IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, ***Plaintiff,*** ***v.*** **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, 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.***	§	**10 Civ. 457 (GLS/DRH)**

NON-PARTIES FINRA AND FINRA EMPLOYEES'
NOTICE OF MOTION TO QUASH SUBPOENAS

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil Procedure 45(c), upon FINRA and the FINRA Employees' Memorandum of Law in Support of Motion to Quash Subpoenas, the Affidavit and Supplemental Affidavit of James R. Shorris, and any additional

evidence or argument that the Court decides to consider at the hearing thereon, the Financial Regulatory Authority, Inc. ("FINRA") and Gary Jaggs, Robert J. McCarthy, Michael Newman, and Randy Pearlman (the "FINRA Employees") hereby move this Court at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on _____ __, ____ at __:_.m. before Judge David R. Homer, for an order granting FINRA and the FINRA Employees' Motion to Quash Subpoenas.

Dated: November 17, 2010

Respectfully submitted,

By: */s/ Richard B. Harper*

Richard B. Harper
(NDNY application to be submitted)
Baker Botts L.L.P.
30 Rockefeller Plaza, 45th Floor
New York, NY 10112
Phone: 212.408.2500
Fax: 212.408.2501
richard.harper@bakerbotts.com

Terri L. Reicher
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1516
Phone: 202.728.8967
Fax: 202.728.8894
terri.reicher@finra.org

ATTORNEYS FOR NON-PARTIES
FINRA AND FINRA EMPLOYEES

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NON-PARTIES FINRA AND FINRA EMPLOYEES' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO QUASH SUBPOENAS

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PRELIMINARY STATEMENT

Financial Industry Regulatory Authority, Inc. ("FINRA") and Gary Jaggs, Robert J. McCarthy, Michael Newman, and Randy Pearlman (the "FINRA Employees") file this motion to quash to prevent Defendants David L. Smith ("Smith") and Timothy L. McGinn ("McGinn) from completing an end run around the discovery rules in an ongoing FINRA disciplinary proceeding (the "FINRA Action") to obtain documents and depositions in this SEC litigation (the "SEC Proceeding") that are protected by the investigatory privilege. On September 14, 2010 and October 4, 2010, Defendants issued five identical subpoenas to the FINRA Employees and FINRA's custodian of records, non-parties to this action (collectively, the "Subpoenas"). Defendants' Subpoenas seek confidential and privileged information at the heart of any FINRA investigation, including (1) 23 categories of documents relating to FINRA's investigation of McGinn, Smith, and their firm McGinn, Smith & Co., Inc. ("McGinn Smith" or the "Firm"), ranging from FINRA internal memoranda and legal analyses to communications between FINRA and the Securities and Exchange Commission (the "SEC") and (2) depositions of the FINRA lead attorney in the ongoing FINRA administrative proceeding, the FINRA examiners who have worked with him, and FINRA's custodian of records. Defendants seek these privileged documents despite an ongoing enforcement action in which FINRA has already produced over 31,000 pages of documents to Defendants.

In early November 2010, Judge Cedarbaum, Part I Judge in the Southern District of New York district court, heard FINRA and the FINRA Employees' motion to quash the Subpoenas and directed the parties to seek the opinion of this Court.

This Court should grant the motion to quash production of the documents and depositions for two independent reasons. First, Defendants have failed to exhaust their administrative remedies by neglecting to pursue the documents in the ongoing FINRA Action that is

specifically governed by rules and standards for obtaining privileged documents. Indeed, McGinn and Smith are now seeking similar types of information from the SEC.

Second, the documents and depositions sought are protected by the investigatory privilege. A straightforward application of that privilege protects the interview notes, internal FINRA communications and analyses, and FINRA's communications with the SEC sought here by the Defendants. McGinn and Smith cannot sidestep application of the investigatory privilege by now claiming they are entitled to the documents in order to pursue a claimed Fifth Amendment violation. In the face of the attached FINRA affidavits describing the independence of the respective FINRA and SEC investigations, Defendants cannot put forward any evidence entitling them to additional discovery. Accordingly, because Defendants have failed to exhaust their administrative remedies and because the documents and depositions sought are protected by the investigatory privilege, the motion to quash should be granted.

BACKGROUND FACTS

I. FINRA's Federal Securities Regulatory Function

FINRA is a private not-for-profit Delaware corporation and a self-regulatory organization ("SRO") registered with the SEC as a national securities association pursuant to the Maloney Act of 1938, § 78o-3, *et seq*., amending the Exchange Act, 15 U.S.C. § 78a, *et seq*. *See Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 201 (2d Cir. 1999). As an SRO, FINRA is part of the Exchange Act's highly interrelated and comprehensive mechanism for regulating the securities markets. *Id.* In this regard, FINRA acts under the SEC. *See McLaughlin, Piven, Vogel, Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 733 F. Supp. 694, 696-97 (S.D.N.Y. 1990).

FINRA is charged with "conducting investigations and commencing disciplinary proceedings against FINRA member firms and their associated member representatives relating to compliance with the federal securities laws and regulations." *D.L. Cromwell Inv., Inc. v.*

NASD Regulation, Inc., 279 F.3d 155, 157 (2d Cir. 2002). As a registered SRO, FINRA has authority to investigate allegations that a member firm is violating the Exchange Act, SEC regulations, FINRA rules, or Municipal Securities Rulemaking Board ("MSRB") rules.[1] *See McLaughlin*, 733 F. Supp. at 697.

If FINRA becomes aware of evidence of potential violations of federal securities laws or other misfeasance by FINRA's members or their associated persons, then FINRA typically will conduct an investigation. Shorris Aff. ¶ 4. FINRA's investigative procedures are described in Sections 8000-8330 of FINRA's Manual. *Id.* ¶ 7. The Rules set forth in the Manual have been reviewed and approved by the SEC. *Id.* As part of its investigation, FINRA gathers documents, takes testimony, and performs other tasks to assess whether a member firm has violated statutes, regulations, or rules over which FINRA has jurisdiction. *Id.* Investigations are typically conducted by examiners in one of FINRA's District offices who interview witnesses, gather and review documents, and work with FINRA's Department of Enforcement ("Enforcement") counsel to analyze whether there is evidence of potential wrongdoing. *Id.*

For each investigation, FINRA maintains a file that typically contains internal memoranda, analyses, and notes regarding the investigation and interpretations of FINRA's and the SEC's rules and regulations. Shorris Aff. ¶ 5. It also may contain internal communications with and among FINRA's Enforcement attorneys and investigative staff. *Id.* The file may also include transcripts of "on the record" interviews, investigative staff and attorney notes, and documents collected from FINRA members and associated persons. *Id.* Together, these documents reflect FINRA's examiners' strategy and the leads pursued in investigations. *Id.*

[1] The FINRA Code of Procedure, approved by the SEC (SEC Rel. N. 34-38908, 62 Fed. Reg. 43571 (Aug. 14, 1997)), governs FINRA disciplinary proceedings against securities firms and their representatives. *See* http://finra.complinet.com/finra. The Exchange Act requires every broker-dealer in the country to be a member of FINRA or one of the national securities exchanges. 15 U.S.C. §§ 78o-3(1)(1), (b)(1), (b)(8).

FINRA goes to great lengths to protect the confidentiality of the materials contained in its investigation files, allowing, only persons directly related to the investigation and the Enforcement action and their supervisors access to the information contained in the investigation files. *Id.* at 6. If FINRA were forced to disclose the contents of its investigation files to non-parties in civil litigation, before a disciplinary hearing on the merits of the investigation, FINRA would be hindered from presenting its strongest possible case. *Id.*

Under FINRA's Rules, the target of a FINRA investigation is afforded certain procedural protections. Shorris Aff. ¶ 7. For example, under FINRA Code of Procedure section 9251, FINRA is required to produce certain investigation files related to the charges but not privileged documents and documents that constitute attorney work product. *Id.* ¶ 8.

When FINRA determines that its members or associated persons have violated FINRA rules, MSRB rules, or the federal securities laws, FINRA has the authority to initiate a disciplinary action adjudicated before a FINRA hearing panel. *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 805-806 (D.C. Cir. 2005).

II. FINRA Investigation of Defendants and Enforcement Proceeding

A. FINRA Investigation of McGinn Smith

In 2008, FINRA commenced a financial/operational, sales practice, and municipal examination of Defendants and their Firm, which first revealed concerns regarding income note offerings, and which resulted in a FINRA investigation that ultimately led to the filing of a complaint in early 2010. By April 2009, FINRA sought the testimony of McGinn and Smith as part of FINRA's routine examination. Russo Decl. ¶¶ 7-8, Exhibits F-G.[2]

[2] As discussed below, on November 15, 2010, Defendants filed a motion to compel the SEC to answer interrogatories and a memorandum and Declaration of Martin P. Russo ("Russo Declaration") in support. Dkt. No. 189. As a convenience to the Court, this Memorandum refers the Court to certain portions of the Russo Declaration and its attached exhibits.

By July 2, 2009, FINRA issued an examination report, citing 17 exceptions, including failure to make an appropriate suitability determination in at least 11 private placement transactions and failure to establish written procedures regarding structured product sales. Russo Decl. ¶ 10, Exhibit I. On September 1, 2009, FINRA issued to McGinn Smith an Examination Disposition Letter stating that it had referred the McGinn Smith matter to FINRA's Enforcement division for review and disposition. *Id.* ¶ 11, Exhibit J. Although the Examination Disposition Letter stated that FINRA only referred to Enforcement the issue relating to McGinn Smith's maintenance of electronic customer correspondence and internal communications, the letter also discussed future compliance conferences with respect to five other issues and explicitly stated that it did not address any other matters being reviewed by other FINRA departments. *Id.*

In early 2010, FINRA took on-the-record interviews of McGinn Smith-associated persons, including McGinn and Smith. Russo Decl. ¶¶ 22-26, 28, Exhibits T-X, Z. The information gathered included testimony regarding witnesses' personal gains at investors' expense and the McGinn Smith-affiliated trusts utilized in the operation of an alleged fraudulent investment scheme. *See, e.g.*, *id.* at Exhibit Z. In fact, on February 12, 2010, FINRA also issued a request for documents seeking documents related to the trusts and personal finances. *Id.* ¶ 27, Exhibit Y.

B. FINRA Enforcement Action

On April 5, 2010, Enforcement issued a formal complaint against Defendants and their Firm, alleging six causes of action. Shorris Aff. ¶ 9, Exhibit 2. The causes of action range from an allegation that the Firm and Smith failed to disclose material facts in connection with the four income note offerings to an allegation that the Firm, acting through Smith, sold unregistered securities, and also allege that Smith "misused the majority of offering proceeds for his own needs." *Id.* Exhibit 2, ¶ 25. In so doing, the six causes of action relate directly to questions that

FINRA asked during its inquiry and examination of Defendants, including allegations related to Defendants' personal gains and the trusts. *Id.*

On July 7, 2010, FINRA Hearing Officer Andrew H. Perkins held an initial pre-hearing conference in the proceeding. Officer Perkins issued a scheduling order requiring the defendants to file all discovery-related motions (including motions pursuant to FINRA Code of Procedure section 9251(c) to compel FINRA to produce documents withheld by FINRA) by August 23, 2010. No motions were filed, and on August 19, 2010, FINRA provided the defendants thousands of documents from FINRA's McGinn Smith investigative file. A hearing on the merits in the FINRA Action is scheduled for May 2011 in Albany, New York.

C. FINRA's Document Production to Defendants

FINRA's document production in the FINRA Action consisted of over 31,250 pages, occupying 18 boxes, and also included multiple CDs containing thousands of additional pages of electronic documents. Among the documents that FINRA produced were:

- documents FINRA obtained from McGinn Smith, including emails, bank records, ledger and bookkeeping records, and investor lists;
- certain documents provided to the SEC by FINRA, including letters to the SEC;
- on-the-record transcripts and tape recordings of transcripts from the FINRA Action and related investigations; and
- communications between FINRA and McGinn Smith's investors.

FINRA did not produce a limited number of documents protected by the investigatory, attorney-client, and work product privileges, as well as the FINRA discovery rules, including:

- notes from FINRA examiner interviews of investors taken in connection with the FINRA Action;
- internal memoranda regarding the FINRA Action;
- internal communications with and among FINRA's Enforcement attorneys and investigative staff in connection with the FINRA Action;
- internal examiner-prepared schedules in connection with the FINRA Action;

- certain communications between FINRA staff and the SEC, including communications containing privileged attachments; and
- a memorandum to the SEC regarding the FINRA Action.

III. SEC v. McGinn, Smith & Co., Inc.

A. Overview of SEC Complaint in the Context of the FINRA Enforcement Action

As FINRA discovered potentially serious securities law violations committed by Defendants and their Firm, FINRA referred the matter to the SEC pursuant to its general authority to refer investigations. Shorris Aff. ¶ 11. On April 20, 2010, two weeks after the FINRA Action was filed, the SEC filed a complaint against Defendants, their Firm, and six other corporations and investment companies related to the Firm. *Id.* ¶ 12, Exhibit 3. The SEC Proceeding includes many of the same facts that underlie the FINRA Action, but the SEC addresses activities after November 2006 and alleges additional securities laws violations beyond those set forth in the FINRA Action. The SEC accuses Defendants and their related entities of mismanaging $136 million raised from clients since 2003 through unregistered offerings.

In order to halt alleged ongoing fraud, maintain the status quo, and preserve any assets for injured investors, the SEC also sought emergency relief, including an asset freeze, appointment of a receiver, expedited recovery, and verified accountings. The Court imposed the asset freeze, TRO, and preliminary injunction, and a trial in the SEC Proceeding will begin after September 15, 2011.

The FINRA Action was entirely separate and independent from the SEC Proceeding. *See* Shorris Aff. at ¶ 13. At no time did FINRA take direction from the SEC concerning FINRA's investigation of Defendants and their Firm, nor did FINRA coordinate its on-the-record interviews of defendants and others with the SEC. *Id.* ¶ 13. FINRA and the SEC did not exchange outlines, questions, or documents with respect to testimony taken in either the FINRA

Action or the SEC Proceeding. *Id.* Pursuant to its authority to refer investigations, FINRA provided copies of transcripts of relevant testimony after such testimony had been taken in the FINRA Action. *Id.* Additionally, the SEC's requests to FINRA for information from FINRA's files were not coerced, suggested, or encouraged—they were simply requests by the SEC for information that FINRA had collected for FINRA's own investigation. Shorris Supp. Aff. at ¶ 4. No SEC or other government employee asked FINRA employees to pursue any particular line of inquiry in the FINRA Action, attended or participated in any of FINRA's on-the-record interviews, or suggested any sort of timing or schedule for FINRA's on-the-record interviews or that FINRA coordinate its interview schedule with that of the SEC. *Id.*

B. Defendants' Subpoenas and the Original Motion to Quash

On or about September 14, 2010, Defendants issued the first four of the Subpoenas, commanding the lead prosecuting attorney, the supervising examiner, and two examiners in the FINRA Action to produce documents beginning September 28, 2010 and appear for depositions beginning October 5, 2010. Shorris Aff. ¶ 14, Exhibit 4. On October 4, 2010, Defendants subpoenaed FINRA's custodian of records to cure a deficiency raised by the FINRA Employees in their initial motion to quash about the propriety of seeking FINRA's records from FINRA's employees. The fifth subpoena commanded the custodian of records to produce documents by October 21, 2010 and appear for a deposition on October 25, 2010.

The Subpoenas include some 23 separate requests targeting privileged materials pertaining to FINRA's investigation of Defendants:

- documents exchanged between, and notes concerning communications between, FINRA or FINRA employees and investors relating to McGinn Smith;
- recordings or transcripts of communications between FINRA and investors, or provided by investors to FINRA, relating to McGinn Smith;
- documents and notes concerning communications between FINRA employees and the SEC relating to McGinn Smith;

- documents concerning communications between FINRA employees and the DOJ concerning Joseph Bruno or McGinn Smith;
- documents and communications concerning Thomas E. Livingston;
- affidavits and sworn statements relating to McGinn Smith;
- internal FINRA reports relating to McGinn Smith or reflecting communications among FINRA employees relating to McGinn Smith or the referral of FINRA's investigation of McGinn Smith;
- records regarding communications with investors and biographical information regarding investors;
- documents identifying FINRA employees who engaged in communications with the SEC relating to McGinn Smith or who were involved in the investigation of McGinn Smith; and
- documents withheld from production in the FINRA Action pursuant to investigatory privilege.

The vast majority of the requested documents have already been produced to Defendants by FINRA in the FINRA Action. For example, as discussed above, FINRA produced to Defendants on-the-record transcripts and tape recordings, as well as documents and correspondence between FINRA and the SEC concerning the investigation of McGinn Smith. The limited number of documents that FINRA did not produce are protected by the investigatory privilege, and many are also protected by the attorney-client and work product privileges, though the investigatory privilege covers all of the protected documents.

On October 1, 2010, FINRA and the FINRA Employees filed a motion to quash the Subpoenas in the Southern District of New York district court.

C. FINRA and FINRA Employees' Original Motion to Quash: Southern District of New York Hearing

On November 2, 2010, after briefing by the parties, Judge Miriam Goldman Cedarbaum, United States District Part I Judge for the Southern District of New York, held a hearing on FINRA and the FINRA Employees' motion to quash the subpoenas. Judge Cedarbaum "directed [the parties] to seek [the] opinion of Judge in Northern District of New York" and stayed the

proceeding pending a decision by this Court.[3]

The parties have agreed to file new memoranda (starting with this) in an attempt to refine the issues before this Court. Although FINRA and the FINRA Employees file this new Memorandum, they submit in support the Affidavit of James S. Shorris (the "Shorris Affidavit") and the Supplemental Affidavit of James S. Shorris (the "Supplemental Shorris Affidavit") that they attached to their original opening and reply briefs, respectively, in the Southern District of New York matter.[4] Concurrently with or shortly after filing this Memorandum, the parties have filed or will file with this Court a briefing schedule stipulated to by the parties.

D. Recent Events in SEC v. McGinn, Smith & Co., Inc.

Just two weeks ago, on November 3, 2010, the SEC filed a motion for an order to show cause why Defendants should not be held in contempt for violating this Court's preliminary injunction order. Dkt. No. 168-1. The SEC's supporting memorandum, in which it argues that Defendants continue to issue unregistered securities, reflects that the SEC continues to investigate Defendants and their Firm as new facts develop.

On November 15, 2010, Defendants filed a motion to compel the SEC to answer interrogatories, seeking to compel the SEC to identify each FINRA employee with whom the SEC has had communications concerning McGinn Smith. Dkt No. 189.

ARGUMENT AND AUTHORITIES

I. Defendants Have Failed to Exhaust Their Administrative Remedies

The Subpoenas should initially be quashed because, prior to their issuance, Defendants failed to exhaust their administrative remedies with respect to their request for FINRA's investigation files. In the FINRA Action, Defendants had the opportunity to file a discovery

[3] A true and correct copy of Judge Cedarbaum's November 2, 2010 order is attached hereto as **Exhibit 1**.
[4] True and correct copies of the Shorris Affidavit and the Supplemental Shorris Affidavit, with supporting exhibits, are attached to this Memorandum as **Exhibits 2** and **3**, respectively.

motion under FINRA Code of Procedure 9251(c) pursuing the withheld documents. Defendants neglected to follow such procedure. Defendants were also subject to a scheduling order in the FINRA Action that set an August 23, 2010 deadline to file motions relating to Enforcement's production of documents pursuant to FINRA Rule 9251, but Defendants also failed to comply with that order.

Before seeking relief from the Court, Defendants are required to exhaust their administrative remedies through FINRA, the SEC, and the appellate courts. *See McLaughlin,* 733 F. Supp. at 698 (administrative remedies doctrine applies to NASD, a FINRA predecessor). The Second Circuit has recognized only one exception to the exhaustion requirement: when an agency action "is plainly beyond [the agency's] jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order," in which case recourse to the courts is available before administrative remedies have been exhausted. *Id.* (citing *Touche Ross & Co. v. SEC*, 609 F.2d 570, 576 (2d Cir. 1979)). The circumstances of this case do not lie within that exception.

II. The Investigatory Privilege Defined and Applicable Legal Standards

Additionally, the Court must quash or modify a subpoena when the subpoena "requires disclosure of privileged or other protected matter and no exception or waiver applies." Fed. R. Civ. P. 45(c)(3)(A)(iii). Federal courts recognize an investigatory file privilege, which is a derivation of the law enforcement privilege. *In re Dep't of Investigations of City of New York*, 856 F.2d 481 (2d Cir. 1988); *Otterson v. Nat'l R.R. Passenger Corp.*, 228 F.R.D. 205, 207 (S.D.N.Y. 2005); *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006) (citing *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991)); *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). While this privilege is typically limited to protecting civil and criminal law enforcement investigation files from discovery, *see In re U.S. Dep't of Homeland Sec.*, 459 F.3d

at 569, "a similar policy has been recognized with respect to investigative materials generated by industry regulatory organizations." *Apex Oil Co. v. DiMauro*, 110 F.R.D. 490, 496-97 (S.D.N.Y. 1985).

Courts have specifically applied the investigatory privilege to FINRA because there are strong policy interests in preserving the ability of SROs to function effectively and in encouraging frank cooperation and discussions in internal investigations. *See, e.g., DGM Invs., Inc. v. N.Y. Futures Exch., Inc.*, 224 F.R.D. 133, 140 (S.D.N.Y. 2004). For example, in *Ross v. Bolton*, 106 F.R.D. 22, 23 (S.D.N.Y. 1985), the defendants sought all NASD (a FINRA predecessor) documents related to the NASD's investigation into an entity's alleged illegal trading of securities, including portions of unsworn depositions NASD had gathered during its investigation. The court acknowledged that NASD was not a government body; however, it found that "[t]his does not preclude the argument that the interests asserted by [NASD] in encouraging witness cooperation and maintaining the integrity of its investigative techniques and files are similar to those of a governmental regulatory agency." *Id.* The court went on to observe that "[t]here is a strong public interest in maintaining the integrity of effective industry self-regulation. This interest would clearly be undermined by making [NASD] files fair game for any of the thousands of private securities fraud litigants across the country who wish to shortcut their own discovery efforts and instead to reap the benefits of [NASD's] ongoing, statutorily governed work." *Id.* (citing 15 U.S.C. §§ 78o-3, 78s).

The *Ross* court balanced this strong public interest against the parties' need to obtain information relevant to their lawsuit. It classified such information into two categories: (1) factual or statistical data and (2) analyses or opinions drawn from such material. While NASD was required to turn over factual data in the form of monthly blotters and confirmation slips, it

did not have to turn over staff analyses of this and other data. The court further held that the unsworn deposition transcripts "constitute[d] opinion and analysis work because the witnesses deposed as well as the questions asked reveal[ed] the nature and direction of [NASD's] investigation." *Id.* at 24. The court also found NASD's analogy to the work product privilege to be persuasive and further noted that the petitioner's interest in the depositions was not so central to its case as to overcome the strong interest held by both NASD and the public in keeping them confidential absent a showing of extraordinary need. *Id.*

Other district courts have consistently applied the *Ross* analysis when evaluating requests for SRO investigatory files. *See DGM Invs., Inc. v. N.Y. Futures Exch., Inc.*, 224 F.R.D. at 138-39; *In re Adler, Coleman, Clearing Corp.*, No. 95-08203, 1999 WL 1747410, at *3 (S.D.N.Y. Dec. 8, 1999).[5] In *Adler*, the petitioner sought to depose the head of an NASD department that conducted an investigation in which the petitioner was eventually charged. *Adler*, 1999 WL 1747410, at *5. Although the petitioner assured NASD that the questions would be solely factual in nature, NASD refused to produce the employee, and the district court denied the petitioner's motion to compel. *Id.* "Premature disclosure of factual information to the target of a pending NASD investigation could impair the NASD's ability to investigate its members, thereby defeating the important 'public interest in maintaining the integrity of effective industry self-regulations'" and that the risk run by "prematurely disclosing the strategy driving an ongoing investigation" was significant. *Id.* (citing *Ross*, 106 F.R.D. at 23). The court noted that although NASD was not a party to the proceeding, it was potentially adverse to the petitioner in any disciplinary action that might arise as a consequence of its investigation. *Id.*

[5] A true and complete copy of *In re Adler, Coleman, Clearing Corp.*, No. 95-08203, 1999 WL 1747410 (S.D.N.Y. Dec. 8, 1999) is attached hereto as **Exhibit 4**.

The investigatory privilege is a qualified privilege with a shifting burden. FINRA, as the party invoking the privilege, bears the initial burden of establishing its applicability. *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003). Courts have consistently held that the initial burden imposed on FINRA is not significant and is met where FINRA identifies the areas of documents it seeks to protect. *DGM Invs., Inc.,* 224 F.R.D. at 140 (where an SRO asserts the investigatory privilege, the standards applicable to governmental entities "appear to have been applied less rigorously, if at all"); *Ross*, 106 F.R.D. at 24 (reaching the merits and balancing the competing interests without evaluating the sufficiency of NASD's claim of privilege); *In re Adler, Coleman, Clearing Corp.*, 1999 WL 1747410, at *3 (reciting established prerequisites but proceeding to a determination without explicitly considering whether the requirements had been met). The burden then shifts to Defendants, as the parties opposing application of the privilege, and such burden is significant and requires Defendants to demonstrate a compelling reason why the investigatory privilege should not apply. *See DGM Invs., Inc.*, 224 F.R.D. at 140 (showing of application of investigatory privilege may only be overcome by an adequate showing of a litigant's need for such information) (citing *Apex Oil Co. v. DiMauro*, 110 F.R.D. at 497-98 (same)).

III. The Investigatory Privilege Applies to Protect Production of the Documents Defendants Seek Here

A. FINRA Has Met its Initial Burden of Showing that the Investigatory Privilege Applies to the Requested Documents

FINRA has met its initial burden of showing that the investigatory privilege applies to the requested documents. In *Adler*, the Southern District of New York district court outlined three prerequisites to the assertion of the privilege by a governmental entity: (1) the head of the department having control over the information requested must assert the privilege; (2) the official in question must do so based on actual personal consideration; and (3) he or she must

specify the information purportedly covered by the privilege, and accompany the request with an explanation as to why such information falls within the scope of the privilege. *Adler*, 1999 WL 1747410 at *5. In *DGM Investments*, the Southern District of New York district court pointed out that these three prerequisites are actually limited to governmental entities, such as the SEC, not non-governmental entities like NASD or FINRA. 224 F.R.D. at 140. "Where . . . a non-governmental self-regulatory entity has asserted the investigatory privilege on the basis of the public interest in preserving the ability of self-regulatory bodies to function effectively, these requirements appear to have been applied less rigorously, if at all." *Id.* (citing *In re NASD*, 1996 WL 406826, at *2 (E.D. La. July 18, 1996)[6] and *Ross*, 106 F.R.D. at 24)). The court noted that while *Adler* had listed these three prerequisites, it had not "explicitly considered whether the requirements had been met." *Id.* Instead, the court should balance the public's strong interest in the confidentiality of FINRA's files against Defendants' need for the files. *Id.*

1. FINRA Properly Asserts the Investigatory Privilege

Notwithstanding the relaxed requirements applied to non-governmental entities, the Shorris Affidavit meets each of the requirements set forth above. First, Mr. Shorris, as Executive Vice President and Acting Director of Enforcement of FINRA, is head of the department having control over the requested documents. Shorris Aff. at ¶ 1. Second, Mr. Shorris asserts the investigatory privilege based on his actual personal consideration of, and familiarity with, the FINRA Action. *Id.* ¶¶ 9, 11, 15 (discussing FINRA's investigation of, and procedural developments in, FINRA's case against Defendants and their Firm), 14 ("I have reviewed and considered the Subpoenas.").

[6] A true and complete copy of *In re NASD*, 1996 WL 406826 (E.D. La. July 18, 1996) is attached hereto as **Exhibit 5**.

Third, Mr. Shorris specifies in great detail both the documents covered by the privilege and why such documents are protected. Shorris Aff. at ¶¶ 16 ("FINRA withheld from production notes from interviews of investors taken in connection with the FINRA Action, internal memoranda regarding the FINRA Action, internal communications with and among FINRA's Enforcement attorneys and investigative staff in connection with the FINRA Action, internal examiner-prepared schedules in connection with the FINRA Action, certain communications between FINRA staff and the SEC, including communications containing privileged attachments, and a memorandum to the SEC regarding the FINRA Action."), 17 ("Disclosure of the privileged withheld information, which is essential to FINRA's case against Defendants, would reveal the nature and direction of FINRA's case to Defendants. It would also inevitably impair FINRA's ability to present the strongest possible case at the merits hearing next May."), 18-21 (describing negative precedential effects of disclosure). Mr. Shorris' explanation, in no less than five detailed paragraphs, as to why the requested documents are covered by the investigatory privilege is the very "deliberate and precise invocation of the claim of qualified privilege" required under applicable caselaw. *See id.* ¶¶ 17-21; *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336 (D.C. Cir. 1984).

Finally, Mr. Shorris supplemented his original affidavit to describe in additional detail his personal consideration of the issues and familiarity with the FINRA Action. Shorris Supp. Aff. at ¶ 2 ("[] I have supervised [FINRA's] examination and inquiry . . . and also the enforcement action . . ."; "I am personally familiar with the FINRA Action, which is separate and apart from the SEC Proceeding."). Accordingly, FINRA has properly invoked the investigatory privilege.

2. FINRA Should Not Be Required to Produce a Privilege Log Under the Circumstances

Defendants have previously taken the position that FINRA and the FINRA Employees are required to produce a privilege log listing the withheld documents. While a privilege log is sometimes relevant to the analysis of the attorney-client and work product privileges, FINRA and the FINRA Employees should not be required to produce a privilege log under the circumstances. As an initial matter, Defendants did not file a motion for withheld documents under FINRA Code of Procedure section 9251(c). In addition, FINRA believes that no privilege log is merited based on the generalized assertions previously put forward by Defendants. Finally, FINRA remains concerned that producing a log of the investigatory privileged documents (which are replete with FINRA's analyses, opinions, and strategy) would reveal the inner workings of a FINRA investigation. Shorris Supp. Aff. at ¶ 7.

Nonetheless, out of an abundance of caution, Defendants are prepared to present to the Court for in camera review (and will bring to the hearing on the motion) a privilege log and the underlying communications with the SEC and investors withheld pursuant to the investigatory privilege.[7]

B. Defendants Have Not Demonstrated a Compelling Need For the Requested Documents

Defendants cannot meet their burden to show a compelling need for each of the categories of documents that FINRA withheld pursuant to the investigatory privilege. The nearly two dozen categories of documents that Defendants seek fall into three general categories: (1) FINRA's witness interviews and communications with customers and investors; (2) FINRA's

[7] Beyond SEC and investor communications, Defendants' requests for effectively every document created by FINRA related to Defendants (Requests 8, 15, 16, 21, and 23) would likely require hundreds or thousands of entries on a log. FINRA would prepare such a log if directed by the Court, but such documents are clearly within the scope of the investigatory, and most likely work product and attorney-client, privileges such that no log should be required.

internal communications, analyses, memoranda, spreadsheets, and documents; and (3) FINRA's communications with the SEC.[8] Defendants cannot proffer any reason why the documents requested in the Subpoenas are so central to their cause as to overcome the strong interests held by FINRA and the public in keeping them confidential.

Witness interviews and communications with customers and investors. It is essential that FINRA's transcripts and communications with investors be protected from disclosure because witnesses privy to information in connection with alleged securities violations should be encouraged to talk frankly and openly to examiners. Shorris Supp. Aff. at ¶ 7. In addition, while FINRA does not have subpoena authority, its rules give FINRA broad authority to obtain documents and testimony from regulated firms and persons, enabling FINRA to obtain information of great regulatory value. Shorris Aff. ¶ 18. If this information is also available on a real-time basis to civil litigants, firms and associated persons are much more likely to oppose FINRA's investigative requests, thereby making FINRA's investigations longer and more difficult to conduct. *Id.* In addition, the confidential nature of FINRA investigations may encourage persons of whom FINRA is not aware, or over whom FINRA has no jurisdiction, to come forward with documents and information that they would not otherwise provide, and others are less likely to come forward, depriving FINRA of an important source of regulatory information. *Id.* ¶ 19. Unsurprisingly, courts have protected such documents under the investigatory privilege. *See, e.g.*, *Ross v. Bolton*, 106 F.R.D. 22 (protecting unsworn deposition transcripts and analyses and opinions drawn from such material).

FINRA's internal communications, analyses, memoranda, spreadsheets, and documents. FINRA's internal communications, analyses, memoranda, spreadsheets, and documents referring

[8] Defendants request an additional category of documents: communications with the Department of Justice (the "DOJ") (Requests 17 and 18). FINRA does not believe it has any written communications with the DOJ regarding the FINRA Action. Shorris Supp. Aff. at ¶ 6.

to Defendants reveal how FINRA conducts its investigations and forms its litigation strategy. Shorris Supp. Aff. at ¶ 7. Not only do such documents constitute work product, but they are the core "opinion and analysis work" contemplated by *Ross* and its progeny. *See Ross*, 106 F.R.D. at 23 (noting "strong public interest" in finding that investigatory privilege precluded discovery of NASD file materials constituting opinion and analysis); *DGM Invs., Inc.*, 224 F.R.D. at 143 (protecting NYBOT's internal compliance manuals from production under the investigatory privilege).

Communications with the SEC. Caselaw has also protected communications between SROs and the SEC from production because disclosure of such documents could compromise the ability of an SRO to carry outs its statutorily assigned function. *See, e.g., Securities and Exchange Commission v. Thrasher*, No. 92 Civ. 6987 (JFK), 1995 WL 46681 (S.D.N.Y. Feb. 7, 1995)[9] (protecting from disclosure communications between the Chicago Board Options Exchange and the SEC).

In the Southern District of New York briefing on this matter (and now in McGinn and Smith's motion to compel against the SEC in this proceeding), Defendants attempted to avoid application of the investigatory privilege by suggesting FINRA is a state actor that violated Defendants' Fifth Amendment rights. This suggestion is misplaced and does not provide grounds for obtaining additional discovery. Because FINRA is a private not-for-profit Delaware corporation and an SRO registered with the SEC, it is not a state actor. *D.L. Cromwell Inv., Inc.*. 279 F.3d at 162 (citing *Desiderio*, 191 F.3d at 206). Accordingly, in order to transform FINRA into a state actor, Defendants must establish that FINRA has a "close nexus" with the SEC so that the "seemingly private behavior may be fairly treated as that of the State itself." *Brentwood*

[9] A true and complete copy of *Securities and Exchange Commission v. Thrasher*, No. 92 Civ. 6987 (JFK), 1995 WL 46681 (S.D.N.Y. Feb. 7, 1995) is attached hereto as **Exhibit 6**.

Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 121 S.Ct. 924 (2001). The state actor analysis looks to factors such as whether the SEC "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private] choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777 (1982). However, as to seeking discovery to support such a claim, adjudicatory bodies such as the SEC, acting in their appellate capacity relating to administrative proceedings, have been careful to warn that defendants cannot "use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated [state action] theory" and "[n]ot every defense of state action deserves discovery and a hearing." *In re Application of Michael Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632, at 17 (Sept. 24, 2008).[10] Indeed, the SEC has found discovery requests to be satisfied either through allowing depositions or, as in this case, by FINRA providing an affidavit. *Id.*

As set forth above, the Shorris Affidavit and Supplemental Shorris Affidavit explain how FINRA was acting as an independent SRO in investigating Defendants. In the face of the Shorris affidavits, Defendants cannot articulate a basis for seeking additional discovery. First, Defendants have previously suggested that FINRA's discovery sought after FINRA's referral was for use by the SEC and that there is no explanation for the continued FINRA investigation. Defendants conveniently focus on FINRA's routine examination but not FINRA's continuing Enforcement investigation and how it directly resulted in the administrative complaint FINRA filed. Even a cursory review of the FINRA complaint in its administrative proceeding, filed before the SEC complaint, shows that FINRA's on-the-record testimony was focused on the very issues it had been investigating—such as the structure of the note offerings and Defendants' use

[10] A true and correct copy of *In re Application of Michael Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632, at 17 (Sept. 24, 2008) is attached hereto as **Exhibit 7**.

of the proceeds for improper purposes. *See, e.g.*, Shorris Aff. Exhibit 2. at ¶¶ 15-23, 31-32. Indeed, it is increasingly typical in FINRA investigations into fraud and mismanagement by a member firm for FINRA to turn its focus to associated persons and registered individuals, especially where those individuals themselves are suspected of shielding assets or personally profiting from alleged securities laws violations. Shorris Supp. Aff. at ¶ 5. As such, there is no inference to be drawn from the timing and substance of the FINRA investigation. Second, FINRA's forwarding of transcripts to the SEC and continuance of its investigation after referral to the SEC do not alter this fundamental point. It is not surprising that FINRA forwarded transcripts to the SEC because often times, the SEC requests access to FINRA's investigative files where a member firm is under investigation by both FINRA and the SEC. *See* Shorris Supp. Aff. at ¶ 3; *In re Application of Michael Sassano*, SEC Admin. Proc. File No. 3-12903, Release No. 58632, at 15. Additionally, as the SEC's recently-filed motion to show cause why defendants should not be held in contempt demonstrates, it is not unusual for an SEC (or FINRA) investigation to expand over time. Such expansion does not indicate collusion between the SEC and FINRA. Accordingly, Defendants cannot establish any specifics that entitle them to discovery regarding communications with the SEC.[11]

[11] Caselaw in analogous circumstances further supports FINRA's position. For example, in *U.S. v. Solomon*, 509 F.2d 863, 867-71 (2d Cir. 1975), the Second Circuit found no violation of a defendant's Fifth Amendment rights on facts substantially similar to those present here. In that case, the New York Stock Exchange (the "NYSE"), a securities self-regulatory organization (its regulatory arm was subsequently merged into FINRA), took testimony under the threat of suspension or expulsion, and then forwarded the deposition to the SEC. Id. The Second Circuit found no state action because the NYSE's efforts were "in pursuance of its own interests and obligations, not as an agent of the [government]." *Id*. at 869. Absent SEC involvement, the NYSE would have investigated anyway. *See also D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc*., 132 F. Supp. 2d 248, 253 (S.D.N.Y. 2001) (declining to find NASD state action based on "the chronology of certain events" in simultaneous government and NASD investigation; NASD has independent obligation to investigate the matters and is conducting its own investigation); *Marchiano v. Nat'l Ass'n of Secs. Dealers, Inc*., No. 00-0031 (HHK), 2000 WL 423810, at *2 (D.D.C. Feb. 28, 2000) (NASD rule did not violate Fifth Amendment rights where respondent was also under criminal indictment because there was no evidence that government forced or encouraged NASD Regulation to adopt NASD rule or prosecute respondent for its violation). Here, because FINRA had a preexisting and independent investigatory mission, FINRA's limited communication with the SEC did not constitute state action. A true and complete copy of *Marchiano* is attached hereto as **Exhibit 8**.

IV. The Investigatory Privilege Applies to Protect the Depositions Sought

Finally, Defendants cannot justify how they are entitled to depose FINRA's lead prosecuting attorney, the supervising examiner, two examiners, and the custodian of records in the FINRA Action under the circumstances. With respect to all of the subpoenaed FINRA employees, the investigatory privilege "applies to both investigatory files and testimony concerning their contents." *In re Adler,* 1999 WL 1747410, at *5 (declining to compel testimony of NASD employee, even where his testimony was sought only as to factual matters and not as to either his opinion or analysis) (citing *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) ("It would make little sense to protect the actual files from disclosure while forcing the government to testify about their contents.")).

With respect to the lead prosecuting attorney, in particular, a defendant who wishes to call a prosecutor as a witness must demonstrate a compelling and legitimate reason to do so. *U.S. v. Regan*, 103 F.3d 1072, 1083 (2d Cir. 1997) (citing *U.S. v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975)). In May 2010, this Court recognized the investigatory privilege and allowed a deposition of an SEC attorney to go forward in the SEC Proceeding on only very narrow grounds that are not present, and are easily distinguished, here.[12] The relief defendant (Smith's wife) had noticed for deposition an SEC attorney involved in the SEC's investigation of McGinn Smith, and the SEC attorney had previously submitted a declaration reporting her results of interviews with unnamed investors. *Id.* At a status conference, the SEC objected to the deposition on various grounds, including that her testimony was protected by the investigatory, attorney-client, and work product privileges. *Id.* This Court found that the claimed privileges had been waived to the extent reported in the attorney's declaration and that the deposition could

[12] *See* Dkt. No. 10.

go forward only with respect to the results of the investor interviews reported in the declaration. *Id*. at 2.

The case for quashing the subpoena of FINRA's lead prosecutor is even stronger here. No privilege has been waived by the FINRA Employees, and Defendants have not demonstrated any reason, much less a compelling and legitimate reason, why they should be permitted to depose Mr. Newman, especially when he and his team are preparing their case for hearing. Defendants have likewise not demonstrated any relevant reason why the other FINRA Employees and the FINRA custodian of records should have their depositions taken in the SEC Proceeding. Those employees have no relevant, discoverable, information that has not already been provided to Defendants, and no declarations of fact have been filed by any of the proposed deponents here.

CONCLUSION

The Federal Rules do not permit a party to use one proceeding as a back door to privileged and confidential investigatory materials unobtainable in another proceeding, especially where—as here—the party has not exhausted its administrative remedies. Accordingly, FINRA and the FINRA Employees respectfully request that the Court quash the Subpoenas.

Dated: November 17, 2010

Respectfully submitted,

By: */s/ Richard B. Harper*

Richard B. Harper
(NDNY application to be submitted)
Baker Botts L.L.P.
30 Rockefeller Plaza, 45th Floor
New York, NY 10112
Phone: 212.408.2500
Fax: 212.408.2501
richard.harper@bakerbotts.com

Terri L. Reicher
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1516
Phone: 202.728.8967
Fax: 202.728.8894
terri.reicher@finra.org

ATTORNEYS FOR NON-PARTIES
FINRA AND FINRA EMPLOYEES

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury pursuant to 28 U.S.C. Section 1746 that on the 17th day of November 2010, I caused the foregoing FINRA and the FINRA Employees' Notice of Motion to Quash Subpoenas, FINRA Employees' Memorandum of Law in Support of Motion to Quash Subpoenas, and supporting exhibits to be served by Federal Express on the following counsel:

Martin P. Russo
Allison B. Cohen
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, NY 10005

Attorneys for Defendants David L. Smith and Timothy M. McGinn

/s/ Richard B. Harper
Richard B. Harper

EXHIBIT 1

MEMO ENDORSED

DOC # 513

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE SUBPOENAS SERVED ON FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. EMPLOYEES	§ § § § § § § § § § §	**Miscellaneous Docket No.: M8-85** ***Securities and Exchange Commission v. McGinn, Smith & Co., et. al.*; U.S. District Court; Northern District of New York; Cause No. 10-457 (GLS/DRH); Judge Gary L. Sharpe, presiding; Magistrate Judge David R. Homer, referral**

OCT 01 2010

FILED
CLERK'S OFFICE
U.S. DIST. COURT
N.D. OF N.Y.
OCT 1 — PM 3:02

FINRA EMPLOYEES'
NOTICE OF MOTION TO QUASH SUBPOENAS

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil Procedure 45(c), upon the FINRA Employees' Memorandum of Law in Support of Motion to Quash Subpoenas, the Affidavit of James R. Shorris, and any additional evidence or argument that the Court decides to consider at the hearing thereon, Gary Jaggs, Robert J. McCarthy Michael Newman, and Randy Pearlman (the "FINRA Employees") hereby move this Court at the United States Courthouse, 500 Pearl Street, New York, on October 19, 2010, at 11:00 a.m. before a Part 1 Judge, for an order granting the FINRA Employees' Motion to Quash Subpoenas.

Parties directed to seek opinion of Judge in Northern District of New York. For oral opinion, see record of proceedings.
So ordered.
November 2, 2010

Miriam Goldman Cedarbaum,
United States District Judge
Part I

GL #- 416541

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE SUBPOENAS SERVED ON FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. EMPLOYEES	§ § § § § § § § § § § §	**Miscellaneous Docket No.: M8-85** ***Securities and Exchange Commission v. McGinn, Smith & Co., et. al.*; U.S. District Court; Northern District of New York; Cause No. 10-457 (GLS/DRH); Judge Gary L. Sharpe, presiding; Magistrate Judge David R. Homer, referral**

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AFFIDAVIT OF JAMES S. SHORRIS

1. My name is James S. Shorris. I am Executive Vice President and Acting Director of Enforcement ("Enforcement") of the Financial Industry Regulatory Authority, Inc. ("FINRA"). I am responsible for managing the entire Enforcement Department, supervising a staff of more than 260 legal and investigative professionals nationwide, developing and implementing enforcement policy, and overseeing investigations and litigation.

2. FINRA is a private not-for-profit Delaware corporation and a self-regulatory organization ("SRO") registered with the Securities and Exchange Commission ("SEC") under Section 15A of the Securities Exchange Act of 1934 (the "Exchange Act"). FINRA is part of the Exchange Act's highly interrelated and comprehensive mechanism for regulating the securities markets.

3. As a registered SRO, FINRA has authority to investigate allegations that a member firm is violating the Exchange Act, SEC regulations, FINRA rules, or Municipal Securities Rulemaking Board ("MSRB") rules. When FINRA determines that its members or associated persons have violated FINRA rules, MSRB rules, or the federal securities laws, FINRA has the authority to initiate disciplinary action. 15 U.S.C. § 78o-3(b)(7).

4. If FINRA becomes aware of evidence of potential violations of federal securities laws or other misfeasance by FINRA's members or their associated persons, then FINRA typically will initiate an investigation. As part of its investigation of its members, FINRA gathers documents, takes testimony, and performs other tasks to assess whether a member firm has violated statutes, regulations, or rules over which FINRA has jurisdiction. Investigations are typically conducted by examiners in one of FINRA's District offices. FINRA's examiners interview witnesses, gather and review documents, and work with Enforcement Department counsel to analyze whether there is evidence of potential wrongdoing.

5. FINRA maintains an investigation file for each investigation. FINRA's investigation files typically contain internal memoranda, analyses, and notes regarding the investigation and interpretations of FINRA's and the SEC's rules and regulations. FINRA's investigation files also may contain internal communications with and among FINRA's Enforcement attorneys and investigative staff. The documents in the file may also include transcripts of "on the record" interviews, investigative staff and attorney notes, and documents collected from FINRA members and associated persons. Together, these documents reflect FINRA's investigators' strategy and the leads pursued in investigations.

6. FINRA goes to great lengths to protect the confidentiality of the materials contained in its investigation files. Inside FINRA, only persons directly related to the investigation and the Enforcement action and their supervisors are allowed access to the information contained in the investigation files. If FINRA were forced to disclose the contents of its investigation files to non-parties in civil litigation, before a disciplinary hearing on the merits of the investigation, FINRA would be hindered from presenting its strongest possible case.

7. FINRA's investigative procedures are described in Sections 8000-8330 of FINRA's Manual. The Rules set forth in the Manual have been reviewed and approved by the SEC. Under the Rules, the target of a FINRA investigation is afforded certain procedural protections, including access to certain investigation files, to wit, transcripts of their testimony and documentary evidence they submitted to FINRA. In the event that formal charges are brought against the targets of open investigations, they are granted access to certain investigation files, including such documents as on the record interviews.

8. Pursuant to FINRA Code of Procedure section 9251(b), FINRA may withhold from production privileged documents and documents that constitute attorney work product. An accurate copy of the FINRA rules cited by FINRA in its memorandum is attached as **Exhibit 1**.

9. Beginning in January 2009 and continuing into early 2010, FINRA investigated the activities of David L. Smith ("Smith"), Timothy L. McGinn ("McGinn" and together with Smith, the "Defendants"), and their firm McGinn, Smith & Co., Inc. ("McGinn Smith" or the "Firm"). The results of that investigation are summarized in FINRA's complaint filed on or about April 5, 2010 (the "FINRA Action"). An accurate copy of the complaint is attached as **Exhibit 2**.

10. A hearing on the merits in the FINRA Action is scheduled for May 2011 in Albany, New York.

11. As FINRA discovered potentially serious securities law violations committed by the Defendants and their Firm, FINRA referred the matter to the SEC pursuant to its general authority to refer investigations.

12. I understand that on or about April 20, 2010, the Securities and Exchange Commission (the "SEC") filed a complaint against the Defendants, their Firm, and six other

corporations and investment companies related to the Firm (the "SEC Proceeding"). I have reviewed the SEC's complaint, and an accurate copy of the complaint that I obtained from the SEC's website is attached as **Exhibit 3**.

13. FINRA did not take direction from the SEC concerning FINRA's investigation of the Defendants and their Firm, nor did FINRA coordinate its on the record interviews of defendants and others with the SEC. FINRA and the SEC did not exchange outlines, questions, or documents with respect to testimony taken in either the FINRA Action or the SEC Proceeding. Pursuant to its authority to refer investigations, FINRA provided the SEC with copies of transcripts of relevant testimony after such testimony had been taken in the FINRA Action.

14. In the SEC Proceeding, the Defendants have subpoenaed for depositions four FINRA employees (the "FINRA Employees") working under my supervision and direction in the FINRA Action (the "Subpoenas"). The Defendants have also asked the FINRA Employees to disclose the contents of FINRA's files relating to its investigation of Defendants and their Firm (the "McGinn Smith Investigative File"). I have reviewed and considered the Subpoenas, and accurate copies of the Subpoenas are attached as **Exhibit 4**.

15. On August 19, 2010, FINRA produced all of the requested documents to the Defendants and their Firm as part of the FINRA Action, other than a limited number of documents withheld because they are protected by applicable privileges. For example, FINRA produced to the Defendants on the record transcripts and tape recordings, as well as certain documents and communications between FINRA and the SEC concerning the investigation of McGinn Smith.

16. FINRA withheld from production notes from interviews of investors taken in connection with the FINRA Action, internal memoranda regarding the FINRA Action, internal communications with and among FINRA's Enforcement attorneys and investigative staff in connection with the FINRA Action, internal examiner-prepared schedules in connection with the FINRA Action, certain communications between FINRA staff and the SEC, including communications containing privileged attachments, and a memorandum to the SEC regarding the FINRA Action. All of these withheld documents are protected from disclosure by FINRA Code of Procedure section 9251(b) and the investigative privilege, and many are also protected by the attorney-client and work product privileges.

17. Disclosure of the privileged withheld information, which is essential to FINRA's case against the Defendants, would reveal the nature and direction of FINRA's case to the Defendants. It would also inevitably impair FINRA's ability to present the strongest possible case at the merits hearing next May.

18. Forcing FINRA to disclose documents from its investigation could also have a negative precedential effect on other FINRA investigations. FINRA conducts thousands of investigations each year. While FINRA does not have subpoena authority, its rules give FINRA broad authority to obtain documents and testimony from regulated firms and persons, enabling FINRA to obtain information of great regulatory value. If this information is also available on a real-time basis to civil litigants, firms and associated persons are much more likely to oppose FINRA investigative requests, thereby making FINRA's investigations longer and more difficult to conduct.

19. In addition, the confidential nature of FINRA investigations may encourage persons of whom FINRA is not aware, or over whom FINRA has no jurisdiction, to come

forward with documents and information that they would not otherwise provide, and others are less likely to come forward, depriving FINRA of an important source of regulatory information.

20. Finally, responding to civil subpoenas for FINRA files would increase the burden on FINRA, which would be forced to divert investigative staff and other resources to respond to subpoenas.

21. The purpose of the Exchange Act's authorization of FINRA to conduct the McGinn Smith investigation and other investigations is to enforce the Federal securities laws and rules as well as FINRA and MSRB rules, thereby protecting investors. Forced disclosure of FINRA's privileged investigation files could prevent FINRA from presenting the strongest possible case at the hearings on the merits of FINRA's investigations. The impact of disclosure upon FINRA would far outweigh any value that the Defendants could gain from disclosure of this information.

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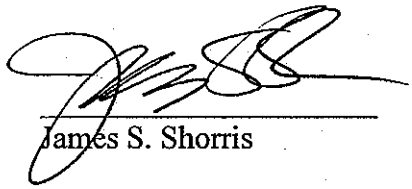
I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on: 9/30/10



James S. Shorris

EXHIBIT 1

Print

9251. Inspection and Copying of Documents in Possession of Staff

(a) Documents to be Available for Inspection and Copying

(1) Unless otherwise provided by this Rule, or by order of the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall make available for inspection and copying by any Respondent, Documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings. Such Documents include but are not limited to:

(A) requests for information issued pursuant to Rule 8210;

(B) every other written request directed to persons not employed by FINRA to provide Documents or to be interviewed;

(C) the Documents provided in response to any such requests described in (A) and (B) above;

(D) all transcripts and transcript exhibits; and

(E) all other Documents obtained from persons not employed by FINRA.

(2) The Department of Enforcement or the Department of Market Regulation shall promptly inform the Hearing Officer and each other Party if, after the issuance of a complaint, requests for information under Rule 8210 are issued under the same investigative file number under which the investigation leading to the institution of disciplinary proceedings was conducted. If Interested FINRA Staff receives Documents pursuant to a request for information under Rule 8210 after Documents have been made available to a Respondent for inspection and copying as set forth in paragraph (a), and if such Documents are material and relevant to the disciplinary proceeding in which such Respondent is a Party, the additional Documents shall be made available to the Respondent not later than 14 days after the Interested FINRA Staff receives such Documents. If a hearing on the merits is scheduled to begin, Interested FINRA Staff shall make the additional Documents available to the Respondent not less than ten days before the hearing. If Interested FINRA Staff receives such Documents ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, Interested FINRA Staff shall make the additional Documents available immediately to the Respondent.

(3) Nothing in paragraph (a)(1) shall limit the discretion of the Department of Enforcement or the Department of Market Regulation to make available any other Document or the authority of the Hearing Officer to order the production of any other Document.

(b) Documents That May Be Withheld

(1) The Department of Enforcement or the Department of Market Regulation may withhold a Document if:

(A) the Document is privileged or constitutes attorney work product;

(B) the Document is an examination or inspection report, an internal memorandum, or other note or writing prepared by a FINRA employee that shall not be offered in evidence;

(C) the Document would disclose (i) an examination, investigatory or enforcement technique or guideline of FINRA, a federal, state, or foreign regulatory authority, or a self-regulatory organization; (ii) the identity of a source, including a federal, state, or foreign regulatory authority or a self-regulatory organization that furnished information or was furnished information on a confidential basis regarding an investigation, an examination, an enforcement proceeding, or any other type of civil or criminal enforcement action; or (iii) an examination, an investigation, an enforcement proceeding, or any other type of civil or criminal enforcement action under consideration by, or initiated by, FINRA, a federal, state, or foreign regulatory authority, or a self-regulatory organization; or

(D) the Hearing Officer grants leave to withhold a Document or category of Documents as not relevant to the subject matter of the proceeding, or for other good cause shown.

(2) Nothing in paragraph (b)(1) authorizes the Department of Enforcement or the Department of Market Regulation to withhold a Document, or a part thereof, that contains material exculpatory evidence.

(c) Withheld Document List

The Hearing Officer may require the Department of Enforcement or the Department of Market Regulation to submit to the Hearing Officer a list of Documents withheld pursuant to paragraphs (b)(1)(A) through (D) or to submit to the Hearing Officer any Document withheld. Upon review, the Hearing Officer may order the Department of Enforcement or the Department of Market Regulation to make the list or any Document withheld available to the other Parties for inspection and copying. A motion to require the Department of Enforcement or the Department of Market Regulation to produce a list of Documents withheld pursuant to paragraph (b) shall be based upon some reason to believe that a Document is being withheld in violation of the Code.

(d) Timing of Inspection and Copying

The Hearing Officer shall determine the schedule of production of documents pursuant to this Rule. Unless otherwise ordered by the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall commence making Documents available to a Respondent for inspection and copying pursuant to this Rule not later than 21 days after service of the Respondent's answer or, if there are multiple Respondents, not later than 21 days after the last timely answer is filed. If a Respondent in a multi-Respondent case fails to answer, the Department of Enforcement or the Department of Market Regulation shall make Documents available to all other Respondents not later than the later of:

(1) 21 days after the filing date of the last timely answer, or

(2) the expiration of the second period provided for filing an answer as set forth in Rule 9215(f).

(e) Place and Time of Inspection and Copying

Documents subject to inspection and copying pursuant to this Rule shall be made available to the Respondent for inspection and copying at FINRA office where they are ordinarily maintained, or at such other FINRA office as the Hearing Officer, in his or her discretion, shall designate, or as the Parties otherwise agree. A Respondent shall be given access to the Documents at FINRA's offices during normal business hours. A Respondent shall not be given custody of the Documents or be permitted to remove the Documents from FINRA's offices.

(f) Copying Costs

A Respondent may obtain a photocopy of all Documents made available for inspection. A Respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made at the request of a Respondent shall be at a rate to be established by the FINRA or FINRA Regulation Board.

(g) Failure to Make Documents Available — Harmless Error

In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement or the Department of Market Regulation, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National Adjudicatory Council, shall determine whether the failure to make the document available was not harmless error, applying applicable FINRA, SEC, and federal judicial precedent.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-99-76 eff. Sept. 11, 2000.
Amended by SR-NASD-97-81 eff. Jan. 16, 1998.
Adopted by SR-NASD-97-28 eff. Aug. 7, 1997.

Selected Notices: 00-56, 08-57.

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Print

9252. Requests for Information

(a) Content and Timing of Requests

A Respondent who requests that FINRA invoke Rule 8210 to compel the production of Documents or testimony at the hearing shall do so in writing and serve copies on all Parties. Such request shall: be submitted to the Hearing Officer no later than 21 days before the scheduled hearing date; describe with specificity the Documents, the category or type of Documents, or the testimony sought; state why the Documents, the category or type of Documents, or the testimony are material; describe the requesting Party's previous efforts to obtain the Documents, the category or type of Documents, or the testimony through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents, or each proposed witness is subject to FINRA's jurisdiction.

(b) Standards for Issuance

A request that FINRA compel the production of Documents or testimony shall be granted only upon a showing that: the information sought is relevant, material, and non-cumulative; the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and each of the persons from whom the Documents and testimony are sought is subject to FINRA's jurisdiction. In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

(c) Limitations on Requests

If, after consideration of all the circumstances, the Hearing Officer determines that a request submitted pursuant to this Rule is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she shall deny the request, or grant it only upon such conditions as fairness requires. In making the foregoing determination, the Hearing Officer may inquire of the other Parties whether they shall stipulate to the facts sought to be proved by the Documents or testimony sought. If the Hearing Officer grants the request, the Hearing Officer shall order that requested Documents be produced to all Parties not less than ten days before the hearing, and order that witnesses whose testimony was requested appear and testify at the hearing. If the Hearing Officer grants the request ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, the Documents or testimony shall be produced immediately to all Parties.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-97-28 eff. Aug. 7, 1997.

Selected Notice: 08-57.

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EXHIBIT 2

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, COMPLAINANT, V. MCGINN, SMITH & CO., INC. (BD NO. 8453), DAVID L. SMITH (CRD NO. 427284), AND TIMOTHY M. MCGINN (CRD NO. 813935), RESPONDENTS.	DISCIPLINARY PROCEEDING NO. 20090179845

Note for Electronic Transmission of this Complaint: *The issuance of a disciplinary complaint represents the initiation of a formal proceeding by FINRA in which findings as to the allegations in the complaint have not been made and does not represent a decision as to any of the allegations contained in the complaint. Because this complaint is unadjudicated, interested persons may wish to contact the respondent before drawing any conclusions regarding the allegations in the complaint.*

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. From in or about September 2003 through in or about November 2006 (the Offering Period), McGinn, Smith & Co., Inc. (the Firm), acting through David L. Smith (Smith), the President and an owner of the Firm, conducted four fraudulent

unregistered securities offerings involving the sale of approximately $89 million in income notes. The notes were issued by four limited liability companies (hereafter Income Note LLCs) managed and controlled by Smith.

2. The income notes, which are securities, were not registered or eligible for an exemption from registration. In offering the notes, the Firm and Smith ostensibly relied upon the exemption provided by Rule 506 of the Securities Act of 1933 (Regulation D). That exemption, however, was not available because, among other things, the four income note offerings had, individually and collectively, in excess of 35 non-accredited investors.

3. Note investors were promised that their funds would be earmarked for a broad array of public and private investments. Instead, Smith, acting on behalf of the investment advisor for the Income Note LLCs, misused the majority of offering proceeds for his own needs and to benefit entities that he, Timothy M. McGinn (McGinn) and/or TL owned, controlled, and/or in which they maintained a financial interest (the Related Entities). Moreover, most of the Related Entities were illiquid and had little or no revenues, or were in poor financial condition, at the time they received the offering proceeds from the Income Note LLCs.

4. Smith misused approximately $51 million of investor funds, directing approximately $17 million to the Related Entities and approximately $34 million more to make loans to those companies. Smith and the Related Entities received a direct financial benefit from these transactions. For example, Smith received personal loans of approximately $590,000 from the Related Entities that were funded by investments made in the Income Note LLCs. Smith controlled, and had an ownership interest in,

the investment advisor for the Income Notes LLCs. The Firm, acting through Smith, failed to disclose the related party transactions and lending activity to the income note investors.

5. During the Offering Period, the Firm and Smith also misrepresented to investors that the Firm would only receive a two percent underwriting/commission fee from the income note offerings. In fact, the Firm received recurring annual commissions from the inception of the offerings, totaling approximately $7.5 million (approximately eight percent of the offering proceeds).

6. The Income Note LLCs defaulted on the income notes. In 2008, Smith sent two letters to the income note holders misrepresenting that the Firm and two of the Related Entities, McGinn, Smith Advisors, LLC, and McGinn, Smith Capital Holdings Corp. (the McGinn Smith Affiliates), would waive or forgo further fees and commissions due to the poor financial condition of the income note issuers. Contrary to those representations, however, the Firm and the McGinn Smith Affiliates subsequently took approximately $6.7 million in fees and commissions.

7. Throughout the Offering Period, the Firm, acting through Smith, also failed to establish and maintain a supervisory system, and failed to establish, maintain and enforce written supervisory procedures that were reasonably designed to achieve compliance with the applicable securities laws and regulations and FINRA rules applicable to private securities offerings and related suitability, disclosure, verification of investor accreditation status and other sales practice-related issues.

8. Finally, in response to a FINRA request for information in September 2009, the Firm, acting through Smith and fellow owner McGinn, provided the staff with falsified

documents, submitting copies of backdated promissory notes for personal loans they (and others) received from two of the Related Entities from October 2006 through October 2009.

9. This conduct violated NASD Conduct Rules 2110, 2120, 2330 and 3010, IM-2310-2, and FINRA Rules 8210 and 2010, and willfully violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder.

RESPONDENTS AND JURISDICTION

10. The Firm has been a member of FINRA since January 9, 1981. It is based in Albany, New York and conducts a general securities business. The Firm derives most of it revenues from private offerings and investment advisory services. The Firm is owned by Smith (50%), McGinn (30%) and TL (20%).

11. Smith has been the President and part owner of the Firm since it became a FINRA member. On April 9, 1973, he first became registered with FINRA as a general securities representative. Smith was the Firm's President and Chief Compliance Officer during the time period of the violations alleged herein. On November 25, 1980, Smith also became registered with FINRA as a general securities principal. He holds several other securities licenses as well.

12. Smith is the President and 50% owner of McGinn Smith Holdings, LLC, the holding company that owns McGinn Smith Capital Holdings Corp. and McGinn Smith Advisors, LLC.

13. McGinn Smith Advisors, LLC was the sole owner and investment advisor for the Income Note LLCs. Those entities paid an annual advisory fee of 1% to McGinn

Smith Advisors, LLC. McGinn Smith Capital Holdings Corp. received a 0.25% annual "servicing fee" from the Income Note LLCs.

14. McGinn has been the Chairman of the Board and part owner of the Firm since it became a FINRA member. On October 18, 1975, he first became registered with FINRA as a general securities representative. On November 25, 1980, he also became registered as a general securities principal. McGinn is a 30% owner of McGinn Smith Holdings, LLC.

OVERVIEW OF FRAUDULENT OFFERINGS

15. The Firm, acting through Smith, sold approximately $89 million in income notes through four private offerings. In offering the notes, the Firm and Smith ostensibly relied upon the exemption provided by Regulation D. The issuers, First Independent Income Notes, LLC, First Excelsior Income Notes, LLC, Third Albany Income Notes, LLC and First Advisory Income Notes, LLC, were created and managed by Smith.

16. The four offerings occurred from on or about September 25, 2003 through on or about November 15, 2006 and raised the following amounts:

- *First Independent Income Notes, LLC (FINN)*
  Offering Period: Sept 2003 – December 2004
  Approximately $20 million

- *First Excelsior Income Notes, LLC (FEIN)*
  Offering Period: January 2004 - January 2005
  Approximately $21 million

- *Third Albany Income Notes, LLC (TAIN)*
  Offering Period: November 2004 - December 2005
  Approximately $30 million

- *First Advisory Income Notes, LLC (FAIN)*
  Offering Period: October 2005 – November 2006
  Approximately $18 million

17. Although the offerings commenced during different periods, they overlapped with each other insofar as, after the first of these offerings, there was always at least one or more of the other offerings ongoing at the time a new offering commenced.

18. All of the note offerings had the same structure and were sold pursuant to a "Confidential Private Placement Memorandum" (PPM) that contained virtually identical disclosures, terms and information. Each investor was also required to complete an Investor Questionnaire and Subscription Agreement.

19. A total of approximately 515 investors purchased notes in the four offerings.

20. The PPMs for all four offerings were prepared at Smith's direction and were reviewed by him for accuracy prior to commencement of each offering.

21. Each issuer offered the same security (and structure), providing for three classes or tranches of income notes with different maturity dates and interest payments. "Secured Senior Notes" typically were due within one year and offered interest payments of 5% to 6%, while "Secured Senior Subordinated Notes" and "Secured Junior Notes" matured within three to five years and paid the highest interest ranging from 7.5% to 10.25%. The Senior Subordinated Note holders' and Junior Note holders' rights to receive payments were subordinated in rights of payment to the Senior Note holders.

22. The PPMs promised investors that they would receive quarterly interest payments.

23. After raising approximately $89 million, the Income Note LLCs have defaulted on the notes. The vast majority of the investments held by the Income Note LLCs are

illiquid and non-performing. In 2008, Smith, acting on behalf of the Income Note LLCs, stopped all redemptions and has only made reduced quarterly interest payments to one of the three classes of income note holders.

FIRST CAUSE OF ACTION

MISUSE OF PROCEEDS
(NASD CONDUCT RULES 2330 AND 2110)

24. The Department realleges and incorporates by reference paragraphs 1-23 above.

25. The PPMs that the Firm distributed to purchasers of the Income Note LLCs' notes promised investors that their funds would be earmarked for a broad array of public and private investments. Instead, Smith, acting on behalf of the investment advisor for the Income Note LLCs, misused the majority of offering proceeds for his own needs and to benefit the Related Entities.

26. From in or about November 2003 through in or about October 2007, Smith, acting on behalf of the investment advisor for the Income Note LLCs, misused approximately $51 million of investor funds, directing approximately $17 million to 3 Related Entities and approximately $34 million more to make loans to 23 other Related Entities.

27. Most of the Related Entities were illiquid and had little or no revenues, or were in poor financial condition, at the time they received offering proceeds from the Income Note LLCs. Some of the Related Entities used those funds to make required payments to investors in earlier offerings involving the Firm, Smith and McGinn. Most of the Income Note LLCs' investments and loans in the Related Entities have not been profitable and have yielded limited or no returns.

28. Approximately $22 million of the loans to the Related Entities have still not been repaid.

29. The PPMs for the Income Note LLCs failed to disclose that the LLCs would be making investments in any of the Related Entities.

30. The PPMs for the Income Note LLCs failed to disclose that the LLCs would be making loans to any of the Related Entities.

31. Smith and the Firm received financial benefits from the transactions involving the Related Entities. For example, Smith caused the Income Note LLCs to use the income note offering proceeds for some the following loans and investments:

- approximately $2 million in loans in October 2007 to 107A, an LLC solely owned by McGinn Smith Holdings, LLC. These funds were used to make an investment in another private offering involving one of the Related Entities. This investment allowed that entity to meet its minimum offering requirement and break escrow, thereby allowing the Firm to receive approximately $635,000 in underwriting fees. This loan remains outstanding;
- approximately $7 million in loans from in or about November 2004 through in or about January 2007 to CCL, an LLC in which Smith held an ownership interest and also served as director;
- approximately $1 million in loans from in or about May 2004 through in or about March 2007 to MSP, a general partnership that Smith co-owned with McGinn. Over $500,000 of this loan remains outstanding; and

- a total of approximately $875,000 used to purchase preferred stock in the Firm from in or about December 2004 through in or about May 2006.

32. From in or about September 2006 through in or about March 2007, Smith also received personal loans of approximately $590,000 from the Related Entities that were funded by investments made in the Income Note LLCs.

33. From in or about February 2007 through in or about March 2008, Smith also misused offering proceeds from the Income Note LLCs to make loans between the various LLCs totaling approximately $1.38 million. For example, on or about February 5, 2007, TAIN lent FEIN approximately $450,000 using funds received from the income note offerings. Approximately $355,000 of this loan is still outstanding.

34. The PPMs for the Income Note LLCs failed to disclose that the LLCs would be lending to, or borrowing from, each other.

