

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,

10 Civ. 457 GLS-DRH

*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.*

---

**ORDER TO SHOW CAUSE, ORDER GRANTING  
A LIMITED STAY OF DISCOVERY, TEMPORARY  
RESTRAINING ORDER, AND GRANTING OTHER RELIEF**

On the application of defendants TIMOTHY M. McGINN and DAVID L. SMITH  
(hereinafter "Defendants") for an Order:

(1) Staying the oral examination of Defendants TIMOTHY M. McGINN and DAVID L. SMITH, currently scheduled for May 25, 2010 and May 26, 2010, pending the Court's decision on the underlying Motion for Stay of Civil Discovery; and

(2) Staying the requirement that Defendants, TIMOTHY M. McGINN and DAVID L. SMITH produce the documents request in the First Request for Production of Documents, pending this Court's decision on the underlying Motion for Stay of Civil Discovery.

This Court has considered: (1) the Complaint filed by the SEC; (2) the

Affirmation of attorney E. Stewart Jones, Jr. outlining the relief prayed for and the reasons therefore; (3) the Memorandum of Law annexed to attorney Jones's affirmation; and (4) the exhibits attached thereto.

Based upon the foregoing documents, the Court finds that a proper showing has been made for the relief granted herein, for the following reasons:

1. It appears from the evidence presented that, unless ordered not to do so, the SEC will conduct depositions of the Defendants on Tuesday, May 25, 2010, and Wednesday, May 26, 2010, pursuant to the civil litigation commenced in this court on April 20, 2010.
2. It appears from the evidence presented that the Defendants have filed a Notice of Motion asking that a Stay be granted in the instant civil proceeding against them; however, it appears as though no decision will be rendered on that motion for some time.
3. It further appears from the evidence presented that, on or before the date that the SEC investigation began, the U.S. Attorney's office of the Northern District of New York commenced a criminal investigation of the Defendants concerning the very same conduct and subject matter as the instant civil proceeding. Defendants' homes and business properties in New York and Florida were raided pursuant to search warrants issued in the Federal District Court of the State of New York and subpoenas have been issued for the production of documents and for the compulsion of testimony to be brought before the Grand Jury in the Northern District of New York in connection to the federal criminal investigation.
4. It further appears that the exact same information, discovery, documents,

testimony, and other relevant materials are being sought out by both the U. S. Attorney's office in its criminal investigation, and the SEC in its civil investigation.

5. It appears that if the depositions of the Defendants are allowed to be conducted on May 25-26, 2010, Defendants face the untenable choice of deciding whether to respond to questions posed, or to assert their rights under the Fifth Amendment. If they choose the former course, they risk providing the U.S. Attorney's office with incriminating leads or evidence that may be used against them. If they choose the latter course, they greatly increase the chance that they be found liable in the SEC's case against them for substantial sums of money. Both entities are clearly interested in the same information, and will assuredly use any and all information obtained against them in either proceeding; thus, allowing the depositions to go forward places Defendants' crucial Fifth Amendment right against self-incrimination in grave jeopardy.
6. It appears from the evidence presented that, unless order not to do so, the SEC will compel the production of documents relating to, inter alia, business and personal transactions and financial interests relating to McGinn, Smith Entities and the Defendants.
7. It appears that if the Defendants were compelled to produce such documents in the instant civil proceeding at this time, when Defendants are under Federal criminal investigation by the U.S. Attorney's office based upon the same set of facts and issues, for the above-stated reasons, Defendants' Fifth Amendment rights against self-incrimination would be jeopardized.

7. Good and sufficient reasons have been shown why procedure other than notice of motion is necessary.
8. This court has jurisdiction over the subject matter of this action and over the Defendants, and venue properly lies in this District.

**NOW, THEREFORE,**

**I.**

**IT IS HEREBY ORDERED** that the SEC show cause, if there be any, to this Court at \_\_\_\_ on the \_\_\_\_ of \_\_\_\_, 2010, in Room \_\_\_\_ of the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207-2924, why this Court should not enter an Order, pending a hearing and determination of the Defendant's Motion for Stay of Civil Discovery, temporarily restraining the SEC from taking the depositions of Defendants or compelling production of the documents outlined in the SEC's First Request for Production of Documents.

**II.**

**IT IS FURTHER ORDERED** THAT A COPY OF THIS Order and the papers supporting the Defendants' application be served upon the SEC on or before \_\_\_\_ May \_\_\_\_ 2010, by personal delivery, facsimile, overnight courier, or first-class mail.

**III.**

**IT IS FURTHER ORDER** that the SEC shall deliver any opposing papers in response to the Order to Show cause above no later than \_\_\_\_ May \_\_\_\_ at 4:00 p.m. Service shall be made by delivering the papers, using the most expeditious means available, by that date and time, to the offices of E. STEWART JONES, PLLC, 28 Second Street, Troy, NY 12180, Attn.: E. Stewart Jones, Jr., Esq., and the offices of DREYER BOYAJIAN, LLP, 75 Columbia Street,

Albany, NY 12210, Attn: William Dreyer, Esq.. The Defendants shall have until \_\_\_\_\_ May \_\_\_\_\_ 201, at 5:00 p.m., to serve, by the expeditious means available, any reply papers on the SEC.

**IV.**

**IT IS FURTHER ORDERED** that this Order shall be, and is, binding upon the SEC and each of their respective officers, agents, employees, servants, attorneys-in-fact, and those person in active concert with them who receive actual notice of this Order by personal service, facsimile, or otherwise.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

Issued At: \_\_\_\_\_  
May \_\_\_\_ 2010  
Albany, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,

10 Civ. 457 GLS-DRH

*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,

ATTORNEY AFFIRMATION  
IN SUPPORT OF ORDER TO  
SHOW CAUSE

*Defendants, and*

LYNN A. SMITH

*Relief Defendant.*

---

E. STEWART JONES, JR., ESQ., under penalty of perjury, affirms as follows:

I am an attorney at law duly licensed to practice in the State of New York, and I am associated with the law firm of E. STEWART JONES, PLLC, the attorney for the above-mentioned defendant TIMOTHY M. MCGINN, and as such I am fully familiar with all the facts and circumstances in this case.

1. This affirmation is being made upon information and belief, except as to those matters wherein it states that your affirmant has actual knowledge thereof.

2. I make this affirmation in support of the defendants' TIMOTHY M. MCGINN and DAVID L. SMITH Order to Show Cause.

3. On May 17, 2010, Defendants were served in the instant matter with Notices of Deposition, compelling Defendants to appear for depositions on May 25 and May 26, 2010.

4. On April 29, 2010, Defendants were further served with a First Request for Production

of Documents in the instant matter, compelling them to produce documents and other information relating to McGinn, Smith & Co. as well as Defendants' personal finances.

5. On or about April 21, 2010, federal agents from the FBI and IRS conducted a series of raids in connection with a Federal criminal investigation of the defendants and their brokerage firm, McGinn, Smith & Co.

6. At or about the same time, it is known by this Affirmant that the U.S. Attorney's Office in the U.S. District Court of the Northern District of New York, who is charged with prosecuting federal crimes, issued multiple Subpoenas calling for files, documents and oral testimony to be brought before the Grand Jury of the U.S. District Court in Albany. Affirmant has confirmed this information with Assistant United States Attorney Elizabeth Coombe.

7. Further, it is understood that more than one attorney who has been hired to represent employees or previous employees of McGinn, Smith & Co. have been informed by the U.S. Attorney's office that a criminal investigation is underway, that there are one or more "subjects" of the investigation, and that the targets of that investigation are the Defendants herein.

8. Clearly, the subject matter, fact, and law at issue in the SEC complaint and investigation, including the assets involved in the entirety of the alleged fraudulent transactions, are under investigation and at issue in the federal criminal investigation against defendants

9. While Defendants ultimately seek a stay in the civil proceedings herein due to the fact that they will be placed in an untenable position in having to choose between exercising their Fifth Amendment rights or to proceed with the SEC inquiries and face substantial civil and criminal penalties, time is of the essence.

10. This Affirmant, who enters this action solely for the purposes of this Motion and request, attests to the meritorious nature of the underlying Motion for a Stay of Civil Discovery,

and further attests to the inherent necessity that the SEC be temporarily restrained from conducting the impending depositions, currently scheduled for Tuesday May 25, and Wednesday, May 26, 2010, due to the constitutional implications of Defendants and the fact that Defendants' underlying Motion will be moot should the depositions be allowed to move forward.

11. This affirmant further attests to the need for the SEC to be temporarily restrained from compelling the production of various other incriminating documents and information as included in the SEC's First Request for Production of Documents.

WHEREFORE, the SEC should be temporarily restrained from compelling the depositions of Defendants on May 25 and 26<sup>th</sup>, 2010, and demanding the production of the documents requested, as good and sufficient reasons exist why procedure other than notice of motion is necessary in this proceeding, given the impending date of Defendants' depositions as scheduled, the content therein of the documents requested to be produced by Defendants, and the fact that they are currently the targets of a federal criminal investigation.

DATED: May 21, 2010

s/ E. Stewart Jones, Jr.  
E. STEWART JONES, JR.  
Bar Roll No.: 103064.



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,

10 Civ. 457 GLS-DRH

*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.*

---

**MEMORANDUM OF LAW**

---

---

E. Stewart Jones, Jr., Esq.  
E. STEWART JONES, PLLC  
Bar Roll No.: 103064  
*Attorney for defendant Timothy M.  
McGinn and submitting on behalf of  
David L. Smith*  
28 Second Street  
Troy, NY 12180  
(518) 274-5820

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

STATEMENT OF FACTS.....1

ARGUMENT.....1

POINT I

A STAY OF DISCOVERY IN THE  
INSTANT CIVIL LAWSUIT AGAINST  
DEFENDANTS SHOULD BE GRANTED

CONCLUSION.....8

TABLE OF AUTHORITIES

<u>Arden Way Assoc. v. Boeksy</u> , 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987).....	2,4
<u>Brock v. Tolkow</u> , 109 F.R.D. 116 (E.D.N.Y. 1985).....	4,6,7
<u>Kashi v. Gratsos</u> , 790 F. 2d 1050, 1057 (2d Circ. 1986).....	2
<u>Landis v. North American Co.</u> , 299 U.S. 248 (1936).....	2
<u>SEC v. Dresser</u> , 628 F.2d 1368, 1376 (D.C. Cir. 1980).....	2
<u>Scipar Inc. v. Simses</u> , 2007 WL 1814599 (W.D.N.Y. 2007).....	4
<u>U.S. v. Certain Real Property and Premises Known as 1344 Ridge Road</u> , 751 F.Supp. 1060 (S.D.N.Y. 1989).....	4,5
<u>United States v. Kordel</u> , 397 U.S. 1 (U.S. Mich. 1970).....	2
<u>U.S. v. Private Sanitation Industry Assoc. Of Nassau/Suffolk, Inc.</u> , 811 F. Supp 802 (E.D.N.Y. 1992).....	2
<u>Volmar Distributors, Inc. v. The New York Post Co., Inc.</u> , 152 F.R.D. 36 (S.D.N.Y. 1993)....	4

**PRELIMINARY STATEMENT**

This Memorandum of Law is submitted on behalf of defendants Timothy M. McGinn's and David L. Smith's (hereinafter defendants) Motion for Stay of Discovery in this civil lawsuit. The stay request is predicated upon the ongoing, active federal criminal investigation of the defendants which arises out of precisely the same allegations contained the SEC complaint herein.

**STATEMENT OF FACTS**

The relevant facts are fully set forth in the Affirmation in Support of Defendants' Motion to Stay Discovery of E. Stewart Jones, Jr., Esq. (hereinafter "Affirmation"), and the exhibits annexed thereto. Those documents are incorporated by reference herein.

**POINT I**

**A STAY OF DISCOVERY IN THE  
INSTANT CIVIL LAWSUIT AGAINST  
DEFENDANTS SHOULD BE GRANTED**

As noted in the Attorney Affirmation, defendants are currently the targets of a criminal investigation in the United States District Court of the Northern District of New York. Multiple subpoenas for documents and testimony relating to the investigation have been issued by the U.S. Attorney's office investigating the case, and it is believed that a Grand Jury sits laying in wait for an indictment to be handed down. The question is not if, but when, the defendants will be charged criminally for the same conduct and transactions that are at issue in the instant SEC investigation civilly. Due to the impending indictment, the identical and overlapping facts, law, and subject matter of the civil and criminal investigations, and the absence of potential harm to the public or

the SEC's investigation, countered by defendants' own vital Fifth Amendment rights against self-incrimination, discovery in the instant civil action should be stayed.

