

EXHIBIT U

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BEFORE THE FINANCIAL INDUSTRY
REGULATORY AUTHORITY

In the Matter of
MCGINN SMITH & COMPANY
20090179845

ORIGINAL

VOLUME II
INVESTIGATIVE TESTIMONY OF
DAVID SMITH
WOODBIDGE, NEW JERSEY
FEBRUARY 2, 2010

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BEFORE THE FINANCIAL INDUSTRY
REGULATORY AUTHORITY

In the Matter of
MCGINN SMITH & COMPANY
20090179845

Continued Investigative testimony of DAVID SMITH,
taken at FINRA, 581 Main Street, 7th Floor, Woodbridge, New
Jersey, on February 2, 2010, commencing at 9:30 a.m.

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APPEARANCES:

BY - CHRISTOPHER RATTINER

BY - STEVEN ROWEN

BY - MICHAEL NEWMAN

BY - GARY JAGGS

BY - MICHAEL PAULSEN

BY - REBECCA SMITH

BY - ROBERT MCCARTHY

FINRA

581 Main Street, 7th Floor
Woodbridge, New Jersey 07095
Representing FINRA.

BY - DAVID FRANCESKI, JR., ESQ.

STRADLEY, RONON, STEVENS & YOUNG LLP
2600 One Commerce Square
Philadelphia, Pennsylvania 19103
Tel: 215-564-8000
Representing Witness.

ALSO PRESENT:

JOSEPH CARR

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DAVID SMITH

prepared on November 2nd, 2009?

A That is the information I received.

Q And signed on or after that date?

A That would be a logical conclusion,
yes.

Q Do you know why the promissory notes
are dated October 2nd, 2006?

A That was the date of the execution of
the loan and the financial record was kept.

Q So this is a backdated document?

MR. FRANCESKI: I am going to
object to that question.

THE WITNESS: My counsel has
advised me that we are not going to
answer any questions regarding that
today, so if we want to go on to other
subjects, we'll do that.

BY MR. NEWMAN:

Q Well, what does that mean?

A It's what it means.

Q Are you asserting the Fifth
Amendment?

MR. FRANCESKI: He's not
asserting the Fifth but he would need

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DAVID SMITH

other counsel to answer those questions.

MR. NEWMAN: I am not following that. You are representing him here?

MR. FRANCESKI: Yeah, but I can't counsel him on that. So if he's to answer those questions, we need to suspend for him to get other counsel to have him counsel on that, which he's entitled to.

We are going to stay and answer other questions for you, but on that particular issue, I can't counsel him. He would be here without counsel, and he deserves counsel on that.

MR. NEWMAN: That is a new one to me. I mean, you are representing him. There's two responses: Either he's going to answer the question, or he's going to not answer based on some Fifth Amendment ground, but to say that he needs another counsel.

MR. FRANCESKI: He needs counsel to decide which option, and then

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DAVID SMITH

there are other options, which option to take with respect to that. I can't counsel him on that, so that's where we are.

MR. NEWMAN: Okay. Well, can you read back the last question I asked.

(Whereupon the Question is Read Back.)

MR. NEWMAN: That is the question I'm asking. I'm asking him pursuant to FINRA Rule 8210, the witness answer that question.

THE WITNESS: Under advice of counsel, I am not going to answer that question.

BY MR. NEWMAN:

Q And do you understand that failure to answer a question pursuant to FINRA Rule 8210 could subject you to disciplinary action, including the suspension or bar from the brokerage industry?

A Yes.

Q And having understood that, you still wish to assert the right not to answer that question?

A I do.

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DAVID SMITH

MR. FRANCESKI: For now until he has counsel on that question, just to be clear. Is that correct, Mr. Smith?

THE WITNESS: I guess that's what we talked about, yes.

MR. NEWMAN: Well, the question is being asked in this testimony.

MR. FRANCESKI: We understand. I just want to make clear, he's not saying he won't answer at some point, he just needs counsel on that question.

BY MR. NEWMAN:

Q Why -- was this promissory note provided to FINRA staff?

A I have just stated for the record any questions regarding these notes, on the advice of counsel, I am not going to respond to.

Q And, again, you understand that your failure to answer that question could subject you to disciplinary action under FINRA Rule 8210?

A I do.

Q Was FINRA staff advised that this document had been backdated when it was provided to

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DAVID SMITH

the staff?

MR. FRANCESKI: Objection, but
you may respond as appropriate.

THE WITNESS: Again, we are --
any questions relating to this document,
under advise of counsel, I am not
answering.

BY MR. NEWMAN:

Q Again, you understand your failure to
answer that particular question could subject you to
disciplinary action under FINRA Rule 8210?

A I do.

