# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

10 Civ. 457 (GLS/DRH)

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

Defendants.

#### NOTICE OF MOTION

PLEASE TAKE NOTICE that, following a conference with the Court on June 11, 2012, and the Order dated June 13, 2012 granting leave to the SEC and Citizens Bank to file the instant motion (Dkt. 499), and upon the Memorandum of Law in Support of the Motion of Plaintiff SEC, and Citizens Bank, to Modify the Asset Freeze to Allow the Sale of the Saratoga Springs Property and to Appoint the Receiver to Oversee the Sale, dated July 11, 2012; the Declaration of Michael A. Kornstein, Esq., dated July 11, 2012, and upon all prior proceedings and filings herein, plaintiff Securities and Exchange Commission and Citizens Bank will move, on August 16, 2012, at 9:30 a.m., or at any other date convenient to the Court, before the Honorable David R. Homer, United States Magistrate Judge, United States District Court, Northern District of New York, 445 Broadway, Albany, NY, for an order modifying the asset freeze to allow for the sale of the Saratoga Springs property and appointing the Receiver to oversee the sale;

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

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

Dated: New York, NY July 11, 2012

# Respectfully submitted,

# s/ David Stoelting

Attorney Bar Number: 516163 Attorney for Plaintiff Securities and Exchange Commission 3 World Financial Center, Room 400 New York, NY 10281 Telephone: (212) 336-0174

Fax: (212) 336-1324

E-mail: stoeltingd@sec.gov

# /s Michael A. Kornstein

Attorney Bar No. 103178 Attorney for RBS Citizens, N.A. Cooper Erving & Savage LLP 39 North Pearl Street Albany, New York 12207 Telephone: (518) 449-3900

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK	
SECURITIES AND EXCHANGE COMMISSION,	- : :
Plaintiff,	:
v.	: 10 Civ. 457 (GLS/DRH)
McGINN, SMITH & CO., INC., et al.,	: :
Defendants.	: :

# [PROPOSED] ORDER MODIFYING ASSET FREEZE TO ALLOW THE SALE OF CERTAIN PROPERTY

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

WHEREAS, the property located at \_\_\_\_\_\_, Saratoga Springs, New York (the "Property") is currently subject to the Freeze Order;

NOW, THEREFORE,

I.

IT IS ORDERED that the Court-appointed Receiver, William J. Brown (the "Receiver"), is given sole authority to take all necessary steps to effectuate a sale of the Property, including the retention of a prominently known real estate agent in the community

where the Property is located, and the Freeze Order is hereby modified to permit the Receiver or the Smiths (with the Receiver's prior written consent) to enter into a contract for the purchase and sale of the Property, and to close a sale of the Property subject to the following terms and conditions:

- A. The Receiver shall provide the Commission with a copy of any contract proposed to be accepted for sale of the Property (the "Contract") within three days of its execution, along with a proposed list of distributions (the "Distribution List") to be made from the proceeds of such sale. The Distribution List may include, among other things, the mortgagee of the Property, and any usual and customary costs of closing, including broker, attorney, and recording fees, real estate taxes and transfer taxes.
- B. The Commission may within one week from the delivery of the Contract and the Distribution List object to the terms of the Contract, and such objections may include the sale price or the proposed distributions. The Court will resolve such objections on motion by the Commission or the Receiver if the Commission and the Receiver do not reach agreement on such objections. The Commission and the Receiver shall not object to a request for an expedited hearing.
- C. The balance of any funds remaining after payment of the Distribution List shall be paid to the Receiver, and deposited in a segregated, interest-bearing account. The Receiver shall send a copy of the statement for this account to David Stoelting, Senior Trial Counsel, Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, New York 10281-1022, and to the Smiths. These funds, together with any interest and income earned thereon, shall be held by the Receiver until further order of this Court.

- D. The Commission and the Receiver shall provide such documents as the purchaser of the Property may reasonably require to evidence the Commission's and the Receiver's consent and authority to convey title to the Property.
- E. The Receiver shall consult with the Smiths, and the Smiths shall cooperate with the Receiver, in the listing, showing and closing of the sale of the Property

II.

IT IS FURTHER ORDERED that, except as modified herein and in the Court's prior Orders, the Preliminary Injunction Order entered July 22, 2010 remains in full force and effect.

effect.		
Dated: Albany, New York, 2012	DAVID R. HOMER United State Magistrate Judge	

NORTHERN DISTRICT OF NEW YORK	
SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	: : : 10 Ctr. 457 (CL S/DDID
ν.	: 10 Civ. 457 (GLS/DRH)
McGINN, SMITH & CO., INC.,	• •
et al.,	:
Defendants.	: :
	<b>:</b>

# MEMORANDUM OF LAW IN SUPPORT OF MOTION OF PLAINTIFF SEC AND CITIZENS BANK TO MODIFY ASSET FREEZE TO PERMIT SALE OF DEFENDANTS' SARATOGA SPRINGS PROPERTY

### PRELIMINARY STATEMENT

The Property is a substantial asset of David and Lynn Smith and should be sold to preserve its value for the benefit of victims pending resolution of this action. Unless the Property is promptly sold, however, the substantial equity will continue to decline sharply as mortgage costs, taxes, and other expenses continue to accrue. Selling the Property is the only way to avoid the ongoing dissipation of this valuable asset. In addition, it

appears unlikely that preventive maintenance is being done to the Property, which will result in a further decrease in value. Declaration of Michael A. Kornstein dated July 11, 2012, ¶ 14.

The US Court of Appeals for the Second Circuit has upheld this Court's authority to order the sale of a similarly situated property owned by the Smiths. *See Smith v. SEC*, 653 F.3d 121 (2d Cir. 2011). For the reasons adopted by the Second Circuit in *Smith v. SEC*, the sale of the Saratoga Springs property should be ordered. A proposed Order is attached to the Notice of Motion dated July 11, 2012.

# **ARGUMENT**

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

The Property should be sold in order to preserve the substantial equity that remains. The mortgage and taxes have been unpaid for more than one year, and if the Smiths are allowed to keep control of the Property, substantial arrearages will continue to accrue, the equity will continue to diminish, and foreclosure will be the only option. Kornstein Decl. ¶¶ 10-12.

The Smiths have made an application for a loan modification with Citizens Bank. See Dkt. 449. However, they have failed to diligently pursue the modification and have failed to supply the Bank with documentation. Declaration of Michael A. Kornstein dated July 11, 2012, ¶¶ 17-20. In the event that the loan modification is granted under terms which preserve the equity of the Property, and the Smiths at all times continue to adhere to those terms, the SEC would consider withdrawing this motion without prejudice. However, if a loan modification is granted on inadequate terms or if the Smiths

allow the Property to deteriorate notwithstanding the modification, this motion would not be withdrawn.

The Smiths have not made mortgage payments on the Property after May 2011. Declaration of Michael A. Kornstein Decl. ¶ 5. The total amount due on the Property as of July 11, 2012, is approximately \$372,500. Kornstein Decl. ¶ 5. There is significant value in the Property. Kornstein Decl. ¶ 12.

The Court's authority to order the sale of the Property is beyond dispute. The Court has previously ordered two properties sold, and the sale of the Vero Beach property was upheld by the Second Circuit. *See Smith v. SEC*, 653 F.3d 121 (2d Cir. 2011). Like the Vero Beach property, the Saratoga Springs property is declining in value and subject to foreclosure. As the Second Circuit found, "it is clear that the magistrate judge did not abuse his discretion when he ordered the interlocutory liquidation of Lynn Smith's Florida house in light of its declining value and the diminishing equity in the property."

The proposed Order would give the Receiver sole authority to effectuate the sale of the Property. The Receiver effectively managed the sale of the Timothy and Nancy McGinn property in Niskayuna and the Vero Beach property. The Saratoga Springs property should be dealt with in similar fashion.

#### **CONCLUSION**

Plaintiff and Citizens Bank respectfully request that the Court grant their motion and enter the proposed Order, in the form attached to the Notice of Motion dated July 11, 2012, to: (a) modify the asset freeze to allow for the sale of the Property; and (b) to appoint the Receiver to oversee the sale of the Property.

Dated: New York, NY July 11, 2012

Respectfully submitted,

s/ David Stoelting

Attorney Bar Number: 516163 Attorney for Plaintiff Securities and Exchange Commission 3 World Financial Center, Room 400 New York, NY 10281

Telephone: (212) 336-0174

Fax: (212) 336-1324

E-mail: stoeltingd@sec.gov

/s Michael A. Kornstein

Attorney Bar No. 103178
Attorney for RBS Citizens, N.A.
Cooper Erving & Savage LLP
39 North Pearl Street
Albany, New York 12207

Telephone: (518) 449-3900

E-mail: mkornstein@coopererving.com

# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

DECLARATION IN SUPPORT OF ORDER MODIFYING ASSET FREEZE

v.

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

10 Civ. 457 (GLS/DRH)

Defendants.

I, MICHAEL A. KORNSTEIN, Esq., declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the following is true and correct:

- I am an attorney and member of the firm of Cooper Erving & Savage LLP, attorneys for RBS Citizens, N.A. doing business as Citizens Bank.
- 2. I make this declaration in support of an Order modifying the asset freeze contained in the July 22, 2010 Preliminary Injunction Order of this Court (Docket No. 96) which currently prohibits creditors from taking any action against the defendants' assets without further Order of this Court (the "Asset Freeze").
- 3. Defendants David L. Smith and Lynn A. Smith (the "Smiths") are the current owners of real property situated at **REDACTED**, Saratoga Springs, New York (the "Property").
- 4. Citizens Bank as successor by merger to Charter One Bank, N.A. is the holder of a Note in the principal amount of \$600,000.00 dated August 7, 2003 executed and delivered to Charter One Bank, N.A. by the Smiths (the "Note"). The Note is secured by a first mortgage lien on the Property granted by the Smiths to Charter One Bank, N.A. (the "Mortgage"). The Mortgage was recorded on or about August 9, 2003 in

the Saratoga County Clerk's Office in Liber 3251 at page 760. Copies of the Note and Mortgage are annexed hereto as **EXHIBITS "A" and "B"**, respectively.

- 5. The Note is currently due for the monthly installments due on June 1, 2011 and subsequent months, and the Smiths are in default under the terms of the Note and Mortgage. The amount required to cure the defaults and reinstate the loan as of July 11, 2012 is approximately \$71,500.00. The total amount due on the Note as of July 11, 2012 including principal, interest, late charges and other items is approximately \$372,500.00.
- 6. Citizens Bank is also the holder of a Home Equity Credit Line Note in the original principal amount of \$115,400.00 secured by a second mortgage lien on the Property. As of March 31, 2012 the Smiths have not borrowed any principal amount from the Home Equity Credit Line Note and the total sum due from the Smiths to Citizens Bank under the terms of the Home Equity Credit Line Note and Mortgage, including annual fees for non-usage and lien release fees is approximately \$751.00.
- 7. Citizens Bank engaged my firm to commence foreclosure proceedings against the Property, and our foreclosure title search revealed the existence of the Asset Freeze, which currently prevents Citizens Bank from foreclosing on the Property and/or taking further action to collect the Note.
- 8. Citizens Bank, which is regulated by the Comptroller of Currency, has an obligation to pursue collection of its non-performing loans.
- 9. Upon learning of the Asset Freeze, I contacted William J. Brown, Esq. who was appointed as Receiver in this case to discuss the possibility of modifying the

Asset Freeze with respect to this Property, Mr. Brown referred me to counsel for the Securities and Exchange Commission ("SEC").

- 10. Proceedings under the New York Real Property and Proceedings Law to foreclose the Mortgage will take considerable time, incur additional interest, fees and costs, and would ultimately result in the Property being sold at public sale to the highest bidder. The interest of Citizens Bank in such a foreclosure sale would be merely to recover its outstanding obligations.
- 11. In many foreclosure sale scenarios, any equity in a foreclosed property is often lost as a byproduct of the foreclosure sale.
- 12. Upon information and belief, the Property may have a value substantially in excess of the amounts due Citizens Bank.
- 13. The foreclosure title report, a copy of which is annexed hereto as **EXHIBIT "C"**, indicates that there are unpaid tax liens in the approximate amount of \$32,000.00. The report shows judgments and/or federal tax liens docketed in Saratoga County against a David Smith d/b/a East Coast Construction, David B. Smith, Lynn Smith, Lynn M. Smith, James A. Smith, and David J. Smith, although none of these individuals appear to be the same individuals who own the Property.
- 14. In the absence of allowing this loan to proceed through foreclosure, the equity in the Property is likely to diminish as real estate taxes and interest continue to accrue. Furthermore, in view of the Smith's inability to pay to the mortgage loan, it would also seem unlikely that any preventive or ongoing maintenance is being done to the Property, which could also result in the Property being worth less over time.

- 15. As an alternative to allowing the foreclosure action to proceed, SEC counsel (with the Receiver's consent) is requesting this Court to direct the Receiver to market and sell the Property in order to preserve and maximize the equity therein for the benefit of this action.
- 16. Citizens Bank has no objection to the relief requested and believes that a privately negotiated sale by the Receiver would enable Citizens Bank to be repaid in full much sooner than a foreclosure proceeding would allow, and such a privately negotiated sale would be more likely to preserve and maximize the equity in the Property for this case.
- 17. The Smiths have submitted a loan modification application to Citizens Bank to determine if they are eligible for any loan modification programs currently offered by Citizens Bank. Even during the course of a foreclosure action, the Smiths may be afforded an opportunity under current applicable law to submit such a loan modification application and if approved, would result in having the foreclosure action discontinued. In my experience of representing Citizens Bank, I have been routinely instructed to continue to prosecute the foreclosure action until a decision regarding a loan modification application is finally determined.
- 18. In this instance, I am advised by Citizens Bank that the Smith's loan modification is as of this date still incomplete, rendering Citizens Bank unable to make a determination as to whether or not the Smiths may be eligible for any of the Bank's current loan modification programs.
- 19. I am advised that on July 2, 2012, Mr. Smith was advised by telephone that the Bank required proof in the form of bank statements or cancelled checks to

substantiate receipt of the rent amount they claim to have received for the Property. The Bank also requested clarification to determine if the Property is the Smith's primary residence or if the Property is an investment property as the lease agreement presented to the Bank indicates this property address as the rental while another document included in the application package indicates this as being the Smith's primary residence. The answer to this question could impact the type of loan modification programs available to the Smiths. Also, under current New York law, the additional requirements pertaining to foreclosure actions involving owner-occupied residential properties would not be applicable if the Property is considered investment property.

20. I am further advised by Citizens Bank that while Mr. Smith indicated in the July 2<sup>nd</sup> phone call that he would provide this information to the Bank that day, he did not do so. A further phone contact was made on July 10th, but the person answering the phone indicated the Smiths were at a function and would give them the message. Later that day the Bank was further advised by the same person that Mr. Smith said he will call the Bank yesterday afternoon or this morning. To my knowledge, the requested information has not yet been provided.

For the foregoing reasons, I request that the proposed Order Modifying the Asset Freeze be granted in all respects, and for such other and further relief as may be just and proper under the circumstances..

I declare under penalty of perjury that the foregoing is true and correct. Executed at Albany, New York on July 11, 2012.

Michael A. Kornstein

CES 181354

NOTE

0016078396

August 7, 2003

ALBANY, NY

[Date]

[City]

[State]

REDACTED

SARATOGA SPRINGS, New York 12866

[Property Address]

#### 1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S.\$ 600,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is CHARTER ONE BANK, N.A.

I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

#### 2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 4.750 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

#### 3. PAYMENTS

#### (A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the first day of each month beginning on October 1, 2003. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on September 1, 2018, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 1215 SUPERIOR AVENUE

CLEVELAND, OH 44114

or at a different place if required by the Note Holder.

#### (B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$

4,667.00

#### 4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

NEW YORK FIXED RATE NOTE-Single Family-Fannie Mac/Freddie Mac UNIFORM INSTRUMENT

-5N(NY) (0005)

Form 3233 1/01

VMP MORTGAGE FORMS - (800)621-729

Page 1 of 3

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#### 5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

#### 6. BORROWER'S FAILURE TO PAY AS REQUIRED

#### (A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.00 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

#### (B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

#### (C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

#### (D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

#### (E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

#### 7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

#### 8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

#### 9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

Form 3233 1/01

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#### 10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Lender may require immediate payment in full of all Sums Secured by this Security Instrument if all or any part of the Property, or if any right in the Property, is sold or transferred without Lender's prior written permission. If Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred without Lender's prior written permission, Lender also may require immediate payment in full. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender requires immediate payment in full under this Section 18, Lender will give me a notice which states this requirement. The notice will give me at least 30 days to make the required payment. The 30-day period will begin on the date the notice is given to me in the manner required by Section 15 of this Security Instrument. If I do not make the required payment during that period, Lender may act to enforce its rights under this Security Instrument without giving me any further notice or demand for payment.

WITNESS THE HAND(S) AND SEAL(S) OF THE	3 UNDERSIG	NED. Witness: Am	n. 00	
DAVID L SMITH	(Seal) -Borrower	LYNN A SMITH	a. Some	-Borrower
	(Seal)			(Seal) -Borrower
	(Seal) -Borrower			(Seal) -Borrower
	(Scal)	<i>}</i>		(Seal) -Borrower
				[Sign Original Only]

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#### Saratoga County COUNTY CLERK'S RECORDING PAGE

RECEIPT NO.: 690227

BOOK OF MORTGAGES

BOOK 03251

PAGE 00760

NO. PAGES

INSTRUMENT CODE: MTG

TNDEXED BY

SCANNED BY:

RECORDING: Cover Sheet Fee (Rcdg MTG) Education Fee Mortgage Tax Fee Recording Fee (MTG)

Markoffs Names

Pages

TOTAL:

6,057.50

3.00 20.00

5.00

54.00

5,975.00

\*\*\*\*\*NOTICE: THIS IS NOT A BILL \*\*\*\*\*

STATE OF NEW YORK SARATOGA COUNTY CLERK

RECORDED ON 08/19/2003 AT 15:43:00

IN BOOK OF MORTGAGES PAGE 00760 OF 03251

INSTRUMENT NO.: 200408988

18

MORTGAGE TAX

SERIAL #: CU200408988

BASIC

3,000.00

CDTA

1,475.00

SONYMA

1,500.00

TOTAL:

5,975.00

SARATOGA COUNTY CLERK

Kathleen A. Marchione SARATOGA COUNTY CLBRK

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Filed 08/19/2003 3:43 PM Volume 03251 Page 00760 X200408988 Baratoga County Clerk

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Prepared By:

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RECORD & RETURN
Cooper Erving & Savage LLP
39 North Pearl Street
Albany, New York 12207

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0016078396

# **MORTGAGE**

This Security Instrument covers real property improved, or to be improved, by a one or two family dwelling only.

# WORDS USED OFTEN IN THIS DOCUMENT

(A) "Security Instrument." This document, which is dated august 7, 2003 together with all Riders to this document, will be called the "Security Instrument."

(B) "Borrower."

