

027 405 04091 11\*700\*LYNN A SMITH 03/03/92  
 CL F1 F2 100% 29 TEFRA 4  
 HOLD FRM NAME 37 CSH AVL 86,581 C/S 0 TMV 282,250  
 HOLD PROCEEDS HSE FX 347,662 T/E 446,449

T/D BAL	S/D BAL	MKT VAL	HSE EXES/CALL	EQUITY
86,581.90- 1	86,581.90- 1		1 86,581 1	86,581
74,804.26- 2	74,804.26- 2	282,250	2 344,848 2	357,054
2,814.06- 3	2,814.06- 3		3 2,814 3	2,814

.. BUYING POWER ..  
 SMA 228,512 STK + CONV BD 457,024  
 SMA USEABLE 228,512 OPT + UNL STK 228,512  
 NET TD BAL 164,200.22- TREASURIES 2,285,120  
 MAX CASH 1-2 315,093 MUNICIPAL BD 1,142,560  
 NON-CONV PD 761,699

NEW ACCT : 405 04091 SPAD ID : KEY : S/R - MENU SCREEN

027 405 04091 11\*700\*LYNN A SMITH 03/03/92  
 CL F1 F2 100% 29 TEFRA 4  
 HOLD FRM NAME 37 CSH AVL 86,581 C/S 0 TMV 282,250  
 HOLD PROCEEDS HSE FX 347,662 T/E 446,449

QUANTITY	DESCRIPTION	PRICE/ENTRY	AMOUNT	TC	S/D
***** 03/02 *****					
CK 00	BS UNION NATIONAL	DEP BQ	9,000.00-	11	
***** 02/28 *****					
#10776-022892	DRAFT DEBIT	CHK KA	500.00	11	
***** 02/21 *****					
INT FR 01/21	THRU 02/20	%	19.71	29	
BAL 86,511-	AVBAL 3,270				
INTEREST ON CREDIT BALANCE	INT		326.90-	11	
AT 3.000%	01/21 THRU 02/20				
***** 02/18 *****					
1,500	PHARMACEUTICAL RESOURCES INC	6 7/8	10,312.50	29	022592
***** 02/14 *****					
200	PHARMACEUTICAL RESOURCES INC	6 7/8	1,375.00	29	022492
***** 02/04 *****					
CK 00	BS UNION NATL BK	DEP BQ	55,755.00-	11	

NEW ACCT : 405 04091 SPAD ID : KEY : PA1-NEXT S/R-MENU PAGE: 1

60,000  
40,000

027 405 04091 11\*700\*LYNN A SMITH 03/03/92  
 CL F1 F2 100% 29 TEFRA 4  
 HOLD FRM NAME 37 CSH AVL 86,581 C/S 0 TMV 282,250  
 HOLD PROCEEDS HSE EX 347,662 T/E 446,449  
 QUANTITY DESCRIPTION PRICE/ENTRY AMOUNT TC S/D

\*\*\*\*\* 02/03 \*\*\*\*\*

UPJOHN CO DIV 3,400.00- 29  
 CASH DIV ON 10000 SHS  
 REC 01/08/92 PAY-02/03/92  
 \*\*\*\*\* 01/31 \*\*\*\*\*

3,300 DFT ISSUED A/O 1-28 #10695 DBT CC 500.00 11  
 REV ENTRY A/O 1-29 #10695 CRD CC 500.00- 11  
 PHARMACEUTICAL RESOURCES INC 6 7/8 22,687.50 29 020791  
 \*\*\*\*\* 01/29 \*\*\*\*\*

2,000- #10695-012992 DRAFT DEBIT CHK KA 500.00 11  
 PHARMACY MANAGEMENT SERVICES INC 10 1/2 21,000.00- 29 020591

+4500

44100

NEW ACCT : 405 04091 SPAD ID : KEY : PA2-PREV S/R-MENU PAGE: 2

027 405 04091 11\*700\*LYNN A SMITH 03/03/92  
 CL F1 F2 100% 29 TEFRA 4  
 HOLD FRM NAME 37 CSH AVL 86,581 C/S 0 TMV 282,250  
 HOLD PROCEEDS HSE EX 347,662 T/E 446,449  
 POSITION SECURITY DESCRIPTION PRICE EX DLA F/S SYM/SEC

\*\*\*TYPE 2\*\*\*

5,000 PHARMACEUTICAL RESOURCES INC 6.500 A 02/26/92 PRX  
 5,000 SB MV 32,500  
 6,000 UPJOHN CO 41.625 A 02/03/92 UPJ  
 6,000 SB MV 249,750

NEW ACCT : 405 04091 SPAD ID : KEY : PA2-PREV S/R-MENU PAGE:

DO NOT WRITE IN THIS AREA — DOCUMENTATION DEPARTMENT USE ONLY

BEAR, STEARNS & CO. INC.

REDACTED  
REPORT OF NEW ACCOUNT

1-700

CUSTOMER'S NAME IN FULL  
**Lynn A. Smith**

SOCIAL SECURITY NO./TAX ID  
**REDACTED**

BUSINESS ADDRESS

BUSINESS PHONE

HOME ADDRESS  
**REDACTED**

HOME PHONE  
**REDACTED**

**Clifton Park, NY 12065**

TYPE OF ENTITY (MUST CHECK ONE)

- A. INDIVIDUAL ☒  
B. JOINT ☐  
C. PARTNERSHIP ☐  
D. CORPORATION ☐  
E. TESTAMENTARY TRUST ☐  
F. OTHER (SPECIFY) ☐

- G. SOLE OWNERSHIP ☐  
H. BANK OR TRUST CO. ☐  
I. INSURANCE CO. ☐  
J. STATE AGENCY ☐  
K. BROKER-DEALER ☐  
L. ESTATE ☐

- M. INVESTMENT CLUB ☐  
N. TRUST ☐  
O. MUTUAL FUND ☐  
P. HEDGE FUND ☐  
Q. IRA (see over) ☐  
R. KEOGH (see over) ☐

APPROX. ANNUAL INCOME

APPROX. NET WORTH

INVESTMENT OBJECTIVE

EMPLOYED BY AND OR NATURE OF BUSINESS

POSITION OR OCCUPATION

IS CUSTOMER EMPLOYED BY A MEMBER FIRM? YES ☐ NO ☒

APPROXIMATE AGE OF CUSTOMER **45** INTRODUCED TO AE BY:

AE KNOWN HOW LONG?

IS AE RELATED? YES ☐ NO ☒

STATE RELATIONSHIP **wf**

MARITAL STATUS

MARRIED ☒

SINGLE ☐

SPOUSES'S OCCUPATION

BANK AND OTHER REFERENCES

DOES CUSTOMER HAVE OTHER ACCOUNTS WITH US? YES ☐ NO ☒  
SPECIFY ACCOUNT NO.

ACCOUNT WILL BE TRADING -

CASH ☐

MARGIN ☐

COMMODITY ☐

IS ACCOUNT HANDLED BY AN INVESTMENT ADVISOR? YES ☐ NO ☒

SPECIFY

IF OTHER THAN AN INDIVIDUAL OR JOINT ACCOUNT INDICATE PERSON AUTHORIZED TO ENTER ORDERS AND  
ISSUE INSTRUCTIONS:

TITLE:

INITIAL TRANSACTION

DEPOSIT

SECURITY

NO. SHARES

NO. DEPOSIT

REASON FOR WAIVE OF DEPOSIT

DOES AE HAVE TRADING AUTHORITY? YES ☒ NO ☐

AE NAME

STATE NAME AND RELATIONSHIP OF ANY THIRD PARTY (OTHER THAN AE) HOLDING TRADING AUTHORIZATION

ARE THEY EMPLOYED BY A MEMBER FIRM? YES ☐ NO ☒ IF SO, STATE NAME OF FIRM

TRADING AUTHORIZATION WILL BE LIMITED ☒ \*FULL ☐ \*GEN. PWR. OF ATTY. ☐

\*NOT ACCEPTABLE FOR BEAR, STEARNS & CO. INC. AEs.

IS THIS ACCOUNT GUARANTEED? YES ☐ NO ☒

ACCOUNT NUMBER OF GUARANTOR

AE REGISTERED IN CUSTOMER'S STATE OF RESIDENCE?

HAVE YOU SENT FORMS TO CUSTOMER?

YES ☐ NO ☒

YES ☐ NO ☒

AE SIGNATURE

TELEPHONE-EXT.

DATE

SUPERVISOR'S SIGNATURE

DATE

MANAGING DIRECTOR'S/PRINCIPAL'S SIGNATURE

DATE

002 ☐

003 ☐

008 ☐

009 ☐

011 ☐

013 ☐

SR-1A

014 ☐

015 ☐

016 ☐

017 ☐

021 ☐

022 ☐

023 ☐

024 ☐

032 ☐

033 ☐

034 ☐

048 ☐

055 ☐

065 ☐

066 ☐

076 ☐

082 ☐

083 ☐

119 ☐

120 ☐

121 ☐

SR-1A

124 ☐

125 ☐

126 ☐

OTHER

DO NOT WRITE IN THIS AREA — DOCUMENTATION DEPARTMENT USE ONLY.

REDACTED

BEAR, STEARNS &amp; CO. INC.

REPORT OF NEW ACCOUNT

1-700

CUSTOMER'S NAME IN FULL <b>Lynn A. Smith</b>		SOCIAL SECURITY NO./TAX ID. <b>REDACTED</b>		DO NOT WRITE IN THIS AREA  DOCUMENTATION DEPARTMENT USE ONLY  002 <input type="checkbox"/> 003 <input type="checkbox"/> 008 <input type="checkbox"/> 009 <input type="checkbox"/> 011 <input type="checkbox"/> 013 <input type="checkbox"/> SR-1A  014 <input type="checkbox"/> 015 <input type="checkbox"/> 016 <input type="checkbox"/> 017 <input type="checkbox"/> 021 <input type="checkbox"/> 022 <input type="checkbox"/> 023 <input type="checkbox"/> 024 <input type="checkbox"/> 032 <input type="checkbox"/> 033 <input type="checkbox"/> 034 <input type="checkbox"/> 048 <input type="checkbox"/> 055 <input type="checkbox"/> 065 <input type="checkbox"/> 066 <input type="checkbox"/> 076 <input type="checkbox"/> 082 <input type="checkbox"/> 083 <input type="checkbox"/> 119 <input type="checkbox"/> 120 <input type="checkbox"/> 121 <input type="checkbox"/> SR-TA  124 <input type="checkbox"/> 125 <input type="checkbox"/> 126 <input type="checkbox"/> OTHER																	
BUSINESS ADDRESS		BUSINESS PHONE																			
HOME ADDRESS <b>REDACTED</b> <b>Clifton Park, NY 12065</b>		HOME PHONE <b>REDACTED</b>																			
TYPE OF ENTITY (MUST CHECK ONE)																					
<table border="0"> <tr> <td>A. INDIVIDUAL <input checked="" type="checkbox"/></td> <td>G. SOLE OWNERSHIP <input type="checkbox"/></td> <td>M. INVESTMENT CLUB <input type="checkbox"/></td> </tr> <tr> <td>B. JOINT <input type="checkbox"/></td> <td>H. BANK OR TRUST CO. <input type="checkbox"/></td> <td>N. TRUST <input type="checkbox"/></td> </tr> <tr> <td>C. PARTNERSHIP <input type="checkbox"/></td> <td>I. INSURANCE CO. <input type="checkbox"/></td> <td>O. MUTUAL FUND <input type="checkbox"/></td> </tr> <tr> <td>D. CORPORATION <input type="checkbox"/></td> <td>J. STATE AGENCY <input type="checkbox"/></td> <td>P. HEDGE FUND <input type="checkbox"/></td> </tr> <tr> <td>E. TESTAMENTARY TRUST <input type="checkbox"/></td> <td>K. BROKER-DEALER <input type="checkbox"/></td> <td>Q. IRA (see over) <input type="checkbox"/></td> </tr> <tr> <td>F. OTHER (SPECIFY) <input type="checkbox"/></td> <td>L. ESTATE <input type="checkbox"/></td> <td>R. KEOGH (see over) <input type="checkbox"/></td> </tr> </table>				A. INDIVIDUAL <input checked="" type="checkbox"/>	G. SOLE OWNERSHIP <input type="checkbox"/>	M. INVESTMENT CLUB <input type="checkbox"/>	B. JOINT <input type="checkbox"/>	H. BANK OR TRUST CO. <input type="checkbox"/>	N. TRUST <input type="checkbox"/>	C. PARTNERSHIP <input type="checkbox"/>	I. INSURANCE CO. <input type="checkbox"/>	O. MUTUAL FUND <input type="checkbox"/>	D. CORPORATION <input type="checkbox"/>	J. STATE AGENCY <input type="checkbox"/>	P. HEDGE FUND <input type="checkbox"/>	E. TESTAMENTARY TRUST <input type="checkbox"/>	K. BROKER-DEALER <input type="checkbox"/>	Q. IRA (see over) <input type="checkbox"/>	F. OTHER (SPECIFY) <input type="checkbox"/>	L. ESTATE <input type="checkbox"/>	R. KEOGH (see over) <input type="checkbox"/>
A. INDIVIDUAL <input checked="" type="checkbox"/>	G. SOLE OWNERSHIP <input type="checkbox"/>	M. INVESTMENT CLUB <input type="checkbox"/>																			
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F. OTHER (SPECIFY) <input type="checkbox"/>	L. ESTATE <input type="checkbox"/>	R. KEOGH (see over) <input type="checkbox"/>																			
APPROX. ANNUAL INCOME	APPROX. NET WORTH <b>1.5 MM</b>	INVESTMENT OBJECTIVE <b>growth</b>																			
EMPLOYED BY AND OR NATURE OF BUSINESS		POSITION OR OCCUPATION																			
IS CUSTOMER EMPLOYED BY A MEMBER FIRM? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>																					
APPROXIMATE AGE OF CUSTOMER <b>45</b>		INTRODUCED TO AE BY:																			
AE KNOWN HOW LONG?		IS AE RELATED? YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> STATE RELATIONSHIP <b>wife</b>																			
MARITAL STATUS		SPOUSES'S OCCUPATION																			
BANK AND OTHER REFERENCES		DOES CUSTOMER HAVE OTHER ACCOUNTS WITH US? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> SPECIFY ACCOUNT NO.																			
ACCOUNT WILL BE TRADING —		CASH <input type="checkbox"/> MARGIN <input checked="" type="checkbox"/> COMMODITY <input type="checkbox"/>																			
IS ACCOUNT HANDLED BY AN INVESTMENT ADVISOR? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>																					
SPECIFY																					
IF OTHER THAN AN INDIVIDUAL OR JOINT ACCOUNT INDICATE PERSON AUTHORIZED TO ENTER ORDERS AND ISSUE INSTRUCTIONS:																					
INITIAL TRANSACTION		TITLE:																			
SECURITY	NO. SHARES	DEPOSIT NO. DEPOSIT																			
REASON FOR WAIVE OF DEPOSIT																					
DOES AE HAVE TRADING AUTHORITY? YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>		AE NAME																			
STATE NAME AND RELATIONSHIP OF ANY THIRD PARTY (OTHER THAN AE) HOLDING TRADING AUTHORIZATION																					
ARE THEY EMPLOYED BY A MEMBER FIRM? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> IF SO, STATE NAME OF FIRM																					
TRADING AUTHORIZATION WILL BE LIMITED <input checked="" type="checkbox"/> *FULL <input type="checkbox"/> *GEN. PWR. OF ATTY. <input type="checkbox"/> *NOT ACCEPTABLE FOR BEAR, STEARNS & CO. INC. AEs.																					
IS THIS ACCOUNT GUARANTEED? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>		ACCOUNT NUMBER OF GUARANTOR																			
AE REGISTERED IN CUSTOMER'S STATE OF RESIDENCE?		HAVE YOU SENT FORMS TO CUSTOMER?																			
YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>		YES <input type="checkbox"/> NO <input type="checkbox"/>																			
AE SIGNATURE <b>Nancy Smith</b>		SUPERVISOR'S SIGNATURE <b>Nancy Smith</b>																			
TELEPHONE EXT.		DATE																			
MANAGING DIRECTOR'S/PRINCIPAL'S SIGNATURE <b>Nancy Smith</b>		DATE <b>11/27/91</b>																			

FINED  
11/25/91OK  
11/27/91



TAX IDENTIFICATION #  
[REDACTED]  
OR  
SOCIAL SECURITY #  
[REDACTED]

BUY

**SELL**

- |                                                                       |                                                              |
|-----------------------------------------------------------------------|--------------------------------------------------------------|
| <input type="checkbox"/> 01 TRANSFER TO CUSTOMER NAME AND SHIP        | <input type="checkbox"/> 06 RECEIVE AGAINST PAYMENT          |
| <input type="checkbox"/> 02 CUSTODIAL ACCOUNT                         | <input checked="" type="checkbox"/> 07 HOLD PROCEEDS         |
| <input checked="" type="checkbox"/> 03 TRANSFER TO FIRM NAME AND HOLD | <input type="checkbox"/> 08 SEND PROCEEDS DIRECT TO CUSTOMER |
| <input type="checkbox"/> 05 USE COD NEW ACCOUNT FORM                  |                                                              |

DISPOSITION OF DIVIDENDS: 1—☐ SEND CHECK 2—☒ HOLD ☐ INCOME ACCT. ☐ DIRECT DEPOSIT

IRA OR KEOGH — DATE OF BIRTH

U.S. CITIZEN? ☒ YES ☐ NO IF NO SPECIFY COUNTRY OF CITIZENSHIP

ACCOUNT NAME AND ADDRESS

L	y	n	n	A	S	m	i	t	h
---	---	---	---	---	---	---	---	---	---

REDACTED

C	l	i	f	t	o	n		P	a	r	k		N	Y		1	2	6	0	5
---	---	---	---	---	---	---	--	---	---	---	---	--	---	---	--	---	---	---	---	---

INTERESTED PARTY # NAME AND ADDRESS: ☐ CONFIRMATIONS ☐ STATEMENTS

INTERESTED PARTY # 2 NAME AND ADDRESS: ☐ CONFIRMATIONS ☐ STATEMENTS

PLEASE ATTACH A LIST OF ANY ADDITIONAL INTERESTED PARTIES:

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION

*Plaintiff,*

vs.

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

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

*Defendants,*

LYNN A. SMITH and NANCY McGINN,

*Relief Defendants, and*

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

*Intervenor.*

---

**DEFENDANT/RELIEF DEFENDANT, LYNN A. SMITH'S RESPONSE TO  
PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS**

Defendant/Relief Defendant, Lynn A. Smith, by and through her attorneys,  
Featherstonhaugh, Wiley & Clyne, LLP, as and for a response to Plaintiff's First Set of  
Requests for Admissions:

1. Denies and refers Plaintiff to Lynn Smith's testimony at a public hearing  
held in July 2010 before the Honorable David R. Homer.

2. Denies. Please see response set forth in Request No. 1.
3. Admits that Lynn Smith maintained a brokerage account at McGinn, Smith & Co., Inc. which in 2010 was transferred to NFS/RMR Capital Management.
4. Denies. David Smith had discretionary investment authority during a period of time not known to her.
5. Denies that Lynn Smith allowed David Smith to use the stock account to further his personal and professional interests.
6. Admits that in the early 1990's the stock account acquired 40,000 shares of a predecessor to Charter One Financial, Inc. at a cost of \$10 per share.
7. Neither admits nor denies without reference to a statement, except admits that the account had value.
8. Please refer to response set forth in Request No. 7.
9. Admits, on information and belief that the Charter One stock continued to appreciate during this time.
10. Neither admits nor denies without reference to a statement.
11. Neither admits nor denies without reference to a statement.
12. Admits, except states that the shares were deposited as a loan into an account for KC Acquisition Corp.
13. Admits, except states that the shares were journaled back as repayment of a loan.
14. Lynn Smith is without knowledge on information to either admit or deny that David Smith, as the treasurer of KC Acquisition Corp. signed the letter authorizing the transfer of shares back to her.

15. Admits that \$326,304 was deposited into the stock account as a reversal of a Q-Tip Trust on advise of counsel; denies that a note receivable totaling \$410,000 was ever deposited into that account; neither admits or denies the remaining statements in Request No. 15 without reference to documents.

16. Admits that transfers were made in furtherance of estate planning.

17. Denies that the transfer from the Smiths' joint checking account to Lynn Smiths' checking account were without consideration. The monies belonged to Lynn Smith; denies that subsequent transfers from David Smith into Lynn Smith's checking account were without consideration.

18. Admits that in 2009, a house in Vero Beach, Florida was transferred to Lynn Smith but denies that said transfer was without consideration.

19. Admits that David Smith and Lynn Smith created the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 pursuant to a Declaration of Trust dated August 4, 2004.

20. Admits that the Smith Trust had no assets when it was created, but states that the Trust was funded immediately after it was created.

21. Admits that the effective date of the Private Annuity is August 31, 2004 but denies the remaining allegations in this request.

22. Denies the stock was "sold" to the Trust and states that the stock was deposited in the Trust account.

23. Admits that Lynn Smith and David Smith signed the Private Annuity Agreement.



24. Neither admits nor denies that Thomas Urbelis, the Trustee of the Smith Trust in 2004, signed the Private Annuity Agreement and refers the SEC to Docket #177 in this action.

25. Neither admits nor denies that the Private Annuity Agreement is a valid, enforceable agreement and refers the SEC to Docket #177 in this action.

26. Admits that on May 4, 2004, Charter One publicly announced that it was being acquired in an all-cash deal by Citizens Financial Group, which paid \$44.50 per share and that the deal was computed on August 31, 2004.

27. Admits that 100,000 shares of Charter One stock was transferred from Lynn Smith's stock account pursuant to a Declaration of Trust and not pursuant to the Private Annuity Agreement.

28. Admits that on the same day that 100,000 shares of Charter One stock was transferred from the Stock Account to the Smith Trust account, September 1, 2004, a cash merger occurred, resulting in the Smith Trust account being credited with \$4,450,000 in cash.

29. Denies. The amount in question was not a distribution to Geoffrey Smith but constituted a reimbursement of taxes previously paid by David Smith.

30. Admits that Lynn Smith had been named as a Defendant in a lawsuit entitled *IASG, Meyers v. Integrated Alarms Services Group, Inc. et al.*, 03-CV-09748 (S.D.N.Y.).

31. Neither admits nor denies that she was served with a Summons and Complaint entitled *IASG, Meyers v. Integrated Alarms Services Group, Inc. et al.*, 03-CV-09748 (S.D.N.Y.) since she cannot recall whether she was ever served in this action.

32. Denies that she was aware that she was named as a Defendant in *IASG, Meyers v. Integrated Alarms Services Group, Inc. et al.*, 03-CV-09748 (S.D.N.Y.) before the lawsuit was settled.

PLEASE TAKE NOTICE, that the Defendant/Relief Defendant reserves the right to supplement and/amend these responses as further discovery is conducted, or should the above information no longer be accurate during the course of this action, and further reserve the right to supplement and/or amend these responses at the conclusion of discovery and at a reasonable time prior to trial, in accordance with the CPLR.

Dated: December 13, 2011

**Featherstonhaugh, Wiley & Clyne, LLP**

By: 

Scott J. Ely

Bar Roll No. 511635

*Attorneys for Defendant/Relief Defendant*

*Lynn A. Smith*

99 Pine Street, Suite 207

Albany, NY 12207

Tel: (518) 436-0786

TO: David Stoelting  
Securities and Exchange Commission  
*Attorney for Plaintiff*  
3 World Financial Center, Room 400  
New York, NY 10281  
[stoeltingd@sec.gov](mailto:stoeltingd@sec.gov)

Kevin McGrath  
Securities and Exchange Commission  
*Attorney for Plaintiff*  
3 World Financial Center, Room 400  
New York, NY 10281  
[mcgrathk@sec.gov](mailto:mcgrathk@sec.gov)

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Dreyer Boyajian LLP  
*Attorneys for David L. Smith*  
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Albany, New York 12207  
[wdreyer@dreyerboyajian.com](mailto:wdreyer@dreyerboyajian.com)

E. Stewart Jones, Jr.  
E. Stewart Jones Law Firm  
*Attorneys for Timothy M. McGinn*  
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[esjones@esjlaw.com](mailto:esjones@esjlaw.com)

Nancy McGinn  
29 Port Huron Drive  
Schenectady, NY 12309  
[nemcginn@yahoo.com](mailto:nemcginn@yahoo.com)

William Brown, Esq.  
Phillips Lytle LLP  
*Attorneys for Receiver*  
3400 HSBC Center  
Buffalo, N.Y. 14203  
[WBrown@phillipslytle.com](mailto:WBrown@phillipslytle.com)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION

*Plaintiff,*

vs.

**AFFIDAVIT OF SERVICE**

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

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

*Defendants,*

LYNN A. SMITH and NANCY McGINN,

*Relief Defendants, and*

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

*Intervenor.*

---

STATE OF NEW YORK :  
 : ss:  
COUNT OF ALBANY :

CHRISTINE E. CRAWFORD, being duly sworn, deposes and says:

1. I am not a party to the action, am over 18 years of age and reside at  
Schenectady, New York.



2. On December 13, 2011 I served a true copy of a Defendant/Relief Defendant, Lynn A. Smith's Response to Plaintiff's First Set of Request for Admissions by electronic mail to the addressees as follows:

David Stoelting  
Securities and Exchange Commission  
*Attorney for Plaintiff*  
3 World Financial Center, Room 400  
New York, NY 10281  
[stoeltingd@sec.gov](mailto:stoeltingd@sec.gov)

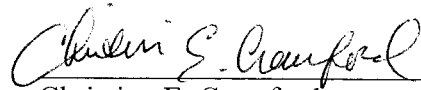
Kevin McGrath  
Securities and Exchange Commission  
*Attorney for Plaintiff*  
3 World Financial Center, Room 400  
New York, NY 10281  
[mcgrathk@sec.gov](mailto:mcgrathk@sec.gov)

William J. Dreyer  
Dreyer Boyajian LLP  
*Attorneys for David L. Smith*  
75 Columbia Place  
Albany, New York 12207  
[wdreyer@dreyerboyajian.com](mailto:wdreyer@dreyerboyajian.com)

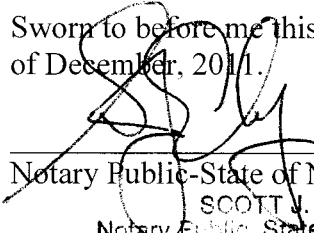
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Christine E. Crawford

Sworn to before me this 13<sup>th</sup> day  
of December, 2011.

  
Notary Public-State of New York  
SCOTT J. ELY  
Notary Public, State of New York  
No. 02EL6134512

Qualified in Rensselaer County  
Commission Expires Oct. 03, 2018

027 405 04091 11\*700\*LYNN A SMITH

03/03/92

CL F1 F2 100% 29

TEFRA 4

HOLD FRM NAME 37 CSH AVL

86,581

C/S 0

TMV

282,250

HOLD PROCEEDS HSE FX

347,662

T/E

446,449

	T/D BAL	S/D BAL	MKT VAL	HSE	EXES/CALL	EQUITY
1	86,581.90- 1	86,581.90- 1		1	86,581 1	86,581
2	74,804.26- 2	74,804.26- 2	282,250	2	344,848 2	357,054
3	2,814.06- 3	2,814.06- 3		3	2,814 3	2,814

## .. BUYING POWER ..

SMA 228,512  
 SMA USEABLE 228,512  
 VET TD BAL 164,200.22-  
 MAX CASH 1-2 315,093

STK + CONV BD 457,024  
 OPT + UNL STK 228,512  
 TREASURIES 2,285,120  
 MUNICIPAL BD 1,142,560  
 NON-CONV BD 761,699

NEW ACCT : REDACTED

SPAD ID : KEY : S/R - MENU SCREEN

027 405 04091 11\*700\*LYNN A SMITH

03/03/92

CL F1 F2 100% 29

TEFRA 4

HOLD FRM NAME 37 CSH AVL

86,581

C/S 0

TMV

282,250

HOLD PROCEEDS HSE FX

347,662

T/E

446,449

QUANTITY	DESCRIPTION	PRICE/ENTRY	AMOUNT	TC	S/D
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\*\*\*\*\* 03/02 \*\*\*\*\*

CK 00	BS UNION NATIONAL	DEP BC	9,000.00-	11	
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\*\*\*\*\* 02/28 \*\*\*\*\*

#10776-022892	DRAFT DEBIT	CHK KA	500.00	11	
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\*\*\*\*\* 02/21 \*\*\*\*\*

INT FR 01/21 THRU 02/20	7 %		19.71	29	
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BAL 86,511-	AVBAL 3,270				
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INTEREST ON CREDIT BALANCE	INT		326.90-	11	
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AT 3.000% 01/21 THRU 02/20

\*\*\*\*\* 02/18 \*\*\*\*\*

1,500	PHARMACEUTICAL RESOURCES INC	6 7/8	10,312.50	29	022592
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\*\*\*\*\* 02/14 \*\*\*\*\*

200	PHARMACEUTICAL RESOURCES INC	6 7/8	1,375.00	29	022492
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\*\*\*\*\* 02/04 \*\*\*\*\*

CK 00	BS UNION NATL BK	DEP BC	55,755.00-	11	
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NEW ACCT : REDACTED

SPAD ID : KEY : PA1-NEXT S/R-MENU

PAGE: 1

027 405 04091 11\*700\*LYNN A SMITH 03/03/92  
 CL F1 F2 100% 29 TEFRA 4  
 HOLD FRM NAME 37 CSH AVL 86,581 C/S 0 TMV 282,250  
 HOLD PROCEEDS HSE EX 347,662 T/E 446,449  
 QUANTITY DESCRIPTION PRICE/ENTRY AMOUNT TC S/D

\*\*\*\*\* 02/03 \*\*\*\*\*  
 UPJOHN CO DIV 3,400.00- 29  
 CASH DIV ON 10000 SHS  
 REC 01/08/92 PAY 02/03/92  
 \*\*\*\*\* 01/31 \*\*\*\*\*  
 DFT ISSUED A/O 1-28 #10695 DBT CC 500.00 11  
 REV ENTRY A/O 1-29 #10695 CRD CC 500.00- 11  
 3,300 PHARMACEUTICAL RESOURCES INC 6 7/8 22,687.50 29 02079:  
 \*\*\*\*\* 01/29 \*\*\*\*\*  
 #10695-012992 DRAFT DEBIT CHK KA 500.00- 11  
 2,000- PHARMACY MANAGEMENT SERVICES INC 10 1/2 21,000.00- 29 02059:  
 INC

NEW ACCT : REDACTED SPAD ID : KEY : PA2-PREV S/R-MENU PAGE: 2

027 405 04091 11\*700\*LYNN A SMITH 03/03/92  
 CL F1 F2 100% 29 TEFRA 4  
 HOLD FRM NAME 37 CSH AVL 86,581 C/S 0 TMV 282,250  
 HOLD PROCEEDS HSE EX 347,662 T/E 446,449  
 POSITION SECURITY DESCRIPTION PRICE EX DLA F/S SYM/SEC

\*\*\*TYPE 2\*\*\*  
 5,000 PHARMACEUTICAL RESOURCES INC 6.500 A 02/26/92 PRX  
 5,000 SB MV 32,500  
 6,000 UPJOHN CO 41.625 A 02/03/92 UPJ  
 6,000 SB MV 249,750

NEW ACCT : REDACTED SPAD ID : KEY : PA2-PREV S/R-MENU PAGE:



<p>1 UNITED STATES DISTRICT COURT 2 NORTHERN DISTRICT OF NEW YORK 3 * * * * * 4 SECURITIES AND EXCHANGE COMMISSION, 5 Plaintiff, 6 -vs- 10 Civ. 457 (GLS/DRH) 7 McGINN, SMITH &amp; CO., INC., 8 McGINN, SMITH ADVISORS, LLC, 9 McGINN, SMITH CAPITAL HOLDINGS CORP., 10 FIRST ADVISORY INCOME NOTES, LLC, 11 FIRST EXCELSIOR INCOME NOTES, LLC, 12 FIRST INDEPENDENT INCOME NOTES, LLC, 13 THIRD ALBANY INCOME NOTES, LLC, 14 TIMOTHY M. MCGINN, DAVID L. SMITH, 15 LYNN A. SMITH, GEOFFREY R. SMITH, 16 Individually and as Trustee of the David L. 17 and Lynn A. Smith Irrevocable Trust U/A 8/04/04, 18 LAUREN T. SMITH, and NANCY MCGINN, 19 20 Defendants, 21 22 LYNN A. SMITH, and 23 NANCY MCGINN, 24 25 Relief Defendants, and GEOFFREY R. SMITH, Trustee of the David L. And Lynn A. Smith Irrevocable Trust U/A 8/04/04, Intervenor. * * * * *</p>	<p>1 N. McGinn 2 3 INDEX 4 EXAMINATION 5 Page 6 NANCY MCGINN 7 Examination by MR. NEWVILLE 6 8 9 EXHIBITS 10 No. Description Page 11 398 Plaintiff's first request for 9 production of documents to defendant Nancy McGinn 12 399 Letter dated 10/21/2011 23 13 addressed to Honorable 14 Judge D. Homer from Eleanor and Russell Lastrup 15 400 E-mail dated October 13, 2009 33 16 from Timothy McGinn to Nancy McGinn 17 401 Series of e-mails between 35 Tim McGinn and Bonnie Sindel 18 402 Three-page document containing 39 19 quick claim deed 20 403 Document prepared by SEC 44 21 summarizing transfers from accounts in the name of Mr. McGinn to Nancy McGinn 22 404 E-mail chain between Nancy McGinn 46 23 and Timothy McGinn 24 25</p>
<p>1 N. McGinn 2 3 EXAMINATION BEFORE TRIAL of NANCY MCGINN, 4 held at Phillips Lytle, LLC, Albany, New York, 5 on November 28, 2011 before NORA B. LAMICA, 6 Court Reporter and Notary Public in and for 7 the State of New York. 8 9 APPEARANCES: 10 Attorneys for Plaintiff: 11 SECURITIES AND EXCHANGE COMMISSION 12 Attorneys at Law 13 3 World Financial Center, Room 400 14 New York, New York 10281 15 BY: JOSHUA M. NEWVILLE, ESQ. 16 BY: DAVID STOELTING, ESQ. 17 18 19 20 21 22 23 24 25</p>	<p>1 N. McGinn 2 3 405 Copies of canceled checks from 48 Timothy McGinn to Nancy McGinn and Nancy Lastrup 4 5 406 Document prepared by SEC titled 50 Nancy McGinn cash deposits into account number 0230257505 6 7 407 Records from the First National 53 Bank of Scotia for the period 3/31/2006 through 4/27/2006 8 9 408 Deposit tickets for Ms. McGinn's 56 account at First National Bank of Scotia for the period 6/2/2008 through 6/19/2008 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>



<p>1 N. McGinn</p> <p>2</p> <p>3</p> <p>4</p> <p>5 IT IS HEREBY STIPULATED by and between</p> <p>6 counsel for the respective parties that this</p> <p>7 Deposition is to be held pursuant to the</p> <p>8 provisions of the Civil Practice Law and</p> <p>9 Rules; that the presence of a Referee is</p> <p>10 waived; that the signing of the minutes is NOT</p> <p>11 waived; the filing of the transcript is</p> <p>12 waived; that the witness may be sworn by</p> <p>13 NORA B. LAMICA, Notary Public in and for the</p> <p>14 State of New York; and that all objections,</p> <p>15 except those as to form are reserved until the</p> <p>16 time of the trial.</p> <p>17</p> <p>18 * * *</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 N. McGinn</p> <p>2 A. I have.</p> <p>3 Q. When was it?</p> <p>4 A. It was nine years ago, eight years ago.</p> <p>5 You're making me really think. 2008 maybe. No, 2003.</p> <p>6 Q. And what type of proceeding was that</p> <p>7 deposition?</p> <p>8 A. It was divorce.</p> <p>9 Q. Have you ever testified under oath in any</p> <p>10 other matters?</p> <p>11 A. No.</p> <p>12 Q. Well you understand that you are under oath</p> <p>13 today; is that correct?</p> <p>14 A. Yes.</p> <p>15 Q. And that your answers will have the same</p> <p>16 effect as if we were in a courtroom with a Judge and a</p> <p>17 jury, correct?</p> <p>18 A. Yes.</p> <p>19 Q. You're not taking any medications or suffering</p> <p>20 from any sort of illness that would prevent you from</p> <p>21 testifying fully and truthfully today, are you?</p> <p>22 A. No.</p> <p>23 Q. As far as a couple of the ground rules, if you</p> <p>24 don't understand one of my questions just please let me</p> <p>25 know. And if you need to take a break at any time just</p>
<p>1 N. McGinn</p> <p>2 N A N C Y M C G I N N, having been called as a</p> <p>3 witness, being duly sworn, testified as follows:</p> <p>4 EXAMINATION</p> <p>5 BY MR. NEWVILLE:</p> <p>6 Q. Ms. McGinn, thanks for being here today.</p> <p>7 Could you state your full name and address for the record</p> <p>8 please?</p> <p>9 A. Nancy Elizabeth McGinn, REDACTED ,</p> <p>10 Waterford, New York 12188.</p> <p>11 Q. As I had mentioned earlier today, I'm</p> <p>12 Josh Newville. With me is David Stoelting. We represent</p> <p>13 the SEC in this matter. And I understand you're here</p> <p>14 today not represented by counsel; is that correct?</p> <p>15 A. That's correct.</p> <p>16 Q. You understand that you have the right to be</p> <p>17 represented by counsel in depositions such as this; is</p> <p>18 that correct?</p> <p>19 A. Yes.</p> <p>20 Q. And you understand that the transcript of the</p> <p>21 deposition today can be used for certain purposes in a</p> <p>22 trial in this action; is that correct?</p> <p>23 A. Yes.</p> <p>24 Q. Have you ever had your deposition taken</p> <p>25 before?</p>	<p>1 N. McGinn</p> <p>2 let me know and we'll see if we can take a break. Is</p> <p>3 that okay?</p> <p>4 A. Sure.</p> <p>5 Q. The court reporter here is transcribing</p> <p>6 everything that we say. It's important that she has a</p> <p>7 clear record so I'd appreciate it if you would let me</p> <p>8 finish my questions before answering the questions. If</p> <p>9 you wish you'll have the opportunity to review the</p> <p>10 transcript to make sure it's accurate before signing it.</p> <p>11 Do you understand that?</p> <p>12 A. Yes.</p> <p>13 Q. What did you do to prepare for your deposition</p> <p>14 today?</p> <p>15 A. Well I didn't even have too much to prepare.</p> <p>16 I know you wanted documents or bank statements and I</p> <p>17 believe that you have all of those already. I don't have</p> <p>18 anything of my own.</p> <p>19 Q. Did you speak to anybody in anticipation of</p> <p>20 the deposition today?</p> <p>21 A. No.</p> <p>22 Q. Did you review any documents that you were in</p> <p>23 possession of in preparation for the deposition?</p> <p>24 A. I don't have any documents so I couldn't</p> <p>25 review.</p>



<p>1 N. McGinn</p> <p>2 Q. Is there anything else that you did to</p> <p>3 prepare?</p> <p>4 A. Not really.</p> <p>5 Q. Does anyone know you're here?</p> <p>6 A. Yeah.</p> <p>7 Q. Who does?</p> <p>8 A. My husband, my parents, family.</p> <p>9 Q. When did you tell them you were coming here to</p> <p>10 testify?</p> <p>11 A. They were at my house for dinner last night.</p> <p>12 My mother was asking what I was doing today so that's why</p> <p>13 I told her what I had to do.</p> <p>14 Q. Did you discuss the substance at all?</p> <p>15 A. Oh no. No.</p> <p>16 (Exhibit 398 marked for identification.)</p> <p>17 Q. Ms. McGinn, I'm handing you what's been marked</p> <p>18 Plaintiff's Exhibit 398. It's a document entitled</p> <p>19 plaintiff's first request for production of documents to</p> <p>20 defendant Nancy McGinn. Do you see the document? Do you</p> <p>21 see that the request is dated September 17, 2010 from</p> <p>22 Mr. Stoelting of the Securities and Exchange Commission?</p> <p>23 A. Mm-hmm.</p> <p>24 Q. And I just ask that when you respond to the</p> <p>25 questions you provide either a "yes" or "no" answer so</p>	<p>1 N. McGinn</p> <p>2 A. Mm-hmm.</p> <p>3 Q. Did you search for documents potentially</p> <p>4 responsive to that request?</p> <p>5 A. Yes. However I didn't have any documents.</p> <p>6 Q. Okay. Request number two concerns documents</p> <p>7 concerning any transfer of money, stocks or other assets</p> <p>8 to any McGinn Smith entity from you or any member of your</p> <p>9 immediate family. Did you search for documents</p> <p>10 responsive to that request?</p> <p>11 A. I wouldn't have had any anyway so there was no</p> <p>12 need to search.</p> <p>13 Q. And I take it that your response to all the</p> <p>14 documents requested is that you don't have any --</p> <p>15 A. Yeah, I just don't have any. That is correct.</p> <p>16 The thing obviously I would have had was the house and I</p> <p>17 sold it so there's no need for documents for that either.</p> <p>18 Q. Request number nine asked for documents</p> <p>19 sufficient to identify all bank, brokerage and other</p> <p>20 investment accounts held at any time in your name or for</p> <p>21 your benefit. Do you see that request?</p> <p>22 A. Mm-hmm. I do.</p> <p>23 Q. And do you currently maintain any bank</p> <p>24 accounts or brokerage accounts?</p> <p>25 A. I have a bank account, however it's a new bank</p>
<p>1 N. McGinn</p> <p>2 she can accurately transcribe it for the record.</p> <p>3 A. Okay.</p> <p>4 Q. Do you recognize this document?</p> <p>5 A. I believe so. It's been a while but yes, I</p> <p>6 think I do.</p> <p>7 Q. Does Exhibit 398 appear to be the request for</p> <p>8 production that was sent to you in September of 2010?</p> <p>9 A. Yes.</p> <p>10 Q. And does this appear to be the same document</p> <p>11 that I sent you by e-mail last week?</p> <p>12 A. Yes.</p> <p>13 Q. You've reviewed this document before, have you</p> <p>14 not?</p> <p>15 A. I have.</p> <p>16 Q. You'll see that the request has a variety of</p> <p>17 categories of documents starting on page four under the</p> <p>18 heading "documents requested". Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. The first request asked for all documents</p> <p>21 concerning any transfer from McGinn Smith or any</p> <p>22 McGinn Smith entity of money, stocks or any other asset</p> <p>23 to you or any member of your immediate family including</p> <p>24 but not limited to property located at 26 Port Huron</p> <p>25 Drive, Niskayuna, New York. Do you see that request?</p>	<p>1 N. McGinn</p> <p>2 account since all of this.</p> <p>3 Q. And where is that new bank account maintained?</p> <p>4 A. TD Bank.</p> <p>5 Q. During the 2003 to the 2010 time period did</p> <p>6 you maintain any other bank accounts?</p> <p>7 A. I had First National Bank of Scotia which is</p> <p>8 the one that I believe that they got the documents from.</p> <p>9 Q. Any other bank accounts?</p> <p>10 A. No.</p> <p>11 Q. Was there a credit union account that you</p> <p>12 maintained?</p> <p>13 A. Oh, SEFCU?</p> <p>14 Q. SEFCU.</p> <p>15 A. I thought I had closed that at that point. If</p> <p>16 I had not it was just open, not used.</p> <p>17 Q. Do you currently have any brokerage accounts?</p> <p>18 A. I do not.</p> <p>19 Q. Did you have any brokerage accounts during the</p> <p>20 2003 to 2010 time period?</p> <p>21 A. No, I did not.</p> <p>22 Q. Any other investment accounts or retirement</p> <p>23 accounts, anything of that nature?</p> <p>24 A. Not to my knowledge. I had when I was working</p> <p>25 but then I didn't work at that point so I didn't have</p>



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<p>1 N. McGinn</p> <p>2 anything, no.</p> <p>3 Q. When did you stop working?</p> <p>4 A. I stopped in -- dates are what really kills me</p> <p>5 -- 2004, maybe it was 2003. I still had the SEFCU.</p> <p>6 That's when I was working I had the SEFCU accounts.</p> <p>7 Q. Where were you employed?</p> <p>8 A. The New York State Legislature.</p> <p>9 Q. What did you do?</p> <p>10 A. I was the majority leader's, one of his</p> <p>11 secretaries.</p> <p>12 Q. And who was the majority leader?</p> <p>13 A. Joseph Bruno.</p> <p>14 Q. How long did you work for Mr. Bruno?</p> <p>15 A. About six years. I started in 1999 so --</p> <p>16 maybe it was '98. I'd really have to look in my records.</p> <p>17 I just don't -- I didn't really think much about it</p> <p>18 time-wise.</p> <p>19 Q. That's fine. We're just trying to get your</p> <p>20 best recollection. So your employment for Mr. Bruno</p> <p>21 ended around the 2004 time period; is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. Have you had any employment since then?</p> <p>24 A. Just recently. Last year I started working,</p> <p>25 last September.</p>	<p>1 N. McGinn</p> <p>2 A. I worked at a place -- it was called</p> <p>3 Capotia (phonetic). It was a debt-reducing company. I</p> <p>4 was only there for a short time. Prior to that I was</p> <p>5 raising children so I would waitress and things like</p> <p>6 that.</p> <p>7 Q. You understand that one of the reasons we're</p> <p>8 here today is because of events that happened involving</p> <p>9 your husband, Tim McGinn. Do you understand that?</p> <p>10 A. Yes, I do.</p> <p>11 Q. Are you currently married to Mr. McGinn?</p> <p>12 A. Yes.</p> <p>13 Q. Roughly when did you get married to</p> <p>14 Mr. McGinn?</p> <p>15 A. July 19, 2006.</p> <p>16 Q. And do you currently reside with Mr. McGinn?</p> <p>17 A. Yes, I do.</p> <p>18 Q. How long have you lived together?</p> <p>19 A. It was eight years in October when we bought</p> <p>20 the house.</p> <p>21 Q. And roughly when did you buy the house?</p> <p>22 A. I think it was October of -- it was eight</p> <p>23 years ago, '04 or '03. I forget when the house was</p> <p>24 purchased.</p> <p>25 Q. You're referring to the house in Niskayuna?</p>
<p>1 N. McGinn</p> <p>2 Q. Where do you currently work?</p> <p>3 A. It's called The Mansion Inn and it's a bed and</p> <p>4 breakfast.</p> <p>5 Q. Where is it located?</p> <p>6 A. Rock City Falls.</p> <p>7 Q. What do you do there?</p> <p>8 A. I'm an innkeeper. We do events, we do</p> <p>9 weddings, things like that. It's my niece through</p> <p>10 marriage, it's her family's place. I'm currently not</p> <p>11 working there now. They're closed during the winter so</p> <p>12 just summertimes.</p> <p>13 Q. And who owns the bed and breakfast?</p> <p>14 A. My nephew's wife's family.</p> <p>15 Q. Could you identify their names just for the</p> <p>16 record?</p> <p>17 A. The last name is Wojidka. It's</p> <p>18 Jeffrey Wojidka, the father.</p> <p>19 COURT REPORTER: Could you spell that?</p> <p>20 THE WITNESS: I could try. It's</p> <p>21 W-O-J-I-D-K-A.</p> <p>22 Q. What is your educational background?</p> <p>23 A. Just high school.</p> <p>24 Q. And where were you employed prior to the time</p> <p>25 you worked for Mr. Bruno in the State Legislature?</p>	<p>1 N. McGinn</p> <p>2 A. Yes, I am.</p> <p>3 Q. Did you have any involvement in the business</p> <p>4 affairs of McGinn Smith?</p> <p>5 A. No, I did not.</p> <p>6 Q. Were you ever employed by McGinn Smith?</p> <p>7 A. No, I was not.</p> <p>8 Q. Were you ever on the payroll for any purposes</p> <p>9 such as health insurance or anything like that?</p> <p>10 A. No.</p> <p>11 Q. Did you ever have any role with any company</p> <p>12 that was affiliated with McGinn Smith?</p> <p>13 A. No.</p> <p>14 Q. Did you ever have any role with any company</p> <p>15 that was affiliated with your husband, Mr. McGinn?</p> <p>16 A. No.</p> <p>17 Q. During the period of your marriage, did</p> <p>18 Mr. McGinn keep you up-to-date on business affairs of</p> <p>19 McGinn Smith at all?</p> <p>20 A. No. I never got involved in any of that at</p> <p>21 all.</p> <p>22 Q. Did he ever tell you anything about how the</p> <p>23 business was going or what kinds of things that they were</p> <p>24 working on?</p> <p>25 A. No.</p>





<p>1 N. McGinn</p> <p>2 Q. During the 2003 to 2010 time period, what</p> <p>3 properties did either you or Mr. McGinn have an interest</p> <p>4 in?</p> <p>5 A. The Niskayuna home and the Florida home.</p> <p>6 Q. Do you currently own the Florida home?</p> <p>7 A. Yes, I believe I'm -- when we purchased it,</p> <p>8 yes.</p> <p>9 Q. Do you currently own the Florida home as joint</p> <p>10 tenants or does one or the other of you --</p> <p>11 A. Joint.</p> <p>12 Q. I'd like to ask you some questions about the</p> <p>13 period of time you and Mr. McGinn co-habitated prior to</p> <p>14 the time you were married.</p> <p>15 A. Okay.</p> <p>16 Q. During that period of time who provided the</p> <p>17 household income for your household?</p> <p>18 A. Well I was still working when I moved in so it</p> <p>19 was a combination. And then of course after when I</p> <p>20 stopped working he did.</p> <p>21 Q. And where was Mr. McGinn employed when you</p> <p>22 began co-habitating?</p> <p>23 A. McGinn Smith.</p> <p>24 Q. Do you recall Mr. McGinn being employed at</p> <p>25 IASG?</p>	<p>1 N. McGinn</p> <p>2 changed.</p> <p>3 Q. So after the -- after you got married would it</p> <p>4 be fair to say during the period of your marriage</p> <p>5 Mr. McGinn provided the household income for the both of</p> <p>6 you?</p> <p>7 A. Yes.</p> <p>8 Q. After you got married who was responsible for</p> <p>9 paying the household bills?</p> <p>10 A. He was.</p> <p>11 Q. Who was responsible for paying other changes</p> <p>12 that weren't related to household bills?</p> <p>13 A. He was.</p> <p>14 Q. Did Mr. McGinn tell you anything about his</p> <p>15 transition from IASG back to McGinn Smith full-time?</p> <p>16 A. No. I mean not really. He probably mentioned</p> <p>17 that it was going to happen. I never got involved in any</p> <p>18 of the business portion because I really didn't know it.</p> <p>19 It was not my field per se so I -- I had three children</p> <p>20 so I was doing my own thing. I also had a brother who</p> <p>21 was very ill that I took care of so I was really quite</p> <p>22 busy myself.</p> <p>23 Q. Did your brother reside with you?</p> <p>24 A. No, but I used to go -- he was at my parent's</p> <p>25 and I would go there every day all day so that consumed a</p>
<p>1 N. McGinn</p> <p>2 A. Yes, he did. I'm sorry about that. He did</p> <p>3 leave McGinn Smith and worked at IASG.</p> <p>4 Q. Do you recall at some point Mr. McGinn left</p> <p>5 IASG and returned to McGinn Smith full-time?</p> <p>6 A. Yes, I do.</p> <p>7 Q. Do you recall roughly when that occurred?</p> <p>8 A. Oh boy, I don't really recall dates. I recall</p> <p>9 the transition but not the dates.</p> <p>10 Q. Okay. Would it seem fair to understand that</p> <p>11 the transition occurred at some point a couple of years</p> <p>12 after you began living together?</p> <p>13 A. Yes.</p> <p>14 Q. During the period of time prior to your</p> <p>15 marriage who was responsible for paying household bills?</p> <p>16 A. Well we both did while I was working. As I</p> <p>17 said, when I stopped working I didn't have an income so</p> <p>18 he did.</p> <p>19 Q. After you stopped working how did you obtain</p> <p>20 money for whatever purposes you needed it?</p> <p>21 A. He would give me money.</p> <p>22 Q. After you got married did that arrangement</p> <p>23 change at all?</p> <p>24 A. No, not really. I mean I had credit cards,</p> <p>25 typical way of purchasing things. Nothing really</p>	<p>1 N. McGinn</p> <p>2 lot of my time.</p> <p>3 Q. Where did your parents reside?</p> <p>4 A. Troy, New York.</p> <p>5 Q. Who are your parents?</p> <p>6 A. Eleanor and Russell Lastrup.</p> <p>7 COURT REPORTER: What is the last name?</p> <p>8 THE WITNESS: L-A-U-S-T-R-U-P.</p> <p>9 Q. Lastrup is your maiden name, correct?</p> <p>10 A. My maiden name, yes.</p> <p>11 Q. Are you familiar at all with the fact that the</p> <p>12 SEC's case focuses in part on a variety of debt offerings</p> <p>13 that Mr. Smith put together?</p> <p>14 A. Only from what I've read. Other than that I</p> <p>15 don't know. It's just from what I read.</p> <p>16 Q. What is it that you've read?</p> <p>17 A. I -- more so just the names of what you're</p> <p>18 naming on there. I myself don't know anything about them</p> <p>19 as well so just what I'm reading is what everybody else</p> <p>20 is reading.</p> <p>21 Q. Are you referring to news articles that have</p> <p>22 been in the press recently?</p> <p>23 A. Yeah, getting these in the mail.</p> <p>24 Q. Did you receive a copy of the SEC's complaint</p> <p>25 in this matter?</p>



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<p>21</p> <p>1 N. McGinn</p> <p>2 A. Yes.</p> <p>3 Q. And you received a copy of the SEC's complaint</p> <p>4 that names you as a relief defendant; is that correct?</p> <p>5 A. Yes.</p> <p>6 Q. Did you prepare and file an answer to the</p> <p>7 SEC's complaint that named you as a relief defendant?</p> <p>8 A. Yes.</p> <p>9 Q. Do you recall roughly when that was filed?</p> <p>10 A. It couldn't have been too long after they came</p> <p>11 into my home. So I don't know exactly the time but I do</p> <p>12 remember doing it.</p> <p>13 Q. Do you recall that there was a second amended</p> <p>14 complaint prepared by the SEC in this case?</p> <p>15 A. No. I guess I just -- I don't know because I</p> <p>16 don't know a lot of this stuff. So if it came in the</p> <p>17 mail -- I know I spoke to David Stoelting one day. I</p> <p>18 think that's when I did the answer.</p> <p>19 Q. Do you recall preparing a separate answer to</p> <p>20 the second version of the SEC's complaint?</p> <p>21 A. I'm not sure if I recall doing the second one.</p> <p>22 I just -- if I was asked to do it I would just do it.</p> <p>23 Q. So earlier we were talking about four debt</p> <p>24 offerings that McGinn Smith put together. Do you recall</p> <p>25 that? The names of the debt offering are the First</p>	<p>23</p> <p>1 N. McGinn</p> <p>2 those trust offerings. Do you understand that?</p> <p>3 A. Yes.</p> <p>4 Q. Did you have any investments personally in any</p> <p>5 of the trust offerings?</p> <p>6 A. No.</p> <p>7 Q. Were there any investments in any of the trust</p> <p>8 offerings made on your behalf?</p> <p>9 A. No.</p> <p>10 Q. Any investments made for your benefit?</p> <p>11 A. Not to my knowledge.</p> <p>12 Q. Did you have any family members that were</p> <p>13 invested in any of the McGinn Smith trusts?</p> <p>14 A. I don't know. Not to my knowledge. I don't</p> <p>15 know what they were invested in if at all so I just don't</p> <p>16 -- I wouldn't know any portion of that at all.</p> <p>17 (Exhibit 399 marked for identification.)</p> <p>18 Q. I just handed you what's been marked as</p> <p>19 Exhibit 399.</p> <p>20 A. Oh okay. I didn't know this was part of it so</p> <p>21 I wouldn't have known where their money was.</p> <p>22 Q. Just take a look at the letter. It reports to</p> <p>23 be a letter dated October 21, 2011 addressed to Honorable</p> <p>24 Judge D. Homer from Eleanor and Russell Lastrup. Do you</p> <p>25 see that?</p>
<p>22</p> <p>1 N. McGinn</p> <p>2 Independent Income Notes, First Excelsior Income Notes,</p> <p>3 Third Albany Income Notes and First Advisory Income</p> <p>4 Notes. Do you understand that?</p> <p>5 A. Yes.</p> <p>6 Q. Did you have any investments in those</p> <p>7 offerings?</p> <p>8 A. No, I did not.</p> <p>9 Q. Were any investments in those debt offerings</p> <p>10 made on your behalf or for your benefit?</p> <p>11 A. No.</p> <p>12 Q. Did you have any family members that had</p> <p>13 investments in those debt offerings?</p> <p>14 A. I don't believe so.</p> <p>15 Q. Did your husband invest in those funds?</p> <p>16 A. I have no idea.</p> <p>17 Q. Would it be fair to say that you don't have</p> <p>18 any personal knowledge concerning those four funds?</p> <p>19 A. That's correct.</p> <p>20 Q. Do you understand that the SEC's complaint</p> <p>21 also focuses on a number of trust offerings that were</p> <p>22 marketed by McGinn Smith?</p> <p>23 A. Yes.</p> <p>24 Q. And you understand that the SEC has alleged</p> <p>25 that your husband, Mr. McGinn, played a role in preparing</p>	<p>24</p> <p>1 N. McGinn</p> <p>2 A. Mm-hmm.</p> <p>3 Q. Have you seen Exhibit 399 before?</p> <p>4 A. I personally haven't seen it, no.</p> <p>5 Q. Eleanor and Russell Lastrup are your parents,</p> <p>6 correct?</p> <p>7 A. That's right.</p> <p>8 Q. Do you see that the first line of the letter</p> <p>9 says, "My husband and myself had our life savings in the</p> <p>10 amount of \$45,000 invested with McGinn Smith." Do you</p> <p>11 see that?</p> <p>12 A. I do.</p> <p>13 Q. At any time did you understand that your</p> <p>14 parents had their life savings invested with</p> <p>15 McGinn Smith?</p> <p>16 A. I thought you were referring to those specific</p> <p>17 things that you told me and I wouldn't have known what</p> <p>18 was what.</p> <p>19 Q. Okay. We'll backup a little.</p> <p>20 A. Okay.</p> <p>21 Q. Did you understand at some point in time that</p> <p>22 your parents invested in some McGinn Smith products?</p> <p>23 A. Yes.</p> <p>24 Q. Did you have any knowledge about what products</p> <p>25 those were?</p>



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<p>25</p> <p>1 N. McGinn</p> <p>2 A. No, I didn't.</p> <p>3 Q. Did you have any understanding about how your</p> <p>4 parents came to invest in McGinn Smith products?</p> <p>5 A. Yes.</p> <p>6 Q. What happened?</p> <p>7 A. Well being that Tim is my husband that's what</p> <p>8 they decided, to ask him where they should invest their</p> <p>9 money and that's how that came about.</p> <p>10 Q. And what did your husband tell them?</p> <p>11 A. He said yes, he could do that, but to my</p> <p>12 knowledge I didn't think this was part of any of what the</p> <p>13 SEC is investigating.</p> <p>14 Q. And what is that understanding based on?</p> <p>15 A. Wherever their money -- I don't know about</p> <p>16 this as well. I just -- I don't have knowledge as to</p> <p>17 where it is or what it's involved in.</p> <p>18 Q. Have you ever spoke to your parents about the</p> <p>19 funds they invested in McGinn Smith?</p> <p>20 A. They have inquired as to where it might be. I</p> <p>21 know they were trying to call the receiver and they can't</p> <p>22 get any feedback from him so that must be why they sent</p> <p>23 the letter.</p> <p>24 Q. Did they ever ask you about it?</p> <p>25 A. No, because they know I don't know anything</p>	<p>27</p> <p>1 N. McGinn</p> <p>2 from your parents. It refers to \$45,000 in TDM '06 cable</p> <p>3 bond. Do you see that?</p> <p>4 A. Mm-hmm.</p> <p>5 Q. What if anything do you know about the TDM '06</p> <p>6 cable bond?</p> <p>7 A. I don't know anything about that.</p> <p>8 Q. Do you have any other knowledge about any</p> <p>9 other investments that your parents have maintained?</p> <p>10 A. I do not.</p> <p>11 Q. Do you have any other family members that had</p> <p>12 McGinn Smith Brokers as their financial advisors or</p> <p>13 brokers?</p> <p>14 A. I believe I have a sister who does.</p> <p>15 Q. What is your sister's name?</p> <p>16 A. Sandy Bejian, B-E-J-I-A-N.</p> <p>17 Q. Do you know what type of investments she had</p> <p>18 in McGinn Smith products?</p> <p>19 A. I do not.</p> <p>20 Q. Do you have any idea whether she had invested</p> <p>21 in stocks or bonds or structured products or trusts or</p> <p>22 funds?</p> <p>23 A. I really don't know that answer.</p> <p>24 Q. Have you ever discussed it with her?</p> <p>25 A. No. She once said, geez, I'm just curious</p>
<p>26</p> <p>1 N. McGinn</p> <p>2 about it. I was never involved in that business at all.</p> <p>3 Q. Did they ever ask your husband about the</p> <p>4 investment that they made?</p> <p>5 A. I don't think so. I don't think they would do</p> <p>6 that.</p> <p>7 Q. Do you have any understanding why they</p> <p>8 wouldn't do that?</p> <p>9 A. Probably just because it is under</p> <p>10 investigation. They wouldn't want to get involved.</p> <p>11 Q. What about prior to the time the SEC became</p> <p>12 involved? Do you recall any conversations between your</p> <p>13 parents and anyone about the status of their investment?</p> <p>14 A. No. They just trusted Tim as to what he was</p> <p>15 doing so they didn't have to really inquire.</p> <p>16 Q. Is it your understanding that your parents</p> <p>17 received all payments of interest that they were</p> <p>18 anticipating from their investment in McGinn Smith</p> <p>19 products prior to the time the SEC filed its lawsuit?</p> <p>20 A. I wouldn't have any knowledge of that.</p> <p>21 Q. Have you ever spoken to your husband about the</p> <p>22 status of your parents' investment in the McGinn Smith</p> <p>23 trust they invested in?</p> <p>24 A. No.</p> <p>25 Q. Take a look at Exhibit 399. It's the letter</p>	<p>28</p> <p>1 N. McGinn</p> <p>2 about it but I have no idea. I never knew anything about</p> <p>3 any of it. I think she also probably tried to call the</p> <p>4 receiver.</p> <p>5 Q. Did she ever ask whether she could talk to</p> <p>6 your husband about the status of her investment?</p> <p>7 A. I don't think she would speak to him about it</p> <p>8 under the circumstances.</p> <p>9 Q. And why is that?</p> <p>10 A. Just because of the investigation.</p> <p>11 Q. In your parent's letter, Exhibit 399, do you</p> <p>12 have any understanding as to why they didn't state that</p> <p>13 Tim McGinn is their son-in-law in the letter?</p> <p>14 A. I don't know why that would make a difference</p> <p>15 if they stated that. I don't know why. I think they</p> <p>16 just wanted to keep it simple. I would assume that if</p> <p>17 anyone wanted to know who they were they could pretty</p> <p>18 much find that out pretty quickly.</p> <p>19 Q. To your knowledge, did your parents ever try</p> <p>20 to redeem the investment they had in the TDM '06 cable</p> <p>21 bond?</p> <p>22 A. I wouldn't have any idea.</p> <p>23 Q. Do you know anything about what happened to</p> <p>24 the funds that were raised for the TDM bonds?</p> <p>25 A. I have no idea.</p>



<p>29</p> <p>1 N. McGinn</p> <p>2 Q. Are you familiar with a company called Cruise</p> <p>3 Charter Ventures?</p> <p>4 A. Just from reading like everyone else has. I</p> <p>5 was not familiar with that, no.</p> <p>6 Q. Prior to the time the SEC filed its lawsuit,</p> <p>7 you had no knowledge concerning a company called Cruise</p> <p>8 Charter Ventures?</p> <p>9 A. That's correct.</p> <p>10 Q. Are you familiar with a company called</p> <p>11 You Only Live Once or YOLO Cruises?</p> <p>12 A. No. I was never familiar with that either.</p> <p>13 Q. Are you acquainted with a woman by the name of</p> <p>14 Marlene Russell?</p> <p>15 A. I know who she is.</p> <p>16 Q. How do you know her?</p> <p>17 A. I actually know her through a good friend of</p> <p>18 mine from years ago. That's all I know her by.</p> <p>19 Q. How long have you been acquainted with</p> <p>20 Ms. Russell?</p> <p>21 A. Probably twelve, thirteen years.</p> <p>22 Q. Do you have any understanding what role she</p> <p>23 played at McGinn Smith?</p> <p>24 A. If I remember correctly, she started as a</p> <p>25 secretary of some sort. That's all I know.</p>	<p>31</p> <p>1 N. McGinn</p> <p>2 cruise business?</p> <p>3 A. No, I did not.</p> <p>4 Q. Did you have -- I'll withdraw that. Did you</p> <p>5 ever discuss with your husband the investigation by FINRA</p> <p>6 into the affairs of McGinn Smith?</p> <p>7 A. Once again, I didn't know anything about any</p> <p>8 of that so it was never discussed.</p> <p>9 Q. Did you understand that your husband had to</p> <p>10 testify at certain points in time in FINRA</p> <p>11 investigations?</p> <p>12 A. I did know that, yes, but I didn't know</p> <p>13 anything about it, just the fact that he was testifying.</p> <p>14 Q. When did you learn that?</p> <p>15 A. Prior to just testifying so whenever that was.</p> <p>16 I just don't pay attention to the dates into what he does</p> <p>17 in his business life.</p> <p>18 Q. And were there a number of occasions you</p> <p>19 learned he was testifying?</p> <p>20 A. Yeah. Yes, because he had to travel, so he</p> <p>21 would tell me he was going to testify for travel.</p> <p>22 Q. What did your husband tell you about the --</p> <p>23 about his testimony in any of these actions?</p> <p>24 A. He didn't tell me a lot. As I said, I was</p> <p>25 taking care of a brother that was very, very ill and I</p>
<p>30</p> <p>1 N. McGinn</p> <p>2 Q. Do you recall that at some point Ms. Russell</p> <p>3 moved to Florida to work in the cruise business?</p> <p>4 A. Yes, I do.</p> <p>5 Q. When did you learn about that?</p> <p>6 A. Probably just when she got offered the</p> <p>7 position. I knew she lived in Florida at one point.</p> <p>8 Q. How did you learn she got offered the</p> <p>9 position?</p> <p>10 A. I think actually my girlfriend who is a good</p> <p>11 friend of hers, she probably called me up and said she</p> <p>12 was moving back to Florida and that's how I learned it.</p> <p>13 Q. Do you keep in touch with her at all?</p> <p>14 A. No, I do not.</p> <p>15 Q. Did you keep in touch with her after the time</p> <p>16 you learned she was moving to Florida?</p> <p>17 A. No, I did not.</p> <p>18 Q. Did you learn anything at all about the</p> <p>19 business of You Only Live Once Cruises?</p> <p>20 A. No.</p> <p>21 Q. Did your husband ever tell you about</p> <p>22 McGinn Smith's involvement in the cruise line industry?</p> <p>23 A. No, he did not.</p> <p>24 Q. You didn't ever hear about the McGinn Smith</p> <p>25 investments in Cruise Charter Ventures or any other</p>	<p>32</p> <p>1 N. McGinn</p> <p>2 was very concerned with that.</p> <p>3 Q. Were you aware of various customer</p> <p>4 arbitrations and complaints that were filed against</p> <p>5 McGinn Smith during the last few years of its existence?</p> <p>6 A. I don't think I was aware until I saw it on</p> <p>7 paper. I didn't know anything about his business or</p> <p>8 anything that was going on.</p> <p>9 Q. When did you see that on paper?</p> <p>10 A. I probably just saw things come in in the</p> <p>11 mail. I really didn't know what it was about. I didn't</p> <p>12 open it. He probably just left papers laying around.</p> <p>13 But like I said, I just -- I don't -- never got involved</p> <p>14 in any part of the business simply because I didn't</p> <p>15 understand any of that.</p> <p>16 Q. What kind of papers did he have laying around?</p> <p>17 A. I think it was just copies like you see these</p> <p>18 of the complaints and things like that.</p> <p>19 Q. Did you ever ask him about it?</p> <p>20 A. No.</p> <p>21 Q. Did he ever tell you anything about the</p> <p>22 complaints that were being filed?</p> <p>23 A. He didn't tell me anything about the</p> <p>24 complaints themselves but he did tell me that he had to</p> <p>25 go and testify at a deposition or something like that but</p>



<p>1 N. McGinn</p> <p>2 we never discussed the complaints or the reasons.</p> <p>3 (Exhibit 400 marked for identification.)</p> <p>4 Q. I'm handing you a one-page document marked</p> <p>5 Exhibit 400. It appears to be an e-mail dated</p> <p>6 October 13, 2009 from Timothy McGinn to Nancy McGinn. Do</p> <p>7 you recognize Exhibit 400?</p> <p>8 A. No, not really, but I guess I see it now.</p> <p>9 Obviously I see.</p> <p>10 Q. Is ncmcginn@yahoo.com an e-mail address that</p> <p>11 you use?</p> <p>12 A. Yes. That's mine.</p> <p>13 Q. Do you have any reason to believe that you</p> <p>14 didn't receive this e-mail, Exhibit 400?</p> <p>15 A. Oh no. I'm sure I received it.</p> <p>16 Q. I just note for the record that Mr. McGinn</p> <p>17 wrote an e-mail, "Lex is a very poor witness. We have</p> <p>18 important points to make. David and I will do so</p> <p>19 Thursday and Friday. I hate the retail business." Do</p> <p>20 you see that?</p> <p>21 A. I do.</p> <p>22 Q. Do you recall anything about the testimony</p> <p>23 that was occurring on or about October 13, 2009?</p> <p>24 A. I do not.</p> <p>25 Q. Was it common for Mr. McGinn to update you on</p>	<p>1 N. McGinn</p> <p>2 Q. Do you recall at some point in time</p> <p>3 McGinn Smith had to cease operating as a retail</p> <p>4 broker/dealer?</p> <p>5 A. You mean when they just put a stop to</p> <p>6 something they were doing? I recall that.</p> <p>7 Q. You're referring to -- are you referring to</p> <p>8 the SEC case or are you referring to something else?</p> <p>9 A. I have no idea what I'm referring to. It was</p> <p>10 a tough time in my life. As I said, I had a brother that</p> <p>11 passed away as well after I was taking care of him so</p> <p>12 there was a lot going on, and then five months later this</p> <p>13 happened. It was a very difficult time in my life. I</p> <p>14 didn't pay any attention to what was going on in Tim's</p> <p>15 life.</p> <p>16 Q. Your brother passed around October or November</p> <p>17 2009?</p> <p>18 A. November.</p> <p>19 Q. November?</p> <p>20 A. Yes.</p> <p>21 (Exhibit 401 marked for identification.)</p> <p>22 Q. Again, I'm handing you a three-page document</p> <p>23 that's been marked as Exhibit 401. It's a series of</p> <p>24 e-mails that appear to be between your husband,</p> <p>25 Tim McGinn, and a woman named Bonnie Sindel at Coldwell</p>
<p>1 N. McGinn</p> <p>2 the testimony in these actions?</p> <p>3 A. He never did it often. Maybe it was because</p> <p>4 it was Lex. I don't even know who Lex is. I only know</p> <p>5 him by name. And apparently he was just giving me an</p> <p>6 update and that's all I -- looking at this, I wouldn't</p> <p>7 even recall ever seeing this until right now because I</p> <p>8 probably saw it and then deleted it.</p> <p>9 Q. Do you have any understanding about what he</p> <p>10 means by "Lex was a very poor witness"?</p> <p>11 A. I'm just assuming he didn't like what he said.</p> <p>12 Not much more. That pretty much sums it up.</p> <p>13 Q. And Mr. McGinn also stated, "We have important</p> <p>14 points to make. David and I will do so Thursday and</p> <p>15 Friday." Do you recall anything about that?</p> <p>16 A. No. They probably were -- maybe were out of</p> <p>17 town, just letting me know he was going to do that</p> <p>18 Thursday and Friday. I don't really recall.</p> <p>19 Q. Do you recall anything about an arbitration</p> <p>20 that was filed by an investor by the name of Chang?</p> <p>21 A. No, I do not.</p> <p>22 Q. Do you recall in December 2009 an arbitration</p> <p>23 award was granted in favor of the Chang's against the</p> <p>24 McGinn Smith entity?</p> <p>25 A. No, I don't.</p>	<p>1 N. McGinn</p> <p>2 Banker. Do you see that?</p> <p>3 A. Mm-hmm.</p> <p>4 Q. Have you seen any of these e-mails in</p> <p>5 Exhibit 401?</p> <p>6 A. I haven't, but I do know who Bonnie Sindel is.</p> <p>7 Q. Who is she?</p> <p>8 A. We -- when we were able to sell the house with</p> <p>9 Bill Brown, he wanted two different realtors to come in</p> <p>10 and she was the one, this realtor and the woman who</p> <p>11 actually sold my house. Oh, this was the first time,</p> <p>12 November '09. I'm trying to think. This I think -- got</p> <p>13 her name through a friend of ours and we were trying to</p> <p>14 get an idea what the house would sell for. That's all I</p> <p>15 could think.</p> <p>16 Q. That was around November 2009?</p> <p>17 A. Yes because -- I really don't know. I don't</p> <p>18 really recall. I just know that we were -- we were going</p> <p>19 to put the house on the market and this must be something</p> <p>20 he corresponded with someone.</p> <p>21 Q. Do you recall discussing putting the house on</p> <p>22 the market with either your husband or with Bonnie Sindel</p> <p>23 in the late 2009 time period?</p> <p>24 A. He may have reached out to her because she was</p> <p>25 a friend of someone in Niskayuna. And we probably just</p>



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<p>1 N. McGinn</p> <p>2 wanted to get an idea because the woman who did sell my</p> <p>3 house was the one I ended up going with, even the first</p> <p>4 time.</p> <p>5 Q. Who is the other real estate broker?</p> <p>6 A. It's Michael Flynn Realty but it was Linda --</p> <p>7 I can't even think of her last name. I'd have to look on</p> <p>8 my e-mails. Sorry about that.</p> <p>9 Q. Let me draw your attention back to</p> <p>10 Exhibit 401. The top part of the e-mail from Mr. McGinn</p> <p>11 to Bonnie Sindel states, "Bonnie, I have put in</p> <p>12 approximately \$235,000 since I bought the house -</p> <p>13 kitchen, pool, fancy deck with three season enclosure,</p> <p>14 fireplace, closets, landscaping, etcetera." Do you see</p> <p>15 that?</p> <p>16 A. Mm-hmm.</p> <p>17 Q. Does that statement comport with your</p> <p>18 understanding of the improvements that were made to the</p> <p>19 Niskayuna house?</p> <p>20 A. Oh yes, over the course of the entire eight</p> <p>21 years.</p> <p>22 Q. Where did the \$235,000 come from to make</p> <p>23 improvements on the house?</p> <p>24 A. We took out a loan, like a loan off the</p> <p>25 mortgage.</p>	<p>1 N. McGinn</p> <p>2 Q. The SEC filed its lawsuit in April 2010,</p> <p>3 correct? You recall that the SEC filed a lawsuit,</p> <p>4 correct?</p> <p>5 A. The original I thought was '09. I'm sorry,</p> <p>6 yes, '10.</p> <p>7 Q. And you were forced to stop marketing the</p> <p>8 house after the SEC filed its lawsuit, correct?</p> <p>9 A. Correct.</p> <p>10 (Exhibit 402 marked for identification.)</p> <p>11 Q. I'm handing you a document that's been marked</p> <p>12 as Exhibit 402. It appears to be a three-page document</p> <p>13 stamped by the Schenectady County Clerk's office</p> <p>14 containing a quick claim deed. Do you recognize this</p> <p>15 document?</p> <p>16 A. Yes.</p> <p>17 Q. What is it?</p> <p>18 A. It's a document turning the house to my name.</p> <p>19 Q. Do you see that the quick claim deed is made</p> <p>20 as of the 19th day of October 2009?</p> <p>21 A. Yes.</p> <p>22 Q. Do you recall the transfer of ownership of the</p> <p>23 Niskayuna house to your name?</p> <p>24 A. I do.</p> <p>25 Q. Does Exhibit 402 refer to the transfer of the</p>
<p>1 N. McGinn</p> <p>2 Q. A second mortgage?</p> <p>3 A. Yeah. What do they call those?</p> <p>4 Q. A home equity loan?</p> <p>5 A. Yeah, home equity.</p> <p>6 Q. Why did you decide not to sell the house in</p> <p>7 the late --</p> <p>8 A. We were forced to not sell. We had someone</p> <p>9 that was very interested and then we had to stop because</p> <p>10 of all of this.</p> <p>11 Q. And at what point in time did you have to stop</p> <p>12 marketing the house?</p> <p>13 A. I believe it was December of '09.</p> <p>14 Q. Who forced you to stop marketing the house?</p> <p>15 A. Or was it December of 2010? I'm trying to</p> <p>16 think of the timeframe because it was April of '09 -- it</p> <p>17 probably was '10. Yeah, the SEC found out that I was --</p> <p>18 I had it up for sale not knowing at that time that I had</p> <p>19 to go through channels.</p> <p>20 Q. You're referring -- I believe you're referring</p> <p>21 to the 2010 time period --</p> <p>22 A. 2010, yes.</p> <p>23 Q. Just for the purposes of the record, just give</p> <p>24 me a minute to finish what I'm saying.</p> <p>25 A. Okay.</p>	<p>1 N. McGinn</p> <p>2 ownership of the Niskayuna house to your name?</p> <p>3 A. Yes.</p> <p>4 Q. So you see on the top of page two it says</p> <p>5 recorded by Attorney Joseph B. Carr?</p> <p>6 A. Yes.</p> <p>7 Q. Do you know Mr. Carr?</p> <p>8 A. I do.</p> <p>9 Q. Do you recall he had involvement in preparing</p> <p>10 the quick claim deed for the Niskayuna house?</p> <p>11 A. Yes, I do.</p> <p>12 Q. What was his involvement?</p> <p>13 A. He was just getting the paperwork ready for</p> <p>14 us, did all the -- did the paperwork for us to have it</p> <p>15 put in my name.</p> <p>16 Q. Why was the Niskayuna house transferred to</p> <p>17 your name?</p> <p>18 A. It was something that Tim and I talked about</p> <p>19 doing when we first moved in but we were not married so I</p> <p>20 couldn't put my name on it at that point. And we just</p> <p>21 kept going on and on and then finally there was a</p> <p>22 decision made.</p> <p>23 Q. Why couldn't you put your name on it before</p> <p>24 you were married?</p> <p>25 A. Oh, because we weren't married. I guess I</p>



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<p>41</p> <p>1 N. McGinn</p> <p>2 wouldn't have thought to buy a house with someone if I</p> <p>3 wasn't married to him. And I wanted to make sure that</p> <p>4 something was in my name after we were married.</p> <p>5 Q. Did you pay for the house?</p> <p>6 A. Did I pay for the house?</p> <p>7 Q. Yes.</p> <p>8 A. No, I did not.</p> <p>9 Q. Did you make mortgage payments for the house?</p> <p>10 A. If I had to I did when I was working. After</p> <p>11 that I did not.</p> <p>12 Q. What did you and Mr. McGinn discuss about the</p> <p>13 transfer of ownership in or about October of 2009?</p> <p>14 A. Oh, it was discussed before that. It just</p> <p>15 happened in October of 2009. It just happened to be the</p> <p>16 right time.</p> <p>17 Q. Why was it the right time?</p> <p>18 A. Well we talked about it a while and every time</p> <p>19 there was a month that something else was going on. And</p> <p>20 this was the month that worked and he brought it up and I</p> <p>21 said okay. And we both discussed it and that's what we</p> <p>22 decided to do.</p> <p>23 Q. I'd like to know what you discussed about it?</p> <p>24 A. I don't think there's that much to discuss.</p> <p>25 As I said, it was something that I wanted to do right</p>	<p>43</p> <p>1 N. McGinn</p> <p>2 A. You know, when we got married it was something</p> <p>3 that -- I had three kids and I wanted to have something</p> <p>4 of my own and that's why I did it like that.</p> <p>5 Q. Did you own a house before you got married?</p> <p>6 A. With my ex-husband I did, yes.</p> <p>7 Q. Obviously Mr. McGinn continued to reside in</p> <p>8 the house after the ownership was transferred, correct?</p> <p>9 A. Yes.</p> <p>10 Q. You did not receive any bids from third</p> <p>11 parties for the house prior to the time ownership was</p> <p>12 transferred into your name, did you?</p> <p>13 A. No, I did not.</p> <p>14 Q. Why were you looking to sell the house in</p> <p>15 2010?</p> <p>16 A. Downsize. The taxes are ridiculous in that</p> <p>17 county. My kids didn't go to school anymore so I thought</p> <p>18 it was a good time to do that.</p> <p>19 Q. Did your children reside with you and</p> <p>20 Mr. McGinn?</p> <p>21 A. Yes.</p> <p>22 Q. Full-time?</p> <p>23 A. Two of them. The third one moved out about a</p> <p>24 year ago.</p> <p>25 Q. Are you acquainted with Mary Ann McGinn?</p>
<p>42</p> <p>1 N. McGinn</p> <p>2 from the start and we couldn't so we just found a lull</p> <p>3 time and that's how it worked out. My brother at that</p> <p>4 point was in hospice care so I didn't have to go and</p> <p>5 completely take care of him like I did prior to that so</p> <p>6 it was a quiet time.</p> <p>7 Q. You see that in the first page of the quick</p> <p>8 claim deed document, the second page of Exhibit 402, it</p> <p>9 says, "Witness of the party of the first part in</p> <p>10 consideration of one and zero-one-hundredth dollars." Do</p> <p>11 you see that?</p> <p>12 A. I do.</p> <p>13 Q. Do you recall the amount of consideration that</p> <p>14 was paid for transfer of the ownership of the Niskayuna</p> <p>15 house to your name?</p> <p>16 A. One dollar.</p> <p>17 Q. Was there anything else given in</p> <p>18 consideration?</p> <p>19 A. Not to my knowledge.</p> <p>20 Q. Why didn't you put the house in joint</p> <p>21 ownership rather than just in your name?</p> <p>22 A. Because we had the other house in joint</p> <p>23 ownership and this was just something I wanted for me. I</p> <p>24 just thought that was the fair thing to do actually.</p> <p>25 Q. Why was that important to you?</p>	<p>44</p> <p>1 N. McGinn</p> <p>2 A. I know who she is, yes.</p> <p>3 Q. Is she someone you keep in touch with?</p> <p>4 A. Never.</p> <p>5 Q. She's Tim's ex-wife, right?</p> <p>6 A. That's correct.</p> <p>7 Q. Were you acquainted with her before the time</p> <p>8 you became involved with Mr. McGinn?</p> <p>9 A. No, I was not.</p> <p>10 Q. Do you have any knowledge about when</p> <p>11 Mr. McGinn's divorce became final with Mary Ann McGinn?</p> <p>12 A. I do know. I mean I don't know the exact date</p> <p>13 but that's why I was deposed, shortly after that.</p> <p>14 Q. That was after the period of time in which you</p> <p>15 Mr. McGinn began living together?</p> <p>16 A. That's correct.</p> <p>17 (Exhibit 403 marked for identification.)</p> <p>18 Q. I'm handing you a document that's been marked</p> <p>19 Exhibit 403. I'll represent to you that you've never</p> <p>20 seen Exhibit 403 before or I'd be very surprised if you</p> <p>21 did because this was a document that was prepared by the</p> <p>22 SEC summarizing various transfers from accounts in the</p> <p>23 name of Mr. McGinn to accounts that were in your name.</p> <p>24 Do you see the document?</p> <p>25 A. Yes.</p>



<p>45</p> <p>1 N. McGinn</p> <p>2 Q. And I'd just like to use Exhibit 403 as a</p> <p>3 frame of reference to go through some of the transactions</p> <p>4 that we've identified.</p> <p>5 A. Okay.</p> <p>6 Q. There are a number of checks that were written</p> <p>7 by Mr. McGinn payable to Nancy Lastrup. Do you see that</p> <p>8 on this chart?</p> <p>9 A. I do.</p> <p>10 Q. And my question for you is do you have any</p> <p>11 recollection of any of the checks that are referred to in</p> <p>12 Exhibit 403?</p> <p>13 A. Do I recall what they were for? No. I just</p> <p>14 -- I couldn't tell you what they were for, each</p> <p>15 individual one. I couldn't tell you. Payments -- make</p> <p>16 payments but I don't know exactly what for.</p> <p>17 Q. Did you and Mr. McGinn have an arrangement or</p> <p>18 anything like that for certain amounts at certain times</p> <p>19 to be transferred to you?</p> <p>20 A. I mean obviously some of them -- I wasn't</p> <p>21 working so if I had a credit card that I was using I'm</p> <p>22 sure it was a payment.</p> <p>23 Q. You don't recall providing consideration to</p> <p>24 Mr. McGinn for any of the transfers that you received</p> <p>25 from him, correct?</p>	<p>47</p> <p>1 N. McGinn</p> <p>2 A. Mm-hmm.</p> <p>3 Q. Do you recognize this e-mail?</p> <p>4 A. I'll have to read it because I didn't</p> <p>5 recognize it at first. I don't recall it but obviously</p> <p>6 it went to me, but it was in '07 so it was quite some</p> <p>7 time ago.</p> <p>8 Q. I realize it was a number of years ago. You</p> <p>9 wrote an e-mail to Mr. McGinn June 4, 2007 saying,</p> <p>10 "Brian Cooper called to get my banking info. I thought I</p> <p>11 was coming to the office to pick up cash." Mr. McGinn</p> <p>12 responds, "Your check was for \$10,808.58. I just wired</p> <p>13 you \$11,000." Do you see that?</p> <p>14 A. I do.</p> <p>15 Q. Your testimony is -- your understanding is</p> <p>16 that was for the tax payment on the Niskayuna house?</p> <p>17 A. I wasn't certain. I still don't know what</p> <p>18 it's for reading this. I just can't -- we're talking</p> <p>19 about June. I'm trying to think of what -- maybe it was</p> <p>20 a -- I just don't recall what that money was for.</p> <p>21 Q. It was your understanding looking at this</p> <p>22 e-mail that you wrote a check in the amount of \$10,808 or</p> <p>23 so and then received a wire?</p> <p>24 A. Correct, so obviously it was a payment of some</p> <p>25 sort.</p>
<p>46</p> <p>1 N. McGinn</p> <p>2 A. No.</p> <p>3 Q. Near the bottom of the first page of</p> <p>4 Exhibit 403 there's an entry for a wire transfer dated</p> <p>5 June 4, 2007 in the amount of \$11,000. Do you see that?</p> <p>6 A. Mm-hmm. I do.</p> <p>7 Q. Do you recall anything about that wire</p> <p>8 transfer?</p> <p>9 A. All I can think is it's probably for a tax</p> <p>10 payment.</p> <p>11 Q. What would the tax payment be on?</p> <p>12 A. It was the house in Niskayuna taxes. We</p> <p>13 probably made the payment for that amount of money.</p> <p>14 That's what I'm thinking it was probably that.</p> <p>15 Q. Was it common for you to make the tax payments</p> <p>16 on the Niskayuna house?</p> <p>17 A. If he was traveling or something I would go</p> <p>18 over. It was just down the street from our house for me</p> <p>19 to make the payment.</p> <p>20 Q. What was just down the street from your house?</p> <p>21 A. Where you pay the taxes.</p> <p>22 (Exhibit 404 marked for identification.)</p> <p>23 Q. I'm handing you a one-page document that's</p> <p>24 been marked Exhibit 404. It's an e-mail chain between</p> <p>25 you and your husband, Timothy McGinn. Do you see that?</p>	<p>48</p> <p>1 N. McGinn</p> <p>2 Q. There's another wire transfer on Exhibit 403.</p> <p>3 The entry is April 28, 2006, wire transfer in the amount</p> <p>4 of \$2,200. Do you have any recollection of that wire</p> <p>5 transfer?</p> <p>6 A. I do not. Once again, if it was a payment, he</p> <p>7 may have been out of town and that's why he put it in my</p> <p>8 account.</p> <p>9 (Exhibit 405 marked for identification.)</p> <p>10 Q. I'm handing you what's been marked as</p> <p>11 Exhibit 405. It's a number of pages of checks from</p> <p>12 Mr. McGinn, copies of canceled checks made out by</p> <p>13 Mr. McGinn made out to either Nancy Lastrup or</p> <p>14 Nancy McGinn. Do you see that?</p> <p>15 A. I do.</p> <p>16 Q. If you could take a minute to just flip</p> <p>17 through the checks and identify whether it appears to be</p> <p>18 your signature on the -- endorsing the checks on the</p> <p>19 back?</p> <p>20 A. Yes. That's my signature.</p> <p>21 Q. Have you had a chance to review all the pages</p> <p>22 of the document?</p> <p>23 A. Yeah. I've gone through several.</p> <p>24 Q. Do all of the checks in Exhibit 405 addressed</p> <p>25 to you appear to be endorsed on the back with your</p>



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<p>1 N. McGinn</p> <p>2 signature?</p> <p>3 A. Yes, they do.</p> <p>4 Q. Do you recall the circumstances surrounding</p> <p>5 any of the checks that you see listed in Exhibit 405?</p> <p>6 A. Payments, bills, car payments, insurance.</p> <p>7 It's just all typical daily things that go into a</p> <p>8 checking account so I could go to the grocery store,</p> <p>9 things like that.</p> <p>10 Q. If you had large expenses between you and</p> <p>11 Mr. McGinn, would Mr. McGinn typically pay for those out</p> <p>12 of his own account?</p> <p>13 A. Yes.</p> <p>14 Q. Were Mr. McGinn's paychecks through his</p> <p>15 employment at IASG or McGinn Smith deposited into your</p> <p>16 account at any point in time?</p> <p>17 A. No.</p> <p>18 Q. To your knowledge those all went directly into</p> <p>19 his account?</p> <p>20 A. To my knowledge, yes.</p> <p>21 Q. After flipping through the exhibits and the</p> <p>22 canceled checks in Exhibit 405, can you identify whether</p> <p>23 any of them were received in consideration of anything?</p> <p>24 A. All of them were definitely something of a</p> <p>25 payment I had to make, whether it be a car, whether it be</p>	<p>1 N. McGinn</p> <p>2 take some time to take a look at it. The title of the</p> <p>3 document is Nancy McGinn cash deposits into account</p> <p>4 number REDACT Just let me know when you've had a</p> <p>5 chance to take a look at Exhibit 406.</p> <p>6 A. Okay.</p> <p>7 Q. For purposes of the record, I'll just note</p> <p>8 that Exhibit 406 contains a summary of various cash</p> <p>9 deposits that we've seen in documentation from your bank</p> <p>10 account at First National Bank of Scotia. After having</p> <p>11 had a chance to flip through the summary of accounts in</p> <p>12 Exhibit 406, do any of them ring a bell or jump out at</p> <p>13 you?</p> <p>14 A. Not really. Like I said, it goes back quite a</p> <p>15 ways.</p> <p>16 Q. It appears you were making a number of cash</p> <p>17 deposits into your account every month from January 2006</p> <p>18 through May of 2010. Do you see that?</p> <p>19 A. Yeah. I think that's pretty typical of a bank</p> <p>20 account. You know. Once again, it was going into my</p> <p>21 account so I was using my card as a debit, putting the</p> <p>22 money in. So I don't find that to be unusual at all.</p> <p>23 Q. And was it common for you to deposit cash into</p> <p>24 the account and then --</p> <p>25 A. If I needed to keep a check that wouldn't</p>
<p>1 N. McGinn</p> <p>2 insurance, credit card payment, numerous things, daily</p> <p>3 household that we do. Just living -- living expenses.</p> <p>4 Q. So the funds were meant to pay living</p> <p>5 expenses --</p> <p>6 A. Absolutely.</p> <p>7 Q. -- for the both of you?</p> <p>8 A. That's correct.</p> <p>9 Q. And you didn't give Mr. McGinn anything in</p> <p>10 exchange for receiving these checks, did you?</p> <p>11 A. No.</p> <p>12 Q. Did you ever receive cash currency from</p> <p>13 Mr. McGinn?</p> <p>14 A. If I needed some cash, but still to this day I</p> <p>15 never carry cash. I always used a credit card. Whatever</p> <p>16 I needed, that's pretty much how everything was paid.</p> <p>17 Q. For example if you needed spending money for</p> <p>18 something would you obtain that from Mr. McGinn?</p> <p>19 A. Or myself. But if I had to have spending</p> <p>20 money, I would ask him for it, yes.</p> <p>21 Q. Let's take a look at another exhibit.</p> <p>22 (Exhibit 406 marked for identification.)</p> <p>23 Q. Exhibit 406 that I'm handing you is another</p> <p>24 document that was prepared by the SEC. I can't imagine</p> <p>25 you've seen the document before but I'd just like you to</p>	<p>1 N. McGinn</p> <p>2 bounce or something like that, yes. That's when I would</p> <p>3 have to put cash in. If I was short on something and I</p> <p>4 wrote checks out or -- I can't explain these right now</p> <p>5 because it was so long ago but -- or if my daughter</p> <p>6 needed something for school and she had to have cash,</p> <p>7 many things. I had three kids living at home at the time</p> <p>8 as well.</p> <p>9 Q. From the records we've seen, these appear to</p> <p>10 be cash currency that you had in your possession and then</p> <p>11 deposited into your bank account. Do you have that</p> <p>12 understanding as well?</p> <p>13 A. Yes. That's correct.</p> <p>14 Q. I'm just wondering. Where did the cash come</p> <p>15 from?</p> <p>16 A. Back in '06, I don't know. It could have been</p> <p>17 where -- you know, I do a lot with my family and we all</p> <p>18 pitch in for certain things. They give me money and I</p> <p>19 put it in the account for my parent's anniversary, if it</p> <p>20 was a birthday. There were six siblings and that's what</p> <p>21 we did a lot if we were going to buy something big for</p> <p>22 someone we all would chip in. If we were going to have a</p> <p>23 party. There's so many things that could be. I just --</p> <p>24 you know, I had neighbors and we would have parties at</p> <p>25 the house and if they brought some pot over or something.</p>



<p>53</p> <p>1 N. McGinn</p> <p>2 There's so many different things I couldn't even pinpoint</p> <p>3 what they all are they're just numerous.</p> <p>4 Q. From 2006 to 2010 you weren't involved in any</p> <p>5 sort of cash business, were you?</p> <p>6 A. No.</p> <p>7 Q. Waiting tables or anything?</p> <p>8 A. No, I wasn't. I would have to be on -- that</p> <p>9 would have to be on a record if I was working, even if it</p> <p>10 was cash tips. I wasn't working at that point. Also my</p> <p>11 kids had credit cards and I -- they would give me cash.</p> <p>12 I'd put it in my account and I'd send the credit card</p> <p>13 payments in my name, you know, under my account. That's</p> <p>14 probably a lot of this as well. My boys would give me</p> <p>15 the money and I would make the payments that way.</p> <p>16 There's so many different things I could say that the</p> <p>17 cash was there for.</p> <p>18 Q. Did you receive child support payments?</p> <p>19 A. No, not -- much earlier in the years, not from</p> <p>20 that point.</p> <p>21 Q. Not in the 2006 and later time?</p> <p>22 A. No.</p> <p>23 (Exhibit 407 marked for identification.)</p> <p>24 Q. I'm handing you what's been marked</p> <p>25 Exhibit 407. They're records from First National Bank of</p>	<p>55</p> <p>1 N. McGinn</p> <p>2 had some work done around the house.</p> <p>3 Q. If you had work done around the house, would</p> <p>4 it have been cash that was provided to you by Mr. McGinn?</p> <p>5 A. If I didn't have that kind of cash, yes. It</p> <p>6 either would have been mine or his or a combination.</p> <p>7 Q. There's a variety of other smaller deposits,</p> <p>8 \$120, \$100, \$220, \$60, \$100, \$40.</p> <p>9 A. Yeah. It's probably just because I had to</p> <p>10 have cash in my account. I never kept a whole lot of</p> <p>11 cash in my --</p> <p>12 Q. Why not just get a check from whoever was</p> <p>13 providing you the money?</p> <p>14 A. I don't really recall right now. Like I said,</p> <p>15 some of it was my kids giving me money if they owed it to</p> <p>16 me. It could just be so many random things I cannot</p> <p>17 pinpoint. It's different when you have kids too. It</p> <p>18 wasn't just Tim and I. I have kids that are borrowing</p> <p>19 money and paying me back, and if I had it I'd put it in</p> <p>20 my account. Very easily \$100 could have been borrowed</p> <p>21 and given to me.</p> <p>22 Q. So it wasn't common for you to just carry the</p> <p>23 \$100 with you until you needed to spend it?</p> <p>24 A. I used my account as a debit card constantly</p> <p>25 rather than having the cash on me. I'd just put it in</p>
<p>54</p> <p>1 N. McGinn</p> <p>2 Scotia. There's a number of pages in the document but</p> <p>3 I'll represent to you what I have done is taken a series</p> <p>4 of cash deposits from March 31, 2006 to April 27, 2006</p> <p>5 and just put them together in one document. Just let me</p> <p>6 know when you've had a chance to flip through</p> <p>7 Exhibit 407.</p> <p>8 A. Okay.</p> <p>9 Q. Do these appear to be copies of cash deposits</p> <p>10 that you made to your account at First National Bank of</p> <p>11 Scotia?</p> <p>12 A. Yes.</p> <p>13 Q. I'll just ask you about the first one,</p> <p>14 March 31, 2006, a cash deposit in the amount of \$1,600.</p> <p>15 Do you see that?</p> <p>16 A. I do.</p> <p>17 Q. Do you have any understanding what that cash</p> <p>18 deposit -- the circumstances surrounding that cash</p> <p>19 deposit?</p> <p>20 A. No, not from that, but it could be -- once</p> <p>21 again it could be -- I had some work done at the house.</p> <p>22 You know. I had people that would mow the lawn that had</p> <p>23 to be paid by cash, a lot of these cash-ins. \$1,600 from</p> <p>24 2006 I cannot recall. I just don't know what it could</p> <p>25 be. You know. Numerous things. Like I said, maybe I</p>	<p>56</p> <p>1 N. McGinn</p> <p>2 the bank. I'd have my card. I still do that the same</p> <p>3 way. I still just use my debit card.</p> <p>4 Q. The last three pages of Exhibit 407 appear to</p> <p>5 reflect a \$2,000 cash deposit of which you had taken out</p> <p>6 \$50. Do you see the last three pages?</p> <p>7 A. The last page of \$2,000? Oh, okay.</p> <p>8 Q. The last three pages of Exhibit 407.</p> <p>9 A. Mm-hmm.</p> <p>10 Q. There's a Bates number at the bottom right.</p> <p>11 It says FNB-Scotia-000093 to 95.</p> <p>12 A. You're looking at this one?</p> <p>13 Q. Yes. 000093 appears to reflect a \$2,000 cash</p> <p>14 deposit with \$50 back. Do you have any recollection or</p> <p>15 understanding what that transaction is?</p> <p>16 A. No, I do not.</p> <p>17 Q. Would it be common for you to have \$2,000 in</p> <p>18 cash to deposit into the bank?</p> <p>19 A. It was probably a bill that I had to pay.</p> <p>20 (Exhibit 408 marked for identification.)</p> <p>21 Q. I hand you what's been marked as Exhibit 408.</p> <p>22 Exhibit 408 is another subset of deposit tickets for your</p> <p>23 account, Ms. McGinn, at the First National Bank of</p> <p>24 Scotia. The date period for these deposits is June 2,</p> <p>25 2008 through June 19, 2008. Does that description seem</p>



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<p>57</p> <p>1 N. McGinn</p> <p>2 accurate to you?</p> <p>3 A. Yes.</p> <p>4 Q. Do you recall a cash deposit in the amount of</p> <p>5 \$720 on or about June 2, 2008?</p> <p>6 A. Not really, no.</p> <p>7 Q. Do you have any understanding sitting here</p> <p>8 today as to where the money came from for that deposit or</p> <p>9 what it was used for?</p> <p>10 A. Well it could be some landscaping I had done.</p> <p>11 It could be something that may have happened to the</p> <p>12 house. These people, they don't take credit cards so you</p> <p>13 always have to have cash to give them. It could be, once</p> <p>14 again, numerous things. I just don't recall exactly what</p> <p>15 these are for at all.</p> <p>16 Q. These records that we're looking at now, they</p> <p>17 don't reflect withdrawals that you made in cash. These</p> <p>18 are deposits that you made of cash into your account.</p> <p>19 A. Right.</p> <p>20 Q. So if you needed to pay a landscaper or</p> <p>21 somebody for work done around the house, you wouldn't</p> <p>22 need to deposit cash into your account, you would</p> <p>23 withdraw cash?</p> <p>24 A. But I would write a check off of that, put the</p> <p>25 cash in and write a check off of that and then I'd have a</p>	<p>59</p> <p>1 N. McGinn</p> <p>2 Q. And do you have any way sitting here today of</p> <p>3 identifying which cash deposits came from which source?</p> <p>4 A. I really wouldn't know. I couldn't do that.</p> <p>5 I just -- I couldn't recall what each of them would be</p> <p>6 from.</p> <p>7 MR. NEWVILLE: Let's take five minutes.</p> <p>8 (Whereupon, a brief recess was taken.)</p> <p>9 MR. NEWVILLE: We're back on the record.</p> <p>10 Q. Just a few clarification points. How old are</p> <p>11 your kids?</p> <p>12 A. 26, 24 and 20.</p> <p>13 Q. Did they reside with you and Mr. McGinn during</p> <p>14 the entire period of time up until recently?</p> <p>15 A. Yes.</p> <p>16 Q. They lived in the Niskayuna house, correct?</p> <p>17 A. Correct.</p> <p>18 Q. During that period of time did you and</p> <p>19 Mr. McGinn pay your children's expenses for various</p> <p>20 things? Let me withdraw that. From the 2003 to 2010</p> <p>21 time period did you pay your children's expenses when</p> <p>22 they needed it?</p> <p>23 A. Well depending on what expenses were. If they</p> <p>24 were old enough to work, they kind-of paid for their own</p> <p>25 clothing and things like that. But yes, as an obligation</p>
<p>58</p> <p>1 N. McGinn</p> <p>2 record.</p> <p>3 Q. But I don't understand why you would have \$720</p> <p>4 in cash lying around that you needed to use to pay --</p> <p>5 A. In '08 I was not working so it was probably</p> <p>6 payments I had to make. And Tim would probably cash his</p> <p>7 check and then give me the cash so I could put it in my</p> <p>8 account. That's how that worked. That's what we used to</p> <p>9 do.</p> <p>10 Q. He would cash his check and take out currency?</p> <p>11 A. Yes, if I needed it for specific cash</p> <p>12 payments, whether it be a cash payment, whether it be a</p> <p>13 car payment that was in my name. Just many things it</p> <p>14 could be.</p> <p>15 Q. Go back and take a look at Exhibit 406. The</p> <p>16 grand total of cash that we've seen that you've deposited</p> <p>17 into your account is around \$53,000 from January '06 to</p> <p>18 May of 2010. Do you see that?</p> <p>19 A. Mm-hmm. Yes.</p> <p>20 Q. And is it your testimony that those deposits</p> <p>21 could be some combination of cash that was provided to</p> <p>22 you by either Mr. McGinn or cash that came to you from</p> <p>23 your children or various other sources?</p> <p>24 A. Yes. I would say it could be from any of</p> <p>25 those.</p>	<p>60</p> <p>1 N. McGinn</p> <p>2 as a parent I did buy clothes when need be, I fed them.</p> <p>3 I did the normal things. But they also had a father that</p> <p>4 would do whatever had to be done as well. They lived</p> <p>5 with me but their father also paid their expenses.</p> <p>6 Q. How much time -- let me backup. There's a</p> <p>7 house in Florida that you and Mr. McGinn own, correct?</p> <p>8 A. That's correct.</p> <p>9 Q. Roughly when did you purchase that house?</p> <p>10 A. Three years ago so 2008 -- 2007 or 2008.</p> <p>11 Q. And that house in Florida was put into both of</p> <p>12 your names, correct?</p> <p>13 A. Correct.</p> <p>14 Q. Joint tenancy to your understanding?</p> <p>15 A. We're both on the deed.</p> <p>16 Q. Okay. What discussions did you have when you</p> <p>17 purchased that house about putting the Florida house in</p> <p>18 both of your names?</p> <p>19 A. That I wanted to be on it as well. We were</p> <p>20 married at this point. Typically that's what you do when</p> <p>21 you're married, you buy a home together. We wanted it to</p> <p>22 be our retirement home so-to-speak.</p> <p>23 Q. How much time do you spend at the Florida</p> <p>24 home?</p> <p>25 A. I do not spend too much time. I'm working</p>



<p>1 N. McGinn</p> <p>2 now. It's tough to get down. Not too much time.</p> <p>3 Q. What about during the 2007 to 2009 time</p> <p>4 period?</p> <p>5 A. I would just go down on occasion because I</p> <p>6 still had kids in school, so I wouldn't leave them for</p> <p>7 that much time.</p> <p>8 Q. How much time did you husband spend in Florida</p> <p>9 during the 2007 to 2009 time period?</p> <p>10 A. Not much more than I did. You know. It's</p> <p>11 hard to -- he would go down maybe for a few days longer</p> <p>12 than I would but really it was never a long length of</p> <p>13 time. At that point we weren't able to.</p> <p>14 Q. Currently have you been spending any time over</p> <p>15 the past say year in the Florida house?</p> <p>16 A. I was there in April last.</p> <p>17 Q. How much time did you spend there?</p> <p>18 A. About a week.</p> <p>19 Q. Are you and Mr. McGinn paying the maintenance</p> <p>20 and keeping up the Florida house?</p> <p>21 A. We pay what we can.</p> <p>22 Q. Do you have plans to sell the Florida house?</p> <p>23 A. Not as of right now.</p> <p>24 Q. The mortgage is not current on that house?</p> <p>25 A. No, it is not.</p>	<p>1 N. McGinn</p> <p>2 Q. How did he come to work with the people at</p> <p>3 AmeriBank?</p> <p>4 A. He found it online I believe.</p> <p>5 Q. What kind of services does AmeriBank offer</p> <p>6 that he works for?</p> <p>7 A. It's credit card swiping machines.</p> <p>8 Q. Credit card processing?</p> <p>9 A. Processing, yes.</p> <p>10 Q. He's working in some sort of sales role to</p> <p>11 your knowledge?</p> <p>12 A. Yeah. I would say that would be the best</p> <p>13 description.</p> <p>14 Q. Do you know anything else about other</p> <p>15 employment that he's had since the SEC case was filed?</p> <p>16 A. He has not had any other employment.</p> <p>17 Q. Let's take a quick look back at the large</p> <p>18 stack of bank account documents that we --</p> <p>19 A. 407?</p> <p>20 Q. We've got 407, we've got 408. Those are</p> <p>21 copies of the cash deposits. And then Exhibit 406, which</p> <p>22 is a summary prepared of various cash deposits that the</p> <p>23 SEC has identified. My question is whether any of the</p> <p>24 deposits in cash were related at all to any loans that</p> <p>25 you had between you and Mr. McGinn?</p>
<p>1 N. McGinn</p> <p>2 Q. You mentioned you currently reside at an</p> <p>3 address in Waterford; is that correct?</p> <p>4 A. That's correct.</p> <p>5 Q. And I think when we spoke last week you said</p> <p>6 you were in the process of moving, right?</p> <p>7 A. Yes, we moved.</p> <p>8 Q. And you reside there with your husband,</p> <p>9 Mr. McGinn, correct?</p> <p>10 A. That's correct, and my daughter. My daughter</p> <p>11 as well.</p> <p>12 Q. Your youngest daughter?</p> <p>13 A. Yes.</p> <p>14 Q. Where is your husband employed?</p> <p>15 A. He is working for a company. It's named</p> <p>16 AmeriBank. I don't know a lot about it or how -- he</p> <p>17 works for them but it's -- what they do is they set-up</p> <p>18 appointments for him and he goes out.</p> <p>19 Q. Do you know who he meets with as part of these</p> <p>20 appointments?</p> <p>21 A. It's all selling. He meets with anyone who</p> <p>22 uses a credit card machine.</p> <p>23 Q. How long has he been working with AmeriBank?</p> <p>24 A. For about four or five months maybe. I forget</p> <p>25 exactly when he started this.</p>	<p>1 N. McGinn</p> <p>2 A. What kind of loan?</p> <p>3 Q. I'm just wondering whether there were any</p> <p>4 loans that were made between you and Mr. McGinn?</p> <p>5 A. Between he and I?</p> <p>6 Q. Yes.</p> <p>7 A. No.</p> <p>8 Q. Was there ever any transfer made between the</p> <p>9 two of you where there was an agreement to pay back the</p> <p>10 amount after a certain period of time?</p> <p>11 A. The only one he and I had an agreement was</p> <p>12 when my daughter went to a private school for one year</p> <p>13 and that was all.</p> <p>14 Q. When was that?</p> <p>15 A. That was sixth grade so it was probably '04.</p> <p>16 I don't know the exact date.</p> <p>17 Q. What were the circumstances surrounding that?</p> <p>18 I take it he paid for the private school and you agreed</p> <p>19 that you would pay him back at some point?</p> <p>20 A. That's correct. I wanted to get her out of</p> <p>21 the public school district so I put her in a private</p> <p>22 school. That didn't go very well. So that was the one</p> <p>23 thing that, you know, I was more than willing to pay him</p> <p>24 back for that.</p> <p>25 Q. Roughly how much was the amount?</p>



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<p>1 N. McGinn</p> <p>2 A. Like probably \$8,000.</p> <p>3 Q. That was for tuition for a year?</p> <p>4 A. Yeah, tuition.</p> <p>5 Q. Did you pay the money back?</p> <p>6 A. Some of it I did.</p> <p>7 Q. About how much?</p> <p>8 A. I don't know, \$1,000. Then we got married and</p> <p>9 he's not going to make me pay him back when we're</p> <p>10 married.</p> <p>11 Q. Aside from that are you aware of any other</p> <p>12 loan agreements?</p> <p>13 A. No. No, none whatsoever.</p> <p>14 Q. That's the only one you're aware of between</p> <p>15 you and your husband?</p> <p>16 A. That's correct.</p> <p>17 Q. Either way, you loaning him money or him</p> <p>18 loaning you money?</p> <p>19 A. Correct.</p> <p>20 Q. Let's go back to when the Niskayuna house was</p> <p>21 originally purchased. We talked about that being around</p> <p>22 the 2003 time period?</p> <p>23 A. I think so.</p> <p>24 Q. And I think you testified that Mr. McGinn</p> <p>25 purchased the house, correct?</p>	<p>1 N. McGinn</p> <p>2 Knowing we were going to get married, that's what I</p> <p>3 wanted to do. Obviously if we didn't get married I</p> <p>4 understood that would not happen but we did. And you</p> <p>5 know, one thing leads to another. Time goes on, you're</p> <p>6 doing things, you're forgetting about it. We just talked</p> <p>7 about it again and it just was one of those times it just</p> <p>8 happened.</p> <p>9 Q. So back in 2003 when Mr. McGinn bought the</p> <p>10 house, did you tell him, "Listen, I want to move in here</p> <p>11 but I'd like the house to be in my name"?</p> <p>12 A. I said after we got married I'd like to be</p> <p>13 able to discuss having the house in my name, and that's</p> <p>14 what we did. It was just an agreement between he and I.</p> <p>15 Q. And how often did you talk about that?</p> <p>16 A. Well whenever I brought it up. You know, once</p> <p>17 in a while if we had an argument I'd say "I want this</p> <p>18 house in my name", that type of thing. It was just</p> <p>19 random, you know, something I wanted to do. If I thought</p> <p>20 about it we spoke about it, and then it just came up</p> <p>21 again and we acted upon it.</p> <p>22 Q. Did -- was he excited to transfer ownership of</p> <p>23 the house into your name?</p> <p>24 A. He didn't have a problem with it. He didn't</p> <p>25 have a problem. He understood that it was something I</p>
<p>1 N. McGinn</p> <p>2 A. That's correct.</p> <p>3 Q. And could you just describe the house a little</p> <p>4 bit?</p> <p>5 A. My house?</p> <p>6 Q. The Niskayuna house, yes.</p> <p>7 A. It's a five-bedroom house. It's a very nice</p> <p>8 house. It's a homey house. We had a great time there.</p> <p>9 It's like all the houses on the street. They're all a</p> <p>10 little on the larger side and it's just a nice house to</p> <p>11 live in. I don't know what else you want me to describe.</p> <p>12 Q. Was the intent to purchase the house for you</p> <p>13 and your children and Mr. McGinn to live in?</p> <p>14 A. It was big enough for us, yes. That's</p> <p>15 correct. And also when his children came to visit they'd</p> <p>16 have a place to stay.</p> <p>17 Q. How much did he pay for the house when it was</p> <p>18 purchased?</p> <p>19 A. I think it was just \$600,000.</p> <p>20 Q. And the \$600,000 was money that Mr. McGinn</p> <p>21 provided or he borrowed?</p> <p>22 A. He borrowed, yes.</p> <p>23 Q. When did your desire to put the house in your</p> <p>24 name first come up?</p> <p>25 A. Right away we spoke about it, you know.</p>	<p>1 N. McGinn</p> <p>2 wanted to do.</p> <p>3 Q. But your testimony is that you had discussed</p> <p>4 it prior to the time you got married but the</p> <p>5 understanding was that you would transfer ownership of</p> <p>6 the house into your name at the time you got married; is</p> <p>7 that correct?</p> <p>8 A. Yeah. I just said -- you know, I wouldn't do</p> <p>9 it prior to that. I didn't think that was necessary. It</p> <p>10 was something I said we'll just wait -- it was a long,</p> <p>11 lengthy divorce so that's why it took so long to get</p> <p>12 married. And then time went by, one thing led to</p> <p>13 another. We bought the other house and then finally it</p> <p>14 came to the point where I transferred the house to my</p> <p>15 name. It was just an agreement between he and I.</p> <p>16 Q. And around the time you got married did you</p> <p>17 have discussions about him transferring the ownership of</p> <p>18 the house --</p> <p>19 A. I'm sure we did. I can't recall but life is</p> <p>20 busy. You know. It's just -- you know. It probably</p> <p>21 should have happened sooner. It didn't. It just</p> <p>22 happened. There were a lot of things -- like I said, it</p> <p>23 was never a house that was just he and I. I had my</p> <p>24 children living there and there was always something</p> <p>25 going on. You know, kids in high school and in college.</p>



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<p>1 N. McGinn</p> <p>2 There was no particular reason why it happened one time</p> <p>3 versus another.</p> <p>4 Q. Did you discuss whether the house would be put</p> <p>5 in both of your names rather than just in your name?</p> <p>6 A. I just said I wanted it in my name.</p> <p>7 Q. Why didn't you want the Florida house in your</p> <p>8 name?</p> <p>9 A. Because it is already. It's in my name as</p> <p>10 well.</p> <p>11 Q. It's in both of your names, correct?</p> <p>12 A. That's correct.</p> <p>13 Q. That's different from the Niskayuna house --</p> <p>14 A. Well when we got married --</p> <p>15 Q. Just let me finish the question please. The</p> <p>16 Florida house is different from the Niskayuna house in</p> <p>17 that the Florida house is in both of your names, correct?</p> <p>18 A. That's correct.</p> <p>19 Q. And the Niskayuna house is now currently --</p> <p>20 was transferred solely to your name, correct?</p> <p>21 A. Right.</p> <p>22 Q. Why the difference?</p> <p>23 A. Because I had to sign a prenuptial agreement</p> <p>24 before I got married and this was one of the things I</p> <p>25 wanted to do, have the Niskayuna house in my name.</p>	<p>1 N. McGinn</p> <p>2 maintained a copy of the prenup?</p> <p>3 A. I don't think so. I think it was in the</p> <p>4 office.</p> <p>5 Q. The home office?</p> <p>6 A. No.</p> <p>7 Q. 99 Pine?</p> <p>8 A. 99 Pine I believe, yeah.</p> <p>9 Q. Are you -- how much time -- let me ask you</p> <p>10 this. You're familiar with David and Lynn Smith, are you</p> <p>11 not?</p> <p>12 A. Yes, I am.</p> <p>13 Q. Are you social friends with the Smith's?</p> <p>14 A. To some degree, not a lot. Tim and Dave have</p> <p>15 known one another for many years so obviously I got to</p> <p>16 know them as well.</p> <p>17 Q. Did you ever have any discussion with the</p> <p>18 Smith's about property they owned in Florida?</p> <p>19 A. No.</p> <p>20 Q. Did you ever see the Smith's when you were in</p> <p>21 Florida?</p> <p>22 A. I have, yes.</p> <p>23 Q. And you understand that they own a house down</p> <p>24 there in Florida, correct?</p> <p>25 A. I know, but discussions -- I don't know what</p>
<p>1 N. McGinn</p> <p>2 Q. Okay. And what did the prenuptial agreement</p> <p>3 have to do with the house?</p> <p>4 A. A personal thing, that's all. Just a personal</p> <p>5 thing of mine. It didn't have anything to do with it but</p> <p>6 I asked -- what I wanted to do with the house was put it</p> <p>7 in my name.</p> <p>8 Q. Did you or did you not sign a prenuptial</p> <p>9 agreement before the marriage?</p> <p>10 A. I did.</p> <p>11 Q. You did. Okay. Did the prenuptial agreement</p> <p>12 have a provision referring to any real estate that either</p> <p>13 you or Mr. McGinn owned?</p> <p>14 A. Yeah. I can't remember exactly what the</p> <p>15 prenup said. It was something in there. And then that's</p> <p>16 what I said eventually what I want to do is put this</p> <p>17 house into my name. And it's just something that he and</p> <p>18 I discussed and that's why we did it. No other reason</p> <p>19 whatsoever.</p> <p>20 Q. Do you have a copy of the prenup?</p> <p>21 A. I think the SEC has it.</p> <p>22 Q. Your understanding is it was seized with the</p> <p>23 business papers?</p> <p>24 A. Yes, it was.</p> <p>25 Q. Do you know whether your husband has</p>	<p>1 N. McGinn</p> <p>2 you mean about discussions about their property in</p> <p>3 Florida.</p> <p>4 Q. Did you ever discuss with the Smith's anything</p> <p>5 about the transfer of ownership of their Florida house?</p> <p>6 A. No.</p> <p>7 Q. Do you understand that David Smith transferred</p> <p>8 ownership of his house to solely his wife's name during</p> <p>9 2009?</p> <p>10 A. No, I did not.</p> <p>11 Q. Did you have any discussion with the Smith's</p> <p>12 about their transferring assets into solely Mrs. Smith's</p> <p>13 name during the 2009 period?</p> <p>14 A. No. I don't know them well enough to discuss</p> <p>15 any of that stuff with them.</p> <p>16 Q. Did you ever have any discussions with the</p> <p>17 Smith's about troubles with the McGinn Smith business</p> <p>18 during the timeframe before the SEC's lawsuit was filed?</p> <p>19 A. No, I did not.</p> <p>20 Q. So it's your testimony that you didn't know</p> <p>21 the business of McGinn Smith was in trouble during the</p> <p>22 2009 time period?</p> <p>23 A. I did not know it was in trouble.</p> <p>24 Q. Other than the fact that you had seen various</p> <p>25 legal papers that had been filed against McGinn Smith and</p>



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<p>73</p> <p>1 N. McGinn</p> <p>2 that you knew that your husband had been testifying</p> <p>3 numerous times in various legal matters -- you knew about</p> <p>4 those, didn't you?</p> <p>5 A. I did, but I wouldn't have known that that</p> <p>6 meant the business was in trouble.</p> <p>7 Q. Okay. We've talked about papers you saw,</p> <p>8 legal filings against McGinn Smith and against your</p> <p>9 husband, correct?</p> <p>10 A. Mm-hmm.</p> <p>11 Q. And we looked at an e-mail from -- an e-mail</p> <p>12 exchange -- an e-mail from Mr. Smith to you in October</p> <p>13 2009 concerning Lex being a poor witness at various legal</p> <p>14 proceedings that he and Mr. Smith were testifying at,</p> <p>15 correct?</p> <p>16 A. Mm-hmm. Yes.</p> <p>17 Q. And right around the same time that you saw</p> <p>18 the legal filings you know that your husband and</p> <p>19 Mr. Smith and Mr. Lex were testifying in arbitrations,</p> <p>20 ownership of the Niskayuna house was transferred solely</p> <p>21 into your name?</p> <p>22 A. Correct.</p> <p>23 Q. And your testimony is that there's no</p> <p>24 connection whatsoever between any of those events?</p> <p>25 A. No, there is not.</p>	<p>75</p> <p>1 N. McGinn</p> <p>2 good time?", and I said, "It is a good time and so let's</p> <p>3 get the paperwork done."</p> <p>4 Q. We spoke earlier a little bit about your</p> <p>5 former employer, Mr. Bruno?</p> <p>6 A. Yes.</p> <p>7 Q. What was his role at McGinn Smith?</p> <p>8 A. I didn't know what he did there. When I was</p> <p>9 working for Senator Bruno I didn't even know he had a</p> <p>10 role in McGinn Smith. I wouldn't have known that.</p> <p>11 Q. At some point in time did you discover that he</p> <p>12 also had some sort of business relationship?</p> <p>13 A. Yes, I did at some point in time. I didn't</p> <p>14 know what his role was though.</p> <p>15 Q. How did you obtain the job with Mr. Bruno's</p> <p>16 office?</p> <p>17 A. I did not know Tim at the time so it wasn't</p> <p>18 through him. I applied and it's a typical thing and you</p> <p>19 take a test.</p> <p>20 Q. And did you meet Mr. McGinn through your --</p> <p>21 A. After. I met him through coming into the</p> <p>22 office but I did not know him prior to.</p> <p>23 Q. What was -- why was Mr. McGinn coming into the</p> <p>24 office?</p> <p>25 A. Well he had meetings everyday so whatever his</p>
<p>74</p> <p>1 N. McGinn</p> <p>2 Q. Did your husband think it was a good idea to</p> <p>3 transfer ownership of his property into your name from</p> <p>4 the beginning?</p> <p>5 A. He -- it was okay with him. You know. He</p> <p>6 didn't fight me on it. He said we'll talk about that at</p> <p>7 some point in time and we talked a few times and, you</p> <p>8 know, it was just -- it just happened. I don't -- as far</p> <p>9 as the legal stuff, I don't look at any of it. I don't</p> <p>10 know about it. If he was having, you know, problems, I</p> <p>11 didn't know anything about it. As far as the house being</p> <p>12 transferred in my name, it was something -- because I</p> <p>13 wanted to do that right from the start and it just</p> <p>14 happened. Just coincidental maybe.</p> <p>15 Q. Who raised the transfer of ownership in 2009?</p> <p>16 A. Who raised it?</p> <p>17 Q. Yes. You had gotten married three years</p> <p>18 before then, right?</p> <p>19 A. I did, yes.</p> <p>20 Q. Did it just come up that at that point in time</p> <p>21 Mr. McGinn said, "I just signed a deed and transferred</p> <p>22 ownership"?</p> <p>23 A. I think it was a matter of maybe even months</p> <p>24 it got talked about. He must have done it. He knew I</p> <p>25 was busy. And we talked about it and he said, "Is this a</p>	<p>76</p> <p>1 N. McGinn</p> <p>2 meeting was for. I had no idea. I didn't sit in on the</p> <p>3 meetings but I enjoyed it there. Everyday there was</p> <p>4 someone coming in.</p> <p>5 Q. Periodically Mr. McGinn would come in for a</p> <p>6 business meeting?</p> <p>7 A. Yeah. I would just imagine it was a business</p> <p>8 meeting, yeah.</p> <p>9 Q. At some point did you learn that Mr. Bruno had</p> <p>10 a role at McGinn Smith that ended?</p> <p>11 A. I didn't know any of that until I think what</p> <p>12 was happening to the Senator. So I really didn't -- I</p> <p>13 knew that they knew one another but I can't say that I</p> <p>14 knew that he had any role at McGinn Smith at all as far</p> <p>15 as a working relationship. I did not know that.</p> <p>16 Q. You knew that Mr. Bruno and Mr. McGinn knew</p> <p>17 each other and had various business meetings, correct?</p> <p>18 A. Yes.</p> <p>19 Q. And then your testimony is you had -- you had</p> <p>20 no knowledge about the specifics of any relationship</p> <p>21 between Mr. Bruno and Mr. McGinn until you began reading</p> <p>22 things in the papers, right?</p> <p>23 A. Correct. I just knew it was like a</p> <p>24 friendship. That's all.</p> <p>25 Q. After legal proceedings began being reported</p>



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<p>77</p> <p>1 N. McGinn</p> <p>2 about Mr. Bruno in the papers did you discuss his role at</p> <p>3 McGinn Smith at all with your husband?</p> <p>4 A. I didn't really discuss it. I probably said,</p> <p>5 "What's going on?" I had no idea it was even happening</p> <p>6 to the Senator because I wasn't there at the time when</p> <p>7 all this took place. You know. All I know is that I</p> <p>8 think he was a salesperson or something at McGinn Smith.</p> <p>9 I didn't know specifics. And I don't even think at that</p> <p>10 point -- I don't think he was even working at</p> <p>11 McGinn Smith at that point so I didn't really think much</p> <p>12 about it.</p> <p>13 Q. Do you recall at some point your husband</p> <p>14 testified in the proceedings involving Mr. Bruno?</p> <p>15 A. Yes, I do remember that.</p> <p>16 Q. Did you discuss with him his testimony at all</p> <p>17 before he went in?</p> <p>18 A. I really didn't because I don't even think</p> <p>19 that's something he should be discussing with me and</p> <p>20 vice-versa. I would never want to put myself in a</p> <p>21 situation -- you know, if I knew something or didn't know</p> <p>22 something, I'd rather not know what he has to testify</p> <p>23 about so I just never even asked questions.</p> <p>24 Q. Well before you came in to testify here today</p> <p>25 did you speak at all with your husband about your</p>	<p>79</p> <p>1 N. McGinn</p> <p>2 (Whereupon, a brief recess was taken.)</p> <p>3 MR. NEWVILLE: Back on the record.</p> <p>4 Q. Just a couple more followup questions. What</p> <p>5 is your current address? It's in Waterford, correct?</p> <p>6 A. Yes.</p> <p>7 Q. And what is the address?</p> <p>8 A. REDACTED</p> <p>9 Q. Crows Nest Court. That's a townhouse I think</p> <p>10 you mentioned?</p> <p>11 A. Yes.</p> <p>12 Q. Who are you renting that from?</p> <p>13 A. A gentleman, Ted Lombardi.</p> <p>14 Q. Is that address considered in Clifton as well?</p> <p>15 A. It's near Clifton Park. They're just right</p> <p>16 next door to one another.</p> <p>17 Q. Is Clifton a different area from Clifton Park?</p> <p>18 A. Clifton Park.</p> <p>19 Q. It's the same thing?</p> <p>20 A. Yeah, it's the same thing. It's not Clifton,</p> <p>21 it's Clifton Park.</p> <p>22 Q. And Waterford is right next to Clifton Park,</p> <p>23 correct?</p> <p>24 A. That's correct.</p> <p>25 Q. Have you signed any -- is that lease in your</p>
<p>78</p> <p>1 N. McGinn</p> <p>2 testimony?</p> <p>3 A. No, I didn't. I just -- I think it's best not</p> <p>4 to. You know. I'd come in and I'd just do what I have</p> <p>5 to do. And -- but no, we didn't discuss it ahead of</p> <p>6 time.</p> <p>7 Q. Did he tell you, "Listen, you're going to</p> <p>8 testify. You might be asked about the topics X, Y or Z"?</p> <p>9 A. Being I was in a deposition before I kind-of</p> <p>10 knew what a deposition was about. So he knew I knew that</p> <p>11 one other time so I knew basically what was going to</p> <p>12 happen. I didn't know what questions would be asked.</p> <p>13 Q. Did you speak with Stew Jones at all before</p> <p>14 coming in here today?</p> <p>15 A. No, I did not.</p> <p>16 Q. Have you ever spoken to Mr. Jones?</p> <p>17 A. No, I have not.</p> <p>18 Q. Mr. Jones represents your husband --</p> <p>19 A. Correct.</p> <p>20 Q. -- in various matters involving McGinn Smith,</p> <p>21 correct?</p> <p>22 A. Yeah. Whatever -- he represents him for</p> <p>23 whatever. I'm not sure.</p> <p>24 MR. NEWVILLE: Let's take a quick break</p> <p>25 and I think we can finish right up.</p>	<p>80</p> <p>1 N. McGinn</p> <p>2 name?</p> <p>3 A. Yes, it is.</p> <p>4 Q. Who is making the lease payments?</p> <p>5 A. We both are. We're both working.</p> <p>6 Q. And Mr. McGinn is residing there full-time?</p> <p>7 A. Yes.</p> <p>8 Q. Have you signed any other leases for other</p> <p>9 real estate in the last year?</p> <p>10 A. I haven't. I mean I had to do this one</p> <p>11 because, I don't know, if they did a credit check he</p> <p>12 wouldn't be able to live anywhere so it had to be in my</p> <p>13 name.</p> <p>14 Q. Do you have any plans to move out anytime</p> <p>15 soon?</p> <p>16 A. We signed a six-month lease to start and we'll</p> <p>17 go from there. I can do it month to month after that.</p> <p>18 Q. Does Mr. McGinn have any plans to move out</p> <p>19 anytime soon?</p> <p>20 A. I don't believe so.</p> <p>21 MR. NEWVILLE: I think we're concluded</p> <p>22 for today. Thank you so much for your time.</p> <p>23 (Whereupon, the Examination concluded.)</p> <p>24</p> <p>25</p>





<p>1 N. McGinn</p> <p>2 REPORTER'S CERTIFICATE</p> <p>3</p> <p>4 I, NORA B. LAMICA, Court Reporter and</p> <p>5 Notary Public, certify:</p> <p>6 That the foregoing proceedings were taken</p> <p>7 before me at the time and place therein set forth, at</p> <p>8 which time the witness was put under oath by me;</p> <p>9 That the testimony of the witness and all</p> <p>10 objections made at the time of the examination were</p> <p>11 recorded stenographically by me and were thereafter</p> <p>12 transcribed;</p> <p>13 That the foregoing is a true and correct</p> <p>14 transcript of my shorthand notes so taken;</p> <p>15 I further certify that I am not a relative or</p> <p>16 employee of any attorney or of any of the parties nor</p> <p>17 financially interested in the action.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22 NORA B. LAMICA</p> <p>23 Notary Public</p> <p>24</p> <p>25</p>	81	<p>1 N. McGinn</p> <p>2 DEPOSITION ERRATA SHEET</p> <p>3 Page No. _____ Line No. _____ Change to: _____</p> <p>4 _____</p> <p>5 Reason for change: _____</p> <p>6 Page No. _____ Line No. _____ Change to: _____</p> <p>7 _____</p> <p>8 Reason for change: _____</p> <p>9 Page No. _____ Line No. _____ Change to: _____</p> <p>10 _____</p> <p>11 Reason for change: _____</p> <p>12 Page No. _____ Line No. _____ Change to: _____</p> <p>13 _____</p> <p>14 Reason for change: _____</p> <p>15 Page No. _____ Line No. _____ Change to: _____</p> <p>16 _____</p> <p>17 Reason for change: _____</p> <p>18 Page No. _____ Line No. _____ Change to: _____</p> <p>19 _____</p> <p>20 Reason for change: _____</p> <p>21 Page No. _____ Line No. _____ Change to: _____</p> <p>22 _____</p> <p>23 Reason for change: _____</p> <p>24 SIGNATURE: _____ DATE: _____</p> <p>25 NANCY MCGINN</p>	83
<p>1 N. McGinn</p> <p>2 DEPOSITION ERRATA SHEET</p> <p>3 Assignment No. 323-699</p> <p>4</p> <p>5 SECURITIES AND EXCHANGE COMMISSION,</p> <p>6</p> <p>7 Plaintiff,</p> <p>8</p> <p>9 -vs- 10 Civ. 457 (GLS/DRH)</p> <p>10</p> <p>11 McGINN, SMITH &amp; CO., INC., et al</p> <p>12</p> <p>13 DECLARATION UNDER PENALTY OF PERJURY</p> <p>14 I declare under penalty of perjury that have</p> <p>15 read the entire transcript of my Deposition taken in the</p> <p>16 captioned matter or the same has been read to me, and</p> <p>17 the same is true and accurate, save and except for</p> <p>18 changes and/or corrections, if any, as indicated by me on</p> <p>19 the DEPOSITION ERRATA SHEET hereof, with the</p> <p>20 understanding that I offer these changes as if still</p> <p>21 under oath.</p> <p>22 _____</p> <p>23 NANCY MCGINN</p> <p>24 Subscribed and sworn to on the _____ day of</p> <p>25 _____, 20____ before me,</p> <p>_____</p> <p>Notary Public, in and for the State of</p> <p>_____</p>	82	<p>1 N. McGinn</p> <p>2 DEPOSITION ERRATA SHEET</p> <p>3 Page No. _____ Line No. _____ Change to: _____</p> <p>4 _____</p> <p>5 Reason for change: _____</p> <p>6 Page No. _____ Line No. _____ Change to: _____</p> <p>7 _____</p> <p>8 Reason for change: _____</p> <p>9 Page No. _____ Line No. _____ Change to: _____</p> <p>10 _____</p> <p>11 Reason for change: _____</p> <p>12 Page No. _____ Line No. _____ Change to: _____</p> <p>13 _____</p> <p>14 Reason for change: _____</p> <p>15 Page No. _____ Line No. _____ Change to: _____</p> <p>16 _____</p> <p>17 Reason for change: _____</p> <p>18 Page No. _____ Line No. _____ Change to: _____</p> <p>19 _____</p> <p>20 Reason for change: _____</p> <p>21 Page No. _____ Line No. _____ Change to: _____</p> <p>22 _____</p> <p>23 Reason for change: _____</p> <p>24 SIGNATURE: _____ DATE: _____</p> <p>25 NANCY MCGINN</p>	84



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Fax number: 518-449-4894

FACSIMILE TRANSMITTAL SHEET

TO: Mr. Thomas Ubelis

FROM: David Smith

COMPANY:

DATE: May 9, 2005

FAX NUMBER:

TOTAL NO. OF PAGES INCLUDING COVER:

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TO: Mr. Thomas Urbelis  
FAX #: 617-338-0122  
FROM: David L. Smith  
DATE: May 9, 2005  
SUBJECT: Deerfield Triarc Capital Corp.

