UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY McGINN,

Case No.: 1:10-CV-457

(GLS/DRH)

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

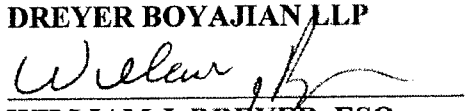
NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the accompanying Memorandum of Law in Support of Defendant David L. Smith's Motion to Modify the July 22, 2010 Preliminary Injunction Order to Release Funds to Pay Attorneys' Fees and Costs, Declarations of David L. Smith and William J. Dreyer and accompanying exhibits submitted in support thereof, defendant David L. Smith

will move this Court before the Honorable David R. Homer, at the United States Courthouse, 445 Broadway, Albany, New York, at a date and time to be determined by the Court, for an order granting the release of $300,000 for Mr. Smith's payment of attorneys' fees and costs in his parallel criminal case.

Dated: February 10, 2012
Albany, New York

DREYER BOYAJIAN LLP



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UNITED STATES DISTRICT COURT
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TIMOTHY M. McGINN, AND DAVID L. SMITH,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY McGINN,

Case No.: 1:10-CV-457

(GLS/DRH)

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DAVID L. SMITH'S MOTION TO MODIFY THE JULY 22, 2010 PRELIMINARY INJUNCTION ORDER TO RELEASE FUNDS TO PAY ATTORNEYS' FEES AND COSTS

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted in support of defendant David L. Smith's motion for a modification of this Court's Preliminary Injunction Order issued on July 22, 2010, freezing all of Mr. Smith's assets and the assets of Lynn Smith, his wife, and assets of the defendant Trust.[1] Mr. Smith is requesting a modification to release restrained funds so that he may advance his attorneys' fees and expenses that will necessarily be incurred in defending his criminal case. Mr. Smith makes this motion pursuant to the Fifth and Sixth Amendments of the United States Constitution.

FACTUAL BACKGROUND

As this Court is aware, a Preliminary Injunction Order (the "Order") was issued on July 22, 2010, freezing all of Mr. Smith's assets and the assets of Lynn Smith and the defendant Trust, which are now under the control of the receiver appointed in this case.[2] Dreyer Decl. ¶ 4, **Ex. A.** Through Mr. Smith's former counsel, he consented to the Order but did not admit or deny the allegations of the Complaint and reserved his right to apply to this Court at any time for a modification of the Order. Dreyer Decl. ¶ 3, **Ex. A.** On January 26, 2012, Mr. Smith and co-defendant Timothy M. McGinn were both indicted on criminal charges that allege the same fraud as this civil case. Dreyer Decl. ¶ 5, **Ex. B.** Both defendants were arraigned on January 27, 2012 and the case is to be tried in United States District Court in Utica, New York in front of the Honorable David N. Hurd. Dreyer Decl. ¶ 6.

[1] This motion does not waive Mr. Smith's right to seek a modification for release for attorneys' fees related to his civil case.

[2] The financial statement of David L. Smith that was provided to the SEC reflects approximately $7 million in family assets.

ARGUMENT

I. Legal Standard of Release for Legal Fees

The Fifth and Sixth Amendments provide Mr. Smith the right to access funds unrelated to the alleged wrongdoing to pay his legal fees and costs. *See S.E.C. v. Coates*, 1994 WL 455558 at *3 (S.D.N.Y. Aug. 23, 1994). "Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, the circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights." *Id.* The Second Circuit in *U.S. v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (*Monsanto IV*), *cert. denied* 112 S.Ct. 382 (1992), concluded that a defendant's constitutional rights, "require an adversary, post-restraint, pre-trial hearing as to probable cause that (a) the defendant committed the crimes that provide a basis for forfeiture, and (b) the properties specified as forfeitable in the indictment are properly forfeitable." 924 F.2d at 1203. Although the *Monsanto* line of cases involved the propriety of an asset freeze in the context of a criminal forfeiture action, the standard cited in *Monsanto IV* has been applied to the propriety of an asset freeze in civil cases affecting a defendant's right to counsel in a parallel criminal case. *See Coates*, 1994 WL 455558; *S.E.C. v. FTC Capital Markets, Inc.*, 2010 WL 1181061 (S.D.N.Y. Apr. 30, 2009); *Commodity Futures Trading Com'n v. Walsh*, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010).

In order for the court to grant a post-restraint, or *Monsanto* hearing, a criminal defendant must make a needs-based showing that the requested frozen funds are necessary to pay his legal defense fees. *See S.E.C. v. Sekhri*, 2000 WL 1036295 (S.D.N.Y. 2000). Once a defendant shows "that without the advancement of the frozen funds, [he] will be unable to pay defense counsel's fees in the criminal action . . . the [Government] is required to demonstrate that the

frozen funds are traceable to fraud."[3] *FTC Capital Markets, Inc.*, 2010 WL 11810616 at *7, *see Coates*, 1994 WL 455558 at *3 (*Monsanto* hearing granted, requiring the SEC to show the extent the defendant's personal assets were traceable to the alleged fraud). Thus the burden shifts to the Government to make a probable cause showing that the restrained funds are traceable to the alleged fraud. *Coates*, 1994 WL 455558 at *4.

II. David L. Smith's Motion for Legal Fees

Mr. Smith requests that this Court allow him to use $300,000 of Smith family assets to pay his attorneys Dreyer Boyajian LLP in order to continue to represent him in his parallel criminal case. Mr. Smith has no other assets with which to pay his attorneys and without a release of a portion of the restrained funds, he will be unable to pay Dreyer Boyajian LLP to continue to represent him. Smith Decl. ¶ 5-7. Among the assets Mr. Smith is asking this Court to consider releasing are Lynn Smith's stock account or liquid cash assets used by the receiver as potential asset sources from which to pay his attorneys' fees and costs. Smith Decl. ¶ 9, Smith **Ex. A**.

The criminal trial is going to be protracted and will involve forty to fifty discs of voluminous discovery, complex tax and securities issues, preparation of numerous witnesses for the defense, and review of prosecution witness testimony. Dreyer Decl. ¶ 10-11. William J. Dreyer, Esq., having defended similar cases in the past, estimates that the approximate legal fees and expenses connected with this criminal case will be in excess of $300,000. Dreyer Decl. ¶ 9. This estimate is based on reasonable and necessary costs for the trial preparation and it is anticipated that the trial will take a minimum of four weeks to complete and almost certainly longer. Dreyer Decl. ¶ 11. A large portion of the funds sought will be used to pay expenses for

[3] Although it is not the burden of the defense to show, it is maintained that the funds requested are not traceable to any of the alleged wrongdoing.

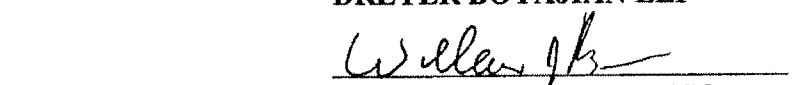
two to three expert witnesses. Dreyer Decl. ¶ 10. Other expenses include costs of photocopying, fees for daily copies of transcripts, other witness fess, and the costs of lodging in Utica for defense attorneys and the client. Dreyer Decl. ¶ 12. As stated in the Declaration of William J. Dreyer, the defense in this case will be complicated and expensive due to the complex nature of the alleged charges in the Indictment, the extensive amount of documents to be reviewed, and the amount of trial preparation and costs that can be expected in a complicated white collar criminal case such as Mr. Smith's. Dreyer Decl. ¶ 9-10.

CONCLUSION

Based on the foregoing and the accompanying declarations of David L. Smith and William J. Dreyer, Mr. Smith respectfully requests that his motion to modify the July 22, 2010 Order to release funds to pay attorneys' fees and costs be granted. Mr. Smith further requests leave to respond to the SEC's opposition papers in lieu of a hearing.

Dated: February 10, 2012
Albany, New York

DREYER BOYAJIAN LLP



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1994 WL 455558
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,

v.

George J. COATES, et al., Defendants.

No. 94 Civ. 5361 (KMW). | Aug. 23, 1994.

Opinion

OPINION & ORDER

KIMBA M. WOOD, District Judge.

***1** On July 22, 1994, this court entered (1) an Amended Order to Show Cause, Temporary Restraining Order, and Other Interim Relief (the "TRO"), including, among other measures, a pre-judgment freeze on the personal assets of defendant George J. Coates ("Coates") and his wife Bernadette Coates; and (2) an Order Appointing a Temporary Receiver, directing the receiver, among other measures, to take possession of the assets of corporate defendant Coates International Ltd. ("CIL"), to operate the business, and otherwise to maintain the status quo. By stipulation of the parties, the TRO has been extended to September 22, 1994, at which time the court intends to conduct a hearing on plaintiff Securities and Exchange Commission's (the "SEC") motion for a preliminary injunction. Presently before the court is Coates' motion for modification of the personal asset freeze to give him access to these funds for payment of living expenses and attorneys' fees. [1] In support of his motion, Coates advances two arguments: 1) releasing funds for payment of his living expenses and attorneys' fees would serve the interests of the allegedly defrauded investors; and 2) certain of the frozen funds should be released because they are not derived from the alleged fraud. For the reasons set forth below, the court hereby denies Coates' motion. The motion is denied, however, without prejudice to Coates' right to reassert it in conjunction with the court's adjudication of the SEC's preliminary injunction motion, as set forth in greater detail below.

DISCUSSION

It is well settled that a district court has authority in a securities fraud case to grant ancillary relief in the form of orders appointing a receiver or temporarily freezing assets. *See S.E.C. v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103, 1105 (2d Cir.1972); *see also S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir.1990). The purpose of such relief is to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial. In considering the scope and propriety of such relief, the court should assess whether it is in fact in the allegedly defrauded investors' interests. *See Manor Nursing Centers*, 458 F.2d at 1105 ("the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief").

Coates asks the court to release frozen personal assets to permit payment of living expenses. In support of this request, Coates argues that such modification of the personal asset freeze will serve the allegedly defrauded investors' interests. He claims that the assets are needed to pay the mortgages on three properties, and thereby avoid foreclosure that would deprive the investors of real property to satisfy a judgment. He argues further that unless he has access to his personal assets for payment of living expenses, he will not have a sufficient incentive to perfect the engine he has developed, thereby making it impossible for CIL to realize its only potential source of income, the sale of licenses to prospective manufacturers of the engine.

***2** I am not persuaded. Significantly, Coates neglects to inform the court that the receiver is currently paying salaries to him, his wife, and his son, who lives with them. The receiver pays a net weekly salary to Mr. Coates of $2,130.57, to his wife, $240.99, and to his son, $581.94. Thus, average monthly net income for the Coates family is approximately $11,814. [2] Coates proposes a monthly budget of $12,931.42, including mortgage payments on the three properties. According to the receiver, the mortgage on one of the three properties is being paid by the receiver directly to the bank. Thus, Coates' proposed budget is improperly inflated by this $2,250 monthly mortgage payment. Reduced by this amount, Coates' monthly budgeted needs total $10,681, well within the bounds of the $11,814 already received monthly by his family. Moreover, as the SEC points out, Coates' budgeted needs include extraordinary items such as expensive hair care, lawn service (alleged to cost $583 a month), pool service, and cable television; and some of the expenses appear to be based on unrepresentatively high bills. *See* SEC's Mem.

in Opposition, at n. 4; *see also,* Exhibits to Certification of George J. Coates in Support of Motion.

I find that the Coates family income is sufficient to satisfy their expenses, including the mortgages allegedly in danger of foreclosure. Furthermore, I cannot accept Coates' position that his family income, which greatly exceeds the average family income in this area, provides an insufficient incentive for him to go to work each day to develop his engine. Even if failure to release Coates' frozen assets would hamper efforts to perfect the Coates engine, I find that any such threat is outweighed by the danger that Coates would unnecessarily waste assets that may rightfully belong to investors. Prior to entering the July 22, 1994 orders, I found that the SEC had made a sufficient showing of (1) violations of the securities laws, including the making of materially false statements in connection with the sale of CIL stock, and the misuse and diversion of investor funds, and (2) a likelihood that these wrongs will be repeated. *See* Transcript of July 22, 1994 Hearing, at 15; Amended Order, at 2–3. My initial findings have been reinforced by the compelling evidence offered by the SEC that on July 22, after Coates' counsel notified him of the court's order freezing Coates' assets but before that order could be served on the relevant financial institutions, Coates' wife, Bernadette Coates, withdrew $25,000 in cash from their joint account. *See* Declaration of Herbert J. Cohen in Opposition to Defendant's Motion, Ex. 12, at 20–21. Coates has offered no evidence to rebut that put forth by the SEC. In light of the foregoing, I find no basis for a finding that the investors' interests would be served by an order modifying the personal asset freeze to give Coates funds for the payment of living expenses, in addition to those his family already receives in the form of salaries. Coates' motion for such an order is hereby denied.

***3** In addition to living expenses, Coates seeks funds with which to retain an attorney to defend him in this action and a related criminal case. As with his living expenses, Coates argues that payment of his attorneys' fees is in the interests of the allegedly defrauded investors, because "[i]f he cannot retain and pay counsel, Coates will not perfect the engine and the licensing agreements will not materialize. CIL will be liquidated and the investors will have no chance of being compensated." Defendant's Mem. at 12. Other than this bald assertion, Coates offers no basis upon which this court could conclude that his legal defense is of critical importance to investors, such that the asset freeze should be modified on that ground, and I decline to do so.

In the alternative, Coates argues that certain of his personal assets should be released, because some of these funds are not derived from the allegedly fraudulent activities. He urges the court to conduct a plenary hearing at which the SEC would have the burden of proving that the frozen assets can be traced to Coates' fraudulent activity. As Coates' request suggests, "[p]arties to litigation usually may spend their resources as they please to retain counsel." *S.E.C. v. Quinn,* 997 F.2d 287, 289 (7th Cir.1993). However, " '[t]heir' resources is a vital qualifier." *Id.* A defendant is not entitled to foot his legal bill with funds that are tainted by his fraud. *Id.* In a criminal case, such restrictions on a defendant's ability to obtain legal counsel do not violate his Sixth Amendment rights. *See United States v. Monsanto,* 491 U.S. 600 (1989); *Caplin & Drysdale v. United States,* 491 U.S. 617 (1989). It follows that a court may impose a pretrial asset freeze in a civil securities fraud case, notwithstanding the defendant's claim that the asset freeze precludes him from obtaining counsel in a related criminal case. *See S.E.C. v. Cherif,* 933 F.2d 403, 416–17 (7th Cir.1991) ("A criminal defendant has 'no Sixth Amendment right to spend another person's money for services rendered by an attorney.' It would be anomalous to hold that a civil litigant has any superior right to counsel than one who stands accused of a crime.") (quoting *Caplin & Drysdale,* 109 S.Ct. at 2652), *cert. denied,* 112 S.Ct. 966 (1992).

Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights. In *Monsanto,* the Supreme Court concluded that under the forfeiture statute covering drug cases, a criminal defendant's assets may be restrained based on a finding of probable cause to believe that the assets are forfeitable. *Monsanto,* 491 U.S., at 615 (*Monsanto III*). The Court did not reach the question of whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed. *Id.* at n. 10. On remand, the Second Circuit sitting en banc concluded that a hearing need not occur before an ex parte restraining order is entered. The court concluded, however, that the Fifth and Sixth Amendments dictate that continuation of such an order, restraining assets otherwise needed to retain counsel, requires an adversary, post-restraint, pretrial hearing as to probable cause that (1) the defendant committed crimes that provide a basis for forfeiture, and (2) the properties specified as forfeitable in the indictment are properly forfeitable. *United States v. Monsanto,* 924 F.2d 1186, 1203 (2d Cir.) (*Monsanto IV*), *cert. denied,* 112 S.Ct. 382 (1991). Although the

Monsanto decisions address the propriety of an asset freeze in the context of drug conspiracy charges, as opposed to the securities fraud alleged here, many of the reasons cited for a hearing in *Monsanto IV* seem equally applicable here. Accordingly, in light of the fact that my order freezing Coates' personal assets may hinder his ability to obtain counsel of choice in the related criminal case, I conclude that that order may not be continued through trial in the absence of an adversary hearing as to whether (1) the SEC has established a *prima facie* case of securities law violations, and (2) the SEC has made a showing that the frozen assets are traceable to fraud. *See Monsanto,* 924 F.2d at 1203; *Quinn,* 997 F.2d at 289 (noting with approval district court's procedure of requiring SEC to make a preliminary showing that assets can be traced to fraud, followed by opportunity for defendant to demonstrate that he possessed assets untainted by the fraud).

***4** The SEC argues that the court's July 22 hearing satisfies any requirement that the court might import from *Monsanto IV. See* SEC's Mem. in Opposition, at 13–15. At the July 22 hearing, I entered the TRO on the basis of the SEC's submission, containing substantial evidence that Coates had committed securities fraud, and that he had diverted funds obtained through this fraud to personal use. *See* Declaration of Herbert J. Cohen in Support of Plaintiff's Application for a Temporary Restraining Order. Coates has offered no evidence to rebut my preliminary findings, and his wife's apparent disregard for my July 22 order lends some support to those findings. However, the proceedings to date have probably not fully satisfied the requirements suggested by *Monsanto IV.* The July 22 hearing was limited to brief argument during two breaks I had during the trial of another case. Counsel to Coates, though present, had received copies of the SEC's moving papers only hours before the hearing. Under these circumstances, I do not think that these proceedings suffice to safeguard the Fifth and Sixth Amendment rights at issue. Accordingly, while I find it appropriate on the basis of the record before me to deny Coates' motion to modify the personal asset freeze at this time, [3] I will revisit the question of whether any of his personal assets should be available to him for purposes of retaining counsel in this case and the related criminal case. A hearing on the preliminary injunction motion is currently scheduled for a hearing on September 22, 1994, at 3:00 p.m. The parties should be prepared to address whether the SEC has made out a *prima facie* case, and to present evidence (prior to the hearing in the form of briefs and supporting affidavits, and at the hearing in the form of live testimony) regarding the extent to which Coates' personal assets are traceable to the alleged fraud. The SEC's submission on this issue shall be served and filed on or before September 12 at 5:00 p.m.; Coates' response shall be served and filed on or before September 21, at 12:00 p.m. Courtesy copies of all submissions must be delivered to chambers.

