

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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 :
 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. :
 ----- X

**Case No.: 1:10-cv-457
(GLS)(DRH)**

**DEFENDANTS' TIMOTHY M.
MCGINN AND DAVID L.
SMITH'S RESPONSE TO
PARAGRAPH III OF MAY 7,
2010 CONSENT ORDER**

Pursuant to paragraph III of the May 7, 2010 Consent Order, Timothy M. McGinn and David L. Smith hereby submit the following response to Part XVI of the April 20, 2010 Order To Show Cause:

Messrs. McGinn and Smith are unable to provide a verified written accounting at this time because they have not had complete access to the documents, nor other resources, that would be necessary and essential to fully, accurately and meaningfully provide such an accounting.

In addition, given the parallel investigation being conducted by the United States Attorney's Office for the Northern District of New York, I am advised by counsels for Messrs. McGinn and Smith in that investigation that it is possible that providing a verified written accounting at this time may implicate Messrs. McGinn's and Smith's 1st, 4th, 5th, 6th, and/or 14th Amendment rights, as well as potentially related due process rights.

For the foregoing reasons, Messrs. McGinn and Smith will not provide a verified written accounting at this time, but reserve all rights to do so in the future.

Dated: Albany, New York
May 19, 2010

GREENBERG TRAURIG, LLP

By: /s/ Michael L. Koenig

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