DAVID L SMITH and
LYNN A SMITH

whose address is REDACTED CLIFTON PARK New York 12065 sometimes will be called "Borrower" and sometimes simply "I" or "me."

(C) "Lender." CHARTER ONE BANK, N.A.

will be called "Lender." Lender is a corporation or association which exists under the laws of the United States of America . Lender's address is 1215 SUPERIOR AVENUE, CLEVELAND, OH 44114

NEW YORK - Single Family - Fannie Mae/Freddic Mac UNIFORM INSTRUMENT

Form 3033 1/01

6(NY) (0005).03

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VMP MORTGAGE FORMS - (800)521-7291

manager and the second production manager of the contract transform the contract of the contract carried that

(D) "Note." The note signed by Borrower and dated August 7, 2003 , will be called the "Note." The Note shows that I owe Lender
SIX HUNDRED THOUSAND & 00/100
Dollars (U.S.\$ 600,000.00 ) plus interest and other amounts that may be payable. I have promised to pay this debt in Periodic Payments and to pay the
and other amounts that may be payable. I have profitised to pay this debt in I carbial I aymosts and to pay
debt in full by September 1, 2018
(E) "Property." The property that is described below in the section titled "Description of the Property," will
be called the "Property."
(F) "Loan." The "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and
late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(G) "Sums Secured." The amounts described below in the section titled "Borrower's Transfer to Lender of
Rights in the Property" sometimes will be called the "Sums Secured."
(H) "Riders." All Riders attached to this Security Instrument that are signed by Borrower will be called
"Riders." The following Riders are to be signed by Borrower [check box as applicable]:
Adjustable Rate Rider Condominium Rider Second Home Rider
Balloon Rider Planned Unit Development Rider 1-4 Family Rider
VA Rider Biweekly Payment Rider Other(s) [specify]
VA Ruer Laymont Ruet Locally 1 aymont Ruet
(I) "Applicable Law." All controlling applicable federal, state and local statutes, regulations, ordinances and
administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable,
judicial opinions will be called "Applicable Law."
(J) "Community Association Dues, Fees, and Assessments." All dues, fees, assessments and other charges
(J) "Community Association Dues, rees, and Assessments." At the secondary of the community association
that are imposed on Borrower or the Property by a condominium association, homeowners association or
similar organization will be called "Community Association Dues, Fees, and Assessments."
(K) "Electronic Funds Transfer." "Electronic Funds Transfer" means any transfer of money, other than by
check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic
instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or
credit an account. Some common examples of an Electronic Funds Transfer are point-of-sale transfers (where
a card such as an asset or debit card is used at a merchant), automated teller machine (or ATM) transactions,
transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(I.) "Escrow Items." Those items that are described in Section 3 will be called "Escrow Items."
(M) "Miscellaneous Proceeds." "Miscellaneous Proceeds" means any compensation, settlement, award of
damages, or proceeds paid by any third party (other than Insurance Proceeds, as defined in, and paid under
the coverage described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) Condemnation or
other taking of all or any part of the Property; (iii) conveyance in lieu of Condemnation or sale to avoid
Condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property. A
taking of the Property by any governmental authority by eminent domain is known as "Condemnation."
(N) "Mortgage Insurance." "Mortgage Insurance" means insurance protecting Lender against the
(N) "Mortgage Insurance." Mortgage Insurance means insurance proceeding Leiner against the
nonpayment of, or default on, the Loan.
(O) "Periodic Payment." The regularly scheduled amount due for (i) principal and interest under the Note,
and (ii) any amounts under Section 3 will be called "Periodic Payment."
(P) "RESPA." "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.)
and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to
time, or any additional or successor legislation or regulation that governs the same subject matter. As used in
this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a
"federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan"
under RESPA.
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# BORROWER'S TRANSFER TO LENDER OF RIGHTS IN THE PROPERTY

I mortgage, grant and convey the Property to Lender subject to the terms of this Security Instrument. This means that, by signing this Security Instrument, I am giving Lender those rights that are stated in this Security Instrument and also those rights that Applicable Law gives to lenders who hold mortgages on real property. I am giving Lender these rights to protect Lender from possible losses that might result if I fail to:

- (A) Pay all the amounts that I owe Lender as stated in the Note including, but not limited to, all renewals, extensions and modifications of the Note;
- (B) Pay, with interest, any amounts that Lender spends under this Security Instrument to protect the value of the Property and Lender's rights in the Property; and
- (C) Keep all of my other promises and agreements under this Security Instrument and the Note.

### DESCRIPTION OF THE PROPERTY

I give Lender rights in the Property described in (A) through (G) below:

(A) The Property which is located at

REDACTED

[Street]

SARATOGA SPRINGS

[City, Town or Village], New York 12866 [Zip Code].

County. It has the following legal

This Property is in Saratoga description:

All that tract or parcel of land as shown on Schedule "A" attached hereto which is incorporated herein and made a part hereof.

- (B) All buildings and other improvements that are located on the Property described in subsection (A) of this
- (C) All rights in other property that I have as owner of the Property described in subsection (A) of this section. These rights are known as "easements and appurtenances attached to the Property;"
- (D) All rights that I have in the land which lies in the streets or roads in front of, or next to, the Property described in subsection (A) of this section;
- (E) All fixtures that are now or in the future will be on the Property described in subsections (A) and (B) of this section;
- (F) All of the rights and property described in subsections (B) through (E) of this section that I acquire in the future: and
- (G) All replacements of or additions to the Property described in subsections (B) through (F) of this section and all Insurance Proceeds for loss or damage to, and all Miscellaneous Proceeds of the Property described in subsections (A) through (F) of this section.

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# BORROWER'S RIGHT TO MORTGAGE THE PROPERTY AND BORROWER'S OBLIGATION TO DEFEND OWNERSHIP OF THE PROPERTY

I promise that: (A) I lawfully own the Property; (B) I have the right to mortgage, grant and convey the Property to Lender; and (C) there are no outstanding claims or charges against the Property, except for those which are of public record.

I give a general warranty of title to Lender. This means that I will be fully responsible for any losses which Lender suffers because someone other than myself has some of the rights in the Property which I promise that I have. I promise that I will defend my ownership of the Property against any claims of such rights.

## PLAIN LANGUAGE SECURITY INSTRUMENT

This Security Instrument contains promises and agreements that are used in real property security instruments all over the country. It also contains other promises and agreements that vary in different parts of the country. My promises and agreements are stated in "plain language."

#### COVENANTS

I promise and I agree with Lender as follows:

1. Borrower's Promise to Pay. I will pay to Lender on time principal and interest due under the Note and any prepayment, late charges and other amounts due under the Note. I will also pay all amounts for Escrow Items under Section 3 of this Security Instrument.

Payments due under the Note and this Security Instrument shall be made in U.S. currency. If any of my payments by check or other payment instrument is returned to Lender unpaid, Lender may require my payment be made by: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location required in the Note, or at another location designated by Lender under Section 15 of this Security Instrument. Lender may return or accept any payment or partial payment if it is for an amount that is less than the amount that is then due. If Lender accepts a lesser payment, Lender may refuse to accept a lesser payment that I may make in the future and does not waive any of its rights. Lender is not obligated to apply such lesser payments when it accepts such payments. If interest on principal accrues as if all Periodic Payments had been paid when due, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until I make payments to bring the Loan current. If I do not do so within a reasonable period of time, Lender will either apply such funds or return them to me. In the event of foreclosure, any unapplied funds will be applied to the outstanding principal balance immediately prior to foreclosure. No offset or claim which I might have now or in the future against Lender will relieve me from making payments due under the Note and this Security Instrument or keeping all of my other promises and agreements secured by this Security Instrument.

2. Application of Borrower's Payments and Insurance Proceeds. Unless Applicable Law or this Section 2 requires otherwise, Lender will apply each of my payments that Lender accepts in the following order:

First, to pay interest due under the Note;

Next, to pay principal due under the Note; and

Next, to pay the amounts due Lender under Section 3 of this Security Instrument.

Such payments will be applied to each Periodic Payment in the order in which it became due,

Any remaining amounts will be applied as follows:

First, to pay any late charges;

Next, to pay any other amounts due under this Security Instrument; and

Next, to reduce the principal balance of the Note.

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If Lender receives a payment from me for a late Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the late Periodic Payment and the late charge. If more than one Periodic Payment is due, Lender may apply any payment received from me: First, to the repayment of the Periodic Payments that are due if, and to the extent that, each payment can be paid in full; Next, to the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due.

Voluntary prepayments will be applied as follows: First, to any prepayment charges; and Next, as described in the Note.

Any application of payments, Insurance Proceeds, or Miscellaneous Proceeds to principal due under the Note will not extend or postpone the due date of the Periodic Payments or change the amount of those payments.

3. Monthly Payments For Taxes And Insurance.

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(a) Borrower's Obligations.

I will pay to Lender all amounts necessary to pay for taxes, assessments, water charges, sewer rents and other similar charges, ground leasehold payments or rents (if any), hazard or property insurance covering the Property, flood insurance (if any), and any required Mortgage Insurance, or a Loss Reserve as described in Section 10 in the place of Mortgage Insurance. Each Periodic Payment will include an amount to be applied toward payment of the following items which are called "Escrow Items:"

(1) The taxes, assessments, water charges, sewer rents and other similar charges, on the Property which under Applicable Law may be superior to this Security Instrument as a Lien on the Property. Any claim, demand or charge that is made against property because an obligation has not been fulfilled is known as a "Lien;"

(2) The leasehold payments or ground rents on the Property (if any);

(3) The premium for any and all insurance required by Lender under Section 5 of this Security Instrument;

(4) The premium for Mortgage Insurance (if any);

(5) The amount I may be required to pay Lender under Section 10 of this Security Instrument instead of the payment of the premium for Mortgage Insurance (if any); and

(6) If required by Lender, the amount for any Community Association Dues, Fees, and Assessments.

After signing the Note, or at any time during its term, Lender may include these amounts as Escrow Items. The monthly payment I will make for Escrow Items will be based on Lender's estimate of the annual amount required.

I will pay all of these amounts to Lender unless Lender tells me, in writing, that I do not have to do so, or unless Applicable Law requires otherwise. I will make these payments on the same day that my Periodic Payments of principal and interest are due under the Note.

The amounts that I pay to Lender for Escrow Items under this Section 3 will be called "Escrow Funds." I will pay Lender the Escrow Funds for Escrow Items unless Lender waives my obligation to pay the Escrow Funds for any or all Escrow Items. Lender may waive my obligation to pay to Lender Escrow Funds for any or all Escrow Items at any time. Any such waiver must be in writing. In the event of such waiver, I will pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Escrow Funds has been waived by Lender and, if Lender requires, will promptly send to Lender receipts showing such payment within such time period as Lender may require. My obligation to make such payments and to provide receipts will be considered to be a promise and agreement contained in this Security Instrument, as the phrase "promises and agreements" is used in Section 9 of this Security Instrument. If I am obligated to pay Escrow Items directly, pursuant to a waiver, and I fail to pay the amount due for an Escrow Item, Lender may pay that amount and I will then be obligated under Section 9 of this Security Instrument to repay to Lender. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 of this Security Instrument and, upon the revocation, I will pay to Lender all Escrow Funds, and in amounts, that are then required under this Section 3.

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I promise to promptly send to Lender any notices that I receive of Escrow Item amounts to be paid. Lender will estimate from time to time the amount of Escrow Funds I will have to pay by using existing assessments and bills and reasonable estimates of the amount I will have to pay for Escrow Items in the future, unless Applicable Law requires Lender to use another method for determining the amount I am to pay.

Lender may, at any time, collect and hold Escrow Funds in an amount sufficient to permit Lender to apply the Escrow Funds at the time specified under RESPA. Applicable Law puts limits on the total amount of Escrow Funds Lender can at any time collect and hold. This total amount cannot be more than the maximum amount a lender could require under RESPA. If there is another Applicable Law that imposes a lower limit on the total amount of Escrow Funds Lender can collect and hold, Lender will be limited to the lower amount.

### (b) Lender's Obligations.

Lender will keep the Escrow Funds in a savings or banking institution which has its deposits insured by a federal agency, instrumentality, or entity, or in any Federal Home Loan Bank. If Lender is such a savings or banking institution, Lender may hold the Escrow Funds. Lender will use the Escrow Funds to pay the Escrow Items no later than the time allowed under RESPA or other Applicable Law, Lender will give to me, without charge, an annual accounting of the Escrow Funds. That accounting will show all additions to and deductions from the Escrow Funds and the reason for each deduction.

Lender may not charge me for holding or keeping the Escrow Funds, for using the Escrow Funds to pay Escrow Items, for making a yearly analysis of my payment of Escrow Funds or for receiving, or for verifying and totaling assessments and bills. However, Lender may charge me for these services if Lender pays me interest on the Escrow Funds and if Applicable Law permits Lender to make such a charge. Lender will not be required to pay me any interest or earnings on the Escrow Funds unless either (1) Lender and I agree in writing that Lender will pay interest on the Escrow Funds, or (2) Applicable Law requires Lender to pay interest on the Escrow Funds.

# (c) Adjustments to the Escrow Funds.

Under Applicable Law, there is a limit on the amount of Escrow Funds Lender may hold. If the amount of Escrow Funds held by Lender exceeds this limit, then there will be an excess amount and RESPA requires Lender to account to me in a special manner for the excess amount of Escrow Funds.

If, at any time, Lender has not received enough Escrow Funds to make the payments of Escrow Items when the payments are due, Lender may tell me in writing that an additional amount is necessary. I will pay to Lender whatever additional amount is necessary to pay the Escrow Items when the payments are due, but the number of payments will not be more than 12.

When I have paid all of the Sums Secured, Lender will promptly refund to me any Escrow Funds that are then being held by Lender.

4. Borrower's Obligation to Pay Charges, Assessments and Claims. I will pay all taxes, assessments, water charges, sewer rents and other similar charges, and any other charges and fines that may be imposed on the Property and that may be superior to this Security Instrument. I will also make ground rents or payments due under my lease if I am a tenant on the Property and Community Association Dues, Fees, and Assessments (if any) due on the Property. If these items are Escrow Items, I will do this by making the payments as described in Section 3 of this Security Instrument. In this Security Instrument, the word "Person" means any individual, organization, governmental authority or other party.

I will promptly pay or satisfy all Liens against the Property that may be superior to this Security Instrument. However, this Security Instrument does not require me to satisfy a superior Lien if: (a) I agree, in writing, to pay the obligation which gave rise to the superior Lien and Lender approves the way in which I agree to pay that obligation, but only so long as I am performing such agreement; (b) in good faith, I argue or defend against the superior Lien in a lawsuit so that in Lender's opinion, during the lawsuit, the superior Lien may not be enforced, but only until the lawsuit ends; or (c) I secure from the holder of that other Lien an agreement, approved in writing by Lender, that the Lien of this Security Instrument is superior to the Lien

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held by that Person. If Lender determines that any part of the Property is subject to a superior Lien, Lender may give Borrower a notice identifying the superior Lien. Within 10 days of the date on which the notice is given, Borrower shall pay or satisfy the superior Lien or take one or more of the actions mentioned in this Section 4.

Lender also may require me to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with the Loan, unless Applicable Law does not permit Lender to make such a charge.

5. Borrower's Obligation to Maintain Hazard Insurance or Property Insurance. I will obtain hazard or property insurance to cover all buildings and other improvements that now are, or in the future will be, located on the Property. The insurance will cover loss or damage caused by fire, hazards normally covered by "Extended Coverage" hazard insurance policies, and any other hazards for which Lender requires coverage, including, but not limited to earthquakes and floods. The insurance will be in the amounts (including, but not limited to, deductible levels) and for the periods of time required by Lender. What Lender requires under the last sentence can change during the term of the Loan. I may choose the insurance company, but my choice is subject to Lender's right to disapprove. Lender may not disapprove my choice unless the disapproval is reasonable. Lender may require me to pay either (a) a one-time charge for flood zone determination, certification and tracking services, or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect the flood zone determination or certification. If I disagree with the flood zone determination, I may request the Federal Emergency Management Agency to review the flood zone determination and I promise to pay any fees charged by the Federal Emergency Management Agency for its review.

If I fail to maintain any of the insurance coverages described above, Lender may obtain insurance coverage, at Lender's option and my expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage will cover Lender, but might or might not protect me, my equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. I acknowledge that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that I could have obtained. Any amounts disbursed by Lender under this Section 5 will become my additional debt secured by this Security Instrument. These amounts will bear interest at the interest rate set forth in the Note from the date of disbursement and will be payable with such interest, upon notice from Lender to me requesting payment.

All of the insurance policies and renewals of those policies will include what is known as a "Standard Mortgage Clanse" to protect Lender and will name Lender as mortgagee and/or as an additional loss payee. The form of all policies and renewals will be acceptable to Lender, Lender will have the right to hold the policies and renewal certificates. If Lender requires, I will promptly give Lender all receipts of paid premiums and renewal notices that I receive.

If I obtain any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy will include a Standard Mortgage Clause and will name Lender as mortgagee and/or as an additional loss payee.

If there is a loss or damage to the Property, I will promptly notify the insurance company and Lender. If I do not promptly prove to the insurance company that the loss or damage occurred, then Lender may do so.

The amount paid by the insurance company for loss or damage to the Property is called "Insurance Proceeds." Unless Lender and I otherwise agree in writing, any Insurance Proceeds, whether or not the underlying insurance was required by Lender, will be used to repair or to restore the damaged Property unless: (a) it is not economically feasible to make the repairs or restoration; (b) the use of the Insurance Proceeds for that purpose would lessen the protection given to Lender by this Security Instrument; or (c)

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Lender and I have agreed in writing not to use the Insurance Proceeds for that purpose. During the period that any repairs or restorations are being made, Lender may hold any Insurance Proceeds until it has had an opportunity to inspect the Property to verify that the repair work has been completed to Lender's satisfaction. However, this inspection will be done promptly. Lender may make payments for the repairs and restorations in a single payment or in a series of progress payments as the work is completed. Unless Lender and I agree otherwise in writing or unless Applicable Law requires otherwise, Lender is not required to pay me any interest or earnings on the Insurance Proceeds. I will pay for any public adjusters or other third parties that I hire, and their fees will not be paid out of the Insurance Proceeds. If the repair or restoration is not economically feasible or if it would lessen Lender's protection under this Security Instrument, then the Insurance Proceeds will be used to reduce the amount that I owe to Lender under this Security Instrument. Such Insurance Proceeds will be applied in the order provided for in Section 2. If any of the Insurance Proceeds remain after the amount that I owe to Lender has been paid in full, the remaining Insurance Proceeds will be paid to me.

