really know,  
8 Steve. I am going to get Mr. McGinn,  
9 that's really his bailiwick. I am  
10 guessing it's been around a couple of  
11 years, but I don't know for certain.  
12 MR. ROWEN: Are you aware of  
13 what revenues the entity earns?  
14 THE WITNESS: No. I am not  
15 terribly familiar with the entity, no.  
16 MR. NEWMAN: What is your  
17 title with TDM Cable?  
18 THE WITNESS: I am not sure  
19 there's even a title. I don't know. I  
20 mean, I may have been listed on the  
21 corporate structures as a vice president  
22 or something, but I have virtually -- I  
23 have very little involvement.  
24 MR. NEWMAN: Is it a  
25 corporation?

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2 THE WITNESS: I believe it is  
3 a corporation, yes.  
4 MR. NEWMAN: Where is it  
5 located, Pine Street?  
6 THE WITNESS: I think the  
7 corporation is probably in Florida, but  
8 I don't know. Could be a New York State  
9 corporation. I didn't -- again, I don't  
10 have any involvement. I don't know. I  
11 mean, it was done -- I think Mr. Carr  
12 probably drew up the papers and he'd  
13 probably know, but he's not on trial  
14 here, so I don't know the answer.  
15 MR. NEWMAN: You said probably  
16 in Florida?  
17 THE WITNESS: I know a lot of  
18 our business was in Florida, so it's  
19 possible in Florida, but it may very  
20 well be a New York corporation if Mr.  
21 Carr drew the papers.  
22 MR. NEWMAN: Well, did you  
23 ever perform any due diligence regarding  
24 TDM Cable?  
25 THE WITNESS: I have not

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2 personally, no.  
3 MR. NEWMAN: That was monies  
4 were invested or loaned by the LLCs in  
5 TDM Cable, correct?  
6 THE WITNESS: That is correct.  
7 MR. NEWMAN: Who did the due  
8 diligence regarding those transactions?  
9 THE WITNESS: Mr. McGinn.  
10 MR. NEWMAN: How do you know  
11 that?  
12 THE WITNESS: Because I know  
13 he did. He's involved in the business.  
14 He's very involved in the business.  
15 MR. NEWMAN: What discussions  
16 did you have with him about that?  
17 THE WITNESS: He, as a partner  
18 in MS Advisors, recommended it, and we  
19 made the investment or the advancement.  
20 He's a managing member of MS Advisors,  
21 and he deals with some of our companies  
22 in some aspects, and that is the one  
23 he's focused on and I am not.  
24 MR. NEWMAN: Okay.  
25 MR. ROWEN: Whose ultimate

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2 authority was the LLCs investments in  
3 TDM Cable?  
4 THE WITNESS: It could be any  
5 of the three members. Generally the  
6 only two that make any real decisions  
7 were Mr. McGinn and myself.  
8 MR. ROWEN: Would you make  
9 decisions without consulting the other?  
10 THE WITNESS: Could be, sure.  
11 MR. ROWEN: Did you or Mr.  
12 McGinn have the authority to make  
13 investments or loans without the other's  
14 involvement?  
15 THE WITNESS: Yes. It is a  
16 committee sort of thing, but any member  
17 of the MS Advisor who manages it has the  
18 ability to advance an idea and make the  
19 decision.  
20 MR. NEWMAN: Who made the  
21 majority of the decisions regarding the  
22 investment choices by the LLCs?  
23 THE WITNESS: Me.  
24 MR. FRANCESKI: By investment  
25 choices you mean loans or investments,

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1 DAVID SMITH  
2 Mike?  
3 MR. NEWMAN: Loans or  
4 investment choices.  
5 THE WITNESS: I did.  
6 MR. ROWEN: Who were the  
7 signatories over the financial accounts  
8 of the four LLCs?  
9 THE WITNESS: Well, the  
10 signatory would be MS Advisors, of which  
11 any three members of MS Advisors could  
12 sign. I think I probably signed the  
13 vast majority of the time, but I guess  
14 probably Mr. McGinn also would have that  
15 authority.  
16 MR. NEWMAN: Going back to my  
17 question a moment ago, approximately  
18 what percentage of the investment  
19 decisions and lending decisions were  
20 made by you versus Mr. McGinn for the  
21 LLCs?  
22 THE WITNESS: Well, initially  
23 until Mr. McGinn came back in '06, I  
24 would say probably 70, 80 percent of the  
25 decisions were mine. I did have some --

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1 DAVID SMITH  
 2 Mr. Livingston did participate in some  
 3 of those decisions, but the majority of  
 4 the decisions were mine.  
 5 Mr. McGinn joined the firm --  
 6 rejoined the firm, excuse me, on an  
 7 active basis in '06, and became, you  
 8 know, much more involved, and I would  
 9 say from that point most of those  
 10 decisions are -- were jointly made.  
 11 MR. NEWMAN: And when did he  
 12 initially leave McGinn Smith? What was  
 13 the year?  
 14 THE WITNESS: He left in '03,  
 15 2003.  
 16 MR. NEWMAN: Okay.  
 17 MR. ROWEN: Let's have this  
 18 marked as Exhibit 4.  
 19 (Whereupon Exhibit 4 is  
 20 Marked.)  
 21 MR. ROWEN: You have been  
 22 handed Exhibit 4 in this matter.  
 23 Exhibit 4 is a total of seven pages.  
 24 This is an Excel spreadsheet of data  
 25 imported from the Quicken registry  
 Page 362

1 DAVID SMITH  
 2 report of all transactions in TDM  
 3 Cable's Mercantile Bank account ending  
 4 in 29507.  
 5 The staff has deleted totals  
 6 and any blank columns. Staff has also  
 7 added the TDM Cable title at the top, a  
 8 balance at the very bottom, numbered the  
 9 rows for clarity, and highlighted select  
 10 lines. Will you please take a minute to  
 11 look over the document.  
 12 THE WITNESS: (Reviewing).  
 13 Okay, Steve.  
 14 MR. FRANCESKI: Steve, before  
 15 he begins, what was it you said about  
 16 the totals? What did you do to the  
 17 document regarding totals?  
 18 MR. ROWEN: I deleted totals  
 19 at the bottom. There's about four rows  
 20 of similar totals that spit out at the  
 21 very bottom, and I deleted those rows  
 22 out.  
 23 MR. FRANCESKI: I'm sorry. I  
 24 don't understand what you mean.  
 25 MR. ROWEN: Sure. Bottom of  
 Page 363

1 DAVID SMITH  
 2 what would be on Page 7.  
 3 MR. FRANCESKI: Oh.  
 4 MR. ROWEN: There would be  
 5 about four rows spaced out of subtotals  
 6 and totals of zero, and the subtotal at  
 7 the very bottom that I deleted out.  
 8 MR. FRANCESKI: In the amount  
 9 column?  
 10 MR. ROWEN: The data is  
 11 scattered across three or four different  
 12 columns when it's imported into Excel.  
 13 MR. FRANCESKI: Got that,  
 14 Dave?  
 15 THE WITNESS: Yeah, I mean  
 16 just --  
 17 MR. FRANCESKI: There's not a  
 18 question. Do you understand what he  
 19 said?  
 20 THE WITNESS: No, but I have a  
 21 question.  
 22 MR. FRANCESKI: Well, wait.  
 23 Wait until he asks his question.  
 24 MR. ROWEN: Are you signatory  
 25 on the Mercantile Bank account listed on  
 Page 364