*a. This Court possesses the inherent power to stay an action*

It is well-settled that while the stay of an action is not a constitutional right, such will be granted when the interests of justice so require. United States v. Kordel, 397 U.S. 1 (1970); Kashi v. Gratsos, 790 F. 2d 1050, 1057 (2d Cir. 1986). It is well within the inherent power of a federal district court to stay an action in the exercise of its discretion. Landis v. North American Co., 299 U.S. 248 (1936); U.S. v. Private Sanitation Industry Assoc. Of Nassau/Suffolk, Inc., 811 F. Supp 802, 805 (E.D.N.Y. 1992). Courts are given such discretion because the failure to stay an action has the potential to conflict with a party's Fifth Amendment rights, extend criminal discovery beyond the scope of FRCP § 16(b), reveal the defense theory in advance of trial, or otherwise prejudice the criminal case unnecessarily. SEC v. Dresser, 628 F.2d 1368, 1376 (D.C. Cir. 1980).

In Arden Way, the court recognized the significance of a stay when constitutional rights were potentially compromised, finding that "absent a showing of undue prejudice upon defendant or *interference* with his constitutional rights," there was no reason prevent plaintiff's civil proceeding to go forward. Arden Way Assoc. v. Boeksy, 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987). Here, it is obvious that the defendants' Fifth Amendment rights are at stake; if required to testify before the SEC and hand over documents which also pertain to a criminal matter in which they are being investigated, the very fabric of their constitutional rights, not to incriminate oneself, will be undermined.

Defendant McGinn is the founder, chairman, secretary, and co-owner of McGinn, Smith & Co., a broker-dealer service group located in Albany, NY; he also serves as treasurer and co-

owner of McGinn Smith Advisors, a wholly owned subsidiary corporation of McGinn, Smith & Co.. Defendant David L. Smith is the founder and president of McGinn, Smith & Co., and the managing member of McGinn Smith Advisors. As noted in the affirmation, on April 20, 2010, the SEC filed a complaint against defendants and their various business concerns alleging, among other things, ongoing fraud and deception of investors. That same day, this Court issued an Order to Show Cause, Temporary Retraining Order, and an Order Freezing Assets and Granting Other Relief, which also set the dates for a preliminary injunction hearing and for the submission of briefs. The SEC has since offered a consent order for this Court's approval to extend the dates found in the original Order (Exhibit A). On April 28, defendants were served with a Notice of Deposition pursuant to the order, noticing defendants that their individual oral examinations would take place on May 12-13, 2010. The following day, defendants were served with a First Request for Production of Documents, asking them to produce documents relating to, inter alia, the business and financial interests of and relating to McGinn, Smith & Co., its entities, and the personal finances of defendants.

During the same time, if not before, the U.S. Attorney's office for the North District of New York launched a criminal investigations of defendants, raiding the defendants' homes and business properties in New York and Florida pursuant to search warrants issued in the Federal District Court of the State of New York (Exhibit B). Several subpoenas have been issued for the production of documents and for the compulsion of testimony to be brought before the Grand Jury in the Northern District of New York in connection to the federal criminal investigation (Affirmation p3).

*b. The interests of justice require that a stay be granted in the instant civil proceeding*

In making a determination as to whether the interests of justice require a stay be granted, the court is charged with balancing several factors, including: (1) the extent to which the issues in the criminal case overlap with the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) plaintiff's prejudice if delayed; (4) private interests of defendants; (5) the court's interests; and (6) the public interest. see Scipar Inc. v. Simses, 2007 WL 1814599 (W.D.N.Y. 2007); citing Volmar Distributors, Inc. v. The New York Post Co., Inc., 152 F.R.D. 36 (S.D.N.Y. 1993); Arden Way Assoc., 660 F. Supp. at 1497. Applying the foregoing principles to the facts of the case herein, it is apparent that a stay is warranted. Clearly, as noted above in section *a*. and the Attorney Affirmation attached, there is no question that there is an active, ongoing criminal investigation in the instant case.

Two main cases exist in which courts have determined that a stay of civil proceedings pending the outcome of a criminal investigation: United States v. Certain Real Property and Premises Known as 1344 Ridge Road, 751 F.Supp. 1060 (S.D.N.Y. 1989), and Brock v. Tolkow, 109 F.R.D. 116 (E.D.N.Y. 1985). In Brock, the court explained this "Hobson's Choice" that a party who is investigated criminally and asked to answer civilly on the same issues is faced with:

"[i]f the defendant are served with interrogatories in the civil case, they must decide whether to respond or to assert their rights under the Fifth Amendment. If they choose the former course, they risk providing the government with leads or evidence that may be used against them. If they choose the latter course, they greatly increase the chance that they be found liable in a civil case for substantial sums of money."

Brock, 109 F.R.D. at 120; see also Certain Real Property, 751 F. Supp. At 1061.

As here, where no indictment has been returned but is very nearly on the horizon, to the courts in Brock and Certain Real Property, it mattered not that the criminal investigations were in

the investigatory stage. Rather, the standard for determining a stay when an individual is not yet indicted was articulated as: “the Fifth Amendment privilege operates where the information sought to be extracted presents “a realistic threat of incrimination” . . . as distinguished from a ‘mere imaginary possibility.’ . . . Thus, it is only when there is but a fanciful possibility of prosecution that a claim of Fifth Amendment privilege is not well-taken”” Certain Real Property, 751 F. Supp 1063 (citations omitted).

Certainly the prosecution of defendants here is not a “mere imaginary possibility.” As detailed in the attached Affirmation, a federal criminal investigation remains active and ongoing, as expressly confirmed by Assistant U.S. Attorney Elizabeth Coombe. Further, when viewing the allegations contained in the civil Complaint filed by the SEC, defendants, along with the “entities they control,” have been accused of orchestrating the “ongoing fraud” of over 900 investors. These types of allegations are familiar to the criminal courts of this State and District, and as this Court is aware, carry with them very onerous criminal penalties upon conviction. On April 27, 2010, the Albany Times Union printed an article detailing a “series of raids in connection with the criminal investigation of McGinn, Smith & Co.,” confirming the suspicion that law enforcement, and not just the SEC, were actively investigating defendants’ business. (Exhibit B). Indeed, it is public knowledge that subpoenas have been issued for documents and voluntary oral testimony to be presented before a Grand Jury in Albany’s U.S. District Court. As noted in the Affirmation, one or more attorneys who have been hired to represent employees of McGinn, Smith & Co. have been informed by the U.S. Attorney’s office that a criminal investigation is underway and that the defendants herein are the targets of that investigation.

Next, there is no question that the concerns of the criminal investigation, conducted by the



U.S. Attorney's office who is charged with prosecuting Federal Crimes, overlap with the subject matter for the SEC's civil investigation. As noted by the court in Brock, a stay of civil proceedings is most likely to be granted where civil and criminal actions involve the same subject matter, for this very reason. Brock, 109 F.R.D. at 119.

Here, the complaint filed by the SEC details the alleged "ongoing fraud" that has been perpetrated by defendants over the course of more than a decade (Exhibit A). It names several entities wholly owned by the defendants and the subsidiaries of those entities, as having been used to misrepresent and further the financial interests of the defendants. Specifically, the complaint alleges that investor funds were secretly funneled into entities owned by defendants; these entities were raided by federal criminal investigators in April. The complaint alleges that investors were tricked into investing in a cruise enterprise in Florida; McGinn's Florida company headquarters was subject to a raid by criminal investigators. The SEC complaint alleges that defendants received vast amounts of undisclosed "personal loans" from their entities and that entities paid for various luxuries enjoyed by their families; the defendants' family homes were raided and the subject of search warrants in the instant ongoing criminal investigation.

Clearly, the subject matter, fact, and law at issue in the SEC complaint and investigation, including the assets involved in the entirety of the alleged fraudulent transactions, are under investigation and at issue in the federal criminal investigation against defendants. This is not merely a case where a single investor is looking to hold defendants civilly responsible for a single mishandled investment, and we seek to stay that action for a much broader criminal investigation of just mere employees - no, the span and scope of both investigations are identical in nature, involve the same documents and transactions, and is based solely on the first hand knowledge and

business dealings of the defendants.

More specifically, the SEC's and the U.S. Attorney's interests are inextricably linked to one another. Indeed, beyond their most basic connection as arms of the Federal Government, they are further united in interest: the U.S. Attorney would of course want to obtain any factual information it could that is gleaned from the course of the SEC's civil lawsuit, including discovery, and the SEC of course desires a successful criminal prosecution because of the preclusive and binding effect it would have on the civil case. Thus, the SEC has every incentive to assist the U.S. Attorney in its quest for criminal convictions, including through its civil discovery. In short; absent a stay, the U.S. Attorney will have access to information it otherwise would not due to the Fifth Amendment, and the SEC will gladly furnish said information because of the benefits of criminal convictions.

Next, it is certain that the SEC will suffer no prejudice as the result of any stay in discovery and likewise, neither will the public interest be placed in jeopardy. By Order of the U.S. District Court of the Northern District of New York, defendants' assets have been frozen, a receiver assigned, and further preventative measures taken which assure that not only will evidence pertaining to the SEC's investigation not be destroyed, but defendant will not harm the public in any way further than what is alleged in the complaint (Exhibits E, A). The Brock court noted that the fact a stay of discovery would cause "no serious damage to the public interest" was significant, in that cases where "a tangible threat of immediate and serious harm to the public at large" must be counterbalanced against the individual threat to a defendant's Fifth Amendment rights, often with the bar favoring heavily on the public interest. Brock, 109 F.R.D. at 119. Those concerns are moot however, where, as here, defendants are no longer doing business

with investors, have been at the forefront of public scrutiny and its inherent outcry and exile for some time, and their assets have been frozen. (see Exhibit B). Further, although the stay is likely to cause some delay in the SEC's pursuing its claim against defendants, this must be balanced against the competing interests that are defendants' Fifth Amendment rights. Courts have acknowledged the utmost importance of a citizen's right against self-incrimination; where as here, they are a very real interest at stake, they must be of chief concern to this Court. Certain Real Property, 751 F.Supp at 1063 ("While a stay. . . may cause some inconvenience and delay. . . 'protection of defendant[s] constitutional right against self-incrimination is the more important consideration").

### CONCLUSION

For the reasons set forth herein, defendants' Motion to Stay Discovery in the instant civil action should be granted; further, pending the court's decision on the instant motion, the oral examination of defendants by the SEC and the SEC's demand for the production of documents should be stayed. Finally, the consent order entered into by the defendants without the benefit of counsel should be denied.

DATED: May 21, 2010

s/ E. Stewart Jones, Jr.  
E. Stewart Jones, Jr.  
Bar Roll No: 103064  
E. STEWART JONES, PLLC  
*Attorney for Timothy M. McGinn and  
on behalf of David L. Smith*  
Office and P.O. Address  
28 Second Street  
Troy, NY 12180  
(518) 274-5820

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,

10 Civ. 457 GLS-DRH

*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,

ATTORNEY AFFIRMATION  
IN SUPPORT OF MOTION  
FOR STAY OF DISCOVERY

*Defendants, and*

LYNN A. SMITH

*Relief Defendant.*

---

E. STEWART JONES, JR., ESQ., under penalty of perjury, affirms as follows:

I am an attorney at law duly licensed to practice in the State of New York, and I am associated with the law firm of E. STEWART JONES, PLLC, the attorney for the above-mentioned defendant TIMOTHY M. MCGINN, and as such I am fully familiar with all the facts and circumstances in this case.

1. This affirmation is being made upon information and belief, except as to those matters wherein it states that your affirmant has actual knowledge thereof.