If I abandon the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If I do not answer, within 30 days, a notice from Lender stating that the insurance company has offered to settle a claim, Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 of this Security Instrument or otherwise, I give Lender my rights to any Insurance Proceeds in an amount not greater than the amounts unpaid under the Note and this Security Instrument. I also give Lender any other of my rights (other than the right to any refund of unearned premiums that I paid) under all insurance policies covering the Property, if the rights are applicable to the coverage of the Property. Lender may use the Insurance Proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

- 6. Borrower's Obligations to Occupy The Property. I will occupy the Property and use the Property as my principal residence within 60 days after I sign this Security Instrument. I will continue to occupy the Property and to use the Property as my principal residence for at least one year. The one-year period will begin when I first occupy the Property. However, I will not have to occupy the Property and use the Property as my principal residence within the time frames set forth above if Lender agrees in writing that I do not have to do so. Lender may not refuse to agree unless the refusal is reasonable. I also will not have to occupy the Property and use the Property as my principal residence within the time frames set forth above if extenuating circumstances exist which are beyond my control.
- 7. Borrower's Obligations to Maintain And Protect The Property And to Fulfill Any Lease Obligations.
  - (a) Maintenance and Protection of the Property.
- I will not destroy, damage or harm the Property, and I will not allow the Property to deteriorate. Whether or not I am residing in the Property, I will keep the Property in good repair so that it will not deteriorate or decrease in value due to its condition. Unless it is determined under Section 5 of this Security Instrument that repair is not economically feasible, I will promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or Condemnation (as defined in the definition of Miscellaneous Proceeds) proceeds are paid because of loss or damage to, or Condemnation of, the Property, I will repair or restore the Property only if Lender has released those proceeds for such purposes. Lender may pay for the repairs and restoration out of proceeds in a single payment or in a series of progress payments as the work is completed. If the insurance or Condemnation proceeds are not sufficient to repair or restore the Property, I promise to pay for the completion of such repair or restoration.
  - (b) Lender's Inspection of Property.

Lender, and others authorized by Lender, may enter on and inspect the Property. They will do so in a reasonable manner and at reasonable times. If it has a reasonable purpose, Lender may inspect the inside of the home or other improvements on the Property. Before or at the time an inspection is made, Lender will give me notice stating a reasonable purpose for such interior inspection.

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- 8. Borrower's Loan Application. If, during the application process for the Loan, I, or any Person or entity acting at my direction or with my knowledge or consent, made false, misleading, or inaccurate statements to Lender about information important to Lender in determining my eligibility for the Loan (or did not provide Lender with such information), Lender will treat my actions as a default under this Security Instrument. False, misleading, or inaccurate statements about information important to Lender would include a misrepresentation of my intention to occupy the Property as a principal residence. This is just one example of a false, misleading, or inaccurate statement of important information.
- 9. Lender's Right to Protect Its Rights in The Property. If: (a) I do not keep my promises and agreements made in this Security Instrument; (b) someone, including me, begins a legal proceeding that may significantly affect Lender's interest in the Property or rights under this Security Instrument (such as a legal proceeding in bankruptcy, in probate, for Condemnation or Forfeiture (as defined in Section 11), proceedings which could give a Person rights which could equal or exceed Lender's interest in the Property or under this Security Instrument, proceedings for enforcement of a Lien which may become superior to this Security Instrument, or to enforce laws or regulations); or (c) I have abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and Lender's rights under this Security Instrument.

Lender's actions may include, but are not limited to: (a) protecting and/or assessing the value of the Property; (b) securing and/or repairing the Property; (c) paying sums to eliminate any Lien against the Property that may be equal or superior to this Security Instrument; (d) appearing in court; and (e) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Lender can also enter the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, have utilities turned on or off, and take any other action to secure the Property. Although Lender may take action under this Section 9, Lender does not have to do so and is under no duty to do so. I agree that Lender will not be liable for not taking any or all actions under this Section 9.

I will pay to Lender any amounts, with interest, which Lender spends under this Section 9. I will pay those amounts to Lender when Lender sends me a notice requesting that I do so. I will pay interest on those amounts at the interest rate set forth in the Note. Interest on each amount will begin on the date that the amount is spent by Lender. This Security Instrument will protect Lender in case I do not keep this promise to pay those amounts with interest.

If I do not own, but am a tenant on the Property, I will fulfill all my obligations under my lease. I also agree that, if I acquire the full title (sometimes called "Fee Title") to the Property, my lease interest and the Fee Title will not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, I will pay the premiums for the Mortgage Insurance. If, for any reason, the Mortgage Insurance coverage ceases to be available from the mortgage insurer that previously provided such insurance and Lender required me to make separate payments toward the premiums for Mortgage Insurance, I will pay the premiums for substantially equivalent Mortgage Insurance coverage from an alternate mortgage insurer. However, the cost of this Mortgage Insurance coverage will be substantially equivalent to the cost to me of the previous Mortgage Insurance coverage, and the alternate mortgage insurer will be selected by Lender.

If substantially equivalent Mortgage Insurance coverage is not available, Lender will establish a non-refundable "Loss Reserve" as a substitute for the Mortgage Insurance coverage. I will continue to pay to Lender each month an amount equal to one-twelfth of the yearly Mortgage Insurance premium (as of the time the coverage lapsed or ceased to be in effect). Lender will retain these payments, and will use these payments to pay for losses that the Mortgage Insurance would have covered. The Loss Reserve is non-refundable even if the Loan is ultimately paid in full and Lender is not required to pay me any interest on the Loss Reserve. Lender can no longer require Loss Reserve payments if: (a) Mortgage Insurance

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coverage again becomes available through an insurer selected by Lender; (b) such Mortgage Insurance is obtained; (c) Lender requires separately designated payments toward the premiums for Mortgage Insurance; and (d) the Mortgage Insurance coverage is in the amount and for the period of time required by Lender.

If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separate payments toward the premiums for Mortgage Insurance, I will pay the Mortgage Insurance premiums, or the Loss Reserve payments, until the requirement for Mortgage Insurance ends according to any written agreement between Lender and me providing for such termination or until termination of Mortgage Insurance is required by Applicable Law. Lender may require me to pay the premiums, or the Loss Reserve payments, in the manner described in Section 3 of this Security Instrument. Nothing in this Section 10 will affect my obligation to pay interest at the rate provided in the Note.

A Mortgage Insurance policy pays Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance

policy.

Mortgage insurers assess their total risk on all Mortgage Insurance from time to time. Mortgage insurers may enter into agreements with other parties to share or change their risk, or to reduce losses. These agreements are based on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include Mortgage Insurance premiums).

As a result of these agreements, Lender, any owner of the Note, another insurer, any reinsurer, or any other entity may receive (directly or indirectly) amounts that come from a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or changing the mortgage insurer's risk, or reducing losses. If these agreements provide that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." It also should be understood that: (a) any of these agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. These agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund; and (b) any of these agreements will not affect the rights Borrower has - if any - regarding the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right (a) to receive certain disclosures, (b) to request and obtain cancellation of the Mortgage Insurance, (c) to have the Mortgage Insurance terminated automatically, and/or (d) to receive a refund of any Mortgage Insurance premiums that were not earned at the time of such cancellation or termination.

11. Agreements About Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are assigned

to and will be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds will be applied to restoration or repair of the Property, if (a) the restoration or repair is economically feasible, and (b) Lender's security given in this Security Instrument is not lessened. During such repair and restoration period, Lender will have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect the Property to verify that the work has been completed to Lender's satisfaction. However, the inspection will be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless Lender and I agree otherwise in writing or unless Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender will not be required to pay Borrower any interest or earnings on the Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security given in this Security Instrument would be lessened, the Miscellaneous Proceeds will be applied to the Sums Secured, whether or not then due. The excess, if any, will be paid to me. Such Miscellaneous Proceeds will be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds

will be applied to the Sums Secured, whether or not then due. The excess, if any, will be paid to me.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the Sums Secured immediately before the partial taking, destruction, or loss in

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value, the Sums Secured will be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the Sums Secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to me.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the Sums Secured immediately before the partial taking, destruction, or loss in value, the

Miscellaneous Proceeds will be applied to the Sums Secured whether or not the sums are then due.

If I abandon the Property, or if, after Lender sends me notice that the Opposing Party (as defined in the next sentence) offered to make an award to settle a claim for damages, I fail to respond to Lender within 30 days after the date Lender gives notice, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the Sums Secured, whether or not then due. "Opposing Party" means the third party that owes me Miscellaneous Proceeds or the party against whom I have a right of

action in regard to Miscellaneous Proceeds.

I will be in default under this Security Instrument if any civil or criminal action or proceeding that Lender determines could result in a court ruling (a) that would require Forfeiture of the Property, or (b) that could damage Lender's interest in the Property or rights under this Security Instrument. "Forfeiture" is a court action to require the Property, or any part of the Property, to be given up. I may correct the default by obtaining a court ruling that dismisses the court action, if Lender determines that this court ruling prevents Forfeiture of the Property and also prevents any damage to Lender's interest in the Property or rights under this Security Instrument. If I correct the default, I will have the right to have enforcement of this Security Instrument discontinued, as provided in Section 19 of this Security Instrument, even if Lender has required Immediate Payment in Full (as defined in Section 22). The proceeds of any award or claim for damages that are attributable to the damage or reduction of Lender's interest in the Property are assigned, and will be paid, to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property will be applied in the order provided for in Section 2.

12. Continuation of Borrower's Obligations And of Lender's Rights.

(a) Borrower's Obligations.

Lender may allow me, or a Person who takes over my rights and obligations, to delay or to change the amount of the Periodic Payments. Even if Lender does this, however, I will still be fully obligated under the Note and under this Security Instrument unless Lender agrees to release me, in writing, from my obligations.

Lender may allow those delays or changes for me or a Person who takes over my rights and obligations, even if Lender is requested not to do so. Even if Lender is requested to do so, Lender will not be required to (1) bring a lawsuit against me or such a Person for not fulfilling obligations under the Note or under this Security Instrument, or (2) refuse to extend time for payment or otherwise modify amortization of the Sums Secured.

(b) Lender's Rights.

Even if Lender does not exercise or enforce any right of Lender under this Security Instrument or under Applicable Law, Lender will still have all of those rights and may exercise and enforce them in the future. Even if: (1) Lender obtains insurance, pays taxes, or pays other claims, charges or Liens against the Property; (2) Lender accepts payments from third Persons; or (3) Lender accepts payments in amounts less than the amount then due, Lender will have the right under Section 22 below to demand that I make Immediate Payment in Full of any amounts remaining due and payable to Lender under the Note and under this Security Instrument.

13. Obligations of Borrower And of Persons Taking Over Borrower's Rights or Obligations. If more than one Person signs this Security Instrument as Borrower, each of us is fully obligated to keep all of Borrower's promises and obligations contained in this Security Instrument. Lender may enforce Lender's rights under this Security Instrument against each of us individually or against all of us together. This means that any one of us may be required to pay all of the Sums Secured. However, if one of us does not sign the Note: (a) that Person is signing this Security Instrument only to give that Person's rights in the Property to Lender under the terms of this Security Instrument; (b) that Person is not personally obligated to pay the Sums Secured; and (c) that Person agrees that Lender may agree with the other Borrowers to

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delay enforcing any of Lender's rights, to modify, or make any accommodations with regard to the terms of

this Security Instrument or the Note without that Person's consent.

Subject to the provisions of Section 18 of this Security Instrument, any Person who takes over my rights or obligations under this Security Instrument in writing, and is approved by Lender in writing, will have all of my rights and will be obligated to keep all of my promises and agreements made in this Security Instrument. Borrower will not be released from Borrower's obligations and liabilities under this Security Instrument unless Lender agrees to such release in writing. Any Person who takes over Lender's rights or obligations under this Security Instrument will have all of Lender's rights and will be obligated to keep all of Lender's promises and agreements made in this Security Instrument except as provided under Section 20.

14. Loan Charges. Lender may charge me fees for services performed in connection with my default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. With regard to other fees, the fact that this Security Instrument does not expressly indicate that Lender may charge a certain fee does not mean that Lender cannot charge that fee. Lender may not charge fees that are prohibited by this Security

Instrument or by Applicable Law.

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If the Loan is subject to Applicable Law which sets maximum loan charges, and that Applicable Law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed permitted limits: (a) any such loan charge will be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (even if a prepayment charge is provided for under the Note). If I accept such a refund that is paid directly to me, I will waive any right to bring a lawsuit against

Lender because of the overcharge.

15. Notices Required under this Security Instrument. All notices given by me or Lender in connection with this Security Instrument will be in writing. Any notice to me in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means. Notice to any one Borrower will be notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address is the address of the Property unless I give notice to Lender of a different address. I will promptly notify Lender of my change of address. If Lender specifies a procedure for reporting my change of address, then I will only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender will be given by delivering it or by mailing it by first class mail to Lender's address stated on the first page of this Security Instrument unless Lender has given me notice of another address. Any notice in connection with this Security Instrument is given to Lender when it is actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Law That Governs this Security Instrument; Word Usage. This Security Instrument is governed by federal law and the law of New York State. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might allow the parties to agree by contract or it might be silent, but such silence does not mean that Lender and I cannot agree by contract. If any term of this Security Instrument or of the Note conflicts with Applicable Law, the conflict will not affect other provisions of this Security Instrument or the Note which can operate, or be given effect, without the conflicting provision. This means that the Security Instrument or the Note will remain as if the

conflicting provision did not exist.

As used in this Security Instrument: (a) words of the masculine gender mean and include corresponding words of the feminine and neuter genders; (b) words in the singular mean and include the plural, and words in the plural mean and include the singular; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. I will be given one copy of the Note and of this Security Instrument.

18. Agreements about Lender's Rights If the Property Is Sold or Transferred. Lender may require Immediate Payment in Full of all Sums Secured by this Security Instrument if all or any part of the Property, or if any right in the Property, is sold or transferred without Lender's prior written permission.

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If Borrower is not a natural Person and a beneficial interest in Borrower is sold or transferred without Lender's prior written permission, Lender also may require Immediate Payment in Full. However, this option

shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender requires Immediate Payment in Full under this Section 18, Lender will give me a notice which states this requirement. The notice will give me at least 30 days to make the required payment. The 30-day period will begin on the date the notice is given to me in the manner required by Section 15 of this Security Instrument. If I do not make the required payment during that period, Lender may act to enforce its rights under this Security Instrument without giving me any further notice or demand for payment.

19. Borrower's Right to Have Lender's Enforcement of this Security Instrument Discontinued. Even if Lender has required Immediate Payment in Full, I may have the right to have enforcement of this Security Instrument stopped. I will have this right at any time before the earliest of: (a) five days before sale of the Property under any power of sale granted by this Security Instrument; (b) another period as Applicable Law might specify for the termination of my right to have enforcement of the Loan stopped; or (c) a judgment has been entered enforcing this Security Instrument. In order to have this right, I will meet the following conditions:

(a) I pay to Lender the full amount that then would be due under this Security Instrument and the Note

as if Immediate Payment in Full had never been required;

(b) I correct my failure to keep any of my other promises or agreements made in this Security

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(c) I pay all of Lender's reasonable expenses in enforcing this Security Instrument including, for example, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) I do whatever Lender reasonably requires to assure that Lender's interest in the Property and rights under this Security Instrument and my obligations under the Note and under this Security Instrument continue unchanged.

Lender may require that I pay the sums and expenses mentioned in (a) through (d) in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check drawn upon an institution whose deposits are insured by a federal agency,

instrumentality or entity; or (d) Electronic Funds Transfer.

If I fulfill all of the conditions in this Section 19, then this Security Instrument will remain in full effect as if Immediate Payment in Full had never been required. However, I will not have the right to have Lender's enforcement of this Security Instrument discontinued if Lender has required Immediate Payment in Full under Section 18 of this Security Instrument.

20. Note Holder's Right to Sell the Note or an Interest in the Note; Borrower's Right to Notice of Change of Loan Servicer; Lender's and Borrower's Right to Notice of Grievance. The Note, or an interest in the Note, together with this Security Instrument, may be sold one or more times. I might not

receive any prior notice of these sales.

The entity that collects the Periodic Payments and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law is called the "Loan Servicer." There may be a change of the Loan Servicer as a result of the sale of the Note. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. Applicable Law requires that I be given written notice of any change of the Loan Servicer. The notice will state the name and address of the new Loan Servicer, and also tell me the address to which I should make my payments. The notice also will contain any other information required by RESPA or Applicable Law. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to me will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither I nor Lender may commence, join or be joined to any court action (as either an individual party or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other has not fulfilled any of its obligations under this Security Instrument, unless the other is notified (in the manner required under Section 15 of this Security Instrument) of the unfulfilled obligation and given a reasonable time period to take corrective action. If Applicable Law provides a time period which will elapse before certain action can be taken, that time period will be deemed to be reasonable for

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purposes of this paragraph. The notice of acceleration and opportunity to cure given to me under Section 22 and the notice of the demand for payment in full given to me under Section 22 will be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20. All rights under this paragraph

are subject to Applicable Law.

21. Continuation of Borrower's Obligations to Maintain and Protect the Property. The federal laws and the laws of New York State that relate to health, safety or environmental protection are called "Environmental Law." Environmental Law classifies certain substances as toxic or hazardous. There are other substances that are considered hazardous for purposes of this Section 21. These substances are gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. The substances defined as toxic or hazardous by Environmental Law and the substances considered hazardous for purposes of this Section 21 are called "Hazardous Substances." "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law. An "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

I will not do anything affecting the Property that violates Environmental Law, and I will not allow anyone else to do so. I will not cause or permit Hazardous Substances to be present on the Property. I will not use or store Hazardous Substances on the Property. I also will not dispose of Hazardous Substances on the Property, or release any Hazardous Substance on the Property, and I will not allow anyone else to do so. I also will not do, nor allow anyone else to do, anything affecting the Property that: (a) is in violation of any Environmental Law; (b) creates an Environmental Condition; or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The promises in this paragraph do not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized as appropriate for normal residential use and maintenance of the Property (including, but not limited to, Hazardous Substances in consumer products). I may use or store these small quantities on the Property. In addition, unless Environmental Law requires removal or other action, the buildings, the improvements and the fixtures on the Property are permitted to contain asbestos and asbestos-containing materials if the asbestos and asbestos-containing materials are undisturbed and "non-friable" (that is, not easily crumbled by hand pressme).

I will promptly give Lender written notice of: (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which I have actual knowledge; (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance; and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If I learn, or any governmental or regulatory authority, or any private party, notifies me that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, I will promptly take all necessary remedial actions in accordance with Environmental Law.

Nothing in this Security Instrument creates an obligation on Lender for an Environmental Cleanup.

#### NON-UNIFORM COVENANTS

I also promise and agree with Lender as follows:

22. Lender's Rights If Borrower Fails to Keep Promises and Agreements. Except as provided in Section 18 of this Security Instrument, if all of the conditions stated in subsections (a), (b) and (c) of this Section 22 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument. Lender may do this without making any further demand for payment. This requirement is called "Immediate Payment in Full."

If Lender requires Immediate Payment in Full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold. At this sale Lender or another Person may acquire the Property. This is known as "Foreclosure and Sale." In any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by Applicable Law and will have the right to add all reasonable attorneys' fees to

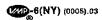
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the amount I owe Lender, which fees shall become part of the Sums Secured.

