

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

**NOTICE OF
CROSS-MOTION**

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

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, AND DAVID L. SMITH,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY MCGINN,

Defendants,

LYNN A. SMITH and NANCY MCGINN,

Relief Defendants, and

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

Intervenor.

PLEASE TAKE NOTICE that, following the conference with the Court on June 11, 2012 and the Order dated June 13, 2012 granting leave to David and Lynn Smith to file cross-motions (Dkt. No. 499), to the Securities and Exchange Commission ("SEC") and Citizens Bank's (Citizens) (collectively "Movants") motion to modify the asset freeze to enable the Receiver to sell the Smiths' Saratoga Springs, New York residence (hereinafter "Property") and upon the Memorandum of Law in opposition to said motion and in support of the Defendants' cross-motion; the Declaration of David L. Smith, dated

July 27, 2012; and upon all prior proceedings and filings herein, Defendants will cross move, 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, New York, for an order modifying the asset freeze to allow for the release of certain funds to satisfy the existing Note and Mortgage on Defendants' Property or such other relief the Court deems appropriate to enable the asset to be maintained;

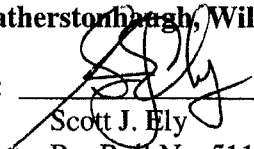
PLEASE TAKE FURTHER NOTICE that a copy of the proposed Order, as revised, is annexed hereto; and

PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7.1(c), opposition papers must be filed and served not less than eleven (11) days prior to the return date.

Dated: July 30, 2012

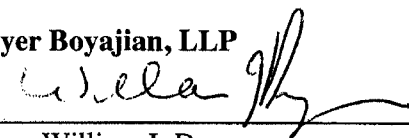
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**Case No.: 1:10-CV-457
(GLS/DRH)**

Defendants,

LYNN A. SMITH and NANCY MCGINN,

Relief Defendants, and

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

Intervenor.

**PROPOSED ORDER MODIFYING ASSET FREEZE TO ALLOW FOR THE
PAYOFF OF A CERTAIN NOTE AND THE RELEASE AND SATISFACTION
OF MORTGAGE RELATING TO THE SMITHS' SARATOGA HOME**

WHEREAS on April 20, 2010, the Securities Exchange 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 [REDACTED] Saratoga Springs, New York (the "Property") is currently subject to the Freeze Order; and

WHEREAS, the Commission has filed a motion seeking to modify the Freeze Order allowing the Receiver to sell the Property which the Court has denied; and

WHEREAS, Defendants' David L. Smith and Lynn A. Smith are the owners of the Property and have cross moved seeking an Order to satisfy the existing Note and Mortgage to avoid the prospect of losing the home to foreclosure in the event their application to modify the mortgage terms is denied by the lender;

NOW, THEREFORE,

IT IS ORDERED that the Court-appointed Receiver, William J. Brown liquidate certain assets from Lynn A. Smith's investment and deposit accounts in order to pay off the remaining balance, (including the principal, interest and penalties) of the Promissory Note, dated August 7, 2003 held by Citizens Bank, successor in interest to Charter One Bank, N.A. and to obtain a full release and satisfaction of the Mortgage, recorded in Book [REDACTED] Page [REDACTED] in the Saratoga County Clerk's office that was recorded on August 19, 2003 to secure the lenders interest in the Promissory Note as well as any line of credit that remains open and is associated with the loan with Citizens Bank.

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.

Dated:

HON. DAVID R. HOMER
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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GEOFFREY R. SMITH, Trustee of the David L.
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Intervenor.

**MEMORANDUM OF LAW IN OPPOSITION TO SEC AND CITIZENS BANK'S
MOTION TO PERMIT THE INVOLUNTARY SALE OF THE SMITHS' HOME AND IN
SUPPORT OF ITS CROSS-MOTION REQUESTING THE RELEASE OF CERTAIN
MONIES TO SATISFY THE EXISTING NOTE AND MORTGAGE AGAINST SAID
PREMISES OR SUCH OTHER RELIEF THE COURT DEEMS APPROPRIATE TO
ENABLE THE ASSET TO BE MAINTAINED**

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Defendants, David and Lynn Smith respectfully submit this memorandum of law in opposition to the joint motion of the SEC and Citizens Bank seeking an order to modify the present asset freeze to enable the forced sale of the Smiths' Property. This memorandum of law is also submitted in support of the Defendants' cross-motion seeking an Order to release certain frozen assets for the purposes of satisfying the existing mortgage which currently encumbers the Property or other relief the Court deems appropriate to enable the asset to be maintained. This requested relief is submitted to the Court as an alternative to a forced sale by the Receiver and to avoid further foreclosure proceedings by Citizens. As the cross-motion will show, the alternative relief sought will have the effect of preserving the equity in the Property without impairing investors' interests and all the while enabling the Smiths to keep their home during the pendency of the civil and criminal actions.

PRELIMINARY STATEMENT

This application has been made at a point in time when this civil litigation has been stayed pending the outcome of the criminal proceedings. It seeks to force the sale of the Smiths' primary residence when all of their assets remain frozen, and at a time when the Smiths are attempting to negotiate a modification of their loan to stave off foreclosure proceedings.

The SEC and Citizens have made what appears to be a simple motion supported by a single declaration from Citizens' foreclosure attorney and a five-paragraph legal argument consisting of less than two pages – ironically the only case law cited being the Second Circuit's decision handed down in this case involving the Vero Beach property. However, the ramifications of this motion are anything but simple. In fact, from the

Smiths' perspective the prospect of losing their home during the duration of these legal proceedings with no significant assets to use to secure other housing is unbearable; particularly at a time when Mr. Smith is focusing on his own criminal defense.

Not only is the application harrowing from a simple human perspective, it is devoid of any analysis or factual basis that would enable the Court to assess the countervailing interests in maintaining or selling the Property. Merely relying on the Second Circuit's decision to uphold this Court's authority to permit the sale of the Vero Beach real estate, prior to a judgment being rendered, is patently insufficient. Indeed, this Court has held in its decision on Vero Beach:

To exercise the equitable jurisdiction invoked by this motion, countervailing interests...must be assessed. It appears in the best interest of both the investors and Lynn Smith that if the property can be maintained for the foreseeable future without sale such that the equity interest in the property will not be diminished, the property should be maintained and its sale denied. However, if the property will significantly diminish in value over the foreseeable duration of this action, its sale should be authorized forthwith to avoid further diminishment of the equity. (Dkt. No. 263 at 7)

It is submitted that when applying this analysis, the Court will find that the factors balance in favor of maintaining rather than selling the Property.

Moreover, the laws of New York State governing foreclosure, particularly more recent enactments, seek to provide homeowners with every opportunity to try and rectify daunting loan requirements and there are procedures that specifically mandate good faith negotiations in this regard. Permitting a forced sale, and thereby bypassing the foreclosure procedure altogether, eliminates these important safeguards not to mention a litigant's due process right to defend the action itself.

It is not clear from this joint application whether Citizens is seeking on its own motion for an order modifying the asset freeze to enable it to proceed with foreclosure. It is difficult to fathom how a bank can negotiate a modification in good faith on one end and proceed on a parallel track with a foreclosure on the other. However, Citizens and the SEC have attempted to take this a step further relying on unsubstantiated facts and in some cases, clear misrepresentations, with the underlying faulty premise that the immediate sale of the Property is “the only way to avoid the ongoing dissipation of this valuable asset.” (Dkt. No. 505-2 at 1).

This simply is not the case. First, if the mortgage was allowed to be satisfied in full, the ability to maintain the equity would clearly outweigh a “fire” sale of the Property at a price likely well below the market value. Significantly, paying off the mortgage from frozen assets would not have a negative impact on the investors’ interests because the Court would simply be replacing the equity in one asset to that of another, namely a debt-free property. If Defendants’ cross-motion in this regard is denied, the Smiths, by Movants’ own admission, would still be afforded an opportunity under current applicable law to seek a loan modification and if approved, would result in having the foreclosure action discontinued. In either case, the ability or opportunity to maintain the asset exists as an alternative to liquidating it, thereby allowing the Smiths to remain living in their home without further diluting their fundamental property rights prior to a judgment being rendered in this case.

Finally, the Smiths are entitled to homestead exemptions existing under New York State law. In the event the Court orders an accelerated sale as requested by the Movants, David and Lynn Smith would be entitled to at least \$125,000.00 each from any

proceeds of the sale existing after all liens are satisfied. Thus, this application is not only unwarranted, it will have minimal gain for allegedly defrauded investors since the Smiths have recognized homestead exemption rights.

BACKGROUND FACTS

As the Court is well aware, the current posture of this case at this point in time is that there exists a freeze of certain assets of Lynn Smith and David Smith, including their primary residence in Saratoga Springs, New York. Pursuant to the Declaration of David Smith, this asset was purchased in 2003, at the very cusp of when the SEC alleges McGinn, Smith & Co., Inc. implemented their alleged fraudulent scheme to defraud investors. The purchase price of the home was \$789,900.00. *See* Declaration of David L. Smith, dated July 27, 2012, ¶2. The Property was financed through a combination of a mortgage in the principal amount of \$600,000.00 and \$189,000.00 derived from Lynn Smith's stock account. *Id.* The Smiths continue to own the Property as husband and wife. *Id.*

As a result of the asset freeze, the Smiths have not been able to pay the monthly mortgage on the Property which is in the amount of \$4,667.00. *Id.* ¶7. The amount that remains outstanding on the mortgage is approximately \$360,000.00. *Id.* Shortly after the Smiths missed their mortgage payment in June 2011, Mr. Smith applied for a mortgage modification with Citizens Bank. Despite his diligent efforts, the processing of the application has been delayed and Mr. Smith has more than once had to provide duplicative applications and back-up documents in furtherance of his attempts to re-negotiate the terms of their loan. *Id.* ¶8. As of the date of this submission, a determination of the Smiths' mortgage modification has not been made.