1 DAVID SMITH  
 2 the registry imported of TDM Cable?  
 3 THE WITNESS: Probably. Don't  
 4 know for certain but probably.  
 5 MR. ROWEN: Who else would be  
 6 a signatory on the account?  
 7 THE WITNESS: Mr. McGinn,  
 8 possibly Brian Cooper, possibly Brian  
 9 Shea, but they are not officers of the  
 10 corporation so I would -- unless they  
 11 got whatever you call it, Power of  
 12 Attorney or something, more likely than  
 13 not just Mr. McGinn and myself.  
 14 MR. ROWEN: Can you please  
 15 review the highlighted transactions on  
 16 Page 1.  
 17 MR. FRANCESKI: Those would be  
 18 the ones that appear gray?  
 19 MR. ROWEN: Yeah, let's say  
 20 darkened transactions.  
 21 MR. FRANCESKI: Lines 4, 7, 8  
 22 and 9, for the record.  
 23 THE WITNESS: Okay.  
 24 MR. ROWEN: Can you please  
 25 describe the transactions darkened on  
 Page 365



1 DAVID SMITH  
2 Page 1.  
3 THE WITNESS: Well, I am not  
4 sure I can with a limited description  
5 here. Looks like the first one you are  
6 referring to is 9-29-06. There's what  
7 appears to be a DEP, I guess.  
8 MR. FRANCESKI: Let me stop  
9 you there, Mr. Smith. We can all read  
10 the document. He wants you to explain  
11 to him, if you can, what that row of  
12 information means, essentially. If you  
13 are just reading the document, that  
14 won't help us.  
15 THE WITNESS: Well, from just  
16 reading this document, I can only make  
17 assumptions, you know. This isn't --  
18 there's not a lot of description here.  
19 We are looking at the first item, 2  
20 million 625.  
21 MR. FRANCESKI: That is the  
22 point. If you know -- if you know,  
23 please help Mr. Rowen by answering his  
24 question. If you don't know, you need  
25 to tell him you don't know.

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1 DAVID SMITH  
2 THE WITNESS: I am going to  
3 say no with certainty.  
4 MR. FRANCESKI: Then you are  
5 going to have to qualify your answer.  
6 THE WITNESS: Then I will  
7 qualify my answer. I believe that was  
8 probably a bridge loan from First  
9 Independent Income Notes to TDM Cable to  
10 purchase assets, I believe.  
11 MR. ROWEN: And what do you  
12 believe the transactions in Line 7, 8  
13 and 9 to be?  
14 THE WITNESS: Those, I  
15 believe, were loans made to the three  
16 principals of the business from the  
17 capital of the business.  
18 MR. ROWEN: And for the  
19 record, DLS, TMM and Matt R. would be  
20 who?  
21 THE WITNESS: DLS would be  
22 David L. Smith, TMM would be Timothy  
23 McGinn, and Matt R. would be Matthew  
24 Rogers.  
25 MR. ROWEN: Can you also

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1 DAVID SMITH  
2 please review the darkened transactions  
3 on Page 2. There are two -- you could  
4 say two series of transactions.  
5 THE WITNESS: Again, I would  
6 assume that First Advisory Income Notes  
7 made a bridge loan to TDM Cable for  
8 acquisition of assets for a transaction  
9 they would be contemplating. Second set  
10 of 47, 48, 49, again, would be loans  
11 from the corporation to the three  
12 principals. And down on the bottom,  
13 basically, I would again make the  
14 assumption of the same thing.  
15 MR. ROWEN: What was your  
16 involvement with these transactions?  
17 THE WITNESS: Not really any,  
18 I mean, other than I obviously received  
19 a loan, but, I mean, in terms of the  
20 transactions of making the advance to --  
21 from the entity to TDM Cable, again, Mr.  
22 McGinn handles that business. I don't  
23 do the due diligence. He handles all of  
24 that. My guess is that we were in the  
25 process of making an acquisition, and he

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1 DAVID SMITH  
2 saw fit to recommend that we make that  
3 advance, and generally those loans are  
4 paid back out of -- once the assets are  
5 transferred.  
6 MR. ROWEN: So let's take the  
7 transactions on Page 1, Lines 4, 7, 8  
8 and 9. So it's your testimony that you  
9 were not aware of any due diligence  
10 around a loan you were about to receive  
11 on 10-2 of '06 at the time that First  
12 Independent made this loan or investment  
13 on 9-29-2006?  
14 THE WITNESS: Due diligence on  
15 a loan that I am going to receive?  
16 MR. ROWEN: Were you aware  
17 that you were going to receive a loan?  
18 THE WITNESS: Yeah. I mean,  
19 we, you know -- we discussed, that's how  
20 we basically lend money to us for  
21 compensation for years of work, and yes,  
22 I was aware I was going to get it. I  
23 don't know what due diligence I would do  
24 on it.  
25 MR. ROWEN: But you are aware

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1 DAVID SMITH  
 2 that's how the funds loaned by First  
 3 Independent would be used?  
 4 THE WITNESS: No. The funds  
 5 loaned by First Independent are used to  
 6 acquire assets that are then sold to  
 7 other, generally, trusts. The loans  
 8 from the company to the principals have  
 9 nothing to do with that. It's assets  
 10 that belong to the firm and they choose  
 11 to lend to the officers.  
 12 MR. NEWMAN: So you are saying  
 13 that \$2.6 million that was lent to TDM  
 14 Cable was designed to assist in the  
 15 acquisition of assets?  
 16 THE WITNESS: Absolutely.  
 17 MR. NEWMAN: But it looks like  
 18 within a few days almost a million  
 19 dollars of that money was used to loan  
 20 money to you, Mr. McGinn and Mr. Rogers.  
 21 What was the purpose of those personal  
 22 loans? Why were the loans made?  
 23 THE WITNESS: Loans made  
 24 because the principals were looking to  
 25 acquire cash for a variety of purposes.

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1 DAVID SMITH  
 2 MR. NEWMAN: These are  
 3 loans -- let's talk about your personal  
 4 loan for \$350,000. It appears from this  
 5 that the source of that money was the  
 6 \$2.6 million that was deposited into --  
 7 into the TDM account on September 29th.  
 8 Is that consistent with your  
 9 recollection?  
 10 THE WITNESS: No, it's not.  
 11 As I said, the funds are used to acquire  
 12 assets to run -- this is an operating  
 13 business. The operating business has  
 14 assets of its own, including cash, which  
 15 they chose in this case to lend to their  
 16 owners.  
 17 MR. NEWMAN: Did the part of  
 18 your loan proceeds come from the  
 19 \$2.6 million that was given to TDM by  
 20 FIIN?  
 21 THE WITNESS: I don't think it  
 22 would come directly from it. TDM Cable  
 23 earns fees. It's part of their capital.  
 24 And when they chose to turn around and  
 25 lend it back out to the principals, it's

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1 DAVID SMITH  
 2 an operating decision of TDM Capital.  
 3 MR. NEWMAN: Let me ask you a  
 4 question. Did you receive a loan based  
 5 on the \$2.6 million -- what you call a  
 6 bridge loan, from FIIN to TDM Cable?  
 7 THE WITNESS: I don't believe  
 8 that is the case, no.  
 9 MR. NEWMAN: So there's a  
 10 million dollars in that account  
 11 independent of the \$2.6 million that was  
 12 deposited by FIIN?  
 13 THE WITNESS: I don't know  
 14 that, but that's not what I said. I  
 15 said the company earns fees when they do  
 16 transactions. Those fees are then in  
 17 the corporation, and they chose in this  
 18 instance to lend the money back to the  
 19 principals.  
 20 MR. NEWMAN: Did you receive a  
 21 loan based on a loan made from FIIN to  
 22 TDM Cable?  
 23 THE WITNESS: No.  
 24 MR. FRANCESKI: I think, Mike,  
 25 you're asking are those the dollars that