Lender may require Immediate Payment in Full under this Section 22 only if all of the following conditions are met:

- (a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;
- (b) Lender sends to me, in the manner described in Section 15 of this Security Instrument, a notice that states:
  - (1) The promise or agreement that I failed to keep or the default that has occurred;
  - (2) The action that I must take to correct that default;
  - (3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given;
  - (4) That if I do not correct the default by the date stated in the notice, Lender may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale;
  - (5) That if I meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Lender's enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and
  - (6) That I have the right in any lawsuit for Foreclosure and Sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses that I may have; and
- (c) I do not correct the default stated in the notice from Lender by the date stated in that notice.
- 23. Lender's Obligation to Discharge this Security Instrument. When Lender has been paid all amounts due under the Note and under this Security Instrument, Lender will discharge this Security Instrument by delivering a certificate stating that this Security Instrument has been satisfied. I will pay all costs of recording the discharge in the proper official records. I agree to pay a fee for the discharge of this Security Instrument, if Lender so requires. Lender may require that I pay such a fee, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted by Applicable Law.
- 24. Agreements about New York Lien Law. I will receive all amounts lent to me by Lender subject to the trust fund provisions of Section 13 of the New York Lien Law. This means that I will: (a) hold all amounts which I receive and which I have a right to receive from Lender under the Note as a trust fund; and (b) use those amounts to pay for "Cost of Improvement" (as defined in Section 13 of the New York Lien Law) before I use them for any other purpose. The fact that I am holding those amounts as a trust fund means that for any building or other improvement located on the Property I have a special responsibility under the law to use the amount in the manner described in this Section 24.

25. Borrower's Statement Regarding the Property [check box as applicable].
This Security Instrument covers real property improved, or to be improved, by a one or two family dwelling only.  This Security Instrument covers real property principally improved, or to be improved, by one or more structures containing, in the aggregate, not more than six residential dwelling units with each
dwelling unit having its own separate cooking facilities.
This Security Instrument does not cover real property improved as described above.



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BY SIGNING BELOW, I accept and agree to the promises and agreements contained in pages 1 through 17 of this Security Instrument and in any Rider signed by me and recorded with it.

Witnesses:	_	DAVID L SMITH	(Seal)
			(Seal) -Borrower
Bri	(Seal) -Borrower	LINN A SMITH	(Seal) -Borrower
	(Seal) -Borrower		(Seal) -Borrower
	(Seal)		(Seal)

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STATE OF NEW YORK, ALBANY

County ss:

On the 7th day of August, 2003
public in and for said state, personally appeared
DAVID L SMITH and
LYNN A SMITH

before me, the undersigned, a notary

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Norary Public

Tax Map Information:

BRYAN M. CLENAHAN
Notary Public, State of New York
No. 02CL6026904
Qualified in Albany County
Commission Expires 06-18-20

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# SCHEDULE A

All that certain tract, piece or parcel of land situate, lying and being in the Outside District of the City of Saratoga Springs, County of Saratoga and State of New York being shown and designated as Lot No. 30 known as . REDACTED on a map entitled made by ABD Engineers and Surveyors, dated May 20, 1987, and filed in the Saratoga County Clerk's Office April 1, 1988 in Drawer M, Map No. 157C.

Being the same premises conveyed to David L. Smith and Lynn A. Smith by deed from James E. Ryman and Debra J. Ryman duly recorded in the Albany County Clerk's Office.

The real property covered by this mortgage is improved, or to be improved, by a one (1) or two (2) family residence or dwelling only. Exemption is requested pursuant to Section 253(2) of the New York State Tax Law.



### CHICAGO TITLE INSURANCE SERVICES, LLC

80 STATE STREET, ALBANY, NY 12207

PHONE: 518-436-9711 Fax: 518-436-0891

Thank you for placing this order with Chicago Title Insurance Services, LLC.

Let us know of any changes that need to be made.

Applicant:

Michael A. Kornstein, Esq. Cooper Erving & Savage 39 North Pearl Street Albany, NY 12207

Phone: 518-449-3900 Fax: 518-432-3111

e-mail:

Title Number:

CT12-30185-ALB

Date of Application: Sales Representative: March 6, 2012

Phone Number:

Joseph Culella 518-436-9711

Customer Reference Number:

Transaction type: Foreclosure/TSG

Mortgage Liability: \$0.00

Purchaser/Borrower:

Seller: David L Smith and Lynn A. Smith

Lender:

Premises: REDACTED

County: Saratoga Municipality: Saratoga Springs

Property Type: 1-4 Family Residential

	Additional Copies:
Additional Searches Ordered:	
Additional Remarks:	

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### CHICAGO TITLE INSURANCE COMPANY MORTGAGE FORECLOSURE GUARANTEE

AMOUNT OF INSURANCE: \$10,000.00

**GUARANTEE NO.: CT12-30185-ALB** TITLE NO.: CT12-30185-ALB

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE LIMITS OF LIABILITY AND OTHER PROVISIONS OF THE CONDITIONS AND STIPULATIONS HERETO ANNEXED AND MADE A PART OF THIS GUARANTEE.

> CHICAGO TITLE INSURANCE COMPANY. a Nebraska corporation, herein called the Company, **GUARANTEES**

Cooper Erving & Savage

herein called the Assured, against loss not exceeding the liability amount stated above which the Assured shall sustain by reasons of any incorrectness in the assurance which the Company hereby gives that, according to the public records, on the date stated below:

(1) Title to the land is vested of record in:

### David L. Smith and Lynn A. Smith

Title acquired by virtue of a certain deed from James E. Ryman and Debra J. Ryman, dated July 30, 2003. and recorded in the Saratoga County Clerk's Office on August 4, 2003, in Liber 1652 page 769.

- (2) The necessary parties defendant to foreclose the mortgage set forth in Schedule "B" are those set forth in Schedule "C".
- All liens or encumbrances affecting the land subsequent to the recording of the mortgage to be foreclosed, (3) which are filed or recorded in those records in the County Clerk's Office, and in counties having a Register in the Register's Office, established by state statute for the purpose of imparting constructive notice of matters relating to real property to purchaser for value and without knowledge are listed in Schedule "D".
- (4) The records of the taxing authority show that all taxes and assessments which are a lien against the land have been paid as of the date herein, except for those taxes and assessments which are shown as open on the Tax Search.

### Annexed to this Guarantee are the following schedules:

Schedule A: Description of the Mortgaged Land

Schedule B:

Mortgage(s) to be foreclosed and any consolidations, modifications and assignments thereof of record

Schedule C: **Necessary Parties Defendant** Schedule D:

Exceptions to title subsequent to the recording of the mortgage to be foreclosed and other information.

Schedule E: Tax Search

CHICAGO TITLE INSURANCE COMPANY

### Case 1:10-cv-00457-GLS-DRH Document 505-6 Filed 07/11/12 Page 3 of 55

Dated: March 1, 2012	By:
Ву:	(8nd Marie 1— Raymond R. Quirk
Authorized Signatory	President
	By:
	ph.
	Michael L. Gravelle

### MORTGAGE FORECLOSURE GUARANTEE

Guarantee No. CT12-30185-ALB

### EXCLUSIONS, CONDITIONS, STIPULATIONS AND MISCELLANEOUS PROVISIONS

### Definition of Terms

The following terms when used in this Guarantee mean:

- (a) "land": the land described, specifically or by reference, in the Guarantee and improvements affixed thereto which by law constitute real property;
  - (b) "date": the effective date;
- (c) "the Assured": the party or parties named as the Assured in this Guarantee, or in a supplemental writing executed by the Company;
  - (d) "mortgage": mortgage, deed of trust, trust deed, or other security instrument;
- (e) "necessary party defendant": Those persons or entities who are necessary parties defendant pursuant to New York State Real Property Actions and Proceedings Law, Section 1311, except that searches have not been made for, and this Guarantee does not cover, General Assignments, Orders Appointing Receivers, and Petitions in Bankruptcy against judgment creditors and minor lienors. Searches for Financing Statements under the Uniform Commercial Code have been made only in the office of the Recording Officer of the County in which the land is situated, and only for those indexed against the land.

### 2. Exclusions from Coverage of This Guarantee

The Company assumes no liability for loss or damage by reason of the following:

- (a) Defects, liens, encumbrances, adverse claims against the title or other matters (1) created, suffered, assumed or agreed to by one or more of the Assured; or (2) resulting in no loss to the Assured;
- (b) Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property, and taxes shown as paid on the Tax Search which, subsequent to the date hereof, are reinstated due to non collection of funds or otherwise;
- (c) Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water, land under water; and land lying in the bed of streets;
- (d) Title to any property beyond the lines of the land expressly described in Schedule A, or title to streets, roads, avenues, lanes, ways or waterways on which such land abuts, or the right to maintain therein vaults, tunnels, ramps or any other structure or improvement; or any rights or easements therein;
- (e) Any federal, state, or municipal lien or charge which may be filed in an office of the federal government, state government, or local municipal government, or any department, agency, or division of them, other than the office of the taxing authority, unless the lien or charge is also filed or recorded in the County Clerk's office, and in counties having a Register, in the Register's office;
- (f) Any person or entity whose interest in the land may be disclosed by an accurate survey of the land or by an inspection of the premises;
- (g) No searches for deaths of any necessary parties defendant have been made, except as to those listed on Schedule "C" as "Record Owner", and as to such persons, searches have only been made in the office of the Clerk of the Surrogate Court in which the land is located.

### . Prosecution of Actions

- (a) The Company shall have the right to institute and prosecute any action or proceeding or do any other act which, in its opinion, may be necessary or desirable to establish or confirm the matters herein guaranteed; and the Company may take any appropriate action under the terms of this guarantee whether or not it shall be liable thereunder and shall not thereby concede liability or waive any provision hereof.
- (b) In all cases where the Company does so institute and prosecute any action or proceeding, the Assured shall permit the Company to use, at its option, the name of the Assured for such purpose. Whenever requested by the Company, the Assured shall give the Company all reasonable aid in prosecuting such action or proceeding, and the Company shall reimburse the Assured for any expense so incurred.

### 4. Notice of Loss – Limitation of Action

A statement in writing of any loss or damage for which it is claimed the Company is liable under this Guarantee shall be furnished to the Company within sixty days after such loss or damage shall have been determined, and no right shall accrue to the Assured under this Guarantee until thirty days after such statement shall have been furnished, and no recovery shall be had by the Assured under this Guarantee unless action shall be commenced thereon within two years after expiration of said thirty day period. Failure to furnish such statement of loss or damage or to commence such action within the time hereinbefore specified, shall be a conclusive bar against maintenance by the Assured of any action under this Guarantee.

### Option to Pay, Settle or Compromise Claims

The Company shall have the option to pay or settle or compromise for or in the name of the Assured any claim which could result in loss to the Assured within the coverage of this Guarantee, or to pay the full amount of this Guarantee or, if this Guarantee is issued for the benefit of a holder of a mortgage, the Company shall have the option to purchase the indebtedness secured by said mortgage. Such purchase, payment or tender of payment of the full amount of the guarantee shall terminate all liability of the Company hereunder. In the event, after notice of claim has been given to the Company by the Assured, the Company offers to purchase said indebtedness, the owner of such indebtedness shall transfer and assign said indebtedness and the mortgage securing the same to the Company upon payment of the purchase price.

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### MORTGAGE FORECLOSURE GUARANTEE

### Guarantee No. CT12-30185-ALB

### Limitation of Liability - Payment of Loss

(a) The liability of the Company under this Guarantee shall be limited to the amount of actual loss sustained by the Assured because of reliance upon the assurances herein set forth, but in no event shall such liability exceed the amount of the liability stated on the face page hereof.

(b) The Company will pay all costs imposed upon the Assured in litigation carried on by the Company for the Assured, and all costs and attorney's fees in litigation carried on by the Assured with the written authorization of the Company,

but in no event shall such liability exceed the amount of liability stated on the face page hereof.

- (c) No claim for damages shall arise or be maintainable under this Guarantee (1) if the Company after having received notice of an alleged additional necessary party defendant, removes the defect, lien or encumbrance on the land held by the additional necessary party defendant within a reasonable time after receipt of such notice, or (2) if the Company after having received notice of an alleged additional necessary party defendant, takes such steps that it deems proper for the purpose of perfecting the titte, whether by foreclosure, re-foreclosure, strict foreclosure or otherwise, and in such action or actions to plead subrogation whenever the Company deems it necessary, or (3) for liability voluntarily assumed by the Assured in settling any claim or suit without written consent of the Company.
- (d) All payments under this Guarantee, including attorney's fees as provided for in paragraph 6(b) hereof, shall reduce the amount of the liability hereunder pro tanto, and no payment shall be made without producing this Guarantee for endorsement of such payment unless the Guarantee be lost or destroyed, in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company.
- (e) When liability has been definitely fixed in accordance with the conditions of this Guarantee, the loss or damage shall be payable within thirty days thereafter.

### 7. Subrogation Upon Payment or Settlement

Whenever the Company shall have settled a claim under this Guarantee, all right of subrogation shall vest in the Company unaffected by any act of the Assured, and the Company shall be subrogated to and be entitled to all rights and remedies which the Assured would have had against any person or property in respect to such claim had this Guarantee not been issued. If the payment does not cover the loss of the Assured, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. The Assured, if requested by the Company, shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation, and shall permit the Company to use the name of the Assured in any transaction or litigation involving such rights or remedies.

### 8. Guarantee Entire Contract

Any action or actions or rights of action that the Assured may have or may bring against the Company arising out of the subject matter hereof must be based on the provisions of this Guarantee. No provision or condition of this Guarantee can be waived or changed except by a writing endorsed or attached hereto signed by the President, or a Vice President of the Company.

### 9. Notices, Where Sent

All notices required to be given by the Company and any statement in writing required to be furnished the Company shall be addressed to it at:

Chicago Title Insurance Company PO Box 45023 Jacksonville, FL 32232-5023

### 10. Failure to Disclose

This Guarantee shall be null and void if the Assured, its attorney or agent makes any untrue statement with respect to any material fact or suppresses or falls to disclose any material fact or if any untrue answers are given to the Company to material inquiries before the issuance of this Guarantee.

### 11. Purpose of Guarantee

- (a) This Guarantee is made for and accepted by the Assured upon the express understanding that it is to be used only for the foreclosure of the mortgage(s) described in Schedule "B" or for the taking of a deed in lieu of foreclosure.
- (b) If a deed in lieu of foreclosure is taken, the Company shall not be liable should the deed be attacked by the grantor, his successors or creditors, for inadequacy of consideration or as to the capacity of the record owner to execute such a deed or for any other reason.

### 12. Miscellaneous Provisions

- (a) Other than for purposes of establishing the vested owner of record of the land and for setting forth liens against a purchase money mortgagor, no search for defects in title, liens, restrictive covenants or any other encumbrance existing or created prior to the date of the mortgage has been made.
- (b) No report on streets or searches for violations in Municipal or other governmental departments have been made; nor have searches been made for corporation franchise taxes or license fees, Federal and State inheritance, transfer or estate taxes. Upon request, the Company will obtain a report from the State Tax Commission on corporation franchise taxes and license fees upon payment of an additional fee, but no responsibility for the correctness of such reports will be assumed by the Company.
- (c) The premium herein includes one continuation of title, which shall be done solely for the purpose of establishing additional necessary parties defendant. The tax search shall not be updated except for an additional charge.

Title Number: CT12-30185-ALB

### SCHEDULE A DESCRIPTION

All that certain tract, piece or parcel of land situate, lying and being in the Outside District of the Saratoga Springs, County of Saratoga and State of New York being shown and designated as Lot 30 known as REDACTED on a map entitled made by ABD Engineers and Surveyors dated May 20, 1987, and filed in the Saratoga County Clerk's Office April 1, 1988 in Drawer M, Map No. 157C.

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### SCHEDULE B MORTGAGES AND ASSIGNMENTS THEREOF OF RECORD

Guarantee No. CT12-30185-ALB

### Mortgage To Be Foreclosed

Mortgage in the amount of \$600,000.00 and interest made by David L. Smith and Lynn A. Smith to Charter One Bank, NA, dated August 7, 2003 and recorded August 19, 2003 in the Saratoga County Clerk's Office in Liber 3251 page 760.

### Junior Mortgage

Credit Line Mortgage in the amount of \$115,400.00 and interest made by David L. Smith and Lynn A. Smith to Charter One Bank, NA, dated August 7, 2003 and recorded September 19, 2003 in the Saratoga County Clerk's Office in Liber 3291 page 246.

If it is the intent to foreclose on both mortgages listed above company must be notified and this foreclosure certificate will be amended.

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### SCHEDULE C NECESSARY PARTIES DEFENDANT

### Guarantee No. CT12-30185-ALB

This certification is made on the assumption that all parties are to be personally served in the proposed action. If any of the persons hereinafter named be dead, their legal representatives and successors in interest should be made parties defendant after search has been amended. If investigation by applicant discloses that there are other persons having an interest in the property whose rights are subordinate to the mortgage to be foreclosed, such persons should also be made parties defendant after search has been amended. If any leases, mortgages or other liens recorded prior to the period covered by this search, but which, by reason of subordination clauses contained therein or otherwise, are in fact subordinate to the lien of the mortgage to be foreclosed, all persons interested in said leases, mortgages or other liens should also be made parties defendant after search has been amended. If the Untied States of America or the State of New York acquires by assignment, or otherwise, an interest in, or a lien on, the premises even after lis pendens, consideration should be given to the desirability of brining in the United States of America or the People of the State of New York as a party defendant.

If the United States of America or the People of the State of New York are made parties, the complaint must set forth the reason thereof in detail. (See R.P.A.P.L. Sec. 202 and 202A U.S.C.A 2410).

The addresses of parties and names of officers of corporations herein given were obtained from the record and are not represented to be the present addresses of the parties, nor the present officers of the corporation.

Consideration should be given to the desirability as defendants the obligor named in the bond or in any extension, assumption or guaranty agreement.

All occupants of the premises herein described should be made parties defendant.

The Company should be requested to continue searches to the date of filing lis pendens. Upon any continuation no examination will be made of the lis pendens or any other papers filed in the action.

The following should be made parties defendant in an action to foreclose the mortgage referred to on page one hereof:

- 1. Any party who by bond, note, extension agreement or otherwise may be liable for deficiency judgment, if such deficiency judgment is desired.
- 2. Any party in possession of any part of the mortgaged premises whose interest plaintiff desires to bar.

3.	David L. Smith	Fee Interest

4.	Lynn A. Smith	Fee Interest

5. Charter One Bank, NA Junior Mortgagee

6. Commissioner of Taxation and Finance Judgment Creditor

7. David P. Barlow Judgment Creditor

8. Velocity Investments, LLC Judgment Creditor

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### SCHEDULE C NECESSARY PARTIES DEFENDANT (Continued)

Guarantee No. CT12-30185-ALB

9. Capital One Bank (USA), NA

**Judgment Creditor** 

10. United States of America

**Judgment Creditor** 

### SCHEDULE D EXCEPTIONS, OBJECTIONS AND OTHER MATTERS

Guarantee No. CT12-30185-ALB

COMPLIANCE WITH THE SERVICEMEMBERS CIVIL RELIEF ACT (50 U.S.C. App. Sec. 501 et seq.) effective December 19, 2003, is required.