Meanwhile, in March of 2012, the Smiths were notified by Citizens' attorney, Michael Kornstein that the bank intended to initiate foreclosure proceedings. To do so however, Citizens is required to seek an Order from this Court to modify the asset freeze. While it is unclear whether the present application is in fact seeking such relief, what is evident is that the SEC, believing that a foreclosure sale would compromise the interests of investors, has petitioned your Honor for an Order that would accelerate the sale of this home. This would, in effect, enable Citizens to bypass a foreclosure proceeding and recover its outstanding obligations sooner and at a fraction of the cost. *See* Declaration of Michael Kornstein, dated July 11, 2012, ¶¶ 10, 16 (Dkt. No. 505-3 at 3, 4). As a result, Citizens has joined the SEC in this application seeking an expedited sale.

For the reasons that follow, this motion should be denied in its entirety.

POINT I

**THE COURT SHOULD NOT INVOKE ITS
EQUITABLE JURISDICTION TO ORDER THE
ACCELERATED SALE OF THE SARATOGA
HOME.**

While the Court's determination and subsequent appeal to the Second Circuit as to the fate of the Vero Beach property was not in favor of the Smiths, the legal reasoning in both opinions is instructive in this case. Consequently, we believe that if the same analysis is imposed here, the Court will ultimately conclude that it is neither in the best interests of the investors nor the Smiths to order a forced sale of the Property at this time.

In balancing the countervailing interests in maintaining or selling the Vero Beach property, the Court considered a number of factors that persuaded it to authorize the sale.

The Court's findings were as follows:

In 2008, the estimated market value of the property was approximately \$2.4 million with an outstanding balance due on the mortgage of approximately \$900,000 leaving an equity in the property of approximately \$1.5 million. With the downward turn of the country's economy and the Florida real estate market, the property's present market value has diminished to approximately \$1.7-\$1.9 million. With a mortgage balance of approximately \$900,000, the equity in the property has already shrunk by approximately \$500,000-\$700,000. No evidence has been offered to indicate that there exists any reasonable expectation that the market for the property will improve in the foreseeable future.

Moreover, it is likely that the current equity in the property will continue to diminish during the pendency of this action. The monthly mortgage payments of over \$6,000 are not being paid and the mortgage holder may well seek an order permitting foreclosure and a sale of the property under less favorable circumstances. Those services necessary for the upkeep of the property either have been canceled or are incurring additional debts against the property. In either instance, the equity in the property will be further reduced by the costs of repairs from deterioration and additional liens against the property for unpaid services. Incurring these additional expenses at a rate of over \$13,000 per month might make sense if there existed any reasonable likelihood that the value of the property would

appreciate sufficiently in the foreseeable future to compensate for the expense. (Dkt. No. 263 at 7, 8).

The Vero Beach case can easily be distinguished from the pending motion involving the Saratoga home for multiple reasons. First, the SEC has provided no evidence that the real estate market in Saratoga County has diminished or that the equity in the Property has been negatively impacted or conceivably will be impacted by outside market forces. In fact the market value of the Property has increased by approximately \$200,000 from the date of purchase to present value. *See* Smith Declaration ¶¶ 2, 4. Also, it would appear that the real estate market place in the Smiths' neighborhood is stable and, in fact, has seen increased activity over the last six months. *See* Smith Declaration, Exhibit "A". As a jurist in upstate New York, your Honor is well aware of the growth and development of the Saratoga area including Saratoga Springs. In addition to the County being home to Global Foundries, the semi-conductor chip factory, Saratoga continues to attract new businesses, visitors and homeowners to the area based on the many of its wonderful attributes and attractions. Therefore, the Court should not harbor the same concerns about the Saratoga market as it did when evaluating the Vero Beach property.

Second, the outstanding balance of the mortgage on the Vero Beach home was approximately \$900,000 with little equity remaining in the property at the time it was eventually sold. In the case of the Saratoga property, the value of the outstanding mortgage is considerably less as is the monthly mortgage payments that are necessary to maintain that mortgage. Consequently, the equity in the home remains significant and without the concern of a volatile market as was the case with the Vero Beach property.

Third, unlike the Vero Beach property, the Smiths are maintaining their Saratoga home with funds they have earned through the Property's rental during the 6 weeks of the thoroughbred horse racing meet. *See* Smith Declaration ¶6. As required by their mortgage, the Smiths maintain their insurance and have provided regular upkeep to the home despite having limited means to do so. *Id.* ¶9. This is contrary to Mr. Kornstein's Declaration where he states, "it would also seem unlikely that any preventive or on-going maintenance is being done to the Property, which could also result in the Property being worth less over time." (Dkt. No. 505-3 at 3, ¶14). The fact that their mortgage payments are behind does not correlate into a declaratory fact that the Smiths are not maintaining their property. For the SEC to rely on this extensively qualified statement based on nothing more than a mere hunch as evidence supporting its application is disingenuous and misleading. Finally, the Saratoga home is the primary residence of the Smiths where Vero Beach was a mere vacation home. Although the SEC fails to make this distinction, the Court cannot ignore the very human factor of potentially displacing two senior citizens with little to no means in which to find alternative housing. Certainly, forcing the Smiths into the public welfare system in one capacity or the other is not in the public's interest and should be considered by the Court.

Fourth, unlike Vero Beach there exists no association or maintenance dues which encumbers or has the potential of diminishing the value of the Saratoga property. *See* Smith Declaration ¶5.

With a strong real estate market that is likely to continue, the only thing impacting the current equity is the interest on the mortgage and certain liens filed against the Property for unpaid taxes. As part of the Smiths' mortgage modification application, it is

their intent to have the accrued interest and taxes rolled into the modified mortgage and, on a going forward basis pay the interest and taxes out of their own limited resources. Therefore, the Smiths are prepared to address the only two items that the Movants have identified as diminishing the future equity in the Property as part of their proposed modification application. Id. ¶11.

However, even if the Smiths' loan modification is rejected and Citizens proceeds with its foreclosure proceedings, the Court should consider the other option of releasing certain funds to pay off the loan and render the property debt free. It is undisputed that the Saratoga home has equity far greater than the \$360,000 outstanding obligation and with a promising market, the value of the Property can only be expected to increase. The Court should distinguish the Smiths' application for this alternative relief being made in its cross-motion from a previous motion made by Lynn Smith seeking the release of monies to pay for ongoing expenses (Dkt. No. 211) including the monthly mortgage payments on the Vero Beach property. Here, there is no detriment to the investors by taking monies from one frozen source to eliminate the debt and thereby increasing the equity of another in essentially the same amount. *See* Smith Declaration, ¶12. This is particularly true when the Saratoga home is not at risk from an unstable market as was the case with the Vero Beach property. On a going forward basis, the Smiths are committed to pay the real estate taxes and to prevent future liens on the Property. Id. Consequently, the equity in this asset can remain essentially intact for the foreseeable future and has the ability to increase.

Thus, in the circumstances presented here, it is submitted that the balance of considerations weighs in favor of maintaining this asset as opposed to permitting a forced sale by the Receiver.

POINT II

**THE COURT SHOULD FIND THAT THE
MOVANTS' MOTION IS NOT RIPE IN LIGHT OF
THE SMITHS' PENDING APPLICATION FOR A
MORTGAGE MODIFICATION.**

As noted in David Smith's Declaration, there is a loan modification application currently pending with Citizens. According to Mr. Kornstein, "[I]n 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." (Dkt. No. 505-3, at 4, ¶17).

There is a growing trend in New York to require lenders to negotiate mortgage modifications in good faith as a result of the predatory lending schemes that led to the real estate crisis in 2008. For example, there is a specific New York statute and corresponding court rule both of which require foreclosing mortgage holders to participate in settlement conferences in good faith. N.Y. CPLR §3408; Admin. Order of Chief Judge of N.Y. Courts §202.12-a(c)(4). Courts have also played an active role in enforcing a requirement for good faith negotiations over a loan modification in the form of appropriate sanctions. *See Wells Fargo Bank, N.A. v. Hughes*, 27 Misc.3d 628 (Sup. Ct. Erie Co., Jan. 13, 2010); *BAC Home Loan Servicing v. Westervelt*, 29 Misc.3d 1224 (N.Y. Sup. Dutchess Co., Nov. 18, 2010); *Emigrant Mortgage Co., Inc. v. Corcione*, 28 Misc.3d 161 (N.Y. Sup. Ct. Suffolk Co., 2010).

In one case, the court found that the lender's bad faith consisted of the ever changing and undocumented reasons for denying a permanent modification as well as *the decision to foreclose while still evaluating the homeowner for a final modification*. *Wells*

Fargo Bank, NA v. Meyers, 913 N.Y.S.2d 500 (Sup. Ct. Suffolk Co., 2010) (*Emphasis added*).

Based on the foregoing, it is submitted that the State's public policy of obligating lenders to deal in good faith in modification applications is undermined when banks are permitted to undertake a parallel track in the form a foreclosure proceeding. Therefore, the Court should dismiss the pending application until such time as a final determination on the Smiths' mortgage modification application is made.

POINT III

**THE COURT SHOULD REJECT MR. KORNSTEIN'S
DECLARATION TO THE EXTENT IT ADVOCATES
FOR A FORCED SALE BY THE RECEIVER.**

The SEC relies on a single declaration of Citizens' attorney Michael Kornstein to support its request to modify the asset freeze so that the Smiths' home can be sold privately by the Receiver rather than through a formal foreclosure proceeding. While it may be appropriate for Mr. Kornstein to submit a declaration that supports relief from the asset freeze in order for his client to proceed with foreclosure, it is improper and inappropriate for him as the bank's representative to advocate for a forced sale.

In reviewing his Declaration, Mr. Kornstein acknowledges that the Smiths may be afforded certain rights during a foreclosure proceeding that would enable them to seek a mortgage modification and, "if approved, would result in having the foreclosure action discontinued." (Dkt. No. 505-3 at 4, ¶17). Presumably, Mr. Kornstein is referring to the Smiths' rights to a court-mediated conference to determine whether the parties can reach a mutually agreeable resolution to help the Smiths avoid losing their home, and to evaluate the potential for a resolution in which payment schedules or amounts may be modified or other workout options considered. Admin. Order of Chief Judge of N.Y. Courts, *supra*. Thus even if the Smiths' current application is denied by Citizens, they will still be afforded the opportunity to save their home from foreclosure based on settlement procedures implemented by our state courts.

