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BEFORE THE FINANCIAL INDUSTRY
REGULATORY AUTHORITY

ORIGINAL

In the Matter of
MCGINN SMITH & COMPANY
20090179845

INVESTIGATIVE TESTIMONY OF
TIMOTHY MCGINN
WOODBIDGE, NEW JERSEY
FEBRUARY 3, 2010

ATKINSON-BAKER, INC.
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BEFORE THE FINANCIAL INDUSTRY
REGULATORY AUTHORITY

In the Matter of
MCGINN SMITH & COMPANY
20090179845

Investigative testimony of TIMOTHY MCGINN, taken
at FINRA, 581 Main Street, 7th Floor, Woodbridge, New Jersey,
on February 3, 2010, commencing at 1:45 p.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

TIMOTHY MCGINN

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2 three-and-a-half million dollars. And the Verifier
3 role would have been maybe a million eight to a
4 million dollars.

5 Q What is the current status of those
6 raises?

7 MR. FRANCESKI: Objection;

8 status.

9 BY MR. RATTINER:

10 Q Are they current with the investors?

11 A Yes.

12 Q Can you list for us your personal
13 bank accounts that you maintain, either signatory
14 authority or control over?

15 A I have a checking account at M&T Bank
16 in Albany, New York.

17 Q And other than that?

18 A That's it.

19 Q How about brokerage accounts?

20 A I have a brokerage account at what
21 was McGinn Smith & Company and now is DLG through
22 Dinosaur.

23 Q And that's just one account?

24 A Yes.

25 Q How about any trusts?

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A No.

Q Any offshore accounts?

A No.

MR. NEWMAN: Yes. The checking account at M&T Bank, how long have you maintained that?

THE WITNESS: 30 years.

MR. NEWMAN: The last seven years, have there been any other accounts that you have had signatory account over?

THE WITNESS: No.

MR. NEWMAN: That's individual or corporate entity accounts?

THE WITNESS: Well, certainly not on an individual basis. In terms of signatory authority, I probably had authority over a dozen accounts. I can't tell you exactly what they are. That information can be gleaned from Mr. Shea, who I am told is coming down here next week to chat with you folks.

MR. NEWMAN: Why don't you tell us what you can right now.

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THE WITNESS: I would guess that the TDM Cable, TDMM Cable accounts I had signatory authority over. There's an entity called Cruise Charter Ventures that I have signatory authority over. McGinn Smith Transaction Funding. McGinn Smith Funding LLC. And that's it.

MR. FRANCESKI: Let me caution the witness. He used the word "guess" in the first part of the answer. Guess won't help me. If you don't know, you should answer you don't know.

THE WITNESS: I believe that is the extent of the signatory authorities that I have or have had.

MR. NEWMAN: Okay.

BY MR. RATTINER:

Q In addition to M&T, are any of those accounts maintained in another bank?

A No.

Q How about Mercantile Bank?

A No.

Q Did you file your taxes, personal

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taxes for 2008?

A Yes.

Q And who would have prepared those?

A Ron Simons, CPA at Piaker & Lyons, Binghamton, New York.

Q What is the current status of First Independent Income Notes?

A What is the current status?

Q Correct.

A Well, the current status is that it has not -- it has had its notes mature, it has not been able to redeem those notes, and it is in a work-out position.

Q What role did you have with the work-out position?

A Very limited role. I have taken over one particular asset out of the portfolio of Mezzanine Funds. I don't know that it happens to be First Independent. It could be one of the other three. The name of that credit is F4W.

Q What do you mean by you took it out?

A I took the responsibility of working with the debtor to try to collect the assets, the dollars that are owed to the funds.

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MR. RATTINER: We are going to
take a five-minute break if you don't
mind.

(Whereupon a recess is taken.)

MR. RATTINER: Back on the
record.

BY MR. RATTINER:

Q Mr. McGinn, you said you wanted to
make a clarifying statement?

A You asked me earlier if I knew how
much money was in the fund accounts and if I had any
information to that extent. I get a daily report for
all of the bank accounts, I very rarely look at it.
I do get it. It's e-mailed to me every day.