35. By misusing offering funds, the Firm and Smith violated NASD Conduct Rules 2330 and 2110.

SECOND CAUSE OF ACTION

OFFERING FRAUD: MISREPRESENTATIONS/OMISSIONS (WILLFUL VIOLATIONS OF SECTION 10(B) OF THE EXCHANGE ACT AND RULE 10B-5 THEREUNDER, NASD CONDUCT RULES 2120 AND 2110 AND IM-2310-2)

36. The Department realleges and incorporates by reference paragraphs 1-35 above.

37. The Firm and Smith failed to disclose the following material facts in connection with the four income note offerings:

- The Income Note LLCs would invest in Related Entities;
- The Income Note LLCs would be making loans to Related Entities;

47. There were more than 35 non-accredited investors in each of the offerings, making them ineligible for the claimed Rule 506 exemption.

48. Furthermore, the four note offerings were not separate and distinct, and were, therefore, subject to integration because, among other things: (1) each successive note offering was issued prior to the previous note offerings reaching its maximum offering amount; (2) the terms and structure of each of the four note offerings were virtually identical; and (3) for at least a portion of the Offering Period, investor funds were raised concurrently for all four offerings.

49. The four integrated offerings had a total of approximately 250 non-accredited investors, which also made them ineligible for the Rule 506 exemption.

50. By selling unregistered securities, the Firm and Smith contravened Section 5 of the Securities Act and thereby violated NASD Conduct Rule 2110.

FOURTH CAUSE OF ACTION

Misrepresentations/Omissions
(NASD Conduct Rule 2110)

51. The Department realleges and incorporates by reference paragraphs 1-50 above.

52. On or around January 25, 2008, Smith sent to the Junior Note holders of all four Income Note LLCs a letter informing them that their annual interest rate would be reduced from 10.25% to 5% due to the effects that market conditions and the credit crisis were purportedly having on the LLCs.

53. In this letter, Smith misrepresented that the Firm and the McGinn Smith Affiliates, which had been receiving fees/commissions from the Income Note LLCs, would

"suspend" collection of further fees and commissions to assist the financial condition of the LLCs.

54. In fact, the Firm and the McGinn Smith Affiliates continued to take fees and commissions, collecting approximately $6.7 million from 2008 to 2010.

55. In 2008, the Firm stopped redemptions for all note holders of the Income Note LLCs. On October 22, 2008, Smith wrote a letter to all of the note holders advising them, among other things, that the Income Note LLCs would be unable to redeem notes on November 15, 2008, due to the illiquidity of the investments made by the LLCs. Smith again blamed this development on, among other things, the "current condition in financial credit markets" and the "liquidity crises."

56. In this letter, Smith represented that the financial condition of the Income Note LLCs, and their ability to repay investors would be re-evaluated the following year. The letter also announced a restructuring of the notes that substantially extended the maturity dates on all classes of the income notes. For example, the maturity dates for the Junior Subordinated Notes, typically five years from purchase, were extended until August 2023.

57. This letter also outlined a restructuring plan for each of the income notes that substantially extended the maturity dates for several years for each of the classes of the notes and unilaterally lowered the interest payments for each.

58. In the January 25, 2008 letter to Junior Note holders and the October 22, 2008 letter to all note holders, Smith failed to disclose that the basis for the Income Note LLCs' poor financial condition was due, at least in part, to his decision to lend/invest the

majority of investor funds in one of the illiquid Related Entities that had limited or no revenues or were in financial distress.

59. In his October 22, 2008 letter to note holders, Smith also misrepresented that the Firm and the McGinn Smith Affiliates would be making their own "sacrifices" and would "forfeit" all annual fees and commissions as part of the proposed note restructuring to "improve liquidity." As noted above, this was a false statement; the Firm received approximately $6.7 million in fees and commission after this letter was sent to investors.

60. By making misrepresenting and omitting facts in communications with investors, Smith violated NASD Conduct Rule 2110.

FIFTH CAUSE OF ACTION

Supervisory Violations
(NASD Conduct Rules 3010 and 2110)

61. The Department realleges and incorporates by reference paragraphs 1-60 above.

62. From in or about 2003 through in or about 2008, the Firm's primary revenues were derived from private placements, including the four income note offerings.

63. During this period, the Firm, acting through Smith, failed to establish and maintain a supervisory system, and failed to establish, maintain and enforce written supervisory procedures, that were reasonably designed to achieve compliance with the applicable securities laws and regulations and FINRA rules applicable to private securities offerings and related suitability, disclosure, verification of investor accreditation status and other sales practice-related issues.

64. As the Firm's Chief Compliance Officer and a supervisory principal, Smith reviewed and accepted the individual investments for the income note offerings. In doing so, Smith relied almost exclusively on the information provided in the Subscription Agreements and Purchaser Questionnaires submitted by each investor. There was no information in those documents relating to the investor's liquid net worth or other investments; therefore, Smith had insufficient information to assess the suitability of the investment.

65. Many of the investor documents that Smith approved were deficient. They were incomplete or missing financial information necessary to ascertain whether the investor was "accredited" under Regulation D or whether the investment was suitable. After the investor submitted the questionnaires to the Firm, many of them were altered to increase the person's reported net worth and/or income to qualify them as accredited.

66. Smith knew, or should have known, that the documents had been altered. At the very least, the obvious alterations should have caused Smith to question the accuracy of the documentation and whether the investor was accredited.

67. Smith failed to ensure that the forms were complete and accurate and to otherwise respond reasonably under the circumstances. Instead, Smith continued to approve the income note investments notwithstanding these deficiencies.

68. As alleged above, the PPMs and Subscription Agreements for the income notes represented that investments would only be accepted from accredited investors. Nevertheless, Smith approved and accepted approximately 250 investments by non-accredited investors.

69. By failing to establish, maintain and/or enforce a supervisory system and written supervisory procedures that were reasonably designed to achieve compliance with all applicable regulatory requirements with respect to the note offerings, the Firm and Smith violated NASD Conduct Rules 3010 and 2110.

SIXTH CAUSE OF ACTION

Providing False Documents to FINRA
(FINRA Rules 8210 and 2010)

70. The Department realleges and incorporates by reference paragraphs 1-69 above.

71. On or about September 30, 2009, the staff sent a letter to the Firm requesting, pursuant to FINRA Rule 8210, all documentation concerning loans received by Smith, McGinn and other Firm employees from certain Related Entities, including TDMCF, and CCV, two LLCs controlled by McGinn and Smith.

72. On or about November 16, 2009, the Firm, acting through Smith and McGinn, submitted to FINRA staff copies of 23 promissory notes relating to loans that Smith and McGinn received from TDMCF and CCV.

73. Six of the notes were signed by Smith as the borrower and related to loans that he had received from TDMCF and CCV.

74. Fourteen of the notes were signed by McGinn and related to loans that he had received from TDMCF and CCV. The remaining notes were signed by MR, a Firm registered representative.

75. Each of the promissory notes signed by the Firm, Smith and MR included a signature date that was during the time period from in or about October 2006 through in or about October 2009.

76. Each note contained information regarding the specifics of the notes, such as the amount of the loan, interest rate, maturity date (in all cases the maturity date is six years from the date of the original loan). The final page on each promissory note stated "IN WITNESS WHEREOF, this Note has been executed and delivered on the date specified above by the duly authorized representative of the Maker."

77. This certification was false. In fact, the subject promissory notes that the Firm provided were actually prepared, dated and signed by McGinn, Smith and MR from in or about November 2, 2009 through in or about November 15, 2009.

78. The Firm, Smith and McGinn provided the subject promissory notes to FINRA staff knowing that the dates reflected thereon were false. Nevertheless, the Firm, Smith and McGinn did not advise the FINRA staff that the copies of the promissory notes they produced to FINRA staff had been backdated.

79. By providing false documents to FINRA staff, the Firm, Smith, and McGinn violated FINRA Rules 8210 and 2010.

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

A. order that one or more of the sanctions provided under FINRA Rule 8310(a) be imposed, including that Respondents McGinn, Smith & Co., Inc. and David L. Smith be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;

B. order that the Respondents bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330; and

C. make specific findings that Respondents McGinn, Smith & Co., Inc. and David L. Smith willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

FINRA DEPARTMENT OF ENFORCEMENT

Dated: April 5, 2010

Michael J. Newman, Senior Regional Counsel
John M. D'Amico, Regional Chief Counsel
FINRA Department of Enforcement
581 Main Street, Suite 710
Woodbridge, NJ 07095
(732) 596-2030; Fax: (202) 721-6557
michael.newman@finra.org
john.d'amico@finra.org

EXHIBIT 3

GEORGE S. CANELLOS
REGIONAL DIRECTOR
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
3 World Financial Center
New York, NY 10281-1022
(212) 336-0174 (Stoelting)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, ***Plaintiff,*** ***v.*** **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,** ***Defendants, and*** **LYNN A. SMITH,** ***Relief Defendant.***	**10 Civ. _____ (___)** **COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Securities and Exchange Commission (the "Commission") for its complaint against McGinn, Smith & Co., Inc. ("MS & Co."), McGinn, Smith Advisors, LLC ("MS Advisors"), McGinn, Smith Capital Holdings Corp. ("MS Capital"), First Advisory Income Notes, LLC ("FAIN"), First Excelsior Income Notes, LLC ("FEIN"), First Independent Income Notes, LLC ("FIIN"), Third Albany Income Notes, LLC ("TAIN") (FIIN, FEIN, FAIN and TAIN are referred to collectively herein as the "Four Funds"), Timothy M. McGinn ("McGinn"),

and David L. Smith ("Smith"), Defendants, and Lynn A. Smith, Relief Defendant, alleges as follows:

SUMMARY OF ALLEGATIONS

1. The Commission brings this action to stop an ongoing fraud orchestrated by defendants McGinn, Smith and entities they control. Since 2003, McGinn and Smith have used MS & Co., a registered broker-dealer and investment adviser, MS Advisors, an investment advisor, and MS Capital, as well as dozens of affiliated entities they own or control (collectively, "the McGinn Smith Entities"), to raise over $136 million in more than 20 unregistered debt offerings. The debt offerings, including the Four Funds and numerous trust entities (the "Trusts"), have been sold to more than 900 investors. The offering fraud already has caused significant investor losses, and this emergency action is intended to stop the fraud and preserve the status quo for the benefit of the victims.

2. McGinn, Smith, MS & Co., MS Advisors and MS Capital deceived investors in the Four Funds. They told investors that their hard-earned money would be invested and that the profits would depend on the spread between the cost of the investment and the rate of return. Instead, the Defendants secretly funneled investor money to entities they owned or controlled, even though this was not permitted by offering materials. Defendants concealed from investors the truth about the Four Funds, including the fact that investor money was being routed to in-house entities controlled by Smith and McGinn and to other non-public and illiquid investments, and that these actions were having a disastrous impact on the investors.

3. In addition to the Four Funds, Smith and McGinn directed a series of smaller-scale offerings, primarily through various Trusts. The Trusts also were used as vehicles to funnel investor funds to various companies controlled by Smith and McGinn, contrary to the terms of

the Private Placement Memoranda (PPMs). Investor money raised in offerings for the Trusts was routinely diverted to other McGinn Smith entities as liquidity needs of the enterprise dictated. The Defendants also used offering proceeds to make unauthorized investments in and unsecured loans to speculative, financially troubled McGinn Smith Entities, to make MS & Co.'s payroll, to pay commission and transaction fees to McGinn Smith Entities, to make interest payments to investors in other entities, to support McGinn's and Smith's lifestyle, and to procure strippers for a "sexually themed" cruise.

4. The Defendants' misrepresentations and omissions have had a devastating impact on the investors. In 2009, Smith and McGinn received e-mails telling them the investors were wondering "if they've bought into a Ponzi Scheme," and a MS&Co. broker reported to McGinn and Smith that there are "many people who refer to our deals as a Ponzi Scheme."

5. As of September 2009, it appears that investors in the four Funds were owed at least $84 million, that the Four Funds had less than $500,000 in cash on hand, and that their remaining assets were worth only a small fraction of the amount owed to investors. Similarly, the Trusts have a negative equity of approximately $18 million, and have never had the ability to pay the interest rates promoted to investors and also pay back principal. Nonetheless, McGinn and Smith have continued to raise money from investors, using similar misrepresentations, as recently as December 2009. During the first few months of 2010, contrary to representations to investors, McGinn and Smith have continued to drain what little cash remains through payment of "fees" to themselves.

6. In order to halt the ongoing fraud, maintain the status quo and preserve any assets for injured investors, the Commission seeks emergency relief, including an asset freeze; a receiver over the McGinn Smith Entities; expedited discovery; and verified accountings.

VIOLATIONS

By virtue of the conduct alleged herein:

7. MS & Co., MS Advisors, MS Capital, McGinn and Smith, directly or indirectly, singly or in concert, have engaged, are engaging, and unless restrained and enjoined will continue to engage in acts, practices, schemes and courses of business that constitute violations of Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] and Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder[17 C.F.R.§ 240.10b-5];

8. MS & Co., MS Advisors, McGinn and Smith directly or indirectly, singly or in concert, have engaged, are engaging, and unless restrained and enjoined will continue to engage in acts, practices, schemes and courses of business that constitute violations of Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 (the"Advisers Act") [15 U.S.C. §§ 80b-6(1)(2) and (6)] and Rule 206(4)-8 thereunder [17 C.F.R. §275.206(4)-8];

9. FAIN, FEIN, FIIN and TAIN have violated, are violating, and, unless restrained and enjoined, will continue to violate Section 7(a) of the Investment Company Act of 1940 ("Company Act") [15 U.S.C. § 80a-7];

10. MS & Co., MS Capital, FAIN, FEIN, FIIN, and TAIN, McGinn and Smith directly or indirectly, singly or in concert, have violated, are violating, and unless restrained and enjoined will continue to violate Sections 5(a) and 5(c) of the Securities Act[15 U.S.C. § 77e];

11. MS & Co. violated, is violating and, unless restrained and enjoined, will continue to violate Section 15(c) (1) of the Exchange Act [15 U.S.C. § 78(o)(1)] and Rule 10b-3 [17 C.F.R. § 240.10b-3], and McGinn and Smith have aided and abetted such violation; and

12. Lynn Smith, as relief defendant, has received and retained ill gotten gains from defendants' fraud.

JURISDICTION AND VENUE

13. The Commission brings this action pursuant to the authority conferred upon it by Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)], Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)], Section 209(d) of the Advisers Act, [15 U.S.C. §80b-9(d)] and Section 42(d) of the Company Act [15 U.S.C. §80a-41(d)] seeking a final judgment: (i) restraining and permanently enjoining the defendants from engaging in the acts, practices and courses of business respectfully alleged against them herein; (ii) ordering defendants to disgorge any ill-gotten gains and to pay prejudgment interest thereon, jointly and severally; (iii) prohibiting McGinn from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. §78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)]; and (iv) imposing civil money penalties on all defendants pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)], Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)], and Section 42(e) of the Company Act [15 U.S.C. § 80a-41(e)].

14. This Court has jurisdiction over this action pursuant to Sections 20(b) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b) and 77v(a)], Sections 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(e) and 78aa], Sections 42 and 44 of the Company Act [15 U.S.C. §§ 80a-41 and 80a-43] and Sections 209 and 214 of the Advisers Act [15 U.S.C. §§ 80b-9 and 80b-14]..

15. Venue lies in the Northern District of New York, pursuant to Section 22 (a) of the Securities Act [15 U.S.C. § 77v(a)], Section 27 of the Exchange Act [15 U.S.C. § 78aa], Section

44 of the Company Act [15 U.S.C. § 80a-43] and Section 214 of the Advisers Act [15 U.S.C. § 80b-14]. The Defendants, directly or indirectly, singly or in concert, have made use of the means and instrumentalities of interstate commerce, or of the mails, in connection with the transactions, acts, practices, and courses of business alleged herein. Certain of these transactions, acts, practices, and courses of business occurred in the Northern District of New York. For example, the main offices of MS & Co., MS Advisors, MS Capital, the Four Funds, and the various Trusts were located in Albany, New York and all of the Defendants, including McGinn and Smith, transacted business at those offices.

DEFENDANTS

16. **Timothy M. McGinn,** age 62, is a resident of Schenectady, New York. He is the chairman, secretary, and co-owner of MS & Co. as well as treasurer and indirect co-owner of MS Advisors. From 2003 to 2006, McGinn served as Chief Executive Officer of Integrated Alarm Services Group, Inc. ("IASG"), a publicly traded company. He left IASG and returned to MS & Co. in the fall of 2006.

17. **David L. Smith,** age 65, is a resident of Saratoga Springs, New York. He is the president of MS & Co. and the managing member of MS Advisors. Until 2007, Smith also was the chief compliance officer of MS & Co. Smith owns about 50% of MS & Co. and about 50% of MS Advisors.

18. **McGinn, Smith & Co., Inc. ("MS & Co."),** a registered broker-dealer and New York corporation founded in 1981 by Smith and McGinn, has its principal place of business at 99 Pine Street, Albany, NY. It is currently owned by Smith (50%), McGinn (30%), another partner ("Partner 3") (about15%) and a fourth partner ("Partner 4") (about 5%). In April 2009, MS & Co. registered with the Commission as an investment adviser, and replaced MS Advisors

as the adviser to the Funds. Throughout 2009, MS & Co. had about 53 employees, including about 35 registered representatives, and branch offices in Clifton Park, Manhattan and Boca Raton. On December 24, 2009, MS & Co. filed a partial BD-W and has been winding down much of its broker-dealer business. On March 9, 2010, it also withdrew its investment adviser registration.

19. **McGinn Smith Advisors, LLC ("MS Advisors")** is a New York corporation with its principal place of business at 99 Pine Street, Albany, New York. MS Advisors is a wholly-owned subsidiary of McGinn, Smith Holdings LLC, which is owned 50% by Smith, 30% by McGinn and 20% by MS Partners. MS Advisors was registered as an investment advisor with the Commission from January 3, 2006 to April 24, 2009. It was the investment adviser to all of the Funds until April 2009, when it was replaced by MS & Co.

20. **McGinn, Smith Capital Holdings Corp. ("MS Capital")** is a New York corporation with its principal place of business at 99 Pine Street, Albany, New York. It is owned by MS Holdings LLC (52%), McGinn (24%) and Smith (24%). It is the indenture trustee for the Funds and the trustee for all the Trusts created between 2006 and 2009. Smith is president and McGinn is chairman of the board.

21. **First Independent Income Notes LLC ("FIIN"); First Equity Income Notes LLC ("FEIN"); First Albany Income Notes LLC ("FAIN") and Third Albany Income Notes LLC ("TAIN")** are New York corporations and unregistered investment companies with their principal places of business at 99 Pine Street, Albany, New York. They are wholly-owned by MS Advisors.

RELIEF DEFENDANT

22. **Lynn A. Smith,** age 64, is the wife of David Smith and a resident of Saratoga Springs, New York.

FACTS

23. McGinn and Smith founded MS & Co. in 1980 and the firm registered as a broker-dealer in 1981. McGinn sold 40% of his interest in MS & Co to Partner 3 in 2003 when he became the chief executive officer of IASG, but he returned to MS & Co. in 2006. Since then, he and Smith have actively controlled virtually every aspect of the McGinn Smith Entities' operations.

The Four Funds

24. Between September 2003 and October 2005, MS Advisors formed FAIN, FEIN, FIIN and TAIN. MS Advisors held 100% of the membership interest in each Fund and was their sole managing member. MS Advisors also served as investment adviser to the Four Funds. Smith was responsible for the majority of the investment decisions for the Funds. Among other functions, McGinn served as signatory on behalf of various McGinn Smith Entities that received loans from the Funds.

25. MS & Co. acted as the placement agent for debt offerings by the Four Funds, raising a total of approximately $90 million. MS Capital served as Trustee and Servicing Agent for each of the Four Funds. The Funds each had between 150 and 300 investors.

26. Each Fund invested more than 40% of its assets in securities. MS & Co. was required to, but did not, register each of the Funds as investment companies.

27. The terms of the offerings by the Four Funds, as disclosed in their "Confidential Private Placement Memoranda ("PPMs"), are summarized below:

OFFERING	DATE OF PPM	AGGREGATE PRINCIPAL AMOUNT	TYPES OF NOTES SOLD
FIIN	Sept. 15, 2003	$20 million	5% Secured Senior Notes due 2004 7.5% Secured Senior Subordinated Notes due 2008 10.25% Secured Junior Notes due 2008
FEIN	Jan. 16, 2004	$20 million	5% Secured Senior Notes due 2005 7.5% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009
TAIN	Nov. 1, 2004	$30 million	5.75% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009
FAIN	Oct. 1, 2005	$20 million	6% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2010

28. Each note holder was entitled to quarterly interest payments. The Secured Senior Subordinated and Secured Junior Note holders' rights to payments were subordinated to the rights of the Senior Secured Note holders.

29. The PPMs contained essentially identical disclosures, terms and conditions. They were prepared at Smith's direction and were reviewed by him for accuracy prior to commencement of each offering. Each PPM disclosed that the issuer was:

> formed to identify and acquire various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio. . . .

30. Although the PPMs include broad disclosures about the risks of investing in the Four Funds, the disclosures regarding potential affiliated transactions, aside from payment of fees and commissions to affiliates, was limited to the following language:

> [The Fund] may acquire Investments from our managing member or an affiliate of our managing member that has purchased the Investments. If the Investment is

> purchased from our managing member or any affiliate, we will not pay above the price paid by our managing member or such affiliate for the Investment, other than to reimburse our managing member or such affiliate for its costs and any discounts that it may have received by virtue of a special arrangement or relationship. In other words, if we purchase an Investment from our managing member or any of its affiliates, we will pay the same price for the Investment that we would have paid if we had purchased the Investment directly. We may also purchase securities from issuers in offerings for which McGinn, Smith & Co., is acting as underwriter or placement agent and for which McGinn, Smith & Co. will receive a commission.

31. The PPMs did not disclose that the Funds would make any loans to, transfers, or investments in, affiliated entities.

32. The Funds increasingly made unauthorized loans and transfers to and investments in affiliated McGinn Smith Entities. By September 2009, approximately one-half of all Funds assets had been loaned to or invested in affiliated, often cash poor and financially desperate McGinn Smith Entities. The PPMs suggested that the Funds were created to identify and invest in a wide spectrum of public and private investments that would "add value to our portfolio." In fact, the Funds served the more limited purpose of loaning or investing the majority of their Funds in financially troubled McGinn Smith Entities. Only about $3.6 million of the approximately $106 million raised by the Four Funds was invested in liquid, publicly traded companies.

33. The PPMs did not disclose that most of the McGinn Smith Entities were illiquid, had little or no revenues, or were in poor financial condition when they received the proceeds from the Four Fund offerings. The investments appear to have been preceded by little due diligence (none of which was done by persons independent of MS & Co.). The investments were generally dictated by liquidity needs of the McGinn Smith Entities.

34. For example, between 2005 and 2007, MS Advisors caused three of the Funds to loan nearly $8 million to alseT IP, a start-up entity partly owned and managed by Partner 3. At

least $700,000 of those loans was immediately transferred to Partner 3 as salary. AlseT never made a penny, and never repaid any of the loans. By December 2007, an internal MS & Co. email shows that the chief financial officer placed the value of the Funds' loans to alseT at zero. Nonetheless, MS Advisors caused two of the Funds to "loan" alseT an additional $250,000 in February 2008, so that alseT could make additional payments to certain individuals.

35. By no later than 2006, as the Defendants knew or recklessly disregarded that the Four Funds could not redeem investor notes when they became due. For example, on December 21, 2006, an MS & Co. employee sent an email to Smith telling him that a TAIN investor wanted to redeem $100,000 in TAIN notes due December 15, 2006 and purchase $100,000 in one of the Trusts (TDM 9.25%). Smith replied that the broker "needs to replace the $100,000 before doing the trade." He continued: "I am running on fumes with all of these redemptions and cannot afford any more."

36. By the end of 2007, each of the Funds had already paid out millions more than the Funds had received in income from investments. As of September 30, 2009, since inception the Funds had revenues of only $12.9 million and spent a total of $37 million, for a combined total loss from operations of $24 million.

37. By the end of 2007, the Funds' assets were worth a fraction of the amount owed to investors. According to an analysis in December 2007 by MS & Co.'s then-chief financial officer, the combined "book value" of the Funds was then only $69,384,870 compared to total notes payable of $86,046,000. Moreover, the CFO calculated that the "net realizable" amount in the Funds combined as only $37,160,299 , nearly $48.9 million less than the amount owed to investors. Nonetheless, the Funds continued to raise money from investors without disclosing these facts.

Additional Misrepresentations and Omissions

38. On January 13, 2005, Smith wrote to a prospective investor that the purpose of TAIN "is to make investments, primarily in the form of secured loans, to private and public entities for purposes that include acquisition, equipment purchases, receivable financing and general corporate growth." At the time Smith wrote this letter, TAIN had made three investments. Only one of those three investments was secured, a loan for only $830,000 out of a total of $13.1 million in outstanding investments.

39. Smith steered another investor away from investing in blue chip stocks like General Electric as too risky, and told him that the Fund private placements were safer investments.

40. On July 6, 2004, an MS & Co. broker told a prospective investor that:

> The [FEIN] Notes represent a basket of asset backed securities with substantial cash flow, a history of performance and limited liquidity in the marketplace. The portfolio includes securities from both the public and private sector. Asset classes consist of bonds, notes, preferred stock, leases, mortgages, limited partnerships, and securitized cash flow instruments. Our most active market of ideas comes from small private placements ($25 - $50 million) offered by investment banks primarily to institutional investors. We take comfort in these ideas due to the fact that these offerings are usually proceeded [sic] with substantial due diligence, scrutinized by product and industry professionals, and underwritten by top-tier investment banking firms with an ongoing capability to assist with additional capital if necessary. . . . I feel this investment is a great way for you to earn an attractive yield while minimizing risk.

41. In fact, the "basket" of securities in which FEIN invested consisted mostly of promissory notes from MS & Co. affiliates that did not have "substantial cash flow" or "a history of performance." There is no evidence that any of the investments in FEIN resulted from "small private placements . . . offered by investment banks primarily to institutional investors". There is no evidence of any "due diligence," "scrutin[y] by product and industry professionals," or underwriting by "top-tier investment banking firms" for any of the investments made by the Four Funds at any time.

42. In addition, MS & Co. did not provide other investors with the relevant PPM prior to their investments.

43. In order to maintain sufficient monies in the Funds to continue to make interest payments, MS and Co. encouraged investors to rollover their notes when they became due. As a result, Defendants were able to use what was, in effect, principal, to continue to make periodic interest payments.

Four Funds Restructuring

44. By as early as 2007, McGinn and Smith generally refused to honor investors' requests for the return of principal at the maturity of the notes, unless the customer's broker was able to find a new investor to replace the outgoing investor.

45. In January 2008, Smith sent a letter to certain Fund investors stating that the Funds had run into difficulty, which he falsely and misleadingly blamed as "primarily on liquidity" caused by the subprime crisis. In April 2008, Smith sent a second letter informing Fund investors that the problems cited in the January letter have "become more acute" and that, because two investments had eliminated their dividends or ceased distributions, the Funds were "forced" to eliminate the interest payments to Secured Junior Notes holders for the quarter. The letter also noted that MS Advisors had been advised by counsel that "distributions at this time quite probably reflect a return of capital and not interest, and therefore distributions at this time might be considered an invasion of principal due to the Senior and Senior Subordinated Note holders. This is a result of not knowing how and where to price our investments in these very illiquid markets."

46. In October 2008, Smith sent a letter to all Four Funds' note holders that falsely and misleadingly blamed the financial condition of the Funds on, among other things, the "current

condition of the financial credit markets" and "financial crisis." It further stated that "the lack of liquidity in the credit markets . . . is the major issue that impacts your investment in the [Funds]."

47. These statements by Smith were false or misleading. The letters did not mention that affiliates of MS & Co., many of which were insolvent, owed the Funds tens of millions of dollars. These letters also omitted the material information that the value of the Funds' assets was only 50 % or less of the amount owed investors, and falsely suggested that note holders had a reasonable prospect of eventually receiving their principal, pursuant to the restructuring plans.

48. The purported restructuring plan extended the maturity dates of the notes, some until 2023, and unilaterally reduced interest payments for all the note tranches. Since the 2008 restructuring, MS Advisors has made only reduced interest payments to the Secured Senior Note holders.

49. Smith also misrepresented that MS & Co. and the McGinn Smith Entities would be making their own "sacrifices" and would "forfeit" all annual fees and commissions as part of the note restructuring to "improve liquidity." In fact, MS & Co. received approximately $700,000 in fees in 2009 and $275,000 in fees in 2010, after this letter was sent.

50. Notwithstanding the insolvency of the Funds, MS & Co. continued to sell and rollover investors' notes in these Funds, including junior notes. Internal MS & Co. documents show new and rollover investments, including investments by customers of Smith, of at least $736,500 in 2008 and $130,500 in 2009. The firm apparently used these new investments in part to permit certain preferred investors to cash out.

51. Despite the dire condition of the Funds, Smith and McGinn and MS Advisors continued to divert the remaining moneys in the Funds to other financially troubled McGinn

Smith Entities, such as Cruise Charter Ventures LLC ("CCV") and TDM Luxury Cruise Trust 07 ("TDM Luxury").

52. The PPMs also stated that the notes were being offered only to "accredited investors." By MS & Co.'s own records, however, the Four Funds each had many unaccredited investors. According to MS & Co.'s records, as of March 20, 2006, FAIN had 30 unaccredited investors; FEIN had 46 unaccredited investors; FIIN had 31 unaccredited investors; and TAIN had 75 unaccredited investors.

THE TRUST OFFERINGS

53. Between 2006 and 2009, MS & Co. acted as placement agent for: four Firstline Jr. and Sr. Trusts 07 offerings ("Firstline Trusts"), TDM Cable Trust 06 ("TDM Cable 06"),TDM Luxury Cruise Trust 07 ("TDM Cruise"), TDM Verifier Trust 07 ("Verifier 07"), TDM Verifier Trust 08 ("Verifier 08"); Cruise Charter Venture Trust 08 ("CCV Trust"), Fortress Trust 08 ("Fortress Trust"), Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08; TDM Verifier Trust 09; TDMM Benchmark Trust 09 ("Benchmark 09"), TDMM Cable Jr. and Sr. Trusts 09 ("TDMM Cable 09"), TDM Verifier Trust 07R; and TDM Verifier Trust 08R and other offerings, including affiliate McGinn Smith Transaction Funding Corp. ("MSTF").

54. The Trusts issued one or more tranches of notes and promoted interest rates ranging from 7.75 % to13% *per annum.* Maturity dates varied from approximately 15 months to five years from the date of the offering.

55. Many of the Trusts were created to loan the offering proceeds, minus placement agent fees, to another McGinn Smith Entity ("the Conduit Entity"), which would then use those funds, minus substantial additional fees, to purchase specific contracts or receivables from a third entity, such as contracts for burglar alarm services or "triple play" (broadband, cable and telephone)

services, or luxury cruise charters. The Trusts were generally left with only a promissory note and a "security" interest in the assets to be purchased by the Conduit Entity.

56. The Declaration of Trust typically defined "Permitted Investments" to mean a "promissory note ("the Note") evidencing a loan from the Trust to [the particular Conduit Entity]. In addition, to the extent not employed for the loan from the Trust to [the Conduit Entity], the Declaration permitted temporary investments limited to (1) certificates of deposit; (2) regularly traded short term AAA rated debt obligations; or (3) U.S. Treasury obligations.

The PPMs Misled Investors As to The True Purpose of the Trusts

57. The true purpose of the Trusts was to structure a series of transactions that would allow various McGinn Smith Entities to siphon off millions of dollars in transaction fees and commissions and to serve the interest of McGinn Smith Entities, not the Trust investors. MS & Co. extracted enormous fees from these Trust deals, which were not clearly disclosed in the PPMs. The Trusts typically paid placement agent fees to MS & Co. of 5% to 9.5%. When the Trusts transferred funds to the Conduit Entity, that entity paid large fees to MS & Co. that were variously characterized as, among other things, "trust administration fees," "acquisition costs," "investment banking fees," "legal fees," and "due diligence fees." Those fees were sometimes as much as 20% or more of the gross proceeds of the offering.

58. Although many of these fees were disclosed in the Trust PPMs, the PPMs failed to disclose that certain of these fees, commissions or transaction costs overstated the true market value of the services performed, were unnecessary or were paid for services not performed or not performed with the customary degree of professional care and due diligence.

59. The PPMs also failed to disclose that, contrary to the terms of the Trust PPMs, large portions of the proceeds would be diverted to financially struggling McGinn Smith Entities,

commingled with the offering proceeds of other Trusts, used to pay interest and principal to investors in other Trusts and to keep the financially failing McGinn Smith fraud scheme afloat.

60. While the Trust PPMs often disclosed that there "was a high degree of risk" associated with the investment, the PPMs failed to disclose that it was virtually certain that the Trusts would not be able to meet their obligations to pay the promised interest payments or to repay principal, given the large percentage of proceeds siphoned off in commissions and transaction fees by McGinn Smith Entities before any investments were made, combined with unauthorized loans to affiliated entities.

61. McGinn and Smith have fraudulently maintained the illusion of success by funding interest payments with principal raised in other Trust offerings, at the expense of these investors. The following examples demonstrate how the Trusts have been used to benefit the McGinn Smith Entities, at the expense of Trust investors.

Benchmark 09 Trust PPM Misrepresented How Proceeds Would Be Used

62. On about July 27, 2009, MS & Co. launched an offering for the Benchmark 09 Trust. The PPM states that approximately $1,950,000 of the $3 million raised would be loaned to TDMM Cable Funding, which would use the loan proceeds to purchase the operating assets and "triple play" contracts of Benchmark LLC. TDMM Cable Funding would then purportedly use the earnings from this investment in Benchmark LLC to repay principal and interest due on the loan from the Benchmark 09 Trust.

63. According to the PPM, MS & Co.'s fees and expenses would total $1,050,000, or 34% of the offering proceeds.

64. Contrary to the representations in the PPM, the net proceeds of the offering were used for many unauthorized purposes. For example, notwithstanding the PPM's representation

that money loaned by the Trust to TDMM Cable Funding would be used to acquire the assets of Benchmark LLC, McGinn directed that some of the money in the TDMM Cable Funding account be diverted to affiliated entities, including TDM Cable 06 and TDM Verifier 07 and TDMM Cable Sr Trust. Those funds were presumably used to pay "interest" to the various Trusts investors.

65. The Benchmark 09 Trust promised investors 10.5% interest on the notes, with a maturity date of five years. Given that defendants took 34% of the proceeds to themselves in fees and diverted additional monies to affiliated entities in unauthorized transfers, their representation that investors would be repaid out of the investment in Benchmark LLC was false, and McGinn, Smith, MS & Co. and MS Capital knew, or recklessly disregarded, that this representation was false. Nevertheless, McGinn continued to personally raise money for this offering as recently as December 10, 2009.