**FOR IMMEDIATE ATTENTION**

Tom,

Please sign page 7 of the first section and page 11 of the second section and fax back to me immediately. This must be submitted today! You only need to send me the signature pages, keep the rest for your file. Any questions call me. My fax is: 518-449-4894.



DEERFIELD TRIARC  
Capital Corp.

JOHN JORDON BROTHERS COMPANIES

817-422-6573

T-918 P.013/024 F-373

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April 6, 2005

Dear Stockholder:

Deerfield Triarc Capital Corp. (the "Company") hereby notifies you (each recipient of this notice, a "Holder") that the Company has filed with the Securities and Exchange Commission (the "SEC") a registration statement on Form S-11 (Registration No. 333-123762) (the "IPO Registration Statement") in connection with its initial public offering (the "IPO") of shares of common stock, par value \$0.001 per share, of the Company (the "Common Stock"). The Company also intends to apply to list its Common Stock on the New York Stock Exchange.

This notice is being provided pursuant to the Registration Rights Agreement, dated December 23, 2004, among the Company, on the one hand, and Credit Suisse First Boston LLC, Deutsche Bank Securities Inc. and Bear, Stearns & Co. Inc. for the benefit of the Initial Purchasers and the Holders (as defined therein), on the other hand, (the "Registration Rights Agreement"). In accordance with and subject to the terms of the Registration Rights Agreement, you may request to include the shares of Common Stock you currently hold in the IPO Registration Statement.

#### IPO Registration Statement

The managing underwriters of the proposed IPO are expected to be Credit Suisse First Boston LLC, Deutsche Bank Securities Inc., and UBS Securities LLC. In order to sell any of your Common Stock pursuant to the IPO Registration Statement, you must fill out and sign the following documents enclosed herewith and return them to the Company by April 26, 2005:

- (1) Registration Notice and Questionnaire (the "Notice"); and
- (2) Questionnaire to be completed by all directors, officers and stockholders of the Company as required by the National Association of Securities Dealers, Inc. (the "NASD Questionnaire").

Deerfield Triarc Capital Corp.  
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Chicago, Illinois 60651  
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Facsimile: (773) 380-1601

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317-422-5573

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P.14/23  
P-573

The managing underwriters of the proposed IPO have advised the Company that, subject to market conditions, they may be unable to underwrite all of the shares of Common Stock that Holders may request to include. Depending on the number of shares of Common Stock that the Company and the requesting Holders propose to offer in the IPO, the managing underwriters may, pursuant to the Registration Rights Agreement, exclude shares of Common Stock that you may propose to include in the IPO Registration Statement if they determine in good faith that marketing factors require a limitation on the number of shares to be underwritten in the IPO.

*Shelf Registration Statement*

If you do not elect to participate in the Company's IPO, the Company will remain obligated under the Registration Rights Agreement to register your Common Stock for resale in a shelf registration statement (the "Shelf Registration Statement") to be filed no later than 90 days after the consummation of the IPO.

*Lock-up*

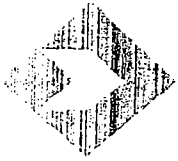
In addition, in connection with the IPO, the underwriters have requested that all Holders be restricted from offering, selling, pledging, contracting to sell or granting any option or contract to purchase shares of Common Stock. As a result, in accordance with the Registration Rights Agreement, all Holders, whether or not they request to include, or in fact do include, any shares of their Common Stock in the IPO Registration Statement, will be deemed to have agreed not to effect any sale or distribution of Common Stock for a period of 180 days following the effective date of the IPO Registration Statement.

*Your Additional Obligations*

Please note also that in order for your shares to be included in the IPO Registration Statement, you must enter into an underwriting agreement with the managing underwriters selected by the Company, execute any questionnaires, powers of attorney, indemnities, lock-up agreements, security escrow agreements and other documents reasonably required under the terms of such underwriting, and furnish to the Company such information as the Company may reasonably request.

*Withdrawal Rights and Obligations*

You may elect to withdraw from the IPO and not include such shares in the IPO Registration Statement by notifying the Company and the managing underwriters in writing of such election to withdraw at least ten (10) business days prior to the effective date of the IPO Registration Statement, unless in the opinion of counsel such withdrawal would necessitate a recirculation of the IPO prospectus to investors, in which case, you must deliver such written notice at least twenty (20) business days prior to the effective date of the IPO Registration Statement. Once the price range for the IPO has been determined, the Company will notify Holders who have elected to participate in the IPO



## DEERFIELD TRIARC

Capital Corp.

of that price range and of the deadline for providing notices of withdrawal in a later mailing.

The information set forth in this letter is qualified in its entirety by the provisions of the Registration Rights Agreement. You should carefully review those provisions in connection with a decision whether to include your Shares of Common Stock in the IPO Registration Statement.

Please review the enclosed Registration Notice and Questionnaire, consider whether you wish to include your shares of Common Stock in the IPO Registration Statement, complete the information requested and sign, date and return the completed Registration Notice and Questionnaire and NASD Questionnaire to Deerfield Triarc Capital Corp. at:

Deerfield Triarc Capital Corp.  
Attention: Frederick L. White, Esq.  
8700 West Bryn Mawr Avenue, 12<sup>th</sup> Floor  
Chicago, Illinois 60631

Please send the completed Registration Notice and Questionnaire and NASD Questionnaire to the above address by registered or certified mail, return receipt requested, or by overnight courier. You may also send it by facsimile, Attention: Frederick L. White, Esq., at (773) 380-1601.

Sincerely,

Frederick L. White, Esq.  
Senior Vice President, General  
Counsel and Secretary

## REGISTRATION NOTICE AND QUESTIONNAIRE

The undersigned beneficial owner of common stock, par value \$0.001 per share (the "Common Stock"), of Deerfield Triarc Capital Corp. (the "Company"), understands that the Company has filed with the Securities and Exchange Commission (the "SEC") a registration statement on Form S-11, which will provide for the registration under the Securities Act of 1933, as amended (the "Securities Act"), of Common Stock to be issued and sold by the Company (the "IPO Registration Statement") to the public (an "IPO").

Each beneficial owner is entitled to the benefits of the Registration Rights Agreement (the "Registration Rights Agreement"), dated as of December 23, 2004, among the Company, Credit Suisse First Boston LLC, Deutsche Bank Securities Inc. and Bear, Stearns & Co. Inc. A copy of the Registration Rights Agreement is available from the Company upon request at the address set forth below.

In order to sell or otherwise dispose of any shares of Common Stock pursuant to the IPO Registration Statement, a beneficial owner of Common Stock generally will be required to be named as a selling security holder in the related prospectus, deliver the prospectus to purchasers of Common Stock and be bound by those provisions of the Registration Rights Agreement applicable to such beneficial owner (including certain indemnification provisions as described below). Beneficial owners are required to complete and deliver the documents listed below and return each to the Company by April 26, 2005 in order to be named as selling security holders in the IPO Registration Statement and related prospectus at the time of effectiveness:

- (1) This Notice of Election and Questionnaire (the "Notice"); and
- (2) A questionnaire to be executed by each holder of equity securities of the Company as required by the National Association of Securities Dealers, Inc. (the "NASD Questionnaire").

Beneficial owners that do not complete this Notice and the NASD Questionnaire and deliver each to the Company as provided herein will not be named as selling security holders in the prospectus and therefore will not be permitted to sell any Common Stock pursuant to the IPO Registration Statement.

Certain legal consequences may arise from being named as selling security holders in the IPO Registration Statement and the related prospectus. Accordingly, holders and beneficial owners of Common Stock are advised to consult their own securities law counsel regarding the consequences of being named or not being named as a selling security holder in the IPO Registration Statement and the related prospectus.

## NOTICE OF ELECTION

The undersigned beneficial owner of Common Stock hereby gives notice to the Company of its election to sell or otherwise dispose of Common Stock beneficially owned by it and listed in Item (4) (unless otherwise specified under Item (4)) pursuant to the IPO Registration Statement. The undersigned, by signing and returning this notice, understands that it will be bound by the terms and conditions of this Notice and the Registration Rights Agreement.

The undersigned understands and agrees that by signing and returning this notice to the Company in order to elect to include any Common Stock in the IPO Registration Statement in order to be sold in the IPO:

- (1) it will be required to execute an underwriting agreement in customary form with the representatives of underwriters selected for the IPO (the "Underwriters") and any other representation required by law, any questionnaires, powers of attorney, indemnities, lock-up agreements, securities escrow agreements and other documents reasonably required under the terms of such underwriting, and to furnish the Company such information as the Company may reasonably request in writing for inclusion in the IPO Registration Statement;
- (2) it is deemed to have agreed not to effect any public sale or distribution of securities of the Company of the same or similar class or classes of the securities included in the IPO Registration Statement or any securities convertible into or exchangeable or exercisable for such securities, including a sale pursuant to Rule 144 or Rule 144A under the Securities Act, during such periods as reasonably requested by the Underwriters (but in no event for a period longer than one hundred eighty (180) days following the effective date of the IPO Registration Statement);
- (3) the Underwriters may exclude some or all of the shares of Common Stock that the undersigned proposes to include in the IPO if such Underwriters determine in good faith that marketing factors require a limitation on the number of shares to be underwritten in the IPO (an "IPO Cutback"); and
- (4) If the undersigned disapproves of the terms of the IPO, it may withdraw therefrom by written notice to the Company and the Underwriters, delivered at least ten (10) business days prior to the effective date of the IPO Registration Statement, provided, that if, in the opinion of counsel such withdrawal would necessitate a recirculation of the Prospectus to investors, the undersigned shall be required to deliver such written notice at least twenty (20) business days prior to the effective date of the IPO Registration Statement (a "Holder Withdrawal").

The undersigned also understands that the Company has the right to terminate or withdraw the IPO Registration Statement at any time prior to its effectiveness (a



"Company Withdrawal"). To the extent that any shares of Common Stock are not registered under and distributed pursuant to the IPO Registration Statement due to a Company Withdrawal, Holder Withdrawal, IPO Cutback, or a Holder's decision not to include its Common Stock in the IPO (the "Remaining Common Stock"), the undersigned also understands that (1) the Company will file a registration statement providing for the resale from time to time by the holders of the Remaining Common Stock in accordance with the Registration Rights Agreement (a "Shelf Registration Statement") and (2) the undersigned may elect to include its Remaining Common Stock in the Shelf Registration Statement.

The undersigned agrees to execute and deliver each of the following documents, a form of each of which will be provided at a later date:

(1) a power of attorney granting Jonathan W. Trutter and Frederick L. White, as the undersigned's attorneys-in-fact, each with full power and authority to act in the name of the undersigned with respect to all matters arising in connection with sale of shares of Common Stock by the undersigned to the Underwriters, including, but not limited to, the power and authority (a) to sell the undersigned's Common Stock pursuant to the underwriting agreement to be entered into with the Underwriters of the proposed IPO and (b) execute such underwriting agreement on behalf of the undersigned and perform its obligations thereunder (the "Power of Attorney"); and

(2) a custody agreement pursuant to which any certificates for shares of Common Stock that the undersigned sells in the IPO will be deposited with the custodian thereunder.

The undersigned hereby provides the following information to the Company and represents and warrants that such information is accurate and complete:

References below to "you" are to you as the undersigned Holder or to the organization that you represent, as applicable.

1. (a) Please print or type your name or your organization's name exactly as it should appear in the IPO Registration Statement.  
David L. Smith and Lynn A. Smith Irrevocable Trust  
Thomas Uchelis, TTEE dated 8/4/04
- (b) Full Legal Name of Registered Holder (if not the same as (a) above) through which Shares of Common Stock listed in Item (3) below are held:  


---
- (c) Full Legal Name of DTC Participant (if applicable and if not the same as (b) above) through which Shares of Common Stock listed in Item (3) below are held:  


---

2. Address for Notices to Holder:

c/o Urbels, Fieldsteel, LLP

155 Federal St. 4th Floor

Boston, MA 02110

Telephone: 617-338-2200

Fax: 617-338-0122

Email address: \_\_\_\_\_

Contact Person: Thomas Urbels

3. Beneficial Ownership of Common Stock:

Type and Amount of Shares of Common Stock beneficially owned: (Please indicate the type and amount of Shares of Common Stock beneficially owned by you on the appropriate lines below.)

<u>TYPE</u>	<u>CUSIP No(s).</u>	<u>AMOUNT</u>
<u>144A (QIBS<sup>1</sup>):</u>	<u>244572 10 3</u>	
<input checked="" type="checkbox"/> Private Placement (IAIs and AIs <sup>2</sup> ):	<u>244572 20 2</u>	<u>50,000 shares</u>
<u>Regulation S:</u>	<u>244572 30 1</u>	
<u>Regulation S:</u>	(ISIN No.) <u>U244 1P 104</u>	

4. Please indicate whether you wish to include Shares of Common Stock in the IPO Registration Statement relating to the IPO of the Common Stock of Deerfield Triarc Capital Corp. :

☒ Yes

☐ No

If "yes," please provide the number of Shares of Common Stock requested by you to be registered under the IPO Registration Statement.

Number of Shares to be registered (IPO):

50,000

5. Beneficial Ownership of Securities of the Company other than the Shares of Common Stock by the Selling Security Holder:

Except as set forth below in this Item (5), the undersigned is not the beneficial or registered owner of any securities of the Company other than the Shares of Common Stock listed above in Item (3).

<sup>1</sup> "qualified institutional buyers" (as defined in Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"))

<sup>2</sup> Institutional "accredited investors" (as defined in Rule 501(a)(1), (2), (3), (7), or (8) of the Securities Act) and individual "accredited investors" (as defined in Rule 501(a)(4), (5), or (6) of the Securities Act)

## 2. Address for Notices to Holder:

[REDACTED]

Santa Rosa Springs, N.Y. 12866

Telephone: 518-449-5131

Fax: 518-449-4894

Email address:

Contact Person: David L. Smith

## 3. Beneficial Ownership of Common Stock:

Type and Amount of Shares of Common Stock beneficially owned: (Please indicate the type and amount of Shares of Common Stock beneficially owned by you on the appropriate lines below.)

TYPE	CUSIP No(s).	AMOUNT
<u>144A (QIBS<sup>1</sup>):</u>	244572 10 3	
<input checked="" type="checkbox"/> Private Placement (IAs and AIs <sup>2</sup> ):	244572 20 2	<u>50,000 Shares</u>
<u>Regulation S:</u>	244572 30 1	
<u>Regulation S:</u>	(ISIN No.) U244 1P 104	

## 4. Please indicate whether you wish to include Shares of Common Stock in the IPO Registration Statement relating to the IPO of the Common Stock of Deerfield Triarc Capital Corp.:

☒ Yes

☐ No

If "yes," please provide the number of Shares of Common Stock requested by you to be registered under the IPO Registration Statement.

Number of Shares to be registered (IPO):

50,000

## 5. Beneficial Ownership of Securities of the Company other than the Shares of Common Stock by the Selling Security Holder:

Except as set forth below in this Item (5), the undersigned is not the beneficial or registered owner of any securities of the Company other than the Shares of Common Stock listed above in Item (3).

<sup>1</sup> "qualified institutional buyers" (as defined in Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"))

<sup>2</sup> Institutional "accredited investors" (as defined in Rule 501(a)(1), (2), (3), (7), or (8) of the Securities Act) and individual "accredited investors" (as defined in Rule 501(a)(4), (5), or (6) of the Securities Act)

Type and amount of securities of the Company beneficially owned other than the Shares of Common Stock owned by the Holder:

None

6. Have you or your organization, if applicable, had any position, office or other material relationship since the inception of the Company in November 2004 with the Company, Deerfield Capital Management LLC, or any affiliates of either?

☐ Yes

☒ No

If yes, please indicate the nature of any such relationship below:

7. Broker-Dealer Status:

Is the undersigned a registered broker-dealer?

☐ Yes

☒ No

Note: In general we will be required to identify any registered broker-dealer as an underwriter in the prospectus.

8. Affiliation with Broker-Dealers:

Is the undersigned an affiliate of a registered broker-dealer? An "affiliate" of a specified person or entity means a person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

☐ Yes

☒ No

If so, please answer the remaining questions in this section.

- (a) Please describe the affiliation between the undersigned and any registered broker-dealers:

(b) If the shares of Common Stock were purchased by the undersigned other than in the ordinary course of business, please describe the circumstances:

N/A

(c) If the undersigned, at the time of its purchase of the shares of Common Stock, had any agreements or understandings, directly or indirectly, with any person to distribute the shares of Common Stock, please describe such agreements or understandings:

N/A

Note: If the undersigned is an affiliate of a broker-dealer and did not purchase its shares of Common Stock in the ordinary course of business or at the time of the purchase had any agreements or understandings, directly or indirectly, to distribute the shares of Common Stock, we must identify the undersigned as an underwriter in the prospectus.

9. Beneficial Ownership by Natural Persons:

Please state the name of the person who has voting or investment power over the shares of Common Stock held by the undersigned? Please describe who has or shares: (a) voting power, which includes the power to vote, or to direct the voting of, such security; and/or, (b) investment power, which includes the power to dispose, or to direct the disposition of, the Common Stock held by the undersigned directly or indirectly, through any contract, arrangement, understanding, relationship.

Thomas Urbelis, Trustee

10. Except as set forth below, the undersigned (including its donees or pledgees) intends to distribute the Shares of Common Stock listed above in Item (4) pursuant to the IPO Registration Statement only pursuant to the underwriting arrangements to be described in the prospectus forming a part of the IPO Registration Statement.

N/A

The undersigned acknowledges that it understands its obligation to comply with the provisions of the Securities Exchange Act of 1934, as amended, and the rules thereunder relating to stock manipulation, particularly Regulation M thereunder (or any successor rules or regulations), in connection with any offering of Shares of Common Stock pursuant to the IPO Registration Statement. The undersigned agrees that neither it nor any person acting on its behalf will engage in any transaction in violation of such provisions.

The Holder hereby acknowledges its obligations under the Registration Rights Agreement to indemnify and hold harmless certain persons set forth therein.

Pursuant to the Registration Rights Agreement, the Company agreed under certain circumstances to indemnify the Holders against certain liabilities.

In accordance with the undersigned's obligation under the Registration Rights Agreement to provide such information as may be required by law for inclusion in the IPO Registration Statement, the undersigned agrees to promptly notify the Company of any inaccuracies or changes in the information provided herein that may occur subsequent to the date hereof at any time while the IPO Registration Statement remains effective. All notices hereunder and pursuant to the Registration Rights Agreement shall be made in writing at the address set forth in Item (2).

In the event any Holder transfers all or any portion of the Common Stock listed in Item (3) above after the date on which such information is provided to the Company, the Holder will notify the transferee(s) at the time of transfer of its rights and obligations under this Registration Notice and Questionnaire and the Registration Rights Agreement.

By signing this Registration Notice and Questionnaire, the undersigned consents to the disclosure of the information contained herein in its answers to Items (1) through (10) above and the inclusion of such information in the IPO Registration Statement and the related prospectus. The undersigned understands that such information will be relied upon by the Company without independent investigation or inquiry in connection with the preparation or amendment of the IPO Registration Statement and the related prospectus.

Please sign and date this Registration Notice and Questionnaire and NASD Questionnaire and provide the information requested below. Please return your completed Registration Notice and Questionnaire to Deerfield Triarc Capital Corp., Attention: Frederick L. White, Esq., 8700 West Bryn Mawr Avenue, 12<sup>th</sup> Floor, Chicago, Illinois 60631, in the manner set forth in the accompanying letter.

Name of Holder: David L. Smith and Lynn A. Smith Irrevocable  
(Type or Print) Trust dated  
Thomas Unpelis, TTEE 8/4/04

K  
Signature of Holder or Person Signing on Behalf of  
Holder if Holder is an Entity

Title: Trustee  
SSON

Date: May 9, 2005

Telephone Number: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Saratoga Springs, N.Y. 12866

David L. Smith, Jr. 12/1/04  
 Irrevocable Trust Agreement  
 NAME: 9/4/04 Thomas O'Neil

PERSONAL AND CONFIDENTIAL

TO THE DIRECTORS, OFFICERS AND STOCKHOLDERS OF DEERFIELD TRIARC  
 CAPITAL CORP.

This questionnaire is being furnished to you in your capacity as a director, or a person nominated to become a director, officer, or a person selected to become an officer, or stockholder, or a beneficial owner of the unregistered equity securities acquired prior to the filing of the Registration Statement on Form S-11 relating to the proposed offering (the "Registration Statement"), of Deerfield Triarc Capital Corp., a Maryland corporation and/or its subsidiaries (collectively, the "Company") and concerns information that may be furnished to the National Association of Securities Dealers, Inc. (the "NASD") in connection with the proposed offering. Your correct responses to this questionnaire ensure that the data furnished to NASD is accurate. Please exercise great care in completing this questionnaire.

Please note that no announcement has been made concerning the proposed offering. The securities laws require that the matter be kept in the strictest of confidence. Unless otherwise indicated, please answer every question as of the date you complete this questionnaire. If there is any situation about which you have any doubt, please contact Robert Forster (at (212) 309-1062 or rforster@hunton.com) of Hunton & Williams LLP before completing the questionnaire. If there is any response or underlying factual matter about which you are uncertain, please explain the matter fully.

Certain terms in the questionnaire appear in quotation marks and have technical meanings as defined in the Addendum. It is important that you refer to the Addendum before answering the questions so that you will fully understand the meaning of these terms.

**IMPORTANT:** If your answer is "yes" to any of the following questions, please explain the details on the questionnaire or on a separate sheet and attach it to this questionnaire. If your response to a question is "no," "none," or "not applicable," please so indicate in the space provided. Unanswered questions will delay the proposed offering.

Please complete, date and sign two copies of this questionnaire and return one to Frederick L. White, Esq., Senior Vice President, General Counsel and Secretary of the Company, at fax no. (773) 380-1601 for receipt not later than April 26, 2005. The other copy is for your files. After you have returned the questionnaire, if you learn of any information that would change your response to any question in this questionnaire, either as a result of your review of a draft or an amendment to the Registration Statement or otherwise, please inform the person named above of such change.

**Question 1:** Indicate whether you have any information pertaining to any arrangement or dealings or compensation agreement entered into since the Company's inception providing for the receipt of any item of value and/or transfer of any warrants, options or other securities from the Company to any "underwriter or related person," "member" of the NASD or between a "person associated with a member" of the NASD on the one hand and the Company or any "affiliate," "controlling" shareholder, officer or director thereof on the other hand during the last 18 months, or proposed arrangements or dealings between any of the foregoing providing for such compensation as described above, other than information relating to the proposed underwriting agreement to be entered into in connection with the proposed public offering of the Company's securities.

I know of no such information



I know of such information \_\_\_\_\_

Description:

Further, indicate if you have entered into any arrangements prior to the filing of the Registration Statement, which provide for the receipt of any item of value and/or the transfer of any warrants, options or other securities from the Company to any "underwriter or related person," "member" of the NASD or between a "person associated with a member" of the NASD on the one hand and the Company or any "affiliate," "controlling" shareholder, officer or director thereof on the other hand, or propose to enter into such an arrangement within 90 days after the commencement of the sales of the securities.

Yes \_\_\_\_\_ No ☒

If "yes," please identify the parties involved and provide the material terms of the arrangement.

Response:

Question 2: State below whether (a) you or any "associate" or "affiliate" of yours are a "member" of the NASD, a "controlling" shareholder of an NASD "member," a "person associated with a member," a direct or indirect "affiliate" of a "member," or an "underwriter or related person" with respect to the proposed offering; (b) you or any "associate" or "affiliate" of yours owns any stock or other securities of any NASD "member" not purchased in the open market; (c) you have any association or other affiliation with a "member" of the NASD otherwise than through share ownership; or (d) you or any "associate" or "affiliate" of yours has made or received any outstanding subordinated loans to any NASD "member." If you are a general or limited partnership, a "no" answer asserts that no such relationship exists for you as well as for each of your general or limited partners.

Yes ☒ No \_\_\_\_\_

If "yes," please identify the NASD "member," provide its name, address and telephone number and describe your relationship, including, in the case of a general or limited partner, the name of the partner.

If you answer "no" to both Question 2 and Question 3, you need not respond to Question 4.

Response:

I serve as the Trustee for the Daniel L. Smith & Lynn A. Smith Irrevocable Trust dated 8/4/04. Mr. Smith is the principal stockholder, President and CEO of: McGinn, Smith & Co - member of the NASD  
99 Pine St. Albany, N.Y. 12207  
518-449-5131

**Question 3:** State below whether you or any "associate" or "affiliate" of yours has been an underwriter, or a "controlling" person or member of any investment banking or brokerage firm which has been or might be an underwriter for securities of the Company or any "affiliate" thereof including, but not limited to, the common stock now being registered.

Yes \_\_\_\_\_ No ✓

If "yes," please identify the NASD "member," describe your relationship, including, in the case of a general or limited partner, the name of the partner and state whether such NASD "member" is participating in the proposed public offering, and, if so, the capacity in which such NASD "member" is participating.

If you answer "no" to both Question 2 and Question 3, you need not respond to Question 4.

Response:

**Question 4:** If your answer to Question 2 or Question 3 was "yes," set forth below information as to all purchases and acquisitions (including contracts for purchase or acquisition) of securities or other items of value of the Company or any "affiliate," "controlling" shareholder, officer or director thereof, by you or any of your "affiliates" or "associates" since the Company's formation, as well as to all proposed purchases and acquisitions which are to be consummated in whole or in part within the next twelve (12) months.

<u>Seller or Prospective Seller</u>	<u>Amount and Nature of Securities</u>	<u>Price or Other Consideration</u>	<u>Date</u>	<u>Description of Relationship</u>
David L. Smith owner	50,000 shares	\$15.00	12/17/04	David L. Smith is the principal shareholder and serves as President and CEO of McGraw, Smith & a member of the NAFS
David L. Smith Trust dated 8/4/04				

55113.000004 RICHMOND 1410383v2

Question 5: Set forth below information as to all sales and dispositions (including contracts to sell or to dispose) of securities or other items of value of the Company or any of its "affiliates" since the Company's formation, by you or, to your knowledge, the Company or any "affiliate," "controlling" shareholder, officer or director thereof or any other "persons" to any NASD "member," any "person associated with a member" of the NASD, any person "affiliated" with a member of the NASD or any "underwriter or related person." Also set forth below information as to all proposed sales and dispositions by you or, to your knowledge, the Company or any "affiliate," "controlling" shareholder, officer or director thereof or any other persons to any NASD "member," any "person associated with a member" of the NASD, any person "affiliated" with a member of the NASD or any "underwriter or related person" which are to be consummated in whole or in part within the next twelve (12) months, other than a sale or disposition in connection with the proposed public offering. Also set forth below a description of the relationship, affiliation or association of you and, if known, the other party or parties to the above transactions with an underwriter or other person or entity in the stream of distribution with respect to the offering.

*None*

<u>Seller or Prospective Seller</u>	<u>Amount and Nature of Securities</u>	<u>Price or Other Consideration</u>	<u>Date</u>	<u>Description of Relationship</u>
-----------------------------------------	--------------------------------------------	-----------------------------------------	-------------	----------------------------------------

Question 6: If you or any of your "associates" or "affiliates" have had since the Company's formation, or are to have within the next twelve (12) months, any transactions of the character referred to in Questions 4 or 5, describe briefly below the relationship, affiliation or association of you and, if known, the other party or parties to any such transaction with an underwriter or other person or entity in the stream of distribution with respect to the proposed offering. In any case, where the purchaser (whether you or any such party) is known by you to be a member of a private investment group, such as a hedge fund or other "group" of purchasers, furnish, if known, the names of all "persons" comprising the "group" and their association with or relationship to any broker-dealer.

**NOTE:** All of the underwriters may not be set forth in the initial filing of the Registration Statement. They will be listed in the final prospectus, copies of which will be sent to you at a later date. As with all other questions herein, you should advise us of any changes in your responses as soon as possible after you learn of such changes, either as a result of your review of subsequent drafts or amendments of the Registration Statement (including the prospectus) or otherwise.

Response:

*None*

Question 7: Except as to any arrangement between the Company, Credit Suisse First Boston LLC, Deutsche Bank Securities, Inc., and UBS Securities LLC in connection with the proposed initial public offering, do you know of any arrangement made or to be made by any "person" or of any transaction already effected (i) to limit or restrict the sale of the Company's Common Stock during the period of the offering of the Common Stock to be registered, (ii) to stabilize the market for the Company's Common Stock, (iii) to withhold commissions or otherwise to hold each underwriter or dealer responsible for the distribution of his, her or its participation in the offering, (iv) to grant any discounts or payment of any commissions to any underwriter or the payment of any finder's fee or similar payment or (v) to allocate any of the Company's Common Stock to be registered to you or any of your "associates" or "affiliates" or to any officer or director of the Company?

Response:

No

Question 8: Do you or any of your "affiliates" or "associates" have a material relationship with or interest in Credit Suisse First Boston LLC, Deutsche Bank Securities, Inc., UBS Securities LLC or any other dealer manager, investment banking firm or underwriting organization?

yes David L. Smith, Beneficiary of the David L. Smith and Lynn A. Smith Trust dated 8/4/04 is the principal shareholder and President of McGinn, Smith & Co., a member of the NASD. McGinn, Smith is an investment banking firm that has served as an underwriter.

Response:

Question 9: Please state the full name, form of organization (e.g., corporation, partnership, etc.), nature of business done by and principal place of business of each "associate" and "affiliate" of yours referred to in the answers to this questionnaire and your relationship with such "associate" or "affiliate," if applicable.

Response:

McGinn, Smith & Co. Inc.  
member of the NASD  
conducts a general securities business  
Corporate headquarters:  
99 Pine St.  
Albany, N.Y. 12207

**Question 10:** Indicate below whether you have any knowledge that more than 10% of the aggregate net proceeds of the proposed public offering, not including underwriting compensation, are intended to be paid to (i) "members" "participating" in the distribution of the proposed offering, (ii) "persons associated with a member," (iii) persons "affiliated" with "members" and (iv) members of the "immediate family" of such persons.

Response:

I have no such knowledge ✓

I have such knowledge \_\_\_\_\_

**Question 11:** Please describe below any "conflict of interest" that you, or any "member" identified by you in Question 2 above, may have with the Company.

Response:

*None*

**Question 12:** Are you now or have you ever been interested in or "affiliated" with any of the firms of Deloitte & Touche LLP, Clifford Chance US LLP or Hunton & Williams LLP?

Yes \_\_\_\_\_ No ✓

If so, please identify the party or parties involved and describe such interest or affiliation.

Response:

I understand that the information I have furnished may be forwarded to the NASD. My responses are accurate and complete to the best of my knowledge. I will promptly advise the Company as to any events relating to the items in this questionnaire that occur between now and the completion of the offering.

I understand and agree that my responses to this questionnaire and any future communications regarding these matters will be relied upon by the Company, the underwriters and their respective counsel

H

LYNN A SMITH

Page 3 of 10  
 Statement Period  
 03-25-10 through 04-23-10  
 B 15 0 B P PB 15 0081609  
 Account Number: [REDACTED] 5287

## MyAccess Checking Additions and Subtractions

Date Posted	Amount(\$)	Resulting Balances(\$)	Transactions
04-13	2.00-	19,643.67	Publix Super M 04/13 #000004659 Withdrwl 9621 N US Hwy 1 Sebastian FL Fee
04-14	17.50-	19,628.17	Check 810
04-15	95,000.00+	114,628.17	Wire Type:Wire IN Date: 100415 Time:1508 Et Trn:2010041500260064 Seq:8579900105Ft/007572 Orig:Thomas Urbelis Ttee ID:Rmr0696711 Snd Bk:Jpmo Rgan Chase Bank, NA ID:021000021 Pmt Det:Swf Of 10 /04/15
04-15	12.00-	114,616.17	Wire Transfer Fee
04-16	50.00-	114,566.17	Check 775
04-19	66,500.00-	48,066.17	Check 819
04-19	422.99-	47,643.18	Check 829
04-19	347.75-	47,295.43	Check 816
04-19	285.35-	47,010.08	Fpl Payment Ctr Des:Bill Pymt Check #:834 Indn:1563056074 Co ID:Lbx025576 Arc
04-19	201.95-	46,808.13	Food Bag # 04/17 #000277145 Withdrwl 5830 N US Route 1 Sebastian FL
04-19	120.86-	46,687.27	Check 818
04-19	2.00-	46,685.27	Food Bag # 04/17 #000277145 Withdrwl 5830 N US Route 1 Sebastian FL Fee
04-20	595.47-	46,089.80	Nissan Motor Acc Des:Pgh - Leas Check #:0828 Indn:29009464465 Co ID:8881893568 Arc
04-20	594.72-	45,495.08	Check 830
04-20	201.95-	45,293.13	Food Bag # 04/20 #000365976 Withdrwl 5830 N US Route 1 Sebastian FL
04-20	201.95-	45,091.18	Food Bag # 04/20 #000365129 Withdrwl 5830 N US Route 1 Sebastian FL
04-20	201.95-	44,889.23	Food Bag # 04/20 #000364461 Withdrwl 5830 N US Route 1 Sebastian FL
04-20	85.00-	44,804.23	Check 826
04-20	75.00-	44,729.23	Check 825
04-20	25.95-	44,703.28	Banfield Pet Hsp Des:Banfld Pet ID:2064090 Indn:Lynn A. Smith Co ID:0000158927 Tel
04-20	2.00-	44,701.28	Food Bag # 04/20 #000365976 Withdrwl 5830 N US Route 1 Sebastian FL Fee
04-20	2.00-	44,699.28	Food Bag # 04/20 #000365129 Withdrwl 5830 N US Route 1 Sebastian FL Fee
04-20	2.00-	44,697.28	Food Bag # 04/20 #000364461 Withdrwl 5830 N US Route 1 Sebastian FL Fee
04-23	44,325.44-	371.84	Legal Order, Lts U042110000091
04-23	100.00-	271.84	Legal Order Fee,Lts U042110000091

## Checks Posted in Numerical Order

Check #	Posting Date	Amount(\$)	Check #	Posting Date	Amount(\$)	Check #	Posting Date	Amount(\$)
775	04-16	50.00	805	04-07	281.20	815*	04-13	681.51
793*	03-26	201.41	807*	04-06	43.42	816	04-19	347.75
796*	04-01	594.72	808	04-05	374.00	818*	04-19	120.86
798*	03-29	350.00	809	04-06	100.00	819	04-19	66,500.00
799	04-06	4,667.00	810	04-14	17.50	825*	04-20	75.00
802*	04-06	620.15	811	04-06	144.00	826	04-20	85.00
803	04-12	810.92	812	04-07	49.62	829*	04-19	422.99
804	04-05	6,186.15	813	04-12	138.24	830	04-20	594.72

PLAINTIFF'S  
EXHIBIT

15 FOR 10  
 03-27-10

1 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

2 -----  
3 SECURITIES AND EXCHANGE COMMISSION

4 Plaintiff,

-versus-

10-CV-457

5 MCGINN, SMITH & CO., INC.,  
6 MCGINN, SMITH ADVISORS, LLC,  
7 MCGINN, SMITH CAPITAL HOLDINGS CORP.,  
8 FIRST ADVISORY INCOME NOTES, LLC,  
9 FIRST EXCELSIOR INCOME NOTES, LLC,  
10 FIRST INDEPENDENT INCOME NOTES, LLC,  
11 THIRD ALBANY INCOME NOTES, LLC,  
12 TIMOTHY M. MCGINN and DAVID L. SMITH,  
13 Defendants,  
14 and LYNN A. SMITH,  
15 Relief Defendant.

16 -----  
17 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

18 held in and for the United States District Court,  
19 Northern District of New York, James T. Foley United  
20 States Courthouse, 445 Broadway, Albany, New York,  
21 on WEDNESDAY, JULY 9, 2010, the HON. DAVID R. HOMER,  
22 United States District Court Magistrate Judge, Presiding.

23 **APPEARANCES:**

24 **FOR THE PLAINTIFF:**

25 SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**APPEARANCES (continued):**

FOR THE RELIEF DEFENDANT LYNN A. SMITH:

FEATHERSTONHAUGH & WILEY LAW FIRM

BY: JAMES D. FEATHERSTONHAUGH, ESQ.

FOR THE TRUSTEE DAVID M. WOJESKI:

THE DUNN LAW FIRM

BY: JILL A. DUNN, ESQ.

FOR THE DEFENDANTS TIMOTHY MCGINN AND DAVID SMITH:

GREENBERG, TRAURIG LAW FIRM

BY: MICHAEL L. KOENIG, ESQ.

ALSO PRESENT:

LYNN A. SMITH, Relief Defendant

DAVID M. WOJESKI, TRUSTEE

RYAN SMITH



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**SEC v McGINN, SMITH et al., 10-CV-457**

1 (Court commenced at 10:35 AM.)

2 THE CLERK: Securities and Exchange  
3 Commission versus McGinn, Smith Incorporated, et al.,  
4 docket 10-CV-457. Appearances for the record please.

5 MR. STOELTING: Good morning, your Honor.  
6 For plaintiff, David Stoelting, Lara Mehraban, and Kevin  
7 McGrath.

8 MR. McGRATH: Good morning, your Honor.

9 THE COURT: Good morning.

10 MS. DUNN: Good morning, your Honor. Jill  
11 Dunn representing the intervenor David Wojeski as trustee of  
12 the David and Lynn Smith irrevocable trust. And it's my  
13 understanding that counsel for Mrs. Smith is caught up in  
14 the security line on the first floor and will be here  
15 momentarily.

16 THE COURT: 10:30 means 10:30, Miss Dunn.  
17 You were not here at 10:30.

18 MS. DUNN: I apologize, your Honor.

19 THE COURT: If you look around the room, a  
20 lot of people waiting in this room waiting on you to show up  
21 on time, as well as Mr. Featherstonhaugh.

22 MS. DUNN: I apologize, your Honor. I have  
23 been reviewing and photocopying the exhibits --

24 THE COURT: I understand. We all have things  
25 to do, Miss Dunn. 10:30 was the scheduled time.

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1 MS. DUNN: I apologize, your Honor.

2 THE COURT: Don't let it happen again.

3 MR. JONES: I apologize.

4 MR. BROWN: William J. Brown, receiver in the  
5 action, your Honor. Good morning.

6 THE COURT: Good morning.

7 MR. KOENIG: Michael Koenig and Emily Feyrer  
8 for the individuals David Smith and Tim McGinn.

9 THE COURT: Good morning.

10 MR. FEATHERSTONHAUGH: James Featherstonhaugh  
11 for the relief defendant Lynn Smith. I apologize to the  
12 Court and fellow counsel and other attendees. We were  
13 caught up in the front door coming in, and it won't happen  
14 again, your Honor.

15 THE COURT: The front door is foreseeable,  
16 Mr. Featherstonhaugh. 10:30 means 10:30.

17 Before we begin, there is an application from  
18 the SEC, I believe, to exclude the Pine Street entities from  
19 the terms of the -- now it's the temporary restraining  
20 order. I received, I believe, an objection from the trust.  
21 Miss Dunn, do you wish to be heard on that point?

22 MS. DUNN: Yes, your Honor. The trust  
23 particularly in its role as a limited partner of Pine Street  
24 Capital Partners has absolutely no objection and, in fact,  
25 supports the request of Pine Street Partners to be released

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1 from the receivership. Our concern stems solely from the  
2 provision that would direct Pine Street to pay any  
3 distributions owed to the trust to the receiver which would  
4 in essence put assets of the trust into receivership without  
5 an application for that relief.

6 I believe that the account into which any  
7 distributions have been made during the life of the  
8 investment and will continue to be made is the very account  
9 that is under the asset freeze order in which we are here  
10 today to litigate. So I don't see any harm in continuing to  
11 have Pine Street make those distributions into that account  
12 in the interim. If this order is lifted and/or not  
13 continued by the Court in a preliminary injunction, no harm  
14 would occur. If you sign the order as is, then we would  
15 have to come back in for more motion practice to lift it  
16 should we be successful in this application to defeat the  
17 preliminary injunction.

18 So, in essence, if the Court wants to sign  
19 the order for whatever period of time it takes us to conduct  
20 this hearing and get a decision, I would have no objection  
21 to that, with the understanding that we would want that  
22 consent order modified and the trust would want standing to  
23 seek to modify that order should we be successful at this  
24 preliminary injunction hearing.

25 THE COURT: All right. My view of the

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1 proposed order excluding Pine Street Properties is that --  
2 and it would be for the whatever period of time it takes to  
3 resolve the preliminary injunction motion. I'll hear from  
4 the SEC if they view it any differently.

5 MS. DUNN: My understanding, your Honor, is  
6 that --

7 THE COURT: But I don't see where it alters  
8 the status quo pending that decision.

9 MS. DUNN: It would put the trust assets  
10 under the control of the receiver. And my reading of the  
11 consent order was that it would be of indefinite duration or  
12 the termination of the litigation subject to modification  
13 upon motion only of the receiver of Pine Street Capital  
14 Partners, thus denying the trust the standing to ask the  
15 Court to modify it, should that become necessary.

16 THE COURT: All right.

17 MS. DUNN: Thank you.

18 THE COURT: Thank you. Mr. Koenig, do you  
19 have any objections?

20 MR. KOENIG: No, your Honor.

21 THE COURT: Mr. Featherstonhaugh?

22 MR. FEATHERSTONHAUGH: I have no objection,  
23 your Honor.

24 THE COURT: Mr. Stoelting, any response to  
25 Miss Dunn?

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1                   MR. STOELTING: Just briefly. I'll just  
2 point out that the counsel for the Pine Street entities is  
3 here in the courtroom today, it's Mr. Mumford, and that  
4 order was negotiated with him, and the text of it and form  
5 of it is certainly agreeable to the effective entities, the  
6 Pine Street entities, and it really doesn't put any assets  
7 into the receivership or into any asset freeze that is not  
8 already affected by the asset freeze. So it does, indeed,  
9 preserve the status quo. It just says distributions going  
10 forward that are made to that trust and that account is  
11 currently frozen, or to Miss Smith, and her assets are  
12 currently frozen, would remain in the segregated account  
13 under the control of the receiver.

14                   THE COURT: And in your view, that's also  
15 pending final determination of a motion for a preliminary  
16 injunction?

17                   MR. STOELTING: Well --

18                   THE COURT: Could.

19                   MR. STOELTING: Well, I think if the Court  
20 determines that the trust account or any of the other -- if  
21 the trust determines that none of Mrs. Smith's accounts  
22 should be frozen, then it wouldn't be appropriate to have  
23 her distributions from the Pine Street entities be frozen  
24 because that's her assets. Like what the same thing with  
25 the trust.

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1 THE COURT: All right. In my view, it does  
2 preserve the status quo and the trust would certainly have  
3 its remedies if it prevails on the SEC's motion here. So it  
4 does preserve the status quo pending determination of the  
5 final motion. The order will be entered and should be filed  
6 later on today.

7 Now, before we commence the hearing, are  
8 there any other issues we need to address from the SEC?

9 MR. STOELTING: Your Honor, a couple of  
10 points that were mentioned in our conference yesterday.

11 First of all, there was a discussion on the  
12 motion by defendant Smith and McGinn regarding their  
13 appearance here today, and your Honor ruled that they must  
14 testify in some form today, and it was agreed during that  
15 call that they would sign a declaration invoking their Fifth  
16 Amendments. We drafted and provided that declaration to  
17 counsel for Mr. Smith and McGinn and e-mailed it about 7:00  
18 last night. As of this moment, I don't have the signed  
19 declaration in hand. I don't know where it is.

20 THE COURT: Mr. Koenig is sneaking up on you.

21 MR. KOENIG: Your Honor, if I may, Mr. Jones  
22 and Mr. Dreyer, who have provided me with signed copies of  
23 declarations as the SEC provided them. So Mr. Stoelting is  
24 concerned about not having them, I've now satisfied him; I'm  
25 handing him over executed declarations by Mr. McGinn and

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1 Mr. Smith.

2 THE COURT: Thank you.

3 MR. STOELTING: Your Honor, this is not the  
4 declaration that we asked them to sign. It -- the  
5 declaration we asked them to sign had two attachments. The  
6 notice of -- the notice of -- I'm sorry. It had the witness  
7 list here today indicating that they were being called as  
8 witnesses, and it also had the complaint attached as Exhibit  
9 A, A and B. And this does not contain either attachment.

10 THE COURT: Mr. Koenig.

11 MR. STOELTING: So I guess we could just take  
12 note of that and if -- I mean we have copies of the ones  
13 that were provided to them with the attachments. I don't  
14 know if it was intentional or an inadvertent omission.

15 THE COURT: Mr. Koenig.

16 MR. KOENIG: I can't, I can't answer that  
17 question. I can only say that the declaration as provided  
18 by the SEC has been signed.

19 THE COURT: Well, the declaration included in  
20 it, incorporated two attachments which are not attached to  
21 which you provided.

22 MR. KOENIG: And I can surmise it was  
23 inadvertence, but I can't know because I am not responsible  
24 for having these executed. I can find that out. If it's  
25 not the SEC's intention to use these with their first



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1 witnesses, I think I could probably have this resolved.

2 THE COURT: I'm hoping we can resolve this  
3 during the lunch hour. And if not, Mr. McGinn and Mr. Smith  
4 would have to be available this afternoon.

5 MR. KOENIG: I'm sure we can resolve it  
6 during the next half-hour, your Honor.

7 THE COURT: All right. Anything else,  
8 Mr. Stoelting?

9 MR. STOELTING: A couple of points regarding  
10 witnesses and exhibits. There are a couple of witnesses who  
11 are on plaintiff's witness list and either relief  
12 defendant's or intervenor's witness list, there's a  
13 Mr. McQuade and a Mr. Welles, and I would just suggest that  
14 for the convenience of these third-party witnesses, that  
15 they only be required to take the stand once during our  
16 case-in-chief and then any, any cross or other questions be  
17 at that time, and that they not be, you know, made to take  
18 the stand when we shift over to their case.

19 THE COURT: Mr. Featherstonhaugh, any  
20 objection?

21 MR. FEATHERSTONHAUGH: I have no objection to  
22 that.

23 THE COURT: Miss Dunn, any objection?

24 MS. DUNN: No objection.

25 THE COURT: All right.

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1 MR. STOELTING: And, your Honor, we have for  
2 the Court and also for the witness a full set of our  
3 exhibits that were on the witness list that we filed last  
4 night and we're prepared to offer a set of those up to your  
5 Honor, if you would like.

6 THE COURT: All right. Copies, I take it,  
7 have been provided to the relief defendant --

8 Mr. Stoelting: We've given a set to Miss  
9 Dunn. And this is a set for Mr. Featherstonhaugh. These  
10 were also e-mailed in PDF form yesterday.

11 THE COURT: All right. Mr. Featherstonhaugh,  
12 are you rising to speak?

13 MR. FEATHERSTONHAUGH: Yes, your Honor. I  
14 will simply advise the Court and counsel that we did receive  
15 e-mailed copies of the exhibits last night. There are a  
16 number of the exhibits to which we would have very strong  
17 evidentiary exception. So to the extent that counsel is  
18 offering them as a whole, while there are many of them I'm  
19 in agreement with, I cannot consent to them being received  
20 in evidence en banc.

21 THE COURT: All right. I didn't take them to  
22 being offered. Mr. Stoelting, I assume you would still be  
23 offering these through the testimony of witnesses.

24 Mr. Stoelting: Yes. Many of them will be  
25 authenticated through witnesses, but a portion of them were

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1 received by the SEC from FINRA, the securities regulator,  
2 and we have -- they were received by FINRA during the  
3 investigation conducted by FINRA in 2009. Essentially the  
4 whole e-mail files and all the financial records of McGinn,  
5 Smith were provided to FINRA and then provided to the SEC  
6 and produced as business records as they were maintained.

7 THE COURT: Mr. Featherstonhaugh, are your  
8 objections on the ground of authentication or hearsay or on  
9 ground of relevance or some other type of...

10 MR. FEATHERSTONHAUGH: Well, if he's offering  
11 the entire FINRA file which he had offered to make available  
12 to me, I would have objection to many of the exhibits on a  
13 variety of different grounds. Specifically, given the  
14 exhibit witness he gave me yesterday, I have no objection to  
15 Exhibits 1 through 67, which were attached to pleadings and  
16 everybody has had them for how ever long. There are,  
17 however, in the e-mailed exhibits yesterday, a series of  
18 declarations which Mr. Stoelting, apparently, intends to  
19 offer for which I believe he had no foundation and no  
20 reasonable exception to the hearsay rule.

21 THE COURT: Isn't hearsay admissible at this  
22 hearing?

23 MR. FEATHERSTONHAUGH: I don't believe this  
24 is admissible at this hearing. It's not authenticated in  
25 any way.

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1 THE COURT: Is it a sworn declaration?

2 MR. FEATHERSTONHAUGH: It's a -- some of them  
3 are secondhand sworn declarations. It's a sworn declaration  
4 that this is what my dead father did two years ago. That's  
5 pretty far removed from anything I've ever seen admitted,  
6 even in an arbitration.

7 THE COURT: Doesn't that go to the weight of  
8 the evidence though in a hearing such as this and not to the  
9 admissibility?

10 MR. FEATHERSTONHAUGH: It may well go to the  
11 weight and not the admissibility. I believe the Court  
12 should review that particular declaration itself.

13 I would also say that, as to going to the  
14 admissibility, these were e-mailed to us last night. They  
15 were, apparently, prepared presumably by Mr. Stoelting and  
16 his colleagues on June 7<sup>th</sup>. At least, that's the date.  
17 They come from various places around the country. We had a  
18 continuing demand for them to produce things that were going  
19 to be used as evidence in this trial. And I think the  
20 tactic of producing it at that time and the violation of the  
21 continuing demand goes to admissibility.

22 THE COURT: Didn't they receive it on  
23 June 7<sup>th</sup>.

24 MR. FEATHERSTONHAUGH: I have no idea.

25 THE COURT: All right. I'm sorry, I thought

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1 that's what you just said.

2 MR. FEATHERSTONHAUGH: It's dated June 7<sup>th</sup>.  
3 When they received it, I don't know.

4 THE COURT: And you received it on June 8?

5 MR. FEATHERSTONHAUGH: Yes.

6 THE COURT: And you think that's a delay?

7 MR. FEATHERSTONHAUGH: I think -- I do, your  
8 Honor. I think they could have produced this -- maybe we  
9 can put Miss Mehraban on the stand. I think they probably  
10 produced these days or weeks ahead of time and deliberately  
11 waited until that time to produce them here.

12 THE COURT: All right. Any other objection  
13 to any of the exhibits?

14 Nothing?

15 MS. DUNN: No, your Honor. Well, withdrawn.  
16 I join Mr. Featherstonhaugh's concerns. And I would simply  
17 represent to the Court that having received them at -- very  
18 late yesterday evening, it was very difficult to get through  
19 all of the documents. And I can't tell you as I sit here  
20 that I have been through all of the documents. But if  
21 they're offered on a piece by piece basis, I would address  
22 them at the time. But I do think there has been some  
23 prejudice. As the intervenor, we were not parties to most  
24 of the discovery that had occurred, and I was not provided  
25 with the discovery from the SEC that had occurred prior to

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1 our intervention which was granted on -- by the Court less  
2 than two weeks ago. So I would just note that objection.

3 THE COURT: All right. Mr. Stoelting, any  
4 response?

5 MR. STOELTING: I mean I think  
6 Mr. Featherstonhaugh is talking about some investor  
7 declarations that we provided from investors in these funds  
8 who described the experience of their investment and their  
9 losses and the impact on their lives. And certainly that  
10 type of declaration is admissible certainly at the summary  
11 judgment stage, which allows for sworn declarations and  
12 affidavits as part of an evidentiary record, and that's the  
13 way we've offered them. And they were drafted this week and  
14 prepared and given over with the rest of the exhibits.

15 These investors are people that are equally  
16 available to us all to call up and interview. They're not  
17 particularly within our control.

18 The other point I'll just raise, it was  
19 somewhat addressed in our exhibit list, regards Plaintiff's  
20 Exhibit, I think it's 119. It's a document over which Miss  
21 Smith has asserted privilege. And we would argue that it  
22 was -- the privilege was waived because it was produced to  
23 FINRA, it was produced to FINRA by McGinn, Smith on June 22,  
24 2008; we have a declaration from FINRA establishing that.

25 THE COURT: This is a declaration by Miss

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1 Smith?

2 MR. STOELTING: No. It's a declaration from  
3 one of the FINRA investigators who handled the receipt of  
4 the production.

5 THE COURT: All right.

6 MR. STOELTING: Who -- which is Exhibit 124.  
7 And the letter is -- it's referred to as an asset transfer  
8 letter, and it's from the estate planning attorney for Lynn  
9 Smith and her husband, and it describes the various  
10 strategies for transferring assets from joint control to  
11 Lynn Smith's control.

12 THE COURT: Who's the letter to?

13 MR. STOELTING: It's to David and Lynn Smith.  
14 And it's from a Martin Finn, F-I-N-N, who was identified as  
15 a JD, CPA, and LLM.

16 THE COURT: And how did you -- how did the  
17 SEC obtain it?

18 MR. STOELTING: It was in the materials that  
19 we received from FINRA. And FINRA received it from McGinn,  
20 Smith in June 2009.

21 THE COURT: Okay.

22 MR. STOELTING: And it apparently -- the  
23 letter itself and the e-mail was sent in January 2009.

24 THE COURT: That's 124?

25 MR. STOELTING: Yes, your Honor. The letter

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1 is Exhibit 118 in the binders.

2           It appears from the cover letter from  
3 Mr. Smith's counsel that they did a privileged review of the  
4 materials before they were produced to FINRA. And the cover  
5 letter, which is also in the binders, establishes that they  
6 did some electronic search terms to weed out privileged  
7 documents, but because of the size of the file, they  
8 didn't -- they weren't certain that they had weeded out all  
9 privileged documents.

10           So the cover letter says essentially, we  
11 retain the right to assert the privilege because we didn't  
12 do a really thorough review of these files within our case  
13 to produce them to you.

14           After the production of those files, at no  
15 time was any assertion over this document made on privileged  
16 grounds. Mr. Smith nor his counsel never asked for it back.  
17 And until I showed it in the deposition, there had never  
18 been a privilege assertion over the document.

19           So it appears what happened is either  
20 Mr. Smith and his counsel looked at it at the time and  
21 determined they didn't want to assert privilege over it, or  
22 they failed to go back and review the file after it was  
23 produced, knowing that there may be privileged documents in  
24 there and failed to timely assert privilege over it. Which  
25 I think under the case law would result in a waiver.

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1 THE COURT: Mrs. Smith was not -- was she a  
2 party to the FINRA proceedings?

3 MR. STOELTING: She was not.

4 THE COURT: All right. Mr. Featherstonhaugh?

5 MR. FEATHERSTONHAUGH: Your Honor, the first  
6 time I think Mrs. -- the first time I saw the document it  
7 was used -- offered as an exhibit by Mr. Stoelting at the  
8 deposition of Lynn Smith. I immediately asserted the  
9 privilege on her behalf. She was not a party to the FINRA  
10 proceeding in any way.

11 Also, I would call the Court's attention to  
12 the declaration of Christopher Ratner and point out that it  
13 is -- at least in my view, it makes no direct assertion that  
14 anybody with both the authority to waive privilege and the  
15 knowledge of the document formally waived it.

16 THE COURT: The letter is addressed to  
17 Mr. and Mrs. Smith or just Mrs. Smith?

18 MR. FEATHERSTONHAUGH: Mr. and Mrs.

19 THE COURT: Then why couldn't Mr. Smith waive  
20 the privilege?

21 MR. FEATHERSTONHAUGH: Mr. Smith could --  
22 certainly would have the authority to waive his privilege.

23 THE COURT: Why didn't he?

24 MR. FEATHERSTONHAUGH: There's nothing in the  
25 declaration that indicates in any way that he did.

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1 THE COURT: Well, wouldn't production of the  
2 letter by Mr. Smith during the FINRA proceedings, without  
3 any demand for its return after its use, constitute a  
4 waiver?

5 MR. FEATHERSTONHAUGH: If it was a knowing  
6 production. A production by error would not have  
7 constituted a waiver. There was no indication that it was  
8 brought specifically to the attention of Mr. Smith or his  
9 attorney. And anyone looking at the letter, certainly  
10 Mr. Stoelting, or Mr. Newman, who was conducting the  
11 hearing, any lawyer who looked at that letter would have  
12 known immediately that it was privileged without the  
13 specific waiver of the people to whom it was addressed.

14 THE COURT: It may well be privileged, but  
15 it's the choice of the privileged holder whether or not to  
16 assert the privilege.

17 MR. FEATHERSTONHAUGH: Yes. But the  
18 lawyer --

19 THE COURT: What requirement is there for  
20 anyone to bring the document specifically to the attention  
21 of Mr. Smith or his counsel? It's in the record of the  
22 proceeding. They're responsible for knowing what's in the  
23 record.

24 MR. FEATHERSTONHAUGH: I believe the  
25 attorneys had a duty to bring it to their attention when

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1 they saw the privileged information coming into their hands,  
2 your Honor.

3 THE COURT: All right.

4 MR. FEATHERSTONHAUGH: In any event,  
5 Mrs. Smith has certainly never waived the privilege.  
6 Mr. Smith, as I understand it, has made an agreement so that  
7 he will not -- or at least we'll know at lunchtime,  
8 whatever, he will not be participating in this hearing. The  
9 only purpose for which Mr. Stoelting could use this exhibit  
10 would be to make an effort to use it against Mrs. Smith.

11 THE COURT: All right. Thank you.

12 Mr. Koenig, did you want to be heard on this?

13 MR. KOENIG: Your Honor, only briefly. And I  
14 think it's the last issue I'd ask the Court's indulgence on  
15 and wish to be heard in this proceeding, but everything  
16 stated is accurate in terms of how it came to light, this  
17 letter. Mr. Smith has advised me that he did not waive  
18 attorney/client privilege on this letter and that it was an  
19 inadvertent production by the law firm handling it at that  
20 point, which did note in its cover letter, which again I saw  
21 from the SEC yesterday, that they had not done a thorough  
22 production privileged review and that they were not waiving  
23 any privileges associated with the production. I can't  
24 speak for what the lawyers did. I can only note that  
25 Mr. Smith did not and has not waived attorney/client

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1 privilege with this. So that may be an issue with him and  
2 his previous law firm. But Mr. Smith has advised me that he  
3 has not and did not ever waive attorney/client privilege  
4 with regard to this.

5 THE COURT: All right. Thank you.

6 MR. KOENIG: Thank you.

7 THE COURT: Well, as to this letter, it  
8 appears to me that the letter was produced by Mr. Smith  
9 through his attorneys during the FINRA proceedings. The  
10 letter is from his -- I will take it to be his counsel, a  
11 letter to he and Mrs. Smith, together. As  
12 Mr. Featherstonhaugh correctly notes, Mr. Smith's waiver  
13 alone would suffice for release of the letter for all  
14 purposes. The letter was produced, it was part of the  
15 record of the FINRA proceedings. No objection was ever  
16 raised until the deposition of Mrs. Smith within the last  
17 week, raised by her. At that point, in my view, it's too  
18 late. The privilege had been waived by Mr. Smith, and it  
19 had been produced to FINRA, used in their proceedings. It's  
20 return was never demanded on the attorney/client privilege  
21 and, therefore, the waiver holds. The objection to the use  
22 of Exhibit 124 on privileged grounds is denied.

23 Anything else, Mr. Stoelting?

24 MR. STOELTING: No, your Honor. Just in  
25 terms of logistics, we may have miscounted the number of

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1 copies we made of exhibits. And we intended to have copies  
2 for the intervenor, the relief defendant, your Honor, and  
3 the withins, but I think we're one short. So perhaps we'll  
4 hand up the copy for your Honor and then we can hand up  
5 copies to the witness. Or if can we just have a moment to  
6 confer on that.

7 THE COURT: The witness can use my copy, if  
8 that's...

9 MR. STOELTING: All right. That would --

10 THE COURT: Let's do it that way.

11 MR. STOELTING: All right. Thank you. Other  
12 than that, we're ready to call our first witness.

13 THE COURT: Any other issues,  
14 Mr. Featherstonhaugh?

15 MR. FEATHERSTONHAUGH: Just one more  
16 housekeeping issue. Your Honor, at the telephone conference  
17 yesterday, my understanding of your Honor's direction in  
18 connection with the Fifth Amendment, assertion of the Fifth  
19 Amendment, whether or not it might be used inferentially  
20 against Mrs. Smith, was that your Honor asked counsel to  
21 brief the issue. And we have done so in a letter brief  
22 which we didn't have a chance to file it electronically, and  
23 it was not clear to me exactly when we were supposed to file  
24 it.

25 THE COURT: Well, I think I said in the

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1 conference yesterday that I would invite post hearing --

2 MR. FEATHERSTONHAUGH: Post, all right.

3 THE COURT: -- briefing. You can hang onto  
4 that if you want. Because my thought was that if this goes  
5 as it appears we all expect, then I would set a deadline for  
6 the SEC to submit their brief; identifying, if they choose  
7 to do so, the specific adverse inferences they believe  
8 should be drawn from the assertion of the privilege by  
9 Mr. McGinn and Mr. Smith and against which parties and have  
10 issues, and then whatever legal authority they have for  
11 their position. And then give both Mrs. Smith and the trust  
12 an opportunity thereafter to respond with their briefs. But  
13 until we know what the specific inferences are and as to  
14 which issues and which parties, it seems to me it's  
15 premature.

16 MR. FEATHERSTONHAUGH: All right. Thank you,  
17 Judge.

18 THE COURT: All right. Miss Dunn, any other  
19 preliminary issues?

20 MS. DUNN: No, sir.

21 THE COURT: Mr. Koenig?

22 MR. KOENIG: No, sir.

23 THE COURT: All right. SEC will call its  
24 first witness.

25 MR. STOELTING: Your Honor, we call the

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1 receiver William Brown.

2 THE CLERK: Raise your right hand.

3 **WILLIAM J. BROWN,**

4 having been duly sworn by the Clerk of the Court, was  
5 examined and testified as follows:

6 THE CLERK: William J. Brown, B-R-O-W-N.

7 THE WITNESS: Correct.

8 THE CLERK: Thank you. Please take the  
9 stand. William J. Brown.

10 MS. MEHRABAN: Good morning, your Honor.

11 THE COURT: Good morning.

12 **DIRECT EXAMINATION BY MS. MEHRABAN:**

13 Q. Mr. Brown, please describe your educational  
14 background after high school.

15 A. I attended LeMoyne College in Syracuse, graduated  
16 from there in REDACTED, work for three years in higher  
17 education, and then I went to Boston College Law School,  
18 from which I graduated with honors in REDACTED. And since that  
19 time I've been an attorney with Phillips, Lytle, LLP, and  
20 its predecessor Phillips, Lytle, Hitchcock, Blaine and  
21 Huber. I became a partner approximately five and a half to  
22 six years after I joined the firm, and I've been practicing  
23 in the bankruptcy and restructuring practice of our firm  
24 since I finished a rotation nine months into my start of the  
25 firm. I'm now the partner in charge of that practice, firm

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1 wide.

2 Q. Okay. What has been previously marked as  
3 Plaintiff's Exhibit 114...

4 MS. MEHRABAN: Should I hand it up?

5 A. I have it.

6 Q. Okay. What is 114?

7 A. It's my vitae resume.

8 Q. Okay. And does it accurately reflect your  
9 educational and professional experience at least with  
10 respect to public matters?

11 A. Yes. I mean there would be hundreds of other  
12 matters as to which the restructuring workout of the --  
13 whatever the nature of the matter, generally would be some  
14 form of financial extremist, was not in the public domain  
15 but was a private company, that that would not be listed  
16 here in a public document.

17 Q. When did you first hear of McGinn, Smith?

18 A. End of January 2010.

19 Q. And were you named receiver for McGinn, Smith and  
20 related entities by the Court on April 20<sup>th</sup>?

21 A. I was.

22 Q. What have you done as receiver since April 20<sup>th</sup>?

23 A. Well, I've -- I filed my first report last week,  
24 last Friday, and all the parties should have a copy of that,  
25 and provided a chamber's copy to the Court. This has turned



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1 out to be a somewhat interesting and in some ways daunting  
2 assignment. It has all the burdens and responsibilities of  
3 an extremely large receivership.

4           You know, I woke up that afternoon to find out  
5 that there were 82 entities associated with the  
6 receivership. And that afternoon and that evening and the  
7 next several days and weeks, quite frankly, have been an  
8 information gathering adventure. I have gotten very good  
9 cooperation from the employees in Albany and elsewhere who  
10 remain on site. But the immediate task when you have an  
11 event like this is to try and bring normalcy and to make  
12 sure you have control of the most significant assets,  
13 particularly cash.

14           My first concern was would we be able to pay gross  
15 payroll on time; who did it need to be paid to. I found out  
16 that there were off site locations through the East Coast  
17 and the Gulf Coast that required payroll management.

18           So after interviewing the on site employees in  
19 Albany, who were primarily with -- not with the broker  
20 dealer, because the broker dealer, I found out, had  
21 terminated its operations in December and transferred in  
22 some fashion those operations to another company in Clifton  
23 Park, New York, I went about making sure we had control of  
24 the bank accounts and cash.

25           For example, on that first evening, I learned

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1 that, in talking with the employees, that there was  
2 approximately \$200,000 in float against one of the bank  
3 accounts. And I was told that most of those checks in float  
4 were investor payments. I was given a number that afternoon  
5 of bank balances of approximately \$480,000, plus, minus.  
6 And so a \$200,000 clearing would have been a significant  
7 impediment in my view. And while the freeze order should  
8 have been in place, I contacted, because I knew an in-house  
9 lawyer at that particular bank at about 7:00 that night at  
10 his house to try and begin the process to assure that the  
11 freeze was in place. He worked with me for the next hour,  
12 was able to get his legal processing staff on the phone, and  
13 we confirmed the freeze and those checks were returned.

14           The following days were a question of securing  
15 property, finding out what property we had, the bank  
16 accounts, shutting down credit cards which we, you know,  
17 found a number of, in case there were remote charges, and  
18 trying to assess the businesses.

19           I had each of the operating entities that I could  
20 identify prepare a cash flow projection for me for 90 days,  
21 because one of my concerns was that they were operating on  
22 at least a cash flow neutral basis. Because it is a  
23 maximum, a maximum bankruptcy receivership, that a receiver  
24 should not incur debts that it cannot pay for. I came to  
25 the view that those entities appeared to be operating on a

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1 cash flow neutral basis. And we've continued on at least  
2 that basis since. All payrolls have been paid. I think the  
3 situation has been normalized. There are always the hiccups  
4 that result.

5           We've begun to look into the various assets. I've  
6 been out to visit some real property sites I'm going to  
7 another one tomorrow to consider how to handle it, manage  
8 it, and possibly how to dispose of it, because I think a  
9 disposition was anticipated pre the receivership. We've had  
10 accountants come in for a day to review the cash flow  
11 processes that I've established to see if they concur with  
12 the controller's view of whether they're adequate or not,  
13 and I have a gotten a sign off on that.

14           There were several immediate issues. And to  
15 identify those and to make sure I wasn't going to step on a  
16 literal land mine, because there was just so much  
17 information that I could never myself in the short term  
18 determine, I asked Messrs. McGinn, Smith and Smith if they  
19 would meet with me on a -- I called it, quite frankly, a --  
20 not a Who Shot John episode. I wanted them to be and their  
21 counsel to be candid with me about my immediate short term  
22 concerns. And they and their counsel arranged that for a  
23 Sunday night following my appointment. And that was helpful  
24 to me. It helped me identify one or two situations that we  
25 were able to unravel after that, one of which is reported in

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1 my receiver's report, and it involved Carnival Cruise Lines.  
2 We're at risk of losing an almost \$500,000 -- \$425,000  
3 deposit that had already been made to Carnival. It was in  
4 the fall. Carnival could have swept it but for the stay the  
5 Court imposed. But eventually we were at material risk of  
6 losing it. There was no practical legal strategy that I  
7 could employ to save that deposit, absent fulfillment to the  
8 contract in some way or its sale or modification. There was  
9 a further deposit due of approximately \$84,000. And there  
10 were additional penalties that I could incur as receiver up  
11 to about another \$171,000 if this cruise was under booked.  
12 So all and all, the estate, you know, was exposed to, you  
13 know, an almost \$700,000 liability, and there was a \$425,000  
14 deposit there. My objective was to get as much of that  
15 deposit back, get out of the cruise situation, and avoid  
16 both reputational and economic risk. I think through the  
17 good auspices of Carnival, after some initial prodding and  
18 encouragement from me, we came to a position where a  
19 substantial amount of the deposit was returned. The cruise  
20 contract was cancelled and we exchanged releases, and I  
21 treated it as a termination of an unfavorable contract.  
22 I've been told so far that the stakeholders in the case view  
23 it as a positive result.

24           So we're near -- if, if the receivership becomes  
25 permanent, I think we're near the start of a second phase of

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1 the case. And, and that would be to figure out how in an  
2 economic way to truly ascertain the value of assets and the  
3 amount of the liabilities. I have preliminary balance  
4 sheets which, on a balance sheet basis, would indicate that,  
5 in large measure, not in all measure, but in a large  
6 measure, most of the assets are balance sheet negative.  
7 Now, what that turns into in real world experience, I don't  
8 know yet. But as I started to say at the beginning, this  
9 case has all the burdens of a large case without the assets  
10 to run a large case. To bring in a team of forensic  
11 accountants is probably not the ideal way to proceed. But  
12 we have to find out if we can identify these assets and  
13 figure out what to do with them in a way using other means  
14 if that's possible. And I'm about to begin to explore that.

15 I've gotten many calls from investors. Obviously,  
16 I can't speak to all of them. Many of them are upset. We  
17 had one potentially angry situation that did not turn into  
18 anything, but we've adopted security procedures that I think  
19 are appropriate. And -- but most of the people express  
20 their concern about their life savings or their pension.

21 I established a website immediately, and we've  
22 posted all the pleadings there. And when investors call, we  
23 tell them essentially two things; we refer them to the  
24 website, we tell them communications will be posted there,  
25 and that I will be communicating with them in a letter

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1 communication sometime in the foreseeable future. Because  
2 it will be an expense for that site -- mailing to that group  
3 of people. But until I can get them all focused on  
4 electronic communications, I will have to do at least one  
5 mailing, in my view, and the access database has been -- as  
6 requested has been brought up to speed to be able to do that  
7 when we're ready.

8 I think that is a summary.

9 Q. Thank you. I'm going to direct your attention to  
10 Exhibit 116, please.

11 A. Yes.

12 Q. 116. What is that?

13 A. It's the first report of the receiver. It's got  
14 an ECF stamp of docket number 49 on it.

15 Q. Thank you. On page three of the report, you  
16 mention that on the -- I believe the second day of the  
17 receivership, you came upon an employee preparing a Form D  
18 filing with the SEC?

19 A. Yes.

20 Q. Can you explain that please?

21 A. Did you say could I explain it?

22 Q. Yes.

23 A. I was doing management by walking about and  
24 observing who was doing what and what was going on in the  
25 midst of a little bit of chaos. And I saw on a -- as I

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1 recall I think, it was a computer screen, I don't think it  
2 was a piece of paper on a desk. But there was paper. What  
3 was clear to me was a form being completed. So as I was  
4 dealing with other employees, I asked what this person was  
5 doing. And I was told that he was completing a SEC Form D.

6 Q. Who was that employee?

7 A. Matthew McGinn.

8 Q. Did you find out any other information about the  
9 filing?

10 A. Well, as I would with anybody, I then asked, you  
11 know, why, what were the circumstances, if he could explain  
12 that to me. And he did.

13 Q. What did he say?

14 A. He said it was required to be filed in connection  
15 with the first line offering.

16 Q. Anything else that you remember?

17 A. I -- no. He said nothing else about it.

18 Q. All right. You mentioned that you met with  
19 Messrs. McGinn, Smith and Smith on one occasion. Have you  
20 met with them since then?

21 A. I've actually met with them at least three times,  
22 possibly four. I'd have to think. But at least three  
23 times.

24 Q. Okay. And the first occasion was the Sunday  
25 evening, I believe you said?

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1           A.    It was a Sunday evening, after the receivership,  
2 for me to solely ascertain, by going through entities, if  
3 they could alert me to issues that they thought I should  
4 bring my attention to for the benefit of the estates.

5           Q.    Okay.  When did you next meet with them?

6           A.    (No response.)

7           Q.    Approximately.

8           A.    Without looking at my calendar, I can't remember.  
9 It would have been the following week, in all likelihood.  
10 That same week.  They asked for copies of documents they  
11 needed.  They informed me they would be able to respond to  
12 requests contained in the order to show cause and the  
13 temporary restraining order.  And as with the other requests  
14 I've gotten, I accommodated that.  I had some staff get that  
15 information together, and we had used an outside IT vendor  
16 to help get some of it.  And there's a logical reason for  
17 that.  Most of the current records had been seized pursuant  
18 to a search warrant, so that we have some electronic  
19 records, and we used the electronic records to try and  
20 provide them the information they requested.

21          Q.    What was the purpose for the other meetings with  
22 Messrs. McGinn and Smith?

23          A.    I've had one other meeting that I recall.  I've  
24 had interim conversations, again for the same general  
25 purposes, document requests.  I had a recent meeting at



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1 their request, which I readily agreed to, to discuss the  
2 form of preliminary injunction. They had two questions  
3 about two provisions, and we discussed that, and I produced  
4 clarity about what I was intending.

5 Q. Okay. You mentioned having spoken to some  
6 investors, right?

7 A. Yes.

8 Q. Approximately how many investors have you spoken  
9 to?

10 A. I didn't do an audit before I came here, but I  
11 would think it's at least in the range of at least 15 to 20.

12 We have several procedures. If they call, a daily  
13 phone log has been maintained with their contact information  
14 for me to return calls periodically. And -- but they are  
15 told to go to the website. And that seems to satisfy most  
16 for now.

17 But I've talked to in that range. Plus I've  
18 talked to secured creditors. I've talked to vendors. I've  
19 talked to partners, you know, in the sense of the people who  
20 are in the deals. The phone has been hot.

21 Q. You mentioned, I believe, that when you first came  
22 in as a receiver, there was about 480,000, I think you said,  
23 in the bank accounts; is that accurate?

24 A. My report actually sets it forth on page 6,  
25 section 4.

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1           On the date of the receivership -- now -- and  
2 this -- we're always looking at bank balances about a day  
3 old because the posting would be as of that night, but it  
4 would be for bank business the day before. So as of  
5 April 19, the amount on hand in the accounts that were  
6 visible to us was \$485,491.63.

7           Q.    Okay. And currently -- I'm sorry. That was for  
8 all McGinn, Smith entities?

9           A.    That was for all the frozen bank accounts.

10          Q.    And currently how much is in those accounts?

11          A.    As of June 2, when I had the staff do this  
12 calculation, those same accounts had balances of  
13 \$750,763.38, not including the Carnival deposit return of  
14 \$222,397. So getting close to a million dollars.

15          Q.    Okay. And that's also in your report on page 6?

16          A.    That's in my report. But, you know, that \$750,000  
17 amount does not take into account checks in float that we  
18 would have written and would be clearing. Any time we're  
19 receiving revenues and we're paying bills. So it's a  
20 dynamic number, as we would say.

21          Q.    Are you aware of any transfers to Lynn Smith of  
22 funds?

23          A.    Pardon me?

24          Q.    Of funds to Lynn Smith.

25               MR. FEATHERSTONHAUGH: I'm going to object to

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1 the form of that question, your Honor, unless it's --

2 THE COURT: I understand. Overruled.

3 A. I need to think about that just for a minute.

4 (Pause.)

5 Q. Do you want me to rephrase the question?

6 A. No. You're asking me, am I aware of any monies  
7 transferred to her.

8 THE COURT: While he's thinking, was the  
9 question in time directed to after Mr. Brown became the  
10 receiver, or at any time?

11 MS. MEHRABAN: At any time. Has he come  
12 across anything in his receivership that reflects a transfer  
13 to Lynn Smith.

14 THE COURT: Before or after April of 20?

15 MS. MEHRABAN: Before or after April 20th. I  
16 can expand the question directly --

17 A. Now, you've asked a different question. You asked  
18 me about any transfer. We have not done a forensic  
19 accounting in any sense yet. I'm aware of transfers.

20 Q. Okay. What are you aware of?

21 A. I'm aware of the provision of benefits in terms of  
22 what I understand to be a car rental, and there are other  
23 benefits that were provided to Messrs. McGinn and Smith that  
24 ...

25 MR. FEATHERSTONHAUGH: Your Honor, I'm going

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1 to object and ask that that answer be stricken. I  
2 understood he was asked about Lynn Smith and not Messrs...

3 THE COURT: Well, I haven't heard the whole  
4 answer yet, but I understand the point of your question --  
5 the point of your objection. It's limited to Lynn Smith,  
6 but it's possible there were ultimate transfers through  
7 David Smith or Mr. McGinn to Lynn Smith. I don't know where  
8 he's going with his answer. Let me hear it first.

9 A. I can put a fine pencil on it. Let me give you  
10 one example.

11 As part of my initial investigation with regard to  
12 insurance, the existence of insurance, because God knows I  
13 want insurance, I asked about motor vehicles because I had  
14 found out in one instance that there was a purported  
15 employee who had a motor vehicle in their possession that  
16 was titled to a McGinn, Smith entity, but there was no lien  
17 on the vehicle and payroll deductions were being taken to  
18 repay the car loan.

19 As part of that request, I learned that we were  
20 making car payments, or had been making car payments on --  
21 for the benefit of -- or out of -- to Mr. McGinn or to the  
22 benefit of the Smiths and McGinns. And one vehicle I was  
23 told, a Lexus, was driven by Mrs. Smith. And I'm now  
24 dealing with that, because our insurance renews at the end  
25 of June, and I'm going to have to deal with it, the vehicle

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1 and the insurance issues.

2 Q. Okay. You mentioned receiving and responding to  
3 information requests from Timothy McGinn and David Smith,  
4 right?

5 A. Information requests? Yes.

6 Q. Have you received requests for information from  
7 other people?

8 A. Yes.

9 Q. How have you responded?

10 A. They've all gotten the information fairly quickly.  
11 I had one situation regarding the Pine Street entities who,  
12 you know, are going to be subject to your Honor's order this  
13 morning, for information. And that information contained  
14 the names of other investors, having nothing to do with this  
15 proceeding, independent third-parties. And I asked that  
16 that information be treated as confidential. I -- my  
17 concern was, because I was aware of litigation going on at  
18 the time here, even though I, as receiver, had obtained a  
19 general extension of the time to appear and answer from the  
20 plaintiff, I asked that the information be treated as  
21 confidential. And that resulted in an exchange of e-mails  
22 about whether that was or was not necessary. I maintain my  
23 position that it was necessary; that I would turn over and  
24 did turn over that same day the information, but I did so on  
25 the grounds that it had to be treated as confidential,

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1 redacted or filed under seal, because I saw no appropriate  
2 purpose for Pine Street to be revealing the names of  
3 third-party investors who have nothing to do with this  
4 proceeding.

5 Q. Have you ever refused to give anyone information  
6 that's been requested?

7 A. No.

8 Q. Okay. Have you --

9 A. I've discussed it with Mr. Featherstonhaugh. For  
10 example, he made a document request. We immediately chatted  
11 about it as to whether it should be this document or that  
12 document. In less than 15 seconds, I think we reached  
13 agreement.

14 Q. Have you reviewed the proposed preliminary  
15 injunction order?

16 A. I have.

17 Q. Okay. And do you consent to the entry of the  
18 proposed preliminary injunction order --

19 A. I do.

20 Q. -- on behalf of the corporate defendants?

21 A. On behalf of the corporate defendants, I do.

22 Q. Okay. I'm going to direct your attention to a  
23 couple of paragraphs in that preliminary injunction order.  
24 I only have one copy. This was electronically filed.

25 A. I have a copy with me.

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1 Q. Okay. I'm going to direct your attention to  
2 paragraph 8(c).

3 A. Yes.

4 Q. Can you please explain the intended purpose of  
5 that paragraph?

6 A. This was one of the two provisions that I  
7 discussed with the parties last week. And it was to assure  
8 them. And we added a new sentence at the end as to my  
9 intentions. I am not asking the Court to effect a  
10 substantive consolidation of the estates at this time. That  
11 is a melding of the assets and liabilities. At this time it  
12 wouldn't be appropriate. I don't know if that is warranted,  
13 or it's warranted in part, or not warranted at all. But to  
14 administer these estates, to pay payroll, to pay vendors, to  
15 pay professional fees, I believe it is necessary for any  
16 responsible receiver, and for the Court to approve, a  
17 provision that says those administrative expenses can be  
18 paid out of any estate. Because the estates are so thin.  
19 And I met with the parties, and they agreed to -- and, and  
20 once they understood that, there was agreement.

21 Q. Okay. I'm also going to direct your attention to  
22 paragraph 8(1).

23 A. Okay. I offered to make a representation about  
24 this paragraph. This is the borrowing paragraph. And it  
25 allows me to exercise my discretion to borrow up to a

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1 hundred thousand dollars. They asked if I would agree to  
2 remove the paragraph. I -- my response, and I told them  
3 that I would make a representation to the Court, that it is  
4 not my intention to borrow. These estates appear to be over  
5 leveraged as it is, but I needed to have a provision so that  
6 should we have a hiccup that I cannot imagine at this point,  
7 for example, expecting a several hundred thousand dollar  
8 collection that doesn't come in and I have a \$15,000  
9 payroll, payroll that Friday, I would need to do something  
10 in my view, to bridge that gap, as long as I was satisfied.  
11 But I also told them that I would not do that, absent  
12 conferring with all the key stakeholders first, even though  
13 I have the discretion to do it. And the party were  
14 satisfied with that.

15 Q. What -- going back to your earlier testimony about  
16 the Form D, what happened after you spoke to Mr. McGinn  
17 about the Form D?

18 A. There --

19 THE COURT: Are you talking about Matthew  
20 McGinn?

21 MS. MEHRABAN: Yes. Matthew. Thank you.

22 A. I had met the prior evening an individual who was  
23 the, quote, in-house counsel to the entities, and I  
24 suggested that we have a conference. And we just sat down  
25 in his office and we went further, what it was about, why it



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1 was being done. I asked him to give me a Form D. Which he  
2 did. And I reviewed it. And I explained that I was not in  
3 a position as receiver and now in charge of these entities  
4 to make the representations and warranties that were  
5 required to sign and file a Form D with the Securities and  
6 Exchange Commission and that we would not be able to do  
7 that. And they understood that, they understood, that  
8 decision was fine.

9 Q. What is a Form D?

10 A. Form D is a form, I believe required to be filed  
11 in connection with private offerings.

12 MS. MEHRABAN: I have no further questions.

13 THE COURT: Thank you. Mr. Featherstonhaugh,  
14 any questions?

15 MR. FEATHERSTONHAUGH: I have a couple, your  
16 Honor.

17 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

18 Q. Mr. Brown, good morning. It's still morning. In  
19 your report and I believe in your testimony here today, you  
20 indicated that there -- the receivership that you are now in  
21 charge of covers some 82 entities, is that correct?

22 A. Well, I -- as of sometime today, it might only be  
23 80.

24 Q. All right. Two -- that's right. This morning,  
25 two of them are out. Well, let me ask you about that. Of

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1 those entities, is it true that five of the entities were  
2 investment funds?

3 A. I don't know what you mean by that. Are you  
4 taking about FAIN and TAIN?

5 Q. Yes. And Pine Street Capital, the one that as of  
6 this morning may leave.

7 A. Well, if -- I don't really want to talk about Pine  
8 Street because they're leaving the scene, but they're the  
9 one that I probably know best at the moment. They are an  
10 entity that raised monies to invest in, you know, what I  
11 would call portfolio companies, other companies as mezzanine  
12 or subordinate. To that extent, I would agree, but I'm not  
13 familiar with the term you used.

14 Q. All right. Well, let me ask you this: Was --  
15 and, I believe me, I understand your familiarity will verify  
16 from entity to entity, but let me ask you about First  
17 Advisory Income Notes Income Notes. Was that also a fund  
18 that invested in other entities and mezzanines debt and did  
19 essentially the same things as Pine Street Capital Partners?

20 A. I can't answer your question today because I've  
21 not done the investigation to go back, as I did more or less  
22 with Pine Street because I was aware of their attempt to be  
23 released from the receivership.

24 Q. All right.

25 A. So I -- in a non-professional conclusion, I'm

**BROWN - CROSS - FEATHERSTONHAUGH**

1 aware that the entity you mentioned made investments in  
2 other entities.

3 Q. Okay. In addition -- and, again, just your  
4 general knowledge, in addition to what I have referred to as  
5 investment funds, and you've used two examples, can you  
6 describe generally the nature of the other I guess it would  
7 be 77 entities?

8 A. Well, they, they take different forms. There are  
9 many -- when money was, if I can use the colloquial term,  
10 raised, they often created several entities with very  
11 similar names. There might have been a trust entity. Then  
12 there might have been what I would call an operating entity.  
13 And sometimes it was a third possibly. So of the 80 or 82  
14 entities, depending upon how you look at it, many of them  
15 are non-operating. Just financial -- just a financial  
16 vehicle of some type.

17 Q. Are some of the them operating entities?

18 A. Yes.

19 Q. And you've mentioned that some of them are trusts.  
20 Are some of them operating businesses?

21 A. Well, on the list? Yes.

22 Q. Okay. And you have -- I believe you testified  
23 that the -- if there is a -- and I guess with the consent  
24 order, there will be a second stage to the receivership,  
25 that one of the first things you would do in that stage is

**BROWN - CROSS - FEATHERSTONHAUGH**

1 to try to ascertain the asset value and the liabilities of  
2 each of the entities.

3 A. Well, I've already done that in an informal way.  
4 In fact, I did that in the first four days. On the Friday  
5 following my appointment, I had had forms prepared for --  
6 one for each entity. And I asked the embedded staff to as  
7 quickly as possible that day or by the next day, because I  
8 was meeting with Messrs. McGinn, Smith and Smith that  
9 Sunday, to prepare for me a description of what the entity  
10 was, what its assets and liabilities were; you know, big  
11 picture. And by Friday evening I had all of that back. And  
12 for the principal entities, I had the balance sheets that  
13 existed as of that time with, in some cases, explanatory  
14 notes.

15 Q. All right. But in your direct testimony, you  
16 said, I believe, I think I actually can quote you here, I  
17 don't know yet what this means in real terms.

18 A. Correct. I said that.

19 Q. Okay. And your first step in the second stage of  
20 the receivership would be to go forward and do that entity  
21 by entity?

22 A. Oh, absolutely. You know, I'll give you more than  
23 you want perhaps in this testimony. I mean, to put it into  
24 reality, in doing this work for so many years, there's one  
25 thing to look at a balance sheet and say oh, great, you

**BROWN - CROSS - FEATHERSTONHAUGH**

1 know, it's -- I have equity of X. But the reality is what  
2 can I sell that building for today. The balance sheet may  
3 not be a test of the real market value of whatever the prime  
4 asset or assets are.

5 So, for example, you know, I was up in Latham two  
6 and a half weeks ago some people say crawling through an  
7 abandoned building. You know, I'm going to another one  
8 tomorrow morning to go examine the boiler room. And it's  
9 that type of examination that will need to be done.

10 Q. Now, you also testified that there's apparently  
11 some cash flow going on within these businesses, is that  
12 correct?

13 A. Yes.

14 Q. And you have made at least -- and I wasn't sure I  
15 understood this answer, so I'll give you a chance to  
16 elaborate. You made an effort to determine that -- I wasn't  
17 sure if it was most or all or some of the entities were at  
18 least cash flow neutral.

19 A. Any of the ones where I was being asked to pay  
20 vendors or to pay payroll that had employees, I needed a  
21 reasonable assurance based upon the employees who were  
22 running those businesses, that they were at least cash flow  
23 neutral. Okay? And hopefully that's still true.

24 Q. Do you know of the entities that are within your  
25 receivership, how many were included in that review?

**BROWN - CROSS - FEATHERSTONHAUGH**

1 A. Ah, yes.

2 Q. Could you tell us?

3 A. Yes.

4 Q. You don't have to name them. I'm just after the  
5 number of them. You are certainly free to name them if you  
6 want.

7 A. Yeah. Four, primarily. They all carried the  
8 largest payrolls. There are other entities under them for  
9 which they may pay the bills because they're service  
10 companies. But four, primarily. I believe that there is  
11 another layer that I've not quite gotten at yet. There's a  
12 series of companies that I'm informed are operated by yet  
13 another company in the southeast under a management  
14 agreement that I truly don't understand yet, but I'm not  
15 being asked to pay that payroll or fund it at the moment.

16 Q. Now, with respect to Pine Street Capital Partners,  
17 which you indicated is the one you're most familiar with,  
18 correct?

19 A. Well, the type of company you asked me about.

20 Q. Right. The investment funds. Are any of the  
21 other companies that are within the scope of your  
22 receivership investors in Pine Street Capital Partners?

23 A. There are -- I would want to see the list before I  
24 answered that question, but I can tell you off the top of my  
25 head that there are parties who are investors who are either

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1 relief defendants or associated with the individual  
2 defendants who are investors. The trustee of one of the  
3 trusts who has since resigned is also an investor in Pine  
4 Street.

5 Q. Do you know if any of the other four funds that  
6 are within your receivership are investors?

7 A. I don't recall if they -- I don't think they are  
8 at the moment, but I would like to see the sheet before I  
9 said more.

10 Q. Okay. You mentioned in response to Miss  
11 Mehraban's question that you were aware of some kind of  
12 provision of services to Lynn Smith. Do you recall that  
13 answer?

14 A. I recall the Q and A.

15 Q. And you mentioned that you had some knowledge of a  
16 car lease, is that correct?

17 A. That is correct. I've seen it.

18 Q. And you mentioned -- can you -- you mentioned that  
19 you understood or you had heard that Lynn Smith drove a car  
20 that was leased by one of the entities?

21 A. The car in question is a Lexus. And when I made  
22 inquiry about the vehicles, I was told that Mrs. Smith was  
23 the driver of that vehicle, and that that vehicle is on the  
24 company's insurance policy.

25 Q. Do you know which company's insurance policy it's

**BROWN - CROSS - FEATHERSTONHAUGH**

1 on?

2 A. I believe they have a consolidated policy, but I  
3 believe the lease, the car lease is McGinn Smith & Co., Inc.

4 Q. Do you know if McGinn, Smith & Co., as part of the  
5 compensation of their principals, provided them with a car?

6 A. I have seen Excel spreadsheets that reveal a tally  
7 of expenses that were reimbursed against a purported, my  
8 word is allowance. They don't call it that though. But I  
9 also asked if 1099s were issued for those benefits, and  
10 while I haven't examined it myself, I was told that the  
11 1099s were not issued.

12 Q. And those were benefits provided to Mr. Smith and  
13 Mr. McGinn?

14 A. Pretax. I've been informed pretax, yes.

15 Q. In that, in that review, did you see any specific  
16 benefits on that Excel spreadsheet that were provided to  
17 Mrs. Smith?

18 A. I do not recall seeing Mrs. Smith's name, but for  
19 most of the time in question, there were two vehicles. And  
20 I was --

21 Q. Well, you're still talking about the Lexus.

22 A. Yes.

23 Q. I'm asking about anything other than that.

24 A. Um...

25 Q. That you recall.



**BROWN - CROSS - FEATHERSTONHAUGH**

1           A.    I don't know how the health care -- I know health  
2 care was being provided. There were country club  
3 memberships. And presently I don't draw any conclusions  
4 about whether it was appropriately part of the compensation  
5 or not, but it was being provided.

6           Q.    And it was compensation that was being provided to  
7 Mr. Smith and Mr. McGinn?

8                   MS. MEHRABAN: Objection.

9           A.    That is correct. Directly to them. Yes.

10          Q.    Thank you.

11                   MR. FEATHERSTONHAUGH: I'm sorry. Did you  
12 have an objection?

13                   MS. MEHRABAN: I was just objecting that you  
14 were incorrectly summarizing what he was saying.

15                   THE COURT: Overruled.

16          A.    Your Honor, I can answer the prior question that  
17 counsel had about --

18                   THE COURT: Well, that's all right. There's  
19 no question pending at the moment. Just wait for the next  
20 question.

21                   THE WITNESS: Oh, I deferred him though, but  
22 I recall the answer.

23                   THE COURT: That's all right. Let  
24 Mr. Featherstonhaugh ask another question, and then you can  
25 answer.

**BROWN - CROSS - FEATHERSTONHAUGH**

1 Mr. Featherstonhaugh.

2 BY MR. FEATHERSTONHAUGH:

3 Q. If you have something you would like to say,  
4 Mr. Brown, go ahead.

5 A. Well, I would like to be as complete as possible  
6 but as accurate as possible. You asked me about whether  
7 there were any other entities essentially as Pine Street  
8 investors.

9 Q. Yes. If you -- entities that were within your  
10 receivership --

11 A. Yeah.

12 Q. -- that you're aware of.

13 A. And, and, and those persons and entities are  
14 listed in the proposed Pine Street dismissal order.

15 Q. Okay. Thank you.

16 MR. FEATHERSTONHAUGH: I have no further  
17 questions for Mr. Brown.

18 THE COURT: Miss Dunn, any questions?

19 MS. DUNN: I have no questions, your Honor.

20 THE COURT: Thank you. Mr. Koenig, I'm not  
21 going to keep calling on you to see if you want to ask any  
22 questions, but I will give you this opportunity.

23 MR. KOENIG: Thank you. No, your Honor. If  
24 I do have any, I'll ask just ask the Court for --

25 THE COURT: All right. Thank you.

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1 Any redirect?

2 MS. MEHRABAN: None. Thank you.

3 THE COURT: All right. Thank you. You may  
4 step down.

5 THE WITNESS: Thank you, your Honor.

6 (Witness William Brown excused.)

7 THE COURT: Before we call the next witness,  
8 just a housekeeping matter, as to the exhibits, there will  
9 be one set that will be designated the exhibits for the  
10 hearing. I assume it's going to -- the SEC intends theirs  
11 to be the ones that are in front of the witness, is that  
12 correct?

13 MR. STOELTING: The -- yes, your Honor.

14 THE COURT: I have not ruled on the  
15 admissibility of anything. Given the looser rulings of  
16 evidence that apply to this hearing, my thought would be  
17 that we would proceed with those exhibits, and at the close  
18 of the hearing, I'll hear any objections any party may have.  
19 This turns to rules and procedures for evidence on its butt,  
20 but it seems appropriate for the way we're proceeding. Any  
21 objection to that? Mr. Stoelting?

22 MR. STOELTING: No objection, except that  
23 those are the exhibits on plaintiff's witness list. We  
24 don't have any copies of any of their exhibits.

25 THE COURT: Well...

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1 MR. FEATHERSTONHAUGH: Well, first of all, no  
2 objection, your Honor. Secondly, I believe you have  
3 everything but one. You don't have them in a handsome  
4 binder like you provided me with.

5 THE COURT: But have you provided them to the  
6 SEC?

7 MR. FEATHERSTONHAUGH: Yes.

8 THE COURT: All right. Miss Dunn, any  
9 objection to the procedure?

10 MS. DUNN: No.

11 THE COURT: And as to your exhibits, have  
12 they been provided to the SEC?

13 MS. DUNN: They've been provided to the SEC  
14 either through the motion filings that have already occurred  
15 or they are exhibits that were in the possession of the SEC  
16 such as exhibits to deposition transcript.

17 THE COURT: Mr. Stoelting?

18 MR. STOELTING: I'm sorry, your Honor, maybe  
19 I missed something in the last couple of days, but I haven't  
20 received any exhibits from either Mr. Featherstonhaugh or  
21 Miss Dunn. If they're saying that there are things that are  
22 already in the record in one way or another, maybe they're  
23 already in our binders. But I haven't --

24 MR. FEATHERSTONHAUGH: We can talk about it  
25 during the lunch.

**MAYA - DIRECT - McGRATH**

1 THE COURT: During the lunch hour, perhaps  
2 you can clarify that among yourselves.

3 All right. SEC's next witness.

4 MR. STOELTING: Your Honor, we call Israel  
5 Maya.

6 **ISRAEL MAYA,**  
7 having been duly sworn by the Clerk of the Court, was  
8 examined and testified as follows:

9 THE CLERK: This is Israel Maya, M-A-Y-A.

10 **DIRECT EXAMINATION BY MR. McGRATH:**

11 Q. Mr. Maya, would you give us your educational  
12 background after high school please?

13 A. I have a Bachelor of Science in accounting from  
14 Brooklyn College.

15 Q. And what year did you graduate college?

16 A. 1978.

17 Q. What is your major?

18 A. Accounting.

19 Q. Can you describe your work history?

20 A. My career started back in <sup>REDACTED</sup> as a compliance  
21 examiner at the commodities Exchange. And after that I  
22 became assistant controller for a small broker dealer.  
23 After that, I was in compliance again for the National  
24 Futures Association which is a regulatory agency. After  
25 that, I joined the New York Stock Exchange also as a -- in

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1 the examination group. After that, I joined a CPA firm,  
2 preparing books and records for broker dealers, future  
3 commission merchants and the like. Then I became a CFO of a  
4 future commission merchant. And after that, I once again  
5 went into public accounting. After public accounting, I  
6 spent some time with FINRA, which is the financial industry  
7 regulatory authority. And then I came to the SEC, the  
8 Commission.

9 Q. When did you join the SEC?

10 A. In August of REDACTED .

11 Q. And what part of the SEC do you work in?

12 A. I work for the broker dealer inspection program.

13 Q. And what are your duties as part of the broker  
14 dealer inspection program?

15 A. My duties consisted of examinations of broker  
16 dealers and assisting our enforcement division, when needed,  
17 on regulatory -- you know, financial matters.

18 Q. Have you ever testified in court before?

19 A. No, I have not.

20 Q. Have you ever given a sworn deposition before?

21 A. No.

22 Q. I've opened before you Plaintiff's Exhibit 70,  
23 which is entitled declaration of Israel Maya. Is that your  
24 declaration?

25 A. Yes, it is.

**MAYA - DIRECT - McGRATH**

1 Q. And if you would look on the last page, tell me if  
2 that's your signature.

3 A. Yes, it is.

4 Q. Can you tell me what documents you used when you  
5 prepared the declaration?

6 A. Documents I used would be Quicken records,  
7 electronic mail, some Excel spreadsheets that I received  
8 from the commissions enforcement division.

9 Q. And do you know how the enforcement division came  
10 to receive the Quicken records, the e-mails, and the other  
11 materials?

12 A. These records were -- they were received from  
13 FINRA, which they had acquired during their investigation of  
14 McGinn, Smith.

15 Q. And you mentioned that you had obtained Quicken  
16 files. Can you tell me what Quicken is?

17 A. Quicken is an off-the-shelf accounting software  
18 where one inputs income, expenses, transactions, like  
19 receipts, disbursements. Quicken is then used to produce  
20 financial statements such as balance sheets, income  
21 statements, source of use of the funds, transactions  
22 journal.

23 Q. And did McGinn, Smith & Co. use Quicken software?

24 A. Yes, they did.

25 Q. How many Quicken files did you receive?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**MAYA - DIRECT - McGRATH**

1 A. Thirty-five, I believe.

2 Q. And what did you do with the Quicken files?

3 A. Well, I analyzed the Quicken files, and in certain  
4 instances I took the Quicken files and I converted them into  
5 Excel to then produce certain schedules.

6 Q. Did you receive Quicken files for the following  
7 entities: First Advisory Income Notes, LLC; First Excelsior  
8 Income Notes, LLC; First Investment Income Notes; and Third  
9 Albany Income Notes?

10 A. Yes, I did.

11 Q. And if I refer to those four entities collectively  
12 as the four funds, would you understand what I mean?

13 A. Yes.

14 Q. And were you able to determine how much money was  
15 raised from investors through the four funds?

16 A. Yes.

17 Q. And how much was raised?

18 A. Raised was approximately \$106 million.

19 Q. And were you able to determine how much of that a  
20 hundred six million was returned to the investors?

21 A. Yes, sir.

22 Q. And how much was returned?

23 A. Approximately 23 million was returned.

24 Q. Were you able to do any analysis of the  
25 investments that were acquired by the four funds?



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1 A. Yes.

2 Q. And did you do any analysis of whether those  
3 investments were public companies or not?

4 A. Yes, I did.

5 Q. Okay. And how much of the -- what -- were you  
6 able to determine the amount of dollars that were used to  
7 acquire public liquid companies?

8 A. Yes.

9 Q. And what was that?

10 A. Approximately \$3.6 million was used to invest in  
11 publicly traded companies.

12 Q. And were you able to make a determination of the  
13 current market value of that 3.6 million in public  
14 companies?

15 A. Yes.

16 Q. And what did you determine?

17 A. Approximately 1.5 million.

18 Q. And as to the remaining 97 million plus, was that  
19 invested in companies that were not public?

20 A. In the most part, they were invested in some  
21 non-public companies.

22 Q. Well, apart from the 3.6 million that you said was  
23 invested in the public companies, was the remainder in  
24 private companies?

25 A. Some, yes, in private companies. They were.

**MAYA - DIRECT - McGRATH**

1 Q. And were you able to determine what percentage of  
2 the investments in the four funds were made in entities that  
3 were affiliated with McGinn, Smith & Co., or David Smith, or  
4 Timothy McGinn?

5 A. Yes.

6 Q. And what did you -- what conclusion did you reach  
7 from that analysis?

8 A. From that analysis, the conclusion was that as of  
9 September 30<sup>th</sup> of 2009, approximately 48. I believe  
10 5 percent was invested in entities that were controlled by  
11 McGinn, Smith.

12 Q. Did that percentage increase after 2003?

13 A. Well, starting in 2003, it was approximately, I  
14 believe, 11 percent, and then gradually it increased to,  
15 September 30<sup>th</sup> of 2009, to approximately 48.5 percent.

16 Q. Could you turn to Exhibit 38 that is in the binder  
17 next to you? Can you tell me what Exhibit 38 is?

18 A. Exhibit 38 is a consolidated balance sheet of the  
19 four funds. And what this exhibit demonstrates is the  
20 assets and liabilities for the four funds starting in  
21 December 31<sup>st</sup> of 2003, and then concluding with  
22 September 30<sup>th</sup>, 2009.

23 Q. And did you prepare Exhibit 38?

24 A. Yes, I did.

25 Q. What records did you use?

**MAYA - DIRECT - McGRATH**

1 A. The Quicken records converted into Excel  
2 spreadsheets.

3 Q. And you see where it says Total, Total Investments  
4 With Affiliates row?

5 A. Yes.

6 Q. And do you see the percentage for the amount at  
7 12/31/2003?

8 A. Yes, I do.

9 Q. And do you see it says 21 percent?

10 A. That's correct.

11 Q. Is that correct?

12 A. The -- that number initially was correct at  
13 21 percent. Later, we went back and we found that there was  
14 an investment in there, I believe it was Aquatic Development  
15 Group that we later found out that I believe is \$1.5 million  
16 that was not an affiliated company. And that's why I  
17 previously said it was 21 percent. It was 11 percent.

18 Q. Okay. So based on what you know now, the correct  
19 percentage under 12/31/03 should be 11 percent?

20 A. That's correct.

21 Q. And does your determination about Aquatic  
22 Development change the percentage of affiliated investments  
23 held as of 12/31/2004?

24 A. As of 2004, it would reduce it, instead of  
25 35 percent, to 33 percent I believe.

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**MAYA - DIRECT - McGRATH**

1 Q. And does it affect the percentage of investments  
2 with affiliates for 2004, '05, or any of the subsequent  
3 years?

4 A. I don't believe so.

5 Q. Could you turn to Exhibit 32, please. Could you  
6 tell me what Exhibit 32 is?

7 A. Exhibit 32 represents the consolidation of all the  
8 four notes -- or the four funds, and it shows the amounts in  
9 investor liability, which represents the top line, which is  
10 approximately \$83 million.

11 The middle line represents the cash balance, which  
12 is approximately, at the time of September 30<sup>th</sup>, 2009,  
13 was 475,000.