Despite acknowledging that the Smiths are afforded these rights "which may result in a foreclosure action being discontinued," Mr. Kornstein and invariably his client, argues in favor of an accelerated sale in which for all intents and purposes would

abrogate this right not to mention their due process rights to defend the action itself. In addition, the relationship between Citizens and the Smiths is governed by the Note and the terms set forth in the security instrument which is explicitly governed by New York law. Pursuant to those documents, David and Lynn Smith are afforded certain rights throughout the foreclosure proceeding that would be completely lost if an accelerated sale is permitted to take place. (Dkt. No. 505-5 at 14, ¶19).

Accordingly, Citizens bank does not have standing to advocate such a position because it violates its obligations to negotiate a mortgage modification in good faith or to proceed through a formal foreclosure procedure both of which are required as a matter of law and pursuant to its contractual obligations to the Smiths. Moreover, while courts are granted wide discretion in crafting an appropriate remedy in these kinds of cases, that authority however, does not extend to abrogating property rights created by state law and protected by due process. See *SEC v. Haligiannis, et al.*, 608 F.Supp.2d 444, 449 (S.D.N.Y. 2009). It is submitted that New York State's foreclosure procedures and whatever rights are created in contract is governed by state law and any rights granted to the Smiths pursuant to state law cannot be abrogated by Citizens or by this Court.

Mr. Kornstein's declaration in support of an accelerated sale also contains factually inaccurate and misleading statements. First, Mr. Kornstein alleges that because the Smiths have not paid their mortgage that 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. (Dkt. No. 505-3 at 3, ¶14). As noted in Point I herein, this is an unfounded and misleading statement whose only purpose is to persuade this Court to expedite the Property's sale.

Second, Mr. Kornstein makes it sound as if Mr. Smith has not been cooperating in providing relevant information so that his mortgage modification application can be processed. He states that Mr. Smith was advised by Citizens to provide certain information by July 2, 2012 which he claims had not been submitted at the time the motion was filed. (Dkt. No. 505-3 at 4, 5, ¶¶19, 20). However, Citizens acknowledged later that the requested documents were in fact received on that same day and that on information and belief Mr. Kornstein was later notified of this fact. *See* Smith Declaration ¶8. Significantly, the SEC has relied on this misstatement in its memorandum of law in furtherance of this motion.

Citizens' self-interest in seeking an expedited forced sale is explicitly evident in Mr. Kornstein's Declaration (Dkt. No. 505-3 at 3, 4 ¶¶10, 16) at the expense of the Smiths and their right to take the measures necessary and afforded to them as New York State citizens to save their home. Therefore, Mr. Kornstein's Declaration to the extent it seeks an accelerated sale should be rejected and, because the Declaration serves as the sole basis upon which this application is based, the Movants' motion should be denied.

POINT IV

**IF THE COURT ORDERS THE FORCED SALE OF
THE SARATOGA HOME, THE SMITHS ARE
ENTITLED TO CLAIM THEIR RESPECTIVE
HOMESTEAD EXEMPTIONS.**

Section 5206 of the CPLR provides that real property owned and occupied as the principal residence is, to a certain degree, exempt from the satisfaction of money judgments. In 2010 the law was change that increased the homestead exemption, the amount of which varies depending on the county in which the property is situated. For Saratoga County the exemption amount is \$125,000. *Id.* New York allows married couples to double the homestead exemption, allowing each spouse to claim the full amount on the property. *John T. Mather Mem. Hospital of Port Jefferson, Inc. v. Pearl*, 723 F.2d 193 (2d Cir. 1983). Therefore, a married couple living in Saratoga County is exempt up to \$250,000.00.

It is well established that the homestead exemption in CPLR §5206(a) is applicable in proceedings involving satisfaction of a money judgment and to no other proceedings, including foreclosure proceedings. *Citibank, N. A. v. Cambel*, 501 N.Y.S2d 133 (2d Dept 1986). Clearly, based on this precedent, if the Court were to allow the bank to proceed with foreclosure, the Smiths would not be entitled to exert their rights to their statutorily entitled homestead exemption. However, the SEC is seeking to sell the home with the intent of paying defrauded investors upon obtaining a money judgment against the Smiths. Therefore the exemptions would be applicable to this application.

The SEC has acknowledged the difficulties in collecting judgments obtained against securities law violators based on homestead exemption statutes enacted by states

throughout the United States and have lobbied Congress to eliminate state laws that “enable defendants to shield their assets from Commission judgments or orders in their homesteads.” See Testimony of Stephen M. Cutler concerning The Securities Fraud Deterrence and Investor Restitution Act, H.R. 2179, June 5, 2003. Upon information and belief, the bill has yet to become law in the United States. In addition, on information and belief, this Court has acknowledged the applicability of the homestead exemption as it related to the sale of Nancy McGinn’s home and in particular, the home’s furniture. In the Court’s Order following a telephone conference between the Receiver and Defendant Nancy McGinn, wherein Ms. McGinn was seeking to retain the proceeds from the sale of the home’s furniture, the Court noted that, “[I]t further appears that in any event, New York State law would exempt \$5,000 from the sale of the furniture for the benefit of Nancy McGinn so that, at most, the Receiver could obtain the remaining approximately \$2,000.” (Dkt. No. 337). Such a determination is consistent with the principle that the Court’s equitable authority does not extend to abrogating property rights created by state law. See Haligiannis supra.

It is submitted that the homestead exemption is indeed a property right under New York law which should be recognized by the Court as it has apparently done so in the past. Accordingly, should the Court find in favor of the Movants granting their request to sell the home through the Receiver, the New York homestead exemption (and perhaps other exemptions involving furniture and other home accessories) would be applicable in this case and any proceeds received after satisfying the existing mortgage and other liens would first have to be applied pursuant to the exemptions before the Receiver could be permitted to retain the remaining liquidated asset.

POINT V

**THE COURT SHOULD GRANT THE SMITHS'
CROSS MOTION AND RELEASE MONIES TO
SATISFY THE EXISTING MORTGAGE.**

As Mr. Kornstein notes in his Declaration any equity in a foreclosed property is often lost as a byproduct of the foreclosure sale. (Dkt. No. 505-3 at 3). On the other hand, granting the SEC's request to bypass those proceedings and order the sale of the Property by the Receiver will result in the allocation of at least \$250,000.00 from the proceeds of that sale directly to David and Lynn Smith. In either case, the alleged defrauded investors' interests are compromised. Therefore, in addition to the argument presented in Point I, it seems that the only reasonable alternative is to release certain monies to satisfy the existing mortgage in order to (1) stave off foreclosure resulting in the loss of essentially all the Property's equity and (2) maintain the frozen asset without a single loss to the investors...and the Smiths, at least through the duration of the various legal proceedings, will be able to continue to live in their home.

CONCLUSION

For the foregoing reasons, Defendants David and Lynn Smith respectfully request that the SEC/Citizens' application seeking a modification to the asset freeze enabling them to either foreclose or sell the Saratoga home privately by the Receiver be denied in all respects and that the cross-motion seeking a modification to the asset freeze to satisfy the existing mortgage lien or such other relief the Court deems appropriate to maintain the asset be granted in all respects.

Dated: July 30, 2012

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

By: 

Scott J. Ely

Bar Roll No. 511635

Attorneys for Defendant/Relief Defendant,

Lynn A. Smith

99 Pine Street, Suite 207

Albany, NY 12207

Tel. No: (518) 436-0786

sje@fwc-law.com

Dreyer Boyajian, LLP

By: 

William J. Dreyer

Bar Roll No.: 101539

Attorneys for Defendant, David L. Smith

75 Columbia Place

Albany, New York 12207

Tel. No: (518) 463-7784

wdreyer@dreyerboyajian.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN, AND DAVID L. SMITH,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY McGINN,

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

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

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

Intervenor.

DECLARATION OF DAVID L. SMITH

I, DAVID L. SMITH, pursuant to 28 USC §1746, declare under penalty of perjury, the following facts:

1. I make this Declaration in opposition to Securities and Exchange Commission ("SEC") and Citizens Bank's ("Citizens") (cumulatively the "Movants") motion seeking an Order to modify the present asset freeze to allow the involuntary sale

of our primary residence at [REDACTED] in Saratoga Springs, New York (hereinafter the "Property") and in support of a cross motion of Lynn A. Smith and David L. Smith to modify the present asset freeze to satisfy the existing note and mortgage at the Property in order to avoid a foreclosure action or such other relief the Court deems appropriate to enable the asset to be maintained. I make this Declaration based on my personal knowledge, the attached exhibits, and on occasion, where noted, on information and belief.

2. My wife, Lynn A. Smith and I hold title to the Property as husband and wife. We closed on the Property on or about August 7, 2003, however pursuant to an agreement with the then-seller, we did not take occupancy until October 2003. We purchased the Property for a contract price of \$789,900.00, \$600,000.00 of which we financed with the remaining approximate \$189,000.00 coming from my wife's brokerage account. All documents pertaining to this purchase were removed from my home on April 20, 2010 by federal agents. However, a redacted version of the deed, the mortgage and the note can be found in the papers submitted by the Movants in their present application.

3. From October 2003 to the present, the Property has been used as our primary residence.

4. On information and belief, the current market value of our home is close to \$1 million. See Exhibit "A". Thomas Roohan, President of Roohan Realty which has served the Saratoga area since 1969 has advised me that the real estate market place in our neighborhood has seen increased activity over the last six months and that the prices remain stable. See Exhibit "A".

5. The Saratoga home is not subject to mandatory association fees as was the case for the Vero Beach property which consisted of a total annual dues of approximately \$30,000.00 (\$4,000 regular assessment; \$3,600 vista property assessment; \$1,900 capital contribution; \$16,700 in trail and golf fees; \$2,400 in tennis expansion fees; and \$1,284 in minimum dining fees).