The TDMM Cable Trust 09

66. On January 19, 2009, MS & Co. launched an offering of $1,550,000 of 9.00% three-year notes in TDMM Cable Senior Trust 09 ("Senior 09 Tranche") and an offering of $1,325,000 of 11% 54-month notes in TDMM Cable Junior Trust 09 ("Junior 09 Tranche," collectively "TDMM Cable 09"). The Senior and Junior offerings sold out.

67. The PPM stated that after MS & Co. took a placement agent fee of 5% of the amount raised for Senior 09 Tranche and 8% of the amount raised for Junior 09 Tranche, the balance, about $2.7 million, would be loaned to TDM Cable Funding, which would use the proceeds to acquire all the operating assets and customer contracts of Broadband Solutions LLC and HipNET LLC (both of which purportedly provided "triple play" service to communities in Florida). The PPMs also state that TDM Cable Funding would pay MS & Co. an additional

$400,000 for "acquisition negotiations, legal and due diligence activities"-- making MS & Co.'s total fee $583,500 or 20.3% of the gross proceeds of the offering.

68. Not satisfied with the disclosed fees, MS & Co. used a total of at least 54% of the funds raised to: (i) make payments to McGinn, McGinn's son, Smith, relief defendant Lynn Smith, MS Partner 4 and an Albany politician; (ii) to cover MS & Co.'s payroll between January and April 2009; and (iii) to pay investors in other Trust entities. The following is a summary of McGinn's misuse use of TDMM Cable 09 investor funds:

69. During January 2009, MS & Co. raised the first $554,000 from investors for the Senior 09 Tranche. On January 30, 2009, McGinn transferred $475,000 from the Trust to TDM Cable Funding, and transferred $413,000 from the TDM Cable Funding to MS & Co., where it was immediately used to cover the firm's payroll.

70. In February 2009, McGinn again transferred large sums of money from the TDMM Cable Senior Trust account to TDM Cable Funding and then to MS & Co to make MS & Co.'s mid-February and end of February payroll. The following months, McGinn again transferred substantial amounts from the TDMM Cable 09 Trust accounts to MS & Co. to cover the March 31 and April 30 payrolls.

71. McGinn also transferred a total of at least $99,000 to McGinn's personal account; more than $21,000 to McGinn's son (apparently a lawyer who worked for MS & Co.); more than $105,000 to a MS & Co. affiliate called Mr. Cranberry; $18,750 to an Albany politician's law firm; at least $70,000 to MSTF; $26,500 to Verifier 07; $10,000 to Firstline Trust; $25,000 to a senior MS & Co. officer $24,000 to Smith; and more than $335,000 to Smith's wife, relief defendant Lynn Smith.

72. The transfers described above total $1,646,040 -- nearly three times the fees to which MS & Co. Entities were entitled pursuant to the PPMs, and more than half of the gross offering proceeds.

The Verifier 08 Trust

73. In December 2007, MS & Co. launched an offering for the TDM Verifier 08 Trust. Verifier 08 offered up to $3.85 million in 18-month notes and 36-month notes, with returns of 8.5% and 10%, respectively. The offering sold out.

74. The PPM represented that the net proceeds of the Trust, $3,484,500, (after subtraction of MS and Co. 9.5% fee of $365,750) were to be "advanced" by the Trust to McGinn Smith Funding LLC ("MS Funding") for the purpose of purchasing $3,000,000 face value of "guaranteed payment units" issued by Verifier Capital LLC, a company that "provides capital to security alarm dealers by purchasing some or all of their security alarm monitoring accounts." A senior managing director of MS & Co. was the Chairman and 12.5% owner of Verifier Capital LLC.

75. The Trust has had to borrow money from other McGinn Smith Entities to make its scheduled interest payments.

76. Verifier 08 investors were deceived about the success of the Verifier 08 Trust with the first quarterly "interest" payment, which was actually a return of investor capital.

77. Thereafter, in order to make quarterly interest payments to Verifier 08 investors, the Verifier 08 Trust repeatedly borrowed funds from other MS Entities. Furthermore, despite having income insufficient to make interest payments to investors, the Trust made numerous unauthorized loans to other MS Entities.

The CCV Trust

78. McGinn, MS Capital and MS & Co. also deceived investors into unwittingly investing in a sexually-oriented charter cruise venture created by McGinn. In February 2008, MS & Co. launched a $3,250,000 note offering for an entity 50% owned by an MS & Co. affiliate called CCV. The PPM stated that CCV "is engaged in the business of procuring whole ship charters and selling the berths to various affinity groups." The PPM stated that the net proceeds of the offering would be used to charter a ship and to "underwrite the marketing, sales and administrative expenses associated with selling [the] berths for the cruise."

79. The PPM did not disclose that CCV operated under the name YOLO (You Only Live Once) Cruises, that the affinity group was sexually oriented, that strippers and go-go dancers would be procured to entertain passengers, that investor money would be used to buy insurance for these individuals and that YOLO was run by a woman with whom McGinn was romantically involved.

80. The PPM failed to disclose that instead of marketing charters to an unlimited variety of "affinity groups" as represented, the charters would only be marketed to a narrow niche of potential customers interested in cruises "involving sexually themed activities among and between consenting adults" (as belatedly disclosed in a PPM for a later offering) and that the charters would involve legally and morally questionable activities that investors might not want to be associated with.

81. McGinn was the managing member of CCV. He was involved in its day-to-day operations and was keenly interested in the activities aboard the cruise. McGinn "borrowed" from other Trusts and Funds to fund CCV.

86. A December 7, 2009 email to McGinn reveals that Firstline loaned another McGinn Smith affiliated entity, known as Mr. Cranberry, more than $2.27 million. Mr. Cranberry does not appear to be involved in the security alarm business.

MS & Co. Did Not Disclose that the Proceeds Would Be Commingled.

87. A common feature of most of the Trust offerings was that the proceeds -- rather than being directly invested -- were "loaned" to an intermediate entity, most often TDM Cable Funding (*see, e.g.* Verifier 07 (for the purchase of alarm contract receivables); TDM Luxury (luxury cabin cruise receivables); and TDM Cable 06 and TDMM Cable 09 Junior and Senior (triple play receivables). However, instead of using the proceeds for the stated purpose, Smith and McGinn diverted the proceeds as needed to meet the cash needs of other McGinn Smith Entities.

88. As alleged above, on several occasions, McGinn transferred funds raised in the TDMM Cable 09 offerings to TDM Cable Funding, and then transferred those funds to MS & Co. for payroll.

McGinn and Smith Have Taken Large Personal "Loans" from Various McGinn Smith Entities

89. McGinn, Smith and another senior MS & Co. employee frequently received substantial "loans" from the McGinn Smith Entities. Between October 2006 and October 2009, TDM Cable Funding "loaned" McGinn $830,341, Smith $694,000, and the senior MS & Co. employee $563,000, for a total of nearly $2.1 million. None of these loans has been repaid, and it does not appear that any interest has ever been paid.

90. McGinn and Smith each took a $200,000 loan from the Firstline Trust. Firstline Securities filed for bankruptcy a few months after the four Firstline offerings raised about $7

million. Although Firstline Trust investors are owed $5.9 million, McGinn and Smith have not repaid the loans.

91. McGinn also authorized the following additional personal loans, none of which were evidenced by loan documentation: (i) from NEI, a McGinn Smith Entity, to Smith totaling $360,000, to the senior MS & Co. employee totaling $285,000 and to McGinn totaling $340,000; and (ii) from TDMM Cable Funding to Smith totaling $74,000, to the senior MS & Co. employee totaling $25,000 and to McGinn totaling $82,500.

McGinn and Smith Submitted Backdated Documents to FINRA

92. While under investigation by FINRA, McGinn, Smith and MS & Co. submitted numerous backdated promissory notes after FINRA requested loan documentation during its exam.

MS & Co. Has Paid for Luxuries for Smith and McGinn and Transferred Funds to Smith's Wife

93. From at least January 2004 through at least December 2008, MS & Co. made monthly payments on two cars for Smith (a Lexus and a Mercedes) totaling about $89,000, including payments of about $17,000 in each of 2007 and 2008. MS & Co. made monthly payments on McGinn's behalf to exclusive country clubs, including the Schuyler Meadows Club, the Fort Orange Club and the Pine Tree Golf Club. In 2007 and 2008 alone, those payments totaled more than $22,000.

94. MS Capital transferred $335,000 to accounts in the name of Smith's wife, relief defendant Lynn Smith. Lynn Smith received many other payments from McGinn Smith Entities. On May 4, 2009, for example, Smith directed that a $100,000 check be issued to his wife's account at National Financial Services. Smith also testified that his salary was generally paid to his wife, Lynn.

The Misuse of Funds and Deception Has Become More Desperate

95. The audited financial statements for MS & Co. for 2008 state that the firm had a loss of more than $1.8 million, and includes a "going concern" clause. Virtually every day in 2009, McGinn obtained from his accounting staff a summary of the cash available in the bank accounts controlled by MS & Co., and a report of the immediate "funding needs." The documentary evidence reveals a constant movement of money among dozens of MS & Co. affiliates and scores of bank accounts, designed to use any cash available to satisfy the most pressing funding needs – primarily the firm's payroll, and payments to the personal accounts of McGinn and Smith, along with interest payments and redemption requests by investors threatening to complain to authorities.

96. Internal MS & Co. emails in 2009, including many by McGinn and Smith, reveal a constant need to raise millions of dollars, a growing desperation to make payroll, meet interest payments and assuage investors complaining of a Ponzi scheme, in order to keep their house of cards from collapsing. For example, on February 24, 2009, Smith emailed McGinn regarding an upcoming payroll. He stated: "We have been living on the edge for some time and Tim's deals have kept us alive by fronting our profit. However, the $200,000 + that we are losing every month is just too difficult to keep pace with." On February 25, 2009, another MS & Co. Partner 3 emailed Smith: "In our many conversations over the last year, I came to understand the depths to which the firm has sunk relative to its revenue." The liquidity problems were so severe that one outside broker was forced to invest $10,000 of his own money so one of his elderly customers could be redeemed.

97. Notwithstanding these financial woes, McGinn and Smith continued to solicit investors for the Four Funds and the Trusts throughout 2009 and into 2010, using the original

SEVENTH CLAIM FOR RELIEF
(Relief Defendant)

140. Paragraphs 1 through 139 are realleged and incorporated and incorporated by reference as if set forth fully herein.

141. Relief Defendant Lynn A. Smith was a recipient, without consideration, of proceeds of the fraudulent and illegal sales of securities alleged above. The Relief Defendant profited from such receipt or from the fraudulent and illegal sales of securities alleged above by obtaining illegal proceeds under circumstances in which it is not just, equitable, or conscionable for her to retain the illegal proceeds. Consequently, Lynn Smith has been named as a Relief Defendant for the amount of proceeds by which she has been unjustly enriched as a result of the fraudulent scheme or illegal sales transactions.

142. By reason of the foregoing, Lynn Smith should disgorge her ill-gotten gains, plus prejudgment interest.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court grant the following relief:

I.

Enter a Final Judgment finding that the Defendants each violated the securities laws and rules promulgated thereunder as alleged against them herein;

II.

Enter an Order temporarily and preliminarily, and a Final Judgment permanently, restraining and enjoining the Defendants and their agents, servants, employees and attorneys and

all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from committing future violations of each of the securities laws and rules promulgated thereunder, or alternatively, from aiding and abetting such future violations, as respectively alleged against them herein.

III.

An Order freezing the assets of the Defendants, the Relief Defendant, and all McGinn Smith Entities pending further Order of the Court.

IV.

An Order appointing temporary and preliminary receivers over the Defendants and all McGinn Smith Entities.

IV.

An Order directing the Defendants, the Relief Defendant and all McGinn Smith Entities to file with this Court and serve upon the Commission, within three (3) business days, or within such extension of time as the Commission staff agrees in writing or as otherwise ordered by the Court, a verified written accounting, signed by each of them under penalty of perjury.

V.

An Order permitting expedited discovery.

VI.

An Order permanently restraining and enjoining the Defendants, the Relief Defendant, the McGinn Smith Entities and any person or entity acting at their direction or on their behalf, from destroying, altering, concealing, or otherwise interfering with the access of the Commission to relevant documents, books and records.

VII.

A Final Judgment directing the Defendants and the Relief Defendant to disgorge their ill-gotten gains, plus prejudgment interest.

VIII.

A Final Judgment directing the Defendants to pay civil money penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

IX.

A Final Judgment permanently prohibiting McGinn from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. §78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)];

X.

Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 20, 2010

s/ David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
Telephone: (212) 336-0174
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov

Of Counsel:
Andrew Calamari
Michael Paley
Kevin McGrath
Lara Mehreban
Linda Arnold

EXHIBIT 4

Bank of America
ACH R/T 021200339

14691

55-33/212 NJ
83817

J & K INVESTIGATIVE SERVICES INC.
P.O. BOX 86
SOMERVILLE, NJ 08876

9/14/10

PAY TO THE ORDER OF Gary Jaggs $ 71.00

Seventy One Dollars and 00/100 DOLLARS

MEMO F/C#26150

Karen Swick
AUTHORIZED SIGNATURE

⑈014691⑈ ⑆021200339⑆ 009506830045⑈

381 Main Street., Suite 710
Woodbridge, NJ 07095

[] YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

[X] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	October 6, 2010 9:30 a.m.

[X] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	September 29, 2010 5 p.m.

[ ] YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants David L. Smith and Timothy M. McGinn	September 13, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Alison E. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, New York 10005
(212) 269-1400

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Next Page)

Issued by the
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

10-457 (GLS/DRH)
(Pending in the United States District Court for the Northern District of New York)
SUBPOENA IN A CIVIL CASE

McGINN, SMITH & CO., INC., et al.,
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.

TO: Gary Jaggs
c/o Financial Industry Regulatory Authority
581 Main Street., Suite 710
Woodbridge, NJ 07095

[] YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM / DATE AND TIME

[X] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

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ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants David L. Smith and Timothy M. McGinn	September 13, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Alison B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, New York 10005
(212) 269-1400

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Next Page)

PROOF OF SERVICE

SERVED	DATE	PLACE

SERVED ON (PRINT NAME)	MANNER OF SERVICE

SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;
(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

SCHEDULE A

Definitions

a. **Communication.** The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

b. **Document.** The term "document" as used herein shall mean and include all true copies, all originals and all non-identical copies, whether different from the original by reason of alterations or notations made on such copies or otherwise, whether in draft or final form, including but not limited to: letters or other correspondence; memoranda; spread sheets; reports; notes; contracts; agreements; proposals; telegrams; telexes; faxes; electronic mail or e-mail; cables; mailgrams; messages; file folders; lists; schedules; tables; indices; transcripts; affidavits; tabulations; diaries; calendars; analyses; instant messages; comparisons; records; books; booklets; circulars; bulletins; notices; records or recordings of telephone or other conversations, conferences or meetings; photographs; film; brochures; catalogs; instructions; charts; graphs; video or audio tapes; computer tapes and disks and CD ROMs, DVDs or other electronic data compilations. The term "document" also means any other written, recorded, transcribed, punched, printed, typed, taped, filmed or graphic matter, however produced or reproduced. The term "document" further means any document that in whole or in part comprises, contains, mentions, reflects, refers to or relates to any document the production of which is sought hereunder. A draft or non-identical copy is a separate document within the meaning of this term.

c. **Identify (with respect to persons).** When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address and telephone number and when referring to a natural person, additionally, the present or

last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

d. **Identify (with respect to documents).** When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; (iv) author(s), addressee(s) and recipient(s) and (v) custodian of the document.

e. **Person.** The term "person" is defined as any natural person or any business, legal or governmental entity or association.

f. **Concerning or Relating to.** The term "concerning" or "relating to" means pertaining to, referring to, describing, sharing, analyzing, reflecting, evidencing or constituting.

g. **And/Or.** The terms "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

h. **Produce.** When referring to documents, "produce" means to make available for inspection and copying, or alternatively, to deliver legible copies to counsel propounding these requests, all responsive documents within your possession, custody or control. All documents to be produced must be produced within the time allocated to respond to these requests.

i. **FINRA.** The term "FINRA" shall mean the Financial Industry Regulatory Authority.

j. **McGinn Smith.** The term "McGinn Smith" shall mean McGinn, Smith & Co.,

Inc., its officers, directors, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

k. **McGinn.** The term "McGinn" shall mean Timothy M. McGinn, his affiliates, employees, associates, agents and representatives.

l. **Smith.** The term "Smith" shall mean David L. Smith, his affiliates, employees, associates, agents and representatives.

m. **Investor.** The term "Investor" shall mean any person, his or her affiliates, employees, associates, agents and representatives, or any entity, its officers, directors, employees, partners, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives who made investments or purchased products, services, or securities, including but without limitation, an interest in FAIN, FEIN, FIIN, TAIN, or the Trusts, through McGinn Smith.

n. **FAIN.** The term "FAIN" shall mean First Advisory Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

o. **FEIN.** The term "FEIN" shall mean First Excelsior Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

p. **FIIN.** The term "FIIN" shall mean First Independent Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

q. **TAIN.** The term "TAIN" shall mean Third Albany Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns,

and representatives.

r. **Trusts.** The term "Trusts" shall mean the Firstline Jr. and Sr. Trusts 07 offerings, TDM Cable Trust 06, TDM Luxury Cruise Trust 07, TDM Verifier Trust 07, TDM Verifier Trust 08, Cruise Charter Venture Trust 08, Fortress Trust 08, Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08, TDM Verifier Trust 09, TDMM Benchmark Trust 09, TDMM Cable Jr. and Sr. Trusts 09, TDM Verifier Trust 07R, or TDM Verifier Trust 08R.

s. **SEC.** The term "SEC" shall mean the United States Securities and Exchange Commission.

Instructions

t. If any information or document requested herein is withheld from production for any reason, state the reason, and identify the information or document.

u. Where an objection is made to any Request, the objection shall state with specificity all grounds for the objection.

v. Where a defense or claim of privilege is asserted in objection to any Request, you are directed to provide a complete statement of the factual and legal basis of the claim of privilege.

w. If any information or document requested, or any portion thereof, is not known to you or is not in your possession, custody or control, but is known or believed by you to be known by or in the possession or control of another person or entity, identify the person or entity known or believed by you to know the information or have possession, custody or control of the information or document.

x. These Requests shall be deemed continuing and shall require further and

supplemental response by you in the event that you discover or obtain additional responsive information or documents between the time of the initial response and the time the action is concluded.

Requests

1. Documents provided by Investors to FINRA relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN and the Trusts.
2. Documents concerning communications between FINRA employees and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, emails, faxes, and letters.
3. Documents concerning communications between FINRA employees and the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, emails, faxes, and letters.
4. Affidavits or any other sworn statements provided to FINRA relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.
5. Recordings or transcriptions of recordings of communications between FINRA and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.
6. Recordings or transcriptions of recordings Investors provided to FINRA relating to communications between Investors and McGinn Smith, Smith, or McGinn concerning any investments held at McGinn Smith, or FAIN, FEIN, FIIN, TAIN, and the Trusts.
7. Notes of communications between FINRA employees and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

8. Internal reports relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

9. Records demonstrating the time, frequency and duration of communications with Investors.

10. Documents reflecting all Investors FINRA contacted or attempted to contact.

11. Documents reflecting the last known contact information for all Investors FINRA contacted or attempted to contact, including but without limitation, addresses, phone numbers, fax numbers, and email addresses.

12. Documents reflecting testimony taken from Investors.

13. Documents concerning communications between FINRA employees and the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, all documents from FINRA referring information obtained in its investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts to the SEC.

14. Notes of communications between FINRA employees and the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

15. Internal reports reflecting communication among FINRA employees relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

16. Internal reports reflecting communications among FINRA employees relating to the referral of FINRA's investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts to the SEC.

17. Documents concerning communications between FINRA employees and the Department of Justice concerning Joseph Bruno, including but without limitation, communications

with persons affiliated with the United States Attorneys' Office for the Northern District of New York.

18. Documents concerning communications between FINRA employees and the Department of Justice concerning McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, communications with persons affiliated with the United States Attorneys' Office for the Northern District of New York.

19. Documents concerning Thomas E. Livingston.

20. Documents concerning communications between FINRA employees and Thomas E. Livingston or his agents.

21. Documents withheld from production in FINRA Disciplinary Proceeding No. 2009017984501 pursuant to a claim of investigative privilege.

22. Documents which identify each and every FINRA employee who engaged in communications with the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

23. Documents which identify each and every FINRA employee who was involved in the investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

Bank of America
ACH R/T 021200339

14692

J & K INVESTIGATIVE SERVICES INC.
P.O. BOX 88
SOMERVILLE, NJ 08876

55-33/212 NJ
93817

9/14/10

PAY TO THE ORDER OF Robert J. McCarthy $ 71.00

Seventy One Dollars and 00/100 DOLLARS

MEMO File # 26149

Karen Lucia
AUTHORIZED SIGNATURE

⑈014692⑈ ⑆021200339⑆ 0095068300451⑈

581 Main Street, Suite 710
Woodbridge, NJ 07095

[ ] YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

[X] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	October 8, 2010 9:30 a.m.

[X] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	October 1, 2010 5 p.m.

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PREMISES	DATE AND TIME

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ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants David L. Smith and Timothy M. McGinn	September 13, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Alison B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, New York 10005
(212) 269-1400

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Next Page)

Issued by the
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

10-457 (GLS/DRH)
(Pending in the United States District Court for the Northern District of New York)
SUBPOENA IN A CIVIL CASE

McGINN, SMITH & CO., INC., et al.,
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.

TO: Robert J. McCarthy
c/o Financial Industry Regulatory Authority
581 Main Street., Suite 710
Woodbridge, NJ 07095

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ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants David L. Smith and Timothy M. McGinn	September 13, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Alison B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, New York 10005
(212) 269-1400

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Next Page)

PROOF OF SERVICE

SERVED	DATE	PLACE

SERVED ON (PRINT NAME)	MANNER OF SERVICE

SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;
(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

SCHEDULE A

Definitions

a. **Communication.** The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

b. **Document.** The term "document" as used herein shall mean and include all true copies, all originals and all non-identical copies, whether different from the original by reason of alterations or notations made on such copies or otherwise, whether in draft or final form, including but not limited to: letters or other correspondence; memoranda; spread sheets; reports; notes; contracts; agreements; proposals; telegrams; telexes; faxes; electronic mail or e-mail; cables; mailgrams; messages; file folders; lists; schedules; tables; indices; transcripts; affidavits; tabulations; diaries; calendars; analyses; instant messages; comparisons; records; books; booklets; circulars; bulletins; notices; records or recordings of telephone or other conversations, conferences or meetings; photographs; film; brochures; catalogs; instructions; charts; graphs; video or audio tapes; computer tapes and disks and CD ROMs, DVDs or other electronic data compilations. The term "document" also means any other written, recorded, transcribed, punched, printed, typed, taped, filmed or graphic matter, however produced or reproduced. The term "document" further means any document that in whole or in part comprises, contains, mentions, reflects, refers to or relates to any document the production of which is sought hereunder. A draft or non-identical copy is a separate document within the meaning of this term.

c. **Identify (with respect to persons).** When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address and telephone number and when referring to a natural person, additionally, the present or

last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

d. **Identify (with respect to documents).** When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; (iv) author(s), addressee(s) and recipient(s) and (v) custodian of the document.

e. **Person.** The term "person" is defined as any natural person or any business, legal or governmental entity or association.

f. **Concerning or Relating to.** The term "concerning" or "relating to" means pertaining to, referring to, describing, sharing, analyzing, reflecting, evidencing or constituting.

g. **And/Or.** The terms "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

h. **Produce.** When referring to documents, "produce" means to make available for inspection and copying, or alternatively, to deliver legible copies to counsel propounding these requests, all responsive documents within your possession, custody or control. All documents to be produced must be produced within the time allocated to respond to these requests.

i. **FINRA.** The term "FINRA" shall mean the Financial Industry Regulatory Authority.

j. **McGinn Smith.** The term "McGinn Smith" shall mean McGinn, Smith & Co.,

Inc., its officers, directors, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

k. **McGinn.** The term "McGinn" shall mean Timothy M. McGinn, his affiliates, employees, associates, agents and representatives.

l. **Smith.** The term "Smith" shall mean David L. Smith, his affiliates, employees, associates, agents and representatives.

m. **Investor.** The term "Investor" shall mean any person, his or her affiliates, employees, associates, agents and representatives, or any entity, its officers, directors, employees, partners, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives who made investments or purchased products, services, or securities, including but without limitation, an interest in FAIN, FEIN, FIIN, TAIN, or the Trusts, through McGinn Smith.

n. **FAIN.** The term "FAIN" shall mean First Advisory Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

o. **FEIN.** The term "FEIN" shall mean First Excelsior Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

p. **FIIN.** The term "FIIN" shall mean First Independent Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

q. **TAIN.** The term "TAIN" shall mean Third Albany Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns,

and representatives.

r. **Trusts.** The term "Trusts" shall mean the Firstline Jr. and Sr. Trusts 07 offerings, TDM Cable Trust 06, TDM Luxury Cruise Trust 07, TDM Verifier Trust 07, TDM Verifier Trust 08, Cruise Charter Venture Trust 08, Fortress Trust 08, Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08, TDM Verifier Trust 09, TDMM Benchmark Trust 09, TDMM Cable Jr. and Sr. Trusts 09, TDM Verifier Trust 07R, or TDM Verifier Trust 08R.

s. **SEC.** The term "SEC" shall mean the United States Securities and Exchange Commission.

Instructions

t. If any information or document requested herein is withheld from production for any reason, state the reason, and identify the information or document.

u. Where an objection is made to any Request, the objection shall state with specificity all grounds for the objection.

v. Where a defense or claim of privilege is asserted in objection to any Request, you are directed to provide a complete statement of the factual and legal basis of the claim of privilege.

w. If any information or document requested, or any portion thereof, is not known to you or is not in your possession, custody or control, but is known or believed by you to be known by or in the possession or control of another person or entity, identify the person or entity known or believed by you to know the information or have possession, custody or control of the information or document.

x. These Requests shall be deemed continuing and shall require further and

supplemental response by you in the event that you discover or obtain additional responsive information or documents between the time of the initial response and the time the action is concluded.

Requests

1. Documents provided by Investors to FINRA relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN and the Trusts.
2. Documents concerning communications between FINRA employees and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, emails, faxes, and letters.
3. Documents concerning communications between FINRA employees and the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, emails, faxes, and letters.
4. Affidavits or any other sworn statements provided to FINRA relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.
5. Recordings or transcriptions of recordings of communications between FINRA and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.
6. Recordings or transcriptions of recordings Investors provided to FINRA relating to communications between Investors and McGinn Smith, Smith, or McGinn concerning any investments held at McGinn Smith, or FAIN, FEIN, FIIN, TAIN, and the Trusts.
7. Notes of communications between FINRA employees and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

8. Internal reports relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

9. Records demonstrating the time, frequency and duration of communications with Investors.

10. Documents reflecting all Investors FINRA contacted or attempted to contact.

11. Documents reflecting the last known contact information for all Investors FINRA contacted or attempted to contact, including but without limitation, addresses, phone numbers, fax numbers, and email addresses.

12. Documents reflecting testimony taken from Investors.

13. Documents concerning communications between FINRA employees and the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, all documents from FINRA referring information obtained in its investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts to the SEC.

14. Notes of communications between FINRA employees and the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

15. Internal reports reflecting communication among FINRA employees relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

16. Internal reports reflecting communications among FINRA employees relating to the referral of FINRA's investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts to the SEC.

17. Documents concerning communications between FINRA employees and the Department of Justice concerning Joseph Bruno, including but without limitation, communications

with persons affiliated with the United States Attorneys' Office for the Northern District of New York.

18. Documents concerning communications between FINRA employees and the Department of Justice concerning McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, communications with persons affiliated with the United States Attorneys' Office for the Northern District of New York.

19. Documents concerning Thomas E. Livingston.

20. Documents concerning communications between FINRA employees and Thomas E. Livingston or his agents.

21. Documents withheld from production in FINRA Disciplinary Proceeding No. 2009017984501 pursuant to a claim of investigative privilege.

22. Documents which identify each and every FINRA employee who engaged in communications with the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

23. Documents which identify each and every FINRA employee who was involved in the investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

Bank of America
ACH R/T 021200339

14694

J & K INVESTIGATIVE SERVICES INC.
P.O. BOX 88
SOMERVILLE, NJ 08876

65-33/212 NJ
93817

9/14/10

PAY TO THE ORDER OF Michael Newman $ 71.00

Seventy One Dollars and 00 DOLLARS

MEMO File#26148

AUTHORIZED SIGNATURE

⑈014694⑈ ⑆021200339⑆ 0095068300451⑈

381 Main Street., Suite 710
Woodbridge, NJ 07095

[ ] YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

[X] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	October 5, 2010 9:30 a.m.

[X] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	September 28, 2010 5 p.m.

[ ] YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants David L. Smith and Timothy M. McGinn	September 13, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Alison B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, New York 10005
(212) 269-1400

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Next Page)

Issued by the
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

10-457 (GLS/DRH)
(Pending in the United States District Court for the Northern District of New York)
SUBPOENA IN A CIVIL CASE

McGINN, SMITH & CO., INC., et al.,
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.

TO: Michael Newman
c/o Financial Industry Regulatory Authority
581 Main Street., Suite 710
Woodbridge, NJ 07095

[] YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

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ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants David L. Smith and Timothy M. McGinn	September 13, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Alison B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, New York 10005
(212) 269-1400

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Next Page)

PROOF OF SERVICE

SERVED	DATE	PLACE

SERVED ON (PRINT NAME)	MANNER OF SERVICE

SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;
(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

SCHEDULE A

Definitions

a. **Communication.** The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

b. **Document.** The term "document" as used herein shall mean and include all true copies, all originals and all non-identical copies, whether different from the original by reason of alterations or notations made on such copies or otherwise, whether in draft or final form, including but not limited to: letters or other correspondence; memoranda; spread sheets; reports; notes; contracts; agreements; proposals; telegrams; telexes; faxes; electronic mail or e-mail; cables; mailgrams; messages; file folders; lists; schedules; tables; indices; transcripts; affidavits; tabulations; diaries; calendars; analyses; instant messages; comparisons; records; books; booklets; circulars; bulletins; notices; records or recordings of telephone or other conversations, conferences or meetings; photographs; film; brochures; catalogs; instructions; charts; graphs; video or audio tapes; computer tapes and disks and CD ROMs, DVDs or other electronic data compilations. The term "document" also means any other written, recorded, transcribed, punched, printed, typed, taped, filmed or graphic matter, however produced or reproduced. The term "document" further means any document that in whole or in part comprises, contains, mentions, reflects, refers to or relates to any document the production of which is sought hereunder. A draft or non-identical copy is a separate document within the meaning of this term.

c. **Identify (with respect to persons).** When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address and telephone number and when referring to a natural person, additionally, the present or

Inc., its officers, directors, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

k. **McGinn.** The term "McGinn" shall mean Timothy M. McGinn, his affiliates, employees, associates, agents and representatives.

l. **Smith.** The term "Smith" shall mean David L. Smith, his affiliates, employees, associates, agents and representatives.

m. **Investor.** The term "Investor" shall mean any person, his or her affiliates, employees, associates, agents and representatives, or any entity, its officers, directors, employees, partners, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives who made investments or purchased products, services, or securities, including but without limitation, an interest in FAIN, FEIN, FIIN, TAIN, or the Trusts, through McGinn Smith.

n. **FAIN.** The term "FAIN" shall mean First Advisory Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

o. **FEIN.** The term "FEIN" shall mean First Excelsior Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

p. **FIIN.** The term "FIIN" shall mean First Independent Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns, and representatives.

q. **TAIN.** The term "TAIN" shall mean Third Albany Income Notes, LLC, its members, employees, agents, affiliates, subsidiaries, related entities, successors, assigns,

with persons affiliated with the United States Attorneys' Office for the Northern District of New York.

18. Documents concerning communications between FINRA employees and the Department of Justice concerning McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, communications with persons affiliated with the United States Attorneys' Office for the Northern District of New York.

19. Documents concerning Thomas E. Livingston.

20. Documents concerning communications between FINRA employees and Thomas E. Livingston or his agents.

21. Documents withheld from production in FINRA Disciplinary Proceeding No. 2009017984501 pursuant to a claim of investigative privilege.

22. Documents which identify each and every FINRA employee who engaged in communications with the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

23. Documents which identify each and every FINRA employee who was involved in the investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

Issued by the
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

10-457 (GLS/DRH)
(Pending in the United States District Court for the Northern District of New York)
SUBPOENA IN A CIVIL CASE

McGINN, SMITH & CO., INC., et al.,
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.

TO: Randy Pearlman
c/o Financial Industry Regulatory Authority
581 Main Street., Suite 710
Woodbridge, NJ 07095

[] YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

[X] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	October 7, 2010 9:30 a.m.

[X] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
Gusrae, Kaplan, Bruno & Nusbaum PLLC 120 Wall Street New York, New York 10005	September 30, 2010 5 p.m.

[ ] YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants David L. Smith and Timothy M. McGinn	September 13, 2010

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Alton B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, New York 10005
(212) 269-1400

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Next Page)

and representatives.

r. **Trusts.** The term "Trusts" shall mean the Firstline Jr. and Sr. Trusts 07 offerings, TDM Cable Trust 06, TDM Luxury Cruise Trust 07, TDM Verifier Trust 07, TDM Verifier Trust 08, Cruise Charter Venture Trust 08, Fortress Trust 08, Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08, TDM Verifier Trust 09, TDMM Benchmark Trust 09, TDMM Cable Jr. and Sr. Trusts 09, TDM Verifier Trust 07R, or TDM Verifier Trust 08R.

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Instructions

t. If any information or document requested herein is withheld from production for any reason, state the reason, and identify the information or document.

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v. Where a defense or claim of privilege is asserted in objection to any Request, you are directed to provide a complete statement of the factual and legal basis of the claim of privilege.

w. If any information or document requested, or any portion thereof, is not known to you or is not in your possession, custody or control, but is known or believed by you to be known by or in the possession or control of another person or entity, identify the person or entity known or believed by you to know the information or have possession, custody or control of the information or document.

x. These Requests shall be deemed continuing and shall require further and

supplemental response by you in the event that you discover or obtain additional responsive information or documents between the time of the initial response and the time the action is concluded.

Requests

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3. Documents concerning communications between FINRA employees and the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts, including but without limitation, emails, faxes, and letters.
4. Affidavits or any other sworn statements provided to FINRA relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.
5. Recordings or transcriptions of recordings of communications between FINRA and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.
6. Recordings or transcriptions of recordings Investors provided to FINRA relating to communications between Investors and McGinn Smith, Smith, or McGinn concerning any investments held at McGinn Smith, or FAIN, FEIN, FIIN, TAIN, and the Trusts.
7. Notes of communications between FINRA employees and Investors relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

8. Internal reports relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

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11. Documents reflecting the last known contact information for all Investors FINRA contacted or attempted to contact, including but without limitation, addresses, phone numbers, fax numbers, and email addresses.