14 The trial, which is the bottom line, is the  
15 equity, which approximately was 18 million in deficit as of  
16 September 30<sup>th</sup>, 2009.

17 Q. How did you determine -- the top line, the sending  
18 ark, that is -- indicates cash.

19 A. The middle --

20 Q. Or, I'm sorry, the top line indicates --

21 A. Liabilities to investors.

22 Q. So that's amounts owed to investors?

23 A. That's correct.

24 Q. And what was that amount as of the last date on  
25 the chart?

**MAYA - DIRECT - McGRATH**

1 A. As of the last day on the chart, I believe it was  
2 about 83 million-plus.

3 Q. Okay. And what does this show the cash on hand to  
4 satisfy that liability?

5 A. The cash on hand is only \$475,000.

6 Q. And then the bottom row that goes in negative  
7 territory is called equity. How did you determine the net  
8 equity was below zero?

9 A. The net equity was pretty much -- it was a  
10 consolidation of all the four funds based on the Quicken  
11 records.

12 Q. Did you also review Quicken records for entities  
13 that raised money other than the four funds?

14 A. Yes, I did.

15 Q. And how many Quicken records did you have for  
16 those entities?

17 A. In total, there was four for the funds and then 31  
18 other entities.

19 Q. And your declaration talks about two of them. And  
20 the first one is Verifier 08. What was the Verifier 08  
21 offering?

22 A. Verifier 08 was offering -- it was an offering I  
23 believe for \$3.6 million. And they were, they were offering  
24 to invest in guaranteed units. And then that money was  
25 going to be invested in MF Funding -- MS Funding I believe.

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**UNITED STATES COURT REPORTER - NDNY**

**MAYA - DIRECT - McGRATH**

1 Q. Do you know what MS Funding is or was?

2 A. No, I don't.

3 Q. And did you have occasion to review a balance  
4 sheet for Verifier 08?

5 A. Yes, I did.

6 Q. Would you look at Exhibit 43? Can you tell me  
7 what Exhibit 43 is?

8 A. Exhibit 43 is the balance sheet that shows that --  
9 it's for TDM Verifier Trust 08.

10 Q. And if you look at the list of assets, can you --  
11 the first row says EF Luxury Cruise Center Inc., \$100,000?

12 A. That's correct.

13 Q. What does that mean?

14 A. That means that the TDM Verifier Trust 08 has  
15 loaned or invested a hundred thousand in Luxury Cruise  
16 Center Inc.

17 Q. In your declaration you refer to a declaration of  
18 trust. Do you know if the declaration of trust or the  
19 private placement memo said that a hundred thousand would be  
20 invested with Luxury Cruise Center?

21 A. It did not say that.

22 Q. And looking at those assets -- well, first of all,  
23 did you prepare this?

24 A. This was prepared -- was generated from the  
25 Quicken files that I received.

**BONNIE J. BUCKLEY, RPR, CRR**  
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**MAYA - DIRECT - McGRATH**

1 Q. And when you say the Quicken files, whose Quicken  
2 files?

3 A. It's McGinn, Smith's Quicken files that I had  
4 received from FINRA.

5 Q. Okay. And you see at the bottom it says MS  
6 Funding GPU? Do you see that?

7 A. Yes.

8 Q. \$3 million? Were you able to determine whether  
9 that -- what that investment was?

10 A. No.

11 Q. Do you know if that investment generated any  
12 return?

13 A. I do know that it didn't generate any returns  
14 because I produced an income statement and I didn't see any  
15 return of -- on that investment.

16 Q. And do you see the other assets for TDM Verifier  
17 Trust?

18 A. Yes.

19 Q. And do they appear to you to be all affiliates of  
20 McGinn, Smith & Co.?

21 A. The one that says due from MS Funding appears to  
22 be an affiliate. And MSAT, I believe, is also an affiliate.

23 Q. And the other one, TDMV 07?

24 A. TDMV 07, I believe, is also an affiliate. But  
25 that would be a payable, being that it's a negative on the

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1 asset side of the balance sheet.

2 Q. When you say payable, what do you mean?

3 A. That means that somehow TDM Verifier Trust 08 has  
4 borrowed 52,000 or owes 52,000 to TDMV 07.

5 Q. And do you have an understanding of why that would  
6 be listed as an asset?

7 A. In accounting, if you, if you have an account set  
8 up as an asset but somehow you have borrowed money and left  
9 it as an asset, it will come up as a negative. That's the  
10 only reason I could see why.

11 Q. And are you just speculating?

12 A. Well, that's -- I'm just thinking of my experience  
13 in accounting. But I don't know why they would reflect it  
14 as a negative there on the balance sheet.

15 Q. And if you look at the list of liabilities on the  
16 balance sheet.

17 A. Yes.

18 Q. What are the biggest liabilities there?

19 A. The two biggest liabilities are due to -- it's DT  
20 Investors 08R, which is 1.7 million approximately. And then  
21 due to investor TDMV 08, 36 MTH of 1.9 million.

22 Q. And based on your review of the records, were you  
23 able to determine whether those assets are going to be  
24 sufficient to justify to meet the liabilities?

25 A. Yes, I was able to determine that.



**MAYA - DIRECT - McGRATH**

1 Q. What --

2 A. That there's more liabilities here than the  
3 assets.

4 Q. And your declaration also refers to TDM Cable  
5 Funding, LLC. Are you familiar with that entity?

6 A. Yes, I am.

7 Q. And do you have an understanding of the reason  
8 that TDM Cable Funding was created?

9 A. I wouldn't know the reason why it was created, no.

10 Q. Just to try to refresh your recollection, could  
11 you look at your declaration at paragraph 46? It's Exhibit  
12 70 in the bigger binder.

13 A. Oh. Oh, okay, yeah. Now I remember.

14 Q. Does that refresh your recollection?

15 A. Yes, it does.

16 Q. What was the purpose of TDM Cable Funding?

17 A. The purpose was for operating a private operating  
18 cable companies that they were going to buy I believe in  
19 developments where they would go into -- I think it was in  
20 Florida, where they would buy these contracts in cable  
21 companies.

22 Q. And did TDM Cable loan money to Timothy McGinn and  
23 David Smith?

24 A. Yes, they did.

25 Q. How did you determine that?

**MAYA - DIRECT - McGRATH**

1           A.    Well, the balance sheet for TDM Cable Funding  
2 showed receivables or assets on their books for Timothy,  
3 TDM, David L. Smith and Matt Rogers. And then looking at  
4 the transactions, I was able to see that these were loans  
5 that were made to the three officers of this entity. But I  
6 also reviewed the actual signed promissory notes which they  
7 had signed for this entity.

8           Q.    Were you able to determine the amounts of the  
9 loans to Mr. Smith and Mr. McGinn?

10          A.    Yes, I was.

11          Q.    And what was the amounts?

12          A.    There was three initial loans. I believe one was  
13 for 352,000 for Mr. McGinn, 350 for Mr. Smith, and I believe  
14 there was like another 350 for Mr. Rogers.

15          Q.    Okay. Would you look at Exhibit 49 please. Can  
16 you tell me what Exhibit 49 is?

17          A.    Exhibit 49 is a schedule, a summary of the  
18 activity in each one of the general ledger accounts. The  
19 one that indicates DLS is for David Smith, TMM is for  
20 Mr. McGinn, and Matt R is for Mr. Rogers.

21          Q.    And did you -- do you know who prepared Exhibit  
22 49?

23          A.    I prepared it.

24          Q.    What did you -- how did you prepare it?

25          A.    I, I took the Quicken records, McGinn, Smith

**MAYA - CROSS - FEATHERSTONHAUGH**

1 Quicken records for this entity, and then I converted it  
2 into Excel, and then pretty much I was able to produce this  
3 schedule.

4 Q. And what's the total amount indicated as  
5 transferred to David Smith?

6 A. It would be 694,000.

7 Q. And what's the total amount indicated on Exhibit  
8 49 as transferred to Mr. McGinn?

9 A. \$830,341.

10 Q. One moment.

11 (Pause.)

12 MR. McGRATH: Thank you, Mr. Maya. I have no  
13 more questions.

14 THE WITNESS: Okay. (Witness standing.)

15 THE COURT: Just a minute.

16 MR. McGRATH: Not yet.

17 THE COURT: Mr. Featherstonhaugh.

18 MR. FEATHERSTONHAUGH: Yes. If I can have a  
19 second to assemble my exhibits, your Honor.

20 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

21 Q. Mr. Maya, you indicated this is your first time  
22 testifying ever. How are you enjoying it so far?

23 A. Well, I'm not. (Laughter.)

24 Q. Well, it will be over shortly.

25 Mr. Maya, you reviewed a number of exhibits, and I

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**MAYA - CROSS - FEATHERSTONHAUGH**

1 would like to take a look at some of them with you. So if  
2 you could, in the exhibits before you, and I'll try to find  
3 it at the same time, maybe we could go back initially --  
4 well, first, let me ask you about your declaration.

5           You testified and later you showed us an Exhibit,  
6 I think it's 38, that -- and I have to tell you my problem  
7 with 38 is my old eyes can't read your exhibits, so I'm  
8 going to ask you to help me; it's in such small print. But  
9 you said this was a consolidated balance sheet of the four  
10 funds, do you recall that?

11           A.   That's correct.

12           Q.   And in that, Mr. Stoelting called your attention  
13 to total investments with affiliates, do you recall that?

14           A.   That's correct.

15           Q.   I think it's the fourth line down. And it shows  
16 those percentages changing over the course of a number of  
17 years anyway, right? Started in 2003, correct?

18           A.   That's correct.

19           Q.   Now, can you tell me what definition you used for  
20 affiliated company?

21           A.   What we did was, I went back and I got the  
22 original agreements that might have been signed with the  
23 four notes with the entities, and I considered an affiliate  
24 where McGinn or Smith had control or they were signing on  
25 both sides of the document.

**MAYA - CROSS - FEATHERSTONHAUGH**

1 Q. Did you consider in any way the extent of  
2 ownership Mr. McGinn and Mr. Smith had in these entities?

3 A. In most instances --

4 Q. Yes.

5 A. -- the affiliation, they were related enough that  
6 we knew that there was some ownership, yes.

7 Q. But did you know the percentage of ownership? Or  
8 did you look at it?

9 A. In some instances, we did look at the percentage  
10 of ownership.

11 Q. Would it be also true then that in some instances  
12 you did not look at it?

13 A. That would be true.

14 Q. Is there a general term used in -- well, in your  
15 profession, accounting profession, is there a percentage of  
16 ownership that is usually relied upon in order to declare an  
17 entity an affiliated entity?

18 A. Not that I'm aware of.

19 Q. Is there any percentage which is used to or relied  
20 on by the SEC in terms of the definition of an affiliated  
21 entity?

22 A. I'm not aware of any.

23 Q. Did you get a chance to take a look -- you  
24 testified at some length about TDM Verifier Trust 08, do you  
25 recall that?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**MAYA - CROSS - FEATHERSTONHAUGH**

1 A. Mm-hmm.

2 Q. And in terms of affiliated entities, you testified  
3 about the four funds. Did you look at the PPMs that were  
4 used for the four funds?

5 A. I reviewed the PPM, I believe it was the one for  
6 FIIN, and then I reviewed the documents -- or the PPMs for  
7 the information that I've declared in my declaration, yes.

8 Q. All right. And do you know who prepared -- and  
9 just so we're clear for the record, I want you to take a  
10 look at Exhibit 1 in those books that have been put in front  
11 of you, if you could.

12 A. I don't have Exhibit 1.

13 MR. STOELTING: May I help?

14 THE COURT: If Mr. Featherstonhaugh wishes  
15 your help, Mr. Stoelting. Hold on.

16 MR. FEATHERSTONHAUGH: That's fine, your  
17 Honor.

18 A. Okay. So, now, Exhibit 1.

19 Q. Is -- when you say you reviewed the PPM for FIIN,  
20 is that, in fact, Exhibit 1 in front of you?

21 A. Yes, it is.

22 Q. And that is the PPM that you reviewed?

23 A. Yes, it is.

24 Q. Do you know who prepared that PPM?

25 A. I don't know exactly who was the preparer, no.

**MAYA - CROSS - FEATHERSTONHAUGH**

1 Q. Do you know -- if you know, do you know if counsel  
2 was consulted in the preparation of the PPM?

3 MR. STOELTING: Objection.

4 THE COURT: Overruled.

5 A. I'm trying to recollect some testimony that I read  
6 that FINRA had taken, and I'm not a hundred percent sure,  
7 but I believe that either Mr. McGinn or Mr. Smith was  
8 consulted in the preparation. But I don't know exactly who  
9 were the -- who was the one that constructed this document.

10 Q. Let me ask you to take a look at page 6, if you  
11 would. Well, maybe preliminarily, page 5 of the PPM. Do  
12 you see that?

13 A. Yes.

14 Q. Can you tell me what the -- just read the  
15 headline, first section.

16 A. Confidential private placement memorandum. It's a  
17 3. -- 3,550,000 TDM Cable Trust 06.

18 Q. Now I would like you to look at page 5. I believe  
19 it's headed risk factors.

20 A. Okay.

21 MR. STOELTING: I think he's on the wrong  
22 exhibit.

23 MR. FEATHERSTONHAUGH: Ah. Well, let me go  
24 up. May I approach, your Honor?

25 THE COURT: Yes.

**MAYA - CROSS - FEATHERSTONHAUGH**

1 BY MR. FEATHERSTONHAUGH:

2 Q. Mr. Maya, maybe I better go back to my preliminary  
3 questions. When you were answering, I think you were  
4 consulting Exhibit 5. I'm asking you about Exhibit 1.  
5 Could you take a minute and just look at that and let me  
6 know if that is the PPM that you indicated you reviewed  
7 prior to preparing these other exhibits.

8 A. It may have been, but I -- you know, word for  
9 word, you're putting me in a spot what I remember what I  
10 read in FIIN, and if it's the same thing. It would be most  
11 difficult for me to say it is.

12 Q. You indicated to me, did you not, that you relied  
13 to some extent on what you read in preparing these exhibits  
14 you've been testifying from?

15 A. That's correct.

16 Q. Well, let me ask you to look at Exhibit 1, in any  
17 event, and can you tell me how page 5 is headed?

18 A. Risk factors.

19 Q. And I now want you to turn to page 6. And I would  
20 ask you to read the section saying that the trustee may  
21 experience a conflict of interest.

22 A. Well, it says the trustee under the indenture  
23 governing the notes is an affiliate of our managing member,  
24 acts as our servicing agent and represents all three  
25 tranches of notes.



**MAYA - CROSS - FEATHERSTONHAUGH**

1 Q. I would like you to -- there's two more  
2 paragraphs.

3 A. The trustee is McGinn, Smith Capital Holding  
4 Corp., which is an affiliate of our managing member, McGinn,  
5 Smith Advisors, LLC and our placement agent McGinn, Smith  
6 Co. Inc. In addition, we have retained McGinn, Smith  
7 Capital Holding Corp. to act as our servicing agent. In the  
8 event that you feel that you are not adequately represented  
9 by the trustee in an event of default, holders of 25 percent  
10 of the aggregate principal amount of all notes outstanding  
11 may vote to remove the trustee and elect a successor  
12 trustee.

13 The trustee under the indenture will represent all  
14 three tranches of notes. The note holders of a particular  
15 tranche of notes may feel that the trustee has a conflict of  
16 interest when it acts in a way that favors one tranche of  
17 notes over another tranche of notes. In that event, holders  
18 of 25 percent of the aggregate principal amount of the notes  
19 in a particular tranche may vote to remove the trustee with  
20 respect to that tranche of notes and appoint a successor  
21 trustee to represent that tranche of notes.

22 Q. Does the PPM, does Exhibit 1 continue to enumerate  
23 various risk factors on the following pages?

24 A. I believe so.

25 Q. I'm not going to ask you to read them because this

**MAYA - CROSS - FEATHERSTONHAUGH**

1 is in evidence, but can you tell us how many pages the  
2 private placement memorandum is?

3 A. It's 18 pages, and then it has exhibits behind  
4 them.

5 Q. And can you tell us what the exhibit behind them  
6 is?

7 A. The exhibits are forms for investor  
8 questionnaires, and it goes through a series of questions  
9 for the investors to fill out.

10 Q. And that's information that the investors have to  
11 provide to the fund, correct?

12 MR. STOELTING: Objection.

13 THE COURT: Overruled.

14 A. Well, it's there. I guess each investor that  
15 wants to invest must abide by the PPM, has to fill it out.

16 Q. All right. Let's go back to Exhibit 38, if you  
17 will. Can you look at that last column for me, which would  
18 be the -- maybe I can just ask you. What is the date on the  
19 last column?

20 A. It's September 30<sup>th</sup>, 2009.

21 Q. Was there any reason you picked that date to --

22 A. There was. And the Quicken records that I had  
23 received for the four funds, some of them I think  
24 extended -- some of the information was until the middle of  
25 October of 2009. So we wanted to keep all the dates

**MAYA - CROSS - FEATHERSTONHAUGH**

1 consistent as one date, September 30<sup>th</sup>.

2 Q. Can you take us through the September '09 analysis  
3 you did. And this is the consolidated balance sheet, all  
4 four of those, right?

5 A. All four of them.

6 Q. Let me ask you, did you prepare a separate balance  
7 sheet for each -- or a balance sheet for each of the funds  
8 individually?

9 A. Yes, I did.

10 Q. Do you know if that's included in this exhibit  
11 book?

12 A. Um...

13 Q. Just if you know. I'm not asking you to look  
14 through the hundred --

15 A. Yeah. I believe that we -- I put together a  
16 balance sheet and I think they were in each of the exhibits  
17 that demonstrate the assets and liabilities for each one of  
18 the funds individually.

19 Q. Okay. Well, looking at the consolidated one, can  
20 you take us through that September 30<sup>th</sup> statement? For  
21 example, under assets, it says cash. Can you read that  
22 number to me?

23 A. That's correct. Under assets for September  
24 30<sup>th</sup>, 2009, it starts with cash, would be \$475,974.57.

25 Q. Mr. Maya, what is your understanding of the

**MAYA - CROSS - FEATHERSTONHAUGH**

1 purpose of these four funds you were analyzing?

2 A. I don't think I understand your question.

3 Q. Well, let me try again. You indicated that you  
4 read the private placement memorandum for FIIN. What did  
5 it -- what did that placement memorandum tell the investors  
6 FIIN was going to do?

7 A. Well, they were going to raise the monies from  
8 investors and then invest it.

9 Q. Ah, all right. So it's your understanding that  
10 all -- the purpose of all four of these funds was to make  
11 investments, correct?

12 A. That's correct.

13 Q. Was it then any kind of a surprise to you that the  
14 cash balance in the funds was low?

15 A. Well, that wasn't a surprise.

16 Q. All right. The second column says non-affiliated  
17 entities. And I really do beg your pardon but I can't read  
18 that number, so if you could help me.

19 A. When you say -- you mean the next row?

20 Q. Yes, the next row. I'm sorry.

21 A. Okay. The next row would be \$31,836,082.35.

22 Q. And that was the value of the non-affiliated  
23 entities?

24 A. That's correct.

25 Q. And is there also, is there also a percentage

**MAYA - CROSS - FEATHERSTONHAUGH**

1 there?

2 A. Yes. It's 45.3 percent.

3 MR. STOELTING: Jim, I'm sorry. Your Honor,  
4 we do have an extra set of this. If I can, if your Honor  
5 would like to see this particular exhibit.

6 THE COURT: No, we're doing okay. Thank you.

7 MR. STOELTING: Okay.

8 BY MR. FEATHERSTONHAUGH:

9 Q. The third entry is other investments  
10 non-affiliated?

11 A. That's correct.

12 Q. And can you tell us what that number is?

13 A. That number represents investments in publicly  
14 traded companies that would not be included in the  
15 affiliates or the non-affiliates.

16 Q. And that was the number you testified to earlier,  
17 correct? I think you said \$3.6 million?

18 A. That's correct.

19 Q. All right. And then you have totaled the  
20 non-affiliated investments, is that what you did?

21 A. That's correct.

22 Q. And that total was thirty five million two hundred  
23 some thousand dollars?

24 A. That's correct.

25 Q. And that was the total value of the non-affiliated

**MAYA - CROSS - FEATHERSTONHAUGH**

1 entities?

2 A. That's correct.

3 Q. And the percentage of non-affiliated entities?

4 A. Would be 50.5 percent.

5 Q. Then the next column appears to be another total,  
6 is that right? Total investments with affiliates?

7 A. Are you speaking about the 34 million?

8 Q. I believe I am if it's a form on the --

9 A. It's \$34,048,135.98.

10 Q. All right. So then it has the total assets, which  
11 I take it means both affiliated and non-affiliated?

12 A. That's correct. And cash.

13 Q. And cash. Can you tell me what that number is?

14 A. That represents all the assets of the four funds  
15 combined.

16 Q. Okay. And what is that number?

17 A. That's 69,785,312.63. \$312.63.

18 Q. Then you have a separate part of your analysis  
19 here that deals with liabilities. Do you see that?

20 A. That's correct.

21 Q. And the first line again refers to unaffiliated  
22 entities, is that right?

23 A. The first row says liabilities were affiliated.

24 Q. Affiliated. Okay, I'm sorry. Can you tell me  
25 what that amount again in September, 30, 2009?

**MAYA - CROSS - FEATHERSTONHAUGH**

1 A. That million amount is \$3,378,910.25.

2 Q. Now, could you also describe for us, what kind of  
3 a liability would the funds have to an affiliated entity?  
4 What sorts of things was that composed of?

5 A. Well, if the fund borrows from another affiliated  
6 entity, that would be a liability, that would be on the, on  
7 the four funds.

8 Q. All right. And that was this \$3,375,000?

9 A. 3,378,910.25.

10 Q. Okay. It then refers to liabilities with  
11 investors. Can you tell me what the nature of those  
12 liabilities reveal?

13 A. The -- they're referring to the line liabilities  
14 with investors, others?

15 Q. Yes.

16 A. Okay. That number represents the interest that  
17 was actually accrued in the four funds.

18 Q. You're saying that represented interest that had  
19 accrued in the funds?

20 A. In the four funds for the investors, yes.

21 Q. Okay. So that's money owed to investors?

22 A. That's correct.

23 Q. And that was 370 some thousand dollars?

24 A. \$373,620, with 65 cents.

25 Q. You then have other liabilities. And I notice

**MAYA - CROSS - FEATHERSTONHAUGH**

1 that there's no entry under other liabilities until we get  
2 to 2006, is that right?

3 A. That's correct.

4 Q. Can you tell me what the other liabilities were?

5 A. In -- those are other liabilities that don't fit  
6 the categories of affiliate or investors. Everything else  
7 was just put into that line item.

8 Q. And then, finally, you have a line that says total  
9 of other liabilities. Is that, in fact, the total of all  
10 those liabilities we've just talked about?

11 A. Yes.

12 Q. And so that's 4 million...

13 A. \$4,285,745.33.

14 Q. And then beneath that, there is a list of -- well,  
15 let me ask you: What is that list beneath that of  
16 liabilities?

17 A. It -- if you're referring to where it says  
18 investors and then the percentage next to it.

19 Q. Yup.

20 A. Okay. What that is, is we took all of the  
21 investors' liabilities for the four funds and we just  
22 separated them by the interest rate that is owed, and that's  
23 how we come up with a total of the 83,604,000.

24 Q. What is the number? 86 million?

25 A. 83 million.



**MAYA - CROSS - FEATHERSTONHAUGH**

1 Q. 83 million. And the different interest rates  
2 represent the different tranches of investment in the four  
3 funds, is that correct?

4 A. I believe so.

5 Q. And, in fact, and, again, you can just refer to  
6 the one PPM that you looked at, that there were three  
7 tranches of notes offered to the investors?

8 A. That's correct.

9 Q. A senior note, senior support dated note, and a  
10 junior note?

11 A. That's correct.

12 Q. And do you know what the difference in those  
13 interest rates were that the investors got to choose from?

14 A. Why the different rates?

15 Q. No, not why. Do you know what? Do you know what  
16 rates were offered for the three tranches?

17 A. Yes.

18 Q. Okay. Can you tell us what they were?

19 A. Well, different -- the different funds had  
20 different tranches and offered the different rates. And  
21 later on, these rates were changed. And that's why you have  
22 in certain columns, you know, let's say like a five percent,  
23 but then you don't have it on September 30<sup>th</sup>. So as the  
24 rates were changing, that's how we reflected -- I reflected  
25 it on this schedule.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**MAYA - CROSS - FEATHERSTONHAUGH**

1 Q. Okay. Do you know which year on this schedule  
2 would reflect the year that the first year that all four  
3 funds had completed their offerings and were operational?

4 A. I'm not sure that -- it might have been sometime  
5 in 2006 or 2007, but I'm not a hundred percent sure.

6 Q. Well, in your declaration, if you want to refer to  
7 it, you may recall, that's Exhibit 70, Mr. Stoelting took  
8 you through some of the paragraphs in the 20s. And  
9 specifically I would like to call your attention to  
10 paragraph 21. Can you take a look at that?

11 A. Okay.

12 Q. And you'll see in there, and you may remember  
13 testifying that you indicated that the total funds -- the  
14 total amount raised by the four funds was 106,941,000?

15 A. That's correct.

16 Q. Do you see that reference? And then you spoke  
17 about the funds return in a total of \$23,137,000.

18 A. That's correct.

19 Q. Do you recall that? And Mr. Stoelting then  
20 referred you to another entry where you indicated that the  
21 net amount of the funds raised for investment was  
22 \$83,804,000, is that correct?

23 A. That would not be correct. That's the amount due  
24 to the investors, not the amount raised.

25 Q. All right. So Mr. McGinn and Mr. Smith, or at

**MAYA - CROSS - FEATHERSTONHAUGH**

1 least the funds and the fund trustees had already returned  
2 \$23 million and change to the investors and eighty three  
3 million eight hundred was what continued to be owed to the  
4 investors?

5 A. That's correct.

6 Q. All right. And, in fact, that \$83 million is  
7 pretty much the number, I think, that you gave me on -- that  
8 was owed to -- owed -- represented the liabilities of the  
9 funds on September 30?

10 A. That's correct.

11 Q. And at that point in time you were saying that the  
12 assets of the four funds was sixty nine million seven  
13 hundred some thousand?

14 A. That's correct.

15 Q. Do you know whether those monies were immediately  
16 due?

17 A. In some instances, by September 30<sup>th</sup>, some of  
18 the notes had already matured and those monies were due.

19 Q. And were there notes that hadn't matured at that  
20 point?

21 A. I believe so. There might have been notes that  
22 were still due to mature as of September 30<sup>th</sup>.

23 Q. In your declaration, I would like to call your  
24 attention to page 4 of it. I see you've made an entry there  
25 that says Lynn Smith is the wife of David Smith. Do you see

**MAYA - CROSS - DUNN**

1 that?

2 A. Yes, I do.

3 Q. Is there any other reference in your declaration  
4 to Lynn Smith?

5 A. No, there isn't.

6 Q. Do you know whether any of these -- is there  
7 anywhere on any of the charts that you prepared that Lynn  
8 Smith's name appears?

9 A. No, it -- her name does not appear any place else.

10 Q. In those charts showing cash flow and the flow of  
11 money, is there any notation on a chart footnote or  
12 otherwise of money that was sent to or given to or  
13 transferred to Lynn Smith?

14 A. Not in my charts.

15 MR. FEATHERSTONHAUGH: I have no further  
16 questions for Mr. Maya.

17 THE COURT: Thank you. Miss Dunn, any  
18 questions.

19 MS. DUNN: Yes, your Honor.

20 **CROSS-EXAMINATION BY MISS DUNN:**

21 Q. Mr. Maya, did any portion of your investigation  
22 into these four notes concern the David and Lynn Smith  
23 irrevocable trust?

24 A. No.

25 Q. Did you in the course of your investigation

**REDIRECT - MAYA - STOELTING**

1 discover that the David and Lynn Smith irrevocable trust,  
2 either the trust itself or through its trustee Thomas  
3 Urbelis, have an investment in any of the four notes that  
4 you just testified concerning?

5 A. No.

6 Q. Do you mention David -- the David and Lynn Smith  
7 irrevocable trust anywhere in your declaration?

8 A. No, I do not.

9 Q. Have you referenced the David and Lynn Smith (sic)  
10 anywhere in any of the charts or documents you've produced  
11 in this proceeding?

12 A. No.

13 MS. DUNN: Nothing further. Thank you.

14 THE COURT: Thank you. Any redirect?

15 MR. STOELTING: Just very briefly, your  
16 Honor.

17 **REDIRECT EXAMINATION BY MR. STOELTING:**

18 Q. Mr. Featherstonhaugh asked you to look at some  
19 pages that were called risk factors in the PPMs. In your  
20 review of the PPM, the private placement memorandum, did you  
21 come across any disclosure in those PPMs saying that  
22 investments with companies affiliated by McGinn, Smith would  
23 be made with investor money?

24 A. No, I didn't see that.

25 Q. And then there was a question and used the phrased

**REDIRECT - MAYA - STOELTING**

1 "completed the offering", where he asked whether any of your  
2 charts reflect a time when the offering was completed. Do  
3 you know when the last money raised from investors was by  
4 the four funds?

5 A. It was in 2008. I believe it was March 2008,  
6 there was still monies being raised.

7 Q. And would you look at Exhibit 39? Can you tell  
8 me, first of all, where Exhibit 39 came from?

9 A. Exhibit 39 initially was an Excel spreadsheet that  
10 our enforcement division had provided, but it was in total  
11 of all the investors. So the way I prepared this was to  
12 illustrate what investments were made in 2008 and on. So  
13 what I did was, I copied from each one of the Excel  
14 spreadsheets for each one of the four funds, as you would  
15 see in the third column it says FAIN, FAIN and TAIN. So  
16 basically what this is a cut and paste of the schedules,  
17 McGinn, Smith's schedules that were provided to FINRA that  
18 later our enforcement division received.

19 Later what I did was, after I had compiled the  
20 schedule of cut and pasting the investments that were  
21 received after 2008, I added another column to demonstrate  
22 what new money. And this is basically from the Quicken  
23 records, as you'll see from -- in the third row, there's  
24 12,000, well, that's new money that came into --

25 Q. Well, well, that's -- does this indicate new

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**REDIRECT - MAYA - STOELTING**

1 investor money being raised in 2008?

2 A. Yes, it does.

3 Q. Okay. And where?

4 A. It shows it in the next to the last column where  
5 it says date received, and it starts off with a  
6 September 3<sup>rd</sup> of '08.

7 Q. Okay. And what's the total of new investor money  
8 raised in 2008 according to this Exhibit 39?

9 A. It's \$3,602,695.

10 Q. No, the new money received in 2008 was my  
11 question.

12 A. Oh. It would be 535,000 of new money.

13 Q. And does your declaration refer anywhere to any  
14 communication by David Smith or by McGinn to investors in  
15 2008 about the state of the four funds?

16 A. Yes. I did see some communication.

17 Q. And what do you recall about that communication?

18 A. There were -- there was a letter that was early in  
19 2008, signed by Mr. Smith, indicating that the funds would  
20 have problems in redeeming their investments. And pretty  
21 much there was an explanation that was the state of the  
22 economy and the liquidity and the credit crisis that would  
23 make it difficult for redemption.

24 Q. Okay. If you would turn to Exhibit 8, I have a  
25 couple more questions. Exhibit 38, I'm sorry.

**REDIRECT - MAYA - STOELTING**

1           Okay. Those numbers on Exhibit 38, are they --  
2 what is the source of those numbers, the original source?

3           A. The source is McGinn, Smith Quicken records, which  
4 were later converted into Excel format.

5           Q. Okay. And do you see -- Mr. Featherstonhaugh  
6 asked you some questions about the value placed on the total  
7 assets as of 6/30/09.

8           A. That's correct.

9           Q. And this exhibit indicates that the value is  
10 69.7 million, roughly?

11          A. \$69,785,312.63.

12          Q. All right. And did you in your declaration have  
13 any occasion to address the accuracy of that valuation?

14          A. Well, yes. What we did is, later on we -- I  
15 prepared a schedule that showed that some of these assets  
16 were actually overvalued.

17          Q. Okay. And would you look at paragraph 28 of your  
18 declaration?

19          A. Okay.

20          Q. All right. And do you see there's a reference in  
21 paragraph 28 to an e-mail from David Rees?

22          A. That's correct.

23          Q. And the date of the e-mail was December 2<sup>nd</sup>  
24 2007?

25          A. Yes.



**MAYA - RECROSS - FEATHERSTONHAUGH**

1 Q. And what did that internal e-mail from David Rees  
2 to David Smith tell you about the internal valuation at  
3 McGinn, Smith?

4 A. The e-mail pretty much said -- stated that the  
5 realizable value was not 69 million, but it was 37 million.

6 Q. And was -- after the receipt of that e-mail, which  
7 was December 2007, did McGinn, Smith do any adjustment to  
8 the value -- the carrying value of its assets?

9 A. No.

10 Q. All right. Thank you.

11 THE COURT: Any recross,  
12 Mr. Featherstonhaugh?

13 **RECROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

14 Q. Mr. Maya, did you -- I take it that in that  
15 testimony you just gave us, you simply relied on Mr. Rees's  
16 evaluation; you didn't go out and independently do one?

17 A. In, in -- I relied on Mr. Rees's calculation when  
18 it came to the non-public investments.

19 Q. Right.

20 A. Pretty much what I had done was, if Mr. Rees had  
21 discounted something a hundred percent, I pretty much  
22 discounted it a hundred percent. If it was a publicly  
23 traded company that I knew that I could go to, let's say,  
24 Bloomberg or the Internet and I could do some research, then  
25 in that instance, I did my research and then found out

**MAYA - RECROSS - FEATHERSTONHAUGH**

1 whether the company was still in business, whether it was  
2 still viable.

3 Q. Can you help me out there? You said, and I had  
4 almost forgotten about this, the public investments of  
5 \$3.6 million, I think you valued at 1.5 million or...

6 A. That's correct.

7 Q. So the publicly traded investments during that  
8 period of time had lost more than half their value?

9 A. Yes, sir.

10 Q. Do you know what the -- whether the Standard and  
11 Poor's index, which is published daily, lost or gained value  
12 between 2007 and September 30<sup>th</sup>, 2009?

13 A. I wouldn't know the answer to that.

14 Q. But that would be available to anyone who wanted  
15 to look at it, wouldn't it?

16 A. Yes.

17 MR. FEATHERSTONHAUGH: No further questions.

18 THE COURT: Miss Dunn, anything further?

19 MS. DUNN: Nothing further.

20 THE COURT: All right. Thank you. You may  
21 step down.

22 THE WITNESS: Okay.

23 (Witness Israel Maya excused.)

24 THE COURT: We'll take our luncheon recess at  
25 this time. Stand in recess until 2:00.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**DANIELLO - DIRECT - McGRATH**

1 (Lunch recess at 12:55 PM.)

2 \* \* \* \* \*

3 (Court reconvened at 2:00 PM.)

4 THE COURT: The plaintiff will call its next  
5 witness.

6 Mr. McGRATH: Call Roseann Daniello.

7 THE CLERK: If you'll step right up here.

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**DANIELLO - DIRECT - McGRATH**

1                                   **ROSEANN DANIELLO,**

2       having been duly sworn by the Clerk of the Court, was  
3       examined and testified as follows:

4                                   THE CLERK:   This is Roseann Daniello.

5       **DIRECT EXAMINATION BY MR. McGRATH:**

6               Q.     Good afternoon, Miss Daniello.   Where are you  
7       currently employed?

8               A.     I'm employed by the Securities and Exchange  
9       Commission.

10              Q.     What's your current position?

11              A.     A staff accountant.

12              Q.     How long have you been a staff accountant with the  
13       SEC?

14              A.     Approximately eight years.

15              Q.     And prior to that, were you employed with the SEC?

16              A.     Yes.   I was a securities compliance examiner.

17              Q.     And how long did you have that position?

18              A.     Ten years.

19              Q.     Is that your first position with the SEC?

20              A.     Yes.

21              Q.     Prior to that, where did you work?

22              A.     I did some bookkeeping for a small firm.

23              Q.     And where did you go to college?

24              A.     Iona College.

25              Q.     What degree did you get?

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                                  **UNITED STATES COURT REPORTER - NDNY**

**DANIELLO - DIRECT - McGRATH**

1 A. I had a BBA in finance.

2 Q. As a staff accountant at the SEC, can you describe  
3 generally what your responsibilities consist of?

4 A. Sure. I work on investigations and litigations,  
5 doing research, analyzing brokerage records, bank records,  
6 things of that nature.

7 Q. And in connection with your responsibilities as a  
8 staff accountant, did you prepare a declaration in  
9 connection with this case?

10 A. Yes, I did.

11 Q. Direct your attention to Exhibit 69 in the book  
12 there before you and ask you to take a look at that  
13 declaration, and specifically the last page, page 9.

14 A. Yes.

15 Q. Is that your signature --

16 A. Yes.

17 Q. -- on that declaration dated April 19, 2010?

18 A. Yes, it is.

19 Q. Can you describe generally what this declaration  
20 covers, what type of information is contained in it?

21 A. This is basically transfers to and from various  
22 accounts of the four funds and some individuals.

23 Q. And you said four funds. What are you referring  
24 to?

25 A. The ones identified in the complaint. FAIN, FEIN,

**DANIELLO - DIRECT - McGRATH**

1 TAIN...

2 Q. And FIIN?

3 A. FIIN.

4 Q. And does it also go into some detail regarding  
5 transfers in and out of a number of trusts affiliated with  
6 McGinn, Smith?

7 A. Yes, it does.

8 Q. And how -- did you personally prepare the  
9 information that's contained in this declaration?

10 A. Yes.

11 Q. What documents did you look at in connection with  
12 preparing this declaration?

13 A. I looked at bank statements, wire --

14 Q. What bank -- I'm sorry, go ahead and finish.

15 A. Wire transfers, cancelled checks, deposit slips.

16 Q. And what bank statements -- what banks did you  
17 obtain statements from?

18 A. M & T Bank, Mercantile Bank.

19 Q. How were those documents obtained?

20 A. Subpoenas.

21 Q. And you said you also reviewed wire transfer  
22 records and cancelled checks?

23 A. Yes.

24 Q. How were those documents obtained?

25 A. Also by subpoena.

**DANIELLO - DIRECT - McGRATH**

1 Q. All right. Did you personally verify the  
2 information contained in each portion of this declaration by  
3 looking at the underlying documentation yourself?

4 A. Yes, I did.

5 Q. Now, since you signed the declaration, did you go  
6 back and recheck prior to your testimony here today?

7 A. Yes, I did.

8 Q. And in the course of rechecking that information,  
9 did you identify any corrections that needed to be made?

10 A. Yes, I did.

11 Q. How many?

12 A. I think there were three of them.

13 Q. All right. Can you identify for the Court what  
14 three corrections needed to be made to this declaration?

15 A. On page 3, paragraph 8, it should be -- the first  
16 one should be \$14,500, on March 19, 2008, it's actually  
17 going to a TAIN account.

18 Q. All right. So in paragraph 8, the document states  
19 the M & T Bank records of TDM Cable Trust 06 show the  
20 following transfers: To a FEIN, F-E-I-N, account. What  
21 you're saying with respect to the first entry, the 14,500,  
22 that should actually be to a TAIN, T-A-I-N, account?

23 A. That's correct.

24 Q. What are the other two corrections that you noted?

25 A. Let's see. On page 9, paragraph 29, where it says

**DANIELLO - DIRECT - McGRATH**

1 M & T Bank records shows the following deposit into TDM  
2 Verifier Trust 07R account, that should be Mercantile Bank.

3 Q. And then the final correction?

4 A. Paragraph 30, where it says Mercantile Bank  
5 records show the following transfers from Integrated  
6 Excellence Sr. Trust 08, that should be M & T Bank.

7 Q. All right. So with those three corrections made,  
8 is the information contained in this declaration, April 19,  
9 2010, accurate and an accurate reflection of the information  
10 that was contained on the documents that you reviewed prior  
11 to preparing this declaration?

12 A. Yes, I believe it is.

13 Q. And, in fact, if you look at the seven documents  
14 to the left of you there that I've marked as Exhibit 69A, is  
15 that a set of backup documents that support the information  
16 contained in both the declaration marked as Exhibit 69 and  
17 the supplemental declaration that you presented and signed  
18 that's marked as Exhibit 72?

19 A. Yes, it is.

20 Q. Now, I just want to ask you one question about  
21 this declaration, Exhibit 69. On page 7, paragraph 25, you  
22 state that on July 30, 2009, records show a transfer of  
23 \$175,000 from TDMM Cable Junior Trust 09 to an account at  
24 National Financial Services in the name of Lynn Smith. Do  
25 you see that statement?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**



**DANIELLO - DIRECT - McGRATH**

1 A. Yes.

2 Q. Do you know based on your review of the records  
3 that you looked at in preparing this particular statement  
4 whether the record indicated which account in the name of  
5 Lynn Smith the money went to?

6 A. Yes, it does.

7 Q. What account was it sent to?

8 A. The stock account. Ending in 916, I believe.

9 Q. And is the backup information for that statement  
10 contained in what I've marked as Exhibit 69A?

11 A. Yes.

12 Q. All right. Now, please turn to the declaration  
13 that you prepared and that's marked as Exhibit 72 in the  
14 binder. Do you see that?

15 A. Yes.

16 Q. It's entitled supplemental declaration of Roseann  
17 Daniello.

18 A. Yep.

19 Q. And if you turn to the second page, is that your  
20 signature?

21 A. It is.

22 Q. And it's -- it was executed on June 2, 2010, in  
23 connection with this case?

24 A. Yes.

25 Q. All right. And let me go through this in a little

**DANIELLO - DIRECT - McGRATH**

1 bit more detail. On the first and second page of this  
2 declaration, you set forth a description of certain charts  
3 that are attached to this declaration?

4 A. Yes.

5 Q. And above that, do you set forth the documents  
6 that you reviewed in connection with preparing the charts?

7 A. That's right.

8 Q. Is that information accurate as you sit here  
9 today?

10 A. Yes, it is.

11 Q. Now, specifically with respect to Exhibit 1, it's  
12 entitled deposits and withdrawals from the David and Lynn  
13 Smith irrevocable trust account. Did you prepare that  
14 chart, personally?

15 A. Yes, I did.

16 Q. And how did you prepare that chart? Based on what  
17 information?

18 A. Based on brokerage account statements.

19 Q. All right. Is all of the information set forth in  
20 this chart information that is reflected in the underlying  
21 documents that you looked at?

22 A. Yes.

23 Q. And does this chart represent a complete depiction  
24 of all of the information that was contained on those  
25 statements or just certain portions that you found relevant?

**DANIELLO - DIRECT - McGRATH**

1           A.    It's the -- it's all the wire transfers incoming  
2 and out going with the exception of stock transfers, for  
3 example, or wire fees, you know, different fees in the  
4 account.

5           Q.    And just directing your attention to the very last  
6 entry at the bottom of Exhibit 1, it states on 4/15/2010,  
7 there was a wire transfer, the payee is identified as Lynn  
8 Smith, and the amount of the withdrawal from the trust  
9 account is identified as \$95,000. Are you familiar with  
10 that entry?

11          A.    Yes.

12          Q.    And do you know based on your review of the  
13 underlying document that you looked at in preparing that  
14 entry whether it indicated where or what account that money  
15 was transferred to?

16          A.    Yes.

17          Q.    What account was that transferred to?

18          A.    The checking account at Bank of America.

19          Q.    In the name of Lynn Smith?

20          A.    Yes.

21          Q.    Is that information also in the underlying  
22 documentation that's been marked 69A?

23          A.    It is.

24          Q.    Now, let me direct your attention to Exhibit 2,  
25 which is identified as -- sorry, Exhibit 2, declaration,

**DANIELLO - DIRECT - McGRATH**

1 transfers to and from the stock account. What documents did  
2 you look at in connection with preparing this exhibit?

3 A. Brokerage account statements at NFS and backup  
4 document.

5 Q. In whose name?

6 A. Lynn Smith.

7 Q. And, again, does this chart purport to contain all  
8 the information contained in the brokerage statements for  
9 the periods 9/3/2004 through April 5<sup>th</sup>, 2010?

10 A. It's actually -- I reviewed this from  
11 December 2005, as it states in my declaration. The earlier  
12 2004 transfers were wire transfers that were received from M  
13 & T.

14 Q. All right. But my question is, is there any  
15 information that was contained in those documents that's not  
16 reflected in these charts? With respect to Exhibit 2.

17 A. It would just be transfers of stock and wire fees  
18 or any other fees in the account.

19 Q. That's not reflected in here?

20 A. That wouldn't be reflected, right.

21 Q. Okay. Exhibit 3 is identified as transfers to and  
22 from the checking account. What checking account are you  
23 referring to there?

24 A. This is the checking account at Bank of America in  
25 the name of Lynn Smith.

**DANIELLO - DIRECT - McGRATH**

1 Q. And, again, did you prepare this chart yourself?

2 A. Yes, I did.

3 Q. Did you review the underlying records that contain  
4 the information that's set forth in this chart?

5 A. Yes.

6 Q. And, finally, with respect to Exhibit 4, entitled  
7 transfers to and from the IRA account, what IRA account  
8 referring to here?

9 A. This is Lynn Smith's IRA account at NFS.

10 Q. Does this chart contain all of the information  
11 that was contained in the documents that you reviewed or  
12 just what you deemed to be relevant selections?

13 A. These would be all the wire transfers in and out  
14 with the exception of stock receipts and, again, wire  
15 transfer fees.

16 Q. Okay. And, again, based on your preparation of  
17 these charts, is the information contained in all four of  
18 the exhibits accurate to the best of your knowledge?

19 A. Yes.

20 Mr. McGRATH: I have no further questions,  
21 your Honor.

22 THE COURT: All right. Mr. Featherstonhaugh,  
23 any questions?

24 MR. FEATHERSTONHAUGH: I do have a few, your  
25 Honor. And with the Court's permission, could I approach

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 the witness and just see what this -- is contained in this  
2 exhibit 69A, the backup?

3 THE COURT: Yes.

4 MR. FEATHERSTONHAUGH: So-called backup.

5 Oh, for me? Apparently, I don't need to.  
6 (indicating).

7 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

8 Q. All right. Just so I understand, Miss Daniello,  
9 the information in Exhibit 69A is all the information you  
10 reviewed to prepare this chart?

11 A. Yes.

12 Q. I wonder if you and I could look at your charts  
13 together. And you actually submitted two sets of charts, is  
14 that right? One in Exhibit 69. Were there charts attached  
15 to that one? Or maybe not. Those were done separately. I  
16 apologize. But, nonetheless, let's look at 69.

17 You have listed transferred, and I call your  
18 attention to page 2 of the document?

19 A. Yes.

20 Q. And on page 2, in paragraph 5, you indicate that  
21 the TDM Cable Trust 6, which presumably has a bank account  
22 at Mercantile Bank, shows ten transfers from the 06 account  
23 at Mercantile Bank to a FIIN account, is that correct?

24 A. Yes.

25 Q. And do you have those account numbers available to

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 you of those two accounts?

2 A. I have whatever accounts I have in this backup  
3 information, I do.

4 Q. All right. Well, the November 29<sup>th</sup>, 2000 -- on  
5 November 29<sup>th</sup>, 2006, you indicate there was a transfer of  
6 a million thirty thousand dollars, is that correct?

7 A. Yes.

8 Q. And do you know what the purpose of that transfer  
9 was?

10 A. No, I don't.

11 Q. Did you make any effort to investigate or  
12 determine the purpose for the transfer?

13 A. No.

14 Q. Do you know whether or not FIIN, F-I-I-N, had any  
15 kind of an investment relationship with TDM Cable Trust?

16 A. I don't.

17 Q. Do you know whether -- well, let's look at the  
18 next transaction. You have another one a little later in  
19 that same year, December 8, 2006. Do you know the purpose  
20 of that \$795,000 transfer?

21 A. No, I don't.

22 Q. Do you know if it was a loan made by FIIN to TDM  
23 Cable Trust 06?

24 A. No, I don't.

25 Q. Do you know if it was an equity investment in TDM

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 Cable Trust 06?

2 A. No.

3 Q. Do you have any idea at all what the purpose of  
4 that transfer was?

5 A. No.

6 Q. Three days later there was another transfer of  
7 \$150,000. Do you have any knowledge of any kind about the  
8 reason or purpose of that transfer?

9 A. No, I don't.

10 Q. Do you know who -- and just so I'm clear, these  
11 are transfers that were going... from the trust to the fund,  
12 is that right?

13 A. That's right.

14 Q. Okay. So do you have any idea who at TDM Cable  
15 Trust 06 directed this transfer be made?

16 A. No, I don't.

17 Q. And, again, you have no idea for what purpose this  
18 transfer was made?

19 A. No, I don't.

20 Q. Would your answer be the same to the rest of those  
21 entries for the transfers between TDM Cable Trust and the  
22 Mercantile Bank account of FIIN?

23 A. My answer would be the sam<sup>RE</sup>.

24 Q. So in connection with ten transfers made between  
25 November 29<sup>th</sup>, 2006, to February 5th, 2007, your testimony



**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 here today is simply that those transfers were made, is that  
2 correct?

3 A. That's correct.

4 Q. You're not characterizing them in any way, is that  
5 correct?

6 A. That's correct.

7 Q. All right. Now, in your next paragraph, you speak  
8 to the bank records which also show that TDM Cable Trust LLC  
9 06 made the following transfers ... Do you see that?

10 A. Yes.

11 Q. That name and designation is slightly different  
12 then the name and designation in paragraph 5 of your  
13 declaration, in that -- in paragraph 6, you refer to an LLC;  
14 is that correct?

15 A. Yes.

16 Q. Are those, in fact, two different entities?

17 A. I don't know if it's the same entity.

18 Q. I notice in paragraph 6 you also don't identify a  
19 bank from which the transfer was made. Do you know if these  
20 transfers were made from the Mercantile Bank, or where they  
21 were made from?

22 A. These were made from the Mercantile Bank.

23 Q. Do you know if it was made from the same account  
24 or different account from the Mercantile Bank? And please  
25 feel free to refer to your backup material if you wish.

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**UNITED STATES COURT REPORTER - NDNY**

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 A. It is the same account at the Mercantile Bank.

2 Q. And, again, in this case you refer to two  
3 transfers. Do you know what the purpose of either of these  
4 transfers was?

5 A. I do not.

6 Q. Do you know whether there was any kind of existing  
7 business relationship between Mr. Cranberry LLC and the TDM  
8 Cable Trust LLC?

9 A. No.

10 Q. Did you conduct any search to see if there were  
11 any notes, loan agreements, e-mails referring to the  
12 transfers or anything else that would explain the transfers?

13 A. No, I did not.

14 Q. Did you consult with any colleagues of yours at  
15 the SEC as to whether or not they had made any search in  
16 that regard?

17 A. No.

18 Q. Did you confer with any employees or personnel of  
19 FINRA as to whether or not they had made any inquiry in this  
20 regard?

21 A. No.

22 Q. I would like to call your attention then to  
23 paragraph 7. And, there, on January 8<sup>th</sup>, now, of 2009, a  
24 fairly recent transfer, you refer to a transfer from the TDM  
25 Cable Trust LLC to TDM Verifier Trust 09. Do you see that?

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**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 A. Yes.

2 Q. Once again, do you know what the TDM Verifier  
3 Trust 09 is?

4 A. I don't.

5 Q. Do you know whether it had any business  
6 relationship with the TDM Cable Trust LLC 06?

7 A. No.

8 Q. Do you have any knowledge of the purpose of this  
9 transfer?

10 A. No.

11 Mr. McGRATH: Your Honor, may I suggest that  
12 I think it was clear from my direct that this witness was  
13 being offered as a summary witness that just set forth  
14 information in bank documents.

15 THE COURT: I understand.

16 Mr. McGRATH: And we're prepared to stipulate  
17 that --

18 THE COURT: I understand.

19 Mr. Featherstonhaugh is entitled to inquire.

20 BY MR. FEATHERSTONHAUGH:

21 Q. You go on in paragraphs 8 and 9 referring to the  
22 further transfers from the TDM Cable Trust 06 to the FEIN  
23 account. Do you see those?

24 A. Yes.

25 Q. And FEIN is another one of the funds that we've

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 been discussing here, correct?

2 A. Yes.

3 Q. And it is a different fund than FIIN, is that also  
4 correct?

5 A. That's correct.

6 Q. Do you have any greater knowledge about the  
7 transfers to the FEIN account than you did to the Finn  
8 account?

9 Mr. McGRATH: Objection to the form of the  
10 question.

11 THE COURT: Do you understand the question?

12 THE WITNESS: I do.

13 THE COURT: Objection is overruled.

14 A. I don't have any other knowledge.

15 Q. Thank you. Now, in paragraph 9, you no longer --  
16 or don't let me -- let me ask you this question. It doesn't  
17 appear to be talking about transfers any more. Now it's  
18 talking about deposits, is that correct?

19 A. That's correct.

20 Q. And it continues to talk about the TDM Cable Trust  
21 06?

22 A. That's right.

23 Q. And although you indicated you don't know whether  
24 TDM Cable Trust 06 is necessarily the same entity as TDM  
25 Cable LLC Trust LLC 06, you did say that it is one single

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 bank account that you've been referring to, correct?

2 A. The Mercantile was one particular bank account.

3 Q. Right.

4 A. The M & T is another.

5 Q. All right. So the M & T Bank records are records  
6 of an account in the name of TDM Cable Trust fund 06?

7 A. Yes.

8 Q. And it received some money. Can you tell me what  
9 the first receipt was?

10 A. \$50,000 from FIIN on February 7, '07.

11 Q. And if you were to look back in paragraph 5, down  
12 at the end of that page, there were two -- on February 2nd  
13 and February 5<sup>th</sup>, there were two occasions when FIIN had  
14 transferred \$50,000 to TDM Cable Trust 06, is that correct?

15 A. That's correct.

16 Q. And then at least in one instance, two days later,  
17 FIIN transferred the money back to TDM Cable Trust?

18 A. That's right.

19 Q. These other three deposits which you show are  
20 money that were receipts, it was money that was received by  
21 the Cable Trust, correct?

22 A. That's right.

23 Q. Do you have any idea why Mr. Cranberry LLC or TAIN  
24 or FEIN transferred those monies to TDM Cable Trust 06?

25 A. No, I don't.

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 Q. And I take it you made no effort to ascertain why  
2 any of those transfers were made.

3 A. No, I didn't.

4 Q. You go on to talk about receipts and disbursements  
5 for the TDM Verifier Trust 07, correct?

6 A. Correct.

7 Q. And, again, you show both transfers out, some  
8 deposits made?

9 A. That's right.

10 Q. Do you have any knowledge -- I'm not going to go  
11 through these one at a time, but there are collection of  
12 them, about 15 or 18, do you have any knowledge about any of  
13 those transactions?

14 Mr. McGRATH: Well, objection to the form of  
15 the question.

16 MR. FEATHERSTONHAUGH: I'll --

17 THE COURT: Overruled. I think the witness  
18 understands.

19 A. I do not.

20 Q. You then talk about Firstline Sr. Trust 07, do you  
21 see that? That's on page 4, I believe.

22 A. Oh, yes.

23 Q. Do you have any knowledge as to the purpose of any  
24 of these transfers?

25 A. I don't.

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 Q. You go from there to TDM Luxury Cruise Trust 07.

2 That would be on page 5. Do you see that?

3 A. Yes.

4 Q. And here, you, again, have a list of transfers.

5 These are transfers being made by the Luxury Cruise Trust to  
6 other entities, is that correct?

7 A. That's correct.

8 Q. And there are 12 or 15 of them. Do you have any  
9 knowledge about the purpose of these transfers?

10 A. I don't.

11 Q. Any knowledge as to who directed the transfers?

12 A. I don't.

13 Q. Any knowledge -- well, let me withdraw that.

14 You then go to the Firstline Sr. Trust 07 series

15 B. Do you see that?

16 A. Yes.

17 Q. And there are a list of funding -- or of transfers  
18 from that to McGinn, Smith Funding, do you see that?

19 A. Yes.

20 Q. And they were all made in late '07 or early '08?

21 A. That's right.

22 Q. And do you have any knowledge of the purpose of  
23 those transfers?

24 A. No.

25 THE COURT: Are there many left,

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1 Mr. Featherstonhaugh?

2 MR. FEATHERSTONHAUGH: Quite a few, your  
3 Honor.

4 THE COURT: Can we ask a summary question? I  
5 can probably predict the answer.

6 MR. FEATHERSTONHAUGH: Yes, we can.

7 THE COURT: Thank you.

8 BY MR. FEATHERSTONHAUGH:

9 Q. Miss Daniello, the rest of your declaration goes  
10 on for three or four pages showing transfers back and forth  
11 between entities, is that correct?

12 A. That's correct.

13 Q. Do you have any personal knowledge as to the  
14 reason for any of those transfers?

15 A. No.

16 Q. Do you have any knowledge which you acquired by  
17 your review of records of any kind, electronic or paper, as  
18 part of your investigation?

19 Mr. McGRATH: Knowledge as to -- objection to  
20 the form of the question. Knowledge as to what?

21 BY MR. FEATHERSTONHAUGH

22 Q. Any knowledge as to the purpose of these  
23 transactions.

24 A. No.

25 Q. There is one specific paragraph I would like to



**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 ask you about. It's paragraph 25. And I would ask you to  
2 take a look at it. And I wonder if -- and this is the  
3 paragraph where you describe a transfer of \$175,000 from the  
4 TDMM Cable Jr. Trust to the account of National Financial  
5 Services in the name of Lynn Smith, do you see that?

6 A. Yes.

7 Q. Could you take a look at your backup material,  
8 69A, and just tell me where you identified that transaction?

9 A. I know it's a wire from Mercantile Bank that shows  
10 the wire transfer.

11 Q. And do you have it there for me to look at? Or  
12 can you direct me to it in the exhibits your counsel has  
13 supplied me?

14 A. Yes. It's Bates stamp Merc 002661 through 2662.

15 Q. Well ... oh, here it is, 2661. All right. I'm  
16 looking at Merc 2661 and 2662. Is this the only document  
17 you reviewed in identifying this transfer?

18 A. This would have identified it, but I probably  
19 looked at it in conjunction with the statements, the bank  
20 statements.

21 Q. Do you have those statements with you?

22 A. It would probably be included in my second  
23 declaration with the backup material there.

24 Q. Well, you can certainly feel free to take a look  
25 at that, if you would, and just call my attention to it.

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1 That would be Exhibit 72.

2 A. Stock account statement shows a receipt of 175,000  
3 on July 30<sup>th</sup>, 2009.

4 Q. Did you also review the June '09 statement of Lynn  
5 Smith?

6 A. The stock account, yes.

7 Q. All right. And did you review the June '09  
8 statement of TDMM Cable Funding?

9 A. Yes, I would have looked at that.

10 Q. Can you tell me whether or not on June 5<sup>th</sup>, '09,  
11 Lynn Smith transferred from her account in two wire  
12 transfers the amounts of \$50,000 and \$316,000 to TDMM Cable  
13 Funding?

14 A. June 5<sup>th</sup> and what?

15 Q. It was the same date, two wires on the same date.  
16 One for 316,000, one for 50,000.

17 A. 50,000 and 316,000? On June 5<sup>th</sup>, '09?

18 Q. Yeah.

19 A. My spreadsheet shows two transfers to Shutts and  
20 Bowen escrow and our community services on those dates for  
21 those amounts.

22 Q. Do you know what -- where the monies -- do you  
23 know what the purpose of those escrow accounts were for?

24 A. I don't.

25 Q. Did -- when you were preparing this ...

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 (Pause. Speaking to counsel.)

2 BY MR. FEATHERSTONHAUGH:

3 Q. Could you take a look at Exhibit 76 in the large  
4 notebook in front of you?

5 A. Okay.

6 Q. Do you see that, Miss Daniello? Have you looked  
7 at that before today?

8 A. No, I have not.

9 Q. When you were preparing your declaration, no one  
10 showed you Exhibit 76?

11 A. No.

12 Q. Can you tell me what it is?

13 A. It's a promissory note.

14 Q. And the amount?

15 Mr. McGRATH: Objection, your Honor. The  
16 document speaks for itself.

17 THE COURT: Overruled.

18 A. \$366,000.

19 Q. And can you tell me the date on it?

20 A. June 5<sup>th</sup>, 2009.

21 Q. Now, Miss Daniello, do you know whether or not --  
22 well, first of all, I'll just ask ... Do you have any idea  
23 what the purpose of this loan was?

24 A. No.

25 Q. And do you know whether or not the hundred --

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 what's the date that the \$175,000 was transferred to Ms.  
2 Smith?

3 A. July 30. July 30<sup>th</sup>, 2009.

4 Q. And do you know whether that transfer was in  
5 partial repayment of the loan made by Lynn Smith to the  
6 cable company on June -- on or about June 5<sup>th</sup>, 2009?

7 A. No.

8 Q. So all you know is it was a transfer, is that  
9 right?

10 A. That's correct.

11 Q. Let's see if we can go to your second declaration,  
12 which is in Exhibit 72, the supplemental declaration of  
13 Roseann Daniello. Do you see that?

14 A. Yes.

15 Q. Can you tell me why you prepared a supplemental  
16 declaration?

17 A. To illustrate the transfers in and out of these  
18 various accounts.

19 Q. Weren't these -- and you hadn't looked at these  
20 accounts before when you did your initial declaration?

21 A. Not all of them.

22 Q. So would you describe for us again everything that  
23 you did in preparing this declaration in terms of documents  
24 you looked at, people you spoke to? What research did you  
25 do to prepare it?

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1           A.    I looked at the brokerage accounts.

2           Q.    When you say the brokerage accounts, could you be  
3 specific for us on this?

4           A.    Sure.  Brokerage accounts of Lynn Smith and the  
5 David and Lynn Smith irrevocable trust, there were  
6 statements at Bear Stearns, National Financial Services, RMR  
7 Capital Management.

8           Q.    Can you tell me for how many years you looked at  
9 the brokerage statement of Lynn Smith?

10          A.    The stock accounts started December 2005, up until  
11 April 2010.

12          Q.    That's the period of time you reviewed, correct?

13          A.    Yes.

14          Q.    Do you have any idea when that account actually  
15 started?

16          A.    I don't.

17          Q.    Did you make any effort to determine the length of  
18 time that account had been in existence?

19          A.    No.

20          Q.    Did you make any effort to determine where the  
21 monies that were in that account on the first date that you  
22 reviewed it, where those monies had come from?

23          A.    No.

24          Q.    Oh.  Now please go ahead and continue the other  
25 things you looked at.

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1           A.    Besides the brokerage account statements, there  
2 would be the wire transfers.  There were --

3           Q.    Well, where would you see the wire transfers?  Did  
4 you see them on the account statements or did you go back to  
5 the banks and get the actual wire instructions?

6           A.    They're noted on the bank statements, and the  
7 banks -- the brokerage firms also provided the wire  
8 transfers.

9           Q.    Okay.  Anything else?

10          A.    If there was any checks paid or received.

11          Q.    Checks paid or received, you reviewed the checks?

12          A.    If we had them available.

13          Q.    Do you know whether you had them available or not?

14          A.    Well, not all of them.

15          Q.    Which would imply some of them?

16          A.    Some of them.  The brokerage firms didn't have  
17 them all.

18          Q.    All right.  Let's go to your exhibits then.  The  
19 first exhibit ... I'm going to skip the first exhibit.  The  
20 first exhibit refers to transfers in and out of the David  
21 and Lynn Smith irrevocable trust account, is that right?

22          A.    That's right.

23          Q.    All right.  I'm going to leave that one.  The  
24 second which I have says transfers to and from stock  
25 account.  Do you see that?

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1 A. Yes.

2 Q. Whose stock account are we referring to?

3 A. Lynn Smith.

4 Q. And do we have an account number that we can tie  
5 this to that you reviewed?

6 THE COURT: Are you asking for the whole  
7 account number?

8 MR. FEATHERSTONHAUGH: No, just the last four  
9 digits would be fine, your Honor, I'm sorry.

10 A. <sup>REDAC</sup>0916. It may also relate to her -- oh, no, I'm  
11 sorry. That's right.

12 Q. Very well. Now, from this exhibit, it appears you  
13 started your review back in -- or at least you made your  
14 first notation in September of '04, is that correct?

15 A. That's right.

16 Q. And you reviewed these -- did you know what the  
17 period of time was that you reviewed this stock account for?

18 A. It started in December of '05. These earlier  
19 transfers come from another source.

20 Q. Could you tell us what that source was?

21 A. That's the David Smith account at M & T Bank.

22 Q. All right. So this is a combination of reviewing  
23 Mr. Smith's checking account? Brokerage account? What kind  
24 of account?

25 A. It's a checking account.

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 Q. So then this first entry, on 9/3/04 there's a  
2 transfer to David Smith from the stock account of Lynn Smith  
3 in the amount of \$5,000, is that right?

4 A. That's right.

5 Q. And, again, let me just ask you, in summary  
6 fashion, in connection with these transfers, do you have any  
7 knowledge as to the purpose of any of these transfers from  
8 Exhibit 2 through the remainder of your declaration?

9 A. Only if it was noted in the description column on  
10 the statement.

11 Q. And if it was noted in the description column on  
12 the statement, was that, in turn, noted on your exhibit?

13 A. It was.

14 Q. Very well. So the first five entries -- or first  
15 four entries here that we see on Exhibit 2 are simply  
16 transfers that are cases where Mrs. Smith took money out of  
17 out of her account and delivered it to Mr. Smith's accounts,  
18 right?

19 A. Yes.

20 Q. Those aren't meant to indicate that Mr. Smith was  
21 giving any money to Mrs. Smith?

22 A. Well, it was Lynn Smith's to David Smith.

23 Q. To David Smith, right?

24 A. Yes.

25 Q. Okay. And that's also true of the fifth entry, is



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1 that correct? That's a little harder for me to understand,  
2 frankly. Maybe you can explain that one to us. It says  
3 check received, pay David Smith, funds to Lynn Smith. Can  
4 you tell us what you're describing there?

5 A. Sure. There was a check received into Lynn  
6 Smith's account for \$10,000, and it came from David Smith.

7 Q. Okay. And that was in January of 2006?

8 A. Yes.

9 Q. Right? When we see a -- here's an example of one  
10 on this first page in February of '06, we see a payee  
11 account, source account, this one is Exchange Boulevard, and  
12 there's an entry of \$200,000, it says funds from Lynn Smith.  
13 Can you tell me what that's intended to tell us?

14 A. It was just a transfer of money from Lynn Smith to  
15 Exchange Boulevard on February 13, '06.

16 Q. Can you tell us who Exchange Boulevard is?

17 A. I don't know.

18 Q. Do you know if they were a company affiliated with  
19 McGinn, Smith & Company?

20 A. I'm not sure if it was affiliated or another  
21 investment, I don't know.

22 Q. I was about to ask that. Do you know whether this  
23 was an investment or not?

24 A. If it wasn't noted on the statement or wire  
25 transfer, I don't know.

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1 Q. So can you tell me anything at all other than what  
2 I can see here about this 2/13/06 entry with regard to  
3 Exchange Boulevard?

4 A. Nothing further.

5 Q. Go down to the bottom of that page and I see an  
6 entry on October 4<sup>th</sup>, 2006. And tell me if I'm reading  
7 that correctly. It appears that Mr. McGinn, Mr. Timothy  
8 McGinn deposited or paid to Mrs. Smith the sum of \$85,000.

9 A. That's right.

10 Q. Do you know if that payment from Mr. McGinn was in  
11 partial payment of a loan that Mrs. Smith had made to him?

12 A. There was nothing noted on the check. I don't  
13 know.

14 Q. And you looked at the check? There was nothing  
15 noted and you didn't ...

16 A. Yes.

17 Q. I wonder if I can show you something just to the  
18 refresh your recollection. (Handed to witness.)

19 Mr. McGRATH: Your Honor, could I get a copy  
20 of that?

21 MR. FEATHERSTONHAUGH: Sure. It's a copy of  
22 Mr. McGinn's check, the \$85,000 check. I just want to see  
23 if it jogs her memory as to what's on the memo line.

24 A. I don't know why it's not on the spreadsheet, but  
25 it looks like interest and principal.

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1 Q. Would there have been any reason that you would  
2 have left a notation "interest and principal" off of the  
3 spreadsheet?

4 A. No. Usually I put what's in there.

5 Q. Oh. Going back to the exhibit, I'm going to turn  
6 the page so I guess the pages aren't numbered, so it's still  
7 Exhibit 2, but we'll be starting with December 27, 2006. Do  
8 you see that as the first entry?

9 A. Yes.

10 Q. Okay. I see the next entry is on 5/14/07, a  
11 payment from Mr. McGinn. Do you see that one?

12 A. Yes.

13 Q. And what's the amount of that one?

14 A. 100,000.

15 Q. And if there had been a notation on the memo line  
16 that this was a loan, would you have noted it in the  
17 exhibit?

18 A. I believe I would have.

19 MR. FEATHERSTONHAUGH: If I may approach once  
20 more, your Honor.

21 BY MR. FEATHERSTONHAUGH

22 Q. Let me see if this jogs your memory.

23 Mr. McGRATH: May I just see it for a moment?

24 (Pause.)

25 A. Okay. It says loan.

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1 Q. Now, I -- listen, I understand you reviewed  
2 hundreds of pages of documents and lots of checks and all  
3 that, but in general terms, you testified specifically to  
4 Mr. McGrath, I think. Are you still sure that all of your  
5 entries here are accurate?

6 A. I believe they were.

7 Q. Can I ask you to look a little farther down to the  
8 November 29<sup>th</sup>, 2007 transfer, McGinn, Smith Funding LLC,  
9 \$375,000. Do you see that one?

10 A. What's the date?

11 Q. It looks like November 29<sup>th</sup>, 2007.

12 A. Okay.

13 Q. And, again, just so -- that's money that was  
14 leaving Lynn Smith's account, right, going somewhere else?

15 A. Yes.

16 Q. And you'll look shortly after that, on 12/20/2007,  
17 you'll see a transfer from David Smith to Lynn Smith of  
18 \$380,000?

19 A. Yes.

20 Q. Do you have any knowledge of whether or not those  
21 amounts are related -- or those transactions are related? I  
22 apologize.

23 A. I do not.

24 Q. Do you know whether the \$375,000 was made as a  
25 loan from Lynn Smith to McGinn, Smith Funding?

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 A. I don't have knowledge of it.

2 Q. And -- well, we'll move to that later.

3 MR. STOELTING: Can I see the document you  
4 showed the witness?

5 MR. FEATHERSTONHAUGH: I thought I gave it to  
6 you.

7 MR. STOELTING: There were two.

8 MR. FEATHERSTONHAUGH: Here. (Pause.)  
9 You've successfully broken my train of thought. All right.

10 BY MR. FEATHERSTONHAUGH

11 Q. We were at the loan -- or we were at the \$375,000  
12 transaction. Look at the bottom of that page, if you would.  
13 There are three large sums -- or two large sums, rather,  
14 going to McGinn, Smith Advisory LLC. Do you see that?

15 A. Yes.

16 Q. And those two amounts aggregate about a million  
17 two hundred thousand dollars?

18 A. Mm-hmm. Yes.

19 Q. And, again, that was money going from Lynn Smith  
20 elsewhere, correct?

21 A. Correct.

22 Q. Do you know if that money was forwarded as an  
23 investment or not?

24 A. I don't know for sure, but the \$554,437 entry, the  
25 description says is for Pine Street Capital Partners.

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1 Q. And are you familiar with Pine Street Capital  
2 Partners?

3 A. Through the course of the investigation.

4 Q. Yes. I'm -- I didn't mean --

5 A. Yes.

6 Q. -- prior to that. And you've heard it -- were you  
7 in the courtroom this morning when it was being described as  
8 to what it was?

9 A. No.

10 Q. Well, do you know what Pine Street Capital  
11 Partners was?

12 A. I just know it's a related entity.

13 Q. So you don't know anything about it being an  
14 investment fund?

15 A. I mean I'm assuming it is from the description  
16 here, but that's all I can say about it.

17 Q. All right. Do you know, do you know whether the  
18 SEC today stipulated to have it removed from the  
19 receivership?

20 A. No, I did not.

21 Q. There are two checks noted at the beginning of the  
22 next page, on January 16, 2009. Do you see those?

23 A. Yes.

24 Q. And here, you have noted the source account. In  
25 the first case you have called it Pine Street Principal, and

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1 in the second place Pine Street Rtn Invd Cap. Do you see  
2 that?

3 A. Yes.

4 Q. Do you know what you meant by those two notations?

5 A. Those notations were taken directly from the  
6 account statements.

7 Q. Okay. Do you know what they meant on the account  
8 statements?

9 A. I guess some sort of the principal and a return on  
10 investment.

11 Q. Pine Street return investment capital maybe?

12 Mr. McGRATH: Objection.

13 THE COURT: No, overruled.

14 A. I can assume, yeah, that it means investment  
15 capital.

16 Q. Well, do you know whether those two amounts of  
17 money were anything other than a return to Mrs. Smith on her  
18 investment in Pine Street Capital Partners that we just  
19 talked about?

20 A. No, I don't.

21 Q. Do you know -- all right. You have no other  
22 knowledge about Pine Street Capital Partners and how it  
23 treated its investors?

24 A. No.

25 Q. Do you know who Capital Center Credit Corporation

**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 is?

2 A. It's another entity, but I don't have any other  
3 knowledge.

4 Q. Do you know whether or not Lynn Smith invested her  
5 money in Capital Center Credit Corporation?

6 A. I've seen transfers to Capital Center, but I don't  
7 know what the purpose was.

8 Q. There, again, are any number of transfers from  
9 Lynn Smith to David Smith, is that correct?

10 A. Yes.

11 Q. And do you have any knowledge as to the purpose of  
12 those transfers?

13 A. No.

14 Q. And you've indicated you -- these are all the  
15 transfers you found after reviewing approximately five years  
16 of records?

17 A. Yes. These are statements and wire transfer  
18 records.

19 Q. Exhibit 3 -- well, let me ask one wrap-up  
20 question. With regard to the brokerage account, I take it  
21 that of all of the rest of those transactions I haven't  
22 asked you about, do you have any direct knowledge as to the  
23 purpose, direction, anything else about those transfers, or  
24 is it just a list of the transfers?

25 A. It's a list of transfers.



**DANIELLO - CROSS - FEATHERSTONHAUGH**

1 Q. Let's take a look, if we could, at the checking  
2 account, which is Exhibit 3. And, here, you start on  
3 July 1<sup>st</sup> of 2009, is that correct?

4 A. Yes.

5 Q. And the last notation you make is January 15<sup>th</sup>,  
6 2010. Can you tell me what records were reviewed to prepare  
7 this exhibit?

8 A. This was the Lynn Smith checking account at Bank  
9 of America.

10 Q. Okay. The first check seems to be from a joint  
11 account labeled David and Lynn Smith, is that correct?

12 A. That's correct.

13 Q. Did you review the records of that account also?

14 A. To find the corresponding transfer, but not -- I  
15 didn't look at that account in full, no.

16 Q. If -- do you know -- you then list a series of  
17 transfers from McGinn, Smith payroll, David Smith, into the  
18 account. Do you see that?

19 A. Yes.

20 Q. Do you know if those transfers represented David  
21 Smith's salary?

22 A. That's what it appears to be.

23 Q. Now, you said transfers to and from the checking  
24 account. I only see one transfer from the checking account  
25 noted on this exhibit. It's dated January 13, 2010. Am I

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1 reading that correctly? This was a transfer from Lynn  
2 Smith's checking account to McGinn, Smith Advisors LLC?

3 A. That's correct.

4 Q. And these are all the transfers to and from the  
5 checking account?

6 A. These are selected transfers.

7 Q. Is there some reason you didn't note that on the  
8 exhibit?

9 A. No.

10 Q. Do you have the checking account records with you?

11 A. The ones that correspond to these entries.

12 Q. But not the others?

13 A. No.

14 Q. Do you remember any of them?

15 A. The other entries?

16 Q. Yeah, the other transfers.

17 A. I don't -- all sorts of entries. Household  
18 expenses, things like that.

19 Q. There were things like groceries and lawn service  
20 and garbage pickup, mortgage payments?

21 A. Yes.

22 Q. All of the normal expenses that a family pays to  
23 get on with the chores of daily living?

24 Mr. McGRATH: Objection to the form of the  
25 question.

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1 THE COURT: Overruled.

2 A. Yes, that's what it appeared to have been.

3 Q. Do you know how many of those entries are -- where  
4 you selected 12 or 18 entries to produce for us, do you know  
5 how many you didn't produce?

6 A. I don't know. I just know it went up to  
7 April 2010. So ...

8 Q. It's fair to say that it's dozens, isn't it?

9 A. Sure.

10 Q. The last exhibit is transfers to and from the IRA  
11 account, is that correct?

12 A. That's correct.

13 Q. When you say the IRA account, don't both  
14 Mrs. Smith and Mr. Smith have an IRA account?

15 A. I was referring to the Lynn Smith IRA account.

16 Q. Okay. Did you review the Dave Smith IRA account?

17 A. I'm sorry?

18 Q. Did you review a Dave Smith IRA account also?

19 A. No, not for this purpose.

20 Q. There are two entries here, one in '06 and one in  
21 '07, where Dave Smith put funds, in one case \$4,500, the  
22 other case \$5,000, into Lynn Smith's IRA account; is that  
23 correct?

24 A. Yes.

25 Q. Do you know whether or not from your review of the

**DANIELLO - CROSS - DUNN**

1 documents, including the documents from Lynn Smith's  
2 brokerage account, whether or not there were years when  
3 Mrs. Smith made the IRA contributions to her and her  
4 husband's account?

5 A. I believe she did.

6 MR. FEATHERSTONHAUGH: I have no further  
7 questions.

8 THE COURT: Thank you. Miss Dunn?

9 MISS DUNN: Thank you, your Honor.

10 **CROSS-EXAMINATION BY MS. DUNN:**

11 Q. Good afternoon, Miss Daniello.

12 A. Good afternoon.

13 Q. I want to take you to Exhibit 1 of your  
14 supplemental declaration, your chart entitled deposits and  
15 withdrawals from the David and Lynn Smith irrevocable trust  
16 account.

17 A. Okay.

18 Q. Can you tell me when that chart was prepared?

19 A. I think a few weeks ago.

20 Q. Okay. And you signed your supplemental  
21 declaration last week on June 2<sup>nd</sup>, is that correct?

22 A. Yes.

23 Q. Okay. Did you update your chart prior to signing  
24 the declaration?

25 A. No. I just went through, obviously, April 15<sup>th</sup>

**DANIELLO - CROSS - DUNN**

1 here.

2 Q. Okay. So you didn't bother to verify the  
3 information in the chart prior to signing this declaration?

4 Mr. McGRATH: Objection. Form of the  
5 question, your Honor. Argumentative.

6 THE COURT: Overruled.

7 A. No, I didn't update it.

8 Q. And turning to the chart, there's an entry about  
9 four lines down, for April 18, 2005. Can you read what that  
10 entry says?

11 A. Check paid to David Smith for \$2,300.

12 Q. In the course of your examination of documents and  
13 your preparation of the chart, did you do any investigation  
14 as to what that \$2,300 may have represented?

15 A. I believe, if I recall, it was related to taxes.

16 Q. Do you know that David Smith paid \$2,300 toward  
17 the trust taxes on April 18<sup>th</sup>, 2005?

18 A. That sounds correct.

19 Q. All right. And the day before you signed this  
20 declaration, your colleague, Miss Mehraban took the  
21 deposition testimony of the trustee on this account, Thomas  
22 Urbelis. Were you aware of that?

23 A. Yes.

24 Q. And are you aware that in his deposition,  
25 Mr. Urbelis testified that Mr. Smith wrote a check to

**DANIELLO - CROSS - DUNN**

1 Mr. Urbelis' law firm in the amount of \$2,300 in April 2005?

2 A. I'm not aware that he testified to that.

3 Q. Are you aware that he wrote a check to

4 Mr. Urbelis' law firm in April 2005 for \$2,300?

5 A. I believe I saw the check.

6 Q. And a check written to Urbelis, Fieldsteel, is  
7 that correct?

8 A. I'm sorry?

9 Q. Was the check written to Urbelis, Fieldsteel?

10 A. I think that's correct.

11 THE COURT: If you have stickers and mark  
12 whatever exhibits you want to use.

13 MISS DUNN: Okay. I want to show this to the  
14 witness and --

15 THE COURT: Well, you better --

16 MISS DUNN: You want it marked?

17 THE COURT: It needs to be marked. (Pause.)  
18 This is for all counsel. If you have any exhibits, please  
19 premark them.

20 MISS MEHRABAN: I believe it's Plaintiff's  
21 Exhibit 90, if you want it.

22 BY MISS DUNN:

23 Q. Miss Daniello, showing you what's been marked as  
24 Intervenor Exhibit 1, which is a grouping of five pages, can  
25 you take a look at those documents? Are those documents

**DANIELLO - CROSS - DUNN**

1 which you reviewed in the course of your investigation and  
2 preparation of your chart?

3 A. Yes.

4 Q. What are those documents? Can you describe those  
5 documents?

6 A. They appear to be reimbursing David Smith for  
7 taxes he paid for this trust account, in the amount of  
8 \$2,300.

9 Q. And then in the last page, is that a check from  
10 Bear Stearns?

11 A. Yes.

12 Q. In the same amount?

13 A. Yes.

14 Q. And who's the check payable to?

15 A. To David Smith.

16 Q. And do you see the letter with the breakdown  
17 between the two payments of \$1,800 and \$500?

18 A. Yes.

19 Q. And can you read that letter?

20 A. Dear Mr. Urbelis: Please find the enclosed check  
21 in the amount of REDACTED. This check represents payment for  
22 the 2004 taxes for the David and Lynn Smith irrevocable  
23 trust as follows: REDACTED federal taxes. REDACTED New York  
24 State taxes.

25 Q. Okay. So, given that you had this documentation

**DANIELLO - CROSS - DUNN**

1 when you prepared your chart, is there a reason why you  
2 didn't list the description of the REDACTED in the chart?

3 A. I don't know what the reason is.

4 Q. Would you agree with me that the REDACTED withdrawn  
5 from the check -- from the trust account, as indicated in  
6 your chart, was paid in taxes by David Smith?

7 A. Yes.

8 Q. Okay. Let's see. Continuing down on your chart,  
9 the first and third entries on the chart, withdrawals in the  
10 amount of \$100,000, \$300,000, do you know what those  
11 withdrawals were?

12 A. Only what was noted on the account statements, to  
13 purchase Pine Street Capital Partners.

14 Q. Okay. So those amounts indicate the trust  
15 acquisition of an interest in Pine Street Capital Partners?

16 A. It appears to be.

17 Q. Okay. And did you know when you prepared your  
18 chart that the trust acquisition of this interest also  
19 obligated it to make capital cash calls to Pine Street  
20 Capital Partners upon demand?

21 A. I did not know.

22 Q. Okay. About halfway down the page, you made an  
23 entry dated December 20<sup>th</sup>, 2006, indicating a wire  
24 transfer to Pine Street Capital Partners in the amount of  
25 \$129,678. Do you see that entry?



**DANIELLO - CROSS - DUNN**

1 A. Yes.

2 Q. And can you read the notation in the box to the  
3 right of that dollar amount?

4 A. 55,576, September 2006 call. 74,102,  
5 December 2006.

6 Q. Now, the account statement for the trust did not  
7 include that notation next to the 129,678, did it?

8 A. It was either in the statement or in the wire  
9 transfer records.

10 Q. Do you have the backup with you?

11 A. I do.

12 Q. Okay. Can you point to me where that is indicated  
13 on either of those two documents?

14 A. Okay. It's on the second page of -- there's a  
15 printout of wire transfers I received from National  
16 Financial Services. Sort of halfway through the stack.

17 Q. Can you identify the page on the account?

18 A. There's actually no page number. It's got gray  
19 shading on some of it.

20 Q. Can I see it? (pause.)

21 All right. Is it your testimony that the same  
22 document from NFS for the June 2006 wire transfer in the  
23 amount of \$83,830 did not have a similar notation from NFS?

24 Mr. McGRATH: I'm going to object to the form  
25 of the question, your Honor. I think --

**DANIELLO - CROSS - DUNN**

1 THE COURT: I understand. Are you referring  
2 to Exhibit 1, the backup document, or both?

3 MISS DUNN: I'm referring to what she's  
4 referring to. I just got --

5 THE COURT: That doesn't answer the question.

6 MISS DUNN: I just got it for the first time  
7 during her direct.

8 Mr. McGRATH: Well...

9 THE COURT: You're asking her the contents of  
10 something. What are you asking her the contents of?

11 MISS DUNN: All right. I'll withdraw the  
12 question.

13 THE COURT: Thank you.

14 BY MISS DUNN:

15 Q. Miss Daniello, in the course of your  
16 investigation, did you have any information to indicate the  
17 reason for the transfer of \$83,830, on June 30<sup>th</sup>, 2006,  
18 for the party to whom it was transferred?

19 A. That was a check paid. We did not have the check,  
20 and the purpose wasn't noted on the statement.

21 Q. All right. Are you aware that the -- the trust  
22 investment in Pine Street Capital Partners required it to  
23 pay a cash call in June 2006?

24 A. I'm not aware.

25 Q. Are you aware that the trust, in fact, paid

**DANIELLO - CROSS - DUNN**

1 \$83,830 to Pine Street Capital Partners in response to a  
2 cash -- capital cash call in June 2006?

3 A. I don't know.

4 Q. All right. And there's another entry in 2006 on  
5 your chart, April 18, 2006, there's a notation of a wire  
6 transfer to David Smith in the amount of \$92,105. Did you  
7 do any investigation to determine what the purpose of that  
8 transfer was?

9 A. Aside from looking at the wire transfers, no.

10 Q. You obtained records from M & T Bank for the  
11 purpose of preparing this chart, didn't you?

12 A. No. For this I looked at simply the trust account  
13 documents.

14 Q. But in the backup documentation, to support your  
15 declaration, do you have documents from M & T Bank?

16 A. I do. As they relate to the specific  
17 transactions.

18 Q. And do you have documents from M & T Bank relating  
19 to David Smith's checking account?

20 A. Yes. As it relates to these.

21 Q. Did you look at checks paid out of David Smith's  
22 checking account at any time following the date of that wire  
23 transfer in the amount of \$92,105?

24 A. Did I look at any checks after that?

25 Q. Did you look at the checks paid section of David

**DANIELLO - CROSS - DUNN**

1 Smith's bank statement for the period following April 18,  
2 2006?

3 A. No.

4 Q. Okay. Is there a reason you didn't obtain the  
5 bank records for the corresponding bank account into which  
6 that money was deposited?

7 A. Well, for this I was just looking at the trust  
8 documents and trying to find the opposite side of the  
9 transactions. So I didn't do a full analysis into that  
10 account.

11 Q. Wouldn't the opposite side of the transaction show  
12 where the money went?

13 A. It would just show the money that was received or  
14 paid.

15 Q. So one side of the transaction would show money  
16 coming out of the trust account, correct?

17 A. Right.

18 Q. And the other side of the transaction would show  
19 where the money went, isn't that correct?

20 A. Right.

21 Q. And would there not be a third side of that  
22 transaction, showing where the money went after it was  
23 deposited into David Smith's checking account?

24 Mr. McGRATH: Objection.

25 THE COURT: Sustained. I think there's a

**DANIELLO - CROSS - DUNN**

1 point here, but let's get to it.

2 MISS DUNN: All right.

3 BY MISS DUNN:

4 Q. Miss Daniello, were you aware that the day before  
5 you signed this declaration, the trustee for this account,  
6 Tom Urbelis, verified that he wired -- he authorized a wire  
7 of \$92,105 to David Smith's checking account on that date?

8 A. No.

9 MISS DUNN: Your Honor, if you could indulge  
10 me. I want this marked Intervenor 2.

11 BY MISS DUNN:

12 Q. Miss Daniello, I'm showing you what has been  
13 marked Plaintiff's Exhibit 20A for identification.

14 THE COURT: Is this among the Plaintiff's  
15 Exhibits?

16 MISS DUNN: I believe it is. It was produced  
17 to us as an exhibit.

18 THE COURT: Hold on.

19 MR. STOELTING: I don't know what it is.

20 THE COURT: Where did you get the number 20A?

21 MISS DUNN: It was from the deposition  
22 transcript of Thomas Urbelis.

23 THE COURT: Well, the plaintiff in this case  
24 is the SEC. Are you offering their exhibit?

25 MISS DUNN: Yes.

**DANIELLO - CROSS - DUNN**

1 THE COURT: And it's 20A in their binder?

2 MISS DUNN: No. It was from the deposition.

3 THE COURT: It can't be an Exhibit Number

4 because it will be a duplicate of what's in the binder.

5 This is Intervenor Exhibit 2.

6 MISS DUNN: Okay. I'll withdraw that.

7 BY MISS DUNN:

8 Q. Miss Daniello, I'm handing you what's been marked  
9 as Intervenor Exhibit 2. Can you take a look at those  
10 pages?

11 MR. FEATHERSTONHAUGH: Your Honor, I would  
12 just ask Miss Dunn to speak up, because I can't hear her.

13 MISS DUNN: Oh, certainly.

14 Mr. McGRATH: I'm sorry, your Honor. Can I  
15 at least see what she's showing her? I just can't --

16 THE COURT: There's nothing to respond to.  
17 She's just showing the witness to the exhibit.

18 Mr. McGRATH: I may have an objection I  
19 should say.

20 THE COURT: She hasn't done anything with it  
21 yet. There's nothing to object to yet. She hasn't even  
22 shown it to the witness yet.

23 MISS DUNN: And I provided copies to  
24 Mr. Stoelting before we started this afternoon.

25 THE COURT: Show it to the witness and then

**DANIELLO - CROSS - DUNN**

1 ask the question.

2 BY MISS DUNN:

3 Q. Miss Daniello, what are these documents?

4 A. They appear to be checks from David Smith for  
5 various tax obligations.

6 Q. And starting with the first page, who is the --  
7 what is the date on the check?

8 A. April 17, 06.

9 Q. And who's the payee?

10 A. U.S. Treasury.

11 Q. What's the amount on the check?

12 A. REDACTED .

13 Q. And is there a notation on the memo line of the  
14 check?

15 A. I can't read the first word but I think it says  
16 2006 estimated.

17 Q. All right. And on the second page, what's the  
18 date of that check?

19 A. April 17, '06.

20 Q. And who is the payee?

21 A. New York State income tax.

22 Q. What's the amount of the check?

23 A. REDACTED

24 Q. Is there a notation on the check?

25 A. Looks like '06 estimated.

**DANIELLO - CROSS - DUNN**

1 Q. All right. And on the third page? What's the  
2 date of that check?

3 A. April 17, '06.

4 Q. The payee on the check?

5 A. U.S. Treasury.

6 Q. What's the amount of the check?

7 A. REDACTED

8 Q. Is there a notation on the check?

9 A. Looks like IRR trust.

10 Q. And the fourth page. What's the date of that  
11 check?

12 A. April 17, '06. New York State income tax,  
13 REDACTED

14 Q. Is there a notation on the memo line?

15 A. Looks like IRR trust.

16 Q. And are all of these checks written on David  
17 Smith's account at M & T Bank?

18 A. Yes.

19 Q. And you said -- did you give me a reason why you  
20 didn't obtain the checks from M & T Bank related to David  
21 Smith's account for the time period in question?

22 A. We have all those checks. We haven't fully  
23 analyzed everything yet.

24 Q. So you have these checks in the possession of the  
25 SEC?



**DANIELLO - CROSS - DUNN**

1 A. We -- I assume we have them.

2 Q. Okay. Do you know what -- if you added these four  
3 checks, do you know what the total is?

4 A. No, I don't.

5 Q. Would you like a calculator or would you trust me  
6 if I tell you it's \$92,195?

7 A. Okay.

8 Q. Does that sound about right?

9 A. Yes.

10 Q. About three quarters of the way down your chart  
11 there's an entry for April 15, 2008, indicating a wire  
12 transfer to David Smith in the amount of \$110,636. Do you  
13 see that entry?

14 A. Yes.

15 Q. Do you know what that money was used for?

16 A. I don't believe so.

17 Q. Did you obtain any documents from either M & T  
18 Bank, the Internal Revenue Service, or the New York State  
19 Department of Tax and Finance to determine whether that  
20 amount of money was paid in April 2008 on behalf of this  
21 irrevocable trust?

22 A. I haven't seen any such documents.

23 Q. Did you request any?

24 A. The M & T records were requested. Not -- I don't  
25 believe the tax -- I'm not sure.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**DANIELLO - CROSS - DUNN**

1 Q. Did you contact the trustee for this trust, Thomas  
2 Urbelis, and request copies of the tax returns for 2006 or  
3 2008?

4 A. Not personally. I didn't do it.

5 Q. Did you communicate with anybody concerning the  
6 tax liabilities of the trust?

7 A. No, I did not.

8 Q. Were you aware when you prepared your chart that  
9 the trustee Thomas Urbelis authorized in writing the  
10 transfer of \$110,636 to David Smith for the payment of taxes  
11 for the trust?

12 A. No, I wasn't aware.

13 Q. And in 2009, turning to the entries on the -- the  
14 two entries on April 13, 2009, your chart shows two  
15 separate withdrawals from the trust account, one in the  
16 amount of \$32,987, one in the amount of \$8,570. Do you see  
17 those entries?

18 A. I do.

19 Q. Are you aware that on April 13<sup>th</sup>, 2009, Thomas  
20 Urbelis requested that checks be issued in those amounts to  
21 the United States Treasury and New York State Income Tax  
22 Department?

23 A. I was not aware.

24 Q. If you were aware of that, would that explain in  
25 your mind the reason for those withdrawals from the trust

**DANIELLO - CROSS - DUNN**

1 account?

2 Mr. McGRATH: Objection.

3 THE COURT: Overruled.

4 A. Well, it would indicate a reason, yes.

5 Q. And were you aware that on April 15<sup>th</sup>, 2010,  
6 Lynn Smith wrote checks from her checking account to pay  
7 taxes for this irrevocable trust?

8 A. I was not aware.

9 Q. Miss Daniello, were you aware or did you learn in  
10 the course of your investigation that David Smith made other  
11 payments to pay the taxes for this trust during its  
12 existence?

13 A. No.

14 Q. Were you aware that on occasion he was not  
15 reimbursed by the trust for any of those payments?

16 A. No.

17 MISS DUNN: I have nothing further, your  
18 Honor.

19 THE COURT: Are you -- the SEC has made good  
20 that they're offering their binders of exhibits in this  
21 hearing in evidence. You've identified two intervenor  
22 exhibits and questioned this witness. Are they being  
23 offered? I just need to know for the record.

24 MISS DUNN: Yes. I will offer them, your  
25 Honor.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**DANIELLO - REDIRECT - McGRATH**

1 THE COURT: All right. We'll include that in  
2 the group we'll address at the end of the hearing.

3 Any redirect?

4 Mr. McGRATH: Yes, your Honor, just briefly.

5 **REDIRECT EXAMINATION BY MR. McGRATH:**

6 Q. Miss Daniello, can you turn to Exhibit 76, which  
7 you were shown and your attention was directed to by  
8 Mr. Featherstonhaugh earlier on in your examination. Do you  
9 have that in front of you?

10 A. Yes.

11 Q. All right. Is that the promissory note that you  
12 were asked questions about?

13 A. Yes.

14 Q. Would you turn to the last page of that document?

15 THE COURT: What's the exhibit again?

16 Mr. McGRATH: Seventy-six, your Honor.

17 BY Mr. McGRATH:

18 Q. Is there a signature line there?

19 A. Yes.

20 Q. Has anybody placed a signature on that document?

21 A. No, there's no signature.

22 Q. All right. Secondly, with respect to all four of  
23 the exhibits that are attached to your supplementary  
24 declaration, Exhibit 72, do you have 72 in front of you?

25 A. Yes.

**DANIELLO - REDIRECT - McGRATH**

1 Q. Would you go to the last column for each of those  
2 exhibits, and is it correct that they're each entitled  
3 description from account statements or wire transfer  
4 records?

5 A. Yes.

6 Q. Do any of those four columns indicate that you're  
7 purporting to put down information that was on checks?

8 A. No, they don't.

9 Q. And, finally, with respect to Exhibit 3 of that  
10 declaration, which is entitled transfers to and from the  
11 checking account. You were asked a series of questions  
12 about certain items that were contained in that checking  
13 account that you did not list in this chart, correct? And  
14 you testified that in fact you didn't list every item from  
15 the bank statements in the chart?

16 A. Yes, that's correct.

17 Q. What criteria did you use to determine what to  
18 include and not include in Exhibit 3?

19 A. This was basically the payroll account from David  
20 Smith, any David or Lynn Smith account, as well as any MS  
21 entity, McGinn, Smith entity.

22 Q. Is that all you were purporting to list in here?

23 A. Yes.

24 Mr. McGRATH: Nothing further, your Honor.

25 THE COURT: Any recross?

1 MR. FEATHERSTONHAUGH: Nothing, your Honor.

2 THE COURT: Mr. Dunn -- Miss Dunn, any  
3 recross?

4 MISS DUNN: No, your Honor.

5 THE COURT: Okay. You may step down.

6 We'll take our -- take an afternoon recess at  
7 this time, fifteen minutes.

8 Before we do, as to scheduling, does anybody  
9 disagree we're not going to finish today? Mr. Stoelting,  
10 since you are -- you stated your hope yesterday, I'll make  
11 you go first.

12 MR. STOELTING: I've abandoned that hope.

13 MR. FEATHERSTONHAUGH: Your Honor, I'm quite  
14 sure we won't. Mr. Stoelting and I conferred at the break,  
15 and even tempering his optimism, I think perhaps --

16 THE COURT: I think you've killed his  
17 optimism.

18 MR. FEATHERSTONHAUGH: -- if we start at  
19 we'll be done by lunchtime tomorrow, but not before.

20 THE COURT: Just for scheduling, we'll go to  
21 whoever is on the stand at 5:00 as long after 5:00 it takes  
22 to finish whatever witness on the stand. And then adjourn  
23 until tomorrow morning at 9 or 9:15 tomorrow, whatever time  
24 we settle on.

25 MISS DUNN: Your Honor, may I inquire, is

1 there any limitation how far after 5:00 we would go?  
2 Because I will need to make some backup child care  
3 arrangements depending on how far into the evening we go.

4 THE COURT: (talking.)

5 MISS DUNN: (crosstalk.) Which is fine, I  
6 can do that.

7 THE COURT: No, I wouldn't expect it would go  
8 past 5:15, 5:20. I appreciate your difficulties. And  
9 you're not the only one in the courtroom with similar  
10 logistical issues here. So we'll -- we won't go much past  
11 that. If that answers your questions.

12 MISS DUNN: Thank you, your Honor.

13 MR. STOELTING: Your Honor, if I may.

14 THE COURT: Yes.

15 MR. STOELTING: I have received from counsel  
16 the declarations of Mr. McGinn and Mr. Smith with the  
17 attachments, and we're prepared to accept these and offer  
18 them as the next two plaintiff's exhibit. I think we would  
19 designate the declaration of David Smith as Plaintiff's 128  
20 and the McGinn declaration as Plaintiff's 129. If that  
21 would be acceptable.

22 THE COURT: The procedure is acceptable. I  
23 don't know if there's objections to those or not. Somebody  
24 is sneaking up behind you again, Mr. Stoelting.

25 MR. FEATHERSTONHAUGH: I simply haven't had

1 an opportunity to look at it yet, your Honor.

2 THE COURT: I'm not going to rule on  
3 objections until, as I said, the conclusion of the hearing  
4 so...

5 MR. FEATHERSTONHAUGH: Right.

6 THE COURT: These are simply being  
7 designated, and we'll address them at that time.

8 MR. KOENIG: Only if you have any questions,  
9 your Honor, but I've spoken to both counsel and they agree  
10 to incorporate the documents.

11 THE COURT: All right. With that, we'll take  
12 our recess. Thank you.

13 (Brief recess at 3:40 PM.)

14 (Court reconvened at 3:55 PM.)

15 THE COURT: Call your next witness, please.

16 MISS MEHRABAN: Going to call Bernard Malmud.

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**MALMUD - DIRECT - MEHRABAN**

1                                   **BERNARD MALMUD,**

2   having been duly sworn by the Clerk of the Court, was  
3   examined and testified as follows:

4                           THE CLERK:   Thank you.   If you'll please take  
5   the witness stand.

6                           This is Bernard Malmud, M-A-L-M-U-D.

7   **DIRECT EXAMINATION BY MS. MEHRABAN:**

8           Q.    Good afternoon, Mr. Malmud.

9           A.    Good afternoon.

10          Q.    Where do you live?

11          A.    I live up in Grafton, New York.

12          Q.    Do you have any formal education after high  
13   school?

14          A.    No, I do not.

15          Q.    Are you currently working?

16          A.    I'm retired, but I work part time.

17          Q.    Where do you work?

18          A.    At St. Mary's Hospital in Troy.   Known as Seton  
19   Health.

20          Q.    What do you do?

21          A.    Transporter, aide.

22          Q.    What is that?

23          A.    I pick up patients.   If they need to be wheeled  
24   over in a wheelchair, I'll wheel them back.   And I enter  
25   their information into a computer.

**BONNIE J. BUCKLEY, RPR, CRR**  
                          **UNITED STATES COURT REPORTER - NDNY**

**MALMUD - DIRECT - MEHRABAN**

1 Q. How long have you worked there?

2 A. It's about seven years now.

3 Q. And when did you retire?

4 A. Probably about nine years ago.

5 Q. Okay. Before you became a transporter's aide,  
6 what did you do?

7 A. I was a wholesale salesman for a pharmacy.  
8 Pharmaceuticals.

9 Q. At any time in your career did you ever earn over  
10 \$200,000 a year?

11 A. No.

12 Q. And did you ever have over a million dollars,  
13 including your home?

14 A. I wished, but the answer is no.

15 Q. Were you a client of McGinn, Smith?

16 A. I beg your pardon.

17 Q. Were you a client of McGinn, Smith?

18 A. Yes.

19 Q. When did you become a client of McGinn, Smith,  
20 approximately?

21 A. Twenty some odd years ago I guess.

22 Q. And how did you become a client of McGinn, Smith?

23 A. One of my customers up in Wynantskill, Hannan's  
24 Pharmacy, which is no longer there, I was friendly with the  
25 son's owner, Jimmy Hannan, and one time we just got to

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**MALMUD - DIRECT - MEHRABAN**

1 talking about stocks and things like that and he said that  
2 his cousin Tim McGinn had a brokerage in Albany and that if  
3 I was interested, to contact him. And I did, I did contact  
4 him. And I was taken care of by David Smith.

5 Q. Okay. Other than David Smith, did you talk to  
6 anyone else at McGinn, Smith?

7 A. Throughout the time?

8 Q. Let's start, let's start with before you invested  
9 any money. Before you invested with McGinn, Smith, did you  
10 talk to anyone other than David Smith?

11 A. No.

12 Q. Okay. And you met with Mr. Smith?

13 A. Yes.

14 Q. At his office?

15 A. Yes.

16 Q. Okay. Did you discuss your investment goals with  
17 David Smith when you met with him?

18 A. I probably did. I really don't remember that  
19 much, going back that far, but I'm sure we had a discussion  
20 about it.

21 Q. Do you have any recollection of what you discussed  
22 regarding your investment goals?

23 A. Well, I was looking forward to a decent retirement  
24 and I was hoping with the monies that I had that I would be  
25 able to invest it and get a decent return and have a little

**MALMUD - DIRECT - MEHRABAN**

1 cushion for when I did retire.

2 Q. And did David Smith make recommendations to you  
3 for your investments?

4 A. Yeah, he did. Yup.

5 Q. And what did he recommend?

6 A. Well, at the beginning I think it was just some  
7 stocks. And later on, we went into notes; he came up with  
8 notes. And I had gone back to him one time with -- I was  
9 handling my father's money because my father was quite  
10 elderly and he wasn't well. He lived in Yonkers, New York,  
11 and I was handling his money. And I called David one time,  
12 and went down there and spoke to him. And --

13 Q. Why don't you take us through that discussion.  
14 You, you -- withdrawn. When did you talk to David Smith  
15 about your father's investments?

16 A. Well, I don't remember the exact time. Basically,  
17 I can tell you what transpired, but I don't remember how  
18 many years ago it was, actually.

19 Q. Approximately how old was your father when you  
20 took over control of your father's accounts?

21 A. About 92, 93. Somewheres around there.

22 Q. And why did you take over control of his account?

23 A. Well, he was just having a hard time managing his  
24 affairs and he wasn't well, so he had turned his affairs  
25 over to me.

**MALMUD - DIRECT - MEHRABAN**

1 Q. And in that context you met with David Smith?

2 A. Yeah. Yeah.

3 Q. And, again, this was at the offices of McGinn,  
4 Smith?

5 A. Yeah. And the reason, the reason I did that, here  
6 again, at the beginning, his costs were extremely high and I  
7 had promised my father that he would never wind up in a  
8 nursing home. He just didn't, didn't want any part of that.  
9 So I figured if I can invest some of the monies that he gave  
10 me, I could get a decent return and, you know, how ever long  
11 my father lived, I would try and keep him comfortable.

12 Q. Tell us about your discussion with David Smith  
13 concerning your father's investment.

14 A. When I went in there, I said something to David  
15 about, I hear a lot about blue chip stocks, what about  
16 something, something like GE stock or something like that,  
17 that's always up on top. Well, David said it's -- he had  
18 something coming up that was less risky and a better return  
19 because stocks fluctuate up and down, and this was a steady  
20 sort of a steady income. And I said -- I had asked him in  
21 the discussion, what about if I needed, needed cash, would I  
22 be able to get some cash. Because my father's expenses, as  
23 I say, were quite high. And he said don't worry about it,  
24 we can work it out; he had something coming up. And he  
25 notified me a short time, excuse me, he notified me a short

**MALMUD - DIRECT - MEHRABAN**

1 time later, and we proceeded to purchase those notes.

2 Q. They were notes you said?

3 A. Well, they called them notes. One was First  
4 Independent, I think it was, and one was Third Albany.

5 Q. All right. Did you follow David Smith's advice  
6 and make these investments?

7 A. I always did. I -- maybe I was a jerk, but I  
8 always trusted him. And no matter what he suggested, I went  
9 along with it, because I figured he was doing it for my  
10 benefit.

11 Q. Prior to investing, did David Smith ever walk you  
12 through the risks of the investments you were making?

13 A. Not really. I -- I -- no, I -- no. We talked, we  
14 talked about the stock and he, and he told me, you know,  
15 that it would be a good thing and it would be a good source  
16 of income because of the rate of interest, and that it was  
17 for so many years, and each month you would get a check for  
18 whatever the percentage was.

19 Q. Did David Smith send you any documents regarding  
20 the investments that were planning on making?

21 A. Nothing other than the papers to sign.

22 Q. Okay. Did you read the documents?

23 A. Hell, no. I would have needed a lawyer to read  
24 the documents. I couldn't understand that if I wanted to.

25 Q. Did David Smith ever explain them to you?

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1 A. No, not really.

2 Q. Do you know what an accredited investor is?

3 A. No.

4 Q. Did you know -- did David Smith ever explain to  
5 you what the companies that you were investing in were doing  
6 with the money?

7 A. Not really, no. Not that I remember, no.

8 Q. Okay. In total, approximately how much did you  
9 and your father invest in McGinn, Smith products?

10 A. About a hundred fifty five, a hundred sixty  
11 thousand. Somewheres around there.

12 Q. And that's --

13 A. Most of it, you know, it -- you know, somewheres  
14 around there, 155, 160,000.

15 Q. That's both your investments and your father's?

16 A. Yeah, a majority of mine, but my father's  
17 investments were in there too.

18 Q. For your father's, just taking your father's  
19 investments, was that the majority of his life savings?

20 A. It was a considerable amount of it. I would say  
21 approximately almost half.

22 Q. And what about yours?

23 A. It was -- here again, it was a considerable  
24 amount. It was most of mine.

25 Q. And how -- your father has passed away?

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1           A.   Unfortunately, yeah.  He was 97 when he passed  
2 away.

3           Q.   And you inherited his accounts at McGinn, Smith?

4           A.   Ah, yes, I did.

5           Q.   At some point you stopped receiving payments on  
6 your investments, is that correct?

7           A.   I beg your pardon?

8           Q.   At some point you stopped receiving payments on  
9 your --

10          A.   Yes.  Yes.  The notes...  What's the term...  
11 defaulted.

12          Q.   And did you receive any letters regarding that  
13 default?

14          A.   Yeah.  Yeah.

15          Q.   Do you recall?

16          A.   Again, you would have needed a lawyer to  
17 understand it, as far as I'm concerned.

18          Q.   Did you -- when did you stop receiving payments on  
19 the investments, approximately?

20          A.   Oh, man.  I really don't remember clearly.  A year  
21 ago, two years ago.  I really don't remember.  Some were  
22 longer than that, but the latest one was about a year or so  
23 ago.

24          Q.   Can you explain how not having this money  
25 available to you has affected you?



**MALMUD - DIRECT - MEHRABAN**

1           A.   Well, heck, yes. The total -- one of the total  
2 statements, last statements that I received was about 238,  
3 \$240,000. I think that would affect almost anybody.

4           Q.   And how has it affected you?

5           A.   Well, to me, it was a tremendous amount of money.  
6 I'm working part time now. I'm not getting rich on what I'm  
7 making, but it helps pay some of the, some of the expenses  
8 that I have. I could use another car. My car is six years  
9 old. I'm not going to go out and buy a car for 25, \$30,000  
10 when I don't know what the hell is in the future -- excuse  
11 me -- what the future has for me. I got married recently.  
12 I have a wife. And I'm looking out for her benefit as well  
13 as my benefit and something she can possibly have or some  
14 enjoyment we can have by, you know, taking some trips, going  
15 here and there. You know, it may be a few things that you  
16 consider luxurious, but it's just -- I mean today, the way  
17 things are today, Social Security in doubt, and, you know, a  
18 lot of money like 240, \$250,000, that's a hell of a lot of  
19 money to make.

20          Q.   At a certain point, Mr. Malmud, you hired a lawyer  
21 to represent you?

22          A.   Yes.

23          Q.   And you filed a claim, a FINRA arbitration claim?

24          A.   Yes, ma'am.

25          Q.   When was that? Approximately.

**MALMUD - CROSS - FEATHERSTONHAUGH**

1           A.    Two years ago.  Three years.  About a little over  
2 two years ago.

3                   MISS MEHRABAN:  I have no further questions.

4                   THE WITNESS:  Okay.

5                   THE COURT:  Mr. Featherstonhaugh?

6                   MR. FEATHERSTONHAUGH:  Yeah, just a couple.

7 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

8           Q.    Mr. Malmud, I believe you testified that you first  
9 became a customer of McGinn, Smith about 20 years ago, is  
10 that right?

11          A.    Well, maybe a little more, but somewhere around  
12 there, yeah.

13          Q.    Could I just inquire as to how old you are now?

14          A.    How old I am?

15          Q.    Yeah.

16          A.    Seventy-eight.

17          Q.    The -- so you were about 58, thereabouts?

18          A.    Somewhere around there, yeah.

19          Q.    And at that time, how much money did you invest  
20 with McGinn, Smith?

21          A.    I, I really -- I don't have any idea.

22          Q.    Okay.  You indicated that you talked to Mr. Smith  
23 at that time when you first became a customer, is that  
24 right?

25          A.    Yes.

**MALMUD - CROSS - FEATHERSTONHAUGH**

1 Q. Even though you were apparently referred to the  
2 firm by somebody related to Mr. McGinn?

3 A. Correct.

4 Q. And you never spoke with Mr. McGinn when you were  
5 opening the account?

6 A. No, sir. In fact, I only spoke to Mr. McGinn one  
7 time. I was with David in his office and we were walking  
8 out of his office and Tim McGinn came by. And he stopped  
9 Tim McGinn and he introduced me to Tim McGinn and said this  
10 is one of our loyal customers who sticks by us through thick  
11 and thin. And I got a handshake, and that was it. And that  
12 was the first and last time I ever saw or spoke to  
13 Mr. McGinn.

14 Q. So you began investing with McGinn, Smith about 20  
15 years ago?

16 A. Approximately.

17 Q. About 1990?

18 A. I guess.

19 Q. And did you have years when you made money?

20 A. There were, there were a lot of ups and downs.  
21 Some of the stocks went out. Some of them made some money.

22 Q. How much money did you invest, do you know?

23 A. You just asked me that.

24 MISS MEHRABAN: Objection.

25 A. I'll give you the same answer. I really don't

**MALMUD - CROSS - FEATHERSTONHAUGH**

1 remember how much.

2 Q. I'm worse off than you because I don't even  
3 remember asking you that. So ... (laughter.)

4 How often would you talk to Mr. Smith during the  
5 period that you just testified about?

6 A. In all the time that I was associated with him?

7 Q. Sure.

8 A. I think I might have visited with him in the  
9 office six or eight times.

10 Q. Okay.

11 A. Most of the stuff was done on the telephone. And  
12 many times he transferred me over to somebody else to talk  
13 to.

14 Q. That would be another broker?

15 A. Somebody in his office.

16 Q. Right. Do you remember the names of any --

17 A. Dave McQuade.

18 Q. Dave McQuade?

19 A. Yeah.

20 Q. You then indicated that there came a time when  
21 you, when you took over investing your father's money?

22 A. Yes.

23 Q. Is that what it was?

24 A. Yeah.

25 Q. But I think you also said your father had given

**MALMUD - CROSS - FEATHERSTONHAUGH**

1 you the money?

2 A. Well, he transferred the money to me, in my name.  
3 He took it out of his name.

4 Q. And how long ago was that?

5 A. I don't know. Time is -- it's difficult to put  
6 a -- I really can't -- let's see ... I'm taking a guess. I  
7 really don't remember accurately. I would take a guess and  
8 say maybe ten years ago or so. That's just a guess.

9 Q. Fair enough. I take it then that that  
10 conversation you described to Miss Mehraban where you  
11 indicated you sat down and talked to Mr. Smith about your  
12 father's money --

13 A. Yeah.

14 Q. -- would have taken place about the time your  
15 father transferred the money to you?

16 A. I guess so.

17 Q. So that conversation would have been about ten  
18 years ago, correct?

19 A. Somewheres around there, I would assume.

20 Q. And you indicated that in that conversation you  
21 told Mr. Smith, well, maybe we should invest in GE; do you  
22 recall that?

23 A. Yeah.

24 Q. Is that a stock you have an interest in because  
25 it's local?

**MALMUD - CROSS - FEATHERSTONHAUGH**

1           A.    No.  It's -- at that time I -- when I started  
2 getting interested in the stock market, I know -- I knew and  
3 still know very little about it.  And I always had heard a  
4 lot about GE and they were always making money and so on and  
5 so forth.  So out of the blue I had said to him, because I  
6 didn't really know that he had something else in mind, I had  
7 suggested, you know, what about stocks, what about an item  
8 like a blue chip stock that I've heard of, called a blue  
9 chip stock with GE.  And he said, well, stocks are kind of  
10 funny, they fluctuate a lot, and you wouldn't be getting a  
11 steady income, and he had something in mind, something that  
12 was coming up very shortly, and he said that it was a lot  
13 less risky and, there again, that there would be a steady  
14 income.

15           Q.    Okay.  And I believe you, I believe you told Miss  
16 Mehraban that you don't recall the name of that investment  
17 that Mr. Smith showed you, is that right?

18                       MISS MEHRABAN:  Objection.

19                       THE COURT:  Hold on.  Hold on.

20                       MISS MEHRABAN:  Objection.  I think he did  
21 say two investments that he -- that were --

22                       THE COURT:  The objection is overruled.  If  
23 the witness did say it, he can repeat that.  Overruled.

24                       Do you recall the question, Mr. Malmud?

25           A.    You asked me the name of the stock -- the notes,

**MALMUD - CROSS - FEATHERSTONHAUGH**

1 whatever the hell, whatever you call them.

2 Q. The name of the investment.

3 A. Yeah. One of them was -- now I don't remember  
4 which came first, but one of them was First Independent, and  
5 the other one was -- First Independent and Third Albany, I  
6 think.

7 Q. Okay. Do you -- and that's all you --

8 A. Oh.

9 Q. You remembered something?

10 A. Yeah. I remembered something else, right.

11 Q. Okay.

12 A. David had also told me about the stock that he had  
13 that I invested at a couple different times and some of my  
14 father's money went into one of them. McGinn, Smith  
15 Preferred Stock. And David told me it's a very hard stock  
16 to get, it was private stock, and he would see what he could  
17 do to get me some shares of that because that also was  
18 earning a pretty decent return at the time. So that was  
19 another one. So you had the First Independent, Third  
20 Albany, and then you had McGinn, Smith Preferred.

21 Q. Did McGinn, Smith send you a monthly statement,  
22 Mr. Malmud?

23 A. Yeah, I got a monthly statement. Yes.

24 Q. And on it, you could track your investments?

25 A. Sort of, yeah.

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**MALMUD - CROSS - FEATHERSTONHAUGH**

1 Q. Do you know whether you still own First  
2 Independent or not?

3 A. No. They defaulted as far as -- First Independent  
4 defaulted. Third Albany defaulted.

5 Q. Do you --

6 A. McGinn, Smith Preferred is somewheres.

7 Q. Do you have any idea what Third Albany was or did  
8 or does?

9 A. I do not, no.

10 Q. Do you know when you invested in it?

11 A. What? The year? No.

12 Q. I'm sorry.

13 A. What year I invested in it?

14 Q. Yes. Do you know? If you know.

15 A. No. I would have to look at the statements. I  
16 might have known at the time that I gave the information to  
17 my lawyer. But I -- offhand, I do not remember the dates.

18 Come to think of it, there's another one that  
19 defaulted, SAI. That's what -- that's going back a ways.

20 Q. Okay. And the money that you invested in those  
21 investments, did you look at anything before you invested?

22 A. Not really, no. David would call me on the phone  
23 and he would tell me that he had something going and it's a  
24 good return and he thought it was something that I should  
25 take advantage of. And I went along with it. No matter --

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**MALMUD - CROSS - FEATHERSTONHAUGH**

1 you know, it may sound kind of stupid, but I trusted him  
2 implicitly. And whatever he suggested, I went along with  
3 it.

4 Q. After you had the telephone discussions with him,  
5 did you ever receive anything in the mail?

6 A. Well, he would, he would, he would send me the  
7 forms to sign which had a whole considerable amount of legal  
8 documentation in there. And --

9 Q. And did you ever read the materials --

10 A. I couldn't.

11 Q. -- that he sent you?

12 A. I couldn't read that damn stuff. Made no sense to  
13 me at all.

14 Q. Okay. Did you ever call him up and say Dave, I've  
15 got all this stuff, but I wonder if you could explain some  
16 of it to me?

17 A. Not that I remember. Because here again, any time  
18 he suggested anything, we just -- I just went along with it.  
19 We never went into anything deeply, that I can remember.  
20 And no, I did not call him and ask him to explain it any  
21 further. I just took him at his word that it was a good  
22 investment, it was going to give me a decent return and I  
23 would be satisfied with it and at the end of the period  
24 where there was three, four, five, whatever the length of  
25 time that the note was in existence, at the end of that

**MALMUD - CROSS - FEATHERSTONHAUGH**

1 time, I would get my principal back. Which I never got any  
2 of it back on any of them.