Q Another issue we discussed last
night, staff made a request for a copy of the
agreement that Mr. Smith referred to in his
testimony, the security agreement.

Is that going to be provided to the
staff today?

A Mr. McGinn is looking for it.

MR. FRANCESKI: Haven't
located it yet, but we are trying.

BY MR. NEWMAN:

Q Do you know when that document was
prepared and dated?

1 DAVID SMITH

2 Trust dated 8-4-04.

3 Does that refresh your recollection?

4 A It may be in the irrevocable trust at
5 the end of '08. It may be in Lynn Smith Trust at a
6 later date. When I gave you the percentages, I was
7 aggregating the two. The numbers haven't changed.

8 Q So the 10 percent includes a
9 percentage owned by this trust?

10 A If it is owned in that trust, yes.

11 Q Well, you tell me.

12 A Well, I just said it's either in that
13 trust or it's in another trust. I don't know for
14 sure.

15 Q Well, how many other trusts are
16 there?

17 A There's two trusts.

18 Q And what is the name of the other
19 trust?

20 A The Lynn Trust and Smith Trust.

21 Q Okay. There's a David and Lynn Smith
22 Trust, correct?

23 A Correct.

24 Q Is there another trust besides that?

25 A I believe there's a Lynn A. Smith

DAVID SMITH

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Trust.

Q Are you familiar with a David Smith Lifetime QTIP Trust?

A Yes.

Q And what is that?

A No longer exists.

Q As of when?

A Early '09, I believe.

Q Did a David Smith Lifetime QTIP Trust own an interest at one point in Pine Street Capital Partners?

A I believe that at one time we transferred some interest into that trust inappropriately. My estate planning attorney brought it to my attention that it was transferred and had to be transferred back. So no longer -- the QTIP Trust no longer exists.

Q All right. But my question is did at one point the QTIP Trust own an interest in Pine Street Capital Partners?

A Same interest that it is in the other two trusts that we are talking about, nothing in addition to.

Q So how is it divided?

1 DAVID SMITH

2 You said approximately 10 percent.

3 How much is comprised of the David and Lynn Smith
4 Trust, and how much is comprised of the Lifetime QTIP
5 Trust?

6 A Assuming it's in the David and Lynn
7 Smith Trust, which I have now said three times, it
8 may or may not be.

9 Q Well, I have a 2008 K-1 return.

10 A It's now 2010.

11 Q Okay. Well, I'm asking you at any
12 point what was the interest?

13 A Okay. It would be the same aggregate
14 interest, approximately 10 percent.

15 Q 10 percent. And how is the
16 10 percent allocated between the different trusts?

17 A I think 75 percent of it is in the
18 name of Lynn Smith -- actually got those numbers
19 yesterday, if you give me a moment. The next time we
20 have a break, I will be able to give them precisely
21 to you.

22 Q So you knew this information
23 yesterday?

24 A No. I got it by way of e-mail last
25 night, so I have it as of yesterday, yes.

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DAVID SMITH

Q Is there a reason why you didn't mention the trust in your testimony yesterday?

A No, there's no reason. I think of Lynn Smith as Lynn Smith. Whether it's a trust or Lynn Smith, I didn't draw a distinction.

Q Well, it is the Lynn Smith and David Smith Trust?

MR. FRANCESKI: I am going to object. We are arguing about something that the witness had told you that he aggregated all of that ownership. He doesn't consider it to be separate.

MR. NEWMAN: That's fine. You can note your objection. I am asking why he didn't mention the trust yesterday.

MR. FRANCESKI: He told you.

THE WITNESS: I just --

MR. FRANCESKI: He just did. Now, let's not get into what we did yesterday, which is badgering him over an answer he's already given. I don't have a problem with questions being asked, but if you're insisting on asking

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DAVID SMITH

the same question more than once, when he's given you the clear answer, it's not appropriate.

MR. NEWMAN: Well, that's your characterization of badgering. When a witness doesn't answer a question, I'm going to continue to ask it until he answers it.

THE WITNESS: I answered the question.

MR. NEWMAN: You can object all you want. I am going to ask the question I'm going to ask.

MR. FRANCESKI: The record will show that Mr. Newman is repeatedly asking the same question, which is abusive to the witness. We will go from there. You answer the question, Mr. Smith, I will object.

BY MR. NEWMAN:

Q The reason you didn't mention the trust yesterday because you were aggregating the trust with Lynn Smith's interest?

A That is correct.

1 DAVID SMITH

2 Q It's, again, the David and Lynn Smith
3 Trust?

4 MR. FRANCESKI: Objection.

5 BY MR. NEWMAN:

6 Q What is the percentage of ownership
7 in the David and Lynn Smith Trust in the actual
8 percentage of ownership in Pine Street Capital?