12. Documents reflecting testimony taken from Investors.

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with persons affiliated with the United States Attorneys' Office for the Northern District of New York.

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19. Documents concerning Thomas E. Livingston.

20. Documents concerning communications between FINRA employees and Thomas E. Livingston or his agents.

21. Documents withheld from production in FINRA Disciplinary Proceeding No. 2009017984501 pursuant to a claim of investigative privilege.

22. Documents which identify each and every FINRA employee who engaged in communications with the SEC relating to McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

23. Documents which identify each and every FINRA employee who was involved in the investigation of McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, and the Trusts.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE SUBPOENAS SERVED ON FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. EMPLOYEES	§	**Miscellaneous Docket No.: M8-85**
	§	***Securities and Exchange Commission v. McGinn, Smith & Co., et. al.*; U.S. District Court; Northern District of New York; Cause No. 10-457 (GLS/DRH); Judge Gary L. Sharpe, presiding; Magistrate Judge David R. Homer, referral**

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SUPPLEMENTAL AFFIDAVIT OF JAMES S. SHORRIS

1. My name is James S. Shorris. On October 1, 2010, I submitted my original affidavit (the "Shorris Affidavit") in support of four Financial Industry Regulatory Authority, Inc. ("FINRA") employees' Motion to Quash subpoenas issued on them individually by David L. Smith and Timothy L. McGinn (together, the "Defendants") in a Securities and Exchange Commission ("SEC") proceeding (the "SEC Proceeding"). On or about October 4, 2010, the Defendants directed a fifth subpoena to FINRA's custodian of records (collectively with the previously-issued subpoenas, the "Subpoenas") in the SEC Proceeding. This supplemental affidavit is intended to address all of the Subpoenas and to supplement statements I made in the Shorris Affidavit. I have personal knowledge of the facts stated in both the Shorris Affidavit and this supplemental affidavit, and I am personally familiar with the documents in question.

2. As Executive Vice President and Acting Director of Enforcement, I have supervised the examination and inquiry of the Defendants and McGinn, Smith & Co., Inc. ("McGinn Smith" or the "Firm"), which commenced in early 2009 (the "FINRA Inquiry"), and also the enforcement action against McGinn Smith initiated on or about April 5, 2010 (together

with the FINRA Inquiry, the "FINRA Action"). I am personally familiar with the FINRA Action, which is separate and apart from the SEC Proceeding.

3. After referring McGinn Smith to the SEC in 2009, FINRA continued to pursue the FINRA Inquiry for its own purposes but communicated with the SEC in connection with a separate investigation the SEC commenced of the Defendants and their Firm. In connection therewith and pursuant to a request from the SEC, FINRA provided the SEC with copies of transcripts of relevant testimony after such testimony had been taken in the FINRA Inquiry. Often times, the SEC requests access to FINRA's investigative files where a member firm is under investigation by both FINRA and the SEC.

4. As I previously stated, FINRA did not take direction from the SEC concerning FINRA's investigation of the Defendants and their Firm, nor did FINRA coordinate its on-the-record interviews of the Defendants and others with the SEC. FINRA and the SEC did not exchange outlines or questions with respect to testimony to be taken in either the FINRA Action or the SEC Proceeding. Additionally, the SEC's requests to FINRA for information from FINRA's files were not coerced, suggested, or encouraged—they were simply requests by the SEC for information that FINRA had collected for FINRA's own investigation. No SEC or other government employee asked FINRA employees to pursue any particular line of questioning in the FINRA Action. No SEC or government employee ever attended or participated in any of FINRA's on the record interviews. No SEC or other government employee suggested any sort of timing or schedule for FINRA's on the record interviews, or that FINRA coordinate its interview schedule with that of the SEC.

5. I understand that during the interviews of McGinn Smith personnel, FINRA asked questions about both Firm and individual employees' assets. It is increasingly typical in FINRA

investigations into fraud and/or other misconduct by a member firm for FINRA to turn its focus to associated persons and registered individuals, especially where those individuals themselves are suspected of shielding assets or personally profiting from alleged securities laws violations.

6. The production in the FINRA Action included over 31,250 pages related to FINRA's investigation of the Defendants and their Firm. FINRA believes it has effectively produced all non-privileged documents that are responsive to the Subpoenas. FINRA does not believe it has any written communications with the Department of Justice regarding the FINRA Action. FINRA withheld from production (a) FINRA's witness interviews and communications with customers and investors taken in connection with the FINRA Action, (b) FINRA's internal communications, analyses, memoranda, spreadsheets, and documents in connection with the FINRA Action, and (c) certain communications between FINRA and the SEC regarding the investigation of Defendants and their Firm.

7. The witness interviews and communications with customers and investors should be protected to allow such persons to talk frankly and openly with investigators. The internal communications, analyses, memoranda, spreadsheets, and documents should be protected because they are replete with FINRA's internal opinions and analyses and would reveal how FINRA conducts its investigations and forms its litigation strategy. The relatively minimal communications between FINRA and the SEC should be protected to allow FINRA to communicate and transfer information to the SEC in furtherance of and to facilitate FINRA's referral.

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

Executed on: 27 October 2010

James S. Shorris

EXHIBIT 4

Westlaw.

Not Reported in F.Supp.2d, 1999 WL 1747410 (S.D.N.Y.)
(Cite as: 1999 WL 1747410 (S.D.N.Y.))

H
Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
In re ADLER, COLEMAN, CLEARING CORP., Debtor.
FIERO BROTHERS, INC., Plaintiff,
v.
Edwin B. MISHKIN, SIPC Trustee for Adler, Coleman Clearing Corp., and the National Securities Clearing Corporation, Defendants.
No. 95-08203 JLG.

Dec. 8, 1999.

Gusrae, Kaplan & Bruno, New York, New York, for Fiero Brothers, Inc.

National Association of Securities Dealers, Inc., Washington, D.C ., Defendant, pro se.

John T. Moran, Delray Beach Florida, Milbank, Tweed, Hadley & McCloy, New York, New York, for National Securities Clearing Corp.

Cleary, Gottlieb, Steen & Hamilton, New York, New York, for Trustee.

MEMORANDUM DECISION ON PLAINTIFF'S MOTION TO COMPEL

GARRITY, Bankruptcy J.

***1** Fiero Brothers, Inc. ("Fiero") moves for the entry of an order pursuant to Rules 9014 and 7037 of the Federal Rules of Bankruptcy Procedure and Rule 37(a)(2) of the Federal Rules of Civil Procedure ("Fed. R. Civ.P.") (a) compelling Cameron Funkhauser, Esq., an employee of the National Association of Securities Dealers ("NASD"), to appear for a duly noticed deposition, or alternatively, directing the NASD to make Funkhauser available for deposition, (b) directing Funkhauser and the NASD to pay costs incurred by Fiero in connection with this motion, and (c) compelling John T. Moran to answer certain questions that he refused to answer during the course of a deposition held on January 30 and 31, 1996. We deny the motion as to the NASD and Funkhauser and grant it as to Moran.

Facts

The following facts are undisputed. On February 27, 1995 (the "Filing Date"), the Securities Investor Protection Corporation ("SIPC") commenced a liquidation proceeding under Section 78eee(b) of the Securities Investors Protection Act, 15 U.S.C. § 78eee(b), against Adler, Coleman Clearing Corp. (the "Debtor") in the United States District Court for the Southern District of New York. District Judge Loretta A. Preska ordered that the liquidation proceeding be removed to this Court, appointed Edwin B. Mishkin as trustee (the "Trustee") to liquidate the Debtor's remaining assets, and authorized the Trustee to retain the law firm Cleary, Gottlieb, Steen & Hamilton ("Cleary, Gottlieb") as counsel.

Fiero is a registered broker/dealer of securities. By complaint dated March 20, 1995, Fiero and Joseph Roberts & Co., Inc. jointly commenced an adversary proceeding against the Trustee, the National Securities Clearing Corporation and Cleary, Gottlieb. Fiero was severed from that action pursuant to a stipulation so ordered by this Court on September 29, 1995. It commenced this adversary proceeding by complaint dated September 12, 1995 (the "Complaint"). In the Complaint, Fiero seeks an award of consequential damages resulting from the named defendants' alleged wrongful manipulation of securities prices in connection with the Trustee's liquidation of the Debtor's assets.

On January 23, 1996, Fiero caused a subpoena to be served on Mr. Funkhauser directing him to appear at a deposition on February 6, 1996. *See* Affirmation of Martin H. Kaplan in Support of Motion to Compel, dated March 4, 1996 (the "Kaplan Af-

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firm.") ¶ 2. By letter dated January 31, 1996 (the "January Letter"), Thomas P. Moran, Esq., an attorney in the Office of the General Counsel of the NASD (who is not related to John T. Moran), objected to the subpoena and informed Fiero's counsel that Funkhauser would not appear at the scheduled deposition because his testimony is protected by the attorney-client, attorney work product and law enforcement privileges. *See* Kaplan Affirm. Ex. B. Funkhauser has been involved in an ongoing NASD investigation into trading by Fiero in certain securities underwritten by Hanover Sterling & Co. ("Hanover"). *See* NASD's Memorandum in Opposition to Motion to Compel, dated March 22, 1996 (the "NASD Mem.") at p. 3. Fiero disputes the NASD's assertion that Fiero is a target of the investigation. Kaplan Affirm. ¶ 7.[FN1] By letter dated February 1, 1996, Fiero asked the NASD to reconsider its position, explaining that Fiero did not seek privileged information because Funkhauser would be called on to testify only as to factual matters relating to his contacts or discussions with Hanover, the Securities and Exchange Commission ("SEC"), the Trustee, the New York Stock Exchange ("NYSE"), the SIPC and certain other third parties, rather than his analysis or opinion. Kaplan Affirm. Ex. C. Funkhauser did not appear at the scheduled deposition, and the NASD failed to seek either a protective order from this Court pursuant to Fed.R.Civ.P. 26(c) or an order quashing the subpoena pursuant to Fed.R.Civ.P. 45.

> FN1. In fact, we understand that in a complaint filed in or about April 1998, the NASD alleged that Fiero and three other brokerage houses made $6.4 million in illegal profits by selling short stocks for which Hanover made a market.

*2 Pursuant to a subpoena issued by Fiero, John T. Moran appeared *pro se* at a deposition held on January 30 and 31, 1996. During that deposition, Moran refused to answer various questions propounded to him concerning the identity of certain individuals or entities with whom he may have discussed matters that are the subject of an ongoing NASD investigation. Kaplan Affirm. ¶ 8; Kaplan Affirm. Ex. E. In doing so, he did not assert any privilege, and has not sought a protective order.

Discussion

We base our subject matter jurisdiction of this matter on 15 U.S.C. §§ 78eee(b)(2)(A) and (b)(4) and the district court's February 27, 1995 order referring and removing the Debtor's case to this court. This motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

Motion to Compel Deposition of Funkhauser

Fed.R.Civ.P. 26(b) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b). Notwithstanding the assertions in the January Letter, the NASD does not contend that the attorney client privilege is applicable herein. It does claim that the information sought by Fiero from Funkhauser concerns matters relating to an active, ongoing NASD investigation and is insulated from discovery under both the "investigative file privilege" and the attorney work product doctrine.

The party seeking to invoke a privilege bears the burden of establishing "those facts that are the essential elements of the privileged relationship." *In re Grand Jury Subpoena Dated Jan. 4, 1984,* 750 F.2d 223, 224 (2d Cir.1984). This burden cannot be " 'discharged by mere conclusory or ipse dixit assertions." ' *Id.* at 225 (quoting *In re Bonanno,* 344 F.2d 830, 833 (2d Cir.1965)). Once this burden has been satisfied, it is incumbent upon the party seeking discovery to demonstrate that its need for the information and the harm that it would suffer as a consequence of non-disclosure outweigh the injury that disclosure would cause either to the other party or the interests cited by it. *Apex Oil v.. DiMauro,* 110 F.R.D. 490, 496 (S.D.N.Y.1985); *see also In re Sealed Case,* 856 F.2d 268, 272 (D.C.Cir.1988)

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(interest in non-disclosure must be balanced against the need of the party seeking discovery for access to the information sought); *Black v. Sheraton Corp. of America,* 564 F.2d 531, 545 (D.C.Cir.1977); *Securities and Exchange Commission v. Thrasher,* No. 92 Civ. 6987, 1995 WL 46681, at *10 (S.D.N.Y. Feb. 7, 1995), *aff'd,* No. 92 Civ. 6987, 1995 WL 456402 (S.D.N.Y. Aug. 2, 1995).

The attorney work product doctrine is set forth in Fed.R.Civ.P. 26(b)(3), which provides in relevant part as follows:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without due hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

***3** Fed.R.Civ.P. 26(b)(3). Thus, in appropriate circumstances, the doctrine prevents disclosure of materials generated in anticipation of litigation, *see, e.g., Hickman v. Taylor,* 329 U.S. 495, 511-13 (1947), as well as the mental impressions, conclusions, opinions or legal theories of an attorney concerning litigation. *See, e.g., Upjohn Co. v. United States,* 449 U.S. 383, 399-401 (1981); *John Doe Corp. v. United States (In re John Doe Corp.),* 675 F.2d 482, 493 (2d Cir.1982).

The "investigatory privilege" is a qualified common law privilege protecting civil as well as criminal law-enforcement investigatory files from civil discovery. *See Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1341 (D.C.Cir.1984); *Black,* 564 F.2d at 541-42; *Frankel v. Securities and Exchange Commission,* 460 F.2d 813, 817 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972); *United States v. American Telephone & Telegraph Company,* 86 F.R.D. 603, 639 (D.D.C.1979). It is predicated on a "public interest in minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources." *Black,* 564 F.2d at 545. The privilege applies to both investigatory files and testimony concerning their contents. *See Sealed Case,* 856 F.2d at 271 ("It would make little sense to protect the actual files from disclosure while forcing the government to testify about their contents").

The privilege has been extended to quasi-governmental or non-governmental entities, like the NASD, entrusted with the enforcement of rules of conduct and procedure promulgated by self-regulating industries. *See Ross v. Bolton,* 106 F.R.D. 22, 23 (S.D.N.Y.1985) (motion to compel production of NASD files denied where NASD had already agreed to produce factual data and remaining documents, including chart of trading activities and transcripts of unsworn deposition testimony taken during NASD investigation, represented staff analyses of data or opinions such that they were protected by investigatory privilege); *see also Thrasher,* 1995 WL 46681, at *12 (disclosure of documents of Chicago Board of Exchange and New York Stock Exchange in possession of SEC barred by investigatory privilege); *Apex Oil,* 110 F.R.D. at 497 (protecting investigative files of New York Mercantile Exchange).

There are three prerequisites to the assertion of the privilege: (i) the head of the department having control over the information requested must assert the privilege; (ii) the official in question must do so based on actual personal consideration; and (iii) he or she must specify the information purportedly covered by the privilege, and accompany the request with an explanation as to why such informa-

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tion falls within the scope of the privilege. *Sealed Case,* 856 F.2d at 270 (citing *Black,* 564 F.2d at 542-43; *Friedman,* 738 F.2d at 1341-42). Once these conditions are satisfied, the information sought will not be disclosed unless the party seeking disclosure establishes that its need for the information outweighs the public interest in preventing disclosure. *See Raphael v. Aetna Casualty & Surety Co.,* 744 F.Supp. 71, 74 (S.D.N.Y.1990) (where qualified common law privilege invoked to defeat discovery, balancing of competing interests required).

*4 The NASD claims that application of the investigatory privilege bars Funkhauser's deposition because Funkhauser's testimony "will reveal, directly or indirectly, to Fiero, a target of the investigation, what information confidential sources are supplying to the NASD and the direction the [NASD] investigation is, or is not, taking." NASD Mem. at p. 5. It also asserts that "premature disclosure of investigatory information, with all its attendant dangers of witness intimidation or retaliation and the conforming tainting of testimony, may potentially prevent the NASD from presenting its strongest case if formal disciplinary action is deemed necessary, thereby frustrating the important public interest in vigorous enforcement of the securities laws." *Id.* Fiero counters that it seeks to depose Funkhauser as a "fact witness" rather than for his "work product" or for "inside information". *See* Reply Affirmation of Martin H. Kaplan in Support of Motion to Compel (undated) (the "Reply Affirm.") ¶ 9.

Neither the investigatory privilege nor the attorney work product doctrine ordinarily precludes discovery of factual or statistical information, as opposed to mental impressions or opinions, even if such information is embodied in privileged materials or serves as the basis for opinions of the investigator or attorney involved. *See Hickman,* 329 U.S. at 507, 513 (noting that "either party may compel the other to disgorge whatever facts he has in his possession" but finding that facts learned by attorney from survivors in tugboat mishap in action against tugboat company were not discoverable under work-product doctrine where information was readily available elsewhere); *Ross,* 106 F.R.D. at 24 (factual or statistical information not protected by investigative privilege); *Ford v. Philips Electronics Instruments Co.,* 82 F.R.D. 359, 360 (E.D.Pa.1979) (work product doctrine furnishes no shield against discovery of facts that adverse party's lawyer has learned or existence or nonexistence of documents, even if documents themselves may not be subject to discovery); *Xerox Corp. v. International Business Machines Corp.,* 64 F.R.D. 367, 381-82 (S.D.N.Y.1974) ("[a] party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable from any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information"); *Banks v. Lockheed-Georgia Co.,* 53 F.R.D. 283, 285 (N.D.Ga.1971) (denying discovery of written opinions and conclusions of defendant's "research" team, which included attorney, under work product doctrine, but ordering defendant to provide plaintiffs with any factual or statistical information that was available to team).

However, when disclosure of facts would effectively reveal the mental impressions or opinions of an attorney, those facts have been protected from disclosure pursuant to the attorney work product doctrine. *See Shelton v. American Motors Corp.,* 805 F.2d 1323, 1329 (8th Cir.1986) (work product doctrine barred deposition of opposing counsel where mere acknowledgment of existence of documents selected in process of compiling documents from among voluminous files in preparation for litigation would reveal mental impressions); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.,* 117 F.R.D. 83, 85-86 (M.D.N.C.1987) ("even seemingly innocent questions, such as the existence or nonexistence of documents or queries concerning which documents counsel has selected in preparing a witness for deposition may implicate opinion

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work product").

***5** This concept was addressed in *Securities and Exchange Commission v. Morelli,* 143 F.R.D. 42 (S.D.N.Y.1992). In that case, the defendants in an insider trading action sought to depose the SEC or a member of its litigation team under Fed.R.Civ.P. 30(b)(6) in an effort to discover factual information upon which the SEC's allegations were predicated, including the time and place of the defendants' alleged receipt of the inside information, the source and substance of the information and the identity of other individuals to whom the information was allegedly transmitted. *Id.* at 44. The SEC moved for a protective order, claiming, among other things, that the information was protected by the work product doctrine. *Id.* In finding that the proposed deposition constituted an impermissible attempt by the defendants to inquire into the mental processes and strategies of the SEC, the court stated:

> Given plaintiff's sworn, uncontroverted statement that all relevant, non-privileged evidence has been disclosed to the defendants, the Court is drawn inexorably to the conclusion that [defendants'] Notice of Deposition is intended to ascertain how the SEC intends to marshall the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated.

Id. at 47.

The same concerns that motivated the court in *Morelli* to deny deposition discovery because it threatened the sanctity of mental impressions, opinions or strategic deliberation under the work product doctrine are present in this case. Premature disclosure of factual information to the target of a pending NASD investigation could impair the NASD's ability to investigate its members, thereby defeating the important "public interest in maintaining the integrity of effective industry self-regulation." *See Ross,* 106 F.R.D. at 23 (noting "strong public interest" in finding that investigatory privilege precluded discovery of NASD file materials constituting opinion and analysis).

This argument is rendered no less compelling merely because *Morelli* involved an attempt to depose opposing counsel, and the court's decision was accordingly influenced in part by the general disapprobation with which this practice is viewed due to its adverse effect upon the efficacy of the adversarial process and the significant risk that the attorney will be forced to reveal his theory of the case or strategy to an opponent. 143 F.R.D. at 47. Although the NASD is not a party to this proceeding, it is potentially adverse to Fiero in any disciplinary action arising as a consequence of its investigation. *See* NASD Mem. at pp. 7-8. Thus, whether it consists of revealing an attorney's legal theories developed in anticipation of a disciplinary proceeding or prematurely disclosing the strategy driving an ongoing investigation, the risk is equally significant. We accordingly find that the scope of the investigative privilege should be extended to encompass the information sought by Fiero in this case.

***6** Fiero contends that its need to obtain the information from Funkhauser outweighs any public interest in preventing disclosure because allegedly contradictory deposition testimony by John Corsiglia, Esq. (then, a Cleary, Gottlieb attorney) calls into question the veracity of the testimony given by Moran, and Funkhauser's testimony is therefore necessary to determine whether Moran is telling the truth. Reply Affirm. ¶ 13. However, Fiero does not identify the relevant Corsiglia testimony, and the record is otherwise devoid of any evidence whatsoever to support a finding that Moran has been anything other than truthful in his testimony. Fiero's unsupported allegations are inadequate to overcome the important public interest served by maintaining the confidentiality of the NASD's investigative files.

Apex Oil, 110 F.R.D. at 490, is instructive on this point. In denying access to investigative files maintained by the New York Mercantile Exchange, the court stated:

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> [P]laintiff argues that it needs the information in question to assess the accuracy and truthfulness of previously obtained deposition testimony. In this regard, plaintiff argues that any witness statements made shortly after the events in question will be more detailed and accurate than deposition testimony long after those events, and that the statements might, in any event, diverge from the testimony offered in pre-trial discovery. On balance, I conclude that plaintiff has not made an adequate showing of need. Plaintiff's principal argument-that statements made to the Exchange investigators may differ from testimony given by the same witnesses in pre-trial depositions-if accepted would eliminate any requirement of a particularized showing of need. There is always a possibility of divergent testimony, and if such a mere possibility were sufficient to waive any protection for the investigative files, it would necessarily do so in every case. Speculation of this sort is simply inadequate to justify overcoming the presumptive protection accorded the investigative files.

Id. at 498 (footnote omitted). Moreover, Fiero has not demonstrated that it is unable to obtain the information it seeks from other sources (*e.g.,* the Trustee, the SIPC, the NYSE, the SEC or "other third parties"). *See Friedman,* 738 F.2d at 1341 (whether information is available from other sources is factor in determining degree of litigant's need to obtain it); *Collins v. Shearson/American Express, Inc.,* 112 F.R.D. 227 (D.D.C.1986) (denial of motion to compel production of Commodities Futures Trading Commission files where documents were privileged, CFTC asserted that disclosure could harm investigation in progress and plaintiffs made only weak showing of need or that documents unavailable elsewhere).

Citing Fed.R.Civ.P. 37(d), Fiero also seeks to impose reasonable costs (including attorneys' fees) incurred in connection with the Motion upon Funkhauser and the NASD. Although the NASD should have moved for a protective order or for an order quashing Funkhauser's subpoena, we find that because the NASD's position was substantially justified, both Fiero and the NASD must bear their own costs and expenses incurred in connection herewith.

Compelling Moran to Testify

*7 Fed.R.Civ.P. 30(c) states that all objections made at the time of a deposition shall be noted and that evidence with respect to which an objection has been interposed will be taken subject to the objection. Fed.R.Civ.P. 30(c). Under Fed.R.Civ.P. 30(d)(1), "[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion" seeking to limit the scope of a deposition conducted in bad faith or in an unreasonably annoying, harassing or oppressive manner. Fed.R.Civ.P. 30(d)(1). "[A]bsent a claim of privilege" or one of the other bases stated in the rule, "instructions not to answer questions at a deposition are improper." *Gould Investors, L.P. v. General Insurance Co. of Trieste & Venice,* 133 F.R.D. 103, 104 (S.D.N.Y.1990) (citing *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, Div. of Equifax Services, Inc.,* 120 F.R.D. 504, 508 (W.D.La.1988)).

If a deponent fails to answer a question propounded at a deposition, the discovering party may move for an order compelling the deponent to respond. Fed.R.Civ.P. 37(a)(2)(B). This rule applies whether or not a party is represented by counsel. Parties appearing *pro se,* although afforded special solicitude, are subject to the compulsion and sanction mechanisms set forth in Fed.R.Civ.P. 37. *See McDonald v. Head Criminal Court Supervisor Officer,* 850 F.2d 121 (2d Cir.1988); *Maleski v. Landberg,* No. 93 Civ. 5318, 1996 WL 63043, at *1 (S.D.N.Y. Feb. 13, 1996); *Baker v. Ace Advertisers' Service, Inc.,* 153 F.R.D. 38, 40 (S.D.N.Y.1992); *Rivera v. Simmons,* 116 F.R.D. 593, 596 (S.D.N.Y.1987).

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this Court that would relieve or prevent Moran from responding to the questions posed by Fiero. Also, there is no evidence to suggest that Moran's refusal to testify is premised upon any allegation that his deposition was being conducted in bad faith or in an unreasonably annoying, harassing or oppressive manner.

Construing the entire record before us in a way favorable to Moran, the only conceivable justification for his refusal to answer is that any testimony concerning the issues in question is in some way privileged because it is or may be the subject of a pending grand jury investigation. *See* Transcript of Deposition of John T. Moran held on January 30, 1996 at p. 129, l. 9 (annexed as Ex. E. to Kaplan Affirm.). Moran acknowledges, however, that he is not aware of any pending grand jury investigation of the matters involved. *Id.* Even if Moran had testified before a federal grand jury, he would not be precluded from revealing either that he testified or the nature of his testimony. *See* Rule 6(e)(2) of the Federal Rules of Criminal Procedure; *In re Application of Eisenberg,* 654 F.2d 1107, 112 n. 9 (5th Cir.1981). We find, therefore, that Moran has not stated any applicable privilege or other legally cognizable basis for his refusal to answer the questions propounded to him by Fiero.

Conclusion

***8** We deny the motion as to Funkhauser and the NASD and grant it as to Moran.

SETTLE ORDER.

S.D.N.Y.,1999.
In re Adler, Coleman, Clearing Corp.
Not Reported in F.Supp.2d, 1999 WL 1747410 (S.D.N.Y.)

END OF DOCUMENT

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EXHIBIT 5

Westlaw.

Not Reported in F.Supp., 1996 WL 406826 (E.D.La.)
(Cite as: 1996 WL 406826 (E.D.La.))

C
Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.
In The Matter of NATIONAL ASSOCIATION OF SECURITIES DEALERS.
No. 96-0518.

July 18, 1996.

AFRICK, United States Magistrate Judge.

*1 This matter is before the court pursuant to a motion to compel compliance with a subpoena duces tecum filed on behalf of Dow Jones & Co., Inc. and Laura Jereski. Said motion is related to a libel action, *MMAR Group, Inc. v. Dow Jones & Co., Inc. and Laura Jereski,* Civil Action No. H-95-1262, pending in the Southern District of Texas.

The basis of the above-referenced libel action is an article written by defendant, Laura Jereski, and published by defendant, Dow Jones & Company, Inc. (collectively referred to herein as "defendants"), in the Wall Street Journal on October 21, 1993. The article concerned the relationship of plaintiff, MMAR Group, Inc. ("MMAR"), with the Louisiana State Employees Retirement System ("LASERS"). MMAR claims that many of the statements in the article were false, including a statement to the effect that on October 4, 1993, the National Association of Securities Dealers, Inc., ("NASD"), in particular, the NASD's District No. 5 based in New Orleans, Louisiana, had filed a notice of a pending action against MMAR.[FN1] Defendants contend that the above statement was "substantially true," in that, prior to the time the article was published, a recommendation had been made that charges be filed against MMAR.

FN1. It has now been established that as of October 21, 1993, the date the pertinent article was published, the NASD had not yet initiated any action against MMAR.

Based upon the above contentions, it is clear that a critical element of MMAR's libel action, as well as defendants' defense thereto, is the status of the NASD's investigation of MMAR at the time the Wall Street Journal article was published. As such, in May, 1996, defendants had a subpoena issued from the United States District Court for the Eastern District of Louisiana commanding, in part, that the New Orleans-based office of the NASD produce all documents evidencing the state of its investigation of MMAR as of October 20, 1993.[FN2]

FN2. *See* exhibit C attached to defendants' motion to compel NASD to comply with the subpoena, document # 2.

NASD objected to producing the subpoenaed documents, arguing that the documents were part of an ongoing disciplinary proceeding against MMAR and therefore, were not subject to discovery.[FN3] In light of the NASD's objections, in February, 1996, defendants filed, in the Eastern District of Louisiana, a motion to compel the NASD to comply with the subpoena.[FN4] On March 13, 1996, the district court, pursuant to defendants' motion, dismissed defendants' motion to compel without prejudice.[FN5]

FN3. The pertinent disciplinary proceeding against MMAR is currently on appeal, subject to a *de novo* review.

FN4. *See* record, document # 2.

FN5. *See* record, document # 9. Defendants' motion to dismiss was prompted by their attempt to obviate the need for the requested documents by requesting that the court in the Southern District of Texas take judicial notice of various proposed facts including the following:

> The NASD district No. 5 staff's report was reviewed by an examination subcommittee of NASD's District No. 5 on October 11, 1993, and the examination

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> sub-committee recommended that the proposed charges be filed against MMAR Group.
>
> *See* "Defendants' First Request for Judicial Notice," attached as exhibit E to defendants' renewed motion to compel, document # 12. On June 18, 1996, the Honorable Frances H. Stacy, United States Magistrate Judge for the Southern District of Texas, denied defendants' request for judicial notice. *See* exhibit B attached to defendants' challenge to the NASD's privilege claims, document # 17.

On June 6, 1996, defendants filed a "renewed" motion to compel the NASD's compliance with their subpoena.[FN6] Following oral argument, on June 19, 1996, the undersigned magistrate judge ordered the NASD to provide a privilege log of documents covering the period up to and including October 21, 1993, which reflect when a recommendation was made that a complaint be filed against MMAR relative to its business dealings with LASERS.[FN7] Upon receipt of the NASD's privilege log, defendants' objections or challenges thereto and the NASD's reply to defendants' objections, defendants' motion to compel was set for hearing.[FN8]

> FN6. *See* record, document # 12.
>
> FN7. *See* record, document # 16.
>
> FN8. *See* record, document # 18.

The NASD does not contend that there are, nor has this court been able to locate, any cases in which NASD documents have been found to enjoy a governmental privilege against discovery.[FN9] Instead, to determine the discoverability of the documents at issue, the court must engage in a balancing test, weighing the "strong public interest in maintaining the integrity of effective industry self-regulation" [FN10], against the "need of the parties to obtain information relevant to their lawsuit." *Ross,* 106 F.R.D. at 24.[FN11]

> FN9. *See* the NASD's memorandum in opposition to motion to compel, document # 15, at page seven, footnote one; *see also Ross v. Bolton,* 106 F.R.D. 22, 23 (S.D.N.Y.1985).
>
> FN10. The NASD's "main purpose is to provide industry self-regulation of the over-the-counter securities market, subject to governmental oversight." *Ross,* 106 F.R.D. at 23.
>
> FN11. In addition to utilizing this balancing test, the *Ross* court divided the information at issue into two categories: "(1) factual or statistical data, and (2) analyses or opinions drawn from such material." *Ross,* 106 F.R.D. at 24. Such a dichotomy would serve no useful purpose in the instant matter. The information sought by defendants, i.e., information regarding the recommendation that a complaint be filed against MMAR, necessarily includes opinions drawn from factual data.

*2 In the factual scenario presented in *Ross, supra,* a litigant in a private securities fraud action sought to discover documents utilized in the NASD's securities fraud investigation. As the *Ross* court noted, the public interest in maintaining the integrity of investigations undertaken by the NASD, the organization created to promote self-regulation of the securities industry, "would clearly be undermined by making NASD files fair game for any of the thousands of private securities fraud litigants across the country who wish to shortcut their own discovery efforts and instead to reap the benefits of the [NASD's] ... work." *Ross,* 106 F.R.D. at 24.

In the instant matter, such a threat to the above-described public interest does not exist. The requested NASD information is not sought for discovery purposes or any other purpose in connection with any private securities fraud litigation or disciplinary

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proceeding against MMAR. Instead, the information is sought in order to support the argument of third parties, Dow Jones and Jereski, that a portion of the alleged libelous article was substantially true.

Additionally, in *Ross, supra,* the court determined that some of the requested information did "not seem so central to defendants' cause as to overcome the strong interest held by both NASD and the public in keeping [the information] confidential absent a showing of extraordinary need." *Id.* at 24. In contrast, the limited information sought from the NASD in the instant matter is crucial. Defendants have filed a motion for summary judgment based, at least in part, on the alleged "substantial truth" of the October 21, 1993, article.[FN12] Defendants attempted to obtain the necessary "undisputed" material facts to support their summary judgment motion via their request for judicial notice.[FN13] Failing that, the only means remaining to defendants is via the instant motion to compel.

> FN12. Defendants' motion for summary judgment is presently pending before the district court in the Southern District of Texas.
>
> FN13. *See* discussion *supra* at note 5.

The court finds that the NASD's interest in maintaining the confidentially of certain documents covering the time period up to and including October 21, 1993, which reflect when a recommendation was made that a complaint be filed against MMAR relative to MMAR's business dealings with LASERS, is outweighed by defendants' need for pertinent information. Such conclusion, however, does not lead this court to conclude that defendants are entitled to blanket inspection of all investigative information utilized by the District 5 Sub-Committee in arriving at its recommendation. The alleged libelous statement which stands at the center of this controversy is:

> The NASD filed a notice of a pending action against the firm and Mr. Brown on Oct. 4. According to people familiar with the investigation, the NASD complaint alleges that MMAR used deceptive or fraudulent information to induce Louisiana's pension fund to buy securities, in order to collect commissions.

Defendants hope to establish that a recommendation had been made to the District Business Conduct Committee for District 5 that a complaint be filed against MMAR. The portion of the Wall Street Journal article referred to above also described the nature of the allegation allegedly contained in the complaint. Accordingly, any order by this court allowing inspection of documents relates to those NASD documents detailing any action that NASD recommended be taken as well as a description of any allegations that NASD recommended should serve as the basis for such a complaint.

***3** Having examined the NASD documents submitted for the court's in-camera review, the court finds that portions of NASD document 6 meet the above description. Accordingly;

IT IS HEREBY ORDERED that the NASD provide defendants, within one week, with a properly redacted copy of document 6.

E.D.La.,1996.
In Matter of Nat. Ass'n of Securities Dealers
Not Reported in F.Supp., 1996 WL 406826 (E.D.La.)

END OF DOCUMENT

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EXHIBIT 6

Westlaw.

Not Reported in F.Supp., 1995 WL 46681 (S.D.N.Y.)
(Cite as: 1995 WL 46681 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
Hugh THRASHER, et al., Defendants.
No. 92 Civ. 6987 (JFK).

Feb. 7, 1995.

Peter Goldstein, Robert Knuts, Lee Larson, SEC, New York City.

David Meister, Asst. U.S. Atty., S.D.N.Y., New York City.