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1 DAVID SMITH  
 2 went out to the loans?  
 3 MR. NEWMAN: Yeah. Right.  
 4 MR. FRANCESKI: Money's  
 5 fungible, so but that is a fair  
 6 question. I just want to know if that's  
 7 what you are asking.  
 8 MR. NEWMAN: Yes.  
 9 THE WITNESS: No. The company  
 10 earns fees when they do transactions,  
 11 and they then turned around, and money  
 12 that was in the corporation, chose to  
 13 lend it to their partners. Whether they  
 14 lend it to the partners or not, it would  
 15 have remained in the corporation.  
 16 MR. ROWEN: If TDM Cable had  
 17 the money to loan \$350,000, 352 plus  
 18 thousand dollars and \$350,000 on  
 19 10-2-06, why did it need \$2.6 million on  
 20 9-29 of '06?  
 21 THE WITNESS: Because I didn't  
 22 say that. I don't know the answer to  
 23 that. I don't know the answer whether  
 24 they had it or not. What I said is,  
 25 Mike addressed the question is whether

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1 DAVID SMITH  
2 it was a result of that, and I said as a  
3 result of the company doing business,  
4 just like Tiffany sells a watch, the  
5 money goes into the corporate pile, and  
6 if they turn around and take the money  
7 that they sold from selling a watch and  
8 give it to one of their employees,  
9 there's nothing wrong with that. That  
10 is the corporate decision. These are  
11 monies that are earned by TDM Cable, and  
12 then they chose to lend the money out to  
13 the principals.  
14 MR. ROWEN: What revenues are  
15 you aware of TDM Cable earning prior to  
16 10-2 of 2006?  
17 THE WITNESS: I don't know.  
18 They earn fees when they do the deals.  
19 That is their business.  
20 MR. ROWEN: When did they  
21 start doing deals?  
22 THE WITNESS: I don't know the  
23 answer to that. I answered that  
24 earlier. I am not that familiar with  
25 the company. I think a couple of years.

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1 DAVID SMITH  
2 MR. NEWMAN: You knew on  
3 September 29th you were involved in the  
4 decision made on behalf of FIIN to lend  
5 \$2.6 million to TDM Cable?  
6 THE WITNESS: As a bridge  
7 loan, yes.  
8 MR. NEWMAN: And you also were  
9 the recipient of a \$350,000 loan on  
10 October 2nd, 2006?  
11 THE WITNESS: That is correct.  
12 MR. NEWMAN: And obviously you  
13 knew you got a loan. Did you receive  
14 \$350,000?  
15 THE WITNESS: I did, yes.  
16 MR. NEWMAN: And who issued  
17 the check to you?  
18 THE WITNESS: I am not sure if  
19 it was a check, but it was issued at the  
20 direction of Mr. McGinn.  
21 MR. NEWMAN: Was it a wire?  
22 Did you get a wire?  
23 THE WITNESS: Probably.  
24 MR. NEWMAN: Where was the  
25 wire, to your personal bank account?

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1 DAVID SMITH  
2 THE WITNESS: Either that or  
3 my brokerage account. I am not sure.  
4 MR. NEWMAN: And where did you  
5 maintain a brokerage account at this  
6 time?  
7 THE WITNESS: National  
8 Financial Services.  
9 MR. NEWMAN: And where was  
10 your personal bank account at this time?  
11 THE WITNESS: M&T Bank.  
12 MR. NEWMAN: Did you  
13 understand when you got that loan that  
14 the source of the loan was the \$2.6  
15 million that the LLC had invested?  
16 THE WITNESS: Let's try this  
17 again because I have said it three  
18 times. The corporation earns money.  
19 It's not the source of the fund.  
20 MR. NEWMAN: Sir, don't raise  
21 your voice, please.  
22 THE WITNESS: Well, you keep  
23 asking me the same question and you  
24 mislead it.  
25 MR. NEWMAN: You are not

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1 DAVID SMITH  
2 answering the question.  
3 MR. FRANCESKI: First of all,  
4 let's not argue. Second of all, I need  
5 to take a break with my client. Can we  
6 go off the record? I need to.  
7 MR. NEWMAN: Question is  
8 pending.  
9 MR. FRANCESKI: No, I think  
10 all the questions were answered.  
11 MR. NEWMAN: Well, I had a  
12 question. He's arguing with me. I have  
13 a question.  
14 MR. FRANCESKI: One more  
15 question, I'll let you do it, but then I  
16 need to take a break with my client.  
17 MR. NEWMAN: That's fine. I  
18 would like to finish the question.  
19 MR. FRANCESKI: What is the  
20 question? Can you read the question  
21 back, please?  
22 (Whereupon the Question and  
23 Answer is Read Back.)  
24 MR. FRANCESKI: That answered  
25 the question. That's what he said. I

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1 DAVID SMITH  
2 want to take a break with my client.  
3 MR. NEWMAN: We will stay  
4 here.  
5 (Whereupon a Recess is Taken.)  
6 MR. FRANCESKI: Go ahead. We  
7 are ready.  
8 MR. NEWMAN: Okay. Back on  
9 the record.  
10 Going back to this one  
11 transaction, did you understand that the  
12 \$350,000 that you received on  
13 October 2nd, those proceeds came in part  
14 from the \$2.6 million that had been lent  
15 by FIIN to TDM Cable?  
16 THE WITNESS: I did not. I  
17 didn't know.  
18 MR. NEWMAN: Did you ever  
19 inquire about that issue?  
20 THE WITNESS: No.  
21 MR. NEWMAN: What knowledge  
22 did you have about the loan that was  
23 issued to Mr. McGinn on the same date  
24 for approximately the same amount of  
25 money? Were you aware that he also got

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1 DAVID SMITH  
2 a loan?  
3 THE WITNESS: I was aware that  
4 he got a loan, yes.  
5 MR. NEWMAN: Were you aware of  
6 the amount approximately?  
7 THE WITNESS: Approximately,  
8 yes.  
9 MR. NEWMAN: Did he discuss  
10 that with you?  
11 THE WITNESS: Indicated that  
12 it was making loans to both of us, but  
13 as far as the discussion goes, I think  
14 that is the extent of it.  
15 MR. NEWMAN: How about  
16 Mr. Rogers? Were you aware that he also  
17 received a loan for \$350,000.  
18 THE WITNESS: I believe so.  
19 MR. NEWMAN: Around the  
20 same -- basically the same date or day  
21 after?  
22 THE WITNESS: Correct.  
23 MR. NEWMAN: Did you have any  
24 concerns that the money you were  
25 receiving were related at all to the

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1 DAVID SMITH  
2 money invested by the limited liability  
3 company?  
4 THE WITNESS: No.  
5 MR. NEWMAN: Why not?  
6 THE WITNESS: Because the  
7 corporation was acquiring assets. They  
8 were going to be selling those assets,  
9 and the money was going to be repaid,  
10 which I believe it was.  
11 MR. NEWMAN: Your loan was  
12 repaid?  
13 THE WITNESS: No. You asked  
14 me about the loan from the LLC.  
15 MR. NEWMAN: Right.  
16 THE WITNESS: That was repaid.  
17 MR. NEWMAN: Okay. It was  
18 repaid by TDM Cable to the LLC?  
19 THE WITNESS: Yes.  
20 MR. NEWMAN: In its entirety?  
21 THE WITNESS: I believe so.  
22 MR. NEWMAN: Did you repay  
23 your personal loan for \$350,000?  
24 THE WITNESS: I have not, no.  
25 MR. NEWMAN: Pardon?

