UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

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

Defendants, and

LYNN A. SMITH,

Relief Defendant.

1:10-CV-457 (GLS/RFT)

**ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER,
AND ORDER FREEZING ASSETS AND GRANTING OTHER RELIEF**

On the Application of Plaintiff Securities and Exchange Commission (the "Commission") for an Order:

(1) directing defendants McGinn, Smith & Co., Inc. ("MS & Co."); McGinn, Smith Advisors LLC ("MS Advisors"); McGinn, Smith Capital Holdings Corp. ("MS Capital"); First Advisory Income Notes, LLC ("FAIN"); First Excelsior Income Notes, LLC ("FEIN"); First Independent Income Notes, LLC ("FIIN"); Third Albany Income Notes, LLC ("TAIN"); Timothy M. McGinn; David L. Smith (collectively, the "Defendants") to show cause why an Order should not be entered, pending a final disposition of this action:

(a) preliminarily enjoining:

(i) MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith from violating Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a) and 77e(c);

(ii) MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;

(iii) MS & Co., MS Advisors, McGinn and Smith from violating Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8;

(iv) MS & Co. from violating Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn from aiding and abetting this violation; and,

(v) FAIN, FEIN, FIIN and TAIN from violating Section 7(a) of the Investment Company Act of 1940 ("Company Act"), 15 U.S.C. § 80a-7.

(b) freezing the Defendants' and Lynn Smith's (the "Relief Defendant") assets;

(c) directing McGinn and Smith (the "Individual Defendants") to provide verified accountings for themselves and MS & Co., MS Advisors, MS

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

(d) appointing a receiver for the Entity Defendants and all other entities McGinn and/or Smith control or have an ownership interest in (collectively the "MS Entities"); and

(e) prohibiting the destruction, alteration or concealment of documents

(2) pending adjudication of the foregoing, an Order:

(a) temporarily restraining the Defendants from violating the aforementioned statutes and rules;

(b) freezing the Defendants' and Relief Defendant's assets;

(c) directing each of the Individual Defendants to immediately provide the verified accounts for themselves and the Entity Defendants, and the Relief Defendant to provide the verified accounts for herself;

(d) appointing a temporary receiver for the MS Entities;

(e) prohibiting the destruction, alteration or concealment of documents by the Defendants; and

(f) providing that the parties may take expedited discovery in preparation for a preliminary injunction hearing on this Order to Show Cause.

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

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

1. It appears from the evidence presented that, unless temporarily restrained, (1) Defendant MS & Co. has violated, and will continue to violate, Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8, and Section 15(c)(a)(1) of the Exchange Act; (2) Defendant MS Advisors has violated, and will continue to violate, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8; (3) Defendant MS Capital has violated, and will continue to violate, Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5; (4) Defendants FAIN, FEIN, FIIN and TAIN have violated, and will continue to violate, Section 7(a) of the Company Act; and (5) Defendants McGinn and Smith have violated, and will continue to violate Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, and Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8, and Defendants McGinn and Smith have aided and abetted, and will continue to aid and abet MS & Co.'s violation of Section 15(c)(a)(1) of the Exchange Act.

2. It appears that the Defendants and Relief Defendant may attempt to dissipate, deplete, or transfer from the jurisdiction of this Court, funds, property and other assets that could

be subject to an order of disgorgement or an order imposing civil penalties. It appears that an order freezing the Defendants' and Relief Defendant's assets, as specified herein, is necessary to preserve the *status quo,* to protect investors and clients of the Defendants from further transfers of funds and misappropriation, to protect this Court's ability to award equitable relief in the form of disgorgement of illegal profits from fraud and civil penalties, and to preserve the Court's ability to approve a fair distribution for victims of the fraud.

3. It appears that an order requiring each of the Individual Defendants and Relief Defendant to provide a verified accounting of their assets, money and property held directly or indirectly by the Defendants and Relief Defendant, or by others for the direct and indirect beneficial interest of the Defendants and Relief Defendant, is necessary to effectuate and ensure compliance with the freeze imposed on the Defendants' and Relief Defendant's assets.

4. It appears that the Defendants may attempt to destroy, alter or conceal documents.

5. It appears that the appointment of a receiver for the MS Entities is necessary to (i) preserve the *status quo*; (ii) ascertain the extent of commingling of funds among the MS Entities; (iii) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Entities; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities; (vii) be available to respond to investor inquiries; (viii) protect investors' assets; and (ix) determine whether the MS Entities should undertake bankruptcy filings.

6. Good and sufficient reasons have been shown why procedure other than by notice of motion is necessary.

7. This Court has jurisdiction over the subject matter of this action and over the

Defendants and Relief Defendant, and venue properly lies in this District.

NOW, THEREFORE,

I.

IT IS HEREBY ORDERED that the Defendants show cause, if there be any, to this Court at 3:00 p.m. on the 3rd day of May 2010, in Ct. Room 6 of the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207-2924, why this Court should not enter an Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, Section 20 of the Securities Act, and Section 21 of the Exchange Act, Section 209(d) of the Advisers Act, and Section 42 of the Company Act preliminarily enjoining:

(1) MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith from violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c);

(2) MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;

(3) MS & Co., MS Advisors, McGinn and Smith from violating Sections 206(1), 206(2), and 206(4) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8;

(4) MS & Co., from violating Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn from aiding and abetting this violation; and,

(5) FAIN, FEIN, FIIN and TAIN from violating Section 7(a) of the Company Act, 15 U.S.C. § 80a-7.

II.

IT IS FURTHER ORDERED that the Defendants show cause at that time why this Court should not also enter an Order directing that, pending a final disposition of this action, the Defendants, the Relief Defendant, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Defendants and Relief Defendant, including but not limited to, the MS Entities, including but not limited to, those entities listed on Exhibit A, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Defendants and Relief Defendant to hold or retain within its or his control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties including but not limited to, all assets, funds, or other properties held in the accounts listed on Exhibit B, as well as each real estate parcel owned directly or indirectly by the MS Entities, including but not limited to, those entities listed on Exhibit A.

III.

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

Court should not also enter an Order enjoining and restraining them, and any person or entity acting at their direction or on their behalf, or any other person, from destroying, altering, concealing or otherwise interfering with the access of Plaintiff Commission and the receiver to any and all documents, books and records, that are in the possession, custody or control of the Defendants, and each of their officers, agents, employees, servants, accountants, financial or brokerage institutions, attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, including but not limited to, those entities listed on Exhibit A, that refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books, and records referring, reflecting or relating to the Defendants' finances or business operations.

IV.

IT IS FURTHER ORDERED that the Defendants show cause at that time why this Court should not also enter an Order directing each of the Individual Defendants to serve upon Plaintiff Commission, within three (3) business days, or within such extension of time as the Commission agrees to, a verified written accounting each signed by Defendants McGinn and Smith and also signed by the officer or employees of the Entity Defendants who are most knowledgeable about the assets, liabilities and general financial condition of each of the Defendants, and verified accountings signed by each of the Individual Defendants and the Relief Defendant identifying their own assets, liabilities and general financial condition, if any, under penalty of perjury. Each of the Defendants and Relief Defendant shall serve such sworn updated written accountings by hand delivery, facsimile transmission to (212) 336-1324 or overnight courier service on the Commission's counsel, David Stoelting, Esq., Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281.

V.

IT IS FURTHER ORDERED that Individual Defendants and Relief Defendant shall file with the Court and serve on the Commission, within three (3) business days following service of this Order, a list of all accounts at all banks, brokerage firms or financial institutions (including the name of the financial institution and the name and number on the account), tax identification numbers, telephone or facsimile transmission numbers (including numbers of pagers and mobile telephones), electronic mail addresses, World Wide Web sites or Universal Records Locators, Internet bulletin board sites, online interactive conversational spaces or chat rooms, Internet or electronic mail service providers, street addresses, postal box numbers, safety deposit boxes, and storage facilities used or maintained by them or under their direct or indirect control, at any time from January 1, 2005 to the present including but not limited to information concerning the MS Entities, including but not limited to, those entities listed on Exhibit A.

VI.

IT IS FURTHER ORDERED that the Defendants show cause at that time why this Court should not also enter an Order appointing or continuing the appointment of a receiver for the MS Entities and all entities they control or have an ownership interest in including but not limited to, those entities listed on Exhibit A, to (i) preserve the *status quo*, (ii) ascertain the extent of commingling of funds among the MS Entities; (iii) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Entities and all entities they control or have an ownership interest in; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities;) (vii) be available to respond to investor inquiries; (viii) protect the assets of the MS Entities from further

dissipation; and (ix) determine whether the MS Entities should undertake bankruptcy filings.

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

(a) Take and retain immediate possession and control of all of the assets and property, and all books, records and documents of the MS Entities including but not limited to, the entities listed on Exhibit A, and the rights and powers of it with respect thereto including the powers set forth in the management agreements and LLC agreements and/or operating agreements applicable to any LLCs or other property or entities owned or controlled by the Defendants;

(b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of the MS Entities including but not limited to, the entities listed on Exhibit A;

(c) Pay from available funds necessary business expenses required to preserve the assets and property of the MS Entities including but not limited to, the entities listed on Exhibit A, including the books, records, and documents of the MS Entities and all entities they control or have an ownership interest in, notwithstanding the asset freeze imposed by paragraph II, above;

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

(e) Take preliminary steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by MS Entities including but not limited to, the entities listed on Exhibit A;

(f) Engage and employ persons, including accountants, attorneys and experts, to

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

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

1. All assets, money, funds, securities, and real or personal property then held directly or indirectly by or for the benefit of the MS Entities and all entities they control or have an ownership interest in, including but not limited to, real property, bank accounts, brokerage accounts, investments, business interests, personal property, wherever situated, identifying and describing each asset, its current location and value;

2. A list of secured creditors and other financial institutions with an interest in the receivership assets;

3. To the extent practicable, a list of investors in the MS Entities including but not limited to, the entities listed on Exhibit A;

(h) The receiver's preliminary plan for the administration of the assets of the receivership, including a recommendation regarding whether bankruptcy cases should be filed for all of a portion of the assets subject to the receivership and a recommendation whether litigation against third parties should be commenced on a contingent fee basis to recover assets for the benefit of the receivership.

VII.

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

attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from, directly or indirectly, singly or in concert, in the offer or sale of any security, by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails to offer or sell securities through the use or medium of a prospectus or otherwise when no registrations statement has been filed or is in effect as to such securities and when no exemption from registration is available in violation of Sections 5(a) and 5(c) of the Securities Act.

VIII.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capital, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, are temporarily restrained from violating, directly or indirectly, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

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

IX.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capital, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

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

X.

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

agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 15(c) of the Exchange Act, 15 U.S.C. § 78(o)(c), and 17 C.F.R. § 240.10b-3, by while acting as a broker or dealer, directly or indirectly, making use of the mails or any instrumentality of interstate commerce, or any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other fraudulent device or contrivance, or to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance" as such term is used in Section 15(c)(1) of the Exchange Act.

XI.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, the Individual Defendants, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from aiding and abetting any broker's or dealer's violations of Section 15(c) of the Exchange Act, 15 U.S.C. § 78(o)(c), by providing substantial assistance

to an individual or entity, which, while acting as a broker or dealer, directly or indirectly, makes use of the mails or any instrumentality of interstate commerce, or any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other fraudulent device or contrivance, or to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance" as such term is used in Section 15(c)(1) of the Exchange Act.

XII.

IT IS FURTHER ORDERED that pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors and each of their officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Sections 206(1), 206(2) and 206(4) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8, while acting as an investment advisor, by the use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to employ any device, scheme or artifice to defraud any client or prospective client; to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client; to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

XIII.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, FAIN, FEIN, FIIN, and TAIN and each of their officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 7(a) of the Company Act, 15 U.S.C. § 80a-7, while acting as an investment company, shall directly or indirectly, offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce; purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the meals or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; control any investment company which does any of the acts enumerated above; engage in any business in interstate commerce; or control any company which is engaged in any business in interstate commerce.

XIV.

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

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

XV.

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

otherwise interfering with the access of Plaintiff Commission and the receiver to any and all documents, books, and records that are in the possession, custody or control of the Defendants and each of their respective officers, agents, employees, servants, accountants, financial or brokerage institutions, or attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, that refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books and records referring, reflecting or relating to the Defendants' finances or business operations, or the offer, purchase or sale of securities and the use of proceeds therefrom; and (2) ordered to provide all reasonable cooperation to the receiver in carrying out his duties set forth herein.

XVI.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, each of the Defendants shall file with this Court and serve upon Plaintiff Commission, within three (3) business days, or within such extension of time as the Commission agrees to, a verified written accounting signed by each of the Individual Defendants, and the officers or employees of the MS Entities who are most knowledgeable about the assets, liabilities and general financial condition of the each of the Defendants, if any, under penalty of perjury, of:

(1) All assets, liabilities and property currently held, directly or indirectly, by or for the benefit of each Defendant, including, without limitation, bank accounts, brokerage accounts, investments, business interests, loans, lines of credit, and real and personal property wherever situated, describing each asset and liability, its current location and amount;

(2) All money, property, assets and income received by each such Defendant for his

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

(3) The names and last known addresses of all bailees, debtors, and other persons and entities that currently are holding the assets, funds or property of each Defendant; and

(4) All assets, funds, securities and real or personal property invested by each such Defendant, or any other person controlled by them, and the disposition of such assets, funds, securities, real or personal property.

Each Individual Defendant and the officers or employees of the Entity Defendants who are most knowledgeable about the assets, liabilities and general financial condition of the Defendants, if any, shall verify the Entity Defendant's accounting and serve such sworn statements of asset identifying information by hand delivery, facsimile transmission to (212) 336-1324 or overnight courier service on the Commission's counsel, David Stoelting, Esq., Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281. Each of the Individual Defendants is required to provide the Commission with an accounting for his own personal assets, liabilities and general financial condition, and also provide an accounting for each of the Entity Defendants. The Relief Defendant is required to provide the Commission with an accounting for her own personal assets, liabilities and general financial condition.

XVII.

IT IS FURTHER ORDERED that William J. Brown, pending further order of this Court, be and hereby is appointed to act as receiver for the MS Entities including

but not limited to, those entities listed on Exhibit A, to (1) preserve the *status quo*; (2) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (3) determine the extent of commingling of funds between the MS Entities; (4) prevent further dissipation of the property and assets of the MS Entities; (5) prevent the encumbrance or disposal of property or assets of the MS Entities; (6) preserve the books, records and documents of the MS Entities; (7) be available to respond to investor inquiries; and (8) determine if the MS Entities and all entities they control or have an ownership interest in should undertake a bankruptcy filing. To effectuate the foregoing, the receiver is hereby empowered to:

(a) Take and retain immediate possession and control of all of the assets and property of the MS Entities including but not limited to, those entities listed on Exhibit A, and all books, records and documents of MS Entities, and the rights and powers of it with respect thereto;

(b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of MS Entities including but not limited to, those entities listed on Exhibit A;

(c) succeed to all rights to manage all properties owned or controlled, directly or indirectly, by the MS Entities, including but not limited to, those entities listed on Exhibit A, pursuant to the LLC and operating agreement relating to each entity;

(d) Pay from available funds necessary business expenses required to preserve the assets and property of MS Entities and all entities they control or have an ownership interest in, including the books, records, and documents of the Defendants, notwithstanding the asset freeze imposed above;

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

(f) Take preliminary steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by the Defendants and the entities they control;

(g) Engage and employ persons, including accountants, attorneys and experts, to assist in the carrying out of the receiver's duties and responsibilities hereunder;

(h) Take all necessary steps to gain control of the Defendants' interests in assets in foreign jurisdictions, including but not limited to taking steps necessary to repatriate foreign assets; and

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

XVIII.

IT IS FURTHER ORDERED that no person or entity, including any creditor or claimant against any of the Defendants, or any person acting on behalf of such creditor or claimant, shall take any action without further order of this Court to interfere with the taking control, possession, or management of the assets, including but not limited to the filing of any lawsuits, liens or encumbrances or bankruptcy cases to impact the property and assets subject to this order.

XIX.

IT IS FURTHER ORDERED that the Defendants shall pay the reasonable costs, fees and expenses of the receiver incurred in connection with the performance of his duties described

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

XX.

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

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

(2) Obtain the production of documents, within three (3) calendar days from service by facsimile or otherwise of a request or subpoena from any persons or entities, including non-party witnesses; and

(3) Service of any discovery requests, notices, or subpoenas may be made by personal service, facsimile, overnight courier, or first-class mail on an individual, entity or the individual's or entity's attorney; and

(4) The receiver may take discovery in this action without further order of the Court.

XXI.

IT IS FURTHER ORDERED that a copy of this Order and the papers supporting the Commission's Application be served upon the Defendants and Relief Defendant on or before Wednesday, April 21, 2010, by personal delivery, facsimile, overnight courier, or first-class

mail.

XXII.

IT IS FURTHER ORDERED that the Defendants and Relief Defendant shall deliver any opposing papers in response to the Order to Show Cause above no later than Tuesday, April 27, 2010, at 4:00 p.m. Service shall be made by delivering the papers, using the most expeditious means available, by that date and time, to the New York Regional Office of the Commission at 3 World Financial Center, Room 4300, New York, New York 10281, Attn: David Stoelting Esq., or such other place as counsel for the Commission may direct in writing. The Commission shall have until Thursday, April 29, 2010, at 5:00 p.m., to serve, by the most expeditious means available, any reply papers upon the Defendants and Relief Defendants, or upon their counsel, if counsel shall have made an appearance in this action.

XXIII.

IT IS FURTHER ORDERED that this Order shall be, and is, binding upon the Defendants and Relief Defendants and each of their respective officers, agents, servants, employees, attorneys-in-fact, subsidiaries, affiliates and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise.

UNITED STATES DISTRICT JUDGE

Issued at : 2 : 00 p.m.
April 21, 2010
Albany, New York

EXHIBIT A

Exhibit A

List of Known Entities Controlled By McGinn and/or Smith

107th Associates LLC Trust 07
107th Associates LLC
74 State Street Capital LP
Acquisition Trust 03
Capital Center Credit Corporation
CMS Financial Services
Cruise Charter Ventures LLC dba YOLO Cruises
Cruise Charter Ventures Trust 08
First Advisory Income Notes LLC
First Commercial Capital Corp.
First Excelsior Income Notes LLC
First Independent Income Notes LLC
FirstLine Junior Trust 07
FirstLine Senior Trust 07
FirstLine Trust 07
Fortress Trust 08
Integrated Excellence Junior Trust
Integrated Excellence Junior Trust 08
Integrated Excellence Senior Trust
Integrated Excellence Senior Trust 08
IP Investors
James J. Carroll Charitable Fund
JGC Trust 00
KC Acquisition Corp.
KMB Cable Holdings LLC
Luxury Cruise Center, Inc.
Luxury Cruise Holdings, LLC
Luxury Cruise Receivables, LLC
M & S Partners
McGinn, Smith & Co.
McGinn, Smith Acceptance Corp.
McGinn, Smith Advisors
McGinn, Smith Alarm Trading
McGinn, Smith Asset Management Corp.
McGinn, Smith Capital Holdings
McGinn, Smith Capital Management LLC
McGinn, Smith Financial Services Corp.
McGinn, Smith FirstLine Funding LLC
McGinn, Smith Funding LLC
McGinn, Smith Group LLC
McGinn, Smith Holdings LLC
McGinn, Smith Independent Services Corp.
McGinn, Smith Licensing Co.