Lloyd S. Clareman, New York City.

Richard Ben-Veniste, Weil, Gotshal & Manges, Washington, DC.

Barry Levin, Los Angeles, CA.

Michael Bachner, New York City.

Stanley S. Arkin, Chadbourne & Parke, New York City.

John B. Harris, Stillman, Friedman & Shaw, P.C., New York City.

Leon Borstein, New York City.

Mark Kaplan, Schulte, Roth, Zabel, New York City.

Gary E. Eisenberg, Monroe, NY.

Jerry D. Sparks, Chicago, IL.

David T. Miyamoto, Graham & James, Los Angeles, CA.

Barry S. Pollack, Arkin, Schaffer & Supino, New York City.

Bobby C. Lawyer, Pettit & Martin, San Francisco, CA.

MEMORANDUM & ORDER

MICHAEL H. DOLINGER, United States Magistrate Judge:

*1 Three defendants have moved to compel production of assertedly privileged documents from the plaintiff. For the reasons that follow, the motions are granted in part.

Background

This lawsuit was commenced by the Securities and Exchange Commission to pursue claims of improper use of so-called insider information by a host of individual investors. The information concerned the intended purchase of the Motel 6 chain by a French corporation in 1989. The complaint named a corporate insider, Hugh Thrasher, as the original source, and it alleged that the information was disclosed to a variety of individuals, who allegedly utilized it to make timely purchases of Motel 6 stock, and some of whom allegedly passed the news on to other potential investors.

Discovery was temporarily stayed in June 1993, at the request of the United States Attorney, while criminal proceedings were instituted against some of the civil defendants as well as other individuals. That stay was vacated in 1994, when the criminal defendants entered guilty pleas, and discovery has again been underway for a number of months.

In the course of those resumed discovery efforts, it became apparent that the Commission was asserting a variety of privileges to block disclosure of a broad array of documents to the defendants. This stance has led defendants Hugh Thrasher, Jonathan Hirsh and Ezra Chammah to seek court intervention

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on their behalf.

Of particular concern are documents that reflect dealings between the Commission and some of the individuals who were not only allegedly tippees, but also tippers to some of the defendants in this case. This concern is particularly acute, according to the moving defendants, because the Commission's case against them must rest substantially on what those defendants' alleged tippers and tippees have told the Commission or other law enforcement authorities. According to defendants, many of these individuals have not been available for depositions, and hence the defendants' only realistic avenue for learning the basis of the allegations against them is through the Commission.

The documents principally at issue on the current motions are notes taken by Commission representatives during the course of interviews of these cooperating individuals. Defendants also seek copies of any cooperation agreements between these individuals and either the Commission or the United States Attorney, written communications with counsel for the cooperators, documents received from the Chicago Board of Exchange ("CBOE") and the New York Stock Exchange ("NYSE"), documents generated in a parallel Commission investigation of trading in Motel 6 stock by other investors, and any documents reflecting communications with the physicians for one cooperator, who died during the course of the Commission's investigation. In addition, defendants seek an order compelling the Commission to answer certain of their interrogatories, and further request enforcement of an order issued by Judge Keenan on May 3, 1993 directing the Commission to prepare an affidavit summarizing what one cooperator told the Commission concerning the events underlying the Commission's complaint. Finally, defendants complain about the adequacy of various entries on the Commission's privilege log, and seek either an order requiring disclosure of the documents improperly described on the log or a direction to the Commission to prepare a proper log.

*2 In opposing these motions, the Commission relies principally on its assertion that most of the documents are protected from disclosure by the work-product rule or by some variant of a law-enforcement privilege. Plaintiff also argues that some of the documents sought are not relevant to the case, or are not in its possession.

ANALYSIS

To facilitate disposition of the issues raised by these motions and the Commission's proffered defenses, I first address the standards governing each of the privilege issues and then apply those standards to the categories of documents at issue. The remaining issues are discussed in the last section of this Memorandum and Order.

A. *General Criteria*

We start by noting that the proponent of a privilege bears the burden " 'to establish those facts that are the essential elements of the privileged relationship.' " *von Bulow v. von Bulow,* 811 F.2d 136, 144 (2d Cir.), *cert. denied,* 481 U.S. 1015 (1987) (quoting *In re Grand Jury Subpoena Dated Jan. 4, 1984,* 750 F.2d 223, 224 (2d Cir.1984)). This burden requires proof not merely of the privileged relationship itself, but of all essential elements of the privilege. *See, e.g., United States v. Schwimmer,* 892 F.2d 237, 244 (2d Cir.1989); *In re Horowitz,* 482 F.2d 72, 82 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973); *Fletcher v. Atex, Inc.,* 156 F.R.D. 45, 49 (S.D.N.Y.1994). To meet that requirement, the party must make an evidentiary showing based on competent evidence, *see, e.g., von Bulow v. von Bulow,* 811 F.2d at 144; *In re Minebea Co.,* 143 F.R.D. 494, 503 (S.D.N.Y.1992), an obligation that cannot be "discharged by mere conclusory or ipse dixit assertions." *von Bulow v. von Bulow,* 811 F.2d at 146 (quoting *In re Bonanno,* 344 F.2d 830, 833 (2d Cir.1965)); *In re Grand Jury Subpoena Dated Jan. 4, 1984,* 750 F.2d at 224-25; *Redvanly v. NYNEX Corp.,* 152 F.R.D. 460, 465

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(S.D.N.Y.1993).

As for the governing law, we look to the law applicable to the pertinent claims and defenses asserted in the underlying action. *See* Fed.R.Evid. 501. Since the Commission asserts claims arising under federal law, and defendants' response is also grounded on federal law, the substantive rules governing any asserted privileges as well as work-product immunity must also be found in federal law.[FN1]

B. *Work-Product Immunity*

Rule 26(b)(3) defines a qualified immunity from discovery for documents "prepared in anticipation of litigation or for trial." This rule applies both to documents and to testimony concerning the substance of such work product. *See, e.g., Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 471 (citing cases). The rule does not, however, protect from disclosure the underlying facts known to the party or his counsel, even if acquired in anticipation of litigation. *See, e.g., United States v. District Council of New York City & Vicinity,* 1992 U.S.Dist. LEXIS 12307, at *17-18 (S.D.N.Y. Aug. 18, 1992) (citing *Hickman v. Taylor,* 329 U.S. 495, 501, 507, 511 (1947)); *Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 471.

*3 In applying Rule 26(b)(3), the courts have generally ruled that it "applies only to documents prepared principally or exclusively to assist in anticipated or ongoing litigation." *Martin v. Valley Nat'l Bank,* 140 F.R.D. 291, 304 (S.D.N.Y.1991). *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d 1109, 1118-19 (7th Cir.1983); *In re Grand Jury Investigation,* 599 F.2d 1224, 1229 (3d Cir.1979); *Hardy v. New York News, Inc.,* 114 F.R.D. 633, 644 (S.D.N.Y.1987). Consequently, "if a party prepares a document in the ordinary course of business, it will not be protected even if the party is aware that the document may also be useful in the event of litigation." *Bowne of New York, Inc. v. AmBase Corp.,* 150 F.R.D. at 471. *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d at 1119; *Hardy v. New York News, Inc.,* 114 F.R.D. at 644; *Joyner v. Continental Ins. Cos.,* 101 F.R.D. 414, 415-16 (S.D.Ga.1983).

Even if the information at issue comes within the scope of the work-product rule, the immunity afforded by the rule is conditional, since its protection may be set aside if the discovering party can demonstrate a sufficiently compelling need for the information. *See, e.g., Bowne of New York, Inc. v. AmBase Corp.,* 150 F.R.D. at 471; *Golden Trade, S.r.L. v. Jordache,* 143 F.R.D. 508, 510 (S.D.N.Y.1992). As defined by Rule 26(b)(3), production of work product may be ordered if the inquiring party "has [a] substantial need of the materials in the preparation of [his] case and ... [he] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See, e.g., Horn & Hardart Co. v. Pillsbury Co.,* 888 F.2d 8, 12 (2d Cir.1989).

Judged by these standards, we see several deficiencies in the Commission's invocation of the work-product rule to block production of an array of documents sought by defendants. Some may be remediable, but others are not.

The initial problem is that the Commission makes no effort to meet its burden of proffering competent evidence establishing the basis of its work-product claim. Its two declarants and one affiant address a variety of matters, but they do not offer testimony with regard to the interview notes, much less establish the precise purpose of the notes, whether a decision had been made to litigate at the time that they were created, whether the Commission was contemplating other alternatives at the time, and whether their notes were treated with the requisite confidentiality. The absence of such a showing precludes us from upholding the work-product claim at this time. *See, e.g., Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 472.

Although its position is not clearly articulated, the Commission appears to assume that its notes of witness interviews created in the course of an investig-

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ation are automatically work product. Although some support for that proposition might be drawn from a decision by Judge Leval in *SEC v. Navarre,* 92 Civ. 3719 (PNL), Memorandum & Order at 2 (S.D.N.Y. July 13, 1993),[FN2] that conclusion is not self-evident. As Judge Leval noted, the purpose of the Commission's investigation is to determine whether there were violations of the securities laws. If it finds none, presumably no litigation would ensue. Moreover, even if the Commission determines that there is evidence of one or more violations, it might choose to proceed by administrative sanctions rather than litigation. *See id.* at 2.

***4** It is thus at least arguable that some or all of the interview notes were not prepared principally or exclusively to assist in anticipated litigation, although such a determination might turn on when the notes were prepared and the timing of any decisions by the Commission that violations had been committed and that litigation was a likely option under the circumstances. Indeed, Judge Sprizzo apparently relied on that precise distinction in declining to uphold the Commission's claim of work product for notes of interviews "taken by the SEC while conducting a fact gathering investigation and prior to the Commission's determination to institute litigation against the ... defendants." *SEC v. Stratton Oakmont, Inc.,* 1992 WL 226924, at * 1 (S.D.N.Y. May 22, 1992).

This approach is consistent with caselaw applying the work-product rule in analogous contexts. Thus, for example, in *Martin v. Valley Nat'l Bank,* 140 F.R.D. at 308, this court rejected a very similar work-product claim by the Division of Investigation of the Department of Labor. In that case the Division had sought protection for all of its investigative documents without regard to when it had decided either that a violation had taken place or that litigation was a potential next step. As noted in *Martin,* "[m]any courts have insisted on proof of 'objective facts establishing an identifiable resolve to litigate prior to the investigative efforts resulting in the report before the work product doctrine becomes applicable.' " *Id.* at 308 (quoting *Janicker v. George Washington Univ.,* 94 F.R.D. 648, 650 (D.D.C.1982)). *Accord, e.g., Redvanly v. NYNEX Corp.,* 152 F.R.D. at 464-65 (citing cases). Moreover, even the courts that have applied a more liberal standard for protection have repeatedly noted that, "[a]t the very least, the proponent of the work-product rule must show that 'some articulable claim, likely to lead to litigation, [has] arisen.' " *Martin v. Valley Nat'l Bank,* 140 F.R.D. at 308 (quoting *Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d at 1119; *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 865 (D.C.Cir.1980)).[FN3] The Commission has not made such a showing with respect to the documents that it seeks to withhold on this basis.

That failing is not the only problem with the Commission's position. Even if we assume that plaintiff could establish the requisite anticipation of litigation for some or all of the documents, we have no indication as to whether any, some or all of the documents were given the confidential treatment that is required to maintain their protected status. For example, if any were shown or otherwise disclosed to counsel for any of the tippees, a strong argument could be made that the work-product immunity was thereby lost, since voluntary disclosure of a document by a party in such a manner that it is likely to be revealed to its adversary constitutes waiver. *See generally Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 479-80 (citing cases). While we may speculate that the Commission staff did not engage in such disclosure, speculation is an impermissible basis on which to uphold a claim of privilege or work-product immunity.

***5** The next difficulty, and one less subject to remediation than the foregoing gaps in plaintiff's showing, involves the Commission's contention that the interview notes consist entirely of materials reflecting the mental processes of its attorneys. The point of this assertion is to invoke the generally recognized principle that so-called "mental process" or "opinion" materials are to be protected from dis-

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closure even more stringently than what might be labelled factual work product. *See, e.g., Upjohn Co. v. United States,* 449 U.S. 383, 402 (1981); *In re Martin Marietta Corp.,* 856 F.2d 619, 625-26 (4th Cir.1988), *cert. denied,* 490 U.S. 1011 (1989); *In re John Doe Corp.,* 675 F.2d 482, 492 (2d Cir.1982). As noted in *Upjohn,* work product reflecting the attorney's mental processes may be ordered disclosed, if at all, only on a strong showing "of necessity and unavailability by other means." 449 U.S. at 402. *See, e.g., In re John Doe Corp.,* 675 F.2d at 492. *See also* Fed.R.Civ.P. 26(b)(3) (if court orders disclosure of work product, it "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.")

Although easily articulated, the line between so-called factual work product and opinion work product is not free from ambiguity in its application. Obviously, many litigation-related activities of an attorney will, upon analysis, yield some insight into the attorney's thought processes concerning the case. For example, in this case the very fact that Commission staff interviewed certain individuals indicates that they suspected that these individuals may have been involved in the transmission of insider information or had some first-hand knowledge of such disclosures, and that their testimony could assist the Commission in making its case against some or all of the defendants. That inference does not, however, justify the conclusion that any document reflecting the fact that the Commission interviewed specified individuals thereby constitutes opinion work product. *See, e.g., Appeal of Hughes,* 633 F.2d 282, 289-90 (3d Cir.1980); *Apex Oil Co. v. DiMauro,* 110 F.R.D. 490, 498 (S.D.N.Y.1985).

Similarly, a transcript of a formal investigative deposition conducted by the Commission or notes of an informal witness interview are likely to be replete with insights as to the staff attorneys' views concerning whom to question, what general subjects to probe and what specific questions are likely to elicit the most helpful information from the Commission's perspective. This does not mean, however, that the transcript of such testimony or the notes of such an interview are necessarily classifiable as opinion work product and thus unavailable even on a showing of both "substantial need" and an inability "without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3).[FN4]

***6** This precise point was made by the Second Circuit in *In re John Doe Corp.,* 675 F.2d at 493, in which the Court addressed the same argument that interview notes constituted opinion work product. Based on its *in camera* review of the notes, the Court rejected that assertion. Observing that the notes simply "recite[d] in a paraphrased, abbreviated form, statements of [the interviewee] relating to events" relevant to a grand jury investigation, the Court concluded that their disclosure "will not trench upon any substantial interest protected by the work-product immunity." *Id.* at 493. Significantly, in drawing the line between factual and opinion materials, the Court acknowledged that the notes could provide some indication of the lawyers' "thinking", since one could deduce their questions from the witness's statements, but it nonetheless found the notes not to be entitled to heightened protection since "those inferences merely disclose the concerns a layman would have as well as a lawyer in these particular circumstances, and in no way reveal anything worthy of the description 'legal theory.' " *Id.* at 493.

This approach to attorneys' notes has been generally followed within this circuit. *See, e.g., Redvanly v. NYNEX Corp.,* 152 F.R.D. at 467-69 (citing cases). Thus, at least to the extent that the notes constitute summaries of what a party or witness has stated to the attorney or his representative, it is treated as factual work product and analyzed under the standards articulated in Rule 26(b)(3). *See, e.g., SEC v. Militano,* 1991 U.S.Dist. LEXIS 17953, at *2-4 (S.D.N.Y. Dec. 12, 1991). *See also Xerox Corp. v. Int'l Business Machines Corp.,* 64 F.R.D. 367, 381-82 (S.D.N.Y.1974).

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Applying these standards, the court has conducted an *in camera* review of documents withheld by the Commission that constitute notes of interviews with witnesses or conversations with their attorneys. Although the Commission has asserted that these notes constitute opinion work product, in the sense that their production would disclose the opinions, theories and analysis of Commission attorneys, I find that a number of the documents do not match that description. These consist, for the most part, of abbreviated recapitulations of what a witness has said during his or her interview.[FN5] Moreover, some of the brief entries in these notes are surrounded by quotation marks, thus indicating that they are direct quotes from the witness. A fair reading of these summaries does not yield any significant insights into the strategy, tactics or theories of the Commission's attorneys. They simply reflect the fact that the Commission was seeking the type of information that any attorney investigating whether insider information had been disclosed would pursue. Thus, application of the criteria used in *In re John Doe Corp.* yields the conclusion that these interview notes should be treated as factual work product under Rule 26(b)(3).[FN6]

*7 There remains for consideration the hotly contested question of whether the defendants have made an adequate demonstration of need to overcome the protection normally afforded such work product. To assess this issue I briefly summarize who is seeking which witnesses' statements and why.

Defendant Thrasher is alleged to have been the original source of the inside information. According to plaintiff, Thrasher was a Motel 6 vice president, and in his corporate capacity learned of an impending acquisition of Motel 6 by a French corporation known as Accor. The complaint alleges that he then tipped his friend Carl Harris, who is now deceased. The Commission charges that Harris in turn disclosed the information to eight others-Angelo Petrotto, Gregg Shawzin, Jeffrey Sanker, Michael Newman, Ira Gorman, William Gomez, Leonard Schaen and David Schaen-and these individuals in turn transmitted the information to fourteen others. Defendant Hirsh is alleged to have received the information from Jeffrey Sanker. As for defendant Chammah, he assertedly received it from a Mark Shawzin, who had previously received it from his brother Gregg Shawzin.

In his letter motion Thrasher seeks production of notes reflecting discussions between Commission staff members and Harris's attorney, Gorman and his attorney, Newman and his attorney, one or both Shawzins and their attorneys, Petrotto, Gomez's attorney and Sanker. Hirsh seeks notes concerning discussions with Sanker and Petrotto. Chammah asks for production of notes concerning discussions with Gregg and Mark Shawzin and Gregg Shawzin's attorney, as well as with Chammah's broker. In addition defendants ask for notes reflecting contacts by the Commission with physicians treating Harris before he died from AIDS.

In seeking to justify his request for witness interview notes, Thrasher observes that the one person whom he is alleged to have tipped-Harris-is dead, and hence statements made by Harris to the Commission or to those individuals whom he directly tipped could be crucial to Thrasher's defense since Harris was presumably the only person to have had direct knowledge as to who was his source. Because the Commission did not take any testimony or statements from Harris before his death, presumably the only current sources of such information are statements made by his attorney and by his alleged tippees. Thrasher notes that the Commission did not take formal testimony from the tippees and thus points to the notes of informal interviews as the only ready source of information as to the basis for the Commission's case.

As for Hirsh and Chammah, they seek a portion of the same body of information. Since Hirsh allegedly was tipped by Sanker, he seeks notes of Commission discussions with Sanker. He also seeks notes of contacts with Petrotto, who was assertedly the roommate of Harris. As for Chammah, he re-

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quests notes concerning the Shawzins because Mark Shawzin allegedly tipped him after receiving the information from Gregg Shawzin. Alternatively, since the Commission's privilege log reflects no notes of conversations with Mark Shawzin, Chammah asks that the Commission be required to prepare an affidavit summarizing the substance of discussions with Mark Shawzin.

***8** Ordinarily a party in the movants' situation might be told to take depositions of these individuals, since they are presumably in a position to provide to the defendants in this case the same information as they previously provided to the Commission. In response to this point, Thrasher asserts that, as a practical matter, they are unavailable. Harris is indisputably dead. As for the other tippees, Thrasher represents, without contradiction, that six have previously invoked their Fifth Amendment immunity to decline to testify. (*See* Harris letter at 4). He further documents the fact that counsel for Sanker and Gomez have recently confirmed that their clients would continue to invoke their Fifth Amendment rights. (*See id.* at 4 & Exhs. B & C). In addition, Thrasher notes, without contradiction, that the Commission has conceded that Gorman's whereabouts are unknown. He also represents, again without contradiction, that Petrotto has defaulted in both this and a parallel private lawsuit and has departed for Italy, that he has been unable to contact Gregg Shawzin either directly or through his criminal defense counsel, and that Newman is similarly unreachable. (*Id.*)

In further support of this point, Hirsh represents that the expense of seeking to locate and depose Petrotto in Milan, Italy, where he is apparently now residing, would be prohibitive for him, even if-as seems unlikely-Petrotto were willing to cooperate. (*See* Hirsh Memorandum at 8-9). Similarly, Chammah notes that Gregg Shawzin previously invoked the Fifth Amendment, and he suggests that there is no reason to assume that his position will change in this respect before the close of discovery. (*See* Jan. 12, 1995 letter to the court from Martin L. Perschetz, Esq., at 11). He also argues that in any event he should have any prior statement in order to determine whether the witness, if he testifies, has previously made any inconsistent statements. (*Id.*)

In opposing these requests, the Commission simply asserts in general terms that the movants have not adequately demonstrated that these witnesses are truly unavailable. It does not explain precisely what showing should be required, but it appears that plaintiff would argue that defendants should now locate and subpoena each of these individuals to determine whether they will still invoke the Fifth Amendment.

The meritlessness of this argument is apparent if we revert to the language of Rule 26(b)(3), which authorizes production of factual work product "upon a showing that the party seeking discovery has substantial need of the materials ... and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." There is no question that the movants have a substantial need to learn what the identified witnesses have told the Commission and would state under oath about their knowledge of the movants' role in the transmission and receipt of insider information. The remaining Rule 26(b)(3) requirement is that movants demonstrate that they cannot obtain this information from other sources "without undue hardship."

***9** This language does not mean that the movants must prove that obtaining the information elsewhere is absolutely impossible or that they must prove the required element beyond a reasonable doubt. All that is needed is a showing that it is likely to be significantly more difficult, time-consuming or expensive to obtain the information from another source than from the factual work product of the objecting party. *See, e.g., United States v. Davis,* 131 F.R.D. 391, 395-96 (S.D.N.Y.1990). When a witness has previously invoked the Fifth Amendment, that "hardship" requirement is generally satisfied absent a showing that he has subsequently changed his mind and

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agreed to waive the privilege. *See, e.g., SEC v. Militano,* 1991 U.S.Dist. LEXIS 17953, at * 2-4; *United States v. Davis,* 131 F.R.D. at 396.

The movants have met their burden in this respect, and the Commission offers no indication that any of the witnesses identified by defendants as previously having invoked the Fifth Amendment are now prepared to testify at a deposition. The same conclusion follows for those witnesses whose whereabouts are currently unknown or who have simply refused to respond to or otherwise cooperate with the parties to this action. Similarly, the fact that a potential witness has departed for another continent after defaulting in this case is sufficient demonstration that obtaining the required information from him will involve undue hardship. *See generally id.* at 396.

The Commission's position on this issue is further undercut by its own conduct in this case. It has delayed until late in the discovery period disclosing its position on these matters; indeed, it failed without explanation or excuse to meet the court's initial schedule for responding fully to defendants' discovery requests. At the same time it has pressed the notion that it wishes to expedite the completion of discovery, which is now scheduled to end in less than two months. It is difficult to reconcile these actions with its current position that defendants must now undertake efforts to depose the scattered and apparently uncooperative witnesses-a process that will be time-consuming, expensive and in all likelihood futile-before they can have access to the Commission's interview notes.

In short, I conclude that, for purposes of Rule 26(b)(3), the movants have amply established their need for access to any notes summarizing statements by or on behalf of Messrs. Harris, Gorman, Newman, Petrotto, Gomez, Sanker and Gregg Shawzin.[FN7] Subject to any other privilege assertion,[FN8] those notes must be produced.[FN9]

As noted, there are several other narrow categories of documents affected by the Commission's work-product claim. Specifically, movants seek notes of any conversations with physicians for Harris prior to his demise, and Chammah asks for notes of conversations with a Mr. Mossari, who was his broker.

The movants seek notes of conversations with Harris's doctors to buttress their contention that the Commission knew that Harris was mortally ill and deliberately avoided taking his testimony, which would have been highly significant in view of his key role as the only direct tippee of Thrasher. The notes are obviously significant for this purpose since they will reflect what the Commission knew of Harris's condition and when it acquired that knowledge.

***10** The Commission's work-product claim in the face of this request is difficult to fathom. The notes reflect what the doctors had to say about their patient's condition, but they contain absolutely no information about plaintiff's counsel's strategy, tactics or legal theories.[FN10] Their only significance in this respect is that they confirm that the Commission was concerned about Harris's medical condition, a concern that would appear self-evident even absent the notes, and that is in any event confirmed by the very concession that the notes exist, irrespective of their specific contents. Although it is possible that defendants could undertake to depose the doctors, this process is likely to be extended and costly, particularly compared to production of the notes. Moreover, the movants' central concern is not how sick Harris was at any given time, but rather what the Commission knew about that subject during the relevant time period, and that information is far more readily obtained from the Commission than from the doctors unless those physicians took equivalently detailed notes of their conversations with the Commission staff members. In sum, the notes must be produced.[FN11]

As for Chammah's broker, if we assume, for the sake of the argument, that the Commission's notes are work product, then production would not be required since Chammah demonstrates no pressing need for them.[FN12] It is not clear, however, wheth-

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er such notes exist and, if so, whether they are in fact work product. Hence the Commission must promptly confirm whether it has such notes, and, if so, must make the necessary showing that they come within the scope of Rule 26(b)(3).

C. *Law-Enforcement Privilege*

In support of its refusal to produce certain documents, the Commission invokes what it refers to as a law-enforcement privilege. This theory is cited to block disclosure of several categories of information, including cooperation agreements with tippees, notes of conversations with counsel for one of the potential cooperators, anonymous written communications from members of the public apparently concerning trading in Motel 6 stock or the disclosure of insider information concerning the Accor acquisition, and materials provided to the Commission by the CBOE and the NYSE. The Commission also originally withheld documents generated by a separate but related investigation into other possibly suspect trading in Motel 6 stock, but it has apparently relented, at least in part, with regard to these documents, apparently because the investigation has come to an end.

The general privilege theory espoused by the Commission has been recognized in various forms as a law-enforcement privilege, investigatory file privilege, official information privilege, executive privilege and informant privilege. *See, e.g., In re Dep't of Investigation of City of New York,* 856 F.2d 481, 484 (2d Cir.1988); *Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1341 (D.C.Cir.1984); *United States v. Davis,* 131 F.R.D. at 395. What unites these slightly disparate but overlapping principles is that the protection they afford a governmental body is conditioned on a specific showing of harm by the agency if the information were disclosed. *See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d at 1341-43; *see also King v. Conde,* 121 F.R.D. 180, 188-90 (E.D.N.Y.1988); *Burke v. New York City Police Dep't,* 115 F.R.D. 220, 228-29 (S.D.N.Y.1987); *Crawford v. Dominic,* 469 F.Supp. 260, 263-65 E.D.Pa.1979 (citing cases).[FN13] Moreover, irrespective of the precise label placed on the asserted privilege, it offers only a qualified protection to the agency, and thus can be overcome by a showing on the part of the requesting party that his need for the information outweighs the purported harm cited by the agency. *See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d at 1342-43 (citing *Frankenhauser v. Rizzo,* 59 F.R.D. 339, 344 (E.D.Pa.1973)); *Raphael v. Aetna Cas. & Sur. Co.,* 744 F.Supp. 71, 74-75 (S.D.N.Y.1990); *King v. Conde,* 121 F.R.D. at 190-91; *Kinoy v. Mitchell,* 67 F.R.D. 1, 12 (S.D.N.Y.1975). *See also Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496-98.

***11** In this case the Commission argues principally that disclosure of the assertedly privileged documents would interfere with its ability to conduct enforcement investigations because it would reveal its investigatory techniques.[FN14] This argument is intended to cover cooperation agreements, documents provided to the Commission by the CBOE and the NYSE, and what are described as "[a]nonymous letters containing tips concerning potential illegal trading activities." (Declaration of Peter Goldstein, Esq., Exh. C-Declaration of Jonathan G. Katz, executed Dec. 27, 1994, at ¶ 3).

The obvious difficulty with the Commission's argument is its complete failure-except with regard to some of the CBOE documents-to offer any meaningful evidence in support of its claim of potential harm. In asserting a law-enforcement privilege for Commission documents, plaintiff relies solely on one sentence contained in the declaration of the Commission's Secretary, Jonathan G. Katz, in which he states:

> The law enforcement privilege is being asserted as to these documents because they contain law enforcement investigatory materials, production of which could impair the Commission's future enforcement efforts in this and other matters.

(*Id.* at ¶ 4).

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Plainly this conclusory assertion of general and speculative harm is inadequate to meet even the most liberal definition of the Commission's burden of proof. *See, e.g., Resolution Trust Corp. v. Diamond,* 137 F.R.D. 634, 641 (S.D.N.Y.1991); *King v. Conde,* 121 F.R.D. at 189. *See also Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d at 1342-43 ("generalized claim" of harm is inadequate).[FN15] As Judge Weinstein has observed:

> The government must specify "which documents or class of documents are privileged and for what reasons." *Kerr v. United States District Court, supra,* 511 F.2d [192] at 198 [(9th Cir.1975)]. This threshold showing must explain the reasons for nondisclosure with particularity, so that the court can make an intelligent and informed choice as to each requested piece of information. "Unless the government, through competent declarations, shows the court *what interests* [of law enforcement ...] would be harmed, *how* disclosure under a protective order would cause the harm, and *how much* harm there would be, the court cannot conduct a meaningful balancing analysis." *Kelly* [*v. City of San Jose*], *supra,* 114 F.R.D. [653] at 669 [N.D.Cal.1987] (emphasis in original). If the police make no such showing, the court has "no choice but to order disclosure." *Id.; see also Johnson v. McTigue,* [122 F.R.D. 9 (S.D.N.Y.1986)] (ordering direct disclosure without *in camera* review); *Martin v. New York City Transit Authority,* No. CV-83-3991, slip op. (S.D.N.Y. Oct. 17, 1983) (same).

King v. Conde, 121 F.R.D. at 189 (emphasis and third brackets in original).

The Commission makes no such showing of harm. Moreover, there is strong reason to doubt that it could do so, at least with regard to cooperation agreements. Indeed, in criminal cases such agreements are routinely produced to the defendant, *United States v. Molina,* 1991 WL 60368, at *2 (S.D.N.Y. Apr. 9, 1991), and they typically form a central basis for cross-examination of the cooperating witness. It is no secret that the Commission, as well as federal prosecutors' offices, seek to elicit cooperation from suspected wrongdoers, and thus it can scarcely be said that disclosure of the agreements in this case will interfere with future law-enforcement efforts by disclosing a government strategy or investigative technique. There is also no basis for inferring that disclosure will harm an ongoing investigation, since it appears that the investigation concerning the Motel 6 matter has been completed. *Compare, e.g., United States v. Lang,* 766 F.Supp. 389, 403-04 (D.Md.1991) (noting interference with continuing investigation); *Raphael v. Aetna Cas. & Sur. Co.,* 744 F.Supp. at 74-75 (same). *See generally National Labor Relations Board v. Robbins Tire & Rubber Co.,* 437 U.S. at 225-33, 236-40 (distinguishing between continuing and completed investigations). There is also nothing in the record suggesting that the Commission gave any assurance to cooperating witnesses that their cooperation would be kept secret; indeed, their identities appear to be conceded. Finally, I note that the terms of any such cooperation agreements would plainly be of major potential significance if any cooperators testified for the Commission since those terms may impact substantially and adversely on the witnesses' credibility.

***12** The Commission also seeks to withhold notes of discussions with Gregg Shawzin or his attorney on the basis of the law-enforcement privilege. We have already rejected the invocation of the work-product rule to block production of this material. Plaintiff's effort to utilize the law-enforcement privilege to obtain the same result is even more threadbare since the patently inadequate Katz declaration, which purports to invoke that privilege, does not even mention this category of documents, much less attempt to justify the withholding of these notes.

Plaintiff may have a potentially stronger basis for resisting production of anonymous notes sent to it, since it may rely on such sources of information in opening investigations, and it is at least conceivable that disclosure of such communications in civil

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cases may pose a danger that the writers' identities will be discovered, which may deter future assistance of this kind. *See generally In re United States,* 565 F.2d 19, 22-23 (2d Cir.1977), *cert. denied,* 436 U.S. 962 (1978) (discussing parameters of informant privilege). On the current record, however, we are reduced to unvarnished speculation on this matter, and thus cannot uphold an argument that the Commission itself does not articulate in any competent manner.

As for the documents received by the Commission from the Chicago Board of Exchange and the New York Stock Exchange, the governing analysis is somewhat different. We start from the premise that investigatory materials of these non-governmental self-regulating bodies may, in some respects, be subject to a qualified privilege upon competent proof of harm if the documents are disclosed. *See, e.g., Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496-97; *Ross v. Bolton,* 106 F.R.D. 22, 23-25 (S.D.N.Y.1985). Insofar as the CBOE is concerned, it makes a sufficient showing to justify its partial withholding of requested documents. (*See* Affidavit of Patricia Sizemore, executed Dec. 28, 1994, at ¶¶ 7-12). The objections are justified because production of investigative reports might well compromise the ability of the CBOE to carry out its statutorily assigned function as a self-regulatory organization. *See, e.g., Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496-97 & n. 8. Moreover, I note that the CBOE does not object to production of the underlying business records that it has gathered and transmitted to the Commission, except to the extent that the documents identify customers. Deletion of that information is entirely proper and does not unfairly burden defendants' discovery efforts.

The Commission's effort to withhold NYSE documents is not supported by any equivalent showing. Moreover, given the generality of the Katz declaration, we have no indication as to the nature of the documents that have been withheld, much less the harm that might be caused by their disclosure. In view of the current record-or the lack of such a record-this aspect of the Commission's privilege claim cannot be upheld. Nonetheless, in view of the fact that the privilege asserted may be said to belong to the NYSE, caution must be observed before ordering production, since the failure of proof may be attributable simply to sloppiness on the part of the Commission. Accordingly, plaintiff will be given one more opportunity to make an adequate showing of privilege with regard to the NYSE documents.

D. *Remaining Matters*

***13** The movants have presented a variety of other discovery-related issues for resolution by the court. I briefly address each of them.

Thrasher seeks to override Commission objections to his interrogatories numbered 8 and 9. These requests seek principally a disclosure of communications with Gregg Shawzin, Sanker, Gomez, Petrotto, Newman, Gorman and an individual named Heinz Grein. The Commission had objected in part on the basis of privilege and in part on the basis that the interrogatories exceed the scope of questions permitted under S.D.N.Y. Civil Rule 46. We have addressed the work-product claim with regard to each of these individuals except Grein. As for Rule 46, it permits the use of interrogatories if they are more efficient than any other form of discovery. In this case, for reasons already noted, efforts to depose these individuals will plainly be far more inefficient than the use of these narrowly tailored interrogatories.

The only uncertainty with regard to these witnesses is whether the Commission's interview notes constitute a complete answer to the questions. If so, then the Commission may provide a Rule 33(c) response.[FN16]

The status of Mr. Grein is less clear. Movants do not specifically address the question of whether he is, as a practical matter, unavailable for deposition. At the same time, as noted, plaintiff makes no

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showing to demonstrate that any interviews with him meet the relevant standard for application of the work-product rule. Since it is plaintiff that bears the initial burden insofar as it relies on the work-product rule, it is to answer the interrogatories with respect to Mr. Grein unless it promptly furnishes adequate proof that the interviews were undertaken in contemplation of litigation. If it attempts to offer such proof, Thrasher may respond with a showing that he has a sufficient need for the information to overcome the work-product immunity.

