

CHRISTOPHER RATTINER - Recross by Mr. Dreyer

1 to a loan, whether the memory in the program would cause
2 both entries to come up. Do you know enough about that?

3 A. No, I don't.

4 MR. DREYER: All right. Thank you.

5 THE COURT: Okay. Thank you. You may step
6 down.

7 (Whereupon, the Witness is excused.)

8 THE COURT: And, members of the jury, we
9 will take our afternoon break now and advise you again not
10 to discuss the case among yourselves or anyone else.

11 Mr. Minor.

12 COURT CLERK: Court stands for the afternoon
13 recess.

14 (Whereupon, a brief recess was taken.)

15 (Whereupon, the proceedings were held in
16 open court in the presence of the Jury.)

17 THE COURT: Next witness.

18 MS. COOMBE: The government call Brian Shea.

19

20 BRIAN E. SHEA, having been called as a Witness,
21 being first duly sworn, was examined and testified as
22 follows under oath:

23

24 DIRECT EXAMINATION BY MS. COOMBE:

25 Q. Mr. Shea, good afternoon.

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. Good afternoon.

2 Q. Have you pled guilty to an offense against the
3 United States?

4 A. Yes.

5 Q. What did you do?

6 A. I pled guilty to corruptly interfering with the
7 United States tax code.

8 Q. Why did you plead guilty to that crime?

9 A. I pled guilty because I had committed certain
10 accounting irregularities that were illegal.

11 Q. Was your guilty plea related to any other
12 activities?

13 A. Yes. I also submitted back-dated promissory
14 notes to FINRA, the regulatory agency, without properly
15 noting on the cover that they were back dated and recently
16 created.

17 Q. Was there anything else?

18 A. Yes. I was also aware that payments had come
19 from entities into Firstline Trusts for investors when I
20 knew that there was no payments available from the company,
21 itself, Firstline, that they had done financing with.

22 Q. What is the maximum potential term of
23 imprisonment that you face?

24 A. Three years.

25 Q. Do you also face a fine?

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1 A. \$250,000.00.

2 Q. Did you enter into a Plea Agreement with the
3 United States?

4 A. Yes.

5 Q. Did you also enter into a Cooperation Agreement
6 with the United States?

7 A. Yes.

8 Q. Do you have any understanding of what those
9 agreements require from you during your testimony?

10 A. Yes.

11 Q. What is your understanding?

12 A. My understanding is that my testimony has to be
13 truthful and honest, and then the government, at their
14 discretion, can file what is called a 5K, which is a
15 possible recommendation to the Judge who has the ultimate
16 authority on downward guidance in my jail time.

17 Q. What did you do to prepare for your testimony
18 today?

19 A. I met several times with Elizabeth Coombe and
20 Alyssa Daversa. I reviewed my FINRA OTR testimony. I
21 reviewed the notes from my meetings with the government,
22 and I reviewed my plea agreement and cooperation agreement.

23 Q. Why did you do this?

24 A. To provide honest and clear testimony.

25 Q. Can you tell us, please, where you grew up?

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1 A. Holyoke, Massachusetts.

2 Q. Could you please tell us about your education?

3 A. I graduated from Union College with a Bachelor
4 of Arts in economics, and then I worked -- I also went
5 through a General Electric financial management program
6 that was a combination of accounting, education, and
7 on-the-job training.

8 Q. Where do you work now?

9 A. I work for McGinn, Smith, Smith & Company for
10 the receiver, William Brown, who is a court-appointed
11 receiver for all of the eighty entities approximately that
12 are involved at McGinn, Smith, Smith & Company.

13 Q. What is your understanding of a receiver's
14 responsibilities?

15 A. The receiver's responsibility is to maximize the
16 amount of monies that can be collected and then paid to
17 investors.

18 Q. Did you ever work for a company call McGinn,
19 Smith & Company, Incorporated, in Albany?

20 A. Yes.

21 Q. We will call it the broker-dealer today, is that
22 okay?

23 A. Okay.

24 Q. When did you work there?

25 A. I worked there from 1991 to 2002. And then I

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1 worked there again in April of 2009 and basically continued
2 there today under the receiver, but there was a search
3 warrant executed in April of 2010 that firmly ceased all
4 operation of the broker-dealer.

5 Q. Is that when the receiver took over?

6 A. Yes.

7 Q. All right. What did you do between 2002 and
8 2009?

9 A. 2002 I worked for a company called IASG, which
10 was a publicly traded alarm company, it went public in
11 2003, and stayed there until it was bought out in 2007, and
12 I was employed there until June of 2007. And then in July
13 of 2007, I went to work for McGinn, Smith Alarm Trading,
14 which is obviously an affiliate of McGinn, Smith & Company
15 that was in the alarm industry and serviced alarm
16 contracts.

17 Q. Was either Mr. McGinn or Mr. Smith involved in
18 either IASG or McGinn, Smith Alarm Traders?

19 A. Yes.

20 Q. Which ones?

21 A. They both were. Mr. Smith served on the board
22 of IASG for most of its existence. And then he was a
23 partner of McGinn, Smith Alarm Traders. Mr. McGinn was
24 much more involved in IASG. He was on the board. I
25 believe he was chairman and CEO. And then left there in

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1 2006. And then when I returned to Alarm Traders, he was
2 obviously an owner of that and actively involved in the
3 business.

4 Q. I want to direct your attention to the second
5 time that you worked at the broker-dealer that was
6 beginning in April of 2009. What was your title at that
7 time?

8 A. CFO and FinOp.

9 Q. What does CFO stand for?

10 A. Chief financial officer.

11 Q. Could you please tell us about your duties and
12 responsibilities as a CFO, a chief financial officer, for
13 the broker-dealer?

14 A. It would involve maintaining accurate accounting
15 records for, not only the licensed entity, which was
16 McGinn, Smith & Company, but they had also approximately
17 eighty other companies, most of them with some activity in
18 bank accounts, and try to keep the financial records up to
19 date, payroll, accounts payable.

20 And then also the FinOp, I had responsibilities
21 that relates to FINRA. So I have to file monthly financial
22 statements with FINRA, quarterly financial and annual
23 financial statements with FINRA, a federally regulated
24 entity.

25 Q. I want to ask you, who did you report to?

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1 A. Primarily David Smith.

2 Q. How often did you communicate with Mr. Smith?

3 A. Daily.

4 Q. How about Mr. McGinn, how often did you
5 communicate with him?

6 A. Not as frequently, but certainly often.

7 Q. Focusing on your work at the broker-dealer the
8 second time beginning in April of 2009, did anyone report
9 to you?

10 A. Yes.

11 Q. Can you give us an idea of the people who
12 reported to you at that time?

13 A. There was -- when I initially returned, there
14 was one employee, Brian Cooper, who reported to me and then
15 there was a lady out on maternity leave, Tricia Trombley,
16 and some period of time pretty soon thereafter she came
17 back to work. Those were my two reports.

18 Q. What were their responsibilities?

19 A. Tricia Trombley was responsible for the
20 commission payroll for the broker-dealers. So we had, I
21 would say, approximately thirty brokers, and she would run
22 the payroll for them. And she also did accounts payable,
23 so she would pay all the bills.

24 And then Brian Cooper did more general
25 accounting for some of the non-regulated entities that he

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1 was responsible for. He also did daily cash balances and
2 made payments to investors as they were required at certain
3 intervals.

4 Q. Did you personally maintain the accounting
5 records for the broker-dealer?

6 A. Yes.

7 Q. What was the broker-dealer's financial condition
8 when you returned in April of 2009?

9 A. It was distraught. There was marginally enough
10 capital, which was a requirement for FINRA to continue
11 operations, and their revenues were heavily reliant on
12 related-party transactions. The costs were not in line
13 with the revenues. In other words, there was expenses, New
14 York City real estate. It was failing.

15 Q. What do you mean by related-party transactions?

16 A. A related-party transaction would be if McGinn,
17 Smith & Company did a private placement, they would earn an
18 underwriting fee from that private placement and that would
19 generate revenue for the firm.

20 Q. Were there any issues with the broker-dealer's
21 net capital with maintaining the minimum necessary when you
22 returned?

23 A. Yes.

24 Q. Can you tell us about those issues?

25 A. The issues -- we were required to have a certain

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1 dollar amount. I believe it was one hundred thousand
2 dollars at the end of every month. There have very strict
3 requirements as to what can consist of that hundred
4 thousand dollars. And every month it was difficult to make
5 the -- make that net capital amount. And that's just the
6 result of the other things I talked about, lack of
7 revenues, and high expenses.

8 Q. Can you tell us any ways in which you went about
9 making the net capital on any months after you returned?

10 A. There was -- there were several occasions where
11 David Smith had directed us not to pay employees at the end
12 of the month, certain salaried employees, including
13 Mr. McGinn, Mr. Smith, myself, Matthew Rogers. Other
14 employees were all told that we would not be paid and the
15 payroll was not accrued. And thus, we made our capital
16 requirement for the month.

17 Another significant item was there were legal
18 fees as it related to the arbitrations that customers had
19 filed against McGinn, Smith & Company. And Mr. Smith had
20 insisted that these items not be properly accrued, and
21 again, that helped us make our net capital.

22 Q. Were there any other expenses that you did not
23 accrue in order for it to appear that the broker-dealer had
24 sufficient net capital?

25 A. There is -- I know that there is a question

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1 about accruing the July rent for the New York City office
2 that -- there is a question whether or not it was accrued
3 or not accrued, and, of course, if it was not accrued, then
4 that would assist in making the capital.

5 Q. Who made the decision about whether to accrue
6 that rent?

7 A. David Smith told Tricia Trombley not to accrue
8 the July rent.

9 Q. Did you ever recommend that the broker-dealer be
10 closed?

11 A. Yes.

12 Q. How many times did you make that recommendation?

13 A. I made that at least two times, probably three
14 times.

15 Q. Who did you make that recommendation to?

16 A. To David Smith.

17 Q. Let's start with the first time. Can you tell
18 us approximately when that was?

19 A. I don't think it was very long after I was
20 there. I returned in April of 2009. I would say late
21 spring, early summer of 2009.

22 I just said, Dave, what are we doing here? Why
23 are we continuing? There is not enough money in it.

24 Q. What did he say?

25 A. He wanted to continue and press on. And then

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1 the other conversations --

2 Q. Well, let's go slow here. Tell us when the next
3 conversation was that you talked to Mr. Smith about closing
4 down the broker-dealer?

5 A. I believe the second time was more in the fall.
6 So in the fall of 2009, there was voluminous inquiries from
7 FINRA requesting documents. There was -- stopped making
8 payments to certain, on certain trusts. The opportunity
9 for income seemed, you know, really very bleak. I believe
10 I made a recommendation at that time. And we were also in
11 the process of trying to sell the brokerage business to
12 someone.

13 Q. What was Mr. Smith's response?

14 A. He still wanted to wait.

15 Q. Did he say anything else?

16 A. I believe there was yet another meeting where
17 something else was said, so there was --

18 Q. Can you tell us when that third meeting was?

19 A. I think the third meeting was in 2010. So we
20 were already -- we had already defaulted on our capital at
21 FINRA in December of 2009. And because we accrued legal
22 fees that were previously not accrued at the direction of
23 FINRA.

24 And there was continued -- we were still a
25 member of FINRA after that, and we had to file audited

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1 financial statements for 2009, which we didn't have the
2 resources to pay the auditors. There was also other
3 filings that were not being made. So we were constantly in
4 default.

5 I suggested to Dave, I said, why don't we just
6 do what is called BDW, broker withdrawal. And he said no,
7 I don't want to do it. I want to hold the FINRA license as
8 a possible chip in negotiating with FINRA that we will
9 resign and give them our license and, you know, we can just
10 walk away.

11 Q. You mentioned that there were additional
12 entities other than the broker-dealer, itself.
13 Approximately how many other entities were there?

14 A. Eighty.

15 Q. Now, during the time that you were gone --

16 MS. COOMBE: Let me rephrase my question.

17 BY MS. COOMBE, CONTINUED:

18 Q. Going back to the first time that you worked at
19 the broker-dealer, were there that number of related
20 entities?

21 A. No. There was probably fifty.

22 Q. Had the accounting staff grown in proportion to
23 the number of related entities?

24 A. No.

25 Q. And were there sufficient resources in the

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1 accounting department to keep books and records for all of
2 these entities?

3 A. No.

4 Q. Other than you, did anyone else maintain
5 accounting records for any of the other McGinn, Smith
6 related entities?

7 A. Yes, Brian Cooper who worked for me. He was in
8 charge of some of the entities.

9 Q. Can you tell us just very generally and in basic
10 terms on what format the books and records for these
11 various entities and the broker-dealer were kept in,
12 electronic, paper?

13 A. There was electronic databases for almost all
14 the entities. The regulated entity was on a platform
15 called Solomon, which is a top ten accounting software
16 where all changes that were made could be tracked. It was
17 an audible software. I think it met the turning of their
18 regulatory requirement and the accounting firms'
19 requirement. And there was one or two other companies that
20 were on that as well.

21 And then the majority of the other entities were
22 on either Quicken or QuickBooks. And then one company was
23 totally kept track of in Excel, which is very unusual.

24 Q. How about, did you keep any hard copy records?

25 A. Yes, we kept hard copy records. When I took the

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1 job over, there was a history of people keeping bank
2 statements and certain other information in black binders
3 and folders. So there was that information.

4 Q. Did the accounting department keep Mr. McGinn
5 and Mr. Smith informed about how much money was available
6 in each bank account for all of these different entities?

7 A. Yes. Brian Cooper would send out an e-mail
8 dated with the balances from M&T Bank and Mercantile Bank.

9 Q. Did these entities generally have just one bank
10 account at one of those banks?

11 A. No, the entities typically had at least two,
12 sometimes three bank accounts each.

13 Q. Was there any common denominator for the bank
14 accounts at M&T Bank versus those at Mercantile Bank?

15 A. The common theme certainly at Mercantile Bank
16 was those were accounts that Mr. McGinn controlled the
17 access to or the movement of funds from. And the M&T
18 accounts probably were more of the entities that Mr. Smith
19 was responsible for.

20 Q. Did either the M&T or Mercantile accounts, was
21 it more common to have escrow accounts kept in benefit or
22 trust for investors at one bank or the other?

23 A. There was accounts at both banks, but certainly
24 the more recent ones seemed to be at Mercantile.

25 Q. Are you familiar with an entity called McGinn,

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1 Smith Transaction Funding Corporation?

2 A. Yes.

3 Q. I am going to call it MSTF today. How were you
4 familiar with MSTF?

5 A. When I returned to the broker-dealer in April of
6 2009, I noticed while I was going through my training with
7 my predecessor, David Rees, that there was several MSTF
8 binders. And we went over it very briefly while he was --
9 I had a two-week transition period. So I became familiar
10 with them immediately.

11 Q. Are you familiar with the PPM for MSTF?

12 A. I am.

13 Q. Are you familiar with the flow of funds for
14 MSTF?

15 A. Yes.

16 MS. COOMBE: Your Honor, may I have
17 permission to approach the witness?

18 THE COURT: You may.

19 MS. COOMBE: Would you like me to continue
20 to ask Your Honor or should I assume I have permission?

21 THE COURT: You have permission.

22 MS. COOMBE: Thank you very much, Your
23 Honor.

24 BY MS. COOMBE, CONTINUED:

25 Q. Mr. Shea, I am showing you what has been marked

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1 GB1A. It has been previously admitted pursuant to
2 stipulation.

3 MS. COOMBE: Ron, if you could call it up,
4 please. We are not going to look at the last line now.

5 BY MS. COOMBE, CONTINUED:

6 Q. Mr. Shea, can you tell us what this is?

7 A. This is a flow of funds for McGinn, Smith
8 Transaction Funding Corporation.

9 Q. That's a picture that represents the
10 broker-dealer, is that what the broker-dealer actually
11 looked like in Albany?

12 A. No, it is just a representative picture.

13 Q. Okay.

14 MS. COOMBE: If we could look at the next
15 slide, please, Ron.

16 BY MS. COOMBE, CONTINUED:

17 Q. That represents the investors at MSTF; is that
18 correct?

19 A. Yes.

20 MS. COOMBE: And then the next slide,
21 please.

22 BY MS. COOMBE, CONTINUED:

23 Q. What does that show, Mr. Shea?

24 A. That the investors made an investment in MSTF.

25 Q. And that's a PPM?

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1 A. Yes.

2 Q. That's being given to them by the broker-dealer?

3 A. Yes.

4 MS. COOMBE: If we could look at the next
5 slide, please, Ron.

6 BY MS. COOMBE, CONTINUED:

7 Q. What does that show, Mr. Shea?

8 A. I am not sure.

9 Q. Oh, I am sorry. I am going to put the screen up
10 because I haven't done it before. There we go. That would
11 make it hard to follow, wouldn't it. I apologize.

12 A. That's okay.

13 Q. All right. All right. Let us know when you are
14 all set?

15 A. Okay. I am good.

16 Q. Okay. What does that show now, Mr. Shea?

17 A. It shows that the investors invested in MSTF and
18 made their payment to the corporation.

19 MS. COOMBE: Next slide, please.

20 BY MS. COOMBE, CONTINUED:

21 Q. What does that to show, Mr. Shea?

22 A. It shows two of the approved uses for the PPM of
23 MSTF investments, which the investors saw in the PPM which
24 is McGinn, Smith cumulative preferred stock and bridge
25 financing.

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1 Q. Was there some other use?

2 A. There was securities, private and public
3 securities.

4 MS. COOMBE: Okay, and if we could look at
5 the next slide, please.

6 BY MS. COOMBE, CONTINUED:

7 Q. What does that show?

8 A. It shows that those investments should have
9 generated a return on capital or a repayment of principal
10 that came back to MSTF.

11 Q. And if we could look at the next slide, please?

12 A. And then obviously with that repayment of
13 capital and earning of fees, the money should have gone
14 back to the investors.

15 Q. Is that an accurate depiction of the flow of
16 money for MSTF?

17 A. No.

18 Q. Okay.

19 A. Well, I mean that's theoretical actually, yes.

20 Q. Once you got back to the broker-dealer, did you
21 find that something else was actually happening with MSTF
22 money that wasn't consistent with what we have just looked
23 at?

24 A. Yes.

25 Q. Could you please tell us what you noticed?

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1 A. I noticed that there were payments to investors
2 that were not investors in MSTF, and I also noticed that
3 there were loans to Timothy McGinn.

4 Q. Did you notice anything else?

5 A. There was interest payments to someone who
6 invested in another entity, 107th Street.

7 Q. Did you notice that any money had been used
8 to -- for the broker-dealer?

9 A. Yes. Also money had gone to the broker-dealer.
10 In addition to money going to the broker-dealer for
11 preferred stock, there was also fees paid to the
12 broker-dealer.

13 Q. All right. After -- how did you notice these
14 unusual transactions?

15 A. The unusual transactions were typically in the
16 Quicken accounting system. My predecessor had entered a
17 lot of items, but he didn't research what they were. So
18 they had unusual notations like unknown or research or
19 check on this, question mark, not sure, booked to expense
20 accounts, such as charity. So those would be some of the
21 clues that I said, okay, I have got to sit down and figure
22 out where all this went.

23 Q. Mr. Shea, I am handing you now Government
24 Exhibit GB9 previously admitted.

25 MS. COOMBE: Could we please look at that on

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1 the screen, Ron.

2 BY MS. COOMBE, CONTINUED:

3 Q. Mr. Shea, can you tell us what this is?

4 A. This is output from the Quicken system for
5 McGinn, Smith Transaction Funding or MSTF. It is a balance
6 sheet as of 12/31/08, and it is printed out on March 3,
7 2009.

8 Q. Okay. Can you tell us what a balance sheet is?

9 A. A balance sheet would show the assets and
10 liabilities of an entity as well as their equity.

11 Q. And if you look in the upper right-hand corner,
12 does it indicate the date?

13 A. March 3rd of 2009.

14 Q. What's the significance of this date?

15 A. That's the date that this report was printed.

16 Q. So does this report accurately reflect the books
17 and records of McGinn, Smith Transaction Funding as of
18 March 3rd of 2009?

19 A. As of December 31, 2008, because that's the
20 control date that's on the balance sheet.

21 Q. Right, but it was printed on March 3rd of 2009?

22 A. So to answer your question, no, it doesn't
23 reflect it as of March 3, 2009, because there could have
24 been transactions between 12/31/08 and 3/3/09 that because
25 of the query you entered, it wouldn't come up.

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1 Q. But this is the balance sheet you got when
2 someone printed it on March 3rd of 2009?

3 A. Yes.

4 Q. Okay.

5 MS. COOMBE: If we could turn to page six of
6 the exhibit, please, Ron.

7 BY MS. COOMBE, CONTINUED:

8 Q. All right. I would like to direct -- first of
9 all, Mr. Shea, why don't you tell us what this is?

10 A. This is a transaction report by account, which
11 is basically the output from the Quicken system of all the
12 transactions that affected a certain account.

13 Q. Okay. What is the date in the upper right-hand
14 corner for this?

15 A. This is also March 3rd of 2009.

16 Q. So is that the date that this was printed?

17 A. Yes.

18 Q. All right. I would like to direct your
19 attention toward the bottom. There is an entry for escrow.
20 And then there is a number of entities underneath that.
21 What does that refer to?

22 A. Escrow, that was the Mercantile Bank escrow
23 account where investor funds were deposited and other
24 ongoing business was conducted.

25 Q. Okay, and I would like to ask you to direct your

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1 attention and tell us whether there were any of these
2 unusual accounting entries that you noticed?

3 A. The fifth line item dated 5/14/08, it has a
4 description as unknown, verify this. And it was recorded
5 in offsets account, Cruise Charter Ventures.

6 Q. Okay. Can you tell us the next unusual entity?

7 A. 5/15/08, at the bottom, NFS, interest coverage
8 for others.

9 MS. COOMBE: Could we look at the next page,
10 please.

11 BY MS. COOMBE, CONTINUED:

12 Q. Can you tell us about any unusual entries on
13 this page?

14 A. The second item was a payment to somebody who is
15 not an investor in MSTF. The next item, 5/20, is a payment
16 as it relates to, I believe, Cruise Charter Ventures, which
17 is not MSTF .

18 The next item, 5/21, Marlene Brustle. She was
19 the president of Cruise Charter Ventures. So she is also
20 not an employee of MSTF. So those were booked to
21 miscellaneous, those two items, an expense item, and they
22 shouldn't have been an expense item of MSTF.

23 Q. Who should they have been an expense of?

24 A. They should have been an expense of Cruise
25 Charter Ventures.

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1 And again, on 6/13/08, there is another payment,
2 IA5, for interest that's not McGinn, Smith Transaction
3 Funding. Can you scroll down?

4 MS. COOMBE: Sure. Ron, could you scroll
5 down please.

6 A. Okay. 6/19/08, Marlene Brustle, supplies,
7 booked to expense miscellaneous, should have been Cruise
8 Charter Venture expense.

9 6/20, an item marked unknown, booked to charity.
10 Obviously that will require research. 6/23, again
11 something labeled unknown.

12 BY MS. COOMBE, CONTINUED:

13 Q. Why was charity an unusual entry?

14 A. It is my understanding that Mr. Rees used
15 charity as an account to hold items until he could find out
16 what it really was, and then he researched it at the end of
17 the year. But a business like MSTF wouldn't have
18 \$25,567.89 booked to charity.

19 Q. Do you see any other unusual transactions?

20 A. 7/1/08, there is another unknown. And again,
21 the payment on 7/15/08, payment to Joseph -- well, above
22 that, 7/15/08, NFS Wire, interest coverage for others.

23 7/15/08, J. Cornacchia, interest coverage for
24 others. And then 7/15/08, NFS Wire, interest coverage for
25 others. 7/17/08, NFS Wire interest coverage for others.

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1 Q. And there are others examples, right, Mr. Shea?

2 A. Yes.

3 Q. Continue to look at it. Are you aware of
4 anything in the MSTF PPM that allowed MSTF money to be used
5 to pay interest coverage for other entities?

6 A. No.

7 Q. Did you look into these payments?

8 A. I did.

9 Q. What did you do to look into these payments?

10 A. I talked to Brian Cooper who worked for me in
11 the accounting department, and also researched certain
12 e-mails and bank statements.

13 Q. What did Mr. Cooper say?

14 A. Mr. Cooper told me that these were, he called
15 them, Tim McGinn's supplemental payments, that Mr. McGinn
16 directed him to make these interest payments to certain
17 investors that had stopped receiving interest payments from
18 another investment.

19 And Cooper showed me in the computer where he
20 would create a spreadsheet, and then Mr. McGinn would wire
21 the money from Mercantile Bank to NFS typically which was
22 the place where the investors' accounts were housed, and
23 the payments would be applied and investors would receive
24 their normal payment.

25 Q. Was there any common characteristic for these

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1 investors that Mr. Cooper told you about?

2 A. Yes, it was typically the biggest investments,
3 the biggest investors in the firm. The Fisher family, for
4 example, which I believe had invested up to eighteen
5 million dollars at one time in McGinn, Smith product.

6 Q. After talking to Mr. Cooper and reviewing the
7 documents that he gave you, what was your understanding
8 about why non-MSTF investors were being paid with MSTF
9 money?

10 A. It was at the direction of Mr. McGinn that those
11 payments were being made.

12 Q. What was your reaction to learning about these
13 payments?

14 A. It was upsetting.

15 Q. Why was it upsetting?

16 A. I knew it wasn't a correct use of MSTF funds.

17 Q. Did you prepare any documents regarding the
18 research?

19 A. I did.

20 Q. And did some of these payments fall in any kind
21 of categories?

22 A. I did. I created three separate spreadsheets, I
23 called them buckets, three different buckets of payments.

24 Q. And can you please just tell us generally about
25 the three different buckets?

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. The first bucket was payments to investors in,
2 what we will call, the Four Funds, which was four large
3 entities that raised money from 2003 to 2005, I think, and
4 those were in bucket number one.

5 Bucket number two were payments solely to
6 Joseph Cornacchia, which you have seen for five thousand
7 dollars a month.

8 And bucket three was payments to non-MSTF
9 investors that were primarily for a failed investment in
10 SAI Trust.

11 Q. Mr. Shea, I am showing you now previously
12 admitted Exhibit GB1B.

13 MS. COOMBE: Could we please look at that,
14 Ron. Thank you.

15 BY MS. COOMBE, CONTINUED:

16 Q. Mr. Shea, does this relate to any of the buckets
17 that you just described for us?

18 A. Yes.

19 Q. Would you tell us which bucket, please?

20 A. This would be bucket number one.

21 Q. Okay, and on the left there is an entry, Four
22 Funds, 10.25 percent interest per PPM. Could you explain
23 to us what that means?

24 A. The investors had made an investment in the Four
25 Funds and were promised a certain interest rate on those

BRIAN E. SHEA - Direct By Ms. Coombe

1 funds, and so that that's the monthly payment or quarterly
2 payment that they were accustomed to.

3 Q. Okay. Now, there is two groups of investors
4 here, regular investors and preferred investors. Do the
5 preferred investors relate to anything that you told us
6 about?

7 A. Yes, the preferred investors were big investors
8 and the preferred clients of the company, big investors,
9 and that's who they were.

10 MS. COOMBE: Next slide please, Ron.

11 BY MS. COOMBE, CONTINUED:

12 Q. This shows a letter, stop payments, and then
13 stop signs, what does this show, Mr. Shea?

14 A. There was a letter that David Smith had sent out
15 that the Four Funds funds were going to stop making
16 payments to certain investors in the Four Funds.

17 Q. Okay.

18 MS. COOMBE: If we could see the next slide,
19 please.

20 BY MS. COOMBE, CONTINUED:

21 Q. Does this represent MSTF -- tell us what this
22 represents, Mr. Shea, please?

23 A. The preferred investors continued to receive
24 monthly payments from MSTF and not from the Four Funds.

25 Q. And how about the regular investors, did they

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1 get any supplemental interest payments?

2 A. No, they did not.

3 Q. Was Mr. Smith the broker for any of these
4 clients that you have researched?

5 A. He was.

6 Q. As the broker, did he have an obligation to
7 review their statements?

8 A. He did.

9 Q. If he had reviewed them, would he have seen that
10 these preferred investors were continuing to receive
11 payments?

12 A. Yes.

13 Q. Okay. If you could turn please to the next page
14 of GB1B. This says MSTF payments to Joe Cornacchia. Does
15 this relate to any of the buckets that you told us about?

16 A. Yes, this is bucket two.

17 Q. If you could please explain to us what is up
18 there right now?

19 A. Mr. Cornacchia had purchased an investment in an
20 SAI Corporation from Mercantile Bank, which was a bank that
21 Mr. McGinn was on the board of at some period of time. I
22 believe the amount was approximately eight hundred thousand
23 dollars. So it was a sizeable investment. Mr. Cornacchia
24 received interest from SAI until they went out of business
25 and declared bankruptcy.

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1 MS. COOMBE: Could we see the next slide,
2 please.

3 BY MS. COOMBE, CONTINUED:

4 Q. What does this show?

5 A. That SAI ceased making payments to
6 Mr. Cornacchia.

7 MS. COOMBE: Could we look at the next
8 slide, please?

9 BY MS. COOMBE, CONTINUED:

10 Q. What does this show?

11 A. At the direction of Mr. McGinn, McGinn, Smith
12 Transaction Funding made a series of monthly payments to
13 Joseph Cornacchia in the amount of five thousand dollars a
14 month.

15 Q. Based on your understanding of the MSTF PPM, was
16 that an authorized use of investor money?

17 A. No.

18 Q. I am showing you now previously admitted
19 Exhibit GB8.

20 MS. COOMBE: Could we please look at that on
21 the screen.

22 BY MS. COOMBE, CONTINUED:

23 Q. Mr. Shea, what is this?

24 A. This is an e-mail from Timothy McGinn to
25 Joseph Cornacchia, dated July 15, 2008.

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1 Q. And it states: Joe, as promised I am today
2 wiring five thousand dollars to your Wachovia account. The
3 account number is there. We will continue to send five
4 thousand dollars on the 15th of each month through 2008.
5 Beginning in January, we hope to send seventy-five hundred
6 dollars per month. See you in Saratoga. Tim.

7 Is this consistent with your understanding of
8 that bucket number two, those payments?

9 A. Yes.

10 Q. And again, what was the purpose of those
11 payments?

12 A. The payments was to keep Mr. Cornacchia
13 satisfied because his SAI investment had failed.

14 MS. COOMBE: Could you please turn to the
15 third page of GB1B.

16 I just need a moment, Your Honor.

17 BY MS. COOMBE, CONTINUED:

18 Q. Mr. Shea, can you tell us what this relates to?

19 A. This is the third bucket, MSTF payments to
20 non-MSTF investors.

21 Q. And there is regular investors and preferred
22 investors there again?

23 A. Yes.

24 MS. COOMBE: Could we see the next slide,
25 please.

BRIAN E. SHEA - Direct By Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. What does that show, Mr. Shea?

3 A. That SAI, as I stated previously, had gone out
4 of business and stopped making payments to SAI Trust, and
5 investors were notified that they would not be receiving
6 any more payments from SAI.

7 MS. COOMBE: Could we see the next slide,
8 please.

9 BY MS. COOMBE, CONTINUED:

10 Q. What does this show?

11 A. It shows payments from MSTF to those preferred
12 SAI investors who continued to receive payments even though
13 SAI had failed. They continued to make the payments.

14 Q. How about those regular investors, did they
15 continue receive payments?

16 A. No.

17 Q. Based on your understanding of the MSTF PPM, was
18 this a permissible use of MSTF money?

19 A. No.

20 Q. I am showing you now previously admitted
21 Exhibit GB6. We have to start on the bottom to read an
22 e-mail. It says it is from Patricia Sicluna. Who is
23 Ms. Sicluna?

24 A. It is Sicluna. So Patty Sicluna was the head of
25 operations at McGinn, Smith & Company.

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1 Q. What did she actually do?

2 A. She ran the back office, received customer
3 funds, applied payments to customers' accounts.

4 Q. The subject is SAI letter. What is your
5 understanding of what the SAI letter was?

6 A. There was a letter that was written that
7 explained to investors that they would no longer be
8 receiving any payments from SAI because the company had
9 gone out of business.

10 Q. And Ms. Sicluna wrote to Mr. McGinn: Tim, do
11 you what (sic) letters sent to Cohen and Fisher?

12 It appears she meant do you want letters sent to
13 Cohen and Fisher.

14 Who are the Cohens?

15 A. Norman and Emily Cohen were pretty good sized
16 investors in the firm, and Tim -- clients of Tim's that he
17 seemed to take especially good care of.

18 Q. And you have already mentioned the Fishers,
19 right?

20 A. Yes.

21 Q. And he wrote back no?

22 A. Correct.

23 Q. What is your understanding of why Mr. McGinn
24 would not want the Cohens and the Fishers to receive this
25 letter stating that there would be no more payments?

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1 MR. JONES: Objection.

2 THE COURT: Overruled.

3 MR. JONES: That is an interpretation of
4 Mr. McGinn's mind.

5 THE COURT: Overruled.

6 BY MS. COOMBE, CONTINUED:

7 Q. You can answer, Mr. Shea.

8 A. He didn't want them to get any bad news that he
9 would have to square up with them about and...

10 Q. Based on your understanding of the MSTF PPM, was
11 this an appropriate use of MSTF funds?

12 A. No.

13 Q. Can you give us an idea of the grand total of
14 MSTF money that was used to pay non-MSTF investors in what
15 you called buckets one, two, and three?

16 A. I believe it was approximately six hundred
17 thousand dollars.

18 Q. Did you ever talk to Mr. Smith about these
19 payments?

20 A. I did.

21 Q. When did you talk to him?

22 A. I talked to him on two occasions.

23 Q. Let's start with the first one first.

24 A. Okay. Which I believe, if I returned to the
25 broker-dealer in April 2009, I think it was sometime in

BRIAN E. SHEA - Direct By Ms. Coombe

1 summer of 2009 we had the first conversation.

2 Q. Where did you talk to him?

3 A. I talked to him in his office.

4 Q. Was that in Albany?

5 A. Yes.

6 Q. What did you say?

7 A. I told him that I had found these payments to
8 non-MSTF investors and what should I do with them.

9 Q. What was his reaction?

10 A. He was very upset. David Smith is a person that
11 generally stays very calm. He was very upset. He was
12 concerned that these payments had gone out of MSTF to
13 non-MSTF investors. He knew it wasn't allowed by the
14 private placement.

15 Q. Did he tell you that?

16 A. Yes, he did.

17 Q. I am sorry. Go ahead.

18 A. Yes. And then he also said, you know, I knew
19 that Tim was paying these people. I am not sure from
20 where, and what the fuck was he thinking.

21 Q. After meeting with Mr. Smith, did you notice any
22 other unusual transactions involving MSTF?

23 A. There were loans from the Four Funds to MSTF and
24 there were payments to McGinn, Smith & Company.

25 Q. I am going to show you now previously admitted

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1 Exhibit GB1C. Mr. Shea, can you please explain what this
2 shows?

3 A. So that the Four Funds made loans to -- so they
4 had resources obviously. They loaned money to MSTF.

5 Q. Just before you continue, can you tell us what
6 was the financial condition of the Four Funds at this time
7 in November of 2008?

8 A. I believe at that time they had stopped making
9 investor payments.

10 Q. Okay, and then there is a red arrow with the
11 seventy-five thousand and fifty thousand, it says
12 November 14, 2008. What does that refer to?

13 A. So on that date there were two wire transfers
14 from the Four Funds into an MSTF operating account.

15 Q. And then there is an arrow with \$125,000 dated
16 November 17, 2008. What does that show?

17 A. It shows on that date the exact same amount,
18 \$125,000 wired over to the broker-dealer.

19 Q. Based on your research, what was that money used
20 for?

21 A. It was used to cover payroll.

22 MS. COOMBE: Could we look at the next page,
23 please.

24 BY MS. COOMBE, CONTINUED:

25 Q. Does this show the same progression of money on

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1 November 26th of 2008, but this time it is \$150,000.00?

2 A. It does.

3 Q. What was that money used for?

4 A. It was used for payroll for the broker-dealer.

5 MS. COOMBE: Could we look at the next page,
6 please.

7 BY MS. COOMBE, CONTINUED:

8 Q. Is this again the same progression of money,
9 \$250,000.00 on April 14th of 2009?

10 A. Yes.

11 Q. What was that money used for?

12 A. It was used for payroll of the broker-dealer.

13 Q. Mr. Shea, what is your understanding about why
14 money didn't go just directly from the Four Funds to the
15 broker-dealer, why did it go through MSTF first?

16 A. At all points during this time, Mr. Smith had
17 sent two letters to investors of the Four Funds that the
18 broker-dealer was going to stop or related entities were
19 going to stop taking any fees. It was a scheme to get
20 money out of the Four Funds and over to the broker-dealer,
21 so it disguised the actual transaction.

22 Q. Now, what if the money had been transferred
23 directly from the Four Funds to the broker-dealer, would
24 that have caused any problems?

25 A. Yes, if they were loans to the broker-dealer, it

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1 wouldn't have been allowable for capital purposes. I
2 explained the capital calculation before. So it wouldn't
3 have been as of much value as opposed to getting it either
4 as a preferred stock investment or a fee from MSTF.

5 Q. Was there anything in the Four Funds' PPMs that
6 allowed money to be used for payroll at the broker-dealer?

7 A. No. The answer is no.

8 Q. Was Mr. Smith aware of these transactions?

9 A. Yes.

10 Q. Mr. McGinn?

11 A. Yes.

12 Q. Now, you mentioned that you spoke to Mr. Smith a
13 second time about the non-MSTF investors payments. Did you
14 also talk to him about these payroll payments?

15 A. I did.

16 Q. When was that?

17 A. This was in the fall of 2009.

18 Q. Where did you talk to him?

19 A. I talked to him at his office.

20 Q. What did he say? Well, first of all, what did
21 you say?

22 A. So we went back over the three buckets, and then
23 we had these payments from the Four Funds and payments to
24 McGinn, Smith & Company. So all those items were
25 identified and identified to Mr. Smith.

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1 Q. What did he say?

2 A. Mr. Smith proceeded to -- at the first meeting
3 all the items were presented. And then I think there was a
4 following meeting after that where much more was discussed.

5 Q. Are we talking about that follow-up meeting?

6 A. Yes.

7 Q. Was there another meeting after that?

8 A. No, the follow-up meeting is the second meeting.

9 Q. Okay. So at the follow-up meeting, did
10 Mr. Smith say anything else?

11 A. Yes, Mr. Smith presented a plan to offset all
12 these items under one account due from McGinn, Smith
13 Advisors, McGinn, Smith Capital Holdings, and basically
14 instructed me to create certain accounting transactions
15 that would disguise the nature of all these payments.

16 Q. Did you question him about doing this?

17 A. I don't recall.

18 Q. Did you talk to Mr. McGinn about this?

19 A. I don't recall talking to Mr. McGinn about it.

20 Q. Is this something you would have been likely to
21 raise with Mr. McGinn?

22 MR. JONES: Objection.

23 THE COURT: Yes. Sustained. Likely.

24 BY MS. COOMBE, CONTINUED:

25 Q. Did you follow Mr. Smith's direction?

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1 A. I did.

2 Q. What did you do?

3 A. I created a new balance sheet account on McGinn,
4 Smith Transaction Funding that said due from McGinn, Smith
5 Advisors and McGinn, Smith Capital Holdings.

6 And then in that account I moved these payments
7 that were made, these loans from the Four Funds, the
8 payments that went to McGinn, Smith & Company and then the
9 payments that were those three buckets, which we talked
10 about, all into this account.

11 Q. I am showing you previously admitted
12 Exhibit GB41B. Mr. Shea, could you please tell us what
13 this is?

14 A. This is output from McGinn, Smith Transaction
15 Funding Quicken file. It shows that it was done on
16 October 12, 2009, and above the date is the newly created
17 balance sheet account, DF, which is due, from MS, which
18 stands for McGinn, Smith Advisors and McGinn, Smith Capital
19 Holdings.

20 Q. Now, why are there some entries that are crossed
21 out?

22 A. This is my work product, and I crossed these
23 items off when I referenced the certain spreadsheets that I
24 had created before that housed the three buckets.

25 Q. Are these the same entries we looked at earlier

BRIAN E. SHEA - Direct By Ms. Coombe

1 where we highlighted some that you said were unusual,
2 including the ones for charities, and fees, and interest
3 coverage for others?

4 A. Yes.

5 Q. After you made these entries, what would someone
6 looking at the books think happened as far as those
7 payments to non-MSTF investors?

8 A. That the net effect of this would give the
9 reader of the balance sheet the impression that McGinn,
10 Smith Advisors and McGinn, Smith Capital Holdings owed
11 McGinn, Smith & Company -- McGinn, Smith Transaction
12 Company at this point in time \$271,619.00.

13 Q. And what about for those payroll diversions that
14 we looked at. What would someone looking at the books
15 after you made these new accounting entries think had
16 happened?

17 A. They would see that money -- well, if they
18 looked at the balance sheet, there is no way they could
19 tell.

20 Q. Are these accurate accounting entries, Mr. Shea?

21 A. No.

22 Q. This is not what actually happened?

23 A. These are actual amounts that were paid to
24 people, but they are -- by putting them in this bucket, it
25 disguised what they really were.

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1 Q. I am showing you now previously admitted
2 Exhibit GB41A.

3 MS. COOMBE: Could we please look at that,
4 Ron.

5 BY MS. COOMBE, CONTINUED:

6 Q. Could you please tell us what this is, Mr. Shea?

7 A. This is one of the spreadsheets that I created.
8 This is bucket number one.

9 Q. Whose handwriting is on here?

10 A. This is my handwriting.

11 Q. Okay, and it states at the top -- let me first
12 talk about, see where it says attorney/client work product,
13 attorney/client privilege. Did you put that on there?

14 A. I did put that on there.

15 Q. Can you tell us why?

16 A. At the instructions of Mr. McGinn and Mr. Smith
17 at some point in time, we began putting attorney/client
18 work product and privilege on a lot of documents.

19 Q. Did they explain to you why they wanted to do
20 that?

21 A. I know we wanted to try to protect it in case of
22 any investigation or anything.

23 Q. Now, the handwriting at the top, could you
24 interpret that for us, just tell us what this all means?

25 A. This is my handwriting. So there is a check

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1 equals DF MSA and MSCH. So I checked the items off as I
2 entered -- as I made the change in the Quicken accounting
3 system to say, okay, it went to the -- it went to that due
4 from MSA MSCH account. So it was a way to make sure all
5 the buckets, all the transactions in bucket one ended up in
6 the correct new general ledger account.

7 Q. So you used this to make false accounting
8 entries?

9 A. I did.

10 Q. All right, and which bucket does this relate to,
11 this page?

12 A. Bucket one.

13 MS. COOMBE: Can we please look at the next
14 page.

15 BY MS. COOMBE, CONTINUED:

16 Q. What does this relate to?

17 A. This relates to bucket two.

18 Q. Whose handwriting is that?

19 A. It is mine.

20 Q. What was the purpose of the use of this
21 document?

22 A. I used this to enter the payments that were
23 previously booked to miscellaneous to due from MSA and
24 MSCH.

25 MS. COOMBE: If we could look at page three,

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1 please.

2 BY MS. COOMBE, CONTINUED:

3 Q. Whose handwriting is that?

4 A. It is mine.

5 Q. What does this relate to?

6 A. I used this -- this is bucket number three to
7 enter payments. Again, these were booked miscellaneous,
8 and I changed it to due from MSA and MSCH.

9 Q. Mr. Shea, can you tell us when you made these
10 false accounting entities?

11 A. I believe it was in October or November of 2009.

12 MS. COOMBE: Can we look back at GB41B.

13 BY MS. COOMBE, CONTINUED:

14 Q. Do you see the date at the top there,
15 October 12, 2009?

16 A. Yes.

17 Q. Is that the date that you made these false
18 accounting entries?

19 A. I would say so based on I printed this out at
20 the same time that I completed the project.

21 Q. Mr. Shea, I am showing you previously admitted
22 Exhibits GB17, GB22, and GB32. Could you tell us what
23 these are?

24 A. GB17 is one of the early drafts of bucket number
25 one. So during this process I would find what I call

BRIAN E. SHEA - Direct By Ms. Coombe

1 exhibits, which I, either through my work or Cooper's work,
2 we would find out what the payments were for, and then we
3 would attach them as exhibits so we could document what
4 they were.

5 Q. Is that your handwriting?

6 A. Yes.

7 Q. Are you the person who prepared GB17?

8 A. Yes.

9 Q. Could you look now at GB22? And if you could
10 just look at the first page. What does this refer to?

11 A. This is bucket number two, payments to
12 Joseph Cornacchia.

13 Q. And whose handwriting is that?

14 A. Timothy McGinn.

15 Q. Can you read it for us?

16 A. It says: To Jay Kaplowitz, attorney/client
17 privilege. And then there is a number across the top.

18 Q. Who is Mr. Kaplowitz?

19 A. He is an attorney that represented the firm from
20 time to time, broker-dealer.

21 MS. COOMBE: Could we look at the next page,
22 please.

23 BY MS. COOMBE, CONTINUED:

24 Q. Whose handwriting is on this?

25 A. This has both my handwriting and Mr. McGinn's

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1 handwriting.

2 Q. Okay. Can you tell us whose is whose?

3 A. My handwriting is the 8/8/08 and 12/31/08
4 entries. And Mr. McGinn's handwriting is the
5 attorney/client privilege.

6 Q. Does this relate to one of the buckets?

7 A. This does. This relates to bucket one.

8 Q. Okay.

9 MS. COOMBE: If we could look at the last
10 page, please.

11 BY MS. COOMBE, CONTINUED:

12 Q. What is this?

13 A. This is bucket three.

14 Q. Whose handwriting?

15 A. Mine at the top where it says exhibit. And then
16 Mr. McGinn's where it says attorney/client privilege.

17 Q. If you could please look now at GB32. Could we
18 please look at pages four, five, and six. Could you tell
19 us what this is, please? Page four, Mr. Shea? Take your
20 time.

21 A. This is another draft of bucket number one. My
22 handwriting again, what I said before, 8/8/08 and 12/31/08.
23 And then Mr. McGinn's handwriting is attorney/client
24 privilege workbook.

25 MS. COOMBE: Could we look at the next page,

BRIAN E. SHEA - Direct By Ms. Coombe

1 please.

2 BY MS. COOMBE, CONTINUED:

3 Q. Could you tell us what this is, please?

4 A. This is bucket number three.

5 Q. Does that -- could you tell us whose handwriting
6 it is, please?

7 A. It is my handwriting at the top, exhibit. And
8 then Mr. McGinn's handwriting attorney/client privilege.

9 MS. COOMBE: Could we look at the last page,
10 please.

11 BY MS. COOMBE, CONTINUED:

12 Q. Could you tell us what this is and whose
13 handwriting is on it?

14 A. This is bucket number two. Mr. McGinn's
15 handwriting at the bottom, again, to Jay Kaplowitz,
16 attorney/client workbook, it looks like.

17 Q. I am showing you now previously admitted
18 Exhibit GB16. Could you tell us what this is, please?

19 A. That is a printout, this is a printout from
20 Quicken from one of the Four Funds, which we will call
21 FIIN.

22 Q. Does this show any of the transactions that we
23 talked about this afternoon?

24 A. It does. This shows that FIIN wired four
25 amounts to McGinn, Smith Transaction Funding, and they were

BRIAN E. SHEA - Direct By Ms. Coombe

1 recorded on their books as due from McGinn, Smith
2 Transaction Funding.

3 Q. What does that mean?

4 A. It would be a loan or an investment. In this
5 case it was a loan.

6 Q. And the date May 14, 2009, in the upper
7 left-hand corner, what is the significance of that date?

8 A. That's the date that this was printed.

9 Q. And this shows that these were booked as loans
10 before you made the false accounting entries; is that
11 correct?

12 A. Correct.

13 MS. COOMBE: If we could look back at GB41B
14 again, please.

15 BY MS. COOMBE, CONTINUED:

16 Q. Are you aware of whether the false entries
17 reflected in this exhibit were ever submitted to FINRA?

18 A. They were.

19 Q. Are you familiar with a letter from FINRA where
20 it requested accounting records from the broker-dealer for
21 various entities?