The above-mentioned act replaces the Soldiers' and sailors' Relief Act of 1940 and provides protective rights to men and women serving in the armed forces of the United States as well as to any U.S. citizen serving in the armed forces of another nation with which the United States is allied in the prosecution of a war or military action, with respect to actions to foreclose mortgages on real property.

Attention is called to the provisions of the Act (Sec. 517) which provide that a servicemember can waive his or her rights under the Act, but only if made pursuant to written agreement. These rights cannot be waived prior to entry into military service as that term is defined in the statute.

In addition, an affidavit of non-military service (which had been required under the previous Act), must state whether or not the defendant is in military service and showing the necessary facts to support the affidavit or, if it cannot be determined whether or not the defendant is in military service, said affidavit should state that the affiant is unable to determine whether or not the defendant is in military service.

If, based upon the affidavit, the court is unable to determine whether the defendant is in military service, it may require the plaintiff to file a bond in an amount approved by the Court prior to the entry of judgment.

Finally, a period of military service may not be included in computing any period provided by the law for the redemption of real property sold or forfeited to enforce an obligation, tax or assessment

Rights of tenants, if any.

Lien of street vault charges, if any.

- 1. As to Covenants, Restrictions and Easements: None were found of record since the date of the mortgage under foreclosure except as set forth herein.
- Bankruptcy searches against David Smith and Lynn Smith in New York State disclosed no returns.
- Unpaid Taxes as detailed on Tax Schedule annexed hereto.
- 4. Order To Show Cause, Temporary Restraining Order, Order Freezing Assets and Granting Other Relief Instrument #2010-012667.
- Order To Show Cause, Temporary Restraining Order, Order Freezing Assets and Granting Other Relief Instrument #2010-013630.



### SCHEDULE D EXCEPTIONS, OBJECTIONS AND OTHER MATTERS (Continued)

Guarantee No. CT12-30185-ALB

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### SCHEDULE D EXCEPTIONS, OBJECTIONS AND OTHER MATTERS (Continued)

Guarantee No. CT12-30185-ALB

18. REDACTED

19. REDACTED

20. REDACTED

Title No. CT12-30185-ALB

### TAX SEARCH

### RETURNS

Our policy does not insure against taxes, water rates, assessments and other matters relating to taxes which have not become a lien up to the date of the policy or installments due after the date of the policy. Neither our tax search nor our policy covers any part of the streets on which the premises to be insured abut. For information only, we set forth the assessed valuation for the current year. Taxes, assessments, water rates and sewer charges which are liens on the real property:

1. SECTION/BLOCK/LOT

167.-4-35

CITY:

Saratoga Springs

PREMISES:

REDACTED

ASSESSED TO:

David and Lynn Smith

LAND VALUE

Assessed:

\$194,800.00

Full:

\$772,700.00

**EXEMPTION Type:** 

Star

Amount:

\$32,770.00

SCHOOL DISTRICT:

Saratoga Springs

PROPERTY CLASS CODE:

210

2012 City Tax

Total: \$6,862.88

1st Payment Due 03-01-2012:

\$1,715.72 -open + penalty- (\$1,818.66 due by 3/31/12)

2nd Payment Due 06-01-2012:

\$1,715.72 -lien, not yet due-

3rd Payment Due 09-01-2012: 4th Payment Due 12-01-2012:

\$1,715.72 -lien, not yet due-\$1,715.72 -lien, not yet due-

2011-2012 School Tax:

Total: \$11,012.26 (\$11,452.26 w/o exemption)

1st Half Due 10-04-2011: 2nd Half Due 02-04-2012: \$5,506.13 -open + penalty-\$5,506.13 -open + penalty-

2011 City Tax:

Total: \$6,853.87 -open + penalty- (\$7,808.41 due by 3/31/12)

2010-2011 School Tax:

Total: \$5,529.54 (\$6,226.01 due by 3/31/12)

Water Account #:

03-1576

Water to 2/15/2012

\$111.18 -paid- SUBJECT TO FINAL READING

NOTE: Any unpaid water, sewer, or special assessments or housing code violations are not included or guaranteed in this search.

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STREET STREETS

SERVICE CHESTON AND CHESTON PARK

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WARRANTY DEED

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DAVID L. SMITH and LYRN A. SMITH, busined and wife, raiding of REDACTED. CSDus Puk. New York, 12065

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SARATORA COUNTY CLERK

SECOND, that said parties of the first part will forever WARRANT title to said

THIRD, that, in compliance with Sec. 13 of the Lieu Law, the grantors will receive the consideration for this coaveysace and will bald the right to receive such consideration as a roas fand to be applied from the purpose of paying the cost of the improvement and will see that the purpose of paying the cost of the improvement and will not to pay the same fast to the separate of the cost of the improvement before using any part of the roat of the same for any other purpose.

IN WILVERS WHEREOF the parties of the first part have becounto set their hands and seals the day and year first above written.

IN PRESENCE OF

STATE OF NEW YORK

On this 310<sup>th</sup> day of J<sub>AL</sub>, 2003, before me, the undersigned, a Nokary Public in and for said State, personally appeared JAMES MERTWAN personally known to me or proved to me our basis of standingtony colorino to be the infoliable whose ones is a superficie to the whith instrument and extrooredegate to me that the executed the same in this expecting, and that to this ingument on the instrument, the individual or persons on behalf of which the individual condy becaused the high-strument. 65: COUNTY OF SARATOGA:

STATE OF NEW YORK :

es COUNTY OF SARATOGA:

On this  $\frac{1}{2}\sqrt{h}$ , day or  $\frac{1}{2}\sqrt{h}$ . 2001 before me, the underginged a broady bribbit in that of for anisi Sunce, proxemily special DEBMA. It NHAM personally intom one or proved in one to the united of standards or other than individual vitous man is assured to the within lemanmant and anisotrately to the rest of the singular confidence of the first of the singular confidence of the province of the sunce it is expected to the within lemanmant and interpret of the singular confidence of the sin

R & Ri Mary Ant McGlon, Esq. 99 Pine Street Albeny, NY 12207

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Kathleen A. Marchions Sakaroda comery Cubbk

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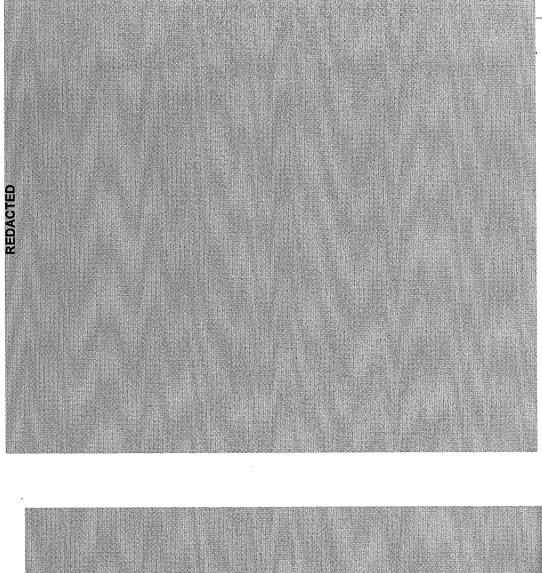
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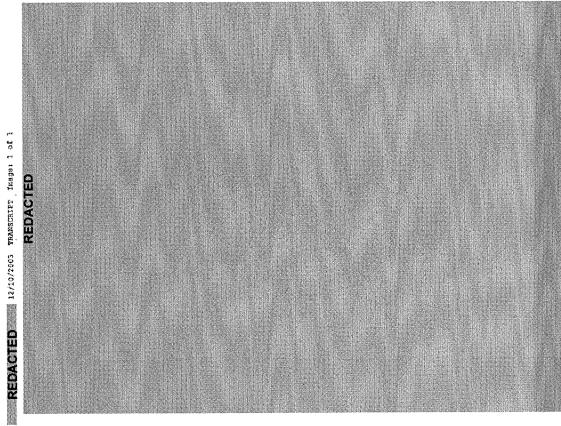
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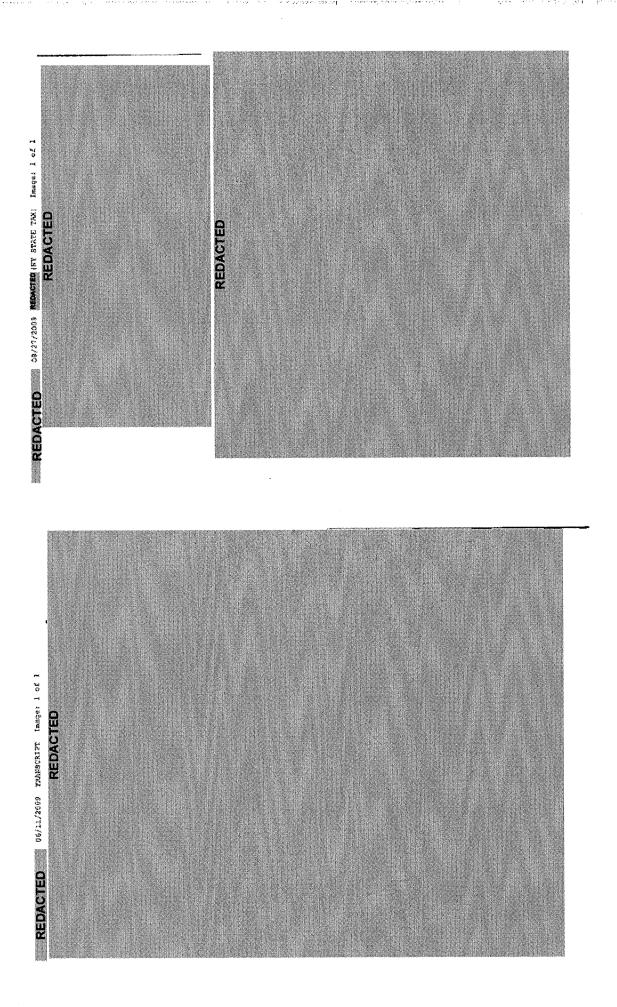
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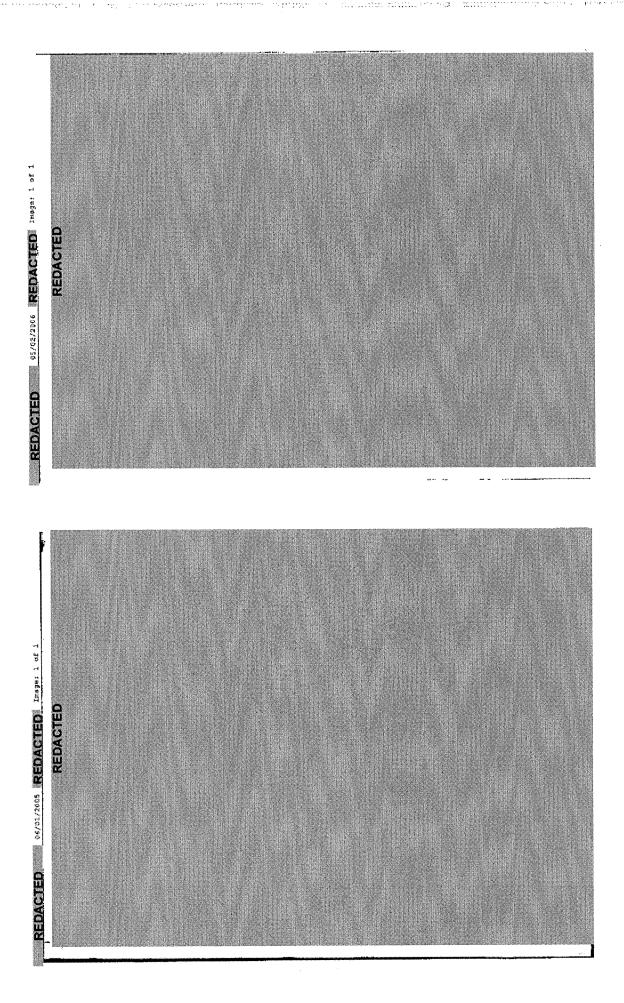
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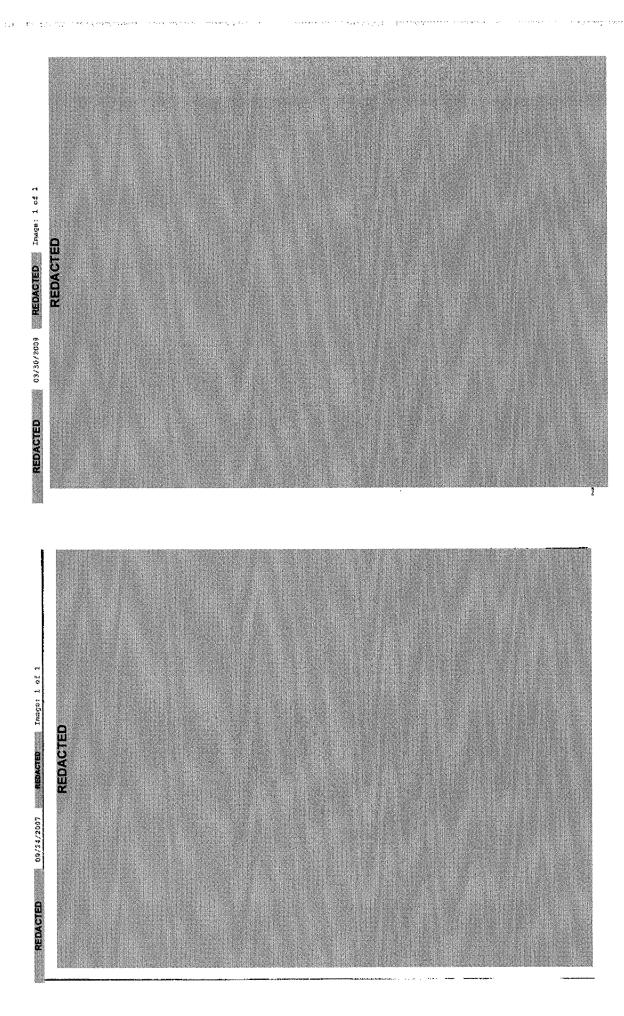
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Case 1:10-cv-0c467-GLS-RFT Document 5 Filed 04/20/10 Page 1 of 22

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

L. DIGTAIOT COURT N.D. GFN.Y. FILED

AR 20 200

1 10-64-167 (0-5/RPH) AWRENCE K BARRIAN, CLERK ALBANY

SECURITIES AND EXCHANGE COMMISSION,

MCGINN, SMITE & CO, INC.;
MCGINN, SMITE & CO, INC.;
MCGINN, SMITE ALVISORS LLC;
FIRST ADVISORY INCOME WOTES, LLC;
FIRST EXCLES HOR FOODER, LLC;
FIRST EXCLES HOR FOODER, LLC;
FIRST FACTOR HOR FOODER, LLC;
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FIRST FACTOR MACGINN, AND

LYNN'A. SMITH,

Defendanta, one

Rettef Defenden

Onder to show cause. Tracorary restraining onder, And onder medteng assets and granting other relief

On the Application of Plaintiff Securities and Buchangs Commission (the Come

(1) descring defendants McChin, Smith & Co., Ive. ("NAS & Co."); McChim, Smith Advisors I.J.C ("MS Advisors"); Moldina, South Cayled Holdings Com, ("MS Capital"); First Advisory Income Noise, LLC ("FAIN"); Hint Excelsion income Noise, LLC ("FEIN"); Pirst Independent Income Notes, LLC ("FIBY"); Third Albany Income Notes, LLC ("TAIN");

Order should not be entered, practing a final disposition of this facilities in the state of the Timodry M. Medina; David L. Smith (collectively, the 'Defendants') to show cases why as

KILLIPS LYTE LLP 3400 HSBC CENTER BUFFALO NY 14203-2887

Record and Return To:

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# Case 1:10-cv-00457-GLS-DRH Document 505-6 Filed 07/11/12 Page 23 of 55

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CTIC INSTR#: 2010012667 04/23/2010 MISC RECORDING Image: 4 of 32

Case 1:10-cv-00457-GLS-RFT Document 5 Filed 04/20/10 Page 2 of 22

### (a) preliminarily enjoining:

- MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith from violating Sections 5(a) and 5(e) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 776(s) and 77e(c);
- MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Scotton 17(s) of the Scantines Act, 15 U.S.C. § 77q(s) and Scotton 10(b) of the Scantines Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and Exchange Act Rule 106-5 flareunder, 17 C.F.R. § 240,106-5;
- (ii) MS & Co., MS Advisors, McGinu and Smith from violating Sections 206(1), 206(2), and 206(4) of the Inventment Advisors Act of 1940 ("Advisors Act"), 15 U.S.C. §§ 805-6(7) and (2), and Rule 206(4)-8 thermodes, 17 C.F.R. §5715.206(4)-5;
- (iv) MS & Co. from violating Section 15(0/1)(A) of the Exchange Act, 15 U.S.C. § 78(0)(1), and Smith and McClinn from aiding and sherting this violation; and,
- (v) FAIN, FEIN, FIIN and TAIN from violating Section 7(s) of the Investment Compiny Act of 1940 ("Company Act"), 15 U.S.C. § 80a-7.
- (b) freezing the Defendants' and Lynn Smith's (the "Rollef Defendant")
  - searte
- (c) directing McGinn and Smith (the "Individual Defendants") to provide verified accountings for themselves and MS & Co., MS Advisors, MS verified accountings for themselves and MS & Co., MS Advisors, MS

Case 1:10-cv-00457-GLS-RFT Document 5 Filed 04/20/10 Page 3 of 22

Capital, FAIN, FEIN, FIIN and TAIN (the "Entity Defendants"), and the Radief Defendant to provide a verified accounting for harvelf;

- (d) appointing a receiver for the Britisy Defendants and all other entities
  MoGinn and/or Smith control or have an ownership interest in
  (authority the "MS Britise"); and
- (e) prehibiling the destruction, altaration or conceaument of document
  (2) pending adjudenton of the foregoing, an Order:
- (4) temporarily restraining the Defendents from violating the afternnexiconed saturtes and roles;
- (b) freezing the Defaulants' and Relief Defaudent's assets;
- (s) directing each of the Individual Defendants to immediately provide the verified accounts for themselves and the Entity Defendants, and the Relief Defendant to provide the verified accounts for herieal;
- (d) appointing a temporary receiver for the MS Butifies;
- (e) prohibiting the destruction, a) treation or conceasiment of documents to Defendants; and
- (f) providing that the parties may take expedited discovery in preparation for a pretenianery injunction bearing on this corder to Show Cause.