McGinn, Smith Transaction Funding Corp.
Mr. Cranberry LLC
MS Partners
MSFC Security Holdings LLC
NEI Capital LLC
Pacific Trust 02
Pine Street Capital Management LLC
Pine Street Capital Partners LP
Point Capital LLC
Prime Vision Communications LLC
Prime Vision Communication Management Keys Cove LLC
Prime Vision Communications of Cutler Cay LLC
Prime Vision Funding of Cutler Cove LLC
Prime Vision Funding of Key Cove LLC
RTC Trust 02
SAI Trust 00
SAI Trust 03
Security Participation Trust I
Security Participation Trust II
Security Participation Trust III
Security Participation Trust IV
Seton Hall Associates
TDM Cable Funding LLC
TDM Cable Trust 06
TDM Luxury Cruise Trust 07
TDM Verifier Trust 07
TDM Verifier Trust 07R
TDM Verifier Trust 08
TDM Verifier Trust 08R
TDM Verifier Trust 09
TDM Verifier Trust 11
TDMM Benchmark Trust 09
TDMM Cable Funding LLC
TDMM Cable Jr Trust 09
TDMM Cable Sr Trust 09
Third Albany Income Notes LLC
Travel Liquidators, LLC
White Glove Cruises LLC
White Glove LLC

EXHIBIT B

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	[redacted]1998	107th Assoc. LLC Trust 07	
Mercantile Bank	[redacted]1987	107th Associates LLC	
M&T Bank	[redacted]6850	107th Associates LLC	
M&T Bank	[redacted]3478	74 State Street Capital LP	Operating
M&T Bank	[redacted]7062	74 State Street Capital LP	
M&T Bank	[redacted]5288	Acquisition Trust 03	Operating Account
Whitney National Bank	[redacted]9335	Benchmark Communication LLC	
M&T Bank	[redacted]0805	Capital Center Credit Corp	Operating
M&T Bank	[redacted]2250	Capital Center Credit Corp	Careclub Depository, 99 Pine St
JPMorganChase	[redacted]6587	Capital Center Credit Corp	Special Account Michael Lewy Attn: David Rees
NFS/Fidelity	[redacted]8178	Capital Center Credit Corp	C/O MCGINN SMITH & CO INC ATTN DAVID P REES
JPMorganChase	[redacted]4817	Capital Center Credit Corp c/o McGinn Smith & Co	
Monterey Bank	[redacted]6854	Charter Cruise Ventures	dba YOLO Cruises
M&T Bank	[redacted]3133	CMS Financial	
M&T Bank	[redacted]6985	CMS Financial Services Corp.	
M&T Bank	[redacted]2064	CMS Financial Services Corp.	
Monterey Bank	[redacted]6846	Cruise Charter Ventures	dba YOLO Cruises
Mercantile Bank	[redacted]3972	Cruise Charter Ventures LLC	
Mercantile Bank	[redacted]1307	Cruise Charter Ventures LLC	
Mercantile Bank	[redacted]2808	Cruise Charter Ventures Trust 08	
M&T Bank	[redacted]3528	First Advisory Income Notes	Operating
M&T Bank	[redacted]7489	First Advisory Income Notes	Escrow
M&T Bank	[redacted]9147	First Excelsior Income Notes LLC	Alarm Accum Account
M&T Bank	[redacted]9139	First Excelsior Income Notes LLC	Operating
Charter One Bank	[redacted]863-8	First Excelsior Income Notes LLC	Escrow
JPMorganChase	[redacted]6928	First Excelsior Income Notes LLC	
NFS/Fidelity	[redacted]9280	First Excelsior Income Notes LLC	
M&T Bank	[redacted]6013	First Independent Income Notes	Operating
M&T Bank	[redacted]9279	First Independent Income Notes	Monitoring Contract Accum
Charter One Bank	[redacted]003-6	First Independent Income Notes	Timothy McGinn
JPMorganChase	[redacted]6893	First Independent Income Notes	
JPMorganChase	[redacted]0087	First Independent Income Notes	
NFS/Fidelity	[redacted]8934	First Independent Income Notes	
Mercantile Bank	[redacted]1921	FirstLine Senior Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
M&T Bank	[redacted]5028	FirstLine Sr Trust 07	
M&T Bank	[redacted]5366	FirstLine Sr Trust 07 Series B	
Mercantile Bank	[redacted]0733	FirstLine Sr Trust 07 Series B	McGinn Smith & Co Inc Trustee
M&T Bank	[redacted]5010	FirstLine Trust 07	
Mercantile Bank	[redacted]910	FirstLine Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
Mercantile Bank	[redacted]0722	FirstLine Trust 07 Series B	McGinn Smith & Co Inc Trustee, UAD 10/16/07
M&T Bank	[redacted]5358	FirstLine Trust 07 Series B	
M&T Bank	[redacted]6413	Fortress Trust 08	c/o McGinn Smith Capital Holdings Corp.
Mercantile Bank	[redacted]9187	Fortress Trust 08 UTD 9/10/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6165	Integrated Excellence Jr Trust	
Mercantile Bank	[redacted]3994	Integrated Excellence Jr Trust 08 DTD 5/28/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6173	Integrated Excellence Sr Trust	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	[redacted]3983	Integrated Excellence Sr Trust 08 DTD 5/27/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6868	IP Investors LLC	
M&T Bank	[redacted]3783	James J. Carroll Charitable Fund	
M&T Bank	[redacted]6815	JGC Trust 00	Operating c/o McGinn Smith
Mercantile Bank	[redacted]1674	Luxury Cruise Center Inc	
Mercantile Bank	[redacted]0446	Luxury Cruise Center Inc	
Mercantile Bank	[redacted]0435	Luxury Cruise Charter Inc. Payables	
M&T Bank	[redacted]3996	M&S Partners	
JPMorganChase	[redacted]3443	McGinn Smith & Co	
JPMorganChase	[redacted]5670	McGinn Smith & Co	
NFS/Fidelity	[redacted]0167	MCGINN SMITH & CO DELIGIANNIS MASTER ACCOUNT	
NFS/Fidelity	[redacted]0035	MCGINN SMITH & CO AVERAGE PRICE ACCOUNT	
JPMorganChase	[redacted]4300	McGinn Smith & Co Capital A/C	
JPMorganChase	[redacted]4302	McGinn Smith & Co Corporate Bond A/C Attn: David Rees	
JPMorganChase	[redacted]4306	McGinn Smith & Co Deposit Account Attn: David Rees	
JPMorganChase	[redacted]4305	McGinn Smith & Co Error Account Attn: David Rees	
JPMorganChase	[redacted]4301	McGinn Smith & Co Firm Trading A/C Attn: David Rees	
JPMorganChase	[redacted]4303	McGinn Smith & Co Govt Bond A/C Attn: David Rees	
NFS/Fidelity	[redacted]1007	MCGINN SMITH & CO INC	
NFS/Fidelity	[redacted]0051	MCGINN SMITH & CO INC ALBANY BTAM $ DIFFERENCE	
NFS/Fidelity	[redacted]0043	MCGINN SMITH & CO INC ALBANY BTAM MASTER ACCOUNT	
NFS/Fidelity	[redacted]1007	MCGINN SMITH & CO INC DAVID L SMITH	
NFS/Fidelity	[redacted]0175	MCGINN SMITH & CO INC DELIGIANNIS $ DIFFERENCE	
NFS/Fidelity	[redacted]0086	MCGINN SMITH & CO INC NYC BTAM UNALLOCATED	
NFS/Fidelity	[redacted]0728	MCGINN SMITH & CO INC REVENUE ACCOUNT	
NFS/Fidelity	[redacted]0060	MCGINN SMITH & CO INC ALBANY BTAM UNALLOCATED	
NFS/Fidelity	[redacted]0205	MCGINN SMITH & CO INC BOYLAN $ DIFFERENCE	
NFS/Fidelity	[redacted]0191	MCGINN SMITH & CO INC BOYLAN MASTER ACCOUNT	
NFS/Fidelity	[redacted]0183	MCGINN SMITH & CO INC DELIGIANNIS UNALLOCATED	
NFS/Fidelity	[redacted]0116	MCGINN SMITH & CO INC ERROR ACCOUNT	
NFS/Fidelity	[redacted]0230	MCGINN SMITH & CO INC RABINOVICH $ DIFFERENCE	
NFS/Fidelity	[redacted]0221	MCGINN SMITH & CO INC RABINOVICH MASTER ACCOUNT	
NFS/Fidelity	[redacted]0248	MCGINN SMITH & CO INC RABINOVICH UNALLOCATED	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]0140	MCGINN SMITH & CO INC SANCHIRICO $ DIFFERENCE	
NFS/Fidelity	[redacted]0132	MCGINN SMITH & CO INC SANCHIRICO MASTER ACCOUNTS	
NFS/Fidelity	[redacted]0159	MCGINN SMITH & CO INC SANCHIRICO UNALLOCATED	
NFS/Fidelity	[redacted]0108	MCGINN SMITH & CO INC SYNDICATE ACCOUNT	
JPMorganChase	[redacted]4304	McGinn Smith & Co Municipal Bond Account Attn: David Rees	
JPMorganChase	[redacted]9815	McGinn Smith & Co Reserve A/C Residual Bal	
NFS/Fidelity	[redacted]0019	MCGINN SMITH & CO RISKLESS PRINCIPAL	
JPMorganChase	[redacted]4307	McGinn Smith & Co Syndicate A/C	
M&T Bank	[redacted]1081	McGinn Smith & Company	Dividend
M&T Bank	[redacted]4734	McGinn Smith & Company	
M&T Bank	[redacted]3569	McGinn Smith Advisors LLC	
M&T Bank	[redacted]6044	McGinn Smith Alarm Trading LLC	
M&T Bank	[redacted]4351	McGinn Smith Capital Holdings	MSCH Paying Agent for Vidsoft Inc.
M&T Bank	[redacted]3551	McGinn Smith Capital Holdings	Payment Agent for Vigilant Privacy Corp.
M&T Bank	[redacted]3803	McGinn Smith Capital Holdings	
JPMorganChase	[redacted]3573	McGinn Smith Capital Holdings	
NFS/Fidelity	[redacted]5734	MCGINN SMITH CAPITAL HOLDINGS	
M&T Bank	[redacted]5783	McGinn Smith Capital Holdings Corp	Hannan Reserve Account
Mercantile Bank	[redacted]1635	McGinn Smith Funding LLC	
Monterey Bank	[redacted]6838	McGinn Smith Funding LLC	
M&T Bank	[redacted]3925	McGinn Smith Holdings LLC	
NFS/Fidelity	[redacted]2944	MCGINN SMITH INCENTIVE PL CUST IRA OF TIMOTHY MCGINN	
JPMorganChase	[redacted]3246	McGinn Smith Incentive Savings Plan	
Mercantile Bank	[redacted]9022	McGinn Smith Independent Services Corp	
M&T Bank	[redacted]6975	McGinn Smith Independent Services Corp	
M&T Bank	[redacted]6051	McGinn Smith Licensing Company LLC	
Mercantile Bank	[redacted]3083	McGinn Smith Transaction Funding Corp	
M&T Bank	[redacted]6207	McGinn Smith Transaction Funding Corp	
Mercantile Bank	[redacted]3857	McGinn Smith Transaction Funding Corp	2nd Offering Account
M&T Bank	[redacted]5036	McGinn Smith Acceptance Corp	
JPMorganChase	[redacted]0294	McGinn, Tim (Union Bank of California Cust Adams Keegan Retirement Svgs Plan, FBO Tim McGinn A/C # [redacted]5003)	
NFS/Fidelity	[redacted]2745	McGinn, Timothy M.	
M&T Bank	[redacted]2675	McGinn, Timothy M.	
M&T Bank	[redacted]9504	McGinn, Timothy M.	
Mercantile Bank	[redacted]2171	MR Cranberry LLC	c/o Timothy McGinn
NFS/Fidelity	[redacted]4272	MR Cranberry LLC	
M&T Bank	[redacted]6421	MSFC Security Holdings LLC	
Mercantile Bank	[redacted]9220	NEI Capital LLC	
M&T Bank	[redacted]5833	Pacific Trust 02	Operating
M&T Bank	[redacted]9626	Pine Street Capital Management LLC	
M&T Bank	[redacted]5478	Pine Street Capital Partners	
M&T Bank	[redacted]9535	Pine Street Capital Partners LP	Operating
Mercantile Bank	[redacted]9687	Prime Vision Communication Mgmt Keys Cove LLC	c/o McGinn Smith & Co
Bank of Florida	[redacted]5976	Prime Vision Communications LLC	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	[redacted]9698	Prime Vision Communications of Cutler Cay LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9518	Prime Vision Funding of Cutler Cove LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9529	Prime Vision Funding of Key Cove LLC	c/o McGinn Smith & Co
M&T Bank	[redacted]5767	RTC Trust 02	Accum
M&T Bank	[redacted]5775	RTC Trust 02	Operating
JPMorganChase	[redacted]6792	RTC Trust II	
M&T Bank	[redacted]3635	SAI Trust 00	
Charter One Bank	[redacted]323-3	SAI Trust 00	
M&T Bank	[redacted]8966	SAI Trust 03	Jr
M&T Bank	[redacted]4620	SAI Trust 03	Sr
M&T Bank	[redacted]7729	Security Participation Trust I	
M&T Bank	[redacted]9410	Security Participation Trust II	Accum
M&T Bank	[redacted]9288	Security Participation Trust II	Operating
M&T Bank	[redacted]8123	Security Participation Trust III	Operating
M&T Bank	[redacted]3115	Security Participation Trust III	Accum
M&T Bank	[redacted]5460	Security Participation Trust IV	
Charter One Bank	[redacted]023-6	Security Participation Trust Oper	
M&T Bank	[redacted]4492	Seton Hall Associates	McGinn & Smith
NFS/Fidelity	[redacted]2208	Smith, David L.	
M&T Bank	[redacted]9965	Smith, David L.	
NFS/Fidelity	[redacted]0916	Smith, Lynn A.	
NFS/Fidelity	[redacted]0912	Smith, Lynn A.	
Bank of America		Smith, Lynn A.	
Mercantile Bank	[redacted]9507	TDM Cable Funding LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9573	TDM Cable Funding LLC / TDM Cable Trust 06	c/o McGinn Smith & Co
M&T Bank	[redacted]4765	TDM Cable Funding LLC TDM Verifier Trust 07 Operating	TDM Verifier Trust 07 Operating
M&T Bank	[redacted]4500	TDM Cable Funding LLC Trust 06 Account	Trust 06 Account
M&T Bank	[redacted]5234	TDM Luxury Cruise Trust 07	
Mercantile Bank	[redacted]2086	TDM Luxury Cruise Trust 07 DTD 7/16/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	[redacted]1437	TDM Verifier Trust 07	Escrow
Mercantile Bank	[redacted]4216	TDM Verifier Trust 07R	
M&T Bank	[redacted]5738	TDM Verifier Trust 08	
Mercantile Bank	[redacted]1030	TDM Verifier Trust 08 DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	[redacted]9132	TDM Verifier Trust 08R DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6736	TDM Verifier Trust 09	
Mercantile Bank	[redacted]4007	TDM Verifier Trust 09 DTD 12/15/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]7064	TDM Verifier Trust 11	
M&T Bank	[redacted]0409	TDM Verifier Trust 11	
M&T Bank	[redacted]7056	TDMM Benchmark Trust 09	
Mercantile Bank	[redacted]9077	TDMM Cable Funding LLC	
Mercantile Bank	[redacted]4139	TDMM Cable Jr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6728	TDMM Cable Jr Trust 09	
Mercantile Bank	[redacted]4150	TDMM Cable Sr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6710	TDMM Cable Sr Trust 09	
M&T Bank	[redacted]5462	Third Albany Income Notes	Escrow
NFS/Fidelity	[redacted]9884	Third Albany Income Notes	
M&T Bank	[redacted]9550	Third Albany Income Notes	Operating
M&T Bank	[redacted]3593	Third Albany Income Notes	Alarm Accum
JPMorganChase	[redacted]6988	Third Albany Income Notes	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]9671	[redacted] TTEE David L Smith & Lynn A Smith, Irrev Tr U/A [redacted]04	

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

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

Defendants.

LYNN A. SMITH,

Relief Defendant.

DAVID M. WOJESKI, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Intervenor.

APPEARANCES:

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending are the motions[1] of (1) plaintiff Securities and Exchange Commission ("SEC") for a preliminary injunction freezing the assets of the defendants and of relief defendant[2] Lynn A. Smith ("Lynn Smith") and granting related relief pending a final disposition of the complaint herein (Dkt. No. 4, 5), and (2) intervenor David M. Wojeski, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Trust") lifting the temporary restraining order ("TRO") freezing the Trust and awarding costs and attorney's

[1]These matters were referred to the undersigned for decision pursuant to 28 U.S.C. § 636(c). Dkt. Nos. 12, 59.

[2]A relief defendant, or nominal defendant, is not accused of wrongdoing but may be joined in an action to facilitate the recovery of relief. Janvey v. Adams, 588 F.3d 831, 834 (5th Cir. 2009) (citing SEC V. Cavanagh, 445 F.3d 105, 109 n.7 (2d Cir. 2006)).

fees (Dkt. No. 31).[3] For the reasons which follow, both motions are granted in part and denied in part.

I. Facts[4]

Defendants Timothy M. McGinn ("McGinn") and David L. Smith ("David Smith") joined to form McGinn, Smith & Co., Inc. ("MS & Co.") in 1981 with a principal place of business at 99 Pine Street, Albany, New York. Through its own employees and through related entities, MS & Co. offered financial services to clients, including investment advice and stock brokerage services as well as investments in securities which it sold. McGinn presently serves as Chairman and Smith as President of MS & Co. Compl. (Dkt. No. 1) at ¶ 16, 17. Lynn Smith is married to David Smith. The Trust was created in 2004 for the benefit of the Smiths' two adult children. The SEC was created, inter alia, to regulate the purchases and sales of securities and acts to enforce compliance with laws and regulations governing such transactions. See 15 U.S.C. § 78a et seq.

A. McGinn, David Smith, and the MS & Co. Entities

The SEC's complaint alleges that from September 2003 to October 2005, MS & Co. and its related entities raised over $120 million from over 900 investors solicited primarily by McGinn and David Smith. Compl. ¶ 1; Mehraban Decl. I (Dkt. No. 4-3) at ¶¶ 2, 3 The

[3]The Trust was previously granted leave to intervene for this and related purposes. Dkt. No. 39.

[4]The facts found herein are based on the sworn statements submitted by the parties, the exhibits attached thereto, the testimony of the witnesses at the hearing on June 9-11, 2010, and the exhibits received at that hearing.

investments were made in four funds[5] which made over twenty unregistered debt offerings.[6] David Smith managed the funds and their investments while McGinn acted on behalf of MS & Co. and its related entities. Compl. ¶¶ 16, 17. Smith prepared and approved the Private Placement Memorandum (PPM) for each fund, which were essentially identical for all and which were given to investors. Mehraban Decl. I at ¶¶ 3-5. The SEC alleges that in a variety of ways, the defendants misrepresented to investors the true nature of the Four Funds, how the funds would be invested, the diligence with which the defendants had investigated the recipients of the funds' investments, the accreditation of investors, and had failed to register the Four Funds as securities as the law required. Id. at ¶¶ 6-13.