22 A. I am. I believe there were several of those
23 letters.

24 MS. COOMBE: May I have a moment, Your
25 Honor?

BRIAN E. SHEA - Direct By Ms. Coombe

1 THE COURT: I think this is a good time to
2 end for the day.

3 Members of the jury, you are going to be
4 excused now until 9:30 tomorrow. Again, I assume that the
5 parking is all set for you, and we will have coffee for
6 you.

7 As I said, I will every time, remind you not
8 to discuss the case among yourselves or anyone else this
9 evening, and we will see you back at 9:30 tomorrow. Thank
10 you again for your service.

11 (Whereupon, the proceedings were held in
12 open court out of the presence of the Jury.)

13 THE COURT: Everyone stay here until the
14 jury leaves the building.

15 Court remains in session for a moment.

16 You may be seated.

17 Mr. Shea, you are a cooperating witness so I
18 am not going to direct you not to discuss your testimony
19 with anyone else over the evening, but I would just advise
20 you that if you do not talk with anybody over the evening
21 about your testimony, it might go a lot easier for you
22 tomorrow. Do you understand?

23 THE WITNESS: Yes, sir.

24 THE COURT: Anything further, counselors
25 before we adjourn for a brief conference?

BRIAN E. SHEA - Direct By Ms. Coombe

1 MS. COOMBE: No, Your Honor.

2 THE COURT: Mr. Minor.

3 COURT CLERK: Court stands adjourned.

4

5 (Whereupon, the proceedings held on

6 January 8, 2013, were ended at 5:10 p.m..)

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I, NANCY L. FREDDOSO, RPR, Official Court Reporter
in and for the United States District Court, Northern
District of New York, do hereby certify that I recorded
stenographically the foregoing at the time and place
mentioned; that I caused the same to be transcribed; and
that the foregoing is a true and correct transcript thereof
to the best of my knowledge, ability, and belief.

I further certify that I am not an attorney or
counsel of any parties, not a relative or employee of any
attorney or counsel connected with the action, nor
financially interested in the action.

S/NANCY L. FREDDOSO, RPR
Official United States Court Reporter

My Commission expires March 30, 2015

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1 (WHEREUPON, the proceedings held on
2 January 9, 2013, were commenced at
3 9:30 a.m..)
4 (Whereupon, the proceedings were held in
5 open court in the presence of the Jury.)
6

7 THE COURT: Good morning, all.

8 Mr. Shea, take the witness stand again, and
9 speak up and, counsel, speak up. I understand from the
10 jury that at times they have been having some difficulty
11 hearing the witness and counsel. So let's correct that
12 situation and move on.

13 You may proceed.

14 MS. COOMBE: Thank you, Your Honor. Good
15 morning. Is that better, ladies and gentlemen? All right.
16 You will have to give me the high sign if I am not blowing
17 you out of the courtroom.

18 DIRECT EXAMINATION BY MS. COOMBE:

19 Q. Mr. Shea, you are going to pull the microphone
20 right up close to you, right?

21 A. Yes.

22 Q. I am handing you previously admitted
23 Exhibit GB41C and an exhibit that has not yet been
24 admitted, GB41C typed.

25 MS. COOMBE: Your Honor, at this time I move

BRIAN E. SHEA - Direct By Ms. Coombe

1 the admission of GB41C typed. It is a typewritten version
2 of GB41C.

3 THE COURT: Any objection? Hearing none,
4 admitted.

5 (Exhibit No. GB41C, received.)

6 MS. COOMBE: Could we please look at GB41C.

7 BY MS. COOMBE, CONTINUED:

8 Q. Could you please turn to page eight of this
9 document?

10 A. Do I get the screen?

11 Q. Yes. Thank you for reminding me. Let us know
12 when you are ready, Mr. Shea.

13 A. I am ready.

14 Q. Do you recognize the handwriting on this page of
15 GB41C?

16 A. Yes.

17 Q. Whose is it?

18 A. David Smith.

19 Q. Okay.

20 MS. COOMBE: Could we please look at the
21 next page.

22 BY MS. COOMBE, CONTINUED:

23 Q. Whose handwriting is that?

24 A. David Smith.

25 MS. COOMBE: And the next page, please.

BRIAN E. SHEA - Direct By Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. Whose handwriting?

3 A. David Smith.

4 Q. And the next page?

5 A. David Smith.

6 Q. How about the handwriting, if we could go back,
7 that's in blue to the right, whose handwriting is that?

8 A. That's mine.

9 Q. Okay.

10 MS. COOMBE: Could we look now at the typed
11 version of GB41C.

12 BY MS. COOMBE, CONTINUED:

13 Q. Mr. Shea, first of all, tell us what this
14 document is, the part that we just looked at?

15 A. This document was written by David Smith after
16 meeting about the transactions that were on MSTF books, and
17 it was David Smith's scheme or master plan to how to
18 address all these transactions.

19 Q. Did you ever receive a copy of this?

20 A. I believe I did.

21 Q. When did you get it?

22 A. In the fall of 2009, probably in October.

23 Q. Why did Mr. Smith give this to you?

24 MR. DREYER: Objection, Your Honor.

25 THE COURT: If he knows, overruled.

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. Mr. Smith gave this to me so I could do the
2 accounting to disguise these transactions as he has
3 outlined in this document.

4 BY MS. COOMBE, CONTINUED:

5 Q. Okay. Let's go through the typewritten version
6 now. At the top it says: Fund advances to MSTF. And then
7 there are a number of amounts listed. Do you recognize
8 those as being from the Four Funds?

9 A. Yes.

10 Q. Are those related to any of the topics that we
11 discussed last evening?

12 A. Yes.

13 Q. Could you tell us which one?

14 A. The topic that -- these were loans that went
15 from the Four Funds to McGinn, Smith Transaction Funding,
16 and then the money came out of McGinn, Smith Transaction
17 Funding and went to McGinn, Smith & Company either through
18 preferred stock or fees in order to fund their payroll.

19 Q. And it states: These should not be loans. The
20 advances of 11/14/08 and 11/26/08 are payments on behalf of
21 MSA MSCH.

22 What are those referring to?

23 A. McGinn, Smith Advisors and McGinn, Smith Capital
24 Holdings.

25 Q. For fees due from the funds through November 26,

BRIAN E. SHEA - Direct By Ms. Coombe

1 2008, \$275,000.00 has been advanced to MSTF and passed
2 through to MS.

3 Do you understand that to refer to the
4 broker-dealer?

5 A. Yes.

6 Q. On September 23, 2008, one-fifty and
7 November 14, 2008, one twenty-five. The advances of
8 4/14/09, two fifty, and 5/1/09, twenty-five, are payments
9 on behalf of MSA and MSCH for fees due them for the funds.
10 These should be applied to the running balance of customer
11 advances.

12 Mr. Shea, is this the first time you ever heard
13 anyone suggest that these transactions were somehow related
14 to MSA and MSCH?

15 A. Around this time period I don't know if I heard
16 it orally from Mr. Smith before this, but it was the first
17 time I had seen documentation regarding that.

18 MS. COOMBE: Could we look at the next page,
19 please.

20 BY MS. COOMBE, CONTINUED:

21 Q. We should simply run a balance due MSTF for
22 advances, debts, and receipt of fees on behalf of MSCH and
23 MSA, credits, and calculate running balance at eight
24 percent.

25 This would leave an existing balance, which we

BRIAN E. SHEA - Direct By Ms. Coombe

1 would then continue to make payments as an offset to our
2 fees.

3 Accrued fees for each of the funds should be
4 debted for these advanced to MSTF. Are there any other
5 entities that we did this for? If so, reconcile the
6 correct accruals for fees.

7 What is this referring to, Mr. Shea?

8 A. This is referring that there was fees that would
9 be accrued at the Four Funds that were due to McGinn, Smith
10 Advisors and McGinn, Smith Capital Holdings, and that those
11 balances should be accrued on their books and then offset
12 the amounts advanced to MSTF. So it is basically asking
13 you to convert the loans from the Four Funds to offset of
14 fees against the accruals to MSA and MSCH.

15 Q. Thus, we were using our fees to pay customer
16 advances.

17 Is that what actually happened, Mr. Shea?

18 A. No.

19 Q. What actually happened?

20 A. They were using funds of McGinn, Smith
21 Transaction Funding to pay preferred customers.

22 Q. It continues: We obviously should not have used
23 MSTF as our personal bank, but TMM -- who does that refer
24 to?

25 A. Timothy Michael McGinn.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. Had access to the cash, and we from, and then
2 there is a blank here.

3 Can you make out that next word, Mr. Shea, if
4 you look at the handwritten copy?

5 A. TMM had access to the cash, and we did not
6 deposit MSTF. I can't really tell.

7 Q. Once the payment history was established there,
8 then it made sense to cover those payments with our
9 deposits, \$550,000.00.

10 Is that what actually happened, Mr. Shea?

11 A. No, that's not what actually happened. The
12 Funds loaned money to MSTF, and those were loans that were
13 documented in loan documents and booked as loans, and
14 then -- so the offsetting against those payments was
15 improper accounting.

16 Q. It continues: We need to complete the circle
17 and deposit sufficient fees to pay off the MSTF balance
18 including interest.

19 Was any real money ever moved, actual money
20 transferred among accounts to repay the MSTF that had been
21 used for these other purposes?

22 A. No.

23 Q. The fact that we have documents showing a loan
24 to MSTF is simply our accounting for the distribution.

25 Was that the accurate accounting, Mr. Shea?

BRIAN E. SHEA - Direct By Ms. Coombe

1 Mr. Shea?

2 A. In one of the drafts of the schedules that we
3 discussed yesterday, they were either identifying notes or
4 I didn't locate the core transaction yet through my
5 research, but I later did.

6 Q. We really need to track these down if at all
7 possible.

8 Is there a signature or anything on the
9 handwritten version?

10 A. No.

11 MS. COOMBE: Could we look at the next page,
12 please. I am sorry. Go back to GB41C. And could we go
13 back to page eight and then to the end of the notes that we
14 just read, next page, next page. Next, next. If we could
15 go back one. Thanks, Ron.

16 BY MS. COOMBE, CONTINUED:

17 Q. Do you see the portion in blue ink, Mr. Shea?

18 A. Yes.

19 Q. Why did you write that next to those entities?

20 A. I believe the \$74,230.00 I thought was an
21 interest payment on behalf of MSTF to MSTF investors.

22 Q. Was it?

23 A. No, it was not. It was later determined to be
24 part of bucket number one which is payments to investors in
25 the Four Funds.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. Okay, and then under the next transaction you
2 have written something to the right there?

3 A. So that would be FEIN. So I found the
4 spreadsheet that would indicate that these were payments to
5 preferred investors in FEIN and had a spreadsheet to
6 support that.

7 MS. COOMBE: Can we look at the next page,
8 please.

9 BY MS. COOMBE, CONTINUED:

10 Q. What is this, Mr. Shea?

11 A. This is Mr. Smith's handwriting. He is running
12 some kind of cumulative balance of these amounts with days
13 and interest, typical of schedules that you would create.

14 MS. COOMBE: Could we look at the next page,
15 please.

16 BY MS. COOMBE, CONTINUED:

17 Q. What is this?

18 A. More of the same thing. These are advances from
19 MSTF calculating a running balance.

20 Q. Whose handwriting is this?

21 A. David Smith's.

22 MS. COOMBE: Next page, please.

23 BY MS. COOMBE, CONTINUED:

24 Q. What is this?

25 A. This is a calculation of 2009 interest. Again,

BRIAN E. SHEA - Direct By Ms. Coombe

1 running balance of the amounts advanced, calculating the
2 days, coming up with a total amount owed to MSTF.

3 MS. COOMBE: And the next page, please.

4 BY MS. COOMBE, CONTINUED:

5 Q. Could you tell us what this is?

6 A. I am sorry. I was looking at wrong page before.

7 Q. Okay. Is this the page you were looking at
8 before?

9 A. Yes.

10 Q. Could you tell us what this page is then?

11 A. Yes. This page is 2009 from the running balance
12 calculating interest by day with the running total that's
13 due MSTF.

14 Q. Let's go to the page before this and make sure
15 we are all squared away. Have you already explained this
16 page to the jury?

17 A. I don't believe so.

18 Q. Could you, please?

19 A. These are 2009 payments to investors that were
20 part of any number of those buckets and the running
21 balance.

22 Q. Is this all Mr. Smith's handwriting?

23 A. Yes.

24 MS. COOMBE: Could we go back to the
25 beginning of this exhibit, please.

BRIAN E. SHEA - Direct By Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. Whose handwriting is this, Mr. Shea?

3 A. David Smith's.

4 Q. Tell us what this refers to?

5 A. This is the schedule of fees owed by the Four
6 Funds to McGinn, Smith Advisors and McGinn, Smith Capital
7 Holdings at the end of the year 2007. So the Funds in
8 their private placement were allowed to pay certain fees,
9 and he calculated these fees that should have been accrued
10 or paid through that point in time by each one of the Four
11 Funds, TAIN, FAIN, FEIN, and FIIN.

12 Q. Were those funds paying investors at that time?

13 A. Not at the time this was written.

14 Q. Just to make sure we are all clear on this. At
15 the time this was written, had you seen any suggestion or
16 talked to anyone that what was really going on is this
17 accrual of fees as opposed to the money being transferred
18 directly from the Four Funds to MSTF and then to the
19 broker-dealer?

20 A. I am sorry. Can you say that again?

21 Q. Sure. At the time that you were involved with
22 Mr. Smith and in creating these false accounting entries,
23 it wasn't until this time that Mr. Smith first suggested to
24 you that any of this had anything to do with MSA or MSCH?

25 A. That's correct.

BRIAN E. SHEA - Direct By Ms. Coombe

1 MS. COOMBE: Could we look at the next page,
2 please.

3 BY MS. COOMBE, CONTINUED:

4 Q. Whose handwriting is this?

5 A. It is David Smith.

6 Q. Just tell us generally what this is?

7 A. It is a continuation from the first page, which
8 is the total fees that were accrued to each one of the Four
9 Funds. And then he subtracted out the amounts that were
10 categorized as loans, to come up with a running balance of
11 fees that were continued to be accrued.

12 MS. COOMBE: Could we look at the next page,
13 please.

14 BY MS. COOMBE, CONTINUED:

15 Q. Do you recognize this, Mr. Shea?

16 A. Yes.

17 Q. What is it?

18 A. This is an output from Quicken from McGinn,
19 Smith Transaction Funding. It is downloaded probably to
20 Excel.

21 Q. Is this something that you prepared?

22 A. Either myself or Brian Cooper prepared this.

23 Q. What does it relate to?

24 A. This is output from the account due from McGinn,
25 Smith Advisors and McGinn, Smith Capital Holdings after all

BRIAN E. SHEA - Direct By Ms. Coombe

1 the accounting entries have been posted.

2 Q. After the new October 12, 2009, accounting
3 entries?

4 A. Yes.

5 MS. COOMBE: Could we look at the next page,
6 please.

7 BY MS. COOMBE, CONTINUED:

8 Q. Is that a continuation of that same schedule?

9 A. Yes. It is page two of it.

10 MS. COOMBE: Could we look at the next page.

11 BY MS. COOMBE, CONTINUED:

12 Q. What is it?

13 A. This is a schedule that shows the advances that
14 the Four Funds made to McGinn, Smith Transaction Funding.
15 That's David Smith's handwriting in the middle on the lined
16 piece of paper.

17 Q. Whose handwriting is that up at the top?

18 A. Up at the top is my handwriting. It is -- so
19 the DT MSA MSCH would be notes that I took as a result of
20 discussions or reviewing this work for Mr. Smith about what
21 account to create and how to handle these transactions.

22 MS. COOMBE: Can we look at the next page,
23 please.

24 BY MS. COOMBE, CONTINUED:

25 Q. What is this, Mr. Shea?

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. This is -- it looks like an output from McGinn,
2 Smith Transaction Funding, Quicken again. It has got a
3 running balance of the account, DF, due from, MS Advisors
4 and MSCH. So it was output with the transactions, and then
5 the days were added and interest was calculated.

6 Q. Okay.

7 MS. COOMBE: Next page, please.

8 BY MS. COOMBE, CONTINUED:

9 Q. Mr. Shea, tell us generally whose handwriting is
10 that, does this have anything to do with the false
11 accounting entries we have been talking about?

12 A. It is David Smith's handwriting. And yes.

13 MS. COOMBE: Next page, please. That's it.

14 BY MS. COOMBE, CONTINUED:

15 Q. All right. I want to direct your attention to a
16 conversation that you testified about yesterday that you
17 had with Mr. Smith when he instructed you to make false
18 accounting entries. Do you remember talking about that
19 yesterday?

20 A. Yes.

21 Q. Did you challenge or question Mr. Smith about
22 making these entries?

23 A. I don't recall challenging him.

24 Q. Mr. Shea, I am handing you Government's
25 Exhibit 1. It has been admitted into evidence, and I do

BRIAN E. SHEA - Direct By Ms. Coombe

1 not seek to admit it at this time.

2 I want you to turn -- first of all, can you tell
3 us what that is?

4 A. This is a memorandum of interview prepared by
5 Alyssa Daversa of a meeting that I had with a variety of
6 government officials on June 17, 2010.

7 Q. I would like to direct your attention to
8 Paragraph 27. I would like you to read that to yourself
9 silently. And when you are done, please let me know.

10 A. I am done.

11 Q. Okay. I will take that back. Thank you.
12 Mr. Shea, does that refresh your recollection about the
13 conversation you had with Mr. Smith?

14 A. It does.

15 Q. Could you please tell us what you now remember?

16 A. As we discussed the transaction, I asked
17 Mr. Smith about how these monies would be paid back or what
18 were we really doing here. He said, this is my money. It
19 is our money due to our companies MSA and MSCH, and I can
20 do with it whatever we want. Go ahead make the entries.

21 Q. I am showing you now Exhibit GH2, previously
22 admitted. What is this, Mr. Shea?

23 A. This is a letter from FINRA, regulatory
24 authority, dated September 30th to David Franceschi who was
25 one of the attorneys that represented the broker-dealer,

BRIAN E. SHEA - Direct By Ms. Coombe

1 requesting information.

2 Q. I would like to direct your attention to
3 Paragraph 1. That's a request for all Quicken data files
4 and included in there are MSTF and also TDM Cable Funding,
5 LLC; is that correct?

6 A. Yes.

7 Q. All right. I would like to direct your
8 attention to the fourth paragraph. It states:

9 If the aforementioned files are not up to date,
10 please indicate the following:

11 A, the date in which the file was last updated.

12 B, description of how the omissions was
13 discovered, when the omission was first discovered and by
14 whom.

15 C, if the omissions were caused by a failure on
16 the part of an employee, identify the employee responsible.

17 D, identify when and if corrective actions will
18 be undertaken to resolve the omissions and prevent
19 recurrences.

20 E, provide the supporting documentation required
21 to update the file to reflect current data.

22 Is it your understanding that this letter would
23 require that FINRA be told any of changes to any accounting
24 entries made after September 30th of 2009?

25 A. Yes.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. And did Mr. Smith, himself, ever see this
2 letter?

3 A. Yes.

4 Q. How do you know that?

5 A. I know that because I had a meeting with
6 Mr. Smith, and he had the letter in his hand, and we
7 discussed it, and he eventually gave me a copy of it.

8 Q. If we could go back to GB41B, please. Do you
9 see the date at the top there, 10/12/09, that's when you
10 made the false accounting entries; is that correct?

11 A. Yes.

12 Q. That was after the letter that we just looked
13 at?

14 A. Yes.

15 Q. I am showing you previously admitted
16 Exhibit GH6. This is an October 14, 2009, letter that
17 states that two CD ROM disks are enclosed to FINRA
18 containing the requested Quicken files. And if we look at
19 page two, you see that MSTF records were included; is that
20 correct?

21 A. Yes.

22 Q. If we could go back to page one, please. It
23 indicates that the individuals responsible for entering
24 data to the Quicken files were David Rees, Brian Cooper,
25 Brian Shea, and staff accountants.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Mr. Shea, when these accounting records were
2 submitted to FINRA, did they include the newly created
3 false accounting entries that we have been discussing?

4 A. Yes.

5 Q. Is there any explanation in the letter about
6 these false accounting entries?

7 A. No.

8 Q. Does the letter indicate the date in which the
9 file was last updated?

10 A. No.

11 Q. Does it describe how any omission was discovered
12 or when it was first discovered?

13 A. No.

14 Q. Does it identify when and if any corrective
15 actions would be taken?

16 A. No.

17 Q. Does it provide any supporting documentation?

18 A. No.

19 Q. I am showing you previously admitted
20 Government's Exhibit GB30 and GB31. Can we look at GB30
21 first, please. This is a memorandum or a letter dated
22 October 10th of 2009. Do you recognize this handwriting,
23 Mr. Shea?

24 A. Yes.

25 Q. Is this entire document in the same handwriting?

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. Yes.

2 Q. Whose is it?

3 A. David Smith's.

4 Q. Could you please look now at GB31? This is a
5 typewritten version of the same letter. It states:
6 client/attorney work product at the top. Attention
7 Jay Kaplowitz, et al., Gersten and Savage.

8 Who was Jay Kaplowitz?

9 A. He is an attorney for Gersten and Savage that
10 represented McGinn, Smith from time to time, the
11 broker-dealer and other entities.

12 Q. From David L. Smith, Timothy McGinn. It is
13 dated October 10th of 2009.

14 How many days was that before you made the false
15 accounting entries, Mr. Shea?

16 A. I believe it was two days before.

17 Q. It states: The following represents a summary
18 of the transactions effected through McGinn, Smith
19 Transaction Funding, LLC, on behalf of McGinn, Smith &
20 Company, MS; McGinn, Smith Capital Holdings, MSCH; McGinn,
21 Smith Advisors, MSA; and Four Investment, LLCs; First
22 Independent Income Notes, LLC, FIIN; First Excelsior Income
23 Notes, LLC, FEIN.

24 And then it goes on to describe the last two,
25 what we have been calling the Four Funds, right, Mr. Shea?

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. Yes.

2 Q. And Mr. Smith is referring to the broker-dealer
3 as MS?

4 A. Yes.

5 Q. It goes on to state: History. Starting in 2003
6 through 2005, the Funds were formed primarily to provide
7 capital through loans to private businesses. The Funds
8 were given wide latitude as to the type of financing that
9 could be provided and specifically permitted to invest in
10 MS affiliated companies.

11 Starting in late 2007, the Funds began to
12 realize a shortfall of income sufficient to meet the debt
13 obligations of the funds due to the under performance of
14 its loans and investments.

15 What does that mean, Mr. Shea?

16 MR. DREYER: Objection, Your Honor. The
17 letter speaks for, itself.

18 THE COURT: Overruled, if he knows. You may
19 answer.

20 A. The funds made a series of investments that had
21 a very unfavorable of outcome, the loss of principal or
22 couldn't make any interest or principal payments.

23 BY MS. COOMBE, CONTINUED:

24 Q. Starting in January of 2008 and culminating in
25 October of 2008, the Funds restructured its payments

BRIAN E. SHEA - Direct By Ms. Coombe

1 without note-holder approval.

2 What does that mean?

3 A. That David Smith had sent two letters to
4 investors describing the, what he believed the
5 circumstances that affected the performance of the other
6 funds and modifying, and then ultimately suspending
7 interest payments to the note-holders.

8 Q. This approach was discussed with Jay and agreed
9 upon due to the assumption that because of the capital
10 structure of the funds, note-holder approval was not
11 likely, and that senior note-holders would likely object.

12 Our approach was generally successful as we have
13 had limited arbitration filings due to the non-performance
14 of the Funds. To date, we have had six arbitration filings
15 out of over thirteen hundred investors.

16 What does the arbitration filings refer to?

17 A. It is customer complaints. When investors are
18 customers of the broker-dealer, they sign a form that says
19 their only action against the broker-dealer is through
20 arbitration. So if you have a complaint you would file
21 an arbitration. So if your investment didn't perform how
22 you thought it was represented, you would file an
23 arbitration.

24 Q. Mr. Shea, can you move that microphone any
25 closer?

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. Yes.

2 MS. COOMBE: Is that any better, ladies and
3 gentlemen.

4 Could we go to the next page, please.

5 BY MS. COOMBE, CONTINUED:

6 Q. However, these arbitrations, in addition to
7 questions that arose during a FINRA routine audit in the
8 fall of 2008, have sent FINRA on a never-ending request for
9 information.

10 Now, at this time in the fall of 2009, had FINRA
11 been asking for documents?

12 A. Yes.

13 Q. Had FINRA been on site at the broker-dealer?

14 A. Yes.

15 Q. We have had limited legal representation from
16 Stradley, Ronon, Stevens, and Young, LLP of Philadelphia,
17 who was handling one of the arbitration cases for our
18 Philadelphia broker representative.

19 Tim and I have sat with an on-the-record, OTR,
20 interview with FINRA in April of 2009.

21 In June of 2009, FINRA sent six auditors to our
22 offices to review the Funds. We have supplied them with
23 approximately thirty thousand pages of documentation and
24 over twenty thousand e-mails.

25 On September 30, 2009, FINRA asked for

BRIAN E. SHEA - Direct By Ms. Coombe

1 additional information for a large number of related
2 entities, some going back as far as 1982.

3 And there is a reference to, see Exhibit 1.

4 Do you understand that reference to the
5 September 30, 2009, letter to be that request from FINRA
6 that we just looked at?

7 A. Yes.

8 Q. In preparing the documentation, we became aware
9 that we had run a number of related transactions through
10 MSTF that were specific to the interests of MS affiliates
11 and its principals. And because of outside investment in
12 MSTF, the use of MSTF as the transaction vehicle was most
13 likely improper.

14 What is your understanding of what this refers
15 to?

16 A. Those were payments to the preferred investors,
17 the three buckets that we discussed yesterday.

18 Q. In addition, the documentation supporting these
19 transactions was either unavailable or not up to date.
20 Realizing the possibility that the appearance of these
21 transactions could be interpreted as the improper use of
22 investors funds, or the commingling of funds, we have
23 sought your counsel on how to rectify this mistake.

24 Mr. Shea, did you understand that this was just
25 the result of a mistake?

BRIAN E. SHEA - Direct By Ms. Coombe

1 MR. JONES: Objection.

2 MR. DREYER: Objection, Your Honor.

3 THE COURT: Sustained.

4 BY MS. COOMBE, CONTINUED:

5 Q. Unfortunately we were under pressure to deliver
6 these documents to FINRA by October 13, 2009. The
7 transactions in question fall into three categories:

8 The first, advances from MSTF to McGinn, Smith &
9 Company.

10 What is your understanding about what this
11 refers to?

12 A. Those were fees paid to -- from MSTF to McGinn,
13 Smith & Company that there was no commercial reason or
14 wasn't allowed for in the private placement.

15 Q. Two, loans from the Funds to MSTF.

16 What is your understanding about what this
17 refers to?

18 A. It was loans from the Funds that were on the
19 Funds books as loans and MSTF books as loans.

20 Q. And three, advances from MSTF?

21 A. Three was the three buckets that we discussed
22 yesterday, payments to preferred investors.

23 Q. Okay. It states: Advances from MSTF to
24 customers of McGinn, Smith of whom we had decided to
25 support because of their high level of importance to the

BRIAN E. SHEA - Direct By Ms. Coombe

1 firm and to whom we were attempting to bridge the gap of
2 their shortfall in income due to the non-performance of
3 their investment in the Funds.

4 Items number one and number two are of less
5 concern to us than item number three. The loans from the
6 Funds are supported by personal guarantees and assignment
7 of fee income due to MSA and MSCH from the Funds.

8 What personal guarantees were in place,
9 Mr. Shea?

10 A. I didn't witness any documents that supported
11 personal guarantees.

12 Q. Advances to MS are also supported by the
13 aforementioned guarantees and assignment, but are
14 problematic because if they are characterized as loans,
15 which they are not, the loans are not on the books of MS.
16 And if they were, would have negative capital consequences.

17 Why would it have been problematic to book the
18 advances to the broker-dealer as loans?

19 A. The loans are not included in your net capital.
20 They would be counted as a liability. So even though you
21 got the cash, you would have an offsetting liability, and
22 your capital would have been below the amount required by
23 FINRA.

24 Q. It continues: They were originally booked as
25 advisory fees, but in reviewing the books for

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1 dissemination, it is apparent to us that there is no place
2 in the PPM of MSTF that permits fees payable to McGinn,
3 Smith -- I am sorry, to MS.

4 And you understand that to be the broker-dealer?

5 A. Yes.

6 Q. Is it your understanding that the MSTF PPM did
7 not allow it to pay advisory fees to the broker-dealer?

8 A. Yes.

9 Q. Why we booked fees that are clearly owed by the
10 Funds to MSCH and MSA, and then ran them through the books
11 of MSTF, is absolutely inexplicable and incredibly stupid.

12 Mr. Shea, were the fees clearly owed by the
13 Funds to MSCH and MSA related to these transactions?

14 A. No.

15 Q. Our solution is simply to book them as advances
16 which are due from MSCH and MSA supported by the fees owed
17 to us.

18 What is your understanding of what this refers
19 to?

20 A. This is suggesting to take what was loans on the
21 Four Funds, and so you would have an item that said loan to
22 MSTF, and instead of it being a loan offsetted against
23 payments that were due MSA and MSCH.

24 Q. Is that what actually happened?

25 A. No.

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1 Q. It continues: Number three is where the major
2 risk is. There is no supportable or plausible reason why
3 monies from MSTF were used to pay clients of the firm.

4 Are you aware of any supportable or plausible
5 reason why MSTF money was used to pay non-MSTF investors?

6 A. No.

7 Q. While they were doing it at the request of MSCH
8 and MSA.

9 Did you ever see any documentation that MSA and
10 MSCH had made these requests?

11 A. No.

12 Q. The first time you heard anything about this was
13 in the fall of 2009 when Mr. Smith suggested that you make
14 those false accounting entries?

15 A. Yes, and before that, he had discussed the fees.

16 Q. It continues: And those entities clearly have
17 the wherewithal to repay the monies from the fees due them.
18 The transactions simply have no place in MSTF. The
19 immediate and pressing problem is how to characterize and
20 justify those payments from MSTF and how to get the money
21 back to MSTF ASAP.

22 Was there money available to move among entities
23 at this time?

24 A. No.

25 Q. Jay has expressed a concern that repaying the

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1 monies at the same time as we are being asked to provide
2 financial files, looks like a cover up. Having discovered
3 this mistake and realizing the appearance of impropriety or
4 worse, I seek a solution that calls for immediate
5 restitution with some reasonable explanation for our
6 behavior.

7 Was there money available for immediate
8 restitution?

9 A. No.

10 Q. Mr. Shea, did you ever see any documentation
11 indicating that this was a mistake?

12 A. No.

13 Q. That will probably call for creativity beyond
14 anyone's ability. I have enclosed several exhibits,
15 Number 1, the September 30th letter from FINRA. Number 2,
16 the MSTF PPM. Gersten has the PPMs of the Funds.
17 Number 3, client payments made through MSTF totalling just
18 under \$600,000.00.

19 And there is a calculation underneath.

20 What does that refer to, Mr. Shea, in number
21 three?

22 A. Number three was the three buckets we discussed
23 yesterday, payments to preferred investors.

24 MS. COOMBE: And the next page, please.

25 BY MS. COOMBE, CONTINUED:

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1 Q. Exhibit 4, this shows a number of Quicken
2 entries that have been identified through:

3 A, 1.4 million dollar purchase of MS preferred
4 stock. This is entirely appropriate and was called for in
5 the PPM.

6 B, offsetting payments of \$50,000.00 to McGinn,
7 Smith, which evidently were simply in error.

8 C, \$275,000.00 in advances to MS as advisory
9 fees, but MS cannot really justify based on the objectives
10 of the PPM. These were not documented, and no one can even
11 remember what they were for.

12 The firm has been under pressure for lack of net
13 capital for some time.

14 How long had the broker-dealer been under
15 pressure for lack of net capital?

16 A. When I returned there immediately in April of
17 2009, I know from that point, on, I personally experienced
18 it every month, and I have seen a document that said that
19 there was further pressure in earlier months.

20 Q. And it continues on: But again, why we did not
21 just take the fee income due to MSA and pay MS is a
22 complete mystery. We need to repay this money also as it
23 is not an appropriate expense for MSTF.

24 What is this referring to?

25 A. This is saying that the Four Funds should have

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1 just paid the fees that were due to MSA, and they should
2 have paid it or paid it directly to MS as an advisory fee.

3 Q. Is that what actually happened?

4 A. No.

5 Q. Was any money paid back with real money
6 transferred among banks accounts?

7 A. No.

8 Q. It continues on: D, underwriting commissions
9 paid to MS entirely appropriate.

10 Exhibit 5. This is the Quicken file that shows
11 three loans to MSTF from FEIN, FIIN, and TAIN.

12 I am not going to read all of the numbers, but
13 they add up to \$550,000.00.

14 While these loans were made for working capital
15 purposes, since they were made to an entity that is owned
16 by principals of MS, we should probably have loan
17 guarantees and collateral in place. Assignment of the fee
18 income once again is most fungible and appropriate
19 collateral.

20 Does this refer to the payroll diversions that
21 we talked about yesterday, Mr. Shea?

22 A. Yes. These are funds or dollar amounts that
23 came from the Funds into MSTF and then on to the
24 broker-dealer.

25 MS. COOMBE: Next page, please.

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1 BY MS. COOMBE, CONTINUED:

2 Q. If we aggregate all three areas of activity with
3 relationships to MS entities, MSTF has assets of, the sum
4 of two numbers, \$872,281.00 and liabilities of \$550,000.00
5 or a net due from of just over \$300,000.00.

6 Thus, if we were to net everything and pay MSTF
7 from MSA and MSCH the sum of \$322,281.00, we would square
8 the books of MSTF, notwithstanding the inappropriate
9 transactions that got us there.

10 Was any money actually moved, Mr. Shea?

11 A. No.

12 Q. We must show a profit motive for MSTF. So they
13 are due in interest on the \$872,000.00 and change. They
14 must also pay interest on their loans from the Funds of
15 \$550,000.00. These loans were actually properly
16 documented.

17 MS. COOMBE: Next page, please.

18 BY MS. COOMBE, CONTINUED:

19 Q. And carried an interest rate of twelve percent.
20 The net monies owed to MSTF of \$322,281.00, plus and minus
21 interest, is well secured by the personal guarantees of Tim
22 and Dave.

23 Were there any personal guarantees from
24 Mr. McGinn and Mr. Smith?

25 A. I haven't seen any documentation of that.

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1 Q. And the fees owed by the Funds to MSCH and MSA
2 of approximately 1.6 million dollars and change. Those
3 fees have been accrued through 12/31/07, and do not include
4 any accruals for 2008 or 2009.

5 The reason for that is in my investor letters of
6 January, April, and October of 2008. I represented to the
7 note-holders of the Funds that MSCH and MSA would waive
8 their fees in an effort to participate in the sacrifice
9 that note-holders were being asked to endure.

10 We are under no obligation to do so, as the fees
11 are not subordinate to anything. In fact, MS also waived
12 commissions of over \$800,000.00 that they have paid their
13 brokers, but never collected from the Funds.

14 Hopefully the reader of this epistle has gained
15 an understanding of our perilous position brought on by our
16 own stupidity. These actions were a result of not thinking
17 things through, not of any attempt of personal enrichment.

18 Mr. Shea, is it your understanding that the
19 false accounting entries had any effect of personal
20 enrichment of Mr. McGinn and Mr. Smith?

21 MR. JONES: Objection.

22 MR. DREYER: Objection.

23 THE COURT: Sustained.

24 BY MS. COOMBE, CONTINUED:

25 Q. We need to rectify the situation hopefully with

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1 as little damage to us personally as can be avoided. In
2 the current climate, any activity that is not by the book
3 and properly documented can bring severe punishment.
4 Thanking you for your assistance.

5 A. May I have another water, please?

6 Q. Mr. Shea, yesterday you also mentioned some
7 payments that Mr. McGinn had taken from an MSTF account,
8 and I would like to talk about those now.

9 I am showing you a previously admitted Exhibit
10 GB1A. Mr. Shea, are you familiar with this chart?

11 A. Yes.

12 Q. What does the red arrow show?

13 A. It shows wire transfers to Mr. McGinn's
14 Mercantile Bank account on specific dates and specific
15 dollar amounts.

16 Q. Okay, and there is a wire for August 22, 2008,
17 \$50,000.00. September 8, 2008, \$50,000.00. October 22,
18 2008, \$20,000.00. October 27, 2008, \$50,000.00.
19 November 7, 2008, \$30,000.00. And July 8th of 2009,
20 \$30,000.00. That's a grand total of \$230,000.00.

21 Did Mr. McGinn ever make a payment to MSTF?

22 A. He did.

23 Q. How much was that for?

24 A. One hundred thousand dollars.

25 Q. Are you familiar with how these transactions

BRIAN E. SHEA - Direct By Ms. Coombe

1 were characterized on the books and records of MSTF?

2 A. Yes.

3 Q. How were they characterized?

4 A. They were characterized as loans from
5 Mr. McGinn.

6 Q. Based on your experience, are loans normally
7 documented by something other than an accounting entry?

8 A. Yes.

9 Q. What?

10 A. It would normally be some sort of written
11 document that was dated, had an interest rate, and some
12 repayment terms.

13 Q. Were there any -- was there any such
14 documentation for these amounts of money that Mr. McGinn
15 took from MSTF?

16 A. No.

17 Q. Did you ever talk to Mr. Smith about this money
18 that Mr. McGinn received from the MSTF account?

19 A. I did.

20 Q. When did you talk to him?

21 A. I talked to him in the fall of 2009.

22 Q. What did he say?

23 A. He said that Mr. McGinn should have not taken
24 loans from this company. It is not allowed per the private
25 placement. Take a look around and see what other

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1 transactions were going on around the same time and get
2 back to me.

3 Q. Did you do that?

4 A. I did.

5 Q. Did you identify any other transactions?

6 A. I did.

7 Q. What did you identify?

8 A. I identified transactions that were occurring
9 around the same time at a company called NEI Capital.
10 Mr. Smith (sic) had taken \$360,000.00 worth of what were
11 characterized as loans at the time. And so I reported that
12 back to him.

13 Q. When you told Mr. Smith about that, did he say
14 anything to you?

15 A. He did. He gave me instructions to see what I
16 could come up with to make the loans appear that they came
17 from NEI Capital instead of McGinn, Smith Transaction
18 Funding.

19 Q. Did you follow his instructions?

20 A. I did.

21 Q. What did you do?

22 A. I created false accounting entries on both MSTF
23 and NEI Capital to make it reflect that Mr. McGinn had not
24 taken loans from MSTF, that his advances had, in fact, come
25 from NEI Capital.

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1 Q. When did you make those false accounting
2 entries?

3 A. I believe it was on November 2, 2009.

4 Q. I am showing you now previously admitted
5 Exhibit GB1D. Could you please tell us what this is,
6 Mr. Shea?

7 A. This is a document that I believe the government
8 created that shows the entries on McGinn, Smith Transaction
9 Funding and NEI Capital.

10 Q. I am sorry to interrupt. Have you reviewed this
11 document?

12 A. Yes, I did.

13 Q. And is it an accurate summary of the documents
14 that are noted here on it? Is it an accurate summary of
15 what you just described to us?

16 A. Yes.

17 Q. Okay. I could direct your attention to then if
18 you could explain to us what this shows?

19 A. It shows before November 2, 2009, the books and
20 records of MSTF would show that Mr. McGinn had taken loans
21 of \$130,000.00, which is the \$230,000.00 that advanced and
22 the \$100,000.00 that he paid back.

23 On the NEI books at that time he had only taken
24 loans of \$210,000.00.

25 And then on November 2nd when I made the false

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1 accounting entries, MSTF books reflected zero was due from
2 Mr. McGinn and \$130,000.00 was added to the amount at NEI.

3 Q. What would someone looking at the books and
4 records of MSTF and NEI Capital think had happened after
5 November 2nd of 2009?

6 MR. DREYER: Objection, Your Honor.

7 MR. JONES: Objection.

8 THE COURT: Sustained as to form.

9 MS. COOMBE: I will rephrase my question.

10 BY MS. COOMBE, CONTINUED:

11 Q. After November 2nd of 2009, what did the books
12 and records of MSTF show regarding the \$130,000.00
13 \$230,000.00 that Mr. McGinn had taken?

14 A. It would appear from the balance sheet that he
15 hadn't taken any loans from MSTF.

16 Q. How about after November 2nd of 2009, what did
17 the NEI books and records state about how much money
18 Mr. McGinn had taken?

19 A. It would appear that he had taken \$340,000.00
20 worth of loans from NEI.

21 Q. Were those entries accurate?

22 A. No.

23 Q. I am handing you now previously admitted
24 Government Exhibit GB51. What is this, Mr. Shea?

25 A. That is a balance sheet from -- it is output

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1 from Quicken, the accounting software for McGinn, Smith
2 Transaction Funding, which is noted in the upper left-hand
3 corner.

4 It was created on February 3, 2010, which is in
5 the upper right-hand corner. That is my handwriting that
6 says 5:00 p.m. And the balance sheet in the middle as of
7 12/31/09, so that is the date that I selected to print the
8 information that would be effective as of that date.

9 Q. Is there an entry regarding a due from
10 Mr. McGinn?

11 A. Yes, approximately three quarters of the way
12 down, there is a line that says DF-TMM. And then you
13 scroll across, you can see that it is zero.

14 MS. COOMBE: Could we have that? It is the
15 ninth up from the -- there we go. Thank you, Ron.

16 BY MS. COOMBE, CONTINUED:

17 Q. Is that what you were just referring to,
18 Mr. Shea?

19 A. Yes.

20 Q. Was that an accurate record?

21 A. No.

22 Q. Are you aware of anything in the PPM for MSTF
23 that allowed Mr. McGinn to take money directly?

24 A. No.

25 Q. I am showing you previously admitted Government

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1 Exhibit GB49. What is this, Mr. Shea?

2 A. The first page is entirely my handwriting, and
3 it looks like notes or -- yes, notes that I had taken. One
4 of the -- items one through six are in pencil.

5 And then there is some writing in pen, and I
6 believe this document represents my preparation for a
7 meeting with Mr. Smith or a result of that meeting with
8 items one through six, but the blue was certainly after the
9 meeting with him or during the meeting that I took notes
10 and documented some of the incorrect accounting that I did.

11 Q. Is any of this related to the false accounting
12 entries that you made to the NEI and MSTF books?

13 A. Yes.

14 Q. What is related to that?

15 A. Under item seven, the fourth line down that
16 says: Offset TMM \$130,000.00 due to NEI. That certainly
17 was part of the account entry that I did.

18 Q. Is there anything else at the top of the page
19 that refers to the false accounting entries made to the
20 MSTF and NEI books?

21 A. There is certainly the -- in the middle under
22 item three, you can see the calculation there, that there
23 is \$165,000.00 and then a loan of two sixteen. And then I
24 subtracted \$130,000.00, which related to the accounting
25 entry and the net of the \$86,500.00, which all tied out to

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1 the amounts in the -- help settle up the due to/due from
2 between the two companies as a result of that accounting.

3 MS. COOMBE: Could we please looking at page
4 two of this exhibit.

5 BY MS. COOMBE, CONTINUED:

6 Q. What is this, Mr. Shea?

7 A. This is an output from Quicken from McGinn,
8 Smith Transaction Funding. And it is their general ledger
9 or bucket due to NEI Capital.

10 Q. And is there an entry for November 2nd, 2009?

11 A. There is. It reflects on November 2, 2009, that
12 I offset on MSTF books the amount due to NEI Capital
13 against the loan balance, where it says category DF-TMM,
14 and so it would have reduced or eliminated and disguised
15 his loan balance and offset it against the due to/due from
16 NEI.

17 MS. COOMBE: Can we look at the next page,
18 please.

19 BY MS. COOMBE, CONTINUED:

20 Q. What is this?

21 A. This is output from NEI Capital. So this was
22 the offsetting account that I would have printed out to
23 make sure that the due to/due from each company tied out.
24 And again on November 2nd, you can see I made the
25 offsetting entry of \$130,000.00 due from TMM, so it

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1 increased his loan balance at NEI Capital by \$130,000.00
2 and offset the due to/due froms.

3 Q. I am handing you now previously admitted
4 Exhibit GB50. Can you tell us what this is, Mr. Shea?

5 A. This is entirely my handwriting. These are
6 notes, I believe these are notes as a result of a meeting
7 with Mr. Smith.

8 Q. And do they refer to any of the entries that we
9 talked about today?

10 A. They do. Item two after the hashmark, it says
11 DF MSA MSCH. So that would have been a note that I was
12 receiving direction as to what that account was.

13 Q. I am handing you previously admitted
14 Exhibit GB44. Could you please tell us what this is?

15 A. This is output from McGinn, Smith Transaction
16 Funding, MSTF's Quicken books. The account DF-TMM, due
17 from Timothy McGinn. This report is dated 10/26/09, and it
18 reflects a balance as of 7/8/09 of \$130,000.00.

19 Q. Is this before or after you made the false
20 accounting entries?

21 A. This is before.

22 Q. Is there any entry there that shows that
23 Mr. McGinn had taken money from MSTF?

24 A. Yes.

25 Q. What are those entries?

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1 A. There is a series of entries, and I won't go
2 over the date and dollar amounts, but I will just go to the
3 dollar amounts. It was \$50,000.00, \$50,000.00, \$20,000.00,
4 \$50,000.00, \$30,000.00.

5 There was a repayment of \$100,000.00 and then
6 another and final advance of \$30,000.00.

7 Q. There is some handwriting at the bottom of this
8 document. Do you recognize any of it?

9 A. I believe the handwriting which is pencil on the
10 left is Brian Cooper's and the handwriting on the right
11 adding up the numbers is Mr. McGinn's.

12 Q. I am handing you previously admitted
13 Exhibit GB45. What is this?

14 A. This is again, output from Quicken for NEI
15 Capital. You can see in the upper left-hand corner. The
16 report over on the right is dated 10/31/09. It is a
17 balance sheet by quarter.

18 Q. Are there any entries regarding Mr. McGinn?

19 A. There are. Just above the total assets line is
20 a line due from TMM, and the ending balance as of 10/31/09
21 shows \$210,000.00.

22 Q. Was that the amount on those books before you
23 made the false accounting entries?

24 A. Yes.

25 Q. After the false accounting entries, what

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1 happened to that amount?

2 A. The amount increased by \$130,000.00 to include
3 the funds that were taken from MSTF.

4 Q. I am showing you previously admitted
5 Exhibit GH14. This is a February 12, 2010, letter from
6 FINRA to Mr. Franceschi. Could you please look at
7 Paragraph 11 on the second page.

8 There is a request for all Quicken data files
9 for the following entities and B is NEI Capital.

10 Could you also look at Paragraph 10, please?

11 In connection with the staff's request dated
12 September 30, 2009, the firm provided the staff with
13 promissory notes associated with TDM Cable Funding, LLC and
14 Cruise Charter Ventures, LLC.

15 And it goes on to request that the firm provide
16 any and all promissory notes that had not been previously
17 provided to the staff including, but not limited to, NEI
18 Capital and TDMM Benchmark Trust 2009.

19 And it goes on and asks for some specific
20 detailed information.

21 Is it your understanding that FINRA had only
22 received documentation for some of the supposed loans that
23 Mr. McGinn and Mr. Smith had taken?

24 A. Yes.

25 Q. I am showing you now previously admitted

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1 Exhibit GF15. Would you please look at number eleven?

2 It states: Enclosed are the firm's Quicken data
3 files for NEI Capital?

4 A. Yes.

5 Q. And the Quicken data files that were produced at
6 the time, did they include the false accounting entries
7 that you had made?

8 A. They did.

9 Q. All right, and can you look at Paragraph 10. It
10 states: Provided herewith is a schedule of loan
11 transactions which satisfies your request.

