

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE COMMISSION,**

*Plaintiff,*

v.

10 Civ. 457 (GLS/DRH)

**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.*

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that upon the Memorandum of Law in Support of Plaintiff's Motion to Modify the Asset Freeze to Allow the Sale of the Vero Beach Property and to Appoint the Receiver to Oversee the Sale dated December 15, 2010; the Declaration of Kevin P. McGrath dated December 15, 2010, and the exhibits thereto; the Declaration of William J. Brown dated December 13, 2010, and the exhibit thereto, and upon all prior proceedings and filings herein,

plaintiff Securities and Exchange Commission will move, on Thursday, January 20, 2011, at 9:30 a.m., or at any other date convenient to the Court, before the Honorable David R. Homer, United States Magistrate Judge, United States District Court, Northern District of New York, 445 Broadway, Albany, NY, for an order modifying the asset freeze to allow for the sale of the Vero Beach property and appointing the Receiver to oversee the sale;

PLEASE TAKE FURTHER NOTICE that a copy of the proposed Order is annexed hereto; and

PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7.1(b)(2), opposition papers must be filed and served not less than seventeen days prior to the return date.

Dated: New York, NY  
December 15, 2010

Respectfully submitted,

**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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

10 Civ. 457 (GLS/DRH)

McGINN, SMITH & CO., INC.,  
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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.*

**ORDER MODIFYING ASSET FREEZE  
TO ALLOW THE SALE OF CERTAIN PROPERTY**

WHEREAS on April 20, 2010, the Commission filed a Complaint and an Order to Show Cause seeking emergency relief and, on that same date, the Court granted the Commission's request for a temporary restraining order that, among other things, froze the assets of the defendants and the relief defendant (the "Freeze Order") and, on July 22, 2010,

the Court entered the Preliminary Injunction Order that, among other things, continued the Freeze Order over the assets of the defendants and relief defendant; and

**WHEREAS**, the property located at [REDACTED], Vero Beach, Florida is currently subject to the Freeze Order (the “Florida Property”);

**NOW, THEREFORE,**

**I.**

**IT IS ORDERED** that the Court-appointed Receiver, William J. Brown (the “Receiver”), is given sole authority to take all necessary steps to effectuate a sale of the Florida Property, including the retention of a nationally known real estate agent, and the Freeze Order is hereby modified to permit the Receiver or the Smiths to enter into a contract for the purchase and sale of the Florida Property, and to conduct a sale of the Florida Property subject to the following conditions:

A. The Receiver shall provide the Commission with a copy of the contract for sale of the Florida Property (the “Contract”) within three days of its execution, along with a proposed list of distributions (the “Distribution List”) to be made from the proceeds of such sale. The Distribution List may include, among other things, the mortgagor of the Florida Property, and any costs of closing, including broker, attorney, and recording fees, and transfer taxes.

B. The Commission may within one week from the delivery of the Contract and the Distribution List object to the terms of the Contract, and such objections may include the sale price or the proposed distributions. The Court will resolve such objections if the Commission and the Receiver do not reach agreement on such objections. Upon request of

the Commission, the Receiver shall provide at their expense an appraisal of the fair market value of the Florida Property, done by an appraiser acceptable to the Commission.

C. The balance of any funds remaining after payment of the Distribution List shall be paid to the Clerk of this Court, together with a cover letter identifying the Smiths as defendants in this action, setting forth the title and civil action number of this action and the name of this Court, and specifying that payment is made pursuant to this Order. The Receiver shall send a copy of the documents sent to the Clerk of the Court to David Stoelting, Senior Trial Counsel, Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, New York 10281-1022. The Clerk shall deposit the funds in an interest bearing account with the Court's Registry Fund. These funds, together with any interest and income earned thereon, shall be held by the Registry Fund until further order of this Court.

E. The Commission shall provide such documents as the purchaser of the Florida Property may reasonably require to obtain title to the Florida Property.

**II.**

**IT IS FURTHER ORDERED** that, except as modified herein, the Preliminary Injunction Order entered July 22, 2010 remain in full force and effect.

Dated: Albany, New York  
\_\_\_\_\_, 2011

\_\_\_\_\_  
DAVID R. HOMER  
United State Magistrate Judge

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**SECURITIES AND EXCHANGE COMMISSION,**

*Plaintiff,*

v.

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

*Defendants,*

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10 Civ. 457 (GLS/DRH)

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S MOTION TO MODIFY THE ASSET FREEZE  
TO ALLOW THE SALE OF THE VERO BEACH  
PROPERTY AND TO APPOINT THE RECEIVER TO  
OVERSEE THE SALE**

December 15, 2010

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Plaintiff respectfully submits this memorandum of law in support of its motion to: (a) modify the asset freeze to allow for the sale of property held in the name of defendant and relief defendant Lynn A. Smith located at [REDACTED], Vero Beach, Florida (the "Property"); and (b) to appoint the Receiver to oversee the sale of the Property.

### **PRELIMINARY STATEMENT**

The Property is a substantial asset of David and Lynn Smith, and the preservation of its value is a primary purpose of the asset freeze. Unless the Property is promptly sold, however, the substantial value in the Property – perhaps as much as \$800,000 in equity – will continue to decline sharply every month as mortgage costs, taxes, and other expenses continue to accrue and remain unpaid. Selling the Property is the only way to avoid the ongoing dissipation of this valuable asset.

Until recently, Lynn Smith supported a sale of the Property. In October 2010, Mrs. Smith urged the Court to enter an Order allowing for the sale of the Property. Docket # 146. As recently as a few weeks ago, her counsel asked the SEC to agree to a sale of the Property. Declaration of Kevin P. McGrath dated Dec. 15, 2010 ¶ 4. Without an explanation for the reversal, Mrs. Smith last week announced that she no longer supported a sale of the Property. The reasons for the sale, however, remain compelling.