3 Q. Well, Mr. Malmud, you understand that all  
4 investments have some risk, don't you?

5 A. Ah, I, I would say so.

6 Q. I'm sorry?

7 A. I would say so.

8 Q. Yeah. You may even, because you follow it, are  
9 you aware that in the last five years at one point General  
10 Electric stock lost 86 percent of its value?

11 A. Well, a lot of stocks lost a fortune of money. I  
12 don't --

13 Q. So when you invested --

14 A. I don't follow it that closely, sir.

15 Q. I'm sorry?

16 A. I don't follow it that closely.

17 Q. So when you invested, however, you knew that there  
18 was some risk involved?

19 A. Well, there would normally be a risk in any  
20 investment.

21 MR. FEATHERSTONHAUGH: Nothing further to  
22 Mr. Malmud.

23 THE COURT: Miss Dunn, any questions?

24 MISS DUNN: Nothing, your Honor, thank you.

25 THE COURT: Any redirect?

**MALMUD - CROSS - FEATHERSTONHAUGH**

1 MISS MEHRABAN: Nothing, your Honor.

2 THE COURT: Thank you, Mr. Malmud. You may  
3 step down.

4 THE WITNESS: Okay. Thank you.

5 (Witness excused.)

6 THE COURT: Call your next witness, please.

7 MR. STOELTING: David McQuade.

8 THE CLERK: Please step right up here.

9 THE WITNESS: Yes.

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**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**McQUADE - DIRECT - STOELTING**

1                                   **DAVID McQUADE,**

2   having been duly sworn by the Clerk of the Court, was  
3   examined and testified as follows:

4                           THE CLERK:   Thank you.   If you'll please take  
5   the stand please.

6                           This is David C. McQuade, M-c-Q-U-A-D-E.

7   **DIRECT EXAMINATION BY MR. STOELTING:**

8           Q.    Good afternoon, Mr. McQuade.

9           A.    Good afternoon.

10          Q.    Where do you work now?

11          A.    Dinosaur Securities.

12          Q.    And did you ever work at McGinn, Smith & Co.,  
13   Inc.?

14          A.    Yes.

15          Q.    What period of time did you work at McGinn, Smith?

16          A.    REDACTED                    through REDACTED

17          Q.    And why did you leave McGinn, Smith?

18          A.    McGinn, Smith got rid of their equity operations  
19   and I was no longer needed.

20          Q.    And what were your duties during the REDACTED years you  
21   worked at McGinn, Smith?

22          A.    Operational duties.   I originally started as  
23   operations assistant and worked my way up to operations  
24   manager.

25          Q.    When did you become operations manager?

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**McQUADE - DIRECT - STOELTING**

1           A.    I believe it was in the winter of 2001 or 2002.  I  
2   can't remember exactly.

3           Q.    And were you operations manager from 2001 until  
4   your departure in 2009?

5           A.    Correct.

6           Q.    And what were your duties as operations manager?

7           A.    Opening up client accounts, taking care of client  
8   deposits into their brokerage accounts, sending checks or  
9   wires, things of that nature, to the clients.  Plenty of  
10   operational things, transfer of accounts to other -- from  
11   other companies to our company.  That type of thing.

12          Q.    By the way, have you ever testified in a court  
13   proceeding like this before?

14          A.    Never.

15          Q.    Who did you report to when you were operations  
16   manager?

17          A.    David Smith.

18          Q.    And did you have occasion to arrange wire  
19   transfers at the requests of David Smith?

20          A.    Yes.

21          Q.    And do you remember arranging for transfers  
22   involving Lynn Smith?

23          A.    Yes.

24          Q.    And who would instruct you on those transfers?

25          A.    David Smith.

**McQUADE - DIRECT - STOELTING**

1 Q. Did Lynn Smith ever instruct you on those  
2 transfers?

3 A. Not that I can recall, no.

4 Q. And can you just tell me what you recall about  
5 those transfers?

6 A. David Smith would ask me to provide him with  
7 letters of authorization.

8 MR. FEATHERSTONHAUGH: Objection.

9 THE COURT: What's your objection?

10 MR. FEATHERSTONHAUGH: Your Honor, my  
11 objection is that he's apparently testifying generally, not  
12 about any transfer that can then be examined.

13 THE COURT: He's testifying -- I believe the  
14 question was as to a general practice. The objection is  
15 overruled.

16 THE WITNESS: Okay.

17 THE COURT: Do you recall the question?

18 THE WITNESS: Yes.

19 A. So I would provide Mr. Smith with letters of  
20 authorization, which he would bring to Lynn Smith, she would  
21 sign them, and then he returned them to me.

22 Q. When you received the letters of authorization  
23 from David Smith, what would be on them?

24 A. Just the general form but no numbers or wire  
25 instructions, just her signature.

**McQUADE - DIRECT - STOELTING**

1 Q. And how many of those would David Smith provide to  
2 you at a time?

3 A. Between 10 and 15. Around a dozen.

4 Q. And where would you keep them?

5 A. I would have them in my office drawer. My desk  
6 drawer. Excuse me.

7 Q. And what would be the circumstances under which  
8 you would employ those letters of authorization to make a  
9 transfer?

10 A. Mr. Smith would either call -- me or actually I  
11 think he would just call me and tell me to wire money to  
12 either his account or provide me with other wiring  
13 instructions.

14 Q. And what would you do when the letters -- the  
15 letters of authorization that were blank except for Lynn  
16 Smith's signature, what would you do when that supply in  
17 your desk got low?

18 A. I would let Mr. Smith know that it was getting  
19 low, and he would ask for more copies, and I would provide  
20 them to him and <sup>REDACTED</sup> through the same scenario.

21 Q. And then what would happen after that?

22 A. He would give them back to me, and I would put  
23 them back in my desk drawer.

24 Q. There's a thick binder in front of you and  
25 there's -- if you would open the big binder, and there's

**McQUADE - DIRECT - STOELTING**

1 side tabs. And if you would open the one that is  
2 plaintiff -- that has 126 on the side tab. And Plaintiff's  
3 Exhibit 126 is a multi-page document that's double-sided.

4 A. Okay.

5 Q. Do you have Exhibit 126 in front of you?

6 A. Yes.

7 Q. And does it -- is the first page something  
8 labeled -- or a document labeled February 20<sup>th</sup>, 2009?

9 A. Correct.

10 Q. And then can you just flip through the next few  
11 pages and just -- or flip through any pages you like for  
12 these and just tell me what these are.

13 A. Okay. These are examples of the --

14 Q. Take your time. I'm sorry, go ahead.

15 A. These are examples of the LOAs that were used.

16 Q. Okay. Are these the types of letters of  
17 authorization that Mr. Smith would provide to you that would  
18 have to be signed by Lynn Smith but have no other  
19 information on them when you received them?

20 A. Not necessarily. This one (indicating), I  
21 believe, looks like it had the information first. The third  
22 page looks like one. I'm sorry, does not look like one.

23 MR. FEATHERSTONHAUGH: Can I --

24 THE COURT: Excuse me. One being filled out  
25 by Mrs. Smith or filled out, signed and blank.



**McQUADE - DIRECT - STOELTING**

1 THE WITNESS: Filled out, signed and blank.

2 THE COURT: You have to repeat that into the  
3 microphone.

4 THE WITNESS: I'm sorry.

5 THE COURT: That's all right.

6 THE WITNESS: Could you repeat the question,  
7 your Honor?

8 THE COURT: You're referring to, you said  
9 this one looks like one, this one doesn't look one. When  
10 you are saying one, what are you referring to?

11 THE WITNESS: I'm sorry. One that was blank  
12 with just Mrs. Smith's signature on it.

13 THE COURT: Hold on now.  
14 Mr. Featherstonhaugh.

15 MR. FEATHERSTONHAUGH: Your Honor, I wonder  
16 if the witness just, so I can follow his testimony... You  
17 said the number three, but do you mean -- these have been  
18 copied, apparently, back to back. I assume they didn't come  
19 that way. Can you just direct me by date or otherwise what  
20 it is you're looking at.

21 THE WITNESS: Definitely. The one dated  
22 November 29<sup>th</sup> -- no, not that one. I apologize. These  
23 don't look like the ones I provided. They're so old.  
24 (Pause.)

25 The ones that I provided to him I don't

**McQUADE - DIRECT - STOELTING**

1 believe had the wire information on them. So these ones all  
2 show -- have it.

3 BY MR. STOELTING

4 Q. Are you able to --

5 MR. FEATHERSTONHAUGH: Can I --

6 MR. STOELTING: May I please.

7 THE COURT: I think there's some confusion.  
8 I know I'm confused. I don't know if Mr. Featherstonhaugh  
9 is. I believe the question you asked him, Mr. Stoelting,  
10 was which pages in Exhibit 126 are those which Mr. McQuade  
11 testifies he received signed and blank by Mrs. Smith. And  
12 I'm still not clear what the answer is. Was that your  
13 question?

14 MR. STOELTING: Correct.

15 BY MR. STOELTING

16 Q. Mr. McQuade, are you able to identify, you know,  
17 generally which one of these is the form of the letter of  
18 authorization that you were referring to a moment ago?

19 A. That's what I'm trying to locate. I believe the  
20 ones that I had had no wire information on it. That's why  
21 I'm trying to find one that's written in. Which  
22 November 27, 2007 looks like one that I would have provided  
23 to him.

24 MR. FEATHERSTONHAUGH: Could you tell us  
25 about where that is?

**McQUADE - DIRECT - STOELTING**

1 THE WITNESS: It's about ... the fourth page.

2 BY MR. FEATHERSTONHAUGH

3 Q. Okay. The one that's dated November 29, 2007?

4 A. Correct.

5 MR. FEATHERSTONHAUGH: Just bear with me for  
6 a second, Mr. Stoelting, until I find it.

7 MR. STOELTING: Sure.

8 THE COURT: You've got the date, Mr.  
9 Featherstonhaugh.

10 MR. STOELTING: It's November 29, 2007.

11 THE COURT: Fourth page, November 29. Go  
12 ahead, Mr. Stoelting.

13 BY MR. STOELTING

14 Q. And in the course of processing these letters of  
15 authorization, did you have occasion to see Lynn Smith's  
16 signature?

17 A. Of course, yes.

18 Q. And look at the first page of Exhibit 126, does  
19 that look like Lynn Smith's signature?

20 A. I don't believe so.

21 Q. And if you would look at the one you were just  
22 identifying, the one dated November 29, 2007, does that look  
23 like Lynn Smith's signature?

24 A. It does not.

25 Q. Could you turn to the tab 81, please.

**McQUADE - DIRECT - STOELTING**

1 THE COURT: What Exhibit Number?

2 MR. STOELTING: It's Exhibit 81. I'm sorry,  
3 your Honor.

4 A. Okay.

5 Q. Is that an e-mail from you to Tim McGinn?

6 A. Yes, it is.

7 Q. Can you read me what the e-mail says?

8 A. Tim, here are the wire instructions to Lynn's  
9 account.

10 Q. And what are you doing in this e-mail?

11 A. He had asked me for the wire instructions to Lynn  
12 Smith's brokerage account.

13 Q. Okay. And do you know why he asked you that?

14 A. I do not.

15 Q. Would you look at the next page, please? There's  
16 an e-mail for -- from you to Patricia Sicluna?

17 A. Correct.

18 Q. Who was Patricia Sicluna?

19 A. She is -- she was the -- kind of administrator of  
20 the alternative investments department. And also we were  
21 colleagues in the fact that we both were able to approve  
22 wires and things to go in and out of brokerage accounts.

23 Q. Okay. What are you saying to Miss Sicluna in this  
24 e-mail?

25 A. I'm asking her to approve the wire on the system

**McQUADE - DIRECT - STOELTING**

1 for DLS, for David Smith.

2 Q. Okay. And why -- do you remember why you would  
3 have done this?

4 A. Well, in order for us to wire the money out of the  
5 brokerage account, we entered the instructions into the  
6 system, and then there has to be an approver that gets --  
7 that approves the wire. And then after that, it gets  
8 approved by our clearing firm.

9 Q. Okay. But my question is who at McGinn, Smith  
10 would have told you to do this?

11 A. Oh. Mr. Smith.

12 Q. And is the money going in or out of the Lynn Smith  
13 account?

14 A. Looks to me it's going out of Mrs. Smith's  
15 account.

16 Q. And did Mrs. Smith call you and tell you this was  
17 okay?

18 A. Not that I recall, no.

19 Q. Do you ever recall speaking with Mrs. Smith about  
20 transfers in or out of any of other accounts?

21 A. No.

22 Q. Would you look at the next e-mail?

23 A. Yes.

24 Q. Is this -- this is an e-mail dated March 11, 2009.  
25 Was this the same thing, something that Mr. Smith told you

**McQUADE - DIRECT - STOELTING**

1 to do?

2 A. Exactly.

3 Q. Would you look at the last page of Exhibit 126,  
4 please?

5 A. 126.

6 Q. I'm sorry, I'm sorry. I meant the last page of  
7 Exhibit 81.

8 A. Okay.

9 Q. Okay? This is an e-mail from you to -- an e-mail  
10 exchange between and you Timothy McGinn on December 11,  
11 2009. And looking at the bottom one, the e-mail dated 9:32  
12 AM, what can you tell me about that?

13 A. Mr. McGinn was sending me a wire -- or a request  
14 to wire \$15,000 from Lynn's account to his own personal  
15 account. And he also says on here that David Smith  
16 authorized this wire, if it's not already done so.

17 Q. Do you remember anything about this particular  
18 transfer from Lynn's account to Mr. McGinn?

19 A. I believe I contacted Dave Smith to find out if it  
20 was okay. And he said that it was. So I believe I  
21 completed one of those LOAs and took care of the wire for  
22 him.

23 Q. And do you know anything about why the transfer  
24 was being made?

25 A. No.

**McQUADE - DIRECT - STOELTING**

1 Q. I just have a couple of more documents. If you  
2 would turn to Exhibit 96.

3 A. Yeah.

4 Q. Do you have Exhibit 96?

5 A. Yes, I do.

6 Q. Okay. Is that your signature on the first page?

7 A. Yes.

8 Q. Do you remember this -- is this a letter that you  
9 sent to America Stock transfer?

10 A. It must be, yes.

11 Q. Do you recognize the letter?

12 A. Not off the top of my head, no.

13 Q. There's a name next to yours. And it says -- you  
14 know, it's kind of scribbled, and it says trustee. Do  
15 you -- can you make out that --

16 A. I believe that's Thomas J. Urbelis.

17 Q. Did you have an understanding of who Mr. Urbelis  
18 was?

19 A. He was the trustee of the David and Lynn Smith  
20 revocable trust -- irrevocable trust. Sorry.

21 Q. And did you ever speak to Mr. Urbelis?

22 A. Maybe once or twice, but not any length. I don't  
23 recall any conversations but...

24 Q. That was my question. Do you remember anything  
25 that you talked about in those two conversations?

**McQUADE - DIRECT - STOELTING**

1 A. No.

2 Q. And is this letter purchasing a stock called  
3 Deerfield Capital Corp., or is it related to the purchase of  
4 a stock by the trust?

5 A. (No response.)

6 Q. Well, let me withdraw that. Can you tell from the  
7 letter -- let me withdraw that again.

8 Did you have an understanding that the David and  
9 Lynn Smith irrevocable trust had a brokerage account at  
10 McGinn, Smith & Co.?

11 A. Yes.

12 MR. FEATHERSTONHAUGH: If I may, your Honor.

13 Mr. Stoelting -- and perhaps I misheard you.  
14 Which exhibit are you --

15 MR. STOELTING: Oh, I'm sorry. It's 96.

16 MR. FEATHERSTONHAUGH: Oh, here it is, in the  
17 front. Thank you.

18 BY MR. STOELTING:

19 Q. And were you ever asked to sign documents  
20 transferring the stock that was in the irrevocable trust  
21 account?

22 A. No.

23 Q. Can you tell me what this letter is doing?

24 A. As operations manager, I was asking this woman  
25 Paula, American Stock Transfer to convert the Deerfield



**McQUADE - DIRECT - STOELTING**

1 Triarc Capital Corporation Accredited Investors, I don't  
2 know if they were units or shares or what, to the common  
3 stock, I believe. Yes, the common shares. And in order to  
4 do so, we had to deliver the shares to the transfer agent so  
5 that they could convert the accredited investment units or  
6 shares to common stock.

7 Q. Okay. And do you know who instructed you to do  
8 that?

9 A. I believe it was David Smith, but I don't know off  
10 the top of my head.

11 Q. Do you recall David Smith giving you instructions  
12 with regard to the irrevocable trust account?

13 A. Very rarely, if ever, but, yes, occasionally.

14 Q. And do you remember Mr. Urbelis ever giving you  
15 instructions as to the irrevocable trust account?

16 A. No, I believe -- no.

17 Q. I think the last document I have is Plaintiff's  
18 90, Exhibit 90. Do you have Exhibit 90 in front of you?

19 A. I do.

20 Q. Can you tell me what this is?

21 A. It's a letter from me to Mr. Urbelis for the  
22 payment of the 2004 taxes in the amount of \$2,300.

23 Q. And is that your signature?

24 A. That is my signature.

25 Q. Okay. Do you remember who instructed you to send

**McQUADE - DIRECT - STOELTING**

1 this letter?

2 A. I would guess David Smith, but I don't know for  
3 sure.

4 Q. Okay. Could it have been anyone other than David  
5 Smith, based on your recollection?

6 A. Based on my recollection, no.

7 MISS DUNN: Objection to the form of the  
8 question.

9 THE COURT: Overruled.

10 BY MR. STOELTING:

11 Q. What was your answer?

12 A. No.

13 MR. STOELTING: I have -- one moment, your  
14 Honor. (Pause.)

15 BY MR. STOELTING:

16 Q. Let me just maybe try to clarify the letters of  
17 authorization that you would receive from Mr. Smith, the --  
18 you know, you said 10 to 15 at a time he would give them to  
19 you and they would be blank except for Mrs. Smith's  
20 signatures?

21 A. Correct.

22 Q. Okay. Was that something -- was that a practice  
23 that occurred throughout the time that you were operations  
24 manager?

25 A. Pretty regularly, yes.

**McQUADE - DIRECT - STOELTING**

1 Q. Okay. Do you ever remember a time when it wasn't  
2 going on, when it didn't happen?

3 A. Well, there would be a time, a couple, two or  
4 three months that it wouldn't happen, but ...

5 Q. But would you pretty much constantly have a  
6 signed -- an LOA in your desk that was signed by Mrs. Smith  
7 but otherwise blank?

8 A. Yes.

9 Q. And if you -- if you could just take another look  
10 at Exhibit 126 and -- which is the collection of letters of  
11 authorization. And they are arranged, for the record,  
12 they're arranged in chronological order from January 2000 to  
13 February 2009. And, you know, there's various formats. And  
14 see if you have any further recollection of those or whether  
15 you -- you know, I guess my question is: How -- your  
16 recollection of the format of the letters, throughout those  
17 ten years that you received them, do you have a strong  
18 recollection of the format of the letter -- of the --

19 A. The format changed over the years, depending, you  
20 know, how quickly and how it was needed to be drawn up, if I  
21 had to make up one quick or if I couldn't find the file or  
22 that type of thing.

23 Q. As you sit here today, are you able to actually  
24 picture of format of those LOAs?

25 A. I can.

**McQUADE - DIRECT - STOELTING**

1 Q. And is there -- are you able to remember how they  
2 changed over the years?

3 A. Over the years, the wiring instructions wouldn't  
4 be on them, it would just be lines.

5 Q. When you say wire instructions, what do you mean?

6 A. The instructions of the bank instructions on where  
7 to send the money.

8 Q. So do you think that the letters of instructions  
9 that you had and that you kept in your desk were different  
10 from the ones here, so that these are just a different set  
11 of letters?

12 A. I do believe so, yes.

13 MR. FEATHERSTONHAUGH: Excuse me. I don't  
14 believe, maybe I just misunderstood, but the form of that  
15 question. I --

16 THE COURT: Well, the form of the question  
17 referred to letters of instruction. Is that different from  
18 letters of authorization?

19 MR. STOELTING: I meant to say letters of  
20 authorization.

21 THE COURT: Well, reask the question.

22 MR. STOELTING: Oh, okay.

23 BY MR. STOELTING:

24 Q. Do you have a specific recollection of how the  
25 letters of authorization changed during the ten years you

**McQUADE - DIRECT - STOELTING**

1 were operations manager?

2 A. Yes.

3 Q. Okay. And how did they change?

4 A. Most recently, the letters of instructions  
5 wouldn't have the actual wire instructions on them, just  
6 have like bank name, ABA number, account name, account  
7 number, but none of those numbers or names.

8 Q. You just used the phrase letter of instruction.

9 A. I apologize. Letter of authorization.

10 Q. Okay. And just so the record is clear, the ones  
11 that you're talking about that were in your desk related to  
12 Lynn Smith's accounts?

13 A. Yes.

14 Q. And is there one here that you can pinpoint as the  
15 form of the one that you remember?

16 A. Let's see... One dated May 21, 2001. Pages from  
17 the back.

18 Q. Okay. That looks like the format?

19 A. It's similar to it, yes.

20 Q. By the way, did anyone else besides you have the  
21 signed -- the Lynn Smith signed letters of authorization in  
22 their desk?

23 A. Not that I'm aware.

24 Q. Did Miss Sicluna keep some of them in her desk?

25 A. Not that I'm aware of.

**McQUADE - DIRECT - STOELTING**

1 Q. Okay. And the format of the May 21, 2001 wire,  
2 did that change over time?

3 A. Yes. It's all pretty much the same. It's just,  
4 you know, where the indents were and that type of thing.  
5 But that's the idea, is that bang name, ABA name, account  
6 name, account number, and it was all blank after these.  
7 Those were written in afterwards.

8 Q. And don't all these have the general format of  
9 bang name, ABA number, account, and then signature at the  
10 bottom?

11 A. They do but the print is actual and typed print.  
12 It's not in handwriting.

13 MR. STOELTING: Okay. Thank you.

14 Mr. McQuade, I have no more questions at this time.

15 THE WITNESS: Thank you.

16 THE COURT: Mr. Featherstonhaugh?

17 MR. FEATHERSTONHAUGH: Your Honor, it's now  
18 ten minutes of 5.

19 THE COURT: It's not late enough,  
20 Mr. Featherstonhaugh.

21 MR. FEATHERSTONHAUGH: Well, I --

22 THE COURT: We can get something done.

23 MR. FEATHERSTONHAUGH: Very well.

24 THE COURT: Besides I want to see Miss Dunn  
25 come from behind you and cut you off. (Laughter.)

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

2 Q. Mr. McQuade, would you tell me -- when did you say  
3 you begin working at McGinn, Smith?

4 A. July 5, 1989.

5 Q. And what did you do immediately before that.

6 A. I was -- before that I was a landscaper.

7 Q. And how long were you a landscaper?

8 A. About three or four months. Not long at all.

9 Q. And could you tell me what your education was?

10 A. I had a high school diploma and three years of  
11 college, no degree.

12 Q. Can you tell me where you attended college for  
13 those?

14 A. Mount Saint Mary College in Newburgh, New York.

15 Q. Can you tell me what you studied there?

16 A. Studied elementary education.

17 Q. What was your first job when you went to work for  
18 McGinn, Smith?

19 A. Operations assistant.

20 Q. And who were you an assistant to?

21 A. To Patricia Sicluna, and my sister Ivy Brooklyn  
22 (phonetic), who at the time was Ivy McQuade.

23 Q. Now, I would like to talk about these letters of  
24 authorization a little bit that you have been discussing  
25 here. So if you could take a look at Exhibit 126.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 A. Okay.

2 Q. Why do you need a letter of authorization?

3 A. Need a letter of authorization when it's sent  
4 from -- it's sent to a third party. So ...

5 Q. Okay. Could you explain that for us?

6 A. Definitely. If I was to wire -- say I wanted to  
7 wire a hundred dollars from my brokerage account to my  
8 checking account, that would not require a letter of  
9 authorization because it's the same name account, it's the  
10 same social security number, and that will all match up. If  
11 I wanted to send it to my wife's IRA or my wife's bank  
12 account, I would have to sign a letter of authorization to  
13 do so because, excuse me, because her social security is not  
14 the same as mine, it's not, it's not an easy transaction, it  
15 has to be approved by the account owner in order to do so.

16 Q. And that would be true not only of a spouse, but,  
17 for example, if you wanted to wire me some money?

18 A. Correct.

19 Q. So any time money is wired out of a brokerage  
20 account to a third party, a letter of authorization is  
21 required?

22 A. Correct.

23 Q. You worked with Mr. Smith, I think, you've now  
24 testified for about 20 years, correct?

25 A. Correct.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**



**McQUADE - CROSS - FEATHERSTONHAUGH**

1 Q. Do you know whether or not Mr. Smith was a  
2 stockbroker?

3 A. I believe he was a stockbroker.

4 Q. Was he a registered stockbroker?

5 A. Yes.

6 Q. Did he handle the accounts for various people?

7 A. Yes.

8 Q. And did he handle other accounts than Lynn Smith's  
9 account?

10 A. Yes.

11 Q. I think we heard Mr. Malmud say he handled --  
12 David Smith handled his account, do you recall that?

13 A. Yes.

14 MR. STOELTING: Objection.

15 THE COURT: Overruled.

16 A. Yes.

17 Q. In any of those accounts, whether it was Lynn  
18 Smith or Jim Featherstonhaugh or Mr. Malmud, if transfers  
19 were going to be made to a third party, you were required to  
20 have an executed letter of authorization; correct?

21 A. Correct.

22 Q. And I think you said the reason for that is to  
23 make sure that the owner of the account knows where the  
24 money is going, correct?

25 A. Correct.

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 Q. You also discussed with Mr. Stoelting the form of  
2 these letters of authorization. So I wonder if you could go  
3 back to the first one you discussed, which does not, at  
4 least in my copy, seem to be dated, but is the very last  
5 page of the exhibit.

6 A. Okay.

7 Q. Do you see that one? It's the one that -- 2200  
8 shares of Charter One Financial?

9 A. Yes.

10 Q. All right. Now, this talks about journaling 2200  
11 shares from one account to another account. Can you explain  
12 what that means?

13 A. Yes. The journaling means basically between  
14 brokerage accounts, journaling money or stock, you would  
15 journal it or transfer it from one account to another  
16 account.

17 Q. So in this case you're not sending a check for a  
18 wire, you're actually transferring the underlying security  
19 from one account to another?

20 A. Correct.

21 Q. All right. Is there anything -- any other kind of  
22 transactions for which letters of authorization are  
23 required?

24 A. Account transfers require transfer forms which  
25 need signatures for a client. Yes.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 Q. I notice that -- and this one page of the exhibit,  
2 you and I are looking at, that the journal transfer seems to  
3 be counter signed, or at least it has two signatures on it,  
4 is that right?

5 A. That's correct.

6 Q. Can you explain what that second signature is?

7 A. At this time, I believe we were clearing through  
8 Bear Stearns Security Corp., and they required an approval  
9 of a principal on any types of journals or wire, that type  
10 of thing. So this was an approval signed by Timothy McGinn.

11 Q. All right. So at least in 2000, it required a  
12 principal of the firm and a letter of authorization executed  
13 by the account owner?

14 A. That was what our broker dealer required -- or  
15 clearing firm, Bear Stearns, required, yes.

16 Q. And in that same time frame, if you can just turn  
17 that page over, so a couple of weeks later, we are not  
18 making a journal entry, but you were wiring funds. Do you  
19 see that? It's dated 1/21/00.

20 A. Yes. \$100,000?

21 Q. Right.

22 A. Yes.

23 Q. Now, this letter -- and this is -- you had some  
24 discussion about this. I'm not sure I fully understood it.  
25 This letter has not only an account number that's been

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 added, but, as you said, it has in some large type, bold  
2 print instructions as wiring instructions, correct?

3 A. Correct.

4 Q. And I thought you said that you didn't recall this  
5 form of letter of authorization.

6 A. That's correct.

7 Q. All right. So as you look at this today, you do  
8 not remember having any of these letters --

9 A. Oh, they look familiar, but it's not -- I'm sorry,  
10 I interrupted you, sir.

11 Q. No, that's okay. You go ahead.

12 A. It's not what I had in my desk.

13 Q. All right. That would also be true then of the  
14 1/27/00 letter next to it?

15 A. Correct.

16 Q. And if we leap back, we go -- well, maybe I could  
17 ask you to go, going chronologically through the exhibit  
18 backwards, identify for me by date the first one which  
19 comports with your recollection of what you had.

20 A. The first one, May 21, 2001, looks familiar.

21 Q. Okay.

22 A. That's the idea of what I'm talking about.

23 Q. And I guess your testimony is that this would  
24 be -- this form would be the form of the letter you said you  
25 had in your desk that had been pre-authorized by Lynn Smith?

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 A. Correct. Similar. Not exact, but very similar.

2 Q. Do you know if Mr. Smith was, in fact, the broker  
3 on Lynn Smith's account?

4 A. Yes, I did know.

5 Q. Do you know if he had any conversations with  
6 Mrs. Smith about the letters of authorization prior to her  
7 signing them?

8 A. I do not.

9 Q. I notice that you continued to require the two  
10 signatures for quite some time, certainly back at that date  
11 you have told me, the May date of '01. Do you ever recall  
12 having letters of authorization in your desk that had been  
13 signed by both the principal and Lynn Smith?

14 A. I do not recall that.

15 Q. If you'll take a look at ... it's not dated here.  
16 Yes, it is. March 5th, '03. There seems to be a change in  
17 format at that time. Do you see it? This is a \$6,000 wire.

18 A. Yes.

19 Q. And a lot of the ones before that have, as you  
20 said, a principal of the firm, either you or Mr. McGinn or  
21 Mr. Smith. This one has payment approval of Patty Sicluna?

22 A. Correct.

23 Q. Do you see that?

24 A. I do.

25 Q. Can you tell me what her role in the approval --

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 in fact, the one before that also has hers -- in the  
2 approval process would have been?

3 A. Well, I'm not exactly sure. I believe at this  
4 time maybe she was -- received approval from Bear Stearns in  
5 order to approve these wires. But I'm not exactly sure.

6 Q. But she, apparently, played some role --

7 A. Yes.

8 Q. -- in the process. And if you look at the date  
9 immediately before that, April 14<sup>th</sup>, 2003. Do you see  
10 that one?

11 A. Yes.

12 Q. And can you tell me what that was a letter of  
13 authorization to do?

14 A. It was to journal \$3,000 from Lynn's individual  
15 account to her -- I'm sorry, Mrs. Smith's individual account  
16 to her IRA account and \$3,000 to Mr. Smith's IRA account as  
17 2003 contributions.

18 Q. Okay. Can you tell me -- that's my question --  
19 whose account this money was coming from? We see where it  
20 was going to.

21 A. Yes. It was coming from Mrs. Smith's account, her  
22 own individual account, to her IRA account and Mr. Smith's  
23 IRA account.

24 Q. IRA account. Now, in my exhibit, I have all the  
25 way to February 13th of 2006 before I see a letter of

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 authorization with just one signature on it. Did anything  
2 happen that changed the firm's procedure at that time that  
3 you recall?

4 A. Yes. The -- our clearing firm changed from Bear  
5 Stearns Securities Corporation to National Financial  
6 Services. And national Financial Services did not require a  
7 payment approval signature. Just the client's signature.

8 Q. I would like you to look at a letter of  
9 authorization, I think you testified about it, dated  
10 November 29, 2007.

11 A. Okay.

12 Q. And I would ask you if you know, if you know, what  
13 this -- the purpose of this transaction.

14 A. I don't know the purpose, other than the 75,000  
15 was to go to McGinn, Smith Funding.

16 Q. Do you know whether that was a bridge loan being  
17 made to McGinn, Smith Funding LLC?

18 A. I do not.

19 Q. When you get to August of 2008, there was a letter  
20 of authorization that is unsigned and has a notation on it,  
21 please attach to signed copy and file. Thanks, John...  
22 Maybe.

23 A. Yes, I see that.

24 Q. Can you tell me what that is?

25 A. I'm not exactly sure.

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 Q. Do you know who John is?

2 A. Yes.

3 Q. Could you tell us, please, who he is?

4 A. John McCarthy (phonetic) was -- became my  
5 operations assistant I believe in 2002. I think he's asking  
6 me to put this blank copy with the signed one.

7 Q. Have you seen a signed one?

8 A. For this particular wire? I don't know. I mean  
9 that was two years ago.

10 Q. I would like you to take a look at a letter of  
11 authorization, the one immediately before that, dated  
12 December 8, 2008.

13 A. Okay.

14 Q. Do you recognize that letter of authorization?

15 A. This particular one? No, not off the top of my  
16 head. No.

17 Q. Well, I note that it's a little different from  
18 some of the others. Can you read that first sentence of it?

19 A. Sure. Please accept this letter as authorization  
20 to wire \$554,437 from my account MSA 040916 to subscribe for  
21 754,996 Pine Street Capital Partners LLC II, and then the  
22 wire instructions.

23 Q. And is there a footnote on that letter?

24 A. Yes. Footnote is subscription includes 200,559 of  
25 future calls.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**



**McQUADE - CROSS - FEATHERSTONHAUGH**

1 Q. Now, are you familiar with Pine Street Capital  
2 Partners LLC?

3 A. Not -- well, no.

4 Q. Did you do any or provide any bookkeeping or  
5 bookkeeping services for them or --

6 A. No.

7 Q. -- anything else?

8 A. No.

9 Q. But you would agree that this was a letter of  
10 authorization -- a specific letter of authorization to wire  
11 money for a specific purpose?

12 A. Yes.

13 THE COURT: Is this a good point,  
14 Mr. Featherstonhaugh, to take a break?

15 MR. FEATHERSTONHAUGH: This would be fine,  
16 your Honor.

17 THE COURT: All right. We'll take our  
18 evening recess at this time. We'll reconvene at 9:15  
19 tomorrow. Is there anything we need to address before we  
20 break for the evening? Mr. Stoelting?

21 MR. STOELTING: No, your Honor.

22 THE COURT: Mr. Featherstonhaugh?

23 MR. FEATHERSTONHAUGH: Nothing, your Honor.

24 THE COURT: Miss Dunn?

25 MISS DUNN: No, your Honor.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 THE COURT: Mr. Koenig?

2 MR. KOENIG: Just one thing on the scheduling  
3 tomorrow, so the Court is aware, I will be here in the  
4 morning but my colleague Emily Feyrer who is admitted to the  
5 Northern District may fill in for me if I have to step out  
6 for a few hours for a previous engagement with one of my  
7 children. I figured no one would mind if I run out of here.  
8 Good night, Judge.

9 THE COURT: All right. Thank you. See you  
10 in the morning.

11 THE CLERK: Court stands in recess.

12 (Court adjourned at 5:10 PM.)

13 \* \* \* \* \*

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**McQUADE - CROSS - FEATHERSTONHAUGH****C E R T I F I C A T I O N**

I, BONNIE J. BUCKLEY, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

---

BONNIE J. BUCKLEY, RPR, CRR

US Court Reporter - NDNY

DATED: JUNE 17, 2010

**BONNIE J. BUCKLEY, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY**

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF NEW YORK

3 -----  
SECURITIES AND EXCHANGE COMMISSION

4 Plaintiff,

5 -versus-

10-CV-457

6 MCGINN, SMITH & CO., INC.,  
7 MCGINN, SMITH ADVISORS, LLC,  
8 MCGINN, SMITH CAPITAL HOLDINGS CORP.,  
9 FIRST ADVISORY INCOME NOTES, LLC,  
10 FIRST EXCELSIOR INCOME NOTES, LLC,  
11 FIRST INDEPENDENT INCOME NOTES, LLC,  
12 THIRD ALBANY INCOME NOTES, LLC,  
13 TIMOTHY M. MCGINN and DAVID L. SMITH,  
14 Defendants,  
15 and LYNN A. SMITH,  
16 Relief Defendant.  
17 -----

18 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd)

19 held in and for the United States District Court,

20 Northern District of New York, James T. Foley United

21 States Courthouse, 445 Broadway, Albany, New York,

22 on THURSDAY, JULY 10, 2010, the HON. DAVID R. HOMER,

23 United States District Court Magistrate Judge, Presiding.  
24

25 **APPEARANCES:**

**FOR THE PLAINTIFF:**

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

**BONNIE J. BUCKLEY, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY**

1 **APPEARANCES (continued):**

2  
3 FOR THE RELIEF DEFENDANT LYNN A. SMITH:

4 FEATHERSTONHAUGH & WILEY LAW FIRM

5 BY: JAMES D. FEATHERSTONHAUGH, ESQ.

6  
7 FOR THE TRUSTEE DAVID M. WOJESKI:

8 THE DUNN LAW FIRM

9 BY: JILL A. DUNN, ESQ.

10  
11 FOR THE DEFENDANTS TIMOTHY MCGINN AND DAVID SMITH:

12 GREENBERG, TRAURIG LAW FIRM

13 BY: MICHAEL L. KOENIG, ESQ.

14  
15 ALSO PRESENT:

16 LYNN A. SMITH, Relief Defendant

17 DAVID M. WOJESKI, TRUSTEE

18 RYAN SMITH

**WITNESS INDEX**

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**McQUADE - CROSS - FEATHERSTONHAUGH**

1 (Court commenced at 9:15 AM.)

2 THE COURT: Good morning. Is Mr. McQuade  
3 present?

4 MR. STOELTING: He is, your Honor. I'll  
5 retrieve him.

6 THE COURT: Is there any other matters to  
7 address before he takes the stand?

8 All right. Thank you.

9 THE COURT: Good morning, Mr. McQuade.

10 THE WITNESS: Good morning, your Honor.

11 THE COURT: I remind you that you are still  
12 under oath.

13 THE WITNESS: All right. Thank you.

14 THE COURT: Mr. Featherstonhaugh.

15 MR. FEATHERSTONHAUGH: Thank you, your Honor.

16 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH (cont'd):**

17 Q. Good morning, Mr. McQuade.

18 A. Good morning, sir.

19 Q. You may recall when we left off yesterday we were  
20 looking at some of the exhibits that you had reviewed with  
21 Mr. Stoelting, and I wonder if I could get you to take a  
22 look at Exhibit 81. It's a multi-page exhibit. Just look  
23 at the first page.

24 A. Okay.

25 Q. Which appears to be an e-mail from you, correct?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 A. Correct.

2 Q. And this is -- can you tell me what this e-mail  
3 is?

4 A. Yes. Tim had -- I believe he called me, I'm not  
5 exactly sure, and asked me for the wire instructions to  
6 Lynn's brokerage account.

7 Q. That would be Tim McGinn?

8 A. I'm sorry, yes, Tim McGinn.

9 Q. And this e-mail is simply you forwarding him those  
10 instructions?

11 A. Correct.

12 Q. Do you know what -- for what purpose Mr. McGinn  
13 wanted the wire information --

14 A. No.

15 Q. -- to Lynn Smith's account? Do you know if he  
16 used that to wire funds to the account?

17 A. I don't.

18 Q. Can you turn the page to -- well, just turn the  
19 page, one page.

20 A. Okay.

21 Q. And this is an e-mail from Patty Sicluna to you?

22 A. Correct.

23 Q. Can you tell us, describe to us what that is  
24 asking you to do?

25 A. Yes. I had a request from David Smith to process



**McQUADE - CROSS - FEATHERSTONHAUGH**

1 this wire, which was the second part of the e-mail, and what  
2 I'm asking Patty in the first e-mail is that when I enter  
3 the wire in the system, I need an approval from somebody  
4 else in the office to -- in order for the wire to be sent  
5 out. So I sent her an e-mail asking her to approve the  
6 wire, and she sent it back to me saying that the wire  
7 approval was done.

8 Q. And so in 2009, it still required two approvals in  
9 order to wire --

10 A. Yes. And then there's also an approval for -- at  
11 the brokerage -- I'm sorry. The clearing firm, National  
12 Financial, had to approve it also.

13 Q. So it required three approvals for the wire to be  
14 sent?

15 A. Right.

16 Q. And then, just going back to what you and I spoke  
17 about yesterday, at 126, just so I'm clear, you may recall  
18 from 2000 up to 2006, I believe the letter of authorization  
19 actually had two signatures on them?

20 A. Yes.

21 Q. I take it after that, you indicated to us that  
22 clearing had gone to Bear Stearns and two signatures were no  
23 longer required?

24 A. It left Bear Stearns and went to National  
25 Financial Services.

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 Q. I'm sorry. Went to NFS. And so two signatures  
2 were no longer required?

3 A. Correct.

4 Q. But are you telling me now that two approvals were  
5 still required?

6 A. Yes. The approval, it's an electronical approval.

7 Q. And since we're talking about Exhibit 126, I  
8 wonder if you could flip back there for me and actually take  
9 a look at the first page of that.

10 A. Okay.

11 Q. And can you tell us what that is?

12 A. It's a letter of authorization to wire \$15,000  
13 from Lynn Smith's account to David L. Smith's account at  
14 M & T Bank.

15 Q. And that's executed by Lynn Smith?

16 A. Yes.

17 Q. And if you go back to the Exhibit 81 that we were  
18 just looking at, is that the letter of authorization from  
19 Lynn Smith authorizing that transaction?

20 A. It looks to be, yes.

21 Q. Okay. So, you weren't just wiring money because  
22 you got an e-mail request; you still required the letters of  
23 authorization and the other approvals?

24 A. Yes.

25 Q. Mr. McQuade, do you know a McGinn, Smith investor

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 named Malmud?

2 A. I know the name.

3 Q. The name?

4 A. Yes.

5 Q. And can you tell me -- well, let me ask you a  
6 general question first. In terms of private placements, if  
7 someone wants to cash in or liquidate those investments, is  
8 anything special required?

9 A. Not exactly sure. It wasn't part of my job.

10 Q. Well, do you, do you recall being directed in 2007  
11 to send Mr. Malmud some redemption forms?

12 A. I don't recall that.

13 Q. Did you ever send redemption forms to any of the  
14 investors?

15 A. Most likely, yes.

16 Q. Can you tell me what a redemption form is?

17 A. I believe it's another form of letter of  
18 authorization to redeem their private placement investment.

19 Q. And can you redeem a private placement investment  
20 without the redemption letter being returned executed?

21 A. Not that I'm aware of.

22 Q. You performed the same functions you've testified  
23 about on Lynn Smith's account for hundreds of investors,  
24 isn't that true?

25 A. That's correct.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**McQUADE - CROSS - FEATHERSTONHAUGH**

1 Q. And you've indicated you did it over 20 years, 18  
2 years?

3 A. Give or take, yes.

4 Q. Would it be fair to say it was actually thousands  
5 of investors?

6 A. I suppose. Yes.

7 Q. In that time, how many letters of authorization  
8 did you receive, if you would estimate for us?

9 A. I would have to say probably a hundred to a  
10 hundred fifty a year.

11 Q. Okay. And did you -- now, you've indicated that  
12 you -- you didn't meet with Mrs. Smith when she brought in  
13 the letters of authorization?

14 A. I did not.

15 Q. Did you meet with the other investors?

16 A. I did not.

17 Q. Were those letters of authorization routinely  
18 forwarded to you by the brokers?

19 A. Occasionally. Or via mail from the client.

20 Q. Okay. So you would get them by mail, you would  
21 get them by other brokers?

22 A. Correct.

23 Q. Are those the two ways you would generally get  
24 them?

25 A. Yes.

**McQUADE - CROSS - DUNN**

1 Q. And in connection with those, would you normally  
2 speak to the brokers?

3 A. Yes.

4 Q. Now, you mentioned at least once that you were  
5 looking at -- and this was in 126, Exhibit 126, that you  
6 were looking at a signature that you thought was not  
7 Mrs. Smith's, is that correct?

8 A. That's correct.

9 Q. I take it that you don't have any handwriting  
10 forensics background? Or maybe you do.

11 A. I do not.

12 Q. So it's, it's just your opinion that that's not  
13 her signature?

14 A. That's correct.

15 Q. Do you know if Mrs. Smith has any medical  
16 condition that makes her signature vary from time to time?

17 A. I do not know of any.

18 MR. FEATHERSTONHAUGH: I have no further  
19 questions.

20 THE WITNESS: Thank you.

21 THE COURT: Miss Dunn.

22 MISS DUNN: Thank you, your Honor.

23 **CROSS-EXAMINATION BY MS. DUNN:**

24 Q. Good morning, Mr. McQuade.

25 A. Good morning.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**McQUADE - CROSS - DUNN**

1 Q. My name is Jill Dunn. I'm the attorney for the  
2 David and Lynn Smith irrevocable trust.

3 A. Okay.

4 Q. Its trustee Mr. Wojeski. You testified yesterday  
5 concerning some -- I'm not sure of the words exactly you  
6 used, but some letters of authorization that you would  
7 maintain with Lynn Smith's signature.

8 A. Correct.

9 Q. Is that correct? And you also testified that you  
10 had several conversations with Mr. Urbelis, who had served  
11 as trustee of this trust for several years, is that correct?

12 A. That's correct.

13 Q. Can you tell me the nature of any of those  
14 conversations, if you recall?

15 A. I think it was more in order to get paperwork  
16 signed Mr. Smith had asked me to contact him to get some  
17 paperwork signed. I don't recall what they were at the  
18 time.

19 Q. Okay. And was there ever an occasion where you  
20 maintained a stack of presigned letters of authorization  
21 from Mr. Urbelis?

22 A. No.

23 Q. Not on any occasion?

24 A. No.

25 Q. Okay. And you also testified yesterday that David

**McQUADE - CROSS - DUNN**

1 Smith very rarely gave you instructions about the trust  
2 account. Do you remember that testimony?

3 A. Correct. Yes.

4 Q. And is that correct?

5 A. I believe so, yes.

6 Q. Okay. And in Plaintiff's Exhibit 126, if you  
7 could turn to about the tenth page, the back side of that  
8 tenth page, there's a letter of authorization dated  
9 August 31, 2004.

10 A. Yes.

11 Q. And do you recognize that letter of authorization?

12 A. It looks familiar but ... it's not, you know ...

13 Q. So you don't recall receiving it?

14 A. No.

15 Q. Okay. Based on your testimony concerning these  
16 different forms of letters of authorization, in particular  
17 the ones which you say Lynn Smith had presigned, does this  
18 appear to be a letter of authorization that had been  
19 presigned and sitting in your desk drawer?

20 A. No, it does not.

21 MISS DUNN: Thank you. I have no further  
22 questions, your Honor.

23 THE COURT: Any redirect?

24 MR. STOELTING: Yes, very briefly, your  
25 Honor.

**McQUADE - REDIRECT - STOELTING****McQUADE - RECROSS - DUNN****REDIRECT EXAMINATION BY MR. STOELTING:**

Q. You mentioned in response to a question from Mr. Featherstonhaugh that you performed the same function for Lynn Smith's account as you did for hundreds or thousands of other investors?

A. Yes.

Q. Okay. For any of those hundreds or thousands of other investors, did you keep a stack of signed but otherwise blank authorizations in your desk?

A. No.

Q. And was David Smith the only person that ever gave you instructions regarding the trust account?

A. As far as I can remember, yes.

Q. Thank you.

THE COURT: Any recross, Mr. Featherstonhaugh?

MR. FEATHERSTONHAUGH: Nothing, your Honor.

THE COURT: Miss Dunn?

**RECROSS-EXAMINATION BY MS. DUNN:**

Q. Mr. McQuade, didn't you just testify that Mr. Urbelis would contact you from time to time concerning documentation for the trust?

A. David Smith had asked me to contact him regarding paperwork.

Q. And did Mr. Urbelis sign the paperwork that gave



**McQUADE - REDIRECT - STOELTING****McQUADE - RECROSS - DUNN**

1 you instructions with regard to the trust account?

2 A. Yes.

3 Q. Thank you.

4 THE COURT: All right. Mr. McQuade, on these  
5 forms that you testified were signed and blank, what  
6 information remained to be completed on those forms?

7 THE WITNESS: Basically the language that  
8 this letter is authorization to wire blank amount of money  
9 from account number blah blah blah blah, to the following  
10 wire instructions or.

11 THE COURT: So the amount of money --

12 THE WITNESS: Was blank.

13 THE COURT: -- the account from which it  
14 would be taken, the account to which it was going?

15 THE WITNESS: The account to which it was  
16 going was also blank.

17 THE COURT: Okay. And the -- you said, I  
18 believe, that you would receive a stack of 10 to 15 signed  
19 blank letters of authorization from time to time from David  
20 Smith, is that correct?

21 THE WITNESS: That's correct.

22 THE COURT: How often would they be  
23 replenished?

24 THE WITNESS: I mean maybe about once a year.  
25 Give or take. I'm not exactly sure. Maybe six months to a

**McQUADE - REDIRECT - STOELTING****McQUADE - RECROSS - DUNN**

1 year.

2 THE COURT: All right. Thank you.

3 THE WITNESS: Your welcome.

4 THE COURT: You may step down.

5 THE WITNESS: Thank you.

6 (Witness David McQuade excused.)

7 THE COURT: Call your next witness please.

8 MR. McGRATH: The Commission calls Timothy

9 Welles.

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**WELLES - DIRECT - McGRATH**

1 **TIMOTHY R. WELLES,**

2 having been duly sworn by the Clerk of the Court, was  
3 examined and testified as follows:

4 THE CLERK: This is Timothy R. Welles,  
5 W-E-L-L-E-S.

6 **DIRECT EXAMINATION BY MR. McGRATH:**

7 Q. Good morning, Mr. Welles.

8 A. Good morning.

9 Q. Where are you currently employed?

10 A. At Pine Street Capital Management.

11 Q. And where is Pine Street Capital Management  
12 located?

13 A. At 99 Pine Street in Albany, New York.

14 Q. What is your position at Pine Street Capital  
15 Management?

16 A. I'm managing director.

17 Q. And how long have you held that position?

18 A. Since early REDACTED.

19 Q. When was Pine Street Capital Management formed?

20 A. Well, the entity was formed in late REDACTED for the  
21 purpose of managing Pine Street Capital Partners LP.

22 Q. All right. Are there two entities in addition to  
23 Pine Street Capital Management LLC known as Pine Street  
24 Capital Partners LLC and Pine Street Capital Partners LP?

25 A. Correct.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**WELLES - DIRECT - McGRATH**

1 Q. Would you explain what the purpose of Pine Street  
2 Capital Partners LLC is?

3 A. Yes. That's the general partner of Pine Street  
4 Capital Partners LP.

5 Q. And what is the purpose of Pine Street Capital  
6 Partners LP?

7 A. It is an investment fund.

8 Q. And what is the general purpose of that investment  
9 fund?

10 A. Broadly speaking, we make direct investments in  
11 established private companies, primarily in the form of  
12 subordinated debt.

13 Q. Do you have a position with respect to Pine Street  
14 Capital Partners LLC and Pine Street Capital Partners LP?

15 A. I am also an investor in Pine Street Capital  
16 Partners LP and I am a member of Pine Street Capital  
17 Partners LLC.

18 Q. All right. So Pine Street Capital Partners LLC is  
19 the general partner?

20 A. Correct.

21 Q. So if I ask you any questions about the general  
22 partner, you'll understand that's the entity I'm referring  
23 to?

24 A. Yes.

25 Q. And Pine Street Capital Partners LP is the fund?

**WELLES - DIRECT - McGRATH**

1 A. Correct.

2 Q. And then there's the Pine Street Capital  
3 Management LLC?

4 A. Correct.

5 Q. What is the purpose of the management LLC with  
6 respect to the fund and the general partner?

7 A. The management LLC is the manager of the fund.

8 Q. What, if any, ownership interest do you have in  
9 these three entities?

10 A. I have my percentage of ownership in the fund on  
11 the basis of my investment amount, the same as any investor  
12 does. I have a percentage interest as a member in the  
13 general partner. And I have a percentage ownership interest  
14 in the management company.

15 Q. All right. With respect to the general  
16 partnership, what is your ownership interest?

17 A. Eighteen percent.

18 Q. Are there other partners that you know of?

19 A. There are.

20 Q. Who are the other partners?

21 A. David Smith, Tony Schmitz, and Michael Lasch.

22 Q. What is David Smith's ownership interest in the  
23 general partner?

24 A. Forty-six percent.

25 Q. What is Tony Schmitz'?

**WELLES - DIRECT - McGRATH**

1 A. Eighteen percent.

2 Q. And the last, Michael Lasch?

3 A. Eighteen percent.

4 Q. And with respect to the management entity, what is  
5 your ownership interest?

6 A. Twenty-eight percent.

7 Q. What is David Smith's?

8 A. Twenty-eight percent.

9 Q. And the other two partners?

10 A. Tony Schmitz is 28 percent, and Michael Lasch is  
11 14 percent I believe.

12 Q. Are all three of the Pine Street entities located  
13 at 99 Pine Street?

14 A. Yes.

15 Q. And other than the four partners that you've just  
16 referred to, are there any other employees of any of these  
17 three entities?

18 A. We have an employee at Pine Street Capital  
19 Management located in Boston.

20 Q. Okay. And do you require the assistance of other  
21 individuals to run the management fund or the general  
22 partner or the fund itself?

23 A. Yes, we do.

24 Q. What type of services do you require?

25 A. Bookkeeping, primarily, and some administration.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**WELLES - DIRECT - McGRATH**

1 Q. And who performs the bookkeeping on behalf of  
2 these entities?

3 A. McGinn, Smith & Company.

4 Q. Is that a compensated role?

5 A. Yes. It has been.

6 Q. In what way?

7 A. We paid an annual service charge.

8 Q. What's the amount of that service charge?

9 A. It was approximately \$30,000 a year.

10 Q. When you say it was, did that stop at some point  
11 in time?

12 A. It did, it stopped a couple of years ago.

13 Q. Why was that?

14 A. It was felt that we were really, you know, had,  
15 had -- it wasn't a formal arrangement, so it was decided  
16 that it wasn't really necessary anymore.

17 Q. So the services that had been performed by McGinn,  
18 Smith employees on behalf of the three Pine Street entities  
19 have been provided free of charge since that time?

20 A. Correct.

21 Q. Now, what generally are your responsibilities with  
22 respect to each of the three entities? I'll take out the  
23 fund where you're just an investor, correct?

24 A. Okay. We're responsible for identifying  
25 transaction opportunities, investment opportunities,

**WELLES - DIRECT - McGRATH**

1 reviewing those opportunities, performing due diligence on  
2 them, determining whether or not it's an investment that we  
3 want to make on behalf of the fund. And, ultimately,  
4 assuming that we make an investment, we monitor the  
5 investment, we attend board meetings and review financial  
6 statements and make sure that things are going as expected.

7 Q. And how was it determined that David Smith would  
8 have a 46 percent interest in these Pine Street entities?

9 A. Well, his interest is in the general partner,  
10 which is where our carried interest resides. And he was  
11 primarily responsible for the fundraising for the fund.

12 Q. Okay. When did the primary fundraising take place  
13 with respect to the fund? What period of time?

14 A. Late 2004 through the end of 2005.

15 Q. And approximately how much money was raised?

16 A. We received total commitments for just a little  
17 less than 27 million.

18 Q. And what percentage of that raised was David Smith  
19 responsible for?

20 A. I would say probably three quarters.

21 Q. How much does the fund currently have under  
22 management?

23 A. We currently have employed capital of about  
24 \$8.4 million, \$8.5 million dollars, and we have about three  
25 and a half million dollars in the bank.



**WELLES - DIRECT - McGRATH**

1 Q. What happened to the rest of the money?

2 A. It was returned to investors.

3 Q. Now, are you familiar with Mrs. Lynn Smith?

4 A. I am.

5 Q. To your knowledge, is she currently an investor in  
6 any -- in the Pine Street Capital Fund?

7 A. She is.

8 Q. Do you know when she first became an investor in  
9 the fund?

10 A. Late 2008.

11 Q. And do you know the circumstances in which she  
12 first became an investor?

13 A. In general, yes.

14 Q. Can you describe in general what your  
15 understanding of those circumstances were?

16 A. She acquired her interest in a secondary  
17 transaction with another investor.

18 Q. And do you know who that other investor was?

19 A. I believe it was the Joan Fischer (phonetic)  
20 Trust -- and an entity called One City Center.

21 Q. Do you know the circumstances in which Miss Smith  
22 obtained that interest from either the Joan Fischer  
23 (phonetic) Trust or the First Century (sic) entity?

24 A. Not specifically, no.

25 Q. How did you become to know about her acquisition

**WELLES - DIRECT - McGRATH**

1 of that interest?

2 A. I was informed of it by David Smith.

3 Q. Okay. Did you ever have any direct discussions  
4 with Lynn Smith about her acquisition of that interest?

5 A. I did not.

6 Q. To your knowledge, did she subsequently acquire  
7 another percentage interest in the Pine Street Capital Fund?

8 A. Yes.

9 Q. When was that?

10 A. 2009.

11 Q. What is your understanding, if any, as to the  
12 circumstances in which she acquired that second interest?

13 A. I don't know the circumstances.

14 Q. Okay. Did you have any discussions with  
15 Mrs. Smith regarding her acquisition of that second  
16 interest?

17 A. I did not.

18 Q. Did you have any discussions with David Smith  
19 about that?

20 A. Other than being informed of it, no.

21 Q. How were you informed of it?

22 A. He came and talked to me about the fact that it  
23 was occurring.

24 Q. And what, if anything, did he tell you, if you  
25 recall?

**WELLES - DIRECT - McGRATH**

1 A. That was essentially it.

2 Q. Okay. To your knowledge, have any of your other  
3 partners ever had any direct discussions with Lynn Smith  
4 regarding her ownership interest in the fund?

5 A. I don't know.

6 Q. Are you familiar with an entity called the David  
7 Smith and Lynn Smith irrevocable trust?

8 A. I am.

9 Q. Is that trust an investor in the Pine Street Fund?

10 A. It is.

11 Q. When did it first invest in the fund?

12 A. At the time of our initial closing in January of  
13 2005.

14 Q. Do you recall how much that investment was?

15 A. The total commitment was for one million dollars.

16 Q. And do you recall the circumstances under which  
17 that investment was made?

18 A. I do.

19 Q. What were the circumstances?

20 A. David Smith told me that the fund wanted to make a  
21 commitment.

22 Q. Okay. Did you at that time know who the trustee  
23 of the irrevocable trust was?

24 A. I did not.

25 Q. Okay. Did you subsequently learn who the trustee

**WELLES - DIRECT - McGRATH**

1 was?

2 A. Yes.

3 Q. When was that?

4 A. When we first started producing documentation.

5 Q. Okay. And do you recall his name?

6 A. Thomas Urbelis.

7 Q. Now, did the trust acquire any additional interest  
8 in the fund after the initial investment?

9 A. It did not.

10 Q. Does it still have an investment in the fund?

11 A. It does.

12 Q. Is it the same percentage investment?

13 A. Yes.

14 Q. Between the time of the first investment and  
15 today, did you ever have any direct discussions with Thomas  
16 Urbelis regarding the trust's investments in the fund?

17 A. I did not.

18 Q. Or the circumstances that led to that investment?

19 A. No.

20 Q. To your knowledge, did any of your partners aside  
21 from Mr. Smith have any discussions with Thomas Urbelis  
22 regarding the trust investment in the fund?

23 A. To my knowledge, no.

24 Q. Did you ever have any discussions with Mr. Urbelis  
25 regarding investments in the fund?

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**UNITED STATES COURT REPORTER - NDNY**

**WELLES - DIRECT - McGRATH**

1           A.    Yes.  Mr. Urbelis had been an investor in Pine  
2 Street, in the Pine Street Fund.

3           Q.    When did he acquire his individual investment in  
4 the fund?

5           A.    At the time of the first close I believe.

6           Q.    All right.  So you've had discussions with him  
7 regarding his personal investments in the fund but not  
8 regarding the trust investments in the funds, is that  
9 correct?

10          A.    Yes.

11                   MISS DUNN:  Objection to the form of the  
12 question.

13                   THE COURT:  Overruled.

14 BY MR. McGRATH:

15          Q.    Are you familiar with entities called First  
16 Advisory Income and Third Albany Income?

17          A.    Yes.

18          Q.    And are they investors in the fund?

19          A.    They are.

20          Q.    Is there any other McGinn, Smith related funds  
21 that are investors, to your knowledge?

22          A.    No.

23          Q.    Do you know the circumstances under which those  
24 two entities became investors in the fund?

25          A.    Yes.

**WELLES - CROSS - FEATHERSTONHAUGH**

1 Q. What were the circumstances?

2 A. David Smith indicated that he would like to have  
3 those funds invested in Pine Street.

4 Q. When was that?

5 A. In 2005.

6 Q. Are they still invested in the fund?

7 A. They are.

8 MR. McGRATH: No further questions. Thank  
9 you.

10 THE COURT: Mr. Featherstonhaugh?

11 MR. FEATHERSTONHAUGH: Thank you, Judge.

12 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

13 Q. Good morning, Mr. Welles.

14 A. Good morning.

15 Q. Can you tell us all a little bit about your  
16 background before Pine Street Capital Partners, your  
17 education, where you were employed?

18 A. I went to the University at Albany and graduated  
19 in 1981. I went to Albany Law School and graduated in 1984.  
20 I --

21 Q. Can I just interrupt you there for a second? Are  
22 you a member of the New York State Bar?

23 A. Retired, yes.

24 Q. Retired. All right. Hope to join you one day.  
25 Go ahead.

**WELLES - CROSS - FEATHERSTONHAUGH**

1           A.    I started my career practicing law at Cahill  
2 Gordon & Reindel in New York City. I went into investment  
3 banking at First Albany and --

4           Q.    When did you make the switch from law to  
5 investment banking?

6           A.    REDACTED And I was in investment banking for First  
7 Albany at a firm called Advest in Hartford.

8           Q.    What kinds of things did that firm do?

9           A.    We assisted companies with a variety of  
10 transactions, capital raising, including public offerings,  
11 private placements, mergers and acquisitions, transactions,  
12 some more general financial advisory kinds of roles.

13          Q.    When you were practicing law at Gordon, Cahill,  
14 did you practice securities law?

15          A.    I did.

16          Q.    Okay. Go ahead.

17          A.    I then, in REDACTED became chief operating officer of  
18 a company called Colonial Data Technologies which is a  
19 publicly traded company.

20          Q.    What did that company do?

21          A.    They -- it manufactured and distributed caller ID  
22 equipment. That company was sold in late 1996. I'm sorry.  
23 Late 1995. Late REDACTED I returned to First Albany as the  
24 chief financial officer.

25          Q.    And did you --

**WELLES - CROSS - FEATHERSTONHAUGH**

1 A. I think it was REDACTED

2 Q. -- continue as the chief financial officer at  
3 First Albany until when?

4 A. Until REDACTED

5 Q. And during those four or five years, can you  
6 describe to us generally the nature of the business that  
7 First Albany was engaged in?

8 A. First Albany is an investment banking and  
9 brokerage firm doing both brokerage and, you know, financial  
10 advisory investment banking services, and had a trading  
11 operation as well.

12 Q. All right. When you left First Albany?

13 A. I, I assisted a friend and colleague as the chief  
14 operating officer of a technology company that was  
15 subsequently sold, and I did some consulting work for  
16 another investment banking firm.

17 Q. What firm was that?

18 A. Stifel Nicolaus.

19 Q. And following that?

20 A. I was introduced to David Smith and we began  
21 discussing the possibility of creating an investment fund  
22 that ultimately became Pine Street Capital.

23 Q. Now, when were you first introduced to David  
24 Smith?

25 A. I believe it was early 2004.



**WELLES - CROSS - FEATHERSTONHAUGH**

1 Q. And what was the nature of that? How did that  
2 come about?

3 A. We were introduced by a mutual friend I believe.

4 Q. I'm sorry, who was?

5 A. I don't actually remember. I --

6 Q. Oh, okay. Did you and Mr. Smith hit it off.

7 A. Yeah, in general.

8 Q. Did you have any -- had you had any shared work  
9 experiences?

10 A. Sure. He was the CEO of a brokerage firm in  
11 Albany.

12 Q. Did he tell you at some point when you met him in  
13 early 2004 about a fund he was putting together?

14 A. Not that I recall.

15 Q. Did there come a time when you learned that he was  
16 putting together a fund?

17 A. Yes.

18 Q. And just tell me generally what you learned.

19 A. Essentially that. That he was putting together an  
20 investment fund with, I think, clients of McGinn, Smith.

21 Q. Did you know anything about the nature of that  
22 investment fund, what it proposed to do, how it was going to  
23 do it?

24 A. Not specifically, no.

25 Q. Did there come a time later on when you learned?

**WELLES - CROSS - FEATHERSTONHAUGH**

1 A. Only in general.

2 Q. And what did you learn in general?

3 A. Well, we had our counsel review the offering  
4 documents for that fund, the two funds that became investors  
5 in Pine Street. So in that sense, I looked at it, had  
6 counsel look at the documents.

7 Q. Which were the two funds that invested in Pine  
8 Street?

9 A. I believe it was First Advisory and Third Albany.

10 Q. And you say you had your counsel review the nature  
11 of the funds because they were going to invest in your fund?

12 A. Correct.

13 Q. Well, we'll get back to that, but now tell me  
14 about your fund. When did you conceive the idea for your  
15 fund?

16 A. I think it was June of '04 or thereabouts. Maybe  
17 a little earlier than that.

18 Q. And when did you tell Mr. Smith about it?

19 A. Actually, it was a discussion that Mr. Smith and I  
20 had.

21 Q. So the idea for the fund came about --

22 A. As a result of our discussions.

23 Q. Discussion. And at that time did -- at the time  
24 of that discussion, were you, I think you said, generally  
25 aware of his fund?

**WELLES - CROSS - FEATHERSTONHAUGH**

1 A. I don't know.

2 Q. All right. You and Mr. Smith had a discussion.  
3 Tell us, if you can, what you recall about that discussion.

4 A. We had a couple of lunches, we talked about some  
5 general opportunities. I was thinking about what I wanted  
6 to do next. And I'm actually not sure who began the  
7 discussions specifically about an investment fund, which  
8 became Pine Street.

9 Q. That discussion was in June of '04?

10 A. I think --

11 Q. Or about.

12 A. -- it was probably a little earlier than that.

13 Q. Okay. When did you have the first closing on Pine  
14 Street?

15 A. January of '05.

16 Q. So from its initial conception to the first  
17 closing was approximately a six or seven month --

18 A. Yes.

19 Q. -- process?

20 A. Yes. Maybe a little longer than that.

21 Q. What was most of that time spent doing?

22 A. Well, we created the fund organization documents,  
23 we wrote a PPM, together with our counsel.

24 Q. Who was your counsel in writing that private  
25 placement memorandum?

**WELLES - CROSS - FEATHERSTONHAUGH**

1 A. Morrison & Foerster.

2 Q. Is that the same counsel that reviewed the First  
3 Independent Income Notes PPM?

4 A. Yes.

5 Q. And did that counsel assist you in the writing of  
6 the private placement memorandum?

7 A. Yes.

8 Q. Did you participate in the writing of that?

9 A. Yes.

10 Q. And your participation was in the form of  
11 providing information?

12 A. Yes. I believe I took the lead in writing it,  
13 with assistance and review from counsel.

14 Q. And had you ever written private placement  
15 memorandums before?

16 A. Yes. I had certainly participated in the process  
17 in a variety of ways.

18 Q. During your legal career?

19 A. Yes.

20 Q. And during your investment banking career?

21 A. Yes.

22 Q. And it's ordinary and usual for lawyers,  
23 investment bankers to work together in the writing of the  
24 private placement memorandums?

25 A. Yes.

**WELLES - CROSS - FEATHERSTONHAUGH**

1 Q. All right. So you said that six or seven month  
2 period was spent creating and writing the private placement  
3 memorandum. What else did you do in that period?

4 A. Created investor presentation and met with  
5 potential investors about making a commitment to the fund.

6 Q. Okay. You mentioned the names of several people.  
7 It went by kind of quickly, so let me just ask you again.  
8 You created three entities, is that correct?

9 A. Correct.

10 Q. And the investors are investors in only one of the  
11 entities?

12 A. That's correct.

13 Q. In the entity with the investors, are the  
14 percentages of ownership in direct proportion to the amount  
15 of the investment?

16 A. Yes.

17 Q. And you mentioned that you are an investor in your  
18 own fund, correct?

19 A. Correct.

20 Q. So in addition to everything else you did, you  
21 took your own money and invested it in the fund, correct?

22 A. Correct.

23 Q. Why did you do that?

24 A. A, I believe in it. And, B, as a sign of faith as  
25 a manager of the fund, you know, we're putting our money

**WELLES - CROSS - FEATHERSTONHAUGH**

1 where our mouths are.

2 Q. You mentioned several other people who were  
3 investors, including Lynn Smith, do you recall that?

4 A. Correct.

5 Q. Is her percentage of ownership also in direct  
6 proportion to the amount of money she invested?

7 A. In her case, it's in direct proportion to her  
8 acquisition of other investor's stake. But, yes, it is on a  
9 dollar invested basis.

10 Q. Right. And you mentioned the David and Lynn Smith  
11 irrevocable trust made an investment?

12 A. Yes.

13 Q. And is their ownership interest in proportion to  
14 the amount of money they invested?

15 A. It is.

16 Q. So neither Lynn Smith nor the trust received any  
17 special treatment from your fund in terms of ownership?

18 A. That's correct.

19 Q. And is that also true of the other entities we  
20 talked about, First Independent and Third Albany.

21 A. It is.

22 Q. And, in fact, it's true of every single one of  
23 your investors?

24 A. Correct.

25 Q. And money that's been returned from the fund to

**WELLES - CROSS - FEATHERSTONHAUGH**

1 your investors, you mentioned, I believe, on direct that you  
2 have about \$11 million left, three and a half in the bank  
3 and 8 million or so invested, right?

4 A. That's right.

5 Q. Which means that you have returned to the  
6 investors \$10 million, 11?

7 A. It's a little more complicated than that.

8 Q. All right. Why don't you explain it for us. We  
9 would really like to understand this fund.

10 A. Broadly speaking, we call about 16 and a half  
11 million dollars of total capital between the partnership  
12 notes and called capital. We made nine investments. We  
13 have received our capital back plus a gain on five of those.  
14 In two of those instances, we made what's called a cashless  
15 call, which means that we took those funds and reinvested  
16 them in another portfolio company. In two occasions we made  
17 distributions of that capital in a couple of different  
18 forms. And the last investment realization we had is in the  
19 bank.

20 Q. You mentioned you made investments in nine  
21 companies?

22 A. Correct.

23 Q. And do you know what those -- who those nine  
24 companies are and what they do as you sit here?

25 A. Sure.

**WELLES - CROSS - FEATHERSTONHAUGH**

1 Q. Would you tell us what you invested in?

2 A. Well, we made investment in a company called  
3 Healthtraxs which owns and operates health club centers. We  
4 made -- which is one of our remaining portfolio companies.  
5 We made --

6 Q. Is that a public or private company?

7 A. It's a private company.

8 A. We made an investment in a technology company in  
9 New York City called Velocity Technology, which is an IT  
10 consulting and hosting company.

11 Q. Public or private?

12 A. Private.

13 Q. Were those equity investments you made?

14 A. They were subordinated debt with equity upside in  
15 the case of Velocity, not in the case of Healthtraxs.

16 Q. So the underlying investment was subordinated  
17 debt?

18 A. Correct.

19 Q. And it had some kind of an equity kicker in it?

20 A. In the case -- in the case -- of those two cases,  
21 in Velocity yes, in Healthtraxs no.

22 Q. Okay. Please go on.

23 A. Let me see. We made an investment in Dynabil,  
24 D-Y-N-A-B-I-L, which is an aircraft parts manufacturer that  
25 was sub order nature debt with warrants. We made investment



**WELLES - CROSS - FEATHERSTONHAUGH**

1 in -- let's see, what was next? Double Es industrial  
2 products company, about an hour outside of Boston. Asian  
3 Technologies Solution is a software company that's outside  
4 of Boston. We made investment in Alfred Angelo, which is an  
5 apparel company outside of Philadelphia. We made investment  
6 in a company called Fishbein in Charlton, North Carolina,  
7 it's an industrial products company. We made investment in  
8 NCT, which is a cable and telecom company in North Carolina  
9 as well.

10 Q. The -- were all those companies private companies?

11 A. Yes.

12 Q. And were all of your underlying investments some  
13 kind of debt or were there some straight equity money  
14 investments?

15 A. We made two, we made two straight equity  
16 investments in connection with also making debt investments.

17 Q. Okay. And the rest of the investments were debt?

18 A. Correct.

19 Q. And were they all subordinated debt?

20 A. Yes.

21 Q. And they all carried some kind of coupon for  
22 return?

23 A. Yes.

24 Q. And your investors who invested in you<sup>RET</sup> you  
25 indicated there was some call. Were those investors -- the

**WELLES - CROSS - FEATHERSTONHAUGH**

1 investment in Pine Street Capital, the investment section of  
2 it, were those investments debt notes or were those  
3 investments simply equity investments in Pine Street Capital  
4 Partners?

5 A. Our investors put 40 percent of their total  
6 commitment in as a partnership note. And then the remaining  
7 60 percent of investment was callable capital that was not  
8 to be called by us until we needed it.

9 Q. All right. So basically what your fund did was,  
10 at least initially, was borrow money from investors, loan  
11 money to private companies, and would it be fair to say that  
12 you made a profit on the spread between the rates at which  
13 you borrowed the money and the rates at which you loaned it?

14 A. Yes. But to be clear, that money was in the fund.

15 Q. Okay. I would like that to be clear, but it  
16 wasn't to me. So maybe you can explain it.

17 A. Each investor had the same pro rata share of notes  
18 and callable equity.

19 Q. Right.

20 A. Those investors own the fund.

21 Q. Right.

22 A. So the investment came out -- you know, the  
23 investments that we made are the property of the fund and  
24 any spread between interest costs on the partnership notes  
25 and what we got...

**WELLES - CROSS - FEATHERSTONHAUGH**

1 Q. Belong to the investors?

2 A. Correct.

3 Q. Let's go back to the formation when you were  
4 putting this together. You indicated on direct that Mr. --  
5 one of the things Mr. Smith did with you was to raise money,  
6 is that correct?

7 A. Correct.

8 Q. And I think -- well, I'll just ask you again, I  
9 apologize for that, but what percentage of the total funds  
10 raised did you say Mr. Smith was responsible for?

11 A. I think it was around 75 percent.

12 Q. Now, you testified to me a minute ago that there  
13 were a couple of reasons why you invested in the fund. I  
14 think the first one you said was I believed in it, is that  
15 right?

16 A. That's right.

17 Q. And you said I believed in it. Did you believe  
18 that the investment would be profitable?

19 A. Correct.

20 Q. And that you would get a return on your  
21 investment?

22 A. Right.

23 Q. Do you know if when Mr. Smith invested on behalf  
24 of First Independent Income Notes and Third Albany Income  
25 Notes if he expected to get a return on his money?

**WELLES - CROSS - FEATHERSTONHAUGH**

1 MR. McGRATH: Objection.

2 THE COURT: Sustained.

3 BY MR. FEATHERSTONHAUGH:

4 Q. At any time in your conversations with Mr. Smith,  
5 did Mr. Smith tell you that he was going to invest money  
6 from First Independent Income Notes and Third Albany Income  
7 Notes?

8 A. Yes, he did.

9 Q. And did he tell you that he expected it to be a  
10 successful investment?

11 MR. McGRATH: Objection. Leading.

12 THE COURT: Overruled.

13 A. Not specifically.

14 Q. Do you know of any investors who invested your  
15 fund and expected to lose money?

16 A. No.

17 Q. You did testify that when these investors wanted  
18 to invest in the fund, the two we're talking about, you had  
19 your counsel look at their private placement memorandums; is  
20 that correct?

21 A. Correct.

22 Q. And as a result of that, did you at some point  
23 learn the nature of the business that those two funds were  
24 in?

25 A. In general, yes.

**WELLES - CROSS - FEATHERSTONHAUGH**

1 Q. Can you tell me in general what the nature of  
2 their business was?

3 A. That they were investment funds looking to make  
4 investments to generate a return.

5 Q. Well, did you also look at their private placement  
6 memorandums?

7 A. Yes, I believe so.

8 Q. Can you take a look at Exhibit 1, I believe it is.  
9 It should be Volume One, Exhibit 1.

10 A. Okay.

11 Q. Do you have it there?

12 A. I do.

13 Q. Okay. Would you look at page 1?

14 A. Yes.

15 Q. Actually, it's numbered page 1. It would  
16 actually -- it would be the, it would be the fourth page in,  
17 starts with summary.

18 A. The fourth page in.

19 Q. Page is headed by the word "summary".

20 A. Yup.

21 Q. Okay. And a little ways down the page, do you see  
22 the word "business"?

23 A. Yes.

24 Q. Would you -- it's just one paragraph. Would you  
25 read that and tell me if you looked at that at the time the

**WELLES - CROSS - FEATHERSTONHAUGH**

1 fund was deciding to invest money.

2 A. Yes, I believe so.

3 Q. Okay. And can you tell me -- maybe you could just  
4 describe for all of us what that section describes.

5 A. Well, it describes what the --

6 MR. McGRATH: Objection, your Honor. The  
7 document speaks for itself.

8 THE COURT: Overruled.

9 A. It generally speaks about what this fund is  
10 entitled to invest or expects to invest.

11 Q. And the nature of the fund and the kinds of things  
12 it will do. Can you tell me the difference between this  
13 fund and your fund?

14 A. This fund is much more broadly based in terms of  
15 the kinds of things that it can invest in.

16 Q. Let me ask you if you would turn, one, two, three,  
17 four, four pages more, to page 9.

18 A. Okay.

19 Q. And with the permission of the Court, it's fairly  
20 short, I would like the witness to read the section called  
21 use of proceeds.

22 A. If all the notes are sold, we would expect to  
23 receive approximately 19.6 million of --

24 Q. Mr. Welles, we need you to speak a little slower  
25 because the reporter is recording it and we would all like

**WELLES - CROSS - FEATHERSTONHAUGH**

1 to hear it.

2 A. -- 19.6 million of net proceeds from this offering  
3 after deducting two percent placement agent commission and  
4 other offering expenses payable by us.

5 We intend to use the net proceeds to acquire  
6 various public and/or private investments, which may  
7 include, without limitation, debt securities, collateralized  
8 debt obligations, bonds, equity securities, trust  
9 preferreds, collateralized stock, convertible stock, bridge  
10 loans, leases, mortgages, equipment leases, securitized cash  
11 flow investments, and any other investments which may that  
12 may add value to our portfolio. Individually an investment  
13 and collectively the investments. Assuming we received the  
14 maximum amount of the offering, we will not invest more than  
15 25 percent of the proceeds of this offering in any single  
16 investment. All subscription proceeds will be held in an  
17 escrow account and no subscription agreement will be  
18 accepted until the minimum proceeds requirement is met for  
19 the first closing. Once we achieve the minimum amount  
20 required for the first closing, we will begin to acquire  
21 investments.

22 Q. Do you want to read that last --

23 THE COURT: I don't want you to keep going,  
24 Mr. Welles.

25 Is there some point you wish to make from

**BONNIE J. BUCKLEY, RPR, CRR**  
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**WELLES - CROSS - FEATHERSTONHAUGH**

1 that paragraph, Mr. Featherstonhaugh?

2 MR. FEATHERSTONHAUGH: There is.

3 THE COURT: Why don't you direct his  
4 attention to whatever it is you want to.

5 MR. FEATHERSTONHAUGH: I'm sorry, your Honor.  
6 I apologize, your Honor. I didn't hear the last part of  
7 what you said.

8 THE COURT: Why don't you direct his  
9 attention to whatever it is in that paragraph.

10 MR. FEATHERSTONHAUGH: Oh, okay. Well, it's  
11 really the third paragraph.

12 THE COURT: Why don't you direct his  
13 attention to what you want to ask him a question about.

14 MR. FEATHERSTONHAUGH: I would like to ask  
15 him about the third paragraph.

16 THE COURT: And what in the third paragraph  
17 do you want to ask him about?

18 MR. FEATHERSTONHAUGH: The third paragraph  
19 and the nature of these is pretty much in its entirety. The  
20 third paragraph describes how investments are acquired,  
21 relationships between related parties, and discloses --

22 THE COURT: Then ask him the question.  
23 Because the document does speak for itself. I don't need  
24 the whole thing read to me.

25 MR. FEATHERSTONHAUGH: All right.



**WELLES - CROSS - FEATHERSTONHAUGH**

1 BY MR. FEATHERSTONHAUGH:

2 Q. Mr. Welles, in the portion that you read, you  
3 notice in that first paragraph it says that they're going to  
4 deduct a two percent placement agent commission, is that  
5 correct?

6 A. Correct.

7 Q. Was any commission charged on your fund when you  
8 were raising money, for the raising of the money?

9 A. Not, not by us.

10 Q. No, but was it, was there a -- was there a charge  
11 made by the people who were selling the interests?

12 A. McGinn, Smith acted as a nonexclusive placement  
13 agent for the fund.

14 Q. Right. And did they charge for their services?

15 A. They were paid by the management company. So the  
16 answer is yes.

17 Q. All right. Well, let's turn to the management  
18 company then for a minute. Would you once again describe  
19 the members of the management company and their percentages?

20 A. David Smith, Tony Schmitz, Timothy Welles  
21 28 percent. Michael Lasch, the remainder.

22 Q. All right. How does the management company  
23 acquire money?

24 A. The management company charges a two and a half  
25 percent annual fee on total committed capital, reduced by

**WELLES - CROSS - FEATHERSTONHAUGH**

1 any principal amounts that have been returned to the  
2 investors.

3 Q. So the management company annually is paid two  
4 percent of the --

5 A. Two and a half percent.

6 Q. -- collected capital?

7 A. No.

8 Q. Or the committed capital?

9 A. The committed capital.

10 Q. The committed capital. So when the fund was  
11 originally sold, the management company would have received  
12 two percent of about \$20 million?

13 A. Two and a half percent --

14 Q. I'm sorry. Two and a half percent.

15 A. -- of \$27 million.

16 Q. All right. And what services does the management  
17 company perform?

18 A. We are the managers of the -- the management  
19 company is the manager of the fund. So the activities that  
20 I described before myself are performed in the management  
21 company, if you will.

22 Q. Okay. Is that a -- how did you arrive at the  
23 amount of the fee?

24 A. It's a, it's a typical size fee in, you know, any  
25 one of a number of private equity funds.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**WELLES - CROSS - FEATHERSTONHAUGH**

1 Q. Were there any, were there any other fees charged  
2 by the management company or any of the other entities?

3 A. Yes. Typically, when we make an investment out of  
4 the fund, the fund will charge a closing fee, and that fee  
5 was split with -- between the management company and the  
6 fund.

7 Q. And how is that fee arrived at?

8 A. It's a negotiated fee between the fund at the time  
9 it makes an investment and the borrowing company, the  
10 portfolio company.

11 Q. And were such arrangements made with all of the  
12 nine companies you invested in?

13 A. Yes.

14 Q. The investments that First Independent and Third  
15 Albany made in your fund, Mr. Welles, would you describe  
16 them as successful investments?

17 A. So far, yes.

18 Q. And they continue to be investors in fund?

19 A. Correct.

20 Q. And do you believe those investments in your fund  
21 have some value?

22 A. We do.

23 Q. I think the only other thing I have for you,  
24 Mr. Welles, is in connection with Lynn Smith directly. In  
25 terms of Pine Street Capital, as far as you're aware, has

**WELLES - CROSS - FEATHERSTONHAUGH**

1 any money ever been transferred from Pine Street Capital to  
2 Lynn Smith to which she was not entitled by virtue of her  
3 investment?

4 A. Not that I'm aware of.

5 Q. Thank you.

6 THE COURT: Miss Dunn.

7 MISS DUNN: Thank you, your Honor.

8 Your Honor, may I preface my examination of  
9 Mr. Welles by advising the Court of conversations  
10 Mr. McGrath and I had yesterday about condensing my  
11 examination of Mr. Welles by using a summary document,  
12 rather than the expense of examination we did when we took  
13 his deposition?

14 THE COURT: Is this -- is the summary  
15 document to be an exhibit?

16 MISS DUNN: Yes. Summary document, all of  
17 the -- basically what we did, we went through all of the  
18 trust brokerage statements, and Mr. Welles identified every  
19 transfer, every deposit into the account from Pine Street  
20 Capital Partners. A summary document has been created.  
21 I've provided all of the account statements to Mr. McGrath.  
22 I have -- I'm going to offer all those account statements as  
23 well. It would shorten his testimony. And I --

24 THE COURT: Mr. Welles' testimony?

25 MISS DUNN: Yes. And as the Court may be

**WELLES - CROSS - FEATHERSTONHAUGH**

1 aware, when I filed my reply papers in this motion, I was  
2 waiting for the transcript, which didn't arrive until I  
3 think yesterday afternoon. It's been provided to Mr. Welles  
4 through his counsel. And SEC has it. And once Mr. Welles  
5 has had the opportunity to review it and make any  
6 corrections, I would also offer that to simply supplement  
7 any document information we don't capture from him today.  
8 Would that be acceptable?

9 THE COURT: Yes, you may proceed.  
10 Mr. McGrath, did you want to --

11 MR. McGRATH: Yes, your Honor, thank you. I  
12 did represent that I would be happy to help her facilitate  
13 expedite Mr. Welles' testimony, particularly documents that  
14 were not in dispute. She gave me a cover sheet with a list  
15 of transactions. And I notified her this morning that I  
16 went through all the backup and I was able to identify the  
17 backup for all except one, two, three, four, five, six,  
18 seven transactions. So I'm happy to give her that. And to  
19 the extent she can at least identify the backup for that  
20 through the testimony, that would be helpful, because I  
21 don't have that backup in the material that she provided.  
22 But for that reservation, I'm happy to have her move  
23 everything else in in summary fashion.

24 MISS DUNN: And the binder this morning  
25 supplemented the account statements. I had -- the account

**WELLES - CROSS - DUNN**

1 statements I gave you yesterday was not the entire set.

2 So...

3 MR. McGRATH: Then with Miss Dunn's  
4 representation that the backup for the other documents are  
5 in here, I'm happy to let the summary document go in, as  
6 long as I have an opportunity at some point to make an  
7 application to the Court to the extent I can't find that  
8 document in here. Which I doubt will happen.

9 MISS DUNN: Sure. And I don't have to offer  
10 the summary document right now. I can offer it through my  
11 accountant who created it.

12 THE COURT: That's fine. You may proceed  
13 using the summary document if you wish.

14 MISS DUNN: Okay. Thank you.

15 **CROSS-EXAMINATION BY MISS DUNN:**

16 Q. Good morning, Mr. Welles.

17 A. Good morning.

18 Q. You are familiar with the David and Lynn Smith  
19 irrevocable trust?

20 A. I am.

21 Q. And you previously testified that the trust made a  
22 one million dollar commitment at the start of the fund?

23 A. Correct.

24 Q. How much money did the trust put into the fund at  
25 the initial close?

**WELLES - CROSS - DUNN**

1 A. One hundred thousand dollars.

2 Q. And was there another contribution to the fund of  
3 a cash investment subsequent to that?

4 A. There was. Of \$300,000.

5 Q. So the initial cash investment was \$400,000?

6 A. Yes.

7 Q. And that's -- as you testified earlier, is that  
8 the 40 percent of the total commitment?

9 A. Correct.

10 Q. And at the time that the trust invested in the  
11 fund, I believe you testified that you learned that  
12 Mr. Urbelis was the trustee of this trust?

13 A. Correct.

14 Q. And did he sign a subscription agreement on behalf  
15 of the trust in order to secure that investment in the fund?

16 A. Yes.

17 Q. And did that subscription agreement obligate  
18 Mr. Urbelis and the trust to pay additional amounts into  
19 your fund?

20 A. It did.

21 Q. What was the nature of those additional payments?

22 A. That obligation was the remaining \$600,000 over of  
23 the total commitment on an as call basis by the manager of  
24 the fund.

25 Q. All right. Have you called the full \$600,000?

**WELLES - CROSS - DUNN**

1 A. We've not.

2 Q. All right. Did there come a time that you made a  
3 capital cash call?

4 A. Yes.

5 Q. And when was that?

6 A. We made three cash capital calls. All of them  
7 were in 2006. And the first one of those was in June of  
8 2006.

9 Q. And did the trust pay that capital cash call to  
10 your fund?

11 A. It did.

12 Q. And did the trust pay those other two capital cash  
13 calls to your fund?

14 A. It did.

15 Q. Were there any additional capital cash calls?

16 A. There were not.

17 Q. To date?

18 A. There were not.

19 Q. Okay. Was there also -- or were there times when  
20 your fund paid amounts of money to the David and Lynn Smith  
21 irrevocable trust?

22 A. Yes.

23 Q. And what was the reason or nature of those  
24 payments?

25 A. The initial payments were within the partnership



**WELLES - CROSS - DUNN**

1 notes as we referred to them. The 40 percent of the  
2 commitment carried an interest rate of nine percent  
3 annually. Those payments are made quarterly. So the trust  
4 would have received its nine percent annual interest  
5 payment, one each quarter, on the amount of the outstanding  
6 notes at the time the payment was made.

7 Q. All right. And the initial -- do you recall when  
8 the initial interest payment would have been made?

9 A. The first payment I believe was March 31 of '05.  
10 And the payment dates were then June, September, and  
11 December.

12 Q. So would that initial interest payment have been  
13 made with respect to the hundred thousand dollars that had  
14 been paid by the trust?

15 A. Yes.

16 Q. And then the additional interest payments from  
17 June 2006 forward were based on the full \$400,000 invested?

18 A. Correct.

19 Q. And did you -- do you recall testifying on  
20 June 3<sup>rd</sup> of this year at a deposition in this matter?

21 A. Yes.

22 Q. Do you recall reviewing various account  
23 statements, brokerage account statements for the trust?

24 A. I do.

25 Q. And do you recall at that time reviewing documents

**WELLES - CROSS - DUNN**

1 or records of Pine Street Capital Partners which reflected  
2 the trust's interest in Pine Street, as well as payments  
3 made by Pine Street to the trust?

4 A. Yes.

5 Q. I'm showing you what's been marked Intervenor  
6 Exhibit 3. This is a schedule or a chart of deposits  
7 recorded, I believe that are recorded on the trust brokerage  
8 statements that were received from Pine Street Capital  
9 Partners.

10 A. Okay.

11 Q. Do you recall discussing these interest payments  
12 and return of capital at your deposition?

13 A. Yes, I do.

14 Q. Okay. Do these amounts reflect, accurately  
15 reflect the dates and amounts of payments made by Pine  
16 Street Capital Partners to the trust?

17 A. Yes, I believe so.

18 Q. Were there any payments made to the trust to which  
19 the trust was not entitled?

20 A. No.

21 Q. Was the trust treated any differently than any  
22 other investor in your fund?

23 A. It was not.

24 Q. You also mentioned that you had -- you did not  
25 have discussions with Mr. Urbelis when the trust initially

**WELLES - CROSS - DUNN**

1 invested in your fund, is that correct?

2 A. Correct.

3 Q. Were there other investors in Pine Street Capital  
4 Partners who you did not discuss the investment directly  
5 with the investor?

6 A. Yes, there were.

7 Q. How many investors total do you have in the fund?

8 A. About 65 or 70.

9 Q. Okay. Of that 65 or 70, can you identify  
10 approximately how many of those investors you met with or  
11 spoke with directly as opposed to speaking with a  
12 representative?

13 A. I would say probably half.

14 Q. So in half of those instances, you were  
15 communicating with an agent or a representative or a  
16 stockbroker on behalf of the investor? Would that be  
17 correct?

18 A. Or in some instances, Mr. Smith had the  
19 conversation, not me.

20 Q. Okay. And Mr. Urbelis was an investor in your  
21 fund as well?

22 A. That's correct.

23 Q. And did you have conversations with him at the  
24 time he invested his own money in the fund?

25 A. No.

**WELLES - CROSS - DUNN**

1 Q. And are you aware whether any members of  
2 Mr. Urbelis' family are investors in the fund?

3 A. Yes.

4 Q. And are you aware whether any other trust in which  
5 he serves as trustee are invested in your fund?

6 A. Yes.

7 Q. And did he have any conversations with you at the  
8 time that his family members or he or himself as trustee of  
9 another trust invested in the fund?

10 A. No.

11 Q. Are you aware that Mr. Urbelis resigned as trustee  
12 of the David and Lynn Smith irrevocable trust?

13 A. Yes.

14 Q. And David Wojeski has been appointed by Mr. and  
15 Mrs. Smith as the successor trustee, are you aware of that?

16 A. Yes.

17 Q. Do you know David Wojeski?

18 A. I do.

19 Q. How long have you known him?

20 A. Probably six or seven years.

21 Q. How is it that you know him?

22 A. Through mutual friends, and his firm until  
23 recently was the auditor of a company on which I serve as a  
24 member of the board.

25 Q. Has he ever communicated with you about the Pine

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**WELLES - CROSS - DUNN**

1 Street Capital Partners fund?

2 A. He has not.

3 Q. What do you know about his background and his  
4 profession?

5 A. He appears to be founded and successfully built a  
6 good accounting firm.

7 Q. Do you know his reputation as an accountant?

8 A. I do.

9 Q. What is his reputation as an accountant?

10 A. I would say it's very good.

11 Q. What is his reputation as an individual? If  
12 you're aware.

13 A. Very good.

14 Q. Do you know him to be a man of integrity?

15 A. Yes.

16 Q. Is he well respected in his community?

17 A. Yes.

18 Q. Do you believe that if he, as an investor -- as a  
19 trustee of an investor in your fund, that he will conduct  
20 himself responsibly on behalf of that investor?

21 A. I do.

22 MISS DUNN: I have no further questions.

23 Thank you, your Honor.

24 THE COURT: Any redirect?

25 MR. McGRATH: Yes, your Honor.

**BONNIE J. BUCKLEY, RPR, CRR**  
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**WELLES - REDIRECT - McGRATH**

1 **REDIRECT EXAMINATION BY MR. McGRATH:**

2 Q. Mr. Welles, Mr. Featherstonhaugh asked you a  
3 series of questions regarding your review of the private  
4 placement memorandum for the funds that were invested, the  
5 Third Albany and First Income --

6 A. Correct.

7 Q. Funds. As you sit here today, are you familiar  
8 with all of the terms and conditions and representations  
9 that were set forth in those private placement memorandum?

10 A. Not specifically, no.

11 Q. Do you have any knowledge other than the  
12 investment that those funds made in your -- or in the Pine  
13 Street Fund, do you have any personal knowledge of any of  
14 the other investments that they made?

15 A. Yes. But not in any detail.

16 Q. All right. Do you have any personal knowledge of  
17 any of the loans that were made by those funds?

18 A. Yes.

19 Q. In what way?

20 A. I was involved in 74 State as a board member.

21 Q. All right. Other than that loan --

22 A. Ah...

23 Q. -- are you --

24 A. There was one other that I was familiar with  
25 called BBI. But other than that, no.

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**WELLES - REDIRECT - McGRATH**

1 Q. Are you familiar with any of the transactions or  
2 transfers that occurred between those funds and any of the  
3 McGinn, Smith entities between 2004 and the present?

4 A. No.

5 Q. All right. So as you sit here today you don't  
6 have any opinion as to whether any of the other transactions  
7 that were made by those funds were in compliance with the  
8 terms or conditions of their private placement memorandum,  
9 do you?

10 A. No, I don't.

11 Q. Now, your -- strike that "your". Pine Street Fund  
12 invested in nine companies, correct?

13 A. Correct.

14 Q. Did you or any of the three partners that you were  
15 associated with have any interest in any of those nine  
16 companies that Pine Street invested in?

17 A. No. Other than through the fund.

18 Q. Right. Did you or any of your partners make any  
19 transfers or loans to any other entities that you or your  
20 partners had investments in?

21 A. No.

22 Q. Did you or your partners make any loans to  
23 yourselves out of the Pine Street Fund?

24 A. No.

25 Q. Now, you said that the -- that part of the

**WELLES - REDIRECT - McGRATH**

1 investment was in a note, correct?

2 A. Correct.

3 Q. And the note promises a certain rate of interest?

4 A. Correct.

5 Q. To the investors? And what was the interest rate?

6 A. Nine percent.

7 Q. All right. And prior to making your investment in  
8 the nine companies, did you or your partners perform due  
9 diligence to try to determine whether those investments  
10 would return sufficient revenue to allow you to meet your  
11 commitment to the investors to pay that interest rate?

12 A. Yes. Although, that, that -- we were really more  
13 looking at what we felt the rate of return out of the  
14 individual portfolio company would be.

15 Q. Well, are you saying you weren't concerned with  
16 whether you would meet your commitment to the investors to  
17 pay the interest rate that you had promised them?

18 A. True.

19 Q. Okay. So wasn't part of your concern then whether  
20 there would be sufficient money coming out of those inVs to  
21 meet your interest rate commitment?

22 A. Yes. Absolutely.

23 Q. All right. And in fact, you have honored your  
24 interest rate commitments to each of these investors, you  
25 have met your interest rate commitment to these investors



**WELLES - REDIRECT - McGRATH**

1 from the day the fund was formed until today, correct?

2 A. Yes.

3 Q. You are not in default on any note to any  
4 investor?

5 A. Correct.

6 Q. And, in fact, in making the due diligence that you  
7 undertook, you looked at a lot of companies, didn't you?

8 A. Yes.

9 Q. How many companies did you look at?

10 A. Eight to 900.

11 Q. Okay. And you were able to winnow down to nine  
12 companies that were sufficient in returning income to you to  
13 meet your commitment to investors, correct?

14 A. Correct.

15 Q. Is it fair to say that you wouldn't have invested  
16 in a company if you didn't think it would generate  
17 sufficient income --

18 A. Yes.

19 Q. -- to meet your committment to investors?

20 A. Yes.

21 Q. And you were able to identify nine such companies?

22 A. Yes.

23 Q. And that was during the period 2005 to 2010?

24 A. Yes. We made you're last investment in November  
25 of 2008.

**WELLES - RECROSS - FEATHERSTONHAUGH**

1 Q. Okay. Now, you indicated that there was a closing  
2 fee that was charged.

3 A. Correct.

4 Q. And you negotiated that with the company that you  
5 were making the investment in?

6 A. Right.

7 Q. So that was an arms length negotiation?

8 A. Yes.

9 Q. In other words, you or your three partners weren't  
10 on both sides of the negotiations for those closing fees,  
11 were you?

12 A. No. That's correct.

13 Q. Would you...

14 MR. McGRATH: No further questions.

15 THE COURT: Mr. Featherstonhaugh.

16 MR. FEATHERSTONHAUGH: Yes.

17 **RECROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

18 Q. Mr. Welles, you were just asked about the interest  
19 rate that you were paying your note holders. Do you recall  
20 those questions?

21 A. Yeah.

22 Q. When was the first interest payment due?

23 A. March 31st of 2005.

24 Q. Of 2005. And that interest payment was made,  
25 correct?

**BONNIE J. BUCKLEY, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY**

**WELLES - RECROSS - FEATHERSTONHAUGH**

1 A. That's correct.

2 Q. And how many companies had you invested in at that  
3 point?

4 A. Zero.

5 Q. So how was that interest payment made?

6 A. It was made out of the principal that was invested  
7 in the fund.

8 Q. So you were returning the investors' money --

9 A. Correct.

10 Q. -- to them as interest?

11 A. That's right.

12 Q. When did the fund break even on a cash flow basis?

13 A. I believe it was in the middle of 2006.

14 Q. And all interest payments that were made before  
15 that were made to the investors using the investor's own  
16 money?

17 A. A declining portion but, yes, there was a portion  
18 of it that was.

19 Q. And based on your knowledge and experience that  
20 you explained to us here, is that typical of funds of this  
21 type?

22 MR. McGRATH: Objection.

23 THE COURT: Overruled.

24 A. I, I don't, I don't really know.

25 Q. Fair enough. Thank you, Mr. Welles.

**BONNIE J. BUCKLEY, RPR, CRR**  
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**WELLES - RECROSS - FEATHERSTONHAUGH**

1 THE COURT: Miss Dunn, anything further?

2 MISS DUNN: No. Thank you, your Honor.

3 THE COURT: All right. Thank you. Thank you  
4 Mr. Welles, you may step down.

5 (Witness Timothy R. Welles excused.)

6 THE COURT: Call your next witness please.

7 MR. STOELTING: Call Lynn Smith.

8 THE COURT: I anticipate at least the direct  
9 on miss Smith will take half an hour.

10 MR. STOELTING: Forty-five minutes to an  
11 hour.

12 THE COURT: We'll take our morning recess at  
13 this time before we start. Stand in recess for 15 minutes.

14 MR. KOENIG: Your Honor, could Mr. Stoelting  
15 and I approach for one quick thing?

16 THE COURT: Does it need to be on the record?

17 MR. KOENIG: No.

18 (Discussion off the record.)

19 (Brief recess at 10:30 AM.)

20 (Court reconvened at 10:45.)

21 THE COURT: Miss Smith, please step forward  
22 to be sworn.

23

24

25

**LYNN SMITH - DIRECT - STOELTING**

1                                   **LYNN A. SMITH,**

2       having been duly sworn by the Clerk of the Court, was

3       examined and testified as follows:

4                           THE CLERK:   This is Lynn A. Smith, S-M-I-T-H.

5                           THE COURT:   Mr. Stoelting.

6       **DIRECT EXAMINATION BY MR. STOELTING:**

7           Q.    Good morning, Mrs. Smith.

8           A.    Good morning.

9           Q.    How long have you been married to David Smith?

10          A.    Forty-two years.

11          Q.    When did you graduate college?

12          A.    1968.

13          Q.    What did you do after graduating college, as far  
14       as work?

15          A.    I was an elementary school teacher for REDACTED

16          Q.    So you stopped teaching elementary school in REDACTED ?

17          A.    Yes.

18          Q.    And after REDACTED, have you had any employment  
19       outside of the home?

20          A.    No.

21          Q.    Have you ever been an employee of McGinn, Smith &  
22       Company?

23          A.    No.

24          Q.    Have you ever worked as an employee or contractor  
25       at any company owned or controlled by your husband?

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**LYNN SMITH - DIRECT - STOELTING**

1 A. No.

2 Q. Have you ever had a securities license?

3 A. No.

4 Q. Have you ever participated in soliciting investors  
5 in any offering your husband was involved in?

6 A. No.

7 Q. Have you ever helped to write any private  
8 placement memorandum?

9 A. No.

10 Q. You recall on April 20<sup>th</sup> of this year, the Court  
11 signed an order freezing your assets temporarily and the  
12 assets of your husband?

13 A. Yes.

14 Q. And when that order was entered, where were you?

15 A. I was in Vero Beach, Florida.

16 Q. And did you leave shortly after that to return to  
17 New York?

18 A. Yes.

19 Q. And how did you get back to New York?

20 A. I drove.

21 Q. And did you use a credit card to pay for gas on  
22 the way up?

23 A. Yes.

24 Q. And that was a Mobil Pass credit card?

25 A. Yes.

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**LYNN SMITH - DIRECT - STOELTING**

1 Q. And since April 20<sup>th</sup>, have you also had  
2 occasions to use a Mastercard credit card?

3 A. Yes.

4 Q. And have you also used a Visa credit card?

5 A. Yes.

6 Q. And have you received any legal advice from any  
7 attorneys on whether the use of those credit cards was  
8 consistent with the asset freeze?

9 MR. FEATHERSTONHAUGH: Objection, your Honor.

10 THE COURT: Sustained.

11 BY MR. STOELTING:

12 Q. Did you have any discussions with your husband on  
13 the topic of whether those -- the use of those credit cards  
14 was consistent with the asset freeze?

15 A. No.

16 Q. Before you is a thick binder on the bottom of a  
17 larger binder. If you could open that and turn to  
18 Plaintiff's 72.

19 Do you have Exhibit 72 in front of you?

20 A. Yes, sir.

21 Q. Okay. This is the supplemental declaration of  
22 Roseann Daniello. And you recall there was several hours of  
23 testimony about this exhibit yesterday?

24 A. Yes, I can.

25 Q. If you would just look at Exhibit 1. It's

**LYNN SMITH - DIRECT - STOELTING**

1 entitled deposits and withdrawals from the David and Lynn  
2 Smith irrevocable trust account. Do you have that open in  
3 front of you?

4 A. Is that page 2?

5 Q. It's called Exhibit 1. The second page of  
6 Plaintiff's 72.

7 A. Page 2? Mine doesn't say Exhibit 1 on it.

8 Q. On the bottom it has the lettering exhibit and  
9 Exhibit 1. It's a table.

10 A. It's a table.

11 Q. Do you see it says deposits and withdrawals from  
12 the David and Lynn Smith irrevocable trust?

13 A. Yes.

14 Q. You see at the bottom it says Exhibit 1?

15 A. Yes.

16 Q. And you see there's a column that says deposits  
17 and a column that says withdrawals?

18 A. Could I have some help? I...

19 THE COURT: Mr. Stoelting, it might  
20 facilitate things if you could come forward and --

21 MR. STOELTING: Sure.

22 THE COURT: -- identify the page that you're  
23 referring to.

24 MR. STOELTING: I'm sorry. You have the  
25 wrong document.



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1           A.     You said 272.

2                     MR. STOELTING:   I'm sorry.   What exhibit did  
3 I say?

4                     THE COURT:    Seventy-two.

5                     MISS MEHRABAN:   Seventy-two.

6 BY MR. STOELTING:

7           Q.     All right.   This binder has...

8                     MISS MEHRABAN:   Seventy-two.

9 BY MR. STOELTING:

10          Q.     All right.   Here we go.   This is what -- I'm  
11 sorry, it was the third page actually.   And there's deposits  
12 and withdrawals (indicating).

13          A.     Mm-hmm.

14          Q.     Do you, do you have any reason to think this does  
15 not accurately reflect actual deposits and withdrawals from  
16 the trust account?

17                     MISS DUNN:    Objection.

18                     THE COURT:    Well, sustained as to form.

19 BY MR. STOELTING:

20          Q.     Do you have any reason to believe that any of the  
21 deposits and withdrawals on Exhibit 1 are not actual  
22 deposits and withdrawals, do not reflect the actual deposits  
23 and withdrawals?

24                     MISS DUNN:    Objection.

25                     THE COURT:    Same ruling.

**LYNN SMITH - DIRECT - STOELTING**

1 BY MR. STOELTING:

2 Q. Are you familiar with deposits and withdrawals  
3 from the trust account?

4 A. It's in an irrevocable trust, so I have a trustee  
5 who takes care of that.

6 Q. Do you have any knowledge of deposits and  
7 withdrawals that have been made from the trust account since  
8 2004?

9 A. Generally speaking, no.

10 Q. Well, do you dispute that any of these deposits  
11 and withdrawals reflected on Exhibit 1 were made?

12 MISS DUNN: Objection.

13 THE COURT: Sustained.

14 MR. STOELTING: Withdrawn.

15 BY MR. STOELTING:

16 Q. Do you recall completing a statement of assets and  
17 liabilities that was required by the Court's order dated  
18 April 20, 2010?

19 A. Yes, I do.

20 Q. Would you turn to Plaintiff's Exhibit 75 please?  
21 Plaintiff's Exhibit 75 is a statement that was submitted on  
22 your behalf.

23 THE COURT: Do you have that exhibit,  
24 Mrs. Smith?

25 RELIEF DEFENDANT LYNN SMITH: Is it Exhibit

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1 3?

2 THE COURT: No.

3 BY MR. STOELTING:

4 Q. It actually was marked as the Deposition Exhibit  
5 3, but for the hearing purposes, it's --

6 THE COURT: Mr. Stoelting, again, if you are  
7 going to refer to an exhibit, it would help if you would  
8 point out the precise page so we all know what we're talking  
9 about. Or if someone will.

10 BY MR. STOELTING:

11 Q. Seventy-five.

12 A. Yes.

13 Q. Would you look at the last page of this exhibit?

14 A. Yes.

15 Q. Is that your signature?

16 A. Yes.

17 Q. And would you look on the third page?

18 A. Yes.

19 Q. Do you have a page open in front of you that is  
20 entitled Lynn A. Smith statement of net assets as of  
21 March 31, 2010?

22 A. Yes.

23 Q. Does this accurately show your net assets as of  
24 March 31, 2010?

25 A. Yes.

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1 Q. Do you see the section called loans receivable?

2 A. Yes.

3 Q. What does that refer to?

4 A. It refers to two loans that I gave to Tim McGinn.

5 Q. What were the amounts of the loans?

6 A. \$900,000 and \$15,000.

7 Q. When did you give those loans?

8 A. I gave the first one, I believe, in 2004, and the  
9 second one, December 2009.

10 Q. And who did you understand Timothy McGinn to be?

11 A. My husband's business partner, as well as a close  
12 friend.

13 Q. And how long had Mr. McGinn been your husband's  
14 business partner when you made the loan?

15 A. Twenty-nine years.

16 Q. And did Mr. McGinn speak to you and request the  
17 loan directly?

18 A. No. He spoke to my husband.

19 Q. Have you ever had a conversation with Mr. McGinn  
20 about these loans?

21 A. I have not had a conversation with Mr. McGinn.  
22 I've had the conversation with my husband.

23 Q. And from which account did you pay the \$900,000,  
24 and the \$15,000 to Mr. McGinn?

25 A. From my stock account.

**LYNN SMITH - DIRECT - STOELTING**

1 Q. How much money has Mr. McGinn paid back?

2 A. He's paid back two separate checks, one for a  
3 hundred thousand dollars and one for 85,000.

4 Q. Do you have an understanding of why Mr. McGinn has  
5 not paid back the balance?

6 A. Yes.

7 Q. What is that?

8 A. He's having a cash flow problem at the moment.

9 Q. And do you know why in the -- since the loans were  
10 made in 2004, he has not paid back a greater amount on the  
11 loans other than the 185,000?

12 A. No.

13 Q. Has he been having cash flow problems since you  
14 extended him the loan in 2004?

15 A. I don't know that.

16 Q. And why did Mr. McGinn need this money?

17 A. For two purposes. One, he was buying some stock  
18 in the alarm company that he was the president of. And the  
19 other was for a down payment on a home in Niskayuna.

20 Q. Do you recall the name of the alarm company?

21 A. Integrated Alarm Systems.

22 Q. Was it Integrated Alarm Services Group Inc.?

23 A. Yes. Sorry.

24 Q. And what is your primary residence?

25 A. Two Rolling Brook Drive, Saratoga Springs, New

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1 York.

2 Q. And is that house held jointly with your husband?

3 A. Yes, it is.

4 Q. When did you purchase that house?

5 A. About eight years ago.

6 Q. And it's been held jointly with your husband since  
7 you purchased it eight years ago?

8 A. Yes.

9 Q. And do you also own a home in Vero Beach?

10 A. Yes.

11 Q. When was that home purchased?

12 A. That was purchased about nine years ago.

13 Q. And when you purchased the Vero Beach home, it was  
14 held jointly with you and your husband, correct?

15 A. Yes, it was.

16 Q. And in whose name is that Vero Beach house now?

17 A. It is in my name.

18 Q. Only?

19 A. Yes.

20 Q. And when did -- when was it transferred from joint  
21 ownership to your ownership only?

22 A. It was transferred a year ago.

23 Q. And why did that transfer occur?

24 A. Because I paid for the home with my funds, and I  
25 had been wanting to put the house in my name, but there was

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1 an estate planning lawyer who said we should keep it  
2 jointly. And that was about four years ago. And then I  
3 insisted that it be put in my name because I paid for it.

4 Q. And you paid for that house out of your stock  
5 account?

6 A. Yes.

7 Q. And that house was -- the Vero Beach house, was it  
8 used by all members of your family?

9 A. Yes.

10 Q. The estate planning attorney you referred to, is  
11 that Martin Finn?

12 A. Yes.

13 Q. And you said that Mr. Finn advised you that from  
14 an estate planning perspective it would be preferable to  
15 leave the house as a joint asset?

16 A. Yes, he did.

17 Q. And you did not follow that advice, correct?

18 A. Correct.

19 Q. And you also own a house in Broadalbin, New York?

20 A. Yes. It's a small camp on Sacandaga Lake.

21 Q. How long have you had that house?

22 A. I've had that house for about 40 years.

23 Q. In whose name is that house?

24 A. Lynn A. Smith.

25 Q. Now, up until about a year ago, which bank account

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1 did you use for basic household bills?

2 A. Oh, our checking account.

3 Q. At Bank of America?

4 A. Yes.

5 Q. And that was a joint account with you and your  
6 husband?

7 A. Yes.

8 Q. And up until about a year ago that joint account  
9 at Bank of America was the account that David Smith  
10 deposited his paychecks?

11 A. Yes. He had direct deposit from work.

12 Q. And then about a year ago, you opened up an  
13 account at BOA in your name only, correct?

14 A. Yes.

15 Q. And at that point, David's paycheck, which had  
16 previously been deposited into the joint account, then began  
17 to be deposited into your account; correct?

18 A. Correct.

19 Q. And do you recall why that change occurred?

20 A. His check -- his paycheck was deposited into that  
21 account because I paid the household bills from that  
22 account. And I had decided that I wanted a checking account  
23 of my own. Many couples have that. I hadn't. And I wanted  
24 to have some independence. My daughter's unemployed, and I  
25 didn't want -- he never used the account anyway, and I

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1 really didn't want someone looking over my shoulder as to  
2 where I was sending someone a check.

3 Q. Doesn't David Smith have a separate checking  
4 account in his own name?

5 A. Yes, he does.

6 Q. Why didn't he choose to have his paychecks  
7 deposited in his own checking account?

8 A. He used the -- his checking account for items that  
9 maybe I could not afford to write checks out of mine. We  
10 had two mortgages, car payments, insurance, and so on. And  
11 that's what he used his account for, the big things. And I  
12 used mine for household daily, lawn service, groceries, that  
13 kind of thing.

14 Q. And at the time that you opened -- that you closed  
15 the joint checking account and opened up your own account  
16 and switched David's paychecks to your own account, wasn't  
17 that about the same time that you switched the Vero Beach  
18 house from joint ownership to your ownership?

19 A. No. I think the Vero Beach house was quite a bit  
20 before that. Or a few months before that.

21 Q. A few months before?

22 A. Yeah. I remember it was the summer that I changed  
23 the checking account, I believe, last summer.

24 Q. And the switch in Vero Beach happened?

25 A. I believe it was April.

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1 Q. Of 2009? Last year?

2 A. Yes.

3 Q. Do you recall consulting with Martin Finn on the  
4 topic of transferring assets to you?

5 A. I don't understand your question.

6 Q. You recall Martin Finn was the estate planning  
7 attorney?

8 A. Yes, I do.

9 Q. All right. And he was engaged by you and your  
10 husband to give you --

11 A. Exactly.

12 Q. Can I finish my question please?

13 A. Sorry.

14 Q. He was engaged by you and your husband to provide  
15 you with estate planning advice?

16 A. Yes.

17 Q. And didn't you have a meeting with him in  
18 January 2009 on the subject of the best way to transfer  
19 assets to your name?

20 MR. FEATHERSTONHAUGH: Your Honor, I just  
21 want to make sure I understand your Honor's ruling from  
22 yesterday. Obviously, I object to any questions, as I  
23 mentioned yesterday, based on the attorney/client privilege  
24 that are going to explore Mrs. Smith's conversation with her  
25 estate planning counsel. I thought your Honor said those

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1 would be preserved. And I can raise them at the end. Or do  
2 I need to --

3 THE COURT: No, you're making an objection  
4 now, I take it?

5 MR. FEATHERSTONHAUGH: Yes.

6 THE COURT: SEC counsel is entitled to find  
7 out if there was a conversation.

8 MR. FEATHERSTONHAUGH: Yeah.

9 THE COURT: And the topic, but not the  
10 content of the conversation.

11 MR. FEATHERSTONHAUGH: Okay. Thank you.

12 THE COURT: As to this question, the  
13 objection is overruled.

14 A. Yes, we had a meeting in 2009.

15 Q. And the topic of the meeting was transferring  
16 assets to your name, correct?

17 MR. FEATHERSTONHAUGH: Objection.

18 THE COURT: Overruled.

19 A. I don't recall that that meeting was about that --

20 Q. What --

21 A. -- transferring assets. It was -- I -- it was  
22 just an estate planning meeting with our lawyer, our estate  
23 lawyer. It was lengthy, and honestly, I can't remember what  
24 actually took place.

25 Q. Do you recall the meeting at all?

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1 A. Yes. I know we had a meeting in 2009.

2 Q. And do you recall among the topics being discussed  
3 of how to move jointly held assets or David Smith's assets  
4 into your name?

5 A. I don't believe that that meeting was solely about  
6 moving assets around. It may have been discussed. He's an  
7 estate planner. That's all I remember about the meeting.

8 Q. Could you turn to Exhibit 118 in the binder,  
9 please?

10 THE COURT: Just to be sure, could you help  
11 her out again?

12 Q. Exhibit 118 is three pages. Mrs. Smith, if you  
13 could just skip over the first page, which is an e-mail.  
14 And the second page is a letter dated January 28, 2009, a  
15 two-page letter from Martin Finn to Mr. and Mrs. David L.  
16 Smith.

17 A. Yes.

18 Q. You have the letter open in front of you?

19 A. Yes.

20 Q. Do you recognize this letter?

21 A. Yes.

22 Q. Did you receive it around January 28, 2009?

23 A. Yes.

24 Q. The letter says Dear David and Lynn.

25 MR. FEATHERSTONHAUGH: Objection, your Honor.

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1 THE COURT: What's your objection?

2 MR. FEATHERSTONHAUGH: My objection is that  
3 this is a letter, a private letter from counsel to the  
4 witness.

5 THE COURT: Is this the same objection as  
6 yesterday?

7 MR. FEATHERSTONHAUGH: Yes.

8 THE COURT: All right. Same ruling.  
9 Overruled.

10 BY MR. STOELTING:

11 Q. The first sentence says: This letter summarizes  
12 the proposed transfer of assets we recently discussed which  
13 will further your estate planning and asset protection  
14 objectives.

15 A. Yes.

16 Q. What were your asset protection objectives at that  
17 time?

18 A. I don't know if I understand the question. I --  
19 we went for estate planning, for talking about an  
20 irrevocable trust for our children and so on. We went to  
21 protect our assets. That's why I went to an estate lawyer.

22 Q. At this time, were you aware that a security  
23 regulator called FINRA was conducting an examination of  
24 McGinn, Smith & Co. Inc.?

25 A. I was aware that there was a routine FINRA audit

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1 going on, which, if I recall, had gone on every year. I  
2 didn't understand that it was an investigation. I just  
3 heard that it was an audit.

4 Q. And did the audit or the investigation, was that  
5 the reason that you were seeking asset protection?

6 A. No.

7 Q. Do you recall in January 2009, shortly before this  
8 meeting, that David Smith received a letter from FINRA  
9 ordering him to appear for sworn on-the-record testimony?

10 A. No.

11 Q. Would you please look at the next -- following  
12 document, Plaintiff's 119? Plaintiff's 119 is a letter from  
13 FINRA, dated January 21, 2009, from a senior examiner at  
14 FINRA to David Smith at 2 Rolling Brook Drive, Saratoga  
15 Springs. That's your home, correct?

16 A. Yes.

17 Q. And the letter says: Dear Mr. Smith: In  
18 connection with the above --

19 MR. FEATHERSTONHAUGH: Objection, your Honor.

20 THE COURT: To what?

21 MR. FEATHERSTONHAUGH: He's reading a  
22 document which, as your Honor has pointed out, speaks for  
23 itself. He hasn't even identified the fact that the witness  
24 has ever seen it.