12 And if we could look at the last page of the
13 exhibit, please.

14 Various loan transactions not evidenced by
15 promissory notes.

16 If you look at the last entry for NEI, it says:
17 NEI TMM, November 2, 2009, \$130,000.00, three percent rate
18 and the term of six years.

19 Is that accurate, Mr. Shea?

20 A. No.

21 Q. Why not?

22 A. Because those funds were actually advanced from
23 MSTF to Mr. McGinn.

24 Q. Did those funds come from NEI?

25 A. No.

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1 Q. I am handing you now previously admitted
2 Exhibit GA14. We start at the bottom. This is an
3 electronic mail message from Mr. McGinn to Ms. Dixon and
4 Ms. Birnbach. And do you know who they are?

5 A. Yes, they are employees at Mercantile Bank.

6 Q. And there are instructions about wiring money to
7 Mr. McGinn's account from MSTF. Is that one of the
8 transactions that we looked at?

9 A. Yes.

10 Q. And then there is an instruction about moving
11 money from Orchards Trust 08 to NEI Capital, LLC.

12 Number three, please issue check from NEI
13 Capital, LLC in the amount of \$40,000.00 payable to
14 Waterville Membership Services and overnight same to
15 Waterville Membership Services, attention to a woman's
16 name, who I will not attempt to pronounce, and the address
17 is there in Greenwich, Connecticut. Please indicate the
18 name of Matthew Rogers on the check.

19 Mr. Shea, what is your understanding of what
20 Waterville Membership Services is?

21 A. It is a membership services for Waterville Golf
22 Club, which is a golf club in Ireland.

23 Q. Do you have any understanding about what the
24 purpose of this payment was?

25 A. I believe it was Mr. Rogers --

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1 MR. JONES: Objection to what he believes.

2 THE COURT: Overruled. He may answer.

3 A. It was Mr. Rogers' initiation fee.

4 BY MS. COOMBE, CONTINUED:

5 Q. How did you learn about this transaction?

6 A. It was -- I either had this e-mail or I had some
7 instructions in the -- or some documentation in a bank
8 statement that said where the money was wired. And then I
9 had a discussion with Mr. McGinn, and he said to record the
10 amount as a loan from Matthew Rogers.

11 Q. Mr. Shea, you mentioned yesterday that you were
12 involved in submitting some back-dated promissory notes to
13 FINRA, and I would like to direct your attention to that
14 now.

15 I am showing you previously admitted
16 Exhibit GH10. What is this?

17 A. This is a cover letter that I prepared on
18 November 16, 2009, and attached promissory notes and mailed
19 them to FINRA.

20 Q. Is that your signature?

21 A. It is.

22 Q. Why did you prepare this letter?

23 A. Brian Cooper, who worked for me, came to my
24 office with these notes and said David Smith wants you to
25 mail these to FINRA.

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1 MS. COOMBE: Can we look at page two,
2 please.

3 BY MS. COOMBE, CONTINUED:

4 Q. Can you tell us generally what is attached to
5 the letter?

6 A. This is a promissory note dated October 2, 2006,
7 for \$352,341.00. So it is a note between Timothy McGinn
8 and TDM Cable Funding, LLC.

9 Q. Is there any other place in the document that
10 indicates when it was signed or when it was prepared?

11 A. No.

12 Q. When was this promissory note actually created?

13 A. November 2, 2009.

14 Q. What are the rest of the attachments to this
15 letter?

16 A. There is a series of promissory notes between
17 Mr. McGinn, Mr. Smith, and Matthew Rogers and TDM Cable
18 Funding and Cruise Charter Ventures.

19 Q. What are the dates that are on these promissory
20 notes?

21 A. These dates, I believe, are all dates that the
22 funds were actually advanced to these three individuals.

23 Q. Are there any dates on any of the promissory
24 notes indicating when they were actually prepared and
25 executed?

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1 A. No.

2 Q. When were they prepared?

3 A. They were prepared on November 2, 2009.

4 MS. COOMBE: Can we go back to page one,
5 please.

6 BY MS. COOMBE, CONTINUED:

7 Q. Mr. Shea, in your letter, did you disclose to
8 FINRA that these promissory notes had just been created?

9 A. No.

10 Q. Why not?

11 A. I should have. I knew that they were recently
12 created. It was misleading.

13 Q. Did you decide to do this on your own?

14 A. I did. I sent this letter on my own, but I
15 didn't sign any of these notes.

16 Q. Were you following any direction when you sent
17 this letter?

18 A. The direction was to send the notes to FINRA.

19 Q. Who did that direction come through?

20 A. It came from David Smith through Brian Cooper.

21 Q. Now, other than the accounting entries in these
22 back-dated promissory notes created to submit to FINRA, are
23 you aware of any documentation indicating that the money
24 Mr. McGinn, Mr. Smith, and Mr. Rogers received were
25 actually loans?

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. No.

2 Q. Are you aware of any interest rate that existed
3 before these back-dated promissory notes were prepared?

4 A. No.

5 Q. Any interest that had been paid?

6 A. No.

7 Q. Any regular repayment schedule?

8 A. No.

9 Q. Are you aware of whether Mr. McGinn and
10 Mr. Smith and Mr. Rogers took money from other LLCs which
11 were characterized on the books and records of the LLCs as
12 loans?

13 A. Yes.

14 Q. Are you aware that there were no promissory
15 notes, even back-dated promissory notes, created for other
16 transactions?

17 A. Yes, I am aware.

18 Q. So other than the accounting entries for those
19 other amounts of money that they received, are you aware of
20 any other documentation indicating that the money was
21 actually loans?

22 A. No.

23 Q. Any stated interest rate?

24 A. No.

25 Q. Any paid interest?

BRIAN E. SHEA - Direct By Ms. Coombe

1 A. No.

2 Q. Any regular repayment schedule?

3 A. No.

4 Q. Are you aware of whether Mr. McGinn and

5 Mr. Smith ever had to prepare personal financial

6 statements?

7 A. Yes.

8 Q. Were you involved in that process?

9 A. Yes.

10 Q. Why did they have to be prepared?

11 A. Through their either ownership or involvement in

12 a regulated insurance company, they had to submit financial

13 statements to both the State of Pennsylvania and the State

14 of Texas.

15 Q. Who prepared those?

16 A. Ron Simons.

17 Q. What was your role in their preparation?

18 A. I was the, I will call it, bird dog. I knew

19 there was a request. I believe I was getting requests from

20 an attorney that worked for the regulated entity saying

21 these financial statements have to be filed. And since I

22 was on site with Mr. McGinn and Mr. Smith that I could

23 facilitate getting the information from them or directly to

24 the accountant, Ronald Simons. So I was the facilitator of

25 trying to get it done by a certain deadline.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. Did you ever talk to Mr. McGinn about these
2 personal financial statements?

3 A. I did.

4 Q. What did he say?

5 A. He said he was aware of the deadline, and he was
6 concerned about the loans and he wasn't sure how to handle
7 them, and he had to talk to David Smith about it, and I was
8 dismissed.

9 Q. What did you understand him to be referring to
10 when he talked about the loans?

11 MR. JONES: Objection.

12 THE COURT: Overruled.

13 A. So I assume it was the loans that had been taken
14 from the various --

15 MR. JONES: Objection. He said he assumes.

16 THE COURT: Not what you assume, what you
17 understand.

18 A. The loans from LLCs and other entities that
19 occurred from 2006, on.

20 BY MS. COOMBE, CONTINUED:

21 Q. Those are the ones that we just looked at
22 related to the back-dated promissory notes and also the
23 ones that had no promissory notes and the letter to FINRA?

24 A. Yes.

25 Q. How many years have you worked with Mr. McGinn

BRIAN E. SHEA - Direct By Ms. Coombe

1 and Mr. Smith all told?

2 A. Twenty years.

3 Q. Are familiar at all with their personal
4 financial situation?

5 A. Yes.

6 Q. Are you familiar with Mr. McGinn's personal
7 financial situation back in 2006 to 2009?

8 A. Yes.

9 Q. Can you tell us about that?

10 A. It would be more when I was directly back at the
11 broker-dealer in 2009, Mr. McGinn had a lot of -- a very
12 high level of personal expenses. Been through two
13 divorces, had several homes, member in four golf
14 memberships. You could tell there was always pressure to
15 get deals closed and to get money. That his paycheck was
16 nowhere near enough money. I think his monthly burn rate
17 was somewhere between thirty and forty thousand dollars a
18 month.

19 Q. Did he make sufficient income to cover those
20 expenses?

21 A. He tried to.

22 Q. Did that have any effect on his interactions
23 with you at all in 2009?

24 A. It did. You could tell there was tremendous
25 pressure to close transactions, to get income into the firm

BRIAN E. SHEA - Direct By Ms. Coombe

1 and to the principals. So there was, yes, there was a lot
2 of pressure to try to generate income.

3 Q. Did it have any effect on the timing of any
4 deals that you were involved in?

5 A. It did. You could -- the speed at which a
6 transaction was conducted, the private placements were
7 pulled together very quickly. Mr. McGinn would typically
8 take an old private placement and mark it up and have one
9 of the assistants type it up. And you could tell this had
10 to be done today.

11 And if there was any review from legal,
12 Joe Carr, it may have been, you know, brushed aside in the
13 sake of speed, you know, this has to be printed today.
14 This has to be mailed today. We have to get this out and
15 get money into the escrow account.

16 Q. Yesterday you testified about talking to
17 Mr. Smith about closing the broker-dealer. When you spoke
18 to Mr. Smith about that, did he ever say anything to you
19 about what effect that would have on Mr. McGinn?

20 A. He was worried about Mr. McGinn. He said he had
21 no idea how he is going to be able to buy groceries if we
22 close this down.

23 Q. Are you familiar with a company called Firstline
24 Security, Incorporated?

25 A. Yes.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. How are you familiar with that company?

2 A. It is a company I had done business with when I
3 was at IASG, which is a public alarm company. And then
4 McGinn, Smith & Company had transactions with them when I
5 was not there, but then they also became the largest
6 service company of McGinn, Smith Alarm Trading where I was
7 employed.

8 Q. Are you familiar with Firstline Trust 07,
9 Firstline Senior Trust 07, Firstline Trust 07 Series B,
10 Firstline Senior Trust 07 Series B.

11 A. Yes.

12 Q. Okay. I am going to refer those as the
13 Firstline Trusts. What was the underlying investment
14 related to the Firstline Trusts?

15 A. They had made loans to Firstline, the alarm
16 company in Utah.

17 Q. Did the trusts make the loans directly or was
18 there an intermediary LLC that actually made the loans?

19 A. There was an intermediary LLC.

20 Q. What is your understanding about where the
21 payments to Firstline investors would come from?

22 A. The payments should have come -- the alarm
23 customers at Firstline would make payments to Firstline,
24 and then the company would remit the debt payments that
25 were due to the various trusts or through the LLC.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. So in other words, it could come from the
2 payments the alarm company made on the loans that had been
3 made to it?

4 A. Yes.

5 Q. Did Firstline ever pay off these loans?

6 A. No.

7 Q. Why not?

8 A. Firstline declared bankruptcy in January 2008.

9 Q. After Firstline filed for bankruptcy, did
10 Firstline stop making payments on its loans?

11 A. Yes.

12 Q. I am showing you previously admitted
13 Exhibit GF22.

14 MS. COOMBE: Could we please look at GF22.
15 Let's start at the bottom.

16 BY MS. COOMBE, CONTINUED:

17 Q. This is an electronic mail message from you to
18 Mr. McGinn regarding Firstline. It is dated February 2nd
19 of 2008.

20 It states: Tim, John just informed me last
21 night that he thought the trusts would not receive any cash
22 until the bankruptcy plan is approved, which would be five
23 to nine months! Do we want to petition the court to try to
24 get some relief for ourselves? Otherwise we have to either
25 suspend investor payments or cover them from other sources.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Why did you suggest the possibility that
2 payments could be covered from other sources?

3 A. That is a decision that Mr. McGinn could make.
4 I had seen, when I worked previously for the broker-dealer,
5 that they took up-front profit and gave it to other trusts.

6 Q. What do you mean by that?

7 A. Use money from one investor, one investment
8 vehicle, paid investors in another investment vehicle.

9 Q. Did you ever challenge Mr. McGinn or Mr. Smith
10 about taking up-front profit in that way?

11 A. I had.

12 Q. What were the results of those conversations?

13 A. It was ineffective. I mean, they continued to
14 take up-front fees.

15 Q. Why was it -- why did you challenge them about
16 taking up-front profit?

17 A. Because there wasn't -- there was no capital
18 reserve or profits typically earned as a transaction,
19 business conducted or payments coming in, and the debt
20 amortized or at the end of the transaction when investors
21 are actually paid off.

22 Q. Is there any issue with taking it up front
23 instead?

24 A. It would leave the investors at risk.

25 Q. And you write: Maybe we should discuss with

BRIAN E. SHEA - Direct By Ms. Coombe

1 Joe Carr tomorrow when you are back in the office.

2 Mr. McGinn wrote back: Called Joe today. He
3 will be out until Monday, as will I.

4 And then you forwarded it to Mr. Carr: Please
5 see below. I will call you later.

6 Then you ask a question about the first lien on
7 the Firstline Trust customer accounts or are we a second
8 behind ADT?

9 Did you talk to Mr. Carr about whether investor
10 payments should stop or be covered from other sources?

11 A. I don't believe I did.

12 Q. Did you talk to Mr. McGinn about whether
13 investor payments should stop or be covered from other
14 sources?

15 A. I don't believe I did.

16 Q. Are you aware of whether Firstline investors
17 continued to be paid after the bankruptcy?

18 A. I am.

19 Q. Who made the decision to continue to pay them?

20 A. Mr. McGinn.

21 Q. When you returned to the broker-dealer in
22 connection with your work on the MSTF books, did you see
23 that MSTF money was used to pay Firstline investors?

24 A. I did.

25 Q. Was it your understanding that this was

BRIAN E. SHEA - Direct By Ms. Coombe

1 permitted use of MSTF money?

2 A. It was not.

3 THE COURT: I think we will take our morning
4 break now, members of the jury. Don't discuss the case
5 among yourselves or anyone else, and we will be back after
6 you have a cup of coffee.

7 (Whereupon, a brief recess was taken.)

8 (Whereupon, the proceedings were held in
9 open court in the presence of the Jury.)

10 THE COURT: Ms. Coombe, you may continue.

11 MS. COOMBE: Thank you, Your Honor.

12 BY MS. COOMBE, CONTINUED:

13 Q. Mr. Shea, please pull that microphone up close
14 to your mouth.

15 MS. COOMBE: Ladies and gentlemen, can you
16 hear me?

17 BY MS. COOMBE, CONTINUED:

18 Q. I am handing you now previously admitted Exhibit
19 GB52. Could you please tell us what this is, Mr. Shea?

20 A. This is an agreement --

21 THE COURT: Move the mike closer.

22 A. That is agreement --

23 BY MS. COOMBE, CONTINUED:

24 Q. Mr. Shea, move it up closer to your mouth.

25 A. That is an agreement made the 15th day of May

BRIAN E. SHEA - Direct By Ms. Coombe

1 2008 between McGinn, Smith Transaction Funding Corporation,
2 MSTF, and the four Firstline Trusts.

3 Q. Okay. I would like to direct your attention to
4 the first paragraph that is numbered one toward the bottom
5 of the page.

6 A. Yes.

7 Q. It states: Effective June 2, 2008, MSTF will
8 assume all obligations of Firstline arising under the PPMs
9 to pay to the Trusts all principal and interest due and to
10 become due to the Trusts thereunder, up to the maximum of
11 three million dollars in the aggregate.

12 What is your understanding of what that means?

13 A. It means that MSTF will make payments to the
14 Firstline Trusts as promised them through their PPMs so
15 they could pay investors.

16 Q. Mr. Shea, do you know where this document came
17 from?

18 A. I do.

19 Q. Where?

20 A. I had seen this document, I believe, for the
21 first time in 2010 when I moved offices from the fifth
22 floor in our building we were in, to the third floor. I
23 remember putting it in the folder. And then I just
24 recently moved offices, and when I was going through it, I
25 saw this folder and opened it and found the document.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. Do you know how it came into your possession to
2 be in this folder?

3 A. I don't recall.

4 Q. Let's look up at the top of the page. There is
5 a date May 15th of 2008. Do you know when this was
6 actually created?

7 A. I don't.

8 MS. COOMBE: Could we look at the second
9 page, please.

10 BY MS. COOMBE, CONTINUED:

11 Q. There are some signatures there. Mr. McGinn as
12 chairman signed for MSTF, and then there are signature
13 lines for the Four Funds and Mr. Smith has signed them, is
14 that true?

15 A. It wasn't the Four Funds, the four Firstline
16 Trusts.

17 Q. You are absolutely right. Thank you for
18 correcting me. Are those their signatures?

19 A. They are.

20 Q. There is no dates next to those, are there?

21 A. No.

22 Q. Mr. Shea, I am handing you now previously
23 admitted Exhibit GB46. And I have placed some tabs on it
24 to help us navigate through the document.

25 Mr. Shea, can you flip through this whole

BRIAN E. SHEA - Direct By Ms. Coombe

1 exhibit and tell us generally what it is and whose
2 handwriting is on it?

3 A. This document is an Excel spreadsheet, I
4 believe, that I prepared month end capital estimate. When
5 I returned to the broker-dealer in April of 2009, I would
6 try to estimate the month end capital and typically have a
7 meeting with David Smith. So the spreadsheet is mine.

8 I believe all the writing on the spreadsheet
9 that I created and then the written documents attached are
10 all Mr. Smith's handwriting.

11 Q. Okay. Did you look through the whole exhibit or
12 just the first pieces of paper that had paper clips?

13 A. I flipped through all of it. Yes, I have looked
14 through all of it.

15 Q. Can you just tell us generally what the whole
16 exhibit is or should we go page by page, Mr. Shea?

17 A. They have to be notes from David Smith.

18 Q. Are they in his handwriting?

19 A. Yes.

20 Q. Okay. You told us about this first page of
21 GB46. Does any of this relate to the expenses that
22 Mr. Smith directed you not to record in order to make net
23 capital that you talked about yesterday?

24 A. I am not sure if that's what occurred at the end
25 of the month of September, but typically at a meeting where

BRIAN E. SHEA - Direct By Ms. Coombe

1 there was a capital shortfall, if we decided to -- or if
2 Mr. Smith decided to defer payroll or not pay people or
3 accrue it, it would be a result of that.

4 MS. COOMBE: Could we look at the next page,
5 please.

6 BY MS. COOMBE, CONTINUED:

7 Q. Is this a similar document?

8 A. Yes, this is for the same time period so it is
9 September. It looks like the numbers have changed. The
10 resultant number that we were short \$198,000.00. On the
11 previous version, we were short \$132,000.00.

12 MS. COOMBE: Could we look at the next page,
13 please? And the next page. Next page.

14 BY MS. COOMBE, CONTINUED:

15 Q. These are all handwritten notes of Mr. Smith, is
16 that right?

17 A. Yes.

18 Q. All right. The page that we are on now, we are
19 on the fifth page that is up on the screen, and you should
20 be able to follow along in your hard copy as well.

21 Do you see there is some handwriting in the
22 middle of the page toward the bottom? Does any of this
23 relate to any of the false accounting entries that you have
24 testified about?

25 A. Yes.

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. Can you tell us which parts and how?

2 A. Certainly the amounts that NEI -- that went back
3 and forth between NEI and MSTF, there was a certain amount
4 that was a fee, and there was another amount that was loans
5 that is an account that I used to offset when I offset the
6 Timothy McGinn loans.

7 MS. COOMBE: Could we look at the next page,
8 please.

9 BY MS. COOMBE, CONTINUED:

10 Q. And is any of this related to the false
11 accounting entries?

12 A. Yes. Certainly the first paragraph, where to
13 get the \$308,000.00, from the Funds to MSTF, that was
14 expended on behalf of MSTF.

15 Q. Okay. Anything else?

16 A. There is certainly a note to call Ronald Simons
17 about receivable purchase for the Fisher Group and for, it
18 looks like Cornacchia.

19 Q. Who is Mr. Simons?

20 A. He is the CPA who worked for Piaker and Lyons.
21 And then at the bottom it says: Offset fees as MS
22 related -- I am not sure what the next word is.

23 MS. COOMBE: Could we look at the next page
24 please.

25 BY MS. COOMBE, CONTINUED:

BRIAN E. SHEA - Direct By Ms. Coombe

1 Q. Again, this is Mr. Smith's handwriting?

2 A. Yes.

3 MS. COOMBE: Next page, please.

4 BY MS. COOMBE, CONTINUED:

5 Q. Can you tell us what this is, please?

6 A. This is again, a month end capital estimate that
7 I would have prepared for the month of October for a
8 meeting with Mr. Smith. And at that time it showed a
9 capital shortfall of \$139,000.00.

10 Q. Okay.

11 MS. COOMBE: Could we look at the next page,
12 please.

13 BY MS. COOMBE, CONTINUED:

14 Q. Is this related to that calculation of net
15 capital or is this something else?

16 A. I would say it was related to net capital.

17 Q. And did the broker-dealer somehow make net
18 capital in October of 2009 despite the shortfall on the
19 calculation that we just looked at?

20 A. Yes.

21 Q. How was that accomplished?

22 A. I am not sure at this -- do you have anything
23 that would refresh my memory?

24 MS. COOMBE: Can we look at the next page,
25 please.

BRIAN E. SHEA - Direct By Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. Can you tell us what this is, please?

3 A. This is an estimate for the month end of
4 October. It shows again a shortfall of \$139,000.00.

5 MS. COOMBE: Next page, please.

6 BY MS. COOMBE, CONTINUED:

7 Q. Is this another version of that?

8 A. It is. It is a clean version.

9 MS. COOMBE: Next page, please. Is that it?

10 Thank you.

11 BY MS. COOMBE, CONTINUED:

12 Q. Mr. Shea, I am handing you previously marked
13 Exhibit GB32. I have opened it up to a page in the
14 document to talk to you about.

15 MS. COOMBE: Page seven, please, Ron.

16 BY MS. COOMBE, CONTINUED:

17 Q. What is this, Mr. Shea, and whose handwriting is
18 on it?

19 A. This is output from McGinn, Smith Transaction
20 Funding. This is my handwriting in the top left,
21 attorney/client privilege, attorney/client work product,
22 MSTF is my handwriting. The lettering all across the side
23 and the handwriting at the bottom is mine.

24 I believe Exhibit No. 4 is Mr. Smith's
25 handwriting.

BRIAN E. SHEA - Direct By Ms. Coombe

1 THE COURT: Members of the jury, there is no
2 claim here of attorney/client privilege, just for your
3 information.

4 BY MS. COOMBE, CONTINUED:

5 Q. And does this relate to anything that we have
6 talked about?

7 A. This relates to accounting work that I did at
8 McGinn, Smith Transaction Funding to identify amounts that
9 were paid to -- so Item A at the bottom, you can see A
10 equals MSPF -- MSPS 2008. So MSPS is McGinn, Smith
11 preferred stock, 1.4 million dollars. So the items marked
12 A should total 1.4 million dollars.

13 And B, it looks like it was the net amount paid
14 McGinn, Smith & Company which was the previously
15 referenced, the \$50,000.00, that appeared to be just an
16 error.

17 C is items that were paid from MSTF to McGinn,
18 Smith & Company for advisory fees.

19 And then D is items paid to McGinn, Smith &
20 Company for underwriting the McGinn, Smith preferred stock
21 offering.

22 MS. COOMBE: Could we look at the next page,
23 please.

24 BY MS. COOMBE, CONTINUED:

25 Q. Can you tell us whose handwriting this is on

BRIAN E. SHEA - Direct By Ms. Coombe

1 here?

2 A. At the top is Mr. Smith's and in the middle is
3 mine.

4 MS. COOMBE: The next page, please.

5 BY MS. COOMBE, CONTINUED:

6 Q. Whose handwriting is this?

7 A. A and B are mine. All the numbers in the middle
8 are Mr. Smith's.

9 MS. COOMBE: Next page, please.

10 BY MS. COOMBE, CONTINUED:

11 Q. Whose handwriting?

12 A. The letters again are mine. And Exhibit 5 and
13 so forth is Mr. Smith's.

14 MS. COOMBE: Next page, please.

15 BY MS. COOMBE, CONTINUED:

16 Q. Whose handwriting?

17 A. The letters are mine. The language in the
18 middle, Exhibit 5, is Mr. Smith's.

19 Q. Mr. Shea, how do you feel about what you did?

20 MR. DREYER: Objection, Your Honor.

21 THE COURT: Overruled.

22 A. I am horrified, embarrassed that my life has
23 been forever altered.

24 MR. JONES: Objection.

25 THE COURT: Overruled.

BRIAN E. SHEA - Direct By Ms. Coombe

1 MS. COOMBE: I have nothing further, Your
2 Honor. May I approach the witness to retrieve my exhibits?

3 THE COURT: You may.

4 MS. COOMBE: Thank you.

5 THE COURT: Mr. Jones, defense counsel may
6 cross-examine, whoever wishes to go first.

7 MR. DREYER: I will go first, Your Honor.

8 THE COURT: Mr. Dreyer.

9

10 CROSS-EXAMINATION BY MR. DREYER:

11 Q. Mr. Shea, are you ready?

12 A. Yes.

13 Q. Mr. Shea, yesterday you told this jury that you
14 pled guilty pursuant to a plea agreement and that you were
15 facing three years imprisonment; is that correct?

16 A. Yes.

17 Q. When you got together with the government and
18 pled guilty in or about July of 2012, that plea took place
19 more than two years after the shutdown or almost two years
20 after the shutdown of McGinn, Smith, would that be fair to
21 say, April of 2010?

22 A. Yes.

23 Q. And what you ultimately wound up pleading to,
24 according to your testimony, is a crime which carries a
25 statutory penalty of three years as you testified

BRIAN E. SHEA - Cross by Mr. Dreyer

1 knew that he was trying to put alarms in Home Depot and in
2 Barnes & Noble, two companies that he had connections with,
3 you knew that, didn't you?

4 A. Again, I didn't know Mr. Cornacchia was
5 connected with either one of those entities.

6 Q. And how about Mr. Fisher, what was Mr. Fisher's
7 background?

8 A. Mr. Fisher ran, I believe, several construction
9 companies and was a very wealthy individual, very active
10 and perhaps the biggest McGinn, Smith investor.

11 Q. And, in fact, he had been with McGinn, Smith
12 from the beginning, was he not, as far as you know just
13 from the books and records?

14 A. When I started there in the early 1990s, it
15 seemed like he was always a customer from that point in
16 time.

17 Q. And so when you went to Mr. McGinn, did you talk
18 to him about the Fisher family also?

19 A. No. I don't recall talking to him about the
20 Fisher family.

21 Q. Well, tell us everything he told you about
22 Mr. Cornacchia and why the supplemental payments, if you
23 want to call them that, were being paid?

24 A. He said, this is to keep Joe happy. This is,
25 you know, to avoid an arbitration.

BRIAN E. SHEA - Redirect by Ms. Coombe

1 Q. Can you tell us about it, Mr. Shea?

2 A. My wife had REDACTED in March of 2006, REDA
CTED

in June of 2008. And
5 then it was approximately nine months later I went back to
6 work for the broker-dealer. I have two teenage daughters.
7 REDACTED

8 Q. And did that affect your ability to just walk
9 away from a job at that time?

10 A. It did.

11 Q. Mr. Dreyer showed you some private placement
12 memorandum for some of the core funds. Did anything he
13 showed you say that money could be used to pay the
14 broker-dealer's employees?

15 A. Not wholesale payments of payroll.

16 Q. And do you know who -- he referred to the
17 managing member in some of his questions of you. Do you
18 know who the managing member was?

19 A. I don't know if it was McGinn, Smith Advisors or
20 McGinn, Smith Capital Holdings.

21 Q. It wasn't the broker-dealer, right?

22 A. Right.

23 Q. Did Mr. Smith ever tell you whether the Four
24 Funds PPMs allowed money to be used for payroll at the
25 broker-dealer?

BRIAN E. SHEA - Redirect by Ms. Coombe

1 A. He did not.

2 Q. You talked at some point today about putting the
3 attorney/client privilege information on documents. And
4 Mr. Dreyer directed your attention to some documents that
5 were attached to a letter that went to Mr. Kaplowitz. Can
6 you tell us, were there other times that you put that
7 legend on documents other than the handwritten notations
8 from Mr. McGinn that Mr. Dreyer was talking about?

9 A. I definitely put it on those spreadsheets that
10 we discussed yesterday with the three buckets. I don't
11 specifically recall if I put it on other documents.

12 Q. Why did you put it on those documents?

13 A. There was overriding fear that -- you know,
14 FINRA was obviously all over us, and that the, you know,
15 there may be some legal problems down the road.

16 Q. Did Mr. Smith ever say anything else to you
17 about why he wanted to put that legend on certain
18 documents?

19 A. Just general discussions that in the event that
20 they were seized, they couldn't be used against any of us.

21 Q. What was your understanding of what he meant by
22 seized or did he explain further what he meant by seized?

23 A. No, he didn't.

24 Q. What's your understanding?

25 A. My understanding is that, you know, some

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. 12-CR-028

TIMOTHY M. MCGINN,
DAVID L. SMITH,

Defendants.

Transcript of the Trial Proceedings held on
January 30, 2013, before the HONORABLE DAVID N. HURD, at
the United States Federal Courthouse, 10 Broad Street,
Utica, New York, before Nancy L. Freddoso, Registered
Professional Reporter and Notary Public in and for the
State of New York.

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Motion

1 him based on --

2 THE COURT: How do you intend to use them?

3 Do you intend to offer them into evidence?

4 MS. COOMBE: I would like to, Your Honor,
5 but otherwise I could question him about them.

6 THE COURT: No, I am not going to allow you
7 to question him about them. Too remote, too prejudicial.
8 Request denied.

9 Anything further?

10 MS. COOMBE: Nothing further.

11 THE COURT: Okay. Mr. Minor.

12 COURT CLERK: Court stands for a brief
13 recess.

14 (Whereupon, a brief recess was taken.)

15 (Whereupon, the proceedings were held in
16 open court in the presence of the Jury.)

17 THE COURT: Good morning, members of the
18 jury. Welcome back. Mr. Smith, take the witness stand and
19 we will continue with his testimony with the
20 cross-examination by the government.

21 Ms. Coombe, you may proceed.

22 MS. COOMBE: Thank you, Your Honor.

23 CROSS-EXAMINATION BY MS. COOMBE:

24 Q. Good morning, Mr. Smith.

25 A. Good morning, Ms. Coombe. How are you?

DAVID SMITH - Cross by Ms. Coombe

1 Q. Very well, thank you. Mr. Smith, I am handing
2 you Government's Exhibits GL3 and GL4. They are not
3 admitted into evidence. Please take your time, look them
4 over, and let me know when you are ready to proceed.

5 A. These are the same. One is typewritten and one
6 is not.

7 Q. Correct.

8 A. Okay.

9 THE COURT: Move the mike over.

10 BY MS. COOMBE, CONTINUED:

11 Q. That's right. GL3 is a handwritten document and
12 GL4 is the typed version?

13 A. And the typed version was by the government; is
14 that correct?

15 Q. That is correct.

16 A. I am ready.

17 Q. Okay. Let's look at GL3 first. This is a
18 document that is in your handwriting, correct?

19 A. That is correct.

20 Q. And you kept it in your home office at your
21 house, is that correct, yes or no, Mr. Smith?

22 A. No.

23 Q. That's where it was recovered when the search
24 warrant was executed. You didn't know that, yes or no?

25 A. I believe it was recovered from my home.

DAVID SMITH - Cross by Ms. Coombe

1 Q. Mr. Smith, you have to answer my questions yes
2 or not.

3 THE COURT: Wait a minute. Mr. Smith, this
4 is cross-examination. If counsel asks for a yes or no
5 answer, if you can answer it yes or no, you do so. If you
6 can't answer yes or no, just say I can't answer it that
7 way, and we will proceed.

8 THE WITNESS: Okay. Thank you.

9 A. Would you repeat the question, please?

10 BY MS. COOMBE, CONTINUED:

11 Q. Mr. Smith, this document GL3 was recovered from
12 your home office when the search warrants were executed,
13 did you know that?

14 A. I did not.

15 Q. This is a document that you wrote, is that
16 correct, GL3?

17 A. That is correct.

18 Q. And it is a -- do you know how many pages it is?

19 A. Well, I don't. I can look if that's important.

20 Q. Well, I would believe it is more than
21 approximately twenty-six pages, does that seem fair?

22 A. I will go along with that.

23 Q. And you wrote this letter back in 1999; is that
24 correct?

25 A. I believe so.

DAVID SMITH - Cross by Ms. Coombe

1 Q. Mr. Smith, I am going to read from page four of
2 the typewritten version of the document, which is GL4. Let
3 me know when you are ready, Mr. Smith.

4 A. I am ready.

5 Q. Mr. Smith, you wrote: If our trusts go into
6 default, everything else will come apart. Is that correct,
7 is that what you wrote?

8 A. That is correct.

9 Q. And this is a letter -- the first page of this
10 is actually a letter to Mr. McGinn from you; is that
11 correct?

12 A. That is correct.

13 Q. The copy that was found when the search warrants
14 were executed, the original is up there in front of you,
15 that's a photocopy of a document, isn't it, GL3?

16 A. I would assume the integrity of the government
17 would be correct, yes. I haven't looked at every word in
18 the typewritten part, so I assume that is correct.

19 Q. Mr. Smith, I am looking back at GL3 now, the
20 handwritten version for a moment.

21 A. Yes.

22 Q. That is the original that was executed in
23 connection with the search warrant. You see it is a
24 photocopy, correct? It is not an original, yes or no?

25 A. No, that is not an original copy.

DAVID SMITH - Cross by Ms. Coombe

1 Q. If we could go back to page four, please?

2 A. Okay.

3 Q. This is the typewritten version, again, GL4.

4 You wrote: The business has become addicted to the cash
5 flow from the trust business and without them we will have
6 a difficult time surviving. Is that correct?

7 A. That is correct.

8 Q. You also wrote: The default of the trusts will
9 drastically reduce revenues, cause us to lose brokers, and
10 at least their confidence in us, bring on crushing
11 litigation, and devastating publicity, and I am convinced
12 prosecution by regulators or worse. The impact on our
13 employees, customers, friends, and family will be
14 devastating.

15 Is that what you wrote, Mr. Smith?

16 A. I did.

17 Q. That's what you wrote in this letter addressed
18 to Mr. McGinn, correct?

19 A. That is correct.

20 Q. Page five, second paragraph. Mr. Smith you also
21 wrote: I, unlike you, feel that we are vulnerable to
22 criminal prosecution.

23 That's what you wrote, right, Mr. Smith?

24 A. I did.

25 Q. You also wrote in this letter to Mr. McGinn:

DAVID SMITH - Cross by Ms. Coombe

1 Aside from the probable violation of Regulation 17 as it
2 relates to accredited investors. Then you go on to explain
3 that you are not aware of action that would be considered
4 remotely illegal, but then you make some derogatory
5 statements --

6 MR. DREYER: Objection.

7 THE COURT: Wait a minute. Sustained. I
8 did not allow that part to go before the jury and that is
9 stricken, and the jury is instructed to disregard it.

10 MS. COOMBE: I am sorry, Your Honor. I
11 understood that Paragraph 2 of page five was --

12 MR. DREYER: May I have a sidebar, Your
13 Honor?

14 THE COURT: No. She is correct. I did
15 allow that and you may continue, and your objection is
16 overruled. My apologies. Proceed.

17 MR. DREYER: But, Your Honor, my objection
18 is she is paraphrasing. It should be read --

19 THE COURT: You cannot paraphrase.

20 MS. COOMBE: I will read it straight, Your
21 Honor.

22 THE COURT: You cannot paraphrase.

23 MS. COOMBE: I understand, Your Honor.

24 BY MS. COOMBE, CONTINUED:

25 Q. Mr. Smith, did you write: Aside from the

DAVID SMITH - Cross by Ms. Coombe

1 probable violation of Reg 17 as it relates to accredited
2 investors, I am not aware of any action that would be
3 remotely considered illegal. However, I would never
4 underestimate the zeal of local or state or even SEC
5 prosecutors to make a story out of our failure.
6 Convictions of fat cat financiers is a great stepping stone
7 up the career ladder.

8 You continued: I believe that we are at risk
9 for the continual raising of investment dollars that are
10 now clearly unlikely to be repaid in full.

11 Is that what you wrote in this letter addressed
12 to Mr. McGinn?

13 A. I think there is one error. Would you like me
14 to correct that?

15 Q. An error in my reading?

16 A. No, not in your reading. Evidently whoever
17 typed it over made an error.

18 Q. You will have a chance to do that with
19 Mr. Dreyer.

20 A. Okay.

21 Q. Page six. Mr. Smith, did you know that your
22 counsel had a copy of this document, this typewritten
23 version, since I believe at least November?

24 A. No, I basically addressed it last evening.

25 Q. So you never reviewed it before then to suggest

DAVID SMITH - Cross by Ms. Coombe

1 that there were any errors; is that correct?

2 MR. DREYER: Your Honor, I object to this.

3 It is a typo.

4 THE COURT: Overruled. She can question
5 when he read it.

6 A. I read the handwritten portion. I have never
7 read the typewritten portion.

8 BY MS. COOMBE, CONTINUED:

9 Q. On page six, you wrote: While you have
10 previously rejected my characterization of these acts as
11 similar to a "Ponzi" scheme, and you have the word Ponzi
12 scheme in quotation marks, because new dollars being raised
13 are in fact buying new product and only, beginning
14 quotations, "profit dollars," end quotations, are being
15 used to cover shortfalls.

16 Is that what you wrote in this letter addressed
17 to Mr. McGinn?

18 A. I did.

19 Q. You continued: I believe that our actions could
20 be defined otherwise. The reason for my beliefs is that we
21 are now in possession of indisputable, empirical evidence
22 that the new investments have no chance of being repaid in
23 full. Whether less than one hundred percent collections,
24 sixty-six percent is in parentheses, is due to normal
25 attrition, fraud, billing errors, or poor credit judgment,

DAVID SMITH - Cross by Ms. Coombe

1 it really does not matter. The facts are that we will
2 never collect one hundred percent or close to it.
3 Therefore, our and you have this word in quotation marks,
4 "profits," which we use are not profits at all, but rather
5 monies that should be held in reserve to allow for the
6 deficit collections for the protection of the new
7 investors.

8 Is that what you wrote, Mr. Smith, in this
9 letter addressed to Mr. McGinn?

10 A. I did.

11 Q. Page seven: For us not to allow for these
12 deficits by setting up adequate reserves is, in my
13 judgment, bordering on fraud. Certainly by not disclosing
14 in the prospectus -- and the prospectus, is that another
15 word or kind of offering document given to investors,
16 Mr. Smith?

17 A. That is, yes.

18 Q. You continued: Our poor history of collections,
19 we are not providing the prospective investor an accurate
20 picture of his risk.

21 Is that what you wrote in this letter addressed
22 to Mr. McGinn, Mr. Smith?

23 A. I did, Ms. Coombe.

24 Q. You continue: We both know why we don't make
25 that disclosure, because such disclosure would cause our

DAVID SMITH - Cross by Ms. Coombe

1 salesmen to cease selling and investors to cease buying.

2 Thus, we are misleading both our own employees and

3 customers.

4 Is that what you wrote, Mr. Smith?

5 A. I did.

6 Q. And the next paragraph: Most of the deficits

7 are from poor credit risks. We now know that, and we

8 continue to accept their contracts without adequate

9 reserves and treat the excess discounted cash flow as

10 certain profit to be distributed as we see fit.

11 Is that what you wrote in this letter addressed

12 to Mr. McGinn?

13 A. I did.

14 Q. And if you could look at page four to the

15 attachment, please. Do you see there is a number ten?

16 A. I am not quite as quick as you.

17 Q. Take your time. Mr. Smith, would you like me to

18 help you find it?

19 A. What?

20 Q. Would you like me to help you find your place?

21 A. Well, if you would like to, yes.

22 Q. I would be happy to.

23 A. I knew you would.

24 Q. May I have it for a moment? Thank you. Here we

25 are.

DAVID SMITH - Cross by Ms. Coombe

1 A. Thank you.

2 Q. You are very welcome. Do you see where I am
3 now, Mr. Smith?

4 A. I am now at Paragraph 10 I believe you said.

5 Q. Correct. Paragraph 10, you wrote:
6 Distributions to Tim and Dave going forward should be
7 eliminated. Not only should those monies be set up as
8 reserves for investor protection, but in future litigation,
9 those distributions would be extremely detrimental to us.
10 Hard to justify investors losing half their money while we
11 continue to prosper at compensation levels that would seem
12 obscene to the average citizen sitting in judgment.

13 Is that what you wrote in this letter addressed
14 to Mr. McGinn?

15 A. I did.

16 Q. And, Mr. Smith, you wound up sending or giving
17 this letter or giving this letter to Mr. McGinn, didn't
18 you?

19 A. I did not.

20 Q. There was a copy only of this letter at your
21 house. There was no original; isn't that right?

22 A. That's what you showed me, but I did not give
23 this letter or deliver it to Mr. McGinn.

24 Q. You kept a copy of this letter, but did not have
25 the original; isn't that right?

DAVID SMITH - Cross by Ms. Coombe

1 A. I do not know how to answer that. It was
2 discovered at my house according to you, and in this form
3 according to you, but other than that I don't know. It is
4 a thirteen, fourteen year old letter. That is all I can
5 tell you.

6 Q. You had conversations with Mr. McGinn about
7 these topics back in 1990, didn't you, yes or no?

8 A. I believe you misspoke on the year, 1999, I did,
9 yes.

10 Q. Yes. If I misspoke, then thank you for
11 correcting me. You did talk to him about these issues back
12 in 1999, didn't you?

13 A. I did.

14 Q. Now, Mr. Smith, you were the guy in charge of
15 the Four Funds, right?

16 A. I was one of the managing members, but I was
17 principally responsible, yes.

18 Q. You made the majority of the decisions regarding
19 the investment choices by those Four Funds; isn't that
20 correct?

21 A. I think that is fair to say, yes.

22 Q. I am handing you Government's Exhibit 30, which
23 has not yet been admitted into evidence. Please take your
24 time, look it over, and let me know when you are ready to
25 proceed.

DAVID SMITH - Cross by Ms. Coombe

1 A. I am ready.

2 MS. COOMBE: Your Honor, the government
3 moves the admission of Exhibit 30.

4 MR. DREYER: No objection.

5 THE COURT: Received.

6 (Exhibit No. 30, received.)

7 BY MS. COOMBE, CONTINUED:

8 Q. This is an electronic mail message from
9 Mr. Rees. I am sorry. I should put it up. Is it up there
10 on your screen?

11 A. It is, yes.

12 Q. This is an electronic mail message dated
13 December 2, 2007. It is from Mr. Rees to yourself; is that
14 correct?

15 A. That is correct.

16 Q. And he says: Dave, here is my preliminary work
17 on the project. I have to confer with Barb Draut
18 (phonetically) that the accrued interest at 10/10/07 is
19 added into the principal balance. We should be receiving
20 our quarterly, in caps, payment tomorrow. And then he goes
21 on to say: I will be in all day Monday to discuss.
22 Correct?

23 A. Correct.

24 MS. COOMBE: And could we please look at the
25 attachment to this?

DAVID SMITH - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. This is a calculation that Mr. Rees prepared
3 comparing the book value for the Four Funds to what the
4 actual net realizable value was, correct?

5 A. That is his work. The work is incorrect, but it
6 is his work.

7 Q. My question was about his work, Mr. Smith.

8 A. Yes, it is his work.

9 Q. And the book value is the amount that, if an
10 asset, shows up on the books, correct?

11 A. No, I don't believe that's the case here.

12 Q. The net realizable value is how much the asset
13 could actually be sold for or the investment?

14 A. That is Mr. Rees' opinion, and that is not
15 correct.

16 Q. Okay. Well, this shows -- let's look at book
17 value, is about seventy million dollars, correct, according
18 to this document, yes or no, Mr. Smith?

19 A. That's what it shows, yes.

20 Q. And the net realizable that Mr. Rees has is
21 thirty-seven million, correct?

22 A. That's what he shows, yes.

23 Q. And the notes payable is eighty-six million; is
24 that correct?

25 A. That is correct.

DAVID SMITH - Cross by Ms. Coombe

1 Q. And what he shows is a deficit of forty-eight
2 million dollars; is that correct?

3 A. That is correct.

4 Q. According to this document that Mr. Rees
5 prepared, the funds were forty-eight million dollars under
6 water, correct or not correct?

7 A. That is not correct.

8 Q. According to this document, that's what this
9 document says that Mr. Rees prepared, yes or no, Mr. Smith?

10 A. That is correct per Mr. Rees.

11 Q. I am handing you Exhibit GM26. Please take your
12 time, look it over, and let me know when you are ready to
13 proceed.

14 A. Okay, Ms. Coombe.

15 Q. And this is an order ticket for a twenty
16 thousand dollar purchase in TAIN, correct?

17 A. That is correct.

18 Q. And it is -- the settlement date is
19 December 21st of 2007; is that correct?

20 A. That is correct.

21 Q. And you were the compliance officer for years at
22 McGinn, Smith, correct?

23 A. Up through sometime in 2007, yes.

24 Q. You were the compliance officer for years at
25 McGinn, Smith, correct?

DAVID SMITH - Cross by Ms. Coombe

1 A. For years, yes.

2 Q. So you are familiar with these kinds of
3 documents, correct?

4 A. I am.

5 Q. And the settlement date was December 21st of
6 2007; correct?

7 A. That is correct.

8 MS. COOMBE: Could we please look at page
9 eleven of this document?

10 BY MS. COOMBE, CONTINUED:

11 Q. This is the note, itself, that was issued to
12 Doctor Smith, correct?

13 THE COURT: It is on the screen.

14 A. Yes, I am sorry.

15 THE WITNESS: Thank you, Your Honor.

16 MS. COOMBE: And could we look at page
17 fifteen, please?

18 BY MS. COOMBE, CONTINUED:

19 Q. Is that your signature?

20 A. It is.

21 Q. You signed this, correct?

22 A. I did.

23 Q. Now, when you signed this you had that
24 electronic mail message from Mr. Rees, correct, you had
25 received it, yes or no?

DAVID SMITH - Cross by Ms. Coombe

1 A. Yes.

2 Q. And that electronic mail message indicated in
3 his analysis that the Four Funds were forty million dollars
4 under water, correct?

5 A. In his analysis, yes.

6 Q. Mr. Smith --

7 MS. COOMBE: Your Honor, I am going to ask
8 you to instruct Mr. Smith again to questions requiring a
9 yes or no answer with one word.

10 A. I answered yes.

11 THE COURT: Proceed.

12 BY MS. COOMBE, CONTINUED:

13 Q. And you didn't -- when you signed this, you
14 didn't pick up the phone and call Doctor Smith and tell him
15 about the issues with the value of the Four Funds, did you,
16 yes or no?

17 A. I did not call Doctor Smith, no.

18 Q. And you didn't pick up the phone and call his
19 broker and tell him either, did you, yes or no?

20 A. I did not.

21 Q. And you did not send any kind of e-mail about
22 that, did you?

23 A. I did not.

24 Q. And you didn't take any steps to avoid this sale
25 being made, correct?

DAVID SMITH - Cross by Ms. Coombe

1 A. No, I did not.

2 Q. And you had some responsibility for the
3 mismanaging of the assets of the Four Funds, didn't you?

4 MR. DREYER: Objection, Your Honor.

5 THE COURT: Sustained as to form.

6 BY MS. COOMBE, CONTINUED:

7 Q. Do you believe you mismanaged the assets of the
8 Four Funds?

9 MR. DREYER: Objection, irrelevant, Your
10 Honor.

11 THE COURT: Overruled.

12 A. I had a responsibility for managing the Funds.

13 BY MS. COOMBE, CONTINUED:

14 Q. Did you believe you mismanaged the assets of the
15 Four Funds?

16 A. I believe that in hindsight some of my judgments
17 could have been made better. In our business, that's what
18 happens.