CONCLUSION

As set forth above, Coates' motion for modification of the order freezing his personal assets for payment of living expenses and attorneys' fees is hereby denied. I find that the salaries currently paid to Coates and his family are sufficient to pay their reasonable living expenses, and that alteration of the asset freeze for payment of these expenses and attorneys' fees would not serve the interests of the allegedly defrauded investors. Coates' motion for modification of the asset freeze is specifically denied without prejudice to his ability to reassert his claim that the frozen assets are not traceable to the alleged fraud, upon a more complete record in conjunction with the court's adjudication of the preliminary injunction motion.

SO ORDERED.

Footnotes

1 The receiver is responsible for managing only corporate assets. Thus, references in Coates' motion papers to the receiver paying these expenses led the SEC and the receiver to believe that Coates seeks payment of these expenses out of CIL corporate assets. In a supplemental letter to the court, Coates has clarified that he seeks access to only his personal assets. He explains that he referred in his motion papers to the receiver "paying" his expenses only to suggest that the receiver could act as a neutral party for the purposes of authorizing the payment of legal fees and living expenses. *See* Letter of William Wolf to the Court, August 11, 1994.

2 This estimate does not include rental income that the SEC estimates at $1,500. *See* SEC's Mem. in Opposition, at 6.

3 *See Manor Nursing Centers, Inc.*, 458 F.2d at 1105 ("[A]t the time the court's order was entered, a great deal of uncertainty existed with respect to the total amount of proceeds received and their location. Appellants' failure to present the evidence to remove this uncertainty warranted a measure designed to preserve the status quo while the court could obtain an accurate picture of the whereabouts of the proceeds of the public offering.").

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2010 WL 882875
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

COMMODITY FUTURES TRADING COMMISSION, Plaintiff,
v.
Stephen WALSH, Paul Greenwood, Westridge Capital Management, Inc., WG Trading Investors, L.P., Wgia, LLC, Defendants,
and
Westridge Capital Management Enhancement Funds Inc, WG Trading Company, LP, WGI LLC, K & L Investments, and Janet Walsh, Relief Defendants.
Securities and Exchange Commission, Plaintiff,
v.
WG Trading Investors, L.P., WG Trading Company, Limited Partnership, Westridge Capital Management, Inc., Paul Greenwood and Stephen Walsh, Defendants,
and
Robin Greenwood and Janet Walsh, Relief Defendants.
United State of America,
v.
Paul Greenwood, and Stephen Walsh, Defendants.

Nos. 09 CV 1749(GBD), 09 CV 1750(GBD), 09 CR 722(MGC). | March 9, 2010.

Attorneys and Law Firms

Frederick P. Hafetz, Tracy E. Sivitz, for Defendant Paul Greenwood.

Glenn C. Colton, Mark A. Flessner, for Defendant Stephen Walsh.
John J. O'Donnell Jr., Marissa Mole, Assistant United States Attorneys.

Opinion

Memorandum Opinion and Order

GEORGE B. DANIELS, District Judge, MIRIAM GOLDMAN CEDARBAUM, District Judge.

***1** On February 24, 2009, the United States Attorney's Office filed a criminal complaint against Defendants Stephen Walsh and Paul Greenwood charging them with conspiracy, securities fraud, and wire fraud. [1] One day later, on February 25, 2009, the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") filed civil actions against Defendants Greenwood, Walsh, and other entities, alleging essentially the same fraudulent conduct from 1996 to February 2009. [2] At that time, Judge Daniels issued a restraining order freezing the assets of all of the defendants, including Greenwood and Walsh.

On November 25, 2009, Greenwood filed a motion in the criminal case requesting that the court allow him to pay attorneys' fees with $1 million worth of certain frozen assets, which he claimed were purchased before the commencement of the criminal conduct charged against him. Greenwood alleges that antiques appraised at $1,127,725 and Steiff collectibles valued at $659,946, that were purchased before 1996, are untainted assets and should be unfrozen and used to pay attorneys' fees.

On December 22, 2009, Walsh filed a similar motion. Walsh alleges that his residence at 7 Half Moon Lane, Sands Point, New York, was purchased in 1999 with proceeds from the sale of another property which he purchased prior to the time period of the alleged fraud. Walsh alleges that he and his wife purchased the original property located at 38 Arden Lane, Sands Point, New York in 1983 for $900,000. In 1999, the Walshes sold 38 Arden Lane for approximately $4,500,000 and used $3,150,000 to purchase 7 Half Moon Lane in cash. The home at 7 Half Moon Lane is owned individually by Defendant Walsh as a result of their divorce settlement. In 2007, a real estate broker for Sands Point represented that 7 Half Moon Lane could sell for between $7,000,000 and $10,000,000. On February 4, 2010, Defendants' motions were argued before Judge Daniels and Judge Cedarbaum.

The motions of Defendants Walsh and Greenwood are granted to the extent that Greenwood's collectibles and Walsh's home at 7 Half Moon Lane may be sold, and Defendants may utilize a portion of the proceeds of the sales to pay for the lawyers of their choice with untainted funds. A hearing will be scheduled for Wednesday, April 21, 2010 at 10:00am, in Courtroom 14A, at which the Government will

have the opportunity to present evidence of probable cause to believe that the funds sought for attorneys' fees are tainted and, if contested by the Defendants, probable cause for the criminal charges in the Indictment.

Legal Standard and Analysis

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has noted that "an element of [the Sixth Amendment] right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez–Lopez,* 548 U.S. 140, 144 (2006). This right, however, has its limits [3] and does not include the use of other people's money to cover a defendant's legal fees. *See S.E.C. v. Cherif,* 933 F.2d 403, 416–17 (7th Cir.1991) ("A criminal defendant has 'no Sixth Amendment right to spend another person's money for services rendered by an attorney.").

***2** In the present case, Defendants Greenwood and Walsh argue that the Sixth Amendment guarantees them the right to counsel of their choice, and that the law permits them to use untainted funds to pay their legal fees and costs. Relying primarily on *United States v. Monsanto,* 924 F.2d 1186, 1203 (2d Cir.) and *S.E.C. v. Coates,* No. 94 Civ. 5361(KMW), 1994 WL 455558 (S.D.N.Y. Aug. 23, 1994), Walsh argues that this court should schedule a hearing at which the Government would be required to demonstrate probable cause that Walsh committed the crimes charged and that the purchase of his home at 7 Half Moon Lane is traceable to proceeds of the crimes charged against him. [4] Greenwood argues that no such hearing is required as to his assets since undisputed evidence establishes that his antiques and collectibles were acquired prior to his alleged fraudulent misconduct.

The Government argues that the asset freeze orders do not violate Defendants' Sixth Amendment rights. The Government contends that Defendants' reliance on *Monsanto* and *Coates* is misplaced since *Monsanto* arose in the context of a criminal asset freeze, and other courts in the civil context have refused to release funds when frozen assets were tainted or where they were insufficient for restitution and disgorgement remedies. The Government further contends that Defendants have been accorded the due process contemplated in those decisions.

In *Monsanto,* the Supreme Court concluded that under the forfeiture statute covering drug cases, "assets in a defendant's possession may be restrained ... on a finding of probable cause to believe that the assets are forfeitable." *Monsanto,* 491 U.S ., at 615 (Monsanto III). On remand, the Second Circuit considered whether the Fifth and Sixth Amendments "require an adversary post-restraint, pretrial hearing in order to continue a restraint ordered ex parte." 924 F.2d 1186, 1188 (2d Cir.) ("Monsanto IV"). The Second Circuit concluded that the Fifth and Sixth Amendments dictate that continuation of an order restraining assets otherwise needed to retain counsel, requires an adversary, post-restraint, pretrial hearing as to probable cause that: "(a) the defendant committed crimes that provide a basis for forfeiture, and (b) the properties specified as forfeitable in the indictment are properly forfeitable." *United States v. Monsanto,* 924 F.2d 1186, 1203 (2d Cir.), cert. denied, 112 S.Ct. 382 (1991).

In *Coates,* the defendant in a civil suit who was also the subject of a parallel criminal prosecution moved the court to release frozen personal assets in order to retain an attorney. 1994 WL 455558, at *3. Relying on *Monsanto,* the defendant in *Coates* urged the court to conduct a plenary hearing at which the SEC would have the burden of proving that the frozen assets can be traced to the defendant's fraudulent activity. *Id.* The SEC argued that the hearing on the restraining order satisfied any requirements from *Monsanto. Id.* at 4. In addressing the applicability of the *Monsanto* cases, the court explained that while those decisions address the propriety of an asset freeze in the context of forfeiture in a drug conspiracy case, many of the reasons cited for a hearing in *Monsanto IV* seem equally applicable to the propriety of an asset freeze in a civil case affecting a defendant's right to counsel in a parallel criminal case.

***3** In its analysis, the court explained that "[a]lthough a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights." *Id.* at 3. Finding that the proceedings had "probably not fully satisfied the requirements suggested by Monsanto," the court scheduled a hearing at which the parties would address whether the Government had made out a prima facie case, and to present evidence regarding the extent to which the defendant's personal assets could be traced to the alleged fraud. *Id.* at 4.

As in *Coates,* the present action involves asset freeze orders in civil actions, with Defendants also being tried in a parallel

criminal proceeding. These unique circumstances require the court to pay particular attention to the Defendants' Fifth and Sixth Amendment rights. The Government has failed to cite any case law which stands for the proposition that a defendant is not entitled to use untainted funds, frozen in a civil action, in order to pay legal fees for his counsel of choice in a parallel criminal action. Moreover, the Government has yet to proffer evidence that demonstrates probable cause to believe that Walsh's home at 7 Half Moon Lane and Greenwood's antiques and collectibles are tainted by the alleged fraud. Since continuation of the freezing orders could hinder Defendants' ability to maintain counsel of choice in the criminal case, a *Monsanto* type hearing is necessary.

Defendants Walsh and Greenwood's motions are granted to the extent that Defendants are entitled to pay for lawyers of their choice with untainted funds. A probable cause hearing will be scheduled for the Government to demonstrate to what extent, if any, Greenwood's antiques and collectibles, and Walsh's home at 7 Half Moon Lane are tainted. The Government shall indicate by April 5, 2010, the nature of the evidence and the extent to which it plans to demonstrate that the assets in question are tainted. Money shall be available to Greenwood up to the requested amount of $1,000,000, and to Walsh up to $900,000 (the 1983 purchase price of the home at 38 Arden Lane) for payment of reasonable attorneys' fees incurred in the criminal case, if the Government cannot meet its burden of demonstrating that there is probable cause to believe that those funds are tainted by fraud. Invoices for attorneys' fees should be submitted as incurred, and limited to fees and expenses related solely to representation in the criminal action. The Receiver, with the cooperation of Defendants' attorneys, should immediately begin the liquidation process of Greenwood's antiques and collectibles, and Walsh's home at 7 Half Moon Lane.

SO ORDERED:

Footnotes

1 *See United State of America v. Paul Greenwood and Stephen Walsh,* 09 cr 722(MGC).

2 *See Commodity Futures Trading Commission v. Stephen Walsh, et. al.,* 09 cv 1749(GBD); *Securities and Exchange Commission v. WG Trading Investors, L.P.,* 09 cv 1750(GBD).

3 *See Morris v. Slappy,* 461 U.S. 1, 13–14 (1983) ("The essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."); *United States v. Cronic,* 466 U.S. 648, 657, n. 21 (1984) ("[T]he appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.").

4 In other parts of his motion, Walsh claims that the evidence clearly establishes that the home at 7 Half Moon Lane is untainted and untraceable to the alleged fraud.

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2010 WL 2652405
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

SECURITIES and EXCHANGE COMMISSION, Plaintiff,
v.
FTC CAPITAL MARKETS, INC., FTC Emerging Markets, Inc., also d/b/a FTC Group, Guillermo David Clamens, and Lina Lopez a/k/a Nazly Cucunuba Lopez, Defendants.

No. 09 Civ. 4755(PGG). | June 30, 2010.

West KeySummary

1 **Securities Regulation**
Preliminary Injunction

Arrestee was entitled to frozen funds to pay for her defense counsel in violation of anti-fraud provisions of federal securities laws case. Without advancement of funds, arrestee would not have been able to pay defense counsel's fees in the criminal action. Further, the commission failed to show that the frozen funds were in fact traceable to fraud. U.S.C.A. Const.Amend. 6.

Opinion

MEMORANDUM OPINION & ORDER

PAUL G. GARDEPHE, District Judge.

***1** The Securities and Exchange Commission brings this action against Defendants FTC Capital Markets, Inc. ("FTC"), FTC Emerging Markets, Inc., Guillermo David Clamens and Lina Lopez for violations of the anti-fraud provisions of the federal securities laws. Lopez moves to modify the June 29, 2009 preliminary injunction to permit FTC to advance her legal fees in the parallel criminal action brought against her. For the reasons stated below, Lopez's motion is GRANTED.

BACKGROUND

FTC Capital Markets is a broker-dealer "transacting in debt and equity securities on behalf of mostly South American institutional customers ..." (Cmplt.¶ 11) FTC Emerging Markets is a Panamanian affiliate of FTC Capital Markets. (Cmplt.¶ 12) Clamens is the chairman and former chief executive officer of FTC Capital Markets and the president of FTC Emerging Markets. (Cmplt.¶¶ 11–12) Lopez is an employee of FTC. (Cmplt.¶ 14) Citgo Petroleum Corporation and PDV Holding held brokerage accounts with FTC Capital Markets. (Cmplt.¶ 19)

The Complaint alleges that "from April through November 2008, defendants Clamens and Lopez caused FTC to make numerous unauthorized transactions in Citgo's and PDV's FTC Accounts." (Cmplt.¶ 23) Lopez is also alleged to have sent false account statements to Citgo and PDV. (Cmplt.¶ 25) Beginning in August 2008, Clamens and Lopez "attempted to hide their fraudulent conduct by engaging in additional unauthorized transactions." (Cmplt.¶¶ 27–33)

The Complaint also charges that FTC Emerging Markets sent false account statements to a Venezuelan bank indicating that it held credit linked notes that had, in reality, already been retired. (Cmplt.¶¶ 34–36) Clamens and Lopez allegedly perpetrated a sort of Ponzi scheme, engaging in unauthorized trading in the accounts belonging to Citgo and PDV in order to "conceal their fraud upon the Venezuelan bank concerning the bank's purported purchase of the credit linked notes." (Cmplt.¶¶ 38–39)

As a result of the alleged fraud, approximately $22 million belonging to Citgo and PDV was not returned to their accounts. (Cmplt.¶ 32)

The Complaint further alleges that FTC Emerging Markets acted as a broker-dealer from at least January 2008 until the initiation of this action, despite not being registered as a broker-dealer with the Commission. (Cmplt.¶¶ 40–43)

This action was filed on May 20, 2009. The Commission claims that (1) Defendants violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b–5 (Cmplt.¶¶ 44–47); (2) FTC Capital Markets, Inc. violated Section 15(c) of the Exchange Act (Cmplt.¶¶ 48–51); (3) FTC Emerging Markets violated Section 15(a) of the Exchange Act (Cmplt.¶¶ 52–54); (4) Clamens and Lopez aided and abetted FTC Capital Markets' violations of

Section 15(c) of the Exchange Act (Cmplt.¶¶ 55–57); and (5) Clamens and Lopez aided and abetted FTC Emerging Markets' violations of Section 15(a) of the Exchange Act (Cmplt.¶¶ 58–60).

*2 On June 17, 2009, Judge Colleen McMahon, sitting in Part I, entered a temporary restraining order freezing the assets of Defendants Clamens, FTC Capital Markets, and FTC Emerging Markets. (Dkt. No. 4) The TRO froze sixty-five accounts, including accounts held by Clamens, FTC Capital Markets, FTC Emerging Markets, FTC Holdings, FTC Group Caracas, FTC Group Sociedad de Corretaje de Titutlos Valores, FTC London UK, and FTC International. (*Id.*, Ex. A) The TRO also froze accounts in the name of Forum Trading Corporation and Prime and Global Securities and restrained Clamens' interest in a New York City apartment. (*Id.*)

On June 29, 2009, this Court entered a stipulation and order converting the TRO to a preliminary injunction and directing that,

> pending final disposition of this action, Defendants, and their agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of such Order by personal 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, business interests or other property of any kind whatsoever) of, held by, or under the control of Defendants....

(Dkt. No. 12)

I. *THE CRIMINAL CASE AGAINST LOPEZ*

On May 18, 2009, the Government unsealed a criminal complaint against Lopez and Clamens and arrested Lopez in Miami, where she resides. (Chaudhry Decl. ¶ 3, Ex. 1) Clamens was not apprehended and has not appeared to answer the charges against him.