The SEC also alleges that the defendants raised additional capital through trust offerings. Beginning in November 2006, the defendants obtained from investors over $23 million for investment in over eighteen trusts. Mehraban Decl. I at ¶ 14. Potential investors were advised by defendants that the funds were created for specific purposes, such as the purchase of contracts for security alarm services, broadband cable services, telephone services, and luxury cruises. Id. at ¶ 15. Investors were to receive annual returns of 7.75-

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[5]First Advisory Income Notes, LLC; First Excelsior Income Notes, LLC; First Independent Income Notes, LLC; and Third Albany Income Notes, LLC (collectively the "Four Funds").

[6]The debt offerings were described as

> various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio (individually an "Investment" and collectively, the "Investments").

PPMs of Four Funds (Dkt. Nos. 4-6 through 9) at 1.

13% on their investments with the investment principle to be returned at the maturity date 18-60 months from the date of the offering. Id. at ¶ 17. From these trust funds, defendants charged fees under various rubrics totaling over 30% of the total invested in the funds, much of which was not disclosed to investors. Id. at ¶¶ 20-47. Given the high fees, both disclosed and undisclosed, charged to the funds by the defendants, the high rates of return promised investors were not reasonably possible.

In 2008, the defendants began advising investors that interest payments could not be made as promised, promised interest rates would be reduced and maturity dates extended, and defendant would no longer charge fees to the funds. Mehraban Decl. I at ¶¶ 54-56. In 2008, MS & Co. lost over $1.8 million. Id. at ¶ 57. Clients complained to authorities about how their investments were being handled and an investigation of the defendants was undertaken by the Financial Industry Regulatory Authority (FINRA).[7] Maya Decl. (Dkt. No. 4-3) at ¶ 3. As events unfolded in 2009, defendants evidenced increasing desperation to satisfy investors' complaints,[8] meet payroll, and continue their operations. Id. at ¶¶ 58-80.

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[7]FINRA was created by statute in 2007 as the only officially registered national securities association. Nat'l Ass'n of Sec. Dealers, Inc. v. SEC, 431 F.3d 803, 804 (D.C. Cir. 2005). "By virtue of its statutory authority, [FINRA] wears two institutional hats: it serves as a professional association, promoting the interests of its] members ... and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or [SEC] regulations issued pursuant thereto." Id. (citing 15 U.S.C. § 78o-3(b)(7)). In its self-regulatory role, FINRA requires members to arbitrate disputes with clients, an arbitration may result in an award of damages to a client against a member, and FINRA may investigate the conduct of a member and impose sanctions. See Karsner v. Lothian, 532 F.3d 876, 880 (D.C. Cir. 2008).

[8]Clients began inquiring of their brokers at MS & Co. whether they had become victims of a Ponzi scheme. Mehraban Decl. I at ¶¶ 69, 73; see also United States v. Treadwell, 593 F.3d 990, 993 n.2 (9th Cir. 2010) ("The term Ponzi scheme refers to a

McGinn and David Smith also took certain steps to protect their own assets from the claims of investors, including transferring title to real estate held jointly with their wives into the names of the wives alone. T. 280-81, 301-02, 372.[9] Nevertheless, defendants continued to solicit and raise capital for the Four Funds through 2009 without advising potential investors of, for example, the reduced interest rates, extended maturity dates, and failures to pay earlier investors as represented. Id. at ¶¶ 81-85.

According to the SEC, as of the date of the commencement of this action, the defendants had raised over $120 million in investments in outstanding funds and over $80 million in principle is currently owed to investors. It appears that MS & Co. and its related entities possessed less than $1 million in assets for the benefit of investors as of that date. First Report of the Receiver (Dkt. No. 49) at 5.

B. The Present Motion

On April 20, 2010, the SEC commenced this action by filing a complaint[10] alleging

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fraudulent scheme in which, rather than paying investor returns from investment income, initial investors are paid off with new contributions from additional investors. . . . Although this may appear to be a good deal for participants at the outset, the underlying economics mean that such a scheme must eventually collapse, when the flow of new funds can no longer support payments required on the earlier funds invested. On collapse, the investors lose their remaining investments.") (citation omitted) (describing history of Ponzi schemes).

[9]"T." followed by a number refers to the page of the transcript of the hearing on June 9-11, 2010.

[10]On April 19 and 20, 2010, law enforcement authorities applied for and received eight search warrants in connection with a criminal investigation of the defendants. See In re Search Warrants Issued Apr. 19 &20, 2010, No. 10-M-204 (N.D.N.Y. FILED May 12, 2010) at Dkt. No. 38, p. 1. The search warrants were executed in succeeding days. Id. at pp. 1-2. Criminal charges have not been filed, but the investigation remains ongoing. In

that the conduct described above constitutes past and ongoing violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5 under the 1934 act, 17 C.F.R. § 240.10b-5; and related provisions. Compl. at ¶¶ 7-12. To preserve defendants' assets for the benefit of investors in the event it prevails here, the SEC simultaneously sought and received the TRO appointing a receiver to take possession of defendants' assets and of MS & Co. and its related entities, freezing defendants' assets pending the outcome of this action, freezing the assets of Lynn Smith, ordering verified accountings, and related relief. Dkt. Nos. 4, 5. A receiver was appointed and the assets of the defendants and Lynn Smith were frozen pending a hearing. TRO at 7.

Prior to the commencement of the hearing on June 9, 2010, McGinn and David Smith consented to a preliminary injunction continuing the freeze of their assets. Dkt. No. 61. Through the receiver, the remaining defendants also consented to such an order. T. 40. Without objection, the SEC's motion for a preliminary injunction as to all defendants will be granted. Issues remain, however, as to both Lynn Smith and the Trust.

C. Lynn Smith

Lynn Smith has been married to David Smith for forty-two years. Smith Aff. (Dkt. No. 23) at ¶ 2; T. 271, 357. Lynn Smith's father died shortly after her marriage leaving her, inter alia, a stock account then valued at approximately $60,000 ("Stock Account") and a camp

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re Search Warrants, No. 10-M-204, at Dkt.No. 37.

on Great Sacandaga Lake.[11] Lynn Smith Aff. ¶¶ 13, 14; T. 326, 355-58. These inheritances have always been maintained solely in Lynn Smith's name. Lynn Smith Aff. ¶ 17; T. 355-59. In addition, in 2009, David Smith and Lynn Smith transferred title to a vacation property in Vero Beach, Florida ("Vero Beach home") into the name of Lynn Smith alone. T. 280-81, 372.[12] In 2009, Lynn Smith also opened a checking account solely in her name after the Smiths had maintained only a single joint checking account for the previous forty years. T. 281-83, 374, 403-04. Thereafter, funds from the joint checking account were transferred into her account along with other funds and it was used to pay the Smiths' joint obligations. T. 282-83; 374-75.

The Stock Account was managed for the first few years by the firm retained by Lynn Smith's father. Lynn Smith Aff. at ¶¶ 14, 15; T. 358-59. However, David Smith became a licensed broker in the mid-1970s and assumed management of the account. T. 360. Over the years, the Smiths used proceeds from the account, inter alia, to purchase their jointly owned primary residences, pay the costs of college educations for their two children, purchase two jointly owned vacation homes in Vermont and later in Florida, and create a Trust in both their names. T. 279-81; 328-29; 350-51; 368-72; see also subsection I(D) infra. Notwithstanding these expenditures, however, the value of the Stock Account grew

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[11]Great Sacandaga Lake is located northwest of Albany and north of Amsterdam in the southern part of the Adirondack Mountains.. In their August 2008 financial statement, the Smiths estimated the value of this property at $700,000 with no mortgage. Pl. Ex. 18 at 1. In her testimony here, Lynn Smith estimated its value at $600,000. Lynn Smith Aff. at ¶¶ 13, 14. No evidence has been presented that David Smith ever held an ownership interest in this camp.

[12]In the August 2008 financial statement, the Smiths valued the property at $2.4 million and stated that the amount of the outstanding mortgage was $902,786. Pl. Ex. 18 at 1.

from a low of $10,000 in the 1970s to a high of over $7 million in 2001. T. 326-27; 349; 363-64. As of January 2010, the account's value was approximately $2.1 million. T. 364; see also T. 349-50 (explaining that approximately $2 million remained in the account subsequent to the creation of the Trust).

Although title to the Stock Account always has remained in the name of Lynn Smith alone, David Smith enjoyed unfettered control over the account.[13] For at least the last ten years, David Smith engaged in Stock Account transactions using authorizations signed in blank by Lynn Smith,[14] or with her signature signed by David Smith, and completed by

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[13]Lynn Smith asserts that she always maintained sole control over the Stock Account and that David Smith acted only as her broker on the account. T. 176-77, 363. She testified that she signed blank account authorizations, and approved David Smith signing her name to others, for her own convenience. T. 384-86. She also testified that she knew of and approved all Stock Account transactions and that, while she approved every transaction proposed by David Smith until 2009, she rejected David Smith's request to loan over $300,000 to MS & Co. to help meet the company's obligations. T. 335-39, 386-87. However, Lynn Smith also testified that when she and David Smith transferred assets previously held jointly or solely in David Smith's name into Lynn Smith's name alone, and when she opened a checking account in her name alone for the first time in her marriage, she took these actions to clarify her financial independence from her husband and not to shield their assets from recovery by investors in light of the FINRA proceedings. T. 375-76, 405. Given that the Smiths had maintained a joint checking account for the previous forty years of their marriage, the fact that real property purchased during their marriage had always been maintained jointly in both their names, the timing of these transfers of title to Lynn Smith as the threat of investors recovering from David Smith mounted, the unfailingly self-serving content of Lynn Smith's testimony, the improbability of that testimony in material respects, the absence of credible corroborating evidence, inconsistencies in her testimony, and the Court's observations of Lynn Smith as she testified, the Court finds incredible her testimony regarding the reasons for these transactions as well as verbal communications with David Smith. Her testimony on those subjects is rejected.

[14]Lynn Smith would sign 10-15 forms in blank at a time and provide them to David Smith for his use in completing transactions on the Stock Account. T. 175-84, 341-43, 384-86. David Smith then gave these blank but signed authorizations to a subordinate to be maintained in the subordinate's desk for use as directed by David Smith. T. 175-84, 384-86, 413-14.

David Smith or a subordinate at MS & Co. T. 175-84; 339-41.[15] Besides investments, David Smith used the Stock Account to make numerous short-term loans to MS & Co. related entities, all of which were repaid from MS & Co. related accounts. See, e.g., T. 341 (bridge loan to TDM Benchmark for $100,000 on March 18, 2010), 433-34 (bridge loan to McGinn Smith Funding for $375,000 on November 29, 2007), 437 (bridge loan to TDMM Cable Funding for $366,000 on June 5, 2009); see also Pl. Ex. 72, Ex. 2 (summary of deposits and withdrawals from Stock Account). David Smith also made two loans to McGinn totaling over $900,000 of which over $700,000 remains unpaid. T. 124-25, 278-79. In 2009, David Smith also caused assets held solely in his name totaling approximately $364,000 to be transferred to the Stock Account with no apparent reason other than to shield those assets from investors. T.290-92, 296-301.

As to the Vero Beach home, the Smiths had purchased a vacation home in Vermont with funds from the Stock Account to be used for skiing vacations when their children, both competitive skiers, were younger. T. 369, 371-72. When the children entered college approximately nine years ago, the Smiths sold the Vermont home and purchased the Vero Beach home again using funds from the Stock Account. T. 371-72. The property was used and enjoyed jointly by the Smiths. T. 372. Title to the Vero Beach home was held jointly in the names of David Smith and Lynn Smith until 2009 when the Smiths caused the title to be transferred into Lynn Smith's name alone. T. 372.

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[15]Over $1.7 million in such loans were made by David Smith to both MS & Co. companies and MS & Co. employees. T. 341, 433-39. They ranged in amounts from $100,000 to $900,000. T. 124-25, 278-79, 341, 433-39. While most loans were repaid within days or weeks with interest, it does not appear that each were memorialized in a writing signed by the loan recipient. T. 433-39.

D. The Trust

In the early 1990s, David Smith caused the Stock Account to purchase 40,000 shares of stock at the initial offering of an Albany-area bank for $400,000. T. 349, 365, 390, 508-09. By August 2004, through bank mergers and acquisitions, the number of shares had increased to approximately 100,000 and their value to over $4 million. T. 313, 365-66, 450-52, 486-87, 508-09, 526. With that stock, David and Lynn Smith created the Trust for the benefit of their two children, now ages thirty and twenty-seven. T. 311-12, 388, 391-92, 450-52, 486-87, 505-06, 526. Thomas Urbelus was selected by the Smiths as Trustee of the Trust and remained in that position until his resignation on April 22, 2010. Urbelus Dep. Tr. (Dkt. No. 66-1) at 10-11, 49-51; T. 312-13, 320, 323, 388-89. Urbelus had remained friends with the Smiths since childhood and the families spent significant time together each year. Urbelus Dep. Tr. at 7-10; T. 313, 389, 507, 566. Urbelus was employed as a lawyer in Boston specializing in real estate. Urbelus Dep. Tr. at 5-6; T. 313.

Throughout Urbelus' tenure as Trustee, David Smith functioned as the Trust's investment advisor and broker. Urbelus Dep. Tr. at 12-14; T. 315-18. When David Smith determined that the Trust should buy or sell an asset, he would prepare the appropriate authorizations, forward them to Urbelus for his signature, receive them back, and complete the transaction. Urbelus Dep. Tr. at 21-22. . At Urbelus' request, David Smith also caused the tax returns for the Trust to be prepared by the Smiths' accountant. Urbelus Dep. Tr. at 11-14; T. 393-94, 448. In most years, David Smith would then issue a personal check to pay the taxes owed by the Trust and Urbelus would cause the Trust to issue checks to Smith in reimbursement. T. 135, 137, 145-48, 394-96, 449, 456-60. In several years, however, David Smith was not reimbursed for paying the Trust's taxes in amounts totaling

approximately $100,000. T. 464-66.

From the creation of the Trust until approximately April 14, 2010, the only distributions from the Trust were those to David Smith to reimburse him for paying the Trust's taxes. Urbelus Dep. Tr. at 18, 30-31; T. 135, 137, 145-48, 449, 456-60, 492-98, 553. The only other distribution from the Trust occurred on April 14 or 15, 2010 after David Smith advised his son Jeffrey Smith, that David and Lynn Smith lacked sufficient cash on hand to pay their personal taxes. T. 347, 463, 515-16, 535-36, 540. Jeffrey Smith, the Smiths' son and a beneficiary of the Trust, then directed Urbelus to transfer approximately $95,000 from the Trust to Lynn Smith's checking account, approximately $60,000 of which was used to pay David and Lynn Smith's taxes. Urbelus Dep. Tr. at 16-17; T. 101, 320-21, 397, 416, 463, 513-16; Pl. Ex. 72, Ex. 1. Following Urbelus' resignation as Trustee, David and Lynn Smith selected David Wojeski, an Albany-area Certified Public Accountant, as the new Trustee. T. 548-49.

II. Discussion

A. Legal Standard

1. Preliminary Injunction

Pursuant to § 20(b) of the Securities Act[16] and § 21(d) of the Exchange Act,[17] the

[16] This Section provides that:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper

Securities and Exchange Commission ("SEC") is entitled to seek injunctive relief in the face of alleged statutory violations. 15 U.S.C. §§ 77t(b), 78u(d). "The crafting of a remedy for violations of the [securities acts] lies within the district court's broad equitable discretion." SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997); see also SEC v. Unifund Sal, 910 F.2d 1028, 1035 (2d Cir. 1990) ("When Congress grants district courts jurisdiction to enjoin those violating or about to violate federal statutes, it is authorizing the exercise of equity practice with a background of several hundred years of history.") (internal quotation marks and citations omitted); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (explaining the equitable powers granted to the district court and holding that when there is "a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy.").

In the Second Circuit, injunctions sought by the SEC do not require a "show[ing of] a risk of irreparable harm or the unavailability of remedies at law. Unifund, 910 F.2d at 1036

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showing, a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 77t(b).

[17] This Section provides that:

Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, [or the rules of exchanges and other registered entities] . . ., it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u(d).

(citations omitted). Thus, "[a] preliminary injunction enjoining violations of the securities law is appropriate if the SEC makes a substantial showing of likelihood of success as to both a current violation and the risk of repetition." SEC v. Cavanagh, 155 F.3d 129, 132 (2d Cir.1998) (citing Unifund, 910 F.2d at 1039-40). However, a less burdensome standard is involved with freezing assets, requiring the SEC to "establish only that it is likely to succeed on the merits, or that an inference can be drawn that the party has violated the federal securities laws." SEC v. Byers, No. 08-CV-7104, 2009 WL 33434, at *3 (S.D.N.Y. Jan. 7, 2009) aff'd — F.3d —, 2010 WL 2366539 (2d Cir. June 15, 2010) (citing Cavanagh, 155 F.3d at 136 ("The standard of review for an injunction freezing assets of a relief defendant is whether the SEC has shown that it is likely to succeed on the merits."), Unifund, 910 F.2d at 1041 (finding an asset freeze appropriate because "[t]here is a basis to infer that the appellants traded on inside information . . . . ")); see also SEC v. Heden, 51 F. Supp. 2d 296, 298 (S.D.N.Y. 1999) ("Unlike a preliminary injunction enjoining a violation of the securities laws, which requires the SEC to make a substantial showing of likelihood of success as to both a current violation and the risk of repetition, an asset freeze requires a lesser showing.") (citations omitted).

Such asset freezes may "apply to non-parties, such as relief defendants allegedly holding the funds of defendants." Heden, 51 F. Supp. 2d at 299 (citations omitted). In these cases, a showing of future statutory violations is not necessary "because [the SEC] is not accusing the [relief] defendant of any wrongdoing." Cavanagh, 155 F.3d at 136 (citing Unifund, 910 F.2d at 1041 ("[T]he freeze order does not place appellants at risk of contempt in all future securities transactions. It simply assures that any funds that may become due can be collected.")); see also Byers, 2009 WL 33434, at *3 (explaining that relief defendants

"have not been accused of wrongdoing, but are merely in possession of assets or property that the SEC claims is ill-gotten and seeks to recover.") (citations omitted).

2. Relief Defendants

"Federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." Cavanagh, 155 F.3d at 136. "The burden rests with the Commission to show that the funds in the possession of [the relief defendant] are ill-gotten." FTC v. Bronson Partners, LLC, 674 F. Supp. 2d 373, 392 (D. Conn. 2009) (citations omitted).

"The ill-gotten gains must be linked to the unlawful practices of the liable defendants." Bronson Partners, LLC, 674 F. Supp. 2d at 392. Where "it would be difficult, if not impossible, to trace specific . . . [fraudulently obtained funds], a freeze order need not be limited . . . to funds that can be directly traced to defendant's illegal activity [because] . . . the defendant should not benefit from the fact that he commingled his illegal profits with other assets." Byers, 2009 WL 33434, at *3 (citations omitted); see also SEC v. Aragon Capital Mgmt., LLC, 672 F. Supp. 2d 421, 443 (S.D.N.Y. 2009) (holding that tracing proceeds of illegal funds is unnecessary and, "where tainted funds have been commingled with potentially legitimate funds, the SEC is entitled to obtain disgorgement from the entire pool of funds.").

