

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS)
(DRH)

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN; AND
DAVID L. SMITH,

Defendants, and

LYNN A. SMITH,

Relief Defendant.

PLAINTIFF’S EXHIBIT LIST

Description of Plaintiff’s Exhibits

The Attachment contains plaintiff’s exhibit list for the preliminary injunction hearing scheduled for June 9, 2010. Most of the exhibits have already been filed with the Court. The first 67 exhibits are the same exhibits offered in support of plaintiff’s motion for a temporary restraining order. Most of the remaining exhibits have been previously marked at depositions or filed in connection with plaintiff’s filing on June 3, 2010. Plaintiff will provide the Court and the parties with copies of the exhibits at the hearing {and the other parties were e-mailed copies of exhibits that were not previously filed on June 8, 2010.

Exhibit 118 is not protected by any privilege

Exhibit 118 is identified as an “Asset Transfer Letter” dated January 29, 2010, from an estate planning attorney named Martin Finn to Lynn and David Smith. David Smith produced the letter to FINRA on June 22, 2009 and, until one week ago, never asked for it back and never asserted any claim of privilege over the letter.

On May 27, 2010, plaintiff sought to question Ms. Smith regarding the Asset Transfer Letter. Counsel objected to the questioning because the letter was from a lawyer, and plaintiff stopped asking questions about the letter once the assertion was made. Plaintiff expressed its position that any privilege over the letter had been waived.

The evidence shows that any attorney-client privilege attaching to Asset Transfer Letter has been waived. As set forth in Exhibit 125, the Declaration of Christopher Rattiner, a Principal Examiner with FINRA, David Smith produced the Asset Transfer Letter to FINRA on June 22, 2009. In the cover letter (see Exhibit 120), Smith’s counsel advised FINRA that it had performed “certain electronic filters and performed text searches in an effort to identify and to remove privileged communications.” The lawyer’s cover letter further stated that in order to turn the production around more quickly, he “did not take the time to perform an extensive privilege review on each email communication being produced, and that “to the extent that certain privileged communications were not identified in our electronic privilege searches, this production is being provided to FINRA with FINRA’s agreement that MSC does not waive any attorney-client, attorney work product or related privileges applicable to the emails actually produced.” Exh. 120.

After the production of the Asset Transfer Letter on June 22, 2010, neither David Smith nor his counsel ever contacted FINRA to assert any privilege with respect to the letter or to request its return. Rattiner Decl. (Exh. 125). As a result, before the Lynn Smith deposition on May 27, 2010, no privilege had ever asserted with respect to the Asset Transfer Letter.

Courts generally apply a balancing test in addressing inadvertent production claims, which turns on the reasonableness on the search for privileged documents. *See Lois Sportswear, U.S.A. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985) (relevant factors are the extent to which reasonable precautions were taken to avoid disclosure of privileged documents; the scope of discovery as compared to the amount of privileged materials disclosed; amount of time taken to correct the error; and overreaching issues of fairness). *See also Roe v. Saint Louis University*, 75 Fed.R.Serv.3d 1104, 2010 WL 199948 (E.D.Mo), citing the test applied by the Eight Circuit in *Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996), “This test requires the Court to consider five factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; 2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error.”

Two possibilities exist, both of which require a finding that any privilege has been waived. Given the letter from Smith’s lawyer stating that it “applied certain electronic filters and performed text searches in an effort to identify and to remove privileged communications,” it is clear that Smith and his lawyers made an effort to remove privileged communications but realized that they may not have caught all of them. Exh. 120. Indeed, David Smith himself helped gather the documents and make them available to FINRA. Rattiner Decl. (attachments). Accordingly, either Smith and his lawyers made the production knowing the Asset Transfer

Letter was included (a clear waiver), or they failed to review the production after it was made, knowing the risk (also a waiver). The cover letter proves that Smith's lawyer knew of the possibility that not all privileged documents had been removed. Exh. 120. They nevertheless failed to review the production at any time after June 22, 2009 (or did review it and concluded the letter was not privileged).