Q Who sends that to you?

A Brian Cooper.

Q What is the purpose of it being sent
to you?

A He sends it to Dave, he sends it to
me.

Q Okay. I wanted to ask you, are you
married?

A Yes.

Q And with regard to the questions I

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2 asked you before with your financial accounts, you
3 mentioned an M&T account and a broker's account.

4 Does your wife maintain any accounts?

5 A Yes.

6 Q What sort of accounts does she
7 maintain?

8 A She has a checking account.

9 Q How about a brokerage account?

10 A No.

11 Q Any trusts?

12 A No.

13 MR. NEWMAN: What account is
14 used to pay your personal expenses, your
15 family expenses?

16 THE WITNESS: Unfortunately,
17 it's mine.

18 BY MR. RATTINER:

19 Q And we had requested yesterday from
20 Mr. Smith, and he had indicated that he was going to
21 try to get it through you, a security agreement? I
22 think that was back from '04, '05?

23 A Oh, yeah, he asked --

24 MR. FRANCESKI: The credit
25 agreement, you mean?

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MR. ROWEN: If we take a step back, what other TDM Cable entities are there?

THE WITNESS: Well, there are two -- there are two entities in the cable business. One is called TDM Cable, which we have just been discussing. The other is called TDMM Cable Funding.

The second M in TDMM is in recognition of an equity ownership by a fellow by the name of Mario Bustamante.

MR. ROWEN: Are there other trusts that have TDM Cable in their names?

THE WITNESS: Yes.

MR. ROWEN: What are those entities?

THE WITNESS: There are TDMM Cable Senior Trust; TDMM Junior Cable Trust; and TDMM Benchmark Trust.

MR. ROWEN: Are there any TDM Cable trusts without the additional M?

THE WITNESS: No.

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MR. ROWEN: Are there separate books for each TDM Cable entity or TDMM Cable entity?

THE WITNESS: Yes.

MR. ROWEN: Separate bank accounts?

THE WITNESS: Yes.

MR. ROWEN: Financial statements?

THE WITNESS: Yes.

MR. ROWEN: What's the purpose of multiple entities -- of having multiple and separate entities?

THE WITNESS: Well, the purpose is that when we first did the -- when we did the first cable transaction in 2006, Mr. Bustamante was not part of the business at that time. The business was to have been serviced by Primevision Communications LLC. As it turns out, Primevision Communications, LLC became insolvent. They went out of the business. We required someone who had the necessary skills and capabilities to

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service the accounts, bill the accounts, collect from the accounts; have a guy go to your house and fix the cable TV if it wasn't working.

Bustamante was recommended to us by a private equity fund that we knew. He ran a similar business in South Florida. We interviewed him. We were very impressed with his capabilities. And we basically hired him to provide those functions for the first two communities that we acquired in the TDM transaction.

Subsequently Mr. Bustamante introduced us to other acquisition opportunities which we followed through on. And he became then the second M in the TDM network.

MR. ROWEN: Was the purpose of the TDMM Cable Senior and Junior Trusts?

THE WITNESS: To acquire some cable, telephone, internet contracts in 22 different communities in South Florida.

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MR. ROWEN: So each of the --
Junior Trust, Senior Trust and TDMM --
TDMM Cable Funding, they were all
conducting separate cable funding
businesses?

THE WITNESS: No.

MR. ROWEN: Explain the
integration.

THE WITNESS: I'm sorry.

MR. ROWEN: Explain the
integration then.

THE WITNESS: The integration
is simply that Bustamante's company, a
company called H Control, provided the
service function for all of the
communities where we acquired the
business and the contracts.

There was a differential in
the equity ownership between the first
two transactions, the first two
communities that we acquired, and all
the subsequent transactions. Because
Bustamante was not a partner at that
point.

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Subsequent to Prime Vision going out of business, when Mario's company came in, he became an equity partner in subsequent transactions.

MR. ROWEN: The TDMM Cable Funding verses the TDM Senior and Junior Trusts, how did they work together?