Chammah complains about the refusal of the Commission to answer five of his interrogatories, numbered 16, 22, 24, 25 and 27. Two of these interrogatories-16 and 27-are contention interrogatories. Under Rule 46(c), such inquiries are presumptively to be made at the conclusion of discovery, although there may be occasions when contention interrogatories are most sensibly answered earlier in the discovery period. In this case neither of these interrogatories seeks information that is crucial for Chammah to be able to conduct his discovery at this time, and both address matters that the Commission is more likely to know about after fact depositions have been conducted. Accordingly, there is no reason to ignore the order of discovery defined by Rule 46.

As for the other interrogatories, the Commission's objections are baseless. [FN17] Number 22 seeks identification of agreements between the Government and the Shawzins. For the reasons noted, this information is not privileged. Moreover, it is plainly relevant. Accordingly plaintiff is to supply an answer either by proffer of the documents, if they are available, or by a textual answer.

***14** Interrogatory 24 seeks a listing of the occasions on which the Shawzins provided testimony on the matters referred to in the Complaint. This inquiry is not beyond the scope of Rule 46 since it calls, in effect, for an identification of documents, that is, transcripts. It is also far more efficient a method than attempting to seek this information from the Shawzins by deposition.

Interrogatory 25 seeks a listing of all meetings between Government representatives and the Shawzins. This inquiry need not be answered for Gregg Shawzin since the Commission is being required to identify any statements made by him to the Commission. As for Mark Shawzin, as earlier noted, there are no listed notes of interviews with him. Since, however, the Commission has not demonstrated that its interviews, if any, were in contemplation of litigation, there is no privileged basis to refuse to answer the interrogatory with respect to him, and there is no reason to assume that a deposition of Mark Shawzin will be a more efficient method of obtaining the requested information.

On the subject of Mark Shawzin, Chammah also asks that the Commission be required to prepare an affidavit setting forth the substance of any statement made by him since there are apparently no notes of those interviews. This approach parallels that originally taken by Judge Keenan with regard to Jeffrey Sanker (*see* Order dated May 3, 1993), and in view of the failure of the Commission to sustain its work-product claim, there is no principled basis for declining equivalent relief. Nonetheless, the preferred approach is to require the Commission to answer in the form of an interrogatory answer, so that the response will, in substance, be that of the Commission, rather than that of a compelled individual witness. *See generally United States v. District Council of New York City & Vicinity,* 1992 U.S.Dist. LEXIS 12307, at *33-42 (refusing to order Rule 30(b)(6) deposition of Government agent).

The movants also ask that I direct the Commission to comply with Judge Keenan's May 3, 1993 order that it supply an affidavit summarizing any statements made by Sanker. That order is the subject of an application by the Commission for reconsideration, and Judge Keenan will address the matter. [FN18]

The parties are also in disagreement as to the obligation of the Commission to produce documents that are assertedly solely in the possession of the United

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States Attorney's Office. The principal focus of concern is apparently on the cooperation agreements that some of the tippees apparently entered into with the prosecutor.

The parameters for answering this question are found in Rule 34, which requires a party to produce documents only if it has possession of the documents or "control" over them. The traditional definition of this term requires that the party have "the legal right to obtain the documents requested on demand." *Searock v. Stripling,* 736 F.2d 650, 653 (11th Cir.1984). *See generally* 4A James W. Moore *et al., Moore's Federal Practice* ¶ 34.17 at 34-69 to 72 & nn. 5-9 (2d ed. 1994). Despite the stringency of this definition, in practice the courts have recently interpreted it more loosely "to require production if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents." *Golden Trade, S.r.L. v. Lee Apparel Co.,* 143 F.R.D. 514, 525 (S.D.N.Y.1992). *See, e.g., Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.,* 1994 WL 510043, at * 3; *Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 1991 WL 17610, at *5 (D.Kan. Jan. 31, 1991); *Scott v. Arex, Inc.,* 124 F.R.D. 39, 41 (D.Conn.1989). *See also M.L.C., Inc. v. North American Philips Corp.,* 109 F.R.D. 134, 136 (S.D.N.Y.1986).

***15** In this case there is some indication in the record that the Commission and the United States Attorney conducted investigations that were, in certain respects, coordinated. Thus, it appears that interviews of some witnesses were conducted jointly by the representatives of both the United States Attorney and the Commission. It is also apparent that the two agencies shared at least some documents and other information.

In short, there is some evidence to permit the inference that the Commission is in a position to obtain copies of witness cooperation agreements from the United States Attorney. Under the circumstances, the Commission may fairly be directed at least to request the documents from the United States Attorney's Office. *See, e.g., Golden Trade S.r.L. v. Lee Apparel Co.,* 143 F.R.D. at 525-26 (citing *Hercules Inc. v. Exxon Corp.,* 434 F.Supp. 136, 158 (D.Del.1977)). If there prove to be insurmountable legal or practical obstacles to the Commission obtaining the documents, these difficulties can be documented, and defendants can then choose another approach. Since, however, the record contains some evidence supporting defendants' contention that the Commission has access and the Commission does not directly address this issue, as now defined, it must bear the burden of attempting to obtain the requested documents in the first place.

Finally, the movants complain that the privilege logs of the Commission are inadequately detailed. This contention is accompanied by a listing of a few items from the logs, but no explanation of the specific inadequacies. I note as well, however, that in submitting documents for *in camera* review, the Commission states that it has recently discovered still more documents, which it proffers to the court. Upon review of the newly updated, and hopefully completed, privilege logs, the defendants may have some specifically defined complaints about specified listings. If so, they are to attempt to resolve the matter first with the Commission, and if that effort is unavailing, they may return to court with a more specifically defined set of complaints.

CONCLUSION

Based upon the foregoing, I conclude that the Commission's invocation of the work-product rule and the law-enforcement privilege cannot be sustained and that plaintiff must produce documents and answer interrogatories to the extent indicated. That task is to be accomplished within seven days. Moreover, insofar as plaintiff is being permitted, as specified above, to make a supplemental showing of the factual basis for withholding certain documents, it is to do so within seven days.

Because the Commission' position on the current motion was, in large measure, unjustified, I further

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conclude that, pursuant to Fed.R.Civ.P. 37(a)(4), the movants are presumptively eligible for an award of the expenses of their motions, including reasonable attorney's fees. *See, e.g., Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 493-94. Accordingly, within seven days movants may serve and file affidavits with contemporaneous time records to document their motion expenses. The Commission may serve responding papers within seven days thereafter.

***16** SO ORDERED.

FN1. Even if this case involved state-law claims and defenses, the work-product issues would be governed by federal law. *See, e.g., United Coal Companies v. Powell Constr. Co.,* 839 F.2d 958, 966 (3d Cir.1988); *Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 471 (S.D.N.Y.1993).

FN2. That two-page decision is annexed as Exhibit E to the declaration of Peter D. Goldstein Esq., executed December 28, 1994.

FN3. A similar, although not identical, analysis is reflected in the courts' treatment of work-product claims by insurance companies to protect their investigative files. As a general matter, the courts have declined to hold such documents to be protected if they predate a decision by the insurance carrier to decline coverage, since such pre-decisional investigations are conducted in the ordinary course of business, and litigation does not become a sufficiently serious prospect until the carrier has made a decision to decline a claim. *See, e.g., Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co.,* 1994 WL 510043 at *5 (S.D.N.Y. Sept. 16, 1994); *Janicker v. George Washington Univ.,* 94 F.R.D. 648, 650 (D.D.C.1982); *Fine v. Bellefonte Underwriters Ins. Co.,* 91 F.R.D. 420, 422 (S.D.N.Y.1981); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.,* 61 F.R.D. 115, 118 (N.D.Ga.1972).

FN4. Indeed, we are informed that in this case the Commission has produced to defendants the testimonial transcripts of more than thirty witnesses. (*See* Dec. 21, 1994 letter to the Court from John B. Harris, Esq., at 2).

FN5. Several constitute summaries that are described as a proffer by the witness.

FN6. The documents that come within this generally described category include the following: Privilege List I-nos. 33-37, 38 (handwritten notes), 39, 48, 122, 182, 183; Privilege List II-nos. 142, 150, 184, 195-97; Privilege List III-nos. 14, 112, 289-91. The Commission has also proffered an undifferentiated mass of recently discovered documents, some of which also come within this category of factual summaries of witness statements. *See* "Summary-Michael Newman Proffer", dated 9/20/91; Memo. dated Nov. 11, 1991 from Ilana R. Marcus to file re "Newman tippees"; Sept. 2, 1992 Memo. to File re: "Jeffrey Sanker".

FN7. It is not clear whether Mark Shawzin has invoked his Fifth Amendment privilege, and in any event the Commission has not listed any notes reflecting interviews of him. I address below the question of whether plaintiff should, in these circumstances, be compelled to prepare an affidavit concerning any interviews of him or otherwise provide equivalent discovery.

FN8. As will be noted, the Commission has also belatedly asserted a so-called law-enforcement privilege for some of these notes. I address that claim in the next section of this decision.

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FN9. Any segregable portions of such documents that contain attorney analysis may be redacted. I note, however, that the documents listed in note 6, *supra,* do not appear to contain any such opinion work product.

FN10. I base those conclusions on my review of documents 30 and 31 from Privilege List III.

FN11. The Commission appears to argue that this line of defense will be deemed meritless at trial. It is not, at this stage, so self-evidently meritless as to justify denying production.

FN12. Chammah's general argument that he needs interview notes, irrespective of witness availability, to determine whether the witness has made inconsistent prior statements cuts too broad a swath. It would effectively eviscerate the factual work-product rule for any interview notes. The argument may have some basis if there are circumstances suggesting a possible weakness of memory on the part of the witness or some other reason to suspect that the witness is hostile or has changed his story, but Chammah makes no such showing concerning his broker.

FN13. We must note a distinction in this respect between cases in which the privilege is asserted in order to block discovery by a party and cases brought under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"), in which the Government invokes the so-called law-enforcement exception to required disclosure. *See* 5 U.S.C. §§ 552(b)(7)(A), (E). Although the statute embodies in general terms the common-law privilege, the Supreme Court has held that in FOIA litigation under sub-section 7(A) (referring to law-enforcement files the disclosure of which would "interfere with enforcement proceedings"), the Government need not demonstrate harm on a document-by-document basis since Congress intended to apply that particular provision to all documents that fit into generic categories of law-enforcement files that are inherently sensitive. *See, e.g., National Labor Relations Board v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 223-36 (1978). *See also* 5 U.S.C. § 552(b)(7)(E) (referring to disclosure of "investigative techniques and procedures"). In contrast to the cases under FOIA-in which the plaintiff cannot invoke his own particularized need for a document otherwise protected under FOIA, *see, e.g., EPA v. Mink,* 410 U.S. 73, 86 (1973)-in ordinary civil litigation the court must consider the discovering party's need for the document for purposes of trial preparation, and therefore the party resisting discovery must make a particularized showing of harm when invoking any qualified privilege, including any variant of the law-enforcement privilege. *See, e.g., Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496 (citing cases). *See generally Frankel v. Securities & Exchange Commission,* 460 F.2d 813, 818 (2d Cir.) (noting distinction between analysis under FOIA and privilege analysis in ordinary civil litigation), *cert. denied,* 409 U.S. 889 (1972).

FN14. As noted, plaintiff originally also withheld documents generated by a continuing investigation because disclosure might thwart that inquiry. It appears that the Commission no longer makes this assertion. (*See* Memo. of Law in Opp'n to Motions of Defs. Hirsh and Thrasher to Compel Production of Documents, at 25-26).

FN15. It is also inadequate in that it appears that the official invoking the privilege did not review the documents at is-

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sue. *See, e.g., Resolution Trust Co. v. Diamond,* 137 F.R.D. at 641 (official invoking privilege may do so only after "personal consideration of the allegedly privileged material.") (citing *Mobil Oil Corp. v. Dep't of Energy,* 102 F.R.D. 1, 5 (N.D.N.Y.1983)). Mr. Katz carefully asserts only that the General Counsel gave "personal consideration to the matter." (Katz Decl. at ¶ 3).

FN16. From a review of at least those notes submitted for *in camera* review, it appears that the documents are too abbreviated and, in some respects, too cryptic to serve as a substitute for a textual interrogatory answer.

FN17. There appears to be an error in the Commission's formal interrogatory response. It lists interrogatory 22 but then supplies an objection labelled as "Response to Interrogatory 23." (*See* Perschetz letter, Exh. D at 17). I assume that the response is intended to address interrogatory 22, although the next listed interrogatory is numbered 24.

FN18. I note that the factual circumstances have changed since the original order. Thus, it appears that there are some Commission notes reflecting statements by Sanker, although the Commission has resisted their production on the current mo- tion.

S.D.N.Y.,1995.
S.E.C. v. Thrasher
Not Reported in F.Supp., 1995 WL 46681 (S.D.N.Y.)

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EXHIBIT 7

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58632 / September 24, 2008

Admin. Proc. File No. 3-12903

In the Matter of the Application of

MICHAEL SASSANO
c/o Graeme W. Bush, Esq.
Zuckerman Spaeder LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm of national securities exchange asserted the privilege against self-incrimination in response to exchange's request for testimony. Held, exchange's findings of violation and imposition of sanctions are sustained.

APPEARANCES:

Graeme W. Bush and Shawn P. Naunton, of Zuckerman Spaeder LLP, for Michael Sassano.

Susan Light, Myles Orosco, and Jacqueline Davis, for Financial Industry Regulatory Authority, Inc., Department of Enforcement, on behalf of NYSE Regulation, Inc.

Appeal filed: December 3, 2007
Last brief received: March 11, 2008

I.

Michael Sassano, a former registered representative of Oppenheimer & Co., Inc. ("Oppenheimer"), a member firm of the New York Stock Exchange, LLC ("NYSE" or the "Exchange"), appeals from NYSE disciplinary action. 1/ The NYSE found that Sassano failed to comply with NYSE requests to provide testimony in connection with NYSE market timing investigations, and thereby violated NYSE Rule 477. 2/ The NYSE censured Sassano and barred him from membership, allied membership, approved person status, and from employment or association in any capacity with any NYSE member or member organization. 3/ We base our findings on an independent review of the record.

II.

a. Initial Failure to Testify. On December 8, 2003, the NYSE's Division of Enforcement ("NYSE Enforcement") notified Sassano that it was investigating allegations that he had "engaged in a trading strategy in which [he] frequently purchased and sold mutual fund shares to capitalize on price discrepancies in different markets commonly known as 'market timing.'" Oppenheimer had previously received a subpoena from the Attorney General of the State of New York ("NYAG") on October 31, 2003 regarding a market timing investigation by the NYAG.

Our Division of Enforcement ("SEC Enforcement") also sent subpoenas throughout late 2003 and 2004 to both Oppenheimer and Sassano in connection with its investigations into

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1/ On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation, Inc. were transferred to NASD, and the expanded NASD changed its name to Financial Industry Regulatory Authority, Inc. See Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the disciplinary action here was taken before the NYSE-NASD consolidation of regulatory operations, we continue to use the designation "NYSE" in this opinion.

2/ NYSE Rule 477 generally states that an NYSE member, or an associated person of an NYSE member, who has been terminated must comply, for up to a year after termination, with an NYSE request to provide testimony or be subject to disciplinary sanctions, including a bar.

3/ Under the NYSE decision, Sassano received a three-month period to testify before the bar would become permanent. The bar commenced on December 3, 2007, and became permanent on March 3, 2008 when he had not testified by that date.

mutual fund trading practices. 4/ On August 17, 2004, Sassano's counsel sent SEC Enforcement written confirmation of Sassano's intention to invoke the Fifth Amendment right against self-incrimination in response to an SEC Enforcement subpoena. 5/ On September 20, 2004, SEC Enforcement sent a letter rescheduling Sassano's testimony for October 8, 2004, and documenting its accommodation of three separate rescheduling requests by Sassano's counsel.

On September 24, 2004, NYSE Enforcement sent Sassano a request to appear for testimony in connection with the Exchange's market timing investigation. On September 29, 2004, Sassano's counsel requested an adjournment of the scheduled testimony. NYSE Enforcement granted the request, rescheduling the testimony for October 26, 2004. On October 25, 2004, Sassano's counsel requested another adjournment of Sassano's testimony, and NYSE Enforcement again accommodated the request, rescheduling the testimony for November 11, 2004. That same day, on October 25, 2004, Sassano's employment at Oppenheimer terminated.

On November 9, 2004, two days before the scheduled NYSE testimony, Sassano's counsel proposed a third extension. At this point, NYSE Enforcement stated that the testimony would not be rescheduled a third time. The next day, on November 10, 2004, Sassano's counsel

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4/ On July 20, 2005, the NYAG and the Commission settled market timing cases against Canadian Imperial Holdings Inc. and CIBC World Markets Corp. and related corporate entities ("CIBC"), which were the parent companies of Sassano's division at Oppenheimer prior to January 2003. The press release announcing the NYAG settlement noted that the settlement "was reached in conjunction with the Securities and Exchange Commission which announced a parallel settlement" the same day. On December 17, 2007, Oppenheimer executed an Acceptance, Waiver and Consent ("AWC") settling the Exchange's enforcement action against Oppenheimer.

NYSE Enforcement has submitted an unopposed motion for leave to adduce the AWC pursuant to Commission Rule of Practice 452. See 17 C.F.R. § 201.452 (stating that a motion for leave to adduce additional evidence "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously"). We have determined to grant NYSE Enforcement's motion.

5/ The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V.

Unless otherwise indicated, references herein to Sassano's "counsel" refer to Sassano's attorneys during the period in which the NYSE issued its requests for testimony. Several weeks before the issuance of the NYSE Hearing Board decision, Sassano's then-counsel withdrew from their representation of Sassano before the NYSE. Sassano subsequently retained new counsel.

called again to request an adjournment of the on-the-record testimony and settlement talks in lieu of such testimony. Although NYSE Enforcement staff left voicemail messages with Sassano's counsel that day to discuss the request, their calls were not returned prior to the scheduled start of Sassano's testimony. Sassano did not appear for his still-scheduled testimony on November 11, 2004.

b. Attorney Proffer. Beginning on November 12, and November 29, 2004, after Sassano had failed to appear for his November 11 testimony, his counsel and NYSE Enforcement discussed Sassano's cooperation with the investigation and the possibility that he would supply information through his counsel instead of by on-the-record sworn testimony.

Sassano's counsel also separately suggested the possibility of an "attorney proffer" with SEC Enforcement in connection with the market timing investigation by SEC Enforcement. Sassano's counsel asked SEC Enforcement staff "whether they had any objection to [NYSE] Enforcement attending the attorney proffer." SEC Enforcement staff did not raise any objections, and Sassano's counsel invited NYSE Enforcement to attend the SEC Enforcement proffer. In a written affirmation (the "Affirmation") submitted in connection with the NYSE proceedings, 6/ NYSE Enforcement represented that, between January 24, 2005 and March 15, 2005, NYSE Enforcement, SEC Enforcement, and the NYAG "discussed the logistics of scheduling and clarifying the scope of [counsel]'s proposed attorney proffer." The Affirmation further stated that these discussions were "a direct result of [counsel]'s request that the SEC and [NYSE] Enforcement jointly attend his proposed proffer." 7/

Sassano's counsel mandated that the proffer discussion "be based on and limited exclusively to those issues presented to counsel prior to the proffer." Accordingly, on March 8, 2005, SEC Enforcement sent Sassano's counsel a letter listing topics to be addressed at the proffer. On April 6, 2005, NYSE Enforcement informed Sassano's counsel that NYSE Enforcement representatives would be attending the proffer, and requested that the proffer address "market timing activity at Oppenheimer," but did not otherwise supplement the list of proffer topics provided by SEC Enforcement.

6/ A Senior Vice President of NYSE Enforcement signed and submitted the Affirmation, which represents that it was prepared based on a review of "[NYSE] Enforcement's confidential investigative file and discussions with Enforcement staff."

7/ Although an affidavit by Sassano's counsel represents that he had "engaged in discussions with representatives of" both SEC Enforcement and NYSE Enforcement "[i]n or about March and April 2005" regarding a joint proffer, the Affirmation submitted by the NYSE represents that the discussions between SEC Enforcement, NYSE Enforcement and the NYAG took place "during the period from January 24, 2005 to March 15, 2005" and "[a]s a direct result of [counsel]'s request that" SEC Enforcement and NYSE Enforcement both attend the proffer.

Representatives of SEC Enforcement and NYSE Enforcement attended the attorney proffer on April 12, 2005. The Affirmation represents that "[a]lthough [Sassano's counsel] discussed areas that [Sassano] could testify about, [counsel] did not offer any specific information" at the proffer. According to an affidavit executed by Sassano's counsel ("Counsel Affidavit") in connection with the appeal before us of the NYSE decision, NYSE Enforcement staff "did not ask any questions about mutual fund trading practices at Oppenheimer" during the proffer and "did not request any information relating to any specific subjects." The Counsel Affidavit also states that, at the end of the proffer, NYSE Enforcement staff asked "if Mr. Sassano would make himself available to the SEC at some point in the future for questioning" and if Sassano "would give truthful answers to the SEC were he to testify."

On April 19, 2005, NYSE Enforcement declined the proposal for cooperation outlined at the attorney proffer. The Affirmation represents that, in so doing, NYSE Enforcement "specifically indicated that [NYSE Enforcement staff] spoke for [NYSE] Enforcement only."

c. Subsequent Failure to Testify. Prior to the April 12 attorney proffer, on March 16, 2005, NYSE Enforcement had issued another request for Sassano's on-the-record testimony in connection with its Oppenheimer investigation. 8/ NYSE Enforcement's letter requested that Sassano appear for testimony on April 26, 2005. On April 20, 2005, after NYSE Enforcement had declined Sassano's proposal outlined at the proffer, Sassano's counsel sent written confirmation that Sassano would not appear for his scheduled testimony before NYSE Enforcement. On April 22, 2005, NYSE Enforcement sent a letter to Sassano's counsel memorializing its attempts to schedule Sassano's testimony (the "April 22 Letter"). The April 22 Letter noted that "[d]uring the period November 11, 2004 and March 2005, Enforcement, counsel and other regulatory entities engaged in several telephone conversations regarding Sassano's cooperation in this matter." The April 22 Letter did not provide further detail about these conversations. 9/ The April 22 Letter also observed that NYSE Enforcement had previously informed Sassano that failure to comply with the requests for testimony could result in formal disciplinary proceedings. Sassano did not appear for testimony before NYSE Enforcement on April 26, 2005, and to date has not testified before NYSE Enforcement.

8/ The initial NYSE Enforcement request for testimony issued on September 24, 2004 indicated that the request for testimony was related to an investigation of allegations that Sassano had himself engaged in market timing. The second NYSE Enforcement request for testimony issued on March 16, 2005 did not directly refer to NYSE Enforcement's investigation of Sassano's trading activities, but instead stated that NYSE Enforcement was investigating "allegations that [Oppenheimer] failed to supervise and control the activities of its employees with regard to its sale of mutual funds."

9/ But see supra notes 6-7 and accompanying text.

III.

On November 15, 2005, NYSE Enforcement charged Sassano with violating NYSE Rule 477 by "fail[ing] to provide testimony in connection with matters that occurred during the course of his employment with a member organization." Sassano did not file an answer with the NYSE Hearing Board. 10/ However, in a series of letters beginning on March 27, 2006 and citing our March 24, 2006 decision in Frank P. Quattrone, 11/ Sassano requested that the Hearing Officer stay the disciplinary action and conduct "a hearing to determine whether the NYSE was engaged in 'state action.'" On December 5, 2006, the NYSE Hearing Officer "direct[ed Sassano] to make an offer of proof . . . that provides the specific factual basis necessary to find 'state action' on the part of the NYSE."

By letter to the parties dated March 27, 2007, the Hearing Officer found, based on a review of submissions by Sassano and NYSE Enforcement, that Sassano had "not made out [his state action] claim but ha[d] alleged sufficient facts to require limited discovery to resolve the matter." The Hearing Officer ordered additional discovery regarding "how [NYSE] Enforcement came to be included in" the attorney proffer with SEC Enforcement; the statement in Sassano's December 19, 2006 submission to the Hearing Officer claiming that "[b]oth the SEC staff and the [NYSE Enforcement] staff advised that they would talk among themselves and make a decision on a joint attendance;" and the reference in the April 22 Letter to "conversations between Enforcement and other regulatory entities during the period November 11, 2004 and March 2005."

In response to the discovery issues identified by the Hearing Officer, on April 9, 2007 NYSE Enforcement submitted the Affirmation, 12/ which describes the period beginning with NYSE Enforcement's first written request for Sassano's testimony on September 24, 2004 through the issuance of the Charge Memorandum on November 15, 2005 in connection with Sasssano's failure to testify. The Affirmation states that Sassano's counsel had first suggested the provision of "'information' to [NYSE] Enforcement in lieu of his testifying" one day before his scheduled testimony on November 11, 2004. According to the Affirmation, the April 22 Letter's reference to "conversations between Enforcement and other regulatory entities during the period

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10/ On January 6, 2006, NYSE Enforcement filed a motion to deem the facts alleged in the November 15, 2005 charge memorandum (the "Charge Memorandum") admitted as true based on Sassano's failure to file an answer to the Charge Memorandum as required under NYSE Rule 476(d). On January 12, 2006, after the standard deadline for filing an answer, Sassano's counsel sent a letter to trial counsel for NYSE Enforcement disputing allegations in the Charge Memorandum and requesting that NYSE Enforcement "reconsider its commencement of an enforcement proceeding against" Sassano.

11/ Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155.

12/ See supra notes 6-7 and accompanying text.

November 11, 2004 and March 2005" identified by the Hearing Officer in ordering additional discovery "merely referenced that conversations were held among all of the parties involved in planning for [Sassano]'s proposed cooperation via the attorney proffer." The Affirmation also states that "there was no flow of information from [NYSE] Enforcement to the SEC regarding [Sassano]'s conduct." 13/

On April 25, 2007, the Hearing Board issued its decision, finding that "[NYSE] Enforcement's attendance at [the] attorney's proffer conducted by [Sassano]'s then counsel for the SEC and [NYSE] Enforcement was not initiated by the SEC or [NYSE] Enforcement" and concluding that "[a]fter reviewing and considering all of the submissions . . . [Sassano] had not made out his claim of 'State Action.'" The Hearing Board accordingly found that Sassano's failure to provide testimony constituted a violation of NYSE Rule 477, and censured and barred Sassano. The NYSE Board of Directors affirmed the Hearing Board decision on October 17, 2007. 14/ This appeal followed.

IV.

Sassano acknowledges that he failed to appear in response to the NYSE's requests for testimony as described above. Such failure establishes prima facie evidence of a violation of

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13/ The Affirmation also states that on March 16, 2005, NYSE Enforcement and SEC Enforcement "had a telephone conversation, during which the SEC advised [NYSE Enforcement] about its Wells process" but that NYSE Enforcement "was not invited to join in any proposed issuance of the SEC's Wells notice."

14/ The NYSE Hearing Board found that Sassano violated NYSE Rule 477. The NYSE Board of Directors on appeal stated that Sassano had "requested a review of a Hearing Officer's determination that he had violated NYSE Rule 476(a) by failing to testify as requested by" NYSE Enforcement. The Board of Directors stated that it affirmed the decision of the Hearing Board "in all respects."

NYSE Rule 476(a)(11) requires persons associated with member firms to respond to requests for information from the Exchange. NYSE Rule 477 extends this requirement to persons formerly associated with a member firm for up to one year after the Exchange receives notice of their termination. Although the initial request for Sassano's testimony was sent on September 24, 2004, before his employment terminated in October 2004, he was no longer employed at Oppenheimer at the time of either of the dates of his scheduled testimony on November 11, 2004 and April 26, 2005. Sassano does not raise as an issue, and we do not believe, that the reference to Rule 476(a) as the basis for Sassano's appeal changes the result here. The Board of Directors made clear that it was reviewing whether Sassano provided testimony as requested and affirmed the Hearing Board's decision in its totality.

NYSE Rule 477. 15/ Sassano argues, however, that he could not be forced to testify because he was entitled to invoke his Fifth Amendment right against self-incrimination. 16/ Sassano argues that NYSE Enforcement's investigation was "inextricably intertwined" with investigations by SEC Enforcement and the NYAG, and that the requests for testimony issued by NYSE Enforcement accordingly constituted "state action" entitling him to invoke his right against self-incrimination. On appeal, Sassano requests reversal of the NYSE decision or, alternatively, a remand of his case to the NYSE for further discovery regarding his state action claim.

The "Fifth Amendment restricts only governmental conduct and will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government." 17/ The U.S. Supreme Court has held that a private party's actions may constitute state action only if there is such a "'close nexus between the State and the challenged action' that the seemingly private behavior 'may be fairly treated as that of the State itself.'" 18/ The factors considered by the Court as "bear[ing] on the fairness of such an attribution" include whether a challenged activity "results from the State's exercise of its 'coercive power;'" 19/ whether "the State has provided such significant encouragement, either overt or covert, that the [private] choice must in law be deemed to be that of the State;" 20/ or whether "a private actor operates as a 'willful participant in

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15/ See, e.g., Warren E. Turk, Exchange Act Rel. No. 55942 (June 22, 2007), 90 SEC Docket 2802, 2805 (stating that a failure to appear for testimony establishes a prima facie violation of NYSE Rule 477); Louis F. Albanese, 53 S.E.C. 294, 297-98 (1997) (sustaining NYSE disciplinary action for violation of NYSE Rule 477 where applicant failed to cooperate immediately with NYSE investigation); Wallace E. Lin, 50 S.E.C. 196, 199 (1990)(sustaining NYSE disciplinary action for violation of Rule 477 where applicant refused to testify in Exchange investigation), aff'd, 933 F.2d 1014 (9th Cir. 1991)(Table); cf. Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 690-91 ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of [analogous NASD Rule].").

16/ See supra note 5.

17/ D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

18/ Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351(1974)).

19/ Id. at 296.

20/ Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (stating that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment").

joint activity with the State or its agents.'" 21/ Some courts have described this last fact pattern as the "joint action" test, 22/ and have focused on inquiries such as whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" 23/ or whether "the particular actions challenged are inextricably intertwined with those of the government." 24/

The "burden of demonstrating joint activities sufficient to render [a self-regulatory organization ("SRO")] a state actor is high, and that burden falls on the party asserting state action." 25/ In order to meet this burden, Sassano must demonstrate "a nexus between the state and the specific conduct of which plaintiff complains." 26/ Accordingly, in this case, Sassano must demonstrate a specific nexus between the government and the Exchange's requests for testimony triggering Sassano's invocation of the Fifth Amendment.

Sassano claims that NYSE Enforcement conducted its investigation jointly with investigations by SEC Enforcement and the NYAG, and that the NYSE requests for testimony thereby constituted "state action." In support, Sassano claims that NYSE Enforcement, SEC Enforcement, and the NYAG "shared information, attended meetings and worked together extensively" and that this cooperation continued "throughout a three-year period beginning in late 2003." We have explicitly said, however, that "cooperation and information sharing between the Commission and an SRO will rarely render the SRO a state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action." 27/

21/ Brentwood Acad., 531 U.S. at 296. See also Quattrone, 87 SEC Docket at 2164 n.25 ("NASD asserts correctly that no evidence existed that the Commission coerced, directed, or encouraged NASD to issue the [request pursuant to analogous NASD rule], but no hearing was held on this issue. Moreover, Quattrone did not need to show that NASD made the request solely at the Commission's behest, but only that NASD engaged in willful participation in joint action with the Commission.").

22/ Turk, 90 SEC Docket at 2807.

23/ Kirtley v. Rainey, 326 F.3d 1088, 1093 (9th Cir. 2003); see also Turk, 90 SEC Docket at 2807.

24/ Mathis v. PG&E, 75 F.3d 498, 503 (9th Cir. 1996); see also Turk, 90 SEC Docket at 2807.

25/ Turk, 90 SEC Docket at 2809.

26/ Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999) (emphasis in original).

27/ Turk, 90 SEC Docket at 2809-10; see also Desiderio, 191 F.3d at 207; Scher v. NASD, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (Mukasey, J.) (finding, where an NASD

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In seeking to overcome this hurdle, Sassano cites: (i) the temporal proximity of events in the investigations by the NYAG, SEC Enforcement, and NYSE Enforcement; (ii) cooperation between SEC Enforcement and NYSE Enforcement in connection with the attorney proffer; (iii) the inclusion of transcripts of testimony taken by NYSE Enforcement in the document production made in connection with the SEC Enforcement investigation; and (iv) language in a Form U4 filed by Oppenheimer that seemed to characterize the various regulatory investigations of Sassano's trading as a single investigation. 28/ He highlights these circumstances in asserting that "the investigations of [NYSE Enforcement], the SEC and the NYAG were so interdependent and inextricably intertwined that" the investigations by the various regulators "were tantamount to one joint investigation."

Sassano notes that "all three investigations were opened within a span of six weeks," and asserts that "all three investigations proceeded together in coordinated lockstep fashion." Sassano also points out that NYSE Enforcement first requested Sassano's testimony on September 24, 2004, after Mr. Sassano's counsel confirmed on August 17, 2004 Sassano's intention to invoke the Fifth Amendment before SEC Enforcement, and several days after SEC Enforcement had confirmed on September 20, 2004 that Sassano's testimony before the Commission had again been rescheduled at the request of Sassano's counsel. According to Sassano, "the virtual coordination of these events strongly suggests that the SEC advised [NYSE Enforcement] that Mr. Sassano would invoke his Fifth Amendment privilege, and that as a result

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27/ (...continued)
investigator shared information with the district attorney's office with which he once worked approximately one year after plaintiff's on-the-record interview before NASD, that "such collaboration," which ultimately led to plaintiff's criminal prosecution, "does not in itself demonstrate that a 'close nexus' existed between the challenged conduct of the NASD and a state actor"), aff'd, 218 F. App'x 46 (2d Cir. 2007) (summary order). But see D.L. Cromwell, 279 F.3d at 163 (noting that NASD's Criminal Prosecution Assistance Unit "was in fact working with the government, and when it does it may well be a state actor," but that the actions of the unit "cannot fairly and automatically be imputed to the rest of" the NASD Department of Enforcement when it was "effectively 'walled off'" from the rest of the department).

28/ The Counsel Affidavit and other exhibits to Sassano's brief in support of his application for review by the Commission were not included in the record considered by the NYSE below. Sassano has submitted motions to adduce as additional evidence: the Counsel Affidavit, an excerpt of testimony by Peter Valverde, one of Sassano's colleagues at Oppenheimer, and a Form U4 filed by Oppenheimer in April 2004. As discussed, see supra note 4, such motions are governed by Commission Rule of Practice 452. We have determined to admit these documents pursuant to that rule.