“Generally, precautions will be reasonable if the procedure followed in maintaining the confidentiality of the document [is] not ... so lax, careless, inadequate or indifferent to consequences as to constitute a waiver.” *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, 96 Civ. 7590, 1997 WL 736726 at *5 (S.D.N.Y. Nov. 26, 1997). In addition, “[t]he reasonableness of a party’s actions to protect privileged information should be measured in light of the risks *foreseeable* to that party at the time the precautions were taken.” *United States v. Rigas*, 281 F.Supp.2d 733, 739 (S.D.N.Y. 2003).

The Court in *Prescient Partners* found the precautions taken by counsel to be reasonable where counsel reviewed documents and instructed paralegal to remove marked privileged documents but paralegal failed to remove all privileged documents and produced them to the adversary. Similarly, in *Lloyds Bank PLC v. Republic of Ecuador*, 96 Civ. 1789, 1997 WL 96591 at *4 (S.D.N.Y. Mar.5, 1997), the Court found no waiver where attorneys spent fifty hours reviewing documents for responsiveness and privilege before producing them and the documents designated as privileged were segregated and marked). *See also Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, 93 Civ. 5125, 1995 WL 117871 at *2 (S.D.N.Y. Mar.20, 1995) (no waiver where attorney “spent 145 hours in reviewing documents for production, that he segregated documents to which privilege rights apply, and that only by inadvertence was this small number of [privileged] documents included among the documents produced.”

Unlike in the cases cited above, Smith and his lawyers made no effort to preserve the privilege over the Asset Transfer Letter. Accordingly, any privilege has been waived.

Dated: New York, NY
June 8, 2010

Respectfully submitted,

s/ David Stoelting

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ATTACHMENT

EXH.	DATE	DOCUMENT	DE
1	9/13/2003	First Independent Income Notes, LLC PPM	4
2	1/16/2004	First Excelsior Income Notes LLC PPM	4
3	11/1/2004	Third Albany Income Notes, LLC PPM	4
4	10/1/2005	First Advisory Income Notes, LLC PPM	4
5	11/13/2006	TDM Cable Trust 06 PPM	4
6	2/23/2007	TDM Verifier Trust 07 PPM	4
7	5/19/2007	Firstline Sr. Trust 07 PPM	4
8	7/16/2007	TDM Luxury Cruise Trust 07 PPM	4
9	10/19/2007	Firstline Trust 07 Series B PPM	4
10	12/17/2007	TDM Verifier Trust 08 PPM	4
11	2/14/2008	Cruise Charter Ventures Trust 08 PPM	4
12	4/22/2008	McGinn, Smith Transaction Funding Corp. PPM	4
13	9/24/2008	Fortress Trust 08 PPM	4
14	1/19/2009	TDMM Cable Jr. Trust 09 PPM	4
15	1/19/2009	TDMM Cable Sr. Trust 09 PPM	4
16	2/2/2009	TDM Verifier Trust 07R PPM	4
17	7/6/2009	TDM Verifier Trust 08R PPM	4
18	7/27/2009	TDMM Benchmark Trust 09 PPM	4
19	9/25/2009	Cruise Charter Ventures, LLC PPM	4
20	2/1/10	David Smith investigative testimony (FINRA)	4
21	2/2/10	David Smith investigative testimony (FINRA)	4
22	2/3/10	David Smith investigative testimony (FINRA)	4
23	2/12/10	David Smith investigative testimony (FINRA)	4
24	2/4/10	Timothy McGinn investigative testimony (FINRA)	4
25	2/3/10	Timothy McGinn investigative testimony (FINRA)	4
26		David Smith – CRD Report	4
27		Timothy McGinn – CRD Report	4
28		McGinn, Smith & Co., Inc. – Form BD	4
29		McGinn, Smith Advisors LLC – CRD	4
30	2/20/08	Email from B. Cooper to D. Smith	4
31		Summary of Assets, Liabilities and Equity	4
32		Chart showing gap between liabilities and cash	4
33		Four Funds consolidated income statement	4
34		FIIN balance sheet	4
35		FEIN balance sheet	4
36		TAIN balance sheet	4
37		FAIN balance sheet	4
38		Four Funds consolidated balance sheet	4
39		List of new Four Funds' investments in 2008 and 2009	4
40		Loan analysis	4
41		Four Funds source and use of funds	4
42		MS & Co., Inc. banking transactions	4