THE WITNESS: TDMM Cable Funding LLC borrowed money from the trust to make these acquisitions.

MR. ROWEN: How did the trust raise money?

THE WITNESS: The trust raised money by a capital raise, Senior tranche and a Junior tranche.

MR. ROWEN: Was that through McGinn Smith & Company?

THE WITNESS: Yes.

MR. ROWEN: Private placement?

THE WITNESS: Yes.

MR. ROWEN: Why not do the funding directly through TDMM Cable Funding LLC?

THE WITNESS: We always did

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this through various trusts, and it worked well. And that was the way we chose to do it.

There's a thousand ways you can do it. None of them are particularly unique in terms of solving the equation for X.

MR. ROWEN: What were the materials of the Senior and Junior -- of the investments sold in the Senior and Junior Trusts.

THE WITNESS: I think the senior tranche was probably 9 percent coupon, and the Junior was perhaps 11.

MR. ROWEN: For what time period?

THE WITNESS: The Junior tranche is always longer. That was probably five years. The Senior was probably three.

BY MR. RATTINER:

Q When was the raise?

A June -- May-June of '09.

MR. ROWEN: Were there any

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raises in 2008?

THE WITNESS: Not for TDMM,
no -- let me rephrase that. Not for the
cable business.

BY MR. RATTINER:

Q Is TDM, single M, no longer being
utilized for additional funding?

Has that sort of been retired for
this new TDMM?

A It is our intent to merge TDM and
TDMM. We haven't quite gotten that done yet. Yeah,
it will be a lot less complicated. We are also in
discussions with Mr. Bustamante to merge all three
entities: The TDM, the TDMM and H Control in one
grouping.

MR. FRANCESKI: What is that
name?

THE WITNESS: H Control.

MR. PAULSEN: The letter H?

THE WITNESS: Yes.

BY MR. RATTINER:

Q We see different classifications,
like TDM Cable 08.

Does that just represent a raise that

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was done in '08?

A No. What it represents is when we did the first transaction in TDM, we did it in '06, and we did a two-year maturity and a four-year maturity. And so the two-year maturity obviously did mature in 2008. And so the TDM Cable 08 was a roll of those dollars.

Q What other TDM Cable with numbers would we have?

A I think that's it.

Q Okay. Is there a TDM Cable 09?

A No.

Q Is TDM Cable set up the same way with the Senior and Junior Trusts?

A No. There's no distinction in terms of seniority. There is just distinction in terms of maturity.

Q Okay. And how much did TDM Cable 06 raise?

You said \$1.8 million?

A No, I didn't say \$1.8 million. That was an answer to the question of what did the assets cost.

I think the raise was something in

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the order of \$3 million -- 2 million 8, \$3 million.

Q That was raised by how many investors?

A I don't know.

Q That was done in the fall of '06?

A Correct.

Q And TDM Cable Funding, how much was raised for that -- TDMM. Sorry.

A TDMM Cable Funding did not do a specific raise. The raise that was done in the trust -- there was a Senior Trust and a Junior Trust. Those proceeds were lent to TDMM Cable Funding. And that raise was roughly \$2 1/2 million.

Q Would TDM Cable 06, I will call it, I guess the investment was 1.8 million?

A Yes.

Q And the revenues were how much; did you say 1.6?

A 1.6, yes.

Q What were the expenses, based on those revenues?

A Roughly 70 percent of that. So let's call it 1.1.

Q So TDM Cable is operating on a

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2 need to be UCC 1s doing certain communications, FCC
3 legal work on our behalf, I mean a potpourri. We
4 have instituted litigation in some instances, and
5 they have been the litigation firm. So they handle
6 all of the legal activities relative to this sector.

7 Q And do you recall if the PPMs for TDM
8 Cable Trust Senior and Junior -- was there a limit to
9 the legal fees that could be expensed?

10 A No.

11 Q There's no limit?

12 A No. I have never seen that in an
13 offering document. Have you?

14 Q Yes, I have. But I am not here
15 testifying.

16 Gersten Savage?

17 A It's another law firm. And they
18 apparently did some work for us in this regard. It's
19 a New York City law firm.