2. I make this affirmation in support of defendants' TIMOTHY M. MCGINN and DAVID L. SMITH motion (a) for a limited stay, as further described in the attached memorandum of law, of the Securities and Exchange Commission's (hereinafter "SEC") investigation of the defendants, specifically with respect to the Notice of Deposition dated May 17, 2010 and First

Request for Production of Documents to Defendants Timothy M. McGinn and David L. Smith dated April 29, 2010; and (b) to stay the Notice of Deposition's oral examination of defendants TIMOTHY M. MCGINN and DAVID L. SMITH, currently scheduled to occur May 25, 2010 and May 26, 2010, pending the Court's decision on the underlying motion herein as detailed below; and (c) to stay the First Request for Production of Documents to Defendants Timothy M. McGinn and David L. Smith, that was returnable on or before May 5, 2010, pending this Court's decision on the underlying motion herein as detailed below.

This Motion is being joined in by William Dreyer, Esq., who represents MR. SMITH.

#### RELEVANT FACTS

3. On April 20, 2010, the SEC commenced the underlying action by filing a Complaint, Order to Show Cause, and other papers attached hereto as Exhibit "A," which alleged among other things, the commission of fraud, misrepresentations and omissions of fact, and illegal transfer of funds on behalf of that defendants TIMOTHY M. MCGINN and DAVID L. SMITH and McGinn, Smith entities (hereinafter "the complaint").

4. On April 20, 2010, the Court issued an Order to Show Cause, Temporary Retraining Order, and an Order Freezing Assets and Granting Other Relief (hereinafter "the Order"), which also set the dates for a preliminary injunction hearing and for the submission of briefs. The Order is attached hereto as Exhibit "B."

5. A Consent Order Extending the dates found in the Order to Show Cause, dated May 7, 2010, is currently pending before this Court, attached hereto as Exhibit "C."

6. On or about April 21, 2010, federal agents from the FBI and IRS conducted a series of raids in connection with a Federal criminal investigation of the defendants and their brokerage

firm, McGinn, Smith & Co. See the attached article dated April 27, 2010 from the Albany newspaper, the Times Union, attached hereto as Exhibit "D."

7. At or about the same time, it is known by this Affirmant that the U.S. Attorney's Office in the U.S. District Court of the Northern District of New York, who is charged with prosecuting federal crimes, issued multiple Subpoenas calling for files, documents and oral testimony to be brought before the Grand Jury of the U.S. District Court in Albany. Affirmant has confirmed this information with Assistant United States Attorney Elizabeth Coombe.

8. Further, it is understood that more than one attorney who has been hired to represent employees or previous employees of McGinn, Smith & Co. have been informed by the U.S. Attorney's office that a criminal investigation is underway, that there are one or more "subjects" of the investigation, and that the targets of that investigation are TIMOTHY M. MCGINN and DAVID L. SMITH, the applicants herein.

9. By the SEC's Notice of Deposition, attached hereto as Exhibit "E," was served on defendants on May 17, 2010 pursuant to the Order, depositions by oral examination have been scheduled for defendants in this matter on May 25-26, 2010.

10. The oral examination of defendants TIMOTHY M. MCGINN and DAVID L. SMITH in the instant civil proceeding at this time, when defendants are under federal criminal investigation based upon the same set of facts and issues, creates an untenable choice for the defendants which courts have chosen to mitigate by staying the civil proceeding, as is more fully discussed in the accompanying memorandum of law.

11. By the SEC's First Request for Production of Documents to Defendants Timothy M. McGinn and David L. Smith (hereinafter "Request for Production"), which was served on

defendants on April 29, 2010 pursuant to the Order, defendants TIMOTHY M. MCGINN and DAVID L. SMITH have been asked to produce documents relating to, inter alia, business and personal transactions and financial interests relating to McGinn, Smith Entities and defendants TIMOTHY M. MCGINN and DAVID L. SMITH. Attached hereto as Exhibit “F” is the Request for Production.

12. Requiring defendants TIMOTHY M. MCGINN and DAVID L. SMITH to produce such documents in the instant civil proceeding at this time, when defendants are under federal criminal investigation based upon the same set of facts and issues, creates an untenable choice for the defendants which courts have chosen to mitigate by staying the civil proceeding, as is more fully discussed in the accompanying memorandum of law.

#### INSTANT MOTION

13. For reasons set forth in the accompanying memorandum of law, the SEC’s investigation of defendants TIMOTHY M. MCGINN and DAVID L. SMITH should be stayed to the extent it requires defendants to give oral testimony before the SEC and produce documentation regarding facts and issues currently under federal criminal investigation.

14. With regard to the requested stay, courts have recognized that simultaneous criminal and civil matters based upon the same facts and issues places an individual in the untenable position of having to decide between exercising their Fifth Amendment rights at the expense of civil exposure and adverse inferences, or foregoing their Fifth Amendment rights at the risk of providing prosecutors with incriminating leads or evidence that may be used in a criminal case against them. As further set forth in the accompanying memorandum of law, while the Constitution does not mandate stays when parallel investigations are ongoing, courts are given

the discretion to grant stays because failing to do so could, inter alia, undermine the protections inherent in a party's Fifth Amendment and Due Process rights.

15. As set forth in the accompanying memorandum, courts have identified a number of factors in determining whether to issue a stay of civil proceedings when there is a parallel criminal investigation or prosecution. Applying those factors to the case at bar, a stay is warranted.

16. More specifically as set forth in the accompanying memorandum of law, a stay is warranted here because: both investigations involve the same issues and subject matter; both investigations are being conducted by a government entity; defendants are not seeking a stay of the entire case; the criminal investigation can advance the same interests as the SEC's investigation; the Fifth Amendment is the more important consideration vis-a-vis any harm that would come from a stay; there is no threat of harm - imminent, serious or irreparable - to the public that would result if a stay is granted; and the SEC can always move to vacate the stay is warranted by a change in circumstances.

17. It should be noted that the remaining factor which is to be considered by the Court is whether an indictment is pending. While there is not yet an indictment in this case, there is a known, active investigation in the United States District Court of the Northern District of New York, and several subpoenas have been issued for the procurement of documents and testimony that were returnable in that court on Thursday, May 6, 2010 and on succeeding dates. Courts have recognized that a criminal investigation is sufficient to warrant a stay and, taken in conjunction with the other supporting factors listed herein, a stay is clearly warranted.

WHEREFORE, your affirmant respectfully requests that the Court:



1. Stay the SEC's investigation insofar as it requires the defendants, TIMOTHY M. McGINN and DAVID L. SMITH to provide oral testimony before the SEC;

2. Stay the SEC's investigation insofar as it requires the defendants, TIMOTHY M. McGINN and DAVID L. SMITH to produce documents that may be of interest in the ongoing criminal investigation against them;

3. Stay the oral examination of defendants TIMOTHY M. McGINN and DAVID L. SMITH, currently scheduled for May 25, 2010 and May 26, 2010, pending the Court's decision on the underlying motion herein as detailed below; and

4. Stay the requirement that Defendants, TIMOTHY M. McGINN and DAVID L. SMITH produce the documents request in the Request for Documents, pending this Court's decision on the underlying motion herein as detailed below.

5. Deny the SEC's request to further extend the dates contained in the court's Order to Show Cause.

DATED: May 21, 2010

s/ E. Stewart Jones, Jr.  
E. STEWART JONES, JR.  
Bar Roll No.: 103064

LAWRENCE K. BAERMAN, CLERK  
ALBANY

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

γ.

***Relief Defendant.***

## JURY TRIAL DEMANDED

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") (about 15%) 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 % to 13% *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.

82. Even though CCV lost \$1.5 million during its first 17 months of operation, McGinn and Smith nonetheless enriched themselves. CCV transferred at least \$50,000 to Smith, \$75,000 to McGinn, and paid at least \$245,000 to MS & Co. in “advisory fees.” CCV also paid McGinn’s son (an attorney and MS & Co. employee) \$7,240 for “consulting.” Between July 2008 and November 2009, CCV also transferred to McGinn more than \$156,000, purportedly to pay credit card charges related to meals, travel and other expenses; and in June 2009, CCV transferred more than \$32,000 to White Glove Cruises, a Florida company managed by McGinn.

83. The CCV Trust also promised investors a 13% rate of interest on their notes, even though the Trust was to earn its investment return by loaning the money to CCV, which was obligated to pay back interest to the CCV Trust of only 10%.

**The CCV Trust (2<sup>nd</sup> PPM).**

84. In 2009, MS & Co. conducted a second CCV offering of \$400,000 raised from just three investors. The PPM falsely and misleadingly stated that CCV’s loss for the period February 1, 2008 through June 2009 was \$870,000. In fact, MS & Co.’s internal books and records show a loss of nearly \$1.5 million during that period.

**The Firstline Trusts**

85. Firstline Trusts raised a total of \$7 million in 2007. According to the Firstline Trust 07 Junior PPM, dated October 19, 2007, the Firstline Trusts were created to acquire a tranche of financing secured by contracts owned or originated by Firstline Security, Inc., a security alarm company. In January 2008, Firstline Security filed for bankruptcy. Nonetheless, MS & Co. continued to sell notes in this offering without disclosing the bankruptcy filing to investors.



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

Fund and Trust PPMs. In Smith's testimony provided to FINRA on February 12, 2010, Smith stated that MS & Co. continues to raise funds from new investors. Smith stated that TDM Benchmark Trust.

**FIRST CLAIM FOR RELIEF**

**Violations of Section 17(a) of the Securities Act  
(Against MS & Co., MS Advisors, MS Capital, McGinn, Smith)  
(Antifraud violations)**

113. Paragraphs 1 through 112 are realleged and incorporated by reference as if set forth fully herein.

114. The Fund and Trust certificates and notes are securities within the meaning of Section 2(1) of the Securities Act [15 U.S.C. § 77b(1) and Section 3(a)(10) of the Exchange Act [15 U.S.C. § 78c(a)(10)].

115. From at least 2005 through the present, the Defendants, directly or indirectly, singly or in concert, by use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce or by the use of the mails, in connection with the offer or sale of securities, knowingly or recklessly: a) employed, are employing or are about to employ devices, schemes and artifices to defraud; b) have obtained, are obtaining or are about to obtain money and property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or c) have engaged, are engaging or are about to engage in transactions, practices or courses of business which have operated, operate or will operate as a fraud and deceit upon investors.

116. By reason of the foregoing, the Defendants, directly or indirectly, singly or in concert, have violated, are violating, and unless restrained and enjoined will again Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

**SECOND CLAIM FOR RELIEF**

(Antifraud Violations)

Violations of Section 10(b) of the Exchange Act and Rule 10b-5  
(Against MS & Co., MS Advisors, MS Capital, McGinn, Smith)

117. Paragraphs 1 through 116 are realleged and incorporated by reference as if set forth fully herein.

118. From at least 2005 through the present, the Defendants, directly or indirectly, singly or in concert, by use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce or by the use of the mails, in connection with the offer or sale of securities, knowingly or recklessly: a) employed, are employing or are about to employ devices, schemes and artifices to defraud; b) have obtained, are obtaining or are about to obtain money and property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or c) have engaged, are engaging or are about to engage in transactions, practices or courses of business which have operated, operate or will operate as a fraud and deceit upon investors.

119. By reason of the activities herein described, the Defendants, singly or in concert, directly or indirectly, have violated, are violating, and unless restrained and enjoined will again violate Section 10(b) of the Exchange Act [15 U.S.C. §§78j(b)] and Rule 10b-5 [17 C.F.R. §240.10b-5] promulgated thereunder.

**THIRD CLAIM FOR RELIEF**

Violations, and Aiding and Abetting Violations, of  
Section 15(c)(1) Of The Exchange Act, 15 U.S.C. §78o(c)(1), And  
Rule 10b-3, 17 C.F.R. §240.10b-3  
(Against MS & Co. and aiding and abetting by McGinn and Smith)  
(Violations of Antifraud Provisions by Brokers)

120. Paragraphs 1 through 119 are realleged and incorporated by reference as if set forth fully herein.

121. MS & Co. engaged and is engaging in the business of effecting transactions in securities for the accounts of others, and therefore was and is a broker within the meaning of Section 3(a)(4) of the Exchange Act, 15 U.S.C. §78c(a)(4).

122. MS & Co., while a broker, directly or indirectly, by use of the mails or the means or instrumentalities of interstate commerce, has effected and is effecting transactions in, and has induced and attempted to induce and are attempting to induce the purchase or sale of, securities by means of manipulative, deceptive, or other fraudulent devices or contrivances, including: (a) acts, practices, and courses of business that operated or would have operated as a fraud or deceit upon any person, including persons to whom MS & Co. offered and/or sold securities; and (b) making untrue statements of material fact and omissions to state a material fact necessary, in order to make the statements made, in light of the circumstances under which they were made, not misleading with knowledge or reasonable grounds to believe that such statements are untrue or misleading.