6. Because of the existing freeze order and the SEC's unwillingness in the past to consent to the release of any monies to pay for our living expenses, we have limited sources of income on which to live. As a result, we have elected to lease our house during the six week Saratoga racetrack season. This year is the second year we have leased the Property. I have attached both last year and this year's leases as Exhibit "B" hereto. The reason why the lease amount is less this year than last year is because Mr. Stoelting directly contacted our tenant without permission last year where he inquired about the rental. It is my understanding and belief that this contact caused our tenant great concern and as a result, she decided to look for a different property to rent. After finding another property, she expressed an interest in reconsidering if there was a price concession. Because she was a reliable tenant who took good care of the Property, we reluctantly agreed to adjust the rent in her favor to secure her tenancy this year. The money that we are paid for the lease goes directly to pay our living expenses and the ongoing maintenance of the Property. The leasing of the Property for such a brief period does not violate the terms of our existing mortgage.

7. Because of the existing freeze order, we have not been able to stay current on our monthly mortgage payments in the amount of \$4,667.00 with an outstanding balance on the total loan of approximately \$360,000.00. The loan originated with Charter

One Bank, N.A. Since then Citizens has allegedly become the holder of the Note however it is not clear to me by what means or operation of law the Note was actually transferred.

8. My wife and I currently have a mortgage modification application before Citizens which I have been diligently pursuing since August 2011 despite the unfounded allegations from the Movants to the contrary. In fact, I have made three attempts to modify our loan. Within two months of missing our June 2011 mortgage, I applied for a modification on August 4, 2011. Citizens required additional information, which I complied with by September 30, 2011. See Exhibit "C." I heard from Citizens on November 1, 2011 stating that they were unable to process the application due to "credit application being incomplete" with no explanation or direction as to how to rectify the alleged deficiencies. In March 2012, I spoke with Citizens attorney Michael Kornstein, the Declarant in the present motion papers who was representing Citizens in the foreclosure action. On April 3, 2012, I sent a second mortgage application directly to Mr. Kornstein at his suggestion. Mr. Kornstein stated to me that he forwarded my application to Citizens on April 4, 2012. Citizens however claimed they never received that application and would need a completely new filing. See Exhibit "D." I completed my third application dated June 8, 2012 and faxed it to Citizens on June 11, 2012. See Exhibit "E." On July 2, 2012, Citizens requested additional information which I provided to them on that very same day which is contrary to Mr. Kornstein's Declaration which stated those documents had not been received at the time he filed this motion. Citizens has confirmed to me that they did in fact receive the documents on July 2, 2012. See Exhibit "F." On information and belief, Mr. Kornstein was notified of this falsity but he

apparently has elected not to submit an amended Declaration to rectify the record. Thus the statement in Movants' Memorandum of Law that we have failed to diligently pursue the modification by failing to supply the Bank with documentation is patently false and unsupported by the facts of this case.

9. In his Declaration, Mr. Kornstein states, "it would also seem unlikely that any preventive or on-going maintenance is being done to the Property, which could also result in the Property being worth less over time." This unfounded and clearly self-serving statement upon which Mr. Kornstein has no personal knowledge is unequivocally false as well. At no time prior to this application has Mr. Kornstein, his client or any representative of the SEC visited the Property to substantiate these conclusions despite having the explicit authority to do so in the mortgage. See Movants' Exhibit "B", p. 8 of 17. In addition, unlike the Vero Beach property, we have been living at the Property and maintaining it as any typical homeowner. The fact that we are able to lease the Property for a rather sizeable sum should be some indication as to its condition. We have maintained insurance on the Property as evidenced by the July 17, 2012 invoice, which I have since paid See Exhibit "G"; I perform all of the mowing, trimming, snow blowing and general upkeep myself. I have a contract with Tru Green for fertilization and pest control for an annual cost of \$700.00. I recently paid Service Tek \$337.00 for carpet cleaning and paid One Hour Heating and Air Conditioning for service and annual maintenance in the amount of \$1,043.75. The Property is being maintained in every way and Movants attempt to characterize its condition as otherwise is disingenuous and misleading.

10. I am also unwilling to concede that the equity line of credit has resulted in \$751 for non-usage fees and lien release fees as set forth in Mr. Kornstein's Declaration. Because my loan documents were confiscated, I do not have the capability of reviewing the veracity of his statement. It was my understanding that fees of \$100 would be charged annually for the use of the line, but would be waived if the line is never used. This would be consistent with the fact that the monthly statements I receive from Citizens specify that no minimum payment is due.

11. I do acknowledge that real property taxes have not been paid on the Property which has resulted in tax liens and that interest continues to accrue on the mortgage. As part of my negotiations on the modification with Citizens to the extent they finalize my application, my intent is to have the accrued interest and taxes rolled into the modified mortgage and, on a going forward basis pay the interest and taxes to the extent I can negotiate a two-year interest only loan or in the alternative an amortization with a combination of some principal, interest and taxes. Therefore, on a going forward basis I am prepared to address the two items that the Movants have identified as diminishing the equity in the Property.

12. As an alternative however, I am requesting by way of cross motion that the Court consider amending the present asset freeze that would enable me to pay off this note and release the mortgage in order to eliminate once and for all the potential for the existing note and mortgage to diminish the equity in the Property either by way of accruing interest or the prospect of a foreclosure action. What the Movants have failed to recognize is that moving for an accelerated forced sale, as a matter of logic and common sense, does nothing to enhance the investors' position. Rather, assuming that the

Property is sold by the Receiver at its present market value (a fact that is doubtful based on the Receiver's willingness to sell the Vero Beach property for between \$1 million and \$1.1 million, less than the original asking price of \$1.8 million), there would be no appreciable difference to the value of the frozen assets as a whole if the Court would authorize the release of sufficient funds to pay off the mortgage. The current market value of the Property is approximately \$1 million with a mortgage of \$360,000.00. In the simplest of terms, if the Movants are successful in this application and sell the Property at its market value, the mortgage would still have to be paid off at closing, leaving a net return of \$640,000.00. On the other hand, while paying off the mortgage from another source of frozen funds would reduce the value of the frozen assets by \$360,000.00 at one end, the net value of the Property would increase to \$1 million because it would no longer be saddled with any debt leaving the equity of the frozen assets as a whole unchanged. The only discernible difference being from the two options is that my wife and I would not be rendered homeless if the mortgage is simply paid off.

13. My wife and I intend to do whatever it takes to stay in our Saratoga home. However, should this Court grant the relief requested by the Movants, as part of any forced sale, this Court should recognize that after satisfying the outstanding mortgage, both Lynn and I are entitled to at least \$250,000.00 resulting from the net proceeds from the sale pursuant to New York State's homestead exemption laws. This money is guaranteed to us so that we do not become homeless and wards of the State and it appears to me that not even an order of disgorgement could take that away from us.

14. I can't help but feel that what is really motivating the Movants here, particularly the SEC, has nothing to do with protecting the investors' interests. Clearly,

selling the Property is not the only way to avoid the dissipation of the Property as contended by the Movants. It is clearly the worst option, considering the fact that a "fire sale" would likely yield much less than what the Property is actually worth, while the cost to manage the asset in light of its stabilized and perhaps increasing market value is minimal and would be almost non-existent if the mortgage was satisfied at this time. It appears that the motivation in pursuing an accelerated sale of our home is purely punitive on the part of the SEC and pecuniary on the part of Citizens which is merely seeking to ride on the coattails of this application to avoid the cost and delay of having to comply with the State's foreclosure laws.

For the foregoing reasons, I request that the Court deny the Movants' mean spirited attempts to force the sale our Saratoga home and to grant our cross-motion to satisfy the existing note and mortgage so that the equity in the Property can be maintained which is in the best interests of all parties involved.

Dated: July 27, 2012


DAVID L. SMITH

EXHIBIT A



J. THOMAS ROOHAN
President

July 26, 2012

Mr. David Smith
[REDACTED]

Saratoga Springs, NY 12866

Dear Mr. Smith:

As you requested, I have done some research on high end homes in Saratoga Springs and in particular "The Meadowbrook" area where you have lived since July of 2003 when you purchased your home for \$789,900. The home sits on 2.23 acres at the corner of Rolling Brook Dr. and Saddle Brook Dr. and has over 4320 square feet of living space. The real estate market place in your neighborhood has seen increased activity over the last 6 months resulting in price stability and it is my professional opinion that your home is worth approximately \$215 per square foot which would align its value to that of the current full market assessed value of \$942,317 that the City of Saratoga Springs has assigned it.

I hope that this answers your question.

If you have any further questions please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "JTRoohan", written over the typed name.

J. Thomas Roohan
President

JTR/mem

Serving the Saratoga Community since 1969

519 BROADWAY, SARATOGA SPRINGS NY 12866 518.587.4500 FAX 518.587.4509

troohan@roohanrealty.com • www.roohanrealty.com

EXHIBIT B



by June 24

ROOHAN REALTY
519 BROADWAY
SARATOGA SPRINGS, NY 12866-2208
RoohanRealty.com

(518) 587-4500
FAX (518) 587-4509

LEASE AGREEMENT

Made the 24th day of April 2012

BETWEEN Lynn Smith the Landlord

(telephone) [REDACTED]

Saratoga Springs, NY 12866
(email address)

AND Vi Ann Lizza the Tenant

(telephone) [REDACTED]

(email address) Rockaway, New Jersey 07866

(If there is more than one Landlord and/or Tenant, the words "Landlord" and "Tenant" will include the plural).

WITNESSETH, That the Landlord agrees to rent to the Tenant the following described premises:

[REDACTED]

(Please Note: Disclosure Regarding Real Estate Agency Relationships Must Be Attached)

during the term of Leasing from the 19th day of July 2012

to the 4th day of Sept. 2012.

The Tenant agrees that he will pay to the Landlord for the use of the above premises rent of:

Fifteen Thousand and no Dollars

(\$ 18,000.00) to be paid as follows:

\$ 9,000.00 non-refundable deposit upon signing of this lease payable to ROOHAN REALTY

\$ 9,000.00 due on or before 6/24/12 payable DIRECTLY TO THE HOMEOWNER

\$ 1800.00 Security Deposit payable DIRECTLY TO THE HOMEOWNER on or before occupancy. (SEE ATTACHED)

IF THE TENANT FAILS TO PAY SAID RENT, OR ANY PART THEREOF WHEN IT BECOMES DUE, IT IS AGREED THAT THE LANDLORD MAY SUE FOR THE SAME, OR RE-ENTER PREMISES, OR RESORT TO ANY LEGAL REMEDY NECESSARY.