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

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Based upon the foregoing documents, the Count finds that a proper showing, as required by Section 20(b) of the Securities Act, Seedon 21(d) of the Exchange Act, Section 209(d) of the Advisors Act, and Section 42(d) of the Company Act, has been made for the militiganted hereun, for the following reasons:

- 206(2), and 206(4) of the Advisors Act and Advisor Act Rule 206(4)-8, and Dafondants McGinn violated, and will continue to violate, Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Euchangs Act and Exchange Act and Rule 10b-5; (4) Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, and Section 206(1), Advisors has violated, and will continue to violate, Section 17(a) of the Securities Act, Section contrars to violate Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities and Smith have aided and abotted, and will continue to aid and abot MS & Co.'s violation of Defendants FAIN, FEIN, FIIN and TAIN have violated, and will continue to violate, Section 1. It appears from the evidence prescried that, unless temporarily restrained, (1)Adviser Act Rule 206(4)-8, and Section 1.5(e)(e)(1) of the Exchange Act; (2) Defendant MS Defendant MS & Co. has violated, and will continue to violate, Sections 5(s) and 5(c) of the (0(b) of the Exchange Act and Exchange Act and Rule 101s-5, Section 206(1), 206(2), and Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisors Act and 206(4) of the Advisors Act and Advisor Act Rule 206(4). 8; (3) Defendant MS Capital has (a) of the Company Act; and (5) Defendants McClinn and Smith have violated, and will Section 15(c)(a)(1) of the Brehange Act.
- It appears that the Defendants and Relief Defendant may strampt to dissipate, bepiets, or transfer from the jurisdiction of this Court, funds, property and other assets that could

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be subject to an order of dispurgement or an order imposing oivil paralties. It supears that an order fraceing the Defendants' and Relief Defendant's needs, as specified harein, is necessary to preserve the status quo, to protect investors and elients of the Defendants from further transfers of funds and misappropriation, to protect this Court's ability to award equitable relief in the form of disgurgement of illegal profits from fraud and eivil persittes, and to preserve the Court's ability to approve a fair distribution for victims of the faud.

- 3. It appears that an order requiting each of the Individual Defendants and Relief Defendant to provide a verified accounting of their assets, money and property held directly or indirectly by the Defendants and Relief Defendant, or by others for the direct and Indirect beneficial interest of the Defendants and Relief Defendant, is necessary to effectuate and conuccounting as the Defendants and Control of the Defendants and Relief Defendant, is necessary to effectuate and conuccounting as the treeze imposed on the Defendants and Relief Defendant's assets.
- 4. It appears that the Defradants may attempt to destroy, alter or conceal documents.
- 5. Reppears that the appointment of a receiver for the MS Entities is necessary to (i) preserve the status que; (ii) ascertain the extent of comminging of finits among the MS Entities; (iii) ascertain the true finencial condition of the MS Entities and the disposition of investor funds; (iv) prevent faultar dissipation of the property and assets of the MS Entities (iv) prevent the examinence or disposal of property or assets of the MS Entities and the investor; (vi) preserve the books, records and documents of the MS Entities and the investor; (vi) preserve the books, records and documents of the MS Entities (vii) be available to respond to investor inquiries; (viii) protect investors' assets; and (ix) determine whether the MS Entities aboud anderstae bankoupley fillings.
- Good and sufficient reasons have been shown why procedure other than by notice of motion is necessary.
- 7. This Court has jurisdiction over the subject matter of this action and over the

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

other disposal of any assets, funds, or other property (notading money, real or personal property, nevent, any withdrawal, transfer, pledge, oncumbrance, assignment, dissipation, concessiment or wherever situated, in whatever form such assets may presently exist and wherever located within excounts listed on Existish B, sa well as each real estate pured owned directly or indirectly by the Defendants, the Relief Defendant, and each of their febaneial and brokerage institutions, officers, Court should not also enter an Order directing that, pending a final disposition of this sertion, the finds or other property of the Defendants and Relief Defendant to hald or retain within its or his ecurities, commodities, choses in setion or other property of say kind whatsoever) of, held by, or under the direct or indirect control of the Defendants and Robef Defendant, including but not control and prohibit the withdrawal, removal, transfer or other disposal of any such assers, funds or other properties including but not limited to, all assets, funds, or other properties held in the participation with them who receive actual notice of such Order by personal service, facsimile brokerage institutions, debtors and bailees, or any other person or entity holding such assets, the territorial junisations of the United States courts, and directing each of the financial or imited to, the MS Batities, including but not limited to, those condice listed on Exhibit A. ervice or otherwise, and each of them, hold and retain within their control, and otherwise whether held in any of their names or for any of their direct or indirect benefitial interest gents, reryands, employees, attorneys-in-fact, and those persons in active concert or

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MS Eachies, including but not limited to, those catilies listed on Exhibit A.

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

- (1) MS & Co, MS Capital, FAIN, FEIN, FIIN, TAIN, McGian and Smith from violating Scotions 5(4) and 5(c) of the Scounition Act, 15 U.S.C. §§ 77e(a) and 77e(c);
- (2) MS & Co., MS Advison, MS Capital, McGinn and Smith from violating Section 17(a) of the Securities Act, 15 U.S.C. § 774(a) and Section 19(b) of the Exchange Act, 15 U.S.C. § 78(b) and Rechange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;
- (3) MS & Co., MS Advisors, McClinn sud Smith from violating Sections 206(1), 206(2), and 206(4) of the Advisors Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4).8 thereunder, 17 C.F.R. §275.206(4)-8;
- (4) MS & Co., from violating Section 15(c)(1)(A) of the Exchange Act, 15'U.S.C. § 78(o)(1), and Smith and McGinn from siding and electing this violetion; and,
- (5) FAIN, FHIN, FIIN and TAIN from violating Section 7(a) of the Company Act, 15

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Court should not also enter an Order enjoining and restrationg them, and any person or entity secting at their direction or on their behalf, or any other person, from destroying, altering, concessing at their direction or on their behalf, or any other person, from destroying, altering, concessing or otherwise interfering with the access of Plaintiff Commission and the receiver to any and all documents, books and records, that are in the possession, custody or control of the Defendants, and each of their officers, agents, employees, servants, accountants, financial or brokenges institutions, attorneys-in-fact, spenidaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, including but not limited to, the old Entities, including to the factoring or relating to the Defendants' finances or business operations.

2

IT IS FURFIEER ORDERED that the Definitudes abow cause at that time why this Count abould not also enter an Order directing each of the Individual Definiduois to serve upon Piaintiff Commission, within dure (3) business days, or within such actuation of lines as the Commission agrees to, a verified written accounting each signed by Defindants McOlim and Smith and also signed by the officer or employees of the Entity Defindants who are most. Knowledgeable about the assets, liabilities and general financial condition of each of the Defindants, and verified accountings signed by sach of the Individual Defendants and the Relief Defendant identifying their own assets, liabilities and general financial condition, if any, under penalty of perjury. Each of the Defendants and Relief Defendant shall serve such sworn updated written accountings by hand delivery, fausimile transmission to (212) 336-1324 or overright concice service on the Commission's counter, David Stocking, Esq., Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281.

IT IS FURTHER ORDERED that Individual Defendants and Relief Defendant shall file with the Court and serve on the Commission, within three (3) business days following service of this Order, a list of all seconds at all bands, brokerage firms or financial institutions (including the name of the financial institution and the name and number on the account), tax identification numbers, telephone or facaimile transmission numbers (including numbers of pagars and nobile telephones), cluckome mail addresses, World Write Wob sites or Universal Records Locators, internet builetin board alter, online internetive conversational spaces or other rooms, internet or electronic mail service providers, street addresses, postal box manbers, early deposit boxes, and storage facilities used or nativitized by them or under thair direct or indirect contents, at any time from Jenuary 1, 2005 to the present including but not limited to information concerning the MS Entities, including but not limited to information.

IT IS KUKCHER CHUREKED that the Defendants show ourse at that time why his Court should not also exist an Order appointing or continuing the appointment of a receiver for the MS Entities and all entities they control or have an ownership interest in theluting but not limited to, those entities they control or have an ownership interest in theluting but not extent of communicities of Mads sarong the MS Entities (iii) ascertain the true financial condition of the MS Entities and the disposition of investor fands; (iv) prevent further dissipation of the property and assets of the MS Entities and all entities they control or have an ownerthip interest in; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities;) (vii) be available to respond to investor inquiries; (viii) protect the assets of the MS Entities; from further

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dissipation; and (ix) determine whether the MS Entities abould undertake bankruptoy Mings.

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

- Take and retain immediate possession and control of all of the assets and property, and all books, records and documents of the MS Entities including but not limited to, the entities listed on Exhibit A, and the rights and powers of it with respect thereto including the powers set forth in the management agreements and LLC agreements andor opening agreements applicable to any LLCs or other property or entities owned or controlled by the Defendants;
- (b) Have exclusive control of, and be made the stoke authorized signatury for, all accounts at any bank, brokerage from or financial inclination that has possession or control of any assets or finds of the MS Entities including but not binded to, the entities listed on Exhibit A;
- Pay from available funds mosessary business expenses required to preserve the sassets and property of the MS Entities including but not limited to, the catifies listed on Enhibit A, including the booles, records, and documents of the MS Entities and all entities they control or have an ownership interest in, notwritatanding the saset freeze imposted by paragraph II, above;

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- (d) Take prefinituary steps to locate assets that may have been conveyed to third
  parties or otherwise concealed;
- (c) Take preliminary steps to ascertain the disposition and use of funds ablathed by the Decembers resulting from the sale of securities issued by MS Entities including but not limited to, the watties listed on Exhibit A;
- Engage and employ persons, including accountants, attorneys and experts, to

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

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

following information:

- All assets, monoy, funds, securities, and real or personal property then
  held directly or indirectly by or for the beaufit of the MS Entities and all entities
  they control or have an ownership interest in, including but not limited to, real
  property, bank accounts, brokenage accounts, investments, business interests,
  portronal property, wherever situated, identifying and describing each asset, its
  current location and value;
- A list of secured creditors and other financial institutions with an interest in the remirentity essets;
- To the extent practicable, 4 list of investors in the MS Entities including but not limited to, the entities listed on Balabili A;
- (h) The receiver's preliminary plan for the administration of the assers of the receiveraity, including a recommendation regarding whether bankruptry cases should be filed for all of a portion of the assets subject to the receivership and a recommendation whether liftgation against third pertue abould be commenced on a contingent fee basis to recover assets for the beaufit of the receivership.

VII.

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

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estone-ya-in-fact, and those persons in active concert or participation with them who reodive actual notice of this Order by personal service, facaimile service, or otherwise, see tempotarily restrained from, directly or indirectly, singly or in concert, in the older or sale of my security, by use of any means or instruments of transportation or communication in intervate commerce or by use of the mails to offer or sail securities intough the use or medium of a prospectus or otherwise when no registrations statement has been filed or is in effect as to such securities and when no exemption from registration is svallable in violation of Sections 5(a) and 5(a) of the Securities Act.

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IT 18 FURCHER ORDERED that, pending a bearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisor, MS Capital, and each of their financial and brokenge institutions, officers, agents, servants, employees, stromeys-in-fact, and those persons for active concert or participation with these and all other persons or entities who receave actual notice of such Coder by personal service, facrimile services or otherwise, and each of them, are temporently restained from violating, directly or indirectly. Section 10(b) of the Exchange Ant, 13 U.S.C. § 78(b), and Rule 100-5 promigated thorounder, 17 C.F.R. § 240, 106-5, by using my means or instrumentality of interattic commerce, or of the mails, or of any facility of any antional scounities exchange, in connection with the purchase or sale of any security:

- (a) to employ my device, scheme, or artifice to defiaud;
- (b) to make say unitue statement of a material fact or to omit to state a material fact recessary in order to make the statements made, in the light of the circumstances under which they were made, not misteading; or

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

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IT IS FURLIMER ORDERED that, pending a hearing and defarmination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capital, and each of their financial and brokenger institutions, efficers, agents, servants, employees, attorney-in-fact, and those persones in sotive concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facefulle service, and each of them, who receive actual notice of this Order by personal service, formities service, or otherwise, are temporarily restrained from violating Section 17(a) of the Scennities Art, 15 U.S.C. § 774(a), in the offer or sale of may security by the use of any means or instruments of transportation or communication in internate commerce or by wee of the north,

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or my numerical of a material fact necessary in order to make the statements made, in light of the droumstences under which they were made, not maleudings or
  - (c) to empage in any transsaction, practice, or course of business which operates or would operate as a final or deceit upon the purchaser.

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IT IS FURTHER ONDERED that, pending a hearing and estamination of the Commission's Application for Preticningly injunction, MS & Co., and each of its officers.

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agents, servant, employees, attomoys-in-fact, and those persons is anive contect or participation with them and all other persons or emittes who receive actual notice of such Order by personal service, facsimile service or otherwise, and such of them, who receive annual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 15(e) of the Exchange Act, 15 U.S.C. § 78(o)(e), and 17 C.F.R. § 240.10b-3, by while acting as a honder or dealer, directly or indirectly, making use of the rasils or any instrumentality of inserstate commerce, or any facility of tany national securities exchange, to effect any temestrian in, or to induce or attempt to induce the purchase or sale of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other familitient device or contrivence, or to use or employ, in commercion with the purchase or sale of sury security otherwise than on a national exchange of the Commission to be included within the term 'manipulative, deceptive or other familiant device or contrivance' as such term is used in 'saction 15(c)(1) of the Exchange Act.

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IT IS FUKITER ORDERED that, pending a hearing and determination of the Commission's Application for Prelimbary Injunction, the Individual Definedants, and each of fines fluancial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in series concert or pretriapsation with them and all other persons or emitties who receive actual notice of such Order by paraonal service, facsimile service, or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from aiding and abeting any broker's or dealer's violations of Section 15(c) of the Exchange Act, 15 U.S.C. § 78(c)(c), by providing substantial sasistence

to an individual or entity, which, while sching as a broker or desider, directly or indirectly, makes use of the makis or any instrumentality of inderstate commence, or any facility of any national securities exchange, to effect any transaction in, or to induce or askempt to induce the purchase or ande of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other frankalism device or contrivate, or to use or employ, in connection with the purchase or safe of any security otherwise flux on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other finaldalent davice or constituence" as such term is used in Section 15(c)(1) of the Exchange Act.

IT IS FURTHER OXDERED that pending a hearing and determination of the

Commission's Application for Preliminary Injunction, MS & Co., MS Advisors and each of their officers, agents, servines, employees, attorneys-to-fact, and those persons in suitre context or pertiripation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of thun, who receive actual notice of tiss Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Sections 206(1), 206(2) and 206(4) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4), 8 thereunder, 17 C.F.R. §275.206(4)-8, while acting as an investment advisor, by the use of the melts or any means or that immentality of interatale commerce, directly or indirectly in employ any device, sothene or artifice to defined any client or prospective client; to engage in any transaction, practice of course of business which operates as a final or deceit upon any client or prospective client; to engage in any set, practice, or course of business which is

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Commission's Application for Preliminary Injunction, FAIN, FEIN, FIIN, and TAIN and each of restrained from violating Section 7(a) of the Company Act, 15 U.S.C. § 80s-7, while acting as an interstate commerce, my security or my interest in a security, whether the issuer of such security is such investment company or another person; control my investment company which does my ninnest in a security, whether the issuer of such security is such investment company or enother person; or offer for sale, sell, or deliver after sale any such security or interest, briding reason to otherwise acquire or attempt to sequire, by see of the meals or any means or instrumentality of heir officar, sgrafs, servents, amployees, stromcys-in-fact, and those parsons in active concert Order by personal erreice, faceintile zervice or otherwise, and each of them, who receive actual investment company, shall directly or indirectly, offer for sale, sell, or deliver after sale, by the believe that such security or interest will be made the subject of a public officing by use of the or participation with them and all other persons or entities who receive actual notice of such of the acts enumerated above; engage in any business in interstate commerce; or control any use of the mails or any means or instrumentality of interstate commerce, any security or any notice of this Order by personal service, fassimile service, or otherwise, are temporarily IT IS FURTHER ORDERED that, pending a hearing and determination of the

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

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

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

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otherwise interfering with the access of Plaintiff Commission and the receiver to sury and all decuments, books, and records that are in the possession, custody or control of the Defendants and each of their respective officers, agants, employees, servants, accountants, financial or brokenage institutions, or stixmeys-in-fact, subsidiaries, affiliates, predecessors, successors and relaxed emities, including but not limited to, the MS Builties, that rafer, reflect or relate to the allegations in the Compisitat, including, without limitation, documents, books and records referring, reflecting or relating to the Defendants' finances or business operations, or the offer, purchases or sale of securities and the use of proceeds flerethout; and (2) ordered to provide all resarable cooperation to the preciver in carrying out his duties set forth herian.

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III IS FUNTHER ORD ERED that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, each of the Defendants shall file with this Court and serve upon Philadiff Commission, within three (3) business days, or within much extension of time as the Commission agrees to, a verified written accounting signed by each of the Individual Defendants, and the officers or employees of the MS Builties why are most knowledgeable about the assets, liabilities and general financial condition of the sech of the Defendants, if any, under penalty of perjuny, of:

- (1) All savets, liabilities and property currently held, directly or indirectly, by or for the benefit of each Defindant, including, without limitation, hank secounts, brokenses accounts, investments, business interests, lotens, lines of credit, and real and personal property wherever situated, describing each asset and liability, its ourrent location and amount;
- (2) All money, property, essets and income received by each such Defendant for his

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

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

Each Individual Defendant and the offices or employees of the Burity Defendants who are most knowledgeable about the sasets, liabilities and general financial condition of the Defendants, if any, shall verify the Burity Defendants is accounting and serve such swarp statements of asset identifying information by hand delivery, lecalnile transmission to (212) 336-1324 or overnight courties service on the Commission's comme, David Shedring, Hsq., Securities and Enchange Commission, 3 World Financial Center, New York, NY 10281. Back of the Individual Defendants is required to provide the Commission with at socounting for his own personal assets, liabilities and general financial condition, and also provide an accounting for each of the Eanity Defendants. The Ralier Defendant is required to provide the Commission with an accounting for the over personal assets, liabilities and general financial condition.

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IX IS FURTHER ORDERED that belillian A. Masson... produce further order of this Court, be said dereby is sprouded to sat as receiver for the MS Entities including

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obligations. All applications for costs, fees and expenses of the receiver and those employed by

may be engaged or employed by the receiver to assist him in carrying out his duties and

herein, including but not limited to the reasonable costs, fers and expenses of all persons who

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- Take preliminary steps to locate assets that may have been conveyed to third parties or otherwise concealed; E
- the Defendants resulting from the sale of eccurities issued by the Defendants and Take preliminary steps to escertain the disposition and use of finds obtained by the entities they control; 8
- assist in the carrying out of the receiver's duties and responsibilities hereunder; Engage and employ persons, including accountants, attentitys and experts, to 3

Take all necessary steps to gain control of the Defendants' interests in assets in

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- foreign jurisdictions, including but not limited to taking steps necessary to repatriate foreign assets; and
- Take nuch farther action as the Court shall deem equitable, just and appropriate under the circumstances upon proper application of the receiver. 8

lawsnik, lieus or encombrances or bankruptcy cases to impact the property and assets subject to control, possession, or management of the essots, including but not limited to the filing of any olainant, shall take my action without further order of this Court to intarfere with the taking clainent against my of the Defradants, or my person seting on behalf of such creditor or IT IS FURTHER ORDERED that no person or early, including any creditor or

IT IS FURTHER ORDERED that the Defendants shall pay the reasonable costs, fees

him shall be made by application to the Court setting forth in reasonable detail the nature of such costs, fees and expenses and shall conform to the Fee Guidelines that will be supplied by the U.S. Securities and Exchange Commission.