25 THE COURT: I'll give him up to the three

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1 paragraphs that you had Mr. Welles read.

2 MR. FEATHERSTONHAUGH: All right.

3 THE COURT: Your objection is overruled.

4 BY MR. STOELTING:

5 Q. This letter was apparently sent to your home,  
6 Mrs. Smith, by, it says, first class and certified mail. Do  
7 you remember receiving this letter around January 21, 2009?

8 A. Sir, I do not. First of all, it's addressed to  
9 Mr. Smith. Apparently, he didn't share this with me.

10 Q. So let me just continue essentially trying to  
11 refresh your recollection. I'll just read the first  
12 sentence.

13 In connection with the above referenced  
14 examination, you are hereby requested under FINRA Rule 8210  
15 to appear for an on-the-record interview.

16 THE COURT: Mr. Stoelting. Her memory is not  
17 exhausted. She said she didn't receive it.

18 MR. STOELTING: I'm trying to refresh her  
19 recollection as to the information in the letter about the  
20 fact that her husband was called for this on the record --

21 THE COURT: Her recollection is not  
22 exhausted. She said she didn't receive it and she wasn't  
23 told.

24 BY MR. STOELTING:

25 Q. Were you aware that your husband gave

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1 on-the-record testimony to FINRA on multiple occasions in  
2 2009 and 2010?

3 A. Yes.

4 Q. And when was the first time you remember being  
5 aware of that?

6 A. I can't remember.

7 Q. And before 2009, do you remember your husband ever  
8 providing on-the-record testimony to FINRA?

9 A. No.

10 Q. Looking back at Plaintiff's 118, which is the  
11 letter from Mr. Finn, the second paragraph refers to  
12 something called the David L. Smith lifetime QTIP trust. Do  
13 you see that?

14 A. I do.

15 Q. Did you have an understanding at the time of what  
16 that trust was?

17 A. I do not understand a QTIP trust to this day. I'm  
18 sorry.

19 Q. I'm not -- I'm just asking generally whether you  
20 had an understanding that your husband had an asset that was  
21 referred to as a QTIP trust.

22 A. Yes.

23 Q. And the letter from Mr. Finn says, it says that  
24 because the David L. Smith lifetime trust was funded with  
25 assets which belong to David, those assets must be



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1 distributed out of the trust and back to David.

2 And then the last sentence of that paragraph says:  
3 Once the assets are back in David's name, David will make a  
4 gift of those assets to Lynn. Lynn will hold these assets  
5 for approximately six months and will then transfer the  
6 assets to the QTIP trust.

7 Do you recall the assets of the trust being  
8 transferred to you?

9 A. No.

10 Q. The next paragraph says: In addition to the above  
11 transfer, we also recommend that David transfer the \$410,000  
12 note receivable and his interest in Capital Center Credit  
13 Corp. and Mr. Cranberry LLC to Lynn. Do you remember those  
14 transfers occurring?

15 A. I'm reading what you're saying, but I don't  
16 remember the transfers occurring.

17 Q. Did you have an understanding at that time why  
18 Mr. Finn was recommending that you move this note and  
19 Mr. Cranberry from David to Lynn?

20 A. No. The reason we went to Marty Finn is because  
21 he's an estate planning lawyer. I certainly could not plan  
22 an estate.

23 Q. Okay. Well, did you disagree with any of his  
24 recommendations?

25 A. No. Of course not.

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1 Q. So you would have done your best to follow his  
2 advice?

3 A. Yes.

4 Q. ^ ^ The last paragraph says: It is important to  
5 note that should either of you file for bankruptcy or be  
6 sued by a creditor subsequent to these transfers, these  
7 transfers will be scrutinized to determine if they were  
8 fraudulently conveyed. In order to avoid these transfers  
9 from being characterized as fraudulent conveyances, you  
10 must: One, not have actual intent to delay or defraud  
11 creditors. Not make transfers which leave you with  
12 insufficient assets to satisfy your debts. Not engage in or  
13 become engaged in a business for which your assets remain  
14 after the transfer constitute an unreasonably small capital.  
15 And, four, not intend to or reasonably believe that you will  
16 incur debts after the transfers for which your remaining  
17 assets are insufficient to repay.

18 Do you recall any conversations with David Smith  
19 on the topic of whether the transfers recommended in this  
20 letter might be considered fraudulent according to the  
21 criteria set out by Mr. Finn?

22 A. No.

23 Q. Do you recall any conversations with anyone on the  
24 topic of whether the transfers recommended in the letter  
25 might be considered fraudulent?

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1           A.    No.

2           Q.    Do you recall any conversations with anyone on the  
3 topic of whether the transfer of the Vero Beach house to  
4 your name and the shifts in the checking account might be  
5 considered fraudulent?

6           A.    No.

7           Q.    Now, in the second page of the letter from  
8 Mr. Finn, there's a reference to the Vero Beach house that  
9 that paragraph that begins: We also discussed ... and it  
10 says, it's three lines down: It is more beneficial for you  
11 to own those properties jointly as tenants by the entirety.  
12 And he's referring to the Vero Beach property. Did I read  
13 that correctly?

14          A.    Yes.

15          Q.    Okay. Why did you reject Mr. Finn's advice that  
16 it was more beneficial from an estate planning perspective  
17 to keep it jointly held?

18          A.    I think I mentioned before, I funded the house and  
19 I wanted the house in my name, and that's what we finally  
20 did.

21          Q.    Well, you said earlier that you respected  
22 Mr. Finn's advice, correct?

23          A.    There's two pages of his advice here. That  
24 particular part of his advice I did not agree with.

25          Q.    Was it because you wanted to keep the Vero Beach

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1 house from any creditors of David Smith?

2 A. No.

3 Q. Now, as to the timing of this meeting with  
4 Mr. Finn, is it your testimony that your husband never told  
5 you -- or withdrawn.

6 Did David Smith tell you about his FINRA  
7 testimony, the fact that he would be examined on the record  
8 by FINRA before the testimony occurred?

9 A. Yes.

10 Q. And how far in advance did you hear about the fact  
11 that FINRA had called him in to testify?

12 A. Not too far in advance.

13 Q. And were you, were you concerned about that?

14 A. Oh, of course.

15 Q. And that had never happened before in his 25 year  
16 career in the securities industry, right?

17 A. Twenty-nine year career. And it was the same kind  
18 of audit every single year. And for the four years before  
19 this past year, everything was fine.

20 Q. Except that he had never been called in before to  
21 give on the record testimony, correct?

22 A. Correct.

23 Q. And the fact that that was happening for the first  
24 time in his 29 year career, did that give you concern?

25 A. Yes.

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1 Q. And did you do anything because of that concern?

2 A. No.

3 Q. Did the movement of these assets that we talked  
4 about, the bank account and the Vero Beach house, have  
5 anything to do with your knowledge about his on-the-record  
6 testimony?

7 A. No.

8 Q. And were you aware that there were a number of  
9 arbitrations filed against McGinn, Smith & Co. Inc., FINRA  
10 arbitrations throughout 2009?

11 A. Yes.

12 Q. And when did you first become aware of that?

13 A. I do not recall.

14 Q. But you did become aware of that some time last  
15 year?

16 A. Oh, yes.

17 Q. And did that concern you?

18 A. Yes.

19 Q. Why did it concern you?

20 A. Why did it concern me that he was being  
21 investigated by FINRA?

22 Q. Yes.

23 A. He's a good businessman. They had a great  
24 business. And I wasn't happy to have my husband be  
25 investigated.

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1 Q. And why did the FINRA arbitrations brought by  
2 customers of McGinn, Smith concern you?

3 A. Why did they concern me? Can you rephrase that?

4 Q. Sure. I'll withdraw the question.

5 Did you understand that the FINRA arbitrations  
6 that were filed in 2009 by customers of McGinn, Smith  
7 against your husband and his company sought money damages?

8 A. Yes. I believe there were many other firms  
9 besides McGinn, Smith that had arbitrations against them.  
10 As we all know, the economic crisis that we've been going  
11 through, giant firms on Wall Street have gone under. Of  
12 course, I was concerned.

13 Q. And were you aware that there had been  
14 arbitrations filed in late 2008 as well against McGinn,  
15 Smith?

16 A. No.

17 Q. It was 2009 that you became aware?

18 A. I, I -- yes.

19 Q. And were you concerned that if those arbitrations  
20 were successful, that you could lose your joint assets or  
21 David Smith's assets?

22 A. I would be concerned that we could lose our  
23 assets, yes.

24 Q. Do you recall submitting an affidavit in this  
25 proceeding a few weeks ago?

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1 A. Yes.

2 Q. And paragraph 11, I can show it to you if you  
3 would like, but it was referred to as something called  
4 Capital Center Credit Stock.

5 A. Yes.

6 Q. And was that another asset of David that was  
7 transferred to you?

8 A. Yes.

9 Q. And do you recall why that was done?

10 A. When that was done? Was that the question, when?

11 Q. Yes.

12 A. Could I have a little help?

13 Q. Yes.

14 A. A lot of numbers here.

15 Q. Let me hand up a copy of your affidavit. It's, I  
16 believe, on page 11. It's referring to an attach -- I'm  
17 sorry.

18 A. Page 11, yes.

19 THE COURT: Does this have an Exhibit Number?

20 MR. STOELTING: Your Honor, it hasn't been  
21 marked as an exhibit, but it's already in the record, it was  
22 filed by Mr. Featherstonhaugh, it's document 23 on --

23 THE COURT: This is the assets and  
24 liabilities statement of Mrs. Smith?

25 MR. STOELTING: No, your Honor. It's called

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1 Affidavit of Relief Defendant Lynn A. Smith. It was filed  
2 on May 21st of this year, document 23.

3 THE COURT: All right. That's sufficient.

4 BY MR. STOELTING:

5 Q. All right. Is this your affidavit?

6 A. Yes.

7 Q. Okay. And that's your signature somewhere in the  
8 back?

9 A. Yes. Yes.

10 Q. Okay. If you would turn please to page 11,  
11 paragraph 33(a).

12 A. Yes.

13 Q. Okay. Does that refresh your recollection about  
14 the transfer of funds held in a Capital Center Credit  
15 Corp. account to you in 2009?

16 A. Yes.

17 Q. Okay. And it refers to an exhibit and transaction  
18 one, and I think if we look at that, it's Exhibit C,  
19 transaction one.

20 A. Yes.

21 Q. Okay. And the amount of that transfer was  
22 \$38,430?

23 A. Yes.

24 Q. Okay. And that transfer was made in 2009?

25 A. Yes.



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1 Q. Okay. And according to your affidavit, Mr. Smith  
2 had held those funds since the late '90s?

3 A. Yes.

4 Q. And why in 2009 did he transfer them to your stock  
5 account?

6 A. I believe he had some legal advice on that. And  
7 the actual check, I believe, on that was for like...

8 Oh, no, not that one. That was just a -- just  
9 something that was old, they were closing down I think.

10 Q. Who was closing down?

11 A. We were.

12 Q. You and your husband?

13 A. I was. We had -- Capital Center Credit Corp,  
14 that's the alarm company, yes, we invested in that.

15 Q. But my question is about the timing of it. Why --  
16 if it had been held by Mr. Smith in the late '90s, why in  
17 2009 was it transferred to your stock account?

18 A. We decided to cash it in.

19 Q. Do you remember any particular reason?

20 A. No.

21 Q. Was it just a coincidence that it happened at the  
22 time that you were transferring the checking account and the  
23 Vero Beach house to your name?

24 A. Yes.

25 Q. You recall we mentioned the QTIP trust earlier and

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1 it was referred to in Mr. Finn's letter?

2 A. Yes.

3 Q. And you didn't recall whether the QTIP funds had  
4 been transferred to you or not? If you would turn to the  
5 next page, page 12.

6 A. Mm-hmm.

7 Q. Do you see the paragraph that says D?

8 A. Yes, D.

9 Q. Does that refresh your recollection that the QTIP  
10 \$326,304 of the QTIP funds were transferred to you?

11 A. You're on D. Yes. Yes.

12 Q. So that transaction did occur, correct?

13 A. Yes.

14 Q. And that occurred, if we -- it's referring to a  
15 row on Exhibit C. It's referenced as item 5. And that  
16 indicates that the transfer occurred on February 20<sup>th</sup>,  
17 2009, correct?

18 A. Exhibit C, item ... I see it.

19 Q. Okay.

20 A. Okay. Item 5.

21 Q. Is that the same transaction that's referenced in  
22 paragraph D on page 12?

23 A. Yes.

24 Q. And that's a transfer from David Smith to you, to  
25 your NFS account of \$326,000?

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1 A. Yes.

2 Q. And you recall when we were looking at the letter  
3 from Mr. Finn and he was describing the transfer of the QTIP  
4 funds, that his letter said or advised that you should hold  
5 the QTIP funds for six months and then transfer them back to  
6 David Smith? Do you recall that, or would you like to look  
7 at the letter again?

8 A. I don't recall it. I can look at the letter again  
9 but ... and which paragraph are you looking at?

10 Q. It's Exhibit 118, the second paragraph of the  
11 letter, referring to the QTIP. It says: Once the assets  
12 are back in David's name, David will make a gift of those  
13 assets to Lynn. Lynn will hold these assets for  
14 approximately six months and will then transfer the assets  
15 back to the QTIP trust.

16 A. What is the question? Yes.

17 Q. Did you ever transfer the \$326,000 back?

18 A. I thought I did. I believe so.

19 Q. Do you know when that happened?

20 A. No.

21 Q. Is it possible it did not happen?

22 A. It's possible.

23 Q. Do you know one way or another?

24 A. No.

25 Q. Do you know Nancy McGinn, the wife of Tim McGinn?

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1 A. Yes.

2 Q. Have you ever discussed with Nancy McGinn the  
3 topic of moving assets from joint ownership or held by a  
4 husband to the wife's name?

5 A. No.

6 Q. Were you aware that Tim and Nancy lived in a house  
7 at 26 Port Huron Drive in Niskayuna?

8 A. Yes.

9 Q. Were you aware that in October 2009, the house in  
10 Niskayuna that had been solely in Tim McGinn's name was  
11 transferred to Nancy McGinn's name for one dollar  
12 consideration?

13 A. No.

14 Q. All right. Mrs. Smith, if you could refer back to  
15 Exhibit 75, which was the statement of net assets we were  
16 looking at a moment ago.

17 A. Yes.

18 Q. Now, this was something, obviously, that was  
19 prepared pursuant to a Court order that you knew would be  
20 given to the SEC, correct?

21 A. Correct.

22 Q. And the statement of net assets does not include  
23 anywhere the David and Lynn Smith irrevocable trust,  
24 correct?

25 A. Correct.

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1 Q. Isn't it true that other financial statements that  
2 were prepared for you and your husband identified the trust  
3 as your own cash asset?

4 A. No.

5 Q. If you would turn ahead a couple documents,  
6 please, to Plaintiff's 78.

7 A. Mm-hmm. Yes.

8 Q. This is called David and Lynn -- David L. Smith  
9 Lynn A. Smith financial statement, August 2008.

10 A. Yes.

11 Q. Have you seen this before?

12 A. (No response.)

13 Q. Let me withdraw that.

14 A. I'm not sure.

15 Q. Can you tell me what this is?

16 A. It says it's a financial statement from  
17 August 2008.

18 Q. Does it look like a financial statement that was  
19 prepared for you and your husband?

20 A. I don't know who prepared it.

21 Q. Do you, do you know -- have you ever heard of a  
22 firm called Piaker & Lyons?

23 A. Yes.

24 Q. What is Piaker & Lyons?

25 A. An accounting firm. Is that how you say it? Is

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1 that the name of the firm?

2 Q. I don't know. I could be saying it wrong.

3 A. I believe it's accounting -- an accounting firm.

4 Q. Doesn't Piaker & Lyons do your and your husband's  
5 personal taxes?

6 A. Yes.

7 Q. And doesn't Piaker & Lyons also prepare the  
8 personal -- I'm sorry. Doesn't Piaker & Lyons also prepare  
9 the tax returns for the David and Lynn Smith trust?

10 A. Yes.

11 Q. And does this look like a financial statement that  
12 Piaker & Lyons prepared?

13 MR. FEATHERSTONHAUGH: Objection, your Honor.

14 A. I don't see their name on it.

15 THE COURT: Hold on. Hold on. Overruled.  
16 You may answer.

17 A. I don't see the firm's name on the report, on the  
18 statement.

19 Q. I don't see it either. That's why I'm asking you  
20 whether it looks like the type of financial statement that  
21 Piaker -- the Piaker firm would prepare.

22 A. I don't know.

23 Q. Do you see it says cash and securities, 7,170,262?  
24 Do you see that on the top of the first page?

25 A. Yes.

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1 MR. FEATHERSTONHAUGH: Your Honor, I would  
2 like to object again. This is -- has not even been  
3 identified. The witness said she doesn't know where it  
4 comes from. She's never seen it.

5 THE COURT: All right. Well, I'll take your  
6 objections at the end, as I said before.

7 MR. STOELTING: And, your Honor, just for the  
8 record she did not say she had never seen it or she does not  
9 know where it comes from.

10 THE COURT: Ask your next question.

11 BY MR. STOELTING

12 Q. In August 2008, the date of this statement, did  
13 you have cash and securities of 7,170,262?

14 A. That's what it says here.

15 Q. Would you look on the next page, and there's a  
16 listing of brokerage accounts and then there's a tally, and  
17 it lists, among other items, it lists the David and Lynn  
18 Smith trust, and it gives it a value of 3.9 million. And  
19 that is included in the tally of items that add up to  
20 7.1 million. And let me just -- my, my question is whether  
21 that refreshes your recollection that in August 2008, you  
22 considered the trust as a cash asset of you and your  
23 husband's.

24 A. May I ask a question on this?

25 Q. Yes.

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1           A.     Would this be the two pieces of paper you showed  
2 me during my deposition and asked me if it was my husband's  
3 handwriting? And it was just something that he was  
4 scribbling in his office.

5                     THE COURT: Well, Mrs. Smith --

6           A.     I don't know what this is.

7                     THE COURT: Hold on. The way this works is  
8 the lawyers ask the questions. You have to answer them.

9                     RELIEF DEFENDANT LYNN SMITH: Okay. Sorry.

10                    THE COURT: If you don't understand the  
11 question or you don't know the answer, you can say that  
12 but...

13                    RELIEF DEFENDANT LYNN SMITH: All right. I  
14 don't know the answer.

15                    THE COURT: But you must answer.

16                    Mr. Stoelting, you said the Lynn Smith trust  
17 account, is that something different from the David and Lynn  
18 Smith trust account?

19                    MR. STOELTING: I believe it's the same  
20 thing.

21                    THE COURT: How is it referred to in the  
22 document?

23                    MR. STOELTING: In this document, it's  
24 referred to as the David L. Smith and Lynn Smith irrevocable  
25 trust.



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1 THE COURT: Okay. Go ahead.

2 MR. STOELTING: And just for the record, your  
3 Honor, this was marked as Mrs. Smith's deposition as  
4 Plaintiff's 11. It has a -- it's designated as hearing  
5 Exhibit 78. But we'll move on.

6 BY MR. STOELTING:

7 Q. If you could turn to the next document, which is  
8 Exhibit 79.

9 A. Yes.

10 Q. This is a letter with Piaker & Lyons' letterhead.  
11 Appears to be to David L. and Lynn A. Smith at 2 Rolling  
12 Brook Drive, dated November 4, 2008. Have you seen this  
13 letter before?

14 A. Possibly.

15 Q. Do you see -- and at the time, it's November 2008,  
16 Piaker was your accounting firm, correct?

17 A. Yes.

18 Q. And it was also the accounting firm that did the  
19 trust tax returns, correct?

20 A. Correct.

21 Q. On the last paragraph of the letter, it says:  
22 David L. and Lynn A. Smith have elected to omit  
23 substantially all of the disclosures required by generally  
24 accepted accounting principles. If the omitted disclosures  
25 were included in this statement of financial condition, they

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1 might influence the user's conclusions about the financial  
2 condition of David L. and Lynn A. Smith. Accordingly, this  
3 statement of financial condition is not designed for those  
4 who are not informed about such matters.

5 Do you have any understanding of why Piaker &  
6 Lyons wrote that to you in this letter?

7 A. No.

8 Q. Do you recall discussions with anyone on the  
9 subject of whether your financial statement should be  
10 prepared according to generally accepted accounting  
11 principles?

12 A. Could you repeat that?

13 Q. Sure. Do you recall any discussions with anyone  
14 on the topic of whether your and your husband's financial  
15 statements should be prepared or should not be prepared by  
16 generally accepted accounting principles?

17 A. I do not remember any conversations regarding  
18 that.

19 Q. Did you ever have the understanding that Piaker &  
20 Lyons was preparing your financial statements without making  
21 disclosures that were required by generally accepted  
22 accounting principles?

23 A. No.

24 Q. Could you look at the statement of financial  
25 condition, which is the second page of Exhibit 79? Do you

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1 have that open in front of you?

2 A. Yes.

3 Q. And it says David L. and Lynn A. Smith statement  
4 of financial condition, August 31st, 2008?

5 A. Mm-hmm. Yes.

6 Q. Okay. And do you see for cash, it indicates  
7 4,960,000? Do you see that?

8 A. Yes.

9 Q. Doesn't that cash account include the value of the  
10 David and Lynn Smith trust?

11 A. No.

12 Q. Did you have 4.9 million in cash in August 2008,  
13 excluding the trust?

14 A. If that's what it says here.

15 Q. All right. Do you know one way or another whether  
16 that 4.9 million would include the value of the trust?

17 A. It is not the value of the trust. It was not.  
18 The trust is -- it has its own value. And this is our  
19 statement here.

20 Q. So your testimony is that this 4.9 million does  
21 not include the value of the trust?

22 A. No.

23 Q. So you recall having 4.9 million in the bank on  
24 August 2008 in cash?

25 A. I don't recall.

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1 Q. So if we looked at your bank account records for  
2 August 2008, we would see a balance of 4.9 million?

3 A. I don't, I don't recall.

4 Q. Could you look at the next page, which is Exhibit  
5 80. The next document. The next exhibit. Do you have  
6 Exhibit 80 open in front of you?

7 A. Yes.

8 Q. Okay. And that's --

9 A. Yes.

10 Q. -- that's, that's three pages of handwriting. And  
11 at the top it says David L. and Lynn A. Smith financial  
12 statement, December 31, 2007; correct?

13 A. Correct.

14 Q. And this is your husband David L. Smith's  
15 handwriting, correct?

16 A. Yes.

17 Q. And do you see on the first page, the section  
18 called assets?

19 A. Yes.

20 Q. And do you see the section called cash and  
21 securities?

22 A. Yes.

23 Q. And what is the items listed under item one?

24 A. MS brokerage, Pine Street Capital, irrevocable  
25 trust.

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1 Q. Are you looking at Exhibit 80? The handwritten

2 ...

3 A. Yes. Yes.

4 Q. Okay. Do you see the number --

5 A. December 31, 2007.

6 Q. Okay.

7 A. Assets cash and securities.

8 Q. Okay. Do you see under cash and securities, it  
9 says number one, David L. Smith, Lynn A. Smith irrevocable  
10 trust?

11 A. Yes.

12 Q. Okay. And does this refresh your recollection  
13 that you counted the trust as your own cash asset?

14 A. No. This was just something that was taken from  
15 our home that was in my husband's office. I don't know --  
16 it wasn't any kind of official statement. It's just  
17 something he was -- had in a folder.

18 Q. But you do agree that it's your husband's  
19 handwriting?

20 A. Yes.

21 Q. Who created the trust?

22 A. I created the trust.

23 Q. And who funded --

24 A. We both created the trust. I funded the trust.

25 Q. So you and your husband would be the grantors?

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1 A. Yes.

2 Q. Do you know that term, "grantor"?

3 A. Yes.

4 Q. Did you understand that you and your husband were  
5 the grantors?

6 A. Yes.

7 Q. And I think you just indicated that, but all the  
8 money that was in the trust account came from, came from  
9 you?

10 A. Yes.

11 Q. And what source did you use?

12 A. I used my brokerage account.

13 Q. And that's what we've been referring to as the  
14 stock account?

15 A. The stock account.

16 Q. And the trust account, that's the only asset the  
17 trust has, correct?

18 A. Yes.

19 Q. And the trust accountants are your accountants,  
20 the Piaker firm, correct?

21 A. Accountant, yes.

22 Q. And do you know how -- do you know who selected  
23 Piaker to be the trust accountants and tax preparers?

24 A. No. No.

25 Q. And who is the initial trustee?

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1 A. Thomas J. Urbelis.

2 Q. And when was the trust created?

3 A. I believe 2004.

4 Q. How was it that Mr. Urbelis became the trustee?

5 A. He has been our friend for 50 years. He's a  
6 lawyer, he's intelligent, he knows my children since they  
7 were born, and we trusted him.

8 Q. And where does Mr. Urbelis live?

9 A. Andover, Massachusetts.

10 Q. And that's near Boston?

11 A. Yes.

12 Q. And how long has he lived there?

13 A. Thirty years.

14 Q. And does -- what is Mr. Smith's -- I mean, I'm  
15 sorry -- Mr. Urbelis' law practice, does it relate at all to  
16 investments or trusts?

17 A. No.

18 Q. Do you have an understanding of what his law  
19 practice relates to?

20 A. I believe it relates to town affairs, municipal  
21 government, not investments.

22 Q. And as far as you know, does Mr. Urbelis have any  
23 expertise in investing?

24 A. No.

25 Q. What is -- what did you -- and Mr. Urbelis was the

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1 trustee until shortly after the SEC lawsuit was filed,  
2 correct?

3 A. Correct.

4 Q. Did you have an understanding of what Mr. Urbelis  
5 did as trustee from 2004 until he resigned?

6 A. I believe he -- if the broker for the trust needed  
7 an approval or if there was some taxes to be paid, that's  
8 what his function was.

9 Q. Well, Mr. Urbelis didn't have any involvement in  
10 the preparation of the tax returns, did he, except to  
11 transfer funds to actually pay the bill?

12 MISS DUNN: Object to the form.

13 MR. STOELTING: I'll withdraw the question.

14 BY MR. STOELTING:

15 Q. Isn't all Mr. Urbelis ever did was sign wire  
16 transfer forms so money could be wired out of the trust bank  
17 account?

18 MISS DUNN: Objection. Leading.

19 THE COURT: If you know.

20 A. I forgot what he -- what his question was,  
21 actually.

22 Q. Sure.

23 A. What was that?

24 Q. As far as you know, isn't the only thing that  
25 Mr. Urbelis ever did was sign wire transfer forms when David



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1 Smith told him to sign those forms so that money could be  
2 transferred out of the trust account?

3 MISS DUNN: Object to the form.

4 A. No.

5 MISS DUNN: And it's a leading question.  
6 This witness is testifying on direct.

7 THE COURT: It's also an adverse witness.  
8 The objection is overruled. The answer is on the record.

9 A. It is no.

10 Q. What else did he do besides sign wire transfer  
11 forms when David Smith told him to sign?

12 A. David Smith can't tell a trustee to sign. He's  
13 the broker. When he was the broker of the trust, yes, but  
14 then that changed. He paid some of the tax -- the taxes for  
15 the trust account. Mr. Urbelis did, from time to time.

16 Q. Correct. And that involved signing a form to  
17 transfer money out of the account, correct?

18 A. Oh, yes. Yes.

19 Q. So are you aware of anything Mr. Urbelis ever did  
20 other than signing transfer forms so that money could leave  
21 the trust account?

22 A. No.

23 Q. Did you understand that neither you nor your  
24 husband could exercise direct control over the trust?

25 A. Yes.

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1 Q. And the trust brokerage account, up until earlier  
2 this year, was always at McGinn, Smith & Co. Inc., correct?

3 A. Yes.

4 Q. And did David Smith have authority to buy or sell  
5 investments for the trust without first telling the trustee  
6 about it?

7 A. No.

8 Q. So he had to somehow get the trustee to sign  
9 something before he could make an investment?

10 A. Yes.

11 Q. And on your understanding, all the investments  
12 made by the trust were selected by David Smith?

13 A. Yes.

14 Q. Could you please turn to Plaintiff's 84? This  
15 is -- do you have Plaintiff's 84 open?

16 A. Is it Exhibit 12?

17 Q. Correct. It was previously marked at the  
18 deposition as Exhibit 12.

19 A. Yes.

20 Q. This is a letter from David L. Smith to  
21 Mr. Urbelis, dated August 4, 2004. Do you remember seeing  
22 this letter before today?

23 A. No.

24 Q. And I'll, I'll just draw your attention to the  
25 fourth sentence in the letter. Mr. Smith writes: You and I

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1 will be able to consult on investments, but I am not  
2 eligible to exercise any direct control over the trust or  
3 its investments.

4 Did I read that correctly?

5 A. Yes.

6 Q. And was that consistent with your understanding of  
7 how the trust was supposed to operate?

8 A. Yes.

9 Q. Could you look at the next page of Exhibit 84?

10 A. Mm-hmm. Yes.

11 Q. Do you see something called a declaration of  
12 trust?

13 A. Yes.

14 Q. And would you look on page 7 of the declaration of  
15 trust?

16 A. Yes.

17 Q. Do you see your signature on that page?

18 A. Yes.

19 Q. And you signed as donor?

20 A. Yes.

21 Q. And do you see your husband's signature?

22 A. Yes.

23 Q. And does that appear to be Mr. Urbelis' signature?

24 A. Yes.

25 Q. Can you tell me what this is?

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1           A.    It's the trustee agreement with -- declaration of  
2 trust.  It's the trust agreement.

3           Q.    Isn't this the document -- did you understand this  
4 to be the agreement that sets forth the terms and conditions  
5 under which the trust was to be administered?

6           A.    Yes.

7           Q.    Would you look at the first page, where it says  
8 first?  Do you see that?

9           A.    Yes.

10          Q.    It says:  During the lives of the donors...  And  
11 that refers to you and your husband?

12          A.    Correct.

13          Q.    During the lives of the donors, the trustee shall  
14 manage, invest, and reinvest the trust estate to satisfy all  
15 obligations of the trust.  Did I read that directly?

16          A.    Correct.

17          Q.    Okay.  What did Mr. Urbelis actually do to manage,  
18 invest, and reinvest the trust estate?

19          A.    Well, Mr. Urbelis is the lawyer.  My husband,  
20 David Smith, was the investment banker.  In fact,  
21 Mr. Urbelis is a client of Mr. Smith's.  So I wouldn't  
22 expect Mr. Urbelis to be making investment decisions.  He  
23 would probably follow the advice of my husband.

24          Q.    Well, do you know how much money -- you just  
25 mentioned that Mr. Urbelis personally had invested in one or

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1 more funds at McGinn, Smith & Co., correct?

2 A. Yes.

3 Q. And did you understand that Mr. Urbelis had  
4 invested in one or more of the First Albany (sic) or Third  
5 Independent (sic) series of notes?

6 A. I heard that here today.

7 Q. You didn't know that previously?

8 A. No.

9 Q. Do you know what else Mr. Urbelis personally or  
10 members of his family had invested in at McGinn, Smith?

11 A. Why would I -- no, I don't know that. Of course  
12 not.

13 Q. Okay. But you were aware that Mr. Urbelis and  
14 members of his family had some of their personal investments  
15 with McGinn, Smith?

16 A. Yes. He's been our friend for 50 years. I would  
17 hope he would be investing with us.

18 Q. All right. Well, did you -- do you remember ever  
19 being concerned that Mr. Urbelis, as trustee, was not  
20 managing, investing the trust estate as the trust  
21 declaration required him to do?

22 A. No.

23 Q. Did you ever have a discussion with your husband  
24 on the topic of whether it was appropriate for him to be  
25 controlling the investments for the trust?

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1           A.    I had no conversation about that.  He was a  
2 financial advisor and a stockbroker.

3           Q.    Do you remember any conversations with anybody on  
4 the topic of whether or not it was appropriate for Mr. Smith  
5 to be controlling the investments of the trust?

6           A.    I had no conservations with anyone.

7           Q.    David Smith was never formally named as investment  
8 advisor for the trust, was he?

9           A.    I have no idea.

10          Q.    And do you know if the trust agreement allows you  
11 and David to take money out of the trust account?

12          A.    It does not allow us to take money out.

13          Q.    Who are the beneficiaries of the trust?

14          A.    Jeffrey Ryan Smith and Lauren Tate Smith, my two  
15 children.

16          Q.    And how old are they now?

17          A.    Twenty-seven -- Lauren is 27.  Jeffrey is 30.

18          Q.    So they were, they were past 21 when the trust was  
19 created?

20          A.    Yes.

21          Q.    And has Jeffrey or Lauren ever received a single  
22 distribution of any money at all from the trust?

23          A.    Um, yes.

24          Q.    When did that occur?

25          A.    Jeffrey took a \$95,000 check from the trust in

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1 April of this year.

2 Q. Wasn't that transfer made into David Smith's  
3 personal account?

4 A. No. It was put into my personal checking account.

5 Q. So the transfer that you're talking about was  
6 actually a transfer from the trust account to your personal  
7 account, correct?

8 A. Yes.

9 Q. Are you aware of any transfers by the trust out of  
10 the trust account to any accounts except to accounts  
11 controlled by you and your husband?

12 A. No.

13 Q. Could you look at Exhibit 95 please? Do you have  
14 Exhibit 95 open in front of you?

15 A. Yes, I do.

16 Q. Does this reflect a wire on April 17, 2006, from  
17 the trust account into David Smith's account at M & T Bank?

18 A. Yes.

19 Q. And we just mentioned a transfer of 95,000 from  
20 the trust account into your account. Do you ever recall  
21 getting any legal advice on the topic of whether it was  
22 appropriate for trust funds to be wired into the personal  
23 accounts of you and your husband?

24 A. Pardon? Can you repeat that?

25 Q. Sure. Did you ever get legal advice on the topic

**LYNN SMITH - DIRECT - STOELTING**

1 of whether it was appropriate for trust funds to be wired  
2 out of a trust account into your personal account?

3 A. No.

4 Q. You and your husband were not the beneficiaries of  
5 the trust, correct?

6 A. No.

7 Q. Did Mr. Urbelis, the trustee, ever ask you whether  
8 it was appropriate for him to be approving wire transfers  
9 into the personal accounts of you and your husband?

10 A. No.

11 Q. Would you look at PX -- or Plaintiff's 97? Do you  
12 have Exhibit 97 open in front of you?

13 A. Yes.

14 Q. Does this reflect a wire transfer of \$110,636 from  
15 the trust account to David L. Smith's account at M & T Bank  
16 on April 11, 2008?

17 A. Yes.

18 Q. Could you turn to Exhibit 98 please? This is a  
19 document called indemnity agreement. And is that your  
20 signature at the bottom?

21 A. Yes.

22 Q. And that's your husband's signature next to it?

23 A. Yes.

24 Q. Do you recall why this indemnity agreement was  
25 entered into?



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1 A. No.

2 Q. If you could turn please to Exhibit 101.

3 A. Yes.

4 Q. This is a letter dated April 22, 2010, from  
5 Mr. Urbelis to David and Lynn Smith at 2 Rolling Brook  
6 Drive, and it says: Dear Dave and Lynn: I hereby resign as  
7 trustee of the above referenced trust. This resignation  
8 shall take effect on May 27, 2010. Do you recall this  
9 letter?

10 A. Yes.

11 Q. Do you remember having an understanding about why  
12 Mr. Urbelis resigned?

13 A. I believe he resigned because he thought there  
14 might be a conflict of interest because he was a client. I  
15 have no idea why he resigned, actually.

16 Q. No idea?

17 A. No.

18 Q. You never talked to Mr. Urbelis about his  
19 resignation?

20 A. No.

21 Q. Where, where -- which institution is the trust  
22 account at the moment?

23 MISS DUNN: Object to the form of the  
24 question.

25 THE COURT: Overruled. Do you understand the

**LYNN SMITH - DIRECT - STOELTING**

1 question?

2 RELIEF DEFENDANT LYNN SMITH: No.

3 BY MR. STOELTING

4 Q. Let me --

5 A. No.

6 Q. I'll withdraw the question. Could you look at  
7 Exhibit 108 please?

8 MISS DUNN: Which number?

9 MR. STOELTING: 108.

10 A. Oh.

11 Q. Can you tell me what Exhibit 108 is?

12 A. It is RMR Wealth Management LLC.

13 Q. Is this an account statement for the account in  
14 the name of the David and Lynn Smith irrevocable trust?

15 A. Yes.

16 Q. And is the date on this account statement March 1,  
17 2010 to March 31, 2010?

18 A. Yes. Yes.

19 Q. Okay. And what is the value of the portfolio in  
20 the trust account as of the date of this account statement?

21 A. \$3,630,726.27.

22 Q. Okay. And if you turn back one exhibit to 107.  
23 Do you have Exhibit 107 open in front of you?

24 A. Yes.

25 Q. And this is another RMR Wealth Management account

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1 in the name of Lynn A. Smith. And do you understand this  
2 account statement to be for what we've been referring to as  
3 the stock account?

4 A. Yes.

5 Q. And this -- the statement date here is March 1,  
6 2010 to March 31, 2010. Can you just read or tell me the  
7 value of the portfolio as of the date as reflected by the  
8 statement?

9 A. \$2,118,511.06.

10 Q. Okay. And both the statement for the trust  
11 account and the stock account are at RMR Wealth Management.  
12 Do you know -- have an understand of when those accounts  
13 shifted from McGinn, Smith & Co. Inc. to RMR?

14 A. I don't know the exact date. Possibly December.

15 Q. Of 2009?

16 A. Yes.

17 Q. Okay. And this -- both statements refer to an  
18 entity called Dinosaur Securities, LLC, RMR Wealth  
19 Management?

20 A. Yes.

21 Q. Do you know what Dinosaur Securities is?

22 A. Yes. It's the brokerage -- McGinn, Smith sold off  
23 the brokerage part of their business to small groups.  
24 Dinosaur Securities is the group.

25 Q. Okay. And as a result of that sale, did the trust

**LYNN SMITH - DIRECT - STOELTING**

1 account and the stock account move then to Dinosaur  
2 Securities?

3 A. Yes.

4 Q. And up until that transfer, in December of 2009,  
5 or around then, had the stock account and the trust account  
6 always been at McGinn, Smith & Co.?

7 A. Yes.

8 Q. The stock account that we can see, at least as of  
9 March 2010, had a 2.1 value in the portfolio. How long have  
10 you had that stock account?

11 A. I've had this stock account since 1969.

12 Q. And when you first opened it, how much money did  
13 you have in the account?

14 A. I inherited the account when my father died, and  
15 he had \$60,000 in it.

16 Q. And then didn't you use a portion of that \$60,000  
17 on -- as a down payment on a house?

18 A. What house?

19 Q. A house that you purchased. Did you use a portion  
20 of that --

21 A. Most likely.

22 Q. And did the value of the stock as a result of the  
23 down payment go down to as low as \$10,000?

24 A. It did not go down in value because of the down  
25 payment. I believe it, I believe it went down when the

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1 market went down.

2 Q. Okay. But --

3 A. But it was -- what? Go ahead.

4 Q. I'm sorry. But for whatever reason, did the  
5 initial 60,000 get reduced to 10,000 at one point?

6 A. At one point in time, yes.

7 Q. And did David Smith eventually handle or come to  
8 handle the stock account?

9 A. He started -- yes, he handled the stock account.

10 Q. Do you remember when that happened?

11 A. Right, right from the beginning, when we were  
12 first married and my dad died and I got the account, he  
13 worked on that. But the account stayed in my name.

14 Q. Did -- so it was sometime in 1969 or a year or two  
15 after that Mr. Smith, your husband, became the broker on the  
16 account?

17 A. No. He worked for a bank for a few years and used  
18 a broker in the Rochester area at Hayden, Stone. And then  
19 when he became a broker, he obviously handled the account.

20 Q. And did Mr. Smith have authority to buy or sell  
21 securities in this stock account without getting your  
22 approval first?

23 A. Without getting my approval?

24 Q. Yes.

25 A. Did he have a discretionary -- as he -- when he

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1 was a stockbroker? I pretty much always gave approval.

2 Q. Okay. But my question was whether he could have  
3 the authority to buy or sell securities on his own without  
4 asking you first.

5 A. He could.

6 Q. So I think you referred to that as discretionary  
7 authority?

8 A. I believe a lot of investors have that with their  
9 brokers. And he was my husband.

10 Q. I'm just trying to establish that he did have  
11 discretionary authority.

12 A. Yes. Yes.

13 Q. And could Mr. -- did Mr. Smith have the authority  
14 to take -- to make cash -- to take cash out of the account  
15 without your approval?

16 A. No.

17 Q. And since the purchase of your -- of the house in  
18 1969, throughout the course of your marriage, you purchased  
19 several marital homes, correct?

20 A. Marital homes, yes.

21 Q. And the stock account was used for the purchase of  
22 those homes, correct?

23 A. Yes.

24 Q. For example, when you bought another home in  
25 Clifton Park in the early 1980s, this stock account was used

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1 for that?

2 A. Yes.

3 Q. And the stock account was used to buy a ski condo  
4 in Killington, Vermont for about \$125,000 in the mid 1980s?

5 A. Yes.

6 Q. And the stock account you already mentioned was  
7 used to buy the Vero Beach house?

8 A. Yes.

9 Q. And the stock account was used to buy the Rolling  
10 Brook Drive house?

11 A. Yes.

12 Q. And the stock account was also used to provide  
13 loans to your husband's business, correct?

14 A. Yes.

15 Q. And on June -- in June 2004, you made a loan of  
16 \$366,000 from the stock account to something called TDMM  
17 Cable?

18 A. Yes.

19 Q. Do you remember why you made that loan?

20 A. Yes. I made that loan, Dave came to me and asked  
21 if I would approve of making a loan to the -- it was a  
22 company in Florida that was kind of like a mini Time Warner  
23 type of company, and I said yes.

24 Q. Did you know anything about TDMM Cable before your  
25 husband asked you --

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1 A. I had heard it spoken of.

2 Q. By your husband?

3 A. Yes.

4 Q. Did you have any knowledge independent of your  
5 husband of TDMM Cable?

6 A. No.

7 Q. Did you go down to Florida and meet the people  
8 that were involved in that company?

9 A. No.

10 Q. Did you do any due diligence except talk to your  
11 husband prior to making the loan?

12 A. No.

13 Q. And you've made a number of these sort of bridge  
14 financing loans out of the stock account to your husband's  
15 business over the years, correct?

16 A. Correct.

17 Q. And the number of those loans has increased in the  
18 last 15 years, is that right?

19 A. Yes.

20 Q. And do you, do you recall approximately how many  
21 times per year you would make this sort of bridge financing  
22 loan out of the stock account to benefit your husband's  
23 business?

24 A. No.

25 Q. Do you remember how many -- on how many occasions



**LYNN SMITH - DIRECT - STOELTING**

1 you've provided bridge financing to your husband?

2 A. No.

3 Q. Do you know or have an understanding why your  
4 husband would come to you for these, for these bridge  
5 financings, instead of going to a bank or another lender?

6 A. Yes.

7 Q. What is that?

8 A. Well, there's several reasons. Banks really  
9 aren't handing out money to small businesses right now.  
10 There's just a credit crunch going on. And I had the money  
11 available. And I could make a small profit, as well as it  
12 would be more profitable for the business. So I thought it  
13 was a good idea.

14 Q. So you understood that you were providing a  
15 benefit to your husband's business by doing these bridge  
16 financing transactions?

17 A. Yes.

18 Q. And what were the repayment terms of the bridge  
19 loans out of the stock account?

20 A. I, I really didn't hear you.

21 Q. I'm sorry. What were the repayment terms of the  
22 bridge loans that you made out of the stock account?

23 A. What were the repayment terms? They were usually  
24 paid back in -- sometimes even within two or three days.

25 Q. And how was the interest rate arrived at?

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1 A. I do not know.

2 Q. Do you remember negotiations?

3 A. No. With my husband?

4 Q. Or anyone.

5 A. No.

6 Q. And when you did these bridge financing loans over  
7 the last 15 years, did you ever deal with anybody except  
8 your husband?

9 A. No.

10 Q. And were loan agreements executed?

11 A. Yes.

12 Q. Were loan agreements executed on every single  
13 occasion you made a bridge loan out of this stock account?

14 A. Yes.

15 Q. Do you remember any times when a loan agreement  
16 was not executed?

17 A. No, I don't.

18 Q. Mrs. Smith, the affidavit of relief defendant Lynn  
19 A. Smith, do you have that accessible?

20 A. I do. I do.

21 Q. The TDMM Cable loan that we talked about a moment  
22 ago, the \$366,000, do you remember if there was a loan  
23 agreement for that loan?

24 A. I want exhibit ... yes, I believe so.

25 Q. Do you actually remember signing a loan agreement

**LYNN SMITH - DIRECT - STOELTING**

1 before you made the loan?

2 A. I would have to. I would have to sign something  
3 before I made the loan.

4 Q. Okay. My question was whether you actually  
5 remembered signing a specific loan agreement before making  
6 the TDMM Cable loan.

7 A. No.

8 Q. Okay. And the promissory note that's attached to  
9 your declaration relates, at least on its face, to that --  
10 to a loan to TDMM Cable; am I right?

11 A. Am I in -- are we looking at Exhibit C?

12 Q. Oh, I'm sorry.

13 A. What are we looking at?

14 Q. I'm sorry, ma'am. I was referring to your  
15 affidavit, which is a separate piece of paper. Oh, I think  
16 you have it but ...

17 A. I do. What page?

18 Q. It's Exhibit A to your affidavit.

19 A. I have it.

20 Q. And I'll just note for the record that this is --  
21 the same document was also included as a Plaintiff's Exhibit  
22 76, but we can refer to the one that's attached to your  
23 affidavit.

24 This promissory note is unsigned, correct?

25 A. Yes.

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1 Q. And if you look at the signature block --

2 A. Yes.

3 Q. -- on page 4 of the document.

4 A. Yes.

5 Q. There's a signature block for Timothy M. McGinn --

6 A. Yes.

7 Q. -- who would sign on behalf of TDMM Cable Funding  
8 LLC. But there's not a signature block for Lynn Smith, the  
9 lender. Do you, do you recall that the notes did not have  
10 signature blocks for you or that you did not -- there was  
11 not a space for you to sign on?

12 A. I was the person loaning the money. This says the  
13 borrower. I never signed -- no, I wouldn't sign this. I  
14 sent -- signed the release of the money in my stock account.

15 Q. Okay. So that you're clarifying that you wouldn't  
16 actually sign a promissory note, you would just sign  
17 something authorizing the release?

18 A. Yes.

19 Q. Okay. So a moment ago you talked about loan  
20 agreements being executed. And so I just want to clarify  
21 for the record what you meant was not that you would sign a  
22 loan agreement but that you would sign an authorization for  
23 the funds to be transferred?

24 A. Yes.

25 Q. And did you understand that Tim McGinn signed --

**LYNN SMITH - DIRECT - STOELTING**

1 well, let me withdraw that question.

2 Do you remember seeing this -- do you remember  
3 even seeing this promissory note before you authorized the  
4 loan?

5 A. I don't remember.

6 Q. Isn't it true that the first time you ever saw  
7 this promissory note was in your lawyer's office a few weeks  
8 ago?

9 A. Possibly.

10 Q. Do you remember giving -- you are not sure?

11 A. I'm not sure.

12 Q. I'm sorry?

13 A. I think it was in my lawyer's office.

14 Q. Right. Isn't it true that the first time that you  
15 ever saw this promissory note was a few weeks ago, after the  
16 SEC case was filed, in your lawyer's office?

17 A. Yes.

18 Q. And was that the typical practice, that you  
19 generally would not see the promissory notes because you  
20 didn't have to sign them anyway?

21 A. Yes.

22 Q. Did you ever refuse a request of your husband to  
23 make a bridge loan to the business?

24 A. Yes.

25 Q. How many times did that happen?

**LYNN SMITH - DIRECT - STOELTING**

1 A. Once.

2 Q. And can you tell me about that?

3 A. Yes. My husband came to me and wanted to put some  
4 money into McGinn, Smith. They were going through a hard  
5 time. And I refused.

6 Q. Why did you refuse?

7 A. Because the other two partners were not  
8 contributing the same amount.

9 Q. When you say the other two partners, who are you  
10 referring to?

11 A. I'm referring to Tim McGinn and Tom Livingston.

12 Q. How did you -- how much was your -- how much did  
13 you understand your husband to be asking for?

14 A. He was asking me for -- either 200 or \$300,000.

15 Q. And he -- did he need that for a bridge loan for a  
16 financing transaction or to meet payroll?

17 A. He needed it for a lot of different things. Not  
18 specific -- he didn't give me specifically what it was.  
19 Keep the business going.

20 Q. Okay. And you mentioned that the business was  
21 going through a hard time when the request was made. What  
22 did you mean by that?

23 A. I mean a lot of small businesses are going through  
24 a hard time in the last two years, and he's -- and McGinn,  
25 Smith was one of them.

**LYNN SMITH - DIRECT - STOELTING**

1 Q. And what did you know about the hard times McGinn,  
2 Smith was undergoing last year?

3 A. Just, I can't -- I'm not going to go into detail.  
4 I just know they were having a hard time.

5 Q. Well, did you understand that the investors in  
6 McGinn, Smith were complaining because they weren't getting  
7 any of the distributions they were supposed to be getting?

8 A. Um, I did hear that.

9 Q. Where did you hear that?

10 A. Just recently. But McGinn, Smith wasn't the only  
11 company that that was happening with. I mean I'm looking at  
12 GE, General Motors. Big companies haven't been -- are  
13 having problems. So, obviously, I knew McGinn, Smith was  
14 having one.

15 Q. Okay. And I, I wasn't interested in things you  
16 may have learned in the courtroom or since the case was  
17 filed. I'm trying to understand things that you knew in  
18 2000...

19 A. I didn't learn that in the courtroom. I mean  
20 we're in a, a depression. I mean businesses are going --  
21 lots of businesses are folding. So, yes, I was worried.

22 Q. Okay. So at the time your husband came to you and  
23 said he needed 2 to 300,000 because his firm was having hard  
24 times --

25 A. Mm-hmm. Yes.

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1 Q. -- did you understand that those hard times had  
2 result -- let me withdraw that.

3 Did you have any understanding of what was the  
4 cause of those hard times at McGinn, Smith & Co.?

5 A. Yes.

6 Q. Okay. And what did you understand?

7 A. I knew there was some arbitrations coming up.

8 Q. And those were customers of McGinn, Smith & Co.?

9 A. Yes.

10 Q. And did you understand that in those arbitrations,  
11 investors were saying that they had been deceived by brokers  
12 at McGinn, Smith & Co.?

13 A. All I knew is that people had lost some money. I  
14 didn't hear the word "deceived".

15 Q. Did you have any -- you mentioned that Mr. McGinn  
16 and Mr. Livingston, your husband's partners, were not  
17 willing to make a contribution at the time your husband made  
18 the request to you. Did you have any understanding of why  
19 they could not or would not?

20 A. No.

21 Q. Did you ever talk to them about why they were not  
22 willing to put money into the business?

23 A. Did I ever speak to them?

24 Q. Yes.

25 A. No.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**



**LYNN SMITH - DIRECT - STOELTING**

1 THE COURT: Was this in 2009, Mrs. Smith?

2 RELIEF DEFENDANT LYNN SMITH: Yes.

3 THE COURT: Thank you.

4 BY MR. STOELTING:

5 Q. Do you remember -- withdrawn. Have you heard of  
6 something called First Independent Income Notes?

7 A. No. I'm not sure.

8 Q. Do you remember in 2003, loaning or giving  
9 \$2 million to First Independent Income Notes LLC?

10 A. In 2003?

11 Q. Yes.

12 A. No.

13 Q. We've marked as Plaintiff's Exhibit 130 a  
14 five-page document, and the first page is a promissory note  
15 dated October 1, 2003. Does this refresh your recollection  
16 about making a two million dollar loan to First Independent  
17 Income Notes in 2003?

18 A. No.

19 Q. Does that appear to be your -- David Smith's  
20 signature at the bottom of the first page of Exhibit 130?

21 A. Yes.

22 Q. Was the stock account used to make a bridge loan  
23 to MS Funding in November 2007?

24 A. Yes.

25 Q. And was that amount \$380,000?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - DIRECT - STOELTING**

1 A. I -- again.

2 Q. Was the amount of that loan to MS Funding  
3 \$380,000?

4 A. I believe it was 376 or something like that. I  
5 think it was -- when the check was returned, it was put in  
6 Dave's account instead of my account, and he just upped it  
7 to 380 and put it in mine.

8 Q. Your stock account?

9 A. Yes.

10 Q. You're talking about the repayment?

11 A. I think it was put in his checking account.

12 Q. Okay. Do you remember why this stock account was  
13 allowed to make that bridge loan to MS Funding in November  
14 of 2007?

15 A. Why the stock account was allowed?

16 Q. Yes.

17 A. Yeah. I signed, I signed the paper to allow it to  
18 make the loan.

19 Q. Okay. But other than that, did you have an  
20 understanding of why an entity called MS Funding needed the  
21 money?

22 A. MS Funding had something to do with the alarm  
23 company that McGinn, Smith was doing alarm deals for a  
24 while. So I knew it was fairly important.

25 Q. Okay. And that knowledge was based on discussions

**LYNN SMITH - DIRECT - STOELTING**

1 with your husband?

2 A. Yes.

3 Q. Anyone else?

4 A. No.

5 Q. And in March 2010, this year, was the stock  
6 account used to make a bridge loan to TDM Benchmark?

7 A. Yes.

8 Q. Do you remember the amount of that loan?

9 A. I think it was a hundred thousand dollars, but I'm  
10 checking. Can you tell me what you're looking at?

11 Q. Sure.

12 A. I believe I see it. Exhibit C. Yes. A hundred  
13 thousand dollars.

14 Q. Okay.

15 A. On 3/18/2010.

16 Q. Do you remember --

17 A. Are we going to use this?

18 Q. We are, one more time. Do you remember signing --  
19 being given by your husband, you know, sort of a stack of  
20 letters of authorization, a dozen or 15 at a time, and then  
21 signing blank letters of authorization, and then signing  
22 them and giving them back to your husband?

23 A. Yes.

24 Q. And how -- why did you do that?

25 A. I actually asked him to do that because I was

**LYNN SMITH - DIRECT - STOELTING**

1 making the loans, and I remember having him bring home the  
2 letters, about 15 of them, I signed them, and I sent them in  
3 the mail to David McQuade and asked him to keep them in his  
4 desk drawer.

5 Q. Okay.

6 A. His office was in Clifton Park and Dave was  
7 working in Albany. And I was living in Saratoga. So to  
8 make things easier on myself, I asked him to keep them.

9 Q. And do you remember signing stacks of letters of  
10 authorization? You know, was that a practice over many  
11 years?

12 A. No.

13 Q. How many times did it happen?

14 A. I don't ... maybe three times.

15 Q. Okay. Do you remember when those three times  
16 occurred?

17 A. No. I just remember doing it.

18 Q. Okay. And when you did that on three occasions,  
19 how many blank letters of authorization would you sign at a  
20 time?

21 A. Maybe a dozen.

22 Q. And do you remember if that was in the last --  
23 those three occasions occurred in the last ten years?

24 A. Yes.

25 Q. Okay. It's Exhibit 126. Do you have Exhibit 126

**LYNN SMITH - DIRECT - STOELTING**

1 open in front of you?

2 A. Yes, I do.

3 MR. STOELTING: For the record, it's a  
4 multi-page document, each page is double-sided, and the  
5 first -- the oldest one on the last page appears to be dated  
6 January 24, 2000 through February 20th, 2009?

7 A. Yes.

8 Q. Could you just take a moment and look at this  
9 exhibit and tell me what it is?

10 A. Sir, I looked through every one of these last  
11 evening, and I am pretty sure that most signatures on here  
12 are mine. But I can --

13 THE COURT: Are those the letters of  
14 authorization?

15 RELIEF DEFENDANT LYNN SMITH: Yes. Yes,  
16 Judge, your Honor.

17 A. I'm not trying to be misleading when I say that on  
18 maybe three or four rare occasions, I have had my husband  
19 sign my name. I have both of my hands, especially this one  
20 (indicating), is riddled with osteo arthritis and some  
21 mornings I can't lift a pen even. So I never thought it  
22 would be a problem. On maybe four occasions I may have said  
23 can you just sign my name.

24 But I did go through all of these last night and  
25 ... that's what it is.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - DIRECT - STOELTING**

1 Q. Okay. Were these -- were any of these -- do you  
2 recognize any of these as the form of the ones that you  
3 signed when you had the stack of, you know, 15 or so at  
4 time?

5 A. I really didn't read each form quite as intensely  
6 as you have. So, no. They all seem to be about the same  
7 thing.

8 Q. And would these be familiar to you as the types of  
9 letters of authorization you would sign for the bridge  
10 financing transactions as well?

11 A. Yes.

12 Q. Do you know if anyone else at McGinn, Smith & Co.  
13 other than Mr. McQuade kept a -- maintained some signed  
14 letters of authorization from you?

15 A. Just Mr. McQuade.

16 Q. How do you know it was just Mr. McQuade?

17 A. I know it was just Mr. McQuade.

18 Q. Earlier you mentioned a company called Integrated  
19 Alarm Services Group Inc..

20 A. Yes.

21 Q. Did you ever loan any money to Integrated Alarm  
22 Services Group Inc.?

23 A. I'm not sure.

24 Q. Have you ever heard of a company that was formed  
25 by your husband and Mr. McGinn around 2000 called First

**LYNN SMITH - DIRECT - STOELTING**

1 Integrated Capital Corp.?

2 A. No.

3 Q. I'm sorry?

4 A. No.

5 Q. Do you ever remember lending any money to First  
6 Integrated Capital Corp.?

7 A. No.

8 Q. Have you ever heard of a company called King  
9 Central?

10 A. No.

11 Q. Did you ever meet a man named Ian Meyers? Meyers

12 A. What was his name again?

13 Q. Ian Meyers. M E Y --

14 A. Have I ever met him? Yes.

15 Q. Who's Ian Meyers?

16 A. I met him socially.

17 Q. Do you recall that there was a time around 2003 or  
18 so when Integrated Alarm Services Group was trying to become  
19 a public company?

20 A. Yes.

21 Q. And do you recall that there -- that difficulties  
22 emerged with Integrated Alarm becoming public because the  
23 accounting firm PricewaterhouseCoopers didn't want to  
24 approve the accounting documents?

25 A. I don't recall that.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - DIRECT - STOELTING**

1 Q. Do you recall that you were asked to sign  
2 promissory notes loaning \$6 million or so to Integrated  
3 Alarm in order to allow the public offering of Integrated  
4 Alarms to go forward?

5 A. I'm sure I did.

6 Q. Do you remember signing those promissory notes?

7 A. Specifically, no.

8 Q. Okay. And it was around \$6 million you loaned?

9 A. What are the dates again?

10 Q. 2004 or so.

11 A. No.

12 Q. 2003.

13 A. I don't recall.

14 Q. But you generally recall loaning about that amount  
15 of money at the time of the offerings so that the offering  
16 could go forward?

17 A. As I said, I'm sure I did.

18 Q. And did the money for that come out of your stock  
19 account for that loan?

20 A. Yes.

21 MR. STOELTING: One moment.

22 (Pause.)

23 BY MR. STOELTING:

24 Q. I just have a few questions, and then I'll be  
25 done.



**LYNN SMITH - DIRECT - STOELTING**

1           The \$95,000 that was transferred to your account  
2 from the stock account in April of this year, was that used  
3 to pay taxes?

4           A.    It wasn't from the stock account.

5           Q.    I'm sorry. I'm sorry. Let me try again. Earlier  
6 we established that there was \$95,000 transferred from the  
7 trust account to your account, correct?

8           A.    That is correct.

9           Q.    And you used some of that money to pay your  
10 personal taxes, correct?

11          A.    That is correct.

12          Q.    And did you think it was appropriate to use money  
13 from the trust account to pay your personal taxes?

14          A.    No.

15          Q.    And that money that was transferred did not -- was  
16 not used for the benefit of any of the beneficiaries,  
17 correct?

18          A.    The way I recall the matter of the 95,000, is that  
19 I was in Florida, and we were trying to get our taxes done,  
20 and my son Jeffrey called and said that he had put \$95,000  
21 in my checking account to write four checks. And I had the  
22 accountant's tax preparation work, and I paid two for the  
23 trust and two for -- went to Dave Smith.

24          Q.    And -- but none of that money went to either of  
25 the beneficiaries, is that right?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - DIRECT - STOELTING**

1           A.    No.

2           Q.    So, so I guess, just so the record is clear, none  
3 of that 95,000 did go to the beneficiaries, you're agreeing  
4 upon?

5           A.    The -- yes. Two of the tax bills were for the  
6 trust fund.

7           Q.    And hasn't there been occasions, at least one  
8 occasion before this year that you paid the trust taxes from  
9 your own account?

10          A.    I believe there has been more than one occasion.

11          Q.    Okay. And do you remember when those occasions  
12 were?

13          A.    I don't have the exact dates, but I know there  
14 have been occasions.

15          Q.    And why would you pay trust taxes from your  
16 personal account?

17          A.    Well, if we had the money to do it, I didn't see  
18 any reason that it couldn't be done.

19          Q.    Well, didn't it -- wasn't there a trust account  
20 for the purpose of paying trust taxes?

21          A.    Yes, but --

22          Q.    So why --

23          A.    -- I do know my husband paid the trust taxes a few  
24 times.

25          Q.    And was he ever reimbursed by the trust?

**LYNN SMITH - DIRECT - STOELTING**

1 A. No.

2 Q. Was there ever any written agreement between the  
3 trust and your husband regarding those payments?

4 A. No. I don't believe so.

5 Q. Now, the stock account, if we could refer back to  
6 that account for a moment, at its low point in '69 or '70,  
7 was it at about \$10,000, I think you testified; and do you  
8 remember by the late 1990s how large that account had grown?

9 A. Yes. I believe it grew to about \$6 million.

10 Q. And during those decades of the '70s, '80s, '90s,  
11 was there additional principal deposits made into the stock  
12 account?

13 A. Additional...

14 Q. I'm sorry, let me ask it a different way. Did you  
15 put additional money into the stock account or was that as a  
16 result of investment returns?

17 A. Those were the result of investment returns.

18 Q. And who devised the investment strategy that  
19 resulted in those returns?

20 A. My husband, David Smith. We had bought in the, in  
21 the '90s some Albany stock, \$400,000 worth of Albany stock.  
22 And then by the time you're talking about, it had gone up to  
23 \$4 million. And that is what we put in the trust.

24 Q. And then two million remained in the stock  
25 account?

**LYNN SMITH - DIRECT - STOELTING**

1 A. That is correct.

2 Q. But just focusing for a moment on the growth of  
3 the \$10,000 to \$6 million, that was as a result of David  
4 Smith's investment, management of the account?

5 A. That is correct.

6 Q. And the decision to buy the Albanc stock you  
7 referred to, that was his decision?

8 A. Yes, it was.

9 Q. And the homes that were bought with the funds from  
10 the stock account, those homes, at least up until 2009, were  
11 all held jointly in the name of you and your husband,  
12 correct?

13 A. Yes.

14 Q. And the -- you mentioned your children's college  
15 education, I think, as something you used this stock account  
16 for. And that was -- that's a shared responsibility of you  
17 and your husband; correct?

18 A. Their college tuitions were paid from the stock  
19 account.

20 Q. And the fact that you were living and paying your  
21 daily household bills from money that was generated by your  
22 husband allowed to keep the stock account clear for things  
23 like the children's education, right?

24 A. Yes.

25 Q. Do you recall how much the -- you know, all

**LYNN SMITH - DIRECT - STOELTING**

1 together for both children, how much the college tuition and  
2 costs was?

3 A. My daughter went to St. Lawrence, it was probably  
4 40 to 45,000 a year. My son went to Lehigh University, and  
5 it was probably about the same amount.

6 Q. And that all came out of this stock account?

7 A. Yes.

8 Q. And up until July 2009, all of your husband's  
9 paychecks went into the joint account, correct?

10 A. Yes.

11 Q. And were you ever aware at any time of your  
12 husband segregating any of his assets from you?

13 A. Could you be a little clearer on that?

14 Q. I'll withdraw the question. I think I'm done.  
15 Just one moment. (Pause.)

16 All right. No further questions. Thank you,  
17 Mrs. Smith.

18 RELIEF DEFENDANT LYNN SMITH: Thank you.

19 THE COURT: We're going to take our luncheon  
20 recess at this time. Stand in recess until 2:00. Thank  
21 you.

22 (Lunch recess at 12:55 PM.)

23 (Court reconvened at 2:00 PM.)

24 MR. STOELTING: Your Honor...

25 THE COURT: Yes.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 MR. STOELTING: Miss Mehraban has left us.  
2 It's her birthday today, so she has returned home to have  
3 dinner with her family. She extends her apologies to the  
4 Court. Just wanted to inform your Honor of that.

5 THE COURT: Okay. Thank you.

6 Mrs. Smith, I remind you that you are still  
7 under oath.

8 THE WITNESS: Yes.

9 THE COURT: Mr. Featherstonhaugh.

10 MR. FEATHERSTONHAUGH: Thank you, your Honor.

11 **CROSS-EXAMINATION BY MR. FEATHERSTONHAUGH:**

12 Q. Afternoon, Lynn.

13 A. Good afternoon.

14 Q. I would like to go back to the very beginning of  
15 Mr. Stoelting's examination of you and actually even a  
16 little before that. Would you just tell the Court where you  
17 grew up and what your education was?

18 A. Yes. I grew up in Amsterdam, New York. I went to  
19 public schools in Amsterdam, and then I went to Russell Sage  
20 women's college for four years and got a dual degree in fine  
21 arts and elementary education.

22 Q. Let's just put a time frame on this. Apparently,  
23 you won't find out what Miss Mehraban's age is, but could  
24 you tell me yours?

25 A. Yes. REDACTED I'm REDACTED

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. So when did you graduate from --

2 A. 1968.

3 Q. You need to let me finish the question first.

4 A. Oh, yeah.

5 Q. You graduated from college in 1968. All right.

6 What did you do immediately after that?

7 A. I taught third grade in Amsterdam.

8 Q. How many years did you do that?

9 A. I did that for one year, because I was married in  
10 the summer before the fall semester and Dave was going in  
11 the Air National Guard, so I lived with my father for that  
12 amount of time while he was in basic training, etcetera.

13 Q. You were married in 19...

14 A. 1968.

15 Q. 68. All right. And you married David Smith?

16 A. Yes.

17 Q. When did you meet David?

18 A. I met him when I was about 13 years old.

19 Q. What were the circumstances when you met him?

20 A. He lived a few doors away from me.

21 Q. Okay. Now, you indicated that after your  
22 marriage, Mr. Smith went off to the Air National Guard and  
23 you lived with your father?

24 A. Yes.

25 Q. Where was that?

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1           A.     That was in Amsterdam, <sup>REDACTED</sup> **REDACTED**

2           Q.     Where was your mother at that time?

3           A.     My mother had died the previous year with -- after  
4 a seven year battle with breast cancer.

5           Q.     Your -- how long did you reside with your father?

6           A.     Only until about March, because ... we were going  
7 to move to east Rochester and Dave was going to work for  
8 Marine Midland Bank, but my father developed brown lung  
9 disease. He was a worker in the foundry at General  
10 Electric, and that's kind of a common -- not very common,  
11 but he did develop brown lung, which is lung cancer. And we  
12 didn't leave for Rochester, we stayed around to care for him  
13 until July, and then he passed away.

14          Q.     Did you have any siblings?

15          A.     No.

16          Q.     You were an only child?

17          A.     Yes.

18          Q.     When did your father pass away?

19          A.     July 1969.

20          Q.     When your father died, did he leave an estate of  
21 any kind?

22          A.     Yes. He left a two family house, the \$60,000  
23 stock account, and the cottages at Sacandaga Lake.

24          Q.     Well, we'll talk about all those things, but let's  
25 see if we can get one off our list right now. Would you

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**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 take a look at... Oops ... yeah, take a look at Exhibit  
2 Number 75 in that book in front of you. Turn to about the  
3 third page, you'll see an exhibit you looked for with  
4 Mr. Stoelting, Lynn A. Smith's statement of net assets. Do  
5 you see that?

6 A. Yes.

7 Q. And there are a lot of entries on it, but I would  
8 like to direct your attention to the real property. Do you  
9 see that?

10 A. Yes.

11 Q. And I would further direct your attention to the  
12 third entry. It says Camp Better Road, Broadalbin, New  
13 York?

14 A. Yes.

15 Q. And it's listed as having a value of \$600,000.  
16 Then it's got a footnote. Do you see that?

17 A. Yes.

18 Q. And the footnote says that's an estimated fair  
19 market value provided by you, correct?

20 A. Correct.

21 Q. Now, is that property the exact same property that  
22 you just testified to that you inherited from your father?

23 A. Yes.

24 Q. And you testified to Mr. Stoelting that the  
25 property is held in your own name, correct?

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**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. Correct.

2 Q. And when you inherited it from your father in  
3 1969, were you the only person that inherited it?

4 A. Yes.

5 Q. And that property has been held in your name from  
6 1969 through today?

7 A. That is correct.

8 Q. Did you make any improvements in that property,  
9 Lynn?

10 A. We made a few improvements, yes.

11 Q. Can you tell me when they were made and how they  
12 were made?

13 A. There's a lake front cottage and two smaller  
14 bungalows, and we refurbish the lake front cottage about, I  
15 would say, 18 years ago maybe.

16 Q. Let's go back to the time you inherited that  
17 property for a minute. What else was in your father's  
18 estate other than that property? You mentioned a house in  
19 Amsterdam?

20 A. Yes.

21 Q. And where was that located?

22 A. REDACTED in Amsterdam, New York.

23 Q. And how long did you own that house?

24 A. We owned it for about 30 odd years and --

25 Q. Can you describe the house to us?

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. It was --

2 Q. What kind of a --

3 A. Yes. It was a two-family home. There was an  
4 upstairs flat and a downstairs flat. And we allowed my  
5 husband's sister and brother-in-law and to kind of rent the  
6 upstairs flat in lieu of -- for a pretty low rent if they  
7 would maintain the property. And then --

8 Q. When you say we allowed...

9 A. Well --

10 Q. The property was in your name right?

11 A. It was in my -- yes, my name.

12 Q. You've been married for 42 years?

13 A. Yes.

14 Q. I've been married a couple less, but do you  
15 sometimes use the word "we" when you're really speaking of  
16 yourself?

17 A. Apparently, yes.

18 Q. Do you remember what the -- you ultimately sold  
19 that property for, the value of it?

20 A. Yes. It was \$60,000.

21 Q. And what did you do with that money?

22 A. Well, we had to make \$20,000 in improvements to  
23 the home before we sold it for the 60. So part of that was  
24 reimbursement and the rest went into my checking account.

25 Q. Now, your checking account, that's also listed on

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 this exhibit, right?

2 A. Yes.

3 Q. And as of March 25, 2010, that was the balance in  
4 your checking account, REDACTED?

5 A. Yes.

6 Q. You mentioned in addition to the house and the  
7 property in Sacandaga, that your father left you a stock  
8 account. Do you remember that?

9 A. Yes.

10 Q. And you estimated value at the time that you  
11 inherited it at about \$60,000?

12 A. Yes.

13 Q. And when the estate was settled, was that account  
14 then put in your name, transferred to your name?

15 A. Yes.

16 Q. And you said that when you got to -- this -- I  
17 believe you said on direct, when you got to Rochester, you  
18 placed the account with a broker at Hayden, Stone, but if  
19 you know, do you know which broker was handling that in  
20 Amsterdam at the time that you inherited it?

21 A. It was being handled by Hayden, Stone either in  
22 Schenectady or Albany.

23 Q. All right. So when you moved to Rochester, you  
24 stayed with the same brokerage --

25 A. Yes.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. -- correct? But you got a different broker?

2 A. Yes.

3 Q. Now, that account that we're talking about, that  
4 was transferred into your name at the settlement of the  
5 estate, is that the same stock account that we've talked  
6 about for two days in this trial?

7 A. That is correct.

8 Q. And that stock account has gone through a number  
9 of brokerage houses, correct?

10 A. Yes.

11 Q. Throughout all that time, that 40 years, has it  
12 ever been a joint account with anybody?

13 A. No.

14 Q. You also said, I believe, on direct examination  
15 that a couple of years after you got to Rochester, your  
16 husband began to -- became the broker on the account?

17 A. Yes.

18 Q. Do you recall when that was?

19 A. '72. Maybe '73.

20 Q. All right. So your husband was the broker on the  
21 account...

22 A. Oh, excuse me. That's wrong.

23 Q. Okay.

24 A. That's when the Hayden, Stone thing was going on.  
25 He became a broker when he began working at Baicsh & Company

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**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 in Schenectady, when we moved from Rochester back to this  
2 area.

3 Q. Okay. So when you moved back here, do you  
4 remember when that was?

5 A. About '74.

6 Q. Okay. So starting sometime around '74, your  
7 husband to whom you had then been married for five years  
8 became also your stockbroker?

9 A. Yes.

10 Q. And he continued in that position until about six  
11 months ago?

12 A. Yes.

13 Q. And currently your stockbroker is your son?

14 A. No.

15 Q. Okay. Who does have your -- I understand your  
16 stock account is frozen but --

17 A. Yes. Phil Rabinowitz, and RMR is the name of the  
18 firm in New York City.

19 Q. That does it?

20 A. Yes.

21 Q. All right. And he became your broker about six  
22 months ago?

23 A. Correct. No. I think even less.

24 Q. Even less?

25 A. Yeah.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. And in that 42 years that you've been married to  
2 Mr. Smith and the 36 years he was your stockbroker, did he  
3 ever give you any reason to distrust him in the handling of  
4 your stock account?

5 A. No.

6 Q. Do you know about how much the account was worth  
7 when you got back to Schenectady in '74?

8 A. Not offhand.

9 Q. I would like you to take a look at Volume One of  
10 Lynn Smith's brokerage statements, and it should be up there  
11 on -- to your left. Do you see it?

12 A. Yes.

13 MR. STOELTING: What number?

14 A. Yes.

15 Q. And I would like you to look at just the very  
16 first --

17 MR. STOELTING: What number?

18 MR. FEATHERSTONHAUGH: Oh, it's going to be  
19 Exhibit 1. Relief Defendant Lynn Smith's Exhibit 1. It's  
20 the Lynn Smith brokerage statements for the year 1999.

21 BY MR. FEATHERSTONHAUGH:

22 Q. Let me -- do you have it?

23 A. I don't know.

24 Q. Let me take a quick look and help you out. That  
25 looks like number 8. So I don't think you have it there.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 That's Volume Two.

2 A. There's two?

3 Q. That is the plaintiff's. It's this bottom one.

4 Okay?

5 A. Yup. Thank you.

6 Q. Do you have it?

7 A. Yes.

8 Q. All right. Now, can you just tell us what it is?

9 A. 6 million --

10 Q. No, no.

11 A. What...

12 Q. I want to know what the document is, not any  
13 numbers on it.

14 A. Oh. It's my statement from McGinn, Smith.

15 Q. Can you tell us the time period that's covered by  
16 this statement?

17 A. Yes. July 31 to August 27, 1999.

18 Q. All right. So this was after your husband had  
19 been managing the account for about 20 years at that point,  
20 right?

21 A. Yes.

22 Q. And is this the oldest statement you and I and  
23 your son Jeffrey were able to get our hands on?

24 A. I believe so.

25 Q. Okay. Now, would you tell me what the value of



**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 your stock account was in 19 -- oh, okay. Go ahead. On  
2 this statement.

3 A. 6,325,371.

4 Q. Can you also tell me, if you know, in the summer  
5 of 1999, do you know if any of the entities which are named,  
6 the entities, as opposed to Dave Smith and Timothy McGinn or  
7 yourself, that are named in the complaint in this case were  
8 even in existence?

9 A. I don't believe so.

10 Q. Do you have any understanding at this time as of  
11 July of 1999 as to whose money this was?

12 A. Yes. It was in my stock account.

13 Q. Well, who owns the money in your stock account?

14 A. It is my money.

15 Q. I would like you to turn to Exhibit 3.

16 THE COURT: Is this relief defendant's  
17 Exhibit 3?

18 MR. FEATHERSTONHAUGH: Yes. Relief  
19 Defendant's Exhibit 3. I apologize, Judge.

20 BY MR. FEATHERSTONHAUGH:

21 Q. Do you see the statement dated December 30, 2003  
22 through January 26, 2001? It's the very first piece of  
23 paper.

24 A. It says December 30, 2000.

25 Q. Yes.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. To January 26, 2001.

2 Q. Correct.

3 A. Yes.

4 Q. Can you tell me what the value of the monies in  
5 your stock account were at that time?

6 A. Yes. \$7,519,548.

7 Q. And would you take a look at Volume Two, which is  
8 right up there with you too, also? Do you have it?

9 A. Mm-hmm.

10 Q. I would like to you look at Relief Defendant's  
11 Exhibit 12. That would be the last tab and the first sheet  
12 of paper under it.

13 A. Yes.

14 Q. And can you tell me the date of that statement?

15 A. (No response.)

16 Q. It's right over the --

17 A. Oh, yes. I'm sorry. January 1<sup>st</sup>, 10, to  
18 1/31/10.

19 Q. And can you tell me what the value of your stock  
20 account was then?

21 A. Yes. 2,152,200.

22 Q. Now, there has been some testimony from you in  
23 this trial about the settlement of an irrevocable trust  
24 which was created in 2004. Do you recall that?

25 A. Yes.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. And you testified, I believe, that the money that  
2 was used to settle that trust came from your stock account,  
3 correct?

4 A. That is correct. Yes.

5 Q. And do you have personal knowledge of where  
6 those -- where that money came from?

7 A. Yes.

8 Q. Could you tell us in your own words where that  
9 money came from?

10 A. Yes. It was an investment of \$400,000 in Albank  
11 stock and --

12 Q. Do you know approximately when that investment was  
13 made?

14 A. Let's see ...

15 Q. By the investment, I'm talking about the purchase  
16 of the Albank stock.

17 A. We owned it for 12 years before it became  
18 4 million. So ...

19 Q. Would it have been the early '90s?

20 A. Yes. It was the early '90s, yes.

21 Q. And did that -- was that stock -- did it continue  
22 to be called Albank during the time that you owned it?

23 A. No. I think it became Charter One, and then I'm  
24 not sure what happened. It was a cash buy out or something  
25 like that. And so we had cash.

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**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. So the bank was acquired a number of times,  
2 correct?

3 A. Yes.

4 Q. And in 2004, when the trust was settled, did you  
5 actually -- as part of the settlement of trust, did you  
6 transfer the shares or a certain portion of the shares of  
7 Charter One into the trust?

8 A. Yes.

9 Q. And then the trust sold those shares, is that  
10 correct?

11 A. That is correct.

12 Q. So the money that was initially placed in that  
13 trust is money that you owned in the early 1990s; that was  
14 your money that bought that stock, correct?

15 A. Yes.

16 Q. Mrs. Smith, when you came back to Schenectady, did  
17 you continue teaching?

18 A. Yes.

19 Q. And for how long did you teach?

20 A. About ten years.

21 Q. And do you recall when you retired from teaching?

22 A. 1980.

23 Q. And what was the reason, if any, other than that  
24 the kids were wearing you out?

25 A. We were expecting our first child.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. And did that child eventually come along?

2 A. Yes, he did.

3 Q. And is he here in the court with you today?

4 A. Yes, he is.

5 Q. And that's Jeffrey Smith seated at that table  
6 behind you?

7 A. Yes.

8 Q. And did you have any other children?

9 A. I have a daughter. I had a daughter two years  
10 later. Lauren Tate Smith.

11 Q. And where does Lauren reside these days?

12 A. Lauren resides in Colorado.

13 Q. During the -- when did you say Jeffrey was born?

14 A. 1980.

15 Q. 1980. And from the time that Jeffrey was born  
16 until today, have you had any employment outside of the  
17 home?

18 A. No.

19 Q. Have you been a homemaker during those years?

20 A. Yes.

21 Q. Can you tell me a little bit about your activities  
22 in the raising of those children from 1980 to 2000, when  
23 they went off to college?

24 A. Yes. Since I worked for -- until I was 33, I  
25 was -- when I had my children finally, I was very involved

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 in everything they did. They were in all kinds of athletics  
2 and activities. And I was very active in school, because I  
3 had the teaching background, so I was always volunteering in  
4 that way.

5 Q. Where did your kids go to school?

6 A. They went to Shenendehowa High School.

7 Shenendehowa school system.

8 Q. Now, let's catch up then, if they went to  
9 Shenendehowa, because when we left you, you were living in  
10 Schenectady, which would not be in the Schenectady district.  
11 Did you move eventually?

12 A. Oh, yes. I'm sorry.

13 Q. When did you move?

14 A. I moved in about 1974.

15 Q. And --

16 A. To Clifton Park.

17 Q. To Clifton Park. Did you buy a house up there?

18 A. Actually, '72 maybe. Yes. We bought a ranch  
19 house.

20 Q. Okay. Had you owned a home in Schenectady?

21 A. No.

22 Q. Okay. Where did the money for the purchase of the  
23 ranch house in Clifton Park come from?

24 A. From the stock account.

25 Q. Okay. So you say your kids went to Shenendehowa

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 High School. And that you were involved in the school  
2 activities. Is there anything else you were doing?

3 A. We were very active, very active with Alpine  
4 skiing. We had bought a townhouse at Killington, which we  
5 had for 17 years, and we would go up most of the weekends  
6 after Thanksgiving until spring. And both of our children  
7 became very avid skiers and went on to be in college teams  
8 and so on.

9 Q. Your daughter is still involved in the ski  
10 industry, isn't she?

11 A. Yes, she is.

12 Q. Where did you get the money to buy that townhouse  
13 in Killington?

14 A. From the, from the stock account. The townhouse  
15 was \$125,000 or so. And it was easy enough to do.

16 Q. Do you remember when you bought it?

17 A. It was in about 1984.

18 Q. Okay. All right. The -- how long did you live in  
19 that first house in Clifton Park?

20 A. Eight or nine years.

21 Q. And did there come a time when you sold that  
22 house?

23 A. Yes.

24 Q. And where did you move to then?

25 A. We moved to another house in Clifton Park.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. And did you use the proceeds from the sale of the  
2 first house to purchase at least in part the house you moved  
3 to?

4 A. Yes.

5 Q. Did you use any additional monies to purchase that  
6 house?

7 A. I'm not sure.

8 Q. How long did you live in that house?

9 A. Let's see ... about 20, 21 years.

10 Q. And did you eventually sell that?

11 A. Yes.

12 Q. Where did you -- did you move to your current  
13 residence at the time you sold that house?

14 A. Actually, we used the stock account for the down  
15 payment on the new house, and then our house we sold two  
16 months after we bought the other house.

17 Q. Okay. So you used the money from the stock  
18 account, from your stock account --

19 A. Yes, from my stock account.

20 Q. -- to buy the residence at?

21 A. Two...

22 Q. **REDACTED**

23 A. Yes.

24 Q. And then you took the proceeds from the sale of  
25 the other house which you had also purchased and returned



**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 that to your stock account?

2 A. Yes. Yes.

3 Q. Now, you put the -- when you bought the house at

4 REDACTED you bought it, you and your husband

5 bought it as tenants in entirety, as joint tenants?

6 A. Yes.

7 Q. And had you owned the other houses with both your

8 names on it?

9 A. Yes.

10 Q. You indicated that you purchased the houses with

11 your funds. Was there any reason you put your husband's

12 name on the houses --

13 A. No.

14 Q. -- other than he was your husband?

15 A. No.

16 Q. The residence at Vero Beach, you said you acquired

17 that about nine years ago?

18 A. Yes.

19 Q. Can you tell us where the money to purchase that

20 house came from?

21 A. We had sold the house at Killington, the townhouse

22 at Killington, and we used part of that, as well as the --

23 went back to the stock account.

24 Q. All right. So when you purchased the house in

25 Vero Beach, you used the proceeds from the sale of

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Killington which had originally been purchased with your  
2 funds, and other monies from your stock account?

3 A. Yes.

4 Q. And you put that house in joint names also, right?

5 A. Correct.

6 Q. Now, there came a time when you transferred the  
7 house from both your names into your name at Vero Beach,  
8 right?

9 A. Yes.

10 Q. It was about a year ago, right?

11 A. Yes.

12 Q. Did you have a lawyer or somebody do that?

13 A. Yes.

14 Q. Did you file a deed?

15 A. Yes.

16 Q. Did you make any attempt to hide what you were  
17 doing?

18 A. No.

19 Q. Did you have any intention to hide that transfer  
20 from anyone in the world?

21 A. No.

22 Q. And you've already testified that -- as to the  
23 reasons you did it and the fact that it was your money that  
24 had purchased it, right?

25 A. Yes.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. Now, you heard, you heard Mr. Stoelting, he was  
2 asking you about a number of transfers. He asked if you  
3 were aware of the fact that your husband was going to give  
4 testimony under oath at FINRA, is that right?

5 A. Yes.

6 Q. And you said that you didn't know it, correct?

7 A. That's correct.

8 Q. Have you ever seen your husband's testimony that  
9 he gave at FINRA?

10 A. No, I haven't.

11 Q. Well, he made a statement about --

12 MR. FEATHERSTONHAUGH: And counsel, I'm  
13 looking at Exhibit 20. This would be Plaintiff's Exhibit  
14 20.

15 A. What am I looking for?

16 Q. You don't need to look for it.

17 A. Oh, okay.

18 Q. I'm sorry. But I would like to ask you if you  
19 agree with -- he was being examined under oath by a fellow  
20 apparently named Mr. Newman, and he made a statement, and I  
21 want to ask you if it's accurate. I'm on page 278.

22 Mr. Newman: Why does your wife have an interest  
23 in that entity as opposed to yourself?

24 The Witness: Because my wife had the assets.

25 Mr. Newman: Can you explain that?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1           The Witness:   It's her money.

2           Mr. Newman:   You have separate finances?

3           The Witness:   Yes.

4           And the witness is your husband, David Smith.

5           Mr. Newman:   You and your wife?

6           The Witness:   Yes.

7           Would you agree with that, that you have separate  
8 finances from your husband?

9           A.    Yes.

10          Q.    Is there anything that Dave said there that you  
11 disagree with?

12          A.    No.

13          Q.    Now, I would like to talk about the joint checking  
14 account.  You indicated that for many years in your marriage  
15 you did have a joint checking account, correct?

16          A.    Yes.

17          Q.    Who -- did you have one checkbook or two  
18 checkbooks?

19          A.    Well, it's 42 years, so I -- we -- I don't know if  
20 we had one or two, but recently we had one.

21          Q.    It's a nightmare with two.  I tried it.  Who kept  
22 physical possession of that one checkbook?

23          A.    I kept possession of that.

24          Q.    And did your husband routinely have a salary check  
25 deposited in it?

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. Yes.

2 Q. And I think you testified that you would pay the  
3 family's bills out of that account, correct?

4 A. Yes.

5 Q. So when you got your own checking account about a  
6 year ago, did your husband continue to deposit his salary  
7 checks in it?

8 A. Yes.

9 Q. And you continued to pay the family bills?

10 A. Yes.

11 Q. Correct? Were you -- when you went to that sole  
12 account, were you consciously engaged in some effort to  
13 shield this REDACTED from your creditors?

14 A. No.

15 Q. I think you testified as to why you wanted to have  
16 your own account, but could you tell me again?

17 A. A lot of my friends had their own accounts. Dave  
18 never ever used it, or if he ever did, it would mess  
19 something up a little. He would forget to enter something.  
20 And I wanted to be more independent. Because my daughter  
21 had lost a job and has been -- was unemployed for a year, so  
22 I once in a while would slip a little bit of money to her.  
23 And I just didn't want someone looking over my shoulder,  
24 questioning it. So ... he agreed.

25 Q. I'm sorry?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. He agreed that it would be fine to get my own.

2 Q. So you thought maybe that by the time you were age  
3 60, it was all right to have your own checking account?

4 A. Yes.

5 Q. During that 20 year period, you talked about when  
6 the kids were growing up and in school, and you told us what  
7 you were doing. What was your husband doing during those  
8 years?

9 A. Working at McGinn, Smith, start -- well, he had  
10 started the business here, and he worked actually very long  
11 hours and has to presently. I would have to be on his case  
12 telling him when the next soccer game or football game was,  
13 or had to be picked up here or there. But he worked at that  
14 and I worked at home.

15 Q. So you were busy, he was busy. Were you familiar  
16 with -- well, first of all, did you have any background in  
17 investment and finance yourself?

18 A. No.

19 Q. Were you familiar with whether or not your husband  
20 had a background in investment and finance?

21 A. Yes.

22 Q. And tell me what that familiarity was.

23 A. He was an economics major at Hamilton College, and  
24 he worked as a banker at first, and then as a stockbroker,  
25 and then formed his own business in the investment banking

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 field.

2 Q. All right. So when your husband took over your  
3 stock account, were you comfortable having him as your  
4 broker?

5 A. Yes.

6 Q. And we've looked at the results in the account.  
7 Did -- how did he do? How did you do using him as a broker?

8 A. I did very well using him as a broker.

9 Q. And was it your habit to listen to his investment  
10 advice when he gave it to you?

11 A. Yes.

12 Q. And during that period of time when you were  
13 bringing the kids up, did you sit down frequently or at all  
14 and discuss your investments?

15 A. I would say it was fairly infrequent. I would  
16 collect the mail; if we got a statement, open it, look at  
17 it, and then place it on his desk.

18 Q. And you did that all through the '80s and the  
19 '90s, is that correct?

20 A. That is correct.

21 Q. Is that your testimony? So when we got to the  
22 2000s, when we got into this millenium, did you and your  
23 husband treat your investments any differently than you had  
24 always treated them?

25 A. Not really, no.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. I take it from that that then you would continue  
2 to look at your monthly statements when they would come in.

3 A. Yes.

4 Q. Did your husband -- there's been a lot of  
5 discussion about your husband using your stock account to  
6 help his business prospects. Were you aware that he was  
7 doing that from time to time?

8 A. He was not using my account without asking me. I  
9 was aware that I was making some loans to them. It was my  
10 husband's business and it was doing well. And so was I. So  
11 there was not reason not to.

12 Q. And did you think that it was in your, in your  
13 interest for your husband's business to do well?

14 A. Yes, I did.

15 Q. Did that play any role in your decision whether to  
16 make these loans or not?

17 A. Yes.

18 Q. And did your trust in your husband play a role in  
19 your decision to make those loans?

20 A. Yes.

21 Q. Nevertheless, when you made the loans, did you  
22 expect the money to be returned?

23 A. Yes.

24 Q. And whose money was it?

25 A. It was the money from my stock account.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**



**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. Whose money was that?

2 A. Mine.

3 Q. You don't have to be so shy to say that,  
4 Mrs. Smith.

5 A. Sorry.

6 Q. On occasion there were some large loans that you  
7 made, is that correct?

8 A. Yes.

9 Q. Do you remember Mr. Stoelting showing you a  
10 document that was a note, I don't remember -- well, here it  
11 is, Plaintiff's Exhibit 130, I don't think you have to look  
12 at it, evidencing a loan for \$2 million way back in 2003?

13 A. Yes.

14 Q. Do you -- I think you said you didn't recall that  
15 specific transaction, is that correct?

16 A. That's correct.

17 Q. And that is quite a lot of money.

18 A. Yes.

19 Q. But it's also quite a while ago. And in that  
20 case, when you decided to make that loan, did you trust your  
21 husband?

22 A. Yes.

23 Q. Was that any different than the loans that are  
24 involved in the current time frame this proceeding covers,  
25 the \$366,000 loan?

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. No.

2 Q. So there was nothing unusual in the way you and  
3 your husband had interacted on those loans in recent years,  
4 is that correct?

5 A. That's correct.

6 Q. And do you have copies of all the promissory notes  
7 that were made out in your name over the years?

8 A. We don't have copies of anything right now.

9 Q. And why is that?

10 A. That is because everything was taken from the home  
11 by the FBI on April 20<sup>th</sup>, I believe, and the office.

12 Q. All right.

13 A. We have no records of anything.

14 Q. But the items that you have identified as loans --

15 A. Yes.

16 Q. -- in this proceeding, it was your understanding  
17 that those were loans, is that correct?

18 A. Yes.

19 Q. And you were entitled to be paid back, is that  
20 correct?

21 A. Yes.

22 Q. And you provided the entities that were paying you  
23 back consideration, is that correct? In other words, you  
24 gave them money?

25 A. Yes.

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 Q. And they used the money?

2 A. Yes.

3 Q. And you asked to get it back with some interest on  
4 it?

5 A. Yes.

6 Q. Did you and I look together at the complaint that  
7 the SEC filed in this action?

8 A. (No response.)

9 Q. Did I review it with you?

10 A. Yes.

11 Q. And in that complaint, I think I have it here  
12 somewhere, you may recall paragraph 12. It's a short  
13 sentence. The SEC alleged Lynn Smith as relief defendant  
14 has received and retained ill gotten gains from defendant's  
15 fraud.

16 Are you able to identify in your stock account or  
17 in any other monies that you have any ill gotten gains that  
18 you retained?

19 A. No.

20 Q. This was not in the complaint, I don't think, but  
21 in an attachment, there was a question about \$350,000 that  
22 had been transferred to you. Do you remember that?

23 A. Um, I thought it was 325,000, but ...

24 Q. That was transferred. I think you're right and  
25 I'm wrong. It was two payments. Do you know if those

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 payments related to a loan that you made?

2 A. It may have something to do... 325 ... it's the  
3 QTIP.

4 Q. Do you remember -- no. Do you remember  
5 Mr. Stoelting asking you about some funds you received from  
6 TDMM Cable Funding?

7 A. Oh, yes.

8 Q. Did you make a loan to TDMM Cable Funding?

9 A. Yes. Yes.

10 Q. And a portion of that loan was repaid, correct?

11 A. Correct.

12 Q. But not all of it?

13 A. Right.

14 Q. And when you made the loan to TDMM Cable Funding,  
15 did you expect to be repaid?

16 A. Yes.

17 Q. Is it your view that you had a right to be repaid?

18 A. Yes.

19 Q. And it was your money that you loaned them, is  
20 that correct?

21 A. Yes.

22 Q. Mr. Stoelting also showed you some financial  
23 statements. You probably don't remember them, there's so  
24 much paper now, I'm not going to look for them. They were  
25 the financial statements of David and Lynn Smith. There

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 were one or two printed ones and a handwritten one.

2 A. Yes.

3 Q. Am I correct in again characterizing -- or I won't  
4 characterize, but did you testify that, forget the  
5 handwritten one for a minute, that the printed ones, that  
6 you had never seen them before the commencement of this  
7 case; right?

8 A. Yes.

9 Q. And you saw them for the first time in your  
10 deposition, correct?

11 A. Yes.

12 Q. Did you participate in any way, shape, manner,  
13 form, in the creation of those documents?

14 A. No.

15 Q. Did you discuss those documents with anybody other  
16 than Mr. Stoelting and me and other people at the  
17 deposition?

18 A. No.

19 Q. Now, you saw another document, and you said you  
20 recognized your husband's handwriting, correct?

21 A. Yes.

22 Q. Did you help your husband create that document?

23 A. No.

24 Q. Up until the time that was shown to you at the  
25 deposition, had you ever seen that document before?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. No.

2 Q. Do you know why your husband created that  
3 document?

4 A. No.

5 Q. Did you participate in any way, shape, manner,  
6 form in the creation of that document?

7 A. No.

8 Q. So it was something your husband did without your  
9 knowledge or consent, is that right?

10 A. That is correct.

11 Q. By the way, while we're talking about handwriting,  
12 and I think you guys talked about this a little, but I want  
13 to make it clear, the exhibit that has those letters of  
14 authorization in it...

15 A. Yes.

16 Q. You don't need to look at it, but after the trial  
17 last night, I asked you to look through that exhibit and  
18 look at every letter of authorization; is that right?

19 A. Yes.

20 Q. And do you remember one of the witnesses had  
21 looked at one of the signatures and said he didn't think it  
22 was yours?

23 A. Yes.

24 Q. I asked you to look at it and tell me whether you  
25 thought all the signatures were yours or not.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 A. Yes.

2 Q. Can you tell me what your conclusion was?

3 A. I think I looked at about a hundred fifty of those  
4 consent forms, and I felt there were four, maybe four that  
5 didn't look quite like my signature. And then I also  
6 explained to you that I have been having an arthritis  
7 problem and sometimes my signature doesn't look like my  
8 signature, but other times I can't hold a pen and so I've  
9 asked Dave to sign for me in my presence, not thinking that  
10 much about it, if he was.

11 Q. That's okay.

12 A. Okay.

13 Q. And the documents that he signed for you, I think  
14 you said you thought there were three or four, they were  
15 signed for you, but they were signed for you by your husband  
16 at your request; is that right?

17 A. That is correct.

18 Q. And sometimes even your signature doesn't look  
19 like your signature, right?

20 A. That is true.

21 Q. You also talked briefly again about the issue of  
22 signing some not completely filled out letters of  
23 authorization. Do you remember that?

24 A. Yes.

25 Q. And that was done, you said, at your request, for

**LYNN SMITH - CROSS - FEATHERSTONHAUGH**

1 your convenience?

2 A. Yes.

3 Q. To the best of your knowledge, did anyone ever use  
4 any of those letters of authorization for any purpose that  
5 you did not agree with?

6 A. No.

7 Q. There's been a lot of discussion about a company  
8 named Pine Street Capital Partners or a fund named Pine  
9 Street Capital Partners. Have you been listening to that?

10 A. Yes.

11 Q. When did you first hear about Pine Street Capital  
12 Partners?

13 A. My husband had met Tim Welles and was impressed  
14 with him, and they were talking about starting a fund. And  
15 he talked to me about it. And socially I think we went out  
16 with Mr. and Mrs. Welles just to get to know them a little.  
17 And Dave asked if he thought -- if I thought it would be a  
18 good idea to invest in it. And as my business advisor, he  
19 thought it was a good move, so I said yes. So I made the  
20 investment.

21 Q. And you have been happy with the investment?

22 A. Yes.

23 Q. You also testified that on at least one occasion,  
24 Mr. Smith asked you to make a loan to one of his businesses  
25 that you refused to make. Do you recall that?



**LYNN SMITH - CROSS - DUNN**

1 A. Yes.

2 Q. And do you recall about when that was?

3 A. Yes. It was in 2009.

4 Q. And what did Mr. Smith say or do when you said no,  
5 I won't make the loan?

6 A. He said fine, we won't make the loan.

7 Q. Did -- so as far as you know, he didn't go out and  
8 make the loan anyway?

9 A. No.

10 Q. He didn't use one of the blank authorizations --

11 A. No.

12 Q. -- to wire money from your account? And I believe  
13 you said that to the best of your knowledge -- well, I -- in  
14 the 34 years he was your stockbroker and the 42 years he's  
15 been your husband, Mr. Smith has done nothing that has  
16 violated your trust?

17 A. No.

18 Q. Thank you.

19 MR. FEATHERSTONHAUGH: I have nothing  
20 further.

21 THE COURT: Miss Dunn?

22 MISS DUNN: Thank you.

23 **CROSS-EXAMINATION BY MISS DUNN:**

24 Q. Good afternoon, Mrs. Smith.

25 A. Good afternoon.

**LYNN SMITH - CROSS - DUNN**

1           Q.    You testified that you created the David and Lynn  
2 Smith irrevocable trust in approximately August 2004, is  
3 that correct?

4           A.    Yes.

5           Q.    What was the reason you created that trust?

6           A.    We had the profits from the Albanc stock in my  
7 account.  Since I had -- both of my parents had passed away  
8 at 50 years old each, I wanted to have something for my two  
9 kids so that if they wanted to start a business or buy a  
10 home or do something, that I could actually see them reaping  
11 benefits during my lifetime.

12          Q.    All right.  I'm handing you what's been marked as  
13 Intervenor Number 7.

14                   THE COURT:  Seven?

15                   MISS DUNN:  Seven.

16 BY MISS DUNN:

17          Q.    Can you identify that document?

18          A.    Yes.  Yes.

19          Q.    Okay.  What is it?  You can flip through it.  It's  
20 a multi-page document.

21          A.    It's the letter asking Tom Urbelis to be the  
22 trustee for the irrevocable trust, and it's the actual  
23 declaration of trust signed by David, Lynn, and Tom.

24          Q.    Okay.  And is that the document by which you  
25 created the trust we're discussing?

**LYNN SMITH - CROSS - DUNN**

1 A. Yes.

2 Q. Did there come a time that Mr. Urbelis resigned as  
3 trustee?

4 A. Yes.

5 Q. Did you take any action to appoint a successor  
6 trustee?

7 A. Yes.

8 Q. Can you take a look at what has been pre-marked  
9 Intervenor Exhibit 8? Can you identify that document?

10 A. Yes. Yes. It's the --

11 Q. What is it?

12 A. It's the appointment of a new trustee, Mr. David  
13 Wojeski.

14 Q. All right. Did you and your husband sign this  
15 document?

16 A. Yes, we did.

17 Q. All right. I'll take both of those.

18 How do you know Tom Urbelis?

19 A. He's been a long time friend of both Dave and  
20 myself for 50 years. He's a lawyer, he's intelligent,  
21 he's -- we see them, he and his wife and family maybe five  
22 to six times a year. We're very close. He would be the  
23 obvious person we thought to be trusting for our children.

24 Q. Do you respect him?

25 A. Yes.

**LYNN SMITH - CROSS - DUNN**

1 Q. Do you respect his judgment?

2 A. Yes.

3 Q. Do you have any reason to doubt his judgment?

4 A. No.

5 Q. If he were to recommend another professional to  
6 you, would you take that recommendation seriously?

7 A. Yes.

8 Q. Has Mr. Urbelis given you any reason not to trust  
9 him during the time that he's been trustee?

10 A. No.

11 Q. Or prior to that?

12 A. No.

13 Q. All right. You testified that the source of the  
14 money that was used to fund the trust for your children was  
15 stock that you had purchased in the early 1990s?

16 A. Yes.

17 Q. And that that stock grew in value over the years,  
18 is that correct?

19 A. Yes.

20 Q. Whose recommendation was it to purchase that stock  
21 in the early 1990s?

22 A. David Smith.

23 Q. Do you know whether your husband had other clients  
24 over the years whose investments grew as a result of his  
25 advice?

**LYNN SMITH - CROSS - DUNN**

1 A. Yes.

2 Q. Do you have any reason to believe that your  
3 husband treats clients' accounts as his own simply because  
4 he's grown their investments?

5 A. No.

6 Q. And so do you recall transferring stock on or  
7 about September 1, 2004 from your account to the trust  
8 account?

9 A. Yes.

10 Q. Would you turn to Plaintiff's Exhibit 126? I  
11 believe it's about ten pages in.

12 A. Is it this (indicating)?

13 Q. No. It's going to be one of these big binders.

14 Can you take a look at that page, it's dated  
15 August 31, 2004. Do you recognize it?

16 A. Yes.

17 Q. Can you describe what that document is?

18 A. It's the transfer of a hundred thousand shares of  
19 Charter One Financial into the irrevocable trust.

20 Q. And is that your signature on that document?

21 A. Yes.

22 Q. And do you recall signing the document?

23 A. Yes.

24 Q. What did you intend to do when you signed this  
25 document?

**LYNN SMITH - CROSS - DUNN**

1           A.    I -- what did I intend to do?

2           Q.    What did you intend the effect of this document to  
3 accomplish?

4           A.    It was -- I intended it -- to put the \$4 million  
5 into an irrevocable trust for Jeffrey and Lauren Smith.

6           Q.    And when you transferred that stock into the  
7 irrevocable trust for Jeffrey and Lauren, what was your  
8 understanding as to what your interest in that stock would  
9 be after that date of transfer?

10          A.    After that date of transfer, that was no longer --  
11 did not belong to me anymore. It belonged to --

12          Q.    And -- I'm sorry?

13          A.    It belonged to Jeffrey and Lauren.

14          Q.    Did you believe any time after September 1, 2004,  
15 when you transferred this stock, at any time did you believe  
16 that the money in that irrevocable trust account was yours?

17          A.    No.

18          Q.    Did you ever try to withdraw any money from the  
19 trust account?

20          A.    No.

21          Q.    Did you ever contact Tom Urbelis and ask him for  
22 money?

23          A.    No.

24          Q.    Did you ever ask him to transfer any money into  
25 your checking account?

**LYNN SMITH - CROSS - DUNN**

1           A.    No.

2           Q.    So in 2004, 2005, 2006, 7, 8, 9, 2010, right until  
3 you sit here today, has there ever been any occasion when  
4 you have requested to draw money out of that stock account?

5           A.    Out of the trust account?

6           Q.    The trust account, yes.

7           A.    We've never drawn money out of the trust account.

8           Q.    All right.  You entrusted this money to  
9 Mr. Urbelis.  Would you expect him to make prudent  
10 investments for your children?

11          A.    Yes.

12          Q.    If at any time you had any reason to be concerned  
13 about the investment decisions he was making, would you have  
14 called him up and said Tom, what are you doing with my kids'  
15 money?

16          A.    Of course.

17          Q.    And were you ever aware of any investment  
18 decisions that he made?

19          A.    Not really.

20          Q.    Okay.  And the -- whose responsibility did you  
21 believe it was to pay obligations such as taxes for the  
22 children's trust fund account?

23          A.    I believed it was the trustee's responsibility.

24          Q.    And we've heard testimony that the trust tax  
25 returns were prepared by an accounting firm by the name of

**LYNN SMITH - CROSS - DUNN**

1 Piaker & Lyons, is that correct?

2 A. Yes.

3 Q. And is that the same accounting firm that prepares  
4 yours and your husband's personal returns?

5 A. Yes.

6 Q. And isn't it also true that the same accounting  
7 firm over the years and from time to time has prepared tax  
8 returns for your son Jeffrey and for your daughter Lauren?

9 A. Yes.

10 Q. So is it fair to say that this accounting firm is  
11 the family accountant?

12 A. It is very fair to say, yes, it is.

13 Q. And if at any point in time if Jeffrey or Lauren  
14 had requested a distribution from the trust fund account,  
15 would it be natural to expect the accounting firm of Piaker  
16 & Lyons to be aware of that and to address any tax  
17 consequences for your children?

18 A. Yes.

19 Q. And prior to April of 2010, are you aware of the  
20 manner in which the trust taxes were paid?

21 A. Yes. Sometimes the trustee paid them and  
22 sometimes we paid them.

23 Q. All right. So you were sitting here yesterday and  
24 you heard my cross-examination of Miss Daniello and we  
25 discussed checks that were issued, authorized by Tom



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1 Urbelis --

2 A. Yes.

3 Q. -- to National -- to NFS, directing them to draw  
4 accounts -- to draw checks on the trust account to the IRS  
5 and Tax and Finance. Do you recall that testimony?

6 A. Yes.

7 Q. All right. Were there also occasions when the  
8 trustee would effectuate a wire transfer for the amount of  
9 the tax liability into your husband's account?

10 A. (No response.)

11 Q. Do you understand my question?

12 A. No.

13 Q. Okay. Let me rephrase it. Do you know, over the  
14 years, were there occasions when Tom Urbelis would transfer  
15 money into someone else's checking account and that person  
16 would physically write the check to pay the trust's taxes?

17 A. Oh, yes.

18 Q. And on some occasions were those estimated taxes?

19 A. Yes.

20 Q. And on other occasions, were they actual tax  
21 payments of the tax liability --

22 A. Yes.

23 Q. -- to your knowledge? And was that function of  
24 actually writing the checks, was that primarily handled by  
25 your husband?

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1 A. Yes.

2 Q. And is your -- does your -- did your husband  
3 typically handle the mailing of the tax checks as close as  
4 possible to April 15<sup>th</sup>, as many of us do?

5 A. Yes.

6 Q. All right. And over the past few years, have you  
7 been spending some time at your house in Florida in the  
8 winter?

9 A. Yes, I have.

10 Q. And did you spend time at the house this past  
11 winter, did you spend time in Florida?

12 A. Yes, I did.

13 Q. And you were in Florida on April 15<sup>th</sup>, 2010, is  
14 that correct?

15 A. Yes, I was.

16 Q. How long had you been there?

17 A. About two and a half months.

18 Q. All right. Had your husband been there with you  
19 for two and a half months?

20 A. No. He came down when he could get away for a  
21 long weekend, etcetera.

22 Q. Would it be typical for you to still be in Florida  
23 in April around time tax?

24 A. Yes.

25 Q. So typically around April 15<sup>th</sup> when your husband

**LYNN SMITH - CROSS - DUNN**

1 was getting all the tax documents together, would it be  
2 typical that he was in New York State and you were in the  
3 State of Florida?

4 A. It could be, yes.

5 Q. So was this year somewhat unusual, in that you  
6 were both in Florida on April 15<sup>th</sup>?

7 A. Yes.

8 Q. And you testified earlier that the two of you had  
9 the tax documents from Piaker & Lyons in front of you on  
10 April 15?

11 A. Yes.

12 Q. And you -- I believe you testified that you wrote  
13 four checks, two checks to pay the trust taxes and two  
14 checks to pay your own taxes, is that correct?

15 A. That is correct.

16 Q. Were you concerned when you were about to write  
17 those checks that you may not have enough money in your  
18 account to cover \$95,000 worth of checks?

19 A. No. Because earlier my son Jeffrey had called and  
20 said that he had put \$95,000 in my checking account to pay  
21 taxes.

22 Q. Okay. So when you wrote the checks, you had  
23 assurances that there was money in the account to cover?

24 A. Yes.

25 Q. But you never requested Tom Urbelis or anybody

**LYNN SMITH - CROSS - DUNN**

1 else to transfer trust fund money into your account on  
2 April 15<sup>th</sup>, did you?

3 A. No.

4 Q. And your son Jeffrey --

5 A. Yes.

6 Q. -- Jeffrey is a beneficiary of this trust fund,  
7 isn't he?

8 A. Yes.

9 Q. And the trust declaration that you just testified  
10 to signing, doesn't that trust declaration also designate  
11 Jeffrey Smith as the alternate trustee?

12 A. Yes, it does.

13 Q. And as the alternate trustee, would it follow that  
14 he would have the ability to authorize transfers of money or  
15 execute documents on behalf of the trust?

16 A. Yes.

17 MISS DUNN: Just one moment, your Honor.

18 BY MISS DUNN:

19 Q. Mrs. Smith, as you sit here today, understanding  
20 that the trust fund account is frozen, do you have an  
21 understanding as to who the owner of that account is?

22 A. Yes.

23 Q. Who owns the money in that account?

24 A. Jeffrey Ryan Smith and Lauren Tate Smith.

25 Q. And prior to April 20<sup>th</sup>, 2010, were you

**LYNN SMITH - CROSS - DUNN**

1 providing any financial support on occasion to either of  
2 your children?

3 A. Yes.

4 Q. Going back over the last two years, were -- can  
5 you tell me approximately how many occasions you provided  
6 financial support to your daughter Lauren Smith?

7 A. Yes. I supported -- I paid the rent for 12  
8 months, as well as I paid a tuition bill in Boston for a  
9 six-month course she was taking.

10 Q. And you provided that support out of your personal  
11 funds?

12 A. Yes.

13 Q. Is there any reason you didn't tell Lauren to go  
14 off and talk to Tom Urbelis and ask him for the money?

15 A. I never considered it. I had --

16 Q. Did you --

17 A. I had the money to give her. And I didn't, I  
18 didn't want her to go and -- to the fund for something  
19 frivolous, or in my estimation frivolous.

20 Q. Do you feel it's your right as a parent to provide  
21 money on occasion to your children?

22 A. Yes, I do.

23 Q. If either of your children wanted to access the  
24 trust fund, such as to start a business or buy a home, would  
25 they have to come to you to ask your permission to either --

**LYNN SMITH - CROSS - DUNN**

1 A. No.

2 Q. -- contact Mr. Urbelis or to make that request?

3 A. Oh, no.

4 Q. How long have your children known Tom Urbelis?

5 A. Their entire lives.

6 Q. They know him?

7 A. Yes.

8 Q. They know his wife?

9 A. Yes.

10 Q. They know his children?

11 A. Yes.

12 Q. They've been to his home?

13 A. Yes.

14 Q. He's been to their home?

15 A. Yes. We spent Thanksgivings together.

16 Q. They know how to contact him?

17 A. Yes.

18 Q. As you sit here today, who do you believe has a  
19 right to withdraw money from the account -- excuse me --  
20 from the trust account?

21 A. Jeffrey Smith and Lauren Smith.

22 MISS DUNN: I have nothing further. Thank  
23 you, your Honor.

24 THE COURT: Thank you. Any redirect?

25 MR. STOELTING: Yes, your Honor.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**LYNN SMITH - REDIRECT - STOELTING**

1 **REDIRECT EXAMINATION BY MR. STOELTING:**

2 Q. Mrs. Smith, the beginning of  
3 Mr. Featherstonhaugh's questioning, he asked about a sale of  
4 a house, I think it was four decades ago, and you said that  
5 you had \$40,000 in proceeds that you did something with and  
6 the rest of it you put in a checking account. Do you recall  
7 that?

8 A. No. I said the house was sold for \$60,000. I had  
9 put 20, about 25, 20 to \$25,000 of my own money in  
10 renovating it to sell it for 60,000. So the profit was  
11 40,000. And I honestly don't know what I did with that. It  
12 was a while ago. I don't know if it went in the stock  
13 account or in my checking account, to be honest with you.

14 Q. Well, this was --

15 A. \$40,000.

16 Q. This was a while ago, right?

17 MR. FEATHERSTONHAUGH: Objection, your Honor.  
18 I think Mr. Stoelting has misrepresented what I asked Mrs.  
19 Smith. I don't think it's intentional.

20 THE COURT: I don't care what you asked her.  
21 The witness has answered. What matters is what she has  
22 answered.

23 You can ask your next question,  
24 Mr. Stoelting.

25 MR. STOELTING: Okay.

**LYNN SMITH - REDIRECT - STOELTING**

1 BY MR. STOELTING:

2 Q. Do you recall that Mr. Featherstonhaugh read to  
3 you an excerpt of what he said was a transcript of David  
4 Smith's testimony before FINRA last year? Do you remember  
5 that?

6 A. Yes.

7 Q. Okay. And he -- the portion that he read involved  
8 a question and answer where Mr. Newman -- well, your husband  
9 said because my wife has the assets. And then THE FINRA  
10 questioner said: Can you explain that? And then your  
11 husband said: It's her money. And then Mr. Newman said:  
12 You have separate finances? And the witness said: Yes.  
13 And then Mr. Newman, just to clarify, said: You and your  
14 wife? And the witness said: Yes.

15 And then he didn't read any further. So I just  
16 want to read you the portion, the very next question and  
17 answer that Mr. Featherstonhaugh did not read to you.

18 It was, the question was: How long has that been  
19 the case?

20 And David Smith said: Twenty years.

21 Now, it's not the case that you and your husband  
22 have had separate finances as your husband testified under  
23 oath at FINRA for 20 years, is it? In fact, you had a joint  
24 account for all of that 20 years, up until the middle of  
25 last year, correct?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**



**LYNN SMITH - REDIRECT - STOELTING**

1           A.     Um...

2                   THE COURT: All right, hold on. There's two  
3 questions. Pick which one you want her to answer.

4                   MR. STOELTING: Okay.

5 BY MR. STOELTING:

6           Q.     Let me start again. The portion that -- the  
7 question and answer that I had read that Mr.  
8 Featherstonhaugh did not read, the very next question and  
9 answer was, the FINRA examiner said: How long was that been  
10 the case? And he was referring to David Smith's testimony  
11 that you and he had separate finances. And then David Smith  
12 said: Twenty years.

13                   That's not correct testimony, is it?

14           A.     I -- we -- our household expenses and so on were  
15 not separate. I don't understand the question actually.  
16 Can you reword it in a way...

17           Q.     Sure. Your husband testified before FINRA under  
18 oath that you and he had separate finances for 20 years.  
19 That testimony is false, isn't it?

20           A.     It's been longer than 20 years.

21           Q.     I'm sorry?

22           A.     I think -- is he talking about the separate  
23 accounts? I don't ...

24           Q.     Well, isn't it true that up until July or so,  
25 about a year ago, you and your husband had a checking

**LYNN SMITH - REDIRECT - STOELTING**

1 account from which he paid all the household bills?

2 A. Checking account, yes.

3 Q. A joint checking account, correct?

4 A. Yes.

5 Q. And up until the very beginning of July 2009, you  
6 had the house in Vero Beach in joint --

7 A. Mm-hmm.

8 Q. -- names, correct?

9 A. Yes.

10 Q. And you and he enjoyed the benefits of the stock  
11 account, correct?

12 A. Yes.

13 Q. And you jointly used the stock account for your  
14 own joint benefit, correct?

15 A. For a joint benefit.

16 Q. Right. You used the stock account to buy assets?

17 A. Yes.

18 Q. That was jointly owned and jointly used for your  
19 family?

20 A. Yes. My assets. Correct.

21 Q. Over the course of 20 years?

22 A. Yes. Correct.

23 Q. And Mr. Smith was allowed to use the stock account  
24 for his benefit on numerous occasions for at least 15 years,  
25 correct?

**LYNN SMITH - REDIRECT - STOELTING**

1 A. Yes.

2 Q. So when he testified under oath that you and he  
3 had separate finances for 20 years, that is a false  
4 statement, isn't it?

5 A. I think that he may have been speaking of the fact  
6 that I had the separate stock account.

7 Q. Well, do you know that? Do you know what he was,  
8 he was --

9 A. I don't know what he was thinking. That's the way  
10 I'm interpreting the question.

11 Q. Now, you testified that the reason that you  
12 established your own checking account after many years of  
13 having a joint checking account and one in which your  
14 husband's paychecks became deposited in after July 2009 was  
15 that you didn't want him looking over your shoulder, and  
16 that the example that you gave was that your daughter was  
17 unemployed and you wanted to help her out. Do you recall  
18 that?

19 A. That was one example.

20 Q. Okay. Do you think your husband would have  
21 prohibited you from helping out your daughter?

22 A. No.

23 Q. So then how --

24 A. He may have not been as generous as I was.

25 Q. All right. Then you were asked a question about

**LYNN SMITH - REDIRECT - STOELTING**

1 whether you had in your possession promissory notes, and you  
2 said that they had been taken in the search on April 20<sup>th</sup>.  
3 Do you recall that?

4 A. Yes.

5 Q. Do you know if your lawyer has ever requested  
6 access to those documents from the IRS or the FBI?

7 A. No.

8 Q. Do you have any understanding of whether he has  
9 the right to get access to documents that concern you?

10 A. Could you repeat that?

11 Q. Sure. Do you have any understanding of whether or  
12 not your lawyer, Mr. Featherstonhaugh, who's a very capable  
13 attorney --

14 A. Yes.

15 Q. -- has the right to call up the U.S. Attorney's  
16 Office and say, look, my client Lynn Smith is named a relief  
17 defendant in this action and I need the documents to make  
18 her case. Do you know if, if he's ever done that, first of  
19 all?

20 A. I believe he has.

21 Q. And has he been able to receive documents?

22 A. I'm not sure.

23 Q. You don't know one way or another whether he's  
24 gotten access?

25 A. I'm looking at all the documents here. I don't

**LYNN SMITH - REDIRECT - STOELTING**

1 know.