20 Q Again, if we look at the bottom of
21 page 3, we will see additional loans of \$30,000 each.

22 MR. FRANCESKI: Lines 93

23 through 95?

24 THE WITNESS: Yes.

25 BY MR. RATTINER:

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entities who were the obligors.

EXAMINATION

BY MR. ROWEN:

Q Earlier we spoke of -- on page 2, two highlighted loans from First Advisory Income Notes, one of \$635,000 and one of \$300,000.

How was First Advisory Income Notes repaid on that loan?

A You are talking about 635 which appears on line 45?

Q Yes.

A Where is the other?

Q Line 60.

A Line 60, 300,000.

First Advisory Income Notes was repaid as a result of a capital raise that we did for TDM Verifier Trust 07.

Q When was that?

A It was in the first quarter of 2007.

MR. RATTINER: Was that the intention of the raise?

THE WITNESS: Yes.

MR. RATTINER: How was that

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disclosed?

THE WITNESS: The intention of the raise was to provide capital to Verifier, Verifier Capital LLC.

What happened here is that FAIN basically bridged that funding and then was repaid out of the proceeds of the offering. And I think that can be established by looking at the books and records of FAIN.

MR. ROWEN: I am going to introduce this as Exhibit 2.

(Whereupon Exhibit 2 is marked.)

THE WITNESS: (Reviewing).

BY MR. ROWEN:

Q Mr. McGinn, you have been handed Exhibit 2 in this matter. This is an Excel spreadsheet of data imported from the Quicken registry report of all transactions in TDM Cable's DT FAIN register account.

The Staff has deleted totals and any blank columns. The Staff has also added the "TDM Cable" title at the top and a balance at the bottom.

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2 Please take a moment to review the
3 document.

4 A (Reviewing). Okay.

5 Q For clarity, DT FAIN would be due to
6 First Advisory Income Notes?

7 A I would assume so.

8 Q Is this register consistent with what
9 you just described about how First Advisory was paid
10 back for these two loans?

11 A (Reviewing). Well, are these amounts
12 cash amounts?

13 Q This is the Quicken account.

14 A It balances.

15 Q Quicken account does two things.

16 A Right. It foots at zero.

17 Q The category when in brackets is the
18 contra to the accounting transaction.

19 A Yeah. It foots.

20 Q Okay. So why are "due to First Line
21 Trust" involved in this?

22 A I don't know. I mean, you would have
23 to ask Mr. Shea or Mr. Cooper.

24 Q Was First Line Trust involved in the
25 repayments of TDM Cable loans from First Advisory?

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A It could have been.

MR. NEWMAN: Were Mr. Shea and Mr. Cooper authorized to make transactions without the approval of either you or Mr. Smith?

THE WITNESS: No. But they are the accounting officers for the firm, and they would be able to give more color in terms of these items than myself.

MR. NEWMAN: Right. But in terms of actually authorizing the transaction --

THE WITNESS: Let's --

MR. NEWMAN: -- who would do that?

THE WITNESS: The authorizing party would more than likely be me.

MR. PAULSEN: Was the managing member or managing partner, as you referred to yourself as, authorizing, as you said, if not 100 percent, 90 percent of the transaction activity that goes on in this account, how don't you have the

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familiarity around these transactions?
If not you, who does?

THE WITNESS: How many -- you know, there are probably thousands of transactions that are run through these various accounts in the last two years plus. And I apologize if I am not conversant on every one of those transactions, but I am not. And -- you know, if these are the numbers that came off the ledger and came out of the QuickBooks, I am sure they are correct.

But if you ask me specifically if I know the background of every single one of these transactions, the answer is no.

MR. FRANCESKI: Just note for the record that these transactions appear to be from times in 2007, the latest being December 31, 2007. And we are in February 3, 2010, as we sit here today, correct?

MR. RATTINER: Noted.

MR. NEWMAN: We also note the

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transactions involve substantial amount of money.

MR. FRANCESKI: I doubt that is a factor that influences memory. But that is the way it goes.