If disgorgement of "fraudulently obtained profits" becomes necessary, the court is granted the ability "to determine how and to whom the money will be distributed," keeping in mind that "[t]he primary purpose of disgorgement . . . is to deter violations of the securities

laws by depriving violators of their ill-gotten gains." SEC v. Fishbach, 133 F.3d 170, 175 (2d Cir. 1997) (citations omitted). "Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal. Thus the measure of losses need not be tied to the losses suffered by defrauded investors . . . ." Id. at 175-76. Rather, the measure of damages revolves around the defendants' "unjust enrichment . . . [with the] court . . . focus[ed] on the extent to which a defendant has profited from his fraud." SEC v. Universal Exp., Inc., 646 F. Supp. 2d 552, 563 (S.D.N.Y. 2009) (citations omitted) (hereinafter "Universal Exp. II").

The second factor is met when "the SEC is likely to be able to show that [the relief defendant] gave no consideration for the [ill-gotten gains received] . . . . " Cavanagh, 155 F.3d at 137; see also FTC v. Bronson Partners, LLC, 674 F. Supp. 2d 373, 392 (D. Conn. 2009) ("A relief defendant can show a legitimate claim to the funds received by showing that some services were performed in consideration for the monies."); Aragon Capital Mgmt., 672 F. Supp. 2d at 444 (classifying relief defendants as "gratuitous transferees who had no legal claim against the pooled funds . . . ."). For legitimate interests to be established, more than conclusory evidence need be proffered. CRTC v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 192 (4th Cir. 2002) ("[A] claimed ownership interest must not only be recognized in law; it must also be valid in fact. Otherwise, individuals and institutions holding funds on behalf of wrongdoers would be able to avoid disgorgement . . . simply by stating a claim of ownership, however specious."); SEC v. Better Life Club of Am., Inc., 995 F. Supp. 167, 182-83 (D.D.C. 1998) (examining assets of relief defendant and concluding that supposed payment for an informal loan given without documentation was subject to disgorgement because "investors received no value on this loan, and it is highly suspect that [the relief

defendant] gave any value to [the defendant]," but mortgage payments for which the relief defendant held cancelled checks and a recorded credit for the down payment of a car likely represented untainted funds which were subject to return to the relief defendant).

Other courts have held that establishment of a debtor-creditor relationship provides sufficient evidence of a legitimate ownership interest. See Janvey v. Adams, 588 F.3d 831, 835 (5th Cir. 2009) (concluding that receipt of "proceeds pursuant to written certificate of deposit agreements . . . well before the underlying SEC enforcement action . . . ." constituted a debtor-creditor relationship which provided a legitimate ownership interest in relief defendants"); SEC v. Founding Partners Capital Mgmt., 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (finding a legitimate ownership interest where relief defendant "received the loan proceeds pursuant to written loan agreements . . . which g[ave the relief defendant] certain rights and obligations . . . .").

Regardless of the relationship between the relief defendant and the defendant, "it is not appropriate to continue [an] asset freeze with respect to the amount . . . ." initially deposited in the relief defendant's account or that which was used to purchase a legitimate investment which was used in a fraudulent manner. Heden, 51 F. Supp. 2d at 302. "There is no authority for the proposition that the Cavanagh test applies to any assets of a relief defendant other than the profits from an illegal trade." Id. at 302 n.4; see also Cavanagh, 155 F.3d at 137 ("[T]he frozen assets are limited to the proceeds of the stock at issue, and the preliminary injunction has no effect on any assets of [relief defendant's] that are not the product of the alleged securities law violations.").

3. Joint Ownership

Where a defendant and relief defendant jointly own an asset, the central inquiry concerns "the element of control [implicating] . . . the concept of equitable ownership." In re Vebeliunas, 332 F.3d 85, 92 (2d Cir. 2003) (citations omitted).[18] Such ownership is established when "an individual . . . exercises considerable authority over the [asset] . . . acting as though its assets are his alone to manage and distribute . . . ." Id. (internal quotation marks and citations omitted); see also Whiting v. Dow Chemical Co., 523 F.2d 680 (2d Cir. 1975) ("In a traditional sense, in the absence of a statutory definition, a beneficial owner would be a person who does not have the legal title to the securities but who is, nevertheless, the beneficiary of a trust or joint venture . . . .").

In Heden, the court considered whether a continued freeze on relief defendants' accounts was appropriate where relatives of the relief defendants used their accounts to broker transactions which allegedly violated the Securities and Exchange Act. SEC v. Heden, 51 F. Supp. 2d 296 (S.D.N.Y. 1999). The court discussed the actions of two different defendants and relief defendant accounts. The first defendant claimed ownership over, and had a power of attorney for, the relief defendant's account for at least seven years, repeatedly used the relief defendant's principal in the account to facilitate stock purchases, made transactions between his personal accounts and that of the relief defendant, and made such transactions in the face of specific prohibitions from defendant's

[18] This case also discusses piercing a trust pursuant to the alter ego theory under New York law. Vebeliunas, 332 F.3d at 91. The court held that, in those cases where New York courts allowed a trust to be pierced, there was a showing "that the respective parties used trusts to conceal assets or engaged in fraudulent conveyances to shield funds from adverse judgments." Id.

employer. Id. at 300. The second defendant had full control over the relief defendant's account, though it had only been in existence for a month, but the second defendant had no interest in the account, had not benefitted from the account, and had not used the account as his own. Id. at 301. The court held that:

> If an asset belonging to a relief defendant is, in reality, also an asset of a defendant, then the freeze sought is against the defendant's assets. . . Accordingly, it is inappropriate to apply the two-part Cavanagh test to determine whether a 'relief defendant's' principal should remain frozen. Rather, [the court] need only determine whether the SEC has met its burden of showing that it is likely to succeed on the merits.

Heden, 51 F. Supp. 2d at 299-300. In determining joint ownership, the Heden court considered a defendant's control over the asset, the length of time the asset had been held, whether the defendant had an interest in and benefitted from the asset, whether the defendant had transferred assets from his name into the asset, whether he or she contributed to acquire the asset initially, and whether the defendant ever withdrew any funds from the asset. Id. at 301. Where a defendant treated an asset as his own, the asset should be treated as that of the defendant and the Cavanagh test becomes irrelevant. Id. at 300.

However, the Second Circuit also examined a similar issue with respect to piercing the veil of a trust in which the trustee's husband had been fraudulently using the trust as his own. Vebeliunas, 332 F.3d 85. In that case, the wife created an irrevokable trust, to which she was the sole trustee, and to which her husband was a 20% beneficiary of the distributions from the trust. Id. at 88. The husband nevertheless fraudulently represented to various creditors that he was the full beneficiary and had present access and ownership over the trust's corpus. Id. at 88-89. Criminal and bankruptcy proceedings ensued. Id. at

89. The Second Circuit refused to pierce the trust on behalf of the husband's creditors because even though the husband "exercised control over the trust and its property . . . and paid virtually all of the expenses associated with the . . . trust . . . , spouses routinely administer each other's assets and conduct business on behalf of each other"[19] and such actions did not confer equitable ownership of the trust's corpus upon the husband. Vebelinunas, 332 F.3d at 93. "The mere fact that [the husband] acted as an agent for his wife does not divest her of her equitable ownership . . . ." Verbelinunas, 332 F.3d at 93.

4. Adverse Inferences

On February 1-3 and 12, 2010, David Smith testified under oath in the FINRA proceeding and the transcript of that testimony was offered in evidence here by the SEC. Pl. Exs. 20-23. The SEC sought the testimony of McGinn and David Smith for the hearing on this motion.[20] Both declined to testify on the ground of their Fifth Amendment privilege against self-incrimination, and, in lieu of an appearance at the hearing, both signed declarations stating that they asserted their Fifth Amendment privilege as to all matters

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[19] The Second Circuit also outlined a litany of factors which, it concluded, did not establish equitable ownership by the husband. Vebeliunas, 332 F.3d at 92. The court stated that "none of the [trust] benefits flowed solely to [the husband]. Rather, all of the benefits . . . flowed jointly to him and his wife, which is consistent with [the wife's] equitable ownership of the property." Id. Moreover, the husband's receipt and use of the trust corpus, primarily property and rent proceeds, "did not evidence control over the property, as spouses routinely share certain financial assets, such as streams of income . . . [and] a homeowner would be expected to allow her spouse . . . to live rent-free in her home." Id. Lastly, as New York is not a community property state, actions such as filing joint tax returns regarding the property in question did not indicate that equitable ownership was granted to the husband. Id.

[20] The Trust also sought to call David Smith as its witness. See Trust Mem. of Law (Dkt. No. 80) at 1.

alleged in the complaint and in the pending motion for a preliminary injunction. Pl. Exs. 128, 129. The SEC contends that on this motion, it is entitled to adverse inferences against the defendants as well as against Lynn Smith and the Trust from the invocation of privilege by McGinn and David Smith. SEC Mem. of Law (Dkt. No, 74). Lynn Smith and the Trust oppose the contention. Dkt. Nos. 79, 80.

A party testifying in a civil proceeding retains the right under the Fifth Amendment to refuse to answer questions if the answers might tend to incriminate him or her, but an adverse party may then be entitled to have the trier of fact "'draw a negative inference from the invocation of that right.'" Wechsler v. Hunt Health Sys., Ltd., No. 94-CV- 8294(PKL), 2003 WL 21998980, at *2 (S.D.N.Y. Aug. 22, 2003) (quoting Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976)); see also Brink's, Inc. v. City of New York, 717 F.2d 700, 710 (2d Cir. 1983). Any inference drawn from the invocation of the privilege must be reasonable under the circumstances. See Brink's, Inc., 717 F.2d at 710. Thus, on these motions, the invocation of the Fifth Amendment privilege by David Smith and McGinn will permit whatever negative inferences are reasonable under the circumstances in favor of the SEC at least as to the defendants. Willingham v. County of Albany, 593 F. Supp. 2d 446, 452 (N.D.N.Y. 2006).

The circumstances presented here, however, include two significant obstacles to the SEC's contention. First, David Smith testified for four days at the FINRA proceedings only two months before the complaint herein was filed. The transcript of David Smith's testimony from that proceeding comprises 1,091 pages. Pl. Exs. 20-23. The FINRA investigation and the allegations in this case substantially overlap and the questions answered by David Smith during his FINRA testimony address matters about which the SEC sought David

Smith's testimony at the hearing in this case. Compare Pl. Ex. 20-23 with Pl. Ex. 128 at ¶ 6(A)-(II).. The purpose underlying the allowance of an adverse inference in civil cases is equitable, not punitive, and serves to vitiate the prejudice to the party denied evidence by invocation of the privilege. See United States v. 4003-05 5th Ave., 55 F.3d 78, 82-83 (2d Cir. 1995). In those instances where David Smith answered a question during the FINRA hearing, the SEC has not been denied David Smith's testimony as to an answered question and no basis exists for an adverse inference there. Thus, the SEC is entitled to adverse inferences only to the extent that the questions to which David Smith asserted the privilege were not otherwise answered during his testimony in the FINRA investigation.

To that limited extent, then, the SEC is entitled to adverse inferences against McGinn and David Smith. They have consented to the relief sought in this motion, however, and the question of what inferences may be drawn against them is largely moot. The second impediment relates to the SEC's contention that adverse inferences should be drawn against Lynn Smith and the Trust and is not moot. In LiButti v. United States, 107 F.3d 110 (2d Cir. 1997), the Second Circuit held that where one party declines to answer questions in a civil case on the basis of the Fifth Amendment privilege against self-incrimination, adverse inferences may be drawn against another associated with the witness depending on the circumstances of the particular case. Id. at 120-21. The court identified "a number of non-exclusive factors" to guide this determination, including the nature of the relevant relationships, the degree of control over the non-testifying witness, the compatibility of the interests between the non-testifying witness and the party, and the role of the non-testifying witness in the litigation. Id. at 123-24. However, "[w]hether these or other circumstances unique to a particular case are considered by the trial court, the overarching concern is

fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." Id. at 124.

Although LiButti concerned inferences to be drawn from a non-party's invocation of the privilege, its analysis is equally applicable here where the SEC seeks to apply adverse inferences from a party's invocation of the privilege against two purported relief defendants with interests in the outcome of this motion but who are non-parties. See Willingham, 593 F. supp. 2d at 453 (applying adverse inferences to one party but not others under LiButti); John Paul Mitchell Sys. v. Quality King Distrib., Inc., 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000) (relying on LiButti to support determination to apply adverse inferences against defendants' company on motion for a preliminary injunction).

As to the first LiButti factor, David Smith has been married to Lynn Smith for forty-two years. They closely share marital, familial, financial, and social ties. For purposes of this analysis, this relationship could not be closer. As to the Trust, David Smith was a co-grantor of the Trust, has always advised on and managed its investments, helped select a childhood friend as its first trustee, assumed responsibility for the Trust's tax returns and payments, and paid those taxes without reimbursement on occasion. Therefore, the relationship between David Smith and the Trust was also very close. While David Smith exercised control over Lynn Smith's finances and influence over those of the Trust, it cannot be said that either Lynn Smith or the Trust exercised any degree of control over David Smith.[21] The interests of David Smith and of Lynn Smith and the Trust are, and have

[21]The Stock Account was always held solely in Lynn Smith's name and, therefore, it was within her power to control David Smith's management of the account. There is no credible evidence that Lynn Smith ever did so, however, perhaps due to the account's impressive growth under David Smith's management. In these circumstances, Lynn

always been, identical. Finally, David Smith plays a central role both in this litigation and, more importantly here, in the financial affairs of Lynn Smith and the Trust as a whole.

Balancing these factors, it is clear that neither Lynn Smith nor the Trust controlled David Smith for purposes of this analysis. Nevertheless, given the nature of the relationships, the complete identity of interests, and David Smith's role both in this litigation and as to Lynn Smith and the Trust, the absence of significant control over David Smith is far outweighed by the other factors. Accordingly, any adverse inferences which can be drawn from David Smith's invocation of his privilege should be applied against Lynn Smith and the Trust.

The question then becomes what adverse inferences should be drawn and what evidentiary weight should they carry. The SEC contends that the following three inferences should be drawn:

> First, adverse inferences should be drawn against Smith and McGinn concerning the evidence regarding likelihood of success on the merits.
> Second, adverse inferences should be drawn against David Smith concerning the evidence regarding the David and Lynn Smith Irrevocable Trust, the Stock Account, the Checking Account, and the Vero Beach house; and against Timothy McGinn as to the Niskayuna house.
> Third, adverse inferences should be drawn against Lynn Smith, based on David Smith's assertion of the Fifth Amendment, with regard to all issues concerning the Trust, the Stock Account, the Checking Account, and the Vero Beach house

Pl. Mem. of Law (Dkt. No. 74) at 1. These contentions, however, appear to confuse evidentiary inferences with issue preclusion. An inference permits a finder of fact to conclude that evidence of a particular fact exists which is unfavorable to the party against

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Smith's failure to exercise any control for decades over David Smith's management of the Stock Account manifests the absence of control.

whom the inference is drawn. See Henning v. Union Pacific R. Co., 530 F.3d 1206, 1219-20 (10th Cir. 2008); An adverse inference is permissive, not mandatory, and an adverse inference alone is insufficient to establish entitlement to relief. See JHP & Associates, LLC v. N.L.R.B., 360 F.3d 904, 910 (8th Cir. 2004) (holding that adverse inference rule is permissive); 3M v. Pribyl, 259 F.3d 587, 606 n. 5 (7th Cir. 2001) (explaining that the adverse inference which the jury could permissibly have drawn did not relieve the plaintiff of the burden of proving the elements of its claims); SEC v. Colello, 139 F.3d 674, 677-78 (9th Cir. 1998) (holding that adverse inference alone insufficient to support a motion for summary judgment); Flinzler v. Marriott Intern., 81 F.3d 1148, 1158-59 (1st Cir. 1996) (holding that adverse inferences are permissive, not mandatory); Daniels v. Pipefitters' Ass'n Local Union No. 597, 983 F.2d 800, 802 (7th Cir. 1993) (finding that the adverse inference to be drawn from the invocation of the Fifth Amendment is permissive rather than mandatory).

Although immaterial in light of the consent of David Smith and McGinn to the preliminary injunction, an adverse inference is appropriate against them as to the likelihood of success on the merits on this motion. Lynn Smith has nominally opposed that element of the SEC's motion. However, it pertains solely to the named defendants and requires the SEC to demonstrate that it is more likely than not that it will prevail on the merits of this action as to the defendants. Lynn Smith is named only as a relief defendant and is involved, therefore, only in questions of relief if the SEC prevails on its claims. The Trust does not oppose the SEC's motion as to that element. An adverse inference against David Smith and McGinn on this element is also supported by equitable considerations where such inferences are drawn against parties declining to provide evidence rather than against third parties. For the same reason as well as the existence and strength of evidence

corroborating those inferences also appear reliable.

A different conclusion is compelled as to Lynn Smith and the Trust, however. While adverse inferences against them are permissible under LiButti as discussed supra, other factors lead to the conclusion that they should not be drawn. First, as to Lynn Smith, David Smith's testimony at the FINRA proceeding included answers to certain questions relevant here. For example, David Smith testified that he and his wife had maintained separate finances for twenty years although they always filed joint tax returns. Pl. Ex. 20 at 278-79. David Smith declined to answer other questions about his wife's finances. Id. at 279-92. Serious questions exist about the credibility of David Smith's limited testimony as they do for Lynn Smith's testimony. See note 12 supra. However, as to those questions which are relevant here and which David Smith answered in the FINRA proceeding, the SEC has obtained sworn answers rendering unwarranted adverse inferences as to those matters.

Moreover, not only the SEC but also Lynn Smith and the Trust were deprived of the testimony of David Smith. As noted, the Trust had served a subpoena on David Smith to testify at the hearing on this motion. Trust Mem. at 1. David Smith's invocation of his Fifth Amendment privilege thus denied his testimony to the parties against whom the SEC seeks the adverse inferences, just as the SEC was denied. Therefore, in these circumstances, imposing adverse inferences against Lynn Smith and the Trust would be inequitable and the reliability of any such inferences is substantially undermined.

Finally, on the record of this case, the importance of the adverse inferences is insignificant. The exhibits include voluminous records of the transactions of the defendants, Lynn Smith, and the Trust. The record also includes the testimony of numerous witnesses, live and by deposition and affidavit, during three days of testimony. In these circumstances,

that evidence, particularly the documentary evidence, far outweighs the probative value of any inferences to be drawn from David Smith's invocation of privilege. Therefore, whether adverse inferences are, or are not drawn, as to any matter at issue on this motion would not affect the outcome in any respect.

Accordingly, adverse inferences from the invocation of the Fifth Amendment privilege against self-incrimination by David Smith and McGinn will be drawn against those two defendants but not against Lynn Smith or the Trust.

