

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

10 Civ. 00457 (GLS/DRH)

MCGINN, SMITH & CO., INC.
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, AND
DAVID L. SMITH, LYNN A. SMITH,
DAVID M. WOJESKI, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,
GEOFFREY R. SMITH, LAUREN T. SMITH, and
NANCY MCGINN,

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

DAVID M. WOJESKI, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.
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**DECLARATION OF MARTIN P. RUSSO, ESQ.
IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL**

I, Martin P. Russo, Esq., declare the following:

1. I am a member of the firm of Gusrae, Kaplan, Bruno & Nusbaum PLLC, attorneys for defendants David L. Smith and Timothy M. McGinn (the "Defendants"). I am admitted to practice in the State of New York and the United States District Court in the Northern District of

New York. I have personal knowledge of the matters set forth herein, except for those matters set forth upon information and belief.

2. This Motion to Compel arises out of the Securities and Exchange Commission's ("SEC") improper objections to Defendant's interrogatories. A true and complete copy of the SEC's Responses and Objections to the Defendant's First Set of Interrogatories dated October 22, 2010 is annexed hereto as Exhibit A.

3. The Financial Industry Regulatory Authority ("FINRA") began a routine examination of the broker dealer McGinn, Smith & Co., Inc. ("McGinn Smith") in or about the fall of 2008. A true and complete copy of a September 5, 2008 letter from FINRA to McGinn Smith about the examination is annexed hereto as Exhibit B.

4. FINRA examiners were on-site at McGinn Smith for three and a half days during that same routine examination. A true and complete copy of a June 10, 2009 letter from McGinn Smiths' counsel relating to the on-site inspection is annexed hereto as Exhibit C.

5. On or about December 15, 2008, FINRA conducted an exit interview and submitted a report in connection with examination number 20080117152 relating to McGinn Smith. A true and complete copy of the December 15, 2008 exit meeting report for the examination of McGinn Smith is annexed hereto as Exhibit D.

6. On or about February 27, 2009, FINRA sent a letter to David Smith regarding the indictment of former New York State senator Joseph Bruno and requested documents and information relating to the indictment pursuant to FINRA Rule 8210. A true and complete copy of the February 27, 2009 letter is annexed hereto as Exhibit E.

7. On or about April 29, 2009, FINRA also took the testimony of David Smith in connection with examination number 2008117152. A true and complete copy of the transcript of the April 29, 2009 investigative testimony of David Smith is annexed hereto as Exhibit F.

8. On or about April 29, 2009, FINRA took the testimony of Timothy McGinn in connection with examination number 2008117152. A true and complete copy of a transcript of the April 29, 2009 investigative testimony of Timothy McGinn is annexed hereto as Exhibit G.

9. After the April 2009 on the record interviews of the Respondents, FINRA requested documents and information from McGinn Smith pursuant to FINRA Rule 8210. True and correct copies of FINRA's requests on in May and June 2009 and McGinn Smith's responses without enclosures are annexed hereto as Exhibit H.

10. On or about July 2, 2009, FINRA issued its examination report for McGinn Smith under the examination number 20080117152. A true and complete copy of the July 2, 2009 examination report is annexed hereto as Exhibit I.

11. On or about September 1, 2009, FINRA issued its Examination Disposition Letter for the McGinn Smith examination number 20080117152 and required a compliance conference on October 5, 2009. A true and complete copy of the September 1, 2009 Examination Disposition Letter is annexed hereto as Exhibit J.

12. On or about December 7, 2009, former Senator Joseph Bruno was convicted on two of the eight counts against him. The conviction was not related to any allegations involving McGinn Smith. A true and complete copy of a December 7, 2009 New York Post article titled "*Joe Bruno guilty of two of eight charges*" is annexed hereto as Exhibit K.

13. On December 22, 2009, FINRA sent a letter to the SEC enclosing documents obtained in its investigation of McGinn Smith in connection with its referral of the investigation to the SEC.

A true and complete copy of the December 22, 2009 letter without enclosures is annexed hereto as Exhibit L.