123. As part of and in furtherance of this violative conduct, MS & Co. offered and/or sold securities by making the material misrepresentations and omissions set forth herein.

124. MS & Co. knew, was reckless in not knowing, or had reasonable grounds to believe that said representations or omissions were false or misleading.

125. By reason of the foregoing, MS & Co. has violated, is violating, and unless

restrained and enjoined, will again violate Section 15(c)(1) of the Exchange Act, 15 U.S.C.

§78o(c)(1), and Rule 10b-3, 17 C.F.R. §240.10b-3.

126. To the extent McGinn and Smith were associated with MS & Co., and not acting brokers unassociated with a registered broker-dealer, McGinn and Smith each aided and abetted, and, unless restrained and enjoined, will again aid and abet, MS & Co's violations of Section 15(c)(1) of the Exchange Act, 15 U.S.C. §78o(c)(1), and Rule 10b-3, 17 C.F.R. §240.10b-3.

**FOURTH CLAIM FOR RELIEF**

(MS & Co., MS Advisors, McGinn and Smith)

Violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8

127. Paragraphs 1 through 126 are realleged and incorporated and incorporated by reference as if set forth fully herein.

128. From at least 2005 through the present, MS & Co. and MS Advisors, by use of the means or instrumentalities of interstate commerce or of the mails, and while engaged in the business of advising others for compensation as to the advisability of investing in, purchasing, or selling securities: (a) employed devices, schemes, and artifices to defraud; and (b) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon clients or prospective clients.

129. By reason of the foregoing, MS & Co. and MS Advisors, singly or in concert, directly or indirectly, violated Sections 206(1), 206(2) and 206(4) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)] and Rule 206(4)-8 thereunder [17 C.F.R. §275.206(4)-8].

130. McGinn and Smith, knowingly or recklessly provided substantial assistance to MS & Co. and MS Advisors and thereby directly or indirectly, singly or in concert, by use of the means or instrumentalities of interstate commerce, or of the mails, aided and abetted MS & Co. and MS Advisors'

violations of Sections 206(1), 206(2) and 206(4)-2 of the Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)] and Rule 206(4)-2 thereunder [17 C.F.R. §275.206(4)-8].

**FIFTH CLAIM FOR RELIEF**

Violations of Section 7(a) of the Investment Company Act  
(FAIN, FEIN, FIIN and TAIN)

131. Paragraphs 1 through 130 are realleged and incorporated and incorporated by reference as if set forth fully herein.

132. FAIN, FEIN, FIIN and TAIN issued securities, in the form of notes, in what amounted to a public offering, and held themselves out as funds 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, and any other investments that may add value to our portfolio.

133. Accordingly, FAIN, FEIN, FIIN and TAIN were investment companies under Section 3(a)(1) of the Company Act [15 U.S.C. § 80a-3(a)(1)], and were required to register as investment companies with the Commission under Section 7(a) of the Company Act [15 U.S.C. § 80a-7(a)]. FAIN, FEIN, FIIN and TAIN were never so registered and, while acting as investment companies, FAIN, FEIN, FIIN and TAIN offered, purchased and sold, redeemed or retired securities by the use of the mails and the means and instrumentalities of interstate commerce and engaged in business in interstate commerce.

134. By reason of the foregoing, FAIN, FEIN, FIIN and TAIN violated Section 7(a) of the Company Act [15 U.S.C. § 80a-7(a)].



**SIXTH CLAIM FOR RELIEF**

Violations of Section 5(a) and 5(c) of the Securities Act  
(MS & Co., MS Capital, the Four Funds, McGinn and Smith )

135. Paragraphs 1 through 134 are realleged and incorporated and incorporated by reference as if set forth fully herein.

136. The notes and certificates that MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith offered and sold as alleged herein constitute “securities” as defined in the Securities Act and the Exchange Act.

137. The FAIN, FEIN, FIIN and TAIN offerings were not limited to 35 or fewer non-accredited purchasers, and MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith could not reasonably have believed that the offering was so limited. Further, not all of the non-accredited purchasers satisfied the sophistication requirement of Rule 506(b)(2)(ii) of Regulation D [17 C.F.R. § 230.506(b)(2)(ii)], and MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith could not reasonably have believed that all such purchasers met the requirement at the time they invested.

138. MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith Investments singly or in concert, directly or indirectly, have made use of the means or instruments of transportation or communication in interstate commerce, or of the mails, to offer and sell securities through the use or medium of a prospectus or otherwise, or have carried or caused to be carried through the mails or in interstate commerce, by any means or instruments of transportation, securities for the purpose of sale or for delivery after sale, when no registration statement has been filed or was in effect as to such securities and when no exemption from registration was available.

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



**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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT  
N.D. OF N.Y.  
ORIGINAL FILE

APR 20 2010

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

*-against-*

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.*

LAWRENCE K. BAERMAN, Clerk  
ALBANY

1.10-CV-457 (GLS/RF)

**ORDER TO SHOW CAUSE,  
TEMPORARY RESTRAINING ORDER,  
AND ORDER FREEZING ASSETS AND GRANTING OTHER RELIEF**

On the Application of Plaintiff Securities and Exchange Commission (the "Commission")  
for an Order:

(1) directing defendants 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");  
Timothy M. McGinn; David L. Smith (collectively, the "Defendants") to show cause why an  
Order should not be entered, pending a final disposition of this action:

- (a) preliminarily enjoining:
  - (i) MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith from violating Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a) and 77e(c);
  - (ii) MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;
  - (iii) MS & Co., MS Advisors, McGinn and Smith from violating Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8;
  - (iv) MS & Co. from violating Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn from aiding and abetting this violation; and,
  - (v) FAIN, FEIN, FIIN and TAIN from violating Section 7(a) of the Investment Company Act of 1940 ("Company Act"), 15 U.S.C. § 80a-7.
- (b) freezing the Defendants' and Lynn Smith's (the "Relief Defendant") assets;
- (c) directing McGinn and Smith (the "Individual Defendants") to provide verified accountings for themselves and MS & Co., MS Advisors, MS

- Capital, FAIN, FEIN, FIIN and TAIN (the "Entity Defendants"), and the Relief Defendant to provide a verified accounting for herself;
- (d) appointing a receiver for the Entity Defendants and all other entities McGinn and/or Smith control or have an ownership interest in (collectively the "MS Entities"); and
  - (e) prohibiting the destruction, alteration or concealment of documents
- (2) pending adjudication of the foregoing, an Order:
- (a) temporarily restraining the Defendants from violating the aforementioned statutes and rules;
  - (b) freezing the Defendants' and Relief Defendant's assets;
  - (c) directing each of the Individual Defendants to immediately provide the verified accounts for themselves and the Entity Defendants, and the Relief Defendant to provide the verified accounts for herself;
  - (d) appointing a temporary receiver for the MS Entities;
  - (e) prohibiting the destruction, alteration or concealment of documents by the Defendants; and
  - (f) providing that the parties may take expedited discovery in preparation for a preliminary injunction hearing on this Order to Show Cause.

This Court has considered: (1) the Complaint filed by the Commission, dated April 20, 2010; (2) the Declaration of Israel Maya, executed on April 20, 2010, and the exhibits thereto; (3) the Declaration of Lara Shalov Mehraban, executed on April 20, 2010, and the exhibits thereto; and (4) the memorandum of law in support of Plaintiff Commission's application, dated April 20, 2010.

Based upon the foregoing documents, the Court finds that a proper showing, as required by Section 20(b) of the Securities Act, Section 21(d) of the Exchange Act, Section 209(d) of the Advisers Act, and Section 42(d) of the Company Act, has been made for the relief granted herein, for the following reasons:

1. It appears from the evidence presented that, unless temporarily restrained, (1) Defendant MS & Co. has violated, and will continue to violate, Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8, and Section 15(c)(a)(1) of the Exchange Act; (2) Defendant MS Advisors has violated, and will continue to violate, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8; (3) Defendant MS Capital has violated, and will continue to violate, Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5; (4) Defendants FAIN, FEIN, FIIN and TAIN have violated, and will continue to violate, Section 7(a) of the Company Act; and (5) Defendants McGinn and Smith have violated, and will continue to violate Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, and Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8, and Defendants McGinn and Smith have aided and abetted, and will continue to aid and abet MS & Co.'s violation of Section 15(c)(a)(1) of the Exchange Act.

2. It appears that the Defendants and Relief Defendant may attempt to dissipate, deplete, or transfer from the jurisdiction of this Court, funds, property and other assets that could



be subject to an order of disgorgement or an order imposing civil penalties. It appears that an order freezing the Defendants' and Relief Defendant's assets, as specified herein, is necessary to preserve the *status quo*, to protect investors and clients of the Defendants from further transfers of funds and misappropriation, to protect this Court's ability to award equitable relief in the form of disgorgement of illegal profits from fraud and civil penalties, and to preserve the Court's ability to approve a fair distribution for victims of the fraud.

3. It appears that an order requiring each of the Individual Defendants and Relief Defendant to provide a verified accounting of their assets, money and property held directly or indirectly by the Defendants and Relief Defendant, or by others for the direct and indirect beneficial interest of the Defendants and Relief Defendant, is necessary to effectuate and ensure compliance with the freeze imposed on the Defendants' and Relief Defendant's assets.

4. It appears that the Defendants may attempt to destroy, alter or conceal documents.

5. It appears that the appointment of a receiver for the MS Entities is necessary to (i) preserve the *status quo*; (ii) ascertain the extent of commingling of funds among the MS Entities; (iii) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Entities; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities; (vii) be available to respond to investor inquiries; (viii) protect investors' assets; and (ix) determine whether the MS Entities should undertake bankruptcy filings.

6. Good and sufficient reasons have been shown why procedure other than by notice of motion is necessary.

7. This Court has jurisdiction over the subject matter of this action and over the

Defendants and Relief Defendant, and venue properly lies in this District.

NOW, THEREFORE,

I.

IT IS HEREBY ORDERED that the Defendants show cause, if there be any, to this Court at 3:00 p.m. on the 3rd day of May 2010, in Room 6 of the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207-2924, why this Court should not enter an Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, Section 20 of the Securities Act, and Section 21 of the Exchange Act, Section 209(d) of the Advisers Act, and Section 42 of the Company Act preliminarily enjoining:

- (1) MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith from violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c);
- (2) MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;
- (3) MS & Co., MS Advisors, McGinn and Smith from violating Sections 206(1), 206(2), and 206(4) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. § 275.206(4)-8;
- (4) MS & Co., from violating Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn from aiding and abetting this violation; and,
- (5) FAIN, FEIN, FIIN and TAIN from violating Section 7(a) of the Company Act, 15 U.S.C. § 80a-7.

II.

**IT IS FURTHER ORDERED** that the Defendants show cause at that time why this Court should not also enter an Order directing that, pending a final disposition of this action, the Defendants, the Relief Defendant, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Defendants and Relief Defendant, including but not limited to, the MS Entities, including but not limited to, those entities listed on Exhibit A, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Defendants and Relief Defendant to hold or retain within its or his control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties including but not limited to, all assets, funds, or other properties held in the accounts listed on Exhibit B, as well as each real estate parcel owned directly or indirectly by the MS Entities, including but not limited to, those entities listed on Exhibit A.

III.

**IT IS FURTHER ORDERED** that the Defendants show cause at that time why this

Court should not also enter an Order enjoining and restraining them, and any person or entity acting at their direction or on their behalf, or any other person, from destroying, altering, concealing or otherwise interfering with the access of Plaintiff Commission and the receiver to any and all documents, books and records, that are in the possession, custody or control of the Defendants, and each of their officers, agents, employees, servants, accountants, financial or brokerage institutions, attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, including but not limited to, those entities listed on Exhibit A, that refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books, and records referring, reflecting or relating to the Defendants' finances or business operations.