Two days after Lopez's arrest, her attorney, Priya Chaudhry, spoke to William Brodsky, an attorney representing FTC Capital Markets. (Chaudhry Decl. ¶ 5) Brodsky "stated that the company will pay and advance Ms. Lopez' [s] legal fees." (*Id.*) That same day, Chaudhry sent a letter to Jorge Piedrahita, the CEO of FTC Capital Markets, to memorialize their agreement that FTC Capital Markets would indeed pay Lopez's legal fees in the criminal action. (Chaudhry Decl. ¶ 5, Ex. 3) This letter—signed by Piedrahita—"set forth the understanding between [Chaudhry and Piedrahita] of the legal services to be performed, the basis on which [Chaudhry] will be paid for those services, and the terms and conditions of [Chaudhry's] representation." (*Id.* at 1) The letter further provided that FTC Capital Markets would pay Lopez a retainer of $25,000 and would continue to pay ongoing legal fees in Lopez's case. (*Id.* at 2) FTC Capital Markets paid Chaudhry $25,000 on May 21, 2009. (Chaudhry Decl. ¶ 6)

On May 27, 2009, Chaudhry met with Brodsky and Piedrahita, among others, to discuss her ongoing representation of Lopez in the criminal action. (Chaudhry Decl. ¶ 7) At that time, FTC Capital Markets agreed to advance further legal fees to Chaudhry. (*Id.*) Following that meeting, Brodsky informed Chaudhry that FTC Capital Markets would advance her an additional $100,000 to pay Lopez's legal fees. (*Id.*) However, on June 17, 2009–before FTC Capital Markets made this payment—its assets were frozen by Judge McMahon's TRO. (Chaudhry Decl. ¶¶ 7–8)

*3 On October 16, 2009, the Government filed an Information in *United States v. Lopez* (09 Cr. 985) (RPP) charging Lopez with one count of conspiracy to commit securities fraud and wire fraud and one count of securities fraud. Lopez pled guilty to both counts pursuant to a cooperation agreement with the Government. (Chaudhry Decl. ¶ 18, Ex. 10) A control date for Lopez's sentencing has been set for November 16, 2010. *United States v. Lopez* (09 Cr. 985), Oct. 16, 2009 Minute Entry for proceedings before Judge Robert P. Patterson.

Chaudhry represents that as of November 12, 2009, she has incurred $101,745 in fees in connection with her representation of Lopez in the criminal action. (Chaudhry Decl. ¶ 19)

DISCUSSION

"It is well settled that a district court has authority in a securities fraud case to grant ancillary relief in the form of orders appointing a receiver or temporarily freezing assets." *SEC v. Coates*, No. 94 Civ. 5361, 1994 WL 455558, at *1 (S.D.N.Y. Aug. 23, 1994) (citing *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103, 1105 (2d Cir.1972); *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir.1990)). "The purpose of such relief is to facilitate enforcement of any

disgorgement remedy that might be ordered in the event a violation is established at trial." *Coates,* No. 94 Civ. 5361, 1994 WL 455558, at *1. When a court weighs the imposition or terms of an asset freeze, "the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief." *Manor Nursing Centers,* 458 F.2d at 1106.

Here, Lopez seeks to modify the June 29, 2009 asset freeze to release $100,000 in order to allow FTC to advance her defense costs in the criminal action. Lopez contends that she has a Sixth Amendment right to advancement of fees in connection with the criminal action. [1]

The Sixth Amendment right to counsel "guarantees more than the mere presence of a lawyer at a criminal trial. It protects, among other things, an individual's right to choose the lawyer or lawyers he or she desires...." *United States v. Stein,* 435 F.Supp.2d 330, 366 (S.D.N.Y.2006) (citing *Wheat v. United States,* 486 U.S. 153, 164, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)), *aff'd,* 541 F.3d 130, 151 (2d Cir.2008). However, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice." *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624–26, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); *see also SEC v. Coates,* No. 94 Civ. 5361(KWM), 1994 WL 455558, at *3 (S.D.N.Y. Aug.23, 1994) ("A defendant is not entitled to foot his legal bill with funds that are tainted by his fraud. In a criminal case, such restrictions on a defendant's ability to obtain legal counsel do not violate his Sixth Amendment rights.") (citing *United States v. Monsanto,* 491 U.S. 600, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989); *Caplin & Drysdale, Chartered,* 491 U.S. 617, 109 S.Ct. 2667, 105 L.Ed.2d 528 (1989)).

***4** "Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights." *Coates,* 1994 WL 455558, at *3.

Here, in order to justify the release of frozen funds, Lopez must demonstrate that she has a Sixth Amendment right to these frozen funds.

I. *LOPEZ HAS A PROPERTY INTEREST IN THE FROZEN FUNDS*

A. *The Frozen Funds Are Not "Another Person's Money"*

The Commission contends that Lopez has no property interest in the frozen funds because the funds are "another person's money" and "are not even held in her name." (Pltf.Br.13–14)

In *United States v. Stein,* 435 F.Supp.2d 330 (S.D.N.Y.2006), the court addressed the criminal defendants' claim that the Government had violated their Sixth Amendment rights by pressuring their employer, the accounting firm KPMG, to stop advancing their defense costs. The court found that the defendants had a reasonable expectation that KPMG would advance fees, giving them a property interest with which the Government could not interfere:

> *Caplin & Drysdale* recognized that the Sixth Amendment does protect a defendant's right to spend his own money on a defense. Here, the KPMG Defendants had at least an expectation that their expenses in defending any claims or charges brought against them by reason of their employment by KPMG would be paid by the firm. The law protects such interests against unjustified and improper interference. Thus, both the expectation and any benefits that would have flowed from that expectation—the legal fees at issue now—were, in every material sense, their property, not that of a third party. The government's contention that the defendants seek to spend "other people's money" is thus incorrect.

Stein, 435 F.Supp.2d at 367, *aff'd,* 541 F.3d at 155–56.

The Commission contends that despite *Stein'* s holding, Lopez cannot claim that FTC's frozen funds belong to her. The Commission argues that *Stein'* s focus is on the Government's "unjustified and improper interference" with KPMG's practice of advancing defense costs, and that it was this interference that violated the defendants' Sixth Amendment rights. [2] 435 F.Supp.2d at 353, 365–73. Lopez has conceded that no such interference occurred here. [3]

The reasoning of *Stein* is nonetheless directly applicable here. The *Stein* court engaged in a two-step analysis. First, the court found that the defendants had a property interest in the advancement of fees and did not, in fact, "seek to spend 'other people's money.' " *Stein,* 435 F.Supp.2d at 367. Next, the court concluded that the Government had interfered with the defendants' property interest and thereby impinged on their Sixth Amendment rights. *Id.* at 367–73. The Commission is incorrect in suggesting that the *Stein* court did not hold that the defendants had a property interest in the advancement of fees. The *Stein* court's conclusion that the Government had

interfered with the defendants' Sixth Amendment rights was premised on its finding that the defendants had a property interest in the advancement of fees. Here, Lopez, like the *Stein* defendants, has a Sixth Amendment claim to the frozen funds to the extent that she had a valid expectation that her defense costs in the criminal action would be advanced. *See Stein,* 435 F.Supp.2d at 367.

B. *Lopez Had A Valid Expectation That Her Costs Would Be Advanced*

***5** "Although the right to indemnification and advancement are correlative, they are separate and distinct legal actions. The right to advancement is not dependent on the right to indemnification."[4] *Homestore, Inc. v. Tafeen,* 888 A.2d 204, 212 (Del.2005) Advancement is "essentially simply a decision to advance credit," *Advanced Mining Sys., Inc. v. Fricke,* 623 A.2d 82, 84 (Del.Ch.1992), and "provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." *Homestore,* 888 A.2d at 211.

Under Delaware law, advancement is permissive, and "expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents *may* be so paid upon such terms and conditions, if any, as the corporation deems appropriate." 8 Del. C. § 145(e) (emphasis added).

FTC's by-laws are silent on the issue of advancement of legal fees. (Chaudhry Decl., Ex. 12) Lopez, however, claims a right to permissive advancement based on FTC's repeated representations that it intended to advance her legal fees, as well as FTC's initial $25,000 payment to her lawyer. *See* Chaudhry Decl. ¶¶ 5–8, Ex. 3.

The Commission argues that "FTC does not have unbridled discretion to authorize or make such advance payments. To the contrary, Lopez is not entitled to advancement because such payment by FTC does not, and cannot, constitute 'appropriate corporate action' under Delaware law." (Pltf.Br.21) (citing *In re Adelphia Communs. Corp.,* 323 B.R. at 354). In seeking to have this Court substitute its judgment for that of FTC's management, the Commission contends that "Clamens owns and controls the FTC Defendant entities.... Thus, any FTC decision to advance Lopez legal fees was Clamens' decision." (Pltf.Br.22) The Commission argues that because Clamens conspired with Lopez to commit the fraud at issue in this action and the related criminal action, his alleged decision to advance Lopez legal fees should be rejected.[5] (*Id.*)

The Commission's argument, however, ignores the fact that FTC has a chief executive officer, Jorge Piedrahita, who has continued to conduct FTC's business and to make decisions on behalf of the company. Indeed, it was Piedrahita who signed the agreement promising Lopez that her legal fees would be advanced. The Commission has acknowledged Piedrahita's operational role at the company; it stipulated that he should receive a $15,000 payment from frozen funds in connection with his work winding down the affairs of the company. *See* Aug. 7, 2009 Order (Dkt. No. 19); Jan. 19, 2010 Pltf. Ltr. 2–3.

Throughout this litigation, the Commission has honored the FTC corporate form, entering into ten separate stipulations with FTC to modify the asset freeze. *See* Dkt. Nos. 13, 18, 19, 21, 23, 26, 27, 37, 42, 43. The Commission has likewise negotiated proposed consent judgments with FTC Capital Markets and FTC Emerging Markets; these agreements were executed by Clamens on behalf of those entities.

***6** Although the Commission could have sought the appointment of a receiver or a trustee "to prevent the dissipation of [FTC's] assets pending further action by the court," *see SEC v. American Bd. of Trade, Inc.,* 830 F.2d 431, 436 (2d Cir.1987), and to "help preserve the status quo," *Manor Nursing Centers, Inc.,* 458 F.2d at 1105, the Commission has not sought to displace Piedrahita and Clamens or to prevent FTC from making business decisions. Indeed, the Commission has acknowledged that it "typically requests the appointment of an independent receiver ... [but] has refrained from doing so here." (Chaudhry Decl., Ex. 7 at 4)

The Commission nonetheless asks this Court to act as though a receiver has been appointed in weighing Lopez's right to the permissive advancement of fees and expenses FTC has promised. *See id.* ("[A]ny such receiver presumably would not (and could not) agree to advance Lopez's fees, and the Court should not permit an essentially defunct FTC to do so merely because the scope of this case did not warrant the appointment of a receiver.") The appointment of a receiver is not automatic upon the Commission's request, however, and, in any event, there was no such request here. *See Manor Nursing Centers, Inc.,* 458 F.2d at 1105 ("the appointment of trustees should not follow requests by the SEC as a matter of course").

Given that the Commission has permitted FTC's management to retain control over FTC's affairs, this Court will not substitute its judgment concerning the advancement issue for that of FTC's management. The Commission has cited no legal authority demonstrating that this Court may overrule FTC's decision to advance Lopez her defense costs in the criminal action. Accordingly, FTC's promise to Lopez is sufficient to create a valid expectation on her part that her fees and expenses incurred in the criminal action would be advanced.

C. The Commission Has Not Demonstrated that All of the Frozen Funds are Traceable to Fraud

A defendant has no Sixth Amendment right to funds that are the proceeds of his or her alleged fraud, even if those funds are necessary in order to retain the counsel of choice. *See Caplin & Drysdale, Chartered,* 491 U.S. 617; *Monsanto,* 491 U.S. 600, 109 S.Ct. 2657, 105 L.Ed.2d 512. The standard that should be applied in determining whether funds are the proceeds of fraud, however, is not entirely clear. In *United States v. Monsanto,* 924 F.2d 1186 (2d Cir.1991), the Second Circuit held that where assets necessary for a defendant's defense are restrained pursuant to criminal forfeiture laws, courts must find that the funds would be properly forfeitable upon conviction in order to justify restraint. *Id.* at 1203. In *SEC v. Coates,* the court, applying *Monsanto,* concluded that an asset freeze imposed in a securities fraud case could not be continued without, *inter alia,* "a showing that the frozen assets are *traceable* to fraud." 1994 WL 455558, at *3 (emphasis added).

***7** The Commission, however, urges this Court to adopt a more restrictive standard for the release of frozen funds to pay attorney's fees in a criminal action: whether or not the funds are *tainted* by fraud. *See* Jan. 11 Tr. 19:9–19:22; Pltf. Br. 14 (citing *Stein,* 2009 WL 1181061, at *1; *Lauer,* 445 F.Supp.2d at 1369–70; *Current Fin. Servs.,* 62 F.Supp.2d at 68). This is the applicable standard when a defendant seeks to use his or her own frozen funds to mount a defense in an SEC civil enforcement action. *Id.* Under this standard, defendants have been barred from utilizing frozen assets to pay legal fees associated with representation in a civil action when it is not clear "whether the frozen assets exceed the SEC's request for damages" or disgorgement. *See SEC v. Bremont,* 954 F.Supp. 726, 733 (S.D.N.Y.1997) (" 'Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime.' ") (quoting *SEC v. Quinn,* 997 F.2d 287, 289 (7th Cir.1993)).

In *SEC v. Sekhri,* No. 98 Civ. 2320(RPP), 2000 WL 1036295 (S.D.N.Y. July 26, 2000), the court adopted a similar standard where a defendant sought the release of frozen funds to pay attorney's fees in a related criminal action. The Court concluded that "a freeze order need not be limited only to funds that can be directly traced to [a] defendant's illegal activity" but may include any funds appropriately subject to disgorgement. *Id.* at *1. The *Sekhri* court had also found, however, that a refusal to lift the freeze would not prevent the defendant "from retaining the counsel of his choice" in the criminal action. *Id.* at *2.

This Court concludes that Lopez's claim to the frozen funds is governed by the standard set forth in *Monsanto* and *Coates.* Lopez has demonstrated—and the Commission does not dispute—that without advancement of the frozen funds, she will be unable to pay defense counsel's fees in the criminal action. *See infra* p. 15. Under such circumstances, the Commission is required to demonstrate that the frozen funds are traceable to fraud. *See Coates,* 1994 WL 455558, at *3 (requiring SEC to make "a showing that the frozen assets are traceable to fraud").

Here, there has been no finding that the frozen funds are traceable to fraud. Indeed, the TRO and the subsequent injunction were merely designed to preserve the status quo; the Court made no finding that the frozen funds were the proceeds of fraud. (Chaudhry Decl., Ex. 4, 5) The Commission conceded as much at oral argument and in its briefing. *See* Chaudhry Decl. ¶ 13; Jan. 11 Tr. 16:12–16:20.

The asset freeze affects sixty-five accounts, including fifteen accounts held by seven FTC-related entities that are not alleged to have participated in the fraud.[6] June 17, 2009 Order, Ex. A (Dkt. No. 4). As of June 17, 2009, the frozen accounts contained $5–6 million. (Kaufman Decl. ¶ 3) The frozen funds are not sufficient to satisfy the approximately $22 million FTC owes to Citgo and PDV. (Cmplt.¶ 32) Were Lopez seeking to use frozen funds to pay her defense costs in a civil action, the fact that potential disgorgement in this case exceeds the amount of money that has been frozen might be sufficient to prevent this Court from releasing the funds. *See Bremont,* 954 F.Supp. at 733. However, Lopez seeks advancement of fees and expenses only in the criminal action against her. While Lopez may not be advanced frozen funds traceable to the fraud she helped to perpetrate, *see Coates,*

1994 WL 455558, at *3, there has been no showing that all of the funds currently restrained are traceable to fraud.

***8** The Commission asserts that all of the frozen funds are the proceeds of fraud because (1) money is fungible; and (2) these assets were all controlled by Clamens. At oral argument, however, the Commission did not contend that it could demonstrate that all of the frozen assets were traceable to fraud:

> It is not traceable in the sense of I can show you that this specific dollar in this specific account was part of that 60 million [the total amount at issue in the fraud, of which $22 million was lost]—or if we can do it, it could be very complicated to do it. We may not be able to do that, but we are alleging—we are showing that all of this money is tainted because it is really all controlled by Mr. Clamens. As a matter of fact, it doesn't make sense to treat one pile of money different from another pile....

(Jan. 11 Tr. 16:14–22). In determining whether funds are the proceeds of fraud or are traceable to fraud, however, it may in fact "make sense to treat one pile of money different[ly] from another pile." The suggestion that Clamens exercised control over the funds in all of these accounts or that funds were transferred from one account to another (Jan. 11 Tr. 15:20–16:22; Kaufman Decl. ¶ 11) does not establish—as the Commission must—that funds held by entities not alleged to have been involved in any wrongdoing are traceable to fraud.

The Commission has also taken inconsistent positions as to priority between compensating victims and paying legal fees. In opposing Lopez's motion for advancement of fees in connection with her criminal case, the Commission has argued that all of the frozen funds must be used to compensate fraud victims. The Commission has entered into proposed consent judgments with Clamens, FTC, and FTC Emerging Markets, however, that provide for payment of $187,500 to the law firm representing those defendants in the civil SEC action. (Feb. 19, 2010 Pltf. Ltr. 2) In other words, the Commission has approved the release of $187,500 to the law firm representing Clamens, the author and principal of the fraud. While the Commission contends that the legal fees were expended "solely for services that were necessary for the marshaling and preservation of frozen assets for future distribution to victims" (Feb. 24, 2010 Pltf. Ltr. 2), the Commission has not provided any support for this assertion, such as the law firm's billing records. The Commission also fails to explain why counsel for Clamens—the primary wrongdoer in this fraud—should receive payment from the very funds the Commission has fought to keep from Lopez when Lopez—instead of refusing to appear in this action—has pled guilty and entered into a cooperation agreement with the Government. While the Commission argues that the victims' rights should prevail when Lopez seeks advancement of fees, it has taken a contrary position as to payment of fees incurred by counsel for the primary wrongdoer.