HOMEOWNER'S EMERGENCY PHONE # [REDACTED]

Unless otherwise stated, this lease applies to and binds the heirs; executors, administrators, and assigns of the respective parties.

This lease has been negotiated and closed by the parties through the office of Roohan Realty and it is understood and agreed to by the parties and Roohan Realty that any further leasing between parties over the next three (3) years shall be considered to have been concluded through Roohan Realty and Roohan Realty is entitled to all commissions resulting there from. It also understood that any sale of said property shall result in commissions being paid to Roohan Realty.

This lease can be changed only by an agreement in writing signed by both Landlord and Tenant.

The Landlord and Tenant have signed this lease on the day and year above written.

The parties further agree as follows:

1. That no more than 8 persons will occupy the premises.
2. That no animals, birds or pets of any description will be on the leased premises.
3. Smoking allowed: yes X no
4. The **TENANT** will be responsible for all damage or breakage and/or loss to the premises, except normal wear and tear and unavoidable casualty which may result from occupancy.
5. The **TENANT** will leave the premises in the same general and good habitable condition.
6. The **TENANT** agrees that at the expiration of said term, the tenant will surrender said premises to the Landlord in as good condition as now, necessary wear and damage by the elements excepted.
7. The **LANDLORD** agrees to pay all utilities, trash removal, maintenance and taxes on said premises during said term.
8. The **LANDLORD** will supply adequate bed linens, towels and blankets.
9. The **LANDLORD** and **TENANT** agree that should the premises be destroyed by fire or other casualty so as to become unfit for human habitation, that these presents shall thereby be ended, with refund to the **TENANT** for any rent **TERM** unused.

James P. Smith 5/9/12 Clare Rizzo 5-1-12
LANDLORD DATE TENANT DATE

Carol T. Smith 4/24/12
LEASING AGENT DATE
TENANT DATE



ROOHAN REALTY
519 BROADWAY
SARATOGA SPRINGS, NY 12866-2208
RoohanRealty.com

(518) 587-4500
FAX (518) 587-4509

LEASE AGREEMENT

Made the 8th day of April 2011

BETWEEN huna Smith the Landlord

(telephone) [REDACTED]

AND

Saratoga Springs NY 12866

Carl & Vikky Hirtz the Tenant

(telephone) [REDACTED]

Rockaway New Jersey 07866

(If there is more than one Landlord and/or Tenant, the words "Landlord" and "Tenant" will include the plural).

WITNESSETH That the Landlord agrees to rent to the Tenant the following described premises;

(Please Note: Disclosure Regarding Real Estate Agency Relationships Must Be Attached)

during the term of leasing from the 7/21 day of July 2011
to the 6th day of Sept 2011

The Tenant agrees that he will pay to the Landlord for the use of the above premises rent of:

Twenty Four Thousand and 00/100 Dollars

(\$ 24,000.00) to be paid as follows:

\$ 12,000.00 non-refundable deposit upon signing of this lease payable to ROOHAN REALTY

\$ 12,000.00 due on or before 6/24/11 payable DIRECTLY TO THE HOMEOWNER

\$ 2,000.00 Security Deposit payable DIRECTLY TO THE HOMEOWNER on or before occupancy. (SEE ATTACHED)

IF THE TENANT FAILS TO PAY SAID RENT, OR ANY PART THEREOF WHEN IT BECOMES DUE, IT IS AGREED THAT THE LANDLORD MAY SUE FOR THE SAME, OR RE-ENTER PREMISES, OR RESORT TO ANY LEGAL REMEDY NECESSARY.

HOMEOWNER'S EMERGENCY PHONE # [REDACTED]

Unless otherwise stated, this lease applies to and binds the heirs; executors, administrators, and assigns of the respective parties.

This lease has been negotiated and closed by the parties through the office of Roohan Realty and it is understood and agreed to by the parties and Roohan Realty that any further leasing between parties over the next three (3) years shall be considered to have been concluded through Roohan Realty and Roohan Realty is entitled to all commissions resulting there from. It also understood that any sale of said property shall result in commissions being paid to Roohan Realty.

This lease can be changed only by an agreement in writing signed by both Landlord and Tenant.

The Landlord and Tenant have signed this lease on the day and year above written.

The parties further agree as follows:

1. That no more than 8 persons will occupy the premises.
2. That no animals, birds or pets of any description will be on the leased premises.
3. Smoking allowed: yes X no
4. The **TENANT** will be responsible for all damage or breakage and/or loss to the premises, except normal wear and tear and unavoidable casualty which may result from occupancy.
5. The **TENANT** will leave the premises in the same general and good habitable condition.
6. The **TENANT** agrees that at the expiration of said term, the tenant will surrender said premises to the Landlord in as good condition as now, necessary wear and damage by the elements excepted.
7. The **LANDLORD** agrees to pay all utilities, trash removal, maintenance and taxes on said premises during said term.
8. The **LANDLORD** will supply adequate bed linens, towels and blankets.
9. The **LANDLORD** and **TENANT** agree that should the premises be destroyed by fire or other casualty so as to become unfit for human habitation, that these presents shall thereby be ended, with refund to the **TENANT** for any rent TERM unused.

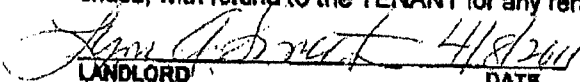
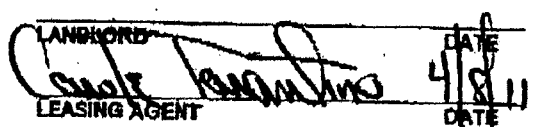
 LANDLORD	<u>4/8/11</u> DATE	_____	TENANT	_____	DATE
 LEASING AGENT	<u>4/8/11</u> DATE	_____	TENANT	_____	DATE



EXHIBIT C



CCO Mortgage

10561 Telegraph Rd.

Glenn Allen, VA 23059

Re: Loan No. [REDACTED] 8396

Property: [REDACTED]

Saratoga Springs, N. Y. 12866

Gentlemen:

Pursuant to your letter of September 13, 2011 and my letter of September 20, 2011 seeking an extension to your request until October 5, 2011, I hereby enclose the following items:

- 1) Hardship letter
- 2) Most recent bank statements for Lynn Smith and David Smith
- 3) Copies of monthly Social Security checks for David and Lynn Smith, copy of monthly retirement check for Lynn Smith, and copy of weekly unemployment benefits for David Smith
- 4) 4506-T

I would note that the monthly unemployment insurance benefit of \$1620 is scheduled to expire at approximately the end of this year. I will be filing the 2010 tax return this week and therefore it is not likely to be available from the IRS anytime soon. If you would like a copy directly from me, I would be amenable to that request. I would point out that the returns are of little value in determining cash flow as all distributions of income and capital from investments remain frozen and under the control of a court appointed receiver. The only income that my wife and I are currently receiving are from Social Security and unemployment.

The issue of the civil suit against me from the SEC as discussed in the hardship letter and the direct reason for my current financial situation will be resolved either by civil trial scheduled for March 2012 or by prior settlement negotiations.

Thank you for your assistance in this matter and I look forward to working with you.

Respectfully,

David L. Smith

ACKNOWLEDGEMENT AND AGREEMENT

In making this request for consideration under the Making Home Affordable Program, I certify under penalty of perjury:

1. That all of the information in this document is truthful and the event(s) identified on page 1 is/are the reason that I need to request a modification of the terms of my mortgage loan, short sale or deed-in-lieu of foreclosure.
2. I understand that the Servicer, the U.S. Department of the Treasury, or their agents may investigate the accuracy of my statements and may require me to provide supporting documentation. I also understand that knowingly submitting false information may violate Federal law.
3. I understand the Servicer will pull a current credit report on all borrowers obligated on the Note.
4. I understand that if I have intentionally defaulted on my existing mortgage, engaged in fraud or misrepresented any fact(s) in connection with this document, the Servicer may cancel any Agreement under Making Home Affordable and may pursue foreclosure on my home.
5. That: my property is owner-occupied; I intend to reside in this property for the next twelve months; I have not received a condemnation notice; and there has been no change in the ownership of the Property since I signed the documents for the mortgage that I want to modify.
6. I am willing to provide all requested documents and to respond to all Servicer questions in a timely manner.
7. I understand that the Servicer will use the information in this document to evaluate my eligibility for a loan modification or short sale or deed-in-lieu of foreclosure, but the Servicer is not obligated to offer me assistance based solely on the statements in this document.
8. I am willing to commit to credit counseling if it is determined that my financial hardship is related to excessive debt.
9. I understand that the Servicer will collect and record personal information, including, but not limited to, my name, address, telephone number, social security number, credit score, income, payment history, government monitoring information, and information about account balances and activity. I understand and consent to the disclosure of my personal information and the terms of any Making Home Affordable Agreement by Servicer to (a) the U.S. Department of the Treasury, (b) Fannie Mae and Freddie Mac in connection with their responsibilities under the Homeowner Affordability and Stability Plan; (c) any investor, insurer, guarantor or servicer that owns, insures, guarantees or services my first lien or subordinate lien (if applicable) mortgage loan(s); (d) companies that perform support services in conjunction with Making Home Affordable; and (e) any HUD-certified housing counselor.

Borrower Signature

Date

CO-Borrower Signature

Date

If you have questions about this document or the modification process, please call your servicer.

If you have questions about the program that your servicer cannot answer or need further counseling, you can call the Homeowner's HOPE™ Hotline at 1-888-995-HOPE (4673). The Hotline can help with questions about the program and offers free HUD-certified counseling services in English and Spanish.

888-995-HOPE
Homeowner's HOPE™ Hotline

Be advised that by signing this document you understand that any documents and information you submit to your servicer in connection with the Making Home Affordable Program are under penalty of perjury. Any misstatement of material fact made in the completion of these documents including but not limited to misstatement regarding your occupancy in your home, hardship circumstances, and/or income, expenses, or assets will subject you to potential criminal investigation and prosecution for the following crimes: perjury, false statements, mail fraud, and wire fraud. The information contained in these documents is subject to examination and verification. Any potential misrepresentation will be referred to the appropriate law enforcement authority for investigation and prosecution. By signing this document you certify, represent and agree that: "Under penalty of perjury, all documents and information I have provided to Lender in connection with the Making Home Affordable Program, including the documents and information regarding my eligibility for the program, are true and correct."