#### IV.

**IT IS FURTHER ORDERED** that the Defendants show cause at that time why this Court should not also enter an Order directing each of the Individual Defendants to serve upon Plaintiff Commission, within three (3) business days, or within such extension of time as the Commission agrees to, a verified written accounting each signed by Defendants McGinn and Smith and also signed by the officer or employees of the Entity Defendants who are most knowledgeable about the assets, liabilities and general financial condition of each of the Defendants, and verified accountings signed by each of the Individual Defendants and the Relief Defendant identifying their own assets, liabilities and general financial condition, if any, under penalty of perjury. Each of the Defendants and Relief Defendant shall serve such sworn updated written accountings by hand delivery, facsimile transmission to (212) 336-1324 or overnight courier service on the Commission's counsel, David Stoelting, Esq., Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281.

V.

**IT IS FURTHER ORDERED** that Individual Defendants and Relief Defendant shall file with the Court and serve on the Commission, within three (3) business days following service of this Order, a list of all accounts at all banks, brokerage firms or financial institutions (including the name of the financial institution and the name and number on the account), tax identification numbers, telephone or facsimile transmission numbers (including numbers of pagers and mobile telephones), electronic mail addresses, World Wide Web sites or Universal Records Locators, Internet bulletin board sites, online interactive conversational spaces or chat rooms, Internet or electronic mail service providers, street addresses, postal box numbers, safety deposit boxes, and storage facilities used or maintained by them or under their direct or indirect control, at any time from January 1, 2005 to the present including but not limited to information concerning the MS Entities, including but not limited to, those entities listed on Exhibit A.

VI.

**IT IS FURTHER ORDERED** that the Defendants show cause at that time why this Court should not also enter an Order appointing or continuing the appointment of a receiver for the MS Entities and all entities they control or have an ownership interest in including but not limited to, those entities listed on Exhibit A, to (i) preserve the *status quo*, (ii) ascertain the extent of commingling of funds among the MS Entities; (iii) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Entities and all entities they control or have an ownership interest in; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities; (vii) be available to respond to investor inquiries; (viii) protect the assets of the MS Entities from further

dissipation; and (ix) determine whether the MS Entities should undertake bankruptcy filings.

To effectuate the foregoing, the receiver would be empowered to:

- (a) Take and retain immediate possession and control of all of the assets and property, and all books, records and documents of the MS Entities including but not limited to, the entities listed on Exhibit A, and the rights and powers of it with respect thereto including the powers set forth in the management agreements and LLC agreements and/or operating agreements applicable to any LLCs or other property or entities owned or controlled by the Defendants;
- (b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of the MS Entities including but not limited to, the entities listed on Exhibit A;
- (c) Pay from available funds necessary business expenses required to preserve the assets and property of the MS Entities including but not limited to, the entities listed on Exhibit A, including the books, records, and documents of the MS Entities and all entities they control or have an ownership interest in, notwithstanding the asset freeze imposed by paragraph II, above;
- (d) Take preliminary steps to locate assets that may have been conveyed to third parties or otherwise concealed;
- (e) Take preliminary steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by MS Entities including but not limited to, the entities listed on Exhibit A;
- (f) Engage and employ persons, including accountants, attorneys and experts, to

assist in the carrying out of the receiver's duties and responsibilities hereunder;

- (g) Report to the Court and the parties within 45 days from the date of the entry of this Order, subject to such reasonable extensions as the Court may grant, the following information:

1. All assets, money, funds, securities, and real or personal property then held directly or indirectly by or for the benefit of the MS Entities and all entities they control or have an ownership interest in, including but not limited to, real property, bank accounts, brokerage accounts, investments, business interests, personal property, wherever situated, identifying and describing each asset, its current location and value;

2. A list of secured creditors and other financial institutions with an interest in the receivership assets;

3. To the extent practicable, a list of investors in the MS Entities including but not limited to, the entities listed on Exhibit A;

- (h) The receiver's preliminary plan for the administration of the assets of the receivership, including a recommendation regarding whether bankruptcy cases should be filed for all of a portion of the assets subject to the receivership and a recommendation whether litigation against third parties should be commenced on a contingent fee basis to recover assets for the benefit of the receivership.

## VII.

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith and each of them, their agents, servants, employees, and



attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from, directly or indirectly, singly or in concert, in the offer or sale of any security, by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails to offer or sell securities through the use or medium of a prospectus or otherwise when no registration statement has been filed or is in effect as to such securities and when no exemption from registration is available in violation of Sections 5(a) and 5(c) of the Securities Act.

### VIII.

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capital, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, are temporarily restrained from violating, directly or indirectly, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or



- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

**IX.**

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capital, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

**X.**

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., and each of its officers,

agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 15(c) of the Exchange Act, 15 U.S.C. § 78(o)(c), and 17 C.F.R. § 240.10b-3, by while acting as a broker or dealer, directly or indirectly, making use of the mails or any instrumentality of interstate commerce, or any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other fraudulent device or contrivance, or to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance" as such term is used in Section 15(c)(1) of the Exchange Act.

# XI.

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, the Individual Defendants, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from aiding and abetting any broker's or dealer's violations of Section 15(c) of the Exchange Act, 15 U.S.C. § 78(o)(c), by providing substantial assistance

to an individual or entity, which, while acting as a broker or dealer, directly or indirectly, makes use of the mails or any instrumentality of interstate commerce, or any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other fraudulent device or contrivance, or to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance" as such term is used in Section 15(c)(1) of the Exchange Act.

## XII.

**IT IS FURTHER ORDERED** that pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors and each of their officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Sections 206(1), 206(2) and 206(4) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8, while acting as an investment advisor, by the use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to employ any device, scheme or artifice to defraud any client or prospective client; to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client; to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

**XIII.**

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, FAIN, FEIN, FIIN, and TAIN and each of their officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 7(a) of the Company Act, 15 U.S.C. § 80a-7, while acting as an investment company, shall directly or indirectly, offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce; purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the meals or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; control any investment company which does any of the acts enumerated above; engage in any business in interstate commerce; or control any company which is engaged in any business in interstate commerce.

**XIV.**

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, the Defendants, and each of their

financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Defendants, including but not limited to, entities owned or controlled by, related to, or associated or affiliated with the MS Entities including but not limited to, those entities listed on Exhibit A, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Defendants to hold or retain within its or his control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties including but not limited to, all assets, funds, or other properties held in the accounts listed in Exhibit B, as well as each real estate parcel owned directly or indirectly by the MS Entities including but not limited to, those entities listed on Exhibit A.

#### XV.

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, the Defendants, any person or entity acting at their direction or on their behalf, and any other third party including but not limited to any investor, be and hereby are enjoined and restrained from destroying, altering, concealing or

otherwise interfering with the access of Plaintiff Commission and the receiver to any and all documents, books, and records that are in the possession, custody or control of the Defendants and each of their respective officers, agents, employees, servants, accountants, financial or brokerage institutions, or attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, that refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books and records referring, reflecting or relating to the Defendants' finances or business operations, or the offer, purchase or sale of securities and the use of proceeds therefrom; and (2) ordered to provide all reasonable cooperation to the receiver in carrying out his duties set forth herein.

#### XVI.

**IT IS FURTHER ORDERED** that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, each of the Defendants shall file with this Court and serve upon Plaintiff Commission, within three (3) business days, or within such extension of time as the Commission agrees to, a verified written accounting signed by each of the Individual Defendants, and the officers or employees of the MS Entities who are most knowledgeable about the assets, liabilities and general financial condition of the each of the Defendants, if any, under penalty of perjury, of:

- (1) All assets, liabilities and property currently held, directly or indirectly, by or for the benefit of each Defendant, including, without limitation, bank accounts, brokerage accounts, investments, business interests, loans, lines of credit, and real and personal property wherever situated, describing each asset and liability, its current location and amount;
- (2) All money, property, assets and income received by each such Defendant for his

direct or indirect benefit from the other Defendants, at any time from January 1, 2005 through the date of such accounting, describing the amount, disposition and current location of each of the items listed;

- (3) The names and last known addresses of all bailees, debtors, and other persons and entities that currently are holding the assets, funds or property of each Defendant; and
- (4) All assets, funds, securities and real or personal property invested by each such Defendant, or any other person controlled by them, and the disposition of such assets, funds, securities, real or personal property.

Each Individual Defendant and the officers or employees of the Entity Defendants who are most knowledgeable about the assets, liabilities and general financial condition of the Defendants, if any, shall verify the Entity Defendant's accounting and serve such sworn statements of asset identifying information by hand delivery, facsimile transmission to (212) 336-1324 or overnight courier service on the Commission's counsel, David Stoelting, Esq., Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281. Each of the Individual Defendants is required to provide the Commission with an accounting for his own personal assets, liabilities and general financial condition, and also provide an accounting for each of the Entity Defendants. The Relief Defendant is required to provide the Commission with an accounting for her own personal assets, liabilities and general financial condition.

XVII.

IT IS FURTHER ORDERED that William T. Brown, pending further order of this Court, be and hereby is appointed to act as receiver for the MS Entities including



but not limited to, those entities listed on Exhibit A, to (1) preserve the *status quo*; (2) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (3) determine the extent of commingling of funds between the MS Entities; (4) prevent further dissipation of the property and assets of the MS Entities; (5) prevent the encumbrance or disposal of property or assets of the MS Entities; (6) preserve the books, records and documents of the MS Entities; (7) be available to respond to investor inquiries; and (8) determine if the MS Entities and all entities they control or have an ownership interest in should undertake a bankruptcy filing. To effectuate the foregoing, the receiver is hereby empowered to:

- (a) Take and retain immediate possession and control of all of the assets and property of the MS Entities including but not limited to, those entities listed on Exhibit A, and all books, records and documents of MS Entities, and the rights and powers of it with respect thereto;
- (b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of MS Entities including but not limited to, those entities listed on Exhibit A;
- (c) succeed to all rights to manage all properties owned or controlled, directly or indirectly, by the MS Entities, including but not limited to, those entities listed on Exhibit A, pursuant to the LLC and operating agreement relating to each entity;
- (d) Pay from available funds necessary business expenses required to preserve the assets and property of MS Entities and all entities they control or have an ownership interest in, including the books, records, and documents of the Defendants, notwithstanding the asset freeze imposed above;



- (e) Take preliminary steps to locate assets that may have been conveyed to third parties or otherwise concealed;
- (f) Take preliminary steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by the Defendants and the entities they control;
- (g) Engage and employ persons, including accountants, attorneys and experts, to assist in the carrying out of the receiver's duties and responsibilities hereunder;
- (h) Take all necessary steps to gain control of the Defendants' interests in assets in foreign jurisdictions, including but not limited to taking steps necessary to repatriate foreign assets; and
- (i) Take such further action as the Court shall deem equitable, just and appropriate under the circumstances upon proper application of the receiver.

**XVIII.**

**IT IS FURTHER ORDERED** that no person or entity, including any creditor or claimant against any of the Defendants, or any person acting on behalf of such creditor or claimant, shall take any action without further order of this Court to interfere with the taking control, possession, or management of the assets, including but not limited to the filing of any lawsuits, liens or encumbrances or bankruptcy cases to impact the property and assets subject to this order.

**XIX.**

**IT IS FURTHER ORDERED** that the Defendants shall pay the reasonable costs, fees and expenses of the receiver incurred in connection with the performance of his duties described

herein, including but not limited to the reasonable costs, fees and expenses of all persons who may be engaged or employed by the receiver to assist him in carrying out his duties and obligations. All applications for costs, fees and expenses of the receiver and those employed by him shall be made by application to the Court setting forth in reasonable detail the nature of such costs, fees and expenses and shall conform to the Fee Guidelines that will be supplied by the U.S. Securities and Exchange Commission.

**XX.**

**IT IS FURTHER ORDERED** that discovery is expedited as follows: pursuant to Rules 26, 30, 31, 33, 34, 36 and 45 of the Federal Rules of Civil Procedure, and without the requirement of a meeting pursuant to Fed. R. Civ. P. 26(f), the parties and the receiver may:

- (1) Take depositions, subject to two (2) calendar days' notice by facsimile or otherwise;
- (2) Obtain the production of documents, within three (3) calendar days from service by facsimile or otherwise of a request or subpoena from any persons or entities, including non-party witnesses; and
- (3) Service of any discovery requests, notices, or subpoenas may be made by personal service, facsimile, overnight courier, or first-class mail on an individual, entity or the individual's or entity's attorney; and
- (4) The receiver may take discovery in this action without further order of the Court.