14. On December 23, 2009, FINRA provided additional documents to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the December 23, 2009 letter without enclosures is annexed hereto as Exhibit M.

15. On December 24, 2009, FINRA provided additional documents to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the December 24, 2009 letter without enclosures is annexed hereto as Exhibit N.

16. On December 29, 2009, FINRA provided additional documents to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the December 29, 2009 letter without enclosures is annexed hereto as Exhibit O.

17. On January 5, 2010, the SEC issued its Formal Order of Investigation relating to the Defendants in this action. A true and complete copy of the Formal Order of Investigation has been filed under seal as Exhibit P.

18. On January 7, 2010, FINRA provided additional documents to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the January 7, 2010 letter without enclosures is annexed hereto as Exhibit Q.

19. On or about January 11, 2010, FINRA took the testimony of McGinn Smith employee David Rees. A true and complete copy of excerpts from the transcript of the January 11, 2010 testimony of David Rees is annexed hereto as Exhibit R.

20. Upon information and belief, none of the witnesses or recipients of FINRA Rule 8210 document requests were told that FINRA was acting for the federal government. As a consequence,

none of the witnesses were aware that they were permitted to assert their Fifth Amendment privilege against self incrimination.

21. On or about February 1, 2010, FINRA provided the transcript of David Rees' testimony to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the February 1, 2010 letter without enclosures is annexed hereto as Exhibit S.

22. On or about February 1, 2010, FINRA took the testimony of David Smith. A true and complete copy of excerpts from the transcript of the February 1, 2010 testimony of David Smith is annexed hereto as Exhibit T.

23. On or about February 2, 2010, FINRA took the testimony of David Smith. A true and complete copy of excerpts from the transcript of the February 2, 2010 testimony of David Smith is annexed hereto as Exhibit U.

24. On or about February 3, 2010, FINRA took the testimony of David Smith. A true and complete copy of excerpts from the transcript of the February 3, 2010 testimony of David Smith is annexed hereto as Exhibit V.

25. On or about February 3, 2010, FINRA took the testimony of Timothy McGinn. A true and complete copy of excerpts from the transcript of the February 3, 2010 testimony of Timothy McGinn is annexed hereto as Exhibit W.

26. On or about February 4, 2010, FINRA took the testimony of Timothy McGinn. A true and complete copy of excerpts from the transcript of the February 4, 2010 testimony of Timothy McGinn is annexed hereto as Exhibit X.

27. On or about February 12, 2010, FINRA sent McGinn Smith a request for documents pursuant to FINRA Rule 8210. A true and complete copy of the February 12, 2010 letter is annexed hereto as Exhibit Y.

28. On or about February 12, 2010, FINRA took the testimony of David Smith. A true and complete copy of excerpts from the transcript of the February 12, 2010 testimony of David Smith is annexed hereto as Exhibit Z.

29. On or about February 18, 2010, FINRA took the testimony of Thomas Livingston. A true and complete copy of the transcript of the the February 18, 2010 testimony of Thomas Livingston is annexed hereto as Exhibit AA.

30. On or about February 19, 2010, FINRA provided the transcripts and exhibits from the February 2010 testimony of David Smith and Timothy McGinn to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the February 19, 2010 letter without enclosures is annexed hereto as Exhibit BB.

31. On or about March 11, 2009, FINRA provided additional documents to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the March 11, 2010 letter without enclosures is annexed hereto as Exhibit CC.

32. On or about March 17, 2010, FINRA took the testimony of Brian Shea, a McGinn Smith employee. A true and complete copy of excerpts from the transcript of the March 17, 2010 testimony of Brian Shea is annexed hereto as Exhibit DD.

33. On or about March 18, 2010, FINRA took the testimony of Matthew Rogers, a McGinn Smith employee. A true and complete copy of excerpts from the transcript of the March 18, 2010 testimony of Matthew Rogers is annexed hereto as Exhibit EE.

34. On or about March 19, 2010, FINRA took the testimony of Patricia Sicluna, a McGinn Smith employee. A true and complete copy of excerpts from the transcript of the March 19, 2010 testimony of Patricia Sicluna is annexed hereto as Exhibit FF.