The proposed Order, attached to the Notice of Motion dated December 15, 2010, should be entered.



**ARGUMENT**

**THE ASSET FREEZE SHOULD BE MODIFIED TO ALLOW  
FOR THE SALE OF THE PROPERTY AND  
THE RECEIVER APPOINTED TO OVERSEE THE SALE**

The Property should be sold in order to preserve the substantial equity that remains. If Mrs. Smith is left in control of the Property, substantial arrearages will continue to accrue, the equity will continue to diminish, and foreclosure will be the only option.

The costs and expenses associated with the Property are considerable. According to a declaration submitted by Lynn Smith on October 4, 2010, the monthly expenses exceed \$13,000, and include monthly mortgage payment of \$6,188, and taxes of \$1,875 per month. *See* Declaration of Lynn A. Smith dated Oct. 4, 2010, Exhibit D (Docket # 146) (itemizing monthly expenses). The amount currently past due is \$32,178.39. McGrath Decl. ¶ 8; Exh. D. The equity value in the Property may already be subject to a charge for these accrued fees, further demonstrating the need to act quickly.

A sale of the Property would result in a significant net gain, possibly more than \$800,000. The overall mortgage balance currently owed on the Property is \$891,954.73, and an appraisal done in September 2010 valued the Property at \$1.7 million. McGrath Decl. ¶ 8; Exh. D. Counsel for the Smiths have stated that they would expect a sale price of \$1.9 million. McGrath Decl. ¶¶ 3-4; Exh. A.

Lynn Smith previously asked the Court to permit the sale of the Property. A Notice of Motion filed by Lynn Smith's counsel on October 4, 2010, requested "that the Court enter an Order authorizing the sale of her Florida home[.]" Docket # 146. In a declaration in support of this motion, Mrs. Smith stated: "With respect to my home at 906

Orchid Point Way, Vero Beach, Florida, I respectfully request an order to be entered by the Court authorizing such property to be listed for sale with the understanding that the proceeds of the sale shall be placed in escrow.” Docket # 146-3.

Lynn Smith’s counsel also proposed a sale of the Property to the SEC three weeks ago, and discussed the entry of a consent order with the SEC to allow for the sale of the Property. McGrath Decl. ¶ 4.

During the pre-motion conference on December 9, 2010, Mrs. Smith reversed her position, and stated through counsel that she now opposes a sale of the Property because she “may” make the Property her primary residence.<sup>1</sup> (During the preliminary injunction hearing, Mrs. Smith testified that the Saratoga Springs, NY, house was her primary residence. Hrg. Tr. 6/10/10 at 279-278.) Mrs. Smith’s about-face, however, underscores the urgent need to sell the Property. If Mrs. Smith is allowed to keep the Property, additional expenses will accrue and foreclosure will become the only option.

The Court has the authority to order the sale. Under the Preliminary Injunction Order, the Smiths must “hold and retain within their control, and otherwise prevent, any . . . encumbrance . . . dissipation . . . or other disposal of any assets . . . including money, real or personal property[.]” Docket # 96, at 5. Lynn Smith’s opposition to the sale means that the dissipation of the value of the Property, which the PI Order is intended to prevent, will continue. Entering the proposed Order is, therefore, needed to prevent Lynn Smith from dissipating this asset.

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<sup>1</sup> Lynn Smith received approximately \$600,000 from the sale of her camp house in July 2010. *See* Trustee’s Verified Accounting dated Aug. 16, 2010. These funds were not used to pay off the amounts owed on the Property, which suggests a lack of good faith in Mrs. Smith’s sudden consideration to making Vero Beach her permanent residence.

The Court also has inherent authority to order the sale of the Property in order to preserve the *status quo*. See *SEC v. Unifund, SAL*, 910 F.2d 1028, 1041-42 (2d Cir. 1990) (asset freeze was warranted in amount sufficient to satisfy potential judgment for penalties in insider trading case); *SEC v. Infinity Group Co.*, 212 F.3d 180, 197 (3d Cir. 2000) (purpose of asset freeze is to preserve status quo by preventing dissipation and diversion of assets); *SEC v. American Board of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987) (receiver needed to prevent dissipation of assets); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1072).

In addition, the Court also has the power to enter the proposed Order under Section 21(d)(5) of the Securities Exchange Act of 1934, which provides that in SEC actions, “the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.” See also *SEC v. Wencke*, 622 F.2d 1363, 1369 (9<sup>th</sup> Cir. 1980) (“federal courts have inherent equitable authority to issue a variety of ‘ancillary relief’ measures in actions brought by the SEC to enforce the federal securities laws”).

The proposed Order would give the Receiver sole authority to effectuate the sale of the Property. The Receiver, who Mrs. Smith’s counsel recognized is “pretty competent,” has experience in real estate transactions and giving him authority to manage the sale is the only option, given that Lynn Smith is opposed to selling the Property. See Declaration of William J. Brown dated December 13, 2010. The proposed Order would allow for the payment of the existing mortgage and closing costs.

The only option that will preserve the equity in the Property for the benefit of investors is to enter the proposed Order. To the extent Mrs. Smith intends to claim the

Property as her “primary residence” in order to set the stage for an assertion of the Florida state law “homestead exemption,” this defense will be unavailing. Even if Mrs. Smith were in the future able to establish that the Property is her homestead, the Court in these circumstances would not be bound by state law. *See SEC v. AMX, Int'l, Inc.*, et al., 872 F. Supp. 1541, 1544 (N.D. Tex. 1994) (defendant subject to disgorgement order not entitled to rely on “state law homestead exemption . . . [defendant’s home is] considered an asset subject to the disgorgement order . . . [b]y selling his home or obtaining a loan on his home [defendant] could begin to pay the equitable remedy[.]”). *See also SEC v. Solow*, 682 F.Supp.2d 1312, 1329 (S.D.Fla. 2010) (assets transferred to defendant’s wife after verdict were subject to disgorgement order; “This Court does not have to recognize the protections of tenancy by the entirety created by State law.”).<sup>2</sup>

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<sup>2</sup> Mr. Russo, on behalf of David Smith, stated during the conference that he would acquiesce to Lynn Smith’s decision regarding the sale of the house, but that the SEC should be required to first “post a bond.” The SEC, however, cannot be required to post a bond. Under Section 21(d)(1) of the Securities Exchange Act of 1934, which provides the statutory basis for the PI Order, the SEC has made “a proper showing” that it is entitled to the relief in the PI Order, therefore it is “without bond.”