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1 DAVID SMITH  
2 THE WITNESS: I have not, no.  
3 MR. NEWMAN: Have you repaid  
4 any of it?  
5 THE WITNESS: No.  
6 MR. NEWMAN: What did you do  
7 with the \$350,000?  
8 THE WITNESS: I believe I  
9 answered that. It went here to my  
10 account or my investment accounts. I  
11 believe I answered that.  
12 MR. NEWMAN: I guess in terms  
13 of where the money went but what did you  
14 do with the money?  
15 THE WITNESS: I don't recall.  
16 MR. NEWMAN: Excuse me?  
17 THE WITNESS: I don't recall.  
18 MR. ROWEN: If you turn to  
19 Page 2 of the exhibit, take a look again  
20 at the darkened transactions, Lines 45,  
21 47, 48 and 49, and Lines 60, 62, and 63.  
22 Are you familiar with these  
23 transactions?  
24 THE WITNESS: Familiar with in  
25 the same extent that FAIN advanced money

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1 DAVID SMITH  
2 used to acquire assets. Subsequently  
3 you're asking me on 47, 48, 49, if I  
4 received a loan, and if I am aware that  
5 FAIN received a loan and Rogers received  
6 a loan, I would answer affirmatively.  
7 MR. ROWEN: And you were  
8 familiar with these transactions were  
9 done on the same day, 1-30 of 2007?  
10 THE WITNESS: No. Other than  
11 looking at it today, I don't recall.  
12 MR. ROWEN: And how about  
13 Lines 60, 62 and 63?  
14 THE WITNESS: Basically, my  
15 response would be the same.  
16 MR. ROWEN: Looking at these  
17 transactions today, does it concern you?  
18 THE WITNESS: No.  
19 MR. ROWEN: Why not?  
20 THE WITNESS: Loans were made  
21 for legitimate corporate purpose. That  
22 corporate purpose was fulfilled, carried  
23 out, and the loans were repaid.  
24 MR. NEWMAN: What was the  
25 purpose of TDM Cable loaning you money?

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1 DAVID SMITH  
2 THE WITNESS: As part of the--  
3 MR. NEWMAN: Personal loans,  
4 why was that legitimate business  
5 purpose?  
6 MR. FRANCESKI: Mike, I will  
7 let him answer that but I just want to  
8 clarify something. Steve asked him a  
9 question about the loans, and I think  
10 that Mr. Smith was answering the loans  
11 from FIIN, FEIN, FAIN, who, whatever, or  
12 didn't trouble him; is that right, Dave?  
13 THE WITNESS: That is correct.  
14 MR. FRANCESKI: I don't know  
15 if you are asking the same. I don't  
16 know whether that's what Stephen  
17 intended to ask but that's what I heard.  
18 MR. NEWMAN: Do you understand  
19 my question?  
20 THE WITNESS: Would you repeat  
21 it?  
22 MR. NEWMAN: Can you read it  
23 back.  
24 (Whereupon the Question is  
25 Read Back.)

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1 DAVID SMITH  
2 THE WITNESS: It was an  
3 accommodation for officers of the  
4 corporation who had performed the  
5 services and duties.  
6 MR. NEWMAN: So and what  
7 duties and services did you perform to  
8 justify a \$350,000 loan?  
9 THE WITNESS: Created the  
10 entity, did the due diligence on the  
11 asset acquisition, I'm an equal partner  
12 of Mr. McGinn that did that work, and we  
13 were all treated equally.  
14 MR. NEWMAN: What type of due  
15 diligence did you do to justify  
16 \$350,000?  
17 THE WITNESS: Did I do?  
18 MR. NEWMAN: Yeah.  
19 THE WITNESS: I didn't do any  
20 due diligence. I said that earlier.  
21 MR. NEWMAN: That was one --  
22 one of the explanations you gave for the  
23 \$350,000 loan.  
24 THE WITNESS: And as I  
25 indicated, Mr. McGinn did the due

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1 DAVID SMITH  
2 diligence, and he treated me as an equal  
3 partner and therefore we got the same  
4 loan.  
5 MR. NEWMAN: You got paid for  
6 Mr. McGinn's due diligence?  
7 THE WITNESS: That is correct,  
8 yes.  
9 MR. NEWMAN: What did you do  
10 personally to justify all of these  
11 loans?  
12 THE WITNESS: I am a member --  
13 I am an equity owner in the corporation.  
14 MR. NEWMAN: Anything else?  
15 THE WITNESS: No.  
16 MR. NEWMAN: TDM, what is it,  
17 is it a corporation, LLC? What is it?  
18 What is the structure of it?  
19 THE WITNESS: I believe it is  
20 an LLC.  
21 MR. NEWMAN: And then when did  
22 TDM Cable first start earning revenues?  
23 THE WITNESS: I don't know.  
24 MR. NEWMAN: Did it ever earn  
25 revenues?

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1 DAVID SMITH  
2 THE WITNESS: Yes.  
3 MR. NEWMAN: Approximately  
4 when? Do you know approximate year?  
5 THE WITNESS: When they  
6 started, did their first transaction.  
7 MR. NEWMAN: Which was when?  
8 THE WITNESS: I testified  
9 earlier I believe it was about two  
10 years.  
11 MR. NEWMAN: Pardon me, two  
12 years ago?  
13 THE WITNESS: I believe I  
14 testified -- I think Chris asked the  
15 question when did TDM start, and I  
16 believe my answer was -- would you go  
17 back? I think I said about two years  
18 ago.  
19 BY MR. RATTINER:  
20 **Q You are saying in 2008 TDM started?**  
21 A You asked me the question, which Mike  
22 has now asked for the third time, the same question  
23 when, and my recollection is, and I'm asking her to  
24 refresh my memory, but I believe I said I thought TDM  
25 Cable started around two years ago.

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1 DAVID SMITH  
2 **Q Okay. Let's look at this document**  
3 **for a second.**  
4 **Is the first investment that TDM**  
5 **Cable made, was that in PVF-Cutler on 10-6-2006 for**  
6 **\$629,000?**  
7 A I think that was the first  
8 investment, yes.  
9 **Q So using this document, the way it**  
10 **speaks for itself, TDM started in or around**  
11 **September 1st, 2006?**  
12 A Yes. So that would be two to three  
13 years.  
14 **Q Just so we are on the same page.**  
15 A Yeah.  
16 MR. ROWEN: Had these loans  
17 from TDM Cable to yourself been repaid?  
18 THE WITNESS: No.  
19 MR. ROWEN: And when are they  
20 due?  
21 THE WITNESS: I don't know. I  
22 don't know the maturity date.  
23 MR. ROWEN: When do you intend  
24 to pay back these loans?  
25 THE WITNESS: When it's in my

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1 DAVID SMITH  
2 interest to, or when the corporation is  
3 in need of capital and calls for the  
4 money back.  
5 MR. NEWMAN: Has this been  
6 reported as income on your tax return?  
7 THE WITNESS: It is not  
8 income. It is a loan.  
9 MR. NEWMAN: Were you aware of  
10 any IRS rules dealing with when loans  
11 are considered to be income versus a  
12 loan?  
13 THE WITNESS: Yes, when they  
14 are forgiven.  
15 MR. NEWMAN: Is that your  
16 understanding of when you have to report  
17 a loan?  
18 THE WITNESS: It's my  
19 understanding, my accountant's  
20 understanding, both, yes.  
21 MR. NEWMAN: And you consult  
22 with your accountant about that issue?  
23 THE WITNESS: I have.  
24 MR. NEWMAN: When did you  
25 consult him?

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1 DAVID SMITH  
2 THE WITNESS: Three years ago,  
3 five years ago.  
4 MR. NEWMAN: And your interest  
5 to when you're going to repay the loans  
6 is when you have to?  
7 THE WITNESS: I said when it's  
8 in my interest to or when the  
9 corporation's interest to have repaid.  
10 MR. NEWMAN: What does that  
11 mean, when it's in your interest?  
12 THE WITNESS: If in my  
13 financial affairs it makes sense to  
14 repay the loan and forego interest  
15 payments, or if the corporation is in  
16 need of capital and thinks it's in their  
17 interest.  
18 MR. NEWMAN: What is TDM  
19 Cable's current status?  
20 THE WITNESS: In terms of?  
21 MR. NEWMAN: Business  
22 operations.  
23 THE WITNESS: Continues to  
24 operate, continues to look for  
25 acquisitions and do transactions.