**XXI.**

**IT IS FURTHER ORDERED** that a copy of this Order and the papers supporting the Commission's Application be served upon the Defendants and Relief Defendant on or before Wednesday, April 21, 2010, by personal delivery, facsimile, overnight courier, or first-class

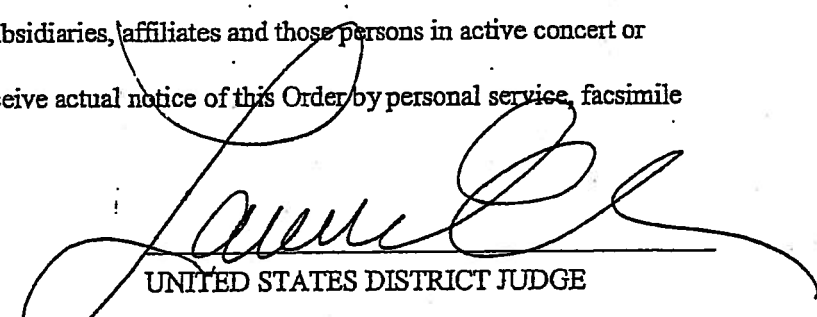
mail.

**XXII.**

**IT IS FURTHER ORDERED** that the Defendants and Relief Defendant shall deliver any opposing papers in response to the Order to Show Cause above no later than Tuesday, April 27, 2010, at 4:00 p.m. Service shall be made by delivering the papers, using the most expeditious means available, by that date and time, to the New York Regional Office of the Commission at 3 World Financial Center, Room 4300, New York, New York 10281, Attn: David Stoelting Esq., or such other place as counsel for the Commission may direct in writing. The Commission shall have until Thursday, April 29, 2010, at 5:00 p.m., to serve, by the most expeditious means available, any reply papers upon the Defendants and Relief Defendants, or upon their counsel, if counsel shall have made an appearance in this action.

**XXIII.**

**IT IS FURTHER ORDERED** that this Order shall be, and is, binding upon the Defendants and Relief Defendants and each of their respective officers, agents, servants, employees, attorneys-in-fact, subsidiaries, affiliates and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise.

  
UNITED STATES DISTRICT JUDGE

Issued at : 2 : 00 P.M.  
April 27, 2010  
Albany, New York

## EXHIBIT A

Exhibit A

List of Known Entities Controlled By McGinn and/or Smith

107<sup>th</sup> Associates LLC Trust 07  
107<sup>th</sup> Associates LLC  
74 State Street Capital LP  
Acquisition Trust 03  
Capital Center Credit Corporation  
CMS Financial Services  
Cruise Charter Ventures LLC dba YOLO Cruises  
Cruise Charter Ventures Trust 08  
First Advisory Income Notes LLC  
First Commercial Capital Corp.  
First Excelsior Income Notes LLC  
First Independent Income Notes LLC  
FirstLine Junior Trust 07  
FirstLine Senior Trust 07  
FirstLine Trust 07  
Fortress Trust 08  
Integrated Excellence Junior Trust  
Integrated Excellence Junior Trust 08  
Integrated Excellence Senior Trust  
Integrated Excellence Senior Trust 08  
IP Investors  
James J. Carroll Charitable Fund  
JGC Trust 00  
KC Acquisition Corp.  
KMB Cable Holdings LLC  
Luxury Cruise Center, Inc.  
Luxury Cruise Holdings, LLC  
Luxury Cruise Receivables, LLC  
M & S Partners  
McGinn, Smith & Co.  
McGinn, Smith Acceptance Corp.  
McGinn, Smith Advisors  
McGinn, Smith Alarm Trading  
McGinn, Smith Asset Management Corp.  
McGinn, Smith Capital Holdings  
McGinn, Smith Capital Management LLC  
McGinn, Smith Financial Services Corp.  
McGinn, Smith FirstLine Funding LLC  
McGinn, Smith Funding LLC  
McGinn, Smith Group LLC  
McGinn, Smith Holdings LLC  
McGinn, Smith Independent Services Corp.  
McGinn, Smith Licensing Co.

McGinn, Smith Transaction Funding Corp.  
Mr. Cranberry LLC  
MS Partners  
MSFC Security Holdings LLC  
NEI Capital LLC  
Pacific Trust 02  
Pine Street Capital Management LLC  
Pine Street Capital Partners LP  
Point Capital LLC  
Prime Vision Communications LLC  
Prime Vision Communication Management Keys Cove LLC  
Prime Vision Communications of Cutler Cay LLC  
Prime Vision Funding of Cutler Cove LLC  
Prime Vision Funding of Key Cove LLC  
RTC Trust 02  
SAI Trust 00  
SAI Trust 03  
Security Participation Trust I  
Security Participation Trust II  
Security Participation Trust III  
Security Participation Trust IV  
Seton Hall Associates  
TDM Cable Funding LLC  
TDM Cable Trust 06  
TDM Luxury Cruise Trust 07  
TDM Verifier Trust 07  
TDM Verifier Trust 07R  
TDM Verifier Trust 08  
TDM Verifier Trust 08R  
TDM Verifier Trust 09  
TDM Verifier Trust 11  
TDMM Benchmark Trust 09  
TDMM Cable Funding LLC  
TDMM Cable Jr Trust 09  
TDMM Cable Sr Trust 09  
Third Albany Income Notes LLC  
Travel Liquidators, LLC  
White Glove Cruises LLC  
White Glove LLC

## EXHIBIT B

**Exhibit B**  
**Known Bank Accounts**

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	1998	107th Assoc. LLC Trust 07	
Mercantile Bank	1987	107th Associates LLC	
M&T Bank	6850	107th Associates LLC	
M&T Bank	3478	74 State Street Capital LP	Operating
M&T Bank	7062	74 State Street Capital LP	
M&T Bank	5288	Acquisition Trust 03	Operating Account
Whitney National Bank	9335	Benchmark Communication LLC	
M&T Bank	0805	Capital Center Credit Corp	Operating
M&T Bank	2250	Capital Center Credit Corp	Careclub Depository, 99 Pine St
JPMorganChase	6587	Capital Center Credit Corp	Special Account Michael Lewy Attn: David Rees
NFS/Fidelity	3178	Capital Center Credit Corp	C/O MCGINN SMITH & CO INC ATTN DAVID P REES
JPMorganChase	4817	Capital Center Credit Corp c/o McGinn Smith & Co	
Monterey Bank	6854	Charter Cruise Ventures	dba YOLO Cruises
M&T Bank	3133	CMS Financial	
M&T Bank	6985	CMS Financial Services Corp.	
M&T Bank	2064	CMS Financial Services Corp.	
Monterey Bank	6846	Cruise Charter Ventures	dba YOLO Cruises
Mercantile Bank	3972	Cruise Charter Ventures LLC	
Mercantile Bank	1307	Cruise Charter Ventures LLC	
Mercantile Bank	2808	Cruise Charter Ventures Trust 08	
M&T Bank	3528	First Advisory Income Notes	Operating
M&T Bank	7489	First Advisory Income Notes	Escrow
M&T Bank	9147	First Excelsior Income Notes LLC	Alarm Accum Account
M&T Bank	9139	First Excelsior Income Notes LLC	Operating
Charter One Bank	363-8	First Excelsior Income Notes LLC	Escrow
JPMorganChase	5928	First Excelsior Income Notes LLC	
NFS/Fidelity	9280	First Excelsior Income Notes LLC	
M&T Bank	6013	First Independent Income Notes	Operating
M&T Bank	9279	First Independent Income Notes	Monitoring Contract Accum
Charter One Bank	003-6	First Independent Income Notes	Timothy McGinn
JPMorganChase	6893	First Independent Income Notes	
JPMorganChase	0087	First Independent Income Notes	
NFS/Fidelity	3934	First Independent Income Notes	
Mercantile Bank	1921	FirstLine Senior Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
M&T Bank	5028	FirstLine Sr Trust 07	
M&T Bank	5366	FirstLine Sr Trust 07 Series B	
Mercantile Bank	0733	FirstLine Sr Trust 07 Series B	McGinn Smith & Co Inc Trustee
M&T Bank	5010	FirstLine Trust 07	
Mercantile Bank	910	FirstLine Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
Mercantile Bank	0722	FirstLine Trust 07 Series B	McGinn Smith & Co Inc Trustee, UAD 10/16/07
M&T Bank	5358	FirstLine Trust 07 Series B	
M&T Bank	6413	Fortress Trust 08	c/o McGinn Smith Capital Holdings Corp.
Mercantile Bank	9187	Fortress Trust 08 UTD 9/10/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	6165	Integrated Excellence Jr Trust	
Mercantile Bank	3994	Integrated Excellence Jr Trust 08 DTD 5/28/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	6173	Integrated Excellence Sr Trust	



**Exhibit B**  
**Known Bank Accounts**

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	██████3983	Integrated Excellence Sr Trust 08 DTD 5/27/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████6868	IP Investors LLC	
M&T Bank	██████3783	James J. Carroll Charitable Fund	
M&T Bank	██████6815	JGC Trust 08	Operating c/o McGinn Smith
Mercantile Bank	██████1674	Luxury Cruise Center Inc	
Mercantile Bank	██████0446	Luxury Cruise Center Inc	
Mercantile Bank	██████0446	Luxury Cruise Charter Inc. Payables	
M&T Bank	██████3998	M&S Partners	
JPMorganChase	██████3443	McGinn Smith & Co	
JPMorganChase	██████5670	McGinn Smith & Co	
NFS/Fidelity	██████0167	MCGINN SMITH & CO DELIGIANNIS MASTER ACCOUNT	
NFS/Fidelity	██████0035	MCGINN SMITH & CO AVERAGE PRICE ACCOUNT	
JPMorganChase	██████4300	McGinn Smith & Co Capital A/C	
JPMorganChase	██████4302	McGinn Smith & Co Corporate Bond A/C Attn: David Rees	
JPMorganChase	██████4306	McGinn Smith & Co Deposit Account Attn: David Rees	
JPMorganChase	██████4305	McGinn Smith & Co Error Account Attn: David Rees	
JPMorganChase	██████4301	McGinn Smith & Co Firm Trading A/C Attn: David Rees	
JPMorganChase	██████4303	McGinn Smith & Co Govt Bond A/C Attn: David Rees	
NFS/Fidelity	██████11007	MCGINN SMITH & CO INC	
NFS/Fidelity	██████0051	MCGINN SMITH & CO INC ALBANY BTAM \$ DIFFERENCE	
NFS/Fidelity	██████0043	MCGINN SMITH & CO INC ALBANY BTAM MASTER ACCOUNT	
NFS/Fidelity	██████11007	MCGINN SMITH & CO INC DAVID L SMITH	
NFS/Fidelity	██████0175	MCGINN SMITH & CO INC DELIGIANNIS \$ DIFFERENCE	
NFS/Fidelity	██████0086	MCGINN SMITH & CO INC NYC BTAM UNALLOCATED	
NFS/Fidelity	██████0728	MCGINN SMITH & CO INC REVENUE ACCOUNT	
NFS/Fidelity	██████0060	MCGINN SMITH & CO INC ALBANY BTAM UNALLOCATED	
NFS/Fidelity	██████0205	MCGINN SMITH & CO INC BOYLAN \$ DIFFERENCE	
NFS/Fidelity	██████0191	MCGINN SMITH & CO INC BOYLAN MASTER ACCOUNT	
NFS/Fidelity	██████0183	MCGINN SMITH & CO INC DELIGIANNIS UNALLOCATED	
NFS/Fidelity	██████0116	MCGINN SMITH & CO INC ERROR ACCOUNT	
NFS/Fidelity	██████0230	MCGINN SMITH & CO INC RABINOVICH \$ DIFFERENCE	
NFS/Fidelity	██████0221	MCGINN SMITH & CO INC RABINOVICH MASTER ACCOUNT	
NFS/Fidelity	██████0248	MCGINN SMITH & CO INC RABINOVICH UNALLOCATED	

