

**AQUATIC
DEVELOPMENT
GROUP, INC.**

RECEIVED

November 22, 2010

William J. Brown, Esq.
Phillips Lytle LLP
3400 HSBC Center
Buffalo, NY 14203-2887

DAVID R. HOMER
UNITED STATES MAGISTRATE JUDGE
ALBANY, NEW YORK

Re: **Third Albany Income Notes (TAIN) loan to Aquatic Development Group (ADG)**

10cv457

Dear Mr. Brown,

I am writing in connection with the bank check in the amount of \$897,965.99 sent to you on May 20, 2010 by ADG to pay off the above-referenced loan ADG had obtained through McGinn Smith & Co. According to our bank statements, that check has not been cashed.

Based upon our prior conversations, I can only surmise that the check has not been cashed because you believe McGinn Smith may somehow be entitled to additional moneys from ADG that they would have been precluded from attempting to collect by cashing the check. However, neither the check itself nor the accompanying cover letter (copy enclosed) sought to make cashing the check an acknowledgment of full and final payment. Rather, we simply stated that the check was for the full amount ADG believes was due and owing as of April 22, 2010.

Nonetheless, in a further effort to dispel the idea that ADG might owe any additional moneys to McGinn Smith, I am also enclosing two affidavits, one from myself and one from ADG's Chief Financial Officer. These affidavits demonstrate, by sworn statements that we are prepared to reiterate in court if necessary, the basis for ADG's position that the \$897,965.99 payment constitutes the full amount that was owed by ADG on the above-referenced note as of April 22, 2010 when I was prepared to meet Dave Smith to pay off the note – a meeting that never took place as the result of the complaint filed by the SEC against McGinn Smith.

I hope that the enclosed affidavits will provide whatever documentation you may need to confirm that this is the correct amount owed on the note so that you can cash the check. Failure to cash the check benefits only our bank, and not McGinn Smith's investors, who have now lost the benefit of close to six month's interest on almost

Mr. William Brown
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\$900,000.00.

Sincerely,

Aquatic Development Group, Inc.

By: 

Herbert S. Ellis, Chairman and COO

Enclosures (3)

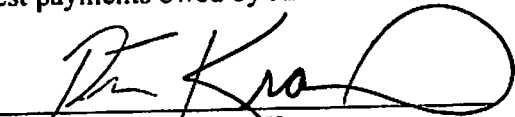
cc: Hon. David R. Homer (wf/encs.)

AFFIDAVIT

STATE OF NEW YORK)
 : SS
COUNTY OF ALBANY)

ROBERT KRAMER, being duly sworn, states:

1. I am the Chief Financial Officer of Aquatic Development Group, Inc. ("ADG").
2. I make this affidavit in connection with a \$75,000 loan made by ADG to McGinn Smith & Co. ("McGinn Smith") on September 29, 2009.
3. I make this affidavit based upon my personal knowledge as set forth in more detail below and my conversations with Herbert Ellis ("Ellis"), Chairman of the Board of Directors of ADG and officers and/or employees of McGinn Smith.
4. Sometime in mid to late September 2009 McGinn Smith principal David Smith ("Smith") contacted me to say that McGinn Smith was having a severe short-term cash crunch and to ask whether ADG was able to help them in any way financially. I advised him that this was not a decision I could make and that he would have to speak with Ellis.
5. On September 29, 2009 at the direction of Ellis I initiated a wire transfer of funds in the amount of \$75,000 from ADG's account with Key Bank to McGinn Smith. Ellis informed me that this was a loan to be repaid by McGinn Smith within a few days.
6. By late October or early November, the loan still had not been repaid and Ellis advised me to offset the loan against future monthly payments of interest that ADG was making on a loan ADG had taken out through McGinn Smith a few years earlier.
7. Shortly thereafter, I received a phone call from an employee of McGinn Smith's I believe, accounting department, asking about the status of the November interest payment on McGinn Smith's loan to ADG. I advised the person calling to contact Smith relative to the arrangements that had been made between Ellis and Smith to consider the \$75,000 loan from ADG to McGinn Smith as prepaid interest on McGinn Smith's loan to ADG. I never heard back from anyone at McGinn Smith refuting the understanding that the loan to McGinn Smith would be repaid by offset against the interest payments owed by ADG to McGinn Smith.


Robert Kramer

Sworn to before me this 22nd
day of November, 2010.

Ralph W. Bandel
Notary Public

RALPH W. BANDEL
Notary Public, State of New York
Qualified in Albany County
No. 02BA4899592
Commission Expires June 15, 20 11

AFFIDAVIT

STATE OF NEW YORK)
 : SS
COUNTY OF ALBANY)

HERBERT S. ELLIS, being duly sworn, deposes and says:

1. I am Chairman of the Board of Directors and majority stockholder of the Aquatic Development Group, Inc. (“ADG”).

2. I make this affidavit in connection with a consultancy agreement dated December 18, 2003 between ADG and McGinn Smith & Co. (“McGinn Smith”), as amended by an amended and restated consultancy agreement dated May 30, 2006 (together the “Consultancy Agreement”) and a \$75,000 loan made by ADG to McGinn Smith on September 29, 2009.