**CONCLUSION**

Plaintiff respectfully requests that the Court grant its motion and enter the proposed Order, in the form attached to the Notice of Motion dated December 15, 2010, to: (a) modify the asset freeze to allow for the sale of the Property; and (b) to appoint the Receiver to oversee the sale of the Property.

Dated: New York, NY  
December 15, 2010

Respectfully submitted,

**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](mailto:stoeltingd@sec.gov)

*Of Counsel:*

Andrew Calamari  
Kevin McGrath  
Lara Shalov Mehraban

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**SECURITIES AND EXCHANGE COMMISSION,**

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**DECLARATION OF KEVIN P. MCGRATH**

I, Kevin P. McGrath, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a senior trial counsel in the Division of Enforcement of the New York Regional Office of the Securities and Exchange Commission. I make this declaration in support of the SEC's motion to: (a) modify the asset freeze to allow for the sale of property held in the name of defendant and relief defendant Lynn A. Smith located at [REDACTED], Vero Beach, Florida (the "Property"); and (b) to appoint the Receiver to oversee the sale of the Property.

2. In September 2010, counsel for Mr. Smith and the SEC had a telephone conversation about selling the Property. The SEC asked Mr. Smith's counsel to provide information regarding the unpaid fees and expenses.

3. On October 1, 2010, I received an email from Mr. Smith's counsel, Alison Cohen, stating that "[b]ased on the real estate comps attached, the estimated value of the property is approximately \$1.9M," and attaching a bank statement showing that as of September 16, 2010, the amount due on the Property was \$19,183.27, including \$12,376.30 past due. A copy of this email is attached as Exhibit A.

4. On November 18, 2010, I received a phone call from Mr. Featherstonhaugh. Mr. Featherstonhaugh told me that the bills were piling up and unless the Property was sold there would be nothing left. Mr. Featherstonhaugh suggested that we agree to put the Property on the market at an offering price of \$1.85 million, and agree that any offer at or above \$1.7 million be accepted. The sales proceeds would then be put in an escrow account per court order until the end of the case. I asked Mr. Featherstonhaugh if he had had the house appraised; he said no but told me that houses on either side of the Property have sold for about \$1.9 million recently. Mr. Featherstonhaugh also said that since the Property is in Lynn Smith's name we should be dealing with him on this issue rather than Mr. Russo.

5. On November 19, 2010, I sent an email to Mr. Featherstonhaugh attaching a proposed consent order that would allow for the sale of the Property.

6. The SEC subsequently determined that having the Receiver oversee the sale of the Property would be preferable, and my colleague David Stoelting sent an email to all parties on December 1, 2010, making that proposal, and stating that "[c]ounsel for both David Smith and Lynn Smith previously have expressed to us a desire to have the Vero Beach house sold." Mr. Russo responded that "the Receiver will not be an acceptable choice – why should we pay for his services?" Mr. Featherstonhaugh responded by asking what the Receiver would charge, what experience the Receiver has in Florida real estate, and adding that the Receiver "seems pretty competent to me and I am not unalterably opposed to his handling the sale if it makes sense." A copy of these emails is attached as Exhibit B.

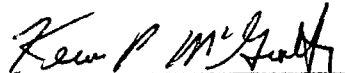
7. In the past few months, the SEC has received several communications from a representative of the bank that holds the mortgage on the Property (the "Bank"). The Bank expressed concerns that the mortgage is now more than 100 days past due. On November 19,

2010, the Bank sent to the SEC a copy of an appraisal for the Property dated September 5, 2010, which discloses that the Property was listed for sale on August 10, 2010, but was taken off the market on August 12, 2010. The appraised value of the Property, according to this appraisal, is \$1.7 million. An excerpt from the appraisal is attached as Exhibit C.

8. On December 14, 2010, the SEC received, pursuant to a subpoena, documents from the Bank regarding the mortgage, showing that the total balance on the mortgage is \$891,954.73, and the past due amount is \$32,178.39. A copy of this document is attached as Exhibit D.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
December 15, 2010

  
\_\_\_\_\_  
Kevin P. McGrath



# **EXHIBIT A**

**McGrath, Kevin**

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**From:** Alison Cohen [acohen@gkblaw.com]  
**Sent:** Friday, October 01, 2010 3:30 PM  
**To:** Mehraban, Lara  
**Cc:** mrusso@gkblaw.com; 'Martin Kaplan'; Stoelting, David; McGrath, Kevin  
**Subject:** SEC v. McGinn Smith  
**Attachments:** 20101001151914895.pdf; 20101001151936524.pdf

Lara,

Attached please find information regarding David Smith's Florida property, including a mortgage statement, property tax assessment, letters from the property association, and a list of area comparables. Based on the real estate comps attached, the estimated value of the property is approximately \$1.9M.

We are gathering similar information relating to the McGinn property and will provide it to you once we receive it.

I am also attaching the summary plan description for Mr. Smith's ERISA qualified 401(k) plan.