But you and I shouldn't be arguing. I am stating for the record what the facts are.

MR. RATTINER: Can we go back to your previous explanation prior to the exhibit being introduced? You said there was a raise for -- and I apologize, I don't remember which entity. I believe it was Verifier?

THE WITNESS: Yes.

MR. RATTINER: So -- and what's the entity's actual title? Just Verifier loan?

THE WITNESS: No. It was TDM Verifier Trust 07.

MR. RATTINER: TDM Verifier Trust 07 raised how much money?

THE WITNESS: I don't know.

MR. RATTINER: Approximately.

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THE WITNESS: \$3 million.

MR. RATTINER: And that was done in 2007. Any idea what season?

THE WITNESS: First quarter.

MR. RATTINER: And how many investors?

THE WITNESS: I don't know, 50.

MR. RATTINER: And that document would have stated the use of the proceeds are for what?

THE WITNESS: The use of proceeds were to buy GPUs from Verifier LLC, which -- the use of proceeds were to loan capital to TDM. TDM in turn would purchase the GPUs of Verifier Capital LLC and pledge those GPUs as collateral to cover the loan.

MR. RATTINER: Based on this and based on the document in front of you, Exhibit Number 2, is there a difference in your view now of what actually occurred versus what you thought occurred, based on what was

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provided by the firm and downloaded by
the Staff?

And if we can even walk
through it. This is a document saying
that TDM Cable owes FAIN the 635 plus
the 300,000; and that it's been paid
back, but not by TDM Cable but rather
First Line Trust Junior 07 and Verifier
Trust.

THE WITNESS: Correct.

MR. RATTINER: Were you
unaware of those transactions?

THE WITNESS: Was I unaware of
those transactions in 2007? Or am I
familiar with those transactions as I
sit here today?

MR. RATTINER: Let's take each
one separately.

THE WITNESS: I am sure I was
aware of them in 2007. And I am not
conversant with them as I sit here
today.

MR. NEWMAN: Your memory has
not been refreshed by what the Staff has

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shown you?

THE WITNESS: That is correct.

MR. RATTINER: What would be the reasoning for such a transaction to switch the liability from one entity to another?

THE WITNESS: I can't tell you that. I don't know.

MR. RATTINER: Is there a typical conversation that would go around saying, "Okay, FAIN needs money and these entities have money"?

THE WITNESS: No. That doesn't seem logical. I am going to have to discuss this with Shea and Cooper to see what the answer is. I don't know off the top of my head.

MR. RATTINER: If we were to ask Mr. Shea and Mr. Cooper during their testimonies, would they refer back to you and say you authorized this?

MR. FRANCESKI: Objection.

THE WITNESS: I am sure they would. I am not disputing that.

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MR. RATTINER: What is the current status of First Line Trust Junior 07?

THE WITNESS: First Line is a company that I testified to earlier today that's in bankruptcy. We are --

MR. RATTINER: That's fine. You don't need to restate that part. In terms of the trust itself, what is the current status of the trust?

THE WITNESS: The current status of the trust is that it is -- it has -- it stopped making interest payments in August '09, and those interest payments are accruing. And we are attempting to do a rescue financing by buying out the corpus of the bankrupt estate at a value that we think will give substantial value over the rescue capital. And that that substantial value will be conveyed to the First Line, Senior and Junior participants in the trusts.

MR. RATTINER: And same

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TIMOTHY MCGINN

question for Verifier Trust.

THE WITNESS: Verifier Trust
is current, has always been current.

Can I further describe current
is 60 days. You know, 60 days is
typical in the industry.

MR. NEWMAN: I think what we
are going to do, we are going to go off
the record, take a few minute break,
and -- for the purpose of figuring out
the schedule for tomorrow. We have more
stuff to go through, but we want to
conclude today around 5:00. So I think
at this point we are going to go off the
record and figure out what the schedule
is going to be, and we will let you
know. But we don't anticipate any more
questioning tonight. We will let you
know in a few minutes.

(Whereupon a recess is taken.)

(Whereupon OTR Adjourned for
the day at 4:45 p.m.)