43		TDM Verifier Trust 08 account balances	4
44		Cruise Charter Ventures, LLC description	4
45		Verifier 08 income/expense	4
46		Verifier 08 interest expense	4
47		Verifier 08 bank record	4
48		TDM Cable Funding, LLC description	4
49		Loans to McGinn, Smith and Rogers	4
50		Promissory Notes for Timothy McGinn	4
51		Promissory Note for David Smith	4
52		Promissory Notes for Matthew Rogers	4
53		TDM Cable Register Report	4
54		Schedule of Loan Transactions Not Evidenced By Promissory Notes	4
55	3/28/2007	Promissory Note from 107 th Associates to FAIN	4
56	7/6/2004	Letter from Rabinovich to Investor	4
57	1/13/2005	Letter from Smith to Investor	4
58	1/25/2008	Letter from Smith to Junior Note Holders in Funds	4
59	4/11/2008	Letter from Smith to Junior Note Holder in FIIN	4
60	4/25/2008	Letter from Smith to Junior Note Holder in FEIN	4
61	10/22/2008	Letter from Smith to FAIN Note Holders	4
62	3/4/2009	Letter from McGinn to MSTF Note Holders	4
63		Letter from Smith to Tom Grygiel	4
64	4/15/2009	Letter to Lex and Smith	4
65		MS & Co. List of Banking Transactions	4
66	12/31/2008	MS & Co. Audited Financials for 2008	4
67		Selected MS & Co. Emails	4
68	4/19/10	Declaration of Lara Shalov Mehraban	4
69	4/19/10	Declaration of Roseann Daniello	4
70	4/19/10	Declaration of Israel Maya	4
71	5/19/10	Defendants' Timothy M. McGinn and David L. Smith Response to paragraph III of May 7, 2010 Consent Order	22
72	6/2/10	Supplemental Declaration of Roseann Daniello	46
73	6/3/10	Supplemental Declaration of Lara Shalov Mehraban	46
74	5/27/10	Transcript of Deposition of Lynn Smith	46
75	5/5/10	Letter from Jim Featherstonhaugh to David Stoelting (Plaintiff's Exhibit ("PX") 3, marked at Lynn Smith Deposition)	46
76	6/5/09	Promissory Note from TDMM Cable Funding, LLC to Lynn Smith (PX 5, marked at Lynn Smith Deposition)	46
77	1/14/09	Email from David Smith to Timothy McGinn (PX 10, marked at Lynn Smith Deposition)	46
78	August 2008	David and Lynn Smith Financial Statement (PX 11, marked at Lynn Smith Deposition)	46
79	11/4/08	Letter from Piaker & Lyons to David and Lynn Smith	46

		(PX 12, marked at Lynn Smith Deposition)	
80	12/31/00	Handwritten Financial Statement for David and Lynn Smith (PX 13, marked at Lynn Smith Deposition)	46
81		Series of emails regarding transfers into and out of Lynn Smith accounts (PX 14, marked at Lynn Smith Deposition)	46
82		Excerpt from account statement for Lynn Smith's checking account (PX 15, marked at Lynn Smith Deposition)	46
83	6/1/10	Draft Transcript of Deposition of Thomas Urbelis	46
84	8/4/04	Letter from David Smith to Thomas Urbelis (PX 17, marked at Thomas Urbelis Deposition)	46
85	12/21/04	Letter from Patty Sicluna to Thomas Urbelis (PX 18, marked at Thomas Urbelis Deposition)	46
86	12/22/04	Fax from Patty Sicluna to Thomas Urbelis (PX 19, marked at Thomas Urbelis Deposition)	46
87		Information Form regarding Trust signed February 25, 2005 (PX 20, marked at Thomas Urbelis Deposition)	46
88	3/1/05	Letter from David Smith to Thomas Urbelis (PX 21, marked at Thomas Urbelis Deposition)	46
89	March 25	Letter from Thomas Urbelis to McGinn Smith & Co. (PX 22, marked at Thomas Urbelis Deposition)	46
90		Letter from David McQuade to Thomas Urbelis dated April 12, 2005, and other documents (PX 23, marked at Thomas Urbelis Deposition)	46
91	5/9/05	Fax from David Smith to Thomas Urbelis (PX 24, marked at Thomas Urbelis Deposition)	46
92	5/9/05	Fax from David Smith to Thomas Urbelis (PX 25, marked at Thomas Urbelis Deposition)	46
93	6/7/05	Fax from Thomas Urbellis to David Smith (PX 26, marked at Thomas Urbelis Deposition)	46
94	4/17/06	Fax from David Smith to Thomas Urbellis (PX 27, marked at Thomas Urbelis Deposition)	46
95	4/17/06	Letter from Thomas Urbelis to David Smith (PX 28, marked at Thomas Urbelis Deposition)	46
96	2/23/07	Fax from David McQuade to Thomas Urbelis (PX 29, marked at Thomas Urbelis Deposition)	46
97	4/11/08	Letter from Thomas Urbelis (PX 30, marked at Thomas Urbelis Deposition)	46
98	11/10/08	Indemnity Agreement (PX 31, marked at Thomas Urbelis Deposition)	46
99		Transfer of Assets Form and Alternative Investments Addendum and Custody Agreement Form (PX 32, marked at Thomas Urbelis Deposition)	46
100	4/13/09	Email from David McQuade to David Smith (PX 33, marked at Thomas Urbelis Deposition)	46