Regards,  
Alison

**Alison B. Cohen, Esq.**  
Gusrae, Kaplan, Bruno & Nusbaum PLLC  
120 Wall Street, 11th Floor  
New York, New York 10005  
(212) 269-1400

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DAVID L. SMITH  
 AND LYNN A. SMITH  
 SARATOGA SPRINGS NY 12866

**Account Information**

Payment Due Date	10 01 10	Statement Date	09-16-10
Principal	1 674 37	Account Number	4600098646
Interest	4 513 78	Maturity/Next Review Date	07-01-31
Past Due Payments	12 376 30	Interest Rate	6 2500%
Late Fees	618 82	Interest Paid Year to Date	28 91/ 09
Total Payment Due	19,183.27	Late Charges Assessed After	10-16-10

**Summary**

Statement Period August 18 2010 September 16 2010

Previous Balance	Advances/Debits	Payments/Credits	Current Balance
866 645 89	.00	.00	866 645 89

**Transaction Detail**

Post Date	Effective Date	Description	Total	Principal	Interest	Late Charge	Insurance	Other
09/16/2010	09/16/2010	LATE CHARGE ASSESSED	309 41			309.41		

(Keep upper portion for your records.)

DAVID L. SMITH  
 AND LYNN A. SMITH  
 2 ROLLING BROOK DR  
 SARATOGA SPRINGS NY 12866

Account Number [REDACTED] Payment Due Date **10-01-10**

Total Payment Due 1 9 1 8 3 2 7

Additional Principal

**Total Amount Enclosed**

Please check this box if changes are noted on the reverse side.

Mercantile Bank  
 a division of Carolina First Bank  
 Payment Services  
 P.O. Box 100201  
 Columbia, SC 29202-3201

0060046000986460000018564458300006188284000000000657

# **EXHIBIT B**

## Stoelting, David

---

**From:** James Featherstonhaugh [JDF@fwc-law.com]  
**Sent:** Thursday, December 02, 2010 3:53 PM  
**To:** Stoelting, David; mrusso@gkblaw.com; acohen@gkblaw.com; jdunn708@nycap.rr.com; Scott Ely; nemcginn@yahoo.com  
**Cc:** McGrath, Kevin; Mehraban, Lara; WBROWN@phillipslytle.com; mkaplan@gkblaw.com  
**Subject:** Re: SEC v. McGinn Smith

David,

Can you tell me what Mr. Brown has indicated he will charge for his services and what experience he has in Florida real estate? He seems pretty competent to me and I am not unalterably opposed to his handling the sale if it makes sense. I will copy Bill on this in case he wants to answer on his own. In the meantime tell Kevin there is no longer any need to get back to me.

-----Original Message-----

**From:** Stoelting, David <StoeltingD@SEC.GOV>  
**To:** James Featherstonhaugh; Martin P. Russo <mrusso@gkblaw.com>; Alison Cohen <acohen@gkblaw.com>; jdunn708@nycap.rr.com <jdunn708@nycap.rr.com>; Scott Ely; nemcginn@yahoo.com <nemcginn@yahoo.com>  
**CC:** McGrath, Kevin <McGrathK@SEC.GOV>; Mehraban, Lara <MehrabanL@sec.gov>; William J. Brown <WBrown@phillipslytle.com>; Alison Cohen <acohen@gkblaw.com>; Kaplan, Martin H. <mkaplan@gkblaw.com>  
**Sent:** Thu Dec 02 15:22:37 2010  
**Subject:** RE: SEC v. McGinn Smith

Jim –

Given your statement that our initial proposal “made no sense,” it seemed unlikely that we were going to reach an agreement. And given your view that “Mr. Smith has no interest” in the VB house, then an agreement seems even more unlikely, since the Court ruled on July 7 that the Vero Beach house should be frozen as a joint asset. In any event, we have concluded that allowing the Smiths to control the timing and terms of the sale of this valuable asset would not be in anyone’s interests. Having the Receiver handle the sale will be more efficient and should result in a quicker sale and a maximization of value. The proceeds of any sale would be placed in the Court account pending the resolution of the case. We are available tomorrow at 10 a m if anyone wants to meet-and-confer on these issues further. Here is the call-in number:

Meeting ID: 0998

Phone Number(s): Internal: x15000

External: (202) 551-5000

Toll-Free: (877) 732-6722

**From:** James Featherstonhaugh [<mailto:JDF@fwc-law.com>]  
**Sent:** Thursday, December 02, 2010 12:08 PM  
**To:** Martin P. Russo; Stoelting, David; Alison Cohen; jdunn708@nycap.rr.com; Scott Ely; nemcginn@yahoo.com  
**Cc:** McGrath, Kevin; Mehraban, Lara; William J. Brown; Alison Cohen; Kaplan, Martin H.  
**Subject:** RE: SEC v. McGinn Smith

Martin,

I thought I responded to this email last night however it seems to have disappeared from my sent items so if I am repeating myself I

apologize. It is my clients position that Mr. Smith has no interest in the Vero Beach and no authority to consent or not consent to any stipulation in connection with it. David, in connection with your email I am more than a little surprised since I have been attempting to negotiate a solution with your colleague Kevin who's last email to me on Nov. 19th is attached. I don't understand what you are trying to do?

James D. Featherstonhaugh

Featherstonhaugh, Wiley & Clyne, LLP

99 Pine Street

Albany, NY 12207

Telephone: (518) 436-0786

Facsimile: (518) 427-0452

[jdf@fwc-law.com](mailto:jdf@fwc-law.com)

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Under U.S. Treasury regulations, we are required to inform you that any advice contained in this e-mail or any attachment hereto is not intended to be used, and cannot be used, to avoid penalties imposed under the Internal Revenue Code.