If you are aware of fraud, waste, abuse, mismanagement or misrepresentations affiliated with the Troubled Asset Relief Program, please contact the TARP Hotline by calling 1-877-585-2009 (toll-free), 202-622-4559 (fax), or www.sigtaerp.gov. Mail can be sent to: Hotline Office of the Special Inspector General for Troubled Asset Relief Program, 1801 L St. NW, Washington, DC 20220.



HELP FOR AMERICA'S HOMEOWNERS.



Dodd-Frank Certification

The following information is requested by the federal government in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203). **You are required to furnish this information.** The law provides that no person shall be eligible to receive assistance from the Making Home Affordable Program, authorized under the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5201 *et seq.*), or any other mortgage assistance program authorized or funded by that Act, if such person, in connection with a mortgage or real estate transaction, has been convicted, within the last 10 years, of any one of the following: (A) felony larceny, theft, fraud or forgery, (B) money laundering or (C) tax evasion.

Borrower

- ☒ I have not been convicted within the last 10 years of any one of the following in connection with a mortgage or real estate transaction:
- (a) felony larceny, theft, fraud or forgery,
 - (b) money laundering or
 - (c) tax evasion

Co-Borrower

- ☒ I have not been convicted within the last 10 years of any one of the following in connection with a mortgage or real estate transaction:
- (a) felony larceny, theft, fraud or forgery,
 - (b) money laundering or
 - (c) tax evasion

In making this certification, I/we certify under penalty of perjury that all of the information in this document is truthful and that I/we understand that the Servicer, the U.S. Department of the Treasury, or their agents may investigate the accuracy of my statements by performing routine background checks, including automated searches of federal, state and county databases, to confirm that I/we have not been convicted of such crimes. I/we also understand that knowingly submitting false information may violate Federal law.

David L. Smith
Borrower Signature

Lynn P. Smith
Co-Borrower Signature

August 4, 2011
Date

August 4, 2011
Date

Number of People in Household:

Monthly Household Income		Monthly Household Expenses/Debt		Household Assets	
Monthly Gross Wages	\$	First Mortgage Payment	\$ 4667	Checking Account(s)	\$
Overtime	\$	Second Mortgage Payment	\$	Checking Account(s)	\$
Child Support / Alimony / Separation ²	\$	Insurance	\$ 300	Savings/ Money Market	\$ N/A
Social Security/SSDI	\$ 2800	Property Taxes	\$ 1200	CDs	\$
Other monthly income from pensions, annuities or retirement plans	\$	Credit Cards / Installment Loan(s) (total minimum payment per month)	300	Stocks / Bonds	\$
Tips, commissions, bonus and self-employed income	\$	Alimony, child support payments	\$	Other Cash on Hand	\$ frozen
Rents Received	\$	Net Rental Expenses	\$	Other Real Estate (estimated value)	\$ by can't order
Unemployment Income	\$ 1620	HOA/Condo Fees/Property Maintenance	\$	Other	\$
Food Stamps/Welfare	\$	Car Payments	\$ 1200	Other	\$
Other (investment income, royalties, interest, dividends etc.)	\$	Other <u>food</u>	\$ 2000	Do not include the value of life insurance or retirement plans when calculating assets (401k, pension funds, annuities, IRAs, Keogh plans, etc.)	
		Other <u>living</u>			
Total (Gross Income)	\$ 4820	Total Debt/Expenses	\$ 9667	Total Assets	\$

¹Include combined income and expenses from the borrower and co-borrower (if any). If you include income and expenses from a household member who is not a borrower, please specify using the back of this form if necessary.

²You are not required to disclose Child Support, Alimony or Separation Maintenance income, unless you choose to have it considered by your servicer.

The following information is requested by the federal government in order to monitor compliance with federal statutes that prohibit discrimination in housing. You are not required to furnish this information, but are encouraged to do so. The law provides that a lender or servicer may not discriminate either on the basis of this information, or on whether you choose to furnish it. If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race, or sex, the lender or servicer is required to note the information on the basis of visual observation or surname if you have made this request for a loan modification in person. If you do not wish to furnish the information, please check the box below.

BORROWER		CO-BORROWER	
I do not wish to furnish this information		I do not wish to furnish this information	
Ethnicity:	<input type="checkbox"/> Hispanic or Latino <input checked="" type="checkbox"/> Not Hispanic or Latino	Ethnicity:	<input type="checkbox"/> Hispanic or Latino <input checked="" type="checkbox"/> Not Hispanic or Latino
Race:	<input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African American <input type="checkbox"/> Native Hawaiian or Other Pacific Islander <input checked="" type="checkbox"/> White	Race:	<input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African American <input type="checkbox"/> Native Hawaiian or Other Pacific Islander <input checked="" type="checkbox"/> White
Sex:	<input type="checkbox"/> Female <input checked="" type="checkbox"/> Male	Sex:	<input type="checkbox"/> Female <input checked="" type="checkbox"/> Male
This request was taken by:		Name/Address of Interviewer's Employer	
Interviewer's Name (print or type) & ID Number			
Face-to-face interview	Interviewer's Signature	Date	
Telephone	Interviewer's Phone Number (include area code)		
Internet			

Making Home Affordable Program Request For Modification and Affidavit (RMA)

MAKING HOME AFFORDABLE.GOV

COMPLETE THE REQUEST FOR MODIFICATION AND AFFIDAVIT (RMA) HERE. COMPLETE ALL THREE PAGES OF THIS FORM.

Loan I.D. Number 8396 Servicer CCO Mortgage

BORROWER		CO-BORROWER	
Borrower's name <u>David L. Smith</u>	Co-borrower's name <u>Lynn A. Smith</u>		
Social Security number <u>3809</u>	Social Security number <u>8058</u>	Date of birth [REDACTED]	Date of birth [REDACTED]
Home phone number with area code <u>518</u>	Home phone number with area code <u>518</u>		
Cell or work number with area code <u>518</u>	Cell or work number with area code <u>518</u>		

I want to: ☒ Keep the Property ☐ Sell the Property

The property is my: ☒ Primary Residence ☐ Second Home ☐ Investment

The property is: ☒ Owner Occupied ☐ Renter Occupied ☐ Vacant

Mailing address: Saratoga Springs NY 12866

Property address (if same as mailing address, just write same): Saratoga Springs NY 12866

Is the property listed for sale? Yes ☐ No ☒

Have you received an offer on the property? Yes ☐ No ☒

Date of offer: _____ Amount of offer \$: _____

Agent's Name: _____

Agent's Phone Number: _____

For Sale by Owner? Yes ☐ No ☒

Who pays the real estate tax bill on your property?
☒ I do ☐ Lender does ☐ Paid by condo or HOA

Are the taxes current? Yes ☐ No ☒

Condominium or HOA Fees Yes ☐ No ☒ \$: _____

Paid to: _____

Have you contacted a credit-counseling agency for help? Yes ☐ No ☒

If yes, please complete the following:

Counselor's Name: _____

Agency Name: _____

Counselor's Phone Number: _____

Counselor's E-mail: _____

Who pays the hazard insurance premium for your property?
☒ I do ☐ Lender does ☐ Paid by Condo or HOA

Is the policy current? Yes ☐ No ☒

Name of Insurance Co.: Preferred Mutual Ins.

Insurance Co. Tel #: _____

Have you filed for bankruptcy? Yes ☐ No ☒ If yes: Chapter 7 Chapter 13 Filing Date: _____

Has your bankruptcy been discharged? Yes ☐ No ☒ Bankruptcy case number: _____

Additional Liens/Mortgages or Judgments on this property: None

Lien Holder's Name/Servicer	Balance	Contact Number	Loan Number

I (We) am/are requesting review under the Making Home Affordable program.
I am having difficulty making my monthly payment because of financial difficulties created by (check all that apply):

- ☒ My household income has been reduced. For example: unemployment, underemployment, reduced pay or hours, decline in business earnings, death, disability or divorce of a borrower or co-borrower.
- ☐ My monthly debt payments are excessive and I am overextended with my creditors. Debt includes credit cards, home equity or other debt.
- ☐ My expenses have increased. For example: monthly mortgage payment reset, high medical or health care costs, uninsured losses, increased utilities or property taxes.
- ☒ My cash reserves, including all liquid assets are insufficient to maintain my current mortgage payment and cover basic living expenses at the same time.

Other: _____

Explanation (continue on back of page 3 if necessary): My wife and I have been named in a civil lawsuit by the SEC and they sought and were granted a freeze on all of our assets since 4/20/2011

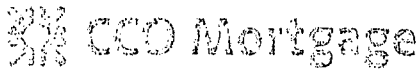
Re: Loan No. [REDACTED] 8396

Dear Sir:

Regarding your letter of July 18, 2011, I enclose the following:

1. financial statement - enclosed
2. tax returns - N/A or not available
3. There are currently no funds available as a result of a civil lawsuit filed by the US Securities and Exchange Commission who requested and were granted a total asset freeze on all bank and stock accounts. This has been in force since 4/20/2011. Resolution will not be forthcoming until a trial is scheduled for April 2012.
4. N/A no additional lien holders
5. enclosed
6. N/A

David L. Smith 8/4/2011
Lr. P. Hunt 8/4/2011



10561 Telegraph Road
Glen Allen, VA 23059

www.ccomortgage.com

July 18, 2011

David L Smith
Lynn A Smith

[REDACTED]
Saratoga Springs NY 12866

RE: Loan No. [REDACTED] 8396

Dear Mortgage Customer:

If the circumstances resulting in the delinquency of your loan are beyond your control, please contact our office to determine if alternatives are available to you.