35. On or about March 26, 2010, FINRA provided additional documents to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the March 26, 2010 letter without enclosures is annexed hereto as Exhibit GG.

36. On or about April 5, 2010, FINRA provided the transcript of the testimony of Brian Shea to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the April 5, 2010 letter without enclosures is annexed hereto as Exhibit HH.

37. On April 5, 2010, FINRA filed its disciplinary action against the Defendants. The FINRA disciplinary complaint captioned *Department of Enforcement v. McGinn, Smith & Co., Inc., et al*, Disciplinary Proceeding No. 2009017984501 is annexed hereto as Exhibit II.

38. On or about April 7, 2010, FINRA provided the transcripts of the testimony of Patricia Sicluna, Matthew Rogers, and exhibits to the testimony of Brian Shea to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the April 7, 2010 letter without enclosures is annexed hereto as Exhibit JJ.

39. On or about April 8, 2010, FINRA provided exhibits to the testimony of Matthew Rogers and Brian Shea to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true and complete copy of the April 8, 2010 letter without enclosures is annexed hereto as Exhibit KK.

40. On or about April 12, 2010, FINRA provided exhibits to the testimony of Patricia Sicluna to the SEC in connection with its referral of the McGinn Smith investigation to the SEC. A true

and complete copy of the April 12, 2010 letter without enclosures is annexed hereto as Exhibit LL.

41. On or about April 20, 2010, the SEC filed a complaint against the Respondents. A true and complete copy of the SEC's April 20, 2010 press release is annexed hereto as Exhibit MM.

42. On or about September 17, 2010, the Defendants served their First Set of Interrogatories upon the SEC. A true and complete copy of Defendants' First Set of Interrogatories to the Plaintiff is annexed hereto as Exhibit NN.

43. On September 21, 2010, the Defendants served upon the SEC a revised version of the First Set of Interrogatories to the Plaintiff to reflect a correction in the case caption. The substantive portion of the document remained the same. A true and complete copy of this set of interrogatories is annexed hereto as Exhibit OO.

44. On or about October 25, 2010, Defendants' counsel emailed the SEC to request a telephone meeting to discuss defects with the SEC's interrogatory responses, which are now the subject of this motion. A true and complete copy of that e-mail is annexed here to as Exhibit PP.

45. On the same day, the SEC responded that it would not amend its responses to the interrogatories and claimed that the information sought is not relevant. A true and complete copy of the SEC's response is annexed hereto as Exhibit QQ.

46. A true and complete copy of the opinion in the case captioned *Perro v. Romano*, No. CV-85-4020 (ILG), 1987 WL 7563 (E.D.N.Y. Feb. 9, 1987) is annexed hereto as Exhibit RR.

47. A true and complete copy of the opinion in the case captioned *Kenneth v. Nationwide Mut. Fire Ins. Co.*, No. 03-CV-521F, 2007 WL 3533887 (W.D.N.Y. Nov. 13, 2007) is annexed hereto as Exhibit SS.

48. A true and complete copy of the opinion in the case captioned *Overton v. Todman & Co.*, CPAS, P.C., No. 05 Civ. 7956(DAB), 2009 WL 3154296 (S.D.N.Y. Sept. 24, 2009) is annexed hereto as Exhibit TT.


49. A true and complete copy of the opinion in the case captioned *Children's First Found, Inc. v. Martinez*, 04-cv-0927, 2007 WL 4344915 (N.D.N.Y. Dec. 10, 2007) is annexed hereto as Exhibit UU.

50. A true and complete copy of the SEC opinion captioned *In the Matter of Application of Frank P. Quattrone*, Admin. Proc. File No. 3-11786, Exchange Act Release No. 53,547 (Mar. 24, 2006) is annexed hereto as Exhibit VV.

51. A true and complete copy of the SEC opinion captioned *In the Matter of Application of Justin F. Ficken*, Admin. Proc. File No. 3-12143, Exchange Act Release No. 54,699 (Nov. 3, 2006) is annexed hereto as Exhibit WW.

52. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 2010.



Martin P. Russo