---

From: Martin P. Russo [<mailto:mrusso@gkblaw.com>]

Sent: Wednesday, December 01, 2010 7:38 PM

To: 'Stoelting, David'; 'Alison Cohen'; [jdunn708@nycap.rr.com](mailto:jdunn708@nycap.rr.com); James Featherstonhaugh; Scott Ely; [nemcginn@yahoo.com](mailto:nemcginn@yahoo.com)

Cc: 'McGrath, Kevin'; 'Mehraban, Lara'; 'William J. Brown'; Alison Cohen; Kaplan, Martin H.

Subject: RE: SEC v. McGinn Smith

David,

We are unable to meet and confer tomorrow inasmuch as we are appearing before Justice Fried in the trial of a case in the Supreme Court, New York County all day. We will make ourselves available on Friday morning. I will also have to consult with our client and will be unable to do it by tomorrow. My belief, though, is that the Receiver will not be an acceptable choice – why should we pay for his services?

Best,

Marty

Martin P. Russo, Esq.

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New York, New York 10005

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From: Stoelting, David [<mailto:StoeltingD@SEC.GOV>]

Sent: Wednesday, December 01, 2010 6:50 PM

To: mrusso@gkblaw.com; Alison Cohen; jdunn708@nycap.rr.com; James D. Featherstonhaugh; Scott Ely; nemcginn@yahoo.com

Cc: McGrath, Kevin; Mehraban, Lara; William J. Brown

Subject: SEC v. McGinn Smith

This is to fulfill the premotion meet-and-confer requirement of Local Rules. Attached below is a proposed Order allowing for the sale of the Vero Beach house, and appointing the Receiver to effectuate such sale. Please advise by close of business tomorrow if you oppose the entry of this order. Counsel for both David Smith and Lynn Smith previously have expressed to us a desire to have the Vero Beach house sold. We believe having the Receiver take control of the sale would be most efficient and would maximize the proceeds. We plan to make a motion for entry of this order on Friday.

Regards.

David Stoelting

<<Proposed Order re Vero Beach 12.1.10.pdf>>

# **EXHIBIT C**



DAVID Smith

Acct # [REDACTED]

File No. 10-63857

APPRAISAL OF



A SINGLE-FAMILY RESIDENCE

LOCATED AT:

[REDACTED]  
Vero Beach, FL 32963

FOR:

Mercantile Bank  
1501 Main Street, 3rd Floor  
Columbia, SC 29201

BORROWER:

N/A

[REDACTED]  
September 5, 2010

BY:

Bryan A. Neill  
Callaway & Price, Inc.

Exterior-Only Inspection Residential Appraisal Report File No 10-63857

The purpose of this summary appraisal report is to provide the lender/client with an accurate, and adequately supported, opinion of the market value of the subject property.

**Property Address:** [Redacted] City: Vero Beach State: FL Zip Code: 32963  
**Borrower:** N/A **Owner of Public Record:** Lynn A. Smith **County:** Indian River

**Legal Description:** See Attached Addendum  
**Assessor's Parcel #:** 334008000200000012.0 **Tax Year:** 2009 **R.E. Taxes \$:** 28,237.59  
**Neighborhood Name:** The Dunes **Map Reference:** 33-40-16 **Census Tract:** 505.03

**Occupant:**  Owner  Tenant  Vacant **Special Assessments \$:** N/A  PUD HOA \$: 200.00  per year  per month  
**Property Rights Appraised:**  Fee Simple  Leasehold  Other (describe)

**Assignment Type:**  Purchase Transaction  Refinance Transaction  Other (describe) Credit Purposes  
**Lender/Client:** Mercantile Bank **Address:** 1501 Main Street, 3rd Floor, Columbia, SC 28201

Is the subject property currently offered for sale or has it been offered for sale in the twelve months prior to the effective date of this appraisal?  Yes  No  
 Report data source(s) used, offering price(s), and date(s). The Subject is listed for sale at \$1,750,000 on 8/10/10, but was taken off the market on 08/12/2010. The Subject Property is not currently listed for sale. No offers or contracts were reported.  
 I did  I did not analyze the contract for sale for the subject purchase transaction. Explain the results of the analysis of the contract for sale or why the analysis was not performed.

**Contract Price \$:** 0 **Date of Contract:** N/A **Is the property seller the owner of public record?**  Yes  No **Data Source(s):** Public Records  
 Is there any financial assistance (loan charges, sale concessions, gift or downpayment assistance, etc.) to be paid by any party on behalf of the borrower?  Yes  No  
 If Yes, report the total dollar amount and describe the items to be paid. N/A N/A

**Neighborhood Data:**  
 Note: Race and the racial composition of the neighborhood are not appraisal factors.  

Location	Urban	<input checked="" type="checkbox"/> Suburban	Rural	Property Values	Increasing	<input checked="" type="checkbox"/> Stable	Declining	PRICE	AGE	One-Unit	Land Use %
Build-Up	<input checked="" type="checkbox"/> Over 75%	<input type="checkbox"/> 25-75%	<input type="checkbox"/> Under 25%	Demand/Supply	Shortage	<input checked="" type="checkbox"/> In Balance	Over Supply	\$ (000)	(yrs)	2-4 Unit	70 %
Growth	<input checked="" type="checkbox"/> Rapid	<input checked="" type="checkbox"/> Stable	<input type="checkbox"/> Slow	Marketing Time	Under 3 mths	3-6 mths	<input checked="" type="checkbox"/> Over 6 mths	500 Low	0	Multi-Family	10 %
Neighborhood Boundaries	See Attached Addendum							5,000 High	40	Commercial	10 %
								2,000 Prod.	20	Other Vacant	10 %

 Neighborhood Description: The subject neighborhood consists of upscale residential developments that are affected by the proximity to the Atlantic Ocean and Indian River. The subject neighborhood has good access along Highway A1A and access to employment, schools, and services is considered good. Overall appeal to the market is good.  
 Market Conditions (including support for the above conclusions): Property values in the neighborhood are stable compared to the rapid appreciation over the past several years. As a result resales have slowed with marketing times increased to over 6 months. Typical financing is available.  
 Dimensions: 100 x 180 Area: 18000 Sq.Ft. Shape: Rectangular View: Golf  
 Specific Zoning Classification: RS-3 Zoning Description: Single-Family Residential  
 Zoning Compliance:  Legal  Legal Nonconforming (Grandfathered Use)  No Zoning  Illegal (describe)  
 Is the highest and best use of the subject property as improved (or as proposed per plans and specifications) the present use?  Yes  No If No, describe.