The Commission has suggested but not demonstrated that the funds held by entities not named in the Complaint are tied to the fraud at issue. Because the Commission has not shown that the funds Lopez seeks are traceable to fraud, it may not deny her advancement of fees for purposes of her criminal defense.

II. *LOPEZ HAS DEMONSTRATED A NEED FOR THE FROZEN FUNDS BUT HAS NOT JUSTIFIED RELEASE OF $100,000*

***9** Although Lopez has demonstrated that she has a Sixth Amendment claim to the frozen funds FTC had promised to advance as payment for her defense costs in the criminal action, courts have also required a showing of need—that is, proof that without the frozen funds, the defendant's Sixth Amendment right to counsel will be infringed upon. *See SEC v. Cobalt Multifamily Investors, I LLC,* No. 06 Civ. 2360(KMW)(MHD), 2007 U.S. Dist. LEXIS 25872, at *10–12 (S.D.N.Y. April 2, 2007); *Sekhri,* 2000 WL 1036295, at *2. Lopez has averred that her current expenses exceed her income and that she and her husband are in the process of declaring bankruptcy. (Chaudhry Decl., Ex. 13 ¶¶ 5–11) Accordingly, Lopez has demonstrated—and the Commission does not dispute—that based on her current income and expenses, she is not capable of paying defense counsel's fees in the criminal action. *See* Chaudhry Decl., Ex. 13.

Lopez seeks the release of $100,000 in frozen funds. Although she asserts that the amount to be advanced is "properly an issue between FTC and Lopez" (Def.Br.15–16), courts in this district have refused to release frozen funds where the amounts already paid to defense counsel, or amounts available from other sources, are sufficient to pay reasonable defense costs. *See Cobalt Multifamily Investors,* 2007 U.S. Dist. LEXIS 25872, at *10–12; *Sekhri,* 2000 WL 1036295, at *2. In *Sekhri,* the court rejected the defendant's request to release $50,000 in frozen funds where each of the two law firms the defendant had retained in the parallel criminal action had already been paid $40,000. The court concluded that the earlier payments did "not appear ... to require augmentation" given that counsel's role

involved merely negotiating a plea agreement and [providing] representation through sentence." *Sekhri,* 2000 WL 1036295, at *2.

The fact that a defendant must demonstrate need before frozen funds will be released, *Cobalt Multifamily Investors, I LLC,* 2007 U.S. Dist. LEXIS 25872, at *10–12, indicates that courts should consider whether the amount requested is truly necessary. Given that the funds released are, in effect, coming out of the pockets of defrauded investors, it is appropriate for the Court to consider whether the funds are necessary to provide a defendant with the counsel of his or her choice.

Here, in seeking the release of $100,000, defense counsel avers that as of November 12, 2009, she has incurred $101,745 in legal fees in the criminal action at a rate of $450 per hour. (Chaudhry Decl. ¶ 19) Defense counsel has already been paid $25,000 by FTC, however, and may have been paid as much as $35,000 by Lopez. (Chaudhry Decl. ¶ 6; Jan. 11 Tr. 31:13–31:18, 32:10–32:14) Accordingly, it appears that counsel may be seeking as much as $160,000 for representing Lopez at her guilty plea and at sentencing.

It is not apparent to this Court that release of $100,000—in addition to the $60,000 that may already have been paid to defense counsel—is necessary to ensure that Lopez will not be deprived of her Sixth Amendment right to counsel. Defense counsel represented Lopez at her guilty plea—to a criminal information filed on the same day as the plea—and will represent Lopez at sentencing. Defense counsel also suggests that Lopez's cooperation with the government will involve "countless hours" of her time, but she fails to explain precisely how that time has been or will be spent. Once a defendant enters into a cooperation agreement with the government, there is often little role for defense counsel prior to sentencing.

***10** A more complete record is necessary before this Court can decide what amount of funds should be released to Lopez for advancement of her legal fees incurred in the criminal action. Lopez is ordered to submit a letter and supporting documentation to this Court providing justification for defense counsel's hourly rate, billing records for the fees defense counsel has incurred to date in the criminal action, and a projection and explanation of future fees that may be incurred. Lopez will make her submission by July 6, 2010. Any response from the Commission is due by July 13, 2010. [7]

CONCLUSION

For the reason stated above, Lopez's motion to modify the June 29, 2009 preliminary injunction to permit FTC to advance her legal fees in connection with *United States v. Lopez* (09 Cr. 985)(RPP) is GRANTED. This Court reserves decision as to the amount to be released.

The Clerk of the Court is directed to terminate the following motion: Docket No. 31.

SO ORDERED.

Footnotes

1 Lopez's application for advancement of legal fees and expenses is limited to those fees and expenses incurred in connection with the criminal action against her. (Jan. 11, 2010 Tr. 12:9–12:22) ("I'm asking for criminal legal fees here, not fees to defend in the civil action."). Many of the cases relied upon by the Commission—and discussed by this Court at oral argument—address motions to unfreeze assets to pay legal fees incurred in defending against SEC civil enforcement actions. These cases employ different standards in weighing claims to frozen assets than those that adjudicate defendants' rights to advancement of legal fees and expenses in criminal cases. *Compare SEC v. Stein,* No. 07 Civ. 3125(GEL), 2009 WL 1181061 (S.D.N.Y. April 30, 2009); *SEC v. Coates,* No. 94 Civ. 5361(KMW), 1994 WL 455558 (S.D.N.Y. Aug.23, 1994).

2 The Commission further notes that "no issue existed in *Stein* regarding the ability of KPMG to pay back fraud victims. Here, by contrast, the Commission sought to freeze the FTC Defendants' assets precisely because they lacked sufficient assets to repay their (and Lopez' [s]) fraud victims." (Pltf.Br.17) Citing case law providing that defendants cannot use their own frozen funds to defend civil enforcement actions unless, *inter alia,* the frozen funds are more than sufficient to pay potential disgorgement, the Commission argues that Lopez's application must be denied. (Pltf.Br.14) The cases cited by the Commission, however, address the use of frozen funds to pay legal fees in civil cases. *See Stein,* 2009 WL 1181061, at *1; *SEC v. Lauer,* 445 F.Supp.2d 1362, 1363, 1369–70 (S.D.Fla.2006); *SEC v. Current Fin. Servs.,* 62 F.Supp.2d 66, 67–68 (D.D.C.1999). Different considerations arise where a defendant's Sixth Amendment right to counsel in a criminal action is at stake. *See, e.g., Current Fin. Servs.,* 62 F.Supp.2d at 67 (noting that the defendant could not claim that asset freeze imposed in SEC action violated his constitutional right to counsel in the SEC action because "the Sixth Amendment provides defendants the right to counsel only in criminal, not civil, proceedings").

3 At oral argument, in response to a question from this Court as to whether there is "any evidence here" of government interference, Lopez's counsel responded, "I think that to answer that question, that, no, the government is not interfering." (Jan. 11, 2010 Tr. 6:16–6:23)

4 FTC is a Delaware corporation. (Chaudhry Decl. ¶ 21, Ex. 12) Accordingly, Delaware law governs Lopez's entitlement to advancement of fees and expenses.

5 The Commission has, however, asked this Court to approve proposed consent judgments that would release $187,500 in frozen funds to pay the fees of the law firm representing Clamens, FTC, and FTC Emerging Markets—the architect of and the vehicles for the alleged fraud. *See infra* pp. 14–15.

6 The FTC-related entities whose accounts have been frozen but who are not named in the Complaint are: FTC Holdings; FTC Group Caracas; FTC Group Sociedad de Corretaje de Titutlos Valores; FTC London UK; FTC International; Forum Trading Corporation; and Prime Global Securities. June 17, 2009 Order, Ex. A (Dkt. No. 4).

7 Once the amount to be released is determined, the Court will consider the question of what account(s) should be tapped to make the payment.

End of Document

2000 WL 1036295
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
Arjun SEKHRI, et al., Defendants.

No. 98 CIV. 2320 RPP. | July 26, 2000.

Attorneys and Law Firms

U.S. Securities and Exchange Commission, Washington, D.C., By Stephen J. Crimmins, Counsel for Plaintiff.

Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York, By Robert J. Anello, Sara Mogulescu, Counsel for Defendant.

Opinion

OPINION AND ORDER

PATTERSON, D.J.

***1** Now pending before the Court is an application by defendant's counsel for a modification of the Court's freezing order of April 24, 1998 to release attorney's fees in the amount of $50,000. For the reasons that follow, the application is denied.

Background

On June 16, 2000, defendant Arjun Sekhri's counsel requested a conference to discuss the release of attorney's fees from the freeze order issued by this Court on April 24, 1998. A conference was held on June 23, 2000. At the conference, the Court requested that the parties provide the Court with information about defendant's assets and about the amount of money in attorney's fees that defendant's counsel has already received.

Pursuant to the Court's request, defendant's counsel and the Securities and Exchange Commission ("SEC") both submitted letters on June 27, 2000. The parties do not dispute that defendant's counsel has been paid a total of $95,000 in legal fees thusfar: Morvillo, Abramowitz, Grand, Iason & Silberberg ("Morvillo Abramowitz") has received $40,000; Driscoll & Redlich has received $40,000; and defendant's Australian counsel has received $15,000. Defendant's counsel stated in its letter that Morvillo Abramowitz and Driscoll & Redlich each seek the release of an additional $25,000 for their attorney's fees. (Def.'s June 27 Letter at 2.)

The parties are also in agreement about defendant's transfer of funds among several accounts, funds which now total $233,386 and are held in a Charles Schwab Brokerage Account in the Cayman Islands. (Def.'s June 27 Letter at 2; SEC's June 27 Letter at 2.) Defendant's counsel also stated in its letter that defendant maintains a 401K account at Solomon Smith Barney with a balance of $35,297. (Def.'s June 27 Letter at 2.) Defendant's counsel maintains that his profits for the insider trading total $255,645.98. (Def.'s July 10 Letter at 4.) However, the SEC described several transfers of money to defendant and defendant's relatives from others involved in the insider trading with the defendant, totaling $993,874.65, and asked that defendant's remaining funds, $233,386, be deposited in the Registry to compensate defrauded investors. (SEC's June 27 Letter at 3.) Defendant's counsel submitted additional letters on July 10, 2000 and July 14, 2000, and the SEC submitted additional letters on July 13, 2000 and July 14, 2000.

Discussion

Defendant's counsel argues that attorney's fees should be released because the freeze order of April 24, 1998 was not limited to defendant's profits from insider information and due to the defendant's constitutional right to assistance of counsel. (Def.'s June 16 Letter at 2.) However, as the SEC argues, a freeze order need not be limited only to funds that can be directly traced to defendant's illegal activity. *See SEC v. Grossman,* 887 F.Supp. 649, 661 (S.D.N.Y.1995) (holding that "[i]t is irrelevant whether the funds affected by the Assets Freeze are traceable to the illegal activity, [where defendants] are jointly and severally liable for the profits of their tippees"); *SEC v. Glauberman,* 1992 WL 175270, at 2 (S.D.N.Y. July 16, 1992) (rejecting the argument that disgorgement is not appropriate because "the challenged transfers cannot be traced dollar for dollar to profits from insider trading"). Furthermore, the defendant should not benefit from the fact that he commingled his illegal profits with other assets. *SEC v. Glauberman,* 1992 WL 175270, at 2 (S.D.N.Y. July 16, 1992).

***2** In addition, several of the cases cited by defendant involved situations where defendants might have been deprived of counsel of their choice if funds were not released. In *United States v. Monsanto,* the Second Circuit

observed, in connection with a pretrial restraining order on defendant's assets, that "[t]he restraining order severely affects [defendant's right to counsel of his choice] by putting beyond the defendant's reach assets which are demonstrably necessary to obtain the legal counsel he desires. The temporary, nonfinal deprivation is, in that respect, effectively a permanent one." 924 F.2d 1186, 1193 (2d Cir.1989). In *SEC v. Coates,* the court required an adversary hearing "in light of the fact that my order freezing Coates' personal assets may hinder his ability to obtain counsel of choice in the related criminal case." 1994 WL 455558, at 3 (S.D.N.Y. Aug. 23, 1994).

Conversely, this is not a case in which defendant has been prevented from retaining the counsel of his choice because of the freezing order. He asserts that he is unaware of it, and he has retained two law firms to represent him in the civil and criminal proceedings in this Court. He has already paid each of those firms $40,000. The defendant is awaiting sentence, and there is no indication that defendant will be deprived of his Sixth Amendment right to representation if the requested $50,000 in attorney's fees is not released from the freezing order. Furthermore, a fee of $40,000 for Morvillo Abramowitz and $40,000 for Driscoll & Redlich for representing a defendant in negotiating a plea agreement and representation through sentence does not appear to this Court to require augmentation.

Conclusion

Because the scope of the freezing order properly includes all of defendant's assets and because the Court is satisfied that defendant has not been and will not be deprived of his Sixth Amendment right to counsel, the application by defendant's counsel to modify the freezing order to allow for release of an additional $50,000 in attorney's fees is denied.

IT IS SO ORDERED.

End of Document

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY McGINN,

Case No.: 1:10-CV-457

(GLS/DRH)

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

DECLARATION OF DAVID L. SMITH

DAVID L. SMITH hereby declares under penalty of perjury:

1. I am a defendant in the above-captioned action.

2. I am also a defendant in a criminal case before Judge David N. Hurd: *United States of America v. Timothy M. McGinn and David L. Smith*, 1:12-cr-028 (DNH).

3. I make this declaration in support of my motion to modify the July 22, 2010 Preliminary Injunction Order to release Smith family funds to pay attorneys' fees and costs.

4. I consented through my former counsel to the July 22, 2010 Order to avoid implicating my Fifth Amendment rights by testifying at the substantive hearing; however, I reserved my right to apply to this Court for a modification of the Order.

5. I currently have no source of income or unrestrained assets.

6. All of my assets and those of my wife, Lynn Smith, and the assets of the defendant Trust are frozen pursuant to orders by Judge David R. Homer in this civil action.

7. The total amount of Smith family assets that are frozen include:

Trust Assets:

Kinderhook Bank	$1,569,482
RMR Stock Account	715,149
Pine Street Capital cash/receiver	364,000
Sacandaga Camp equity	600,000
Total	$3,248,631

David Smith's Assets:

Waterville Golf Club, Waterville, Ireland Equity interest	In arrears and unvalued

Lynn Smith's Assets:

RMR Stock Account	$1,033,592
Pine Street Capital cash/receiver	1,250,000
Checking account *	17,000
Vero Beach real property **	200,000
Investments under receiver control ***	320,000
Cash value life insurance policy	70,138
Total	$2,890,730

* The balance of approximately $17,000 includes an offsetting liability of approximately $23,000 for returned checks for income tax payments.
** Assumed selling price of $1,400,000, minus mortgage, selling costs, and accrued tax and fee liability.
*** Estimated value at 50% of cost.

Joint Assets:

Residence: 2 Rolling Brook Drive, Saratoga Springs, N. Y.	
Estimated net equity	$400,000

Retirement Accounts:

David Smith 401-k	$310,000
IRA David Smith	41,000
IRA Lynn Smith	29,000
Total	$380,000

Irrevocable Life Insurance Trust:

Lynn Smith, beneficiary	$160,000 cash value

Total Frozen Assets:

Trust Assets	$3,248,631
David Smith's Assets	unvalued
Lynn Smith's Assets	2,890,730
Joint Assets	400,000
Retirement Accounts	380,000
Irrevocable Life Insurance Trust	160,000
Total	**$7,079,361**

8. Unless a portion of family assets are released to pay my attorneys' fees, I will be unable to continue to retain counsel of my choice in my criminal case, in violation of my rights under the Sixth Amendment.

9. My attorney, William J. Dreyer, Esq. has informed me that Dreyer Boyajian LLP reasonably anticipates that it will incur over $300,000 in future attorneys' fees and costs related to my upcoming criminal trial which will presumably begin in late 2012 or 2013.

10. Without a release of the asset freeze to pay my attorneys, they will be unable to continue to represent me in my criminal case. My wife, Lynn Smith, and/or Geoffrey Smith,

through their attorneys Featherstonhaugh, Wiley & Clyne, LLP, consent to a release of funds to my attorneys. See **Ex. A.**

11. Accordingly, I have moved this Court to authorize the release of $300,000 of my family's frozen assets for the payment of necessary and reasonable attorneys' fees and costs related to my criminal case.

Pursuant to 18 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: February 10, 2012

DAVID L. SMITH

EXHIBIT A

FEATHERSTONHAUGH, WILEY & CLYNE, LLP
ATTORNEYS AND COUNSELLORS AT LAW

99 PINE STREET
ALBANY, NEW YORK 12207
WEBSITE: FWC-LAW.COM

JAMES D. FEATHERSTONHAUGH
jdf@fwc-law.com

PHONE: (518) 436-0786
FAX: (518) 427-0452

Via Facsimile Transmission
(518) 463-4039 & First Class Mail

February 9, 2012

William Dreyer
Dreyer & Boyajian
75 Columbia Place
Albany, New York 12207

Re: Securities Exchange Commission v. McGinn, Smith & Co., Inc., et al.
Case No: 1:10-CV-457 (GLS/DRH)

Dear Mr. Dreyer:

As you know this firm represents Lynn Smith in connection with the above referenced civil action.

I am writing this letter with the express permission from our client, Lynn Smith authorizing your firm to make an application to the Federal District Court seeking the release of certain funds, now frozen in her brokerage account and/or liquid cash assets currently being held by the receiver and which represent distributions from Pine Street Capital, to pay for David Smith's legal defense in the pending criminal action. Lynn Smith agrees that your firm may seek the release of up to $300,000 for such purposes.