Take depositions, subject to two (2) calendar days' notice by facsimile or

a meeting pursuant to Fed. R. Civ. P. 26(f), the parties and the receiver may:

IT IS FURTHER ORDERED that discovery is expedited as follows: pursuant to Rules 26, 30, 31, 33, 34, 36 and 45 of the Pederal Rules of Civil Procedure, and without the requirepeant of

Obtain the production of documents, within times (3) calendar days from service by faceimile or otherwise of a request or subpoces from any persons or entities, 8

Service of any discovery requests, notines, or subpossus may be made by personal sarvice, fassimile, overnight courier, or first-class mail on an individual, epitty or the individual's or entity's atterney, and ව

The receiver may take discovery in this action without further order of the Court. Ē

Makasaka, April Al, 2019, by personal delivery, faceimile, evernight courter, or first-class IT IS FURTHER ORDERED that a copy of this Order and the papers supporting the Commission's Application be served upon the Defendants and Relief Defendant on or before

CTIC INSTR#: 2010012667 04/23/2010 MISC RECORDING Image: 23 of 32

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, April 172010, at 4:00 p.m. Service shall be made by delivering the papers, 10281, Attn: David Stoelling Esq., or such other place as comset for the Commission may direct Relief Defendants, or upon their counsel, if counsel shall have made an appearance in this setion. IT IS FURTHER ORDERED that the Defendants and Reliaf Defendant shall deliver April 24, 2010, at 5:00 p.m., using the most expeditious means available, by that date and time, to the New York Regional to serve, by the most expeditious means available, say reply papers upon the Defendants and Office of the Commission at 3 World Financial Center, Room 4300, New York, New York any apporting papers in response to the Order to Show Cause above no later than in writing. The Commission shall have until Thursday.....

IT IS FURTHER ORDERED that this Order shall be, and is, binding upon the Defendants and Relief Defendants and each of their respective officers, agents, servants,

employees, attorneys-in-fact, subsidizates, effiliates and those passons in active concert or participation with them who receive actual notice of this Orde service, or otherwise.

EXHIBIT A

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List of Known Entities Controlled By McGian and/or Smith

107th Associates LLC Trust 07

107th Associates LLC Capaciton

CMS Pinandis Service

Chief Commercial Capital Capaciton

CMS Finandis Service

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Chief Charrer Ventures LLC der YOLO Cruises

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KC Apagediction Corp.

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KC Apagediction Corp.

KMS Cable Holdings LLC

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Laxary Cruise Receivables, LLC

N. A. S. Denance

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Prince Vision Communications LLC

Prince Vision Communications LLC

Prince Vision Communications of Culter Cay LLC

Prince Vision Practing of Key Cove LLC

Prince Vision Practing of Lay Cove LLC

M. Trust (0)

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Socurity Periopsion Trust III

Socurity Periopsion Trust IV

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Court Sent Approxime

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EXHIBIT B

Exhibit B Known Bank Ascounts

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J. ...... Case 1:10-cv-00457-GLS-RFT "Document 6-2" Filed 04/20/10 Page 5 of 8

Institution	Accessed Number	Name of Account Holder	Accessed Nume 2
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Exhibit B Known Bank Accounts

":10 INSTR#: 2010013630 05/03/2010 MISC RECORDING Image: 1 of 33



SARATOGA COUNTY – STATE OF NEW YORK Kathled a marchiome, county clerk 40 momaster street, ballston 8PA, NY 12120

COUNTY CLERK'S RECORDING PAGE \*\*\*THIS PAGE IS PART OF THE DOCUMENT ~ DO NOT DETACH\*\*

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A Eo Sin SECURITIES AND EXCHANGE COMMISSION, UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

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MCGRN, SMITE ADYRODS ILC;
MCGRN, SMITE ATALAL ROLDINGS CORP;
REST ADYRODK NOTES, ILC;
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TERED ALBARY INCOME NOTES, ILC;
TEMORAL MANCHING AND
DAYD L. SMITE; MCGINN, SMITTH & CO., INC.,

1 10-ev-457 (0-5/AF) LAWRENCE K. BAERMAN, CLERK ALBANY

Rellef Defauden

Defendants, and

LYNNA, SMITH,

OKDER TO SEOW CAUSE, TEMPOKANY RESTRAINING OFDER, AND OEDER PREEZING ASSETS AND GRANTING OTHER RELIEF

On the Application of Plaintiff Securities and Exchange Commission (the "Commission") (1) . directing defendants McGina, Smith & Co., Iso. ("MS & Co."); McGina, Smith Advisora LLC ("MS Advisory"); McGina, Smith Capital Holdings Carp. ("MS Capital"); First

Advisory Income Notes, LLC ("FAIN"); First Excelsion Income Notes, LLC ("FBIN"); First Timothy M. McGinn; Drvid L. Smith (collectively, the "Defindants") to show cause why an Independent Income Notes, LLC ("PIRV"); Third Albery Income Notes, LLC ("ZAIN"); Order should not be entered, pending a final disposition of this action: ZO10013830 04/03/2010 03/2552 PM 33 Puges MISC RECORDING

Record and Return To:

WILLIAM 3 BROWN PHILLIPS LYTLE LLP 3400 HSBC CENTER BUFFALD NY 14203-2887

Partyl: SECURITIES AND EXCHANGE COMMISSION
Party2: MCGINN SMITH AND CO INC

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- (a) preliminarily enjoining:
- (f) MSS & Co., MS Capital, FAIN, FEBN, FIBN, TAIN, McGiun and Smith from violating Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 58 77-6(a) and 77-c(c);
- (ii) MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Section 17(4) of the Securities Act, 15 U.S.C. § 774(4) and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 784(6) and Exchange Act Rule 105-5 theremoder, 17 C.F.R. § 240,100-5;
- (iii) MS & Co., MS Advisors, McClina and Smith from violating Sections 206(1), 206(2), and 206(4) of the Investment Advisors Act of 1940 ("Advisors Aar"), 15 U.S.C. §§ 800-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.P.R. §275-206(4)-8;
- (fv) MS & Cu. from violating Section 15(c)(1)(A) of the Exchange Act,
  15 U.S.C. § 78(c)(1), and Smith and McGinn from eiting and
  abetting this violation; and,
- (v) FAIN, FEIN, 171N and TAIN from violating Section 7(s) of the Investment Company Act of 1940 ("Company Act"), 15 U.S.C. §
- (b) freezing the Dufundams' and Lynn Smith's (the "Relief Defundam") sesset:
- (c) directing McGinn and Smith (the "Individual Defondants") to provide verified accountings for themselves and MS & Co., MS Advisors, MS

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Coping, FADN, FEIN, FUN and TAIN (the "Entity Defendants"), and the Relief Defendant to provide a verified accounting for kerself,

- (d) appointing a receiver for the Emity Defendents and all other entities
  Medium and/or Smith control or have an ownership interest fu
  (collectively the "MS Entitles"); and
- probabiling the destruction, siteration or concealment of documents

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- pending adjudication of the foregoing, an Orden
- temporanly restraining the Defendank from violating the aforcularitioned statutes and rules,
- freezing the Defendants' and Relief Defendant's 28896;
- directing each of the Individual Defendants to immediately provide the verified accounts for themselves and the Entity Defendants, and the Relief Defendant to provide the verified accounts for heiself.
  - appointing a temporary receiver for the MS Entities;
- prohibiting the destruction, elecation or concealment of documents by the Polescontents and

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providing that the parties may take expedited discovery in proparation for a preliminary infemetion tenering on this Order to Slow Cause.

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This Court has considered: (1) the Complaint filed by the Commission, dated April 20, 2010; (2) the Declaration of Israel Mays, excented on April 20, 2010, and the eathblit thereto; (3) the Declaration of Lars Shalor Metarban, excented on April 20, 2010, and the exhibits thereto; and (4) the memorandum of lary in support of Plaintiff Commission's application, laied April 20, 2010.

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CTIC INSTR#: 2010013630 05/03/2010 MISC RECORDING Image: 6 of 33

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Based upon the foregoing documents, the Court finds that a proper showing, as required by Section 20(4) of the Securities Act, Section 21(4) of the Eschange Act, Section 209(4) of the Advisors Act, and Section 42(4) of the Company Act, has been made for the relief granted insert, for the following reasons:

- violated, and will continue to violate, Sections S(s) and S(e) of the Securities Act, Section 17(s) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 105-5; (4) 206(2), and 206(4) of the Advisors Act and Advisor Act Rule 206(4).8, and Defendants McCinn Advisors has violated, and will continue to violate, Section 17(a) of the Securities Act, Section Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, and Section 206(1), continue to violate Sections 5(a) and 5(c) of the Securities Ant, Section 17(s) of the Securities It appears from the evidence presented that, unless temporarily restrained, (1) Defendant MS & Co. has violated, and will continue to violate, Sections 5(s) and 5(c) of the Advier Act Rule 206(4)-8, and Section IS(0X8)(1) of the Exchange Act; (2) Defendent MS Defendants FAIN, FEIN, FIIN and IAIN have violated, and will continue to violate, Section and Smith have nided and abetted, and will continue to aid and abet MS & Co.'s violation of Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisors Act and Securities Act, Section 17(s) of the Securities Act, Section 19(b) of the Exchange Act and 18(h) of the Exchange Act and Exchange Act and Rule 106-5, Section 206(1), 206(3), and 206(4) of the Advisors Act and Advisor Act Rule 206(4)-8; (3) Defendant MS Capital has 7(a) of the Company Act; and (5) Defendants McGinn and Smith have violated, and will Section 15(a)(a)(1) of the Exchenge Act.
- It appears that the Defendants and Relief Defendant may alterny! to dissipate,
  depicte, or transfer from the jurisdiction of this Court, fands, property and other assets that could

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be antipes to an order of disporgement or an order imposing eivil penalties. It appears that an order fivezing the Defendants' and Relief Defendant's assets, as specified berein, is mecosasy to preserve the stanus qua, to protect investors and clients of the Defendant from further transiters of funds and misappropriation, to protect this Court's shiftly to aveard equishle relief in the form of dispargement of linegal profits from fruid and sivil penalties, and to preserve the Court's shiftly to approve a fair distribution for violance of the fauid.

- 3. It appears that an order requiring each of the Individual Defendente and Redict Defendant to provide a verified ecosmicing of their sasets, ancey and property bold directly or indirectly by the Defendents and Redict Defendent, or by others for the direct and indirect beneficial interest of the Defendants and Relief Defendant, in necessary to effectate and conure compliance with the freeze imposed on the Defendants' and Relief Defendant's assets.
- 4. It appears that the Defendants may actempt to destroy, after to conceal documents
- 5. It'species that the appointment of a receiver for the MS Entities is necessary to (i) preserve the stanks que; (ii) secretain the certain of comminging of funds among the MS Entities; (iii) secretain the true fannels condition of the MS Entities and the disposition of investor funds; (iv) prevent further disalguian of the property and assets of the MS Entities; (v) prevent the encomponence or disposal of property or assets of the MS Entities and the investors; (vi) prevent the books, receives and documents of the MS Entities; (vii) be available to prepond to investor inquiries; (viii) protect investors assets; and (iv) determines whether the MS Entities are the contract of the MS Entities and the investor inquiries; (viii) protect investors assets; and (iv) determines whether the MS Entities are the contract of the major that the MS Entities are the contract of the major that the MS Entities are the contract of the major that the majo
- Good and sufficient reasons have been shown why procedure other than by notice of motion is necessary.
- 7. This Court has jurisdiction over the subject matter of this action and over the

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Defendants and Rakef Defendant, and venue properly lies in this District. NOW, THEREBORE,

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Court at 3:00 p.m. on the 3reddey of May 2010, in Room Co of the Jemes T. Foley United States Courthouse, 445 Bressiwsy, Albany, NY 12207-2924, why this IT IS HERREY ORDERED that the Defendants show cause, if there be may, to this Court abouid not eater an Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, Section 20 of the Securities Act, and Section 21 of the Exchange Act, Section 209(d) of the Advisors Act, and Section 42 of the Company Act preliminarity exjoining:

- violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 779(a) and (1) MS & Co., MS Capital, PAIN, FRIN, FIIN, TAIN, McChim and Smith from
- 17(2) of the Securities Act, 15 U.S.C. § 77q(e) and Section 10(b) of the Exchange MS & Co., MS Advisors, MS Capital, McGian and Smith from violating Section Act, 15 U.S.C. § 78j(b) and Exchange Act Rule 10h-5 thereunder, 17 C.F.R. § 240.10b-5; 3
- 206(2), and 206(4) of the Advisors Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule MS & Co., MS Advisors, McGinn and Smith from violating Sections 206(1), 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8;
- MS & Co., from violating Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn from aiding and abetting this violation; and, Ŧ
- FAIN, FIIN, FIIN and TAIN from violating Section 7(a) of the Company Act, 15 U.S.C. § 304-7. ତ

other disposal of any assets, fluids, or other property (including money, real or personal property, . prevent, eny withdrawni, transfer, pleige, enounbrance, assignment, dissipation, concesiment or Court should not also enter an Order directing that, pending a final disposition of this action, the Defendants, the Relief Defendant, and each of their financial and brokerage institutions, officers, wherever situated, in whatever form such assets may presently exist and wherever located within accounts listed on Exhibit B, as well as each real estate parcel owned directly or indirectly by the funds or other property of the Defendants and Refine Defendant to hold or retain within its or his conyrol and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or under the direct or indirect control of the Defendants and Reitef Defendant, including but not securities, commodities, choses in setion or other property of any kind whatsoeves) of, held by, participation with them who receive actual notice of such Order by personal service, facairalle IT IS FURTHER ORDERED that the Defendants show cause at that time why this brokerage institutions, debtors and baltes, or any other param or entity holding such assets, the terriprisa jurisdiction of the United States courts, and directing each of the financial or service or otherwise, and each of them, hold and retain within their control, and otherwise United to, the MS Entities, including but not limited to, those capitos lirted on Exhibit A, whether held in any of their names or for any of their direct or indirect beauticial interest agents, servants, employees, attorneys-in-faut, and those persons in active concert or MS Entities, including but not limited to, those emities listed on Exirbit A.

III IS FUXTHER ORDERED that the Defendants show cause at that time why this

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Coaxt should not also unter an Order enjoluning and restraining them, and may person a entity secting at their direction or on their behalf, or any other person, from destroying, siltering, conceasing or otherwise interfering with the access of Palentiff Commission and the receiver in any and all documents, books and records, that are in the possession, custody or control of the Defendents, and subt of their offloats, agants, employees, servants, accountants, financial or brokenege histlittices, stromeys-in-fact, subsidiaries, affiliates, predecession, successors and related semiles, including but not thursted, to books Endries, including but not limited to, those entities listed on Estiblit A, that refer, reflect or relate to the allegadests in the Complain, including, without limitation, documents, books, and records referring, reflecting or relating to the Defendents' finances or bestoness.

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IT IS FURTHER ORDERED that the Definations alove cause at that time why this Count should not also cater an Order directing each of the Individual Defendants to serve upon Plainisif Commission, within three (3) business days, or within woch extension of time as the Commission agrees to, a varified written accounting each signed by Defendants Medjims and Smith and also signed by the officer or employees of the Busity Defendants Medjims and knowledgeable shout the assets, liabilities and general financial condition of each of the Defendants, and varified accountings signed by each of the Individual Defendants and the Relief Defendant identifying their own assets, liabilities and general financial condition, if may, under permity of perjury. Buth of the Defendants and Relief Defendant shall serve ruch sworn updated written accountings by hand desivery, hearbuills massmission to (212) 336-1324 or overnight countier service on the Commission's coursed, David Stocking, Eeq., Securities and Exchange Commission, 3 World Pinancial Center, New York, NY 10281.

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IT IS FURLIERS ONDERED not individual Defendants and Relief Defendent shall file with the Court and serve on the Contrainstion, within these (3) business days following service of this Order, a list of all secounts at all backs, brokerage firms or insarcial institutions services of this Order, a list of all secounts at all backs, brokerage firms or insarcial institutions (faculting the name of the financial institution and the name and numbers (including numbers of pagers and nobile solephones), decreamed the numbers (facilating numbers of pagers and nobile solephones), decreamed numbers (world Wide Web sites or Universal Records Locators, interact buildeth board files, colline interactive conversational spaces or chair rooms, interact or electronic small service providers, sincet addresses, postal box numbers, arily deposit boxes, and storage facilities used or maintained by them or under their direct or indicent contexting the MS Britiss, including but not limited by them or unities kired on Ehrhörit A.

TT IS FURTHER ORDERED that the Defendants show cause at that time why this Court should not also cater an Order supolating or continuing the appointment of a receiver for the MS Emities said still entities they control or have an overtently immest in including but not limited in, those artities liated on Exhibit A, 70 (i) preserve the states give, (ii) saverain the extent of comminging of fends among the MS Emities; (ii) accertain the true financial condition of the MS Emities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Emities and lengthese and all entities they control or have an overnerably inferest in; (v) prevent the encamberance or disposal of property or assets of the MS Emities and the investors; (vi) preserve the books, records and documents of the MS Emities and the investors in invastor inquiries; (vii) protect the assets of the MS Emities from further

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iitskystion; and (ix) determine whether the MS Equites aboubl undertake brokruptoy filings.

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- To effectuate the faregoing, the receiver would be empowered to:
- Take and remin immediate postestion and control of all of the assets and property, and all books, records and decuments of the MS Entities including but not limited to, the entities listed on Exhibit A, and the rights and powers of it with respect thereto including the powers set forth in the management agreements and LLC agreements endors operating agreements applicable to any LLCs or other property or entities owned or controlled by the Defradants;
  - (b) Have exclusive control of, and be made the sole sufferiezed algoratory for, all accounts at any band, braceage from or flannical institution that has possession or control of any assets or fineds of the MS Entitles including but not limited to, the entitles tighted on Exhibit A;
- (c) Pry from available finds ascessary business expenses required to preserve the assets and property of the MS Entities including that not limited to, the multiss fisted on Exhibit A, including the books, records, and documents of the MS Retities and all emitties they control or have an ownership interest in, notwoindstending the saset frozes fingoes thy paragraph II, above;

  (d) Take preliminary steps to locate assets that may have been curveyed to third
  - (d) Take preliminary stops to Rocate assets that may have been correspon to
    parties or otherwise vonceabed;
     (e) Take preliminary stops to naccetain the disposition and use of finite obta.
- Take preliminary steps to ascartain the disposition and use of fands obtained by the Declaridatis resulting from the sale of securities tensed by MS Entitles incleding but not limited to, the entitles listed on Entitle?
- (f) Regrge and employ persons, including accountants, attendays and experts, to

arrist in the earrying out of the receiver's duties and responsibilities hareneder;

Report to the Court and the parties within 45 days from the date of the entry of

- (g) Report to the Court and the parties within 45 drys from the case of use class; this Crder, subject to such reasonable extensions as the Court may great, the following information:
  Sallowing information:
- 1. All assets, money, fands, accurities, and real or personal property then hald directly or indirectly by or for the benefit of the MS Entitles and all emities they control or have an ownership interest in, including but not limited to, real property, hank accountly, hockwage accounts, investments, business interests, personal property, wherever situated, identifying and describing each asset, its countril location and value;
- A list of secured meditors and other finencial institutions with an inferest in the receivestity assets;
- 3. To the extrant pranticable, a list of investors in the MS Entities including but not timated to, the entities listed on Exhibit A;

  The receiver's preliminary plan for the subministration of the assets of the receivership, including a recommendation regarding whether bankrupkly enset receivership, the lutting at a should be filed for all of a portion of the assets subject to the receivership and a recommendation whether liftigation against third parties should be commenced on a contribute to the receivership.