[NYSE Enforcement] sought Mr. Sassano's testimony with the intent of launching this proceeding against him." 29/

In D.L. Cromwell Inv. Inc., v. NASD Regulation, Inc., however, the court declined to find that an NASD request for information constituted state action based on "the chronology of certain events" in simultaneous government and NASD investigations regarding the appellants' trading in shares of a particular company. 30/ The Cromwell appellants contended that NASD's requests for on-the-record interviews constituted state action triggering their right to invoke the privilege against self-incrimination, noting that NASD's requests for testimony "followed shortly after individual appellants contested grand jury subpoenas," and that NASD "refused to delay the [requested testimony] until after completion of the Eastern District's criminal investigation." 31/ The Second Circuit affirmed the district court's finding that this evidence showed only that NASD and the government "pursued similar evidentiary trails because their independent investigations were proceeding in the same direction." 32/ In reaching this conclusion, the Cromwell court credited consistent testimony by NASD staff indicating that NASD's requests for information "issued directly from [NASD] as a product of its private investigation" and that "none of the demands [for testimony] was generated by governmental persuasion or

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29/ Sassano also argues that the timing of NYSE Enforcement's settlement with Oppenheimer and a settlement in an SEC Enforcement administrative proceeding against another Oppenheimer employee a week later reflects joint action. As noted below, however, this similarity of timing in investigations into the same subject matter involving many defendants and several regulatory agencies is insufficient to substantiate Sassano's claim that NYSE Enforcement "was following the lead of then-New York Attorney General Eliot Spitzer, and was relying entirely upon the joint investigative efforts of the NYAG and the SEC."

30/ 279 F.3d at 162 (affirming district court's decision to deny appellants' request to enjoin an NASD request for an on-the record interview and rejecting appellants' claim that NASD was acting "as a willing tool of" federal prosecutors in a government investigation).

31/ Id.

32/ Id. at 162-63.

collusion." 33/ Similarly, in Turk, we concluded that evidence that SEC Enforcement and NYSE Enforcement requested an individual's testimony "within one month of each other" and "brought charges in connection with their respective investigations on the same day" were insufficient to establish state action. 34/

We thus agree with the Exchange that the timing of the actions in the simultaneous regulatory investigations is insufficient to prove a "causal connection between the requests for testimony" in the separate investigations, or that "the SEC guided [NYSE] Enforcement's investigation." The overlapping timing in the correspondence regarding the various investigations, particularly in light of Sassano's repeated requests for rescheduling of testimony, does not establish that these were other than parallel investigations of the same underlying activities, the same conclusion reached by the court in Cromwell.

Morever, despite Sassano's assertions that the investigations were conducted jointly over a three-year period, Sassano does not provide evidence that either of NYSE Enforcement's requests for testimony were "generated by governmental persuasion or collusion," 35/ or that SEC Enforcement "exercised significant control and influence over the [NYSE Enforcement] investigation." 36/ We similarly do not find that the timing of these requests for testimony indicates that the government "ha[d] so far insinuated itself into a position of interdependence with [NYSE Enforcement] that it must be recognized as a joint participant" 37/ in the requests

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33/ Id. at 163. The court credited the testimony of NASD staff members despite the appellants' attempts to buttress the state action claim by noting, among other things, "the statement of an unidentified FBI agent to an individual appellant that 'we are working with the NASD -- they know exactly what is going on' . . . questions posed by [NASD Enforcement] regarding two documents that Cromwell believes had been seized previously by the FBI; . . . [and NASD Enforcement]'s knowledge of certain government witnesses." Id. at 162.

34/ Turk, 90 SEC Docket at 2809. Sassano attempts to distinguish Turk by arguing that his case "involves extensive evidence of coordination between [NYSE Enforcement], the SEC and the NYAG over a time period spanning several years." We address this evidence below (see infra notes 40 and 43); however, this alleged coordination occurred after Sassano had already failed to testify at the NYSE.

35/ D.L. Cromwell, 279 F.3d at 163.

36/ Gregg Heinze, Exchange Act Rel. No. 56100 (July 19, 2007), 91 SEC Docket 303, 311.

37/ Turk, 90 SEC Docket at 2807 (citations omitted).

for testimony, or that the requests for testimony are "inextricably intertwined" 38/ with investigations by the government. We therefore reject Sassano's contention that the chronology of events in the investigations evidences state action.

Sassano also argues that the circumstances surrounding the joint attendance of SEC Enforcement and NYSE Enforcement at the attorney proffer, including NYSE Enforcement's deference to Commission staff at that proffer, demonstrates that it had engaged in willful joint action with government officials. Sassano highlights the fact that NYSE Enforcement, unlike SEC Enforcement, did not send a list of discussion topics prior to the proffer, despite notice that the discussion at the proffer "would be limited exclusively to issued raised beforehand." Additionally, Sassano's counsel represents, and NYSE Enforcement does not dispute, that during the proffer, NYSE Enforcement "did not ask any questions about mutual fund trading practices at Oppenheimer and did not request any information relating to any specific subjects." Sassano further notes that NYSE Enforcement's inquiries at the proffer were limited solely to whether "Mr. Sassano would make himself available to the SEC at some point in the future for additional questioning," and "if Mr. Sassano would give truthful answers to the SEC" in response to such additional questioning. The Counsel Affidavit also states that NYSE Enforcement did not seek "any additional information from" Sassano's counsel after the proffer despite counsel's offer "to make [him]self available . . . at some point in the future for further discussion on behalf of Mr. Sassano." Sassano argues that these actions at the proffer reveal NYSE Enforcement's "complete reliance on the SEC's inquiries," and that such reliance demonstrates that NYSE Enforcement was "working jointly with the SEC at the proffer." Sassano further contends that cooperation with SEC Enforcement at the proffer "rendered [NYSE Enforcement] a 'state actor' and its investigation 'state action,'" giving rise to Fifth Amendment protections. 39/

However, the relevant issue here is whether the NYSE's requests for Sassano's testimony -- not the NYSE's actions in connection with a proffer that occurred almost seven months after the Exchange's initial request for testimony -- may be fairly attributed to the state. 40/ Evidence

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38/ Id. (citations omitted).

39/ Sassano argues that NYSE Enforcement "was not acting independently at all, but instead was relying upon" the investigative efforts of SEC Enforcement and the NYAG. NYSE Enforcement's issuance of the requests for testimony giving rise to this proceeding undermines any inference that NYSE Enforcement investigation was simply passively relying on the investigative efforts of government agencies rather than pursuing a separate investigation.

40/ See D.L. Cromwell, 279 F.3d at 163 (finding no state action where NASD Enforcement issued requests for information "as a product of its private investigation" and "none of the demands [for information] was generated by governmental persuasion or collusion . . ."); see also Kirtley v. Rainey, 326 F.3d at 1093 (indicating that joint action inquiry focuses

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of cooperation between NYSE Enforcement and SEC Enforcement in connection with the proffer could standing alone suggest that such cooperation resulted from an integrated joint investigation by NYSE Enforcement and SEC Enforcement. Such evidence might be sufficient to support a respondent's request for an opportunity to develop evidence on the possibility of state-SRO joint action. 41/ However, unlike in Quattrone, the NYSE has already afforded Sassano the opportunity to develop further evidence regarding the degree of cooperation between NYSE and the Commission. Our consideration of the evidence produced by Sassano and the totality of all the evidence leads us to conclude that Sassano did not meet his burden of showing that the NYSE requests for Sassano's testimony were inextricably intertwined with the government investigations.

The evidence indicates that the joint participation at the proffer actually occurred at Sassano's counsel's suggestion, not as a result of any SEC Enforcement guidance of or control over the NYSE Enforcement investigation, nor as a result of interdependence between the investigations as a whole. The Affirmation expressly represents that "there was no flow of information from [NYSE] Enforcement to the SEC regarding [Sassano's] conduct" and that references in the record to conversations between NYSE Enforcement and "'other regulatory

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40/ (...continued)
on whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" (emphasis added)); Mathis v. PG&E, 75 F.3d at 503 (focusing the joint action test on whether "the particular actions challenged are inextricably intertwined with those of the government" (emphasis added)); Desiderio v. NASD, 191 F.3d at 207 (indicating that a theory based on the nexus between actions by a private actor and the state must be based on evidence of "a nexus between the state and the specific conduct of which plaintiff complains" (emphasis in original)).

41/ In Quattrone, we credited evidence indicating that investigations by an SRO and government agencies were conducted jointly, and accordingly held that the respondent had "earned the right to present evidence regarding whether NASD's role in the Joint Investigation rendered the [request for testimony] state action." Quattrone, 87 SEC Docket at 2164-65 & n.27 (finding that summary judgment was inappropriately granted in the NASD's favor when the respondent "introduced facts indicating that the request was part of the Joint Investigation or, at the least, that he could have believed reasonably that this was the case"). We note that Quattrone presented considerably stronger evidence that the government and SRO investigations, as a whole, were inextricably intertwined than is indicated in the present case. Evidence of a joint investigation in Quattrone included, among other things, written statements from the NASD that its investigation was part of a joint investigation with the Commission and that "any resolution of the matter will need to involve all three regulators" (i.e., NYSE, the NASD, and SEC Enforcement), and Congressional testimony by the then-Director of SEC Enforcement indicating that the investigations were conducted jointly. Id. at 2156-57 and 2159.

entities' . . . merely referenced that conversations were held among all of the parties involved in planning for [Sassano]'s proposed cooperation via the attorney proffer." Notwithstanding Sassano's claim that the discovery ordered by the Hearing Officer was insufficient, the Affirmation covers the period starting from NYSE Enforcement's first written request for Sassano's testimony in September 2004 through the issuance of the NYSE Enforcement Charge Memorandum in November 2005. In this light, the evidence does not justify a finding that any cooperation at the proffer resulted from an overall joint investigation by NYSE Enforcement and the government agencies, nor does it justify a finding that the NYSE Enforcement investigation as a whole, or the specific NYSE Enforcement requests for testimony, were inextricably intertwined with the governmental investigations. 42/

Sassano's remaining claims are similarly insufficient to buttress his state action defense. Sassano notes that NYSE Enforcement "questioned Mr. Valverde [one of Sassano's coworkers] and subsequently forwarded his testimony to the SEC's Division of Enforcement." Although the Exchange does not dispute Sassano's claim that the transcript of testimony taken by NYSE was shared with SEC Enforcement, it is worth noting that the Valverde testimony was taken by the Exchange in December 2005 -- well after the Exchange's requests for Sassano's testimony issued in September 2004 and March 2005 and even after the issuance of the NYSE Enforcement Charge Memorandum giving rise to this case. In any event, NYSE Enforcement and SEC Enforcement both conducted investigations of market timing activities. Given the common subject matter of these investigations, it is hardly surprising that NYSE Enforcement took testimony that would be germane to SEC Enforcement's investigation. The fact that NYSE Enforcement pursued testimony from another CIBC employee after Sassano had twice failed to testify undermines Sassano's claim that NYSE Enforcement was simply relying on the investigative efforts of government agencies rather than pursuing a separate investigation. Moreover, courts have explicitly held that sharing of information and formal testimony between an SRO and the Commission is insufficient to establish state action. 43/ We do not find that the

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42/ Sassano's argument to the contrary notwithstanding, even joint action by SEC Enforcement and NYSE Enforcement at the proffer would not, under these facts, automatically transform the entire NYSE Enforcement investigation into a joint investigation with SEC Enforcement, nor would it retroactively convert the prior NYSE Enforcement requests for testimony into state action, if the two agencies had not been acting jointly when those requests were issued. See supra note 40 and infra note 43.

43/ Scher v. NASD, 386 F. Supp. 2d at 408 (finding, where an NASD investigator shared information with the district attorney's office with which he once worked approximately one year after plaintiff's testimony, that "such collaboration," which ultimately led to the plaintiff's criminal prosecution, "does not in itself demonstrate that a 'close' nexus' existed between the challenged conduct of the NASD and a state actor"); see also U.S. v. Finnerty, 411 F. Supp. 2d 428, 433 (S.D.N.Y. 2006) (stating that "[t]he mere fact that the

(continued...)

forwarding of Valverde's December 2005 NYSE Enforcement testimony to SEC Enforcement establishes that the NYSE's requests for Sassano testimony were issued in September 2004 and March 2005 as part of a single joint investigation by NYSE Enforcement and SEC Enforcement. 44/

Sassano also points to a statement in a Form U4 filed by Oppenheimer which characterizes the various investigations by "NASD, NYSE, USAO, SEC, MASS SEC COMMISSION, NYAG, ET AL." as "one investigation by all regulators." 45/ However, this cursory reference to the various investigations appears in a regulatory filing by Oppenheimer and not by any of the investigating regulators. Such a filing, particularly by an entity itself under investigation in connection with the same activities, does not in any way establish the nature of the relationship between NYSE Enforcement's investigation and the investigations of the Commission and the NYAG for purposes of the state action test.

In sum, Sassano has not presented evidence meeting the high standard required to establish a state action defense. Sassano's evidence does suggest possible coordination between the government agencies and NYSE personnel, particularly with respect to the preparation for, and participation in, the attorney proffer. The evidence indicates that Sassano himself initiated much of that coordination, which occurred after Sassano had already refused to appear for NYSE testimony. In addition, under the "joint action" test, Sassano is required to present evidence reflecting not just general collaboration or cooperation between the SRO and a government

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43/ (...continued)
Government may have requested and received documents from the NYSE in the course of its investigation does not convert the investigation into a joint one").

44/ Sassano states that SEC Enforcement produced the Valverde NYSE testimony in connection with the administrative proceeding against Sassano but did not include any other transcripts of testimony by NYSE Enforcement. On this basis, he concludes that the Valverde transcript "represents the only testimony taken by [NYSE Enforcement] in connection with its so-called independent investigation of Mr. Sassano and mutual fund trading practices at Oppenheimer" and uses this opportunity to request "focused discovery to probe whether [NYSE Enforcement] questioned any additional Oppenheimer and/or [CIBC] employees besides Mr. Valverde, or whether [NYSE Enforcement] simply relied upon the investigatory interviews conducted by the SEC and NYAG." The key question is whether the NYSE acted on behalf of SEC Enforcement in seeking Sassano's on the record testimony. See supra note 43. The possibility of the opposite -- NYSE reliance on testimony obtained by SEC Enforcement -- is only remotely probative on this key issue and is even less so considering, as we said, the NYSE and the SEC Enforcement staffs permissibly may share information and cooperate.

45/ Sassano indicates that the Form U4 was filed upon Sassano's suspension of employment from Oppenheimer.

agency, but evidence suggesting an "interdependence" between the government investigations and the SRO's requests for testimony triggering his invocation of his Fifth Amendment right. Sassano's evidence falls short of suggesting that NYSE's requests for his testimony were "inextricably intertwined" with the investigations by the NYAG or SEC Enforcement or that the government investigations were so "interdependent" with the requests for testimony that the government "must be recognized as a joint participant" in those requests. 46/

V.

Sassano has requested further discovery to substantiate his theory that the NYSE engaged in state action. Unlike previous cases remanded on this basis, however, we believe that the NYSE has already afforded Sassano sufficient opportunity to present and develop his state action claim. We have previously remanded cases in which the applicants had been limited in their ability to introduce evidence on the state action question in the SRO proceedings below, for instance when an SRO had not made its employees "available for testimony at a respondent's request or produced affidavits responding to" reasonable and credible evidence suggesting state action. 47/ We have also provided for an opportunity to develop further evidence regarding state action claims in cases in which the SRO's initial consideration of such claims had not been able to take into account significant developments in the law regarding the state action defense. 48/

46/ See generally Mathis v. PG&E, 75 F.3d at 503; Kirtley v. Rainey, 326 F.3d at 1093. Sassano also alleges statements suggesting cooperation between the NYAG and SEC Enforcement, e.g., requests by the SEC that "representative of the NYAG's office . . . attend Mr. Sassano's deposition," and a statement by SEC Enforcement to Sassano's counsel that "the SEC and NYAG were working together in investigating Mr. Sassano." Sassano also argues that "it was a matter of public record . . . that the NYAG was working hand-in-hand with the SEC to jointly investigate" one of Sassano's colleagues. Although these allegations may suggest cooperation between the two government agencies, they are not indicative of cooperation between NYSE Enforcement and either government agency.

Additionally, Sassano alleges that "counsel for CIBC and Oppenheimer, respectively, were sharing documents and information regarding alleged market timing activities obtained during the course of employee interviews . . . with the SEC, the NYAG and [NYSE Enforcement]." However, any such cooperation by counsel for CIBC and Oppenheimer would not indicate a joint investigation by NYSE Enforcement and either government agency.

47/ Ficken, 89 SEC Docket at 695.

48/ Id. at 694 (noting that "NASD did not have the opportunity to evaluate [the Commission's Quattrone decision] before ruling on Ficken's claims"); Turk, 90 SEC Docket at 2810

(continued...)

Sassano claims that he has presented "specific evidence" supporting his state action claim that "entitles [him] to additional discovery to make out this claim" despite the NYSE's express consideration of his state action claim during the hearing below. There are, however, limitations on the opportunity for discovery on the question of state action. We have specifically cautioned that applicants "may not use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory" of state action. 49/ We have also noted that an appeal based solely on a state action defense is subject to dismissal if the applicant "fail[s] to introduce sufficient evidence" to justify his state action claim. 50/ Moreover, such evidence must be presented at the "initial evidentiary hearing, so that the record is fully developed in the first instance when the case is before the SRO." 51/ We further stated that "[n]ot every defense of state action deserves discovery and a hearing" and that discovery must be based on "a reasonable and credible basis to conclude that the SRO's . . . seemingly private behavior 'may be fairly treated as that of the state itself.'" 52/

The proceedings below afforded Sassano the opportunity to present and develop evidence supporting his state action claim. 53/ The Exchange specifically considered Sassano's state

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48/ (...continued)
n.27 (specifically noting the "unusual posture of the appeal" and indicating that "the evidence presented to date might be the result of more than cooperation and . . . Turk's NYSE evidentiary hearing occurred before the issuance of our decisions in Quattrone and Ficken"); Heinze, 91 SEC Docket at 311 (granting remand where the respondent had "identified specific evidence that warrants a further opportunity to develop and present his state action claim" and "the NYSE considered Heinze's case without the full benefit of all our recent decisions on this issue").

49/ Ficken, 89 SEC Docket at 695 n.36 (citing G.K. Scott & Co., 51 S.E.C. 961, 973 (1994)).

50/ Turk, 90 SEC Docket at 2810 n.27.

51/ Id.

52/ Id. at 2807 n.15 (citing Brentwood Acad., 531 U.S. at 295).

53/ Compare Heinze, 91 SEC Docket at 311 (finding that "Heinze had identified specific evidence that warrant[ed] a further opportunity to develop and present his state action claim" when Heinze's contentions, including an assertion that an NYSE attorney informed Heinze that SEC Enforcement "had instructed the NYSE to limit the amount of information about his investigation that the Exchange provided to Heinze," raised "the possibility that [SEC Enforcement] exercised significant control over the NYSE's investigation of Heinze").

action claims in light of the criteria set forth in Quattrone and its progeny. 54/ Moreover, the Hearing Officer, after allowing Sassano to make an offer of proof on his state action claim, ordered further "limited discovery" regarding evidence of cooperation between NYSE Enforcement and SEC Enforcement in connection with the attorney proffer, which was Sassano's most credible evidence in support of his joint action argument. That additional discovery did not ultimately substantiate his state action claim.

We have indicated that, in order to obtain further discovery, an applicant is required "to state the precise manner in which [the facts he does possess] support[] his claims," to explain "why he needs additional discovery," to "state with some precision the materials he hope[s] to obtain with further discovery," and to explain "exactly how" the further information would support his claims. 55/ Sassano has not made any such attempt to focus the scope of his requested further discovery. For instance, although the Affirmation addressed communications between the various regulatory entities, he requests further discovery regarding, among other things, "the scope and extent of any cooperation, communication and/or sharing of information between [NYSE Enforcement], the SEC and the NYAG regarding their investigations of Mr. Sassano, CIBC and Oppenheimer" without indicating how such further discovery would elaborate or expand the evidence included in the Affirmation. 56/ Nor has Sassano identified the actual materials he hopes to obtain upon further discovery, or how such materials would support his claim. His discovery requests are broad and general, suggesting the forbidden fishing expedition. In this light, Sassano has not established a reasonable and credible basis to support his request on appeal to reopen the discovery process.

54/ The Hearing Officer found that Sassano "had not made out his claim of 'State Action'" on April 25, 2007, after our decisions in Quattrone and Ficken. In addition, in denying Sassano's request for additional discovery on appeal, the NYSE Board of Directors expressly stated that it had considered "the relevant decisional law (including the SEC's decisions in Quattrone, Ficken, Turk and Heinze)."

55/ Ficken, 89 SEC Docket at 695-96 n.37 (citing Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442-43 (5th Cir. 1993)).

56/ Sassano also argues, "merely by way of example," that he is entitled to additional discovery regarding "the circumstances surrounding [NYSE Enforcement's] complete reliance upon the investigatory efforts of the SEC at the attorney proffer, and [NYSE Enforcement's] determination not to pose any questions of its own at the proffer; the extent of the [NYSE Enforcement's] joint participation with the SEC and NYAG in investigatory interviews of CIBC and/or Oppenheimer employees;" and whether NYSE Enforcement questioned any other CIBC or Oppenheimer employees. See supra note 44.

VI.

Section 19(e)(2) of the Securities Exchange Act of 1934 directs us to sustain the NYSE's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 57/ Sassano asks that we modify the penalty imposed by the NYSE to "provide Mr. Sassano with twelve months within which to comply with [NYSE Enforcement]'s request for testimony (instead of the three months provided in the NYSE Decision), and to impose a bar of limited duration rather than a permanent bar." Sassano urges that "in the event [he] ultimately complies with [NYSE Enforcement's] request for testimony . . . a bar of limited duration not exceeding two years would be appropriate." 58/

We sustain the sanctions imposed by the NYSE because, as explained below, we conclude that Sassano's failure to appear for on-the-record testimony in this case demonstrates that he poses too great a risk to the markets and investors protected by the self-regulatory system to be permitted to remain in the securities industry. We also conclude that the sanctions imposed on Sassano will have the salutary effect of deterring others from engaging in the same serious misconduct.

NYSE Rule 477(c) expressly contemplates that the failure to testify may result in a permanent bar. 59/ "Because of limited Commission resources, Congress has given [SROs] significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations." 60/ As we have repeatedly emphasized, it is vitally important to the self-regulatory system that SRO investigators be able to obtain information and testimony from member firms and associated

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57/ 15 U.S.C. § 78s(e)(2). Sassano does not claim, and the record does not show, that NYSE's action imposed an undue burden on competition.

58/ See supra note 3.

59/ Under NYSE Rule 477(c), a former employee of a member organization that "is adjudged guilty in a proceeding under Rule 476 of having refused or failed to comply" with any requirement to appear or testify "may be barred from being a member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization permanently, or for such period of time as may be determined . . . ."

60/ PAZ Sec., Inc., Exchange Act Rel. No. 54656 (Apr. 11, 2008) __ SEC Docket __, __ (quoting Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007) 91 SEC Docket 3147, 3157), appeal docketed, No. 08-1188 (D.C. Cir. May 13, 2008).

persons promptly and without conditions. 61/ Because the SROs lack subpoena power, they "necessarily rel[y] upon the full and prompt cooperation of [their] members and associated persons in conducting an investigation." 62/ Vigorous enforcement of Rule 477, therefore, helps ensure the continued strength of the self-regulatory system -- and thereby enhances the integrity of the securities markets and protects investors -- by "barring individuals and firms who have already demonstrated a refusal to be investigated." 63/ We have recently held that "[a] complete failure to respond to a request for information . . . renders the violator presumptively unfit for employment in the securities industry." 64/

Sassano has admitted throughout these proceedings that he has not appeared for on-the-record NYSE testimony. The Exchange's original request for such testimony has been outstanding since September 2004. Nevertheless, Sassano failed to appear for an interview even after the Exchange twice rescheduled his testimony at the request of his counsel, and after two separate requests for testimony by the Exchange. We have previously observed that a failure to respond until after the imposition of disciplinary sanctions "is tantamount to a complete failure to respond." 65/ Moreover, the NYSE's determination to bar Sassano was consistent with sanctions we have expressly affirmed in other SRO proceedings involving a failure to testify. 66/

61/ Albanese, 53 S.E.C. at 298.

62/ Id. at 297-98; see also Richard J. Rouse, 51 S.E.C. 581, 584 (1993) (finding rule requiring NASD members and associates to comply with its information requests to be "a key element in the NASD's effort to police its members").

63/ PAZ Sec., Inc., __ SEC Docket at __.

64/ Id. at __.

65/ Id. at __.

66/ See, e.g., Fawcett, 91 SEC Docket at 3158 (upholding bar for violation of analogous NASD rule).

We find that no factors mitigate the severity of Sassano's violative conduct. 67/ Sassano had no legitimate basis for refusing to testify before the NYSE. Instead, aware of the consequences, Sassano refused to comply with NYSE Enforcement's requests in contravention of his duty to cooperate fully and promptly with those requests. 68/ Lesser sanctions may, in certain circumstances, be appropriate for an incomplete or dilatory response to requests for information or a failure to respond where mitigating circumstances exist. However, in light of Sassano's complete failure, without mitigation, to respond to the Exchange's repeated requests for testimony, we conclude that the bar is not "excessive or oppressive" within the meaning of Exchange Act Section 19(e)(2). 69/

We concur in the NYSE's determination that Sassano's misconduct demonstrates that he poses too great a risk to the self-regulatory system -- and the markets and investors it protects -- to be permitted to remain in the securities industry. We conclude, therefore, that the sanctions imposed by the NYSE to redress that risk serve the public interest and are neither excessive nor

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67/ Sassano has argued that "compelling [him] to testify before the [NYSE] while the SEC proceeding is pending would be highly prejudicial to [him] in the [SEC] enforcement proceeding" and "would enable the SEC's Division of Enforcement to effectively end run the provisions of Rule 230(g) of the SEC's own Rules of Practice . . . preclud[ing] the issuance of investigatory subpoenas for the purpose of obtaining evidence relevant to the proceeding 'after the institution of proceedings.'" On July 18, 2008, the SEC Enforcement proceeding against Sassano was settled. See Michael Sassano, Exchange Act Rel. No. 58193 (July 18, 2008), __ SEC Docket __. Given the settlement of the SEC Enforcement proceeding, Sassano's prejudice argument is moot.

Moreover, we are not aware of any offer by Sassano to comply with the NYSE Enforcement requests for testimony now that any threat that such testimony would be used in the SEC Enforcement investigation has subsided. In any event, the existence of a parallel ongoing SEC Enforcement investigation did not justify Sassano's refusal to testify before the NYSE. See Fawcett, 91 SEC Docket at 3158 (sustaining bar for failing to provide information despite applicant's claim that he was "faced with a Hobson's choice: either provide testimony that might incriminate him in then-pending proceedings before the [Commission] and [the NYAG], or be barred by [NASD] from practicing his profession").

68/ Cf. Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000) (stating that, by registering with NASD, respondent "agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with NASD investigations"). As we have previously noted, "even if the failure to respond does not result in direct improper financial benefit to respondents or harm to investors, it is serious because it impedes detection of such violative conduct." PAZ Sec., Inc., __ SEC Docket at __.

69/ Fawcett, 91 SEC Docket at 3157-58.

oppressive. The bar is also an appropriate remedy because it will serve as a deterrent to others who may be inclined to ignore NYSE requests for testimony, thereby protecting the investing public by encouraging the timely cooperation that is essential to the prompt discovery and remediation of misconduct. 70/

An appropriate order will issue. 71/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES); Commissioner WALTER not participating.

Florence E. Harmon
Acting Secretary

70/ In making this determination, we are mindful that although "'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

71/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58632 / September 24, 2008

Admin. Proc. File No. 3-12903

In the Matter of the Application of

MICHAEL SASSANO
c/o Graeme W. Bush, Esq.
Zuckerman Spaeder LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NYSE Regulation, Inc. against Michael Sassano, be, and it hereby is, sustained.

By the Commission.

Florence E. Harmon
Acting Secretary

EXHIBIT 8

Westlaw.

Not Reported in F.Supp.2d, 2000 WL 423810 (D.D.C.)
(Cite as: 2000 WL 423810 (D.D.C.))

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Only the Westlaw citation is currently available.

United States District Court, District of Columbia.
Anthony J. MARCHIANO, Plaintiff,
v.
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC., Defendants.
No. CIV. A.00-00331(HHK).

Feb. 28, 2000.

Emmett H. Miller, III, Kilpatrick Stockton, LLP, Washington, DC, for Plaintiff: Anthony Marchiano.

Terri L. Reichere, National Assoc. of Securities Dealers, Washington, DC, for Defendant: NASD, Inc. & NASD Regulations, Inc.

MEMORANDUM OPINION AND ORDER

KENNEDY, District J.

***1** Plaintiff, the president and owner of A.S. Goldmen & Co., Inc., is named in a 240-count, 330-page New York State criminal indictment that charges him, *inter alia,* with violating New York State securities laws. He seeks a temporary restraining order against defendants, National Association of Securities Dealers, Inc., and National Association of Securities Dealers Regulation, Inc., entities that are prosecuting an administrative proceeding against plaintiff because, contrary to their internal rules, he has refused to answer their requests for information. Plaintiff argues that unless this proceeding is immediately enjoined, he will be punished and irreparably harmed for having exercised his Fifth Amendment Right not to incriminate himself because the inevitable result of the proceeding will be his expulsion from defendants' membership and the securities industry. Having considered plaintiff's motion for injunctive relief and the argument of counsel at a hearing, the court concludes that plaintiff's request for a TRO should be denied.

Injunctive relief is a special remedy in the law, that is warranted only when the movant is able to make the following showing:

(1) That he is substantially likely to prevail on the merits of the suit,

(2) That he will suffer irreparable injury if the injunction is not granted,

(3) That the injunction will not substantially harm other interested parties,

(4) That the public interest will be furthered by the injunction.

CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C.Cir.1995). This circuit has held that these requirements are best gauged on a sliding scale; that is, if one factor is particularly favorable to the movant, an injunction may be appropriate even if the showing with respect to the other factors is relatively weak. *See Id.* If one factor can be said to predominate, however, it is "irreparable injury." *See Id.* at 952 (" 'The basis of injunctive relief in the federal courts has always been irreparable harm" ') (citation omitted).

I believe plaintiff has made a weak showing of irreparable injury. The irreparable injury which plaintiff alleges is that he will be barred, automatically and immediately, from pursuing his vocation should the defendants' administrative proceeding be allowed to continue. This is simply not true.

Assuming that plaintiff is found guilty as charged in the administrative proceeding, the sanction that will be imposed is governed by the NASD Sanction Guidelines. These *Guidelines,* by their own terms, "do not prescribe fixed sanctions for particular violations ... [but] provide direction for ... imposing

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sanctions consistently and fairly," *NASD Sanction Guidelines* at 1 (1998). Further, they "are not intended to be absolute." Rather, "[b]ased on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended and may consider aggravating and mitigating factors in addition to those listed in these guidelines." *Id.* (emphasis added). While the guidelines state that "a bar should be standard" for failing to respond to information requests, they also state that "[w]here mitigation exists" consideration should be given to suspending the individual ... for up to two years." *Id.* at 31. The court has no way of gauging the receptivity of defendants' adjudicators to any mitigating factors, i.e., the desire not to incriminate himself, which plaintiff may wish to present. Further, per NASD Code of Procedure §§ 9268(e) and 9311(b), if plaintiff appeals an adverse decision in the current adjudicatory proceeding within 25 days of issue, the decision shall be stayed until a final decision is handed down by the appellate body. These considerations leave the court unconvinced that plaintiff will suffer irreparable injury without immediate intervention by this court.

***2** Plaintiff has also failed to demonstrate a substantial likelihood of success on the merits. Plaintiff's first task in seeking relief for violation of his Fifth Amendment rights is to demonstrate that defendants are state actors. Plaintiff argues that defendants should be considered state actors for two reasons. First, plaintiff contends that defendants act as a "quasi-governmental authority" under the auspices of Congress and the SEC. Second, plaintiff maintains that defendants' measured coordination with New York law enforcement officials creates state action "by association."

As to his "quasi-governmental" rationale, the court observes that every district and appeals court that has ruled on this issue has held that the NASD is *not* a state actor. Plaintiff strenuously argues that many of these cases are dated and their determinations are not dispositive, given changes in the NASD's structure in 1983 and 1996. While many of these cases were decided before 1996, *Graman v. NASD,* 1998 WL 294022 (D.D.C.1998), a 1998 case decided by this court was not. In *Graman,* my colleague Judge Robertson explicitly considered and rejected the plaintiffs' argument that "NASD is a 'quasi-governmental authority' to which Congress has delegated substantial regulatory re sponsibility...." even in light of the plaintiffs' "suggestion that NASD's once-private status has recently changed." *See Graman* at *2, 3. It is well-settled, then, that NASD and NASDR are not state actors.

Plaintiff's "state action by association" argument is similarly unconvincing. As the Supreme Court held in *Blum v. Yaretsky,* 457 U.S. 991, 1004-05 (1982), "a State normally can be held responsible for private decision only when it has exercised coercive power or has provided such significant encouragement ... that the choice must in law be deemed to be that of the State. Mere approval ... is not sufficient to justify holding the State responsible ...." Plaintiff has not indicated that Congress or the SEC have forced or even significantly encouraged defendants to proceed with their administrative proceeding or the underlying NASD disclosure requirement. Consequently, plaintiff has failed to impute state action to defendants.

Accordingly, because plaintiff has failed to show irreparable injury and that he is likely to prevail on the merits of this suit, it is, this 28th day of February 2000 hereby

ORDERED that plaintiff's request for a temporary restraining order is DENIED.

D.D.C.,2000.
Marchiano v. National Ass'n of Securities Dealers, Inc.
Not Reported in F.Supp.2d, 2000 WL 423810 (D.D.C.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, ***Plaintiff,*** ***v.*** **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, 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.***	§	**10 Civ. 457 (GLS/DRH)**

ORDER GRANTING FINRA AND FINRA EMPLOYEES'
MOTION TO QUASH SUBPOENAS

On _____ __, ____, FINRA and FINRA Employees' Motion to Quash Subpoenas came on to be heard. After considering the Motion to Quash Subpoenas, the memorandum of law and affidavits of James S. Shorris in support, the Defendants' response, the

governing law, and the argument of counsel, the Court finds that FINRA and FINRA Employees' Motion to Quash Subpoenas as to Gary Jaggs, Robert J. McCarthy, Michael Newman, Randy Pearlman, and FINRA's custodian of records is GRANTED.

IT IS SO ORDERED this _____ day of _____, ____.

_____
HONORABLE DAVID R. HOMER
U.S. MAGISTRATE JUDGE