B. Likelihood of Success

Section 10(b) of the Exchange Act "prohibit[s] fraud, manipulation, or insider trading . . . ." 15 U.S.C. §78j; see also Ganino v. Citizens Utilities Co., 228 F.3d 154, 161 (2d Cir. 2000) ("Section 10(b) of the Exchange Act bars conduct involving manipulation or deception . . . that [is] intended to mislead investors by artificially affecting market activity, and deception being misrepresentation, or nondisclosure intended to deceive.").[22] Also, Section 17(a) of the Securities Act functions in conjunction with Section 10(b) of the Exchange Act to "prohibit fraud in the offer, purchase, and sale of securities." SEC v. Global Telecom Servs., L.L.C., 325 F. Supp. 2d 94, 111 (D. Conn. 2004) (citations omitted). Similarly, Section 15(c) of the Exchange Act "prohibits a broker or dealer from using any manipulative or deceptive device . . . to induce or attempt to induce the purchase or sale of any security."

[22] Rule 10b-5 prohibits the same conduct in connection with the purchase or sale of securities as does § 10(b) of the Exchange Act. See Cyber Media Group, Inc. v. Island Mortgage Network, Inc., 183 F. Supp. 2d 559, 569 (E.D.N.Y. 2002) (citing IBM Corp. Sec. Litig., 163 F.3d 102, 106 (2d Cir. 1998)) (discussing the test which applies to both provisions).

SEC v. George, 426 F.3d 786, 792 (6th Cir. 2005).

To prove any, or all, of these violations, the SEC must establish that the defendant made material false statements or omissions[23], with scienter[24], in connection with the securities exchange. See Ganino, 228 F.3d at 161(holding that for a Section 10(b) violation the SEC must prove "that the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff.") (citations omitted); Global Telecom., 325 F. Supp. 2d at 111(concluding that in order to prevail on a § 17(a) violation the SEC must show that "defendant (1) ma[de] a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities.") (citations omitted); George, 426 F.3d at 792 ("The elements of a § 15(c)(1) violation are the same as those for a violation of [Section 10(b) of the Exchange Act and Rule 10b-5], with a similar scienter requirement that a statement be made with knowledge or reasonable grounds to believe that it is untrue or misleading.") (internal quotations and citations omitted) .

"Section 5 of the Securities Act prohibits issuers, underwriters and dealers from

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[23] A statement or fact "is material if there is a substantial likelihood that a reasonable [investor] would consider it important . . . ." Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (internal quotation marks and citations omitted).

[24] Scienter is defined as an "intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). In the Second Circuit, scienter can be established by reckless conduct. See e.g., Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44-48 (2d Cir. 1978). Such conduct "is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Id. at 47.

selling or offering to sell unregistered securities." SEC v. Tecumseh Holdings Corp., No. 03-CV-5490, 2009 WL 4975263, at * 2 (S.D.N.Y. Dec. 22, 2009) (citations omitted). In order to establish a violation of this section the SEC must prove "(1) [t]hat the defendant directly or indirectly sold or offered to sell securities[25]; (2) that no registration statement was in effect for the subject securities; and (3) that interstate means were used in connection with the offer or sale." SEC v. Universal Exp., Inc., 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007) (hereinafter "Universal Exp. I") (citations omitted). "Liability does not require that the defendant actually passed title of the security. Any person engaged in steps necessary to the distribution of the unregistered security is liable under Section 5." Tecumseh, 2009 WL 4975263, at *3 (citations omitted).

Sections 206(1) and 206(2) of the Advisers Act "prohibits investment advisers from employing any device, scheme, or artifice to defraud any client or prospective client . . . [or] engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." SEC v. Treadway, 430 F. Supp. 2d 293, 338 (S.D.N.Y. 2006) (citing 15 U.S.C. § 80(b)(6)(1) & (2)) (internal quotation marks omitted).

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[25] A Second Circuit test, adopted by the Supreme Court, dictates the method by which the court should "decid[e] whether a transaction involves a 'security.'" Reves v. Ernst & Young, 494 U.S. 56, 66 (1990). Securities are defined first by the motivation of the seller, stating that "[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.'" Id. Second, the court evaluates "the plan of distribution." Id. (internal question marks and citations omitted). Third, the court determines "the reasonable expectations of the investing public," naming those instruments securities to which the public attaches such a definition. Id. (citations omitted). Finally, the court is to consider "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary." Id. at 67 (citations omitted).

"Section 206(1) requires fraudulent intent, while § 206(2) requires only negligence." Id. (citations omitted). By enacting this provision, Congress "establishe[d] a statutory fiduciary duty for investment advisers to act for the benefit of their clients, requiring advisers to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." SEC v. Moran, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996) (citations omitted). Additionally, § 206(4) also prohibits investment advisors from "directly or indirectly . . . engag[ing] in any transaction, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. §80b-6(4).[26]

Finally, § 7(a) of the Investment Company Act prohibits interstate commerce, namely the offering or selling of securities, by unregistered investment companies. 15 U.S.C. § 80a-7.

1. The Defendants

From the unrebutted submissions of the SEC, the SEC has demonstrated a substantial likelihood of success on its claims against McGinn, David Smith, and the other named defendants. See, e.g., Mehraban Decl. I; Pl. Exs. 1-67. Moreover, as discussed supra, adverse inferences are drawn against McGinn, David Smith, and the other

[26] Section 206(4) is applicable to pooled investment vehicles. 17 C.F.R. § 275.206(4)-8. Pooled investment vehicles are "any investment company as defined in section 3(a) of the Investment Company Act . . . ." Id. § 275.206(4)-8(b). An investment company, pursuant to the Investment Act, is one which "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities." 15 U.S.C. § 80a-3. Liability may be found where an investment adviser makes a false statement of material fact to an investor, realized or prospective, or fails to disclose material facts necessary to make statements made to investors be truthful. 17 C.F.R. § 275.206(4)-8(a).

defendants, which were controlled by McGinn and David Smith, from the invocation of the Fifth Amendment privilege by McGinn and David Smith. Finally, all defendants have consented to the entry of the relief sought by the SEC in this motion. Accordingly, the SEC has satisfied its burden of proof on this element of its motion and the motion is granted as to all defendants.

2. Lynn Smith

The SEC has argued that Lynn Smith is an appropriate relief defendant and thus the asset freeze should continue as to assets held presently in her name alone.. Those assets include the Stock Account, the Vero Beach home, the Great Sacandaga camp, and Lynn Smith's checking account. In the alternative, the SEC also contends that David Smith is a joint owner of the Stock Account, the Vero Beach home, and the checking account so that, even if Lynn Smith is not properly named as a relief defendant, these assets are still a personal asset of his which should remain frozen. Lynn Smith argues that the SEC has failed to establish that she is appropriately named as a relief defendant as these assets do not contain or derive from ill-gotten gains and she has always maintained sole ownership and control of them.

a. Relief Defendant

In this instance, Lynn Smith has likely received ill-gotten gains throughout the multiple deposits into her stock account after 2003 when the fraudulent scheme involving the Four Funds alleged by the SEC commenced. Since 2003, Lynn Smith has been

refunded over $1 million from MS & Co. and its related individuals and entities in loan repayments. These payments include $375,000 in December 2007 (T. 434); $325,000 in June and July of 2009 (T. 98-99, 115-18, 381-82); $100,000 in March 2010 (T. 438-39); and $185,000 in October 2006 and May 2007 (T. 124-25). These payments derived from fraudulently obtained investments. As such, Lynn Smith received loan repayments from ill-gotten gains. Because all of these payments were commingled with potentially legitimate funds, separating the legitimately held funds in the Stock Account and the checking account from the fraudulently obtained funds would be nearly impossible and the SEC is entitled to freeze the entirety of the accounts. Aragon Capital Mgmt., 672 F. Supp. 2d at 443.

Moreover, Lynn Smith has failed to establish a legitimate interest in the return of the funds which she received from MS & Co. after 2003. It is undisputed that Lynn Smith provided McGinn Smith with multiple loans, the number and amounts of which increased in recent years. T. 330. Lynn Smith testified that she was a bona fide creditor and was entitled to repayment of those loans with interest. T. 378-81. However, Lynn Smith was unaware how many loans she has made, to whom the loans were made, what they were for, or what the interest rates and payment schedules were. T. 330-32, 409-11.[27] Lynn Smith made two loans to McGinn totaling $915,000 ($900,000 in 2004 and another $15,000 in 2009) and was only recently repaid $185,000, $85,000 in October 2006 and $100,000 in May 2007. T. 124-25, 278-79, 431-33; Pl. Ex. 75. Additionally, Lynn Smith made loans of $2 million $6 million for which she had no recollection of terms or conditions. T. 339, 345-46, 379. Such conduct belies any claim of a legitimate creditor-debtor relationship.

[27] See also note 13 supra.

Accordingly, these claims by Lynn Smith are rejected. Kimberlynn Creek Ranch, 276 F.3d at 192.

In support of her claims of being a bona fide creditor, Lynn Smith testified that she always made the final decision as to whether to approve any loans or transactions from the Stock Account. These decisions were memorialized in letters of authorization signed by Lynn Smith which provided consent for monetary transfers from the Stock Account to third parties. When Lynn Smith pre-signed the letters of authorization, the forms were blank as to the amount of the transfers from the Stock Account. T. 219. The forms were pre-signed, in batches of 10-15 at a time, or Lynn Smith's signature was signed by David Smith which David Smith would use at his option. T. 341-43, 384-86. No other client provided pre-signed authorization forms to MS & Co. to be utilized whenever deemed appropriate. T. 191, 218. These authorizations were maintained by one of David Smith's subordinates for use by David Smith. T. 384-86, 413-14. Such uninformed, casual, and informal transactions in the amounts at issue here corroborate the conclusion that there was no consideration and no contractual relationship which would entitle Lynn Smith to repayment as an arms length, disinterested creditor. Founding Partners Capital, 639 F. Supp. 2d at 1294; Better Life Club, 995 F. Supp. at 182-83.

Therefore, the SEC has demonstrated a substantial likelihood of success in proving that Lynn Smith is an appropriate relief defendant with respect to the Stock Account and that her Stock Account includes ill-gotten gains to which she has no legitimate claim of ownership. Accordingly, the SEC's motion as to the Stock Account on this ground is granted and the Stock Account shall remain frozen.

b. Equitable or Joint Ownership

The SEC contends that Lynn Smith's assets are also subject to its motion because they were jointly owned by David Smith. As to the Stock Account, even if Lynn Smith is not an appropriate relief defendant or the legitimate funds in her Stock Account could be separated, it is of no consequence because David Smith was the joint owner of the Stock Account. Since the Stock Account was one of his assets, "it is inappropriate to apply the two-part Cavanagh test . . . [r]ather, [the court] need only determine whether the SEC has met its burden of showing that it is likely to succeed on the merits." Heden, 51 F. Supp. 2d at 299-300. To determine whether David Smith was the joint owner of the Stock Account, various factors must be considered. They include the length of time the Stock Account was established and David Smith's access to that account, whether David Smith had an interest in and benefitted from the Stock Account, and whether David Smith freely transferred his own assets into the Stock Account or withdrew the account's assets for his purposes. Heden, 51 F. Supp. 2d at 301.

The Stock Account has been in existence for approximately forty-two years. Lynn Smith Aff. at ¶¶ 13, 14; T. 326, 355-58. David Smith had unfettered control over the account, acting as its broker, for approximately thirty-five years. T. 360. As previously discussed, David Smith directed transfers from the account at his sole option by the blank letters of authorization which Lynn Smith signed. The letters of authorization were used at the direction of David Smith to transfer money from the account into the MS & Co.-related businesses for bridge loans and for operating expenses usually in the range of $100,000 - $1 million. See. e.g., T. 339-40, 433 (bridge loan to MS Funding for $375,000); T. 341 (bridge loan to TDM Benchmark of $100,000); T. 437-38 (bridge loan to TDMM Cable

Funding for $366,000); T. 341-42. For these reasons, it is clear that David Smith had complete access to and control over the account and that such access and control were maintained for decades.

Additionally, David Smith benefitted from the Stock Account. First, the account was used to purchase jointly owned residences including their primary residences and vacation homes in Vermont and Florida and finance their children's college educations. T. 279-81, 328-29, 350-51, 368-72, 404. Furthermore, the account was used to fund MS & Co.'s operating expenses as MS & Co. increasingly experienced difficulties meeting its obligations in 2008-10. T. 329-31, 378. These loans ensured that MS & Co. would continue to operate. T. 410-11. Thus, David Smith utilized the Stock Account as a personal line of credit for his business interests to further his personal and professional endeavors.

Finally, the record establishes that David Smith treated the Stock Account as his own. As previously discussed, David Smith used the account to make bridge loans to keep his business going. Furthermore, David Smith occasionally deposited his assets into the stock account. In 2009, David Smith directed that $38,430 be deposited into the Stock Account, proceeds from assets held by David Smith in his name alone since the late 1990s. Dkt. No. 23, Lynn Smith Aff. at ¶33(a); T.298, 435, 474-75. Additionally, David Smith also had the funds of a trust, totaling $326,304 and a note receivable totaling $410,000, both in his name alone, deposited in the Stock Account. T. 290-92, 296, 436-37, 475-76; Pl. Ex. 118. Thus, David Smith also deposited his personal assets into the Stock Account.

The record establishes that David Smith acted almost identically to the defendant, Goran Heden, in the Heden case. Like Heden, Smith "viewed and treated the [stock] account and his own account[s] interchangeably." Heden, 51 F. Supp. 2d at 300. Smith

had access and control over the account for decades, he had both a personal and professional interest in the Stock Account and benefitted from its funds in both his home-life and career, and he commingled funds between the Stock Account and his business and personal accounts. As such, the SEC need not establish that Lynn Smith is a proper relief defendant but only that there is a likelihood of success against David Smith to continue the asset freeze as to the Stock Account. The SEC has made such a showing. Therefore, in the alternative, the SEC's motion for as to the stock account is granted on this ground as well.

The record as to the Vero Beach home and the checking account in Lynn Smith's name is essentially the same. The Vero Beach home was purchased with proceeds derived from the Stock Account and was held jointly by the Smiths until 2009 when it was transferred into the name of Lynn Smith alone without fair consideration. The Smiths maintained a joint checking account throughout their marriage from which they paid their various expenses. Also in 2009, Lynn Smith opened a checking account in her name for the first time and thereafter deposited funds and paid expenses into and out of the account which had previously been deposited into and paid from the joint checking account. These actions in 2009 followed the commencement of the FINRA proceedings in which David Smith faced the distinct possibility that his assets could be seized to pay judgments awarded to investors. The two assets were treated no differently by the Smiths after the 2009 transfers and were at all time used jointly by the Smiths for their mutual benefit. Thus, the SEC has demonstrated a likelihood of success in proving that these assets were jointly owned by David Smith and that the 2009 transfers into Lynn Smith's name alone were solely for the fraudulent purpose of shielding David Smith's assets from seizure. The SEC's

motion as to these assets is also granted.

As to the Great Sacandaga Lake camp, the record demonstrates without contradiction that this property was inherited by Lynn Smith from her father in 1969, remained in her name alone since that time, David Smith's only interest in the asset was periodically to vacation at the property with his family, and David Smith never controlled the asset in any way. Thus, on this record, there exists no likelihood of success that the SEC will demonstrate that David Smith was a joint, equitable, or beneficial owner of the property. Therefore, the SEC's motion as to the Great Sacandaga Lake camp is denied and the asset freeze in the TRO as to the camp is vacated.

3. The Trust

The SEC contends that the Trust is an appropriate relief defendant and, that in the alternative, even if it is not properly named as a relief defendant, David Smith was a beneficial owner of the trust over which he asserted dominion and control. The Trust contends that it cannot be pierced under the alter ego theory and that David Smith is not the equitable owner of the Trust.

a. Relief Defendant

The SEC has failed to demonstrate a likelihood that it will prove that the Trust is an appropriate relief defendant. First, the SEC has not established that the Trust was created with ill-gotten gains. It is undisputed that the Trust originated from bank stock in the Stock Account purchased in the early 1990s well prior to 2003 when the SEC alleges the scheme

began here. T. 349. In fact, none of the named entities except MS & Co. existed at that time. T. 363. Thus, there is no proof that fraudulently obtained funds were deposited into the Stock Account prior to the purchase of the bank stock in the early 1990s.

This stock was untouched for the fourteen years it remained in the Stock Account while it grew in value from $400,000 to over $4 million by market forces alone. No testimony or proof was offered that additional capital was invested into the stock or that the portfolio was otherwise modified since the 1990s. Accordingly, this stock investment represents untainted funds easily identifiable and severable from the stock account as a whole. See Heden, 51 F. Supp. 2d at 302 & n.4 (explaining that it is inappropriate to freeze assets initially used to purchase legitimate investments, regardless of the authenticity of the later transfers with the stock, but, the subsequently earned proceeds of the stock, if fraudulently obtained, may represent ill-gotten gains); Better Life Club, 995 F. Supp. 182-83 (finding mortgage payments and trade-in credit untainted and provable funds that were probably reimbursable since they were not ill-gotten). As such, the Cavanagh factors cannot be fulfilled because the Trust was neither created from nor in possession of ill-gotten funds.

Second, there is no evidence that the purchase or sale of the bank stock was fraudulent or otherwise illegal. By all accounts, the stock was purchased for value. Thus, appropriate consideration was provided for the purchase and the Smiths had a legitimate interest in the eventual growth, sale, and proceeds of the bank stock at a time predating the commencement of the scheme alleged herein. See, e,.g., Cavanagh, 155 F.3d at 137 (explaining that a legitimate interest in funds arises when relief defendants can demonstrate that they gave consideration in the exchange). Therefore, the SEC has failed to

demonstrate a likelihood of success on this ground that the Trust is an appropriate relief defendant as the SEC has failed to prove that the Trust received or was created with ill-gotten gains or that it had no legitimate claim to its corpus.

b. Equitable or Joint Ownership

The SEC has also failed to demonstrate that David Smith was an equitable owner in the Trust Account. The record is devoid of any proof that David Smith "exercise[d] considerable authority over [the trust] to the point of completely disregarding [its] form and acting as though its assets [were] his alone to manage and distribute . . . ." In re Vebeliunas, 332 F.3d at 92. David Smith acted as the broker for the Trust. See T. 556 (explaining that the current trustee believes that a prudent trustee would hire an investment advisor to preserve, protect, and grow the corpus of the trust). The original trustee, Urbelus, possessed the authority to utilize a broker to assist him in his duty to preserve the Trust corpus. As trustee, Urbelus retained the final authority for approving distributions and authorizations. T. 418. While David Smith advised him on the appropriate assets to buy and sell, Urbelus provided the final consent and signed the appropriate authorizations. T. 418. Unlike the Stock Account, there were no pre-signed forms from Urbelus that David Smith could use at any time. T. 216. Each suggested transaction was discussed, a form was sent from David Smith to Urbelus, Urbelus signed the form, and the requested action was taken soon thereafter. Therefore, David Smith did not exercise authority over the Trust but acted as an advisor and broker. Urbelus was indisputably the one who maintained control of the assets.

Furthermore, David Smith did not distribute the assets to himself and the record does

not support the conclusion that David Smith considered the Trust his own property. On occasion, David and Lynn Smith provided their children with financial support, presumably including when they paid the Trust's taxes, for the stated benefit of conserving the trust corpus and assisting their children. T. 135-37, 145-49, 187-88, 399. Such tax payments from David Smith for the Trust and, by extension, his children are insufficient to establish equitable ownership. In re Vebeliunas, 332 F.3d at 93 (refusing to pierce a trust based on equitable ownership even though the husband paid all expenses of the trust because "spouses routinely administer each other's assets and conduct business on behalf of each other.").