3. I make this affidavit based upon my personal knowledge as set forth in more detail below, and my meetings and conversations with McGinn Smith principal David Smith (“Smith”).

4. The Consultancy Agreement was entered into to provide bonus compensation to McGinn Smith in addition to their industry standard finance fee for anticipated successful financial advisory services to ADG and related companies in connection with the development, financing and construction of a proposed waterpark on Randall’s Island in New York City (the “City”) pursuant to a concession agreement (the “Concession Agreement”) between the City and an ADG affiliate. McGinn Smith, and specifically Smith, was assisting ADG in its efforts to obtain financing for this project on a best efforts, success fee basis.

5. ADG’s involvement with the project began in 1999. McGinn Smith became actively involved as a financial advisor working with me to help locate and sort likely debt and equity players for the project.

6. Due to a number of factors, including obtaining required city agency approvals, design and design approvals and a myriad of unexpected and costly delays, the development process was delayed several years leading to escalating project cost that eventually exceeded the target number in the Concession Agreement by over \$100 million. In consideration of the drawn out duration of the development process and increased project cost, the Consultancy Agreement was amended in May 2006 to give McGinn Smith an extra two years of bonus success fees to be paid out of anticipated profits from the operation of the Randall’s Island waterpark. At that time it was anticipated that the project would finally come to an underwriting at the end of 2006. That did not happen as bids for the

construction work far exceeded the \$215 million committed to the project from three funding sources, two of which had been introduced to the project by Smith.

7. The Concession Agreement was terminated by the City in September 2007 due to ADG's alleged failure to obtain financing commitments in accordance with the terms thereof.

8. Thereafter I worked assiduously in an effort to get the City to reconsider its decision and get the waterpark project restarted and kept Smith aware of our progress to assist him in coordinating his efforts on behalf of the project. My efforts continued until October 2008 when we were advised by the City unequivocally that there would be no waterpark project on Randall's Island.

9. Smith assisted me in my efforts to get the waterpark project restarted and ADG made the first three (3) payments due under the Consultancy Agreement in April, July and October 2008.

10. Following receipt of the final "no" from the City in October 2008, making it clear that there would be no waterpark project, Smith's and ADG's efforts ceased, ADG stopped making payments under the Consultancy Agreement and McGinn Smith never requested or made demand for any further payments.

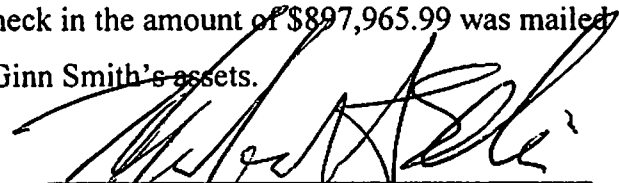
11. In September 2009 Smith contacted me to ask for a loan from ADG to McGinn Smith to help meet a severe short-term cash crunch the company was facing at the end of the month. He said the loan would be repaid within a few days. Smith was a good friend of mine and it sounded like he was in a bind. I authorized ADG's chief financial officer to loan \$75,000 to McGinn Smith; no written agreement was entered into.

12. Several weeks later, after several phone calls, it became apparent that McGinn Smith was not going to be able to repay the \$75,000 within a few days as had been agreed. Smith at this point was not returning my calls. I then advised Bob Kramer, ADG's chief financial officer to offset the loan against future monthly payments of interest at the rate of 15% that ADG was making on a loan it had taken out through McGinn Smith several years before.

13. This was done, to the best of my knowledge, without objection from McGinn Smith. Mr. Kramer told me in November 2009 that he received a call from someone in McGinn Smith's accounting department asking why ADG had not made the November interest payment. He said he told the person to talk to Dave Smith to confirm the existence of ADG's \$75,000 loan and the fact that, in lieu of repayment as promised, we were writing it down against monthly interest due from ADG on the loan from McGinn Smith. To the best of my knowledge, there was never a response from anyone at McGinn Smith regarding this action as the \$75,000 covered interest on the loan into the middle of May 2010. Full payment on the loan was due on April 21, 2010.

14. In or about the middle of March 2010, I contacted Smith to advise him that ADG was about to complete a required restructuring of its debt in order to pay off the loan from McGinn Smith on time and would be able to meet our commitment date. Smith was in Florida at the time and we made arrangements to meet in Albany upon Smith's return on April 21 or 22 to complete the payoff. Just before that the SEC complaint against McGinn Smith was filed and, as a result, that meeting never took place.

15. While ADG was ready, willing and able to have paid off its loan from McGinn Smith on April 21, 2010, because of the initiation of the lawsuit against McGinn Smith by the SEC, the final payoff was not made until May 20, 2010 when a bank check in the amount of \$897,965.99 was mailed to William Brown, the receiver appointed to handle McGinn Smith's assets.



Herbert S. Ellis

Sworn to before me this 10th
day of November, 2010.

Ralph W. Bandel
Notary Public

RALPH W. BANDEL
Notary Public, State of New York
Qualified in Albany County
No. 02BA4899592
Commission Expires June 15, 20 11