We will review your situation if you send us the following information:

1. Attach completed financial statement.
2. Include two most recent tax returns, pay stubs, checking account and savings account statements. (If you are self-employed please provide a profit and loss statement.)
3. Please include a hardship letter explaining your situation. Please state the amount of funds that you have available to apply towards your delinquency.
4. Please provide the name, phone number, and address of any additional lien holders, such as a second mortgage loan or an equity line of credit. Also please provide the monthly payment and outstanding balance of each of those liens.
5. Please sign and date the Dodd Frank Certification form.
6. Complete and sign the 4506-T form.

If your home is listed for sale and the net proceeds of the sale will not be sufficient to pay off your loan, please include a copy of your listing agreement, signed purchase agreement, Preliminary HUD One, and authorization to speak with your realtor regarding this transaction. We will review your request for a short sale. Submission of a short sale package does not guarantee an approval.

It is imperative that you return a complete package to us within 7 days of the date of this letter. Please be advised that Collection and Foreclosure action will continue during the review process and will only be discontinued if the loan is approved for a Loss Mitigation workout and terms are accepted. If you have any questions, please call your Collections Counselor at 877-745-7366.

Loss Mitigation Department

XC067 CPI

Form

4506-T**Request for Transcript of Tax Return**

(Rev. January 2011)

OMB No. 1545-1872

Department of the Treasury
Internal Revenue Service

► Request may be rejected if the form is incomplete or illegible.

Tip. Use Form 4506-T to order a transcript or other return information free of charge. See the product list below. You can quickly request transcripts by using our automated self-help service tools. Please visit us at IRS.gov and click on "Order a Transcript" or call 1-800-908-9946. If you need a copy of your return, use Form 4506, Request for Copy of Tax Return. There is a fee to get a copy of your return.

1a Name shown on tax return. If a joint return, enter the name shown first. <u>David L. Smith</u>	1b First social security number on tax return, individual taxpayer identification number, or employer identification number (see instructions) <u>[REDACTED] 3809</u>
2a If a joint return, enter spouse's name shown on tax return. <u>Lynn A. Smith</u>	2b Second social security number or individual taxpayer identification number if joint tax return <u>[REDACTED] 8058</u>
3 Current name, address (including apt., room, or suite no.), city, state, and ZIP code (See instructions) <u>David L. Smith [REDACTED] Saratoga Springs, New York 12866</u>	
4 Previous address shown on the last return filed if different from line 3 (See instructions) 	
5 If the transcript or tax information is to be mailed to a third party (such as a mortgage company), enter the third party's name, address, and telephone number. The IRS has no control over what the third party does with the tax information. <u>CCO Mortgage 10561 Telegraph Rd. Glen Allen, VA 23059</u>	
<p>Caution. If the transcript is being mailed to a third party, ensure that you have filled in line 6 and line 9 before signing. Sign and date the form once you have filled in these lines. Completing these steps helps to protect your privacy.</p>	
6 Transcript requested. Enter the tax form number here (1040, 1065, 1120, etc.) and check the appropriate box below. Enter only one tax form number per request. ► <u>1040</u>	
a Return Transcript, which includes most of the line items of a tax return as filed with the IRS. A tax return transcript does not reflect changes made to the account after the return is processed. Transcripts are only available for the following returns: Form 1040 series, Form 1065, Form 1120, Form 1120A, Form 1120H, Form 1120L, and Form 1120S. Return transcripts are available for the current year and returns processed during the prior 3 processing years. Most requests will be processed within 10 business days. <input checked="" type="checkbox"/>	
b Account Transcript, which contains information on the financial status of the account, such as payments made on the account, penalty assessments, and adjustments made by you or the IRS after the return was filed. Return information is limited to items such as tax liability and estimated tax payments. Account transcripts are available for most returns. Most requests will be processed within 30 calendar days. <input type="checkbox"/>	
c Record of Account, which is a combination of line item information and later adjustments to the account. Available for current year and 3 prior tax years. Most requests will be processed within 30 calendar days. <input type="checkbox"/>	
7 Verification of Nonfiling, which is proof from the IRS that you did not file a return for the year. Current year requests are only available after June 15th. There are no availability restrictions on prior year requests. Most requests will be processed within 10 business days. <input type="checkbox"/>	
8 Form W-2, Form 1099 series, Form 1098 series, or Form 5498 series transcript. The IRS can provide a transcript that includes data from these information returns. State or local information is not included with the Form W-2 information. The IRS may be able to provide this transcript information for up to 10 years. Information for the current year is generally not available until the year after it is filed with the IRS. For example, W-2 information for 2007, filed in 2008, will not be available from the IRS until 2009. If you need W-2 information for retirement purposes, you should contact the Social Security Administration at 1-800-772-1213. Most requests will be processed within 45 days. <input type="checkbox"/>	
<p>Caution. If you need a copy of Form W-2 or Form 1099, you should first contact the payer. To get a copy of the Form W-2 or Form 1099 filed with your return, you must use Form 4506 and request a copy of your return, which includes all attachments.</p>	
9 Year or period requested. Enter the ending date of the year or period, using the mm/dd/yyyy format. If you are requesting more than four years or periods, you must attach another Form 4506-T. For requests relating to quarterly tax returns, such as Form 941, you must enter each quarter or tax period separately. <u>12/31/10</u> <u>12/31/09</u>	

Signature of taxpayer(s). I declare that I am either the taxpayer whose name is shown on line 1a or 2a, or a person authorized to obtain the tax information requested. If the request applies to a joint return, either husband or wife must sign. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, trustee, or party other than the taxpayer, I certify that I have the authority to execute Form 4506-T on behalf of the taxpayer. Note. For transcripts being sent to a third party, this form must be received within 120 days of signature date.

<p><u>David L. Smith</u></p> <p>Signature (see instructions)</p>	<p><u>9/30/11</u></p> <p>Date</p>	<p>Telephone number of taxpayer on line 1a or 2a <u>[REDACTED]</u></p>
<p>Sign Here</p> <p>Title (if line 1a above is a corporation, partnership, estate, or trust)</p> <p>_____ Spouse's signature</p>		
<p>_____ Date</p>		

For Privacy Act and Paperwork Reduction Act Notice, see page 2.

Cat. No. 37667N

Form 4506-T (Rev. 1-2011)

HARDSHIP LETTER

Re: Loan No. [REDACTED] 8396

Property: [REDACTED]

Saratoga Springs, N. Y. 12866

My current financial situation and inability to meet the current mortgage obligation is the result of a civil suit brought by the Securities and Exchange Commission against me, my businesses, my wife, and a trust set up for my children. The SEC sought and was successful in freezing all of my family's assets and having my business of thirty years placed in receivership. While this suit is completely without merit, this is not the time or place to make that argument. The suit and asset freeze has been in place since April 20, 2010. While my wife and I were able to sell a property in her name in the summer of 2010 and thus providing us with a temporary source of funds, living expenses, including mortgage payments made to CCO through June of 2011 and legal expenses have exhausted all current resources available to us. Our only source of income remain Social Security benefits, unemployment insurance, and a small retirement benefit to my wife, aggregating approximately \$4500 per month. This amount does not begin to meet our obligations, even absent the obligation to CCO.

We are currently six months away from the scheduled civil trial when we expect to be fully exonerated and have our assets returned to us at that time. There have recently been preliminary discussions of settlement as the legal costs and toll on my wife and family have become difficult to manage. I will keep you apprised of any developments in that regard. As you can imagine, finding employment in the current economy with a pending lawsuit has made the search for employment challenging to say the least. This difficult time has been with me and my family for some 18 months, but the end is finally in sight. I seek your patience and understanding until this issue is resolved and I will be in a position to meet my obligation in full.

Respectfully,

David L. Smith

EXHIBIT D

April 3, 2012

Mr. Michael A. Kornstein
Cooper Erving & Savage, LLP
39 North Pearl St.
Albany, N. Y. 12207

Re: RBS Citizens, N. A.

Mortgage loan # [REDACTED] 8396

David and Lynn Smith

[REDACTED], Saratoga Springs, N. Y. 12866

Dear Mr. Kornstein,

At your request, I am returning the following completed items that, as is my understanding, you will forward to CCO Mortgage, the servicing company for the above mentioned mortgage loan:

1. Request for Modification and Affidavit (RMA)
2. CCO Financial Statement
3. Request for Transcript of Tax Return (4506-T)
4. Dodd – Frank Certification
5. 2012 City and County Tax Bill, City of Saratoga Springs, N. Y., showing full market value
6. 2010 copy of Federal Tax Return for David and Lynn Smith (1040)

Per our conversation of early March 2012, you will forward the enclosed items onto the work out group of the bank for refinancing or restructuring in order that an agreement may be worked out and the foreclosure of the above property will not go forward.

Thank you for your assistance and consideration in this matter. If you need to contact me for any reason I can be reached at home on [REDACTED] or my cell on [REDACTED]. My e-mail address is: [REDACTED]

Sincerely,

David L. Smith

COOPER ERVING & SAVAGE LLP
ATTORNEYS AND COUNSELLORS AT LAW

Founded 1813

TERRANCE P. CHRISTENSON
MICHAEL A. KORNSTEIN
SUSAN CARROLL PICOTTE
PHILLIP G. STECK
KELLY L. MALLOY
SCOTT P. OLSON
DAVID C. ROWLEY
BRIAN W. MATULA*

39 NORTH PEARL STREET
ALBANY, NEW YORK 12207-2797
(518) 449-3900
FACSIMILE (518) 432-3111

CLIFTON PARK OFFICE:
1520 CRESCENT ROAD - SUITE 300
CLIFTON PARK, NEW YORK 12065

REPLY TO ALBANY OFFICE

E-MAIL: MKORNSTEIN@COOPERERVING.COM
DIRECT DIAL: (518) 432-3126

JAMES FENIMORE COOPER
(1888-1938)
WM. VAN RENSSELAER ERVING
(1925-1940)
B. JERMAIN SAVAGE
(1910-1952)

JAMES G. BRENNAN
SENIOR COUNSEL

± CAROLYN SNYDER LEMMON
OF COUNSEL

KIMBERLY G. FINNIGAN†
DENNIS W. HABEL
JENNIFER C. ZEGARELLI

*ALSO ADMITTED IN VERMONT
†ALSO ADMITTED IN NEW JERSEY
±ALSO ADMITTED IN MASSACHUSETTS

April 4, 2012

David Smith
[REDACTED]

Saratoga Springs, NY 12866

Re: RBS Citizens, N.A.
Mortgage Loan No. [REDACTED] 8396

This Communication is from a Debt Collector

Dear Mr. Smith:

This will acknowledge receipt of your letter of April 3, 2012 and the loan modification application and supporting documents. I am forwarding the application and documents to my foreclosure contact who will in turn forward them to the Bank's Loss Mitigation Department.