19 Q. You believe you have some responsibility for
20 mismanaging the assets of the Four Funds, don't you?

21 A. I believe I had the responsibility for managing
22 the Funds. Any funds have good choices, bad choices.

23 Q. You believe that you had some responsibility for
24 mismanaging the assets of the Four Funds, don't you?

25 MR. DREYER: Objection, Your Honor, asked

DAVID SMITH - Cross by Ms. Coombe

1 and answered now three times.

2 THE COURT: Overruled. Cross exam.

3 A. I don't know how to answer that any other way,
4 Ms. Coombe.

5 BY MS. COOMBE, CONTINUED:

6 Q. Did you testify before the Securities and
7 Exchange Commission in a deposition, Mr. Smith?

8 A. I did.

9 Q. Did you raise your right hand and take an oath
10 and swear to tell the truth, the whole truth, and nothing
11 but the truth just like you did yesterday in this
12 courtroom?

13 A. I did.

14 Q. This is a copy of your transcripts. Please turn
15 to your SEC transcripts.

16 MS. COOMBE: Page 471, counsel, lines
17 twenty-two to twenty-four.

18 BY MS. COOMBE, CONTINUED:

19 Q. Mr. Smith, do you see where I am? Page 471,
20 lines twenty-two to twenty-four. Were you asked this
21 question and did you give this answer?

22 Do you believe you mismanaged the assets of the
23 Four Funds?

24 Answer: I believe I had some responsibility,
25 yes.

DAVID SMITH - Cross by Ms. Coombe

1 Were you asked that question and did you give
2 that answer?

3 MR. DREYER: Objection not inconsistent.

4 THE COURT: Overruled. It is up to the jury
5 to make that determination. You may answer.

6 A. Yes, that is my testimony.

7 BY MS. COOMBE, CONTINUED:

8 Q. Mr. Smith, I am handing you Exhibit GB1C. Would
9 you like me to take the binder back from you?

10 A. That would be great.

11 Q. Mr. Smith, you are familiar with the
12 transactions that are summarized on these charts, aren't
13 you?

14 A. I am.

15 Q. And I am handing you now previously admitted
16 Exhibit GB12?

17 A. Yes, go ahead.

18 Q. This is an electronic mail message from Mr. Carr
19 to Mr. McGinn with a copy to you, correct?

20 A. That is correct.

21 Q. And Mr. Carr wrote: Tim, I have attached three
22 promissory notes evidencing loans to McGinn, Smith
23 Transaction Funding Corp. Dave requested that I forward
24 them to you for signature. After signing please mail the
25 original signed notes to my attention, Joe.

DAVID SMITH - Cross by Ms. Coombe

1 MS. COOMBE: Could we look at the attached
2 notes, please, page two?

3 BY MS. COOMBE, CONTINUED:

4 Q. This is a promissory note for a loan dated
5 April 14th of 2009 between MSTF and TAIN, correct?

6 A. That is correct.

7 Q. Page six is a note for a loan for a transaction
8 on April 14th of 2009 for fifty thousand dollars between
9 MSTF and FIIN, correct?

10 A. That is correct.

11 Q. And page ten, this is a note dated April 14,
12 2009, for one hundred thousand dollars between MSTF and
13 FEIN, correct?

14 A. That is correct.

15 MS. COOMBE: Could we go back to page three
16 of GB1C, please?

17 BY MS. COOMBE, CONTINUED:

18 Q. And those notes correspond to the transactions
19 between the Four Funds and MSTF, correct, that are on the
20 chart?

21 A. Which page are we on, please?

22 Q. We are on page three.

23 A. For 4/14 2009, that is correct.

24 Q. Correct. And so notes were executed for those
25 loans between the Four Funds and MSTF, correct?

DAVID SMITH - Cross by Ms. Coombe

1 A. Well, the notes I had, only one was signed, but
2 I would assume so, yes.

3 Q. Actually none of the notes that we looked at
4 were signed, they were all prepared though, correct?

5 A. Yes.

6 Q. I am handing you now Exhibit GB13. This is one
7 of the notes we just looked at, correct?

8 A. Yes, it is.

9 Q. And if we look down at the bottom of the page?

10 A. Yes.

11 Q. It has Mr. McGinn's initials and signature and
12 the date, right?

13 A. That is correct.

14 Q. And that's on every page of the document,
15 correct?

16 A. Yes, it is.

17 Q. And if we look at the last page we have
18 Mr. McGinn's signature, correct?

19 A. We do, yes.

20 Q. So a note was executed for this particular
21 transaction indicating that it was a loan, right?

22 A. That is correct.

23 Q. I am handing you now GB16.

24 MS. COOMBE: Could we look at page two,
25 please?

DAVID SMITH - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. This is a note, November 26th of 2008 for fifty
3 thousand dollars between FIIN and MSTF and executed by
4 Mr. McGinn, correct?

5 A. That is correct.

6 MS. COOMBE: If we could go back to GB1C,
7 please, Ron, to page two.

8 BY MS. COOMBE, CONTINUED:

9 Q. That corresponds to one of these transactions of
10 money being transferred from the Four Funds to MSTF,
11 correct?

12 A. That is correct.

13 Q. And a note was prepared indicating that it was
14 loan between the Four Funds and MSTF, correct?

15 A. That is correct.

16 MS. COOMBE: And if we could go back now to
17 GB16 to the third page.

18 BY MS. COOMBE, CONTINUED:

19 Q. This is a note dated November 14th of 2008 for
20 fifty thousand dollars between FIIN and MSTF, correct?

21 A. Correct.

22 Q. It is executed by Mr. McGinn?

23 A. Correct.

24 MS. COOMBE: And if we go back to GB1C to
25 the first page, please.

DAVID SMITH - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. It corresponds to the transaction in pink,
3 correct?

4 A. That is correct.

5 Q. And a promissory note was prepared indicating
6 that that transaction was a loan between the Four Funds and
7 MSTF, correct?

8 A. That is correct.

9 Q. I am handing you now Exhibit 23. You talked
10 about this with Mr. Dreyer yesterday, correct?

11 A. I did.

12 Q. This is the document that has the going concern
13 clause in it, correct?

14 A. Correct.

15 Q. And this document is dated in, I believe it is
16 February 16th of 2009, that's on page three, right,
17 Mr. Smith?

18 A. That is correct.

19 MS. COOMBE: And if we could go back to
20 GB1C, please. Could we go to page three, Ron?

21 BY MS. COOMBE, CONTINUED:

22 Q. That's before these transactions; is that
23 correct?

24 A. That is correct, yes.

25 Q. I am handing you now Exhibit GB10. Please let

DAVID SMITH - Cross by Ms. Coombe

1 me know when you are ready to proceed.

2 A. Yes, I am ready.

3 Q. This an electronic mail message from Mr. Cooper
4 to you and Mr. Shea regarding account balances, correct?

5 A. That is what the memo says, yes.

6 Q. Okay, and it says: Here are the account
7 balances as of 4/10 2009. Dave, the book balance for TAIN
8 and FIIN is after the quarterly interest payment payable
9 4/15.

10 Could you look on page two, please?

11 A. Yes.

12 Q. About halfway down page there is an entry for
13 McGinn, Smith Transaction Funding?

14 A. I believe so.

15 Q. It is also up on the screen, Mr. Smith, and
16 highlighted.

17 A. Okay. Thank you.

18 Q. That indicates that the balance on April 10th of
19 2009 was just five hundred dollars in this particular
20 account, correct?

21 A. The balance that is in the McGinn,
22 Smith & Company balance, that's what the title of the thing
23 is, yes.

24 Q. Okay. Well, let's look up at the top of
25 document then. Do see Mr. Cooper has account name in the

DAVID SMITH - Cross by Ms. Coombe

1 first column, then account number, and then the book
2 balance, closing ledger on 4/8, closing ledger on 4/9, and
3 then change from the prior day, correct? That's what the
4 document says, right, Mr. Smith?

5 A. That is correct, yes.

6 Q. Okay. So if we look down at McGinn, Smith
7 Transaction Funding, the one that is highlighted up on the
8 screen?

9 A. Yes.

10 Q. Do you see the balance on 4/10 2009 was five
11 hundred dollars and thirty cents, correct?

12 A. That's what it says, yes.

13 Q. And then in the notes, it says: Transfer to
14 INEX Senior, transfer 4K, four thousand dollars, to TDMV08,
15 transfer 4K from Fortress, correct?

16 A. That's what it says, yes.

17 Q. Mr. Cooper is explaining the transfers that have
18 happened between April 8th and April 10th, correct?

19 A. I don't know that.

20 Q. I am handing you now Exhibit GB15. This is a
21 electronic memo from Mr. Cooper to and Mr. Shea and
22 yourself with the account balances. He writes: Good
23 morning, here are the balances for 4/20 and activity from
24 4/13 to 4/20. Correct?

25 A. Correct.

DAVID SMITH - Cross by Ms. Coombe

1 Q. And if we look at the second page, it is similar
2 to the document we just looked at?

3 A. Yes.

4 Q. Do you see halfway down the page again there is
5 an entry for McGinn, Smith Transaction Funding?

6 A. Yes.

7 Q. It indicates the balance on 4/10 had been five
8 hundred dollars and thirty cents, correct?

9 A. Correct.

10 Q. And on 4/17, the balance was five hundred
11 dollars and thirty cents, correct?

12 A. Correct.

13 Q. And then there are some notes, transfer 100K,
14 which means one hundred thousand dollars, from TAIN and
15 FEIN and fifty thousand dollars from FIIN. And then
16 transfer 250K, or two hundred and fifty thousand dollars,
17 to McGinn, Smith operating account, is that correct?

18 A. That is correct.

19 Q. And that's describing what we were looking at in
20 the charts that are GB1C, correct?

21 A. That is correct.

22 Q. I am handing you now Exhibit GB14. This is an
23 electronic mail message from yourself to Mr. McGinn. I am
24 going to read the highlighted portion: Also, any new
25 thoughts on how we are going to meet the MSTF interest

DAVID SMITH - Cross by Ms. Coombe

1 payments of one hundred and forty thousand at the end of
2 the month. I assume that there are no assets that can be
3 monetized.

4 Mr. Smith, you were asking Mr. McGinn whether he
5 had any new thoughts on how you were going to meet the MSTF
6 payment of one hundred and forty thousand dollars at the
7 end of the month, correct?

8 A. That is correct.

9 MS. COOMBE: Could we look at GB1B support,
10 please?

11 BY MS. COOMBE, CONTINUED:

12 Q. I am handing you Exhibit GB1B. If you could
13 turn to the spreadsheet that's attached to it, please.

14 Mr. Smith, do you see where I am?

15 A. I am looking at the sheet on the screen, yes.

16 Q. Okay. Do you see under comments for the Four
17 Funds interest payments that were made, that is the MSTF
18 money that was used to pay investors in the Four Funds who
19 were no longer receiving interest payments, correct?

20 A. I would not characterize it that way, no.

21 Q. Money came out of the MSTF bank account and paid
22 investors who were investors in the Four Funds; is that
23 correct?

24 A. That is correct.

25 Q. If you look at the comments column, there are

DAVID SMITH - Cross by Ms. Coombe

1 references to Fisher and Sack. And if we look a little
2 further down. Are any of these people mentioned here, were
3 any of them your clients?

4 A. Well, I think Mr. Fisher was a client of
5 Mr. McGinn's, but I had a lot of interaction with him so I
6 think that is a fair statement.

7 Q. How about the Cohens, were they your clients
8 after Mr. McGinn went to IASG?

9 A. I may have had the accounts signed to me, but I
10 didn't have any real interaction with them, no.

11 Q. But once an account is under your authority,
12 your registered representative number, you have some
13 responsibility regarding those accounts, right?

14 A. That is a fair statement, sure.

15 Q. You have some obligation as a broker to review
16 customer statements particularly for your own clients,
17 correct?

18 A. Up to a certain time, but then they are done by
19 th compliance officer.

20 Q. Well, as a broker you always have responsibility
21 four your own personal clients; isn't that right,
22 Mr. Smith?

23 A. If you are acting as a broker, yes.

24 Q. So for people you were acting as a broker, you
25 did have some responsibility to be familiar with their

DAVID SMITH - Cross by Ms. Coombe

1 customer statements, isn't that correct?

2 A. That would be correct.

3 Q. Now, these people who were being paid out of the
4 MSTF money you talked about with Mr. Dreyer yesterday, they
5 were all important clients of the firm, weren't they?

6 A. Well, the Fishers were important clients.
7 Mr. Cornacchia was a client of Mr. McGinn's, and he has
8 testified as important. Mr. Cohen I have less familiarity
9 with.

10 Q. About how about the Sacks?

11 A. Sacks were related to Mr. Fisher. I think the
12 daughter-in-law, maybe, not a large client, but their
13 connection to Mr. Fisher, obviously the relationship
14 carried forward.

15 Q. Now, you were concerned that Mr. McGinn had paid
16 non-MSTF investors with MSTF investor money, weren't you?

17 A. I did express that concern, yes.

18 Q. You were concerned that this was strained a
19 little bit from the intended investment objective of MSTF
20 which was to provide bridge loans for investment banking
21 transactions, correct?

22 A. Initially that is correct.

23 Q. I am handing you now GB5.

24 A. We are getting quite a pile here, Elizabeth.

25 Q. Would you like me to take them back, Mr. Smith?

DAVID SMITH - Cross by Ms. Coombe

1 A. Yes.

2 Q. If you just hand me the whole pile, I will take
3 care of it.

4 A. There we go.

5 Q. This is an electronic mail message. If you look
6 at the second page. Mr. Lex wrote, please let me know --
7 let me start there. Talked to Dave Rees. He says that
8 David Smith has calls into them to get update. He doesn't
9 have money to pay Judge/Oppenheimer, correct?

10 A. That is what it says, yes.

11 Q. And Mr. Lex wrote, please let me know how much
12 is due Oppenheimer/Judge. I would like to advance it to
13 them, and I would like it to go out today. And he wrote
14 that to Mr. Guzzetti, correct?

15 A. Yes, he did.

16 Q. And Mr. Guzzetti wrote: Bill we cannot pay with
17 advance money from you. This is a regulatory issue,
18 correct?

19 A. That is correct.

20 Q. And you wrote to Mr. Guzzetti, and he sent it to
21 you. You wrote: Please make it clear that no one is ever
22 authorized to advance money to a client for any reason.

23 That's what you wrote, right, Mr. Smith?

24 A. Regarding that situation, yes, I did write that.

25 Q. This is rules of fair practice 101, that is what

DAVID SMITH - Cross by Ms. Coombe

1 you wrote; isn't it? Yes or no?

2 A. Yes.

3 Q. Now, you were concerned enough about the
4 payments that had been made out of MSTF to non-MSTF
5 investors that you actually consulted with an attorney,
6 right?

7 A. Regarding that issue, yes.

8 Q. That was unusual for you, wasn't it?

9 A. I try to keep my contacts with attorneys to a
10 minimum, yes.

11 Q. And you went to New York City, correct, and you
12 met with Mr. Kaplowitz?

13 A. Enroute from Philadelphia, yes.

14 Q. And you testified yesterday that it didn't
15 have -- you weren't doing anything at this time in
16 restructuring the Four Funds, is that what you said
17 yesterday?

18 A. I don't recall that testimony.

19 Q. Did you know that at the time on September 30th
20 of 2009, Mr. Rachmuth at Gersten, Savage billed 1.2 hours
21 for conversations with Mr. Fornari regarding McGinn, Smith
22 restructuring and for a meeting with you and Mr. McGinn
23 regarding restructuring options. Did you know that?

24 A. I did not, and I would like to correct your
25 comment on my testimony. I think I referred to the meeting

DAVID SMITH - Cross by Ms. Coombe

1 that I was having with Mr. Kaplowitz, that it didn't have
2 anything to do with restructuring the Funds.

3 Q. So you don't dispute that at this time period,
4 around the same time, late September, early October of
5 2009, you and Mr. McGinn were talking to Gersten, Savage
6 about the possibility of restructuring the Four Funds?

7 A. I don't recall that. I started speaking with
8 Gersten, Savage probably in the summer of 2008, and it was
9 an ongoing thing. I don't have any recollection of -- what
10 was the date you gave me?

11 Q. Sure. Let me show you this exhibit, and see if
12 it helps you remember, Mr. Smith.

13 A. Sure.

14 Q. I am showing you Exhibits GB47 and GB48. They
15 are not admitted into evidence. Please take a look at
16 GB47.

17 A. Yes. I don't think these meetings have anything
18 to do a restructuring. I think these meetings quite
19 possibly had to do with -- I am trying to think of my dates
20 now. But there was this FINRA production thing that we
21 talked about yesterday with Danovitch, which was the result
22 of the overstepping, in my judgment, of FINRA during the
23 Chang arbitration, and that's how he became involved.

24 Q. Mr. Smith, right now I want to talk about the
25 billing records to the extent they indicate that in

DAVID SMITH - Cross by Ms. Coombe

1 September, late September and early October, you and
2 Mr. McGinn were talking to Gersten, Savage about
3 restructuring. I am going to direct your attention to the
4 entries for Mr. Rachmuth, September 30th of 2009 and
5 October 1st of 2009. Do you see those entries?

6 A. I see, and I don't know a Mr. Rachmuth. I don't
7 know if I have ever met him. It is a complete mystery to
8 me. I don't know who he is.

9 Q. Okay, and Mr. Rachmuth billed for conversations
10 with Mr. Fornari regarding McGinn, Smith restructuring
11 meeting with Mr. McGinn and Mr. Smith regarding
12 restructuring options?

13 A. With Mr. Fornari I may very well have met, yes.

14 Q. And let's look at Mr. Roper. There is an entry
15 October 3rd of 2009 reviewing FEIN documents and for
16 October 5, 2009, drafting memo, correct?

17 A. That's what he has billed, yes.

18 Q. And none of this helps to you remember that at
19 the time you and Mr. McGinn actually were talking to
20 Gersten, Savage about restructuring the Four Funds?

21 A. I don't, but I know the meeting that we had with
22 Mr. Kaplowitz that we talked about had nothing to do with
23 the restructuring the Funds.

24 MS. COOMBE: I move to the strike the second
25 part of that answer, Your Honor, as non-responsive.

DAVID SMITH - Cross by Ms. Coombe

1 THE COURT: Overruled. That may stand.

2 MS. COOMBE: I move the admission of

3 Government's Exhibit 47.

4 THE COURT: Any objection?

5 MR. DREYER: No, Your Honor.

6 THE COURT: Received.

7 (Exhibit No. 47, received.)

8 BY MS. COOMBE, CONTINUED:

9 Q. You went to New York City and met with
10 Mr. Kaplowitz, right, on a Friday night?

11 A. On a Friday night. I believe it was the 9th of
12 October.

13 Q. And the next day you sent him a handwritten
14 letter from yourself and Mr. McGinn; is that correct?

15 A. That is correct.

16 Q. This is GB30 and GB31. You are familiar with
17 these documents, aren't you, Mr. Smith?

18 A. I am.

19 Q. This is a letter in your handwriting, isn't it,
20 to Gersten, Savage?

21 A. Yes.

22 Q. And it says at the top that it is from you and
23 Mr. McGinn, correct?

24 A. That's what it says, yes.

25 MS. COOMBE: Could we look at page three,

DAVID SMITH - Cross by Ms. Coombe

1 please? Actually can we look at GB31, which is the
2 typewritten version of this letter.

3 BY MS. COOMBE, CONTINUED:

4 Q. Do you see the highlighted portion. You wrote:
5 On September 30, 2009, FINRA asked for additional
6 information for a large number of related entities, some
7 going back as far as 1982. In preparing the documentation,
8 we became aware that we had run a number of related
9 transactions through MSTF that were specific to the
10 interests of MS -- and you mean the broker-dealer there
11 right, by MS?

12 A. That is correct.

13 Q. -- affiliates and its principals, and because of
14 outside investment in MSTF, the use of MSTF as the
15 transaction vehicle was most likely improper.

16 In addition, the documentation supporting these
17 transactions was either unavailable or not up to date.
18 Realizing the possibility that the appearance of these
19 transactions could be interpreted as the improper use of
20 investor funds or the commingling of funds, we have sought
21 your counsel on how to rectify this mistake.
22 Unfortunately, we are under pressure to deliver these
23 documents to FINRA by October 13, 2009.

24 The transactions fall into three categories.
25 One, advances from MSTF to McGinn, Smith & Company. Two,

DAVID SMITH - Cross by Ms. Coombe

1 loans from the funds to MSTF.

2 And those are the two parts of the payroll
3 transactions we were talking about earlier where money was
4 transferred from the Four Funds to MSTF and then MSTF sent
5 money on the same day to the broker-dealer, correct?

6 A. I believe that's the same reference, yes.

7 Q. And three, advances from MSTF, and you wrote, to
8 customers of McGinn and Smith of whom we had decided to
9 support because of their high level of importance to the
10 firm and to whom we were attempting to bridge the gap of
11 their shortfall in income due to the non-performance of
12 their investment in the funds.

13 That is what you wrote, right, Mr. Smith?

14 A. That is all correct, yes.

15 Q. You went on to write items number one and number
16 two are of less concern to us than item number three. The
17 loans from the Funds are supported by personal guarantees
18 and assignment of fee income due to MSA and MSCH from the
19 Funds.

20 Advances to MS are also supported by the
21 aforementioned guarantees and assignment, but are
22 problematic because if they are characterized as loans,
23 which they are not, the loans are not on the books of MS.
24 And if they were, would have negative capital consequences.

25 Now, we looked a number of promissory notes a

DAVID SMITH - Cross by Ms. Coombe

1 few minutes ago. Those all indicated that there were loans
2 between the Four Funds and MSTF, didn't they, yes or no?

3 A. Yes.

4 Q. You continued: They were originally booked as
5 advisory fees, but in reviewing the books for
6 dissemination, it is apparent to us that there is no place
7 in the PPM of MSTF that permits fees payable to MS. Why we
8 booked fees that are clearly owed by the Funds to MSCH and
9 MSA and then ran them through the books of MSTF is
10 absolutely inexplicable and incredibly stupid.

11 That's what you wrote, isn't it, Mr. Smith?

12 A. I did, and that was accurate, yes.

13 Q. Our solution is simply to book them as advances
14 which are due from MSCH and MSA supported by fees owed to
15 us. Y.

16 Our solution was to make new accounting entries,
17 yes or no?

18 A. My solution was to correct the problem.

19 Q. Mr. Smith, the question requires a yes --

20 A. My solution was to correct the problem, yes.

21 Q. You continue: Number three is where the major
22 risk is. You wrote: There is no supportable or plausible
23 reason why monies from MSTF were used to pay clients of the
24 firm.

25 That's what you wrote, isn't it, Mr. Smith?

DAVID SMITH - Cross by Ms. Coombe

1 A. That's what I wrote at that time, yes.

2 Q. While they were doing it at the request of MSCH
3 and MSA and those entities clearly have the wherewithal to
4 repay the monies from the fees due them, the transactions
5 simply have no place in MSTF.

6 The immediate and pressing problem is how to
7 characterize and justify those payments from MSTF and how
8 to get the money back to MSTF ASAP. Jay has expressed a
9 concern that repaying the monies at the same time as we are
10 being asked to provide financial files looks like a
11 cover-up.

12 Now, Mr. Kaplowitz had cautioned you about a
13 cover-up, right? You testified about that yesterday?

14 A. I did.

15 Q. He did that when he met with you on Friday
16 night, right?

17 A. That is correct. That is my recollection.

18 Q. You explained yesterday that he said whatever
19 you do, make sure that it doesn't like you are covering up
20 the books and records. That's what you said yesterday,
21 right?

22 A. That's what I said yesterday.

23 Q. I am handing you now Government's Exhibit GH2.
24 This is a September 30, 2009, request from FINRA. You see
25 in paragraph one, they ask for all Quicken data files,

DAVID SMITH - Cross by Ms. Coombe

1 electronic accounting entries for a number of entities,
2 including MSTF; is that correct?

3 A. That is correct.

4 Q. If we look at -- I believe it is the last
5 paragraph on this page. Paragraph 4, FINRA said: If the
6 aforementioned files are not up to date, please indicate
7 the following:

8 The date in which the file was last updated.
9 Description of how the omission(s) was discovered, when the
10 omission was first discovered, and by whom. If the
11 omission was caused by failure on the part of an employee,
12 identify the employee responsible. Identify when and if
13 corrective actions will be undertaken to resolve the
14 omission and prevent recurrences. And E, provide the
15 supporting documentation required to update the file to
16 reflect current data.

17 And this request from FINRA was pending when you
18 wrote that letter to Mr. Kaplowitz, wasn't it?

19 A. By way of the date it was, yes.

20 MS. COOMBE: Could we go back please and
21 look at GB31, page nine, actually page eight. Page seven,
22 Ron.

23 BY MS. COOMBE, CONTINUED:

24 Q. Just where the highlighting ends you wrote:
25 Having discovered this mistake and realizing the appearance

DAVID SMITH - Cross by Ms. Coombe

1 of impropriety or worse, I seek a solution that calls for
2 immediate restitution with some reasonable explanation for
3 our behavior. That will probably call for creativity
4 beyond anyone's ability.

5 That's what you wrote; isn't it, Mr. Smith?

6 A. That is what I wrote, yes.

7 Q. Now, you testified yesterday that you directed
8 that new accounting entries be made that Saturday while you
9 were at the office, right?

10 A. I think I testified that upon examination of the
11 documentation that's what it appeared. I didn't initially
12 think that, but as I looked at the date on the exhibits
13 that I sent to Mr. Kaplowitz, I believe they were dated
14 October 10th. So that would lead me to believe that that's
15 what happened. And I believe that was my testimony.

16 Q. I am handing you GB32, Mr. Smith. These are the
17 exhibits to the letter that you sent to Mr. Kaplowitz; is
18 that correct?

19 A. No, I am not talking -- oh, I am sorry. I need
20 to go a little further.

21 Q. Look at the first page. It says Exhibit 1 on
22 the upper right-hand corner.

23 A. Yes, I am sorry.

24 Q. These are the exhibits.

25 MS. COOMBE: Could we look at the next page,

DAVID SMITH - Cross by Ms. Coombe

1 please, Ron, and the page after that.

2 BY MS. COOMBE, CONTINUED:

3 Q. That's a copy of the PPM for MSTF, correct?

4 A. That is correct.

5 MS. COOMBE: Let's look that the next page.

6 BY MS. COOMBE, CONTINUED:

7 Q. Those are some spreadsheets. There aren't any
8 dates on those about when those were prepared, are there?

9 A. These are not the exhibits I was referring to.

10 Q. Okay.

11 MS. COOMBE: Let's look at the next page,
12 please. And the next page. Next page.

13 A. Right.

14 BY MS. COOMBE, CONTINUED:

15 Q. There is no date on these either, right?

16 A. These are not the exhibits I was referring to.

17 Q. Okay.

18 MS. COOMBE: Next page, please.

19 BY MS. COOMBE, CONTINUED:

20 Q. Now, there is a date on this. It says 10/10/09.
21 Is that what you are referring to?

22 A. That is, yes.

23 Q. So these are the exhibits that you are referring
24 to?

25 A. Yes, it is.

DAVID SMITH - Cross by Ms. Coombe

1 Q. And you think because it says 10/10/09 that you
2 must have directed that these new accounting entries be
3 made on October 10th of 2009?

4 A. I think so because it appears -- from what I
5 know of the accounting system, and I am not intimately
6 knowledgeable, but the 10/10 date is the date that it is
7 printed out. So I am assuming that when he printed that
8 out at 10/10, that, in fact, was a reflection of what now
9 records now looked like.

10 Q. And this is the records regarding MSTF and
11 MS Advisors, right, it is not between MSTF and the Four
12 Funds or -- correct? The Four Funds are not mentioned on
13 this document?

14 A. Correct.

15 Q. So you didn't wait to hear back from
16 Mr. Kaplowitz after sending him that letter before
17 directing that new accounting entries be created?

18 A. I had conversations with Mr. Kaplowitz that day.
19 I don't recall whether I specifically discussed what we
20 were doing, but I had I think at least two conversations
21 during the day with him while we were trying to get this
22 put together. And he was out at his home in Montauk. I
23 think I faxed this to his home, but I don't recall that we
24 went into this. I am not sure if Mr. Kaplowitz had the
25 background to understand it anyway.

DAVID SMITH - Cross by Ms. Coombe

1 Q. You have a very low opinion of Mr. Kaplowitz --

2 MR. DREYER: Objection.

3 A. No, I have a very high opinion of Mr. Kaplowitz.

4 He is a lawyer, not an accountant. I discovered lawyers

5 have very little financial background, present company

6 excepted.

7 MR. DREYER: Objection.

8 MS. COOMBE: Your client is talking,

9 Mr. Dreyer.

10 MR. DREYER: I am objecting to the biplay.

11 THE COURT: Next question.

12 BY MS. COOMBE, CONTINUED:

13 Q. I am handing you GB41 --

14 A. He said it --

15 MR. DREYER: Objection to biplay.

16 THE COURT: Mr. Smith, wait until you get a

17 question and then answer it, and then maybe your lawyer

18 might not be so upset.

19 THE WITNESS: Okay. I apologize.

20 A. I am sorry, Ms. Coombe.

21 BY MS. COOMBE, CONTINUED:

22 Q. You are familiar with this document, aren't you,

23 Mr. Smith? You are aware that this was recovered from

24 search warrant executed at your home?

25 A. I am not, no.

DAVID SMITH - Cross by Ms. Coombe

1 MS. COOMBE: Can we look at GB41A, please,
2 Ron?

3 BY MS. COOMBE, CONTINUED:

4 Q. These are documents regarding the money that was
5 paid out of MSTF to non-MSTF investors, correct?

6 A. Yes, I believe that is correct.

7 Q. Okay, and I am going to hand you now Exhibit
8 GB41B. This is a document regarding transactions between
9 MSTF and MS Advisors and MSCH. And you see that
10 transactions have been crossed off; is that correct?

11 A. I do see that, yes.

12 Q. That relates back to the money that was used
13 from MSTF to pay non-MSTF investors, correct?

14 A. I don't know that. I didn't prepare this
15 document. I don't know that.

16 Q. I am handing you now Exhibit GB41C. And I am
17 giving you a typewritten version of part of it? Please
18 take your time, look it over, and let me know when you are
19 ready to proceed?

20 A. I am ready to go. I am familiar with this.

21 Q. Okay. It is in your handwriting, right?

22 A. Yes.

23 Q. This was recovered from your house as well, you
24 had it at your house?

25 A. More likely than not, yes.

DAVID SMITH - Cross by Ms. Coombe

1 Q. Okay. I would like to look at page eight, and
2 we have a typewritten version that I gave to you
3 separately. There is a number of entries at the top. Do
4 you see those all there, Fund advances to MSTF?

5 A. Yes.

6 Q. And those relate to some of the payroll
7 transactions that we looked at earlier this morning,
8 correct?

9 A. No, they relate to the loans to MSTF, I believe.

10 Q. Okay. The loans that -- the money that went
11 from the Four Funds to MSTF and then on the same day was
12 used to pay employees of McGinn, Smith & Company, correct?

13 A. No, that's not correct.

14 Q. All right. Let's go back and look at the chart.
15 Let's look at GB1C again. Let's see on the chart in the
16 handwriting on the left, you have got FIIN, fifty thousand
17 dollars, November 14th of 2009 (sic), correct?

18 A. That is correct.

19 Q. And the chart on the right indicates
20 November 14, 2008, fifty thousand dollars from FIIN. Those
21 match up, don't they?

22 A. They do.

23 Q. Okay, and the next entry in your handwriting is
24 11/14 seventy-five thousand dollars. That matches up too,
25 doesn't it?

DAVID SMITH - Cross by Ms. Coombe

1 A. It does.

2 Q. We will look at page two. There are three
3 transactions on your chart, November 26th of 2008 for fifty
4 thousand dollars each, correct?

5 A. Correct.

6 Q. And those match up to the chart on the right,
7 correct?

8 A. That is correct I guess. Going into MSTF? The
9 chart has been moved.

10 Q. Right. And then you see the entire amount goes
11 out on the same day to the broker-dealer's account, that's
12 correct, isn't it?

13 A. That is not correct.

14 Q. The money didn't move from MSTF to the
15 broker-dealer account and was used for payroll, what is not
16 correct about that, Mr. Smith?

17 A. Because it went to the purchase of McGinn, Smith
18 Preferred Stock and then it used as payroll, yes.

19 Q. I am not asking about the purchase of stock.

20 A. You are asking what the money was moved for, and
21 I am telling you it was moved to purchase McGinn, Smith
22 Preferred Stock.

23 Q. Mr. Smith, I am going to ask you to listen to my
24 question. I didn't ask you what the purpose of the
25 movement of the money was. I asked you if money moved from

DAVID SMITH - Cross by Ms. Coombe

1 MSTF to the broker-dealer and then was used to pay the
2 employees of broker-dealer, yes or no?

3 A. Yes.

4 Q. That's the question I asked you, Mr. Smith.

5 MR. DREYER: Objection.

6 THE COURT: Move on.

7 BY MS. COOMBE, CONTINUED:

8 Q. Would you agree with me now or do you want to go
9 through the April 14th ones as well that these match up
10 with the chart that is on GB1C?

11 A. Yes, I don't think that's necessary.

12 Q. And you wrote these should not, and you
13 underlined, be loans, correct, in GB41C?

14 A. That is correct.

15 MS. COOMBE: Let's go back to GB12 for a
16 moment if we could have it on the side of the screen, Ron.

17 BY MS. COOMBE, CONTINUED:

18 Q. We looked at these notes that were prepared
19 earlier for these transactions, didn't we?

20 A. Yes, but I think you are mis --

21 Q. Mr. Smith, you need to answer my questions.

22 A. Well, then I will answer no, it can't be
23 answered.

24 Q. Well, this is a note for a transaction dated
25 April 14th of 2009. It is for one hundred thousand

DAVID SMITH - Cross by Ms. Coombe

1 dollars, and it is between MSTF, and this one is with TAIN,
2 correct?

3 A. Yes, but that's not what the reference to the
4 loans are, Ms. Coombe.

5 Q. Mr. Smith, you need to answer my question. You
6 will have a chance to answer and say whatever you want when
7 Mr. Dreyer stands up and asks you questions.

8 A. Okay.

9 Q. This is characterized as a note, which is a loan
10 between MSTF and TAIN; is that correct?

11 A. That's true.

12 MS. COOMBE: Could we look at GB41C, please,
13 the second page? I am sorry the typed version, Ron, GB41C
14 typed. Could we look at the second page, please? The last
15 paragraph.

16 BY MS. COOMBE, CONTINUED:

17 Q. Thus, we were using our fees to pay customer
18 advances. You wrote: We obviously should not have used
19 MSTF as our personal bank, but TMM had access to the cash,
20 and we from -- and there is some word we couldn't read,
21 deposit MSTF. That's what you wrote, Mr. Smith?

22 A. I am assuming so, yes.

23 MS. COOMBE: And if we can look at page
24 three, please.

25 BY MS. COOMBE, CONTINUED:

DAVID SMITH - Cross by Ms. Coombe

1 Q. You wrote: The fact that we have documents
2 showing a loan to MSTF is simply our accounting for the
3 distribution. Correct, that's what you wrote?

4 A. Yes, that's correct.

5 Q. And then at the bottom, you wrote: The
6 schedules are drawn from the schedules that you provided
7 me. Right?

8 A. That is correct.

9 Q. And this was for Mr. Shea, right, he is the guy
10 who gave you the schedules; isn't that right?

11 A. I believe so, yes.

12 Q. Now, the broker-dealer had to maintain a minimum
13 amount of net capital, right, in order to stay in business?
14 Yes or no, Mr. Smith?

15 A. No.

16 Q. There were no net capital requirements that you
17 were familiar with that were imposed by regulators?

18 A. Yes.

19 Q. And it was necessary to maintain those net
20 capital requirements for the broker-dealer to be continued
21 to be registered with its regulators; isn't that right?

22 A. No, that's not correct.

23 Q. You had to have certain amounts of minimum net
24 capital; isn't that right?

25 A. To continue to do business until it was

DAVID SMITH - Cross by Ms. Coombe

1 corrected.

2 Q. You couldn't do business when you didn't have
3 the minimum net capital requirements, right, Mr. Smith?

4 A. That is correct.

5 Q. And I am handing you now Exhibit GE10. This is
6 an electronic mail message from you to Mr. McGinn. And you
7 wrote the following: That you had no choice but to
8 instruct Dave Rees to delete the following paychecks on
9 Friday. And there were a number of people listed, right?

10 A. That is correct.

11 Q. And you --

12 MS. COOMBE: If we could go farther down.

13 BY MS. COOMBE, CONTINUED:

14 Q. You said you would further instruct Dave to pay
15 no bills including rent, the one exception will be health
16 coverage. You continued: This will leave us approximately
17 eighty-five thousand dollars short as regards to cash flow
18 in order to meet the rest of payroll. I suspect our net
19 capital will be wiped out as we were barely at the minimum
20 at the end of last month. I will press Dave in the
21 morning, but I suspect that we were on our way to losing at
22 least two hundred thousand dollars for the month.

23 With the held checks, we probably need to come
24 up with one hundred and twenty-five thousand dollars to
25 clear the capital hurdle and of course provide the cash for

DAVID SMITH - Cross by Ms. Coombe

1 the rest of payroll. Obviously the payables, although not
2 being paid -- referring to the rent and the salaries,
3 etcetera, right, that's what you mean there?

4 A. Basically all payables, yes.

5 Q. -- they need to be accrued for capital purposes,
6 and if calculated, would put us in net capital violation.

7 You wrote: We can probably manipulate that for
8 this month, but if no solution is found in the next couple
9 of weeks, we will have to report the net capital violation
10 and more likely than not, consider closing our doors.

11 That's what you wrote; isn't it?

12 A. That is correct. All of it is correct.

13 Q. You went on to say: We have been living on the
14 edge for some time. And Tim's deals have kept us alive by
15 fronting our profit. However, the two hundred thousand
16 dollars plus that we are losing every month is just too
17 difficult to keep pace with.

18 And this was sent in February of 2009, correct?

19 A. That is correct.

20 Q. Mr. Smith, I just want to go back for a moment
21 to the topic we were talking about a moment ago, which is
22 the new accounting entries that you directed to be made.
23 You are aware that those were submitted to FINRA, aren't
24 you?

25 A. I am aware that the comptroller complied with

DAVID SMITH - Cross by Ms. Coombe

1 the letter as far as I know, yes.

2 Q. You were familiar with FINRA's request for the
3 documents that we looked at a few moments ago?

4 MS. COOMBE: We can put it back up on
5 screen, GH2.

6 BY MS. COOMBE, CONTINUED:

7 Q. You were familiar with this request at the time,
8 right, Mr. Smith?

9 A. I was familiar with the letter. I turned that
10 over to staff. I can't swear I knew everything in there.
11 I knew FINRA was asking for documentation if that's your
12 question, yes.

13 Q. Mr. Kaplowitz told you to be sure, to make sure
14 that nothing looked like you were doing a cover up of the
15 books and records, right?

16 A. That is correct, yes.

17 Q. And Paragraph 4 says: Hey, if there is anything
18 that is not up to date, just let us know when you send us
19 these accounting records. Right?

20 A. That what Paragraph 4 reads, yes.

21 Q. And you didn't take any actions to make sure
22 that FINRA was informed about the new accounting entries
23 that you made, did you, Mr. Smith? Yes or no? Yes or no?

24 A. No.

25 Q. Mr. Smith, there was some arbitration awards

DAVID SMITH - Cross by Ms. Coombe

1 filed against you and the firm in connection with your
2 operation of the Four Funds?

3 MR. DREYER: Objection, Your Honor.

4 THE COURT: Sustained.

5 BY MS. COOMBE, CONTINUED:

6 Q. Mr. Smith, you had a house in Vero Beach,
7 Florida, right?

8 A. I did.

9 Q. It was worth about a million dollars back in
10 March or April of 2009; is that right?

11 A. I would have hoped it was worth more than that,
12 but I will go along with that.

13 Q. How much would you say it was worth back at that
14 time?

15 A. In 2009?

16 Q. Right.

17 A. Probably two million two.

18 Q. And you transferred that house to your wife on
19 March 5th of 2009, didn't you?

20 MR. DREYER: Objection, Your Honor.
21 Irrelevant.

22 THE COURT: Overruled.

23 BY MS. COOMBE, CONTINUED:

24 Q. Did you transfer that house to your wife on
25 March 5th of 2009?

DAVID SMITH - Cross by Ms. Coombe

1 A. That is the date that doesn't sound correct. I
2 would hesitate to affirm that.

3 Q. Spring of 2009?

4 A. My recollection is I spoke to Mr. Carr to handle
5 that in the spring of 2009, and I thought it was
6 consummated in the fall of 2009, but I could be incorrect.

7 Q. And that an after Doctor Chang had filed an
8 arbitration seeking --

9 MR. DREYER: Objection, Your Honor.

10 THE COURT: Where is that related to this
11 case, Ms. Coombe?

12 MS. COOMBE: Your Honor --

13 THE COURT: As far as the arbitration is
14 concerned?

15 MS. COOMBE: It is relevant to the movement
16 of the house, Your Honor, and it is relevant to my next
17 line of questioning.

18 THE COURT: Cross-exam. Overruled. We will
19 let you continue, but keep it in intact.

20 MS. COOMBE: I will.

21 BY MS. COOMBE, CONTINUED:

22 Q. Mr. Smith, that was after Doctor Chang had filed
23 his arbitration and other investors in the Four Funds had
24 filed arbitration complaints with FINRA; isn't that right?

25 A. I believe Doctor Chang filed his arbitration in

DAVID SMITH - Cross by Ms. Coombe

1 2008, December of 2008, so if your date is correct, that
2 would be accurate.

3 Q. There was another arbitration filed in November
4 of 2008, is that correct, Steinkirchner (phonetically)?

5 A. There was a number of arbitrations. I can't
6 corroborate the dates.

7 Q. And you had an estate planning lawyer who
8 recommended that the house not be transferred to your wife;
9 is that right?

10 A. That is incorrect.

11 Q. I am handing you now Exhibit 31. This has not
12 yet been admitted into evidence. Mr. Smith, go ahead and
13 take a look at this letter.

14 A. Okay.

15 Q. If you look at the second page, does that
16 refresh your recollection that Mr. Finn (phonetically) said
17 that it was more beneficial for you to own --

18 MR. DREYER: If it is not in evidence, it
19 shouldn't be read from.

20 BY MS. COOMBE, CONTINUED:

21 Q. Does that refresh your recollection, Mr. Smith,
22 about whether your attorney recommended that you not
23 transfer that house to Mrs. Smith?

24 A. It does not. My attorney initially recommended
25 that I do transfer it, so I am not -- I mean, it reads what

DAVID SMITH - Cross by Ms. Coombe

1 it is. But his initial recommendation was to transfer it.
2 So it seems to be contrary to what he originally
3 recommended.

4 Q. Well, that's not what is reflected in this
5 letter, right?

6 MR. DREYER: Objection, Your Honor.

7 THE COURT: Sustained.

8 BY MS. COOMBE, CONTINUED:

9 Q. Now, Mr. Smith, you wrote that you didn't
10 believe you should be forced to share your earnings for the
11 rest of your life with the likes of Doctor Chang, didn't
12 you?

13 MR. DREYER: Objection, Your Honor. This is
14 again the arbitration matter. It has no relevance here.

15 THE COURT: No, overruled. Doctor Chang was
16 one of the investors. Go ahead.

17 A. I may have very well have written that, yes.

18 BY MS. COOMBE, CONTINUED:

19 Q. And you also wrote that your alleged inattention
20 as a compliance officer should not result in millions of
21 dollars owed to clients. You also wrote that, didn't you?

22 A. Could very well have. I don't recall it
23 specifically, but I have no reason to believe I didn't.

24 Q. And you also wrote that there should be some
25 corporate protection for incompetency, didn't you?

DAVID SMITH - Cross by Ms. Coombe

1 A. That would sound like my flippancy, yes, I may
2 very well have done that.

3 Q. Now, you talked yesterday about a trust that you
4 set up for the benefit of your children, correct?

5 A. That is correct.

6 Q. And you testified that it was worth about four
7 million dollars?

8 A. That is correct.

9 Q. You set that trust up back on August 4th of
10 2004?

11 A. Yes, I think that's the date, yes.

12 Q. And when you testified before FINRA, you told
13 them about that trust, and you told them that it was for
14 the benefit of your children, right?

15 A. That is correct.

16 Q. I am handing you Exhibit 29?

17 MR. DREYER: Your Honor, this is way outside
18 the scope of this indictment, and I object to relevancy.

19 THE COURT: Counsel, what is relevant with
20 this?

21 MS. COOMBE: Your Honor, it is relevant
22 to --

23 MR. DREYER: Well, Your Honor, if Ms. Coombe
24 is going explain the relevancy, I suggest a sidebar.

25 THE COURT: Okay. Members of the jury, we

DAVID SMITH - Cross by Ms. Coombe

1 will have you excused for the morning break now, and we
2 will see if there is any relevance to this matter. Don't
3 discuss the case among yourselves or anyone else.

4 (Whereupon, the proceedings were held in
5 open court out of the presence of the Jury.)

6 THE COURT: You say it is irrelevant. She
7 says it is relevant. Go ahead. Tell me how this is
8 relevant to go before the jury and the issues of this case.

9 MS. COOMBE: Your Honor, there is actually
10 an annuity agreement for this trust under which the terms,
11 all of that money would be paid out to Mr. and Mrs. Smith.
12 The nature of that agreement was not disclosed to FINRA.
13 It was not disclosed in the civil SEC proceedings. It was
14 an effort to conceal money from investors, and I think it
15 is directly relevant to the credibility of Mr. Smith. I
16 don't have many questions about it. I have like a handful
17 of questions.

18 MR. DREYER: It is totally wrong, Your
19 Honor. What Ms. Coombe has just said is absolutely one
20 hundred percent incorrect. And it would cause a mini trial
21 in order to explain what she is saying.

22 The corpus of the trust was established for
23 the benefit of the children. Fifteen years after the
24 establishment of the trust, Mr. and Mrs. Smith would be
25 entitled to an annuity such as a retirement annuity. It

DAVID SMITH - Cross by Ms. Coombe

1 would not interfere with the corpus of the trust. And it
2 would require that the trust exceed a very high number,
3 from four million to over twelve million before that
4 annuity would kick in.

5 To put this before the jury at this point is
6 just a side issue that has no bearing and was prepared by
7 lawyers for the purpose of not only supplementing Mr. and
8 Mrs. Smith's retirement accounts, but also to keep the
9 trust in place for the benefit of the children.

10 Mr. Smith did not testify in any proceeding
11 before the magistrate in this case with respect to the
12 provisions of this case. And this is going to extend this
13 case by about two days in order to explain the entire
14 proceeding here.

15 It has no bearing on his credibility. It
16 has no bearing on anything in this case because to open
17 this up will now require that for the first time Mr. Smith
18 explain exactly why a major mistake was made in the courts
19 below in the presentation of that case to the United States
20 Magistrate.

21 THE COURT: Sounds like a peripheral issue,
22 Ms. Coombe, that you are opening the door for something
23 that's really not that particularly relevant to the overall
24 picture of this case. How is this really anything
25 significant? You just said you only have a few questions.

DAVID SMITH - Cross by Ms. Coombe

1 MS. COOMBE: Your Honor, Mr. Smith, when he
2 was asked about this in FINRA, he said the trust was for
3 the benefit of the children. The annuity agreement shows
4 that the purpose of the trust is going to be --

5 THE COURT: No. Answer my question. How is
6 this really relevant to the issues of this case that's been
7 going on for four weeks, and we should have two or three
8 questions just enough to open up a door on a whole new
9 proceeding and where it goes? How could that possibly
10 advance your case to any significant degree at all?