9 MR. FRANCESKI: Today?

10 MR. NEWMAN: Today.

11 THE WITNESS: One or the other
12 owns 75 percent. The other owns 25
13 percent. I don't know the distinction.
14 As indicated a few moments ago, I will
15 get that information for you at a break.

16 BY MR. NEWMAN:

17 Q So 75 percent of the entire
18 partnership?

19 A Yeah. 75 percent of my aggregated
20 interest.

21 Q Which is 75 percent of 10 percent?

22 A That is correct.

23 Q Okay. I just want to make clear, we
24 are talking about different percentages, and
25 25 percent would be in the other?

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DAVID SMITH

A 2.5 percent.

Q You will get that information during the next break?

A Right.

Q Is there anything else besides the two trusts and the management company interest in Pine Street Capital that you haven't testified to?

A Not that I am aware of.

Q Did do and your wife have any other trust interest in any other entity in which the LLCs invested in, whether individually or jointly?

MR. FRANCESKI: Can I hear that question again, please?

BY MR. NEWMAN:

Q Yeah.

Do you or your wife, either individually and jointly through a trust, have an interest in any other entities in which the LLCs have invested?

A Just through the trust or through our names individually in addition to the trust?

Q We'll start with the trust first.

A No.

Q How about individually or through

1 DAVID SMITH

2 your wife's name?

3 A Yes.

4 Q And what would they be?

5 A We own some Deerfield Triarc, DFR.
6 It is a public company. We made an investment in
7 GSC, which was discussed yesterday. Private REIT. I
8 have had investments in Exchange Boulevard. I had a
9 nominee interest in alseT. That's all that comes to
10 mind at the moment.

11 Q Okay. Of the DFR, what is the
12 interest that's owned? How much?

13 A It's worth -- I don't know the
14 percentage interest of the company.

15 Q What is the dollar amount?

16 A Dollar amount is -- it's about a
17 hundred and -- it's about \$16,000. I am trying to
18 think of the first split.

19 MR. FRANCESKI: Which one are
20 we on?

21 THE WITNESS: We are on DFR.
22 I think it is about \$16,000. I think I
23 have about 4,000 shares. I think stocks
24 are around \$4.

25 BY MR. NEWMAN:

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DAVID SMITH

Q When was that acquired?

A It was acquired on the original offering which was back in '06, I think, maybe '05.

Q And that's in your name?

A It's in my wife's name.

Q Why is it in your wife's name?

A Because the investment account has been in my wife's name for 20 years.

Q That's true for all your investment accounts?

A Pretty much, yes. David Smith has had a small account from time to time, but I don't know if it's even active anymore.

MR. FRANCESKI: David meaning you?

THE WITNESS: Meaning me, yes.

BY MR. NEWMAN:

Q Besides those four entities, are there any other entities in which -- in which the LLCs have invested which you or your wife have an interest?

A Those are all that I recall. If you want to give me the list, Gary, I will go through it and make sure I didn't make any mistakes.

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DAVID SMITH

MR. NEWMAN: Exhibit Number 1.

THE WITNESS: I think you had
the list of all the investments.

MR. NEWMAN: Exhibit Number 1.

MR. FRANCESKI: Does somebody
have my copy of 1?

THE WITNESS: One jumps right
out at me, CMET. My wife has an
investment in CMET.

BY MR. NEWMAN:

Q And what is your wife's interest in
that entity?

A It is a private placement, no value.
She owns 15,000 shares.

Q When was that acquired?

A I believe it's in '04, through M&S
Partners Coventry, I think that's approximately about
15 years old. M&S Partners made an investment about
15 years ago, I believe, and then, of course, through
CMS we have a -- but that's not me individually.

I am unsure of Smash Holdings. I
don't think we have an investment there, but there is
a possibility. (Reviewing).

Q One more question, going back to the

1 DAVID SMITH

2 know, we were in the process of talking with
3 investment bank, not mentioned there, but it was
4 Friedman, Billings. We had approached them sometime,
5 I think, in 2002, obviously earlier than October,
6 with an opportunity to get more capital. We had sort
7 of -- we had a large line of credit with Key Bank,
8 about 125 million at the time, and we were pushing
9 the limits of that, and in our conversations with
10 Friedman, Billings, they really advocated another
11 approach to taking the whole enterprise public,
12 something that we had not considered up to that time,
13 but they made a pretty good story for.

14 And so what I believe this letter is,
15 is in anticipation of that public offering, we were
16 trying to get these trusts in a more fungible manner
17 and acceptable manner, and so we were offering in
18 exchange for some of the trusts for some bonds and
19 integrated which would then ultimately become the
20 public company.

21 Q Were there trusts or bonds issued
22 through private placements?

23 A The trusts were, yes.

24 Q In the first paragraph it states,
25 many of you have participated in several of these