**Utilities:** Public  Other (describe)  Public  Other (describe)   
 Electricity:  Water:  Off-site improvements—Type: Public  Private   
 Gas:  None Sanitary Sewer:  Street: Asphalt Alley: None

FEMA Special Flood Hazard Area:  Yes  No FEMA Flood Zone: AE FEMA Map #: 1201190169F FEMA Map Date: 07/02/1992  
 Are the utilities and off-site improvements typical for the market area?  Yes  No If No, describe.  
 Are there any adverse site conditions or external factors (easements, encroachments, environmental conditions, land uses, etc.)?  Yes  No If Yes, describe.

**Sources Used for Physical Characteristics of Property:**  Appraisal Files  MLS  Assessment and Tax Records  Prior Inspection  Property Owner  
 Other (describe) **Data Source(s) for Gross Living Area:** Indian River County Property Appraiser

GENERAL DESCRIPTION	GENERAL DESCRIPTION	GENERAL DESCRIPTION	GENERAL DESCRIPTION	GENERAL DESCRIPTION
Units: <input checked="" type="checkbox"/> One <input type="checkbox"/> One with Accessory Unit	<input checked="" type="checkbox"/> Concrete Slab <input type="checkbox"/> Crawl Space	<input checked="" type="checkbox"/> FWA <input type="checkbox"/> HWBB	<input checked="" type="checkbox"/> Fireplaces: #	<input type="checkbox"/> None
# of Stories: One	<input type="checkbox"/> Full Basement <input type="checkbox"/> Finished	<input type="checkbox"/> Radiant	Wood Stove(s): #	<input checked="" type="checkbox"/> Driveway # of Cars: 6
Type: <input checked="" type="checkbox"/> Det. <input type="checkbox"/> Att. <input type="checkbox"/> S-Det/End Unit	<input type="checkbox"/> Partial Basement <input type="checkbox"/> Finished	<input type="checkbox"/> Other	Patio/Deck	Driveway Surface: Paver
<input checked="" type="checkbox"/> Existing <input type="checkbox"/> Proposed <input type="checkbox"/> Under Const.	Exterior Walls: CBS/Good	Fuel: Electric	<input checked="" type="checkbox"/> Porch	<input checked="" type="checkbox"/> Garage # of Cars: 3
Design (Style): Contemporary	Roof Surface: Concrete Tile/Good	<input checked="" type="checkbox"/> Central Air Conditioning	<input type="checkbox"/> Pool	<input type="checkbox"/> Carport # of Cars
Year Built: 2001	Gutters & Downspouts: Yes/Good	<input type="checkbox"/> Individual	<input type="checkbox"/> Fence	<input type="checkbox"/> Attached <input type="checkbox"/> Detached
Effective Age (Yrs): 4	Window Type: Alum S.H./Good	<input type="checkbox"/> Other	<input type="checkbox"/> Other	<input checked="" type="checkbox"/> Built-in
Appliances: <input checked="" type="checkbox"/> Refrigerator <input checked="" type="checkbox"/> Range/Oven	<input checked="" type="checkbox"/> Dishwasher <input checked="" type="checkbox"/> Disposal <input checked="" type="checkbox"/> Microwave	<input checked="" type="checkbox"/> Washer/Dryer	<input type="checkbox"/> Other (describe)	

Finished area above grade contains: 10 Rooms 3 Bedrooms 3.5 Baths 4,047 Square Feet of Gross Living Area Above Grade  
 Additional features (special energy efficient items, etc.): The home is a one-story contemporary style home with extensive golf views. The Subject has a built three car garage. The Subject has an open brick paver pool and patio area.  
 Describe the condition of the property and data source(s) (including apparent needed repairs, deterioration, renovations, remodeling, etc.): The residence is of newer construction, and appears to be of good condition. Only an exterior inspection was performed; however the exterior appears to be in good condition with no items of deferred maintenance.

Are there any apparent physical deficiencies or adverse conditions that affect the livability, soundness, or structural integrity of the property?  Yes  No If Yes, describe.

Does the property generally conform to the neighborhood (functional utility, style, condition, use, construction, etc.)?  Yes  No If No, describe.