11 MS. COOMBE: I think it goes to Mr. Smith's
12 credibility, Your Honor, and also his effort to hide assets
13 from the investors, who were the investors of the trust.

14 THE COURT: Would these two or tree
15 questions and all of the other evidence that you have
16 presented, you need this to make out your case, is that
17 what you are to trying to tell me? That after three weeks
18 and three weeks of testimony that you need three or four
19 questions about some other issue to make out your case and
20 it is vital to your case in any way?

21 MS. COOMBE: Your Honor, I will move on to a
22 different topic.

23 THE COURT: Very good. We will take a
24 break.

25 Mr. Minor.

DAVID SMITH - Cross by Ms. Coombe

1 COURT CLERK: Court stands for the morning
2 recess.

3 (Whereupon, a brief recess was taken.)

4 (Whereupon, the proceedings were held in
5 open court in the presence of the Jury.)

6 THE COURT: Ms. Coombe, you may proceed.

7 MS. COOMBE: Thank you, Your Honor.

8 BY MS. COOMBE, CONTINUED:

9 Q. Good morning, again, Mr. Smith.

10 A. Good morning.

11 Q. I am handing you Exhibits GB52 and GB52A. Let's
12 look at GB52, please. Mr. Smith, you talked about this
13 with Mr. Dreyer yesterday, right?

14 A. I did, yes.

15 Q. This is an agreement that's dated May 15th of
16 2008 between MSTF and the four Firstline Trusts; isn't that
17 correct?

18 A. That is correct.

19 Q. And date at the top is May 15th of 2008?

20 A. That is correct.

21 MS. COOMBE: Could we look at the second
22 page, please?

23 BY MS. COOMBE, CONTINUED:

24 Q. You signed this on behalf of all four of the
25 Firstline Trusts?

DAVID SMITH - Cross by Ms. Coombe

1 A. I did.

2 Q. As president of McGinn, Smith Capital Holdings
3 Corporation, the trustee, correct?

4 A. That is correct.

5 MS. COOMBE: And could we look a GB52A,
6 please?

7 BY MS. COOMBE, CONTINUED:

8 Q. This indicates that this document was not
9 created until June 2nd of 2009, correct?

10 A. Yes, that's correct.

11 Q. And it is your testimony that you believed you
12 did not execute this document until June of 2009; is that
13 correct?

14 A. That would be correct, yes.

15 Q. You didn't execute it on May 15th of 2008, the
16 date that's on the document?

17 A. I don't believe so, no.

18 Q. So this is another example of a document that
19 you and Mr. McGinn executed that doesn't have the actual
20 date on it, yes or no?

21 A. Yes.

22 MS. COOMBE: Could we look back at GB52,
23 please? Let's look at the third whereas paragraph that's
24 highlighted.

25 BY MS. COOMBE, CONTINUED:

DAVID SMITH - Cross by Ms. Coombe

1 Q. It states: Whereas, Firstline has defaulted
2 with respect to its obligations to pay principal and
3 interest to trust number one, trust number two, trust
4 number three, and trust number four, collectively the
5 trusts, as required pursuant to the terms of the
6 confidential private placement memoranda dated May 19,
7 2007, and October 19, 2007, collectively the PPMs.

8 It is clear from this paragraph that the
9 Firstline had defaulted on its obligations that were
10 related to the Firstline Trusts, correct?

11 A. That is correct, yes.

12 Q. Now, you are not telling this jury that you
13 signed this on behalf of the Firstline Trusts and you
14 didn't ask Mr. McGinn what had happened to cause the
15 default, are you?

16 A. I have no recollection of signing it. You know,
17 I indicated yesterday that it look like I signed it in June
18 of 2009, but I have no recollection beyond that.

19 Q. This document indicates that seven million
20 dollars of investor money was tied up in connection with
21 something that had defaulted. You did not ask Mr. McGinn
22 about that?

23 A. I have no recollection of asking him, no.

24 Q. You had been the compliance officer before this,
25 right?

DAVID SMITH - Cross by Ms. Coombe

1 A. I had been the compliance officer up until
2 sometime in 2007, yes.

3 Q. A default that would affect seven million
4 dollars of investor money is something that you would want
5 to follow up and ask questions about, isn't it, Mr. Smith?

6 A. It normally would, but I don't recall reading
7 it, yes.

8 Q. Now, yesterday you testified that this would be
9 the latest that you found out about the bankruptcy, this
10 June 2nd of 2009; is that correct?

11 A. I believe I testified, if not I will correct it,
12 somewhere in and around that time because I think this
13 document and probably conversations started on what was
14 going on, but I was unable to pinpoint the time exactly.

15 Q. But you also said it could have been even
16 earlier than this, right?

17 A. Yes.

18 Q. You think Mr. Shea told you and it could be late
19 2009 -- I am sorry, late 2008, spring 2009; is that right?

20 A. You know, I basically had approximately about a
21 year's time in there. I didn't recall it. And my -- best
22 of my recollection was Mr. Shea, but I would not testify
23 under oath to the certainty of either of those things.

24 Q. You are just sure that you didn't know that
25 during the time period of the post-bankruptcy sales, is

DAVID SMITH - Cross by Ms. Coombe

1 that what you are saying?

2 A. I am quite sure I didn't know about it not even
3 through those, but beyond that, but again my recollection
4 is just not good.

5 Q. Now, you were in charge of the brokers on
6 June 2, 2009, when this document was created, correct?
7 They ultimately --

8 A. I had -- CEO and head of the brokers unit, yes,
9 I had responsibility for that.

10 Q. And you didn't tell the brokers about the
11 default that is reflected in this document in June of 2009,
12 did you?

13 A. Not exactly then, no.

14 Q. Did you tell them in July of 2009?

15 A. No.

16 Q. And you didn't tell them in August either, did
17 you?

18 A. I believe in August was when Mr. Carr was
19 drafting that letter, and whether I had conversations in
20 and around August, I can't tell you with certainty, but it
21 was around that time.

22 Q. Mr. Smith, you didn't tell the brokers until
23 that meeting on September 3rd of 2009 about the bankruptcy;
24 isn't that right?

25 A. If that's when the meeting, I don't know. I

DAVID SMITH - Cross by Ms. Coombe

1 don't believe I had much input in that meeting. I guess
2 what I am saying, Ms. Coombe, is that prior to that
3 meeting, I would have had some indication of what was going
4 on. And whether I disclosed that to anybody, I have no
5 recollection of, but I can't say with certainty.

6 Q. You didn't tell them -- you were in charge of
7 retail sales ultimately on June 2nd of 2009, right?

8 A. Yes.

9 Q. And you didn't tell investors in the Firstline
10 Trusts about the default in June of 2009, did you, yes or
11 no?

12 A. No.

13 Q. You didn't tell them in July of 2009, did you?

14 A. No.

15 Q. And you didn't tell them in August of 2009, did
16 you?

17 A. No.

18 Q. Now, you were the CEO of the broker-dealer?

19 A. I was.

20 Q. You mentioned before you were the compliance
21 officer for some years; is that correct?

22 A. I mentioned several times I was the compliance
23 officer up until somewhere in 2007. I can't tell you
24 exactly when.

25 Q. And by at least June of 2009 you learned that

DAVID SMITH - Cross by Ms. Coombe

1 you had offered a product to investors where the company
2 generating the underlying income stream had filed for
3 bankruptcy, and you didn't ask anyone to look into that?

4 A. Mr. McGinn was -- I believe as of that time,
5 June of 2009, I knew he was looking into it, yes.

6 Q. You didn't ask anyone to look and pull the sales
7 and say, hey, we should check and make sure that we didn't
8 sell this to anyone. You didn't do that in June of 2009,
9 did you, Mr. Smith?

10 A. Not in June of 2009, no.

11 Q. Not in July of 2009?

12 A. No.

13 Q. Not in the August of 2009?

14 A. I believe I did in August, yes.

15 Q. Well, after -- you testified yesterday that it
16 is whatever date is on that e-mail from Mrs. Sicluna,
17 correct?

18 A. No, I believe I testified yesterday I thought I
19 had received the entire list. And then subsequent to that,
20 the e-mails would suggest that I asked that that list to be
21 narrowed. So it was sometime within the late August,
22 September timeframe.

23 Q. You didn't do it in June as soon as you found
24 out about it, did you?

25 A. I did not.

DAVID SMITH - Cross by Ms. Coombe

1 Q. Or whenever you found out about it, you didn't
2 look into a better way, did you, to try to protect the
3 investors?

4 MR. DREYER: Objection, Your Honor.

5 THE COURT: Overruled.

6 A. I just don't know the date that I found out
7 about it. So it is pretty difficult for me to answer your
8 question.

9 BY MS. COOMBE, CONTINUED:

10 Q. Whenever you found out about it, you didn't take
11 any action immediately to inform investors, did you?

12 A. Well, if I found out about it in August of 2009,
13 we did take immediate action in September.

14 Q. Mr. Smith, on this document, GB52 that we just
15 looked at, it shows that you knew about the default at
16 least as early of June of 2009, doesn't it?

17 A. If it assumes I read it, yes.

18 Q. Let's look at the bottom of this page. Number
19 one, effective June 2, 2008, MSTF will assume all
20 obligations of Firstline arising under the PPMs to pay to
21 the trusts all principal and interest due and to become due
22 to the trusts thereunder up to a maximum amount of three
23 million dollars in aggregate.

24 Number two, in consideration of the foregoing,
25 the trusts sell, assign, and transfer to MSTF all rights

DAVID SMITH - Cross by Ms. Coombe

1 that exist to collect any unpaid and accruing principal and
2 interest due from Firstline to the trusts pursuant to the
3 terms of the PPMs including, but not limited to, all
4 residual payments and amounts that would have been payable
5 to the trusts in accordance with the terms of the PPMs
6 after receipt of the final payments of principal and
7 interest from Firstline.

8 So the underlying income stream that was
9 described in the PPMs to the Firstline investors is
10 actually being transferred as part of this agreement to
11 MSTF; is that correct? Yes or no?

12 A. Yes.

13 Q. You didn't tell investors about that in June of
14 2009, did you, Mr. Smith?

15 A. I did not.

16 Q. You didn't tell the brokers about that in 2009,
17 in June of 2009, did you, Mr. Smith?

18 A. I did not.

19 Q. I am handing you now Exhibit GF41. You are
20 familiar with this letter, Mr. Smith?

21 A. Yes, I am.

22 MS. COOMBE: Let's look at the second page.
23 Let's look at the bottom.

24 BY MS. COOMBE, CONTINUED:

25 Q. Funding was able to secure immediate financing,

DAVID SMITH - Cross by Ms. Coombe

1 secured by its Firstline receivables in order to have funds
2 available to make the monthly payments due to its lenders.
3 It was anticipated that this borrowing and the concomitant
4 payments to lenders would continue until the bankruptcy
5 proceeding was concluded and Funding received the amounts
6 that Firstline owed to it.

7 At the onset it was anticipated that the
8 bankruptcy proceeding would be concluded in short order and
9 that there would be no disruption in payments required to
10 be made Funding to its lenders. The lender has become
11 exhausted with the time delays, and is no longer willing or
12 capable of funding.

13 Now, Mr. Smith, you knew, based on the document
14 we just looked at, GB52, that some of the money to pay
15 Firstline investors was coming from MSTF, right?

16 A. Again, if I had read it, I would have known
17 that, yes.

18 Q. Did Mr. McGinn tell you that he also took money
19 from accounts related to Integrated Excellence trusts to
20 pay Firstline investors?

21 A. No, I have no recollection of that.

22 Q. You didn't know about the money that came from
23 all of the other trusts to pay the Firstline investors?

24 A. I have no recollection of that, no. I mean, I
25 have had -- I testified yesterday that Mr. Shea had

DAVID SMITH - Cross by Ms. Coombe

1 expressed some concern of payments, and I had said
2 basically that those are from the operating companies.
3 They are our money at discretion. I have no concern. But
4 specifically, no.

5 Q. That was about these payments to Firstline
6 investors?

7 A. No, it was a general statement. I testified
8 yesterday that when I met with Mr. Shea, one of his
9 concerns was that simply that he was having difficulty --

10 Q. Mr. Smith, I am going to interrupt because I am
11 actually talking about the Firstline payments?

12 A. Well, then no. The answer is no.

13 Q. And when you found out about the default and the
14 bankruptcy, you didn't look into how investors had been
15 paid for almost twenty-two months?

16 A. Would you help me out a little bit? When did I
17 find out about the default and bankruptcy?

18 Q. You know, Mr. Smith, I am going to repeat my
19 question for you. Whenever you found out about the
20 default, you didn't look into how Firstline investors had
21 been paid and how they were paid for twenty-two months,
22 didn't look into that at all?

23 A. I don't have a recollection of that, no.

24 Q. When you found out about the Firstline
25 bankruptcy, you didn't look into at all how investors had

DAVID SMITH - Cross by Ms. Coombe

1 been paid for twenty-two months?

2 A. I just didn't get involved in that. I don't
3 have a recollection of that, no.

4 Q. Mr. Smith, I am handing you G111. This is your
5 personal financial statement that was prepared on March 23,
6 2009, for the year ending December 31, 2007, correct?

7 A. That is correct.

8 Q. This was prepared because it had to be submitted
9 to regulators with the Pennsylvania Department of
10 Insurance, correct?

11 A. That was my understanding, yes.

12 Q. And it was later sent off to regulators in Texas
13 as well, correct?

14 A. That is my understanding, yes.

15 MS. COOMBE: Could we please look at page
16 three, Ron?

17 BY MS. COOMBE, CONTINUED:

18 Q. Do you see the liabilities net worth section?

19 A. I do.

20 Q. You have listed liabilities, one for your
21 Saratoga Springs home and another for your Vero Beach,
22 Florida home, right?

23 A. That is correct.

24 Q. Now, at this point you had received four hundred
25 and seven thousand dollars from TDM Cable Funding, LLC in

DAVID SMITH - Cross by Ms. Coombe

1 2006?

2 A. I believe that's the correct number, yes.

3 Q. You received another one hundred and eighty-two
4 thousand from TDM Cable Funding, LLC in 2007; isn't that
5 right?

6 A. I don't have any knowledge or reason to believe
7 you are not correct, so I will be happy to subscribe to it.

8 Q. Four hundred and thirty-one thousand dollars
9 from McGinn, Smith Funding, LLC in 2007?

10 A. Same answer.

11 Q. That's six hundred and thirteen thousand dollars
12 in 2007 and four hundred and seven thousand dollars in
13 2006. That's more than one million dollars, right,
14 Mr. Smith?

15 A. That is correct.

16 Q. You didn't disclose a single penny of that money
17 that you claimed were loans on this document, did you, yes
18 or no?

19 A. No.

20 Q. I am handing you now Government's Exhibit GI10.
21 This is your personal financial statement dated November 4,
22 2008, for year end August 31st of 2008.

23 MS. COOMBE: Could we look at the second to
24 the last page, please?

25 BY MS. COOMBE, CONTINUED:

DAVID SMITH - Cross by Ms. Coombe

1 Q. Loans receivable are listed there. You list
2 money your partners, Tom Livingston and Mr. McGinn, owed
3 you, right?

4 A. I did.

5 MS. COOMBE: Could we go back to page two of
6 this document, please, Ron? Liabilities and net worth.

7 BY MS. COOMBE, CONTINUED:

8 Q. Now, in 2008 you received additional money,
9 right? This is as of August 31, 2008?

10 A. I would assume that's the case.

11 Q. Now, it is even more than a million dollars.
12 You didn't disclose a single penny of that money that you
13 claimed to the IRS were loans on this document, did you
14 Mr. Smith, yes or no?

15 A. Would you rephrase the question?

16 Q. You didn't disclose a single penny of the money
17 that you had received which you did not declare as income
18 on your tax returns because you claimed they were loans on
19 this document, yes or no?

20 MR. DREYER: Objection to the form of the
21 question, Your Honor. It is a three part question.

22 THE COURT: Overruled. He may answer.

23 A. I did not disclose --

24 BY MS. COOMBE, CONTINUED:

25 Q. Yes or no, Mr. Smith.

DAVID SMITH - Cross by Ms. Coombe

1 THE COURT: Can you answer yes or no?

2 A. Please rephrase the question again.

3 BY MS. COOMBE, CONTINUED:

4 Q. Mr. Smith, you didn't disclose a single penny of
5 the money that you had received that you didn't pay taxes
6 on because you claimed that they were loans, that money
7 that you had received from the LLCs, you didn't disclose a
8 single penny of that on this, did you, yes or no?

9 A. I did not.

10 Q. Mr. Smith, may I retrieve the exhibits I gave to
11 you to see if there is something stuck.

12 A. Sure. Do you need these also.

13 Q. I would be happy to take them from you.

14 Mr. Smith, I am handing you now Exhibit GI16. Is that your
15 handwriting?

16 A. Yes, it is.

17 Q. You didn't talk about this document or look at
18 it with Mr. Dreyer yesterday, did you?

19 A. Yes, actually I did.

20 Q. You didn't look at it yesterday?

21 A. Oh, I did not look at it, no.

22 Q. You prepared this for Mr. Simons, correct?

23 A. Yes, I believe so.

24 Q. And it says 2006 income tax at the top, is that
25 correct?

DAVID SMITH - Cross by Ms. Coombe

1 A. That is correct.

2 Q. Let's look at other income. You wrote other
3 income, TDM three hundred and fifty thousand dollars,
4 that's what you wrote, isn't it?

5 A. That is correct.

6 Q. You didn't describe the three hundred and fifty
7 thousand dollars that you received on October 2nd of 2006
8 from TDM Cable Funding LLC as a loan on this document, did
9 you, Mr. Smith, yes or no?

10 A. I did not.

11 Q. You told Mr. Simons that it was other income,
12 didn't you, yes or no?

13 A. I don't believe so.

14 Q. This document says TDM, three hundred and fifty
15 thousand dollars, other income, doesn't it?

16 A. I am sorry. When you said I told him, I thought
17 you were referring to a conversation. This document would
18 suggest that, yes.

19 Q. I am handing you Government's Exhibit GH2. This
20 is a request from FINRA dated September 30th of 2009. If
21 we look at the second page, Paragraph 5 is a request for
22 any loan documentation, correct?

23 A. Correct.

24 Q. I am handing you now Exhibit GH10. This is a
25 letter that Mr. Shea sent on November 16th of 2009 to

DAVID SMITH - Cross by Ms. Coombe

1 FINRA?

2 MS. COOMBE: And could we please look at
3 page, I believe it is page six.

4 BY MS. COOMBE, CONTINUED:

5 Q. Now, this is the promissory note dated
6 October 2nd of 2006 for three hundred and fifty thousand
7 dollars between you and TDM Cable Funding, LLC; is that
8 correct? There is a tab on it.

9 A. Yes, I found that, thank you. Yes.

10 MS. COOMBE: Could we look at the -- I think
11 it will be page nine, Ron.

12 BY MS. COOMBE, CONTINUED:

13 Q. Is that your signature, Mr. Smith?

14 A. Is it page four in the note?

15 Q. Yes.

16 A. I have no reason to believe, yes, that is my
17 signature there.

18 Q. It says: In witness whereof, this note has been
19 executed and delivered on the date specified above by the
20 duly authorized representative of the maker.

21 You didn't sign this note on October 2nd of
22 2006, did you, Mr. Smith?

23 A. No, I did not.

24 Q. You actually signed it on November 2nd or around
25 that time 2009, correct?

DAVID SMITH - Cross by Ms. Coombe

1 A. Around that time. I am not sure which date,
2 yes.

3 Q. And all of the notes that are in your name that
4 are in GH10, that exhibit in front of you, you signed all
5 of those in November of 2009, correct?

6 A. That, I don't know. As I have testified
7 yesterday, I signed a lot of documents. These may have all
8 been inconclusive. They may not have been. I am just not
9 sure of that.

10 Q. Mr. Smith, you appeared for testimony in front
11 of FINRA; is that right?

12 A. I did.

13 Q. Your testimony began on February 1st of 2010.
14 They asked you about money you, Mr. McGinn, and Mr. Rogers
15 had received, right?

16 A. I am sure they did, yes.

17 Q. And they asked you about the more than one
18 million dollars that you, Mr. McGinn, and Mr. Rogers
19 received in October 2006, right?

20 A. I believe they did, yes.

21 Q. You told them that you received the money
22 because you, Mr. McGinn, and Mr. Rogers were looking to
23 acquire cash, right?

24 A. I don't recall that. I don't know, but maybe
25 so.

DAVID SMITH - Cross by Ms. Coombe

1 Q. Mr. Smith, I am handing you a copy of your FINRA
2 deposition. It is at the beginning of the binder. I am on
3 page 370. Lines twenty-one through twenty-five. Do you
4 see where I am, Mr. Smith?

5 A. Three seventy, twenty-one to twenty-five.

6 Q. Yes.

7 A. Yes, I do see that.

8 Q. Were you asked this question and did you give
9 this answer?

10 Question: What was the purpose of those
11 personal loans, why were the loans made?

12 Answer: Loans made because the principals were
13 looking to acquire cash for a variety of purposes.

14 Were you asked that question and did you give
15 that answer?

16 A. I have to stop you for a minute. On what date
17 are we on? Obviously I am on wrong page here. I am on
18 December 14th. Are we at a different time?

19 Q. Let me assist you, Mr. Smith. You are in the
20 SEC deposition.

21 A. Oh.

22 Q. I will find the page for you. There you are.

23 A. Thank you.

24 Q. You are welcome. I put a post-it note next to
25 it. Mr. Smith, did you -- were you asked this question --

DAVID SMITH - Cross by Ms. Coombe

1 do you want me to repeat the question and the answer or can
2 you now answer that you were asked that question and gave
3 that answer?

4 A. Were are on three seventy, and twenty-one
5 through twenty-one, yes.

6 Q. Twenty-one through twenty-five?

7 A. Yes.

8 Q. You were asked that question and you gave that
9 answer?

10 A. That is correct.

11 Q. Now, you did not know the maturity date when you
12 testified before FINRA, right?

13 A. More likely than not.

14 Q. They asked you when you intended to pay back the
15 loans, right?

16 A. Could you direct me to where that language is?
17 Is that just following?

18 Q. You can say you don't remember?

19 A. I don't remember.

20 Q. Can you look at page three hundred and
21 eighty-seven, please.

22 A. Yes, I am with you.

23 Q. Were you asked this question and did you give
24 this answer?

25 MS. COOMBE: I am sorry. Counsel, I am at

DAVID SMITH - Cross by Ms. Coombe

1 page three eighty-seven, lines twenty-three through three
2 hundred and eighty-eight, line four.

3 BY MS. COOMBE, CONTINUED:

4 Q. Were you asked this question and did you give
5 this answer?

6 Question: When do you intend to pay back these
7 loans?

8 Answer: When it is in my interest to or when
9 the corporation is in need of capital and calls for the
10 money back.

11 Were you asked that question and did you give
12 that answer?

13 A. Yes.

14 Q. And then they asked you what you meant when you
15 said that you intended to pay them back when it is in my
16 interest to, right?

17 A. I don't recall. You will have to help me out.

18 Q. I am going to direct your attention to page
19 three eighty-nine, lines ten through seventeen. Were you
20 asked this question and did you give this answer?

21 Question: What does that mean when it is in
22 your interest?

23 Answer: If in my financial affairs it makes
24 sense to repay the loan and forgo interest payments or if
25 the corporation is in need of capital and thinks it is in

DAVID SMITH - Cross by Ms. Coombe

1 their interest.

2 Were you asked that question and did you give
3 that answer?

4 A. Yes.

5 Q. After asking you about the October three hundred
6 and fifty thousand dollar transaction, the December
7 fifty-seven thousand dollar transaction, and the July 2007
8 thirty thousand dollar transaction, FINRA then asked you
9 whether you had received any other loans from TDM Cable
10 Funding, LLC, didn't they?

11 A. I believe so, yes.

12 Q. And you told them no, didn't you?

13 A. I indirectly told them no, yes.

14 Q. And you actually -- you at this point had
15 received more than five hundred thousand dollars from
16 MS Funding, LLC, right?

17 A. I don't know that. I have no reason to doubt
18 it. At that time, I didn't know that.

19 Q. When first questioned about loan documentation
20 during the FINRA deposition, you said that you did not know
21 if the documentation for the TDM Cable loans had been made
22 in the past year, right?

23 A. I guess that's correct.

24 Q. You said that some loan documents had been
25 created in the past year, but that you didn't know what

DAVID SMITH - Cross by Ms. Coombe

1 specific loans, right?

2 A. That is correct, yes.

3 Q. They asked you if it was possible that the newly
4 created loan documents were for the TDM Cable Funding, LLC
5 2006 and 2007 transactions, right?

6 A. Again, I have no reason to doubt you. I don't
7 know where you are reading.

8 MR. DREYER: Your Honor, I object to this
9 line of questioning. There is no inconsistency here.

10 THE COURT: Overruled.

11 BY MS. COOMBE, CONTINUED:

12 Q. And you told them I don't know, right?

13 A. Again, I don't know. Maybe it is best to direct
14 me so I can follow the lines.

15 Q. Page 410.

16 A. Okay. I am on 410, Ms. Coombe.

17 Q. Were you asked this question and did you give
18 this answer?

19 When were these loans documents prepared.

20 And you said: I don't know.

21 Right?

22 A. I said I don't know and some additional
23 language, yes.

24 Q. You said: All I have said is that I recall
25 signing the loan document recently, within the last couple

DAVID SMITH - Cross by Ms. Coombe

1 months. I don't know what loan that related to, whether it
2 was one in 2009 or whether it was -- I don't know.

3 And then you were asked: Is it possible it is
4 for one of the 2006 or 2007 transactions?

5 And you told them: I don't know.

6 A. That is correct.

7 Q. They asked you whether a newly created loan
8 document had been provided to the FINRA staff, right?

9 A. Again, have we moved on to some other language,
10 some other spot here?

11 Q. Page 411, lines twelve to thirteen. Were you
12 asked this question and did you give this answer?

13 Has that document been provided to the FINRA
14 staff?

15 Answer: I don't know. I don't think you have
16 asked for one.

17 A. That is correct.

18 MS. COOMBE: Could we look back at GH10,
19 please?

20 BY MS. COOMBE, CONTINUED:

21 Q. That's the promissory notes, Mr. Smith, that
22 were submitted to FINRA?

23 A. Yes.

24 Q. And they showed you this note, didn't they?
25 During your deposition, they showed you this note?

DAVID SMITH - Cross by Ms. Coombe

1 A. I don't recall that they had, but they may have,
2 yes.

3 Q. And they asked when it was signed, didn't they?

4 A. Yes.

5 Q. And you told them you didn't know when it was
6 signed, right?

7 A. Again, I think that's part of my answer, but I
8 am not following the testimony, which I would like to be
9 able to.

10 Q. You had just signed these notes back in
11 November, around November 2, 2009, right?

12 A. I have testified and firmly believe that I
13 signed a variety of notes. I never knew the specific ones
14 and couldn't relate to specific ones.

15 Q. Your deposition was on February 2nd, just three
16 months after November of 2009, right?

17 A. That is correct.

18 Q. You knew when you signed these notes in November
19 of 2009 that they were going to be provided to FINRA,
20 right?

21 A. That, I did know, yes.

22 Q. And you knew that notes were created in response
23 to a request from FINRA, didn't you, yes or no, Mr. Smith?

24 A. Yes.

25 Q. You did not want to admit to FINRA that you had

DAVID SMITH - Cross by Ms. Coombe

1 just signed these notes, did you, yes or no?

2 MR. DREYER: Objection, Your Honor. It is
3 misstatement of the testimony before FINRA.

4 THE COURT: Overruled. Cross-examination.

5 A. No, I had no reluctance to tell them that at
6 all.

7 BY MS. COOMBE, CONTINUED:

8 Q. Your deposition ended that day, right, and you
9 went back for more testimony the next day?

10 A. That is correct.

11 Q. And then they asked you again about these notes,
12 and that is when you finally told them that they were
13 signed on November 2nd of 2009, right?

14 A. As a result of learning from the night before,
15 yes.

16 MR. DREYER: Objection, Your Honor. It is a
17 misstatement of the testimony of the first day. It has
18 just been brought out that he admitted on the FINRA record
19 that he signed --

20 THE COURT: Overruled. You may redirect,
21 Mr. Dreyer.

22 BY MS. COOMBE, CONTINUED:

23 Q. They asked you whether they were back dated
24 documents, right, and you refused to answer that question?

25 MR. DREYER: Objection, Your Honor.

DAVID SMITH - Cross by Ms. Coombe

1 A. No, that's not true.

2 THE COURT: Answer may stand.

3 BY MS. COOMBE, CONTINUED:

4 Q. Could you turn to page 433, please, Mr. Smith,
5 line eleven to eighteen on page 433. Does that refresh
6 your recollection that you were asked whether the documents
7 were back dated, and you refused to answer that question?

8 A. That refreshes my recollection that
9 Mr. Franceschi, my attorney, instructed me not to answer
10 it, but prior to that I had answered all questions.

11 Q. And the FINRA staff asked you if there were
12 other entities that had made personal loans to you, right,
13 and you told them that there were not?

14 A. I may have very well answered that. I didn't
15 have any recollection of any of those loans, so I may have
16 answered that way, yes.

17 Q. They asked you if you received any loans from
18 NEI Capital, LLC, right, and you told them that you were
19 not aware of any, right?

20 A. That is correct.

21 Q. You actually received three hundred and sixty
22 thousand dollars from NEI Capital, LLC, right?

23 A. At the time I didn't know that.

24 Q. You didn't tell FINRA that, did you?

25 A. I didn't tell them that because I didn't know

DAVID SMITH - Cross by Ms. Coombe

1 it, yes.

2 Q. You told FINRA that the terms of the loans were
3 almost always market driven, didn't you?

4 A. I believe I said that, yes.

5 Q. You mentioned an interest rate of ten to twelve
6 percent, right?

7 A. I may very well have done that, yes.

8 Q. And then when they asked you whether the rate
9 was ten to twelve percent, you said: I am saying in my
10 judgment I think most of those loans could range in the --
11 I guess that's not true. I guess we have loans as low as
12 six percent.

13 Is that your testimony, Mr. Smith?

14 A. That appears to be my testimony, yes.

15 MS. COOMBE: Could we look back at GH10,
16 please?

17 BY MS. COOMBE, CONTINUED:

18 Q. Those are the notes. What is the rate on this
19 note, Mr. Smith?

20 A. Three percent.

21 Q. That is a lot less than ten to twelve percent,
22 right?

23 A. That is.

24 Q. It is half of even six percent, right?

25 A. That is.

DAVID SMITH - Cross by Ms. Coombe

1 Q. And that's a long way from market rate, isn't
2 it?

3 A. Not necessarily.

4 Q. A long way from what you told FINRA was market
5 rate, ten to twelve percent, isn't it?

6 A. It is a long way from ten percent, yes.

7 MS. COOMBE: May I have a moment, Your
8 Honor?

9 THE COURT: You may.

10 MS. COOMBE: I have nothing further, Your
11 Honor.

12 THE COURT: Mr. Dreyer, redirect, if any.

13 MR. DREYER: Yes. Thank you, Your Honor, a
14 few questions.

15

16 REDIRECT EXAMINATION BY MR. DREYER:

17 Q. Good morning, Mr. Smith.

18 A. Good morning, Mr. Dreyer.

19 Q. Mr. Smith, Ms. Coombe has read certain excerpts
20 from a letter that you wrote in 1999 which was addressed to
21 Mr. McGinn. And I am going to start off by asking you, do
22 you have any recollection as to whether you ever gave that
23 letter or delivered the letter to Mr. McGinn?

24 A. Yes, I do.

25 Q. What is your recollection?

DAVID SMITH - Redirect by Mr. Dreyer

1 questions of this witness?

2

3 RECROSS EXAMINATION BY MR. JONES:

4 Q. Mr. Smith, with respect to the issue that
5 Mr. Dreyer was just discussing with you, had you ever
6 received that type of warning before in the long history of
7 McGinn, Smith?

8 A. No, that was the first time in roughly
9 twenty-eight years that we had received that type of
10 warning.

11 Q. And at the end of 2008 in the same document that
12 the government has employed here, it is reflected that the
13 net equity of McGinn, Smith was in excess of the amount of
14 the loss reflected, correct?

15 A. Yes, we still had -- at the end of 2008, we
16 still had a stockholder's equity, I believe, of two million
17 dollars.

18 Q. And the loss that was the source of the warning,
19 that was a loss that occurred because of that single stock
20 failing in 2008, it was not a recurring loss going forward,
21 correct?

22 A. That is my recollection. I don't know of the
23 million eight, how much of that was accounted for, but a
24 substantial amount -- we had taken a substantial hit on an
25 individual stock, yes.

DAVID SMITH - Recross by Mr. Jones

1 Q. That was done and over at the end of 2008?

2 A. There wasn't much left of it. I think we still
3 retain the stock so maybe we had some upside, but the
4 downside was pretty much over.

5 Q. You have been present in the courtroom as a
6 number of people have talked about the transfer of money
7 among various affiliates and related parties and operating
8 companies, LLCs, the McGinn, Smith entities, those
9 transfers were contemplated by the business model and were
10 permitted and authorized by the business model, correct?

11 A. That is correct.

12 MR. JONES: Thank you.

13 THE COURT: Ms. Coombe, recross, if any.

14 MS. COOMBE: May I approach, Your Honor?

15 (Whereupon, a sidebar conference was held
16 outside the hearing of the jury. No
17 transcript taken.)

18

19 RECROSS-EXAMINATION BY MS. COOMBE:

20 Q. Mr. Smith, you testified on redirect about what
21 a Ponzi scheme means, didn't you?

22 A. I did, yes.

23 Q. Are you familiar with the definition that a
24 Ponzi scheme is investment fraud. It involves the payment
25 of purported returns to existing investors from funds

DAVID SMITH - Recross by Ms. Coombe

1 contributed by new investors. Are you familiar with that
2 definition, yes or no?

3 A. No.

4 Q. Are you familiar with the fact that that
5 definition is on the Securities and Exchange Commission
6 website?

7 A. No.

8 MS. COOMBE: I have nothing further, Your
9 Honor.

10 THE COURT: Thank you. Members of the jury,
11 we will break for lunch now until quarter of two. And we
12 will see where we go from there. Don't discuss the case.
13 We will see you back here then at that time.

14 (Whereupon, the proceedings were held in
15 open court out of the presence of the Jury.)

16 THE COURT: Any further witnesses -- you may
17 step down, Mr. Smith.

18 THE WITNESS: Thank you.

19 (Whereupon, the Witness is excused.)

20 THE COURT: Any further witnesses on behalf
21 of Defendant Smith, Mr. Dreyer?

22 MR. DREYER: No, Your Honor, we rest.

23 THE COURT: Defendant Smith rests. The
24 defense has rested.

25 Ms. Coombe.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. 12-CR-028

TIMOTHY M. MCGINN,
DAVID L. SMITH,

Defendants.

Transcript of the Trial Proceedings held on
January 29, 2013, before the HONORABLE DAVID N. HURD, at
the United States Federal Courthouse, 10 Broad Street,
Utica, New York, before Nancy L. Freddoso, Registered
Professional Reporter and Notary Public in and for the
State of New York.

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1 Ms. Coombe, you may proceed with
2 cross-examination of Mr. McGinn.

3 MS. COOMBE: Thank you, Your Honor.

4

5 CROSS-EXAMINATION BY MS. COOMBE:

6 Q. Good morning, Mr. McGinn.

7 A. Good morning, Ms. Coombe.

8 Q. Firstline Security Incorporated filed for
9 bankruptcy on January 25, 2008, isn't that correct?

10 A. Yes.

11 Q. And you found out about it right away, didn't
12 you?

13 A. I did.

14 Q. Almost immediately?

15 A. Correct.

16 Q. You got an e-mail saying that they were over at
17 the courthouse filing the papers; isn't that right?

18 A. I don't recall that, but maybe.

19 Q. Mr. Rogers wrote that to you?

20 A. Again, I don't specifically recall that, but it
21 could be the case.

22 Q. But you found out right away, right?

23 A. Yes.

24 Q. Now, after the bankruptcy the brokers who worked
25 for McGinn, Smith & Company, Incorporated continued to sell

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Firstline Series B products, didn't they?

2 A. Yes.

3 Q. They didn't know about the bankruptcy so they
4 couldn't tell investors, right?

5 A. Yes.

6 Q. And so there were investors who purchased
7 Firstline Series B without knowing about the bankruptcy,
8 right?

9 A. Yes.

10 Q. These sales should never have been made, right?

11 A. That is what I testified to yesterday, yes.

12 Q. That is a yes, I take it?

13 A. I said yes.

14 Q. The bankruptcy was obviously material for new
15 sales, correct?

16 A. The bankruptcy would have been material for
17 those sales. They were secondary sales, not primary sales.

18 Q. So that answer is yes?

19 A. Yes.

20 Q. I am going to put the screen up, Mr. McGinn. I
21 am handing you previously admitted Exhibit GF18. Please
22 take your time, look it over. Let me know when you are
23 ready to proceed.

24 A. I am ready.

25 Q. If you look down underneath you see this an

TIMOTHY MCGINN - Cross by Ms. Coombe

1 electronic mail message from Ms. Sicluna to you. The
2 subject, Firstline Series B. If we could just look a
3 little further. The subject, Firstline Series B and TDM
4 Verifier Trust 08, ticketed, collected, uncollected.
5 Ms. Sicluna outlined for you how much had been sold of the
6 Series B offerings; isn't that correct?

7 A. Yes.

8 Q. You had asked her for that information, correct?

9 A. Yes.

10 Q. You wanted to know how much had been sold,
11 right?

12 A. Yes.

13 Q. You wanted to know how much money had actually
14 been collected, correct?

15 A. Yes.

16 Q. And this e-mail shows that sixty-five thousand
17 dollars was still available of Firstline Senior Series B,
18 correct?

19 A. Yes.

20 Q. Dated January 7, 2008?

21 A. Yes.

22 Q. Now, by this time, you were advising Firstline
23 Security, Incorporated in its negotiations with its major
24 creditors, correct?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. And you had been since late December when
2 Firstline Security, Incorporated had hired the
3 broker-dealer to assist in those negotiations, correct?

4 A. No.

5 Q. I am handing you now previously admitted Exhibit
6 GF20. Please take your time, look it over. Let me know
7 when you are ready to proceed.

8 A. I am ready.

9 Q. All right. The first page is an electronic mail
10 message from Mr. Rogers. You testified yesterday these
11 were his former colleagues at ADT Security. You see a copy
12 was sent to you; is that correct?

13 A. Yes.

14 Q. Please look at the second page. This is a
15 memorandum dated January 25th of 2008. It is from you and
16 Mr. Rogers to those gentlemen at ADT Securities, correct?

17 A. Yes.

18 Q. I am going to direct your attention to the
19 second sentence of first paragraph. Subsequently, in late
20 December 2007, MS, that's the broker-dealer, right?

21 A. MS is the broker-dealer, correct.

22 Q. Was engaged by the company, that's Firstline
23 Security, Incorporated, right?

24 A. Yes.

25 Q. In an advisory capacity to assist them in

TIMOTHY MCGINN - Cross by Ms. Coombe

1 negotiating with ADT, GE Security and Alarm.com
2 Micorstrategies who are the major creditors of the company
3 owed in the aggregate of approximately fifteen million
4 dollars.

5 That is what it says, isn't it, Mr. McGinn?

6 A. That's what it says.

7 MS. COOMBE: Could we look at Exhibit GF1B,
8 please?

9 BY MS. COOMBE, CONTINUED:

10 Q. This is a chart of all of the post-bankruptcy
11 sales and it -- the orders of every single one of these
12 people was processed after the bankruptcy, correct?

13 A. Correct.

14 Q. And you knew about the bankruptcy when these
15 sales occurred, didn't you?

16 A. I did.

17 Q. You didn't tell Andy Guzzetti about the
18 bankruptcy, did you?

19 A. No.

20 Q. You didn't tell Bill Lex about the bankruptcy?

21 A. No.

22 Q. You didn't tell the brokers, any of them, did
23 you?

24 A. No.

25 Q. Did the broker-dealer have a compliance officer

TIMOTHY MCGINN - Cross by Ms. Coombe

1 back in January of 2008?

2 A. Yes.

3 Q. Who was the compliance officer?

4 A. Stephen Smith.

5 Q. Can you explain to the ladies and gentlemen of
6 the jury what a compliance officer does?

7 A. A compliance officer has the responsibility of
8 monitoring the activities of the firm to assure that they
9 are in compliance, compliance officer, with the rules and
10 regulations of both the SEC and FINRA.

11 Q. You didn't tell the compliance officer,
12 Mr. Smith, about the bankruptcy when it happened, did you?

13 A. I did not.

14 Q. The compliance officer could have made sure that
15 there were no more sales, right?

16 A. Perhaps.

17 Q. Well, he could have, right, if he had looked
18 into it?

19 A. Perhaps.

20 Q. You took no actions to make sure that there were
21 no post-bankruptcy sales, isn't that correct, Mr. McGinn,
22 yes or no?

23 A. It is not a question that can be answered with a
24 straight yes or no.

25 Q. That's fine then. You didn't tell the brokers,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 right?

2 A. Correct.

3 Q. You didn't tell the compliance officer?

4 A. Correct.

5 MR. JONES: This is kind of redundant.

6 THE COURT: Overruled.

7 BY MS. COOMBE, CONTINUED:

8 Q. Now, one of your responsibilities was to sign
9 subscription agreements sometimes, right?

10 A. Sometimes.

11 Q. And you signed as in your capacity as the -- I
12 believe it was the chairman of McGinn, Smith Capital
13 Holdings Corporation?

14 A. Yes.

15 Q. And that was the trustee for these trusts,
16 correct?

17 A. Yes.

18 Q. Now, when you signed the subscription agreements
19 there is a point for having subscription agreements, right?

20 A. There is.

21 Q. You have to make sure that the investor is
22 actually accredited and not selling these products to
23 someone who shouldn't be in there, right?

24 A. That's correct.

25 Q. The broker-dealer, the supervisors, the

TIMOTHY MCGINN - Cross by Ms. Coombe

1 managers, the owners, they have the responsibility to make
2 sure that happens, right?

3 A. They do.

4 Q. And you have to make sure that the form was
5 properly filled out, right?

6 A. Yes.

7 Q. Make sure the investors got the information they
8 were supposed to get?

9 A. Yes.

10 Q. That's the responsibilities of the owners of the
11 broker-dealer, right?

12 A. As you just indicated previously, also the
13 managers and the sales managers of the broker-dealer as
14 well.

15 Q. It was the responsibility of you as one of the
16 owners of the trustee and the broker-dealer, is that right
17 or not right, Mr. McGinn?

18 A. Of me as well as others.

19 Q. It was the responsibility of you -- I am not
20 asking about the others. Was it your responsibility, yes
21 or no?

22 MR. JONES: Asked and answered.

23 THE COURT: Overruled. Answer the question.

24 A. Yes.

25 BY MS. COOMBE, CONTINUED:

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. I am handing you previously admitted
2 Exhibit GF1B. Please take your time, look it over. Let me
3 know when you are ready to proceed. It is actually GF1B
4 support.

5 A. I am ready.

6 Q. These are the subscription agreements that go
7 with the chart we just looked at, correct?

8 A. Yes.

9 Q. All right. Let's look at the first one. Let's
10 look at page two. This is a subscription agreement for
11 Firstline Senior Trust 07 Series B, correct?

12 A. Yes.

13 MS. COOMBE: And if we could look at the
14 bottom of the page, please. And could we look at the next
15 page, please?

16 BY MS. COOMBE, CONTINUED:

17 Q. Do you see at the bottom this is one for
18 Doctor Henry Crist in Hummelstown, Pennsylvania, correct?

19 A. Yes.

20 MS. COOMBE: Could we look at the next page,
21 please?

22 BY MS. COOMBE, CONTINUED:

23 Q. It is dated January 29, 2008. That's after the
24 bankruptcy right, Mr. McGinn?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Now, that second signature down there, whose
2 signature is that?

3 A. It is mine.

4 Q. Did you call Doctor Crist up and tell him about
5 the bankruptcy?

6 A. No.

7 Q. Did you call Mr. Lex and tell him about the
8 bankruptcy?

9 A. No.

10 Q. You didn't send Doctor Crist an e-mail and say,
11 hey, you just brought into a bankrupt product, did you?

12 A. I did not.

13 Q. And you didn't send Mr. Lex an e-mail stating
14 that his client, Doctor Crist, had just brought into a
15 bankrupt product, did you?

16 A. No.

17 Q. Let's look at the next one. I believe it is
18 page six of the exhibit. This is another Firstline Senior
19 Trust 07 Series B subscription agreement, correct?

20 A. Yes.

21 Q. Let's look at the next page. This is for
22 Mr. Vanasek in King of Prussia, Pennsylvania, correct?

23 A. It is.

24 Q. He is purchasing ten thousand dollars, right?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Money that he had earned, right, his money,
2 right?

3 A. I assume so.

4 MS. COOMBE: Let's look at the next page,
5 please.

6 BY MS. COOMBE, CONTINUED:

7 Q. This one is dated January 31st of 2008. That's
8 after the bankruptcy, right, Mr. McGinn?

9 A. Yes, it is.

10 Q. That's your signature there, isn't it?

11 A. It is.

12 Q. You didn't call Mr. Vanasek and tell him about
13 the bankruptcy, did you?

14 A. No.

15 Q. You didn't call his broker and tell him, did
16 you?

17 A. No.

18 Q. You didn't send them an e-mail to let them know
19 what was going on, did you?

20 A. No.

21 MS. COOMBE: Let's look at the next one,
22 please.

23 BY MS. COOMBE, CONTINUED:

24 Q. This is another Firstline Senior Trust 07
25 Series B subscription agreement.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 MS. COOMBE: Let's look at the next page.

2 BY MS. COOMBE, CONTINUED:

3 Q. This is for Robert and Maureen Gallo. They
4 invested thirty thousand dollars. Do you see that,
5 Mr. McGinn?

6 A. I do.

7 Q. Thirty thousand dollars.

8 MS. COOMBE: Now, let's look at the next
9 page.

10 BY MS. COOMBE, CONTINUED:

11 Q. This one is dated February 4th of 2008, after
12 the bankruptcy, right?

13 A. Yes.

14 Q. And that's your signature, isn't it?

15 A. It is.

16 Q. You didn't call Mr. or Mrs. Gallo and tell them
17 about the bankruptcy, did you?

18 A. No.

19 Q. And you didn't get in touch with their broker
20 either?

21 A. No.

22 Q. You didn't do anything to get in touch with any
23 of those people to tell them that they had bought into a
24 bankrupt product, did you?

25 A. Correct.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 MS. COOMBE: Could we look a GF1A, please?

2 BY MS. COOMBE, CONTINUED:

3 Q. Please take your time, look that over, and let
4 me know when you are ready to proceed.

5 A. I am ready.

6 Q. Actually I am going to also give you previously
7 admitted Exhibit GF1A support. Take your time, look that
8 over, and let me know when you are ready to proceed.

9 A. I am ready.

10 Q. Now this chart, GF1A. These are e-mails that
11 Mr. Guzzetti sent to all brokers that talked about the
12 availability of Firstline Trust 07 Series B starting on
13 January 25, 2008, the date that Firstline Security,
14 Incorporated filed for bankruptcy. You were on the all
15 broker e-mail chain, weren't you?

16 A. Yes.

17 Q. You got those e-mails, didn't you?

18 A. I assume so.

19 Q. You got that e-mail dated January 25th of 2008.
20 Do have a little Firstline eleven percent available, make
21 the calls. Right?

22 A. That is what it says.

23 Q. January 28, 2008, seventy-five thousand dollars
24 Firstline B, two hundred and fifty thousand dollars of
25 Firstline B. Mr. Guzzetti sent that e-mail to you too,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 right?

2 A. To all brokers.

3 Q. You didn't call Mr. Guzzetti up and say, hey,
4 you better stop selling this. The company filed for
5 bankruptcy, did you?