Please be advised however, that Mrs. Smith's agreement to help finance her husband's defense in the criminal matter should not be construed in any way as a waiver of any defenses that she has raised in the SEC's present civil action concerning her past and present exclusive ownership to all the assets in that account or in her investments in

Pine Street Capital.

Very truly yours,

Featherstonhaugh, Wiley & Clyne, LLP

James D. Featherstonhaugh

JDF:cc

cc: Lynn Smith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY McGINN,

Case No.: 1:10-CV-457

(GLS/DRH)

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

DECLARATION OF WILLIAM J. DREYER

WILLIAM J. DREYER hereby declares under penalty of perjury:

1. I am an attorney duly admitted to practice in this Court. I am a partner in the law firm of Dreyer Boyajian LLP, counsel to David L. Smith in the above-captioned case and in the

parallel criminal action, *United States of America v. Timothy M. McGinn and David L. Smith*, 1:12-cr-028 (DNH).

2. I submit this declaration and the attached exhibits in support of David L. Smith's motion to modify the July 22, 2010 Preliminary Injunction Order (the "Order") to release funds to pay attorneys' fees and costs.[1]

3. Through his former counsel, Mr. Smith consented to the entry of the Order however reserved his rights to apply to this Court for a modification. See **Ex. A.**

4. All of the assets of Mr. Smith and the assets of his family are frozen and in the control of the receiver appointed in this case.

5. On January 26, 2012 Mr. Smith was indicted on charges of tax fraud, securities fraud, and mail and wire fraud. *United States of America v. Timothy M. McGinn and David L. Smith*, 1:12-cr-028 (DNH). See **Ex. B.** The Indictment speaks for itself and should be considered "complex" by the Court.

6. Mr. Smith's arraignment took place before Judge Randolph F. Treece on January 27, 2012 and Mr. Smith's trial is to be tried in Utica, presumably in late 2012 or 2013.

7. As set forth in the declaration of David L. Smith, all of Mr. and Mrs. Smith's assets have been frozen as a result of a preliminary injunction in this case and he possesses no other assets with which to continue to retain counsel in his parallel criminal case.

8. Dreyer Boyajian LLP was retained by Mr. Smith in April 2010 for the then-unindicted criminal investigation and in December 2010, Mr. Smith retained this law firm to defend him in this civil case.

[1] The motion to modify the July 22, 2010 Preliminary Injunction does not waive David L. Smith's right to seek a modification for release for attorneys' fees related to his civil case. It is expected that the assistant U.S. Attorney in the civil case will make a motion to stay the civil proceedings or seek a stipulation of the parties to accomplish a stay until Mr. Smith's criminal proceedings are complete. It is expected that this motion or the filing of the stipulation of stay will be made within the next two weeks.

9. Based upon my experience in handling the defense in white collar criminal trials, which are extremely complicated and expensive, it is anticipated that by the end of Mr. Smith's criminal trial, the total amount of legal fees and disbursements will be in excess of $300,000.

10. I base this estimate on a careful review of the allegations in the January 26, 2012 Indictment, the voluminous number of exhibits that will need to be reviewed and are contained on over forty discs, and the amount of witnesses expected to be called at trial, including at least two to three expert witnesses to testify regarding the tax and security counts against Mr. Smith. These experts will be necessary to address the issues of the taxability of the loans in limited liability companies and disclosure requirements in private placement memoranda, among other things.

11. Due to the complex nature of Mr. Smith's criminal case, it is expected that the criminal trial will take at least four weeks to complete, in addition to the months of trial preparation, possible motions, and pre-trial and trial related costs.

12. We are requesting $250,000 in fixed legal fees[2] and $50,000 to be placed in our escrow account as an expense fund to cover the costs that can reasonably be expected to be incurred, including the costs of living for counsel and our client throughout the trial in Utica, expenses for copying fees, transcripts, courtroom technology, and experts.

13. The requested amount is a conservative estimate as there is a high likelihood that the receivables will exceed the $300,000 we are requesting for Mr. Smith's criminal case *alone*.

14. Due to the complex nature of Mr. Smith's criminal case and the extensive amount of documents and files that must be reviewed, we ask that $300,000 of the frozen assets (i.e.

[2] As of January 31, 2012, $16,969.50 in fees and disbursements related to Mr. Smith's criminal case is currently outstanding. It is intended that this amount will be satisfied with the $250,000 fixed fee that is requested.

liquid assets) be released to pay for the reasonable and necessary attorneys' fees that can be expected to be incurred in our continuing representation of Mr. Smith.

15. It is respectfully requested that the Court grant relief sought in this motion.

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

Executed on: February 10, 2012

WILLIAM J. DREYER

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	
-against-	**10 Civ. 457 (GLS) (DRH)**
MCGINN, SMITH & CO., INC.; **MCGINN, SMITH ADVISORS LLC;** **MCGINN, SMITH CAPITAL HOLDINGS CORP.;** **FIRST ADVISORY INCOME NOTES, LLC;** **FIRST EXCELSIOR INCOME NOTES, LLC;** **FIRST INDEPENDENT INCOME NOTES, LLC;** **THIRD ALBANY INCOME NOTES, LLC;** **TIMOTHY M. MCGINN; AND** **DAVID L. SMITH,**	
Defendants, and	
LYNN A. SMITH,	
Relief Defendant.	

PRELIMINARY INJUNCTION ORDER

The Securities and Exchange Commission ("Commission") having filed a Complaint on April 20, 2010; and the Commission that same day having filed an Order to Show Cause seeking emergency relief; and the Court having entered an Order dated April 20, 2010 granting a temporary restraining order; asset freeze and other relief against 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 ("McGinn"); David L. Smith ("Smith") (collectively, the "Defendants") and Lynn A. Smith ("Relief Defendant"); and

appointing a temporary Receiver over MS & Co., MS Advisors, MS Capital, FAIN, FEIN, FIIN and TAIN, and all other entities McGinn or Smith control or have an ownership interest in, including but not limited to the entities listed on Exhibit A (collectively, the "MS Entities").

Defendants and the Relief Defendant each having (1) entered a general appearance; (2) consented to the Court's jurisdiction over Defendants and Relief Defendant and the subject matter of this action; (3) consented to entry of this Preliminary Injunction Order (the "Order"), without admitting or denying the allegations of the Complaint, and reserving all rights to answer or otherwise respond to the Complaint; (4) waived findings of fact and conclusions of law for the purposes of this Order only; (5) waived any right to appeal from this Order; and (6) reserved their rights to apply to this Court at any time for a modification of this Order.

The Court has considered: (1) the Complaint filed by the Commission on April 20, 2010; (2) the Declaration of Israel Maya, executed on April 19, 2010; (3) the Declaration of Roseann Daniello, executed on April 19, 2010; (4) the Declaration of Lara Shalov Mehraban, executed on April 19, 2010; (5) the Appendix of Exhibits in Support of Emergency Application; and (6) the Memorandum of Law in support of the Commission's application, dated April 20, 2010.

Based on the foregoing, the Court finds that a proper showing, as required by Section 20(b) of the Securities Act of 1933 ("Securities Act"), Section 21(d) of the Securities Exchange Act of 1934 ("Exchange Act"), Section 209(d) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 42(d) of the Investment Company Act of 1940 ("Company Act") has been made for the relief granted herein.

NOW, THEREFORE,

I.

IT IS HEREBY ORDERED that the Commission's Motion for a Preliminary Injunction is GRANTED.

II.

IT IS HEREBY ORDERED that, pending a final disposition of this action, MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith, and each of their agents, servants, employees, attorneys, 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 preliminarily restrained and enjoined from violating, directly or indirectly, Sections 5(a) and 5(c) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77e(a) and 77e(c).

III.

IT IS FURTHER ORDERED that, pending a final disposition of this action, MS & Co., MS Advisors, MS Capital, McGinn and Smith, and each of their agents, servants, employees, attorneys, 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 preliminarily restrained and enjoined from violating, directly or indirectly, Section 17(a) of 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 Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

IV.

IT IS FURTHER ORDERED that, pending a final disposition of this action, MS & Co., MS Advisors, McGinn and Smith, and each of their agents, servants, employees, attorneys, 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 preliminarily restrained and enjoined

from violating, directly or indirectly, 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) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8.

V.

IT IS FURTHER ORDERED that, pending a final disposition of this action, MS & Co., each of its agents, servants, employees, attorneys, 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 preliminarily restrained and enjoined from violating, directly or indirectly, Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn, and each of their agents, servants, employees, attorneys, 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 preliminarily restrained and enjoined from, directly or indirectly, aiding and abetting a violation of Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1).

VI.

IT IS FURTHER ORDERED that, pending a final disposition of this action, FAIN, FEIN, FIIN and TAIN, and each of their agents, servants, employees, attorneys, 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 preliminarily restrained and enjoined from violating, directly or indirectly, Section 7(a) of the Company Act, 15 U.S.C. § 80a-7.

VII.

IT IS FURTHER ORDERED that, pending a final disposition of this action, the Defendants and 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 this 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, 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, his or her 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 all real property owned directly or indirectly by the MS Entities.

VIII.

IT IS FURTHER ORDERED that, pending final disposition of this action, William J. Brown, Esq., who was appointed Temporary Receiver by the Court's order dated April 20, 2010, shall serve as Receiver over the MS Entities, pending the final disposition of this action 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; and (viii) determine whether the MS Entities should undertake bankruptcy filings.

To effectuate the foregoing, the Receiver is empowered to:

(a) Take and retain immediate possession and control of all of the assets, including but not limited to all books, records and documents, of the MS Entities, and assume all the rights and powers of these assets with respect thereto including the powers set forth in the applicable management agreements, by-laws, LLC agreements or any other controlling agreements;

(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;

(c) Pay from available funds of any MS Entity the necessary expenses required to preserve the assets and property of the MS Entities, 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 VII, above. This subparagraph does not, and is not intended to, effectuate or permit a substantive consolidation of the estates except for the payment of expenses as expressly set forth in this subparagraph;

(d) Succeed to all rights to manage all properties owned or controlled, directly or indirectly, by the MS Entities, pursuant to applicable management agreements, by-laws, LLC agreements, or other controlling agreements relating to each entity;

(e) Take steps to locate assets that may have been conveyed to third parties or otherwise concealed;

(f) Take steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by MS Entities;

(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) Establish a cash management system by closing, transferring, consolidating and opening bank accounts and securities accounts, so long as records are kept of the sources and uses of all funds;

(i) Invest all cash of the MS Entities in U.S. government securities or U.S. government guaranteed securities having remaining maturities of up to two years and in money market accounts maintained by financial institutions having net worths of no less than $50 billion;

(j) Discharge his duties as Receiver by making and authorizing in the ordinary course payments and disbursements from the funds and assets under his control, incurring expenses, and entering into agreements, including loan agreements and credit facilities, all as reasonably necessary or advisable under the circumstances;

(k) Investigate, prosecute, defend, intervene in, and otherwise participate in, compromise and adjust actions in any state, federal, administrative, or foreign tribunal of any kind, or any potential actions or claims, as the Receiver believes in his sole discretion advisable or proper to collect, conserve, or otherwise recover the assets of the MS Entities, or entities they own or control;

(l) Notwithstanding the terms of this Order, borrow monies and encumber assets of

the MS Entities, or the entities they own or control, to the extent such actions are deemed necessary by the Receiver based on his own experience and input from his advisors to be most beneficial to preserving enterprise value for one or more of the MS Entities and those entitled to proceeds; provided that encumbrances in excess of $100,000 shall first require at least four (4) business days' written notice (unless shortened by court order) to the Commission, McGinn and Smith (such notice to be given to McGinn and Smith via ECF, facsimile, e-mail, and/or hand delivery to their respective counsel of record), and such other MS Entity investors having filed notices of appearance in the above-captioned case; provided further that the Receiver may apply for an order under seal or a hearing *in camera*, as circumstances require;

(m) Use, lease, sell, and convert into money all assets of the MS Entities, either in public or private sales or other transactions on terms the Receiver reasonably believes based on his own experience and input from his advisors to be most beneficial to the MS Entities and those entitled to the proceeds; provided, however, all leases and sales of property appraised for or having a cost basis of $100,000 or more shall only be consummated with prior court approval on at least four (4) business days' written notice (unless shortened by court order) to the Commission, McGinn and Smith (such notice to be given to McGinn and Smith via ECF, facsimile, e-mail, and/or hand delivery to their respective counsel of record), and creditors or MS Entity investors who have filed notices of appearance in the appearance in the above-captioned case; provided further that the Receiver may apply for an order under seal or *in camera*, as circumstances

require;

(n) 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

(n) Take such further action as the Court shall deem equitable, just, and appropriate under the circumstances upon proper application of the Receiver.

IX.

IT IS FURTHER ORDERED that the Receiver and all persons who may be engaged or employed by the Receiver to assist him in carrying out his duties and obligations hereunder, or any of their partners, officers, directors, members, employees, or agents, shall be immune from liability for all actions or omissions within the scope of the Receiver's authority. This provision shall apply to claims based on conduct during the term of any agreement entered into between the Receiver and any other person who may be engaged or employed by the Receiver hereunder, even if such claims are filed after the termination of any such agreement.

X.

IT IS FURTHER ORDERED that if in accordance with this order the Receiver determines that any of the MS Entities, should undertake a bankruptcy filing, the Receiver be, and hereby is, authorized to commence cases under title 11 of the United States Code for such entities in this district, and in such cases the Receiver shall prosecute the bankruptcy petitions in accordance with title 11 subject to the same parameters and objectives as a chapter 11 trustee and shall remain in possession, custody, and control of the title 11 estates subject to the rights of any party in interest to challenge such possession, custody, and control under 11 U.S.C. § 543 or to request a determination by this Court as to whether the Receiver should be deemed a debtor in

possession or trustee, at a hearing, on due notice to all parties in interest, before the undersigned. Before taking action under this paragraph, however, at least two (2) business days' written notice (unless shortened by court order) stating that the Receiver is contemplating action under title 11 must be provided to the Commission, McGinn and Smith (such notice to be given to the McGinn and Smith via ECF, facsimile, e-mail, and/or hand delivery to their respective counsel of record), and such other MS Entity investors who request such notice; provided further that the Receiver may apply for an order under seal or a hearing *in camera* as circumstances require.

XI.

IT IS FURTHER ORDERD that to facilitate efficient coordination in one district of all bankruptcies of MS Entities and the entities they own or control, the Northern District of New York shall be the Receiver's principal place of business for making decisions in respect of operating and disposing of each of the MS Entities and entities they own or control, and their respective assets.

XII.

IT IS FURTHER ORDERED that in lieu of providing retainers to the Receiver and his advisors, all payments made pursuant to the foregoing procedures prior to the initiation of any voluntary or involuntary petition for relief under the United States Bankruptcy Code, or foreign insolvency proceeding, shall be deemed payments made according to ordinary business terms and incurred in the ordinary course of business or financial affairs of the transferees and the MS Entities and not subject to avoidance as a preferential payment.

XIII.

IT IS FURTHER ORDERED that no person or entity, including any creditor or claimant against any of the Defendants or the Relief Defendant, or any person acting on behalf of

such creditor or claimant, shall take any action without further order of the 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.

XIV.

IT IS FURTHER ORDERED that the Defendants and the MS Entities are jointly and severally liable for the the reasonable costs, fees and expenses of the Receiver incurred in connection with the performance of his duties as described herein, including but not limited to, the reasonable costs, fees and expenses of all person 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, with notice to all parties and an opportunity to be heard.

XV.

IT IS FURTHER ORDERED that, pending final disposition of this action, the Defendants, the Relief Defendant, and any person or entity acting at their direction or on their behalf, or any other person, including but not limited to any investor, who receives actual notice of this Order by personal service or otherwise, are (1) restrained and enjoined from destroying, altering, concealing or otherwise interfering with the access of Commission and the Receiver to any and all documents, books and records, that are in the possession, custody or control of the Defendants, the Relief Defendant, 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, 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' and the Relief Defendant's finances or business operations; 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 this Order shall be, and is, binding upon the Defendants and Relief Defendant 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.