Exterior-Only Inspection Residential Appraisal Report File No. 10-63857

There are 15 comparable properties currently offered for sale in the subject neighborhood ranging in price from \$ 2,350,000 to \$ 5,250,000				
There are 8 comparable sales in the subject neighborhood within the past twelve months ranging in sale price from \$ 2,100,000 to \$ 5,100,000				
FEATURE	SUBJECT	COMPARABLE SALE NO. 1	COMPARABLE SALE NO. 2	COMPARABLE SALE NO. 3
906 Orchid Point Way Address Vero Beach	911 Orchid Point Way Vero Beach, FL 32963	251 Seabreeze Court Vero Beach, FL 32963	120 Seaspray Lane Vero Beach, FL 32963	
Proximity to Subject	0.02 miles NNW	0.83 miles SSE	0.51 miles SE	
Sale Price	\$ 0	\$ 2,025,000	\$ 1,240,000	\$ 2,000,000
Sale Price/Gross Liv. Area	\$ 0.00 sq. ft.	\$ 471.59 sq. ft.	\$ 405.23 sq. ft.	\$ 467.18 sq. ft.
Date Source(s)	Public Records, Sales Office	Public Records, Sales Office	Public Records, Sales Office	Public Records, Sales Office
Verification Source(s)	Street Inspection - DOM 881	Street Inspection - DOM 617	Street Inspection - DOM 141	
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION	DESCRIPTION	DESCRIPTION
Sale or Financing Concessions	Conventional	Cash	Cash	Cash
Date of Sale/Time	08/27/2010	06/22/2010	06/15/2010	
Location	Suburban	Orchid Island \	Orchid Island \	Orchid Island \
Leasehold/ Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple
Site	18,000 Sq.Ft.	18,000 Sq.Ft. +/-	22,500 Sq.Ft. +/-	25,308 Sq.Ft. +/-
View	Golf	Preserve /	Golf Course /	Golf Course /
Design (Style)	Contemporary	Contemporary	Colonial	Colonial
Quality of Construction	Good	Good	Good	Good
Actual Age	9	6	10	12
Condition	Good	Good	Good	Good
Above Grade	Total Rooms Baths	Total Rooms Baths	Total Rooms Baths	Total Rooms Baths
Room Count	10 3 3.5	10 3 4	10 3 3.5	12 4 4.5
Gross Living Area 300.00	4,047 sq. ft.	4,294 sq. ft.	3,060 sq. ft.	4,281 sq. ft.
Basement & Finished Rooms Below Grade	N/A	N/A	N/A	N/A
Functional Utility	Average	Average	Average	Average
Heating/Cooling	Central	Central	Central	Central
Energy Efficient Items	Average	Average	Average	Average
Garage/Carport	3 Car Garage	3 Car Garage	2 Car Garage	3 Car Garage
Porch/Patio/Deck	Porch	Porch	Patio/Deck, Porch	Patio/Deck, Porch
Other	F/P	F/P	F/P	F/P
Other	Pool/Hot Tub	Pool	Pool/Hot Tub	Pool/Hot Tub
Net Adjustment (Total)	\$ -50,000	\$ -50,000	\$ 320,000	\$ -50,000
Adjusted Sale Price of Comparables	Net Adj. -6.4%	Net Adj. 25.8%	Net Adj. -6.5%	Net Adj. -6.5%
	Gross Adj. 6.4%	Gross Adj. 25.8%	Gross Adj. 6.6%	Gross Adj. 6.6%
	\$ 1,895,000	\$ 1,560,000	\$ 1,870,000	\$ 1,870,000
I <input checked="" type="checkbox"/> did <input type="checkbox"/> did not research the sale or transfer history of the subject property and comparable sales. If not, explain				
My research <input type="checkbox"/> did <input checked="" type="checkbox"/> did not reveal any prior sales or transfers of the subject property for the three years prior to the effective date of this appraisal.				
Data source(s) Indian River County Property Appraiser				
My research <input type="checkbox"/> did <input checked="" type="checkbox"/> did not reveal any prior sales or transfers of the comparable sales for the year prior to the date of sale of the comparable sale.				
Data source(s) Indian River County Property Appraiser				
Report the results of the research and analysis of the prior sale or transfer history of the subject property and comparable sales (report additional prior sales on page 3)				
ITEM	SUBJECT	COMPARABLE SALE NO. 1	COMPARABLE SALE NO. 2	COMPARABLE SALE NO. 3
Date of Prior Sale/Transfer	No sales in past	No other sales in	No other sales in	No other sales in
Price of Prior Sale/Transfer	three years	the past year	the past year	the past year
Data Source(s)	Public Records	Public Records	Public Records	Public Records
Effective Date of Data Source(s)	Current	Current	Current	Current
Analysis of prior sale or transfer history of the subject property and comparable sales None				
Summary of Sales Comparison Approach. All six sales are located in the Orchid Island Project of Vero Beach and are the most recent sales available. All four comparables were adjusted for GLA. This adjustment was abstracted by using the matched pair technique. The adjusted range is \$1,307,500 to \$1,895,000 and the average is \$1,662,083. We have given equal weight to all six comparables as they are the most recent sales. We have concluded at \$1,700,000 for the Subject Property.				
Indicated Value by Sales Comparison Approach \$ 1,700,000				
Indicated Value by: Sales Comparison Approach \$ 1,700,000 Cost Approach (if developed) \$ 2,050,000 Income Approach (if developed) \$ N/A				
The Sales Comparison Approach best reflects the interactions of buyers and sellers in the open marketplace, as such, it provides the best indication of value. The Cost Approach is considered supportive due to the limited amount of incurable depreciation. The Income Approach is not considered applicable because homes in the area are not bought for income.				
This appraisal is made <input checked="" type="checkbox"/> "as is," <input type="checkbox"/> subject to completion per plans and specifications on the basis of a hypothetical condition that the improvements have been completed, <input type="checkbox"/> subject to the following repairs or alterations on the basis of a hypothetical condition that the repairs or alterations have been completed, or <input type="checkbox"/> subject to the following required inspection based on the extraordinary assumption that the condition or deficiency does not require alteration or repair. The Subject was appraised as is.				
Based on a visual inspection of the exterior areas of the subject property from at least the street, defined scope of work, statement of assumptions and limiting conditions, and appraiser's certification, my (our) opinion of this market value, as defined, of the real property that is the subject of this report is \$ 1,700,000 as of 09/05/2010 which is the date of inspection and the effective date of this appraisal.				