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1 DAVID SMITH  
2 MR. NEWMAN: What were the  
3 revenues last year?  
4 THE WITNESS: I don't know.  
5 MR. NEWMAN: Is it operating  
6 at a profit?  
7 THE WITNESS: I believe so.  
8 MR. NEWMAN: Do you know what  
9 the profit is?  
10 THE WITNESS: I do not.  
11 MR. NEWMAN: What do you know  
12 about the financial condition of TDM  
13 Cable?  
14 THE WITNESS: Not much.  
15 MR. NEWMAN: What is the  
16 source of that information? What is the  
17 source of your knowledge about TDM  
18 Cable's financial condition?  
19 THE WITNESS: Discussions with  
20 Mr. McGinn who runs the corporation.  
21 MR. NEWMAN: Does TDM Cable  
22 have any investors?  
23 THE WITNESS: No.  
24 MR. NEWMAN: Has TDM Cable  
25 ever had any investors?

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1 DAVID SMITH  
2 THE WITNESS: I don't know.  
3 MR. ROWEN: Let's have this  
4 marked Exhibit 5.  
5 (Whereupon Exhibit 5 is  
6 Marked.)  
7 MR. ROWEN: Handing you what's  
8 been marked Exhibit 5 in this matter,  
9 this is an Excel spreadsheet data  
10 imported from the Quicken registry  
11 report of all transactions in TDM  
12 Cable's DT FAIN register account. The  
13 staff has deleted totals and any blank  
14 columns. The staff has also added the  
15 TDM Cable title at the top and a balance  
16 at the bottom. Please take a moment to  
17 review the document.  
18 THE WITNESS: (Reviewing).  
19 Okay.  
20 MR. ROWEN: Based on this  
21 document, how is First Advisory paid  
22 back for its loans to TDM Cable?  
23 THE WITNESS: How is it paid  
24 back, the procedure, the process?  
25 MR. ROWEN: Yes.

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1 DAVID SMITH  
2 THE WITNESS: I don't know and  
3 I don't think it can be determined from  
4 this document.  
5 MR. ROWEN: From this  
6 document, what were the source of funds  
7 that TDM Cable used to pay back First  
8 Advisory?  
9 THE WITNESS: I don't believe  
10 you can tell from this document.  
11 MR. ROWEN: "This" being the  
12 register report for the due to First  
13 Advisory account within TDM Cable's  
14 Quicken books? Do you see the  
15 categories DT First Line Jr Trust 07,  
16 and DT's First Line Trust 07 -- Sr.,  
17 Senior, and DT Verifier Trust?  
18 THE WITNESS: (Reviewing) I  
19 see those lines. I guess, I can't say  
20 enough. I don't run this business. I  
21 don't -- so looking at this document, I  
22 am unable to answer your question.  
23 MR. NEWMAN: When you  
24 testified before that the monies were  
25 repaid to TDM Cable monies that had been

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1 DAVID SMITH  
2 loaned by FIIN, did you learn or  
3 understand of what the source of that  
4 repayment was?  
5 MR. FRANCESKI: Mike, I think  
6 you said funds repaid to TDM. I think  
7 you mean repayment by TDM to FAIN.  
8 MR. NEWMAN: Excuse me,  
9 correct. Yes, that is correct.  
10 Do you understand what the  
11 source of those funds were?  
12 THE WITNESS: I believe the  
13 source of the funds, the corporation,  
14 when they sell the assets that they have  
15 acquired and get more capital, then they  
16 repaid the bridge loan funds.  
17 MR. NEWMAN: Do you understand  
18 that the First Line Trust made  
19 investment or paid money to TDM Cable in  
20 the amount of \$124,000?  
21 THE WITNESS: I did not.  
22 MR. NEWMAN: What is your --  
23 sorry. Go ahead.  
24 THE WITNESS: It says it's an  
25 adjustment. I don't know what the entry

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1 DAVID SMITH  
2 is. I don't do these.  
3 MR. NEWMAN: How about DT  
4 Verifier Trust, \$145,000? Were you  
5 aware of that?  
6 THE WITNESS: No.  
7 MR. ROWEN: What is First Line  
8 Trust?  
9 THE WITNESS: First Line Trust  
10 is a grantor trust that basically  
11 acquires home security alarm assets.  
12 MR. ROWEN: What is your  
13 affiliation with First Line Trust?  
14 THE WITNESS: I don't really  
15 have an affiliation other than McGinn  
16 Smith & Company acted as placement  
17 agent.  
18 MR. ROWEN: Do you know who  
19 the trustee of First Line Trust is?  
20 THE WITNESS: I would assume  
21 it's McGinn Smith Capital Holdings,  
22 which I said in the past, but I don't  
23 know for certain.  
24 MR. ROWEN: And do you know  
25 who the advisor or the manager of First  
Page 394

1 DAVID SMITH  
2 Line Trust is?  
3 THE WITNESS: I do not.  
4 MR. ROWEN: Are you aware of  
5 the current status of First Line Trust?  
6 THE WITNESS: To a limited  
7 degree.  
8 MR. ROWEN: Can you -- and  
9 what is that?  
10 THE WITNESS: Limited degree  
11 is that, the trust was not receiving  
12 payments from First Line who filed  
13 bankruptcy, I believe, in February of  
14 '08. Current status is that Mr. McGinn  
15 has been working with First Line. They  
16 are going to acquire the assets from the  
17 bankruptcy trust and restructure and  
18 refinance them and get it back in  
19 operating position.  
20 MR. ROWEN: Is First Line  
21 Trust up to date on its payments to its  
22 investors?  
23 THE WITNESS: No. First Line  
24 filed bankruptcy shortly after being  
25 sued by GE Capital, a fact totally  
Page 395

1 DAVID SMITH  
2 unbeknownst to us, and since that time  
3 has required working with both the corp.  
4 and people at First Line. That is the  
5 extent of my knowledge.  
6 MR. ROWEN: Okay. When you  
7 say First Line at the start of that  
8 involved with GE Capital, is that First  
9 Line Trust or is that --  
10 THE WITNESS: No. That is the  
11 corporation First Line.  
12 MR. ROWEN: Thank you.  
13 MR. NEWMAN: When was that  
14 lawsuit?  
15 THE WITNESS: I don't know.  
16 MR. NEWMAN: Approximately?  
17 THE WITNESS: Well, they filed  
18 in February of '08, and they  
19 purportedly, from what I know, they  
20 filed almost immediately after it. So I  
21 guess they probably got the lawsuit  
22 sometime in the fall of '07, but again,  
23 I repeat, I don't know with certainty.  
24 I am not involved with this stuff.  
25 MR. NEWMAN: Who is, Mr.  
Page 396

1 DAVID SMITH  
2 McGinn?  
3 THE WITNESS: Mr. McGinn, yes.  
4 MR. NEWMAN: Did DT First Line  
5 Trust raise funds through McGinn Smith?  
6 THE WITNESS: Yes.  
7 MR. NEWMAN: When and how much  
8 was raised? What period of time and how  
9 much was raised?  
10 THE WITNESS: I think it was  
11 raised in '07. I think it was  
12 approximately \$3 million.  
13 MR. NEWMAN: Sometime in '07.  
14 Do you know the approximate time period  
15 in '07?  
16 THE WITNESS: I think there  
17 was two offerings. I think one was in  
18 the spring of '07, might have been '06,  
19 though, and then there was one in the  
20 fall of '07.  
21 MR. NEWMAN: Was that the  
22 First Line Trust 07?  
23 THE WITNESS: That would make  
24 sense, yes.  
25 MR. NEWMAN: And how much was  
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1 DAVID SMITH  
2 raised in that offering?  
3 THE WITNESS: I think -- I  
4 believe the offerings in total were in  
5 the \$3 million range but I don't know  
6 for certain.  
7 MR. NEWMAN: Cumulatively or  
8 separately?  
9 THE WITNESS: I think the --  
10 think the cumulatively. I think that is  
11 the amount of money, but I am not  
12 certain. I can't emphasize that enough.  
13 MR. NEWMAN: What fees did  
14 McGinn Smith receive for the offering?  
15 THE WITNESS: Their typical  
16 fees of 8 to 10 percent as placement  
17 agent.  
18 MR. NEWMAN: Any other fees  
19 besides that?  
20 THE WITNESS: No.  
21 MR. NEWMAN: Were any of the  
22 offering proceeds used to pay or invest  
23 in TDM Cable?  
24 THE WITNESS: I don't know.  
25 No, I wouldn't think so but I don't