**Exhibit B**  
**Known Bank Accounts**

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	██████0140	MCGINN SMITH & CO INC SANCHIRICO S DIFFERENCE	
NFS/Fidelity	██████0132	MCGINN SMITH & CO INC SANCHIRICO MASTER ACCOUNTS	
NFS/Fidelity	██████0159	MCGINN SMITH & CO INC SANCHIRICO UNALLOCATED	
NFS/Fidelity	██████0108	MCGINN SMITH & CO INC SYNDICATE ACCOUNT	
JPMorganChase	██████4304	McGinn Smith & Co Municipal-Bond Account Attn: David Rees	
JPMorganChase	██████9815	McGinn Smith & Co Reserve A/C Residual Bal	
NFS/Fidelity	██████0019	MCGINN SMITH & CO RISKLESS PRINCIPAL	
JPMorganChase	██████4307	McGinn Smith & Co Syndicate A/C	
M&T Bank	██████1081	McGinn Smith & Company	Dividend
M&T Bank	██████4734	McGinn Smith & Company	
M&T Bank	██████3569	McGinn Smith Advisors LLC	
M&T Bank	██████5044	McGinn Smith Alarm Trading LLC	
M&T Bank	██████4351	McGinn Smith Capital Holdings	MSCH Paying Agent for Vidsoft Inc.
M&T Bank	██████3551	McGinn Smith Capital Holdings	Payment Agent for Vigilant Privacy Corp.
M&T Bank	██████3803	McGinn Smith Capital Holdings	
JPMorganChase	██████3573	McGinn Smith Capital Holdings	
NFS/Fidelity	██████5734	MCGINN SMITH CAPITAL HOLDINGS	
M&T Bank	██████5783	McGinn Smith Capital Holdings Corp	Hannan Reserve Account
Mercantile Bank	██████1635	McGinn Smith Funding LLC	
Monterey Bank	██████6838	McGinn Smith Funding LLC	
M&T Bank	██████3925	McGinn Smith Holdings LLC	
NFS/Fidelity	██████2944	MCGINN SMITH INCENTIVE PL CUST IRA OF TIMOTHY MCGINN	
JPMorganChase	██████3246	McGinn Smith Incentive Savings Plan	
Mercantile Bank	██████9022	McGinn Smith Independent Services Corp	
M&T Bank	██████6975	McGinn Smith Independent Services Corp	
M&T Bank	██████5051	McGinn Smith Licensing Company LLC	
Mercantile Bank	██████3083	McGinn Smith Transaction Funding Corp	
M&T Bank	██████6207	McGinn Smith Transaction Funding Corp	
Mercantile Bank	██████3857	McGinn Smith Transaction Funding Corp	2nd Offering Account
M&T Bank	██████5036	McGinn Smith Acceptance Corp	
JPMorganChase	██████3294	McGinn, Tim (Union Bank of California Cust Adams Keegan Retirement Svgs Plan, FBO Tim McGinn A/C # ██████5003)	
NFS/Fidelity	██████2745	McGinn, Timothy M.	
M&T Bank	██████2675	McGinn, Timothy M.	
M&T Bank	██████9504	McGinn, Timothy M.	
Mercantile Bank	██████2171	MR Cranberry LLC	c/o Timothy McGinn
NFS/Fidelity	██████4272	MR Cranberry LLC	
M&T Bank	██████5421	MSFC Security Holdings LLC	
Mercantile Bank	██████9220	NEI Capital LLC	
M&T Bank	██████5833	Pacific Trust 02	Operating
M&T Bank	██████9626	Pine Street Capital Management LLC	
M&T Bank	██████5478	Pine Street Capital Partners	
M&T Bank	██████9535	Pine Street Capital Partners LP	Operating
Mercantile Bank	██████9687	Prime Vision Communication Mgmt Keys Cove LLC	c/o McGinn Smith & Co
Bank of Florida	██████5976	Prime Vision Communications LLC	

**Exhibit B**  
**Known Bank Accounts**

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	██████9698	Prime Vision Communications of Cutler Cay LLC	c/o McGinn Smith & Co
Mercantile Bank	██████9518	Prime Vision Funding of Cutler Cove LLC	c/o McGinn Smith & Co
Mercantile Bank	██████9529	Prime Vision Funding of Key Cove LLC	c/o McGinn Smith & Co
M&T Bank	██████5767	RTC Trust 02	Accum
M&T Bank	██████5775	RTC Trust 02	Operating
JPMorganChase	██████6792	RTC Trust II	
M&T Bank	██████3635	SAI Trust 00	
Charter One Bank	██████323-3	SAI Trust 00	
M&T Bank	██████3966	SAI Trust 03	Jr
M&T Bank	██████4620	SAI Trust 03	Sr
M&T Bank	██████7729	Security Participation Trust I	
M&T Bank	██████9410	Security Participation Trust II	Accum
M&T Bank	██████9288	Security Participation Trust II	Operating
M&T Bank	██████3123	Security Participation Trust III	Operating
M&T Bank	██████3115	Security Participation Trust III	Accum
M&T Bank	██████5460	Security Participation Trust IV	
Charter One Bank	██████023-6	Security Participation Trust Oper	
M&T Bank	██████4492	Seton Hall Associates	McGinn & Smith
NFS/Fidelity	██████2208	Smith, David L.	
M&T Bank	██████3965	Smith, David L.	
NFS/Fidelity	██████0916	Smith, Lynn A.	
NFS/Fidelity	██████0912	Smith, Lynn A.	
Bank of America		Smith, Lynn A.	
Mercantile Bank	██████9507	TDM Cable Funding LLC	c/o McGinn Smith & Co
Mercantile Bank	██████9573	TDM Cable Funding LLC / TDM Cable Trust 06	c/o McGinn Smith & Co
M&T Bank	██████4765	TDM Cable Funding LLC TDM Verifier Trust 07	TDM Verifier Trust 07 Operating
M&T Bank	██████4500	TDM Cable Funding LLC Trust 06 Account	Trust 06 Account
M&T Bank	██████5234	TDM Luxury Cruise Trust 07	
Mercantile Bank	██████2086	TDM Luxury Cruise Trust 07 DTD 7/16/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	██████437	TDM Verifier Trust 07	Escrow
Mercantile Bank	██████4216	TDM Verifier Trust 07R	
M&T Bank	██████5738	TDM Verifier Trust 08	
Mercantile Bank	██████1030	TDM Verifier Trust 08 DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	██████9132	TDM Verifier Trust 08R DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████6736	TDM Verifier Trust 09	
Mercantile Bank	██████4007	TDM Verifier Trust 09 DTD 12/15/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████7064	TDM Verifier Trust 11	
M&T Bank	██████0409	TDM Verifier Trust 11	
M&T Bank	██████7056	TDMM Benchmark Trust 09	
Mercantile Bank	██████9077	TDMM Cable Funding LLC	
Mercantile Bank	██████4139	TDMM Cable Jr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████5728	TDMM Cable Jr Trust 09	
Mercantile Bank	██████4150	TDMM Cable Sr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████5710	TDMM Cable Sr Trust 09	
M&T Bank	██████5462	Third Albany Income Notes	Escrow
NFS/Fidelity	██████9884	Third Albany Income Notes	
M&T Bank	██████9550	Third Albany Income Notes	Operating
M&T Bank	██████6593	Third Albany Income Notes	Alarm Accum
JPMorganChase	██████6988	Third Albany Income Notes	

FPA  
RML  
950920

**Exhibit B**  
**Known Bank Accounts**

<b>Institution</b>	<b>Account Number</b>	<b>Name of Account Holder</b>	<b>Account Name 2</b>
NFS/Fidelity	██████████9671	██████████ TTEE David L Smith & Lynn A Smith, Irrev Tr U/A ██████████04	

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

10 Civ. 475 (GLS)

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.*

---

**CONSENT ORDER EXTENDING  
DATES IN ORDER TO SHOW CAUSE**

WHEREAS, on April 20, 2010, plaintiff Securities and Exchange Commission (the "Commission") commenced this action by filing a Complaint, Order to Show Cause, and other papers, and, on that same day, the Court issued an Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief (the "Order"), that, among other things, temporarily froze the assets of the Defendants and the Relief Defendant; and set dates for a preliminary injunction hearing and for the submission of briefs;

**NOW, THEREFORE:**

**I.**

**IT IS ORDERED** that the Order is modified so that the preliminary injunction hearing referenced in Part I of the Order shall be scheduled for May 18, 2010, at 10:00 a.m.

**II.**

**IT IS FURTHER ORDERED** that Part XXII of the Order is modified so that Defendants and Relief Defendant shall serve any opposing papers in response to the Order no later than May 7, 2010, and the Commission shall have until May 14, 2010 to serve any reply papers upon the Defendants and Relief Defendant.

**III.**

**IT IS FURTHER ORDERED** that the Order is modified so that the verified written accountings provided for in Part XVI of the Order shall be filed and served on or before April 28, 2010.

**IV.**

**IT IS FURTHER ORDERED** that except as expressly modified herein, the Order shall remain in full force and effect until further order of this Court.

**V.**

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of the Order and this Consent Order, and for all other purposes.



**SO ORDERED:**

Dated: \_\_\_\_\_, 2010

UNITED STATES DISTRICT JUDGE

**timesunion.com**

## Federal raids targeted Albany brokerage firm

FBI and IRS went to homes, offices of McGinn, Smith officials last week in Albany and Florida

By BRENDAN J. LYONS, Senior writer

**Click byline for more stories by writer.**

First published: Tuesday, April 27, 2010

ALBANY -- Federal agents from the FBI and Internal Revenue Service recently conducted a series of raids in connection with a criminal investigation of McGinn, Smith & Co., a longtime Albany brokerage firm that has been accused of fraud by the Securities and Exchange Commission.

The federal raids early last week at the offices and homes of McGinn, Smith's top officials, Timothy M. McGinn and David L. Smith, took place at several locations in the Albany area, including the company's former Pine Street headquarters, and in south Florida, according to two people briefed on the law enforcement activity.

Search warrants related to the case were filed under seal in U.S. District Court in Albany and South Florida. But the raids confirm that federal authorities have expanded their interest in McGinn, Smith's business dealings from a civil action to a criminal investigation.

Spokespersons for the FBI and U.S. Attorney's office in Albany, where the case is being spearheaded, declined to comment.

Last week, the SEC filed complaints in Albany and Miami accusing McGinn, Smith and their various companies of engaging in "an ongoing fraud."

The complaint alleges they deceived an untold number of people while raising more than \$136 million in unregistered debt offerings and trusts that were sold to some 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," the SEC's complaint says. "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."

The firm's dealings came under scrutiny last fall during the criminal trial of former state Senate Majority Leader Joseph L. Bruno, who had been retained by McGinn, Smith as a consultant. McGinn, who lives in Niskayuna and is chairman of the board, testified at Bruno's trial as a government witness that he co-founded the company in 1980 and engaged largely in investment banking.

"McGinn, Smith trades on all of the securities exchanges in the United States with the



exception of commodities," McGinn testified on Nov. 3. "(The firm) raises capital for various businesses and nonprofits, health care-related, security-alarm related, cable-TV related, various other industries, and has done so for 30 years."

There is no indication in the SEC's complaint that the investigation of the firm is tied to Bruno. The former state senator, who faces sentencing next week for his conviction on federal corruption charges, was hired by McGinn, Smith in 1992 to develop "money management relationships with labor unions (and) pension funds," McGinn testified.

The SEC has filed hundreds of pages of documents in its civil action accusing the firm of numerous breaches of federal securities regulations. They said the firm began receiving e-mails from investors last year who feared they had been duped in a "Ponzi scheme."

As of last September investors were owed \$84 million from a fund that had less than \$500,000 cash.

"Nonetheless, McGinn and Smith have continued to raise money from investors, using similar misrepresentations, as recently as December 2009," the SEC wrote. "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."

An attorney for the firm has not responded to a request for comment.

The SEC's complaint also names Smith's wife, Lynn. The SEC claims the firm violated federal law by selling unregistered securities to unqualified investors and then mismanaged the money in a scheme dating to at least 2003. McGinn, Smith's assets were frozen by a federal judge in Albany and an attorney has been appointed to oversee the firm's remaining assets.

Brendan J. Lyons can be reached at 454-5547 or by e-mail at [blyons@timesunion.com](mailto:blyons@timesunion.com)



The depositions will be recorded by sound, sound-and-visual and/or stenographic means and will continue day to day until completed.