Just to clarify, as I believe I indicated to both Bill Dreyer and you, my marching orders are to proceed with the foreclosure until such time as the Bank's Loss Mitigation Department approves any loan modification. I do not want there to be any misunderstanding of that fact as the Bank's Foreclosure Department and Loss Mitigation Department tend to work independently of each other. It is therefore in your interest to stay on top of this; the loss mitigation department may be reached at 877-745-7366.

Very truly yours,

COOPER ERVING & SAVAGE LLP



Michael A. Kornstein

MAK:raw

cc: William Dreyer, Esq.
178870

herein.

>>> David Smith <smithd345@yahoo.com> 6/6/2012 10:59 AM >>>

Dear Mr. Kornstein,

Bill Dreyer notified me yesterday that you had been in contact with the SEC regarding the foreclosure on the property located at 2 Rolling Brook Dr., Saratoga Springs, NY 12866. You are acting on behalf of your client, RBS Citizens, N.A., Mortgage Loan No. [REDACTED] 8396.

As you are aware, I am attempting to have that loan modified in order to be able to meet the loan obligation and prevent foreclosure. In a letter to me, dated April 4, 2012, you indicated to me that you were forwarding the application and documents to your foreclosure contact who was in turn going to forward them to the Bank's Loss Mitigation Department. As a result of yesterday's contact from Bill Dreyer, I called the Bank this morning to determine the status of my application. Much to my surprise and dismay, the Loss Mitigation Department informed me that they had never received my application. The Department's representative seemed quite willing to help and voiced some encouragement that upon receipt of the full application modification assistance was quite possible. Unfortunately, they will not accept the package that I sent to you and that I retained a copy of. They are insisting that I provide them with a current package and dated currently. I will be working on that application today and forwarding it to them directly upon completion. I obviously don't know what happened to the application that you forwarded in early April, but as a result of your representative not acting upon it or having never received it, my efforts to prevent the foreclosure have been compromised. I respectfully request that you delay your proceedings until the Loss Mitigation Department has received my application and been given the opportunity to act upon it.

Respectfully,

David L. Smith

EXHIBIT E

June 8, 2012

CCO Mortgage

Loss Mitigation Department

10561 Telegraph Rd.

Glen Allen, VA 23059

To whom it may concern:

Enclosed please find our application to refinance our current loan and mortgage held by CCO Mortgage. I spoke with one of your representatives on June 6, 2012 regarding the status of our application filed April 4, 2012 and was informed that the bank had never received it. I have since been informed by the attorney handling the foreclosure action, Michael A. Kornstein, that he had sent the application on April 4, 2012 to the bank contact, Destine Gee. I have enclosed various communications supporting those facts. Your representative informed me that due to the fact that the application was never received, I would have to refile a complete and current one. Thus, please accept the enclosed as our application for modification of Mortgage Loan No. [REDACTED] 3396.

Enclosed with the application are numerous supporting documents, including:

1. Uniform Borrowers Assistance Form
2. Dodd-Frank Certification
3. IRS Form 4506-T
4. Hardship Letter
5. Communication with Mr. Michael A. Kornstein, attorney for Cooper Erving & Savage, the bank's foreclosure representative
6. Award Letters from the Social Security Administration for my wife and I, along with copies of current benefit checks demonstrating the benefits currently being received
7. Home Owners Insurance Declaration Page
8. Tax return for David and Lynn Smith for the tax year 2010
9. April/May bank statements from the 1st National Bank of Scotia, Scotia, NY, for our operating checking account
10. 2012 City & County Tax Bill, City of Saratoga Springs, showing the full value of the property as of July 1, 2010 at \$942,317
11. Third party documentation for employment, consisting of employment agreements with Capacity One Management and NYI Building Products, Inc.

12. Rental agreements for the last two years supporting rental income. For purposes of the financial statement, we have used the average rental of the two years

We believe that the best approach for our purposes as regards to the modification process is to refinance our existing loan with a 15 year fixed, interest only for two years. We have assumed a rate of 3.5%, which is above the current published market rate of 3% for the Albany, NY area. The loan is well covered with a loan to value of approximately 35%. We have total assets in excess of \$3,500,00, which are currently not available to us due to a Court ordered freeze resulting from litigation commenced by the SEC in April 2010. We fully anticipate those assets to be released at the conclusion of the litigation within approximately 18 months. We are able to meet an interest only obligation, plus real estate taxes and home owners insurance with our current income. Our credit history was excellent until the imposed freeze of April 20, 2010. We seek your approval for the modification application and with it the ability to remain in our home of the last nine years.

We previously faxed this complete application to 888-777-1631.

Thank you for your consideration.

Sincerely,



David L. Smith



Lynn A. Smith

EXHIBIT F

Scott Ely

From: Hatcher, Glennis B [Glennis.B.Hatcher@rbscitizens.com]
Sent: Tuesday, July 17, 2012 10:57 AM
To: David Smith
Cc: Scott Ely; William Dreyer; Gorbaty, Oleg
Subject: RE: loan no. [REDACTED] 8396/ David L. Smith

Hi Mr. Smith,

I am just returning from vacation and I just received your email. I have forwarded your original email to our Attorney to answer any legal questions you may have. Your loan is currently with our decisioning team and they need some additional information. They are requesting that you send a new Profit & Loss statement showing your income from the two contracts as well as expenses. One of the contracts stipulates that you will receive a percentage from all gross sales which makes it impossible to arrive at your income due to lack of gross sales amount.

Thank you,

Glennis Hatcher

Relationship Manager
Debt Management, Mortgage & Fraud Operations
RBS Citizens Business Services

10561 Telegraph Road
Glen Allen, Va 23059
Telephone: Phone 1-877-745-7364 Ext. 4264
Internal phone number (804) 627-4264
Facsimile: 1-888-999-5293
Email glennis.b.hatcher@rbscitizens.com

From: David Smith [mailto:[REDACTED]]
Sent: Thursday, July 12, 2012 12:36 PM
To: Hatcher, Glennis B
Cc: Scott Ely; William Dreyer
Subject: loan no. [REDACTED] 8396/ David L. Smith

Dear Ms. Hatcher,

It is my understanding that you have been out of the office on vacation. I trust that you had an enjoyable and relaxing break. In your absence, I have worked with Jenifer Bess. On July 2nd, Jenifer contacted me seeking some additional information to complete the modification application. I complied with that request on the same day, faxing the information to the number provided by Jenifer. Jenifer and I spoke this morning regarding that information which Jenifer believed the bank had yet to receive. I told Jenifer that I had sent it as previously indicated on July 2nd. After a few moments Jenifer was able to locate the information. A problem has arisen in that the SEC is seeking to accelerate the foreclosure of my home and has filed an application with the court seeking to do just that. As part of their motion, the SEC included an affidavit from Michael Kornstein, an Albany, N.Y. attorney who is representing the bank in the foreclosure action, stating that despite my representation on July 2nd that I had sent the additional information, I had in fact not sent it and am simply attempting to slow the process down. That affidavit is obviously false as I had indeed sent the information and the bank had simply lost track of it until this morning. I would appreciate your contacting Mr. Kornstein and informing him that the information provided to him was incorrect and therefore his affidavit

7/26/2012

contained false information. I would appreciate you doing that either in letter form or by email, copying me in whichever method you select. The SEC has repeatedly provided faulty and unconfirmed information to the court in order to advance their position, and I must ask that you provide them the correct information through Mr. Kornstein.

Thanking you in advance for your cooperation.

Sincerely,

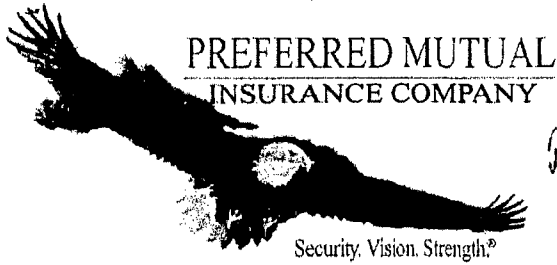
David L. Smith

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7/26/2012

EXHIBIT G



One Preferred Way, New Berlin, NY 13411
Direct Bill Tel: 888.511.2455 Fax: 607.847.9416
www.preferredmutual.com

DAVID L SMITH &
LYNN A SMITH
SARATOGA SPRINGS NY 12866 6438

Billing Statement

Account Number [REDACTED] 7471
Statement Date 06/22/12
Payment Due Date 07/17/12
Account Balance \$2,464.00
Minimum Due Now \$251.40

Questions about this policy?
Call your Independent Agent at: 518-584-7600

SUTTON & TARANTINO INSURANCE
AGENCY INC
17 DIVISION STREET
SARATOGA SPRINGS NY 12866 31 96600

Questions about this statement?
Call Preferred Mutual at: 1-888-511-2455

Account Activity

Process Date	Policy Number	Policy Type	Transaction	Amount
04/06/12			PREVIOUS BALANCE	\$225.75
04/06/12			Payments Received	\$230.75-
04/06/12			Serv Chrg Incl In Payment	\$5.00
04/06/12	[REDACTED] 13257	Homeowners	Additional Premium	\$0.00
06/12/12	[REDACTED] 13257	Homeowners	Renewal Business	\$2,464.00
			ACCOUNT BALANCE	\$2,464.00

Next Billing Date is 07/23/12 Estimated Minimum Due will be \$251.40 Next Due Date is 08/17/12

Please read the important information on the reverse side of this statement.

Messages Avoid Service Charges and Late Fees, pay the Account Balance, and allow time for mailing.

Policy Information

[REDACTED] 3257 07/17/11 to 07/17/12
[REDACTED] 3257 07/17/12 to 07/17/13

See Policy Declarations For Any Additional Locations

SARATOGA SPRINGS NY 12866
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