David Smith received money from the Trust on one occasion which was unrelated to the payment of the Trust's taxes. However, that distribution was requested and authorized by his son, Jeffrey, a beneficiary of the trust. T. 398, 513-16. Because the Trust had virtually no limits on the types of distributions the beneficiaries could request, the money was properly requested and provided. T. 534-35, 560. Once Jeffrey Smith's request was approved by the trustee, he was free to use it as he saw fit, including sharing it with his parents. T. 398, 560. He used the money to help his parents meet their tax obligations. This action is insufficient to establish control and ownership by David Smith. Moreover, this single use of the Trust for the benefit of David Smith differs materially from the pattern of such use of the Stock Account over a period of years. Furthermore, even though a benefit was temporarily conferred, this assistance was still insufficient to act as total reimbursement for all of the financial help David and Lynn provided to the Trust for the prior payments of the Trust's taxes. No other distributions were requested or provided to David Smith. Thus, the Trust's benefits did not flow to David Smith and he did not exercise control over them

such that he treated the corpus as his own.

Accordingly, there is no likelihood that the SEC will prove that David Smith was the beneficial owner of the Trust. Therefore, the SEC's motion as to the Trust is denied and the Trust's motion to vacate the asset freeze in the TRO as to the Trust is granted. While the Trust also seeks an award of attorney's fees and costs incurred in connection with this proceeding, it has offered no authority for such an award. Finding that the SEC acted to freeze the Trust in good faith and with sufficient cause, the Trust's motion for an award of attorney's fees and costs is denied.

4. McGinn Residence

In 2009, McGinn transferred title to his residence in Niskayuna, New York from a title held jointly by he and his wife, Nancy McGinn, into his wife's name alone. T. 302. The stated consideration was $1 and the transaction occurred after commencement of the FINRA proceedings, complaints from investors, and as David Smith was transferring various properties held jointly with his wife into her name alone. T. 301-02. The SEC contends that McGinn's residence remains subject to the TRO asset freeze and is included within McGinn's consent to the preliminary injunction at issue here. Pl. Mem. of Law (Dkt. No. 47) at 16-17. McGinn contends that because title to the residence is now held solely by Nancy McGinn and because she has not been named as a defendant or relief defendant, the residence was not included in the TRO asset freeze nor in the preliminary injunction to which he consented. Dkt. No. 71.

There exists no dispute that the residence is now held solely in Nancy McGinn's name. Therefore, while the SEC would appear to have demonstrated sufficient cause to

include the residence in the asset freeze as with the Smiths' assets transferred into Lynn Smith's name alone, Nancy McGinn is not a party to this action in any capacity. Unless and until she is, this Court lacks jurisdiction to restrain her actions with respect to any property presently titled to her alone. See NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 134-35 (N.D. La. 1989) (holding that court lacked jurisdiction to restrain property allegedly involved in fraudulent transfer until question of title holder had been resolved). Accordingly, the Niskayuna residence now titled to Nancy McGinn alone is not included within the TRO asset freeze nor within the preliminary injunction to which McGinn has consented.

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. The SEC's motion for a preliminary injunction continuing the asset freeze as to the defendants and Lynn Smith (Dkt. No. 4) is:

A. **GRANTED** as to all defendants;

B. **GRANTED** as to Lynn Smith for the Stock Account, Vero Beach home and her checking account;

C. **DENIED** as to Lynn Smith for the Great Sacandaga Lake camp as to which the asset freeze is **VACATED**; and

D. **DENIED** as to the Trust as to which the asset freeze is **VACATED**; and

2. The Trust's motion to lift the TRO as to the Trust and for attorney's fees and costs (Dkt. No. 31) is:

A. **GRANTED** as to the TRO and the TRO is **VACATED** as to the Trust; and

B. **DENIED** as to attorney's fees and costs.

IT IS SO ORDERED.

DATED: July 7, 2010
Albany, New York

David R. Homer
United States Magistrate Judge

From: Smith, David <00080144@exchorg.com>
Sent: Thursday, April 30, 2009 6:28 PM (GMT)
To: Cooper, Brian <cooperb@mcginnsmith.com>; 'PATRICIA CLEVELAND' <pmack@mtb.com>
Cc: Shea, Brian <sheab@mcginnsmith.com>
Subject: RE: Transfer

Patti, I authorize the transfer.

Thank you

From: Cooper, Brian
Sent: Thursday, April 30, 2009 2:27 PM
To: PATRICIA CLEVELAND; Smith, David
Cc: Shea, Brian
Subject: Transfer

Patti, please confirm that Dave Smith received $100,000 in his own account and then transfer from his own account REDACTED 9965 to the McGinn Smith Operating account REDACTED 4734.

Dave please respond authorizing this transfer.

Thank you,

Brian J. Cooper
McGinn Smith & Co. Inc.
99 Pine Street, Suite 5
Albany, NY 12207
Phone 518-449-5131 ext 232
Fax 518-449-4894
Toll Free 1-800-724-3330

M&T Bank

ACCOUNT NO.	ACCOUNT TYPE
REDACTED 9504	M&T SELECT WITH INTEREST

STATEMENT PERIOD	PAGE
SEP. 16 -OCT. 17, 2006	1 OF 3

00 0 02056M NM 017

2240

TIMOTHY M MCGINN
99 PINE ST
ALBANY NY 12207-2776

INTEREST PAID YEAR TO DATE 35.50

ALBANY

ACCOUNT SUMMARY

BEGINNING BALANCE	DEPOSITS & OTHER ADDITIONS		CHECKS PAID		OTHER SUBTRACTIONS		CURRENT INTEREST PD	ENDING BALANCE
	NO.	AMOUNT	NO.	AMOUNT	NO.	AMOUNT		
2,106.01	4	367,361.42	34	176,491.90	19	67,455.42	8.17	125,528.28

ACCOUNT ACTIVITY

POSTING DATE	TRANSACTION DESCRIPTION	DEPOSITS, INTEREST & OTHER ADDITIONS	CHECKS & OTHER SUBTRACTIONS	DAILY BALANCE
09-16-06	BEGINNING BALANCE			$2,106.01
09-18-06	CREDIT CARD PAYMENT REDACTED 7996		278.00	
09-18-06	CHECK NUMBER 7990		275.62	
09-18-06	CREDIT CARD PAYMENT REDACTED 7997		216.00	
09-18-06	CAPITAL ONE ARC CHECK PYMT REDACTED 7998		134.00	1,202.39
09-19-06	CHECK NUMBER 7972		300.00	902.39
09-21-06	INCOMING FEDWIRE FUNDS TRANSFER	4,250.00		
	MR CRANBERRY LLC			5,152.39
09-22-06	CHECK NUMBER 8010		500.00	4,652.39
09-25-06	CHASE CHECK PYMT REDACTED 8005		205.00	4,447.39
09-26-06	CHECK NUMBER 8007		1,667.81	
09-26-06	CHECK NUMBER 8006		747.50	
09-26-06	MBNA/IBS CHECK PYMT REDACTED 8008		610.00	
09-26-06	CHECK NUMBER 8011		488.60	933.48
09-27-06	CITICARD PAYMENT CHECK PYMT REDACTED 8004		1,850.00	916.52-
09-28-06	INCOMING FEDWIRE FUNDS TRANSFER	10,000.00		
	MR CRANBERRY LLC			
09-28-06	INSUFFICIENT FUNDS FEE-CITICARD PAYMENT CHECK P		19.00	
09-28-06	M & T MORTGAGE MTG PYT REDACTED 4800		1,590.87	
09-28-06	VERIZON ARC CHECK PYMT REDACTED 8013		159.44	7,314.17
09-29-06	HOME EQUITY LOC PAYMENT REDACTED 0830		988.35	6,325.82
10-02-06	INCOMING FEDWIRE FUNDS TRANSFER	352,341.00		
	TDM CABLE FINANCING LLC			
10-02-06	CHECK NUMBER 8012		1,789.25	356,877.57
10-03-06	CHECK NUMBER 8009		1,122.87	355,754.70
10-04-06	PAYBYPHONE-PYMT PHONE PYMT		39,000.00	
10-04-06	CHECK NUMBER 8036		7,800.00	
10-04-06	CHECK NUMBER 8016		730.07	
10-04-06	CHECK NUMBER 8032		677.75	
10-04-06	CHECK NUMBER 8018		376.88	

M&T Bank

ACCOUNT NO.	ACCOUNT TYPE
REDACTED 9504	M&T SELECT WITH INTEREST

STATEMENT PERIOD	PAGE
SEP. 16 -OCT. 17, 2006	2 OF 3

TIMOTHY M MCGINN

ACCOUNT ACTIVITY

POSTING DATE	TRANSACTION DESCRIPTION	DEPOSITS, INTEREST & OTHER ADDITIONS	CHECKS & OTHER SUBTRACTIONS	DAILY BALANCE
10-04-06	CHECK NUMBER 8017		353.19	
10-04-06	CHECK NUMBER 7987		350.00	
10-04-06	CHECK NUMBER 8015		195.38	306,271.43
10-05-06	CHECK NUMBER 8041		85,000.00	
10-05-06	CHECK NUMBER 8014		11,000.00	
10-05-06	CHECK NUMBER 8021		1,483.92	
10-05-06	CHECK NUMBER 8019		714.02	208,073.49
10-06-06	TELLER MISCELLANEOUS DEBIT		575.00	
10-06-06	CHECK NUMBER 8024		18,723.81	
10-06-06	AMERICAN EXPRESS CHECK PYMT REDACTED 8030		13,222.84	
10-06-06	CHECK NUMBER 8020		11,997.85	
10-06-06	CHECK NUMBER 8025		10,400.32	
10-06-06	CHECK NUMBER 8031		166.43	152,987.24
10-10-06	HELOC EQUITY PMT CHECKPAYMT REDACTED 8022		1,535.70	
10-10-06	CHECK NUMBER 8023		375.00	
10-10-06	CHECK NUMBER 8028		123.97	150,952.57
10-11-06	CHECK NUMBER 8035		6,318.00	
10-11-06	CHECK NUMBER 8037		2,500.00	
10-11-06	CHECK NUMBER 8033		1,261.67	
10-11-06	CHECK NUMBER 8042		1,214.84	
10-11-06	CHECK NUMBER 8038		637.54	
10-11-06	CHECK NUMBER 8040		489.61	138,530.91
10-12-06	DEPOSIT	770.42		
10-12-06	CHECK NUMBER 8039		3,000.00	
10-12-06	M & T MORTGAGE MTG PYT 0005174800		1,590.87	134,710.46
10-16-06	CHECK NUMBER 8054		1,200.00	
10-16-06	AMERICAN EXPRESS CHECK PYMT REDACTED 8046		275.00	
10-16-06	CAPITAL ONE ARC CHECK PYMT REDACTED 8044		175.00	133,060.46
10-17-06	INTEREST PAYMENT	8.17		
10-17-06	TCM BANK PAYMENT REDACTED 8049		3,755.35	
10-17-06	CHECK NUMBER 8048		2,510.00	
10-17-06	CITICARD PAYMENT CHECK PYMT REDACTED 8047		1,275.00	125,528.28
	ENDING BALANCE			$125,528.28

CHECKS PAID SUMMARY

7972	09-19-06	300.00	7987*	10-04-06	350.00	7990* 09-18-06	275.62

M&T Bank

ACCOUNT NO.	ACCOUNT TYPE
REDACTED 9504	M&T SELECT WITH INTEREST

STATEMENT PERIOD	PAGE
SEP. 16 -OCT. 17, 2006	3 OF 3

TIMOTHY M MCGINN

CHECKS PAID SUMMARY

8006*	09-26-06	747.50	8007	09-26-06	1,667.81	8009*	10-03-06	1,122.87
8010	09-22-06	500.00	8011	09-26-06	488.60	8012	10-02-06	1,789.25
8014*	10-05-06	11,000.00	8015	10-04-06	195.38	8016	10-04-06	730.07
8017	10-04-06	353.19	8018	10-04-06	376.88	8019	10-05-06	714.02
8020	10-06-06	11,997.85	8021	10-05-06	1,483.92	8023*	10-10-06	375.00
8024	10-06-06	18,723.81	8025	10-06-06	10,400.32	8028*	10-10-06	123.97
8031*	10-06-06	166.43	8032	10-04-06	677.75	8033	10-11-06	1,261.67
8035*	10-11-06	6,318.00	8036	10-04-06	7,800.00	8037	10-11-06	2,500.00
8038	10-11-06	637.54	8039	10-12-06	3,000.00	8040	10-11-06	489.61
8041	10-05-06	85,000.00	8042	10-11-06	1,214.84	8048*	10-17-06	2,510.00
8054*	10-16-06	1,200.00						

ANNUAL PERCENTAGE YIELD EARNED = 0.10 %

ENJOY THE FLEXIBILITY OF LOCKING IN FIXED-RATE LOANS WITHIN A LINE OF CREDIT. WITH M&T CHOICEQUITY, YOU GET THE ABILITY TO LOCK IN A LOAN WITH A GREAT FIXED RATE, AS WELL AS A LINE OF CREDIT - ALL IN ONE ACCOUNT. HOW'S THAT FOR FLEXIBILITY? BEST OF ALL, YOU DECIDE THE REPAYMENT SCHEDULE THAT FITS YOUR BUDGET. SO WHY WAIT? START ENJOYING THE FLEXIBILITY OF M&T CHOICEQUITY TODAY. TO APPLY, STOP BY ANY M&T BRANCH, VISIT WWW.MANDTBANK.COM, OR CALL THE M&T TELEPHONE BANKING CENTER AT 1-866-236-1219.

M&T Bank

ACCOUNT NO.	ACCOUNT TYPE
REDACTED 9504	M&T SELECT WITH INTEREST

STATEMENT PERIOD	PAGE
AUG. 18-SEP. 15, 2006	1 OF 2

00 0 02056M NM 017

6774

TIMOTHY M MCGINN
99 PINE ST
ALBANY NY 12207-2776

INTEREST PAID YEAR TO DATE 27.33 ALBANY

ACCOUNT SUMMARY

BEGINNING BALANCE	DEPOSITS & OTHER ADDITIONS		CHECKS PAID		OTHER SUBTRACTIONS		CURRENT INTEREST PD	ENDING BALANCE
	NO.	AMOUNT	NO.	AMOUNT	NO.	AMOUNT		
12,750.60	3	37,472.09	27	34,711.42	10	13,406.23	0.97	2,106.01

ACCOUNT ACTIVITY

POSTING DATE	TRANSACTION DESCRIPTION	DEPOSITS, INTEREST & OTHER ADDITIONS	CHECKS & OTHER SUBTRACTIONS	DAILY BALANCE
08-18-06	BEGINNING BALANCE			$12,750.60
08-21-06	CHECK NUMBER 0055		600.00	
08-21-06	CHECK NUMBER 7961		310.18	11,840.42
08-22-06	CHECK NUMBER 7964		385.21	11,455.21
08-24-06	DEPOSIT	3,222.09		14,677.30
08-25-06	CHASE CHECK PYMT REDACTED 7965		205.00	14,472.30
08-28-06	CHECK NUMBER 7967		206.80	
08-28-06	CHECK NUMBER 7971		201.80	14,063.70
08-29-06	INCOMING FEDWIRE FUNDS TRANSFER MR CRANBERRY LLC	4,250.00		
08-29-06	MACYS PAYMENT CHECK PYMT REDACTED 7968		1,531.45	
08-29-06	MBNA/IBS CHECK PYMT REDACTED 7969		523.00	
08-29-06	CHECK NUMBER 7966		225.00	16,034.25
08-31-06	AMERICAN EXPRESS CHECK PYMT REDACTED 7976		4,638.65	
08-31-06	M & T MORTGAGE MTG PYT REDACTED 4800		1,590.87	
08-31-06	HOME EQUITY LOC PAYMENT REDACTED 1830		1,027.09	
08-31-06	DAIMLER CHRYSLER BILLPYMT REDACTED 7974		488.60	8,289.04
09-01-06	CHECK NUMBER 7981		2,000.00	
09-01-06	CHECK NUMBER 7975		353.19	
09-01-06	CHECK NUMBER 7977		138.73	5,797.12
09-05-06	INCOMING FEDWIRE FUNDS TRANSFER MR CRANBERRY LLC	30,000.00		
09-05-06	CHECK NUMBER 7992		500.00	
09-05-06	CHECK NUMBER 7973		914.60	
09-05-06	CHECK NUMBER 7979		604.45	
09-05-06	CHECK NUMBER 7978		489.61	33,288.46
09-06-06	CHECK NUMBER 7982		7,800.00	
09-06-06	CHECK NUMBER 7980		99.36	25,389.10
09-07-06	CHECK NUMBER 7970		5,000.00	20,389.10
09-08-06	CHECK NUMBER 7986		3,352.26	

From: "Livingston, Thomas" <livingstont@mcginnsmith.com>
To: "Smith, David <smithd@mcginnsmith.com>
Cc:
Bcc:
Date: Wed, 25 Feb 2009 12:28:57 PM
Subject: Re today
Attachments:

Dear Dave:
I understand that the decisions that are being made today are difficult ones. The impact of which on me personally is beyond catastrophic. As you know I have been here for twenty two years and through those many years we have faced many calamities. This of course makes all of them seem insignificant by comparison. In our many conversations over the last year I came to understand the depths to which the firm has sunk relative to its revenue. I have attempted with some success to develop alternative revenue sources (structured products) and after many conversations it became clear that we needed additional revenue producers. I have worked on that for the last 4 months and now all that work has gone away due to the financial crisis we now face. All of this is of course moot given the firms financial condition.
As you know from our prior conversations that I have attempted to restructure my personal finances to reflect the realities of today. That being said the conversation we had this morning (Mcginn, Rees and you) has me absolutely dumbfounded. I have for these many years done what was ever asked of me. I clearly understand the position we are in. However, to unilaterally decide to eliminate my entire salary and put me on straight commission is suggests that I have merited no consideration even as a partner in the firm. This decision will quickly put me in bankruptcy and have an enormous impact on the two young children I have at home. I have always been a survivor and am very creative as it pertains to generating revenue. Up and until September of last year I was generating a large amount of revenue for the firm. As you know from prior conversations I had the Morgan Stanley guys to my house a few weeks ago. That business will be back. Frankly, absent the government preferreds are the only way the backs can and will recapitalize. The decisions being made today are decisions you and Tim have made. They never included me a supposed partner in the firm. You never asked nor did Tim, how will this impact you Tom? It basically says that my talents , work, contribution are basically worth zero. I understand sacrifices have to be made. Nobody is more willing to make them more than me. However, I also understand that there are plenty of ways for you and Tim to draw income that doesn't necessarily come from MS. Many of these entities have been set up over the last few years and they never included me. I do not have the ability to pay any of my commitments absent remuneration. Not getting paid Friday is something I can try to deal with but eliminating my salary completely is not only unfair it is undeserved. We have paid people very large salaries that make very little contribution and I have not had a say in that. I would hope that you would reconsider this action. You and I both know that I can sell! I

will generate substantial revenue for the firm as I have in the past. It is as though you and Tim are showing me the door. If that is the case then I need to know it and take appropriate action for my families best interest. I would hope that we could have a phone conversation to discuss this in greater detail.