6 A. No.

7 Q. January 28th: Both nine and a half percent and
8 eleven percent are done. They start up again on April 15th
9 of 2008. We have a beautiful secondary investment that
10 just became available. Firstline eleven percent. This
11 e-mail went to you, right, Mr. McGinn, you are part of the
12 all brokers chain?

13 A. Yes.

14 Q. And Mr. Guzzetti advertised it again on
15 April 16, 2008, correct?

16 A. It seems so.

17 Q. April 17th?

18 A. Yes.

19 Q. April 18th?

20 A. Yes.

21 Q. April 21st?

22 A. Yes.

23 Q. April 22nd?

24 A. Yes.

25 Q. April 23rd?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Yes.

2 Q. And it goes on and on and on, almost everyday,
3 isn't that right?

4 A. Well, it goes on and on and on. I think I would
5 have to check if it went out everyday, but it does go on
6 and on and on.

7 Q. Let's look at how long it goes on for, until
8 June 4th of 2008 when Firstline is finally done, correct?

9 A. That's correct.

10 Q. There is thirty-one e-mails about these sales
11 that went to you, Mr. McGinn, thirty-one e-mails. You
12 didn't respond to a single one to tell people to stop
13 selling this product, did you?

14 A. That's correct.

15 Q. I am going to hand you previously admitted
16 Exhibits GE4, GE8, GE14, GE16, GE17, GE18. Please take
17 your time, look these over, and let me know when you are
18 ready to proceed.

19 A. Okay.

20 Q. Let's start by looking at GE4. Now, these are
21 all examples of an electronic mail messages to the all
22 brokers from Mr. Guzzetti where you wrote back, right?

23 A. Yes.

24 Q. All right. This is one dated January 23rd of
25 2008. Mr. Guzzetti's e-mail is at the bottom, and you

TIMOTHY MCGINN - Cross by Ms. Coombe

1 wrote back: How is cash? Correct?

2 A. Yes.

3 Q. Okay. Let's look at GE8. This is another daily
4 e-mail from Mr. Guzzetti at the bottom.

5 MS. COOMBE: If we could look a little
6 farther down, Ron.

7 BY MS. COOMBE, CONTINUED:

8 Q. June 24, 2008. Andy, we have sold zero bonds of
9 the Integrated Junior. Is there a reason or something I
10 should know? Tim.

11 You wrote back to that all broker e-mail too,
12 right, Mr. McGinn?

13 A. Yes.

14 MS. COOMBE: Let's look at the GE14.

15 BY MS. COOMBE, CONTINUED:

16 Q. This one is dated July 24th of 2008.
17 Mr. Guzzetti's e-mail is actually on the second page with
18 his characteristic all caps. And you wrote back to this
19 one too, right?

20 A. Yes.

21 MS. COOMBE: Let's look at GE16.

22 BY MS. COOMBE, CONTINUED:

23 Q. There is Mr. Guzzetti's e-mail on the bottom
24 November 13, 2008, and you wrote back, right?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Let's take the Integrated deal off the daily
2 run. I am terminating the deal. That is what it says,
3 right?

4 A. It does.

5 Q. Let's look at GE17, December 19, 2008, another
6 e-mail from Mr. Guzzetti, all brokers. You wrote back
7 again. The second sentence: We absolutely need to close
8 this deal. The last sentence: But the truth is that this
9 deal is slow moving and it must, in all caps, get done.
10 You wrote back to that too, right?

11 A. Yes.

12 MS. COOMBE: Let's look at the GE18.

13 BY MS. COOMBE, CONTINUED:

14 Q. This is another message from Mr. Guzzetti that
15 you wrote back to, January 20, 2009. Andy, we will need to
16 collect a minimum of two million by January 30th.

17 You wrote back to that one too, right,
18 Mr. McGinn?

19 A. Yes.

20 Q. I am handing you now previously admitted
21 Exhibit GF34. Please take your time, look it over. Let me
22 know when you are ready to proceed.

23 A. I am ready.

24 Q. This is an electronic mail message from
25 Mr. Geoff Smith to you and Mr. Smith and some others; is

TIMOTHY MCGINN - Cross by Ms. Coombe

1 that correct?

2 A. Yes.

3 Q. Dated May 12th of 2008, that's after the
4 bankruptcy, right?

5 A. It is.

6 Q. And it says weekly report for May 5th dot, dot.

7 MS. COOMBE: Let's look at the second page,
8 last paragraph please, first sentence.

9 BY MS. COOMBE, CONTINUED:

10 Q. As far as Andrew Nigrelli, who I think is my
11 strongest lead so far, his compliance department is
12 currently reviewing the Firstline Series B deal.

13 You didn't write back to Mr. Smith and tell him
14 he shouldn't be selling this, did you?

15 A. He wasn't selling this. This was for
16 illustrative purposes only.

17 Q. Mr. McGinn, my question requires a yes or no
18 answer.

19 MR. JONES: No, it doesn't. I object.

20 BY MS. COOMBE, CONTINUED:

21 Q. If you can't answer yes or no --

22 THE COURT: Wait a minute, wait a minute.
23 If you can't answer yes or no, just say you can't answer
24 yes or no.

25 A. I cannot answer yes or no.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. You didn't get in touch with Mr. Smith and tell
3 him that Firstline Security, Incorporated had filed for
4 bankruptcy at this time in May of 2008, did you?

5 A. No.

6 Q. Now, in the spring of 2010, you told Gersten,
7 Savage about these post-bankruptcy sales, didn't you?

8 A. Yes.

9 Q. And you told Gersten, Savage that you had come
10 to an agreement with all to settle for cash and notes of
11 one hundred cents on the dollar. That's what you told
12 them, isn't it?

13 A. Correct.

14 Q. You didn't have that agreement with
15 Doctor Crist, did you?

16 A. I don't recall.

17 Q. You told him that if he wanted to get any of his
18 money back, that he was going to have to pony up some more
19 money, that's what you told him, isn't it?

20 A. I don't recall.

21 Q. You heard Doctor Crist testify, didn't you?

22 A. I did.

23 Q. You didn't have that agreement with Mrs. Kogan,
24 the chemist from New York City, who testified, did you?

25 A. I don't recall.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. You didn't have that agreement with Mr. Cahn,
2 the lawyer from New York City, did you?

3 A. I don't recall.

4 Q. You didn't have that agreement with
5 Mr. Greenberg, the commodities trader from New York City,
6 did you?

7 A. I don't recall.

8 Q. And you didn't have that agreement with
9 Mr. Pugliese, the retired command master sergeant, did you?

10 A. No.

11 Q. You also told Gersten, Savage that the
12 bankruptcy had occurred on January 28th of 2008, but it was
13 actually January 25th, wasn't it?

14 A. Yes, it was.

15 Q. And you also told Gersten, Savage that you
16 didn't receive notification of the bankruptcy until
17 February 1st of 2008, but you got notification on the same
18 day, didn't you?

19 A. I learned of it the same day, yes.

20 Q. Now, you didn't tell any of the brokers about
21 the bankruptcy in 2008, did you?

22 A. No.

23 Q. And you didn't tell investors about the
24 bankruptcy in 2008, did you?

25 MR. JONES: Asked and answered. Objection,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 repetitive.

2 THE COURT: Overruled. Cross exam.

3 A. Repeat the question, please.

4 BY MS. COOMBE, CONTINUED:

5 Q. You didn't tell investors about the Firstline
6 Security, Incorporated bankruptcy in 2008, did you?

7 A. No.

8 Q. You didn't tell them that no more money was
9 coming in, did you?

10 A. In what year?

11 Q. 2008?

12 A. No.

13 Q. You didn't tell the brokers about the bankruptcy
14 in January of 2009, did you?

15 A. No.

16 Q. You waited until September of 2009, right?

17 A. Yes.

18 Q. And you finally told the investors in September
19 of 2009, right?

20 A. Yes.

21 Q. How many months was that after Firstline had
22 filed for bankruptcy, Mr. McGinn?

23 A. Twenty-one.

24 Q. You had opportunities to tell the brokers,
25 didn't you?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Sure.

2 Q. Everyday was an opportunity to tell the brokers,
3 everyday of those twenty-one months, wasn't it?

4 A. Of course.

5 Q. I am handing you previously admitted
6 Exhibit GF24. Please take your time, look it over, and let
7 me know when you are ready to proceed?

8 A. I am ready.

9 Q. This is an electronic mail message from Mr. Lex
10 to you, right?

11 A. Yes.

12 Q. It is dated February 27th of 2008, correct?

13 A. Yes.

14 Q. That's more than one month after the bankruptcy,
15 right?

16 A. Yes.

17 Q. So you knew about the bankruptcy at this time,
18 correct?

19 A. Yes.

20 Q. And he wrote to you: Dear Tim -- we will look
21 at the second paragraph at the bottom that is highlighted.

22 The greater question is whether TDM Verifier
23 and/or Firstline could have the same problems as SAI. If
24 TDM or Firstline became slow pay or defaulted, what are the
25 provisions to protect our clients?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 You wrote back: Everything okay with Verifier
2 and Firstline.

3 You didn't tell him about the bankruptcy, did
4 you?

5 A. I was --

6 Q. Yes or no, Mr. McGinn?

7 A. I cannot answer that question with a yes or no.

8 Q. On February 28th of 2008 in this electronic mail
9 message, did you write back to Mr. Lex: Firstline
10 Security, Incorporated filed for bankruptcy more than a
11 month ago, did you write that to him?

12 A. No.

13 Q. Did you pick up the phone and call him and tell
14 him that?

15 A. No.

16 Q. You didn't tell Mr. Lex about the bankruptcy on
17 February 28th of 2008, did you?

18 A. That's correct.

19 Q. Now, nothing prohibited you from telling him,
20 right?

21 A. No.

22 Q. You didn't talk about this e-mail with Mr. Jones
23 during your direct testimony, did you?

24 A. No.

25 Q. After Firstline Security, Incorporated filed for

TIMOTHY MCGINN - Cross by Ms. Coombe

1 bankruptcy, it stopped making payments on the loans, right?

2 A. After Firstline filed bankruptcy, its customers
3 stopped making payments into our lock box. Firstline
4 Security, Inc. was never, ever intended to make payments
5 directly to MS Funding.

6 Q. All right. Mr. McGinn, after Firstline
7 Security, Incorporated filed for bankruptcy, you didn't see
8 another penny after that bankruptcy date, did you, except
9 for a few dollars that went into the lock box. That's what
10 you said yesterday, isn't it, yes or no?

11 A. Yes.

12 Q. And they never paid a single -- you never got a
13 single penny on those October loans, did you?

14 A. Yes, we did. We did get payments on the October
15 loans.

16 Q. The money that went into the lock box by mistake
17 that had to go back to the bankruptcy court?

18 A. Yes.

19 Q. The money didn't stay with you very long, did
20 it?

21 A. I am not sure how long it stayed with us.

22 Q. So at this point you decided to keep paying
23 investors in the Firstline Trusts, right?

24 A. At this point we decided to continue to make the
25 payments from the obligor to the lender.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Mr. McGinn, excuse me. My question requires a
2 yes or no answer, not a speech.

3 MR. JONES: Objection to the comments.

4 THE COURT: It is cross-examination,
5 Mr. Jones. You understand that I am sure.

6 A. Repeat the question, please.

7 BY MS. COOMBE, CONTINUED:

8 Q. I will, Mr. McGinn.

9 A. Thank you.

10 Q. You decided to keep paying investors in the
11 Firstline Trusts after Firstline Security, Incorporated
12 filed for bankruptcy, yes or no?

13 A. Yes.

14 Q. And you said for approximately twenty-one months
15 you continued to pay them, correct?

16 A. Yes.

17 Q. And you, yourself, directed the transfers to pay
18 them, correct?

19 A. Yes.

20 Q. It was approximately two million dollars,
21 correct?

22 A. Yes.

23 Q. You got it from other trusts that you
24 controlled, correct?

25 A. In some cases.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. From TDM Cable Trust 06?

2 A. Perhaps.

3 Q. From TDM Verifier Trust 07?

4 A. Again, perhaps.

5 Q. From Integrated Excellence Junior Trust 08?

6 A. Perhaps.

7 Q. From TDM Luxury Cruise Trust 07?

8 A. Again, perhaps.

9 Q. From TDM Verifier Trust 07R?

10 A. Same answer.

11 Q. Well, let's look at GA1B. Mr. McGinn, this
12 chart shows that money was directed on August 4, 2009, from
13 TDM Verifier Trust 07R directly from the account in the
14 name of the trust to pay investors in Firstline sixty-seven
15 thousand dollars. Does that refresh your recollection?

16 A. Yes.

17 Q. You also diverted money from McGinn, Smith
18 Transaction Funding Corporation; isn't that correct?

19 A. No.

20 Q. You transferred money from McGinn, Smith
21 Transaction Funding Corporation, isn't that correct?

22 A. Better word. Yes.

23 Q. And you also transferred money from other
24 unrelated limited LLCs like TDM Cable Funding, LLC,
25 correct?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. No, not correct.

2 Q. You took money from wherever you could to pay
3 these Firstline investors, isn't that correct?

4 A. We took --

5 Q. Yes or no, Mr. McGinn?

6 A. I can't answer it yes or no.

7 Q. You directed all of these payments, didn't you?

8 A. Yes.

9 Q. I am handing you Exhibit 12, which has not yet
10 been admitted. Please take your time, look it over, and
11 let me know when you are ready to proceed.

12 A. I am ready.

13 Q. This is a series of electronic mail messages.

14 MS. COOMBE: And, Your Honor, the government
15 moves the admission of Exhibit 12 at this time.

16 THE COURT: Any objection?

17 MR. JONES: No, Your Honor.

18 THE COURT: Received.

19 (Exhibit No. 12, received.)

20 BY MS. COOMBE, CONTINUED:

21 Q. Mr. McGinn, this is a series of electronic mail
22 messages between Mr. Cooper and yourself; isn't that
23 correct?

24 A. Yes.

25 Q. And it shows that month after month Mr. Cooper

TIMOTHY MCGINN - Cross by Ms. Coombe

1 wrote to you saying he needed money to pay the Firstline
2 investors, correct?

3 A. Yes.

4 Q. And month after month, you wrote back or else
5 directed the bank about where the money should come from,
6 correct?

7 A. Correct.

8 Q. Now, the Firstline PPM state clearly that the
9 payments on the certificates will be made from the
10 monitoring payments from the contracts received by the
11 trust fund, correct?

12 A. I am not sure. I don't have that in front of
13 me.

14 Q. Did you appear for a deposition in front of the
15 Securities and Exchange Commission?

16 A. I did.

17 Q. Did you raise your right hand to swear to tell
18 the truth, the whole truth and nothing but the truth just
19 like you did here?

20 A. Yes.

21 Q. I am handing you a copy of your SEC transcripts.
22 You will see there is a tab for SEC. Could you please turn
23 to the December 15th deposition at page 187. If you need
24 help, I will help you find it.

25 MS. COOMBE: Mr. Jones, I am on page 187 of

TIMOTHY MCGINN - Cross by Ms. Coombe

1 December 15th, lines sixteen through twenty.

2 A. Okay. I am there.

3 BY MS. COOMBE, CONTINUED:

4 Q. Were you asked this questions and did you give
5 this answer?

6 But the PPM does state clearly that the payments
7 on the certificates will be made from the monitoring
8 payments for the contracts received by the trust fund,
9 isn't that --

10 Answer: That's what it says, yes.

11 That's what you testified to, right, Mr. McGinn?

12 A. Yes.

13 Q. The PPM doesn't say that McGinn, Smith Funding
14 will pay investors from whatever sources are available at
15 the time, yes or no? You don't need to look at your
16 transcript, Mr. McGinn. Just answer my question, please.

17 MR. JONES: Objection.

18 A. Would you mind repeating that question, please?

19 BY MS. COOMBE, CONTINUED:

20 Q. The Firstline PPM does not say that McGinn,
21 Smith Funding will pay the investors from whatever source
22 of money is on hand at the time, does it?

23 A. Well, that's the testimony at the SEC, yes.

24 Q. So it doesn't say that, does it?

25 A. That is the testimony that I gave at the SEC. I

TIMOTHY MCGINN - Cross by Ms. Coombe

1 am not looking at the PPM, so I can't tell what you the PPM
2 says right now.

3 Q. All right. That's fine. I will read the
4 question and answer to you.

5 MS. COOMBE: Mr. Jones, December 15th SEC
6 deposition, page one hundred and eighty-seven.

7 MR. JONES: That's Mr. McGinn.

8 MS. COOMBE: I am sorry. Mr. Jones, I was
9 giving you the line and page number. I did mean you.

10 MR. DREYER: Would you repeat it?

11 MS. COOMBE: I will. I would be delighted
12 to repeat it. The line and page number for counsel is page
13 187, December 15, 2011, SEC deposition. It starts at line
14 twenty-one, and it goes through page 188.

15 BY MS. COOMBE, CONTINUED:

16 Q. Mr. McGinn, do you see where I am?

17 A. I do.

18 Q. Question: It doesn't say that McGinn, Smith
19 Funding will pay the investors from whatever source of
20 money it had on hand at the time, does it?

21 Answer: It does not say that.

22 And then you go on to point out some other
23 issues; is that correct?

24 A. That's correct.

25 Q. Now, you wrote the Firstline PPMs, didn't you?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. I did.

2 Q. You were familiar with the provisions since you
3 wrote them by and large, right?

4 A. Yes.

5 Q. You didn't put in these PPMs that -- any
6 provisions that any excess money would be used however you
7 wanted it to be used, right?

8 A. Any excess monies from where?

9 Q. Any excess money from the raise that wasn't used
10 for the underlying investment could be used however you
11 wanted it to be used, did you put that language in any of
12 the PPMs, yes or no?

13 A. I did not.

14 Q. You didn't tell investors that they were
15 purchasing into some McGinn, Smith umbrella, did you, yes
16 or no?

17 A. I did not.

18 Q. You didn't tell them about the sister companies,
19 yes or no?

20 A. I did not.

21 Q. And you didn't tell that money would be diverted
22 among the various trusts and LLCs to pay whatever needed to
23 be paid at the time, did you?

24 A. I would not --

25 Q. Yes or no?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. I can't answer that yes or no.

2 Q. There isn't language like that in any of the
3 PPMs, is there, Mr. McGinn, yes or not?

4 MR. JONES: Language like what? Object to
5 the form of the question.

6 THE COURT: Overruled.

7 A. No.

8 BY MS. COOMBE, CONTINUED:

9 Q. I am handing you now previously admitted
10 Exhibit GF41. I will take the binder back, thank you.
11 Please take your time, look it over, and let me know when
12 you are ready to proceed.

13 A. I am ready.

14 Q. This is a letter dated September 10, 2009. It
15 is signed by you as the chairman of the board of McGinn,
16 Smith Capital Holdings Corporation, which was the trustee
17 for the Firstline Trusts, correct?

18 A. Yes.

19 Q. You were the chairman of the board of the
20 trustee, correct?

21 A. Yes.

22 Q. And also an owner, correct?

23 A. Yes.

24 Q. And this letter went out under your signature as
25 the chairman of the board for McGinn, Smith Capital

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Holdings Corporation, correct?

2 A. Over my signature.

3 Q. All right. Let's look at page two. Let's look
4 at Paragraph 2, the last sentence. It states: Firstline
5 concealed from Funding that it was embroiled in a massive
6 disagreement with ADT, and, in fact, breached various
7 representations and warranties in the loan documents at the
8 time that Funding made the two loans to Firstline.

9 I am handing you previously admitted Exhibits
10 GF7 and GF13. Please take your time and look them over,
11 and let me know when you are ready to proceed.

12 A. I am ready.

13 Q. Let's look at GF7 first. This is the August 8,
14 2007, e-mail from Mr. Baker to you telling you that ADT has
15 notified them that they are in breach of the dealer
16 agreement; isn't that correct, that's what that says?

17 A. That's what it says.

18 Q. Let's look at GF13. This is the e-mail with the
19 legal opinion attached, correct?

20 A. Yes.

21 MS. COOMBE: If we look at the last page,
22 Paragraph 13.

23 BY MS. COOMBE, CONTINUED:

24 Q. ADT Securities Services, Incorporated has sent
25 certain correspondence to borrower asserting that borrower

TIMOTHY MCGINN - Cross by Ms. Coombe

1 has breached its dealer agreement with ADT. The
2 allegations suggest that ADT may seek damages that would
3 exceed 7.5 million dollars. Borrower has indicated to us
4 that it disputes ADT's claims. In addition, ADT has
5 informally suggested that borrower owes it approximately
6 1.2 to 1.4 million dollars in attrition chargebacks for
7 accounts purchased by ADT in 2006 pursuant to the dealer
8 agreement.

9 Isn't that correct?

10 A. That's what it says.

11 Q. And you didn't include that information in the
12 PPMs for the Firstline Series B transactions, did you?

13 A. No.

14 Q. If you had, then Tom Brown, the state worker,
15 who wound up purchasing this would have had that
16 information, right?

17 A. Assuming he read it, yes.

18 Q. If you had, then he could have decided whether
19 he wanted to invest knowing about this potential
20 litigation, correct?

21 A. Correct.

22 Q. If you had, then Mary Dale, the retired nurse
23 from Florida, she would have had that information available
24 in the PPM, correct, yes or no?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. And she could have decided whether she wanted to
2 invest knowing about this potential litigation, right?

3 A. Yes.

4 Q. And if you had, then Mr. Cahn, the lawyer from
5 New York City, he would have had this information in the
6 PPM and he could have decided if he wanted to put his money
7 in a company knowing that they were facing this potential
8 litigation, correct? Mr. McGinn, yes or no?

9 A. It can't be answered yes or no.

10 Q. You didn't include this information in the PPM,
11 if you had, then Doctor Crist would have had this
12 information, correct?

13 A. Yes.

14 Q. And he would have been able to consider that
15 information in deciding whether he wanted to make this
16 investment with his money, correct?

17 A. He could have.

18 Q. And you didn't include this information in the
19 PPM, so Mr. Pugliese didn't have it, correct?

20 A. Correct.

21 Q. And if you had, then he could have decided
22 whether he wanted to invest his money knowing about this
23 potential litigation, correct?

24 A. Yes.

25 MS. COOMBE: Let's go back to GF41. Could

TIMOTHY MCGINN - Cross by Ms. Coombe

1 we look at the second page, please, Ron. Last paragraph.

2 BY MS. COOMBE, CONTINUED:

3 Q. It states: Funding was able to secure immediate
4 financing, secured by its Firstline receivables in order to
5 have funds available to make the monthly payments due to
6 its lenders. It was anticipated that this borrowing and
7 the concomitant payments to lenders would continue until
8 the bankruptcy proceeding was concluded and Funding
9 received the amounts that Firstline owed to it. At the
10 onset, it was anticipated that the bankruptcy proceeding
11 would be concluded in short order and that there would be
12 no disruption in the payments required to be made by
13 Funding to its lenders. The lender has become exhausted
14 with the time delays and is no longer willing or capable of
15 funding.

16 There wasn't a single mystery lender, was there,
17 Mr. McGinn?

18 A. There wasn't a single mystery --

19 Q. Lender?

20 A. No.

21 Q. It came from a variety of sources, right?

22 A. Yes.

23 Q. Some money came from the Integrated Excellence
24 Trusts with the investors like Monsignor Wargo and
25 Mr. Novak, right?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. It came from --

2 Q. Mr. McGinn, yes or no?

3 A. I can't answer it yes or no.

4 Q. It came from Integrated Excellence, money raised
5 in connection with Integrated Excellence Trust, didn't it?

6 A. Yes.

7 Q. It came from money raised in connection with the
8 TDM Verifier Trust 07R?

9 A. Yes.

10 Q. It came from money raised in connection with the
11 TDM Luxury Cruise Trust 07?

12 A. Yes.

13 Q. And it came from TDM Cable Trust 06?

14 A. Yes.

15 Q. And it came from MSTF?

16 A. Yes.

17 Q. Did you hear Mr. Greenberg testify about how his
18 money was being used to pay himself?

19 A. How his money was used to do what?

20 Q. To pay himself because he was an investor in
21 MSTF and also Firstline, did you hear him say that?

22 A. I don't recall hearing him say that.

23 Q. I am handing you previously admitted
24 Exhibit GB52. Please take your time and let me know when
25 you are ready to proceed.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. I am familiar with the document.

2 Q. This is an agreement dated May 15, 2008. It is
3 between MSTF and the Firstline Trust, correct?

4 A. Yes.

5 MS. COOMBE: Let's look at the second page.

6 BY MS. COOMBE, CONTINUED:

7 Q. That's your signature there?

8 A. Yes.

9 Q. And Mr. Smith signed it on behalf of the
10 Firstline Trust, right?

11 A. Yes.

12 MS. COOMBE: Let's go back to the first
13 page, please.

14 BY MS. COOMBE, CONTINUED:

15 Q. The date on this is May 15th of 2008.

16 MS. COOMBE: Ron, could we go back and look
17 at GF1B.

18 BY MS. COOMBE, CONTINUED:

19 Q. May 15, 2008, is right in the middle of these
20 post-bankruptcy sales, right, Mr. McGinn?

21 A. Actually I would suggest it is near the end.

22 Q. There is fifty-eight thousand dollars available
23 as of May 15, 2008, right, and that's the amount that was
24 ticketed that day?

25 A. I see that.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. There had been a lot that had been sold before
2 May 15, 2008, right?

3 A. Yes.

4 Q. So that agreement is dated May 15, 2008, right,
5 it is in the heart of these post-bankruptcy sales, correct?

6 A. Yes.

7 MS. COOMBE: Let's go back to GB52, please.

8 BY MS. COOMBE, CONTINUED:

9 Q. So if this agreement is dated May 15th of 2008,
10 then Mr. Smith must have known about the bankruptcy in the
11 middle of the post-bankruptcy sales, right?

12 MR. DREYER: Objection, Your Honor, as to
13 what Mr. Smith must have known.

14 THE COURT: Sustained.

15 BY MS. COOMBE, CONTINUED:

16 Q. Mr. McGinn, this is dated May 15th of 2008 and
17 it is signed by Mr. Smith, right?

18 A. Yes.

19 Q. That's in the -- we just looked at that. It is
20 during the post-bankruptcy sales, correct?

21 A. Yes.

22 Q. I am handing you previously admitted Exhibit
23 GB52A. Please take your time, look it over, and let me
24 know when you are ready to proceed.

25 A. I am ready.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. You are familiar with this exhibit, Mr. McGinn?

2 A. I am now.

3 Q. You heard the testimony of Special Agent
4 Doug Miller from the IRS who is the computer guy who
5 testified?

6 A. Yes.

7 Q. He testified that this document, GB52, that we
8 just looked at, according to the computer evidence, it was
9 not created until June 2nd of 2009, more than a year after
10 that it is dated, correct?

11 A. Yes.

12 Q. So when did you actually execute this agreement,
13 was it May 15, 2008, in the middle of the post-bankruptcy
14 sales or did you wait a year and then back date it?

15 A. It was executed on June 2nd, 2009.

16 Q. So this is just another example of a back dated
17 document that you and Mr. Smith cooked up?

18 MR. JONES: Objection to form.

19 THE COURT: Sustained.

20 BY MS. COOMBE, CONTINUED:

21 Q. Mr. McGinn, this is just another example of a
22 document that you and Mr. Smith executed that doesn't have
23 the accurate date on it; isn't that correct?

24 MR. JONES: Objection to form.

25 THE COURT: Overruled.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Yes.

2 BY MS. COOMBE, CONTINUED:

3 Q. Now, Mr. Smith was your business partner, right?

4 A. Yes.

5 Q. You had been partners for more than twenty-five
6 years, right?

7 A. Yes.

8 Q. You shared the successes of your business?

9 A. Yes.

10 Q. You shared the losses, the good times and the
11 bad, right?

12 A. Correct.

13 Q. And you had raised approximately seven million
14 dollars in connection with the Firstline Trusts, right?

15 A. Yes.

16 Q. And you had ongoing conversations with Mr. Smith
17 about whether or not you should tell the brokers about the
18 Firstline bankruptcy, didn't you?

19 A. I don't recall those discussions, no.

20 Q. Mr. McGinn, I have handed you the binder with
21 your transcripts again.

22 A. Yes.

23 MS. COOMBE: Counsel, I am at the
24 December 15, 2011, SEC deposition, page 179, Line 17.

25 BY MS. COOMBE, CONTINUED:

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Mr. McGinn, do you want me to help you find it?

2 A. No.

3 Q. Okay. Just let me know when you are ready.

4 A. I am ready.

5 Q. Were you asked this question and did you give
6 this answer?

7 Question: Did you ever have a discussion with
8 Mr. Smith about whether or not you should tell the brokers
9 about the Firstline bankruptcy?

10 Answer: I think that there were ongoing
11 conversations with Mr. Smith about that.

12 And then you went on to talk about how you
13 thought that the Firstline bankruptcy would be quick,
14 right?

15 A. Yes.

16 Q. Were you asked that question and did you give
17 that answer under oath?

18 A. I did.

19 MS. COOMBE: Could we go back to
20 Exhibit GB52. And could we look, please, at the third
21 whereas paragraph? I believe it is already highlighted.

22 BY MS. COOMBE, CONTINUED:

23 Q. Mr. McGinn, let he me know when you are ready.

24 A. I am ready.

25 Q. It says: Whereas, Firstline has defaulted with

TIMOTHY MCGINN - Cross by Ms. Coombe

1 respect to its obligations to pay principal and interest to
2 trust number one, trust number two, trust number three, and
3 trust number four as required pursuant to the terms of the
4 confidential private placement memorandum dated May 19,
5 2007, and October 19, 2007.

6 You didn't tell the investors that in, oh, did
7 you say that you guys executed this in June of 2009, this
8 document?

9 A. No.

10 Q. You didn't tell the brokers that in June of
11 2009, did you?

12 A. No.

13 MS. COOMBE: Could we go to the bottom of
14 the last paragraph please, number two?

15 BY MS. COOMBE, CONTINUED:

16 Q. It states: That in consideration of the
17 foregoing, the trusts sell, assign, and transfer to MSTF
18 all rights that exist to collect any unpaid and accruing
19 principal and interest due from Firstline to the trusts
20 pursuant to the terms of the PPMs including, but not
21 limited to, all residual payments and amounts that would
22 have been payable to the trust in accordance with the terms
23 of the PPMs after receipt of the final payments of
24 principal and interest from Firstline.

25 You were selling the underlying income stream of

TIMOTHY MCGINN - Cross by Ms. Coombe

1 the trusts to MSTF, right?

2 A. Yes.

3 Q. You didn't tell the Firstline investors that,
4 did you?

5 A. No, there was no need to.

6 Q. Mr. McGinn, you didn't tell the brokers either,
7 did you, yes or no?

8 A. No.

9 Q. I am handing you now GF16. Please take your
10 time, look it over, and let me know when you are ready to
11 proceed.

12 A. I am ready.

13 Q. This is an electronic mail message between you
14 and Mr. Rabinovich, correct?

15 A. It is.

16 Q. And you were checking on the status of a six
17 hundred thousand dollar wire, correct?

18 A. Yes.

19 Q. It is October 29th of 2007.

20 MS. COOMBE: And could we look up further on
21 the page, a little farther.

22 BY MS. COOMBE, CONTINUED:

23 Q. You wrote: The eagle has landed. Thank you.

24 That means the wire has arrived, right?

25 A. Yes, it does.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. And you needed that money right away, correct?

2 A. Yes.

3 Q. Now, that money was ticketed as a purchase of
4 Firstline Senior Trust 07 Series B, correct?

5 A. Yes.

6 Q. And you actually used that money to pay
7 Stewart's, didn't you?

8 A. I did.

9 Q. You didn't tell Mr. Rabinovich that, did you,
10 yes or no?

11 A. No.

12 Q. You didn't tell his father, Stanley Rabinovich
13 that either, did you?

14 A. I did not.

15 Q. You wanted to keep Mr. Rabinovich happy, didn't
16 you?

17 A. Which Mr. Rabinovich?

18 Q. Mr. Phil Rabinovich?

19 A. Sure.

20 Q. You wanted him to keep selling your products,
21 right?

22 A. Of course.

23 Q. You wanted to keep making money, right?

24 A. Of course.

25 Q. And you wanted to keep his father happy, right?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. To a lesser extent, yes.

2 Q. Well, you wanted his father to keep investing in
3 your products, right?

4 A. Of course.

5 Q. You wanted to make money, right?

6 A. Absolutely.

7 Q. You can't disappoint investors, can you,
8 Mr. McGinn?

9 A. We try not to.

10 Q. You said before we live in an eat what you kill
11 world, haven't you?

12 A. I have used that term, yes, on several
13 occasions.

14 Q. And in your world, the kill was the investors'
15 money, correct?

16 A. No.

17 Q. You wanted to make sure that nothing would
18 interfere with your ability to get the kill, to get the
19 money from the investors; isn't that right?

20 A. No, it is not right.

21 Q. You didn't tell the investors what was really
22 going on with Firstline because you knew that it would
23 cause problems in your business, didn't you?

24 A. No.

25 Q. And you knew that it would be harder for your

TIMOTHY MCGINN - Cross by Ms. Coombe

1 brokers to sell investments?

2 A. It may have been.

3 Q. And you knew that it would affect your ability
4 to sell other products after that announcement was made,
5 didn't you?

6 A. Yes.

7 Q. And in fact, yesterday during your testimony you
8 talked about how it got tough to sell products at the end,
9 in the fall of 2009, and that was after the Firstline
10 announcement was finally made, right?

11 A. Yes.

12 Q. I am going to hand you Government's Exhibits GL3
13 and GL4. They have not been admitted. Please take your
14 time, look them over, and let me know when you are ready to
15 proceed.

16 Mr. McGinn, I am just going to retrieve those
17 papers so I can put the screen down for a moment. I will
18 take the binder too.

19 A. You may proceed.

20 Q. Now, I am going to focus on GL3. This is a
21 letter that your partner, Mr. Smith, wrote in 1999; isn't
22 it? It requires a yes or no answer, Mr. McGinn.

23 A. I don't know if the letter was dated. I am
24 looking for the date. It is not dated.

25 Q. This is a letter that your partner, Mr. Smith,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 wrote?

2 A. Yes.

3 Q. And I am going to direct your attention to page
4 four.

5 A. GL3 or GL4?

6 Q. It is GL4. That is a typewritten version of
7 GL3, easier to read. Page four, did Mr. Smith write: If
8 our trusts go into default, everything else will come
9 apart, is that what he wrote?

10 A. Is this on the typewritten page?

11 Q. Yes. Page four?

12 A. I don't see that on page four.

13 Q. Do you see it now, Mr. McGinn?

14 A. I do.

15 Q. Is that what that says?

16 A. That is what it says.

17 Q. Did Mr. Smith, your business partner, write:

18 The business has become addicted to the cash flow from the
19 trust business, and without them, we will have a difficult
20 time surviving.

21 Is that what he wrote?

22 A. That is what he wrote.

23 Q. Did he write: The default of the trusts will
24 drastically reduce revenues, cause us to lose brokers and
25 at least their confidence in us, bring on crushing

TIMOTHY MCGINN - Cross by Ms. Coombe

1 litigation and devastating publicity, and I am convinced
2 prosecution by regulators or worse.

3 Is that what he wrote?

4 A. That's what he wrote.

5 Q. Did he also write: The impact on our employees,
6 customers, friends, and family will be devastating.

7 Is that what he wrote?

8 A. Yes.

9 Q. Could you please turn to page seven. Did
10 Mr. Smith write: For us not to allow for these deficits by
11 setting up adequate reserves is, in my judgment, bordering
12 on fraud?

13 A. That's what he wrote.

14 Q. Did he write: Certainly, by not disclosing in
15 the prospectus our poor history of collections, we are not
16 providing the prospective investor an accurate picture of
17 this risk.

18 Is that what he wrote?

19 A. Yes.

20 Q. He wrote: We both know why we don't make that
21 disclosure, because such disclosure would cause our
22 salesmen to cease selling and investors to cease buying.

23 Is that what he wrote?

24 A. Yes.

25 Q. And that's what we were just talking about,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 right, Mr. McGinn?

2 MR. JONES: Objection.

3 THE COURT: Overruled.

4 BY MS. COOMBE, CONTINUED:

5 Q. Bad announcements make it hard to sell stuff,
6 don't they?

7 A. Yes.

8 Q. Did he also write: Thus, we are misleading both
9 our own employees and customers?

10 A. Yes.

11 Q. If we look now at the second paragraph, third
12 sentence, did he write: Most of the deficits are from poor
13 credit risks?

14 A. Yes.

15 Q. Did he go on to say: We now know that and we
16 continue to accept their contracts without adequate
17 reserves and treat the excess discounted cash flow as
18 certain profit to be distributed as we see fit.

19 Is that what he wrote?

20 A. Yes.

21 Q. You were familiar with the fact that investors
22 can file arbitration proceedings with FINRA, Mr. McGinn?

23 A. Yes.

24 Q. And you have been subject to FINRA arbitration
25 complaints, have you not?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 MR. JONES: Objection.

2 THE COURT: Overruled. I will allow a
3 little bit here.

4 A. Yes.

5 BY MS. COOMBE, CONTINUED:

6 Q. And was your firm also the subject of FINRA
7 arbitration complaint?

8 MR. JONES: Objection.

9 A. Yes.

10 THE COURT: Overruled.

11 BY MS. COOMBE, CONTINUED:

12 Q. And did a Doctor Chang (phonetically) file a
13 complaint back in --

14 MR. JONES: Objection.

15 THE COURT: Where are we going with this?

16 MS. COOMBE: I just have two or three
17 questions. I will lay a foundation.

18 MR. JONES: I object to this whole line of
19 questioning.

20 MR. DREYER: I join in the objection.

21 THE COURT: Proceed. Overruled.

22 BY MS. COOMBE, CONTINUED:

23 Q. Did Doctor Chang file an arbitration complaint
24 on December 22nd of 2008 --

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. And was that arbitration ongoing?

2 MR. JONES: Objection.

3 BY MS. COOMBE, CONTINUED:

4 Q. -- after that point?

5 THE COURT: Overruled.

6 A. Yes.

7 BY MS. COOMBE, CONTINUED:

8 Q. And was an award eventually --

9 MR. JONES: Objection.

10 THE COURT: Where is the foundation going
11 with this, Ms. Coombe?

12 BY MS. COOMBE, CONTINUED:

13 Q. I want to direct your attention to October of
14 2009. Did you transfer your house in Niskayuna from your
15 name to the name of your wife at that time?

16 MR. JONES: Objection.

17 MR. DREYER: Objection, Your Honor.

18 THE COURT: Overruled.

19 BY MS. COOMBE, CONTINUED:

20 Q. Did you, Mr. McGinn?

21 A. Yes.

22 Q. You had been married to her for several years
23 before that, right?

24 A. That's correct.

25 Q. And it was in the fall of 2009 after arbitration

TIMOTHY MCGINN - Cross by Ms. Coombe

1 and a complaint was filed that you transferred the house to
2 her name; isn't that correct?

3 MR. JONES: Objection.

4 THE COURT: Overruled.

5 A. Yes.

6 MS. COOMBE: Could we look at GE10, please.

7 BY MS. COOMBE, CONTINUED:

8 Q. I am handing you previously admitted
9 Exhibit GE10. I will put the screen up for you too. This
10 is an electronic mail message from Mr. Smith to yourself
11 dated February 24th of 2009, correct?

12 A. Yes.

13 Q. And I would like to direct your attention down
14 to the large paragraph in the middle of the e-mail, the
15 fifth line down where it starts "obviously." It states:
16 Obviously, the payables -- and Mr. Smith is referring to
17 not paying employees, correct?

18 A. Yes.

19 Q. Although not being paid, need to be accrued for
20 capital purposes and if calculated would put us in net
21 capital violation. We can probably manipulate that for
22 this month, but if no solution is found in the next couple
23 of weeks, we will have to report the net capital violation
24 and more likely than not, consider closing our doors.

25 Mr. Smith, in his own words, said that he was

TIMOTHY MCGINN - Cross by Ms. Coombe

1 manipulating the net capital calculations, is that correct,
2 Mr. McGinn?

3 A. Those are the words he used.

4 Q. I am handing you now previously admitted
5 Exhibits GG23 and GG26. Take your time, look them over,
6 and let me know when you are ready to proceed.

7 A. I am ready.

8 Q. This is an electronic mail message from
9 Mr. Cooper to yourself regarding Integrated Excellence.
10 And he explains: We received the monthly legacy payment
11 yesterday. Legacy took draws totaling six hundred and
12 ninety-seven thousand, eight hundred and fifteen dollars.
13 Since inception, their average payments to us have been
14 twelve thousand, five hundred. They did not draw enough to
15 finance the total obligations to investors.

16 And then he explains that there is an ongoing
17 shortfall; is that correct?

18 A. Yes, it does.

19 Q. Okay. Could you please look at GG26. That is
20 an electronic mail message from Mr. Cooper to yourself
21 about the Integrated interest payments. He writes: Tim,
22 the INEX payments are due. I am expecting the legacy
23 payment, 14K. That's fourteen thousand, right?

24 A. Yes.

25 Q. To come in today. I will be short approximately

TIMOTHY MCGINN - Cross by Ms. Coombe

1 sixty-five hundred dollars a month going forward.

2 And then he suggests adjusting the percent of
3 principal return for the next twelve months and either do
4 catch-up payments or one balloon payment at the end,
5 correct?

6 A. Yes.

7 Q. You accepted his suggestion, and the payments to
8 investors were reduced; is that correct?

9 A. Yes.

10 Q. Could you look at GB1A, please.

11 MS. COOMBE: Could we look at the last slide
12 please, Ron. Thank you.

13 BY MS. COOMBE, CONTINUED:

14 Q. Mr. McGinn, this shows some money that you took
15 from MSTF, right?

16 A. This shows some money that I borrowed from MSTF,
17 correct.

18 Q. All right. Let's get straight on the term
19 "took." Money went from MSTF bank account to your bank
20 account, isn't that right, yes or no?

21 A. Yes.

22 Q. You later characterized it as a supposed loan,
23 right?

24 MR. JONES: Objection to the form of that
25 question.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 THE COURT: Overruled.

2 A. No, I did not characterize it as a supposed
3 loan. I characterized it as a loan.

4 BY MS. COOMBE, CONTINUED:

5 Q. So this is money that you took from MSTF and
6 characterized as a loan, correct?

7 A. I borrowed from MSTF and characterized it
8 appropriately as a loan.

9 Q. Mr. McGinn, the money went from the MSTF bank
10 account to your personal bank account and you used it after
11 that point for whatever you wanted to, right?

12 A. Yes.

13 Q. You don't call that taking money?

14 A. I call that borrowing money from MSTF.

15 Q. Because you decided -- you, yourself, decided
16 that you were a good credit risk, right?

17 A. That's correct.

18 Q. That is what you testified to yesterday?

19 A. Yes.

20 Q. So you took fifty thousand dollars from MSTF on
21 August 22nd of 2008, correct?

22 A. Yes.

23 Q. And you took another fifty thousand dollars on
24 September 8th of 2008?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Took another twenty thousand dollars on
2 October 22nd of 2008?

3 A. The numbers are correct. Again, I would
4 substitute the word borrow.

5 Q. You took -- you wound up with two hundred and
6 thirty thousand dollars in your bank account, correct?

7 A. Yes.

8 Q. And you spent that money on whatever you wanted
9 to, right?

10 A. Yes.

11 Q. You, yourself, directed these transfers, right?

12 A. Yes.

13 Q. When you appeared before FINRA, did you tell
14 them that you had taken this money?

15 A. I don't recall.

16 Q. You actually told them that you had never
17 received any fees from the money raised from MSTF
18 investors, right?

19 A. Fees are different than loans.

20 Q. I know, but you told them you hadn't received
21 any fees, right?

22 A. That's correct.

23 Q. You told them that hadn't receive any payments,
24 right?

25 A. I don't recall.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. You told them that you hadn't receive any loans,
2 right?

3 A. I don't recall.

4 Q. Mr. McGinn, I am handing you the binder that
5 also has your FINRA transcripts in it.

6 MS. COOMBE: Counsel, I am at page eighty,
7 lines twenty-two to twenty-five.

8 BY MS. COOMBE, CONTINUED:

9 Q. Mr. McGinn, let me know when you are ready.

10 A. I am ready.

11 Q. Were you asked this question -- and you had been
12 talking about MSTF before this, is that correct, if you
13 look over on page seventy-eight, you will see that?

14 A. Yes.

15 Q. Were you asked this question and did you give
16 this answer: What -- did you receive any fees or payments
17 or loans from the money that was raised?

18 Answer: No.

19 Did you -- were you asked that question and did
20 you give that answer?

21 A. Yes.

22 Q. You were under oath then, right?

23 A. Of course.

24 Q. So you didn't tell FINRA that you had taken this
25 money from MSTF, did you?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. I did not.

2 Q. Now, you testified yesterday that you took this
3 money because MSA had fees that had accrued from the Four
4 Funds, right?

5 A. That's correct.

6 Q. Wouldn't it have been more efficient to just
7 take the money right from MSA then?

8 A. It may have been more efficient. However, MSTF
9 then would have lost the interest earning function of these
10 loans.

11 Q. So it would have been more efficient to just
12 take the money from MSA, right, yes or no, Mr. McGinn?

13 A. Perhaps. Perhaps.

14 Q. It is one transaction instead of a whole bunch
15 of transactions and offsetting transactions, right?

16 A. It would have been one transaction. That part
17 of your question is correct. As you can see here, this
18 extends over a period of eleven months, and it didn't need
19 to, plus didn't want to do it for eleven months.

20 Q. Well, you didn't take the money from MSA because
21 it was just an accrual, right?

22 A. Just accrual?

23 Q. There was no real money sitting in the MSA bank
24 account, was there?

25 A. There was a real obligation between the funds

TIMOTHY MCGINN - Cross by Ms. Coombe

1 and MSA to pay those funds, and there was real money in the
2 Funds' accounts to pay those accounts. Your question was
3 is there real money in MSA. The answer is no, there didn't
4 have to be.

5 Q. Actually that wasn't my question. My question
6 was focusing on the bank account for MSA. You gave a
7 different answer. My question is, there wasn't any real
8 money for those fees sitting in the MSA bank account, was
9 there?

10 A. No.

11 Q. Cold hard cash, Mr. McGinn?

12 A. Cold hard cash, Ms. Coombe, no.

13 Q. What you are talking about is the fact that it
14 was owed, just like you supposedly owed these loans that
15 you took back to all of those LLCs, right?

16 A. Supposedly?

17 Q. Correct.

18 MS. COOMBE: I withdraw my question.

19 A. Thank you.

20 BY MS. COOMBE, CONTINUED:

21 Q. Now, at this time Mr. Smith had sent letters out
22 to the investors in the Four Funds, and he had promised not
23 to take any fees, right, to share in the hardship because
24 they weren't getting their money; isn't that right?

25 A. It is not right. He -- in his letter, he

TIMOTHY MCGINN - Cross by Ms. Coombe

1 indicated that he would not take any future fees.

2 Q. It was carefully crafted so that investors would
3 think no more fees would be taken --

4 MR. JONES: Objection to the form of the
5 question.

6 BY MS. COOMBE, CONTINUED:

7 Q. -- that and Mr. --

8 THE COURT: Sustained as to the form.
9 Rephrase.

10 BY MS. COOMBE, CONTINUED:

11 Q. You and Mr. Smith relied on the nuances of that
12 letter which had been sent to assure investors that your
13 firm was sharing the burden with them, when in reality you
14 were going to take whatever money you wanted based on some
15 technical interpretation of the letter; isn't that correct?

16 MR. JONES: Objection, Your Honor.

17 MR. DREYER: Objection.

18 THE COURT: Sustained.

19 BY MS. COOMBE, CONTINUED:

20 Q. Mr. McGinn, there is accrued fees in MSA, they
21 are not cold, hard cash, right, you would agree with me
22 about that, they weren't sitting in a bank account at MSA?

23 A. That's correct.

24 Q. Because then you could have just taken the money
25 right from MSA, right?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. I could have.

2 Q. The reason you didn't is because that accrual of
3 fees was really nothing more than funny money on the books,
4 right?