IT IS FURCHER ORDERED fast, pending a hearing and determination of the Commission's Application for Preliminary Injured on, MS & Co., MS Capital, EAIN, FEIN, FIRM, TAIN, McGino and Smith nod each of them, their agents, servents, carpicyses, and Smith nod each of them, their agents, servents, carpicyses, and

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ethantoys-in-fact, and those persons in sative context or participation with them who receive actual notice of this Order by personal service, facterials service, or otherwise, are importally restrained from, directly or indirectly, singly or in context, in the offer or sale of any security, by use of any means or instruments of transportation or communication in internate commerce or by use of the mails to offer or sail securities through the use or medium of a prospectus or otherwise when no registrations statement has been filed or is in effect as to such securities and when no registration is swallable in violation of Scultous S(s) and S(c) of the Securities Act.

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IT IS FUKCHER ORDERED that, pending a bearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capthal, and each of their financial and brokenge institutions, officers, agents, servents, employeds, attorneys-in-flact, and those generous periodic periodic personal service, model of these persons in series concert or participation with them and all other persons or entities who receive serval notice of such Order by personal service, faccinalise services or otherwise, and each of them, are temporarily restrained from violating, directly or indirectly, Section 10(b) of the Bachange Act, 15 U.S.C. § 78(b), and Rule 10th-5 premaligated thereunder, 17 C.F.R. § 240,10th-5, by using any means or instrumentality of interestant commercial to the punchase or sale of my security:

- (a) to employ any device, scheme, or artiflet to definite;
- (b) to make any untrue statement of a material fact or to coult to state a material fact mecessary in order to make the scatements made, in the light of the circumstances under which they were smade, not raislessting; or

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(c) to engage in any act, practice, or course of business which operates or would operate us a finale or detail upon any person.

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IT IS FURTIER ORDERED that pending a hearing and determination of the Commission's Application for Preliminary Liquestion, MS & Co., MS Advisors, MS Capital, and each of their financial and brotecage institutions, officers, agents, aervants, employees, attenteys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual anotice of such Order by personal service, factionile service or observies, and each of them, who receive actual sociece of this Order by personal services, factionile services, factinile services, or observies, are temporarily restrained from violating Societion 17(4) of the Securities Act, 15 U.S.C. § 174(a), in the offer or sale of any security by the use of any means or instruments of transportation or communication is internate commerce or by use of the mails, directly or indirectly.

- (a) to employ any device, scheme, or actifice to defrand;
- (b) to obtain money or property by means of any untrue statement of a material fact or any ornission of a material fact necessary in order to make the statements made, in light of the sincimalances under which they were made, not
- to engage in any transaction, practice, or course of business which operates or would operate as a fixed or deceit upon the pirrchaser.

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

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sgends, servanis, exployers, attanzay-in-fact, and those penacs in utilve concert or participation with them and all other persons or entitles who reactive actual notice of such Order by personal service, facatinile services or entitles who reactive actual notice of litis Order by personal service, facatinile service, or otherwise, are temporarily restrained from violating Section 15(c) of the Exchange Act, 15 U.S.C. § 726(c)(c), and 17 C.F.R. § 240.109-3, by while sociate as a broken or dealer, directly or indirectly, making use of the mails or any while sociate or commerce, or any facility of any natural securities exchange, to effect say tenassical in, or to induce or electry it is a member, by means of any manipulative, decaptive from on a national exchange of which it is a member, by means of any manipulative, decaptive or other frauchlent device or contrivance, or to use or employ, in connection with the practime or sale of any security ofserwise than on a national securities exchange, any sect, practice, or course of businesse defined by the Commission to be included within the term "manipulative, deceptive or other Exudulent device or contains or to be included within the term "manipulative, deceptive or other Exudulent device or contains or to be included within the term "manipulative, deceptive or other Exudulent device or contains or or being them is used in Section 13(c)(c) of the Exchange Act.

5

IT IS FURTIERR ORDERED that pending a hearing and determination of the Commission is Application for Experiments biproction, the Individual Definedrate, and each of their financial and brobenage institutions, officers, agents, severants, semployees, attuntay-in-floct, and those persons in settive occurr or participation with them and all other persons or entities who receive actual notice of and Order by personal service, finaintle service or otherwise, and each of them, who receive actual notice of this Order by personal service, finaintle service, or otherwise, are temporarily restrained from aiding and abotting my broker's or dealer's violations of Section 15(c) of the Exchange Act, 15 U.S.C. § 78(o)(c), by providing substantial sestitance

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to an individual or entity, which, while soting as a bruker or dealer, directly or indirectly, makes
use of the mails or any instrumentality of interstate commerce, or any facility of any national
accustrice archange, to effect any transaction in, or to induce or attempt to induce the purchase or
sale of any accurity otherwise than on a national exchange of which it is a member, by means of
any mampulative, deceptive or other frauthiest device or contrivence, or to use or employ, in
consection with the purchase or sale of any security otherwise than on a national securities
exchange, any set, practice, or course of business defined by the Commission to be included
within the term 'manipulative, deceptive or other frauthelent device or contrivence" as such term
is used in Section 15(0x1) of the Exchange Ast.

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IT IS PURLIER OXDERED that pending a beauting and determination of the Commission's Application for Preliquieary injection, MS & Cb., MS Advisors and such of their officers, agails, servants, employees, stionage in-fact, and those persons in active concert or participation with them and all other persons or emitties who receive actual notice of each Order by personal service, faccinalise service, or officewise, art temporarily restrained from violating coins 206(1), 206(2), and 206(4) of the Advisors Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rute 206(4)-8 thereunder, 17 C.R.R. §275.206(4)-8, while acting as an investment advisor, by the use of the mails or any nears or instrumentality of interstate commerce, directly or indirectly to employ any device, achemic or suffice to defrand any olient or prospective elient; to emgage in my transcotion, pructice or course of business which is enabled decertive or manipulative.

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## XIII

Commission's Application for Preliminary Injunction, FAIN, FEIN, FIIN, and TAIN and each of restrained from violating Section 7(a) of the Company Act, 15 U.S.C. § 80s-7, while acting as an intertate commerce, any security or my laterest in a security, whether the issuer of such security is such investment company or another person; control any inventment company which does any interest in a mounity, whether the issuer of such security is such investment company or mother person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to their officers, agents, servents, emplayees, attorneys-in-fact, and those persons in active concert Order by personal service, facsimile service or otherwise, and each of them, who receive actual investment company, shall derectly or indirectly, offer for sale, sell, or deliver after sale, by the otherwise acquire or attempt to sequire, by use of the meals or any means or instrumentality of believe that such scounty or interest will be made the subject of a public offering by use of the or participation with them and all other persons or entities who receive actual notice of such use of the mails or any means or instancentality of interstate commerce, any security or any of the acts enumerated above; engage in any business in interatate commerce; or control any nails or my means or instrumentality of interests commerce; purchase, redeon, retire, or IT IS FURTHER ORDERED that, pending a hearing and determination of the notice of this Order by parsonal service, frozinile service, or otherwise, no temporarily

## XI

IT IS FURTHER ONDEREE that, pending a bearing and electronization of the Commission's Application for a Preliminary injunction, the Defendents, and each of their

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linancial and brokerage institutions, officers, agants, servants, employees, attorneys-in-fact, and receive actual notice of such Order by personal aervice, facaimile service or otherwise, and each control and prohibit the withdrawal, removal, transfer or other disposal of any such search, funds indirect control of the Defendants, including but not limited to, entities owned or controlled by. accounts listed in Exhibt B, as well at each real estate parcel owned directly or indirectly by the those persons in active concert or participation with them and all other persons or emities who 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 ballees, or any other person or entity bolding such assets, funds or other property of the Defendants to hold or retain within its or his or other properties including but not fimited to, all assets, funds, or other properties bekt in the of them, bold and relain within their control, and otherwise prevent, any withdrawal, transfer, finds, or other propery (including money, rest or personal property, securities, commodities, choses in whice or other property of any kind windscorver) of, held by, or under the direct or related to, or senociated or affiliated with the MS Endides including but not limited to, those pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, enthies listed on Exhibit A, whether hold in any of their names or for any of their direct or MS Entities including but not limited to, wose carifes listed on Exhibit A.

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IT IS FURTHER DEDUCERED that, pending a hearing and determination of the Commitment of the Harming at their direction for a Preliminary Injunction, the Defendents, any person or entity sating at their direction or on that behalf, and any other third purly including but not limited to say investor, be and henchy are enjoined and restrained from destroying, altering, concealing or

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otherwise interfering with the secases of Pieintiff Corunisator and this receiver to any and all documents, books, and records that are in the possession, custody or control of the Defendents documents, books, and records that are in the possession, custody or control of the Defendents and each of their respective officers, agains, employees, servants, accountants, financial or brokenage institutions, or attoriosy-in-fact, unistitutions, affiliates, predecessors, successors and related emities, including but not limited to, the MS Entitios, that reflect or relate to the allegations in the Complaint, including without imitation, documents, books and records allegations in the Complaint, including without imitation, documents, books and records referrings reflecting or relating to the Defendents' finances or business operations, or the offer, purchase or gale of securities and the use of proceeds thereform; and (2) ordered to provide all purchase or gale of securities and the use of proceeds thereform; and (2) ordered to provide all researable cooperation to the receiver in carrying out his duties set Earth herein.

## 5

IT IS FURCIEER ONDERED that, pending a heating and determination of the Commission's Application for a Preliminary Injunction, each of the Defindants shall file with this Court and serve upon Plaintiff Commission, within farce (3) business days, or within such cartenison of times as the Commission agrees to, a verified written accomming signed by each of the Indvictual Defendants, and the officers or employees of the MS Emilies who are most knowledgeable about the assets, lishilides and general insancial condition of the each of the Defendants, if say, under penalty of poplury, of:

- (1) All search, lishilities and property emercity held, directly or indirectly, by or for the benefit of each Defendant, including, without limitation, bank secounds, prolecage accounts, investments, business interests, losnes, lines of credit, and real and personnal property wheever situated, describing each asset and liability, its current location and amount.
  - (2) All money, property, assets and income received by each such Defendant for his

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direct or indirect benefit from the other Defandants, at any time from Fortary 1, 2006 through the date of each accounting, describing the amount, disposition and current incedion of each of the Henra itself,

- (3) The names and last known addresses of all bullees, deblors, and other parsons and entities that currently are holding the essent, funds or property of each Defendant; and
- (4) All assets, funds, secinities and real or personal property invested by each nech.

  Defendant, or say other person controlled by them, and the disposition of much assets, funds, securities, real or personal property.

Bach Individual Dedoudent and the officers or employees of the Buity Defendunis who are most knowledgeable about the sasest, libblities and general financial condition of the Defendunis, if any, shall verify the Entity Defendunis, is serve such sworm statements of seart identifying information by hand delivery, facinally transmission to (212) 336-1234 or overnight counies service on the Commission's formed, David Stocking, Baq. Securities and Exchanges Commission, 3 World Financial Center, New York, NY 10281. Each of the Individual Defendunis is required to provide the Commission with az accounting for the own general faculties and general fanancial condition, and also provide the Commission with an accounting for the own personal seases, liabilities and general funancial condition.

## XVIII.

IT IS PURITHER ORDERED that Milliam A. Branda..... pending further order of this Court, do and decedey is speciated to eat as receiver for the MS Brittise including

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but not limited to, those endities listed on Exhibit A, to (1) preserve the scalar quo; (2) securation the true financial condition of the MS Endities and the dispossition of investor funds; (3) determine the extent of committeeing of funds between the MS Entities; (4) prevent further discipation of the property and assets of the MS Entities; (5) prevent the sensembrance or dispossion for the property or assets of the MS Entities; (6) preserve the books, records and documents of the MS Entities; (7) be available to respond to investor inquirion; and (8) determine if the MS Entities and all entities they control or have an ownership interest in should undertake a bankruptery Ellag. To effectuate the foregoing, the receiver is hereby empowered to:

- Take and retain immediate possessing and control of all of the severa and property of the MS Builties including that not limited to, those sutities listed on Exhibit A, and all books, records and documents of MS Emilies, and the rights and powers of it with respect theories.
- (b) Bieve excitative control of, and be made the sole authorized rigaratory the, all accounts at any bank, brokerage farm or financial institution that has possession or control of any assets or bruds of MS Entities including but not firmined to, those entities fisted on Exhibit A;
- (c) succeed to all afghts to manage all properties owned or controlled, directly or indirectly, by the MS Entities, including but not limited to, faces entities listed on Entitle! A purranst to the LLC and operating agreement relating to seath ordity;

  (d) Pay from available funds moonsary haddness expenses required to preserve the
  - Pay from available funds moceany business expanses required to preserve the sessia and property of MS Entities and all entities they central or have sur ownership interest in, including the books, records, and documents of the Defendants, notwithermating the seset freezes imposed above;

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- Take preliminary stops to locate assets that may have been conveyed to third
  parties or otherwise connealed;
- (f) Lake preliminary steps to ascertain the disposition and use of finals obtained by the Defendants resulting from the sale of securities issued by the Defendants and the entities they control;
- (g) Bagago and amploy pursons, including eccountaries, ettorisys and experts, to assist in the earlying out of the receiver's duties and responsibilities bearander;
- (h) Take all mecassary steps to gain control of the Defendants' interests in sessio in foreign jurisdictions, including but not limited to taking steps necessary to reputate foreign session and
- Take such finther serien as the Court shall deem equitable, just and appropriate under the circumstance upon proper application of the receiver.

XVIII

II IS FURTIEER ORDERED into no person or easily, including any creditor or cisions at spaint any of the Defendants, or any person acting on behalf of such creditor or claimen, shall take any solion without further order of this Court to interfere with the taking control, possession, or management of the sesolt, incloding but not limited to the filing of any lawanits, liens of encombanges or bankrapicy cases to impact the property and seeds subject to this order.

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IT IS FURTHER ORDERED that the Defendants whall pay the reasonable costs, feed and expenses of the reserver incurred in connection with the performance of his duties described

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

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

- (1) Take depositions, subject to two (2) telendar days' notice by faceimile or
- (2) Obtain the production of documents, within three (3) calendar days from service by florismic or otherwise of a request or subposes from any possons or entities, isolating some yearty witnesses; and
- (3) Service of any discovery requests, notices, or subpocuse may be made by personal service, faceintle, overnight conder, or finst-class mad on an individual, entity or the individual's or entity's ettorney, and
- The receiver may take discovery in this action without further order of the Court.

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IT 18 FURTHER, ORDERED that a copy of this Order and the papers supporting the Commission's Application be served upon the Defendents and Relief Defendant on or before Mannieston's Application be served upon the Defendents and Relief Defendant on or before Mannieston's Application by presented delivery, farainalis, overnight couries, or first-clars

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mail

II IS FURTHER ONDERED that the Defendants and Relief Defendant shall deliver my opposing papers in response to the Order to Stow Causes above no later than I are the content of the Content of Stow Causes above no later than I are the content of the Content stow of the Content stow of the content of the contents are realished, by that date and time, to the New York Regional Office of the Commission at 3 World Financial Center, Room 4300, New York, New York 19281, After, David Steeling Enq. or used other piace as coursed for the Commission may direct in writing. The Commission shall have until Thanks and April 24, 2010, at 500 p.m., to serve, by the most expeditious means available, my reply papers upon the Defendants and Reite Defendants, or upon their commed, if commet thall have made are appearance in this action.

X

IT IS FURTHER ORDERED that this Order shall be, and is, bucking upon the Defendants and Relief Defendants and each of their respective officers, agents, servants, employees, attenueys-ta-fact, subsidiaries, taffitates and thous-pureous in active concert or participation with them who receive actual roles of this Orderby personal strains, factinile service, or otherwise.

April 24 2010

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Case 1:10-cv-00457-3LS-DRH "Dodumeht 5:1 · Filed 04/20/10 "Page 1 of 3" ""

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## Echielt A. List of Known Entitles Controlled by McGinz and/or Swith

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Title No. CT12-30185-ALB

Control of the Contro

### TAX SEARCH

### RETURNS

Our policy does not insure against taxes, water rates, assessments and other matters relating to taxes which have not become a lien up to the date of the policy or installments due after the date of the policy. Neither our tax search nor our policy covers any part of the streets on which the premises to be insured abut. For information only, we set forth the assessed valuation for the current year. Taxos, assessments, water rates and sewer charges which are liens on the real property:

1. SECTION/BLOCK/LOT

167,-4-35

CITY:

Saratoga Springs.

PREMISES:

REDACTED

ASSESSED TO:

David and Lynn Smith

LAND VALUE

\_

\$194,800.00

Assessed: Full:

\$772,700.00

**EXEMPTION** Type:

Star

Amount:

\$32,770.00

SCHOOL DISTRICT:

Saratoga Springs

PROPERTY CLASS CODE:

meran Da alvano

2012 City Tax

Total: \$6,862.88

1st Payment Due 03-01-2012:

\$1,715.72 -open + penalty- (\$1,818.66 due by 3/31/12)

2nd Payment Due 06-01-2012:

\$1,715.72 -lien, not yet duo-

3rd Payment Due 09-01-2012:

\$1,715.72 -lien, not yet due-

4th Payment Due 12-01-2012:

\$1,715.72 -lien, not yet due-

2011-2012 School Tax:

Total: \$11,012.26 (\$11,452.26 w/o exemption)

## COMBINED TOTAL AMOUNT DUE BY 3/31/12 FOR 2011/2012 SCHOOL TAX IS-\$10,016.60

1st Half Due 10-04-2011:

\$5,505.13 -open + penalty-

2nd Half Due 02-04-2012:

\$5,506.13 -open + ponalty-

2011 City Tax:

Total: \$6,853.87 -open + penalty- (\$7,808.41 due by 3/31/12)

2010-2011 School Tax:

Total: \$5,529,54 (\$6,226.01 due by 3/31/12)

Water Account #

03-1576

Water to 2/15/2012

\$111.18 paid SUBJECT TO FINAL READING

.NOTE: Any unpaid water, sewer, or special assessments or housing code violations are not included or guaranteed in this search.

03/22/2012 11:32:29 AM D-Killion