# **EXHIBIT D**

12-14-2010  
14:17:41

**Note Inquiry**

Next Display: 2 50-0705-1

BBAGWELLA1

**Basic Note Data**

Note number: [REDACTED] 000 02  
Short name: SMITH DAVID L  
MEMO ACTIVE

**-----Customer Data-----\***  
DAVID L SMITH  
AND LYNN A SMITH

**\*-----Balance Data-----\***

Note amount: 1,000,000.00  
Principal bal: \* 866,645.89 SARATOGA SPRINGS NY 12866  
Interest bal: \* 23,321.20  
P/O: 12-14-10 \* 891,954.73  
Avail for disb: .00

A

Contact/Title:  
Tax ID: XXX-XX-3809  
Home phone: 518-371-0912  
Business phone: 518-449-5131  
Officer: A89

**\*-----Interest Data-----\***

Int rate: 6.2500  
Daily int factor: 150.459355

**\*-----Dates-----\***

Note date: 6-22-01  
Last renewed:  
Maturity date: 7-01-31  
Last active: 11-29-10  
Last paid installment: 7-01-10  
Interest paid-to date: 7-09-10

**\*-----Next Payment Data-----\***  
Next due date: 8-01-10  
Next pmt amount: 6,188.15  
Total past due amt: 32,176.39

**\*-----Sold Data-----\***

Percentage sold: .0000  
Total sold: .00

F3=Exit F7=Print history F8=Participation inquiry F24=More keys

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

10 Civ. 457 (GLS)  
(DRH)

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, and*

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 0/04/04,

*Intervenor.*

**DECLARATION OF WILLIAM J. BROWN, RECEIVER**

I, William J. Brown, declare under penalty of perjury pursuant to U.S.C. § 1746  
that the following is true and correct:

1. I am the Receiver appointed by the Court in this action pursuant to the  
Preliminary Injunction Order dated July 26, 2010 (Docket No. 96). I make this declaration to  
provide some background information at the request of the Securities and Exchange Commission  
("SEC") in connection with its Motion ("Motion") for authority to sell the so-called Vero Beach  
home occupied from time to time by David and Lynn Smith.

- 2 -

2. I also make this Declaration in support of the Motion because, as Receiver of the various McGinn Smith estates, it is to the benefit of investors of those entities to maximize the recovery of any equity in the Smith Vero Beach house.

3. I have had substantial and regular professional experience in the sale and disposition of real estate as part of my professional career. My involvement with real estate has included all types of properties including high-end residential properties (single family, condominiums, and cooperative interests), manufacturing facilities, warehouse facilities, urban and suburban hotels, ski resorts, condominium and timeshare developments (both under construction and completed but not yet stabilized), farms, sports arenas, hospitals, and shopping centers, as just some examples.

4. I have dealt with many issues associated with those types of properties and strategies associated with dealing with them including environmental (both current and historical), zoning, deterioration, waste and cosmetic repair.

5. My proposed involvement in this instance arose at the inquiry of the SEC. If I were to be charged with the sale management role sought by the Motion, unless sound reasons were presented to me by the parties in interest, I would envision having a listing agreement signed within approximately two weeks following the entry of an order approving the sale process. I am currently not familiar with the particular details of the subject real property including any sales limitations, condition, or any necessary repairs or improvements, interior staging or other matters which might be necessary to realistically make the property suitable for appropriate sale at the best price under the circumstances. If any of those types of issues did exist, they could delay placing the house on the market.

- 3 -

6. I would, under all circumstances, solicit advice and input from the parties in interest including the Smiths. My estimated cost to perform this role is attached and was previously provided to the parties in interest.

Dated: December 13, 2010

/s/ William J. Brown  
William J. Brown, Receiver

Doc # 01-2421013.1



**Estimate of Time for Receiver Oversight  
of Sale of Smith Vero Beach Home**

<i>Time</i>	<i>Description</i>
1 Hour	Obtain information from Smiths and others regarding house, valuation, taxes, state of condition, staging and repairs, if any, and assessment of any special issues
1-2 Hours	Identify, contact and interview two to three appropriate real estate brokers, evaluate proposals and consultations regarding same
1-2 Hours	Obtain and review and consult with Smiths on broker opinion of value and determine listing price
1-2 Hours	Review, comment and finalize listing agreement
1-2 Hours	Monitor sales activity and performance of broker
1-3 Hours	Review contracts, consult with parties in interest including Smiths, distribute and negotiate information (but not including any legal work regarding provisions for relevant contract or issues regarding objections to sale)
1 Hour	Close sale transaction
<b>TOTAL</b>	<b>7-13 Hours</b> <b>x \$225 = \$1,575 - \$2,925</b>

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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<b>SECURITIES AND EXCHANGE COMMISSION,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>-against-</b>	:	<b>09 Civ. 14(S)</b>
	:	
<b>GEN-SEE CAPITAL CORPORATION a/k/a</b>	:	
<b>GEN UNLIMITED and RICHARD S. PICCOLI,</b>	:	
	:	
<b>Defendants.</b>	:	

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**CERTIFICATE OF SERVICE**

I, David Stoelting, pursuant to 28 U.S.C. § 1746, certify that on April 22, 2009, I filed on the Court’s ECF system, the following documents:

- Memorandum of Law in Support of Plaintiff’s Motion to Modify the Asset Freeze to Allow the Sale of the Vero Beach Property and to Appoint the Receiver to Oversee the Sate dated December 15, 2010;
- Declaration of Kevin P. McGrath dated December 15, 2010
- Declaration of William J. Brown, Receiver, dated December 13, 2010,

And sent by electronic mail copies of these documents to:

Martin P. Russo  
Gusrae Kaplan Bruno & Nusbaum PLLC  
120 Wall Street, 11<sup>th</sup> floor  
New York, NY 10005

James D. Featherstonhaugh  
Featherstonhaugh Wiley & Clyne, LLP  
99 Pine Street  
Albany, NY 12207

Jill Dunn  
Law Offices of Jill Dunn  
99 Pine Street  
Albany, NY 12207

Nancy McGinn  
26 Port Huron Drive  
Niskayuna, NY 12309

Dated: December 15, 2010  
New York, New York

**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) 336-0533  
Fax: (212) 336-1324  
E-mail: stoeltingd@sec.gov