5 A. Wrong.

6 MS. COOMBE: Could we look at Defendant's
7 Exhibit 187, please?

8 BY MS. COOMBE, CONTINUED:

9 Q. It is another example of this, Mr. McGinn. You
10 have got money going all these different entities. If it
11 was really fees that were accrued by MSA, why not just use
12 that money directly?

13 A. The reason that those monies were not used
14 directly because that scenario as described on the screen
15 provided MSTF with a risk-free asset that paid an eight
16 percent interest rate. Those advances from MSTF to all of
17 the parties indicated on the screen were totally and fully
18 collateralized by the fees that were earned, but not yet
19 paid to MSA.

20 Q. So you had all this money and all these
21 complicated transactions because it was actually this eight
22 percent that would be paid back, it was a good deal for
23 MSTF to make all these payments to other people and to you.
24 Is that what you are telling the jury?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 MS. COOMBE: Can we go back to GB1A, please?

2 BY MS. COOMBE, CONTINUED:

3 Q. Now, at some point in time you paid one hundred
4 thousand dollars back, didn't you?

5 A. I did.

6 Q. And that was -- you used that money then to make
7 some payments that were necessary out of the MSTF account;
8 isn't that true?

9 A. I don't know.

10 Q. You actually paid that money back because you
11 didn't have enough money to pay the MSTF investors that
12 month; isn't that right?

13 A. I gave that money back because it was a partial
14 repayment of the loans that I had taken from MSTF.

15 Q. And you paid that money back because you were
16 short that month to pay MSTF investors; isn't that right,
17 Mr. McGinn?

18 A. I paid that money back --

19 Q. This requires a yes or no answer, Mr. McGinn,
20 not a speech.

21 MR. JONES: Objection.

22 THE COURT: Can you answer yes or no?

23 A. I can't answer yes or no.

24 BY MS. COOMBE, CONTINUED:

25 Q. You had to liquidate stock to pay that money

TIMOTHY MCGINN - Cross by Ms. Coombe

1 back, didn't you?

2 A. I don't recall.

3 MS. COOMBE: Let's look at GB1B.

4 BY MS. COOMBE, CONTINUED:

5 Q. I am handing you a copy of it, Mr. McGinn. Let
6 me know when you are ready.

7 A. I am ready.

8 Q. You are familiar with these charts, right,
9 Mr. McGinn?

10 A. I am.

11 Q. Let's look at page four.

12 MS. COOMBE: It is actually GB1B support,
13 Ron.

14 BY MS. COOMBE, CONTINUED:

15 Q. You are familiar with this spreadsheet, right?

16 A. Yes.

17 Q. Now, you directed all of these payments on here,
18 didn't you?

19 A. Yes.

20 Q. Directed every single one of them?

21 A. I said yes.

22 Q. And you decided that this group of investors
23 should continue to receive their payments while others did
24 not, isn't that true, yes or no?

25 A. I can't answer that question yes or no.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Well, the first category in orange, those are
2 all people who were being paid interest that they were not
3 getting from the Four Funds, correct?

4 A. That's correct.

5 Q. And the money ties out to exactly what they were
6 owed on their non-performing Four Funds investments?

7 A. That's correct.

8 Q. Now, these were all important clients of the
9 firm, weren't they?

10 A. Yes, they were.

11 Q. You made sure that they continued to receive
12 their interest payments, didn't you?

13 A. Yes, I did.

14 Q. Now, there was no supportable reason why money
15 from MSTF was used to pay clients at the firm, was there,
16 like this, yes or no, Mr. McGinn?

17 A. No.

18 Q. And there was no plausible reason why money from
19 MSTF was used to pay clients of the firm like this, was
20 there?

21 A. There was.

22 Q. I am handing you GB31. This is a typewritten
23 copy of the letter that you and Mr. Smith sent to Gersten,
24 Savage in New York City. You are familiar with that letter
25 aren't you, Mr. McGinn?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. I am.

2 Q. I am going to direct your attention to page
3 five. Do you see you guys are talking about advances from
4 MSTF to customers in --

5 MR. JONES: Objection. No foundation. This
6 letter did not come from Mr. McGinn.

7 THE COURT: Overruled. He can explain.

8 BY MS. COOMBE, CONTINUED:

9 Q. Well, Mr. McGinn, let's look at the first page
10 of the letter, GB31. It is to the attention of
11 Jay Kaplowitz, et al., Gersten and Savage. It is from
12 David L. Smith and Timothy McGinn. That's what it says,
13 doesn't it?

14 A. That's what it says.

15 Q. All right. Let's look at page five. It states:
16 Advances from MSTF to customers of McGinn, Smith of whom we
17 had decided to support because of their high level of
18 importance to the firm and to whom we were attempting to
19 bridge the gap of their shortfall in income due to the
20 non-performance of their investments in the Funds.

21 MS. COOMBE: And let's look at the next
22 page, please, number three.

23 BY MS. COOMBE, CONTINUED:

24 Q. Number three is where the major risk is. There
25 is no supportable or plausible reason why monies from MSTF

TIMOTHY MCGINN - Cross by Ms. Coombe

1 were used to pay clients of the firm.

2 That is what it says, doesn't it, Mr. McGinn?

3 A. That is what it says.

4 Q. At the bottom it says: The transactions simply
5 have no --

6 MS. COOMBE: Could we look at the next page,
7 please?

8 BY MS. COOMBE, CONTINUED:

9 Q. -- place in MSTF. That's what it says, right?

10 A. That's what it says.

11 Q. And you are the person who directed them, aren't
12 you?

13 A. I am the person who directed them? I am not
14 person who wrote that letter.

15 Q. Mr. McGinn, that question is you were the person
16 that directed them, correct?

17 A. Yes.

18 MS. COOMBE: I move to strike the rest of
19 the answer as non-responsive.

20 THE COURT: Sustained.

21 BY MS. COOMBE, CONTINUED:

22 Q. Did you tell Tom Brown, the guy that worked for
23 New York State, that other junior note holders were still
24 getting their payments?

25 A. No.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. How about Mr. Deleonardis, your high school
2 friend and the former owner of Bob and Ron's Fish Fry, did
3 you tell him that you had these special investors that you
4 were still paying?

5 A. No.

6 Q. Did you tell Mr. Phil or Mr. Sam Rabinovich?

7 A. No.

8 Q. You didn't tell any of the other Four Funds
9 investors that weren't getting paid about these payments to
10 these special clients of the firm, did you?

11 A. No.

12 Q. Now, yesterday you also talked about the
13 payments to Mr. Cornacchia, correct?

14 A. Yes.

15 Q. And you said that the payments were to get
16 access to the owners of Home Depot and Barnes and Noble,
17 right?

18 A. That's correct.

19 Q. I am handing you now Government's Exhibit 17.
20 Please take your time and look it over. Let me know when
21 you are ready to proceed.

22 MS. COOMBE: Your Honor, the government
23 moves the admission of Exhibit 17.

24 THE COURT: Any objection?

25 MR. JONES: May I just have a second,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 please? No.

2 THE COURT: Received.

3 (Exhibit No. 17, received.)

4 A. I am ready.

5 BY MS. COOMBE, CONTINUED:

6 Q. Mr. McGinn, this is December 9, 2009, letter
7 from Eileen Cornacchia to you, is that correct, and
8 Mr. Smith?

9 A. Yes.

10 Q. And she is Mr. Cornacchia's wife?

11 A. Yes.

12 Q. Okay, and if we could look at -- this a letter
13 that was received by McGinn, Smith & Company. If you would
14 look at the last page. Mr. Shea sent it to you. It said
15 received today, registered mail, correct?

16 A. Yes.

17 Q. Okay.

18 MS. COOMBE: Let's look back at the second
19 page.

20 BY MS. COOMBE, CONTINUED:

21 Q. The letter says: Dear Tim and Dave, as you know
22 Joe recently underwent open heart surgery. Before the
23 surgery, he turned all of our investment information over
24 to me. I enlisted my brother to review all the documents
25 with me. There is one that seems to have a mysterious

TIMOTHY MCGINN - Cross by Ms. Coombe

1 history and an unacceptable outcome. This is the loan --
2 and loan is in all caps -- that Joe that made to SAO for
3 eight hundred and eighty-two thousand, three hundred and
4 seventeen dollars and eighty cents. The file of documents
5 from the inception of the loan, which she has in quotes, is
6 mismatched trail of paperwork, where A is not followed by
7 B. In one letter, Dave actually refers to the "loan" as an
8 investment.

9 Joe trusted Tim when he said this was guaranteed
10 by him personally. Joe trusted Tim when he said that times
11 were tough and the monthly payments needed to be lowered.
12 Last year Tim told me at the bar at Pine Tree that 2008 was
13 the best year he had ever had in his life. Last spring the
14 promised payments stopped altogether with no notification
15 as to why or when they would resume. Joe had to call Tim
16 to discover that your firm simply stopped making payments.

17 According to the documents in our files, McGinn,
18 Smith has a fiduciary responsibility and mountains of
19 monthly and yearly reports corresponding to this loan and a
20 guarantee from Tim, which he said David agrees with, to
21 repay the loan. The promise to make Joe whole was also
22 spoken to other people. Joe has requested a schedule of
23 payments received and what McGinn, Smith was considering
24 interest and what was considered principal.

25 At this juncture and in the current culture of

TIMOTHY MCGINN - Cross by Ms. Coombe

1 financial schemes with questionable histories, we make a
2 demand for the outstanding principal and interest amount
3 still owed to Joe to be acknowledged by your firm in detail
4 and payment made in twelve equal payments over the next
5 twelve months beginning January 1, 2010. If we can not
6 settle this as described above or in another way that is
7 acceptable to us, we have no option, but to open an
8 investigation into all of the variables and contradictions
9 that have been put forth since May 25, 2004. We/I look
10 forward to a swift and amicable repayment of this loan.

11 There is not word in there about payments to
12 have access to the owners of Home Depot and Barnes and
13 Noble, is there, Mr. McGinn, yes or no?

14 A. No.

15 Q. I am handing you now Exhibit GB1C. I will take
16 that binder back if you would like to get it out of your
17 way.

18 THE COURT: We will take our morning break
19 now, members of the jury. Don't discuss the case among
20 yourselves or anyone else. We will be back then.

21 Mr. Minor.

22 COURT CLERK: Court stands for the morning
23 recess.

24 (Whereupon, a brief recess was taken.)

25 (Whereupon, the proceedings were held in

TIMOTHY MCGINN - Cross by Ms. Coombe

1 open court in the presence of the Jury.)

2 THE COURT: Ms. Coombe, you may continue
3 with your cross-examination of Mr. McGinn.

4 MS. COOMBE: Thank you, Your Honor.

5 BY MS. COOMBE, CONTINUED:

6 Q. Mr. McGinn, just before the break I handed you
7 GB1C. Do you have that up there?

8 A. Yes.

9 Q. You are familiar with these transactions, aren't
10 you?

11 A. Yes.

12 Q. You didn't talk about these transactions
13 yesterday with Mr. Jones, did you?

14 A. I don't believe so, no.

15 Q. Now, when you testified before FINRA, you told
16 FINRA that the Four Funds never invested in MSTF; isn't
17 that right?

18 A. I may have.

19 Q. We can look at the transcripts?

20 A. Okay.

21 Q. Page seventy-two, Mr. McGinn. The FINRA
22 transcript, please.

23 MS. COOMBE: Counsel, it is page eighty-two,
24 lines twelve to fourteen.

25 BY MS. COOMBE, CONTINUED:

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Mr. McGinn, do you see where I am?

2 A. I do.

3 Q. Were you asked this question and did you give
4 this answer?

5 Question: Did any of the four LLCs invest in
6 MSTF?

7 Answer: No.

8 Were you asked that question and did you give
9 that answer under oath?

10 A. Yes.

11 Q. And you also told FINRA that the Four Funds had
12 never loaned money to MSTF, correct?

13 A. Yes.

14 Q. And that wasn't true, was it?

15 A. Apparently not.

16 Q. I am handing you now previously admitted
17 Exhibit GB12. I can take the binder back if you would
18 like. Thank you. Please look it over and let me know when
19 you are ready to proceed.

20 A. I am ready.

21 Q. This is an electronic mail message from Mr. Carr
22 to yourself with copy to Mr. Smith, correct?

23 A. Yes.

24 Q. And it refers to the promissory notes?

25 A. It does.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. And then it says: I have attached three
2 promissory notes evidencing loans to McGinn, Smith
3 Transaction Funding Corporation. Dave requested that I
4 forward them to you for signature. After signing, please
5 mail the original signed notes to my attention, Joe.

6 MS. COOMBE: And then if we look at the next
7 page.

8 BY MS. COOMBE, CONTINUED:

9 Q. Now, that's a note for April 14, 2009, one
10 hundred thousand dollars between MSTF and TAIN, correct?

11 A. Yes.

12 Q. And if we could go back to GB1C, that's one of
13 the transactions on the chart, correct?

14 MS. COOMBE: That's the third page, Ron.

15 A. It is.

16 BY MS. COOMBE, CONTINUED:

17 Q. And there is also a note in GB12 for April 14th
18 of 2009, fifty thousand dollars between MSTF and FIIN,
19 correct?

20 A. Yes.

21 Q. And that's another one of the transactions on
22 the chart that's up on the screen?

23 A. It is.

24 Q. And finally, there is a note dated April 14th of
25 2009 for one hundred thousand dollars between MSTF and

TIMOTHY MCGINN - Cross by Ms. Coombe

1 FEIN; is that correct?

2 A. It is.

3 Q. I am showing you now previously admitted
4 Exhibit GB13. This is a note, April 14th of 2009 for fifty
5 thousand dollars between MSTF and FIIN. And if you look at
6 the bottom, are those your initials and your handwriting?

7 A. Yes.

8 Q. You put the date on there, didn't you?

9 A. I did.

10 MS. COOMBE: Let's look at the next page.

11 BY MS. COOMBE, CONTINUED:

12 Q. Those are your initials and the date again,
13 aren't they, Mr. McGinn?

14 A. Yes.

15 MS. COOMBE: And the next page, please.

16 BY MS. COOMBE, CONTINUED:

17 Q. Again, initials and the date?

18 A. Yes.

19 Q. And finally your signature is on the last page
20 of this document, correct?

21 A. It is.

22 Q. I am handing you now previously admitted
23 Exhibit GB16.

24 MS. COOMBE: Could we please look at page
25 two?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. This is a note from November 26th of 2008 for
3 fifty thousand dollars that's between FIIN and MSTF; is
4 that correct?

5 A. Yes.

6 Q. And you signed that on behalf of MSTF?

7 A. I did.

8 Q. And that relates back to the chart that we
9 looked at just after the break, correct?

10 A. Yes.

11 Q. And there is another one attached as well. The
12 last page of this exhibit is November 14th of 2008, fifty
13 thousand dollars between FIIN and MSTF, correct?

14 A. Correct.

15 Q. And again, your signature, correct?

16 A. That's correct.

17 Q. All right.

18 MS. COOMBE: Could we please go back to GB1C
19 page three.

20 BY MS. COOMBE, CONTINUED:

21 Q. Now, the date on this is April 14, 2009,
22 correct?

23 A. Yes.

24 Q. And you are familiar with the fact that on
25 February 16, 2009, your accountants at Piaker and Lyons

TIMOTHY MCGINN - Cross by Ms. Coombe

1 attached a going concern to your financial statements?

2 A. I am.

3 Q. That meant that it was questionable whether the
4 business would continue operating, correct?

5 A. Yes.

6 Q. And that going concern was issued before these
7 transactions on April 14th of 2009, right?

8 A. That's correct.

9 Q. Investments in the broker-dealer are a lot less
10 attractive after there is a going concern; isn't that
11 right, Mr. McGinn?

12 A. In some instances.

13 Q. Well, a company whose prospects of continuing in
14 business is less attractive than one that does not have a
15 going concern rider; isn't that right?

16 A. Yes.

17 Q. I am handing you now Exhibit GB14. That is an
18 electronic mail message from Mr. Smith to you dated
19 April 19th of 2009. The subject is Bud Koffman. I am just
20 going to direct your attention to the end of the e-mail.
21 The last three sentences. Do you see where it starts
22 "also."

23 Also any new thoughts on how we are going to
24 meet the MSTF interest payment of one hundred and forty
25 thousand dollars at the end of the month. I assume that

TIMOTHY MCGINN - Cross by Ms. Coombe

1 there are no assets that can be monetized.

2 Now, in April of 2009 you owed MSTF investors
3 one hundred and forty thousand dollars, right?

4 A. Approximately.

5 Q. And you didn't have the money to pay them
6 apparently, correct?

7 A. I don't know.

8 Q. That's what Mr. Smith is saying, right?

9 A. That is.

10 Q. And so in order to pay them, you took money from
11 TDMM Cable Junior Trust 09, fifty-three thousand dollars;
12 is that right?

13 A. I don't know.

14 Q. You took twenty-five thousand dollars from FIIN;
15 isn't that right?

16 A. It could be, yes.

17 Q. And you took ten thousand dollars from TDM
18 Luxury Cruise; isn't that right?

19 A. TDM Luxury Cruise, LLC.

20 Q. One of the TDM Luxury Cruise accounts; is that
21 correct?

22 A. Yes.

23 Q. And so you took money in order to pay the MSTF
24 investors from multiple sources, correct?

25 A. Correct.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. You didn't tell the MSTF investors that their
2 payments had come from these other sources, did you?

3 A. I didn't have to.

4 Q. Mr. McGinn, I am going to move to strike your
5 answer.

6 MS. COOMBE: Judge, move to strike,
7 non-responsive.

8 THE COURT: It may be stricken. Jury is
9 instructed to disregard it.

10 BY MS. COOMBE, CONTINUED:

11 Q. Mr. McGinn, you didn't tell MSTF investors that
12 their money had come from these other sources, did you?

13 A. That's correct.

14 Q. And you didn't tell the TDMM Cable Junior
15 Trust 09 investors that money was transferred to pay MSTF
16 investors, did you?

17 A. No.

18 Q. You didn't tell the FIIN investors that either,
19 did you?

20 A. I did not.

21 Q. And you did not tell the TDM Luxury Cruise
22 investors that, did you?

23 A. No.

24 Q. Now, Mr. Smith was concerned about all of these
25 transactions out of MSTF, wasn't he? The ones -- I will be

TIMOTHY MCGINN - Cross by Ms. Coombe

1 a little more specific. The ones that were to the
2 preferred customers, to Mr. Cornacchia and of payroll, ones
3 that passed through MSTF that we just looked at?

4 A. Mr. Smith was concerned about the optics of
5 those payments, yes.

6 Q. Mr. Smith was concerned; is that correct?

7 A. That's correct.

8 Q. So you and he went to New York City; is that
9 right?

10 A. We go to New York City a lot.

11 Q. Did you go to New York City to see Mr. Kaplowitz
12 to talk to him about these transactions?

13 A. Yes.

14 Q. And you met with Mr. Kaplowitz on a Friday
15 night, didn't you?

16 A. We did.

17 Q. Bright and early the next morning you sent off
18 some schedules to Mr. Kaplowitz, didn't you?

19 A. I don't believe that I sent those schedules. I
20 think Mr. Smith sent those schedules, yes.

21 Q. I am handing you Exhibit GB22. Please take your
22 time, look it over, and let me know when you are ready to
23 proceed?

24 A. I am ready to proceed.

25 Q. Okay. Let's look at the first page.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 MS. COOMBE: And, Ron, can we turn it so we
2 can look at the fax cover line, please? Thank you.

3 BY MS. COOMBE, CONTINUED:

4 Q. Do you see it is dated 10/10/09, 6:19, and there
5 is a fax number there, and it says Timothy McGinn. That's
6 your name, right?

7 A. That is my name, yes.

8 Q. And do you recognize that phone number?

9 A. I don't.

10 Q. Okay, and the handwriting on this document,
11 that's your handwriting; isn't it?

12 A. Yes.

13 Q. And this is a schedule of payments made to
14 Mr. Cornacchia; isn't it?

15 A. It is.

16 MS. COOMBE: Let's look at the next page.

17 BY MS. COOMBE, CONTINUED:

18 Q. These are payments to investors in the Four
19 Funds, right, the special customers of the firm that you
20 kept paying with MSTF money, right?

21 A. Yes.

22 Q. And that's your handwriting at the bottom,
23 attorney/client privilege?

24 A. Yes.

25 MS. COOMBE: Let's look at the third page,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 please.

2 BY MS. COOMBE, CONTINUED:

3 Q. This is a schedule of some of the payments that
4 fell into what we called the third bucket on the chart we
5 looked at a few moments ago; is that correct?

6 A. The third bucket?

7 Q. These are some other examples of payments that
8 were paid to non-MSTF investors with MSTF money; is that
9 correct?

10 A. Yes.

11 Q. And that's your handwriting at the bottom of the
12 page, right?

13 A. It is.

14 Q. You were involved in pulling these documents
15 together and sending them off to Mr. Kaplowitz; isn't that
16 correct?

17 A. Apparently.

18 Q. Isn't that correct, Mr. McGinn?

19 A. Yes.

20 Q. Mr. McGinn, I am handing you previously admitted
21 Exhibit GI13. This is a copy of the personal financial
22 statement that Mr. Simons prepared for you, correct?

23 A. Yes.

24 Q. And it was prepared because you had to submit it
25 to regulators at the Pennsylvania Department of Insurance,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 correct?

2 A. That's correct.

3 Q. It was also eventually sent to regulators in
4 Texas, correct?

5 A. Yes.

6 Q. And it is a statement of your financial
7 condition as of December 31st of 2007, right?

8 A. Yes.

9 Q. As of December 31, 2007, you had received four
10 hundred and seven thousand dollars from TDM Cable Funding,
11 LLC related to deal involved in TDM Cable Trust 06,
12 correct?

13 A. Yes.

14 Q. And you had received one hundred and
15 eighty-eight thousand dollars from TDM Cable Funding, LLC
16 related to TDM Verifier Trust 07, correct?

17 A. Yes.

18 Q. And you had also received another three hundred
19 and ninety thousand, three hundred and one dollars from
20 McGinn, Smith Funding, LLC in 2007, correct?

21 A. Yes.

22 Q. That's a total of four hundred and seven
23 thousand dollars in 2006 and another five hundred and
24 seventy-eight thousand dollars in 2007. It is just under a
25 million dollars, right, Mr. McGinn?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Yes.

2 MS. COOMBE: Let's look at page six of this
3 document.

4 BY MS. COOMBE, CONTINUED:

5 Q. That's your handwriting; isn't it?

6 A. Yes.

7 Q. You are sending information to Mr. Simons,
8 correct?

9 A. Yes.

10 MS. COOMBE: Could we look at the page
11 before this, Ron?

12 BY MS. COOMBE, CONTINUED:

13 Q. You wrote: This is the quick and dirty. Please
14 fill in the loan amount due to DLS.

15 You are asking him to fill in how much money you
16 owe to Mr. Smith, correct?

17 A. Yes.

18 MS. COOMBE: Could we look at the next page,
19 please?

20 BY MS. COOMBE, CONTINUED:

21 Q. This is where you listed your assets, correct?

22 A. Yes.

23 MS. COOMBE: Let's look at the next page.

24 BY MS. COOMBE, CONTINUED:

25 Q. This is where you have listed your liabilities,

TIMOTHY MCGINN - Cross by Ms. Coombe

1 you have got your mortgage there, right?

2 A. Yes.

3 Q. Your two houses, the one in Niskayuna and the
4 one in Boca Raton?

5 A. Yes.

6 Q. And the total mortgage, and that's your total
7 liabilities, right?

8 A. Yes.

9 Q. You didn't list a single penny of that nearly
10 one million dollars that you had received, did you?

11 A. Correct.

12 MS. COOMBE: Could we look back at page two?

13 BY MS. COOMBE, CONTINUED:

14 Q. This is a typed up version of what you sent to
15 Mr. Simons, right?

16 A. Yes.

17 Q. If we look down below under liabilities, you see
18 the loan that you owed to Mr. and Mrs. Smith is listed
19 there, correct?

20 A. Yes.

21 Q. Where did you disclose the nearly one million
22 dollars that you had gotten that we had just talked about,
23 Mr. McGinn?

24 A. It does not appear on this statement.

25 Q. It is a huge portion of your net worth; isn't

TIMOTHY MCGINN - Cross by Ms. Coombe

1 it?

2 A. Yes.

3 MS. COOMBE: Let's look at page three.

4 BY MS. COOMBE, CONTINUED:

5 Q. You talked about Note C yesterday in business
6 interest. That talks about the fact that you owned an
7 interest in the broker-dealer, which has a certain value.
8 That doesn't have anything to do with disclosing the
9 personal liabilities that you had on this personal
10 financial statement, does it, Mr. McGinn?

11 A. No.

12 Q. It actually talks about investments, not loans,
13 right?

14 A. Yes.

15 Q. Now, you didn't ask Mr. Simons to look up the
16 amount of those supposed loans that you had taken, did you?

17 A. I didn't think I had to.

18 Q. You asked him to look up the money for
19 Mr. Smith, didn't you?

20 A. I did.

21 Q. You didn't think you had to ask Mr. Simons to
22 look up that money, it slipped your mind that you had taken
23 almost a million dollars that you weren't intending to
24 repay, it slipped your mind when you prepared this personal
25 financial statement, yes or no?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. The personal financial statement was prepared by
2 Mr. Simons. Mr. Simons had performed all of the other
3 related work for us and for me.

4 MS. COOMBE: Your Honor, I am going to move
5 to strike as non-responsive.

6 THE COURT: Yes, sustained. Rephrase your
7 question.

8 BY MS. COOMBE, CONTINUED:

9 Q. Mr. McGinn, are you telling this jury that you
10 forgot about nearly one million dollars of supposed loans
11 that you had not been paying tax on, is that what you are
12 telling them?

13 MR. JONES: Object to the form of the
14 question. That is not his testimony.

15 THE COURT: Overruled.

16 BY MS. COOMBE, CONTINUED:

17 Q. Yes or no?

18 A. No.

19 THE COURT: Answer my stand.

20 BY MS. COOMBE, CONTINUED:

21 Q. Is it on here, Mr. McGinn?

22 A. It is not.

23 Q. Now, you didn't forget about those supposed
24 loans when you were filling out your tax returns, did you,
25 you remembered they were loans then, didn't you?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. I didn't fill out my tax returns.

2 Q. Well, you didn't forget about them when the tax
3 returns were prepared, did you?

4 A. No.

5 Q. And you only forgot about them when you were
6 doing this personal financial statement and the mortgage
7 application that we are going to look at later, right?

8 A. Perhaps.

9 Q. Yes or no, Mr. McGinn?

10 A. No.

11 Q. I am handing you previously admitted
12 Exhibit GH10. It is a letter from Mr. Shea to Mr. Pearlman
13 at FINRA. You are familiar with this, aren't you,
14 Mr. McGinn?

15 A. I am.

16 Q. You are familiar with the fact that there are a
17 number of promissory notes attached to this, aren't you?

18 A. Yes.

19 Q. I am also going to show you GH2. This is a
20 letter dated September 30, 2009, from FINRA, correct?

21 A. Yes.

22 MS. COOMBE: And let's look at the second
23 page.

24 BY MS. COOMBE, CONTINUED:

25 Q. It states: In connection with the entities

TIMOTHY MCGINN - Cross by Ms. Coombe

1 listed in item number one, please provide all documentation
2 related to loans made payable to the following individuals:
3 Mr. and Mrs. Smith, you, Matthew Rogers, Mr. Bustamonte
4 including, but not limited to, loan origination documents,
5 promissory notes, repayment information, and any other
6 documents. Additionally, please identify whether there
7 were/are any other loans made payable to other individuals
8 or entities not previously identified.

9 Now, GH10 that we just looked at, that was sent
10 to FINRA in response to this request, wasn't it,
11 Mr. McGinn?

12 A. Yes.

13 MS. COOMBE: Let's look at the next page of
14 GH10, please.

15 BY MS. COOMBE, CONTINUED:

16 Q. This is a note dated October 2nd of 2006. It is
17 between you and TDM Cable Funding, LLC, correct?

18 A. Correct.

19 MS. COOMBE: Let's look at the next page,
20 please, and the next page.

21 BY MS. COOMBE, CONTINUED:

22 Q. You signed this, didn't you?

23 A. I did.

24 Q. And it states: In witness whereof, this note
25 has been executed and delivered on the date specified above

TIMOTHY MCGINN - Cross by Ms. Coombe

1 by the duly authorized representative of the maker.

2 That is not true, is it, Mr. McGinn?

3 A. No, it is not.

4 Q. Now, you didn't put any other dates on any of
5 these promissory notes, did you?

6 A. I did not, no.

7 Q. I am going to show you Exhibits GK2, GK3, and
8 GK7. Please take your time, look them over, and let me
9 know when you are ready to proceed.

10 A. I am ready.

11 Q. Mr. McGinn, this is a note between you and --

12 MS. COOMBE: Can we look a little farther
13 down?

14 BY MS. COOMBE, CONTINUED:

15 Q. -- and the trustees of the McGinn, Smith
16 Incentive Savings Plan and Trust, correct?

17 A. Yes.

18 Q. And you have dated it in your own handwriting up
19 at the top, correct?

20 A. Yes.

21 MS. COOMBE: And could we look a little
22 farther down, please? Could we look at the next page,
23 please, Ron?

24 BY MS. COOMBE, CONTINUED:

25 Q. It is dated in your handwriting, correct?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Yes.

2 Q. And Mr. Smith also signed it as a witness; isn't
3 that correct?

4 A. He did.

5 MS. COOMBE: Let's look now at GK3.

6 BY MS. COOMBE, CONTINUED:

7 Q. This is another note between -- this one is
8 between you and Mrs. Smith; is that correct?

9 A. It is.

10 Q. It was originally dated September 10th of 2003?

11 A. It was.

12 Q. And if we look at the bottom, you actually got a
13 witness, right?

14 A. Yes.

15 Q. And then it was --

16 A. Actually it is a notary, not a witness.

17 Q. Oh, it was a notary, okay. So after that, you
18 revised this note; is that correct?

19 A. I beg your pardon?

20 Q. You revised this note and put the new date on
21 for a new amount; is that correct?

22 A. Yes.

23 Q. All right.

24 MS. COOMBE: Let's look at GK7, please.

25 BY MS. COOMBE, CONTINUED:

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. This is another example of a note between you
2 and Mrs. Smith?

3 A. Correct.

4 Q. Do you see it was originally dated
5 September 10th of 2003?

6 A. Yes.

7 Q. And again, there is a notary at the bottom?

8 A. Yes.

9 Q. So you actually had it notarized?

10 A. Correct.

11 Q. And then you changed it to a later date,
12 October 15th, correct?

13 A. Yes.

14 Q. And you had it notarized again; is that correct?

15 A. Yes.

16 MS. COOMBE: Can we go back to GH10, please?

17 BY MS. COOMBE, CONTINUED:

18 Q. I am handing you now GD13 and Government's
19 Exhibit 7.

20 MS. COOMBE: Could we look at GD13, please,
21 Ron?

22 BY MS. COOMBE, CONTINUED:

23 Q. This is an electronic mail message from
24 Mr. Cooper to you and a copy to Mr. Carr. It says: Tim,
25 here are how the loans currently appear on the balance

TIMOTHY MCGINN - Cross by Ms. Coombe

1 sheet. And it lists the amounts that you and Mr. Smith and
2 Mr. Rogers had taken from TDM Cable Funding, LLC, correct?

3 A. That's correct.

4 MS. COOMBE: And if we could look, please,
5 now at Exhibit 7.

6 BY MS. COOMBE, CONTINUED:

7 Q. It is dated October 13th of 2009. It is between
8 Mr. Cooper and you with a copy to Mr. Carr, and he -- do
9 you see the highlighted parts, needs note per conversation;
10 is that correct?

11 A. Yes.

12 Q. I am handing you now Exhibit GD21. Could you
13 look at the last page, please? Do you see this is a grid
14 note summary?

15 A. Yes.

16 Q. This was prepared by the accountants, right?

17 A. Yes.

18 Q. And there is some confusion about the term. If
19 you look over at the column, you see it says six years and
20 it has been changed to five years; is that correct?

21 A. Yes.

22 Q. And then on the actual notes on GH10, it was
23 changed back to six years; is that correct?

24 A. Could you blow that up, please? Yes.

25 Q. All right.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 MS. COOMBE: And if we look back at GD21,
2 the last page, please.

3 BY MS. COOMBE, CONTINUED:

4 Q. There is some confusion over the interest rate
5 too, right? It says six percent. It has been crossed out
6 and put three percent, right?

7 A. It has been crossed out for the three percent.
8 I don't believe there was any confusion whatsoever.

9 Q. All right.

10 MS. COOMBE: Move to strike.

11 Non-responsive.

12 THE COURT: Overruled.

13 BY MS. COOMBE, CONTINUED:

14 Q. Mr. McGinn, it says six percent and then it was
15 changed to three percent, is that correct? On this
16 document, is that what it says?

17 A. Yes.

18 Q. Obviously the information about the year -- the
19 terms of these supposed notes and the interest rate was not
20 clear in the accounting records to the accountants, was it?

21 A. The schedule as described was corrected to
22 reflect the correct terms of the loans.

23 Q. Right, because the accounting records didn't
24 have what you believed to be the correct terms of the loans
25 in them, did they?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. That's correct.

2 Q. Now, yesterday you testified that when you were
3 deposed by FINRA that both you and Mr. Smith said in what I
4 think you referred to as a straightforward manner, you told
5 FINRA that you executed those promissory notes in the fall
6 of 2009. Was that your testimony?

7 A. Yes.

8 Q. Now, a straightforward manner would be to come
9 in and tell FINRA exactly what happened the first time it
10 came up, right?

11 A. That's correct.

12 Q. It would be not to be beat about the bushes?

13 A. That's correct.

14 Q. Not to make them ask you a bunch of questions?

15 A. Correct.

16 Q. Just come out and tell them, right?

17 A. To answer their questions.

18 Q. That is a straightforward manner, isn't it?

19 A. To answer their questions truthfully and
20 directly.

21 Q. Mr. McGinn, that's not exactly what happened, is
22 it, during your testimony before FINRA, yes or no?

23 A. I think it is what happened.

24 Q. You went down to New Jersey to testify before
25 FINRA on February 3rd of 2010, correct?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Yes.

2 Q. And when FINRA first asked you about when the
3 notes were created for the TDM Cable Funding, LLC
4 transactions, you told them that you weren't sure, right?

5 A. I don't know.

6 Q. Mr. McGinn, I am handing you your binder with
7 your transcripts in it.

8 MS. COOMBE: Counsel, it is page 113, lines
9 sixteen to twenty-four.

10 BY MS. COOMBE, CONTINUED:

11 Q. Mr. McGinn, are you ready?

12 A. No.

13 Q. Okay.

14 A. Okay.

15 Q. Were you asked this question and did you give
16 this answer?

17 Question: When were those notes created?

18 Answer: I am not sure.

19 Is that the question you were asked and the
20 answer you gave?

21 A. Yes.

22 Q. You were under oath at the time, right?

23 A. Yes.

24 Q. And it wasn't until the next day, February 4th,
25 that you finally admitted that you had signed those notes

TIMOTHY MCGINN - Cross by Ms. Coombe

1 in November of 2009, right?

2 A. That may be the case. I don't know.

3 Q. I am going to direct your attention to page 171.

4 And you will see just a few pages before that, Mr. McGinn,

5 that it is the beginning of the questioning on the second

6 day of your testimony?

7 A. Yes.

8 Q. Page 171, lines eleven through seventeen.

9 A. Yes.

10 Q. Were you asked these questions and did you give

11 these answers? I am going to go back to line seven

12 actually.

13 Question: Okay, and have you signed any

14 promissory notes in the last half of the year in 2009?

15 Answer: No.

16 Question: How about subsequent to November?

17 Answer: Excuse me, yes, I have.

18 Question: And when was that?

19 Answer: We executed notes in November of 2009.

20 Question: And what was that for?

21 Answer: That was for the TDM Cable 06

22 transaction.

23 Were you asked those questions and did you give

24 those answers?

25 A. Yes.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. And even then when FINRA asked you if you had
2 signed any other notes that day in November, you told them
3 that you didn't remember, right?

4 A. I told them that I executed notes in November of
5 2009.

6 Q. Mr. McGinn, you first told --

7 A. Page 171, line fourteen.

8 Q. You first told them that you didn't remember,
9 right? That's about the notes we just talked about that I
10 just asked you questions. We go on. Then they asked you
11 if you had signed any other notes that day, and you told
12 them you didn't remember, right, Mr. McGinn?

13 A. Yes.

14 Q. Then when they expanded the timeframe to
15 November and December, then you said that there may have
16 been other notes; isn't that right?

17 A. Yes.

18 Q. And then finally you admitted that you had
19 signed a number of notes in November of 2009 in response to
20 FINRA's request; isn't that right?

21 A. Yes.

22 Q. Mr. McGinn, you had just signed those notes in
23 November of 2009, this is February, correct?

24 A. Yes.

25 Q. Three months had passed. You had created those

TIMOTHY MCGINN - Cross by Ms. Coombe

1 promissory notes in response to a formal written request by
2 your regulator, FINRA; isn't that right?

3 A. That's correct.

4 Q. And you actually had to give Mr. Rogers a
5 forgiveness of indebtedness schedule to get him to sign his
6 promissory notes; isn't that right?

7 A. That is also correct.

8 Q. And you didn't want to admit to FINRA that you
9 had signed all of those notes; isn't that right?

10 A. No, it is not right.

11 Q. Is that testimony what you call a
12 straightforward manner?

13 A. Yes.

14 Q. Now, when you signed those promissory notes in
15 GH10, you knew that they were going to be provided to
16 FINRA, didn't you?

17 A. Yes, I did.

18 Q. Now, you took some money in connection with the
19 Fortress Trust 08 raise; isn't that correct?

20 A. I borrowed some money from NEI Capital, yes.

21 Q. You wound up with cold hard cash in your bank
22 account, right, Mr. McGinn?

23 A. I am not sure how cold it was.

24 Q. Cash?

25 A. Cash.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. You are familiar with that phrase, cold hard
2 cash?

3 A. No.

4 Q. You wound up with cash in your bank account
5 though, correct?

6 A. Yes.

7 Q. And that was between you and Mr. Smith and
8 Mr. Rogers, the amount of cash that wound up in your bank
9 accounts was approximately twenty-eight percent of the
10 Fortress Trust 08 raise; is that correct?

11 A. Could be.

12 Q. Now, the supposed loans that you received from
13 NEI Capital, LLC in connection with the Fortress Trust 08
14 raise, they aren't disclosed in the PPM, are they?

15 A. They are not.

16 Q. And the Fortress Trust 08 investors had no idea
17 that money raised was going to be loaned to the principals
18 because it wasn't disclosed, correct?

19 A. Correct.

20 Q. That could be said about all of these trusts,
21 correct?

22 A. Yes.

23 Q. Now, Mr. McGinn, you used money that you had
24 gotten in your supposed loans for a number of different
25 purposes, right?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Of course.

2 Q. Used it to pay alimony?

3 A. Of course.

4 Q. Used it to pay the Smiths on the loans you had
5 taken from them?

6 A. Yes.

7 Q. And then you paid about ninety thousand dollars
8 worth of taxes?

9 A. Could be.

10 Q. You made investments with some of it?

11 A. Yes.

12 Q. Yes or no?

13 A. Yes.

14 Q. And you used some of it for your house in
15 Florida?

16 A. Yes.

17 Q. Related expenses?

18 A. Yes.

19 Q. You used some for your house in Niskayuna?

20 A. Probably.

21 Q. Seventy-five thousand dollar deck?

22 A. Perhaps.

23 Q. And there are country clubs. You have country a
24 club in Boynton Beach, Florida?

25 A. It was a golf club, not a country club.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Q. Loudonville, New York?

2 A. Yes.

3 Q. And Ireland, right?

4 A. Golf club.

5 Q. You used that money for whatever you wanted,
6 right?

7 A. Yes.

8 Q. I just want to go back to your personal
9 financial statement for a moment. When you testified
10 before the SEC, you said that it was an oversight not to
11 list those loans, didn't you?

12 A. Yes.

13 Q. And you took responsibility for that oversight,
14 didn't you?

15 A. It was an oversight by me and, as testified to
16 by Mr. Simons, by him as well.

17 Q. It was an oversight by you as well, right,
18 Mr. McGinn?

19 A. Yes.

20 Q. You are the guy that wound up with the cash in
21 your bank account, not Mr. Simons, right?

22 A. That's correct.

23 Q. Mr. McGinn, I am handing you Exhibit GK9. I
24 would be happy to take the binder back if you would like to
25 get rid of it. Thank you.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 Mr. McGinn, these are copies of mortgage
2 applications that you filed with Mercantile Bank; isn't
3 that right?

4 A. Yes.

5 Q. And those were in connection with a mortgage on
6 your second house down in Boca Raton, Florida?

7 A. Yes.

8 Q. I would like to direct your attention to page
9 fifteen. It will come up on the screen. This is a loan
10 application; is that correct?

11 A. Yes.

12 Q. And you have initialed it at the bottom of the
13 page?

14 A. I did.

15 MS. COOMBE: Could we look at page sixteen,
16 please?

17 BY MS. COOMBE, CONTINUED:

18 Q. Those are your initials as well, right?

19 A. Yes.

20 Q. Page seventeen, those are your initials down
21 there?

22 A. Yes.

23 Q. And this says you that need to list all
24 liabilities.

25 MS. COOMBE: Ron, could we just blow up that

TIMOTHY MCGINN - Cross by Ms. Coombe

1 box right above liabilities.

2 BY MS. COOMBE, CONTINUED:

3 Q. It says to list all liabilities, right,
4 including alimony, that is what it says, right, Mr. McGinn?

5 A. Yes.

6 Q. Show us where you declared the four hundred and
7 seven thousand dollars -- four hundred and seven, three
8 hundred and forty-one dollars that you had received from
9 TDM Cable Funding, LLC which you did not pay tax on because
10 you claimed that it was a loan?

11 A. It is not so listed.

12 Q. How about the three hundred and ten thousand
13 dollars that you had received in connection with the
14 Firstline raise in May?

15 A. Also not listed.

16 Q. How about the one hundred and eighty-eight
17 thousand dollars that you had received from McGinn, Smith
18 Funding, LLC?

19 A. Not listed, but let me just look at this for a
20 second. It is not listed.

21 MS. COOMBE: Let's look at the next page,
22 please. Can we look at the bottom and blow up the top
23 part.

24 BY MS. COOMBE, CONTINUED:

25 Q. Is that your signature, Mr. McGinn?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. It is.

2 Q. Dated May 29th of 2007?

3 A. It is.

4 MS. COOMBE: Can we make that a little
5 bigger, Ron? The amount above it or that whole thing
6 actually.

7 BY MS. COOMBE, CONTINUED:

8 Q. Mr. McGinn, can you read that to the jury, that
9 declaration?

10 A. Yes, I can.

11 Q. Could you please do that?

12 A. I/we fully understand that it is a federal crime
13 punishable by fine or imprisonment, or both, to knowingly
14 make any false statements concerning any of the above facts
15 as applicable under the provisions of Title 18, United
16 States Code, Section 1001, et seq.

17 Q. That's the false statement provision of the
18 United States Code. Did you know that, Mr. McGinn?

19 A. I assume that's the case.

20 Q. And it is actually et. seq. for et seq., and it
21 is the other crimes, similar crimes that follow, did you
22 know that?

23 A. No, but thank you for enlightening me.

24 MS. COOMBE: Let's look at the next page,
25 please.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. And at the bottom, that's your signature; isn't
3 it?

4 A. Yes.

5 Q. And it has the same declaration, doesn't it?

6 A. It does.

7 Q. Okay.

8 MS. COOMBE: Let's look up at the other part
9 of this form on the right, the next page, please, Ron. Can
10 we blow up those declarations?

11 BY MS. COOMBE, CONTINUED:

12 Q. We see G: Are you obligated to pay alimony,
13 child support or separate maintenance, and you checked no.
14 No is checked; is that correct?

15 A. No is checked.

16 Q. You were required to pay alimony at that time,
17 weren't you?

18 A. Yes.

19 Q. Lets' look at H: Is any part of the down
20 payment borrowed. And you wrote no, right? Where it says
21 no, it may be an electronic check. It says no on the form
22 that you signed, correct?

23 A. H is checked no.

24 Q. You had gotten ninety thousand dollars that you
25 used for a down payment that was from indirectly in

TIMOTHY MCGINN - Cross by Ms. Coombe

1 connection with the Firstline raise; is that correct?

2 A. It may have been.

3 Q. And you claim that it was loan when you didn't
4 pay taxes on it, right?

5 A. That's correct.

6 Q. You didn't tell the bank about that here, did
7 you?

8 A. I am not certain that that ninety thousand
9 dollars came from that source. So no, I didn't tell the
10 bank about that.

11 Q. And I says: Are you a co-maker or an endorser
12 on the note. And no is checked, right?

13 A. Yes.

14 Q. What about all those notes for the loans that
15 you weren't paying taxes on, Mr. McGinn?

16 A. What about them?

17 Q. You would have said yes, right? Yes would have
18 been the accurate answer?

19 A. That's correct.

20 Q. So all three of those answers are not accurate.
21 Well, you say the H is, but G and I are not accurate,
22 correct?

23 A. Correct.

24 MS. COOMBE: Let's look at page three of
25 this document.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. This is dated June 20th of 2007 and there is an
3 acknowledgment certification?

4 A. Yes.

5 Q. And if we look a little farther up, you are
6 swearing that this is true, correct?

7 A. Yes.

8 Q. And you are subject to the penalties of the
9 United States Code, correct?

10 A. Yes.

11 MS. COOMBE: Let's look at page two, please.

12 BY MS. COOMBE, CONTINUED:

13 Q. And you see this is where it is asking for your
14 liabilities?

15 A. Assets and liabilities, yes.

16 Q. Let's focus on the liabilities. Can you show us
17 where you listed all that money that you had gotten that
18 you hadn't paid taxes on?

19 A. It is not listed.

20 Q. I am handing you now GD4. Is this your
21 handwriting, Mr. McGinn?

22 A. It is.

23 Q. And you wrote Crystal -- was she the loan
24 officer down at Mercantile Bank?

25 A. I don't think she was a loan officer. I think

TIMOTHY MCGINN - Cross by Ms. Coombe

1 she held an administrative clerical function.

2 Q. And she was your contact at Mercantile Bank in
3 connection with your loan application?

4 A. That is correct.

5 Q. And this is dated May 29th of 2007, and is that
6 the actual date that you prepared this document?

7 A. Probably.

8 Q. And you wrote: Crystal, I will have my
9 assistant fax to you a copy of my pay stub Thursday. Also,
10 I have received cash payments totaling three hundred and
11 forty-five thousand dollars so far this year from
12 affiliated entities. I would forecast total income for
13 2007 of approximately 1.2 million dollars.

14 Mr. McGinn, I am handing you Exhibit GJ11. This
15 is your tax return for 2007. Line twenty-two reports five
16 hundred and thirty-seven thousand dollars and change,
17 correct?

18 A. It does.

19 Q. Now, you had received five hundred and
20 seventy-eight thousand dollars that you claim are loans
21 that you did not pay taxes on that year, right?

22 A. Correct.

23 Q. And you told the bank that you expected your
24 total income to be about 1.2 million, right?

25 A. I told the bank that I forecast my income to be

TIMOTHY MCGINN - Cross by Ms. Coombe

1 about 1.2 million.

2 Q. And the rest of that number is this five hundred
3 and seventy-eight thousand dollars in the supposed loans
4 that you received; isn't it, Mr. McGinn?

5 A. It may have been.

6 Q. So you are telling the bank that those are fees
7 while you are telling the IRS that they are loans, right?

8 A. Wrong.

9 Q. You are telling -- you didn't pay taxes on
10 those, did you, because you claimed they were loans?

11 A. I did not pay taxes on them.

12 Q. And you told the bank -- let's just go back and
13 look at GD4. I have received cash payments totaling three
14 hundred and forty-five thousand dollars so far this year
15 from affiliated entities. You didn't say loans, did you,
16 Mr. McGinn?