Tom Thomas E. Livingston
Principal
McGinn Smith Co., Inc.
99 Pine St.
Albany, New York 12207
(p) 518-449-5131
(f) 518-463-9183

From: "Smith, David" <smithd@mcginnsmith.com>
To: "McGinn, Timothy <tmmcginn@mcginnsmith.com>
Cc:
Bcc:
Date: Wed, 14 Jan 2009 12:55:47 PM
Subject:
Attachments:

Tim,
I need two pieces of information from you by tomorrow morning if possible:

1) current balance of Lynn"s loan-- I have a pretty good handle on this so if you are unable to get to this that is ok.
2) my value for Mr. Cranberry- this has to be quite accurate as I am meeting with my estate attorney tomorrow afternoon and Lynn and I have to shift money arround between us, and our respective net worths are critical in determining that number.

I also need this information for my financial statement for the insurance departments and CVoventry is crawling up my ass.

Thanks,
Dave

FINRA Dispute Resolution
Northeast Processing Center
One Liberty Plaza
165 Broadway, 27th Floor
New York, NY 10006
Email:neprocessingcenter@finra.org
Phone: 212-858-4200
Fax: 301-527-4873

FINRA

Number of Pages including the Cover Sheet: 25

Date: 12/31/2009

Case Number:08-04924

Case Name: Duckkyu Chang, Kee Chang, et al. vs. McGinn, Smith & Co., Inc., Timothy M. McGinn, David L. Smith, et al.

To: David C. Franceski

Phone: 215-564-8062 Fax: 215-564-8120

From: Roy Rowsell
Case Administrator

Message:

C10

FINRA
Financial Industry Regulatory Authority

VIA MAIL AND FACSIMILE

December 31, 2009

David C. Franceski, Jr., Esq.
Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098

Subject: FINRA Dispute Resolution Arbitration Number 08-04924
Duckkyu Chang, Kee Chang, et al. vs. McGinn, Smith & Co., Inc., Timothy M. McGinn, David L. Smith, et al.

Dear Mr. Franceski:

In accordance with the Code of Arbitration Procedure I enclose the decision reached by the arbitrator(s) in the above-referenced matter.

Responsibility to Pay Monetary Award

Pursuant to the Code of Arbitration Procedure[1] the responsible party must pay any monetary awards within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. If an award is not paid within 30 days, the responsible party must pay post-judgment interest at the legal rate or as provided in the award by the arbitrator(s).

Tracking Payment of Award

FINRA Dispute Resolution has implemented a system of monitoring and tracking compliance with arbitration awards by members and associated persons. We request prevailing claimants to notify us in writing when their awards have not been paid within 30 days of receipt of the award, and require member firms to certify in writing that they have complied with awards against them or their associated persons.

Written notification concerning award compliance or lack thereof must be directed to:

Avichai Badash
FINRA Dispute Resolution
One Liberty Plaza

[1]Customer Code Rule 12904
Industry Code Rule 13904
Old Code Rule 10330(h)

165 Broadway, 52nd Floor
New York, NY 10006
212-858-4325 (tel) 301-527-4739 (fax)

Expedited Suspension Proceedings for Non-Payment of Awards

Members and associated persons who do not comply with an award in a timely manner are subject to expedited suspension proceedings as set forth in Rule 9554.

Right to File Motion to Vacate Award

All awards are **final** and are not subject to review or appeal by the arbitration panel or by FINRA Dispute Resolution. Any party wishing to challenge the award must make a motion to vacate the award **in a federal or state court** of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, or applicable state statute. There are limited grounds for vacating an arbitration award, and a party must bring a motion to vacate within the time period specified by the applicable statute. Parties and counsel should consult federal and state statutes and case law to determine the appropriate court, standards, and time limitations in their individual circumstances. FINRA Dispute Resolution is not authorized to provide legal advice concerning a motion to vacate.

A motion to vacate, confirm, or modify an arbitration award is a matter only between the parties to the arbitration. FINRA Dispute Resolution is not a proper party to post-award motions and should not be named as a party to any post-award motion. However, for cases filed on or after April 12, 2004, if the award contains expungement relief, or if a party seeks expungement relief in court, there may be a duty to name FINRA as a party as provided in Rule 2080.

Questions Concerning Award

Please direct any questions regarding this award to me. **The parties must not contact the arbitrators directly.**

Forum Fees

You will receive under separate cover an invoice that reflects the fees assessed and any outstanding balance or refund due. **Fees are due and payable to FINRA Dispute Resolution upon receipt of the invoice and remitted to the address specified on the invoice.**

Any applicable refunds will also be sent under separate cover approximately 45 days after the case closes. Pursuant to the Code of Arbitration Procedure, "Any refunds of fees or costs incurred under the Code will be paid directly to the named parties, even if a non-party made payment on behalf of the named parties."[2]

All questions regarding payment of fees and refunds should be directed to FINRA Finance at (240) 386-5910.

Arbitration Evaluation

[2] Customer Code Rule 12902(e)
Industry Code Rule 13902(e)

As a service organization, the primary goals of FINRA Dispute Resolution are the integrity of its process and the satisfaction of its clients. To ensure that we are meeting your needs and satisfying our commitment to you, **we need to hear from you.** If you have not already done so, please take the time to complete an evaluation of our services, the process, and the arbitrator(s) assigned to your case. For your convenience, we have now made it possible for you to evaluate our services using the Internet. Please direct your Web browser to http://www.finra.org/arbevaluation.

If you do not have Internet access, or have difficulty completing the evaluation form online, we will send a hard copy evaluation form to you. The completed evaluation form should be mailed in to the address indicated below. If you need a hard copy of the evaluation form, please contact the undersigned. Whenever possible, however, we encourage you to use the new online version, as it will help us to review your feedback in a more expeditious manner. Your feedback is a valuable and necessary component in our efforts to serve you better.

Very truly yours,

Roy Rowsell
Case Administrator
Phone: 212-858-5288
Fax: 301-527-4805
NEProcessingCenter@finra.org

RR:clo:LC09A
idr: 08/25/2009

RECIPIENTS:

David C. Franceski, Jr., Esq., Thomas Edward Livingston
Stradley Ronon Stevens & Young, LLP, 2600 One Commerce Square, Philadelphia, PA 19103-7098

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David C. Franceski, Jr., Esq., Timothy Michael McGinn
Stradley Ronon Stevens & Young, LLP, 2600 One Commerce Square, Philadelphia, PA 19103-7098

Jenice L. Malecki, Esq., Duckkyu Chang TTEE Cumberland Pathology
Malecki Law, 11 Broadway, Suite 715, New York, NY 10004

Jenice L. Malecki, Esq., Duckkyu Chang
Malecki Law, 11 Broadway, Suite 715, New York, NY 10004

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FINRA
Financial Industry Regulatory Authority

VIA MAIL AND FACSIMILE

December 31, 2009

David C. Franceski, Jr., Esq.
Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098

Subject: FINRA Dispute Resolution Arbitration Number 08-04924
Duckkyu Chang, Kee Chang, et al. vs. McGinn, Smith & Co., Inc., Timothy M. McGinn, David L. Smith, et al.

Dear Mr. Franceski:

An arbitration Panel issued the enclosed award ordering you, or your client(s), to pay monetary damages or provide other relief to a party in the above-referenced matter.

Please be aware that the Code of Arbitration Procedure[1] provides as follows:

> All monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award: (1) if not paid within thirty (30) days of receipt, (2) if the award is the subject of a motion to vacate which is denied, or (3) as specified by the arbitrator(s) in the award. Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

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Members must notify FINRA Dispute Resolution in writing, within 30 days of receipt of the award, whether or not they or their associated persons have complied with the award. The 30-day period ends on: February 1, 2010 Associated persons who have changed employment since the arbitration claim was filed are required to notify FINRA Dispute Resolution directly

[1]Customer Code Rule 12904(i)
Industry Code Rule 13904(i)
Old Code Rule 10330(h)

regarding the payment status of any awards against them. Please review Notice to Members 00-55 for more information on the notification requirement and the sanctions for noncompliance.

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Please direct any questions regarding this award to me. **The parties must not contact the arbitrators directly.**

Please forward any questions or correspondence concerning the monitoring and tracking of arbitration awards and/or payment of awards to:

Avichai Badash
FINRA Dispute Resolution
One Liberty Plaza
165 Broadway, 52nd floor
New York, NY, 10006

You may also contact him by telephone at 212-858-4325, fax at 301-527-4739, or e-mail at avichai.badash@finra.org.

Very truly yours,

Roy Rowsell
Case Administrator
Phone: 212-858-5288
Fax: 301-527-4805
NEProcessingCenter@finra.org

RR:clo: LC09X
idr: 09/16/2009

CC:

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RECIPIENTS:

David C. Franceski, Jr., Esq., David Lee Smith
Stradley Ronon Stevens & Young, LLP, 2600 One Commerce Square, Philadelphia, PA 19103-7098

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Very truly yours,

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RR:clo: LC09X
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RECIPIENTS:

David C. Franceski, Jr., Esq., William Francis Lex
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December 31, 2009

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Jenice L. Malecki, Esq., Duckkyu Chang TTEE Cumberland Pathology

Malecki Law, 11 Broadway, Suite 715, New York, NY 10004

RECIPIENTS:

David C. Franceski, Jr., Esq., McGinn, Smith & Co., Inc.
Stradley Ronon Stevens & Young, LLP, 2600 One Commerce Square, Philadelphia, PA 19103-7098

Award
FINRA Dispute Resolution

In the Matter of the Arbitration Between:

Duckkyu Chang, Kee Chang, and Duckkyu Chang TTEE Cumberland Pathology Associates, LLC (Claimants) vs. McGinn, Smith & Co., Inc., Timothy M. McGinn, David L. Smith, Thomas E. Livingston, Lex & Smith Associates Ltd., William F. Lex, McGinn Smith Advisors, LLC, and McGinn, Smith Capital Holdings Corp. (Respondents)

Case Number: 08-04924 Hearing Site: Philadelphia, Pennsylvania

Nature of the Dispute: Customers vs. Member, Associated Persons, and Non-Members.

REPRESENTATION OF PARTIES

Claimants Duckkyu Chang ("D. Chang"), Kee Chang ("K. Chang"), and Duckkyu Chang TTEE Cumberland Pathology Associates, LLC ("Cumberland"), hereinafter collectively referred to as "Claimants": Jenice L. Malecki, Esq., Malecki Law, New York, NY.

Respondents McGinn, Smith & Co., Inc. ("MS & Co."), Timothy M. McGinn ("McGinn"), David L. Smith ("Smith"), Thomas E. Livingston ("Livingston"), Lex & Smith Associates Ltd. ("Lex & Smith"), William F. Lex ("Lex"), McGinn, Smith Advisors, LLC ("MS Advisors"), and McGinn, Smith Capital Holdings Corp. ("MS Capital"), hereinafter collectively referred to as "Respondents": David C. Franceski, Jr., Esq., Stradley, Ronon, Stevens & Young, LLP, Philadelphia, PA. Previously represented by Christine M. Debevec, Esq., Stradley Ronon Stevens & Young, LLP, Philadelphia, PA.

CASE INFORMATION

Statement of Claim filed on or about: December 22, 2008.
D. Chang signed the Uniform Submission Agreement: December 16, 2008.
K. Chang signed the Uniform Submission Agreement: December 16, 2008.
Cumberland signed the Uniform Submission Agreement: December 16, 2008.

Joint Statement of Answer filed by Respondents MS & Co., Smith, and Lex on or about: March 12, 2009.
MS & Co. signed the Uniform Submission Agreement: March 12, 2009.
Smith signed the Uniform Submission Agreement: March 12, 2009.
Lex signed the Uniform Submission Agreement: March 12, 2009.

McGinn did not file an Answer.
McGinn signed the Uniform Submission Agreement: August 4, 2009.

Livingston did not file an Answer.
Livingston signed the Uniform Submission Agreement: August 5, 2009.

Lex & Smith did not file an Answer or sign the Uniform Submission Agreement.

MS Advisors did not file an Answer or sign the Uniform Submission Agreement.

MS Capital did not file an Answer or sign the Uniform Submission Agreement.

CASE SUMMARY

Claimants asserted the following causes of action: unsuitable investments, negligence, negligent supervision, breach of contract, violations of industry rules, failure to diversify, *respondeat superior*, breach of fiduciary duty, fraud, misrepresentations, and omissions. The causes of action relate to unspecified private placement products, notes, and trusts.

Unless specifically admitted in their Answer, Respondents MS & Co., Smith, and Lex denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested compensatory damages in the amount of $2,577,000.00, commissions, interest, attorneys' fees, costs, and punitive damages.

Respondents MS & Co., Smith, and Lex requested Claimants' claims be denied in their entirety.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel acknowledges that they have each read the pleadings and other materials filed by the parties.

Respondents Lex & Smith, MS Advisors, and MS Capital are not members or associated persons of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to Claimants' claims against Respondents Lex & Smith, MS Advisors, and MS Capital.

On or about June 30, 2009, Claimants filed a Motion in Support for Default Judgment against Respondents Timothy M. McGinn and Thomas E. Livingston. On or about July 10, 2009, Respondents filed an Opposition to Claimants' Motion. On August 4, 2009 a pre-hearing conference was conducted to address the Motion and the Panel, having considered the submissions and oral arguments of the parties and after due deliberation, denied the Motion.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

ARBITRATORS' FINDINGS

The arbitrators have provided an explanation of their decision in this Award, the explanation is for the information of the parties only and is not precedential in nature.

Dr. Chang and his wife as individuals and Dr. Chang in his role as trustee of Cumberland Pathology pension accounts appear to be intelligent, accomplished people. However, the Arbitration Panel finds no logical carryover from being very experienced at the practice of medicine or music theory or the use of Quicken software programs to account for small-business accounts receivable and accounts payable to any understanding of private placement prospectus.

Furthermore, Mr. Lex seems to be a conscientious broker and insurance salesman who is congenial. McGinn, Smith & Company as the supervisor of Mr. Lex had necessary procedures and policies in place to carry out its duties to potential customers as they had standard education programs for brokers and industry-standard supervision procedures for individual broker accounts.

The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn, Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. At the risk of being redundant, this arbitration decision does not affect any contractual responsibility Mr. Livingston and Mr. McGinn may have, if any, to reimburse McGinn, Smith & Co. for damages McGinn, Smith & Co. ultimately provides the Claimants. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGinn.

The quantitative reasoning and reason for the assignment of fault is set out immediately below.

Dr. Chang and Kee Mann Chang are found to be responsible for the consequences of their own investment decisions after their stating repeatedly verbally and in writing that they had the opportunity to read investment literature and query resources such as Mr. Lex about the risks and rewards of the subject private placement notes.

The fault of Mr. Lex, Mr. Smith, and McGinn, Smith & Company is derived from the overconcentration of the Claimants' investments in these private placement notes. While Mr. Lex is certainly not responsible for preventing the Claimants from investing all of their funds into a single instrument, Mr. Lex and McGinn, Smith & Co. through Mr. David Smith [because Mr. David Smith oversaw Mr. Lex as the compliance officer for a large majority of the time period in question] could have just told Dr. Chang and Kee Mann Chang that McGinn, Smith & Co. would not play a part in these disproportionate investment actions as they developed. Mr. Lex and/or McGinn, Smith & Co. could have declined to conduct the sale of any more of these notes once the over-concentration

reached a critical mass.

As to some counter-arguments presented to the arbitration Panel, the Panel finds the line of reasoning that these private placement notes were both diversified within each note, and the five or more notes were separately varied so there was not concentration, to be disingenuous. There are about a dozen or maybe two dozen small to moderately capitalized LLCs within these notes that are all either consumer service companies like residential alarm companies or discretionary-consumer goods companies like swimming pool supply firms or golf club accessory supply firms. A truly diversified portfolio would have some selections of small, mid and large capitalized businesses among the number of business areas such as some greater number of the 98 categories of businesses that Value Line created. Another counterpoint raised in the arbitration hearing with colored "pie-charts" depicting the percentage of the Chang's assets that were invested in these private placements, was that the Respondents concluded that the subject private placement notes were only 40 to 60% of the Claimants' total assets; this statement by the Respondents rings hollow. Of the liquid or near liquid assets Dr. Chang and Kee Mann Chang had, these subject notes were close to 90% of their net worth, and this aspect of the over-concentration is exacerbated by Mr. Lex only knowing a fraction of Dr. Chang's and Kee Mann Chang's total liquid/near liquid assets.

As to one other counterpoint raised by the Respondents in this case, the Panel finds that the Respondents' argument, that rescission is impossible because the "wrong" parties were sued, to be a fiction. Even while the Respondents referenced briefly and vaguely to regulatory prohibitions at the end of the Arbitration Hearing, this Panel finds that it is within regulatory parameters for Mr. Lex and/or Mr. David Smith to own the notes as individuals if McGinn, Smith & Co. believes it cannot do so. As a result of the Panel's award being joint and several, McGinn, Smith & Co. could compensate Mr. Lex and/or Mr. David Smith if McGinn, Smith & Co. chose to do so in the possible ownership interest in the subject notes ordered here to be returned by the Claimants.

In determining the Award of $805,110.00, the Arbitration Panel has accounted for in a partial rescission of the purchase of the subject notes: (1) the interest earned by the notes while the Claimants actually held these notes, (2) an imputed interest the Claimants would have conservatively earned with the $805,110.00 if they had never purchased some of these notes, and (3) there is no purposeful assault on the public good by the Respondents so NO punitive damages are awarded.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents McGinn, Smith & Co., Inc., William Lex, and David Smith are jointly and severally liable for and shall pay to Claimants $805,110.00 in compensatory damages. Concurrently Dr. Chang, Kee Mann Chang, and Cumberland Pathology Associates are to provide ownership rights to the Respondents of 45% of the face value of the initial value of private placement notes as defined below.
    a. Payment of $805,110.00 shall be made within 30 days of the issuance

of this Award, and any amount paid after 30 days from the Award issuance date will be subject to post-judgment interest of 6% per Pennsylvania statutes.

b. Concurrently with the payment of the full amount of funds to the Claimants in the amount of $805,110.00, the Claimants shall sign over to the specific Respondent party(s) [designated before hand by the Respondents] all ownership rights the Claimants have to 45% of the face value of the "notes" to the Respondents [the particular private placement notes will be chosen by the Claimants].
c. The 45% shall be that percentage of the face value [initial purchase value before commissions are deducted] of the total subject "notes" value when initially purchased by the Claimants.
d. The universe of these "notes" are defined as: all FEIN, FIIN, TAIN, notes held by Dr. Chang on December 11, 2009; and all FAIN, FIRST LINE, INEX notes held by Dr. Chang's IRA as of December 11, 2009; and all FIIN, FAIN, FEIN notes held by Kee Mann Chang as of December 11, 2009; and all INEX and FAIN notes held by Cumberland Pathology Associates, LLC as of December 11, 2009.
e. In addition, if any interest/return of principal of the universe of notes as set out above occurs from the date of this Award until the funds are actually received by the Claimants, then the amount of the interest/return of principal shall also be returned to the Respondents immediately.

2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Timothy M. McGinn's (CRD #813935) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to Notice to Members 04-16, Respondent Timothy M. McGinn must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

   Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

   Pursuant to the Rule 12805 of the Code, the arbitration panel has made the following Rule 2080 affirmative findings of fact:

   The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

   The arbitration panel has made the above Rule 2080 finding based on the following reasons:

   The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn,

Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGinn.