Dated: New York, New York  
May 17, 2010

**s/David Stoelting**  
Attorney Bar Number: 516163  
Attorney for Plaintiff  
SECURITIES AND EXCHANGE COMMISSION  
New York Regional Office  
3 World Financial Center, Suite 400  
New York, New York 10281-1022  
Telephone: (212) 336-0174  
Fax: (212) 336-1324  
E-mail: StoeltingD @sec.gov

Of Counsel:  
Michael Paley  
Kevin McGrath  
Lara Mehraban  
Linda Arnold

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

---

**SECURITIES AND EXCHANGE COMMISSION,**

*Plaintiff,*

**v.**

**10 Civ. 475 (GLS)**

**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.*

---

**PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANTS TIMOTHY M. MCGINN AND DAVID SMITH**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Paragraph XX of the Order to Show Cause entered April 20, 2010, plaintiff Securities and Exchange Commission requests that defendants Timothy M. McGinn and David L. Smith produce the following documents at the Commission's offices at 3 World Financial Center, Suite 400, New York, N.Y. 10281, on or before May 5, 2010.

**INSTRUCTIONS**

1. Each Request requires the production of each responsive document in its entirety, including all non-identical copies, drafts, and identical copies containing different handwritten notations, without abbreviation, expurgation, or redaction.

2. If any document sought by this Request is withheld under a claim of privilege (including work product), then: (a) identify each such document by stating: (i) the type of document; (ii) the general subject matter of the document; and (iii) such other information as is sufficient to identify the document for a subpoena duces tecum, including, without limitation, the author of the document, the addressee of the document and, where not apparent, the relationship of the author and addressee to one another, the number of pages, its present custodian, and each person to whom the document or substance of the document production was communicated, in whole or in part; and (iii) identify the nature of the privilege and all facts upon which that assertion is based.

3. If any document sought by this Request once was, but no longer is, within a responding party's possession, control or custody, please identify each such document and its present or last known custodian, and state: (a) the reason why the document is not being produced; and (b) the date of the loss, destruction, discarding, theft or other disposal of the document.

4. No part of the document request shall be left unanswered merely because an objection is interposed to another part of the document request.

5. Unless otherwise indicated, this Request seeks documents from January 1, 2003 onward.

6. This Request is ongoing in nature, and the responding party should continue to produce responsive documents as they are found or created on an ongoing basis.

#### **DEFINITIONS**

“Communication” means any transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

“Concerning” means relating to, referring to, describing, evidencing, or constituting.

“Document” is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including without limitation audio files, voicemail messages, electronic spreadsheets and drafts of electronic spreadsheets or other computerized data, including email messages (deleted or otherwise, and whether located at your offices or at your employees’ residences or property, or on central or official databases, your servers and backup servers, local databases, internet-based e-mail servers, individual employees’ hard drives, discs or personal digital assistants), notes, memoranda, work papers, paper files, desk files, draft workpapers). A draft or non-identical copy is a separate document within the meaning of this term.

“FAIN” shall mean First Advisory Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

“FEIN” shall mean First Excelsior Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers,

employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

“FIIN” shall mean First Independent Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

“Immediate Family” shall mean parents, former or current spouse, sibling, children, grandchildren.

“Lynn Smith” shall mean Lynn A. Smith and any person or entity acting on her behalf.

“McGinn” shall mean Timothy M. McGinn and any person or entity acting on his behalf.

“McGinn Smith Entities” or “McGinn Smith Entity” shall mean all of or any of the entities known as McGinn, Smith & Co., Inc., McGinn, Smith Advisors, LLC, and McGinn, Smith Capital Holdings Corp., as well as any entity or trust in which any of them, Smith, and/or McGinn have or had a controlling interest, any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, trustees, attorneys, consultants, representatives and independent contractors of the foregoing entities, including, but not limited to, the entities identified in Exhibit A to the Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, entered on April 20, 2010.

“Smith” shall mean David L. Smith and any person or entity acting on his behalf.

“TAIN” shall mean Third Albany Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the

foregoing entities.

**DOCUMENTS REQUESTED**

1. All documents concerning FAIN.
2. All documents concerning FEIN.
3. All documents concerning FIIN.
4. All documents concerning TAIN.
5. All documents concerning any McGinn Smith Entity.
6. All documents concerning any loans by any McGinn Smith Entity, including but

not limited to the dates, amounts, and terms of all such loans, to, or on behalf of any of the following persons or entities:

- a. McGinn ;
- b. Smith;
- c. Lynn Smith;
- d. Any member of the Immediate Family of McGinn, Smith or Lynn Smith;
- e. Thomas Livingston;
- f. Matthew Rogers; and
- g. any McGinn Smith Entity.

7. All documents concerning any loans to, or on behalf of, any McGinn Smith Entity from, or on behalf of, any of the following persons or entities:

- a. McGinn;
- b. Smith;
- c. Lynn Smith;



- d. any member of the Immediate Family of McGinn, Smith or Lynn Smith;
- e. Thomas Livingston;
- f. Matthew Rogers; and
- g. any McGinn Smith Entity.

8. All documents concerning any transfer of money, stocks, or any other asset from any McGinn Smith Entity to any of the following persons or entities:

- a. McGinn, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, McGinn;
- b. Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Smith;
- c. Lynn Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Lynn Smith;
- d. any member of the Immediate Family of McGinn, Smith or Lynn Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of such Immediate Family member;
- e. Thomas Livingston, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Livingston;
- f. Matthew Rogers, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Rogers; and
- g. any McGinn Smith Entity.

9. All documents concerning any transfer of money, stocks, or any other asset to any McGinn Smith Entity from any of the following persons or entities:

- a. McGinn, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, McGinn;
- b. Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Smith;
- c. Lynn Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Lynn Smith;
- d. any member of the Immediate Family of McGinn, Smith or Lynn Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of such Immediate Family member;
- e. Thomas Livingston, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Livingston;
- f. Matthew Rogers, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Rogers; and
- g. any McGinn Smith Entity.

10. All documents concerning any investment in any McGinn Smith Entity by any of the following persons or entities:

- a. McGinn, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, McGinn;
- b. Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Smith;
- c. Lynn Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Lynn Smith;

d. any member of the Immediate Family of McGinn, Smith or Lynn Smith, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of such Immediate Family member;

e. Thomas Livingston, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Livingston;

f. Matthew Rogers, including, but not limited to, all bank, brokerage or other investment accounts held at any time in the name of, or for the benefit of, Rogers; and

g. any McGinn Smith Entity.

11. All documents concerning any loans, transfers, or investments made by FAIN to or in any McGinn Smith Entity.

12. All documents concerning any loans, transfers, or investments made by FEIN to or in any McGinn Smith Entity.

13. All documents concerning any loans, transfers, or investments made by FIIN to or in any McGinn Smith Entity.

14. All documents concerning any loans, transfers, or investments made by TAIN to or in any McGinn Smith Entity.

15. All documents concerning any loans, transfers, or investments made by any McGinn Smith Entity to or in another McGinn Smith Entity.

16. All documents concerning any transfers of funds to or on behalf of McGinn, including, but not limited to, transfers by FAIN, FEIN, FIIN, TAIN or any McGinn Smith Entity.

17. All documents concerning any transfers of funds to or on behalf of Smith, including, but not limited to, transfers by FAIN, FEIN, FIIN, TAIN or any McGinn Smith Entity.

18. All documents concerning any transfers of funds to or on behalf of Lynn Smith, including, but not limited to, transfers by FAIN, FEIN, FIIN, TAIN or any McGinn Smith Entity.

19. All documents concerning any due diligence performed in connection with each investment made by FAIN, FEIN, FIIN, TAIN or any other McGinn Smith Entity.

20. All documents concerning any communications (including e-mail) concerning FAIN, FEIN, FIIN, TAIN or any McGinn Smith Entity, including, but not limited to, any communications with investors or potential investors and any communications with any entities in which FAIN, FEIN, FIIN, TAIN or any McGinn Smith Entity invested.

21. All documents concerning marketing or promotional materials concerning any securities, notes, stock, or indebtedness issued by FAIN, FEIN, FIIN, TAIN or any McGinn Smith Entity.

22. All documents concerning any tax returns filed by FAIN, FEIN, FIIN, TAIN, or the McGinn Smith Entities for the tax years 2003 through 2009.

23. All documents concerning any tax returns filed by McGinn and/or Smith for the tax years 2003 through 2009.

24. All documents concerning the financial condition of FAIN, FEIN, FIIN, TAIN, and the McGinn Smith Entities, including, but not limited to, any audited financial statements.

25. All documents concerning compensation, payments and bonuses in any form paid or awarded to, or on behalf of McGinn and/or Smith.

26. All documents concerning Mr. Cranberry LLC.

27. Documents sufficient to show all assets, liabilities and property currently held, or purchased and/or sold since January 1, 2000, directly or indirectly, by or for the benefit of McGinn and/or Smith, including without limitation, bank accounts, brokerage accounts,

investments, business interests, loans, lines of credit and real and personal property wherever situated.

28. Documents sufficient to show all money, property, assets and income received from any source by McGinn and/or Smith for the direct or indirect benefit of McGinn and/or Smith, including, but not limited to, fees, commissions, salary, bonuses, options, and interest income.

29. Documents sufficient to identify all bailees, debtors, and other person and entities that currently are holding the assets, funds or property of McGinn and/or Smith.

30. Documents sufficient to show all assets, funds, securities and real or personal property invested by McGinn and/or Smith, or any other person controlled by McGinn and/or Smith, and the disposition of such assets, funds, securities real or personal property.

31. All documents concerning any services or other consideration provided by Lynn Smith to any McGinn Smith Entity.

32. All documents concerning any services or other consideration provided by John Faso to any McGinn Smith Entity.

33. All documents concerning any services or other consideration provided by Matthew McGinn to any McGinn Smith Entity.

34. Documents sufficient to identify all email accounts and telephone numbers held by McGinn and/or Smith.

35. All documents concerning any investor complaints against McGinn, Smith or any McGinn Smith Entity.

36. All documents concerning the performance and/or investment income of FAIN, FEIN, FIIN, TAIN and any other McGinn Smith Entity.

37. All documents concerning McGinn's statement to the Financial Industry Regulatory Authority on February 3, 2010, that "these loans [from TDM Cable] were meant to be compensation for not only the early stages of the transaction, but continuing management of the business."

38. All documents concerning Smith's statement to the Financial Industry Regulatory Authority on February 1, 2010, that "all related party investments defined in a credit agreement as 20 percent or more, that either Dave Smith, Tim McGinn, affiliated parties owned, pledged their fees from McGinn Smith Capital Holdings, MS Partners, and MS Advisors to collateralize the loan [to Capital Center Credit Corp.] ...."

39. All documents concerning Smith's statement to the Financial Industry Regulatory Authority on February 1, 2010, that "in fact, there's a substantial amount of money that is accrued to the funds and is being allocated both for guarantees that were in place and also to dollars that were – that we now can – have to use if we want."

40. Documents sufficient to identify all credit cards and debit cards that McGinn and Smith have used since 2003.

41. Documents sufficient to identify all mortgages to which McGinn and/or Smith are parties.

42. Documents sufficient to identify all safe deposit boxes in the name of or under the control of McGinn and/or Smith.

43. Document sufficient to identify all memberships by McGinn and/or Smith in any club and the source of all payments for membership contributions, fees and dues.

44. Document sufficient to identify all cars owned or leased by McGinn and/or Smith and the source of all payments for car loans and leases.

45. Documents sufficient to identify all entities in which McGinn and/or Smith served or currently serve as an officer or director.

46. Documents sufficient to identify McGinn's ownership or other interest in any golf club, golf course or hotel in Waterville, Ireland or elsewhere.

47. All documents concerning the sale or transfer of the property located at 16 Port Huron Road, Niskayuna, N.Y.

48. All documents sufficient to show all compensation or other considerations of value paid or given or transferred to Marlene Brustle by McGinn, Smith or any McGinn Smith Entity.

49. All documents relating to any services provided by Marlene Brustle to any McGinn Smith Entity.

Dated: New York, New York  
April 29, 2010

**s/David Stoelting**  
Attorney Bar Number 516163  
Attorney for Plaintiff  
SECURITIES AND EXCHANGE COMMISSION  
New York Regional Office  
3 World Financial Center, Suite 400  
New York, New York 10281-1022  
Telephone: (212) 336-0174  
Fax: (212) 336-1324  
E-mail: StoeltingD@sec.gov

Of Counsel:  
Michael Paley  
Kevin McGrath  
Lara Mehraban  
Linda Arnold