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1 DAVID SMITH  
2 know.  
3 MR. NEWMAN: Who would know  
4 that?  
5 THE WITNESS: Mr. McGinn.  
6 MR. ROWEN: Were you aware at  
7 all of First Line Trust investing in TDM  
8 Cable?  
9 THE WITNESS: I am not.  
10 MR. NEWMAN: What was the use  
11 of proceeds for those offerings? How  
12 was money supposed to be used? How was  
13 it represented to investors?  
14 THE WITNESS: It was used to  
15 purchase alarm company assets.  
16 MR. NEWMAN: It was all \$3  
17 million used for that purpose?  
18 THE WITNESS: Best of my  
19 knowledge, yes.  
20 MR. NEWMAN: Do you know if TD  
21 First Line Trust Jr or TD First Line  
22 Trust 07 had independent source of  
23 revenues or income to invest in TDM  
24 Cable independent of the offering  
25 proceeds? I'm asking are you aware of

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1 DAVID SMITH  
2 either of these entities having  
3 sufficient funds to invest in TDM Cable  
4 independent of the offering proceeds?  
5 THE WITNESS: I am not aware  
6 of the transactions, no.  
7 MR. FRANCESKI: He got the  
8 answer before I objected but, Mike, I  
9 don't think DT is part of the name.  
10 MR. ROWEN: I think DT is  
11 shorthand for due to, as this is pulled  
12 from accounting software. The category  
13 column is where you would see the contra  
14 account, an accounting software, or you  
15 would see, as you can see in the very  
16 last line, an income category.  
17 MR. FRANCESKI: That is what I  
18 thought. Mike was referring to it as DT  
19 First Line Trust.  
20 MR. NEWMAN: I am just reading  
21 off the ledger entry. But you  
22 understand what I'm asking you about,  
23 correct?  
24 THE WITNESS: That answer I  
25 don't know.

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1 DAVID SMITH  
2 MR. ROWEN: What is Verifier  
3 Trust?  
4 THE WITNESS: Verifier Trust,  
5 again, to the best of my knowledge, I  
6 can't repeat enough, I don't work in  
7 this area so I am being asked to respond  
8 to questions that I don't have a lot of  
9 personal knowledge of, but it is a --  
10 best of my knowledge, again, it is a  
11 trust that acquires assets in the home  
12 security alarm business.  
13 MR. ROWEN: And what was  
14 McGinn Smith's involvements in Verifier  
15 Trust?  
16 THE WITNESS: Again, without  
17 knowing certainty, but I would --  
18 believe we probably had placement at  
19 some point in time, yes.  
20 MR. ROWEN: Trustee, as well?  
21 THE WITNESS: Probably.  
22 MR. ROWEN: Who makes the  
23 investment decisions on behalf of  
24 Verifier Trust?  
25 THE WITNESS: Mr. McGinn.

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1 DAVID SMITH  
2 BY MR. RATTINER:  
3 **Q With regards to Exhibit Number 4, you**  
4 **had stated before that you believed that the first**  
5 **investment made on behalf of TDM Cable would be the**  
6 **PVF-Cutler; is that correct?**  
7 A Well, we came to that conclusion  
8 because that was the first line item. Again, I just  
9 don't have a good operating -- pretty obvious, I  
10 don't have a good grasp on the fact pattern here. I  
11 don't work in this area. Seems to make sense if  
12 that's the first entry. Seemed fairly consistent  
13 with my recollection that it was a two to three-year  
14 old operation. So that's the best I can give you.  
15 **Q So then the loans made to yourself,**  
16 **Mr. McGinn and Mr. Smith, were not based on the**  
17 **revenues of the loans or the investment TDM Cable**  
18 **made as no investment had been made to date?**  
19 A Based on the revenues that they are  
20 going to earn from the transaction.  
21 **Q So projected revenues?**  
22 A It's not really projected. It's  
23 known what the revenues are going to be at the  
24 conclusion of the transaction.  
25 **Q So in this case we have \$2.6 million**

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1 DAVID SMITH  
2 **investment by the note, and we have the \$629,000**  
3 **investment. We will see another investment a few**  
4 **lines down of PVF-Key for \$364,800.**  
5 A Which lines?  
6 **Q A few lines down. I don't have the**  
7 **numbers on my sheet. I apologize.**  
8 MR. FRANCESKI: Line 15.  
9 THE WITNESS: I don't know  
10 what that is.  
11 BY MR. RATTINER:  
12 **Q Are you aware of PVF-Key?**  
13 A No.  
14 **Q Okay. And we will see another**  
15 **investment down below for PVF-Cutler, about another**  
16 **10 lines down or so, \$68,659?**  
17 A (Reviewing), yes, I see that, yes.  
18 Yeah, I am not familiar with that. I recognize the  
19 name Primevision Communications. I think they are  
20 one of the vendors in these communities that we do  
21 these deals in.  
22 **Q Okay. Two lines below we will see**  
23 **another \$57,000 and it's labeled as loans other, and**  
24 **then the memo line we'll see DLS and then in the**  
25 **description we will see DLS.**

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1 DAVID SMITH  
2 **Is that another loan to yourself?**  
3 A That's what the designation would  
4 suggest. Seems a little out of the ordinary because  
5 there's no one else involved, and I don't get loans  
6 unless the other parties do, so it may have been a  
7 repayment for an advance. I don't know. I don't  
8 recall.  
9 **Q And what sort of disclosure is there**  
10 **with regards to legal fees for TDM Cable?**  
11 **Is there any disclosure?**  
12 MR. FRANCESKI: Disclosure,  
13 Chris?  
14 BY MR. RATTINER:  
15 **Q You said there's no investors in TDM**  
16 **Cable?**  
17 A I don't believe. I think the only  
18 parties are Smith, McGinn and Rogers.  
19 **Q So what legal fees would TDM Cable**  
20 **incur?**  
21 A Putting the deals together, making  
22 the acquisition of assets, dealing with purchases  
23 from sale agreements.  
24 **Q Okay. If we go on to the second**  
25 **page, the last two lines, you will see two more items**

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1 DAVID SMITH  
2 **labeled as loan DLS and loan TLM.**  
3 **Did you receive those loans? I'm**  
4 **sorry, if we already discussed those, I apologize.**  
5 A Apology accepted.  
6 **Q I will find another one. If we go**  
7 **down to the bottom of Page 3, we have three loans of**  
8 **\$30,000 each to DLS, Matt or TMM.**  
9 **What were those for?**  
10 A Again, all the loans that come out of  
11 the corporation are, in effect, choice of the company  
12 in ways of awarding the principals for their efforts,  
13 and I don't believe there's any specific purpose for  
14 each one. It is a cumulative sort of approach.  
15 **Q And what other entities -- are there**  
16 **any other entities that would have made similar loans**  
17 **to yourself?**  
18 A This is a way we conducted business  
19 for some time. So I can't -- I am not aware of any,  
20 but this has been our business now for -- through the  
21 years. So I don't think there's any other entities  
22 but there may be.  
23 **Q So in terms of receiving loans, as**  
24 **far as you were aware, the only ones that you**  
25 **received loans from would be TDM Cable?**