101	4/22/10	Letter from Thomas Urbelis to David and Lynn Smith (PX 34, marked at Thomas Urbelis Deposition)	46
102	4/15/10	Email from Brian Mayer to Thomas Urbelis (PX 35, marked at Thomas Urbelis Deposition)	46
103		Page 6 of Trust account statement for June 2006 (PX 36, marked at Thomas Urbelis Deposition)	46
104	5/2/10	Letter from David Smith to Thomas Urbelis (PX 37, marked at Thomas Urbelis Deposition)	46
105	5/10/10	Letter from Thomas Urbelis to David Smith (PX 38, marked at Thomas Urbelis Deposition)	46
106	5/17/10	Trustee Appointment (PX 39, marked at Thomas Urbelis Deposition)	46
107		RMR Wealth Management LLC account statement for Lynn Smith for the period from March 1, 2010 to March 31, 2010	46
108		RMR Wealth Management LLC account statement for David L. and Lynn A. Smith Irrevocable Trust for the period from March 1, 2010 to March 31, 2010 RMR Wealth Management LLC account statement for NFS/FMTC IRA FBO Lynn A. Smith for the period from March 1, 2010 to March 31, 2010	46
109	1/11/10	Letter from Timothy McGinn to investor	46
110	3/1/10	Letter from Timothy McGinn to investor	46
111	3/25/10	Letter from Joseph B. Carr to investor	46
112	4/2/10	Letter from Craig Norman to Timothy McGinn	46
113	3/25/10	PPM for McGinn, Smith Firstline Funding, LLC (without exhibits or appendices)	46
114		Curriculum Vitae for the Receiver, William J. Brown	
115	6/4/10	Receiver's Consent to the Entry of Preliminary Injunction Order	48
116	6/4/10	First Report of the Receiver	49
117		Schenectady County Endorsement and Quitclaim Deed between Timothy McGinn and Nancy McGinn	
118		Email from Tiffani Filien to David Smith with letter attachment (PX 9, marked at Lynn Smith Deposition)	
119	1/21/09	Letter from Steven Rowen to David Smith	
120	6/22/09	Letter from Christine Debevec to Michael Newman	
121	6/7/10	Declaration of Betty Rosenzweig	
122	6/7/10	Declaration of Marcia Kenyon	
123	6/7/10	Declaration of Paul Carus III	
124		Tax Returns for David L. and Lynn A. Smith Irrevocable Trust for 2004-2009	
125	6/8/10	Declaration of Christopher Rattiner with attachments	
126		Letters of Authorization	
127	2/9/10	Letter re Loans	

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TIMOTHY M. MCGINN; AND
DAVID L. SMITH,

Defendants, and

LYNN A. SMITH,

Relief Defendant.

PLAINTIFF’S WITNESS LIST

Plaintiff intends to call the following witnesses at the preliminary injunction hearing scheduled for June 9, 2010:

1. David Smith
2. Timothy McGinn
3. Lynn Smith
4. Thomas Urbelis (by deposition)
5. Nancy McGinn
6. Timothy Welles
7. David McQuade
8. Bernard Malmud
9. Roseann Daniello
10. Israel Maya
11. William Brown

Dated: New York, NY
June 8, 2010

Respectfully submitted,

s/ David Stoelting

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