Dated: July 22, 2010
Albany, New York

David R. Homer
UNITED STATES MAGISTRATE JUDGE

Exhibit A
List of Known Entities Controlled By McGinn and/or Smith

107th Associates LLC Trust 07
107th 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
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
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	[redacted]998	107th Assoc. LLC Trust 07	
Mercantile Bank	[redacted]987	107th Associates LLC	
M&T Bank	[redacted]6850	107th Associates LLC	
M&T Bank	[redacted]8478	74 State Street Capital LP	Operating
M&T Bank	[redacted]062	74 State Street Capital LP	
M&T Bank	[redacted]5288	Acquisition Trust 03	Operating Account
Whitney National Bank	[redacted]9335	Benchmark Communication LLC	
M&T Bank	[redacted]0805	Capital Center Credit Corp	Operating
M&T Bank	[redacted]2250	Capital Center Credit Corp	Careclub Depository, 99 Pine St
JPMorganChase	[redacted]587	Capital Center Credit Corp	Special Account Michael Lewy Attn: David Rees
NFS/Fidelity	[redacted]178	Capital Center Credit Corp	C/O MCGINN SMITH & CO INC ATTN DAVID P REES
JPMorganChase	[redacted]4817	Capital Center Credit Corp c/o McGinn Smith & Co	
Monterey Bank	[redacted]854	Charter Cruise Ventures	dba YOLO Cruises
M&T Bank	[redacted]133	CMS Financial	
M&T Bank	[redacted]6985	CMS Financial Services Corp.	
M&T Bank	[redacted]064	CMS Financial Services Corp.	
Monterey Bank	[redacted]846	Cruise Charter Ventures	dba YOLO Cruises
Mercantile Bank	[redacted]3972	Cruise Charter Ventures LLC	
Mercantile Bank	[redacted]1307	Cruise Charter Ventures LLC	
Mercantile Bank	[redacted]2808	Cruise Charter Ventures Trust 08	
M&T Bank	[redacted]3528	First Advisory Income Notes	Operating
M&T Bank	[redacted]489	First Advisory Income Notes	Escrow
M&T Bank	[redacted]9147	First Excelsior Income Notes LLC	Alarm Accum Account
M&T Bank	[redacted]9139	First Excelsior Income Notes LLC	Operating
Charter One Bank	[redacted]363-8	First Excelsior Income Notes LLC	Escrow
JPMorganChase	[redacted]6928	First Excelsior Income Notes LLC	
NFS/Fidelity	[redacted]9280	First Excelsior Income Notes LLC	
M&T Bank	[redacted]5013	First Independent Income Notes	Operating
M&T Bank	[redacted]9279	First Independent Income Notes	Monitoring Contract Accum

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Charter One Bank	[redacted]003-6	First Independent Income Notes	Timothy McGinn
JPMorganChase	[redacted]893	First Independent Income Notes	
JPMorganChase	[redacted]087	First Independent Income Notes	
NFS/Fidelity	[redacted]934	First Independent Income Notes	
Mercantile Bank	[redacted]1921	FirstLine Senior Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
M&T Bank	[redacted]5028	FirstLine Sr Trust 07	
M&T Bank	[redacted]5366	FirstLine Sr Trust 07 Series B	
Mercantile Bank	[redacted]0733	FirstLine Sr Trust 07 Series B	McGinn Smith & Co Inc Trustee
M&T Bank	[redacted]5010	FirstLine Trust 07	
Mercantile Bank	[redacted]1910	FirstLine Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
Mercantile Bank	[redacted]0722	FirstLine Trust 07 Series B	McGinn Smith & Co Inc Trustee, UAD 10/16/07
M&T Bank	[redacted]5358	FirstLine Trust 07 Series B	
M&T Bank	[redacted]6413	Fortress Trust 08	c/o McGinn Smith Capital Holdings Corp.
Mercantile Bank	[redacted]9187	Fortress Trust 08 UTD 9/10/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6165	Integrated Excellence Jr Trust	
Mercantile Bank	[redacted]3994	Integrated Excellence Jr Trust 08 DTD 5/28/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6173	Integrated Excellence Sr Trust	
Mercantile Bank	[redacted]3983	Integrated Excellence Sr Trust 08 DTD 5/27/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6868	IP Investors LLC	
M&T Bank	[redacted]3783	James J. Carroll Charitable Fund	
M&T Bank	[redacted]6815	JGC Trust 00	Operating c/o McGinn Smith
Mercantile Bank	[redacted]1674	Luxury Cruise Center Inc	
Mercantile Bank	[redacted]0446	Luxury Cruise Center Inc	
Mercantile Bank	[redacted]0435	Luxury Cruise Charter Inc. Payables	
Mercantile Bank	[redacted]1945	Luxury Cruise Receivables LLC	
Mercantile Bank	[redacted]1967	Luxury Cruise Receivables LLC	
M&T Bank	[redacted]9996	M&S Partners	
JPMorganChase	[redacted]443	McGinn Smith & Co	
JPMorganChase	[redacted]570	McGinn Smith & Co	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]0167	MCGINN SMITH & CO DELIGIANNIS MASTER ACCOUNT	
NFS/Fidelity	[redacted]035	MCGINN SMITH & CO AVERAGE PRICE ACCOUNT	
JPMorganChase	[redacted]300	McGinn Smith & Co Capital A/C	
JPMorganChase	[redacted]302	McGinn Smith & Co Corporate Bond A/C Attn: David Rees	
JPMorganChase	[redacted]306	McGinn Smith & Co Deposit Account Attn: David Rees	
JPMorganChase	[redacted]305	McGinn Smith & Co Error Account Attn: David Rees	
JPMorganChase	[redacted]301	McGinn Smith & Co Firm Trading A/C Attn: David Rees	
JPMorganChase	[redacted]303	McGinn Smith & Co Govt Bond A/C Attn: David Rees	
NFS/Fidelity	[redacted]007	MCGINN SMITH & CO INC	
NFS/Fidelity	[redacted]051	MCGINN SMITH & CO INC ALBANY BTAM $ DIFFERENCE	
NFS/Fidelity	[redacted]043	MCGINN SMITH & CO INC ALBANY BTAM MASTER ACCOUNT	
NFS/Fidelity	[redacted]007	MCGINN SMITH & CO INC DAVID L SMITH	
NFS/Fidelity	[redacted]175	MCGINN SMITH & CO INC DELIGIANNIS $ DIFFERENCE	
NFS/Fidelity	[redacted]086	MCGINN SMITH & CO INC NYC BTAM UNALLOCATED	
NFS/Fidelity	[redacted]728	MCGINN SMITH & CO INC REVENUE ACCOUNT	
NFS/Fidelity	[redacted]060	MCGINN SMITH & CO INC ALBANY BTAM UNALLOCATED	
NFS/Fidelity	[redacted]205	MCGINN SMITH & CO INC BOYLAN $ DIFFERENCE	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]191	MCGINN SMITH & CO INC BOYLAN MASTER ACCOUNT	
NFS/Fidelity	[redacted]83	MCGINN SMITH & CO INC DELIGIANNIS UNALLOCATED	
NFS/Fidelity	[redacted]116	MCGINN SMITH & CO INC ERROR ACCOUNT	
NFS/Fidelity	[redacted]230	MCGINN SMITH & CO INC RABINOVICH $ DIFFERENCE	
NFS/Fidelity	[redacted]221	MCGINN SMITH & CO INC RABINOVICH MASTER ACCOUNT	
NFS/Fidelity	[redacted]248	MCGINN SMITH & CO INC RABINOVICH UNALLOCATED	
NFS/Fidelity	[redacted]140	MCGINN SMITH & CO INC SANCHIRICO $ DIFFERENCE	
NFS/Fidelity	[redacted]32	MCGINN SMITH & CO INC SANCHIRICO MASTER ACCOUNTS	
NFS/Fidelity	[redacted]59	MCGINN SMITH & CO INC SANCHIRICO UNALLOCATED	
NFS/Fidelity	[redacted]108	MCGINN SMITH & CO INC SYNDICATE ACCOUNT	
JPMorganChase	[redacted]304	McGinn Smith & Co Municipal Bond Account Attn: David Rees	
JPMorganChase	[redacted]815	McGinn Smith & Co Reserve A/C Residual Bal	
NFS/Fidelity	[redacted]019	MCGINN SMITH & CO RISKLESS PRINCIPAL	
JPMorganChase	[redacted]307	McGinn Smith & Co Syndicate A/C	
M&T Bank	[redacted]1081	McGinn Smith & Company	Dividend

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
M&T Bank	[redacted]4734	McGinn Smith & Company	
M&T Bank	[redacted]9569	McGinn Smith Advisors LLC	
M&T Bank	[redacted]5044	McGinn Smith Alarm Trading LLC	
M&T Bank	[redacted]4351	McGinn Smith Capital Holdings	MSCH Paying Agent for Vidsoft Inc.
M&T Bank	[redacted]9551	McGinn Smith Capital Holdings	Payment Agent for Vigilant Privacy Corp.
M&T Bank	[redacted]8803	McGinn Smith Capital Holdings	
JPMorganChase	[redacted]573	McGinn Smith Capital Holdings	
NFS/Fidelity	[redacted]734	MCGINN SMITH CAPITAL HOLDINGS	
M&T Bank	[redacted]5783	McGinn Smith Capital Holdings Corp	Hannan Reserve Account
Mercantile Bank	[redacted]1635	McGinn Smith Funding LLC	
Monterey Bank	[redacted]838	McGinn Smith Funding LLC	
M&T Bank	[redacted]8925	McGinn Smith Holdings LLC	
NFS/Fidelity	[redacted]944	MCGINN SMITH INCENTIVE PL CUST IRA OF TIMOTHY MCGINN	
JPMorganChase	[redacted]246	McGinn Smith Incentive Savings Plan	
Mercantile Bank	[redacted]9022	McGinn Smith Independent Services Corp	
M&T Bank	[redacted]5975	McGinn Smith Independent Services Corp	
M&T Bank	[redacted]5051	McGinn Smith Licensing Company LLC	
Mercantile Bank	[redacted]3083	McGinn Smith Transaction Funding Corp	
M&T Bank	[redacted]6207	McGinn Smith Transaction Funding Corp	
Mercantile Bank	[redacted]8857	McGinn Smith Transaction Funding Corp	2nd Offering Account
M&T Bank	[redacted]5036	McGinn Smith Acceptance Corp	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
JPMorganChase	[redacted]0294	McGinn, Tim (Union Bank of California Cust Adams Keegan Retirement Svgs Plan, FBO Tim McGinn A/C #[redacted]5003)	
NFS/Fidelity	[redacted]745	McGinn, Timothy M.	
M&T Bank	[redacted]2675	McGinn, Timothy M.	
M&T Bank	[redacted]9504	McGinn, Timothy M.	
Mercantile Bank	[redacted]5288	McGinn, Timothy M.	
JPMorganChase	[redacted]9655	McGinn, Timothy M.	
Bank of America	****5452	McGinn, Timothy and Nancy	
Mercantile Bank	[redacted]2171	MR Cranberry LLC	c/o Timothy McGinn
NFS/Fidelity	[redacted]272	MR Cranberry LLC	
M&T Bank	[redacted]6421	MSFC Security Holdings LLC	
Mercantile Bank	[redacted]9220	NBI Capital LLC	
M&T Bank	[redacted]5833	Pacific Trust 02	Operating
Mercantile Bank	[redacted]9687	Prime Vision Communication Mgmt Keys Cove LLC	c/o McGinn Smith & Co
Bank of Florida	[redacted]976	Prime Vision Communications LLC	
Mercantile Bank	[redacted]9698	Prime Vision Communications of Cutler Cay LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9518	Prime Vision Funding of Cutler Cove LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9529	Prime Vision Funding of Key Cove LLC	c/o McGinn Smith & Co
M&T Bank	[redacted]6767	RTC Trust 02	Accum
M&T Bank	[redacted]6775	RTC Trust 02	Operating
M&T Bank	[redacted]3635	SAI Trust 00	
Charter One Bank	[redacted]823-3	SAI Trust 00	
M&T Bank	[redacted]8966	SAI Trust 03	Jr
M&T Bank	[redacted]4620	SAI Trust 03	Sr
M&T Bank	[redacted]7729	Security Participation Trust I	
M&T Bank	[redacted]9410	Security Participation Trust II	Accum
M&T Bank	[redacted]9288	Security Participation Trust II	Operating
M&T Bank	[redacted]8123	Security Participation Trust III	Operating
M&T Bank	[redacted]8115	Security Participation Trust III	Accum
M&T Bank	[redacted]5460	Security Participation Trust IV	
Charter One Bank	[redacted]023-6	Security Participation Trust Oper	
M&T Bank	[redacted]4492	Seton Hall Associates	McGinn & Smith
NFS/Fidelity	[redacted]208	Smith, David L.	
M&T Bank	[redacted]965	Smith, David L.	
NFS/Fidelity	xxx-xx6777	Smith, David L.	
NFS/Fidelity	xxx-xx4353	Smith, David and Lynn	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]916	Smith, Lynn A.	
NFS/Fidelity	[redacted]912	Smith, Lynn A.	
Bank of America		Smith, Lynn A.	
JPMorganChase	[redacted]	Smith, Lynn A.	
Mercantile Bank	[redacted]9507	TDM Cable Funding LLC	c/o McGinn Smith & Co .
Mercantile Bank	[redacted]9573	TDM Cable Funding LLC / TDM Cable Trust 06	c/o McGinn Smith & Co
M&T Bank	[redacted]4765	TDM Cable Funding LLC TDM Verifier Trust 07 Operating	TDM Verifier Trust 07 Operating
M&T Bank	[redacted]4500	TDM Cable Funding LLC Trust 06 Account	Trust 06 Account
M&T Bank	[redacted]5234	TDM Luxury Cruise Trust 07	
Mercantile Bank	[redacted]2086	TDM Luxury Cruise Trust 07 DTD 7/16/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	[redacted]1437	TDM Verifier Trust 07	Escrow
Mercantile Bank	[redacted]4216	TDM Verifier Trust 07R	
M&T Bank	[redacted]5738	TDM Verifier Trust 08	
Mercantile Bank	[redacted]1030	TDM Verifier Trust 08 DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	[redacted]9132	TDM Verifier Trust 08R DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6736	TDM Verifier Trust 09	
Mercantile Bank	[redacted]4007	TDM Verifier Trust 09 DTD 12/15/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]7064	TDM Verifier Trust 11	
M&T Bank	[redacted]409	TDM Verifier Trust 11	
M&T Bank	[redacted]7056	TDMM Benchmark Trust 09	
Mercantile Bank	[redacted]9077	TDMM Cable Funding LLC	
Mercantile Bank	[redacted]4139	TDMM Cable Jr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6728	TDMM Cable Jr Trust 09	
Mercantile Bank	[redacted]4150	TDMM Cable Sr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]5710	TDMM Cable Sr Trust 09	
M&T Bank	[redacted]462	Third Albany Income Notes	Escrow
NFS/Fidelity	[redacted]884	Third Albany Income Notes	
M&T Bank	[redacted]9550	Third Albany Income Notes	Operating
M&T Bank	[redacted]3593	Third Albany Income Notes	Alarm Accum
JPMorganChase	[redacted]988	Third Albany Income Notes	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]671	Urbelis Thomas TTEE David L Smith & Lynn A Smith, Irrev Tr U/A 8/4/04	
Mercantile Bank	[redacted]2022	White Glove Cruises LLC	
Mercantile Bank	[redacted]8201	White Glove Cruises LLC	
Mercantile Bank	[redacted]2231	White Glove Cruises LLC	
Mercantile Bank	[redacted]2759	White Glove Cruises LLC	

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	**Criminal Number:** 1:12-CR-028-DNH
	:	
v.	:	**VIOLATIONS:**
	:	**18 U.S.C. § 1349 (Conspiracy);**
	:	**18 U.S.C. § 1341 (Mail Fraud);**
	:	**18 U.S.C. § 1343 (Wire Fraud);**
	:	**15 U.S.C. §§ 78j(b) and 78ff;**
	:	**17 C.F.R. § 240.10b-5 (Securities Fraud);**
TIMOTHY M. MCGINN and	:	**26 U.S.C. § 7206(1) (Filing a False Return);**
DAVID L. SMITH,	:	**18 U.S.C. § 2 (Aiding and Abetting and Causing**
	:	**an Act to be Done)**
Defendants.	:	**One Forfeiture Allegation**

INDICTMENT

THE GRAND JURY CHARGES:

At all times relevant to this Indictment unless otherwise stated:

Relevant Persons and Entities

1. From in or about 1981 through on or about December 24, 2009, McGinn, Smith & Co. Inc. (the "broker-dealer") was a broker-dealer registered with the Securities and Exchange Commission ("SEC"). The broker-dealer's registration with the SEC allowed it to buy and sell securities for itself and others.

2. The broker-dealer's headquarters was in Albany, New York, and by in or about 2005, it had more than 30 registered representatives working in, among other places, its offices in Albany, Clifton Park, and New York, New York. In addition, the broker-dealer had a relationship with Lex and Smith Associates, Ltd. in King of Prussia, Pennsylvania.

3. Defendants TIMOTHY M. MCGINN and DAVID L. SMITH founded the broker-dealer and each owned 50% of the broker-dealer until in or after about 2003, when MCGINN sold 20% of his interest in the broker-dealer to another person. From in or about September 2006 through in or about December 2009, both MCGINN and SMITH were active in the day-to-day management of the broker-dealer.

4. Among other things, the broker-dealer was engaged in the business of creating and selling unregistered securities pursuant to Regulation D of the Securities Act of 1933, 17 C.F.R. § 230.501 et seq. Sales of these unregistered securities were generally limited to certain types of investors including individuals who met minimum net worth and income requirements.

5. As part of the sales process, the broker-dealer provided investors with documents describing the unregistered securities known as private placement memoranda ("PPMs").

6. McGinn, Smith Capital Holdings, Corp. ("MS Capital") was a New York corporation owned by defendant TIMOTHY M. MCGINN (25.5%), defendant DAVID L. SMITH (25.5%), and another company controlled either directly or indirectly by MCGINN and SMITH (49%).

7. From on or about September 29, 2006 through on or about January 21, 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH created the following limited liability companies which they controlled either directly or indirectly: TDM Cable Funding, LLC; NEI Capital LLC; TDMM Cable Funding, LLC; McGinn, Smith Funding LLC; and Cruise Charter Ventures, LLC (collectively "the LLCs").

8. McGinn, Smith Transaction Funding Corp. was a New York corporation controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH through McGinn, Smith Holdings LLC, a New York limited liability company owned by defendant DAVID L. SMITH (50%),

defendant TIMOTHY M. MCGINN (30%), and another person (20%). From on or about May 2, 2008 through on or about November 26, 2008, the broker-dealer raised approximately $6.8 million from investors for McGinn, Smith Transaction Funding Corp. According to the PPM, investor money would be used to (a) provide capital to close financial transactions originated by the broker-dealer; (b) invest in other public and private securities; and (c) purchase $1.5 million of the broker-dealer's 2008 Series Cumulative Preferred Stock.