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1 **DAVID SMITH**  
2 A To the best of my knowledge, yeah.  
3 **Q And did you create loan documents**  
4 **with regards to those loans?**  
5 A I believe so.  
6 **Q And at what point did you create**  
7 **those?**  
8 **At the time the loan was made?**  
9 A I don't know.  
10 MR. NEWMAN: Who prepared the  
11 loan documents?  
12 THE WITNESS: I would guess  
13 Mr. Carr but I wouldn't want to answer.  
14 MR. NEWMAN: Were they  
15 prepared in the last year?  
16 THE WITNESS: I don't know.  
17 MR. NEWMAN: You have no  
18 knowledge of that?  
19 THE WITNESS: Are you looking  
20 at the loan for '07; is that what we are  
21 talking about?  
22 MR. NEWMAN: Right. I am  
23 looking at the loan --  
24 THE WITNESS: I know there's  
25 been some loan documents created in the

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1 **DAVID SMITH**  
2 last year, but I don't know what  
3 specific loans.  
4 BY MR. RATTINER:  
5 **Q How specifically for October '06, the**  
6 **first page?**  
7 A I have no idea.  
8 MR. ROWEN: You said you knew  
9 loan documents were created in the last  
10 year?  
11 THE WITNESS: Yeah, because I  
12 remember signing one recently, you know,  
13 within the last couple of months, it  
14 seems to me.  
15 MR. ROWEN: Were those for  
16 personal loans to yourself or Mr. McGinn  
17 or Mr. Rogers?  
18 THE WITNESS: I only take care  
19 of myself. So if I got a loan and had  
20 loan documents signed, I sign it for  
21 myself, no one else.  
22 MR. ROWEN: And you stated you  
23 are not aware of any other entity that's  
24 loaned you personally?  
25 THE WITNESS: I believe -- I

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1 **DAVID SMITH**  
2 am not at the moment, yeah. As I said,  
3 I think the way we have compensated  
4 ourselves in these type of transactions,  
5 we don't take salaries, we don't take  
6 bonuses, we don't get paid reimbursement  
7 of expenses. In effect, the corporation  
8 lends us money, and I think the only  
9 entity that I am familiar with at the  
10 moment is TDM. That's where our  
11 business has been over the last three  
12 years, and so I would guess that would  
13 be the entity.  
14 MR. ROWEN: And specifically  
15 that's TDM Cable, but there might be  
16 other TDM entities?  
17 THE WITNESS: TDM Cable is the  
18 operating company, yes.  
19 MR. ROWEN: Have you borrowed  
20 money from TDM Cable in the last year?  
21 THE WITNESS: If I have, it's  
22 on this document.  
23 MR. ROWEN: I'm asking you.  
24 THE WITNESS: I don't know. I  
25 mean, I don't know.

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1 **DAVID SMITH**  
2 MR. ROWEN: You remember  
3 signing loan documents on behalf of  
4 yourself in the last year but you are  
5 not sure if you received loans in the  
6 last year?  
7 THE WITNESS: That is correct.  
8 Somebody asked me if we had done a loan  
9 document recently, and I said yes, but I  
10 can't remember specifically whether it  
11 was for a loan now or if we were getting  
12 our documentation up to speed. I don't  
13 know.  
14 MR. NEWMAN: Well, why don't  
15 you think about that for a minute.  
16 That's important point in terms of when  
17 these loan documents were prepared.  
18 MR. FRANCESKI: Wait a minute.  
19 I didn't hear a question.  
20 MR. NEWMAN: When were the  
21 loan documents prepared for these loans  
22 that we just discussed?  
23 MR. FRANCESKI: We discussed  
24 several, Mike.  
25 MR. NEWMAN: The TDM Cable

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1 DAVID SMITH  
2 loans.  
3 MR. FRANCESKI: From '06 to  
4 '07?  
5 MR. NEWMAN: Right. When were  
6 those loan documents prepared?  
7 THE WITNESS: I don't know.  
8 All I have said is that I recall signing  
9 the loan document recently within the  
10 last couple of months. I don't know  
11 what loan that related to, whether it  
12 was one in '09 or whether it was -- I  
13 don't know.  
14 MR. NEWMAN: Is it possible  
15 it's for one of the '06 or '07  
16 transactions?  
17 THE WITNESS: I don't know.  
18 MR. NEWMAN: Why would a loan  
19 document be prepared after the fact?  
20 THE WITNESS: Because maybe it  
21 was a detail that hadn't been done. I  
22 don't know. The corporation is a  
23 closely held corporation, and maybe they  
24 were getting our documentation in order.  
25 MR. NEWMAN: Do you have a  
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1 DAVID SMITH  
2 copy of the loan agreement or document  
3 that you signed in the last year?  
4 THE WITNESS: I am sure I do,  
5 yeah.  
6 MR. NEWMAN: Where would that  
7 record be?  
8 THE WITNESS: Probably at  
9 McGinn Smith & Company.  
10 MR. NEWMAN: Has that document  
11 been provided to FINRA staff?  
12 THE WITNESS: I don't know. I  
13 don't think you have asked for one.  
14 MR. NEWMAN: Has that document  
15 been identified as a document that was  
16 prepared after the fact?  
17 THE WITNESS: I haven't so  
18 stated that, no. The only fact that I  
19 have stated, the only fact that I know  
20 is that I recall signing a loan document  
21 sometime within the last couple of  
22 months. I don't know if it's been given  
23 to FINRA. I don't know if they asked  
24 for it, and I don't know exactly which  
25 loan it was for. I don't remember.

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1 DAVID SMITH  
2 MR. NEWMAN: Who gave you the  
3 document to sign?  
4 THE WITNESS: I believe the  
5 document that was given to me by my  
6 attorney, Mr. Carr.  
7 MR. NEWMAN: Was that given to  
8 you through e-mail or in person?  
9 THE WITNESS: I would guess in  
10 person. I can't imagine it was given to  
11 me in e-mail.  
12 MR. FRANCESKI: When you say  
13 your attorney, do you mean McGinn Smith  
14 attorney or is he your personal  
15 attorney?  
16 THE WITNESS: He's both.  
17 BY MR. RATTINER:  
18 **Q Before we introduce the exhibit, I**  
19 **have a Shutts & Bowen, S-h-u-t-t-s and B-o-w-e-n.**  
20 **What is that?**  
21 A Shutts & Bowen is a law firm, I  
22 think, out of Miami. I believe they represent TDM  
23 Cable on their acquisitions.  
24 **Q Can you look at Page 7 of Exhibit**  
25 **Number 4. And if you go about five lines down, you**  
Page 412

1 DAVID SMITH  
2 **will see a payment of \$260,000?**  
3 A Hm-hm.  
4 **Q What was that for?**  
5 A I believe it was probably for legal  
6 fees, I think. I think they are a law firm out of  
7 Miami. That's what the name means to me.  
8 **Q Is that an extreme number, \$260,000,**  
9 **in addition to the other legal fees that are**  
10 **identified throughout this document for TDM Cable to**  
11 **incur?**  
12 A I don't know. It could be cumulative  
13 for several transactions. I don't know the origin of  
14 the billing. Looks about comparable to what  
15 Mr. Franceski sends to me. So it's probably nothing  
16 out of the ordinary.  
17 MR. RATTINER: We are going to  
18 introduce Exhibit Number 6.  
19 (Whereupon Exhibit 6 is  
20 Marked.)  
21 BY MR. RATTINER:  
22 **Q They are promissory notes in the**  
23 **amount of \$350,000 dated October 2nd, 2006. We have**  
24 **another one dated October 2nd, 2006 of \$352,341 for**  
25 **Mr. McGinn. The first one was for Mr. Smith. And**

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1 DAVID SMITH

2 **\$350,000, October 3rd for Matt Rogers. We are going**  
3 **to focus our question on the document that you would**  
4 **have signed.**

5 MR. FRANCESKI: This package  
6 is the exhibit?

7 MR. RATTINER: Correct.

8 THE WITNESS: (Reviewing).

9 BY MR. RATTINER:

10 **Q Is this the promissory note that you**  
11 **just referenced that you may have signed in 2009?**

12 A I don't know.

13 **Q When was this document signed?**

14 A Doesn't have a date on when it was  
15 signed. Notice dated October 2nd, 2006 but there's  
16 no date when it was signed.