3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Thomas E. Livingston's (CRD #864264) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to Notice to Members 04-16, Respondent Thomas E. Livingston must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

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4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution assessed a filing fee* for each claim:

Initial claim filing fee	= $1,800.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as a party, McGinn, Smith & Co., Inc., is assessed the following:

Member surcharge	= $2,800.00
Pre-hearing process fee	= $ 750.00
Hearing process fee	= $5,000.00

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ $450.00			= $ 450.00
Pre-hearing conference:	August 11, 2009	1 session	
Three (3) Pre-hearing sessions with Panel @ $1,200.00			= $3,600.00
Pre-hearing conferences:	May 4, 2009	1 session	
	August 4, 2009	1 session	
	September 10, 2009	1 session	
Twenty (20) Hearing sessions @ $1,200.00			= $24,000.00
Hearing Dates:	October 12, 2009	2 sessions	
	October 13, 2009	2 sessions	
	October 14, 2009	2 sessions	
	October 15, 2009	2 sessions	
	October 16, 2009	2 sessions	
	October 19, 2009	2 sessions	
	October 20, 2009	2 sessions	
	December 8, 2009	2 sessions	
	December 10, 2009	2 sessions	
	December 11, 2009	2 sessions	
Total Hearing Session Fees			= $28,050.00

1. The Panel has assessed $14,025.00 of the hearing session fees jointly and severally to Claimants.

2. The Panel has assessed $14,025.00 of the hearing session fees jointly and severally to Respondents McGinn, Smith & Co., Inc., William F. Lex, and David L. Smith.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

ARBITRATION PANEL

Thomas B. Salzer - Public Arbitrator, Presiding Chairperson
Edward Greer - Public Arbitrator
Kenneth J. Beahan - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Thomas B. Salzer
Public Arbitrator, Presiding Chairperson

12-31-09
Signature Date

Edward Greer
Public Arbitrator

Signature Date

Kenneth J. Beahan
Non-Public Arbitrator

Signature Date

December 31, 2009
Date of Service (For FINRA Dispute Resolution use only)

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Edward Greer - Public Arbitrator
Kenneth J. Beahan - Non-Public Arbitrator

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Thomas B. Salzer
Public Arbitrator, Presiding Chairperson

Signature Date

Edward Greer
Public Arbitrator

12/30/09
Signature Date

Kenneth J. Beahan
Non-Public Arbitrator

Signature Date

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Edward Greer	-	Public Arbitrator
Kenneth J. Beahan	-	Non-Public Arbitrator

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Public Arbitrator, Presiding Chairperson

Signature Date

Edward Greer
Public Arbitrator

Signature Date

Kenneth J. Beahan
Non-Public Arbitrator

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Signature Date

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Date of Service (For FINRA Dispute Resolution use only)

SECURITIES PURCHASE AGREEMENT

2nd **THIS SECURITIES PURCHASE AGREEMENT** (the "Agreement") is entered into on this ~~24th~~ day of ~~December~~ 200~~3~~, between Thomas E. Livingston, an individual ("Purchaser") and Timothy M. McGinn, an individual ("Seller").

WHEREAS, Seller is the owner of 100 of the outstanding capital stock of McGinn, Smith & Co., Inc., a Delaware corporation (the "Company") which is equal to one half of the outstanding shares of the Company (such interest shall be referred to herein as the "Timothy McGinn Shares");

WHEREAS, Seller desires to sell, and Purchaser desires to purchase upon Closing (as defined herein) 40 shares of the Company (the "Transferred Shares") from Seller upon the terms and conditions set forth in this Agreement; and

WHEREAS, Seller desires to grant an exclusive option giving the Purchaser the right to purchase an additional 20 shares of the Company from Seller (the "Option Shares") upon the terms and conditions set forth in the Agreement;

NOW, THEREFORE, in consideration of the promises and of the mutual covenants, agreements, representations, and warranties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, each intending to be legally bound, do hereby agree as follows:

ARTICLE 1
PURCHASE AND SALE OF SECURITIES

1.1 Purchase and Sale of The Transferred Shares. At the Closing (as hereinafter defined) Seller shall sell and convey to Purchaser, and Purchaser shall purchase and accept, the Transferred Shares, free and clear of any and all liens, except for restrictions on resale pursuant to applicable state and federal securities laws.

1.2 Purchase Price. The purchase price for the Transferred Shares shall be Five Hundred Thousand Dollars ($400,000) (the "Purchase Price").

1.3 Closing. The closing of the purchase and sale of the Transferred Shares (the "Closing") shall take place at the offices of McGinn, Smith & Co., Inc., 99 Pine St. Albany, NY 12207 at 10:00 a.m. eastern time on ~~December 24, 2003~~ January 7, 2004 or at such other location, date and time as may be agreed upon between the parties hereto.

1.4 Transactions To Be Effected at the Closing:

11/2/04 TMM 12/6/04

(a) The Seller shall surrender to the Company (acting as its own transfer agent) for the benefit of Purchaser the certificate(s) representing the Transferred Shares (or an affidavit of loss with respect thereto) accompanied by duly executed stock powers and Purchaser shall deliver the Purchase Price to the Seller, by wire transfer of immediately available funds in accordance with the Seller's written instructions provided in writing to the Purchaser prior to the Closing.

(b) The Company (acting as its own transfer agent) shall cancel Seller's certificates and issue new certificates representing the Transferred Shares to Purchaser with the customary securities law restrictive legend. Such certificates shall be duly endorsed by the authorized officers of the Company.

(c) Each of the parties hereto shall execute and deliver to the other parties hereto such other documents or instruments as any party hereto reasonably requests to effect the transactions contemplated hereby.

(d) Seller shall cease to be entitled to any of the benefits of ownership of the Transferred Shares, including without limitation, any benefits under the Company's Certificate of Incorporation.

1.5 The Option Shares.

(a) Grant of Option. Subject to the approval of the NASD, the Seller hereby grants an exclusive option to Purchaser to purchase the Option Shares from Seller ("Purchase Option"), based upon the following vesting schedule:

(i) Thirty days from the submission, by the Company, of the NASD Rule 1017 application for the approval of the Purchaser acquiring 25% or more of the Company's outstanding capital stock – June 30, 2004 the Purchaser may purchase 10 shares of the Company from Seller for an aggregate purchase price of $100,000; and

(ii) From December 31, 2004 – June 30, 2005 the Purchaser may purchase 5 shares of the Company from Seller at the relevant Option Purchase Price (as hereinafter defined); and

(iii) From December 31, 2005 – June 30, 2006 the Purchaser may purchase 5 shares of the Company from Seller at the relevant Option Purchase Price (as hereinafter defined).

(b) Exercise and Option Purchase Price. At any time during an exercise period for the respective portion of the Option Shares, Purchaser shall issue a notice to Seller of his intent to exercise the option for the relevant available portion of the Option Shares (the "Option Exercise Notice"). Along with delivery of Option Exercise Notice, Purchaser shall include payment of the 'Option Purchase Price' (as hereinafter defined), in cash. Option Purchase Price shall mean, an amount that capitalizes the Company at an amount equal to 10 times the Company's net after tax earnings, as determined in accordance with GAAP, subject to a maximum amount of three (3) times the book value of the Company for the period ending December 31 of the previous period.

TMM 1/2/04

(c) Exclusive Option. Seller shall not transfer any Option Shares or any other without allowing Purchaser the right to first exercise the Purchase Option.

ARTICLE 2

REPRESENTATIONS AND WARRANTIES OF SELLER

The Seller hereby represents and warrants to Purchaser as follows (Purchaser is paying the Purchase Price and Option Purchase Price, respectively, for the respective Transferred Shares/Option Shares in reliance upon, among other things, the representations of this Section 2.):

2.1 Title to The Timothy McGinn Shares. Seller is the owner of all right, title and interest (legal and beneficial) in and to the Timothy McGinn Shares, free and clear of all liens, except for restrictions on resale pursuant to applicable state and federal securities laws. There are no voting trust arrangements, shareholder agreements or other agreements, arrangements or understandings to which a Seller is a party or to which the Timothy McGinn Shares are subject (i) granting any option, warrant or right of first refusal with respect to the Timothy McGinn Shares to any person, (ii) granting to any person a proxy or any other right to vote or to cause the voting of the Timothy McGinn Shares in any particular matter, (iii) restricting the right of Seller to sell the Timothy McGinn Shares to Purchaser, (iv) restricting any other right of Seller with respect to the Timothy McGinn Shares, or (v) requiring Purchaser to become a party to or to be bound by the terms of any agreement, arrangement or understanding with respect to the Timothy McGinn Shares. Seller has the right, power and capacity to sell, assign and transfer the Timothy McGinn Shares to Purchaser free and clear of any liens. The voting rights for the Timothy McGinn Shares are equivalent to that of all other outstanding shares of the Company. Upon payment for the Timothy McGinn Shares pursuant to this Agreement, good, valid and marketable title to such Timothy McGinn Shares, free and clear of all liens, encumbrances, equities or claims, will be transferred to Purchaser.

2.2 Power and Authority. Seller has the full power, capacity and authority necessary to enter into and perform its obligations under this Agreement and all other instruments or documents executed by Seller in connection with this Agreement and to consummate the transactions contemplated hereby and thereby.

2.3 Due Authorization; Validity; Enforceability. This Agreement and all other instruments or documents executed by Seller in connection with this Agreement have been duly executed and delivered, and constitute legal, valid and binding obligations of Seller, enforceable in accordance with their respective terms, except as enforcement thereof may be limited by the effect of bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights and remedies of creditors, and the effects of general principles of equity, whether applied by a court of law or equity.

2.4 Number of Shares in the Company/Timothy McGinn Shares. Prior to transferring any shares form Seller to Purchaser pursuant to the terms of this Agreement: i) the Timothy McGinn Shares are the only shares of the Company owned by Seller; ii) the Company currently

1/2/04 TMM 1/2/04

has 200 outstanding shares; and iii) all of the other shares of the Company (100 shares) are owned by David L. Smith.

2.5 Litigation. To the knowledge of Seller, no pending nor threatened actions, suits, claims, proceedings, investigations, demands, assessments, audits, fines, judgments, costs or other causes of action exist against the Company, Seller, nor any other employee, officer or shareholder except as set forth upon Exhibit A, attached hereto and made a part hereof.

2.6 Affiliates. Attached as Exhibit B, and made a part hereof, is a list of all other corporations, partnerships, affiliations, companies or any other entities, etc. which the Seller currently owns an interest, or is currently a manager, director or officer of, that conducts business of a similar nature as Company ("Affiliates"). No current business transactions are active, pending nor contemplated with any of the Affiliates, except as listed upon the attached Exhibit C, which is made a part of this Agreement.

2.7 Buy/Sell Agreement. Within ninety (90) days after the date of this Agreement, Seller, Purchaser and Company shareholders owning more than 10% of the Company's equity securities shall enter into a Buy/Sell Agreement for the sale of Seller's/Purchaser's then current shares to the other then current shareholders, to be funded by an appropriate level of life insurance, in a form customary for shareholders of a company of the size and complexity of the Company.

ARTICLE 3
COMPANY OBLIGATIONS

3.1 Transfer of he Timothy McGinn Shares. Immediately upon Closing, the Company shall take any actions necessary to evidence the sale of the Transferred Shares and covenants to take any further future actions required to transfer the Option Shares as necessary on the Company's books and records, which the Company shall provide evidence of in writing to Seller and Purchaser.

3.2 NASD Rule 1017 Application. Immediately upon Closing, the Company shall use its best efforts to file with the NASD a Rule 107 Application for the approval of the Purcahser acquiring more than 25% of the Company's outstanding capital stock.

ARTICLE 4
INDEMNIFICATION

4.1 Agreement of the Indemnitors to Indemnify.

(a) Subject to the terms and conditions of this Article 4, Seller agrees to indemnify, defend and hold Purchaser harmless from, against, for and in respect of any and all losses asserted against, or paid, suffered or incurred by Purchaser, or any of them, and resulting from, based upon, or arising out of:

(i) the inaccuracy, untruth or incompleteness of any representation and warranty of Seller contained in Section 2 of this Agreement;

TMM J
1/2/04 1/2/04

(ii) a breach of or failure to perform any covenant or agreement of Seller made pursuant to this Agreement or any other agreement entered into in connection herewith;

(iii) any and all actions, suits, claims, proceedings, investigations, demands, assessments, audits, fines, judgments, costs and other expenses (including, without limitation, reasonable legal fees and expenses) incident to any of the foregoing or to the enforcement of this Section 4.1., provided, however, that Seller's liability under this section shall be limited to the amount of the Purchase Price and Option Price paid by the Purchaser to the Seller.

4.2 Procedures for Indemnification.

(a) Any indemnification claim shall be made by the Purchaser by delivery of a written notice to the Seller requesting indemnification and specifying the basis on which indemnification is sought and the amount of asserted losses.

(b) The Seller shall have thirty (30) days to object to such indemnification claim by delivery of a written notice of such objection to the Purchaser specifying in reasonable detail the basis for such objection. Failure to timely so object shall constitute a final and binding acceptance of the indemnification claim by the Seller, and the indemnification claim shall be paid in accordance with Section 4.2(c) hereof. If an objection is timely interposed by the Seller, and the dispute is not resolved by the Purchaser and the Seller within twenty (20) days from the date the Purchaser receives such objection, such dispute shall be resolved by as provided in this Agreement.

(c) Upon determination of the amount of an indemnification claim whether by agreement between the Seller and the Purchaser or by any other final adjudication, the amount of such indemnification claim shall be paid within ten (10) days of the date such amount is determined.

4.3 Survival of Representations and Warranties. All of the covenants, representations and warranties set forth in this Agreement, and in any document delivered pursuant to this Agreement, shall survive the consummation of the transactions provided for herein and shall not be extinguished by the consummation of such transaction.

ARTICLE 5
GENERAL PROVISIONS

5.1 Correctness of Representations and Warranties. Seller covenants that the representations and warranties set forth in Article 2 of this Agreement shall be true and correct on the Closing Date. In addition to and not in limitation of any other remedies available to Purchaser, if such representations and warranties are not true and correct on the Closing Date, Purchaser shall have the option, in its sole discretion, not to consummate the transactions contemplated by this Agreement.

TMM JF 1/2/04

5.2 Fees and Expenses. Except as specifically provided in this Agreement, Purchaser on the one hand, and Seller on the other hand, each shall pay their respective fees and expenses in connection with the transactions contemplated by this Agreement.

5.3 Notices. All notices, request, demands, and other communications hereunder shall be in writing (which shall include communications by telex and facsimile) and shall be delivered (a) in person or by courier or overnight service, (b) mailed by first class registered or certified mail, postage prepaid, return receipt requested, or (c) by facsimile transmission, as follows:

(a) If to Seller or Purchaser:

C/O McGinn, Smith & Co., Inc.
99 Pine St.
Albany, NY 12207
(800) 361-8150 (phone)

(b) If to Seller's Attorney:

Gersten, Savage, Kaplowitz, Wolf & Marcus
101 East 52nd Street 9th Fl.
New York, NY 10022
(212) 752-9700 (phone)
(212) 813-9768 (facsimile)
Attn: Jay M. Kaplowitz, Esq.

(c) If to Purchaser's Attorney

Harris Beach LLP
54 State Street, 8th Floor
Albany, New York 12207
(518) 427-9700 (phone)
(518) 427-0235 (facsimile)
Attn: Brendan F. Chudy, Esq.

or to such other address as the parties hereto may designate in writing to the other in accordance with this Section 5.3. Any party may change the address to which notices are to be sent by giving written notice of such change of address to the other parties in the manner above provided for giving notice. If delivered personally or by courier, the date on which the notice, request, instruction or document is delivered shall be the date on which such delivery is made and if delivered by facsimile transmission or mail as aforesaid, the date on which such notice, request, instruction or document is received shall be the date of delivery.

5.4 Assignment; Binding Effect. This Agreement shall not be assignable by either of the parties hereto without the written consent of the other party.

TMM 1/2/04

5.5 No Benefit to Others. The representations, warranties, covenants, and agreements contained in this Agreement are for the sole benefit of the parties hereto, and in the case of Article 4 hereof, the Purchaser, and they shall not be construed as conferring any rights on any other persons.

5.6 Counterparts. This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same agreement, and shall become effective when one counterpart has been signed by each party and delivered to the other party hereto.

5.7 Integration of Agreement. This Agreement supersedes all prior agreements, oral and written, between the parties hereto with respect to the subject matter hereof. Neither this Agreement, nor any provision hereof, may be changed, waived, discharged, supplemented, or terminated orally, but only by an agreement in writing signed by the party against which the enforcement of such change, waiver, discharge, or termination is sought.

5.8 Governing Law. This Agreement and all matters arising directly or indirectly herefrom shall be construed under the laws of the State of New York without regard to conflict of laws principles.

5.9 Partial Invalidity. Whenever possible, each provision hereof shall be interpreted in such manner as to be effective and valid under applicable law, but in case any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision or provisions had never been contained herein unless the deletion of such provision or provisions would result in such a material change as to cause completion of the transactions contemplated hereby to be unreasonable.

5.10 Confidentiality. Except as required by law, this Agreement and the transactions contemplated herein, shall not be disclosed by any of the parties hereto, without the other parties' written permission.

TMM
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1/2/04

[Signatures on Following Pages]

IN WITNESS WHEREOF, each party hereto has caused this Agreement to be executed as of the day and year first above written.

SELLER:

TIMOTHY M. MCGINN

PURCHASER:

THOMAS E. LIVINGSTON

Agreed to and accepted (only with respect to Section 1.4(b) 3.1 and 3.2 hereof) by the Company:

MCGINN, SMITH AND CO., INC.

By: David L. Smith
Name: David L. Smith
Title: President

David L. Smith is not a party to this Agreement and executes this Agreement solely for the purposes as set forth hereinafter:

David L. Smith i) affirms the covenants and representations set forth in paragraphs 2.4, 2.5, 2.6 and 4.3; and ii) agrees to enter into a Buy/Sell Agreement in a similar manner as set forth in paragraph 2.7.

DAVID L. SMITH

Stock Repurchase Agreement

WHEREAS, Thomas E. Livingston has become a shareholder of McGinn, Smith & Co., Inc.; and

WHEREAS, McGinn, Smith & Co., Inc. is desirous of maintaining some control of its' ownership;

IT IS HEREBY AGREED:

Should Thomas E. Livingston leave the employ of McGinn, Smith & Co., Inc. for any reason, either voluntarily or by action of McGinn, Smith & Co., Inc., Thomas E. Livingston shall sell and McGinn, Smith & Co., Inc shall buy any and all interests of McGinn, Smith & Co., Inc. then currently owned by Thomas E. Livingston. Additionally, upon termination of the employment of Thomas E. Livingston, any unexercised options held by Thomas E. Livingston shall expire.

Consideration for such purchase and sale shall be the greater of either the last sale for comparable assets, or the value of the common stock of McGinn, Smith & Co., Inc. calculated at two (2) times book.

AGREED to this 2nd day of January, 2004:

By: _____
Timothy M. McGinn, Chairman of the Board
McGinn, Smith & Co., Inc.

By: _____
Thomas E. Livingston