The Trusts

9. Between on or about October 23, 2006 and on or about July 10, 2009, on the following dates, defendants TIMOTHY M. MCGINN and DAVID L. SMITH used MS Capital to create the following 17 trusts ("the Trusts") as defined in declarations of trust for each of the Trusts:

Name of Trust	Trust Creation Date
TDM Cable Trust 06	10/23/06
TDM Verifier Trust 07	1/18/07
Firstline Trust 07	5/19/07
Firstline Sr. Trust 07	5/19/07
TDM Luxury Cruise Trust 07	7/11/07
Firstline Trust 07 Series B	10/15/07
Firstline Sr. Trust 07 Series B	10/15/07
TDM Verifier Trust 08	12/11/07
Integrated Excellence Jr. Trust 08	5/27/08
Integrated Excellence Sr. Trust 08	5/27/08
Fortress Trust 08	9/10/08
TDM Verifier Trust 09	12/12/08
TDMM Cable Jr. Trust 09	1/16/09

Name of Trust	Trust Creation Date
TDMM Cable Sr. Trust 09	1/16/09
TDM Verifier Trust 07R	1/29/09
TDM Verifier Trust 08R	6/30/09
TDMM Benchmark Trust 09	7/10/09

10. From in or about October 2006 through in or about November 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH used the broker-dealer to offer and sell approximately $37 million of unregistered securities to investors in the form of investments in the Trusts.

11. According to the PPMs prepared for the offering and sale of these investments in the Trusts, after deducting fees and other deal costs, such as underwriting fees, investor money would be provided to one of the LLCs or McGinn, Smith Transaction Funding Corp., which had entered into or would enter into an agreement with a third party requiring payments from the third party. Those agreements were related to (a) burglar alarm, broadband, cable, and telephone services; (b) loans to companies providing those services; (c) guaranteed payment units (scheduled payments) from an entity providing capital to companies providing those services; and (d) luxury cruise charters and travel agencies (the "Agreements").

12. According to the PPMs, investors would receive principal and interest payments ranging from 7.75% to 13% over twelve to sixty-six months. When there were two classes of contract certificates – the senior and junior classes – the senior certificates offered a lower interest rate and a higher priority of repayment, while the junior certificates offered a higher interest rate and a lower priority of repayment.

13. According to the PPMs, the broker-dealer would receive approximately $2.2 million in underwriting fees from the Trusts. Between in or about 2006 and 2009, the broker-dealer received in excess of $6 million in connection with transactions related to the Trusts, of which approximately $1.8 million was paid directly from the Trusts and booked as underwriting fees. Approximately 80% of the more than $6 million paid to the broker-dealer consisted of investor money.

14. The trustee for each of the trusts was MS Capital, and, according to the PPMs, the trustee would not receive any fees for its services.

15. As direct and indirect owners of MS Capital, defendants TIMOTHY M. MCGINN and DAVID L. SMITH owed a legal duty to investors requiring that they not put their own interests ahead of the interests of investors.

16. With the exception of TDM Cable Trust 06, the declarations of trust for all of the Trusts, which were attached to the PPMs, limited the use of investor money to the direct or indirect acquisition of revenue streams created by the Agreements and temporary investments in (1) certificates of deposit; (2) short term AAA rated debt obligations regularly traded on a recognized exchange in the United States; or (3) obligations issued by the United States Treasury or other obligations backed by the full force and credit of the United States (the "Permitted Investments").

The Firstline Trusts

17. Firstline Security, Inc. ("Firstline") was a Utah corporation engaged in the business of selling primarily residential security alarm contracts.

18. ADT Security Services, Inc. ("ADT") was Firstline's dealer for security alarm contracts, and ADT had a security interest in all alarm contracts generated by Firstline.

19. On or about May 9, 2007, defendant TIMOTHY M. MCGINN, as Chairman of McGinn, Smith Funding LLC, executed an agreement with Firstline promising to lend Firstline approximately $2.8 million secured by alarm contracts generated by Firstline (the "May Loan"). From in or about September 2007 through in or about April 2012, Firstline was required to make monthly payments on the May Loan.

20. On or about May 19, 2007, MS Capital formed Firstline Trust 07 for the purpose of acquiring two classes in the Firstline financing.

21. Between on or about May 24, 2007, and on or about January 4, 2008, the broker-dealer raised approximately $3.7 million from investors who purchased unregistered securities from Firstline Trust 07 and Firstline Sr. Trust 07 (the "Firstline Trusts") in return for monthly payments on their investments to be paid from the revenue stream produced by the May Loan. In connection with these sales, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to Firstline Trust 07 and Firstline Sr. Trust 07 investors that in connection with the May Loan they had paid themselves $620,000 from McGinn, Smith Funding LLC above and beyond what was disclosed in the PPMs.

22. From in or about September 2007 through in or about December 2007, Firstline made the scheduled monthly payments on the May Loan.

23. On or about August 8, 2007, Firstline's Chief Executive Officer told defendant TIMOTHY M. MCGINN that ADT had informed Firstline that Firstline was in breach of its dealer agreement, and on October 4, 2007, Firstline's attorney told McGinn, Smith Funding LLC that ADT might sue Firstline and seek more than $7.5 million in damages related to the breach (the "Potential ADT Litigation").

24. Beginning on or about August 8, 2007, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose the Potential ADT Litigation to the existing and prospective Firstline Trust investors.

25. On or about October 4, 2007, defendant TIMOTHY M. MCGINN, as Chairman of McGinn, Smith Funding LLC, executed an agreement with Firstline promising to lend Firstline approximately $2.4 million secured by alarm contracts generated by Firstline (the "October Loan"). From in or about January 2008 through in or about October 2012, Firstline was required to make monthly payments on the October Loan.

26. Between in or about October 29, 2007, and in or about June 16, 2008, the broker-dealer raised approximately $3.2 million from investors who purchased unregistered securities from Firstline Trust 07 Series B and Firstline Sr. Trust 07 Series B (the "Firstline Series B Trusts") in return for monthly payments on their investments from the revenue stream produced by the October Loan. In connection with these sales, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to Firstline Series B Trust investors (a) the Potential ADT Litigation; and (b) that in connection with the October Loan they planned to pay themselves $315,000 from McGinn, Smith Funding LLC above and beyond what was disclosed in the PPMs.

27. On or about November 20, 2007, ADT filed a lawsuit in Arapahoe County, Colorado against Firstline, the broker-dealer, and others alleging that Firstline was in breach of the dealer agreement and seeking the appointment of a receiver for Firstline (the "ADT Litigation").

28. Between on or about November 20, 2007 and June 16, 2008, in connection with the sale of contract certificates for the Firstline Series B Trusts, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, in violation of their legal duty to disclose material information to investors,

concealed, disguised, and failed to disclose the ADT Litigation to existing and prospective Firstline Series B Trust investors.

29. Beginning in or about January 2008, Firstline stopped making payments on the May Loan and failed to make its first payment on the October Loan.

30. On or about January 25, 2008, Firstline filed a voluntary petition for Chapter 11 bankruptcy in United States Bankruptcy Court in the District of Utah.

31. From in or about January 2008 through in or about September 2009, Firstline made no payments on the May and October Loans, and there was no income stream to make payments to investors.

32. From in or about January 2008 through in or about September 2009, the Firstline and Firstline Series B Trusts continued to make approximately $2 million in payments to investors by diverting money from trusts and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH, including, among other trusts and entities, TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; TDM Verifier Trust 07R; and TDM Cable Funding, LLC when, as MCGINN and SMITH then well knew, this was not a permitted use of investor funds in those trusts as defined by the relevant PPMs and the declarations of trust. Defendant TIMOTHY M. MCGINN directed these improper diversions of funds, which misled the Firstline and Firstline Series B investors into believing that the income streams in which they had invested were performing well.

33. From in or about January 2008 through in or about September 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to existing and prospective Firstline and Firstline Series B investors that (a) Firstline had defaulted on

the May and October Loans; (b) Firstline had filed for bankruptcy; and (c) contrary to the PPMs for the Firstline and Firstline Series B Trusts, investor payments had been and would be made using money improperly diverted from entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH including, among other trusts and entities, TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; TDM Verifier Trust 07R; and TDM Cable Funding, LLC.

34. From in or about January 2008 through in or about September 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to investors in TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; and TDM Verifier Trust 07R that money had been improperly diverted to make payments to Firstline and Firstline Series B investors when, as MCGINN and SMITH then well knew, this was not a permitted use of investor funds as defined by the PPMs and the declarations of trust.

35. From on or about January 25, 2008 through on or about June 16, 2008, after Firstline filed for bankruptcy, the broker-dealer sold unregistered securities for Firstline Trust 07 Series B and Firstline Sr. Trust 07 Series B including approximately $600,000 of unregistered securities for Firstline Trust 07 Series B to replace an investment made by a broker's father and, in connection with those sales, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to these new investors that (a) Firstline had defaulted on the May and October Loans; (b) Firstline had filed for bankruptcy; and (c) contrary to the PPMs for the Firstline and Firstline Series B Trusts, investor payments had been and would be made using money improperly diverted from trusts and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L.

SMITH including, among other trusts and entities, TDM Cable Trust 06; TDM Verifier Trust 07; Integrated Excellence Jr. Trust 08; TDM Luxury Cruise Trust 07; TDM Verifier Trust 07R; and TDM Cable Funding, LLC.

36. On or about September 10, 2009, more than 19 months after Firstline filed for bankruptcy and defaulted on the May and October Loans, defendants TIMOTHY M. MCGINN and DAVID L. SMITH first notified Firstline and Firstline Series B investors of Firstline's January 25, 2008 bankruptcy filing and the defaults on the May and October Loans by mailing investors a memorandum from the general counsel for the broker-dealer. The memorandum falsely stated that (a) post-bankruptcy investor payments had been funded by an unidentified lender when, as MCGINN and SMITH then well knew, the payments to investors had been made with money improperly diverted from trusts and entities controlled by MCGINN and SMITH; and (b) Firstline had concealed the Potential ADT Litigation when, as MCGINN and SMITH then well knew, Firstline had disclosed the Potential ADT Litigation approximately two years earlier.

The Integrated Excellence Trusts

37. Integrated Excellence, Inc. was a Georgia corporation engaged in the business of selling residential security alarm contracts. Integrated Excellence Funding, LLC was a Georgia corporation created for the purpose of obtaining capital for Integrated Excellence, Inc.

38. On or about May 27, 2008, MS Capital formed Integrated Excellence Sr. Trust 08 and Integrated Excellence Jr. Trust 08 ("the Integrated Excellence Trusts") for the purpose of acquiring two classes in the Integrated Excellence Funding, LLC financing.

39. On or about May 28, 2008, defendant TIMOTHY M. MCGINN, as Chairman of McGinn, Smith Transaction Funding Corp., executed an agreement with Integrated Excellence

Funding, LLC promising to lend money to Integrated Excellence Funding, LLC secured by alarm contracts generated by Integrated Excellence, Inc. From on or about May 29, 2008 through on or about August 1, 2008, Integrated Excellence Funding, LLC borrowed approximately $697,815 under the terms of that agreement (the "Integrated Excellence Loans").

40. Between in or about June 2008 and in or about August 2013, Integrated Excellence Funding, LLC was required to make monthly payments on the Integrated Excellence Loans.

41. Between on or about June 9, 2008 and on or about September 26, 2008, the broker-dealer raised approximately $1.2 million from investors who purchased unregistered securities from the Integrated Excellence Trusts in return for monthly payments on their investments to be paid from the revenue stream produced by the Integrated Excellence Loans.

42. On or about July 1, 2008 and on or about July 15, 2008, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, who were officers and owners of the Trustee for Integrated Excellence Jr. Trust 08, for their own benefit and without authorization, improperly diverted $85,000 from an escrow account holding investor funds for Integrated Excellence Sr. Trust 08 to their personal bank accounts, and between in or about July 2008 and in or about April 2010, MCGINN and SMITH concealed, disguised, and failed to disclose to investors that they had done so.

43. In or about August 2008, defendant TIMOTHY M. MCGINN directed that $142,000 be improperly diverted from an escrow account holding investor funds for Integrated Excellence Jr. Trust 08 and be used to make investor payments to Firstline Sr. Trust 07 investors and TDM Luxury Cruise Trust 07 investors, and from in or about August 2008 through in or about April 2010, defendants MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to (a) Integrated Excellence Jr. Trust 08 investors that they did so when, as MCGINN and SMITH then

well knew, this was not a permitted use of investor funds as defined by the PPMs and declarations of trust; and (b) Firstline Sr. Trust 07 and TDM Luxury Cruise Trust 07 investors that, contrary to the relevant PPMs and declarations of trust, their investor payments had been and would be made using money improperly diverted from the Integrated Excellence Jr. Trust 08.

44. From in or about June 2008 through in or about December 2009, Integrated Excellence Funding, LLC, through another entity, made monthly payments on the Integrated Excellence Loans totaling approximately $244,709, which loan payments were not sufficient to cover payments of approximately $283,159 due to the Integrated Excellence investors.

45. Between in or about June 2008 and in or about December 2009, defendant TIMOTHY M. MCGINN directed that the Integrated Excellence Trusts continue to make payments due to investors by diverting money from trusts and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH, including, among other trusts and entities, TDM Luxury Cruise Trust 07 and TDMM Cable Sr. Trust 09 when, as MCGINN and SMITH then well knew, this was not a permitted use of investor funds as defined by the relevant PPMs and the declarations of trust, and between in or about June 2008 and in or about February 2010, MCGINN and SMITH concealed, disguised, and failed to disclose to investors in the TDM Luxury Cruise Trust 07 and TDMM Cable Sr. Trust 09 that they had done so. These payments misled the Integrated Excellence Trust investors into believing that the income streams in which they had invested were performing well.

46. Between in or about June 2008 and in or about February 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to the Integrated Excellence investors that (i) the Integrated Excellence Loans were not generating sufficient revenue to make monthly investor payments; and (ii) contrary to the PPMs for the Integrated Excellence

Trusts, investor payments had been and would be made using money improperly diverted from trusts and entities controlled by MCGINN and SMITH including, among other trusts and entities, TDM Luxury Cruise Trust 07 and TDMM Cable Sr. Trust 09.

TIMOTHY M. MCGINN and DAVID L. SMITH Improperly Divert $4.1 Million for Their Own Benefit and the Benefit of a Senior Managing Director of the Broker-Dealer

47. Between on or about October 2, 2006 and on or about August 28, 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH for their own benefit and the benefit of Matthew Rogers, a senior managing director of the broker-dealer, and without authorization, improperly diverted approximately $4.1 million above and beyond what was disclosed in the relevant PPMs from the LLCs; Integrated Excellence Jr. Trust 08; TDMM Cable Jr. Trust 09; and McGinn, Smith Transaction Funding Corp. as follows when, as MCGINN and SMITH then well knew, these transfers were not a permitted use of investor funds as defined by the relevant PPMs and declarations of trust:

(A) Between on or about October 2, 2006 and on or about August 28, 2009, in connection with transactions related to many of the Trusts, MCGINN and SMITH improperly diverted approximately $3.8 million from the LLCs to their own and Rogers's personal bank accounts and to pay $40,000 to Waterville Golf Links in Ring of Kerry, Ireland for a membership for Rogers;

(B) In or about July 2008, MCGINN and SMITH, who were officers and owners of the Trustee for Integrated Excellence Sr. Trust 08 (MS Capital), improperly diverted approximately $85,000 directly from an escrow account holding investor funds for Integrated Excellence Sr. Trust 08 to their personal

bank accounts;

(C) On or about April 30, 2009, MCGINN, who was an officer and owner of the Trustee for TDMM Cable Jr. Trust 09 (MS Capital), improperly diverted approximately $30,000 directly from an escrow account holding investor funds for TDMM Cable Jr. Trust 09 to his personal bank account; and

(D) From on or about August 22, 2008 through on or about July 8, 2009, MCGINN improperly diverted approximately $230,000 from McGinn, Smith Transaction Funding Corp., to his personal bank accounts, and on or about February 27, 2009, MCGINN repaid $100,000 of the money that he had taken.

48. Between in or about October 2006 and in or about April 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH concealed, disguised, and failed to disclose to investors in the Trusts that for their own benefit and the benefit of Matthew Rogers and without authorization they had improperly diverted approximately $4.1 million from the LLCs; Integrated Excellence Jr. Trust 08; TDMM Cable Jr. Trust 09; and McGinn, Smith Transaction Funding Corp. above and beyond what was disclosed in the relevant PPMs. MCGINN received approximately $1,616,142 (approximately $1,386,142 of which was related to the Trusts), and SMITH received approximately $1,567,000.

49. Between in or about October 2006 and in or about August 2009, defendant TIMOTHY M. MCGINN used the money that had been improperly diverted to his personal bank accounts for, among other things: (a) expenses related to his homes in Niskayuna, New York (at least $129,997) and Boca Raton, Florida (at least $63,808); (b) thoroughbred race horses (at least

$39,458); (c) alimony (at least $147,942); (d) loan payments to defendant DAVID L. SMITH and his wife (at least $255,000); (e) country club expenses at, among others, Waterville Golf Links in Ring of Kerry, Ireland; Pine Tree Golf Club in Boynton Beach, Florida; and Schuyler Meadows in Loudonville, New York (at least $54,414); (f) payments to investment accounts (at least $62,250); and (g) income tax payments (at least $89,642).