17 **Q Is it typical that you don't date**  
18 **documents upon signing them?**

19 A I didn't draw the document. I sign  
20 them. So I think that is a question that's -- the  
21 answer is no. I mean, obviously we have detail but I  
22 sign a lot of documents, and clearly not a date on  
23 here. So I don't know.

24 MR. NEWMAN: And we would like  
25 to make a request on the record pursuant

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1 DAVID SMITH

2 MR. FRANCESKI: Any or all in  
3 the exhibit or whatever?

4 MR. NEWMAN: Well, the entire  
5 set of promissory notes.

6 MR. FRANCESKI: Okay. Do I  
7 get to take these with me tonight?

8 MR. NEWMAN: Yes.

9 BY MR. RATTINER:

10 **Q This states that the principal and**  
11 **interest are due October 1st, 2012; is that correct?**

12 A Am I supposed to have Matthew, Rogers  
13 and Tim?

14 MR. ROWEN: They are part of  
15 the exhibit package.

16 THE WITNESS: I think the  
17 question was just directed to me, wasn't  
18 it?

19 MR. NEWMAN: We are asking the  
20 firm --

21 MR. FRANCESKI: The firm.

22 MR. NEWMAN: -- McGinn Smith  
23 to provide that information tomorrow  
24 morning.

25 THE WITNESS: For all three of

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1 DAVID SMITH

2 to FINRA Rule 8210 that the firm provide  
3 tomorrow morning a statement as to when  
4 this promissory note was signed by you.

5 THE WITNESS: Well, if I don't  
6 know, how am I going to do that?

7 MR. NEWMAN: You have counsel,  
8 don't you?

9 MR. FRANCESKI: He's made the  
10 request, and we will talk about it this  
11 evening.

12 THE WITNESS: Okay.

13 BY MR. RATTINER:

14 **Q Do you know if you signed this**  
15 **document as pursuant to a FINRA request?**

16 A I don't -- Chris, I don't know when I  
17 signed this document. I don't know if I signed it in  
18 2006. I don't know if I signed it yesterday. So I  
19 don't know the answer to that.

20 MR. FRANCESKI: Mike, your  
21 request was that the firm provide --

22 MR. NEWMAN: -- a statement as  
23 to the date in which this note was  
24 signed, approximate date this was  
25 signed.

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1 DAVID SMITH

2 these notes?

3 MR. NEWMAN: Yes.

4 BY MR. RATTINER:

5 **Q So in terms of the principal and**  
6 **interest, that's due on October 1st, 2012?**

7 A That's right.

8 **Q And when is the maturity date for**  
9 **FIIN, First Independent?**

10 A Regarding?

11 **Q The maturity date of the notes**  
12 **initially issued for FIIN?**

13 A 2008.

14 **Q So how does this carry a 2012**  
15 **payment?**

16 A Because the notes are obviously in  
17 default, and they have been extended. This notice is  
18 payable to TDM Cable funding. I don't know why  
19 you're asking me what this has to do with FIIN.

20 **Q Well, the initial funding we are**  
21 **saying \$2.6 million came in from FIIN, and then came**  
22 **out as 1.52 million to the three owners DLS, TMM and**  
23 **Matt R.?**

24 MR. FRANCESKI: Let me object.  
25 I don't think there's anything of record

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1 DAVID SMITH  
2 that matches to what you just said,  
3 Chris.  
4 MR. RATTINER: Okay. In this  
5 case the record, in terms of what was in  
6 the account prior to the million 52  
7 being lent to the individuals mentioned,  
8 prior to FIIN depositing the \$2.6  
9 million, the account was zero.  
10 MR. FRANCESKI: Again, that's  
11 not -- I am not here to answer  
12 questions, but that's not what the  
13 document, Exhibit 4 says. Document  
14 Exhibit 4 is not a bank account, as far  
15 as I know. It is a Quicken program.  
16 MR. RATTINER: It is a  
17 download of the bank account that's  
18 inputted through Quicken by the firm.  
19 MR. FRANCESKI: No, it's not a  
20 bank account. Banks make bank accounts.  
21 McGinn Smith doesn't make bank accounts.  
22 THE WITNESS: The question  
23 was --  
24 MR. ROWEN: I will say it  
25 again. It's an Excel spreadsheet of

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1 DAVID SMITH  
2 data imported from the Quicken register  
3 report of all transactions in TDM  
4 Cable's Mercantile Bank account ending  
5 in 29507.  
6 THE WITNESS: Yeah, but I  
7 think the question was, and I guess we  
8 can ask the court reporter to go back to  
9 it, as I interpret the question, you  
10 said how does the promissory note  
11 between David L. Smith and the other  
12 parties and TDM Cable, maturing in 2012,  
13 how is FIIN going to pay it back? I  
14 don't know.  
15 BY MR. RATTINER:  
16 **Q That wasn't my question.**  
17 A That was your question.  
18 **Q No, it wasn't.**  
19 MR. FRANCESKI: Dave, just let  
20 him ask the question. Steve, did I  
21 understand you to say that what we have  
22 in front of us as Exhibit 4 was created  
23 through a Quicken program from data in  
24 bank records?  
25 MR. ROWEN: Well, the staff

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1 DAVID SMITH  
2 did not create the Quicken files. This  
3 Quicken files were provided by the firm.  
4 I can't speak to --  
5 MR. FRANCESKI: That's what I  
6 thought.  
7 MR. ROWEN: -- how they were  
8 populated, but the staff created the  
9 Excel spreadsheet directly from a data  
10 import of a Quicken registry report for  
11 all transactions in what's marked as TDM  
12 Cable's Mercantile Bank account ending  
13 in 29507.  
14 MR. FRANCESKI: You said that  
15 but there's nothing of record to  
16 demonstrate that. Okay. I got it.  
17 MR. NEWMAN: Well, right. We  
18 are representing that's how it was  
19 prepared.  
20 THE WITNESS: Chris, would you  
21 go back and ask your question again. I  
22 must have totally misunderstood.  
23 BY MR. RATTINER:  
24 **Q The note is due payable on October 1,**  
25 **2012; is that correct?**

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1 DAVID SMITH  
2 A That is correct.  
3 **Q And is it normally a six year payment**  
4 **time frame on notes?**  
5 A I don't know if there is any  
6 normalcy. I don't know if there is any pattern that  
7 I could subscribe to.  
8 MR. RATTINER: Okay. I don't  
9 think I have anything else.  
10 MR. NEWMAN: Okay. One final  
11 point. The credit agreement, security  
12 agreement you referred to earlier  
13 involving the 20 percent investment in  
14 affiliates and the fees, collateralized  
15 fees, do you have a copy of that  
16 agreement with you in New Jersey? Do  
17 you have that here?  
18 THE WITNESS: No.  
19 MR. NEWMAN: Could you provide  
20 that -- can the firm provide that to us  
21 by tomorrow so we can use it for  
22 testimony tomorrow?  
23 MR. FRANCESKI: We will take  
24 that under consideration.  
25 MR. NEWMAN: We are making a

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1 DAVID SMITH  
 2 request for that, and if possible we  
 3 would appreciate if that could be  
 4 provided, could be faxed, but we would  
 5 like to have a copy of that tomorrow so  
 6 we can take a look at it for testimony.

7 MR. FRANCESKI: Okay. Again,  
 8 I don't know whether that can be done  
 9 but I understand your question.

10 MR. NEWMAN: Okay. That's  
 11 fine.

12 MR. RATTINER: No further  
 13 questions for this evening, we will go  
 14 off the record and resume tomorrow at 9  
 15 a.m.

16 (Whereupon OTR Adjourned for  
 17 the day at 6:30 p.m.)  
 18  
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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

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