2 Q. Have you learned that, in fact, there has been  
3 several red wells of files from the documents taken from  
4 your house that concern you that have been produced to him?

5 A. Again, I didn't get the first part.

6 Q. I'm sorry?

7 A. I didn't understand the first part.

8 Q. Did you understand that Mr. Featherstonhaugh and  
9 Miss Dunn have been given access to documents concerning you  
10 that were taken from your home?

11 MISS DUNN: I object, your Honor.

12 A. They weren't taken from my home.

13 MISS DUNN: No foundation for that. I'm not  
14 representing Mrs. Smith.

15 THE COURT: Well, I note that you're not  
16 representing Mrs. Smith.

17 MISS DUNN: Nor have I had any communications  
18 with the U.S. Attorney's Office concerning this case.

19 THE COURT: I'm not concerned with that.  
20 It's whether the witness knows or not. And the witness  
21 doesn't know.

22 BY MR. STOELTING:

23 Q. Do you have your affidavit in front of you. It's  
24 the one with the promissory note attached. It's also marked  
25 as Exhibit 90 in the binder, if that's easier for you to

**LYNN SMITH - REDIRECT - STOELTING**

1 turn to.

2 A. In what volume, sir?

3 Q. In that one. Ninety. Do you have the promissory  
4 note in front of you?

5 A. I'm reading it. Yes.

6 Q. Okay. What is the interest rate that you, the  
7 lender, are to be paid under this note?

8 A. I do not know.

9 Q. Do you see what's indicated in the note at the  
10 top?

11 A. Yes.

12 Q. What does it say?

13 A. You want me to read the first sentence?

14 Q. No. It -- do you see the second paragraph? It  
15 says the interest rate shall be fixed at 24 percent per  
16 annum. Did I read that correctly?

17 A. I don't see that.

18 Q. Are you looking at -- let me just --

19 A. I'm looking at -- you said 90. Plaintiff  
20 Exhibit 23.

21 MR. FEATHERSTONHAUGH: Your Honor, I would  
22 concede that --

23 THE COURT: Hold on for a second. Let's just  
24 get the witness on the right page.

25 RELIEF DEFENDANT LYNN SMITH: You said 90.

**LYNN SMITH - REDIRECT - STOELTING**

1 THE COURT: Hold on, Mrs. Smith. They're  
2 going to find it for you.

3 MR. STOELTING: All right. I'm sorry about  
4 that.

5 THE COURT: It's just that the witness has a  
6 number of volumes in front of her. The lawyers might be  
7 used to dealing with these things. And Mrs. Smith is not a  
8 lawyer and is not used to dealing with these regularly. So  
9 any help you can give her, including physically showing her  
10 the page, it would greatly facilitate things.

11 MR. STOELTING: I will do that.

12 A. Sir, you gave -- the page you told me to look at  
13 is about the trust. And then he just handed me something  
14 about the \$366,000 promissory note. So I don't know what...

15 MR. FEATHERSTONHAUGH: May I help the witness  
16 out, your Honor?

17 THE WITNESS: He said 90.

18 MR. FEATHERSTONHAUGH: He would like to you  
19 read this sentence. That's all.

20 RELIEF DEFENDANT LYNN SMITH: Oh, all right.  
21 Okay. I see it.

22 BY MR. STOELTING:

23 Q. Okay. I'm sorry about that. Okay. My question  
24 is just related to the interest rate on this \$366,000 loan.  
25 And according to the note -- do you have the note in front

**LYNN SMITH - REDIRECT - STOELTING**

1 of you?

2 A. Yes.

3 Q. And is the interest rate 24 percent?

4 A. That's what it says.

5 Q. Okay. Did you understand at the time that you  
6 made this loan that you would be paid a 24 percent interest  
7 rate?

8 A. No. But I put a lot of money up. \$366,000. So I  
9 don't think it's fair --

10 Q. So you thought the 24 percent was fair?

11 A. I didn't see this note. Remember we discussed  
12 that earlier? This is the note that Mr. McGinn was -- I  
13 don't -- I never saw this.

14 Q. All right. Well, put aside the note then, and  
15 I'll just ask: When you made the loan of \$366,000, did you  
16 understand that the interest rate would be 24 percent on  
17 what you would be repaid?

18 A. I -- all I knew is that I was going to be repaid  
19 with interest.

20 Q. Did you know what the interest rate would be?

21 A. No.

22 Q. Generally, on the bridge financings from the stock  
23 account, do you recall what the interest rates were?

24 A. No, sir. I don't work at McGinn, Smith. I made  
25 these bridge loans to help the business out because my



**LYNN SMITH - REDIRECT - STOELTING**

1 husband is also the owner of the company. But I, I don't  
2 know what the interest rates were. And I would gladly make  
3 these loans.

4 Q. There was also some follow-up questions about the  
5 series of exhibits, I think it was 78 to 80, which purported  
6 to be joint financial statements of you and David, and one  
7 of them was a handwritten note that, handwriting that you  
8 identified as David's handwriting that said the financial  
9 statement of David and Lynn, and it listed the stock account  
10 as a cash asset.

11 A I recall.

12 Q My question is, you, I think, couldn't explain  
13 that at all, why he would do that, but I mean...

14 A What was the question again? Why the trust was --

15 THE COURT: Hold on, hold on, hold on.  
16 Mrs. Smith, he hasn't asked you a question yet.

17 RELIEF DEFENDANT LYNN SMITH: Oh.

18 MR. STOELTING: I'm getting there.

19 THE COURT: Let him finish his question.

20 BY MR. STOELTING:

21 Q I'm sorry. I'm getting there. You understood  
22 David Smith as a securities professional, right?

23 A Yes.

24 Q And his business is assets and liabilities and  
25 knowing what the difference is and knowing what an asset is

**LYNN SMITH - REDIRECT - STOELTING**

1 and what a liability is, correct?

2 A Correct.

3 Q Okay. And he's been doing that for almost 30  
4 years, right?

5 A Yes.

6 Q Wouldn't you expect him to know, especially in  
7 regard to his own --

8 MR. FEATHERSTONHAUGH: Your Honor.

9 Q -- assets what is an asset and what is not?

10 THE COURT: Is there an objection?

11 MR. FEATHERSTONHAUGH: Yes.

12 THE COURT: Sustained.

13 A I don't know what are you looking at.

14 THE COURT: Hold on. Hold on, Mrs. Smith.  
15 You don't have to answer the question.

16 RELIEF DEFENDANT LYNN SMITH: Oh. Oh.

17 BY MR. STOELTING:

18 Q The letters of authorization, you know, that you  
19 said you looked at every single one. When those were  
20 executed, when they were submitted for payment, did you get  
21 a phone call every time, or did once you handed them over to  
22 McGinn, Smith, the signed ones, were they just used  
23 according to whenever they were needed?

24 MR. FEATHERSTONHAUGH: I'll object to the  
25 form of the question. I'm not sure --

**LYNN SMITH - REDIRECT - STOELTING**

1 THE COURT: Mrs. Smith, do you understand the  
2 question?

3 RELIEF DEFENDANT LYNN SMITH: I don't know if  
4 he's talking about the forms that I --

5 THE COURT: All right. All right. Objection  
6 sustained.

7 MR. STOELTING: I can ask another question.

8 BY MR. STOELTING:

9 Q Do you recall the letters of authorization which  
10 were Exhibit 126?

11 A Yes.

12 Q Would you like to look at them? I have a question  
13 about them.

14 A Okay. (Pause.) Yes.

15 Q And I think you had testified that there were  
16 several, on three occasions at least, you signed stacks of  
17 them, or, you know, 10 to 15, and gave them to David and he  
18 kept them or somebody --

19 A I mailed them to David McQuade.

20 Q Okay. Or David McQuade kept them. And you knew  
21 he worked under your husband's direction?

22 A Yes.

23 Q So was it your understanding at the time that you  
24 would be contacted each time before that LOA would actually  
25 be used, or that you trusted your husband to use it in his

**LYNN SMITH - REDIRECT - STOELTING**

1 discretion when he needed to without clearing it with you  
2 each and every time?

3 A I would say most of the time it was cleared.

4 Q Do you remember times when it was not cleared?

5 A No.

6 Q And when it was cleared, what would happen?

7 A They would wire the money.

8 Q No, but I meant how would the clearance happen?  
9 What was the procedure?

10 A What was the office procedure?

11 Q Yes. For example, when the signed LOA is sitting  
12 in Mr. McQuade's desk --

13 A Okay.

14 Q -- what would happen? Would Mr. Smith call you  
15 and say we want to use one of those signed LOAs now?

16 A He may have said something before he left for  
17 work, we're going to do a loan or something. I'm not sure.

18 Q And then in Miss Dunn's questions, I think she  
19 might have misspoke, but she asked a question about would  
20 you expect Mr. Urbelis to make wise investment decisions.  
21 And you had testified earlier today that you understood that  
22 Mr. Urbelis never made any investment decisions for the  
23 trust; correct?

24 A Did she say for the trust?

25 MS. DUNN: I'm going to object. I don't

**LYNN SMITH - REDIRECT - STOELTING**

1 think that's a fair characterization.

2 THE COURT: Overruled.

3 MS. DUNN: And I don't believe that was her  
4 prior testimony.

5 THE COURT: Overruled.

6 A Was her statement, did she say for the trust or  
7 wise business...

8 Q Well, let me just ask it a different way then.

9 A Okay.

10 Q You understood that the investment decisions for  
11 the securities held by the trust were made by David Smith,  
12 correct?

13 A Correct.

14 Q And not Mr. Urbelis?

15 A No. He would -- they would discuss it and then  
16 ...

17 Q But who's -- but the securities held by the trust,  
18 those stocks were all selected by David Smith, and not  
19 Mr. Urbelis; correct?

20 A Yes.

21 Q I think you said that -- you said we have never  
22 drawn any money out of the stock account, correct? I think  
23 that's what you said in response to a question by Miss Dunn.  
24 Do you recall that statement?

25 A I don't recall it. You can remind me though.

**LYNN SMITH - REDIRECT - STOELTING**

1 What was the --

2 Q Okay. Well, I wrote it down. Maybe I wrote it  
3 down wrong. But I wrote down -- okay. (crosstalk.)

4 But you recall, but you recall on several  
5 occasions substantial sums of money, 95,000, a hundred  
6 thousand, being transferred directly from the trust account  
7 into the accounts of you and your husband, correct?

8 A No. The 95,000 was the only time that Jeff had  
9 asked for money from my trust.

10 Q And that money was deposited into your account?

11 A He instructed them to put it in our account.

12 Q Why did Jeffrey do that?

13 A Because he's -- I have a great son and a great  
14 family. And he knew that we were short of cash at that  
15 point and had to get \$60,000 of taxes in. We were in  
16 Florida and he did that for us.

17 Q And that was --

18 A I would do the same for him if I had to.

19 Q That was to pay your taxes, right?

20 A Yes. I'm his mother.

21 Q And it wasn't to pay Jeffrey's taxes?

22 A It was to pay the trust taxes and to pay David and  
23 Lynn Smith's taxes.

24 Q Do you know why the trustee didn't pay the taxes  
25 directly to the accounting firm that was preparing the

**LYNN SMITH - RECROSS - DUNN**

1 returns?

2 A No, I don't.

3 MR. STOELTING: Thank you.

4 THE COURT: Mr. Featherstonhaugh, any  
5 recross?

6 MR. FEATHERSTONHAUGH: Nothing, your Honor.

7 THE COURT: Miss Dunn, anything further?

8 MS. DUNN: Just briefly.

9 **RECROSS-EXAMINATION BY MISS DUNN:**

10 Q Mrs. Smith, do you understand the difference  
11 between having discretionary authority to make trading  
12 decisions in an account and --

13 MR. STOELTING: Objection. Beyond the scope.

14 THE COURT: I haven't heard the question,  
15 first of all.

16 MR. STOELTING: Sorry.

17 MS. DUNN: Mr. Stoelting, on  
18 cross-examination, asked Mrs. Smith about the authority of  
19 the trust versus the -- the authority of trustee versus the  
20 authority of David Smith on the account. I want to explore  
21 that.

22 THE COURT: I didn't make -- I wanted to hear  
23 the question. I haven't heard the question yet.

24 MS. DUNN: I'll rephrase.

25 BY MS. DUNN:

**LYNN SMITH - RECROSS - DUNN**

1           Q     Mrs. Smith, do you -- Mr. Stoelting asked you on  
2 cross-examination whether or not you understood that your  
3 husband made the investment decisions for the trust. Do you  
4 recall him asking you that?

5           A     I believe so.

6           Q     And he used the words "selecting investments". Do  
7 you recall that question?

8           A     Yes.

9           Q     Do you understand that the trustee had the only  
10 authority to make investment decisions and authorizations  
11 for the account?

12          A     Yes.

13          Q     And you understand your husband's role as a  
14 stockbroker in making recommendations of investments to  
15 clients?

16          A     Yes.

17          Q     Did you understand that Tom Urbelis was a client  
18 of your husband's?

19          A     Yes.

20          Q     Do you understand that Tom Urbelis, as trustee of  
21 the David and Lynn Smith irrevocable trust, was a client of  
22 your husband's?

23          A     Yes.

24          Q     Would you expect that Tom Urbelis, as trustee, as  
25 a client of your husband, who is a stockbroker, to receive



**LYNN SMITH - RECROSS - DUNN**

1 recommendations of investments from your husband?

2 A Yes.

3 Q Would you anticipate that Mr. Urbelis, having a  
4 long-standing relationship of trust with your husband, might  
5 agree with some of those recommendations and, therefore,  
6 authorize investments?

7 A Yes.

8 MS. DUNN: Thank you. Nothing further.

9 THE COURT: Thank you. Thank you,  
10 Mrs. Smith, you may step down.

11 (Lynn A. Smith excused.)

12 THE COURT: We're going to take a break, but  
13 does the SEC have any further witnesses.

14 MR. STOELTING: Your Honor, we don't.

15 THE COURT: Are you okay?

16 RELIEF DEFENDANT LYNN SMITH: It's just a  
17 book. Thank you.

18 MR. STOELTING: We have no further witnesses.

19 THE COURT: No further witnesses?

20 MR. STOELTING: Correct.

21 THE COURT: Mr. Featherstonhaugh, do you have  
22 any witnesses?

23 MR. FEATHERSTONHAUGH: Yes, I do.

24 THE COURT: How many?

25 MR. FEATHERSTONHAUGH: One.

1 THE COURT: And, Miss Dunn, how about you?

2 MS. DUNN: I have one -- I'm going to use one  
3 of Mr. Featherstonhaugh's witnesses and I have two brief  
4 witnesses.

5 THE COURT: All right. Stand in recess for  
6 15 minutes.

7 (Brief recess at 3:45 PM.)

8 (Court reconvened at 4:00 PM.)

9 THE COURT: The SEC rests?

10 MR. STOELTING: We rest, your Honor.

11 THE COURT: Mr. Featherstonhaugh, any  
12 witnesses?

13 MR. FEATHERSTONHAUGH: Yes, your Honor. At  
14 this time relief defendant Lynn Smith will call John D'Aleo.

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7 DIRECT EXAMINATION BY MR. FEATHERSTONHAUGH:

15 A. Yes. I graduated from St. Johns University in  
16 1968 with a BBA in accounting. I subsequently got an MBA  
17 from Bernard Baruch College in New York City, which is a  
18 business school part of the community system. I passed my  
19 CPA exam and became a CPA in 1972. When I graduated from  
20 college, I immediately started with Coopers & Lybrand, the  
21 successor firm is now PricewaterhouseCoopers. I was in the  
22 New York City office from [REDACTED] **REDACTED**

REDACTED

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1 I moved up to the Capital District in the latter  
2 part of REDACTED when the firm opened up an office here. I was  
3 asked to come up and help start the office and to run the  
4 tax practice. Which I did. So I've been with Coopers &  
5 Lybrand from -- now PricewaterhouseCoopers, from REDACTED through  
6 REDACTED When I left the firm, I started my own consulting  
7 firm which is Devonshire Business Consulting.

8 Q. And have you and I known one and another for a  
9 while?

10 A. We've known each other for probably over 20 years.

11 Q. And we've known each other professionally and  
12 personally, is that right?

13 A. Yes. You were my client, tax client and business  
14 client.

15 Q. And did there come a time when I called you and  
16 spoke to you about the case that's being tried here today?

17 A. Yes, you did. It was -- I believe it was about  
18 the 27th or 28th of April and you indicated you had some  
19 matter you were dealing with and could I possibly help you  
20 out. I went down to your office. We discussed certain  
21 things. And you gave me the general outline of what you  
22 might ask me to do. And we decided to go forward from  
23 there. I signed an accounting service agreement, I believe  
24 it was on April 29<sup>th</sup>. And you outlined some of the things  
25 you needed.

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1           The first thing you indicated to me that you did  
2 need was --

3           Q.   Well, you indicated to me, did you not, that in  
4 order to provide those services, you would need to be paid  
5 for them; correct?

6           A.   Absolutely.

7           Q.   And I agreed to pay you for them?

8           A.   Yes, you did.

9           Q.   And, in fact, you're being paid for your time  
10 today?

11          A.   Absolutely.

12          Q.   Is that correct?

13          A.   Or hope to be.

14          Q.   Now, that takes care of your side, as to my  
15 obligation. What did I initially ask you to do?

16          A.   Well, initially you had indicated that you had to  
17 report back to the Court to provide a compilation of Lynn  
18 Smith's assets. So we had a discussion about that. I made  
19 certain inquiries. You provided me with certain  
20 information.

21                I did speak to Lynn Smith to gather some of the  
22 information. You showed me copies of certain documents you  
23 had. You had copies of brokerage statements and a few other  
24 things. And we decided the format would be in the form of a  
25 compilation.

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1 Q. Let me just ask you if you can -- there's a  
2 notebook to your left, if you can pick that up and just look  
3 at Exhibit 13 while you're providing this testimony.

4 A. Yes. I have that.

5 Q. Okay. Please go ahead. I gave you what I had.

6 A. Okay. You gave me certain documents. And this,  
7 what you see in front of you here is Exhibit 13, is a  
8 compilation of that information put together in typical  
9 format.

10 There's certain information I had to get from Lynn  
11 about values and so forth, estimated values. And all that's  
12 reflected in this particular document.

13 Q. Can you tell me, you used the word "compilation",  
14 is that a term of art?

15 A. Yes, it is.

16 Q. Would you tell us what it is?

17 A. A compilation basically is an accumulation of  
18 information to be reported in a standard fashion but it  
19 doesn't require the accountant that's doing it to do any  
20 analytical work or any kind of verification that would  
21 normally be required either for review, which is the next  
22 highest level, or an audit, which is even a higher level.  
23 So this is the lowest level of accumulated data to be  
24 reported.

25 Q. And I'm asking you to take a look at Exhibit 13,

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1 and I'm asking you if you actually prepared that document.

2 A. Yes, I did.

3 THE COURT: Is this Exhibit 13 in this  
4 proceeding? The SEC's --

5 MR. FEATHERSTONHAUGH: Yes. This is Lynn  
6 Smith's Exhibit 13, your Honor, but it's the one that  
7 unfortunately I missed. It is the one duplicate. It is  
8 also Plaintiff's Exhibit 75. We did the best we could. I  
9 apologize for that.

10 THE COURT: That's okay.

11 BY MR. FEATHERSTONHAUGH:

12 Q. All right. With reference to that exhibit, that  
13 was physically prepared by you, Mr. D'Aleo?

14 A. Yes, it is.

15 Q. And would you tell the Court and counsel here what  
16 you relied on to prepare that?

17 A. Well, the information came from various sources.

18 THE COURT: Can you hold on for a second?

19 THE WITNESS: Absolutely. (Interruption.)

20 THE COURT: All right. I'm sorry. Go ahead.

21 A. There were certain documentation that you had  
22 accumulated. For instance, there was a bank statement that  
23 showed certain cash. There was information with respect to  
24 Lynn's brokerage accounts. So we looked at that  
25 information. That information is here.

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1           There were other things that we accumulated based  
2 on discussions with Lynn Smith. For instance, the loan  
3 receivables, we talked about that. That didn't show up any  
4 place in the documents that I looked at. So they  
5 indicated -- she, rather -- that they had these loan  
6 receivables, which you see there, for one 900,000, and one  
7 for 15,000.

8           She also indicated based on her assertion that  
9 they had no face value even though the -- no market value,  
10 rather, even though the face value was a total of 915,000.

11           Similarly, she indicated to me the property that  
12 was owned either in her name or jointly. And that's  
13 reflected here. If that's jointly held property, it shows  
14 half the value and it's netted down by the amount of the  
15 mortgages, the column of these particular values.

16           Q. Is that indicated in the footnote?

17           A. Yes, it is. It's in the footnotes.

18           Q. Okay. This document was ultimately shown to Lynn  
19 Smith. And if you turn the page, it was Lynn Smith who  
20 verified the document, correct?

21           A. Absolutely. Yes.

22           Q. Now, after we had completed that and sent it off  
23 to the SEC, did there come a time when I asked you to do  
24 some further work?

25           A. Yes, you did. You had indicated to me that you



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1 had information presented to you by the SEC that showed  
2 various accounts that Lynn had amounts that were deposited  
3 into the accounts. It might have been a security account, a  
4 checking account. I think maybe there was some schedule for  
5 the IRA. And you asked me if I could help you out and look  
6 at that, and what documents I might need or further  
7 information I might need to accumulate and assist you in  
8 responding to the information that was on those particular  
9 documents.

10 Q. I would like you to take a look at Lynn Smith  
11 relief defendant's Exhibit 14.

12 A. Yes.

13 Q. And it is a three-page document. Is that the  
14 document that I showed you?

15 A. Yes, it is.

16 Q. Now, have you altered that document to some  
17 extent?

18 A. Yes, I did. The left hand column where it has  
19 footnotes number listed down by row certain numbers, that  
20 was not part of the document. I put this on the document so  
21 we could have cross references to certain other information  
22 that was going to be supplied.

23 Q. And that is true of both of the first two pages of  
24 the document?

25 A. First three pages. All three pages.

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1 Q. Okay. All three pages of the document. Now, did  
2 you prepare another document that those footnote numbers  
3 relate to?

4 A. Yes, I did.

5 Q. And would you take a look under tab 15?

6 A. Yes. That's a document I prepared that we were  
7 referring to that has the cross references to the footnotes  
8 that are in the previous three pages.

9 Q. And did I indicate to you at the time I showed you  
10 the original three-page document that I had, in fact,  
11 received it from Mr. Stoelting who had inquired about these  
12 transfers?

13 A. Yes. That was my understanding.

14 Q. And I asked you to look at all the material we had  
15 and do whatever you could to explain each of the  
16 transactions?

17 A. That's correct.

18 Q. Right?

19 A. Yes.

20 Q. And I take it you were able to explain some and  
21 there's some that you were not able to explain?

22 A. Yes. Some of the information that's on these  
23 three exhibits we had no further documentation to determine  
24 the source of where it came from or what it was actually  
25 for, simply because we didn't have the documents available

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1 to us that might have helped us in coming to those  
2 conclusions.

3 Q. Can you -- and I'm going to take you to 15 and  
4 have you take us right through the transfers in a minute,  
5 but just before I do, to the best of your ability, can you  
6 describe what you did have and what you were able to review  
7 in trying to reconcile these transfers?

8 A. Well, the principal documents we looked at were  
9 the so-called stock brokerage statements. That's the --  
10 that's on the first particular exhibit. We also took a look  
11 at some information that was provided to you as -- I think  
12 as a result of me asking you certain questions to try to get  
13 additional information that was provided to you through  
14 various sources. And I had conversations with Lynn Smith to  
15 get a better understanding what some of these things were.  
16 And I had made requests of you to try to get further  
17 information. And I believe that you accumulated certain  
18 information based on data that maybe Dave Smith had also  
19 given to you.

20 Q. Well, did I show you data that I got in response  
21 to my discovery requests that actually the SEC gave to me?

22 A. Yes. Absolutely.

23 Q. Okay. Well, why don't you go ahead, item by  
24 item...

25 MR. FEATHERSTONHAUGH: And it really won't

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1 take that long, your Honor. There aren't that many.

2 Q. Mr. D'Aleo, and tell us to what extent you can  
3 resolve the origin and nature of the transactions that we  
4 were asked about by the Security & Exchange Commission.

5 A. Okay. I would also make one additional point.  
6 Some of the ITEMS that we did not have additional data for,  
7 and this information I used what the explanation was of the  
8 SEC, specifically with respect to items relating to cash  
9 contributions to the IRA, simply because we could not get  
10 our hands on the IRA statements they were not made available  
11 to me.

12 But I think the way to approach this by looking at  
13 the footnotes, everything that is indicated with an item one  
14 next to it, simply is the information or the document source  
15 or the use of the fund was not available to me and I could  
16 not make a comment on those. So everything that's marked  
17 with an item one is in that category. There was no  
18 information.

19 Q. So just for an example, and we'll only do one,  
20 that very first entry, on January 10<sup>th</sup>, 2006, you were  
21 asked about it, it says a check was received in the amount  
22 of \$6,301, to Lynn Smith's account; correct?

23 A. That's correct.

24 Q. And did I tell you that I had asked for copies of  
25 the checks?

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1           A.    I believe you may have.  I couldn't say for  
2   surety, but I know I made requests of you to try to find out  
3   additional information, and we did not receive that  
4   information.

5           Q.    You did not receive it.  And so it's footnote one,  
6   and that means that we really have no idea where it came  
7   from or what its purpose was?

8           A.    That's correct.

9           Q.    Go ahead.

10          A.    Okay.  Item two is a check received on April 13,  
11   2006.  I'm looking now at the statement, the first document  
12   which is funds received into Lynn Smith's accounts.  That  
13   shows a check received on that date for 4500.  Again, we had  
14   no specific information about that other than the notation  
15   that was on the original document from the SEC that said it  
16   was a cash contribution from a prior -- for a prior year IRA  
17   deposit.

18                The next item is an item on October 4<sup>th</sup>, 2006,  
19   in the amount of \$85,000.  That we were able to find because  
20   you provided me with the copy of a check from Tim McGinn  
21   that indicated that it was a partial repayment of a loan  
22   that had been made.  So that's what the footnote says,  
23   partial repayment of loans to Tim McGinn.  And then a copy  
24   of the check was available to me.

25                THE COURT:  I'm sorry.  Are these all

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1 deposits into the Lynn Smith stock account?

2 THE WITNESS: Yes. Speaking -- this right  
3 now is speaking about only deposits into Lynn Smith's stock  
4 account.

5 THE COURT: All right. Thank you.

6 BY MR. FEATHERSTONHAUGH

7 Q. And if you'll take a look at Exhibit 15 G, as in  
8 guy.

9 A. Yes. That is the copy of the check that you  
10 showed me evidencing the \$85,000 payment into the account of  
11 Lynn Smith. And it's from Timothy McGinn. And the memo  
12 says on it interest and principal. And then we inquired as  
13 to what that was, and were told by Miss Smith that that was,  
14 in fact, a partial repayment of the loans that she had made.

15 Q. And I would direct your attention to the third  
16 part of G.

17 A. Yes. That is a promissory note dated  
18 October 15<sup>th</sup>, 2004, for the \$970,000 that Mr. McGinn  
19 borrowed from Lynn Smith. You made that available to me,  
20 and I have seen this document.

21 Q. Did you cross check the date of the check and the  
22 amount against the Lynn Smith account statements?

23 A. Yes, I did.

24 Q. Okay. Go ahead then.

25 A. Okay. The next item, again, is item five, that's

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1 another 4500 -- excuse me -- a \$5,000 contribution that we  
2 didn't have any specific detail on other than the reference  
3 put in by the SEC that again it was a cash contribution for  
4 a prior year IRA.

5           The next item, item six, which is on May 14, 2007,  
6 is a check received in the amount of \$100,000. Item six...  
7 Okay. That also relates to a partial repayment of a loan  
8 from Tim McGinn, similar to the \$85,000 check we looked at  
9 before. You showed me a copy of the check. And I believe  
10 that it probably was attached in the second page of Exhibit  
11 15G. Shows the check, made payable to amount to Lynn Smith,  
12 signed by Timothy McGinn in the amount of a hundred thousand  
13 dollars, and the memo says loan.

14           Next item is item seven. It's dated 12/20/2007.  
15 Also says transaction. Check received in the amount of  
16 \$300,000. Okay. This one is a little bit more involved.  
17 It took some further analysis based on information that you  
18 provided to me, some of which you had to go back and request  
19 of Miss Smith, some of this information, to try to make a  
20 better understanding of what this was.

21           This relates to repayment of a bridge loan in the  
22 amount of 375,000 that was made by Miss Smith on  
23 November 29<sup>th</sup>, 2007, to McGinn Smith Funding. And that  
24 was evidenced by a copy of the December '07 brokerage  
25 statement showing the wire transfers. And we have a copy of

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1 that; I see it; I believe it's in one of these references.

2 Q. It is in volumes one or two up there, but I don't  
3 think you need to look at it.

4 A. Okay. So she made this 375,000 bridge loan on  
5 November 29, 2007. A repayment of that loan in the total  
6 amount of 376,438 was on December 12<sup>th</sup> of '07, deposited  
7 in error in the M & T Bank account of Mr. David Smith. And  
8 we also saw a copy of that particular deposit. Obviously,  
9 since Lynn made the loan, it was an error, he paid it back  
10 to David.

11 So we see the \$375,000 then going back and  
12 ultimately, after they -- excuse me -- we saw the 376,438  
13 going back. And that went back to David. And since he  
14 realized that he knew right from the beginning when this  
15 came to light that this was not supposed to be given to him,  
16 he simply, as I understood it, rounded up the payment to  
17 \$380,000 and transferred that to Lynn Smith, which was  
18 deposited in her account on December 21 of '07.

19 So we saw those documents with respect to the  
20 various statements that we had available to us.

21 Q. And the next three items that you were asked  
22 about?

23 A. The next three items, miscellaneous checks  
24 received on January 5 of 2010. One was for \$525. The next  
25 was for \$708.33. The last was for 1,329.17. And those were

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1 all were indicated with an item notation of one. We simply  
2 didn't have the information available to determine what  
3 those payments are for, or where in fact they -- well, we  
4 know where they ended up, but we didn't know what they were  
5 for.

6 Q. Okay. Can we turn the page?

7 A. The next page is other funds received into Lynn  
8 Smith's accounts. The second schedule that was provided by  
9 the SEC to you. The first item is item we call item 8.  
10 There was a transfer made on February 4, 2009, from the  
11 account of Capital Center Credit Corporation in the amount  
12 of 38,430.46.

13 Okay. We inquired as to what this was, and the  
14 explanation we got was as follows. Capital Center Credit  
15 Corporation was an entity that was around sometime in the  
16 '90s. It had been some kind of active business. This  
17 \$38,000 represented the balance in that particular account  
18 and it was closed out. It was funds that, no question,  
19 belonged to David Smith. He simply deposited this \$38,000  
20 into his wife's account.

21 Okay. The next item is on March 3, 2006. It's a  
22 payment from McGinn, Smith & Company. It references M & T  
23 Bank in the amount of \$20,000. We have a cross reference of  
24 one, which means that we were not able to determine what  
25 that was for, other than the fact that it actually was

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1 deposited in her account on that date.

2           The next item is a check received on January 16,  
3 2009, from Pine Street principles. It says Pine Street  
4 principles. Pine Street principle partners I believe. In  
5 the amount of \$166,020. That's our reference number nine.  
6 This is an amount that we determined was a partial repayment  
7 of a portion of the five percent notes due December 31, '09,  
8 that was issued by Pine Street Capital Partners LLC.

9           The next item is an item on, also on January 16 of  
10 2009. It's also from Pine Street. It's in the amount of  
11 \$62,257. We reference that as item cross reference ten.  
12 That is an amount which was explained as a return of equity  
13 capital in Pine Street Capital Partners LLC. And, in fact,  
14 in addition to the amount which we see deposited into the  
15 account, it's also the amount shown on the schedule K-1 of  
16 Lynn Smith in the Form 1065, which is the partnership  
17 return, and shows in the capital reconciliation section as a  
18 return capital. So that it meets that amount.

19           The next item is what we refer to as item 11.  
20 It's a deposit on February 20<sup>th</sup>, 2009. It is from David  
21 Smith in the amount of \$326,304.11. The only documentation  
22 was a discussion, I think, I had with Lynn and maybe some  
23 further information I got from you. And all I knew at this  
24 point in time when I prepared this, it had something to do  
25 with some estate planning transfers among the parties. And

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1 that's the way I reported it in this document.

2 The next item is cross reference item 12. It  
3 relates to a transaction on June 10<sup>th</sup>, 2009, from TDMM  
4 Cable Funding, in the amount of \$160,800. And this relates  
5 to a partial repayment of a loan which I think has been  
6 discussed earlier today, the \$366,000 loan was made on  
7 June 5th of '09. And we saw statements showing where it  
8 came out of. It actually was two transfers that came out of  
9 Lynn's account. One in the amount of \$50,000, and 316,000.

10 Now, the reason why we found this information in  
11 order to find -- determine what this particular repayment  
12 was for, we kind of cross reference to see where the money  
13 came from. We didn't normally look at amounts coming out of  
14 her account, but in order to get a better understanding of  
15 what this was, we found out it related to the \$366,000 loan.  
16 So this is a partial repayment of \$160,800.

17 And I also would draw your attention to item 12,  
18 which was deposited on July 30, 2009, also from TDMM Cable  
19 Jr. Trust in the amount of \$175,000. And that also was a  
20 partial repayment of the \$366,000 loan.

21 Q. Would you take a look at 15 F?

22 A. Yes.

23 Q. Is that the transaction we're talking about?

24 A. Yes. This is the promissory note dated June 5th,  
25 2009, in the amount of \$366,000.

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1 Q. And there was a question, a couple of questions  
2 earlier today about the interest rate on this note. Is that  
3 expressed in the note?

4 A. Yes. It's shown as an interest rate shall be  
5 fixed at 24 percent per annum.

6 Q. Can you tell me if that loan was repaid? I think  
7 in the one case, the first repayment was made five days  
8 after the loan was made, and the other one about 40 days,  
9 what the effective interest rate received by the lender  
10 would be?

11 A. I actually didn't evaluate that but, obviously --  
12 not obviously. I believe since the amount was 106,800  
13 included a certain amount of interest, and the 175 would  
14 also include interest. I did not calculate the interest. I  
15 cannot say without some surety that the amount paid did or  
16 did not include the interest. But I would imagine the  
17 repayment was consistent with this note, it may have  
18 included the interest.

19 Q. So it was a matter of hundreds of dollars that  
20 would have been owed?

21 A. Right. Because it was repaid in a very short  
22 period of time.

23 Q. Okay. No, I think you have one more. I'm sorry.

24 A. Yes. We have item 13, which was a deposit on  
25 March 18, 2010, in the amount of \$100,000. That's our cross

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1 reference 13.

2           Okay. This relates to a repayment of a loan made  
3 to TDMM Benchmark on March 16, 2010. And we saw copies of  
4 statements showing the outgoing wire. And we saw a copy of  
5 the March statement from Mercantile showing the incoming  
6 wire from Lynn Smith on 3/16/10. And the repayment was  
7 actually two days later. It came back two days after it was  
8 made.

9           Q. Okay. Now, that's the last question that was  
10 posed concerning the stock account, right? We've reviewed  
11 everything we know about those on the two pages?

12          A. That's correct.

13          Q. I also asked you to review the questions that have  
14 been presented in connection with the checking account.

15          A. This was a little bit more problematic, in that we  
16 didn't have access; at least I wasn't given access, I don't  
17 think you had access to any checking account statements. So  
18 I also indicated on this the various deposits that were made  
19 and used similar type footnotes. A number of them had  
20 number ones next to them, which indicated we could not get  
21 the information.

22               The largest proportion of these deposits were a  
23 series of deposits of David Smith's payroll check. And they  
24 vary from amounts of 7,896 to a high of 17,731. And the  
25 only information we had, which is what was provided and the

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1 data that was submitted by the SEC, is that these were, in  
2 fact, deposits of payroll. We had no other indication to  
3 determine that, but I have no reason to believe it was not  
4 payroll deposit.

5 Q. And let me ask you, it reviews a number of  
6 deposits, the first one starting in July 15<sup>th</sup> of '09,  
7 right?

8 A. That's correct.

9 Q. So you have four and a half months left of '09.  
10 And then the last one on April 8<sup>th</sup> of 2010?

11 A. That's the amount of 17,731...

12 Q. Right.

13 A. 08.

14 Q. Well, I know the amount, but that's the last --

15 A. Yes, it is.

16 Q. -- one we got, right?

17 A. April, April 8.

18 Q. So the time period covers about a nine month time  
19 period?

20 A. Yes.

21 Q. And did the SEC total what the payroll deposits to  
22 Mr. Smith were for that nine month period?

23 A. Yes. It totaled \$129,096.67.

24 Q. Okay. There are five more entries on the sheet.  
25 Would you explain them?

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1           A.     Okay.   The next three supposedly are deposits that  
2 came from David Smith's M & T account into Lynn's account.  
3 They are amounts of varying dates, but amounts of \$4,000,  
4 \$200, \$2,000.   For a total of 6200.   And the only reference  
5 we have is the information that was on the SEC prepared  
6 schedule.   We had no further documentation as to what it was  
7 for.   We couldn't see any source material to determine what  
8 it was.

9                     The last item we looked at was a total of \$60,000  
10 payments into Lynn Smith's accounts.   It doesn't say when  
11 they were or where they came from.   It just says \$60,000.  
12 But I believe, based on our investigation, that those simply  
13 were an accumulation of wire transfers from Lynn Smith's  
14 brokerage account into her checking account as follows:

15                     On December 13 of '09, there was 15,000 deposited.  
16 On February 16 of 2010, there was \$20,000 deposited.   And on  
17 March 25, 2010, there were \$25,000 deposited.   All of these  
18 being transferred from her brokerage account into her  
19 checking account.

20                     So we can't say without some surety what the  
21 \$60,000 is because there is no detail given in the SEC  
22 statement, but we believe relative to the timing of the  
23 other items that are on the statement that it probably was  
24 those three wire transfers.

25           Q.     All right.   Thank you, Mr. D'Aleo.

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1           Now I just have a couple of general accounting  
2 questions for you if I might.

3           A.    Mm-hmm.

4           Q.    Sometime early yesterday --

5           A.    Mm-hmm.

6           Q.    -- there was a gentleman, who isn't here so I'll  
7 apologize to him in absentia, I can't remember his name, but  
8 I think he's a staff accountant or at least worked for the  
9 SEC at some point, to whom I asked, is there the term  
10 "affiliate", are there any accounting rules governing when  
11 someone is an affiliate or not.

12          A.    Well, I think the term "affiliate" is used in a  
13 number of different instances for different purposes. It  
14 usually relates to some form of control or ownership  
15 interest, and it could vary from as low as 20 percent in  
16 circumstances, certain circumstances it could be deemed to  
17 be an affiliate of 20 percent. For instance, in the  
18 relationship of the control of a foreign corporation, it  
19 would be 50 percent. And in connection with an affiliate  
20 being consolidated as part of a consolidated tax return or  
21 financial statement, it could be as high as 80 percent. So  
22 I don't think it's one particular meaning for that, but  
23 there is an understanding that the definition of the word  
24 "affiliate" and it is delineated for the purpose on which  
25 you're trying to determine what it is.

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1 Q. Are you aware of any circumstances where an  
2 ownership interest of less than 20 percent qualifies as to  
3 be an affiliate?

4 A. It's not typical, no. Because I think it's deemed  
5 if you've invested 20 percent, you're not really controlling  
6 the particular entity.

7 Q. I have one final question for you, Mr. D'Aleo.  
8 Can you take a look at Exhibit 79. And this would be  
9 plaintiff's Exhibit 79. And let me just help you in the  
10 interests of...

11 I would like you to take a look at the fourth  
12 paragraph of that letter that was read here in court today.  
13 It's just two sentences.

14 A. Yes.

15 Q. Do you see that?

16 A. I see that.

17 Q. Why don't you read it. Not everybody has a copy.

18 A. Okay. It says David L. and Lynn A. Smith have  
19 elected to omit substantially all of the disclosures  
20 required by generally accepted accounting principles. If  
21 the omitted disclosures were included in the statement of  
22 financial condition, they might influence the user's  
23 conclusion about the financial conditions of David L. and  
24 Lynn A. Smith. Accordingly, this statement of financial  
25 condition is not designed for those who are not informed

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1 about such matters.

2 Q. Is that a common reference in accounting  
3 compilations, language either identical to that or of that  
4 type?

5 A. Yes. This, this -- the first paragraph says this  
6 is a compilation. We have compiled the information. So  
7 that is, as I indicated before, that's like the lowest level  
8 of putting things together. And --

9 Q. All right. That's the same level as the  
10 compilation --

11 A. Exactly.

12 Q. -- you did?

13 A. Yeah, right. There's certain required language  
14 that has to go in the statements that are required by the  
15 accounting rules. And although, obviously, we have to say  
16 David L. and Lynn Smith, you refer to that, but it's not  
17 uncommon for various disclosures that are required normally  
18 in the gap, footnote disclosures, other details not to be  
19 included in a compilation.

20 Q. So that -- is it at all unusual to see that  
21 language attached to a compilation?

22 A. No. As a matter of fact, in certain instances, it  
23 would be required.

24 MR. FEATHERSTONHAUGH: Thank you. I have  
25 nothing further for this witness.

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1 THE COURT: Miss Dunn, any questions?

2 MS. DUNN: Your Honor, Mr. D'Aleo is a  
3 summary witness for me as well, but for purposes of clarity,  
4 I have no objection to Mr. Stoelting doing his  
5 cross-examination of Mr. D'Aleo now, and then I would put on  
6 my direct with him, if that would make sense for the record.  
7 Or do you want -- I, I, I'm happy to go now if you would  
8 like.

9 THE COURT: Why don't you go now, and then  
10 Mr. Stoelting can cross-examine on both.

11 MS. DUNN: Okay.

12 MR. STOELTING: Actually, your Honor, it  
13 would likely be Mr. McGrath.

14 THE COURT: I'm sorry. Mr. McGrath.

15 **DIRECT EXAMINATION BY MISS DUNN:**

16 Q. Mr. D'Aleo, did there come a time that an issue  
17 came up during -- following your preparation of the asset  
18 inventory for Lynn Smith that you were questioned as to why  
19 you did not include within that asset inventory an NFS stock  
20 account held under the name of the David and Lynn Smith  
21 irrevocable trust by its trustee Thomas Urbelis?

22 A. Yes.

23 Q. And was there a reason that you -- or what was the  
24 reason you didn't include that stock account in Lynn Smith's  
25 inventory of assets?

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1           A.    Well, it was first indicated to me when we  
2 inquired that it was an irrevocable trust, and that if it is  
3 an irrevocable trust, then the assets were transferred into  
4 the trust, that those assets are not owned by David or Lynn  
5 Smith but, in fact, are owned by the trust.

6           Q.    Okay. Did you review the trust declaration?

7           A.    I did. I have seen a copy of it. I can't say I  
8 looked at every line of it, but I have seen the declaration  
9 of trust.

10          Q.    Did you reach any conclusions regarding it when  
11 you reviewed it?

12          A.    It was a relatively standard trust document. And,  
13 accordingly, it would meet the criteria of being a trust. A  
14 trust is a separate entity, a legal entity. It's a separate  
15 taxpayer. The assets that are put into it are -- is funded,  
16 are assets owned by that entity, the trust.

17          Q.    And did there come a time that you signed an  
18 accounting services agreement with my law firm?

19          A.    Yes, I did.

20          Q.    Do you recall the date that you signed that  
21 agreement?

22          A.    I believe it was May 17<sup>th</sup>.

23          Q.    Of this year?

24          A.    Of 2010. Excuse me.

25          Q.    Okay. I'm going to show you intervenor Exhibits

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1 9, 4, 12, and 2, in that order. I apologize that they are  
2 in that order and not in numerical order.

3 When I asked you to review this trust account for  
4 me, did you indicate that you needed certain documents to  
5 perform that review?

6 A. Yes. I thought it would be helpful to get copies  
7 of the tax returns since that was would be the annual  
8 summary of what happened. And you did supply me with tax  
9 returns. And then, since one of the investments, income  
10 items that was listed on the tax return was the investment  
11 of the trust by Pine Street Capital Partners LP, you also  
12 were able to obtain copies of the Form 1065, which is the  
13 partnership agreement of the trust -- partnership tax return  
14 of the trust, the schedule K-1, which is the amount reported  
15 by each individual partner. And you obtained copies of the  
16 K-1s for the Lynn and David Smith trust.

17 In addition, since we were looking at some of the  
18 items of various deposits and an analysis of what was paid  
19 out of the accounts, some of it obviously related to income  
20 taxes, because we looked at the tax returns. And I made an  
21 inquiry of you as to whether or not you could have the  
22 trustee obtain what is known as an account transcript from  
23 the Internal Revenue Service, which you did obtain.

24 What an account transcript is is basically a  
25 summary of that particular taxpayer, showing the amount of

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1 tax, the amount of payments that were made, whether there  
2 were estimated payments, extension payments, final payments,  
3 if any penalties were imposed, if there was any interest  
4 calculated. So you provided me with that information also.

5 Q. Did there come a time that you asked me to  
6 obtained additional information concerning the trust  
7 investment in Pine Street Capital Partners?

8 A. Yes, there is -- there was. And you obtained  
9 information with respect to what's reported in these K-1s.  
10 And I think you also had some other information you may have  
11 gathered based on data that you received in connection with  
12 the deposition of Mr. Welles.

13 Q. All right. And did you also consult with the  
14 accountant? Did you consult with anyone related to the  
15 trust outside of my law firm?

16 A. Yes. One of the schedules I prepared was a  
17 summary of the taxes that were paid and due for the period  
18 in which the trust existed and also the amount of taxes paid  
19 or distributions that were made in connection with those  
20 taxes.

21 And in connection with that evaluation, I did  
22 speak to a Mr. Ron Simons who's a partner at the Piaker firm  
23 who prepared these returns. And prior to the time we  
24 actually received the transcripts from the Internal Revenue  
25 Service, he was helpful in discerning some of the

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1 information that was on the tax return, specifically  
2 relating to when estimated tax payments were made.

3 Q. Okay. Did Mr. Simons provide you with any  
4 information concerning the manner in which the trust taxes  
5 were paid?

6 A. He gave the amounts that were paid. He indicated  
7 in a brief conversation I had with him that typically the  
8 payments were made, he would fill out the tax returns, he  
9 would provide the information to make the payments, and  
10 occasionally those payments, as we determined based on  
11 looking at the facts, either were paid directly by the  
12 trustee, or in other cases may have been paid by David  
13 Smith. And then we subsequently were able to trace that in  
14 those cases, not in every case, but most of those cases, the  
15 amounts that David Smith paid on behalf of the trust were,  
16 in fact, reimbursed to David Smith by the trust.

17 Q. Okay. And did you -- did there come a time that  
18 you reviewed the NFS brokerage account statements for the  
19 trust?

20 A. Absolutely. We looked at all -- we looked at  
21 every statement that was prepared during the period in which  
22 the trust existed.

23 Q. Okay. I'm giving you intervenor Exhibit Number 5.  
24 Are these the account statements which you said you reviewed  
25 at my request?

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1           A.    I would say without going through every one that  
2 these are the statements for the years 2004 through the  
3 first several months of 2010.

4           Q.    All right.  And can you take me through your  
5 analysis of these account statements and describe for the  
6 Court what you were doing as you were reviewing the  
7 statements?

8           A.    Well, basically, in looking at the statements, I  
9 looked at the activity in the account from the period of  
10 inception through this time in 2010, with a view to get a  
11 better understanding of what happened within the trust.  And  
12 in doing that, I was able to put together a schedule showing  
13 all the deposits to the trust and distributions or transfers  
14 out of the trust from the time it was first funded in  
15 September of 2005 through the period in March of 2010.

16          Q.    All right.  How did you determine how the trust  
17 was first funded in September 2004?

18          A.    Okay.  I looked at the trust document, found that  
19 it was actually formed on, I believe, August 4th of 2004.  
20 And then in the tax return for 2004 year, it showed the sale  
21 of certain stocks.  Obviously, it had been funded by that  
22 date.  And then in looking at the statements for the trust  
23 and also looking at Lynn Smith's personal statements, I was  
24 able to determine that the fund -- excuse me -- the trust  
25 was funded on September 1, 2005, by a transfer of 100,000



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1 shares of Charter One Financial.

2 Q. Are you sure it was September 1, 2005?

3 A. 4. Excuse me.

4 Q. And how did you get the information to indicate it  
5 was funded in that manner?

6 A. By looking at the statement at the trust level, it  
7 showed an incoming transfer of the 100,000 shares on  
8 September 1st, and then looking at Lynn Smith's brokerage  
9 statement, her individual brokerage stock statement, it  
10 showed the transfer out to the account of the trust on that  
11 date.

12 Q. All right. And that account statement for the  
13 September 2004 period from Lynn Smith, Lynn Smith's stock  
14 account, is that one of the documents you previously  
15 testified to under examination by Mr. Featherstonhaugh?

16 A. Yes, it is.

17 Q. I'm handing you what I've marked as intervenor  
18 Exhibits 3, 10 and 11. Are those the schedules that you  
19 prepared at the conclusion of your examination?

20 A. Yes, they are.

21 Q. All right. And starting with the Intervenor  
22 Exhibit 3.

23 A. Yes.

24 Q. The Smith irrevocable trust deposits, 2004 to  
25 2010.

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1           A.    Yes.

2           Q.    Can you take the Court through this document,  
3 explain how you arrived at these entries?

4           A.    Okay.  These are all deposits that went into the  
5 account from the period September 1, 2004, up through and  
6 including part of April 2010.

7                   Basically, without going on a line by line basis,  
8 it shows the initial contribution to the trust of a hundred  
9 thousands of Charter One, which was then sold in the trust  
10 on September 1, 2004, and the proceeds were 4,000,450.  So  
11 that was the large portion -- that was the portion in which  
12 the trust was funded with.

13                   And these other amounts that were additions were  
14 either interest paid on the notes that were issued when they  
15 acquired those notes, those two different purchases, one of  
16 a hundred thousand, and one of 300,000.  So this schedule  
17 shows the deposits into the account of the interest.  It  
18 also shows some return of capital that was received into the  
19 trust as a portion of the notes were being redeemed.

20                   I could go through every line, but that's  
21 basically what it is.

22           Q.    Okay.  So each of these entries listed as a  
23 deposit, is that an amount that you obtained from the  
24 account statements in Intervenor's Exhibit 5?

25           A.    That's correct.  Each of these were taken from and

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1 traced to the particular monthly statement that is indicated  
2 on this schedule.

3 Q. All right. And if you look at the fourth grouping  
4 of entries, do you see a date that says 8/21/2006?

5 A. Yes.

6 Q. Is there any significance to that?

7 A. Well, we realized that that was a typo. It's  
8 supposed to be 3/31/2006. So --

9 Q. All right.

10 A. -- when this was prepared, there was an error.

11 Q. So that entry actually relates to -- that \$9,000  
12 deposit relates to an entry on Exhibit 5, a deposit made on  
13 March 21, 2006?

14 A. Exhibit 3?

15 Q. I'm sorry. Exhibit 5. The account statements.

16 A. Oh, yes. Yes.

17 Q. All right.

18 A. Each of these that are delineated here on the  
19 schedule all relate to deposits or additions to the accounts  
20 on the dates that are indicated, except for that one, there  
21 was a typo.

22 Q. Okay. And you prepared this document?

23 A. Yes, I did.

24 Q. Do you have a pen with you, Mr. D'Aleo?

25 A. I do.

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1 Q. I'm going to ask you to correct that typographical  
2 error on the exhibit since it has not yet been entered into  
3 evidence?

4 A. Okay. I've done that.

5 Q. With that correction, is this document -- does it  
6 accurately reflect all the deposits made into the Lynn and  
7 David Smith irrevocable trust brokerage account from  
8 September 2004 through April 16, 2010?

9 A. That's correct, it does.

10 Q. All right. Can you explain the bottom section of  
11 that document, other contributions to trust?

12 A. Yes. What this shows, there was a period in which  
13 the brokerage statements wouldn't show amounts related to  
14 private placements. They just simply couldn't. Since they  
15 couldn't value it, the clearing agent would not show that  
16 asset. So what the bottom line -- bottom four lines are, is  
17 it actually came back into the statement when it changed the  
18 clearing agent. I believe it was on October 9, 2009. So it  
19 then showed back on the statement.

20 Similarly, on September -- excuse me -- July 2,  
21 2009, the partnership units, which also were not in the  
22 statement because they wouldn't show private placements,  
23 came back into the statement. So there really wasn't  
24 technically a deposit. It was just a reintroduction of the  
25 partnership units into the statement because they were never

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1 there before.

2 Q. Okay. And what is the reason you chose to include  
3 it in this document?

4 A. Just for clarity and to be complete based on  
5 increases in the values of that account in that time period.

6 Q. All right. Turning to Intervenor's Exhibit 10,  
7 which is entitled David and Lynn Smith irrevocable trust  
8 withdrawals 2004 to 2010, can you explain who you created  
9 this statement and the source of the information is?

10 A. The source of the information was basically the  
11 same, was looking at the various account statements and  
12 seeing the amounts that came out. And they were, in fact,  
13 limited as one, two, three, four ...

14 MR. McGRATH: I'm sorry. Do you have an  
15 extra copy?

16 A. Okay. So to continue, these amounts were also  
17 determined by looking at the individual statements for the  
18 time period and that's reflected on this particular chart.

19 Q. Okay. Can you explain the first two entries, the  
20 100,000 and the 300,000?

21 A. Yes. The 100,000 was taken out on December 27,  
22 2004. The 300,000 was taken out on April 11, 2005. These  
23 both were a subscription to the \$400,000 in nine percent  
24 notes that the trust actually purchased in Pine Street  
25 Capital Partners LP.

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1 Q. Okay. And the entry for April 18, 2005, can you  
2 explain that entry --

3 A. Yes.

4 Q. -- and how you arrived at it?

5 A. Okay. On April 18, 2005, there was a withdrawal  
6 of \$2,300. And determined that was a repayment to David  
7 Smith to reimburse him for the 2004 trust taxes that were  
8 actually paid from his personal account.

9 The way we got to that is we saw that the  
10 distribution comes out in the amount of \$2,300 in another  
11 exhibit which I assume we're going to get to, which is a  
12 summary of all the tax returns. That is the amount,  
13 cumulative amount of taxes paid in 2005 for both U.S. and  
14 New York State.

15 Q. Did there come a time that you saw a -- any checks  
16 written by David Smith representing his payment of that  
17 \$2,300?

18 A. I think I made a request of you to try to get  
19 those checks. And, yes, we did see those checks. One for  
20 \$1,800 and one for -- 1800 and \$500, yes.

21 Q. And was there a package of documents that I  
22 obtained from Thomas Urbelis at your request and provided to  
23 you?

24 A. Yes, you did.

25 Q. And was the copy of David Smith's check in that

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1 package?

2 A. I believe it was.

3 Q. The next entry, April 18, 2006, in the amount of  
4 \$92,105, does that indicate that amount was withdrawn from  
5 the trust account on that date?

6 A. Yes, it does.

7 Q. Can you amplify on your explanation in this box  
8 and explain how you arrived at this explanation?

9 A. Okay. This also was a total amount of 92,105  
10 wired into the account of David Smith, again reimbursing him  
11 for taxes. It was made up of two pieces. It actually is  
12 made up of three pieces, excuse me.

13 The 2005 trust taxes equal the total 71,595, and  
14 the first payment of the 2006 estimated taxes was \$16,000,  
15 both of which were paid from David Smith's personal account.  
16 There's a difference between that total and the 92,105, of  
17 \$4510.

18 And further determination, I think what we found  
19 was that, in fact, David Smith made an estimated tax payment  
20 in the amount of REDACTED to New York State. And I believe we  
21 saw a check for that. I do have to say, however, that since  
22 we were unable to get the transcripts from New York State  
23 because they were going to take four to six weeks, as  
24 opposed to the IRS that gave it to us in two days, we have  
25 not been able to document that. But the returns as filed

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**D'ALEO - DIRECT - DUNN**

1 did not show that additional \$4600 payment being made, but  
2 we do have a check that I've seen in the amount of \$4600  
3 that was made payable to New York State income tax that had  
4 a reference for --

5 Q. Okay.

6 A. -- the trust payment.

7 Q. All right. Now you prepared this chart or last  
8 updated it on June 4, 2010, is that correct?

9 A. That's correct.

10 Q. And if you could look at the documents I gave you,  
11 Intervenors' Exhibit 2 is in front of you in that pile.  
12 They are copies of four pages, copies of cancelled checks?

13 A. Yes.

14 Q. Can you take that out?

15 A. I have that.

16 Q. All right. Since you last updated this chart,  
17 have -- did I provide you with those copies of cancelled  
18 checks?

19 A. Yes, you did.

20 Q. Did you review the cancelled checks?

21 A. Yes, I did.

22 Q. And could you tell me if you drew any conclusions  
23 as a result of your review of the cancelled checks  
24 consecutively numbered REDACTED

25 A. These were payments all drawn on the M & T bank



**D'ALEO - DIRECT - DUNN**

1 account of David Smith, and they were amounts that paid the  
2 U.S. Treasury on 4/17/06, in the amount of REDACTED

3 Q. Is that the first check written?

4 A. That's the first check.

5 Q. Is there any notation on that check that you could  
6 tie to the trust tax return, such as a taxpayer ID number?

7 A. Yes. In the stamp on the back that shows where it  
8 was being charged to or deposited, it has the trust federal  
9 ID number starting with the series 55, which, in fact, is  
10 the taxpayer identification number of the trust.

11 Q. And the next page, check number 1743?

12 A. That's made payable to New York State income tax  
13 in the amount of REDACTED. This is the check I just referenced  
14 that we found out about that came out of the account of  
15 David L. Smith payable to New York State income tax. And  
16 that also was in connection with the trust. This is the  
17 particular check that we've not been able to determine, in  
18 fact, that the return included that amount. And since we've  
19 not received the transcripts from New York State, we don't  
20 know whether or not the state credited it. But it appears,  
21 based on what's on this check, it is a payment in connection  
22 with the New York State income tax.

23 Q. Okay. And the next two checks?

24 A. Okay. The next check is check number REDACTED. It's  
25 dated April 17, '06, again drawn on the M & T bank account

**D'ALEO - DIRECT - DUNN**

1 of David Smith, in the amount of 55,000... I'll have to  
2 read this. I think it's 55,268<sup>REDACTED</sup>

in that series?

4 A. Final check is check number <sup>REDACTED</sup>, also on  
5 April 17, '06, in the amount of REDACTED, payable to New York  
6 State income tax.

7 Q. All right. Mr. D'Aleo, if you add those four  
8 checks together, what's the total amount that they  
9 represent?

10 A. If you add these together, it comes to \$92,195, I  
11 believe.

12 Q. And those checks were written on what date?

13 A. These were written on 4/17/06.

14 Q. And you determined from your review of the trust  
15 account statements that the next day \$92,105 was wired from  
16 the trust account to David Smith's account, is that correct?

17 A. That's correct. I think it's two days later. Oh,  
18 some of them the 17th and some of them the 16th. Oh,  
19 they're all dated the same date.

20 Q. Okay.

21 A. Excuse me, it is one day.

22 Q. Okay. Now, the next entry in your trust  
23 withdrawal chart, June 30, 2006, can you explain that entry?

24 A. That is the amount of \$83,830.

25 Q. And let's take that with the following entry for

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1 \$129,678.

2 A. That is on December 20<sup>th</sup> of 2006.

3 Q. What do those two amounts of withdrawals  
4 represent?

5 A. We were able to determine that all both of these  
6 were capital calls for the Pine Street Capital Partners LP.

7 Q. How did you make that determination?

8 A. We made an inquiry -- I made an inquiry through  
9 you. We were able to determine, I believe, based on the  
10 deposition that was given by Mr. Welles, that, in fact,  
11 these were amounts relating to capital calls.

12 Q. All right. Were you also able to tie those  
13 amounts in any way to the K-1 -- the schedule K-1s issued by  
14 Capital Street Partners to the trust?

15 A. Yes, I believe I was. They were shown as  
16 withdrawals from the capital section of the tax returns.

17 Q. And that would be in 2006? The K-1s are in  
18 Intervenor Exhibit 4.

19 A. I'm looking at that.

20 Q. Would the aggregate of those two amounts, \$83,830,  
21 and \$129,678, would they show on the K-1 statement issued by  
22 Pine Street Capital Partners to the trust?

23 A. Yes.

24 Q. In the tax year 2006? (crosstalk.)

25 A. If you look at the 2006 schedule K-1, which is a

**D'ALEO - DIRECT - DUNN**

1 portion of the partnership return that goes to the  
2 individual investor, the aggregate of those two amounts are  
3 reported as capital contributed during the year, for a total  
4 of 213,508.

5 Q. Okay. Is that box N of the K-1 for 2006?

6 A. It's box N, and it's the second line. It's  
7 entitled capital contributed during the year.

8 Q. Okay. And the next line on your schedule,  
9 April 15<sup>th</sup> 2008, can you explain that entry in your  
10 explanation?

11 A. Okay. That's in the amount of 110,636. And when  
12 we prepared the schedule summarizing the amounts that were  
13 required to cover the taxes for 2007 for New York State and  
14 for the U.S. for the trust, it totalled 110,636.

15 Q. Okay. And you drew those amounts from the tax  
16 returns and from the account statements?

17 A. That's correct.

18 Q. All right.

19 A. And some of it was also duplicative work with  
20 respect to New York -- the U.S. payment because it was  
21 reported on the transcripts.

22 Q. Okay. And the next entry, April 15<sup>th</sup>, 2009?

23 A. That was April 15<sup>th</sup>. Oh, April 13<sup>th</sup>, 2009?

24 Q. The next entry on the trust of withdrawal  
25 document.

**D'ALEO - DIRECT - DUNN**

1           A.    I have April 13<sup>th</sup>, 2009. 32,987? That is the  
2 balance that was due for the 2008 federal taxes, 32,987.  
3 And there was a check drawn from the trust in that amount.  
4 Also on that date, there was a check for \$8,570, which is  
5 the amount of the New York State final trust payment. And I  
6 indicated on my schedule that even though the check was  
7 drawn for 8570, the return shows 8573 as being due.

8           Q.    Okay. And those two amounts, you reviewed  
9 documentation of checks having been issued directly from the  
10 NFS trust account to pay these taxes?

11          A.    Yes.

12          Q.    All right. And then the final entry on that  
13 chart, can you explain what that is?

14          A.    The final entry in the book chart is April 15,  
15 of 2010 for \$95,000, which was the amount that was drawn and  
16 deposited in the account of Lynn Smith. We were able to  
17 determine two things. First, the total of REDACTED which is  
18 made up of a U.S. payment of REDACTED and a New York State  
19 payment of REDACTED, related to the extension payments for the  
20 trust, for a total of REDACTED.

21               And the additional amounts, the difference, the  
22 \$75,000, we were able to determine was amounts that were  
23 deposited in Lynn Smith's accounts for which they made  
24 personal extension payments of sixty-six-five for the United  
25 States and REDACTED for New York State.

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1 Q. All right. Turning to the final exhibit in front  
2 of you, Intervenor's Exhibit 11.

3 THE COURT: Do you have much longer, Miss  
4 Dunn?

5 MS. DUNN: Very close.

6 THE COURT: Close?

7 MS. DUNN: Yes.

8 A. Yes.

9 Q. Can you explain this document, how you prepared it  
10 and what it shows?

11 A. What this document shows is based on information  
12 that was accumulated from the tax returns, from  
13 conversations with Ron Simons at Piaker with respect to  
14 estimated tax payments, and also with respect to reviewing  
15 the account transcripts from the Internal Revenue Service.

16 Now, what this shows in some level of detail are  
17 the tax payments, whether they were in connection with  
18 estimated payments or final payments or carryovers from  
19 extra payments in a prior year, and it tracks on a year by  
20 year basis the tax liabilities and the payments made against  
21 those liabilities. That's the top one-half of the schedule.

22 On the bottom, we summarize on the left-hand side  
23 the payments that were made that relate to particular  
24 periods and summarized by year. Those total REDACTED which  
25 agrees to the total amount of the payments that were made

**D'ALEO - DIRECT - DUNN**

1 for all the years, REDACTED .

2 The bottom half on the right-hand side is a  
3 summary of distributions that were made from the trust to  
4 pay the taxes whether they were made in the form of direct  
5 payments, by check to the tax authorities or by wires or by  
6 payments made either by wire or by check to the account of  
7 David Smith or Lynn Smith to pay the taxes that we just  
8 discussed. That totals REDACTED

9 Q. All right. And based upon your review of all of  
10 the documentation we've discussed and your preparation of  
11 these charts and in your consultation with Ron Simons, the  
12 accountant for the trust, were you able to reach a  
13 conclusion as to whether or not all of the trust tax  
14 liabilities were paid --

15 A. Yes.

16 Q. -- for all of the preceding years, dating back to  
17 the taxable Year 2004.

18 A. Well, yeah, I think I would make one caveat. All  
19 the payments for the years 2008 were made and the extension  
20 payments were made for 2009. We don't know yet what the  
21 final taxes are yet for 2009 because the returns haven't  
22 been prepared.

23 Q. And with the exception of the two payments you  
24 testified to that were made on April 15<sup>th</sup>, in the amount  
25 of REDACTED and REDACTED to pay Lynn and David Smith's personal

**D'ALEO - DIRECT - DUNN**

1 taxes, with the exception of those two amounts, were you  
2 able to account for all of the money that has gone out of  
3 the trust account since its inception?

4 A. Yes. I accounted for all the monies that went  
5 out. The -- my analysis here determines that the actual  
6 amounts of tax payments that were made out of the trust were  
7 actually less than were made because the distributions in  
8 certain cases David Smith was not reimbursed in total for  
9 the amounts that he had paid personally.

10 Q. Okay. And do you -- can you tell us the amount of  
11 money over the years that David Smith was not reimbursed  
12 for?

13 A. Well, the total taxes equal REDACTED And the  
14 amount of reimbursements were 266,601. So a difference of,  
15 let's say, a hundred thousand dollars roughly.

16 Q. All right. Very good. Thank you.

17 THE COURT: We're going to take our evening  
18 recess at this time. It appears we'll be back together  
19 again tomorrow. I would propose 10:15, since I have another  
20 matter on at 9:30. SEC have any thoughts on the subject?

21 MR. STOELTING: I think 10:15 is acceptable  
22 to us.

23 THE COURT: Mr. Featherstonhaugh?

24 MR. FEATHERSTONHAUGH: 10:15 is fine with me,  
25 your Honor.



**D'ALEO - DIRECT - DUNN**

1 THE COURT: And Miss Dunn?

2 MS. DUNN: Is there -- do we have any play  
3 with that to maybe start a little bit later? I have a  
4 commitment tomorrow from 10 to 11. I was not anticipating  
5 this hearing going this long.

6 THE COURT: I don't think any of us were.

7 MS. DUNN: If not, that's fine, I can make  
8 adjustments.

9 THE COURT: I think you'll have to make  
10 adjustments.

11 MS. DUNN: Okay. Thank you.

12 THE COURT: 10:15 tomorrow to the conclusion  
13 or the death, whichever comes first. (laughter.) All  
14 right?

15 We'll stand in recess.

16 (Court adjourned at 5:15 PM.)

17 \* \* \* \* \*

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C E R T I F I C A T I O N

I, BONNIE J. BUCKLEY, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

---

BONNIE J. BUCKLEY, RPR, CRR

US Court Reporter - NDNY

DATED: JUNE 22, 2010

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF NEW YORK

3 -----  
SECURITIES AND EXCHANGE COMMISSION

4 Plaintiff,

5 -versus-

10-CV-457

6 MCGINN, SMITH & CO., INC.,  
7 MCGINN, SMITH ADVISORS, LLC,  
8 MCGINN, SMITH CAPITAL HOLDINGS CORP.,  
9 FIRST ADVISORY INCOME NOTES, LLC,  
10 FIRST EXCELSIOR INCOME NOTES, LLC,  
11 FIRST INDEPENDENT INCOME NOTES, LLC,  
12 THIRD ALBANY INCOME NOTES, LLC,  
13 TIMOTHY M. MCGINN and DAVID L. SMITH,  
14 Defendants,  
15 and LYNN A. SMITH,  
16 Relief Defendant.  
17 -----

18 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd)

19 held in and for the United States District Court,

20 Northern District of New York, James T. Foley United

21 States Courthouse, 445 Broadway, Albany, New York,

22 on FRIDAY, JULY 11, 2010, the HON. DAVID R. HOMER,

23 United States District Court Magistrate Judge, Presiding.  
24

25 **APPEARANCES:**

**FOR THE PLAINTIFF:**

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

**BONNIE J. BUCKLEY, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY**

1 **APPEARANCES (continued):**

2  
3 FOR THE RELIEF DEFENDANT LYNN A. SMITH:

4 FEATHERSTONHAUGH & WILEY LAW FIRM

5 BY: JAMES D. FEATHERSTONHAUGH, ESQ.

6  
7 FOR THE TRUSTEE DAVID M. WOJESKI:

8 THE DUNN LAW FIRM

9 BY: JILL A. DUNN, ESQ.

10  
11 FOR THE DEFENDANTS TIMOTHY MCGINN AND DAVID SMITH:

12 GREENBERG, TRAURIG LAW FIRM

13 BY: MICHAEL L. KOENIG, ESQ.

14  
15 ALSO PRESENT:

16 LYNN A. SMITH, Relief Defendant

17 DAVID M. WOJESKI, TRUSTEE

18 RYAN SMITH

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\* \* \* \* \*

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**D'ALEO - CROSS - McGRATH**

1 (Court convened at 10:10 AM.)

2 THE CLERK: Today is June 11, 2010. The time  
3 is 10:10 AM. Securities & Exchange Commission versus  
4 McGinn, Smith & Company, Incorporated, Docket Number  
5 10-CV-457.

6 THE COURT: Good morning. Mr. D'Aleo, I  
7 remind you that you are still under oath.

8 THE WITNESS: Yes, I understand that.

9 MR. McGRATH: Good morning, your Honor.

10 **CROSS-EXAMINATION BY MR. McGRATH:**

11 Q. Good morning, Mr. D'Aleo.

12 A. Good morning.

13 Q. Mr. D'Aleo, yesterday you were shown a document  
14 that was marked as Intervenor's Exhibit 3 entitled Smith  
15 irrevocable trust deposits 2004 to 2010. Do you have that  
16 document handy there?

17 A. Yes. I have it in front of me now.

18 Q. All right. Now, just for clarification, that  
19 document lists a number of deposits that were made into the  
20 irrevocable trust from Pine Street Capital, correct?

21 A. That's correct.

22 Q. Weren't there other deposits into the Lynn Smith  
23 irrevocable trust during those time periods aside from  
24 income and interest earned from Pine Street?

25 A. Well, there was the original deposit of the shares

**D'ALEO - CROSS - McGRATH**

1 that went in when the fund was funded -- the trust was  
2 funded, rather, on September 1, 2004. Yeah, there were  
3 shares that were put in, a hundred thousands shares of  
4 Charter One Financial.

5 Q. Right. Were there any other deposits made into  
6 that account during that period in terms of any other  
7 holdings that the trust had?

8 A. I don't believe so.

9 Q. I would like to direct your attention now to Lynn  
10 Smith Exhibit 14. It's in the binder, Volume III. Do you  
11 have that in front of you? It's a thin binder.

12 A. Okay. Which number did you say?

13 Q. It's Exhibit 14.

14 A. Yes, I have that in front of me.

15 Q. Can you turn to -- the first page of that exhibit  
16 is entitled funds received into Lynn Smith's account,  
17 correct?

18 A. That's correct.

19 Q. Okay. Can you turn to the second page which is  
20 also entitled funds received into Lynn Smith's account.

21 A. That's correct.

22 Q. Now, were these all transfers into the brokerage  
23 account?

24 A. Yes, I believe there were.

25 Q. There are actually two accounts listed on this

**D'ALEO - CROSS - McGRATH**

1 chart, though, aren't there? There's one that ends in 916  
2 and one that ends in 912, if you look at the first page.

3 A. Okay. Yes. That also includes some contributions  
4 that were made into a -- I assume that 912 is an IRA  
5 account.

6 Q. All right. Sir, remember yesterday when the Judge  
7 asked you whether the deposits were into the brokerage  
8 account? I just want to clarify that there are actually two  
9 accounts that were included on this chart, correct?

10 A. That's correct. There's two small contributions  
11 that are indicated, they were cash contributions to the --  
12 an IRA account.

13 Q. Okay. Thank you. All right if you could turn to  
14 page 2 of that chart, please.

15 A. Mm-hmm.

16 Q. There's an entry, the top entry is dated 2/4/2009.

17 A. Correct.

18 Q. And it says transfer account Capital Center Credit  
19 Corp.

20 A. Yes.

21 Q. And the amount is \$38,430.46, correct?

22 A. Yes. I see that.

23 Q. And your note, which is note 8 on Exhibit 15 --

24 A. Yes.

25 Q. -- states that this relates to final distribution



**D'ALEO - CROSS - McGRATH**

1 from Capital Center Credit Corp. to David Smith which was  
2 deposited into account of Lynn Smith, correct?

3 A. That's correct.

4 Q. It goes on to say documentation for this  
5 transaction is not currently available.

6 A. That's correct.

7 Q. So just so I understand, this is a transfer that  
8 David Smith made of a distribution that he received into  
9 Lynn Smith's brokerage account, correct?

10 A. That's correct.

11 Q. All right. Now, going further down, there's an  
12 entry on 2/20 -- and that was for \$38,438.46?

13 A. 430.46.

14 Q. 430.46.

15 A. Yes.

16 Q. Going further down, transaction on 2/20/2009?

17 THE COURT: Excuse me. What was the date of  
18 that?

19 MR. McGRATH: That was 2/4/2009, your Honor.

20 THE COURT: Thank you.

21 BY MR. McGRATH:

22 Q. On 2/20/2009, there's an entry also entitled  
23 transfer, correct?

24 A. That's correct. I see it.

25 Q. And it says Smith, David, and the amount is

**D'ALEO - CROSS - McGRATH**

1 \$326,304.11. And you have a footnote 11 there. And that  
2 was also transferred into Lynn Smith's brokerage account by  
3 David Smith, correct?

4 A. That's correct.

5 Q. And the note that you have, footnote 11 on Exhibit  
6 15, says relates to estate planning transfers between  
7 spouses, correct?

8 A. That's correct.

9 Q. This is based on your conversation with Lynn  
10 Smith, that you got that information?

11 A. I believe I did.

12 Q. All right. So am I interpreting this correctly to  
13 state that David Smith transferred \$326,304.11 into Lynn  
14 Smith's brokerage account on that date?

15 A. That's correct.

16 Q. Okay. Now, if you can look at the third page of  
17 Exhibit 14.

18 A. I have that in front of me.

19 Q. Okay. Where it says footnote 15, there's an item,  
20 it doesn't have a date, the source says Smith, Lynn total,  
21 and the amount is \$60,000.

22 A. Yes, I see that.

23 Q. All right? And your footnote 15 on Exhibit 15  
24 states relates to three transfers from Lynn Smith brokerage  
25 account to her checking account, and then you give the dates

**D'ALEO - CROSS - McGRATH**

1 of the three transfers; 11/13/09, \$15,000; 2/16/10, \$20,000;  
2 and 3/25, and you say 1 here?

3 A. Obviously a 10.

4 Q. 10. \$25,000. What was the basis for your  
5 footnote 15?

6 A. Okay. I think I testified yesterday that we did  
7 not know what made up that \$60,000. We had -- and I assume  
8 from the timing that it was these three transfers, but I  
9 don't have any specific documentation as to what the amounts  
10 were because the schedule that relates to this item 15 on  
11 the SEC document doesn't indicate what the source is. So I  
12 can't say as I sit here today with absolutely surety that  
13 those are the three transfers. I just believe it to be the  
14 three transfers.

15 Q. Okay. And did you look at the Lynn Smith checking  
16 account and identify three transfers into that account on  
17 the dates identified in the footnote 15, with those amounts  
18 associated with them?

19 A. Into her checking account? No, I did not see it  
20 in her checking account because we didn't have checking  
21 account statements available to us.

22 Q. So I'm just confused then. Help me understand.  
23 Where did you get the dates and amounts if you didn't look  
24 at the checking account?

25 A. I believe what I testified to is that we didn't

**D'ALEO - CROSS - McGRATH**

1 know exactly what the -- where this went other than this is  
2 what the schedule says. I saw those amounts coming out of  
3 the brokerage accounts, those three transfers from her  
4 brokerage statements, and those amounts totalled \$60,000.

5 Q. Okay. So the entry, for example, on 11/13/09,  
6 \$15,000, you obtained that from looking at Lynn Smith's  
7 brokerage account?

8 A. That's correct. All three of those notations in  
9 front of you are distributions out of the stock brokerage  
10 account.

11 Q. So -- but what made you believe that that money  
12 went into the checking account? Did you have any basis for  
13 that belief?

14 A. Other than what is indicated here on the schedule  
15 prepared by the SEC. It says Lynn Smith total. I just  
16 assumed that. The truth of the matter is when we looked at  
17 the schedule we did not know where it went. So...

18 Q. Okay. So did you talk to Lynn Smith and ask her  
19 where the money went?

20 A. I don't recall speaking to her, but it doesn't  
21 mean I did not speak to her.

22 Q. But you have no recollection of speaking to her  
23 regarding those three transfers?

24 A. Not specifically.

25 Q. And so would it be fair to say then you also don't

**D'ALEO - CROSS - McGRATH**

1 know what, if anything, she did with that money --

2 A. That would be --

3 Q. -- once it was transferred out of the brokerage  
4 account?

5 A. That would be a fair statement.

6 Q. You tried to be as thorough as you could in  
7 preparing these charts, correct?

8 A. That's correct.

9 Q. And you spoke to her regarding other transactions  
10 that are reflected on these charts, correct?

11 A. Yes.

12 Q. And you're stating that you don't recall and your  
13 documents don't indicate that you spoke with her regarding  
14 the actual end transfer here?

15 A. No, I can't recall having spoken to her  
16 specifically about that.

17 Q. Okay. Now, I would like to direct your attention  
18 to intervenor 10, which is a document entitled David and  
19 Lynn Smith irrevocable trust withdrawals 2004 to 2010. Do  
20 you have that document in front of you?

21 A. Give me a minute.

22 Q. Yup.

23 A. I have that in front of me now.

24 Q. And you testified at some length about this  
25 document yesterday, do you recall?

**D'ALEO - CROSS - McGRATH**

1 A. That's correct.

2 Q. I would like to direct your attention to -- I'm  
3 just going to focus on several of these transactions. The  
4 first one is dated 4/15/2008. And the amount in the column  
5 is \$110,636. Do you have that?

6 A. I do. I see that.

7 Q. And then in the right your explanation is wire  
8 transfer for payment of 2007 U.S. and N.Y.S, which New York  
9 State, correct?

10 A. That's correct.

11 Q. Trust taxes and 2008 trust estimates?

12 A. That's correct.

13 Q. Now, again, you testified at some length about the  
14 documents that you looked at in connection with preparing  
15 this chart yesterday. Just for my clarification, did you  
16 actually look at the checks that would support the payment  
17 by David Smith of the taxes on behalf of the trust in 2007  
18 for federal and state taxes?

19 A. As I sit here today, I can't say specifically. I  
20 believe I did. But I did have some other method of  
21 determining those payments, because with -- at least with  
22 respect to the federal payment, we have the account  
23 transcript from the IRS showing that payment -- or portion  
24 of that payment that relates to the federal taxes that's  
25 detailed on Exhibit 11. And I believe I saw the checks but

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1 I would not say without some surety because I've seen so  
2 many documents recently, but I believe I have seen those  
3 checks.

4 Q. But the IRS account that you looked at, that  
5 doesn't tell you who paid that money, it just shows the  
6 amount of money that was actually paid, correct?

7 A. That's correct.

8 Q. And yesterday do you remember Miss Dunn showed you  
9 a series of checks relating to some of the earlier taxes  
10 that were paid by David Smith?

11 A. That's correct.

12 Q. I believe it was in connection with -- it might  
13 have been 2004, 2005, I'm not sure, but she showed you the  
14 actual checks that reflected payments by David Smith out of  
15 this checking account to the IRS and to the New York State  
16 tax authority, correct?

17 A. That's correct.

18 Q. And she did not show you yesterday checks that  
19 would support payments by David Smith in connection with the  
20 2007 federal and state tax returns, correct?

21 A. And the 2008 estimates.

22 Q. And the 2008 estimates.

23 A. To the best of my knowledge, no, she did not show  
24 them to me yesterday, that's absolutely correct.

25 Q. So as you sit here today are you sure that you've

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1 seen actual checks that document payments by David Smith on  
2 behalf of the trust for the 2007 and 2008 federal and state  
3 tax returns?

4 A. Well, as I sit here this morning I cannot  
5 specifically recall having seen those checks. I believe I  
6 have seen them, but I couldn't confirm it.

7 Q. What's the basis for your belief?

8 A. Well, I -- because I saw a number of different  
9 documents. I may or may not have seen those checks. I did  
10 see the wire transfer going out for this amount that  
11 specifically related to the aggregate of payments that were  
12 made on that date and I believe related to the payments for  
13 those specific taxes.

14 Q. Well, you saw the wire transfer from the  
15 irrevocable trust to David Smith's bank account?

16 A. That's correct.

17 Q. But you didn't see -- at least you're not  
18 testifying right now that you saw the checks, correct?

19 A. That's correct.

20 Q. Okay. Now, let me direct your attention to the  
21 entry on 4/13/2009, in the amount of \$32,987. And the  
22 column on the right says explanation, 2008 U.S. final trust  
23 tax payment; correct?

24 A. That's correct.

25 Q. I'm going to ask you the same question for that



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1 one. Did you see the actual check that was written by David  
2 Smith to the IRS to support that payment?

3 A. As I sit here today, I can't recall having seen  
4 that check. It doesn't mean I didn't see it, but I don't  
5 recall having seen that check.

6 Q. It doesn't mean that you did either, correct?

7 A. That's correct.

8 Q. And the same question with respect to the next  
9 entry, 4/13/2009, \$8,570, and it says 2008 New York State  
10 final trust tax payment return shows 8,573.

11 A. My answer would be the same to that.

12 Q. Meaning you don't recall one way or another  
13 whether you saw a check to support that?

14 A. That's correct.

15 Q. Okay. Now, Mr. D'Aleo, you've been an accountant  
16 your whole professional life, correct?

17 A. That's correct.

18 Q. You detailed for the Court your training and your  
19 extensive experience?

20 A. Yes.

21 Q. Have you prepared tax returns on behalf of trusts  
22 during the course of your career?

23 A. I have.

24 Q. And by the way, have you ever performed any  
25 services for David or Lynn Smith prior to being retained by

**D'ALEO - CROSS - McGRATH**

1 Mr. Featherstonhaugh in connection with this case?

2 A. Individually, no.

3 Q. On behalf of any entity associated with them?

4 A. Yes, I did. Back sometime I believe in the '90s,  
5 when I still was a partner at what is now  
6 PricewaterhouseCoopers, we were involved in a deal they did  
7 in connection with building the civic center up in Saratoga,  
8 but I believe that was sometime in the 1990s.

9 Q. And I'm sorry, what did you do on their behalf?

10 A. The firm was involved in assisting in the  
11 preparation of projections that went into that offering  
12 document.

13 Q. And what was your role?

14 A. As a partner, probably overseeing the project.

15 Q. So getting back to my question, sorry I  
16 interrupted you there...

17 A. That's okay.

18 Q. The -- you've prepared tax returns on behalf of  
19 trusts?

20 A. Yes, I have.

21 Q. Approximately how many tax returns if you could  
22 estimate over the course of your career?

23 A. Hundreds.

24 Q. Okay. And, in fact, you prepared tax returns on  
25 behalf of irrevocable trusts?

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1           A.    Yes.

2           Q.    And New York irrevocable trusts -- or maybe that's  
3 not the -- it's the federal trust, correct?

4           A.    That's correct.

5           Q.    All right.  So you're familiar with the tax  
6 consequences of an irrevocable trust?

7           A.    I am.

8           Q.    What is the benefit to the donor in terms of tax  
9 consequences for placing money in an irrevocable trust on  
10 behalf of the donor's children?

11          A.    Well, the asset is being transferred, the  
12 ownership of the asset is being transferred from the  
13 individual to the trust.  The trust owns that asset.  So  
14 anything having to do with the future activity of that  
15 specific asset, whether it generates income or appreciates,  
16 depreciates, that's all reportable by the trust and goes to  
17 the benefit or the detriment of the trust.

18          Q.    Now, you understand in this case there's been  
19 testimony that there was approximately \$400,000 in stock  
20 that was donated to the trust, the irrevocable trust when it  
21 was first created?

22          A.    I don't believe --

23                   MISS DUNN:  Objection.  That's a  
24 mischaracterization of the testimony.

25 BY MR. McGRATH:

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**D'ALEO - CROSS - McGRATH**

1 Q. Do you recall how much stock was donated?

2 THE COURT: Hold on.

3 MR. McGRATH: I'm sorry. I'll rephrase the  
4 question.

5 THE COURT: Thank you.

6 BY MR. McGRATH

7 Q. You've looked at all the documentation relating to  
8 the irrevocable trust, correct?

9 A. I can't say I looked at every piece of  
10 documentation related to the trust.

11 Q. All right. Let me direct your attention to  
12 Intervenor Exhibit 3.

13 A. Yes.

14 Q. Do you have that?

15 A. I do.

16 Q. On the top -- and you prepared this schedule?

17 A. I did.

18 Q. All right. And on the top of it it has a date,  
19 9/1/2004?

20 A. Correct.

21 Q. It says deposits amount, \$4,450,000. And  
22 explanation, 100,000 shares Charter One Financial. Do you  
23 see that?

24 A. I do.

25 Q. What does that mean when you prepared that? What

**D'ALEO - CROSS - McGRATH**

1 did that mean to you?

2 A. That amount was transferred from the account of  
3 Lynn Smith -- trust -- her brokerage account into the  
4 account of the trust, and it was sold on that date. It's a  
5 hundred thousand shares, the market value on that date was  
6 4,450,000.

7 Q. So when the shares -- after the shares were  
8 transferred into the trust, they were sold, and they had a  
9 sale price of 4,450,000, correct?

10 A. That's correct. Yup.

11 Q. Do you know what the value of the stock was when  
12 it was originally purchased?

13 A. I do not. I don't know anything -- all I know  
14 about the stock I had seen a brokerage statement, Lynn  
15 Smith's brokerage statement, the earliest one was sometime  
16 in 1990, and those shares were in that account. Excuse me,  
17 1999. And the shares were in the account at that particular  
18 time.

19 Q. Were you aware of the fact that there was a  
20 sizable appreciation in the value of the stock from the time  
21 it was originally purchased and when it was sold after being  
22 received into the trust?

23 A. I would assume there was an appreciation in  
24 connection with the company being taken over by Charter  
25 Financial.

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1           Q.    Okay.  So just stepping back to square one, with  
2 respect to the donor contributing stock into an irrevocable  
3 trust, what are the tax consequences to the donor at the  
4 point where the contribution is made?

5           A.    It's a transfer --

6           Q.    If any.

7           A.    If any.  It's a transfer of that asset out of  
8 their ownership into the ownership of the trust.

9           Q.    Is there a gift tax associated with that?

10          A.    There could or could not be, based on what the  
11 circumstances were.

12          Q.    And could you just describe generally what type of  
13 circumstances would factor into whether or not there's tax  
14 consequences with respect to a gift tax?

15          A.    There's a difference between what's known as a  
16 basis of the shares in the hands of the donor and the shares  
17 when it's contributed typically is considered to be a gift.  
18 I'm not saying that's the case in every circumstance, but  
19 that's the general rule.

20          Q.    So if a person has stock that, just as an example,  
21 they purchased on day one for one dollar and it's  
22 contributed to the irrevocable -- to an irrevocable trust  
23 and it's sold the next day and it's got a hundred dollars in  
24 value, what would the tax consequences be to the donor?  
25 Would they be taxed based on the one dollar contribution or

**D'ALEO - CROSS - McGRATH**

1 the one hundred dollar appreciated value?

2 A. The donor wouldn't be taxed at all on the sale of  
3 the shares inside the trust.

4 Q. Okay. Once an asset is placed in the trust, an  
5 irrevocable trust we're talking about now, if there's  
6 distribution out from the trust to a beneficiary, are there  
7 tax consequences associated with the distribution to the  
8 beneficiary?

9 A. There can be. The income generated in the trust  
10 could be allocated to the people that receive it, or the  
11 trust could choose to pay the tax at the trust level and  
12 just distribute out cash on an after-tax basis.

13 So it would vary based on what the trustee wanted  
14 to do, or what was actually being distributed out. If  
15 there's income in the trust and then there's a distribution,  
16 it wouldn't necessarily have to be. That income is  
17 allocated to the beneficiary because the trust would pay the  
18 tax.

19 Q. Assume for a moment that there's no income, that  
20 there's just a donation say of a million dollars into a  
21 trust, and then a hundred thousand of that million dollar  
22 contribution is distributed to a beneficiary. Would that be  
23 recognized as income by the beneficiary?

24 A. Not necessarily. It could be distribution of an  
25 asset. Probably in most cases it is a distribution of an

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1 asset.

2 Q. With no tax associated with that distribution to  
3 the beneficiary?

4 A. Not if the tax was paid at the trust level.

5 Q. Okay. Now, do you understand that if a donor  
6 contributes assets to an irrevocable trust, creditors of the  
7 donor cannot typically reach those trust assets? Is that  
8 one of the benefits of an irrevocable trust?

9 A. That's my understanding.

10 Q. Okay. And you've prepared -- as you just said,  
11 you prepared tax returns on behalf of irrevocable trusts?

12 A. That's correct.

13 Q. In your experience, does the trustee of the trust  
14 normally issue checks to pay the trust, federal and state  
15 taxes?

16 A. They can. They could order somebody else to. The  
17 could maybe give directions. I mean I've seen situations  
18 where they just -- an asset is held in a specific account  
19 and they said to whoever the holder is, issue checks to the  
20 U.S. Treasury, such and such, issue checks to the New York  
21 State income tax, a certain amount.

22 Q. When you say the holder, you mean the holder of  
23 the asset that's in the trust?

24 A. That's correct. What I mean, where it's  
25 deposited. So if it's in the brokerage account, they could



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1 give instructions to the brokerage account, please send a  
2 check for X amount of dollars to the U.S. Treasury.

3 Q. Because the brokerage account actually has control  
4 of that asset?

5 A. It has physical control of that asset.

6 Q. Right. And are there other instances where the  
7 trustee of the trust writes the check him or herself?

8 A. That could be true. And they would have to get  
9 reimbursed for the amount. If they paid it out of their own  
10 account are you speaking of?

11 Q. No, no, I'm saying out of an account that's in the  
12 name of the trust.

13 A. The trust has a checking account and it's  
14 available to the trustee and that's possible, one way of  
15 doing it, yes.

16 Q. Wouldn't that be the typical way of doing it?

17 A. I would say there isn't any typical way. I've  
18 seen accounts where there are no checking accounts  
19 associated with a particular asset.

20 Q. How typical is that a trustee would ask a third  
21 party, not the holder of the asset, but some third party  
22 that ostensibly has no ownership or control over the trust  
23 to write a check out of that person's personal account to  
24 pay the taxes? How typical is that in your experience?

25 A. I would say it's not typical, but it's not that it

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1 couldn't be done. But I would say it's not typical.

2 Q. Well, physically it can be done, but in your  
3 experience have you ever seen that happen other than in this  
4 case?

5 A. I cannot recall whether I have or not.

6 Q. Okay.

7 MR. McGRATH: No further questions. Thank  
8 you.

9 THE COURT: Thank you. Any redirect?

10 MR. FEATHERSTONHAUGH: Nothing, your Honor.

11 THE COURT: Miss Dunn, anything further?

12 MISS DUNN: Yes, just briefly, your Honor.

13 **REDIRECT EXAMINATION BY MISS DUNN:**

14 Q. Mr. D'Aleo, Mr. McGrath asked you a few questions  
15 about the entry on Intervenor's Exhibit 10, which you made  
16 related to April 15<sup>th</sup>, 2008. Can you take a look at that?

17 A. Yes.

18 Q. And can you explain how it is that you came to the  
19 conclusion that the \$110,636 of that withdrawal was used  
20 dollar for dollar for the trust 2007, 2008 taxes? And if  
21 you need to refer to the trust tax returns or intervenor 11,  
22 feel free to do so.

23 A. Okay. Looking at Exhibit 11, as I explained  
24 yesterday, the whole top section of that chart indicates the  
25 taxes for the various years, the estimated tax payments that

**D'ALEO - REDIRECT - DUNN**

1 were made and the final tax payments that may have been  
2 made, extension payments that were made. And then that  
3 information was summarized by date in the bottom left-hand  
4 corner.

5 I draw your attention to the summary where it says  
6 summary tax payments about halfway down for the dates, where  
7 it says April 15, 2008, you see a payment of \$30,000,  
8 aggregate payment of 30,000, which is described in more  
9 detail above. And --

10 Q. What is that 30,000 in the aggregate of?

11 A. The 30,000 is the aggregate of an estimated tax  
12 payment made on, I think it was -- this shows it as being  
13 4/15/08, to the U.S. Treasury for 24,000, and a payment to  
14 New York State in the amount of 6,000, for a total of  
15 30,000.

16 Q. How did you determine that those were the  
17 estimated payments made to the U.S. Treasury and New York  
18 State Tax and Finance Department on those dates?

19 A. Well, with respect specifically to -- well, first  
20 of all, they were claimed on the return as those payments,  
21 both the New York State and the federal return. And in  
22 addition, and looking at the transcripts for the 2008 U.S.  
23 return, we saw an estimated payment that was claimed on the  
24 return was, in fact, credited to the account of the trust in  
25 the amount of 24,000.

**D'ALEO - REDIRECT - DUNN**

1 Q. All right. So does that indicate that the U.S.  
2 Treasury received \$24,000 on that date?

3 A. It does.

4 Q. And that it was credited to the taxpayer ID number  
5 associated with this trust?

6 A. Yes, it does.

7 Q. Go on.

8 A. The 6,000, as I explained yesterday, which relates  
9 to the estimated tax payment for New York State, we  
10 attempted, I believe, to get transcripts from New York State  
11 similar to the IRS. They were told -- we were told it would  
12 take four to six weeks, so we have not received that.  
13 However, the tax return, as prepared, showed the credit for  
14 that \$6,000 payment against the total tax liability that was  
15 due.

16 Q. Okay. And in that chart below, summary of tax  
17 payments, what is the second entry related to 4/15/2008?  
18 What is that amount, \$80,636? What does that represent and  
19 where did you ascertain that amount?

20 A. Okay. If you look at the top of that chart  
21 relating to the 2007 tax year, there was a payment made, an  
22 extension payment made on 4/15/08, in the amount of 62,582,  
23 for the federal -- to the U.S. Treasury, and a payment made  
24 for \$18,054 to New York, totalling 80,636.

25 Again, with respect to the federal payment, we saw

**D'ALEO - REDIRECT - DUNN**

1 that amount being credited both on a tax return and shown to  
2 be credited in the account transcript that we got from the  
3 Internal Revenue Service.

4 With respect to the New York State payment, we saw  
5 the credit of the New York State return. And since we had  
6 not been able to receive the account transcripts from New  
7 York State, we couldn't further document it that way, but it  
8 was in an amount that was claimed on the return filed.

9 Q. So the 30,000 and the 80,636 is what represents  
10 the 110,636 on your summary chart of trust withdrawals?

11 A. Yes.

12 Q. Okay. And with respect to those payments that you  
13 testified were made in April 2007, that make up that entry,  
14 were you also able to determine based on the following year  
15 tax returns that there were no penalties or interest imposed  
16 as a result of a failure to pay the taxes in the prior year?

17 A. That's correct.

18 Q. And did the account transcripts that we were able  
19 to obtain from the IRS on Tuesday of this week, did they  
20 also confirm that there were no penalties related to the  
21 non-payment of the taxes for 2007, 2008?

22 A. Well, let me just verify. I think in the  
23 transcripts, in certain instances, show penalties required,  
24 because there may have been late payments. But they're all  
25 in these totals. So the amount of the final tax, including

**D'ALEO - REDIRECT - DUNN**

1 whatever penalty, because if you look at the chart where it  
2 says -- about halfway down the left-hand column it says  
3 final tax and then in paren it says plus penalties. If  
4 there was a penalty that was assessed or paid on the return,  
5 it's in these totals. So there's nothing that I'm aware of  
6 that's above and beyond these amounts.

7 Q. Okay. Understanding your testimony that the  
8 actual returns for 2009 have not yet been filed, I believe  
9 you testified that an extension was filed and an extension  
10 payment was filed this April for 2009, is that correct?

11 A. That's correct.

12 Q. Okay. So segregating that for 2008, 2007, and  
13 going back for the life of the trust, have you, have you  
14 reached any conclusions with respect to the payments of the  
15 trust taxes up to and including tax year 2008?

16 A. Yes. Based on what I've seen, both the tax  
17 returns and transcripts, I could state that as far as I know  
18 all the taxes that were required to be paid, any penalties  
19 that were required to be paid, in fact were paid in all the  
20 years through 2008.

21 Q. Okay. And Mr. McGrath also asked you about the  
22 entries on the withdrawal chart for -- related to April 13,  
23 2009. Can you take a look at those two entries? One is for  
24 \$323,987, which you state relates to the 2008 U.S. final  
25 trust tax payment. And the second entry is for \$8,570,

**D'ALEO - REDIRECT - DUNN**

1 which you state relates to the 2008 New York State final  
2 trust tax payment. And you note that the return shows  
3 \$8,573 due.

4 And did you testify -- Mr. McGrath asked you  
5 whether you had seen checks demonstrating the payment of  
6 those taxes from David Smith. Do you recall that testimony?

7 A. Yes.

8 Q. And you said you didn't recall whether you had  
9 actually seen any such checks or not?

10 A. That's correct.

11 Q. All right. I'm going to show you -- I believe  
12 this document is a part of one of the plaintiff's exhibits.  
13 I don't have the number, so I'm going to mark it Intervenor  
14 Exhibit 14.

15 Mr. D'Aleo, handing you what's been marked for  
16 identification as Intervenor 14, which is among the  
17 materials that the plaintiff has provided to me in this  
18 litigation. Is this one of the documents that you reviewed  
19 in conducting your examination of the trust tax payments?

20 A. It is now, I recall this document, yes, I do.

21 Q. And what does this document relate to?

22 A. It relates to a request to Tom Urbelis, the  
23 trustee, to accept this letter of authorization -- excuse  
24 me. It's a letter written to McGinn, Smith signed by Thomas  
25 Urbelis, trustee. It says: Please accept this letter as

**D'ALEO - REDIRECT - DUNN**

1 authorization to issue two checks from the account as  
2 follows: \$32,987 payable to, quote, U.S. Treasury. \$8,570  
3 payable to, quote, New York State income tax. Thank you for  
4 your prompt attention to this matter. And there's a  
5 signature block, which is not signed here, but it says  
6 Thomas Urbelis, trustee.

7 Q. All right. Thank you. And is it -- understanding  
8 that this document is not signed, and we may not have been  
9 able to confirm whether it was signed because we didn't have  
10 those documents, did this document -- did reading this  
11 document point you in any particular direction to determine  
12 what these two payments were for?

13 A. Well, yes. Obviously, it explains what they're  
14 for. At least what years they relate to -- excuse me --  
15 what year they relate to or what the payments are for. And  
16 those amounts are coincidental and they agree to the  
17 balances that were due to the U.S. Treasury and to New York  
18 State relating to that particular tax year. It agreed to  
19 the amount on the return, and, therefore, agreed to what I  
20 had on Exhibit 11.

21 Q. All right. So it agreed with it with the  
22 exception of the \$3 difference that you noted on your chart,  
23 is that correct?

24 A. That's correct.

25 Q. Okay. And Mr. McGrath also asked you whether you



**D'ALEO - REDIRECT - DUNN**

1 tracked any other payments into the trust stock account at  
2 NFS. Do you recall that question?

3 A. I do.

4 Q. And I believe you told him that your deposit sheet  
5 noted all deposits into the account. Were there other  
6 accruals within the account such as interest on the initial  
7 purpose of the trust?

8 A. There were a number of transactions within the  
9 brokerage account itself that might be interest on cash  
10 balances. It could be security transactions. I honestly  
11 didn't go through it in detail because those were all  
12 internal to the brokerage account itself.

13 Q. Okay. So those transactions that you didn't  
14 include in this deposit summary were amounts that never left  
15 the trust account, is that correct?

16 A. That's correct.

17 Q. They were transactions within the account?

18 A. Yes.

19 Q. So any of the deposits that you showed were  
20 external, such as the initial funding of the account and the  
21 payments and distributions and interest payments from Pine  
22 Street Capital into the account, is that correct?

23 A. That's correct. There might have been minor  
24 distributions for wire fees and so forth, but that was all  
25 internal to the account.

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1                   MISS DUNN: Okay. Nothing further, your  
2 Honor. Thank you.

3                   MR. McGRATH: Just very brief, your Honor.  
4 Just one document. (Pause.)

5 **RE-CROSS EXAMINATION BY MR. McGRATH:**

6           Q. All right. Mr. D'Aleo, Intervenor Exhibit 14 that  
7 you were just shown, the document dated April 13...

8           A. I think she took that back.

9           Q. Yeah, yeah, I have it here.

10          A. Okay. Yeah.

11          Q. And I'm happy to show it to you again. It's  
12 unsigned. It's from allegedly from -- not allegedly, but  
13 it's got a signature for Thomas Urbelis, trustee, right?

14          A. That's correct.

15          Q. And it says under his name, please accept this  
16 letter as your authorization to issue two checks from the  
17 above account. And it's addressed to McGinn, Smith & Co.,  
18 correct? You want to look at it again?

19          A. No, no. I remember that, yeah.

20          Q. Okay. In the amounts of 32,987 and then \$8,570.  
21 So this document shows that a check was requested to be  
22 issued from McGinn, Smith, right?

23          A. I think it shows it was requested to be  
24 distributed from whatever that account number is.

25          Q. Right. But it's addressed to McGinn, Smith & Co.,

**D'ALEO - RECROSS - McGRATH**

1 correct?

2 A. Yeah, according -- yes, the letter is addressed to  
3 them.

4 Q. Yeah. And my questions were, just to clarify,  
5 that you hadn't seen checks issued by David Smith in  
6 connection with these two checks, right? Do you remember my  
7 question?

8 A. Yes.

9 Q. My questions were whether or not you had seen  
10 checks issued by David Smith. And you said at first you  
11 might have, but you weren't sure.

12 A. Right.

13 Q. Right.

14 A. That's correct.

15 Q. So, so the fact is you didn't see checks issued to  
16 David Smith in connection with these two amounts to the  
17 Treasury and New York State, right?

18 A. That's correct.

19 MR. McGRATH: Okay. That's all. Thank you.

20 THE COURT: Anything else, Miss Dunn?

21 MISS DUNN: No. Thank you, your Honor.

22 THE COURT: Thank you. You may step down.

23 (Witness John D'Aleo excused.)

24 THE COURT: Mr. Featherstonhaugh, any further  
25 witnesses.

**JEFFREY SMITH - DIRECT - DUNN**

1 MR. FEATHERSTONHAUGH: None, your Honor. At  
2 this point, Relief Defendant Lynn Smith rests.

3 THE COURT: Thank you. Miss Dunn, any  
4 witnesses?

5 MISS DUNN: Yes, your Honor. The trust calls  
6 Jeffrey Smith.

7 **JEFFREY SMITH,**  
8 having been duly sworn by the Clerk of the Court, was  
9 examined and testified as follows:

10 **DIRECT EXAMINATION BY MISS DUNN:**

11 Q. Good morning, Mr. Smith.

12 A. Good morning.

13 Q. Can you please tell us your educational  
14 background?

15 A. Sure. I graduated from high school in 1998 and  
16 went on to attend Lehigh University. I graduated in 2002  
17 with a BS in finance.

18 Q. Do you have any post-graduate education or  
19 certifications?

20 A. Yes. I recently was awarded the chartered  
21 financial analyst designation.

22 Q. Are you presently employed?

23 A. I am.

24 Q. Can you tell us your employment?

25 A. I'm employed by a company by the name of Access

**JEFFREY SMITH - DIRECT - DUNN**

1 Trade Management and I perform business development duties.  
2 It's basically a sales job.

3 Q. All right. Going back to when you graduated from  
4 college, can you tell us your employment history? And I'm  
5 sorry, what year did you graduate from Lehigh?

6 A. 2002. In October of REDACTED I got a job with a firm  
7 called Bernstein Greenberg Trading. They were a commodities  
8 option trading firm. And I took a position as an assistant  
9 trader. And I worked on the New York Board of Trade  
10 commodities exchange floor. I performed the duties of an  
11 assistant trader for roughly REDACTED, I think, at which  
12 time I became a self-employed commodities option trader on  
13 that same exchange. I held that position for about REDAC  
14 REDACTED I believe. During that time I was a part-time  
15 employee of McGinn, Smith, working as a registered  
16 representative. And in REDACTED I left my position as a  
17 commodities trader and became a full-time employee of  
18 McGinn, Smith.

19 Q. What did you do at McGinn, Smith?

20 A. I performed a number of duties. Primarily, I was  
21 a -- I managed accounts of several clients that were friends  
22 and colleagues of mine from my previous position. I raised  
23 capital and managed those accounts.

24 Q. And did there come a time when you left the  
25 employment of McGinn, Smith?

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**JEFFREY SMITH - DIRECT - DUNN**

1 A. Yes.

2 Q. Or changed your employment within McGinn, Smith?

3 A. Yes. In December of REDACTED, when McGinn, Smith  
4 ceased its broker dealer operations, I remained a part-time  
5 employee of McGinn, Smith. And I was also a part-time  
6 employee of RMR Wealth Management as a registered  
7 representative there to continue to service the accounts  
8 under my control.

9 Q. All right. Did there come a time when that  
10 changed?

11 A. Yes. I resigned from RMR Wealth Management, I'm  
12 unsure of the exact date, but it was something like  
13 REDACTED -- somewhere between REDACTED<sup>ED</sup> of  
14 REDACTED. And I also resigned from McGinn, Smith on -- around  
15 the same time, I believe it was REDACTED

16 Q. All right. And from the time you graduated  
17 college in 2002 until April of 2010, where did you live?

18 A. I lived in the New York City area, mostly in  
19 Manhattan, but I spent some time in Hoboken, New Jersey.

20 Q. And your work locations during that time period  
21 from REDACTED to April REDACTED, were you primarily working in New  
22 York City?

23 A. That's correct.

24 Q. Did there come a time that you learned that a --  
25 well, let me ask you this first: Are you the son of David

**JEFFREY SMITH - DIRECT - DUNN**

1 L. and Lynn A. Smith?

2 A. Yes, I am.

3 Q. And this is your mother seated here in the  
4 courtroom, is that correct?

5 A. That's her.

6 Q. Did there come a time that you learned that your  
7 parents had created a trust for the benefit of you and your  
8 sister?

9 A. Ah, yes.

10 Q. When did you first learn of that?

11 A. It was late 2004. My guess would be I learned of  
12 it when I came home for Thanksgiving in 2004.

13 Q. All right. How did you learn of it?

14 A. To the best of my recollection, I had a sit down  
15 with my father in his home office during that Thanksgiving  
16 break and he told me that the trust had been created for my  
17 benefit and my sister's benefit. And then he showed me the  
18 declaration of trust and I read it through.

19 Q. Okay. And can you take a look at what I've put in  
20 front of you as Intervenor Exhibit, I believe it's 11. Is  
21 that 11? The one that's in your hand?

22 A. Seven.

23 Q. Seven. Sorry. Is that the trust declaration that  
24 he showed you in the fall of 2004?

25 A. Yes, I believe it is. Yes.

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1 Q. Did he -- did your father explain to you how the  
2 trust was funded?

3 A. Yeah. He mentioned that my mother had transferred  
4 stock from Charter Financial Bank into the trust to fund it.  
5 It was an investment that I was aware of. And he told me of  
6 the initial funding.

7 Q. Okay. Do you know when the initial funding was  
8 made?

9 A. I didn't know the exact date at the time, but I, I  
10 had assumed that it was just prior to our meeting,  
11 relatively close to our meeting.

12 Q. All right. At the time that you had that  
13 conversation with your father where you learned of the  
14 trust, was it your understanding that the trust had been  
15 fully funded at that time?

16 A. Yes.

17 Q. All right. And after that conversation with your  
18 father, did you have any other conversations any time in  
19 2004, 2005 with anyone else about the trust?

20 A. I had a conversation with my sister about it.

21 Q. What was the nature of that conversation?

22 A. I told her that we had a trust that we were both  
23 the beneficiaries of and that it had roughly \$4 million in  
24 it. She was happy to hear that.

25 Q. Who wouldn't be. You said you read through the



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1 trust -- withdrawn.

2 Did you have any conversations with Tom Urbelis  
3 during that same time period concerning the trust?

4 A. No, I didn't.

5 Q. Do you know Tom Urbelis?

6 A. Yes. Very well.

7 Q. How do you know him?

8 A. I've known him for as long as I can remember. He  
9 was a very close friend of my parents. He would spend  
10 several weeks with his family at our camp house with -- you  
11 know, and I would hang out and play with his kids. And we  
12 would see each other at various holidays as well.

13 Q. All right. And do you know how to contact him  
14 independent of your parents?

15 A. Yeah.

16 Q. Have you contacted him independent of your  
17 parents?

18 A. I have.

19 Q. All right. And you said that when your father  
20 showed you this declaration of trust, that you read it, is  
21 that correct?

22 A. Yes.

23 Q. Did you see your name anywhere in the trust?

24 A. Um ... I'm sure that I did at the time. I, I  
25 can't remember reading it, six years ago, but yes.

**JEFFREY SMITH - DIRECT - DUNN**

1 Q. All right. Were you aware after the trust was  
2 created that the stock that your mother transferred to the  
3 trust was held in a brokerage account?

4 A. Yes.

5 Q. And what was your understanding as to what  
6 brokerage or clearing house was holding that stock?

7 A. I knew that the stock was held at McGinn, Smith  
8 and -- well, I guess the brokerage was McGinn, Smith, and at  
9 the time the account was held at Bear Stearns which was the  
10 clearing firm.

11 Q. Okay. Can you explain the difference between a  
12 brokerage and a clearing house?

13 A. Sure. You know, clearing firms are entities that  
14 essentially provide protection in transactions between two  
15 parties. In the case that one party is unable to fulfill  
16 the obligations of a trade, the clearing house will be asked  
17 to step in to protect the other side of that trade.

18 Q. And you stated that you understood this stock had  
19 been funded from Al -- did you say Albank or -- you were  
20 talking about bank stock. Which stock were you talking  
21 about?

22 A. I believe at the time it had been Charter One Bank  
23 or Charter Financial.

24 Q. Did you have any knowledge as to the origin of the  
25 Charter One stock that your mother transferred into the

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1 trust account?

2 A. Yeah. It was Albank, which had been purchased or  
3 acquired by Charter One Financial, and I believe Charter One  
4 Financial at a later time was purchased by Citizens Bank.

5 Q. And throughout -- from the time the trust account  
6 was created through McGinn, Smith with, I believe you said  
7 Bear Stearns was the initial clearing firm, were account  
8 statements issued for that trust account?

9 A. Yes.

10 Q. And do you have any knowledge as to who the  
11 account statements were issued to?

12 A. Well, they were issued to the trust, and they were  
13 sent in duplicate to Tom Urbelis and to my parents' home.

14 Q. Is that their home in Saratoga?

15 A. Ah, yes.

16 Q. Okay. And was -- did you have any expectation as  
17 the beneficiary that you would receive account statements on  
18 this account?

19 A. I don't know that I had any expectation that I  
20 would receive statements, but I certainly reviewed the  
21 statements. I knew where they were kept and I reviewed them  
22 from time to time.

23 Q. Do you know when the account statements arrived at  
24 the Smith family home in Saratoga, what happened to them,  
25 how they were maintained?

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1           A.    They were maintained in a binder, kept in my  
2 father's office.  I, I can't specifically remember if the  
3 trust had its own binder.  I know that there was a binder  
4 full of statements from my own personal stock account and my  
5 sister's.  And I know that the trust statements were also in  
6 a binder that was labeled.

7           Q.    All right.  So is it possible that the trust  
8 account statements were maintained in a binder with your and  
9 your sister's personal account statements?

10                   MR. McGRATH:  Objection.  Leading.

11                   THE COURT:  Overruled.

12           A.    It's possible.

13           Q.    You said you don't recall whether the trust  
14 statements were segregated or with yours and your sister's  
15 statements.

16           A.    I can't recall that now.

17           Q.    All right.  So you and your sister had your own  
18 individual brokerage statements, is that what you're saying?

19           A.    Yes.

20           Q.    Were yours and your sister's account statements  
21 also mailed to the family home in Saratoga?

22           A.    They were.  That was for convenience.

23           Q.    Were they mailed there during times when that  
24 wasn't your primary residence?

25           A.    Absolutely.  Yeah.

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1 Q. Why were yours and your sister's personal account  
2 statements mailed to the family home in Saratoga?

3 A. We were both moving frequently. It was just  
4 easier than to constantly change the mailing address on the  
5 account. That's a tedious process with clearing firms.

6 Q. All right. And the -- your personal account  
7 statements and the trust account statements, were they  
8 available to you in the family home in Saratoga?

9 A. Sure. Yeah.

10 Q. And what did you do, if anything, to inform  
11 yourself as to the status of the trust brokerage account?

12 A. I reviewed the statements probably quarterly;  
13 maybe, maybe a little more frequently than that. As I  
14 mentioned, I lived in Manhattan, and so from time to time I  
15 would be coming home to visit or stopping through, and I  
16 would, I would glance at the statements at that time.

17 Q. All right. And did you review any investments in  
18 the account?

19 A. Yes.

20 Q. Did you have any opinions as you reviewed them  
21 based on your experience as to the advisability of the  
22 investments in the account?

23 A. I knew of two private placement investments in the  
24 trust, one of which was Pine Street Capital, which I had  
25 heard of my father speak of. I was comfortable with it.

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1 The other was Deerfield Triarc, which I at the time didn't  
2 know a whole lot about but trusted that it was a worthwhile  
3 investment. And the other investments were public  
4 securities that I was familiar with.

5 Q. And with respect to either Deerfield or Pine  
6 Street, did you conduct any independent research when you  
7 saw that the trustee had invested in those private  
8 placements?

9 A. I didn't conduct any research with respect to Pine  
10 Street, and initially I didn't conduct any research with  
11 respect to Deerfield. However, at one point, Deerfield  
12 became a public company and I did do some research on that  
13 company at that time and actually made an investment in the  
14 public company in my personal stock account and recommended  
15 it to a couple of my clients.

16 Q. Did you make money on that investment?

17 A. I can't recall. I traded it a little bit.

18 Q. All right. Did you ever contact Tom Urbelis to  
19 discuss the investments?

20 A. No.

21 Q. As the beneficiary of the account, did you have  
22 any expectation that you could control the investments in  
23 any way?

24 A. I didn't have any expectation, no.

25 Q. How did you view the money that was in the

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1 account?

2 A. I viewed it as my money. Sort of a nest egg. I  
3 felt like it was something I could fall back on if I became  
4 unemployed or if I wanted to start my own business or or  
5 build a house or something like that.

6 Q. And at the time the trust was created in 2004, you  
7 and your sister were both in your 20s, is that correct?

8 A. Yes.

9 Q. All right. Were you both working?

10 A. Yes.

11 Q. Relatively self-sufficient?

12 A. I was self-sufficient. My sister was relatively  
13 self-sufficient.

14 Q. Were either of you relying upon anyone else's  
15 income?

16 A. My sister, I believe, got some cash from my mother  
17 from time to time.

18 Q. All right. From August 2004, until December 2009,  
19 were you ever involved in the preparation of the trust tax  
20 returns?

21 A. No.

22 Q. And during that same time period, were you  
23 involved in the management of the trust investments?

24 A. No.

25 Q. Did you request any distribution from the trustee

**JEFFREY SMITH - DIRECT - DUNN**

1 as a beneficiary during that time period?

2 A. No.

3 Q. Did there come a time that you became involved in  
4 paying of the trust taxes?

5 A. Yes.

6 Q. And can you tell me when that occurred?

7 A. April of this year.

8 Q. All right. And do you remember what date in April  
9 you may have been become involved in it?

10 A. Yeah. On April 15<sup>th</sup> of this year, I contacted  
11 Mr. Urbelis and requested a wire transfer to my mother's  
12 account in order to pay taxes.

13 Q. All right. What did you tell Mr. Urbelis in that  
14 conversation?

15 A. I asked him -- or, or I told him that, that I  
16 needed money out of the trust for tax purposes and that I  
17 would be sending him a letter of authorization to sign and  
18 send back to RMR Wealth Management.

19 Q. All right. Do you recall what, if  
20 anything, Mr. Urbelis said to you?

21 A. I think he said okay.

22 Q. And did you provide him with a proposed letter of  
23 authorization?

24 A. I didn't physically provide it, but I was there  
25 when it was provided.



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1 Q. Do you know who provided it to him?

2 A. Yeah. Brian Mayer.

3 Q. And who's Brian Mayer?

4 A. He was the office manager of RMR Wealth  
5 Management. He was a partner there.

6 Q. Was RMR a clearing firm for this account on  
7 April 15, 2010?

8 A. No. They were the wealth management firm. They,  
9 they managed the account, and their broker dealer services  
10 were provided by Dinosaur Capital and they were cleared  
11 through National Financial Services.

12 Q. All right. I misunderstood. So on April 15<sup>th</sup>,  
13 2010, you called Tom Urbelis and you asked him to -- or you  
14 directed him to transfer \$95,000 by wire transfer to your  
15 mother's checking account; is that your testimony?

16 A. Correct.

17 Q. Okay. How did you arrive at that dollar amount?  
18 Did you have a conversation with Mrs. Smith, your mother?

19 A. No.

20 Q. Okay. How did you arrive at that dollar amount?

21 A. Ah, I had a conversation with my father. He had  
22 the tax returns for the trust and for himself personally  
23 that were prepared by Piaker & Lyons in front of him and --

24 Q. Did you have an understanding as to what the  
25 \$95,000 represented?

**JEFFREY SMITH - DIRECT - DUNN**

1           A.    I knew that a portion of the 95,000 was to pay the  
2           estimated trust taxes and a portion was to pay the estimated  
3           taxes of my parents.

4           Q.    Why did you request money from the trust brokerage  
5           account to pay your parents' personal taxes?

6           A.    It was April 15<sup>th</sup> and they on that date didn't  
7           have the funds to make their tax payment, so I suggested  
8           that I could help them do that.

9           Q.    And how did you propose to do that?

10          A.    I told my father that I would take a distribution  
11          from the trust and deposit it in my mom's checking account.

12          Q.    All right.  So when you told Mr. Urbelis that you  
13          wanted \$95,000 for tax purposes, did you explain to him that  
14          a portion of it was for the trust taxes and a portion of was  
15          for your parents' taxes?