50. Between in or about October 2006 and in or about August 2009, defendant DAVID L. SMITH used the money that had been improperly diverted to his personal bank accounts for, among other things: (a) expenses related to his homes in Orchid Island, Florida (at least $145,445) and Saratoga Springs, New York (at least $86,334), (b) country club expenses at among others, Waterville Golf Links in Ring of Kerry, Ireland; Orchid Island Golf and Beach Club in Vero Beach, Florida; Schuyler Meadows in Loudonville, New York; and Saratoga Golf and Polo Club in Saratoga, New York (at least $57,928); (c) payments to investment accounts (at least $810,000); and (d) income tax payments (at least $145,092).

Defendants TIMOTHY M. MCGINN and DAVID L. SMITH Direct False Accounting Entries Regarding the Improperly Diverted $4.1 Million and Fail to Declare It On Their Tax Returns

51. In or about October 2007, defendant DAVID L. SMITH directed accountants at the broker-dealer and an outside accounting firm to reclassify transactions regarding money improperly diverted in 2006 from TDM Cable Funding, LLC to the personal bank accounts of MCGINN, SMITH, and Rogers as "loans" when, as he then well knew, (a) they were not "loans"; (b) they were not a permitted use of investor funds as defined by the PPM and the declaration of trust for TDM Cable Trust 06; and (c) they were not disclosed in the TDM Cable Trust 06 PPM as "loans."

52. Between in or about October 2007 and in or about the fall of 2009, at the direction of defendants TIMOTHY M. MCGINN and DAVID L. SMITH, accountants at the broker-dealer continued to book the money that had been improperly diverted from the LLCs as "loans" when, as MCGINN and SMITH then well knew (a) they were not "loans," (b) they were not a permitted use of investor funds as defined by the relevant PPMs and the declarations of trust, and (c) they were not disclosed in the relevant PPMs as "loans."

53. Between in or about October 2007 and in or about October 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH and Matthew Rogers failed to declare the $4.1 million improperly diverted for their own benefit on their federal income tax returns for tax years 2006, 2007, 2008, and 2009.

54. In or about November 2008 and in or about the spring of 2009, defendants TIMOTHY M. MCGINN and DAVID L. SMITH did not include any of the money that had been improperly diverted for their own benefit as "loans" on audited personal financial statements prepared by their outside accountant.

55. From in or about September 2009 through in or about January 2010, defendants TIMOTHY M. MCGINN and DAVID L. SMITH misled the broker-dealer's regulator, Financial Industry Regulatory Authority, Inc. ("FINRA"), about the money that had been diverted from the LLCs by (1) directing the creation of backdated promissory notes to support the false "loan" accounting entries discovered by FINRA; and (2) causing the submission of the backdated promissory notes to FINRA.

56. On or about November 2, 2009, after discovering that defendant TIMOTHY M. MCGINN had improperly diverted money from McGinn, Smith Transaction Funding Corp.,

defendant DAVID L. SMITH, to conceal the source of the diverted funds, directed an accountant for the broker-dealer to make a false accounting entry indicating that MCGINN had taken $130,000 from NEI Capital LLC.

Count One
(Conspiracy to Commit Mail and Wire Fraud)

57. Paragraphs One through Fifty-Six are hereby realleged and incorporated by reference as if fully set forth herein.

58. From on or about September 29, 2006 through on or about April 20, 2010, within the Northern District of New York and elsewhere, defendants TIMOTHY M. MCGINN and DAVID L. SMITH and others conspired to commit the following offenses:

a. **Mail Fraud,** by devising and intending to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, promises, and material omissions and for the purpose of executing such scheme and artifice and attempting so to do, knowingly placed, caused to be placed, and took and received in a post office and authorized depository for mail certain matters, documents, letters, and mailings to be sent or delivered by the United States Postal Service and/or by any private or commercial interstate carrier, in violation of Title 18, United States Code, Section 1341;

b. **Wire Fraud**, by devising and intending to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, promises, and material omissions, and for the purpose of

executing such scheme and artifice and attempting so to do, transmitted and caused to be transmitted by means of wire, radio, and television communication in interstate commerce any writings, signs, signals, and sounds, in violation of Title 18, United States Code, Section 1343.

Purpose

59. A purpose of the conspiracy was to mislead investors regarding the safekeeping and use of investor money by the Trusts and McGinn, Smith Transaction Funding Corp.; the risks of the Trust and McGinn, Smith Transaction Funding Corp. offerings; the performance of the underlying income streams; the source of payments to investors; and the improper diversion of investor money, all done in order to obtain money from investors and enrich themselves.

Manner and Means

60. MCGINN, SMITH, and their co-conspirators made and caused to be made numerous material misrepresentations and material omissions designed to mislead prospective and existing investors regarding the risks of the Trust and McGinn, Smith Transaction Funding Corp. offerings; the use of investor money; the performance of the underlying income streams; the source of investor payments; and the improper diversion of investor money.

61. As a result of the material misrepresentations and material omissions by MCGINN, SMITH and their co-conspirators, investors in the Trusts were not aware that MCGINN and SMITH had improperly diverted money for their own use and without authorization directly from escrow accounts containing investor money for Integrated Excellence Sr. Trust 08 and TDMM Cable Jr. Trust 09.

62. As a result of the material misrepresentations and material omissions by MCGINN, SMITH and their co-conspirators, investors in the Trusts were not aware that MCGINN and SMITH

had improperly diverted money from an escrow account containing investor money for Integrated Excellence Jr. Trust 08 to make payments to Firstline Sr. Trust 07 and TDM Luxury Cruise Trust 07 investors.

63. As a result of the material misrepresentations and material omissions by MCGINN, SMITH, and their co-conspirators, investors in the Trusts were not aware that for their own benefit and the benefit of Matthew Rogers and without authorization, MCGINN and SMITH had improperly diverted $3.9 million from the LLCs above and beyond what was disclosed in the PPMs.

64. As a result of the material misrepresentations and material omissions by MCGINN, SMITH, and their co-conspirators, investors in the Trusts and McGinn, Smith Transaction Funding Corp. were not aware that MCGINN, for his own benefit and without authorization, had improperly diverted $230,000 from McGinn, Smith Transaction Funding Corp. above and beyond what was disclosed in the PPM.

65. As a result of the material misrepresentations and material omissions by MCGINN, SMITH and their co-conspirators, investors in the Trusts were not aware of: (a) the Potential ADT Litigation; (b) the ADT Litigation; (c) Firstline's defaults on the May and October Loans; (d) Firstline's bankruptcy petition; (e) the failure of the underlying income streams to generate sufficient income to pay investors in the Firstline and Firstline Series B Trusts and the Integrated Excellence Trusts; and (f) the diversion of money to pay Firstline, Firstline Series B, and Integrated Excellence Trust investors.

66. Part of the manner and means of the conspirators' scheme to defraud consisted of misleading investors into believing that the income streams in which they had invested were performing well by making payments to investors with money improperly diverted from other trusts

and entities controlled by defendants TIMOTHY M. MCGINN and DAVID L. SMITH.

67. As part of the conspiracy, the broker-dealer routinely used the United States mail, private mail carriers, electronic mail, interstate facsimiles, and interstate wire transfers from financial institutions located outside New York State to send investment documents, PPMs, and investor payments. The broker-dealer also routinely obtained investor money through interstate wire transfers from financial institutions located outside New York State and through mailings delivered by the United States Postal Service and private mail carriers. Most of these mailings came to and from Albany and Clifton Park in the Northern District of New York.

68. The use of the mails and interstate wires was foreseeable, and defendants TIMOTHY M. MCGINN and DAVID L. SMITH were aware that use of the mails and interstate wires would follow in the ordinary course of business.

In violation of Title 18, United States Code, Section 1349.

COUNTS TWO THROUGH EIGHT
(Mail Fraud)

69. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

70. From in or about September 2006 through in or about December 2009, in the Northern District of New York and elsewhere, defendants TIMOTHY M. MCGINN and DAVID L. SMITH devised and intended to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and to obtain money and property by means of material false and fraudulent pretenses, representations, promises, and material omissions and attempting to do so.

71. For the purpose of executing such scheme and to obtain money and property by means of material false and fraudulent pretenses, representations, promises, and material omissions and attempting to do so, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, in the Northern District of New York and elsewhere, on or about the following dates knowingly placed, caused to be placed, and took and received in a post office and authorized depository for mail certain matters, documents, letters, and mailings to be sent or delivered by the United States Postal Service and/or by any private or commercial interstate carrier, the following matters and things to and from the addresses listed below:

Count	Date	Matter or Thing	Address
2	10/2007	A private placement memorandum for Firstline Trust 07 Series B	Delivered to: T.B. Guilderland, NY
3	12/18/2007	A $50,000 check from M. & K.D. to purchase contract certificates from Firstline Sr. Trust 07 Series B	Delivered to: McGinn, Smith & Co. Inc. Clifton Park, NY
4	01/28/2008	A letter of authorization for a $30,000 wire transfer from H.C. to purchase contract certificates from Firstline Sr. Trust 07 Series B	Delivered to: McGinn, Smith & Co. Inc. Clifton Park, NY
5	05/15/2008	A $50,000 check from R. & S. B. to purchase contract certificates from Firstline Trust 07 Series B	Delivered to: McGinn, Smith & Co. Inc. Clifton Park, NY
6	06/06/2008	A subscription agreement for Firstline Trust 07 Series B	Delivered from: R. & J. P. Schenectady, NY
7	06/09/2008	A $100,000 check from B.S. to purchase contract certificates from Integrated Excellence Sr. Trust 08	Delivered to: McGinn, Smith & Co. Inc. Clifton Park, NY
8	09/10/2009	A letter and memorandum from McGinn Smith Capital Holdings Corp. regarding Firstline Trust 07 Series B to A.G.	Delivered from: McGinn, Smith & Co. Inc. Clifton Park, NY

All in violation of Title 18, United States Code, Section 1341.

COUNTS NINE THROUGH EIGHTEEN
(Wire Fraud)

72. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

73. From in or about September 2006 through in or about December 2009, in the Northern District of New York and elsewhere, defendants TIMOTHY M. MCGINN and DAVID L. SMITH devised and intended to devise a scheme and artifice to defraud investors by soliciting investments under false pretenses and concealing, disguising, and failing to disclose material information, and to obtain money and property by means of material false and fraudulent pretenses, representations, promises, and material omissions and attempting to do so.

74. For the purpose of executing such scheme and artifice, defendants TIMOTHY M. MCGINN and DAVID L. SMITH, in the Northern District of New York and elsewhere, on or about the dates listed below, knowingly transmitted and caused to be transmitted by means of wire communication in interstate commerce the following writings, signs, and signals, specifically, facsimile transmissions and money transfers, as described below:

Count	Date	Writing, Sign, or Signal	Origin	Destination
9	04/23/2008	Facsimile related to B.K.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
10	05/10/2008	Facsimile related to A.C.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
11	05/28/2008	Facsimile related to T.R.'s purchase of contract certificates from Firstline Trust 07 Series B	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA

Count	Date	Writing, Sign, or Signal	Origin	Destination
12	07/14/2008	Facsimile related to S.J.T.W.'s purchase of contract certificates from Integrated Excellence Sr. Trust 08	McGinn, Smith & Co. Inc. Clifton Park, NY	National Financial Services LLC Marlborough, MA
13	08/29/2008	Wire transfer of $97,000 to Firstline Sr. Trust 07	Integrated Excellence Jr. Trust 08 Mercantile Bank account ending in 3994 Boca Raton, Florida	Firstline Sr. Trust 07 M & T bank account ending in 5028 Albany, New York
14	08/29/2008	Wire transfer of $45,000 to TDM Luxury Cruise Trust 07	Integrated Excellence Jr. Trust 08 Mercantile Bank account ending in 3994 Boca Raton, Florida	TDM Luxury Cruise Trust 07 M & T bank account ending in 5234 Albany, New York
15	07/01/2008	Wire transfer of $35,000 to David L. Smith	Integrated Excellence Sr. Trust 08 Mercantile Bank account ending in 3983 Boca Raton, Florida	David L. Smith M & T bank account ending in 9965 Albany, New York
16	07/01/2008 07/15/2008	Wire transfers totaling $50,000 to Timothy M. McGinn	Integrated Excellence Sr. Trust 08 Mercantile Bank account ending in 3983 Boca Raton, Florida	Timothy M. McGinn M & T bank account ending in 9504 Albany, New York
17	08/22/2008 09/08/2008 10/22/2008 10/27/2008 11/07/2008 07/08/2009	Wire transfers totaling $230,000 to Timothy M. McGinn	McGinn, Smith Transaction Funding Corp. Mercantile Bank account ending in 3083 Boca Raton, Florida	Timothy M. McGinn M & T bank accounts ending in 9504 & 2675 Albany, New York
18	04/30/2009	Wire transfer of $30,000 to Timothy M. McGinn	TDMM Cable Jr. Trust 09 Mercantile Bank account ending in 4139 Boca Raton, FL	Timothy M. McGinn M & T bank account ending in 2675 Albany, New York

All in violation of Title 18, United States Code, Section 1343.

COUNTS NINETEEN THROUGH TWENTY-FOUR
(Securities Fraud)

75. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

76. On or about the following dates, each such date constituting a separate count of this Indictment, within the Northern District of New York and elsewhere, the defendants TIMOTHY M. MCGINN and DAVID L. SMITH, and others, willfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce and the mails, in connection with the purchase and sale of any securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; and (c) engaging in transactions, acts, practices, and courses of business which operated or would operate as a fraud and deceit upon persons in connection with the following transactions:

Count	Date	Transaction
19	01/11/2008 01/28/2008	Wire transfers related to TDM Verifier Trust 08 totaling $50,000 from the McGinn, Smith Funding LLC Mercantile bank account ending in 1635 to the Timothy M. McGinn M & T bank account ending in 9504
20	01/28/2008	Wire transfer related to TDM Verifier Trust 08 of $50,000 from the McGinn, Smith Funding LLC Mercantile bank account ending in 1635 to the David L. Smith M & T bank account ending in 9965
21	09/29/2008 10/03/2008 10/06/2008	Wire transfers related to Fortress Trust 08 totaling $210,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the Timothy M. McGinn M & T bank account ending in 9504
22	09/29/2008 10/03/2008 10/06/2008	Wire transfer related to Fortress Trust 08 totaling $360,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the David L. Smith M & T bank account ending in 9965

Count	Date	Transaction
23	10/03/2008	A wire transfer related to Fortress Trust 08 of $245,000 from the NEI Capital LLC Mercantile bank account ending in 9220 to the Matthew Rogers Citicorp Florida bank account ending in 9958 related to Fortress Trust 08
24	11/07/2008	Electronic mail message from tmmcginn@mcginnsmith.com to Mercantile Bank employees in Boca Raton, Florida related to Fortress Trust 08

All in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 2.

COUNTS TWENTY-FIVE THROUGH TWENTY-SEVEN
(Filing False Returns)

77. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

78. On or about the following dates, each such date constituting a separate count of this Indictment, in the Northern District of New York, defendant TIMOTHY M. MCGINN willfully made and subscribed to the following joint U.S. Individual Income Tax Returns for the following tax years, each of which (a) was prepared in the Northern District of New York; (b) was filed with the Internal Revenue Service; (c) was verified by a written declaration that it was made under the penalties of perjury; and (d) defendant TIMOTHY M. MCGINN did not believe to be true and correct as to every material matter, to wit: the returns, at line 22, reported the following amounts as income when, as defendant TIMOTHY M. MCGINN then well knew, the total income he had received during each year was substantially in excess of that amount:

Count	Date Return Filed	Tax Year	Amount Reported at Line 22
25	10/18/2007	2006	$598,577
26	10/20/2008	2007	$537,850
27	10/15/2009	2008	$383,219

All in violation of Title 26, United States Code, Section 7206(1).

COUNTS TWENTY-EIGHT THROUGH THIRTY
(Filing False Returns)

79. Paragraphs One through Fifty-Six and Fifty-Nine through Sixty-Eight are hereby realleged and incorporated by reference as if fully set forth herein.

80. On or about the following dates, each such date constituting a separate count of this Indictment, in the Northern District of New York, defendant DAVID L. SMITH willfully made and subscribed to the following joint U.S. Individual Income Tax Returns for the following tax years, each of which (a) was prepared in the Northern District of New York; (b) was filed with the Internal Revenue Service; (c) was verified by a written declaration that it was made under the penalties of perjury; and (d) defendant DAVID L. SMITH did not believe to be true and correct as to every material matter, to wit: the returns, at line 22, reported the following amounts as income when, as defendant DAVID L. SMITH then well knew, the total income he had received during each year was substantially in excess of that amount:

Count	Date Return Filed	Tax Year	Amount Reported at Line 22
28	10/17/2007	2006	$487,337
29	10/20/2008	2007	$475,160
30	10/15/2009	2008	$501,199

All in violation of Title 26, United States Code, Section 7206(1).

Forfeiture Allegations

81. The allegations contained in Counts One through Twenty-Four of this Indictment are realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

82. Upon conviction of the offenses in violation of Title 18, United States Code, Sections 1341, 1343, and 1349 set forth in Counts One through Eighteen of this Indictment, defendants TIMOTHY M. MCGINN and DAVID L. SMITH shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses.

83. Upon conviction of the offenses in violation of Title 15, United States Code, Sections 78j(b)and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5 set forth in Counts Nineteen through Twenty-Four of this Indictment, which are realleged and incorporated by reference as if fully set forth herein, defendants TIMOTHY M. MCGINN and DAVID L. SMITH shall forfeit to the United States, pursuant to 18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7), and 1961(1), and 28 U.S.C. § 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses.

84. If any of the property described above, as a result of any act or omission of the defendants:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party,

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

the United States of America shall be entitled to forfeiture of property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

85. The intent of the United States of America to forfeit such property includes a money judgment in the amount of $8,000,000 representing the total dollar amount constituting or derived from proceeds traceable to the offenses of conviction.

All pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

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