17 A. I didn't --

18 Q. Yes or no. You didn't say loans, did you?

19 A. No.

20 Q. And you wrote I would forecast total income for
21 2007 of approximately 1.2 million dollars. You didn't
22 break income out into loans and non-loans, did you?

23 A. No.

24 MS. COOMBE: Let's look at page three of
25 this exhibit.

TIMOTHY MCGINN - Cross by Ms. Coombe

1 BY MS. COOMBE, CONTINUED:

2 Q. You wrote: Mr. McGinn is a fifty percent owner
3 and a managing member of McGinn, Smith Funding, LLC. He
4 intends to provide the cash required by drawing two hundred
5 thousand dollars from this account. It is signed and dated
6 by you, correct?

7 A. Yes.

8 Q. And that's your handwriting, right?

9 A. It is.

10 Q. Now, at the time that MS Funding, LLC account
11 had money from Fishers and Stewart's in it, right?

12 A. From the Fishers and Stewart's, Inc.

13 Q. Correct. Is that true?

14 A. Yes.

15 Q. And they were investors, right?

16 A. They were lenders.

17 Q. And did the Fishers give you the money for your
18 second house in Florida?

19 A. The Fishers lent money to MS Funding for the
20 purposes that MS Funding felt were appropriate.

21 Q. Did the Fishers tell you that it was okay for
22 you to use the money that they had given to you to buy
23 yourself a second house in Florida, did they tell you that?

24 A. No.

25 Q. Did you get a letter from them that you give to

TIMOTHY MCGINN - Cross by Ms. Coombe

1 the bank indicating that it was okay to use this money, a
2 gift letter or a loan letter that banks require, did you
3 get one from the Fishers, Mr. McGinn?

4 A. It wasn't Fishers' money.

5 Q. How about from Stewart's?

6 A. It wasn't Stewart's money.

7 Q. Did Stewart's give you permission to use money
8 that they had given to you in MS Funding, LLC to use to buy
9 a second house in Florida, yes or no?

10 A. Yes.

11 Q. They gave you permission?

12 A. There was an explicit or implicit, rather,
13 permission because they lent the money to MS Funding.
14 MS Funding could do with that money anything it wished so
15 long as it paid both the Fishers and the Stewart's Corp
16 back.

17 Q. So did you give the bank a letter indicating
18 that this was a loan from Stewart's that had to be paid
19 back?

20 A. It was not a loan from Stewart's to me.

21 Q. Did you give the bank a letter saying this was a
22 gift from Stewart's to you?

23 A. It was not a gift from Stewart's to me.

24 Q. You didn't disclose the true nature of this
25 money to the bank, did you, Mr. McGinn?

TIMOTHY MCGINN - Cross by Ms. Coombe

1 A. Yes, I did.

2 Q. I am handing you now Exhibit GK10.

3 MS. COOMBE: Could we look at page fourteen,
4 please, Ron.

5 BY MS. COOMBE, CONTINUED:

6 Q. That's a different copy of the document we just
7 looked at, right, Mr. McGinn?

8 A. If you say so.

9 Q. And this is from the bank's records. Do you see
10 at the bottom there is a handwritten note that says used
11 fifty percent?

12 A. I see that.

13 Q. The bank needs to get proof of what is going on
14 from you, right?

15 A. Yes.

16 Q. Because even though you have a thirty-year
17 banking relationship with the bank, the bank has to make
18 sure that everything is fair and square before they turn
19 over money to anyone, even you, isn't that right,
20 Mr. McGinn?

21 A. Of course.

22 MS. COOMBE: May I have a moment, Your
23 Honor?

24 THE COURT: You may.

25 MS. COOMBE: Your Honor, I have no further

TIMOTHY MCGINN - Cross by Ms. Coombe

1 questions.

2 THE COURT: Mr. Jones, redirect, if any.

3 MR. JONES: Thank you, Judge.

4

5 REDIRECT EXAMINATION BY MR. JONES:

6 Q. Mr. McGinn, good afternoon.

7 A. Good afternoon, Mr. Jones.

8 Q. Let's begin with some broader discussion.

9 THE COURT: Do you want that up or down?

10 MR. JONES: I will put it down at this
11 point.

12 BY MR. JONES, CONTINUED:

13 Q. Is a loan a form of compensation?

14 A. It may be, yes.

15 Q. And once a loan is received by the borrower, is
16 the money the borrower's?

17 A. Of course.

18 Q. And is the money the borrower's to do with as
19 the borrower wishes?

20 A. Yes.

21 Q. With respect to the broad umbrella that was
22 created by McGinn, Smith within which all of these trusts
23 and affiliates and later parties operated, what role did
24 this concept contemplate for loans?

25 A. Well, the role of the loans was contemplated to

TIMOTHY MCGINN - Recross by Ms. Coombe

1 MS. COOMBE: Could we please look at page
2 seventeen?

3 BY MS. COOMBE, CONTINUED:

4 Q. Mr. McGinn, can you see that? I would be happy
5 to find it for you in hard copy if you would like.

6 A. I can see it.

7 Q. All right. Is that your handwriting and your
8 initials for the Citi liability, which was originally
9 thirty-two thousand dollars and change, and you have
10 changed to zero?

11 A. Yes.

12 Q. And is that also your handwriting below that for
13 the AMEX, I assume that is a reference to American Express;
14 is that correct?

15 A. Yes.

16 Q. And it said -- it is hard for me to make out,
17 but does it say twenty-nine thousand and change?

18 A. Yes.

19 Q. And you changed that to zero, right?

20 A. Yes.

21 Q. And you initialed it?

22 A. Yes.

23 Q. So you didn't notice when you were checking
24 these portions of the liabilities that the substantial
25 amount of money that you had received which you claimed to

TIMOTHY MCGINN - Recross by Ms. Coombe

1 the IRS were loans was not reflected here?

2 A. I only checked those items that were listed and
3 made the appropriate adjustments.

4 Q. So I take it the answer to my question is no?

5 A. That's correct.

6 MS. COOMBE: Could we look at GI14, please?

7 BY MS. COOMBE, CONTINUED:

8 Q. Actually before we do that, Mr. McGinn, we
9 talked about the personal financial statement that
10 Mr. Simons prepared for you this morning, correct?

11 A. Yes.

12 Q. And you had done your handwritten summary for
13 him, correct?

14 A. That is correct.

15 Q. And you had asked him to look up information
16 about the money that you owed to Mr. and Mrs. Smith; is
17 that correct?

18 A. Yes.

19 Q. Now, you were ultimately responsible for the
20 information in that personal financial statement; isn't
21 that right?

22 A. Yes.

23 Q. It was your personal financial statement, not
24 Mr. Simons', correct?

25 A. It was my personal financial statement as

TIMOTHY MCGINN - Recross by Ms. Coombe

1 prepared by Mr. Simons.

2 Q. It was your personal financial statement,
3 correct?

4 A. That's what I said.

5 Q. All right.

6 MS. COOMBE: Could we look at GI14 now,
7 please?

8 BY MS. COOMBE, CONTINUED:

9 Q. Here, I will bring you a copy, Mr. McGinn.
10 Please take your time and look it over and let me know when
11 you are ready to proceed?

12 A. I am ready.

13 Q. This is an electronic mail message from
14 Mr. Simons to yourself. It is dated April 23rd of 2009.
15 It states: Tim, please review, approve attached statement.
16 I also need missing mortgage payment interest details to
17 complete the last footnote. I am in the Syracuse office
18 all day/evening. Please call me when you can. He lists
19 his phone number and signs it. Thanks, Ron Simons.

20 Mr. Simons asked you to approve the financial
21 statement before submitting it, didn't he?

22 A. Yes.

23 Q. And you did approve it before you sent it out?

24 A. Yes.

25 Q. At no time during that process did you say, hey,

TIMOTHY MCGINN - Recross by Ms. Coombe

1 I got all this money, and I am claiming they are loans to
2 the IRS, I should put this down on this personal financial
3 statement?

4 A. That's correct.

5 Q. On redirect you talked to Mr. Jones about the
6 promissory notes that were created in November of 2009. Do
7 you remember talking to him about that?

8 A. Yes.

9 Q. Now, FINRA is a self-regulatory organization,
10 right?

11 A. It is.

12 Q. It is paid for by the members of FINRA.

13 A. Correct.

14 Q. And it doesn't have all the law enforcement
15 authorities of the federal government, does it?

16 A. I don't believe it has any law enforcement
17 authority.

18 Q. In fact, it is not part of the federal
19 government, is it?

20 A. No.

21 Q. Or the state government?

22 A. No.

23 Q. It doesn't have the power to execute search
24 warrants, does it?

25 A. I don't believe so.

TIMOTHY MCGINN - Recross by Ms. Coombe

1 Q. It doesn't have the power to seize computers,
2 does it?

3 A. I doubt it.

4 Q. And it doesn't have the power to do forensic
5 analysis to see when documents were created, does it?

6 A. No.

7 MS. COOMBE: Could we look at GH10, please?
8 Could we look --

9 BY MS. COOMBE, CONTINUED:

10 Q. This is the letter again from Mr. Shea to FINRA
11 with the notes that were prepared in response to FINRA's
12 September 30, 2009 request.

13 MS. COOMBE: Could we look at the signature
14 page of the last note, please? I am sorry, the signature
15 page of the first note, Ron.

16 BY MS. COOMBE, CONTINUED:

17 Q. Do you see where it is highlighted there,
18 Mr. McGinn?

19 A. I do.

20 Q. In witness whereof, this note has been executed
21 and delivered on the date specified above by a duly
22 authorized representative of the maker. And you signed it,
23 and it was actually prepared in November of 2009; isn't
24 that right?

25 A. That's correct.

TIMOTHY MCGINN - Recross by Ms. Coombe

1 Q. On redirect you talked about the all broker
2 e-mails that Mr. Guzzetti sent. Do you remember talking
3 about that?

4 A. Yes.

5 Q. I believe you testified that you went delete,
6 delete, delete, right?

7 A. That's correct.

8 MS. COOMBE: Could we look at GE4, please.

9 BY MS. COOMBE, CONTINUED:

10 Q. I am going to give you a pile of exhibits here,
11 Mr. McGinn, and we will look at them up on the screen. You
12 didn't delete GE4, this one, did you, Mr. McGinn, you
13 responded to it?

14 A. That's right.

15 MS. COOMBE: And could we look at GE8,
16 please?

17 MR. JONES: What was the date on that
18 previous exhibit?

19 MS. COOMBE: It is GE4. Ron, I am sorry, we
20 will have to go back. I don't have a copy. January 23,
21 2008. Could we look at GE8 please?

22 BY MS. COOMBE, CONTINUED:

23 Q. You didn't delete this one, did you, Mr. McGinn?

24 A. No.

25 Q. And GE14, 16, 17, and 18 you have in front of

TIMOTHY MCGINN - Recross by Ms. Coombe

1 you. You didn't delete any of those, did you, you wrote
2 back to them?

3 A. That's correct.

4 Q. So you didn't delete all of the e-mails you
5 received from Mr. Guzzetti, did you?

6 A. Not all.

7 Q. Now, in September of 2009 when you finally told
8 the Firstline investors and the brokers about Firstline
9 Security, Incorporated's bankruptcy and the Firstline
10 investors stopped receiving their payments, wouldn't that
11 have been a good time to repay the money that you had taken
12 in connection with the Firstline raises?

13 A. We had repaid some of those funds. The costs
14 that we incurred to mount the rescue mission were
15 significant, both in legal costs and direct personnel costs
16 at McGinn, Smith & Company. And we viewed that, by the
17 way, as a partial repayment of those loans.

18 Q. So the safety cushion went to a rescue mission
19 that the investors knew nothing about in connection with a
20 bankruptcy that the investors knew nothing about; is that
21 right?

22 A. The cost went --

23 Q. Mr. McGinn, my question requires a yes or a no
24 answer.

25 A. I can't answer that yes or no.

TIMOTHY MCGINN - Recross by Ms. Coombe

1 Q. Well, let's break it down. The Firstline
2 investors didn't know about the bankruptcy, right?

3 A. Correct.

4 Q. And so they couldn't possibly have known that
5 you had decided to incur fees on behalf of trying to buy
6 some assets out of bankruptcy, could they?

7 A. That's correct.

8 Q. And they didn't have any way of approving that
9 you take that money as fees, did they?

10 A. Say that again, please.

11 Q. They didn't have any way because they didn't
12 know about fees they didn't approve that you would decide
13 to take those actions, did they?

14 A. No.

15 Q. So you just decided on your own that this money
16 that was supposed to be a safety cushion supposedly, the
17 asset that is carried on the LLC's books, that you would
18 use it as you saw fit without any input or disclosure to
19 the investors; isn't that right, yes or no?

20 A. Yes, that's right.

21 Q. You talked to Mr. Jones about the transfer of
22 your house to your wife. And you said that you were not
23 found liable in that arbitration action of Doctor Chang;
24 correct?

25 A. That's correct.

TIMOTHY MCGINN - Recross by Ms. Coombe

1 Q. At the time you transferred the house to her,
2 you did not know that that's how it would turn out, did
3 you?

4 A. Of course not.

5 Q. And the firm was held liable; isn't that
6 correct?

7 A. Yes.

8 Q. And as an owner of the firm, you had some
9 exposure in that judgment; isn't that correct?

10 A. I had exposure to the extent that I was a
11 shareholder in McGinn, Smith & Company, yes. It had
12 nothing to do with the house.

13 Q. Well, the house would be available to fulfill a
14 judgment if it was in your name; isn't that correct,
15 Mr. McGinn?

16 A. But it wasn't in my name.

17 Q. Not after you transferred it.

18 MS. COOMBE: Just need a moment, Your Honor.

19 THE COURT: You may.

20 MS. COOMBE: Could we look at GF24, please?

21 BY MS. COOMBE, CONTINUED:

22 Q. Mr. McGinn, you talked to Mr. Jones about this
23 e-mail on redirect, didn't you?

24 A. I did.

25 Q. And you had some testimony about the differences

TIMOTHY MCGINN - Recross by Ms. Coombe

1 between SAI and Firstline, didn't you?

2 A. Yes.

3 Q. Let's look at what you actually said to Mr. Lex.
4 Can you read that, actually the highlighted sentence at the
5 bottom of that e-mail, please?

6 A. Everything okay with Verifier and Firstline.

7 Q. You didn't distinguish SAI. You said everything
8 okay with Firstline, didn't you?

9 A. I was referring to the question that he asked in
10 his e-mail and that's what I answered.

11 Q. What you answered is everything okay with
12 Firstline; isn't that true, Mr. McGinn?

13 A. Yes.

14 Q. Everything was not okay with Firstline, was it?

15 A. Everything was okay with the Firstline
16 obligations and the obligations to the Firstline Trust.

17 MS. COOMBE: I move to strike.

18 Non-responsive.

19 MR. JONES: Objection. He has answered the
20 question.

21 THE COURT: Overruled. He answered your
22 question.

23 BY MS. COOMBE, CONTINUED:

24 Q. Mr. McGinn, this is what you wrote in response
25 to Mr. Lex, isn't it?

TIMOTHY MCGINN - Recross by Ms. Coombe

1 A. It is.

2 Q. You didn't tell him about the Firstline
3 Security, Incorporated bankruptcy, did you?

4 A. I did not.

5 MS. COOMBE: I have no further questions.

6 THE COURT: Anything further with this
7 witness?

8 MR. JONES: No, Your Honor.

9 THE COURT: Okay. Mr. McGinn, you may step
10 down. Thank you.

11 (Whereupon, the Witness is excused.)

12 MS. COOMBE: Your Honor, may I retrieve the
13 exhibits that are up there? Thank you.

14 THE COURT: Mr. Jones.

15 MR. JONES: No further witnesses.

16 THE COURT: Defendant McGinn rests?

17 MR. JONES: Subject to any further witnesses
18 that are called, yes, Your Honor.

19 THE COURT: Mr. Dreyer.

20 MR. DREYER: Thank you, Your Honor. Your
21 Honor, we call Mr. David Smith.

22

23 DAVID SMITH, having been called as a Witness, being
24 first duly sworn, was examined and testified as follows
25 under oath:

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK
3 10 CIV. 457 (GLS/DRH)

4 -----x

5 SECURITIES and EXCHANGE COMMISSION,
6
7 Plaintiff,

8 v.
9 MCGINN, SMITH & CO., INC.,
10 MCGINN, SMITH ADVISORS, LLC,
11 MCGINN, SMITH CAPITAL HOLDINGS CORP.,
12 FIRST ADVISORY INCOME NOTES, LLC,
13 FIRST EXCELSIOR INCOME NOTES, LLC,
14 FIRST INDEPENDENT INCOME NOTES, LLC,
15 THIRD ALBANY INCOME NOTES, LLC,
16 TIMOTHY M. MCGINN, DAVID L. SMITH,
17 LYNN A. SMITH, DAVID M. WOJESKI,
18 Trustee of the David L. and Lynn A.
19 Smith Irrevocable Trust U/A 8/04/04,
20 GEOFFREY R. SMITH, LAUREN T. SMITH,
21 and NANCY MCGINN,

22 Defendants,
23 LYNN A. SMITH, and
24 NANCY MCGINN,
25 Relief Defendants, and
26
27 DAVID M. WOJESKI, Trustee of the
28 David L. and Lynn A. Smith Irrevocable
29 Trust U/A 8/04/04,
30 Intervenor.

31 -----x

32 DEPOSITION OF: ANDREW G. GUZZETTI
33 WEDNESDAY, JUNE 15, 2011

34 ROSENBERG & ASSOCIATES, INC.

35 Certified Court Reporters & Videographers

36 425 Eagle Rock Ave., Ste 201 250 Park Ave., 7th Fl.

37 Roseland, NJ 07068 New York, NY 10177

38 (973) 228-9100 1-800-662-6878 (212) 868-1936

39 www.rosenbergandassociates.com

1 Deposition of ANDREW G. GUZZETTI,
2 a nonparty witness, taken by Plaintiff,
3 pursuant to Subpoena, at the office of
4 United States Securities and Exchange
5 Commission, 3 World Financial Center,
6 New York, New York, on Wednesday,
7 June 15, 2011, at 9:39 a.m., before
8 Robert M. Levine, a Court Reporter
9 and Notary Public of the State
10 of New York.

1 A P P E A R A N C E S:

2

3 SECURITIES AND EXCHANGE COMMISSION

4 Attorneys for Plaintiff

5 New York Regional Office

6 3 World Financial Center

7 New York, New York 10281-1022

8 BY: HAIMAVATHI V. MARLIER, ESQ.,

9 DAVID STOELTING, ESQ.

10 (212) 336-0533

11 marlierh@sec.gov

12

13 GILBERT B. ABRAMSON & ASSOCIATES, LLC

14 Attorneys for Witness

15 1616 Walnut Street - Fifth Floor

16 Philadelphia, Pennsylvania 19103

17 BY: GILBERT B. ABRAMSON, ESQ.

18 (215) 772-1070

19 gabramson@gbalaw.com

20 ALSO PRESENT:

21 DAVID L. SMITH

22

23

24

25

1 Andrew G. Guzzetti - June 15, 2011
2 ask that question again. I'm sorry. I
3 missed it.

4 MS. MARLIER: Sure.

5 Q. When you read this e-mail, is it your
6 understanding that TAIN didn't have sufficient
7 capital on hand to redeem an existing noteholder?

8 A. Yes. At that particular time that's
9 what I would get out of that statement. Yes.

10 Q. Did you think that Mr. Smith's
11 redemption instruction as outlined in this e-mail
12 was consistent with the terms of the PPM?

13 A. No.

14 Q. Why not?

15 A. Because you have a maturity date. And
16 if somebody matures date, they have a right to get
17 the money.

18 Q. Do you know if brokers sold investments
19 in the Four Funds?

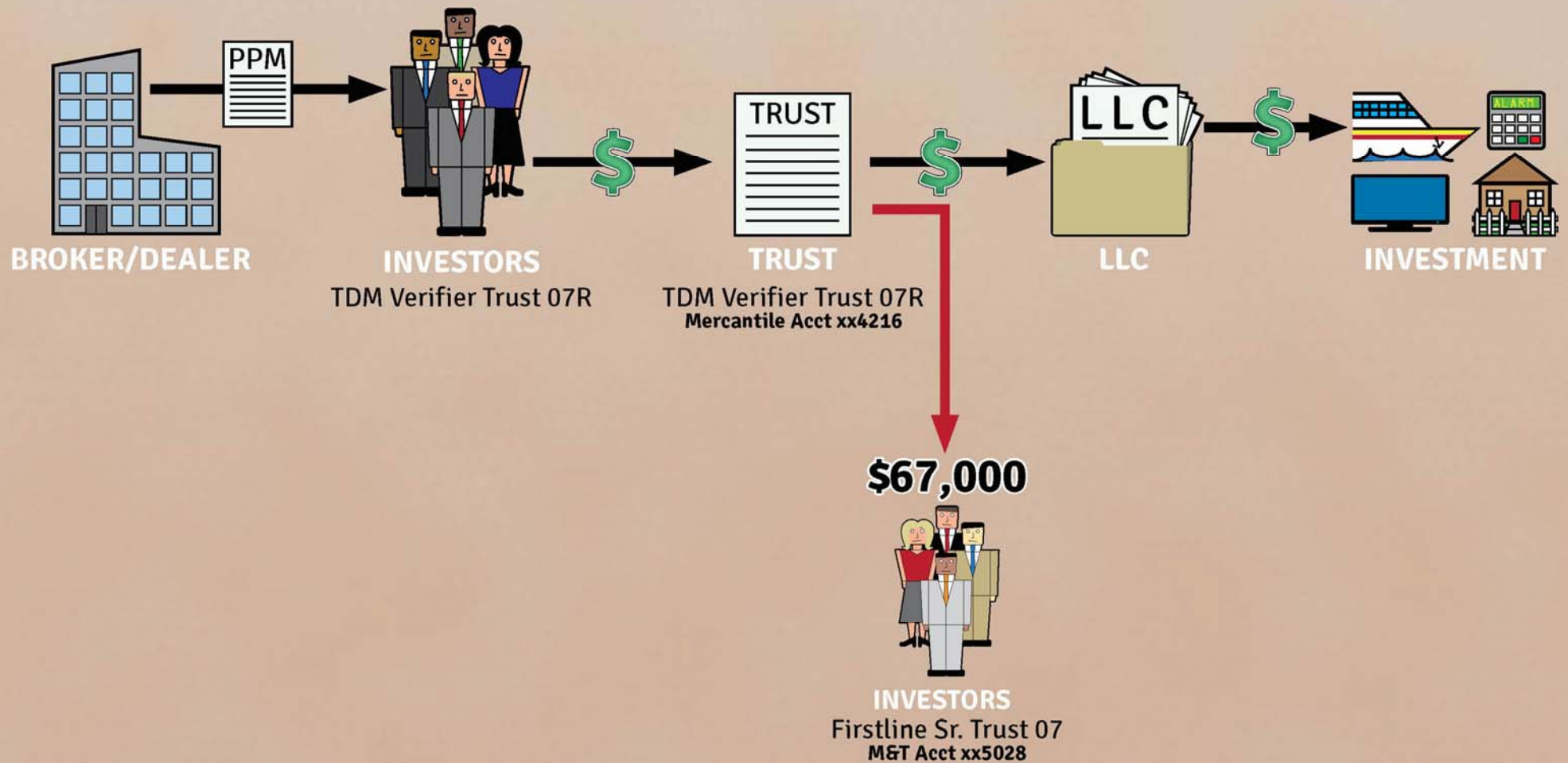
20 Let me back up.

21 When were brokers told about this
22 instruction?

23 A. That I'm not sure of. As I told you
24 before, there was two, two of these Funds notes that
25 were done before me. So when they were originally

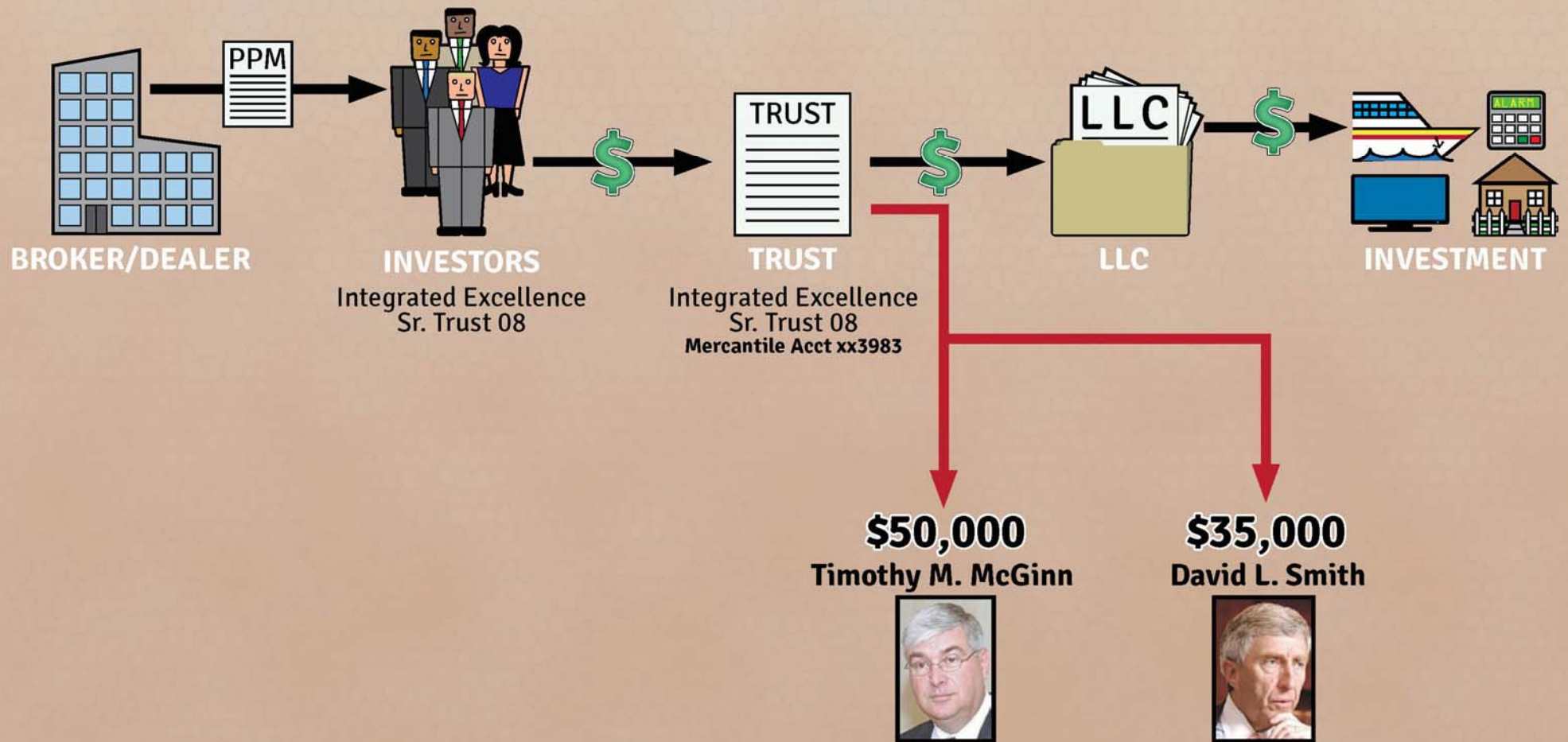
TDM Verifier Trust 07R

08/04/2009



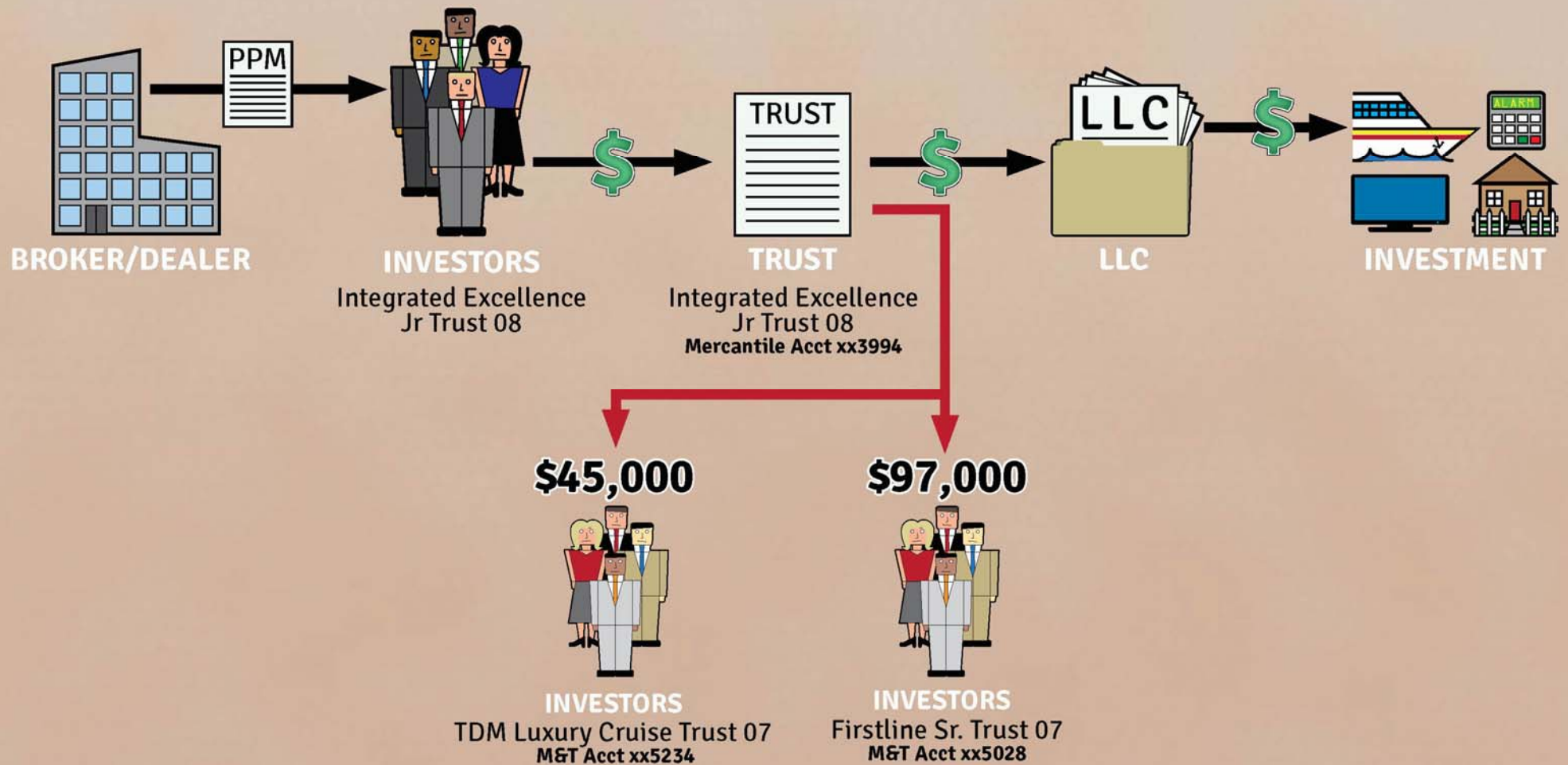
Integrated Excellence Sr. Trust 08

07/01/2008 & 07/15/2008



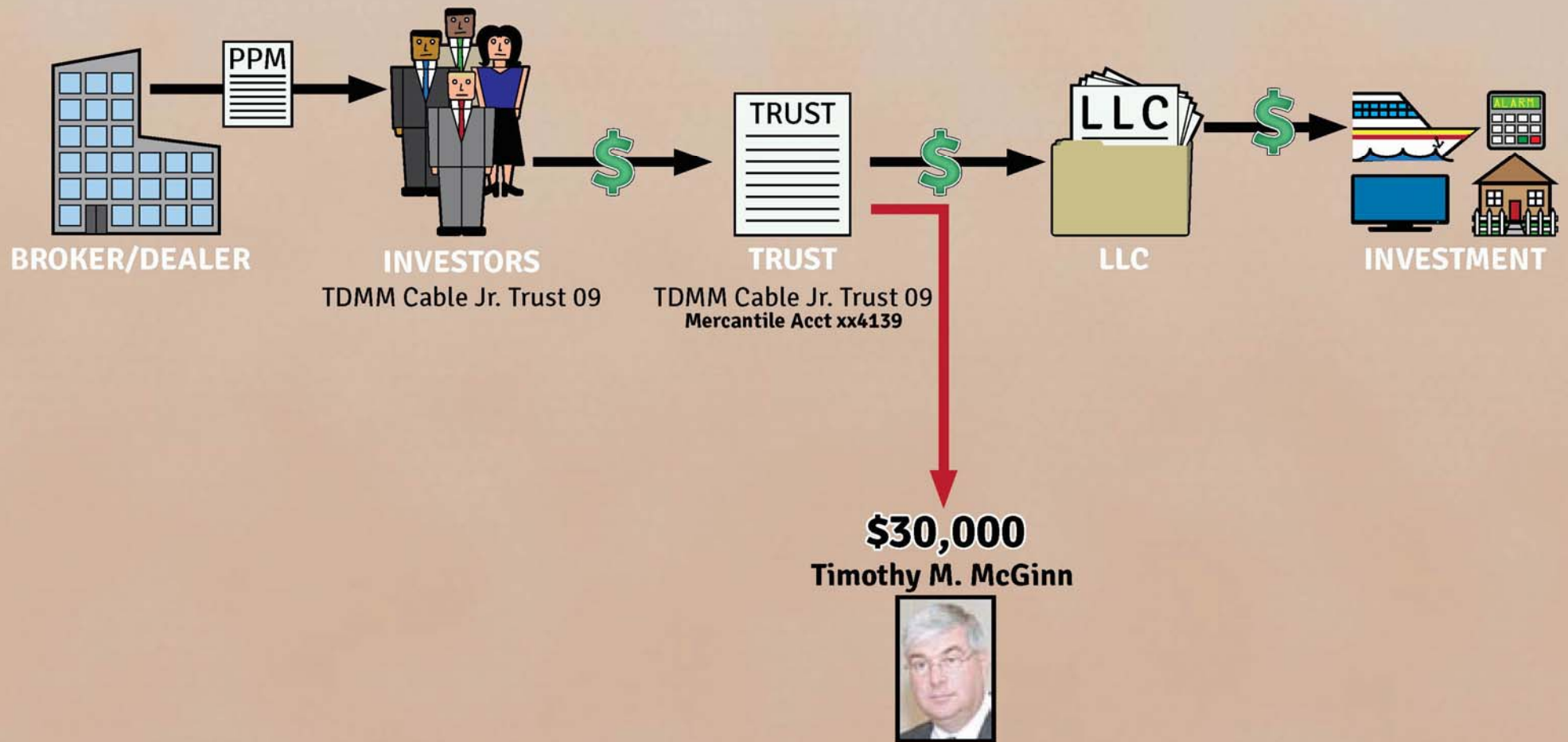
Integrated Excellence Jr. Trust 08

08/29/2008

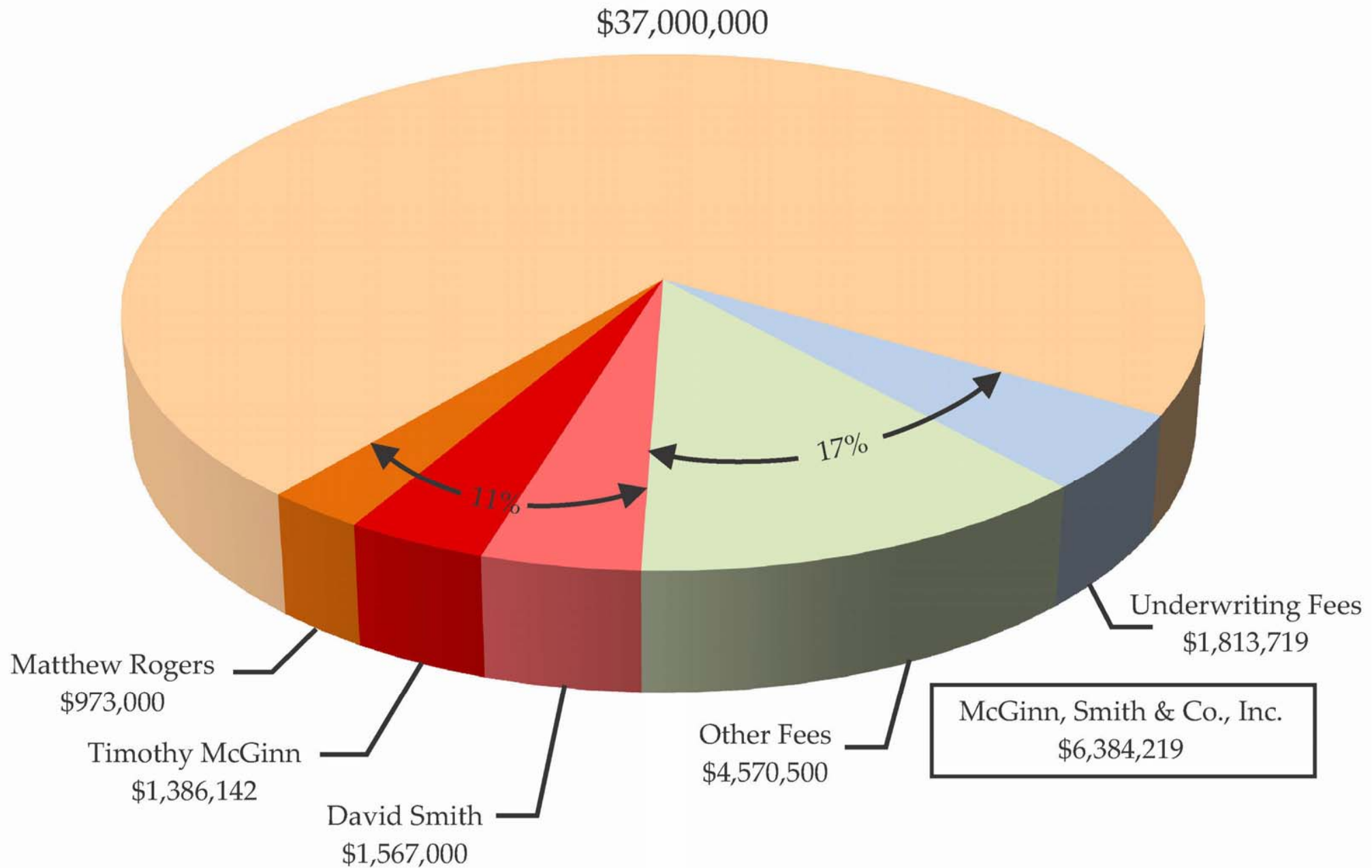


TDMM Cable Jr. Trust 09

04/30/2009



Payments from the 17 Trusts to the Broker-Dealer, McGinn, Smith, and Rogers



From: McGinn, Timothy [tmmcginn@mcginnsmith.com]
Sent: Friday, November 07, 2008 1:12 PM
To: Dixon, Joan A.
Subject: RE: journals, checks and wires

remitter

From: Dixon, Joan A. [mailto:Joan.Dixon@bankmercantile.com]
Sent: Friday, November 07, 2008 1:12 PM
To: McGinn, Timothy
Subject: RE: journals, checks and wires

Hi Mr. McGinn – do you want Matthew's name in the remitter side or the payee side with Waterville Membership Services?

From: McGinn, Timothy [mailto:tmmcginn@mcginnsmith.com]
Sent: Friday, November 07, 2008 12:59 PM
To: Dixon, Joan A.; Birnbach, Denise
Subject: journals, checks and wires

Joan,

Please execute the following:

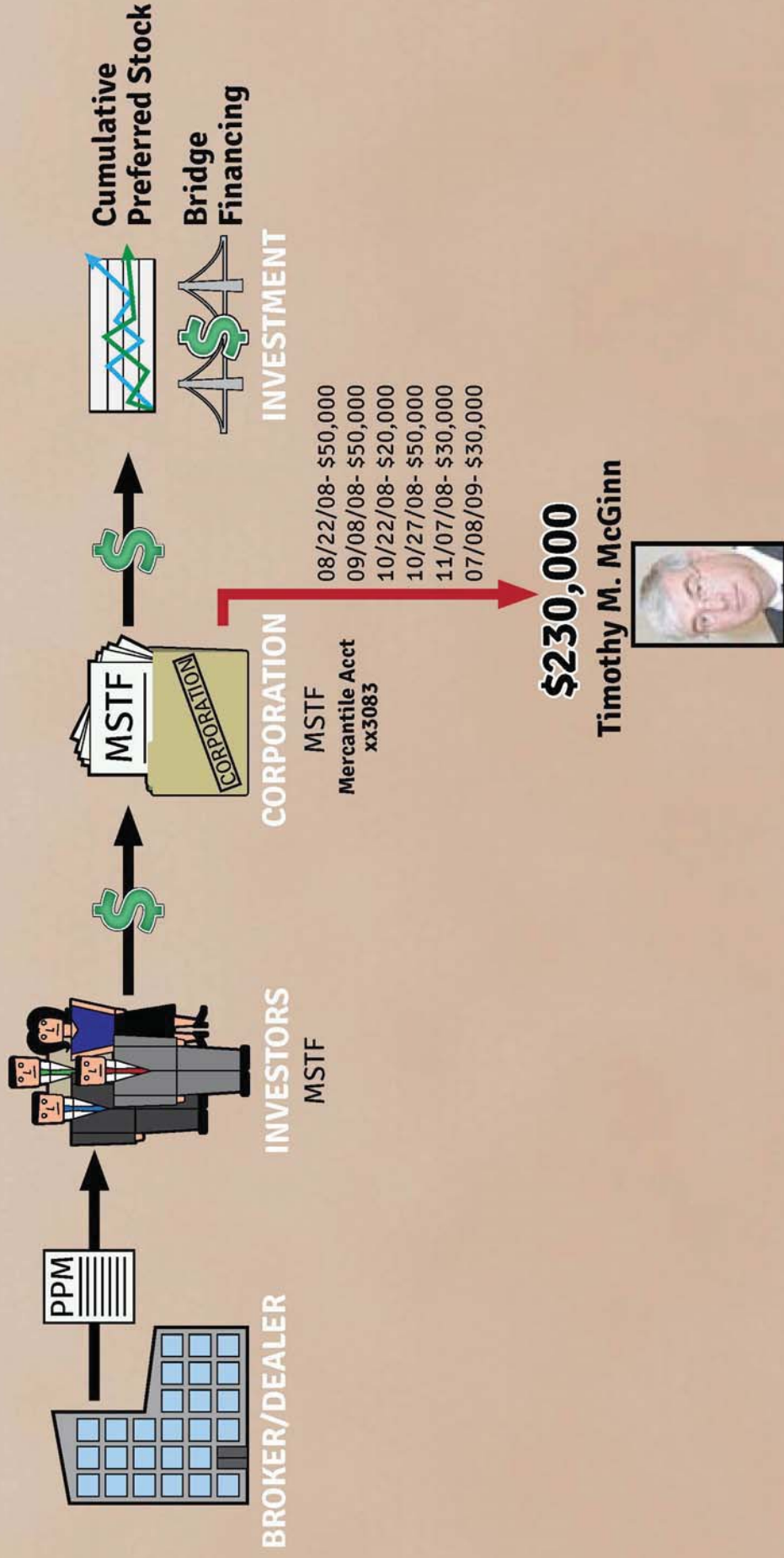
- 1) From McGinn, Smith Transaction Funding Corp., please wire \$30,000 to:
M & T Bank
Buffalo, NY
ABA #: REDACTED
Account #: REDACTED 9504
Account Name: Timothy M. McGinn
- 2) Please journal \$36,000. from Fortress Trust 08 to NEI Capital LLC.
- 3) Please issue check from NEI Capital LLC in the amount of \$40,000. payable to Waterville Membership Services and overnite same to:
Waterville Membership Services
Attn: Amanda Vocaturo
One East Weaver St.
Third Floor
Greenwich, Ct. 06831
Phone: 203-552-5590

Please indicate the name of Matthew Rogers on the check.

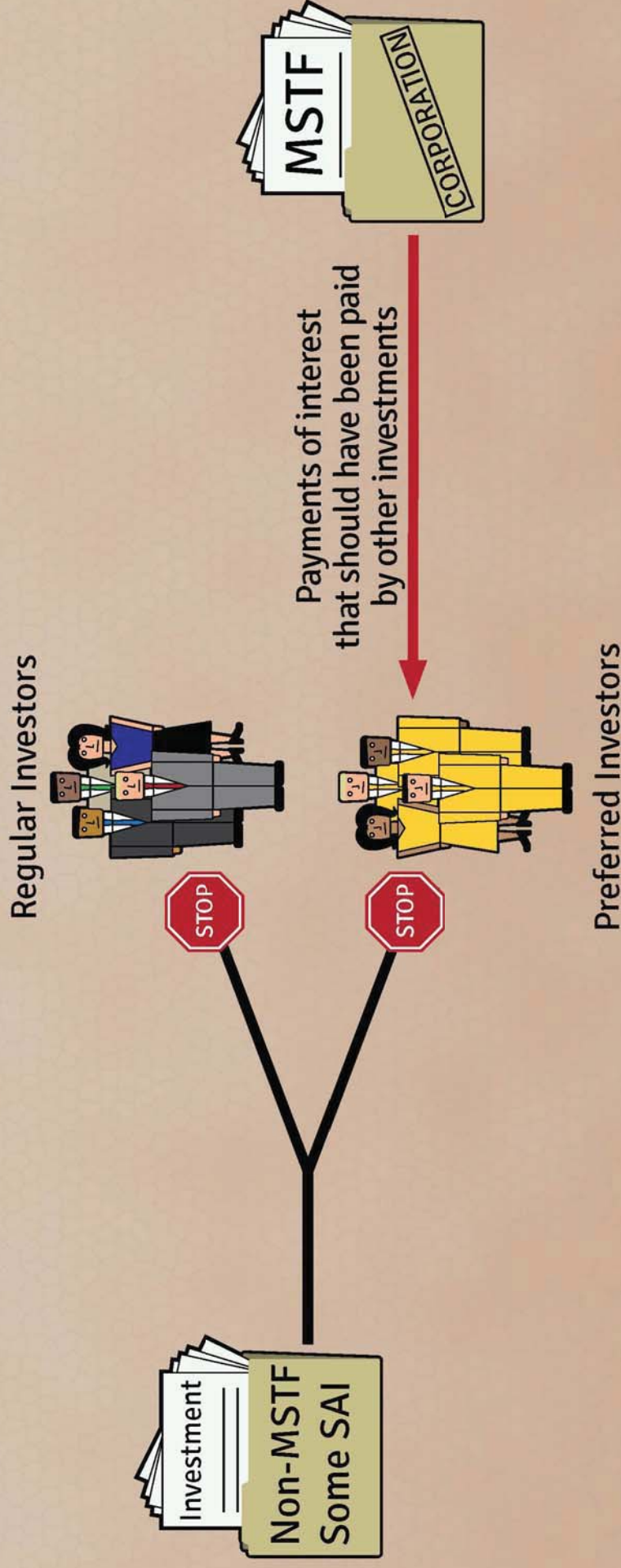
Thank you,

Timothy M. McGinn
Chairman and CEO

McGinn Smith Transaction Funding Corporation (MSTF)



MSTF Payments to non-MSTF Investors



Payments from “Four Funds” for Payroll



McGinn, Smith Transaction Funding and NEI Capital, LLC
False Accounting Entries

Before 11/2/2009

<u>MSTF Books</u>		<u>(Exhibit GB44)</u>		<u>NEI Books</u>		<u>(Exhibit GD10)</u>	
DF TMM		\$130,000.00		DF TMM		\$210,000.00	

11/2/2009

<u>MSTF Books</u>		<u>(Exhibit GB45, 49, 51)</u>		<u>NEI Books</u>		<u>(Exhibit GB45, 49, 51)</u>	
DF TMM		\$0.00		DF TMM		\$340,000.00	