16          A.    No, I didn't.

17          Q.    Is there any reason you didn't break that down for  
18          him?

19          A.    It was my money.  I -- honestly, on that day, I  
20          didn't think that it was that big of a deal.  I expected to  
21          get the portion of the taxes that my parents paid for their  
22          joint tax bill back into the trust shortly afterwards, and  
23          it was more of something that I just overlooked.  I'm sure  
24          that I can't speak for him, but I'm sure that Mr. Urbelis  
25          would have approved --

**JEFFREY SMITH - DIRECT - DUNN**

1 MR. McGRATH: Objection.

2 A. -- of the distribution.

3 MR. McGRATH: Objection.

4 THE COURT: Sustained as to the last portion  
5 of the answer.

6 BY MISS DUNN:

7 Q. Had you ever before that date requested a  
8 distribution from Mr. Urbelis?

9 A. No, I hadn't.

10 Q. And had he ever communicated to you any procedure  
11 that you should follow if you wanted to request a  
12 distribution?

13 A. Ah, no.

14 Q. Had he ever advised you that if you wanted a  
15 distribution, you had to provide him with any written  
16 documentation?

17 A. I was not advised of that, no.

18 Q. Were you ever told that you had to provide any  
19 detail to any request, substantiate any amount of money that  
20 you requested from the trust?

21 A. No.

22 Q. All right. Do you have a present need or  
23 anticipate any need in the next 18 to 24 months to request a  
24 distribution from the trust?

25 A. I do.

**JEFFREY SMITH - DIRECT - DUNN**

1 Q. What would be the reason for that anticipation?

2 A. I would say that I'm under employed at the moment.  
3 I don't have a salary income. I don't have health insurance  
4 at the moment. And I have some credit card debt. I would  
5 like to take care of those things. And I've also been  
6 working for about a year to start a business of my own, and  
7 I've considered taking a distribution to move that forward.

8 Q. Okay. And do you know whether your sister Lauren  
9 has any reason to request a distribution, any need for funds  
10 at this point in time?

11 MR. McGRATH: Objection. Hearsay.

12 THE COURT: If he knows. Overruled.

13 A. Yeah. She, she, she probably could use some  
14 money. She was used to getting money from my mother from  
15 time to time and she has been denied that in the last couple  
16 of months.

17 Q. All right. Do you know whether Lauren has health  
18 insurance?

19 A. She does.

20 Q. Mr. Smith, from the time you learned in the fall  
21 of 2004 of the existence of this trust fund until you sit  
22 here today, what has been your understanding as to who owns  
23 the money in the trust fund?

24 A. I believed it to be owned by Lauren and I,  
25 equally.

**JEFFREY SMITH - CROSS - McGRATH**

1 Q. Thank you very much.

2 MISS DUNN: Nothing further.

3 THE COURT: Mr. McGrath.

4 MR. McGRATH: Thank you.

5 THE COURT: Please proceed.

6 **CROSS-EXAMINATION BY MR. McGRATH:**

7 Q. Good morning. My name is Kevin McGrath, and I'm  
8 with the Securities & Exchange Commission.

9 A. Good morning.

10 Q. Let me take you back to your first -- your  
11 employment with Access Trade Management.

12 A. Mm-hmm.

13 Q. When did you begin working with them?

14 A. Only a few weeks ago.

15 Q. What's your current salary?

16 A. Zero.

17 Q. How is your compensation to be based?

18 A. I'll be compensated on a commission basis in the  
19 case that I procure a deal that's profitable.

20 Q. And what, if any, expectation do you have as to  
21 what type of annual income you'll earn in your current  
22 position if you're successful? What's the range, if you can  
23 estimate?

24 A. When I was hired, I was told that depending on the  
25 amount of work I put in, I could expect anywhere from zero

**JEFFREY SMITH - CROSS - McGRATH**

1 dollars a year to \$1 million a year.

2 Q. And when you were employed at Bernstein  
3 Greenberg -- is that the name of the company?

4 A. Yes.

5 Q. From REDACTED, approximately REDACTED, what was your  
6 salary range during that period of time?

7 A. My salary was roughly REDACTED a year.

8 Q. Did you receive any commissions or bonuses?

9 A. I received a bonus in each of those years.

10 Q. What was the bonus each year, if you can remember,  
11 to the best of your recollection?

12 A. They ranged from about REDACTED to I think about  
13 REDACTED.

14 Q. So your highest salary at Bernstein Greenberg was  
15 about 3REDACTED and your highest bonus was about REDACTED

16 A. That's right.

17 Q. Did you receive any commissions?

18 A. No.

19 Q. Any other compensation?

20 A. No.

21 Q. So your total salary during that period of time  
22 was approximately REDAC -- sorry, REDACTED at its peak; is that  
23 roughly...

24 A. Yes.

25 Q. Were you receiving any other source of income

**JEFFREY SMITH - CROSS - McGRATH**

1 during that period of time, REDACTED other than from  
2 Bernstein Greenberg?

3 A. No, with the exception that at some point in REDACTED,  
4 I was -- I began part-time employment at McGinn, Smith, and  
5 I received some income there.

6 Q. All right. But let's just limit my question to  
7 prior to that point in time. You didn't --

8 A. Prior to that point, no.

9 Q. Okay. Did you receive any gifts or monies from  
10 your parents during that period of time?

11 A. Um...

12 Q. Other than whatever was put into the trust.

13 A. Not that I recall. There may have been a cell  
14 phone bill paid on my behalf or something of that nature.

15 Q. Did you own any property between the years REDACTED  
16 and REDACTED

17 A. No.

18 Q. Do you currently own any property?

19 A. No.

20 Q. Have you ever owned any property?

21 A. No.

22 Q. So it would be fair to say you've always rented  
23 apartments since you've been employed?

24 A. That's right.

25 Q. Has your salary been sufficient to meet your rent

**JEFFREY SMITH - CROSS - McGRATH**

1 payments and your daily living expenses?

2 A. Yes.

3 Q. Now, in REDACTED you became self-employed, you said,  
4 for a period of time as a commodities trader?

5 A. Yes.

6 Q. And you did that for approximately REDACTED ?

7 A. I think so, yeah.

8 Q. Okay. What was your income during that period of  
9 time from your commodities trading activity?

10 A. I believe my first full year of trading, I earned  
11 somewhere around REDACTED

12 Q. And then in the second six-month period?

13 A. Ah, I can't completely recall, but the number I  
14 had in my head was that I made about REDACTED a year, so I  
15 would say about REDACTED .

16 Q. Were you based in New York during that period of  
17 time?

18 A. Yes.

19 Q. And during the time that you were a commodities  
20 trader, you also started some part-time work with McGinn,  
21 Smith?

22 A. Correct.

23 Q. What type of salary or compensation did you  
24 receive from McGinn, Smith?

25 A. I believe my starting salary was REDACTED a year



**JEFFREY SMITH - CROSS - McGRATH**

1 and I would earn commissions on the accounts that I managed.

2 Q. Do you remember roughly how much you earned in  
3 commission the first year that you worked for McGinn, Smith?

4 A. I can't really recall. It was probably <sup>REDACTED</sup> or  
5 REDACTED

6 Q. And then you testified that at sometime in <sup>REDACTED</sup>  
7 you became a full-time employee of McGinn, Smith?

8 A. Yes.

9 Q. Was that in the New York office?

10 A. Yes.

11 Q. Why did you decide to get out of the commodities  
12 trading business?

13 A. Well, to be frank, I was making \$80,000 a year and  
14 guys standing around me were making \$3 million a year. I  
15 wasn't that good at it.

16 Q. All right. And when you joined McGinn, Smith in  
17 2008, what was your total salary compensation package for  
18 that year? If you can remember or estimate.

19 A. Well, now that I -- now that you ask the question  
20 that way, I think I may have misspoken about my part-time  
21 employment at McGinn, Smith. My salary was not REDACTED a  
22 year until I became a full-time employee.

23 I think when I was a part-time employee, I was --  
24 I think I earned somewhere around REDACTED a year. I can't  
25 remember exactly, but it was around there.

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**JEFFREY SMITH - CROSS - McGRATH**

1 Q. And then when you became a full-time employee?

2 A. When I became a full-time employee, my salary was  
3 REDACTED a year to start.

4 Q. Did you receive any commission income?

5 A. Yes.

6 Q. Or bonuses in REDACTED ?

7 A. Only commission income.

8 Q. Approximately how much?

9 A. I believe, I believe in REDACTED, I earned about --  
10 somewhere around REDACTED in commissions.

11 Q. And you were employed full time at McGinn, Smith  
12 in REDACTED as well until it ceased operations in December,  
13 correct?

14 A. Yes.

15 Q. What was your salary and commission during that  
16 year?

17 A. I took a salary cut in REDACTED to help the business.  
18 It was -- my salary was cut to REDACTED. And I probably -- in  
19 REDACTED I probably earned about REDACTED or REDACTED in commission.

20 Q. During the period from REDACTED, when you first became  
21 self-employed, until December REDACTED, when McGinn, Smith  
22 ceased operation, did you have any income from any source  
23 other than what you just testified to?

24 A. No.

25 Q. Did you receive any monies from your parents

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

**JEFFREY SMITH - CROSS - McGRATH**

1 during that period of time, other than whatever was in the  
2 trust?

3 MR. FEATHERSTONHAUGH: Your Honor, I would  
4 like to object at this point on the grounds that if there's  
5 any relevancy to these questions, either the direct  
6 examination or in this case, I have no idea what it is.

7 THE COURT: All right.

8 MR. McGRATH: Well, if I may respond, your  
9 Honor.

10 THE COURT: It's not necessary. Overruled.

11 A. No, I didn't receive any other monies.

12 Q. Now, let me direct your attention to when you  
13 testified you first learned of the existence of the  
14 irrevocable trust.

15 A. Mm-hmm.

16 Q. You testified that to the best of your memory, it  
17 was sometime in around Thanksgiving of REDACTED, correct?

18 A. Yes.

19 Q. And you testified that your father told you about  
20 the trust?

21 A. Yes.

22 Q. Was your mother present for that conversation?

23 A. No.

24 Q. Was it an in-person conversation?

25 A. It was.

**JEFFREY SMITH - CROSS - McGRATH**

1 Q. And tell me again to the best of your memory what  
2 you remember your father telling you in as much detail as  
3 you can.

4 A. He said he wanted to talk to me about something.  
5 He -- we sat in his office. He said that he and my mother  
6 had opened a -- or created a trust account on behalf of my  
7 sister and I. And to the best of my recollection, he told  
8 me the, the approximate value of the trust.

9 Q. And what did he tell you the approximate value  
10 was?

11 A. Approximately \$4 million.

12 Q. Do you have that trust document still in front of  
13 you there?

14 A. Yes.

15 Q. Can you look on page 7, please?

16 A. Mm-hmm.

17 Q. It's Plaintiff's Exhibit 84. And there's a  
18 signature line for David L. Smith. Do you see that?

19 A. Yes.

20 Q. Do you recognize that to be your father's  
21 signature?

22 A. I do.

23 Q. And he's identified as a donor on that trust,  
24 correct?

25 A. He is.

**JEFFREY SMITH - CROSS - McGRATH**

1 Q. Now, what else do you remember your father telling  
2 you about why they created the trust?

3 A. I can't really recall, other than he said that he  
4 and my mother wanted to allow my sister and I to, you know,  
5 have this money.

6 Q. Now, had you asked your father during this period  
7 of time for any money for any reason?

8 A. No.

9 Q. Were you in need of \$2 million at this point in  
10 time?

11 A. At that point in time, no.

12 Q. And is it your testimony that this sort of came as  
13 a surprise to you, that you had not had any advance warning  
14 that your mother and father were creating this trust before  
15 this conversation in Thanksgiving?

16 A. It was a pleasant surprise that put me at ease.

17 Q. I'm sure it was. Would you describe you and your  
18 family as close?

19 A. Yes.

20 Q. Were you aware of the fact that in December of  
21 2003, your mother and father had been sued in connection  
22 with the operation of the McGinn, Smith business by an  
23 individual by the name of Ian Meyers?

24 A. Did you say that my mother and father were sued?

25 Q. Yes, that your mother and father were sued.

**JEFFREY SMITH - CROSS - McGRATH**

1 A. I was unaware.

2 Q. Were you aware of the fact that your father had  
3 been sued by anyone in or about December of 2003?

4 A. No. No.

5 Q. Had you had any discussions with your parents  
6 about the fact that their assets might be in jeopardy prior  
7 to your conversation with your father in Thanksgiving of  
8 2004, when he informed you that they created an irrevocable  
9 trust in the name of your -- on behalf of you and your  
10 sister?

11 A. No.

12 Q. Let me just show you what I've marked as  
13 Plaintiff's Exhibit 131 and ask you to take a look at the  
14 caption here. Just read the caption for a second.

15 A. Up here?

16 Q. Yeah, please.

17 A. United States.

18 Q. No, I'm sorry, just read it to yourself.

19 A. Okay.

20 Q. And then turn to the last page. And when you  
21 finish reading that, turn to page 48.

22 A. Mm-hmm.

23 Q. Do you see the date there? December 9, 2003?

24 A. Yes.

25 Q. All right. And do you see that there's a demand

**JEFFREY SMITH - CROSS - McGRATH**

1 for \$3 million?

2 A. I do.

3 Q. All right. And it's a fairly lengthy document.

4 You can feel free to look at it if you want, but just  
5 looking at the caption, does that refresh your recollection  
6 in any way that your mother and father and McGinn, Smith &  
7 Company and Integrated Alarm Services and a number of other  
8 entities were sued by an Ian Meyers in December 2003?

9 MISS DUNN: Objection, your Honor. The  
10 witness did not testify he does not recall. He testified  
11 that he was not aware of any such lawsuit. This is not a  
12 refreshing of his recollection.

13 THE COURT: Sustained.

14 BY MR. McGRATH:

15 Q. Do you have any recollection of a lawsuit that was  
16 filed by anybody against your mother or father prior to the  
17 formation of the irrevocable trust in 2004?

18 MR. FEATHERSTONHAUGH: Your Honor, I would  
19 like to once again--

20 MISS DUNN: Objection.

21 THE COURT: Overruled.

22 A. No.

23 Q. I would now ask you to look at that document and  
24 I'll ask you the same question. Does that refresh your  
25 recollection as to?

**JEFFREY SMITH - CROSS - McGRATH**

1 MISS DUNN: I renew my objection.

2 A. I have no recollection.

3 THE COURT: Hang on. Overruled.

4 A. I have no recollection, so it couldn't refresh it.

5 Q. So this document does not refresh your  
6 recollection?

7 A. No.

8 Q. Did you ever have a conversation with your mother  
9 or father prior to Thanksgiving of 2004 in which they told  
10 you that they had made a payment in settlement of any  
11 lawsuit?

12 A. No.

13 Q. When you had the conversation with your father in  
14 Thanksgiving 2004, did he make any reference to you that one  
15 of the reasons they set up this trust was to protect family  
16 assets from potential creditors of your mother or father or  
17 the McGinn, Smith business?

18 A. No.

19 Q. Now, you said that you told your sister about the  
20 existence of the trust?

21 A. Yes.

22 Q. And you said that she was very happy to hear that?

23 A. She was.

24 Q. When did you tell your sister?

25 A. Thanksgiving weekend, that -- you know, she was



**JEFFREY SMITH - CROSS - McGRATH**

1 home too.

2 Q. So was it your understanding that she had not  
3 heard of this before?

4 A. Ah, yes.

5 Q. Do you know why your parents hadn't told her prior  
6 to this -- prior to you telling her?

7 A. Um, she, she most likely wouldn't understand it as  
8 well as I did. And --

9 Q. She?

10 A. -- and they, you know, they, they probably wanted  
11 me to tell her about it.

12 Q. Why do you say your sister wouldn't understand  
13 that \$4 million had been given to you and her?

14 A. Well, she would understand it on that simple level  
15 but not in any more detail.

16 Q. And that's the reason why you don't think your  
17 parents told her before this?

18 A. Well, they wouldn't have told her before this  
19 because, like me, she was living in Manhattan and we came  
20 home together for the holiday.

21 Q. Had you had any conversations with your parents  
22 between August 4, 2004, the date the declaration of trust  
23 was signed, and Thanksgiving 2004?

24 A. Not that I recall.

25 Q. Would it be typical for you to go that many months

**JEFFREY SMITH - CROSS - McGRATH**

1 without talking to your parent?

2 A. I didn't say that I didn't talk to them. I don't  
3 recall having a conversation about the trust.

4 Q. Okay. Do you recall having conversations or  
5 with -- well, my question was would it be typical for you  
6 during that period of time to go three or four months  
7 without having a telephone conversation with your parents.

8 A. And my answer is that I'm sure that I had numerous  
9 telephone conversations with both of them during that  
10 period.

11 Q. Okay. Now, you testified that you have your own  
12 personal stock account?

13 A. Yes.

14 Q. And can you tell me approximately how much money  
15 is in that account today?

16 MISS DUNN: Objection. Relevance.

17 THE COURT: Overruled.

18 A. Today, the value I think is -- the value on the  
19 account statement is roughly \$60,000.

20 Q. Okay. And did you start that account yourself?

21 A. No. It was a custodial account started by my  
22 father shortly after I was born.

23 Q. Have you made any withdrawals from that account  
24 for personal living expenses or other personal expenses  
25 since, say, 2002?

**JEFFREY SMITH - CROSS - McGRATH**

1 A. Ah, yes.

2 Q. Can you approximate how many or the range, without  
3 getting into too much detail?

4 A. Maybe three or four times since that time I've  
5 taken one <sup>REDACTED</sup>, if I was going on a  
6 vacation or something like that.

7 Q. Okay. And you testified that you're aware of the  
8 fact that your sister had a brokerage account -- or has a  
9 brokerage account?

10 A. Yes.

11 Q. Do you have any knowledge as to how much money is  
12 in her account today?

13 A. Yeah. It's, it's roughly the same. The accounts  
14 were roughly the same value.

15 Q. Okay. The -- now, you testified that you were  
16 aware of the fact that after the irrevocable trust was  
17 created, that an investment was made in Pine Street Capital  
18 Partners fund, is that correct?

19 A. Yes.

20 Q. How did you learn about that?

21 A. I believe my father told me about it.

22 Q. Okay. And is it your understanding that your  
23 father recommended that the trust invest in that entity?

24 A. Yeah.

25 Q. Okay. Did your father recommend that the trust on

**JEFFREY SMITH - CROSS - McGRATH**

1 your and your sister's behalf make any investments in First  
2 Advisory Income Notes or First Excelsior Income Notes or  
3 First Independent Income Notes or Third Albany Income Notes?

4 A. Well, the trust never made an investment in any of  
5 those entities, so it would be my best guess that he didn't  
6 recommend it.

7 Q. Okay. And to your knowledge, did your father ever  
8 recommend that the trustees make any investments in any of  
9 the other trusts that were formed and sold by McGinn, Smith  
10 & Company from 2004 to the present?

11 A. No. But I've personally invested in those.

12 Q. But your father didn't recommend that any of the  
13 money in that irrevocable trust, to your knowledge, be  
14 invested in any of those trusts, correct?

15 A. To my knowledge, no.

16 Q. Okay. Now, you testified that you believe this  
17 money in this trust is yours and your sister's correct?

18 A. Yes.

19 Q. Do you believe you can draw on that at any point  
20 in time for whatever purpose that you want?

21 A. Within reason. I don't think it would be prudent  
22 to buy a Ferrari with that money.

23 Q. Well, but based on your knowledge of the trust  
24 document, do you have any limitation --

25 A. I don't think that there's any limitation in the

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1 trust document to my knowledge.

2 Q. Okay. And the same with respect to your sister?

3 There's no limitation -- let me just finish the question.

4 To your knowledge, there's no limitation in the trust

5 document as to how or why your sister could withdraw money

6 or request that it be withdrawn?

7 A. There's no limitation in the request.

8 Q. Now, you testified that you were aware of the fact

9 that your mother had provided some money to your sister in

10 the last couple of years because she was unemployed or

11 needed the money?

12 A. Yes.

13 Q. Do you have any understanding as to why your

14 sister didn't withdraw some of the money that she had in the

15 irrevocable trust for that purpose?

16 A. Well, my understanding was that she was looking

17 for employment and didn't want to tap into the trust. My

18 understanding was that my mother was there to help her and

19 she didn't feel any need to access the trust.

20 Q. You testified that you had asked the trustee to

21 wire \$95,000 out of the account on or about April 15<sup>th</sup> of

22 this year, correct?

23 A. Yup.

24 Q. And you testified that you suggested -- well,

25 strike that.

**JEFFREY SMITH - CROSS - McGRATH**

1           Let me ask you, how did you first become aware of  
2 the fact that your parents needed money to pay their taxes  
3 in April of 2010?

4           A.   Well, I had a conversation with my father.

5           Q.   Tell me about that conversation.  What did he say  
6 to you and what did you say to him?

7           A.   Well, I was also aware that it was tax time, so we  
8 were discussing taxes, and I told him what my taxes were, he  
9 told me what his taxes were and what the trust taxes were.  
10 And he told me that he didn't have the money to pay those  
11 taxes on that day.  Neither him, nor my mother.

12          Q.   So did he ask you to get in touch with  
13 Mr. Urbelis?

14          A.   No.  I suggested that the trust could pay his  
15 taxes.

16          Q.   So your testimony is your father didn't say  
17 anything to you about getting in touch with Mr. Urbelis;  
18 this was just your idea?

19          A.   It was my idea to use the trust.  My father may  
20 have said well, give Tom a call.

21          Q.   Okay.  And who, who initiated that phone call  
22 between you and your father that day?

23          A.   I can't recall.

24          Q.   Okay.  Do you and your father talk about taxes  
25 every April 15<sup>th</sup>?

**JEFFREY SMITH - CROSS - McGRATH**

1           A.    In the last several years, in the last seven or  
2 eight years, yeah.

3           Q.    Okay. And you testified that when you called  
4 Mr. Urbelis, you just told him it was for taxes?

5           A.    Correct.

6           Q.    You testified that you didn't make it clear to him  
7 that it was not just for the trust taxes, but that it also  
8 involved your parents' taxes?

9           A.    That's right.

10          Q.    Did you have any concern that if you told him that  
11 it was for your parents, that he might ask you some  
12 questions?

13          A.    I didn't.

14          Q.    Well, are you aware of the fact that the trust is  
15 for your benefit and not for your parents' benefit?

16          A.    Yes, I am.

17          Q.    And that didn't give you reason to believe that he  
18 might ask you some questions at least if you told him that  
19 the taxes were going to be for your parents and not for you  
20 or for the trust?

21          A.    I can't project whether or not he would have asked  
22 me questions.

23          Q.    No, I'm asking you whether or not you had any  
24 concern that --

25          A.    I --

**JEFFREY SMITH - CROSS - McGRATH**

1 Q. -- let me finish.

2 A. Okay.

3 Q. My question is, did you have any concerns in your  
4 mind when you called Mr. Urbelis and just told him that you  
5 wanted the distribution for taxes, that if you told him that  
6 it was for your mother and father's personal taxes, and not  
7 the taxes of the trust, that he would at least ask you some  
8 questions? Did you have any concern in your mind about  
9 that?

10 A. No, I didn't.

11 Q. You just thought that he would give you money out  
12 of the trust that is set up for your benefit and not ask you  
13 any questions about why it was going to your parents?

14 A. Um, can you ask me that question again?

15 Q. Yes. You thought that Mr. Urbelis would not ask  
16 you any questions if you told him to give you money to help  
17 pay your parents' taxes?

18 A. At the time it didn't cross my mind.

19 Q. I mean you understood that this irrevocable trust  
20 meant that your parents were giving you the money and that  
21 they would no longer have any right to it; that's the theory  
22 behind that trust, correct?

23 A. Correct.

24 Q. And you had never asked Mr. Urbelis for any  
25 distribution of that trust up until that point in time,



**JEFFREY SMITH - CROSS - McGRATH**

1 correct?

2 A. Correct.

3 Q. And your sister had never asked for any  
4 distribution up until that point in time?

5 A. That's correct.

6 Q. And your testimony is that you never gave it any  
7 thought that if you told him that the distribution, the very  
8 first distribution that was going to come out of that trust  
9 was going to go from you directly back to your parents to  
10 pay their taxes, that he wouldn't ask you a question?

11 MISS DUNN: Objection. Asked and answered.

12 THE COURT: Sustained. Sustained.

13 BY MR. McGRATH:

14 Q. Were you aware of the fact that your parents had  
15 previously or that your father had previously asked  
16 Mr. Urbelis to wire money from the irrevocable trust to his  
17 accounts?

18 A. I was not aware of that, no.

19 Q. Did you -- you testified that you reviewed the  
20 trust statements, correct?

21 A. Correct.

22 Q. Did you notice any transfers on those statements  
23 that were not authorized by you or your sister?

24 A. I didn't notice. I testified that I reviewed the  
25 monthly statements from time to time, so it's quite possible

**JEFFREY SMITH - REDIRECT - DUNN**

1 that I never looked at an April statement.

2 Q. Did you ask your parents why they didn't have  
3 enough money to pay their own personal taxes in April 2010?

4 A. Well, I knew why.

5 Q. Why?

6 A. My mother's stock account was fully invested and  
7 neither she nor my father had the cash in their checking  
8 account.

9 Q. And of the \$95,000 that was wired out of the  
10 irrevocable trust, approximately 66,000 of that went to your  
11 parents for their taxes, correct?

12 A. Yes.

13 MR. McGRATH: No further questions. Thank  
14 you.

15 THE COURT: Mr. Featherstonhaugh, do you have  
16 any questions?

17 MR. FEATHERSTONHAUGH: I don't have any  
18 questions.

19 THE COURT: Miss Dunn, will there be any  
20 redirect?

21 MISS DUNN: Briefly.

22 THE COURT: All right. I'm going to hold you  
23 to briefly.

24 **REDIRECT EXAMINATION BY MISS DUNN:**

25 Q. Mr. Smith, you testified a little bit on

**JEFFREY SMITH - REDIRECT - DUNN**

1 cross-examination about the purpose that you understood --  
2 withdrawn.

3 Mr. McGrath was asking you whether you believed  
4 there was any limitation on the purpose for which you could  
5 make a request for a distribution. Do you recall that?

6 A. Yes.

7 Q. And you said, I believe, that you didn't  
8 understand there to be any limitation on the request that  
9 you could make --

10 A. Correct.

11 Q. -- is that correct?

12 A. Yes.

13 Q. All right. Did you have any understanding as to  
14 the -- within the trust declaration, whether there's any  
15 guidance in that declaration to the trustee as to the  
16 purposes of distributions or the intentions of your parents  
17 when they created the trust?

18 A. Not that I recall.

19 Q. Okay. Did you have any understanding that  
20 distributions would be for, I believe you testified on  
21 direct, starting a business, buying a home?

22 A. I don't think it specifically says that in the  
23 trust.

24 Q. Okay. Do you think that it would appropriate to  
25 make a request for a distribution for an emergency purpose?

**JEFFREY SMITH - REDIRECT - DUNN**

1 A. Absolutely.

2 Q. Okay. And on April 14<sup>th</sup>, 15<sup>th</sup> of this year,  
3 where were you physically when you had a conversation with  
4 your father about taxes?

5 A. I was in Saratoga at my parents' home.

6 Q. And where were your parents?

7 A. They were in Vero Beach, Florida.

8 Q. And they were both there, correct?

9 A. Yes.

10 Q. All right. You had this conversation when you  
11 were in Saratoga and they were in Florida. And did you  
12 contact Mr. Urbelis from Saratoga?

13 A. Um...

14 Q. If you recall.

15 A. No. Actually, the initial conversation that I had  
16 with my father was several days earlier, maybe even -- it  
17 may have even been the 14<sup>th</sup>. And on that same day I drove  
18 down to Manhattan, I was in the midst of moving, and I  
19 physically went to the RMR Wealth Management office, and I  
20 contacted Mr. Urbelis from there.

21 Q. Okay. And did you consider the payment of taxes  
22 on time on April 15<sup>th</sup> to be an emergency or a significant  
23 situation that needed to be addressed?

24 A. Yes.

25 MISS DUNN: Nothing further, your Honor.

**BONNIE J. BUCKLEY, RPR, CRR**  
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1 Thank you.

2 THE COURT: Mr. McGrath, anything further?

3 MR. McGRATH: No, your Honor, thank you.

4 THE COURT: Thank you. You may step down.

5 We'll take a ten-minute recess.

6 (Witness Jeffrey Smith excused.)

7 (Brief recess at 11:50 AM.)

8 (Court reconvened at 12:00 PM.)

9 THE COURT: Miss Dunn, any further witnesses?

10 MISS DUNN: Yes, your Honor. I call David

11 Wojeski.

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**WOJESKI - DIRECT - DUNN**

1                                   **DAVID M. WOJESKI,**

2       having been duly sworn by the Clerk of the Court, was  
3       examined and testified as follows:

4                               THE CLERK:   This is David M. Wojeski,  
5       W-O-J-E-S-K-I.

6       **DIRECT EXAMINATION BY MISS DUNN:**

7               Q.     Good morning, Mr. Wojeski.

8               A.     Good morning.

9               Q.     Can you please tell the Court about your  
10       educational background.

11              A.     Sure.   I graduated from SUNY Albany in 1987 with a  
12       Bachelors in accounting, went to work for Ernest & Whinney  
13       in REDACTED was there until -- which became eventually Ernst &  
14       Young.   Left there in REDACTED to start my own practice with a  
15       partner, and I've been a partner in my own practice since  
16       REDACTED

17              Q.     Are you a certificated public accountant?

18              A.     CPA.   Certificated in 1989 I think.

19              Q.     Do you have any other certifications?

20              A.     I think I still have certified informations  
21       systems auditor certification.   That's probably it.

22              Q.     Do you have any experience in forensic accounting?

23              A.     Yes.   We have a separate company, actually a  
24       forensic accounting company that's in our firm as well.

25              Q.     Can you tell me about your firm?

**BONNIE J. BUCKLEY, RPR, CRR**  
                              **UNITED STATES COURT REPORTER - NDNY**

**WOJESKI - DIRECT - DUNN**

1           A.    It's a, it's a -- your typical public accounting  
2 firm. We have roughly 30 employees in the accounting side,  
3 about 40 percent audit, 40 percent tax, and 20 percent  
4 special projects transactions work. I'm a tax -- my  
5 expertise is in tax and transactions, mergers and  
6 acquisitions, tax planning compliance. And we have the  
7 audit side as well. Similar, similar to any other  
8 relatively good sized firm.

9           Q.    Okay. And you have -- you said you have a  
10 separate business concerning forensic accounting. What is  
11 that?

12          A.    Forensic Accounting Services Group.

13          Q.    Can you explain that?

14          A.    One of my partners is a certified fraud examiner.  
15 And we have -- I think the other -- I think one of our other  
16 employees is also certified. We deal with -- could be  
17 anything, could be the matrimonial area, could be  
18 embezzlement, could be just asset location. It's really --  
19 a lot of CPA firms may do it. We kind of just segregated  
20 the company to do solely that. Because we have two people  
21 whoa re really just focused on it.

22          Q.    Okay. And are either of those people you  
23 individually?

24          A.    No.

25          Q.    And in your accounting firm and in your

**WOJESKI - DIRECT - DUNN**

1 professional experience, what involvement have you had in  
2 estate planning?

3 A. Quite a bit. We probably -- I probably do or  
4 involved in at least 50 trust returns a year. We do a lot  
5 of estate planning. So I'll help design the trusts or  
6 any -- the entire estate plan. A lot of it is -- some of  
7 it's Medicaid, almost all of it is irrevocable trust, a few  
8 revocable which are built into the wills. We don't -- I  
9 don't prepare trust documents, I'm not an attorney, but  
10 we'll work with the attorneys in designing the whole plan.

11 Q. All right. So you're familiar with irrevocable  
12 trusts?

13 A. Yeah.

14 Q. Do you serve as trustee of any trusts?

15 A. I have I believe three. I'm serving as one active  
16 right now, co-trustee. I've been named in a few other ones.  
17 But most of them are trusts that will be funded based on  
18 life insurance or when some -- generally death, but when  
19 some other thing happens. Also, some of -- one is a  
20 matrimonial trust that I've been named in, but that hasn't  
21 been funded yet either.

22 Q. When you became trustee of any of those other  
23 trusts, were you familiar at all with the beneficiary of the  
24 trusts?

25 A. Two of them I know the beneficiaries. The one



**WOJESKI - DIRECT - DUNN**

1 that I'm the active trustee with now, I did not know the  
2 beneficiaries. I do know them now.

3 Q. All right. Can you describe your understanding  
4 the roles of a trustee in an irrevocable trust?

5 A. As a trustee, my role really is to make sure that  
6 the -- that I am -- that the trust's investments that I'm  
7 complying as the trustee with the intent of the trust, which  
8 relates back to the intent of the grantors. So basically  
9 following the trust document.

10 Q. Okay. And what are the typical powers of a  
11 trustee, or limitations on those powers, if you know?

12 A. They're all different, but generally you have the  
13 power to make investment decisions, you have the power to  
14 determine principal and income, sometimes you have the power  
15 of distribution, sometimes distribution is required. You  
16 have the power to terminate, the power to resign. I mean,  
17 it's really -- it's a very flexible document. So they're  
18 all different.

19 Q. So are you saying that the trust document governs  
20 what the powers of the trustee are?

21 A. Absolutely.

22 Q. Okay.

23 MR. STOELTING: Your Honor, just a point of  
24 clarification I guess. I didn't understand Mr. Wojeski to  
25 be here as an expert witness testifying about general

**WOJESKI - DIRECT - DUNN**

1 practice and procedures of trusts as a general matter. He  
2 is the trustee of the specific trust, and I assumed his  
3 evidence had to do with the specific trust.

4 THE COURT: Well, we'll find out. Please  
5 proceed.

6 BY MISS DUNN:

7 Q. And Mr. Wojeski --

8 MISS DUNN: I'm sorry, was there a question  
9 pending? Did he answer that last question?

10 THE COURT: Why don't you just ask the next  
11 question.

12 MISS DUNN: Yeah. Okay, thank you.

13 BY MISS DUNN:

14 Q. And did there come a time when you were asked to  
15 become the trustee of the David and Lynn Smith irrevocable  
16 trust?

17 A. Yes. You had given me a call and asked if I had  
18 any trust experience and trustee experience. When I said  
19 yes, you had kind of given me the background of the case and  
20 what it involved and to see if I was interested in  
21 potentially taking on an engagement. I then said possibly,  
22 depending on what the trust looked like, what the powers  
23 were. And specifically from my standpoint was I wanted to  
24 make sure it was extremely broad powers so that it wasn't a  
25 trust that required a lot of work and had some potential for

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1 litigation. It could have different income beneficiaries  
2 from remainder beneficiaries. This one did not. It had  
3 very broad powers. I also wanted to make sure I had the  
4 power to resign and in a quick manner. Which it does. That  
5 kind of satisfied those obligations.

6 And then I also wanted to see the tax returns to  
7 make sure that at least it looked like we had compliance  
8 issues taken care of.

9 And the third thing was I really wanted to stay  
10 out of litigation, the courtroom, and the press. Which I  
11 accomplished none of the above.

12 And I met with Mr. D'Aleo before I actually signed  
13 the affidavit to accept the trustee. And he had a roll  
14 forward of the trust. He's a CPA. I hadn't met him  
15 before...

16 Q. I'm sorry, what did you say? He had a what?

17 A. A roll forward of the trust. So basically he had  
18 here's what the trust is funded with, here's what's come out  
19 of it and here's what's gone into it. And everything else  
20 was just trust activity, investment activity.

21 Q. Okay. Let's, let's slow down a little bit.

22 THE COURT: You're going to have to slow  
23 down.

24 A. Okay. The -- so he had prepared a roll forward of  
25 the trust. So what had went into the trust to fund it,

**WOJESKI - DIRECT - DUNN**

1 which was the bank stock that we've heard of earlier, and  
2 then he had all of the withdrawals out of the trust, money  
3 that went out to wherever it went, and then deposits to the  
4 trust from wherever it came from, outside of what happened  
5 within the activity.

6           You know, it's not -- if there's dividends being  
7 re-invested, interest being re-invested, that wasn't a  
8 concern to me. I wanted to make sure there wasn't a lot of  
9 ancillary things going on, knowing that that probably was  
10 going to be a question at some point.

11           So knowing that he had a background at PWC, was a  
12 CPA, and had accounted for all of that in/out activity made  
13 me comfortable that there was, you know, there was a pretty  
14 clean trust.

15           Q.    Okay. So prior to meeting Mr. D'Aleo, did you  
16 review the trust declaration?

17           A.    Absolutely.

18           Q.    Okay. And based on your experience with the  
19 trust, what was your understanding of that trust  
20 declaration?

21           A.    It was pretty broad and it gave me rights to  
22 resign. And there were only two income beneficiaries. And  
23 the money was really separate shares, which means it gets  
24 split half and half.

25           Q.    Okay. And when you reviewed that trust

**WOJESKI - DIRECT - DUNN**

1 declaration, did you come to any conclusions as to whether  
2 there was anything usual or unusual about this trust  
3 declaration?

4 A. No, not really. I don't really know what the  
5 necessary purpose was. It could have been for wealth  
6 transfer. It could have been for estate planning issues.  
7 It could have been to -- you know, it's pretty broad,  
8 meaning that the same thing could have been accomplished  
9 with an outright gift to the two children, but then the two  
10 children could have squandered the money. So that's pretty  
11 typical of why you would set it up that way.

12 Q. Okay. And -- so when you met with Mr. D'Aleo, at  
13 that point, did you review any documents other than the  
14 trust declaration?

15 A. Yeah. He walked me through what he did.

16 Q. What documents did you review?

17 A. The tax returns and the brokerage statements.

18 Q. And did you have any discussions with Mr. D'Aleo  
19 or did you review those documents with him in any way?

20 A. Yeah. I went through -- you know, he gave me  
21 copies of all the -- I requested him to give me copies of  
22 all the account statements. I would say --

23 Q. Referring to the account statements.

24 A. The investment statements.

25 Q. Okay. Exhibit 5, the brokerage account, is that

**WOJESKI - DIRECT - DUNN**

1 what you're referring to?

2 A. Ah, the -- this binder?

3 Q. The NFS brokerage?

4 A. Yes.

5 Q. Okay.

6 A. Yeah. I didn't look at every one of those. I  
7 didn't check his work. He had just kind of walked me  
8 through and said here's what happening. And it did tie in.  
9 I did look at the trust tax returns, I did look at the tax  
10 liabilities that were paid, and I did tie them back to his  
11 roll forward.

12 Q. Okay. And what was your understanding -- did you  
13 reach any understanding with Mr. D'Aleo or independently as  
14 to whether the taxes had been paid for the trust?

15 A. Yeah. All the -- well, based on the IRS  
16 transcript and the tax returns, the taxes had been paid,  
17 with the exception of 2009. Which is on extension, so I  
18 really don't know.

19 Q. Okay. Did you receive information that extension  
20 payments had been made in this year, had been tendered in  
21 April of this year?

22 A. Yeah. Yeah, shows that. And then they were, you  
23 know, rejected.

24 Q. And in reviewing the tax returns, did you come to  
25 any -- withdrawn.

**WOJESKI - DIRECT - DUNN**

1           In the course of your review of the trust and the  
2 transactions and the different documents that you just  
3 identified, as well as your interactions with Mr. D'Aleo,  
4 did you come to any understanding as to the manner in which  
5 the taxes had been paid for the trust during its  
6 five-plus-years existence?

7           A.    Yeah. I believe -- I don't know if I can remember  
8 whether all of them were paid by Mr. Smith and then  
9 reimbursed and some of them were paid directly, but there  
10 was probably a combination of them.

11          Q.    Okay. And in your experience with trusts, how  
12 would trust taxes typically be paid? Is there a typical  
13 way?

14          A.    It depends. I mean you can -- some people set up  
15 their trust to be what's called intentionally defective.  
16 Which means the grantor, although they have no rights to the  
17 trust, will be forced to pay the trust taxes. Some of them  
18 will be paid by the trustee. Most of them are paid -- if  
19 it's a typical irrevocable trust where there's a lot of  
20 activity and you have a checking account, the trustee would  
21 generally pay the taxes. But if you have, you know, a  
22 parent who or grandparent sets up a trust for a child, maybe  
23 puts ten thousand shares of GE in it, and they're going to  
24 allow it just to sit for the shares of GE because they're  
25 very loyal to GE, there's no checking account, well, the

**WOJESKI - DIRECT - DUNN**

1 parent will cut the check and they'll -- they can either get  
2 reimbursed or not, it will be considered another addition to  
3 the trust.

4 Q. All right. And can you take a look at intervenor  
5 Exhibits 3, 10, and 11, which I believe are under the binder  
6 in front of you. Those are -- 3 is the Smith irrevocable  
7 trust --

8 A. Yup.

9 Q. -- deposits chart.

10 A. I have that.

11 Q. 10 is the Smith irrevocable trust withdrawals  
12 chart. And 11 is the Smith irrevocable trust tax payments  
13 chart.

14 A. I have them.

15 Q. And did you sit down and review these documents  
16 with Mr. D'Aleo and discuss the trust brokerage account and  
17 the payment of taxes with him?

18 A. I did.

19 Q. Did you review these documents with him?

20 A. Yes.

21 Q. And did you conduct -- I know you said you didn't  
22 look at all of the backup statements. Did you conduct any  
23 kind of random review to match up any of these amounts?

24 A. Yeah. The taxes were probably all matched up,  
25 because him and I were actually discussing him. With the



**WOJESKI - DIRECT - DUNN**

1 deposits, I probably looked at maybe four, I would say. And  
2 the withdrawals... The withdrawals probably the same thing,  
3 probably a couple, just some random statements.

4 Q. Okay. And in your review of the taxes and tax  
5 payments, did you have any questions remaining when you  
6 completed that review to satisfy any concerns you had about  
7 the trust taxes?

8 A. No. From my standpoint, I'm taking responsible  
9 from the point I've been hired. I just wanted to make sure  
10 I wasn't going to run into, you know, a nest of problems.  
11 So the taxes had been paid, they had been filed. I was fine  
12 with it from that standpoint.

13 Q. Okay. And did you independently seek to determine  
14 or confirm the payment of trust taxes with any taxing  
15 authorities?

16 A. Yeah. I got the -- I called the IRS and received  
17 the transcripts. Getting them from New York State is a long  
18 process.

19 Q. All right. What did you do with respect to New  
20 York State?

21 A. Called them, called a few different people, and I  
22 do have some contacts there, but there's really no mechanism  
23 other than a manual form which, you know, takes 60 days to  
24 process.

25 Q. Okay. And what do you understand your role to be

**WOJESKI - DIRECT - DUNN**

1 as a trustee under this trust?

2 A. Manage the investments to maximize return,  
3 minimize risk, and follow the trust document with the  
4 donor's intent and on behalf of the beneficiaries.

5 Q. All right. And how would you go about managing  
6 investments? Would you make investment decisions and  
7 determinations and selections of investments on your own?

8 A. No.

9 Q. What would you do?

10 A. I would hire an investment manager.

11 Q. All right. What type of investment manager would  
12 you hire?

13 A. Someone who has experience in managing a portfolio  
14 of \$4 million.

15 Q. Are you familiar with Pine Street Capital  
16 Partners?

17 A. A little bit.

18 Q. All right. Had you been familiar with it prior to  
19 your involvement in this trust?

20 A. Yes.

21 Q. What's the nature of your understanding of Pine  
22 Street Capital Partners?

23 A. It's a mezzanine fund subordinated debt. I know  
24 Tim Welles on a professional level. I have actually sat  
25 through a presentation of the Pine Street Capital fund, so

**WOJESKI - DIRECT - DUNN**

1 I'm somewhat familiar with it.

2 Q. Do you think it's a good investment?

3 A. I trust Tim, so I would think that it's probably  
4 a -- you know, a good investment.

5 Q. Are there any other factors that you've considered  
6 in agreeing to be trustee of this trust or things that you  
7 need to consider going forward?

8 A. Getting paid.

9 Q. Well, what is your understanding of how you will  
10 be paid? Do you have an understanding?

11 A. Yeah. We spoke about -- I generally don't work  
12 off of a fee schedule that trustees would often work off of.  
13 I work on an hourly basis.

14 Q. All right. Are you familiar what a fee schedule  
15 is for trustees?

16 A. Yes. I couldn't recite it, but it would be  
17 relatively high in trust.

18 Q. And your hourly rate that you've agreed upon,  
19 would that -- how would that compare to the statutory fee  
20 schedule for trustees?

21 A. It should be lower unless I spend an awful long  
22 time in court.

23 Q. All right. Thank you.

24 MISS DUNN: I have nothing further, your  
25 Honor.

**WOJESKI - CROSS - STOELTING**

1 THE COURT: SEC?

2 **CROSS-EXAMINATION BY MR. STOELTING:**

3 Q. Good afternoon, Mr. Wojeski. I'm David Stoelting,  
4 I'm one of the lawyers for the SEC. And we met yesterday I  
5 think.

6 A. Yes. Good afternoon.

7 Q. Did you understand at the time that you became the  
8 trustee of the irrevocable trust, that the assets of the  
9 trust were frozen pursuant to a Court order?

10 A. I did.

11 Q. And you understood that the trust has only one  
12 asset, its brokerage account?

13 A. Correct.

14 Q. And you have -- have you had any discussions with  
15 anyone about what would happen to the asset of the trust if  
16 the freeze was lifted?

17 A. No.

18 Q. Do you know if the asset of the trust would be  
19 used to benefit David and Lynn Smith?

20 A. Not -- it couldn't directly be, if I'm the  
21 trustee.

22 Q. You wouldn't allow that, would you?

23 A. Not if -- if they petitioned to receive funding,  
24 no.

25 Q. Were you aware that 66,000 of trust funds prior to

**WOJESKI - CROSS - STOELTING**

1 the time you became trustee and prior to the time of the  
2 asset freeze, were you aware that 66,000 in trust assets was  
3 used to pay taxes of David and Lynn Smith?

4 A. Yes.

5 Q. How did you learn that?

6 A. Through just the testimony. And I think it was on  
7 John D'Aleo's roll forward as well.

8 Q. Okay. So did you ask Mr. D'Aleo about that  
9 transfer?

10 A. No.

11 Q. Did you form an opinion about whether that  
12 transfer was consistent with the declaration of trust?

13 A. Not particularly.

14 Q. Was it a concern to you that trust assets were  
15 used to pay taxes of people who were not the beneficiaries?

16 A. I thought it was an issue until I -- the trail --  
17 my understanding is the trail, it went through Jeff's -- you  
18 know, that Jeff requested it. So the ultimate disposition  
19 of what he does with his money would, would -- is less of a  
20 concern to me as trustee.

21 Q. Well, you understood that the money that was used  
22 to pay the taxes went directly from the trust account to  
23 Lynn Smith's personal checking account, correct?

24 A. Mm-hmm. Yes.

25 Q. And so if Jeff came to you and said I want you to

**WOJESKI - CROSS - STOELTING**

1 transfer -- I want you to wire out \$66,000, assuming there  
2 was no freeze over the account, if Jeff came to you post  
3 freeze and said I want you to wire out X amount of funds to  
4 my mother's account, would you do that?

5 A. I would probably -- he's got the authority to come  
6 and request it for the purpose he wants to request it for.  
7 I would -- as a trustee, I would tell him that any requests  
8 that he has should go through his account. Whether he uses  
9 it to pay taxes is really not -- it's -- I don't really have  
10 the authority over what he does with the money, provided  
11 it's a reasonable request.

12 Q. But you have authority over what you do, right?

13 A. Sure.

14 Q. And you understand you have a fiduciary duty to  
15 the trust asset, correct?

16 A. Mm-hmm. The beneficiaries.

17 Q. And you understand that your duty to the  
18 beneficiaries is to preserve that asset for their benefit,  
19 correct?

20 A. Correct.

21 Q. And if the beneficiaries ask you to do something  
22 with that asset that you think might not preserve that asset  
23 or be in the best interests of that asset, it's your  
24 fiduciary duty to refuse that request; correct --

25 A. It.

**WOJESKI - CROSS - STOELTING**

1                   MISS DUNN:  Objection.

2                   THE COURT:  Overruled.

3           A.     It could be.  And in that case -- I mean this is a  
4 pretty simple trust in that you've got separate shares.  You  
5 have two beneficiaries who essentially have half the trust.  
6 If a beneficiary who isn't making unreasonable requests and  
7 doesn't have a history of making unreasonable requests said  
8 I would like to do this with my money and I think it's a  
9 reasonable request, you know, the form of the -- the form  
10 that maybe should go directly to one of the beneficiaries  
11 who then can use the money.  But if they say put it in  
12 writing and say look, here's what I'm requesting you to do,  
13 I would probably follow that, follow that distribution.  I  
14 don't think that's a violation of the intent of the donors  
15 or, or what the beneficiary would like to use the money for.  
16 I certainly wouldn't accept a phone call from Mr. Smith  
17 saying my taxes are due, I owe 50,000 bucks, please put  
18 \$50,000 in my account.  That -- I think there's a difference  
19 in those two scenarios.

20           Q.     Why wouldn't you do it if Mr. Smith asked you to  
21 do it?

22           A.     He has no right to that money.  It's, it's really  
23 the kids' money.  And I, I don't know the intent of the  
24 thing, but from the donor's intent, they essentially have  
25 made a gift to their children.

**WOJESKI - CROSS - STOELTING**

1           The main reason it's probably outside -- out in a  
2 trust is so that the kids don't take it and blow it on  
3 something. So they at least have some control from a  
4 trustee's standpoint who at least can put the brakes on it  
5 and say Jeff, I don't think it's a great idea to put a  
6 million dollars into a typewriter business, you know, or  
7 something to that extent. So I think there's some  
8 discretion over it. But it is really the kids' money.

9           Q. Well, doesn't -- isn't the spirit of an  
10 irrevocable trust formed by parents to benefit their  
11 children? Doesn't the word "irrevocable" mean the money is  
12 not supposed to come back to benefit the parents?

13          A. The money is out of their control. So you're  
14 relying on -- I mean, Jeff does not have to -- certainly  
15 doesn't have to fund his parents' taxes or do anything.  
16 He -- I mean the trust can be liquidated tomorrow. There's  
17 actually a right for me to terminate the trust tomorrow and  
18 issue to two two million dollar checks to the kids.  
19 That's -- you know, I don't think that's the spirit of what  
20 the trust is. But I do actually have the right to do that  
21 in this trust document.

22          Q. Do you think, as trustee, if Jeff made a request  
23 of you to wire money for taxes, do you think you, as  
24 trustee, would have a right to know whose taxes those funds  
25 are going to be used for?



**WOJESKI - CROSS - STOELTING**

1           A.    I would ask.

2           Q.    And if you don't ask, do you think Jeff has an  
3 obligation to tell you whose taxes?

4                   MISS DUNN:  Objection.

5                   THE COURT:  Overruled.

6           A.    I think he would tell me, or he wouldn't get the  
7 money probably.  From that standpoint, if it was going to go  
8 to -- I've been dating a girl for two weeks and she's got a  
9 \$50,000 tax liability, that's a big difference than, you  
10 know, what he may consider to be an emergency situation, he  
11 needs money to loan to his parents or potentially give to  
12 his parents to cover a tax issue they have at that point.

13          Q.    Okay.  But your testimony is that it would be your  
14 practice to make sure that he told you what the use of the  
15 money was for.

16          A.    I would ask.

17          Q.    And I think you said that you were familiar with  
18 the manner in which taxes were being paid with the trust  
19 over the years --

20          A.    Sure.

21          Q.    -- whether it would be wire transfers into Mr. and  
22 Mrs. Smith's account or whether they would just pay the  
23 taxes themselves.  Do you think when -- did you also hear  
24 the evidence that the trustee, Mr. Urbelis, who lives in  
25 Boston, would be instructed to transfer the funds to the

**WOJESKI - CROSS - STOELTING**

1 account? Do you think the trustee had an obligation to  
2 really ensure that the amount he was wiring was the same  
3 amount as the tax liability?

4 A. Probably. I mean, I don't know the circumstances  
5 behind it, but the numbers matched.

6 Q. Okay. But my question is, the trustee's fiduciary  
7 duty, doesn't the fiduciary duty of the trustee require him  
8 to actually see some evidence that the money he's wiring  
9 into the third party's account really is the actual amount  
10 of the tax liability?

11 A. I would -- I mean, yes, I would probably ask the  
12 CPA firm what's the tax, what do we owe in taxes.

13 Q. Well, would you want to see something, see some  
14 kind of evidence, especially if you weren't wiring the money  
15 to the CPA firm?

16 A. It depends on the relationship is. I mean you  
17 would have to trust your professional to give you the right  
18 number.

19 Q. And you mentioned you had a significant number of  
20 experiences and in your professional career with irrevocable  
21 trusts?

22 A. Mm-hmm. Yes.

23 Q. Has anyone ever asked you to establish an  
24 irrevocable trust in order to shield assets from creditors?

25 A. Um, no. I think it's consideration of whether

**WOJESKI - CROSS - STOELTING**

1 shielding -- I mean there's a number of reasons to do it.  
2 It could be for shielding for creditors, whether there's  
3 issues or not issues. It could be for long term care to  
4 shield assets for long term care, expenses that may happen  
5 in the future. It could be for wealth transfer. It could be  
6 for just getting your kids money while you're still alive  
7 and seeing them use it as opposed to it happening through  
8 inheritance. There's a number of reasons to do it. I don't  
9 design them, attorneys do, but asset protection, I know  
10 attorneys do -- you know, I know that is one of the reasons  
11 that attorneys will mention it.

12 Q. And has anyone -- well, withdrawn.

13 Well, is it an appropriate use of an irrevocable  
14 trust to create it in order to protect assets of a  
15 fraudulent scheme?

16 A. You would have to ask an attorney that one. I  
17 wouldn't know that.

18 Q. Thank you.

19 THE COURT: Mr. Featherstonhaugh, any  
20 questions?

21 MR. FEATHERSTONHAUGH: No questions, your  
22 Honor.

23 THE COURT: Miss Dunn, any redirect?

24 MISS DUNN: Yes, just briefly.

25

**WOJESKI - REDIRECT - DUNN**

1 **REDIRECT EXAMINATION BY MISS DUNN:**

2 Q. Mr. Wojeski, Mr. Stoelting asked you about how you  
3 would handle requests for distributions or requests for  
4 transfers of money for payment of taxes. And I believe you  
5 stated you would -- if a third party asked you, you would  
6 want something in writing; was that your testimony?

7 A. Yeah.

8 Q. Okay. And you also stated that if you were the  
9 trustee and one of the beneficiaries asked you for a sizable  
10 amount of money, you would ask additional questions, is that  
11 correct?

12 A. Correct.

13 Q. And is it your understanding that there was a  
14 long-standing relationship between Tom Urbelis and the Smith  
15 family?

16 A. Yes.

17 Q. So was there a level of familiarity between  
18 Mr. Urbelis and Jeff Smith that you do not share with  
19 Jeffrey Smith?

20 MR. STOELTING: Objection.

21 A. Yes.

22 THE COURT: Overruled.

23 BY MISS DUNN:

24 Q. And when did you first meet David Smith?

25 A. Probably two weeks ago, I went down to meet with

**WOJESKI - REDIRECT - DUNN**

1 Mr. D'Aleo.

2 Q. All right. Was that in my office?

3 A. Yes.

4 Q. All right. And you testified that you -- when did  
5 you first meet Jeffrey Smith?

6 A. Wednesday.

7 Q. Okay. So you don't have that familiarity with  
8 Jeffrey Smith or David Smith that Mr. Urbelis had with them?

9 A. Correct.

10 Q. Would that be the reason you would require  
11 additional information?

12 A. Yeah. I, I think you need to be comfortable with  
13 who you're dealing with. I certainly -- you know, the trust  
14 I'm involved with now, I know the beneficiaries much greater  
15 and I knew the donor quite well.

16 MISS DUNN: Thank you.

17 THE COURT: Anything else, Mr. Stoelting?

18 MR. STOELTING: No, your Honor.

19 THE COURT: All right. Thank you. You may  
20 step down.

21 (Witness David Wojeski excused.)

22 MISS DUNN: The Intervenor rests, your Honor.

23 THE COURT: Any rebuttal?

24 MR. STOELTING: No rebuttal from plaintiff,  
25 your Honor.

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1 THE COURT: All right. The proof is closed.

2 We need to address the issue of the exhibits in evidence.

3 The SEC is offering which numbered exhibits?

4 MR. McGRATH: Your Honor, there's a copy for  
5 the Court of all our exhibits right here (indicating).  
6 There's Plaintiff's 1 to 131.

7 THE COURT: All right. Mr. Featherstonhaugh,  
8 to which, if any, of those exhibits do you object?

9 MR. FEATHERSTONHAUGH: If I had thought I was  
10 going to have to tell you before lunch, I would have made a  
11 list, but there are four of them. Actually maybe plaintiff  
12 can help me find them. There were four. There were four  
13 declarations.

14 MR. STOELTING: Okay.

15 MR. FEATHERSTONHAUGH: I don't have the  
16 numbers.

17 MISS DUNN: Your Honor, while they are  
18 conferring, would the Court excuse Mr. Wojeski from further  
19 attendance? He has a prior commitment.

20 THE COURT: Yes.

21 MISS DUNN: Thank you.

22 (Pause.)

23 MR. FEATHERSTONHAUGH: Your Honor,  
24 Plaintiff's Exhibit 121, 122 and 123, I would object to  
25 their admission. Your Honor may recall that right at the

**SEC v McGINN, SMITH et al. 10-CV-457**

1 beginning of this case, your Honor allowed me to depose Miss  
2 Mehraban about some witnesses who she had met with. And in  
3 that deposition, the deposition record, which is back, she  
4 indicated she was asked if any witness statements had been  
5 made, any declarations, and so on. She said they had not.  
6 These witness statements were, apparently, prepared on  
7 June 7, a day before this hearing started. They are  
8 out-of-court declarations to which the defendants have had  
9 and will have --

10 THE COURT: Is your -- is the ground for your  
11 objection hearsay?

12 MR. FEATHERSTONHAUGH: Yes.

13 THE COURT: Why isn't hearsay admissible?

14 MR. FEATHERSTONHAUGH: Well, in this kind of  
15 a hearing, some degree of hearsay is admissible. These are  
16 not only not admissible because I don't -- they didn't even  
17 offer a witness to say they're genuine. They are irrelevant  
18 to any of the issues in this trial.

19 THE COURT: Aren't they --

20 MR. FEATHERSTONHAUGH: Now, I understand it's  
21 a court trial and the Court will weigh -- give it whatever  
22 weight it is, but I do think they're inadmissible.

23 THE COURT: Well, relevance is an additional  
24 grounds. The SEC, I think, has to show likelihood of  
25 success on the merits of the claim still against David Smith

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1 and Timothy McGinn, among others. Aren't they relevant to  
2 that issue?

3 MR. FEATHERSTONHAUGH: They don't appear to  
4 me to be relevant to that issue, but your Honor will be the  
5 ultimate decider.

6 THE COURT: All right.

7 MR. FEATHERSTONHAUGH: I also would like to  
8 object to the exhibit offered this morning.

9 THE COURT: Is that 131?

10 MR. FEATHERSTONHAUGH: Yes, it is 131.

11 THE COURT: Is that the Court document  
12 involving Ian Meyers?

13 MR. FEATHERSTONHAUGH: Yes.

14 THE COURT: Okay.

15 MR. FEATHERSTONHAUGH: And in the event it  
16 should be admitted and even in the event that it isn't, it  
17 is my understanding -- perhaps Mr. McGrath can help us out  
18 here, he seems to have looked into this I guess. It's my  
19 understanding, and I think the Court can take judicial  
20 notice of this, and I've attempted by way of a phone call to  
21 acquire a document, which maybe I can introduce after lunch,  
22 if we haven't finished. It's my understanding that that  
23 case was settled approximately two years after it was filed  
24 for no money and with a letter of apology from the  
25 plaintiff. Which seems to me to be something that might be



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1 of some interest to the Court.

2 THE COURT: Miss Dunn, what objection -- to  
3 what exhibits do you object, if any?

4 MISS DUNN: I join in Mr. Featherstonhaugh's  
5 objections concerning the declaration. My additional  
6 objection to Plaintiff's Exhibit 131 is that it was  
7 proffered for the purpose of refreshing the witness'  
8 recollection, which is not a basis for admitting the  
9 document, when, in fact, he testified he had never seen it  
10 and was not aware of the lawsuit. So I don't even think  
11 there's a foundation from a very basic standpoint of  
12 offering it. And if it is offered, then certainly -- and  
13 I'm not aware of the additional information of this  
14 document, I don't know what it is, but in the interest of  
15 completeness, if the resolution of this purported lawsuit  
16 exists, then that ought to be information considered  
17 contemporaneously with it. But I object strongly to it  
18 being admitted, because there has been no foundation for it.

19 THE COURT: All right. Any other objections.

20 MISS DUNN: No, thank you.

21 THE COURT: All right. As to the objections  
22 to Exhibits 121, 122, and 123, the objections are overruled.  
23 Hearsay is admissible in this hearing. The objections go to  
24 the weight, not to the admissibility, and since it is a --  
25 since there's not a jury present, I feel confident I can

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1 determine the appropriate weight to be accorded those.

2 Mr. Stoelting or Mr. McGrath, what's your  
3 position on Exhibit 131?

4 MR. STOELTING: Your Honor, it's a pleading  
5 filed in a court proceeding, obviously. And it -- you know,  
6 I think it can be recognized by the Court as a public record  
7 and accept it for whatever weight it takes. But if they  
8 want to admit any document showing the resolution, showing  
9 that no money was paid, I certainly have no objection to  
10 that.

11 THE COURT: Well, it was only used to refresh  
12 the recollection of the witness, and he did not recognize it  
13 and his recollection was not refreshed in this proceeding.  
14 It was used in this proceeding for that purpose.

15 MR. STOELTING: That's correct. And there's  
16 really no witness that looked at it and authenticated it,  
17 but I think the Court has its own power to look at it and  
18 see it as a court document and give it whatever weight it  
19 chooses. If they want to show it was settled for no money,  
20 I have no objection to them putting that in.

21 THE COURT: All right. The objection is  
22 Exhibit 131 is sustained. The document in this proceeding,  
23 there is no foundation for it. And -- well, there's no  
24 foundation for it. It's not authenticated. Your objection  
25 is sustained. Therefore, Plaintiff's Exhibit's 1 through

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1 130 are received in evidence.

2 Mr. Featherstonhaugh -- Mr. Koenig, did you  
3 want to be heard?

4 MR. KOENIG: Yes, your Honor, there's one  
5 document I would like to bring to the Court's attention. I  
6 may have to talk to Mr. Stoelting about in terms of the  
7 substantive purposes. Document 117. It's a deed from --  
8 it's a deed involving the McGinn house. And it's unclear  
9 why the SEC is offering it now because there's something in  
10 the brief that maybe Mr. Stoelting and I could talk about  
11 and it may become a substantive issue. I'm not sure what  
12 purpose it's having in this proceeding. And I can elaborate  
13 now if the Court would like.

14 THE COURT: Is this the 2009 transfer or some  
15 prior transfer?

16 MR. KOENIG: It's the 2009.

17 THE COURT: Well, there was reference to it  
18 in the testimony.

19 MR. KOENIG: Well, there was, but there's  
20 something in their brief. And this is why it requires  
21 further conversation with us before we bring it to the  
22 court's attention. But there's something in the SEC's brief  
23 on this issue.

24 THE COURT: There's something or nothing?

25 MR. KOENIG: Something.

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THE COURT: Oh.

MR. KOENIG: In the SEC's brief on this issue. The house is not part of the hearing. It's not part of their TRO. The SEC is taking the position in conversations with me that the house should be a frozen asset, because they believe, at least they articulated to me, and correct me if I'm wrong, Mr. Stoelting, but we had conversations about this, that somehow this was a fraudulent conveyance. But there's nothing before the Court, Mrs. McGinn is not a party to the Court to this proceeding. So I don't know if they're -- what they're seeking to do with the house other than this one line in their brief on page -- I think it's page 8 or 9.

THE COURT: Well, I think in this proceeding, the relevance they proffered is that in 2009 both Mr. Smith and Mr. McGinn took certain steps to transfer assets from either joint or their own names into their wife's name, and that this was some evidence that Mr. McGinn, as well as Mr. Smith, took those steps. If there's other relevance to it, somebody's going to have to explain it to me.

MR. KOENIG: That's what I'm getting to. Based on what's in their brief, I think they might try to say at some point on its face this should be part of the freeze. But I don't see it that way but I don't know because their memo mentions it but it's not an asset that's

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1 under the Court's consideration right now. And I just want  
2 to be sure if they're going to try to do it -- (crosstalk.)

3 THE COURT: Are you including that as part of  
4 the motion here?

5 MR. STOELTING: Your Honor, I've made it no  
6 secret. I told Mr. Koenig numerous times that we view that  
7 transfer as fraudulent and that the house is absolutely an  
8 asset of Mr. McGinn.

9 And the Court will notice that I had Nancy  
10 McGinn on our witness list for this hearing, and our  
11 intention was to call Mrs. McGinn and subpoena and compel  
12 her attendance in order to explain that transfer. And  
13 Mr. Koenig came to me and called me and said I'm not going  
14 to accept this subpoena, but if you don't try to call her to  
15 the hearing, we won't dispute the authenticity of the deed  
16 transfer. So I'm really surprised to hear this right now.

17 MR. KOENIG: That's correct.

18 MR. STOELTING: I'm going to call Nancy  
19 McGinn to testify about --

20 MR. KOENIG: I'm not questioning the  
21 authenticity of the deed, your Honor. That's why I said I  
22 don't object to the admissibility of the deed. But, first  
23 of all, Mr. Stoelting could have subpoenaed Nancy McGinn. I  
24 was not authorized to accept service for her. And it's true  
25 he made no secret to me that he believes it's a fraudulent

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1 conveyance. Nowhere in any of the SEC's papers, in their  
2 complaint, the TRO, anything submitted to the Court have  
3 they properly brought that piece of property to the Court's  
4 attention. It's not properly a part of this proceeding.

5 THE COURT: Well, we can deal with that,  
6 we're not going to resolve that now. This is only as to the  
7 admissibility of 117. It's been authenticated. And Exhibit  
8 117 will be admitted. If there's other relief that either  
9 you or the SEC seeks with respect to that particular  
10 property, we can address that at a later time.

11 MR. KOENIG: That's all I was seeking, your  
12 Honor. Thank you.

13 THE COURT: I believe that addresses the  
14 SEC's exhibits.

15 As to the Relief Defendant Exhibits, which  
16 ones do you have, Mr. Featherstonhaugh?

17 MR. FEATHERSTONHAUGH: I am offering all of  
18 the Relief Defendant's Exhibits 1 through 15.

19 THE COURT: Miss Dunn, any objection to  
20 those?

21 MISS DUNN: No.

22 THE COURT: Mr. Stoelting or Mr. McGrath, any  
23 objections to any of those exhibits?

24 MR. STOELTING: No objection.

25 THE COURT: All right. Relieve Defendant's

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1 Exhibits 1 through 15 are received in evidence.

2 And Miss Dunn, which of the intervenor's  
3 Exhibits do you offer in evidence?

4 MISS DUNN: I move in Intervenor's Exhibits 1  
5 through 15 into evidence at this time.

6 THE COURT: Any objection,  
7 Mr. Featherstonhaugh?

8 MR. FEATHERSTONHAUGH: No objection, your  
9 Honor.

10 THE COURT: Mr. Stoelting or Mr. McGrath, any  
11 objections?

12 MR. STOELTING: We don't have any objection  
13 to the Relief Defendant's Exhibits.

14 THE COURT: These are the Intervenor's  
15 exhibits.

16 MR. STOELTING: We have no objection to the  
17 Intervenor's Exhibits. I'm sorry.

18 THE COURT: All right. Intervenor's Exhibits  
19 1 through 15 are received in evidence.

20 MR. STOELTING: Your Honor, can I just raise  
21 a point with regard to some of the exhibits that Mr. McGrath  
22 included when he was examining Miss Daniello. It was a pile  
23 of backup, it was Exhibit 69. And it was provided to the  
24 counsel and it was identified as 69A. Was there a 69B? No  
25 just 69A. And I think our intention was to include 69A

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1 which was the backup.

2 THE COURT: I understood everything between 1  
3 and 130 to be included and admitted.

4 MR. STOELTING: Okay. Thank you.

5 THE COURT: Now, as to briefing on adverse  
6 inferences, my intent is that the issue be briefed first by  
7 the SEC since you seek the adverse inferences from the  
8 invocation of the Fifth Amendment privilege by Mr. McGinn  
9 and Mr. Smith, and that in your pleadings, you identify what  
10 adverse inferences you ask the Court to draw as to which  
11 issue is pending in this proceeding and as to which parties.  
12 That I will give additional time to the relief defendant and  
13 the intervenor to respond. No reply brief will be necessary  
14 absent approval from the Court. How long does the SEC need?

15 MR. STOELTING: Next Wednesday we could  
16 provide a brief.

17 THE COURT: That's the 16<sup>th</sup> I believe.

18 MR. McGRATH: Yeah, I think so, your Honor.

19 THE CLERK: Yes.

20 THE COURT: And Mr. Featherstonhaugh and Miss  
21 Dunn, how long do you need?

22 MR. FEATHERSTONHAUGH: Your Honor, if they  
23 will -- are going to file -- if the Court is going to allow  
24 them to file a brief on Wednesday, we will file our brief on  
25 Thursday. I would urge the Court --



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1 THE COURT: The 17<sup>th</sup>?

2 MR. FEATHERSTONHAUGH: Yes.

3 THE COURT: Okay.

4 MR. FEATHERSTONHAUGH: I would urge the Court  
5 to ask them to file their brief on Monday. We've looked at  
6 the issue, it's pretty straight forward, and my client at  
7 least now for six weeks has been totally without access to  
8 any funds, in spite of the fact that the SEC has not even  
9 alleged a claim to about 60 percent of those funds. But we  
10 are -- we need to get a resolution on this case.

11 THE COURT: All right. Miss Dunn, is the  
12 17<sup>th</sup> agreeable to you or do you need additional time?

13 MISS DUNN: Your Honor, I got up at 5:00 this  
14 morning to write this letter brief on this issue because I  
15 was under the impression that we were all going to be  
16 briefing it for you today.

17 THE COURT: I thought I was pretty clear in  
18 describing what I anticipated.

19 MISS DUNN: Okay. So that, that was my  
20 mistake. So I don't really need much time. I also agree  
21 with the law the Second Circuit is pretty clear. It's  
22 really how you apply it. I would also support shortening  
23 the SEC's time to file.

24 THE COURT: I don't find five calendar days  
25 from today for submission of the brief unreasonable. So the

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1 SEC's brief is due the 16<sup>th</sup>, by agreement, and the other  
2 parties, the Intervenor and the relief defendant's briefs  
3 are due the 17<sup>th</sup>.

4 All right. With that, is there any other  
5 issues we need to address? I know the parties would like to  
6 make some argument, and I would like to hear it, but I  
7 propose that we take a luncheon recess.

8 MISS DUNN: May I make a request that the  
9 briefs be filed on the 16<sup>th</sup> sometime before the close of  
10 business? Just because the electronic filing allows it  
11 right until midnight. And in turning around the next day, I  
12 would like to have it during the business day, if that's  
13 possible.

14 THE COURT: Well, I'm going to leave it at  
15 the 16<sup>th</sup>. But yours will be the 18<sup>th</sup>. If you want to  
16 file it on the 17<sup>th</sup>, all the better. I'll just give you  
17 an additional day.

18 1:45 for closing arguments. Any objections?  
19 Is that agreeable?

20 All right. See you at 1:45.

21 THE CLERK: Court stands in recess.

22 (Lunch recess at 12:45 PM.)

23 (Court reconvened at 1:45 PM.)

24 THE COURT: For the SEC?

25 MR. STOELTING: Thank you, your Honor. And,

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1 first of all, I would like to thank your Honor for your  
2 attention during the past few days. I think the hearing has  
3 gone on more than we initially expected but we do appreciate  
4 the Court's indulgence.

5 First of all, the defendants, actually all  
6 defendants, including Mr. McGinn and Mr. Smith, have  
7 consented to the relief in the draft preliminary -- proposed  
8 preliminary injunction order that's before the Court. And  
9 Mr. Brown, the receiver, has consented on behalf of the  
10 relief -- of the entity defendants. So I just wanted to  
11 note that. The only parties, therefore, contesting the  
12 entry of the proposed order are the relief defendant and the  
13 trustee.

14 And the reason we're here, really, is because  
15 of the \$6 million in those two accounts and the significance  
16 of those funds. We heard the receiver testify as to the  
17 amount of money that he found in the coffers of McGinn,  
18 Smith when he was appointed receiver on April 20<sup>th</sup>. Less  
19 than \$500,000 remain in the accounts, even though upwards of  
20 a hundred fifty million dollars was raised in the various  
21 offerings from 2003, up until, indeed, the moment of the  
22 filing of this case. And we heard the evidence of even  
23 after the filing of this case of Mr. McGinn's son trying to  
24 get the receiver to file a Reg D Form so they could continue  
25 with yet another fraudulent offering. So after all that

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1 money raised, more than a hundred million dollars, after the  
2 returns to investors, the losses are well above \$80 million.  
3 Just a staggering volume of losses, investor losses. And  
4 the suffering of those investors is considerable.  
5 Unfortunately, the amount of money remaining is a pittance.  
6 The \$6 million that we're fighting over here over these last  
7 three days may be the only significant asset that can go  
8 toward those investors.

9                   Plaintiff has made an overwhelming cause --  
10 an overwhelming showing of likelihood of success on the  
11 merits. The Exhibits 1 to 130 that have been received into  
12 evidence clearly show a significant investment fraud at  
13 McGinn, Smith & Co. Inc., from September 2003 up until the  
14 filing of the complaint. The Maya declaration, Plaintiff's  
15 Exhibit 70, tracks the money that came in, how it was used,  
16 and the misuse of investor funds, the internal loans to  
17 Mr. McGinn and Mr. Smith that went undisclosed and the use  
18 of those funds and how it was inconsistent with the  
19 representations that were made to investors.

20                   THE COURT: I think I understand the SEC's  
21 position with respect to likelihood of success on the  
22 merits. Let's begin with the relief defendant, however.  
23 What do you believe you need to prove and how do you believe  
24 you've proved it?

25                   MR. STOELTING: For the relief defendant, we

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1 have to show that they received ill gotten gains, which is  
2 plainly shown through the bank records and that they have no  
3 rightful right to receive those fund. And let me just  
4 address the two accounts first which are at issue.

5           The stock account. And if you look at -- I  
6 think the way to look at this stock account and the trust  
7 account is as sort of it's all communal marital property.  
8 David Smith and Lynn Smith accumulated about \$6 million that  
9 was in the stock account by the Year 2000. That started off  
10 with about 10,000 from Lynn Smith's inheritance. By the  
11 Year 2000, that amount was \$6 million. And that really  
12 represented all of their joint marital property, the money  
13 in that stock account. And then they took the 6 million and  
14 broke it apart into two bits. Four million went into the  
15 trust. And the timing of that creation of the trust account  
16 is critical, because the evidence with regard to the fraud  
17 shows that it began in September 2003, with the First  
18 Independent offering. And then the second offering began in  
19 January 2004. So by the time the trust was created in  
20 August 2004, tens of millions of dollars had already been  
21 made to investors, that money was already being used in ways  
22 inconsistent. So the fraud was well underway when the trust  
23 account was created.

24           The stock account was clearly used to benefit  
25 David McGinn -- or Tim -- or David Smith and his business

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1 from the beginning. Mrs. Smith testified that she allowed  
2 the account to be used as a financing arm of the broker  
3 dealer. And if you look at Plaintiff's 126, which is the  
4 letters of authorization, which go from 2000 up until 2009,  
5 which Mr. McQuade testified he kept in his desk and they  
6 would be replenished every once in a while, signed the  
7 letters of authorization by Mrs. Smith, given over to  
8 Mr. Smith. And really, when she did that, she relinquished  
9 control of the account and allowed it to be used however  
10 Mr. Smith liked. And he used it for his business, he used  
11 the stock account to make loans that were critical for his  
12 business, and it was really jointly used by them and used by  
13 him and incorporated and became part of the broker dealer  
14 and a critical part of the broker dealer's operation.

15           If you look at those letters of  
16 authorization, each of them is for a specific amount. And  
17 if you add them all up, I believe it's well over  
18 \$20 million, the total amount of those letters of  
19 authorization.

20           If you look at Plaintiff's 81, which is  
21 internal McGinn, Smith e-mails, noting specific transfers  
22 during 2009, February, March, two in May, June three  
23 transfers, in and out of the stock account, directed by  
24 Mr. Smith. July, August, October, December. And in  
25 December, Mr. McGinn participates in it and directs the

**SEC CLOSING STATEMENT - STOELTING**

1 transfer of \$15,000 to him. In and out of the stock  
2 account, mostly out.

3           And I think as -- in terms of the law,  
4 Mr. Smith's control over that account and his ability to use  
5 it for his own purposes shows his control and the fact that  
6 it was used jointly by them shows that it's a joint marital  
7 asset, and, therefore, should be subject to the freeze. The  
8 fact that they lived off -- Mrs. Smith testified they lived  
9 off Mr. Smith's earnings from the brokerage business, that  
10 allowed them to keep a stock account, which ostensibly was  
11 in Mr. Smith's name, free to use for these joint purposes.  
12 The assets that were purchased with the stock account funds  
13 were joint assets. The three houses they bought in Clifton  
14 Park and Rolling Brook Drive, those were joint assets. The  
15 children's college education, that was a joint  
16 responsibility of the parents that was used out of -- that  
17 was paid out of the stock account. So the stock account  
18 really became part of the brokerage business and, therefore,  
19 is subject to the freeze as an asset of Mr. Smith's.

20           THE COURT: Is it -- is the contention that  
21 Mr. Smith was somehow inequitable or beneficial or some  
22 other description owner of the stock account?

23           MR. STOELTING: Yes.

24           THE COURT: When do you contend he became  
25 such an owner?

**SEC CLOSING STATEMENT - STOELTING**

1                   MR. STOELTING: Well, you know, Mrs. Smith's  
2 own declaration and her deposition said that at least 15  
3 years it had been essentially an asset of the broker dealer.  
4 In her declaration she said, I have made -- she was -- I was  
5 asking about the loan that she made of \$366,000 to TDMM  
6 Cable, which by the way was signed by Mr. McGinn on behalf  
7 of TDMM Cable, she said, I have made similar loans to  
8 provide bridge financing to facilitate closing of various  
9 transactions. There's the \$6 million loan to Integrated  
10 Alarm Services, there's the \$2 million loan to First  
11 Independent, which is Plaintiff's 130. At least for 15  
12 years that account had been dominated and used by David  
13 Smith for his business. The letters of authorization that  
14 we have, the oldest one is 2000, but Mrs. Smith seemed to  
15 suggest that they went back farther than that. When she  
16 signed those letters of authorization and gave them over to  
17 Mr. Smith, they could be used for any purpose. She really  
18 was surrendering control of the account and the money in  
19 that account to him.

20                   THE COURT: Did she do so, on this record, as  
21 to Mr. Smith because he was her husband or because he was  
22 her broker?

23                   MR. STOELTING: Oh, it was because he was her  
24 husband and because they jointly used it and they jointly  
25 used it for the benefit of themselves as a married couple.

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1 The account was part of their joint marital assets, and the  
2 fact that they chose to keep the bulk of it -- they didn't  
3 have IRAs really, they didn't put the money in savings  
4 bonds. What they did with it was they stuck it all into  
5 Lynn's stock account and they used it to buy marital assets,  
6 and it was a joint account from which they both received  
7 substantial business, both business and professional.  
8 Mrs. Smith was clear it was a very substantial benefit to  
9 her husband she was extending. And it, you know, clearly  
10 also benefited their marriage and was used jointly by them.  
11 The fact that it was in her name really doesn't affect the  
12 way it was used as a joint asset. And then the -- you know,  
13 his control over the account essentially makes Mr. Smith the  
14 beneficial owner. His ability to take those letters of  
15 authorization and use them --

16 THE COURT: Is there a difference between  
17 beneficial owner and equitable owner?

18 MR. STOELTING: I think beneficial owner  
19 is -- seems to be a more accurate term, and I'm not sure  
20 there's -- what the difference would be, but his ability to  
21 direct where the funds go...

22 THE COURT: Well, in the Second Circuit case  
23 cited by the Intervenor, *Vebeliunas*, they speak in terms of  
24 an equitable ownership and what must be proven for that. I  
25 don't know if you're familiar with the case, but my question

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1 is, are we talking about the same thing or are they two  
2 different concepts?

3 MR. STOELTING: What we cite in our brief is  
4 -- I think courts use them kind of interchangeably,  
5 beneficial or equitable ownership. And we cited cases in  
6 our brief the ability to control an account and to direct  
7 what happens to it means you have beneficial ownership over  
8 it.

9 And, you know, I think it's important to  
10 remember too that the relief we're seeking here is not --  
11 we're not seizing the account, we're not taking the account  
12 away completely, we're just talking about a preliminary  
13 freeze over the account for the duration of the case just to  
14 preserve the status quo until the case is over.

15 The you are Belliss case I think --

16 THE COURT: If Mr. Smith and Mrs. Smith, if  
17 it is found that they jointly shared ownership of the stock  
18 account and in the end the SEC prevails in this case, is the  
19 entire amount of the stock fund forfeitable for the benefit  
20 of the investors?

21 MR. STOELTING: I think it depends on what  
22 the amount of the judgment that we receive is. Assuming we  
23 receive a judgment --

24 THE COURT: Let's assume it's the \$80 million  
25 that you contend is the maximum amount.

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1                   MR. STOELTING: All right. If we received a  
2 judgment for 80 million, we can certainly look to the  
3 entirety of that stock account.

4                   THE COURT: Okay.

5                   MR. STOELTING: Because I believe under New  
6 York law a joint account is jointly held by the owners of  
7 the account because one person can remove a hundred percent  
8 of the assets at any time.

9                   The other point on the account is -- on the  
10 stock account, I want to address the trust account a little  
11 more extensively in a moment, is that Lynn Smith really  
12 received the significant fraudulent proceeds into that  
13 account. Certainly in 2009, when the -- when they and  
14 Mr. McGinn started the process of moving assets around and,  
15 you know, there's Plaintiff's Exhibit 77, which is the David  
16 Smith e-mail to Timothy McGinn where he says, Lynn and I  
17 have to shift money around, we're going to go meet with  
18 Mr. Finn and he'll tell us how to do that, there was a  
19 substantial transfer from, I believe it was the QTIP trust  
20 that had been in Mr. Smith's name, that was then transferred  
21 to Lynn Smith's stock account and never moved out even  
22 though Mr. Finn had advised her to move it out. The Vero  
23 Beach house, which is a joint -- was a joint asset of theirs  
24 and even those Mr. Finn advised them that it was better to  
25 keep it jointly held, they nevertheless moved it into Lynn's

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1 name. There was the checking account, which in July 2009 --  
2 and just to put a context on this, the e-mails that were  
3 flying around McGinn, Smith in 2009 are quite revealing.  
4 While all those assets transfers were going on, February 25,  
5 2009, this is appendix Plaintiff's Exhibit 67, at 136,  
6 Mr. Livingston e-mailed David Smith saying, in our many  
7 conversations over the last year I came to understand the  
8 depths to which the firm has sunk relative to its revenue.  
9 Decisions here have been made over the last year I had zero  
10 say in that I would rather not put in an e-mail but that put  
11 me at risk. There's an e-mail on April 7, 2009, Plaintiff's  
12 67, at 204, e-mail to McGinn and Smith from one of their  
13 brokers, Mr. Lex (phonetic), saying I just got off the phone  
14 with an investor who's been calling for almost two months to  
15 get his TDMM redemption. He is one of the many people who  
16 refer to our deals as a Ponzi scheme. And there's numerous  
17 other e-mails of that nature. So as those e-mails are being  
18 received by Mr. McGinn and Mr. Smith, they're moving assets  
19 into their spouse's name and some of those assets end up in  
20 the stock account. The Capital Center Credit stock,  
21 \$326,000 moved into Lynn Smith's stock account. So that's  
22 the argument on that. It's really sort of a two, sort of  
23 two layers to the stock account argument which are -- I mean  
24 it seems apparent that it was just a joint marital assets,  
25 it benefited both of them, it was used by Mr. Smith for his

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1 own business purposes. He -- whenever he was doing a deal,  
2 he would look to the stock account to close the deal.  
3 Mrs. Smith allowed it to be used without question. She only  
4 dealt with Mr. Smith. He could make the transfers happen at  
5 the drop of a hat. And it allowed all these deals to  
6 happen. Maybe we wouldn't have had a fraudulent scheme of  
7 this scope if Mrs. Smith had just said no to her husband at  
8 some point.

9 (Court reporter interruption at 2:01 PM.)

10 THE COURT: I'm sorry, go ahead, Mr.  
11 Stoelting.

12 MR. STOELTING: I just want to talk about the  
13 evidence regarding the trust account for a moment.

14 I think the only conclusion to reach from the  
15 evidence is that this account was created to shield assets  
16 after the fraud was well under way. The allegation is  
17 supported by the Maya declaration. Certainly, the  
18 allegation in the complaint is that the first of the four  
19 funds began in September 2003. Almost immediately they  
20 began -- they were invested in companies affiliated or  
21 connected to McGinn and Smith, contrary to the express terms  
22 of the PPM.

23 In August '04, seemingly out of the blue,  
24 because the beneficiaries testified today that it caught  
25 them by surprise that suddenly their parents had created a

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1 trust for their benefit of \$4 million, which represents  
2 almost three-quarters of their net worth, suddenly  
3 transferred to their children who had never before heard of  
4 the idea and, indeed, were not even told of it for four  
5 months. It was created on August 4th, and it wasn't until  
6 Thanksgiving that they got around to even telling them that  
7 it had been created for their benefit.

8           The trust, in addition to the timing of it  
9 which suggests a fraudulent intent, the way it was handled  
10 and all of the evidence relating to the trust, shows that  
11 David Smith dominated and controlled every single thing that  
12 happened. There wasn't one thing that ever happened to that  
13 trust that David Smith didn't direct and control.

14           THE COURT: Do you see any distinction  
15 between David Smith as the grantor and David Smith as the  
16 broker?

17           MR. STOELTING: Well, as the grantor, he knew  
18 that he couldn't control the trust and he could not do the  
19 things he was doing.

20           THE COURT: Doesn't that depend on a finding  
21 that the trustee, Mr. Urbelis, was under the control of Mr.  
22 Smith?

23           MR. STOELTING: Well, the evidence certainly  
24 shows that he was under the control of Mr. Smith.

25           THE COURT: Doesn't it depend on that

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1 finding?

2 MR. STOELTING: Well, I think that the  
3 finding is supported by the evidence. If you find that Mr.  
4 Urbelis was a completely independent trustee and exercised  
5 his own independence, I think it's a different, it's a  
6 different outcome. But there's certainly no evidence to  
7 that, and I'll get through some of Mr. Urbelis' --

8 THE COURT: There seems to be two arguments  
9 here. One is that the stock account from which the trust  
10 was created was a joint asset of Mr. and Mrs. Smith as of  
11 August 2004 and, therefore, the creation of the trust was  
12 the proceeds of (inaudible) and so forth. Is that correct,  
13 that's the first theory?

14 MR. STOELTING: Well, with regard to the  
15 trust?

16 THE COURT: Yes.

17 MR. STOELTING: I think that certainly is the  
18 evidence; that it was used -- the joint funds were used to  
19 fund the trust. And that's certainly proven by the fact  
20 that David Smith --

21 THE COURT: If -- let me -- if the joint  
22 funds were used to fund the trust, is that sufficient for  
23 the trust to be frozen and seized if you prevail for the  
24 benefit of the investors? Is that alone sufficient?

25 MR. STOELTING: Well, I think it does show --

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1 it would justify freezing it because it was joint funds that  
2 went into it. When it becomes a trust, I think they become  
3 joint funds, and in some -- they become trust funds, I'm  
4 sorry, and then we have to look at how the trust operated  
5 and why it was created. But certainly I would point out  
6 that they were joint--

7 THE COURT: I'm not sure what the answer to  
8 the question was. Forget how the trust was treated or  
9 created. We'll talk about that in a minute. If it was a  
10 joint asset separated into a trust, can it be seized?

11 MR. STOELTING: I think in this circumstance  
12 yes, because it was a joint asset that was subject to  
13 creditors that was fraudulently put into the trust during a  
14 fraudulent scheme to shield it from, to shield it from  
15 creditors.

16 THE COURT: All right. As to how the trust  
17 was handled, the Intervenor cites the Second Circuit's  
18 decision in *Vebeliunas*. And I haven't seen in your papers  
19 where you address that case. What's your position as to  
20 *Vebeliunas* and whether or not that controls as to how this  
21 was treated?

22 MR. STOELTING: Well, I think *Vebeliunas* is  
23 just a different situation, because I think that decision  
24 says that under those facts there was not an intent to  
25 shield money from creditors. I have it ... I mean it says



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1 in the Second Circuit's opinion, there are no allegations in  
2 the instant case that the irrevocable Vart trust was used to  
3 conceal assets from creditors. And here, that is -- I think  
4 that is what the evidence shows.

5 THE COURT: All right. You're going -- what  
6 is the evidence that you believe shows that in August 2004,  
7 the Smiths created the trust to shield it from creditors?

8 MR. STOELTING: Well, because -- a few  
9 things, your Honor. One is just the fact the evidence  
10 showing that the fraudulent scheme began in September 2003  
11 and was well underway and David Smith was directing that  
12 scheme. Two, is that there seems to have been no prior plan  
13 to create a trust. The beneficiaries said that they had  
14 never heard of the idea -- or Mr. Jeff Smith said he had  
15 never been told of any plan to create a trust. Mrs. Smith  
16 had never talked of any longstanding plan to create a trust.  
17 It seems to, you know, have suddenly developed around  
18 August 2004. It seems like if you had this money, they had  
19 that \$6 million sitting in the stock account for many years,  
20 it seems like if there was some plan to create a trust,  
21 someone would have been told about it before. And then  
22 there's also just the kind of common sense view of why. You  
23 have \$6 million, why break off -- give four million to your  
24 kids when you're, you know, I guess mid 50s and your  
25 children are in their late 20s.

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1 THE COURT: Well, one reason that it seems to  
2 arise from the evidence is the tax benefit. Why wasn't that  
3 sufficient?

4 MR. STOELTING: Well, there's no evidence as  
5 to the timing. The tax benefit could have been achieved  
6 three years before, before the fraud started.

7 THE COURT: What difference does the -- you  
8 say the absence of longstanding planning; they could have  
9 done it earlier; they could have done it later. The  
10 evidence on the record appears to be that at least in August  
11 of 2004, there was a tax benefit to be achieved by creating  
12 the trust.

13 MR. STOELTING: And that tax benefit would  
14 have been there during the previous ten years as well.

15 THE COURT: So you're saying selection of the  
16 timing of August 2004 supports your contention?

17 MR. STOELTING: Yes, I think so. The fact  
18 that, you know, \$6 million sitting in a stock account  
19 suddenly gets moved into a trust almost a year after the  
20 start of the fraudulent scheme, I think certainly at least  
21 at this level, at this stage, when we're just trying to keep  
22 the account frozen during the pending of the case, certainly  
23 supports at least an inference, which I think the case law  
24 requires, that there was fraudulent intent when the trust  
25 was created. And certainly that the way the trust was

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1 handled also shows an intent to ignore the structures and  
2 formalities of the trust and just, you know, treat it as  
3 their own asset. And the trust was created and handled by  
4 David Smith as a joint marital asset. The beneficiaries --

5 THE COURT: What did the Smiths do with the  
6 assets of the trust other than reimburse themselves for  
7 payment of taxes?

8 MR. STOELTING: Well, they used it to pay  
9 their own taxes...

10 THE COURT: Well, that's in 2010.

11 MR. STOELTING: Well, they received trust  
12 money into their own account and used it to pay taxes. It's  
13 true they didn't take trust funds and go out and buy houses  
14 and boats. They kept it in their trust account, just like  
15 they would have kept it or might have kept it if it had been  
16 in some other account. But they had the knowledge that that  
17 money wasn't going to be seized by some creditor while the  
18 fraudulent scheme was ongoing. It could just sit there. I  
19 think it's natural that they don't touch it, because that  
20 was the whole point, is to keep it there during the period  
21 of fraud so nobody could get at it. It would have, I think,  
22 defeated the purpose if they had taken the money out and  
23 spent it on things for them.

24 But the beneficiaries, the people who the  
25 trust was supposedly created for never got any benefit from

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1 the trust, at least up until now. And even Lauren, the  
2 daughter, who we heard testimony from was out of work for a  
3 year and had to depend on her mother for support never went  
4 to the trust to get that money.

5 And even, you know, David Smith, just to show  
6 how it was kind of viewed as just part of their joint  
7 estate, David Smith is paying the taxes for the trust out of  
8 his own pocket. I think there was evidence from the  
9 accountant that he went a hundred thousand dollars in the  
10 hole. There's no loan agreements or any sort of  
11 acknowledgment of that debt to the trust, that the trust  
12 owes him that money. That's because it doesn't matter.  
13 It's all there. He knows that if he needs that money, if he  
14 needs that trust money, he can get it back. And then when  
15 the time comes, when he really does need that money, that's  
16 exactly what happens, he gets that money as soon as he needs  
17 it.

18 And just to summarize for a moment, that the  
19 level of David Smith's domination of the trust, he created  
20 it, he chose the accounting firm, he chose the lawyer, he  
21 chose the trustee, his childhood friend who has his own  
22 investment account with him. He picked every single  
23 investment. The only thing the trust does is invest.  
24 That's its the only asset; it's the only activity; and all  
25 those investment decisions are made by David Smith.

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1                   Mr. Urbelis, the trustee, when you look at  
2 the exhibits that are in evidence, the communications  
3 between Mr. Urbelis and David Smith, there are faxes saying  
4 please sign, sign and return; barely an explanation.  
5 Mr. Urbelis was really the signature. That's what he  
6 provided. He was there to sign documents when he was told  
7 to sign documents.

8                   THE COURT: Was there anything that  
9 prohibited David Smith from functioning as the broker for  
10 the fund--

11                   MR. STOELTING: No. He's --

12                   THE COURT: -- for the trustee?

13                   MR. STOELTING: He can be the broker, but he  
14 knew what he was doing was wrong, because he wrote it in  
15 that letter, Plaintiff's 84. It said, I know that I am not  
16 eligible to exercise control over the trust to the trustee  
17 when the trust was created. And that letter said --  
18 acknowledged that fact. And then it said, you and I will  
19 get together and work out the details of that. And when we  
20 took Mr. Urbelis' deposition, he said they just never got  
21 around to having that conversation.

22                   When you look at the communications between  
23 David Smith and Mr. Urbelis, you know, all Mr. Urbelis does  
24 is sign documents when he's told to sign documents.  
25 Plaintiff's 85, 91, 92, 96, 100, faxes from McGinn, Smith to

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1 Urbelis, please sign, sign here, put your signature here.

2 Mr. Urbelis -- well, first of all, he admitted that he did  
3 not verify the tax liability when he made those transfers to  
4 Mr. Smith's and Lynn Smith's accounts. He would just get a  
5 phone call saying taxes is 95 grand, a hundred grand,  
6 whatever, and he would sign it and transfer the money.

7 Mr. Urbelis --

8 THE COURT: It turns out that the amounts  
9 were accurate though, correct?

10 MR. STOELTING: It appears so. It appears  
11 they were accurate.

12 Mr. Urbelis actually made clear when he  
13 became trustee that he didn't want to have anything to do  
14 with the taxes. He said, and this is on page 43 of his  
15 transcript, I didn't get into the details of these things  
16 with the accountant. I just assumed the money went kind of  
17 like we talked about. I didn't care as long as I wasn't  
18 getting notices from the IRS that the State of New York --  
19 and the State of New York that the taxes weren't getting  
20 paid.

21 And it certainly is undisputed, Mrs. Smith  
22 testified, Mr. Urbelis testified that he -- every investment  
23 the trust made was selected by David Smith. He doesn't have  
24 any expertise whatsoever in investments. His practice is in  
25 zoning and land use.

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1 THE COURT: What reason was there for  
2 Mr. Urbelis to question the investment decisions or  
3 recommendations made by Mr. Smith? The fund was doing well.  
4 The trust was doing pretty well, wasn't it?

5 MR. STOELTING: I think he had an obligation  
6 under the trust agreement. He had a fiduciary duty to --  
7 the trust agreement says the trustee has sole duty to make  
8 investment decisions. And he advocated that responsibility  
9 and allowed Mr. Smith to control the investments. He didn't  
10 have any role in investments.

11 THE COURT: If Mr. Urbelis had followed the  
12 same practice with respect to a, you know, a broker named  
13 Jones unrelated to either the grantors or the grantees in  
14 this case, would he have still violated his fiduciary duty?

15 MR. STOELTING: I think so. And the point  
16 here is that Mr. Smith did not have discretionary authority  
17 on the account, on the trust account. Mr. Smith -- it was  
18 the trustee who had the sole authority under the trust  
19 agreement to make investment decisions. And he farmed that  
20 duty out to Mr. Smith. Mr. Smith was never appointed  
21 investment advisor of the fund. He wasn't formally retained  
22 to make investment decisions for the fund. He was just  
23 the --

24 THE COURT: Does the trust agreement require  
25 that?

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1                   MR. STOELTING: No. But my point is that he  
2 was just a broker who executes trades. You know, of course,  
3 the account was handled at McGinn, Smith, and I think it's  
4 interesting that Mr. Smith does not put the trust money into  
5 his own investment vehicles. He doesn't put the trust into  
6 First Independent or any of the four funds or any of the  
7 other trust offerings that he does over the years. He keeps  
8 it out of those and puts it in, you know, Pine Street, which  
9 has offered solid returns. The reason the trust account did  
10 well was really because of the Pine Street returns that it  
11 received over the years. When you look at the deposits,  
12 most of the significant deposits are distributions from the  
13 Pine Street fund. That's a fund that Mr. Smith had nothing  
14 to do with the investment decisions. Those investment  
15 decisions were all made by Mr. Welles.

16                   THE COURT: Anything else?

17                   MR. STOELTING: One moment, your Honor.

18                   (Pause.)

19                   MR. STOELTING: I think that's it, your  
20 Honor. Just to highlight the one piece of evidence with  
21 regard to the trust. You know, a single distribution,  
22 really the only time there was a distribution from the trust  
23 account other than to pay taxes or a capital call to the  
24 Pine Street fund before the SEC filed its case was \$66,000  
25 to benefit David and Lynn Smith, not the beneficiaries.

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1 THE COURT: If I accept Jeffrey Smith's  
2 testimony, what was wrong with that distribution?

3 MR. STOELTING: I'm sorry?

4 THE COURT: If I accept Jeffrey Smith's  
5 testimony that, as the beneficiary, he directed the  
6 distribution of the money to his mother's account, then what  
7 was improper about that?

8 MR. STOELTING: Well, first of all, he wasn't  
9 candid with the fiduciary. He wasn't candid with the  
10 trustee. How can a trustee execute his fiduciary  
11 responsibilities when a relevant fact is omitted from him,  
12 which is 66,000 of the 95,000 is going to benefit, not the  
13 beneficiaries, but the grantor? And it's not the case here  
14 that the money was received by Jeffrey and then given to his  
15 mother. It went directly to his mother's account, all  
16 95,000. So -- and the trustee didn't know that. The  
17 trustee believed he was making a transfer just for the  
18 payment of trust taxes. He might have not allowed such a  
19 distribution. We'll never know.

20 THE COURT: All right. Thank you.

21 Mr. Featherstonhaugh?

22 MR. FEATHERSTONHAUGH: May it please the  
23 Court. I've had the honor of representing Lynn Smith,  
24 relief defendant in this action. And I have listened  
25 carefully to Mr. Stoelting's description of his view of the

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1 case. I'm afraid I must disagree with him on virtually  
2 every point.

3           The first day I was in law school, I had an  
4 introduction to a law professor named Burton Andrews who  
5 said, the first question you have to ask in every case is  
6 why are we here? In this case, we're here because the SEC  
7 filed a complaint. And I would urge the Court in the  
8 drafting of this decision and in consideration of  
9 Mr. Stoelting's argument to return to that complaint.

10           In the complaint, which was the basis for the  
11 motion for the preliminary injunction, and, indeed, the  
12 basis for the temporary restraining order, the SEC  
13 specifically names Lynn Smith as a relief defendant. If you  
14 look at our brief, we have detailed the eight times Lynn  
15 Smith is mentioned. But she's brought into the case as a  
16 relief defendant. The law is very clear as to what it is  
17 the SEC needs to prove against a relief defendant. And it  
18 goes beyond the SEC. They're also called nominal  
19 defendants. They're a creature of the common law. And they  
20 basically allow a court to take a legal matter and add an  
21 equitable, an equitable side to it so that complete relief  
22 can be afforded to a plaintiff.

23           Now, this case that's outlined in the  
24 complaint is just an ordinary civil lawsuit. It's not even  
25 fast-tracked. The scheduling hearing I don't think is

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1 before September. And it makes four broad claims, four  
2 broad statutory claims.

3           What they have to do to succeed in any way  
4 against Lynn Smith is, first they have to show this Court  
5 that they have a probability of success on the merits. I  
6 would suggest to the Court that that decision will turn  
7 almost entirely on the Court's determination as to what  
8 extent the inference to be drawn based on the actions of  
9 Mr. McGinn and Mr. Smith can be used against Mrs. Smith and  
10 what those inferences would be. Because, certainly, there  
11 was no proof in this courtroom over the last two days about  
12 any specific fraud committed by anybody that led to the  
13 acquisition of any specific or, as the case law allows,  
14 approximated ill gotten gains. In fact, quite contrary to  
15 what Mr. Stoelting has said, that the losses are  
16 \$80 million, I would encourage the Court to look both at the  
17 testimony and at the exhibits of Israel Maya,  
18 Mr. Stoelting's witness and colleague. In fact, that chart  
19 that I examined him on which was consolidated balance sheets  
20 of the four funds made it clear that, at most, after five  
21 years of operation, the funds were under water by 10 or  
22 \$11 million. Subsequent to that, there were -- brought out  
23 on redirect, there was some hearsay testimony from Mr. Rees  
24 that he -- from Mr. Maya that Mr. Rees had disagreed with  
25 him and that it was some number beneath that. But, in fact,

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1 Mr. Brown, the first witness in this trial, sat in that very  
2 chair and told the Court that one of the first things he  
3 would do when the second portion of the receivership started  
4 was to determine -- to begin a forensic accounting, to do a  
5 determination as to what the losses might be. There was no  
6 proof put in front of the Court other than the most wildly  
7 generalized statements of any specific losses. And that is  
8 important when we remember why we're here.

9           We're here as a relief defendant. They have  
10 specific obligations against us which are different than the  
11 ones Mr. Stoelting is asking for.

12           Once they have -- if they are able somehow to  
13 meet their burden that they will succeed on the merits on  
14 the question if there is a fraud... Which is not at all  
15 clear to me, they have five funds, one they moved to let out  
16 of this proceeding. There are five funds that did mezzanine  
17 investments, raised money the same way from investors, one  
18 succeeded and four failed. But put that aside and assume  
19 they meet that burden for a minute.

20           As against the relief defendant, the measure  
21 of what they get is not the losses. A relief defendant's  
22 situation is not unlike a bail man. It's very much like if  
23 I steal Mr. Stoelting's hat and coat, I check the coat at  
24 the coat room at the Brown Derby, move on with the hat, he  
25 sues me, he can name the coat clerk at the Brown Derby, so

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1 that if he succeeds, he can get his coat back. Because that  
2 person has no legal claim to the property. So he's got to  
3 show, first of all, that ill gotten gains, and he is  
4 required to show the approximate amount of them, have gotten  
5 into Lynn Smith's hands. He hasn't done that here.

6 THE COURT: Is it your -- I'm just trying to  
7 understand. Is it your position that only the amount of ill  
8 gotten gains, presumably those from the four funds that can  
9 be shown to have been deposited into Lynn Smith's stock  
10 account could be recovered?

11 MR. FEATHERSTONHAUGH: That's almost what I'm  
12 saying, but not quite. I've read the tracing cases. So I'm  
13 saying that that amount -- I'm not saying you have to trace  
14 the exact dollar, but you would have to show that David  
15 Smith had profited by whatever, a hundred dollars, and that  
16 somehow that -- not necessarily that particular hundred  
17 dollars, but a hundred dollars that he had got to Lynn  
18 Smith.

19 THE COURT: What if it's shown he profited by  
20 \$10 million?

21 MR. FEATHERSTONHAUGH: Same thing. You would  
22 have to show that that got to Lynn Smith if you're going to  
23 name her as a relief defendant and get disgorgement of her.  
24 There's no disparity in the courts at all about that. You  
25 can't simply recover it in some oxygen tent recovery because

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1 she's married to him. The money --

2 THE COURT: Well, that gets to the issue  
3 here. Simply being married to him and having the stock  
4 account isn't enough. And I don't think the SEC asserts  
5 that. It's whether or not David Smith shared an ownership  
6 in that stock account, beneficial, equitable, or otherwise.  
7 Isn't that the issue?

8 MR. FEATHERSTONHAUGH: Well, actually, no, it  
9 isn't.

10 THE COURT: What do you think is the issue?

11 MR. FEATHERSTONHAUGH: That's the issue that  
12 Mr. Stoelting argued today.

13 THE COURT: What's your issue?

14 MR. FEATHERSTONHAUGH: Well, the issue --  
15 my -- it's not my issue, it's his issue; he drafted the  
16 complaint.

17 THE COURT: How do you phrase the issue?

18 MR. FEATHERSTONHAUGH: In the issue (sic),  
19 the issue against Lynn Smith is can they freeze her assets  
20 because they have demonstrated a reasonable likelihood of  
21 success on the merits that they can recover funds that she  
22 is holding that are the funds received from the ill gotten  
23 gains of one of the two principals.

24 And in that complaint, your Honor -- and I  
25 suggest that they're bound by that complaint. They're the

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1 ones that drafted it. In that complaint they only allege  
2 two things. They allege the \$335,000 that she was paid and  
3 that the testimony in the court was, was the return of loan  
4 monies from the TDMM Cable deal to whom she had loaned  
5 \$366,000, they allege in the complaint that she received  
6 that \$335,000, that's the proceeds of ill gotten gains and  
7 that she had no ownership interest in it. I think we've  
8 proven unequivocally that she had an ownership interest in  
9 it. And they have done nothing to refute that proof.

10           The other money they claim is a hundred  
11 thousand dollars. And that's all. That's the only two  
12 sums. They claim a hundred thousand dollars was transferred  
13 to her -- was ordered to be transferred to her on a certain  
14 date. In fact, and we've submitted, and I invite the Court  
15 to look at the date in the complaint and look at Lynn  
16 Smith's stock accounts, it's clear from the e-mail that  
17 there was a direction to deliver a hundred thousand dollars.  
18 It's equally clear that no hundred thousand dollars was ever  
19 delivered, so there's nothing to recover.

20           Now, they have tried to change that claim  
21 here, and maybe the Court will think under some -- it can  
22 exercise its equitable powers to let them change that. But  
23 even there -- and this came up in the cross-examination of  
24 Mr. D'Aleo this morning, and we admit it, we haven't hidden  
25 anything in any of these transactions, they asked Mr. D'Aleo

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1 about only two transactions. It was the \$326,304.11 QTIP  
2 transaction, and the \$38,430 transaction that was the  
3 cleanup of one of the accounts. Mr. McGrath asked about it.  
4 It's in Mr. D'Aleo's exhibit. But we said those monies did  
5 come from Mr. Smith.

6 If the Court were inclined to sort of  
7 generally let them amend their complaint, maybe they could  
8 make a claim to those monies or otherwise to be frozen, not  
9 to be taken, but to be frozen. But beyond those specific  
10 dollars, they have no claim here because they haven't  
11 alleged a claim here.

12 THE COURT: Is it your position, for example,  
13 with respect to the Vero Beach house, that only that portion  
14 of that residence which the SEC can show was purchased or  
15 paid for with ill gotten gains can be forfeited?

16 MR. FEATHERSTONHAUGH: The Vero Beach house  
17 is -- maybe I can just run through the assets. That one is  
18 a little --

19 THE COURT: Let's do that, but first try to  
20 answer my question.

21 MR. FEATHERSTONHAUGH: Okay. That one is a  
22 little bit different. Vero Beach house was jointly owned  
23 until a year ago. Clear proof is it was bought with Lynn  
24 Smith's money. Equally clear proof that for eight years it  
25 was owned jointly. That that was set aside. What the

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1 SEC -- the SEC would absolutely -- to get at Lynn Smith's  
2 share, would have to absolutely demonstrate, again, she was  
3 in possession of ill gotten gains; that somehow those ill  
4 gotten gains could only be satisfied by that house and they  
5 could assert a claim to it. Now, if they want to set aside  
6 the transfer as a transfer and fraud of creditors, that's a  
7 little different. If they were to transfer that -- or  
8 challenge that successfully and get it back to the joint  
9 status, that would be like any other joint asset on the  
10 jointly held.

11 THE COURT: All right.

12 MR. FEATHERSTONHAUGH: But there again it  
13 raises the question of the Sacandaga Lake house. I mean you  
14 stand here and ask yourself how your government could  
15 proceed and put a freeze on that. We do have Rule 11. We  
16 have some responsibilities. That was left to Mrs. Smith by  
17 her father and has been solely in her name from that day to  
18 this. There is no possible claim that could be made to it.

19 Now, just to finish up on that amount they  
20 have to (inaudible), they keep talking about the investor  
21 losses. The investor losses are not the measure of recovery  
22 from a relief defendant. So if they were able some day  
23 years from now to prove that there were \$80 million in  
24 investor losses, that would only be the beginning of proving  
25 a cause of action against the relief defendant. To proceed

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1 against the relief defendant, you have to show causal  
2 connection between the offending fraud and the ill gotten  
3 gains that she has. There has to be a gain. Someone has to  
4 get the money. They would have had to be -- they have to be  
5 able to demonstrate that Mr. Smith got the money and somehow  
6 it got to Mrs. Smith without any claim of ownership on her  
7 part.

8                   There's a reason why the SEC's mountain is a  
9 high mountain to climb. Relief defendants and nominal  
10 defendants are not accused of anything. They are simply  
11 people who, its alleged by the government or by other civil  
12 litigants, have come into possession of ill gotten gains.  
13 And so the courts have been very restrictive in how you drag  
14 those people into court and how you proceed.

15                   Now, Mr. Stoelting, I would like to address  
16 his argument, he said we should look at the stock account  
17 and everything else. He actually said community property,  
18 but we aren't a community property state. But as joint  
19 property, as if by osmosis, the osmosis of marriage, that  
20 property of one spouse over time can become the property of  
21 another spouse. It's actually -- it's from the Charles  
22 Dickens, who -- I don't know if your Honor enjoys English  
23 literature, but you may remember the brief exchange in  
24 Oliver Twist, where Mr. Brownhall says to bumble, remember  
25 Bumble, the law will hold you responsible for the actions of

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1 your wife. And Bumble replies, well, sir, then the law is  
2 an ass and an idiot and undoubtedly a bachelor. We moved on  
3 since Oliver Twist. Women are people too. The mere fact of  
4 marriage does not merge your assets in some magical way with  
5 your husbands.

6 Now, to the extent that he argues that David  
7 Smith's control of the account is something more than that  
8 osmosis, to the extent that he argues that, he neglects to  
9 deal with the issue that David Smith was the broker on the  
10 account. Of course, he exercised control over the account.  
11 I can tell you at the moment happening at least, my  
12 partner's husband is a stockbroker. He handles whatever  
13 money I've been able to accumulate in a discretionary  
14 account. Shame on me, I don't even read the account  
15 statements.

16 THE COURT: You do business with family, huh?

17 MR. FEATHERSTONHAUGH: (laughter.) But  
18 it's -- and my name isn't the same as his and we haven't  
19 endorsed gay marriage yet, although it came close this year,  
20 but I would be very offended if someone were to argue that  
21 because I've given him that discretion for years, he has  
22 traded my stock, it has somehow magically become his money.

23 THE COURT: But what broker in an arms length  
24 deal uses a client's account to make loans to his own  
25 business?

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1 MR. FEATHERSTONHAUGH: One that's spoken to  
2 the client and gotten permission, as the proof was here.  
3 And in this case, a perfectly good business reason.  
4 Mrs. Smith testified quite candidly. She understood that  
5 the success of her husband's business was to her benefit.  
6 And when he said we'd like to make this loan, you'll make a  
7 little money out of it, and it will allow us to do some  
8 things, she didn't get in there, nor is she required to, in  
9 my view, and get down to the details of it, but she said  
10 okay, go ahead. And she had no reason to stop doing that  
11 because, with the exception of the loans to Mr. McGinn, the  
12 loans were repaid.

13 And another thing, the last prong that they  
14 have to prove is that there is no ownership claim to the  
15 funds. Now, there was a reason I put in every stock  
16 statement that I could get. I could only get them back to  
17 '99. But the uncontroverted proof is that that stock  
18 account was hers and hers alone from 1969. Once her husband  
19 became the broker of it, you cannot reach the conclusion he  
20 wants if these people aren't married. And I understand that  
21 that makes the analysis very difficult. Nonetheless, the  
22 analysis has to be done as if there is no marriage. These  
23 are individual legal people, and they have a right both to  
24 own assets, control assets, as she controlled it when she  
25 said to him the one time on the last loan, no, I'm not going

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1 to do it. If your partners aren't going to step up, I'm not  
2 doing it either.

3 THE COURT: But ignoring the fact of the  
4 marriage is like trying to ignore the fact that there's  
5 light outside the windows now, isn't it? What other  
6 client -- this record is barren of any evidence that any  
7 other client of McGinn, Smith ever gave 10 to 15 blank  
8 letters of authorization to any broker. The fact is there  
9 was a marriage involved here. And how do I ignore that?

10 MR. FEATHERSTONHAUGH: Well, there was a  
11 marriage involved, however, there was clear testimony to  
12 resolve that issue. That was done as a convenience to  
13 Mrs. Smith, not as a convenience to Mr. Smith.

14 THE COURT: That's if I find Mrs. Smith's  
15 testimony credible.

16 MR. FEATHERSTONHAUGH: Yes. And if you were  
17 to find it incredible, then there's no testimony as to why  
18 it was done, merely a fact that it was done, because no one  
19 else, no one else has spoken about it.

20 What you're being asked to do here though --  
21 well, first of all -- and I don't want to forget this,  
22 although I almost did... Talking about, first of all, what  
23 he's asking to you do is forget the complaint. There is no  
24 suggestion anywhere in the complaint, anywhere in the  
25 temporary injunction order, or anywhere in the preliminary

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1 injunction motion, they've never alleged until this argument  
2 that what they're really saying is that no, Mrs. Smith,  
3 you're not a relief defendant, you're somehow Mr. Smith or  
4 Mr. Smith owns all your assets. They've never alleged it.  
5 I don't think there's any basis on which the Court can rule  
6 on that. Now, there have been other cases where people, as  
7 your Honor has referred to a couple of them, those were  
8 cases where that was the underlying allegation. That's not  
9 the underlying allegation here.

10 Your Honor, thank you very much for your time  
11 and attention.

12 THE COURT: Thank you. Miss Dunn.

13 MS. DUNN: Thank you, your Honor. Your  
14 Honor, when the trustee of this irrevocable trust sought to  
15 intervene in this action, as you can see by our opening  
16 motion papers, it was not just unclear, but there was  
17 absolutely nothing in the complaint or in the TRO or in any  
18 of the declarations or exhibits, voluminous though they  
19 were, submitted in support of either the filing of the  
20 action or the TRO that made any reference whatsoever to the  
21 David and Lynn Smith irrevocable trust which was created on  
22 August 4, 2004. The only reference in -- throughout the  
23 entire set of papers was the fifth page, standing alone on  
24 that page, as almost an afterthought where they reference  
25 the irrevocable trust brokerage account. There was no

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1 showing made as to why this account should be included. In  
2 the opening papers, the trustee challenged the SEC to  
3 identify some theory, any theory at all on which we could  
4 then reply and brief the issue as to what the nature of this  
5 claim against the trust is. And I have to admit that I'm  
6 still confused what the plaintiff's theory is against this  
7 trust. Despite having filed its response papers to the  
8 motion, and I considered -- and obviously this hearing is a  
9 hearing on the motion, but all of the papers that have been  
10 filed through affidavit and exhibits are all part and parcel  
11 of the evidence to be considered by the Court, as well as  
12 the memoranda of law that have been filed by the parties  
13 with respect to this motion. And despite having had the  
14 opportunity to brief this issue at length, after a couple of  
15 different extensions of time, today is the first day that I  
16 have ever heard that the SEC is claiming that there was any  
17 kind of fraud in the creation of this trust which was  
18 created nearly six years ago. This, frankly, was a surprise  
19 to hear it. There's no evidence to support the allegation.  
20 The -- it's uncontroverted that a trust came into existence  
21 by the declaration of trust. That is black letter law.  
22 There are numerous cases, some of them were cited in my  
23 brief, that a trust comes into creation by the document  
24 through which it's written. And there's been no dispute by  
25 the SEC that that trust came in creation in August 2004.

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1 There was not a trust estate's expert called to testify,  
2 there was no affidavits submitted, there was no estate  
3 planning expert testimony to refute that that trust came  
4 into existence. Even the plaintiff's own accountants never  
5 examined the trust document, the trust declaration. They  
6 never examined the trust tax returns. They didn't go out  
7 and ask for a copy of the application for the taxpayer ID  
8 number. They didn't ask for the tax return. They didn't  
9 ask for the transcript of the taxes that were paid. They  
10 proposed to you a chart that Miss Daniello prepared where  
11 she left blanks next to certain dollar amounts in a way to  
12 suggest that David Smith somehow stole money from this  
13 trust. Nothing could be further from the truth. We have  
14 spent nearly three days demonstrating time and time again  
15 every single penny that went into that account by Lynn Smith  
16 on September 1, 2004. Every single penny has been accounted  
17 for. Not by the party who bears the burden of proof, but by  
18 the intervenor. Every penny. Even the \$66,000 that they  
19 take issue with, Mr. Smith, Jeffrey Smith, testified that he  
20 and he alone requested Tom Urbelis to transfer that money to  
21 his mother's account. That was solely the direction of a  
22 beneficiary of the account. It was his right to do it,  
23 unfettered unquestionable right to request a distribution  
24 from the trust. He acknowledged he told Mr. Urbelis it was  
25 for tax purposes. Mr. Urbelis testified in his deposition,

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1 he considered that to mean for the trust tax purposes as had  
2 been the practice every year of the trust existence. No one  
3 has questioned whether or not the trust taxes were paid  
4 other than in this suggestive manner by the SEC. In fact,  
5 Mr. Stoelting stood here a moment ago and conceded that  
6 every penny that was distributed out of that trust account  
7 has been accounted for. It either went to pay its  
8 investment or its capital cash calls to Pine Street Partners  
9 or it was used to pay taxes. He disputes that a portion of  
10 it was used at Jeffrey Smith's decision and in his  
11 discretion to assist his parents. But we heard from  
12 Mr. Smith, his mother didn't know that he was doing that.  
13 His mother didn't ask him to make that distribution. His  
14 father didn't ask him to make that distribution. He and he  
15 alone made that suggestion that he had the ability to  
16 request this money. It was an emergency situation. He knew  
17 his parents did not have available cash. His mother's money  
18 was tied up in equity investments. It is not unreasonable  
19 for him to use money from his trust fund for purposes that  
20 he sees fit.

21                   There has been no response whatsoever from  
22 the plaintiff on any manner in any conceivable way in which  
23 the case at bar can be distinguished from the clear  
24 controlling authority of the Second Circuit in the 2003  
25 decision concerning *Babbitt versus Vebeliunas*.

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1 THE COURT: What about the contention of the  
2 SEC that the trust was formed with ill gotten gains?

3 MS. DUNN: I think that -- even if --

4 THE COURT: Wouldn't that distinguish it from  
5 *Vebeliunas*?

6 MS. DUNN: No, I don't think it would, for  
7 two reasons. One is that the Court can't disregard the  
8 trust form unless there was something illegal in its  
9 creation. There was no evidence, particularly given your  
10 evidentiary ruling concerning a proposed exhibit of the  
11 plaintiff, there was no evidence that there was any  
12 fraudulent conveyance in August 2004.

13 If you look at the plaintiff's complaint --  
14 there's two reasons I say that. If you look at the  
15 plaintiff's complaint, even though the initial investments  
16 were created for those two funds, I believe it was in the  
17 fall of 2003, there's no allegation in the complaint that  
18 any distributions were made of the investors' money. I  
19 believe the first allegation of a distribution was --  
20 there's a phrase, I think it's paragraph 35 of the  
21 complaint, I'm not positive, but it makes a reference to as  
22 early as 2006, is the phrase. So it is impossible on the  
23 evidence and the pleadings before the Court for the SEC to  
24 prove any fraudulent conveyance in 2004, in August 2004.  
25 The only evidence that is before the Court is that Lynn

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1 Smith acquired that stock, all that stock in 1992,  
2 April 1992 was the IPO offering of Albank. Mrs. Smith  
3 acquired 40,000 shares of Albank stock. It's in her  
4 affidavit which she submitted in support of the Intervenor's  
5 motion. She obtained that stock at a purchase of \$400,000.  
6 That \$400,000 was unquestionably drawn from her stock  
7 account in April 1992. A stock account which she originally  
8 inherited from her father in 1969. The fact that that grew,  
9 that stock account grew over that number of years is a  
10 reflection of both the market during that time period and  
11 the performance of the stocks and the investment decisions  
12 that were made. There have been no allegation there was any  
13 fraud whatsoever in 1992. She acquired the Albank stock in  
14 April 1992. She held it for, we know, seven years, because  
15 we heard John D'Aleo's testimony and we have her brokerage  
16 account statement as early as 1999 showing her owning 110  
17 shares of Charter One stock. She testified that that stock  
18 between 1992 and 1999, as a result of mergers and  
19 acquisitions of a local bank from Albank -- Albany Savings  
20 Bank, I believe, originally to Albank to Charter One,  
21 Citizens Bank, it was the same traunch of assets. It was  
22 converted and it grew as a result of mergers and  
23 acquisitions. She didn't lose any of her ownership rights  
24 of that stock at any time between the time she acquired it  
25 in 1992 and 1999. She had it in her account from 1999, and

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1 then in 2004, they do an estate planning. She testified  
2 they were doing estate planning for a number of years.  
3 She's talked about the work they did with Martin Finn.  
4 There was evidence in the record that this particular trust  
5 was created upon the advice of an attorney in Buffalo. This  
6 was not something that, you know, somebody took out a piece  
7 of paper and said I'm putting this stock into a trust for my  
8 children. This is a formal declaration of trust. We've  
9 heard two experienced CPAs testify --

10 THE COURT: Would you have any argument  
11 against the freezing here if this had been created from a  
12 stock account solely in the name of David Smith?

13 MS. DUNN: Well, that's not the circumstances  
14 we have here.

15 THE COURT: I understand.

16 MS. DUNN: I don't know. It would depend on  
17 what time period you're talking about.

18 THE COURT: August 2004.

19 MS. DUNN: In August 2004. There's been no  
20 evidence of any fraud or fraudulent intent in August of  
21 2004. Even in the complaint itself it references as early  
22 as 2006. There is no proof of any fraudulent intent,  
23 there's not even an allegation of any fraudulent acts during  
24 those initial funding of those first two funds that were  
25 created.

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1                   We even heard testimony of a non-party  
2 witness, Timothy Welles, who explained this type of private  
3 placement investments, who said that they can continue  
4 raising money for -- after -- up to a year after the  
5 closing. So even under the best of circumstances, if that  
6 first offering was done in September 2003, we're already in  
7 September 2004 and they could still be raising money. And  
8 there's been no allegation in the complaint by the plaintiff  
9 that any money was distributed or improperly taken at the  
10 moment of the offering or during that one year cycle of the  
11 offering.

12                   So, yes, if that money was David Smith's in  
13 2004, it absolutely belongs to the trustee of this trust as  
14 we stand here today.

15                   The law is clear in the Second Circuit that  
16 you are required to look at New York law before disregarding  
17 the form of the trust. There are several reasons that that  
18 should not be done here. The *Vebeliunas* case -- and I know  
19 I'm slaughtering the name...

20                   THE COURT: Well, one of us is. Probably  
21 both of us.

22                   MS. DUNN: I'm trying. It is, I think, quite  
23 difficulty, if not impossible, to distinguish the facts from  
24 that case from the facts in this case with one exception.  
25 The debtor husband of that case had already been indicted

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1 and may have been convicted of fraud at the time this law  
2 was established. It is very clear that Mrs. Vebeliunas was  
3 the trustee of an irrevocable trust. She purchased the  
4 asset that was in that trust from an inheritance which she  
5 took and grew with investment decisions. She owned the  
6 property. In that case the property was the family  
7 residence. The -- there were no allegations that the trust  
8 was actually used to conceal assets in that. There was no  
9 allegation that the debtor put any assets into the trust.

10 Consistent with the plaintiff's case here,  
11 there is -- the Second Circuit said that there was  
12 insufficient evidence to establish that the consideration  
13 paid was inadequate. In this instance, we heard two  
14 accountants testify that in the creation of this trust,  
15 there were clearly tax benefits created that came into  
16 existence as a result of the creation of the trust.

17 In that case, Judge Pooler took pains to  
18 recognize that New York is not a community property state.  
19 She specifically stated and acknowledged that the debtor  
20 husband managed certain ministerial business matters for the  
21 trustee wife and paid virtually all of the expenses  
22 associated with the irrevocable trust. But, quote, was  
23 never the equitable owner nor in control of the irrevocable  
24 Vart trust because spouses routinely administer each other  
25 assets and conduct business on behalf of one another.

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1                   While I don't represent Mrs. Smith, I am one  
2 of those lady lawyer progressive feminists, and I do think  
3 that the theories advanced by the SEC in this case not only  
4 don't comport with Second Circuit law, they don't comport  
5 with reality in the way people conduct their lives.

6                   New York is not a community property state.  
7 The money that Mrs. Smith used to invest in this trust was  
8 her rightful money. She testified that she -- and it's  
9 never been contradicted, that she believes at all times that  
10 when she transferred that stock into the trust account, she  
11 relinquished all title, ownership, control, beneficial,  
12 equitable, actual, or legal any interest whatsoever in that  
13 stock was gone from her hands the moment she transferred it.  
14 She identified the letter of authorization by which the  
15 transfer was effectuated. We saw that she testified that it  
16 was created for estate planning purposes. David Smith --  
17 there's not one piece of evidence that David Smith has ever  
18 transferred a single penny into this trust. Never. There  
19 was no evidence whatsoever that he owned the Charter One  
20 shares.

21                   THE COURT: What about the \$100,000 of  
22 unreimbursed taxes that he paid? Wasn't that a benefit to  
23 the trust?

24                   MS. DUNN: It may be a benefit to the trust,  
25 but as a donor of the trust, he actually was entitled to

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1 make a contribution to the trust, but ironically didn't make  
2 a contribution to the trust. None of the money that's in  
3 the trust account that's frozen was David Smith's, and he  
4 didn't transfer anything in.

5                   Specifically, in the Second Circuit ruling in  
6 the *Vebeliunas* case, that even in an instance where the  
7 debtor husband in that case paid all of the expenses, every  
8 single expense of the trust in that case was paid by the  
9 debtor husband, even under that set of facts, the Second  
10 Circuit refused to pierce the trust. They considered it  
11 ministerial. David Smith is entitled as a donor to make a  
12 contribution to the trust, which he didn't do. He's  
13 entitled to pay an expense on behalf of the trust. He's  
14 entitled to pay the accountant's fee on the trust if he  
15 chose to do so. That has no bearing on whether or not the  
16 assets in the trust belong to him. It could be construed as  
17 a gift. It could be construed as a mistake. It's very  
18 possible --

19                   THE COURT: It can also be construed as his  
20 property. It's some evidence of a lot of things, depending  
21 on what facts are found.

22                   MS. DUNN: But that property -- that hundred  
23 thousand dollars was not paid into the trust, it was paid to  
24 the taxing authorities.

25                   THE COURT: But the trust realized a hundred



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1 thousand dollar benefit, don't you agree?

2 MS. DUNN: So if David Smith is a creditor of  
3 the trust, then that's a separate issue, but there's not a  
4 penny that came into the trust of that money. At this point  
5 if he's a creditor of the trust and he wants to make a  
6 claim, that's an issue to be decided in New York courts, you  
7 know, perhaps by the receiver. But I wouldn't concede that  
8 point whatsoever. The case law is very clear, he's entitled  
9 to make payments on behalf of the trust. The point is the  
10 trust is this bundle of rights, and if he takes assets over  
11 here and sends them over here to the IRS and the Tax and  
12 Finance, nobody has penetrated that trust. Nor should this  
13 Court.

14 You discussed with Mr. Stoelting this issue  
15 of beneficial owner and equitable owner. And I don't think  
16 he's drawing a distinction, and I don't know that the case  
17 law does. I don't think that it matters. Because in this  
18 case, very clearly, the trust is the record owner of the  
19 brokerage account. And its clear under case law that the  
20 trustee is the equitable owner of the trust assets. In that  
21 regard, we've heard under -- examination by the plaintiff's  
22 attorneys, suggestions have been made and characterizations  
23 were made in its memo of law painting Mr. Urbelis as a  
24 figure head and characterizing him as confused, saying he  
25 didn't care. This man is an engineer, he's got an MBA, he's

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**TRUSTEE CLOSING STATEMENT - DUNN**

1 got a law degree, he's been a lawyer in Boston for almost  
2 30, probably 35, 40 years. He understands fiduciary duties.  
3 I urge you to read his deposition transcript. He took pains  
4 to explain to Miss Mehraban during his deposition that he  
5 understood exactly what his duties were. He understood that  
6 David Smith didn't have the authority to transfer money in  
7 and out of this account. It was not going to be treated in  
8 the ordinary sense. He took pains to explain that he's on  
9 the board of a charitable organization where their  
10 investment advisor has authority to make trades on the  
11 account and produces a report once a year. He knew that  
12 wasn't going to be the case here. And the SEC is the only  
13 party we've heard from who's ever disregarded that form.  
14 Every single witness, including every single SEC witness,  
15 took the stand and testified that there are just reams of  
16 information, reams of paper showing that Tom Urbelis  
17 authorized every single transaction out of that account.  
18 Every penny. Money to Pine Street Capital Partners, every  
19 transfer into David or Lynn Smith's checking accounts which  
20 we tied were payments to pay the taxes, every penny that was  
21 accounted for, every penny in the trust account was  
22 authorized by Tom Urbelis. There's been no testimony or  
23 suggestion that those weren't his signatures. He  
24 authenticated his signature. His deposition, which he  
25 voluntarily came here to do the day after Memorial Day, when

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1 he was not under the subpoena power of this Court, as a  
2 resident of the State of Massachusetts, he volunteered to  
3 come here and lay out exactly what he did, his relationship  
4 with the Smith family over the past 50, 55 years, how he's  
5 familiar with the children, he's familiar with their needs,  
6 he is familiar with his fiduciary duty. Ironically, one of  
7 the suggestions that the Court should take note of that the  
8 plaintiff made was that the payments, the transfers of large  
9 amounts of money in the years from 2005 forward to pay the  
10 trust taxes, that they were suspect in some way because  
11 those amounts varied year by year. That argument is  
12 ludicrous.

13 THE COURT: I understand your position on  
14 that. And I don't believe I need to hear anything else.

15 MS. DUNN: All right. Thank you.

16 The other point that they're making is that  
17 Mr. Stoelting has said -- has characterized Mr. Urbelis as a  
18 signature. And that's important for a couple of reasons.  
19 First of all, he's characterizing him as a mere signature,  
20 but he's disregarding Mr. Urbelis' testimony where he went  
21 to lengths to describe that not only was this trust invested  
22 upon his decision through McGinn, Smith, but his personal  
23 accounts, David Smith was his personal broker, his wife's  
24 broker, he's got IRAs invested, and he's the trustee of  
25 other Urbelis family trusts that were also handled by

**TRUSTEE CLOSING STATEMENT - DUNN**

1 McGinn, Smith. He talked to David Smith all the time about  
2 various investment decisions. He testified that they had  
3 conversations about his investments. Dave would call him up  
4 and make a recommendation about an investment. They would  
5 have a conversation about the investment. There's  
6 documentation in the record that shows Patty Sicluna from  
7 McGinn, Smith writing a letter to Mr. Urbelis and separating  
8 out each of the different investment decisions that he had  
9 made when he decided to invest in Pine Street Capital  
10 Partners. He made that decision with respect to this trust,  
11 another trust he's the trustee of, his personal account, his  
12 wife's account. All of those things demonstrated that he  
13 had conversations. He testified in his deposition that at  
14 any time he had questions about documents, he would have a  
15 conversation with David Smith about these investments, he  
16 would make a decision about the investment authorize it, and  
17 then the staff at McGinn, Smith would send him the paperwork  
18 that was required to sign. So it's somewhat misleading to  
19 suggest that somebody just put a piece of paper in front of  
20 him and he signed just a signature page and faxed it back.  
21 There's ample evidence that that is not what happened.

22                   There was also testimony by Mr. Urbelis that  
23 at times he would get paperwork and he would recall other  
24 paperwork he had signed and sometimes that was confusing and  
25 he would make a call to say well, what is this about? And

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**TRUSTEE CLOSING STATEMENT - DUNN**

1 he said Dave always answered his questions, always returned  
2 his calls, they always had these conversations.

3           The SEC's witness Brian McQuade took the  
4 stand and said he had several conversations with Mr. Urbelis  
5 concerning paperwork. Importantly, Mr. McQuade also stated  
6 he never kept -- never even saw any kind of pre-signed  
7 letter of authorization from Mr. Urbelis. He also testified  
8 on direct examination by the SEC's counsel that David Smith  
9 very rarely gave him direction concerning this irrevocable  
10 trust account.

11           The bottom line is I would be concerned if  
12 there was no signatures, if there were no documentary  
13 evidence from Tom Urbelis authorizing all of these  
14 transactions. It's ironic that the SEC wants to have it  
15 both ways. On the one hand they want to disregard the form  
16 of this trust, when everybody else involved in it well  
17 before anybody knew of this action, everybody regarded the  
18 form of the trust. Every formality was follow every step of  
19 the way. All of the signatures that were required were  
20 obtained. And the trustee has never contradicted any of  
21 that. He answered every single question Miss Mehraban put  
22 to him. He travelled here voluntarily to offer that  
23 testimony to the SEC at their request on very short notice  
24 because of the time frame we had in this litigation. There  
25 is no evidence whatsoever that anybody other than Tom

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**TRUSTEE CLOSING STATEMENT - DUNN**

1 Urbelis, as the trustee, was the equitable owner of this  
2 property. He was the record owner of the brokerage account  
3 and the equitable owner of the assets.

4                   Lastly, on this issue of relief defendant  
5 versus beneficial owner, I started in my remarks with the  
6 comment that I still don't know the theory of relief that's  
7 being advanced against this trust. I asked in my papers, is  
8 it relief defendant or is it this alter ego theory? And at  
9 times, in the plaintiff's response, they sometimes want to  
10 treat it as a relief defendant because under their  
11 understanding of that law, they think they can capture any  
12 assets up to the amount claimed in the complaint. Which I  
13 submit to you is incorrect. I think there's an absolute  
14 obligation to identify the specific ill gotten gains, which  
15 none can be identified for, with respect to this trust  
16 whatsoever. So faced with the inability to identify any  
17 penny transferred into this trust account by David Smith or  
18 any other named defendant, save Lynn Smith of the official  
19 funding, the SEC then substitutes a theory and says oh,  
20 well, he had beneficial control and domination over this  
21 account.

22                   THE COURT: Is it your position that strict  
23 tracing is required?

24                   MS. DUNN: No, I don't think strict tracing  
25 is required. I think strict sourcing is required. And I

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1 think there's a very clear distinction. I understand from  
2 my criminal practice the whole concept of seizure of assets  
3 and the fact that prosecutors and plaintiffs can acquire  
4 substitute assets on a disgorgement argument. But that's an  
5 instance where you have a stash of money that is used to buy  
6 a boat and of course you can get back the equivalent value  
7 of that money. But in this instance, you -- they have to  
8 prove that there was some ill gotten gain and they have to  
9 identify the amount of the ill gotten gain.

10                   Sourcing, on the other hand, is identifying,  
11 in fact, that it is ill gotten in the first instance and  
12 identifying the amount of money when it came in and where it  
13 came from. If that money has left the hand of the relief  
14 defendant, they can then invoke the substitute assets or  
15 anti-tracing argument and get to it that way. And I don't  
16 dispute that that is the applicable law here. But in this  
17 instance they don't seem to be willing to do that. They  
18 want to advance this argument that David Smith had some kind  
19 of Svengali like control over all accounts that ever existed  
20 in McGinn, Smith. And I think it's disingenuous that to  
21 argue that a stockbroker who's managing an account, how he  
22 manages hundreds if not thousands of accounts, somehow  
23 acquires beneficial ownership of that account. There's been  
24 no proof in the record. There are no material facts in  
25 dispute as I stand here at this moment concerning David and

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**TRUSTEE CLOSING STATEMENT - DUNN**

1 Lynn Smith irrevocable trust that could prevent you from  
2 ruling right from the bench right now. There's simply no  
3 proof. They've acknowledged that every penny that came out  
4 of the account has been traced to either Pine Street Capital  
5 Partners, a legitimate investment that everybody let out of  
6 the case on Wednesday, and payments to taxes.

7 THE COURT: Well, that's the second reference  
8 to letting them out of the case.

9 MS. DUNN: I'm sorry. (crosstalk.)

10 THE COURT: The conditions --

11 MS. DUNN: Relieving them from the --

12 THE COURT: The conditions under which they  
13 were relieved were extremely restrictive.

14 MS. DUNN: I understand.

15 THE COURT: You make it sound like they  
16 walked away free and clear.

17 MS. DUNN: I understand that.

18 THE COURT: They didn't.

19 MS. DUNN: But on his argument, Mr. Stoelting  
20 acknowledged that Pine Street Partners is a good investment  
21 it's a sound investment. And you know --

22 THE COURT: Sounded pretty good to me.

23 MS. DUNN: Well, I would agree. I'm sure Tim  
24 Welles would be happy to hear that.

25 So, in any event, your Honor, just in

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**TRUSTEE CLOSING STATEMENT - DUNN**

1 conclusion, there is simply no one other than the SEC who  
2 has ever disregarded the form of this trust. There was no  
3 fraud in its creation. There's -- it has never been used to  
4 conceal assets. Even under a liberal construction of the  
5 complaint, there's nothing in the complaint to suggest that  
6 any money was distributed from those early investment funds  
7 that were created less than a year before this trust was  
8 created. This is money that belongs to Jeff and Lauren  
9 Smith. They're entitled to it. They should be released and  
10 the account should be released immediately from the asset  
11 freeze order. And I would submit that, while I do reserve  
12 the right to respond to anything the SEC submits concerning  
13 a negative inference to be drawn, even if you were to decide  
14 today to draw that negative inference, the weight of the  
15 inference, aside from the admissibility, the weight of the  
16 inference has clearly been rebutted, not just by the  
17 evidence and testimony I've offered, but by every witness  
18 the SEC offered that I cross-examined and every document  
19 that is in evidence supports the fact that this is a trust,  
20 a trust is a trust. All of the case law I've submitted  
21 indicates and supports, this is clearly, under Second  
22 Circuit and New York State law it's a trust, it cannot be  
23 disregarded and should be released from the asset freeze  
24 order.

25 THE COURT: Thank you.

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1 MS. DUNN: Thank you.

2 THE COURT: Anything else? Mr. Koenig?

3 MR. KOENIG: Nothing, sir.

4 THE COURT: All right.

5 MR. BROWN: Your Honor. William Brown.

6 THE COURT: Yes.

7 MR. BROWN: May I be heard?

8 THE COURT: Yes.

9 MR. BROWN: Your Honor, since your Honor is  
10 reserving, understandably, decision today, there is the  
11 matter that the proposed preliminary injunction order expand  
12 slightly the receiver's powers. The current TRO does not  
13 have a power for the receiver to commence any litigation. I  
14 presently have the need to commence one because of  
15 continuing passage of statute of limitations. Clause 17-I  
16 of the TRO allows the Court to take such action as it deems  
17 equitable, just, and appropriate under the circumstances  
18 upon proper application of the receiver to allow for other  
19 powers to the receiver during the gap period.

20 The proposed preliminary injunction grants  
21 that power to the receiver. And I am requesting the court,  
22 and I do have the consent of all the parties present, to  
23 allow the receiver to commence litigation for the recovery  
24 of assets.

25 THE COURT: Does your consent include David

**BONNIE J. BUCKLEY, RPR, CRR**  
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1 Smith and Timothy McGinn?

2 MR. BROWN: Yes. Because the consent was --

3 THE COURT: Mr. Koenig has consented?

4 MR. BROWN: He has.

5 MR. KOENIG: Yes, sir.

6 THE COURT: Any objection from any party?

7 There being no objection, I will grant your  
8 request. Do you need something in writing?

9 MR. BROWN: I don't believe so, your Honor.  
10 I'm satisfied with you can so order the record.

11 THE COURT: Your request is granted.

12 MR. BROWN: Thank you. One other thing, your  
13 Honor, and only because it was mentioned to me by one of the  
14 parties. The preliminary injunction, which is important to  
15 the receiver -- or pardon me -- the temporary restraining  
16 order, that's important to the receiver, with respect to the  
17 non-disposition of assets and the like, and the other  
18 remedies, one counsel informally took the position with me  
19 that that might expire today because the preliminary  
20 injunction here has commenced, and may conclude.

21 THE COURT: Any party want to be heard on  
22 that?

23 MR. STOELTING: Well, it's certainly not our  
24 position. Clearly, the temporary restraining order is in  
25 effect.

1 MR. FEATHERSTONHAUGH: It's certainly not my  
2 position, your Honor.

3 THE COURT: Miss Dunn?

4 MS. DUNN: I suggested it to Mr. Brown in a  
5 casual conversation. I think that's what the statute says,  
6 but we're not going to be going out transferring any assets.  
7 Obviously, you know, the hearing continues until the Court  
8 makes its final rulings on this issue on negative inference,  
9 in any event, so I don't raise that at this point.

10 THE COURT: Mr. Koenig?

11 MR. KOENIG: Your Honor, we've entered into  
12 the consent order so -- I don't know whether the Court has  
13 signed that yet or not. But we certainly have no objection  
14 to the TRO remaining in effect until such time as you sign  
15 and enter the consent order.

16 THE COURT: My view is that it continues  
17 until decision on the motion for preliminary injunction as  
18 well. If anybody party seeks relief from that, they can  
19 make a motion.

20 All right. Anything else?

21 All right. Decision is reserved. Thank you  
22 very much.

23 THE CLERK: Court stands in recess.

24 (Court adjourned at 3:20 PM.)

25

\* \* \* \* \*

C E R T I F I C A T I O N

I, BONNIE J. BUCKLEY, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

---

BONNIE J. BUCKLEY, RPR, CRR

US Court Reporter - NDNY

DATED: JUNE 24, 2010

**BONNIE J. BUCKLEY, RPR, CRR**  
**UNITED STATES COURT REPORTER - NDNY**

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March 23, 2009

David L. & Lynn A. Smith  
REDACTED

Saratoga Springs, New York 12866

We have reviewed the accompanying statement of financial condition of David L. and Lynn A. Smith as of December 31, 2007, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. All information included in this financial statement is the representation of David L. and Lynn A. Smith.

A review of personal financial statements consists principally of inquiries of the individuals whose financial statements are presented and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our review, with the exception of the matters described in the following paragraphs, we are not aware of any material modifications that should be made to the accompanying statement of financial condition in order for it to be in conformity with generally accepted accounting principles.

Generally accepted accounting principles require that personal financial statements include a provision for estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases. The accompanying statement of financial condition does not include such a provision, and the effect of this departure from generally accepted accounting principles has not been determined.

**DAVID L. AND LYNN A. SMITH**

**STATEMENT OF FINANCIAL CONDITION  
DECEMBER 31, 2007**

**ASSETS**

Cash and Cash Equivalents	\$ 4,915,000
Marketable Securities	1,502,000
Cash Value – Life Insurance	140,000
Retirement Plan Accounts	297,000
Business Interests:	
McGinn, Smith & Co., Inc. – 50% Ownership Interest	1,000,000
Mr. Cranberry, LLC – 10% Ownership Interest	493,000
Residence – Saratoga Springs, New York	1,000,000
Real Estate – Vero Beach, Florida	2,400,000
Real Estate – Lake Front Adirondack Park	700,000
Loans Receivable	1,299,000
Other Investments	<u>1,011,000</u>
	<b>\$ <u>14,757,000</u></b>

**LIABILITIES AND NET WORTH**

Liabilities	
Mortgage Debt – Saratoga Springs, New York	\$ 465,000
Mortgage Debt – Vera Beach, Florida	<u>913,000</u>
	1,378,000
Net Worth	<u>13,379,000</u>
	<b>\$ <u>14,757,000</u></b>

**SEE ACCOUNTANTS' REVIEW REPORT**

**DAVID L. AND LYNN A. SMITH**

**NOTES TO STATEMENT OF FINANCIAL CONDITION  
DECEMBER 31, 2007**

**NOTE A – BASIS OF ACCOUNTING**

The accompanying statement of financial condition include the assets and liabilities of David L. and Lynn A. Smith. Assets are stated at their estimated current values and liabilities at their estimated current amounts.

**NOTE B – OWNERSHIP OF ASSETS**

The accompanying statement of financial condition includes assets registered in various forms of ownership, summarized as follows:

David L. Smith – Individual	\$ 2,628,000
Lynn A. Smith – Individual	2,726,000
David L. Smith and Lynn A. Smith – Joint	4,100,000
David L. and Lynn A. Smith – Irrevocable Trust U/A 8/4/04	4,453,000
David L. Smith Lifetime QTIP Trust U/A 1/19/07	553,000
David L. Smith – Retirement Accounts	273,000
Lynn A. Smith – Retirement Accounts	<u>24,000</u>
	<u>\$ 14,757,000</u>

**NOTE C – MARKETABLE SECURITIES**

The estimated current values of marketable securities are valued at either their quoted closing prices or, for securities not traded on the financial statement date, amounts that fall within the range of quoted bid and asked prices. Marketable securities consist of the following:

Bristol Myers Squibb – 2,000 Shares	\$ 53,000
Citigroup, Inc. – 25,000 Shares	736,000
Deerfield Capital Corp. – 42,800 Shares	342,000
General Electric Co. – 10,000 Shares	<u>371,000</u>
	<u>\$ 1,502,000</u>

**SEE ACCOUNTANTS' REVIEW REPORT**



**DAVID L. AND LYNN A. SMITH**

**NOTES TO STATEMENT OF FINANCIAL CONDITION  
DECEMBER 31, 2007**

**NOTE D – CASH VALUE – LIFE INSURANCE**

At December 31, 2007, David L. Smith owned a \$350,000 whole life insurance policy which had a guaranteed cash surrender value of \$140,000.

**NOTE E – RETIREMENT PLAN ACCOUNTS**

Retirement plan assets are valued at their estimated current value of the underlying securities, and are summarized as follows:

McGinn, Smith & Co., Inc. Retirement	
Plan FBO David L. Smith	\$ 235,000
David L. Smith IRA	38,000
Lynn A. Smith IRA	<u>24,000</u>
	\$ <u>297,000</u>

**NOTE F – BUSINESS INTERESTS**

David L. Smith owns a 50% interest in McGinn, Smith & Co., Inc. and a 10% interest in Mr. Cranberry, LLC, which are valued at their estimated current value. Generally accepted accounting principles require that summarized financial information of a closely held business be presented whenever an individual has a material investment in such a business. Mr. Smith has informed us that the accompanying statement of financial condition omits this disclosure for their investment in closely held businesses because such information is not readily available.

**NOTE G – RESIDENCE AND REAL ESTATE**

The estimated current value of the residence and other real estate (jointly owned) is based on recent comparable sales of similar properties.

**SEE ACCOUNTANTS' REVIEW REPORT**

**DAVID L. AND LYNN A. SMITH**

**NOTES TO STATEMENT OF FINANCIAL CONDITION  
DECEMBER 31, 2007**

**NOTE H – LOANS RECEIVABLE**

David L. and Lynn A. Smith have various loans receivables from various individuals and business entities, which generally bear interest at market rates. David L. and Lynn A. Smith believe all loans are fully collectible.

**NOTE I – OTHER INVESTMENTS**

Other investments consist of not readily marketable investments and are valued at estimated amounts determined by the owners, summarized as follows:

Pine Street Capital Partners:	
Notes Receivable	\$ 434,000
Partnership Interests – At Equity	352,000
C-Met Financial Holdings – 15,000 Shares	150,000
McGinn Smith Preferred Stock	<u>75,000</u>
	<u>\$ 1,011,000</u>

**NOTE J – MORTGAGE DEBT**

Mortgage debt consists of the following at December 31, 2007:

Mortgage on jointly owned residence in Saratoga Springs, New York requiring monthly payments of \$4,667 including interest at 4.75%.	\$ 465,000
Mortgage on jointly owned real estate in Vera Beach, Florida, requiring monthly payments of \$6,188 including interest at 6.25%.	<u>913,000</u>
	<u>\$ 1,378,000</u>

**SEE ACCOUNTANTS' REVIEW REPORT**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

10 Civ. 457  
(GLS/DRH)

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

*Defendants, and*

LYNN A. SMITH,

*Relief Defendant.*

---

**SUPPLEMENTAL DECLARATION OF ROSEANN DANIELLO**

I, Roseann Daniello, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I submit this declaration in further support of the plaintiff Securities and Exchange Commission's motion for a preliminary injunction, and to supplement my declaration dated April 19, 2010.
2. I have reviewed bank and brokerage records for the following accounts:

<b>Account Name</b>	<b>Institution</b>	<b>Statements Reviewed</b>	
David L. and Lynn A. Smith Irrevocable Trust	Bear Stearns/NFS/RMR Capital Management	October 2004 to April 2010	"Trust Account"
Lynn A. Smith	NFS/ RMR Capital Management	December 2005 to April 2010	"Stock Account"
Lynn A. Smith	NFS/ RMR Capital Management	January 2006 to April 2010	"IRA Account"
Lynn A. Smith	Bank of America	July 2009 to April 2010	"Checking Account"

3. Attached as Exhibit 1 is a chart showing the transfers in and out of the Trust Account.

4. Attached as Exhibit 2 is a chart showing the transfers in and out of the Stock Account.

5. Attached as Exhibit 3 is a chart showing the transfers in and out of the Checking Account.

6. Attached as Exhibit 4 is a chart showing the transfers in and out of the IRA Account.

7. The reference to David Smith on the attached exhibits refers to accounts David Smith had at M&T Bank and NFS.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 2, 2010  
New York, New York

  
Roseann Daniello

## DEPOSITS AND WITHDRAWALS FROM THE DAVID AND LYNN SMITH IRREV. TRUST ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	DEPOSITS	WITHDRAWALS	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
12/27/2004	Wire Transfer	Pine Street Capital Partners		(100,000.00)	To purchase Pine Street Capital Partners
4/1/2005	Deposit	Oube St Capital PTNS 00 BS M&T BK PSCP Interest	2,100.00		Oube St Capital PTNS 00 BS M&T BK PSCP Interest
4/11/2005	Wire Transfer	Pine Street Capital Partners		(300,000.00)	Pine Street Capital Partners, 30% Capital Commitment
4/18/2005	Check Paid	David Smith		(2,300.00)	
6/30/2005	Deposit	Pine Street Capital Partners	8,250.00		PSCP Int. Pine St Cap Prt 00 BS D Smith & Lynn M&T
10/4/2005	Deposit	Pine Street Capital Partners	9,000.00		Pine St Cap Ptm LP 00 BS FBO DL Smith M&T BK PSCP INT a/o 10/3
12/30/2005	Check Rec'd		9,000.00		PSCP Int
3/31/2006	Check Rec'd		9,000.00		PSCP Int
4/18/2006	Wire Transfer	David Smith		(92,105.00)	PSCP Int
6/30/2006	Check Rec'd		9,000.00		PSCP Int
6/30/2006	Check Paid			(83,830.00)	
9/29/2006	Check Rec'd		9,000.00		PSCP Int
12/20/2006	Wire Transfer	Pine Street Capital Partners		(129,678.00)	55,576 Sept 2006 Call - 74,102 Dec 2006
12/29/2006	Check Rec'd		9,000.00		PSCP Int
3/30/2007	Check Rec'd		9,000.00		Pine St Int
6/29/2007	Check Rec'd		8,163.26		Pine St Int
9/25/2007	Check Rec'd		18,594.26		PSCP Dist
10/1/2007	Check Rec'd		7,326.52		PSCP Int
12/31/2007	Check Rec'd		7,326.52		PSCP Int
3/31/2008	Check Rec'd		7,326.52		PSCP Int
3/31/2008	Check Rec'd		25,793.27		PSCP Int
3/31/2008	Check Rec'd		55,782.82		PSCP Prin
4/15/2008	Wire Transfer	David Smith		(110,636.00)	
6/30/2008	Check Rec'd		6,071.40		PSCP Int
9/30/2008	Check Rec'd		6,071.40		PSCP Int
12/31/2008	Check Rec'd		5,429.90		Pine St Int
1/16/2009	Check Rec'd		27,891.00		Pine St Rtn Invd Cap
1/16/2009	Check Rec'd		74,377.00		Pine Street Prin
4/13/2009	Check Paid			(32,987.00)	
4/13/2009	Check Paid			(8,570.00)	
4/15/2010	Wire Transfer	Smith, Lynn		(95,000.00)	

## TRANSFERS TO AND FROM THE STOCK ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	FUNDS FROM LYNN SMITH	FUNDS TO LYNN SMITH	LYNN SMITH'S ACCOUNT	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
9/3/2004	Transfer	David Smith	(\$5,000)		Stock Account	
10/8/2004	Transfer	David Smith	(\$10,000)		Stock Account	
12/27/2004	Transfer	David Smith	(\$30,000)		Stock Account	
4/13/2005	Transfer	David Smith	(\$50,000)		Stock Account	
1/12/2006	Check received	David Smith		\$10,000.00	Stock Account	
1/12/2006	Check received			\$6,301.00	Stock Account	
2/6/2006	Check received			\$4,246.58	Stock Account	
2/13/2006	Transfer	ExchangeBld.com	(\$200,000)		Stock Account	
2/17/2006	Check paid		(\$15,000)		Stock Account	
3/3/2006	Transfer	McGinn Smith & Company		\$20,000.00	Stock Account	
3/7/2006	Check paid		(\$10,000)		Stock Account	
3/27/2006	Check paid		(\$15,000)		Stock Account	
4/12/2006	Transfer	David Smith	(\$17,000)		Stock Account	
5/26/2006	Transfer	David Smith	(\$15,000)		Stock Account	
6/22/2006	Transfer	David Smith	(\$10,000)		Stock Account	
9/1/2006	Check paid		(\$20,000)		Stock Account	
9/25/2006	Transfer	David Smith	(\$15,000)		Stock Account	
10/4/2006	Check received	McGinn, Timothy		\$85,000.00	Stock Account	
12/27/2006	Check paid		(\$15,700)		Stock Account	

Exhibit 2

## TRANSFERS TO AND FROM THE STOCK ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	FUNDS FROM LYNN SMITH	FUNDS TO LYNN SMITH	LYNN SMITH'S ACCOUNT	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
12/27/2006	Check paid		(\$10,350)		Stock Account	
1/10/2007	Check received			\$26,000.00	Stock Account	
5/14/2007	Check received	McGinn, Timothy		\$100,000.00	Stock Account	
5/14/2007	Check received			\$4,200.00	Stock Account	
7/30/2007	Transfer	McGinn Smith Holdings LLC	(\$150,000)		Stock Account	
11/29/2007	Transfer	McGinn Smith Funding LLC	(\$375,000)		Stock Account	
12/20/2007	Check received	David Smith		\$380,000.00	Stock Account	
12/27/2007	Transfer	David Smith	(\$80,450)		Stock Account	
3/10/2008	Transfer	M&S Partners	(\$200,000)		Stock Account	
4/15/2008	Transfer	Smith, Lynn IRA	(\$5,000)		Stock Account	
4/15/2008	Transfer	David Smith	(\$5,000)		Stock Account	
4/15/2008	Transfer	Smith, Geoffrey Roth IRA	(\$4,000)		Stock Account	
4/15/2008	Transfer	Smith, Lauren Roth IRA	(\$4,000)		Stock Account	
7/8/2008	Transfer	David Smith	(\$20,000)		Stock Account	
8/4/2008	Transfer	David Smith	(\$20,000)		Stock Account	
11/6/2008	Transfer	David & Lynn Smith		\$560.10	Stock Account	
12/9/2008	Transfer	McGinn Smith Advisors LLC	(\$554,437)		Stock Account	To subscribe for 754,996 Pine Street Capital Partners LLC
12/24/2008	Transfer	McGinn Smith Advisors LLC	(\$683,157)		Stock Account	
12/29/2008	Transfer	McGinn Smith & Company	(\$100,000)		Stock Account	

## TRANSFERS TO AND FROM THE STOCK ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	FUNDS FROM LYNN SMITH	FUNDS TO LYNN SMITH	LYNN SMITH'S ACCOUNT	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
1/16/2009	Check received	Pine St Prin		\$166,020.00	Stock Account	
1/16/2009	Check received	Pine St Rln Invd Cap		\$62,257.00	Stock Account	
2/4/2009	Transfer	Capital Center Credit Corp.		\$38,430.46	Stock Account	
2/20/2009	Transfer	David Smith	(\$15,000)		Stock Account	
2/20/2009	Transfer	David Smith		\$326,304.11	Stock Account	
3/11/2009	Transfer	David Smith	(\$10,000)		Stock Account	
4/6/2009	Transfer	David Smith	(\$12,000)		Stock Account	
4/30/2009	Transfer	David Smith	(\$100,000)		Stock Account	
5/6/2009	Transfer	David Smith	(\$15,000)		Stock Account	
6/5/2009	Transfer	R Community Services LLC	(\$50,000)		Stock Account	
6/5/2009	Transfer	Shuts & Bowen LLP Escrow	(\$316,000)		Stock Account	
6/9/2009	Transfer	David Smith	(\$10,000)		Stock Account	
6/10/2009	Transfer	TDDMM Cable Funding		\$160,800.00	Stock Account	
7/30/2009	Transfer	TDDMM Cable Jr. Trust 09		\$175,000.00	Stock Account	
8/5/2009	Transfer	David Smith	(\$10,000)		Stock Account	
8/19/2009	Transfer	Mobile Search Security LLC	(\$50,000)		Stock Account	
10/27/2009	Transfer	David Smith	(\$40,000)		Stock Account	
10/30/2009	Transfer	TDDMM Benchmark Trust 09	(\$300,000)		Stock Account	
11/13/2009	Transfer	Smith, Lynn	(\$15,000)		Stock Account	



## TRANSFERS TO AND FROM THE STOCK ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	FUNDS FROM LYNN SMITH	FUNDS TO LYNN SMITH	LYNN SMITH'S ACCOUNT	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
11/16/2009	Transfer	David Smith	(\$40,000)		Stock Account	
12/4/2009	Transfer	David Smith	(\$25,000)		Stock Account	
12/11/2009	Transfer	McGinn, Timothy	(\$15,000)		Stock Account	
12/28/2009	Transfer	David Smith	(\$35,000)		Stock Account	
1/5/2010	Check received			\$525.00	Stock Account	
1/5/2010	Check received			\$708.33	Stock Account	
1/5/2010	Check received			\$1,329.17	Stock Account	
1/29/2010	Transfer	David Smith	(\$25,000)		Stock Account	
2/16/2010	Transfer	Smith, Lynn	(\$20,000)		Stock Account	
3/16/2010	Transfer	TDMM Cable Funding	(\$100,000)		Stock Account	
3/18/2010	Transfer	McGinn Smith Funding LLC	(\$20,000)		Stock Account	
3/18/2010	Transfer	TDMM Cable Funding		\$100,000.00	Stock Account	
3/25/2010	Transfer	Smith, Lynn	(\$25,000)		Stock Account	
4/5/2010	Transfer	McGinn Smith Firstline Funding LLC	(\$300,000)		Stock Account	

## TRANSFERS TO AND FROM THE CHECKING ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	FUNDS FROM LYNN SMITH	FUNDS TO LYNN SMITH	LYNN SMITH'S ACCOUNT	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
7/1/2009	Check	David & Lynn Smith		\$250.00	Checking Account	
7/15/09	Check paid	McGinn Smith Payroll, David Smith		\$7,896.60	Checking Account	
8/3/2009	Transfer	McGinn Smith Payroll, David Smith		\$7,896.60	Checking Account	
8/14/2009	Transfer	McGinn Smith Payroll, David Smith		\$7,896.60	Checking Account	
9/2/2009	Transfer	McGinn Smith Payroll, David Smith		\$7,896.60	Checking Account	
9/15/2009	Transfer	McGinn Smith Payroll, David Smith		\$8,234.85	Checking Account	
10/2/2009	Transfer	McGinn Smith Payroll, David Smith		\$8,888.56	Checking Account	
10/15/2009	Transfer	McGinn Smith Payroll, David Smith		\$8,888.56	Checking Account	
10/28/2009	Check	David Smith		\$4,000.00	Checking Account	
11/5/2009	Transfer	McGinn Smith Payroll, David Smith		\$8,888.56	Checking Account	
11/13/2009	Transfer	Smith, Lynn		\$15,000.00	Checking Account	
11/18/2009	Check	David Smith		\$200.00	Checking Account	
12/4/2009	Check	David Smith		\$2,000.00	Checking Account	
12/7/2009	Check	David Smith		\$2,500.00	Checking Account	
12/17/2009	Transfer	McGinn Smith Payroll, David Smith		\$8,888.56	Checking Account	
12/31/2009	Transfer	McGinn Smith Payroll, David Smith		\$8,888.56	Checking Account	
1/12/2010	Transfer	McGinn Smith Advisors LLC		\$5,000.00	Checking Account	
1/13/2010	Check	McGinn Smith Advisors LLC	(\$5,000)		Checking Account	
1/15/2010	Transfer	McGinn Smith Payroll, David Smith		\$6,775.38	Checking Account	

## TRANSFERS TO AND FROM THE CHECKING ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	FUNDS FROM LYNN SMITH	FUNDS TO LYNN SMITH	LYNN SMITH'S ACCOUNT	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
1/29/2010	Transfer	McGinn Smith Payroll, David Smith		\$6,775.39	Checking Account	
2/16/2010	Transfer	Smith, Lynn		\$20,000.00	Checking Account	
2/16/2010	Transfer	McGinn Smith Payroll, David Smith		\$6,775.38	Checking Account	
3/2/2010	Transfer	McGinn Smith Payroll, David Smith		\$6,775.39	Checking Account	
3/25/2010	Transfer	Smith, Lynn		\$25,000.00	Checking Account	
4/8/2010	Transfer	McGinn Smith Payroll, David Smith		\$17,731.08	Checking Account	

## TRANSFERS TO AND FROM THE IRA ACCOUNT

DATE	TRANSACTION TYPE	PAYEE ACCOUNT / SOURCE ACCOUNT	FUNDS FROM LYNN SMITH	FUNDS TO LYNN SMITH	LYNN SMITH'S ACCOUNT	DESCRIPTION FROM ACCOUNT STATEMENTS OR WIRE TRANSFER RECORDS
4/13/2006	Check received	David Smith		\$4,500.00	IRA Account	Cash Contribution prior yr IRA
4/9/2007	Check received	David Smith		\$5,000.00	IRA Account	Cash Contribution prior yr IRA

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

-----X  
:  
**SECURITIES AND EXCHANGE COMMISSION,** :

**Plaintiff,** :

**- against-** :

**MCGINN, SMITH & CO., INC., et al.,** :

**Defendants.** :  
-----X

**: 10 CV 457 (GLS/DRH)**

**PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS  
TO DEFENDANTS TIMOTHY MCGINN AND DAVID SMITH**

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, plaintiff Securities and Exchange Commission requests that defendants David Smith and Timothy McGinn answer the following Requests for Admissions in writing and under oath within thirty (30) days of the date of these Requests.

Pursuant to Federal Rule of Civil Procedure 36(a)(4): "If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny."

## **DEFINITIONS AND INSTRUCTIONS**

1. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Requests all responses that might otherwise be construed to be outside the scope of the Requests.
2. The use of the singular form of any word includes the plural and vice versa.
3. The terms “any” and “all” shall be construed to mean “any and all.”
4. “Concerning” shall mean relating to, referring to, regarding, describing, evidencing or constituting.
5. The term “communication” means the transmittal of information, in the form of facts, ideas, inquiries or otherwise.
6. “D. Smith” shall mean defendant David L. Smith and any person or entity acting on his behalf.
7. “T. McGinn” shall mean defendant Timothy McGinn and any person or entity acting on his behalf.
8. “MS & Co.” shall mean the entity McGinn, Smith & Co., Inc.
9. “MS Advisors” shall mean the entity McGinn Smith Advisors, LLC.
10. “MS Capital” shall mean the entity McGinn, Smith Capital Holdings Corp.
11. “FINN”, “FEIN”, FAIN” and “TAIN” shall mean First Independent Income Notes, LLC; First Excelsior Income Notes, LLC; First Albany Income Notes, LLC; and Third Albany Income Notes, LLC, respectively.
12. “Funds” shall mean FIIN, FEIN, FAIN and TAIN.

13. “Trusts” or “Trust Offerings” shall mean the offerings known as Firstline Jr. and Sr. Trusts 07 offerings; Firstline Jr. and Sr. Trust 07 Series B offerings; TDM Cable Trust 06, TDM Luxury Cruise Trust 07, TDM Verifier Trust 07, TDM Verifier Trust 08, Cruise Charter Venture Trust 08, Fortress Trust 08, Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08; TDM Verifier Trust 09; TDMM Benchmark Trust 09, TDMM Cable Jr. and Sr. Trusts 09, TDM Verifier Trust 07R; and TDM Verifier Trust 08R and McGinn Smith Transaction Funding Corp.

14. These Requests for Admissions shall be deemed continuing, and supplemental answers shall be required if D. Smith or T. McGinn directly or indirectly obtains further information after the initial response, as provided by Federal Rule of Civil Procedure 26(e).

### **REQUESTS FOR ADMISSIONS**

1. Admit the genuineness of all documents listed in Attachment A, copies of which are being provided with these Requests for Admission.

2. Admit that T. McGinn was the chairman, secretary, and co-owner of MS & Co. as well as treasurer and indirect co-owner of MS Advisors.

3. Admit that T. McGinn owned 30% of MS & Co. and 30% of MS Advisors.

4. Admit that D. Smith was the president of MS & Co. and the managing member of MS Advisors, and also was the chief compliance officer of MS & Co.

5. Admit that D. Smith owned 50% of MS & Co. and 50% of MS Advisors.

6. Admit that MS Capital was owned by MS Holdings LLC, McGinn and Smith.
7. Admit that between September 2003 and October 2005, MS Advisors formed FAIN, FEIN, FIIN and TAIN.
8. Admit that MS Advisors held 100% of the membership interest in each Fund and was each Fund's sole managing member.
9. Admit that MS Advisors was the investment adviser to the Funds until April 2009, when it was replaced by MS & Co.
10. Admit that D. Smith was responsible for the majority of the investment decisions for the Funds.
11. Admit that T. McGinn signed documents on behalf of entities that received loans from the Funds.
12. Admit that the Funds did not register as investment companies.
13. Admit that the Funds' private placement memoranda (the PPMs") were prepared at D. Smith's direction and were reviewed by him for accuracy prior to commencement of each offering.
14. Admit that the Funds' PPMs did not expressly allow investments in entities affiliated with MS & Co., MS Advisors, T. McGinn or D. Smith.
15. Admit that the Funds' PPMs did not expressly allow loans to entities affiliated with MS & Co., MS Advisors, T. McGinn or D. Smith.
16. Admit that the Funds' PPMs did not expressly allow transfers to entities affiliated with MS & Co., MS Advisors, T. McGinn or D. Smith.



17. Admit that the PPMs did not disclose that the Funds would make any loans to, transfers, or investments in, entities affiliated with MS & Co., MS Advisors, T. McGinn or D. Smith.
18. Admit that the Funds increasingly made loans and transfers to and investments in entities affiliated with MS & Co., MS Advisors, T. McGinn and D. Smith.
19. Admit that from 2005 through 2007, the Funds transferred approximately \$10 million to AlseT IP.
20. Admit that AlseT never repaid any of the loans received from the Funds.
21. Admit that by 2006, T. McGinn and D. Smith knew that the Funds could not redeem investor notes when they became due.
22. Admit that, by as early as 2007, MS & Co., T. McGinn and D. Smith generally refused to honor investors' requests for the return of principal at the maturity of the notes, unless the customer's broker was able to find a new investor to replace the outgoing investor.
23. Admit that, in 2008 and 2009, MS & Co. continued to sell and rollover investors' notes in the Funds.
24. Admit that MS & Co. acted as placement agent for the Trusts.
25. Admit that, from at least January 2004, MS & Co. made monthly payments on two cars for D. Smith, a Lexus and a Mercedes, totaling more than \$89,000, including payments of about \$17,000 in each of 2007 and 2008.
26. Admit that MS & Co. made monthly payments on T. McGinn's behalf to exclusive country clubs, including the Schuyler Meadows Club, the Fort Orange Club

and the Pine Tree Golf Club, including payments in 2007 and 2008 alone totaling more than \$22,000.

27. Admit that Lynn Smith received more than \$1.8 million from D. Smith and entities affiliated with D. Smith and/or T. McGinn since at least 2003.

28. Admit that Lynn Smith provided no consideration for the receipt of these funds.

29. Admit that Lynn Smith maintained a brokerage account at MS & Co. which in 2010 was transferred to NFS/RMR Capital Management (the "Stock Account").

30. Admit that D. Smith exercised beneficial ownership and control over the Stock Account from at least 1995 through 2010.

31. Admit that Lynn Smith allowed D. Smith to use the Stock Account to further his personal and professional interests.

32. Admit that, in the early 1990's, the Stock Account acquired 40,000 shares of a predecessor to Charter One Financial, Inc. ("Charter One") at a cost of \$10 per share.

33. Admit that by the end of August 1999, the Stock Account had 110,735 shares of Charter One worth \$24.75 per share, or \$2,740,691.

34. Admit that each September from 1999 to 2002, Charter One issued a 5% stock dividend resulting in a total of an additional 21,269 shares added to the Stock Account.

35. Admit that the Charter One stock also continued to appreciate during this time.

36. Admit that during the period from August 1999 to September 2002, a total of 24,530 shares of Charter One stock from the Stock Account were sold for a gross

profit of approximately \$800,000, and an additional 2,574 shares of Charter One stock was transferred out of the Stock Account.

37. Admit that by the end of September 2002, the Stock Account had 105,000 shares of Charter One stock worth over \$3 million.

38. Admit that on October 14, 2002, the 105,000 shares of Charter One stock were journaled out of the Stock Account, and were deposited into an account for KC Acquisition Corp..

39. Admit that the 105,000 shares of Charter One remained out of the Stock Account from October 14, 2002 to July 29, 2003, when the shares were journaled back into the Stock Account from the KC Acquisition Corp. account.

40. Admit that D. Smith, as the treasurer of KC Acquisition Corp., signed the letter authorizing the transfer of shares back to L. Smith.

41. Admit that D. Smith deposited into the Stock Account \$38,430 in cash, the proceeds of a trust amounting to \$326,304, and a note receivable totaling \$410,000.

42. Admit that in 2009, D. Smith and Lynn Smith began moving assets that had been jointly held into solely Lynn Smith's name.

43. Admit that the transfers from the Smiths' joint checking account to Lynn Smith's checking account were without consideration.

44. Admit that all other transfers from D. Smith to Lynn Smith's checking account were without consideration.

45. Admit that, in 2009, a house in Vero Beach, Florida was transferred to Lynn Smith without consideration after being previously held in joint ownership by D. Smith and Lynn Smith.

46. Admit that, from 2003 through March 2010, T. McGinn made numerous cash transfers from T. McGinn's account to an account in the name of Nancy McGinn, without consideration.

47. Admit that D. Smith and Lynn Smith created the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Smith Trust") pursuant to a Declaration of Trust dated August 4, 2004.

48. Admit that the Smith Trust had no assets when it was created.

49. Admit that, on or about August 31, 2004, D. Smith and Lynn Smith entered into a "Private Annuity Agreement" with the Smith Trust.

50. Admit that, under the Private Annuity Agreement, D. Smith and Lynn Smith agreed to sell 100,000 shares of Charter One stock to the Smith Trust in exchange for annuity payments from the Smith Trust to D. Smith and Lynn Smith of \$489,932 per year from September 26, 2015 until the last to die of D. Smith and Lynn Smith.

51. Admit that both D. Smith and Lynn Smith signed the Private Annuity Agreement with the Smith Trust.

52. Admit that Thomas Urbelis, the Trustee of the Smith Trust in 2004, signed the Annuity Agreement on behalf of the Smith Trust.

53. Admit that the Private Annuity Agreement is a valid and enforceable agreement.

54. Admit that, on May 4, 2004, Charter One publicly announced that it was being acquired in an all-cash deal by Citizens Financial Group, which paid \$44.50 per share and that the deal was completed on August 31, 2004.

55. Admit that on September 1, 2004, 100,000 shares of Charter One stock was transferred from the Stock Account to the Smith Trust account pursuant to the Private Annuity Agreement.

56. Admit that, on the same day that the 100,000 shares of Charter One stock were transferred from the Stock Account to the Smith Trust account, September 1, 2004, a cash merger occurred, resulting in the Smith Trust account being credited with \$4,450,000 in cash.

57. Admit that Geoffrey Smith and Lauren Smith, the named beneficiaries of the Smith Trust, never received a distribution from the Smith Trust from its creation until April 15, 2010, when Geoffrey Smith requested a distribution of \$95,000, to give to his parents to pay their personal taxes, and these funds were transferred directly from the Smith Trust to Lynn Smith's checking account.

58. Admit that in December 2003, D. Smith, Lynn Smith, T. McGinn, MS & Co. and other entities controlled by D. Smith and T. McGinn had been named as defendants in a securities fraud suit filed in the United States District Court for the Southern District of New York arising from the June 2003 initial public offering of IASG, *Meyers v. Integrated Alarm Services Group, Inc., et al*, 03-cv-09748 (S.D.N.Y.).

59. Admit that pursuant to a deed dated October 19, 2009, T. McGinn transferred title to a house, located at 26 Port Huron Drive, Niskayuna, New York, to Nancy McGinn, for consideration of "less than \$100.00."

Dated: New York, New York  
October 31, 2011

SECURITIES AND EXCHANGE COMMISSION

By s/ David Stoelting  
David Stoelting  
Kevin P. McGrath  
Lara Shalov Mehraban  
3 World Financial Center  
Room 4300  
New York, New York 10281  
Tel: 212-336-0174 (Stoelting)  
Fax: 212-336-1324  
Attorney for Plaintiff

### ATTACHMENT A

PI EXHIBIT NO.	DATE	DOCUMENT
1	9/13/2003	First Independent Income Notes, LLC PPM
2	1/16/2004	First Excelsior Income Notes LLC PPM
3	11/1/2004	Third Albany Income Notes, LLC PPM
4	10/1/2005	First Advisory Income Notes, LLC PPM
5	11/13/2006	TDM Cable Trust 06 PPM
6	2/23/2007	TDM Verifier Trust 07 PPM
7	5/19/2007	Firstline Sr. Trust 07 PPM
8	7/16/2007	TDM Luxury Cruise Trust 07 PPM
9	10/19/2007	Firstline Trust 07 Series B PPM
10	12/17/2007	TDM Verifier Trust 08 PPM
11	2/14/2008	Cruise Charter Ventures Trust 08 PPM
12	4/22/2008	McGinn, Smith Transaction Funding Corp. PPM
13	9/24/2008	Fortress Trust 08 PPM
14	1/19/2009	TDMM Cable Jr. Trust 09 PPM
15	1/19/2009	TDMM Cable Sr. Trust 09 PPM
16	2/2/2009	TDM Verifier Trust 07R PPM
17	7/6/2009	TDM Verifier Trust 08R PPM
18	7/27/2009	TDMM Benchmark Trust 09 PPM
19	9/25/2009	Cruise Charter Ventures, LLC PPM
20	2/1/10	n/a
21	2/2/10	n/a
22	2/3/10	n/a
23	2/12/10	n/a
24	2/4/10	n/a
25	2/3/10	n/a
26		n/a
27		n/a
28		McGinn, Smith & Co., Inc. – Form BD
29		n/a
30	2/20/08	Email from B. Cooper to D. Smith
31		n/a
32		n/a
33		n/a
34		n/a
35		n/a
36		n/a
37		n/a
38		n/a
39		n/a
40		n/a

41		n/a
42		n/2
43		TDM Verifier Trust 08 account balances
44		Cruise Charter Ventures, LLC description
45		Verifier 08 income/expense
46		Verifier 08 interest expense
47		Verifier 08 bank record
48		TDM Cable Funding. LLC description
49		Loans to McGinn, Smith and Rogers
50		Promissory Notes for Timothy McGinn
51		Promissory Note for David Smith
52		Promissory Notes for Matthew Rogers
53		TDM Cable Register Report
54		Schedule of Loan Transactions Not Evidenced By Promissory Notes
55	3/28/2007	Promissory Note from 107 <sup>th</sup> Associates to FAIN
56	7/6/2004	Letter from Rabinovich to Investor
57	1/13/2005	Letter from Smith to Investor
58	1/25/2008	Letter from Smith to Junior Note Holders in Funds
59	4/11/2008	Letter from Smith to Junior Note Holder in FIIN
60	4/25/2008	Letter from Smith to Junior Note Holder in FEIN
61	10/22/2008	Letter from Smith to FAIN Note Holders
62	3/4/2009	Letter from McGinn to MSTF Note Holders
63		Letter from Smith to Tom Grygiel
64	4/15/2009	Letter to Lex and Smith
65		MS & Co. List of Banking Transactions
66	12/31/2008	MS & Co. Audited Financials for 2008
67		Selected MS & Co. Emails
68	4/19/10	n/a
69	4/19/10	n/a
70	4/19/10	n/a
71	5/19/10	n/a
72	6/2/10	n/a
73	6/3/10	n/a
74	5/27/10	n/a
75	5/5/10	n/a
76	6/5/09	Promissory Note from TDMM Cable Funding, LLC to Lynn Smith (PX 5, marked at Lynn Smith Deposition)
77	1/14/09	Email from David Smith to Timothy McGinn (PX 10, marked at Lynn Smith Deposition)
78	August 2008	David and Lynn Smith Financial Statement (PX 11, marked at Lynn Smith Deposition)
79	11/4/08	Letter from Piaker & Lyons to David and Lynn Smith (PX 12, marked at Lynn Smith Deposition)
80	12/31/00	Handwritten Financial Statement for David and Lynn



		Smith (PX 13, marked at Lynn Smith Deposition)
81		Series of emails regarding transfers into and out of Lynn Smith accounts (PX 14, marked at Lynn Smith Deposition)
82		Excerpt from account statement for Lynn Smith's checking account (PX 15, marked at Lynn Smith Deposition)
83	6/1/10	n/a
84	8/4/04	Letter from David Smith to Thomas Urbelis (PX 17, marked at Thomas Urbelis Deposition)
85	12/21/04	Letter from Patty Sicluna to Thomas Urbelis (PX 18, marked at Thomas Urbelis Deposition)
86	12/22/04	Fax from Patty Sicluna to Thomas Urbelis (PX 19, marked at Thomas Urbelis Deposition)
87		Information Form regarding Trust signed February 25, 2005 (PX 20, marked at Thomas Urbelis Deposition)
88	3/1/05	Letter from David Smith to Thomas Urbelis (PX 21, marked at Thomas Urbelis Deposition)
89	March 25	Letter from Thomas Urbelis to McGinn Smith & Co. (PX 22, marked at Thomas Urbelis Deposition)
90		Letter from David McQuade to Thomas Urbelis dated April 12, 2005, and other documents (PX 23, marked at Thomas Urbelis Deposition)
91	5/9/05	Fax from David Smith to Thomas Urbelis (PX 24, marked at Thomas Urbelis Deposition)
92	5/9/05	Fax from David Smith to Thomas Urbelis (PX 25, marked at Thomas Urbelis Deposition)
93	6/7/05	Fax from Thomas Urbellis to David Smith (PX 26, marked at Thomas Urbelis Deposition)
94	4/17/06	Fax from David Smith to Thomas Urbellis (PX 27, marked at Thomas Urbelis Deposition)
95	4/17/06	Letter from Thomas Urbelis to David Smith (PX 28, marked at Thomas Urbelis Deposition)
96	2/23/07	Fax from David McQuade to Thomas Urbelis (PX 29, marked at Thomas Urbelis Deposition)
97	4/11/08	Letter from Thomas Urbelis (PX 30, marked at Thomas Urbelis Deposition)
98	11/10/08	Indemnity Agreement (PX 31, marked at Thomas Urbelis Deposition)
99		Transfer of Assets Form and Alternative Investments Addendum and Custody Agreement Form (PX 32, marked at Thomas Urbelis Deposition)
100	4/13/09	Email from David McQuade to David Smith (PX 33, marked at Thomas Urbelis Deposition)
101	4/22/10	Letter from Thomas Urbelis to David and Lynn Smith (PX 34, marked at Thomas Urbelis Deposition)

102	4/15/10	Email from Brian Mayer to Thomas Urbelis (PX 35, marked at Thomas Urbelis Deposition)
103		Page 6 of Trust account statement for June 2006 (PX 36, marked at Thomas Urbelis Deposition)
104	5/2/10	Letter from David Smith to Thomas Urbelis (PX 37, marked at Thomas Urbelis Deposition)
105	5/10/10	Letter from Thomas Urbelis to David Smith (PX 38, marked at Thomas Urbelis Deposition)
106	5/17/10	Trustee Appointment (PX 39, marked at Thomas Urbelis Deposition)
107		RMR Wealth Management LLC account statement for Lynn Smith for the period from March 1, 2010 to March 31, 2010
108		RMR Wealth Management LLC account statement for David L. and Lynn A. Smith Irrevocable Trust for the period from March 1, 2010 to March 31, 2010 RMR Wealth Management LLC account statement for NFS/FMTC IRA FBO Lynn A. Smith for the period from March 1, 2010 to March 31, 2010
109	1/11/10	Letter from Timothy McGinn to investor
110	3/1/10	Letter from Timothy McGinn to investor
111	3/25/10	Letter from Joseph B. Carr to investor
112	4/2/10	Letter from Craig Norman to Timothy McGinn
113	3/25/10	PPM for McGinn, Smith Firstline Funding, LLC (without exhibits or appendices)
114		n/a
115	6/4/10	n/a
116	6/4/10	n/a
117	10/19/2009	n/a
118		Email from Tiffani Filien to David Smith with letter attachment (PX 9, marked at Lynn Smith Deposition)
119	1/21/09	Letter from Steven Rowen to David Smith
120	6/22/09	Letter from Christine Debevec to Michael Newman
121	6/7/10	n/a
122	6/7/10	n/a
123	6/7/10	n/a
124		Tax Returns for David L. and Lynn A. Smith Irrevocable Trust for 2004-2009
125	6/8/10	n/a
126		Letters of Authorization
127	2/9/10	Letter re Loans
128	6/9/2010	n/a
129	6/9/2010	n/a
130		Note from Lynn Smith to FIIN for \$2,000,000

<b>AUGUST 2 TRO EXHIBIT NO.</b>		
1	8/31/04	Private Annuity Contract
2	9/7/04	Private Annuity Calculations
3		n/a
4		n/a
5		n/a
6		n/a
7		IASG Prospectus
8		n/a
9	9/28/02	Account Statement
10	10/14/02	Letter of Authorization
11	1/1/03	Account Statement
12	7/26/03	Account Statement
13	7/29/03	Letter of Authorization
14		Handwritten letter from D. Smith to T. McGinn
15	2/26/04	Letter from S. Vitulano to D. Smith
16		n/a
17		n/a

<b>DEPOSITION EXHIBIT No.</b>		
1	1/18/2011	n/a
2	5/5/2011	n/a
3	2/4/2008	Email from Guzzetti to all-brokers
4	8/2/2010	n/a
5	9/15/2003	FIIN PPM
6	1/16/2004	FEIN PPM
7		FEIN Questionnaire
8		FEIN Subscription Agreement
9	11/1/2004	TAIN PPM
10		TAIN Questionnaire
11		TAIN Subscription Agreement
12	10/1/2005	FAIN PPM
13		FAIN Questionnaire
14		FAIN Subscription Agreement
15	2/14/2005	Email from Rabinovich to Michael Favish
16	11/14/2006	Email from Guzzetti to Mayer, Chiappone, Feldmann, Rabinovich, & Sicluna
17	12/21/2006	Email from Patricia Sicluna to Guzzetti
18	11/16/2007	Email from Guzzetti to Richard Feldman
19	12/7/2007	Email from Guzzetti to all-brokers
20	3/17/2009	Email from David Smith to Bill Lex, Tim McGinn, Andrew Guzzetti, Tim McGinn
21	2/21/2006	Email from Patricia Sicluna to Richard Feldmann
22	11/22/2006	Email from Patricia Sicluna to Richard Feldmann
23	8/24/2009	Email from Patricia Sicluna to David Smith, with FAIN, FEIN, & TAIN Investor Lists attachments
24	3/20/2006	Email from Jennifer Spinner to Patricia Sicluna
25	11/4/2009	Email from Brian Cooper to Stephen Smith
26	4/8/2008	Email from Guzzetti to all-brokers
27	5/17/2007	Firstline Sr. Trust 07 PPM
28	10/19/2007	Firstline Trust 07 Series B PPM
29	3/1/2010	Email from Patricia Sicluna to Lex, Mayer, Rogers, Rabinovich, Gamello, Chiappone, Fedlmann, Nicolosi, Anthony, Geoff Smith, Tim McGinn, David Smith, Shea, Carr.
30	3/25/2010	Letter from Joseph Carr to Firstline Investors
31		Handwritten Notes

32	3/30/2009	Letter from Jaggs (FINRA) to Stephen Smith
33	4/16/2009	Letter from Richard Feldmann to Gary Jaggs
34	1/18/2011	n/a
35	5/5/2011	n/a
36	5/5/2004	Letter from Rabinovich to Gregory Mann
37	5/14/2004	Email from Rabinovich to Stan Osis
38	9/30/2004	Letter from Rabinovich to Hadar Granader
39	10/25/2004	Email from Rabinovich to Michael Raber
40	10/28/2004	Letter from Rabinovich to Dr. John Ware
41	1/19/2005	Letter from Rabinovich to Gary Blum
42	1/24/2005	Email from Rabinovich to Chistine Sanderson with attachments
43	1/19/2005	Letter from Rabinovich to Larry Lynch
44	8/2/2006	Email from Rabinovich to Yukiko Nakagawa
45	7/19/2004	Email from Rabinovich to Stan Osis
46	2/20/2005	Email from Larry Teich to Rabinovich
47	1/19/2006	Email from Mary Ellen Hennessy to Rabinovich
48	11/14/2006	Email from Guzzetti to Mayer, Chiappone, Feldmann, Rabinovich, & Sicluna
49	12/13/2007	Email from Rabinovich to Renney T.
50	10/27/2006	Email from Rabinovich to Sicluna
51	7/27/2010	Email from Elain Larson to Rabinovich & Steve Larson
52	2/22/2008	Email from Rabinovich to Renney T.
53	4/9/2008	Email from Guzzetti to Rabinovich
54	4/11/2008	Email from Rabinovich to Sicluna
55	4/22/2008	Email from Marci Williams to Rabinovich
56	7/13/2008	Email from Alvin Zawatsky to Rabinovich
57	9/5/2008	Email from Alvin Zawatsky to Rabinovich
58	2/24/2010	Email from Rabinovich to David Smith
59	10/18/2008	Email from Rabinovich to Arie Rosen
60	10/23/2008	Email from San Osis to Rabinovich
61	2/14/2008	Cruise Charter Ventures Trust 08 PPM
62	8/10/2009	Cruise Charter Ventures Trust 09 PPM
63	9/25/2009	Cruise Charter Ventures, LLC PPM
64	3/9/2010	Email from Rabinovich to Matthew Rogers
65	8/20/2009	TDMM Benchmark Trust 09 PPM
66	9/1/2009	Email from Rabinovich to Stanton Rowe, with attachment
67	8/25/2009	Email from Rabinovich to Tim McGinn
68	8/15/2009	Email from Rabinovich to Tim McGinn

69	10/6/2009	Email from Tim McGinn to Rabinovich
70	1/19/2009	TDMM Cable Sr. Trust 09 PPM
71	1/19/2009	TDMM Cable Jr. Trust 09 PPM
72	5/26/2009	Email from Rabinovich to Guzzetti
73	6/16/2009	Email from Guzzetti to Rabinovich
74	7/8/2009	Email from Sicluna to Cooper, Trombley, Shea, & Guzzetti
75	12/17/2007	TDM Verifier Trust 08 PPM
76	1/29/2009	Email from Rabinovich to Arie Rosen
77	1/30/2009	Email from Arie Rosen to Rabinovich
78	2/3/2009	Email from Rabinovich to Guzzetti
79	4/23/2009	Email from Guzzetti to David Smith
80	7/24/2009	Email from Sicluna to Tim McGinn
81	1/20/2011	n/a
82	5/16/2011	n/a
83	3/2/2009	Email from Livingston to David Smith
84	3/17/2009	Agenda & Attendees for Board of Directors Meeting
85	11/8/2005	Email from Mayer to Guzzetti, with attachment "Investing 101" ppt
86	6/11/2007	McGinn Smith FC Meeting List of Attendees & Agenda
87	2/2/2006	Email from Guzzetti to brokers
88	2/22/2006	Email from Guzzetti to all-brokers, with attachments
89	3/1/2006	Email from Migdale to Stefanie
90	11/16/2005	Email from Mayer to Catherine
91	1/12/2009	Email from Guzzetti to Furno, Mayer, & Nicolosi, with attachments
92	1/22/2008	Email from Renney T. to Mayer
93	1/29/2008	Email from Renney T. to Mayer
94		1 page document titled Affiliates: FIIN, FEIN, FAIN, TAIN, & PSCP.
95	12/17/2007	McGinn Smith FC Meeting List of Attendees & Agenda
96	1/31/2008	Email from Lawson to Mayer
97	11/19/2009	Email from Lawson to Mayer
98	12/28/2009	Email from Lawson to Mayer
99	6/15/2007	Email from Mayer to Schiro & Guzzetti
100	11/6/2007	Email from Mayer to David Smith & McGinn
101	3/18/2009	Email from McGinn to Shea
102	9/8/2009	Email from Lex to David Smith, McGinn, Guzzetti, & Mayer

103	9/8/2009	Email from Guzzetti to Lex, David Smith, McGinn, & Mayer
104	1/18/2011	n/a
105	5/5/2011	n/a
106	1/14/2004	Email from Rogers to Livingston
107	5/24/2004	Email from Rogers to Klotman
108	10/13/2005	Email from Rogers to Sicluna
109	4/15/2004	Letter from MS Compliance to James & Carole Meyer
110	9/15/2005	Penson Financial Services New Account Approval Form
111	6/9/2006	Letter from MS Compliance to Shapiro
112	11/13/2008	Email from Shapiro to Rogers
113	3/24/2010	Chart of Firstline Broker Participations
114	8/25/2009	Email from Guzzetti to Rabinovich, Rogers, & Mayer
115	4/21/2010	Email from Rogers to Fowler
116	4/24/2010	Email from Rogers to Fowler
117	4/26/2010	Email from Fowler to Rogers
118	2/3/2009	Email from David Smith to Rogers & McGinn
119	Jun-09	n/a
120	Jun-09	n/a
121	10/4/2010	n/a
122	6/9/2011	n/a
123	2/5/2008	Email from Guzzetti to all-brokers
124	6/8/2011	n/a
125	6/26/2007	Email from Guzzetti to all-brokers
126	8/1/2007	Email from David Smith to Guzzetti
127	9/29/2005	Email from Guzzetti to Chiappone
128	2/22/2006	Email from Weisman to Guzzetti
129	10/23/2009	Email from Rabinovich to Guzzetti & Mayer
130	5/9/2007	Email from Guzzetti to Ron
131	11/14/2006	Email from Sicluna to Spinner, Rees, Trombley, & Guzzetti
132	2/2/2007	Email from Guzzetti to David Smith
133	11/11/2007	Email from Guzzetti to David Smith
134	11/12/2007	Email from Guzzetti to David Smith
135	11/20/2007	Email from Guzzetti to David Smith
136	12/12/2007	Email from Sicluna to David Smith, Guzzetti, & McGinn
137	12/19/2007	Email from Guzzetti to Sicluna

138	12/19/2007	Email from Guzzetti to David Smith, Sicluna, & Rees
139	12/20/2007	Email from Sicluna to Guzzetti
140	12/21/2007	Email from Gamello to David Smith & Guzzetti
141	1/23/2008	Email from David Smith to Guzzetti
142	1/25/2007	Email from Guzzetti to Livingston
143	11/14/2007	Email from Guzzetti to all-brokers, with attachment detailing fees
144	11/28/2007	Email from Guzzetti to all-brokers
145	11/14/2007	Email from Guzzetti to Sicluna
146	1/15/2008	Letter from David Smith to FIIN Investors
147	1/16/2008	Email from Guzzetti to all-brokers
148	2/27/2008	Email from Guzzetti to Chiappone
149	11/21/2008	Email from Livingston to Guzzetti & all-brokers
150	1/5/2009	Email from Cooper to Guzzetti & Rees
151	1/6/2009	Email from Lex to McGinn, David Smith, & Guzzetti
152	6/2/2009	Email from Lex to Guzzetti
153	9/3/2009	Email from Guzzetti to Rabinovich
154	4/12/2010	Email from Guzzetti to Gamello
155	7/27/2009	Email from Beecher to Guzzetti
156	9/24/2009	Email from Guzzetti to McGinn
157	9/25/2009	Email from Guzzetti to all-brokers
158	9/30/2009	Email from Guzzetti to all-brokers
159	10/13/2009	Email from Guzzetti to McGinn
160	12/29/2009	Email from McGinn to Guzzetti, with attachment picture
161	2/17/2009	Email from Guzzetti to all-brokers, with attachment "Talking Points for TDMM Cable 09"
162	2/17/2009	Email from McGinn to Guzzetti
163	8/17/2009	Email from Sicluna to McGinn & Guzzetti
164	11/11/2009	Letter from David Smith to Investors
165	2/17/2010	Email from McGinn to Lex, David Smith, Shea, Guzzetti, & Abramson
166	Jun-09	n/a
167	Jun-09	n/a
168	7/7/2011	n/a
169		Chart of Lex investors
170		Chart of Lex investors
171		Barbara Ann Monahan IRA folder
172	11/14/2006	Email from Sicluna to Guzzetti
173	2/6/2007	Email from Goldstein to Sicluna & Lex
174		n/a



175	6/2/2007	Email from Sicluna to David Smith
176	11/14/2007	Email from Adkins to Mcquade
177	12/17/2007	Email from Adkins to David Smith
178	12/19/2007	Email from Guzzetti to David Smith, Sicluna, & Rees
179	1/25/2008	Email from Adkins to David Smith, Guzzetti, & Sicluna
180	1/28/2008	Email from Adkins to David Smith
181	5/5/2008	Email from Adkins on behalf of Lex to Guzzetti
182	9/23/2008	Email from Lex to David Smith, with attachment
183	1/23/2009	Email from Lex to Guzzetti
184	2/17/2009	Email from Lex to McGinn
185	4/7/2009	Email from David Smith to Lex
186	4/15/2009	Letter from Taney representing the Krimms to Lex & David Smith
187	7/15/2009	Email from Lex to Guzzetti, David Smith, & McGinn
188		William & Patricia Seigford Folder, Multiple Files
189	4/29/2011	n/a
190	5/17/2011	n/a
191	7/11/2011	n/a
192		Marlene De Luca IRA Folder FAIN, Multiple Files
193		FAIN Subscription Agreement filed by De Luca
194		Andrew De Luca IRA Folder FAIN, Multiple Files
195		Marlene De Luca IRA Folder FIIN, Multiple Files
196	12/19/2007	Letter from Lex to Marlene DeLuca
197		Carol Benderson-Lighter IRA Folder, Multiple Files
198	3/28/2011	n/a
199	4/19/2011	n/a
200	7/15/2011	n/a
201	10/5/2005	Email from Guzzetti to Gamello
202	3/24/2006	Email from Gentile to Gamello
203		List of Gamello investors
204	5/13/2008	Email from Gamello to Guzzetti
205	11/15/2007	Email from Gamello to Guzzetti & Nicolosi
206	11/16/2007	Email from Gamello to Guzzetti
207	12/19/2007	Email from Sicluna to Guzzetti, Rees, & David Smith
208	12/20/2007	Email from Guzzetti to Gamello
209	1/2/2008	Email from Gamello to Sicluna
210	1/16/2008	Email from Gamello to Guzzetti
211	1/16/2008	Email from Sicluna to Gamello, Nicolosi, & Guzzetti

212	4/11/2008	Letter from David Smith to Bernard Cohen, re: FIIN
213	5/9/2008	Email from Rees to Guzzetti
214	5/13/2008	Letter from David Smith to Mr. & Mrs. Cohen, re: FAIN
215	6/28/2008	Email from Gentile to Gamello
216	10/13/2008	Letter from David Smith to Mr. & Mrs. Mayberry, with attachment of restructuring plan for FIIN
217	10/13/2008	Letter from David Smith to Mr. & Mrs. Mayberry, with attachment of restructuring plan for TAIN
218	10/13/2008	Letter from David Smith to Joseph Mayberry, with attachment of restructuring plan for TAIN
219	10/20/2008	Letter from David Smith to Michael Favish, re: FEIN
220	10/22/2008	Letter from David Smith to Joseph Mayberry, with attachment of restructuring plan for FAIN
221	10/26/2009	Email from McGinn to all-brokers
222	11/18/2009	Email from McGinn to all-brokers, with attachment of Memo 11/16/09
223	12/26/2009	Email from McGinn to all-brokers, with attachment of Asset Purchase Agreement
224	2/26/2010	Email from McGinn to Gamello
225	4/1/2010	Email from Carr to Gamello
226	9/24/2008	Fortress Trust 08 PPM
227	10/23/2009	Email from Gamello to McGinn
228	11/19/2009	Email from Shea to Mayer, Rabinovich, Rogers, Leo, Geoff Smith, Gamello, Chiappone, Lex, Sicluna & Carr, with attachment plan for Fortress Trust
229	11/20/2009	Email from Shea to Gamello
230	11/20/2009	Email from McGinn to Guzzetti, Lex, Chiappone, Gamello, & David Smith
231	11/23/2009	Email from Shea to Gamello, Mayer, Rabinovich, Rogers, Leo, Geoff Smith, Chiappone, Lex, Sicluna, Carr, Guzzetti, David Smith, & McGinn
232	12/2/2009	Email from Guzzetti to all-brokers, with attachment of Fortress Trust Letter
233	12/28/2009	Email from Gamello to Shea, McGinn, Guzzetti, & David Smith, with attachment
234	8/7/2009	Email from Gamello to Guzzetti
235	11/18/2009	Email from Guzzetti to Lex, Gamello, Mayer, Rabinovich, Rogers, & Chiappone
236	12/21/2009	Letter from Carr to All Employees of McGinn Smith
237		Gamello 2006, 2008, 2009 W-2 forms
238	1/18/2011	n/a

239		Charts of Fund Securities bought & sold
240		Chart of Chiappone brokered products
241		Chart of Trusts in IRA Accounts
242		TDMM Cable Sr. Trust 09 Principal Amortization Schedule
243		Chart of Charges & Earnings on Funds
244		Template Letter from David Smith to Investor
245		Letter from Chiappone to Feibes & Schmitt
246		Chart of Floyd Maines Investments
247		Security Alarm Receivables Overview & Trust Configuration by Chiappone
248		Letter from McGinn Smith to Susan summarizing her investments
249		Bruce Becker Holdings
250		Letter from Chiappone to Guy Berthiaume
251	7/29/2005	Sample letter from Tony Schmitz, Dave Smith, Tim Welles, & Mike Lasch to Investors
252	10/23/2006	TDM Cable Trust 06 ppt by McGinn
253		FAIN Investment Analysis
254		Letter from Chiappone to Kathleen Bradt
255	2/6/2008	Letter from David Smith to William Maines
256	5/15/2008	Email from David Smith to all-brokers
257	8/28/2008	Email from Chiappone to David Smith
258	May-04	Fax from Chiappone to The National Bank of Cossack, attn: James Warren
259		Memo to Brokers of Fortress Trust 08 with letter from MS Capital to Fortress Trust Investors
260	11/19/2009	Email from Shea to Mayer, Rabinovich, Rogers, Leo, Geoff Smith, Gamello, Chiappone, Lex, Sicluna, Carr, McGinn, & David Smith
261	2/15/2010	Letter from McGinn to Investor
262	2/24/2010	Letter from David Smith to Investor, re: FAIN
263	6/17/2011	n/a
264	7/18/2011	n/a
265	8/9/2011	n/a
266		McGinn Smith Supervisory Compliance Manual
267	12/30/2009	Email Correspondence between Pat Sicluna and Carmelo Nicolosi
268	10/18/2007	Email Correspondence between Pat Sicluna and Carmelo Nicolosi
269	11/14/2007	Email Correspondence between Carmelo Nicolosi and Marlene Brustle

270	11/15/2007	Email between Guzzetti and Chiappone re: FAIN Redemptions
271	1/8/2008	Email from Nicolosi to Chiappone
272	11/4/2008	Email from Stephen Smith to Nicolosi
273	11/4/2008	Email form Stephen Smith to Steven Rowen
274	8/24/2009	Email correspondence between Sicluna and Nicolosi
275	11/16/2009	Email correspondence from Sicluna to Tim McGinn and Carmelo Nicolosi
276	11/24/2009	Email from David Smith to Andrew Guzzetti and Tim McGinn
277	4/9/2010	Email from Brian Shea to Guzzetti, Nicolosi and Carr
278	9/2/2009	Email from Guzzetti to all brokers
279	9/8/2009	Email from Guzzetti to Mayer, Rogers, Gamello, Scutt, Dichiarara, Chiappone, Lex, Rabinovich, Nicolosi, Feldmann, Anthony, Geoff Smith, Leo, Furno, Livingston, David Smith, McGinn, Carr
280	5/13/2009	Email Nicolosi to Guzzetti, Gottlieb
281	9/8/2009	Email from Guzzetti to all brokers with bcc to Rogers, Leo, George, Choy, Cooper, Andonov, Feldmann, Cardillo, Levy, Sicluna, Barnes, Smith, Elliot, Kipper, Livingston, Kelley, Chiappone, Nicolosi, Gamello, Anthony, Goldstein, McGinn, Rabinovich, Mayer, McQuade, Guzzetti, Rutherford, Kurtz, Loporto, Silverman, Fletcher, Furno, Deligiannis
282	6/16/2011	n/a
283	3/24/2010	Letter from IRA Services Trust Company to Donald Anthony
284	8/8/2011	n/a
285	3/8/2007	Email from Guzzetti to all brokers
286	2/4/2008	Email from Guzzetti to Donald Anthony
287	8/24/2009	Email from Guzzetti to David Smith
288	8/19/2009	Email from Thomas Livingston to Donald Anthony
289		Post 2003- excludes cancelled transactions
290	3/8/2005	Email from David Smith to Don Anthony
291	9/25/2007	Email from Don Anthony to David Smith
292	1/16/2008	Email from Guzzetti to Anthony
293	10/9/2008	Email from Guzzetti to Keller, Dichiarara, Livingston, Mayer, Leo, Rogers, Scutt, Rabinovich, Chiappone, Rutherford, Gamello, Feldmann, Anthony, Smith
294	11/13/2006	TDM Cable Trust 06 offering

295	11/17/2008	TDM Cable Trust 06 offering
296	7/16/2007	TDM Luxury Cruise Trust 07 offering
297	2/23/2007	TDM Verifier Trust 08 offering
298	2/2/2009	TDM Verifier Trust 07R offering
299	7/6/2009	TDM Verifier Trust 08R offering
300		2007 W2 for Donald J Anthony
301	12/31/2004	Paycheck for Donald J Anthony
302		n/a
303	12/15/1995	Letter from D. Smith to Livingston
304	1/14/04	Email from R. Rogers to Livingston
305	1/2/2004	Securities Purchase Agreement
306	2/4/2005	Fax from Livingston to David Goldstein
307	1/23/2008	Fax from Livingston to T. McGinn and D. Smith
308	10/15/2009	Email from Livingston to T. McGinn and D. Smith

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

-----X	:	
SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	10 CV 457 (GLS/DRH)
- against-	:	
	:	
MCGINN, SMITH & CO., INC., et al.,	:	
	:	
Defendants.	:	
-----X	:	

**PLAINTIFF’S FIRST SET OF REQUESTS FOR ADMISSIONS  
TO DEFENDANT/RELIEF DEFENDANT LYNN A. SMITH**

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, plaintiff Securities and Exchange Commission requests that defendant/relief defendant Lynn A. Smith answer the following Requests for Admissions in writing and under oath within thirty (30) days of the date of these Requests.

Pursuant to Federal Rule of Civil Procedure 36(a)(4): “If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.”

## **DEFINITIONS AND INSTRUCTIONS**

1. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Requests all responses that might otherwise be construed to be outside the scope of the Requests.
2. The use of the singular form of any word includes the plural and vice versa.
3. The terms “any” and “all” shall be construed to mean “any and all.”
4. “Concerning” shall mean relating to, referring to, regarding, describing, evidencing or constituting.
5. The term “communication” means the transmittal of information, in the form of facts, ideas, inquiries or otherwise.
6. “D. Smith” shall mean defendant David L. Smith and any person or entity acting on his behalf.
7. “Lynn Smith” shall mean defendant/relief defendant Lynn Smith and any person or entity acting on her behalf.
8. “T. McGinn” shall mean defendant/relief defendant Timothy M. McGinn and any person or entity acting on his behalf.
9. These Requests for Admissions shall be deemed continuing, and supplemental answers shall be required if Lynn Smith directly or indirectly obtains further information after the initial response, as provided by Federal Rule of Civil Procedure 26(e).

### **REQUESTS FOR ADMISSIONS**

1. Admit that Lynn Smith received more than \$1.8 million from D. Smith and entities affiliated with D. Smith and T. McGinn from 2003 through 2010.
2. Admit that Lynn Smith provided no consideration for the \$1.8 million that she received from D. Smith and entities affiliated with D. Smith and T. McGinn from 2003 through 2010 .
3. Admit that Lynn Smith maintained a brokerage account at MS & Co. which in 2010 was transferred to NFS/RMR Capital Management (the “Stock Account”).
4. Admit that D. Smith exercised beneficial ownership and control over the Stock Account from at least 1995 through 2010.
5. Admit that Lynn Smith allowed D. Smith to use the Stock Account to further his personal and professional interests.
6. Admit that, in the early 1990’s, the Stock Account acquired 40,000 shares of a predecessor to Charter One Financial, Inc. (“Charter One”) at a cost of \$10 per share.
7. Admit that by the end of August 1999, the Stock Account had 110,735 shares of Charter One worth \$24.75 per share, or \$2,740,691.
8. Admit that each September from 1999 to 2002, Charter One issued a 5% stock dividend resulting in a total of an additional 21,269 shares added to the Stock Account.
9. Admit that the Charter One stock also continued to appreciate during this time.
10. Admit that during the period from August 1999 to September 2002, D. and Lynn Smith sold a total of 24,530 shares of Charter One stock from the Stock Account



for a gross profit of approximately \$800,000, and transferred an additional 2,574 shares of Charter One stock out of the Stock Account.

11. Admit that by the end of September 2002, the Stock Account had 105,000 shares of Charter One stock worth over \$3 million.

12. Admit that on October 14, 2002, the 105,000 shares of Charter One stock were journaled out of the Stock Account, and were deposited into an account for KC Acquisition Corp.

13. Admit that the 105,000 shares of Charter One remained out of the Stock Account from October 14, 2002 to July 29, 2003, when the shares were journaled back into the Stock Account from the KC Acquisition Corp. account.

14. Admit that D. Smith, as the treasurer of KC Acquisition Corp., signed the letter authorizing the transfer of shares back to Lynn Smith.

15. Admit that D. Smith deposited into the Stock Account \$38,430 in cash, the proceeds of a trust amounting to \$326,304, and a note receivable totaling \$410,000.

16. Admit that in 2009, D. Smith and Lynn Smith began transferring assets that had been jointly held into solely Lynn Smith's name.

17. Admit that the transfers from a bank account jointly owned by D. Smith and Lynn Smith to Lynn Smith's checking account, and subsequent transfers from D. Smith into Lynn Smith's checking account, were without consideration.

18. Admit that, in 2009, a house in Vero Beach, Florida that was held in joint ownership by D. Smith and Lynn Smith, was transferred to Lynn Smith without consideration.

19. Admit that D. Smith and Lynn Smith created the David L. and Lynn A. Smith Irrevocable Trust U/A/ 8/04/04 pursuant to a Declaration of Trust dated August 4, 2004 (the “Smith Trust”).

20. Admit that the Smith Trust had no assets when it was created.

21. Admit that, on or about August 31, 2004, D. Smith and Lynn Smith entered into a “Private Annuity Agreement” with the Smith Trust.

22. Admit that, under the Private Annuity Agreement, D. Smith and Lynn Smith agreed to sell 100,000 shares of Charter One stock to the Smith Trust in exchange for annuity payments to D. Smith and Lynn Smith from the Smith Trust of \$489,932 per year from September 26, 2015 until the last to die of D. Smith and Lynn Smith.

23. Admit that both D. Smith and Lynn Smith signed the Private Annuity Agreement with the Smith Trust.

24. Admit that Thomas Urbelis, the Trustee of the Smith Trust in 2004, signed the Private Annuity Agreement.

25. Admit that the Private Annuity Agreement is a valid, enforceable agreement.

26. Admit that, on May 4, 2004, Charter One publicly announced that it was being acquired in an all-cash deal by Citizens Financial Group, which paid \$44.50 per share. The deal was completed on August 31, 2004.

27. Admit that on September 1, 2004, 100,000 shares of Charter One stock were transferred from the Stock Account to the Smith Trust account pursuant to the Private Annuity Agreement.

28. Admit that, on the same day that the 100,000 shares were transferred from the Stock Account to the Smith Trust account, September 1, 2004, the cash merger occurred, resulting in the Smith Trust account being credited with \$4,450,000 in cash.

29. Admit that Geoffrey Smith and Lauren Smith, the named beneficiaries of the Smith Trust, never received a distribution from the Smith Trust from its creation until April 15, 2010, when Geoffrey Smith requested a distribution of \$95,000, to give to his parents to pay their personal taxes, and these funds were transferred directly from the Smith Trust to Lynn Smith's checking account.

30. Admit that, in December 2003, D. Smith, Lynn Smith, McGinn, MS & Co. and other entities controlled by D. Smith and T. McGinn had been named as defendants in a securities fraud suit filed in the United States District Court for the Southern District of New York arising from the June 2003 initial public offering of IASG, *Meyers v. Integrated Alarm Services Group, Inc., et al*, 03-cv-09748 (S.D.N.Y.).

31. Admit that Lynn Smith was served with a Summons and Complaint in connection with the *Meyers v. Integrated Alarm Services Group, Inc., et al*, lawsuit.

32. Admit that Lynn Smith was aware of the fact that she was named as a defendant in the *Meyers v. Integrated Alarm Services Group, Inc., et al*, lawsuit before that lawsuit was settled.

Dated: New York, New York  
October 31, 2011

SECURITIES AND EXCHANGE COMMISSION

By s/David Stoelting  
David Stoelting  
Kevin P. McGrath  
Lara Shalov Mehraban

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Attorney for Plaintiff

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

10 Civ. 475 (GLS)  
(DRH)

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

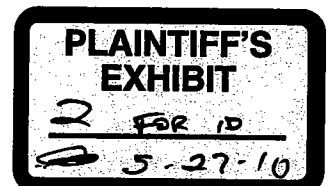
*Defendants, and*

LYNN A. SMITH,

*Relief Defendant.*

**PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF  
DOCUMENTS TO RELIEF DEFENDANT LYNN A. SMITH**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Paragraph XX of the Order to Show Cause entered April 20, 2010, plaintiff Securities and Exchange Commission requests that relief defendant Lynn A. Smith produce the following documents at the Commission's offices at 3 World Financial Center, Suite 400, New York, N.Y. 10281, on or before May 17, 2010.



## INSTRUCTIONS

1. Each Request requires the production of each responsive document in its entirety, including all non-identical copies, drafts, and identical copies containing different handwritten notations, without abbreviation, expurgation, or redaction.

2. If any document sought by this Request is withheld under a claim of privilege (including work product), then: (a) identify each such document by stating: (i) the type of document; (ii) the general subject matter of the document; and (iii) such other information as is sufficient to identify the document for a subpoena duces tecum, including, without limitation, the author of the document, the addressee of the document and, where not apparent, the relationship of the author and addressee to one another, the number of pages, its present custodian, and each person to whom the document or substance of the document production was communicated, in whole or in part; and (iii) identify the nature of the privilege and all facts upon which that assertion is based.

3. If any document sought by this Request once was, but no longer is, within a responding party's possession, control or custody, please identify each such document and its present or last known custodian, and state: (a) the reason why the document is not being produced; and (b) the date of the loss, destruction, discarding, theft or other disposal of the document.

4. No part of the document request shall be left unanswered merely because an objection is interposed to another part of the document request.

5. Unless otherwise indicated, this Request seeks documents from January 1, 2003 to the present.

6. This Request is ongoing in nature, and the responding party should continue to produce responsive documents as they are found or created on an ongoing basis.

### **DEFINITIONS**

1. “Communication” means any transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

2. “Concerning” means relating to, referring to, describing, evidencing, or constituting.

3. “Document” is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including without limitation audio files, voicemail messages, electronic spreadsheets and drafts of electronic spreadsheets or other computerized data, including email messages (deleted or otherwise, and whether located at your offices or at your employees’ residences or property, or on central or official databases, your servers and backup servers, local databases, internet-based e-mail servers, individual employees’ hard drives, discs or personal digital assistants), notes, memoranda, work papers, paper files, desk files, draft workpapers). A draft or non-identical copy is a separate document within the meaning of this term.

4. “Immediate Family” shall mean parents, former or current spouse, sibling, children, grandchildren.

5. “McGinn” shall mean Timothy M. McGinn and any person or entity acting on his behalf.

6. “McGinn Smith Entities” or “McGinn Smith Entity” shall mean all of or any of the entities known as McGinn, Smith & Co., Inc., McGinn, Smith Advisors, LLC, and McGinn, Smith Capital Holdings Corp., as well as any entity or trust in which any of them, Smith, and/or

McGinn have or had a controlling interest, any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, trustees, attorneys, consultants, representatives and independent contractors of the foregoing entities, including, but not limited to, the entities identified in Exhibit A to the Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, entered on April 20, 2010.

7. "Smith" shall mean David L. Smith and any person or entity acting on his behalf.

8. "You" or "Your" shall refer to Lynn A. Smith and any person or entity acting on her behalf.

#### **DOCUMENTS REQUESTED**

1. Documents sufficient to identify all bank, brokerage, trust or other investment accounts held at any time in your name, or for which you have any direct or indirect beneficial interest.

2. For all accounts identified in response to Item 1, above, for the period January 1, 2003 through the present, all monthly account statements and documents sufficient to show the current holdings in such accounts and any transfers of funds to or from the accounts since the date of the last regular account statement.

3. For all accounts identified in response to Item 1, above, for the period January 1, 2003 through the present, all documents concerning deposits, credits, withdrawals and/or debits from the accounts and all documents providing source and recipient information about such deposits, credits, withdrawals and/or debits including but not limited to:

- a. Deposit slips (front and back);
- b. Copies of checks (front and back);



- c. Credit memoranda, including but not limited to, wire transfer documentation identifying the source of funds (including account number, financial institution, and holder of such account), letters of credit and correspondence; and
  - d. Debit memoranda, including but not limited to, wire transfer documentation identifying the recipient of funds (including account number, financial institution, and holder of such account), banker's acceptances, bank charges, letters of credit, letters of authorization, documents identifying who ordered or authorized the transaction and all correspondence.
4. Without regard to date, for all accounts identified in response to Item 1, above, account opening documents, signature card documentation, corporate resolutions, incorporation documents, corporate or partnership agreements, compliance documentation, and powers of attorney.
5. All documents concerning any transfer of money, stocks, or any other asset from any McGinn Smith Entity to you (including, but not limited to, any loan or repayment of any loan).
6. All documents concerning any transfer of money, stocks, or any other asset to any McGinn Smith Entity from you (including, but not limited to, any loan or repayment or any loan, and any investment).
7. All documents concerning any services or other consideration provided by you to any McGinn Smith Entity.
8. All documents concerning any tax returns filed by you for the tax years 2003 through 2009.
9. Documents sufficient to show all assets and liabilities held, or purchased and/or sold since January 1, 2000, directly or indirectly, by or for the benefit of Lynn A. Smith, including without limitation, bank accounts, brokerage accounts, investments, business interests, loans, lines of credit and real and personal property wherever situated.

10. Documents sufficient to show all assets and liabilities jointly held, or purchased and/or sold since January 1, 2000, directly or indirectly, by or for the benefit of Lynn A. Smith and Smith, including without limitation, bank accounts, brokerage accounts, investments, business interests, loans, lines of credit and real and personal property wherever situated.

11. Documents sufficient to identify all bailees, debtors, and other person and entities that currently are holding any of your assets, funds or property (including, but not limited to, any property owned jointly with Smith).

12. Documents sufficient to identify all credit cards and debit cards that you have used since 2003.

13. Documents sufficient to identify all mortgages to which you are a party.

14. Documents sufficient to identify all safe deposit boxes in your name or under your control.

15. All documents concerning loans by you to McGinn, or loans from McGinn to you.

16. All documents concerning loans by you to Smith, or loans from Smith to you.

17. All documents concerning any transfer of assets, since January 1, 2003, to any member of your Immediate Family.

Dated: New York, New York  
May 10, 2010

**s/David Stoelting**  
Attorney Bar Number 516163  
Attorney for Plaintiff  
SECURITIES AND EXCHANGE COMMISSION  
New York Regional Office  
3 World Financial Center, Suite 400  
New York, New York 10281-1022  
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E-mail: StoeltingD @sec.gov

Of Counsel:

Michael Paley

Kevin McGrath

Lara Mehraban

Linda Arnold

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION

*Plaintiff,*

vs.

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

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

*Defendants*

LYNN A. SMITH and NANCY McGINN,

*Relief Defendant and*

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

*Intervenor.*

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**DEFENDANT/INTERVENOR GEOFFREY R. SMITH, TRUSTEE OF  
THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST AND  
DEFENDANTS, GEOFFREY R. SMITH AND LAUREN T. SMITH'S ANSWER  
TO PLAINTIFF'S SECOND AMENDED COMPLAINT**

The Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust ("Smith Trust"), and Defendants Geoffrey R. Smith and Lauren T. Smith, individually and as beneficiaries of the Smith Trust (collectively "Defendants") by and through their attorneys, Featherstonhaugh, Wiley & Clyne, LLP, as

and for an answer to the Plaintiff's Second Amended Complaint dated June 8, 2011 allege as follows:

1. The allegations contained in Paragraph 1 constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

2. The allegations contained in Paragraph 2 constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

3. The allegations contained in Paragraph 3 constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

4. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 4.

5. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 5.

6. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 6.

7. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 7 and refers the Court to the Complaint referenced in said Paragraph.

8. Defendants admit the allegations that set forth in Paragraph 8.

9. Defendants admit the allegation that the Smith Trust opposed entry of the preliminary injunction order but lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 9.

10. Defendants admit that after several weeks of discovery, the Court conducted a hearing on June 9 through 11, 2010 in which the testimony of several individuals were taken and refers the Court to the transcript for the substance of said testimony.

11. Defendants admit that the Court issued a Memorandum-Decision and Order on July 7, 2010 and refers the Court to said Order as to the Court's findings of fact and law.

12. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 12.

13. Defendants admit that the Plaintiff filed an Amended Complaint in August 2010 seeking emergent relief and refers the Court to the Amended Complaint referenced in said Paragraph 13, Defendants deny the remaining allegations set forth in Paragraph 13.

14. Defendants admit the Court issued a Memorandum-Decision and Order on November 22, 2010 and refers the Court to said Order as to the Court's findings of fact and law.

15. Defendants admit the Court issued a Memorandum-Decision and Order on December 1, 2010 and refers the Court to said Order as to the Court's findings of fact and law.

16. The allegations contained in Paragraph 16 constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

17. The allegations contained in Paragraph 17 constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations in Paragraph 17.

18. The allegations contained in Paragraph 18 constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

19. The allegations contained in Paragraph 19 constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court.

To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

20. The allegations contained in Paragraph 20 constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations in Paragraph 20.

21. The allegations contained in Paragraph 21 constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations in Paragraph 21.

22. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 22 and refer all questions of law to the Court.

23. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 23 and refer all questions of law to the Court.

24. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 24 and refer all questions of law to the Court.



25. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 25 and refer all questions of law to the Court.

26. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 26 and refer all questions of law to the Court.

27. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 27 and refer all questions of law to the Court.

28. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 28.

29. Defendants admit that David L. Smith is a resident of Saratoga Springs, New York and was 65 years of age at the time of filing of the original Complaint; lacks knowledge or information sufficient to form a belief as to the remaining allegation in Paragraph 29.

30. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 30 of the Second Amended Complaint.

31. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 31.

32. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 32.

33. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 33.

34. Defendants admit the allegations set forth in Paragraph 34.

35. Defendants admit the allegations set forth in Paragraph 35.

36. Defendants admit that Lynn A. Smith is the wife of David Smith, a resident of Saratoga Springs, and was at the age of 64 at the time of the filing of the original Complaint.

37. Defendants admit that Nancy McGinn is the wife of Timothy McGinn and a resident of Schenectady, New York.

38.-123. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraphs 38 through 123.

124. Defendants admit the allegations set forth in Paragraph 124.

125. Neither admits nor denies and refers the Court to the respective legal instruments referenced in Paragraph 125.

126. Neither admits nor denies and refers the Court to the Private Annuity Agreement reference in Paragraph 126.

127. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 127.

128. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 128.

129. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 129.

130. Denies the allegations set forth in Paragraph 130.

131.-142. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraphs 131 through 142.

143. Defendants deny the allegations set forth in Paragraph 143 except to admit that in July 2010 Geoffrey and Lauren Smith received distributions from the Smith Trust.

144. Defendants admit the allegations set forth in Paragraph 144.

145. Defendants deny the allegations set forth in Paragraph 145.

146. Defendants deny the allegations set forth in Paragraph 146.

147. Defendants neither admit nor deny the allegations in Paragraph 147 and refer the Court to Memorandum Decision and Order, dated July 7, 2010.

148. Defendants admit that certain disbursements were made by the Smith Trust sometime after July 7, 2010 but are without knowledge to confirm the remaining allegations in Paragraph 148 absent a formal accounting.

149. Defendants admit that Lynn Smith was paid for the fair market value of the Lake Property but lack knowledge to confirm the remaining allegations in Paragraph 149 absent a formal accounting.

150. The Smith Trust and Geoffrey Smith admit that Geoffrey Smith received a disbursement from the Smith Trust, \$200,000 of which was used to invest in a company Geoffrey Smith created, Capacity One Management LLC but denies the remaining allegations in Paragraph 150. Defendant Lauren Smith lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 150.

151. Defendants admit that Lauren Smith received \$83,500 but deny the remaining allegations in Paragraph 151.

152. The Smith Trust and Geoffrey Smith admit that Jill Dunn, counsel for the Smith Trust, was paid for her legal services but lack knowledge to confirm the remaining allegations in Paragraph 152 absent a formal accounting. Defendant Lauren Smith lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 152.

153. The Smith Trust and Geoffrey Smith admit that David Wojeski, the former trustee of the Smith Trust was paid for his professional services but lack knowledge to confirm the remaining allegations in Paragraph 153 absent a formal accounting. Defendant Lauren Smith lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 153.

154. Defendants admit the Court re-froze the Smith Trust on August 3, 2010 and refer the Court to its Memorandum-Decision and Order for its finding of fact and legal conclusions; Defendants deny the remaining allegations in Paragraph 154.

155. Defendants deny the allegations set forth in Paragraph 155.

156. Defendants deny the allegations set forth in Paragraph 156.

157. Defendants deny the allegations set forth in Paragraph 157.

158. Defendants deny the allegations set forth in Paragraph 158.

159. Defendants deny the allegations set forth in Paragraph 159.

160. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 160.

161. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 161.

162. Defendants deny the allegations set forth in Paragraph 162.

163. Defendants deny the allegations set forth in Paragraph 163.

164. Defendants deny the allegations set forth in Paragraph 164.

165. Defendants deny the allegations set forth in Paragraph 165.

166. Defendants deny the allegations set forth in Paragraph 166.

167. Defendants deny the allegations set forth in Paragraph 167.

168. Defendants deny the allegations set forth in Paragraph 168.

169. Defendants deny the allegations set forth in Paragraph 169.

170. Defendants deny the allegations set forth in Paragraph 170.

171. Defendants deny the allegations set forth in Paragraph 171.

172. Defendants deny the allegations set forth in Paragraph 172.

173. Defendants deny the allegations set forth in Paragraph 173.

174. Defendants deny the allegations set forth in Paragraph 174.

175. Defendants deny the allegations set forth in Paragraph 175.

#### **FIRST CLAIM FOR RELIEF**

##### **Violations of Section 17(a) of the Securities Act**

(Against MS & Co., MS Advisors, MS Capital, McGinn, and Smith)  
(Antifraud violations)

176. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “175” above as if fully set forth herein.

177. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 177.

178. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 178.

179. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 179.

#### **SECOND CLAIM FOR RELIEF**

##### **Violations of Section 10(b) of the Exchange Act and Rule 10b-5**

(Against MS & Co., MS Advisors, MS Capital, McGinn and Smith)  
(Antifraud violations)

180. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “179” above as if fully set forth herein.

181. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 181.

182. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 182.

**THIRD CLAIM FOR RELIEF**  
**Violations, and Aiding and Abetting Violations, of**  
**Section 15(c)(1) of the Exchange Act, 15 U.S.C. §240.10b-3**  
(Against MS & Co., MS Advisors, MS Capital, McGinn and Smith)  
(Violations of Antifraud Provisions by Brokers)

183. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “182” above as if fully set forth herein.

184. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 184.

185. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 185.

186. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 186.

187. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 187.

188. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 188.

189. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 189.

**FOURTH CLAIM FOR RELIEF**  
**Violations of Sections 206(1), 206(2) and 206(4)**  
**of the Advisers Act and Rule 206(4)-8**  
(MS & Co., MS Advisors, McGinn and Smith)

190. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “189” above as if fully set forth herein.

191. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 191.

192. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 192.

193. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 193.

**FIFTH CLAIM FOR RELIEF**  
**Violations of Sections 7(a) of the Investment Company Act**  
(FAIN, FEIN, FIIN and TAIN)

194. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “193” above as if fully set forth herein.

195. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 195.

196. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 196.

197. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 197.

**SIXTH CLAIM FOR RELIEF**  
**Violations of Sections 5(a) and 5(c) of the Securities Act**  
(MS & Co., MS Capital, the Four Funds, McGinn and Smith)

198. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “197” above as if fully set forth herein.

199. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 199.

200. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 200.

201. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 201.

202. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 202.

**SEVENTH CLAIM FOR RELIEF**  
(Relief Defendant/Intervenors)

203. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “202” above as if fully set forth herein.

204. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 205.

205. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 205.

**EIGHTH CLAIM FOR RELIEF**  
**Violations of Section 276 of New York Debtor and Creditor Law**  
(David Smith, Lynn Smith, Tim McGinn, Nancy McGinn,  
the Defendant/Intervenor, Geoffrey Smith, and Lauren Smith)

206. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “205” above as if fully set forth herein.

207. a) Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 207(a).

b) Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 207(b).



c) Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 207(c).

208. Defendants deny the allegations set forth in Paragraph 208 as it relates to the Smith Trust and Lynn Smith and lack knowledge or information sufficient to form a belief as to the allegations concerning Nancy McGinn.

209. Defendants deny the allegations set forth in Paragraph 209.

210. (a) Defendants deny the allegations set forth in Paragraph 210(a).

(b) Defendants deny the allegations set forth in Paragraph 210(b).

(c) Defendants deny the allegations set forth in Paragraph 210 (c).

(d) Defendants deny the allegations set forth in Paragraph 210 (d).

211. The allegations contained in Paragraph 211 constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against the Defendants, to which a response is required, they are denied.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE,  
THE TRUST ALLEGES AS FOLLOWS:**

212. Defendants repeat and reiterate the responses contained in Paragraphs numbered "1" through "211" above as if fully set forth herein.

213. The Smith Trust has not received nor was it ever funded with ill-gotten gains allegedly resulting from David Smith's violation of federal securities laws.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE,  
THE TRUST ALLEGES AS FOLLOWS:**

214. Defendants repeat and reiterate the responses contained in Paragraphs numbered "1" through "213" above as if fully set forth herein.

215. The SEC does not have the authority to bring claims of violation of the New York Debtor and Creditor Law.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE,  
THE TRUST ALLEGES AS FOLLOWS:**

216. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “215” above as if fully set forth herein.

217. As an Irrevocable Trust, neither Lynn Smith nor David Smith have legal or equitable title in the Smith Trust Corpus and despite the existence of a private annuity agreement, the beneficial ownership of the Defendant/Intervenor is fully vested in the beneficiaries, Geoffrey and Lauren Smith.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE,  
THE TRUST ALLEGES AS FOLLOWS:**

218. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “217” above as if fully set forth herein.

219. Any right of disgorgement the SEC may have in the event of a judgment against David Smith is limited to his share of any annuity payments he may receive should he survive to 2015 and beyond.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE,  
THE TRUST ALLEGES AS FOLLOWS:**

220. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “219” above as if fully set forth herein.

221. As a matter of law, the corpus of the Smith Trust is immune from any right of disgorgement the SEC may have in the event of a judgment against David Smith.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Defendant/Intervenor, Geoffrey R. Smith, Trustee of the Smith Trust and Defendants

Geoffrey R. Smith and Lauren T. Smith, individually and as beneficiaries of the Smith Trust demands trial by jury in this action of all issues so triable.

WHEREFORE, the Defendants demand judgment dismissing the Plaintiff's Second Amended Complaint.

DATED: July 29, 2011

Respectfully submitted,

**Featherstonhaugh, Wiley & Clyne, LLP**

By: \_\_\_\_\_

  
Scott J. Ely, Esq.

Bar Roll No. 511635

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and Lynn A. Smith Irrevocable Trust and  
Defendants, Geoffrey R. Smith and Lauren  
T. Smith, individually and as beneficiaries to  
the Smith Trust*

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# EXHIBIT C

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**SUMMARY OF TRANSACTIONS INVOLVING  
CHARTER ONE STOCK HELD IN STOCK ACCOUNT  
(SOURCE: BROKERAGE ACCOUNT STATEMENTS FOR ACCT. NO. [REDACTED] 091)**

DATE	NUMBER of SHARES	MARKET PRICE (AT CLOSE)	VALUE (AT CLOSE)	NOTES
1992	40,000	\$10	\$400,000	L. Smith's Affidavit in Support of Smith Trust's Motion to Intervene.
8/27/1999 <sup>1</sup>	110,735	\$24.75	\$2,740,691	
9/24/1999	110,735	\$23.125	\$2,560,747	
10/29/1999	116,271	\$24.563	\$2,855,965	Acquired 5,536 shares as stock dividend.*
11/26/1999	116,271	\$22.3130	\$2,594,355	
12/31/1999	116,271	\$19.125	\$2,223,683	
1/28/2000	114,071	\$18.8130	\$2,146,018	Journal of 2,200 shares to [REDACTED] 065 LOA on 1/4/2000. (No other information provided in statement as to where shares went.)
2/25/2000	114,071	\$15.938	\$1,818,064	
3/31/2000	114,071	\$21	\$2,395,491	
4/28/2000	114,071	\$20.313	\$2,317,124	
5/26/2000	114,071	\$21.9380	\$2,502,490	
6/30/2000	114,071	\$23	\$2,623,633	
7/28/2000	114,071	\$21.375	\$2,438,268	
8/25/2000	114,071	\$22.813	\$2,602,302	
9/29/2000	114,071	\$24.375	\$2,780,481	
10/27/2000	119,774	\$21.938	\$2,627,602	Acquired 5,703 shares as stock dividend.*
11/30/2000	119,774	\$24	\$2,874,576	
12/29/2000	119,600	\$28.875	\$3,453,450	174 shares delivered to [REDACTED] 418 on 12/27/00. (No other information provided in statement as to where shares went.)
1/26/2001	119,600	\$27.125	\$3,244,150	
2/23/2001	119,600	\$28.51	\$3,409,796	
3/30/2001	119,600	\$28.3	\$3,384,680	
4/27/2001	119,600	\$29.22	\$3,494,712	
5/25/2001	119,600	\$30.150	\$3,605,940	

<sup>1</sup> Date of first available brokerage statement for Stock Account.

\* Note regarding stock dividends: The brokerage statements list these acquisitions as stock purchases with no purchase price. For the years from 1999 to 2002, the relevant Forms 10-Q explain that a 5% stock dividend was issued, which explains why no purchase price was listed for the acquisition of the shares.

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**SUMMARY OF TRANSACTIONS INVOLVING  
CHARTER ONE STOCK HELD IN STOCK ACCOUNT  
(SOURCE: BROKERAGE ACCOUNT STATEMENTS FOR ACCT. NO. [REDACTED] 091)**

DATE	NUMBER of SHARES	MARKET PRICE (AT CLOSE)	VALUE (AT CLOSE)	NOTES
6/29/2001	117,600	\$31.9	\$3,751,440	Sold 2,000 shares on 6/20/01 for \$31.04/share for gross profit of \$62,077.93
7/27/2001	100,600	\$31.78	\$3,197,068	Sold total of 17,100 shares from 7/3-7/23 for \$31.30 to \$32.74/share for total gross profit of \$541,421.89.
8/31/2001	100,600	\$29.2	\$2,937,520	
9/28/2001	105,630	\$28.22	\$2,980,879	Acquired 5,030 shares by stock dividend.*
10/26/2001	105,630	\$27.27	\$2,880,530	
11/30/2001	105,630	\$27.55	\$2,910,107	
12/31/2001	105,430	\$27.15	\$2,862,425	200 shares delivered to [REDACTED] 418 on 12/20/01. (No other information provided in statement as to where shares went.)
1/25/2002	105,430	\$29.7	\$3,131,271	
2/22/2002	105,430	\$29.32	\$3,091,208	
3/28/2002	105,430	\$31.22	\$3,291,525	
4/26/2002	105,430	\$35.07	\$3,697,430	
5/31/2002	100,000	\$36.2	\$3,620,000	Sold total of 5,430 shares on 5/16/02 for \$35.23 to \$35.49/share for gross profit of \$192,096.19.
6/28/2002	100,000	\$34.38	\$3,438,000	
7/26/2002	100,000	\$31.62	\$3,162,000	
8/30/2002	100,000	\$33.7	\$3,370,000	
9/27/2002	100,000	\$30.03	\$3,003,000	
10/25/2002	0	0	0	Acquired 5,000 shares by stock dividend.* On 10/14/02, 105,000 shares journaled to [REDACTED] 674. (No other information provided in statement as to where shares went.)
11/29/2002	0	0	0	No Charter One shares in account.
12/31/2002	0	0	0	No Charter One shares in account.
1/31/2003	0	0	0	No Charter One shares in account.
2/28/2003	0	0	0	No Charter One shares in account.
3/28/2003	0	0	0	No Charter One shares in account.

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**SUMMARY OF TRANSACTIONS INVOLVING  
CHARTER ONE STOCK HELD IN STOCK ACCOUNT  
(SOURCE: BROKERAGE ACCOUNT STATEMENTS FOR ACCT. NO. [REDACTED] 091)**

DATE	NUMBER of SHARES	MARKET PRICE (AT CLOSE)	VALUE (AT CLOSE)	NOTES
4/25/2003	0	0	0	No Charter One shares in account.
5/30/2003	0	0	0	No Charter One shares in account.
6/27/2003	0	0	0	No Charter One shares in account.
7/25/2003	0	0	0	No Charter One shares in account.
8/29/2003	105,000	\$31	\$3,255,000	On 7/29/03, 105,000 shares journaled from [REDACTED] 674. (No other information provided in statement as to where shares came from.)
9/30/2003	105,000	\$30.6	\$3,213,000	
10/31/2003	105,000	\$31.96	\$3,355,800	
11/28/2003	105,000	\$33.22	\$3,488,100	
12/31/2003	105,000	\$34.55	\$3,627,750	
1/30/2004	105,000	\$36.21	\$3,802,050	
2/27/2004	105,000	\$36.22	\$3,803,100	
3/31/2004	105,000	\$35.36	\$3,712,800	
4/30/2004	105,000	\$33.37	\$3,503,850	
5/28/2004	105,000	\$43.96	\$4,615,800	
6/30/2004	105,000	\$44.19	\$4,639,950	
7/30/2004	105,000	\$44.41	\$4,663,050	
8/31/2004	105,000	\$44.47	\$4,669,350	
9/30/2004	0	0	0	On 9/1/04, 100,000 shares journaled to Smith Trust account. 5,000 subject to cash merger for gross profit of \$222,500.

Total Shares Sold From August 1999 to September 2004 = 29,530  
(including 5,000 shares subject to cash merger)

Total Shares transferred out of account from = 2,574  
from August 1999 to September 2004

Gross Profits from Sales of Charter One stock:	June 2001	\$62,077.93
	July 2001	\$541,421.89
	May 2002	\$192,096.19
	September 2004	\$222,500.00
	<b>TOTAL</b>	<b>= \$1,018,096.01</b>